INDEX.

New Jersey Court of Errors and Appeals

IN CHANCERY OF NEW JERSEY.

57-84.

Between: WESTERN REALTY COMPANY, Complainant, AND LOUIS KASSOFF, *et ux*, Defendants.	On Bill to Foreclose.

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Order Dismissing Answer and Counterclaim.

This matter coming on to be heard in the presence of John N. Platoff, solicitor of complainant of William F. Burke, John H. Sheridan, of counsel, solicitor of defendants, Louis Kassoff and Nettie Kassoff; and the court having read the affidavits and exhibits presented on behalf of complainant and the affidavit presented on behalf of the defendants, and having heard the arguments of the said solicitors, and it being of the opinion that the answer filed by the defendants, Louis Kassoff and Nettie Kassoff, discloses no legal defense to the bill of complaint and is sham and frivolous; and that the counterclaim filed by the said defendants discloses no cause of action and is sham and

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frivolous with respect both to the First Cause of Action and the Second Cause of Action.

And it appearing that due notice of the said complainant's motion to strike out the said answer and counterclaim for the cases aforesaid, has been given to the said defendants;

10 It is thereupon on this 8th day of October, 1925, ORDERED, ADJUDGED AND DECREED that the answer of the defendants, Louis Kassoff and Nettie Kassoff, be and the same is hereby stricken out, and that the bill of complaint be taken as confessed against the said defendants, Louis Kassoff and Nettie Kassoff;

And it is further ORDERED that the counterclaim filed by the defendants, Louis Kassoff and Nettie Kassoff, be and the same hereby is dis-
20 missed;

And it is further ORDERED that the said defendants pay to complainant, the costs of this motion to be taxed, and also the sum of Fifty Dollars as a special counsel fee on this motion to be taxed in the costs.

Respectfully advised,

JAMES F. FIELDER.

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I hereby approve the foregoing order as to form only.

WM. F. BURKE,
Solicitor of Defendants.

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Bill to Foreclose, Complaint.

IN CHANCERY OF NEW JERSEY.

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

The complainant, Western Realty Company a corporation of the State of New Jersey, having its principal office in the Town of Union, Hudson County, New Jersey respectfully shows that:

1. On August 4th, 1924, Louis Kassoff, being indebted to Western Realty Company in the sum of Seventy-five Hundred ($7,500) Dollars, executed to it, a bond of that date to secure that sum, payable on August 4, 1928, with interest at the rate of six per-centum per annum, payable quarter yearly on the first days of January, April, July and October of each year the said mortgage is to run, the first payment of said interest to have been made on the first of said interest days next succeeding the date thereof.

2. To secure payment of the bond, said Louis Kassoff executed to said Western Realty Company, a mortgage of even date with the bond; and thereby conveyed to it, in fee, the land hereinafter described, on the express condition that such conveyance should be void if payment should be made according to the terms of the bond. Which mortgage having been first duly acknowledged, and the certificate of acknowledgement duly endorsed thereon, was recorded in the office of the Register of the County of Hudson in book 1247 of Mortgages, page 493.

3. The said mortgage was a purchase money mortgage executed by the said Louis Kassoff to

the said complainant in part payment of the consideration for the premises hereinafter described, conveyed on the fourth day of August, 1924, by complainant to the said Louis Kassoff.

4. The mortgaged premises are described as follows:

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All that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Town of West Hoboken, in the County of Hudson and State of New Jersey, which on a certain map entitled "Official Map of the Town of West Hoboken, County of Hudson, New Jersey, made by Sebastian Maulbeck, 1906" and shown in County Block #2037, is marked, known and designated as part of lot numbered four (4) in block numbered ninety-one (91) and particularly described as follows:

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Beginning at a point in the northwesterly side or line of Bergenline Avenue (formerly known as Spring Street) opposite the center line of a two story frame party wall standing partly on the premises herein described and partly on the premises adjoining the same on the southwest, said point being distant eighty-one and one-tenth feet (81.10′) northeasterly from the northwesterly corner of Bergenline Avenue (formerly known as Spring Street) and Malone Street; running thence (1) north fifty-four degrees fifty-two minutes, twenty-six seconds West (N. 54° 52′ 26″ W.) to, through and beyond the center line of the hereinbefore mentioned two

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story frame party wall, one hundred (100′) feet to a point; running thence (2) north thirty-four degrees, fifty-nine minutes East (N. 34° 59′ 00″ E.) eighteen and sixty-eight one-hundredths feet (18.68′) to a point; said point being the northwesterly corner of lot numbered four (4) block numbered ninety-one (91) as shown on the map hereinbefore mentioned; running thence (3) south fifty-five degrees East (S. 55° 00′ 00″ E.) and along the northeasterly side or line of the said lot numbered four (4), on the aforementioned block and map, one hundred feet (100′) to the northwesterly side or line of Bergenline Avenue (formerly known as Spring Street), said point being known as the northeasterly corner of the said lot numbered four (4), in the aforementioned Block and Map; running thence (4) south thirty-four degrees fifty-nine minutes West (S. 34° 59′ 00″ W.) and along the northwesterly side or line of Bergenline Avenue (formerly known as Spring Street) eighteen and nine-tenths feet (18.90) to the point or place of beginning.

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

6. On October 1, 1924, an installment of interest fell due on complainant's bond and mortgage and remained unpaid for more than thirty

days thereafter and no part thereof has yet been paid.

7. Both bond and mortgage contained an agreement that should any tax or assessment be imposed upon the premises described in the said mortgage and become due and payable and remain unpaid and in arrear for the space of ninety days, then at the option of the said mortgagee, the whole principal sum of the said mortgage should become due and payable immediately thereafter.

8. On June 1, 1924, taxes for the first half of the year 1924, became due and payable and remained unpaid and in arrear for the space of ninety days thereafter and no part thereof has yet been paid.

9. Complainant has elected that the whole principal sum with all unpaid interest shall be now due.

10. Said Louis Kassoff is married, and his wife's name is Nettie. Any claim or interest she may have, by way of inchoate right of dower, or otherwise, is subject to complainant's mortgage.

11. Said Louis Kassoff and Nettie Kassoff or one of them, has always been in possession of the mortgaged premises.

12. The whole amount of principal with interest thereon from August 4, 1924, is due upon complainant's bond and mortgage.

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

1. That Louis Kassoff and Nettie Kassoff who are the defendants to this suit, may answer this bill of complaint and each statement therein made.

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2. That an account may be taken of the amount due on complainant's mortgage.

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

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

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

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JOHN N. PLATOFF,
Solicitor for and of counsel with complainant.

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Answer and Counterclaim.

IN CHANCERY OF NEW JERSEY.

Between: WESTERN REALTY COMPANY, a corporation of New Jersey, Complainant, AND LOUIS KASSOFF, *et ux*, Defendants.	On Bill, &c.

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The answer of the defendants, Louis Kassoff and Nettie Kassoff, his wife, and the counterclaim of Louis Kassoff, against the complainant.

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The defendants, Louis Kassoff and Nettie Kassoff, his wife, answering the bill of complaint, say that:

FIRST DEFENSE:

1. They admit the making of the bond referred to in Paragraph 1, but deny that said bond contains any condition or agreement for the payment of the interest on the first days of January, April, July and October in each year or that the first payment of interest was to be made on the first of such interest days succeeding the date of said bond.

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2. Paragraphs 2, 3, 4, and 5 are admitted.

3. They deny paragraph 6.

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4. They admit paragraph 8 and say that any taxes on said premises payable on June 1st,

1924, were imposed before the making and delivering of said mortgage and said taxes have since been paid by these defendants.

5. Paragraphs 9 and 12 are denied.

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SECOND DEFENSE:

1. On June 19th, 1924, complainant entered into an agreement in writing with defendant, Louis Kassoff, a copy of which is hereto annexed, marked Exhibit "A" and made a part hereof.

2. On August 4th, 1924, title to the premises referred to in said agreement was passed and these defendants executed and delivered to complainant four bonds and mortgages as provided in said agreement. It was not agreed that said bonds and mortgages should contain any provision for the payment of interest in any manner other than that mentioned in said agreement and if it appears in said bond or mortgage that said interest was to be paid on the first days of January, April, July and October, the same was inserted inadvertently and by mistake and without the assent or knowledge of these defendants or either of them.

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3. Before the commencement of this suit, defendant, Louis Kassoff, tendered to complainant, the sum of $112.50, three months' interest on said mortgage but complainant refused to accept the same.

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4. Before the commencement of this suit, complainant informed defendants that it, complain-

ant, would not accept payment of any sum for interest on said bond and mortgage.

By way of counterclaim against complainant, the defendant, Louis Kassoff, says that:

10 1. Paragraph 1 of the Second Defense is repeated as though set forth herein at length.

2. In and by said contract the lands and premises which complainant therein agreed to convey to this defendant were to be about 88 feet in width.

3. On August 4th, 1924, complainant conveyed certain lands to this defendant purport-
20 ing to be the premises described in said contract and this defendant paid to it the consideration money agreed by him to be paid and executed and delivered to it four bonds and mortgages aggregating $30,000.

4. Since said day, this defendant has ascertained that the lands so conveyed to him by complainant are only 75 feet in width.

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SECOND CAUSE OF ACTION:

1. Paragraph 1 of the Second Defense is repeated as though set forth at length.

2. At and prior to the making of said contract, complainant by its officers and agents, to induce this defendant to purchase said premises and to pay the consideration therefor, falsely
40 and fraudulently represented to this defendant that said premises, described in said contract, were eighty-eight feet in width in front and rear.

3. This defendant relying on said representations and believing them to be true, entered into said contract.

4. On August 4th, 1924, this defendant, still relying upon said representations and believing them to be true, purchased said premises and paid the consideration therefor agreed to be paid in and by said contract.

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5. Said representations were false and untrue and complainant well knew them to be false and untrue and said premises are only seventy-five feet in width in front and rear, as complainant well knew.

This defendant, therefore, prays:

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1. That said complainant may answer this counterclaim and each statement herein made;

2. That complainant may be decreed to make to this defendant a proper allowance or rebate on the purchase price for said premises because of the deficiency in the quantity of lands so conveyed.

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3. That complainant may be decreed to pay to this defendant the damages sustained by him by reason of the false and fraudulent representations of complainant.

Solicitor of Defendants.

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EXHIBIT A.

ARTICLES OF AGREEMENT, made the 19th day of June in the year of Our Lord One Thousand Nine Hundred and twenty-four

BETWEEN WESTERN REALTY COMPANY, A Corporation of the State of New Jersey, party of the first part;

AND LOUIS KASSOFF of the Town of Weehawken in the County of Hudson and State of New Jersey, party of the second part;

WITNESSETH, That the said party of the first part, for and in consideration of the sum of Forty-two Thousand ($42,000.00) Dollars to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that it the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed of Full Covenant and Warranty free from ali encumbrance except as hereinafter set forth on or before the fifteenth day of July, 1924, next ensuing the date hereof, all that lot, tract, or parcel of land and premises, with the buildings thereon, hereinafter particularly described situate, lying and being in the Town of West Hoboken in the County of Hudson and State of New Jersey being about eighty-eight (88′) feet wide by about one hundred (100′) feet deep. Being known as and by the Street Nos. of 343-345-347-349 Bergenline Avenue, West Hoboken, N. J.

The party of the first part will convey the premises above described according to the same description and by the same metes and bounds as contained in the Deed from their Grantors. Subject to cornice encroachments.

And the said party of the second part his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, its successors and assigns, that he the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the said sum of Forty-two Thousand ($42,000.00) Dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

On Execution of this agreement for which this is also a receipt..	$ 500.00
On delivery of deed, cash	$11,500.00
By the party of the first part taking back four separate first mortgages, each in the amount of $7,500 for four years, interest at the rate of six per cent., payable quarterly ..... same containing usual interest, tax, assessment, insurance and installment default clauses, and an agreement not to claim credit on the interest payable on bond and mortgage, by reason of any tax assessed, or to be assessed against the premises.	$30,000.00
Total Purchase Price	$42,000.00

It is understood by and between the parties hereto that the party of the second part will engage George Walscheid, attorney, 411 Lewis Street, Town of Union, N. J., to make the search on the within property, it being further understood, however that the cost therefor, which is to be borne by said party of the second part, shall not exceed the sum of Two Hundred ($200). Any excess to be paid by the party of the first part.

This contract is entered into upon the knowledge of the parties as to the value of the land and whatever buildings are upon the same, and not on any representations made as to character or quality.

And the said party of the first part hereby agrees to pay to J. I. Kislak, Inc., a commission of 2½% on the purchase price aforesaid, said commission to be paid in consideration of services rendered in consummating this sale; said commission to become due and payable upon the execution of this contract.

And it is further agreed, by the parties to these presents, that the said party of the second part, his heirs and assigns, may enter into and upon the said land and premises on the 15th day of July, 1924, next ensuing the date hereof, and from thence take the rents, issues and profits to his and their use.

And it is further agreed, by the parties hereto, that the said Deed of Full Covenant and Warranty shall be delivered and received at the office of J. I. Kislak, Inc., 34 Newark Street, Hoboken, N. J., between the hours of 10 in

the forenoon and 3 o'clock in the afternoon on the said fifteenth day of July, 1924, next ensuing the date hereof.

