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Complainants' Exhibits.

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Amended Notice of Appeal.

In Chancery of New Jersey.

149-237

On Bill, &c.

Between

Elmer W. Lang and Marjorie A. Lang,
Complainants,

and

North Jersey Agency, Inc.,
Defendant.

The complainants, Elmer W. Lang and Marjorie Lang hereby appeal from the final decree made in the above entitled cause on the 16th day of October, 1944, by his Honor Luther A. Campbell, Chancellor of the State of New Jersey, upon the advice of Vice Chancellor Vivian M. Lewis, and from the whole and every part thereof to the Court of Errors and Appeals in the Last Resort in All Causes.

Dated: December 19, 1944.

John O. McGuire,
Solicitor for Complainants.

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

Thomas E. Duffy,
Of Counsel with Complainants.

Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS

On Appeal from the Court of Chancery.

Between
Elmer W. Lang and Marjorie A. Lang, his wife,
Complainants-Appellants,

and

North Jersey Agency, Inc., a corporation of the State of New Jersey,
Defendant-Appellee.

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

The petition of Elmer W. Lang and Marjorie A. Lang, his wife, the appellants in the above entitled cause, respectfully shows that:

1. Petitioners find themselves aggrieved by a final decree, made in the Court of Chancery by his Honor Luther A. Campbell, Chancellor of the State of New Jersey, upon the advice of Vice Chancellor Vivian M. Lewis, bearing date, the 16th day of October, 1944, in a certain cause in said Court of Chancery wherein the said Elmer W. Lang and Marjorie A. Lang, his wife, were complainants and the said North Jersey Agency, Inc., a corporation of the State of New Jersey was defendant, in this respect, to wit, that the said decree adjudges that the Complainant-Appellants are not entitled to the relief sought and prayed for by them in their bill of complaint, being that the defendant-appellee, North Jersey Agency, Inc., a corporation of the State of New

Jersey, may be decreed and declared to be liable to complainant-appellants, Elmer W. Lang and Marjorie A. Lang, his wife, for the amount of the deficiency Seven Thousand Seven Hundred and Ninety-Six Dollars and Sixty-Eight ($7,796.68) cents and interest thereon from the 23rd day of August, 1940 and costs of this suit and that execution might issue against said North Jersey Agency, Inc., a corporation of the State of New Jersey for said sum.

And petitioners appeal from the decree of the Chancellor which decrees as aforesaid upon the ground that the same is erroneous in that:

1. The transaction between the defendant-appellee and complainant-appellants constituted in equity an assumption by the defendant-appellee of the mortgage debt, since the purchaser, defendant-appellee deducted and retained out of the purchase price as fixed and agreed upon, the amount of the mortgage debt, and the grantor, complainant-appellants, being personally liable for payment of same was entitled to be indemnified by the defendant-appellee.

2. The transaction between the parties was a sale and not an exchange and therefore the doctrine of equitable assumption of mortgage debt should have been applied in the instant case.

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

JOHN O. McGUIRE,
Solicitor for Appellants.

THOMAS E. DUFFY,
Of Counsel with Appellants.

Bill of Complaint.

Filed December 1, 1942.

IN CHANCERY OF NEW JERSEY

To the Honorable Luther A. Campbell,
Chancellor of the State of New Jersey:

The complainants, Elmer W. Lang and Marjorie A. Lang, his wife, residing in the City of Passaic, County of Passaic and State of New Jersey, respectfully show that:

1. On the 31st day of October, 1924, the complainant, Elmer W. Lang, being indebted to the Security Mortgage and Title Insurance Company, a corporation of the State of New Jersey, in the sum of Seventy-Five Hundred ($7500.00) Dollars, executed to it his bond of that date, by which he obligated himself in the penal sum of Fifteen Thousand ($15000.00) Dollars, conditioned to pay the principal sum of Seventy-Five Hundred ($7500.00) Dollars on the 31st day of October, 1925, together with interest at the rate of six per centum per annum from October 31st, 1924 and to be paid semi-annually.

2. To secure said bond, the complainant, Elmer W. Lang, executed and delivered to the said Security Mortgage and Title Insurance Company, a New Jersey Corporation, a mortgage of even date upon lands and premises therein described, which mortgage was recorded in the Register's Office of Passaic County in Book U-13 of Mortgages for said County at pages 473 &c.

3. On the 8th day of January, 1925, by written assignment bearing that date, the said bond and mortgage were assigned to the Labor Co-operative National Bank of Paterson.

4. On the 24th day of November, 1925, by written assignment bearing that date, the Labor Co-operative National Bank of Paterson assigned said mortgage to the Security Mortgage and Title Insurance Company, which deed of assignment was on the 2nd day of December, 1925, recorded in the Register's Office of Passaic County in Book K-4 of Assignments, Page 498.

5. On the 22nd day of December, by written assignment bearing that date, the Security Mortgage & Title Insurance Company assigned said mortgage to the Garfield Trust Company, which deed of assignment was on the 16th day of April, 1926, recorded in the Register's Office of Passaic County in Book N-4 of Assignments, page 14.

6. On the 27th day of January, 1928, by written assignment bearing that date, the Garfield Trust Company assigned said mortgage to the Security Mortgage & Title Insurance Company, which deed of assignment was on the 3rd day of February, 1928, recorded in the Register's Office of Passaic County in Book T-4 of Assignments, page 470.

7. On the 17th day of April, 1929, by written assignment bearing that date, the Security Mortgage & Title Insurance Company assigned said mortgage to the Roman and Greek Catholic Gymnastic Slovak Union Sokol, which deed of assignment was on the 23rd day of April, 1929 recorded in the Register's Office of Passaic County in Book Z-4 of Assignments, page 386.

8. Subsequently the Roman and Greek Catholic Gymnastic Slovak Union Sokol changed its name to the Slovak Catholic Sokol.

9. On the 25th day of April, 1935, the Security Mortgage & Title Insurance Company executed a blanket deed of assignment of mortgages including the aforesaid mortgage to the Slovak Catholic Sokol, which deed of assignment was recorded on the 7th day of May, 1935, in Book P-5 of Assignments, page 406.

10. By warranty deed dated the 31st day of October, 1936, complainants Elmer W. Lang and Marjorie A. Lang, his wife, sold and conveyed the mortgaged premises to the North Jersey Agency, Inc., a corporation of New Jersey, which deed was recorded on November 4, 1936, in the Register's Office of Passaic County in Book K-39 of Deeds for said County, page 117 &c. Said deed provided that the conveyance therein was made expressly subject to the aforesaid mortgage held by the Slovak Catholic Sokol, Inc., a New Jersey Corporation.

11. At the final settlement of the aforesaid sale of the mortgaged premises to the North Jersey Agency, a New Jersey Corporation, the defendant herein and upon the delivery to and acceptance of the deed by it, the said North Jersey Agency, Inc., a New Jersey Corporation, deducted the amount of the complainants' mortgage, which was then still due and owing, from the agreed purchase price and the North Jersey Agency, Inc., a New Jersey Corporation was given a credit against the purchase price in the amount of the balance then due on the aforesaid mortgage referred to in Paragraphs 2, 3, 4, 5, 6, 7, 8 and 9 hereof.

12. By reason of the aforesaid sale of the mortgaged premises to the North Jersey Agency, Inc., a New Jersey Corporation wherein it ac-

cepted the same subject to said mortgage and deducted the amount of said indebtedness from the agreed purchase price and received a credit for the amount due on said mortgage on account of said agreed purchase price, the North Jersey Agency, Inc., a New Jersey Corporation became liable in equity and good conscience to complainants for the payment of said mortgage indebtedness.

13. On July 1, 1937, complainants' bond and mortgage by their terms became due and payable and default was made in payment thereof.

14. On May 23, 1940, the Slovak Catholic Sokol, Inc., a New Jersey Corporation instituted suit in this court against complainants Elmer W. Lang and Marjorie A. Lang, his wife, the defendant North Jersey Agency, Inc., a New Jersey Corporation, and others to foreclose said mortgage, and said parties were duly served with process in said suit.

15. On July 18, 1940, a final decree was entered in said suit adjudging that there was due to said Slovak Catholic Sokol, Inc., a New Jersey Corporation upon said bond and mortgage the sum of $7347.73 together with interest from July 15, 1940, and directing that a writ of fieri facias issue to the Sheriff of Passaic County for the sale of the mortgaged premises to raise and satisfy the sum so due, together with taxed costs, and interest thereon from the date of said decree.

16. The said costs were taxed in the cause at the sum of $255.38.

17. Said writ of fieri facias was duly issued and pursuant thereto the sheriff of Passaic County on July 25, 1940, sold said premises at

public sale to the Slovak Catholic Sokol, Inc., a New Jersey Corporation, it being the highest and best bidder for the sum of $100.00.

18. Said Sheriff's sale was confirmed by an order entered in said Chancery suit on August 28, 1940. The fees and disbursements of the Sheriff as lawfully allowed in connection with said sale amounted to $69.94 and they were paid out of the proceeds of said sale. The balance of $35.06 has been credited upon said decree and execution, leaving a deficiency of $7796.68 computed as follows:

Decree	$7347.73
Interest from July 15, 1940 to August 23, 1940	49.29
Costs taxed	255.38
Sheriff's fees	64.94
Commissions on sale of property	179.34
	7896.68
Minus amount realized from Sheriff's Sale	100.00
TOTAL DEFICIENCY	$7796.68

19. Complainants charge that by virtue of the sale of the mortgaged premises described heretofore they have become liable to the Slovak Catholic Sokol, Inc., a New Jersey Corporation, for the amount of the aforesaid deficiency, together with interest thereon from August 23, 1940.

20. On the 17th day of September, 1940 the Slovak Catholic Sokol, Inc., a New Jersey Corporation, instituted suit against the complainants herein in the Passaic County Circuit Court for the amount of the deficiency as aforesaid in the

amount of $7,796.68 together with interest from August 23, 1940 and costs of suit.

21. Complainants charge that by virtue of the sale of the mortgaged premises described in Paragraphs 10 and 11 above, wherein the North Jersey Agency, Inc., a New Jersey Corporation accepted the mortgaged premises subject to the aforesaid mortgage and retained the amount thereof out of the agreed purchase price and received a credit for the amount due on said mortgage on account of said agreed purchase price, the North Jersey Agency, Inc., a New Jersey Corporation is liable to complainants for the amount of the aforesaid deficiency, together with interest thereon from August 23, 1940.

22. Complainants have applied to the said North Jersey Agency, Inc., a New Jersey Corporation and requested it to pay to complainant or Slovak Catholic Sokol the amount of the said deficiency, but it has wholly refused and neglected so to do and the entire sum remains unpaid.

23. There is due to complainant upon their deficiency on said bond and mortgage the sum of $7,796.68 together with interest thereon from August 23, 1940.

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

1. That the defendant North Jersey Agency, Incorporated, a New Jersey Corporation may answer this bill of complaint and each statement herein made.

2. That the defendant North Jersey Agency, Incorporated, a New Jersey Corporation, may be decreed and declared to be liable to complainants

Elmer W. Lang and Marjorie A. Lang, for the amount of the deficiency and interest thereon from the 23rd day of August, 1940 and costs of this suit.

3. That a decree may be entered directing that execution issue against the said defendant, North Jersey Agency, a New Jersey Corporation, for payment to the complainants of the amount of said deficiency together with interest thereon from the 23rd day of August, 1940, and costs of this suit.

4. That complainants may have such other and further relief in the premises as may be agreeable to equity and good sense.

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

JOHN O. MCGUIRE,
Solicitor of Complainants.

THOMAS E. DUFFY,
Of Counsel with Complainants.

Answer.

IN CHANCERY OF NEW JERSEY

149/237

ON BILL, &c.

Between

ELMER W. LANG and MARJORIE A. LANG,

Complainants,

and

NORTH JERSEY AGENCY, INC.,

Defendant.

The defendant North Jersey Agency, Inc. answering the bill of complaint says that:

1. This defendant believes the allegations of Paragraphs 1 to 9 inclusive to be true, but asks that the documents referred to therein be produced at the hearing of this cause so that the exact wording thereof may be shown.

2. Defendant admits that by deed dated October 31, 1936, recorded November 4, 1936 in Book K 39 of Deeds for Passaic County, page 117, complainants conveyed to defendant premises described as follows:

All that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Passaic in the County of Passaic and State of New Jersey:

BEGINNING at a point in the Northeasterly side of Van Houten Avenue distant 88 feet Southeasterly from the Easterly corner of Van Houten Avenue and Barry Place and running thence (1) Northeasterly and parallel with Barry Place 132

feet; thence (2) Southeasterly and parallel with Van Houten Avenue 44 feet; thence (3) Southwesterly and parallel with the first course 132 feet to said Northeasterly side of Van Houten Avenue and thence (4) Northwesterly along the same 44 feet to the point or place of BEGINNING.

Subject to a mortgage now a lien on said premises held by Slovak Catholic Sokol, a corporation of New Jersey, originally given to secure the payment of $7,500.00 upon which there is now due the principal sum of $5,750.00 payable according to the terms of said mortgage.

Subject also to Zoning Ordinance restrictions and regulations of the City of Passaic, if any.

Except as herein specifically admitted the allegations of Paragraph 10 of said bill are denied.

3. Paragraphs 11 and 12 inclusive of said bill are denied.

4. Defendant believes the allegations of Paragraphs 13, 14, 15 and 16 inclusive to be true, but asks that due proof be made thereof at the hearing of this cause.

5. Paragraphs 17, 18, 19, 20, and 21 inclusive are denied.

6. Paragraph 22 is admitted.

7. Paragraph 23 is denied.

REED, REYNOLDS & SMITH,
Solicitors for Defendant.

Replication.

IN CHANCERY OF NEW JERSEY

149-237

ON BILL, &c.

