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Transcript of Docket.

Filed July 1, 1930.

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

IN THE

Second District Court

10

OF THE CITY OF PATERSON.

LUCY B. KEYES and JAMES E.
KEYES, her husband,
Plaintiffs,

vs.

JESSE KIMMEL,
Defendant.

In an Action
On Contract.

Demand.

20

SPINDEL & BERR,
Plaintiff's Attorney.

Plaintiff's Costs.

Summons	2.10	
Additional Deft.		
Mileage		
Listing Fee	1.50	30
Witness Fee		
Warrant		
Attorney's fee		
Total Cost		
Execution		
Statement		

March 22 A. D. 1930 state of demand was filed
and summons issued in the above stated cause, re-
turnable April 2, A. D. 1930 at ten o'clock in the
forenoon and was returned as follows:

40

Transcript and Record.

19	Execution returned	Satisfied Execution	
		Mileage	
		5% sergt at arms	
	Sergt at arms		
	Notice of appeal filed		
	June 14, 1930		
	Bond filed June 19, 1930	(L.S.)	10

I, Henry Budkin, Clerk of the Second District Court of the City of Paterson, County of Passaic and State of New Jersey, Certify that said Court is a Court of Record with a Seal; that the foregoing is a transcript and true copy of the record of a judgment of said court, and that it is of the whole thereof.

In Witness Whereof, I have hereto set my hand as Clerk of said Second District Court of the City of Paterson and affixed the seal of said Court at Paterson, this 21st day of June A. D. 1930. 20

HENRY DURKIN,
Clerk (Seal of Court)

30

40

Specifications of Determinations.

Filed July 1, 1930.

NEW JERSEY SUPREME COURT.

10	<p>LUCY B. KEYES and JAMES E. KEYES, her husband, Plaintiffs-Appellees,</p> <p style="text-align: center;">vs.</p> <p>JESSE KIMMEL, Defendant-Appellant.</p>	}	<p>On Appeal from District Court.</p> <p>Specifications of Determin- ations.</p>
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20 To—Lucy B. Keyes and James E. Keyes, her husband, plaintiffs-appellees or Spindel and Berr, attorneys of plaintiffs-appellees.

Sirs:

Take Notice that the following is a specification of the determinations of the District Court with which the appellant is dissatisfied in point of law:

30 1. The court below erred in allowing the following question to the witness Lucy B. Keyes over defendant's objection:

10 "Q. Were you in my office when a letter was dictated to Kimmel & Kimmel, addressed to the Romaine Building, Paterson, New Jersey, by me in your presence—wherein I am saying—wherein I said: 'This is to advise you for the second time'— 'that the mortgage now held by the estate of Joseph Steinberg, which mortgage is due and being called in for payment by the mortgagee unless additional charges of four hundred dollars are paid to the attorneys representing the es-

Specifications of Determinations.

tate,' which I dictated in said letter in your presence?"

2. The court below erred in allowing the following question to the witness Lucy B. Keyes over defendant's objection:

"Q. Do you know of your own knowledge whether or not that letter enclosed in an envelope addressed to Kimmel & Kimmel, Romaine Building, Paterson, New Jersey was in fact mailed to them in the United States Post Office?" 10

3. The court below erred in permitting notice to produce the letter, Exhibit P-2 to be served on defendant's attorney in court while engaged in the trial of the cause over defendant's objection and then permitting said letter, Exhibit P-2 to be introduced in evidence by the plaintiff over defendant's objection. 20

4. The court below erred in ruling over defendant's exception that "I think I shall rule that an extension would be just the same as a substitution."

5. The court below erred in allowing the following question to the witness Lucy B. Keyes over defendant's objection: 30

"Q. One minute, Mrs. Keyes, please, until the question is finished, did Mr. Jesse Kimmel take any steps of any kind or character pertaining to the substitution, renewal, replacement or extension of the first mortgage that was being called in by the first mortgagee up to the present date, if you know?"

6. The court below erred in refusing to direct 40

Specifications of Determinations.

a verdict for the defendant, on defendant's motion at the close of the whole case.

7. The court below erred in giving judgment in favor of the plaintiffs instead of the defendant.

10 8. The court below erred in holding that the action was not barred under sections 60 and 61 of the District Court Act, by reason of Lucy B. Keyes failure to file a counterclaim for her alleged cause of action in the previous suit between Jesse Kimmel, plaintiff and Lucy B. Keyes defendant.

9. The court below erred in holding the charges made by the attorneys for the Steinberg estate were reasonable and allowing a recovery therefor.

20 10. The court below erred in not giving judgment for the defendant.

KIMMEL & KIMMEL,
Attorneys of Defendant-Appellant.

30

40

Notice to Produce.

SECOND DISTRICT COURT OF PATERSON.

<hr style="border: 0.5px solid black;"/> <p>LUCY B. KEYES and JAMES E. KEYES, her husband, Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">JESSE KIMMEL, Defendant.</p> <hr style="border: 0.5px solid black;"/>	}	<p>On Contract.</p> <p>Notice to Produce.</p>	<p>10</p>
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To—SPINDEL & BERR, Attorneys of the above named plaintiffs:

Sirs:

Take notice that the defendant demands that the plaintiffs produce at the trial of the above stated cause the original of deed for premises located in West Englewood, Bergen County, New Jersey, more particularly described in the contract referred to in the State of Demand made by Jesse Kimmel as grantor to Lucy B. Keyes, grantee which said deed was executed by Jesse Kimmel in performance of said contract; also that you produce at the trial of the above stated cause a continuation or extension agreement of mortgage executed by the estate of Mr. Steinberg, dec'd and Lucy B. Keyes and any and all data and correspondence relating to the above matter and that in default thereof secondary evidence will be offered to prove the same.

Dated: March 26, 1930.

KIMMEL & KIMMEL,
Attorneys of Defendant. 40

Specification of Defenses.

SECOND DISTRICT COURT OF PATERSON.

10	LUCY B. KEYES and JAMES E. KEYES, her husband, Plaintiffs, vs. JESSE KIMMEL, Defendant.	}	On Contract. Specification of Defenses.
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The following is a specification of the defenses intended to be made by the defendant in the trial of the above cause:

- 20 1. Denies all the allegations contained in the State of Demand.
- 30 2. The mortgage referred to in paragraph No. 2 of the State of Demand was never called in or the full amount of the principal paid on demand of the holder of the said mortgage but said mortgage is still in force and effect having been extended by the holder thereof. Wherefore no substitution having been made of a new mortgage for the said mortgage hereinbefore referred to, defendant is not liable to the plaintiffs or either of them, as the contract provision set forth in paragraph 2 of the State of Demand.
- 40 3. Denies that James E. Keyes has or ever had any rights by virtue of the contract referred to in paragraph No. 1 of the State of Demenad, and more particularly with reference to the provision of the contract set forth in paragraph No. 2 of the State of Demand.

Specification of Defenses.

4. In the month of July, 1929 the defendant sued Lucy B. Keyes, the actual plaintiff in this action in the First District Court of the City of Paterson in which action the said Lucy B. Keyes failed to deliver or file a discount, set-off, or counterclaim setting up the cause of action on which she now attempts to sue, wherefore by virtue of the provision of the statute in such case made and provided she is precluded from having or maintaining the present suit on said cause of action. 10

KIMMEL & KIMMEL,
Attorneys of Defendant.

State of Demand.

20

SECOND DISTRICT COURT OF PATERSON.

LUCY B. KEYES and JAMES E.
KEYES, her husband,

Plaintiffs,

On Contract.

vs.

JESSE KIMMEL,

State of
Demand. 30

Defendant.

Plaintiff demands judgment in the sum of Five Hundred (\$500.00) Dollars for this:

1. On August 4th, 1928, defendant entered into a certain contract with plaintiffs herein, the original copy of which contract will be presented at the trial of the within cause; wherein and 40

State of Demand.

whereby plaintiff and this defendant agreed to exchange certain respective parcels of realty, one for the other for the prices and in the manner more particularly set forth in the said contract.

10 2. Among other things it was agreed in the contract hereinbefore mentioned by and between these plaintiffs and the defendant herein as follows:

20 It is agreed, however, that in the event that said first mortgage aforementioned is called in and the full amount of the principal demanded by the mortgagees at any time prior to the expiration of three years from the date hereof, then and in such event the party of the first part does hereby agree to secure and place a new first mortgage on the premises, not less than \$12,000.00, to take place of the first mortgage aforementioned and agreed to pay all expenses for acquiring the same and in connection therewith. It being however, understood that in the event such substitution of first mortgage shall become necessary, that the party of the second part shall and will upon such substitution taking
30 place, pay over to the party of the first part the sum of \$150.00 in cash and nothing more.

40 3. Notwithstanding the said agreement between the parties, defendant herein in violation and in controversion of the same and in breach of the said covenant hereinbefore set forth did not comply and perform the said agreement notwithstanding a notice being given to him that the said

State of Demand.

mortgage referred to in the said contract was due and was being called in.

4. By reason of the defendant's breach of the said contract this plaintiff was obliged to expend the sum of Four Hundred (\$400.00) Dollars in order to obtain a continuation of a \$12,000.00 mortgage upon the premises referred to in the contract hereinbefore set forth. 10

Wherefore this plaintiff demands judgment in the sum of Four Hundred (\$400.00) Dollars, together with interest and costs of suit.

SPINDEL & BERR,
Attorneys for Plaintiffs.

Notice of Appeal. 20

SECOND DISTRICT COURT OF THE CITY OF
PATERSON.

LUCY B. KEYES and JAMES E.
KEYES, her husband,
Plaintiffs,

vs.

JESSE KIMMEL,
Defendant.

On Contract.
Notice of Appeal. 30

To—Lucy B. Keyes and James E. Keyes, her husband, plaintiffs, or Spindel & Berr, attorneys of plaintiffs:

Sirs: 40
Take Notice that the defendant, Jesse Kimmel,

Bond.

hereby appeals to the New Jersey Supreme Court from the judgment of the Second District Court of the City of Paterson rendered in the above stated action on June 11th, 1930.

Dated: June 12, 1930.

10

KIMMEL & KIMMEL,
Attorneys of Defendant.

Bond on Appeal.

20

Know all men by these presents, that we Jesse Kimmel and Lena Kimmel, are held and firmly bound unto Lucy B. Keyes and James E. Keyes, her husband, in the sum of \$553.20, for payment of which sum we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Signed with our seals and dated this 18th day of June, nineteen hundred and thirty.

30

Whereas, a judgment was rendered in the Second District Court of the City of Paterson on June 11th, nineteen hundred and thirty in a suit therein depending wherein Lucy B. Keyes and James E. Keyes, her husband are plaintiffs and Jesse Kimmel is defendant, for the plaintiffs and the defendant, Jesse Kimmel, is about to appeal from said judgment of the said Second District Court of the City of Paterson to the New Jersey Supreme Court;

40

Now, the condition of this obligation is such, that if the said Jesse Kimmel shall pay the costs of the said appeal, whatever be the result thereof, and shall pay to the said Lucy B. Keyes and James

Bond.

E. Keyes, her husband, the judgment of the Second District Court of the City of Paterson so aforesaid rendered against the said Jesse Kimmel, if the said appeal be not prosecuted by the said Jesse Kimmel or be dismissed, then this obligation to be void; otherwise, to remain in full force and effect.

JESSE KIMMEL (L.S.)
LENA KIMMEL (L.S.)

10

Signed, sealed and delivered
in the presence of
David Kimmel.

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

Lena Kimmel, being duly sworn, on her oath, says, that she is the surety in the within named bond; that she is a freeholder in the County of Passaic and has property subject to execution worth the sum of Seven hundred and fifty (\$750.00) Dollars over and above all her just debts and liabilities.

20

LENA KIMMEL.

Subscribed and sworn to before me
this 14th day of June, 1930.

David Kimmel,
An Attorney at Law of N. J.

30

40

Bond.

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

10 Be it Remembered, that on this 19th day of June 1930, before me, the subscriber, an Attorney-at-Law of N. J., personally appeared Jesse Kimmel and Lena Kimmel to me known to be the parties who executed the foregoing bond, and I having first made known to them the contents thereof, they severally acknowledged that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

DAVID KIMMEL,
 An Attorney-at-Law of N. J.

I approve of the within bond. Let it be filed.

20

F. W. FREEMAN,
 Judge of the Second District Court
 of the City of Paterson.

30

40

Testimony.SECOND DISTRICT COURT OF THE CITY OF
PATERSON.

LUCY B. KEYES and JAMES E. KEYES, her husband, Plaintiffs, vs. JESSE KIMMEL, Defendant.	}	On Contract.	10
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Transcript of testimony taken on the trial of the above stated matter, before HON. FORSTER W. FREEMAN, Judge of said Court, at the City Hall, Paterson, New Jersey, on the eleventh day of June, 1930. 20

APPEARANCES:

BARNETT BERR, ESQ., (SPINDEL & BERR),
for the Plaintiffs.

DAVID KIMMEL, ESQ., (KIMMEL & KIMMEL), for the Defendant.

PETER O'BYRNE sworn as stenographer. 30

Mr. Berr: If your Honor please, this is an action which is based on a contract bearing date August 4th, 1928, in the branch of that issue between the Kimmel and Keyes families, and I indicated in my state of demand, or annexed to my state of demand a demand for specification of defenses. Now, I note in the specification of defenses that that defense is a defense to the effect that we did not file 40

Testimony.

a set-off or counterclaim as against the original action which was brought before your Honor and a jury sometime in August or September—I don't quite remember the exact date, and they allege that that in itself is a bar to the bringing of this action. Now, then, I would like to have your Honor dispose of that defense at this time in the nature of a motion, so that we do not interrupt the orderly conduct of the trial and we can speed it up. Now, that is purely a matter of law, and my defense is, and anticipating the fact that they are going to allege that we should have counterclaimed, not having notice of it, I think my right of action to that, your Honor, did not accrue until after that suit was started and disposed of, and I think if your Honor will see the record your Honor will be satisfied that that is so.

The Court: I think I can pass upon it that it was accrued subsequently.

Your action is to recover for the placing of the mortgage?

Mr. Berr: I think that Mr. Kimmel will admit that for the sake of this action that the extension or substitution or renewal was in fact after the former trial.

The Court: Well, isn't that a matter of proof?

Mr. Berr: Well, I am saying, if he admits it, we can dispose of it.

Mr. Kimmel: I don't.

Mr. Berr: Has your Honor the original specification of defenses before you?

The Court: Yes.

Mr. Berr: I wanted to know if they were filed.

Mrs. Lucy B. Keyes—Direct.

MRS. LUCY B. KEYES, one of the plaintiffs, sworn as a witness on behalf of the plaintiffs, testifies as follows:

Direct-examination by Mr. Berr:

Q. Mrs. Keyes, did you enter into a contract with one Jesse Kimmel, pertaining to certain property in Teaneck on August 4th, 1928? A. Yes. 10

Q. (Showing witness) I show you a contract and ask you whether that is the contract made between you and Mr. Kimmel? A. Yes.

Q. Now, then, will you—

Mr. Berr: Have you any objection to this going in?

Mr. Kimmel: Let's see the paper. No.

Mr. Berr: I will offer it. 20

(Contract marked Exhibit P-1.)

Mr. Berr: Calling your Honor's attention in this contract to the following clause which is the basis of this action:

"By assuming the mortgage at present a lien upon the premises and paying the same according to the terms thereof, twelve thousand dollars, which mortgage the party of the first part"—the defendant in this case—"expressly warrants and guarantees the mortgage will not be called in for payment by the present mortgagees or their assigns within three years from the date hereof. It is agreed, however, that in the event that the said first mortgage aforementioned is called in and the full amount of the principal demanded by the mortgagees at any time prior to the expiration of three years from the date hereof, then and in such event the party of 30 40

Mrs. Lucy B. Keyes—Direct.

10 the first part does hereby agree to secure and place a new first mortgage”—the party of the first part being Mr. Kimmel, Jesse Kimmel—“on the premises, not less than twelve thousand dollars, to take the place of the first mortgage aforementioned, and agrees to pay all expenses for acquiring the same and in connection therewith; it being however understood that in the event such substitution of first mortgage shall become necessary, then the party of the second part shall and will”—that is Mr. Keyes and Mrs. Keyes—“upon said substitution taking place, pay over to party of the first part, the sum of one hundred and fifty dollars in cash and nothing more.”

20 Mr. Kimmel: Of course, I just want to say this at this time. Mr. Berr has made the statement: “Mr. and Mrs. Keyes”—

Mr. Berr: Strike out “Mr. and Mrs.”

Mr. Kimmel: I am referring to the actual wording of that particular paragraph. I made a copy from the pleadings here.

30 Q. Now, Mrs. Keyes, was this first mortgage against this property at Teaneck of twelve thousand dollars ever called in by the mortgagees? A. Yes. When it became due they wrote me a letter

Mr. Kimmel: I object.

Q. I asked you whether it was called in—yes or no? A. Yes.

40 Q. Did you, after being notified that the mortgagees were going to call in the first mortgage of twelve thousand dollars, inform Mr. Jesse Kimmel

Mrs. Lucy B. Keyes—Direct.

to that effect? A. Yes, through my lawyer, and through the agent who was in his office at the time.

Q. Through your lawyer? A. Yes.

Q. And through whom else? A. The agent.

Q. Who was the agent? A. Mr. Ebright. When I got the letter after paying the interest—

Mr. Kimmel: I object to the answer. It is not responsive to the question. 10

The Court: Just answer the question, Mrs. Keyes.

Q. Now, then, did you ever speak to Mr. Kimmel yourself about it? A. Why, no. When I heard that he wouldn't—

Mr. Kimmel: I object. The answer is "No." 20

A. (Continuing) But my lawyer—

Mr. Kimmel: Just a moment.

Q. Now, then, do you know of your own knowledge whether or not your lawyer did in fact notify Mr. Kimmel?

Mr. Kimmel: I object. Just a moment. The witness has stated that she didn't know. 30

The Witness: I did not.

Mr. Berr: She hasn't answered yet.