The rents of said premises, insurance premiums, water rents, taxes, and interest on Mortgage, if any, shall be adjusted, apportioned and allowed as of the day of delivery of said deed. 10

Gas and electric fixtures, gas stoves, hot water heaters and chandeliers, carpets, linoleum, mats and matting in halls, screens, shades, awnings, ash cans, heating apparatus, if any, and all other personal property appurtenant to or used in the operation of said premises is represented to be owned by seller and is included in this sale.

The risk of loss or damage to said premises by fire or otherwise until the delivery of said deed is assumed by the party of the first part. 20

In case the premises shall suffer injury beyond the ordinary wear and tear, the party of the first part, shall repair the damage before the date set for delivery of said deed or make an appropriate deduction from the purchase price herein stated.

It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor, and that there are no encroachments thereon and that the buildings comply with municipal ordinances and regulations and the provisions of the New Jersey State Tenement House Act as enforced by the State Board of Tenement House Supervision, to be shown by the report of the department or board enforcing the same where such ordinances, regulations and said act apply. 30 40

It is expressly understood and agreed that the title to the land and premises hereby agreed to be conveyed is not derived from any Martin Act proceedings or any Act for the Sale of Land for non-payment of the municipal taxes or assessments.

10 The premises above described are sold subject to restrictions appearing of record, if any.

If at the time for the delivery of the deeds, the premises or any part thereof shall be or shall have been affected by an assessment or assessments which are or may become payable in annual installments of which the first installment is then due or has been paid, then for the purpose of this contract all the unpaid installments of any such assessment, including those 20 which are to become due and payable after the delivery of the deed, shall be deemed to be due and payable and to be liens upon the premises affected thereby and shall be paid and discharged by the seller thereof, upon the delivery of the deed.

And for the performance of all and singular the covenants and agreements aforesaid, the 30 said parties do bind themselves and their respective heirs, executors and administrators;

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

Signed, Sealed and Delivered in the presence of J. I. Kislak.

Western Realty Company,
By F. Saperstein (L. S.),
40 President.

Louis Kassoff (L. S.)

Notice.

IN CHANCERY OF NEW JERSEY.

57-84.

Between: WESTERN REALTY COMPANY, a corporation of New Jersey, Complainant, AND LOUIS KASSOFF,, *et ux*, Defendants.	On Bill, &c.

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To Louis Kassoff and Nettie Kassoff, the above named defendants, or William F. Burke, Esq., their Solicitor:

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TAKE NOTICE that on Monday, July 20th, 1925, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, at Chancery Chambers, #1 Exchange Place, Jersey City, New Jersey, I shall apply to the Chancellor for an order striking out the answer and counterclaim filed by you in the above entitled cause, for the following reasons:

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1. The said answer discloses no defense to the bill of complaint and is sham and frivolous in that:

(a) Paragraph one (1) of the First Defense, in so far as the same denies that the said bond contains any condition or agreement for the payment of the interest on the first days of January,

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April, July and October in each year, or that the first payment of interest was to be made on the first of such interest days, succeeding the date of said bond, and likewise paragraph three (3) of the said First Defense, are untrue, as will appear upon inspection of the said bond which is hereby referred to for greater certainty.

(b) Paragraph four (4) of the said First Defense, in so far as the same alleges that any taxes on said premises, payable on June 1st, 1924, were imposed before the making and delivering of said mortgage, is frivolous and immaterial and constitutes no defense to the bill of complaint; and on the closing of title, complainant paid over to defendants, a sum sufficient to pay said taxes in full upon defendants' agreement to forthwith pay the same.

(c) It is untrue that the said taxes were paid by defendants, prior to the filing of the answer. Said taxes actually were paid on January 2nd, 1925, subsequent to the filing of the bill of complaint and the answer, and payment at such time constitutes no defense to this suit.

(d) Paragraph five (5) of said First Defense is untrue.

(e) Paragraph two (2) of the Second Defense is frivolous because the terms of the said agreement, as to the dates for payments of interest merged in the terms of the said bonds and mortgages.

(f) Paragraph two (2) of said Second Defense is untrue, in so far as the sum alleges that

"if it appears in said bond or mortgages that said interest was to be paid on the first days of January, April, July, and October, the same was inserted inadvertently and by mistake, and without the assent or knowledge of these defendants, or either of them;" and even if true, the said allegation is frivolous because after default in the payment of the said installment, defendants were notified of said default, and agreed to pay said installment, but wholly failed and refused to do so, and wholly failed and refused to tender payment of the same until complainant had elected that the whole principal sum should be due and payable.

(g) Paragraph three (3) of said Second Defense is frivolous because said tender was not made until after complainant had elected that the whole principal sum should be due and payable, and had informed defendants of said election.

2. The said counterclaim discloses no cause of action in that:

(a) Paragraph two (2) of the First Cause of Action of said counterclaim, is untrue in so far as the same alleges that the "lands and premises which complainant therein agreed to convey to the defendants, were to be about eighty-eight (88) feet in width." The said contract provided that the plaintiff would convey to defendant the following:

"ALL that lot, tract, or parcel of land and premises hereinafter particularly described, situ-

ate, lying and being in the Town of West Hoboken, County of Hudson, and State of New Jersey being about eighty-eight (88) feet wide by about one hundred (100) feet deep. Being known as, and by the street numbers of 343, 345, 347 and 349 Bergenline Avenue, West Hoboken, New Jersey. The party of the first part will convey the premises above described by the same description and by the same metes and bounds, as contained in the deed from their grantors."

(b) Paragraph four (4) of the First Cause of action is untrue because prior to and at the time of closing of title on August fourth, 1924, defendant was fully aware that said lands were seventy-five feet in width and he accepted title and executed said bonds and mortgages with full knowledge of the dimensions of said premises.

(c) The First Cause of Action of said counterclaim is frivolous because the terms of the said contract as to the dimensions of the premises were merged in the terms of the said bonds and mortgages.

(d) The First Cause of Action of said counterclaim is frivolous because the dimensions stated in said contract are controlled by and subject to the metes and bounds and street number descriptions.

(e) Paragraphs 2, 3, 4 and 5 of the Second Cause of Action of said counterclaim are untrue.

Notice.

(f) The Second Cause of Action of said counterclaim is frivolous because prior to and at the time of closing of title on August 4th, 1924, defendants were fully aware that said lands were seventy-five (75) feet in width and accepted title and executed said bonds and mortgages with full knowledge of the dimensions of said premises. 10

(g) The Second Cause of Action of said counterclaim is frivolous because the terms of said contract as to the dimensions of the premises were merged in the terms of the said bonds and mortgages.

(h) The Second Cause of Action does not allege that the defendants sustained any damages and in fact defendants sustained none. 20

JOHN N. PLATOFF,
Solicitor of Complainant.

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Affidavit of Samuel Saperstein.

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

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

1. I am the president and principal stockholder of Western Realty Company, the complainant in this action and for and on behalf of complainant, I conducted all the business transactions with Louis Kassoff, the defendant, in the sale of the premises numbers 343-345-347 and 349 Bergenline Avenue, West Hoboken, New Jersey, and executed the contract of sale dated June 19, 1924, and the deed for said premises dated August 4, 1924.

2. Complainant acquired title to the said premises by deed of Henry Treuhaft and Tillie Treuhaft his wife, dated February 8, 1922, recorded in the Hudson County Register's office February 9, 1922, in Liber 1427, page 491; and complainant owned said premises continuously until August 4, 1924, when the same were conveyed to defendant. Shortly after the complainant acquired title to said premises complainant offered the said premises for sale at the price of Fifty Thousand ($50,000) Dollars.

3. Said premises consist of four three-story frame buildings which cover the entire width of the premises.

4. I never saw a survey of these premises and consequently did not know their exact di-

mensions, having purchased them for complainant upon inspection and by the street numbers of the buildings thereon. I never stated the dimensions of the permises to defendant and prior to the execution of the contract between complainant and defendant, I never had any conference with the defendant regarding this property, the entire matter being arranged by the broker and his agents.

5. J. I. Kislak, Inc., was the broker who negotiated the sale by complainant to defendant, and Max Bernfeld was the person of that firm who actually procured the sale. The contract of sale was prepared by them and executed in the presence of Julius I. Kislak, at 34 Newark Street, Hoboken, New Jersey, on June 19th, 1924, at a conference which began at 8 P. M. and was not completed until 12 P. M.

6. Defendant and I were continuously present during this conference and I know that defendant did not make inquiry regarding dimensions, and that no representations of any kind whatsoever were made to him regarding the dimensions of the premises. The discussion was entirely concerning the purchase price, the rental value of the premises, the income, taxes, and operating expenses; and the dimensions of the land or buildings did not influence either the complainant or the defendant in the sale and purchase of said premises; the premises were always referred to by street number, and in no other way. It was clearly understood by the persons present, that the sale was of the prem-

ises known by the street numbers 343, 345, 347 and 349 Bergenline Avenue, West Hoboken, New Jersey, and that said buildings occupied the entire width of the land which was to be sold. The said premises consist of three story buildings. The ground floor of each of said buildings is used as a store, the upper two stories of each of the said buildings are used as dwellings. The entire premises are constructed for use by two families. The said premises are located on the westerly side of Bergenline Avenue (formerly known as Spring Street) between Malone and Union Streets, a secondary business location in the Town of West Hoboken (now Union City).

7. The purchase price of Forty-two Thousand ($42,000) Dollars is the lowest price for which complainant was ever willing to sell the premises. Prior to the conference at the office of J. I. Kislak, Inc., the property had been offered to Mr. Kassoff for sale at Forty-five Thousand ($45,000) Dollars. He inspected the same several times and then we arranged for the conference at the office of J. I. Kislak, Inc. The entire discussion at that conference had reference to the purchase price and during a considerable period, we failed to come to an agreement on the price. I insisted upon Forty-five Thousand ($45,000) Dollars, and Mr. Kassoff offered Forty Thousand ($40,000) Dollars at first. I would not sell for Forty Thousand ($40,000) Dollars, under any circumstances. Mr. Kislak and Mr. Bernfeld earnestly requested me to reduce the asking price and I finally con-

sented to accept Forty-two Thousand ($42,000) Dollars, although I felt that this was low. This was absolutely my last figure and if Mr. Kassoff had not accepted it, the deal would have fallen through. The complainant was never willing to sell said premises for less than Forty-two Thousand ($42,000) Dollars, and refused to sell the premises for less than that sum, the defendant as heretofore stated, having previously to the said conference and at the conference, offered to pay Forty Thousand Dollars therefor, then Forty-one Thousand Dollars and then Forty-one Thousand Five Hundred Dollars, and I refused to sell for any of these prices or any other price less than Forty-Two Thousand Dollars.

8. When complainant purchased said premises and during the time complainant owned the same and endeavored to sell the same, I considered the premises worth at least Twelve Thousand Dollars a house, and based my opinion upon the occupancy and income and rental value of each house, and the taxes and operating expenses of each house and because of the character of the property. As a result, the exact dimensions of the land upon which each building is erected was of no consequence to complainant, defendant, or to any prospective buyer.

9. I have been informed and believe that several other brokers exhibited these premises for sale to the defendant and went with the defendant to make an inspection of the premises and that the defendant inspected the said premises many times prior to the execution of the con-

tract, and was fully familiar with the said premises both inside and outside.

10. A few days after the contract of sale was entered into, the defendant called upon me, with another broker, and stated to me that this other broker had been negotiating with the said defendant for about a year, for the sale of these premises, but had asked Fifty Thousand Dollars for the premises and had only been able to get the price down to Forty-eight Thousand Dollars, and therefore defendant purchased the premises through J. I. Kislak, Inc., for Forty-two Thousand Dollars. Defendant said that this broker had spent so much time trying to sell him this property that he asked me to pay this broker some of the commission. I told him that he should have told me this before the contract was executed as I could not then ask J. I. Kislak, Inc., to divide the commission.

11. Defendant has had a great deal of experience in buying and selling real estate. For twenty years or more he was engaged in the painting and wallpaper business, furnishing these supplies to real estate owners and builders, and for more than fifteen years last past, he has bought, sold and owned real estate in the northern part of Hudson County, and during the last five or six years, he has retired from the paint and wallpaper business and has engaged in the business of buying and selling real estate, as a real estate operator and speculator, and I have been informed and believe that in the last four or five years he has bought and sold

not less than thirty parcels of real estate in the northern part of Hudson County.

12. I did not falsely, fraudulently or in any other way represent to the defendant that the premises were eighty-eight feet in width, in front and rear, and defendant did not rely upon any such representations made by me or by anybody else either prior to the making of the contract or prior to the closing of title, or at any time since then. As I have stated before, the defendant is a man of wide real estate experience and made several personal inspections and investigations of the premises, extending over a period of about a year, and the contract of sale expressly states that the premises are sold by street numbers, and that the deed for the same would be the same description as contained in the deed to the complaint. In addition to this, the contract of sale, which is the usual printed form of contract, contains a clause that the Contract is entered into upon the knowledge of the parties as to the value of the land, and whatever buildings are upon the same and not on any representations made as to character or quality, and the deed for the premises made by complainant to defendant does not contain any representations as to dimensions, the premises being described by lot numbers, upon a filed map, exactly in accordance with the deed of Henry Treuhaft and wife to complainant, as intended by our contract of sale, and this deed conveyed all the property which complainant owned in the vicinity.

