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Filed November 15, 1929.

68-264.

In Chancery of New Jersey

Between

ACQUACKANONK BUILDING AND LOAN ASSOCIATION, Passaic, N. J., a corporation of New Jersey,

Complainant,

and

AUGUSTA B. PARSONNET,

Defendant.

On Bill, etc.

Notice of Appeal.

The defendant, Augusta B. Parsonnet, of the City of Newark, County of Essex and State of New Jersey hereby appeals from the final decree made in the above entitled cause by the Chancellor on the advice of Vice-Chancellor Bentley on October 28, 1929, from the whole and every part hereof, to the Court of Errors and Appeals in the last resort in all causes.

THOMAS L. PARSONNET,
Solicitor for and of Counsel with Defendant.

Dated: November 7, 1929.

I conceive there is good cause to appeal in the above entitled cause.

THOMAS L. PARSONNET,
Solicitor for and of Counsel with Defendant.

PETITION OF APPEAL.

Filed December 10, 1929.

COURT OF ERRORS AND APPEALS
OF NEW JERSEY.

ACQUACKANONK BUILDING AND LOAN ASSOCIATION, Passaic, N. J., a corporation of New Jersey, *Complainant-Respondent,* *vs.* AUGUSTA B. PARSONNET, *Defendant-Appellant.*	*Petition of Appeal.*

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

The petition of Augusta B. Parsonnet of the City of Newark, County of Essex and State of New Jersey, the appellant in the above entitled cause, respectfully shows:

1. Petitioner finds herself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey upon the advice of his Honor, Vice-Chancellor John Bentley, bearing date the 28th day of October, 1929, in a certain cause in the said Court of Chancery wherein the said Acquackanonk Building and Loan Association of Passaic, a corporation, was complainant and the said Augusta B. Parsonnet was defendant, in this respect, to wit, that the said decree adjudges that the defendant-appellant do specifically perform the terms of an alleged contract

which is set forth in the bill of complaint filed in the said cause and in the said decree.

2. And petitioner appeals from the decree of the Chancellor which decrees as aforesaid upon the ground that the same is erroneous in that it was proved upon the final hearing of the cause that the alleged contract was no contract and was without consideration as regards this appellant; that the terms and provisions of the said alleged contract were violated by the complainant-respondent; that the decree aforesaid requires the said appellant to pay a greater amount than agreed upon in the alleged contract in that it requires the payment in addition to the contract price of a premium at the rate of $1.00 per thousand of the mortgage loan; that it affirmatively appears by the proofs that complainant-respondent itself violated the terms of the said contract by requiring the payment of a price in excess of that stipulated by the said alleged contract; that said decree requires your petitioner to pay to the complainant-respondent a price in excess of that stipulated by the said alleged contract; that it appears affirmatively by the testimony that complainant was never ready and willing to comply with the terms of the alleged contract and itself breached the said alleged contract and that there was admitted certain testimony to which reference will be made at a later date, over objection, which said testimony was improperly admitted to the prejudice of this petitioner and that said court excluded certain testimony on behalf of this petitioner erroneously and to the prejudice of this petitioner.

3. Petitioner therefore prays that the said decree of the said Chancellor may be in the par-

ticulars aforesaid wholly reversed, set aside and for nothing holden and that the petitioner may have such other relief in the premises as to this court shall seem proper.

THOMAS L. PARSONNET,
Solicitor for and of Counsel with Appellant.

ANSWER TO PETITION OF APPEAL.

Filed December 27, 1929.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ACQUACKANONK BUILDING AND LOAN ASSOCIATION, Passaic, N. J., a corporation of New Jersey, *Complainant-Respondent,* *vs.* AUGUSTA B. PARSONNET, *Defendant-Appellant.*	*On Appeal from the Court of Chancery.*

The answer of Acquackanonk Building and Loan Association, Passaic, N. J., a corporation of New Jersey, the above named respondent, to the petition of appeal of Augusta B. Parsonnet, the above named appellant.

This respondent, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto, nevertheless admits that a decree was, on October 28, 1929, made and entered in the Court of Chancery of New Jersey, in the above entitled cause, for the

purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree, this respondent begs leave to refer thereto when the same shall be produced.

This respondent is advised and believes that the said decree is agreeable to equity, and it prays that the same may be affirmed with costs to be taxed in favor of this respondent.

VERNET A. ARNOLD,
Solicitor for Complainant-Respondent.

HENRY C. WHITEHEAD,
Of Counsel with Respondent.

BILL OF COMPLAINT.

Filed May 9, 1928.

IN CHANCERY OF NEW JERSEY.

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

The complainant, Acquackanonk Building and Loan Association, Passaic, N. J., a corporation of New Jersey, having its principal office at 38 Bloomfield avenue in the City of Passaic, in the County of Passaic and State of New Jersey, respectfully shows that:

1. On January 31, 1928, complainant, Acquackanonk Building and Loan Association, Passaic, N. J., a corporation of New Jersey, acquired in fee simple, title to all those certain tracts, lots or parcels of lands and premises, situate, lying and being in the Township of Lyndhurst, in the County of Bergen and State of New Jersey:

TRACT ONE: Being known and designated as Lots Nos. 20 and 21 in Block O, as the same are laid down and shown on map entitled, "Map No. 2, Property of the Woodridge Bldg. & Realty Co., adjoining Rutherford Borough and known as the Kingsland Tract, Bergen County, N. J., Boettner & Pomerehne, Managers", which map is on file in the Bergen County Clerk's Office.

TRACT TWO: Being known and designated as Lot No. 45 and the northwesterly one-half of Lot No. 44 in Block P, as the same are laid down and shown on map entitled, "Map No. 2, Property of the Woodridge Bldg. & Realty Co., adjoining Rutherford Borough and known as the

Kingsland Tract, Bergen County, N. J., Boettner & Pomerehne, Managers", which map is on file in the Bergen County Clerk's Office.

TRACT THREE: Being known and designated as Lot No. 43 and the southeasterly one-half of Lot. No. 44 in Block P, as the same are laid down and shown on map entitled, "Map No. 2, Property of the Woodridge Bldg. & Realty Co., adjoining Rutherford Borough and known as the Kingsland Tract, Bergen County, N. J., Boettner & Pomerehne, Managers", which map is on file in the Bergen County Clerk's Office.

2. On September 7, 1927, complainant, Acquackanonk Building and Loan Association, Passaic, N. J., entered into a certain agreement in writing with Augusta B. Parsonnet, wherein and whereby complainant agreed to convey said lands and premises, by deed of bargain and sale as soon as said complainant acquired title to the above described premises to the said Augusta B. Parsonnet, in consideration of the said Augusta B. Parsonnet executing to the Acquackanonk Building and Loan Association, Passaic, N. J., purchase money mortgages of Eleven Thousand ($11,000) Dollars each on tracts Nos. 2 and 3, and a purchase money mortgage in the sum of Eleven Thousand Five Hundred ($11,500) Dollars on Tract No. 1 as above set forth, together with payments by the said Augusta B. Parsonnet of one-half of the accrued unpaid taxes and assessments on the properties above described, including the second half of the 1927 taxes. A true copy of said written agreement is hereunto annexed and made a part hereof.

3. The said Augusta B. Parsonnet agreed and promised to buy the above described prem-

ises and the Acquackanonk Building and Loan Association, Passaic, N. J., agreed to sell the above described premises on the terms and conditions aforesaid.

4. Immediately upon the complainant securing title to the above described premises the defendant was notified and the complainant endeavored to fix a date for the passing of title but in each instance the defendant refused and has ever since refused to consummate the contract and take title in accordance with the terms and conditions of said agreement.

5. Complainant has always been ready and willing and now tenders itself ready and willing to perform its part of said agreement, and, on being paid the taxes and assessments, which constitute the remainder of said purchase money, in accordance with the terms of the contract aforesaid, to convey said lands and premises to the said Augusta B. Parsonnet by deed, duly executed by complainant.

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

1. That Augusta B. Parsonnet who is the defendant to this suit, may answer this bill of complaint and each statement therein made.

2. That the said Augusta B. Parsonnet may be compelled by the decree of this Court specifically to perform the said agreement with complainant, and to pay to complainant 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

Augusta B. Parsonnet of a deed executed by complainant, as in said agreement provided.

3. That in case the said defendant, Augusta B. Parsonnet 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 complainant, and that the said lands and premises may be sold under the direction of 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 this complainant.

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.

VERNET A. ARNOLD,
Solicitor for Complainant.

HENRY C. WHITEHEAD,
Of Counsel with Complainant.

AGREEMENT, Made between the Acquackanonk Building & Loan Association, Passaic, N. J., a corporation of New Jersey, and Augusta B. Parsonnet of the City of Newark, New Jersey.

WITNESSETH, WHEREAS, the Acquackanonk Building & Loan Association holds first mortgages on property formerly of Costello, and now of Di Charo on 729, 731 and 738 Second avenue, Lyndhurst, New Jersey, and Augusta B. Parsonnet holds second mortgages on the same properties.

AND WHEREAS, the mortgages of the Acquackanonk Building & Loan Association, Passaic, N. J., are under foreclosure, and in addition to the second mortgages of the said Augusta B. Parsonnet, there are mechanics' liens on the properties held respectively by L. Greenberg & Sons, Inc., Yellow Pine Lumber Corporation, and Martin Jensen, and these mechanics' lien claims are in litigation, and the respective priorities of the mortgages and lien claims are in dispute.

AND WHEREAS, it is thought advisable that a settlement be arrived at, so that without further litigation the foreclosures of the Acquackanonk Building & Loan Association may proceed to a final decree and sale.

THEREFORE, it is agreed between the parties hereto in consideration of the premises and of one dollar (1) by each party to the other in hand paid that the Acquackanonk Building & Loan Association will proceed with its foreclosure suits, unless it is found that good title can be procured from the present owner, Di Charo, directly that upon the obtaining of title, either from Di Charo or under the foreclosure suits, title will be taken by the said Augusta B. Par-

sonnet, who will thereupon execute to the Acquackanonk Building & Loan Association, new first mortgages of Eleven Thousand ($11,000) Dollars each, on houses Nos. 729 and 731, and a new first mortgage of Eleven Thousand Five Hundred ($11,500) Dollars on house No. 738, Second avenue, Lyndhurst, New Jersey.

The said Acquackanonk Building & Loan Association shall clear title so that the said Augusta B. Parsonnet shall have the title free from all encumbrance, except only the new first mortgages of the Acquackanonk Building & Loan Association above specified, except that the said Augusta B. Parsonnet shall pay one-half of accrued and unpaid taxes and assessments on the property, and will pay all of the second-half of 1927 taxes. The second mortgages now held by the said Augusta B. Parsonnet shall not be considered encumbrances under this paragragh, and if not cut off under the foreclosure suits, shall be cancelled of record or subordinated to the new first mortgages of the Acquackanonk Building & Loan Association.

This agreement, so far as the Acquackanonk Building & Loan Association is concerned, is contingent upon the ability of that association to eliminate the lien claims of Greenberg, Yellow Pine Lumber Corporation and Martin Jensen, by payment not in excess of Seven Hundred ($700) Dollars per house for all three claims. If the Acquackanonk Building & Loan Association shall find that more money per house must be paid in order to satisfy these three mechanics' liens and clear the title of these liens, then it shall have the right at its option to withdraw from this contract.

The said Augusta B. Parsonnet shall co-operate as far as possible to the end that the said pending foreclosure suits may proceed as rapidly as possible, and shall consent to the entry of such decrees therein as may be desired by the Acquackanonk Building & Loan Association or its counsel, not inconsistent with the terms of this agreement.

IN WITNESS WHEREOF, the Acquackanonk Building & Loan Association, Passaic, N. J., has caused these presents to be signed by its President, and its corporate seal attested by its Secretary to be hereto affixed, and the said Augusta B. Parsonnet has hereunto set her hand and seal this seventh day of September, 1927.

ACQUACKANONK BUILDING & LOAN ASSOCIATION,
Passaic, N. J.

By

(Signed) LOUIS DRUKKER,
President.

Attest:

(Signed) JOHN W. NUMANN,
Secretary.

(SEAL)

(Signed) AUGUSTA B. PARSONNET. (L. S.)

Signed, sealed and delivered in the presence of

ANSWER.

Filed June 7, 1928.

IN CHANCERY OF NEW JERSEY.

Between

ACQUACKANONK BUILDING AND LOAN ASSOCIATION, Passaic, N. J., a corporation of New Jersey,

Complainant,

and

AUGUSTA B. PARSONNET,

Defendant.

On Bill, etc. Answer.

The defendant, Augusta B. Parsonnet, residing in the City of Newark, County of Essex and State of New Jersey by way of answer to the bill of complaint filed herein, says that:

1. She has no knowledge of the facts alleged in paragraph one of the bill of complaint and therefore denies the same.

2. She admits the execution of the instrument alleged in paragraph two of the complaint.

3. She denies the allegations contained in paragraph three of the bill of complaint and says that the said instrument was executed solely for the purpose of having a working arrangement between the parties hereto, and solely for the protection of the said defendant, it being definitely understood in the agreement between the parties that the purpose of the said agreement was to avoid the necessity of bidding in at the Sheriff's sale at such an amount as would re-

quire the payment to the Sheriff of considerable fees. She says further that the agreement was executed with the intention to bind the complainant to convey title to the defendant under the terms thereof, if the defendant should so desire. Defendant further says that there was no consideration paid for the execution of the aforesaid instrument.

4. She denies the allegations of paragraph four of the bill of complaint and says that she was prepared originally to take title to the premises in accordance with the provisions set forth in the bill of complaint, but that upon trying to make arrangements to take title thereto according to those provisions the complainant demanded a premium for the loans which were provided under the instrument alleged in paragraph two of the complaint, and informed defendant that it would refuse to convey the said premises unless the said defendant paid to complainant such premium. Defendant alleges that this demand was in violation of the agreement made by the said complainant and constituted a breach of any contract which might have existed between the parties hereto.

5. Defendant denies the allegations contained in paragraph five of the bill of complaint.

Wherefore defendant prays that the bill of complaint herein filed be dismissed with costs of suit and counsel fee.

Solicitors for and of Counsel with Defendant.

REPLICATION.

Filed June 11, 1928.

IN CHANCERY OF NEW JERSEY.

Between	
ACQUACKANONK BUILDING AND LOAN ASSOCIATION, Passaic, N. J., a corporation of New Jersey, *Complainant,*	*On Bill, &c. Replication.*
and	
AUGUSTA B. PARSONNET, *Defendant.*	

The complainant joins issue on the answer of the defendant.

VERNET A. ARNOLD,
Solicitor for Complainant.

ORDER OF REFERENCE.

IN CHANCERY OF NEW JERSEY.

Between	
ACQUACKANONK BUILDING AND LOAN ASSOCIATION, Passaic, N. J., a corporation of New Jersey, *Complainant,*	*On Bill, &c.*
and	*Order of Reference.*
AUGUSTA B. PARSONNET, *Defendant.*	

This matter being opened to the Court by Vernet A. Arnold, solicitor of the complainant, and it appearing that Thomas L. Parsonnet, solicitor of the defendant, has consented hereto;

IT IS, on this seventeenth day of September, 1928, on motion of Vernet A. Arnold, solicitor of the complainant, ORDERED that the above entitled cause be referred to Hon. John Bentley, one of the Vice-Chancellors of this Court, to hear the same for the Chancellor, and to report thereon to him, and to advise what order or decree should be made therein.

E. R. WALKER,
C.

I hereby consent to the entry of the foregoing order.

PARSONNET and FRUCHTMAN,
Solicitors of Defendant.

MEMORANDUM OF OPINION.

IN CHANCERY OF NEW JERSEY.

Between

ACQUACKANONK BUILDING AND LOAN ASSOCIATION, Passaic, N. J., a corporation of New Jersey,

Complainant,

and

AUGUSTA B. PARSONNET,

Defendant.

(Not for Print.)

On Bill, &c.

68-264.

Memorandum of Opinion.

October 10, 1929.

VERNET A. ARNOLD, ESQ.,
Solicitor,

HENRY C. WHITEHEAD, ESQ.,
of Counsel for the Complainant.

PARSONNET & FRUCHTMAN, Esqs.,
Solicitors,

THOMAS L. PARSONNET, ESQ.,
of Counsel for the Defendant.

MEMORANDUM OF OPINION.

(This memorandum is not to be printed in the official or unofficial reports.)

BENTLEY, *V.-C.:*

On bill for specific performance.

On September 27, 1927, the complainant and defendant entered into a written contract whereby the former agreed that it would obtain title

to certain premises in Bergen County and convey the same to the defendant in consideration of the execution of three mortgages by her upon the lands so to be acquired by her. There were certain contingencies and conditions set up in the contract, which are of no importance for the purpose of this decision. On January 31st of the following year title to the above-mentioned lands was secured. Thereupon the complainant caused the defendant to be notified and called upon her to take title, in accordance with the terms of the said contract. This she refused to do.

The only witness for the defendant is her counsel who has attempted to vary or contradict the terms of the written contract by parol. I know of no exception to the general rule that would justify me in so finding and none has been pointed out to me although the most abundant opportunity has been afforded for that purpose.

There should be a decree in accordance with the prayers of the bill.

DECREE.

A True Copy,

VERNET A. ARNOLD,
Solicitor of Complainant.

IN CHANCERY OF NEW JERSEY.

Between	
ACQUACKANONK BUILDING AND LOAN ASSOCIATION, Passaic, N. J., a corporation of New Jersey, *Complainant,*	*On Bill, &c.*
and	*Decree.*
AUGUSTA B. PARSONNET, *Defendant.*	

This cause, coming on to be heard in the presence of Vernet A. Arnold, solicitor, and Henry C. Whitehead, counsel of complainant, and Thomas L. Parsonnet, solicitor of the defendant, and the Court having examined the pleadings and having taken proofs orally and in open court and heard and considered the arguments of counsel thereon; and it appearing to the satisfaction of the Court that the complainant, Acquackanonk Building and Loan Association, Passaic, N. J., was, on the 31st day of January, 1928, seized, in fee simple, of all those certain tracts, lots or parcels of lands and premises, situate, lying and being in the Township of Lyndhurst, in the County of Bergen and State of New Jersey.

TRACT ONE: Being known and designated as Lots. Nos. 20 and 21 in Block O, as the same

are laid down and shown on map entitled "Map No. 2, Property of the Woodridge Bldg. & Realty Co., adjoining Rutherford Borough and known as the Kingsland Tract, Bergen County, N. J., Boettner & Pomerehne, Managers", which map is on file in the Bergen County Clerk's Office.

TRACT TWO: Being known and designated as Lot No. 45 and the northwesterly one-half of Lot No. 44 in Block P, as the same are laid down and shown on map entitled "Map No. 2, Property of the Woodridge Bldg. & Realty Co., adjoining Rutherford Borough and known as the Kingsland Tract, Bergen County, N. J., Boettner & Pomerehne, Managers", which map is on file in the Bergen County Clerk's Office.