Mr. Kimmel: I object to it on the ground that it is not competent.

The Court: Question allowed.

A. Yes.

Q. You do know of your own knowledge that your lawyer did notify Mr. Kimmel? A. Yes.

Q. Do you know of your own knowledge whether Mr. Ebright, your agent, did notify Mr. Jesse 40

Mrs. Lucy B. Keyes—Direct.

Kimmel that the first mortgage was being called in?

Mr. Kimmel: Object on the ground it is hearsay. The agent is here in court.

The Court: If she knows herself she has a right to answer.

10 A. Well, he said he did.

Q. Who did? A. Mr. Ebright.

Mr. Kimmel: I move to strike out the answer to the question.

The Court: Strike it out.

Q. Were you in my office, Mrs. Keyes, when a letter was dictated to Kimmel & Kimmel— A. Yes.

20 Mr. Berr: One minute, Mrs. Keyes, please.

The Court: Don't go so fast.

Q. Were you in my office when a letter was dictated to Kimmel & Kimmel, addressed to the Romaine Building, Paterson, New Jersey, by me in your presence—

Mr. Kimmel: I object to the question.

The Court: I will admit it. Answer yes or no.

30 Q. (Continuing) Wherein I am saying—

Mr. Kimmel: Answer yes or no.

Q. (Continuing) Wherein I said: "This is to advise you for the second time"—

Mr. Kimmel: Just a moment. Such practice is—

40 Mr. Berr: Will you wait until I am through, Mr. Kimmel?

Mrs. Lucy B. Keyes—Direct.

Mr. Kimmel: He is reading a letter which at the present time is not admitted in evidence. He can put the entire letter into the record by reading that letter and it is not proper.

Mr. Berr: I want to read as much of the letter as will give the witness a reasonable opportunity to know whether or not that letter was written in her presence. How does she know? I might have written ten letters in her presence. I have got to give her something to base her answer on. 10

The Court: She is entitled to know.

Q. (Continuing) "that the mortgage now held by the estate of Joseph Steinberg, which mortgage is due and being called in for payment by the mortgagee unless additional charges of four hundred dollars are paid to the attorneys representing the estate", which I dictated in said letter in your presence? 20

Mr. Kimmel: I object to the question on the ground it is incompetent, irrelevant and immaterial and not the proper method of proving that letter in evidence.

Mr. Berr: I will connect it up, and your Honor will have a complete picture of what happened. 30

The Court: I will admit it.

Mr. Kimmel: Exception.

A. Yes.

Q. Were you in the room when that particular letter, a portion of which I just referred to, was drawn? A. Yes.

Q. Do you know of your own knowledge whether or not that letter enclosed in an envelope address- 40

Mrs. Lucy B. Keyes—Direct.

ed to Kimmel & Kimmel, Romaine Building, Paterson, New Jersey, was in fact mailed to them in the United States Post Office?

10 Mr. Kimmel: I object on the ground it is incompetent, irrelevant and immaterial, and further on the ground that the question assumes that it was enclosed—

The Court: Objection overruled.

Mr. Kimmel: I ask an exception.

Q. Do you know whether or not that letter was in fact mailed? A. I do.

20 Mr. Berr: Your Honor please, so that I am not charged by Mr. Kimmel with attempting to do anything that might mislead him or your Honor, I am going to show this witness this letter and ask her whether or not after she reads the letter copy to herself if that was the letter that was mailed to Kimmel & Kimmel to which she has just answered the last point on this question.

Mr. Kimmel: I object to that. Not a proper method of proving the letter.

30 Mr. Berr: I am not attempting now to prove a communication—

The Court: Isn't the easiest way to have your opponent produce the letter?

Mr. Berr: I don't expect him to produce it. I asked him and he refused.

The Court: You would then have laid the ground for your proving the letter by secondary evidence.

40 Mr. Berr: I don't want to offer the letter yet. I will ask the question and connect the letter up myself.

Mrs. Lucy B. Keyes—Direct.

The Court: The proper way to prove that is by notice to produce, and then prove it by secondary evidence.

Mr. Kimmel: There was no notice to produce here. We had no notice of that.

Mr. Berr: I did not serve notice on Mr. Kimmel to produce. I did ask him to produce the original and he hasn't done it. 10

The Court: Ask him again. He is in court now.

Mr. Berr: Will your Honor bear with me a moment, please?

The Court: Yes, sir.

(Mr. Berr writes on a paper and hands same to Mr. Kimmel.)

Mr. Kimmel: On this notice to produce, I want to state that I object to the notice to produce, first on the ground it was served while in court. 20

Mr. Berr: It is proper if you have the letter in court.

Mr. Kimmel: I have the letter and it will be offered later on. I just want to state for the purpose of the record that the notice to produce is not properly served upon me while at the counsel table and at the trial of the case, and that the rules of notice to produce are prescribed by the District Court Act and the Practice Act of our State. 30

The Court: I will admit it.

Mr. Kimmel: I ask an exception.

Mr. Berr: My answer to that, so as to get the record straight, is that where a document of the bar and a notice to produce is served by direction and with the approval of the Court weighing the issue, then it is a matter 40

Mrs. Lucy B. Keyes—Direct.

wholly discretionary with the sitting or trial judge and he may lift or suspend the obligation with respect to rules referring to the notice to produce as he sees fit in the conduct of the case.

The Court: Proceed.

10 Q. (Showing witness) Mrs. Keyes, I show you this original letter and ask you whether this is the letter—after you read it over and satisfy yourself that that is or that is't—that was sent to Mr. Kimmel, addressed to Mr. Kimmel, Romaine Building, notifying him concerning the first mortgage calling in this mortgage on August 14th? A. Why—

Mr. Kimmel: Counsel is endeavoring to prove a letter by secondary evidence.

20 The Court: Is this the original letter?

Mr. Berr: Yes.

The Court: I will allow it.

Mr. Kimmel: Exception.

A. Yes.

Q. Is that the letter? A. Yes.

Mr. Berr: I offer it in evidence.

Mr. Kimmel: I object to it.

30 The Court: I will allow it.

Mr. Kimmel: Exception.

My objection is that it is not properly proven, and it is incompetent, immaterial and irrelevant at this stage of the proceedings.

(Letter marked Exhibit P-2).

Q. Mrs. Keyes, after that letter was sent to Mr. Kimmel and after Mr. Ebright informed you that
40 he had spoken to Mr. Kimmel concerning this first

Mrs. Lucy B. Keyes—Direct.

mortgagee calling in the mortgage, did Mr. Jesse Kimmel make any attempt to take any steps whatever to replace, substitute or renew that first mortgage of twelve thousand dollars?

Mr. Kimmel: Objected to as incompetent, irrelevant and immaterial, and that the question is based on evidence that was absolutely ruled as inadmissible by your Honor a moment ago with respect to the agent notifying Jesse Kimmel. 10

Mr. Berr: Your Honor will recall why it was ruled she couldn't tell the Court what Mr. Ebright said here.

The Court: I will permit what she knows if she knows.

Mr. Berr: I will withdraw the question. 20

Q. Did Mr. Jesse Kimmel take any steps of any kind or character— A. No.

Q. One minute, Mrs. Keyes, please, until the question is finished. Did Mr. Jesse Kimmel take any steps of any kind or character pertaining to the substitution, renewal, replacement or extension of the first mortgage that was being called in by the first mortgagee up to the present date, if you know? 30

Mr. Kimmel: I object to the question on two grounds, the first ground being that he uses the word "extension" and that is not mentioned in the contract and it alters the meaning, and on the ground that the mortgage wasn't called in—they haven't proved that the mortgage was called in, and, therefore, they are trying to put the cart before the horse. 40

Mrs. Lucy B. Keyes—Direct.

Mr. Berr: Why, your Honor please, there is the notice in evidence notifying them the mortgage was called in.

Mr. Kimmel: To Mr. Kimmel, but not as mortgagee. You got to prove that the mortgage was called in.

10 Mr. Berr: One of my first questions was: "Was your mortgage called in", and she said "Yes."

Mr. Kimmel: I am going to move to strike out the question and answer on the ground that the State of Demand says "for a continuation". Now, an "extension" does not fall within those terms.

The Court: Strike out.

Mr. Berr: You mean—

20 Mr. Kimmel: Was the mortgage called in?

Mr. Berr: So that there may be no misunderstanding—it may be this defendant's defense is the construction of this paragraph—I am going to urge that question in its present form, and in answer to Mr. Kimmel I am going to say as follows: that this clause in this contract says that if that mortgage is called in at any time within three years that he has taken the obligation of getting a new mortgage—not an extension—let's forget about an extension—but he, himself, has an obligation. That's my case, My case is that he took an obligation under this contract and he never complied with the obligation, and by reason of his non-compliance with the obligation we were forced to spend four hundred dollars that under their contract we only had to give him one hundred and fifty dollars to do. The question as to

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Mrs. Lucy B. Keyes—Direct.

whether it was an extension or a substitution or a replacement isn't material insofar as the fixing of the liability under the clause is concerned.

The Court: You are contending an extension is the same as a new mortgage?

Mr. Berr: If she had to pay for it, yes. He had to do it but he failed to do it. I urge the question in the present form. 10

Mr. Kimmel: I object to it on the same grounds as before. My grounds of objection were that he used the word "extension" and my contention is that it doesn't come within the meaning of that particular part of the contract, and the second ground was that there was no testimony up to the present holding that the mortgage was actually called in. 20

The Court: She testified that there was.

Mr. Kimmel: I move that that answer be stricken out on the ground that the State of Demand—

The Court: I think I will allow the question.

Your contention is that any extension you are not bound by—you are not liable for an extension, although if the mortgage was called in and a new mortgage made or a renewal—substitution, as they have it here—substitution of the first mortgage, then you would be liable? 30

Mr. Kimmel: That's right.

The Court: I think I shall rule that an extension would be just the same as a substitution. 40

Mr. Kimmel: I ask an exception.

Mrs. Lucy B. Keyes—Direct.

The Court: I will permit the question.

Mr. Kimmel: So that for the purpose of the record, your Honor rules then that the term "extension" would be included in that paragraph of the contract which is the subject matter of the controversy?

10 The Court: If it is shown that they had to pay money for the extension.

Mr. Berr: So that there will be no ambiguity, your Honor feels now, and as the trial judge your Honor adjudicates that it is apparent from the phraseology of the clause that an extension was within the intention of the parties at the time they contracted, and therefore you permit evidence pertaining to it?

20 The Court: Right.

Mr. Kimmel: I ask for an exception.

Q. (Repeated by stenographer) Did Mr. Jesse Kimmel take any steps of any kind or character pertaining to the substitution, renewal, replacement or extension of the first mortgage that was being called in by the first mortgagee up to the present date, if you know? A. No.

30 Q. Did you have to do anything in order to prevent a foreclosure of that first mortgage—yes or no? A. Yes.

Q. Did you have to do something? A. Yes.

Q. What did you have to do? A. I had to pay four hundred dollars.

Q. For what? A. For a new mortgage, or an extension—it don't make any difference.

40 Q. And whom did you have to pay it to? A. Lawyer Steinberg.

Mrs. Lucy B. Keyes—Direct.

Q. Lawyer Steinberg. Was he the attorney for the estate? A. For the estate.

Q. (Showing witness) And this check you gave to Lawyer Steinberg? A. Yes.

Q. Is that for four hundred dollars? A. Yes.

Mr. Berr: Offer it in evidence.

Mr. Kimmel: I object to it—not binding upon this defendant, incompetent, irrelevant and immaterial. 10

The Court: Allowed.

(Check marked Exhibit P-3)

Mr. Kimmel: Ask for an exception, and I also base my objection on the former objection raised on the question of construction of that particular paragraph—I mean it is a continued objection so far as that. 20

The Court: Yes.

Q. When you gave him the check addressed to the Estate of Joseph L. Steinberg, the mortgagee, did you get a receipt? A. Yes.

Q. (Showing witness paper) Is this the receipt? A. Yes.

Mr. Kimmel: I object to it on the same ground, and also it is incompetent, irrelevant and immaterial. 30

Q. Did you receive in exchange for that money an extension mortgage? A. Yes.

Q. Given to you by Herman Levine, executor of the estate of Joseph L. Steinberg? A. Yes.

Q. (Showing witness) I show you an extension and ask you to look it over, and ask you if that is the extension that you received? A. Yes.

Mr. Berr: I offer it in evidence. 40

Mr. Kimmel: Object to it on the same

Mrs. Lucy B. Keyes—Direct.

grounds—incompetent, irrelevant and immaterial and not binding upon the defendant.

(Receipt marked Exhibit P-4.)

(Extension mortgage marked Exhibit P-5).

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Q. Mrs. Keyes, did Mr. Kimmel pay you—Mr. Jesse Kimmel make any payments to you of any kind or character of this four hundred dollars that you expended for the extension of that mortgage?

A. No.

Q. To date you have received from Mr. Jesse Kimmel no money at all on that contract? A. No.

20

Mr. Berr: Of course, this is all in the nature of corroborative testimony—letters.

Q. Mrs. Keyes, did you get some letters from Lichman, Steinberg and Lieberman—

Mr. Kimmel: I object.

Mr. Berr: Will you wait until the question is over?

Mr. Kimmel: But your witness is almost ready to answer. That's why I am objecting.

30

Q. Did you get some letters from the law firm of Lichman, Steinberg and Lieberman, counsel for the Estate of Joseph L. Steinberg, deceased, pertaining to this first mortgage and this extension?

Mr. Kimmel: Objected to on the ground—

Q. (Continuing) Yes or no?

40

Mr. Kimmel: (Continuing)—it is incompetent, irrelevant and immaterial and not

Mrs. Lucy B. Keyes—Direct.

binding on this defendant.

The Court: Question allowed.

Mr. Kimmel: Exception.

Q. Did you receive any letters? A. Yes.

Mr. Kimmel: Whatever may have been said between the lawyers for the estate and Mrs. Keyes has no bearing or any weight on this particular defendant. 10

The Court: If these letters are corroboration of the calling of the mortgage and paying of the commission they will be admitted.

Mr. Kimmel: Exception.

Q. (Showing witness) Now, Mrs. Keyes, I show you a letter bearing date August 21, 1929, and ask you whether that is one of the letters that you received from that firm of lawyers representing that estate? 20

The Court: These letters are in corroboration of the point at issue?

Mr. Berr: Yes, sir.

A. Yes.

Mr. Kimmel: Same objection.

(Letter dated August 21, 1929, marked Exhibit P-6.) 30

Mr. Kimmel: Now, if the Court please, he said this was in corroboration, this letter in question: "In reply to your last letter"—

Mr. Berr: It speaks about a new mortgage, Mr. Kimmel. That's the whole case. I just want to connect it up and show that that was the line of dealing between the parties.

Mrs. Lucy B. Keyes—Direct.

Q. Mrs. Keyes, I show you a letter bearing date September 18th and ask you whether or not that is one of the letters received by you? A. Yes.

Mr. Berr: I offer it.

Mr. Kimmel: Same objection.

(Letter marked Exhibit P-7)

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Q. (Showing witness) I show you a letter dated August 25th, 1929, received from the firm of Lichman, Steinberg and Lieberman, and ask you whether that is one of the letters that you received? A. Yes.

Mr. Berr: I offer it in evidence.

Mr. Kimmel: I object to it on the same ground.

20

(Letter marked Exhibit P-8.)

Mr. Kimmel: Of course the Court understands that this line of objection arose out of the construction of that particular part of the paragraph, that is, as to whether the terms of the contract was broad enough to include the word "Extension".

The Court: That is all in there.

Mr. Berr: (Showing counsel) You will admit receiving this letter?

30

Mr. Kimmel: I admit nothing, Mr. Berr.

Cross-examination by Mr. Kimmel:

Q. Barney Berr, your attorney, was your duly authorized agent with respect to this mortgage that is the subject matter of this suit, is that correct, Mrs. Keyes? A. Yes.

40 Q. Referring now to Plaintiff's Exhibit P-2, did you specifically authorize Mr. Barney Berr or Mr.

Mrs. Lucy B. Keyes—Cross.

Morris Spindell, either of the members of Spindell and Berr, to write that letter? A. Yes.

Q. Now, referring to that letter, Mrs. Keyes, you knew on August 14th, 1929, that the amount that it would cost you for the mortgage would be four hundred dollars, didn't you. You knew on that day— A. Yes.

10

Q. Is that correct? And this mortgage that we are speaking of now is a twelve thousand dollar mortgage on a piece of property in West Englewood, sometimes known as Teaneck, New Jersey, is that correct? A. Yes.

Q. The title to which is in your name, is that correct? A. Yes.

Q. And now referring to the contract that is marked Plaintiff's Exhibit One, the house on Paulison Avenue that is mentioned in that contract, Mrs. Keyes, that property was in your name, was it not? A. Yes—no.

20

Mr. Berr: One minute, Mrs. Keyes. I object to the question on the ground that this is an action instituted for the replacement of a mortgage and as to whether or not the Paulison Avenue house was in her name or in her mother's name is not evidential.

30

The Court: I will allow the answer to stand.

Q. You are positive that the title to that piece of property in West Englewood which this twelve thousand dollar mortgage was a lien on was in your name?

Mr. Berr: Object to that on the ground that it is immaterial.

40

Mrs. Lucy B. Keyes—Cross.

The Court: What has that got to do with the case, Mr. Kimmel?

Mr. Kimmel: Question withdrawn.

10 Q. Now, on what day were you in Spindell & Berr's office when this letter was dictated? Do you remember the day it was? A. I don't remember. It is so long ago you get me all mixed up. I don't know.

Q. Well, now, how long is it? A. I couldn't remember what day.

Q. Well, was it 1929? A. I don't know. I know just the dates—I have the dates when the mortgage was due.

20 Q. Mrs. Keyes please, will you answer me? A. I couldn't just tell you. I have been in so many times to see my lawyer.

Mr. Kimmel: Just a minute. I move to strike out this answer as not responsive to my question.

The Court: She was explaining that she don't know.

