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THE COMPANIES

SECRETARY OF THE STATE

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STATE OF NEW YORK

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Bill of Complaint.

(Filed Jan. 16th, 1926)

IN CHANCERY OF NEW JERSEY

Between

THEODORE SCHMIDT and BERTHA
SCHMIDT,
Complainants,
and

OTTO SCHMIDT, FERDINAND
SCHMIDT, JOHANNA LINDEN-
BERGER, PAULINE MATHES,
GEORGE B. MATHES, VICTOR
HAEMMERLINE, MRS. VICTOR
HAEMMERLINE, HERBERT H.
HAEMMERLINE, MRS. HERBERT
HAEMMERLINE, AUGUSTA
SCHMIDT, and JEAN B. HAEM-
MERLINE,
Defendants.

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On Bill, &c.

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To the Honorable, EDWIN ROBERT WALKER, Chan-
cellor of the State of New Jersey :

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The complainants, Theodore Schmidt and
Bertha Schmidt, his wife, of the City of Jersey
City, Hudson County, New Jersey, respectfully
show that :

1. Charles Schmidt, the father of the complain-
ant, Theodore Schmidt, died on or about July,
1886, leaving a last Will and Testament, a copy
of which is hereby annexed and made a part here-

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of, seized in fee simple of a certain tract or parcel of land and premises situate in the City of Hoboken, Hudson County, State of New Jersey, described as follows:

10 ALL that certain lot, tract or parcel of land
and premises hereinafter particularly de-
scribed, situate, lying and being in the City
of Hoboken, in the County of Hudson and
State of New Jersey, being part of a tract of
land known by the name of Hoboken and
which on a Map of said tract made by Charles
Loss and now on file in the Office of the Clerk
of the County of Bergen at Hackensack is
designated and marked as lot number Fifty-
nine, Bounded Easterly in front by Washing-
20 ton Street and Southerly by lot number fifty-
eight, Westerly by Bloomfield Street and
Northerly by lot number sixty. Said lot be-
ing twenty-five feet wide by one hundred and
fifty feet deep, throughout, situate between
Second and Third Streets. Being the same
premises that were conveyed to said Jacob
Besson by John White and wife by deed bear-
ing date the first day of April, 1856 and rec-
orded in the Hudson County Clerk's Office in
30 Liber 52 of Deeds for said County, page 350
&c. And being the same premises conveyed
to Charles Schmidt by Jacob Besson and
Sarah C., his wife, by deed bearing date the
fifth day of January, 1869, and recorded in the
Hudson County Clerk's Office in Book 182 of
Deeds for said County, page 400 &c.

2. Said last Will and Testament was duly ad-
mitted to probate by the Surrogate of the County
40 of Hudson shortly after the death of said Charles
Schmidt.

Bill of Complaint.

3. The third clause of said last Will and Testament, provides as follows:

“ITEM.—I give and devise unto my beloved wife, Pauline Schmidt, all my real estate, wherever situate, to have, hold, receive, use and enjoy the rents, issues and profits thereof during the term of her natural life, and from and after her decease, I give and devise my said real estate unto such child or children as I shall leave or have living at the time of my decease and to their heirs and assigns forever; and the representatives of any deceased child to have the share of his or her parent.”

4. The said Charles Schmidt, deceased left him surviving as his sole next of kin and heirs at law, his widow, Pauline Schmidt, and seven children, Otto Schmidt, Ferdinand Schmidt, Johanna Linderberger, Pauline Mathes, Caroline Haemmerline, Augusta Schmidt and the complainant, Theodore Schmidt.

5. The said Pauline Schmidt, the wife of said Charles Schmidt, died at the City of Jersey City, Hudson County, New Jersey, on or about November 12, 1925.

6. The said Otto Schmidt, is of full age and unmarried.

7. The said Ferdinand Schmidt is of full age and unmarried.

8. The said Johanna Lindenberger is of full age and is a widow and unmarried.

9. The said Pauline Mathes is of full age and

Bill of Complaint.

is a married woman, and husband's name is George B. Mathes.

- 10 10. The said Caroline Haemmerline, died intestate, during the year 1916, leaving her surviving, as her sole next of kin and heirs at law, her husband, Jean B. Haemmerline and two children, Victor Haemmerline and Herbert H. Haemmerline. The said Victor Haemmerline is of full age and is a married man. Complainant has been unable to ascertain after diligent and careful inquiry, the christian name of the wife of the said Victor Haemmerline and therefore designates her as Mrs. Victor Haemmerline; the said Herbert H. Haemmerline is of full age and is a married man, complainant has been unable to ascertain after diligent
20 and careful inquiry, the christian name of the wife of the said Herbert H. Haemmerline and therefore designates her as Mrs. Herbert H. Haemmerline.

11. The said Augusta Schmidt, is of full age and is a widow, and never remarried after her husband died.

- 30 12. Complainant, Theodore Schmidt, is a married man and is of full age, his wife is the complainant, Bertha Schmidt, and she is of full age.

13. The said lands and premises consist of a lot or tract of land about twenty-five feet in width by one hundred and fifty feet in depth, upon which is erected on the front of said lot, a brick building, four stories in height, consisting of a store and three apartments, and on the rear of said lot, there is erected a four story building, containing two stores, and two apartments.

- 40 14. The complainant, Theodore Schmidt is seized

Bill of Complaint.

of and entitled to one equal undivided seventh part of the said premises, and the complainant, Bertha Schmidt, the wife of the complainant, Theodore Schmidt, has an inchoate right of dower in the one equal seventh part of the said premises to which he is entitled as aforesaid.

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15. The said Otto Schmidt is seized of and entitled to one equal undivided seventh part of the said premises.

16. The said Ferdinand Schmidt is seized of and entitled to one equal undivided seventh part of the said premises.

17. The said Johanna Lindenberger is seized of and entitled to one equal undivided seventh part of the said premises.

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18. The said Pauline Mathes is seized of and entitled to one equal undivided seventh part of the said premises, and the said defendant, George B. Mathes, the husband of the defendant, Pauline Mathes, claims an inchoate right of curtesy in the said equal undivided seventh part of the said premises to which she is entitled to as aforesaid.

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19. The said Victor Haemmerline is seized of and entitled to one equal undivided fourteenth part of the said premises, subject to the right of curtesy of the defendant, Jean B. Haemmerline in the same, and the said Mrs. Victor Haemmerline, the wife of the said Victor Haemmerline, claims an inchoate right of dower in the one equal undivided fourteenth part of the said premises to which he is entitled to as aforesaid.

20. The said Herbert H. Haemmerline is seized

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Bill of Complaint.

of and entitled to one equal undivided fourteenth part of the said premises, subject to the right of curtesy of the defendant, Jean B. Haemmerline in the same, and the said Mrs. Herbert H. Haemmerline, the wife of the said Herbert H. Haemmerline, claims an inchoate right of dower in the one equal
10 undivided fourteenth part of the said premises to which he is entitled to as aforesaid.

21. The said Augusta Schmidt is seized of and entitled to one equal undivided seventh part of the said land and premises.

22. Complainants are desirous that a partition or division of the said tract of land and premises should be made among complainants and the
20 several parties seized of and entitled thereto, according to their several respective rights, estates and interests therein, or in case, as complainants believe and aver the fact to be, that the said tract of land and premises cannot be divided among the owners thereof, without great prejudice to their interest, then that the same may be sold and the proceeds divided among complainants and the other parties entitled thereto, as aforesaid, according to their respective rights and interests.

30 Complainants are without adequate remedy in the courts at law and therefore pray:

1. That Otto Schmidt, Ferdinand Schmidt, Johanna Lindenberger, Pauline Mathes, George B. Mathes, her husband, Victor Haemmerline, Mrs. Victor Haemmerline, his wife, Herbert H. Haemmerline, Mrs. Herbert H. Haemmerline his wife, and Jean B. Haemmerline, and Augusta Schmidt,
40 who are the defendants to this suit may answer this bill of complaint and each statement therein made.

Bill of Complaint.

2. That a fair partition and division of the above described premises may be made, according to the practice of this court, if the same be practicable and consistent with the rights of all the parties interested therein, among complainants and the other persons entitled to shares of the said premises, according to their respective rights and interests therein, and that the liens, if any, on the undivided estate or interest of any of the parties hereto be decreed to be a charge only on the share assigned to such party, such share to be first charged with its just proportion of the costs of these proceedings. 10

3. That in case actual partition shall be found to be impracticable, or if it should appear that the same cannot be made without great prejudice to the owners of the said premises, then that the said tract of land and premises may be decreed by this court to be sold, including the inchoate right of dower of the complainant, Bertha Schmidt, and the inchoate rights of dower of the defendants, Mrs. Victor Haemmerline and Mrs. Herbert H. Haemmerline, and the right of curtesy of the defendant, Jean B. Haemmerline, in the undivided share of which his wife, Caroline Haemmerline died seized, and the inchoate right of curtesy of the defendant, George B. Mathes, and that, after paying out of the proceeds thereof the costs and charges of this suit, the remainder of such proceeds be divided among complainants and the several parties interested therein, according to their respective rights, shares and interests; and that the portion of the moneys arising from said sale of the estate, share or interest of any party against whom there are existing any liens or encumbrances held by any creditor of such party, who is a party defendant to this suit, be brought unto this court by the master who shall make sale of the said premises, 20 30 40

Bill of Complaint.

after deducting the costs, charges and expenses to which it shall be liable to the end that this court may make such order touching the same as the circumstances of the case may require.

