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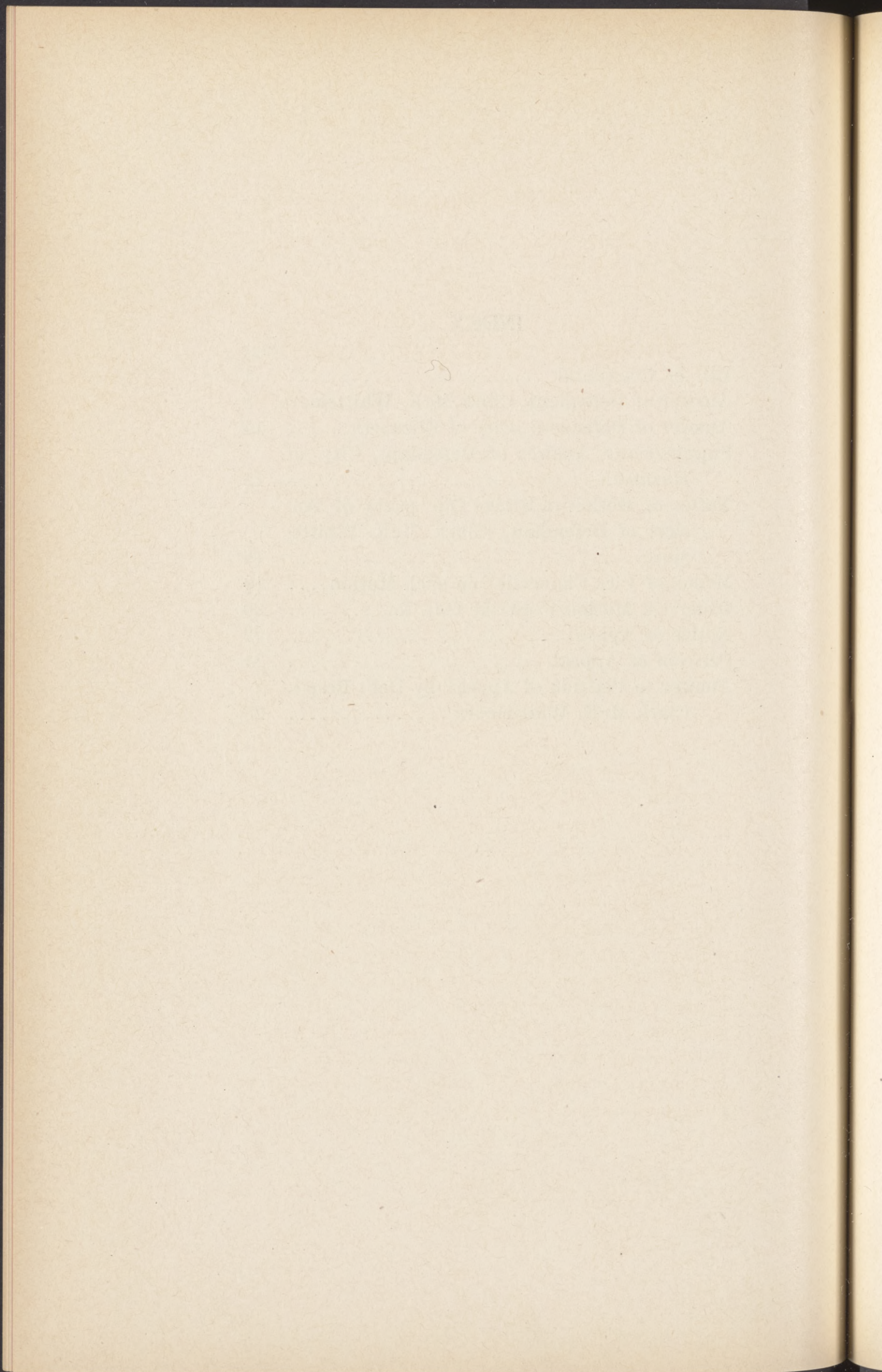

Bill of Complaint.

(Filed September 16, 1930).

(81-106)

In Chancery of New Jersey.

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey. 10

Complainant, John C. Griffin, residing at #649 Wyoming Avenue, in the City of Elizabeth, County of Union, State of New Jersey, respectfully shows that:

1. Complainant is and has been the lawful owner and possessor of a certain lot or tract of land in the aforesaid City of Elizabeth described as follows: 20

Beginning on the northerly side of Wyoming Avenue at a point distant sixty (60) feet easterly from the corner formed by the intersection of said side of Wyoming Avenue with the easterly side of Springfield Road; thence running easterly along said side of Wyoming Avenue ten (10) feet; thence running northerly at right angles to said side of Wyoming Avenue one hundred and seventy (170) 30 feet to the southerly side of Elizabeth Place; thence westerly along said side of Elizabeth Place ten feet; and thence southerly one hundred and seventy (170) feet to the place of beginning; (Elizabeth Place is now known as Baker Place.) The above property being the extreme Westerly 10 feet of 645 Wyoming Avenue, as the same adjoins #647 Wyoming Avenue, also owned and possessed by said complainant; complainant deriving his title 40

and possession to the above tract of land by virtue of a judgment in an Action in Ejectment, entered in the Union County Circuit Court of this State, on October 16, 1922, in which action the El Mora Realty Company, a corporation of this State, was plaintiff, and the complainant John C. Griffin was defendant; which judgment is still in full force
10 and effect, and has never been disturbed or set aside in any way, by any of the Courts of this State, either on rule to show cause or on appeal; that complainant has caused certified copies to be made of all the proceedings in the aforesaid Action in Ejectment, and has caused the same to be recorded in the Union County Register's Office in Book 1048 of Deeds aforesaid County on Pages 449 &c., which records and proceedings in said
20 courts are herewith brought into Court.

2. That by virtue of the aforesaid judgment in the aforesaid Action of Ejectment, and by virtue of the laws and decisions of the State of New Jersey and particularly by virtue of the statute laws of this State, the aforesaid judgment is conclusive as to the right of possession, and the title to the premises, (as the case may be) as the same has been established by such judgment, upon the par-
30 ty against whom it is recovered, and upon all persons claiming from, through or under such party (certain exceptions as to infants &c., none of which exist in this matter) Vol. 2 Comp. Stats. of N. J., Section 44, Pg. 2062.

3. That on June 30, 1926 J. A. Kiernan, Attorney of John C. Griffin in the aforesaid Ejectment matters, sent a communication to the Secretary of the Board of Revision of Taxes, of the said City of
40 Elizabeth, reciting the aforesaid proceedings in the

Ejectment suit and requesting and demanding said Board to tax and assess the aforesaid plot of 10 feet, as described in #1 against the said John C. Griffin; and the said John C. Griffin presumed that said communication had been duly acted upon, and the aforesaid 10 feet plot of land duly assessed against him; that on August 7, 1930, in procuring a Mortgage Loan complainant procured a Tax Search from the Comptroller's Office of the said City of Elizabeth, which disclosed the following matters, of which complainant hereinafter complains: 10

(1) Nos. 643-645 Wyoming Avenue of which the above is a part sold May 17, 1926 under Chapter 237 laws 1918 to C. McK. Whittemore at 8% redemption fee. (Certificate #1227.) 20

(2) Nos. 643-645 Wyoming Avenue sold April 25, 1927 under Chapter 237 laws 1918 to F. Brodesser at 8% redemption fee. (Certificate #1395.)

(3) Nos. 643-645 Wyoming Avenue sold May 21, 1928 under Chapter 237 laws 1918 to C. McK. Whittemore at 8% redemption fee. (Certificate #1655.)

(4) Nos. 643-645 Wyoming Avenue sold May 5, 1930 under Chapter 237 laws 1918 to C. McK. Whittemore at 8% redemption fee for, $135.63. Add interest at 8% from May 5, 1930. (Certificate #2481.) 30

4. That complainant, through his solicitor J. A. Kiernan has investigated the above liens in the said Comptroller's Office of the City of Elizabeth; and has been informed by the officials therein that #1 of said liens is of a total amount of $85.39 for paving against the whole of #645 Wyoming Ave- 40

nue aforesaid formerly consisting of 40 feet of assessable realty; that the proportionate amount for the said 10 feet would be $21.35; with interest at 8% from May 17, 1926, in all amounting to about $28.72 up to September 8, 1930; that #2 was for taxes of $159.60 for the same property and the proportionate amount with the said 10 feet would be
10 $39.90 with interest at 8% from April 25, 1927, and up to September 8, 1930, this amounting to $50.67; that #3 is also for taxes of $133.16 against the same property, and the proportionate amount for the one-quarter or 10 feet would be $33.29 with interest at 8% from May 21, 1928, which amounts to $39.61, up to September 8, 1930; that #4 is for taxes of the same property of $129.65, and the proportionate amount for the said 10 feet would be
20 $32.42 with interest at 8% from May 5, 1930 in all amounting to $33.29, up to September 8, 1930; the total amount of the above with interest up to September 8, 1930, being $152.29; that the remaining portion of #645 Wyoming Avenue aforesaid, is taxed and assessed against the said El Mora Realty Company, of which Clark McK. Whittemore, hereinafter mentioned, is an officer and stockholder; that through some error or neglect the afore-
30 said 10 feet of land was not assessed against complainant for the years herein stated, but was wrongfully included as a whole in #645 Wyoming Avenue, that the said Clark McK. Whittemore, is also the possessor of the tax certificate relating to #2, the same having been turned over to him by F. Brodesser.

5. That as the situation now stands, the return of the above tax and encumbrance liens including
40 the 10 feet of #645 Wyoming Avenue, owned by

complainant, causes the same to be a cloud upon the title of complainant, and prevents complainant from dealing with and disposing of said property, as he otherwise could do, were these liens not open and in existence in the aforesaid Comptroller's Office of the City of Elizabeth; that complainant has applied to the said Comptroller and also to the City Treasurer of the City of Elizabeth for the relief of the above matters and has tendered to them in cash, the aforesaid sum of $159.29, the proportionate amount due as aforesaid from complainant, on the aforesaid assessments; that said tender has been refused by said officials, and complainant informed by them that they can do nothing for him in said matters because the aforesaid tax sales certificates were issued for the whole of said #645 Wyoming Avenue, and they are without power to cancel or discharge said certificates except upon payment of the whole sum mentioned in said certificates, and that as complainant owns and possess only the said Westerly 10 feet of #645 Wyoming Avenue, the remaining 30 feet being held by the said El Mora Realty Company, this requirement of said City Officials is unjust and inequitable; that complainant has tendered on September 8, 1930 to the aforesaid Clark McK. Whittemore the said sum of $152.29 in cash, being the aforesaid proportionate amounts due under the aforesaid tax certificates held and possessed by the said Clark McK. Whittemore, that at the time of making such tender, complainant, through his attorney, J. A. Kiernan presented to said Clark McK. Whittemore certain papers, calling for the signature of said Clark McK. Whittemore, and directed to the aforesaid Comptroller of the City of Elizabeth, whereby the aforesaid tax liens mentioned in the aforesaid

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certificates would be cancelled and discharged, so far as relating to the aforesaid extreme Westerly 10 feet of #645 Wyoming Avenue that the said Clark McK. Whittemore refused to accept said tender or payment from complainant in any manner, and refused to issue any cancellation or discharge of said liens as above requested; that the above tender of money of $152.29, is herewith brought into and paid into Court for the use and benefit of the said Clark McK. Whittemore holder and possessor of the aforesaid tax certificates; that no notices to redeem have been given to said complainant, under these certificates, by the said Clark McK. Whittemore or anyone else, and no proceedings taken to collect said monies or to acquire any title, according to the provisions of the tax laws.