TRACT THREE: Being known and designated as Lot No. 43 and the southeasterly one-half of Lot No. 44 in Block F, as the same are laid down and shown on map entitled, "Map No. 2, Property of the Woodridge Bldg. & Realty Co., adjoining Rutherford Borough and known as the Kingsland Tract, Bergen County, N. J., Boettner & Pomerehne, Managers", which map is on file in the Bergen County Clerk's Office; that on the 7th day of September, 1927, the said complainant entered into an agreement in writing with the defendant, Augusta B. Parsonnet, wherein and whereby said complainant agreed to convey said lands and premises, by deed on its acquiring title, namely, on the 31st day of January, 1928, to the said Augusta B. Parsonnet, and the said Augusta B. Parsonnet agreed to pay therefore, one-half of the accrued and unpaid taxes and assessments on the property and further to pay the second half of the 1927 taxes, said taxes and assessments amounting in all to the sum of fifteen hundred six and 04/100

($1506.04) dollars, which was to be paid upon the delivery of said deed and the execution of purchase money mortgages in the sum of $11,500 on house No. 738, Second avenue, Lyndhurst, New Jersey, more particularly heretofore described as Tract No. 1, and in the sums of $11,000 respectively on Tract No. 2 and Tract No. 3 aforementioned, each of said three mortgages to be a purchase money mortgage and said title to be passed on the 31st day of January, 1928; and it further appearing to the satisfaction of the Court that the said defendant has refused and failed to perform said agreement on her part, and that the said complainant has always been and still is ready and willing in all things to comply with the terms of said agreement on its part;

And the Court being of the opinion that the complainant is entitled to the specific performance of the aforesaid agreement as prayed by it in its bill of complaint filed herein;

It is, on this 28th day of October, 1929, Ordered, Adjudged and Decreed that the said agreement be in all things specifically performed by the said defendant on the 20th day of November, 1929, at the hour of two o'clock in the afternoon at the office of Vernet A. Arnold, Esquire, No. 38 Broadway, in the City of Passaic, in the County of Passaic and State of New Jersey, pay to the said complainant the said sum of $1506.04, with interest thereon from the 31st day of January, 1928, together with the taxed costs of this suit as hereinbefore allowed, and, at the same time, make, execute and acknowledge in due form of law and deliver to the said complainant, Acquackanonk Building and Loan Association, Passaic, N. J., her bonds in the penal

sums of $23,000, $22,000 and $22,000 respectively for the payment of $11,500, $11,000 and $11,000 respectively, in regular Building and Loan form, dated January 31, 1928, with interest, dues and premium, the latter to be charged at the rate of $1.00 per $1,000 of the mortgage loan, said dues and interest to be in accordance with the by-laws, constitution, rules and regulations of the said complainant association, and, at the same time, make, execute and acknowledge in due form of law and deliver to said complainant, Acquackanonk Building and Loan Association, Passaic, N. J., three purchase money mortgages on said lands and premises, the first to be in the sum of $11,500 and to cover the aforementioned Tract No. 1, payable in regular Building and Loan form and in accordance with the constitution and by-laws of the said complainant association, the second and third of the purchase money mortgages to be in the sum of $11,000 respectively and to cover Tract No. 2 and Tract No. 3 respectively, and upon delivery at the same time and place by said complainant to said defendant, Augusta B. Parsonnet of a bargain and sale deed, duly executed and acknowledged by said complainant, Acquackanonk Building and Loan Association, Passaic, N. J., conveying to the said Augusta B. Parsonnet the said lands and premises in fee.

And it is further ORDERED, ADJUDGED AND DECREED, that the rents of said premises, insurance premiums, water rents, taxes, dues, interest and monthly premiums, assessment and repairs, if any, shall be adjusted, apportioned and allowed as of January 31, 1928.

And it is further ORDERED, ADJUDGED AND DECREED, that if, at the time and place hereinbefore mentioned, the said defendant shall fail or

neglect to pay the sum of $3,501.30, which represents one-half of the total of 1926 taxes, the first half of the 1927 taxes and two sewer assessments, plus the second half of 1927 taxes, all of the taxes for the years 1928 and 1929, with interest from January 31, 1928, together with said taxed costs as hereinbefore mentioned, and to deliver said three bonds and three mortgages hereinbefore described, duly executed and acknowledged, upon tender of said deed, the aforesaid sums of $11,500, $11,000 and $11,000, with interest from January 31, 1928, being a total of $40,874.53, together with the taxed costs of this suit as hereinbefore mentioned, shall be and become, and are hereby impressed as a lien upon said lands and premises, in favor of the said complainant, to the end that said lands and premises may be sold pursuant to law under the direction of this Court, to satisfy such lien, and that in case of deficiency should arise upon such sale, the said defendant may be ordered by this Court to pay such deficiency.

It is further ORDERED, that the said defendant pay to said complainant, the costs of this suit to be taxed, including a counsel fee of $1,000.00, which is hereby allowed.

It is further ORDERED that true but uncertified copy of this decree and of said taxed costs, be served on the solicitor of said defendant, within three days after the date hereof.

E. R. WALKER,

C.

Respectfully advised,

JOHN BENTLEY,

V.-C.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

Between

ACQUACKANONK BUILDING AND LOAN ASSOCIATION, Passaic, N. J., a corporation of New Jersey,

Complainant,

and

AUGUSTA B. PARSONNET,

Defendant.

On Bill, &c.

Transcript.

Transcript of the testimony taken in the above-stated cause, on final hearing, at the Chancery Chambers in Jersey City, on June 17, 1929, at 10 o'clock in the forenoon, before his Honor John Bentley, Vice-Chancellor.

Appearances:

Vernet A. Arnold, Esq., solicitor.

Henry C. Whitehead, Esq., of counsel, for the complainant.

Messrs. Parsonnet & Fruchtman, solicitors.

Thomas L. Parsonnet, Esq., of counsel, for the defendant.

Arthur R. Bailey, official shorthand reporter, 1 Exchange Place, Jersey City.

The Court: I wonder if we can't make some kind of a start while waiting for Mr. Arnold?

Mr. Whitehead: (After reading the bill.) Perhaps in an outline of the case I might say that the Aquackanonk Building & Loan Association has a first mortgage under foreclosure on these

properties. There were also certain mechanics' liens and Mrs. Parsonnet had second claims. The litigation promised to be protracted and the buildings were only partially occupied, so that we undertook to settle the lien claims, and we did accomplish a settlement with the Building & Loan. That left the properties in a position where a sale would be apt to wipe out the second mortgages of the defendant; so, in order to protect her interest and also to avoid owning the premises which was not in their line of business we made this agreement which I will offer in evidence.

(Admitted in evidence and marked Exhibit C. 1.)

Mr. Whitehead: At the time of the execution of that agreement there was a letter written by Mrs. Parsonnet to the Building & Loan Association. I have here the original and ask that that be admitted in evidence.

(Admitted and marked Exhibit C. 2.)

Mr. Whitehead: Now, it is agreed that subsequently and in the early part of 1928, the Aquackanonk Building & Loan Association did get title to this property from the sheriff under a foreclosure decree entered in its several foreclosure suits.

Then I want to put in evidence a series of letters (handing letters to Mr. Parsonnet).

Mr. Parsonnet: I have no objection, but I don't see anything in them to bind the defendant.

Mr. Whitehead: The first letter is dated August 2, 1927—

Mr. Parsonnet: This is rather irregular. I don't know whether your Honor desires to have these papers in evidence before you hear the

opening of counsel. I think Mr. Whitehead was about to open, and that is why I remained silent for awhile. I think before the introduction of these letters in evidence there should be an opening.

The Court: I assumed that you had completed your opening, supplemented by the reading of the bill.

Mr. Whitehead: Yes.

The Court: Then suppose we hear from Mr. Parsonnet.

Mr. Parsonnet: It was my original intention to supply my mother with money to the extent of $2,000, the amount to be paid over the lien of the mortgages of the Building & Loan Association. However, there was a proposition of settlement made, and I explained to the Building & Loan Association that so far as my mother was concerned I didn't want to hurry them but I wanted some concessions instead as I was to pay it off, and I would be willing to take over the pieces of property if they would bear the expense of the Building & Loan Association mortgage. My understanding is that this contract lacked mutuality. Furthermore, there is no consideration for the agreement. The sole purpose of this was to settle a dispute which was made against the Building and Loan Association. In other words, we gave all our rights to the Building & Loan Association and the only right we received in return was the right to repurchase the property. And for those reasons I contend that this contract is not valid and binding upon the defendant. There is testimony, if your Honor please, that I represented my mother in the preparation of this contract. Furthermore, this contract calls for the accept-

ing by the Building & Loan Association of two mortgages in the sum of $11,000 and one mortgage for $11,500.

Mr. Whitehead: I offer in evidence a letter dated August 2nd, 1927, from Thomas L. Parsonnet to Henry C. Whitehead.

(Admitted in evidence and marked Exhibit C. 3. The letter is as follows:)

August 2, 1927.

Henry C. Whitehead, Esq.,
Peoples Bank Bldg., Passaic, N. J.

Dear Mr. Whitehead:

The contract as dictated by you yesterday was perfectly satisfactory. However, the change made in it providing for a deposit of $1,000 I am certain is not acceptable to my mother. My mother is perfectly sound financially, but I cannot honestly see why she should be compelled to put up the $1,000. Of course, I appreciate that it is a matter in which the parties are going to be mutually helpful, but for the time being, I am sure, that the building and loan association can more easily waive this deposit than my mother can spare it.

Yours very truly,
THOMAS L. PARSONNET.

Mr. Whitehead: I also offer in evidence copy of letter from Messrs. Hart & Vannaman to Thomas L. Parsonnet, dated February 23, 1928.

Offer of Documentary Evidence.

(Admitted in evidence and marked Exhibit C. 4, and is as follows:)

February 23rd, 1928.

Mr. Thomas L. Parsonnet,
60 Park Place, Newark, N. J.

Dear Sir:

We are instructed by the Aquackanonk Building & Loan Association to notify you that the matter of the settlement of the Costello Lyndhurst houses must be made before March 1st, next, otherwise it is the intention of the Association to take possession of the properties and take care of the collection of the rents.

If it is your intention to carry out the provisions of the contract previously entered into, it will be necessary for you to act on or before March 1st next.

Yours very truly,
HART & VANNAMAN.

Mr. Whitehead: Also letter of March 10, 1928, from Hart & Vannaman to Thomas L. Parsonnet.

(Admitted in evidence, marked Exhibit C. 5, and is as follows:)

March 10th, 1928.

Mr. Thomas L. Parsonnet,
Newark, New Jersey.

Dear Sir:

We were disappointed in not hearing from you with reference to the Costello properties in Lyndhurst. The sheriff's sale of these properties took place over a month ago and we feel that we have been very lenient in

having permitted you to stall us off as long as you have. We are not willing to have this matter remain in its present condition any longer. According to the agreement entered into between the Association and your mother, title was to be taken immediately upon our perfecting title and we insist that the terms of this agreement be carried out without further delay.

We shall expect to hear from you definitely on Monday, March 12th, 1928, as to just when this matter is to be closed.

Yours very truly,

HART & VANNAMAN.

Mr. Whitehead: Also letter of March 27th, 1928, from same to same.

(Admitted in evidence, marked Exhibit C. 6, and is as follows:)

March 27th, 1928.

Mr. Thomas L. Parsonnet,
60 Park Place, Newark, N. J.

Dear Sir:

We are very sorry that we have not heard from you with reference to the closing of title for the Lyndhurst houses. We must insist that title be closed by not later than April 2nd, 1928, otherwise it is the intention of the Association to take physical possession of the properties, to make whatever repairs are necessary and then place the houses on sale at public auction. Any deficiency that may be suffered by the Association, it is the intention of the Association to look for re-

imbursement from your mother on account of her contract.

We feel that we have been very lenient in giving you two months, viz., February and March, in order to close title, and that further delay is not warranted.

Very truly yours,

HART & VANNAMAN.

Mr. Whitehead: I also offer in evidence a letter of March 28, 1928, from Thomas L. Parsonnet to Hart & Vannaman.

(Admitted in evidence, marked Exhibit C. 7, and is as follows:)

March 28, 1928.

Hart & Vannaman,

Peoples Bank Bldg., Passaic, N. J.

Gentlemen:

I am in receipt of your letter of March 27th, and am sorry to see the attitude you have taken, but I will be able to give you my mother's answer by Saturday morning.

Very truly yours,

PARSONNET & FRUCHTMAN,

By Thos. L. Parsonnet.

Mr. Whitehead: I offer also letter of April 20, 1928, from Parsonnet & Fruchtman, signed by Thomas L. Parsonnet, and addressed to Vernet A. Arnold.

(Admitted in evidence, marked Exhibit C. 8, and is as follows:)

April 20, 1928.

Vernet A. Arnold, Esq.,
36 Bloomfield Avenue, Passaic, N. J.

Re: AQUACKANOCK *vs.* PARSONNETT.

Dear Sir:

We are in receipt of your letter of April 18th. If you will be good enough to permit me to take this matter up with my mother when she returns from Chicago the latter part of next week I will appreciate it.

Very truly yours,
PARSONNET & FRUCHTMAN,
Per Thos. L. Parsonnet.

Mr. Whitehead: I also offer in evidence letter of May 19, 1928, from Thomas L. Parsonnet to Vernet A. Arnold.

(Admitted, marked Exhibit C. 9, and is as follows:)

May 19, 1928.

Vernet A. Arnold, Esq.,
38 Bloomfield Avenue, Passaic, N. J.

Dear Sir:

RE: AQUACKANONK BLD & LOAN
v. PARSONNET.

In pursuance of our telephone conversation of May 18th, with reference to the above matter, I am writing to inform you that you must have mislaid or not received my former letter written on the Thursday that you requested me to get in touch with

you. I told you in that letter that my mother could not enter into the arrangement suggested, but if you would be good enough to wait a short period of time I would like to enter into that arrangement with you myself.

Will you please advise whether this is satisfactory to you and if so whether we could get together on the proposition.

I am enclosing herewith Stipulation for answer for twenty days beyond that which I have now.

Very truly yours,
THOMAS L. PARSONNET.

P.S. Will you kindly send a copy of the bill of complaint to me. TLP.

Mr. Whitehead: I also offer in evidence letter of May 25, 1928, from Thomas L. Parsonnet to Vernet A. Arnold.

(Admitted in evidence, marked Exhibit C. 10, and is as follows:)

May 25, 1928.

Vernet A. Arnold, Esq.,
38 Bloomfield Avenue, Passaic, N. J.

Dear Sir:

Re: AQUACKANONK B. & L. ASSOCIATION v. PARSONNET.

Will you kindly forward me a copy of the bill of complaint in the above matter? I believe that before the time for answering has expired I will be in a good position to perform our arrangement but I want to take

no chances and therefore ask that I receive a copy of the bill.

Very truly yours,
PARSONNET & FRUCHTMAN,
Per Thos. L. Parsonnet.

Mr. Whitehead: I will call Mr. Hart.

EUGENE I. HART, sworn on behalf of the complainant, testified as follows:

Direct examination by Mr. Whitehead.

Q Mr. Hart, you are a practicing attorney in the City of Passaic? A I am.

Q Member of the firm of Hart & Vannaman? A Yes.

Q And you have been a practicing attorney for more than 15 years? A I have.

Q Did the firm of Hart & Vannaman represent the Aquackanonk Building & Loan Association as its solicitors in the year 1927 and 1928? A They did.

Q Do you recall the matter of the foreclosure of these mortgages on the Costello property in Lyndhurst? A Yes.

Q Do you recall having a conference with Mr. Parsonnet at your office with respect to the matter of closing this contract Exhibit C. 1, made between the Aquackanonk Building & Loan Association and Augusta B. Parsonnet, relating to these properties? A Yes.

Q Can you tell me about when that conference was had? A My recollection is that the sheriff's sale occurred sometime in January and the conference was—oh, a month or so later.

Q In the year 1928? A In the year 1928.

Q I show you Exhibit C. 6; that is a letter written by you, is it not? A Yes.

Q That is dated March 27, 1928; are you able to say that the conference that I have referred to was held before or after the writing of that letter? A After.

Q Very long after? A My recollection is that it was in the month of April.

Q The month of April, 1928? A Yes, all of that.

Q Who was present at that time? A Mr. Parsonnet and myself.

Q Just you two? A That is my recollection, yes.

Q Do you recall then that figures were prepared and produced to afford a basis for the closing of the contract? A There was a set of figures produced, yes.

Mr. Whitehead: I will ask Mr. Parsonnet if he has the original papers. May I use this copy?

Mr. Parsonnet: Certainly.

Q I ask you if this is a copy of the figures that was produced and submitted at that time at that conference? A That looks to me to be a copy of the figures that were submitted at that time.

Q By whom were those figures prepared? A By the Secretary of the Aquackanonk Building & Loan Association.

Q Now, was the matter concluded at that conference? A Well, no. Mr. Parsonnet stated that he required further time to explain the proposition to his mother. He had to satisfy his mother as to the value of the property.

Mr. Whitehead: I offer a paper in evidence the paper referred to containing the figures.

(Admitted in evidence and marked Exhibit C. 11, and is as follows:)

EXHIBIT C. 11.

Mortgage		$11,500.	
Paramount	$493.23 ½=	246.62	
½ 1926	341.24 ½	170.62	
½ 1st ½ 1927	148.16 ½=	74.08	
			$11,991.32
Mortgage,		$11,000.	
Harrington	$365.87=	187.98	
½ 1926	335.52=	167.76	
½ 1st ½ 1927	151.89=	75.95	11,431.69
Mortgage		$11,000.	
Harrington	$365.87	187.98	
½ 1926	335.52	167.76	
½ 1st ½ 1927	155.54	77.77	11,453.51
			$34,858.52

COVERED BY THE FOLLOWING MORTGAGES:

Mortgages	Dues	Interest	Premiums
$11,400	114	57	$11.40
11,600	116	58	11.60
12,000	120	60	12.00
$35,000.	350.	175.	35.00

RECAPITULATION.

Charges:	Mortgages	$35,000.
	Feb. & Mar dues	350.
	Mar. interest	175.
	Mar. premium	35.
	2nd half 1927 taxes	454.52
		$35,014.52
Credit:	Difference between Contract and mortgages	143.48
		$35,871.04
	To be paid in cash	871.04
		$35,000.00

Q That statement, Exhibit C. 11, shows at the bottom an item marked to be paid in cash $871.04; was there anything said with reference to that item? A I don't recall anything except there may have been some conversation about it that it was to be added to the mortgage. I don't recall exactly about that cash balance.

Q Did Mr. Parsonnet at that time have anything to say in regard to the inability of his mother to pay this? A Well, he did; he stated that his mother was short of cash and that she didn't care to put any more cash in it than necessary.

Q Now, as to the center of this page C. 11, there is a column headed "premiums, three items; was there anything said by Mr. Parsonnet with reference to that?

Mr. Parsonnet: I object to that.

The Court: I will allow it and deal with it later.

A Why, I am not sure whether he mentioned that or not, but if he did I explained to him that those were the monthly premiums that were charged by the Association on all mortgage loans of one per cent.

Q Did Mr. Parsonnet at that time make a protest against those items? A I don't recall that he did.

Q Now, there is another item in Exhibit C. 11, under the heading of "Recapitulation", and among the items of "Charges" is second half of 1927 taxes, $454.52; did Mr. Parsonnet protest that item? A No, he did not.

Cross examination by Mr. Parsonnet.

Q You remember very distinctly that I did not protest that item, do you? A Well, my recollection is that you did not protest the tax item. The taxes had already been covered by the supplemental agreement, as I recall it.

Q Now, at that conference did Mr. Numann and Mr. Whitehead join in on that? A It is possible that Mr. Numann was there. I don't recall Mr. Whitehead being at any conference that I was in. And you were there also.