10 4. That a writ of subpoena may issue, commanding said defendants to answer this bill of complaint and to abide by such decrees as this court may make in the premises.

JOHN J. MARNELL,
Solicitor of Complainants.

LEON ABBOTT,
of Counsel.

State of New Jersey, } ss.:
County of Hudson, }

20 John J. Marnell, of full age, being duly sworn, according to law, upon his oath deposes and says:

1. I am the solicitor of the complainants in the cause in which the foregoing bill of complaint is filed.

30 2. The wife of Victor Haemmerline and the wife of Herbert H. Haemmerline, both of whom are defendants to this suit, are necessary party defendants to this suit, but notwithstanding due inquiry therefor from all persons and sources whence it seemed probable information could be obtained, I have been unable to ascertain the christian name of the said wives of the said Victor Haemmerline and Herbert H. Haemmerline.

JOHN J. MARNELL.

Sworn and subscribed to before me
this 15th day of January, 1926.

40 CHARLES W. MARINELL,
Attorney at Law,
of New Jersey.

Bill of Complaint.

In the Name of God, Amen: I, Charles Schmidt, of the City of Hoboken, in the County of Hudson and State of New Jersey, being of sound mind, memory and understanding, for which blessing I thank God, do make and publish this my last Will and Testament in manner following that is to say:

First: It is my will and I do order that all my just debts and funeral expenses be duly paid and satisfied as soon as conveniently can be after my decease.

Item: I give and bequeath unto my beloved wife, Pauline Schmidt, all my personal estate, household goods, money in bank and other securities of which I may die possessed and of whatever the same may consist to her own sole use forever, excepting however the money invested in my business hereby empowering and authorising my executors hereinafter named at any time when my said wife shall wish to sell and dispose of my share in said business, to sell the same, the proceeds of such sale to be invested in Real Estate securities, and the interest arising from such investment or investments to be paid to my said wife and to be enjoyed by her during the term of her natural life and after her death said capital is to be divided among my children or their heirs share and share alike, and in case one or more of my said children should die without leaving lawful issue, then the share of such deceased child or children to go to the surviving children share and share alike.

Item: I give and devise unto my beloved wife Pauline Schmidt all my real estate wherever situate, to have, hold, receive, use and enjoy the rents, issues and profits thereof during the term of her

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natural life, and from and after her decease, I give and devise my said real estate unto such child or children as I shall leave or have living at the time of my decease and to their heirs and assigns forever; and the representatives of any deceased child to have the share of his or her parent.

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Item: It is my will and I do hereby empower and autohrise my executors hereinafter named, whenever necessary to mortgage my real estate for the purpose of paying off existing liens or mortgages, but in no case to encumber my said real estate more than the same is encumbered at my death.

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Lastly: I hereby appoint my beloved wife, Pauline Schmidt, and my brother-in-law, Ferdinand Eichner, Executors of this my last Will and Testament and Guardians to my children during their minority.

CHAS. SCHMIDT. (L. S.)

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Signed, published and declared by the said Charles Schmidt, to be his last will in the presence of us, who were present at the same time, and subscribed our names as witnesses in the presence of the testator.

THOMAS M. ABELL, 388 Washington St., Hoboken,
N. J.

MORRIS BRETZFELD, 81 Washington St., Hoboken.

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**Decree Pro Confesso and Order of
Reference.**

(Filed Feb. 18th, 1926.)

IN CHANCERY OF NEW JERSEY.

59-722

Between

THEODORE SCHMIDT and BERTHA
SCHMIDT, his wife,
Complainants,

and

OTTO SCHMIDT, et als., et ux,
Defendants.

On Bill, &c.

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This cause being opened to the court by John J. Marnell, solicitor of the complainants, and it appearing that process of subpoena calling upon the defendants to answer the complainants' bill of complaint filed herein has been duly issued and returned served upon the defendants, Otto Schmidt, Ferdinand Schmidt and Johanna Lindenberger, and that acknowledgment of service in writing on the subpoena for all of the other defendants, to wit, Pauline Mathes, George B. Mathes, Jean B. Haemmerline, Victor Haemmerline, Mrs. Victor Haemmerline, Herbert H. Haemmerline, Mrs. Herbert H. Haemmerline and Augusta Schmidt, has been made by William F. Burke, solicitor for said defendants.

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And it further appearing that the said defendants, Otto Schmidt, Ferdinand Schmidt, Johanna Lindenberger, Pauline Mathes, George B. Mathes, Jean B. Haemmerline, Victor Haemmerline, Mrs.

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Decree Pro Confesso and Order of Reference.

Victor Haemmerline, Herbert H. Haemmerline, Mrs. Herbert H. Haemmerline and Augusta Schmidt, have not nor has any of them filed an answer to said bill of complaint within the time limited by law, but have wholly failed and neglected so to do:

10 It is thereupon, on this 18th day of February, 1926, on motion of John J. Marnell, solicitor of the complainants, ORDERED and DECREED that the said complainants' bill of complaint be and the same is hereby taken as confessed against the said defendants, Otto Schmidt, Ferdinand Schmidt, Johanna Lindenberger, Pauline Mathes, George B. Mathes, Jean B. Haemmerline, Victor Haemmerline, Mrs. Victor Haemmerline, Herbert H. Haemmerline, Mrs. Herbert H. Haemmerline and Au-
20 gusta Schmidt.

It is further ORDERED that it be referred to Dougal Herr, Esquire, one of the Special Masters of this court, to ascertain and report the right, title and interest of the respective parties in the premises mentioned and described in the bill of complaint in this cause; and also whether in his opinion the said lands and premises are so situate that a partition thereof can be made without great
30 prejudice to the owners thereof, and that he state the facts upon which his opinion is founded.

It is further ORDERED that it be referred to said master to ascertain and report whether the undivided interest or estate of any of the parties to this suit in said lands and premises is subject to any lien by mortgage, judgment, decree, devise or otherwise, and if so, to what liens or encumbrances, and by whom they are held; and to ascertain and report the amount due to any party as
40 aforesaid on his said lien on the said premises.

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Petition.

It is further ORDERED that the said master make his report to the Chancellor on the 12th day of March, 1926, at 10:30 o'clock in the forenoon, at the State House in Trenton.

E. R. WALKER,
C. 10

Petition.

(Filed March 22nd, 1926.)

IN CHANCERY OF NEW JERSEY.

59-722

Between	}	On Bill, &c.
THEODORE SCHMIDT and BERTHA		
SCHMIDT,		
Complainants,		
and		
OTTO SCHMIDT, et als.,		
Defendants.		

To the Honorable Edwin Robert Walker, Chan- 30
cellor of the State of New Jersey:

The petition of Otto Schmidt, Ferdinand Schmidt, Johanna Lindenberger, Pauline Mathes, Augusta Schmidt, Jean B. Haemmerline, Victor Haemmerline and Herbert Haemmerline, of the City and State of New York, respectfully shows:

1. That heretofore and prior to January 16, 1926, complainants filed their bill of complaint praying 40

10 for the partition of certain lands whereof Charles Schmidt died seized and which premises are more particularly described in said bill of complaint and are known as Street #216 Washington Street and #217 Bloomfield Street, in the City of Hoboken in the County of Hudson and State of New Jersey, and your petitioners are made parties defendant to said bill of complaint.

20 2. That thereafter and on January 16, 1926, process of subpoena to answer, returnable on January 26, 1926, was issued and returned duly served and afterwards and on February 18, 1926, interlocutory decree and order of reference to Dougal Herr, Esq., one of the Special Masters of this court, was duly entered in said cause, none of the defendants in said cause having filed an answer to said bill of complaint.

3. That at and prior to the filing of said bill of complaint, Eichner's Inc., Ferdinand Eichner, Walter Eichner and Louis Eichner and one Feldman, were in possession of said premises.

30 4. Your petitioners have since said decree, ascertained that said Eichner's Inc., a corporation, Ferdinand Eichner, Walter Eichner and Louis Eichner and said Feldman, or some of them, claim some right or interest in and to said premises.

5. Said premises are situated on the westerly side of Washington Street between Second and Third Streets running through to Bloomfield Street and are very valuable business properties.

40 6. That neither said Eichner's Inc., Ferdinand Eichner, Walter Eichner, Louis Eichner nor one Feldman are made parties defendant to the said

bill of complaint, notwithstanding their said claim to tenancy and right of possession. Your petitioners and complainant, Theodore Schmidt, are all of the tenants in common in said premises.

7. That it is necessary that the claims of said Eichner's Inc., Ferdinand Eichner, Walter Eichner, Louis Eichner and said Feldman be adjudicated in this suit and that they be made parties defendant to said suit. 10

8. That unless the claims of Eichners' Inc., Ferdinand Eichner, Walter Eichner, Louis Eichner and said Feldman be ascertained and determined prior to the sale of said premises, your petitioners are informed and verily believe that the said premises at such sale will not bring a fair and adequate price. 20

Your petitioners, therefore, pray that the said decree may be opened and that they be granted leave to file an answer and counterclaim and bring in the said Eichner's Inc., Ferdinand Eichner, Walter Eichner, Louis Eichner and said Feldman as parties defendant to the said cause.