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

1. That the said Clark McK. Whittemore and the said City of Elizabeth, a municipal corporation of this State, may answer this Bill of Complaint, and each and every statement therein made.

2. That an accounting may be taken of the proportionate amount or amounts due from complainant to the said Clark McK. Whittemore, upon the aforesaid tax certificates; and that the said Clark McK. Whittemore may be ordered and decreed to accept and receive from said complainant the aforesaid proportionate amounts; and that he be further directed and decreed, upon payment to him of the aforesaid proportionate monies, to execute due and proper releases and discharges, directed to the proper officials of said City of Elizabeth; and to do any and all things necessary to the end that

the aforesaid 10 feet of property may be discharged from the liens of the aforesaid matters mentioned in said certificates; and that the aforesaid City of Elizabeth through its proper tax officials shall receive from complainant the aforesaid releases and discharges of said tax liens against aforesaid property. 10

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.

J. A. KIERNAN,
Solicitor and Counsel with Complainant.

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Answer of Defendant, Clark McK. Whittemore.

(Filed November 6, 1930).

IN CHANCERY OF NEW JERSEY.

JOHN C. GRIFFIN, Complainant, and CLARK McK. WHITTEMORE, *et al.* Defendants.	On Bill, Etc. Answer. (D-81-106.)

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Clark McK. Whittemore, one of the defendants, residing in the City of Elizabeth, N. J. answering the bill of complaint of the complainant, John C. Griffin, says:

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1. He denies the allegations of paragraph 1, except he admits the complainant derived whatever title to the premises described in the bill of complaint that he may possess, if any, by the judgment in the action of ejectment referred to in said paragraph.

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2. He denies the allegations of paragraph 2.

3. He denies the allegations of paragraph 3, except that he admits the tax sales referred to as items (1), (2), (3) and (4).

4. He denies the allegations of paragraph 4, except that he admits that the entire premises known as No. 645 Wyoming Avenue, were assessed to the El Mora Realty Company, as owner; that defendant is an officer and stockholder of said Company

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and that F. Brodesser has assigned to defendant the tax certificate referred to as above item (2).

5. He denies the allegations of paragraph 5, except that he admits the tender to him of the sum of $152.29 and his refusal to accept said sum and that no notices to redeem have been served by this defendant, or other action taken by him under the provisions of the tax laws. 10

Further answering, this defendant says:

6. The complainant has no title to the premises described in the bill of complaint, and that the title to said property is in the El Mora Realty Company.

7. The complainant has no right to an apportionment of the tax liens held by this defendant referred to in the bill, as against the premises described in said bill; that said tax liens constitute claims against the entire premises described as No. 645 Wyoming Avenue, being a lot forty feet wide and one hundred and seventy feet deep, inclusive of the premises described in said bill; that said entire plot No. 645 Wyoming Avenue is not marketable and has no value if reduced in size because the property is privately restricted so as to require any house erected upon it to have a lot or curtailage not less than forty feet in width; that an apportionment of said tax liens would prejudice, depreciate or destroy the value of the remainder due to this defendant on said tax liens, and the value of the security to which this defendant is entitled according to law; that the amount tendered by complainant is much less than the sum to which this defendant is entitled in case of any payment or redemption from said tax sales; that the premi-

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ses described in the bill have a value greater than one-fourth of the whole lot described as No. 645 Wyoming Avenue, which has a width of forty feet and said premises described in the bill as a strip ten feet wide of said lot should bear or be charged with a larger portion than one-quarter of the amount due on said tax liens, in case any apportionment thereof can be had, which this defendant denies.

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8. The complainant does not come into Court with clean hands, and is entitled to no relief in equity in this suit for the following reasons:

Defendant acquired title to his adjoining premises on the corner of Wyoming Avenue and Springfield Road, with the dwelling house erected thereon by mesne conveyances from the purchaser of the same from W. J. Crawford and James Parmelee, who afterward organized and controlled the El Mora Realty Company which owned the adjoining lot and a large amount of other land on the same block and other blocks of land in the vicinity, which were laid out in lots and blocks, and sold and improved in separate lots and blocks subject to a certain uniform set of covenants and restrictions which operated for the benefit of the said purchaser, and the complainant as his grantee by mesne conveyances and for the joint benefit of the owners of other lots and houses in the same block and vicinity; that among said restrictions was a provision that no house should be built upon a lot having a width less than forty feet; that the lot to which complainant acquired title had a width of sixty feet and a house was erected and standing thereon when sold by said Crawford and Parmelee; that the next two adjoining lots were laid out forty

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feet wide, and were vacant and unimproved and could not be increased in size because a house was erected and standing on the next lot to the east; that the most easterly of said lots was sold by the El Mora Realty Company and a dwelling house has been erected thereon; that said restrictions are still in full force and effect and binding on said property; that said premises No. 645 Wyoming Avenue are still vacant and unimproved and if reduced to a width less than forty feet becomes unmarketable and practically valueless; that the width of said lot cannot be increased because no land is available adjoining the same that is not covered by a building; that complainant well knew all of said facts and planned to destroy the value of said forty feet lot and to prevent it from being improved in whole or in part by the erection of a building, and to acquire gratuitously the light, air and view over said entire lot for the benefit of his adjacent property and residence or dwelling house and for other reasons by falsely pretending to have taken and kept possession of the ten foot strip described in the bill for the period of twenty years, whereas such possession, if any there was, was not open, peaceable, notorious or adverse, but was by the license and consent of said El Mora Realty Company, the owner in fee of said ten foot strip; that said El Mora Realty Company upon being apprised of the complainant's claim of possession, instituted an action in ejectment against complainant but judgment was rendered in favor of the complainant upon the false claim that such possession that complainant had or claimed, was adverse to the El Mora Realty Co.; that after said adjudication the City of Elizabeth would not or did not make any change in its method of assessment

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against the lot No. 645 Wyoming Avenue, but continued to tax and assess said lot with a width of forty feet as one entire lot disregarding the judgment in the ejectment suit as a basis for dividing said lot into two parcels; that said judgment, if effective to divide the ownership into two parcels would greatly reduce the taxable and market value of the two parcels to a sum in the total much less than the taxable and market value of the property continued as one parcel, and result in a loss of tax revenue to the City of Elizabeth; that the major portion of the reduction in value would result to the portion of the lot owned by the El Mora Realty Company having a width of thirty feet which has become wholly unsalable because of the restrictions preventing it from being improved by the erection of a dwelling house, whereas the other portion of the lot having a width of ten feet would retain its relative value by being added to complainants' adjoining improved lot; that by reason of the refusal and failure of the City of Elizabeth to assess the two portions of said lot separately, the El Mora Realty Company, was unable to pay the taxes and assessments, assessed and levied, in the various years for which the tax sales in question were made, without paying the taxes and assessments on the portion of the lot of which the complainant claimed the right to possession, involving the possible loss of that portion of said taxes and assessments which would properly be a charge against the lot described in the bill, which lot, because of its greater value, should bear relatively a larger proportion of said taxes and assessments than the remainder of said lot; that the lot described in the bill was benefited by the improvements for which said assessments were made at a

greater rate and a greater sum relatively than the remainder of said lot having a width of forty feet of which it is a part. Said El Mora Realty Company therefore did not pay said taxes and assessments, and the complainant also having failed to pay or offer to pay the same the entire lot was offered for sale in the years of 1926, 1927, 1928 and 1930, and this defendant being an officer and stockholder of said El Mora Realty Company, and to protect his interest and to prevent other persons from acquiring a tax title in said lot against whom, for the reasons above set forth, an apportionment could not be enforced, purchased or acquired said tax claims, and still holds and possesses the same. This defendant, therefore, says it is contrary to equity and good conscience to permit the complainant to exercise any right of apportionment of said tax claims against this defendant or the El Mora Realty Company.

9. The judgment in ejectment in favor of the defendant is not conclusive and binding on this defendant or the El Mora Realty Company in this Court, and in any jurisdiction, affected only the right of possession at the time of the rendition of said judgment.

WHITTEMORE & McLEAN,
Solicitors of Defendant.

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Answer of the Defendant, City of Elizabeth.

(Filed September 22, 1930).

IN CHANCERY OF NEW JERSEY.

Between JOHN C. GRIFFIN, Compl't, and CLARK McK. WHITTEMORE, *et al.* Def'ts.	On Bill, &c. Answer of Defendant, the City of Elizabeth.

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The answer of defendant, the City of Elizabeth a municipal corporation of the State of New Jersey:

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1. Defendant has no knowledge of the matters contained in Pars. 1, 2, 3, 4 and 5, leaving complainant to his proof; except that such tax sales were made, and this defendant will abide by such decree as the Court may make in this matter.

EDWARD NUGENT,
Sol'r &c., of the City of
Elizabeth, Defendant.

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Supplemental Answer, City of Elizabeth.

(Filed November 21, 1930).

IN CHANCERY OF NEW JERSEY.

Between JOHN C. GRIFFIN, Compl't, and CLARK McK. WHITTEMORE, *et al.* Def'ts.	On Bill, &c. Supplemental Answer of Defendant, the City of Elizabeth.

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The Supplemental answer of the defendant the City of Elizabeth, a Municipal Corporation of New Jersey:

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2. In addition to the matters herein before set forth in the answer filed by this defendant, defendant denies the right of this Court to make any changes in the amounts levied in the assessments mentioned in the Bill of Complaint, so as to reduce the amounts of any or all of such assessments, but instead, insists that the amounts of said assessments should not be reduced, to the detriment of the said defendant the City of Elizabeth; this defendant also denies that this Court has any power to place valuations upon lots of land, or parts of such lots in said City of Elizabeth; and that such powers are vested in the assessors, and the tax boards of said City of Elizabeth, and the County of Union.

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EDWARD NUGENT,
Sol'r &c., of the City of
Elizabeth, Defendant.

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Notice of Motion to Strike Out Parts of Answer of Clark McK. Whittemore, Deft.

(Filed November 12, 1930).

IN CHANCERY OF NEW JERSEY.

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Between JOHN C. GRIFFIN, Compl't, and CLARK McK. WHITTEMORE, *et al.* Def'ts.	On Bill, &c. On Motion to Strikt out Parts of Answer.