Mr. Kimmel: I asked her what time it was, and whether she does or does not know.

30 *By the Court:*

Q. Answer yes or no? A. I say I don't know.

By Mr. Kimmel:

Q. Who was in the office at the time this letter marked Plaintiff's Exhibit P-2 was dictated? A. Why, I really don't know. I know I was in very much excited about it.

Q. You were in? A. Yes.

40 Q. Was there anybody else in the room besides

Mrs. Lucy B. Keyes—Cross.

yourself at the time? A. I have forgotten that. It is so long ago.

Q. Who dictated the letter, Mr. Berr or Mr. Spindell? A. Mr. Berr.

Q. Were you in the room when he dictated that letter? A. Yes.

Q. And you told him to dictate that letter? A. I told him to take the letter, to dictate the letter. 10

Q. Did you wait in the room until the letter was typewritten? A. Yes, I then—

Q. Just a moment—did you? A. Yes.

Q. And who signed the letter, do you know? A. Mr. Berr.

Q. Didn't you trust your attorney that he would send the letter out without waiting until the letter was typewritten and signed, too? 20

Mr. Berr: Object to that. It is immaterial.

Mr. Kimmel: I press the question on the ground of credibility.

The Court: Objection sustained.

Mr. Kimmel: Exception.

Q. Now, how do you know that the letter was mailed? A. Well, I know it was mailed. 30

Q. Did you see someone from the office take the letter and mail it—yes or no? A. Well, that part now I have forgotten, but I know it was mailed.

Q. Did you see anyone from the office of Spindell & Berr actually mail the letter?

Mr. Berr: Objected to on the ground that the only testimony there was about that letter was: "Do you know whether it was mailed", and her answer was "Yes." 40

Mrs. Lucy B. Keyes—Cross.

The Court: He has a right to cross-examine as to how she knows.

A. I know it was mailed because Mr. Berr told the boy to see that the letter got out.

10 Q. Did you see the letter mailed? A. No, but I heard Mr. Berr tell the boy to take the letter and mail it.

Q. Did you see him take the letter and mail it?
A. Yes.

Mr. Berr: Is Mr. Kimmel referring to the letter he now has in his files?

Mr. Kimmel: That's the letter I am now referring to, Exhibit P-2.

20 Q. Do you remember having a conversation with me, Mrs. Keyes, referring to this mortgage?

Mr. Berr: Objected to on the ground that any conversation had with Mr. David Kimmel is not evidential, not proper cross-examination.

The Court: Objection sustained.

30 Mr. Kimmel: She says that the mortgage was called in, and she says that she knows we didn't take any steps. Now I am laying a foundation for that.

The Court: You can ask her what she knows and how she knows it.

Mr. Kimmel: I am leading up to that by asking her what she knows about the conversation.

The Court: You can get up to that in another way, I think.

40 *By Mr. Berr:*

Q. Was there and is there a second mortgage on

Mrs. Lucy B. Keyes—Cross.

your Teaneck property which mortgage would become a first mortgage if the twelve thousand dollar mortgage were paid off—yes or no?

Mr. Kimmel: I object to the question on the ground that it is incompetent, irrelevant and immaterial, and not within the issues raised here on this trial. 10

The Court: Does the contract mention a second mortgage?

Mr. Berr: No, sir.

Mr. Kimmel: The second mortgage, by the way, was a purchase money mortgage and was taken back by the seller.

Mr. Berr: By this defendant.

Mr. Kimmel: By the seller.

Mr. Berr: It will be quite material, and material as to what the attitude of this defendant was as pertaining to the second mortgage that he had under his control. 20

The Court: I will admit it.

Mr. Kimmel: Exception.

Q. Mrs. Keyes, was there such a mortgage? A. Yes.

Q. What type of mortgage was it—was it a purchase money mortgage which you gave in exchange for part of the purchase price of this property? A. Yes. 30

Q. Who did you give it to? A. Mr. Kimmel.

Mr. Kimmel: I object on the same grounds.

Q. You say you gave it to Mr. Kimmel—what Mr. Kimmel? A. Mr. Jesse Kimmel.

40

Mrs. Lucy B. Keyes—Cross.

Q. He is the man that you bought this property from in Teaneck? A. Yes.

Q. Now, then, do you know of your own knowledge whether or not he retained that mortgage or assigned it to someone?

10

Mr. Kimmel: I object to this line again on the ground that it is incompetent, irrelevant and immaterial and not within the issues raised here. The question is are we bound by that particular clause of the contract. That's the only thing here. What we did with the mortgage or what we didn't do with it is none of this plaintiff's concern.

20

The Court: The only point involved, as I see it, is there was a second mortgage controlled by you, and you would not allow a substitution.

Mr. Kimmel: That hasn't been proven.

Mr. Berr: He wouldn't consent and grant that it should be signed, and the only thing that she could do was to extend the mortgage.

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Mr. Kimmel: I question that, too, if the Court please. There is no testimony in the record that at the time the demand was made as alleged by the plaintiff that the mortgage was in the possession of this particular defendant.

Q. Answer the question?

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Mr. Kimmel: Just a moment. There is no evidence and this witness cannot testify to that of her own knowledge, because she doesn't know. She doesn't know.

Mrs. Lucy B. Keyes—Cross.

Mr. Berr: I asked her if she knows.

Q. Do you know, Mrs. Keyes—yes or no, Mrs. Keyes, is the answer to this question—do you know whether or not the holder of that second mortgage did in fact refuse to execute a subrogation? A. Yes.

10

Mr. Kimmel: Object to the question on the ground that the legal rights are specified in the second mortgage in which there was a stipulation, and covered also by the terms of the contract which is now Exhibit P-1.

The Court: I will permit the question.

Mr. Kimmel: Exception.

Q. Do you know whether that was in fact done? A. Yes.

20

Q. And was a subrogation prepared, in fact? A. Yes.

Q. By whom? A. By you.

Q. And that subrogation, do you know whether it was presented to the holder of that second mortgage? A. To the holder of the second mortgage.

Q. And do you know whether or not that the signature of the holder of that second mortgage was denied? A. Yes.

30

Q. Who went with it? A. I did.

Q. Did you speak to the holder of that second mortgage? A. Yes.

Q. What did he say?

Mr. Kimmel: I object. Not binding on the defendant.

The Court: Question allowed.

Mr. Kimmel: Exception.

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Mrs. Lucy B. Keyes—Cross.

Q. What did he say to you? A. I went to see him and he said he couldn't do it. He would have to ask Mr. Kimmel, his lawyer.

Q. What Mr. Kimmel? A. Mr. Jesse Kimmel.

Q. What else did he say? A. He couldn't do it other than that.

10 Q. What did he do with the subrogation? A. He didn't do anything with it, and my mortgage was going on and on and on, and I had to get a mortgage.

Q. What excuse or reason did he give you for not signing that subrogation?

Mr. Kimmel: I object to it as not binding upon this defendant.

20 The Court: So far as he refused, that stands.

By Mr. Kimmel:

Q. This second mortgage, the purchase money mortgage you speak of, that contained a clause in it right in the body of the mortgage that it was to remain subject to any mortgage or mortgages not exceeding the sum of twelve thousand dollars?

30 Mr. Berr: Object to it on the ground the mortgage speaks for itself, and anything she said is not the best evidence.

Q. You read the mortgage yourself when it was given—

Mr. Berr: Objected to. It is immaterial whether she read it or not. That second mortgage is not in issue.

40 The Court: Can't you save sime by stipulating to something. The contract is in evidence. It shows that clause in there.

Mrs. Lucy B. Keyes—Cross.

Mr. Kimmel: The mortgage contains the same clause. Mr. Berr dictated it.

Mr. Berr: Yes, but there is nothing in this subrogation clause which says that that clause shall be binding upon the assignees of the mortgage. I don't know whether I put in that mortgage "assignees", and I could not tell unless I saw it whether there is a subrogation clause, and that is purely a matter of contract between these two parties. Now, if it is not binding on the assignees, I don't know, and I couldn't tell unless I saw the mortgage. I don't know, and I couldn't tell, and I can't draw any inferences. 10

Mr. Kimmel: I will take exception to your Honor's ruling on my previous— 20

The Court: Allowed.

Q. Do you know, Mrs. Keyes, that that clause which was mentioned in the contract was incorporated in the mortgage and dictated by your own attorney?

Mr. Berr: Objected to.

The Court: Did she sign it.

Mr. Berr: She signed it, but her testimony is not the best evidence. The mortgage must be presented. 30

The Court: Is the mortgage available?

Mr. Berr: The mortgage is available, certainly.

Mr. Kimmel: I will ask the question on the ground of credibility. If necessary, I will produce the original.

The Court: I will permit it.

Mr. Berr: Exception. 40

Mrs. Lucy B. Keyes—Cross.

Q. Do you know whether or not the subrogation clause mentioned in the contract was contained in the mortgage? A. I don't know. I have forgotten that now.

10 Q. Didn't I tell you, as a matter of fact, that it had a clause to that effect when the subrogation agreement was brought up—

Mr. Berr: One moment. What Mr. David Kimmel told her isn't binding on these plaintiffs.

The Court: That doesn't affect the question here.

Mr. Kimmel: Exception.

20 Q. You have had considerable real estate dealings, haven't you, Mrs. Keyes?

Mr. Berr: Objected to on the ground that it doesn't make any difference. What difference does that make to the disposition of the issue here?

Q. Answer the question? A. Why, I don't know.

30 Q. You don't know? A. Yes, I have had real estate dealings, but one gets mixed with another.

Q. Well, you had it in front of you—you were in the office on the day that this contract was closed, weren't you?

Mr. Berr: Object to it. Immaterial.

Q. You were present at the time this contract was executed?

40 Mr. Berr: The contract must speak for itself.

James E. Keyes—Direct.

Q. You were present, were you? A. Yes.

Q. And you were the one who was telling Mr. Berr what terms you wanted in that contract?

Mr. Berr: Objected to as immaterial.
Contract speaks for itself.

The Court: Objection sustained.

Mr. Kimmel: Exception.

10

MR. JAMES E. KEYES, one of the plaintiffs, sworn as a witness on behalf of the plaintiffs testifies as follows:

Direct-examination by Mr. Berr:

Q. Now, then, Mr. Keyes, you are the husband of Mrs. Keyes? A. Yes. 20

Q. And you are party plaintiff in this suit? A. Yes.

Q. And you are the Mr. Keyes referred to in that contract? A. Yes.

Q. Exhibit P-1. Your name is James E. Keyes? A. Yes.

Q. Now, then, did you in conformity with the provisions of the contract marked Exhibit P-1 between your wife and yourself and Mr. Jesse Kimmel, the defendant, inform Mr. Jesse Kimmel that the first mortgagee was calling in the mortgage, and it was necessary to take steps to either replace it or have it extended or renewed? A. Yes. 30

Mr. Kimmel: I object to that on the same ground of objections.

Mr. Berr: The answer is in.

Mr. Kimmel: Well, a continuing objection. 40

James E. Keyes—Direct.

Mr. Berr: In other words, he objects to all questions on the part of the plaintiff.

10 Q. Did Mr. Jesse Kimmel, if you know, ever take any steps of any kind or character to comply with the provisions of that contract, particularly that paragraph referring to the substitution or renewal of the first mortgage of twelve thousand dollars? A. No.

Q. He didn't. Did you in order to prevent a foreclosure of that first mortgage do anything? A. Yes.

Q. Tell about it?

Mr. Kimmel: Object to this line of questions.

20 Mr. Berr: The answer is in.

The Court: To show what he had to do.

Mr. Kimmel: Well, I object to it on the same ground.

The Court: Question allowed.

Mr. Kimmel: Exception.

30 Q. And what did you do about it? A. Why, we got in touch with Mr. Kimmel to find out what he was going to do about it to perform his part of that contract, and we waited until six months after its due date before we agreed to do about it ourselves and have it taken care of.

Q. Do you know whether or not a communication was forwarded to Mr. Kimmel informing him that in the event he failed to take care of that particular provision of the contract pertaining to this mortgage of twelve thousand dollars that you intended to hold him liable for it?

40

James E. Keyes—Direct.

Mr. Kimmel: Object to it on the same grounds.

Q. The extension of mortgage I note is dated December 9th, is that the date you got it extended, 1929? A. Yes.

Q. And that is about five or six months after August 14th, the date of the letter forwarded to Mr. Kimmel concerning the fact that it would cost four hundred dollars to replace or renew that mortgage? A. Yes. 10

Q. And is this the extension that was given you (showing witness paper)? A. Yes.

Q. (Showing witness) And is this the check which was given by your wife—

Mr. Kimmel: Object to this line of questions upon the same grounds. 20

Q. (Continuing) In order to procure that extension? A. Yes.

Mr. Berr: Of course, when I ask him: "Is this the extension", I show him Exhibit P-5, and when I ask him: "Is this the check", I show him Exhibit P-3.

Q. Now, then, do you know whether or not your wife got a receipt for her money? A. Yes. 30

Mr. Kimmel: I object to this. It is purely hearsay.

Mr. Berr: Corroboration.

The Court: Question allowed.

Mr. Kimmel: Exception.

Q. (Showing witness) Do you know whether or not that is the receipt from Lichman, Steinberg & Lieberman— A. Yes. 40

James E. Keyes—Direct.

Q. (Continuing) Pertaining to this mortgage of twelve thousand dollars? A. Yes.

Q. Who are they, by the way, Lichman, Steinberg & Lieberman? A. They are the representatives of the executors of the estate of Steinberg.

10 Q. And the estate of Steinberg were the mortgagees holding this twelve thousand dollar mortgage? A. Yes.

Q. (Showing witness) Look at Exhibit P-8 and tell me did your wife get that letter? A. Yes.

Q. (Showing witness) Look at Exhibits P-6 and P-7. Did your wife get those letters? A. Yes, both of them.

Mr. Kimmel: Object to the question on the same continuing objection I have been making from the outset.

20

The Court: Continue the exception.

Q. In so far as the subrogation is concerned, did you have a subrogation drawn? A. Yes.

Mr. Kimmel: Object to the question on the ground that it is incompetent, irrelevant and immaterial.

Mr. Berr: Corroboration of the wife's testimony, if the Court please.

30

Mr. Kimmel: For the purpose of saving time I will ask the Court to note a continued exception to this line of questions.

The Court: Continued exception allowed.

Q. Mr. Keyes, was a subrogation drawn? A. Yes.

Q. By whom? A. By you.

40 A. The first mortgage of twelve thousand dollars.

James E. Keyes—Direct.

Q. Well, I mean the subrogation was to be signed by whom? A. Oh, by Botwick.

Q. Who is he? A. He is the owner of the second mortgage.

Q. He is the man who took the assignment from Mr. Kimmel of that second mortgage? A. I think so.

Q. And what was done with that subrogation? A. It was presented to him for his approval. 10

Q. And his signature? A. And his signature.

Q. And was it signed? A. No, not that I know of.

Q. Can you tell me from what you know whether or not it was signed? A. No, it wasn't signed.

Q. Do you know of your own knowledge whether or not Mr. Jesse Kimmel ever intended or did in fact make arrangements to comply with that provision of the contract— 20

Mr. Kimmel: I object to the question.

Mr. Berr: Will you wait until the question is through?

Q. (Continuing)—marked Exhibit P-1, calling for the substitution or renewal of the twelve thousand dollar mortgage in the event the mortgagee called the same in? A. No. 30

Mr. Kimmel: Object to the question on the same grounds.

Q. Do you know whether or not he did or didn't take any steps? A. No, he didn't.

Mr. Kimmel: This objection I am making is this man couldn't tell what the man's intention was, and also it is incompetent, irrelevant and immaterial, and not binding upon the defendant. 40

James E. Keyes—Cross.

The Court: Objection sustained. He couldn't tell what Mr. Kimmel's intent was.

10 Q. Do you know whether or not he did take any steps from the time he was notified of the first mortgagee's desire to be paid until today? A. I know he didn't.

Cross-examination by Mr. Kimmel:

Q. How do you know he didn't, Mr. Keyes? A. Because I was compelled to assist in arranging for the extension of the mortgage, and at which time

20 Q. How do you know that he did do it or didn't do it? A. I had no communication from him thereafter.

Q. But you don't know— A. I know he didn't communicate with the mortgagee to arrange for any extension of the mortgage.

Q. You do know, however, that there was some litigation pending at that time?

Mr. Berr: Objected to.

The Court: Question allowed.

30 Q. You know there was some litigation at that time, do you?

Mr. Berr: I object to it. It is irrelevant and immaterial.

The Court: I will admit it.

Q. Yes or no—litigation with respect to the lien on Paulison Avenue? A. Yes.

40 Q. Just tell me, how do you know that he didn't do anything with respect to this mortgage? A. By

James E. Keyes—Cross.

reason of the fact that the attorney representing the estate said that nothing was done.

Q. He told you that nothing was done? A. Yes.

Q. Now, who told you that? A. Lawyer Steinberg.

By Mr. Berr:

Q. I didn't hear that name. Who told you that?
A. Lawyer Steinberg, representing the estate.

10

By Mr. Kimmel:

Q. So you take it that the estate is the only one that we would take the question up with, is that it, and no one else? A. I don't know who else would take it up.

Q. Don't you think that it would be possible for Jesse Kimmel to have taken steps with someone else outside of the estate that held the mortgage—

20

Mr. Berr: I don't think that is material.
Mr. Kimmel: He says that he knows.

Q. That's the only reason that you believe that he didn't take any steps, is that it? A. Oh, I know that we wouldn't have been forced to do what we did if he had taken any steps, and he would have communicated with us, I believe, and notified us to that effect.

30

By Mr. Berr:

Q. By the way, were you there when the subrogation was given to Mr. Botwick? A. No, I wasn't.

40

Henry Ebright—Direct.