And your petitioners will ever pray, etc.

WM. F. BURKE, 30
Solicitor of Petitioners.

State of New Jersey, }
County of Hudson, } ss.:

William F. Burke, of full age being duly sworn according to law, on his oath deposes and says:

1. I am Solicitor of the Petitioners above named. 40

Order to Show Cause.

2. I have read the contents of the foregoing petition and know the contents thereof and the matters and things therein are true to the best of my knowledge and belief.

WM. F. BURKE.

10 Sworn and subscribed before me this
22nd day of March, 1926.

G. FRANK SHANLEY,
A Master in Chancery,
of New Jersey.

Order to Show Cause.

20 (Filed March 22nd, 1926.)

IN CHANCERY OF NEW JERSEY.

59-722

30	Between THEODORE SCHMIDT and BERTHA SCHMIDT, Complainants, and OTTO SCHMIDT, et als., Defendants.	}	On Bill, &c. On Petition.
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40 A petition having been filed by Otto Schmidt, Ferdinand Schmidt, Johanna Lindenberger, Pauline Mathes, Augusta Schmidt, Jean B. Haemmerlein, Victor Haemmerlein and Herbert Haemmerlein, defendants in this cause, alleging that

Order to Show Cause.

Eichner, Inc., a corporation, Ferdinand Eichner, Walter Eichner, Louis Eichner and one Feldman, are in possession of the premises described in the bill of complaint, claiming some interest or right in said premises and that complainants have neglected to make said parties or any of them parties defendant to said bill of complaint and that it is necessary that the rights if any of said parties be ascertained before the partition and sale of said premises and praying that the Interlocutory Decree heretofore entered in this cause be opened and said petitioners be granted leave to bring in said parties as parties defendant to this cause. 10

It is on this twenty-second day of March, 1926, on motion of William F. Burke, Solicitor of Petitioners, ORDERED that complainants show cause before the Chancellor at the Chancery Chambers in the City of Jersey City, on Monday April 12th next, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, why the Interlocutory Decree entered in this cause on February 18, 1926, should not be opened and vacated and said petitioners be permitted to file an answer and counterclaim to bring in said Eichner, Inc., Ferdinand Eichner, Walter Eichner, Louis Eichner and said Feldman as parties defendant in said cause. 20

And it is further ORDERED that a copy of this Order and of the said petition certified by Solicitor of Petitioner's, be served on the Solicitor of Complainants within 5 days from the date hereof. 30

Respectfully advised,

E. R. WALKER.

C.

JOHN BENTLEY.

V. C.

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Answer and Counterclaim of Defendants Otto Schmidt, Ferdinand Schmidt, Johanna Lindenberger, Pauline Mathes, Augusta Schmidt, Jean B. Haemmerlein, Victor Haemmerlein and Herbert Haemmerlein.

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(Filed April 26th, 1926.)

IN CHANCERY OF NEW JERSEY.

59-722.

Between

THEODORE SCHMIDT and BERTHA
SCHMIDT,

Complainants,

and

OTTO SCHMIDT, et als.,
Defendants.

On Bill, &c.

Answer and
Counterclaim

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The answer of the defendants, Otto Schmidt, Ferdinand Schmidt, Johanna Lindenberger, Pauline Mathes, Augusta Schmidt, Jean B. Haemmerlein, Victor Haemmerlein and Herbert Haemmerlein, of the City and State of New York to the bill of complaint and the counterclaim of said defendants against Eichner's Inc., a corporation, Ferdinand Eichner, Walter Eichner, Louis Eichner and Charles Feldman, third parties.

These defendants answering the bill of complaint say that:

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1. They admit the allegations of the bill of complaint as to the respective interests of the parties to the said bill.

*Answer and Counterclaim of Defendants Otto
Schmidt, et als.*

By way of counterclaim against Eichner's Inc., a corporation, Ferdinand Eichner, Walter Eichner, Louis Eichner and Charles Feldman, third parties, these defendants, say that:

1. Complainant, Theodore Schmidt and these defendants are now and were at and prior to the filing of the bill of complaint, seized as tenants in common of the following described lands and premises, viz.:

All that certain lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Hoboken, in the County of Hudson and State of New Jersey, being part of a tract of land known by the name of Hoboken and which on a Map of said tract made by Charles Loss and now on file in the Office of the Clerk of the County of Bergen, at Hackensack is designated and marked as lot number Fifty-nine, bounded Easterly in front by Washington Street and Southerly by lot number fifty-eight, Westerly by Bloomfield Street and Northerly by lot number sixty. Said lot being twenty-five feet wide by one hundred and fifty feet deep, throughout, situate between Second and Third Streets.

2. Heretofore and prior to January 16, 1926, complainants filed their bill of complaint praying for the partition and sale of said lands and premises.

3. At the time of the filing of said bill, said Eichner's Inc., a corporation, Ferdinand Eichner, Walter Eichner, Louis Eichner and Charles Feldman herein designated third parties, were and are still in possession of said lands and premises, or some part thereof claiming some right, title or interest, therein or some part thereof.

*Answer and Counterclaim of Defendants Otto
Schmidt, et als.*

10 4. Said third parties Eichner's Inc., Ferdinand Eichner, Walter Eichner and Charles Feldman, and Louis Eichner or some of them claim some right, title or interest in or to said lands and premises or some part thereof adverse to the right, title and interest of these counterclaiming defendants.

5. Said Eichner's Inc., Ferdinand Eichner, Walter Eichner, Louis Eichner and Charles Feldman have not nor have any or either of them any right, title or interest in or to said lands and premises or any part thereof.

These defendants therefore pray :

20 1. That said third parties Eichner's Inc., Ferdinand Eichner, Walter Eichner, Louis Eichner and Charles Feldman may answer this counterclaim and each statement herein made.

2. That said third parties be required to set out and discover what right, title or interest they or either or any of them claim in and to said lands and premises or any part thereof, and in what part thereof.

30 3. That said third parties and each of them be decreed to have no right, title or interest in or to said lands and premises or any part thereof.

4. That a writ of subpoena may issue, commanding said third parties to answer this counterclaim and to abide by such decree as this court may make in the premises.

WM. F. BURKE,

Solicitor for and of counsel with Defendants, Otto Schmidt, Ferdinand Schmidt, Johanna Lindenberger, Pauline Mathes, Augusta Schmidt, Jean B. Haemmerlein, Victor Heimmerlein, and Herbert Haemmerlein.

Subpoena to Answer.

NEW JERSEY, to wit: The State of New
 Jersey to Eichners, Inc., a corpora-
 (Seal) tion of New Jersey, Ferdinand
 Eichner, Walter Eichner, Louis
 Eichner and Charles Feldman,
 GREETING:

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Whereas a counterclaim has lately been exhibited
 against you in our Court of Chancery by Otto
 Schmidt et als., defendants in a suit therein pend-
 ing, wherein Theodore Schmidt et al. are complain-
 ants, and Otto Schmidt et al. are defendants, in
 which counterclaim you are named as third parties,
 to be relieved touching the matters therein con-
 tained:

THEREFORE WE COMMAND YOU, if you
 intend to make a defense, that you file an answer to
 said counterclaim in the office of the Clerk of our
 said Court at Trenton, on or before the expiration
 of twenty days from and after the Seventh day of
 May, 1926, and in default thereof such order or
 decree will be made against you as the Court shall
 think equitable and just.

20

WITNESS, his Honor Edwin Robert Walker,
 Chancellor of our said State, at Trenton, the
 Twenty-seventh day of April, in the year of our
 Lord, One thousand nine hundred and twenty-six.

30

THOMAS BARBER,
 Clerk.

WM. F. BURKE,
 Sol'r.

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simple of the lands and premises described and mentioned in the bill of complaint filed herein.

6. That the said Charles Schmidt died leaving a last will and testament, a copy of which is hereto annexed and made a part hereof, which, among other things, provided for the appointment of this defendant as one of the executors which said last will and testament was duly admitted to probate by the Surrogate of the County of Hudson and this defendant duly qualified as executor thereunder. 10

7. The said Charles Schmidt left him surviving as his sole next of kin and heirs at law, his wife, Pauline Schmidt and seven children, Otto Schmidt, Ferdinand Schmidt, Johanna Lindenberger, Pauline Mathes, Caroline Haemmerlein, Augusta Schmidt and Theodore Schmidt. 20

8. The said Caroline Haemmerlein died intestate during the year 1916, leaving her surviving as her sole next of kin and heirs at law, her husband, Jean B. Haemmerlein and two children, Victor Haemmerlein and Herbert Haemmerlein.

9. The said Pauline Schmidt, wife of said Charles Schmidt died at Jersey City, County of Hudson and State of New Jersey, on the 12th day of November, 1925. 30

10. That this defendant from the time of the admitting to probate of said last will and testament of Charles Schmidt acted as executor thereunder and among other things, collected, paid and disbursed the rents, issues and profits of the said lands and premises mentioned in the bill of complaint and made repairs and maintained the same, paid the taxes, water rents, insurance and expenses 40

in maintenances, interest on the mortgages thereon, took care of, managed and preserved the said premises so that upon the decease of the said Pauline Schmidt, the said lands and premises would be a valuable asset to the said estate.

