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**NEW JERSEY COURT OF ERRORS  
AND APPEALS.**

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MORTGAGE & INVESTMENT COM-  
PANY OF NEW JERSEY,  
Complainant-Appellee,

vs.

ROMEL REALTY COMPANY,  
Defendant-Appellant.

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On Appeal  
from the  
Court of  
Chancery.

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**Bill of Complaint.**

(Chancery Docket 68-89)

IN CHANCERY OF NEW JERSEY.

To the Honorable EDWIN ROBERT WALKER  
Chancellor of the State of New Jersey:

The Complainant MORTGAGE & INVESTMENT  
COMPANY OF NEW JERSEY, (a corporation of the  
State of New Jersey) respectfully shows that:

30

1. On June 14th, 1927—ROMEL REALTY COM-  
PANY, (a corporation of the state of New Jersey)  
being indebted to STEENLAND CONSTRUCTION COM-  
PANY, (a corporation of the State of New Jersey)  
in the sum of TWENTY THOUSAND THREE HUNDRED  
THIRTY FIVE (\$20,335.) dollars executed to it a  
bond of that date to secure that sum, payable

40

*Bill of Complaint.*

with instalments of 5% on the principal quarterly with interest at the rate of 6% per centum per annum, payable quarterly, from the date of the bond.

10

2. To secure payment of the bond, said ROMEL REALTY COMPANY executed to said STEENLAND CONSTRUCTION COMPANY a mortgage of even date with the bond; and thereby conveyed to it in fee, the land hereinafter described, on the express condition that such conveyance should be void if payment should be made according to the terms of the bond. Which mortgage, having been first duly acknowledged and the certificate duly indorsed thereon was recorded in the Clerk's Office of Bergen County, in Book 959 of Mortgages, page 94.

20

3. The mortgaged premises are described as follows:

ALL THOSE CERTAIN lots, tracts or parcels of land and premises situate, lying and being in the City of Englewood, in the County of Bergen and State of New Jersey, and known and designated on a Map entitled, "Sub-Division of Brinkerhoff Estate, property of Steenland Construction Company, City of Englewood, Bergen County, New Jersey," and filed in the Office of the Clerk of Bergen County on the 20th day of April, 1927, as Map No. 2243, as lots numbered one (1) two (2) three (3) four (4) five (5) six (6) seven (7) eight (8) nine (9) and ten (10) in Block numbered one hundred seventeen (117).

30

40

*Bill of Complaint.*

4. ON August 1, 1927 the said Steenland Construction Company (a corporation) by written assignment assigned said bond and mortgage to the Mortgage & Investment Company of New Jersey, which assignment having been first duly acknowledged, the certificate of acknowledgment duly endorsed thereon was on August 2, 1927 recorded in the Clerk's Office of Bergen County in book 164 of assignments of mortgages for said County page 546, etc.

10

Both bond and mortgage contain an agreement that if any installment of interest or principal should remain unpaid for 30 days after the same should fall due, then the whole principal sum, with all unpaid interest, should, at the option of the mortgage, its representatives or assigns, become immediately due.

20

The mortgage also contained an agreement that the mortgagor, its heirs and assigns, would keep the buildings on the mortgaged premises insured against loss or damage by fire in a sum and by insurers satisfactory to the mortgagee, and would assign the policy of insurance to the mortgagee, its representatives or assigns, and in default of so doing that the mortgagee, representatives or assigns, should be entitled to effect such insurance, and the premiums paid for the same by the mortgagee, or assigns, with interest at 6 per centum per annum, should be a lien on said land added to the amount of the mortgage debt and secured by the mortgage.

30

ON DECEMBER 14, 1927 5% instalment of the principal, and one-quarter interest fell due on complainants bond and mortgage, and remained

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*Bill of Complaint.*

unpaid for more than 30 days thereafter, and no part thereof has yet been paid. Complainant has elected that the whole principal sum with all unpaid interest shall be now due.

10 Said ROMEL REALTY COMPANY have always been in possession of the mortgaged premises.

Of the principal sum \$19,318.25 with interest thereon, from September 14th, 1927 is due upon the complainants bond and mortgage.

Complainant is without adequate remedy in the courts of law and therefore pray:

20 1. That ROMEL REALTY COMPANY, who are the defendants to this suit, may answer this bill of complaint without oath and each statement therein made:

2. That an account may be taken of the amount due on complainants mortgage:

30 3. That the defendants, or one of them, may be decreed to pay complainant the amount so found due, with interest and costs, by a short day, to be appointed by this Court; and that in default of such payments, they, and each of them, be debarred and foreclosed of all equity of redemption in said lands: or

40 4. That a decree may be made for the sale of the mortgaged premises to raise and pay to the complainant the amount so found due on its mortgage, with interest and costs:

*Answer and Counterclaim.*

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

10

GEORGE H. RICHENAKER,  
Solicitor and Counsel with Complainant.

**Answer and Counterclaim.**

The answer and counterclaim of the defendant, Romel Realty Company, a corporation organized under the laws of the State of New Jersey.

20

This defendant, answering the bill of complaint, says:

1. Paragraphs 1 to 4 inclusive are admitted.

2. The statement or allegation in an unnumbered paragraph that \$19,318.25 of the principal of the bond and mortgage mentioned in paragraphs 1 and 2 of the complaint, is due, is denied.

30

3. The mortgage set forth in the bill of complaint and sought thereby to be foreclosed, was given by defendant to Steenland Construction Company, the mortgagee, in part payment of the purchase price of the lands and premises described in said mortgage and conveyed to defendant by said Steenland Construction Company,

40

*Answer and Counterclaim.*

10 who subsequently sold and assigned said mortgage to the complainant; and this defendant was induced to accept said conveyance and make said mortgage through the fraud of said Steenland Construction Company, in that it, by its officers and agents, wilfully and fraudulently represented to this defendant, before the execution of said conveyance and mortgage, that the said lands and premises were immediately available for the construction and erection thereon of apartment houses, which representation was known by said Steenland Construction Company to be false, and was made to induce this defendant to purchase 20 said lands and to execute said mortgage; whereas said lands and premises were then and still are restricted for the erection thereon of single family, detached dwelling houses; and defendant, relying upon said misrepresentations, accepted said conveyance and executed the said purchase money mortgage.

30 4. The complainant purchased and took said bond and mortgage from the mortgagee, Steenland Construction Company, subject to all equities and defenses.

By way of counterclaim against the complainant, this defendant says:

1. The allegations in paragraph 3 of the foregoing answer are re-iterated and repeated.

40 2. The total purchase price of the mortgaged premises was \$29,050., which amount is greatly

*Answer and Counterclaim.*

in excess of the value of said premises, by reason of the fact that they are not available for the erection of apartment houses, as misrepresented to this defendant as aforesaid; but the real and true value of said premises is not in excess of \$20,000. 10

This defendant is without adequate remedy at law, and therefore prays:

1. That the Court make a decree abating from the principal of complainant's bond and mortgage the difference between the aforesaid purchase price of the mortgaged premises and the true value thereof. 20

2. If the Court shall find that the principal of complainant's mortgage is now due, then that the Court fix and determine the amount to be abated therefrom by reason of the aforesaid misrepresentations, and make its decree accordingly.

JASON R. ELLIOTT,  
Solicitor of Defendant. 30

### Answer to Counterclaim.

The complainant, to the answer of the bill and counterclaim thru its Solicitor, George H. Richenaker says that:

10

1-2—The complainant joins issue in the answer of the defendant as to the amount of the principal due on the bond and mortgage.

20

3. The complainant denies the allegations set forth in paragraph three of the answer, but says that if there is any money due from the said Steenland Construction Company to the defendant for the reason set forth therein, it should not be deducted from the principal of said mortgage.

4. The complainant denies the allegations set forth in paragraph four,

30

As to the counterclaim contained in said answer complainant says that, (1) It denies the allegations set forth in paragraph one of the counterclaim, and says that, if there is any money due to the defendant from said Steenland Construction Company, it should not be deducted from the principal of said mortgage.

40

2—Complainant has not sufficient knowledge or information to form a belief as to the allegations set forth in paragraph two of the counterclaim, as to the amount of money paid by defendant, but denies the same is not available for

*Order of Reference.*

the erection of apartment house, and that the real and true value of the premises is not excess to \$20,000.

GEORGE H. RICHENAKER,  
Solicitor for complainant.

10

**Order of Reference.**

THIS MATTER BEING opened to the Court by George H. Richenaker, Solicitor for the complainant, and it appearing by the consent hereto in writing that due notice of this application has been given to the Solicitor of the defendant.

20

IT IS ON THIS 13th day of November, 1928, ORDERED, THAT IT BE REFERRED TO Hon. William B. Mackay, one of the Advisory Masters of this Honorable Court to hear the same for the Chancellor and to report unto him, and to advise what order or decree should be made therein.

E. R. WALKER,  
Chancellor.

30

I HEREBY CONSENT TO THE ENTRY OF THE FOREGOING ORDER.

JASON R. ELLIOTT,  
Solicitor for the defendant  
Romel Realty Co.

40

**Amendments to Answer and  
Counterclaim.**

Filed December 14th, 1928.

10     The defendant, by leave of the Court, hereby amends its answer and counterclaim as follows:

1. Paragraph 3 of the answer is amended by adding the following: Said lands and premises were and are restricted as aforesaid both by covenants and restrictions in the deed conveying them to said Steenland Construction Company and by zoning ordinance of the City of Englewood.

20

2. Paragraph 2 of the counterclaim is amended to read as follows: The total purchase price of the mortgaged premises was \$29,050., which amount is greatly in excess of the value of said premises, by reason of the fact that they are not available for the erection of apartment houses, as misrepresented to this defendant as aforesaid; but the real and true value of said premises is not in excess of \$15,000.

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JASON R. ELLIOTT,  
Solicitor of Defendant.

40

**Testimony.**

## IN CHANCERY OF NEW JERSEY

Hackensack, New Jersey  
December 14th 1928. 10

BEFORE:

HONORABLE WILLIAM B. MACKAY, Advisory Master.

APPEARANCES:

For the Complainant;  
GEORGE H. RICHENAKER, Esq.

For the Defendant; 20  
JASON R. ELLIOTT, Esq.

Of counsel;  
HERMAN VANDERWART, Esq.

Counsel for complainant offers in evidence bond and mortgage made by Romel Realty Company to Steenland Construction Comany, dated June 14th, 1927, and acknowledged June 23rd, 1927, the mortgage being recorded in book 959 of Mortgages, Page 94 &c., in the sum of \$20,335.00, and also a bond accompanying the same made by the same parties, dated the same date and in the penal sum of \$40,670.00, conditioned for the payment of \$20,335.00. 30

Mortgage received and marked Exhibit C-1 in evidence.

Bond received and marked Exhibit C-2 in evidence. 40

*Testimony.*

10 Counsel for complainant offers in evidence an assignment of a mortgage from the Steenland Construction Company to the Mortgage & Investment Company of New Jersey, the complainant, dated August 1st 1927, acknowledged August 1st, 1927, and recorded August 2nd, 1927, in Book 164 of Assignments of Mortgages for Bergen County, on Page 546 &c, which assignment assigns the mortgage dated July 14th, 1927, made by the Romel Realty Company in the sum of \$20,335.00.

Assignment received and marked Exhibit C-3 in evidence.

20 NOTE: Testimony on the part of the complainant as to the amount due on complainant's bond and mortgage, is omitted, because defendant concedes that if it is not allowed the abatement claimed, then the amount stated in the decree appealed from is due to complainant.

30 Testimony taken before the Advisory Master in respect to the value of the mortgaged premises and to the amount of the abatement claimed, is also omitted, because those questions are not now before this court.

It is agreed between counsel that the testimony following is all the testimony that is pertinent and germane to the issues on this appeal.

It is also agreed that Emily A. V. Brinkerhoff, former owner of the mortgaged premises, died on October 21, 1921.

40

*Testimony.*

LILLIAN ANDOLSEK SWORN as the stenographer in the case.

## THE CASE FOR THE DEFENDANT.

10

Counsel for defendant offers in evidence certified copy of last will and testament of Emily A. V. Brinckerhoff which is received and marked Exhibit D-1.

Executor's deed from Bankers Trust Company to Steenland Construction Company which is recorded in Book 1264 of Deeds for Bergen County, Page 511 &c, is received and marked Exhibit D-2 in evidence.

20

Quit claim deed from the Bankers Trust Company, et al, to the Steenland Construction Company which is recorded in Book 1495 of Deeds, Page 101 &c, is received and marked Exhibit C-4 in evidence.

Zoning ordinance (certified copy) of the City of Englewood is received and marked Exhibit D-3 in evidence.

NOTE: It is agreed that the mortgaged premises lies in a zone wherein the erection of apartment houses was at the time of the sale of the premises prohibited by the zoning ordinance of the City of Englewood.

30

Exhibit D-3 is therefor not printed.

Deed conveying premises to the defendant, dated June 14th, 1927, and recorded in Book 1503 of Deeds, Page 374 &c, is received and marked Exhibit D-4½ in evidence.

40

*Jason R. Elliott—Direct.*

JASON R. ELLIOTT, sworn as a witness for defendant, testified as follows:

10 *Direct Examination by Mr. Vanderwart:*

Q. Mr. Elliott, are you an officer of the defendant in this case? A. Yes, Secretary and Treasurer.

Q. Are you familiar as Secretary and Treasurer with the facts surrounding the transaction of this mortgage? A. Yes, sir.

20 Q. Will you tell us where the property is located? A. The property is located at the northeast corner of Lydecker Street and Brinkerhoff Court, Englewood, as shown on the map of property of the Steenland Construction Company. It consists of Lots 1 to 10 inclusive in Block 117. It is over 140 feet in front on Lydecker Street and 200 feet deep on Brinkerhoff Court. It is 140 feet in width at right angles, a trifle more than the same frontage on Lydecker Street.

30 Q. Did you buy the property as an officer of the Romel Realty Company? A. No, sir, the Romel Realty Company had not been organized. It was planned but had not been organized at the time the property was purchased.

Q. In whose name were the original contracts taken? A. One in the name of myself and one in the name of Frank V. Romaglia who is now President of the Romel Realty Company. Two groups were taken in my name,—one had three lots and the other four lots.

40

*Jason R. Elliott—Direct.*

Q. In whose name was the deed given? A. To Romel Realty Company. We assigned our interest to the Romel Realty Company.

Q. When did you purchase the property? A. We purchased six of the ten lots in two plots at the auction sale of the former Brinckerhoff Estate Property which was held by Joseph P. Day, auctioneer, under the direction of the Steenland Construction Company on a large tract that included our property at Englewood on May 14, 1927. 10

MR. RICHENAKER: I would like to have that stricken out unless he tells us who he means by "we."

A. Mr. Romaglia and I. 20

By Mr. Vanderwart:

Q. I show you a descriptive circular and ask you whether that describes the property that was sold on that day?

Mr. Richenaker: I object to any papers to prove anything like that as there was no contract or agreement entered into by the Romel Realty Company.

Master: I will admit that. 30

Mr. Vanderwart: I will offer it in evidence.

Mr. Richenaker: I object because it does not show anything entered into or anything to be entered into between the Steenland Construction Company and the Romel Realty Company. This company was not in existence at that time. 40

*Jason R. Elliott—Direct.*

Master: I will take it subject to your objection, Mr. Richenaker.

Circular is received and marked Exhibit D-4 in evidence.

10

By Mr. Vanderwart:

Q. Did you personally attend the auction sale on that date? A. Yes.

Q. Who was with you? A. My associate, Frank V. Romaglia, and his son, Frank V. Romaglia, Jr. They did not stay with me, I saw them, and John Micklus.

20

Q. How did you first become aware of the fact that this sale was to occur, Mr. Elliott? A. By advertisements in the papers, and signboards and these maps. I also talked with Mr. Steenland in his office and he told me that wonderful apartment house property was to be sold in Englewood and that I could make money on it.

Q. I show you copy of Englewood Press and ask you if that is one of the things that brought you to the auction? A. It is.

30

Copy of Englewood Press is received and marked Exhibit D-5 in evidence.

Mr. Richenaker: I object to any inducement of sale to be offered. It is immaterial and irrelevant.

Master: I receive it subject to the same objection.

Mr. Richenaker: Of course, it did not induce the Romel Realty Company to come.

40

*Jason R. Elliott—Direct.*

By Mr. Vanderwart:

Q. When you went to the sale that day accompanied with these people, did you see any others there? A. Yes. 10

Q. Will you name some people you saw there? A. There was a big tent on the property and there were eighty or a hundred people there.

Q. Name some? A. George Beckmann, Morris Peterson, Arthur Eisenstein, Charles Greenberg and William Greenberg.

Q. Who was the auctioneer? A. Joseph P Day, Inc. The man who conducted the sale was James Day, brother of Joseph. The two Steenlands were there too and they sat next to the auctioneer's desk and they were there throughout the sale. 20

Q. Did he say who the owner of the property was? A. The Steenland Company.

Q. What did he say, if anything, regarding the use to which the property could be put?

Mr. Richenaker: I object to these questions on the ground that they were not made to the Romel Realty Company. 30

Master: I will take it subject to your objection and if I find it irrelevant I will strike it out.

A. He described the wonderful property and called peoples' attention to the character of the neighborhood and mentioned the new apartment houses almost in sight across the street and 40

*Jason R. Elliott—Direct.*

10 said, "Now, gentlemen, the former restrictions on this property have been lifted and the entire tract is now available for apartments. You can build apartment houses on this property tomorrow if you want to." That was what induced us. We were acting for the Romel Realty Company, in contemplation of it. We organized it afterwards and own 99% of the stock of the Romel Realty Company. We decided upon its name and were waiting to take title.

By Mr. Vanderwart:

20 Q. Was anything else said that you remember?

A. There was a repetition of that remark from time to time. I remember when he called for bids he offered Lots 1, 2 and 3 in Block 117. He called for bids on a lot price. They were 20 foot lots and no one said anything. I made a bid, I think my bid was \$600.00 per lot, and he laughed at me. He said, "You mean per front foot. That's ridiculous." I then said "I will withdraw the bid," but the bid wasn't withdrawn and was raised. We didn't bid on these particular lots again and someone else got it. Later on the auctioneer said it was a woman and there was some misunderstanding and put it on afterwards. I said "we" when I spoke about bidding, but I was the one who did the speaking for both Mr. Romaglia and me.

30

Q. Did you sign a regular agreement? A. Not for those three lots at that time. Later on he put on he put on 4, 5, 6 and 7 and they were subsequently sold to somebody, and then 8, 9, and 10,

40

*Jason R. Elliott—Direct.*

as shown here. I bid for those and then our bid was accepted and memorandum of sale was offered for signature. I have the memorandum of sale here. Its for 8, 9 and 10 and was signed by Mr. Romaglia. I saw him sign it and it is his signature. Subsequently Lots 1, 2 and 3 were offered again. The woman had misunderstood something and they offered them again. My bid was accepted and I signed this memorandum of sale.

10

Q. And these were the two that were signed on that day? A. Yes.

Memorandum of sale of Lots 1, 2 and 3, Section 117, for the sum of \$9150.00, is received and marked Exhibit D-5½ in evidence.

20

Memorandum of sale of Lots 8, 9 and 10, Section 117, for the sum of \$5400.00 is received and marked Exhibit D-6 in evidence.

By Mr. Vanderwart:

Q. Mr. Elliott, did you have any knowledge of any restrictions concerning that property at that time of the auction sale on May 14th, 1927? A. None whatever.

30

Q. When did you first learn of them? A. Some time after we took the deed—sometime I should say between the 1st and 15th of July.

Q. I notice that Exhibit D-6 calls for the delivery of a title policy? A. Yes, sir.

40

*Jason R. Elliott—Direct.*

10 Q. When was that title policy delivered to you, if you know, with relation to the delivery of the deed? A. A month or six weeks after the deed was delivered, as shown on the face of it. The date it was acknowledged I don't know, and at that time we had not received the title insurance policy. Subsequently a week or so later I heard gossip around Englewood to the effect that this property wasn't available for apartments; that Steenland had deceived the people and I thought I better look it up.

20 Q. When? A. Some time in the early part of July. Then I went to the office of the building inspector in Englewood and they had a zoning map on the wall, a copy of which has been introduced and is marked Exhibit D-3, and I saw then that this property was in the district that is zoned for one family dwellings. A few days after that, if not immediately, I wrote a letter to Steenland Construction Company dated July 15th.

30 Q. Will you just identify this letter? A. This is the letter which I have referred to.

Letter dated July 15th, 1927, written by Jason R. Elliott to Steenland Construction Company is received and marked Exhibit D-7 in evidence.

By Mr. Vanderwart:

40 Q. Going back, Mr. Elliott, you have talked about I think, six of these lots, haven't you?  
A. Yes.

*Jason R. Elliott—Direct.*

Q. Will you tell us about the purchase of the remaining four lots. A. Yes, this sale was on a Saturday, May 14th, and on the Monday or Tuesday following, I am not sure, a man by the name of Holbrook, who was in the employ of the Steenland Construction Company, came to my office at the Fidelity Union Title & Mortgage Guaranty Company, 191 Main Street, Hackensack, in which I was employed. I knew him because he had been in the office before on behalf of Mr. Steenland, or the Steenland Construction Company, and he reminded me that I purchased some lots at the sale and that Mr. Romaglia had, and said "Now you ought to have these other lots 4, 5, 6 and 7." He also said that Lots 1, 2 and 3 and 8, 9 and 10 formed an L and we ought to have the others to fill out the plot and we would have a wonderful apartment house site.

Q. After the sale? A. After the auction. Mr. Holbrook said further, "That corner plot is only 60 feet. That won't do you any good. You've got a 25 foot setback on Brinckerhoff Court and only 35 feet left to build up. I've got a man that is going to put up an apartment house on those other lots if you don't." I told him I would sell him ours and he would have a nice tract then, and that I was not interested and that he should see if he couldn't sell it to this man to complete his tract.

Q. Who was present when that conversation took place? A. Eric Rausenberger who was employed by the Fidelity Union and who was my

*Jason R. Elliott—Direct.*

assistant there. So Holbrook urged me to take these lots, as I have stated, and then came back next day or day after and said "That other man won't buy yours." I said "All right, let it ride.  
 10 Anyhow, how is it that you have those for sale, I thought they were sold?" He said "Yes, they were sold but Steenland bought them back from the people that bought them at the sale. I have another man who is ready to buy right now and put an apartment house up." He came back again and I fell for his high-powered salesman-ship, but in the meantime I spoke to Steenland on the telephone.

20 Q. Which Steenland? A. Peter.

Q. Is he the same man who was at the sale?  
 A. Yes, this man right here. He didn't deny Holbrook represented him and said "You ought to have those." I said "You are asking too much," and he said "No, that's the price." I have forgotten now whether the price was \$13,500.00 or \$14,000. Anyhow, finally the up-shot was that I agreed that we take this other  
 30 piece and we drew up a contract and I wanted him to take a mortgage for an even amount on it. He said "This has to be sold with the terms of sale at the auction," and he referred back to the map and so we talked about this map and about the property and I drew a contract.

40 Contract for sale of Lots 4, 5, 6 and 7 in Block 117, for \$14,500.00 between Steenland Construction Company and Jason R. Elliott is received and marked Exhibit D-8 in evidence.

*Arthur Eisenstein—Direct.*

By Mr. Vanderwart:

Q. I think you have stated that the premises described in these three agreements were later put in one deed. A. They were all included in the deed from the Steenland Construction Company to us. 10

Q. To what company? A. The Romel Realty Company, the defendant.

Q. The total purchase price named in the three agreements was what amount? A. That can be had by adding them up. \$29,050.

Q. How much was on mortgage? A. 70%. The balance was paid him in cash and checks at the sale and some at the time of closing of title. 20

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ARTHUR EISENSTEIN called as a witness, having been duly sworn, testified as follows:

*Direct Examination by Mr. Vanderwart:*

Q. What is your business, Mr. Eisenstein? 30  
A. Building and real estate.

Q. And where are your offices located? A. Palisades Park.

Q. You are a resident of Palisades Park? A. I am.

Q. Do you recall attending a certain auction sale on May 14th on the property that Mr. Elliott has testified about? A. Yes.

*Arthur Eisenstein—Direct.*

Q. I show you Exhibit D-4 and ask you if you have seen that before? A. Yes.

Q. Did you ever have one of those? A. I have.

10 Q. Where did you receive it? A. Well, I had several of them prior to the sale and at the sale, I don't know just where.

Q. Do you recall seeing that particular sheet or one like it at the auction sale? A. I believe so.

Q. Do you recall the auctioneer? A. Yes.

Q. Did you see Mr. Steenland at the sale? A. I did.

20 Q. Which Mr. Steenland? A. Both of them, I believe.

Q. Did you see Mr. Elliott there? A. I did not know the gentleman.

Q. How did you come to come to the sale? A. Through literature mailed, advertisements, etc.

Q. What did you hear the auctioneer say, if anything, concerning the use to which this property could be put. A. The auctioneer's words I cannot remember. He put the property up for sale and I bought a parcel there.

30 Q. Do you remember his saying anything about the use to which the property could be put? A. I do not.

Q. For what purpose did you buy the property? A. For apartment house site or perhaps for speculation. I didn't know just what I was going to do with this property but I had that in view.

40 Q. Did you hear the auctioneer say anything concerning apartment houses? A. I don't remember.

*Arthur Eisenstein—Direct.*

Q. Where did you receive your information that you desired the property for apartment house property? A. That's the business I was in. It is up to me to look for a location, etc.

Q. What did you do with this property after you purchased it?

10

Mr. Richenaker: I object. I think that is irrelevant and immaterial.

Master: I will sustain the objection.

By Mr. Vanderwart:

Q. Did you use the property for apartment house purposes that you bought, Mr. Eisenstein?

20

A. I did not.

Q. Have you got the property today? A. I have not.

Mr. Richenaker: I object. It is irrelevant and I move it be stricken from the record.

By Mr. Vanderwart:

30

Q. Did you have any conversation with Mr. Steenland about the use of the property for apartment house purposes prior to the sale?

A. No.

Q. Did you have any conversation with him about it after the sale?

Mr. Richenaker: I object.

40

*George H. Beckman—Direct.*

By Mr. Vanderwart:

Q. After you purchased it I mean?

10           Master: I will sustain the objection.

*Cross examination by Mr. Richenaker:*

Q. Before the sale you never new Jason Elliott? A. Never knew him.

Q. Who was the auctioner, do you remember his name? A. Mr. Joseph P. Day's brother.

Q. Did you hear him read off the conditions of sale? A. Somebody read them off.

20    Q. What conditions were read off? A. I do not know.

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GEORGE H. BECKMAN called as a witness, having been duly sworn, testified as follows:

*Direct Examination by Mr. Vanderwart:*

30    Q. Did you buy any property at this auction sale? A. I did.

Q. You were present there that day on May 14th? A. I was.

Q. For what purpose did you buy your property? A. We bought it for investment purposes and for our own use. We bought it to resell.

Q. To resell? A. Yes.

40    Q. When you were there that day did you hear the auctioneer say anything about the use of

*George H. Beckman—Direct.*

the property for any particular kind of building? A. I came at the very last of the sale and the terms of the sale had been read and I heard nothing about the conditions under which the sale was held or anything from the auctioneer. I got there real late. 10

Q. And yet you bought at that sale? A. Yes.

Q. Did you see this map there? A. I did.

Q. Exhibit D-4? A. Yes.

Q. I mean a copy of it? A. Yes.

Q. Did you have one there like it? A. I did.

Q. Did you purchase the property with the understanding that you could use it for the building of apartment houses? 20

Mr. Richenaker: I object.

Master: I will admit it subject to your objection, Mr. Richenaker.

By Mr. Vanderwart:

Q. For what purpose did you understand you could resell the property? A. As I understand it, the property had no restrictions except for business or any obnoxious purpose. I understood you could build apartment houses, for instance. 30

Q. But didn't derive that knowledge, as I understand it, from anything that was said at the sale? A. No.

Q. Where did you get that knowledge? A. From the advertisement that appeared previous to the sale and the circular which I was handed at the sale. 40

*George H. Beckman—Direct.*

Q. Do you recall a meeting in your office during the summer of that year when Mr. Steenland, Mr. Elliott and Mr. Peterson were present?

A. I do.

10

Q. In reference to this property? A. Yes.

Q. What was the purpose of that meeting?

A. The purpose of the meeting was to endeavor through co-operative action to get the zoning restrictions changed so that the property would be available for apartment house purposes.

Q. Do you remember what was the date of the meetings? No, I don't.

20

Q. You are a member of the firm of Eyyper & Beckmann? A. I am.

Q. I show you a memorandum agreement and ask you if you recognize your signature upon it?

A. I do.

Q. Did you see the other people sign it the day after the meeting. A. I don't remember seeing them the day after.

30

Q. Do you remember what was talked about at that meeting in the summertime in your office, in substance? Will you look at that agreement and see if it embodies the understanding arrived at that day? A. Yes, that's right.

Q. At that meeting was anyone directed to put the agreement in writing? A. Yes, I believe Mr. Elliott was.

Q. Where did you obtain a copy of this agreement? A. Never had a copy.

Q. Did you get this (indicating)? A. I got this (indicating.)

40

Q. Where did you get it? A. I don't remember.

*George H. Beckman—Direct.*

Q. Did you make any application to the City of Englewood in pursuance of the denying—

Mr. Richenaker: I object. It has nothing to do with any representations that were made at the sale. 10

Master: I will admit it subject to your objection and I will strike it out if I am satisfied that it is not relevant.

Mr. Richenaker: I object. It is trying to get around the one thing to which it was sold subject to. It was sold subject to the zoning law and the advertisement so says. It is incompetent and irrelevant and we are bringing in something which has no bearing whatever and has nothing to do with the matter. 20

By Mr. Vanderwart:

Q. Did you make any application? A. Yes, I did.

Q. With what success? 30

Mr. Richenaker: I object.

Master: I will allow that.

A. They refused to change the zoning ordinance with reference to building apartments.

Memorandum agreement is received and marked Exhibit D-9 in evidence. 40

*Carminé Richard—Direct.**Cross Examination by Mr. Richenaker:*

10 Q. You say Mr. Elliott drew up this agreement? A. I believe he was authorized at that time.

Q. Why did you select him? A. Because I believed it was in line with his profession.

Q. You know he is in what profession? A. He is a member of the Bar as far as I know.

Q. Was he connected with any other corporation at that time dealing with real property?

Mr. Vanderwart: A. We admit that.

20

CARMINE RICHARD, called as a witness, having been duly sworn, testified as follows:

*Direct Examination by Mr. Vanderwart:*

Q. What is your business? A. Real estate.

Q. Did you attend the auction sale on May 14th at Englewood? A. Yes, sir.

30 Q. How did you come to go to this sale? A. I saw a sign outside the property being sold and and that's what drew me.

Q. Where did you see the sign? A. On the property.

Q. What did the sign say about the use of the property? A. I didn't notice anything on the sign,—it just drew my attention.

40 Q. Do you remember seeing any copies of this map, Exhibit D-4? A. Yes.

*Carmine Richard—Direct.*

Q. Did you receive one of those at the sale?

A. Yes, sir.

Q. Were you present when the auctioneer started to sell the lots? A. Yes, sir.

10

Q. What, if anything, did you hear him say concerning the use of this property for apartment houses? A. He made an announcement that the property could be used for apartment houses.

Q. Did you buy any lots? A. I bought plenty of them.

Q. Have you any of them today? A. No, sir.

Q. What did you do with them?

20

Mr. Richenaker: I object.

Master: I will sustain the objection.

By Mr. Vanderwart:

Q. Did you ever receive a deed for this property from the Steenland Company?

Mr. Richenaker: I object.

