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Bill of Complaint
(Filed June 26, 1930.)
IN CHANCERY OF NEW JERSEY

BILL OF COMPLAINT

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

The complainants, Nathan E. Jacobson and Rebecca Jacobson, his wife, of the City of Paterson, in the County of Passaic and State of New Jersey, respectfully show that:

1. On October 28, 1929, complainants, Nathan E. Jacobson and Rebecca Jacobson, his wife, were seized in fee simple of all that certain lot, tract or parcel of land and premises, situate, lying and being in the City of Paterson aforesaid, known as No. 104 and the westerly half of No. 106 Fair street, as assessed by the City of Paterson, and more particularly described as follows: 10

Beginning in the southerly line of Fair Street at a point seventy-five feet Easterly from the Southeast intersection of Fair and Paterson Street, running thence (1) Easterly along the southerly line of Fair Street thirty-seven feet six inches; thence (2) Southerly parallel with Paterson Street one hundred and six feet and six inches to the rear of lots fronting on Broadway; thence (3) Westerly along the rear of lots fronting on Broadway, thirty-seven feet and six inches and thence (4) Northerly parallel with the second course, one hundred and six feet and six inches to the Southerly line of Fair Street and to the place of beginning. 20

2. On the date last mentioned, complainants entered into a certain agreement in writing with William R. Lambert, wherein and whereby complainants agreed to convey the said lands and premises by deed of warranty, on or before Decem- 30

Bill of Complaint

ber 27, 1929, to the said William R. Lambert, in consideration of the payment by the said William R. Lambert of the sum of Fifteen Thousand Dollars (\$15,000), and the said William R. Lambert agreed to pay the complainants said purchase price of Fifteen Thousand Dollars (\$15,000), by the payment of Five Hundred Dollars (\$500) in cash upon the execution of said agreement, and the payment of One Thousand Dollars (\$1,000) on November 29,
10 1929, and payment of the balance, Thirteen Thousand Five Hundred Dollars (\$13,500), upon the delivery by complainants of said deed to the said William R. Lambert; the said deed to be delivered at the office of E. H. Lambert, 20-22 Church Street, Paterson, New Jersey, or at any other place mutually agreed upon, between the hours of 10 o'clock in the forenoon and 3 o'clock in the afternoon, on the date hereinbefore set forth.

20 3. The said agreement was duly acknowledged before Tunis R. Spear, a Notary Public of New Jersey, who affixed his signature and notarial seal to said certificate of acknowledgment. A true copy of said written agreement is hereto annexed and made a part hereof, as if more fully set forth.

4. The said William R. Lambert paid to complainants, the sum of Five Hundred Dollars (\$500.00) at the time of the execution and delivery of the said agreement in writing.

30 5. On said December 27, 1929, at the hour of 10 o'clock in the forenoon, complainants offered and tendered a warranty deed, conveying the lands and premises hereinbefore referred to, to the said William R. Lambert, duly executed and acknowledged by complainants, for the purpose of deliver-

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ing the said deed to the said William R. Lambert, upon the payment by him of the balance of the purchase money, pursuant to the terms of the aforesaid agreement; but the said William R. Lambert refused to accept said warranty deed or pay complainants the balance of the purchase price due them as aforesaid.

6. The defendant, some time prior to said December 27, 1929, and on many occasions since then, has stated to complainants his refusal to accept a deed from complainants, and his refusal to pay over the balance of the purchase price due them. 10

7. On March 14, 1930, and on divers other dates prior thereto and since then, complainants have in writing and orally expressed to the defendant, William R. Lambert, their willingness to tender a warranty deed to him, in accordance with the terms of said contract, upon receipt from him of the balance of purchase monies due them under said contract. On all of said occasions, the said defendant, William R. Lambert, has refused and still refuses to accept a warranty deed for said premises, and refuses to pay the balance of the purchase monies due under said contract. Complainants have, in writing and otherwise, on March 14, 1930, and since then written the defendant, making time of the essence of their contract, tendering unto him a deed upon receipt of the balance of monies due them under said contract, but defendant refuses to pay the balance of the purchase price due complainants, and refuses to accept a warranty deed. 20 30

8. Complainants have always been ready and willing, and now tender themselves ready and willing to perform their part of the said agreement.

Bill of Complaint

and on the payment of the remainder of said purchase monies, with interest, to convey the said lands and premises to the said William R. Lambert, by a warranty deed, duly executed by complainants.

Complainants are without adequate remedy in the courts of law, and therefore pray:

1. That William R. Lambert, who is the defendant to this suit may answer this bill of complaint and each statement therein made.

10 2. That the said William R. Lambert may be compelled by the decree of this court specifically to perform the said agreement with complainants, and to pay to complainants the remainder of the said purchase money, as in and by said agreement provided, with interest from the time said purchase money ought to have been paid, on the delivery by complainants to said William R. Lambert of a deed executed by complainants, as in said agreement provided.

20 3. That in case the said defendant, William R. Lambert should, within the time limited by this Court for such performance of said contract, fail and neglect, upon the tender of said deed, to pay the said remainder of said purchase money as aforesaid, that then and in that event the said sum, together with interest and costs, may be and become a lien upon the said lands and premises in favor of the complainants, and that the said lands and premises may be sold under the direction of
30 this court for the satisfaction of such lien so impressed on said lands and premises; and in case a deficiency should arise upon said sale, that the said defendant may be ordered by this court to pay said deficiency, together with interest and costs to these complainants.

Bill of Complaint

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

Saul M. Mann

Solicitor for and of counsel
with complainant.

Articles of Agreement, made the Twenty-eighth day of October in the year of our Lord One Thousand Nine Hundred and Twenty-nine, between Nathan E. Jacobson and Rebecca Jacobson, his wife, of the City of Paterson, in the County of Passaic and State of New Jersey, of the first part; hereinafter known as the Seller, and William R. Lambert, of the City of Paterson, in the County of Passaic and State of New Jersey, of the second part; hereinafter known as the Purchaser. 10

Witnesseth: That the said Seller, for and in consideration of the sum of Fifteen Thousand dollars, 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, doth agree to and with the said Purchaser, that the said Seller, will well and sufficiently convey to the said Purchaser, his heirs and assigns, by warranty deed free from all encumbrance except zoning restrictions, if any, on or before the twenty-seventh day of December next ensuing the date hereof; all that lots, tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the City of Paterson, in the County of Passaic and State of New Jersey. 20 30

Notice of Appeal

Bill of Complaint

Being further described as lot No. 104 and the westerly half of 106 Fair Street as assessed by the City of Paterson, and as shown on the City atlas of the City of Paterson, N. J. It being the intention to convey all of the property now owned by the seller at this location, the property having a frontage of 37½ feet, more or less, and a depth of 106 feet, more or less.

10 And the said Purchaser doth covenant, promise, and agree, to and with the said Seller, their heirs, executors, administrators and assigns, that he will pay and satisfy or cause to be paid and satisfied, unto the said Seller the said sum of Fifteen thousand (\$15,000.00) dollars, as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

20	The sum of five hundred (\$500.00) dollars in cash, upon the signing of this agreement, receipt of which is hereby acknowledged	\$ 500.00
	A further payment on November 29, 1929	
	of	1,000.00
	Upon receipt of duly executed deed, cash	13,500.00

Purchase price\$15,000.00

30 It being understood and agreed that the purchaser has the right of paying the full amount of the unpaid balance at any time during the term of this contract and that the seller will deliver to him a deed, upon five days notice from the purchaser of such desire.

And it is further agreed, by the parties to these presents, that the said Purchaser, himself, his heirs or assigns, may enter into and upon the said land and premises upon receipt of deed and from thence take the rents, issues and profits.

Bill of Complaint

And it is further agreed, by the parties hereto, that the said Deed shall be duly executed and acknowledged by the seller, at the seller's expense, to convey to the purchaser or the purchaser's assigns, the absolute fee of the above premises, free of all incumbrances, except as herein stated, and shall be delivered and received at the office of E. H. Lambert, 20-22 Church St., Paterson, N. J., or at any other place mutually agreed upon, between the hours of ten in the forenoon and three o'clock in the afternoon on the date hereinbefore set forth. 10

Rents, Water Rents, Interest on Mortgages, and Insurance Premiums, if any, are to be apportioned to date of passing title.

Any buildings on the land hereby agreed to be conveyed are represented to be wholly within the lines of said land.

Gas and electric fixtures and chandeliers, window shades, wire screens and storm sash, or other fixtures not belonging to the tenant of said premises, if any, and now on said premises are included in this sale. 20

The risk of loss or damage to said premises by fire or otherwise until the delivery of said deed is assumed by the seller.

The seller is to pay all assessments for public improvements completed or under construction at date of this agreement.

The owner or owners of property or properties to be sold or exchanged hereunder, hereby recognize E. H. Lambert as the broker negotiating this agreement of sale and hereby agree to pay said broker for services rendered, a commission of none per centum of said sale of exchange price, as named 30

Bill of Complaint

herein, same to be paid upon the execution of this agreement. This is a net sale with no commission paid by the seller.

In Witness Whereof, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

Witness:

Signed:

Nathan E. Jacobson (L. S.)

Rebecca Jacobson (L. S.)

William R. Lambert (L. S.)

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The observance of the following suggestions will save time and trouble at the closing of this title.

The Seller

First. Should bring all insurance policies or duplicates.

Second. Should also bring the tax and water receipts of the current year, and any leases, deeds and agreements relating to the premises.

20 Third. When there is a water meter on the premises it should be read.

Fourth. If there are any mortgages on the premises to be conveyed, the seller should produce receipts showing to what date the interest has been paid, and if the principal has been reduced, evidence of such reduction, in form to be recorded, must be produced.

Fifth. If the seller is married, husband and wife must join in the execution of the deed.

30 Sixth. The seller should furnish to the purchaser a full list of tenants, giving the names, rent paid by each and date to which rent has been paid.

Bill of Complaint

The Purchaser

First. Should be prepared with money or a certified check drawn to his own order. The certified check may be for an approximate amount and money may be provided for the balance of the settlement.

Second. Husband and wife should be at the closing in order to sign in the event a mortgage is being made.

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State of New Jersey }
County of Passaic } ss.

Be It Remembered, That on this 28th day of October, in the year of Our Lord One Thousand Nine Hundred and Twenty-nine, before me, the subscriber, a Notary Public, personally appeared Nathan E. Jacobson and Rebecca Jacobson, him wife, who, I am satisfied are the Grantors in the within Agreement named; and I having first made known to them the contents thereof, they did acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed. 20

Tunis R. Spear,
Notary Public of New Jersey.

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Answer

(Filed July 26, 1930.)
IN CHANCERY OF NEW JERSEY

	Between	}	On Bill, &c.
	Nathan E. Jacobson, and Re-		
	becca Jacobson, his wife,		
	Complainants,		
	and		
10	William R. Lambert,	}	
	Defendant.		

ANSWER

The defendant, residing in the City of Paterson, County of Passaic and State of New Jersey, answering the bill of complaint filed in the above cause, says that:

20 1. He has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 1 of the complaint.

30 2. He admits the execution of the contract, referred to in paragraph 2 of the complaint, and says that same was signed and executed by him under the circumstances, upon the conditions and by reason of the assurances and representations then and there made to him in connection therewith by the complainants, all of which are more particularly set forth in the first and sixth separate defenses hereinafter stated.

3. He admits the acknowledgment of said contract, as alleged in paragraph 3 of the complaint, and in further answer thereto repeats the matters and things set forth by him in paragraph 2 hereinabove.

Answer

4. He admits the payment of the sum of \$500.00 to complainants, as is alleged in paragraph 4 of the complaint, but says that said payment was made under the circumstances and upon the conditions, representations and assurances to him made by complainants, as is more particularly set forth in the first and sixth separate defenses hereinafter contained.

5. He denies the allegations contained in paragraph 5 of the complaint.

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6. He denies the allegations contained in paragraph 6 of the complaint, and in further answer thereto says that he did, prior to December, 1929, and on several occasions thereafter, inform complainants that Arthur H. Freestone, for whom he was acting as agent in connection with the transaction and the purchase of the lands and premises in question, was unable to perform and carry out the terms of the purchase of said property, and by reason of said inability on the part of the said Arthur H. Freestone, instructed complainants to keep and retain the sum of \$500.00 paid by him to them, pursuant to his understanding with complainants, as is more particularly set forth in the first separate defense hereinafter contained.

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7. He denies the allegations contained in paragraph 7 of the complaint, except in that he admits that complainants wrote to him relative to said lands and premises. In further answer to the matters contained in paragraph 7 of the complaint, he says that, by reason of the understanding made and entered into between him and complainants, as is particularly set forth in the first separate defense hereinafter contained, and the payment by

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Answer

him to complainants of the sum of \$500.00, and the retention of said by complainants under the circumstances therein set forth, he was not obligated to take said conveyance and was relieved and discharged from his obligations under said contract.

8. He denies the allegations contained in paragraph 8 of the complaint.

AS A FIRST SEPARATE DEFENSE

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1. Prior to and concurrently with the execution of the contract, referred to in paragraph 2 of the complaint, he expressly made known and stated to complainants that he was not desirous of purchasing, nor did he intend to purchase, the lands and premises described in said contract for himself or for his own use; but that he was doing so merely as the agent for, and on behalf of, his principal, whose identity he was then unable to disclose to complainants, and by reason whereof he was unwilling to enter into the said contract and/or to pay them the sum of \$500.00 in connection with said transaction, excepting, however, upon the express understanding that said contract was not to come into force or effect as against him, unless his said principal was able and willing to perform the terms of said contract on or before the date fixed for the consummation thereof, and that in the event of his principal being unable or unwilling to do so, then complainants were to keep and retain the said sum of \$500.00, to be paid by him to them as aforesaid, in full payment and satisfaction of any and all rights and/or claims which they might have against defendant by reason of his having entered

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Answer

into said understanding and/or executed the said contract.

2. Complainants, in order to induce him to execute the contract, hereinabove referred to, then and there assured defendant that they were willing to execute said contract and to permit him to execute same in accordance with and subject to the conditions and express understanding had between them and particularly set forth in the preceding paragraph.

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3. Relying upon the assurances and representations thus given and made to him by complainants, he did thereupon execute the said contract and thereafter did pay to complainants the said sum of \$500.00.

4. Subsequent to the execution of said contract, and prior to the date fixed for the consummation thereof, Arthur H. Freestone, for whom defendant was acting as agent in connection with the purchase of said property and said transaction, informed defendant that he was unable to perform and carry out the terms and provisions of the said contract, and thereupon defendant informed complainants of said fact, and authorized and directed complainants to keep and retain the sum of \$500.00, paid by him to them, in accordance with their understanding as hereinabove mentioned, which complainants have done.

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5. The said Arthur H. Freestone, for whom and on whose behalf defendant was acting in the said transaction and in connection with the execution of said contract, was unable, prior to and at the time fixed for the consummation of said contract, and ever since has been and still is unable, to comply with and carry out the terms of the contract hereinabove referred to.

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Answer

6. By reason of all of the foregoing, there has been an accord and satisfaction of the said contract, and defendant is not liable thereunder.

AS A SECOND SEPARATE DEFENSE

1. Paragraphs 1, 2, 3, 4, and 5 of the first separate defense are hereby expressly referred and made a part hereof as though the same were repeated verbatim herein.

10 2. The condition precedent, upon the happening of which the said contract was to become effective and go into force, as aforementioned, has never occurred, happened or been fulfilled, by reason whereof said contract is not binding upon, is ineffective and unenforceable as against the defendant.

AS A THIRD SEPARATE DEFENSE

20 1. Paragraphs 1, 2, 3, 4, and 5 of the first separate defense are hereby expressly referred to and made a part hereof as though the same were repeated verbatim herein.

30 2. To now permit complainants to enforce the said contract as against defendant, in direct violation of their express understanding with defendant and contrary to their representations and assurances, made to him as aforesaid, will result in great and irreparable loss and damage to defendant, by reason whereof complainants are equitably estopped from enforcing said contract.

AS A FOURTH SEPARATE DEFENSE

1. Paragraphs 1, 2, 3, 4, and 5 of the first separate defense are hereby expressly referred to and

Answer

made a part hereof as though the same were repeated verbatim herein.

2. By reason of all of the foregoing and circumstances hereinabove set forth, complainants are without clean hands and are not entitled to the equitable relief sought by them.