- 10 11. Defendant is preparing his final account in said estate and in the opinion of this defendant, there will not be sufficient personal property in said estate to pay the expenses of accounting, commissions and legal fees and defendant alleges that a considerable portion of the counsel fees, commissions and expenses as aforesaid will have to be paid from the moneys received from the sale of the said land and premises mentioned in the bill of complaint and that this defendant, as executor as aforesaid has an interest in certain rights in and to the
20 said lands and premises for the purposes and to the extent as aforesaid.

COUNTERCLAIM.

By way of counterclaim against Theodore Schmidt, Bertha Schmidt, Otto Schmidt, Ferdinand Schmidt, Johanna Lindenberger, Pauline Mathes, George B. Mathes, her husband, Victor Haemmerlein, Mrs. Victor Haemmerlein, his wife, Herbert
30 Haemmerlein, and Mrs. Herbert Haemmerlein, his wife, Jean B. Haemmerlein and Augusta Schmidt, this defendant alleges:

1. He repeats and realleges all the allegations contained in paragraphs 5, 6, 7, 8, 9, 10, 11, and makes the same a part of this counterclaim.

This defendant therefore prays:

- 40 1. That the amount of any deficiency shown by the final account when allowed in said estate of

Answer to Counterclaim.

Charles Schmidt for the payment of administration expenses, commissions, and counsel fees be decreed to be a lien against said lands and premises mentioned in the bill of complaint or a lien against the undivided or divided shares of Theodore Schmidt, Bertha Schmidt, Otto Schmidt, Ferdinand Schmidt, Johanna Lindenberger, Pauline Mathes, George B. Mathes, her husband, Victor Haemmerlein, Mrs. Victor Haemmerlein, his wife, Herbert Haemmerlein, Mrs. Herbert Haemmerlein, his wife, Jean B. Haemmerlein and Augusta Schmidt. 10

2. That the payment of the shares of the said Theodore Schmidt, Bertha Schmidt, Otto Schmidt, Ferdinand Schmidt, Johanna Lindenberger, Pauline Mathes, George B. Mathes, her husband, Victor Haemmerlein, Mrs. Victor Haemmerlein, his wife, Herbert Haemmerlein and Mrs. Herbert Haemmerlein, his wife, Jean B. Haemmerlein and Augusta Schmidt, derived from any sale of the said lands and premises or a proper portion thereof be retained or paid into court until this defendant, as executor as aforesaid, has a reasonable time to prepare and present his final account in said estate for allowance to the Orphans' Court of the County of Hudson or such other and proper relief as shall be just. 20

WM. B. STITES, 30
Solicitor for Defendant Ferdinand Eichner.

In the Name of God, Amen: I, Charles Schmidt, of the City of Hoboken, in the County of Hudson and State of New Jersey, being of sound mind, memory and understanding, for which blessing I thank God, do make and publish this my last Will and Testament in manner following that is to say: 40

First: It is my will and I do order that all my just debts and funeral expenses be duly paid and satisfied as soon as conveniently can be after my decease.

10 Item: I give and bequeath unto my beloved wife, Pauline Schmidt, all my personal estate, household goods, money in bank and other securities of which I may die possessed and of whatever the same may consist to her own sole use forever, excepting however the money invested in my business hereby empowering and authorising my executors hereinafter named at any time when my said wife shall wish to sell and dispose of my share in said business, to sell the same, the proceeds of such sale to be invested in Real Estate securities, and the interest arising from such investment or investments, 20 to be paid to my said wife and to be enjoyed by her during the term of her natural life and after her death said capital is to be divided among my children or their heirs share and share alike, and in case one or more of my said children should die without leaving lawful issue, then the share of such deceased child or children to go to the surviving children share and share alike.

30 Item: I give and devise unto my beloved wife Pauline Schmidt all my real estate wherever situate, to have, hold, receive, use and enjoy the rents, issues and profits thereof during the term of her natural life, and from and after her decease, I give and devise my said real estate unto such child or children as I shall leave or have living at the time of my decease and to their heirs and assigns forever; and the representatives of any deceased child to have the share of his or her parent.

40 Item: It is my will and I do hereby empower

Answer to Counterclaim.

and authorise my executors hereinafter named, whenever necessary to mortgage my real estate for the purpose of paying off existing liens or mortgages, but in no case to encumber my said real estate with more than the same is encumbered at my death.

Lastly: I hereby appoint my beloved wife, Pauline Schmidt and my brother in law Ferdinand Eichner, Executors of this my last Will and Testament and Guardians to my children during their minority.

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CHAS. SCHMIDT. (L. S.)

Signed, published and declared by the said Charles Schmidt, to be his last will in the presence of us, who were present at the same time, and subscribed our names as witnesses in the presence of the testator.

20

THOMAS M. ABELL, 388 Washington St., Hoboken,
N. J.

MORRIS BRETZFELD, 81 Washington St., Hoboken.

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**Replication to Answer of Ferdinand
Eichner to the Counterclaim of
Otto Schmidt, et als., and Answer
to Counterclaim of Ferdinand
Eichner.**

(Filed, July 2nd, 1926.)

10 IN CHANCERY OF NEW JERSEY.

59-722.

Between

THEODORE SCHMIDT and BERTHA
SCHMIDT,

Complainants,

and

20 OTTO SCHMIDT, et als.,
Defendants.

On Bill, &c.

30 Defendants, Otto Schmidt, Ferdinand Schmidt,
Johanna Lindenberger, Pauline Mathes, George B.
Mathes, her husband, Victor Haemmerlein, Mrs.
Victor Haemmerlein, his wife, Herbert Haemmer-
lein and Mrs. Herbert Haemmerlein, his wife, Jean
B. Haemmerlein and Augusta Schmidt, join issue
on the answer of Ferdinand Eichner, the third
party named in the Counterclaim of said defend-
ants.

As to the Counterclaim in said answer of Ferdi-
nand Eichner, these defendants say that:

1. Paragraphs 5, 6, 7, 8 and 9 of the Answer of
said Ferdinand Eichner, repeated in paragraph 1
of the Counterclaim, are admitted.

40 2. Paragraphs 10 and 11 of the Answer of Ferdi-

*Notice of Motion to Strike Out Counterclaim and
Parties Defendants.*

nand Eichner to the Counterclaim of these defendants, repeated in paragraph 1 of the Counterclaim of said Ferdinand Eichner, are denied.

WM. F. BURKE,

Solicitor of Defendants,

Otto Schmidt, Ferdinand Schmidt,
Johanna Lindenberger, Pauline
Mathes, George B. Mathes, her
husband, Victor Haemmerlein,
Mrs. Victor Haemmerlein, his
wife, Herbert Haemmerlein,
and Mrs. Herbert Haemmerlein,
his wife, Jean B. Haemmerlein
and Augusta Schmidt.

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Notice of Motion to Strike out Counterclaim and Parties Defendants.

(Filed, May 11th, 1926.)

IN CHANCERY OF NEW JERSEY.

59-722.

Between

THEODORE SCHMIDT and BERTHA
SCHMIDT,

Complainants,

and

OTTO SCHMIDT, et als.,
Defendants.

On Bill, &c.

30

To William F. Burke, Solicitor for Otto Schmidt,
Ferdinand Schmidt, Johanna Lindenberger,
Pauline Mathes, Augusta Schmidt, Jean B.

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*Notice of Motion to Strike Out Counterclaim and
Parties Defendants.*

Haemmerlein, Victor Haemmerlein and Herbert Haemmerlein and William B. Stites, Solicitor for Eichners, Inc., a corporation, Ferdinand Eichner, Walter Eichner, Louis Eichner and Charles Feldtmann.

10 PLEASE TAKE NOTICE that on Monday, the 17th day of May, 1926, at Chancery Chambers in Jersey City, at ten o'clock in the forenoon (Daylight Savings Time), or as soon thereafter as counsel can be heard, the complainants above named will apply by motion to the Chancellor for an order striking out the above named Eichners, Inc., Ferdinand Eichner, Walter Eichner, Louis Eichner and Charles Feldtmann as parties defendants in the above entitled action and also to strike
20 out the counterclaim filed herein in so far as the aforesaid named persons are concerned.

The grounds upon which said applications will be based are as follows:

1. They or either of them are not proper or necessary parties defendants to this partition suit.
2. They or either of them have no rights, title or interest in or to the lands and premises described in the bill of complaint herein which will
30 in any way or manner effect the partition of the same in accordance with the prayer of the bill of complaint.
3. That the defendants or counterclaimants have no right or sufficient interest in the described lands and premises to bring in third party defendants or file a counterclaim herein for the reason that they have not sufficient interest and title in the described lands and premises having sold all
40 their interest therein to one Sol Lubasch.

JOHN J. MARNELL,
Solicitor of Complainants,
Theodore Schmidt and Bertha Schmidt.

**Notice of Motion to Strike Out and
Dismiss the Answer to Counter-
claim and Counterclaim of De-
fendant, Ferdinand Eichner.**

(Filed, June 2nd, 1926.)

IN CHANCERY OF NEW JERSEY.