Master: I will admit it subject to your objection.

30

A. No, sir.

By Mr. Vanderwart:

Q. What did you do with reference to your contract with Mr. Steenland?

Mr. Richenaker: I object as to what he did with reference to the contract.

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*Carminé Richard—Cross.*

Master: I will take your objection with this line of testimony.

10 A. I refused to take title because I couldn't use it for the purpose of apartment houses.

By Mr. Vanderwart:

Q. Did you receive your money on the day you took the property? A. A settlement was made afterwards and I released them upon the payment of a certain amount.

*Cross Examination by Mr. Richenaker:*

20 Q. In other words, you lost some money? A. Because I wanted to get through with it.

Q. Your lawyer advised you to settle for an amount less than you paid? A. Yes.

Q. And you did it on your lawyer's advice? A. I was anxious to settle.

Q. Your attorney was there? A. Yes.

Q. Would you like to mention the name of your attorney? A. Mr. A. C. Hart.

30 Q. Did you attend this meeting at Mr. Beckmann's office? A. No.

Q. Did you ever make an application for an apartment house on your site? A. No, but I found out it was not permissible.

Q. Then you didn't know whether you could or not? A. I never made application.

*Max Goldflamm—Direct.*

MAX GOLDFLAMM, called as a witness, having been duly sworn, testified as follows:

*Direct Examination by Mr. Vanderwart:* 10

Q. Where do you do business? A. I do business over here.

Q. Have you an office? A. 433 Bergenline Avenue.

Q. What is the business at that office? A. Real estate and mortgages.

Q. Did you attend this sale on May 14th, that you have heard about in this case? A. I have been at sales but I do not know whether it was May 14th, I stop in to so many sales around here. 20

Q. I ask you if you recognize this map as a copy of an auction sale? A. I am pretty sure I do.

Q. Look at it carefully. A. Yes, I remember it.

Q. You attended this sale? A. I attended that sale.

Q. Do you remember seeing Mr. Elliott at the sale? A. I do not. 30

Q. Did you get one of these handouts (Exhibit D-4)? A. I did but threw it away.

Q. Did you buy property at that time? A. No, sir, I never buy.

Q. You don't buy? A. I never buy blank property.

Q. What did you hear the auctioneer at that

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*Max Goldflamm—Direct.*

particular sale say, that you remember? A. I heard him call out the price.

10 Q. Did you hear him say, prior to the selling of the property, that this property could be used for the erection of apartment houses? A. If I recollect right, I think he did. I was there with another man and I thought it was a little high.

Q. Do you remember the auctioneer making any statement as to the use of the property for apartment houses? A. I think he said it was restricted apartment houses.

20 Q. Do you remember whether he said that you could use this particular property for apartment houses,—this property that was being sold? A. He called off that you could use it.

Q. When he called out did he say what it could be used for? A. He said "No restrictions at all," and that you could build apartment houses or anything. I had a builder with me who was interested in an apartment site and I think the price didn't suit him. That's why I was down at that auction.

*Cross Examination by Mr. Richenaker:*

30 Q. They could have stores do you mean? A. I can't remember. I am in the mortgage end. When a builder takes me down I have to be impartial to both sides, but when I think it is a good buy I tell him in an offhand way because I don't want to be enemies.

Q. Did you say he was interested in apartment sites? A. Whether it was stores or not, I do not know.

40 Q. Did you hear him mention stores? A. I don't remember if he did.

*Eric Rausenberger—Direct.*

Q. You don't remember whether he mentioned apartment houses? A. No.

Q. You said that there were no restrictions?

A. He announced that there were no restrictions on it, it was unrestricted entirely. 10

Q. Did he say or did you assume that you could even build stores there? A. I wasn't interested in the building.

Q. When you say "Entirely unrestricted," you were wrong, weren't you? A. Naturally, I am wrong when I say it was restricted—unrestricted.

Q. Did you hear the auctioneer read the terms of sale? A. I paid no attention to it.

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ERIC RAUSENBERGER, called as a witness, having been duly sworn, testified as follows:

*Direct Examination by Mr. Vanderwart:*

Q. Mr. Rausenberger, you are employed where? A. In May, June and July in 1927, with the Fidelity Union Title Company.

Q. Did you know a Mr. Holbrook? A. Yes, sir. 30

Q. Did you see him in your office just after May 14th, 1927? A. I saw him in the office.

Q. Was Mr. Elliott there at that time? A. Yes.

Q. Did they have a conversation on that particular day? A. Yes.

Q. What was that conversation about? A. About the auction sale.

40

*Eric Rausenberger—Direct.*

Mr. Richenaker: I object, your honor, as to what was said between Mr. Holbrook and Mr. Elliott.

10 Master: I will admit is subject to your objection.

By Mr. Vanderwart:

Q. What was said about the auction sale? A. I was interested in it more or less as there was a great deal of speculation going on and I turned around. Mr. Holbrook evidently had a piece that he felt Mr. Elliott ought to have. Mr. Elliott, as I remember it, bought a piece on the corner and then bought another piece and Mr. Holbrook had this plot for sale alongside of this corner plot.

20

Q. Did he say whom he represented? A. Mr. Holbrook brought an application as a representative from Mr. Steenland's offices. I think it was signed "Steenland, by Holbrook." I understood Mr. Holbrook was an agent of Mr. Steenland and we accepted him as such.

Q. By "we" whom do you mean? A. The company.

30

Q. On that day did he say who he was representing—when he was there on the 15th? A. He was representing the seller of the property. He had this piece of property for sale and I understood it was because he was friendly with Mr. Elliott that he wanted him to have it so that no one else could shut off Mr. Elliott's property, and if this man put up an apartment house on the inside lots it would shut off Mr. Elliott's property.

40

*Eric Rausenberger—Cross.*

Q. Did he say who the owner of the property was at that time? A. I understood at that time that the Steenland Company was the owner and that another man wanted to buy it, and that Mr. Holbrook came to see him because he knew Elliott owned the other lots and wanted him to have a chance to buy it. 10

Q. And did he say at that time anything about the use of this property for apartment houses? A. Well, that was the idea. Yes, he did say the man he expected to sell it would erect an apartment house and that Mr. Elliott's apartment house would be worthless because there was a set-back on the side street and the corner piece. 20

*Cross Examination by Mr. Richenaker:*

Q. What date was that? A. I couldn't say what date it was. It was after the auction sale.

Q. How long? A. I couldn't say.

Q. A week, month or half a year? A. It must have been within a week or so afterwards.

Q. You stated that just about this time there was quite a little real estat speculation going on? A. For that matter there always is. 30

Q. And there was quite a bit at that time in 1927, around May? A. I say that only because I speculate a little myself.

Q. At this time you were speculating in the real estate business around you? A. Yes.

Q. Are you doing it now? A. Yes.

Q. What speculations have you made lately?

Mr. Vanderwart: I object. 40

*Frank Romaglia, Jr.—Direct.*

Mr. Richenaker: I will withdraw the question.

10 By Mr. Richenaker:

Q. You saw Mr. Holbrook? A. Yes.

Q. How often? A. Four or five times.

Q. He was in for mortgage loans? A. Yes, sir.

Q. Did he procure any? A. As I remember he had several applications. He was in the office a good many times concerning applications that he made.

20 Q. You pay a commission to agents? A. No, sir.

Q. Did Mr. Holbrook come in for anyone else beside Mr. Steenland? A. No, sir.

Q. Did you ever pay any commission? A. No, sir.

Q. Did you pay any to the Steenland Construction Company? A. I don't think so.

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30 FRANK ROMAGLIA, JR., called as a witness, having been duly sworn, testified as follows:

*Direct Examination by Mr. Vanderwart:*

Q. Did you attend the auction sale on the Brinckerhoff Tract on May 14th, 1927? A. I did.

Q. Did you see Mr. Elliott there? A. I did.

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*Frank Romaglia, Jr.—Cross.*

Q. Who were you with? A. Mr. Elliott, my father and Mr. Micklus.

Q. Did you see the other gentlemen there who have testified today? A. I do not remember. 10

Q. Prior to the sale of the lots at auction sale, what if anything, did you hear the person who was selling them say concerning the use of this property for apartment houses? A. He said that the lots were available for apartments and that you could build apartments tomorrow if you wanted to.

Q. At that time did you see this circular? A. I did.

Q. Have one in your hand at the sale? A. Yes, sir. 20

Q. Did you hear him say anything else about the use of the property? A. He said it was available for apartments and that the man who had built Tudor Hall was present at the sale and you could have him build an apartment if you wanted to.

Q. A man from Tudor Hall? A. A contractor to the Hall.

Q. Did you see him? A. I didn't see him, he just announced that. 30

*Cross Examination by Mr. Richenaker:*

Q. Are you connected with the Romel Realty Company? A. Yes, sir.

Q. In what relationship? A. I have a couple of shares.

Q. Are you an officer? A. No, sir.

Q. According to the certificates of incorpora- 40

*John Micklus—Direct.*

tion you have forty-eight shares? A. That's my father.

10 Q. This gentleman (pointing to Frank V. Romaglia) is your father? A. Yes.

Q. He is the Frank Romaglia interested in the corporation? A. Yes.

Q. You heard the terms of sale read at the time of the auction? A. I did, but I don't remember what they were.

Q. You don't remember what they were? A. No.

Q. Do you remember who the auctioneer was?

20 A. I would remember if I saw him, but I do not know.

Q. I ask you whether these are the terms of sale that were read at the time of the auction?

A. I do not know.

Q. Did you see Mr. Steenland there? A. I saw Mr. Steenland.

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JOHN MICKLUS, called as a witness, having been duly sworn, testified as follows:

30 *Direct Examination by Mr. Vanderwart:*

Q. Were you present at the auction sale on May 14th on the Brinckerhoff Property? A. Yes, sir, I was.

Q. Who were you with? A. Messrs. Elliott, Romaglia, Sr. and Romaglia, Jr.

Q. Did you see this gentleman (pointing to Mr. Peter Steenland)? A. He was sitting on the left hand side of the auctioneer.

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*John Micklus—Cross.*

Q. I ask you if you saw Exhibit D-4 or a copy of it? A. I did.

Q. Do you remember the auctioneer? A. He was a burly fellow by the name of James Day.

10

Q. Did you hear him say anything at all about the use of this property for apartment house purposes while the sale was in progress? A. He glanced over the crowd and recognized a gentleman who had built Tudor Halls and said, "I have with me here the contractor from Tudor Halls. If you sign a contract he will commence building your apartment house tomorrow morning."

Q. When did he make those statements? A. While the sale was in progress.

20

Q. Was property from the Brinckerhoff Tract being called off at that time? A. Yes.

Q. Is that all you remember as to what he said? A. He talked about the fine site of the property for apartment houses and how short a time it would take to get to New York City.

*Cross Examination by Mr. Richenaker:*

Q. You heard him read off the terms of sale? A. I didn't pay much attention to the terms of sale.

30

Q. You are not an attorney, are you? A. No.

Q. And you would know by any statement like that, that that was just to induce the people to bid? A. I don't know what was in his mind.

Q. You know no one would sign a contract the next day until they got a deed. That wouldn't have influenced you at all, a statement

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*Frank Romaglia, Sr.—Direct.*

like that? A. Well it would have influenced me later on. If I was interested in the property I would have purchased it for an apartment house.

10 Q. You wouldn't enter into a contract with anybody the next day, would you? A. Not having a deed I wouldn't.

Q. The folder has it shown right on there hasn't it? A. Yes.

Q. You didn't consider anything he said would be beyond the printing that was on that folder, did you? A. None of his remarks were pertaining to the things on the folder.

20 Q. The only thing you remember was the remark about the apartment house contained on the folder. You don't remember about the terms of sale? A. No.

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FRANK ROMAGLIA, SR., called as a witness, having been duly sworn, testified as follows:

*Direct Examination by Mr. Vanderwart:*

30 Q. Mr. Romaglia, are you an officer of the defendant, Romel Realty Company? A. I am.

Q. What office? A. President.

Q. You are President? A. Yes.

Q. Do you remember a certain auction sale held on May 14th, 1927, on the Brinckerhoff Tract in Englewood? A. I do.

Q. With whom did you attend at that sale? A. With Mr. Elliott, my son here and John Micklus.

40

*Frank Romaglia, Sr.—Direct.*

Q. For what purpose did you go there? A. For the purpose of buying some of that property.

Q. Had you seen any advertisements about the sale before you went? A. I had. 10

Q. What was your object in buying that particular property? A. For the purpose of organizing the corporation.

Q. What was the object of the corporation? A. To go into the real estate and building business.

Q. When you attended the sale on that day, who was the auctioneer? A. I do not remember his first name, but I understood he was a representative of his brother, Mr. Joseph P. Day. 20

Q. Did you see Mr. Peter Steenland there? A. I did.

Q. You knew him at that time? A. I was introduced to him by Mr. Elliott prior to the sale.

Q. What did you do before the sale? A. Why, Mr. Steenland took us around and showed us the property and at that time I believe that we had the maps, Exhibit D-4, and we walked up Brinckerhoff Court back and forth and Mr. Steenland was praising the property, and that it was very valuable property, particularly for apartment house sites. We walked back and forth on Brinckerhoff Court as he was showing us the property. 30

Q. And then the sale took place after that? A. It did.

Q. It was held where? A. In a tent on the premises. 40

*Frank Romaglia, Sr.—Direct.*

Q. Prior to the sale, do you know whether the auctioneer said anything about the use of this property for apartment house purposes? A. Positively did. He stated that the restrictions had been lifted and that the entire tract was available for apartment houses and that you could build tomorrow. He also said "We have a building contractor here who has put up one of the most beautiful apartment houses in the City of Englewood, and you could sign a contract and build tomorrow if you so pleased or desired." In asking for bids this was repeated throughout the sale.

10  
20 Q. Did you buy any of those lots that day?  
A. Yes.

Q. Did you enter into a contract to buy them?  
A. I did.

Q. Will you state whether those remarks of the auctioneer had anything to do with your purchase? A. If certainly did.

Q. Did you pay any money that day yourself?  
A. I did by checks.

30 Q. I show you this contract, Exhibit D-6, and ask you if this is your signature? A. It is.

Q. Later on, what if anything, did you do with your contract? A. Assigned it over to the Romel Realty Company for which purpose we had bought them. We had discussed this matter some time prior.

Q. Whom do you mean by "We?" A. Myself and Mr. Elliott, and we assigned the contracts over to the Romel Realty Company.

40 Q. Were you present later on when the deed was given for these lots which you entered into

*Frank Romaglia, Sr.—Cross.*

a contract for, at the time of closing? A. Yes, I was.

Q. Showing you Exhibit D-4½, were you present when D-41½ was delivered? A. Yes, sir.

10

Q. Were you at that time an officer of the company? A. Yes, sir.

Q. Did you know of the purchase by Mr. Elliot of his lots that day? A. Yes.

Q. And subsequent to it? A. I did.

Q. The placing of the title in the Romel Realty Company was in accordance with his assignment as well as your own? A. Yes.

*Cross Examination by Mr. Richenaker:*

20

Q. What is your business? A. Title searcher.

Q. As a title searcher you are well acquainted with the necessary things to perfect a title and entering agreements, and you know what contracts of sale are? A. I do.

Q. You know when you assign a contract of sale that ordinarily you take it subject to all the terms of that contract? A. I do.

Q. I show you Exhibit D-6, and ask you whether you knew the terms of that agreement you signed? A. I never looked at them.

30

Q. And you, a searcher, signed a contract without knowing what you were signing? A. That sort of a contract, yes.

Q. And you never read that over and never looked at it. A. I did not and I don't think anyone else that signed it did either.

Q. And you will sign a paper with two pages of matter, knowing that you take it subject to

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*Frank Romaglia, Sr.—Cross.*

all its terms when you sign it? A. I relied entirely upon the reputation of the people who were selling the property and likewise on what Mr. Steenland told us at the time.

10 Q. Who sold the property that day? A. A representative of Joseph P. Day.

Q. It was his brother, wasn't it? A. Yes.

Q. You were led to understand it was Joseph P. Day's brother? A. Yes.

Q. And you heard him read over all these terms of sale before any lots were put up, didn't you? A. I did.

Q. And did you listen to them? A. I did.

20 Q. Do you remember when he read Paragraph 7? A. I cannot remember as to that paragraph.

Q. Do you remember his stating that the property was sold subject to the zoning laws of the City of Englewood? A. I can't say I did. I heard him read off a lengthy statement and he said the entire property was available for apartments.

30 Q. You said he said the restrictions were lifted. What restrictions did you presume that he meant at that time? A. As to apartment houses.

Q. Well, what as to the apartment houses? What kept you from building apartment houses? A. Because we couldn't get permission from the City of Englewood.

Q. Then you knew there were zoning laws? A. Not at that time.

Q. And you are a searcher? A. I am.

Q. How long? A. Pretty near thirty years.

*Frank Romaglia, Sr.—Cross.*

Q. And you remember the time that the Supreme Court came out with their decisions against the effect of zoning laws, don't you? A. I can't say that I do.

Q. If you came across a search wherein the deed or other instruments on record in the Clerk's Office had "Subject to zoning laws of this borough," would you set it up as a searcher? A. I certainly would.

10

Q. And you knew it had the same clause in this instance, didn't you? A. So far as this particular clause in the deed is concerned, we relied on Mr. Steenland's reputation.

Q. I am not talking about your deed. I am talking about what you should know in making a search. A. Well, I didn't search the property.

20

Q. But you would know that if you came across it in a search? A. I would.

Q. If you signed your name to such a statement and it was read off, you would know that you were taking it subject to any zoning laws, wouldn't you? A. I would, naturally, but I relied upon this map here that was read off by the auctioneer.

30

Q. I ask you to look at Exhibit D-4 and ask you what the green printing states? A. "Restrictions lifted 5/3/27," which I believe means May 3, 1927,— "Entire tract now available for apartments."

Q. What restrictions were lifted? A. I and the majority of the people who attended that sale assumed naturally, from that advertisement, that the entire tract, as far as restrictions con-

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*Frank Romaglia, Sr.—Cross.*

cerning apartment houses, had been lifted as of that date.

10 Q. You mean when you search lots and you refer to restrictions that it means zoning ordinances? A. I don't see where a search has anything to do with this.

Q. But you know that as a searcher in this line of business the difference between a zoning ordinance and a restriction, don't you? A. I didn't see the zoning ordinance there.

20 Q. Wasn't it read off to you from the terms of sale? A. I again say I never paid any attention to that thing and I don't think anyone did.

Q. Then you want to say that because you didn't read the terms of sale that Mr. Steenland used fraud in inducing you to buy property? A. I don't want to use that word, but it was misrepresentation. I know the auctioneer read off the terms of sale but he said the entire tract was available for apartments.

30 Q. You knew the time what zoning ordinances were, didn't you? A. I did, but I did not know of the existence of a zoning ordinance that would affect the property there.

Q. You know the difference between a zoning ordinance at this time? A. Why sure I do.

Q. I understand you bought this property for the purpose of organizing a corporation. You bought it just so you could organize a corporation? A. We decided to organize a company and we decided upon that particular name.

40 Q. Who decided that? A. Mr. Elliott and myself.

*Frank Romaglia, Sr.—Cross.*

Q. Did you notify the Steenland Construction Company at the time of the sale as to the corporation? A. I don't know that I did.

Q. Did you have a conversation with Mr. Steenland, either one of them, at the sale? A. Yes, I was talking with this gentlemen here (pointing to Mr. Peter Steenland) I believe.

10

Q. At that time you didn't say that there was a corporation in existence or going to be? A. I don't recall that I did.

Q. I also call your attention to six Xs in green on Exhibit D-4 and ask you whether they are the same color as the words about restrictions? A. Yes.

20

Q. That would naturally call your attention to this (indicating)?

Mr. Vanderwart: I object.

Master: I will note the objection.

By Mr. Richenaker:

Q. It would naturally lead you to this (indicating)? A. Possibly.

Q. Underneath it crossed out, is printing in red? A. Yes.

30

Q. Then it would be natural to suppose that the red would call your attention to this particular paragraph—I mean being a different color it would naturally attract your eye? A. Frankly speaking, this is the thing (indicating), that attracted my attention,—only that green up here (indicating).

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*Jason R. Elliott—Direct.*

MR. JASON R. ELLIOTT, upon being recalled, testified as follows:

10 *Direct Examination by Mr. Vanderwart:*

Q. Mr. Elliott, do you know the date of incorporation of the Romel Realty Company, the defendant? A. I think the certificate of incorporation was filed May 26th, 1927.

Q. What office at the present time do you hold in that company? A. Secretary and Treasurer.

Q. As such officer, are you in custody of the minute book? A. Yes, sir.

20 Q. Will you produce it? A. (indicating) This is it.

Minutes of Romel Realty Company are received and marked Exhibit D-9 in evidence.

A. (By Mr. Elliott) The minutes were prepared and then adopted at the meeting.

30 *By Mr. Richenaker:*

Q. Regular printed form? A. I prepared them myself.

Q. You had all this typewritten? A. Yes.

Q. You say you wrote these up right after that time? A. These were drawn and motions were made and carried and signed immediately after at the dates of these meetings.

40 Q. Then you wrote this up about the 10th of June? A. Yes.

*Jason R. Elliott—Direct.*

Q. Sure it wasn't after that? A. Absolutely.

By Mr. Vanderwart:

Q. They bear your signature as Secretary? 10  
A. Yes.

Q. Will you turn to the minutes of the stockholders' organization meeting and read into the record whatever resolution was passed authorizing the directors to act? A. "Messrs. Romaglia, Elliott and Rausenberger were nominated for directors of the company to hold office for the ensuing year. No other nominations having been made they were unanimously elected."

"Upon motion duly made and seconded and by the affirmative vote of all present it was resolved that the Board of Directors be and they hereby are authorized to issue capital stock of this company to the aggregate amount of \$100,000. in such amounts and proportions as from time to time shall be determined by the Board and as may be permitted by law, and to accept in full or part payment thereof such property as the Board may determine shall be necessary for the business of the company." 20 30

Q. Have you any minutes of a Board of Directors meeting at which this property in question in this cause of action was mentioned?

A. This first meeting was June 10th, 1927. It was the first meeting of the corporation.

Q. Will you read any motion which was passed? A. "First meeting of the Board of Directors held at Hackensack on the 10th day of June, 1927, at 10:30 A. M. Upon motion being 40

*Jason R. Elliott—Direct.*

made and seconded the following preamble and resolutions were adopted:

10       “WHEREAS MESSRS. Romaglia and Elliott have presented to the meeting auctioneer’s memorandum of sale of certain premises purchased by them respectively, and a contract of sale with the Steenland Construction Company for other premises, all in the City of Englewood, New Jersey, and whereas, they have offered to assign the aforesaid memorandum of sale and contract to the company at the valuations hereinafter set forth in payment of their subscriptions for capital stock of the company; the particular parcels of lands, the contract prices, the deposits paid and the valuations proposed being as follows: (‘then follows the property in question in this suit and other lands, but all of the property that is included in this suit is included in that’)

	Lots 1, 2 and 3 in Block 117	contract price \$9150. deposit paid 915. value 1520.
30	Lots 8, 9 and 10 in Block 117	contract price \$5400. deposit paid 540. value 1140.
	Lots 4, 5, 6 and 7	contract price \$14,500 deposit 1,450 value 2,600

40       “Now, therefore, be it resolved, in the opinion of the Board of Directors the valuations of said memorandum and contract as above set forth are reasonable, it would be to the interest of the

*Jason R. Elliott—Direct.*

company to acquire the lands above described; and further resolved that the President and Treasurer be and they are hereby authorized and directed to issue to the order of said Frank V. Romaglia and Jason R. Elliott, certificates of full paid Managers' Shares of the capital stock of this company to the aggregate amount of \$10,000, in consideration of the assignment of said contracts." 10

Q. The gentlemen named as directors in those stockholders minutes, are they the persons who have testified this morning, Mr. Frank Romaglia, Mr. Rausenberger and yourself? A. Yes, sir.

Q. The documents referred to in that preamble and in the resolution too, are they the exhibits which have been offered, known as D-5, D-6 and the contract known as D-8? A. What we had before us were the duplicate copies of these things. 20

Q. They are the ones referred to in the minutes? A. Yes.

Q. In pursuance of those minutes, what did the officers of the company do, if anything, toward completing that transaction? A. We raised the money in the corporation, took the deed to the property—one deed, and executed the purchase money mortgage. 30

Q. Was the stock issued to the gentlemen described in the preamble? A. The stock was issued that day or the day after.

Q. I think this morning you testified that the deed was taken and after that the agreement was drawn in Mr. Beckmann's office, which has 40

*Jason R. Elliott—Direct.*

10 been marked in evidence, Exhibit D-9. Do you know what, if anything, was done in pursuance of that agreement? A. No. The meeting was held July 18th and I drew this agreement the next morning in the office of the Fidelity Union Title Company where I was manager, Mr. Beckmann got it from me about noon and said "That's pretty speedy work." I signed it for the Romel Realty Company. These interlineations in blue ink (indicating) were not in the contract as I drew it.

Q. Have you a copy of the agreement which you signed? A. Yes.

20 Q. Having explained that, do you know what, if anything, was done in pursuance of that agreement with respect to this particular property on the Brinckerhooff Map? A. Nothing was done with respect to the mortgaged premises.

Q. This was signed by owners of various properties? A. Yes.

30 Q. Was anything done with respect to the agreement? A. Eypper & Beckmann made an application for a permit to build an apartment house.

Mr. Richenaker: I object.

By the Master:

40 Q. Did you make an application? A. No, sir. I was present at a hearing of the Board of Adjustant at the request of Peter M. Steenland and when they considered and heard this application of Eypper & Beckmann for an apartment house on Palisade Avenue.

*Jason R. Elliott—Direct.*

By Mr. Vanderwart:

Q. With what result—what was the result of the making of that application as far as the erection of an apartment house on the Brinckerhoff Tract was concerned? 10

Mr. Richenaker: I object.

Master: I sustain the objection.

By Mr. Vanderwart:

Q. Who asked you to attend that hearing, Mr. Elliott? A. Peter Steenland wrote to me some time early in October and asked me to attend a hearing set for some date mentioned in the letter. I went to the place where the hearing was to be held in the City Hall in Englewood, but it wasn't held and was postponed and postponed. On October 6th, 1927, I received this letter from the Steenland Construction Company: "According to the agreement entered into on July 19th, 1927, relating to the permit for which Messrs. Eyyper & Beckman had applied, there will be a meeting at the City Hall of Englewood on October 11th at 8:15, before the Board of Adjustment. We, the Steenland Construction Co., would kindly ask you to be present, if possible." 20 30

Letter from Steenland Construction Company to Romel Realty Co., is received and marked Exhibit D-10 in evidence.

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*Jason R. Elliott—Direct.*

By Mr. Vanderwart:

1 0 Q. Then it was postponed? A. Yes. Finally the hearing was held some time early in March, 1928.

Q. I call upon Mr. Steenland to produce a letter written to him by attorney for the Romel Realty Company on the date of April 23rd, 1928.

Letter from J. R. Elliott to the Steenland Construction Company is received and marked Exhibit D-11 in evidence.

2 0 Q. Mr. Elliott, did you at any time write letters to the complainant, Mortgage & Investment Company of New Jersey, concerning your attitude toward the payment of this mortgage? A. I wrote them a letter after one of the payments would have been due—it was overdue and they demanded why I hadn't paid it.

Letter from J. R. Elliott to Mortgage & Investment Company of New Jersey, dated October 17th, 1927, is received and marked Exhibit D-12 in evidence.

By Mr. Vanderwart:

3 0 Q. Mr. Elliott, did you then receive a letter from Mr. Richenaker? A. A little while afterwards.

Letter from George Richenaker to Romel Realty Company, dated November 25th, 1927, is received and marked Exhibit D-13 in evidence.

By Mr. Vanderwart:

4 0 Q. On this letter I see an annotation. What is that in explanation of? A. May I read the

*Jason R. Elliott—Direct.*

letter. I received it November 25th and on December 14th I mailed them a check for the amount that was requested.

Q. What did you write them when you mailed the check? A. I mailed the check without any comment. 10

Q. Whose check was it? A. Romel Realty Company's.

Q. Will you tell us why you as an officer made that payment?

Richenaker: I object for what reason it was made.

Master: I will permit it. 20

A. Because we knew there was some payment to be made upon the mortgage—didn't assert it was wholly invalid.

By Mr. Vanderwart:

Q. Had the Board of Adjustment acted at that time? A. No, sir.

Q. When did you finally refuse to pay the interest and installments? A. Some time in April or May or thereabouts—I don't know if there was any definite refusal. 30

Q. Did you have any conversations with the complainant about any statement of the mortgage? A. I never saw any of the officers of the complainant.

Q. Did you see their attorney? A. I did after the suit was started. I said I would have to file an answer claiming an abatement on the princi- 40

*Jason R. Elliott—Cross.*

pal price because of the initial misrepresentation, and I did file an answer and counterclaim.

10 Master: When was that suit started?  
Mr. Richenaker: Bill was filed June 6th, 1928.

*Cross Examination by Mr. Richenaker:*

Q. Mr. Elliott, what is your profession? A. lawyer.

Q. How long have you been an attorney? A. An attorney since March, 1907.

20 Q. During the year 1927, especially in June, you were an attorney? A. But I was not practicing.

Q. Were you an attorney? A. Yes.

Q. Were you a counselor? A. Yes.

Master:

Q. When were you a counselor? A. In November, 1911.

30 By Mr. Richenaker:

Q. Who were the three incorporators? A. Mr. Frank Romaglia, Sr., Eric Rausenberger and myself.

Q. Is Mr. Rausenberger still interested in this company? A. No.

Q. When did he get out? A. He was a mere dummy for the purpose of having three. He had two shares of stock which were assigned back.

40

*Jason R. Elliott—Cross.*

Q. Is he still in the corporation? A. No.

Q. When you had this talk in your office, Mr. Rausenberger was an officer of the company?

A. No, he was not. He came during the talk with Holbrook.

10

Q. Was he a director? A. No.

Q. You stated that on 'June 10th' the three directors were present. Who was there? A. Mr. Rausenberger, Mr. Romaglia and I. This conversation with Holbrook was in May, about Monday or Tuesday after the sale—the 16th or 17th of May, and the organization had not then been completed. I hadn't signed the certificate of incorporation.

20

Q. Mr. Rausenberger was not then a member of the corporation? A. No.

Q. And neither were you? A. No.

Q. Then you had no interest in the corporation when that conversation was had? A. There wasn't any corporation.

Q. How did you go to this sale, by what method? A. I think I walked from my home.

Q. You live in Englewood? A. Yes.

Q. How long have you lived there? A. Forty-two or forty-three years.

30

Q. You are familiar with the doings in Englewood, aren't you? A. Some of them.

Q. You take an interest in the City of Englewood I presume? A. Yes.

Q. And you knew there was a zoning ordinance in the City of Englewood? A. Yes.

Q. And you knew to all evidence it was still in effect when you purchased this property? A.

40

*Jason R. Elliott—Cross.*

10 Yes, but I did not know the terms of the zoning ordinance nor what property it affected or what property it restricted. I know it was passed in 1923 but I haven't followed it. I hadn't looked at the zoning map since the first publication of it in 1923. When I went to this sale and saw these advertisements I assumed that what was said at Mr. Peter Steenland's authorization was true. I didn't know the gentlemen as well as I know him now.

Q. At that time that you went to the sale you purchased how many lots of these in question here?

A. Three.

20 Q. And those are Lots—? A. The Exhibit speaks for itself,—1, 2 and 3.

Q. Those lots have a setback, haven't they?

A. Yes.

Q. That was stated at the sale wasn't it? A. No.

Q. You didn't know about that setback? A. No.

Q. Are you sure of it? A. I had seen the map and the setback was on the map.

30 Q. Then you knew about the setback. You heard the terms of sale read? A. Yes.

Q. Before you signed this agreement you read it over very carefully? A. No, I did not. This was presented to me on a pad with this (indicating) side up. Terms of sale had been read and I signed it.