Between

ELMER W. LANG and MARJORIE A. LANG, his wife,

Complainants,

and

NORTH JERSEY AGENCY, INC., a corporation of the State of New Jersey,

Defendant.

The complainants, Elmer W. Lang and Marjorie A. Lang, his wife, join issue on the answer of the defendant.

JOHN O. MCGUIRE,
Solicitor of the Complainants.

Consent Order of Reference.

Filed August 5, 1943.

IN CHANCERY OF NEW JERSEY

149-237

On Bill, &c.

Between

Elmer W. Lang and Marjorie A. Lang, his wife,
Complainants,

and

North Jersey Agency, Inc., a corporation of the State of New Jersey,
Defendant.

This matter being opened to the court by John O. McGuire, Solicitor of the Complainants and it appearing that Reed, Reynolds & Smith, Solicitors for the Defendant have consented hereto:

It is on this 5th day of August, 1943, on motion of John O. McGuire, Solicitor of the Complainants, Ordered, that the above entitled cause be referred to Hon. Vivian M. Lewis, one of the Vice Chancellors of this Court, to hear the same for the Chancellor and to report thereon to him and to advise what Order or Decree should be made thereon.

Luther A. Campbell,
C.

We hereby consent to the entry of the foregoing order.

Reed, Reynolds & Smith,
Solicitors of the Defendant.

Designation.

IN CHANCERY OF NEW JERSEY

149-237

ON BILL, &c.

Between

ELMER W. LANG and MARJORIE A. LANG, his wife,

Complainants,

and

NORTH JERSEY AGENCY, INC., a corporation of the State of New Jersey,

Defendant.

This matter being opened to the court by John O. McGuire, Esquire, solicitor of the complainants, and it appearing that due notice of this application has been given to Reed, Reynolds and Smith, solicitors of the defendant:

It is on this 13 day of Sept., Nineteen Hundred and Forty-three, ORDERED, that the 16 day of November, Nineteen Hundred and Forty-three, at the hour of ten o'clock in the forenoon, at the Chancery Chambers, in the City of Paterson, be designated as the time and place for the hearing of the above entitled cause.

VIVIAN M. LEWIS,
V. C.

Consent is given to the above Designation.

REED, REYNOLDS & SMITH,
Solicitors for Defendant.

Notice of Hearing.

IN CHANCERY OF NEW JERSEY

149/237

On Bill, &c.

Between

Elmer W. Lang and Marjorie A. Lang,
Complainants,

and

North Jersey Agency, Inc., a corporation of the State of New Jersey,
Defendant.

To: Reed, Reynolds and Smith,
Solicitors of the Defendant.

Take notice of the hearing of this cause before the Honorable Vivian Lewis, the Vice Chancellor of this Court, to whom the said cause has been referred on the sixteenth day of November, 1943, at the hour of ten o'clock in the forenoon, at the Chancery Chambers in the City of Paterson, the time and place designated by the order of the said Vice Chancellor, made on the thirteenth day of September, 1943.

John O. McGuire,
Solicitor of the Complainants.

Opinion.

IN CHANCERY OF NEW JERSEY

Docket No. 149/237

Sept. 6, 1944.

Between

ELMER W. LANG and MARJORIE A. LANG,
Complainants,

and

NORTH JERSEY AGENCY, INC.,
Defendant.

(SYLLABUS)

In a suit to enforce against a grantee of a deed an alleged equitable assumption of a mortgage executed by the grantor, *held*, the proof did not show facts and circumstances sufficient to come within the principles of equitable assumption.

JOHN O. MCGUIRE, ESQ.,
Solicitor for Complainants.

MESSRS. REED, REYNOLDS & SMITH,
Solicitors for Defendant.

LEWIS, *V. C.*:

Complainant, Elmer W. Lang, then unmarried, executed a mortgage in the amount of $7,500.00, which later, by mesne assignments, became the property of the Slovak Catholic Sokol, Inc. Complainant, Elmer W. Lang, later married the other complainant, and on October 31st, 1936, they conveyed the mortgaged premises to the defendant by deed which made the premises expressly subject to the mortgage but contained no provision

for assumption of the mortgage by the grantee. Subsequently, the mortgage was foreclosed and bid in by the Slovak Catholic Sokol, Inc., for the sum of $100.00. A suit for the deficiency was brought in 1940 against complainant, Elmer W. Lang, for the sum of $7,796.68. Complainants applied to defendant to pay the amount of this deficiency, and upon its refusal the present suit was brought. Since then and before final hearing, complainants settled with the Sokol for the sum of $2,500.00, and received from the Sokol a covenant not to sue. Defendant moved to strike the bill, on which decision was reserved until final hearing. It is the contention of complainants that the transaction between them and defendant was such as to constitute in equity an assumption by the defendant of the mortgage debt. This contention is based upon the well settled equitable principle in this State that where the purchaser deducted or retained out of the purchase price, as fixed and agreed upon the amount of the mortgage debt, equity will raise or impose upon his conscience an obligation to indemnify his grantor, if the latter himself be personally liable for the payment of the mortgage debt, and this although the premises were conveyed subject to the mortgage.

Heid v. *Vreeland,* 30 N. J. Eq. 591.
Reeves v. *Cordes,* 108 N. J. Eq. 469.
DeLotto v. *Zippe,* 116 N. J. Eq. 344.

In the late case of *Meyers* v. *Siracusa,* 125 N. J. Eq., 183, it was held:

> "Assuming the proofs meet the allegations, it seems to me to be well settled that where a purchaser of mortgaged premises had deducted or retained out of the purchase price, as fixed or agreed upon the

> amount of the mortgage debt, equity will then raise or impose upon his conscience an obligation to indemnify his grantor, if the latter himself be personally liable for the payment of the mortgage debt and this although the premises were conveyed subject to the mortgage."

Assuming that the nature of the transaction between the parties was such as to constitute in equity an assumption of the mortgage debt, I do not see any ground in equity on which the defendant can be held liable for more than the amount of the actual damages sustained by them, namely, the amount of $2,500.00, paid in settlement of the claim of the Sokol. The doctrine of implied assumption was developed and adopted in this Court to prevent injustice and loss to a mortgagor who had parted with his property. In its application the vendor becomes the debtor and the vendor remains only as a surety, and it would be most inequitable to allow him to more than indemnify himself for his loss. In the instant suit, according to their contention, the complainants would receive the total amount of the deficiency, namely, the sum of $7,800.00, whereas their actual loss was only $2,500.00, and they would, therefore, be receiving a clear profit of the difference. It seems clear that the doctrine of equitable assumption can be used only as a shield and not as a sword, so that at most the complainants could only recover the $2,500.00.

But, in my opinion, there was no equitable assumption and defendant, accordingly, is not liable even to reimburse complainants for the sum paid by them to the assignee of the mortgage. The parties entered into a formal contract of exchange. which sets forth that the defendant

"agrees to grant and convey to the party of the first part at a valuation for the purpose of this contract of $7,500.00" in the premises in question. The contract expressly provided that the premises were to be conveyed subject to the mortgage held by the Sokol, which was stated to be the sum of $5,750.00. The contract also sets forth that "the difference between the values of the respective premises over and above encumbrances shall be deemed for the purpose of this contract to be $1,750.00" in favor of the defendant, which the complainants agreed to pay. There is also a provision that the defendant shall pay a sum in reduction of the mortgage on the property given by it in exchange. It clearly appears from this contract that this was not a sale of the premises owned by complainant at a price of $7,500.00, together with a sale by defendant to complainants of another parcel at a price of $17,000.00. These two figures are expressly set forth in the contract as being valuations for the purpose of the exchange of properties and, therefore, solely for the purpose of determining the debts and credits to be adjusted upon the conveyances. It is true that in the closing statement drawn up at the time of the exchange of deeds appear the expressions twice "Price $17,000.00" for one parcel, and "Price $7,500.00" as to the other. In view of the formal contract, the use of the expression "Price" on the sheet setting up the various debts and credits would not be controlling. Mr. Bowes, who conducted the negotiations for the exchange, testified that after various discussions it was agreed that complainants' equity should be considered as a cash payment against the purchase of the other house owned by defendant. These agreements were embodied in a formal contract

of exchange, and he further testified that the closing was in accordance with the terms of the contract.

In my opinion the figure of $7,500.00 was merely the figure agreed on as a basis of valuation for the exchange of properties, and did not constitute a sale at the price of $7,500.00, and, accordingly, there was no equitable assumption of the mortgage debt.

A decree will be advised dismissing the bill.

Final Decree.

Filed October 16, 1944.

IN CHANCERY OF NEW JERSEY

149/237

On Bill, &c.

Between

Elmer W. Lang and Marjorie A. Lang,

Complainants,

and

North Jersey Agency, Inc.,

Defendant.

This cause coming on to be heard in the presence of John O. McGuire, solicitor for complainants, and Reed, Reynolds & Smith, solicitors for the defendant, and the court having examined the pleadings and having taken proof orally and in open court and having heard and considered the arguments and briefs of counsel thereon, and it

appearing to the satisfaction of the court that the complainants are not entitled to the relief sought and prayed for by them in their bill of complaint:

It is on this 16th day of October, 1944, ORDERED, ADJUDGED and DECREED that said bill of complaint be and the same is hereby dismissed with costs.

And it is further ORDERED, ADJUDGED and DECREED that the complainants pay to the defendant North Jersey Agency, Inc., the name of which has recently been changed to Nutley Agency, its costs of this suit to be taxed including a counsel fee of $500.00 which is hereby allowed to said defendant within 30 days after the service upon complainants' solicitor of a true but uncertified copy of this decree and of said taxed costs; and that in default of such payment execution issue therefor according to the practice of this court against the goods and chattels, lands, tenements, hereditaments and real estate of the said complainants or either of them.

LUTHER A. CAMPBELL,
C.

Respectfully advised,
VIVIAN M. LEWIS,
V. C.

Testimony.

IN CHANCERY OF NEW JERSEY

Between

ELMER W. LANG and MARJORIE A. LANG, his wife,
Complainants,

and

NORTH JERSEY AGENCY, INC., a corporation of the State of New Jersey,
Defendant.

Transcript of testimony taken in the above entitled cause before the HON. VIVIAN M. LEWIS, Vice Chancellor, at the Chancery Chambers, Court House, Paterson, on Tuesday the 16 day of November, 1943.

APPEARANCES:

MR. JOHN O. MCGUIRE, for the complainants,

MR. HUGH B. REED, for the firm of REED, REYNOLDS AND SMITH, for the defendant.

Mr. McGuire: This is a case in which the complainants, Elmer Lang and Marjorie Lang of the City of Passaic were the owners of a piece of property on Van Houten Avenue in the City of Passaic and they were indebted to the Security Mortgage and Insurance Company, a corporation of New Jersey on a bond and mortgage which was placed on that property and through a series of assignments that bond and mortgage became the property of the Slovak Catholic Sokol, the Slovak Catholic Sokol being the holders of that mortgage and Mr. Lang being the owner and occupier of the premises. Finally Mr. Lang sold those premises to the North Jersey Agency of

Nutley, New Jersey for the sum of $7500.00. It is our contention that in so selling the premises for the sum of $7500.00 the North Jersey Agency assumed, in equity, the mortgage which was at that time on the premises, our contention being that from the sum of $7500.00 was withheld the sum of $5750 by the North Jersey Agency, which was the amount of the mortgage and that as a matter of fact the North Jersey Agency set up the sum of $7500.00 as the price, the purchase price and then as a credit at the time of the closing took the $5750.00 the amount of the mortgage thereby in equity assuming the mortgage. Since that time it became due. The Catholic Slovak Sokol instituted foreclosure proceedings. There was a sheriff's sale and at the Sheriff's sale it was purchased for the sum of $100.00. After that the Slovak Catholic Sokol sued Elmer Lang for the deficiency, the amount of the deficiency being $7796.68, said suit being started in the Passaic County Circuit Court. If it please the Court for the purpose of this complaint it is our contention that the North Jersey Agency is liable in the sum of $7796.68 on the theory of equitable assumption of a mortgage which has long been held to be good law in our courts of equity. We will, however, stipulate at this time so that all of the facts may be before the Court, since we are coming into equity we want all the facts before the Court, since the time of the starting of this deficiency suit Mr. Lang settled his obligation with the Slovak Catholic Sokol for the sum of $2500.00 and that we are willing to stipulate at this time. However it is still our contention that Mr. Lang was sued and was put in jeopardy in the sum of $7796.68.

The Court: All right, put on your witnesses.

Elmer W. Lang—Direct.

ELMER W. LANG, duly sworn.

Direct-examination by Mr. McGuire:

Q. Mr. Lang, what is your full name? A. Elmer W. Lang.

Q. Where do you live? A. 297 Howard Avenue, Passaic, New Jersey.

Q. I ask you, Mr. Lang, if in the year 1924 you were the owner of a piece of property on Van Houten Avenue in the city of Passaic? A. I was.

Q. What was that address? A. 244 Van Houten Avenue.

Q. As the owner of that property did you have occasion to execute a bond and mortgage to the Security Mortgage and Title Insurance Company? A. I did.

Q. I show you what purports to be that original bond and mortgage and ask you if it is the original bond and mortgage? A. Yes, it is.

Mr. McGuire: I would like to offer this in evidence, is there any objection, Mr. Reed?

Mr. Reed: No objection.

(Bond marked C-1 and mortgage marked C-2 in evidence.)

Q. Now, Mr. Lang, do you know whether or not through a series of assignments that bond and mortgage eventually came into the possession of the Slovak Catholic Sokol? A. I know it eventually came into the possession of the Slovak Catholic Sokol, yes.

Q. Did you make payments to the Slovak Catholic Sokol on account of that particular mortgage? A. I did.

Q. Were those both interest and amortization payments? A. Yes, sir.

Q. Now, Mr. Lang, on or about the 31 day of October 1936 did you have occasion to negotiate for the sale of this Van Houten Avenue property? A. I did.

