INDEX

NOTICE OF APPEAL.

Filed June 15, 1928.

In Chancery of New Jersey

Between	
STONE & STONE, INC., *Complainant,*	*On Bill, &c.*
and	*Notice of Appeal.*
SIMON-SCHULTZ Co., a corporation, *Defendant.*	

Notice is hereby given that Philip Ettinger, purchaser at a sale made by Joseph L. Smith, receiver of the defendant corporation, hereby appeals to the Court of Errors & Appeals in the last resort in all causes from the order made by the Chancellor on the advice of Vice-Chancellor Maja Leon Berry; which order bears date June 5, 1928.

Dated June 15, 1928.

FRANK E. BRADNER,
Solicitor of Philip Ettinger.

I conceive there is good cause for appeal in the above-stated cause.

FRANK E. BRADNER,
Of Counsel with Philip Ettinger.

Served June 15, 1928, on Stein, McGlynn & Hannoch, solicitors of receiver.

PETITION OF PHILIP ETTINGER.

Filed October 11, 1927.

IN CHANCERY OF NEW JERSEY.

Between

STONE & STONE, INC., *Complainant,*

and

SIMON-SCHULTZ COMPANY, a corporation, *Defendant.*

On Bill, &c.

Petition.

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey.

The petition of Philip Ettinger of the City of Newark, County of Essex and State of New Jersey, respectfully shows:

1. That your petitioner is the purchaser of certain lands and premises described in the bill of complaint herein, sold by Joseph L. Smith, Esquire, receiver, appointed by this court August 16, 1927, pursuant to the directions of an order of this court made in this cause on June 28, 1927.

2. That said lands and premises which are located on Osborne Terrace at or near Renner avenue in the City of Newark, New Jersey, particularly known as Tract 3 on Map of defendant, showing Osborne Terrace and Renner avenue property, being more particularly described as follows:

Petition of Philip Ettinger.

Third Tract: BEGINNING at a point on the westerly side of Osborne Terrace 226.40 feet westerly from the southerly side of Renner avenue; thence running north 50 degrees, 35 minutes, 30 seconds west 100 feet; thence running south 39 degrees, 24 minutes, 30 seconds west 117.74 feet to the most southerly side of the property of the East Side Realty Company, as shown by map made by C. F. Lemessina, surveyor, dated August 1, 1922; thence running south 42 degrees, 56 minutes, 45 seconds east 90.78 feet to a point; thence running north 59 degrees, 42 minutes east 35.95 feet to a point in the said westerly line of Osborne Terrace; and thence running northerly along said westerly side of Osborne Terrace 89 feet more or less to the point and place of BEGINNING; which was struck off and sold at public vendue to petitioner by said receiver at said sale at the price of twenty-three thousand ($23,000) dollars, petitioner being the highest bidder therefor, and petitioner thereupon signed the conditions of said sale and acknowledgment of his said purchase, and paid to the said receiver the sum of twenty-three hundred dollars, being ten per cent. (10%) of the said purchase price in accordance with said conditions of sale.

3. By an order of this court made in this cause on September 13, 1927, said sale was duly confirmed and said receiver was directed to execute good and sufficient conveyance in the law for the lands and premises so purchased by petitioner as aforesaid.

4. Petitioner has not yet completed his said purchase and the deed for said lands and premises has not yet been delivered to him.

5. Since the date of said sale, purchaser has discovered that the rear line of said premises is not 117.74 feet as is described in the advertisement for sale of said premises, but in fact measures only 111.12 feet and that the difference of 6.62 feet is owned by persons other than the defendant herein named.

6. The said difference in measurement was not inserted in the notices and advertisement of said sale, nor in the said conditions of sale.

Petitioner therefore prays that he may be relieved from his said bid; that the said sale may be opened and set aside and that the said receiver may be directed to return to petitioner the deposit of twenty-three hundred dollars so paid by him to said receiver as aforesaid, or in the alternative that your petitioner be allowed such abatement or amount as the Court may deem equitable and just, your petitioner tendering himself ready, able and willing to consummate this transaction and accept a deed therefor with such abatement, or such other further relief as to the Court may seem equitable and just.

CARL OLSAN,
Solicitor for Petitioner.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

PHILIP ETTINGER, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the petitioner in the foregoing petition named. I have read the same and am familiar with the contents thereof, and the matters and things therein contained are true.

2. The advertisement of sale in this matter set out the description by metes and bounds as set forth in my petition. The conditions of sale mentioned the tract merely by tract number, namely tract 3 on map showing Osborne Terrace and Renner avenue properties, without indicating in any manner whatsoever, that the dimension of the rear line thereof was other than 117.74 feet.

3. That immediately on bidding in the property, your deponent caused a survey of the said premises to be made and was, sometime afterward, advised that the rear line thereof measured 111.12 feet and no more. Your deponent immediately investigated the matter and found that the remaining 6.62 feet was owned by others than the Simon-Schultz Company, or its receiver.

4. Your deponent is ready, willing and able to take title to the premises, but had he been informed of the exact dimensions of the premises he would not have paid the amount of twenty-three thousand dollars that your deponent did pay, but would have paid a considerably smaller amount.

PHILIP ETTINGER.

Sworn and subscribed to before
me this 10th day of October,
A. D., 1927.

A. NATHAN COHEN,
An Attorney at Law of New Jersey.

ORDER TO SHOW CAUSE.

Filed October 11, 1927.

IN CHANCERY OF NEW JERSEY.

Between STONE & STONE, INC., *Complainant,* *and* SIMON-SCHULTZ COMPANY, a corporation, *Defendant.*	*On Bill, &c.* *Order to Show Cause.*

Upon reading the petition of Philip Ettinger, filed herein and affidavit annexed thereto, from which it appears that Philip Ettinger, the above-named petitioner, did purchase by receiver's sale, premises on Osborne Terrace, City of Newark, County of Essex and State of New Jersey, which premises are not in area and dimensions in accordance with the description furnished petitioner in notice and order of sale, etc.,

It is on the eleventh day of October, 1927, ORDERED, that the said receiver do show cause before the Chancellor at the Chancery Chambers in the City of Newark, New Jersey, on the 18th day of October, next, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why said sale should not be opened and set aside or such further action and proceedings taken therein as to the Chancellor may seem equitable and just;

And it is further ORDERED, that a copy of this order, which shall be certified by the solicitor

of the petitioner herein, as a true copy, shall be served on the defendant receiver herein, within three days from the date hereof.

E. R. WALKER,
C.

Respectfully advised,

MAJA LEON BERRY,
V.-C.

I hereby certify the within to be a true copy of the original.

CARL OLSAN.

ANSWER OF JOSEPH L. SMITH, RECEIVER, ETC.

Filed October , 1927.

1188.
I.
10.19.27.

IN CHANCERY OF NEW JERSEY.

Between STONE & STONE, INC., *Complainant,* *and* SIMON-SCHULTZ COMPANY, a corporation, *Defendant.*	*On Bill, &c.* *Answer of Joseph L. Smith, Receiver of Simon-Schultz Company to Answer of Philip Ettinger.*

JOSEPH L. SMITH, Receiver of Simon-Schultz Company, a corporation, answering the petition filed herein by Philip Ettinger, respectfully says:

1. He admits the allegations set forth in paragraph 1 of the said petition, except that he was appointed receiver of the defendant company on February 23, 1927.

2. He admits paragraph 2.

3. He admits paragraph 3, except that prior to the confirmation of the sale the discrepancy in the description was made known to this Honor-

able Court, and Philip Ettinger was directed to consummate the sale.

4. He admits paragraph 4, and says that on October 13, 1927, the date set for the closing of the title he was ready, willing and able to convey good title to the lands and premises described, and so notified the said Philip Ettinger.

5. He has no knowledge of the allegations set forth in paragraph 5 and leaves the petitioner to his proof.

6. He admits paragraph 6.

7. Joseph L. Smith, receiver as aforesaid, further answering the petition filed herein by Philip Ettinger, says, that the sale was well advertised for at least seven (7) weeks in advance of the date set for the sale, and petitioner had ample and sufficient opportunity to measure and inspect the property.

8. That at the time of the sale the parcel on tract No. 3 was put up and sold by description "more or less," and announcements were made that purchasers would be required to take the property "as is."

STEIN, McGLYNN & HANNOCH,
Solicitors for and of Counsel with
Joseph L. Smith, Receiver of
Simon-Schultz Company.

REPLY.

Filed October , 1927.

IN CHANCERY OF NEW JERSEY.

Between	
STONE & STONE, INC., *Complainant,*	*On Bill, &c.*
and	*Reply.*
SIMON-SCHULTZ COMPANY, a corporation, *Defendant.*	

PHILIP ETTINGER, petitioner herein, replying to the answer filed herein by Joseph L. Smith, receiver of the defendant herein, respectfully says:

1. He admits paragraph 3 of the answer, but states that this court did permit your petitioner to make this application for rescission, without prejudice, after such confirmation.

2. He admits paragraph 4 of the answer.

3. He has no knowledge of the allegations of paragraph 7 of the answer, except that he denies that he had ample and sufficient opportunity to measure and inspect the property, and leaves this defendant to his proof.

4. He denies the allegations of paragraph 8 of the answer.

CARL OLSAN,
Of Counsel with Petitioner.

Letter of Vice-Chancellor Berry.

(Copy)

COURT OF CHANCERY OF NEW JERSEY.