Q. Mr. Elliott, you as an attorney, signed an agreement for the sale of property without reading it over? A. I did.

40 Q. And you didn't listen to the terms of sale

*Jason R. Elliott—Cross.*

when they were read by the auctioneer? A. Yes.

Q. Then you heard the terms of sale? A. Yes.

10

Q. Then you knew all that was in the terms of sale? A. Yes.

Q. And you knew you were taking it subject to the zoning ordinance of the City of Englewood, didn't you? A. I relied upon the auctioneer's representation of what the zoning ordinance was.

Q. After the date of the sale you entered into a contract for Lots 4, 5, 6 and 7? A. Yes.

Q. And this (indicating) is the contract you entered into with the Steenland Construction Company? A. Yes.

20

Q. You drew up this contract? A. I did, I had it done.

Q. At your office? A. Yes.

Q. It was not drawn at the office of the Steenland Construction Company? A. Couldn't be done in both places.

Q. When you took those lots you took those subject to what restrictions? A. "Building restrictions as provided in petition of Steenland Construction Co. to the Mayor and Council of the City of Englewood, dated March 28, 1927, accompanying the map hereinafter mentioned."

30

Q. What you just read off, is that printed part of the contract? A. That is typed in.

Q. Who did the typing? A. The stenographer in the Fidelity.

Q. At your request? A. At Mr. Steenland's request.

40

*Jason R. Elliott—Cross.*

Q. Mr. Elliott, who dictated this contract? A. I did, but put that in at his request.

Q. Who dictated it? A. I did.

10 Q. Then you mean to say you didn't read your contract over before you purchased it? A. I did.

Q. Then you knew you took those lots subject to those restrictions. Did you or did you not? A. No.

20 Q. You did not know what you dictated in a contract to be signed by yourself? A. That is not what was intended. He said "This has to conform with the terms of sale," and the terms of sale recited certain restrictions covered by the petition of the Steenland Construction Company to the Mayor and Council of the City of Englewood and covered by the map annexed to said petition and approved by the Mayor and Council of the City of Englewood in 1927. I learned afterwards that the original restrictions in this petition, as referred to, were restrictions which limit the use to one family houses. This was simply copied from that. I relied upon this

30 thing—this was all that was talked about.

Q. I show you petition dated March 28th, 1927, and ask you whether that was the petition?

A. I don't know, as I never saw the petition.

Q. You never saw the petition? A. No.

Q. And yet you signed an agreement, not at an auction sale, but in a private office, not knowing what you were signing? A. We talked about it—the restrictions were set forth in this memorandum of sale—auctioneer's terms of sale,

40

*Jason R. Elliott—Cross.*

and those are the restrictions we were taking it subject to.

Q. Then you saw Exhibit D-4 at the time of the auction sale? A. Yes.

Q. You saw "Restrictions lifted 5/3/27" printed on it, did you not? A. Yes. 10

Q. You at that time knew there were zoning laws, didn't you, and you know as an attorney that at that time there were restrictions of record? A. There are two kinds of restrictions and that simply says "Restrictions."

Q. You were employed in what office at that time? A. I was manager of the Fidelity Union Title Company. 20

Q. You are very familiar with searches, aren't you? A. Yes.

Q. And you are familiar with what restrictions mean and what zoning ordinances mean? A. Yes.

Q. You are well acquainted in that line? A. I admit it.

Q. And when you have restrictions it means deed restrictions, doesn't it? A. Not only.

Q. Was your attention called also to the Xs down in the corner (indicating)? A. No. 30

Q. All you noticed was the part up above? A. Let me be more accurate. My recollection is that before the sale Steenland told me that they weren't going to use these just as they were; that those restrictions had been lifted; that they had been in their first deed and had been lifted by the former owner and instead of having new maps prepared they were going to have something like that put on. 40

*Jason R. Elliott—Cross.*

Q. Then Mr. Steenland told you the deed restrictions were lifted before the sale and you had a conversation before you went to the sale?

10 A. Yes.

Q. Where? A. In his office a month before. He got me interested in it—that was before May 3rd, 1927.

Q. What was your conversation with Mr. Steenland at that time? A. A lot of it wasn't material at all. I went down to see him about something else. Mr. Rausenberger was with me and Steenland said "You ought to buy. That's going to be wonderful property and you can build apartment houses and make some money." I said "I think I will go to the sale." That's the substance of it.

20 Q. At the time of this sale you as an attorney knew that if you applied to the court that you could get a permit to build an apartment house even though the Council would not grant one?

Mr. Vanderwart: I object to that question.

30 Master: I will admit it in view of the evidence.

A. No, I didn't know it. I was not familiar with the decisions and I understood there had been some conflicting decisions and that in some case in Nutley, I think, it had been granted and there had been a controversy and it was up in the air. I wasn't following this thing in detail.

40

*Jason R. Elliott—Cross.*

By Mr. Richenaker:

Q. You knew that the general opinion around was that the zoning ordinance could be defeated by certiorari to the Supreme Court? A. I knew the Constitutional Amendment had been proposed and was likely to be acted upon favorably but I knew the act wouldn't be decided in a hurry. 10

Q. Then you knew at the time that you were not liable to build an apartment house and you knew about the new law? A. No.

Q. You just stated that you knew there was a new zoning law coming out? A. I knew there was a new Constitutional Amendment proposed. 20

Q. Then you did at this time know it was coming out? A. I have no knowledge of the future, Mr. Richenaker.

Q. Mr. Elliott, when you bought Lots 1, 2 and 3, what kind of an apartment were you going to put up on that? A. I wasn't thinking very much when I bid for Lots 1, 2 and 3.

Q. Then you didn't intend to put it up on the whole? A. We didn't intend to build it ourselves; we expected to sell it to somebody and for that purpose we must have property that was available. 30

Q. When you purchased Lots 1, 2 and 3, what kind of an apartment house were you going to put up? A. I didn't consider that. I didn't consider the setback line and how little frontage would be left to put a house up.

Q. You didn't think at the time you were going to buy it, that you would put up a 35 feet apart- 40

*Jason R. Elliott—Cross.*

ment house? A. I didn't give it due consideration.

10 Q. When Mr. Holbrook came to you with the proposition to buy the four lots in back of you, which would make a nice square, that was a pretty good proposition for you, wasn't it? A. It looked logical.

Q. And it was very clever of you to take it, wasn't it? A. I don't think so.

Q. I don't mean now, I mean at the time you purchased it? A. I thought it was better for me to buy the other even if I paid more than it was worth, rather than to have some other fellow buy it, as they threatened.

20 Q. It would spoil your apartment house? A. Yes.

Q. What was the date that you agreed to take Lots 4, 5, 6 and 7? A. 31st day of May, just 15 days after.

Q. When was the Romel Realty Company formed? A. Certificate of incorporation was filed May 26th.

30 Q. Are you sure it is not May 25th? A. I am not speaking from the record. I haven't the original. It was recorded in the Office of the Clerk of Bergen County on May 25th and filed in the Office of the Secretary of State May 26th.

Q. Before you went over to Englewood on the 14th, you heard Mr. Romaglia state that this corporation was formed for the purpose of buying apartment house sites, wasn't it? The corporation was formed for the purpose of buying

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*Jason R. Elliott—Cross.*

these lots, wasn't it? A. Of taking over these lots, yes. We had bought and were planning the corporation.

Q. But you individually entered into an agreement to take Lots 4, 5, 6 and 7 after the corporation was formed, didn't you? A. No.

10

Q. What was the date that you agreed to take those lots? A. May 31st.

Q. Wasn't it formed on the 25th? A. It wasn't completed.

Q. Couldn't they have taken it over on the 25th? A. I had no authority. No officers were appointed at that time.

Q. If it was for the purpose of the corporation, wouldn't you have seen to it that it was to be taken as the company instead of an individual? A. No.

20

Q. When did you assign these contracts to the Romel Realty Company? A. They were handed over—they hadn't been recorded and we notified the title officer of the Cliffside Title Company and Steenland that title should be taken in the name of the Romel Realty Company.

Q. That was after June 10th, wasn't it? A. I think I notified him before June 10th.

30

Q. How could you, you had no corporation then? A. It was all planned.

Q. When you had it all planned, why didn't you take these last four lots in the name of the Romel Realty Company? A. I hadn't any authority to do it. I wasn't an officer.

Q. You stated you attended the Council meeting at the hearing on this apartment house mat-

40

*Jason R. Elliott—Cross.*

ter? A. Yes, the Board of Adjustment meeting. They only had one meeting.

10 Q. When did the decision come out? A. I can't tell you exact dates on that. It was in the Spring before I wrote this letter (indicating). The Board of Adjustment heard everyone but didn't announce their decision then. They acted under the new law in which they could recommend or fail to recommend an appeal, and the announcement was made in the newspapers.

Q. Wasn't one of the reasons given that they wouldn't do it because of this new law that had come out? A. I don't know the reason.

20 Q. Didn't you read them—they were published in the paper weren't they? A. Not in connection with that announcement of the Board of Adjustment. I simply read of the meeting which the Board had and also a recommendation for an apartment house on Tenafly Road. On the appeal of the Steenland Construction Company they said nothing. That's what I read.

30 Q. When was this deed given to you from the Steenland Construction Company? A. On the date of the acknowledgment of our mortgage which I think was June 23rd.

Q. It was before the first of July? A. Yes.

Q. Were you ever stopped from putting up an apartment house on that property? A. No.

Q. Did you ever attempt to put one up?

Mr. Vanderwart: I object.

Master: I will note the objection.

*Jason R. Elliott—Cross.*

By Mr. Richenaker:

Q. Did you, after receiving this deed, ever attempt to put up an apartment house? A. No.

Q. Then how do you know that you couldn't have put up an apartment house? A. Because there was a zoning against it and I couldn't offer it for sale for an apartment house. I couldn't guaranty that you could put up an apartment house.

10

Q. Did you try to put one up? A. No.

Q. You and I have had quite a few conversations about this interest? A. Yes.

Q. When did I ask you first to pay the interest on this as attorney for the Mortgage & Investment Company? A. I don't think you spoke to me about it before this letter (indicating).

20

Q. I wrote to you about November 25th? A. Yes.

Q. You came down to see me about it? A. I have been there a good many times.

Q. Then you did what toward the payment of the interest? A. On December 14th I sent a check for the first installment of the principal and interest.

30

Q. When was it due? A. September 14th.

Q. Do you remember when I wrote to you last?  
A. No, I don't

Letter from George H. Richenaker to Mr. J. Elliott, dated January 28th, 1928, is received and marked Exhibit C-5 in evidence.

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*Jason R. Elliott—Cross.*

By Mr. Richenaker:

Q. What did you do in response to that? A. I wrote to you and asked for an extension of time.

10 Q. Why did you ask for an extension? A. I was still hopeful that this property might be made available for the building of apartment houses and I didn't want foreclosure suit started.

Q. You also wanted to raise money, didn't you, and you told me that was the reason? A. Yes.

Q. And it was not to have any reduction on the mortgage or anything else, but just because you couldn't raise the money? A. I didn't tell you all of my reasons.

20 Q. But you did tell me certain reasons. And didn't you ask me to intervene and have the payment of interest only and not the principal? A. I think so.

Q. And didn't I say I would try to do it for you? A. Yes.

Q. And succeeded for how long? A. I don't recall.

Q. It was pretty near June 6th? A. Yes.

30 Q. And up to that time you were trying to raise money to pay the interest on the mortgage? A. Yes.

Q. Going back to the time you had a conversation with Mr. Steenland before the sale, you remember telling him about another proposition in Englewood you had made money on?

Mr. Vanderwart: I object.

Master: The objection is sustained.

*William Greenberg—Direct.*

By Mr. Richenaker:

Q. Do you recall the auctioneer on that day?

A. He said he was Jim Day.

Q. The brother of Joseph P. Day? A. He said 10  
so.

Q. Do you know where he is now? A. No, I  
don't. I heard he was dead.

MR. WILLIAM GREENBERG, called as a witness,  
having been duly sworn, testified as follows:

*Direct Examination: By Mr. Vanderwart:* 20

Q. You practice law in Englewood, Mr. Green-  
berg? A. Yes, sir.

Q. Were you at an auction sale upon the Brinck-  
erhoff property? A. Yes.

Q. On May 14th, 1927? A. Yes.

Q. At that time did you see one of the adver-  
tisements of sale there? A. I did.

Q. Do you now who conducted that sale? A.  
A fellow by the name of Day. 30

Q. Did you see Steenland there? A. Both of  
them.

Q. You know them both? A. Yes.

Q. Did you see Mr. Elliott? A. No.

Q. Did you see Mr. Romaglia? A. No, I don't  
know him yet.

Q. What, if anything, did you hear the auction-  
eer say that afternoon concerning the use of this  
property for apartment houses? A. I remained  
at the auction sale fully two hours and I heard 40

*William Greenberg—Cross.*

a man, whose name was Day, state that the property was available at that time for apartment houses.

10 Q. When did he make that statement? A. During the course of the sale. He made it during the course of the two hours that I was there for the purpose of boosting the bid.

Q. You heard that more than once? A. Yes.

Q. Did you hear his opening remarks? A. No, I did not.

Q. Did you buy any lots there? A. Yes, eight.

Q. Did you have any idea that you could use them for apartment houses? A. That was the only purpose we bought them for.

20

*Cross Examination: By Mr. Richenaker:*

Q. You heard the conditions of sale read at the sale, didn't you? A. I don't recall.

Q. This morning there was testimony brought out that on July 19th there was a meeting of the different owners to ascertain whether they could erect apartment houses. Were you approached on this? A. Yes, I was approached.

30 Q. You did not sign this, did you? A. I don't recall, but I think I did—yes, I signed it. I inserted the ink marks there (indicating) and the ink marks there (indicating).

Q. And what did you tell Mr. Steenland about your position on this? A. I was very much delayed because the construction of apartment houses could not be commenced, and I was not interested in floating second mortgages.

40

*Jeanette B. Kerr—Direct.*

Q. You are not sure about it? A. Frankly, I don't remember.

Q. Would you say that the conditions of sale, after being signed by everyone, were not read?

A. I don't recall.

10

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MRS. JEANETTE B. KERR, called as a witness, having been duly sworn, testified as follows:

By Mr. Vanderwart:

Q. Mrs. Kerr, what was your mother's name?

A. Emily A. V. Brinckerhoff.

20

Q. I show you a certified copy of the will of Emily A. V. Brinckerhoff and ask you whether you recognize that as the will of your mother? A. Yes, indeed, I do.

Q. Your mother was the owner of the property and died seized of the property known as the Brinckerhoff Tract, a part of which is pictured on the leaflet here, Exhibit D-4? A. Yes.

Q. Do you recall the time when the executors proposed to give the deed marked Exhibit D-2, conveying this property to the Steenland Construction Company subject to certain restrictions?

30

A. Do I recall it?

Q. Do you remember the executors mentioning it to you? A. Yes, indeed.

Q. At that time this deed shows that the property was sold subject to certain restrictions. How many heirs were there at that time who were interested in it? A. Six.

40

*Jeanette B. Kerr—Direct.*

Q. Your brothers and sisters? A. One brother and five sisters.

10 Q. I show you a certain deed dated May 3rd, 1927, from the Bankers Trust Company and Frederick S. Duncan, as executor, to Steenland Construction Company and ask you whether your consent to the deed was asked at that time?

Mr. Richenaker: I object.

20 Master: Counsel for the defendant desires to offer evidence to show that a deed made by the executors of Emily A. V. Brinckerhoff lifting the restrictions on this property is void for the reason that the executors had no power at the time specified under the provisions of the will to make such a deed, and as a matter of law, it is void and should have been executed if at all, by the heirs. As a matter of law, I will sustain the objection, but I will agree that counsel for the defendant has offered this witness so that in case any rebuttal is offered on the subject it will not be permitted.

30 Deed from Bankers Trust Company, et al, to Steenland Construction Company, dated May 3rd, 1927, is received and marked Exhibit C-4 in evidence.

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*Jason R. Elliott—Recalled, Re-direct.*

IN CHANCERY OF NEW JERSEY

Hackensack, New Jersey,

10

January 4th, 1929.

Met pursuant to adjournment.

JASON R. ELLIOTT, re-called as a witness, having been duly sworn testified as follows:

*Re-Direct Examination: By Mr. Vanderwart:*

Q. I show you Exhibit D-8 and call your attention to the wording in that Exhibit concerning restrictions, and you tell us the circumstances surrounding the insertion of those words in a very brief way. A. This— 20

Mr. Richenaker: I object, your honor.

Master: I will admit it.

A. I drew this contract first—I had it drawn, without any reference to restrictions in it and signed it and sent it to Mr. Steenland of the Steenland Construction Company. Mr. Steenland sent it back to me. I don't recall whether he sent it by Mr. Holbrook in person or sent it by mail, and sent word I think, over the telephone, and said it was subject to the same restrictions as the terms of sale at auction sale. 30

Master: You agreed to that?

A. Yes. 40

*Jason R. Elliott—Recalled, Re-direct.*

By Mr. Vanderwart:

10 Q. I show you Exhibit D-5½, terms of sale, and ask you to point out the words which you took from it and inserted in this contract, D-8. Just give us the paragraph. A. I can't exactly be-  
cause it is two excerpts combined. It isn't a whole paragraph.

20 Q. Tell us what they are? A. In Paragraph Seventh of the terms of sale, after setting forth the restrictions it says: "The premises covered by the deed and covered by a certain petition of the Steenland Construction Company to the Mayor and Council of the City of Englewood, dated Marche 28th, 1927, and covered by the map annexed to said petition and approved by the Common Council of the City of Englewood, April 5th, 1927." In this contract I put "Building restrictions as provided in petition of Steenland Construction Co. to the Mayor and Council of the City of Englewood, dated March 28th, 1927, accompanying the map hereinafter mentioned."

30 Q. That petition described in D-8 is the same reference had in D-5½? A. Yes.

Q. That was your action? A. Yes.

40 Master: What did you understand the building restrictions provided in the petition of the Steenland Construction Company to the City of Englewood were? A. I understood them to be as set forth in these terms of sale in substance. It was not limited to one family dwellings. The only restrictions here (indicating) are as to building lines and cost of construction of the property, as set forth.

*Jason R. Elliott—Recalled, Re-direct.*

Master: What did the City of Englewood have to do with that? A. Those restrictions were set forth in a petition accompanying the map and they have to approve a map before it can be filed.

Master: The only restrictions the City of Englewood could have placed would have been zoning restrictions, wouldn't they? A. Yes, but when they accept a map it has to be accompanied by a petition. I would like to say that I learned afterwards that there were two petitions to the Common Council.

Master: How long afterwards did you learn that? A. Some time after the middle of July or thereabouts and long after we took the deed to it.

Master: After you had this other petition regarding the zoning restrictions or before? A. I don't know what you mean.

By Mr. Vanderwart:

Q. Was it after that or before it? A. Steenland's first petition dated March 28th, 1927, to the Council contained the restrictions that were in the deed from the Bankers Trust Company to Steenland, Exhibit D-2, and that provided that only one family detached dwellings should be erected on the property. He subsequently made another petition to the Council which was dated about May 3rd I think, or April 27th, in which they petitioned the Council to modify the restrictions and the modified restrictions are as set forth in Paragraph Seventh of Exhibit D-5½. The executors had also given an instrument which

*Jason R. Elliott—Recalled, Re-direct.*

10 has been offered in evidence, purporting to modify restrictions; so while I referred incorrectly to the date of the earlier petition, I knew nothing at the time of any two petitions, and the error is in the date of the petition. I didn't mean to bind ourselves by the restrictions concerning single family dwellings.

By Mr. Vanderwart:

Q. The error was in inserting the date? A. That's all.

20 Q. What date did you insert in that? A. March 28th. There is no petition of March 28th at all. The map was offered under the date of March 28th to the Council as in the petition. The restrictions were modified by a petition which was offered subsequently. I knew nothing of this.

30 Q. In your cross-examination you spoke of a visit to Mr. Steenland's office and your knowledge of a map prior to the sale date, May 14th, and you said you visited his office about two weeks, I think, before the sale. I show you a map and ask you if that is a copy of a map you saw at Mr. Steenland's office at that time? A. It is and the only map I saw at his office at that time.

Map is received and marked Exhibit D-14 in evidence.

By Mr. Vanderwart:

40 Q. What did Mr. Steenland say, if anything, concerning the layout of the property at that time, Mr. Elliott, on that occasion of your visit?

*Jason R. Elliott—Recalled, Re-direct.*

A. I saw this map on his desk and we had been talking about the proposed coming sale so I said "Let me have a copy." He said "Oh, no, this is not the new map. This is not to be used. We are putting this out in a different layout and I will send you a copy of that map when I get them. We are having it changed."

10

Q. When did you first see the may which was exhibited at the auction sale—the exhibit with the green marks on it, Exhibit D-4? A. I received one through the mail a few days, possibly nearly a week before the auction sale—within the preceding week, from Joseph P. Day's office.

20

Q. I refer you to meeting in Eypper & Beckmann's office on July 18th, at which you said Mr. Steenland and Mr. Beckmann, I think, and the other gentlemen were present with you. Will you tell us at that time what Mr. Steenland's statements were concerning his knowledge of the zoning restrictions? A. After we all got together he said, "Now, gentlemen, we want to get this straightened out about this building apartment houses up here on this Brinckerhoff Property. I want you to know that I have acted in good faith in this matter. I know it is zoned against apartment houses now but I was informed by members of the Englewood City Council that if an application were made for a permit to put up an apartment house you would get it all right. That's why I represented it as available for apartment houses. All that is necessary is for some of us to get together and

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*Jason R. Elliott—Recalled, Re-cross.*

make an application and we will then get it straightened out and make money on this deal." In substance, those were his exact words.

10 Q. It was the following day I think you said that agreement was executed, Exhibit D-9? A. Yes, after a conversation with all of the people there.

Q. I think you testified before it was without success.

*Re-Cross Examination by Mr. Richenaker:*

20 Q. Mr. Elliott, when you made up this contract, dated May 31st, Exhibit D-8, your attention was called to building restrictions, was it not? A. To the restrictions referred to in the terms of sale, that's all.

Q. Your attention was called that there were building restrictions? A. My attention was called that there were restrictions mentioned at the auction sale.

Q. Your attention was called to the restrictions dated March 28th, 1927, weren't they? A. No.

30 Q. You mean you set forth that date of those restrictions and didn't have any attention called to your mind that there were such restrictions? A. My attention was called to the restrictions set forth in the terms of sale read at the auction sale. I was told it was sold subject to the same restrictions and the date used in here was the date that I used.

40 Q. I show you petition with a map, dated March 28th, and ask you whether that was the petition setting forth those restrictions? A. I do not know. I never saw this instrument.

*Jason R. Elliott—Recalled, Re-cross.*

Q. But you have looked it up since, haven't you? A. Yes.

Q. And you found that on record?

Mr. Vanderwart: I object to that. It doesn't make any difference why he hasn't since that time. 10

Master: I will admit it. In case of fraud it is admissible.

A. As a matter of fact I have never personally examined the record.

Petition dated March 28th, 1927, is received and marked Exhibit C-6 in evidence. 20

Petition dated April 28th, 1927, is received and marked Exhibit C-7 in evidence.

Letter from the City Solicitor of Englewood to the Steenland Construction Company, dated May 4th, 1927, is received and marked Exhibit C-8 in evidence.

By Mr. Richenaker: 30

Q. Then both these petitions, Exhibit C-6 and C-7, were on record before the auction sale and before you signed up the agreement, Exhibit D-8? A. The record speaks for itself.

Q. Do you know whether that is a fact or not?

A. I did not know it at the time.

Q. Do you know whether it is a fact or not?

A. Yes. 40

*Jason R. Elliott—Recalled, Re-cross.*

Q. You did not look up those, either one of those agreements, before signing this contract with that stipulation in it? A. No.

10 Q. It would have been easy enough to get a copy? A. I intended to refer to the restrictions in the terms of sale and use of that date was taken from that.

Q. The restrictions in Exhibit C-7 are the same as the restrictions in the terms of sale, are they not? A. Yes.

20 Q. Then you knew both before you bought at the auction sale and before you signed the contract, Exhibit D-8, what the restrictions were, did you not? A. I knew of the restrictions in C-7 as stated in the terms of sale. The terms of sale was my only knowledge of restrictions. I had no other information other than in the terms of sale.

Q. In the terms of sale it gives it "subject to the following restrictions and restrictive covenants" does it not? A. Yes.

Q. So you knew that, did you not? A. Yes.

30 Q. You knew it was also subject to all zoning laws now existing in the City of Englewood? A. Yes.

Master: Would you have the right to build an apartment house if it were not for the zoning laws of the City of Englewood? A. I doubt it.

By Mr. Richenaker:

40 Q. Have you attempted to build an apartment house? A. No.

*Jason R. Elliott—Recalled, Re-cross.*

Q. Since you have held your land have you started any action either at law or in equity to decide your privileges under the restrictions in the deed given to you by the Steenland Construction Company? A. No.

10

Q. Then you do not know whether you could build an apartment house if there were no zoning laws? A. Categorically, I don't know. I don't believe it, of course.

Q. You referred to a meeting in Mr. Steenland's office before the sale and were shown Exhibit D-14. Do you remember what date that was? A. I can't say exactly but I think it was within two weeks before the sale—about that. I saw work started up on the place and saw a big sign put up.

20

Q. You looked over several other maps while you were there with Mr. Steenland? A. No.

Q. But at that time you mentioned that you had attended a public auction on April 2nd, 1927, at Englewood, and bought some property, didn't you? A. Yes, maybe I did. I don't remember.

Q. At that time you asked Mr. Steenland about some of the stone that was in the walls on the property of this Brinckerhoff Estate? A. Yes.

30

Q. What did you say to him about it? A. I noticed they were tearing down some of the wall and I wanted some stone for a stone wall and asked if I could have some and he said the contractor who was on the job there was disposing of the whole business for him.

Q. After you purchased the property you took some of that stone away, didn't you? A. Some

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*Jason R. Elliott—Recalled, Re-cross.*

of the stone that was on the wall in front of our property, yes.

Q. In other words, you bought some of the property that this stone was on, did you not?

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A. Yes.

Q. In this conversation you also told him about these three lots that you purchased at the auction sale on April 2nd and made a nice profit on it? A. Yes.

Q. Mr. Steenland mentioned the auction sale that he was going to have? A. Yes.

Q. He never said anything at that time that it was not restricted against apartments, did he?

20

Mr. Vanderwart: I object to that. It seems to me it was immaterial what was said at that time concerning apartment houses.

Master: The Castle case (23 U. S.) seems to hold that evidence of this kind is admissible in a fraud case. I will admit it.

30

A. I don't recall anything at that time said about apartments one way or the other.

By Mr. Richenaker:

Q. Then seeing this map had nothing to do in influencing you in purchasing at the auction sale, did it? A. No.

Q. Then you further stated that there was a meeting held to obtain a permit for an apartment house. Where was that meeting held? A.

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*Jason R. Elliott—Recalled, Re-cross.*

Meeting wasn't held regarding the obtaining of a permit.

Q. The meeting I referred to was held at the office of Eypper & Beckmann the day before the date of this agreement which I think is D-9.

10

A. Mr. Steenland asked me to come to the meeting at that office.

Q. Wasn't that meeting called by Mr. Beckmann? A. No, by Steenland.

Q. What did he do, send you a letter or telephone? A. Telephoned to me.

Q. Do you know who called up? A. I think Mr. Peter Steenland.

Q. At that meeting you said that Mr. Peter Steenland said that he was led to believe that if an application were made for a permit to put up an apartment house it would be granted. Are you sure it wasn't Mr. Beckmann? A. I am sure it was Mr. Peter Steenland.

20

Q. And didn't Mr. Beckmann have charge of the meeting? A. I don't think anyone had charge of the meeting—didn't elect any chairman.

Q. And wasn't Mr. Beckman the moving party to try for this permit? A. There was no specific permit talked about at that time. It was the consensus of our opinion that it was advisable for someone to start one. Steenland said we ought to do it and that he believed we could put up an apartment house.

30

Q. Are you sure Mr. Beckmann didn't make that proposition? A. Well, Mr. Beckman may have coincided with it.

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*Jason R. Elliott—Recalled, Re-cross.*

Q. Couldn't it have been that Steenland coincided with Mr. Beckmann's statement? A. That might be.

10 Q. You are not sure? A. Well, everybody talked there.

Q. So you are not positive who made the different statements at that time? A. Oh, yes, some I am very positive about. Mr. Steenland made the statement as to what he had been led to believe by the Council before the sale.

Q. Then you knew at that meeting that it was necessary to get the consent of the Zoning Committee of the City of Englewood? A. Yes.

20 Q. And you knew it before the meeting was called, did you not? A. Yes.

Q. And you knew it from the time of the sale on, did you not? A. Not at the time of the sale.

30 Q. At the time of the sale you had a different view on it? A. I understood from the statements made that you could build an apartment house there the next day if you wanted to. Subsequent to the sale and after this (indicating) contract was made, on about July 14th or July 15th I learned that the property was zoned against apartment houses.

Q. But then you took the deed after you learned about the zoning? A. I took the deed on the date of its acknowledgment which was—I mean I got it when it came back from record.

Q. It was recorded on June 29th, wasn't it? A. I think so.

40 Q. Before June the 29th you didn't know that you had to apply to the City of Englewood for

*Jason R. Elliott—Recalled, Re-cross.*

a permit for any building, especially an apartment house? A. I knew you had to apply for a permit to put up any building.

Q. And even though it stated in the deed which was recorded on June 29th, "Subject to restrictions of record and the zoning ordinance of the City of Englewood" you didn't know that there was any zoning ordinance on any of this property? A. I knew there was a zoning ordinance in the City of Englewood. 10

Q. And you knew it covered this property, did you not? A. Yes.

Q. And you also knew that at that time if a permit was not granted that you could get it by certiorari and obtain it according to the mandamus? A. I knew I could take it up but didn't know whether I could get it or not. 20

Q. You knew the general trend of the cases were supporting applications for those proceedings?

Mr. Vanderwart: I object.

Master: I will sustain the objection on the ground that it has already been answered. 30

By Mr. Richenaker:

Q. You also had this property insured, did you not, by a title company? A. No.

Q. The title policy was given with it, was it not? A. No.

Q. It was given afterwards, was it not, and the agreement was that it was to be given? A. Yes. 40

*Jason R. Elliott—Recalled, Re-cross.*

Q. Did you get such a title policy? A. Yes.

Q. Will you produce it? A. Yes.

10 Q. Who gave the title policy? A. The Cliffside Park Title Guarantee and Trust Company.

Q. This policy had it subject to the restrictions of the zoning ordinance, did it not? A. Yes.

Q. And also to restrictions, covenants and agreements of record affecting the premises in question, does it not? A. Yes.

Q. Then it sets forth the mortgage that you made and the second half of the 1927 taxes, does it not? A. Yes.

20 Guaranty of title is received and marked Exhibit C-9 in evidence.

Master: It bears date June 29th.

By Mr. Richenaker:

Q. When did you receive this policy? A. I think it was some time in August. It was subsequent to our meeting at Eyyper & Beckmann's office.

30 Q. You are well versed in title policies because at that time you were working with a title company? A. Yes.

Q. Up to receiving this deed, D-4½, and the title policy, you never raised any objections about this property to the Steenland Construction Company, did you? A. Not up to the time of receiving the deed but before receiving the policy.