HENRY EBRIGHT, sworn as a witness on behalf of the plaintiffs testifies as follows:

Direct-examination by Mr. Berr:

Q. What is your business, Mr. Ebright? A. Real estate broker.

10 Q. Are you a duly licensed real estate broker?
A. Yes, sir.

Q. And are you the Mr. Ebright referred to by Mrs. Keyes in her testimony? A. Yes.

Q. Are you the agent that she was speaking about? A. I was the broker.

Q. And do you know what steps were taken in so far as the twelve thousand dollar mortgage is concerned by Mr. and Mrs. Keyes? A. I do.

20 Q. What steps were taken? A. Why, when Mrs. Keyes called me up that—

Mr. Kimmel: Just tell us what steps were taken.

The Court: Just tell us what was done.

A. Mrs. Keyes was notified that the first mortgage was due.

30 Q. What else? A. So Mrs. Keyes asked me to see about it, what I can do—so I went to Mr. Steinberg, which is the attorney for the estate holding the first mortgage on the Teaneck property that I sold to her.

Q. What did Mr. Steinberg say to you would be necessary in order to obtain a renewal?

Mr. Kimmel: Object to it. The question is based on false assumption and secondly, it is irrelevant, incompetent and immaterial.

40 Mr. Berr: Question withdrawn.

Henry Ebright—Direct.

Q. Now, then, what was in fact done—was the mortgage renewed? Was it extended? Was it replaced? A. It was extended.

Q. And the extension, you were there when it was given? A. Yes.

Q. Were you there when it was paid for? A. Yes, sir. 10

Q. (Showing witness) I show you a check for four hundred dollars. Were you there when that check was given? A. Yes, sir.

Q. Were you there when this extension was given?

Mr. Kimmel: Same objection to this line of questions.

A. Yes, sir.

Q. Now, Mr. Ebright, was an attempt made by Mr. and Mrs. Keyes to have a new mortgage of twelve thousand dollars placed on the premises rather than a renewal or extension? 20

Mr. Kimmel: Objected to.

The Court: If he knows he can answer.

Mr. Kimmel: I object to the question on the ground it is immaterial.

The Court: Question allowed.

Mr. Kimmel: Exception. 30

A. I do.

Q. And your answer is what? A. I do know about it.

Q. Well, did they try to arrange for a new mortgage or didn't they? A. They asked Mr. Steinberg, and the best they could do was Mr. Steinberg—

Mr. Kimmel: One moment—

Q. Please answer my question. Did they try to 40

Henry Ebright—Direct.

arrange for a new mortgage—yes or no? A. Yes.

Q. What steps were taken pertaining to the arrangement for a new mortgage?

Mr. Kimmel: If you know.

A. We went down to the second mortgagee to have a subrogation signed by him.

10

Q. Well, before, a subrogation was drawn, I presume? A. Yes.

Q. By whom? A. By the firm of Spindell & Berr.

Q. And then you went to Mr. Botwick? A. Mr. Botwick, Broadway.

Q. What did you ask him to do? A. I asked him would he kindly sign a subrogation.

Q. Subrogation as applied to what? A. For a first mortgage of twelve thousand dollars.

20

Q. And what did he say to you in the presence of Mrs. Keyes? A. He will have to ask his attorney.

Q. And what else did he say to you? A. I says: "Who is your attorney?" He says "Kimmel & Kimmel", and he told me to come back the next day.

Q. And did you? A. Yes.

30

Q. What did he say? A. He said his attorney told him not to sign it.

Mr. Kimmel: Objected to as immaterial, incompetent and irrelevant, and further on the ground that it is not binding upon this defendant. We will produce the mortgage. The mortgage speaks for itself.

*Henry Ebright—Cross.**Cross-examination by Mr. Kimmel:*

Q. Mr. Ebright, do you know whether the second mortgage contains a subrogation clause in the body of it?

Mr. Berr: Objected to on the ground that the second mortgage speaks for itself. 10

The Court: Didn't we agree that this was in the mortgage?

Mr. Berr: It is a question of the "assigns" part. There is a question whether or not the word "assigns" is in that mortgage.

(Discussion.)

Mr. Kimmel: I will produce the mortgage and avoid all this controversy, and I will object to this line of questions on the same grounds. 20

The Court: If the mortgage can be produced it will speak for itself.

SAMUEL STEINBERG, sworn as a witness on behalf of the plaintiffs, testifies as follows:

Direct-examination by Mr. Berr:

Q. Are you a member of the firm of Lichman, Steinberg & Lieberman? A. I am. 30

Q. And you are the attorney that was in charge of this mortgage held by the estate of Joseph L. Steinberg? A. I was.

Q. Now, then, that mortgage is a twelve thousand dollar mortgage on some property owned by Mrs. Lucy B. Keyes in Teaneck, is that right? A. That's right.

Q. Do you recall when that first mortgage be 40

Samuel Steinberg—Direct.

came due? A. Yes, on June 9th, 1929.

Q. Now, then, did you notify Mr. and Mrs. Keyes, or Mrs. Keyes, that the mortgage was due?

A. Not at that time.

Q. Well, how long after that? A. On August 5th the matter was turned over to me.

10 Q. Why was it turned over to you, do you know?

A. Well, the executor of the estate told me that the mortgage was overdue and had not been paid.

Q. And were you instructed to either call in the money or call in the loan?

Mr. Kimmel: Objected to on the same grounds.

The Court: Question allowed.

A. Yes, I was.

20 Q. And you notified Mrs. Keyes, you say? A. I did.

Q. After you were retained, that this mortgage was due? A. I did.

Q. And that you expected payment? A. I did.

Q. And you were authorized by this estate to collect the money if it were paid?

30 Mr. Kimmel: If the Court please, I object to this line of questions relative to authority as it has not been properly proved. The proper method of proving agency or authority is well defined and settled in this State, and that is not the method of proving agency. I object to it and ask that it be stricken from the record.

The Court: I will admit it.

Mr. Kimmel: Exception.

40 Q. Did you have the authority and were you em-

Samuel Steinberg—Direct.

powered with the privilege and right to collect the money for this estate in payment of this mortgage?

A. Yes, of course.

Q. So that if the money had been collected by you could have arranged to have that mortgage cancelled, being properly cloaked with the power?

Mr. Kimmel: I object to the question on the basis of an assumption: "If it were turned over to you." Now, the money hasn't been turned over to him. 10

The Court: Isn't that question answered by the previous answer?

Q. Now, then, Mr. Steinberg, did Mr. and Mrs. Keyes or either of them take any steps either to forestall or prevent a foreclosure? A. Yes, they did. 20

Q. Well, what did they do, if you know? A. Well, we tried to get together on what it would cost to either place a new mortgage on there or grant an extension.

Q. And with whom were they trying to get together with? A. With myself.

Q. You being the authorized representative of the mortgagee? A. That's right. 30

Mr. Kimmel: Object to that.

Q. And after considerable discussions and meetings and conferences and communications, did you finally agree on what the estate would require for the replacement of that twelve thousand dollar mortgage? Did you agree on the terms? A. I didn't tell them what the estate would require. I told them what my charge would be.

Q. In other words, that was the requirement. Be 40

Samuel Steinberg—Direct.

fore they could get an extension or renewal they would have to pay a certain fee to you? A. That's right.

Q. And I think you call it "services rendered"—yes or no? A. Yes.

10 Q. And that "services rendered" item was paid in conformity with the arrangements made between you? A. That's so.

Q. And the amount was how much money? A. Four hundred dollars.

Q. And you issued a receipt for it? A. I did.

Q. (Showing witness) And I show you a receipt and ask you whether that is the receipt you signed and issued? A. Yes, that's the receipt.

20 Q. (Showing witness) And I show you these three letters and ask you whether these are letters written by you, dictated by you and signed by you? A. Not this one.

Q. Yes—I beg your pardon. A. Yes.

Q. (Showing witness) Showing the witness Exhibits P-8, P-7, P-4, and Exhibit P-6, and your answer is "Yes,"—these are all instruments, letters and communication drafted and written by you? A. Yes.

30 Q. Now, did Mr. Jesse Kimmel, from the date of your retainer in this matter, ever make any demand or application to you as the agent or representative of this estate for a renewal, substitution or replacement or extension of that first mortgage held by the estate? A. No, he did not.

Q. You say he did not? A. He did not.

Q. When, in fact, was the extension given and the arrangements for the same completed—on the day that you received the four hundred dollars? A. Yes, on that day.

40

Samuel Steinberg—Cross.

Q. And is that the date, December 9th? A. Yes, 1929.

Q. Six months after the due date of the mortgage? A. That's right.

Q. And five months after you were retained to represent the estate to foreclose or collect the money? A. Well, it was less than that. 10

Q. Well, about that. (Showing witness) Is this the extension that was given to these people—showing witness Exhibit P-5? A. Yes.

Cross-examination by Mr. Kimmel:

Q. Mr. Steinberg, you have testified that your charge was four hundred dollars for services? A. That's right.

Q. That constituted legal services, didn't it? A. Yes. 20

Q. What was the nature of those services? A. For handling the entire transaction.

Q. Yes. Let's start from the beginning. What did you do for the four hundred dollars?

Mr. Berr: I object as to what he did. The fact is that the testimony is it cost four hundred dollars. He refused to get that extension. It was part of the terms, and if it was, we are entitled to our respective share of it. 30

The Court: Question allowed.

A. Well, I had numerous conferences with these people.

Q. How many conferences did you have, Mr. Steinberg?

Mr. Berr: If your Honor please, Mr. 40

Samuel Steinberg—Cross.

10 Steinberg is not suing here for a fee as to what he did or how much should be charged for each visit and how much should be charged for an extension of mortgage. That isn't the issue. If your Honor should find that there has been a non-compliance with this contract by Jesse Kimmel he should pay—

(Discussion)

The Court: I think the reasonableness of the charge has something to do with it. I will allow the question.

20 Q. How many conferences did you have? A. Well, I didn't keep track of it. Between Mr. Ebright and Mr. and Mrs. Keyes there must have been ten of them.

Q. And how long did each conference last on an average? A. On an average—oh, about an hour.

Q. That's ten hours. What else did you do besides that? A. I wrote quite a number of letters to both Mr. and Mrs. Keyes.

Q. How many letters? A. I think there were four.

30 Q. What else did you do? A. I had a search made at the Bergen County Court House to run the title down to date.

Q. Did you make that search yourself? A. No, I didn't.

Q. Did you have an outside searcher make that search for you? A. Yes.

Q. How much did that cost?

40 Mr. Berr: One minute. If your Honor please, what the searcher charged is not evidential.

Samuel Steinberg—Cross.

The Court: He can testify.

A. I paid twenty dollars.

Q. What else did you do, Mr. Steinberg, in this connection? A. And I think I had a tax search made for two dollars, and I had a number of conferences also with Mr. Levine, the executor of the estate. 10

Q. How many conferences? A. About half a dozen.

Q. And these conferences lasted how long? A. Well, one took quite a bit of my time because I had to go to his mill during the day time.

Q. And how long did that conference last? A. Well, I think two or three hours.

Q. Each conference? A. Each conference.

Q. Anything else you did in this connection? 20
A. Well, I drew the extension, and all of these conferences with Mr. and Mrs. Keyes were in the evening. Of course, I had a special trip down to the office at eight o'clock, because Mr. Keyes, I understand, works in New York. Of course, I considered that, too.

Q. And you drew the extension? A. I drew the extension.

Q. And what else did you do? You got the search from your searcher? A. Yes. 30

Q. And that search shows a bond and mortgage that was given by Mrs. Lucy B. Keyes and James E. Keyes—

Mr. Berr: Object to it on the ground that the search speaks for itself and the record speaks for itself.

(Discussion)

A. Yes. 40

Samuel Steinberg—Cross.

Q. Did it have a subrogation right in the body of the purchase money mortgage? A. Yes.

Q. Outside of preparing the extension, did you perform any legal service? A. Yes, I went to the property twice with Mr. Levine to see what condition it was.

10 Q. And that took you how long each time? A. Well, we went up on Sunday morning—took us all morning.

Q. It only takes you half an hour to go from here to West Englewood? A. Little more than that..

Q. How many miles is it? A. I don't know. It took quite some time to go there and back.

Q. And that completes all your services, is that correct? A. Yes, as much as I can remember.

20 Q. How many hours did these two visits to West Englewood constitute? A. What.

Q. How many hours in measure of time did these visits to West Englewood take? A. I told you it took all morning.

Q. Would that be three or four hours? A. Yes, about four hours.

30 Q. So that you had ten conferences of one hour apiece—that would be ten hours—correct? And you had six conferences of two to three hours. Giving you the maximum of eighteen—eighteen and ten is twenty-eight hours—and you went to the property twice—that took four hours—that would be a total in all of thirty-six hours, is that correct? A. I don't know.

Q. Well, I am taking the figures that you gave?

The Court: He hasn't got them there.

Mr. Berr: It is agreed that the mathematical total of the figures he gave him will show it is thirty-six hours.

40

Samuel Steinberg—Cross.

Q. Thirty-six hours, is that correct? A. Yes.

By Mr. Berr:

Q. When you work on Sunday morning you make a substantial charge therefor, don't you? A. If I can get it.

Q. I mean as a general rule you insist on it, don't you? A. Yes, I do. 10

Q. In the conduct of the practice of law you only go on a Sunday morning to arrange these things in order to accomodate the mortgagee and mortgagor? A. In this case I did.

Q. For your own benefit you would prefer not to go on Sunday? A. Yes.

Q. Was it a nice day—these two Sundays?

Mr. Kimmel: Well, what's the difference? 20

Mr. Berr: Well, it is worth more to stay away on a Sunday that is not a rainy day.

(At this point a recess is taken until two o'clock in the afternoon.)

AFTER RECESS.

Mr. Berr: I would ask your Honor to permit me to recall Mr. Ebright for just one or two questions. 30

The Court: All right.

HENRY EBRIGHT, a witness already sworn, recalled, and further examined as follows:

Direct-examination by Mr. Berr:

Q. Now, then, Mr. Ebright, before you and Mrs. 40

Henry Ebright—Recalled—Direct.

Keyes went to the office of Mr. Steinberg pertaining to an extension or renewal of this twelve thousand dollar mortgage, did you speak to Mr. Jesse Kimmel pertaining to what he intended to do about replacing, substituting or renewing that twelve thousand dollar mortgage that was being called in? A. I did.

10 Q. Where did you speak to him? A. In the restaurant on Washington Street—in that restaurant in the Romaine Building.

Q. Romaine Building—that's the building that the office of Kimmel & Kimmel is situated? A. Mr. Dave Kimmel was there, too.

Q. What did you say to him, Mr. Jesse Kimmel, and what did Mr. Jesse Kimmel say to you? A. I walked over to him and I said: "Hello, Dave", and
 20 "Hello Jesse." He said: "Hello, Ebright. What's the good word?" I said: "Jesse, why don't you straighten out the matter in reference to the first mortgage? It has been called, and Mrs. Keyes was notified that they were going to call that mortgage in." He said: "What are you going to do about it?" I said: "You know what you agreed in the contract. I was broker, and I know what you agreed upon in the agreement." I said: "Why
 30 don't you pay what they claim? Why don't you pay the deficiency?" He said: "I don't pay nothing." He said: "Buckus". He said: What can they get—"buckus".

Q. What does "buckus" mean? A. Nothing.

Q. Did you tell him that Mrs. Keyes was arranging to have that mortgage renewed?

Mr. Kimmel: Objected to. This witness is an intelligent witness.

40 Q. Did you say anything else to Mr. Jesse Kim-

Henry Ebright—Recalled—Direct.

mel concerning what Mrs. Keyes had to do? A. I said to him, Mr. Jesse Kimmel, and you, Dave: "You know that I would be a traitor if I would sell the property for you"—

Q. I don't want to know that. I am asking you whether or not you said anything else to him concerning what Mrs. Keyes would have to do if he didn't do it pertaining to the twelve thousand dollar mortgage—that's all I wanted? A. I did. 10

Q. What did you tell him? A. I told him, I says: "Remember when her mortgage will become due she will have to go and try to get a mortgage, a new mortgage, or extend it, or do something with it."

Q. And did you ask him whether he intended to do anything about it? A. I did.

Q. And what did he say to you? A. He says he wouldn't do anything. 20

Cross-examination by Mr. Kimmel:

Q. Mr. Ebright, when did this conversation take place? A. It was one day when you and your brother Jesse was eating in that restaurant.

Q. I asked you when that conversation took place? A. I don't remember the date. 30

Q. Was it in July, 1929? A. I don't remember the date.

Mr. Berr: He says he don't remember the date.

Mr. Kimmel: I am testing his memory as to the conversation. The man relates the incident and I am fixing the time.

The Court: Proceed.

Henry Ebright—Recalled—Cross.

Q. Was it in August, 1929? A. I don't remember.

Q. When was it? A. It was after Mrs. Keyes was notified that the mortgage was due.

Q. When was it? When was it that she was notified that it was due? A. I don't know.

10 Q. Was it during the summer months?

Mr. Berr: He says he doesn't remember. That's a definite answer.

The Court: Proceed.

Q. Was it during the summer months of 1929? A. I don't remember the date. I don't remember the month.

Q. But you remember the conversation—yes or no? A. Yes.

20

MRS. LUCY B. KEYES, one of the plaintiffs, already sworn, recalled, and further testifies as follows:

Direct-examination by Mr. Berr:

30 Q. Mrs. Keyes, did you have occasion to talk to Mr. David Kimmel, Jesse Kimmel's brother, concerning this mortgage proposition? A. Yes, one day on my telephone—

Q. Just a minute. The answer is "Yes." What did he say to you? A. Why, he said to me—

Mr. Kimmel: I am going to object to the conversation unless the time is fixed.

The Witness: I forget the time.

40 Q. And was it after you got the notice that the mortgage was due? A. It was while we were debating this mortgage concern business.

Mrs. Lucy B. Keyes—Recalled—Direct.

Mr. Kimmel: When was it? Let's fix the time.

The Witness: I could not say.

Mr. Berr: The witness has said it was after the mortgage was called in and during the time arrangements were being made concerning that mortgage. Now that's about as definite as he can expect. 10

Mr. Kimmel: Well, when was that?

Mr. Berr: Well, she can't give you the date.