13. J. Emil Walscheid, Esq., represented both complainant and defendant in the examina-

tion and closing of title to the premises, and the title was closed in Mr. Walscheid's office on August 4, 1924, and annexed hereto is a copy of the figures on settlement (Schedule "A") as of August 4, 1924, together with a copy of a letter under date of September 9, 1924, modifying the settlement figures (Schedule "B"). In this settlement complainant allowed defendant credit against the purchase price for the sum of $1,034.12 to cover taxes and interest for the year 1923, and for the sum of $586.49 to cover the installment of taxes due June 1, 1924, and $47.64 for principal and interest due on an assessment for street improvements, and it was agreed that the defendant would forthwith pay all past due taxes and assessments for which credit had been given him on the settlement. The closing of the title consumed seven or eight hours and was attended part of the time by Henry Vogler, Esq., a Counsellor at Law of this State, who is employed by Mr. Walscheid, and also by Mr. Walscheid personally. Mr. Max Klipper was also present. At the closing of the title, there was on the table, around which we were sitting, a survey of these premises which had been procured by the defendant. The deed, bonds and mortgages which had been prepared by Mr. Walscheid were exhibited to all the parties. Defendant examined the survey and read the deed and bonds and mortgages in full. I did not examine the survey, nor did I read the papers. I left the matter in the hands of the two lawyers and was satisfied to rely upon them. Mr. Walscheid explained the settlement and contents of the deed and bonds and mortgages to

us, and being satisfied with his explanation, I signed the deed and closed the deal. Defendant however, examined the survey and carefully read each description, and Mr. Walscheid compared the descriptions and explained them to Mr. Kassoff on the survey while Mr. Kassoff was holding the survey in his hands, and asked and received an explanation of all the figures and details before he would close, and that is why the deal took seven or eight hours to close. Neither the said Louis Kassoff nor any other person made any statements or asked any questions regarding any discrepancy in description or any deficiency in the quantity of land. The discussions were principally concerning the settlement of the figures and the credits and allowances to be made and violations of the regulations of the New Jersey State Tenement House Commission. Prior to the execution of the bonds and mortgages, the defendant read them all in full and Mr. Walscheid explained the contents thereof to the defendant in the presence of all of us and stated particularly the date when the interest payments were to be made, and the date of maturity of the said bonds and mortgages. I particularly remember that prior to the execution of the bonds and mortgages, I stated to the defendant that interest and installments on all my obligations became due on the first days of January, April, July and October, the so-called bank interest days, and I preferred to have the interest payments become due under defendant's bonds and mortgages on these days, to which the said Louis Kassoff, assented, stating that it made no difference to him.

14. These bonds and mortgages each contain the following agreements:

"The condition of the above obligation is such that if the above bounden Louis Kassoff, his heirs, executors, or administrators, shall well and truly pay, or cause to be paid unto the above named Western Realty Company, its successors and assigns, the just and full sum of Seven Thousand, Five Hundred ($7,500) Dollars, on the fourth day of August, which will be in the year One Thousand Nine Hundred and Twenty-Eight, and the interest thereon, to be computed from the day of the date hereof, at and after the rate of six per cent. per annum, and to be paid quarterly on the first days of January, April, July and October, of each year the mortgage accompanying the within bond is to run, the first payment of said interest to be made on the first of said interest days next succeeding the date hereof, without any fraud or other delay, then the above obligation to be void, otherwise to remain in full force and virtue."

"And it is hereby expressly agreed, that should any default be made in the payment of the said interest, or of any part thereof, on any day whereon the same is made payable as above expressed, or should any tax, assessment, water rent or other municipal or governmental rate charge, imposition, or lien be hereafter imposed or acquired upon the premises described in the mortgage accompanying this bond, and become due and payable; and should the said

interest remain unpaid and in arrear for the space of thirty (30) days, on said tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien, or any or either of them remain unpaid and in arrear for the space of ninety (90) days, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of Seven Thousand, Five Hundred ($7,500) Dollars with all arrearage of interest thereon, shall, at the option of the said Western Realty Company, or its successors, legal representatives or assigns, become and be due and payable immediately thereafter."

15. I saw the defendant several times after August 4th, 1924, in connection with this transaction. There were some changes to be made in the figures of our settlement by reason of the cancellation of some insurance policies, and a mistake in the allowance for taxes, and these matters were all adjusted on or about September 9, 1924, by my reimbursing him for all the sums which were due him. On none of these occasions nor on any other occasion prior to November 10, 1924, did the defendant make any statement regarding the quantity of the land or the dimensions of the premises.

16. On September 16, 1924, complainant entered into an agreement to purchase other premises from Zerman & Rubenstein, Inc., and agreed to make payment of part of the consideration by

the transfer and assignment to Zerman & Rubenstein, Inc., of three of the bonds and mortgages of defendant, at the face value of Twenty-two Thousand Five Hundred Dollars, together with accrued interest, and on November 7, 1924, when the transaction between complainant and Zerman & Rubenstein, Inc., was arranged for closing, Irwin Rubenstein, Esq., attorney for Zerman & Rubenstein, Inc., advised Zerman & Rubenstein, not to accept said bonds and mortgages for the reason that the installments of interest due thereon on October 1, 1924, had not been paid, whereupon it was arranged between deponent and the said Irwin Rubenstein that the closing of the transaction be deferred until the next day so that the said interest could be collected from the defendant. The said Irwin Rubenstein then attempted to reach the defendant by telephone for the purpose of requesting him to pay this interest but there was no answer. Later, the same day, I myself telephoned to the defendant requesting him to pay the interest due and defendant did not say anything to the effect that the same was not due but stated that he forgot to pay the same and promised to pay the same by the next day. The said Irwin Rubenstein also wrote a letter to the defendant on the same day requesting that the defendant forthwith pay the interest then more than thirty days in arrears. Defendant never paid this interest amounting to $280, and this interest not being paid, Zerman & Rubenstein, Inc., refused to accept the said bonds and mortgages, and complainant, at great inconvenience and financial embarrassment to itself, was com-

pelled to raise the sum of Twenty-two Thousand, Five Hundred Dollars in cash from other sources, to carry out the contract with Zerman & Rubenstein, Inc., and on November 10, 1924, complainant notified the defendant that it had elected to declare the full amount of principal and interest on said bonds and mortgages due. 10

17. The taxes on the mortgaged premises for the year 1923 were not paid by the defendant until September 4, 1924, and taxes for the year 1924, the first installment of which became due and payable June 1, 1924, the second installment of which became due and payable on December 1, 1924, were not paid by the said Louis Kassoff until January 2, 1925. The assessment for the improvement of Bergenline Avenue 20 amounting to $46.74 which became due on April 9, 1924, has not yet been paid according to the records in the West Hoboken Tax Collector's office and the full amount thereof is now over due with interest at the rate of seven per cent. from April 9, 1924.

SAMUEL SAPERSTEIN.

Sworn and subscribed to before me this 10th day of June, 1925, } 30

ANNA KATTENHORN,
Notary Public of New Jersey.

40

Affidavit of J. Emil Walscheid.

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

J. Emil Walscheid, of full age, being duly sworn according to law upon his oath deposes and says:

I am a member of the Bar of this State and have been engaged in the practice of law since 1896 and maintain my office at No. 404 Lewis Street, Town of Union, Hudson County, New Jersey.

On or about June 20th, 1924, I was retained by Western Realty Company and Louis Kassoff, the parties to this suit to examine title to premises Nos. 343-345-347-349 Bergenline Avenue, West Hoboken, N. J., and to close the title to said premises and to prepare the necessary papers therefor in accordance with agreement in writing between the said parties dated June 19, 1924, a copy of which contract was delivered to me by the said Louis Kassoff.

I turned the matter over to Henry Vogler, one of my assistants, who is a member of the Bar of this state to take care of the matter in collaboration with me. As the contract described the premises by street number, I requested that the Western Realty Company deliver a metes and bounds description of the premises so that the matter could be properly handled. On June 25th, 1924, Mr. Saperstein, the President of Western Realty Company delivered such a description and on that date Mr. Vogler wrote Louis Kassoff a letter giving this information to Mr. Kassoff and suggesting that a survey of the premises be ordered, a copy of this letter

is annexed hereto, marked Schedule "C." Shortly thereafter Mr. Kassoff called on me at my office and we went together to Harmon & Harmon, Civil Engineers and Surveyors, who maintain an office in the same building, and ordered a survey of the premises. This survey was subsequently delivered to my office and a copy thereof is hereto annexed. This survey was required so that separate descriptions of the buildings could be drawn, as the descriptions furnished by Mr. Saperstein comprised the entire premises, and so that Mr. Kassoff might be satisfied that there were no existing encroachments.

Before the closing of title Mr. Kassoff called at my office and inspected this survey but made no comment concerning the dimensions of the premises. The title was closed in my office on August 4th, 1924 and consumed almost the entire day, Mr. Vogler and I both attending to the closing. The deed and bonds and mortgages and other necessary papers were all prepared before the closing of title and together with the survey were upon the table around which we were all sitting during practically the entire time consumed by the closing of title. The closing was also attended by Mr. Saperstein, Mr. Kassoff and Max Klipper, a Real Estate and Insurance agent, who had an interest in the premises and held the fire insurance policies covering the buildings thereon.

At the time of closing title it was disclosed that the taxes for the year 1923 and for the first half of the year 1924 and an assessment for a street improvement were unpaid and Mr. Kassoff was given credit upon the purchase price for

the amount due and unpaid upon these taxes and assessments, and also for the taxes which had then accrued and which were not yet payable, upon the understanding that Mr. Kassoff would forthwith make payment of all taxes and assessments then due. A copy of the figures on settlement on closing of title is hereto annexed (Schedule "A") as is also subsequent correspondence modifying these figures, Schedule "B."

Mr. Kassoff also examined the survey upon the day of closing title, but did not make any remarks concerning the same, nor express any dissatisfaction with the dimensions of the premises. Mr. Kassoff also read the four bonds and four mortgages before execution, taking considerable time to do so. Prior to the execution, Mr. Kassoff had the survey before him while I showed him the dimensions of each parcel covered by each individual mortgage and indicated to him on the survey, the dimensions of the entire premises and also the dimensions of each parcel covered by each individual mortgage, and with him, checked up the dimensions and descriptions as set forth in the deed for the entire premises and in the four bonds and mortgages covering the individual parcels. I then stated to him the contents of each of the papers and asked him whether he fully understood the same and asked him whether he executed them as his voluntary act and deed for the purposes and uses therein expressed, and upon his replying in the affirmative, I thereupon affixed my signature as a witness on these papers and signed the certificates of acknowledgment. Mr. Kassoff made no comment regarding the de-

scriptions or dimensions of the different parcels, all of which he read at length and also made no objections to the dates of interest payments.

Mr. Kassoff took the survey with him when he left my office, on the day of closing.

Mr. Kassoff called at my office a number of times after the closing of title, for the purpose of correcting the settlement figures as will appear by the correspondence annexed to the affidavit of Mr. Vogler. Mr. Kassoff never made any statement to me about the dimensions of the premises until several weeks after the closing of title when he stated to me that the property was not as wide as the contract called for. I called his attention to the fact that he was buying by street number and that he had the survey and was fully apprised of the size and dimensions of the property prior to and at the closing of title, and that I had fully explained to him the dimensions of the property, and asked him whether he wished his money back, and he stated that he did not.

I heard nothing further about the matter until I was informed by counsel for Western Realty Company that Mr. Kassoff had failed to pay interest due on the bonds and mortgages on October 1, 1924, and for more than thirty days thereafter, and that upon request being made for the payment of the principal, he interposed as a defense the fact that premises were not of the width represented.

J. Emil Walscheid.

Subscribed and sworn to before me this 20th day of June, 1925.

Anna Kattenhorn,
Notary Public of N. J.

Affidavit of Henry Vogler.

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

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

I am a member of the Bar of the State of New Jersey and have been engaged in the practice of law since 1908, and am employed by J. Emil Walscheid, Esq.

On or about June 20th, 1924, Mr. Walscheid was retained by Western Realty Company and Louis Kassoff, the parties to this suit, to examine the title to premises known by the street numbers 343, 345, 347 and 349 Bergenline Avenue, West Hoboken, County of Hudson, New Jersey, and to close title to said premises, and referred the matter to me to take care of with him.

Upon examination of the contract I decided it was advisable and necessary to procure a metes and bounds description and also a survey of the premises so that separate mortgages on the different properties could be correctly drawn in compliance with the terms of the contract and to satisfy Mr. Kassoff that there were no existing encroachments on the premises intended to be purchased. I requested Mr. Saperstein of the Western Realty Company to bring in the deed under which it obtained title to the premises intended to be conveyed. On June 25th, 1924, I wrote Mr. Kassoff and again informed him that it would be necessary that the premises be surveyed as will appear from a copy of the letter to Mr. Kassoff which is attached hereto (Schedule "C").

Subsequently, a survey was made by Harmon & Harmon, Civil Engineers and Surveyors, who have their offices in the Dispatch Building, Town of Union, N. J. and was thereafter delivered to the office of J. Emil Walscheid and on one of Mr. Kassoff's visits to the office prior to the closing of title, I exhibited the survey to Mr. Kassoff for his inspection. He examined the same carefully and made no comment and the same seemed to meet with his satisfaction. Mr. Kassoff called on me several times between the time Mr. Walscheid was retained and the time of closing title and the only question which he seemed to be concerned about was the supposed existence of conditions which he believed were tenement house violations and he made no comment regarding the dimensions of the properties intended to be conveyed. Taking into consideration the fact that there were four separate mortgages to be executed, I requested Messrs. Harmon & Harmon who made the survey to draw the separate descriptions and on being presented with the same I prepared all of the papers necessary for the closing of the title from the description furnished by Harmon & Harmon.