40

*Jason R. Elliott—Recalled, Re-cross.*

Q. When was the fist that you spoke to them about it? A. "Them" meaning whom? (Mr. Richenaker:) Mr. Peter Steenland.

A. In my letter of July 15th which is Exhibit D-7. 10

Q. And you said that the meeting in Beckmann's office was held when? A. July 18h.

Q. And you stated that you didn't know anything about these restrictions until the meeting in Beckmann's office? A. No, I said about July 14th or 15th, the date I wrote that letter.

Q. I show you a letter dated December 3rd, 1927, and ask you who wrote the letter? A. I did. 20

Q. That's the one you sent to Mr. Peter Steenland? A. Yes.

Q. And this pen notation was made by you? A. Before the letter went out.

Letter from Jason R. Elliott to Peter M. Steenland, dated December 3rd, 1927, is received and marked Exhibit C-10 in evidence.

By Mr. Richenaker:

Q. On December 3rd, you didn't believe that Mr. Steenland intentionally mislead purchasers at that auction sale, did you? A. No. 30

Q. And at that time when you wrote this letter (indicating) you represented the Romel Realty Company, were you not? A. Yes.

Q. At the last hearing we mentioned a question of settlement regarding the payment of principal and interest with the Mortgage & Investment Company, and I would like to ask 40

*Jason R. Elliott—Recalled, Re-cross.*

10 you further whether we didn't try to make another arrangement with them to release part of the back lots upon a payment of a sum of money, provided the interest was paid up to that time?

Mr. Vanderwart: I object to the question. It seems to me it has no bearing and any talk of settlement prior to the institution of suit or this hearing was certainly made without prejudice on the part of both parties, and it doesn't seem to me to enter into the case in this suit. That's the reason I object.

20 Master: That is admissible.

A. Yes, but more than interest was wanted—a sum of money to include interest.

By Mr. Richenaker:

Q. What was your proposition at that time?

30 Mr. Vanderwart: I object on the same ground. We are going into all the propositions which were made back and forth.

Master: I think if it is a case where fraud exists by reason of these maps, etc., and yet not being a case of fraud on the contract, the question might then be very material as to why the delay in this case. In the Curtis case payments were made on account of the principal and evidence was admitted as to conversations, as to settlements and so forth, and that was all

40

*Jason R. Elliott—Recalled, Re-cross.*

considered material in the case as to whether or not the defendants were guilty of laches.

A. It was to make a payment of \$5,000.00 to include some principal and interest if the Mortgage & Investment Company would release I think it was the three back lots, 8, 9 and 10.

10

By Mr. Richenaker:

Q. Sure it was Lots 8, 9 and 10? A. I don't recall whether it was 44 feet or all of it.

Q. It was 44 feet and that property was to be sold to whom?

20

Mr. Vanderwart: I object.

Master: I will admit it.

A. To the owner of the adjoining property, Miss Armstrong.

By Mr. Richenaker:

Q. Then at that time if they would do that you agreed to continue on with the mortgage according to the original terms? A. I didn't make any agreement.

30

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*Peter M. Steenland—In Rebuttal, Direct.*

COMPLAINANT'S REBUTTAL EVIDENCE.

PETER M. STEENLAND called as a witness in re-  
 1 0 buttal, having been duly sworn, testified as fol-  
 lows:

*Direct Examination: By Mr. Richenaker:*

Q. Are you connected with the Steenland Con-  
 struction Company? A. Yes, sir.

Q. What office do you hold? A. President.

Q. Do you have charge of the affairs of the  
 Steenland Construction Company and know about  
 2 0 the affairs of the Steenland Construction Com-  
 pany? A. Yes, sir.

Q. And do you have personal knowledge re-  
 garding this Brinckerhoff Estate auction sale?  
 A. Yes, sir.

Q. In fact, you are the one who had personal  
 charge of the same all the way through? A. Yes,  
 sir.

Q. You were present at the auction sale held  
 on the Estate May 14th? A. Yes, sir.

3 0 Q. And before any sales were made by the auc-  
 tioneer, did he read the terms of sale? A. Yes,  
 sir, not the auctioneer but one of his men.

Q. Who was the auctioneer that day? A. James  
 Day.

Q. What relation was he to Joseph P. Day who  
 advertised the sale? A. His brother.

Q. And James Day had the actual charge of  
 the auction on that day? A. Yes.

4 0 Q. He read the terms of sale as set forth in

*Peter M. Steenland—In Rebuttal, Direct.*

D-5½? A. Yes, sir, word for word, because I checked it over myself.

Q. And did you hear him read that all sales were subject to the zoning laws now existing in the City of Englewood? A. Yes, sir, positively, because I checked every item as he went over them. 10

Q. Did the contracts of sale signed by Mr. Elliott and Mr. Romaglia differ in any respect from the terms of sale that he read off before he auctioned them off? A. No.

Q. Did the deed that you gave to the Romel Realty Company differ in any respect from the representations before the sale? A. No. 20

Q. Previous to the sale was there anything said about a title policy? A. It says so in the contract of sale. 20

Q. Who gave that policy? A. The Cliffside Park Title Company.

Q. And previous to the sale did you have the Cliffside Park Title Company search this property for you? A. Yes, sir. They were to give the purchaser a title policy for their purchase. That arrangement I made with Mr. Preston. 30

Q. Did you authorize the auctioneer or any of his agents to make any other representations further than set forth in the terms of the sale and the maps, such as Exhibit D-4?

Mr. Vanderwart: I object. He has already testified that James Day was his agent for the purpose of conducting the sale so it matters little as to any specific instructions he gave him. 40

*Peter M. Steenland—In Rebuttal, Direct.*

10

Mr. Richenaker: At auction sales or in any case of agency, a purchaser is put on his guard for taking into account anything said by the agent other than what is apparent as to his authority.

20

Master: If Steenland agreed to the maps and the agent made statements regarding apartments, wouldn't that be in line with his authority, having the maps in his possession? Reading this "Entire Tract now available for Apartments," you don't mean to say Steenland, having authorized this and approved and passed it out, told his agent that no apartments could be built?

Mr. Richenaker: That's not the case. It would not give them any right to say an apartment could be built on the next day. Any purchaser would know it could not be built on the next day.

Master: How many days would it be?

Mr. Richenaker: Until they could get a permit.

30

Master: Why wouldn't the next day be as good ten or twenty days?

Mr. Richenaker: They would have to get a permit.

Master: I will let you go into it and give the counsel an opportunity to examine along all lines.

Mr. Richenaker: I will withdraw that last question.

40

*Peter M. Steenland—In Rebuttal, Direct.*

By Mr. Richenaker:

Q. You heard Mr. Elliott testify regarding a certain Mr. Holbrook. Was he your agent at the time of the sale or at the procuring of the Contract D-8? A. He acted as an agent in that case and at the sale but he is not our permanent agent—never has been or one that we employ and has a drawing account. 10

Q. And then when he went to get the Contract D-8, he was acting in what capacity? A. He was acting merely as the agent between us at the time and for the person who had bought the property at auction sale.

Q. Which property? A. The four lots,—4, 5, 6 and 7. Mr. Holbrook came to me, he has known me for a number of years, and says "That man made a mistake. Who is that gentleman?" I said "I think that is Mr. Jason Elliott. I know him a little." He said "Who bought the other four lots?" I told him Mr. Boreo. 20

Q. The result was what? A. He made a deal between Mr. Boreo and Mr. Elliott.

Q. Who purchased Lots 4, 5, 6 and 7? A. Mr. John Boreo bought them at the auction sale. 30

Q. Did he get a deed? A. No, because when Mr. Holbrook came along he immediately saw the mistake that Mr. Elliott had made in reference to the three lots because he could never use them. He saw Mr. Boreo and asked him whether he would take a certain amount.

Mr. Vanderwart: I object.

Master: You still had title to the lots? 40

*Peter M. Steenland—In Rebuttal, Direct.*

A. Yes, they were taking their title on or before June 14th and Mr. Holbrook went immediately to Mr. Elliott on a Monday or Tuesday I understand.

10

Master: This contract, D-8, who was that between? A. Between us, the Steenland Construction Company and Mr. Elliott.

Master: At that time did Mr. Elliott say anything to you about the Romel Realty Company? A. Not at the very time.

20

Mr. Vanderwart: At what time?

Mr. Richenaker: At the auction sale and up to the signing of D-8, which was May 31st, 1927.

A. Mr. Elliott told me he was going to form a corporation and try to make some money in real estate.

By Mr. Richenaker:

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Q. Do you remember when he said that? A. The first inkling that I had of Mr. Elliott in reference to purchasing property was the time he came to the office. I have known Mr. Elliott for quiet some time and—

Mr. Vanderwart: I object. The answer is not responsive.

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A. I didn't know Romel Realty Company was in existence until he asked for deed.

*Peter M. Steenland—In Rebuttal, Direct.*

By Mr. Richenaker:

Q. Up to the time of the auction sale until just before giving the deed on or about June 14th, you didn't know, or rather, the Steenland Construction Company, didn't know there was any such a thing in existence as the Romel Realty Company? A. No, did not know it. 10

Q. When D-8, the agreement for sale, was signed, you did not know that the Romel Realty Company was in existence? A. No, didn't know anything about it.

Q. You heard the testimony regarding a meeting in Mr. Beckmann's office on or about July 18th. Who called that meeting? A. This meeting came about this way: Mr. Beckmann came to our office and he said, "Mr. Steenland,— 20

Mr. Vanderwart: I object to what he said. I think the answer should be responsive.

A. Mr. Beckmann asked me to have a meeting at his office and asked me if I would get in touch with some of them. I said I would get in touch with Jason Elliott and he would get in touch with the others up there. 30

By Mr. Richenaker:

Q. When you attended the meeting you heard the testimony that you said the Council of the City of Englewood caused you to believe that if an application were made for a permit to put up 40

*Peter M. Steenland—In Rebuttal, Direct.*

an apartment house it would be granted? A. I had that information. I did say that if I remember correctly.

10 Q. From what source did you obtain that information? A. From the Council—Mr. Greenberg.

Q. Is he one of the Council? A. Yes, Mr. Charles Greenberg.

Q. Previous to the auction sale the title company reported to you what restrictions were against the property?

Mr. Vanderwart: I object.

20 Mr. Richenaker: I will withdraw the question.

By Mr. Richenaker:

Q. You knew what restrictions were against the property? A. Yes.

Q. What restrictions were against this particular property? A. In the original deed which we received on April 27th, 1924, if I am correct,—

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Mr. Vanderwart: I object. It has been gone over.

By Mr. Richenaker:

Q. They were the restrictions set forth in Exhibit D-2? A. Yes.

Q. Under those restrictions could you build an apartment house on this property?

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*Peter M. Steenland—In Rebuttal, Direct.*

Mr. Vanderwart: I object. It is calling for a conclusion.

Mr. Richenaker: I will withdraw the question.

10

By Mr. Richenaker:

Q. Did you afterwards do anything regarding those restrictions set forth in D-2?

Mr. Vanderwart: I object to the word "afterwards." I think we ought to have a date. After the sale do you mean?

Mr. Richenaker: After receiving the deed, D-2, and prior to the sale.

20

A. Yes, sir, I went to the authorities in the City of Englewood to have my map filed. We had to draw a petition and a copy of these restrictions put in, in addition to the set-back which is marked on the map. That's the first petition (indicating).

Q. That's all set forth in Exhibit C-6? A. Yes, sir.

Q. And that was the petition that was filed with the map? A. Yes, sir.

30

Q. After doing that what did you do regarding the restrictions? A. I had everything arranged with the City of Englewood to sell this property according to the map without this being printed on: "Restrictions lifted 5/3/27—Entire tract now available for apartments." That was not on. We had put in red to call attention to it: "Present restrictions expire in

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*Peter M. Steenland—In Rebuttal, Direct.*

1930, making these lots available for apartment houses. Englewood Gardens Apartment now erected on Palisade Avenue, 2 blocks from this property.”

- 10 Q. Then Mr. Day had these maps made? A. Through his agent, McDonald. I went to the Bankers Trust Company to sign this petition, this first one. They had mortgage on it and the City of Englewood demanded that they become a party to this petition. I saw Mr. Michaels and Mr. Riley in regard to it. They called up Mr. Duncan to sign the petition as one of the heirs. It was signed and they asked me if I would consider lifting these restrictions. Mr. Michaels
- 20 asked me so for his particular auction sale. I told him my maps were filed and Mr. Duncan said he could get this through in time for this auction sale, I said “How much would you want to pull this through?” They wanted \$15,000 to have these restrictions removed and we agreed on it. Then I went to Mr. McDonald and asked him if that could be done. Burns and the attorney talked it over and decided that this could
- 30 be put on (indicating) and have this (indicating) x'd so that attention is called to both sides, and I so notified Mr. Preston of the Cliffside Park Title Company and told him about it and asked him if he could arrange that with Mr. Duncan who represented the heirs of the Brinckerhoff Estate. Mr. Duncan and Mr. Preston of the Cliffside Park Title Company arranged matters. Mr. Duncan invited me to come along to the Mayor and Council with the second petition
- 40 which Mr. Reeves drew and I went with them

*Peter M. Steenland—In Rebuttal, Direct.*

and they asked me why I wanted to have this removed and I told them and said we were paying \$15,000 to have them lifted,—restrictions, not zoning. They called my attention that I must put in the contract of sale “Zoning,” and asked me if I would send them a copy of the contract of sale. I said I would do so. And then after I seen Preston and Mr. Duncan had arranged this with the Mayor and Council and I was there one evening with them, I said when I left, “If anybody applies for a permit according to the zoning, you will refuse them,” and they had one of these maps on the wall in the little chamber, it was in the small room.

10

Q. Then what was done? A. The second petition was accepted by the Mayor and Council and placed on record and recorded.

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Q. Where? A. In Hackensack, and also three copies.

Q. What did you obtain from the Bankers Trust Company and Frederick S. Duncan? A. A deed from them removing these restrictions. That deed was Exhibit C-4.

Q. What did you do with the deed regarding the recording thereof? A. I understood the Cliffside Park Title Company recorded this.

30

Q. The \$15,000 was paid to whom? A. To the Bankers Trust Company, who holds the mortgage on this property, and Frederick S. Duncan. I had paid \$15,000 off and it was in addition to the mortgage.

Q. After this was done, what did you do with the advertisements for sale? A. These (indi-

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*Peter M. Steenland—In Rebuttal, Cross.*

eating) were printed. I got a couple of hundred and I sent them to some friends and Mr. Joseph P. Day sent out the rest.

10 Q. (Showing Exhibit D-4) these were the ones exhibited at the auction sale? A. Those were the ones. Only a few went out before the auction sale that were blank.

Q. You testified that John Boreo purchased four lots,—4 to 7, of this property? A. Yes, sir.

Q. Is that a memorandum of sale (indicating) for it? A. Yes, sir.

20 Q. And before conveying it to Jason Elliott according to your agreement, what did you do with John Boreo regarding this agreement? A. We paid to him what he paid for the property and an additional amount for Mr. Holbrook.

Q. What did John Boreo do with his contract? A. Turned it over to us.

Memorandum of sale of Lots 4, 5, 6 and 7, Section 117, for the sum of \$12,000.00, is received and marked Exhibit C-11 in evidence.

*Cross Examination by Mr. Vanderwart:*

30 Q. Mr. Steenland, as an experienced real estate man, would you say it is a fact that this property would be more valuable if available for building apartment houses on it than if it was only available for one family houses? A. Certainly.

Q. Why is that? A. Because they are always paying more money for an apartment house site than for a one family house site.

*Peter M. Steenland—In Rebuttal, Cross.*

Master: How much more? A. Sometimes 100 percent and sometimes more.

By Mr. Vanderwart:

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Q. Because of the greater rent, isn't it? A. Yes, sir.

Q. How long have you owned this tract? A. Since 1924.

Q. You were aware of the fact that you could not build apartment houses upon it? A. Yes, sir,—six years restrictions.

Q. In addition to that you were aware of the fact that you would have to obtain municipal permission before you could build apartment houses? A. Yes, sir.

20

Q. So that the time you came to this auction sale you were aware of the fact that there were two sets of restrictions against it, one contained in a deed made by certain executors to you and the other existing in the ordinances of Englewood City? A. No, sir, one, the zoning ordinance.

Q. Then what did these words mean: "Present restrictions expire in 1930, making these lots available for apartment houses?" A. That means just what it says. The present restrictions, not zoning, had been removed.

30

Q. When you went to this auction and prior to May 3rd, 1927, there were two sets of restrictions against this property? A. Prior to May 3rd, yes.

Q. You knew that? A. Prior to May 3rd, yes.

Q. You then conducted these negotiations with

40

*Peter M. Steenland—In Rebuttal, Cross.*

the executors of the Brinckerhoff Estate. How many of the restrictions did they succeed in lifting? A. Just apartment house restrictions.

10 Q. Insofar as you were concerned? A. As far as the Brinckerhoff Estate was concerned.

Q. And it still left them subject to such restrictions as Englewood had? A. Zoning.

Q. First coming to the restrictions attempted to be lifted on the Brinckerhoff Estate, you left that pretty much to your attorneys, didn't you? A. I went there myself to the Mayor and Council.

20 Q. I spoke of the executors of the Brinckerhoff Estate and your dealing with them? A. I went there myself.

Q. Didn't you say that you left it up to the attorneys of the Bankers Trust Company and the Cliffside Park Title Company as to the lifting of these restrictions? A. I did not say that. I said I went to the Mayor and Council with Mr. Duncan.

Q. Did you have any correspondence with Mrs. Clarence Kerr? A. No, sir.

30 Q. You did, did you not? A. No.

Q. Didn't you know as a matter of fact at that time that Mrs. Clarence Kerr as one of the heirs of the Brinckerhoff Estate objected to the lifting of these restrictions in the manner you carried it out? A. No, I did not know that.

Q. Who were your attorneys in this matter? A. I acted for that myself.

40 Q. Concerning the lifting of one-half of these restrictions, that is, the heirs' restrictions, who acted for you? A. I acted for myself most of

*Peter M. Steenland—In Rebuttal, Cross.*

the time except the drawing of the papers which was done by Preston of the Cliffside Company.

Q. Did you know then, acting for yourself, that the executors only had power to convey this property for a period of five years after the date of Mrs. Brinckerhoff's death? A. I did not know it.

10

Master: What clause is that in the will?

Mr. Vanderwart: In the Fifteenth paragraph of her will marked in evidence D-1.

By Mr. Vanderwart:

Q. Did you know that?

20

Mr. Richenaker: I object, your honor, to any testimony regarding the legality of anything on record.

Master: I will allow it.

A. I did not know anything about it that Mrs. Kerr had any objections whatsoever, much less did I know about the will.

30

By Mr. Vanderwart:

Q. Didn't your attorney tell you anything about it and didn't the Bankers Trust Company tell you anything about it? A. No, sir. I received a letter from Mrs. Kerr, registered letter, on May 14th, just about maybe a few minutes before the auction sale, and I spoke to Mr. Preston, who came later to the sale.

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*Peter M. Steenland—In Rebuttal, Cross.*

Counsel for defendant calls upon the complainant for a letter dated May 12th, 1927, written by Janet B. Kerr to the Steenland Construction Company.

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Counsel for complainant states he hasn't such letter but will admit the copy.

Letter dated May 12th, 1927, from Janet B. Kerr to Steenland Construction Company is received and marked Exhibit D-15 in evidence.

By Mr. Vanderwart:

20 Q. After you received this letter you took it to your attorney? A. I took it to Mr. Preston.

Q. Was he acting as your attorney? A. Because he guaranteed the title.

Q. You took it to Mr. Preston? A. Yes.

Q. You got this before the sale, did you not?  
A. No, sir. In fact, I got it a few minutes before the sale. I wasn't home then at that time, at the time of the sale at least.

30 Q. You were aware when the sale began that one of the heirs of the Estate of Emily A. V. Brinckerhoff had objections to the lifting of these restrictions?

Mr. Richenaker: I object as it is immaterial, irrelevant and has no bearing on this case.

By Mr. Vanderwart:

Q. You knew that? A. I knew it—just about.

Q. You knew it before any lots had been sold?

40 A. May have been sold, I don't know.

*Peter M. Steenland—In Rebuttal, Cross.*

Q. Did you receive the letter at the auction sale? A. It was handed to me at the sale or at the house.

Q. Which was it? A. I am not sure.

Q. Do you want to say it was not handed to you at your office? A. I got it either at the auction sale or at my office but I know it was no time to inquire in any way.

Q. Coming to the sale itself, you had knowledge at the time of this sale that the property was zoned by Englewood against apartment houses? A. Yes, sir.

Q. Why didn't you put that in the contract? A. We did.

Q. Does it say that it is zoned against apartment houses?

Mr. Richenaker: I object. The contract speaks for itself and the terms of sale.

By Mr. Vanderwart:

Q. You knew that much, that it was zoned against apartment houses and you also knew at that time that one of the heirs was objecting to the lifting of these apartment restrictions. Jos. P. Day, you say was your agent? A. Yes, sir, he was the auctioneer.

Q. Why did you permit him to tell the public there at that time that you could build apartment houses on this property tomorrow if you wanted to? A. If you got a permit, and I believe you could.

*Peter M. Steenland—In Rebuttal, Cross.*

Q. Did you permit him to say that? A. I didn't say anything to him.

Q. You heard him talk there. You have conducted a number of auction sales before? A. This is the first one. I had some houses once before, years ago.

Q. And you were present, as Mr. Elliott and the rest have testified, at this sale from the very beginning and you heard him say that you could build apartment houses there tomorrow if you wanted to? A. I do not remember.

Q. Would you say he didn't say it? A. I wouldn't say it.

Q. You have heard these gentlemen testify as to what he said. When he made those remarks did you make any attempt to intervene? A. Because I believed if they applied for a permit they would have got one.

Q. That's your best answer? A. That's my best answer.

Q. Had you at that time had any experience with permits? A. Not in the City of Englewood except for homes.

Q. Have you conducted any mandamus litigation before the Supreme Court of this state for apartment house permits? A. No.

Q. You allowed him then to make these statements concerning apartment houses because you thought that a purchaser could get a permit? A. I believe he could.

Q. You didn't hear him say anything to anybody about the fact that the ordinances of Englewood did not permit apartment house construc-

*Peter M. Steenland—In Rebuttal, Cross.*

tion, did you? A. I did not hear him say there were. I remember that the contract of sale was read and it was subject to zoning and I checked every item when they were read.

Q. This advertisement is particularly designed, is it not, in its wording to convey the idea that apartment houses can be constructed here? A. This particular green writing on there was put on to call attention to the fact that the restrictions against apartments were removed and that is why the x's were put on about apartment houses. This piece of property had restrictions on there for years and practically everybody knew it.

Q. If there had not been anything in this contract of sale concerning zoning restrictions, is it not a fact that a purchaser would certainly think that the property was available for apartments?

Mr. Richenaker: I object.

Master: I will sustain the objection.

By Mr. Vanderwart:

Q. Mr. Day, the auctioneer, was very anxious and communicated that to you, did he not, before the sale, the this property must be available for apartment houses? A. Mr. James Day I only met at the auction sale—never met him before.

Q. Did you talk with Mr. Joseph P. Day before the auction sale? A. I spoke with Mr. McDonald and Burns, men in his office.

Q. And they advised it must be available for apartments, if possible? A. Their suggestion

*Peter M. Steenland—In Rebuttal, Cross.*

was that it should be put on—took it up with their attorney.

10 Q. They were anxious to sell if free and clear of apartment house restrictions? A. They were anxious to sell it with the restrictions removed, but not the zoning restrictions.

Q. Were they not anxious to sell it so that people could build apartment houses there? A. They were.

Q. Were you not anxious to do that very thing? A. Yes.

Q. Is that the reason you paid the \$15,000? A. Yes, sir.

20 Q. Mr. Holbrook had worked for you before, hadn't he? A. Never employed by us. He was employed simply as any other man and says, "Mr. Steenland, I think I can get you a mortgage. Have you any applications?" That's the way he was employed this time—never drew a salary.

Q. But he got a commission for this sale? A. Yes, for the four lots, I suppose he did.

30 Q. You paid it to him, didn't you? A. Yes. He suggested that he would go around and see Mr. Elliott and asked me who Mr. Elliott was.

Q. And you were at that time the owner of the lots? A. We contracted with a man by the name of Boreo for the four lots so that is the way Holbrook came to go to Elliott. He first went to Mr. Boreo if I remember correctly.

Q. And you executed this contract of sale for the four lots? A. Yes.

Q. And Mr. Holbrook negotiated the sale? A. Yes, he did.

*Peter M. Steenland—In Rebuttal, Cross.*

Q. So that to that extent he was your agent?

A. Yes.

Q. You were sorry, of course, after this transaction had occurred, that these people couldn't build apartment houses there? A. I did not know they could not build any. 10

Q. You knew it when they came to the meeting at Beckmann's office that apartment houses could not be built there? A. I did not know it.

Q. Isn't it a fact that a number of other people had complained about the fact? A. That's not a fact.

Q. When did Mr. Richards start his law suit?

A. He refused to pay on the 14th of June of the same year because he didn't have the money and he told me so. 20

Q. When did he start his law suit? A. I don't know exactly, maybe a month or so after.

Q. And who else started litigation? A. Mr. Morris Peterson I think in August or September.

Q. And Mr. Eisenstein? A. Yes.

Q. Mr. Beckmann never started a law suit? A. No.

Q. You gave his deed back to him? A. Made a settlement. 30

Q. You also settled with Richards? A. Yes.

Q. And you also settled with Eisenstein? A. Yes.

Q. And their dissatisfaction was all based upon the fact that they could not build apartment houses? A. I beg to differ, no sir.

Q. When you say you did not know at the time of the meeting in Beckmann's office that apart- 40

*Peter M. Steenland—In Rebuttal, Cross.*

ment houses could not be constructed, you mean do you not, that no one had made an application to the Council? A. I mean that I didn't know that they couldn't get a permit. That's what I  
10 said.

Q. What was the purpose of the meeting then in the office? A. Mr. Beckmann came to me at the Palisade Park office and said "Mr. Steenland, unless we get busy on our purchase over on the Brinckerhoff Estate in Englewood, we are not going to get our permits to build apartment houses." "Why?" "Because they are going to pass a law so that we won't be able to get any permit in the City of Englewood." I said "That's  
20 new to me." He said "Would you care to have a meeting of the ones you sold this property to?" I had no objection. As I knew the purchasers he wanted me to get them together.

Q. When you came together at the meeting, didn't you know that these various persons said they made their purchases with the idea of erecting apartment houses? A. No.

Q. You were willing to go along and make this application? A. No, sir, I did not make the application.  
30

Q. You were willing? A. I was willing to help them along.

Q. You signed this memorandum of agreement as property owner? A. Yes, my own property, sure. They wanted me to.

Q. Were you present when it was presented to the Mayor and Council? I mean the petition for an apartment house. A. Yes—no, I was not at  
40

*Peter M. Steenland—In Rebuttal, Cross.*

the Mayor and Council. I was to the zoning Commission's Office in March, almost eight months afterwards.

Q. You were aware of the necessity that application had to be made to an Adjustment Commission? A. I only knew it through Mr. Beckmann. 10

Q. You knew it May 14th, did you not? A. No, sir.

Q. Hadn't you inspected the zoning ordinance? A. I inspected it the very night I asked them to remove these restrictions and asked them if the petition was agreeable and if they would accept it.

Q. You did examine it that night? A. I saw the paper on the wall. 20

Q. You knew there was an Adjustment Commission then? A. They told me there was one. They told me at that Council meeting I could only sell it subject to zoning. They wanted a copy of the contract before the sale and I said I would see that they got it so that if there were any objections it could be corrected.

Q. All that was before the sale? A. The conversation was at that Council meeting when we were getting the heir's restrictions lifted. 30

Q. Did they give you any indication that night from what they said that lead you to believe that you could put an apartment house up? A. Yes, sir, I was lead to believe by the Council right there because I wanted their attention to it. They said that there was an apartment house now in the course of construction opposite.

Q. I suppose you told them that this property 40

*Peter M. Steenland—In Rebuttal, Cross.*

was going to be sold and you would like to have it available for apartments? A. I told them that the restrictions would be lifted and we would put that on.

10 Q. When speaking about the zoning ordinance you said that they led you to believe that the zoning could be lifted? A. Yes.

Q. But that wasn't the Adjustment Commission? A. No, sir.

Q. They also told you at that time of the Adjustment Commission? A. They did.

Q. You knew there was an Adjustment Commission? A. Yes.

20 Q. You knew of the necessity of an application, not to those gentlemen but to the Adjustment Commission? A. I found that out afterwards.

Q. As a matter of fact, isn't that the reason, because of what these gentlemen said to you that night, why you did not jump up in your seat and stop Mr. Day when he said "You can build apartment houses here tomorrow if you want to." A. The reason I got from the Council, right.

30 Q. In other words, from what Mr. James Day said that day you would understand that apartment houses could be built there tomorrow, thinking that they could get those permits which you knew they had to apply for? A. I knew it had to be subject to zoning because they particularly asked me about that and Mr. Reeves asked me to be sure and send him a copy of it and if there is any mistake in it he was allowed to correct it because the second petition was with that positive understanding. They knew I was paying \$15,000.

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*Peter M. Steenland—In Rebuttal, Re-direct.*

I told them so and Mr. Reeves particularly called my attention that I must put in "Subject to Zoning," and we put it in.

Q. Did you read this petition carefully that you presented that night? A. Mr. Reeves drew that petition. 10

Q. You read it carefully? A. Not carefully—I went over it.

Q. Mr. Reeves represented the City of Englewood? A. Yes.

Q. Do you recall this clause that night "It is understood and agreed that nothing herein contained shall in any way constitute a waiver by the City of Englewood of any of the provisions of any present or future zoning ordinances." A. I believe so. 20

*Re-Direct Examination by Mr. Richenaker:*

Q. Did you ever have any intention of building apartments on these lots?

Mr. Vanderwart: I object.

Master: I will allow it. 30

By Mr. Richenaker:

Q. Were you ever going to build on these lots?

A. No, I was not going to build.

Q. You were about to state why Mr. Eisenstein, Mr. Richards and Mr. Peterson gave up their lots. Did they give these lots up and return them to you because they bought them for apartment houses and couldn't use them for such? A. No, sir, they did not. 40

*Peter M. Steenland—In Rebuttal, Re-direct.*

Q. When Mr. Richards gave his up, did he take a financial loss for giving up his contract?

A. He certainly did.

10 Q. You said that at this meeting the statement was brought out that there were to be new laws. When were the votes taken on that new zoning ordinance?

Mr. Vanderwart: I object.

Master: I will admit that.

A. In November.

20 Mr. Vanderwart: We will agree it was September 20th.

By Mr. Richenaker:

Q. And they were referring to the Constitutional Amendment which they knew was coming out, and they didn't know which way it was going to turn? A. Correct.

30 Q. Did the Committee give you an answer directly as soon as you applied for this? A. Mr. Beckmann applied. Not until March.

Q. March of what year? A. 1928.

Q. Regarding this letter from Mrs. Kerr, what was the date that you received it? A. The day of the auction sale, the 14th

40 Q. And at that time you didn't think very much about it or up to the present time? A. Because she had nothing to do with the first deed—was not consulted. Mr. Duncan and Mr. Michaels gave me the deed and they are the ones who signed the

*Peter M. Steenland—In Rebuttal, Re-cross.*

second deed, and when I told him (Mr. Michaels) he said "Don't pay any attention to it."

Q. And you still think so at the present time?

A. Still think so.

Q. You had Mr. Preston of the Cliffside Title Company take care of the legal end of this? A. Because he was guarantying the title.