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To MESSRS. WHITTEMORE & McLEAN, Solicitors of Defendant Clark McK. Whittemore:

Sirs:

Please take notice that on Wednesday, November 12, 1930, at 10 o'clock in the forenoon, before such Vice Chancellor as may be holding the Court of Chancery, at Chancery Chambers, in the Industrial Office Building, 1060 Broad Street, in the City of Newark, N. J., a motion will be made by
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me to have the Court strike out the following paragraphs or parts of answer of the defendant, Clark McK. Whittemore, upon the grounds herein set forth, and for such other and further relief as may be necessary:

Paragraph 6 of said answer, will be asked to be stricken out for the reason that complainant has a title to said premises set forth in the Bill of Complaint, and that such title is evinced by the matter
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set forth in par. 1 of said Bill of Complaint, the

laws of this state set forth in par. 2, and the admission of the defendant in his answer that judgment in said ejectment suit mentioned in the bill, was rendered in favor of defendant;

Upon the further ground that such judgment is res adjudicata, and is binding upon the parties thereto, and all connected, in all Courts of this state. 10

Paragraph #7 of said answer, will be moved to be stricken out, on the grounds that the same presents no defence to this action which can be considered by this Court; that the matters and things stated therein relating to the taxes and tax certificates mentioned in par. #3 of the bill, are matters and things which the said El Mora Realty Company, as owner of the major part of #645 Wyoming Avenue, Elizabeth, N. J., should have presented to the tax assessor of the ward in which the property is situated at the time of such assessment was made, or should have presented to the Union County Board of Taxation on appeal, and that such matters should have been presented by said Company to the tax authorities of the City of Elizabeth, or to the said Union County Board of Taxation, according to the provisions of "An act for the assessment and collection of taxes" (Revision of 1918) P. L. of N. J., 1918 pg. 847, and the amendments and supplements thereto; as these matters are by law within the scope and province of the aforesaid authorities; 20 30

Paragraph #8 of said answer, will be asked to be stricken out, because the same presents no defence to the matters alleged in said Bill of Complaint; that the matters and things set forth in 40

this part of the answer, are matters which can not be considered by this Court, and are matters and things which could have been presented by the said El Mora Realty Company to the different tax boards mentioned in the preceding paragraph;

10 That this Court according to the matters set forth in the preceding paragraphs can not undertake to value different parts of the same lot, and apportion taxes or assessments accordingly; that these are matters which are within the province of the authorities set forth in the preceding paragraph;

Paragraph #9 of said answer will be moved to be stricken out upon the grounds that the said judgment in ejectment, in favor of the defendant, 20 as set forth in paragraph #1 of his bill, is binding and conclusive on the said El Mora Realty Company, and all connected therewith, in every jurisdiction, according to the laws and decisions of this state.

J. A. KIERNAN,
Sol'r of Compl't.

(Service of a true copy of the above Notice, 30 acknowledged by Messrs. Whittemore & McLean, Sol'rs. November 5, 1930.)

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Memo. of Vice Chancellor, on Motion.

IN CHANCERY OF NEW JERSEY.

GRIFFIN vs. WHITTEMORE.	Memorandum.

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On motion to strike answer.

BACKES, Vice Chancellor:

The complainant's title to the ten feet is so imperfectly set up in the bill that Paragraph 6 will not be stricken out of the answer. In Paragraph 1 of the answer the defendant does not admit the complainant has title, he only concedes that whatever title he has is by virtue of the judgment and in Paragraph 6 he denies there is title in the complainant. The issue must be settled at the hearing on the proofs.

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Paragraph 7 must stand. The motion is to strike it in its entirety. One statement in the paragraph holds it, viz: that the amount tendered is not proper portion. That issue must be settled at the hearing.

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Paragraph 8 will be stricken out. Unclean hands alleged is not for the defendant to raise, they are not unclean towards the defendant in respect to the relief sought. 94 N. J. E. 167; 83 N. J. E. 188; 88 N. J. E. 397; 89 N. J. E. 541, 133 Atl. Rep. 41, 96 N. J. E. 95.

Paragraph 9 will stand. It is argumentative, but the motion to strike is not on that ground.

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Order on Motion to Strike Out &c.

(Filed November 22, 1930).

IN CHANCERY OF NEW JERSEY.

Between JOHN C. GRIFFIN, Compl't, and CLARK McK. WHITTEMORE, *et al.* Def'ts.	On Bill, &c. Order on Motion to Strike Out, &c.

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A Motion having been made by the complainant to strike out of the answer filed by the defendant Clark McK. Whittemore, Paragraphs Six (6), Seven (7), Eight (8), and Nine (9), upon the grounds set forth in the Notice of Motion to Strike Out &c., of which the said defendant Clark McK. Whittemore had due notice; and the matters and things coming on before this Court, and the Court having heard the arguments of J. A. Kiernan, Solicitor of said complainant, and of Messrs. Whittemore & McLean, Solicitors of said defendant Clark McK. Whittemore; and the Court having considered the aforesaid matters:

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It is on this 22nd day of November One Thousand Nine Hundred and Thirty, Ordered that the motion to strike out of the said answer of said Clark McK. Whittemore, the said Paragraphs Six (6), Seven (7), and Nine (9), be and the same is here-

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by denied, and said paragraphs allowed to stand; and it is further ordered, that paragraph eight (8) of said answer, be and the same is hereby stricken out.

E. R. WALKER,
C.

Respectfully advised,
JOHN H. BACKES,
V. C.

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Notice of Appeal.

(Filed November 28, 1930).

IN CHANCERY OF NEW JERSEY.

JOHN C. GRIFFIN, Complainant, and CLARK McK. WHITTEMORE, *et al.* Defendants.	On Bill, &c. Notice of Appeal. (D-81-106).

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(From Order by the Chancellor, advised by Hon. JOHN H. BACKES, Vice Chancellor).

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The complainant, John C. Griffin hereby appeals from so much of the Order on Motion to Strike Out, &c., made in the above entitled cause on the 22nd day of November, 1930, as denies said Motion to Strike out Paragraphs Six (6), Seven (7), and Nine (9), of the Answer filed by the defendant Clark McK. Whittemore; and so much of said Order, as directs and orders that said Paragraphs Six (6), Seven (7), and Nine (9), be and are allowed to stand; and on the aforesaid, this appeal is made to the Court of Errors and Appeals in the Last Resort in All Causes.

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Dated, November 25, 1930.

J. A. KIERNAN,
Solicitor for and of Counsel
with Complainant.

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Notice of Appeal.

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

J. A. KIERNAN,
Of Counsel with Complainant.

(Service of a true copy of the within Notice of Appeal, acknowledged by Messrs. Whittemore & McLean, Sol'rs of Clark McK. Whittemore, Deft.; and Edward Nugent, Sol'r for Deft., City of Elizabeth, November 25, 1930).

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Petition of Appeal.

(Filed December 2, 1930).

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between JOHN C. GRIFFIN, Complainant-Appellant, and CLARK McK. WHITTEMORE, *et al.* Defendants-Respondents.	On Appeal from Court of Chancery. Petition of Appeal.

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

The petition of John C. Griffin, the appellant in the above entitled cause, respectfully shows, that:

Petitioner finds himself aggrieved by an Order, made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, (advised by Honorable John H. Backes, Vice Chancellor) bearing date the 22nd day of November, 1930, in a certain cause in said Court of Chancery, wherein the said John C. Griffin is complainant, and the said Clark McK. Whittemore, and the City of Elizabeth, a municipal corporation of this State, are defendants, in this respect, to wit, that the said Order on Motion to Strike Out, &c., recites and adjudges in part, that the said Motion to Strike Out Paragraphs Six (6), Seven (7), and Nine (9), of the Answer filed by the defendant, Clark McK. Whittemore, be denied, and the said

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Paragraphs allowed to stand, as pleaded and set forth in said Answer:

Petitioner appeals from the above parts of said Order On Motion to Strike Out, and herewith presents his grounds of appeal from the aforesaid Order on Motion &c.:

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1. That the said Order is erroneous, in that Paragraph Six (6) of said Answer should have been ordered stricken out, for the reasons that complainant below has a title to said premises set forth in said Bill of Complaint; that such title is evinced by the matters set forth in Par. 1 of said Bill of Complaint, the laws of this State set forth in Par. 2; and the admissions of the defendant, Clark McK. Whittemore, in his Answer that judgment in said ejectment suit mentioned in the said Bill of Complaint, was rendered in favor of John C. Griffin (the Complainant in this present action, and the defendant in the ejectment suit mentioned in the Bill of Complaint), that such judgment in said ejectment suit, so pleaded in the Bill of Complaint, is not legally controverted by the defendant Clark McK. Whittemore in his Answer; that the same is *res adjudicata,* and is binding upon the parties thereto, and all connected, in all Courts of this State:

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2. That Paragraph Seven (7) of said Answer should have been ordered stricken out, because the same presents no defense to this action which can be considered by the Court of Chancery; that the matters and things stated therein relating to the taxes and tax certificates mentioned in Par. 3 of the Bill, are matters and things which the said El Mora Realty Company, as owner of the major part of #645 Wyoming Avenue, Elizabeth, N. J.,

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should have presented to the tax assessor of the ward in which the property is situated at the time of such assessment was made, or should have presented to the Union County Board of Taxation on Appeal, and that such matters should have been presented by said Company to the tax authorities of the City of Elizabeth, or to the said Union County Board of Taxation, according to the provisions of "An Act for the assessment and collection of taxes" (Revision of 1918), P. L. of N. J., 1918 pg. 847, and the amendments and supplements thereto; as these matters are by law within the scope and province of the aforesaid authorities; and that the said Court of Chancery is not authorized or empowered by law to consider, review, revise or in any way to adjudicate upon these matters so set forth in Paragraph Seven (7), of said Answer, that the said tax boards and the Supreme Court of the State of New Jersey have sole jurisdiction in such tax matters, and that any law or act of the Legislature of this State pretending to vest any such jurisdiction in the Court of Chancery of this State, is contrary to the New Jersey State Constitution, and such laws are unconstitutional and of no force or binding effect.

3. Paragraph Nine (9) of said Answer, should have been ordered stricken out, because of the matters herein set forth in #1 of these grounds (which are considered as repeated herewith), and, in addition thereto, because this Paragraph is argumentative; and presents nothing which affects the ownership or right of possession of the complainant to said premises; and presents nothing which shows that the right of possession and ownership of the complainant have, in any way, been changed or af-

fected since the time said judgment of possession and ownership was rendered in said ejectment suit.

Petitioner therefore prays that the said Order On Motion to Strike Out, &c., made by the Chancellor as aforesaid, may be, in the particulars aforesaid, reversed, set aside, and for nothing holden, and that petitioner may have such other relief in the premises as to this Court may seem meet and proper. 10

Dated, November 29, 1930.

J. A. KIERNAN,
Solicitor for and of Counsel
with Appellant.

(Service of a true copy of the within Petition of Appeal, acknowledged by Messrs. Whittemore & McLean, Sol'rs of Clark McK. Whittemore, Deft.-Respt.; and Edward Nugent, Sol'r of City of Elizabeth, Deft.-Respt.; November 29, 1930). 20

NOTE.—No Answer to this Petition is required from the City of Elizabeth, Deft.-Respt.,as City is only a nominal party.

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Answer to Petition of Clark McK. Whittemore.

(Filed December 3, 1930).

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between JOHN C. GRIFFIN, Complainant-Appellant, and CLARK MCK. WHITTEMORE, *et al.* Defendants-Respondents.	On Appeal from the Court of Chancery. Answer to the Petition of Appeal.

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20 The answer of Clark McK. Whittemore, the above named respondent, to the petition of appeal of John C. Griffin, the above named appellant.

This respondent, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits that an order was, on the 22nd day of November, 1930, made and entered in the Court of Chancery of New Jersey in the above entitled cause for the purposes in said petition mentioned and as therein
30 set forth; but as to the substance and form of said order, this respondent begs leave to refer thereto when the same shall be produced.

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

WHITTEMORE & McLEAN,
Solicitors for and of Counsel
40 with Respondent.

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New Jersey Court of Errors and Appeals

Between JOHN C. GRIFFIN, Complainant-Appellant, and CLARK McK. WHITTEMORE, *et al.*, Defendants-Respondents.	On Bill, &c. On Appeal from Court of Chancery.

BRIEF FOR COMPLAINANT-APPELLANT.

Statement.

This is an appeal from an Order On Motion to Strike Out &c., dated November 22, 1930, made by the Chancellor, as advised by Vice Chancellor Backes (Case pg. 20). This order was made as a result of a motion to strike out Pars. 6, 7, 8 and 9 of the answer filed by the defendant Clark McK. Whittemore. This order allows Pars. 6, 7 and 9 to stand, and orders Par. 8, stricken out. As will be shown hereafter, the order appealed from goes

to the merits of the whole case, and, is therefore appeallable.