The title was closed on August 4th, 1924, and consumed almost the entire day and was attended by Mr. Walscheid, myself, Mr. Kassoff, Mr. Saperstein and Mr. Max Klipper who was present to take care of the fire insurance policies. The deed, bonds and mortgages and survey were all in plain view on the table around which we were all sitting and the settlement figures were made up in accordance with the statement hereto annexed (Schedule "A") which showed

taxes for 1923 and 1924 and an assessment for street improvements unpaid, Mr. Kassoff was allowed credit on the purchase price for these items upon the understanding that he would forthwith pay them to the municipal authorities.

Mr. Kassoff examined the survey again at the time of closing title and also examined the deed and bonds and mortgages most carefully, and read the papers through before execution by him. He made no comment regarding the dimensions of the premises or the dates upon which interest and principal were due and payable on the bonds and mortgages, and seemed entirely satisfied with the transaction, except that he was concerned about the tenement house violations, although I told him repeatedly that the buildings were not subject to the tenement house act. Although I had advised Mr. Kassoff that the buildings intended to be conveyed under the contract were not subject to the regulations of the Board of Tenement House Supervision and informed him that I had made inquiry and received no report direct from the Board of Tenement House Supervision, Mr. Kassoff was very persistent and would not consent to close the title until I had telephoned to Newark and obtained from the Board of Tenement House Supervision, a report which was in compliance with my opinion, and I then advised Mr. Kassoff that we would protect him on that score.

Mr. Kassoff then consented to close the matter and in closing, figured every item on settlement down to the penny and otherwise exercised considerable care in the closing of the title and in my opinion, was fully familiar with the contents of the deed, bonds and mortgages and

also with the descriptions in the deed and mortgages and the survey of the premises. Mr. Walscheid and Mr. Kassoff compared the dimensions of each parcel described in the four mortgages, with the survey, Mr. Walscheid pointing out on the survey where each of the four parcels lay, and the dimensions of the entire premises. Then they checked up the dimensions and descriptions in the deed and in the four mortgages upon the survey. Then Mr. Kassoff executed the bonds and mortgages and Mr. Walscheid witnessed the same, after explaining to Mr. Kassoff again, their contents, describing the premises and the dates upon which the interest payments and payments of principal were due. Mr. Kasroff acknowledged the execution of these mortgages in my presence and Mr. Walscheid thereupon signed the certificates of acknowledgment.

After the closing of title Mr. Kassoff called at the office numerous times in order to correct some miscalculations in the adjustments.

Some time after the closing of title Mr. Kassoff again called on me and the only question taken up was an error in certain adjustments regarding unpaid taxes which should have been allowed to Mr. Kassoff on closing. I went through the adjustments with him again and found that he was right in his contention. Although no question was raised by Mr. Kassoff I showed him that he was also entitled to a rent allowance and advised him that I would write the Western Realty Company regarding the matter and would obtain such moneys for him as were due to him.

Prior to September 6, 1924, I obtained from the Western Realty Company a check in the sum of $256.32 made to the order of Mr. Kas-

soff and on September 9, 1924, I mailed the check received to Mr. Kassoff in a letter, a copy of which is hereto attached (marked Schedule "B").

The only matters open to adjustment to my knowledge at the time of sending this letter were the insurance items referred to in the letter under date of September 9th, and although several visits were made to the office by Mr. Kassoff regarding these matters subsequent to September 9, 1924, nothing was ever said to me by him about the dimensions of the premises. These visits continued until October, 31, 1924, when I again informed Mr. Saperstein that Mr. Kassoff was entitled to an additional allowance of $7.40 and $12.97 as rebates on insurance policies?

At no time after the close of title did Mr. Kassoff refer to any discrepancy in description or dimensions of the premises except on one occasion several weeks after the closing of title when he spoke to Mr. Walscheid and stated that the premises were not as wide as the contract called for. When Mr. Walscheid asked him whether he wished his money back, Mr. Kassoff replied in the negative.

I did not hear Mr. Saperstein or anybody on his behalf at any time make any representations regarding the width or dimensions of the premises and the premises were always referred to by the street number.

HENRY VOGLER.

Subscribed and sworn to before me this 7th day of July, 1925.

ANNA KATTENHORN,
A Notary Public of New Jersey.

Affidavit of Max Klipper.

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

Max Klipper, of full age, being duly sworn according to law deposes and says:

I reside at #897 Summit Avenue, Jersey City, Hudson County, New Jersey and am engaged in the real estate business. 10

For a period of three years prior to August 4th, 1924, I was the agent for the collection of the rentals of the premises known as Nos. 343-345-347-349 Bergenline Avenue, Town of West Hoboken, Hudson County, New Jersey and I also held two mortgages against the said premises. One was a second mortgage for $2,125.00 and the other was a third mortgage for $3,600.00.

A few days prior to the 4th day of August, 1924, I was notified by Henry Vogler, Esq., to attend the closing of title of the said premises on the said day and to receive at that time satisfaction in full of the mortgages held by me. 20

I arrived at Mr. Walscheid's office at 10:30 A. M., on that morning and I found there Mr. Kassoff, Mr. and Mrs. Saperstein and Mr. Vogler. I remained in Mr. Walscheid's office during the entire transaction except that for a period of one half hour I was out to lunch with Mr. Vogler. During the entire period I did not hear any discussion whatsoever concerning the number of feet of land involved in the deal. There was on the table around which we were sitting a survey of the premises which were being conveyed to Mr. Kassoff and this survey lay in full view during the entire transaction. I remember that several times Mr. Kassoff took up this survey and examined it very carefully. 30 40

The deed, bonds and mortgages which had been prepared by Mr. Walscheid were also shown to Mr. Kassoff and these also lay on the table for a considerable while.

During the entire morning there was considerable wrangling between the parties concerned and Mr. Vogler regarding the tenement house violations against the property, the taxes and insurance and the various adjustments to be made. The wrangling continued so long that Mr. Vogler was taken ill and was compelled to call Mr. Walscheid in to close the transaction. Mr. Walscheid came in and in my presence Mr. Walscheid read to Mr. Kassoff the descriptions in the mortgages while the survey was lying in front of them on the table and he also compared the descriptions in the mortgages with the survey. Mr. Kassoff made no comment at that time regarding the quantity of land in the tract.

At one time during the closing, Mr. Kassoff remarked to me that he had been offered Fifty Thousand ($50,000) Dollars for this very parcel. He knew I had been the agent of the premises and he asked me whether in my opinion if he improved the premises and made the necessary repairs and decorations he would be able to receive Forty-five ($45) Dollars as rental for six rooms and Forty ($40) Dollars for five rooms. I assured him that I thought so and then he said he would raise the rents of the stores immediately. He also stated that in view of the fact that he would be able to procure more rental from the premises he was not going to accept the offer of Fifty Thousand ($50,000) Dollars he had received.

Affidavit of Max Klipper.

Because of the fact that the transaction took six to seven hours I was not able to procure my money and to execute the releases until about four o'clock in the afternoon. At that time the transaction was finally closed by Mr. Walscheid and then I left. Mr. and Mrs. Saperstein had left some time previously so that when I left the office only Mr. Kassoff remained with Mr. Walscheid.

MAX KLIPPER.

Subscribed and sworn to before me this 7th day of July, 1925.

ANNA KATTENHORN,
Notary Public of New Jersey.

Affidavit of Francis E. Harmon.

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

Francis E. Harmon, of full age, being duly sworn according to law upon his oath deposes and says:

I am a Civil Engineer and Surveyor and member of the firm of Harmon & Harmon, Civil Engineers and Surveyors, with offices at #404 Lewis Street, Town of Union, Hudson County, New Jersey.

On July 1st, 1924, Counsellor, J. Emil Walscheid and Louis Kassoff called on me and requested me to make a survey of the premises Nos. 343-345-347-349 Bergenline Avenue, West Hoboken, New Jersey, and I did so and delivered the survey to Mr. Walscheid at Mr. Walscheid's office on July 14th, 1924.

My survey of the premises revealed that there were no encroachments.

A short time thereafter Mr. Henry Vogler of Mr. Walscheid's office requested me to prepare separate descriptions of the separate parcels which I did and delivered to Mr. Vogler.

A copy of the survey is hereto annexed.

Francis E. Harmon.

Subscribed and sworn to before me this 11th day of March, 1925.

Anna Kattenhorn,
Notary Public of New Jersey.

Affidavit of Francis E. Harmon.

SCHEDULE "A."

SETTLEMENT on closing of title, Western Realty Company to Louis Kassoff, premises known as Nos. 343-345-347-349 Bergenline Avenue, in the Town of West Hoboken, Hudson County, New Jersey.

10

Purchase price			$42,000.00	
Insurance				
233763	Commerce	54.38—	18.13	
778863	Republic Casualty..	64.80—	54.00	
2714	National Liberty...	50.63—	32.24	
2778	" " ...	118.13—	42.65	
5928978	London	58.13—	11.65	
5929171	"	135.63—	64.05	
5929072	"	135.63—	50.23	
564504	Allemaine	100.63—	46.12	
556786	"	100.63—	37.82	
556683	"	43.13—	13.17	
263753	Commerce	126.88—	58.15	
235784	"	126.88—	46.96	
233763	"	54.38—	16.05	
		11.00—	7.40	
2936	National	18.63—	12.97	
		87.00—	7.25	
555003	N. Y. Plate Glass..	118.13—	59.06	578.01
				$42,578.01

20

30

cc

40

Affidavit of Francis E. Harmon.

CREDIT

Deposit			$500.00	
Water		28.96		
		21.40		
		9.16		
		5.82		
	2)	$65.34		
Taxes—1923—		$971.01		
		63.11		
			1,034.12	
1924—		$483.50		
		3.99		
			586.49	
				1,621.61
Assessment		46.74		
		.90		
				47.64
Deposit on Lease				150.00
				2,356.92
				$40,221.09

Affidavit of Francis E. Harmon.

SCHEDULE "B."

September 9, 1924.

Mr. Louis Kassoff,
21 Liberty Place,
Weehawken, N. J.

Dear Sir: 10

Enclosed herewith you will find check of Western Realty Co. made to your order in the sum of $256.32, moneys due to you on a re-adjustment of the consideration to be paid on account of premises purchased by you from the Western Realty Co., and known as Nos. 333-339 Bergenline Avenue, West Hoboken.

The Western Realty Company is to be charged with the following: 20

Taxes for the year 1924, 6 mo.	$533.50	
Interest from June 1 to Aug. 1	6.23	
Taxes for month of July	88.92	
Total amount due for taxes...		$682.65
Insurance charged which was cancelled.		
Policy #2778 National Liberty	42.65	
Policy #5929072 London	50.23	
Policy #556797 Allomainia ...	37.82	
Policy #235784 Commercial ..	46.96	
Total amount due for insurance		177.66
Moneys due for rent not allowed on closing		37.50
Grand total due Mr. Kassoff		843.81

30

40

Against this total is to be charged:

Amount charged for taxes and interest on the date of closing	587.49
Net amount due to Mr. Kassoff	$256.32

10 There has not been taken into consideration in this check the plate glass insurance policy for which Mr. Kassoff was charged $7.25, and two other insurance items, the first being in the sum of $12.97.

As to the plate glass insurance and the other insurance items mentioned, Mr. Saperstein is endeavoring to make arrangements to deliver to this office the insurance policies covering these
20 items.

Yours very truly,

Encl.
HV:Z

30

40

Affidavit of Francis E. Harmon.

SCHEDULE "C."

June 25, 1924.

Mr. Louis Kassoff,
21 Liberty Place,
Weehawken, N. J.

Dear Sir:

I have this day received from Mr. Saperstein, a correct description of the premises intended to be conveyed under a contract made between you and the Western Realty Company, and have this day ordered a search.

Mr. Saperstein informs me that he has no survey covering the premises, and I believe that it is to your advantage that a survey be ordered before you take possession.

Will you kindly call on Mr. Vogler of this office, and take this matter up with him.