10

*Re-Cross Examination: By Mr. Vanderwart:*

Q. Then you were represented by an attorney?

A. So far as the drawing of the papers.

Q. You showed this letter to Mr. Michaels when? A. A week after or ten days.

Q. You showed it to Preston the day you got it? A. At the auction sale. It was after Mr. Preston talked with him.

20

Q. If you got it before it wouldn't have made any difference in your attitude? A. It would have made a difference.

Q. Woud you have called the sale off? A. No doubt we would have, yes, sir.

Q. Didn't you say you didn't think much of it? A. No, we didn't.

Q. Why would you have called the sale off? A. We would have investigated it. I would have asked them to look it up.

30

Q. If you got it five minutes before the sale would you have held the sale up? A. Couldn't. She had nothing to do with it in the beginning. I got a deed signed by Mr. Michaels and Mr. Duncan who signed the first deed.

Q. And there is no difference between the two deeds except the will, is there? A. No.

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*L. Stanley Ford—In Rebuttal, Cross.*

L. STANLEY FORD called as a witness in rebuttal, having been duly sworn, testified as follows:

10 *Direct Examination: By Mr. Richenaker:*

Q. You were present at the auction sale? A. I was.

Q. Where did you sit during the auction sale?

A. In front of the auctioneer, a little bit to his right.

Q. Did you hear the auctioneer read the terms of sale? A. I did.

20 Q. Did he read everything as set forth in D-6? A. I heard him read from a sheet of white paper,—it was a copy of the sale when he turned it over. I could see this side (indicating).

Q. Do you know whether he mentioned at that time that it was subject to zoning—the zoning ordinance? A. Yes.

*Cross Examination by Mr. Vanderwart:*

30 Q. You heard him say you could build apartment houses there tomorrow? A. I heard the other gentlemen testify he did. I know that he read the terms of sale,—that's our terms of sale (indicating). He read from a sheet which I presume was a copy like this (indicating). I was close enough. I was not any further from the auctioneer than from here just out to the hall,—I could see the sheet. After he had read the terms of sale he made some general remarks which were

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*L. Stanley Ford—In Rebuttal, Cross.*

Q. You know these other things very distinctly?  
A. I know he read from this sheet.

Q. What do you mean by general sales talk?  
A. He spoke about the desirability of its location in Englewood and so on and so forth, like I have heard many a real estate man ramble on.

10

Q. Did he talk quite a while? A. He did.

Q. He talked about the apartment house right across the street? A. He did.

Q. You do recall then? A. Yes.

Q. And he talked about the availability of this property for apartment houses? A. He may have.

Q. You say he did? A. I don't recall, he may have.

20

Q. You didn't get from his talk at all the idea you couldn't build apartment houses there until you had made an application for a permit? A. No.

Q. You didn't get that idea? A. No.

Q. You got the impression which the other gentlemen have given voice to, namely, you could build apartment houses there tomorrow? A. I didn't get that impression because I knew more about it when I went there and I was laboring under a different idea possibly.

30

Q. Are you related to Mr. Steenland? A. I am Peter Steenland's son-in-law.

Q. What were you doing at the sale? A. I was employed by Mr. Peter Steenland as a real estate agent in his office and had something to do with the details of the sale and was there at his request.

40

*L. Stanley Ford—In Rebuttal, Re-direct.*

Q. You acted as an agent? A. Yes.

Q. You spoke of the details of the sale? A. I was there as an interested party because I was connected with his company.

10 Q. You could have had something to do with the drafting of this sheet? A. No.

Q. You sure you didn't put in these words about zoning in the City of Englewood? A. I am sure I had nothing to do with the drafting of this.

Q. Who did? A. I do not know.

Q. You didn't tell anybody to put in any of these terms of sale? A. I was not consulted.

20 Q. You spoke about the details of the sale? A. I was talking about physical labor in connection with the sale,—chairs, tables, etc.

*Re-Direct Examination: By Mr. Richenaker:*

Q. During the sale did the auctioneer mention anything about the new bridge across the Hudson? A. He dwelt on that and showed some picture, if I recall.

30 Q. He stressed that point a great deal more than about the apartment houses? A. I wouldn't say that but I know he stressed it.

Q. He didn't stress the apartment house any more than the bridge or the street they are located on, or that they had sewer and water and electric and City improvements? A. As I have testified, he made a general sales talk and gave all the reasons why a person should buy that property.

40

*L. Stanley Ford—In Rebuttal, Re-cross.**Re-Cross Examination by Mr. Vanderwart:*

Q. One of the reasons was that you could build immediately? A. Whether he said that you could build tomorrow, I don't know. 10

Q. He advanced that as one of the reasons for buying the property? A. He advanced it as it was an apartment site.

Q. Didn't he say that up to May 3rd, it was restricted against apartments? A. I am not sure.

Q. And didn't he say "And now it is available for apartment houses, gentlemen." A. He made certain references to restrictions.

Q. He conveyed the impression to you that these restrictions against apartment houses had all been lifted and the property was now available for apartments? A. He spoke about apartments,—not much about that. 20

Q. And he said it was now available? A. I don't know that he did say that.

30

40

**Exhibit C-4.***(Abridgement)*

## THIS INDENTURE

10 made the 3rd day of May in the year of Our  
Lord One Thousand Nine Hundred and twenty-  
seven.

BETWEEN, BANKERS TRUST COMPANY, a corpora-  
tion of the State of New York and FREDERICK S.  
DUNCAN, as Executors of the Last Will and  
Testament of Emily A. V. Brinckerhoff, de-  
ceased, parties of the first part, Grantors

20 and

STEENLAND CONSTRUCTION COMPANY, a corpora-  
tion of the State of New Jersey, party of the  
second part, Grantee.

30 WITNESSETH, That the said parties of the first  
part, for and in consideration of the sum of  
Fifteen Thousand (\$15,000.00) Dollars, secured  
by a certain bond and mortgage recorded in  
book 667, of Mortgages page 258 &c. for Bergen  
County, New Jersey in the amount of Forty  
Thousand (\$40,000.00) Dollars, the principal  
sum of which has been reduced to Twenty-five  
Thousand (\$25,000.00) Dollars and which sum is  
hereby increased to Forty Thousand (\$40,000.00)  
Dollars, this deed being the consideration there-  
for; and the said parties of the first part being  
fully satisfied and contented hereby remise, re-

40

*Exhibit C-4.*

lease and forever quit-claim and by these presents do remise, release forever quit-claim unto the party of the second part and to its successors and assigns forever.

10

All that lot, tract or parcel of land and premises situate, lying and being in the City of Englewood, County of Bergen, State of New Jersey, being four tracts with three exceptions, and being the same premises conveyed by the party of the first part to the party of the second part by deed dated April 20th, 1924, recorded in Book 1264 of deeds for Bergen County, page 511, &c.

The habendum clause being the usual habendum clause of a quit claim deed, subject however to the following restrictions:

20

No building shall be erected on any portion of the premises covered by the petition of the Steenland Construction Company to the Mayor and Common Council of the City of Englewood, dated March 28th, 1927, and covered by the map annexed to said petition and approved by the Common Council of the City of Englewood, April 5th, 1927, nearer the building line of Palisade Avenue than 50 feet, nearer the building lines of Lydecker Street or Brayton Street than 40 feet or nearer the building lines of any street that may hereafter be laid out in said property than 25 feet; and no building shall be erected on any part of said premises the construction cost of which to the builder (exclusive of cost of land and overhead) shall be less than Fifteen Thousand (\$15,000.00) Dollars, which sum may include cost of garage or incidental outbuildings in a sum not in excess of One Thousand Dollars (\$1000.00); except on

30

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*Exhibit C-4.*

10 that portion of said premises immediately facing on Palisade Avenue, such minimum cost of such buildings may be Twelve Thousand Dollars (\$12,000.00). No building shall be erected on a plot of less than three lots in that portion of the property designated on the above mentioned map as lots 1 to 19 inclusive in Block 117, and on the remaining portion of the property covered by said map no building shall be erected on a plot of less than 4 lots as designated on said map; and no transfer of any portion of the property constituting lots 1 to 19 inclusive of block 117 as shown on said map shall be made that will result in any owner holding a plot of less than three of said lots 1 to 19 inclusive block 117 contiguous to each other; and no transfer of any portion of the remaining portions of the property shown on said map shall be made that will result in any owner holding a plot of less than 4 of said lots contiguous to each other. It is expressly agreed that the release of any portion of the premises herein conveyed from the lien of any mortgage thereon will not affect the foregoing covenants and restrictions as to character and location of buildings to be erected on said premises.

30 The above covenants and conditions are to run with the land and are to be binding upon the parties hereto, their successors and assigns.

Subject to a first mortgage recorded in book 667, page 258, &c. of Mortgages for Bergen County, New Jersey, which the party of the second part assumes and agrees to pay according to the terms therein set forth.

It is the intention of the parties hereto to modify certain restrictions recited in deed dated

40

*Exhibit C-4.*

April 28th, 1924 and recorded in the Clerk's Office of the County of Bergen on the second day of May, 1924, in book 1264, page 511, &c.

IN WITNESS WHEREOF, the said parties of the first part have respectively caused its Corporate Seal to be hereto affixed and attested by its Trust Officer and these presents to be signed by its Vice-President and has hereunto set his hand and seal the day and year first above written.

BANKERS TRUST COMPANY,  
By: R. G. PAGE,  
Vice-President.

(SEAL)

FREDERICK S. DUNCAN (L.S.)  
Joint Executors of the Estate of  
Emily A. V. Brinckerhoff, Deceased.

Attest:

P. E. GODRIDGE,  
Trust Officer.

Steenland Construction Company grantee hereby accept the foregoing deed on the terms and conditions and subject to the covenants and restrictions herein set forth subject to the mortgage above recited; and hereby covenants and agrees as above set forth with the grantors and acknowledges that the principal sum remaining due under as secured by said mortgage is

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*Exhibit C-5.*

Forty Thousand (\$40,000.00) Dollars with interest from April 28th, 1927.

10 (SEAL) STEENLAND CONSTRUCTION COMPANY,

By: PETER M. STEENLAND,  
President.

Attest:

WILLIAM F. SCHUBERT,  
Secretary.

20 Duly proved and acknowledged, and recorded in the Bergen County Clerk's Office, May 14, 1927, in Book 1495 of Deeds, pages 101, etc.

---

**Exhibit C-5.**

Letterhead of

30 GEORGE H. RICKENAKER  
*Counsellor at Law,*  
144 Main Street, Hackensack, N. J.

January 28th, 1928.

Mr. J. Elliott,  
Hackensack, N. J.

Dear Sir:

40 I have just received word from the Mortgage & Investment Company that on December 14th

*Exhibit C-6.*

last there was due the sum of \$1016.75 for principal on your mortgage and \$289.77 interest making a total of \$1306.52.

Will you kindly send me a check for the same at once, and oblige.

10

Yours truly,

GEORGE RICHENAKER.

H—

---

**Exhibit C-6.**

20

(Abridgement)

PETITION of Steenland Construction Co. and the Executors of Emily A. V. Brinckerhoff, Dec'd to the Mayor and Common Council of the City of Englewood, dated March 28, 1927.

Pursuant to statute recited, petitions the Council to approve map annexed to the petition entitled "Subdivision of Brinckerhoff Estate, City of Englewood, Bergen County, New Jersey, Property of the Steenland Construction Company".

30

Steenland Construction Company covenants with the City of Englewood that none of the lots of land as designated on said map shall after the filing of the petition be subdivided otherwise than as shown on the map and that no building shall hereafter be erected nearer to the line or side of any of the streets avenues or roads indicated

40

*Exhibit C-7.*

on said map than the building line drawn and shown on said map.

“Restrictions April 28th, 1924”

10 Here follow restrictions identical with those contained in the deed from the executors of Emily A. V. Brinckerhoff to Steenland Construction Co., dated April 28th, 1924. (Exhibit D-2.), including limitation to use for single-family dwellings; to which is added:

“It is also understood that no buildings is to be erected on less than sixty foot frontage.”

20 Duly executed, acknowledged and proved by petitioners.

Resolution of approval by Common Council, approved by the Mayor, attached, and the whole recorded in the Bergen County Clerk's Office April 27, 1927.

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**Exhibit C-7.**

(Abridgement)

30

PETITION OF STEENLAND CONSTRUCTION Co. and the Executors of Emily A. V. Brinckerhoff, Dec'd, to the MAYOR & COUNCIL of THE CITY OF ENGLEWOOD, dated April 28th, 1927.

RECITES prior petition to the Mayor & Council (Exhibit C-6) and the restrictions contained therein, and the approval of said former petition.

40

*Exhibit C-7.*

Further recites that the petitioners desire the modification of the restrictions quoted from the original petition, "So that the said restrictions on said property shall remain in all particulars as set forth in the original petition of March 28th, 1927, so as to read as follows:"

10

(Here follow restrictions identical with those set forth in the quit-claim deed from the Executors to Steenland Construction Co., dated May 3rd, 1927,—Exhibit C-4), to which is added:

"It is understood and agreed that nothing herein contained shall in any way constitute a waiver by the City of Englewood of any of the provisions of any present or future zoning ordinances."

20

Consent of the executors of Emily A. V. Brinckerhoff, as mortgagees, is recited.

"This petition and the covenants herein contained shall be binding on the owner or owners and the mortgagee or mortgagees of the lots herein described, its or their successors and assigns, and shall be for the benefit of future owners of the several lots shown on said map."

30

Duly executed, acknowledged and proved by the petitioners.

Resolution of approval by the Common Council, approved by the Mayor, attached, and the whole recorded in the Bergen County Clerk's Office, May 6th, 1927.

40

**Exhibit C-10.**

Letterhead of

10 JASON R. ELLIOTT,  
Counsellor at Law,  
191 Main Street, Hackensack, N. J.

December 3, 1927.

Mr. Peter M. Steenland, President,  
Steenland Construction Co.,  
Palisades Park, N. J.

RE: *Romel Realty Company.*

20 My dear Mr. Steenland:

I did not intend to let your letters of November 9th and 25th go entirely without acknowledgement. I tried one or twice to get in communication with you by telephone, but you were said to be out when I called, and apparently you were not informed of my call.

30 I cannot agreed with all that you say in your letter of November 9th. I have previously stated the position that I think Romel Realty Company should take in the matter. I do not believe that you intentionally misled purchasers at the auction sale, but I do feel that the conditions that have developed are not such as purchasers were led to believe, by endorsements on the map and the statements of the auctioneer. Whether these representations were waived by the execution of the contracts subsequently

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*Exhibit D-1.*

executed is a question upon which we may disagree.

However, I am sure this situation can be amicably adjusted; but I would prefer to defer making any further payments of any nature in connection with the matter until we have another personal conference.

10

Yours very truly,

J. R. ELLIOTT.

JRE:LHB

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**Exhibit D-1.**

20

Certified Copy of the Will of  
Emily A. V. Brinckerhoff.

*(Abridgement)*

(Part of 14th clause)

“All the residue of my estate, of whatsoever kind and wheresoever situated, including any of the foregoing legacies which may have lapsed or for any reason failed to be effective and including any remainders and reversions not otherwise herein disposed of I give equally per stirpes to my daughters who shall survive me and the issue of any daughter or daughters of mine who shall not survive me.”

30

40

*Exhibit D-2.*

(Part of 15th clause)

10 "I authorize and empower my executors at any time during a period of five years from my death to partition, sell, mortgage, lease, convey and generally to deal with real estate (except the Brayton Street Cottage and lot) of which I may die seized or in which I may have an interest, on such terms and at such times and in such manner as they in their discretion may deem best."

20 Will and codicils proved before the Surrogate of Bergen County November 4th, 1921 and Letters Testamentary were issued to the Bankers Trust Company and Frederick S. Duncan.

**Exhibit D-2.***(Abridgement)*

## THIS INDENTURE,

made the 28th day of April, 1924,

30 BETWEEN, BANKERS TRUST COMPANY, a corporation of the State of New York and FREDERICK S. DUNCAN, as Executors of the Last Will and Testament of Emily A. V. Brinckerhoff, deceased, parties of the first part,

and

40 STEENLAND CONSTRUCTION COMPANY, a corporation of the State of New Jersey, party of the second part,

*Exhibit D-2.*

WITNESSETH, That the said parties of the first part by virtue of the power and authority to them given in and by the said Last Will and Testament and for and in consideration of the sum of \$74,000 has granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto the said party of the second part and to their heirs and assigns forever.

10

CONVEYS four (4) tracts of land in the City of Englewood, Bergen County, New Jersey, including premises described in the mortgage in question in this suit.

20

SUBJECT however, to a purchase money mortgage for \$40,000, and

*(Restrictions)*

“SUBJECT also to the following covenants and restrictions; No building shall be erected on any portion of the premises herein conveyed nearer the building line of Palisade Avenue than fifty (50) feet, nearer the building line of Lydecker Street or Brayton Street than forty (40) feet, or nearer the building lines of any streets that may hereafter be laid out in said property than twenty-five (25) feet; no building shall be erected on any part of said premises except for single family dwelling purposes with incidental individual garages and outbuildings for such residences, and no such residential building shall be erected on any part of said premises the construction cost of which to the builder (exclusive of cost of land and overhead) shall be

30

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*Exhibit D-2.*

less than \$15,000 which sum may include cost of garage or incidental out-buildings in a sum not in excess of \$1,000: except on that portion of the premises covered hereby immediately facing

10 on Palisade Avenue, such minimum cost of such residence buildings may be \$12,000, but nothing herein contained shall prevent the party of the second part or their assigns after (6) six years from the date hereof from erecting on said premises, not nearer than 50 feet to the building line of Palisade Avenue 40 feet to the building line of Lydecker Street or Brayton Street and 25 feet from the building line of any streets that may hereafter be laid out in said premises, an apartment house or houses."

20 HABENDUM to the party of the second part their heirs and assigns forever, with covenant against acts by the Grantors.

Duly executed and acknowledge by the parties of the first part, and recorded in the Bergen County Clerk's Office, May 2, 1924, in Book 1264, page 511 &c.

30

40

Joseph Day

# In Booming Bridge Zone!! Palisade Ave. Apartment Sites

ENGLEWOOD, N. J.

## Public Auction—May 14th

THE State of New Jersey has always been noted as an ideal place of residence. Chiefly because of the high elevation of many of its towns, "healthfulness" has been one of the many magnets attracting the home owner. Excellent roads, picturesque scenery, charming homes, plenty of breathing space, are other features that have brought to New Jersey residents from New York, Brooklyn, Long Island and Westchester.

With the many improvements now under way and proposed, making New Jersey more accessible to Manhattan, the **Investor**, **Speculator** and **Operator**, as well as the **Homebuilder** are directing their attention to "close in" sections.

The early opening of the Vehicular Tunnel and particularly the final assurance by both New York and New Jersey authorities of the construction of the Hudson River Bridge are the causes for present interest in vacant land being at fever heat in Englewood, West Englewood and Englewood Cliffs.

This territory, being within the "bridge zone" will be the first to feel the effect of the mass of new population bound to pour across the Hudson as a result of this gigantic improvement.

These Englewood lots on Palisade Avenue and Lydecker Street to be offered by me at auction on May 14th, are ready now for the Homebuilder. A finer section would be difficult to find. Imposing mansions, modest homes of the type we like to live near, and modern apartments surround and are close to these former Brinckerhoff Estate lots.

Palisade Avenue, as nearly everyone knows, is one of New Jersey's prominent auto thoroughfares leading directly to the Dyckman Street Ferry. Suitable vacant land on Palisade Avenue in this vicinity is rapidly being bought up by the shrewd investor and builders. The Englewood Gardens Apartment to house 244 families is within several hundred feet of these lots, while an 80 family apartment house is also nearby. Apartments in this high, widespread-view-commanding home section, are eagerly sought after.

Englewood, and the property to be sold is easily reached via the Erie Railroad to Englewood Station, only a few blocks from these lots. Buses to Manhattan on Palisade Avenue pass within one block of these lots, while buses to Dyckman and 125th Street ferries pass the property. Public and private schools, churches of various denominations, chain stores, public library, fraternal and social societies, golf and country clubs, help make Englewood the ideal place to live in.

Included in this auction is a magnificent stone mansion, garage and barn, ready for immediate occupancy.

In addition to the investment and speculative possibilities, the attractive and easy terms offered should be inducement to purchase several of these Englewood lots. Pages of descriptive matter could be written about Englewood and the property to be sold, but we want you to see it. We want you to walk over the property and see the beautiful homes around it, its accessibility to the station, and business sections of Englewood; then after looking it over consider its future possibilities upon the completion of the new bridge and other improvements—then we know you will be at the Auction Sale on Saturday, May 14th and **BUY**.

**NOTE**—Present restrictions expire in 1930, making these lots available for apartment houses. Englewood Gardens Apartment now erected on Palisade Avenue, 2 blocks from this property.



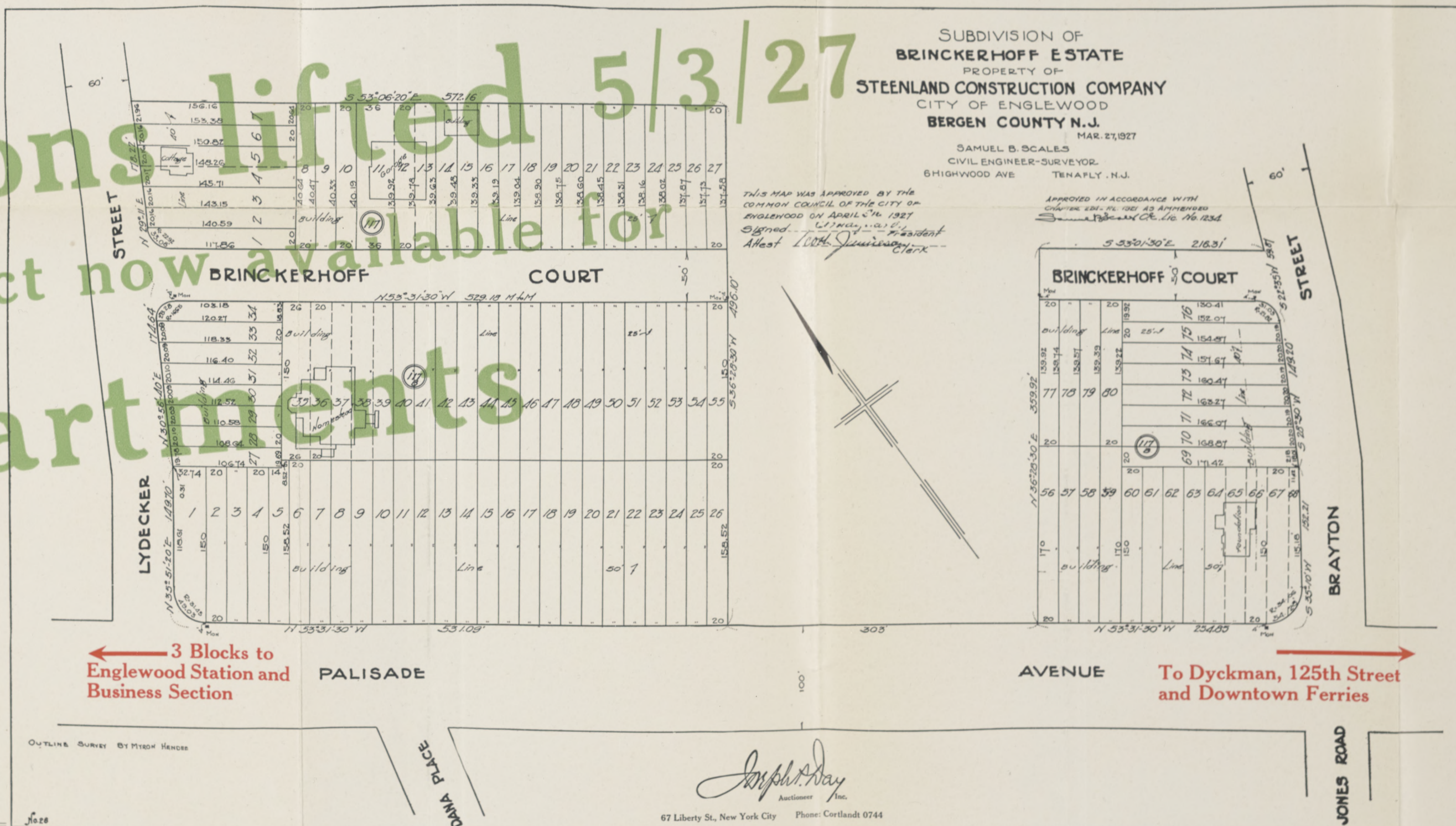
Upper photo shows one of the many fine homes at these lots. Lower is view of Englewood's business section.



Another view of these former Brinckerhoff Estate lots on Palisade Avenue.



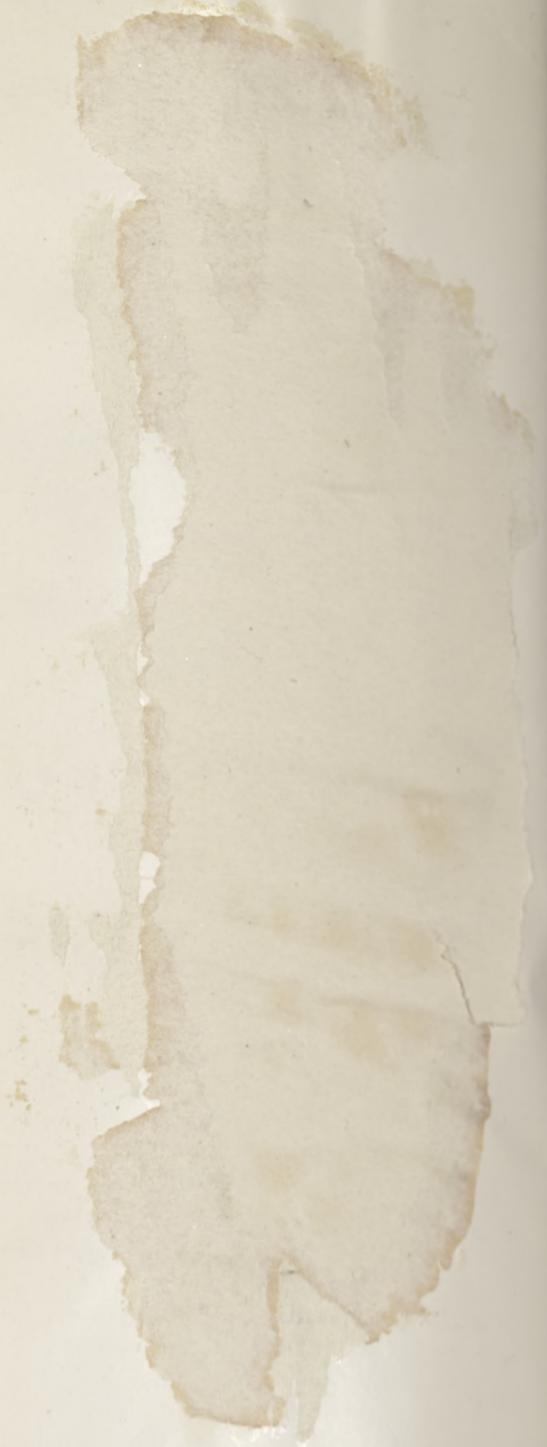
A few more of the many homes that stamp these Englewood lots as the place to build your home.



Joseph Day

Joseph Day

Exhibit D-4



**Exhibit D-4 1/2.***(Abridgement)***THIS INDENTURE,**

made the 14th day of June, in the year 1927, 10

BETWEEN, STEENLAND CONSTRUCTION COMPANY,  
party of the first part and ROMEL REALTY COM-  
PANY, party of the second part:

WITNESSETH, That the party of the first part in  
consideration of \$100, and other valuable con-  
siderations, does grant, bargain, sell and convey  
to the party of the second part, its successors  
and assigns forever,

20

ALL those certain lots of land situated in the  
City of Englewood, Bergen County, New Jersey,  
being the same as the mortgaged premises de-  
scribed in the bill of complaint.

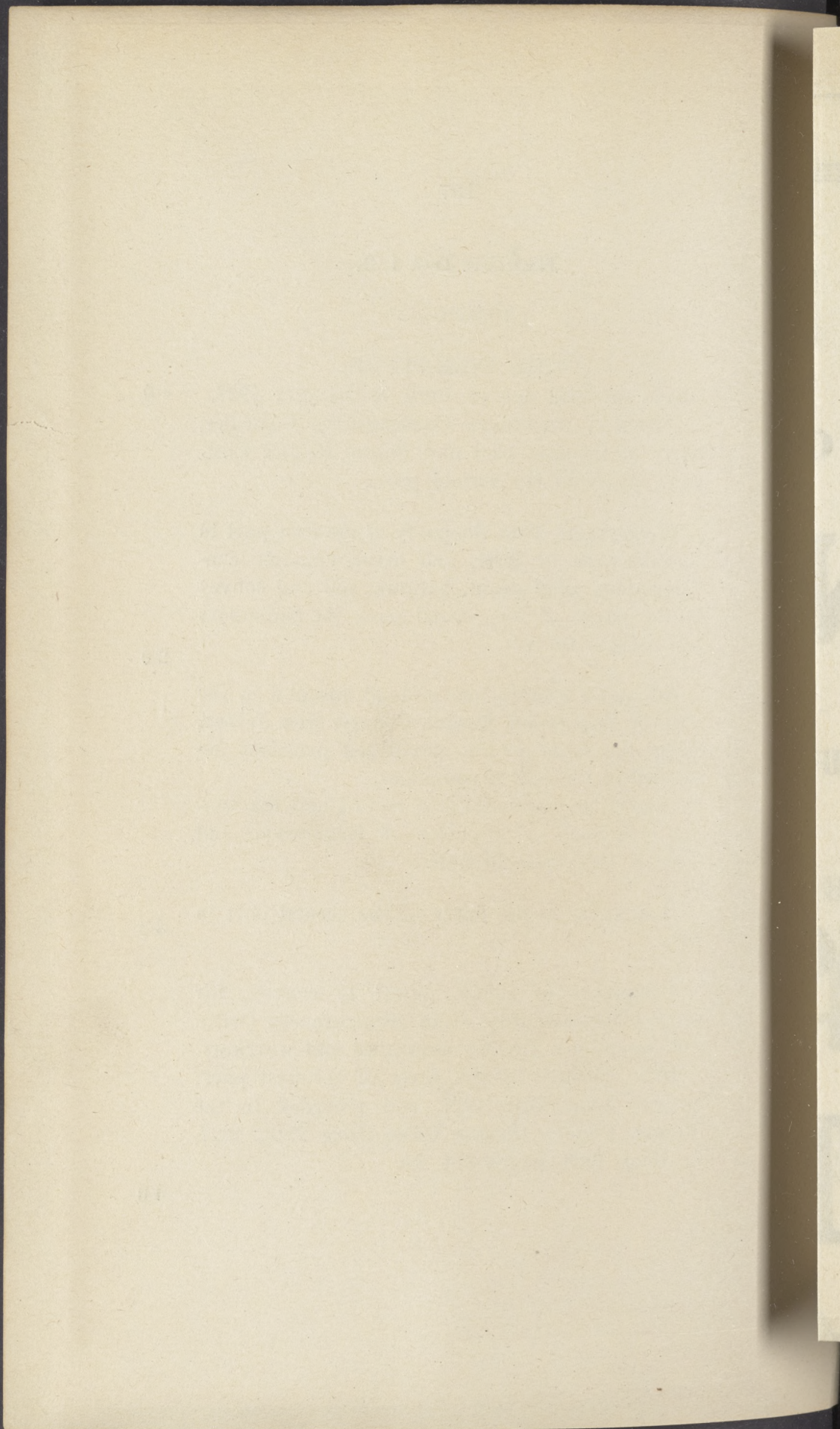
Subject to restrictions of record and the zon-  
ing ordinance of the City of Englewood, and  
Tax of 1927—second half.