Q. With whom did you negotiate? A. With the North Jersey Title and Mortgage Company.

Q. Otherwise known by what name, Mr. Lang? A. I think it was North Jersey Agency.

Q. The North Jersey Agency, and what agreements, if any, did you make concerning the purchase price of this property on Van Houten Avenue? A. The purchase price was $7500.00.

Q. Did they agree to pay that price? A. They did eventually, there was quite some haggling about it before they agreed to the price; they requested permission to have a committee inspect the premises, the committee did inspect the premises and eventually they agreed to the price of $7500.00.

Mr. McGuire: Mr. Reed, do you have the original closing statement according to our notice to produce?

Mr. Reed: Yes.

Q. Now, Mr. Lang, I show you what purports to be the original closing statement and ask you if you received a copy of that statement from the North Jersey Agency? A. Yes, I did.

Q. And that statement is dated as of what date, Mr. Lang? A. October 31, 1936.

Q. And as to your Van Houten Avenue property does the statement set up a purchase price? A. Yes, sir, $7500.00.

Q. What is that purchase price? A. $7500.00.

Q. And on the other side of the ledger or on the other side of the statement does it set up any credits to the North Jersey Agency? A. Yes, it does.

Q. What credit do you find set up against the purchase price of $7500.00? A. Principal of the mortgage of $5750.00, Interest from July 1, 1936 to October 31, 1936 of $115.00, rent for November 1936 of $75.00 and taxes for October of $23.75.

Q. For which the North Jersey Agency takes a total credit of what sum?

Mr. Reed: Should he testify from that? That should be offered in evidence.

Mr. McGuire: I will offer it right now.

The Court: It will be offered, do you object to it?

Mr. Reed: I have no objection.

The Court: Received.

(Marked as Exhibit C-3 in evidence.)

Q. Mr. Lang, at any time during your discussion of the negotiations with the North Jersey Agency was there any question concerning the payment of the price of $7500.00? A. No, sir.

Q. Did you receive any of this amount of $7500.00 paid to you? A. In cash?

Q. That is right? A. No, sir.

Q. Well, now, how was this amount of $7500.00 to be paid, how was it set up? A. Well, the amount of the mortgage, $5750.00 was withheld by them and I was given a credit for the balance, the difference between that and the $7500.00.

Q. I see; now, was the sale finally consummated in accordance with that statement? A. Yes, sir.

Q. And I show you what purports to be a certified copy of the deed, Elmer W. Lang to the North Jersey Agency and ask you if you signed the deed of which that is a certified copy?

Mr. Reed: I have the original deed here.

Mr. McGuire: All right, I will give him the original deed.

The Court: It will be received in evidence.

(Marked as Exhibit C-4 in evidence.)

A. I didn't answer that question, the answer is yes.

Mr. McGuire: That is all.

Cross-examination by Mr. Reed:

Q. Mr. Lang, did you enter into a contract with the North Jersey Agency in regard to this transaction? A. A contract?

Mr. McGuire: I object, if the Court please, on the ground that the deed and closing statement speak for themselves and the contract entered into before is in no way binding.

The Court: Objection overruled, I will allow it.

A. Yes.

Q. Will you look at the signature on this paper and tell me if that is yours? A. Yes, sir; it is.

Q. And that is the contract for this transaction, is it not? A. That is the contract, yes, sir.

Q. And it was pursuant to this contract that you made your conveyance of the title? A. Subsequently, yes.

Mr. Reed: May I have this marked for identification?

(Marked as D-1 for identification.)

Q. Well, now, this contract marked as D-1 for identification was the arrangement, was your contract with regard to the property with the North

Jersey Agency was it not? A. I have already testified, sir, that I signed it.

The Court: Answer the question.

A. Yes.

Q. And that was carried out, wasn't it, you conveyed the property to them and they conveyed the property to you? A. In that respect, yes.

Q. Well, what do you mean by "in that respect?" A. Well, it was carried out to that extent, I conveyed to them and they conveyed another property to me in accordance with this contract.

Q. You said that the price of $7500.00 was agreed to after considerable haggling, who did you negotiate with? A. With Mr. Bowes and Mr. Jaegel.

Q. Mr. Bowes was the agent for the sale of the property, was he not? A. Well, I understood he was an employee of the North Jersey Agency.

Q. And he showed you or he did everything for the sale of the property that was later conveyed to you, did he not? A. Yes.

Q. And you approached him in regard to it? A. I don't know whether we ever did or not.

Q. How did you learn of it? A. I learned of it through Mrs. Lang, that the property was available.

Q. Was it you that suggested a transfer of your property in exchange? A. No, I didn't suggest a transfer in exchange, I made it very plain to them I couldn't purchase the property unless they would purchase mine.

Q. And after that negotiation you entered into the contract for identification, D-1? A. I explained to them I didn't have enough funds to purchase their house unless they purchased mine from me.

Elmer W. Lang—Cross.

Q. You were to pay them the difference in price, is that it? A. Their price was $17,500.00 for their piece of property and my price for mine was $7,500.00.

Q. I see, and you, I say, were to pay them the difference between the two values? A. Yes, they were—that is the difference between $7500.00 and $17,500.00.

Q. There was a mortgage on the property you bought, wasn't there? A. $5750.00.

Q. No, on the property you bought? A. On the Howard Avenue property? Yes, as I recall there was a mortgage of $13,500.00 on that.

Q. So that you were to pay them the difference in cash? A. No, not in cash.

Q. Not in cash? A. No, after they purchased my house, it was necessary for them to purchase my house first, and credit me with the difference.

Q. But there was still a difference which you had to pay in cash on the closing? A. On the closing, yes.

Q. You say an action was brought against you by the holder of your mortgage, what was the name of it? A. The Slovak Catholic Sokol.

Q. Which you settled? A. Yes, I settled that with them, yes, sir.

Q. For $2500.00? A. $2500.00.

Q. You were alone on the bond of that mortgage were you not? A. I didn't hear you?

Q. Mrs. Lang wasn't on the bond with you? A. No, sir, I was on the bond alone.

Q. You were not married to her at that time? A. No.

Q. And she wasn't liable in any way to the Slovak Catholic Sokol? A. No.

Mr. McGuire: That is all for this witness if your Honor please except I have

not introduced a covenant not to sue in evidence but I have stipulated that.

JOHN BLANDA, duly sworn:

Direct-examination by Mr. McGuire:

Q. Mr. Blanda, are you an attorney at law of the state of New Jersey? A. I am.

Q. Licensed to practice law in this state? A. Yes, sir.

Q. And in the course of your practice did you represent the Slovak Catholic Sokol of the city of Passaic? A. I do.

Q. And, Mr. Blanda, did you have occasion to search the records of a particular mortgage which has been introduced into evidence from Elmer W. Lang to the Security Mortgage and Title Insurance Company? A. I did.

Q. Mr. Blanda, will you tell us what your search disclosed concerning the various assignments? A. In searching the records of the Passaic County Register's Office I found the mortgage was given from Elmer W. Lang, widower to the Security Mortgage and Title Insurance Company on October 31, 1924. The Security Mortgage and Title Insurance Company assigned that particular mortgage to the Labor Cooperative National Bank of Paterson on January 8, 1925. The Labor Cooperative National Bank of Paterson then assigned that mortgage back to the Security Mortgage and Title Insurance Company on November 24, 1925. The Security Mortgage and Title Insurance Company then assigned the mortgage to the Garfield Trust Company on December 27, 1925. The Garfield Trust Company assigned said mortgage to the Security

Mortgage and Title Insurance Company on January 27, 1928. The Security Mortgage and Title Insurance Company then assigned the mortgage to the Roman and Greek Catholic Gymnastic Slovak Union Sokol by assignment dated April 17, 1929. On the 19 January 1934 a certificate of change of name of the Roman and Greek Catholic Gymnastic Slovak Union Sokol was filed changing the name to the Slovak Catholic Sokol. That is recorded in Book X-2 page 366. On April 25, 1935 the Security Mortgage and Title Insurance Company assigned, among other mortgages, the particular mortgage in question, to the Slovak Catholic Sokol.

Q. Now, Mr. Blanda, did you have occasion to institute any legal proceedings in connection with that mortgage? A. Yes.

Q. What legal proceedings did you institute? A. On March 5, 1940 the Slovak Catholic Sokol authorized me to foreclose the property known as 244 Van Houten Avenue, Passaic, New Jersey.

Q. Did you proceed with your foreclosure? A. I did.

Q. Did you receive a decree? A. A decree was received, yes.

Q. Did you proceed with the Sheriff's sale? A. The Sheriff's sale proceeded and the Slovak Catholic Sokol purchased in.

Q. After that purchase did you proceed with any further litigation in this matter? A. A suit was commenced in the Passaic County Circuit Court against Elmer W. Lang for a deficiency on the bond.

Q. And do you know what the amount of that suit was, Mr. Blanda? A. $7796.68 together with interest.

Q. $7796.68 together with interest; do you know,

Mr. Blanda, whether or not that suit was subsequently settled by Mr. Elmer Lang? A. It was.

Q. And settled with the payment of what sum? A. $2500.00.

Q. In exchange for what? A. A covenant not to sue.

The Court: That was the suit on the bond?

The Witness: Yes.

Mr. Reed: In exchange for what?

Mr. McGuire: A covenant not to sue.

Cross-examination by Mr. Reed:

Q. You sued for a deficiency, have you the items making up that deficiency? A. I have, yes, sir.

Q. And how is that made up? A. They are made up as follows: amount of the mortgage $5750.00, taxes paid May 20, 1940, $1163.89, interest on principal from July 1, 1939 to July 15, 1940, $533.17, interest on taxes from May 20, 1940 to July 15, 1940, $10.67, a total sum of $7,457.23, from which a credit is deducted of rents received for March and April 1940, no further rents after April having been received $110.00, and that left the sum of $7,347.23. The fees and disbursements of the Sheriff as lawfully allowed upon execution were $77.43 and these fees and disbursements were paid by the plaintiff to the said Sheriff and the sum of $100.00 realized from the Sheriff's sale was credited upon the decree and execution and there remains due to the plaintiff the sum of $7796.68 together with interest from the 23 day of August 1940. There was the further sum of $255.38, further costs for the Sheriff of the county of Passaic.

Q. The Sheriff? A. That is right.

Q. How is that made up? A. A taxed bill of costs, I believe—yes, sir, here is a taxed bill of costs.

Q. Taxed costs? A. Yes.

Q. I see; then there was this decree and costs— A. And the Master set down that figure as the amount being due to the Slovak Catholic Sokol. The Master's Inspection Report set down the sum of $7,347.73 which is the amount due to the 15 day of July, 1940.

Q. Plus? A. Plus $255.38 and $77.40 which I read to you a minute ago.

Q. I noticed in the statement you included commissions at $178.00, I wondered how you got that in? A. Commissions?

Q. Sheriff's commissions of $100.00? A. $100.00 was credited, the sum of $100.00 was realized on the sale which has been duly credited upon said decree.

Mr. Reed: All right, sir, that is all.

Mr. McGuire: That is all, that is our case Vice Chancellor.

GEORGE T. BOWES, duly sworn.

Direct-examination by Mr. Reed:

Q. Mr. Bowes, where are you now employed? A. With the Franklin Mortgage and Title Guarantee Company in Newark.

Q. In 1936 were you connected with the North Jersey Agency? A. I was.

Q. And did you have anything to do with the sale of a property which was afterwords purchased by Mr. Lang? A. I did.

Q. Whom did you see in regard to it? A. I was first contacted by Mrs. Lang and I showed her the Howard Street house which they eventually bought.

Q. What happenend then? A. After meeting Mrs. Lang and showing she and her sister through the house I asked them if they were interested and she said "Yes, they were interested," but that they had a house for sale on Van Houten Avenue and that they would not be in a position to buy our house unless they sold their house.

Q. What then? A. I told her our company had a policy not to consider exchanges of property but that I would be glad to go and look at their house and perhaps be able to represent them in selling it, and so I went over and went through their house with Mrs. Lang and her sister and she told me they had been trying to sell at $7500. without success, so after going through the house I told her I would take it up with our company and see if there would be any way for us to consider the equity in our house as part payment against the price of their house and after taking it up with the company and taking our committee down through the Van Houten Avenue house and considering it from all angles we finally arrived at a basis of taking Mr. Lang's equity and considering it as a cash payment against the purchase of our house on Howard Avenue.

Q. Did you see Mr. Lang in the matter at all? A. The first conversation was with Mrs. Lang, subsequently to that I saw Mr. Lang on several occasions.

Q. And was any contract entered into? A. I have some recollection that after some negotiation and after finally arriving at the credits on

the property a contract was prepared and entered into.

Q. I show you this paper marked D-1 for identification is that it? A. That is the contract.

Q. I notice you are a witness to the signatures, did you witness the signatures? A. Yes, I did.

Mr. McGuire: No objection.

(Marked D-1 in evidence.)

Q. Did you have anything to do in furtherance of the matter? A. The actual signing of the contract ended my part of the transaction except I did attend the closing.

Q. Except what? A. Except that I attended the closing. I also had the responsibility of taking care of the Van Houten Avenue property after the North Jersey Agency took it over.

Q. Was the closing in accordance with the terms of the contract? A. Yes, sir.

Mr. Reed: I think that is all.

Cross-examination by Mr. McGuire:

Q. Mr. Bowes, when Mrs. Lang first went to see you didn't she tell you she couldn't possibly buy the Howard Avenue property unless she sold her Van Houten Avenue property for $7500.00? A. Both Mr. and Mrs. Lang.

Q. Did she or did she not? A. Yes, she did, after she had seen the Howard Street property.

Q. After she had seen the Howard Street property and she told you she had been trying to sell it for $7500.00 is that right? A. Yes.