Very truly yours,

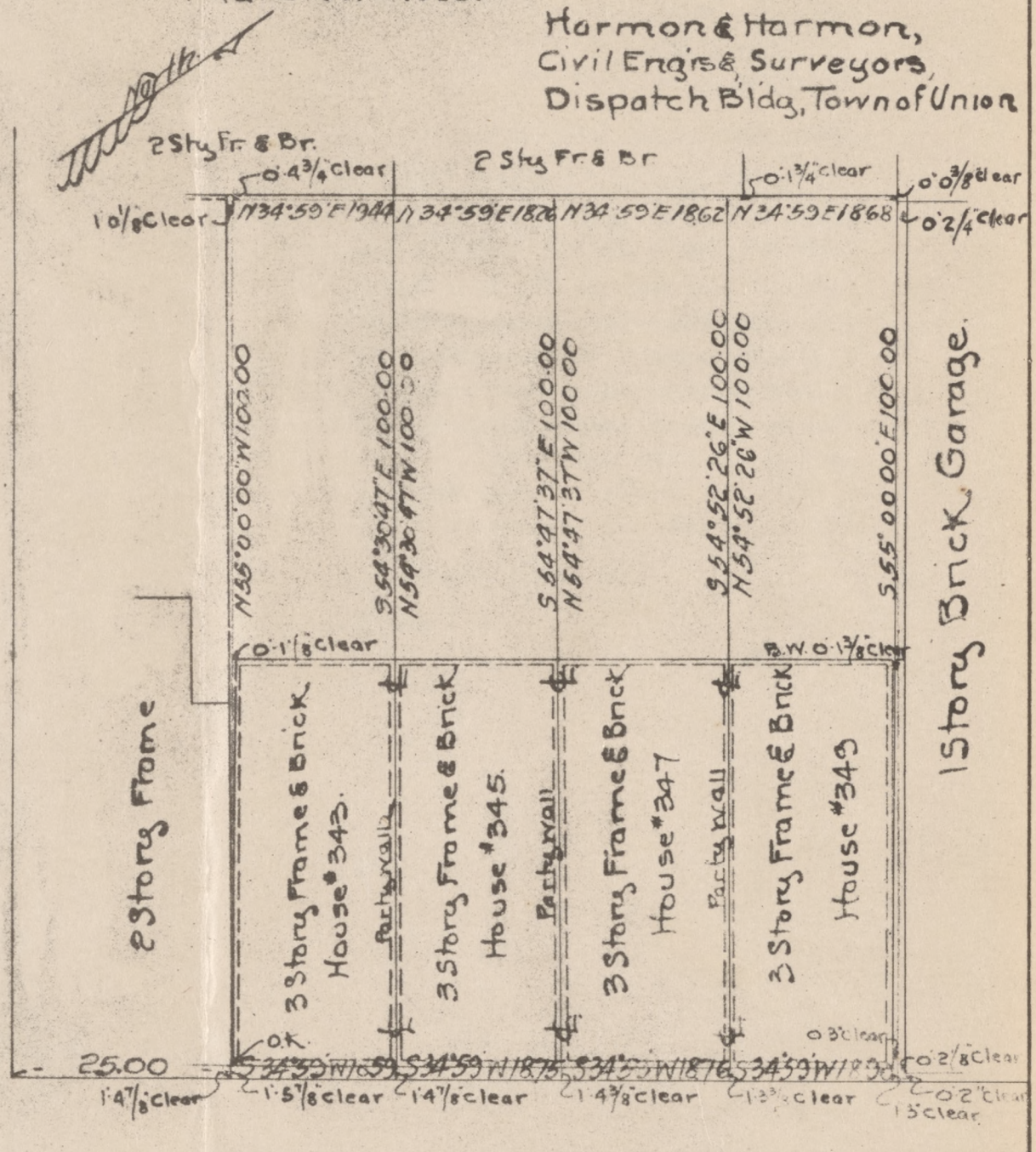
J. Emil Walscheid.

HV:PRC.

Sketch showing survey & sub-division of lots #2, 3 & 4 blk #91,
Official Map of West Hoboken,
Town of West Hoboken, Hudson County, N.J.
County block #2037.

Copy Ordered by Counselor John N. Platoff.
March 11th 1925.

Harmon & Harmon,
Civil Eng'rs & Surveyors,
Dispatch Bldg, Town of Union



Note: This is a true copy of the survey ordered by Mr Louis Kassoff, July 1st 1924
The original survey was delivered to Counselor J. Emil Walscheid's Office July 14th 1924

Affidavit of Louis Kassoff on Motion to Strike Out Affidavit.

IN CHANCERY OF NEW JERSEY.

Between: WESTERN REALTY COMPANY, a corporation of New Jersey, Complainant, AND LOUIS KASSOFF, *et ux.*, Defendants.	On Bill, &c.

10

STATE OF NEW JERSEY,
COUNTY OF HUDSON, } ss.:

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

1. I am one of the defendants in this cause, and filed my answer to the bill of complaint about January of this year. Said answer so filed by me is not sham or frivolous but was made in good faith.

2. On June 19, 1924, complainant and I entered into an agreement for the sale of certain premises in the then Town of West Hoboken, Hudson County, N. J., now City of Union City, for the sum of Forty-two Thousand ($42,000) Dollars.

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3. During the course of negotiations, Mr. Samuel Saperstein, President of the Complainant, and who was then acting for the complain-

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ant in the negotiations and making the sale, stated to me that the premises were eighty-eight (88) feet in width. At the time of the closing of the contract, he did not have the deed to the complainant with him nor did he have any survey and in describing the premises the street numbers were used but it was stated that the premises were about eighty-eight (88) feet in width by about one hundred (100) feet in depth.

4. After the contract was executed, Mr. Saperstein took the contract to Mr. Walscheid for the purpose of having a search made, saying that he would take care of it.

5. The contract called for closing on July 15, 1924, but it was not closed until August 4th. The closing consumed several hours in the afternoon.

6. The contract between us for the purchase of the property provided that the interest should be payable quarterly. At the time of the closing, nothing was said by Mr. Saperstein to me about making the interest payments to be due on January, April, July and October 1st, and nothing was said with reference to making the first interest payment due October 1, 1924, and I deny that Mr. Saperstein stated to me that interest and installments on all his obligations became due on the first days of January, April, July and October, the so-called bank interest days, and that he preferred to have the interest payments become due under my bonds and mortgages on these days and I further deny that I agreed or

assented to this change of the contract. No mention of this was made by Mr. Saperstein at any time during the closing or at any time prior thereto.

7. I was not aware until about the 8th of November that any change had been made in the dates of interest payments. 10

8. On November 7, Mr. Saperstein called me on the telephone and informed me that the interest on the mortgages was due and asked me to pay the same. I informed him that I would do so the next day. On the next day, I called up Mr. Saperstein on the telephone and asked him to whose order I should make the check payable and he refused to tell me and informed 20 me that I had better see his lawyer. He informed me that he had heard that I intended to start suit against the complainant for the deficiency in the quantity of the land and stated that if I was going to make trouble, they had me because the interest was more than thirty days over due and that if I would drop the suit I contemplated bringing, they would accept the interest. At the same time, I informed him that 30 the interest was not more than thirty days over due, that the interest was due on the 4th of November and that I had thirty days within which to pay it; and he replied "You'll find it out."

9. After said telephone conversation, on November 8, 1924, I tended, at the office of Samuel Saperstein at the Prudential Insurance Com- 40

pany, Dispatch Building, Union City, N. J., with Mr. William F. Burke, my counsel, to Mr. Saperstein, three months' interest on the four bonds and mortgages, amounting to Four Hundred Fifty ($450) Dollars, and he refused to accept the tender unless I would agree to abandon my contemplated suit for the deficiency and I refused to agree to this and he refused to accept the interest.

10. Afterwards, about November 11, 1924, I received a registered letter from Mr. Platoff, Solicitor for Complainant, of which a copy is hereto annexed.

11. I did not examine the survey for the dimensions of the entire plot; I relied upon the statements in the contract and the statements made to me by Mr. Saperstein before entering into the contract. I did not hear Mr. Walscheid say anything to me during the closing about the difference between the actual dimensions of the entire plot and the stated width in the contract. My attention was never called to the fact that the plot conveyed as shown by the survey was thirteen (13) feet less than the width stated in the contract and as represented to me.

12. I do not remember that Mr. Walscheid said anything to me about the change in the interest days to the first days of January, April, July and October of each year. There were a number of people present at the closing and considerable arguments and confusion and Mr. Saperstein was in a hurry to catch a boat to go

on his vacation, and of course, I was not expecting any change in the interest dates and did not pay much attention when Mr. Walscheid took my acknowledgment.

13. I have not had a great deal of experience in buying and selling real estate. For a number of years I conducted a retail paint and wall paper store on Bergenline Avenue; up to 1922, and I have purchased and sold a number of pieces and parcels of land in North Hudson but I am not a surveyor and usually rely upon my counsel on questions regarding surveys and other matters.

14. I did not receive the abstract from Mr. Walscheid until October 31 and while this abstract sets out the four mortgages held by the complainant, there was nothing therein to apprise me of the fact that the interest was due other than quarterly from August 4, 1924. I was not aware that the mortgages called for the payment of the first interest on October 1st, until after the thirty days in which to pay the same had expired, nor was I aware that the premises conveyed to me were only seventy-five (75) feet in width until long after the title closed.

15. At the time of the making of the contract, the deed conveying the premises to the complainant was not produced and I never saw it but I relied upon Mr. Saperstein's statement that the premises were eighty-eight (88) feet in width.

16. I never said that I had an offer for Fifty Thousand ($50,000) Dollars for the premises. If

I had had such an offer, I would have accepted it and would not have offered the complainant to reconvey the premises to it.

17. On or about November 17, 1924, I tended to the complainant a deed reconveying said premises to it and demanded the return of the moneys that I had paid but the complainant refused to accept the reconveyance.

18. Some time after that, complainant offered to abandon its foreclosure suits against me if I would abandon my contemplated suit because of the thirteen (13) foot deficiency.

LOUIS KASSOFF.

Sworn and subscribed before me this 21st day of August, 1924.

JOHN H. SHERIDAN,
Master in Chancery
of New Jersey.

Affidavit of Louis Kassoff.

REGISTERED.

John N. Platoff,
Counsellor at Law,
Dispatch Building,
Union Hill, N. J.

Tel. Union 1080 November 10, 1924. 10

Mr. Louis Kassoff,
21 Liberty Place,
Weehawken, N. J.

Dear Sir:

This is to inform you that Western Realty Company who holds your four bonds and mortgages, each for $7,500 covering premises 343-345-347-349 Bergenline Avenue, West Hoboken, 20 New Jersey, demands payment in full of the full amount of principal and interest evidenced by these four bonds and mortgages by reason of the fact that you have failed to pay the interest due on these bonds and mortgages on October 1st, 1924 or within thirty days thereafter, in accordance with the provisions of the said bonds and mortgages.

Kindly arrange to make payment to me on or 30 before next Saturday.

Very truly yours,

p/k (signed) JOHN N. PLATOFF.

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Final Decree.

IN CHANCERY OF NEW JERSEY.

57-84.

Between: WESTERN REALTY COMPANY, Complainant, AND LOUIS KASSOFF, *et ux.*, Defendants.	On Bill to Foreclose.

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This cause being opened to the court by John N. Platoff, solicitor of complainant, and it appearing that process of subpoena calling upon the defendants to answer the complainant's bill of complaint filed herein, has been duly issued and returned served upon the defendants Louis Kassoff and Nettie Kassoff, and it further appearing that the defendants, Louis Kassoff and Nettie Kassoff filed an answer herein, and that on the eighth day of October, 1925, it was ordered, adjudged and decreed by this court that the said answer of the defendants, Louis Kassoff and Nettie Kassoff, be stricken out, and that the bill of complaint be taken as confessed against the said defendants, Louis Kassoff and Nettie Kassoff; and it further appearing that on the thirteenth day of October, 1925, by an order duly made in this cause, the bill of complaint herein was taken as confessed against the said defendants, Louis Kassoff and Nettie Kassoff; whereupon, and upon reading a report

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made by Otto Venino, Esq., one of the Masters of this Court bearing date the twenty-fourth day of October, 1925, whereby it appears that there is due to the complainant for principal and interest on its mortgage the sum of Eight Thousand Fifty ($8,050) Dollars, and no cause appearing to the contrary;

It is on this 28th day of October, 1925, ordered, adjudged and decreed that the said report and all the matters and things therein contained do stand ratified and confirmed; and that the complainant is entitled to have the said sum of Eight Thousand and Fifty ($8,050) Dollars, with lawful interest thereon to be computed from the twenty-fourth day of October, 1925, being the date of the said master's report, together with the complainant's costs in this cause to be taxed, including a counsel fee of $130 Dollars, which is hereby allowed to said complainant, raised and paid out of the mortgaged premises in said bill of complaint described.

It is further ordered, adjudged and decreed that so much of the said mortgaged premises be sold as will be sufficient to raise and satisfy the said debt, interest and costs, and that a writ of *fieri facias,* issued for that purpose, out of this court, directed to the Sheriff of the County of Hudson, commanding him to make sale according to law, of so much of the said mortgaged premises as will be sufficient to satisfy the said debt, interest and costs, and out of the moneys arising from such sale to pay to the complainant, or its solicitor, the said debt, interest and costs; and that in case more money

shall be raised by said sale than shall be sufficient to answer said several payments, such surplus money be brought into this court to abide the further order of this court, unless otherwise previously disposed of by this court, and that the Sheriff make his return, without delay, of his proceedings by virtue of said writ.

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It is further ordered, adjudged and decreed that the defendants and each of them stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to so much of the said mortgaged premises as shall be sold as aforesaid by virtue of this decree.

E. R. Walker,
Chancellor.

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Notice of Appeal From Order Striking Out Answer.

IN CHANCERY OF NEW JERSEY.

Between: WESTERN REALTY COMPANY, Complainant, AND LOUIS KASSOFF, *et ux.*, Defendants.	On Bill, &c.

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The defendants hereby appeal from the Order made in this cause on October 8th, 1925, striking out the answer of the defendants and directing that the bill of Complaint be taken as confessed as against the defendants and striking out the counter-claim of said defendants.

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Dated, November 9th, 1925.

WM. F. BURKE,
Solicitor for and of Counsel
with Defendants.

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

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G. FRANK SHANLEY,
Of Counsel with Defendants.

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Notice of Appeal From Final Decree.

IN CHANCERY OF NEW JERSEY.

Between: WESTERN REALTY COMPANY, Complainant, AND LOUIS KASSOFF, *et ux.*, Defendants.	On Bill, &c.