A. (Continuing) And Mr. David Kimmel called me up and he said: "What are you going to do about it"—

Mr. Kimmel: I object. She must show that I called her up; that it was my voice; that I was speaking to her. 20

The Court: The witness has testified that you called her up.

A. (Continuing) Yes. You told me it was Mr. David Kimmel. He said: "What are you going to do about that mortgage—"

By the Court:

Q. Did you recognize his voice? A. Yes. 30

Q. Whose voice was it? A. Mr. David Kimmel's. He said: "What are you going to do about that mortgage?" I said: "What are you going to do about it?" He said: "Nothing. You know Steinberg is going to foreclose on it", and I told that to Mr. Steinberg—

Mr. Kimmel: I object.

40

Mrs. Lucy B. Keyes—Recalled—Cross.

Cross-examination by Mr. Kimmel:

Q. Was this conversation subsequent to August?

A. It was during—

10 Q. Just one minute, if you please, Mrs. Keyes. Was it subsequent to the writing of that letter, Exhibit P-2 that you spoke to me—that letter was written in August, on August 14th? A. Mr. Kimmel, don't ask me dates.

Q. Was it before or after this letter? A. I could not tell you. It was while we were debating about the mortgage.

Q. Was it before or after the writing of this letter? A. I just could not tell you. You kept us so long in doubt about it—six months.

20 Mr. Berr: That's all, Mrs. Keyes. That's our case. We rest.

DEFENDANT'S CASE.

Mr. Kimmel: I am calling the Clerk of the First District Court.

Mr. Berr: What is it you are going to ask him?

30 Mr. Kimmel: The record.

Mr. Berr: We will admit the record.

Mr. Kimmel: This was a suit in the Paterson District Court, First District between Jesse Kimmel, plaintiff, and Lucy B. Keyes, defendant, and the summons was issued on July 12th, 1929. The venire—this was tried before your Honor and a jury, and the trial actually took place on October 25th, 1929.

The Court: Is that the case I tried?

40 Mr. Kimmel: Yes, sir.

Jesse Kimmel—Direct.

Mr. Berr: What else do you want to read into the record, Mr. Kimmel. The record is admitted.

The Court: You mean the book will be admitted?

Mr. Berr: In so far as he wants to use it.

Mr. Kimmel: And there was no set-off filed in this case at that time? 10

Mr. Berr: That is admitted. What else?

Mr. Kimmel: That's all.

Mr. Berr: As long as we have stipulated what is going in as being matters of record in the First District Court, I don't want this book offered. I am stipulating on that theory.

Mr. Kimmel: We are agreeing, therefore 20

Mr. Berr: What you said to the Court. That's the fact.

JESSE KIMMEL, the defendant, sworn as a witness on his own behalf, testifies as follows:

Direct-examination by Mr. Kimmel:

Q. You are the defendant in this case? A. Yes. 30

Q. And do you remember the purchase money mortgage that Mrs. Lucy B. Keyes issued to you on this transaction arising out of the contract, Exhibit P-1? A. Yes.

Q. (Showing witness) Is this the mortgage? A. Yes, that's the mortgage.

Mr. Berr: I object to it on the ground that the paragraph pertaining to the subrogation does not include any assignees of the 40

Jesse Kimmel—Direct.

mortgage, and therefore it is immaterial on the trial of this issue.

Mr. Kimmel: Any covenant in the body of the mortgage is binding on any assignees.

Mr. Berr: Well, that is a question that this Court is not being called upon to pass upon.

10

Mr. Kimmel: I offer the bond and mortgage.

Mr. Berr: Where is the bond.

Mr. Kimmel: Not the bond—the mortgage.

Mr. Berr: I object to it on the ground it is not material to the issue.

The Court: You raised the question yourself.

20

(Mortgage marked Exhibit D-1.)

Q. (Showing witness) I show you an assignment of a mortgage between yourself and Morris Botwick, dated March 26th, 1929, and ask you if you executed that assignment to Morris Botwick?
A. I did.

30

Mr. Berr: I object to it on the ground that it is immaterial and not evidential on the trial of this cause.

The Court: I will admit it.

Mr. Berr: Exception.

Mr. Berr: I object to that mortgage. Will your Honor allow an exception so far as that is concerned, too?

The Court: Exception allowed, sir.

40

Q. You are an attorney at law of the State of New Jersey?

Jesse Kimmel—Direct.

Mr. Berr: Admitted.

Q. And as such have you had occasion to close real estate deals? A. Very often.

Mr. Berr: Objected to on the ground it is immaterial.

Mr. Kimmel: It is for the purpose of showing that the charges made here are not reasonable. 10

The Court: I will admit the qualifications for that purpose.

Mr. Berr: Before you ask that question I call your Honor's attention, if your Honor please, to the specification of defense. Now, our statute pertaining to specifications of defense is very, very definite. Where you set forth defenses upon request you are barred from offering any testimony— 20

The Court: Which section are you reading?

Mr. Berr: I am reading the specifications of defense. I am not referring to all of them, but there is nothing that affects the amount paid, the nature of the amount payable. Now this is on a request—where I requested a pleading known as specification of defenses, and they must include that. Since that isn't included, then they waive their right to present any testimony to contradict it. Now, then, your Honor certainly cannot now permit them in view of this specification of defense to go into the question as to the reasonableness of the four hundred dollar charge when they didn't set it forth as one of their defenses in connection with 30

40

Jesse Kimmel—Direct.

their damages. They should do that under the statute.

Mr. Kimmel: There is a general denial there is nothing due.

Mr. Berr: That has nothing to do with the reasonableness of it.

10 Mr. Kimmel: If that's the case I am going to ask your Honor for leave to amend. We want to get at the meat of this and dispose of it on its merits.

The Court: I don't think you would be surprised by that, Mr. Kimmel?

Mr. Berr: I am not going to contest very strenuously—

20 The Court: Make a memorandum that there is an amendment.

Mr. Berr: I think it is the duty of Mr. Kimmel to say now whether he is through with his amendments of the specifications. I don't want to stand up and bar him from offering testimony—

The Court: I don't think there will be any further amendments.

30 Q. Did you at any time have occasion to get this twelve thousand dollar mortgage from Mr. Steinberg through the office of Evans, Smith & Evans, on this very property?

Mr. Berr: Objected to on the ground it is immaterial because of the fact that the question doesn't fix the time—improper question.

(Discussion)

The Court: Question allowed.

40 A. I did.

Jesse Kimmel—Direct.

Q. And how much were the legal charges? A. I think it was either fifty-five or sixty-five dollars that Mr. David Smith charged me.

Q. Now, it has been testified here that Mr. Steinberg had ten conferences, approximately ten hours; that he wrote four letters, and paid a searcher twenty dollars, and had a tax search which cost him two dollars; that he had six conferences lasting from two to three hours, with Mr. Herman Levine, the executor, drew the extension mortgage, and went to the property twice and spent eight hours, approximately, on these two occasions. Would you say for an extension that it was necessary for Mr. Steinberg to make a search? A. No. 10

Mr. Berr: Objected to on the ground that it is immaterial. 20

The Court: He has a right to show in his opinion the reasonableness or unreasonableness of the charge.

Mr. Berr: This is an action brought up on a breach of contract.

The Court: I know, but the contract doesn't specify the exact amount that will be paid.

(Discussion)

The Court: I have already ruled they have a right to go into the charges—the reasonableness of this charge. 30

Mr. Berr: Exception.

A. No. The reason is when I bought that property I had a title guarantee policy on it, and when the firm of Evans, Smith & Evans were taking care of this mortgage lien of twelve thousand dollars I turned that policy over to them. 40

Jesse Kimmel—Direct.

Q. When was that, about, do you remember? A. Oh, they made a search of the premises at the time the lien was made.

Q. And for whom did they make the search? A. They made the search for the Steinberg estate.

10 Q. And that's the same estate from which Mrs. Keyes got this extension, as has been testified? A. That's the same estate.

Q. What would you say, therefore, would be a reasonable charge for the services rendered by Mr. Steinberg as outlined by me just a moment ago?

A. I should say one hundred or one hundred and twenty-five dollars would be good compensation for all that work.

20 Q. Now, did Mr. Botwick ever come to you on the subrogation agreement that was testified to by Mr. and Mrs. Keyes? A. Never did.

Q. Do you know to whom he went? A. He went to David Kimmel.

Q. Now, the title on the West Englewood property on which this twelve thousand dollar mortgage was, was in whom, do you know, at the time you made the conveyance? A. It was in my name.

Q. And to whom did you convey it? A. I conveyed that property to Mrs. Lucy B. Keyes.

30 Q. And did you in turn receive a piece of property from Lucy B. Keyes? A. In exchange, yes.

Mr. Berr: Objected to. It is immaterial as to whether or not he got a piece of property from Lucy B. Keyes.

Mr. Kimmel: Withdraw the question.

40 Q. Now, you heard Mr. Ebright testify concerning an alleged conversation in the restaurant in the Romaine Building while Mrs. Keyes was endeavoring to get a new mortgage. Did you in fact have

Jesse Kimmel—Direct.

any such conversation? A. I never had such a conversation with Mr. Ebright. The conversation which he has reference to was a conversation which took place in the restaurant in the Romaine Building previous to drawing up the contract for the exchange of these two pieces of property.

Q. That's the only conversation you had with him relative to this twelve thousand dollar mortgage? A. I never had any conversation with him relative to a twelve thousand dollar mortgage. 10

Q. Now, I refer to Plaintiff's Exhibit One, and particularly the paragraph which is in issue here. Can you tell me now who dictated that paragraph?

Mr. Berr: One minute. I object to that on the ground that it is immaterial.

Mr. Kimmel: On the question of construction. If the attorney for Mrs. Keyes drew it, on the question of construction, why, certainly, it would be against the plaintiff. 20

(Discussion)

The Court: I will admit it for what it is worth.

Mr. Berr: I object to it and ask an exception.

A. Mrs. Keyes attorney dictated that. 30

Q. Who was Mrs. Keyes attorney? A. I am not sure. It was either Mr. Berr or Mr. Spindell, and I am not sure which one it was. It was dictated in their office.

Cross-examination by Mr. Berr:

Q. Mr. Kimmel, you are practicing law for about five or seven years, are you not? A. Yes, sir.

Q. And you have drawn a number of contracts 40

Jesse Kimmel—Cross.

for the sale and exchange of real property? A. I didn't hear that.

Q. You have drawn a number of contracts for the sale and exchange of real property in the course of your business? A. Yes.

10 Q. And the basis of fixing the price of one hundred to one hundred and twenty-five dollars maximum as being a good fee, as you call it, for putting this extension through on a twelve thousand dollar mortgage that is past due, is your honest opinion as to what it would honestly cost and what it honestly and reasonably should cost, is that right? A. I think from one hundred to one hundred and twenty-five dollars is good compensation for drawing up an extension and taking care of the—

20 Q. And calling your attention to the contract—by the way, this contract was drawn and you signed it knowing the contents thereof—read the contract over—right? A. Yes.

Q. You knew what was in it? A. Yes.

Q. And you helped and participated in the dictating and constructing of all parts of this contract, did you not? A. I did not.

Q. Who did? A. I left that to my brother.

30 Q. And you stood by and you had no correction or alteration whatever? A. No, I was satisfied to abide by what he did.

Q. And you heard what he was doing and what he was saying? A. Well, I think I heard most of it.

Q. Well, you are positive, aren't you, you were there? A. We have three different rooms in our office, Mr. Berr.

40 Q. How do you know who dictated this particular clause? A. Because I was there and heard that clause.

Jesse Kimmel—Cross.

Q. Dictated? A. Dictated.

Q. And you agreed and offered no suggestion or alteration or amendment to that clause, did you?

A. No.

The Court: He must have agreed, or he wouldn't sign it.

Q. The clause referred to, which is the subject matter at issue in this case, you agreed as follows: "It is agreed, however, that in the event that the said first mortgage aforementioned is called in and the full amount of the principal demanded by the mortgagees at any time prior to the expiration of three years from the date hereof, then and in such event the party of the first part does hereby agree to secure and place a new first mortgage on the premises, not less than twelve thousand dollars, to take the place of the first mortgage aforementioned, and agrees to pay all expenses for acquiring the same and inconnection therewith." You didn't say: "Agrees to pay all reasonable expenses or charges," did you? 10
20

Mr. Kimmel: Now, if the Court please, the contract speaks for itself. That is a matter for the Court to rule on.

The Court: The defendant is entitled to the reasonableness of that charge. 30

Q. You didn't suggest nor did you require that the expenses set forth in that particular clause be fixed as "reasonable expenses or charges", did you?

Mr. Kimmel: I object to that question on the ground that it is improper. It is irrelevant, incompetent and immaterial, and what 40

Jesse Kimmel—Cross.

he didn't suggest is immaterial because the contract speaks for itself.

The Court: I will permit it.

A. What was that question?

10 Q. I say, you didn't ask me or your brother, David Kimmel, nor did you suggest or require that the words "reasonable expenses and charges in connection therewith" be written instead of the words "all expenses for acquiring the same and in connection therewith." You didn't require that change, did you? A. "All expenses" means "reasonable".

20 Q. I didn't ask you that. I asked you did you require that the words "reasonable expenses" be put in the contract? A. Well, if it isn't there I guess I didn't require it.

Q. Well, you didn't require it— A. It was understood.

Q. And if you didn't say that, you meant "all expenses". A. All reasonable expenses.

30 Q. And you said further in that clause: "And agree that the party of the second part, Mr. and Mrs. Keyes"— A. No, I didn't mean that. I said: "Party", and I meant but one party in particular, Mrs. Lucy B. Keyes.

Q. You didn't say "Lucy B. Keyes" in the clause, did you? A. No.

Q. And the party of the second part in this contract is Lucy B. Keyes and Thomas E. Keyes, both of the City of Passaic, and County of Passaic? A. The only reason that Mr. Keyes was made a party defendant was because this was an exchange and we had to cut off his curtesy right.

Jesse Kimmel—Cross.

Mr. Berr: I move that that be stricken out as not responsive.

A. (Continuing) The deed was conveyed to Mrs. Lucy B. Keyes.

Mr. Kimmel: It certainly is responsive.
The Court: Proceed.

10

Q. And you said further that the party of the second part, regardless of whom you meant— A. I meant Mrs. Lucy B. Keyes.

Q. (Continuing) "Shall and will pay over to the party of the second part the sum of one hundred and fifty dollars in cash and nothing more." Why was that put into the contract?

Mr. Kimmel: I object to it as to why it was put into the contract. It is absolutely immaterial as to why it was put into the contract. It is there, and we are coming down to the question now as to the reasonableness of the charge.

20

Mr. Berr: Mr. Kimmel testifies, I think, that the reasonable charge is one hundred to one hundred and twenty-five dollars. He has undertaken in this contract to obtain the replacing or substituting of a new mortgage in the event the old one is called in, and agrees to pay all expenses therefor. That is a question of fact. Would it be reasonable? Would it be reasonable for a lawyer in practice for seven years, where property rights and contractual obligations are involved, to take the party of the second part and contract one hundred and fifty dollars towards the payment of a fee of one hundred and twenty-five dollars. Now, that is important.

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Jesse Kimmel—Cross.

It goes to the credibility of the man.

Mr. Kimmel: That clause was put in with the thought of renewal and renewal would involve a search and that search would require more work.

10 A. The reason I agreed to the one hundred and fifty dollars in there is this: In case the Steinberg Estate had to be paid that twelve thousand dollar mortgage and somebody else placed a different mortgage on that place they would have to make a complete tax search and full United States Supreme Court search, and I figured that one hundred and fifty dollars would cover any attorney for all his expenses, and the way we arrived at the one hundred and fifty dollars was that I would be
20 sure that I would be covered and not have to stand any loss in case the Steinberg mortgage was paid off and a new mortgage had to be gotten. No attorney would charge more than one hundred and fifty dollars, I don't think, for taking care of that entire transaction.

Q. In other words, you mean to say that the reason that one hundred and fifty dollar provision was put in there instead of the provision that the present purchaser was to pay all expense of substitution and renewal is in order to cover up any
30 expenses or obligation that might be necessitated if the Steinberg mortgage was called in, is that not so? A. That's the reason. It would cover me completely.

Q. And you by reason of that clause felt you were protected for any expenditure of any kind or character, regardless what the value was regarding that mortgage?
40

Jesse Kimmel—Cross.

Mr. Kimmel: I object to what he felt.

The Court: Objection sustained.

Q. That was your intent?

Mr. Kimmel: The clause in the agreement speaks for itself. I object to what his intent was.

The Court: What has the intent of that man got to do with regard to what the contract is now. He might have intended a thousand things that didn't get into that contract.

Mr. Berr: Withdraw the question.

Q. Now, then, you also say that one hundred to one hundred and twenty-five dollars would be sufficient, and so forth. Suppose you did, Mr. Kimmel, thirty-six hours worth of work—by that I mean spent thirty-six hours in representing a client, and part of that thirty-six hours it was necessary for you to work during the month of August and September, and October, too, on fair and nice days, on Sunday morning—spend four hours on two successive Sundays, how much would you consider a reasonable charge for that alone?

A. The four hours on two Sundays were not necessary because we had given a guaranteed survey to the Steinberg estate when they first gave me that mortgage.

Q. Now, Mr. Kimmel, suppose it was necessary, and you did it, what would be the reasonable charge for it? A. I still think that one hundred to one hundred and twenty-five dollars was more than sufficient to pay for any extension closing of that kind where that party had a search, and if they went to the trouble of getting a new search

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Jesse Kimmel—Cross.

Evans, Emith & Evans charged me fifty-five or sixty-five dollars to make an original closing, not an extension closing.

Q. How much premium did you pay on the original twelve thousand dollar mortgage?

10 Mr. Kimmel: Object to it as incompetent, irrelevant and immaterial, and not an issue here. The issue here is are the legal charges of Mr. Steinberg fair and reasonable.

The Court: Nothing said about commissions in this case.