Q Now, Mr. Hart, referring to Exhibit C. 11, which is the statement you and Mr. Numann prepared— A It was prepared by Mr. Numann.

Q Were you there? A I am not sure whether I was there when he made a tentative statement or not, but it seems to me it may have been this particular one.

Q You don't remember any talk with reference to it? A Only by way of explanation as to what it was.

Q You remember I objected to it or brought it up? A Well, I wouldn't want to say that you didn't object to it or that you did.

Q Do you remember also that I objected to the payment of the February and March dues? A That was, probably brought up by you, because we desired—

Q Pardon me; you remember distinctly that I spoke about it? A Not distinctly, but I presume that you did speak about it, because it was a part of the statement. The reason that the dues—

Q I don't care for the reason. A Well, I just wanted to say that it was—

Mr. Parsonnet: I object and ask that that be stricken out.

The Court: It may be stricken out.

Q Now, you didn't conduct the negotiations? A I did not.

Q Nor did you prepare the contract originally? A No.

Q All of the negotiations were off prior to the time set for the closing of this matter and that was left to Mr. Vannaman? A That's right.

JOHN W. NUMANN, sworn on behalf of the complainant, testified as follows:

Direct examination by Mr. Whitehead.

Q Mr. Numann, you are secretary of the Aquackanonk Building & Loan Association? A I am.

Q How long have you been secretary of that association? A Approximately 12½ years.

Q Did you prepare the figures in connection with the attempt to close the contract between the Aquackanonk Building & Loan Association— A I did.

Q —and Augusta B. Parsonnet, marked Exhibit C. 1 in this case? A I did.

Q I show you Exhibit C. 11; did you prepare the figures shown there? A I did.

Q The contract, Exhibit C. 1, calls for mortgages on three properties of $11,000 on each of two and $11,500 on the third, whereas this statement calls for mortgages of $11,400, $11,600 and $12,000; can you explain why the mortgages were increased to those amounts?

Mr. Parsonnet: I object to that. The statement will speak for itself.

Mr. Whitehead: I think that is just what it doesn't do, and that is the reason I wanted to get the explanation of the figures on the record for the benefit of the Court. Under the contract, we were to furnish him with three mortgages, two for $11,000 each and one for $11,500, and Parsonnet was to pay one-half of all accrued and unpaid taxes and assessments on the property. Now, he came to us and he said, "We can't pay one-half of those accrued taxes and assessments unless you increase your mortgages so that we can do so." We said, "All right, we will increase our mortgages from $33,500, which is what the agreement calls for, to $35,000, and we will charge them against the $35,000—the taxes that you are bound to pay under your agreement." So we made up our statement, to which he agreed, mortgages plus the taxes, and they are set out sep-

arately at the top of the sheet on Exhibit C-11, which showed a total of $34,856.52, so that if they gave back to us the $35,000 or mortgages they would be giving us mortgages in excess of the indicated indebtedness to the extent of $143.48; they would give us the $35,000 of mortgages and we would charge them with that. Then we would charge them also with the February and March dues on those mortgages of $350, the March interest $175., March premium of $35., and the second half of 1927 taxes, which he agree to pay in full in the contract which is marked Exhibit C. 1. That made a total of $36,014.52. We credited to that total the amount which I have mentioned above of $143.48, and that leaves a balance of $35,871.04, or which $35,000 is represented by the new mortgages to be given and $871.04 which we demanded in cash and which he wouldn't produce, or couldn't produce, or didn't produce.

The Court: Well, gentlemen, I want all the light I can get on this.

Mr. Parsonnet: I will withdraw the objection.

Mr. Whitehead: I thought if Mr. Parsonnet had no fault to find with the statement I have just made we might let that stand as an explanation.

Mr. Parsonnet: I consent that it be so stipulated, except there is a construction to be placed upon the paper which is marked Exhibit C. 2.

Q Now, Mr. Numann, your building and loan association operates under the Building & Loan

Association Act of the State of New Jersey, does it not? A Yes.

Q And shares in your association are taken out by members and pledged as security for loans?

Mr. Parsonnet: I object to that as immaterial.

The Court: I will overrule the objection and deal with it when I come to decide the case.

Mr. Parsonnet: You can see that he is leading up to a point which is entirely irrelevant, namely, that that is the reason why they insisted upon the payments of dues, and that is the reason why they insisted upon the agreement.

The Court: To decide that now would be practically deciding the case. I overrule the objection and will permit the question to be answered.

A They are.

Q Referring to the items shown in the middle of the page of Exhibit C. 11, under the heading of dues, will you state why those items are set out in this statement? A It is the practice of the Building & Loan to issue shares in semi-annual periods and the new series begins in February. As usual, these shares are in serial form and a person obtaining a mortgage in March would have to pay dues for February and March, and mortgages obtained in April would require dues to be paid for February, March and April. Of course, the dues on the shares are credits against that mortgage and add to the value of the shares.

Q What have you to say about the next group headed "Interest"; why are those items included in the statement? A Well, that is one month's charge for interest at the rate of one-half of one per cent. monthly.

Q On each mortgage? A Yes.

Q How is the interest payable, in advance? A Payable on the first Wednesday of the month.

Mr. Parsonnet: Does that objection of mine go to this?

The Court: Of course, it goes to all questions showing the custom of the complainant in its dealing with the mortgages, on the ground already stated.

Q Now, what have you to say with respect to the three items under the heading of "Premium."? A That is a charge at the rate of 10 cents per $100 monthly for the period that a loan may be in operation. That is to say, if the borrower should repay a mortgage at the end of the month the premium ceases and no further payment will be made thereon. Should he continue it, it would be payable monthly so long as the mortgage is in effect.

Q You say, should he continue it; what do you mean by that, the premium? A I mean the mortgage.

Q I assume you took title to this property through the sheriff? A Yes.

Q Has your association been ready to perform the agreement at all times with Mr. Parsonnet? A At all times.

Q Ready now? A Ready now.

John W. Numann, cross.

Cross examination by Mr. Parsonnet.

Q Mr. Numann, you were present at the conference with Mr. Hart, were you not? A A conference. I don't know whether it is the one you refer to or not.

Q At the time when the bonds and mortgages were given to me to have signed by my mother and at the time when that statement was prepared? A At the time the statement was prepared I know I attended the conference with you then. I also had the deed in my possession ready for signature.

Q At that time? A Yes.

Q Do you remember I left the office at that time, saying I was not sure whether my mother would sign the bond and mortgage? A My recollection is, the only thing that held up the passing of title at that time was the sum of $871.04, which was to be produced most likely the next day or so.

Q At that time did I not mention to you that I would try to get my mother to do it? A Absolutely not.

Q Do you remember my drawing the contract previous to Exhibit C. 1?

Mr. Whitehead I object to that. How is that competent?

Mr. Parsonnet: I will connect it up, and if I don't I will consent that it be stricken out.

The Court: I will allow it subject to that agreement.

A I don't recall it.

Q Do you remember that Mr. Whitehead drew a contract precisely similar in all its terms

but which required the payment of $1,000? A I don't recall that.

Q Do you remember that we had a discussion at that time concerning the premium? A Not a discussion. There was an explanation of the item on this statement that is prepared here, which was discussed and explained to your satisfaction.

Q Do you remember that I objected to the payment of the premium? A Absolutely not.

Q Don't you remember that I ask you also to add to the amount of your mortgage a sum representing the last half of 1927 taxes? A There were no discussions whatsoever, and no objections raised whatsoever, and that the only point involved before the conference was held, and that before the deed was passed you were to pay $871.04, and everything would be all right.

Q Do you remember that I objected to the dues for the past month? A You didn't object to it. You may have asked for an explanation as to why it was taken off and I told you it was because we opened a new series in February.

Q There wasn't any discussion about that whatsoever? A I don't say there was not any discussion; there may have been a question raised which was explained.

Q Now, Mr. Numann, before the execution of the contract C. 1 you recollect having a conference with me, do you not? A I recall that you appeared before the Board of Directors at one meeting.

Q That was in pursuance of an arrangement that I had with you to appear there, was it not? A That was the general discussion at the time. The lien claim suit came up and you requested an arrangement of this sort be executed.

Q Is it not true that it was you, Mr. Numann, who came to me and suggested a settlement of this matter?

Mr. Whitehead: I object to that. That is immaterial, your Honor.

The Court: What is the purpose of it, to refresh his recollection?

Mr. Parsonnet: Something more than that. It was brought out that the arrangement was purely and simply to get things settled and to give to my mother just the rights that she would have in a foreclosure suit without settling the case. In other words, I am trying to bring out that no consideration was to be paid or agreed to on the part of my mother.

The Court: A promise given for a promise?

Mr. Parsonnet: Yes, but the promise that was given was one which had to be fulfilled under any circumstances. If we hadn't entered into this we would have a perfect right in this property anyway. It was a promise given which didn't mean anything.

The Court: You couldn't purchase it without any money?

Mr. Parsonnet: That is true, but we could have purchased it at the sheriff's sale for even a lesser price than we agreed to pay here after a considerable delay in trying to settle the suit. In other words, it was a promise given by the building and loan association which was nugatory because they agreed to do just what under the law they were compelled to do, give us an opportunity to purchase the property.

The Court: The law does not attack the payment of money.

Mr. Parsonnet: That was for their own benefit, not ours.

The Court: I don't want to get into an argument. It may be dispositive of the whole case. There is no jury here and I will allow the question to be answered. The question is whether you made the suggestion to Mr. Parsonnet of a settlement.

A I recall that Mr. Parsonnet and I, possibly in the presence of Mr. Hart or Mr. Vannaman, went over this matter quite thoroughly, and of course what Mr. Parsonnet was anxious to talk about was as to whether or not the building and loan, in the event of foreclosure of the property, would return the money or replace the money, and I assured Mr. Hart at that time that the association was not interested in the payment of the money but that we would work with him.

Q Wasn't it suggested that the mechanics' lien be settled by the payment of the money by the building and loan association? A I think not.

Q Or with Mr. Vannaman, in your presence? A I don't recall whether that question came up.

Q Do you remember being in Mr. Vannaman's office prior to my coming to Mr. Vannaman's office, in respect to an arrangement to meet there, for the purpose of trying to settle the matter? A You are referring to the time this statement was prepared?

Q No, I am referring to the execution of this contract? A I can't set the date. I recall,

though, at the time this statement was prepared that we were in conference.

Q That isn't what I mean. Perhaps I can refresh your recollection by reminding you of a visit which you made to my office? A Oh, that was long after. The visit to your office was with Mr. Arnold.

Q No, I mean you came with Mr. Vannaman? A Not with Mr. Vannaman. I was only in your office once and that was with Mr. Arnold. That was last spring.

Q It is true, is it not, that you were made a defendant in the mechanics' lien suit of Martin Jensen? A I don't recall the name. We were served by the Yellow Pine Lumber Company.

Q Yes, that was one; and Martin Jensen, electrician; do you remember that? A That being a legal matter wouldn't come under my jurisdiction.

Re-direct examination by Mr. Whitehead.

Q Mr. Numann, do you recall the amounts of the original mortgages of the building and loan that you foreclosed?

Mr. Parsonnet: I object to that. I don't think that is at all material.

The Court: I am going to allow it. I want to hear the whole thing.

A On two of the properties the mortgage was $9,000 each, and on one other property—I don't recall the number but the building was located on a lot 50 feet frontage; on that property the mortgage was $9,400. The buildings on all were similar.

Mr. Whitehead: That is our case, if your Honor please.

THE DEFENSE.

THOMAS L. PARSONNET, sworn on behalf of the defendant, testified as follows:

Direct examination.

I am attorney at law and Master in Chancery of the State of New Jersey. I represent my mother, Augusta B. Parsonnet in this transaction. My mother originally was the holder of a blank mortgage of $16,000, which was made by Edward Costello as a temporary construction loan for a period of one month. The mortgage was second of record to the three mortgages of the Aquackononk Building & Loan Association, but there was on record at the time of the granting of my mother's mortgage, a mortgage in the sum of $2,000, which had been a land mortgage upon the property. This land mortgage had not been postponed of record to the mortgage of the Aquackanonk Building & Loan Association. As part of the advancements made, my mother paid off and satisfied the holder of this land mortgage. When Costello departed, various mechanics' lien suits were started against my mother, two cases, and the Aquackanonk Building & Loan Association, one being a suit by the Yellow Pine Lumber Co., one by Joseph Lochrich, one by Martin Jensen and the 4th by L. Greenberg & Son, a corporation. Subsequently, the Yellow Pine Lumber Co. discontinued its suit against the Building & Loan Association.

The matter continued for a long space of time, the mortgage having originally placed in 1925. At the end of 1927, at the request or either Mr. Numann of the Building & Loan Association or of Mr. Vannaman who represented the complainant I came to Passaic and discussed the matter of settlement with Mr. Vannaman and Mr. Numann. It was arranged in the following manner: That if we could secure a settlement with the various mechanics' lien claimants for a specified price, as set forth in the contract, we would be willing to waive any and all rights that we might have against the Building & Loan Association and let the sheriff's sale go through. The claim of Martin Jensen had already gone to judgment and we were all afraid that there would be a sale on that judgment of these properties which might cause serious inconvenience to all of us. We, therefore, made an arrangement to settle with all of these parties, and instead of my bidding in at the sheriff's sale it was arranged that the Building & Loan Association would purchase the properties and turn it over to me, as provided for in the contract. They retained the right to withdraw from the contract if they couldn't settle for a specific price. As a matter of fact, they were compelled to settle for a price higher than the amount set forth, if my memory serves me, and they had the right under the terms of the contract to withdraw from it. On January 31st, the sheriff drew and delivered his deed to the complainant—oh, these conferences, had before the execution of the contract, resulted in the drawing of a form of contract which was not satisfactory to me, for the reason that it was provided that my mother was to pay a deposit on account of the contract of a

thousand dollars. I brought it to the attention to Mr. Vannaman and I think Mr. Whitehead that my mother did not want to advance any sum of money whatsoever for the purchase of this property. The contract originally prepared is here and I offer it in evidence.

Mr. Whitehead: The contract was never executed?

Mr. Parsonnet: Never executed.

Mr. Whitehead: I object to anything of this nature. Of course, if your Honor feels that it would be of any aid to the decision of this objection I will withdraw my objection.

Mr. Parsonnet: If your Honor please, it explains the arrangement subsequently entered into, as indicated by Exhibit C. 2, which agrees with the fact that the taxes are to be added to the amount of the mortgage, and in case it was the intention, at least on our side, that all taxes, including the taxes which had to be paid at the time the deed was delivered, would have to be paid by the Building & Loan Association and added to this mortgage. It indicates the intention of the parties.

The Court: Well, I will allow it to be marked in evidence. As I said before in other matters, if I don't think I ought to consider it I won't consider it. If I do, it is in.

(The same is marked Exhibit D. 1.)

That contract is precisely the same in all of its terms, except the last paragraph requiring payment of a thousand dollars' deposit. I either

wrote or telephoned to Mr. Whitehead, telling him that I could not agree to that.

The Court: Well, that letter is in evidence, isn't it?

I believe it is. May I see the exhibit, Mr. Whitehead? (Mr. Whitehead hands exhibit to the witness.) There is a letter, I think written to you.

Mr. Whitehead: I don't see it, but I think there is a letter. Yes, it is Exhibit C. 3.

Mr. Parsonnet: The letter is dated August 2, 1927 (and is Exhibit C. 3), and is as follows:

Dear Mr. Whitehead:

The contract as dictated by you yesterday was perfectly satisfactory. However, the change made in it providing for a deposit of one thousand dollars I am certain is not acceptable to my mother. My mother is perfectly sound financially, but I cannot honestly see why she should be compelled to put up $1,000. Of course, I appreciate that it is a matter in which the parties are going to be mutually helpful, but for the time being, I am sure, that the building & loan association can more easily waive this deposit than my mother can spare it.

That letter was written in an answer to a letter received from Mr. Whitehead under date of August 1, 1927, which I offer in evidence.

(Admitted and marked Exhibit D. 2.)

Thereafter, I communicated with Mr. Vannaman and told him that it would be impossible for my mother to advance him any money, and as a result of that the contract which has been offered in evidence as Exhibit C. 1 was executed. However, before I delivered the contract I made it expressly understood that no amount of money was to be paid to the Building & Loan Association by my mother at the closing of title.

Mr. Whitehead: I object to that, your Honor, as contradictory of the terms of the contract itself. The contract here is reduced to writing and signed by both parties. Mr. Parsonnet is stating what the intention was.

Exhibit C. 2 indicates that all unpaid taxes and taxes which had accrued and unpaid at the time of the passing of title were to be paid by the Building & Loan Association and added to the amount of its mortgage.

The Court: Now, Mr. Parsonnet, the language of C. 2 is that a half of the accrued and unpaid taxes, and so forth, be advanced by the complainant. C. 1, the contract, says "except that the said Augusta B. Parsonnet shall pay one-half of accrued and unpaid taxes and assessments on the property, and will pay all of the second half of 1927 taxes.

That is true. At the time when I entered into that contract it was in Sptember, and it was contemplated between the parties that the matter would be closed in a month or two at the most without the necessity of paying the taxes for the last half of 1927. We contemplated that the

closing would take place before the taxes were due.

> The Court: No, but it seems to me that that letter would hardly accord with that regarding the last half of the 1927 tax.

That's the reason why I am attempting to bring out any testimony to the effect that the contemplation was not as to any particular tax but at the time it was closed no money would have to be paid. The contemplation was that this title closing would take place during the year 1927 so that the 1927 taxes did not have to be paid at that time, but it was understood between us that at the time of the closing no cash payment would have to be made of any sort.

Now, the Building & Loan Association, without consulting me concerning it, paid the 1927 taxes and attempted to induce me to pay it back to the Building & Loan Association. There was no specific agreement in the contract which required the payment of taxes at any specific time. There was no provision in the contract which suggested that the mortgage should contain any provision for the payment of taxes at any specified time. They paid the taxes and then expected we would pay them as soon as we closed the title. I think that was in violation of the contract, or at least of the understanding, and that the Exhibit C. 2 did not completely express the understanding between the parties, and that is the reason I have been attempting to bring it out. It was understood between Mr. Vannaman and Mr. Numann and myself that at the time when the title closed it would be during the year 1927 and no talk was had at that time

concerning the 1927 taxes, because it was felt that title would be closed before they were due. The sheriff delivered the deed on January 31, 1927, and a short time after that I was notified to that effect—

Mr. Whitehead: 1928.

Mr. Parsonnett: 1928, pardon me.

I was notified to that effect on January 31, 1928 by the office of Hart & Vannaman. There was a delay of about two months, due to several causes, one of which was the absence of my mother from the city for a period of a few weeks. During the early part of the month of April I appeared at the office of Mr. Vannaman, which is next door to the office of Mr. Whitehead, and Mr. Hart was there to meet me to close this title. Mr. Numann was called by Mr. Hart at the time at his office, and he came right over and joined in the conference. We had the figures ready at the time and we went over them. He pointed out the payment of the taxes of 1927, and I said to him at that time that he could have waited before paying them and that I thought in view of the fact that he had already paid them it should have been added to the mortgage. I did not make a specific point of it, however; I suggested it.