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The defendants hereby appeal from the final decree made in the above entitled cause on October 28, 1925, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in All Causes.

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Dated, November 10, 1925.

WM. F. BURKE,
Solicitor for and of Counsel
with Defendants.

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

WM. F. BURKE,
Of Counsel with Defendants.

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Petition of Appeal From Order.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ON APPEAL FROM THE COURT OF CHANCERY OF NEW JERSEY.

Between

WESTERN REALTY COMPANY,
Complainant-Appellee,

AND

LOUIS KASSOFF, *et ux*,
Defendants-Appellants.

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TO THE HONORABLE THE COURT OF ERRORS AND APPEALS IN THE LAST RESORT IN ALL CAUSES:

The petition of Louis Kassoff and Nettie Kassoff, the appellants in the above stated cause, respectfully shows that you petitioners find themselves aggrieved by an order made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date October 8, 1925, in a certain cause in said Court of Chancery wherein the said Western Realty Company was complainant and the said Louis Kassoff and Nettie Kassoff, his wife, were defendants, in this respect, to wit: that the said order strikes out the answer of the defendants and the counterclaim filed by the defendants and directing that the bill of complaint be taken as confessed against the said defendants.

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And your petitioners appeal from the said order as aforesaid, upon the ground that the same is erroneous in that:

1. The answer of the defendants should not have been struck out.

10 2. The answer of defendants was not sham or frivolous.

3. The said Court should not have found that said answer was sham or frivolous.

4. The counterclaim filed by the defendants should not have been struck out.

5. The counterclaim filed by the defendants
20 was neither sham nor frivolous.

6. The Court should not have found that said counterclaim was sham or frivolous.

7. The proofs established that said counterclaim was filed by the defendants in good faith and was neither sham nor frivolous.

30 8. The said counterclaim was not a defense but a cross suit and should not have been struck out.

Your petitioners, therefore, pray that the said order of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that petitioners may have such other relief in the premises as to this Court shall seem proper.

Wm. F. Burke,
40 Solicitor for and of Counsel
with Appellants.

Petition of Appeal From Decree.

NEW JERSEY COURT OF ERRORS AND APPEALS,

ON APPEAL FROM THE COURT OF CHANCERY OF NEW JERSEY.

Between

WESTERN REALTY COMPANY,
Complainant-Appellee,

AND

LOUIS KASSOFF, *et ux*,
Defendants-Appellants.

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TO THE HONORABLE THE COURT OF ERRORS AND APPEALS IN THE LAST RESORT IN ALL CAUSES:

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The petition of Louis Kassoff and Nettie Kassoff, the appellants in the above stated cause, respectfully shows that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by His Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date October 28, 1925, in a certain cause in said Court of Chancery wherein the said Western Realty Company was complainant and the said Louis Kassoff and Nettie Kassoff, his wife, were defendants, in this respect to wit; that the said decree adjudges that the complainant's mortgage is due and that the mortgaged premises should be sold to raise and satisfy the money so found due to complainant, and that a writ of *fieri facias* do issue for that purpose and further adjudging and decreeing that the defendants and each of them stand debarred and foreclosed of and from all equity of redemption of, in and to said mortgaged premises.

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Petition of Appeal From Decree.

And your petitioners appeal from the said decree as aforesaid, upon the ground that the same is erroneous in that:

1. The answer of the defendants should not have been struck out.

10 2. The answer of defendants was not sham or frivolous.

3. The said Court should not have found that said answer was sham or frivolous.

4. The counterclaim filed by the defendants should not have been struck out.

5. The counterclaim filed by the defendants
20 was neither sham nor frivolous.

6. The Court should not have found that said counterclaim was sham or frivolous.

7. The proofs established that said counterclaim was filed by the defendants in good faith and was neither sham nor frivolous.

8. The said counterclaim was not a defense
30 but a cross suit and should not have been struck out.

Your petitioners, therefore, pray that the said decree of the said Chancellor may be wholly in the particulars aforesaid, reversed, set aside and for nothing holden, and that petitioners may have such other relief in the premises as to this Court shall seem proper.

WM. BURKE,
40 Solicitor for and Of Counsel
with appellants.

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New Jersey Court of Errors and Appeals

BETWEEN: WESTERN REALTY COMPANY, a corporation of New Jersey, *Complainant-Appellee,* AND LOUIS KASSOFF, et ux, *Defendants-Appellants.*	On Bill On Appeal from Chancery.

BRIEF FOR APPELLANTS

The bill of complaint in this cause was filed to foreclose a mortgage made by the defendants to complainant, dated August 4, 1924, to secure the sum of $7,500 due on August 4, 1927 with interest at 6% payable quarterly on the first days of January, April, July and October, in each year, the first payment of interest to be made on the first of such interest days succeeding the date of said mortgage. The interest due on October 1, 1924, was not paid within thirty days thereafter and on November 7, 1924, defendant was notified that the interest had not been paid. Defendant says he tendered the amount of the interest on November 8, 1924, and was refused. The bill was filed almost immediately afterwards.

The second defense of the answer sets up that the contract for the purchase of the premises in question does not contain any provision for the payment of interest in any way other than quarter yearly and that if it appears that interest was to be paid on the first days of January, April, July and October, such provision was inserted inadver-

tently and by mistake and without defendant's assent or knowledge.

Complainant claims that the matter was mentioned at the closing but this is denied by defendants whose affidavit shows that no mention was made of any such change and that the abstract of title by the attorney selected by both parties in the contract does not show that the interest is so payable.

Defendant, Louis Kassoff, filed a counterclaim setting up that the mortgage was a purchase money mortgage, that defendants had purchased the lands in question together with three other adjoining parcels from complainant under a contract between them wherein the four parcels were described as one tract as follows: All that lot, tract, or parcel of land and premises, with the buildings thereon, hereinafter particularly described situate, lying and being in the Town of West Hoboken, in the County of Hudson, and State of New Jersey, being about eighty-eight (88) feet wide by about one hundred (100) feet deep. Being known as and by the Street Nos. of 343-345-347-349 Bergenline Avenue, West Hoboken, N. J., and alleging that complainant had on August 4, 1924, conveyed to defendants certain lands purporting to be the lands described in said contract and that he had since ascertained that the lands so conveyed were only 75 feet in width. Defendant also in his counterclaim alleged that defendant had, in reliance on the false representations of complainant, that said lands were 88 feet in width, been induced to enter into said contract and to purchase said premises.

Motion was made to strike out the answer of defendants and counterclaim of defendant, Louis

Kassoff, on the ground that the same were sham and frivolous.

The motion was heard by the Vice Chancellor on the affidavits submitted; the answer and the counterclaim were struck out and final decree was entered.

Appeal is taken from both order and decree.

Point I

The counterclaim should not have been struck out as frivolous.

A frivolous defense is one which on its face sets up no defense although it may be true in fact.

In re *Beam,* 93 N. J. Eq. 593.

The mortgage under foreclosure was a purchase money mortgage.

On the foreclosure of a purchase money mortgage the defendant owner is entitled to counterclaim for the value of the deficiency in the lands conveyed.

Kuhnen vs. *Parker,* 56 N. J. Eq. 286.

The contract called for the conveyance of a plot *about* 88 feet in width. The plot actually conveyed was only 75 feet in width.

This was a considerable variance; and if a purchase money mortgage is entitled to a reduction for such a deficiency under a deed with the usual covenants on the theory of damages for a breach of covenant, then surely it is not frivolous for defendant to set up such a claim on the breach of a contract to convey.

Point II

The counterclaim should not be struck out as sham.

A sham defense is one which is good on its face but false in fact.

In re *Beam* supra.

In view of the fact that the contract described the plot as being 88 feet in width when it in fact was only 75 feet clearly shows, irrespective of any other factor in the case, that the defense is not false in fact.

At the least, the defendant is entitled to a hearing on the merits and the question should not have been decided on ex parte affidavits. Defendant was entitled to cross-examination.

Complainant relies practically on a waiver by defendant of the difference in quantity and seeks to show that he was aware of the deficiency but it is apparent from the affidavits that the circumstances were such that he might not have fully understood the actual deficiency considering the fact that the title closing consumed the entire day and that there was considerable confusion and discussion on other points. At the least, defendant was entitled to a hearing on the merits.

Point III

Defendant's counterclaim should not have been struck out in any event as either sham or frivolous.

While it is true that an answer may be stricken out as sham, *Penrose* vs. *Absecon Land Co.*, 94 N. J. Eq. 436, there is no provision for striking out a bill of complaint as sham or frivolous.

Defendant's counterclaim sets up the deficiency in the quantity of the land and also false representations on the part of the complainant and seeks affirmative relief for his damages thereby.

A counterclaim is deemed to be a cross-action and the rules respecting the form and manner of pleading the bill of complaint and answer apply respectively to the counterclaim and the answer thereto. *Rule* 71.

The court below was without authority to strike out the counterclaim as sham or frivolous.

Point IV

Defendant's counterclaim was neither sham nor frivolous.

After the bill to foreclose was filed, complainant offered to abandon its foreclosure provided defendant would waive his claim for the deficiency.

There must have been some truth and justice in defendant's claim otherwise complainant would not have made such an offer.

Point V

The answer should not have been stricken out.

There was a question of fact as to whether or not the provision for the payment of the interest on October 1, 1924, instead of three months after the date of the mortgage, November 4, 1924, was inserted with the knowledge or assent of the defendants and they are at the least entitled to a hearing on the merits and to cross-examination. It cannot be said that this defense is so sham as to justify a denial of a trial on the merits.

It will be noted that the defendant, Louis Kassoff, was notified on November 7, 1924, that the

interest on his mortgages was *due* not *overdue* but *due,* and defendant the next day offered to pay the interest and then was informed that no interest would be received.

Of course, if such a provision was inserted without defendant's knowledge or assent and complainant seeks to take advantage of that provision, the Court would not aid them in what would amount practically to fraud.

Point VI

It is respectfully submitted the order and decree should be reversed.

Respectfully submitted,

William F. Burke,
Solicitor for and of Counsel with Appellants.

New Jersey
Court of Errors and Appeals

Between: WESTERN REALTY COMPANY, A Corporation of New Jersey, *Complainant-Appellee,* AND LOUIS KASSSOFF, ET UX, *Defendants-Appellants.*	On Bill, Etc. On Appeal from Chancery.

BRIEF FOR COMPLAINANT-APPELLEE.

Point I

There was no error in striking out the counterclaim as frivolous.

The power of the Court of Chancery to strike out a counterclaim as frivolous is not here discussed. That aspect of the problem is reserved for discussion under Point III. For purposes of convenience the First and Second Causes of Action of the counterclaim will be considered separately.

FIRST CAUSE OF ACTION

The First Cause of Action alleges merely the discrepancy between the quantity of land described in the contract, Exhibit A (State of Case p. 12), and the quantity actually conveyed. No fraud is alleged, and, hence, this Count must stand or fall without aid from the allegations of fraud in the Second Cause of Action.

The Count is frivolous for three reasons:

(a) Where a deed is made and accepted in pursuance of an executory contract, the law presumes that it fully expresses the final intentions of the parties as to so much of the contract as it purports to execute.

> *Davis* v. *Clark,* 47 N. J. L. 338.
> *Onderdonk* v. *Gray,* 19 N. J. E. 65.
> *Long* v. *Hartwell,* 34 N. J. L. 116.
> *Blum* v. *Parsons Mfg. Co.,* 80 N. J. L. 390.
> *Goldsmith* v. *Meyer,* 94 N. J. L. 40.
> *Merchants & Traders Developing Co.* v. *Mercer Realty Co.,* 99 N. J. L. 442.

Davis v. *Clark, supra,* decided by this Court, was an action to recover damages for a deficiency in the quantity of land sold by defendant to plaintiff. The contract described the tract as containing two hundred forty-four acres, while, in fact, it contained only two hundred twenty-four acres. The deed described the property by metes and bounds, and contained no representation as to the quantity of land. The Court held that the deed expressed the final intentions of the parties, and, since it purported to execute the whole of the contract, the plaintiff could not recover.

In *Onderdonk* v. *Gray,* supra, the Court said:

> "Whatever was intended by the terms used in the contract, or the parol agreement then made as to the possession, was all done away with by the arrangement at the delivery of the deed. The parties in executing a contract have a right to

> depart from its terms. And if they do so, and by consent accept something different in execution of the contract, they are bound by the acceptance, and cannot look back to the contract."

In *Long* v. *Hartwell,* supra, the question was whether the stipulation in the executory contract that the vendor would convey two lots merged in or was extinguished by the acceptance of a deed conveying only one lot. The Court said:

> "The general rule will not be questioned, that the acceptance of a deed for land is to be deemed prima facie full execution of an executory agreement to convey, and thenceforth the agreement becomes void, and the rights of the parties are to be determined by the deed, not by the agreement. * * *
>
> "In cases where the clause in the agreement stipulating that the contract contains a certain number of acres is omitted in the deed, no action will lie on the agreement for deficiency in quantity. * * *
>
> "The acceptance of a deed conveying the whole premises without the covenant as to quantity, or against encumbrances, raises the presumption that the grantee agreed to take title at his own risk as to quantity or encumbrances, or he would have rejected it." (Page 122).