AS A FIFTH SEPARATE DEFENSE

1. Paragraphs 1, 2, 3, 4, and 5 of the first separate defense are hereby expressly referred to and made a part hereof as though the same were repeated verbatim herein. 10

2. Although defendant promptly notified complainants of the fact that his principal was unable to perform said contract, complainants failed to take any steps or actions towards enforcing, or attempting to enforce, said contract as against defendant, or his principal, but on the contrary greatly delayed doing so, by reason where defendant charges that complainants are guilty of laches. 20

AS A SIXTH SEPARATE DEFENSE

1. Paragraphs 1, 2, 3, 4, and 5 of the first separate defense are hereby expressly referred to and made a part hereof as though the same were repeated verbatim herein.

2. Defendant has now learned that the representations and assurances made to him by complainants, as herinbefore stated, were false and untrue, since complainants did not then, nor at any time thereafter, intend to carry out and/or abide by the representations and assurances made by them to defendant as aforesaid, but made same solely for the purpose of deceiving and defrauding 30

Answer

defendant in the premises, and in order to induce him to execute the said contract.

3. By reason of the matters hereinabove set forth, defendant says that the execution of said contract by him was procured by means of the fraud, artifice and deceit practiced and perpetrated upon him by complainants, as aforementioned, by reason of all of which defendant charges that said contract is null and void.

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AS A SEVENTH SEPARATE DEFENSE

1. Defendant charges that complainants have an adequate remedy at law and are, therefore, not entitled to the equitable relief sought by them.

AS AN EIGHTH SEPARATE DEFENSE

20 1. Paragraphs 1, 2, 3, 4, and 5 of the first separate defense are hereby expressly referred to and made a part hereof as though the same were repeated verbatim herein.

30 2. On occasions subsequent to the date specified in the said contract for its consummation, defendant informed complainants that the said Arthur H. Freestone, for whom he was acting as agent in connection with said transaction and the execution of the contract aforesaid, was unable to perform and carry out the terms and provisions thereof, and informed complainant that he was satisfied to permit them to keep and retain the sum of \$500.00, which he had paid to them as aforesaid, in full payment, satisfaction and discharge of his obligations, if any, under the said contract, to which the complainants agreed to, and pursuant to which they have kept and retained said money.

Mendelsohn & Mendelsohn,
Solicitors of Defendant.

Notice

(Filed September 29, 1930.)
IN CHANCERY OF NEW JERSEY

Between

Nathan E. Jacobson and Re-
becca Jacobson, his wife,

Complainants,

and

William R. Lambert,

Defendant.

On Bill, Etc.

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NOTICE

To Mendelsohn & Mendelsohn, Esq.,
Solicitors of Defendant.

Sirs:

Take Notice that I shall move before the Chan-
cellor in the Chancery Chambers, First National
Bank Building, Jersey City, New Jersey on August 20
18, 1930, at ten o'clock, A. M., or as soon thereaf-
ter as counsel can be heard, to strike out the An-
swer interposed by the defendant in the above en-
titled matter, on the ground that same is sham, friv-
olius and false, and on the ground that the alle-
gations of said Answer, even if true, do not estab-
lish or set up a defense to the bill of complaint.

The attached affidavits will be used by me in
the foregoing motion. 30

Dated: August 5, 1930.

Yours,

Saul M. Mann,

Solicitor of Complainants.

Affidavit

along the rear of lots fronting on Broadway, thirty-seven feet and six inches and thence (4) northerly parallel with the second course, one hundred and six feet and six inches to the southerly line of Fair Street and to the place of Beginning.

2. On the date last mentioned, complainants entered into a certain agreement in writing with William R. Lambert, wherein and whereby complainants agreed to convey the said lands and premises by deed of warranty, on or before December 27, 1929, to the said William R. Lambert, in consideration of the payment by the said William R. Lambert of the sum of Fifteen Thousand Dollars (\$15,000), and the said William R. Lambert agreed to pay the complainants said purchase price of Fifteen Thousand Dollars (\$15,000) by the payment of Five Hundred Dollars (\$500) in cash upon the execution of said agreement, and the payment of One Thousand Dollars (\$1,000) on November 29, 1929, and payment of the balance, Thirteen Thousand Five Hundred Dollars (\$13,500), upon the delivery by complainants of said deed to the said William R. Lambert; the said deed to be delivered at the office of E. H. Lambert, 20-22 Church Street, Paterson, New Jersey, or at any other place mutually agreed upon, between the hours of 10 o'clock in the forenoon and 3 o'clock in the afternoon, on the date hereinbefore set forth.

3. The said agreement was duly acknowledged before Tunis R. Spear, a Notary Public of New Jersey, who affixed his signature and notarial seal to said certificate of acknowledgment.

4. The said William R. Lambert paid to complainants, the sum of Five Hundred Dollars (\$500.-

Affidavit

00) at the time of the execution and delivery of the said agreement in writing.

5. On said December 27, 1929, at the hour of 10 o'clock in the forenoon, complainants offered and tendered a warranty deed, conveying the lands and premises hereinbefore referred to, to the said William R. Lambert, duly executed and acknowledged by complainants, for the purpose of delivering the said deed to the said William R. Lambert, upon the payment by him of the balance of the purchase money, pursuant to the terms of the aforesaid agreement; but the said William R. Lambert refused to accept said warranty deed or pay complainants the balance of the purchase price due them as aforesaid.

6. The defendant, some time prior to said December 27, 1929, and on many occasions since then, has stated to complainants his refusal to accept a deed from complainants, and his refusal to pay over the balance of the purchase price due them.

7. On March 14, 1930, and on divers other dates prior thereto and since then, complainants have in writing and orally expressed to the defendant, William R. Lambert, their willingness to tender a warranty deed to him, in accordance with the terms of said contract, upon receipt from him of the balance of purchase monies due them under said contract. On all of said occasions, the said defendant, William R. Lambert, has refused and still refuses to accept a warranty deed for said premises, and refuses to pay the balance of the purchase monies due under said contract. Complainants have, in writing and otherwise, on March 14, 1930 and since then written the defendant, mak-

Affidavit

ing time of the essence of their contract, tendering unto him a deed upon receipt of the balance of monies due them under said contract, but defendant refuses to pay the balance of the purchase price due complainants, and refuses to accept a warranty deed.

8. Complainants have always been ready and willing, and now tender themselves ready and willing to perform their part of the said agreement, and on the payment of the remainder of said purchase monies, with interest, to convey the said lands and premises to the said William R. Lambert, by a warranty deed, duly executed by complainants. 10

9. Before the execution of the aforesaid agreement, the defendant had offered to pay complainants monies for an option for the purchase of said premises, but complainants did refuse said option, informing defendant that the only understanding into which they would enter, concerning the sale of said property, would be an absolute contract. As a result thereof, the contract aforesaid was entered into. A true copy of said contract is annexed to the bill of complaint. 20

10. At the time of the execution of said contract and at all times prior thereto, the defendant never disclosed his principal, and never revealed in any manner whatsoever, that he was acting as agent for an undisclosed or any principal.

11. In the latter part of August and in the early part of September, the defendant came to complainants, asking them to sell him their aforesaid property. The defendant also wrote complainants the letter, of which a true copy is annexed hereto and made part thereof, as if set forth at length. When the contract was entered into, complainants 30

Affidavit

always believed that the defendant was acting for himself.

12. It was only when the second payment of One Thousand Dollars (\$1,000) became due on said contract, to wit, on or about November 29, 1929, when complainants demanded of defendant the second payment of One Thousand Dollars (\$1,000), that the defendant did then inform complainants that he had assigned the contract to a third party, not disclosing the name of said third party, but 10 informing complainants that said third party would close the deal in a few days, would communicate with the complainants in a few days, and would pay the balance of the purchase price. Complainants then asked the defendant who the assignee of said contract was, but he told complainants that he could not reveal the name.

13. Complainants deny that there ever was at 20 any time any talk of any kind whatsoever, or any agreement whatsoever, that complainants would keep and retain the sum of Five Hundred Dollars (\$500) already paid to them in full payment for a release or for an accord or satisfaction of their claim against defendant. Complainants' first knowledge of the fact that defendant had an undisclosed principal or any principal in the transaction, came after the date for the closing of title had passed.

30 14. As late as June, 1930, the defendant offered complainants a note made by Arthur Freestone, in the sum of Five Hundred Dollars (\$500), in addition to the monies already received by complainants in full settlement of complainants' claim against William R. Lambert.

Affidavit

15. We deny the contents of the first separate defense, second separate defense, third separate defense, fourth, fifth, sixth, seventh and eighth separate defenses. The defendant never told us or any one to our knowledge, that the money being paid on account of said contract was being paid and that the contract was being executed upon the understanding that it was not to go into force as against the defendant, unless his principal performed the terms of said contract.

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Emanuel Jacobson

Nathan Jacobson

Sworn to and subscribed before me, this 5 day of August, 1930.

Dorothy Turnbull, Notary Public.

E. H. Lambert, Realtor
Lambert Building, 20-22 Church St.,
Paterson, New Jersey

October 21, 1929. 20

Mr. Nathan Jacobson,
83 Fair Street,
Paterson, N. J.

Dear Sir:

You have doubtless learned of our purchasing the church property on Broadway which is in the rear of your Fair Street property.

This was a speculative purchase which we intend to hold for some time as a parking space but are willing to consider the purchase of your 1½ lots at a reasonable price should you care to sell. If you are willing to consider a reasonable price at this time get in touch with us.

Yours very truly,

E. H. Lambert

By W. R. Lambert.

Affidavit

State of New Jersey }
 County of Passaic } ss:

Rebecca Jacobson, of full age, being duly sworn according to law, upon her oath deposes and says:

1. I am the wife of Nathan E. Jacobson, and one of the complainants in the above entitled matter, having executed the contract attached to the bill of complaint. William R. Lambert never spoke to me at any time concerning any of the details surrounding the execution of the aforesaid contract. I signed the contract at Mr. Lambert's office, and was told the contents thereof by my husband. Mr. Lambert never told me that he was acting as an agent. I deny the allegations contained in all the separate defenses of Mr. Lambert, the contents of none of said separate defenses having ever been brought to my knowledge by Mr. Lambert or anybody else.

20 Rebecca Jacobson

Sworn to and subscribed before me, this 5th day of August, 1930.

Dorothy Turnbull, Notary Public of N. J.

Service of the within notice and affidavit acknowledged this 7th day of August, 1930.

Mendelsohn & Mendelsohn,

Solicitors of Defendant.

Solicitors of Defendant.

Affidavit

(Filed September 29, 1930.)
IN CHANCERY OF NEW JERSEY

Between Nathan E. Jacobson and Re- becca Jacobson, his wife, Complainants, and William R. Lambert, Defendant.	}	On Bill, Etc.
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AFFIDAVIT

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

William R. Lambert, of full age, being first
 duly sworn according to law upon his oath, de- 20
 poses and says:

1. I am the defendant named in the above-en-
 titled cause. I have seen and read a copy of the
 affidavits made by Nathan E. Jacobson and Em-
 manuel Jacobson and Rebecca Jacobson in the
 above cause.

2. Replying to the affidavit made by the said
 Nathan E. Jacobson and Emmanuel Jacobson, I
 say that it is not true, as is alleged in paragraph 30
 5 of said affidavit, that the complainants on De-
 cember 27, 1929, or at any other time, offered and
 tendered to me a warranty deed, duly executed and
 acknowledged by them or that I ever refused to
 accept any such deed. On the contrary, I say that
 I never saw any such deed, nor was any such deed
 ever offered to me.

Affidavit

3. I deny that I ever made any statements to complainants, such as are alleged in paragraph 6 of said affidavit. I, however, did, on several occasions both prior and subsequent to December 27, 1929, inform the complainants that Arthur H. Freestone, for whom I was acting as agent in connection with the transaction and the purchase of the property in question, was unable to perform and carry out the terms of the contract for the
10 purchase of said property, and that because of this situation, I told the complainants, that, in accordance with our previous understanding, they should keep and retain the \$500.00 which I had previously paid to them, and to consider their liability under the said contract at an end.

4. I deny that the complainants have ever, by writing or otherwise, made time of the essence of the contract in question, as is stated in paragraph
20 7 of the said affidavit. I further say that by reason of my previous understanding and agreement with the complainants, I was not obliged to accept the deed or pay the balance of the purchase price in the event that my principal Arthur H. Freestone did not, or was unwilling to, perform the contract in question, in which event the complainants were to retain the \$500.00 which I had paid to them and the contract in question was to be at
30 an end.

5. I absolutely deny that I ever offered to pay to the complainants any money for an option to purchase the property in question, or that the complainants ever refused such an option, at the same time informing me that the only understanding into which they would enter, concerning

Affidavit

the sale of said property, would be an absolute contract, as is particularly stated in paragraph 9 of said affidavit. On the contrary, the express understanding under which the contract in question was entered into was that in the event that my principal would not carry it out, then the complainants were to keep and retain the \$500.00 which I had paid to them, and the contract was to be at an end, and that there was to be no further liability whatsoever on my part.

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6. I deny that I failed to disclose the fact that I was merely acting as agent in the matter, as is stated in paragraph 10 of the affidavit. On the contrary, I say that I specifically made known to the said complainants both before and at the time of the execution of the said contract that I was merely acting as an agent in the matter and had no other interest therein whatsoever.

7. I also deny that the complainants at the time of the execution of the contract in question believed or had any occasion or reason to believe that I was acting for myself as is stated in paragraph eleven of said affidavit since I specifically told them, both prior to and at the time of the execution of said contract that I was not purchasing said property for myself, but merely was acting as agent for my principal.

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8. I also deny the truth of the statements contained in paragraph 12 of said affidavit.

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9. I absolutely deny the truth of the statements contained in paragraph 13 of said affidavit and by way of further answer thereto, specifically refer to my statements in paragraphs 5 and 6 of this affidavit.

Affidavit

10. I deny the statements contained in paragraph 14 of the affidavit.

William R. Lambert.

Sworn to and subscribed before me this 21st day of August, 1930.

J. D. Birchenough, A Notary Public of New Jersey.

State of New Jersey, }
 10 County of Passaic. } ss:

E. H. Lambert, of full age, being first duly sworn according to law upon his oath, deposes and says:

1. I am the father of William R. Lambert, the defendant named in the foregoing action.

2. I am engaged in the real estate and insurance business and have my office at No. 20-22 Church Street, Paterson, New Jersey.

20 3. I know Mr. and Mrs. Jacobson, the complainants in the foregoing action, having seen them at my office at the time they entered into a contract with my son, William, for the sale of the property on Fair Street, Paterson, New Jersey.

30 4. I clearly recall the conversation which my said son had with them at the time and in the course of which he told them that inasmuch as he was merely an agent, and was not purchasing the property for himself, he wanted it understood that in case his principal didn't go through with the deal, he was not to be held responsible, but that they, Mr. and Mrs. Jacobson, were to keep the \$500.00 which he would pay them and the contract was to be off. To this Mr. Jacobson answered

my brother informed them that he wanted it to be understood that in case his principal didn't go through with the contract, then they, the Jacobsons, were to keep the \$500.00 and the deal and contract were to be off, to which Mr. Jacobson replied that he so understood it and that he was perfectly satisfied therewith.

Joseph R. Lambert.

Sworn to and subscribed before me this 21st day of August, 1930.

10 J. D. Birchenough, A Notary Public of New Jersey.

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Order to Strike Answer

(Filed October 10, 1930.)

IN CHANCERY OF NEW JERSEY

Between

Nathan E. Jacobson and Re-
becca Jacobson, his wife,

Complainants,

and

William R. Lambert,

Defendant.

On Bill, Etc.

10

ORDER TO STRIKE ANSWER

A motion having been made by Saul M. Mann, Solicitor of the complainants, to dismiss the Answer filed by the defendant, William R. Lambert, on the ground that the Answer was sham, false, did not set up a defense to the bill of complaint, and if true, could not be proven by legal or proper evidence; and it appearing that due notice of said motion was given to the defendant; and the Court having heard the arguments of Saul M. Mann, Solicitor of the complainants, and Sam Mendelsohn, of the law firm of Mendelsohn & Mendelsohn, Solicitors of the defendant, and being of the opinion that said Answer is defective, and does not set up a legal or equitable defense to the bill of complaint, and the Court being of the opinion that the same should be struck out;

It is, thereupon, on this 10th day of October, 1930, ordered that paragraphs one to eight inclusive of the Answer, and the entire first separate defense, second separate defense, third separate de-

Order to Strike Answer

fense, fourth separate defense, fifth separate defense, sixth separate defense, seventh separate defense, and eighth separate defense, be and the same hereby are stricken out.

E. R. Walker, C.

John J. Fallon, J. C.

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Notice of Appeal

(Filed October 25, 1930.)

IN CHANCERY OF NEW JERSEY

80-67

Between

Nathan E. Jacobson, and Re-
becca Jacobson, his wife,

Complainants,

and

William R. Lambert,

Defendant.