Q. (Repeated by stenographer) How much premium did you pay on the original twelve thousand dollar mortgage?

20 Mr. Kimmel: Object to the question as incompetent, irrelevant and immaterial, and it doesn't go to the question of reasonable charges.

Mr. Berr: I think it is evidential. It goes to what as a matter of fact, is the truth in the case. The man has testified one hundred to one hundred and twenty-five dollars would pay all expenses. I want to prove that he himself paid more.

30 (Discussion)

The Court: I will overrule the question.

Mr. Berr: Exception.

Q. When was this search made by Evans, Smith & Evans—what year? A. I think it was made in 1926. I think that is about the year.

Q. When did you close your title to Mrs. Keyes?

A. I think it was in about September or October
40 of 1928.

Jesse Kimmel—Cross.

Q. Are you sure it wasn't in March of 1927? A. No, it wasn't in March.

Q. It was in September or October of 1928? A. Well, it was some time after August.

Q. Well, I mean about how many periods of months—three, six, nine month, or three, six, nine weeks? A. I think it was within four months of the time that the contract was signed. 10

Q. It wasn't in March of 1929—you are positive about that? A. I don't think it was.

Q. Eh? A. Because I remember—

Q. Answer my question? A. Just a moment—

Q. I don't want any speeches. I asked you whether it was or wasn't.

The Court: If you don't know, Mr. Kimmel, say so. 20

The Witness: I don't know.

Q. Well, might it have been in March? A. I don't think so.

Q. Can't you remember? Can't you remember? A. I don't remember, but I think it was in the Summer time because it was a very hot day when we signed that contract. We all had sodas up in the office.

Q. You got this purchase money mortgage, didn't you, at the time of the closing? A. I got the purchase money mortgage at the time of the closing? 30

The Court: What importance does this time of the closing have?

Mr. Berr: The reason that it makes a difference is because this man has testified that he didn't have a conversation with Mr. Ebright. That depends on a man's memory—that depends on how good a man's memo- 40

Jesse Kimmel—Cross.

ry is, and if he can't recall when he himself got his purchase money mortgage, which is an important item in this case, then his memory is not as good as—

The Court: Proceed.

- 10 A. I told you first it was during a warm day.
 Q. "During a warm day". Is that the best time you can fix? A. Well, if you remember, we all had ice-cream sodas at the time the contract was signed.
 Q. Well, can you— A. It was in August that the contract was signed.
 Q. How many months after the mortgage was signed was this contract given to you? A. Less than four months.
- 20 Q. How much less than four months? A. Well, I don't just remember the month.
 Q. I don't want the month. I want a reasonable approximation of the time within reason—how many weeks? A. I think the original contract had a clause in it that the title was to be closed in thirty days.
- 30 Q. And was the title closed in thirty days or wasn't it? A. I don't think so. I think it was closed in about six weeks—from four to six weeks.
 Q. Not from four months? A. No, I will take that back.
 Q. By the way, you testified that Mr. Botwick brought the subrogation to your brother? A. I didn't testify to that.
 Q. You said David Kimmel? A. I said Mr. Botwick had no conversation with me about the subrogation, but that he had a conversation with Mr. David Kimmel.

Jesse Kimmel—Cross.

Q. That's right—you said that, didn't you? A. That's right. That isn't what you said.

Q. How do you know he did? A. Because David Kimmel told me about it.

Q. Who told you? A. And told me about some subrogation that was given to Morris Botwick.

Q. You weren't in the office when Morris Botwick was there? A. No. 10

Q. Anything concerning that phase of it was told you by your brother? A. That's right.

Mr. Berr: I ask your Honor to strike that out as hearsay.

Mr. Kimmel: No objection.

Q. Now, do you know of your own knowledge from Botwick what your brother advised him to do? 20

Mr. Kimmel: I object to that question. I can go on the stand and tell what I advised. I am here.

Q. Now, then, if you put Evans, Smith & Evans to search in 1926, and then you closed title with Mrs. Keyes in 1928, which was two years after you originally had the mortgage and the search, why do you say it wasn't necessary to make a new search in 1930, a continuation search— 30

Mr. Kimmel: That's 1929, Mr. Berr.

Q. (Continuing) For the protection of the mortgage— A. In the first place, it isn't 1928, it is 1929.

Q. Yes? A. When Evans, Smith & Evans closed the title for the Steinberg Estate I had a title insurance on it which I turned over to Evans, Smith & Evans, and they made a search on the property. 40

Jesse Kimmel—Cross.

Q. Why do you assert as a lawyer that in 1929 there was no necessity for making a search? A. If I am going to close an extension on a mortgage which was recorded three years ago, anything subsequent to the recording of that mortgage does not affect that mortgage. You know that, Mr. Berr.

10 Q. Yes? A. Therefore, a search is not necessary for an extension. A search would be necessary only for a new mortgage.

Q. But, Mr. Kimmel, if, as a matter of fact, a new mortgage was originally intended, then a new search would have been—

Mr. Kimmel: I object to that. The contract speaks for itself. They have not got a renewal here. They have got an extension.

20

The Court: There is no question about it, Mr. Berr. If a new mortgage was gotten a search would have been necessary.

A. M. KOHLRIGHT, sworn as a witness on behalf of the defendant, testifies as follows:

Direct-examination by Mr. Kimmel:

30

Q. Mr. Kohlright, you are a practicing attorney of this State? A. I am, sir.

Q. And as such, have you had occasion to close extension of mortgages? A. A few.

Q. Mr. Steinberg, the man that closed this extension of mortgage, testified on cross-examination that he had ten conferences lasting about one hour each; wrote four letters, paid twenty-two dollars for a search and a tax search, had six conferences
40 of two or three hours each with the executor of the

A. M. Kohlright—Direct.

estate of Joseph Steinberg; drew an extension agreement, and went to the property twice and spent about four hours each time. Now, from your experience, would you say that a search and a tax search were necessary for the extension of a mortgage? A. I would not.

Q. And for the outlined services rendered by Mr. Steinberg, what would you say would be a reasonable charge? A. May I ask which Mr. Steinberg it is? 10

Q. Of Lichman, Steinberg and Lieberman? A. My answer would take into consideration the attorney's reputation and the time he has been practicing at the bar. Considering Mr. Steinberg's reputation and the length of time he has been practicing, I would say that one hundred and fifty dollars— 20

Mr. Berr: I don't think that Mr. Kohlright should be permitted to answer the question until I cross-examine him as to his qualifications.

The Court: You should have said so. Proceed.

By Mr. Berr:

Q. How long have you been practicing? A. August 10th, 1928. 30

Q. How many titles have you closed within the two years? A. Oh, about a dozen.

Q. How many? A. About a dozen. During my clerkship of over two years, I daresay I closed maybe a dozen or so.

Q. Do you ever work on Sundays? A. Sometimes.

Q. Do you ever work evenings? A. Yes. 40

*A. M. Kohlright—Cross.**By Mr. Kimmel:*

Q. Now, what do you say the reasonable charge for these services would be Mr. Kohlright? A. I say taking into consideration the length of time Mr. Steinberg had been practicing and his reputation as a lawyer, I think one hundred and fifty dollars—to do the work you have outlined, a fee of one hundred and fifty dollars would be sufficient, taking into consideration that a search is not necessary for an extension.

Cross-examination by Mr. Berr:

Q. Now, then, Mr. Kohlright, if a search was made, regardless of what the reason was, how much would you increase the value? A. Complete search or a continuation?

Q. A search for a mortgagee's protection? A. That would all depend.

Q. What kind of a search would you have made? A. I would make a continuation if I had gotten the search I have heard described from Evans & Smith.

Q. If a full search was made, would twenty dollars be reasonable? A. Twenty dollars is very reasonable.

Q. And if it was a continuation search, would twenty dollars still be reasonable—I mean to a client? A. To a client, yes.

Q. And would you add that twenty dollars to the— A. I certainly would.

Q. And do you think a lawyer should charge by the hour in the course of his practice? A. I don't think that a lawyer can charge for services by the

A. M. Kohlright—Cross.

hour. I mean an attorney of standing like Mr. Steinberg.

Q. Or an attorney of standing like Mr. Kimmel?

A. Of yourself.

Q. In view of the fact that Mr. Kimmel asked you the question concerning the hours of labor, your figure of one hundred and fifty dollars is more or less of a group figure? A. I am taking into consideration what the reasonableness of the charge would be for such services, assuming that it required that length of time, together with the attorney that does the work—taking into consideration his reputation at the bar and the length of time he has been practicing. 10

Q. So, then, if we say a man spends eight hours in conference, and two Sunday mornings of four hours each examining a piece of real estate, and the man comes back to his office when he is otherwise not there evenings to keep appointments, running over a period of twenty hours spent on behalf of the client, and draws an extension, and in fact makes a search, whether it be necessary or not, then he is only entitled to one hundred and seventy dollars? A. Absolutely. I'd do it every day in the week for that much. 20

30

SAMUEL ROSENFELD, sworn as a witness on behalf of the defendant, testifies as follows:

Direct-examination by Mr. Kimmel:

Q. Mr. Rosenfeld, you are a practicing attorney of the State of New Jersey? A. Yes, sir.

Q. And as such, have you had occasion to close real estate matters? A. Yes, I have. 40

Samuel Rosenfeld—Direct.

Q. You had occasion to close mortgages, that is?

A. Yes.

Q. Now, Mr. Steinberg, the man that closed this extension mortgage, stated that he made a search and a tax search. Is it necessary to make a search and a tax search when you extend a mortgage? A.

10 In my opinion, no.

Q. And he says he had ten conferences lasting approximately ten hours; that he wrote four letters; that he had six conferences with the executor of the estate of Joseph L. Steinberg lasting from two to three hours; drew an extension, and went to the property on two occasions and spent about eight or ten hours there all together in connection with the work of closing, what would you say would be a reasonable charge therefore? A.

20 Oh, I think from one hundred and twenty-five to one hundred and fifty dollars.

Cross-examination by Mr. Berr:

Q. Are you the attorney that tried this case, the case between Mrs. Keyes against Mr. Kimmel, when this court sat last in the examination of the issue? A. I think so. I don't think it was this case. I think it was on some other—

30 Q. When it was on last October—the same contract? A. I don't know.

Q. (Showing witness) Let me show it to you to identify it? A. I think so.

Mr. Berr: That's all.

Defendant Rests.

Mr. Kimmel: I would like to make a motion at

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Defendant's Motion for Direction of Verdict.

this time to direct a verdict under Section 60 of the District Court Act, which provides as follows:

(Counsel reads Section 60 of the District Court Act.)

Now, under that Section, Lucy B. Keyes, the defendant in the case of Jesse Kimmel against Lucy B. Keyes, should have filed a counterclaim and set-off. She has failed to do so. The records that I introduce at the case on trial today, show that the case was tried on October 25th. Plaintiff's Exhibit 1, the letter that was offered in evidence by Mr. Berr, indicates that the damages were liquidated on August 14th, 1929, or about two months prior to the cause of action between Jesse Kimmel and Lucy B. Keyes, and she then had filed no counterclaim and set-off, and, therefore, under Section 60 of the District Court Act, the plaintiff in that particular case, is barred from suing.

My second argument with respect to directing a verdict is as to the reasonableness of the charge for drawing an extension of mortgage and services rendered in connection therewith. All three members of the bar who testified for the defendant—and there is, by the way, no contradiction of that testimony—show indisputably that the value of a reasonable charge for those services should not exceed, in any event, one hundred and fifty dollars, and I therefore ask for the direction of a verdict on those two grounds.

The Court: On the first ground, Mr. Kimmel, August 5th they were notified the mortgage was due.

Mr. Kimmel: The suit was tried two months later.

The Court: The suit was filed, according to your

Defendant's Motion for Direction of Verdict.

testimony, on July 12th. It wasn't tried until some time later. The language of the statute is: "Plaintiff in such suit, shall on or before the time specified for appearance." Now, that's the return date of the summons. Now, I haven't the date before me. You may have it **there**.

10 Mr. Kimmel: Let me read Section 61 in connection with Section 60.

(Counsel reads Section 61 of the District Court Practice Act.)

The Court: That must be read in conjunction with Section 60. The statute speaks of the return day, and the return day in your first suit—you can look it up, and tell me, if you wish, but I believe it was August 5th.

20 Mr. Kimmel: The summons is dated July 3rd, returnable July 12th, but as I read Section 60, not only does it say: "Before the time specified for appearance in the process", but, "On or before the final hearing."

(Argument)

The Court: I am afraid I will have to deny your motion on that point.

30 Mr. Kimmel: Exception.

The second ground is that from the uncontradicted testimony of the experts here as to the reasonableness of the charge, it has been proven that the charge is one hundred and fifty dollars at most, and that being the case, the plaintiff has failed to prove any charges in so far as his contract is concerned.

(Argument)

40 The Court: I think I shall have to find that the

Defendant's Motion for Direction of Verdict.

charge is reasonable taking everything into consideration. So far as the search itself went, making a search, in a continuation of mortgage that wouldn't be necessary on account of any lien or something of that kind, but a person extending a mortgage of twelve thousand dollars might very reasonably want to know whether there were any liens or not—want to know whether there were any taxes, and taxes would be a prior lien, and he very reasonably would want to look over the property, which he states he spent some time in doing, before he extended it. 10

I think that I will have to hold that it was reasonable.

Mr. Kimmel: My third ground is that the clause in the contract is not broad enough to include the term "Extension". 20

(Counsel reads from Bouvier's Law Dictionary, Volume 2, the definition of the word "Renewal", and from Volume 1 of the same book, the definition of the word "Extension".

(Argument.)

The Court: I think that the whole paragraph must be read together. You can't take one clause and exclude the rest of the paragraph. The entire intent is shown in the mortgage in the forepart: "It is agreed, however, that in the event that said first mortgage aforementioned is called in and the full amount of the principal demanded by the mortgagees at any time prior to the expiration of three years"—in case the mortgage should be called in they got to get another mortgage. 30

I will deny your motion. 40

Mr. Kimmel: Exception.

Defendant's Motion for Direction of Verdict.

(Both sides sum up.)

The Court: I find for the plaintiffs in the sum of two hundred and fifty dollars, and I will allow them the one hundred and fifty dollars which the contract provided should be allowed.

10

Certificate of Stenographer.

I, Peter O'Byrne, do hereby certify that the foregoing is a true and accurate transcript of the stenographic notes as taken by me in the above entitled matter at the time, and place, hereinbefore set forth.

PETER O'BYRNE,
Stenographer.

20

Certificate of Judge.

SECOND DISTRICT COURT OF THE CITY OF
PATERSON.

To the Honorable WILLIAM B. GUMMERE, Chief Justice, and to the Associate Justices of the Supreme Court of the State of New Jersey.

30

I, Forster W. Freeman, Judge of the Second District Court of the City of Paterson, do certify that the foregoing stenographer's transcript of testimony made by Peter O'Byrne, a stenographer designated by me, is my state of the case between Lucy B. Keyes and James E. Keyes, her husband, Plaintiffs, and Jesse Kimmel, Defendant, as the same was tried before me on the eleventh day of June, 1930.

Dated: June 26, 1930.

40

F. W. FREEMAN,
Judge.

Exhibit P-1.

This Agreement, made the 4th day of August, in the year of our Lord One Thousand Nine Hundred and twenty eight

Between Jesse Kimmel, single, of the City of Paterson in the County of Passaic and State of New Jersey, party of the first part;

And Lucy B. Keyes and James E. Keyes, her husband, both of the City of Passaic in the County of Passaic and State of New Jersey, party of second part; 10

Witnesseth, That the said party of the first part, for and in consideration of the sum of Nine thousand seven hundred and fifty (\$9,750.00) Dollars, together with the exchange of a piece of property located at 306 Paulison Ave., Passaic, New Jersey that the parties of the second part are to convey free and clear except a \$9,000.00 mortgage to be paid and satisfied as hereinafter mentioned, (*J. K. L. B. K. J. E. K.*) and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that the said party of the first part, will well and sufficiently convey to the said party of the second part, their heirs and assigns, by Deed of Warranty, free of all encumbrances on or before the 7th day of September next ensuing the date hereof, All the lots, tracts, or parcels of land and premises, hereinafter particularly described situate, lying and being in the Township of Teaneck in the County of Bergen and State of New Jersey, together with all buildings and improvements erected thereon. 20 30

BEGINNING at a point in the southerly side of West Englewood Avenue, and in the easterly line of land conveyed by the Estate of William Walter 40

Exhibit P-1.

Phelps to the Hackensack Coal and Lumber Company, by deed dated Dec. 20th, 1921 and recorded in Deed Book 1143, page 80, said point being distant three hundred and fourteen (314) feet and eighteen hundredths (.18) of a foot on the course of North fifty three (53) degrees, seventeen (17) minutes, and fifty (50) seconds West from a stone monument in the corner formed by the westerly side of Westfield Avenue and the southerly side of West Englewood Avenue, and running thence (1) from said beginning point along the said easterly line of the Hackensack Coal and Lumber Company, south forty four (44) degrees and forty one minutes west one hundred and twenty five feet; thence (2) south fifty three degrees, seventeen minutes and fifty seconds East fifty feet; thence (3) north, forty four degrees and forty one minutes east one hundred and twenty five feet to the southerly side of West Englewood Avenue; and thence (4) along the southerly side of West Englewood Avenue north fifty three degrees seventeen minutes and fifty seconds west fifty feet to the point or place of beginning.

The above described premises being subject to a \$12,000.00 mortgage, which mortgage the parties of the second part hereby assume and agree to pay according to the terms thereof.

The purchase money mortgage of \$6500.00 is to be for a period of three years bearing interest at the rate of 6% payable quarter annually together with installments on account of the principal sum of \$200.00.