Toms River, N. J.
October 21, 1927.

Chambers of Maja Leon Berry, *V.-C.*

In re: Stone & Stone *v.* Simon-Schultz, Inc.

Carl Olsan, Esq.,
Federal Trust Building,
Newark, N. J.

Stein, McGlynn & Hannoch
17 Academy Street
Newark, N. J.

Gentlemen:

In the above matter, I have examined the papers submitted on the argument on the order to show cause why Philip Ettinger should not be relieved of his bid for the property described in his petition and I have come to the conclusion that the petitioner should not be relieved of his bid, but an allowance should be made to him on account of the purchase price, of such sum as will represent the difference between the value of the land sold and described in the advertisement of sale, and the value of the land which the receiver can actually deliver. It appears that all the courses and distances in the description of the tract which the receiver can deliver correspond to those of the advertised tract with the exception of the northwest property line, and that this line is about 6.62 feet short. I will hear testimony on this question of value at the convenience of counsel; or, if more

convenient, it may be referred to a master for that purpose.

I am returning to Mr. Olsan herewith copy of advertisement and copy of map of Theodore R. Freund left with me last Wednesday, and I am returning to Messrs. Stein, McGlynn & Hannoch copy of petition, copy of conditions of sale and copy of map of W. H. Hoff, left with me at the time of the argument. The other papers left with me I have filed.

Very truly yours,

MAJA LEON BERRY.

MLB:ELS

AFFIDAVITS.

Filed January , 1928.

IN CHANCERY OF NEW JERSEY.

Between

STONE & STONE, INC., *Complainant,*

and

SIMON-SCHULTZ COMPANY, a corporation, *Defendant.*

On Bill, &c.

Affidavit.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. *ss.*

MORRIS TZESES, being duly sworn according to law, deposes and says:

That he is a resident of the City of Newark, and has been engaged in the building business for the past nineteen years, during which period he has built not less than ten and considerably more apartment houses of the kind herein discussed by deponent.

That from his examination of the premises in question and his inspection of the architect sketches, he finds that the variation in width of the rear line to the extent of 6.62 feet, will affect the building proposed to the extent of two rooms on the southerly side of each floor of the said building, to the extent of at least six rooms if only a three-story building were built, and at the rate of two rooms for each floor that the owner intends to add thereto.

That the southerly side of said premises as provided in the original sketch for 117 feet lot, marked Schedule A, would allow of the building of a court of twelve feet for light and air as required by the Tenement House and Building regulations, but as the line now actually runs, there is at best about nine feet which does not allow the court, unless the building is affected by elimination of the two rooms herein above stated. The layout proposed in Schedule B for the premises is the best that can be suited to the area available, so as to conform to the Tenement House Board and Building Department regulations, and utilize the area available.

That the cost of erecting the two rooms on a lot that would allow for it, of the kind and character indicated in the proposed sketch, marked Schedule A, would not exceed the sum of eight hundred ($800) dollars for the two rooms on each floor; these rooms being bedrooms and requiring no additional plumbing or other facilities.

The rental value for these two rooms per floor would be at least forty ($40) dollars and based on a building cost of eight hundred ($800) dollars, which is approximated at eight ($8) dollars in monthly rental value, there is a direct rental loss of at least thirty-two dollars ($32) per month for the two rooms per floor. This would make a loss in valuation in a five-story building as proposed of at least one hundred sixty ($160) dollars per month, which on the rental basis figured at six times the annual rental, would be valued at not less than twelve thousand ($12,000) dollars in actual value, so far as the sale value of the property is concerned when completed.

This deponent, estimating the value of the building completed in accordance with the sketches submitted, five stories, taking the land value of a basis of thirty thousand ($30,000) dollars, says that the value of the building as completed in this particular locality would be two hundred fifty-five thousand ($255,000) dollars, and that the same building as proposed in Schedule B would be not more than two hundred forty thousand ($240,000) dollars to two hundred forty-five thousand ($245,000) dollars; this deponent fixing the actual value at two hundred forty-three thousand ($243,000) dollars, making an actual difference in value of at least ten thousand ($10,000) dollars. This deponent resides at No. 46 Bock avenue, nearby the premises in question, and has resided there for the past five (5) years, and is thoroughly familiar with the lots on Osborne Terrace, and land values in and about the particular locality in question. That the lines of this lot being irregular as shown on sketches, marked Schedule A and Schedule B, and survey of Theodore Freund, marked Schedule C, submitted to this deponent and from his inspection of the premises made, that the value of the lot being squared off, would be considerably more than as it actually is. That to this deponent's knowledge, the said lot as it is, as measuring 117.74 feet in the rear as shown by Schedule A would be not less than twenty-five thousand ($25,000) dollars. That the said lot as it measures 111.12 feet in the rear thereof as shown in Schedule B, is of a value no greater than twenty thousand ($20,000) dollars.

That the valuation fixed by this deponent is affected, first by the angles in the southeast

corner thereof to some slight extent, and this deponent, from his experience as a real estate operator and builder, and his deductions from Schedules A and B submitted herewith and discussed with this deponent, herein fixes the difference in valuation because of the shortage of the six (6) feet more or less, in the rear, of not less than three thousand ($3,000) dollars. That this estimate is based on the sale value of the premises on the deponent's knowledge as a real estate expert and builder and the computing of the said lots by area based on this deponent's valuation thereof as measured out and computed by this deponent.

MORRIS TZESES.

Sworn and subscribed to before
me this 30th day of December,
A. D., 1927.

Corrections made before execution.

A. NATHAN COHEN,
An Attorney at Law of N. J.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

EDWARD J. MAIER, being duly sworn on his oath, deposes and says:

That he is and has been for many years in the real estate business, in the City of Newark, County of Essex and State of New Jersey, and is at present the President of the E. J. Maier Corp., which is now actively engaged in the real estate business in all its branches.

Your deponent says that based on a price of twenty-three thousand dollars ($23,000) for the Osborne Terrace tract, survey of which has been shown deponent, there is a total of twelve thousand square feet (12,000), making the price per square foot one dollar and ninety-two cents ($1.92).

The reduced dimensions give the plot a total area of only eleven thousand seven hundred square feet (11,700) the difference being three hundred square feet (300), which at the actual price per square foot paid of one dollar and ninety-two cents ($1.92) makes a difference in the actual value based on the purchase price, of five hundred seventy-six dollars ($576).

Your deponent has examined the sketches, marked A and B, on which it appears that the smaller dimensions will allow the construction of a building having two rooms less per floor. A reasonable allowance for damage by reason of such reduction in size is not less than five hundred ($500) dollars, making the minimum reasonable total damage according to your deponent's information, knowledge and belief, based on his experience and knowledge as a real estate expert, of not less than ten hundred seventy-six dollars ($1,076).

EDWARD J. MAIER.

Sworn and subscribed to before
me this 10th day of January,
A. D., 1928.

JAMES V. ALCAMO,
A Notary Public of N. J.
(SEAL)

Affidavit of Philip Ettinger.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

PHILIP ETTINGER, being duly sworn on his oath, deposes and says:

That he purchased lot on Osborne Terrace from the Simon-Schultz Company at receiver's sale. That the said premises were advertised by the receiver for an apartment house site as shown by the prospects sent out by the receiver and that he purchased said lot at said receiver's sale for the sum of twenty-three thousand ($23,000) dollars, with the intent and purpose of erecting thereon a five-story apartment house. That immediately on such purchase he authorized and engaged one, Harold F. Clark, Architect of the City of Newark, to draw up plans therefor, as shown by sketch marked Schedule A.

On consulting his attorney and having survey made, he discovered that the said premises were 6.62 feet short in the rear thereof, and that the shortage affected the southerly side line of said premises, as shown by survey, marked Schedule C.

Your deponent took the matter up with the architect engaged by him with the result that his plans had to be revised at considerable cost and expense to your deponent, and sketch, marked Schedule B was the best plan that could be devised for the use of the said premises to conform to the original plans of your deponent as applied to the premises in question.

That said sketches as drawn necessitate the elimination of two rooms per floor of the said building as planned, which as a direct result of the shortage in area of the lot causes your deponent a loss in rental value and actual value of

Affidavit of Philip Ettinger.

the building of not less than ten thousand ($10,000) dollars.

Your deponent has computed the actual area of the lot and finds that there is a difference in the land under the lesser dimension of a little over three hundred (300) square feet, which based on the purchase price paid by your deponent, is actually one dollar and ninety-two cents ($1.92) per square foot, making a shortage in actual value based on said purchase price, five hundred seventy-six ($576) dollars or more.

That your deponent feels himself entitled to this last mentioned sum, together with an amount expended by him for the plans and the actual loss that will be suffered by your deponent in the character of the building that can be built thereon in a sum of not less than three thousand ($3,000) dollars, and that your deponent considers same a fair and just allowance to be made him under the circumstances.

PHILIP ETTINGER.

Sworn and subscribed to before
me this 11th day of January,
A. D., 1928.

JAMES V. ALCAMO,
A Notary Public of N. J.
(SEAL)

Affidavit of Harold F. Clark.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

HAROLD F. CLARK, being duly sworn on his oath, deposes and says:

That he is and has been for several years a practicing architect duly licensed in the City of Newark, County of Essex and State of New Jersey.