The above cases are sufficient to justify the lower Court in striking out this Count as frivolous. There was a complete merger of the contract between complainant and defendant in the

deed from complainant to defendant, so far as the quantity of lan dwas concerned. The deed contained no representation as to quantity, merely describing the property by street number, and by the description contianed in the deed from complainant's grantors. (Affidavit of Samuel Saperstein, State of Case, p. 27, LL. 30 to 40; aff. of J. Emil Walscheid, S. of C. p. 34, LL. 30 to 40; aff. of Henry Volger, S. of C., p. 38, LL. 22 to 35.) This fact is nowhere denied by the defendant. If a final hearing had been held, and the contract offered in evidence, it would have been rejected on the ground that its provisions had been merged in the deed.

Blum v. *Parsons Mfg. Co.* supra, at page 397.

(b) For another reason the First Cause of Action of the counterclaim is defective. It will be noted that Exhibit "A" (State of Case p. 12) describes the property by street numbers, and also provides that the property shall be conveyed "according to the same description and by the same metes and bounds as contained in the deed from their (complainant's) grantors."

Where property is described by metes and bounds, the addition of a clause representing that it contains a certain quantity of land is considered as mere matter of description, and not a representation of quantity, and is subject to the other controlling specifications. *Melick* v. *Dayton,* 34 N. J. E. 245; *Weart* v. *Rose,* 16 N. J. E. 290; *Clark* v. *Davis,* 32 N. J. E. 530; *Andrews* v. *Rue,* 34 N. J. L. 402.

It is submitted that the dimensions stated in the contract are controlled by, and subject to, the street number description and the clause whereby complainant agreed to convey by the

same description as contained in the deed from its grantors, and that therefore the clause regarding dimensions is not a representation of quantity.

(c) Finally, the First Cause of Action is defective for the reason that the element of quantity of land was obviously not of the essence of the contract. In such case, the Court of Chancery cannot grant an abatement for a deficiency. *Hostetter* v. *Merick,* 92 N. J. E. 313; *Potter* v. *Lumsden,* 93 N. J. E. 477.

In the Hostetter case, supra, the property was described by street number "the said lot being 34½ feet front on Pacific Avenue and of that width 100 feet in depth." The property was in reality only 34 feet in front and 30 feet in back. The Court said:

> "But I think no case of either class is to be found in which relief has been given for deficiency in quantity of land in the absence of fraud unless it has satisfactorily appeared that the element of quantity of land was of the essence of the contract. Where a sale is by the acre or other unit of superficial contents, and a substantial mistake has been made touching the area, a vendee may be equitably awarded appropriate compensation for deficiency in quantity or where the mistake in quantity is so gross that it is clear the purchaser would not have contracted had he known the mistake, like relief may be awarded; but where from all the circumstances of the case it is clear that the sale was in gross, and that the purchaser was not in fact influenced in the price he agreed to pay by any mistake touching area, there is obviously no equitable ground for abate-

> ment from the purchase price. On the contrary, in such circumstances, an abatement from the purchase price would be clearly inequitable. Recognition of these principles will be found in *Weart* v. *Rose,* 16 N. J. Eq. 290, 298; *Melick* v. *Dayton,* 34 N. J. Eq. 245, 250; *McMichael* v. *Webster,* 54 N. J. Eq. 478, 492; *Strauss* v. *Norris,* 78 N. J. Eq. 488, 494."
>
> See also *Potter* v. *Lumsden,* 93 Eq. 477.

In the present case the property consists of four three-story frame buildings, which cover the entire width of the premises conveyed. (Affidavit of Samuel Saperstein, State of Case, p. 22; Survey, S. of C., p. 53). The purchase price was arrived at with reference to the entire parcel and was based upon the income and rental value of each house, and the taxes and operating expenses. (State of Case p. 25, lines 20 to 30). Nowhere does the defendant, Louis Kassoff, allege that the quantity of land was a factor in arriving at the purchase price, or that he was in the least degree influenced to pay the purchase price by the quantity of land. (See Affidavit of Louis Kassoff, State of Case p. 53, et seq.) These facts indicate that the element of quantity of land was not "of the essence of the contract."

SECOND CAUSE OF ACTION

The defendant's Second Cause of Action alleges a misrepresentation by the complainant as to the quantity of land, a reliance upon said representations, and the purchase of the premises in reliance thereon (State of Case p. 10).

This count must also be stricken as frivolous unless it appears that there is some equity which

prevents the rule of merger stated above from operating. If, at the time the deed was executed and delivered to defendant, he was aware that the premises were only seventy-five feet in width, he is not entitled to recover, even if a fraudulent representation had been made in the contract. From the affidavits before him, the Vice Chancellor was enabled to determine whether the defendant knew, or should have known, when he accepted the deed, how much land the premises comprised. (For a discussion of this evidence see Point II infra.) The overwhelming weight of these affidavits indicates that defendant could not possibly have been ignorant of the quantity of land when he accepted the deed. Being satisconcerning this preliminary question of fact, the Vice Chancellor had complete authority to strike out the Count as frivolous on the ground that the rule of *Davis* v. *Clark,* supra, applied.

Moreover, there is no allegation in the said cause of action that defendant sustained any damages by reason of the alleged misrepresentation as to the quantity of land, and in fact they sustained none. Considering the buildings thereon, and the method by which the purchase price was arrived at, defendant received all that he bargained for, and was not injured by a twelve-foot deficiency in the width of the premises. This failure to allege any damage in the counterclaim, coupled with the total absence of any allegation or proof of damage in the affidavit of Louis Kassoff, is fatal to the validity of the counterclaim.

It will also be noted that the contract described the property as containing "about eighty-four feet." If the element of quantity were of the

essence, this terminology would not have been employed. Moreover, it was within the province of the lower Court to determine that the discrepancy in such a case was comparatively so slight as to be covered by the use of the word "about," and that therefore the counterclaim does not lie.

Point II

There was no error in striking out the counterclaim as sham.

Under Point I, we have undertaken to prove that both causes of action in the counterclaim are frivolous. Under this point, we are concerned with demonstrating that both causes of action are sham as well. While recognizing that in *Fidelity etc. Co.* v. *Wilkes-Barre etc. Co.,* 98 N. J. L., 507, Justice Minturn held that a pleading may not be stricken out as sham and frivolous, yet it is conceivable that a false pleading may fail to state a cause of action, and may thus be both sham and frivolous (*Schiff* v. *Alexander,* 130 At. 133.) The defendant's counterclaim not only fails to state a cause of action either count, but the material facts alleged are palpably sham, and hence, both counts were rightfully stricken out as either sham or frivolous.

FIRST CAUSE OF ACTION

It has been held that in order to ground and action for abatement from the purchase price, there must have been fraud or gross mistake. (*Strauss* v. *Norris,* 78 N. J. E. 488.) No fraud being alleged in the first cause of action, it must rest upon gross mistake. The only allegation

from which mistake may be inferred lies in Paragraph 4 that "Since that date (August 4, 1924) this defendant has ascertained that the lands so conveyed to him by complainant, are only seventy-five feet in width." If this allegation is false and defendants were aware of the discrepancy in the quantity of land prior to August 4, the date they accepted the deed, the first cause of action is fatally defective.

The evidence that defendant, Louis Kassoff, was aware that the lands conveyed to him were only seventy-five feet in width, prior to his acceptance of the deed and execution of the bonds and mortgages, is overwhelming. It is uncontradicted that: he had personally inspected the premises many times during the period of about a year prior to the execution of the contract (affidavit of Samuel Saperstein, State of Case p. 25, LL. 33-40, p. 26, LL. 1-18); on July 1, 1924, defendant and J. Emil Walscheid ordered Frances E. Harmon, C. E., to make a survey of the premises (Affidavits of J. Emil Walscheid, S. of C. p. 35, LL. 2-6, and Frances E. Harmon, p. 6, LL. 414-18); sometime before the closing of title, defendant called at the office of J. Emil Walscheid and inspected the survey (affidavits of J. Emil Walscheid, S. of C., p. 35, LL. 18-21, Henry Vogler, p. 39 LL. 1-14, survey, p. 52); the closing consumed seven or eight hours and during the entire period, the survey, deeds, bonds and mortgages lay in full view on the table, (affidavits of J. Emil Walscheid, S. of C., p. 35, LL. 18-30, Henry Vogler, p. 39, LL. 31-40, and Max Klipper, p. 43, LL. 28-40); several times at the closing defendant examined the survey very carefully (affidavits of Max Klipper, p. 43, LL. 38-40, J. Emil Walscheid,

p. 36, LL. 13-18, and Henry Volger, p. 40, LL. 8-12); defendant compared the description on the survey with those in the deed and mortgages, (affidavits of Samuel Saperstein, p. 29, LL. 2-10, J. Emil Walscheid, p. 36, LL. 20-31, Henry Volger, p. 41, LL. 2-13, and Max Klipper, p. 44, LL. 16-21); before signing the bonds and mortgages, defendant read all the papers, J. Emil Walscheid explained the contents of each and asked defendant whether he understood the same, and whether he executed the bonds and mortgages as his voluntary act and deed, and defendant answered in the affirmative, (affidavits of J. Emil Walscheid, p. 36, LL. 32-40, Samuel Saperstein, p. 29, LL. 22-25, and Henry Volger, p. 41, LL. 10-21).

These are the plain or conceded facts in the case in the face of which paragraph 4 of the First Count of the Counterclaim is palpably false.

There is here no room for the mistake required to ground an action for abatement of the purchase price. The mistake must be sufficient to induce the Court to believe that if the truth had been known, the parties would not have contracteed. Mistake and gross mistake are interchangeable in this connection.

Strauss v. *Norris,* supra.
Melich v. *Dayton,* 34 N. J. E., 245,
Weart v. *Ross,* 16 N. J. E., 290.

SECOND CAUSE OF ACTION

In their brief, under Point II, defendants did not seek to justify the allegations of fraud in the second cause of action. They rely, apparently, upon a misunderstanding on the part of defendants, occasioned by the confusion surrounding the closing of title. However, an examination of the affidavits will reveal that the second cause of

action could not possibly stand even if pressed by defendants.

It is elementary that to ground an action, a misrepresentation must be material. The representation as to the quantity of land was not material in this case. The premises consisted of four three-story frame buildings covering the entire width of the land sold, situated in a secondary business location in the City of Union City, and each building consisted of a store and two stories occupied as dwellings, (Survey, S. of C., p. 52, affidavit of Samuel Saperstein, S. of C., p. 42, LL. 1-20). The premises had been offered for sale at Fifty thousand ($50,000.00) dollars, and it was only after long and arduous negotiating that complainant was induced to accept Forty-two thousand ($42,000.00) dollars; and, if this figure had not been accepted, the deal would have fallen through, (affidavit of Samuel Saperstein, S. of C., p. 25, LL. 1-5). The purchase price was arrived at upon the income and rental value of the houses and the taxes and operating expenses of each, and, because of the character of the property, the dimensions of the land were of no consequence, (affidavit of Samuel Saperstein, S. of C., p. 25, LL. 24-23). No complaint was ever made by defendant, Louis Kassoff, concerning the discrepancy until foreclosure proceedings were begun, (affidavit of J. Emil Walscheid, S. of C., p. 37, LL. 12-25).

But whether the misrepresentation, if any, was material or not, there certainly was no reliance upon it by the defendant, Louis Kassoff. He had inspected the premises personally a great many times before the purchase, with more than one broker. He was a skilled real estate operator, familiar with property in that locality. He ordered

a survey of the premises before he took title. At the closing, he made absolutely no comment regarding the dimensions of the premises, made no request that a covenant as to quantity be contained in the deed, and devoted the entire seven or eight hours to wrangling over adjustments and examining the closing papers and survey. The entire course of his conduct, both positive and negative, was inconsistent with any reliance upon the representation contained in the contract.

Point III

Thus, the vital allegations of this count are ~~shown~~ sham.

Under the general equitable powers of the Court of Chancery, it may strike out a counterclaim as sham or frivolous.

As defandants point out in Point III, of their brief, a counterclaim is deemed to be a cross action, and the rules respecting the form and manner of pleading the bill of complaint apply to the counterclaim. They assert that "there is no provision for striking out a bill of complaint as sham or frivolous," and, therefore, they argue, the court below was without authority to strike out the counterclaim as sham or frivolous. This contention ignores, first, Rule 67 of the Rules of the Court of Chancery, and, second, the general inherent power of the Court of Chancery to order any frivolous or false pleadings stricken out.

(a) *A Counterclaim May Be Stricken Out As Frivolous.*

Rule 67 of the present Rules of the Court of Chancery is as follows:

> "Demurrers, pleas and exceptions to answer are abolished. Any pleading may be objected to, on motion, on the ground that it discloses no cause of action, defense, or counterclaim, respectively."

No more explicit authority in the Court of Chancery to strike out a bill of complaint or counterclaim on the ground that it is frivolous, and discloses no cause of action, can be imagined.

But aside from the Chancery Rules, there is a general inherent power in the Court of Chancery to order either frivolous or false pleadings to be stricken out. The cases in support of this contention will be found in subdivision (b) hereunder.

(b) *A Counter claim May Be Stricken Out As Sham.*

An objection to a pleading under Rule 67 is tantamount to a demurrer at common law. (*Weidmann Silk Dyeing Co.* v. *E. Jersey Water Co.,* 88 N. J. E., 397, affirmed 89 N. J. E., 541.) Since, under a demurrer, all facts properly pleaded had to be admitted for the purposes of the demurrer, under Rule 67 there can be no motion to strike a bill of complaint or counterclaim on the ground that it is sham. But the inherent power of a court of equity to so far control a suit before it as to strike out a false pleading, has been recognized and exercised in the following cases:

> *Weidmann Silk Dyeing Co.* v. *E. Jersey Water Co.*, Supra.
> *In re Beam,* 93 N. J. E., 493.
> *Stanbery* v. *Baker,* 55 N. J. E., 270.