On Bill, &c.

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NOTICE OF APPEAL

Defendant, William R. Lambert, hereby appeals from an order made by the Chancellor on the advice of Vice-Chancellor John J. Fallon, in the above cause on the tenth day of October, Nineteen hundred and thirty, striking out paragraphs one to eight inclusive of the answer filed in the above cause, as well as the entire first separate defense, second separate defense, third separate defense, fourth separate defense, fifth separate defense, sixth separate defense, seventh separate defense, and eighth separate defense, set up in said answer, and from the whole and every part thereof, to the Court of Errors and Appeals, in the last resort in all causes. 20 30

Dated: October 22, 1930.

Mendelsohn & Mendelsohn

Solicitors for and of counsel
with defendant.

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

Sam Mendelsohn,

Of counsel with defendant.

Service of a copy of the within Notice of Appeal is hereby acknowledged this 22nd day of October, 1930.

Saul M. Mann,
Solicitor of Complainants.

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Petition of Appeal

(Filed Oct. 27, 1930.)

NEW JERSEY COURT OF ERRORS
AND APPEALS

Between

 Nathan E. Jacobson and Re-
becca Jacobson, his wife,
Complainants-Respondents
and
William R. Lambert,
Defendant-Appellant.

 On Appeal from
Court of
Chancery

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PETITION OF APPEAL

To the Honorable the Court of Errors and Appeals in the Last Resort in All Causes.

The petition of William R. Lambert, of the City of Paterson, in the County of Passaic, and State of New Jersey, the appellant in the above entitled cause, respectfully shows that: 20

1. Petitioner finds himself aggrieved by an order made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Vice-Chancellor John J. Fallon, bearing date of October 10, 1930, in a certain cause in said Court of Chancery pending, wherein Nathan E. Jacobson and Rebecca Jacobson, his wife, are complainants and petitioner, William R. Lambert, is defendant, striking out paragraphs one to eight inclusive of the answer therein filed and the entire first separate defense, second separate defense, third separate defense, fourth separate defense, fifth separate defense, sixth separate defense, seventh separate defense and eighth separate defense, contained in said answer, in these respects, to wit: 30

Petition of Appeal

(a) The Court of Chancery erred in finding that paragraphs one to eight inclusive of the answer, filed in the above cause hereinabove referred to, did not set up nor disclose a legal or equitable defense to the cause of action set out in the bill of complaint, and in striking out same by reason thereof.

10 (b) The Court of Chancery erred in finding that the entire first separate defense, contained in the answer filed in the cause referred to, did not set up nor disclose a legal or equitable defense to the cause of action set out in the bill of complaint, and in striking out same by reason thereof.

20 (c) The Court of Chancery erred in finding that the entire second separate defense, contained in the answer filed in the cause referred to, did not set up nor disclose a legal or equitable defense to the cause of action set out in the bill of complaint, and in striking out same by reason thereof.

(d) The Court of Chancery erred in finding that the entire third separate defense, contained in the answer filed in the cause referred to, did not set up nor disclose a legal or equitable defense to the cause of action set out in the bill of complaint, and in striking out same by reason thereof.

30 (e) The Court of Chancery erred in finding that the entire fourth separate defense, contained in the answer filed in the cause referred to, did not set up nor disclose a legal or equitable defense to the cause of action set out in the bill of complaint, and in striking out same by reason thereof.

(f) The Court of Chancery erred in finding that the entire fifth separate defense, contained in the answer filed in the cause referred to, did

Petition of Appeal

not set up nor disclose a legal or equitable defense to the cause of action set out in the bill of complaint, and in striking out same by reason thereof.

(g) The Court of Chancery erred in finding that the entire sixth separate defense, contained in the answer filed in the cause referred to, did not set up nor disclose a legal or equitable defense to the cause of action set out in the bill of complaint, and in striking out same by reason thereof.

(h) The Court of Chancery erred in finding that the entire seventh separate defense, contained in the answer filed in the cause referred to, did not set up nor disclose a legal or equitable defense to the cause of action set out in the bill of complaint, and in striking out same by reason thereof. 10

(i) The Court of Chancery erred in finding that the entire eighth separate defense, contained in the answer filed in the cause referred to, did not set up nor disclose a legal or equitable defense to the cause of action set out in the bill of complaint, and in striking out same by reason thereof. 20

(j) The Court of Chancery erred in finding that the whole of the answer, as well as all of the eight separate defenses therein contained, filed in the cause referred to, did not set up nor disclose a legal or equitable defense to the cause of action set out in the bill of complaint, and in striking out same by reason thereof.

(k) The order complained of is too narrow and legally insufficient, and the Court of Chancery was without power or authority to make same, by reason of which the Court of Chancery erred in making said order. 30

Petition of Appeal

Petitioner, therefore, prays that the said order of the 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 equitable and proper.

Mendelsohn & Mendelsohn,

Solicitors for and of counsel
with Defendant-Appellant.

Sam Mendelsohn,

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Of counsel with Defendant-Appellant.

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Answer to Petition of Appeal

(Filed Oct. 30, 1930.)

NEW JERSEY COURT OF ERRORS
AND APPEALS

Between Nathan E. Jacobson and Rebecca Jacobson, his wife, Complainants-Respondents and William R. Lambert, Defendant-Appellant.	}	On Appeal from Court of Chancery	10
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ANSWER TO PETITION OF APPEAL

The answer of Nathan E. Jacobson and Rebecca Jacobson, his wife, the above named respondents, to the petition of appeal of William R. Lambert, the above named appellant:

These respondents, not admitting the truth of all or any of the matters in the said petition of appeal contained for answer thereto, nevertheless, admit that an order was, on October 10, 1930, made and entered in the Court of Chancery of New Jersey in the above entitled cause, for the purposes in said petition mentioned and therein set forth; but as to the substance and form of said order, these respondents beg leave to refer thereto when the same shall be produced.

The respondents are advised and believe that the said order is agreeable to equity; and they pray that the same may be affirmed with costs to be taxed in favor of these respondents.

Dated Oct. 29, 1930.

Saul M. Mann,
Solicitor for and of Counsel
with Respondents.

Answer to Petition of Appeal

Service of the within Answer to Petition of Appeal is hereby acknowledged, this 29th day of October, 1930.

Mendelsohn & Mendelsohn,
Solicitors of Defendant-Appellant.

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Service of 3 copies of brief of
respondent is hereby acknowledged
this 27th day of January, 1931.

Isidore Mendelsohn
Sole Appellant

New Jersey Court of Errors and Appeals

Between

NATHAN E. JACOBSON and RE-
BECCA JACOBSON, his wife,
Complainants-Respondents,

and

WILLIAM R. LAMBERT,
Defendant-Appellant.

On Appeal
from Court
of Chancery.

BRIEF OF NATHAN E. JACOBSON AND REBECCA JACOBSON, HIS WIFE, COM- PLAINANTS-RESPONDENTS.

This is an appeal taken by the defendant from the order of the Chancellor advised by Vice-Chancellor Fallon, striking out the answer filed by him in the Court below. The facts involved, succinctly stated follow:

Facts.

The bill of complaint alleges that on October 28, 1929, complainants being seized in fee simple of the land and premises described in the bill of complaint, entered into a certain agreement in writing *and under seal* (State of Case, p. 5, et seq.) with William R. Lambert, the defendant, wherein and whereby they agreed to convey said lands and premises by deed of warranty on or before December 27, 1929, to the defendant, in consideration of payment of Fifteen Thousand Dollars (\$15,-

000), the defendant agreeing to pay complainants said sum in accordance with the terms of the contract annexed to the bill of complaint. Defendant paid Five Hundred Dollars (\$500) deposit upon the execution of said agreement and was to make another payment of One Thousand Dollars (\$1,000) on November 29, 1929, the balance amounting to Thirteen Thousand Five Hundred Dollars (\$13,500), to be paid at the time of delivery of deed by complainants to the defendant, at the office of the defendant. Said agreement was drawn by the defendant, and complainants duly acknowledged same before a notary public in his employ.

On December 27, 1929, and on divers other dates thereafter, complainants offered and tendered a warranty deed to defendant, conveying to him the lands and premises hereinbefore referred to, and offered said deed to defendant upon payment by him of the balance of the purchase money, pursuant to the terms of said agreement; but the defendant refused to accept said warranty deed or pay the balance of the purchase price to complainants, due as aforesaid.

As a result of defendant's refusal to perform, the bill of complaint in this matter was filed on June 26, 1930, seeking to have defendant specifically perform the aforesaid contract, complainants tendering themselves ready, willing and able to perform the covenants and obligations imposed upon them by said contract.

Answer was interposed, (State of Case, p. 10, et seq.), setting up among other defenses, as a first separate defense, that prior to *and concurrently* with the execution of said contract, he informed complainants that he was acting as agent for a principal, whose identity he was unable to disclose, and that said contract was being executed on the express oral understanding that it was not to come

into force as against the defendant, who signed the contract, unless his said principal was able and willing to perform the terms of the contract, and that in the event his principal was unable or unwilling to do so, then complainants would keep and retain the deposit of Five Hundred Dollars (\$500), in full payment of damages.

Defendant's answer further set up that his principal, Arthur H. Freestone, was unable to, and did not perform said contract, by not delivering the necessary monies to consummate same, and that as a result thereof, the condition precedent, upon the happening of which the said contract was to become effective as against him, namely, performance by Arthur H. Freestone, never having occurred, that, therefore, said contract was not binding upon defendant, and unenforceable as against him.

As a sixth separate defense, defendant set up that the representations of the complainants that they would agree that the contract was not to be in force unless Freestone advanced the monies, was false and untrue, since complainants did not then intend to carry out their agreement to consider the contract at an end in the event that freestone failed to advance the money. The defendant in effect charges fraud on complainants' part as a result of their said conduct.

As an eighth separate defense the defendant sets up an accord and satisfaction in that he permitted complainants, in accordance with an arrangement made at the time the contract was drawn, to keep the deposit of Five Hundred Dollars (\$500), in full payment, satisfaction and discharge of the contract.

A motion was then made by complainants, seeking to strike the answer as being sham and insufficient in law, and that the separate defenses were inadmissible in evidence to vary the terms of the

contract or to be offered for the purposes raised thereby, because they violated the terms of the Statute of Frauds. At the hearing on the motion to strike, the complainants relied upon their bill of complaint and affidavits (State of Case, p. 18, et seq.). Defendant rested upon his answer and affidavits (State of Case, P. 27, et seq.).

The learned Vice-Chancellor in accordance with the Chancery practice, considered the bill, answer and affidavits and ordered the entire answer stricken, from which order the defendant has appealed to this forum.

Preliminary Statement of Law.

With the preliminary statement of law as a general proposition, as set up by the defendant-appellant in his brief, no quarrel is sought. However, the cases cited by the defendant-appellant are clearly inapplicable to the case at bar. In the case at bar the motion to strike the answer was made after filing of bill and answer, and the hearing thereon was based on bill, affidavits, answer and affidavits, in accordance with the present Chancery practice.

Section 4 of the Chancery Act of 1915 (P. L. 1915, pp. 184-185) provides—"any frivolous or sham defense may be struck out on notice and a decree *pro confesso* entered, or the defendant may be allowed to defend on terms, or such other order or decree may be made in the premises as may be just." Prior to the adoption of this Act, at a hearing for interlocutory relief, decision was based on bill and answer, all facts set up in the answer, and well pleaded, being admitted by the motion to strike.

The Act of 1915 to expedite litigation and make

less possible dilatory practices, went a step further than the old Chancery practice. Where a Vice-Chancellor chooses, he now can, under the powers created by this Act, call for evidence on the hearing of the motion to strike; evidence in the form of oral testimony or affidavits. The propriety of taking evidence on the return of a motion to strike a pleading under the Chancery Act of 1915 was based upon and approved by the Court of Errors and Appeals in the case of *Penrose v. Absecon Land Co., et al.*, 94 N. J. Eq. 436, 120 Atl., page 207, wherein this Court, speaking through Mr. Justice Parker, said:

“It is suggested that there is no provision for the taking of evidence under this section, but the necessary implication of the statute is that evidence shall be taken; for the very word “sham” connotes unfounded allegations of fact, and the universal practice is to deal with sham pleadings in a summary way by affidavits or documentary evidence and without waiting for the formality of a trial. The evident intent of the statute was to assimilate the equity practice in this respect to that at common law.”

This case has been followed in *Western Realty Co. v. Kossoff*, 100 N. J. Eq. 325, 134 Atl., 733, and in *South Camden Trust Co. of Camden v. Stiefel*, 101 N. J. Eq. 41, 137 Atl., 91, wherein Vice-Chancellor Leaming says:

“Since a pleading which bases a defense on matters which are untrue is a mere sham and an obstruction of justice in a pending suit, in this state it has been thought to be within the powers of the court to test the truth of the defensive matter by affidavits filed in support of a motion to strike the pleading from the records. In some jurisdictions this procedure has been held violative of the constitutional right of trial of is-

sues of fact by a jury or by orderly examination and cross-examination of witnesses (as to such cases see an extended note on 'Sham Pleadings' in 113 Am. St. Rep. 639), but in this state the procedure is regarded as merely an inquiry whether there is an issue of fact to be tried; a distinction being recognized between the determination whether there is a real issue to be tried and the trial of an issue upon a motion; whether what in form is an issue is a real issue. *Coykendall v. Robinson*, 39 N. J. Law, 98."

Thus, even though an answer set up facts which would constitute a good defense, nevertheless, to prevent unfair methods of delay the Court has been enabled by the Chancery Act by calling for proofs in affidavit form, to force a party to put himself under oath to substantiate his pleading, a practice comparable to that of the law courts in their dealing with a motion to strike the pleading. The result is that those facts which a party has set up in an answer, but which he knows are sham, he will not incorporate in an affidavit supporting an answer, fearing to perjure himself. This enables the Court to consider as facts in the answer, only those allegations verified at the hearing on the motion to strike.

Following this practice, at the argument and hearing on the motion to strike, the learned Vice-Chancellor considered the matter not merely on bill and answer as suggested by the defendant in his preliminary statement of law, but on bill and affidavits and answer and affidavits, as set forth in the State of the Case. The Court did not weigh the affidavits or their conflicting issues, but did properly consider as well pleaded only those allegations raised by the pleadings and supported by affidavit.

POINT I.

The Answer was properly stricken out, since it set up no legal or equitable defense which could be proven under laws of evidence.

A.

The answer was properly stricken since it sought to violate the terms of the Statute of Frauds.

Section 5 of the Statute of Frauds sets up that no action shall be brought upon any contract for sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto, by him or her lawfully authorized. 2 Comp. Stat. 2612.

The defendant, by seeking to show the terms of the condition precedent, attempts orally to impose upon the contract a condition not contained therein. It is elementary and requires no citation of authority to state that a condition precedent, regardless of its terms, is, nevertheless, a part of the contract itself, supported by the same consideration and inseparable therefrom. The complainants, therefore, respectfully urge that the condition precedent not having been reduced to writing, is inadmissible in evidence, since it does not comply with the terms of the Statute of Frauds. The condition precedent not in writing can no more be inadmissible to prove or disprove a contract for the sale of realty, than any other term of such a contract.

“A contract in writing for the sale of land, modified as to mode of performance by parol, cannot be enforced, being within the statute of frauds.”

Halpern v. Shurkin, 98 N. J. Eq. 28, 129 Atl., 487.

“The parol variation is within the fifth section of the statute of frauds, which provides that no action shall be brought on a contract for the sale of land unless it, or a memorandum thereof, be in writing. C. S. p. 2612. A written contract for the sale of land, with parol modification, will not, against objection, be enforced as modified. 25 R. C. L. 708, and cases. An instructive discussion of the subject and a collection of the authorities may be found in the note to *Bonicamp v. Starbuck*, L. R. A. 1917B, 141; *Brooks v. Wheelock*, 11 Pick. (28 Mass.) 439.

“ * * * * The statute requires that all the essential terms of a contract for the sale of land be reduced to writing to qualify it for enforcement by the courts (*Schenck v. Spring Lake Beach Improvement Co.*, 47 N. J. Eq. 44, 19 A. 881), and the terms of performance are, of course, an essential. An executory parol agreement substituting methods of performance is within the statute and unenforceable. *Malkan v. Hemming*, 82 Conn. 293, 73 A. 752; *Rucker v. Harrington*, 52 Mo. App. 481; *Warren v. Mayer Mfg. Co.*, 161 Mo. 112, 61 S. W. 644; *Abell v. Munson*, 18 Mich. 306, 100 Am. Dec. 165.”