I subsequently advised my mother that this settlement was a good one and that she would have a chance to recover all her money if she went through with it, and for that reason I was very anxious to put the deal through. I did not make a strenuous objection to the payment of those taxes. Also at that time they required the payment of one-tenth of one per cent. per

annum each month, amounting to $35 a month. I did strenuously object to that, as it was understood by me from the very beginning that no premium would be charged. I have had five years' experience as an attorney, and in all my experience only three building and loan associations have done otherwise than allow the premium at the beginning of the loan, and Mr. Numann suggested at that time that I would not be greatly injured by the payment of the premium, because of the fact that I intended to sell these properties and that the purchaser and not myself would be compelled to bear the same. It was the first time that I had contemplated the payment of any premium, and although I strenuously objected to it Mr. Numann refused to change his figures on that basis.

I also objected to the payment of dues for the month of February and March; but Mr. Numann said that the new series had begun in February and that it could not be changed. I suggested that instead of giving the shares starting from last February they should give me the shares during the next month, which he refused to do.

The total amount that the statement showed that was required to be paid in cash was the sum of $871; whereas, if the arrangement had gone through as contemplated we would not have had to pay any amount of money perhaps, with the exception of interest for one month, by reason of the delay in taking title.

On coming home to my mother I showed her the figures and she at once refused to go through with the deal, insisting that she had intended not to pay any money and would not pay any money. I urged her to complete the deal even

as it stood, because I thought the properties were well worth while, but she refused it. I wrote to either Mr. Vannaman or Mr. Arnold, who then took charge of the matter and suggested that he thought I could still induce my mother to enter into the arrangement.

On May 19th, I wrote again, saying that my mother would not enter into it, and then suit was started. On May 25th, I wrote to Mr. Arnold, saying: "Will you kindly forward to me a copy of the bill of complaint in the above matter; I believe that the formal time for answer has expired. I will be in a good position to perform our arrangement, but I want to take no chances and therefore ask that I receive a copy of the bill." The arrangement which I referred to was the arrangement to go through as suggested by the Aquackanonk Building & Loan Association. Then I received this letter in reply from the office of Vernet A. Arnold, signed by Vernet A. Arnold, under date of May 6, 1928: "I have your letter of May 25th, and in accordance with your request I enclose copy of the bill of complaint. Since Mr. Numann and I last saw you the Building & Loan has had the buildings put in shape and the following bills have been incurred." Then it enumerates a total of $3,300 in bills. "Also, since we saw you last there has been a carrying charge for one month. I call your attention to these figures because they will necessarily be added to the purchase price."

Why has this money gone into the buildings, and the carrying charge will be at the rate of $100 per month. In other words, the total price for two of the buildings will be $11,200 each and

the purchase price of the third building will be $11,700. The letter goes on:

"I might say that the building & loan does not care to wait after May 30th, next Wednesday, with any arrangement with you, as they have now waited over two years. Kindly close this matter with a deposit of cash on or before Wednesday, May 30th, or I will not be in position to make any further arrangements with you." I might say that our arrangements had not been waiting for two years but less than one year at the time.

Upon receipt of this letter I, of course, came to the conclusion that nothing further could be done and filed my answer to the suit and contested it.

Cross examination by Mr. Whitehead.

Q You attended the sheriff's sale yourself, Mr. Parsonnet? A Yes.

Q You complain of the payment of the second half of the 1927 taxes by us and charging those to your mother in April, 1928; do you find fault with that? A At the present time? Yes, I felt that it should be added to the amount of the mortgage.

Q Wasn't that in the interest of your mother that she should do that rather than have the taxes at seven or eight per cent. accumulating on it? A I felt that it was beyond your authority to pay the taxes unless you were willing to include them in the amount of the mortgage.

Q But your mother in the contract expressly agreed to pay them, didn't she? A Yes. At no special time, however.

Q Is it your interpretation of the contract that those taxes might have remained unpaid indefinitely? A No, I don't think that would be a reasonable interpretation.

Q No; the reasonable interpretation was that those taxes were to be paid at the time the transaction was closed? A No, not at all; because the contemplation was that it would have been closed prior to the time they were due.

Q Then they would be due when you would close? A After the closing.

Q Is it your idea that according to your agreement with the Building & Loan those taxes might remain after they were due? A It is always customary to have 120 days.

Q So that you expected to be governed by the terms of the mortgage in respect to those taxes? A There is no specification as to that.

Q Isn't it true if you had any leeway it was only such leeway as the mortgage would provide? Isn't that so? A No.

Q What is the truth regarding that? A It would be such leeway as was agreed upon at the time of drawing the contract.

Q Anything in the contract to that effect? A No.

Q Now, when this agreement was made by you on behalf of your mother you thought that the properties taken over by your mother could be sold or used to advantage in a trade so that she might recover something from these properties on account of her mortgage indebtedness; is that so? A Yes.

Q That was your purpose in her behalf in making this deal? A It was to protect her money.

Q It looked to you when this contract was made as if she might be wiped out entirely, didn't it? A What do you mean by that?

Q It looked to you as if her second mortgage interest might be wiped out entirely by the foreclosure of the Building & Loan mortgage, didn't it? A No, not necessarily.

Q How did you expect to preserve her interest? A By purchasing, as I said.

Q If you had purchased you would have had to put up cash for the full amount of the deed? A Cash or security procured on mortgage elsewhere.

Q And this contract was made in order that your mother might become a purchaser without the effort of putting up cash, or without the expense of borrowing money elsewhere; isn't that true? A Yes.

Q Now, you say that you talked to Mr. Numann about the shares? A About May shares instead of February shares.

Q Are you sure about that? A Quite sure, Mr. Whitehead.

Q Don't you know, as a matter of fact, that our association doesn't issue any May shares? A I believe that was explained to me at the time.

Q So that the discussion ended right there on the May shares? A It did.

Q But you said in your testimony that you demanded May shares and Mr. Numann refused to give them to you? A After I said that I certainly realized it and meant to go back and correct myself. I did suggest May shares, but it was explained to me that there were no such.

Q Now, have you in your files any letter written by you to the Building & Loan, or to

New Jersey State Library

Hart & Vannaman, or to Arnold, or to me, in which you protest the features of the contract which you now find fault with? A I don't think, Mr. Whitehead, that I ever wrote a letter on that to Mr. Arnold, or Mr. Hart or Mr. Vannaman, but I know they called on me a few times. I don't remember whom I told it to, but I know I made my objection clear.

Q You never put it in writing, did you? A No, I never did.

Q Now, after the meeting at which a settlement was attempted and this statement C. 11 was produced subsequent to that but not long after, Mr. Arnold and Mr. Numann called upon you at your office in Newark, didn't they? A Yes.

Q At that time, isn't it true that you then advanced the proposition to take these properties yourself? A Yes, I advanced it in a letter.

Q Not your mother, but you? A Yes.

Q It became then your own proposition, isn't that true—your personal proposition and not for your mother? A In one letter, and I told Mr. Arnold the same thing personally, that I would try to take it myself, but I couldn't do it for a few weeks.

Q But at that conference in your office Mr. Arnold suggested that you take the property for yourself; isn't that true? A That is generally true, yes.

Q Isn't it true that this letter that you have just introduced, written by Mr. Arnold—and that is exhibit what number? A I haven't offered it. May I offer it now?

The Court: All right.

(The same is marked Exhibit D. 3.)

John W. Numann, recalled, direct.

Q Isn't it true that that letter which has just been marked Exhibit D. 3 was with reference to the proposition that you had made individually to take over the property? A By no means. It was in reference to my letter of May 5th, Exhibit C. 10.

Q What did that say. Let me see it, please? A (Witness hands letter to counsel.)

Mr. Whitehead: I think that is all.

The Court: That completes the defendant's case, Mr. Parsonnet?

Mr. Parsonnet: It does, your Honor.

COMPLAINANT'S REBUTTAL.

JOHN W. NUMANN, recalled on behalf of the complainant, in rebuttal, testified as follows:

Direct examination by Mr. Whitehead.

Q Do you recall that conference at Mr. Parsonnet's office in Newark, in reference to this matter? A In the spring of 1928?

Q Yes. A Yes.

Q Do you remember the gist of the discussion at that conference? A We went over the matter as to repairing the property, and I explained to Mr. Parsonnet the nature of the repairs to be made, and what the building would stand in the event of purchase. As I recall it, the matter at all times was the payment of money by Mrs. Parsonnet, and Mr. Parsonnet thought that he would prefer to go ahead with it and relieve her of the contract; but at that

time I believe his mother was away out of town and he was to take the matter up with her.

Q The suggestion then was that Mr. Thomas L. Parsonnet would take the property? A He personally. Of course, it was also explained to him at that time that we had a contract in force with his mother.

Cross examination by Mr. Parsonnet.

Q You say you explained what was to be done; did you explain about the $3,300 at that time? A I can't say as to what amount had been put through at that time.

Q Didn't I tell you that my mother didn't want to go through with it if she had to pay this cash? A Mr. Parsonnet, you never raised the question of premium at all except at the time the instrument was prepared for you and explained to your satisfaction, and that was the only time that it was raised at all.

Q Didn't I tell you at the time I met you and Mr. Hart that the premium was not provided for by the contract, but that you insisted upon the contract and you ought to go through with it anyway? A If that had been my reason at that time and you agreed to it, you may have said it. But I know you raised no serious objection; you asked for an explanation only.

Re-direct examination by Mr. Whitehead.

Q Did you ever make any demand upon Mrs. Augusta Parsonnet for the payment of these repairs? A No.

Q Is your association ready at this time to perform the agreement as to those items of repairs? A I would say yes.

John W. Numann, recalled, re-cross.

Mr. Parsonnet: I object. Mr. Numann can't speak for us in this affair.

The Court: He can make an offer which I can adopt.

Mr. Parsonnet: I object on the further ground, whether they are now ready to waive their former demand. Nevertheless, that wouldn't relieve them from the responsibility of having rescinded the contract.

The Court: So far as the correspondence, that was long after the bill was filed.

Mr. Parsonnet: Yes, your Honor; at the time the bill was filed I, of course, had told my mother about it again and asked her if she would, and she said she didn't know; and I immediately communicated with her and told her we might be in a position to go ahead, and thereupon I received that letter.

The Court: That is a matter in which you disagree; I mean as to whether you had dealings on behalf of the complainant or in your own individual capacity. You disagree on that?

Mr. Parsonnet: Oh, entirely; entirely.

Re-cross examination by Mr. Parsonnet.

Q Mr. Numann, did you receive from Mr. Arnold, copy of my letter of May 5th, 1928? A I may have. I am familiar with the transaction, but I can't say whether I saw the identical letter, but I was familiar with the transaction.

Q In other words, this letter didn't convey anything new to you? A It did not.

John W. Numann, recalled, re-cross.

Q And in response to it, did you instruct Mr. Arnold to ask for an additional $300 to be expended in repairs on the property? A The status of the buildings was such that they were without windows and they were at the mercy of the elements. In fact, I have no correct information here, but I know the police of Lyndhurst asked us to protect these buildings. The windows were out and if the buildings were permitted to stand in that way longer they wouldn't be worth a cent. Something had to be done. There wasn't any fixtures left in the building.

Q Mr. Numann, if you were referring by any chance to my proposition with you, why did this letter refer to the purchase price? Was there any contract between the Building & Loan and myself? A The purchase price that was referred to was the one that we spoke to you about. You knew the terms of the contract with your mother and naturally we wouldn't expect the son to pay more as a purchase price than did your mother would have bought it for and assigned the contract to you, I should think.

Q I read from Exhibit D. 3: "And while it is satisfactory in this I don't know that the building and loan would care to wait until next Wednesday for any arrangement with you, as now we have waited over two years"; did I personally ever have any arrangement with you? A Personally?

Q Yes. A No.

Q In other words, doesn't this letter refer to me as an attorney for my mother and not to me individually? A Well, it refers to a contract with your mother. It referred to a certain contract, or certain property under contract, to your mother.

Thomas L. Parsonnet, recalled, direct.

Q When you are talking about me in a representative capacity, are you not referring to my mother and not referring to myself? A You were acting in a dual capacity there: You were attorney for your mother on the contract and at the same time you were representing those concerned with your mother's contract.

Q So that you were going to consider me and ask me for the contract? A I wouldn't say that.

Q You were willing that I should take the responsibility on this contract instead of my mother? A Subject to approval, yes.

Q Then why did you insist upon the payment of $3,300 in cash from me more than you were going to give it to my mother? A Why, we had a contract with your mother.

Q You were willing to substitute her for me? A If the terms were agreed upon.

Q Suppose I had taken an assignment of that contract, would you consider under those circumstances that you would have to deliver the property to me at the price mentioned in the contract? A That would be a matter for our counsel to advise on.

COMPLAINANT RESTS.

DEFENDANT'S REBUTTAL.

THOMAS L. PARSONNET, resuming the stand on behalf of the defendant, in rebuttal, testified as follows:

When the bill of complaint was served upon my mother I immediately communicated with

her and told her she was being sued for specific performance, and I told her that, under the circumstances, she ought to very seriously consider, or reconsider, the proposition. She told me she had and she might go through with it, and on May the 25th, 1928, I wrote this letter to Mr. Arnold, Exhibit C. 10, to which Exhibit D. 3 is an answer. At the time when Mr. Numann and Mr. Arnold were in my office I told them that I would probably take an assignment of the mortgage and take an assignment of the contract and take title myself. It was on that basis that I was going to take title and not simply as a new purchaser, but using all the terms and conditions of the contract between my mother and the Building & Loan. I believe also after the bill was filed I called Mr. Arnold on the phone and told him that my mother would reconsider it. I am not absolutely sure of that. This letter Exhibit D. 3 speaks of the contract and refers to my being liable on the contract but makes me as the representative of my mother.

The Court: Do you now rest?

Mr. Parsonnet: Yes. Does your Honor prefer oral argument or written memorandums?

The Court: I would prefer to have written briefs. Do you want to submit briefs directly independently or do you want to exchange briefs and submit answering briefs?

Mr. Parsonnet: I would prefer answering briefs.

The Court: Then you ought to serve yours on Mr. Whitehead—how long do you want?

Mr. Parsonnet: Ten days will be enough.

Mr. Whitehead: Then I will have ten days after receiving your brief?

The Court: Can you reply to his brief in five days after?

Mr. Whitehead: Yes.

The Court: Now, will you see that you get your respective exhibits and hand me those with your briefs and send me the briefs together?

Mr. Parsonnet: We will prepare our briefs and serve them upon one another and then send them to the Vice-Chancellor all together.

Mr. Whitehead: That will be fine.

Exhibit C. 1.

EXHIBIT C. 1.

AGREEMENT, Made between the Acquackanonk Building & Loan Association, Passaic, N. J., a corporation of New Jersey, and Augusta B. Parsonnet, of the City of Newark, New Jersey.

WITNESSETH, WHEREAS, the Acquackanonk Building & Loan Association holds first mortgages on property formerly of Costello, and now of Di Charo on 729, 731 and 738 Second Avenue, Lyndhurst, New Jersey, and Augusta B. Parsonnet holds second mortgages on the same properties.

AND WHEREAS the mortgages of the Acquackanonk Building & Loan Association, Passaic, N. J., are under foreclosure, and in addition to the second mortgages of the said Augusta B. Parsonnet, there are mechanics liens on the properties held respectively by L. Greenberg & Sons Inc., Yellow Pine Lumber Corporation, and Martin Jensen, and these mechanics lien claims are in litigation, and the respective priorities of the mortgages and lien claims are in dispute.

AND WHEREAS it is thought advisable that a settlement be arrived at, so that without further litigation the foreclosures of the Acquackanong Building & Loan Association may proceed to a final decree and sale.

THEREFORE it is agreed between the parties hereto in consideration of the premises and of One Dollar (1) by each party to the other in hand paid that the Acquackanonk Building & Loan Association will proceed with its foreclosure suits, unless it is found that good title can be procured from the present owner, Di Charo, directly that upon the obtaining of title, either from Di Charo or under the foreclosure suits,

Exhibit C. 1.

title will be taken by the said Augusta B. Parsonnet, who will thereupon execute to the Acquackanonk Building & Loan Association new first mortgages of Eleven Thousand ($11,000) Dollars each on houses Nos. 729 and 731, and a new first mortgage of Eleven Thousand Five Hundred ($11.500) Dollars on house No. 738, Second Avenue, Lyndhurst, New Jersey.

The said, Acquackanonk Building & Loan Association shall clear the title so that the said, Augusta B. Parsonnet shall have the title free from all encumbrance, except only the new first mortgages of the Acquackanonk Building & Loan Association above specified, except that the said Augusta B. Parsonnet shall pay one-half of accrued and unpaid taxes and assessments on the property, and will pay all of the second-half of 1927 taxes. The second mortgages now held by the said Augusta B. Parsonnet shall not be considered encumbrances under this paragraph, and if not cut off under the foreclosure suits, shall be canceled of record or subordinated to the new first mortgages of the Acquackanonk Building & Loan Association.

This agreement so far as the Acquackanonk Building & Loan Association is concerned, is contingent upon the ability of that Association to eliminate the lien claims of Greenberg, Yellow Pine Lumber Corporation, and Martin Jensen by payment not in excess of Seven Hundred ($700) Dollars per house for all three claims. If the Acquackanonk Building & Loan Association shall find that more money per house must be paid in order to satisfy these three mechanics liens and clear the title of these liens then it shall have the right at its option to withdraw from this contract.

Exhibit C. 1.

The said Augusta B. Parsonnet shall co-operate as far as possible to the end that the said pending foreclosure suits may proceed as rapidly as possible, and shall consent to the entry of such decrees therein as may be desired by the Acquackanonk Building & Loan Association or its counsel, not inconsistent with the terms of this agreement.

In Witness Whereof, the Acquackanonk Building & Loan Association, Passaic, N. J., has caused these presents to be signed, by its President, and its corporate seal attested by its Secretary to be hereto affixed, and the said Augusta B. Parsonnet has hereunto set her hand and seal this 7th day of ~~August,~~ September, 1927.

ACQUACKANONK BUILDING & LOAN ASSOCIATION, PASSAIC, N. J.

By

LOUIS DRUKKER
President.

ATTEST:

John W. Numann
(seal) Secretary.

(seal)

AUGUSTA B. PARSONNET

Signed, sealed and delivered in the presence of

Thomas L. Parsonnet

Exhibit C. 2.

EXHIBIT C. 2.

ACQUACKANONK BUILDING AND LOAN ASSOCIATION
OF PASSAIC, NEW JERSEY

September 9th, 1927.

Mrs. Augusta B. Parsonnet,
Newark, New Jersey.

Dear Madam:
Pursuant to the request of your attorney we hereby agree that the half of the accrued and unpaid taxes and assessments referred to in paragraph 2 of page 2 of the agreement entered into between us, bearing date September 7th, 1927, which are to be paid by you, shall be advanced by us and added to the amounts of the mortgages to be given by you to our Association.

Very truly yours,

ACQUACKANONK BUILDING AND
LOAN ASSOCIATION, PASSAIC, N. J.,

By LOUIS DRUKKER
President.

Exhibits C. 3 to C. 10 are letters which were offered in evidence and printed in full on pages 27 to 32.

Exhibit C. 11.

EXHIBIT C. 11.