In the Weidmann case, Chancellor Walker used the following language (page 401):

> "Although a demurrer to an answer would not formerly lie, courts of eequity have always had the power to strike out pleadings (including answers) as sham and frivolous, the same as courts of common law.

> *Stanbery* v. *Baker,* 55 N. J. E., 270, 271. And Rule 53 of the present edition (Chancery Rules, 1917) recognizes this power."

This case of *Stanbery* v. *Baker,* adverted to by Chancellor Walker, held that while the old Chancery Rule 213 did not authorize a motion to strike out a demurrer, the notice of motion did not purport to have been given under the rule,

> "and it may, therefore, be considered as based upon the general power of the Court of Chancery to strike out a frivolous demurrer on motion. The existence of such right is denied by the defendant, but I think the Court of Chancery has the power inherent in every superior court of striking out a demurrer clearly frivolous, or clearly intended for the sole purpose of delay. * * * This right of the Court of Chancery to overrule and suppress pleadings as sham and frivolous would seem to be necessary for the due administration of justice, and to be the same in its character as the right constantly exercised in our superior courts of common law." (Page 271.)

In re Beam, supra, involved a question whether the Prerogative Court had the right to strike out an answer as sham. The Court held:

> "I think the law is the other way, and that this court has inherent power to order false pleadings stricken out, whether in causes pending before it as a court of original jurisdiction, or as appellate tribunal. Courts of general jurisdiction have power to strike out pleadings as sham or frivolous.

> And it has been their immemorial practice to do so. Anonymous, 7 N. J., Law 160. The Court of Chancery has inherent power to strike out a frivolous demurrer. *Stanbery* v. *Baker,* 55 N. J. E., 270. And the Court of Errors and Appeals will strike out an appeal as sham and frivolous if it presents no arguable case." (Page 595.)

As indicated by Chancellor Walker in the preceding case, this inherent power to strike out pleadings resides in all the superior courts of this state.

> *Pope* v. *Skinkle,* 45 N. J. L., 39.
> *Brown* v. *Warden,* 44 N. J. L., 177, 179.
> *Coykendall* v. *Robinson,* 39 N. J. L., 98.
> *Mt. Pleasant Cemetery Co.* v. *Erie R. R. Co.,* 74 N. J. L., 100.
> *Schiff* v. *Alexander,* 130 Atl. Rep., 133.

Schiff v. *Alexander,* supra, involved an appeal from an order of the Hudson County Circuit Court striking out the defendant's answer and counterclaim, and directing the entering of a final judgment. The lower court's opinion was adopted by the Supreme Court. The counterclaim was stricken out on the ground that it was both sham and frivolous. The Practice Act, Section 320, S. C. R. 1913, Rule 40, provides:

> "Demurrers are abolished. Any pleading may be struck out on motion on the ground that it discloses no cause of action, defense or counterclaim respectively."

This is substantially the same language as Rule 67 of the Chancery Rules, quoted above. This is the statutory source of the power of the law courts to entertain motions to strike,. Hence, the

action of the court in the Schiff case in striking out the counterclaim as sham must have been based upon an inherent power such as has been heretofore described.

The fact that, today, motions to strike are generally made in Equity, under Rule 67, and, at law under the Practice Act and Rules of the Supreme Court, has tended to obscure the immemorial jurisdiction of the superior courts over objectionable pleadings without statutory enactment. But the jurisdiction, nevertheless, indubitably continues to exist.

It is submitted that the above cases amply vindicate the power of the lower court to strike out the counterclaim of the defendant, on the ground that the same was either false or frivolous.

In this connection, the procedure on an application to strike out a counterclaim on the ground of sham should be considered. Complainant filed several affidavits in support of its motion, and defendant, Louis Kassoff, filed an affidavit by himself. That the lower court had the right to consider these affidavits on the motion, and, with reference to them, to determine whether the counterclaim was sham, is settled by the following cases:

Penrose v. *Absecon Land Co.*, 94 N. J. E., 436.

In re Beam, 93 N. J. E., 593.

Milberg v. *Keuthe*, 93 N. J. L. 779, 791.

Soulthrope v. *Commonwealth Gas Co.*, 98 N. J. L., 845, 848.

Lembeck N *Betz Brewing Co.* v. *Krause*, 94 N. J. L., 291.

Conklin v. *Genung*, 92 N. J. L., 618.

Schiff v. *Alexander*, 130 Atl., 133.

Point IV

Defendants' counterclaim was either sham or frivolous.

This point has been sufficiently covered under Points I and II. Apparently the defendants seek under this point to have this Court pass upon the truth or falsity of defendants' claim and to draw inferences from the alleged fact that complainant offered to abandon its foreclosure proceedings, if defendant would waive his claim for the deficiency. The truth or falsity of that fact has been determined by the lower Court.

Point V

There was no error in striking out the answer.

The sole point raised by the defendants under Point V is that the provision contained in the bonds and mortgages that the first interest day should be October 1, 1924, was inserted without the knowledge or assent of the defendants. No fraud is alleged, defendants relying upon a mistake as to the date upon which the first payment of interest would become due (S. of C., p. 9, LL. 23-33).

The defendants do not seek reformation or rescission on the ground of mistake. They are seeking to avoid the effect of the plain language of these bonds and mortgages by a prior written agreement. This is violative, but not only of the rule of merger above described, but of the parole evidence rule, which excludes written, as well as oral, prior agreements.

A mortgage cannot be reformed, corrected, or declared void for fraud or mistake in the consideration in a suit brought to foreclose it, nor can that suit be defended on such grounds. The only remedy is by cross-bill for that purpose.

Graham v. *Berryman,* 19 N. J. E., 29-34.
Miller v. *Gregory,* 16 N. J. E., 274.

The defendants should not be relieved for another reason. The stipulation in a mortgage for the whole debt to mature upon default in an interest payment, is not treated as a forfeiture clause, but rather as a stipulation for a period of credit on condition. Breaches of such clauses are only relieved against when purely equitable grounds, incident to the individual case, are presented.

Bergman v. *Fortescue,* 74 N. J. E., 266.
Spring v. *Fisk,* 21 N. J. E., 175.
Arkanburgh v. *Lakeside Residence Association,* 56 N. J. E., 192.

Equity will not relieve the mortgagor for a failure to pay an interest installment promptly upon the due dates where payment is delayed because of the negligence of the mortgagor.

Baldwin v. *aVn Vorst,* 10 N. J. E., 577.
Spring v. *Fisk,* supra.
Haggerty v. *McCanna,* 25 N. J. E., 48.
Serrel v. *Rothstein,* 49 N. J. E., 385.
Garfinkel v. *Hickey,* 96 N. J. E., 720.

In each of the above cases, distinction was drawn between a mistake and mere carelessness or negligence. In *Spring* v. *Fisk,* supra, the court held that the fact that the mortgage was recorded at length was sufficient to render the mortgagor's ignorance as to any of its items, mere carelessness.

The same view was taken in the case of *Garfinkel* v. *Hickey,* supra, where the court said:

> "the mortgage was recorded, and the defendant, being charged thereby with constructive notice of the interest maturity dates thereunder, always had it in his power to acquire actual knowledge of such dates by examining the record. Being, so far as the point here involved is concerned, in the position of a debtor, it was his duty to inform himself of these dates in order that he might pay the interest when it fell due, instead of relying upon what he thought was the probability of the creditor sending him a demand for payment."

In the instant case, there was even less excuse than in the Garfinkel case for the debtor's ignorance of the interest days, for there was here no reliance upon the creditor to notify him when interest fell due. There were no acts or declarations on the part of the mortgagee which led to the mistake on the defendant's part.

The mistake must be as to a fact not only not known to the party, but one which he could not by reasonable diligence have ascertained.

> *Graham* v. *Berryman,* 19 N. J. E., 29.
> *Institute B. & L. Association* v. *Edwards,* 81 N. J. E., 359.

Aside from the frivolousness of the defense on this score, it is clear that the answer is sham because the mortgagor did not labor under any mistake as to the interest dates. At the closing Samuel Saperstein asked him whether it made any difference if the interest payments came due on the bank interest days, January 1, April 1, July 1,

and October 1, and he answered that it did not, (affidavit of Samuel Saperstein, S. of C., p. 29, LL. 30-40). Defendant read over the bonds and mortgages very carefully before signing the same, and the contents thereof were read and explained to him in full by his counsel, J. Emil Walscheid, (affidavit of J. Emil Walscheid, S. of C., p. 36, LL. 30-40).

On November 7, 1924, Samuel Saperstein telephoned the defendant and requested him to pay the interest, and defendant did not deny that the same was due, but stated that he forgot to pay the same and promised to make payment the next day. He also received a letter to that effect. Interest was never paid and not tendered until after complainant had elected to declare the principal sum due, (affidavit of Samuel Saperstein, S. of C., p. 32, LL. 24-40). Thus, there is no possibility that defendant was not made fully aware when interest was due, both on the date of the closing and repeatedly thereafter.

The fact that defendant tendered to complainan three months' interest after complainant had elected to declare the principal sum due, is, of course, no defense to the foreclosure suit.

> *Weiner* v. *Cullen,* 128 Atl. Rep., 176.
>
> *Joseph M. Rowland Co.* v. *Sutton,* 4 A. R., 120.
>
> *Arkenburg* v. *Lakeside Residence Association,* supra.
>
> *Baldwin* v. *Van Vorst,* supra, and other cases cited under this point.

The question has been raised whether the tender of interest by the defendant was not made before complainant elected to declare the principal sum due. The affidavits of both Samuel Saperstein and

defendant agree that on November 7, 1924, Mr. Saperstein called the defendant on the telephone and informed him that the interest on the mortgages was due and defendant agreed to pay the same the next day, not denying that the said interest was due. (Affidavit of Samuel Saperstein, S. of C., p. 32, affidavit of Louis Kassoff, S. of C., p. 55.) It is also undisputed that the interest was not paid the next day. Assuming it is true, as defendants allege, that on November 8, 1924, he tendered the amount of the interest to Mr. Sapeerstin, which fact complainant has never had opportunity to deny, it is submitted that this fact cannot aid defendant. Complainant was under no duty to notify defendant of its election to declare the principal sum matured. The mortgage merely contained the usual printed clause providing for the acceleration of maturity upon default "at the option of the said Western Realty Company" (State of Case, p. 31).

> "But in the absence of such a provision (requiring notice of default), no notice to the mortgagor is necessary, nor any demand of payment before suit; the commencement of a suit for foreclosure of the entire mortgage is a sufficient declaration of thee mortgagee's intention, and is all th notice to which the mortgagor is entitled." 27 Cyc. 1524.

The mere refusal to accept the interest when tendered after default is a sufficient election to declare the entire principal sum due.

Thorn v. *Mosher,* 20 N. J. E., 257.
Baldwin v. *Van Vorst,* supra.
Serrel v. *Rothstein,* 49 N. J. E., 385.

Of course, if complainant had accepted the interest tendered after default, it would have waived its right to foreclose, but a mortgagee cannot be compelled to waive such right by a tender of the amount in arrear.

> *Malcolm* v. *Allen,* 49 N. Y., 448, 27 Cyc., 1524.

As to the defense that it was not agreeed that the bonds and mortgages should contain any provision for the payment of interest in any manner other than that mentioned in said agreement, the rule of merger settles this point. The provision that interest should be payable quarterly in the contract, was merged in the provisions contained in the bonds and mortgages. See cases supra under Point I.

Point VI

The answer was properly stricken out on the ground that taxes were in default.

In their brief, defendants did not advert to the fact that the bill to foreclose was based, not only on the failure to pay interest, but also upon the failure to pay current taxes for more than ninety days after the same became due (S. of C., p. 6). They apparently do not specify as a ground for appeal that the lower court erred in striking out the defense, insofar as defendants sought to excuse the non-payment of taxes. This fact alone is sufficient to justify the court in striking out the answer for no adequate defense was interposed to the bill to foreclose on this point. The allegation that the taxes were paid subsequent to the suit cannot relieve the defendants.

After foreclosure proceediengs have been commenced for non-payment of taxes, payment by the mortgagor of the same is of no avail.

> *Arkenburgh* v. *Lakeside Residence Association,* 56 N. J. E., 102.
>
> *Bergman* v. *Fortescue,* 74 N. J. E., 266.
>
> *Newark Trunk Co.* v. *Clark,* 94 N. J. E., 79.

Moreover, while it is true that these taxes became due on June 1, 1924, a sum sufficient to pay the same was allowed to defendant at the closing (S. of C., p. 48), upon defendant's agreement to pay the same at once. (Affidavit of J. Emil Walscheid, S. of C., p. 35 to 36; affidavit of Henry Volger, S. of C., p. 40, L. 1 to 8.) When the Bill of Complaint was filed, more than ninety days after the closing, these taxes still remained due and unpaid.

Point VII

It is respectfully submitted that the order and decree appealed from, should in all things be affirmed.

IT IS RESPECTIVELY SUBMITTED THAT THE ORDER AND DECREE APPEALED FROM, SHOULD IN ALL THINGS BE AFFIRMED.

Respectfully submitted,

JOHN N. PLATOFF,

Solicitor for and of Counsel with Complainant-Appellee.