And the said parties of the second part for themselves, their heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, his heirs, execu-

Exhibit P-1.

tors, administrators and assigns, that the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the said sum of Nine thousand seven hundred and fifty (\$9,750.00) Dollars together with the exchange of a piece of property that the parties of the second part are to convey free and clear except a \$9,000.00 mortgage to be paid and satisfied as hereinafter mentioned, as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

On Execution of this agreement for which
this is also a receipt \$500.00

By executing a purchase money bond and mortgage in the sum of \$6500.00 for a period of three years with interest at 6% payable quarter-annually together with quarter annual installments of \$200.00 6500.00

On delivery of warranty deed cash 2750.00

By assuming the mortgage at present a lien on the premises, and paying the same according to the terms thereof \$12,000.00

which mortgage the party of the first part expressly warrants and guarantees will not be called in for payment by the present mortgagees or their assigns within three years from the date hereof.

It is agreed, however, that in the event that said first mortgage aforementioned is called in and the full amount of the principal demanded by the mortgagees at any time prior to the expiration of three years from the date hereof, then and in such event the party of the first part does hereby agree to secure and place a new first mortgage on the premises, not less than \$12,000.00, to take place of the first mortgage aforementioned and agrees to pay

Exhibit P-1.

all expenses for acquiring the same and in connection therewith. It being however understood that in the event such substitution of first mortgage shall become necessary, that the party of the second part shall and will upon said substitution taking place, pay over to the party of the first part the sum of \$150.00 in cash and nothing more.

10 The parties of the second part agree to convey to the party of the first part and the parties of the second part their heirs, administrators and assigns agree to and with the said party of the first part, his heirs, administrators and assigns that the said parties of the second part will well and sufficiently convey to the said party of the first part, his heirs, administrators and assigns by Deed of Warranty, free of all encumbrances excepting a present Building & Loan mortgage of \$9,000.00, which the party of the first part agrees to assume and pay according to the terms thereof, all those lots, tracts and parcels of lands and premises hereinafter particularly situate, lying and being in the City of Passaic, in the County of Passaic and State of N. J.

20 BEGINNING on the northeasterly side of Paulison Avenue at a point distant ninety seven and five hundredths feet northwesterly from the corner formed by the intersection of the northeasterly side of Paulison Avenue and the northwesterly side of Bloomfield Avenue and running thence (1) north-easterly along the rear line of lot fronting on Bloomfield Avenue as laid down and shown on Atlas of the City of Passaic and Acquackanonk Township, made by Wise & Ginsburg, 1916, one hundred feet more or less to the rear line of adjoining owner, thence (2) northwesterly along the line of adjoining owner twenty eight and twenty

30

40 two hundredths feet, thence (3) southwesterly and

Exhibit P-1.

parallel with the first course one hundred feet more or less to the northwesterly side of Paulison Avenue; thence (4) southeasterly and along the same twenty eight and twenty two hundredths feet to the point or place of Beginning

Known as 306 Paulison Avenue, Passaic, New Jersey.

The party of the first part agrees to and with the parties of the second part that he will subrogate a second mortgage to be executed at the closing of the title, now existing or to be hereafter executed in a sum not exceeding \$12,000.00 and it is hereby agreed that the said subrogation agreement aforementioned shall be incorporated in the body of the mortgage to be executed on the day of closing.

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

It is expressly understood and agreed that the party of the second part is not to pay any commission to anybody for effecting this exchange or for performance of any work in connection therewith.

It is understood and agreed that on the day of closing title at the time of the performance and consummation of this contract mechanic lien releases will be delivered by the party of the first part to the parties of the second part from all mechanics or material men who furnished material or did any work of any kind on the building erected on the premises contracted to be conveyed by these presents by the party of the first part to the party of the second part. Said party of the first

10

20

30

11)

Exhibit P-1.

part agreeing to pay any and all such bills or claims to mechanics or material men prior to the date of closing.

10 It is expressly understood and agreed that all apportionments of every kind and nature shall be made as of September 1st, 1928 regardless of the date of closing.

It is further understood and agreed that the premises that the party of the first part hereby conveys is subject to existing leases and the said party of the second part is to receive the deposit or security given under said leases together with assignments of said leases on the date of closing.

20 It is understood and agreed that as regards the assessments against the property which the party of the first part agrees by these premises to convey to the party of the second part, said assessments are to be paid by the party of the first part on the day of closing.

It is agreed between the parties hereto that the within contract is not assignable.

J. K.

L. B. K.

J. E. K.

30 And it is further Agreed, by the parties to these presents, that the said parties of the second part, their heirs and assigns, may enter into and upon the said land and premises on the 7th day of September next ensuing the date hereof, and from thence take the rents, issues and profits to them and their use.

40 And it is further Agreed, by the parties hereto, that the said deeds of warranty shall be delivered and received at office of Kimmel & Kimmel, 136 Washington Street, Paterson, N. J. between the hours of 8:00 o'clock in the evening and 9:00 o'clock

Exhibit P-1.

clock in the evening on the said 7th day of September next ensuing the date hereof.

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

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

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

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

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

It is expressly understood and agreed that the title to the land and premises hereby agreed to be conveyed is not derived from any proceedings or 40

Exhibit P-1.

any Act for the Sale of Land for non-payment of the municipal taxes or assessments, or by adverse possession.

The premises above described are sold subject to zoning ordinances, if any.

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

30 And it is hereby agreed by and between the parties hereto that in case any sewer or street improvements are made, or have been made, upon which the property mentioned herein is located, up to the time of delivery of deed, but not assessed such assessment shall be borne by the party of the first part, his heirs, executors, administrators and assigns.

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

In Witness Whereof, the said parties have here-

Exhibit P-1.

unto interchangeably set their hands and seals the day and year first above mentioned.

JESSE KIMMEL (L.S.)

LUCY B. KEYES (L.S.)

JAS. E. KEYES (L. S.)

Signed, Sealed and Delivered
in the presence of
Burnett Berry.

10

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

Be it Remembered, that on this 4th day of August, in the year of our Lord One Thousand Nine Hundred and twenty eight, before me, the subscriber, an attorney at law of N. J. personally appeared Jesse Kimmel, Lucy B. Keyes and James E. Keyes, her husband, 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.

20

An Atty at Law of N. J.

30

Endorsed—Contract for Sale of Property. Jesse Kimmel to Lucy B. Keyes and James E. Keyes, her husband. Dated Aug. 4th, 1928.

40

Exhibit P-2.

Morris M. Spindel

Barnett Berr

Law Offices

SPINDEL AND BERR

68 Lexington Avenue

Cor. Monroe St.

Passaic, N. J.

10

Telephone 9069.

August 14th, 1929.

Kimmel & Kimmel, Esqs.,
Romaine Building,
Paterson, New Jersey.

Re: Lucy B. Keyes Mortgage

Gentlemen:

20 This is to advise you for the second time that the mortgage now held by the estate of Joseph Steinberg, for which mortgage is due and being called in for payment by the mortgagee, unless additional charges of Four Hundred (\$400.00) Dollars are paid to the attorneys representing the estate.

30 Of course you realize that under our contract any amount over and above One Hundred and Fifty (\$150.00) Dollars for the renewal or replacement of the mortgage is to be paid for by you. Unless within three days from the date of this letter you inform us that you can replace the said mortgage for a lesser amount we shall authorize without further delay the attorneys for the estate of Joseph Steinberg to proceed to close the transaction pertaining to the renewal of the said mortgage, and we shall hold you liable for the difference between One Hundred and Fifty (\$150.00)

40

Exhibit P-2.

Dollars and Four Hundred (\$400.00) Dollars in accordance with our contract with you.

Yours very truly,

SPINDEL AND BERR.

P. S.

Kimmel vs. Keyes.

10

In the above matter we have filed our venire for a Jury trial and have been informed that Jury trials will not be tried until September.

Please advise us what date is convenient to you in September as this case must be tried then.

SPINDEL AND BERR.

Exhibit P-3.

20

No. 2054

Passaic, N. J. Dec 9th 1929

PASSAIC NATIONAL BANK AND TRUST
COMPANY

Passaic, N. J.

Pay to the order of

Lichtman, Steinberg and Lieberman \$400.00/100
Four Hundred and No/100 Dollars

LUCY B. KEYES. 30

Endorsed—Legal services in re extension of 1st mortgage on West Englewood property.

Lichtman, Steinberg & Lieberman, Attys.

40

Exhibit P-4.

LICHTMAN, STEINBERG & LIEBERMAN

Attorneys at Law

Katz Building, 160 Market Street
Paterson, N. J.

Gabriel Lichtman
Samuel Steinberg
Milton N. Lieberman

Telephone
Sherwood 7585

10

Dec 9—1929

Received of Lucy B. Keyes the sum of Four hundred (\$400.00) for services rendered in mortgage from said Lucy B. Keyes to Herman Levine, executor of the Estate of Joseph L. Steinberg, deceased.

SAMUEL STEINBERG.

20

Exhibit P-5.

This Agreement Made the ninth day of December, in the year One Thousand Nine Hundred and Twenty-nine

Between Lucy B. Keyes and James E. Keyes, her husband, party of the first part, and Herman Levine, executor of the estate of Joseph L. Steinberg, deceased, party of the second part

30

Whereas, the party of the second part holds the bond of David Kimmel and Jesse Kimmel bearing date, the Ninth day of June, One thousand Nine Hundred and Twenty six, conditioned for the payment of the principal sum of Twelve Thousand (\$12000.00) dollars, on the Ninth day of June, one thousand nine hundred and twenty-nine, and the interest thereon, together with a mortgage securing payment thereof, made and executed by the said David Kimmel and Jesse Kimmel, bearing

40

Exhibit P-5.

even date with said bond, and recorded in the office of the Clerk of the County of Bergen, in the State of New Jersey, on the ninth day of June, one thousand nine hundred and twenty-six in Liber 843 of Mortgages, at page 659 &c.

And Whereas, the said party of the first part is now the owner of the premises described in the said mortgage and has requested that the time of payment of the said principal sum of Twelve Thousand (\$12000.00) dollars, secured to be paid thereby, be extended for two years from the Ninth day of June, one thousand nine hundred and twenty-nine. 10

Now this Agreement Witnesseth, that the said party of the second part, in consideration of the premises and of one dollar to him in hand paid by the said party of the first part, agrees to extend the time of payment of the said principal sum of Twelve Thousand (\$12000.00) dollars, to the Ninth day of June, which will be in the year one thousand nine hundred and thirty-one. 20

Provided, that the said interest thereon according to the tenor of the said bond or obligation, is punctually paid semi-annually, on the Ninth day of December in each and every year until said principal sum is fully paid; all terms and conditions of said bond and mortgage to remain in full force and effect, except as the same may be herein modified. 30

And Provided Further, that nothing herein contained shall in anywise impair the security now held for the said debt. And the said party of the first part agrees to the extension of the time of payment of the principal of said bond hereinbefore stated, and for their heirs, executors and administrators hereby covenant to pay the same on 40

Exhibit P-5.

the Ninth day of June one thousand nine hundred and thirty-one and to pay the interest thereon on the days on which the same becomes due, as hereinbefore mentioned.

10 And it is further Mutually Agreed, that should the said interest, or any part thereof, remain due and unpaid for the space of thirty days, or should any tax or assessment remain due and unpaid for the space of sixty days after the same shall have become due and payable, then the whole of the said principal sum shall, at the option of the said party of the second part, or of his successors or assigns, become due and payable immediately thereafter, anything hereinbefore stated to the contrary notwithstanding.

20 In Witness Whereof, the parties hereto have hereunto set their respective hands and seals the day and year first above written.

LUCY B. KEYES (L.S.)
 JAMES E. KEYES (L.S.)
 HERMAN LEVINE (L. S.)
 Executor of the estate of
 Joseph L. Steinberg, deceased.

Signed, Sealed and Delivered
 30 in the presence of
 Samuel Steinberg.

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

40 Be it Remembered, That on this ninth day of December, in the year of our Lord One Thousand Nine Hundred and Twenty-nine, before me, the subscriber, an attorney at law of New Jersey, personally appeared Lucy B. Keyes, James E. Keyes

Exhibit P-5.

and Herman Levine, who, I am satisfied, are the parties 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.

10

SAMUEL STEINBERG,
An attorney at law of N. J.

Endorsed—Extension of Mortgage. Lucy B. and James E. Keyes, her husband to Herman Levine, executor of estate of Joseph L. Steinberg, deceased. Dated, Dec. 9, 1929. Received in the Clerk's Office of the County of Bergen N J on the 11 day of Dec A. D., 1929, at 9.40 o'clock, in the forenoon and recorded in Book 106 of Mortgages for said County, on page 6 &c.

20

James W. Mercer, County Clerk.

30

40

Exhibit P-6.

LICHTMAN, STEINBERG & LIEBERMAN
Attorneys at Law
Katz Building, 160 Market Street
Paterson, N. J.

Gabriel Lichtman Telephone
Samuel Steinberg Sherwood 7585
Milton N. Lieberman

10 August 21, 1929.

Mrs. Lucy B. Keyes,
72 Grove Street,
Passaic, New Jersey.

Dear Madam:

In reply to your last letter, please be informed
that the term of the new mortgage will be for two
years, and not three years as stated to you by Mr.
Ebright.

20 If this is satisfactory, kindly send me your
written authorization to proceed.

Very truly yours,

LICHTMAN, STEINBERG & LIEBERMAN,
By Samuel Steinberg.

SS:EJ

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40

Exhibit P-7.

LICHTMAN, STEINBERG & LIEBERMAN

Attorneys at Law

Katz Building, 160 Market Street

Paterson, N. J.

Gabriel Lichtman

Telephone

Samuel Steinberg

Sherwood 7585

Milton N. Lieberman

September 18, 1929. 10

Mrs. Lucy B. Keyes,

72 Grove Street,

Passaic, New Jersey.

Re: Estate of Joseph L. Steinberg, deceased.

Dear Madam:

In accordance with an arrangement made by your agent, Mr. Edright, you were to be at my office between 2:30 P. M. and 3:00 P. M., Saturday, September 14th, to close the matter of extending the mortgage held by Herman Levine, as executor of the above estate, on your property. The appointment was not kept, and I was not notified of its cancellation. 20

Mr. Levine desires to have this matter completed very soon. Will you, therefore, inform me when you can be here to close it.

Very truly yours,

30

LICHTMAN, STEINBERG & LIEBERMAN,

By Samuel Steinberg.

SS:EJ

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Exhibit 8.

LICHTMAN, STEINBERG & LIEBERMAN
Attorneys at Law
Katz Building, 160 Market Street
Paterson, N. J.

Gabriel Lichtman Telephone
Samuel Steinberg Sherwood 7585
Milton N. Lieberman

10

August 5, 1929.

Mrs. Lucy B. Keyes,
72 Grove Street,
Passaic, New Jersey.

Re: Estate of Joseph L. Steinberg, deceased.

Dear Madam:

20

I represent Herman Levine, executor of the estate of Joseph L. Steinberg, deceased, who holds a mortgage for \$12000.00 on property in the Township of Teaneck which was purchased by you from David and Jesse Kimmel. This mortgage fell due on June 9, 1929 and has not been paid.

I may be able to obtain a new mortgage for you for a period of two years, if you so desire. My commission for obtaining this mortgage or renewal will be \$400.00, which includes all services for legal, search and filing fees, and drawing a new bond and mortgage.

30

Will you kindly let me know at your earliest convenience whether you would want a new mortgage on these terms.

Very truly yours,

LICHTMAN, STEINBERG & LIEBERMAN,
By Samuel Steinberg.

SS:EJ

40

Exhibit D-1.

This Indenture, Made the 1st day of September in the year of our Lord One Thousand Nine Hundred and twenty eight

Between Lucy B. Keyes and James E. Keyes, her husband, both of the City of Passaic in the County of Passaic and State of New Jersey, party of the first part, hereinafter known as the Mortgagor, 10

And Jesse Kimmel, single, of the City of Paterson, in the County of Passaic and State of New Jersey, party of the second part, hereinafter known as the Mortgagee,

Witnesseth, that the said mortgagor, for and in consideration of the sum of Sixty five hundred (\$6500.00) Dollars, lawful money of the United States of America, to her in hand well and truly paid by the mortgagee at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said mortgagor therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, enfeoff, convey and confirm to the said mortgagee and to her heirs and assigns, 20

All those lots, tracts or parcels of land and premises hereinafter particularly described, situate, lying and being in the Township of Teaneck in the County of Bergen and State of New Jersey, 30

BEGINNING at a point in the southerly side of West Englewood Avenue, and in the easterly line of land conveyed by the Estate of William Walter Phelps to the Hackensack Coal and Lumber Company, by deed dated Dec. 20th, 1921 and recorded in Deed Book 1143, page 80, said point being distant three hundred and fourteen (314) feet and 40

Exhibit D-1.

eighteen hundredths (.18) of a foot on the course
 of North fifty three (53) degrees, seventeen (17)
 minutes, and fifty (50) seconds West from a stone
 monument in the corner formed by the westerly
 side of Westfield Avenue and the southerly side
 of West Englewood Avenue, and running thence
 10 (1) from said beginning point along the said
 easterly line of the Hackensack Coal and Lumber
 Company, south forty four (44) degrees and forty
 one minutes west one hundred and twenty five
 feet; thence (2) south fifty three degrees, seven-
 teen minutes and fifty seconds East fifty feet;
 thence (3) north, forty four degrees and forty one
 minutes east one hundred and twenty five feet to
 the southerly side of West Englewood Avenue;
 and thence (4) along the southerly side of West
 20 Englewood Avenue north fifty three degrees sev-
 enteen minutes and fifty seconds west fifty feet
 to the point or place of beginning.

The mortgage hereby subrogates the within
 mortgage to any first mortgage in the sum of \$12,-
 000.00 either existing on the premises in question
 presently or to be subsequently placed thereon.