It is a general rule that an order to be appeallable must go, to some extent, to the merits of the controversy, or substantially affect the legal or equitable rights of the party appealing.

Kocher's Chancery Practice, Pg. 765, citing cases.

The appeal is based upon the grounds that Pars. 6, 7, and 9, should also have been ordered stricken out. *If Par. 7 is ordered stricken out, there is nothing left to the defense of the real defendant Clark McK. Whittemore,* and he would have to abide by such decree as the Court of Chancery might make, ordering him to receive from the complainant, the proportionate amounts due on the tax certificates mentioned in the bill (Case pg. 3.) The other defendant, the City of Elizabeth, is but a nominal party to this action.

The bill of complaint in this case was filed to obtain relief from the amounts due upon four certain tax certificates held by the defendant Clark McK. Whittemore. These certificates, which are set forth on page 3 of the case, embrace the whole of a vacant lot #645 Wyoming Avenue, Elizabeth, N. J. Originally this lot was 40 x 170 ft., and owned by the El Mora Realty Co. The complainant John C. Griffin, claimed ownership by adverse possession, of the Westerly 10 ft. of this lot #645 Wyoming Avenue; this 10 ft. adjoining other property owned by the complainant. The claim of adverse possession was upheld in an ejectment suit brought against the said John C. Griffin by the said El Mora Realty Co., in the Union County Circuit Court. Judgment for possession of this 10 ft.

was entered in favor of John C. Griffin on October 16, 1922 (Case, pg. 2), and the same has never been disturbed.

The bill was filed to compel the said Clark McK. Whittemore, holder of the aforesaid tax certificates, to receive from the complainant the sum of $152.29 in cash, the proportionate amount due on the aforesaid tax certificates; being reckoned as the one-fourth amount of the total sum of the aforesaid tax certificates, for the said #645 Wyoming Avenue, it being a vacant lot, and, as stated, originally 40 ft. front. *The only relief prayed for by the complainant in his bill, is that the said Clark McK. Whittemore may be decreed to accept these proportionate amounts,* and to execute discharges of said liens from the aforesaid 10 ft.; and that the City of Elizabeth, only a nominal defendant, be decreed to accept said discharges of said 10 ft.

To this bill, the defendant Clark McK. Whittemore filed an answer (Case, pgs. 7-13), and objections were made by the complainant to Pars. 6, 7, 8 and 9 of this answer. The other defendant, the City of Elizabeth, filed an answer agreeing to abide by the decree of the Court of Chancery, and also filed a supplemental answer, denying the right of the Court of Chancery to reduce any assessments upon the property in question (Case, pgs. 14-15.)

It is contended, on behalf of John C. Griffin, the

complainant-appellant that the Order on Motion to Strike Out the above parts of the answer of the defendant Clark McK. Whittemore, should be reversed and set aside; and that Pars. 6, 7 and 9 should be ordered stricken out of said answer. It it further contended that this Court should order and direct, that the Court of Chancery should proceed to ascertain if the said $152.29 is the correct and proportionate amount due upon said tax certificates for the aforesaid 10 ft. of land, now owned and possessed by the said John C. Griffin; and, if so, to order and direct that the said defendant, Clark McK. Whittemore, receive this proportionate amount, and execute such releases of the same, as will authorize the said City of Elizabeth to cancel and discharge upon its tax books, the aforesaid tax liens, so far as relating to the extreme westerly 10 ft. of said #645 Wyoming Avenue, Elizabeth, N. J.

POINT I.

Pars. Six and Nine of the Answer, should be stricken out.

Pars. 6, and 9 above referred to, practically embrace the same matters, and may be taken up together, as both deny the title of the complainant to the aforesaid 10 ft. mentioned in the bill, and both concern the ejectment suit mentioned in said bill.

The complainant sets forth in his bill (Case, pg. 2, lines 1-20) that he derives his title to the said 10 ft. of land by virtue of the judgment in the aforesaid ejectment suit.

The defendant, Clark McK. Whittemore, in his answer admits clearly that judgment in favor of said John C. Griffin was entered in the aforesaid ejectment suit. Nothing is set up in these parts of his answer, showing anything that might change the possession or ownership of this land, and nothing is shown effecting any change in such ownership. On these pleadings of the defendant, (Case pg. 8, lines 20-30; pg. 11, lines 20-40; pg. 13, lines 20-30), the Court of Chancery could not hear anything from him, as nothing is set up in these two paragraphs showing any facts, or pleadings, or proceedings of any kind, that tend to show a title or possession in any one else. The mere fact that the defendant sets up in these paragraphs that the title to the property is in the El Mora Realty Co., amounts to nothing; the defendant must show facts, proceedings or documents show-

ing a title in said company. These proofs would have to be something which took place after October 17, 1922, the date of the judgment in the ejectment suit, rendered in favor of the complainant. A consideration of this matter will show that if the defendant Whittemore or the El Mora Realty Co., have acquired any title or possession to the said 10 ft. of land since 1922, they are bound by all the rules of pleading to set forth what their claim of title consists of. As the case and pleadings now stand, the Court of Chancery is bound by the judgment rendered in the ejectment suit, in favor of the complainant, and could not hear anything from the defendant, concerning the title and possession of the aforesaid 10 ft.

It is too well settled for discussion, that the judgment in the aforesaid ejectment suit is res judicata, and the Court of Chancery could not hear anything connected with this action, but is entirely bound by the judgment in the ejectment suit.

It is only necessary to cite some of the leading equity cases on this subject in this state, as follows:

Where the parties to a suit at law have tried an issue of fact over which the court had jurisdiction, neither party, after judgment, can obtain, in equity, any relief against the other, predicated in whole or in part upon an assumption of any such fact, contrary to its determination by the court of law;

Phillips vs. Pullen, 45 N. J. Eq. 830; cited and approved in Brick vs. Burr, 47 N. J. Eq. 192;

Derby Company vs. Water Company, 65 N. J. Eq. at pg. 489;

Woolsey vs. Woolsey, 72 N. J. Eq. at pg. 902;

Bank vs. Hamilton, 99 N. J. Eq. at pg. 497.

POINT II.

Par. Seven of answer should be stricken out, for lack of jurisdiction, &c.

Par. 7, of the answer filed by the defendant, Clark McK. Whittemore, practically embraces the same matters set forth Par. 8 of this answer. Par. 8 was ordered stricken out, and it is difficult to see why Par. 7 was not, at the same time, ordered stricken out.

Par. 7 goes to the whole of the defense in this matter, and if this paragraph is stricken out, there is nothing left of the defendants' case, except that defendant Whittemore will have to take the aforesaid proportionate amount of $152.29 for the discharge of his tax liens against said 10 ft. strip.

Briefly, the matters set forth in Par. 7 of this answer (Case, pg. 9.) are to the effect, that the amount tendered by the complainant to the defendant Whittemore, is not the proper amount; that the 10 ft. is of more value than reckoned by the complainant; that the remaining 30 ft. of this lot #645 Wyoming Avenue has depreciated in value; and that the 10 ft. should be charged with a larger proportion than one-quarter of the amount due on said tax liens.

As stated in the grounds mentioned in the Petition of Appeal, (Case pg. 25), these matters and things stated in said Par. 7 of the answer, are matters which are not within the jurisdiction of the Court of Chancery. These are matters which are only within the jurisdiction of the different tax boards of Union County, and the Supreme Court, on review.

The tax laws of this state relating to real property, were revised in 1918 (P. L. of N. J., 1918 pg. 847) and the sections of that act pertinent to the issues involved in this appeal, are about as follows:

Sec. 501, that the assessor shall determine the full and fair value of each parcel of real property situated in his taxing district, at such price as, in his judgment, such parcel would sell for, at a fair and bona fide sale, by private contract, on the first of October next preceding the date of such assessment:

Sec. 502, provides that the tax assessor shall advertise such assessment books open for his inspection, by any tax payer, for the purpose of enabling such tax payer to ascertain what assessments had been made against him or his property; and to confer informally with the assessor as to the correctness of the assessments, to the end that any errors may be corrected before the filing of the assessment list and duplicate.

Sec. 513, of said tax act reads, in part, as follows:

No tax or assessment imposed or levied in this state shall be set aside or reversed in any court of law or equity in any action, suit or proceeding for any irregularity or defect in form, or illegality in assessing, laying or levying any such tax or assessment, or in the proceding for collecting the same,

if the person against whom, or the property upon which such tax or assessment is assessed, is in fact liable to taxation on such tax of assessment as levied, assessed or laid; (this section further provides that such court may correct the errors, and may fix the amount to be levied, &c.,) This section 513 has been construed in several cases, which will be referred to later.

Sec. 701 of said act provides that any taxpayer feeling aggrieved by the assessed valuation of his property, or feeling that he is discriminated against by the assessed valuation of any other property in the county, may, on or before June 15, file with the county board of taxation a petition of appeal; that such board shall hear such appeal, and revise and correct such assessment, in accordance with the true value of such taxable property; and that witnesses may be compelled to attend; and books and records produced before them for that purpose.

(The above sections 501 and 502, will also be found in Vol. 2 Cum. Supp. to Comp. Stats. of N. J. Pg. 3494; Section 513, Id. pg. 3499, and section 701 pg. 3505, 3506.)

The above sections are the only ones relating to the matters in dispute. And, the only one of those sections, which even hints at a court of equity being concerned in a tax matter, is that of section 513, hereinbefore referred to, and set forth.

Section 513 above mentioned, is the same as that of section 39, P. L. of 1903 pg. 419; 4 Comp. Stats. Pg. 5124.

Counsel has examined all the citations in Shepard's N. J. Citations from 1903 down, and has been unable to find any case, under the old section

39 of the 1903 act, or the new section 513 of the 1918 act, where the Court of Chancery has undertaken to pass upon a tax matter, concerning either the old or new sections. So that, as far as Chancery is concerned, it looks as if these sections were considered as a dead letter.

The old section 39 of the 1903 tax act, this is referred to in Shepard's Citations as follows:

> Ocean Grove vs. Reeves, 79 N. J. L. 334 at 338, Trust Co. vs. Essex County Board of Taxes, 90 N. J. L. 51, Iron Co. vs. Netcong, 90 N. J. L. 58, all taken up on certiorari from tax boards.

As to section 513, the reprint of the old section 39, this is referred to in the following cases:

> Lehigh Valley Co. vs. Mayor &c., of Jersey City, 102 N. J. L., pg. 576, Town of Kearny vs. State Board of Taxes, 103 N. J. L. pg. 26, Pennsylvania Railroad Co. vs. State Board of Taxes, 103 N. J. L. pg. 28. All of the above cases were taken up to the Supreme Court, on appeals from tax boards in the regular way, and all of them were taken up on writs on certiorari.

> Town of Cranbury vs. Chamberlin, 6 Miscell. Rep. 39; this is the only other case reported as to section 513; it is of no moment, as it only concerns a tax lien being prior to a chattel mortgage; it is an appeal to the Supreme Court from the Perth Amboy District Court.

All of the above cases were taken up, in the regular way, by writs of certiorari to the Supreme Court, on appeals from the different tax boards. *There is no reported case of the Court of Chancery considering any tax matter, relating to real estate,*

either under the old section 39 of the 1903 act, or the new section 513 of the 1918 act. So that, it appears that this question of jurisdiction, so fai as Chancery is concerned in these matters, has not been raised before this time.