That he drew the sketches herein marked Schedule A and Schedule B, for Mr. Philip Ettinger for lot on Osborne Terrace, in accordance with survey submitted to him made by Theodore Freund, surveyor, dated September 9, 1927.

These sketches are drawn for five-story apartment house intended to be erected by the said Philip Ettinger, and in compliance with his instructions to utilize available space for a five-story apartment to the best and most economical advantage.

The sketches submitted herewith, marked Schedule A and Schedule B, are the best and most economical layout in your deponent's opinion and experience as an architect, and represents the most economical usage, both in area used and cost of construction.

Your deponent says that Schedule A representing the original sketch drawn by your deponent, differs from Schedule B, drawn by your deponent, when the difference in dimension of the lots was discovered, in this respect, that Schedule A, the larger plot allows two additional rooms per floor to be built. The additional six and one-half feet (6½) in ground dimensions is sufficient to permit the making of some of the rooms slightly larger and the two additional rooms as aforesaid. The smaller plot, Schedule

Affidavit of Harold F. Clark.

B, necessitates the elimination of two entire rooms on each floor, of the proposed building, with a re-arrangement of rooms greatly to the detriment of the building. Both plans conform with the requirements of the Tenement House Board of New Jersey, and the other and several building codes that apply.

The owner, in the opinion of this deponent, is entitled to compensation of some amount for the difference in the size of the lot, which your deponent is in no position from his experience to fix or approximate the value thereof.

HAROLD FOSTER CLARK.

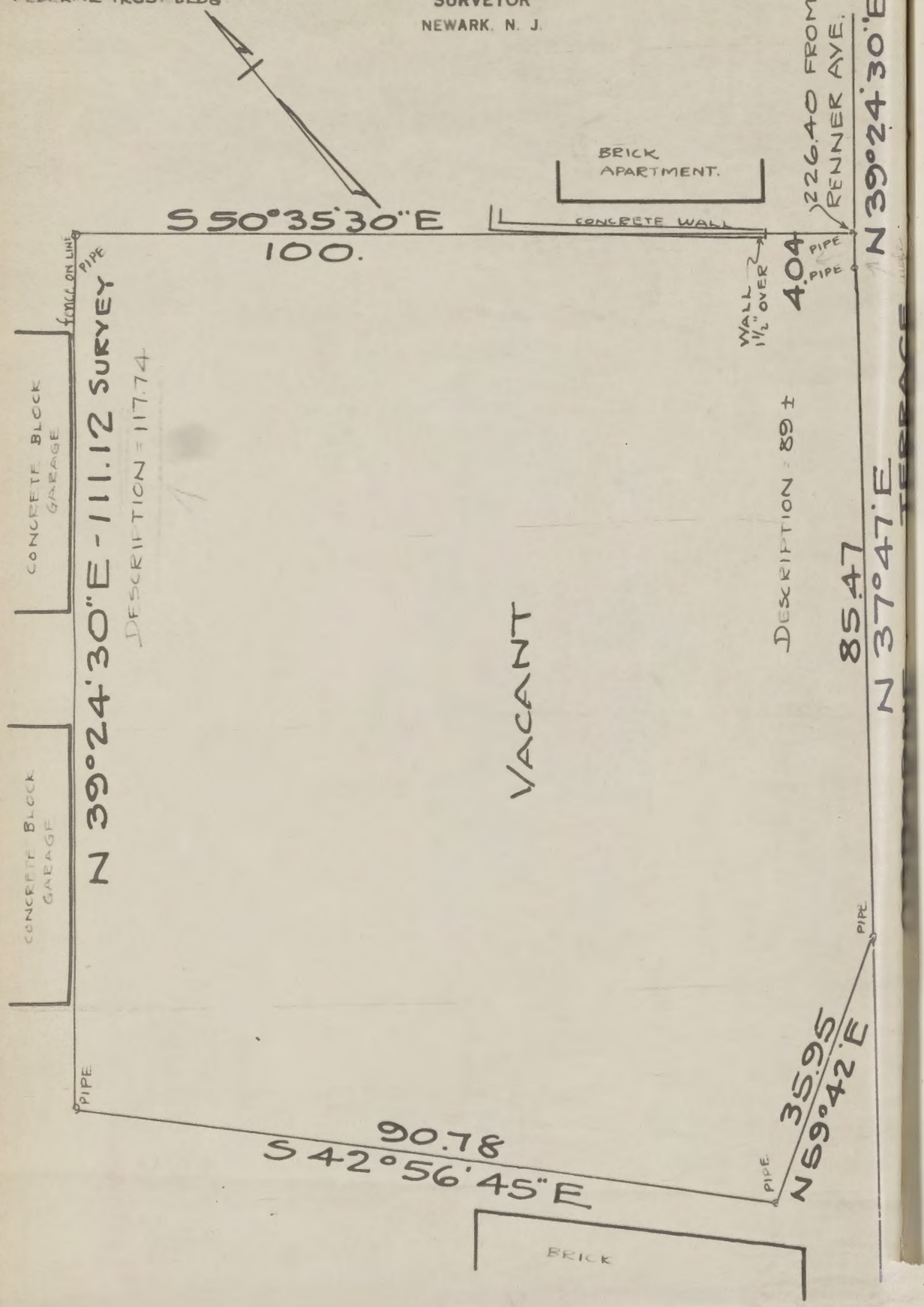
Sworn and subscribed to before
me this 11th day of January,
A. D., 1928.

JAMES V. ALCAMO,
A Notary Public of N. J.
(SEAL)

24 COMMERCE ST
FEDERAL TRUST BLDG

THEODORE R. FREUND
SURVEYOR
NEWARK, N. J.

PHONE MITCHELL



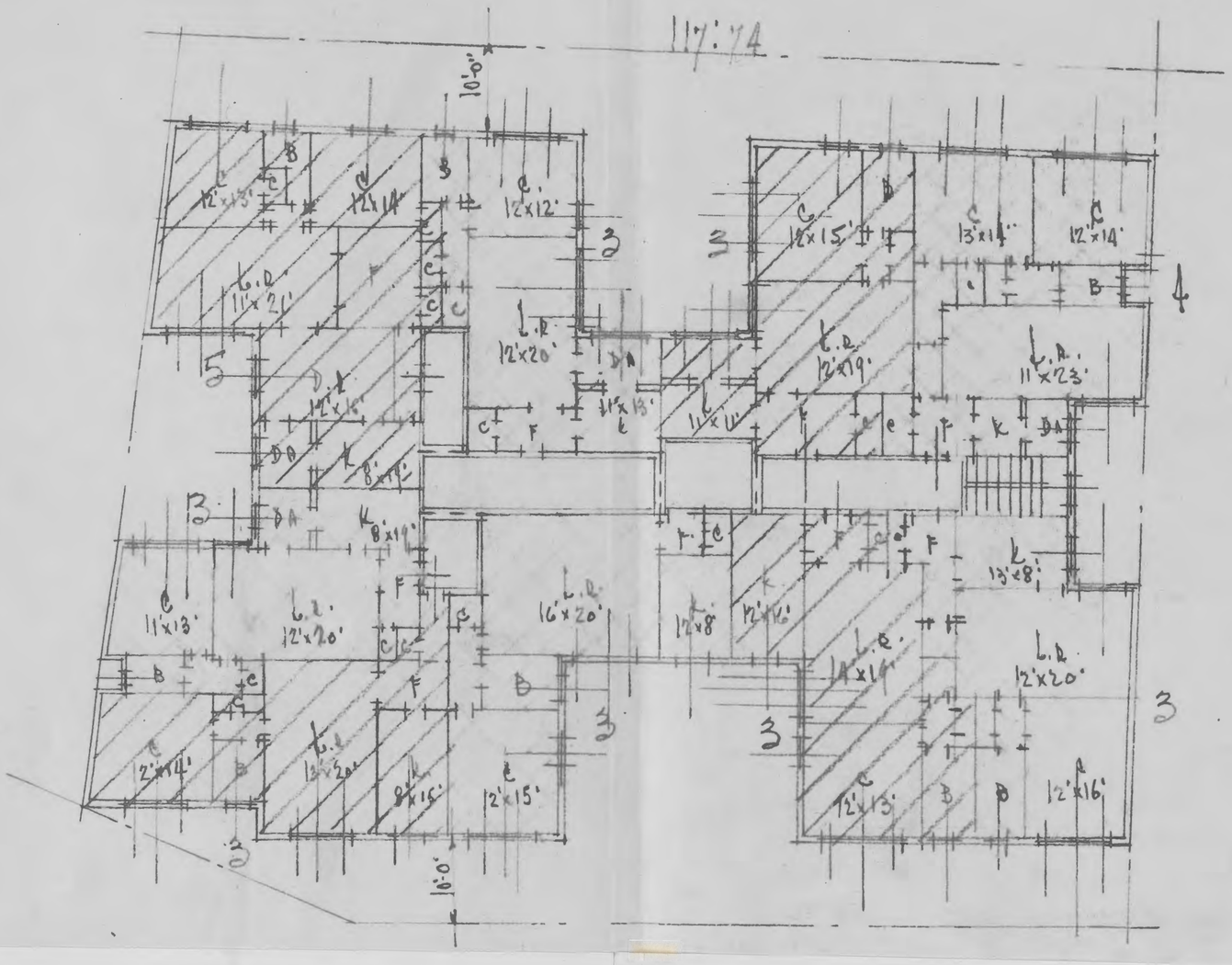
PROPERTY AT NEWARK N.J.
SURVEY NO. 1191
MAP NUMBER
TAX SHEET
SCALE 1 IN. = 16 FT.