Mortgage		$11,500.	
Paramount	$493.23 ½=	246.62	
½ 1926	341.24 ½=	170.62	
½ 1st ½ 1927	148.16 ½=	74.08	
			$11,991.32
Mortgage		$11,000.	
Harrington	$365.87=	187.98	
½ 1926	335.52=	167.76	
½ 1st ½ 1927	151.89=	75.95	
			11,431.69
Mortgage		$11,000.	
Harrington	$365.87=	187.98	
½ 1926	335.52=	167.76	
½ 1st ½ 1927	155.54=	77.77	
			11,433.51
			34,856.52

Covered by the following mortgages:

Mortgages	Dues	Interest	Premiums
$11,400.	114	57	11.40
11,600.	116	58	11.60
12,000.	120	60	12
$35,000.	350.	175.	35.00

RECAPITULATION.

Charges:	Mortgages	$35,000.	
	Feb. & Mar. dues	350.	
	Mar. interest	175.	
	Mar. premium	35.	
	2nd half 1927 taxes	454.52	
			$36,014.52
Credit:	Difference between contract and mortgages	143.48	
			$35,871.04
	To be paid in cash	871.04	
			$35,000.00

Exhibit D. 1.

EXHIBIT D. 1.

AGREEMENT, Made between the Acquackanonk Building & Loan Association, Passaic, New Jersey, a corporation of New Jersey, and Augusta B. Parsonnet, of the City of Newark, New Jersey.

WITNESSETH, WHEREAS, the Acquackanonk Building & Loan Association holds first mortgages on property formerly of Costello, and now of Di Charo on 729 and 738 Second Avenue, Lyndhurst, New Jersey, and Augusta B. Parsonnet holds second mortgages on the same properties,

AND WHEREAS the mortgages of the Acquackanonk Building & Loan Association, Passaic, N. J., are under foreclosure, and in addition to the second mortgages of the said Augusta B. Parsonnet, there are mechanics liens on the properties held respectively by, L. Greenberg, & Sons Inc., Yellow Pine Lumber Corporation., and Martin Jensen, and these mechanics lien claims are in litigation, and the respective priorities of the mortgages and lien claims are in dispute,

AND WHEREAS it is thought advisable that a settlement be arrived at, so that without further litigation the foreclosures of the Acquackanonk Building & Loan Association may proceed to a final decree and sale.

THEREFORE it is agreed between the parties hereto in consideration of the premises and of One Dollar (1) by each party to the other in hand paid that the Acquackanonk Building & Loan Association will proceed with its foreclosure suits, unless it is found that good title can be procured from the present owner, Di Charo, directly that upon the obtaining of title, either

Exhibit D. 1.

from Di Charo or under the foreclosure suits, title will be taken by the said Augusta B. Parsonnet, who will thereupon execute to the Acquackanonk Building & Loan Association new first mortgages of Eleven Thousand ($11,000) Dollars each on houses No. 729 and 731, and a new first mortgage of Eleven Thousand Five Hundred ($11,500) Dollars on house No. 738, Second Avenue, Lyndhurst, New Jersey.

The said, Acquackanonk Building & Loan Association shall clear the title so that the said, Augusta B. Parsonnet shall have the title free from all encumbrance, except only the new first mortgages of the Acquackanonk Building & Loan Association above specified, except that the said Augusta B. Parsonnet shall pay one-half of accrued and unpaid taxes and assessments on the property, and will pay all of the second-half of 1927 taxes. The second mortgages now held by the said Augusta B. Parsonnet shall not be considered encumbrances under this paragraph, and if not cut off under the foreclosure suits, shall be canceled of record or subordinated to the new first mortgages of the Acquackanonk Building & Loan Association.

This agreeemnt so far as the Acquackanonk Building & Loan Association is concerned, is contingent upon the ability of that Association to eliminate the lien claims of Greenberg, Yellow Pine Lumber Corporation., and Martin Jensen by payment not in excess of Seven Hundred ($700) Dollars per house for all three claims. If the Acquackanonk Building & Loan Association shall find that more money per house must be paid in order to satisfy these three mechanics liens and clear the title of these liens then it

Exhibit D. 1.

shall have the right at its option to withdraw from this contract.

The said August B. Parsonnet shall co-operate as far as possible to the end that the said pending foreclosure suits may proceed as rapidly as possible, and shall consent to the entry of such decrees therein as may be desired by the Acquackanonk Building & Loan Association or its counsel, not inconsistent with the terms of this agreement.

The said Augusta B. Parsonnet has deposited with Acquackanonk Building & Loan Association as earnest money under this contract, One Thousand ($1000) Dollars, which upon completion of this contract shall be applied to the payment of the taxes and assessments, and if the contract shall not be completed by the Acquackanonk Building & Loan Association shall be returned to the said Augusta B. Parsonnet.

In Witness Whereof, the Acquackanonk Building & Loan Association, Passaic, New Jersey, has caused these presents to be signed, by its President, and its corporate seal attested by its Secretary to be hereto affixed, and the said Augusta B. Parsonnet has hereunto set her hand and seal this day of August, 1927.

_____

_____

Exhibit D. 2.

EXHIBIT D. 2.

HENRY C. WHITEHEAD
Counselor at Law
Passaic, N. J.

August 1, 1927.

Mr. Thomas L. Parsonnet,
60 Park Place,
Newark, N. J.

Dear Mr. Parsonnet:

I enclose the contracts. I did not get to Newark this afternoon on account of the storm. You will notice that I have made a few changes and additions to the contracts that I dictated this morning. I think you will approve of the changes, but an explanation of the deposit of One Thousand ($1000) Dollars, should be made, and that is, that the Building and Loan Association feel that without a deposit made by your mother, they are accepting all of the risk in the situation, which is hardly fair.

They must go ahead at once and put up the money to pay off the liens and also will be obliged, during the month, to pay some of the taxes, as notices of redemptions have been served by the buyers of the tax liens and the time for redemption will expire during August.

They feel, therefore, that a deposit from your mother, sufficient to insure the completion of the matter, is in order.

Please let me have the contracts back as promptly as possible and let me hear about the Greenberg matter.

Yours very truly,

HENRY C. WHITEHEAD

HCW:CAB

Exhibit D. 3.

EXHIBIT D. 3.

Law Offices
VERNET A. ARNOLD
38 Bloomfield Avenue
Passaic, N. J.
Telephone 6674

May 26, 1928

Thomas L. Parsonnet, Esq.
Counsellor at Law
305 Military Park Building
60 Park Place, Newark, N. J.

Dear Sir:

Re: Acquackanonk B. & L. Assn.
VS
Augusta B. Parsonnet

I have your letter of May 25th and in accordance with your request I inclose copy of bill of complaint. Since Mr. Numann and I last saw you the Building and Loan has had the buildings put in shape, and the following bills have been incurred:

Carpenter work	$450.00
Plumbing	550.00
Electrical work	200.00
Mason work	150.00
Painting work	1950.00
Total	$3300.00

Also since we saw you last there has been a carrying charge for one month. I call your attention to these figures because they will necessarily be added to the purchase price, as this

Exhibit D. 3.

money has gone into the buildings. The carrying charge will be at the rate of $100 per month. In other words, the total price for two of the buildings will be $11,200 each, and the purchase price of the third building will be $11,700. I might say that the Building and Loan does not care to wait after May 30, next Wednesday, for any arrangement with you as they have now waited over two years. Kindly close this matter by a deposit of cash on or before Wednesday, May 30th, or I will not be in a position to make any further arrangements with you.

Yours truly,

VERNET A. ARNOLD

VAA:HA

23. MAY.1.1930

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

New Jersey Court of Errors and Appeals

Between

ACQUACKANONK BUILDING AND LOAN ASSOCIATION, Passaic, N. J., a corporation of New Jersey,
Complainant-Respondent,

and

AUGUSTA B. PARSONNET,
Defendant-Appellant.

On Bill, &c.

On Appeal from Chancery.

BRIEF OF DEFENDANT-APPELLANT.

Facts.

This is an appeal from a decree of the Court of Chancery directing the defendant-appellant specifically to perform an alleged contract between the complainant-respondent and defendant-appellant, set forth on page 68 of the State of the Case, as Exhibit C. 1. The facts leading up to the execution of that agreement are as follows:

The defendant-appellant was the holder of a mortgage in the sum of six thousand dollars ($6,000) upon the property mentioned in Exhibit C. 1, and the complainant-respondent was the holder of three mortgages upon the said premises in the amounts respectively of $9,000, $9,000 and $9,500. Several lien claims had been filed by lien claimants involving these properties and the owner of the property had absconded. The lien claimants were contesting the priority of the mortgages both of the complainant and the defendant in this suit and the defendant in this

suit claimed a right to be prior to the mortgage of the B. & L. Ass'n at least to the extent of $2,000 by reason of a right of subrogation to the lien of a land mortgage upon the property mentioned in the testimony of the defendant on page 48 of the State of the Case, line 26.

In order to settle the entire dispute and to effect a good title to the property and to dispose of all delays it was agreed that this defendant would permit the complainant to make settlement with the various lien claimants for the sum of $700 per house and to cause the property to be sold under its foreclosure proceedings without objection or contest upon the part of this defendant on condition that upon securing title the complainant would convey its title to this defendant and take back a mortgage equal to the costs to the complainant of each individual house.

It appears from the testimony that this contract was entered into for the sole purpose of securing this defendant's consent to the foreclosure proceedings and of restraining the bidding at the Sheriff's Sale so as to avoid payment of extra costs. In pursuance of this agreement, the Acquackanonk B. & L. Ass'n attempted to settle the lien claims and in fact did settle them for a payment in excess of $700 per house. Thereafter, in further pursuance of the agreement, the property was purchased by the Acquackanonk B. & L. Ass'n at the Sheriff's Sale, at the price of $100.00 per house and upon receipt of the deed, said Acquackanonk B. & L. Ass'n notified the defendant's solicitor. After some delay the defendant's solicitor appeared at the office of the complainant's solicitor to arrange for the taking of title. At that time there were present one of complainant's solici-

tors and Mr. Numann, the Secretary of the B. & L. Ass'n, and there were presented at that time, for the signature of the defendant, three bonds and mortgages which are mentioned in Exhibit C. 11 as being in the sums of $11,400, $11,600 and $12,000. It also appears from Exhibit C. 11 that the said B. & L. Ass'n demanded the payment of a monthly premium of one per cent. a month. There is some conflict in the testimony as to whether or not the payment of this premium was objected to, but the fact remains that the premium was demanded and the further fact remains that the decree of the Court of Chancery directs the defendant to pay this premium in spite of the fact that there is no portion of the alleged contract (Exhibit C. 1) which requires the payment of any premium. Furthermore, demand was made upon the defendant personally to execute three bonds, when in fact, there is no portion of the alleged contract which provides that the said defendant should execute any bonds. The said contract provides only that the defendant execute mortgages, but not that she execute any bonds.

It might be pointed out at this time that the reason why the mortgages were for the sums of $11,400, $11,600 and $12,000 instead of $11,000, $11,000 and $11,500 respectively is because of the agreement contained in the letter known as Exhibit C. 2 (State of the Case, p. 71), which provides that the one-half of the accrued and unpaid taxes and assessments should be paid by the B. & L. Ass'n and added to the mortgages. In spite of this agreement and notwithstanding the same, and in violation thereof the decree provides that the mortgages should be only the sums of $11,000, $11,000 and $11,500 respectively and directs this defendant to pay the said one-

half of the accrued and unpaid taxes and assessments in cash. This was not in any way in pursuance of the agreement as finally arranged, and is in violation thereof.

At the conference which was held as aforesaid in the office of the solicitor for complainant, it was admitted by the complainant that the matter was not concluded, but that the solicitor for the defendant had to satisfy his mother (the defendant) as to the value of the property (State of the Case, p. 30, l. 39). This is further proof of the fact that the defendant did not consider herself bound by the alleged agreement, but considered it simply as a means for her protection in the event that she desired to take title to the property. Thereafter the defendant decided not to take title to the premises in spite of the fact that her solicitor urged her to do so.

As appears by the testimony on pages 55 and 56 of the State of the Case, defendant's solicitor continued to urge the defendant to take the title even on the basis as demanded by the B. & L. Ass'n, but on May 26th, 1928, the attorney for the B. &. L. Ass'n wrote to the defendant's solicitor a letter (Exhibit D. 3) demanding the payment of an additional $3,300 for repairs. This of course, the defendant refused to do, and thereupon contested the suit for specific performance. Complainant contended in the testimony that this letter (Exhibit D. 3) was written in contemplation of taking of title, not by the defendant but by the defendant's solicitor himself. This is expressly denied by testimony of the defendant on page 66 of the State of the Case and is more clearly brought out by the letter itself in view of the fact that it is captioned under the head "Acquackanonk B. &. L. Ass'n *v.* Augusta B. Parsonnet." This fact alone would

disprove the fact that the letter was written in contemplation of the taking of title by the defendant's solicitor. Why should the letter be captioned in the case at bar, if it was intended to discuss a matter totally foreign to the case? It is perfectly obvious that a demand was made upon this defendant, in contemplation of her taking title, that she pay not only the contract price but also the cost of repairs. It is respectfully submitted that that portion of the testimony of Mr. Numann on pages 62 and 63 of the State of the Case is proven by the letter itself to be utterly untrue and false.

It is further respectfully submitted that the maxim *"falsus in unum, falsus in omnibus"* would apparently apply to this case. Mr. Numann testifies not only that the demand for the payment for repairs was not made of the defendant but also testifies that no complaint was made as to charge for premium. This was of course vehemently contradicted by the defendant. Furthermore even though no objection had been made to the payment of premiums at the time of the conference, the failure to make such objection at that time would not be binding upon the defendant because she was not present and was represented only by her solicitor who is not shown to have had a complete agency for her but on the contrary is shown to have had only the power of representing her as per instructions.

Upon the final hearing, a decree was entered providing *inter alia* that the defendant pay to the complainant in cash one-half of the accrued and unpaid taxes and assessments for 1926 and 1927; this provision is improper because of the agreement contained in Exhibit C. 2 which provides that although the defendant was to pay

for such taxes and assessments, nevertheless they were to be added to the amount of the mortgage and paid in the first instance by the complainant.

The decree further provides that the defendant pay to the complainant in cash the sum of $3,501.30 which is said by the decree to represent one-half of the 1926 taxes, one-half of the first half of the 1927 taxes, two sewer assessments and taxes for the years 1927, 1928 and 1929. It is urged on behalf of the defendant that nowhere in the testimony is there any statement of any sort proving the amount of the taxes for the years 1926, 1927, 1928 and 1929, nor is there any evidence to indicate that there was a sewer assessment upon the premises and that the decree is therefore erroneous and improper inasmuch as it is based upon no evidence. The decree further provides that the complainant and defendant pay for the repairs to the premises. This was certainly not within the contemplation of the parties at the time of the execution of the agreement and under the terms of the decree the defendant would be compelled to pay the sum of $3,300.00 as set forth in the letter D. 3, the demand for which the said complainant expressly disaffirmed by virtue of the testimony of Mr. Numann on page 62, line 36.

THE LAW.

The decree entered in this case is urged by the defendant-appellant to have been erroneous for the following reasons:

I. The alleged agreement constituted no contract and is unenforceable because:

(A) It is founded upon no consideration.

(B) There is a lack of mutuality expressly set forth in the said contract.

(C) It is void as against public policy by reason of the fact that it is a contract to suppress the bidding upon the foreclosure sale.

(D) It does not and never was intended to constitute a valid or binding agreement upon the defendant to purchase the property, but simply constitutes an agreement upon the part of the defendant to permit the foreclosure proceedings of the complainant to be uncontested in consideration of which agreement the complainant agreed to convey the premises to the defendant at the price which premises would cost the complainant in the event that the said defendant desired to purchase the same.

(E) It is so vague, indefinite, and incomplete that it cannot be enforced.

II. The alleged contract was violated by the complainant itself in that:

(A) The complainant, in violation of its agreement, demanded the payment of a greater sum of money than that called for by the alleged contract in demanding the payment monthly of the sum of $35.00 representing a premium or bonus which said premium or bonus had never been in the contemplation of the parties.

(B) After the bill of complaint was filed in this cause and the defendant, notwithstanding the prior violations, advised the complainant that she would probably take title, the complainant refused to convey title unless there was paid to it the extra sum of $3,300.00 for repairs.

III. The decree itself requires the defendant to perform in a manner not required by the alleged agreement, in that:

(A) It requires the defendant to pay the premium set forth above.

(B) It requires the defendant further to pay the costs of the repairs as aforesaid.

(C) It requires the defendant to pay the one-half of the 1926 and 1927 taxes in cash, notwithstanding the agreement set forth in Exhibit C. 2.

IV. The decree is further erroneous in that:

(A) It requires the defendant to pay taxes and sewer assessments which it sets forth specifically, whereas in truth and in fact there is no evidence in this case to indicate either the amount of said taxes or whether the said complainant actually paid them.

(B) It requires the defendant to execute and deliver to the complainant three bonds made personally by the said defendant agreeing to pay the respective sums of $11,000, $11,000 and $11,500, bearing the penal sum of $22,000, $22,000 and $23,000, in spite of the fact that there is no provision of any sort in the contract requiring the said defendant to execute such bonds.

V. The complainant was never ready or willing to comply with the alleged agreement.

VI. The decree is further improper and erroneous because it is based upon testimony which was improperly admitted over the objection of the counsel for the defendant.

The testimony specifically referred to is the testimony of John W. Numann on pages 41 and

42 of the State of the Case, which will later be discussed with more particularity.

I. THE ALLEGED AGREEMENT CONSTITUTED NO CONTRACT AND IS UNENFORCEABLE:

A. BECAUSE IT IS FOUNDED UPON NO CONSIDERATION.

It is a well-known rule of law that "a promise to do what the promisor is already bound to do cannot be a consideration, for if a person gets nothing in return for his promise but that to which he is already legally entitled, the consideration is unreal." *Berlaut Dev. Co.* v. *McManus,* 97 N. J. E. 438; *Conover* v. *Stillwell,* 34 N. J. L. 54.

It is respectfully submitted that an analysis of the contract sued upon will indicate that the intention of the parties was that in consideration of the agreement by the defendant to facilitate the foreclosure proceedings, the complainant agreed to reinstate its mortgages and to give to the defendant the same right of redemption which the said defendant would have upon the foreclosure sale. In view of the fact that the defendant had the right to bid upon the foreclosure sale, it appears clear that the only consideration upon which the contract may be based is the agreement upon the part of the complainant to accept new mortgages. This agreement the accept new mortgages was given to the defendant-appellant as consideration for her agreement, to facilitate the foreclosure proceedings and to permit the B. & L. Ass'n to take title at the foreclosure proceedings without contest. The contract having been without consideration, it is

therefore submitted that no decree for specific performance may be granted.

B. THE CONTRACT LACKS MUTUALITY.

It will be noted (Exhibit C. 1, p. 69 of the State of the Case, l. 28) that as part of the contract, it is provided that should the B. &. L. Ass'n be compelled to pay more than $700, a house to clear the title of the mechanics' lien claims, it has the option to withdraw from the contract. A Court of Equity will not decree that one party shall specifically perform a contract which the party at his option may refuse to carry out. "25 R. C. L. 227."

It is established by the testimony that the B. & L. Ass'n actually was compelled to pay more than $700 per house and therefore by virtue of the terms of the contract, it has the right at its option to withdraw therefrom. Under the circumstances, there is no mutuality of remedy between the parties even after the entry of the decree, for the complainant may withdraw from the contract, and the defendant-appellant would be unable to compel the said complainant to convey the premises. The law is well established that where such lack of mutuality of remedy exists, neither party may secure a decree for specific performance.