59-722.

10

Between

THEODORE SCHMIDT and BERTHA
SCHMIDT,
Complainants,

and

OTTO SCHMIDT, et als.,
Defendants.

On Bill, &c.

20

Sirs:

TAKE NOTICE that on Monday, June 7, 1926,
I shall apply to the Chancellor at the Chancery
Chambers, in the City of New Jersey, at ten o'clock
in the forenoon (Daylight Saving Time), or as
soon thereafter as counsel can be heard, for an
order striking out and dismissing the answer and
counterclaim of defendant, Ferdinand Eichner, on
the following grounds, that:

1. Said answer is sham and frivolous.
2. The defense set up in said answer is sham and
frivolous.
3. Said counterclaim is sham and frivolous.
4. Said answer discloses no defense to the
counterclaim.

40

*Notice of Motion to Strike Out Counterclaim and
Parties Defendants.*

5. Said counterclaim discloses no cause of counterclaim.

Dated, June 2, 1926.

WM. F. BURKE,
Solicitor of Defendants,
Otto Schmidt, et als.

10

To

WILLIAM B. STITES, Esq.,
Solicitor of Defendant,
Ferdinand Eichner.

JOHN J. MARNELL, Esq.,
Solicitor of Complainants.

20 **Notice of Motion to Strike Out Counterclaim and Parties Defendants.**

(Filed May 9th, 1926.)

IN CHANCERY OF NEW JERSEY.

59-722.

30	Between THEODORE SCHMIDT and BERTHA SCHMIDT, Complainants, and OTTO SCHMIDT, et als., Defendants.	}	On Bill, &c.
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40 To John J. Marnell, Solicitor for Theodore Schmidt and Bertha Schmidt and William F.

*Notice of Motion to Strike Out Counterclaim and
Parties Defendants.*

Burke, Solicitor for Otto Schmidt, Ferdinand Schmidt, Johanna Lindenberger, Pauline Mathes, Augusta Schmidt, Jean B. Haemmerlein, Victor Haemmerlein and Herbert Haemmerlein.

PLEASE TAKE NOTICE that on Monday, the 17th day of May, 1926, at Chancery Chambers in Jersey City, at ten o'clock in the forenoon (Day-light Saving Time) or as soon thereafter as counsel can be heard, the defendants, Eichners, Inc., Walter Eichner and Charles Feldman will apply by motion to the Chancellor for an order striking out the above named Eichners, Inc., Walter Eichner and Charles Feldman as parties defendants in the above entitled action and also to strike out the counterclaim filed herein in so far as the aforesaid named persons are concerned.

The grounds upon which said application will be based are as follows:

1. They or either of them are not proper parties defendants to this partition suit.

2. They or either of them are not necessary parties to this partition suit.

3. Whether persons are proper, but not necessary parties to a partition suit rest entirely in the discretion of the complainants.

4. They have no rights, title or interest in or to the lands and premises described in the bill of complaint herein which will in any way or manner effect the partition of the same in accordance with the prayer of the bill of complaint.

5. That annexed hereto and made a part hereof are copies of the affidavits which will be used upon this motion.

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6. That the rules of this court concerning the filing and serving of said counterclaim have not been complied with.

10 7. That the defendants or counterclaimants have no right or sufficient interest in the described lands and premises to bring in third party defendants or file a counterclaim herein for the reason that they have not sufficient interest and title in the described lands and premises having sold all their interest therein to one Sol Lubasch.

WM. B. STITES,
Solicitor for Defendants,
Eichners, Inc., Walter Eichner,
and Charles Feldman.

20

Affidavit.

IN CHANCERY OF NEW JERSEY.

59-722.

30

Between THEODORE SCHMIDT and BERTHA SCHMIDT, Complainants, and OTTO SCHMIDT, et als., Defendants.	}
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State of New Jersey, }
 County of Hudson, } ss.:

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Walter Eichner, being duly sworn on his oath, deposes and says: That he is one of the parties

Affidavit of Walter Eichner.

defendant named in the counterclaim filed in the above entitled action and that he has no individual interest, rights or title to the lands and premises described in the complaint filed herein and makes no claim for any such rights, interest or title.

Deponent further says that he is an officer, to wit: Treasurer of the defendant Eichners, Inc., also named as a defendant in said counterclaim and is a director in the said Eichners, Inc., and that the said Eichners, Inc., does not claim any title or liens to or against the lands and premises described in the bill of complaint and that the only interest which the said Eichners, Inc., has in the said described lands and premises is that the said Eichners, Inc., is a tenant occupying a part of the premises described in the bill of complaint, and that the said Eichners, Inc., has no interest whatever in the partition suit in which it is made a party defendant and that neither this deponent, individually or Eichners, Inc., desires to be involved in any litigation concerning the partition of the said lands and premises which would necessarily involve considerable expense to deponent and the said Eichners, Inc., and that in so far as deponent is informed and verily believes, the said Eichners, Inc., or this deponent has no interest or rights, which, in any way will effect a partition of the said mentioned premises and that a proper and equitable partitioning of the said lands and premises can be made by this court without the necessity of making deponent or the said Eichners, Inc., parties defendants to this action.

WALTER R. EICHNER.

Sworn and subscribed to before me
this 4th day of May, 1926.

LOUISE R. ROHS,
Notary Public
of New Jersey.

Affidavit.

IN CHANCERY OF NEW JERSEY.

59-722.

10	Between THEODORE SCHMIDT and BERTHA SCHMIDT, Complainants, and OTTO SCHMIDT, et als., Defendants.	}	On Bill, &c.
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20 State of New Jersey, } ss.:
 County of Hudson, }

30 Walter Eichner being duly sworn on his oath,
 deposes and says: That he is one of the third party
 defendants named herein and that on the first day
 of May, 1926, he had a conversation with one Sol
 Lubasch of No. 218 Washington Street, Hoboken,
 New Jersey, which said premises immediately ad-
 joins the premises described in the bill of com-
 plaint herein and that the said Sol Lubasch stated
 to deponent that he had purchased the interest of
 the defendants or counterclaimants herein to the
 lands and premises described in the bill of com-
 plaint, to wit, 216 Washington Street, with the ex-
 ception of the interest of Theodore Schmidt and
 that the price agreed upon was upon the basis of
 \$92,500.00 and that it was his purpose to endeavor
 to dispose of the property now owned by him at
 No. 218 Washington Street, together with the
 lands and premises described in the bill of com-
 40 plaint, which is No. 216 Washington Street, as one

Affidavit of Charles Feldtmann.

parcel, as the two parcels, together, would have a frontage of fifty feet and could be more easily disposed of to a better advantage.

WALTER R. EICHNER.

Sworn and subscribed to before me 10
this 6th day of May, 1926.

LOUISE R. ROHS,
Notary Public
of New Jersey.

Affidavit.

IN CHANCERY OF NEW JERSEY. 20

59-722.

Between

THEODORE SCHMIDT and BERTHA
SCHMIDT,
Complainants,

and

OTTO SCHMIDT, et als.,
Defendants.

On Bill, &c.

30

State of New Jersey, }
County of Hudson, } ss.: .

Charles Feldtmann, named as defendant in the counterclaim herein as Charles Feldman, being duly sworn on his oath, deposes and says: That he 40

Affidavit of Charles Feldtmann.

has no interest, rights or title that would in any way or manner effect the partitioning of the lands and premises mentioned in the bill of complaint filed herein and that the only interest which deponent has in the said described lands and premises is that he occupies a part of the same, to wit, Number 217 Bloomfield Street, Hoboken, New Jersey as a tenant, and that his tenancy in no way effects the title or rights or partitioning of the said described lands and premises and that deponent does not desire to be subjected to expense and inconvenience in and about any litigation or partitioning of the said lands and premises as he makes no claim of any title, interest or liens to or against the same.

CHARLES FELDTMANN.

Sworn and subscribed to before me
this 4th day of May, 1926.

LOUISE R. ROHS,
Notary Public
of New Jersey.

Service of a copy of the within Notice and Affidavits is hereby acknowledged this 8th day of May, 1926.

JOHN J. MARNELL,
Solicitor for Theodore Schmidt,
and Bertha Schmidt.

May 8, 1926.

WM. F. BURKE,
Solicitor for Otto Schmidt, Ferdinand
Schmidt, Johanna Lindenberger,
Pauline Mathes, Augusta Schmidt,
Jean B. Haemmerlein, Victor
Haemmerlein and Herbert Haemmerlein.

Answer to Counterclaim.

(Filed July 2nd, 1926.)

IN CHANCERY OF NEW JERSEY.

59-722.

Between

THEODORE SCHMIDT and BERTHA
SCHMIDT,

Complainants,

and

OTTO SCHMIDT, et als.,

Defendants.

10

On Bill, &c.

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The answer of the defendant, Walter R. Eichner, of East Orange, in the County of Essex and State of New Jersey to the counterclaim filed herein.

1. Denies paragraph 1.
2. Admits paragraph 2.
3. Answering paragraph 3, he alleges that in so far as the allegations therein contained refer to this defendant, the same is denied. 30
4. Answering paragraph 4, he alleges that in so far as the allegations therein contained refer to this defendant, the same are denied.
5. Answering paragraph 5, he alleges that in so far as the allegations therein contained refer to this defendant, the same are admitted. 40

Answer to Counterclaim.