NEWARK, N. J. SEPT. 9, 1927
Theodore R. Freund SURVEYOR
24 COMMERCE ST.
MITCHELL 1865

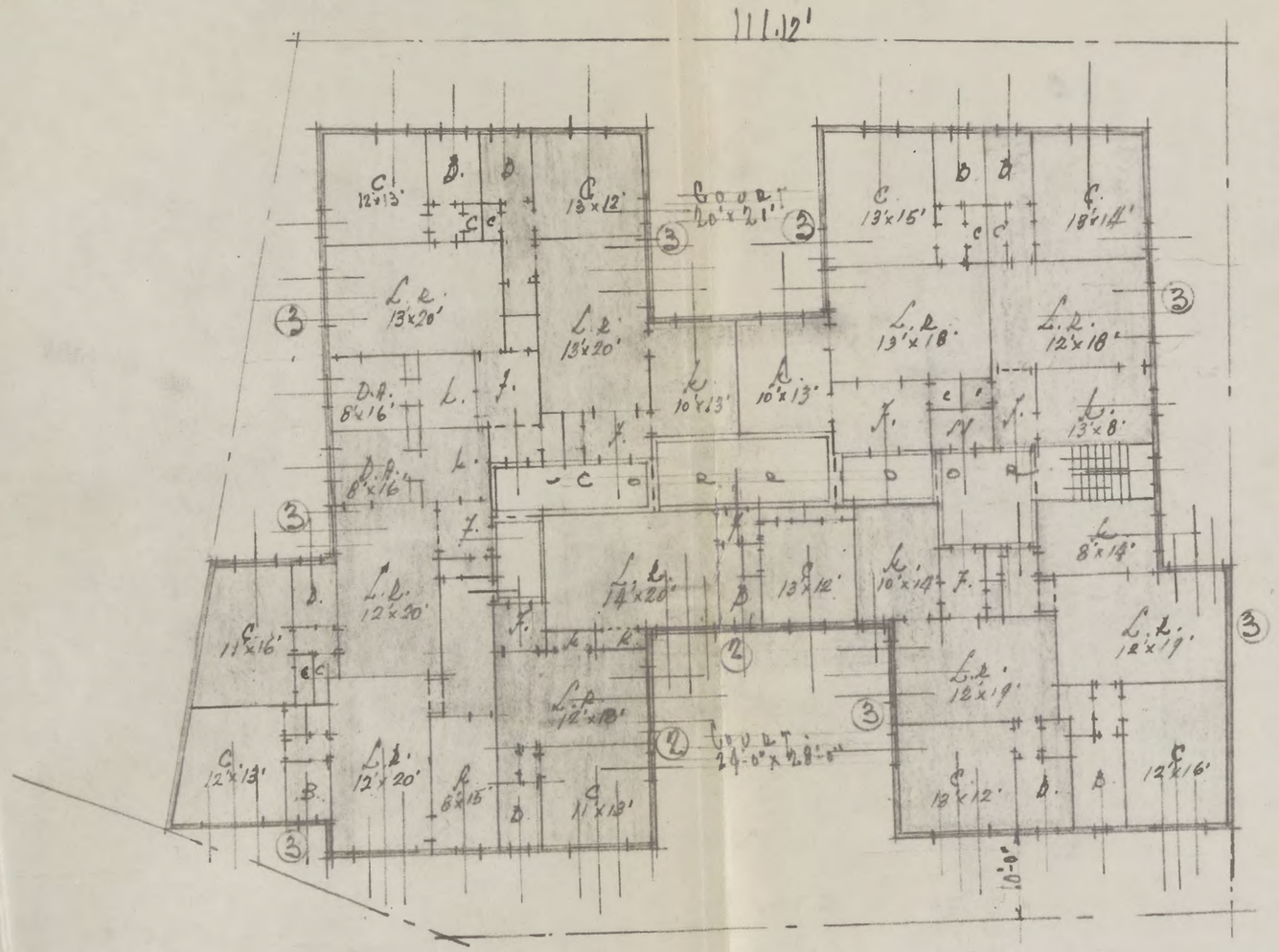
IMPERIAL TRACING CLOTH

SCHEDULE A

A


117'-7 1/4"
10'-0"
12'x13'
12'x14'
12'x12'
L.R. 11'x21'
L.R. 12'x20'
11'x13'
12'x15'
13'x14'
12'x14'
L.R. 12'x19'
L.R. 11'x23'
8'x14'
8'x19'
L.R. 12'x20'
16'x20'
12'x8'
12'x16'
13'x8'
L.R. 14'x14'
L.R. 12'x20'
12'x13'
12'x16'
12'x14'
8'x16'
12'x15'
10'-0"

SCHEDULE B



SCHEDULE.
8-3 ROOM Apt. 24 ROOMS.
2-2 " " 4 "
10 APARTMENTS. 28 ROOMS.

B

Dec. 17. 1927.

HAROLD FOSTER CL
ARCHITECT
38 CLINTON STREET
NEWARK N. J.

Affidavit of John J. Berry.

AFFIDAVIT.

Filed March , 1928.

IN CHANCERY OF NEW JERSEY.

63-338.

Between

STONE & STONE, INC., *Complainant,*

and

SIMON-SCHULTZ COMPANY, a corporation, *Defendant.*

On Bill, &c.
Affidavit.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

JOHN J. BERRY, being duly sworn on his oath according to law, deposes and says:

I am a practicing realtor of the State of New Jersey, having my office at 983 Broad street, Newark, N. J.

I have been engaged in the real estate business for the past twenty years in and about the City of Newark, County of Essex, and State of New Jersey, and am familiar with the value of land, and particularly apartment house sites in the City of Newark.

I have examined the tract of land which is located on the northwesterly side of Osborne Terrace, approximately two hundred thirty (230) feet south of Renner avenue. This tract of land is sufficiently large for the construction of an apartment house, and the difference of six (6)

feet, more or less, on the rear line of this property does not affect the building of any apartment house thereon, and will not be deterrent to the building af any apartment house thereon.

From an examination of the map, I note that there is a frontage of approximately eighty-five (85) feet on Osborne Terrace, and the most southerly portion is cut off by a triangular plot thirteen (13) feet six (6) inches at the most southerly part. The most southerly line of the plot does not run perpendicular to the street line, so that a discrepancy of approximately six (6) feet in the rear is of little consequence in placing a value upon the entire plot of ground.

JOHN J. BERRY.

Subscribed and sworn to before me this 12th day of March, 1928.

BEN KLEINBERG,
Notary Public of N. J.

MEMORANDUM OF VICE-CHANCELLOR.

Filed April 16, 1928.

IN CHANCERY OF NEW JERSEY.

Between

STONE & STONE, INC., *Complainant,*

and

SIMON-SCHULTZ COMPANY, a corporation, *Defendant.*

On Application for Confirmation of Receiver's Sale of Land.

Memorandum.

Not to be printed in any report.

Stein, McGlynn & Hannoch, for the receiver.

Carl Olsan, Esq., for Philip Ettinger, the purchaser.

BERRY, *V. C.*

Philip Ettinger was the purchaser of a tract of land at receiver's public sale. The only question involved in this controversy is as to the amount of the allowance, if any, which should be made by the receiver to the purchaser on account of the purchase price of the land bid in by him, because of a discrepancy in the distance on one of the property lines. This line was advertised as 117.74 feet in length. It is actually 111.12 feet long, a difference of 6.62 feet. Other lines of the property, which is irregular in extent, are as advertised. The discrepancy results in a deficiency of 300 square feet of land. The purchase price, on the basis of the advertised description, was $1.92 per square foot. On this basis the value of the shortage would be

$576. Numerous affidavits have been submitted, both on behalf of the receiver and of the purchaser, but differing widely as to the question of value of the lot as affected by this discrepancy. The purchaser claims to be entitled to an allowance of $3,000 on his bid of $23,000. Real estate experts and experienced builders say the value of the lot for apartment house purposes—the purpose for which it is claimed it was purchased—or for any other purpose, is affected very little, if any, by the discrepancy. One reputable real estate expert says the value of the land is as great as if it had the full area as advertised. The advertisement was the result of an honest mistake on the part of the receiver and while it is possible that the purchaser may be getting all in value he bargained for yet he is getting less in area and I think under the circumstances he should be allowed a proportionate rebate in the purchase price. He will be credited on his bid with the sum of $576, and on payment of the balance the receiver will deliver the deed.

Decided April 16, 1928.

PETITION OF RECEIVER.

Filed May 15, 1928.

IN CHANCERY OF NEW JERSEY.

63-338.

Between

STONE & STONE, INC., *Complainant,*

and

SIMON-SCHULTZ COMPANY, a corporation, *Defendant.*

On Bill, &c.

Petition to Compel Philip Ettinger to Complete His Purchase.

To His Honor, Edwin Robert Walker, Chancellor of the State of New Jersey:

The petition of Joseph L. Smith, respectfully sets forth:

1. That your petitioner is the duly appointed, qualified and acting receiver for the creditors and stockholders of the defendant corporation.

2. On June 28, 1927, an order was made herein whereby, it was, among other things, ordered that the following described premises be sold in the presence and under the direction of your petitioner as receiver for the creditors and stockholders of the defendant corporation:

Premises being in the City of Newark, County of Essex, and State of New Jersey.