HABENDUM to the party of the second part in  
fee, 30

COVENANTS of seizin, power to convey, for  
quiet possession, free from encumbrances (with-  
out exception), further assurance and warranty.

Duly executed by the party of the first part;  
proved June 23rd, 1927, and recorded in the  
Bergen County Clerk's Office June 29th, 1927,  
in Book 1503, pages 374, &c.

40



Ex D 5 Wm Am

12/14/28

Joseph Day  
Auctioneer Inc.

# THE GATES ARE DOWN

In the Finest Residential Section of All

Englewood **BERGEN COUNTY** New Jersey

ON AND NEAR PALISADE AVENUE  
ENGLEWOOD'S MAIN EAST AND WEST THOROUGHFARE  
AND GATEWAY TO THE BUSINESS CENTER

The One Time **Brinckerhoff Estate** On Palisade Ave.

Is now to be Sold in Separate Lots and Plots at

# PUBLIC AUCTION

Next Saturday, May 14th

2 P. M. on Premises, Under Tent

Property known as the Brinckerhoff Estate

Englewood **Bergen County** New Jersey

ON PALISADE AVENUE, BRAYTON AND LYDECKER STREETS  
FOR APARTMENTS AND HOUSES  
CLOSE TO ENGLEWOOD BUSINESS CENTER

# 100 Apartment and Home Building LOTS

Mansion and Outbuildings

In Most Exclusive Residential Section

The property known as the Brinckerhoff Estate is one of the most prominent of the many large and beautiful estates along both sides of Palisade Avenue.

The Brinckerhoff Estate property has the additional advantage of being close to the thriving business center of Englewood, where it is difficult nowadays to find parking space for automobiles, and where the business interests of Englewood are finding it necessary to relocate in the adjacent side streets, because of the scarcity of business sites available along the main thoroughfare.

But,---most important of all,---is the fact that the Brinckerhoff property is available for the construction of apartment houses. And,---everybody who knows anything about apartment buildings and about real estate in general, knows that apartment houses in a suburban town should be located close to the business center and the station. These requirements are met fully by the Brinckerhoff Estate property.

In addition, the Brinckerhoff Estate property includes a number of residence building sites on Brayton and Lydecker Streets and adjacent

thoroughfares, and also the sale of the beautiful Brinckerhoff Estate mansion and a few outbuildings.

With the sale of this important "key" property and its future development, with homes of moderate value and apartment houses of the attractive garden type along Palisade Avenue, Palisade Ave. real estate should mount to higher and higher values, because the earning power of apartment houses is much greater than that of private dwellings.

The time to buy property of this high character is while it is still to be purchased, as residential property, and prior to the time when the development of it has been begun by apartment builders. When these builders begin to get busy, you will not buy these Palisade Avenue residential lots for anything like the price at which they will sell at the Auction Sale I am going to hold on Saturday, May 14th.

My advice to you, New York and New Jersey builders, investors, speculators and homeseekers, is to attend this sale on Saturday, May 14th, and to buy! buy!! buy!!!

**80%** On Installment Contract

SEND FOR BOOKMAP

**FREE TITLE POLICIES**

67 Liberty Street  
New York City

Joseph Day  
Auctioneer INC.

Telephone  
Cortlandt 0744

Exhibit D-5

138

Exhibit D-5

12/11/88

Exhibit D-5



**Exhibit D-5 1/2.**

**MEMORANDUM OF SALE for Lots 1, 2 & 3,  
signed by Jason R. Elliott.**

*(Abridgement)*

10

**AUCTION SALE OF ENGLEWOOD, N. J. LOTS  
Saturday, May 14th, 1927**

TERMS OF SALE.

*First:* The property will be sold under the direction of the owner by Joseph P. Day, Inc., Auctioneer, by lot and block numbers on a certain map entitled "Subdivision of Brinckerhoff Estate, Property of Steenland Construction Company, City of Englewood, Bergen County, N. J.," prepared by Samuel B. Scales, Civil Engineer-Surveyor, which map was approved by the Common Council of the City of Englewood, April 5th, 1927, and filed in the County Clerk's office of Bergen County, N. J.

20

**Paragraphs "Second", "Third", "Fourth", "Fifth", and "Sixth" relate to options and terms and place of payment).**

*Seventh:* The deed so given shall be subject to the following restrictive covenants, which shall run with the land and also subject to all zoning laws now existing in the City of Englewood.

30

No building shall be erected on any portion of the premises covered by the deed of April 28th, 1924, from the Bankers Trust Company and Frederick S. Duncan as Executors under the will of Emily A. V. Brinckerhoff, deceased, parties of the first part and Steenland Construction Company, a New Jersey Corporation, party of the second part, and covered by a certain peti-

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*Exhibit D-5½.*

tion of the Steenland Construction Company to the Mayor and Common Council of the City of Englewood, dated March 28th, 1927, and covered by the map annexed to said petition and approved by the Common Council of the City of Englewood, April 5th, 1927, nearer the building line of Palisade Avenue than 50 feet, nearer the building lines of Lydecker Street or Brayton Street than 40 feet or nearer the building lines of any streets that may hereafter be laid out in said property than 25 feet; and no building shall be erected on any part of said premises the construction cost of which to the builder (exclusive of cost of land and overhead) shall be less than Fifteen Thousand (\$15,000.00) which sum may include cost of garage or incidental outbuildings in the sum not in excess of One Thousand Dollars (\$1,000.00), except on that portion of said premises immediately facing on Palisade Avenue, such minimum cost of such buildings may be Twelve Thousand Dollars (\$12,000.00). No building shall be erected on a plot less than three lots in that portion of the property designated on the above mentioned map as lots 1 to 19 inclusive in block 117, and on the remaining portion of the property covered by said map no building shall be erected on a plot of less than 4 lots as designated on said map; and no transfer of any portion of the property constituting lots 1 to 19 inclusive of block 117 as shown on said map shall be made that will result in any owner holding a plot of less than three of said lots 1 to 19 inclusive, block 117 contiguous to each other; and no transfer of any portion of the remaining portions of the property shown on said map shall be made that will result in any owner holding a plot of less than 4 of said lots contiguous to each other. It is expressly agreed that the release of any portion of the premises herein conveyed from the lien of any mortgage

*Exhibit D-5½.*

thereon will not affect the foregoing covenants and restrictions as to character and location of buildings to be erected on said premises.

The above covenants and conditions are to run with the land and are to be bindings upon the parties hereto, its successors and assigns. 10

Adequate gas, water, and sewer service is now available to purchasers of all lots except the following four lots, namely, lots 77, 78, 79, 80, block 117 B.

(Paragraph "Eighth" refers to policies of title insurance to be issued by the Cliffside Park Title Guarantee & Trust Co., free of cost to purchasers).

(Paragraph "Ninth" relates to bidding, re-sale in case purchaser fails to comply with conditions of sale, re-sale and liability of purchaser for deficiency on re-sale). 20

STEENLAND CONSTRUCTION COMPANY,  
*Owner.*

30

40

**Exhibit D-7.**

Letterhead of

10 JASON R. ELLIOTT,  
Counsellor at Law,  
191 Main Street, Hackensack, N. J.

July 15, 1927.

RE: *Romel Realty Company.*  
Steenland Construction Company,  
Palisades Park, N. J.

Gentlemen:

20

At and before your auction sale of the Brinkerhoff Estate property at Englewood, on May 14th, it was expressly represented and emphasized that the entire tract was available for the building of apartment houses. It was in reliance upon that representation that I and my associate, Mr. Romaglia, made the purchases which were subsequently assigned to the Romel Realty Company.

30

It has now been brought to my attention that the property is not at present available for apartment houses, by reason of restricting ordinances of the City of Englewood. I did not investigate this question before, but relied upon the personal and published representations of yourselves and your auctioneers, and also upon the promised title insurance of the Cliffside Park Title Guarantee and Trust Co. I have not yet

40

*Exhibit D-7.*

received the guaranty for the plot to which Romel Realty Company took title.

Under the circumstances I consider it inadvisable for the Romel Realty Company to make any further payments on account of their contracts or upon the mortgage given to your Company, until and unless the property in question is made available for the erection of apartment houses, according to representations.

10

I would also remind you that your Company, according to the conditions and terms of sale as read by the Auctioneer, guaranteed sewer, water and gas for all lots except numbers 77-78-79-80. So far as I know these facilities have not yet been provided for the lots fronting on the westerly section of Brinkerhoff Court. It seems to me that this is also a matter which should be completed before any further payment should be made upon the premises affected thereby.

20

Yours very truly,

JASON R. ELLIOTT. 30

JRS/MAZ

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**Exhibit D-8.***(Abridgement)*

10                   THIS AGREEMENT,  
                    made this 31st day of May, 1927,

BETWEEN, STEENLAND CONSTRUCTION Co., a corporation of the State of New Jersey, hereinafter described as the seller, and JASON R. ELLIOTT, of Englewood, County of Bergen, New Jersey, hereinafter described as the purchaser.

20                   WITNESSETH, That the said seller for and in consideration of the sum of \$14,500 to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said purchaser do agree with the said purchaser that it will convey to the said purchaser by a warranty deed, free from all encumbrances, except as hereinafter provided, and also subject to Building restrictions provided in petition of Steenland Construction Co. to the Mayor and Council of the City of Englewood,  
30                   dated March 28, 1927, accompanying the map hereinafter mentioned.

Tract of land, designated as Lots 4, 5, 6, & 7 in Block 117 on "Map of Subdivision of Brinckerhoff Estate, Property of Steenland Construction Co., City of Englewood, Bergen County, N. J."

(Here follow terms of payment and other provisions not in dispute).

40                   Signed and sealed by both parties.

**Exhibit D-9.****Memorandum Agreement.**

We, the undersigned, owners and purchasers under contract of lots shown on "Map of the Brinckerhoff Estate, property of Steeniand Construction Company", at the northeasterly corner of Palisade Avenue and Lydecker Street, Englewood, N. J., do hereby, in consideration of our mutual undertakings, agree, each with the others, as follows:

10

In the event that any one of us, the owner or owners of any group of lots, shall undertake the erection of an apartment house upon any such group of lots and shall obtain from the proper authorities of the city of Englewood, permission for the erection of such apartment house, then the remainder of the undersigned will pay, when due, the cost of financing the construction loan or first mortgage on such apartment house, not to exceed five percent of the amount of the loan obtained; such cost to be apportioned amongst the other owners in proportion to the amount of front feet of lots owned by them respectively.

20

30

It is the intent of this agreement that the owners of the property upon which such apartment house should be erected shall be relieved of the expense of financing, in return for the benefit which will accrue to the other owners of property on said map by reason of the removal of the "zoning" restrictions now in effect, providing and on condition that constructio of said

40

*Exhibit D-9—Memorandum Agreement.*

building is commenced within 90 days after permit is granted.

10 Witness the signatures of the respective owners, this 19th day of July, 1927.

ROMEL REALTY Co.,  
By J. R. ELLIOT, *Treas.*

STEENLAND CONSTRUCTION Co.,  
per P. M. STEENLAND, *Pres.*  
EYPPER & BECKMAN, INC.,  
GEO. H. BECKMAN, *Ses.*

20 JEROME HOLDING CORP.,  
per WILLIAM GREENBERG, *Pres.*  
EDSON B. GORHAM.  
MORRIS PETERSON.  
ARTHUR EISENSTEIN.  
JOSEPH A. PRESTON.

30

40

**Exhibit D-10.**

Letterhead of

STEENLAND CONSTRUCTION COMPANY,  
Commercial Ave., Palisades Park, N. J. 10

Oct. 6, 1927

Romel Realty Co.,  
Mr. Jason Elliot,  
c/o Fidelity Union Title Guaranty & Trust Co.,  
191 Main St.,  
Hackensack, N. J.

Dear Sir:

20

According to the Agreement entered into on July 19th, 1927, relating to the permit for which Messrs. Eypper & Beckman had applied, there will be a meeting at the City Hall of Englewood on October 11th, at 8:15, before the Board of Adjustment. We, the Steenland Construction Co., would kindly ask you to be present, if possible.

Very truly yours,

30

STEENLAND CONSTRUCTION COMPANY,  
PETER M. STEENLAND, *Pres.*

PMS/EIB

40

**Exhibit D-11.**

Letterhead of

10 JASON R. ELLIOTT,  
Counsellor at Law,  
191 Main Street, Hackensack, N. J.

April 23, 1928.

RE: *Romel Realty Co.*  
Steenland Construction Co.,  
Palisades Park, N. J.

Gentlemen:

20 The recent decision of the Board of Adjustment of Englewood refusing to grant Eypper & Beckmann permission to erect an apartment house on part of the former Brinkerhoff property on Palisade Avenue appears to settle adversely your assertion that the property would be available for apartment houses, even though it was not actually so available at the time of the auction sale in May, 1927.

30 Therefore, Romel Realty Co. offers to reconvey to you the property known as Lots 1 to 10 in Block 117 and rescind the contracts for the lots on the southerly side of Brinckerhoff Court and the westerly side of Brayton Street; and we demand that you refund the amounts paid on account of the purchase price of the several properties and on account of the mortgage upon Lots 1 to 10 in Block 117.

Yours truly,

40 J. R. ELLIOTT,  
Atty. for Romel Realty Co.

JRE:SRH

**Exhibit D-12.**

Letterhead of

JASON R. ELLIOTT,  
*Counsellor at Law,*  
 191 Main Street, Hackensack, N. J.

10

October 17, 1927.

Mortgage & Investment Co. of N. J.,  
 Palisade Ave and Ferry Street,  
 Jersey City, N. J.

RE: *Romel Realty Co.*

Gentlemen:

20

In response to your letter of October 13th I wish to say that we have been withholding the payment referred to pending the determination of an application now pending before the Board of Adjustment of the City of Englewood for the erection of an apartment house upon adjacent property, also sold by the Steenlands.

In the advertising and in the announcement made by the auctioneer at the sale, it was stated on behalf of the Steenlands that all of the former Brinkerhoff property (of which the mortgaged premises is a part) was immediately available for the erection of apartment houses. The Romel Realty Co. made its purchases upon that understanding. It has since developed that the property is zoned against apartments by local ordinance; but the Steenlands had been lead to believe, by members of the Englewood

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40

*Exhibit D-12.*

City Council, that the erection of apartment houses would be permitted nevertheless, upon application for a building permit.

10 I have been requested to attend the hearing by the Board of Adjustment, upon the pending application, on Tuesday evening next, October 18th. If this application is acted upon favorably there will be no further delay or question about payment of interest or installments upon the mortgage which was given by Romel Realty Co. to Steenland Construction Co. But if the decision is adverse, serious consideration will be given to the question of instituting a suit in Chancery in which a reconveyance of the property would be offered and repayment of the consideration demanded, on the ground of false representations. In the meantime we are disinclined to disburse any money, which would add to an investment which would be unfortunate, if the property is not available for apartment houses.

20

Yours truly,

30

J. R. ELLIOTT.

JRE:SRH

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**Exhibit D-13.**

Letterhead of

GEORGE H. RICHENAKER,  
*Counsellor at Law,*  
144 Main Street, Hackensack, N. J.

10

November 25th, 1927

Romel Realty Co.,  
Hackensack, N. J.

Gentlemen:

The Mortgage & Investment Company have informed me that the sum of \$1016.75 and interest in the sum of \$305. on your mortgage on the Englewood property is due and unless the same is paid, they will have to foreclose.

20

Kindly let me know what you expect to do in this matter.

Your truly,

GEORGE RICHENAKER.

30

GHR-H

Check mailed Dec. 14/27.

40



To

EXHIBIT D-14

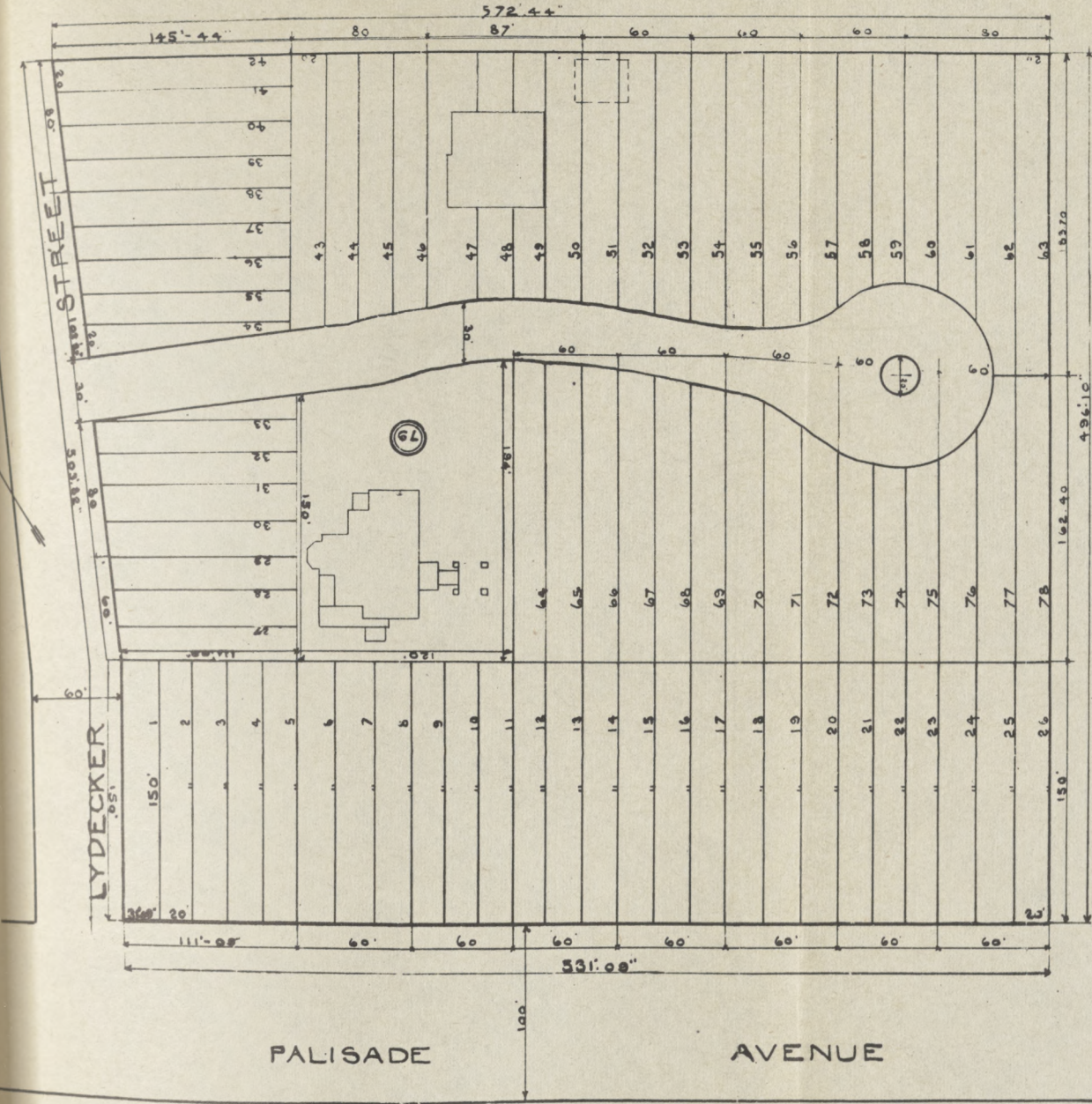
BRINKERHOFF  
ESTATE

WILL DIVIDE TO SUIT

*Kindly return  
to  
P. B. Board  
unimproved.*

*Ex D-14  
was  
a.m.*

*1/4/29.*



PALISADE

AVENUE

←  
To Cars and Erie R. R. Station  
and Shopping Centre

→  
To Dyckman Ferry

152

BRINKERHOFF

*Exhibit D-14*

**Exhibit D-15.**

May 12, 1927.

Steenland Construction Company,  
Palisades Park, N. J.

10

Dear Sirs:

I am informed that the executors of the Estate of Emily A. V. Brinckerhoff have recently given you a deed purporting to modify the restrictive covenants under which the Brinckerhoff property on Palisade Avenue, Englewood, N. J., was sold to you some time ago.

20

As one of the heirs and residuary legatees of Mrs. Brinckerhoff, I hereby notify you that such deed or agreement was made without my authority or consent, and that I do not agree to any change or modification of the restrictions and covenants under which the property was sold to you.

Very truly yours,

JANET B. KERR.

30

Englewood, N. J.

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**Opinion.**

(Decided April 22, 1929,—Filed April 23, 1929.)

10 The complainant seeks to foreclose a purchase  
money mortgage given by defendant to the Steen-  
land Construction Company, assignor of the com-  
plainant, for part of the purchase price for cer-  
tain real estate in the City of Englewood, New  
Jersey. The facts briefly, are as follows:

20 The Steenland Construction Company pur-  
chased a tract of land on Lydecker and other  
streets in Englewood, New Jersey, on April 28th,  
1924, from Frederick A. Duncan and the Bankers  
Trust Company, executors of the Estate of Emily  
A. V. Brinckerhoff, deceased. Restrictive cove-  
nants provided inter alia for the erection of one  
family dwellings only. A short time prior to  
May 3rd, 1927, Mr. Steenland of the Steenland  
Construction Company, talked with Mr. Duncan,  
one of the executors, relative to the premises in  
question and Duncan suggested that the restric-  
tive covenants might be modified to permit the  
erection of apartment houses. An agreement was  
reached whereby the Steenland Construction Com-  
30 pany promised to pay the executors \$15,000. for a  
modification of the restrictive covenants in order  
to permit the premises to be used for the erection  
of apartment houses. Papers were drawn and  
application was made to the City of Englewood  
for approval of the modification of the restrictions  
and the approval was had and the agreement and  
approval was recorded about May 6th, 1927, in  
the Bergen County Clerk's Office. The deed of  
40 modification bears date April 28th, 1927. The

*Opinion.*

Steenland Construction Company prepared maps with a recitation of advantages thereon and fixed May 14th, 1927, for a public sale of the said property in lots.

Across the map in green letters was the following: "Restrictions lifted 5/3/27. Entire Tract Now Available for Apartments." 10

In the lower left hand corner in red letters: "Note—Present restrictions expire in 1930, making these lots available for apartment houses. Englewood Gardens Apartment now erected on Palisade Avenue, two blocks from this property." This red letter printing was x'd out with six large green x's.

At the auction sale on May 14th 1927, Jason R. Elliott purchased Lots 1 to 3 inclusive in Block 117 and Frank Romaglia purchased Lots 8 to 10 inclusive in Block 117. A few days after the sale Elliot entered into a contract of sale for the purchase of lots 4 to 7 inclusive in Block 117 and drew the contract personally for these last mentioned lots. Steenland refused to sign the contract until Elliott had inserted the restriction clause. Elliott inserted the restriction clause in the contract as follows: "Building restrictions as provided in petition of Steenland Construction Co. to the Mayor and Council of the City of Engelwood, dated March 28, 1927, accompanying the map hereinafter mentioned," and it was signed May 31st, 1927. Testimony was produced to show that the restriction just recited should refer to the petition dated April 28th, 1927, setting forth the modified restrictions as mentioned in the seventh ar- 20

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*Opinion.*

10 ticle of the conditions of sale hereinafter set forth and also further read: "It is understood and agreed that nothing herein contained shall in any way constitute a waiver by the City of Englewood of any of the provisions of any present or future zoning ordinances."

Both Elliott and Romaglia claim that James Day, the auctioneer at the auction sale, stated that the property was immediately available for apartment houses. They admit that the conditions of sale were read by the auctioneer. They admit signing the contracts of sale but say they did not read them.

20 The conditions of sale are nine in number. The one which relates particularly to this case is as follows:

"*Seventh*: The deed so given shall be subject to the following restrictive covenants, which shall run with the land and also subject to all zoning laws now existing in the City of Englewood.

30 No building shall be erected on any portion of the premises covered by the deed of April 28th, 1924, from the Bankers Trust Company and Frederick S. Duncan as Executors under the will of Emily A. V. Brinckerhoff, deceased, parties of the first part and Steenland Construction Company, a New Jersey Corporation, party of the second part, and covered by a certain petition of the Steenland Construction Company to the Mayor and Common Council of the City of Englewood, dated March 28th, 1927, and covered by the map annexed to said petition and approved by  
40 the Common Council of the City of Englewood,

*Opinion.*

April 5th, 1927, nearer the building line of Palisade Avenue than 50 feet, nearer the building lines of Lydecker Street or Brayton Street than 40 feet or nearer the building lines of any streets that may hereafter be laid out in said property than 25 feet; and no building shall be erected on any part of said premises the construction cost of which to the builder (exclusive of cost of land and over-head) shall be less than Fifteen Thousand Dollars (\$15,000.00) which sum may include cost of garage or incidental out-buildings in the sum not in excess of One Thousand Dollars (\$1,000.00); except on that portion of said premises immediately facing on Palisade Avenue, such minimum cost of such buildings may be Twelve Thousand Dollars (\$12,000.00). No building shall be erected on a plot of less than three lots in that portion of the property designated on the above mentioned map as lots 1 to 19 inclusive in block 117, and on the remaining portion of the property covered by said map no building shall be erected on a plot of less than 4 lots as designated on said map; and no transfer of any portion of the property constituting lots 1 to 19 inclusive of block 117 as shown on said map shall be made that will result in any owner holding a plot of less than three of said lots 1 to 19 inclusive, block 117 contiguous to each other; and no transfer of any portion of the remaining portions of the property shown on said map shall be made that will result in any owner holding a plot of less than 4 of said lots contiguous to each other. It is expressly agreed that the release of any portion of the pre-

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*Opinion.*

mises herein conveyed from the lien of any mortgage thereon will not affect the foregoing covenants and restrictions as to character and location of buildings to be erected on said premises.

10 The above covenants and conditions are to run with the land and are to be binding upon the parties hereto, its successors and assigns."

The conditions of sale as read by the auctioneer set forth the restrictions as modified and also mentioned the zoning ordinance of the City of Englewood. Elliott and Romaglia both contend that while they signed the contracts in their own names they had in mind forming a corporation to be known as the Romel Realty Company and taking the deed in its name.

20 On June 14th, 1927, the Steenland Construction Company executed deed to defendant for Lots 1 to 10 inclusive in Block 117 and the defendant company executed the purchase money mortgage in question. The deed recited: "Subject to restrictions of record and the zoning ordinance of the City of Englewood."

30 Sometime in the early part of July, 1927, Elliot heard gossip around Englewood to the effect that apartment houses could not be built on the premises. Then he went to the office of the building inspector of Englewood and found the zoning ordinance provided for one family dwellings only. He wrote to Steenland on July 15, 1927 (hereinafter to be referred to). After writing this letter Elliot drew an agreement bearing date July 19, 1927, sent it to Mr. Beckmann, and a meeting was called at which all or most of the signers attended.

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*Opinion.*

The agreement was signed by defendant, Steenland Construction Company and other owners interested as a result of the said auction sale. In effect, the agreement provided that one of the signers should apply for a building permit, and if successful they were all to help finance the proposition. The meeting was held, and application was made for permit. The proceedings lagged and permit was finally refused in March, 1928, the constitutional zoning amendment having been voted upon favorably by the people at an election held September 20, 1927. 10

An answer was filed by the defendant setting up fraud in the inception of the contract. 20

The first contention is that the will of Emily A. V. Brinckerhoff only permitted the executors to sell and convey real estate within a period of five years from the date of her death, which was October 21st, 1921.

The second contention is that the zoning ordinance of the City of Englewood prevented the erection of apartment houses.

The complaint claims the full amount of the mortgage is due less a payment which was made on account, and the defendant contends that there should be an abatement from the principal in the sum of \$14,525 and reduced interest charges. 30

## I.

As to the defendant's first contention, that the modification deed of April 28th, 1927, made between the executors of Emily A. V. Brinckerhoff 40

*Opinion.*

and the Steenland Construction Company is void for the reason that Emily A. V. Brinckerhoff died October 21st, 1921 and more than five years elapsed between the date of her death and the giving of the modification deed on April 28, 1927.

The clause in question is a part of Article XV of her will, reading as follows: "I authorize and empower my executors at any time during a period of five years from my death to partition, sell, mortgage, lease, convey and generally to deal with real estate (except the Brayton Street Cottage and lot) of which I may die seized or in which I may have an interest, on such terms and at such times and in such manner as they in their discretion may deem best."

Article XIV provides that all of the residue of the estate is to go to the daughters surviving, etc.

I mention this clause because on the day of the auction sale Mrs. Clarence Kerr, one of the daughters, presented a letter to Steenland or to someone for him objecting to the modified restrictions and claiming in substance, that the modification deed was invalid and of no effect, and I believe threatening some procedure.

In view of the fact that Mrs. Kerr was one of the beneficiaries under the will and particularly of part of the residue of the estate, and it appearing that she was evidently willing to have the executors accept the \$15,000.00 from the Steenland Construction Company, it can hardly be said that she would have any right at that date or at a later date to come into equity and set aside this deed.

*Opinion.*

One of the prerequisite maxims of equity is: "He that seeks equity must do equity," and unless she intended a return of the moneys it is not likely she would have any standing in this Court. 10

Furthermore, it has been held in this State that where there is a limitation upon the exercise of a power of sale and where the limitation upon the exercise of such power is of the essence thereof, the power must be executed within the prescribed period, but where it is merely directory the power may be executed after the expiration of the limited period.

*Marsh vs. Love*, 15 Stewart, Equity 112; *Chasmar vs. Bucken*, 10 Stewart, Equity 415; *Brearley vs. Molten*, 62 New Jersey Equity 345-353; *Molten vs. Sutphin*, 66 New Jersey Equity 20. 20

I might add that this deed of conveyance was simply modifying certain restrictions which only had two years to run and it meant to the estate the sum of \$15,000.00, which was a valuable consideration and worth while under the circumstances and therefore, the executors and beneficiaries would not be in a position to attack this instrument. 30

## II.

Defendant contends that the zoning ordinance was a restrictions against the erection of apartment houses. From the testimony adduced in this case it is apparent that this is the restriction upon which the defendant mainly relies. It 40

*Opinion.*

10 may be true that the auctioneer stated that apartment houses could be built on the premises and it is equally true that the wording in "green letters" hereinbefore referred to, was printed across the face of the map together with the words in red in the lower left hand corner which were x'd out.

20 The defendant Jason R. Elliott, testified that he first became aware of the public sale by advertisements, sign-boards and maps; that Steenland told him that wonderful apartment house property would be sold and that he could make money on it. He says the auctioneer said at the time of the sale "Former restrictions have been  
30 lifted and the entire tract is now available for apartment houses." That is what induced him to buy. He states further, that he purchased Lost 1, 2 and 3 in Block 117, and that Romaglia, who was with him and who intended to form the Romel Realty Company with him, purchased Lots 8, 9 and 10 in Block 117, and that in addition to the auctioneer's statements the conditions of sale were read and that after the purchases he and Romaglia signed these contracts of sale which contained the same conditions as read by the auctioneer but which they did not read; that he first learned of the restrictions between July 1st and July 15th, 1927; that a title policy was delivered to him between July 14th and August 1st, 1927; that about July 16th, an agent of Steenland by the name of Holbrook, endeavored to sell him Lots 4, 5, 6 and 7 in the same block number and succeeded, whereby  
40 Elliott prepared the contract himself and sent it

*Opinion.*

to Steenland for execution, but Steenland refused to sign the same because there was nothing mentioned about restrictions and that Elliott then inserted: "Subject to Restrictions, &c.," and the contract was duly executed on May 31st, 1927. Between July 1st and 7th, 1927, he heard gossip around Englewood that the property was not available for apartments. He went to the building inspector of Englewood and saw the zoning map and found that the property was zoned for one family dwellings. This was early in July. On July 15th, 1927, he wrote a letter to the Steenland Construction Company in which he said: "It has been brought to my attention that the property is not at present available for apartment houses by reason of restricting ordinances of the City of Englewood, &c." Nothing is said in this letter about the deed restrictions upon which so much stress was laid. He also refers in this letter to the terms of sale being read by the auctioneer.