Halpern v. Shurkin, 98 N. J. Eq. 28, 129 Atl., 487.

In *Kerzner v. Chanin*, 98 N. J. Law 38, 118 Atl., 393, the terms of the written contract were changed by substituted oral agreement, changing the

terms of payment and provision for the assumption of mortgages, proof of which was admitted into evidence by the trial court. The Supreme Court, through Mr. Justice Swayze, at page 694, said:

“The learned judge treated the case as if the contract were an ordinary contract in writing, disregarding the fact that it was a contract which is required by the statute of frauds to be in writing, or have some memorandum or note thereof in writing. * * * The present case is very different. It counts (as the original complaint averred) on a substituted oral contract, substituted because both parties either agreed to abrogate or, as the plaintiff says, to change material particulars affecting the time of payment and the security to be given; oral because no part of it was in writing except the original contract. *The case of contracts coming within the statute of frauds is expressly excepted by Williston (Contracts, Sections 598, 1828), from the rule allowing merely written contracts to be varied by subsequent oral agreements.*”

The attempt to impose upon a contract required to be in writing by the statute of frauds an oral condition precedent is analogous to imposing upon such a written contract a subsequent oral agreement.

“1 Beach, on contracts, section 579, lays down the rule as stated, and in section 577 says: ‘It is also the general rule that the evidence necessary to take the contract out of the Statute of Frauds must all be furnished by the writings; parol evidence not being admissible to supply evidence not found in them.’ *Dana v. Hancock*, 30 Vt. 616, 29 Am. & Eng. Enc. Law, 2d ed. 824, says: ‘The general rule is, contrary to the rule at common law, that parties to a written agreement coming within the provisions of the Statute

of Frauds may not, by mere oral agreement, alter one or more of the terms thereof, and thus make a new contract, resting partly in writing and partly in parol. And it has been said that it is not important whether or not the alteration is in a particular which was originally required by the statute to be in writing. If any alteration is made, so that part of the contract has to be proved by oral evidence, *in this case the condition precedent*, (italics mine) it ceases to be a contract in writing, and is thus exposed to all the evils which the statute was intended to remedy.' Woods on Statute of Frauds, section 384, says: 'It is by the written contract alone * * * that the parties are bound, and more especially is that so in a case where, as here, the contract is one which by the Statute of Frauds is required to be in writing. The intention of the legislature was that the writing should be the evidence, and the only evidence, of the contract, and that there should be no occasion to look beyond it.'

Bonicamp v. Starbuck, L. R. A. 1917B, 143.

B.

The defendant in effect seeks to establish an agency by evidence parol to the contract, concealing it under the guise of a "condition precedent".

In his answer, the defendant seeks to set up a disclosure of agency to the complainants, and that it was understood in view of said disclosure that the defendant would not be bound as agent.

In *Randolph v. General Investors' Co.*, 97 N. J. Eq. 493, 128 Atl., 156, Chief Justice Gummere, speaking for the Court of Errors and Appeals, said at page 157, on this section of the Statute of

Frauds, and the attempt to prove an agency parol to the contract :

“In construing this provision of the Statute, Mr. Justice Depue, in the case of *Johnson & Miller v. Buck*, 35 N. J. Law, 338 (10 Am. Rep. 243), uses the following language:

‘The memorandum must contain the full terms of the contract—that is, the names of the buyer and seller, the subject of sale, the price, and terms of credit, and the conditions of sale, if any there be. * * * * To supplement this memorandum, *or supply the omission of any of the essential parts of the contract, parol testimony cannot be received.* The policy of the statute is to exclude testimony of that uncertain character with respect to transactions within its provisions. It therefore requires the substantive parts of the contract to appear in the writing. To admit parol evidence of any of the terms of the contract with respect to which the memorandum is silent, would open the door to the very mischief the statute was intended to suppress.’

“The doctrine declared in this case was approved and followed in *Bowers v. Glucksmann*, 68 N. J. Law, 146, 52 A. 218. In *Schenck v. Spring Lake Beach Improvement Co.*, 47 N. J. Eq. 44, 49, 19 A. 881, 883, *Van Fleet, V. C.*, in dealing with a case somewhat similar to that now before us, except that the parties were transposed, thus states the legal principle:

‘Where the action is by a vendee against a vendor, as it is in this case, and the complainant puts his right to relief exclusively on a written contract, as the complainant does here, it would seem to be clear beyond question, that unless the writing, set out in the bill, shows on its

fact that the defendant is the vendor, the complainant's case has no foundation.'

"Schenck v. Spring Lake Co. has been frequently cited with approval in later decisions by the Court of Chancery; it was approved by this court in Clement v. Young-McShea Amusement Co., 70 N. J. Eq. 677, 681, 67 A. 82, 118 Am. St. Rep. 747."

See also

Drill Construction Co. v. Louis Rosenthal,
Vol. 8 N. J. Advance Reports Misc. 666.

C.

The defendant cannot prove the existence of a condition precedent to a contract which is required to be in writing by the Statute of Frauds, by parol proof.

In the case at bar, defense sets up that the contract was delivered to the complainants already executed by the defendant with a condition precedent attached thereto, namely, that if the third party principal failed to put up the money, the contract was not to come into effect as against defendant agent.

In an annotation in 11 A. L. R., Annotated, at page 1174, we find the following:

"As regards conveyances of real estate, there seems to be little, if any, relaxation of the original rule that such instruments cannot be delivered to the grantee upon condition. This rule, however, rests upon two grounds: (1) the inadmissibility of parol evidence to prove the condition, and (2) that such delivery is an attempt to deliver the deed in escrow to the grantee, and that this cannot be done. So that, even though

the first ground should be modified, the latter would, in a proper case, prevent the introduction of the evidence."

"The rule in this state regarding deeds conveying real estate, or an interest therein, or agreements for the sale thereof, is that a delivery cannot be made to the grantee, or other party thereto, conditionally, or, as is said, 'In escrow', and, when delivered to a party, the delivery operates at once, and the condition is unavailable. *Gilbert v. Insurance Co.*, 23 Wend. 43; *Worall v. Munn*, 5 N. Y. 299; *Braman v. Bingham*, 26 N. Y. 483; *Wallace v. Berdell*, 97 N. Y. 13, 25."

Blewitt v. Boorum, 37 Northeastern Reporter, 120, 121.

"Parol evidence is not admissible to show that a deed actually delivered to the grantee and absolute on its face shall have effect only upon the performance of some condition or the happening of some contingency. This is the settled law. *Mowry v. Heney*, 86 Cal 471, 25 Pac. 17; *Whitney v. Whitney*, 10 Idaho, 633, 80 Pac. 1117, 69 L. R. A. 572; *Haworth v. Norris*, 28 Fla. 763, 10 South. 18; *Berry v. Anderson*, 22 Ind. 36; *Lawton v. Sager*, 11 Barb. (N.Y.) 349; *Wipfler v. Wipfler*, 153 Mich 18, 116 N. W. 544, 16 L. R. A. (N.S.) 941, with extended note; 8 R. C. L. 1003. This has been and still is the law of this state."

Reed v. Reed (Maine) 104 Atl., 230.

The case of *Allen v. Hughes*, 141 N. E., 188, is much in point and similar to the present issue. In that case the defendant contracted to purchase lands from the plaintiff in writing. When the vendee refused to perform, the vendor instituted suit. Defense was entered, seeking to set up that when

the vendee first talked of purchasing land, he stipulated that his purchase should be conditional upon his securing a loan upon his adjoining land of one hundred and seventy acres; that he was unable to obtain the loan, and that, therefore, the condition precedent having never been fulfilled, the contract spent itself at that point, and that he could not be held liable thereon. The Supreme Court of Illinois, speaking through Mr. Justice Cartwright, said:

“The contract of the defendant was not by its terms conditional, and he was not entitled to prove that there was any condition not expressed in it. * * * * “The inability of the defendant to procure money with which to make payment was no defense. *Milnor v. Willard*, 34 Ill. 38; *Wood v. Sheffer*, 248 Ill. 617, 94 N. E. 24.”

The case of *Elwood v. Smith*, 104 N. J. Law 248, 139 Atl., page 900, which was unanimously affirmed by our Court of Errors and Appeals, 105 N. J. Law 236, 143 Atl., 916, is in point and on “all fours” with the case at bar. The facts in that case were as follows:

The plaintiff's husband and the defendant met with reference to the sale of the property, and a written contract was drawn in which the defendant's wife is not named as a party and which she did not sign. At the time of the negotiations the defendant, who had the contract on his desk, signed in duplicate with his own signature, and warned the plaintiff that he thought Mrs. Smith would refuse to sign the contract, but the plaintiff took one of the copies and said he would take the chances of that. The defendant's wife did refuse to sign, and plaintiff raised an issue of fraud on this subject, which was found adversely by the trial judge.

Mr. Justice Parker, whose opinion was affirmed by the Court of Errors and Appeals said:

"The plaintiff attacks the third finding of the trial judge to the effect that the delivery of the contract to the plaintiff's husband (and it is admitted on the record that there was a contract) was conditional upon obtaining the signature of the defendant's wife is erroneous, and particularly that the testimony tending to show that such delivery was conditional was incompetent. We incline to think that this point was well taken, for if there was a delivery of the paper to the plaintiff (and the "contract" was expressly admitted on the trial), we fail to see how it could, under the rules of evidence as obtaining in this state, be tied up to any conditions between the plaintiff and the defendant which were a matter of parol. 21 C. J. 874; Black v. Shreve, 13 N. J. Eq. 455; Ordinary v. Thatcher, 41 N. J. Law, 403, 32 Am. Rep. 225; Lake v. Weaver, 76 N. J. Eq. 280, 288, 74 A. 451, 34 L. R. A. (N.S.) 495."

In a headnote written by Justice Parker, in *Elwood v. Smith*, supra, we find the following:

"Where purchaser of land sued the vendor for nonconveyance according to written contract, framing his action as if it were for fraud, admitting parol evidence that the written contract was conditional on the vendor's wife agreeing to convey held error."

That a contract similar to the one at bar cannot be varied by parol, finds support in numerous authorities in this State.

"It seems entirely clear that the defendants by their first separate defense, are seeking to change and vary the terms of a written agreement by an oral one, which is not permissible under the authority of Bowers

v. Glucksman, 68 N. J. Law, 146, 52 A. 218; Lippincott v. Bridgewater, 55 N. J. Eq. 208, 36 A. 672; Kerzner v. Chanin, 98 N. J. Law, 38, 118 A. 693.' ”

In effect the defendant sought to set up a defense that although the contract was delivered to complainants, nevertheless, its future existence and delivery was to be conditioned upon the act of a third party, the defendant's principal, Freestone, advancing the money, the recital of which act was parol to the contract.

The deliverance of Chief Justice Beasley, for the Court of Errors and Appeals in the case of *Ordinary v. Thatcher*, 41 N. J. Law, 403, at pages 410 and 411, is most apropos.

“Before leaving the subject, I also remark that the rule which is above applied in this case is not, in my judgment, by any means a merely technical one. To the contrary, I regard it as a wise regulation, founded in public utility, and conducing greatly to the security of persons desirous of executing contracts in a definite and assured form. The law reasonably provides that the instrument delivered shall be conclusive, with respect to its contents, as to the intention of the parties to it; and in the same manner, and in view of the same considerations, *the act of delivering the instrument should be equally conclusive. The danger to be apprehended from fraud and false swearing, as well as from the infirmity of human memory, would be as great in the one case as in the other. If a condition could be annexed to a delivery of a deed when made to the obligee himself, the very essence of the transaction would be left to depend on the memory and truth of the bystanders.* I cannot but think that there is manifest wisdom in the old rule, *that the law will regard in such transactions not*

what is said but what is done. Nor does it seem to me that such rule is ever, in any of its manifold applications, of more worth than when it is employed as a safeguard to persons who are of necessity represented by public officers. It must strike everyone as a most alarming idea, that any of the numerous bonds that are given to surrogates and clerks can be defeated if it can be made to appear, by parol, that any of the parties executing and delivering such instruments stated to such officers receiving it that it was to be inefficacious unless upon the happening of some event. This present case would afford a fair illustration of the practical operation of such a pernicious principle. * * * In my judgment, law and public policy are in accord on this subject, both declaring that such a defence cannot prevail."

Ordinary v. Thatcher, 41 N. J. Law, pp. 410, 411.

Gleaning a collection of cases from other States, as found in 16 L. R. A., New Series, at page 941, we find the following on the effect of delivery of deed to the grantee, subject to future extrinsic conditions:

"It may be said to be a well-settled rule of law that, where a grantor delivers his deed to the grantee, without any express reservation of the right to recall it, and with intent that in a certain contingency it shall be effective without any further act on the part of the grantor, such delivery is effectual to pass title presently. There are two different grounds upon which the courts arrive at such conclusion: First, upon the well-known rule of evidence that parol testimony is inadmissible to vary the terms of a written instrument; second, that such delivery is an attempt to deliver the deed in escrow to the

grantee, which cannot be done, for delivery to a stranger is essential to an escrow.

“In the first class of cases, the authorities will be found to be almost unanimously agreed upon the proposition that, where the grantor has delivered his absolute deed to the grantee, with the intent to relinquish all control over the same, he, or those claiming under him, will not afterwards be permitted to show that such delivery was conditional. Thus, in *Williams v. Higgins*, 69 Ala. 517, it was held that, where the grantor voluntarily, by his own act, placed his absolute deed in the possession and under the dominion of the grantees, its legal operation and effect could not be avoided by parol evidence showing that the delivery was not absolute, but that it was qualified or conditional, without a violation of the cardinal rule that the operation and effect of written instruments could not be varied or altered by evidence resting in parol. The court said: *‘It is incumbent on a grantor who would qualify the delivery of a deed to the grantee, to express the qualification in the deed, or in an accompanying writing, as it is to express in writing any qualification or limitation of the works of grant or covenant found in the deed.’*

“And in *Mowry v. Heney*, 86 Cal. 471, 25 Pac. 17, it was held that, when an absolute deed had been delivered to the grantee, the title became vested, free from any condition, and parol evidence was inadmissible to show that such delivery was subject to any condition not expressed therein. Accordingly, it was further held that its operation could not be defeated by parol proof of an intention on the part of the grantor, known to the grantee, that it should not take effect except in the event of the grantor’s death.

“And in *Haworth v. Norris*, 28 Fla. 763,

10 So. 18, it was held that, while parol evidence was admissible to prove that a deed was never delivered to the grantee, or that it came into his possession accidentally or by mistake, or contrary to the intention of the parties, or by fraud, or otherwise illegally, yet, it could not be shown by parol that an actual delivery to the grantee of a deed absolute upon its face was under any agreement that a condition not expressed in the deed should be performed, and that the deed should not be operative unless such condition was performed; upon the ground that the effect of such evidence would be to contradict a written instrument absolute upon its fact by a parol showing that it was not absolute, but conditional.

“And this proposition that parol evidence is inadmissible to show that the delivery to the grantee of a deed, absolute upon its fact, was in fact conditional, finds support in the following cases: *Ashford v. Prewitt*, 102 Ala. 264, 48 Am. St. Rep. 37, 14 So. 663; *Whitney v. Dewey*, 10 Idaho, 633, 69 L. R. A. 572, 80 Pac. 1117; *Warren v. Miller*, 38 Me. 108; *Beers v. Beers*, 22 Mich. 42; *Wilbur v. Grover*, 140 Mich. 187, 103 N. W. 583; *Nolan v. Garrison*, 151 Mich. 138, 115 N. W. 58; *Black v. Shreve*, 13 N. J. Eq. 455; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Braman v. Bingham*, 26 N. Y. 483; *Lambert v. McClure*, 12 Tex. Civ. App. 579, 34 S. W. 973.”

See also

Berry v. Anderson, 22 Ind. 36, *Lawton v. Sager*, 11 Barb. 349.

A consideration of the authorities hereinbefore submitted must lead to the conclusion that the learned Vice-Chancellor properly struck out the answer, insofar as it sought to set up an oral condi-

tion precedent; this, not only because it was open and apparent that an attempt was made by artful pleading to invalidate a contract legitimately entered into between the parties, but because the cases and law writers, to avoid the possibility of attempts to invalidate contracts, laid down the rules above set forth.

In view of the foregoing, it is respectfully submitted that the order, insofar as it strikes out the answer and the first, second and third separate defenses, is proper and should be affirmed.

POINT II.

Defense fails to prove that contract sued upon was induced or tinged with fraud as set up in the defense.