BEGINNING at a point on the westerly side of Osborne Terrace distant two hundred twenty-six feet and forty one-hundredths of a foot

(226.40′) westerly from the southerly side of Renner Avenue; thence, running north fifty degrees thirty-five minutes thirty seconds west one hundred (100′) feet; thence, running south thirty-nine degrees twenty-four minutes thirty second west one hundred and eleven and twelve one hundredths of a foot (111.12′) to the most southerly side of the property of the East Side Realty Company as shown by Map made by C. F. Lemessina, surveyor, dated August 1, 1922; thence, running south forty-two degrees fifty-six minutes forty-five seconds east ninety feet and seventy-eight one-hundredths of a foot (90.78′) to a point; thence running north fifty-nine degrees forty-two minutes east thirty-five feet and ninety-five one hundredths of a foot (35.95′) to a point in the said westerly line of Osborne Terrace; and thence, running northerly along said westerly side of Osborne Terrace eighty-nine feet (89′) more or less, to the point and place of BEGINNING.

3. On August 16, 1927, the said lands and premises after having been duly advertised by the said receiver pursuant to the statute in such case made and provided, were struck off and sold at public vendue to Philip Ettinger, of the City of Newark, in the County of Essex, and State of New Jersey for the sum of $23,000.00, the said Philip Ettinger being the highest bidder for the same.

4. The said sale was upon certain terms and conditions, a true copy of which is annexed hereto and made a part hereof, marked Schedule "A."

5. The said Philip Ettinger, the purchaser at said sale as aforesaid, immediately upon the said

lands and premises being struck off to him, signed the said conditions of sale and an acknowledgment of his purchase, and paid to the said Receiver the sum of $2,300.00, being ten per cent. of the said purchase price of $23,000.00, according to the terms of said sale.

6. On September 20, 1927, an order was made by this court in this cause, duly confirming the said sale by the Receiver to the said Philip Ettinger, and directing the said Receiver to execute good and sufficient conveyances in the law to the said Philip Ettinger for the said lands and premises so purchased by him as aforesaid, upon his complying with the conditions of said sale.

7. The said Philip Ettinger has not complied with the remaining conditions of said sale and has not completed his said purchase within the time limited by said conditions of sale, and has not paid the balance of the said purchase price of $20,700.00 or any part thereof, to the said Receiver.

WHEREFORE, your petitioner prays that an order may be made requiring the said Philip Ettinger to perform the said contract for the purchase of the said lands and premises so sold to him by the said Receiver as aforesaid.

And your petitioner prays for such other and further relief as may be equitable and just in the premises.

And your petitioner will ever pray, etc.

JOSEPH L. SMITH,
Petitioner.

SCHEDULE "A."

IN CHANCERY OF NEW JERSEY.

Between	
STONE & STONE, INC., *Complainant,*	*On Bill, &c.*
and	*Conditions of Sale.*
SIMON-SCHULTZ COMPANY, a corporation, *Defendant.*	

This sale is being held in accordance with the provisions of an order made on June 28, 1927, in Chancery of New Jersey, and all sales will be made subject to the confirmation of the Court and application for confirmation will be made on September 13, 1927, at 10 o'clock in the forenoon (daylight saving time), at Chancery Chambers, 1060 Broad street, Newark, N. J.

The several properties will be sold in the following order:

FIRST: The three tracts of land, designated as tracts (1) (2) and (3) on the Map showing Osborne Terrace and Renner avenue property, will be sold in one parcel, subject to the following liens and encumbrances:

(a) Mortgage held by Workingmen's Building and Loan Association in the sum of approximately $36,890.00

(b) Subject to taxes, amounting to approximately $1,868.47

(c) Subject to assessments in the sum of approximately $507.60 and restrictions of record.

SECOND: The three tracts will be sold separately free and clear of all liens, except taxes, assessments, and restrictions of record.

THIRD: The tract of land on the Easterly side of Roseville Avenue, Newark, N. J., commonly known as #443 Roseville Avenue, which property is more particularly described in the said order of sale. This property will be sold subject to a first mortgage in the sum of $8,500 together with interest amounting to $566.48 and subject to taxes, assessments and improvements.

FOURTH: The tract of vacant land on the northerly side of Marie Place, being lots #116 to 121, inclusive on Map #2 of Stuyvesant Land Company. This property will be sold subject to a mortgage in the sum of $2,200, and in addition interest amounting to $126.50, and taxes, assessments and restrictions, if any.

FIFTH: (a) All of the vacant land in South Orange, N. J., being lots number 4, 5, 7, 9, 11, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26 on Map of property of Anna R. Warner, will be sold in one parcel subject to the mortgages aggregating $ and subject to taxes, assessments, improvements and restrictions, if any.

(b) Then the above mentioned lots will be sold separately, subject to taxes, assessments, improvements and restrictions, if any.

(c) The 3 tracts of land upon which are erected three 1-family residences, being lots #6, 10, and the northeasterly part of lots 12 and 13, will be sold in one parcel subject to mortgages aggregating $44,278.17, and subject to taxes, assessments, improvements and restrictions, if any.

(d) The preceding three tracts will be sold separately subject to taxes, assessments, improvements, restrictions and the following mortgages:
On lot #6 Mortgage in the sum of....$14,803.92
On lot #10 " " " " 14,910.00
On lots 12 and 13 " " " " 14,564.25

The successful bidders shall sign acknowledgments of their bids in writing and shall be required to pay ten per cent. (10%) of the purchase price, the balance to be paid within thirty days after confirmation of said sale.

The receiver and the Court of Chancery shall have the right to reject any and all bids.

If the balance of any bid or bids is not paid in accordance with the terms of these conditions, the Receiver shall have the absolute right to sell such property or properties at public or private sale, with or without notice, and deduct the costs of re-sale from the deposit or deposits already made, together with any loss sustained on the re-sale, and the original bidder or bidders shall not have the benefit of any such re-sale, and in the event of any excess being received by the Receiver, he shall retain the same for the benefit of the estate.

Each purchaser shall be liable for any deficiency caused by his failure to comply with the terms of this sale.

Each purchaser will sign the receipt annexed to the conditions of sale, which will, as between the Receiver and the purchasers be considered an agreement of sale.

This sale is also subject to any further conditions which may be announced at the sale.

JOSEPH L. SMITH, Receiver.

Stein, McGlynn & Hannoch,
17 Academy St.,
Solicitors of Receiver.

Newark, New Jersey,
August 16, 1927.

RECEIVED from the undersigned the sum of Two thousand three hundred 00/100 Dollars ($2300.00) as a deposit on the real estate described as Tract III. Osborne Terrace & Renner Avenue Property said property having been sold in accordance with the terms of said Conditions of sale.

The full purchase price is $23,000.00

The balance of $20,700 is payable in cash thirty days after confirmation of the within sale at the office of Solicitors of the Receiver, Stein, McGlynn & Hannoch, 17 Academy St., Newark, N. J.

This receipt, together with the Conditions of Sale annexed hereto, shall constitute the entire agreement between the parties hereto.

The Receiver and Auctioneer make no representations whatsoever concerning the condition of said properties.

Signature of Purchaser Phil Ettinger
Address 267 Osborne Terrace
Newark, N. J.

Petition of Receiver.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

JOSEPH L. SMITH, being duly sworn on his oath according to law deposes and says: that he is the petitioner named in and who subscribed the foregoing petition, that he has read the said petition and knows the contents thereof and that the same is true, except as to the matters therein stated to be alleged on information and belief, and as to those matters, he believes it to be true.

JOSEPH L. SMITH.

Subscribed and sworn to before me,
this 15th day of May, 1928.

JEROME B. McKENNA,
Attorney at Law, of New Jersey,
Master in Chancery.

ORDER TO SHOW CAUSE.

Filed May 15, 1928.

IN CHANCERY OF NEW JERSEY.

63-338.

Between

STONE & STONE, INC.,
Complainant,

and

SIMON-SCHULTZ Co., a corporation,
Defendant.

On Bill, &c.

Order to Show Cause.

The Receiver of the defendant corporation having filed his duly verified petition setting forth that Philip Ettinger has not completed the purchase of certain property more particularly described in said petition, and praying that an order may be made requiring the said Philip Ettinger to perform the said contract for the purchase of the said lands and premises so sold to him by the said Receiver, and good and sufficient reason appearing for the entry of this order, it is on this 15th day of May, 1928, on motion of Stein, McGlynn & Hannoch, solicitors for and of counsel with the Receiver,

ORDERED, that Philip Ettinger, show cause before the Chancellor, at Chancery Chambers, Industrial Building, #1060 Broad street, Newark, N. J., on May 22, 1928, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the prayer of the said petition should not be granted; and it is further

Order to Show Cause.

ORDERED, that a copy of this order, and the petition upon which it is based, be served upon the said Philip Ettinger, or his solicitor, within two days from the date of this order.

E. R. WALKER,
C.

Respectfully advised,

MAJA LEON BERRY,
V.-C.

ORDER.

Filed June 7, 1928.

IN CHANCERY OF NEW JERSEY.

63-338.