Thus we have the unusual situation of a lawyer finding out early in July that the zoning ordinance of Englewood prevented the erection of apartments; wrote a letter to Steenland Construction Company to that effect, and a few days later prepares an agreement himself; has his company sign it and sends it to Beckmann so that he and Steenland and others may sign it; meets these people and endeavors to carry the agreement into effect by helping with an application to the zoning authorities in Englewood, and then says after a foreclosure was started almost a year later that he had been defrauded

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*Opinion.*

10 by reason of the zoning ordinance. Vice-Chancellor Bentley in *Mass vs. Schomer, New Jersey Advance Reports*, Volume, VI, No. 52, page 1883, speaking relative to the people who had claimed to have been defrauded: "The most stupid man, in the circumstances would have rushed to the Chancellor with the greatest speed. And these men were acting under the guidance of a legal adviser who was quick, when forced to do so, to retain counsel of standing and ability."

20 Upon cross-examination Elliott testified that he received a letter from the complainant's attorney, Mr. Richenaker, demanding an installment of principal and interest amounting to \$1321.75 and that in default thereof there would be a foreclosure. This letter bears date November 25th, 1927, which was more than six months after the auction sale and more than four months after he had ascertained the situation regarding zoning ordinances. In answer to this letter Elliott mailed a check for the amount on December 14th, 1927, without comment. Later he said this payment was made because they believed  
30 there was something due on the mortgage. He finally refused to pay anything further after this date although requested so to do, and although he knew that it would not pay off the mortgage debt even though he was allowed the abatement claimed by him in this suit. Although Elliott refused to pay anything further on the mortgage it does not appear that he ever requested from complainant or its attorney a reduction by reason of the alleged fraudulent  
40 representations.

*Opinion.*

It further appears the suit to foreclose the mortgage was started June 6th, 1928; that Mr. Jason R. Elliott is a lawyer, having been admitted as an attorney in March, 1907, and as a counsellor in November, 1911. He has lived in the City of Englewood for a period of forty-two or forty-three years and knew there was a zoning ordinance in force in the City of Englewood in recent year. He admits that he knew thoroughly what was in the terms of sale read at the auction. He claims to be familiar with deed restrictions and zoning ordinances and understands thoroughly what they mean. He says he did not intend to build an apartment house at the time of the auction or later, but wanted to sell the property to someone as an apartment house site. He further stated that the only reason he knew why an apartment house could not be put up was because of the zoning law.

On January 28th, 1928, Mr. Richenaker, solicitor for the complaint, demanded an installment of principal and interest amounting to \$1306.52. Elliott saw Richenaker personally and asked for an extension of time because he said the property was not available for apartments and further said because he wanted to raise money. Elliott admits that after the conversation, in response to the letter of January 28th, 1928, Richenaker succeeded at Elliott's request in holding off foreclosure until June 6th, 1928, to give Elliott a chance to get the money.

In my opinion the following testimony which sets forth the conversation between Richenaker

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*Opinion.*

and Elliott after the letter of January 28th, 1928, had been written, is important. It follows:

By Mr. Richenaker:

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Q. What did you do in response to that? A. I wrote to you and asked for an extension of time.

Q. Why did you ask for an extension? A. I was still hopeful that this property might be made available for the building of apartment houses and I didn't want foreclosure suit started.

Q. You also wanted to raise money, didn't you, and you told me that was the reason? A. Yes.

20

Q. And it was not to have any reduction of the mortgage or anything else, but just because you couldn't raise the money? A. I didn't tell you all of my reasons.

Q. But you did tell me certain reasons. And didn't you ask me to intervene and have the payment of interest only and not the principal? A. I think so.

Q. And didn't I say I would try to do it for you? A. Yes.

30

Q. And succeeded for how long? A. I don't recall.

Q. It was pretty near June 6th? A. Yes.

Q. And up to that time you were trying to raise money to pay the interest on the mortgage? A. Yes.

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Elliott also testified that he had a conversation with Mr. Steenland of the Steenland Construction Company, relative to the proposed auction sale about a month prior to May 14th, 1927.

*Opinion.*

I can't bring myself to believe that any fraud was practiced upon Elliott or Romaglia in view of the foregoing testimony. It is difficult to conceive of a lawyer experienced in title work conversing with the owner of the property a month prior to the sale, attending the sale and hearing all of the conditions read, then purchasing knowing as he must have known, that the conditions as read were embodied in the contract which he was signing and that the contract specifically set forth that he was purchasing subject to the zoning ordinance of the City of Englewood. Then too, the fact that he had lived in this City for a period of forty-two or forty-three years. On the other hand, Mr. Steenland may be a very clever real estate operator but after all he is not a lawyer, he is not versed in legal technicalities, he honestly considered the modification of the restrictions necessary in order to make the property available for apartments and paid a substantial sum of money, the sum of \$15,000.00, in the belief that he was so doing.

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Mr. Frank Romaglia also has been a title searcher for about thirty years and very carefully searches and analyzes titles for others. He too, heard the conditions of sale read and as an expert in the title line was in a position to know just what he was receiving for the money expended.

30

Defendant cites Pomeroy's Equity Jurisprudence, paragraph 895, page 1855: "Whenever a positive representation of fact is made the party receiving it, is in general entitled to rely and act upon it."

This it is true is the general rule, but does not

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*Opinion.*

apply where the evidence does not warrant such a conclusion.

Several cases were cited in defendant's brief to show that Pomeroy's citation applied in this case. 10 The first, *Summer vs. Seaton*, 47 New Jersey Equity 103. This is a case where the City Council of Rahway changed the location of a street in such manner as to cut off access to the street, and then assess for benefits upon the assumption that complainant would become the owner of the strip in question. The defendant knew complainant had no legal title, and succeeded in an ejectment action at law. Complainant brought this suit to perpetually 20 restrain defendant from further prosecuting ejectment suit at law. The defendant was silent when in conscience he should have spoken. This case is not in point.

The second case, *Turner vs. Haupt*, 53 New Jersey Equity 526, is where complainant's mental faculties were weakened by disease and a fraud thereby practiced upon her. This case does not apply.

The third case, *Borden vs. Hutchinson*, 49 30 Atlantic Reporter (New Jersey) 1088, is where plaintiff in a judgment conducted a sale and assured the bidders there were no liens except the mortgage, when as a matter of fact he held a judgment against the property. He did nothing in his lifetime after the sale to collect his judgment and equity refused to permit the executors of his estate to collect. This case has no bearing upon the matters before us in this cause.

In order that a misrepresentation may constitute a fraud, it must be: 1. Untrue; 2. Made 40

*Opinion.*

for the purpose of inducing the other party to act; 3. Stated as a fact; 4. Material; 5. Relied upon by him to whom it was made; 6. Injury.

If the party complaining has not been misled, as where he knew that the representation was false at the time it was made, or has not been misled to his prejudice or injury by the misrepresentation, equity will not consider his complaint.

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In the instant case, defendant or its agents believed the deed restrictions had been lifted, and in my opinion they had been lifted.

The fourth case, *Campbell vs. Nichols*, 33 New Jersey Law 81 is an action upon a promisory note sold by the agent of the maker to a third party, and falsely representing that the note had already been passed and was on the market. The maker when sued was not permitted to set up the falsity of the statements of his agent in order to defeat the action.

20

In this case the court said: "A party defrauded can disaffirm the contract unto which he has been inveigled, and recover the money which he has paid with interest; or he can obtain a full indemnification by a suit founded on the fraud against him by whom he was misled."

30

The fifth case, *Straus vs. Norris*, 75 Atlantic 980, the complainant alleged that he purchased a farm of eighty-two acres more or less and that defendant orally represented that there were eighty-two acres and the price was fixed at approximately \$450.00 per acre. The suit was to recover the difference in value between eighty-

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*Opinion.*

two acres and sixty-nine and seventy-one one hundredths acres. This case in no way squares with the facts in the case before me.

10 Although there may, for the sake of argument, be some ground for dispute regarding the representations made in the present case, I am confirmed in the opinion that the evidence does not bear out the claim of defendant in that respect.

20 Elliott claims he knew of the fraud in July, 1927, and yet he paid an installment of principal and interest in December, 1927, without comment, and in January simply requested additional time in which to pay another installment of principal and interest that was due because he did not have the money, and no effort was made to rescind this alleged fraudulent agreement until suit was started to foreclose the mortgage June 6th, 1928. This case seems to me (even though fraud is admitted) would come within the rule laid down in *Eibel vs. Von Fell*, 55 New Jersey Equity, page 670, in which the court said "A court of equity will rescind a

30 transaction entered into upon the faith of a material misrepresentation false in fact, if the person to whom it was made relied upon it and in consequence suffered injury. The fact that it was made innocently will not prevent the rescission. In this respect the rule of equity is broader than the rule of law in an action for deceit, where it is necessary to prove moral fraud in order to support the action. \* \* \* Held that

40 although the vendor had made a material repre-

*Opinion.*

sentation in reference to the property sold, the conduct and acts of the vendees, after they had knowledge of the facts amounted to a ratification of the sale." (*Eibel vs. Von Fell*, 55 New Jersey Equity, page 670). 10

Mr. Justice Dupue in *Williamson vs. New Jersey Southern Railroad* says: "The vendor may rescind the contract of sale and reclaim the property until, with a knowledge of the fraud, he elects to ratify and confirm the sale \* \* \* Delay in exercising the power of rescission is evidence of an election, to treat the sale as valid, of more or less weight, according to the circumstances of the case," 29 New Jersey Equity, page 319. 20

I must conclude, therefore, that there was no fraud on the part of the complainant or its assignor which entitles the defendant to an abatement in this case.

This disposition of the cause makes it unnecessary to decide the question raised by the complainant to the effect that the Romel Realty Company could not take advantage of the defense of fraud in this suit. 30

I will advise a decree for the complainant for the amount admitted to be due on its mortgage with interest, which I believe is \$19,318.25 and interest from September 14th, 1927.

WILLIAM B. MACKAY,  
A. M.

**Final Decree.**

(Filed June 15, 1929.)

10 THIS CAUSE BEING heard in the presence of  
George H. Richenaker, Solicitor for the com-  
plainant and Herman Vanderwart, of counsel  
with defendant, and Jason R. Elliott, solicitor  
of defendant, before Honorable William B. Mac-  
kay, one of the Advisory Masters of this Court  
appointed to hear the same, and the Court hav-  
ing examined the pleadings and having taken  
proof orally and heard and considered the ar-  
guments of counsel thereof, AND IT APPEARING to  
the satisfaction of the Court, that there was no  
20 fraud on the part of the complainant or its as-  
signor, and that the defendant was not entitled  
to any abatement of principal due on the mort-  
gage mentioned in the bill of complaint.

IT IS ON THIS 15TH DAY OF JUNE, 1928, ORDERED,  
ADJUDGED AND DECREED that the report of the  
Advisory Master filed in this cause, and all mat-  
ters and things therein contained do stand rati-  
fied and confirmed and that the said mortgaged  
30 premises be sold as aforesaid to raise and sat-  
isfy the money due to the said complainant, that  
is to say, to pay and satisfy unto the complain-  
ant the sum of \$19,318.25 together with interest  
in the sum of \$1860.95 from September 14, 1927  
to April 22, 1929 the date of the said Masters  
report, making a total of \$21,179.20 with interest  
from June 22, 1929 being the date of the said  
Advisory Masters report with the complainants  
40 costs in this cause to be taxed, and that a writ

*Final Decree.*

of Fieri Facias issue for that purpose out of this court directed to the Sheriff of Bergen County, commanding him to make sale according to law of the said mortgaged premises, and that out of the money arising from said sale to pay to the complainant or its solicitor its said debt, interest and costs, and that in case more money shall be raised at said sale than shall be sufficient to answer said several payments, said surplus be brought in this court to abide by the further order of this court, unless otherwise previously disposed of by it, and that the said Sheriff make return without delay of his proceedings by virtue of his said writ.

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AND IT IS FURTHER ORDERED, adjudged and decreed, that the defendant stand absolutely debarred and foreclosed of and from all equity of redemption of in and to said mortgaged premises, when sold as aforesaid by virtue of said decree.

20

E. R. WALKER  
C.

Respectfully advised,

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WILLIAM B. MACKAY,  
Advisory Master.

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**Notice of Appeal.**

(Filed June 24, 1929.)

10 The defendant, Romel Realty Company, hereby  
appeals from the final decree made in the above  
entitled cause by the Chancellor, on the advice  
of Hon. William B. Mackay, one of the Advisory  
Masters of this Court, on June 15th, 1929, and  
from the whole and every part thereof, to the  
Court of Errors and Appeals in the Last Re-  
sort in All Causes.

Dated, June 21, 1929.

20

JASON R. ELLIOTT,  
Sol'r and of counsel with Defendant.

I conceive that there is good cause for appeal  
in the above entitled cause.

JASON R. ELLIOTT,  
of Counsel with Defendant.

(Service acknowledged, June 21, 1929.)

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### Petition of Appeal.

(Filed July 12, 1929.)

To the Honorable the Court of Errors and Appeals in the Last Resort in All Causes: 10

The petition of Romel Realty, Company, the appellant in the above entitled cause, respectfully show that:

Petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, upon the advice of Honorable William B. Mackay, one of the Advisory Masters of said Court of Chancery, bearing date the 15th day of June, 1929, in a certain cause in said Court of Chancery wherein said Mortgage & Investment Company of New Jersey, (a corporation) was complainant, and Romel Realty Company (a corporation) was defendant, in this respect, to wit: 20

That the said decree adjudges that there was no fraud on the part of the complainant or its assignor of the mortgage mentioned in the bill of complaint, and that the defendant was not entitled to any abatement of the principal due on said mortgage, and that the mortgaged premises should be sold to raise and satisfy the sum of \$19,318.25, with interest thereon from September 14th, 1927. 30

And petitioner appeals from said decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous for the following causes and reasons:

1. The said Advisory Master erroneously decided that a certain quit-claim deed given by 40

*Petition of Appeal.*

10 Bankers Trust Company and Frederick S. Duncan, as Executors of the Will of Emily A. V. Brinckerhoff, to Steenland Construction Company, dated May 3rd, 1927, and recorded in Book 1495 of Deeds for Bergen County, pages 101 &c., was valid and effective for the purpose of modifying restrictions imposed by a former deed between the same parties, notwithstanding the fact that the power of sale given to said executors was limited to a period of five years after the death of the testatrix, and that said period had expired prior to the execution of the aforesaid deed.

20 2. The said Advisory Master erroneously decided that the representations made by the complainant's assignor, Steenland Construction Company, to the effect that certain restrictions upon the mortgaged premises had been removed, were not fraudulent because the officers of that company believed that the restrictions (Against apartment houses) had been removed by the deed mentioned in Reason 1 above and believed therefore that their statements were true.

30 3. The said Advisory Master indicates in his opinion that because the vendees of the premises in question, to whom certain material representations were made as to the uses to which the premises could be put, could have ascertained the truth or falsity of such representations by examination of records, it was therefore incumbent upon them to make such examination.

40 4. The said Advisory Master suggests in his opinion that because one of the vendees of the pre-

*Petition of Appeal.*

mises in question is a lawyer and the other a title searcher, they were therefor not entitled to rely upon the positive representations made by the vendors as to the permitted uses of the preimises, but they were charged with the knowledge which they might have acquired by the exercise of their special skill. 10

5. Payment of an instalment of principal and interest upon the mortgage in question and requests for extensions of time for further payments of interest, after discovery of one ground for considering the representations to be false which induced the purchase and mortgage, did not constitute a ratification of the transaction which would preclude a claim for abatement from the amount of the mortgage debt. 20

6. The Advisory Master erroneously indicates in his opinion that the defendant was the moving party in an agreement between Steenland Construction Co., one Beckmann, the defendant and others, with reference to the financing of an apartment house to be built by one of the parties if permission could be obtained. The facts, as shown by the testimony, are that the defendant, Romel Realty Company, did not initiate said agreement and took no action pursuant to it. But the execution of such agreement did not constitute a waiver of the rights of Romel Realty Company against Steenland Construction Company or its assignee, the appellee herein, by reason or account of fraud at the inception of the transaction resulting in the mortgage in question. 30 40

*Petition of Appeal.*

10 7. The summaries of facts as set forth in the opinion of the Advisory Master, upon which he appears to have based his decision, are in many respects at variance with the testimony as it appears in the record.

8. The Advisory Master erred in his conclusion that there was no fraud on the part of the complainant or its assignor which entitled the defendant to an abatement from the mortgage debt.

20 Petitioner therefor prays that the said decree of said Chancellor may be wholly reversed, set aside and for nothing holden, and that petitioner may have such other relief in the premises as to this Court shall seem proper.

JASON R. ELLIOTT,  
Solicitor and of Counsel with Appellant.

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**Answer to Petition of Appeal.**

The answer of the above named respondent to the petition of appeal of the above named appellant.

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained, to be true, for answer thereto, nevertheless, says and admits, that a decree was, on June 15th, 1929, 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 decree is agreeable to equity, and he prays that the same may be affirmed, with costs to be adjudged to this respondent.

GEORGE H. RICHENAKER,  
Solicitor and Counsel with respondent.

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## New Jersey Court of Errors and Appeals

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Between

MORTGAGE & INVESTMENT  
COMPANY OF NEW JERSEY,  
Complainant-Appellee,

and

ROMEL REALTY COMPANY,  
Defendant-Appellant.

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On Appeal  
from the  
Court of  
Chancery.

### **BRIEF FOR DEFENDANT- APPELLANT.**

The appellant respectfully submits the following brief of the facts and the law in this suit:

#### **Facts.**

The complainant sues to foreclose a purchase-money mortgage given by the defendant to Steenland Construction Company at the time of the conveyance of the mortgaged premises by said Steenland Construction Company to defendant, and as part of the consideration therefore.

The defendant, in its answer and counterclaim, alleges false and fraudulent misrepresentations in the inception of the sales which were con-

summed by the execution of said deed and mortgage, upon which representations the defendant relied in accepting the deed and making the mortgage. The representations the falsity of which is charged were that the premises were at the time of the sales available for the erection thereon of apartment houses; whereas defendant alleges that the use of the premises was restricted both by deed and by zoning ordinance of the City of Englewood (in which the premises are situate) to one-family, detached dwellings.

The defendant does not deny the validity of the bond and mortgage. It paid one installment of principal and interest. But it prays an abatement from the principal, of the difference between the purchase price of \$29,050, and the true value of the property at the time of the sale, for the purposes to which its use was restricted.

The mortgaged premises and other property were offered for sale at a public auction, held on the property, under the authority of Steenland Construction Company and in the presence of its president and vice-president, on May 14th, 1927.

Prior to the auction sale a newspaper advertisement was published (Exhibit D-5) in which it was emphasized that the property was both desirable and available for apartment houses.

A "book-map" or circular (Exhibit D-4), showing and describing the premises, and distributed by authority of the sellers at and before the auction sale, bears the statement, in prominent green print across its face, "Restrictions Lifted, 5/3/'27. Entire Tract Now Available for Apartments." The terms of sale read by the auctioneer and incorporated in the memoranda

signed by purchasers, stated that the property was subject to zoning ordinance of the City of Englewood. But, after reading the terms of sale, the auctioneer, according to the uncontradicted testimony of several witnesses, repeatedly stated that apartment houses could be erected on the property immediately, if a purchaser desired. (Case, p. 18, line 6; p. 30, line 10; p. 39, line 10; p. 41, line 10; p. 44, line 5).

Peter and Rollo Steenland (president and vice-president of the Steenland Construction Co.) were both present near the auctioneer at the time, but said nothing to deny or modify such statements. (Case, p. 17, line 20; p. 108, line 6)

The mortgaged premises consists of ten contiguous lots, known as Lots Nos. 1 to 10 inclusive in Block 117 on the map Exhibit D-4. Three of these lots, Nos. 1, 2 & 3, were purchased at the sale by Jason R. Elliott, and three, Nos. 8, 9 & 10, were purchased by Frank V. Romaglia. The remaining four lots, Nos. 4, 5, 6 & 7, were purchased by Mr. Elliott from Steenland Construction Company as a result of negotiations initiated by one Holbrook, an agent of Steenland Construction Company (Case pp. 21 & 22.)

Subsequently the defendant, Romel Realty Company, was organized by Messers. Romaglia and Elliott, who became its president and secretary-treasurer respectively. Their contracts (Exhibits D-5½, D-6 and D-8) were assigned to the corporation (Case, p. 52, lines 10-40), which paid the balance of the purchase-price, and they as its officers accepted the deed to it and executed the bond and mortgage in question, on June 28th, 1927.

Neither Elliott nor Romaglia made any inquiries, investigations or examinations of the

records to ascertain the truth or falsity of the representations made by the vendor as to the uses to which the property could be put, until some time after the execution and delivery of the deed and bond and mortgage. They desired property that they could use or sell for apartment house purposes, and bought the premises in question for the price agreed upon, and caused the bond and mortgage to be executed by their corporation, in reliance upon the representations of the vendor that the premises were available for such use at that time. (Case, p. 18, line 6; p. 19, line 30; p. 44, line 5; p. 46, line 5; p. 47, line 22; p. 60, line 10; p. 61, line 15)

The negotiations leading to the contract of sale between Steenland Construction Company and Elliott (Exhibit D-8), although subsequent to the auction sale, were based upon the representations made at the sale and subsequent representations of the same tenor, made by Holbrook, the agent of the vendor. (Case, pp. 21 & 22; also pp. 36-37).

In the contract (Exhibit D-8) which resulted from these negotiations, reference was made by inadvertence to restrictions set forth in a petition by the sellers to the Common Council of the City of Englewood, dated March 28, 1927. These restrictions limited the use of the premises to one-family dwellings; but the intent of both parties, as shown by the testimony (Case, p. 75, lines 20-40) was that the restrictions should be the same as set forth and embodied in the memoranda signed at the auction sale (Exhibits D-5½ & D-6).

As to Restrictions by Deed:

The mortgaged premises and other property were formerly owned by one Emily A. V. Brine-

kerhoff, who died on October 21, 1921, (Stipulated on record, Dec. 14, 1928), leaving a last Will (Exhibit D-1).

By the 14th clause in her Will, the testatrix devised the residue of her estate to her surviving daughters. In the 15th clause she gives a power of sale to her executors, in the following words:

“I authorize and empower my Executors at any time during a period of five years from my death to partition, sell, mortgage, lease, convey and generally to deal with real estate (except the Brayton Street cottage and plot) of which I may die seized or in which I may have an interest, on such terms at such time and in such manner as they in their discretion may deem best.”

Pursuant to this power of sale and within the five-year limited period, the executors conveyed a tract including the mortgaged premises, to Steenland Construction Company, by deed dated April 28th, 1924 (Exhibit D-2). This deed includes restrictive covenants including a restriction of the use of the premises for one-family, detached dwellings, until April 28th, 1930.

Subsequently, on May 3rd, 1927, after the expiration of the five-year period limited in the power of sale, the executors gave a quit-claim deed (Exhibit C-4) describing the same property, with restrictions omitting the limitation to one-family dwellings, and reciting that it is given to modify the restrictions contained in the former deed.

As to the Zoning Ordinance:

The provisions of the Zoning Ordinance of the City of Englewood (Exhibit D-3), in force at the

time of the sales under consideration, limited the use of the mortgaged premises to one-family, detached dwellings.

### POINT I.

**The statement "Restrictions lifted, 5/3/27, Entire Tract now available for Apartments," amounts to a representation that there was nothing else to prevent the erection of apartment houses, and the defendant had a right to rely on such representation.**

Complainant contended that the imprint in green across the face of the circular-map (Exhibit D-4) referred only to the restrictions mentioned in a note in red ink at a corner of the circular, over which green X's are imprinted.

If the green imprint had consisted only of the words "Restrictions lifted, 5/3/27," or "These restrictions lifted," there would be some force to complainant's contention. But the additional words "Entire tract now available for apartments" is tantamount to an express representation that there were no other restrictions of any kind forbidding the use of the property for apartments at the then present time. The words are positive and susceptible of no other construction.

The provision in the conditions of sale read at the auction and incorporated in the memoranda signed by purchasers, that the premises were subject to zoning ordinance of the City of Englewood, is not inconsistent with the representations above quoted. The reasonable and

ordinary implication of the two statements is that the zoning ordinance did not prohibit the use of the property for apartments; but the inference would be that such ordinance only prohibited use for business, garages or other non-residential purposes. Moreover, acceptance of this meaning was suggested and induced by the auctioneer by statements made after reading the terms of sale, in the presence of the two chief officers of the vendors, that apartment houses could be commenced on the premises the next day, if a purchaser desired. (Case, p. 31, line 10; p. 39, line 10; p. 41, line 10; p. 44, line 5)

That this was the meaning inferred by Beckmann and Richard, who purchased property at the auction sale, is indicated by the testimony. (Case, p. 27, line 30; p. 31, line 10) The testimony on this point is undisputed.

The defendant had a right to rely on these representations, and was under no obligation to make any independent investigation or examination of records.

2 Pomeroy's Equity Jurisprudence,  
Par. 895 (p. 1855).

*Sumner v. Seaton*, 47 Equity, 103

*Borden v. Hutchinson*, 49 Atl. 1088.

It is admitted that these cases are not on "all fours" with the instant case, but the principle affirmed is applicable.

*Borden v. Hutchinson* (supra) was on a bill for an injunction, to restrain the defendant from enforcing against land of the complainant, a judgment obtained by defendant's testator, a former owner of the land. The testator and judgment creditor had acquired the farm after

having obtained the judgment in question. Subsequently he sold it at public sale. In offering it for sale, he had stated that there was a mortgage for a certain sum, upon it, but made no mention of the judgment or of any other lien. In the syllabus by the Court it is said:

“The prior record of the judgment is constructive notice to subsequent purchasers, but it will not avail against the actual notice given by announcements to bidders, inviting them to purchase upon a statement of the lien of the property about to be sold, which excluded the idea that there was any judgment lien.” (Cites *Sumner vs. Seaton*, *supra*.)

In the instant case the representations of the vendors that the property was “now available” for apartments, excluded the idea that the zoning ordinance, mention of which was made, would offer any obstacle to the erection of apartments.

The defendant did rely on these representations. The testimony of Elliott and Romaglia to that effect and that they did not examine the records is clear, positive and undisputed. (Case, p. 19, line 30; p. 47, line 20; p. 61, line 10; p. 81, line 16; p. 82, line 20). The Master, in his opinion does not question their testimony; he only implies that by reason of their special knowledge and skill they should have been led to examine the records. But surely they are not to be deprived, because of their vocations as lawyer and title searcher, of the right to rely on affirmative representations made to them by a vendor, which is accorded to buyers generally.

Other persons made purchase agreements at the auction sale, and at least one subsequently refused to carry out because the property could not be used for apartment houses, and the Steenlands settled with them. (Carmin Richard, Case p. 32, line 10).

And yet the learned Advisory Master implies that because Elliott was a lawyer and Romaglia a title searcher, they had no right to rely on the representations made, but they could and should have ascertained the facts before they purchased, and are not now entitled to relief.

## POINT II.

**The defendant did not do anything which constituted a waiver of its right to relief, and is not in laches.**

The Master expresses his opinion (Case, p. 170) that the acts of the defendant in paying an installment of principal and interest on the mortgage after Elliott knew of the fraud, and subsequent requests for extensions of time, indicate a ratification of the transaction, which bars the defendant from relief under cases which he cites. This conclusion is not warranted by the evidence.

The execution of the agreement dated July 19, 1927 (Exhibit D-9) did not constitute any waiver or relinquishment of defendant's claim of misrepresentations by Steenland Construction Company. Defendant nor its officers took no action under this agreement. The execution of it was mere evidence of their good faith and their willingness to let the Steenlands make good their representations if they could.

The Master in his opinion states that Elliott drew this agreement prior to a meeting of the signers, indicating that Elliott initiated the matter, (Case, p. 163, line 30). This is erroneous. The testimony shows that neither Elliott nor Romel Realty Co. initiated the matter, but Steenland requested Elliott to attend the meeting, which was held on July 18, 1927, and that Elliott was there requested to draw the agreement, which he did the next day, (Case, p. 28, line 5; p. 30, line 8; p. 54, line 10; p. 85, line 10; p. 97, line 20) and then signed it for Romel Realty Co. and delivered it to a Mr Beckmann.

The Master also states that Elliott endeavored to carry this agreement into effect by helping with an application to the zoning authorities in Englewood. There is nothing in the case to support this assumption, nothing to indicate that Elliott did more than to attend a meeting of the Board of Adjustment as a passive observer, at the request of Steenland. (Case, p. 54, line 35; p. 55, line 20; and Exhibit D-10).

Defendant, until April, 1928, was awaiting the decision of the Board of Adjustment of the City of Englewood, on the application for an apartment house permit, which had been made by Eypper & Beckmann pursuant to the agreement, Exhibit D-9,—in order to give Peter Steenland an opportunity to substantiate his assertion that a permit would be granted if applied for.

The letter from Elliott to Steenland Construction Company dated April 23, 1928 (Exhibit D-11) shows that the defendant had no intention of affirming the transaction or of waiving its right to relief.

The making of the payment on account of the mortgage did not constitute a waiver of defend-

ant's rights. *Curtiss-Warner Corp. v. Thirkettle*, 99 Equity, 806.

When this payment was made in December, 1927, the mortgage had been assigned to the complainant. If it was foreclosed, Romel Realty Co. would have been unable to re-convey the premises to Steenland Construction Co. and that would have barred their contemplated and threatened suit for rescission. They were therefore obliged to prevent foreclosure if possible, or to delay or postpone it, and payment of an installment was therefore necessary.

There has been no suggestion that the complainant has been placed in any worse position by this payment made by defendant or by the requests for extension of time for further payments.

### POINT III.

**The quit-claim deed given by the executors of Emily A. V. Brinkerhoff to Steenland Construction Company, dated May 3, 1927, was not effective to modify the restrictions imposed by their prior deed.**

This deed was given after the expiration of the five year period to which the executors' power of sale was limited by the Will of their testatrix (Exhibit D-1). Moreover, their power had been exhausted by the deed of April 24, 1924, (Exhibit D-2). In the latter deed there was no reservation of any power or interest in the grantors which would have been any justification for any subsequent instrument affecting the

premises, even if there had been no time limit to their power of sale.

In testatrix's Will, prior to the power of sale, she devised her remaining real estate to her surviving daughters. Thus the power was merely a discretionary power with a limited time in which to exercise it.

The rule is well settled in this State that a power to sell must be strictly executed in regard to time, as well as in all other particulars when express directions are given.

*Booraem vs. Wells*, 19 Equity, p. 87.

*Cruikshank v. Parker*, 52 Equity, p. 310

*Pratt vs. Worrell*, 66 Equity, p. 194

*Hattie vs. Gehin*, 76 Atl. 4. (Aff'd, 76 Equity, 340)

In *Cruikshank vs. Parker*, (supra) this Court said:

“If we can ascertain the intention of the testator, that must govern. The only object of construction is to ascertain his Will.”

In *Molten v. Sutphin*, 66 Equity, 20, cited by the Advisory Master in support of the deed in question, a power of sale was held to extend beyond the period limited, because the testatrix had directed a division of the proceeds of the sale, and had made no alternative disposition of the property directed to be sold in case it was not sold within the limited period.

The Chancellor says:

“It is to be presumed that the testatrix did not intend to die intestate of this property if not sold.”