The leading case in the country on this point is *Rust* v. *Conrad,* 47 Mich. 449, where it was specifically held that where the complainant had the right to withdraw from the contract, no specific performance would be decreed by reason of the fact that there was a lack of mutuality. Thus in the case of *Ten Eyck* v. *Manning,* 52 N. J. Equity, 47, it was held by Vice-Chancellor

Van Fleet that where a husband brings suit for specific performance to compel the defendant to purchase premises, title to which remains in the complainant's wife, specific performance will be denied by reason of the fact that the defendant could not secure such decree against the complainant; in other words there was no mutuality of remedy. The Vice-Chancellor then says:

> "The remedy by specific performance is not a matter of strict right but of sound judicial discretion and will be granted or denied as the justice and rights of the particular case shall seem to the Court, on full consideration of the rights and equities of the parties, to require. The enforcement or denial of this remedy is regulated by certain well-established principles, one of which is that it will not be granted, as a general rule, in cases where mutuality of obligation and remedy does not exist; or, stated in another form, mutuality of remedy is essential to the maintenance of a suit for specific performance. Fry, Spec. Perf., Section 286; Waterman, Spec. Perf., Section 196." Vice-Chancellor Van Fleet further says, "And in Van Doren *v. Robinson,* 1 C. E. Gr. 256, 259, Chancellor Green said: 'The general principal is that where the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other.' In Beard *v.* Linthicum, 1 Md. Ch. 345, 350, Chancellor Johnson held that if one of the parties is not bound, or it is not able to perform his part of the contract, he cannot call upon the Court to compel specific performance by the opposite party; and in the subsequent case of Duval *v.* Myers, 2 Md. Ch. 401, 405, the same judge said in substance that the right to the specific execution of a contract depends upon whether the agreement is obligatory upon both parties, so that upon the application of either against the other the Court can compel a specific performance. And Chief Justice Beasley in pro-

> nouncing the opinion of the Court of Errors and Appeals, in Richards *v.* Green, 8 C. E. Gr. 536, 537, said: 'In every case that I can find, where specific performance has been ordered, a mutual remedy existed upon the contract at the time of rendering the decree. It seems to me that the rule is universal to this extent, that equity will not direct a performance of the terms of an agreement by the one party, when at the time of such order, the other party is at liberty to reject the obligation of such agreement.' The reason on which this principle rests was stated by Lord Redesdale, in Lawrenson *v.* Butler, 1 Sch. & L. 13, 18 in this wise: were it 'otherwise it would follow that the Court would decree a specific performance when the party called upon to perform might be in this situation, that if the agreement was disadvantageous to him he would be liable to the performance, and yet if advantageous to him he could not compel a performance. This is not equity as it seems to me'."

It therefore seems apparent that since this defendant could not compel the complainant to perform the contract should the complainant decide that it was disadvantageous, it would not be equity to compel this defendant so to perform. It is respectfully submitted that this type of case differs radically from the type of case where the complainant suing for a specific performance is himself not bound, prior to the filing of the bill, because he has signed no written agreement; such cases where the complainant might rely upon the Statute of Frauds in defense to an action contain a mutuality of remedy because of the fact that upon filing his bill the complainant submits himself to the jurisdiction of the Court and may be compelled to convey. In the case at bar, however, the complainant has at all times the right even after the entry of the decree to withdraw from

the obligation of the contract because it paid a sum in excess of $700 per house. This proposition of law is well set forth in the *Ten Eyck case, supra,* which case has been followed invariably by the courts of this State such as the case of *Miller* v. *Weiss,* 91 N. J. E. 321; *Public Service Corporation* v. *Hackensack Meadows Company,* 72 N. J. E. 285. In the case of *Flight* v. *Bolland* (1828), 4 Russ. Ch. 298, 38-Eng. reprint, 817, 28 revised rep. 101; 6 Eng. Rul. Cas. 693, Sir John Leach, Master of the Rolls, said, "It is not disputed that it is a general principle of courts of equity to interpose only where the remedy is mutual. The plaintiff, being an infant, has attempted to rely upon a supposed analogy based upon the cases under the Statute of Frauds, where the plaintiff may obtain a decree for specific performance of a contract signed by the defendant, although not signed by the plaintiff. It must be admitted that such, now, is the settled rule of the Court, although seriously questioned by Lord Redesdale upon the ground of want of mutuality. But these cases are supported, first because the Statute of Frauds only requires the agreement to be signed by the party to be charged; and next, it is said that the plaintiff, by the act of filing the bill, has made the remedy mutual. Neither of these cases apply to the case of an infant. The act of filing the bill by his next friend cannot bind him." In the case at bar, it is respectfully submitted that the act of filing the bill does not waive complainant's right to withdraw from the contract and that the complainant is no more bound at the present time than he was before the institution of the suit.

It is further said by Vice-Chancellor Buchanan in *Patterson* v. *J. D. Loiseaux Lumber Co.,* 92

N. J. E. 569, 584: "Specific performance will not be decreed where *at the time of the decree,* both parties are not bound—where complainant could not be compelled to perform the obligation of her part. Richards *v.* Green, 23 N. J. E. 32; Woodruff *v.* Woodruff, 44 N. J. E. 349; Ten Eyck *v.* Manning, 52 N. J. E. 47." And in the case of Rosenson *v.* Bochenek, 101 N. J. E. 479, Vice-Chancellor Church says:

> "There is another reason why I think this contract is unenforceable. In the case of Ten Eyck *v.* Manning, supra. Vice-Chancellor Van Fleet says (at page 48): 'Of the many defenses set up only one need be considered, and that is that the contract which the complainant asks to have enforced does not give to the defendant a right to the same remedy against the complainant which the complainant seeks against the defendant; in other words, that this court could not on the defendant's application compel the complainant to specifically perform the contract. The remedy by specific performance is not a matter of strict right but of sound judicial discretion, and will be granted or denied as the justice and right of the particular case shall seem to the court on full consideration of the rights and equities of the parties to require. The enforcement or denial of the remedy is regulated by certain well-established principles, one of which is that it will not be granted, as a general rule, in cases where mutuality of obligation and remedy does not exist; or stated in another form, mutuality of remedy is essential to a suit for specific performance.'
>
> "In this case the title to the land which the husband agreed to convey was still in the wife when the husband sued and also when the decree was to be pronounced. In the case at bar complainant could not convey the property mentioned in the contract of sale at the time mentioned in said contract.

> He now seeks to enforce the original contract because some time thereafter he was able to secure and offer the defendant what he thought was a good title to lands he had contracted to sell, without authority to sell. I think the reasoning of Vice-Chancellor Van Fleet applies here. When the contract was entered into, it could not be mutually enforced. I think it would be inequitable and unjust to compel defendant to wait until such time—perhaps months or years after the date set for closing—as complainant could secure the premises he had agreed to deliver. This point was not discussed in complainant's brief."

In the case of *Grunt* v. *Olsan,* 101 N. J. Eq. 506, there was a clause as follows: "It being understood, however, that the same does not make the title unmarketable and is not considered an encumbrance against the said premises." Complainant contended that this clause meant that if complainant, on further consideration, decided that the reservation made the title unmarketable then complainant might rescind the contract. Vice-Chancellor Church in commenting upon this says: "To so decide would, it seems to me, be tantamount to holding that there was in the contract no mutuality of obligation, which the courts held to be essential is cases of this character." In other words, the Vice-Chancellor held that if this clause was to be construed as giving to the complainant the right to withdraw from the contract, then there would be no mutuality and therefore could be no decree for specific performance. It is respectfully submitted that such a situation actually exists in the case at bar, namely, that the complainant had and still has the right to withdraw from the contract and that therefore, there is present in this case an actual want of mutuality.

And again in the case of *Freeman* v. *Anders,* 143 Atl. 550, *V.-C.* Leaming reaffirming the decision of *Ten Eyck* v. *Manning, supra,* again holds that where the complainant cannot be compelled to perform, the Court will dismiss the bill.

In the case of *Degheri* v. *Carobine,* 140 Atl. 406, the Court of Errors and Appeals by Kays, *J.,* again affirms the Ten Eyck case, reversing the Court of Chancery, saying, "The remedy by specific performance is not a matter of strict right, but of sound judicial discretion and will be granted or denied as the justice and right of the particular case shall seem to the Court, on full consideration of the rights and equities of the parties to require." And again, "*V.-C.* Leaming lays down the rule in the case of *P. S. Corp.* v. *Hackensack Meadows,* 72 N. J. Equity 287; 64 Atl. 977, as follows, 'It is a well-established rule in equity that no contract will be specifically enforced unless there is in the contract such mutuality of obligation that either party may enforce it against the other.' "

It may be urged that the contract in this case is a legally enforceable contract. Even though this were true, nevertheless, since it lacks mutuality, specific performance, being a matter of discretion, should be refused. As is said in Pomeroy's Specific Performance of Contracts, page 417, Section 163:

> "It is not then sufficient in general, that a valid and binding agreement exists, and that an action at law for damages will lie in favor of either party for a breach by the other; the peculiarly distinctive feature of the equitable doctrine, is, that the remedial right to a specific performance must be mutual. If therefore, from the nature or form of the contract, itself, from the relations of

the parties, from the personal incapacity of one of them, or from any other cause, the agreement devolves no obligation at all upon one of the parties or if it cannot be specifically enforced against him, then and for that reason, he is not in general, entitled to the remedy of a specific performance against his adversary party, although otherwise, there may be obstacle arising, either from the terms of the contract or from his personal status and relations, to an enforcement of the relief against the latter, individually."

In 5 Pomeroy's Eq., Jurisprudence, Section 2191, it is said:

"The frequent statement of the rule of mutuality—'that the contract to be specifically enforced must as a general rule, be mutual—that is to say, such, that it might, at the time it was entered into, have been enforced by either of the parties against the other,' is open to so many exceptions that is of little value as a rule. But in view of the firm place that the doctrine of mutuality has obtained in the courts of equity, it seems well to attempt a restatement that shall be more free from exceptions. The following forms seem to meet the cases generally. 'Equity will not compel specific performance by a defendant, if after performance the common law remedy of damages would be his sole security for the performance of the plaintiff's side of the contract.' 'The court will not grant specific performance to the plaintiff and at the same time leave defendant to the legal remedy of damages for possible future breaches on plaintiff's part.' This rule, it is believed, covers the circumstances in equity where, according to the weight of authority, the court refuses its aid for lack of mutuality.

"So far as there is a principle of mutuality, it is a mutuality of remedy in equity at the time of filing the bill that is required,

> and not a mutuality in the terms of the contract when the contract is made. Equity is entirely willing to grant plaintiff the performance he applies for, but if it finds that in doing so the defendant, without fault, is left in turn to a remedy at law only, it refuses to lend its aid to such an unequal result."

It is perfectly clear from an examination of the case at bar that in view of the fact that the complainant has paid more than $700 per house for the release of the mechanics' lien claims, this defendant-appellant could not secure a decree in specific performance against the complainant, and in fact, could not even sue at law should the said complainant determine to disaffirm the contract. Under the circumstances, since there is a total lack of mutuality of remedy, it is respectfully submitted that the decree of the Court of Chancery directing the defendant specifically to perform is erroneous.

C. THE CONTRACT IS VOID AS AGAINST PUBLIC POLICY, by reason of the fact that its purpose *inter alia,* is to suppress the bidding at the Sheriff's Sale upon foreclosure.

It will be noted that the undisputed and uncontradicted testimony of the defendant was to the effect that, as part of the agreement, it was agreed that the defendant should not bid upon the property in order to permit the complainant to secure title upon the Sheriff's Sale at as low a price as possible.

It has been held by numerous cases in this State and practically every other State in the United States that such a contract is void and unenforceable, both at law and in equity as being in contravention of public policy. In the

case of *Morris* v. *Woodward,* 25 N. J. E. 32, it was held by Chancellor Runyon, that an agreement by a third mortgagee not to bid at a Sheriff's Sale in consideration of the complainant's offer to pay his claim if he did not bid, was contrary to the policy of the law. *Fuller* v. *Abrahams,* 3 Brod. and Bing. 116; *Martin* v. *Ranlett,* 5 Rich. (Law) 542; *Mills* v. *Rogers,* 2 Littell (Ky.) 217; *Smith* v. *Rinley,* 2 Dev. 126. The Chancellor says, "In judicial sales at auction, no practice which will tend to prejudice the sale should be permitted, least of all should he for whose benefit the property is sold, be allowed to reap the advantage of such practice on his part." In the case of *Brooks* v. *Cooper,* 50 N. J. Eq. 761, an agreement between two newspapers to refrain from competing for governmental advertising business and to share the net profits was held illegal and void.

In *Jones* v. *Caswell,* 3 Johns. Cas. 29, it was held that a note given in consideration of forbearance of bidding at a Sheriff's Sale of real estate was without consideration on the ground that it was the policy of the law to encourage bidding at sales on execution. It may be noted that this case is very similar to the case at bar. In the Jones case, a note given in consideration of forbearance of bidding at a Sheriff's Sale was held void; in the case at bar, there is a contract, part of whose terms contemplate the forbearance of bidding at the Sheriff's Sale by the defendant-appellant, which contract is therefore also void.

See also the cases of *Gulick* v. *Ward,* 5 Halst. 87; *Gardiner* v. *Morse,* 25 Me. 140; *Gibbs* v. *Smith,* 115 Mass. 592; *Goldman* v. *Oppenheim,* 118 Ind. 951; *Atlas Bank* v. *Holm,* 71 Fed. 489;

Doolan v. *Ward,* 6 Johns. 194; *Barton* v. *Benson,* 126 Pa. St. 431.

The Court of Chancery by *V.-C.* Pitney, in the case of *Lennon* v. *Heindel,* 56 N. J. E. 8, has held that an execution sale will be set aside where two persons have agreed, the first to refrain from bidding so as to permit the other to procure the property as cheaply as possible in consideration of the agreement of the intended purchaser to convey the property to him at an advance of $700 on the purchase price.

It may also be pointed out at this time that the invalidity of the contract by reason of its violation of public policy is not affected by the fact that the property is purchased at its true value. This is indicated by 6 R. C. L. page 10 where it is said, "But it is not necessary that the purpose of the contracting parties should be to buy the property at less than its value. Where their purpose is to prevent competition the fact that there was no design to purchase the property at less than its value does not render the agreement valid. The general rule is well stated in the annotation in 20 L. R. A. page 545 where it is said, "The general principle of law applied to all sales at auction is that any act of the auctioneer or of the party selling or of third parties as purchasers, which prevents a fair, free and open sale, or which diminishes competition, and stifles or chills the sale, is contrary to public policy and renders the sale null and void." "All contracts that have for their object the prevention, checking or chilling of bids at auction sales come within the doctrines above set forth, and operate as a fraud upon the debtor and his remaining creditors by depriving the former of the opportunity which he ought to possess of obtaining a full equivalent for the property

which is devoted to the payment of his debts and opens the door for oppressive speculation. (*Jones* v. *Caswell,* 3 Johns. Cas. 29.)''

It is therefore respectfully submitted, in view of the cases heretofore referred to, that the contract between the parties which contemplated the taking of title by the complainant and contemplated further the refraining from bidding by the defendant, a fact not denied or disputed anywhere in the testimony, was definitely a contract in violation of public policy and therefore unenforceable as against the defendant-appellant.

D. THE ALLEGED CONTRACT DOES NOT AND NEVER WAS INTENDED TO CONSTITUTE A VALID OR BINDING AGREEMENT UPON THE DEFENDANT TO PURCHASE THE PROPERTY.

The testimony is a clear indication of the situation at the time previous to the execution of the instrument. The complainant had started foreclosure proceedings and was being harassed in the prosecution of these proceedings by the filing of mechanics' lien claims and by the threatened filing of a claim upon the part of the defendant to subrogation to the rights of a certain land mortgage in the sum of $2,000, the lien of which was prior to the lien of the complainant. These contests as to the right of the complainant to priority had caused a delay in the proceedings from the fall of 1925 to the fall of 1927 and the proceedings were not then nearing a stage of completion. In order to wind the matter up and to secure good title an agreement was reached between the parties. Defendant contends and testified that this agreement was reached at the request and solicitation of the complainant. The complainant on the other hand contends

that the agreement was entered into at the request of the defendant. The fact remains, however, and is admitted, that it was entered into for the primary purpose of securing title. An examination of the agreement indicates in itself that its purpose was purely to permit the B. & L. Ass'n to continue with its foreclosure proceedings. Why did it retain the right to withdraw from the contract if it was compelled to pay more than $700 per house, if it was not contemplated that the agreement to turn the property over to the defendant was solely for the purpose of inducing her to permit the foreclosure to go through? It appears in the testimony that a previous contract, prior to the execution of Exhibit C. 1, Exhibit D. 1 was prepared, which the defendant refused to sign on the ground that it required the payment of $1,000. Defendant did not contemplate being bound by the agreement but, as is testified, contemplated a situation in which she at her option, might or might not take title. Upon executing the contract, she understood simply that she was bound thereby to facilitate in the foreclosure proceedings in consideration of which the complainant was bound to convey the premises to her should she desire to take such conveyance.

It may be objected that the evidence to this effect is a violation of the Parole Evidence Rule. It is, however, urged that the agreement is so indefinite and ambiguous as to require explanation and that, therefore, this evidence is admissible to explain the intention of the parties.

E. THE CONTRACT IS SO VAGUE AND INDEFINITE IN ITS TERMS THAT IT CANNOT BE ENFORCED.

It is well settled law that a contract, to be enforceable, must contain all of the provisions and terms necessary upon which to base the settlement. (See *Wharton* v. *Stoutenburgh,* 35 N. J. E. 266; *Kuskin* v. *Gutman,* 98 N. J. E. 617; *Kurtz* v. *Busch,* 3 M. 389, 128 Atl. 552 and many other cases.) The contract set up by the complainant does not mention the manner of the payment of interest and does not mention any tax or interest default clause to be included in the mortgages, nor does it provide for the execution of a bond. In other words, the contract is not complete and therefore, by virtue of the cases above cited, it is a *nudum pactum* and cannot be enforced against the defendant-appellant.

II. THE ALLEGED CONTRACT WAS VIOLATED BY THE COMPLAINANT ITSELF.

A. The complainant upon an attempt to close the title demanded the payment of the sum of $35.00 per month as a premium or bonus upon its mortgage. This demand was not in any way provided for in the alleged agreement, Exhibit C. 1, nor is there any indication that it would be payable by the said defendant. Nevertheless, as indicated by the testimony of the complainant, on p. 35 of the State of the Case, an examination of Exhibit C-11 indicates that the complainant demanded the sum respectively of $11.40, $11.60 and $12.00 for premiums and made as a condition of the transaction, the inclusion of a provision in its mortgages that such premiums be paid. This demand was definitely in violation of the agreement upon the part of the complainant to accept mortgages in the sums specified by

the said Exhibit C. 11. It may be pointed out at this time that Exhibit C. 11, as shown on p. 35 of the testimony, indicates an improper total. It is more properly and accurately set forth on p. 72 of the State of the Case.