Between STONE & STONE, INC., *Complainant,* *and* SIMON-SCHULTZ CO., a corporation, *Defendant.*	*On Bill, &c.* *Order Requiring Philip Ettinger to Complete His Purchase.*

This matter being opened to the Court by Stein, McGlynn & Hannoch, solicitors for the Receiver, and in the presence of Carl Olsan, Esq., solicitor for and of counsel with Philip Ettinger, and it appearing that the order to show cause made in this matter dated May 15, 1928, has been duly served on the person and in the manner therein directed; and the Court having read the petition and affidavit of said petitioner, and having heard the arguments of counsel, and being satisfied that the allegations of said petition are true, and that the said Philip Ettinger should be required specifically to perform his contract for the purchase of lands and premises described in said petition, sold to him by Joseph L. Smith, Receiver of the defendant corporation, pursuant to the directions of an order made by this court, on the 28th day of June, 1927, it is on this 5th day of June, 1928,

Order.

ORDERED, that the said Philip Ettinger within ten days after the service upon him of a certified copy of this order, pay to the said Joseph L. Smith, Receiver of the defendant corporation, the balance of the purchase price due from him under the terms and conditions of the sale made by the said Joseph L. Smith, Receiver of the defendant corporation, less the abatement in the sum of $576.00 allowed by this Court, and confirmed by an order of this court on the 20th day of September, 1927, together with interest thereon from the 13th day of October, 1927, and that, within the same time aforesaid, he pay to the said Joseph L. Smith, Receiver, or to his solicitors the costs of these proceedings to be taxed.

E. R. WALKER,
C.

Respectfully advised,

MAJA LEON BERRY,
V.-C.

I, THOMAS BARBER, Clerk of the Court of Chancery of the State of New Jersey, the same being a Court of Record, do hereby certify that the foregoing is a true copy of the Order Requiring Philip Ettinger To Complete His Purchase, filed June 7th, 1928, in the cause wherein Stone & Stone, Inc., is complainant, and Simon-Schultz Company, a corporation, is defendant, now on the files of my office.

IN TESTIMONY WHEREOF, I have hereto set my hand and affixed the seal of said Court, at Trenton, this eleventh day of June, A. D., nineteen hundred and twenty-eight.

THOMAS BARBER,
Clerk.

(SEAL)

PETITION OF APPEAL.

Filed June 27, 1928.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between	
STONE & STONE, INC., *Complainant-Appellant,*	*On Appeal from Chancery.*
and	
SIMON-SCHULTZ COMPANY, a corporation, *Defendant-Respondent.*	*Petition of Appeal.*

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

The petition of Philip Ettinger respectfully shows:—

1. Petitioner finds himself aggrieved by an order made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, which order bears date June 5, 1928, and does order:— that the said Philip Ettinger within ten days after service upon him of a certified copy of this order, pay to Joseph L. Smith, Receiver of the defendant corporation, the balance of the purchase price due from him under the terms and conditions of the sale made by the said Receiver, less abatement, in the sum of $576.00 allowed by this court, together with interest thereon from October 13, 1927; and also, the costs of the proceedings.

Petition of Appeal.

2. Petitioner appeals from the said order upon the ground that the same is erroneous, for these reasons:—

1. The Receiver had no power to sell the tract of land struck off to the petitioner, free and clear of mortgages.

2. The petitioner was entitled to be relieved from his bid on account of a misdescription in the amount of land.

3. The amount allowed by the Court as an abatement from the purchase price was insufficient to compensate the petitioner for his loss.

4. The petitioner should not have been charged with interest or costs.

3. The petitioner therefore prays that the said order of the Chancellor may be reversed, set aside and for nothing holden and that petitioner may have such other relief as to this Court may seem equitable.

FRANK E. BRADNER,
Solicitor for and of Counsel
with Petitioner.

Service acknowledged June 27, 1928, by Stein, McGlynn & Hannoch, solicitors for Joseph L. Smith, receiver.

ANSWER TO PETITION OF APPEAL.

Filed July 27, 1928.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between STONE & STONE, INC., *Complainant,* *and* SIMON-SCHULTZ Co., a corporation, *Defendant.*	*On Appeal from Chancery.* *Answer to Petition of Appeal.*

The answer of Joseph L. Smith, receiver in Chancery for Simon-Schultz Co., to the petition of appeal of the appellant, Philip Ettinger.

This respondent not acknowledging all or any of the matters, which in the said petition of appeal are contained, to be true, in answer thereto, nevertheless, says and admits that an order was on the 5th day of June, 1928, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the said order is agreeable to equity, and he prays that the same may be affirmed with costs.

STEIN, McGLYNN & HANNOCH,
Solicitors for and of Counsel with Respondent,
Joseph L. Smith, Receiver in Chancery of
Simon-Schultz Co.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

STONE & STONE, INC.,
Complainant-Appellant,

and

SIMON SCHULTZ CO., a corporation,
Defendant-Respondent.

On Appeal of Philip Ettinger.

BRIEF FOR APPELLANT.

The appellant was the purchaser of a plot of ground on Osborne Terrace in Newark at a sale made by Joseph L. Smith, Receiver of the defendant corporation, on August 16, 1927. The land is described in the appellant's petition to be relieved of his bid, par. 2, p. 2, of the state of the case. It is also shown in a survey opposite p. 23. It was a vacant plot of ground adapted for the erection thereon of a large apartment house. The Receiver advertised the property for sale and described it by metes and bounds, and also stated that this particular tract of land would be sold together with two other tracts subject to certain liens and encumbrances (see conditions of sale, p. 30, line 28). The advertisement also stated that the three tracts will be sold separately free and clear of all liens, except taxes, assessments and restrictions of record. See conditions of sale, p. 31, line 1.

It appears from the receipt given to the purchaser (p. 33) for the deposit made by him at the sale, that he purchased Tract 3 Osborne Terrace and Renner Avenue property, which means No. 3 in the statement of the three tracts of land

on p. 30 in the conditions of sale. It therefore, appears and the fact is that Tract 3 was sold separately free and clear of all liens except taxes, assessments and restrictions of record.

Shortly after the sale was made, the purchaser having contemplated erecting an apartment house on the land, had a survey made and discovered that the lot was not as wide in the rear portion as the advertised descriptions indicated. The description calls for 117 74/100 feet; the survey shows that there are only 111 12/100 feet. See survey opposite page 23.

In view of the fact that the purchaser could not erect upon the 111 12/100 feet the contemplated apartment house, and it appearing that the Receiver could not give him title to the additional 6 62/100 feet, he applied to the court by petition (p. 2) to be relieved of his bid. The Receiver in his answer to that petition (p. 8) states that he has no knowledge of the allegation in par. 5 of the petition, that the rear line of the premises measures only 111 12/100 feet. He does not state that he had no information sufficient to form a belief as to the facts alleged.

The Vice-Chancellor heard the application upon the petition and answer and reply (p. 10) and sent a memorandum of his conclusions to counsel (p. 11) in which he says: "I have come to the conclusion that the petitioner should not be relieved of his bid, but that an allowance should be made to him on account of the purchase price, of such sum as will represent the difference between the value of the lands sold and described in the advertisement of sale and the value of the land which the Receiver can actually deliver."

No order was taken upon this Opinion, but it seems that the parties must have agreed to submit

affidavits on the question of the value of the land. The affidavits on behalf of the petitioner and appellant herein, will be found on pp. 13, 14, 15, 16, 17, 18, 19 and 20; and an affidavit in behalf of the Receiver will be found on pp. 23, 24. The diagrams in the state of the case marked Sched. A, B and C are annexed to the affidavits on behalf of the appellant. The appellant's affidavits were filed in January, 1928, and the Receiver's affidavit was filed in March, 1928, and the Vice-Chancellor decided the matter on April 16, 1928. His Opinion will be found on p. 25. It will be observed that the Vice-Chancellor allows the purchaser $1.92 per square foot for the deficient quantity of land, which was the purchase price on the basis of the advertised description, which amounts in total to $576.00 on a purchase of $23,000.

On May 15, 1928 (p. 27) the Receiver filed a petition to compel the appellant to complete his purchase, and there is not a word in that petition to indicate that any allowance had been made to the purchaser. Upon filing the said petition, an order to show cause was made on May 15, 1928 (p. 35) why the prayer of the petition should not be granted; and on June 7, 1928, an order was made (p. 37), in which it is ordered (p. 38) that the said Philip Ettinger shall pay to the Receiver the purchase price less the abatement in the sum of $560.00 allowed by the court, together with interest from October 13, 1927, and the costs of the proceedings. From this order, this appeal has been taken.

GROUNDS OF APPEAL.

1. The Receiver had no power to sell the tract of land struck off to the appellant, free and clear of mortgages.

2. The appellant was entitled to be relieved from his bid on account of a misdescription of the quantity of land.

3. The amount allowed by the court as an abatement in the purchase price was insufficient to compensate appellant for his loss.

4. The appellant should not have been charged with interest or costs.

ARGUMENT.

1. The point is made that the Receiver had no power to sell the particular tract of land free and clear of mortgages because nothing appears to show that the Receiver had obtained an order authorizing him to make such sale. The peculiarity of the advertisement that he would sell the three tracts together subject to mortgages, and then sell the tracts separately free and clear, raises a doubt as to the authority to sell; and for this reason the mortgages could not have been disputed, or the Receiver would not have been willing to sell subject to them. The Receiver does not show in his petition to compel the purchaser to take the property that he was specially authorized by the order of the court to sell this particular property free and clear of mortgages; and the inference from the conditions of sale is that he was authorized to make sale but could use his own judgment as to whether he would sell subject to the mortgages, or free and clear of them.