Defendant seeks to set up from complainants' failure to comply with the alleged condition precedent, that complainants never intended to comply therewith, and with a fraudulent state of mind induced defendant to sign the contract. The answer in the sixth separate defense so alleges (Case, p. 15). The affidavits of the defendant supporting the answer at the motion to strike, however, are entirely silent on the question of fraud. Defendant knew that no fraud existed and did not dare to make oath to support his allegations of fraud.

The affidavits supporting the answer being silent on the question of fraud, the lower Court had a right to disregard the fraud issue completely, it being utterly unsubstantiated. See *Penrose v. Absecon Land Co.*, 94 N. J. Eq. 436, 120 Atl., 207; *South Camden Trust Co. of Camden v. Stiefel*, 101

N. J. Eq. 41, 137 Atl., 91, and argument under preliminary statement of law in this brief.

“Since the mere failure to perform a covenant does not conclusively establish that it was originally made with the fraudulent intent of a subsequent breach, there can be no redress unless it affirmatively appears that at the time of making such promise the promisor acted with the purpose of deception and misrepresented his then existing intent to perform.”

26 *C. J.*, p. 1095.

An analysis of defendant's answer and the absence of question of fraud in his affidavits, reveals that no question of fact on fraud was set up before the lower Court, and that the Court properly struck the sixth separate defense covering the fraud question.

A charge of fraud cannot be presumed, but must be pleaded in detail apprising the other party of the fraud alleged. A study of the sixth separate defense reveals that the charge of fraud is unfounded and proven sham by the failure of defendant's affidavits to make any mention of fraud.

POINTS III AND IV.

Defendant's failure to offer affidavits in connection with the alleged fraud, and his failure to properly allege any fraud in the Answer, eliminates the question raised in Points III and IV of the defendant's brief.

POINT V.

There was no accord and satisfaction of the contract sued upon set up by the Answer and sustained by affidavit.

Paragraph two of the eighth separate defense, (Case, p. 16), seeks to set up that complainants were informed that if Freestone, defendant's principal, was unable to advance the monies required, that then complainants were to retain the Five Hundred Dollars (\$500), paid as a deposit, in full payment, satisfaction and discharge of the contract, to which complainants agreed, and in pursuance of which they kept and retained said money. The aforesaid allegation in the eighth separate defense, however, was not sustained or supported by the affidavits filed by the defendant. In the affidavits, attempt is made to show (Case pp. 28, 30, 32,), that the accord and satisfaction arrangement was made concurrent with the making of the contract, and by parol it is sought to be established that an understanding was made simultaneously with the execution of the agreement, that the deposit was to be retained in discharge of the contract in the event that defendant's principal failed to advance the necessary monies.

This clearly cannot be shown, since it is an attempt to vary the terms of a written contract. The contract being silent on discharge of the contract by acceptance of the deposit, it cannot be set up by a contemporaneous parol agreement in view of the cases herein cited under Point I.

The attempt to show that the accord and satisfaction was consummated after the breach of the agreement, falls because of the failure of the affidavits submitted in support of the answer, to support the allegation. The affidavit of William R. Lambert, in support of the answer on this issue makes mention of the agreement made contemporaneous with the contract, that complainants should retain the Five Hundred Dollars (\$500) as damages, in the event of his principal's failure to perform. (Case, p. 29). Nowhere, however, in any of the defendant's affidavits is there any mention of the acceptance of said sum. It was not incumbent upon the complainants to defend the allegation of accord and satisfaction, the said allegation not having been made out or sustained by the defendant.

“ * * * * where an accord and satisfaction is relied on as a defense, the burden of proving it is on defendant. * * * * He must sustain his plea by showing by competent evidence every element necessary to constitute it.”

1 *C. J.*, 580, 581.

It was incumbent upon the defendant, in order to sustain his answer before the lower Court, to establish consideration for the accord and satisfaction and its acceptance by complainants with the intention that it operate as a satisfaction. The answer and affidavits of the defendant do not set forth this requirement.

Mr. Justice Trenchard in a delivery for the New Jersey Court of Errors & Appeals, in *Decker v. George W. Smith & Co.*, 88 N. J. Law 630, 96 Atl., 915, at page 916, says:

“A consideration is necessary to render an accord and satisfaction valid. The consideration may present itself in many different shapes, but in some form or other it must be found. There must be some advantage, or presumed or assumed advantage, accruing to the party who yields his claim, or some detriment to the other party. *Daniels v. Hatch*, 21 N. J. Law, 391, 47 Am. Dec. 169; 1 C. J. 528.

“To constitute a valid accord and satisfaction, it is essential that the debtor shall have offered what was given, and that the *creditor shall have accepted it with the intention that it should operate as a satisfaction*. The intention of the parties, which is, of course, controlling, must be determined from all the circumstances attending the transaction. *Morris Canal, etc., Co. v. Van Vorst*, 21 N. J. Law, 100; *Oliver v. Phelps*, 20 N. J. Law, 180; *Rose v. American Paper Co.*, 83 N. J. Law, 707, 85 Atl. 354; 1 C. J. 529, 530. See also, *Cooke v. McAdoo*, 85 N. J. Law, 692, 90 Atl. 302.”

“A plea of accord and satisfaction is bad unless it avers acceptance by the complainant.”

Morris Canal v. Van Vorst, 21 N. J. Law, 100.

Defendant having failed to sustain the burden of proof on the question of accord and satisfaction, having failed to establish a consideration therefor, and having failed to prove an acceptance of the alleged accord and satisfaction by the complain-

ants, it is respectfully urged that this defense must fall.

There was no proof in the affidavits that the accord was executed by complainants' acceptance of defendant's proposition. Hence the accord and satisfaction must fall. See *Cooke v. McAdoo*, 85 N. J. Law, 692; 90 Atl., 302, and cases therein cited.

In view of the foregoing, it is respectfully urged that the order insofar as it struck out the answer and the eighth separate defense was proper and should be sustained by this Court.

Conclusion.

It is, therefore, respectfully submitted that the answer and all the separate defenses therein contained, for the reasons discussed in Points one, two, three, four and five of this brief, fail to set up legal or equitable defenses, and that such facts alleged therein were sham as proven by the defendant's failure to substantiate the facts alleged in his answer by verification, by reason of which the order striking them out was proper, and should be affirmed.

Respectfully submitted,

SAUL M. MANN,
Solicitor for and of Counsel
with Complainants-Respondents.

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New Jersey Court of Errors and Appeals

Between

Nathan E. Jacobson and
Rebecca Jacobson, his wife,
Complainants-Respondents,

and

William R. Lambert,
Defendant-Appellant.

On Appeal from
Court of
Chancery.

BRIEF OF WILLIAM R. LAMBERT, DEFENDANT-APPELLANT

This is an appeal from an order, made by Vice-Chancellor Fallon, striking out the defendant's answer, including all of the separate defenses therein contained. The bill of complaint prayed for the specific performance of a contract for the sale of real estate. The answer, amongst others, set up the following defenses.

1. That the contract sued upon never came into legal effect or existence, because its doing so was dependent upon the occurrence of a condition precedent which never happened.

2. That the contract sued upon was null and void because the defendant was induced to enter into and execute same by reason of the false and fraudulent statements, representations and assurances which complainants made to him.

3. Complainants are equitably estopped from enforcing said contract, because defendant relied upon their representations,

assurances and promises that they would not enforce it against him in case his principal was unable or unwilling to perform it, and by reason of which he was induced to execute it.

4. That complainants are not entitled to the equitable relief sought by them because they come into court without clean hands.

5. That there was an accord and satisfaction made of the contract sued upon.

This answer, and the separate defenses above stated, were, upon complainant's motion, struck out by the learned Vice-Chancellor, because, as stated in the order (Case, p. 33), it "is defective and does not set up a legal or equitable defense to the bill of complaint." From this order, so entered, the defendant prosecutes the present appeal.

PRELIMINARY STATEMENT OF LAW

No replication was filed by complainants to the answer and the separate defenses therein set forth, which, upon complainants' motion, was struck out because they failed to set up a legal or equitable defense to the bill of complaint. In such a situation, it is well settled that the motion is addressed especially and peculiarly to the pleading itself, the defect in which, if any, must appear upon its face, and not from matters extraneous to it. And the authorities are also in accord, that, for the purpose of passing upon the motion to strike, all of the facts, as alleged and set forth in the pleading objected to, must be deemed and taken as being true.

In *Neptune Fisheries Co. v. Cape May Real Estate*, 89 N. J. Eq. 552, 105 Atl. 212, Mr. Justice Bergen, delivering the opinion of the Court of Errors and Appeals, inter alia, said:

“In the present case the false representation was charged in the answer, and where the decree is based on bill and answer, the facts set up as a defense in the answer must be taken as true. *Gaskill v. Sine*, 13 N. J. Eq. 130 and other cases to be found in Section 262, N. J. Dig. Ann. under title Equity.”

The Court of Errors and Appeals, in the case of *Gallagher v. Lembeck & Betz Eagle Brewing Co.*, 86 N. J. Eq. 188, Mr. Justice Parker, delivering the opinion, said:

“The appeal is from the denial of a motion to strike out the bill of complaint praying an injunction against the enforcement of a judgment at law.

“We are of the opinion that this bill, *the statement of which for present purposes must be taken as true*, makes out a complete case for equitable relief.”

Chancellor Walker, in *McCran v. Western Union Telegraph Co.*, 120 Atl. 515, 94 N. J. Eq. 281 said:

“The status being thus preserved on interlocutory proceedings, the case came on for final hearing on information and answer, by stipulation of the parties signed and filed in this cause. *And on a hearing*

upon bill (or information) and answer, the facts well pleaded in the answer are to be taken as true. See *Doremus v. Cameron*, 49 N. J. Eq. 1, 22 Atl. 802; *Neptune Fisheries Co. v. Cape May R. E. Co.*, 89 N. J. Eq. 552, 105 Atl. 212."

Chancellor Green, in the case of *Gaskill v. Sine*, 13 N. J. Eq. 130, said:

"To a bill of foreclosure, the defendant, by his answer, set up two distinct defenses, one of which was that the complainant who was the assignee of the mortgage, acted as the agent or trustee of the mortgagee in procuring the assignment, and that the consideration paid for the assignment was the money of the mortgagee. No replication having been filed to the answer, *the Chancellor held, in accordance with the well settled rule of practice, that the facts thus set up as a defence must be taken as true, and on this ground dismissed the complainant's bill.*"

And in the case of *Brooks v. Metropolitan Life Ins. Co.*; 70 N. J. L. 36, Mr. Justice Hendrickson, in delivering the opinion of the Court, said:

"In general, a party cannot demur unless the objection appears on the face of the preceding pleadings. 1 Chet. Pl. 666. See also, *Id.* 197, 198. A demurrer is addressed to matters apparent on the face of the pleadings. In aid of it the Court cannot look to facts appearing in other parts of the record. *Huss v. Central R. and Banking Co.*,

66 Ala. 472; Nyblack v. Hesteruss (CC) 41 Fed. Rep. 120; American Insurance Co. v. Replogle, 114 Ind. 1, 15 N. E. Rep. 8110."

In 16 Cyc. on pages 383-384, the following excerpt appears:

"When complainant sets down the cause for a hearing on bill and answer, or on bill, answer and exhibits, he thereby admits that every well pleaded averment of the answer, whether responsive to the allegations of the bill or in avoidance, is true. Having filed no replication the answer is taken as true, and therefore defendant needs no proof, and the complainant not having replied cannot offer any. It is in effect a submission of the cause to the court by complainant on the contention that he is entitled to the decree prayed for in his bill upon the admissions and notwithstanding the denials of the answer."

POINT I.

THE CONTRACT SUED UPON NEVER CAME INTO LEGAL EFFECT OR EXISTENCE BECAUSE ITS SO DOING WAS DEPENDENT UPON THE OCCURRENCE OF A CONDITION PRECEDENT WHICH NEVER HAPPENED.

The facts relating to this point are set out in the second separate defense of the answer (Case, p. 14), which reads as follows:

AS A SECOND SEPARATE DEFENSE

1. Paragraphs 1, 2, 3, 4, and 5 of the first separate defense are hereby expressly referred and made a part hereof as though the same were recited verbatim herein.

The paragraphs above referred to read as follows:

1. Prior to and concurrently with the execution of the contract, referred to in paragraph 2 of the complaint, he expressly made known and stated to complainants that he was not desirous of purchasing, nor did he intend to purchase, the lands and premises described in said contract for himself or for his own use; but that he was doing so merely as the agent for, and on behalf of, his principal, whose identity he was then unable to disclose to complainants, and by reason whereof he was unwilling to enter into the said contract and/or to pay them the sum of \$500. in connection with said transaction, excepting, however, upon the express understanding that said contract was not to come into force or effect as against him, unless his said principal was able and willing to perform the terms of said contract on or before the date fixed for the consummation thereof, and that in the event of his principal being unable or unwilling to do so, then complainants were to keep and retain the said sum of \$500.00, to be paid by him to them as aforesaid, in full payment and satisfaction of any and

all rights and/or claims which they might have against defendant by reason of his having entered into said understanding and/or executed the said contract.

2. Complainants, in order to induce him to execute the contract, hereinabove referred to, then and there assured defendant that they were willing to execute said contract and to permit him to execute same in accordance with and subject to the conditions and express understanding had between them and particularly set forth in the preceding paragraph.

3. Relying upon the assurances and representations thus given and made to him by complainants, he did thereupon execute the said contract and thereafter did pay to complainants the said sum of \$500.00.

4. Subsequent to the execution of said contract, and prior to the date fixed for the consummation thereof, Arthur H. Freestone, for whom defendant was acting as agent in connection with the purchase of said property and said transaction, informed defendant that he was unable to perform and carry out the terms and provisions of the said contract, and thereupon defendant informed complainants of said fact, and authorized and directed complainants to keep and retain the sum of \$500., paid by him to them, in accordance with their understanding as hereinabove mentioned, which complainants have done.

5. The said Arthur H. Freestone, for whom and on whose behalf defendant was acting in the said transaction and in connection with the execution of said contract, was unable, prior to and at the time fixed for the consummation of said contract, and ever since has been and still is unable, to comply with and carry out the terms of the contract hereinabove referred to.

2. The condition precedent, upon the happening of which the said contract was to become effective and go into force, as aforementioned, has never occurred, happened or been fulfilled, by reason whereof said contract is not binding upon, is ineffective and unenforceable as against the defendant.

In short, the facts, as above charged, are that, prior to and contemporaneously with the execution of the contract in question, complainants and defendant agreed that same was not to come into force or effect unless and until Arthur Freestone, defendant's principal, would first be able and willing to perform it before its consummation date, which event, however, didn't occur. As is held by all of the authorities referred to in our preliminary statement of law, supra, all of these facts, as set forth in this defense, must, for the purpose of complainants' motion, be deemed and taken to be true. Thus the only inquiry before the Vice-Chancellor was: do said facts constitute a legal or equitable defense to the bill of complaint. If so, then the learned Vice-Chancel-

lor committed reversible error in ordering this defense struck out. That these facts constitute not only an equitable but also a legal defense cannot be gainsaid. They strike at the very root and basis of the complainants' cause of action as set out in the bill of complaint. They clearly establish the fact that the very contract, which complainants seek to enforce, never came into legal existence and is wholly ineffective and inoperative because of the non-occurrence of the contingency upon the happening of which its going into legal effect and operation was conditioned. If such facts are true, and for the purpose of the motion they must be assumed to be true, then there is no valid or binding contract in existence, the specific performance of which could be granted.

But, the learned Vice-Chancellor took the view that, inasmuch as the evidence as to these facts was in the form of an oral agreement made between the parties prior to or contemporaneously with the execution of the written contract, defendant was legally precluded from offering said proof, since same would be in derogation of the parol evidence rule as laid down in the case of *Naumberg v. Young*, 44 N. J. L., 331, and the cases following. However, the authorities hereinafter referred to clearly hold to the contrary. The legal effect of the oral agreement set up in the answer and said defense, would be to control the operation of the written contract sued upon, and not to vary, alter or contradict any of its terms. It would establish the written contract never came into legal effect or existence, because

the condition upon which it was to become operative never occurred.