There is some dispute in the testimony as to whether the defendant, through her attorney, made objection to the charge of this premium. It was emphatically testified by the defendant's witness that objection was made to the charge of premium. This is denied, however, by complainant. The fact remains that this premium was charged, and whether or not the attorney for the defendant objected to it is immaterial. There is no proof that the attorney for the defendant was authorized by the defendant to consent to this charge, nor is there any proof that the said attorney for the defendant was authorized to consent to the payment of "dues" for February and March 1928 or to the payment of March interest or premium. The demand made by the complainant that premiums should be paid to the extent of $35.00 a month and that in addition, the defendant pay in cash $350.00 for dues, $175 for interest and $35.00 for one month's premium consituted a direct violation of the agreement set forth as Exhibit C. 1. An entire perusal of that agreement will indicate definitely that there was absolutely no contemplation of these charges. There was certain testimony by Mr. Numann, Secretary of the complainant, explaining that the practice of the complainant is to charge premiums at the rate of one-tenth of one per cent. per month. The fact that it is the practice of this particular association to make such a charge is of course immaterial to the issue involved. There is testimony offered by the defendant (State of the Case, p. 55, l. 7) and it

might even be a subject of judicial notice, that in general, Building and Loan Associations charge their premiums upon the making of the loan and deduct the premiums from the amount loaned. It also appears that up to the date of the conference for the taking of title, neither the defendant nor her attorney were aware of the practice of the complainant as to the charge of premiums. If the complainant should be allowed to charge a premium at the rate of $35.00 a month, assuming that the loan would take 12 years to pay off, this charge would, in effect, be increasing the cost, or purchase price of the premises, as far as the defendant is concerned, by the sum of $8,640 for the three houses. It is respectfully submitted that such a proposition certainly could not have been in the contemplation of the defendant nor is it provided for in the alleged contract.

A thorough search of the authorities has been made but no case has been found wherein the vendor of real estate has attempted to demand a premium upon the purchase money mortgage which such vendor has agreed to take for the purchase of the property. It is respectfully submitted, however, that a demand for such premium is tantamount to a demand for the payment of a price in excess of the price stipulated by the contract for sale and such a demand is of course a breach of the agreement. It seems unnecessary to cite authority for this proposition. It makes no difference whether the vendor is a Building and Loan Association, a corporation, a partnership or an individual; if such vendor demands a price in excess of the price stipulated by the contract or demands the payment of a bonus or premium upon its mortgage, whether such bonus or premium be paid at once or in

installments, such demand constitutes a breach of the contract for sale. The fact that a B. & L. Ass'n is exempted by statute from the operation of the Usury Act has no effect in this case, by reason of the fact that the complainant herein agreed to take a purchase money mortgage in a definite, specified amount for the purchase price of the property and in violation of that agreement demanded a mortgage requiring the payment over a period of time of $8,640 in excess of the price set by the alleged contract. From this demand, the complainant never receded. In truth and in fact the complainant insisted upon these premiums and continued to insist upon them and the decree itself requires the defendant to make payment of such premiums. It might be argued that if the complainant had eventually waived its demand for the payment of the excess sum of money, the Court might declare that the complainant was now ready and willing to perform the terms of the contract. However, the complainant has always insisted upon the payment of the premiums and uses as its argument the fact that no particular objection was made to such demand. In the first place, defendant's testimony is to the effect that a strenuous objection was made to the payment of premium; in the second place, whether the defendant's attorney did or did not object thereto, nevertheless the defendant herself made objection thereto and her attorney has not been shown to have been authorized to waive this objection. Without doubt, if a single individual, upon a closing of title insisted that in addition to the ordinary payments of principal and interest, the purchase money mortgage should require the payment of a premium of one-tenth of one per cent. per month, no court would hold that such individual was within his rights to make such demand. The

mere fact that the complainant happens to be a Building and Loan Association cannot, it is submitted, affect this situation. Certainly this Court would not permit the complainant to demand from the defendant the payment of a specified sum, say for example, $8,640, in cash at the time of closing. Why, then, may the complainant be permitted to demand such payment over a period of time? It is not provided for in the contract; it is clearly shown not to have been in the contemplation of the parties; and complainant has failed absolutely to prove that the defendant herself consented to such payment.

It therefore appears that the complainant has itself violated its agreement by demanding this monthly premium and therefore is in no position to demand the performance of the alleged contract. As proof of the fact that the defendant was justified in abandoning the contract, after the breach thereof by the complainant in demanding the payment of these premiums, it is necessary merely to refer to the case of *Holt* v. *United Security Life Ins. Co.*, 76 N. J. Law 585, which holds that the repudiation or breach of an agreement by one party dispenses with the further performance of the terms of the contract by the other party.

B. After the bill of complaint was filed in this cause, complainant refused to convey title to the defendant unless there was paid to it the extra sum of $3,300.00 for repairs. It is submitted that a defendant in a specific performance suit may tender himself ready and willing to proceed with the contract even after the filing of the bill of complaint and that if the complainant thereupon refuses to proceed with the contract unless there is paid to him a sum of money not pro-

vided for by the contract, nor in any way contemplated by it, he has therefore breached the contract and may not thereafter compel specific performance.

On page 56 of the State of the Case, defendant's attorney testified that on May 25, 1928, he wrote to the attorney for the complainant saying that he would probably proceed with the closing of title even on the terms insisted upon by the complainant. It might be noted at this point that the Court's stenographer confused the testimony at the bottom of page 56 of the State of the Case. At this part of the testimony, the defendant's attorney was reading from the letter of the solicitor for the complainant which is more correctly set forth as Exhibit D. 3 on page 77 of the State of the Case. Examining the letter, Exhibit D. 3, it will be seen that in response to the letter of the defendant's attorney of May 25, 1928, the solicitor for the complainant answered and said that the B. & L. would not be willing to convey unless the defendant paid the price of $3,300 in excess of the purchase price, this money representing the cost of repairs. Mr. Numann, for the complainant, testifies that this letter referred to a proposition to pass title to the solicitor for the defendant. This is, of course, an absurd construction to put upon the letter which speaks for itself in that its very caption refers to the cause of action which the complainant had or claimed to have against the defendant. It refers not to the defendant's attorney, Thomas L. Parsonnet, but specifically to the defendant herself, Augusta B. Parsonnet, and must therefore be considered as speaking for itself, as referring to the arrangement, whereby the defendant then contemplated going through

with the contract upon the terms as demanded by the complainant.

It therefore appears that subsequent to the filing of the bill of complaint but prior to the filing of the answer, the complainant repudiated the contract by demanding the cash payment of $3,300.00 in excess of the purchase price agreed upon. Although the complainant in its testimony receded from its position in this regard, nevertheless, the decree itself (State of the Case, p. 22, l. 35) requires the defendant to pay for these repairs. Here again, it is submitted that no authority need be cited for the proposition that a vendor of real estate, who has agreed to convey the premises for a specified price may not put the same in repair by expending several thousands of dollars therein and demand payment for the cost of the repairs in addition to the purchase price. This, however, was attempted by the complainant and it is therefore respectfully submitted that the complainant was in default of its contract at that time even if never before and should therefore not be entitled to a decree. It may be argued that the letter of the defendant's attorney of May 25, 1928 (State of the Case, p. 32), waived defendant's objection to the complainant's demand for the payment of premiums. This, however, is not the case, in view of the fact that, as was testified by defendant's attorney, at the bottom of page 55 of the State of the Case and top of page 56, said defendant's attorney was still of the belief that he could induce his mother to enter into the arrangement and for that reason wrote the letter.

III. THE DECREE IS IMPROPER IN ITSELF BECAUSE:

A. IT REQUIRES THE DEFENDANT TO PAY THE PREMIUM ABOVE SET FORTH.

There is a great abundance of authority to the effect that a court cannot change the terms of a contract even for the purpose of rendering it effective. *Degheri* v. *Carobine,* 6 A. R. 290, 140 Atl. 406; *Sica* v. *Home Ins. Co.,* 148 Atl. 170; *Kuskin* v. *Guttman,* 98 Equity 617, affirmed 99 N. J. E. 887. In the *Degheri* case, *supra,* the Court of Errors and Appeals by Kays, *J.,* said: "We are therefore of the opinion that the Court went beyond sound discretion in its decree in this case. Vice-Chancellor Van Fleet in the case of *Ten Eyck* v. *Manning,* 52 N. J. Equity 47, at page 49; 27 Atl. 900, lays down the following principles: 'the remedy by specific performance is not a matter of strict right but of sound judicial discretion, and will be granted or denied as the justice and right of the particular case shall seem to the Court, on full consideration of the rights and equities of the parties, to require.' " The case clearly holds that no Court may take upon itself the power to change the terms of a contract. In the case at bar, a reading of the instrument sued upon will indicate that there was absolutely no contemplation upon the part of the defendant that she would be compelled to pay a premium to the complainant. This premium may be considered in two lights, first—in the nature of usurious payment, and second as a payment of purchase price in excess of the price required by the contract. Neither of these payments, whether it be considered usury or excess purchase price was contemplated by the defendant and to compel the defendant to pay the same is to write into the contract a

provision not included therein and is therefore improper.

B. The decree by its terms requires the defendant further to pay the cost of the repairs, to-wit: The sum of $3,300. This requirement also compels the defendant to do more than contracted for and it is respectfully submitted that the Court erred in requiring such payment. In truth and in fact the complainant in its testimony (see testimony of Mr. Numann, p. 62 of the State of the Case, l. 34), denied making a demand for the payment of these repairs and impliedly waived this demand, which nevertheless and notwithstanding this waiver, is provided for in the decree. It is respectfully urged that the decree should be reversed for this reason.

C. The decree furthermore requires the defendant to pay to the complainant, in cash, one-half of the 1926 taxes, one-half of the first half of 1927 taxes, all of the second half of 1927 taxes and all of the taxes thereafter. It is admitted by the complainant, in fact proven by the complainant itself, that the complainant was to pay all of the taxes for the year of 1926 and the first half of the year 1927, and would add one-half of that amount to the amount of the mortgages to be given by the defendant to the complainant. As part of the agreement (Exhibit C. 1) there must be considered the letter, Exhibit C. 2, set forth on page 71 of the State of the Case, which was offered in evidence by the complainant (p. 35, ll. 18-23); the proposed statement of closing known as Exhibit C. 11 (p. 72) itself shows that these taxes were to be added to the amounts of the mortgages. Notwithstanding this agreement and in spite thereof, the decree requires these taxes and assessments to be paid in cash by the defendant. This is a

wholly improper and erroneous modification of the contract by the parties and the decree should be reversed for this reason.

IV. THE DECREE IS FURTHER ERRONEOUS IN THAT:

A. It requires the defendant to pay to the complainant certain taxes and sewer assessments which it sets forth specifically whereas, in truth and in fact, there is no evidence of the existence of such taxes and assessments. The decree (p. 23, ll. 4-9) specifies that the defendant pay to the complainant in cash, the sum of $3,501.30 "which represents one-half of the total of 1926 taxes, the first half of the 1927 taxes and two sewer assessments plus the second half of 1927 taxes, all of the taxes for the years 1928 and 1929 with interest from January 21, 1928." Nowhere at any part of the State of the Case, is there any reference made to any sewer assessments; nowhere is there any reference made to taxes for the years 1928 or 1929. The amounts are not proven and are in fact unknown to this defendant. Any statement which might have been made by the complainant to the Court which was not subject to cross examination cannot be made the basis of a decree. This defendant is unaware of the existence of any sewer assessments; this defendant is further unaware of the amount of 1928 or 1929 taxes; there is in fact, no proof as to the amount of taxes for the years 1926 and 1927, although for the purposes of this case, it has been assumed by the defendant that the statements of the complainant as to their amounts are accurate. This defendant-appellant does, however, respectfully urge that the decree is improper and erroneous in that it requires her

to pay specific items which are not proven or in any way set forth in the evidence, and which are not even shown to have been paid by the complainant.

B. The decree further requires this defendant-appellant to execute and deliver to the complainant three bonds which would render this defendant-appellant personally liable to the complainant in the sums of $11,000, $11,000 and $11,500 respectively, bearing the penal sums of $22,000, $22,000 and $23,000 respectively. This also is a modification of the contract between the parties at the will of the Court, there being no agreement whatsoever shown in the contract or in the evidence, whereby the defendant-appellant agreed to execute such bonds. It is not true that bonds are a necessary adjunct of mortgages. Although almost invariably mortgages are given simply as security for the payment of personal debts, nevertheless, the indebtedness may be an indebtedness which is to be considered purely a lien upon the building and where there is no agreement to execute a bond it is respectfully contended that the Court may not imply such an agreement. As adequate proof of the fact that a mortgage may be perfectly valid and binding in the absence of a bond which it secures, it is necessary merely to refer to cases holding that a deed given as security for the payment of monies is to be construed simply as a mortgage. See *Vanderhoven* v. *Romaine,* 56 N. J. E. 1, and many other cases. It will be noted that the alleged agreement at no point requires this defendant to execute a bond, but simply requires the execution of a mortgage. The decree, disregarding this point entirely, not only requires the defendant-appellant to execute bonds, but requires these bonds to be executed in the penal

sums of $22,000, $22,000 and $23,000 respectively. It is urged that there is utterly no justification for this provision in that such requirement is a bare-faced effort on the part of the complainant to cause to be read into the contract provisions which never were actually included, or intended to be included in the agreement. It is therefore contended that the decree is erroneous on this ground and should be reversed.

V. THE COMPLAINANT WAS NEVER READY OR WILLING TO COMPLY WITH THE ALLEGED AGREEMENT.

As part of the conditions which the complainant set as conditions precedent to the closing of title regardless of the terms of the contract were the following requirements: First, that this defendant should execute bonds as above set forth. Second—that this defendant should agree to pay the sum of $35.00 a month as premiums. Third, that this defendant should pay dues for the months of February and March, interest for the month of March, premium for the month of March, and the second half of the taxes for the year 1927. These demands were made upon the defendant as indicated by Exhibit C. 11. It is respectfully submitted that none of these demands was contemplated by the contract and that since the complainant never receded from these demands, but always insisted upon them, it was never ready and willing to proceed in accordance with the terms set forth by the alleged contract, Exhibit C. 1. The rule of law is well established that one may not sue for specific performance without previously making a tender of performance himself, in conformity with the contract. *Biddle* v. *Coryell,* 18 N. J. L. 377; *Bidwell* v. *Garrison,* 36 Atl. 941 (not officially re-

ported) where the Court holds for the defendant in that the vendor did not tender performance in accordance with the contract which required the determination of the acreage of the tract to be sold, by a survey. Although it may be true in certain cases that a tender of performance in accordance with the contract is waived by some act of the defendant, nevertheless, the complainant in this case never tendered itself ready and willing to perform in accordance with the contract. It always insisted upon the payment of the premiums above set forth; it always insisted upon the execution of the bonds personally by the defendant; it always insisted upon the payment of the so-called "back-shares" for the months of February and March and interest from the month of March 1928; it always insisted upon the payment in cash of the taxes for the last half of the year 1927 which it claimed to have paid, whereas the contract did not require that these taxes be paid to the complainant.

It later insisted in addition to the above payments and in addition to the requirement of payment of premiums and in addition to the demand for the execution of bonds that the defendant pay the sum of $3,300.00 for repairs. This latter demand was apparently waived during the trial of the cause, but was nevertheless included in the decree. It therefore appears that the complainant was never ready or willing to comply with the agreement and never tendered performance in accordance with the agreement, but in truth and in fact violated the agreement itself. It being a condition precedent to the right to specific performance that a tender be made in accordance with the terms of the contract, it is therefore urged that the decree for specific performance was erroneous because such proper

tender was never made, and further because the complainant expressed its unwillingness to convey in accordance with the terms of the contract.

VI. THE COURT ERRONEOUSLY ADMITTED CERTAIN EVIDENCE OVER OBJECTION.

During the course of the trial (page 41 of the State of the Case) there was admitted in evidence over objection, testimony of John W. Numann, to the effect that the complainant has as its custom, the rule that borrowers must take out shares and pledge them as security for loans. On page 42, further, over the objection of the defendant, the said Numann testified that there is a charge at the rate of $.10 per $100 monthly for premium. This testimony which was given by Mr. Numann on pages 41 and 42 of the State of the Case was improperly admitted as being immaterial and incompetent. The fact that this particular complainant charges premiums in a certain matter can certainly not bind the defendant. It was not shown that this custom of the complainant was brought home to the defendant at the time of the execution of the agreement and there is nothing in the contract referring to the payment of premium. There is no proof that the custom of this particular complainant was the custom of all Building and Loan Associations, but in truth and in fact, there is proof on the part of the defendant (page 55 of the Case, line 7) that the custom of this particular association with reference to premiums is contrary to the usual custom of Building and Loan Associations. The case of *Steward* v. *Scudder,* 24 N. J. L. 96, is authority for the proposition, holding that usage cannot be allowed to explain or limit a contract unless it

be certain, uniform and notorious so that it must have been known by the parties and formed a part of the contract. It is clear that the custom of this particular association in charging monthly premiums is neither certain, uniform, or notorious and could not have been in the contemplation of the parties unless brought home to them. It is therefore submitted that the Court erred in admitting this testimony over the defendant's objection and that the decree based upon this testimony is erroneous and should be reversed.

In summation therefore, it is respectfully urged that the decree for the specific performance should be reversed on the grounds hereinbefore set forth, namely, first—that the alleged agreement constituted no contract and is unenforceable because there is a lack of consideration; because there is a total want of mutuality; because the contract is in violation of public policy; because it was not intended to bind the defendant and because it is too vague, indefinite and incomplete. Second—the contract was violated by the complainant in that the complainant demanded the payment of the premiums above set forth and the payment of an extra sum of $3,300 in addition to the purchase price. Third—the decree is improper in that it requires the defendant to pay the said premium, to pay the cost of repairs and further, it requires the defendant-appellant to pay in cash, one-half of the taxes for the year 1926 and one-half of the first half of the year 1927, when as a matter of fact, as is admitted by the complainant, this amount was to be added to the amount of complainant's mortgage. Fourth—the decree is further erroneous in that it requires defendant-appellant to pay certain taxes and sewer assessments which it definitely sets forth, of which

there is no proof, and in that it requires the defendant to execute the bonds making herself personally liable to the complainant on said bonds, when there is no requirement to that effect in the contract. Fifth, the complainant was never ready and willing to perform according to the contract, and Sixth, because the Court erroneously admitted evidence to the effect that the charging of monthly premiums is the custom of the complainant, which such evidence was immaterial and incompetent to the issue, and was prejudicial to the interests of the defendant.

For all of which reasons, your defendant respectfully urges that the decree of the Court of Chancery in this cause be set aside, reversed, and for nothing holden.

Respectfully submitted,

THOMAS L. PARSONNET,
Solicitor for and of Counsel with
Defendant-Appellant.

23 MAY.T.1930

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

New Jersey Court of Errors and Appeals

Between

ACQUACKANONK BUILDING AND LOAN ASSOCIATION, Passaic, N. J., a corporation of New Jersey,
Complainant-Respondent,

and

AUGUSTA B. PARSONNET,
Defendant-Appellant.

On Bill, &c.

On Appeal from Chancery.

REPLY BRIEF OF DEFENDANT-APPELLANT.

The brief submitted by complainant-respondent contains certain matter which in the opinion of the appellant requires refutation, in view of the fact that this appeal is being submitted on briefs.