It is difficult to comprehend how equity came to be mentioned in either of the aforesaid sections. There never has been any procedure in Chancery for the reviewing or revising of real estate tax matters. A bill could not be filed by this purpose, for the complainant in such a bill has adequate remedies at law, by appeals to the tax board, and by certiorari to the Supreme Court. If the aggrieved party lets the time go by for the prosecution of these various writs, it is his own fault; just as it was the fault of the defendant Clark McK. Whittemore, and the El Mora Realty Co., in the present matter.

But, if it is held in this action, that equity has the right to review and revise tax values and tax amounts, there will be a flood of equity cases. Therefore, it is better to keep the jurisdiction of these tax matters in the different tax boards, and in the Supreme Court, on review, by certiorari; where such jurisdiction has always been maintained.

A long line of cases in this State have laid down the principles time and again, that the Supreme Court of this State has the sole right to review taxes and assessments.

Justice Black in his admirable work on taxation (3rd Ed. 1926) denies the right of Chancery having any jurisdiction in tax matters.

"It is and always has been one of the prerogatives of the Supreme Court to supervise the pro-

ceedings, and to correct the errors of all inferior tribunals, and of persons and bodies exercising particular legal functions, such, as the assessment of property for taxation. The principal mode in which this power is put forth, is by the effective and comprehensive writ of certiorari.

Such power cannot be transferred by legislation to the Court of Chancery, to review the action of taxing authorities, and thereby destroy the right of review resting in the Supreme Court. The Supreme Court has exclusive jurisdiction."

Black, "Taxation in New Jersey" (3rd Ed. 1926). Section 279A, Section 282, citing a number of cases as follows:

Jersey City vs. Lembeck, 31 N. J. Eq. 255, 267. (This is a leading case, the opinion being a vigorous one by Chief Justice Beasley) :

Bogert vs. Elizabeth, 25 N. J. Eq. 426.
Land Co. vs. Hoboken, 31 N. J. Eq. 461.
Jewell vs. West Orange, 36 N. J. Eq. 403.
Nugent vs. Hayes, 94 N. J. Eq. 484.
Mack vs. Cain, 92 N. J. Eq. 631.

All of the above cases are to the effect that the Supreme Court has sole jurisdiction in reviewing tax matters, and counsel has been unable to find a case in this state where the Court of Chancery undertook to review tax matters, for the purpose of revising the same, and readjusting taxes or assessments.

In its present status, if this case went to a hearing before a Vice Chancellor, the proceedings, would be about as follows:

On the part of the complainant there would be first produced the certified transcripts of the ejectment suit relating to the said 10 ft.; the complainant would then testify that nothing had happened since 1922 to change his ownership or possession; a clerk from the Elizabeth tax office would then be called, and, he would testify that $152.29 was the correct proportionate amount due on said tax certificates; the tender has been admitted; the complainant would then rest.

On the part of the defendant, of course, the judgment in the ejectment suit is res judicata, as previously set forth. Nothing could be received from him on this matter, and as he has pleaded nothing which happened since 1922, the date of the judgment in ejectment, he would have to sit mute on this point.

Then, the defendant Whittemore would proceed to go in on Par. 7 of his answer. This would oblige him to testify as to the remaining 30ft. of his lot at #645 Wyoming Avenue being greatly depreciated in value, and that the 10 ft., formerly of this lot, secured by the complainant in the ejectment suit, is of greater value than the reckoning of one- fourth of said lot. Real estate experts would be called by the defendant to support this contention, and to give their ideas of the market value of the 10ft. and also of the remaining 30ft. of #645 Wyoming Avenue.

The defendant would then rest.

The complainant might or might not, combat these values.

Then, the Vice Chancellor hearing the matter, would be called upon to advise the decree. If he went into the matters contended for by the defendant, and decreed that the 10ft. owned by the complainant, should bear a greater proportion of the taxes than the one-fourth sum reckoned by complainant; and that the remaining 30ft. owned by the El Mora Realty Co., was of less value than before, it will be plainly seen that the Court of Chancery would then be going into duties imposed upon tax assessors and tax boards. If it made such a decree, a copy of the same would have to be filed in the Tax Office at Elizabeth, and the amounts would have to be changed upon the tax books, and the tax certificates referred to.

A consideration of this phase of the matter, will show how greatly the Court of Chancery would be called upon to interfere in tax matters. It makes no difference that this action is between individuals, for if it is once adjudged that the Court of Chancery has jurisdiction to revise taxes on real estate in any way, then that Court would be called upon to do so in numerous actions. It would be asked to do so in foreclosure and partition suits.

From the aforesaid references to the said tax act of 1918, it will be seen that according to section 501 the El Mora Realty Company, at the time these assessments were made by the tax assessor, could have inspected his books, and talked with him relative to having the assessments corrected. This it did not do.

Under section 701, the said Company had the right to appeal the assessment to the County Board of Taxation, and before this board all the

matters and things stated in paragraph 7 of the answer of the defendant Whittemore, could have been heard and passed upon; and, if necessary, that Board, after hearing the matters, could have increased or reduced the assessments, in accordance with the matters and things set forth in such part of the answer. No such appeals were taken by said Company, but, instead, the assessments were paid, without any question being raised against them by said Company. It is apparent, that in the matter of getting these assessments corrected, and adjusted in a legal way, the said Company was guilty of fatal laches.

POINT III.

Section 513 of the 1918 tax act is unconstitutional, so far as relating to equity.

So far as section 513 of the tax act of 1918 is concerned, that part of ths section, which recites that a court of equity has power to correct errors in taxation, and fix the amounts to be levied, this is clearly unconstitutional. It is an attempt to transfer to the Court of Chancery the powers vested in the Supreme Court, and exercised by the Supreme Court alone, under the writ of certiorari. It makes no difference how this matter is set forth in the section referred to, for the result is the same, and amounts to conferring jurisdiction upon equity in tax matters

"That the legislature cannot confer upon the Circuit Courts the power to review the proceed-

ings of inferior tribunals by certiorari, has already been decided by this court in State, Flanagan, pros. vs. Plainfield, 15 Vroom 118, the reason being that, by our constitution, the authority exercised by the King's Bench by means of the writs of certiorari, mandamus and quo warranto, is vested exclusively in the Supreme Court, and that, therefore, *a law which attempts to transfer any portion of that authority to the Circuit Courts is unconstitutional.*

It cannot be denied that this is what the proviso under consideration does. The power conferred by it is the certiorari power. The fact that it is designated by another name is immaterial. If the legislature can invest the Circuit Courts with this authority, merely by designating it an appeal, no reason can be perceived why it cannot, by the same process, also clothe them with the power heretofore solely exercised by this court through its prerogative writs of mandamus and quo warranto."

McCullough vs. Essex Circuit Court, 59 N. J. L. 103, at pp. 104, 105.
New Brunswick vs. McCann, 74 N. J. L. 171 at pg. 173.

POINT IV.

The parts of the Answer objected to should be stricken out; and the complainant afforded relief.

On behalf of the complainant-appellant it is contended that Pars. 6, 7 and 9 of the aforesaid answer should be stricken out, and this Court should order and direct, that the Order of the Court of Chancery appealed from should be set aside, and that Court should be directed to enter an order striking out Paragraphs 6 and 9 of said answer, as it fully appears, that the defendant Whittemore has admitted in his answer that the complainant has title to the said 10 ft. of land involved in this matter by virtue of the judgment in the aforesaid ejectment suit; nothing being set up to controvert said title.

Par. 7 should be ordered stricken out, because of the Court of Chancery having no jurisdiction to go into and review tax matters, for the purpose of revising and adjusting the amounts of the same; these being matters solely within the jurisdiction of tax boards, and the Supreme Court.

It is really only necessary for this Court to concern itself with Par. 7, for if that is ordered stricken out, it would be a waste of time for the defendant Clark McK. Whittemore to try to set up any defense to the judgment in the ejectment suit, as that whole matter is res judicata, according to that which is set forth in Point I.

As has been previously stated, the matters involved in these tax certificates are several years old, and the amounts were paid to the tax officers of Elizabeth without protest. All the matters stated in Par. 7 could have been produced before the tax boards of Elizabeth and Union County.

Without those appeal proceedings to the tax boards having been taken, the defendant, Clark Mc. Whittemore, on behalf of the El Mora Realty Co., which he represents, being an officer of the same, now asks that the Court of Chanery review the aforesaid assessments. And, also asks that the Court of Chancery, revise and adjust the amounts of such taxes and assessments, so that said El Mora Realty Co. will have the amounts taxed against it reduced. If this is done, and such a decree entered by the Court of Chancery, then the tax officials of Elizabeth and Union County would be bound by such decree year after year; and, if they altered their figures as against the said El Mora Realty Co., that Company could take the aforesaid decree, and apply to the Chancery Court for an injunction restraining such tax boards from raising the amounts of said taxes. The slightest consideration of this phase of the matter will show the endless amount of litigation that would follow, if a decision were made that tax matters might be litigated in our Court of Chancery.

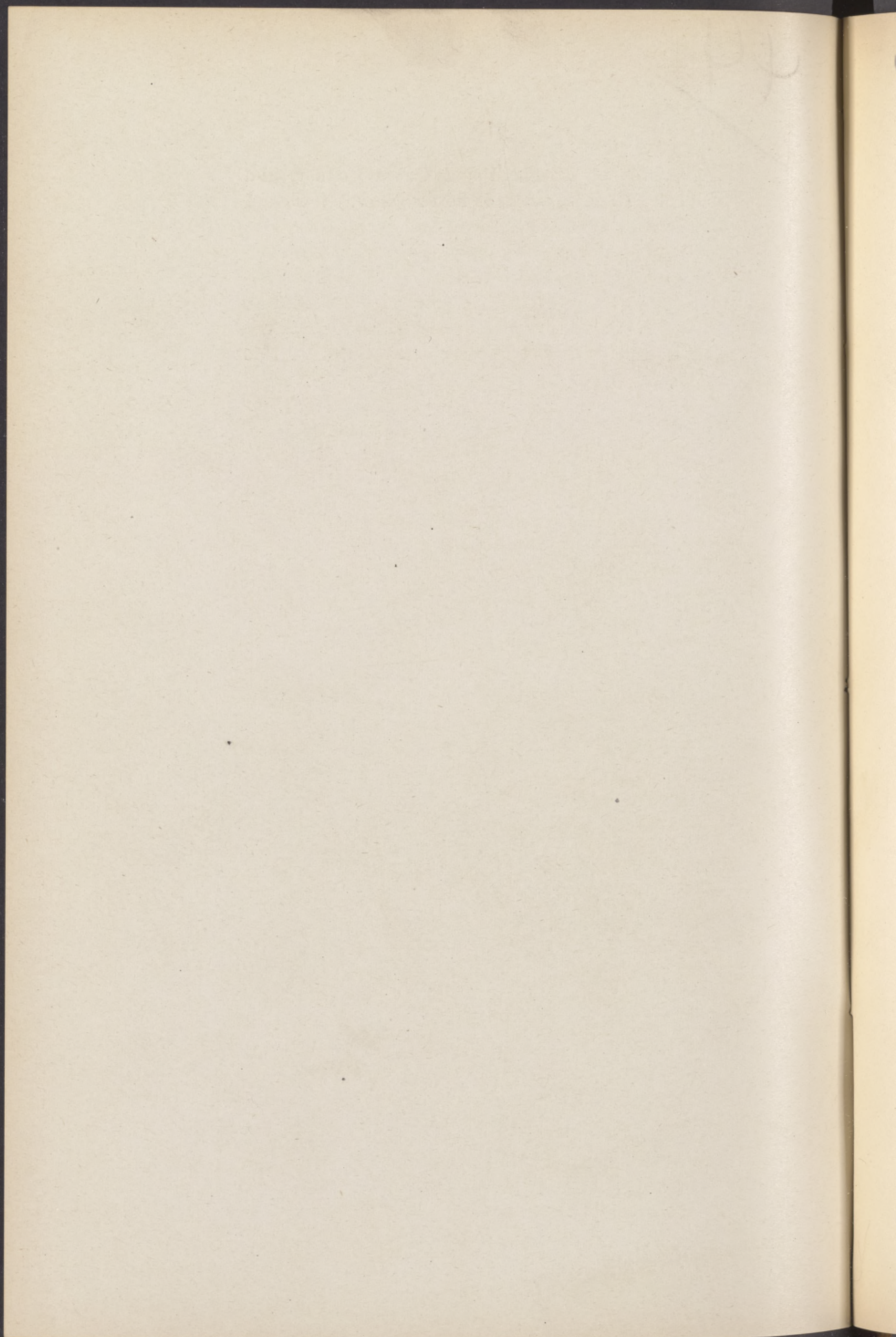
But, it must be plainly evident that neither a court of equity or a court of law, should undertake, in the first instance, to review or revise any tax or assessment. This would be something like an appellate court entering a judgment, without the matter having been brought before any of the lower courts.