"A D D E N D A"

In fact this exception to the Parol Evidence Rule is as firmly established as the rule itself, being specifically ingrafted upon and embodied in the rule itself, as enunciated by Mr. Justice Depue in *Naumberg v. Young*, 44 N.J.L. 331, wherein, on page 336, it is stated:-

"Another class of cases in which oral testimony of an agreement by the parties is held to be competent, are those in which the evidence is offered to show that the written agreement was made to take effect upon a condition which was not performed. *Pym v. Campbell*, 6 E.& B. 370, and *Wallis v. Littell*, 11 C.B. (N.S.) 369, are cases of this class. In the first of these cases the action was for the non-performance of an agreement to sell. The plaintiff produced the written agreement signed by the defendant. The defendant was allowed to prove, by oral testimony, that the agreement was drawn up and signed with the understanding that it should be no bargain until approved by A., and that A. did not approve it. In the second of these cases the plaintiff declared on an agreement in writing by the defendant to transfer to him a farm the latter held under Lord S. upon the terms and conditions under which the same was held by the defendant under Lord S. In an action for refusing to transfer the farm, the defendant was allowed to prove, by parol, that the agreement was subject to the condition that it should be null and void if Lord S. should not, within a reasonable time, consent and agree to the transfer of the farm to the plaintiff. In cases of this class the oral testimony is received, not with a view to add an additional term to the written agreement in defeasance of it, but for the purpose of showing that the latter did not become an agreement at all."

A clear and concise statement of the scope and application of the parol evidence rule may be found in the recent case of *Cohen V. Cohn*, 102 N.J.Eq. 245, where Mr Justice Trenchard, writing for the Court of Errors & Appeals, on page 247, said:

"The true distinction is this: The rule excluding parol evidence has no place in any inquiry unless the court has before it some ascertained paper beyond question binding and effective, and hence parol evidence is admissible to show conditions relating to the delivery and taking effect of the instrument, as that it shall only become effective upon certain conditions or contingencies, for this is not an oral contradiction or variation of the written instrument, but goes to the very existence of the contract and tends to show that no valid

It is now well settled in this State that parol evidence is admissible for the purpose of establishing such an oral agreement; and that such an oral agreement, if established, constitutes a legal and equitable defense to the action and one that is wholly defeasive thereof. The authorities so holding in this State and in other jurisdictions as well, are numerous.

In *O'Brien v. Paterson Brewing & Malting Company*, 69 N. J. Eq. 117, Vice-Chancellor Pitney said:

“We now come to the only difficult point in the case.

“Against any relief is urged the time-honored rule that parol evidence cannot be used to vary or contradict the terms of a written contract.

“Without stopping at this moment to enumerate and classify the numerous exceptions to that rule, especially in a court of equity, it is sufficient to say that the evidence here relied upon does not tend to vary the terms of the contract. There is no contention that the complainant did not understand that he was signing an absolute promissory note in favor of the defendant, payable one day after date, and negotiable in its terms. *What he does contend is that it never had any binding effect upon him in equity.*

“To show this by parol is no more a breach of the rule invoked than it is to prove that an absolute deed is given as a mortgage, or that a promissory note is given by the maker to the payee without consideration and as an accommodation to the latter, or that it was given for a consideration that had wholly failed, or was a mere gift, as in *Metler v. Metler*, 18 N. J. Eq. (3 C. E. Gr.) 270, and affirmed on appeal, 19 N.J. Eq. (4 C. E. Gr.) 457.

“It has been said that the rule sustaining the sanctity of written contracts against parol evidence is as strictly maintained in equity as at law but I cannot admit the accuracy of that statement.

“I have made a careful examination of the authorities upon that subject and find they do not sustain it, except in the matter of the true construction of a contract. But when we come to the inquiring into the objects and purposes for which it was not intended.”

The case of *The Oak Ridge Company v. John Toole*, 82 N. J. Eq. 541, is directly in point with the case under consideration. In that case complainant sought the specific performance of a written contract under which defendant had agreed to purchase the realty therein described. *Defendant, in his answer, admitted the execution of the written agreement sued upon, but insisted that same was signed on the understanding that it would not be considered as binding upon him,*

which fact, however, was denied by the complainant. The court, in denying specific performance and dismissing the bill of complaint, said:

“He (the defendant) rests his defense upon the ground that the agreement, while signed by his client, was to have no binding effect upon him. I think his position is well taken and I agree with his view of the case. In *O'Brien v. Paterson Brewing & Malting Co.*, 69 N. J. Eq. 117, practically all the questions involved in this issue are thoroughly and exhaustively discussed by the learned Vice-Chancellor. This case, it seems to me, establishes the rule, that if the parties to an agreement stipulated at the time that it was made that it was to have no binding effect upon them, then, notwithstanding their execution of the agreement, such a contract is of no force and effect at law or in equity. The rule now so well established in equity, admitting parol evidence to show for what purpose the written agreement was executed, was properly invoked by the defendant. The evidence leaves no doubt in the court's mind that in this issue the agreement between the complainant and the defendant was made for the purpose as stated by the latter and his witnesses. It is inequitable and unjust, therefore, for the complainant to enforce the agreement of April 13.”

The case of *Peter Brewing Corporation v. Bernhard et al.*, 137 Atl. 828, was a judgment credi-
101 N.J.E. 60

tor's suit to set aside fraudulent conveyances. There complainant had obtained a judgment by default against one of the defendants upon a written agreement whereby defendant had assumed the debt of another, after the trial judge had ruled against the legality of his defense that the agreement sued upon was executed by him pursuant to an oral agreement made with plaintiff that it was not to be considered as binding upon defendant. To complainant's suit in Chancery defendant interposed this very same defense, which the Court upheld and in dismissing the bill, said:

"There seems to be ample authority to sustain the power of this court to restrain the enforcement of the judgment where an equitable defense is established, as well as to restrain the suit at law before it goes to judgment.

"I have reached the conclusion that the bill of complaint should be dismissed and that the defendant should be accorded appropriate relief against the enforcement of the judgment at law, entered in favor of plaintiff, upon the authority of *O'Brien v. Paterson Brewing etc. Co.*, 69 N. J. Eq. 117; *Oak Ridge Co. v. Toole*, 82 N. J. Eq. 541, and other cases of like import and cases cited therein."

The Court of Errors & Appeals, in the case of *Gallagher v. Lembeck & Betz Eagle Brewing Co.*, 86 N. J. Eq. 188, Mr. Justice Parker, delivering the opinion, said:

"The appeal is from the denial of a motion to strike out the bill of complaint praying an injunction against the enforcement of a judgment at law. Amongst the various grounds assigned for the motion is that of general want of equity. *The bill of complaint to which the motion was addressed contained an allegation admitting the execution of the \$12,000. note but stating that at the time of the complainants having executed it, it was upon the representation and promise made to him by the agent of the defendant that he would never be called upon to pay it if he continued to sell products of the defendant company.*

"We are of the opinion that this bill, the statements of which for present purposes must be taken as true, makes out a complete case for equitable relief. It is very similar to the case of O'Brien v. Paterson Brewing & Malting Co., 69 N. J. Eq. 117, in which Vice-Chancellor Pitney awarded an injunction and decreed the delivery of the note for cancellation. Whether the complainant may maintain a defense at law on these facts seems immaterial in view of the decisions. In Metler v. Metler's administrator, 19 N. J. Eq. 475, and similar cases, it was held that even though the defense was good at law, the complainants were entitled as against the payee to an injunction against enforcement of the note at law, and to a decree that it be delivered up."

The United States Supreme Court, in the case of *Burke v. Dulaney*, 153 U. S. 234, 38 L.ed. 698, Mr. Justice Horten delivering the opinion, said:

“Objection being made by the plaintiffs to this testimony, the defendant offered to prove that at the time of the giving of the note and prior thereto, Dulaney, the payee of the note, agreed with Mr. Burke, the maker of the note, that the note should be given to represent the price conditioned upon his demanding it after an inspection of the mining property mentioned. He offered also to prove that after inspecting the property and testing it, the defendant notified testator that he did not want the interest; that he was prepared to make a deed for the interest to the latter, and demanded the delivery of the note. All this evidence was excluded by the court upon motion of the plaintiffs, to which ruling the defendant excepted.

“The authorities cited do not determine the present case. The issue here is between the original parties to the note. *And the evidence offered by the appellant, and excluded by the court, did not in any true sense contradict the terms of the writing in suit, nor vary their legal import, but tended to show that the written instrument was never, in fact, delivered as a present contract, unconditionally binding upon the obligor according to its terms from the time of such delivery, but was left in the hands of Dulaney, to become an absolute obliga-*

tion of the maker in the event of his electing, upon examination or investigation, to take the stipulated interest in the property in question. In other words, according to the evidence offered and excluded, the written instrument, upon which this suit is based, was not—except in a named contingency—to become a contract or a promissory note which the payee could at any time rightfully transfer. Evidence of such an oral agreement would show that the contingency never happened, and would not be in contradiction of the writing. It would prove that there never was any concluded, binding contract, entitling the party who claimed the benefit of it to enforce its stipulations.”

Mr. Justice Miller, in delivering the opinion of the United States Supreme Court, in the case of *Ware v. Allen*, 128 U. S. 591, 22 L.ed. 563, said:

“We are of opinion that this evidence shows that the contract upon which this suit is brought never went into effect; that the condition upon which it was to become operative never occurred, and that it is not a question of contradicting or varying a written instrument by parol testimony, but that it is one of that class of cases, well recognized in the law, by which an instrument, whether delivered to a third person as an escrow or to the obligee in it, is made to depend, as to its going into operation, upon events to occur or to be ascertained thereafter.” (Citing numerous cases.)

Vice-Chancellor Berry, in the recent case of *Giberson et al. v. First National Bank of Spring Lake et al.*, 136 Atl. 323, 100 N. J. Eq. 414 said:

“It is equally true, however, that numerous cases have arisen in the courts of equity of this state in which parol evidence has been admitted respecting the rights of the parties under written instruments, including promissory notes, which would not have been admitted had the issue been framed at law; the courts in such cases uniformly distinguishing between parol evidence to vary a written instrument and parol evidence showing facts which control its operation. *Chetwood v. Brittan*, 2 N. J. Eq. 438; *Stoutenburgh v. Tompkins* (1853) 9 N. J. Eq. 332; *Sweet v. Parker* (1871) 22 N. J. Eq. 453; *Van Syckel v. Dalrymple*, 32 N. J. Eq. 233, affirmed 32 N. J. Eq. 826; *O’Brien v. Paterson Brewing Co.*, supra; *Oak Ridge Co. v. Toole*, 82 N. J. Eq. 541, 88 A. 827; *Gallagher v. Lembeck & Betz Eagle Brewing Co.*, supra; *Massopust v. Lembeck & Betz Eagle Brewing Co.*, supra.”

In addition to the authorities above cited, there are scores of others, some of which are: *Massopust v. Lembeck & Betz Eagle Brewing Co.*, 94 N. J. Eq. 103, 118 Atl. 630; *Van Syckel v. Dalrymple*, 32 N. J. Eq. 233, affirmed 32 N. J. Eq. 826; *Sweet v. Parker*, 22 N. J. Eq. 453; *Stoutenburgh v. Tompkins*, 9 N. J. Eq. 332; *Chetwood v. Brittain*, 2 N. J. Eq. 438; *Reynolds v. Robinson*, 110 N. Y. 654; *MacFarland v. Sikes*, 54 Conn. 250; *Southern*

Street Railway Advertising Co. of Baltimore v. Metropole Stove Manufacture Co., 91 Md. 61, 46 Atl. 513; Colonial Park Estates v. Massart, 112 Md. 648, 77 Atl. 275; Wilson v. Powers et al., 131 Mass. 537; Julliard v. Chaffre, 92 N. Y. 531; Benton v. Marten, 52 N. Y. 572; 22 Corpus Juris, 1148, section 1540; and 10 Ruling Case Law, sections 234 and 249 on pages 1041, 1053 and 1054.

In view of all of the authorities above cited, we respectfully submit that the answer and second separate defense—wherein it was alleged, in substance, that the contract sued upon was inoperative and of no legal force or effect because complainants and defendant, prior to and simultaneously with its execution, had orally agreed that same was not “to come into force or effect unless and until defendant’s principal was able and willing to perform its terms on or before the date fixed for its consummation,” which condition, upon which the contract was to become operative, never occurred—set up and disclosed a legal and equitable defense to the bill of complaint; and that parol evidence was both competent and legal to establish such defense, notwithstanding the written contract sued upon. Nor does it matter that the making and existence of said oral agreement was denied by complainants’ affidavits, since, as indicated under the “Preliminary Statement of Law,” supra, its making and existence, as alleged in the answer and second separate defense, must, for the purpose of deciding complainants’ motion to strike, be assumed or taken to be true.”

In view of the foregoing, we respectfully submit that the order, in so far as it strikes out the answer and the second separate defense, is erroneous, and should be set aside and reversed, so that defendant may be permitted to have his day in Court and be heard relative to his said defense.

POINT II.

THE CONTRACT SUED UPON IS NULL AND VOID BECAUSE DEFENDANT WAS INDUCED TO ENTER INTO AND EXECUTE SAME BY REASON OF THE FALSE AND FRAUDULENT STATEMENTS, REPRESENTATIONS AND ASSURANCES WHICH COMPLAINANTS MADE TO HIM.

The sixth separate defense (Case, pp. 15-16) states, in substance, that complainants represented to and assured defendant that, unless his principal was able and willing to carry out the proposed written contract, same would not go into force or effect or become operative against him; that relying upon the truth of said assurances and representations, defendant executed the written contract sued upon; that defendant has since learned that said representations and assurances were false, because complainants did not, at the time of their making or at any time thereafter intend to fulfill or abide by them, but had made them solely for the purpose of deceiving and defrauding defendant and in order to induce him to execute the said contract.

All of the foregoing facts, as set out in the answer and sixth separate defense, must, as herein-

before noted, for the purpose of complainants' motion to strike, be deemed and taken to be true. That these facts set up and spell out a clear case of fraud on the part of complainants in procuring the written contract cannot be questioned or denied. That a contract thus procured will be held to be null and void and not enforced by a Court of Equity, is a principle of law and equity jurisprudence so elementary as to make the citation of any authority in support thereof wholly unnecessary.

Vice-Chancellor Van Fleet, in the case of *Plummer v. Keppler*, 26 N. J. Eq. 481, said:

"On a bill for specific performance, the court will grant or refuse its aid according to the justice of the case; it will never extend its aid to a suitor who has practiced a fraud, or procured the contract by a misrepresentation of a material fact xxxx."

The principles enunciated in the *Plummer v. Keppler* case, *supra*, were stated with approval by the Court of Errors & Appeals in the case of *Neptune Fisheries Co. v. Cape May Real Estate Co.*, 89 N. J. Eq. 522, 105 Atl. 212, wherein Mr. Justice Bergen, delivering the opinion of the Court, said:

"If it (the contract) has been procured by any sort of fraud or falsehood, or its enforcement will be attended with great hardship or manifest injustice, the Court will refuse its aid."

Nor is the defendant precluded, by the parol

evidence rule, from establishing the false and fraudulent representations and assurances, which were orally made to him by the complainants, as a result of which he was induced to execute the contract in question. Such evidence neither varies, alters nor contradicts the terms of the written contract. On the contrary, it admits the execution of the contract, but tends to prove that it is null and void, because, as a result of the fraud practiced or perpetrated, there never was in fact a meeting of the minds, and hence, no valid, binding contract ever made.

In view of the foregoing, we respectfully submit that the order, in so far as it strikes out the answer and the sixth separate defense, wherein fraud is set up and charged in the procurement of the contract sued upon, is erroneous, and should be set aside and reversed, to the end that the defendant may have his day in Court and be heard relative to his said defense.

POINT III.

COMPLAINANTS ARE EQUITABLY ESTOPPED FROM ENFORCING SAID CONTRACT, BECAUSE DEFENDANT RELIED UPON THEIR REPRESENTATIONS, ASSURANCES AND PROMISES THAT THEY WOULD NOT ENFORCE IT AGAINST HIM IN CASE HIS PRINCIPAL WAS UNABLE OR UNWILLING TO PERFORM IT, AND BY REASON OF WHICH HE WAS INDUCED TO EXECUTE IT.

The answer and the third separate defense (Case, p. 14), in substance, stated (1) that "prior

to and concurrently with the execution of the written contract sued upon, defendant made known and stated to complainants that he was not desirous of purchasing, nor did he intend to purchase, the lands and premises described in the contract for himself or for his own use, but that he was doing so merely as the agent for, and on behalf of, his principal, whose identity he was then unable to disclose to complainants, and by reason of which situation he was unwilling to enter into the said contract or to pay the sum of \$500.00 in connection with said transaction, *excepting, however, upon the express understanding that said contract was not to come into force or effect as against him, unless his said principal was able and willing to perform the terms thereof on or before the date fixed for its consummation;* (2) that "complainants, in order to induce him to execute said contract, then and there assured him that they were willing to execute said contract themselves and permit him to execute same in accordance with and subject to said conditions and understanding;" (3) that, "relying upon the truth of the representations and assurances made and given to him by complainants as aforesaid, he did thereupon execute said contract and pay the sum of \$500.00 thereon;" (4) "that subsequently, and prior to the date fixed for the consummation thereof, Arthur H. Freestone, his principal, informed him that he was unable to perform or carry out the terms and provisions of said contract;" (5) that "thereupon defendant immediately informed complainants of said fact;" (6) that "said Arthur H. Freestone, ever since said time, has

been, and still is, unable to carry out the terms of said contract;" and (7) that to permit said complainants to now enforce said contract against defendant, in violation of their said express understanding and contrary to complainants' said representations and assurances, will result in great and irreparable loss and damage to defendant, by reason whereof complainants are and should be equitably estopped from enforcing same."