6. This defendant further answering alleges that he does not know or is he acquainted with Louis Eichner and that this defendant has no individual right, title or interest to the said lands and premises.

WM. B. STITES,

10 Solicitor for and of Counsel for the Defendant,
Walter R. Eichner.

Answer to Counterclaim.

(Filed July 2nd, 1926.)

IN CHANCERY OF NEW JERSEY.

59-722.

20

Between

THEODORE SCHMIDT and BERTHA
SCHMIDT,

Complainants,

and

OTTO SCHMIDT, et als.,
Defendants.

On Bill, &c.

30

The answer of the defendant, Charles Feldtmann, named herein as Charles Feldman of the City of Hoboken, County of Hudson and State of New Jersey, to the counterclaim filed herein.

1. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 1 and leaves counterclaimants to their proof.

40

Answer to Counterclaim.

2. Admits paragraph 2.

3. Answering paragraph 3, this defendant alleges that in so far as the allegations therein contained relate to this defendant, he admits that he has some right or interest therein.

4. Answering paragraph 4, he admits that he has some right or interest in the said premises, but denies that the same is adverse to the right, title and interest of the counterclaiming defendants.

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5. Answering paragraph 5, he alleges that in so far as the allegations therein contained refer to this defendant, he denies the same.

6. This defendant further answering says that the only right or interest which he has in the lands and premises described in the complaint and counterclaim is that he occupies a part hereof, to wit, #217 Bloomfield Street, Hoboken, New Jersey, as a tenant, paying rent for the use and occupation thereof.

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WM. B. STITES,
Solicitor for and of Counsel for the Defendant,
Charles Feldtmann.

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Affidavit.

(Filed June 14th, 1926.)

IN CHANCERY OF NEW JERSEY.

59-722.

10

Between

THEODORE SCHMIDT and BERTHA
SCHMIDT,

Complainants,

and

OTTO SCHMIDT, et als.,

Defendants.

On Bill, &c.

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State of New Jersey, }
County of Hudson, } ss.:

Otto Schmidt, of full age, being duly sworn according to law on his oath deposes and says:

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1. I am one of the defendants in the above-entitled cause.

2. I have read the affidavit of Walter Eichner verified May 6, 1926.

3. The counterclaiming defendants are still seized of their several undivided rights and interests in and to the premises described in the bill of complaint and counterclaim.

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4. Said counterclaiming defendants have not nor have any of them, conveyed their right, title

43
Order.

or interest in or to said premises and are still parties in interest in said suit.

OTTO SCHMIDT.

Sworn and subscribed before me
this 20th day of May, 1926.

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EDMUND B. HARRIGAN,
Notary Public for New Jersey.

Order.

(Filed June 28th, 1926.)

IN CHANCERY OF NEW JERSEY

20

59-722.

Between

THEODORE SCHMIDT and BERTHA
SCHMIDT,

Complainants,

and

OTTO SCHMIDT, et als.,

Defendants.

On Bill, &c.

30

This matter coming on to be heard in the presence of William F. Burke, Solicitor of Defendants, and John J. Marnell, Solicitor of Complainants, and William B. Stites, Solicitor of Defendants; it appearing that the defendants, Otto Schmidt, Ferdinand Schmidt, Johanna Lindenberger, Pauline Mathes, Augusta Schmidt, Jean B. Haem-

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merlein, Victor Haemmerlein, and Herbert Haemmerlein, gave due notice of a motion to strike out and dismiss the answer to the counterclaim of the said defendants, and the counterclaim of defendant, Ferdinand Eichner, and it further appearing that the complainants gave due notice of a motion to strike out the counterclaim of the said defendants, and it further appearing that the defendants, Eichners, Inc., Walter Eichner and Charles Feldman, gave due notice of a motion to strike out the counterclaim of the defendants, Otto Schmidt, Ferdinand Schmidt, Johanna Lindenberger, Pauline Mathes, Augusta Schmidt, Jean B. Haemmerlein, Victor Haemmerlein and Herbert Haemmerlein, and it appearing that all of said motions were duly continued to June 14, 1926, and at that time the arguments of the respective counsel and the affidavits on the respective motions were heard and considered,

It is thereupon on this 28th day of June, 1926, ORDERED that decision on the motion of the defendants, Otto Schmidt, Ferdinand Schmidt, Johanna Lindenberger, Pauline Mathes, Augusta Schmidt, Jean B. Haemmerlein, Victor Haemmerlein and Herbert Haemmerlein, be reserved for final hearing.

It is further ORDERED that the motions of the complainants and of the defendants, Eichners, Inc., Walter Eichner, and Charles Feldman, for dismissal of the counterclaim of the other parties defendants, be and the same is hereby denied and it is further ORDERED that the applications of the complainants and the defendants, Eichners, Inc., Walter Eichner and Charles Feldman, for an order striking out the defendants, Eichners, Inc., Walter Eichner and Charles Feldman, as parties

*Order Appealed From Made by the Chancellor on
the Advice of V. C. James F. Fielder.*

defendant to this suit, be and the same are hereby denied.

And it is further ORDERED that the defendants, Eichners, Inc., Walter Eichner and Charles Feldman, have twenty days from June 14, 1926, to file their answers to the counterclaim of the other defendants, and upon their failure so to do, such decree may be entered against them as the Chancellor shall deem meet.

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Respectfully advised,

EDWIN ROBERT WALKER,
Chancellor.

JAMES F. FIELDER,
V. C.

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**Order Appealed From Made by the
Chancellor on the Advice of V. C.
James F. Fielder.**

(Filed, July 12th, 1926.)

IN CHANCERY OF NEW JERSEY.

59-722.

Between

THEODORE SCHMIDT and BERTHA
SCHMIDT,
Complainants,

and

OTTO SCHMIDT, et als.,
Defendants.

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On Bill, &c.
Notice of
Appeal.

The defendant, Eichners, Inc., hereby appeals to the Court of Errors and Appeals from that part of

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*Order Appealed From Made by the Chancellor on
the Advice of V. C. James F. Fielder.*

an order made herein on the 28th day of June, 1926, wherein it was ordered that the motions of the complainants and of the defendants, Eichners, Inc., Walter Eichner and Charles Feldman, for dismissal of the counterclaim of the other parties de-
 10 defendants be and the same is hereby denied and further ordered that the applications of the complainants and the defendants, Eichners, Inc., Walter Eichner and Charles Feldman for an order striking out the defendants, Eichners, Inc., Walter Eichner and Charles Feldman as parties defendant to the suit be and the same are hereby denied and also from that part of the said order directing the defendants, Eichners, Inc., Walter Eichner and Charles Feldman to answer the counterclaim.

20 I conceive there is good cause of appeal in the above stated cause.

Dated, July 2, 1926.

WM. B. STITES,
Solicitor and of Counsel for Defendant,
Eichners, Inc.

Service of a copy of the within notice of appeal is hereby acknowledged this 2nd day of July, 1926.

30 JOHN J. MARNELL,
Solicitor for Complainants.

WM. F. BURKE,
Solicitor for Defendants, Otto Schmidt,
Ferdinand Schmidt, Johanna Lindenberger, Pauline Mathes, George B. Mathes, Victor Haemmerlein, Mrs. Victor Haemmerlein, Herbert Haemmerlein, Mrs. Herbert Haemmerlein, Jean B. Haemmerlein and
 40 August Schmidt.

Petition of Appeal.

(Filed July 16, 1926.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between

THEODORE SCHMIDT and BERTHA
SCHMIDT,

Complainants,

and

OTTO SCHMIDT, et als.,

Defendants.

10

On Bill, &c.

To the Honorable Court of Errors and Appeals
in the last resort in all causes:

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The petition of Eichners, Inc., a domestic corporation, the appellant in the above stated cause, respectfully shows that your petitioner finds itself aggrieved by an order made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of New Jersey, advised by V. C. James F. Fielder, bearing date the 28th day of June, 1926, wherein Theodore Schmidt and Bertha Schmidt were complainants and the said Eichners, Inc., and Otto Schmidt, Ferdinand Schmidt, Johanna Lindenberger, Pauline Mathes, George B. Mathes, Victor Haemmerlein, Mrs. Victor Haemmerlein, Herbert Haemmerlein, Mrs. Herbert Haemmerlein, Jean B. Haemmerlein and Augusta Schmidt, were defendants in this respect, to wit, that the said order adjudges that the motions of the complainants and of the defendants, Eichners, Inc., Walter Eichner and Charles Feldman for a dismissal of

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10 the counterclaim of the other parties defendants be denied and further ordering that the applications of the complainants and the defendants, Eichners, Inc., Walter Eichner and Charles Feldman for an order striking out the defendants, Eichners, Inc., Walter Eichner and Charles Feldman as parties
20 defendants to the suit be denied and also ordering and directing the defendants, Eichners, Inc., Walter Eichner and Charles Feldman to answer the counterclaim of the other defendants. And your petitioner humbly appeals from that part of the said order of the Chancellor which orders as aforesaid upon the ground that the same is erroneous for that the defendants, Eichners, Inc., Walter Eichner, and Charles Feldman are not proper or necessary parties to this partition suit and are improperly and erroneously permitted to be brought in as
30 parties defendants and required to answer the said counterclaim of the other defendants and for the further reason that no copy of the said counterclaim of the other defendants was served upon the said Eichners, Inc., Walter Eichner and Charles Feldman or their solicitor as directed by the rules of the Court of Chancery. Your petitioner therefore prays that the said order of the said Chancellor may be in the particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioner may have such relief in the premises as to this honorable court shall seem meet.