Q. Then did you not send up a committee to inspect the Van Houten Avenue property? A. Yes, we did.

Q. To decide on the price that you would place on that particular property, is that right? A. No.

Q. You didn't send the committee there for that purpose? A. We sent a committee to inspect the house.

Q. What was the purpose of that inspection? A. The purpose of the inspection was Mr. Lang had made the statement, and Mrs. Lang, that they couldn't buy our house unless they sold theirs and we wanted to see how much credit we could give them towards the purchase of our house.

Q. As a matter of fact— A. We did not want to buy Van Houten Avenue, we did not want to buy their house.

Q. As a matter of fact, Mr. Bowes, didn't you tell them after your inspection of the house that you would agree to a purchase price of $7500.00? A. We finally agreed to a credit, yes.

Q. To a credit of $7500.00? A. To a credit on our house.

Q. You didn't agree to a purchase price of $7500.00? A. For the purpose of passing the contract the price was set at $7500.00.

Q. The purchase price, is that correct, was set at $7500.00? A. If I may express myself?

Q. Will you answer the question, please? Was the purchase price set at $7500.00? A. For the purposes of the contract the values were placed on both properties.

Q. And for the purposes of this contract of exchange marked D-1 in evidence was the price set at $7500.00? A. That is correct.

Q. And for the purposes of the closing statement was the price set at $7500.00? A. Mr. Tucker prepared the closing statement in accordance

with the contract, I had nothing to do with the preparation of the closing statement.

Q. And was the closing statement prepared in accordance with the contract? A. I assume so.

Q. And in accordance with your agreement, is that right? A. That is right.

Q. And did you see the closing statement at all? A. I did, yes.

Q. And in the closing statement do you know whether or not the purchase price was set forth at $7500.00? A. For the purpose of arriving at the values, yes.

Q. The price was set forth at $7500.00? A. Yes.

Q. And a credit was taken by your North Jersey Agency for $5750.00 the amount of the mortgage is that right? A. Yes. We did not want to buy the Van Houten Avenue property at all.

Redirect-examination by Mr. Reed:

Q. He asked you if the purchase price was set at $7500.00 was the purchase price set at $7500.00 or was that the amount fixed to show what the balance of the purchase price would be?

Mr. McGuire: I object, it is leading.

A. Mr. Lang paid $17,500.00 for the Howard Street house which was the price we had asked. He did not question the price we were asking for our house, therefore, after our committee inspected the Van Houten Avenue house I prevailed upon them not to question the price Mr. Lang wanted for his house. We were only doing it to give more credit for his equity so that he would have an additional cash credit against the purchase of

our house. Our committee did not want to take the Van Houten Avenue house and it was only after considerable effort I was able to persuade them to take the house at all.

HENRY C. TUCKER, duly sworn.

Direct-examination by Mr. Reed:

Q. Mr. Tucker are you connected with the North Jersey Agency or what was the North Jersey Agency? A. I am not connected with the North Jersey Agency.

Q. What? A. I am not connected with the North Jersey Agency.

Q. With whom are you connected? A. Nutley Mortgage and Title Guaranty Company.

Q. And did you have anything to do with the closing of the transaction between the North Jersey Agency and Mr. Lang? A. I did.

Q. What part did you take in it? A. Well, preparing the closing statement and the delivery of the papers and having them executed.

Q. I show you Exhibit D-1 are you familiar with that? A. I am.

Q. That is the contract you closed? A. That is right.

Q. And you had this closing statement prepared, Exhibit C-3 in evidence? A. That is the statement.

Q. And what was the purpose of that? A. To disclose the net equities in both houses and determine the amount that had to be paid by Mr. Lang.

Q. And that amount was $1355.77? A. That is correct.

Q. The original contract called for the payment

by him of $1750.00 do you know the reason for the reduction? A. Well, it was due to the credits.

Q. On the closing statement? A. Yes.

Mr. Reed: That is all.

Cross-examination by Mr. McGuire:

Q. Mr. Tucker, did you draw up the contract? You are an attorney, aren't you? A. No, I am not.

Q. Did you draw up the deeds? A. I did.

Q. You did draw up the deed; do you know whether any right of reentry was put into the deed, a right of reentry into the property?

Mr. Reed: What was that question?

The Court: Where is the deed?

Mr. McGuire: The deed is here.

Q. Do you know of your own knowledge whether it was or not? A. No, I do not.

Q. You also say you drew up this contract for the sale of the property, is that right? A. That is right.

Q. And do you know whether or not the purchase price of $7500.00 was set out in that contract? A. The price is $7500.00 set out for the purposes of value.

Q. Do you know whether or not the purchase price of $7500.00 is set up in the contract? A. Well, if you want to call it purchase price; I call it a value.

Q. Do you know whether or not this closing statement which you made up has a purchase price of $7500.00 set up? A. It has the word price on it.

Q. It has the word "price" before it. You

typed that word, did you? Did you put that word "price" in there? A. The word price is there.

Q. And the word "credit" is there on the other side of the state? A. Yes.

Mr. McGuire: That is all.

The Court: Anything further?

Mr. Reed: No, I think I am through.

Mr. McGuire: That is all, your Honor.

The Court: Well, what do you want to do about it, do you want to brief it or argue it and let me take it and go over it.

Mr. McGuire: I am prepared to argue it.

Mr. Reed: I think it would be better to have the testimony written up so that your Honor could see it all with the briefs and exhibits.

The Court: I think it would be more satisfactory and I will take it on briefs.

Mr. Reed: Then there are the various questions raised on the motion to strike.

The Court: You ought to raise those on your brief again. How long do you want to brief it?

Mr. Reed: May I have a copy of the testimony?

The Court: Yes, certainly, Mr. Masterton will get it ready for you.

Mr. Reed: And after I get the testimony can I have two weeks?

The Court: Two weeks from the testimony, or thirty days if you want it.

Mr. Reed: Should Mr. McGuire give me his brief first and let me answer?

Mr. McGuire: I would be glad to.

The Court: Mr. McGuire will present his

brief to you within thirty days and then you will have an opportunity to answer that in the same time.

Exhibit C-1.

Know All Men by these Presents that Elmer W. Lang, widower, of the City of Passaic in the County of Passaic and State of New Jersey, held and firmly bound unto Security Mortgage and Title Insurance Company a corporation having its principal office in the City of Passaic, in the County of Passaic and State of New Jersey, in the sum of Fifteen Thousand Dollars, in Gold Coin of the present standard of weight and fineness, lawful money of the United States of America, to be paid to the said Security Mortgage and Title Insurance Company its successors or assigns: For which payment well and truly to be made I bind myself, my heirs, executors and administrators, jointly and severally firmly by these presents. Sealed with my seal, Dated the Thirty-first day of October one thousand nine hundred and twenty-four.

The Condition of the above obligation is such that if the above bounden Elmer W. Lang, widower, his heirs, executors or administrators, shall well and truly pay or cause to be paid unto the above named Security Mortgage and Title Insurance Company, its successors or assigns, the just and full sum of Seventy-Five Hundred Dollars, in Gold Coin of the present standard of weight and fineness, lawful money as aforesaid of the Thirty-first day of October, which will be in the year one thousand nine hundred and

twenty-five and the interest thereon, to be computed from the date hereof at and after the rate of six per cent. per annum, to be paid semi-annually without any fraud or other delay, then the above obligation to be void, otherwise to remain in full force, virtue and effect.

And it is hereby expressly agreed that should any default be made in the payment of the said interest, or of any part thereof, on any day whereon the same is made payable, as above expressed, or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in the mortgage accompanying this bond, and become due and payable, and should the said interest or any part thereof remain unpaid and in arrears for the space of ten days, or said tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien, or any or either of them, remain unpaid and in arrears for the space of thirty days, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of Seventy-Five Hundred Dollars, in Gold Coin of the present standard of weight and fineness, lawful money as aforesaid, with all arrearage of interest thereon shall at the option of the said Security Mortgage and Title Insurance Company its successors or assigns, become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

And it is further agreed, that in case of a con-

veyance of the real estate described in the mortgage given to secure this obligation, or of any part of said real estate, or in case of the actual or threatened demolition or removal of any building erected upon the said premises, or any of the fixtures contained therein, or in case any such building shall be allowed to deteriorate by reason of lack of proper repairs, of which the obligee or its assigns shall be the sole judge, the principal secured by this bond shall, at the option of the holder, immediately become due and payable, unless in the event of a conveyance as aforesaid, the purchaser of said real estate shall execute to the obligee herein or its assigns a collateral bond for the payment of the money secured thereby.

It is also expressly understood and agreed, by and between the parties hereto, that this obligation shall be and remain in full force and effect and in no wise be impaired until the actual payment of said sums to said obligee or its assigns. And in case of a sale or transfer of any property embraced in a mortgage collateral to this bond, and in case of any agreement or stipulation between the owner or owners of said mortgaged property and the said obligee, or its assigns, extending the time or modifying the terms of payment above recited, the above mentioned obligor shall nevertheless continue liable to pay the sum above secured according to the tenor of any such agreement, unless expressly released and discharged in writing by the above-named obligee or its assigns.

ELMER W. LANG (L.S.)

Sealed and delivered
in the presence of
J. A. CROWLEY.

Revenue Stamps $3.75.

Exhibit C-2.

This Indenture made the Thirty-first day of October in the year of our Lord, One Thousand nine hundred and twenty-four.

Between Elmer W. Lang, widower, of the City of Passaic in the County of Passaic and State of New Jersey, party of the first part;

And Security Mortgage and Title Insurance Company a corporation having its principal office in the City of Passaic, in the County of Passaic and State of New Jersey, party of the second part;

Whereas, the said Elmer W. Lang, widower, is justly indebted to the said party of the second part, in the sum of Seventy-Five Hundred dollars, in gold coin of the present standard of weight and fineness, lawful money of the United States of America, secured to be paid by his certain bond or obligation, bearing even date with these presents, in the penal sum of Fifteen Thousand dollars, gold coin of the present standard of weight and fineness, lawful money as aforesaid, conditioned for the payment of the said first mentioned sum of Seventy-Five Hundred dollars, gold coin of the present standard of weight and fineness, lawful money as aforesaid, to the said party of the second part, its successors or assigns, on the Thirty-first day of October which will be in the year one thousand nine hundred and twenty-five and interest thereon to be computed from the date hereof at and after the rate of six per cent. per annum, and to be paid semi-annually on the first day of January and July in each year.

And it is thereby expressly agreed that should any default be made in the payment of the said

interest or of any part thereof, on any day whereon the same is made payable, as above expressed, or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition, or lien be hereafter imposed or acquired upon the premises described in this mortgage, and become due and payable, and should the said interest on any part thereof remain unpaid and in arrears for the space of ten days, or said tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien, or any or either of them remain unpaid and in arrears for the space of thirty days, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods as the case may be, the aforesaid principal sum of Seventy-Five Hundred dollars in gold coin of the present standard of weight and fineness with all arrearage of interest thereon, shall at the option of the said party of the second part, its successors or assigns, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, anything therein before contained to the contrary thereof in anywise notwithstanding; as by the said bond or obligation, and the condition thereof, reference being thereunto had, may more fully appear.

Now this Indenture Witnesseth, that the said party of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of One dollar, to him in hand paid by the said party of the second part, at or

Exhibit C-2.

before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents does grant, bargain, sell, alien, release, convey and confirm, unto the said party of the second part, and to its successors and assigns forever.

All that certain tract of land and premises, situate, in the City of Passaic in the County of Passaic and State of New Jersey.

BEGINNING at a point in the northeasterly side of Van Houten Avenue distant eighty-eight (88) feet southeasterly from the easterly corner of Van Houten Avenue and Barry Place and running thence (1) northeasterly and parallel with Barry Place, one hundred thirty-two (132) feet; thence (2) southeasterly and parallel with Van Houten Avenue, forty-four (44) feet; thence (3) southwesterly and parallel with the first course, one hundred and thirty-two (132) feet to said northeasterly side of Van Houten Avenue, and thence (4) northwesterly and along the same, forty-four (44) feet to the point or place of beginning.

Being the same premises conveyed to the parties of the first part by Walter E. Chave, by Deed dated October 29th, 1919 and recorded in the Passaic County Register's Office in Book V-27 of Deeds, page 316 &c.

Together, with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also

all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances: To Have and to Hold the above granted and described premises with the appurtenances, unto the said party of the second part, its successors and assigns, to its and their own proper use, benefit and behoof forever. And the said party of the first part and his heirs the above described and granted premises and every part thereof with the appurtenances, in the quiet and peaceable possession of the said party of the second part, its successors and assigns, against every person and persons whomsoever will Warrant and forever Defend. Provided always and these presents are upon this express condition that if the said party of the first part, his heirs, executors or administrators, shall well and truly pay unto the said party of the second part, its successors or assigns, the said sum of money mentioned in the condition of said bond or obligation, and the interest thereon, at the time and times and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then these presents, and the estate, hereby granted, shall cease, determine and be void.

And the said Elmer W. Lang, widower for himself, his heirs, executors and administrators, do covenant and agree that the said party of the second part, its successors and assigns shall be at liberty, immediately after any default in any of the conditions of said bond or mortgage, upon bill filed, or any other proper legal proceedings commenced for the foreclosure of this mortgage, to apply for, and shall be entitled as a matter of

right, and without regard to the value of the premises above described, or the solvency or insolvency of the party of the first part, or of any owner of said premises, and without notice to the party of the first part, his heirs or assigns, to the appointment by any competent court or tribunal of a receiver of the rents, issues, and profits of said premises, with the power to lease said premises, with power to pay taxes, assessments, and water rents, which are or may become liens on said premises, and keep the same insured, and with power to take proceedings to dispossess tenants, and remove owners, and make all necessary repairs, and with such other powers as may be deemed necessary, who, after deducting all charges and expenses attending the execution of the said trust as receiver, shall apply the residue of the said rents and profits to the payment and satisfaction of this mortgage, and the bond accompanying the same, or to any deficiency which may arise after applying the proceeds of the sale of said premises to the amount due, including interest, and cost and expenses of the foreclosure sale.