All of the foregoing facts are set forth and pleaded in the answer and the third separate defense, and as hereinbefore indicated, all of them must, for the purpose of passing upon complainants' motion, be deemed and taken as true. That they clearly set up facts by reason of which complainants are estopped in equity from enforcing the contract cannot be gainsaid. That parol evidence is admissible and competent for the purpose of establishing these facts, notwithstanding the written contract, is held by all the authorities referred to in Points I and II, *supra*, since such evidence does not vary, alter or contradict the terms of the written contract, but merely establishes facts, by reason of which complainants are equitably estopped from enforcing it.

Professor Pomeroy, in his treatise on Equity Jurisprudence (4th edition) Vol 2, pages 1760-1762, section 860, says:

"The equitable remedy of the specific performance of contracts, even when they are valid and binding at law, is not a matter of course; it is so completely governed

by equitable considerations that it is sometimes, though improperly, called discretionary, it is never granted unless it is entirely in accordance with equity and good conscience. In short, a court of equity will not grant its affirmative remedy to compel the defendant to perform a contract which he did not intend to make or which he would not have entered into had its true effect been understood. Wherever the defendant's mistake was, either intentionally or not, induced or made probable or even possible, by the acts or omissions of the plaintiff, *then, on the plainest principles of justice, such error prevents a specific performance of the agreement. A mistake which is entirely the defendant's own or that of his agent, and for which the plaintiff is not directly or indirectly responsible may be proved in defense, and may defeat a specific performance. This is indeed the very essence of the equitable theory concerning the nature and effect of mistake.*"

Chancellor Williamson, in *Stoutenburgh v. Tompkins*, 9 N. J. Eq. 332, said:

"It is vain to say that a court of equity will refuse its aid to compel a party to do what a conscientious man ought not to ask him to do, under all the circumstances of the case, and yet, by a strict application of a principle of law, forbid his proving the circumstances which establish the hardship and inequity of the case."

"But there is a great difference between

introducing parol evidence for the purpose of showing that the writing does not express the true intention of the parties, *and in introducing it for the purpose of showing the circumstances which make it inequitable and unconscientious that the intention should be carried out.* * * * But it is equally well settled that specific performance is discretionary with courts of equity, and a defendant will generally succeed in procuring a dismissal of the bill, if he convinces the court that the exercise of the jurisdiction will be inequitable under the circumstances."

Vice-Chancellor Berry, in *Giberson et al. v. First National Bank of Spring Lake et al.*, 100 N. J. Eq., 414, 136 Atl. 323, said:

"Acting on more liberal principles, equity often softens the rigor of the law, and, although a party's legal rights are apparently clear on the face of a written instrument, that does not preclude a court of equity from inquiring into the circumstances under which the document was executed or procured in order to determine whether or not the instrument should be given the effect which at law would necessarily follow from its terms. Such inquiry might indicate a situation which would make it inequitable to enforce legal rights."

Vice-Chancellor Pitney, in *O'Brien v. Paterson Brewing & Malting Co.*, 69 N. J. Eq. 117, said:

“To the view of a chancellor it is no more equitable and just that a man should not have the benefit of a parol promise of the character here in question, which he has acted upon, then it is that he should not have the benefit of a parol contract to convey lands upon which he has acted in such manner that he cannot be restored. As the court will not permit the statute of frauds to be made an instrument of fraud, so it ought not to permit the rule that parol evidence cannot be permitted to alter or vary a written contract to be made an instrument of fraud.

“In my judgment, it is what is known in equity as a fraud for one person to procure from another his promissory note upon a verbal promise or pledge that it shall not be enforced, and afterwards to invoke the rule in question in order to be able to enforce it.

“It has sometimes been suggested and supposed that there must have been a fraudulent intent on the part of the party making the verbal promise or agreement entertained at the time of so making or entering into it—that is, that there should have been fraud in the inception of the affair—but this is not necessary. It is now well settled that the act which excites the jurisdiction of the Court, and which the court calls fraudulent, is the setting up of the statute of frauds as a defense to a suit for specific performance, where, according to the notions of the Chancellor, it is inequitable and

unjust so to do. Such conduct the court classes as fraudulent."

In view of all of the foregoing, we respectfully submit that, by reason of their representations, assurances and agreement, complainants are equitably estopped from enforcing the contract, which, under the circumstances, it would be most inequitable and unconscientious to decree the specific performance of; and that the learned Vice-Chancellor committed reversible error in striking out the answer and said third separate defense, by reason of which said order should be reversed and set aside, and the defendant be afforded his day in Court relative to set defense.

POINT IV.

HE WHO COMES INTO EQUITY MUST COME WITH CLEAN HANDS.

This principle furnishes a most important and even universal rule affecting the entire administration of equity jurisprudence as a system of remedies and remedial rights. It says that wherever a party, seeking some equitable relief, has in his prior conduct, with reference to the transaction in question, violated conscience or good faith, then a court of equity will refuse to interfere on his behalf, or to award him any equitable remedy.

The answer and fourth separate defense set out and charge facts showing that the contract was procured by complainants from defendant by means of the representations, assurances and

promises made by them to him, prior to and at the time of its execution, and contrary to and in violation of all of which complainants now seek its specific performance. The truth of these facts thus charged must be assumed and taken for granted for the purpose of deciding complainants' motion to strike, as was discussed by us under Points I, II and III, supra. The admission of parol evidence for the purpose of establishing these facts is both competent and legal, as is indicated in **Points I, II and III, supra**, because same is not admitted for the purpose of varying, altering or contradicting the terms of the written contract, but for the purpose of showing facts and circumstances making its enforcement "inequitable and unconscientious". That such facts constitute a valid equitable defense, which, if established at the trial, would defeat complainants' right to the equitable relief sought by them, cannot be denied.

The equitable "doctrine of clean hands" is most often applied in cases involving specific performance of contracts. A contract may be perfectly valid and binding at law, and of a class, which, by reason of the inadequacy of the legal remedy, brings it within the equitable jurisdiction; yet, if complainants' acts or conduct in procuring it has been unconscientious, inequitable or tainted with bad faith, a court of equity will refuse him the remedy of specific performance. *Gluck v. Rynda Development Co.*, 99 N. J. Eq. 788, 134 Atl. 363, affirmed 100 N. J. Eq. 554, 135 Atl. 917; *Neptune Fisheries Co. v. Cape May Real Estate Co.*, 89 N. J. Eq. 552, 105 Atl. 212; *Kutschinski v. Thompson*, 101 N. J. Eq. 649, 138 Atl. 569; *New-*

ark Cleaning & Dye Works v. Gross, 102 N. J. Eq. 362, 140 Atl. 684; Prindeville v. Johnson & Higgins, 93 N. J. Eq. 425, 116 Atl. 785; Plummer v. Keppler, 26 N. J. Eq. 481; Muller v. Weiss, 91 N. J. Eq. 29, 108 Atl. 768, affirmed 91 N. J. Eq. 321, 109 Atl. 357; Hummer v. Buerk, 90 N. J. Eq. 102, 106 Atl. 141; Johnson v. Board of Commissioners of Somerville, 33 N. J. Eq. 152; Blake v. Flatley, 44 N. J. Eq. 288; Sherman v. Wright, 49 N. Y. 227; Snell v. Mitchell, 65 Me. 48; Easton v. Plummer, 46 N. H. 464; Burke v. Seely, 46 Mo. 334; Mississippi etc. R. R. v. Crowell, 91 U. S. 643.

In Plummer v. Keppler, 26 N. J. Eq., 481, Vice-Chancellor Van Fleet said:

“The remedy by specific performance is discretionary; the question is not, what must the court do, but what, in view of all the circumstances of the case in judgment, should it do to further justice. When the contract has been fairly procured and its enforcement will work no injustice or hardship, it is enforced almost as a matter of course; but, if it has been procured by any sort of fraud or falsehood, or its enforcement will be attended with great hardship or manifest injustice, the court will refuse its aid. Seymour v. Delancey, 6 Johns. Ch. 22; King v. Morford, Saxton 281; Rodman v. Zilley, Id. 324; Ccnover v. Wardell, 5 C. E. Gr. 273; Sotry’s Eq. Jur. Sec. 750 a, 751.”

In Blake v. Flatley, 44 N. J. Eq. 228, Mr. Jus-

tice Scudder, speaking for the Court of Errors & Appeals, said:

"But it is also held that courts of equity will not interfere to decree a specific performance except in cases where it would be strictly equitable to make such a decree. Whether, therefore, the contract shall be enforced specifically must rest in the sound and reasonable discretion of the court, depending on the equity of the particular case and the nature of the objections to it. It must determine what are the objectionable circumstances which will control its jurisdiction in such cases, within the established rules of equity, though none of these rules are of absolute obligation and authority in all cases. *Gariss v. Gariss*, 1 C. E. Gr. 79; *Pinner v. Sharp*, 8 C. E. Gr. 274; *Locander v. Lounsbery*, 9 C. E. Gr. 417; *Plummer v. Keppler*, 11 C. E. Gr. 481; *Brown v. Brown*, 6 Ste. Eq. 650; 1 Story's Eq. Sec. 742."

Vice-Chancellor Lewis, in *Muller v. Weiss*, 91 N. J. Eq. 29, 108 Atl. 768, affirmed 91 N. J. Eq. 321, 109 Atl. 357, said:

"There is also evidence as to a misstatement of Muller as to the cost of excavating the rock on the property. These misstatements are in themselves sufficient to warrant me in denying specific performance. *In suits for specific performance anything said or done to mislead the purchaser compels the court to deny relief to the com-*

plainant. Bowker v. Cunningham, 78 N. J. Eq. 458, 79 Atl. 608; Pyalt v. Lyons, 51 N. J. Eq. 308, 27 Atl. 934; Brisbane v. Sullivan, 86 N. J. Eq. 411, 99 Atl. 197; Neptune Fisheries Co. v. Cape May Real Estate Co., 89 N. J. Eq. 552, 105 Atl. 212.”

And Mr. Justice Bergen, in delivering the opinion of the Court of Errors & Appeals in that case, Muller v. Weiss, 91 N. J. Eq. 321, 109 Atl. 357, said:

“The remedy invoked by this appeal is discretionary. It is not what must be done, but what, in view of all the circumstances, should be done, and, where a contract is procured by fraud, and its enforcement would be a manifest injustice, the Court will refuse its aid. Plummer v. Keppler, 26 N. J. Eq. 481; Ten Eyck v. Manning, 52 N. J. Eq. 47, 27 Atl. 900.”

In Neptune Fisheries Co. v. Cape May Real Estate Co., 89 N. J. Eq. 552, 105 Atl. 212, Mr. Justice Bergen, delivering the opinion of the Court of Errors & Appeals, *inter alia*, said:

“If it (the contract) has been procured by any sort of fraud or falsehood, or its enforcement will be attended with great hardship or manifest injustice, the court will refuse its aid.”

In Hummer v. Buerk, 90 N. J. Eq. 102, 106 Atl. 141, opinion by Vice Chancellor Backes, it was held:

"The guiding principle in the exercise of the jurisdiction is that declared in *Plummer v. Keppler*, 26 N. J. Eq. 481, and repeated in numerous cases.

"The remedy by specific performance is discretionary; the question is not, what must the court do, but what, in view of all the circumstances of the case in judgment, should it do, to further justice? When the contract has been fairly procured and its enforcement will work no injustice or hardship, it is enforced almost as a matter of course; but if it has been procured by any sort of fraud or falsehood, or its enforcement will be attended with great hardship or manifest injustice, the court will refuse its aid."

Vice-Chancellor Backes, in *Newark Cleaning & Dye Works v. Gross*, 102 N. J. Eq. 362, 140 Atl. 684, said:

"In such circumstances where a suitor is himself guilty of unconscionable conduct in the transaction, a court of equity will remain passive. *Pomeroy's Equity Jurisprudence*, Sec. 397; *Pendleton v. Gondolf*, 85 N. J. Eq. 308, 96 Atl. 47; *Prindeville v. Johnson & Higgins*, 93 N. J. Eq. 425, 116 Atl. 785; *Gluck v. Rynda Co.*, 99 N. J. Eq. 788, 134 Atl. 363."

In the case of *Gluck v. Rynda Development Co.*, 99 N. J. Eq. 788, 134 Atl. 363, affirmed 100 N. J. Eq. 554, 135 Atl. 917, Vice-Chancellor

Berry, after an exhaustive review and discussion of the authorities in point, said:

"It should be borne in mind that the remedy by specific performance in this court is discretionary. The question is not, what must the court do, but what, in view of all the circumstances of the case in judgment, should the court do to further justice."

In view of all of the foregoing, we respectfully submit that the facts, as set forth in the answer and fourth separate defense, clearly showed that complainants were "without clean hands" and constituted a valid equitable defense to the relief sought by complainants, by reason of which the learned Vice-Chancellor committed reversible error in making the order striking same out and which order, it is respectfully submitted, should be reversed and set aside so that defendant may have his day in Court relative to the defense therein set up by him.

POINT V.

THERE WAS AN ACCORD AND SATISFACTION OF THE CONTRACT SUED UPON.

Paragraph 2 of the eighth separate defense, (Case, p. 16) reads as follows:

2. On occasions subsequent to the date specified in the said contract for its consummation, defendant informed complainants that the said Arthur H. Freestone, for whom he was acting as agent in connection

with said transaction and the execution of the contract aforesaid, was unable to perform and carry out the terms and provisions thereof, and informed complainant that he was satisfied to permit them to keep and retain the sum of \$500.00, which he had paid to them as aforesaid, in full payment, satisfaction and discharge of his obligations, if any, under the said contract, to which the complainants agreed to, and pursuant to which they have kept and retained said money.

For the purpose of passing upon complainants' motion to strike, the Court, as hereinbefore indicated, must assume that all of the facts, as set forth in the answer and eighth separate defense, supra, are true. These facts show that the parties after the date fixed for the consummation of the contract entered into an agreement of accord and satisfaction, which was executed, with reference to said contract. That such facts when established constitute a legal and equitable defense to complainants' action on said contract cannot be questioned.

The learned author of Ruling Case Law, Volume 1, pages 178-179, says:

"Accord and satisfaction is a method of discharging a contract or settling a cause of action arising either from a contract or a tort, by substituting for such contract or cause of action an agreement for the satisfaction thereof and an execution of such substituted agreement.

"After a contract under seal has been breached the general rule has always been that an accord and satisfaction thereafter made is a good plea in bar of an action on the contract."

In view of the foregoing, we respectfully submit that the order, in so far as it strikes out the answer and the eighth separate defense, is erroneous, and should be set aside and reversed, to the end that defendant may be permitted to have his day in Court and be heard relative to his said defense.