As the El Mora Realty Co. had full opportunity to object to the amount of these taxes before the

tax boards of Elizabeth and Union County, and neglected to do so, there is no reason why it should now obtain such relief in any of our courts.

Finally, it is insisted upon the part of the complainant-appellant, that the jurisdiction of reviewing and revising taxes and assessments should be maintained, as heretofore, solely with the different tax boards, and with the Supreme Court of this state.

J. A. KIERNAN,
Solicitor for and of Counsel
with Complainant-Appellant.



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New Jersey Court of Errors and Appeals

Between JOHN C. GRIFFIN, Complainant-Appellant, *and* CLARK McK. WHITTEMORE, *et al.*, Defendants-Respondents.	**On Bill, Etc.** **On Appeal From Court of Chancery.**

BRIEF FOR DEFENDANT-RESPONDENT, CLARK McK. WHITTEMORE.

Statement.

The complainant, John C. Griffin, filed a bill of complaint in this cause, asking for relief from the amounts due on four certain tax certificates held by this defendant and asking, further, that an accounting be taken of the proportionate amount or amounts due from complainant to this defendant, upon the aforesaid tax certificates. Complainant further asks that a decree be entered, ordering this defendant to accept and receive from complainant the aforesaid proportionate amounts; further, that this defendant, upon payment to him of the aforesaid proportionate monies, to execute due and proper releases and discharges and further, to do any and all things necessary to the end that the said ten (10) feet of property sold by defendant, City of Elizabeth, to this defendant, may be discharged from the aforesaid tax liens.

This defendant filed an answer to complainant's bill of complaint, contending complainant was

New Jersey State Library

not entitled to such a decree, whereupon complainant moved to strike out all four of the defenses interposed by this defendant. The Chancellor, upon advice of Vice Chancellor Backes (Case, p. 20), struck out only the third defense (par. 8), allowing paragraphs six, seven and nine to stand.

The order made by the Chancellor, as advised by Vice Chancellor Backes, does not go to the merits of the controversy, neither does it affect the legal or equitable rights of the parties appealing; this defendant contends the complainant has no right to appeal from the order of the Chancellor as advised by Vice Chancellor Backes, as the same is not appealable within the meaning of Section 111 of the Chancery Act, Compiled Statutes, page 450, which reads as follows:

> "All persons *aggrieved* by any order or decree of the Court of Chancery, may appeal from the same or any part thereof, to the Court of Errors and Appeals * * *"

and the construction of this act as placed upon it by the courts of this State.

In the case of *Newark Plank Road Co.* vs. *Elmer et al,* reported in 9 Equity, page 754 at page 787, this Honorable Court for the first time went into the question of appeals from the Court of Chancery to the Court of Errors and Appeals. In this case there were three several orders of decrees entered by the Court of Chancery from which the respective defendants took separate appeals. The Court in passing upon these appeals said:

> "Neither of those decrees disposed of the whole merits of the case but left important questions for further examination and the future judgment of the Court. They were, therefore, not final decrees."

Since the questions which arose in this case were based on an earlier statute than the one under which the complainant in the present case has proceeded, the law is therefore, not applicable but it shows that as early as 1855, this Court first considered, whether or not, an appeal affected the merits of the controversy (or case).

It was held in the case of *Beckhard* v. *Rudolph,* reported in 68 Equity, p. 749, at p. 750, by this Honorable Court that "Relief by appeal from Chancery is only for *persons aggrieved* by the order or decree in question". This rule is also supported by the following case: *Attorney General, et al.,* v. *City of Paterson,* 9 Equity, p. 624.

It was held in the case of *Green* v. *Blackwell,* 32 Equity, p. 768, where the opinion of this Honorable Court was written by Justice Dixon, "One cannot appeal from Court of Chancery to this Court for the purpose of having decree confirmed; he must appear to be *aggrieved* or he has no standing here."

In the case of *Attorney General, et al.,* v. *City of Paterson* (*supra*), the complainant asked for an injunction as against defendant. The Chancellor refused to grant it. The complainant appealed from the order of the Chancellor to the Court of Errors and Appeals. This Honorable Court stated, "The granting or refusal of the temporary injunction during the pendency of the cause was a matter of discretion with the Chancellor. It concluded no right of the parties, or of either of them. The order is in no sense a final order * * *. It is not an order from which an appeal will properly lie." This Court also cited *Garr* v. *Hill,* 5 Equity, p. 639.

In the case of *National Bank of the Metropolis* v. *Sprague,* 21 N. J. Equity, p. 458, at p. 459, this Honorable Court had the following to say regarding appeals:

> "It is settled and is not in fact disputed that an appeal will not lie from an order in the discretion of the Chancellor or upon a mere matter of practice. It was so ruled by this Court in the matter of the application of Anderson, Guardian of Thompson, in 17 Equity, p. 536, 'The real question is whether the order applied for was in the discretion of the Chancellor or whether it was the matter of right which he was bound to grant upon case shown.' What is a matter of discretion may in some cases be doubtful. In the people against the Superior Court of New York, 5 Wendell, p. 125, this discretion is defined to be 'that which is not and cannot be governed by any fixed principles or rules'. And in Rogers *v.* Hosack's Executors, 18 Wendell, p. 319, Justice Cowen says, 'that to warrant an appeal some definite rule of law or equity must appear to have been violated'."

This is cited with approval in the opinion of this Court delivered by the Chief Justice in *Garr* v. *Hill,* 5 Equity, p. 639.

This defendant contends that the order made by the Chancellor, as advised by Vice Chancellor Backes, striking out paragraph 8 of the defendant's answer and refusing to strike out paragraphs 6, 7 and 9 of defendant's answer was a discretionary order within the meaning of the definition of the rule as laid down by this Court and stated in the preceding paragraph, and therefore, the complainant cannot appeal; neither can the said order be said to be a final order.

In the case of *Attorney General, et al.,* v. *Paterson* (*supra*), the learned Justice Potts, speaking for this Honorable Court, at page 629, also went into the question as to when an order is appealable:

> "Indeed, so narrow is the question that usually comes up by appeals from interloc-

utory orders of the Court of Chancery, so exclusively is the appellate court confined to the simple merits of the order itself, that repeated efforts have been made to define with precision the exact line between orders that are appealable, and orders that are not appealable. This is no easy task, nor has it been entirely accomplished. The statute says that all persons *aggrieved* by any order, &c., may appeal.

"But this language must have a legal construction; and hence this court held, in the first case above cited (Garr *vs.* Hill, *supra*), that the parties must in a legal sense be aggrieved. The order must be one that touches the merits of the question in the cause, and affects the rights or interests of the party * * *. In Bruce *v.* Street, Chancellor Kent, delivering the unanimous opinion of the Court of Errors of New York, said: 'It has been frequently admitted in this court that there is a class of orders in chancery which are not objects of appeal. But there never has been any precise and definite line drawn between that class of orders which are, and that class which are not, the ground of appeal. Every person of sense and reflection will at once perceive that such a distinction does, and must exist. * * * Many of these orders relate to the process and practice of the court, and to allow an appeal from every order would not only be absurd but intolerably oppressive.' It never was contemplated to allow an appeal from any decree or order which did not involve a *decision* upon some matter touching the *merits* of the controversy."

This defendant believes and contends the complainant has not been aggrieved in a legal sense within the meaning of the statutes and the construction placed upon the same by the cases hereinbefore cited. The Chancellor, as advised by Vice Chancellor Backes, simply refused to strike out paragraphs 6, 7 and 9 of this defendant's answer and certainly it cannot be said that any defi-

nite rule of law or equity was violated by his refusal to do so.

In the case of *Mutual Life Insurance Co. of New York* v. *Sturges*, reported in 33 Equity 328, at p. 331, the opinion of this Honorable Court was delivered by the learned Justice Dixon and was stated as follows:

> "The right of appeal depends upon whether the appellant is, in a legal sense, aggrieved (Green *v.* Blackwell, *supra*), and that must be determined by considering, not upon what grounds the chancellor has proceeded, but what effect his action has upon the claims of the appellant."

What was the effect of the order made by the Chancellor as advised by Vice Chancellor Backes, upon the rights of the complainant in the case *sub judice.* He was not aggrieved in a legal sense within the meaning of the cases hereinabove cited, for complainant may now proceed to the trial of the issues involved.

It was held in the case of *Stevens' Executrix* v. *Stevens' Executor,* 24 Equity, p. 574, at page 575, wherein the opinion of this Honorable Court was written by the learned Chief Justice, with reference to when an order is appealable:

> "Among the class thus indicated as being clearly not appealable, are all the ordinary orders made in the progress of the suit for the purpose of putting the case at issue, obtaining the requisite evidence, and affording the parties a hearing. No one pretends that any orders of this kind will form a basis for an appeal."

Clearly the order made by the Chancellor, as advised by Vice Chancellor Backes, was for the purpose of putting the litigant in the case *sub judice* at issue and in order that this defendant

might submit all the evidence he has at the trial of the cause.

For the reasons hereinbefore set forth this defendant contends that the order from which complainant appeals is not appealable and that the appeal should, therefore, be dismissed.

It is contended on behalf of Clark McK. Whittemore, the defendant-respondent, that the order on motion to strike out paragraphs 6, 7, 8 and 9 of his answer should be affirmed for the reasons hereinafter set forth.

POINT I.

Paragraphs 6 and 9 of this defendant's answer should not be stricken out.

Paragraphs 6 (Case, p. 9) and 9 (Case, p. 13) of this defendant's answer do not embrace the same matters. Paragraph 6 embraces the question of the title to ten feet of property complainant seeks to redeem from lien of certificates held by this defendant, while paragraph 9 clearly raises a question for the Court to decide, whether or not the judgment which was rendered in favor of the defendant (John C. Griffin) in an action in ejectment in the Union County Circuit Court (for the ten feet in question) affected only the right of possession. In other words, this defendant, who admits the entering of the judgment in favor of the complainant, John C. Griffin, contends by paragraph 9 that said judgment simply affected the right of possession to the said ten feet at the time of the rendition of the verdict.

Paragraph 6 of this defendant's answer simply alleges that the complainant has no title to the premises in question, and alleges further, that

title to the premises is in the Elmore Realty Company. The defendant, by making this statement, joins issue with the complainant on this question. Therefore, this question cannot be determined by a motion to strike, but can only be determined by the evidence on the final hearing.