This raises a question, which it is respectfully submitted, makes the title doubtful that the Receiver could give. I concede that this point was not made before the Vice-Chancellor, but as it goes to the power of the Receiver to make any sale, I feel justified in making it on this appeal.

2. The appellant asks the court to be relieved of his bid, that is to rescind the contract that he made with the Receiver to purchase this land. The Receiver on the other hand, asked the court to compel the purchaser to specifically perform his contract.

It is not claimed in this case that there was an intentional misrepresentation as to the quantity of land. In Pomeroy's Specific Performance, par. 217, it is said:

> "In maintaining the defense to a suit for specific performance, the knowledge, belief or intent of the party making the representations is wholly immaterial and the question is not raised." "The point upon which the defence turns is the fact of the other party having been misled by a representation calculated to mislead him and not the existence of a design to thus mislead."
>
> "In *Bascomb* v. *Beckwith,* L. R. 8 Eq. Cas. 100, a map was exhibited to the purchaser which was not misleading if examined carefully and which was not intended to mislead, but which was liable to mislead if not carefully examined and which map did in fact mislead the purchaser; specific performance was accordingly denied."

The foregoing quotations have been taken from the opinion of Vice-Chancellor Leaming in *Bowker* v. *Cunningham,* 78 N. J. Eq. 458 at p. 462. In *Lounsbery* v. *Locander,* 25 N. J. Eq. 554 at p. 559, Court of Errors, Justice Depue stated the rule to be in this class of cases: "The general doctrine in equity is that a purchaser on a bill

for specific performance filed by the vendor, will not be compelled to accept compensation.'' It appears clearly in this case that the Receiver contracted to sell land that he did not own and had no right to sell. He made the representation in the advertisements and in the conditions of sale, that he did own the land and had the legal right to sell it. The purchaser acts promptly upon discovery of the misdescription and asks to be relieved of his bid, and the Receiver asks that he be required to perform the contract notwithstanding the misdescription. Under the authorities, it is respectfully submitted that the purchaser is entitled to have the contract rescinded.

3. The allowance made by the court is deemed to be insufficient to compensate the appellant.

Vice-Chancellor Van Fleet in *Peeler* v. *Levy,* 26 N. J. Eq. 330, stated the law in regard to compensation as follows at page 332:

> ''Compensation is to be awarded, when it appears from a view of all the circumstances of the particular case, it will subserve the ends of justice; and it will be denied when, upon a like view it appears that it will produce hardship or injustice to either of the parties. No inflexible rule can be adopted applicable to all cases, but each case must be decided on its own special facts. Generally, it will be denied where the party asking it had notice at the time the contract was made that the vendor was agreeing for more than he could give or convey, and it appears the vendee has not in consequence of the contract, placed himself in a situation from which he cannot extricate himself without loss.''

In *White* v. *Weaver,* 68 N. J. Eq. 644, this court affirmed a decree advised by Vice-Chancellor Reed in which he held that notice of defects

in the title before bringing suit, did not affect the right of the vendee to have compensation.

In *Hall* v. *Ely,* 91 N. J. Eq., this court, Justice Parker, writing the opinion, held that evidence was admissible to show the knowledge of both parties as to the defect in title. Both the former cases on the subject are referred to.

In *Brisbane* v. *Sullivan,* 86 N. J. Eq. 611, the rule is stated: ''A court of equity will not decree the specific performance of a contract with compensation unless it can do equity to all the parties before it.''

There was no testimony taken in this case on the subject of notice to the purchaser. The Receiver in his answer to the petition of the purchaser to be relieved of his bid, does set up at page 9, that the purchaser had ample and sufficient opportunity to measure and inspect the property, and at the time of sale the tract was sold by description ''more or less and 'as is.' '' This is denied in the Reply, p. 10.

The Receiver made no effort to sustain his answer by testimony. It seems to me that the Vice-Chancellor failed to appreciate the evidence introduced by the appellant. It is clear that Mr. Ettinger bought this plot of ground and contemplated erecting an apartment house. He had plans prepared for an apartment house and the general lay-out appears in Schedule A annexed to the affidavit of Morris Tzeses, which begins at page 13. The witness states that the building proposed in Schedule A could not be erected on the plot of ground which the Receiver can convey, without a loss of two rooms on the southerly side of each floor, and that the rental value of two rooms per floor would be at least $40.00 per month. He further says that a build-

ing could be erected and designed as in Schedule B, and he fixes the difference in valuation because of the shortage, of six feet more or less in the rear, at not less than $3,000, and says (p. 16, l. 11): "This estimate is based on the sale value of the premises on deponent's knowledge as a real estate expert and builder, and the computing of the said lots by area based on this deponent's valuation thereof as measured out and computed by this deponent." Edward J. Maier testified (p. 16) that the purchase price of the plot of ground appears to be 1.92 per square foot, and that the value of the piece of ground to be excluded, at that unit price would be $576.00. In Mr. Maier's opinion, $500 in addition to $576, would be a reasonable allowance by reason of the reduction in size of the proposed building; but Mr. Maier bases his opinion upon his experience and knowledge as a real estate expert. He does not pretend to have any knowledge of building. Mr. Tzeses was a builder. The appellant's own affidavit on page 18, shows what he proposed to do with the property, and he claims $3,000 compensation.

The affidavit of Harold F. Clark (p. 20), states that he is an architect and that he prepared Schedules A and B, and the sketches are drawn for five-story apartment houses. The affidavit on the part of the Receiver by Mr. John J. Berry (p. 23) is very general. At the conclusion of it, he merely states that the discrepancy of six feet in the rear is of little consequence in placing a value upon the entire plot of ground. The real question is, *how much would it have cost the appellant to buy from the owner of the ground the six additional feet?* That question was not considered. It certainly would have been a very serious condition if this appellant

had erected a five-story apartment house on the six feet. He would have been subjected to a suit by the owner to remove the building or to pay damages, and now the Receiver says: "Well, you take the reduced quantity of land and I will allow you $576 out of $23,000. *The purchaser did not make a contract to pay 1.92 per square foot. He contracted to pay $23,000 for the entire plot of ground, as described by the Receiver.* He says that he is willing to accept compensation, if he is compensated to the extent of his loss by reason of being unable to have the additional rooms in the apartment house, and his witnesses fix that loss at approximately $3,000. If the contract is to be performed with compensation, the amount ought to be such a sum as will really compensate the appellant for his loss, and it is suggested that if the testimony is of such a character that the Court cannot determine what amount should be allowed, that is if the question is one of real doubt, then the contract should be rescinded and specific performance should be denied.

4. The adjudication that the appellant should pay interest and costs, seems to be unfair. While it is true that the final order establishes the status of the parties as of the time when the contract should have been performed and that if both parties had known there was a deficiency in the quantity of land at that time, interest would probably be charged as in *Hall* v. *Ely;* but in this case the purchaser did not know of the defect and he acted promptly when he discovered it and the delay has not been caused by him. *He could not pay until the Court had decided whether he ought to pay; he did not know what amount he must pay until the Court had decided what amount should be allowed to him.* In other words, he did not know how much he owed the Receiver

until the order was made fixing the amount. Why should he pay costs when he is successful in obtaining an abatement of the contract price? It is contended that he should be relieved from both interest and costs.

In conclusion, I respectfully submit that in view of the uncertainty as to the amount of compensation to be awarded, the contract to purchase this land should be rescinded and the order made in the Court of Chancery should be reversed.

FRANK E. BRADNER,
Of Counsel with Appellant.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

STONE & STONE, INC.,
Complainant-~~Appellant~~,

and

SIMON-SCHULTZ CO., a corporation,
Defendant-~~Respondent~~.

On Appeal of
PHILIP ETTINGER.

BRIEF FOR RECEIVER OF RESPONDENT.

Statement of Facts.

The statement of facts as contained in the brief of the appellant is correct, although certain facts therein are over-emphasized to the under-emphasis of other facts. These facts will be commented upon in the argument, however, rather than repeating them here at length.

ARGUMENT.

POINT I.

The first ground of appeal is not maintainable for the following reasons:

(a) The question was not raised before the Vice-Chancellor below.

(b) The purchaser at a judicial sale is bound to take such title as an examination of the proceedings will show that he will get.

(c) There is no evidence to show that the Receiver had no power to make the sale in question.

The appellate court will not ordinarily consider a question not raised and argued below un-

less it goes to the jurisdiction of the Court or involves public policy. *Allen* v. *Paterson* (1923, Err. & App.) 99 N. J. L. 489, 123 Atl. 884, affirmed 99 N. J. L. 532, 124 Atl. 924.

The reason for this rule is contained in the statement of Scudder, *J.*, in *Woodward* v. *Bullock,* 27 N. J. E. 507 (1873), E. & Ap. at p. 509:

> "It is sometimes said that this court, on appeal, will not permit parties to raise objections which they did not present to the court below, not only in justice to that court, but also to prevent surprise and abuse by reserving points expressly for further litigation."

The Court adds, however, that where the entire proceedings are before the appellate court for review, under certain circumstances public policy requires that the whole case should be examined and determined on appeal.

The entire proceedings are not before the Court on this appeal and there is no question of public policy involved here. The question of the power of the receiver to make sale in question was not raised or argued before the Vice-Chancellor below and does not go to the jurisdiction of the Court. Fairness and justice requires that the point should not be considered by the Appellate Court on this appeal.