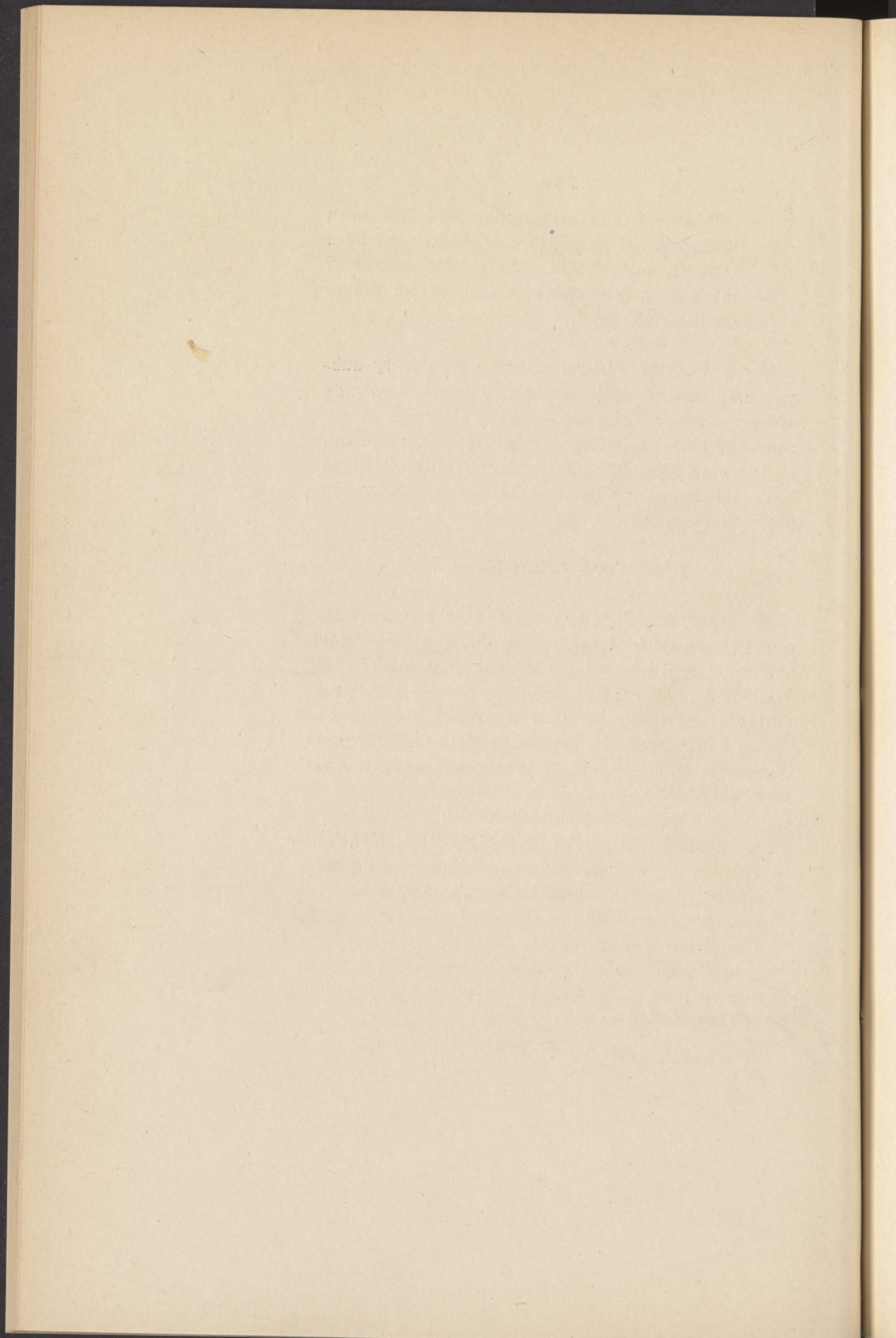
CONCLUSION

It is respectfully submitted that the answer, and the separate defenses therein contained, for the reasons discussed by us under Points I, II, III, IV, and V of this brief, were not defective, and did set up a legal or equitable defense to the bill of complaint, by reason of which the order striking them out is erroneous, and, therefore, should be set aside and reversed.

Respectfully submitted,

MENDELSON & MENDELSON,
Solicitors for and of Counsel
with Defendant-Appellant.

James Mendelson
of counsel



New Jersey Court of Errors and Appeals

Between Nathan E. Jacobson and Rebecca Jacobson, his wife, Complainants-Respondents, and William R. Lambert, Defendant-Appellant.	} On Appeal From Court Of Chancery
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Reply Brief of William R. Lambert, Defendant-Appellant.

That the Court of Chancery has the power to strike out a sham or frivolous pleading is a fact that is not, nor ever was, questioned by us, and one concerning which there is no dispute whatever in this case. In view of this, we fail to see the necessity or relevancy of the argument in respect thereto, which appears on pages 4 to 6 of our adversary's brief. The Court below struck out the answer and separate defenses because it was of the opinion or found that they **"failed to disclose a legal or equitable defense to the complaint."** It is in the making of this decision or determination that, we contend, the Court below committed legal error.

Our adversary concedes that he has "no quarrel" to find with the soundness of the principles discussed under our "preliminary statement of law". (Our main brief, pages 2 to 5.) He, however, by an ingenious, though meritless, argument contends they are inapplicable to the case at bar, because it was heard on bill, answer and affida-

vits, whereas the other cases were heard merely on bill and answer. By this contention he attempts to prove merely a distinction without difference, because he completely ignores the fact that the Court below, notwithstanding its consideration of the bill, answer and affidavits, and the argument thereon, **declined to find that said answer and the facts therein pleaded, were sham or untrue, as was desired and urged by our adversary.** The Court below merely found and determined that said answer "does not set up a legal or equitable defense to the bill of complaint." (Case p. 33, lines 28-30.)

It must, therefore, follow that the Court below, by its refusal to find that said answer was sham, must have necessarily found, as a matter of fact, and for the purpose of the motion only, that the legal presumption as to the verity of the matters therein pleaded, was not overcome, but on the contrary was sustained by the affidavits. Thus the principles, discussed in our main brief under the "Preliminary Statement of Law," become, with all the more force and reason, applicable to the case at bar, notwithstanding our adversary's argument to the contrary.

Under Point V, page 7 of his brief, our adversary argues that proof of a parole agreement, made prior to or concurrently with a written one, the purpose of which is to show that the written one was not to be considered binding or operative until a certain agreed upon contingency occurred, is inadmissible. This argument is plainly without merit or authority to support it, and clearly con-

trary to the now well settled principles of law as defined by all of the authorities in point, some of which are referred to on pages 10 to 18 of our brief, and which indicate how extensively the existence of these principles has been recognized in our, as well as other States. Nor does even a single one of the cases cited by our adversary hold to the contrary, because all of them involved, and are applicable to, only cases wherein the purpose of the parol agreement was to modify, terminate or defeat the written one already in force and effect. **In short, each of these cases deals with parol agreements relative to conditions subsequent upon the occurrence of which the written agreement, already in force and effect, is to be modified, terminated or defeated. However, the parol agreement in the case at bar, and those involved in the cases cited in our brief, deal with conditions precedent, only upon the happening of which, the written agreement is to become operative against and binding upon the parties to it.**

Commencing on page 12 of his brief, our adversary states as his premise that the "defense sets up that the contract was delivered to the complainants already executed by defendant with a condition precedent attached thereto," and then refers to a number of authorities dealing with a conditional or escrow delivery of deeds or other instruments. That said statement of the defense is erroneous clearly appears from a reading of the first separate defense. (Case, pages 12-12.) The defense, as there pleaded, is that prior to and concurrently with the signing of the written agree-

ment, the parties entered into an oral agreement that the written one was not to come into force or effect or become binding upon defendant unless and until a certain specified contingency actually occurred. Thus it is apparent that our adversary's premise is false and it, therefore, follows, as an inevitable result, that all of the authorities cited by him in support thereof are likewise inapplicable to the facts in the case at bar.

An examination of the authorities, cited by him, will also disclose that they merely deal with conditions independent of and not created by express agreement between the parties, pursuant to, and as a result of, which the written one is signed by them, as is the fact in the case at bar. Furthermore, said cases deal with and involve conditions subsequent and not conditions precedent, as does the case at bar. Nor is the case of *Elwood v. Smith*, 104 N.J.L. 248, in point or conflict with the authorities cited on pages 10 to 15 of our main brief, and all of which are in point with, and applicable to, the case at bar. That the facts involved in *Elwood v. Smith*, supra, were entirely different than those present in the case under consideration is manifest from the opinion itself, wherein the facts are stated as follows:

“The circumstances of the case are about as follows: The plaintiff's husband and the defendant met with reference to the sale of the property, and a written contract was drawn in which the defendant's wife is not named as a party and which

she did not sign. The contract was apparently on a printed form containing a clause with relation to liquidated damages in case of failure to perform, but the amount of the liquidated damages was left blank, and, consequently, the clause is nugatory. **At the time of the negotiations the defendant, who had the contract on his desk, signed in duplicate with his own signature, and warned the plaintiff that he thought Mrs. Smith would refuse to sign the contract, but the plaintiff took one of the copies and said he would take the chances of that. The defendant's wife did refuse to sign, and plaintiff raised an issue of fraud on this subject, which was found adversely by the trial judge; and in that finding we fully concur.**"

In that case, defendant executed and delivered the contract, **not** in accordance with nor pursuant to a prior or concurrent express oral agreement made between him and the other party, whereby they agreed that the written one was not to go into force or effect or become binding upon him unless and until a specified contingency occurred; which, however, is the fact in the case at bar. **There the legal existence of the contract was admitted, as the Court carefully points out in this language—"and it is admitted on the record that there was a contract," and in another part of the opinion, "and the 'contract' was expressly admitted on the trial."** In the case at bar, however, not only is there no such admission, but on the con-

trary the legal existence of the contract is disputed and denied, by reason of the non-happening of the condition upon the occurrence of which it was to become operative and come into legal effect and existence. There the contract itself, having been admitted, the function or effect of said condition, of necessity, could only have been to terminate or defeat said existing contract, and as such was, in effect, a "condition subsequent," and hence incapable of being proven by parol testimony. **In the case at bar, the parol agreement had the effect of a condition precedent, since it prevented the written contract from even becoming operative or coming into legal force or effect, until the agreed upon contingency had first happened.**

The aforesaid distinctions and the failure of the Court, in *Elwood v. Smith*, supra, to even evince the slightest criticism or disapproval, let alone reversal, of that long and now well settled line of cases. (*Sweet v. Parker*, 22 N.J.Eq. 453; *O'Brien v. Paterson Brewing & Malting Co.*, 69 N.J.Eq. 117; *The Oak Ridge Company v. John Toole*, 82 N.J.Eq. 541; *Peter Brewing Corporation v. Bernhard et al.*, 101 N.J.Eq. 60; *Gallagher v. Lembeck & Betz Eagle Brewing Co.*, 86 N.J.Eq. 188; *Masopust v. Lembeck & Betz Eagle Brewing Co.*, 94 N.J.Eq. 103; *Giberson v. First National Bank of Spring Lake*, 100 N.J.Eq. 414, and others) **none of which are even referred to in the Court's opinion, and all of which are in point with the case at bar, conclusively demonstrates the fact that said case is entirely different from and inapplicable to**

the case at bar. Nor is it amiss to here point out that the *Elwood v. Smith* case was tried in a law court and not in the Chancery Court, wherein, of necessity, much more liberality is exercised in admitting evidence of this character in order to reach the equity of the case, than would be allowed by a court of law. *Stoughtenburgh v. Tompkins*, 9 N.J.Eq. 332; *Headley v. Leavitt*, 65 N.J.Eq. 648; *O'Brien v. Paterson Brewing & Malting Co.*, supra; *Gallagher v. Lembeck & Betz Eagle Brewing Co.*, supra, *Peter Brewing Corporation v. Bernhard et al.*, supra.

As was pointed out in our main brief, not only were the facts, as pleaded for the purpose of the motion, assumed to be true, but the Court below declined to find that they were untrue. That these facts, as pleaded, charge that complainants, at the time of making their said oral promise, never intended to carry same out, but did so only for the purpose of thereby deceiving and inducing defendant to sign the written agreement, is conclusively shown by paragraph 2 of the sixth separate defense (Case, pages 15-16) which reads as follows:

“Defendant has now learned that the representations and assurances made to him by complainants, as hereinbefore stated, were false and untrue, since complainants did not then, nor at any time thereafter, intend to carry out and/or abide by the representations and assurances made by them to defendant as aforesaid,

but made same solely for the purpose of deceiving and defrauding defendant in the premises, and in order to induce him to execute the said contract.”

From the foregoing it is apparent that sufficient facts were charged and pleaded, and none of which, upon hearing, were found to be sham, to make out a prima facie case of fraud, and by reason of which the Court erroneously ordered said defense stricken out.

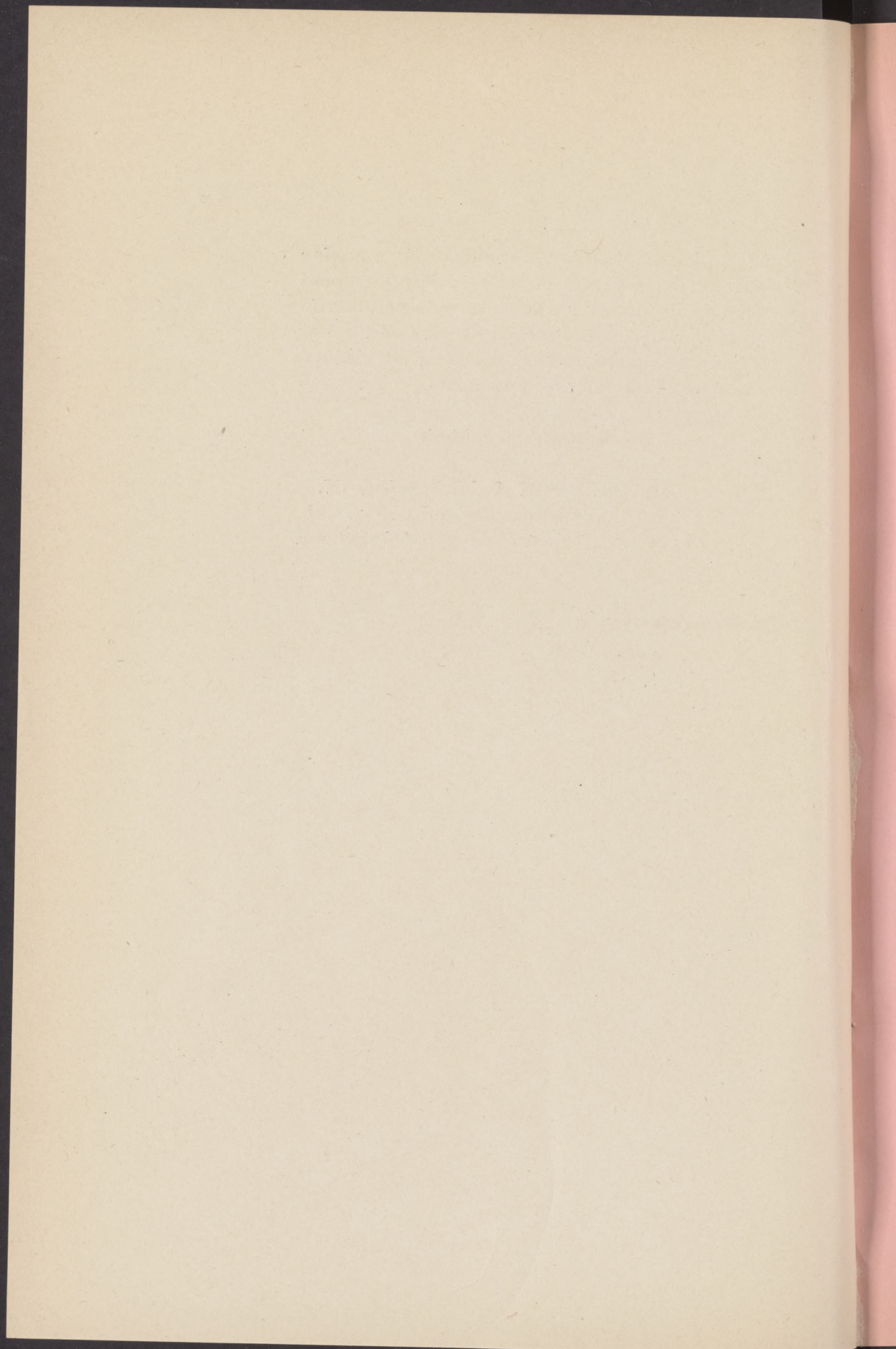
On page 24 of his brief, our adversary argues that “defendant having failed to sustain the burden of proof on the question of accord and satisfaction, and having failed to prove an acceptance of the alleged accord and satisfaction by the complainants, that this defense must fail.” The action of the Court below was taken, not upon a final hearing, but merely on a motion to strike the pleading. A thorough search of all of the authorities fails to disclose a single one, nor does our adversary refer to any, which holds that the rule relative to the burden of proof is applicable to mere motions to strike out pleadings. On the contrary, the settled rule of law is that matters pleaded are to be assumed to be true for the purpose of determining a motion to strike the pleading wherein same is set forth. It is unquestionable that the facts, pleaded and charged in the eighth separate defense, sufficiently set out a valid accord and satisfaction, the truth of which, as before stated, must be assumed for the purpose of the motion to strike. Even if the rule relative to

the burden of proof were applicable to a motion to strike out a pleading, we respectfully submit that this requirement was more than fulfilled in the case at bar by the refusal of the Court below to find and determine that the facts, as pleaded in said separate defense, were sham.

Respectfully submitted,

MENDELSON & MENDELSON,
Solicitors for and of Counsel
with Defendant-Appellant.

Stuart Mendelson
of counsel



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