Defendant's admission that judgment in ejectment was rendered in favor of complainant and against Elmore Realty Company does not preclude this defendant from claiming that complainant has no title to the ten feet in question, because the judgment in ejectment is conclusive only as to right of possession as it existed at the termination of the suit. The defendant, therefore, by paragraph 6, simply alleges a state of title as it exists at the present time.

In the case of *Hoboken Land & Improvement Company* vs. *Hoboken,* reported in 36 N. J. L. p. 540 at p. 543, this Honorable Court said:

> "The action of ejectment is a possessory action. All that is involved in it is the right of possession, and the party, whether plaintiff or defendant, in whom is vested the right of possession, is entitled to succeed in the action, without regard to where the ultimate fee may be."

In the case of *Hunt* vs. *O'Neill,* reported in 44 N. J. L. p. 564 at p. 566, wherein the opinion was written by the learned Justice Depew, it was held:

> "The section of the Act which makes a judgment in ejectment conclusive relates only to the right of possession, and the title to the premises as they existed at the termination of the suit. A judgment in ejectment will not conclude the defeated party as to a title or right of possession subsequently accruing."

This case also cites with approval, *Hoboken Land & Improvement Company* vs. *Hoboken* (*supra*).

Paragraph nine of this defendant's answer, which complainant sought to have stricken out and further which the Chancellor, as advised by Vice Chancellor Backes, refused to strike out, from which order complainant appeals, merely alleges the principles of law enunciated in *Hoboken Land & Improvement Company* v. *Hoboken* and *Hunt* v. *O'Neill* (*supra.*).

Complainant cites the case of *Phillips* v. *Pullen*, reported in 45 N. J. Eq., page 830, which case was cited with approval in the case of *Brick* v. *Burr*, reported in 47 N. J. Eq., p. 192. This defendant does not deny that the law as laid down in that particular case by the learned Justice Garretson is true, but states that the rule referred to by complainant does not apply to the case *sub judice*. This defendant has already shown what this Honorable Court decided many years ago—that an action in ejectment did not affect the title to the fee, but simply affected the right of possession at the time of the rendition of the verdict. This defendant in this suit does not question the right of possession at the time the verdict was rendered, but alleges by paragraph six of his answer that complainant has no title to the premises, and further alleges that title is in the Elmora Realty Company. Complainant assumes because of the judgment which was rendered in his favor in the action in ejectment that he has title to the premises. Complainant has no title to the fee and never did have title to the ten feet in question.

Complainant also cites the cases of *Derby Company* v. *Water Company*, 65 N. J. Equity, p. 489; *Woolsey* v. *Woolsey*, 72 Equity, at p. 902, and *Bank* v. *Hamilton*, 99 N. J. Equity, at p. 497. This defendant states that none of these cases have any bearing on the present controversy, and simply approve the rule as laid down in the case of *Phillips* v. *Pullen* (*supra*).

POINT II.

Paragraph 7 of this defendant's answer should not be stricken out for lack of jurisdiction.

Complainant alleges in his brief paragraph seven goes to the whole of the defense in this matter. Such is not the fact, for paragraphs six and nine question the right of complainant to redeem the property from the lien of the certificates held by this defendant, while paragraph seven questions the adequacy of the amount tendered by complainant to this defendant for redemption of the property from the lien of the certificates held by him.

This defendant alleges by paragraph seven of his answer that because of the premises known as #645 Wyoming Avenue having been restricted so that no building can be erected upon any lot having a frontage of less than forty feet, said plot known as #645 Wyoming Avenue (which said plot is a forty foot plot), if complainant is permitted to redeem ten feet of the said lot which he now seeks to do, would have only a frontage of thirty feet; that because of the restrictions aforesaid, limiting any one building upon a lot with less than forty feet frontage, the remaining thirty feet would be of no real value whatsoever to this defendant. Further, it would naturally follow that to permit complainant to redeem the ten feet from the lien of the certificates held by this defendant would, therefore, not be equitable and just.

It was held in the case of *Culver* v. *Watson*, reported in 28 Equity, p. 548:

> "The owner of the fee of lands, sold for the payment of taxes, may * * * file a bill in equity against the purchaser of said lands at the tax sale to redeem by complying with the requirements of the act."

This case is also cited with approval in the case of *Dodge* v. *Jordon,* 91 Equity 42, at p. 45.

This defendant, however, does not deny the right of complainant to file a bill in equity for the redemption of lands from the lien of tax sale certificates, if complainant were the owner and at the same time tendered the clerk of the court, the amount due on the tax sale certificates, together with costs and interest. Complainant in the case *sub judice,* did not tender to this defendant the full amount due and owing on the said liens owned by him together with costs and interest as provided by Public Laws of 1919, page 284, amending Public Laws of 1918, page 883, which provides as follows:

> "The amount required to redeem within ten days from the date of sale shall be the sum paid at the sale with interest from the date of sale at the rate of redemption for which same was sold; after ten days from date of sale the amount required for redemption shall be the amount above set out in this section together with the expenses incurred by the purchasers hereinafter mentioned and subsequent municipal liens as provided in the following two sections."

It was held in the case of *Smith* v. *Specht,* 58 Equity 47, at page 48:

> "Since Gen. Stat. 3354, paragraph 338, (this act superseded by section hereinabove referred to) requiring the redemptioner from tax sales to pay the price, with costs, expenses and twelve per cent. interest, does not expressly give the landowner the right to come into equity to redeem, equity will compel him, as a condition of permitting him to redeem, to pay all taxes paid by the purchaser, on the principle that he who seeks equity must do equity."

Complainant in the case *sub judice* seeks equity but is not willing to do equity for he only wants to pay a proportion of the cost that this defendant advanced at the time he purchased the tax sale certificates. Complainant states these matters are not within the jurisdiction of the Court of Chancery. If the Court of Chancery has no jurisdiction over such matters, then complainant cannot secure the remedy he asks for.

Complainant alleges that only the Tax Board of Union County has jurisdiction over these matters and the Supreme Court, on review. If this statement is so, since complainant is the moving party and the one asking for apportionment in this Court, then complainant should resort to such authority for such relief and not by this present action.

Complainant, quoting sections 501, 502, 513 and 701 of the tax laws of this State, has gone far astray from the question before this Honorable Court, as paragraph seven of this defendant's answer questions the adequacy of complainant's tender, and it naturally follows that if the Court of Chancery has jurisdiction over the subject matter of the bill of complaint, then it also has the jurisdiction, power and authority to decide upon the question raised by this defendant in paragraph seven of his answer to complainant's bill of complaint. See *Smith* v. *Specht* (*supra*).

This paragraph of defendant's answer presents matters of fact which can only be determined from the evidence on final hearing. Since it presents questions of fact which can only be determined from the evidence on final hearing, the Chancellor, as advised by Vice Chancellor Backes, properly refused to strike out the said paragraph.

Referring again to complainant's argument wherein he states that the questions raised by paragraph seven of this defendant's answer are

matters which are not within the jurisdiction of the Court of Chancery (page 8 of complainant's brief), and stating further, that these are matters which are only within the jurisdiction of the different Tax Boards of Union County, and the Supreme Court, on review, the Tax Assessor and County Tax Board are not authorized by law to make apportionment of taxes or a division of a lot into parts for purposes of taxation after the taxes have been levied and the property *sold at tax sale,* and in the absence of such authority, have no jurisdiction.

This defendant is not the moving party for apportionment, but expressly denies the right of complainant to have the taxes apportioned, and particularly to redeeming ten feet thereof, when taxes were levied on forty feet and sold to this defendant and his certificate is for entire forty feet.

This defendant insists that the defense presented by paragraph seven of the answer is precisely the issue to be settled by this Court. Complainant has filed a bill seeking an apportionment of the Tax Laws on a per front foot or area basis. This defendant, by paragraph seven, directly challenges the right to such an apportionment in this particular case, and the issue of apportionment (if at all) on that basis is presented as an issue of fact and is therefore a proper matter to be presented as a defense. The Chancellor, therefore, as advised by Vice Chancellor Backes, very properly refused to strike out paragraph seven of this defendant's answer.

Complainant states that the sections of the Tax Act (pp. 8 and 9 of Complainant's Brief) are the only sections of the Tax Act which even hint that a Court of Equity might be concerned with a tax matter. Complainant further states that no citations whatsoever have been found showing that

the Court of Chancery has ever undertaken to pass upon a tax matter, and alleges further that as far as the Court of Chancery is concerned it looks as if these sections were considered as a dead letter. See *Smith* v. *Specht* (*supra*).

Complainant further shows that the respective sections referred to by him were taken up on appeal on certiorari from the Tax Boards and further states that there is no reported case of the Court of Chancery considering any tax matter relating to real estate, either under the old section 39 of the 1903 Act or the new section 513 of the 1908 Act, alleging further that it appears that the question of jurisdiction, so far as Chancery is concerned, in these matters, has not been raised before this time.

This defendant does not question the jurisdiction of the Court of Chancery, but simply challenges the right of the complainant to such an apportionment in this particular case. The complainant is the one seeking apportionment, and he himself raises the question of the Court of Chancery to entertain jurisdiction over such a matter. This defendant directly challenges the right of the complainant to an apportionment of said tax certificates, and states further that such a question is a question of fact, and therefore, a proper matter to be presented as a defense.

Complainant assumes that he has the right to redeem the ten foot strip in question from the lien of the certificates held by this defendant.

In the case of *Langley* v. *Jones,* reported in 43 Equity, p. 404, at p. 406, in which case a bill was filed by the complainant for the redemption of tax sale certificates held by the defendant, where the opinion was written by Vice Chancellor Bird, "I am obliged to conclude that the complainant has not shown by his bill his right to redeem. I will so advise." In other words, since complainant's

right to redeem has been challenged, the burden of proof is upon complainant to prove his right to do so.

Complainant further assumes that he has the right to redeem for the reason that judgment in the suit in ejectment brought by the Elmora Realty Company against him in the Union County Circuit Court was rendered in his favor. He also seems to have forgotten that the judgment rendered in his favor merely affected the right of possession at the time of the rendition of the verdict in his favor, and further, that the judgment in the suit in ejectment did not vest the title to the premises in him, but was simply an adjudication of the fact that he was entitled to possession at the time the verdict was rendered.

Complainant does not seek to redeem the premises in question from the lien of the tax sale certificates held by this defendant within the meaning of the word "redeemed" as used in this Act relative to redemption from tax sales.

In the case of *Mitsch* v. *Owens,* reported in 82 Equity, p. 404, at page 405, Chancellor Walker stated, "The word 'Redeem' means repurchase".

The case of *Pace* v. *Bartles,* 47 Equity, p. 170, is also cited as approving of this construction of the word redeem. The Chancellor, continuing, said further:

> "It is perfectly apparent that a repurchase of land sold for taxes can be made only by the owner or other person having an interest in the land and not by a mere stranger at a judicial sale."

The Chancellor also cites with approval *Frazier* v. *Johnson,* 65 N. J. L. 673, and *Cadmus* v. *Bayonne,* 61 N. J. L. 494. It was held in the latter case that the right to redeem is the right of the owner and that its form is strictly prescribed.

In the case of *Frazier* v. *Johnson*, reported in 65 N. J. L. 673, which case was decided by this Honorable Court and the opinion therein was written by the late learned Justice Vredenburgh, the facts in that case were very much similar to those of the case *sub judice*.