And it is further mutually covenanted and agreed that the said party of the first part his heirs, executors, administrators or assigns, shall until payment of the whole principal and interest aforesaid, keep the buildings on the above described premises insured to their fair, insurable value against loss or damage by fire, in companies to be selected by the party of the second part, and assign the policies of insurance therefor to the said party of the second part, its successors or assigns, as collateral security for the payment of said moneys, with power to apply all payments

on said policies at their option to the repair or rebuilding of the premises injured by fire, or to the principal or interest moneys secured by said bond, and in default of such insurance and assignment of policies, said party of the second part, its successors and assigns, may insure the same as aforesaid, and recover all premiums paid by them, with interest, as part of the moneys secured by these presents; and may also, at its or their election, forthwith demand all principal and interest moneys secured by said bond, with interest and premium aforesaid, as immediately due and payable, without further notice.

And it is agreed that neither the mortgagor, nor the heirs and assigns of the mortgagor, shall be entitled to any credit on the interest payable on this mortgage for the taxes which may be levied on the mortgaged premises, or for any part of such taxes.

In Witness Whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

ELMER W. LANG (L.S.)

Signed, Sealed and Delivered
in presence of
J. A. CROWLEY.

Exhibit C-2.

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

Be it Remembered, That on this Thirty-first day of October in the year of our Lord, One Thousand Nine Hundred and twenty-four before me the subscriber, a Notary Public of New Jersey personally appeared Elmer W. Lang, widower, who, I am satisfied is the mortgagor mentioned in the within mortgage, to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

JAMES A. CROWLEY,
Notary Public of N. J.

(Endorsement): Mortgage—Elmer W. Lang to Security Mortgage and Title Insurance Company —Dated October 31st, 1924—Received in the Register's Office of the County of Passaic, N. J. on the 3rd day of November A.D., 1924 and Recorded in book U-13 of Mortgages for said County on pages 473—John R. Morris, Register.

Exhibit C-3.

NUTLEY MORTGAGE & TITLE GUARANTY COMPANY

CLOSING STATEMENT

NORTH JERSEY AGENCY—ELMER W. LANG

OCTOBER 31ST, 1936

(Howard Avenue and Dakota Street property)

	Credit		*Debit*
Paid on contract	500.	Price	17,000.00
Principal-Mortgage	13,500.	Fire insurance prem.	3.19
Int. from 8/4/36 to 10/31/36	195.75	Taxes, Nov. Dec.	84.58
No water adjustments			
No rent adjustments			
Total credit	$14,195.75	Total Debit	$17,087.77
		Less total Credit	14,195.75
		Balance due	$ 2,892.02

(Van Houten Avenue Property)

	Credit		*Debit*
Paid on contract	None	Price	7,500.00
Principal-mortgage	5,750.	(Fire insurance pre-	
Int. from 7/1/36 to 10/31/36	115.	(mium to be adjusted (later	
Rent for November, 1936	75.00		
No water adjustments			
Taxes for October	23.75		
Total credit	$ 5,963.75	Total Debit	$ 7,500.00
		Less total credit	5,963.75
		Balance due	$ 1,536.25

Howard and Dakota St., property	Balance due	$ 2,892.02
Van Houten Avenue, property ..	Balance due	1,536.25
NET BALANCE DUE NORTH JERSEY AGENCY, INC.		$ 1,355.77

Exhibit C-4.

No. 716372 Revenue Stamps $2.00

Elmer W. Lang ux

to

North Jersey Agency, Inc.

THIS INDENTURE, made the Thirty-first day of October in the year One thousand nine hundred and thirty six.

BETWEEN Elmer W. Lang and Marjorie A. Lang, his wife, of the City of Passaic, County of Passaic and State of New Jersey, parties of the first part;

AND North Jersey Agency, Inc., a corporation of New Jersey, party of the second part;

WITNESSETH, that the said parties of the first part, for and in consideration of One Dollar and other valuable consideration lawful money of the United States of America to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said parties of the first part being therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part, and to its successors and assigns, forever,

ALL that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Passaic in the County of Passaic and State of New Jersey.

Exhibit C-4.

Beginning at a point in the northeasterly side of Van Houten Avenue distant 88 feet southeasterly from the easterly corner of Van Houten Avenue and Barry Place and running thence (1) northeasterly and parallel with Barry Place 132 feet; thence (2) southeasterly and parallel with Van Houten Avenue 44 feet; thence (3) southwesterly and parallel with the first course 132 feet to said northeasterly side of Van Houten Avenue and thence (4) northwesterly along the same 44 feet to the point or place of beginning.

Subject to a mortgage now a lien on said premises held by Slovak Catholic Sokol, a corporation of New Jersey, originally given to secure the payment of $7,500.00 upon which there is now due the principal sum of $5,750.00 payable according to the terms of said mortgage.

Subject also to Zoning Ordinance restrictions and regulations of the City of Passaic, if any.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

And Also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in or to the above described premises, and every part and parcel thereof, with the appurtenances.

To Have and to Hold all and singular, the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, its successors and assigns, to its own proper use, benefit and behoof forever.

Exhibit C-4.

And the said Elmer W. Lang and Marjorie A. Lang, his wife for themselves, their heirs or assigns do covenant, grant and agree to and with the said party of the second part, its successors and assigns, that the said Elmer W. Lang and Marjorie A. Lang, his wife, at the time of the sealing and delivery of these presents, were lawfully seized in their own right of a good, absolute and indefeasible estate of inheritance in fee simple, of and in all and singular the above granted bargained and described premises, with the appurtenances, and have good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid.

And that the said party of the second part, its successors and assigns, shall and may at all times hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy the above granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said parties of the first part, their heirs or assigns, or of any other person or persons lawfully claiming or to claim the same.

And that the same now are free, clear, discharged and unencumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and incumbrances of what nature and kind soever.

And Also, that the said parties of the first part, and their heirs or assigns, and all and every other person or persons whomsoever, lawfully or equitably deriving any estate, right, title or interest, of, in or to the hereinbefore granted premises, by, from, under or in trust for it or them, shall and

will at any time or times hereafter, upon the reasonable request, and at the proper costs and charges in the law, of the said party of the second part, its successors and assigns, make, do and execute, or cause or procure to be made, done or executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law for the better and more effectually vesting and confirming the premises hereby intended to be granted, in and to the said party of the second part, its successors and assigns forever, as by the said party of the second part, its successors or assigns or its counsel learned in the law, shall be reasonably advised or required.

And the said Elmer W. Lang and Marjorie A. Lang, his wife their heirs or assigns, the above described and hereby granted and released premises, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, its successors and assigns, against the said parties of the first part, and their heirs or assigns, and against all and every person or persons whomsoever, lawfully claiming or to claim the same shall and will warrant and by these presents forever defend.

In Witness Whereof, the parties of the first part have set their hands and seal the day and year first above written.

Elmer W. Lang (LS)
Elmer W. Lang
Marjorie A. Lang (LS)
Marjorie A. Lang

Signed, sealed and delivered)
in the presence of)
Henry C. Tucker.

Exhibit C-4.

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

Be It Remembered, that on this 31st day of October in the year One thousand nine hundred and thirty six before me the subscriber - personally appeared Elmer W. Lang and Marjorie W. Lang, his wife, who, I am satisfied, are the grantors mentioned in the within instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

Henry C. Tucker Seal

Henry C. Tucker
Notary Public of N. J.
My commission expires Aug. 31, 1938

Received for record November 4th A.D. 1936 at 9 A.M.

John R. Morris, Register.

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

I, Floyd E. Jones, Register of Deeds and Mortgages in and for said County and State, do hereby certify that the foregoing is a true copy of the record of the Deed, and of the whole thereof, given by Elmer W. Lang et ux to North Jersey Agency, Inc. As the same is taken from and compared with the original entry thereof, recorded in Book K 39 of Deeds on pages 117 &c. for said

County and now remaining on record in this office.

In testimony whereof, I have hereunto set my hand and affixed the Official Seal of said County at Paterson, this Thirteenth Day of November A.D., 1943 ....

(Seal)

148939

FLOYD E. JONES,
Register.

Fee: Three Dollars and twenty cents.

Exhibit D-1.

This Agreement made the Ninth day of October in the year One Thousand Nine Hundred and thirty-six

Between North Jersey Agency, Inc., a corporation of New Jersey, party of the first part, and Marjorie A. Lang, and Elmer W. Lang, her husband, of the City of Passaic, County of Passaic and State of New Jersey parties of the second part:

Witnesseth, as follows: The party of the first part, in consideration of One Dollar, paid by the parties of the second part, the receipt of which by the party of the first part is hereby acknowledged, and also in consideration of the conveyance by the parties of the second part of the real property hereinafter mentioned, hereby agree to grant and convey to the parties of the second part, at a valuation for the purpose of this contract of Seventeen Thousand ($17,000.00) Dollars,

All that certain tract of land and premises sit-

Exhibit D-1.

uate in the City of Passaic, County of Passaic and State of New Jersey.

BEGINNING at the corner formed by the intersection of the Southwesterly line of Howard Avenue with the Northwesterly line of Dakota Street and from thence running (1) along said Northwesterly line of Dakota Street, South 42 degrees, 30 minutes West 88.52 feet; thence (2) at right angles to Dakota Street, North 47 degrees, 30 minutes West 65 feet to the line of lands heretofore conveyed to one Johnson by Estelle Rosner; thence (3) along the line of same, North 42 degrees, 30 minutes East 89.35 feet to said Southwesterly line of Howard Avenue; and thence (4) along the same, South 46 degrees, 48 minutes, 30 seconds East 65 feet to the corner aforesaid, the point or place of BEGINNING.

And the parties of the second part, in consideration of One Dollar paid by the party of the first part, the receipt of which by the parties of the second part is hereby acknowledged, and also in consideration of the conveyance by the party of the first part of the real property hereinbefore mentioned, agrees to grant and convey to the party of the first part, at a valuation for the purposes of this contract of Seven Thousand Five Hundred ($7,500.00) Dollars,

All that certain tract of land and premises situate in the City of Passaic, Passaic County, New Jersey.

BEGINNING at a point in the Northeasterly side of Van Houten Avenue distant 88 feet Southeasterly from the Easterly corner of Van Houten Avenue and Barry Place and running thence (1) Northeasterly and parallel with Barry Place 132

feet; thence (2) Southeasterly and parallel with Van Houten Avenue 44 feet; thence (3) Southwesterly and parallel with the first course 132 feet to said Northeasterly side of Van Houten Avenue and thence (4) Northwesterly along the same 44 feet to the point or place of BEGINNING.

Said premises which are to be conveyed by the party of the first part are to be conveyed subject to the following incumbrances:

1. Mortgage held by The Franklin Society for Home Building and Savings, a corporation of New York, upon which there is due the principal sum of Thirteen Thousand Five Hundred ($13,500.00) Dollars, payable according to the terms of said mortgage.

2. Covenants and restrictions contained in deed from Michael F. Burns to Michael J. Antal and wife, dated August 25, 1919 and recorded April 14, 1921 in Book Y-28 of deeds page 167;

3. Zoning Ordinance restrictions and regulations of City of Passaic, if any.

4. Slight encroachment of eaves of garage on property adjoining on the West.

Said premises which are to be conveyed by the parties of the second part are to be conveyed subject to the following incumbrances:

1. Mortgage held by Slovak Catholic Sokol, a corporation of New Jersey, upon which there is due the principal sum of Five Thousand Seven Hundred Fifty ($5,750.00) Dollars, payable according to the terms of said mortgage. (EWL GTB)

2. Zoning Ordinance restrictions and regulations of City of Passaic, if any.

Exhibit D-1.

The difference between the values of the respective premises, over and above incumbrances shall be deemed for the purposes of this contract to be One Thousand Seven Hundred Fifty ($1,750.00) Dollars in favor of the party of the first part, and the said parties of the second part agree to pay the same as follows:

On the signing of this contract the receipt whereof is hereby acknowledged	$ 500.00
On the day of closing title and delivery of deeds	1,250.00
	$1,750.00

EWL EWL GTB

The parties of the second part, for themselves, their heirs and assigns covenant and agree to and with the party of the first part, its successors and assigns, to pay on account of the principal of the mortgage aforesaid of $13,500.00 held by The Franklin Society for Home Building and Savings, the sum of One Thousand Six Hundred ($1,600.00) Dollars on July 1, 1937, thereby reducing said principal sum to Eleven Thousand Nine Hundred ($11,900.00) Dollars, it being understood and agreed between the parties hereto that this covenant shall not merge in the deeds to be given under this contract but shall remain in full force and effect until said reduction of principal is made. The party of the first part, for itself, its successors and assigns agrees to and with the parties of the second part, their heirs and assigns, that it the said party of the first part will obtain for the parties of the second part, a Federal Housing mortgage of $11,900.00 payable according to the regulations of the Federal

Exhibit D-1.

Housing Administration, as soon as con be reasonably obtained from and after the date the parties of the second part shall have reduced the principal sum of said mortgage to $11,900.00, as hereinbefore provided, with the understanding that the costs incidental thereto shall be borne by the parties of the second part, said costs, however shall not exceed Three Hundred ($300.00) Dollars.

Each of the parties to these presents hereby agrees to convey the property above described, as sold by that party, free from all incumbrances, except as above specified, and to execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered to the other party, or to the assigns of the other party (the deed to be drawn in each case at the cost of the vendor), a proper warranty deed containing full covenants, duly executed and acknowledged to convey and assure to the grantees an absolute fee of said premises.

Said deeds shall be delivered and exchanged on Saturday the second day of January at ten o'clock A.M., at the office of Nutley Mortgage and Title Guaranty Company No. Chestnut Street in the Town of Nutley, New Jersey.