WM. B. STITES,
Solicitor and of Counsel for
Appellant, Eichners, Inc.

Petition of Appeal.

Service of a copy of the within petition of appeal is hereby acknowledged this 14th day of July, 1926.

JOHN J. MARNELL,
Solicitor for Complainants, Theodore
Schmidt and Bertha Schmidt.

WM. F. BURKE, 10
Solicitor for Defendants, Otto Schmidt,
Ferdinand Schmidt, Johanna Lin-
denberger, Pauline Mathes, George
B. Mathes, Victor Haemmerlein,
Mrs. Victor Haemmerlein, Herbert
Haemmerlein, Mrs. Herbert Haem-
merlein, Jean B. Haemmerlein and
Augusta Schmidt.

WM. B. STITES, 20
Solicitor for Walter Eichner,
and Charles Feldman.

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20 W.M. E. SUTTER
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New Jersey Court of Errors and Appeals

Between	}	On Bill, Etc. On Appeal From Order.
THEODORE SCHMIDT and BERTHA SCHMIDT,		
<i>Complainants,</i>		
and		
OTTO SCHMIDT, et als.,		
<i>Defendants-Appellees,</i>		
EICHNERS, INC., a Third Party,		
<i>Appellant.</i>		

BRIEF FOR DEFENDANTS-APPELLEES

Facts

The bill was filed for the partition or sale of certain lands in the City of Hoboken, consisting of a single lot twenty-five (25) feet wide front and rear by one hundred fifty (150) feet in depth, of which complainant, Theodore Schmidt, and these defendants-appellees are seized in fee as the devisees or their heirs under the will of Charles Schmidt.

Defendants-appellees filed an answer and counterclaim bringing in appellant and others as third parties, alleging that appellant was in possession of the premises or some part thereof,

claiming some right, title or interest therein and denying such right.

Motion was made, by appellant, to strike appellant out as a party and to strike out the counter-claim as against it. On this motion the affidavits (c. pp. 34, 36, 37, 42) were submitted. In one affidavit appellant says it is a tenant but does not disclose under whom it claims.

This motion was denied and from the order denying the motion this appeal was taken.

This we submit is all of the facts pertinent on this appeal. What was done in the cause before the filing of the counter-claim or what was done by other defendants or complainants has no bearing on the issue involved.

The simple question presented is:

Was the refusal of the Court below to strike out appellant as a party and the refusal to strike out the counter-claim as to it reversible error?

Point I

Appellant is a proper party to this suit.

Rule 6 provides as follows:

Any person may be made a defendant who either jointly, severally or in the alternative, is alleged to have or claim an interest in the controversy, or in any part thereof, adverse to the complainant; or whom it is necessary or proper to make a party for the complete determination or settlement of any question involved therein.

Rule 71 provides as follows:

A counter-claim is deemed to be cross-action, and the rules respecting the form and manner of pleading the bill of complaint and answer, apply respectively to the counter-claim and the answer thereto.

Appellant was brought in as a third party and therefore is in the same position as a defendant to a bill.

The counter-claim alleges it is in possession of some part of the premises in question and has or claims to have an interest in the subject of the controversy or some part thereof.

The motion is in lieu of a demurrer.
Rule 67.

On a demurrer, the allegations of the bill are taken as true.

If it be true that appellant is in possession of a part or all of the premises and claims an interest therein, then, certainly it is at least proper to make it a party for the complete determination or settlement of the interests of the parties to the suit.

It is not a question of whether appellant holds some encumbrance on the lands or on an undivided interest, but whether it has any right or interest therein.

Point II

The Court below very properly refused to consider the affidavits submitted on the motion.

The fourth, fifth and seventh grounds of appellant's motion present questions of fact which cannot be heard on a motion of this kind. There is no provision in the rules or statutes for a motion to strike out a bill on a question of fact, and as to appellant, the counter-claim is a bill of complaint.

Nevertheless, appellant, in its brief, rests its principal ground of appeal squarely on the allegation of its *ex parte* affidavit that it is a tenant. We submit that that is a question of fact to be determined at the hearing.

It may be that appellant is a tenant and perhaps a tenant under one of the co-owners. Surely then, appellees have the right to make it a party to their counter-claim.

Rules 6 and 13.

Weise vs. Welsh, 30 N. J. Eq. 431.

We realize that there is as yet no proof of this, but such a question should not be tried on *ex parte* affidavits.

Point III

It was not necessary to serve the counter-claim on appellant.

Appellant's sixth ground of motion is that the counter-claim was not filed or served.

The case (p. 18) shows that the counter-claim was filed.

There is no proof of the failure to serve the counter-claim on appellant.

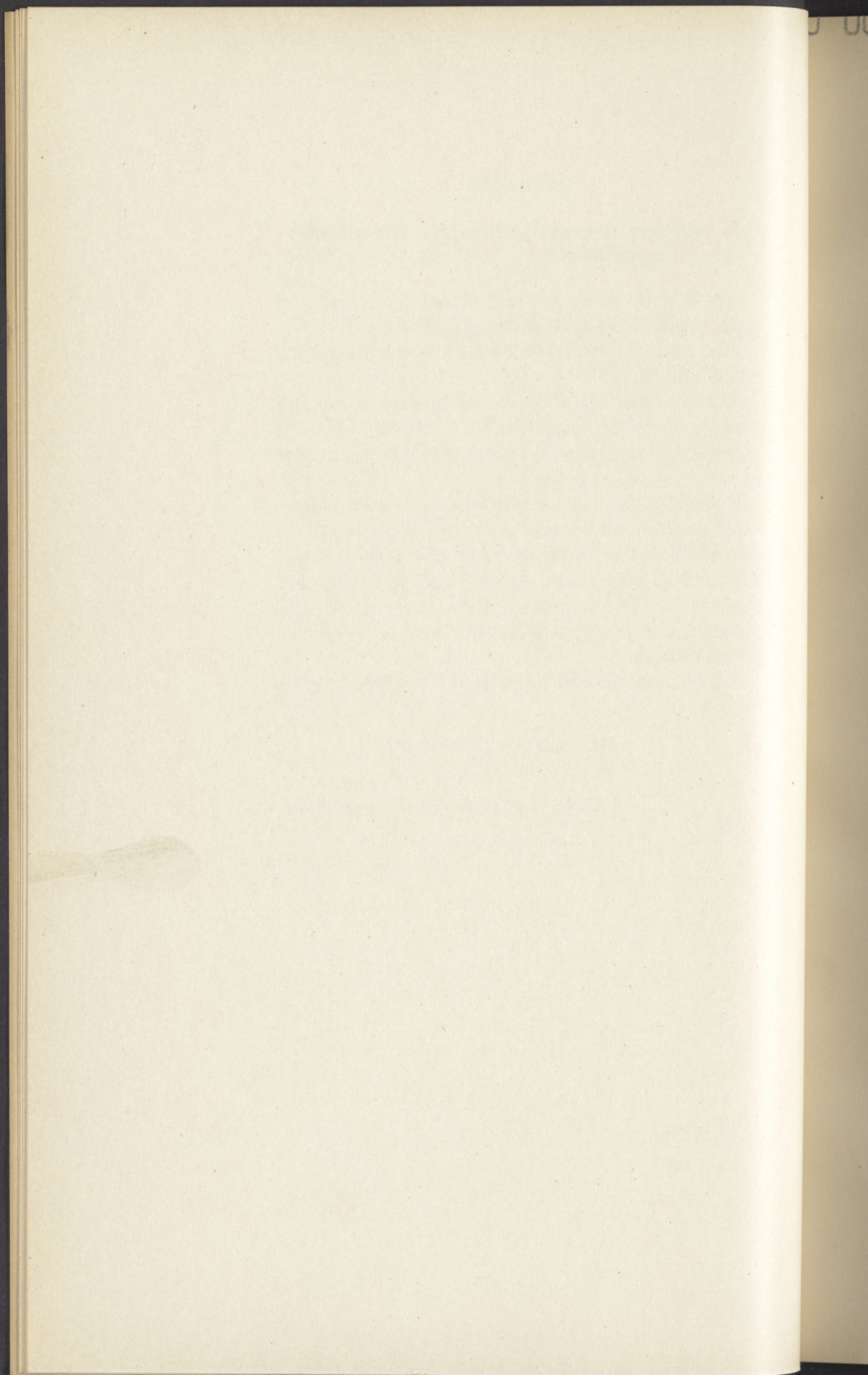
We submit, however, that it was not necessary to serve it on appellant.

Rule 73 requires service on a co-defendant when such co-defendant is made a party to a counter-claim. Appellant was not a co-defendant made a party to a counter-claim; it was not a party to the suit, when the counter-claim was filed; it was brought in as a third party by the counter-claim.

It is respectfully submitted that the order should be affirmed.