The plaintiff's right to the possession of the lands in dispute was that of a purchaser at a tax sale thereof under proceedings regularly taken in accordance with the statutory directions. The defendant's ground of resistance to that right was that he occupied the lands or part of the same and had paid into Court for the plaintiff the purchase money, interest, fees, costs, expenses and charges incurred, and being such occupant, was entitled to redeem the lands under the provisions of our statute. At the trial of this suit the jury was instructed by the court to find a verdict for the defendant and from the judgment thereupon entered in the Supreme Court the plaintiff brought error. This Honorable Court reversed the judgment.

The complainant has not shown that he has the right to redeem the premises in question from the lien of the certificates held by this defendant. Further, if complainant has the right to redeem, and this defendant contends that he has not, complainant must also show that he has a right to redeem the ten-foot strip in question for a portion of the price for which the premises were sold.

All of these questions have been raised by this defendant in his answer. Therefore, this defendant by his answer raised both questions of law and of fact. The questions of fact can be determined only from the evidence on the final hearing.

The complainant assumes further that because of the judgment in the ejectment suit in the Union County Circuit Court having been rendered in favor of the defendant (complainant in this suit),

defendant could not show or plead anything which may have happened since 1922, the date of the judgment in ejectment. In this the complainant errs, for it was held in the case of *Hoboken Land and Improvement Company* vs. *Hoboken* (*supra*), and *Hunt* v. *O'Neill* (*supra*), complainant may show anything which may have happened since the date of the judgment in the ejectment suit, for that judgment merely affected the right of possession at the time of the rendition of the verdict.

This defendant, by virtue of paragraph seven of his answer, could testify, and also have others give testimony as to the great depreciation in value of the remaining thirty feet of the original forty-foot lot, because of the restrictions covering the property.

It therefore, follows that if, the complainant has the right to have the Court of Chancery decree that this defendant accept the sum of $152.29, representing one-fourth of the tax valuation of the property in question, that the Court of Chancery also has the jurisdiction and the power to consider whether or not the sum tendered, represents the fair proportion of the taxes. Once again this defendant would cite the equitable maxim, "He who seeks equity must do equity." *Smith* v. *Specht* (*supra*).

With regard to the various references made by complainant to the Tax Act of 1918, this defendant feels that in view of what has already been stated by him with regard to the Tax Act, it would be mere surplusage to comment further.

POINT III.

Section 513 of the 1918 Tax Act has no bearing with regard to this defendant's answer.

Complainant, with regard to this point (page 15 of Complainant's Brief), assumes that Section 513 of the Tax Act of 1918 (Ch. 236, Laws of 1918, page 870), confers upon the Court of Chancery the power to correct errors in taxation, and states further that that part of the Act is clearly unconstitutional. Complainant states further: "It makes no difference how this matter is set forth in the Section referred to, for the result is the same, and amounts to confirming jurisdiction upon equity and tax matters." In support of his contention, complainant cites the case of *Flannigan* v. *Plainfield,* reported in 44 N. J. L., p. 118; *McCullough* v. *Essex Circuit Court,* 59 N. J. L., p. 103, at p. 104 and 105; and *New Brunswick* v. *McCann,* reported in 74 N. J. L., p. 171, at p. 173. These cases all held that the Legislature could not authorize the Circuit Court to review a matter which was reviewable by a writ of certiorari, which writ is one of the prerogative writs and issues out of the Supreme Court. This defendant admits that the Circuit Court has no power to review a matter which is reviewable by a writ of certiorari.

Complainant evidently assumes that this defendant bases his rights in this matter on Section 513 of the Tax Act of 1918 (Ch. 236, Laws of 1918, p. 870). This defendant does not base his rights upon this section.

Complainant, by filing his bill of complaint in the Court of Chancery asking that the Court decree this defendant accept the sum tendered and in turn execute and make releases to the com-

plainant for the ten-foot strip in question, admits the Court of Chancery has jurisdiction to review tax matters. This defendant is not the moving party for apportionment, but expressly denies that complainant has the right of apportionment. Once again this defendant reiterates that if, as complainant alleges, the Tax Assessor and County Tax Board have jurisdiction, or further, that the Supreme Court has jurisdiction over this matter in the nature of a writ of certiorari, he should resort to the Tax Assessor, the County Tax Board or the Supreme Court for his relief, and not by filing a bill in chancery. Defendant does not challenge the jurisdiction, but challenges the right of the complainant to have such an apportionment in this particular case, upon a per front foot or area basis, made. It is, therefore, immaterial to this defendant whether Section 513 be constitutional or unconstitutional.

POINT IV.

The parts of the answer objected to should not be stricken out, the complainant should not be afforded relief, and the order appealed from should be affirmed.

Among other things, complainant alleges and also states, it fully appears that this defendant has admitted in his answer that complainant has title to the said ten feet of land involved in this matter by virtue of the judgment in the aforesaid ejectment suit. This defendant has not admitted, by his answer, nor does he admit at this time that complainant has title or ever had title to the ten feet. This defendant, by paragraph 1 of his answer (p. 8 of State of Case), denies the allegations of paragraph 1 of complainant's bill of complaint (p. 1 of State of Case), except that

he admits the complainant derived whatever title to the premises described in the bill of complaint that he *may possess, if any,* by the judgment in the action of ejectment referred to in said paragraph.

Complainant contends further under Point Four of his brief (p. 17) that paragraph 7 should be ordered stricken out because the Court of Chancery has no jurisdiction to go into and review tax matters for the purpose of adjusting and revising amounts of the same.

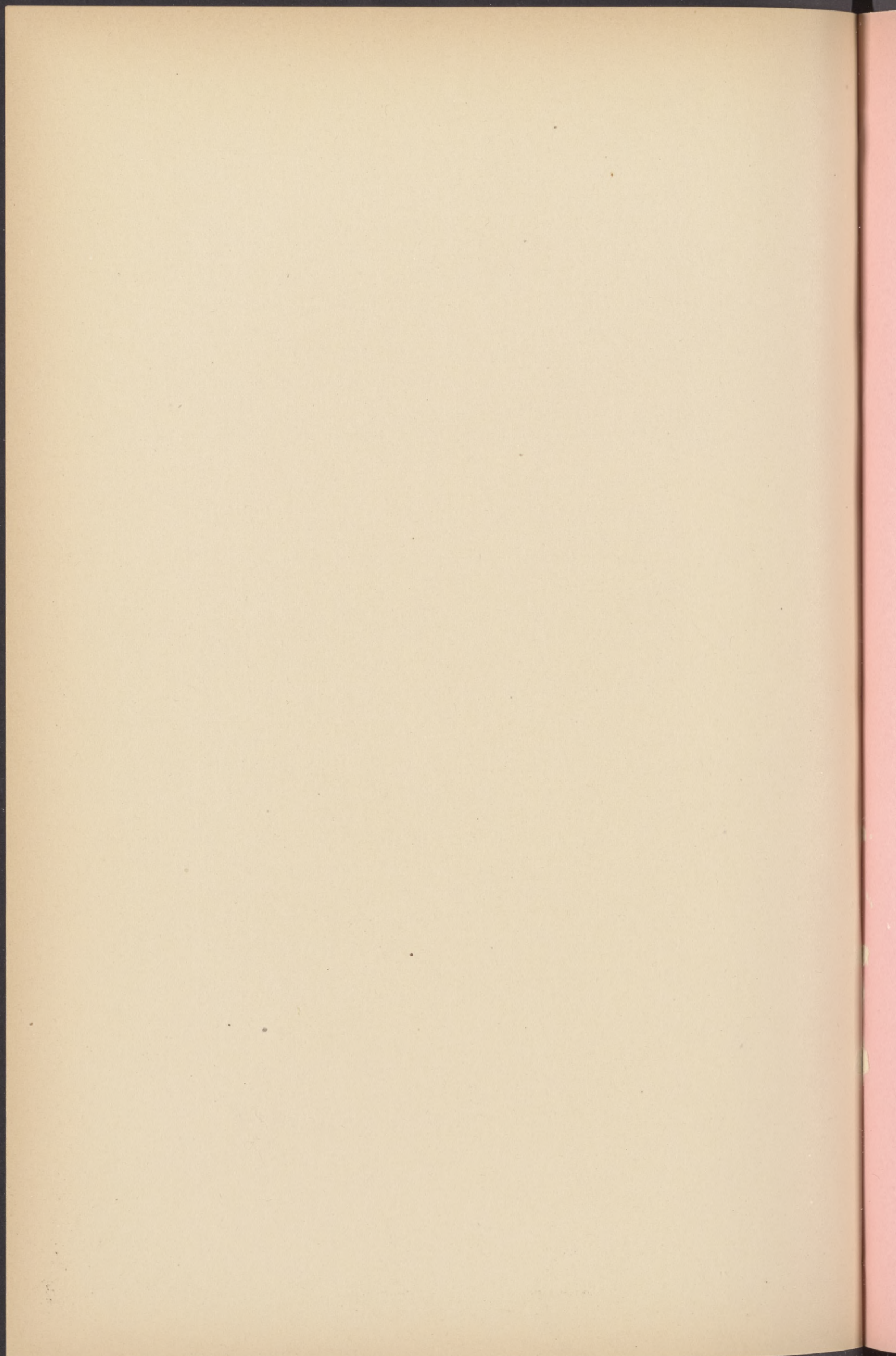
This defendant, answering that point of complainant's brief, reiterates that if the Court of Chancery has jurisdiction over complainant's bill of complaint and has the authority and power to make any kind of a decree in accordance with the prayers contained in complainant's bill of complaint, this defendant contends that the Court of Chancery also has the power to consider whether or not the apportionment on a per front foot or area basis is equitable with regard to this defendant. The complainant, by filing his bill of complaint in the Court of Chancery asking for such a decree, admits that the Court of Chancery has jurisdiction over these matters. The complainant is the moving party in this case, and the defendant is not the moving party for apportionment, but expressly denies the right of apportionment. The defendant, by paragraph 7 of his answer (p. 9 of State of Case), directly challenges the right of the complainant to an apportionment in this particular case on a per front foot or area basis, and the issue of that apportionment (if at all) on that basis is presented as an issue of fact. All issues of fact are proper matters to be presented as a defense, and can only be determined from the evidence on the final hearing. Therefore, it naturally follows that this paragraph should not be stricken out.

Complainant is in error wherein he states that this defendant now asks that the Court of Chancery review the assessments (Page 18 of Complainant's Brief). This defendant does not ask the Court to review the assessments. The complainant is the one seeking the remedy.

This defendant, answering complainant's brief as stated on pages 18 and 19, contends that if the Tax Assessor and the County Tax Board, and the Supreme Court of this State on review, have the jurisdiction of revising and reviewing taxes and assessments as complainant alleges, the complainant, because he is the moving party, should resort to such authorities for such relief, and not by this action.

Lastly, this defendant insists that the defense presented by paragraph seven is precisely the issue to be settled by this Court, for complainant has filed a bill seeking an *apportionment* of the *taxes on a per front foot or area basis.* This defendant simply challenges the right to such an apportionment in this particular case, and the issue of apportionment (if at all) on that basis is presented as an issue of fact and a proper matter to be presented as a defense. This defendant, therefore, states that the order appealed from by the complainant-appellant, made by the Chancellor, as advised by Vice Chancellor Backes, should be affirmed. The issues raised by the answer of this defendant involve questions of fact and can only be determined by the evidence on the final hearing.

WHITTEMORE & McLEAN,
Solicitors for and of Counsel with
Defendant-Respondent.



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Plaintiff's Witnesses

Frederick J. Quigley—
Direct . . . . [illegible]
Cross . . . . [illegible]

Eugene John Luippold—
Direct . . . . [illegible]

Minnie Kanski—
Direct . . . . [illegible]
Cross . . . . [illegible]

Jacob Freesmann—
Direct . . . . [illegible]