Each of the parties hereto assumes the risk of loss or damages by fire prior to the completion of this contract on the premises owned by them respectively. The rents of the said premises, taxes, insurance premiums, water rents, interest and installments on mortgages, if any, shall be adjusted, apportioned and allowed up to the day of taking title.

If there be water meters on the premises both

parties shall furnish readings to dates not more than thirty days prior to the time herein set for closing title and the unfixed meter charges for the intervening time shall be apportioned on the basis of such last readings.

All personal property appurtenant to or used in the operation of said premises is represented to be owned by the respective sellers and is included in this exchange.

In case the premises shall suffer injury beyond the ordinary wear and tear, the parties hereto shall repair the damages before the date set for the taking of title or make an appropriate deduction from the difference of purchase price herein stated.

This contract covers all right, title and interest of the respective sellers, of, in and to any lands lying in the bed of any street, road or avenue, opened or proposed, in front of or adjoining the premises to be conveyed to the centre line thereof, or all right, title, and interest of the respective sellers in and to any awards made or to be made in lieu thereof, and the sellers will execute and deliver to the purchasers, on closing of title or thereafter, on demand, all proper instruments for the conveyance of such title and the assignment and collection of such awards.

It is expressly understood and agreed that the title to the land and premises hereby agreed to be exchanged is not derived from any proceedings or any Act for the Sale of Land for nonpayment of the municipal taxes or assessments, or by adverse possession.

It is understood and agreed that the buildings upon said premises are all within the boundary

lines of the property as described in the respective deeds therefor, and that there are no encroachments thereon and that the buildings comply with municipal ordinances and regulations and the provisions of the New Jersey State Tenement House Act as enforced by the State Board of Tenement House Supervision, to be shown by the report of the department or board enforcing the same where such ordinances, regulation and said act apply.

And it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties.

In Witness Whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

MARJORIE A. LANG (Seal)
ELMER W. LANG (Seal)

Witness
GEORGE T. BOWES

NORTH JERSEY AGENCY, INC.
EDWARD M. DAVIS,
(Seal) Vice-President.

Attest:
ARNO RUNTLER,
Secretary.

New Jersey Court of Errors and Appeals

Between ELMER W. LANG and MAJORIE A. LANG, his wife, Complainants-Appellants, and NORTH JERSEY AGENCY, INC., a corporation of the State of New Jersey, Defendant-Appellee.	On Bill, &c. On Appeal from the Court of Chancery. Sat Below: LUTHER A. CAMPBELL, *C.* VIVIAN M. LEWIS, *V. C.*

BRIEF FOR COMPLAINANTS-APPELLANTS.

Introductory Statement.

Complainants appeal from a final decree made in the Court of Chancery by his Honor LUTHER A. CAMPBELL, Chancellor, upon the advice of Vice-Chancellor VIVIAN M. LEWIS.

Complainant Elmer W. Lang owned a house on Van Houten Avenue in the City of Passaic and gave a Bond and Mortgage covering same to the Security Mortgage and Title Insurance Company, which Bond and Mortgage, by mesne assignments became the property of the Slovak Catholic Sokol. Subsequently, when $5,750.00 was due on the Bond and Mortgage, complainants contracted to sell their house to the defendant for $7,500.00 and to buy from the defendant a house on Howard Avenue, in Passaic for $17,500.00

The defendant purchased complainant's house subject to said Mortgage and deducted or re-

tained out of the purchase price the amount of the Mortgage debt, viz., $5,750.00. On closing, a closing statement was prepared by the defendant, showing a credit of the amount of the Mortgage against the purchase price.

Thereafter Slovak Catholic Sokol foreclosed the Mortgage, brought suit against Elmer W. Lang for deficiency and obtained a judgment of $7,796.68.

Complainants, contending that the defendant was the primary obligor, applied to it for the payment of the judgment, and upon its refusal to do so, brought the present suit in Chancery for said amount. Thereafter, and before final hearing, complainants paid to Slovak Catholic Sokol $2,500.00, in settlement of the judgment.

The Chancellor, upon the advice of Vice-Chancellor Vivian M. Lewis, decided after final hearing that the transaction between complainants and defendant was not a sale but an exchange and therefore that the complainants were not entitled to the relief sought and a decree was entered dismissing the Bill of Complaint.

We claim there was error in holding that the transaction was not a sale but an exchange and in the denial of the relief sought by complainants.

ARGUMENT.

POINT ONE.

The transaction between the parties was a sale and not an exchange (Ground of Appeal No. 2).

An exchange is defined in the decision of this Court in the case of *Haber* v. *Goldberg,* 92 N. J. L. 368, at page 369 as follows:

> "An exchange is a mutual grant of equal interests, the one in consideration of the other. The word "exchange" is so individually requisite and appropriated by law to this case that it cannot be supplied by any other word or expressed by any circumlocution. The estates exchanged must be equal in quantity; not of value, for that is immaterial, but of interest: as fee-simple for fee-simple, a lease of twenty years for a lease of twenty years, and the like." 2 Bl. Com. 323.

The requirements of an exchange are to be found in the foregoing paragraph and at page 370; they are, (1) "* * * an exchange of actual interests," (2) "* * * an actual warranty with a condition of re-entry, so that if the title to either tract of land turns out to be bad, and the party or his assigns should afterward be evicted, he and they can recover back their tract which was given in exchange," (3) "* * * it is absolutely necessary that the word "exchange"—excambrium—should be used. No other word can supply its place, however equivalent its significance" (Italics by the Court).

It will be observed that none of the requirements of an exchange are present in the trans-

action involved in this case. There is no exchange of actual interests (not of value, but of estates). The contract (Case, pages 58 to 64) provides that the complainants agree to convey land to the defendant at a certain valuation and the defendant agrees to convey to the complainants lands at a certain valuation, each premises are to be conveyed subject to certain mortgages and the complainants agree to pay to the defendant a sum in cash, after taking credit for the mortgage.

There is no condition of re-entry contained in the deed from Lang to North Jersey (Case, pp. 53 to 58). The word "exchange" is not used anywhere in the deed. On the contrary, the words "sold" and "sell" are each used (Case, p. 53, l. 29, Case, p. 55, l. 16) while the contract is replete with the words, "sold", "sellers", "purchasers" and "purchase price." (Case, p. 62, l. 15, p. 63, ll. 10, 20 and 30.)

It is admitted that at the top corner of the printed form used for the Contract there are the words "Contract for Exchange" in small print.

In the cited case of *Haber* v. *Goldberg, supra,* the Court at page 372 said:

> "* * * and it is significant too that the word 'sold' is used in the agreement, which indicated that the parties meant a sale and not an exchange."

In the case of *Caldwell Building and Loan* v. *Henry,* 120 N. J. Eq., the Court held at page 430, "a sale is no less a sale because the consideration is land and not money. *Haber* v. *Goldberg,* 92 N. J. L. 367."

This Court held in the case of *Smith* v. *Colonial Woodworking Company, Inc.,* 110 N. J. Eq. 418

at page 420, that the Vice-Chancellor in the Court below, wherein the facts were very similar to those of the case at bar, "erred in holding that there was an exchange of properties" and concluded, "that there were sales of the properties between the several vendors and vendees." In that case A conveyed to B property valued at $30,000.00 subject to mortgages in the sum of $27,000.00. B conveyed to A unencumbered property valued at $20,000.00. A executed to B a mortgage on the latter property for $14,000.00 and paid the balance in cash. The court held that the transaction amounted to sales and purchases and not to an exchange of properties.

In the case of *Fidelity Union Trust Co.* v. *Prudent Investment Corporation,* 129 N. J. Eq. 255, the facts were similar to those of this case. They were: A gave to B $10,000.00 and property for B's property, upon which there was a mortgage. In the contract and on the passing of title the respective owners placed a valuation upon their respective properties. Mortgages were delivered by A to B and credits were apportioned between the owners. The deeds of conveyance recited no right of re-entrance, the Court held that the transaction was a sale and not an exchange.

The proof at the final hearing indicated that there was never any intention on the part of the complainants to exchange their property. We believe the proof clearly indicates their intention was always to "sell" their property.

Elmer W. Lang testified (Case, p. 29, ll. 31 to 40), on cross-examination:

> "A. No, I didn't suggest a transfer in exchange, I made it very plain to them I couldn't purchase the property unless they would purchase mine.

> Q. And after that negotiation you entered into the contract for identification, D-1? A. I explained to them I didn't have enough funds to purchase their house unless they purchased mine from me."

As a matter of fact, Counsel for the defendant uses the word "bought" indicating a purchase and a sale as distinguished from an exchange (Case, p. 30, ll. 10 to 15).

George T. Bowes, a witness offered by the defendant, substantiated the testimony of the complainant (Case, p. 35, ll. 10 to 20). In referring to a conversation had with Mrs. Lang, he testified that:

> "* * * I asked them if they were interested and she said 'Yes, they were interested,' but that they had a house for sale on Van Houten Avenue and that they would not be in a position to buy our house unless they sold their house."

On cross-examination, the same witness testified (Case, p. 36, ll. 27 to 32):

> "Q. Mr. Bowes, when Mrs. Lang first went to see you didn't she tell you she couldn't possibly buy the Howard Avenue property unless she sold her Van Houten Avenue property for $7500.00? A. Both Mr. and Mrs. Lang."

Again (Case, p. 38, ll. 30 to 38) the same witness in answer to a question put to him by Counsel for the Defendant, testified:

> "A. Mr. Lang paid $17,500.00 for the Howard Street house which was the price we had asked. He did not question the price we were asking for our house, therefore, after our committee inspected the Van Houten Avenue house I prevailed upon

them not to question the price Mr. Lang wanted for his house."

This certainly indicates a sale upon an agreed purchase price and the transaction was finally consummated for that purchase price, indicating a sale. (Case, p. 38, ll. 11 to 18.):

> Q. And in the closing statement do you know whether or not the purchase price was set forth at $7500.00? A. For the purpose of arriving at the values, yes.
> Q. The price was set forth at $7500.00? A. Yes.

Henry C. Tucker, a witness for the defendant who handled the closing for the defendant testified (Case, p. 40, ll. 36 to 40, top of page 41):

> Q. Do you know whether or not this closing statement which you made up has a purchase price of $7500.00 set up? A. It has the word price on it.
> Q. It has the word "price" before it. You typed that word, did you? Did you put that word "price" in there? A. The word price is there.

The Closing Statement, Exhibit C-3 (Case, p. 52, ll. 10 and 20) indicates that a definite purchase price was placed on each property.

POINT TWO.

The transaction between the complainant and defendant constituted in equity an assumption by the defendant of the mortgage debt, since it deducted and retained out of the purchase price as fixed and agreed upon, the amount of said mortgage debt, and the complainant being personally liable for payment of the same is entitled to be indemnified by the defendant and to a decree against it (Ground of Appeal No. 1).

The law is well settled that even though there be no express assertion of assumption of the mortgage in the deed there may be an implied assumption. This assumption is implied where the purchaser deducts from the purchase price the amount of the mortgage, or the amount of the mortgage is credited against the purchase price. *Tichnor* v. *Dodd,* 4 N. J. Eq. 454; *Herd* v. *Vreeland,* 30 N. J. Eq. 591; *Reeves* v. *Cordes,* 108 N. J. Eq. 469; *Fidelity Realty Co.* v. *Fidelity Corporation of N. J., et al.,* 113 N. J. Eq. 356; *Fiedler Corporation* v. *Peak Realty Company, a corporation,* 114 N. J. Eq. 535; *Meyers* v. *Siracusa,* 125 N. J. Eq. 183; *Thayer* v. *Torrey,* 37 N. J. L. 339; *Freedman* v. *Zuckerman,* 104 N. J. E. 322; *Herbert* v. *Corby,* 17 N. J. Misc. 204.

If it is concluded that the transaction was a sale and not an exchange as argued under Point One, then the remaining question is, did the defendant deduct or retain out of the purchase price as fixed and agreed upon, the amount of the mortgage debt, because in that event equity will impose upon the defendant an obligation to indemnify the complainant.

In the case of *Max* v. *Beckelman,* 115 N. J. Eq., this Court affirmed a decision advised by Vice-Chancellor Stein and at page 121 says:

> "Even if the defendant purchasers cannot be said to have assumed the payment of the mortgages under their contract which so provides in express language, and the premises were intended to be conveyed subject to the mortgages, the equitable doctrine long and well established is, that where the purchaser deducted or retained out of the purchase price, as fixed and agreed upon, the amount of the mortgage debt, equity will there raise or impose upon his conscience an obligation to indemnify his grantor, if the latter himself be personally liable for the payment of the mortgage debt, and this although the premises were conveyed subject to the mortgage as is claimed by the purchasers in this instant case. Reeves v. Cordes, 108 N. J. Eq. 469; Tichenor v. Dodd, 4 N. J. Eq. 454; Thayer v. Torrey, 37 N. J. Law 339; Friedman v. Zuckerman, 104 N. J. Eq. 322."

If the transaction was a sale as distinguished from an exchange then we believe it follows that there was a definite purchase price because that is one of the component parts or requirements of a sale. We have, however, additional facts to support our argument that there was a definite purchase price of $7500.00. Under Point One we made reference to the testimony of the various witnesses in the case concerning the purchase price. The closing statement, Exhibit C-3 (Case, p. 52, l. 22) which was prepared and drawn by Henry C. Tucker on behalf of the defendant (Mr. Tucker also drew the deeds, Case, p. 40, l. 15) contains the following language: there are two columns, one headed "credit," and the other headed "debit"; there are the words "paid on con-

tract," and under the heading "credit" the word "none"; alongside it is the word "price" and under the heading "debit", the figure "7500.00"; so that in the Closing Statement, the price on the property is stated to be $7500.00 and the defendant takes credit on account thereof for the amount of the mortgage in the sum of $5750.00. This would indicate that the net amount in cash to be paid by the defendant to the complainants for the Van Houten Avenue property would be the sum of $1750.00. Mr. Tucker attempts to explain the purpose of the Closing Statement as being: (Case, p. 39, ll. 33 to 40.)