In the first place the respondent contends that the appellant's points to the effect that the contract lacks mutuality and that it is void as against public policy are not included in the appellant's grounds of appeal. This appellant respectfully calls to the attention of the Court the fact that the first ground of appeal set forth in the petition, namely, that the alleged contract was no contract and was without consideration as regards this appellant covers both of these grounds of appeal. If a contract is void being in violation of public policy, it is no contract. It is respectfully submitted that the brief of the appellant has sustained the charge that this contract is in violation of public policy and that

it is therefore a void contract, or in other words no contract. Respondent in discussing this point says that there is no testimony to the effect that it was agreed that the respondent should secure title upon the Sheriff's Sale at as low a price as possible. On page 49 of the State of the Case, beginning at line 22, the attorney for the appellant testified:

> "We, therefore, made an arrangement to settle with all of these parties, and instead of my bidding in at the Sheriff's Sale, it was arranged that the Building & Loan Association would purchase the properties and turn it over to me as provided for in the contract."

Appellant urges that this testimony is proof of the contention as set forth by the appellant. It is a natural consequence that the agreement of the appellant to refrain from bidding carries with it an implied understanding that the properties would be purchased by the respondent at as low a price as possible. It is, of course, a matter of record that the properties were purchased for $100 each. Respondent in its brief attacks appellant's attorney personally on this point, but it appears from the testimony as above shown, that the agreement was actually made, and there was no testimony to contradict it.

As to the point that the contract lacked mutuality this is also covered in the petition of appeal by the first ground: that the alleged contract was no contract and was without consideration as regards this appellant. It is urged that the allegation that the contract was no contract as regards this appellant is practically the same as an allegation that the contract was unenforceable as against this appellant, and one of the reasons why the contract was unenforceable is that there was no mutuality of obligation

or of remedy. Respondent makes no effort of any sort to disprove the contention that the contract did lack mutuality, but relies upon the purely technical evasion that the solicitor for the appellant failed to include this point as one of his grounds of appeal. Appellant respectfully urges that even if the petition of appeal does not specifically cover this point, appellant should not be penalized by reason of her solicitor's omission more specifically to refer thereto. Respondent had ample opportunity to answer appellant's argument on this point after the receipt by it of appellant's brief. However, perhaps because this point was found to be unanswerable, respondent attempted to circumvent it by saying that it was not one of the grounds set forth in the petition of appeal. Appellant respectfully prays that she be not foreclosed of her opportunity to press this contention because it may not have been specifically set forth in the petition and urges that the allegation in the petition of appeal that the contract was no contract as regards this appellant, may be construed to cover this particular ground of appeal.

Respondent claims that it did not violate the terms of the contract and contends that appellant "presumably" knew that premiums would be charged. Respondent apparently intentionally misconstrued the testimony on behalf of the appellant and attempted to show that the words "as it was understood by me from the very beginning that no premium would be charged" are indicative of the fact that there was a discussion about premiums before the time when there was an attempt to close the title. It is unfair to attempt this construction especially in view of the testimony of its own witness, John W. Numann, who infers that the first and only

time the premium was discussed was at the date when the closing of title was attempted. It is apparent that the premiums were not discussed previous to that time. Furthermore, it is immaterial whether they were or not; as contended in appellant's brief, the attorney for the appellant is not shown to have been authorized to consent to the payment of these premiums. There is no evidence in the case to show that the previous mortgages held by complainant-respondent provided for the payment of monthly premiums and no evidence to show that if they did this defendant-appellant was aware of the fact. She cannot be presumed to have known it and cannot certainly be presumed to have consented impliedly to the payment of premiums of which she was not aware.

Respondent's brief suggests that it is significant that the appellant herself did not appear and testify. This fact is very easily explained: It appears from the testimony that she never had any direct dealings with complainant-respondent. She could not have testified to anything; any testimony that she might have given about conversations or understandings would have been excluded because such conversations or understandings were not had in the presence of anyone representing the complainant-respondent and therefore could not have been binding upon complainant-respondent. Respondent in its brief refers to the testimony of Mr. Numann, page 43, lines 18 to 24, where Numann denied that the attorney for the defendant-appellant was not sure whether his mother would sign the bond and mortgage and said that the only thing that held up the passing of title was the sum of money which was to be produced in a day or so. This testimony of Mr. Numann's is ex-

pressly contradicted by his own attorney, Mr. Hart, who testified on page 34, line 36, that "Mr. Parsonnet stated that he required further time to explain the proposition to his mother. He had to satisfy his mother as to the value of the property." Mr. Numann is expressly contradicted by his own attorney who was present at the conference.

Respondent urges that appellant should have applied to the Court of Chancery to amend the decree. Certainly this would have been a novel procedure. Respondent wants this appellant to appear before a Vice-Chancellor who has decided a certain matter in a certain way and has ordered this appellant to perform certain acts, and to ask that Vice-Chancellor to change his mind and amend his decree. Respondent cites the case of *Whyte* v. *Arthur*, 17 N. J. E. 521-524, in support of this contention. That case merely holds that a recital in a decree as to the state of the pleadings in the cause is presumptive evidence that the pleadings in the court below were as stated by the decree. It is not at all authority for the proposition that an appellant before appealing an erroneous decree should ask the Vice-Chancellor or the Chancellor to amend the decree. The errors contained in the decree affect, not facts in the record, but the rights of this appellant. They are not misstatements of fact but are misstatements and misapplications of the law. If this contention of respondent were correct, it would operate to deny to the aggrieved party the right to appeal.

Respondent does not touch upon certain errors complained of, namely: That the decree specified the amounts of 1928 and 1929 taxes without having any evidence proving these amounts; that the decree requires the execution of bonds which

were not provided for in the contract; that the decree requires the defendant to pay in cash the 1927 taxes and one-half of the 1926 taxes in spite of the agreement by complainant-respondent indicated by Exhibit C. 2, that these amounts were to be paid by it and added to the amounts of the mortgages.

As to the testimony which was improperly admitted, respondent contends that since no jury was present, the evidence was harmless. It forgets that it is upon this evidence that the Court ordered the payment of premiums at the rate of $35.00 a month, although these premiums are not provided for in the contract. Respondent contends that the requirement for the payment of these premiums should be implied, but in this contention, overlooks the case of *Degheri* v. *Carobine*, 6 A. R. 2, 892, 140 Atl. 406, and the case of *Sukman* v. *Ihle*, 100 N. J. E. 598, which hold that the Court cannot imply provisions of a contract so as to make it enforceable and that if the contract is incomplete in itself it cannot be enforced. The testimony as to the custom of the Building & Loan Association to charge premiums was entirely immaterial to the issue and incompetent; nevertheless, since these premiums were, by the decree, required to be paid this testimony of course influenced the court below in making the decree.

The brief of the respondent says that the claim of the appellant that the contract was not intended to bind her is not supported anywhere in the State of the Case. On page 26 of the State of the Case, line 30, the attorney for the defendant-appellant said,

> "The sole purpose of this was to settle a dispute which was made against the Building & Loan Association. In other words,

> we gave all our rights to the Building & Loan Association and the only right we received in return was the right to repurchase. And for these reasons, I contend that this contract is not valid and binding upon the defendant."

The claim therefore is not wholly unfounded and an examination of the history of the transaction will indicate most clearly that such was the intention of the appellant. It has been held in many cases cited in appellant's brief that a decree for specific performance is within the sound discretion of the Court and that where any doubts remain in the mind of the Court as to whether such a decree shall be made, even though the contract may be valid at law, such doubts will be resolved in favor of the defendant.

Respondent makes a point of the fact that the attorney for the appellant was not sufficiently concerned about his objections to reduce them to writing. Appellant insists that it is entirely unnecessary to reduce such objections to writing and that the mere fact that the attorney for appellant felt that she should take title in spite of the respondent's violation of the contract cannot affect the appellant's rights. It will be noted that although appellant's attorney did not reduce his objections to writing he did, nevertheless, make his objections clear by oral conversation. However, whether he made his objections clear or not is immaterial. The fact remains that the Building & Loan Association violated its contract and was not ready and willing to perform it.

In conclusion, it is submitted that respondent has failed utterly to answer or explain a way any of the cases supporting the principal charges set forth in appellant's brief, namely that there was no mutuality; that the contract was against

public policy; that it was so vague, indefinite, and incomplete as to be unenforceable; that the complainant was not ready and willing to comply with the terms of the alleged contract and violated its terms by demanding the premium and $3,300.00 for repairs; that the decree is improper in that it requires the payment of the premium and of the repairs and of the 1926 and 1927 taxes in cash, requires the payment of certain taxes and sewer assessments not justified by the evidence, and requires the execution and delivery of bonds not provided for by the contract.

Respectfully submitted,

THOMAS L. PARSONNET,
Solicitor for and of Counsel with
Defendant-Appellant.

23 MAY.T.1930

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

New Jersey Court of Errors and Appeals

Between ACQUACKANONK BUILDING AND LOAN ASSOCIATION, PASSAIC, NEW JERSEY, *Complainant-Respondent,* *and* AUGUSTA B. PARSONNET, *Defendant-Appellant.*	*On Bill, etc.* *On Appeal from Chancery.*

BRIEF OF COMPLAINANT-RESPONDENT.

Statement of Case.

The Respondent had granted three mortgage loans to one Costello as owner, upon three certain properties in Lyndhurst, New Jersey. The Appellant held a second mortgage covering these same properties. The owner had absconded and Respondent had been obliged to institute foreclosure on all of its said mortgages. The Appellant was made party defendant and certain lien claimants were also parties defendant and questions of priority had been raised by the answering defendants, including Appellant and lien claimants. The houses affected were incomplete and unoccupied. A protracted and troublesome litigation was in prospect. In an effort to avoid the delay, expense and loss necessarily attendant upon a protracted and troublesome litigation, the Appellant and Respondent conferred, with the result that on or about September 7, 1927, an agreement in writing was entered into, set forth as Exhibit C. 1 (State of Case, pp. 68-69-70).

Subsequently, in January, 1928, Respondent obtained title to the premises from the Sheriff of Bergen County under its foreclosure suits and called upon the Appellant to perform the agreement of September 7, 1927.

The Appellant refused to perform and on May 9, 1928, the bill of complaint in this cause was filed in the Court of Chancery, asking that the Appellant be called upon to specifically perform the said agreement.

ARGUMENT.

Appellant, in her petition of appeal, has specified nine grounds (State of Case, p. 3, ll. 11 to 37 inclusive). Her argument here must be limited to those grounds. Statements, both factual and argumentative in Appellant's brief, not germane to those grounds, may not be considered.

In the absence of a concise statement of Appellant's grounds of appeal in Appellant's brief, it may be helpful to state them here. They are:

1. That the alleged contract was no contract and was without consideration as regards this Appellant.
2. That the terms and provisions of the said alleged contract were violated by the Complainant-Respondent.
3. That the decree aforesaid requires the said Appellant to pay a greater amount than agreed upon in the alleged contract, in that it requires the payment, in addition to the contract price, of a premium at the rate of One Dollar per One Thousand Dollars of the mortgage loan.
4. That it affirmatively appears by the proofs that Complainant-Respondent itself violated the terms of the said contract by requiring the payment of a price in excess of that stipulated by the said alleged contract.

5. That said decree required your petitioner to pay to the Complainant-Respondent a price in excess of that stipulated by the said alleged contract.
6. That it appears affirmatively by the testimony that Complainant-Respondent was never ready and willing to comply with the terms of the alleged contract and itself breached the said alleged contract.
7. There was admitted certain testimony to which reference will be made at a later date, over objection, which said testimony was improperly admitted to the prejudice of this petitioner.
8. That said Court excluded certain testimony on behalf of this petitioner erroneously and to the prejudice of this petitioner.

Only the first seven grounds of appeal may be considered, inasmuch as the Appellant has apparently herself abandoned the eighth ground. As a matter of fact, the record does not show that the Court below excluded any testimony and the Appellant does not make any reference in her brief to this ground of appeal.

The First Ground of Appeal is without substance.

The purpose of the contract is obvious. It was made for the mutual advantage of the parties to it. It was designed to avoid a long and costly litigation; to enable Respondent to speedily complete its foreclosure suits and at the same time to protect the Appellant's interest.

The only witness produced for the Appellant in the Court below was her attorney, who is also her son. On cross examination, his testimony is, in part, as follows:

Q Now, when this agreement was made by you on behalf of your mother, you thought

that the properties taken over by your mother could be sold or used to advantage in a trade, so that she might recover something from these properties on account of her mortgage indebtedness; is that so? A Yes.

Q That was your purpose in her behalf in making this deal? A It was to protect her money (State of Case, p. 58, ll. 30 to 40).

Q And this contract was made in order that your mother might become a purchaser without the effort of putting up cash or without the expense of borrowing money elsewhere; isn't that true? A Yes (State of Case, p. 59, ll. 17 to 21).

The direct testimony of Mr. Parsonnet is to the same effect (State of Case, p. 49, ll. 12 to 27 inclusive):

"That if we could secure a settlement with the various mechanics' lien claimants for a specified price, as set forth in the contract, we would be willing to waive any and all rights that we might have against the Building and Loan Association and let the Sheriff's sale go through. The claim of Martin Jensen had already gone to judgment and we were all afraid that there would be a sale on that judgment of these properties which might cause serious inconvenience to all of us. We therefore made an arrangement to settle with all of these parties, and instead of my bidding in at the Sheriff's sale, it was arranged that the Building and Loan Association would purchase the properties and turn it over to me, as provided for in the contract."

Mr. Parsonnet, in filing the answer for his mother, the Respondent (State of Case, p. 14) and in his brief in her behalf in this court makes the claim that the contract was not intended to bind the Respondent but contemplated a situation in which she, at her option, might or might not take title. But there is absolutely no testimony to that effect. Mr. Parsonnet, his mother's only

witness, does not say so himself. We submit that such a claim is wholly unfounded and obviously unreasonable. The contract plainly shows that it was entered into for the mutual advantage of the parties to it, and is thus supported by adequate consideration.

Respondent did not violate the terms and provisions of the contract, and called upon Appellant only for reasonable performance.

The contract called upon the Appellant to execute to Acquackanonk Building and Loan Association (Respondent) new first mortgages. Twice in the contract these mortgages are referred to as "new first mortgages." That is, they were mortgages to take the place of those under foreclosure, and were to be of the same form. It is a reasonable assumption that Appellant knew what that form was. She held a second mortgage and was a party to the foreclosure suits. Through her son and attorney, she was participating in conferences and discussions as to how the vexed and complicated situation existing might be cleared up. Presumably she knew how Respondent's mortgage claims on these several properties were made up and that its practice of charging dues, interest, premiums and fines was discussed.

Mr. Parsonnet's testimony so indicates. In his direct testimony (State of Case, p. 55, ll. 2, 3 and 4) he says: "as it was understood by me from the very beginning that no premium would be charged." It is true that he rather inconsistently states, about ten lines below, that—"It was the first time that I had contemplated the payment of any premium."—but it is more reasonable to accept the view that the matter had been considered and that the usual terms of the

Building and Loan mortgage had been agreed upon.

That the settlement proposed and urged by Respondent was favorably regarded by Mr. Parsonnet, acting for his mother, appears from his own statements in the testimony:

> "I subsequently advised my mother that this settlement was a good one and that she would have a chance to recover all her money if she went through with it, and for that reason I was very anxious to put the deal through" (State of Case, p. 54, ll. 33-38).
>
> "I urged her to complete the deal even as it stood, because I thought the properties well worth while, but she refused it" (State of Case, p. 55, l. 40 and p. 56, ll. 1 and 2).
>
> "I will be in a good position to perform our arrangement" (State of Case, p. 56, ll. 16 and 17).
>
> "When the bill of complaint was served upon my mother I immediately communicated with her and told her she was being sued for specific performance and I told her that, under the circumstances she ought to very seriously consider, or reconsider, the proposition. She told me she had and she might go through with it" (State of Case, p. 65, ll. 39 and 40; p. 66, ll. 1-5).

Mr. Parsonnet was not sufficiently concerned about his objections to reduce them to writing (State of Case, p. 60, ll. 1-10). Furthermore, it is significant that the Appellant herself did not appear and testify. She resided in Newark, New Jersey and no reason for her absence is given.

Mr. John W. Numann, Secretary of Respondent Company, and a witness in its behalf, contradicts Mr. Parsonnet with regard to his objections, in the following testimony, on cross examination:

> "Q Do you remember that we had a discussion at that time concerning the pre-

mium? A Not a discussion. There was an explanation of the items on this statement that is prepared here, which was discussed and explained to your satisfaction.

Q Do you remember that I objected to the payment of the premium? A Absolutely not" (State of Case, p. 44, ll. 3-13).

"Q Do you remember I left the office at that time, saying I was not sure whether my mother would sign the bond and mortgage? A My recollection is, the only thing that held up the passing of title at that time was the sum of $871.04 which was to be produced most likely the next day or so" (State of Case, p. 43, ll. 18-24).

Mr. Parsonnet made no move to have the decree amended by the Court of Chancery in the respects in which he here alleges it to be erroneous. The final decree was filed on or about October 28, 1929. The petition of appeal was filed December 10, 1929. At no time has Appellant made application for amendment, and so is bound here by the recitals of the final decree.

Whyte v. *Arthur*, 17 N. J. Eq. 521, 524.

If those recitals are not true, application should have been made to the Court of Chancery to amend the decree according to the facts.

In this case the closing date of the contract became January 31, 1928. The Appellant defaulted. When the final decree was entered in the Court of Chancery on or about October 28, 1929, it was entirely proper that the Appellant should be called upon to settle and pay as of the proper closing date, viz.: January 31, 1928. This is not only in line with plain principles of justice, but is also consistent with the procedure laid down in this state.

St. John the Baptist &c. v. *Baron, et al.*, 73 Atl. Rep. 422.

It was entirely proper therefore that the Appellant should be called upon to pay the 1928 and 1929 taxes, and we submit that it was entirely proper, too, that the decree should contain the following provision:

> "And it is further ordered, adjudged and decreed that the rents of said premises, insurance premiums, water rents, taxes, dues, interest and monthly premiums, assessment and repairs, if any, shall be adjusted, apportioned and allowed as of January 31, 1928" (State of Case, p. 22, ll. 32-37).

To have decreed otherwise would have been to permit Appellant to profit by her own default.

The foregoing, under this title, we submit as a discussion of Appellant's grounds of appeal 2 to 6 inclusive.

The testimony admitted by the Court below over objection of Appellant, was properly admitted and was not prejudicial to her.

The testimony complained of, appears on pages 41 and 42 of the State of Case. It had to do only with an explanation by the Respondent of the figures submitted by it in connection with the attempted closing of the title. No jury was presen and the learned Vice-Chancellor undoubtedly gave to the testimony only such weight and importance as it was entitled to.

We have not discussed certain points raised by Appellant in her brief under the captions "the contract lacks mutuality" and "the contract is void as against public policy," because we do not conceive that those points are included in Appellant's grounds of appeal and because, also, it seems to us, that they utterly lack substance. Respondent's demand upon Appellant for performance and the filing of its bill in this cause

clearly established its election not to withdraw from the contract; and so far as public policy is concerned, the agreement is in every respect proper and legitimate; we submit that it hardly lies in the mouth of the Appellant, a party to the agreement and present at the sale itself, through her son and attorney, to raise this objection and that it might fairly be deemed reprehensible for her attorney, in his brief in this cause (p. 18 thereof), in his zeal to press this point, to assert that his testimony in the case was

> "to the effect that, as part of the agreement, it was agreed that the defendant should not bid upon the property in order to permit the complainant to secure title upon the Sheriff's sale at as low a price as possible."

There is no such testimony as the attorney, himself the sole witness, should know.

Respectfully submitted,

VERNET A. ARNOLD,
Solicitor for Complainant-Respondent.

HENRY C. WHITEHEAD,
Of Counsel.