Even if the receiver's power could be questioned on this appeal, it would not be a basis for granting rescission and permitting the appellant to escape his obligations.

In *Boorum* v. *Tucker* (1893) a case in Chancery, reported in 51 N. J. Eq. 133, affirmed in Court of Errors and Appeals in 52 N. J. Eq. 587, it was held that purchasers at judicial sales are not entitled to what is called a merchantable title. The Court granted the complainant's petition

that the purchasers at sheriff's sale under the execution should be compelled to complete their purchase. At page 139, Pitney, *V.-C.,* said:

> "I understand the rule in New Jersey to be that a purchaser at a judicial sale is bound to take such title as an examination of the proceedings will show that he will get; he is bound to examine for himself beforehand to see what title he will obtain by the sale."

and at p. 140 quoting from Van Fleet, *V.-C.,* in *Hayes* v. *Stiger,* 2 Stew. Eq. 196:

> " 'No attempt has been made to show that the title the petitioner will get, if his contract is enforced, is worth less than the sum he agreed to pay; it cannot, therefore, be assumed he will be required to pay more than the title he will acquire is worth. As the case stands, the highest equity he can claim is that he has not made as good a bargain as he expected to make. This can hardly be esteemed an equity sufficient to justify the abrogation of a contract.' "
> "This last remark applies to the case in hand, for here no proof was offered that the property was not worth the amount that was bid for it."

The foregoing quotations are particularly applicable to the present case.

Finally, there is nothing in the State of the Case to indicate that the receiver had no power to sell free and clear of mortgages. The argument of the appellant consists solely of inferences. One of these inferences is made merely because the advertisement, notice of sale and conditions of sale do not repeat the order of sale in detail. Also, the petition to compel the purchaser to take the property need not show receiver's special authorization to sell the property in the precise manner in which he did. The petition, p. 27, State of Case, does refer specifically to the order

of sale dated June 28, 1927. That order of sale authorized a sale free and clear of liens under the rule of *Randolf* v. *Larned* (1876) 27 N. J. Eq. 557. Even if that order of sale had not authorized a sale free of mortgages, that objection should have been specifically asserted before the Vice-Chancellor, and should not be raised for the first time in this appeal.

POINT II.

The appellant is not entitled to be relieved from his bid since:

(a) He made an election to take the property with an abatement in the purchase price.

(b) He did not act promptly upon discovery of the misdescription.

It is a well settled rule that after a party to a contract has made an election to abide by it, upon which election the other party has relied, he cannot later decide to rescind the contract. There is a complete discussion of the doctrine of waiver by election in *Blum Building Co.* v. *Ingersoll* (1926), 99 N. J. Eq. 563. Vice-Chancellor Backes there declares an election to be irrevocable and in the course of the opinion quotes this statement from 20 Corp. Jur. 38:

> "An election once made between co-existing remedial rights which are inconsistent is not only irrevocable and cannot be withdrawn without due consent even though it has not been acted upon by another to his detriment, but it is also conclusive and constitutes an absolute bar to any action, suit or proceedings based upon a remedial right inconsistent with that asserted by the election or to the maintenance of a defense founded on such inconsistent rights."

The appellant elected to adhere to the contract of purchase and merely asked the Court to

allow him an abatement in the purchase price. In p. 5 of the State of Case, the appellant states in his affidavit, lines 23-29:

> "Your deponent is ready, willing and able to take title to the premises, but had he been informed of the exact dimensions of the premises he would not have paid the amount of twenty-three thousand dollars that your deponent did pay, but would have paid a considerably smaller amount."

It is true that the petition (State of Case, p. 4, ll. 20-27), prays for a rescission as well as:

> "or in the alternative that your petitioner be allowed such abatement or amount as the Court may deem equitable and just, *your petitioner tendering himself ready, able and willing to consummate this transaction and accept* a deed therefor with such abatement, or such other further relief as to the Court may seem equitable and just."

The appellant then submitted affidavits to determine the amount of the abatement in purchase price and a sum was fixed by the Court. It is submitted that this is clearly an election to affirm the contract with compensation for the misdescription. The appellant can not now attempt to rescind the entire transaction. If he were dissatisfied with the amount allowed by the Court, he should have appealed from the ruling dated April 16, 1928.

The appellant did not act promptly upon discovery of the misdescription. The sale was held on August 16, 1927, upon the premises; the sale was confirmed on September 13, 1927, and order of confirmation entered on September 20, 1927; and the date for closing set by the Conditions of Sale was October 13, 1927. The survey made by the surveyor of the appellant (State of Case, opposite p. 23) is dated September 9, 1927. Therefore, the appellant knew at least at that

time of the misdescription. Nevertheless, he permitted the sale to be confirmed, and neglected filing his petition to be relieved of his bid or to be allowed an abatement in the purchase price until October 11, 1927, *i. e.* just two days before the time for payment of the balance of the purchase price. It is submitted that this is not the prompt action required in a court of equity of a complaining party.

The cases cited in the argument of the appellant are those concerning bills for specific performance. The petition of the receiver to compel the appellant to complete his purchase, although in the nature of a bill for specific performance, is not exactly identical with it. It must be remembered that the receiver is an officer of the Court.

In *Silver* v. *Campbell* (1875), 25 N. J. Eq. 465, Chancellor Runyon said at p. 466:

> "Purchasers at sales under decrees of this court, if not already parties to the suit, are regarded, to a certain extent, as parties to it, to be under the control of the Court on the one hand, and its protection on the other. Such purchaser may therefore be compelled to complete his purchase in a summary way by an order upon him, without a bill, to pay the money or bring it into court. A purchaser will not be permitted to baffle the Court."

Confirmation of a judicial sale merely covers the point that the property brought the highest and best price that could be obtained for it in cash. An attack upon the sale on any other ground must be made the basis of independent action, either by bill or petition.

See *Koegel* v. *Koegel* (1914, in Chancery) 83 N. J. Eq. 179, 89 Atl. 861.

Oakley v. *Shaw* (1908, in Chancery) 69 Atl. 462.

Cropper v. *Brown* (1909, in Chancery) 76 N. J. Eq. 406, 74 Atl. 987.

The petition filed by appellant on October 11, 1927, can only be construed as a petition for an abatement in the purchase price. It is not such independent action required by the cases above cited, and is no basis for the appellant's present belated request for an abrogation of the entire contract of purchase.

POINT III.

The allowance made by the Court is sufficient to compensate the appellant.

The present appeal is from the order dated June 7, 1928, and not from the decision made by the Court on April 16, 1928 (State of Case, p. 25). The purchaser should have appealed from the compensation then granted and not have delayed until an attempt was made to compel him to complete the purchase.

There is a fallacy running through the entire argument of the appellant concerning the loss by him "of two rooms on the southerly side of each floor." The appellant assumes that the apartment house had to be designed according to *one* of the plans included in the state of case, and that no other floor plan could be devised whereby the two additional rooms could be built on each floor. It is known that there are many ways of plotting apartment houses, and the appellant has not shown that the two rooms must be omitted in all other plans. He has merely produced affidavits to the effect that there was a loss of two rooms per floor on the *particular* floor plan he submitted with the State of the Case. This testimony is not sufficient to enable him to recover additional compensation, and the Court rightly refused to

grant him further abatement in the purchase price on this meagre ground.

The appellant has not shown how much it would have cost to buy from the present owner the six additional feet. The price of such land, however, if for sale, would in all probability be fixed on a certain rate per square foot, and not on the basis of its value as a site for additional rooms for an apartment house.

The basis selected by the Court is the reasonable and proper one, and did full equity to both parties. The conclusion reached by the Court is fully supported by the affidavits of John J. Berry, and Edward J. Maier, the only affiants who claim to be real estate experts.

POINT IV.

The charging of the appellant with interest and costs was proper.

The day for closing of title was October 13, 1927, and the appellant wrongfully refused and neglected to complete his purchase at that time and ever since that time. The appellant could and should have paid the balance of the purchase price into the court, and have asked the Court to determine the amount to be returned to him as compensation. His duty to pay arose on October 13, 1927, more especially since he allowed the sale to be confirmed by the Court.

Cropper v. *Brown, supra,* is in line with the many cases which hold that although legal title does not vest in the purchaser at a judicial sale until the delivery of the deed, the beneficial ownership is vested in him. The property is held in trust for the purchaser, so that any increase or decrease in value inures to him. It is in all

probability the great decrease in land values since the time of the sale, rather than the very slight misdescription, which makes the appellant so desirous of rescinding the entire contract of purchase. Nevertheless, even though he may have made a bad bargain, the beneficial ownership of the land is in him, and he should be compelled to pay interest on the purchase price. The appellant made no tender or offer to pay into court the original purchase price or the purchase price with the abatement. Had he done so, he could have avoided the accrual of interest.

The appellant should pay costs because although he obtained an abatement of the contract price, he refused to complete the contract as modified, and compelled the receiver to take summary proceedings against him in the nature of a bill for specific performance.

It is respectfully submitted, therefore, that the order of the Court of Chancery bearing date June 5, 1928, should be in all things affirmed.

STEIN, McGLYNN & HANNOCH,
Solicitors for and of Counsel with
Receiver of Respondent.

AARON LASSER,
Of Counsel.