The exercise of a power of sale after the expiration of a period limited in a Will, has only been held valid where the power had not been exercised or exhausted within the period, and the subsequent exercise of it was deemed necessary to carry out the testator's intention as expressed in his Will, or to prevent intestacy as to the subject of the power.

In the instant case, the testatrix's prior devise left no justification for such delayed exercise of the power. Obviously the object of the power given by Mrs. Brinckerhoff's Will was merely convenience in the sale of the real estate. This power was exhausted by a single instrument, complete in itself, within the time limited. Nothing remained for the executors to do under the Will, nor was reserved by them in their deed, in respect to the property conveyed. Therefore, by reason of the devise above mentioned, the power to modify the restrictions rested solely in the surviving daughters of the testatrix.

The Master, in his opinion says (Case, p. 161, line 24):

"I might add that this deed of conveyance was simply modifying certain restrictions which only had two years to run and it meant to the estate the sum of \$15,000.00, which was a valuable consideration and worth while under the circumstances and therefore, the executors and beneficiaries would not be in a position to attack this instrument."

Referring to the letter, (Exhibit D-15) presented to the Steenland Construction Company by Mrs. Janet B. Kerr, one of the daughters, ob-

jecting to the modified restrictions, he says (Case, p. 160, line 32):

“In view of the fact that Mrs. Kerr was one of the beneficiaries under the Will and particularly of part of the residue of the estate, and it appearing that she was evidently willing to have the executors accept the \$15,000.00 from the Steenland Construction Company, it can hardly be said that she would have any right at that date or at a later date to come into equity and set aside this deed.”

The fact that the deed in question was given for a valid consideration does not validate it for the purpose for which it was given. For that reason, the executors could not attack it, but the devisees would be in a position to do so. The devisees have a prima facie case for a restraining order preventing the erection of an apartment house on the premises contrary to the restriction in the earlier deed. Such order might be vacated on proof that the applicant had consented to the modification of the restrictions, and had received a consideration therefore. But the letter (Exhibit D-15) conclusively shows that Mrs. Kerr had not consented but did object to such modification, and there is no proof or indication whatever in the testimony or the records that she was “evidently willing to have the executors accept the \$15,000.00 from the Steenland Construction Company.” Besides, it will be seen by reference to Exhibit C-4 that the consideration was the increase by \$15,000.00 in a then existing mortgage. There is no proof that the mortgage debt has been paid nor any ground for inference

that the executors have received any of that principal to distribute to the heirs.

The Master, in his opinion, adverts to the fact that no mention was made of this claim of ineffectiveness of Exhibit C-4 to modify restrictions, prior to the commencement of foreclosure.

The very fact of that omission indicates that Elliott nor Romaglia had not examined the records. If they had done so, certainly they, by reason of their professional training, would have jumped at the defect and raised the question immediately. But they would have been under no obligation to do so. Certainly there is no rule of law or equity requiring a prospective defendant to inform his adversary of his chief defence in advance, nor to penalize him for not discovering that defence first.

#### POINT IV.

**The representations of appellant's vendor (Steenland Construction Company) being untrue, were none the less fraudulent in equity even though either seller or buyer believed them to be true.**

The Master, in his opinion says:

“If the party complaining has not been misled, as where he knew that the representation was false at the time it was made, or has not been misled to his prejudice or injury by the misrepresentation, equity will not consider his complaint.

In the instant case, defendant (sic.) or its agents believed the deed restrictions

had been lifted, and in my opinion they had been lifted."

The defendant's agents did believe, at the time of the sale, that the restrictions had been lifted, and it was that belief, induced by the representations of the sellers, which led them to make their purchases. Otherwise they would not have bought.

It may be that the Master intended to say that the vendors or its agents believed the deed restrictions had been lifted. In such event this case certainly comes within the well-settled rule that conscious fraud is not essential to relief in equity.

*Campell v. Nichols*, 33 Law, p. 81

*Borden v. Hutchinson*, 49 Atl., p. 1088

*Strauss v. Norris*, 77 Equity, p. 33.

### Conclusion.

The defendant has come into Court with clean hands. It has attempted to deceive no one. Elliott notified their vendor, Steenland Construction Co., of their claim of false representations as soon as he became aware of it, by Elliott's letter of July 15, 1927 (Exhibit D-7), and also notified the complainant by Elliott's letter of October 17, 1927 (Exhibit D-12). Elliott's letter to Steenland Construction Co. dated October 5, 1927 (Exhibit C-10) is but another straightforward expression of their position, with a courteous disclaimer of belief in any intentional misrepresentations. His letter of April 23, 1928 (Exhibit D-11) is a final re-statement of their position.

Defendant respectfully submits that the four elements of fraud essential to relief in equity have been proven.

1. *That affirmative representations of material facts were made.*

That the representations alleged were made, is proven by both documentary evidence and testimony.

2. *That the representations were false.*

The statement "Restrictions Lifted \* \* \* Entire Tract now available for Apartments," was false because, as a matter of law the deed, Exhibit C-4, was not effective to remove or modify the prior restrictions.

Even if to the above statement is added the words "Subject to Zoning Ordinance of the City of Englewood," the statement is false, because the clear implication to an ordinarily reasonable and prudent man was that such ordinance did not prohibit the erection of apartment houses on the premises.

3. *That the representations were relied upon by the parties seeking relief.*

This is proven by the positive and undisputed testimony of Messrs. Romaglia and Elliott that they did not examine the title to the premises or any records pertaining thereto, prior to accepting the deed and making the mortgage in question; but relied wholly upon the published advertisements and the statements of the Steenland Construction Co. and its agents.

4. *That the party seeking relief suffered damages.*

The question of damages is not discussed by the Master in his opinion, because, on his con-

clusion that there was no fraud, it was not necessary to consider that question. But cogent evidence is before this Court in the following testimony of Peter M. Steenland. (Case, p. 102, line 30)

“Cross Examination by Mr. Vanderwart:

Q. Mr. Steenland, as an experienced real estate man, would you say it is a fact that this property would be more valuable if available for building apartment houses on it than if it was only available for one family houses? A. Certainly.

Q. Why is that? A. Because they are always paying more money for an apartment house site than for a one family house site.

Master: How much more? A. Sometimes 100% and sometimes more.

Additional testimony on this question was taken before the Master on January 10th and January 16th 1929; but this testimony is not printed because the question of amount of damages is not now before this Court.

Defendant-Appellant respectfully submits that a decree should be made reversing the decree of the Court of Chancery with costs, holding that the defendant-appellant is entitled to abatement from the mortgage in question, and remitting the cause back to the Court of Chancery for determination of the amount of the abatement to which the defendant is entitled and for a new decree in accordance with such determination.

JASON R. ELLIOTT,  
Counsel for Defendant-Appellant.

## New Jersey Court of Errors and Appeals

Between:

MORTGAGE AND INVESTMENT COM-  
PANY OF NEW JERSEY,  
*Complainant-Respondent,*

and

ROMEL REALTY COMPANY,  
*Defendant-Appellant.*

On Appeal from  
the Court of  
Chancery.

### BRIEF OF THE COMPLAINANT- RESPONDENT.

#### Essential Statement of Facts Not Set Forth in the Brief of the Defendant-Appellant.

That Conditions of Sale were announced at the said Auction Sale, and only those said conditions were incorporated in the Contracts of Sale arising therefrom.

That Exhibits "D-4," "D-5½," and "D-5," contained statements that title insurance policies would be issued to all purchasers at the said Auction Sale, and that such a title policy was issued to the Romel Realty Company (Case, p. 88, lines 7 to 22), which said title policy was marked "Exhibit C-9," but is not printed among exhibits herein.

That although the defendant claimed that the restrictions, set forth in contract "Exhibit D-8," were different from what was intended at the time of the making of the said contract, there is no request in the pleadings that this be reformed.

That there is no assignment to the Romel Realty Company by Jason R. Elliott and Frank Romaglia, or either of them, but the contracts for sale were merely "handed over" (Case, p. 67, line 26).

That Jason R. Elliott and Frank Romaglia, or either of them, did not assign any right of action of fraud they may have acquired to the Romel Realty Company.

That Jason R. Elliott, one of the purchasers of part of the premises, has been an Attorney at Law for twenty-two years and a Counsellor at Law since 1911, and was connected, at the time of the said Auction Sale, with a prominent Title Company. He lived practically all of his life in the City of Englewood, and therefore was in a position to know the legal effect of the contract he signed, the difference between zoning ordinances and Deed Restrictions, and especially concerning the zoning ordinances of the City of Englewood.

Mr. Romaglia has been a Title Searcher for nearly thirty years and was in a position to know the legal effect of the contract which he signed and the difference between zoning ordinances and Deed Restrictions.

That at the time of the said Auction Sale, the question of enforcing zoning ordinances was very much in doubt, and that at that time building permits, which were refused by municipalities, were obtained by mandamus through the courts, and that shortly thereafter a constitutional amendment regarding zoning ordinances was to be voted upon, the outcome of which was uncertain.

That Janet B. Kerr, one of the heirs of Emily A. V. Brinckerhoff, former owner of the said premises who wrote the letter "Exhibit D-15," in the said letter, or at no time thereafter offered to return the consideration given for the deed modifying restrictive covenants.

In reply to the several points argued by the Appellant in its brief and the cases cited in support thereof the following is respectfully submitted:

**Re: Point I.**

It is plainly evident from an examination of Exhibit D-4 (Case, p. 135) that the printing in green, "Restrictions Lifted 5/3/27, Entire Tract Now Available for Apartments," was especially set forth in large type to call attention to the note printed in red and crossed out by six X's in the lower left-hand corner, which X's were also in green, to show that the restrictions against the said premises expired on May 3rd, 1927, instead of in the year 1930, and it is difficult to understand how anyone could have inferred that it referred to any zoning ordinance or municipal regulation as the defendant and its agents knew no zoning ordinance would expire either in May, 1927, or in the year 1930.

The word "restrictions" as referred to and as used in connection with real estate means "deed or record restrictions" as contradistinguished from zoning regulations or municipal ordinances affecting property. That the word "restrictions" could be construed to include zoning regulations is purely a misconstruction of the ordinary and usual meaning of the word.

The references and cases cited; to wit:

*2 Pomeroy's Equity Jurisprudence*, Par. 895, page 1855;

*Sumner v. Seaton*, 47 Equity 103; and

*Borden v. Hutchinson*, 49 Atlantic 1088,

are all very ably disposed of by the learned Advisory Master in his Opinion (Case, p. 167, line 34, &c.).

In this connection also see:

*Industrial Savings & Loan Co. v. Plummer*, 92 Atl. 583; E. & A. of N. J. 1914,

in which case MINTURN, J., quotes Chancellor KENT as follows:

“The common law affords to every one reasonable protection against fraud and unfair dealing; but it does not go to the romantic length of giving indemnity against the consequence of indolence and folly, or a careless indifference to the ordinary and accessible means of information. Every person reposes at his peril in the opinion of others, when he has an equal opportunity to form and exercise his own judgment. ‘*Simplex Commendatio non obligat.*’”

And

12 R. C. L., page 384, Par. 135.

“It is generally held that one has no right to rely on representations as to the condition, quality, or character of property, or its adaptability to certain uses, where the parties stand on equal footing and have equal means of knowing the truth.”

The Appellant argues that it relied solely upon the representations made and that its officers did not use their skill and special knowledge to acquaint themselves with the facts prior to the sale, notwithstanding the fact that they knew some years prior to the sale of the zoning ordinance in the City of Englewood and they had actual and constructive knowledge of any restrictions of record prior to the sale (Case, p. 61, lines 6 to 12). This knowledge made it a duty of the Appellant to ascertain at its peril just what the restrictions of record, if any, were, and what the terms of the zoning ordinance were affecting the premises.

*Commercial Credit Corporation v. Coover*,  
129 Atlantic Rep. 187; E. & A. of N. J.  
1925.

“Whatever puts a party on inquiry amounts to notice, if inquiry becomes duty and would lead to knowledge of facts by exercise of ordinary intelligence and understanding.”

Also see *46 Corpus Juris*, page 543, Par. 28-1, and cases cited thereunder.

*Hemsley v. Marlborough House Co.*, 61  
Atlantic Rep. 455, E. & A. of N. J. 1905.

“A purchaser who had notice of the existence of restrictions limiting the right to erect buildings on the land, because they appear in the direct chain of title, is chargeable with knowledge of the purpose for which the restrictions were made.”

The fact that the officers of the Appellant were both experienced title men, one being a Counsellor at Law, imposed a greater duty upon it.

### Re: Point II.

In reply to this point, the respondent begs leave to refer to the Master's Opinion (Case, p. 170, line 16, to p. 171, line 21).

Also in this connection see:

*Arnold v. Hagerman, et al.*, 17 Atlantic  
Rep. 93, E. & A. of N. J. 1889.

“Upon discovery of fraud, which has induced a contract, the defrauded party must promptly elect whether he will rescind or not, and if he then evinces an intention not to rescind, the contract becomes, as to him, irrevocably established.”

*Robertson, et al. v. Criterion Const. Co.,*  
140 Atl. 574, Par. 2.

“To rescind contract for fraud, injured party must act promptly to repudiate it; failure of injured party to act promptly to repudiate contract for alleged fraud is plenary proof of election to affirm; election to affirm contract from failure to act promptly to repudiate it for alleged fraud is irrevocable.”

*Mass v. Schomer, et al.,* 144 Atl. 19, at page  
22.

“And yet they never appealed to this court, to relieve them from the consequences of the fraud they charge against the complainant, until after this bill had been filed to enforce the provisions of the mortgage of April 1, 1926. The most stupid man, in the circumstances in which they say they found themselves, would have rushed to the chancellor with the greatest speed. And these men were acting under the guidance of a legal adviser who was quick, when forced to do so, to retain counsel of standing and ability.”

### Re: Point III.

The executors of the estate of Emily A. V. Brinkerhoff conveyed the title to the premises in question by a deed (Exhibit D-2) concerning which deed the defendant raises no question or objection whatsoever, and in which deed the executors imposed certain restrictions which applied only to the property so conveyed and was in no manner a neighborhood restriction. Subsequently thereafter by Exhibit C-4, the said executors released that part of the restrictions in the previous deed, which pertained to apartment houses, which said release was in the form of a quitclaim deed.

Therefore, if your honorable court holds that said rights arising under the restrictions on the

land created a legal estate in the land conveyed, then we respectfully beg leave to refer to the report of the master regarding the same (Case, p. 159, line 37, to p. 161, line 30).

Provided, however, if this court holds that a certain legal estate was retained in the said premises, then the question regarding the said quitclaim deed raises a question of title, and is not within the jurisdiction of the court of chancery to decide.

*Price v. Lawton*, 27 Equity 325—which was thereafter affirmed, 28 Equity 274:

“An allegation that there is an outstanding paramount title will not enable the owner of the equity of redemption to arrest the enforcement of a purchase money mortgage.”

*Frenche v. McConnel*, 38 Atl. 687:

“A breach of covenants in a deed against encumbrances or for good title is no defense against proceedings to foreclose a mortgage given on the land, for part of the consideration money, except in cases where there has been an eviction by title paramount or an action is pending to try title to the mortgaged premises. A further exception exists where actual fraud in the transaction is alleged and proven.”

And as the conveyance included both restrictions of the deed and the zoning ordinance, the above mentioned case is identical with the case in question.

*Gihon v. Morris, et al.*, 106 Atl., page 807, 90 Equity 230.

“A vendor conveyed land with full covenants for title. The vendee took and retained possession; after some years they filed a bill to

rescind for an alleged defect in title; there was no fraud. Held, that the vendee cannot rescind and recover the purchase money, but must be content with his rights, under the covenants for title."

No fraud was perpetrated in obtaining the said quitclaim deed, and therefore, the defendant will have to rely on its covenants of title in the above mentioned case.

*Van Waggoner v. McEwen*, 2 Equity 412.

"Where a mortgage is given to secure the purchase money of land, an allegation of an outstanding title against the lands purchased, is no objection to a decree of foreclosure, *aliter*, if the purchaser is evicted or an ejection actually commenced against him."

The Court further held at page 413:

"This court will not undertake to settle a question of title between the defendant and the heirs of Tuers. The heirs are not even parties here and without first settling that question the defense set up is of no avail whatever. The whole case made is nothing more than an allegation of an outstanding title."

The defendants in this action tried to bring in such heirs of the Brinckerhoff Estate, but according to above mentioned case they have no standing in this court, in this case.

On the other hand, we believe the rights to be personalty and the case *sub judice* comes within the decision of this court as set forth in:

*Wellitoff v. Kohl*, 105 Equity, p. 181, E. & A. N. J. 1929, decided October 14, 1929,

wherein said court holds:

"The restriction arising from a restrictive covenant is not an estate in land, as is a legal

easement, but is purely a creature of equity arising out of contract, etc.”

Therefore, the executors of the said estate had the power, even though the same was exercised over five years after the death of the testatrix, to release any of the said restrictions for a valuable consideration and in other words, to treat the same as personalty.

#### **Re: Point IV.**

In reference to Point IV argued in the Appellant's Brief, we respectfully beg leave to refer to the Master's opinion (Case, p. 171, lines 26 to 30) in which he finds as a fact that there was no fraud.

### **ARGUMENTS OF COMPLAINANT-RESPONDENT.**

#### **POINT I.**

#### **Representations of auctioneer are limited to conditions of sale.**

Messrs. Elliott and Romaglia should have relied upon the conditions of sale and not the statement of the auctioneer, for an auctioneer is a special agent and cannot bind the parties by any contract other than that actually made. See *6 Corpus Juris*, page 825.

*6 Corpus Juris*, page 827.

“Printed conditions under which a sale proceeds are binding on both the seller and buyer and cannot be varied.”

*6 Corpus Juris*, page 828.

“The conditions of public sale announced by the auctioneer at the time and place of sale

are binding upon the purchaser whether he knew them or not."

Therefore, the defendants have no right of action based on fraud arising from any statements of the auctioneer, regarding the construction of apartment houses which were not included in the conditions of sale and even though he made them and believed them to be true, still there would be no right of action on the part of the defendant.

*Wilson v. Renner*, 89 Atl. 758.

Paragraph 5—85 N. J. Law 340 E. & A. 1914—  
"If the plaintiff made a statement to the defendant with intent to deceive then the defendant would have a right to take advantage of it, but if such statement was a mere expression of opinion as to what the plaintiff thought was true it does not constitute fraud."

*This was expressly held proper by the Court of Errors and Appeals.*

The undisputed facts are that the Steenland Construction Company paid the sum of \$15,000 to procure a release of the deed restrictions relating to apartment houses and acted upon advice of expert legal counsel in the acceptance of the deed Exhibit C-4 which released the said restrictions which conclusively proves that the Steenland Construction Company, its officers or agents could not have been guilty of intentional fraud upon Messrs. Elliott and Romaglia (Case, p. 110, line 18).

This fact is also not disputed by the defendant, because they wrote a letter to that effect, Exhibit C-10 in the second paragraph of which it is stated, "I do not believe that you intentionally misled purchasers at the auction sale, etc."

## POINT II.

**Jason R. Elliott and Frank Romaglia did not rely upon the statement "Restrictions lifted 5/3/27, Entire Tract Now Available For Apartment Houses," as printed on Exhibit D-4, nor upon the statements of the auctioneer relating to the building of apartment houses.**

The testimony of Jason R. Elliott shows that he knew that there was a zoning ordinance in the City of Englewood, which affected the said premises (Case, p. 59, line 35; p. 87, line 17), and also knew there was a constitutional amendment regarding the zoning ordinances to be voted upon in September of the same year (Case, p. 64, line 22, to p. 65, line 22), and that the enforcement of the zoning ordinances was very uncertain, and mentioned that he knew about the *Nutley* case, all of which shows that at the time of the auction sale he purchased property merely for speculative purposes and was willing to take a chance on the outcome of the zoning condition.

There is a restriction also on the property purchased by Jason R. Elliott, viz., lots 1 to 3, showing a 25 foot setback from Brinckerhoff Court, and a 40 foot setback from Lydecker Street, all of which would not make this tract an available apartment house site. It is clearly brought out that when Mr. Elliott purchased only lots 1, 2, and 3 for an apartment house site he was not thinking very much, nor did he give it due consideration (Case, p. 66, line 6).

Both Mr. Romaglia and Mr. Elliott stated that the defendant corporation was to be formed for the taking over of the property purchased at the auction sale for an apartment house site, but the testimony does not bear this out, as Jason Elliott

purchased lots 1, 2 and 3 and Frank Romaglia purchased lots 8, 9 and 10 which taken together make an (L) shaped tract which with setbacks would be wholly unsuitable for an apartment house site. The testimony also shows that a few days after the sale and upon Mr. Holbrook's suggestions to Mr. Elliott, that he should have purchased lots 4 to 7, both inclusive in the same block, it was evidently the first time they thought of the tract for an apartment house site.

The testimony further shows that Jason R. Elliott purchased part of the property in question for fear that some one else would buy lots 4 to 7 and erect an apartment thereon and not because of any representations made at the sale (Case, p. 66, line 16).

Jason R. Elliott also had his attention called to the fact of the zoning restrictions in Englewood when he purchased lots 4, 5, 6 and 7, in Block 117 on the Map in question, which contract for sale was dictated by himself in the office wherein he was working, and when sent to the Steenland Construction Company for a signature, was returned to him for the express purpose of inserting the paragraph relating to the restrictions, and this surely should have drawn the attention of Mr. Elliott who was a lawyer and a title officer, to the fact that there were restrictions and zoning ordinances affecting the premises in question (Case, p. 61, line 22, to p. 62, line 30).

### POINT III.

#### **Romel Realty Company cannot plead fraud.**

No representations were ever made by the Steenland Construction Company to the defendant Romel Realty Company, at the time of the auction sale or upon the agreement for the purchase

of said lots 4 to 7 or at any other time, as the Romel Realty Company was not formed until May 25th, 1927 (Case, p. 50, line 15), which was after all three contracts were signed. No assignment of the contracts from Jason R. Elliott or Frank Romaglia was ever made to the Romel Realty Company for the same was not produced at the time of the hearing, and the testimony shows that the contracts were "handed over—they hadn't been recorded," and notified the Title Officer of the Cliffside Park Title Guarantee & Trust Company and Steenland that title should be taken in the name of Romel Realty Company (Case, p. 67, line 26), and the testimony of Mr. Steenland shows (Case, p. 96, line 39) that he did not know that the Romel Realty Company was in existence until it asked for the deed which was just before May 31st, 1927.

Further there is no testimony showing that any representations or statements were relied upon to establish fraud, other than those made at the auction sale and at the signing of the contracts for the lots 4 to 7. Therefore, there could have been no fraud perpetrated by the Steenland Construction Company upon Romel Realty Company.

*Lembeck v. Gerken*, 96 Atl. 577; 88 N. J. L. 329, E. & A. 1916.

"Where defendant made false representations in a sale of land plaintiff who purchased from the defendant's grantee cannot base an action of fraud on such representations which were neither made to the plaintiff or made with the intent that he should rely on them."

In this case even tho false representations may have been made to Mr. Elliott or Mr. Romaglia, they were not made to the Romel Realty Company, nor made with intent that the Romel Realty

Company should rely on them, as grantors did not know of said company till asking for deed (Case, p. 96, line 29; p. 97, line 12).

*Baker v. Dietrick*, 118 Atl., page 745, holds at page 746; 98 N. J. L. 70, S. C. 1922:

“An action for deceit can not be maintained except by the person defrauded.” No one but the person who relied on the misrepresentations can maintain a suit based on them.

“A fraud is an individual and personal thing. It is a cause of complaint to the person only upon whom it is committed. No other person can claim or benefit from it.

“A right of action based on fraud is not assignable.

“Any fraud in inception of debt does not follow the assignment but is personal to the contracting parties.”

*27 Corpus Juris*, page 6, says that—

“Thus where fraud occurred in the original sale of property, there can be no recovery for such fraud by a subsequent donee, grantee, trustee, or purchaser.”

*Lawrence v. Montgomery*, 37 Cal. 183—

“Injury caused by fraud in the sale of land is personal and does not run with the land and hence a subsequent grantee has no right of action therefor.”

On the same page *Corpus Juris* also says—

“Stockholders and creditors of a corporation cannot maintain an action for fraud upon the corporation by its officers or other parties and misrepresentations made to individuals and inducing them to contract for the transfer of property to subsequently formed corporations, etc.”

And cites,

*Ettar Realty Co. v. Cohen*, 163 App. Div. 409; 148 N. Y. Supp. 625.

“Where in reliance on defendant’s misrepresentations certain individuals purchased realty at a given price and subsequently the vendor gave the deed to the plaintiff corporation formed after the misrepresentations had been made, plaintiff could not, in the absence of assignment sue for fraud because no misrepresentations had been made to it.

“Where defendant contracted to sell land and the purchasers formed a corporation to which the conveyance was made directly, the corporation without proof of assignment cannot recover against defendant for false representations made concerning the property; the contract for the conveyance having been made before the corporation was in existence and the misrepresentations having been made to the individual.”

On page 626 the Court said,

“There is no evidence of any assignment to plaintiff of the cause of action for deceit. It therefore cannot recover under *Fox v. Hirschfeld*, 142 N. Y. Supp. 261, on page 627, the court further said, ‘In the case at bar there is not even the form of an assignment.’ If this court was right in the case cited, I cannot see how the Ettar Realty Co., has any cause of action. No representations were made to it. It was not then in existence. While undoubtedly the Isears were the real parties in interest if they were the parties deceived the cause of action vested in them. It does not appear that said cause of action has been transferred to the plaintiff. For this reason and not that expressed by the lower court the judgment should be confirmed.”

As there was no evidence produced in the testimony that any cause of action for fraud has

been assigned by either Elliott or Romaglia, or both, and as action for fraud does not follow the land this case is identical with the said *Ettar Realty Co. v. Cohen* case.

#### POINT IV.

#### **Jason R. Elliott and Frank Romaglia and the Romel Realty Company are estopped from alleging fraud.**

1. They or either one of them did not deny that the conditions of sale were read at the auction, and which Jason Elliott, who as an attorney at law should have known were the only representations binding as far as therein set forth.

2. That Jason Elliott should have found out what the zoning ordinances were as he knew Englewood had zoning ordinances, having lived there all his life.

3. That he did not examine all the printing of the green marked on Exhibit D-4, which green printing covered the statement in red showing the restrictions expired in 1930, and which being in red was X'd out by X's of the same color as the printing on which the defendant relied, and he should have seen that the restrictions lifted referred only to the deed restrictions and not zoning ordinances.

4. That he did not ascertain from the Cliffside Park Title Guarantee and Trust Company what the restrictions actually were in their policy, as set forth in the second paragraph of Exhibit D-7.

5. That Jason Elliott is a lawyer of almost twenty-two years' standing, and for a number of years associated with a title company, and that Frank

Romaglia, a title searcher, or either of them did not examine the title to find out what the restrictions and the zoning ordinances of Englewood were, as their attention was repeatedly called to them.

6. That Jason Elliott and Frank Romaglia did not examine the copies of the agreement Exhibits D-5½ and 6, which they signed on the day of the auction sale and find out what they contained, as they had copies of the same in their possession from the time of the auction sale up to the date of the trial, as they offered the same in evidence.

7. That in all their dealings with the complainant the evidence shows that they only wanted time to raise money to pay the interest and no claim for reduction of principal was asked for showing that the answer interposed was only for delay (Case, p. 57, line 30; p. 91, lines 10 to 33, and Exhibits C-5 and D-13).

8. That they did not find out for themselves what the deed restrictions and zoning ordinances were.

*Pomeroy's Equity Jurisprudence 2, page 379.*

“The same result must plainly follow when, after the representation, the party receiving it has given to him a sufficient opportunity of examining into the real facts, when his attention is directed to the sources of information, and he commences, or purports, or professes to commence, an investigation. The plainest motives of expediency and of justice require that he should be charged with all the knowledge which he might have obtained had he pursued the inquiry to the end with diligence and completeness. He cannot claim that he did not learn the truth and that he was misled.”

Jason R. Elliott certainly had his attention called both to the deed restrictions and zoning ordinances at the time he made out contract for lots 4 to 7 if he did not when he signed contract for lots 1 to 3.

9. The Romel Realty Company is estopped from setting up the defense of fraud because they did not disaffirm the transaction immediately (see Exhibit D-7) and not wait till they found out what the decision of the Board of Adjustment would be. It certainly showed by making a payment of principal and interest in December and the fact that they entered into the agreement with the others to get a permit and from their statements in Exhibit D-12 that they were willing to take their chances in getting a permit.

*Pomeroy's Equity Jurisprudence 2, page 385.*

"All these considerations as to the nature of misrepresentations require great punctuality and promptness of action by the deceived party upon his discovery of the fraud. The person who has been misled is required, as soon as he learns the truth, with all reasonable diligence to disaffirm the contract, or abandon the transaction, and give the other party an opportunity of rescinding it, and of restoring both of them to their original position. He is not allowed to go on and derive all possible benefits from the transaction, and then claim to be relieved from his own obligations by a rescission or a refusal to perform on his own part. If after discovering the untruth of the representations, he conducts himself with reference to the transaction as though it were still subsisting and binding, he thereby waives all benefit of, and relief from, the misrepresentations."

## POINT V.

**No fraud was perpetrated.**

All the representations made by the Steenland Construction Company as to how the property was to be sold were set forth in the contracts for sale marked Exhibits D-5½, 6 and 8 and were read by the auctioneer at the sale and the same were set forth in the deed from Steenland Construction Company to Romel Realty Company Exhibit D-4½ and no different restrictions or changes were made in any one except in Exhibit D-8 wherein the purchaser therein, Jason R. Elliott, inserted the restrictions as set forth in the petition of March 28th instead of April 28th through his own error which the said Steenland Construction Company would have changed or agreed to have changed if they had been requested to do so.

The statement of Exhibit D-4 claims that "Restrictions Lifted 5/3/27 Entire Tract Now Available For Apartments," applied only to the deed restrictions as is clearly shown by the deed restrictions expiring April, 1930, printed in red and X'd out by green X's and in the terms of sale that were read at the time of the auction sale it was distinctly stated that the property was sold subject to the Zoning Ordinances of Englewood.

The defendant, therefore, took the property subject to the zoning ordinances of Englewood, and the deed restrictions set forth in the contract of sale which were the same as those set forth in the petition of April 28th.

Therefore, the defendant cannot claim any breach of covenants or restrictions and must rely upon the restrictions as set forth in said deed.

*Hawthorne v. Oddison*, 94 Equity 588, 120 Atl. page 797, Paragraph 3.

"In the absence of actual eviction for pending action to try an adverse title—foreclosure

of a purchase money mortgage will not be arrested by a defense of want of title in the vendor in which case the covenants of title must be relied upon by the purchaser for recovery of damages in a court of law."

Paragraph 7:

"Where a conveyance of land is made containing full covenants and warranty of title misrepresentation by the vendor that the title is perfect will not ordinarily afford ground for equitable relief if the vendor made the representations in good faith and believed that they were true, since in such circumstances the purchaser will be deemed to have relied upon the covenants."

Paragraph 8:

"Where a purchaser accepts a deed of conveyance containing a warranty of title excepting limitedly all claims under the vendor the covenants in effect declare the vendor does not warrant against title paramount and nothing short of fraudulent intent of the vendor in representing his title to be good or concealment where the duty of disclosures exists can authorize relief for his misrepresentations as to the title."

**CONCLUSION.**

Therefore, we respectfully pray that the final decree filed in this cause, as advised by the Master, be affirmed, and that the appellant's appeal from the said decree be denied, and dismissed with costs.

Respectfully submitted,

GEORGE H. RICHENAKER,  
Counsel for Respondent.