> "A. To disclose the net equities in both houses and determine the amount that had to be paid by Mr. Lang."
>
> "Q. And that amount was $1355.77? A. That is correct."

The true intent of the parties can be derived from the deed, Exhibit C-4 (Case, p. 53, l. 5) containing the words "Revenue Stamps $2.00." By Congressional Act, Revenue Stamps are required to be placed upon a deed and the Act in effect at the time of this transaction, in 1936, is found in U. S. Code Annotated, Title 26-725, Revenue Act of 1932, reading as follows:

> "8. Conveyances: Deed, instrument, or writing, delivered on or after the 15th day after the date of the enactment of the Revenue Act of 1932 and before July 1, 1934 (unless deposited in escrow before April 1, 1932) where any lands, tenements, or other realty sold shall be granted, assigned, transferred or otherwise conveyed to or vested in the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance re-

> maining thereon at the time of sale; exceeds $100.00 and does not exceed $500.00, 50 cents; and for each additional $500.00 or fractional part thereof, 50 cents."

This Act was subsequently amended, but continued as above quoted until 1940, when the only change made was with relation to the computation of the tax, providing for 55 cents instead of 50 cents as theretofore required.

If the complainants' contention is correct, the value of the stamps would be computed on the basis of $7500.00 after adjustments and credit for the value of the encumbrance. It will be observed that revenue stamps were placed on deed on the basis of complainants' computation, because the requirement was 50 cents for every $500.00 or fraction thereof, and after credit for adjustments and mortgage, the cash balance was $1536.25 (Case p. 52, l. 32) so that $2.00 worth of revenue stamps were placed on the deed. Obviously, at the time of the closing, the defendant, who affixed the stamps to the deed, considered the purchase price to be $7500.00, and taking credit for the amount of the encumbrance upon the property, stamps were affixed upon the deed on that basis.

There is definite proof of the purchase price in the testimony. The complainant testified: (Case, p. 30, l. 3.)

> "A. Their price was $17,500.00 for their piece of property and my price for mine was $7,500.00."

Mr. Lang also testified: (Case, p. 27, ll. 27 to 35.)

> "Q. Well, now, how was this amount of $7500.00 to be paid, how was it set up? A. Well, the amount of the mortgage, $5750.00 was withheld by them and I was given

a credit for the balance, the difference between that and the $7500.00.

Q. I see; now, was the sale finally consummated in accordance with that statement? A. Yes, sir."

Again (Case, p. 26, ll. 10 to 20) the complainant testified:

"Q. The North Jersey Agency, and what agreements, if any, did you make concerning the purchase price of this property on Van Houten Avenue? A. The purchase price was $7500.00.

Q. Did they agree to pay that price? A. They did eventually, there was quite some haggling about it before they agreed to the price; they requested permission to have a committee inspect the premises, the committee did inspect the premises and eventually they agreed to the price of $7500.00."

The defendant's witness, Henry C. Tucker, testified that the defendant took credit for the amount of the mortgage against the purchase price: (Case, p. 39, l. 40, to top of page 40.)

"Q. The original contract called for the payment by him of $1750.00 do you know the reason for its reduction? A. Well, it was due to the credits.

Q. On the closing statement? A. Yes."

The difference between $7500.00 and $1750.00 is the sum of $5750.00, which was the amount due on the mortgage on complainants' house, so that obviously the amount of the mortgage was deducted and credited against the purchase price in order to arrive at the net figure of $1750.00.

George T. Bowes, the other witness for the defendant testified (Case, p. 38, ll. 15 to 20).

"Q. The price was set forth at $7500.00? A. Yes.

Q. And a credit was taken by your North Jersey Agency for $5750.00 the amount of the mortgage, is that right? A. Yes. We did not want to buy the Van Houten Avenue property at all."

In the case of *Fiedler Corp.* v. *Peak Realty Co.*, 114 N. J. Eq. 535, the Court at page 536-537 held:

"The defendant Peak Realty Company having accepted the property subject to the mortgage and kept back enough of the vendor's money to pay it, it is only common honesty that it be required to pay or stand primarily liable for the debt. The retention of the money imposes upon the defendant the duty of protecting the vendor against the debt. We have said heretofore that this must be so even according to the lowest notions of justice, for it would be intolerably unjust to permit the vendee to keep back the vendor's money with the understanding that he would pay, and still be free from all liability for failure to apply the money according to his promise.

It is so well established in this court, that it seems almost unnecessary to repeat it, that where a purchaser of mortgaged premises deducts or retains out of the purchase price, as fixed and agreed upon, the amount of the mortgage debt under the circumstances herein, equity will there raise or impose upon his conscience an obligation to indemnify his grantor, if the latter himself be personally liable for the payment of the mortgage debt, and this although the premises were conveyed subject to the mortgage. Tichenor v. Dodd, 4 N. J. Eq. 454; Heid v. Vreeland, 30 N. J. Eq. 591; Thayer v. Torrey, 37 N. J. Law 339; Friedman v. Zuckerman, 104 N. J. Eq. 322; Reeves v. Cordes, 108 N. J. Eq. 469; Dieckman v. Walser, 114 N. J. Eq. 382."

In the case of *Fidelity Union Trust Co.* v. *Prudent Investment Corp.*, 129 N. J. Eq. page 255, the facts were very similar, to those of the case at bar. In that case A and B owned respective properties. In consideration of B's property A gave to B his property and $10,000.00, there being at that time a mortgage on A's property and B took title subject to the mortgage. Upon the passing of title to the respective premises, the owners thereof each placed a valuation thereon. The respective deeds of conveyance recited no right of re-entry and the Court after holding that the transaction was a sale and not an exchange, said at page 259:

> "Crediting the amount of the mortgage against the purchase price, as was done in the Prudent Investment Corporation-Fischer-Vernick transaction, carries with it an assumption of the mortgage by the grantees. The following cases are authority for that determination. Crowell v. Hospital of Saint Barnabas, 27 N. J. Eq. 650; Dieckman v. Walser, 114 N. J. Eq. 382; 168 Atl. Rep. 582; Meyer v. Blacker, 120 N. J. Eq. 35; 184 Atl. Rep. 191; Meyers v. Siracusa, 125 N. J. Eq. 183; 4 Atl. Rep. (2nd) 519; Tomlinson v. Warner Bros. Theatres Inc., 126 N. J. Eq. 485; 9 Atl. Rep. (2nd) 744.
>
> Even though there be no express assertion of assumption of mortgage, the courts of this state in a long line of decisions, hold that there may be an implied assumption in circumstances such as are present in the instant case."

Our case is on all fours with the above case in that by both the testimony hereinabove referred to and the Closing Statement also referred to *supra*, the mortgage was credited against the purchase price.

In the case of *Reinfeld* v. *Fidelity Union Trust Co.*, 123 N. J. Eq. page 428, the Court at Page 432 held:

> "The conveyance by Essex Realty Holdings Incorporated, to Harry Kalisch was made pursuant to an agreement, whereby the former agreed to convey the property and the latter agreed to pay and satisfy $370,000.00 as the consideration, $145,000 in cash and $225,000 "by accepting the premises subject to a mortgage to be held by the Fidelity Union Title and Mortgage Guaranty Company or their nominee." Title passed in accordance with the agreement. On the settlement, Kalisch was charged with the purchase price $370,000 and credited with the amount of the mortgage. The rule applies stated by Mr. Justice DEPUE in *Crowell v. Hospital of St. Barnabas,* 27 N. J. Eq. 650, 655. "If, by the terms of purchase the mortgage money is, by agreement, taken as part of the consideration money, equity raises upon the conscience of the purchaser an obligation to indemnify the mortgagor against the mortgage debt."

There is one remaining question that we feel should be argued, and that is the amount of decree to which complainants' would be entitled if successful. The Vice-Chancellor in the Court below touched upon the question in his opinion (Case, p. 19, ll. 25 to 35) and said that: " * * * at most the complainants could only recover the $2,500.00", because of the fact that the complainants had paid in settlement of the claim of Slovak Catholic Sokol that amount. Complainants do not desire to be unjustly enriched, and ask only that the law applicable to the facts in this case be applied thereto and that a decree be entered for such amount as complainants may be entitled.

We have searched the authorities for a case wherein a similar situation existed and have been

unsucessful in finding one. Inasmuch as the theory of equitable assumption rests upon the principal that the purchaser of the property agreed to pay a definite price and took credit for the amount of the mortgage in the closing of the sale, we feel that the present action is merely to recover from the defendant the balance of the amount that he agreed to pay for the property and that the fact that the complainant compromised the claim against himself for $2500.00, should not relieve the defendant from paying the full balance of the purchase price.

Conclusion.

We respectfully submit that the Court of Chancery erred in holding that the transaction between the complainants and the defendant was not a sale but an exchange and in holding that there was no equitable assumption. We respectfully submit that the transaction was a sale and that there was an equitable assumption and that the complainants are entitled to a decree for the amount of the mortgage which was credited against the purchase price.

Respectfully submitted,

JOHN O. MCGUIRE,
Solicitor for
Complainants-Appellants.

THOMAS E. DUFFY,
AUBREY J. ELIAS,
Of Counsel.

To be argued by
AUBREY J. ELIAS.

New Jersey Court of Errors and Appeals

Between

ELMER W. LANG and MARJORIE A. LANG,
Complainants-Appellants,

and

NORTH JERSEY AGENCY, INC.,
Defendant-Appellee.

On Bill, &c.

On Appeal from Decree of Court of Chancery.

BRIEF FOR DEFENDANT-APPELLEE.

Statement of Facts.

On October 31, 1924, complainant Elmer W. Lang, then a widower, executed a bond (Exhibit C-1, State of the Case, p. 42), to the Security Mortgage and Title Insurance Company conditioned for the payment of $7,500.00 secured by a mortgage (Exhibit C-2, S. C., p. 45) covering the premises described in deed from complainants to defendant (Exhibit C-4, S. C., p. 53).

The Slovak Catholic Sokol, having become the owner of said bond and mortgage, foreclosed it. The property was purchased by it at the Sheriff's sale for the sum of $100 (S. C., p. 34, l. 21) and on September 17, 1940 (S. C., p. 8, l. 35) it brought suit in the Passaic County Circuit Court against Elmer W. Lang for an alleged deficiency of $7,796.68 (S. C., p. 32, l. 33, *et seq.*). On September 17, 1940 Slovak Catholic Sokol instituted suit against Elmer W. Lang. On December 1, 1942 complainants brought this action against defendant. Thereafter before final hearing in said

cause complainants obtained a covenant not to sue from Slovak Catholic Sokol.

On October 9, 1936, complainants entered into a contract with the North Jersey Agency, Inc. (Exhibit D-1, S. C., p. 58) (The contract is entitled "CONTRACT FOR EXCHANGE" at the top thereof and on the back thereof. These words are omitted in the State of the Case but the omission is referred to in complanants' brief, p. 4, l. 20).

Pursuant to the terms of said contract by deed dated October 31, 1936, complainants conveyed the equity in the said mortgaged premises to the defendant (Exhibit C-4, S. C., p. 53) which deed recites that the conveyance is "subject to a mortgage now a lien on said premises held by Slovak Catholic Sokol, a corporation of New Jersey, originally given to secure the payment of $7,500, upon which there is now due the principal sum of $5,750, payable according to the terms of said mortgage" (S. C., p. 54, l. 15, *et seq.*).

Complainants' demand for relief is based on the contention that the defendant at the closing of the contract (Exhibit D-1, S. C., p. 58) which is dated October 9, 1936, deducted and retained out of the purchase price fixed and agreed upon the amount of said mortgage debt.

We insist that no such sum was deducted or retained by defendant; that defendant purchased only the equity in the property. The collateral covenant of complainants in regard to payment on account of the mortgage on property conveyed by defendant to them is corroborative evidence of this fact (Exhibit D-1, p. 61, l. 20, *et seq.*).

On page 2 of the brief filed on behalf of complainants in the second and third paragraphs of said page it is stated that Slovak Catholic Sokol brought suit against Elmer W. Lang for deficiency

"and obtained a judgment of $7,796.68," and that "thereafter and before final hearing complainants paid to Slovak Catholic Sokol $2,500.00 in settlement of the judgment." There is no statement in the testimony or proofs that such judgment had been obtained, on the contrary it is apparent that no judgment was entered. (See bill of complaint, paragraph 20, S. C., p. 8; see testimony of Elmer W. Lang, S. C., p. 30, l. 25; testimony of John Blanda, S. C., p. 32, l. 32, *et seq.*).

ARGUMENT.

Before stating the argument on the main question involved there are several facts which we think should be called to the attention of the court.

POINT I.

The complainant Marjorie A. Lang was not a party to the bond or mortgage upon which the suit for deficiency is based. She was not married to the complainant Elmer W. Lang at the time of the execution of said bond and mortgage and was not liable in any way to the Slovak Catholic Sokol (S. C., p. 30, l. 33, *et seq.*).

> "If the grantor in a deed to a grantee who assumes payment of the mortgage debt is not liable to the mortgagee the grantee incurs no liability by his assumption."
>
> *Meyer* vs. *Supinski,* 125 N. J. Eq. 584.

There is, therefore, no basis for her claim of a right to recover against defendant in any event.

Motion to strike the bill of complaint on this ground was made and decision reserved till final hearing (S. C., p. 18, l. 15).

POINT II.

At the time that this action was commenced neither complainant had paid anything on account of said deficiency (Par. 22 of the bill of complaint, S. C., p. 9, l. 25, and p. 18, l. 12; complainants' brief, p. 2, l. 14).