Respectfully submitted,

WM. F. BURKE,
Solicitor of Defendants-Appellees.



OCT. 1. 1926

New Jersey Court of Errors and Appeals

Between

THEODORE SCHMIDT and BERTHA
SCHMIDT,

Complainants,

and

OTTO SCHMIDT, et als.,
Defendants,

EICHNERS, INC.,
Defendant-Appellant.

On Appeal
from the
Court of
Chancery.

BRIEF FOR APPELLANT.

The Bill in this case was filed for the purpose of partitioning lands in the City of Hoboken, New Jersey, of which Charles Schmidt died seized or if this be found to be impracticable, then to sell said lands and divide the proceeds of the sale among complainants and the several parties interested therein, according to their respective rights, shares and interests therein and the questions at issue are:

(1) Whether or not a tenant in possession of a part of the lands sought to be partitioned is a proper or necessary party to said suit.

(2) Whether or not the fact that the rules of the Court of Chancery concerning the filing and serving the counterclaim of the appellees were complied with.

Statement of Case.

The complainants bring their suit to partition lands of which Charles Schmidt died seized, or if this cannot be done without prejudice to the owners of said premises, then to sell the same and divide the proceeds among the parties entitled thereto. In the bill, complainants show that Charles Schmidt died testate in July, 1886, seized of said lands. The third clause of his will provides as follows:

“ITEM.—I give and devise unto my beloved wife, Pauline Schmidt, all my real estate, wherever situate, to have, hold, receive, use and enjoy the rents, issues and profits thereof during the term of her natural life, and from and after her decease, I give and devise my said real estate unto such child or children as I shall leave or have living at the time of my decease and to their heirs and assigns forever; and the representatives of any deceased child to have the share of his or her parent.”

Pauline Schmidt, the widow of said Charles Schmidt enjoyed her life estate in said lands until the month of November, 1925, when she died. The following named children and grandchildren survived her: Theodore Schmidt, Otto Schmidt, Ferdinand Schmidt, Johanna Lindenberger, Pauline Mathes, Augusta Schmidt, Victor Haemmerlein, and Herbert Haemmerlein, and they became seized of said lands as tenants in common, subject to the estate by the curtesy of the defendant, Jean B. Haemmerlein, in the share of which his wife, Caroline Haemmerlein, died seized and subject to inchoate rights of dower and curtesy of the respec-

tive wives and husbands of the said tenants in common as set out in said bill of complaint on pages 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10.

None of the defendants to the bill of complaint filed answers within the time allowed by law, a decree pro confesso was entered against all of said defendants on February 18, 1926.

On March 22, 1926, all of said defendants set out and described in said bill of complaint, filed their petition in the cause admitting service of the subpoenas on each of them and the entry of the interlocutory decree and Order of Reference to one of the special masters of this court, and admitting that none of said defendants in said cause filed an answer to said bill of complaint, pages 13 and 14, 15-16.

In said petition they further set out that at and prior to filing of said bill of complaint, Eichners, Inc., Ferdinand Eichner, Walter Eichner and Louis Eichner and one Feldman were in possession of said premises and that said Eichners, Inc., a corporation, Ferdinand Eichner, Walter Eichner, Louis Eichner and said Feldman, or some of them, claim some right or interest in said premises, (p. 14).

They also set out that neither Eichners, Inc., Ferdinand Eichner, Walter Eichner, Louis Eichner or said Feldman are made parties defendant to said bill of complaint, notwithstanding their claim to tenancy and right of possession and they admit that petitioner and complainants are all of the tenants in common in said lands (pp. 14 and 15).

Said petitioners further allege that it is necessary that the claims of said Eichners, Inc., Ferdinand Eichner, Walter Eichner, Louis Eichner and said Feldman be adjudicated in this suit and they be made party defendants to said suit (p. 15).

They pray in said petition that said decree be opened, that they be granted leave to file an answer and counterclaim and bring in said Eichners, Inc., Ferdinand Eichner, Walter Eichner, Louis Eichner and said Feldman as party defendants to said cause (p. 15).

An order to show cause was granted on this petition, returnable April 12, 1926, as to why the interlocutory decree entered on February 18, 1926, should not be opened and vacated, and said petitioners be permitted to file an answer and counterclaim to bring in said Eichners, Inc., Ferdinand Eichner, Walter Eichner, Louis Eichner and said Feldman as parties defendant in said cause (pp. 16 and 17).

On the return day of said order to show cause, an order was made granting the prayer of said petitioners.

On April 26, 1926, the defendants in the bill of complaint filed their answer and counterclaim. In the same, they admit that complainants and the defendants named in the bill were at and prior to the filing of the bill of complaint, seized as tenants in common of said lands. They say that at time of filing bill, Eichners, Inc., Ferdinand Eichner, Walter Eichner, Louis Eichner and Charles Feldman were and are in possession of said lands or some part thereof, claiming some right or interest therein adverse to the right of said defendants and pray that they may answer the counterclaim and that they set out their interests, if any (pp. 19 and 20), and that a subpoena may issue commanding them to answer this counterclaim (p. 20).

Subpoena issued to said defendants, page 21, and defendant, Ferdinand Eichner answered, pages 22, 23, 24, 25, 26, 27 and Replication filed to this, pages 28-29.

Subsequently, a Notice of Motion to strike out counterclaim and parties defendant, Eichners, Inc., Ferdinand Eichner, Walter Eichner, Louis Eichner and Charles Feldman on the grounds:

(1) That they or either of them are not proper or necessary parties defendants to this partition suit.

(2) They or either of them have no rights, title or interest in or to the lands and premises described in the bill of complaint herein which will in any way or manner effect the partition of the same.

(3) That the defendants or counterclaimants have no right or sufficient interest in the said lands to bring in third party defendants or file a counterclaim herein for the reason that they have not sufficient interest or title in the lands, having sold their interests therein to one Sol Lubash.

was made by the complainants, pages 29-30.

The defendants, Eichners, Inc., Walter Eichner and Charles Feldman, also served Notice of Motion to strike out counterclaim and parties defendants assigning the same reasons as had complainants and the additional reason that

“That the rules of this court concerning the filing and serving of said counterclaim have not been complied with”

and annexed to said notice, the affidavits, pages 32, 33, 34, 35, 36, 37, 38.

Both of said motions to strike out counterclaim and parties defendants were argued before V. C. Fielder and he denied the same and directed that defendants, Eichners, Inc., Walter Eichner and

Charles Feldman answer to the counterclaim of the other defendants and this they did, pages 43, 44, 40, 41, 39, *except Eichners, Inc.*

The defendant, Eichners, Inc., the appellant contends:

(1) That it is a tenant occupying a part of the premises described in the bill of complaint and has no interest in the partition suit in which it is made a party defendant and that a proper and equitable partition of said lands can be made without making it party defendant to this action.

(2) That the rules of the Court of Chancery concerning the filing and serving of the counterclaim of the appellees were not complied with.

POINT I.

Encumbrances on the property constitute no objection to a partition.

3 C. S., 3912, Sec. 54, provides that it shall not be necessary in the first instance to make any creditor having a lien on any real estate sought to be partitioned, or any part thereof by judgment, decree, mortgage or otherwise, a party to the proceedings, and that the partition of the premises shall not alter, affect or impair the lien of such creditors.

As regards real estate, it is not necessary that the encumbrancer should be a party to the suit for partition. His rights are not affected by it.

Low v. Holmes, 17 E., 148-150;

Polhemus v. Empson, 27 E., 190-193;

Becker v. Carey, 36 Atl. Rep., 770;
 McCullough v. Ward, 76 E., 445;
 Greiss v. Noisky, 82 E., 1-5;
 Kochers Chan. Prac., 92.

3 C. S., 3913, Sec. 56, provides that complainant in any such suit in partition, may, at his election, make every creditor having a lien on the undivided interest or estate of any of the parties, by mortgage, judgment, decree, devise or otherwise, a party to the proceedings.

Van Houten v. Stevenson, 69 E., 626;
 Schenk v. Yard, 86 Atl. Rep., 81-84.

It will be noted that complainant may do this, at his election, but only where the lien is on the undivided interest or estate of any of the parties.

Van Houten v. Stevenson, 69 E., 626.

In the cause at issue, the appellant was a tenant in possession of the ground floor of the lands sought to be partitioned at the time of the filing of the bill of complaint and his tenancy is an encumbrance against all of the lands sought to be partitioned and not against any particular undivided interest in said lands.

In Greiss v. Noisky, 86 E., 1-5, the court held that a mortgagee, whose mortgage had been on the whole of the land prior to the filing of the bill was not a necessary party to the bill to partition the lands and it would seem that the rule laid down in that case applies to this situation.

POINT II.**Rule 73 of the Court of Chancery provides that,**

Where a co-defendant is made a party to the counterclaim, a copy thereof shall be served upon him or his solicitor within five days after the same is filed.

No copy of the said counterclaim of the other defendants was served upon said Eichners, Inc., or their solicitor as directed by said rules.

Conclusion.

It is respectfully submitted that for the reasons set forth, the said order of the said Chancellor should be reversed with costs.

Respectfully submitted,

WM. B. STITES,
Solicitor and of Counsel for
Appellant, Eichners, Inc.