> "An assumption of a mortgage by a grantee creates no liability unless his grantor is bound to pay the debt."
>
> *Usbe Building & Loan Association* vs. *Ocean Pier Realty Corp.*, 112 N. J. Eq. 580.

> "Where the contract is one of indemnity the obligee cannot recover until he has been actually damnified and he can recover only to the extent of the injury he has sustained up to the time of the institution of the suit."
>
> *Westville Land Co.* vs. *Handle,* 112 N. J. Law 447-452.

No express covenant to assume the mortgage is alleged.

> "The basis for such a suit (before payment by plaintiff) is the express agreement of the assuming grantee to pay the debt for which the plaintiff is liable. It does not rest upon the relation of principal and surety but upon a covenant under seal."
>
> *Gruen* vs. *Tepperman,* 116 N. J. Eq. 398-400.

This question was also raised in motion to strike the bill and decision reserved.

POINT III.

The amount claimed as deficiency in the foreclosure action is excessive. An examination of the items which go to make up the alleged deficiency make that apparent.

1. The property was sold by the Sheriff for $100 to Slovak Catholic Sokol but in the alleged deficiency is included Sheriff's commissions on sale of $179.34 (S. C., p. 34, l. 18, bill of complaint, S. C., p. 8, l. 21).

2. The Slovak Catholic Sokol was not entitled to the full amount of the deficiency. It bought in the mortgaged property for a nominal sum of $100 (S. C., p. 34, l. 27), and it should have been required to credit on account of the deficiency the fair value of the property it received as of the date of the foreclosure sale.

Meyer vs. *Supinski,* 125 N. J. Eq. 584-593.

POINT IV.

In any event neither of complainants is now liable for the deficiency and therefore if defendant had been liable to complainant or either of them such liability is extinguished.

Prior to the hearing before the Vice-Chancellor in this cause complainant had secured from Slovak Catholic Sokol a covenant not to sue (S. C., p. 33, l. 8 and l. 14).

If complainants had any justification for their contention that the payment of the mortgage in question was assumed by defendant the Slovak Catholic Sokol might contend that it had a right of action against the North Jersey Agency, Inc.

> "A covenant not to sue one of several obligors is no evidence of the payment of the bond but exactly the contrary and therefore it can never have the effect of a release, nothing will extinguish the bond but actual technical release."
>
> *Crane* vs. *Alling,* 15 N. J. Law 423-425.

The reason that a covenant not to sue was given by the Slovak Catholic Sokol to Elmer W. Lang was not explained. It may have been on the theory that notwithstanding the fact that the covenant not to sue would relieve Mr. Lang from further liability the Slovak Catholic Sokol could still proceed against the North Jersey Agency, Inc.

In *Binns* vs. *Baumgartner,* 105 N. J. Eq. 58 the right of a mortgagee to proceed against the grantee of a mortgaged premises was recognized and stated.

No one was liable on the bond or for the deficiency alleged in this case except Elmer W. Lang unless as complainants assert there was an equitable assumption by defendant. Why, therefore, was a covenant not to sue given to Mr. Lang unless it was for the reason that either Slovak Catholic Sokol or complainants hope to recover the entire amount of the alleged deficiency from defendant.

It is interesting to note that complainants admit that "the fact that complainant comprised the claim against himself for $2,500 should not relieve the defendant from paying the full balance of the purchase price." In other words, the contention of complainants is that the payment made was simply a consideration for the covenant not to sue and not a payment on account of the deficiency. It is evident, therefore, that neither of the complainants has a right of action against defendant to recover the amount paid.

The fact that the covenant not to sue which relieved Elmer W. Lang from liability would also release the North Jersey Agency, Inc. may have been overlooked.

> "If discontinuance of suit against Supinski operates as a discharge of his liability as an assuming grantee then the Rauches' obligation to indemnify Supinski against his liability to complainant is at an end and complainant is not entitled to the benefit of the obligation."
>
> *Meyer* vs. *Supinski,* 125 N. J. Eq. 584-589.

In *Feitlinger* vs. *Heller,* 112 N. J. Eq. 209, Forman gave a mortgage to complainants and then conveyed the mortgaged premises to Shapiro who in turn conveyed to others. There was an assumption clause in each conveyance. The mortgage was foreclosed and at the sale by the Sheriff a deficiency of $20,000 resulted. Forman obtained what was designated as a covenant not to sue on payment of $5,000 and his agreement to waive the right to redeem the property and complainants agreed that if they recovered the full amount of the mortgage debt and their costs from any other person to repay to Forman the price of the release. The court held (p. 212):

> "But if the release be construed as a covenant not to sue it affords the Formans the same immunity as does a release, and liability being terminated leaves the defendants with nothing to indemnify and nothing remains in the Formans to which the complainants may succeed."

POINT V.

It is manifest, however, that there was no assumption of the mortgage in question legal or equitable, express or implied, in the agreement of

sale (Exhibit D-1, S. C., p. 58) in the deed given by complainant to defendant (Exhibit C-4, S. C., p. 53) or by parol.

It will be noted that in the agreement (Exhibit D-1, S. C., p. 58) that the North Jersey Agency, Inc., the defendant in this suit, in consideration of One Dollar and the conveyance of the premises described in the bill of complaint agrees to convey to complainant at a valuation for the purpose of the contract of $17,000, the land therein described and complainants (S. C., p. 59, l. 21) in consideration of One Dollar and the conveyance by defendant as aforesaid agree to convey to said defendant "at a valuation for the purposes of this contract" of $7,500 the premises described in the bill of complaint. The premises to be conveyed by complainants to defendant are to be conveyed subject to the mortgage (S. C., p. 60, l. 33).

The difference between the values of the respective premises over and above encumbrances shall be deemed for the purposes of the contract to be $1,750 in favor of defendant which complainants agree to pay (S. C., p. 61).

It is to be noted that defendant does not agree to pay any money to complainants.

The contract and the deed given pursuant thereto are very similar in form to those mentioned in the following case.

Garfinkle vs. *Vinik,* 115 N. J. Eq. 42, where it is held that there was no assumption legal or equitable.

> "Complainants' attempt to spell out an assumption by Ratner from the documents executed in connection with the conveyance of the premises by complainants to him and the facts and circumstances surrounding such conveyance. Such an assumption can be proven parole. *Dieckman* vs. *Walser,* 114 N.

J. Eq. 382. However, I do not find that there was any such assumption. It has been held that where the amount of an existing mortgage has been deducted from a fixed purchase price an agreement to assume the mortgage will be implied, such does not appear to be the situation here. The conveyance was made pursuant to a contract for exchange of premises between Ratner and Viniks. The printed form used by them is so entitled, it contains a covenant that the Viniks in consideration of One Dollar and also in consideration of the conveyance by the party of the first Part of the real property hereinbefore mentioned agrees to grant and convey to the party of the first part at a valuation for the purpose of this contract of $32,000 the premises in question. It further contains a provision that the premises are to be conveyed subject to two mortgages one of which is that in suit and also a purchase money mortgage of $1,300. It will be noted that there is no agreement to pay the sum of $32,000. The covenants by Ratner are similar and in both cases the consideration is expressed to be One Dollar and the conveyance by the other party. The deed for the premises was executed to Ratner without any express assumption and he gave a third mortgage in the amount of $2,250. * * * From these facts I cannot spell out any implied assumption on the theory that the $32,000 mentioned in the agreement was a fixed price which Ratner agreed to pay, part of the payment being the existing mortgage."

"Under well settled principles the purchaser of a mere equity of redemption does not incur any personal liability for the payment of existing encumbrances upon the property as between the purchaser and his grantee the property conveyed becomes the primary fund for the payment of a mortgage debt."

Wittson vs. *Englewood Plumbing Supply Co., Inc.*, 121 N. J. Eq. 323-326.

In *Smith* vs. *Colonial Woodworking Co. Inc.*, 108 N. J. Eq. 303, the Vice-Chancellor before whom the case was tried held that there was not a sale of properties but an exchange of equities. On appeal, 110 N. J. Eq. 418, this court held that the Vice-Chancellor erred in holding that there was an exchange of properties and decided that there were sales thereof between the several vendors and vendees but that complainants were in no better position because no assumption of the mortgage was stated in the deed nor did it appear there that the mortgage was taken as a part of the consideration money.

On application for a rehearing reported in 111 N. J. Eq. 313 the Vice-Chancellor said (p. 314),

> "Our unfortunate characterization of the contract in our earlier opinion was to emphasize our view that the parties swapped properties with something to boot by one of them and we accordingly held that 'the contract is to grant and convey,' not to sell. The stipulated values of the respective properties was stated in the agreement to be for the purpose of this contract * * * trading figures. Joachinstahl did not agree to pay $30,000 for defendant's property in cash and retain $27,000 to pay off the mortgage debts, he took the defendant's property at that valuation subject to $27,000 mortgage encumbrances.
>
> Further there is nothing of proof in the moving papers that the deed does not truly state the understanding of the parties, nothing that words of assumption of the mortgage debt as a part consideration of the purchase price were omitted from the deed by mutual mistake. Mutual mistake is essential."

The dictionary definition of the meaning of the word "exchange" is very much broader than the definition given in *2 Blackstone Commentaries* 323 as cited in *Haber* vs. *Goldberg*, 92 N. J. Law 367-369. The dictionary defines it as "Traffic: barter:

the mutual giving of equivalents in money, goods or labor," and it was unquestionably used in its broader sense by Vice-Chancellor Lewis in his opinion in this case. He does not say that the contract in question did not constitute a sale of complainant's property but that it did not do so at the price of $7,500.00.

He gave complainants every opportunity to provide evidence, documentary or by parol, of an agreement to assume or equitable assumption but after due consideration of all of the evidence he held that complainants had failed in their effort to do so.

> "The findings of fact by a lower court will not be reviewed beyond inquiry whether there was any legal evidence upon which the finding was based. An examination of the proofs show there was legal evidence to support the factual finding stated."
>
> *Fratello* vs. *City of Newark,* 68 N. J. Law Journal, page 134, (Issue of April 26, 1945).

> "The proofs here entirely fail to show the retention of a single penny of the purchase money."
>
> *Hied* vs. *Vreeland,* 30 N. J. Eq. 591-594.

The purchaser of an equity of redemption does not become personally liable for the payment of encumbrance on the property since there is in such purchase no contract express or implied that the purchaser assumes the payment of the encumbrances as a personal liability.

> *Reeves* vs. *Cordes,* 108 N. J. Eq. 469.

In *Fidelity Union Trust Co.* vs. *Prudent Investment Corp.,* 129 N. J. Eq. 255, cited in complainant's brief the Vice-Chancellor at page 258 laid

stress upon the fact that the defendant Vernick testified that he and Fisher gave $10,000 in cash and the Belleville property "to pay" for the Lyons Avenue property and evidently relied on that statement.

Complainants' brief also enlarges on the question of the amount of revenue stamps and asserts that defendant affixed these stamps (p. 11, l. 20).

We find no proof of this assertion and in any event since it is common knowledge that people differ as to the amount of stamps required this fact can have but little weight in determining the questions presented. The only representative of defendant present at the closing was Mr. Bowes, and no inquiry was made from him either as to his knowledge of the requirements or of the amount attached.

Mr. Tucker who made up the closing statement was not shown to be the agent of the defendant. He was employed by the Nutley Mortgage and Title Guaranty Company.

POINT VI.

Mr. Lang attempted to show that it was agreed that the price of $7,500 should be paid for the property he was to convey (S. C., p. 26, l. 15, *et seq.*). Mr. Bowes, witness for the defendant, testified to the contrary (p. 35, l. 30). He told complainant that the equity in the complainants' property would be considered as a payment against the purchase of the property to be conveyed to them (p. 37, l. 22). No testimony was produced on the part of complainants to deny or explain the testimony of Mr. Bowes.

> "A parol agreement of the grantee that he will assume the mortgage indebtedness upon

> the land conveyed as part of the consideration of the conveyance is valid and enforceable. Proof of the parol agreement must, however, be clear and convincing."
>
> *Dieckman* vs. *Walsar*, 114 N. J. Eq. 382-386.

Such proof was not produced.

The full and complete agreement superceded any informal contract in any event.

> *Herman* vs. *Most*, 125 N. J. Law 563;
> *Curtis-Warner Corp.* vs. *Thirkettle*, 99 N. J. Eq. 806.

POINT VII.

It is the contention of complainants that the use of the word "price" in the settlement sheet (Exhibit C-3, S. C., p. 52) and the credit thereon of the amount due on the mortgage is conclusive evidence that the mortgage was assumed.

Mr. Tucker who prepared the statement testified that the purpose of the closing sheet was to disclose the net equities and determine the amount to be paid by complainants (S. C., p. 39, l. 34, *et seq.*).

A similar contention was made in the case of *Malcolm* vs. *Lavinson*, 110 N. J. Law 63-66, where the court held:

> "Nor is there other proof of an express agreement obligating the defendants to assume the mortgage debt. The plaintiff contends that there is proof in the final settlement sheet that the amount of the third mortgage was credited to defendants as part of the consideration. We find no such proof. The settlement sheet admitted in evidence shows that in the calculation of $2,700 cash payment required by the contract to be made

by the Paternosters a charge was made against them of the accrued interest to the closing date on the first and second mortgages and a credit in their favor for unaccrued interest paid by them in advance on the third mortgage but such a debit and credit were proper in any event."

"There is nothing of proof in the moving papers that the deed does not truly state the understanding of the parties. Nothing that words of assumption of the mortgage debt as a part of the consideration of the purchase price were omitted from the deed by mutual mistake."

Smith vs. *Colonial Woodworking Co. Inc.*,
111 N. J. Eq. 313.

We respectfully insist that the decree from which this appeal is taken be affirmed.

REED, REYNOLDS & SMITH,
Solicitors for Defendant-Appellee.

HUGH B. REED,
Of Counsel.

To be argued by HUGH B. REED.