Together with all and singular the profits, priv-
 ileges and advantages, with the appurtenances to
 the same belonging or in anywise appertaining.
 30 Also all the estate, right, title, interest, property,
 claim and demand whatsoever of the mortgagor
 of, in and to the same, and of, in and to every part
 and parcel thereof,

To Have and to Hold, all and singular the above
 described tracts or lots of land and premises with
 the appurtenances, unto the said mortgagee, his
 heirs and assigns, to the only proper use, benefit
 and behoof of the said mortgagee, his heirs and
 40 assigns forever. Provided always, and it is agreed

Exhibit D-1.

by and between the parties to these presents that if the said mortgagor, her heirs and assigns does and shall well and truly pay, or cause to be paid, to the said mortgagee, his heirs and assigns the sum of Sixty five hundred (\$6500.00) Dollars as follows: Two hundred (\$200 00) Dollars on account of the principal sum of said mortgage, payable quarter annually—balance to be due and payable Sept. 1st, 1931, with lawful interest thereon from the 1st day of September 1928, at the rate of six per cent. per annum, payable quarter annually according to the conditions of a certain bond (the terms, covenants and conditions, and all matters and things contained in said bond being hereby made a part hereof as though particularly incorporated herein), bearing even date herewith, in the penal sum of Thirteen thousand (\$13,000.00) Dollars, made by said Lucy B. Keyes and James E. Keyes without any deduction or defalcation for taxes, assessments, or any other imposition whatsoever, thence and from thenceforth these presents and said obligation shall cease and be void, anything herein and therein contained to the contrary in anywise notwithstanding.

It is agreed that any portion of the above described premises may be released from the lien of this mortgage upon payment of such sum or sums as may be acceptable to the holder hereof.

And the said Mortgagor, for herself, her heirs and assigns does covenant and grant to and with the said mortgagee, his heirs and assigns that she shall not nor will claim or demand or be entitled to receive any credit or credits on the interest payable hereon, or on the moneys to secure payment of which this mortgage is made, for any taxes assessed against said lands.

Exhibit D-1.

And the Mortgagor, hereby warrants and defends the title to the said lands and premises.

10 The mortgagor shall and will keep the buildings erected and to be erected, upon the lands above conveyed insured against loss or damage by fire by insurers, through such broker or brokers selected and in an amount approved by the mortgagee, and assigns, and assign the policy or policies and certificate or certificates thereof to the mortgagee, his heirs and assigns, as collateral security for the payment of the principal and interest aforesaid; and it is agreed that if the mortgagor, her heirs and assigns, shall neglect to pay all or any tax, assessment or other municipal or governmental rate, charge, imposition, or any installment or installments of monthly Building Loan dues and
20 interest or any sums payable under any lien superior hereto, or any premium for insurance, as aforesaid, on any day whereon the same shall become due and payable, then it shall be lawful for the mortgagee, his heirs and assigns, to pay such charges, and the sum or sums so paid shall be a lien on the said mortgaged premises added to the amount secured hereby, with interest at six per cent. per annum, and, in the event of such payment, at the option of the mortgagee, his heirs or
30 assigns, the principal sum secured hereunder shall become immediately due and payable, and the mortgagor agrees that if default be made in the payment of any installment of principal or of the said interest, or any part thereof, on any day whereon the same is made payable as hereinbefore expressed, and should the same remain unpaid and in arrears for the space of thirty days, or if default be made in the payment of any of said
40 taxes, water rents or other municipal or govern-

Exhibit D-1.

mental rate, charge, imposition or any money payable under the terms of any mortgage lien paramount hereto, on any day whereon the same shall become due and payable, and should the same remain unpaid and in arrears for the space of thirty days, or in the event that any building shall be demolished or removed from the mortgaged premises (or if the removal or demolition thereof is threatened) without the consent in writing of the mortgagee or holder of this mortgage, or in the event that the owner of the mortgaged premises shall fail, within ten days after written request therefor, to furnish a statement of the amount due and owing for principal and interest hereunder, or evidence of the payment of taxes, water rents, interest and principal of prior mortgages or any carrying charges, or in the event that default be made in any of the terms, covenants and conditions herein contained, or contained in any mortgage constituting a lien upon the mortgaged premises prior and superior to the lien hereof, or should any action be commenced to foreclose any such prior mortgage, or should the owner of the mortgaged premises fail, for a period of thirty days, to begin compliance with any requirements, recommendation or recommendations of any of the Departments or authority of the State of New Jersey, or the municipality where such mortgaged premises are situate, such municipality or State Department or authority having jurisdiction over the mortgaged premises, or in the event of the adjudication in bankruptcy or insolvency of the mortgagor or the owner of the mortgaged premises, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case

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Exhibit D-1.

may be, the aforesaid principal sum of money, with all arrearages of interest thereon, and any other charges paid by the holder of this mortgage, shall, at the option of the mortgagee and assigns, become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired,
 10 anything hereinbefore contained to the contrary hereof in anywise notwithstanding.

And the said mortgagor agrees that the said mortgagee, his heirs or assigns shall and may, from time to time, and at all times after default shall be made in the performance of the proviso or condition herein contained, peaceably and quietly enter into, have, hold, use, occupy, possess
 20 and enjoy all and singular the above granted and bargained premises, with the appurtenances, without the let, suit, trouble hindrance or denial of the said mortgagor, her heirs or assigns, or of any other person or persons whatsoever.

And the said mortgagor agrees that if default shall be made, as aforesaid, the mortgagee, his heirs and assigns, shall have the right forthwith, after any such default, to enter upon and take possession of the said mortgaged premises, and to let the said
 30 premises, and receive the rents, issues and profits thereof, and to apply the same, after payment of all necessary charges and expenses, on account of the amount hereby secured, and said rents and profits are, in the event of any such default, hereby assigned to the mortgagee, his heirs and assigns and the mortgagee, his heirs and assigns shall also be at liberty immediately after any such default, upon proceedings being commenced for the fore-
 40 closure of this mortgage or any other mortgage on said premises to apply for the appointment of

Exhibit D-1.

a receiver of the rents and profits of the said premises, and be entitled to the appointment of such receiver as a matter of right, as security for the amounts due the mortgagee, his heirs & assigns without consideration of the value of the mortgaged premises or solvency of any person or persons liable for the payment of such amounts. 10

And it is agreed that the said Mortgagor shall and will keep the building or buildings and improvements now on said premises or that may hereafter be erected thereon, in good and substantial repair. Upon failure so to do, the whole indebtedness secured and represented by this mortgage and bond accompanying same shall, at the option of the mortgagee, become due and payable, and also the said mortgagee may enter upon the premises and repair and keep in repair the same, and the expense thereof shall be added to the principal sum secured hereby with legal interest. 20

All of the covenants and conditions herein contained shall be for the benefit of and bind the heirs, executors, administrators, successors and assigns of the respective parties hereto.

In Witness Whereof the said mortgagors have hereunto set their hands and seals the day and year first above written. 30

LUCY B. KEYES (L.S.)
JAMES E. KEYES (L.S.)

Signed, Sealed and Delivered
in the presence of
David Kimmel.

Exhibit D-1.

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

10 Be it Remembered, That on this 1st day of Sept. in the year of our Lord One Thousand Nine Hundred and Twenty eight, before me the subscriber, an attorney at law of N. J., personally appeared Lucy B. Keyes and James E. Keyes, her husband, who, I am satisfied, are the persons mentioned in the within lease, 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.

DAVID KIMMEL,
 An Atty at Law of N. J.

20 Endorsed: Mortgage. Lucy B. Keyes and James E. Keyes, her husband to Jesse Kimmel, single. 137163. Received in the Clerk's Office of the County of Bergen, N. J. on the 5 day of Sept A. D., 1928, at 11.42 o'clock in the forenoon and Recorded in Book 1094 of Mortgages for said County, 134 &c on page
 James W. Mercer, County Clerk.

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Exhibit D-2.

40 Know All Men by these Presents, That Jesse Kimmel of the City of Paterson in the County of Passaic and State of New Jersey, party of the first part; in consideration of the sum of Sixty one hundred (\$6100.00) Dollars, lawful money of the United States of America, to him in hand paid by Morris Botwick of the City of Paterson in the County of Passaic and State of New Jersey, party

Exhibit D-2.

of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred and set over and by these presents does grant, bargain, sell, assign, transfer and set over unto the said party of the second part, his heirs, Executors, Administrators or Assigns a certain Indenture of Mortgage bearing date the 1st day of September One Thousand Nine Hundred twenty eight, made by Lucy B. Keyes and James E. Keyes, her husband to Jesse Kimmel, single, on lands in Township of Teaneck, Bergen County, N. J. to secure the payment of the sum of Sixty five hundred (\$6500.00) Dollars, which mortgage is recorded in the Clerk's office of the County of Bergen in Book 1094 of Mortgages, pages 134 &c. 10 20

Together with the bond or obligation therein described, and the money due and to grow due thereon, with interest. To Have and to Hold the same unto the said party of the second part, his heirs or assigns forever, subject only to the proviso in the said Indenture of Mortgage mentioned: And I do hereby make, constitute, and appoint the said party of the second part my true and lawful attorney, irrevocable, in my name, or otherwise, but at his proper costs and charges, to have, use and take all lawful ways and means for the recovery of all the said money and interest; and in case of payment, to discharge the same as fully as I might or could do if these presents were not made: I do hereby covenant, promise and agree, to and with the said party of the second part, that there is now due and owing upon the said Bond and Mortgage the sum of Sixty one hundred (\$6100.00) Dollars, principal and interest thereon to be com- 30 40

Exhibit D-2.

puted at the rate of six per centum per annum from the 1st day of March 1929.

In Witness Whereof, I have hereunto set my hand and seal the 26th day of March, in the year of our Lord one thousand nine hundred and twenty nine.

10

JESSE KIMMEL (L.S.)

Signed, Sealed and Delivered
in the Presence of
Morris F. Levin.

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

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Be it Remembered, That on this 26th day of March in the year of our Lord One Thousand Nine Hundred and twenty nine, before me, the subscriber, an Attorney at Law of N. J., personally appeared Jesse Kimmel who, I am satisfied, is the person mentioned in the within Instrument, 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.

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MORRIS F. LEVIN,
An Attorney at Law of N. J.

Endorsed—Assignment of Mortgage. Jesse Kimmel to Morris Botwick. Dated March 26th, 1929. Received in the Clerk's Office of the County of Bergen N J in the 27 day of March A. D. 1929, at 2.19 o'clock, in the afternoon and Recorded in Book 190 of Assignments of Mortgages for said County, on page 525 &c.

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James W. Mercer, County Clerk.

Opinion of Supreme Court.

Filed May 25, 1931.

NEW JERSEY SUPREME COURT.

No. 403. OCTOBER TERM, 1930.

LUCY B. KEYES and JAMES E.
KEYES, her husband,
Plaintiffs-Respondents,

vs.

JESSE KIMMEL,
Defendant-Appellant.

10

Submitted October Term, 1930. Decided May
25, 1931.

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On appeal from Second District Court of Paterson.

Before Justices CASE, DALY and DONGES.

For plaintiffs-respondents, SPINDEL & BERR.

For defendant-appellant, KIMMEL & KIMMEL.

Per Curiam.

Defendant appeals from a judgment of \$250.00 rendered against him in the Second District Court of Paterson. On an exchange of properties between the parties an agreement in writing was made by and between the defendant as party of the first part and the plaintiffs as party of the second part, wherein it was provided, with respect to a first mortgage of \$12,000.00 then on the premises conveyed out by the defendant, as follows:

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“It is agreed, however, that in the event that said first mortgage aforementioned is

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Opinion of Supreme Court.

called in and the full amount of the principal demanded by the mortgagees at any time prior to the expiration of three years from the date hereof, then and in such event the party of the first part does hereby agree to secure and place a new first mortgage on the premises, not less than \$12,000.00, to take place of the first mortgage aforementioned and agrees to pay all expenses for acquiring the same and in connection therewith. It being however understood that in the event such substitution of first mortgage shall become necessary, that the party of the second part shall and will upon said substitution taking place, pay over to the party of the first part the sum of \$150.00 in cash and nothing more.”

Subsequently the holder of the mortgage, after the due date but before the expiration of the three year period above mentioned, demanded payment. Due notice was served upon the defendant requiring him to comply with his contractual obligation. He failed to comply and because of that failure the plaintiffs, at a cost of \$400.00, succeeded in procuring a continuation of the existing mortgage. Their suit is to recover that sum as damages for defendant's default. The verdict of \$250.00 represents the disbursement of \$400.00 less \$150.00 which, under the contract, would have become due the defendant had he performed the required service.

Defendant's first point on the appeal is that the court below erred in refusing to direct a verdict for the defendant. Thereunder he argues that because Lucy B. Keyes did not file a set off or counterclaim in another District Court action that was

Opinion of Supreme Court.

brought against her by the defendant and that was tried October 25, 1929, she is barred by sections 60 and 61 of the District Court act (section 60 as amended by chapter 271, P. L. 1927, page 499, and section 61 as amended by chapter 132, P. L. 1922, page 231) from prosecuting the present action. It is not clear that the defendant's breach was complete or that the damage therefrom had been suffered at the time of the first action. That action, moreover, was by the defendant against Lucy B. Keyes alone. The present action, and the right upon which it proceeds, is by and in Lucy B. Keyes and James E. Keyes. Joint and separate debts cannot be set off against each other. *Reveruzzi vs. Caruso*, 86 N. J. L. 556. It is further contended that the \$400.00 charge was unreasonable; but the disbursement was actually made and we do not consider that the refusal to direct a verdict was erroneous on this point. The final contention under this heading is that no breach of contractual obligation was shown. The duty of the defendant arose, under the wording of the contract, "in the event that the first mortgage aforementioned is called in and the full amount of the principal demanded." Webster's New International Dictionary defines the word "call", in this use, to be "to demand-payment of, especially by formal notice; as, to call a bond". We think that the demand for payment was sufficiently in the proof to make the question one of fact and not of law. We find no error in the refusal to direct a verdict.

It is unnecessary to review the remaining points further than they are met by the foregoing observations.

Judgment below is affirmed, with costs.

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Order Affirming Judgment.

Filed June 12, 1931.

NEW JERSEY SUPREME COURT.

10	LUCY B. KEYES and JAMES E. KEYES, her husband, Plaintiffs-Respondents, vs. JESSE KIMMEL, Defendant-Appellant.	}	On Appeal from the Second District Court of Paterson.
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20 This cause having been submitted at the October Term of this court by Kimmel & Kimmel, Attorneys for the defendant-appellant and Messrs. Spindel & Berr, Attorneys for plaintiff respectively, and the court having inspected the transcript of the records of the District Court and having considered the arguments of counsel as submitted in the briefs filed in the within matter and the arguments presented by counsel orally and having duly considered the cause assigned for error;

30 It is thereupon ORDERED, that the judgment of the said Second District Court of Paterson be in all things affirmed with costs to be taxed; and that the record and proceedings be remitted to the Second District Court of Paterson to be proceeded with in accordance with this judgment and the practice of said court.

Entered June 12, 1931.

40 On motion of
 SPINDEL & BERR,
 Attorneys for Plaintiff-Respondents.

**Notice of Appeal to New Jersey Court of Errors
and Appeals.**

Filed June 26, 1931.

NEW JERSEY SUPREME COURT.

LUCY B. KEYES and JAMES E.
KEYES, her husband,
Plaintiffs-Respondents,

vs.

JESSE KIMMEL,
Defendant-Appellant.

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Action at Law.

Notice
of Appeal.

To: SPINDEL & BERR,
Attorneys of Plaintiffs-Respondents.

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Sirs:

Take Notice that the defendant-appellant ap-
peals from the whole of the judgment entered in
this cause to the New Jersey Court of Errors and
Appeals in the last resort in all causes.

Dated: June 22nd, 1931.

KIMMEL & KIMMEL,
Attorneys of Defendant-Appellant.

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Grounds of Appeal.

Filed June 26, 1931.

NEW JERSEY COURT OF ERRORS AND APPEALS.

10	LUCY B. KEYES and JAMES E. KEYES, her husband, Plaintiffs-Respondents, vs. JESSE KIMMEL, Defendant-Appellant.	}	Action at Law. Grounds of Appeal.
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20 To: SPINDEL & BERR,
 Attorneys of Plaintiffs-Respondents.

Sirs:

Take Notice that the defendant-appellant hereby assigns the following as the Grounds of Appeal upon which the defendant-appellant will rely upon in this cause:

- 30 1. The Supreme Court affirmed the judgment, whereas for one or more of the grounds filed in the Supreme Court, that court should have reversed the judgment.

Dated: June 22nd, 1931.

KIMMEL & KIMMEL,
Attorneys for Defendant-Appellant.

Recognizance.

Filed June 26, 1931.

NEW JERSEY SUPREME COURT.

<p>LUCY B. KEYES and JAMES E. KEYES, her husband, Plaintiffs-Respondents,</p> <p style="text-align: center;">vs.</p> <p>JESSE KIMMEL, Defendant-Appellant.</p>	}	<p>10</p> <p>On Appeal.</p> <p>Recognizance.</p>
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Be it Remembered that on the 25th day of June, 1931 personally appeared before me, Frederick W. Van Blarcom, one of the commissioners appointed by the Supreme Court to take recognizance of bail, Jesse Kimmel, David Kimmel and Lena Kimmel of Keyes and James E. Keyes her husband the sum of Seven Hundred (\$700.00) Dollars to be made and levied on their and each of their goods and chattels, lands and tenements, hereditaments and real estate to the use of the said Lucy B. Keyes and James E. Keyes, their executors, administrators and assigns if failure be made in the following condition:

Whereas, said Jesse Kimmel has taken an appeal to the New Jersey Court of Errors and Appeals from the Supreme Court of Judicature to remove a certain judgment obtained by said Lucy B. Keyes and James E. Keyes her husband, in an action in the said Supreme Court as appears of record in the said Supreme Court,

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Recognizance.

Now, therefore, the condition of this recognizance is such, that the said Jesse Kimmel, appellant in said appeal shall prosecute the said appeal with effect, and also pay and satisfy (if the said judgment be affirmed) all the damages and costs adjudged in the former judgment and costs and
 10 damages to be awarded for delay under execution, then this recognizance to be void, else to remain in full force.

JESSE KIMMEL (L.S.)
 DAVID KIMMEL (L.S.)
 LENA KIMMEL (L.S.)

Taken and acknowledged the
 25th day of June 1931

Frederick W. Van Blarcom,
 20 Supreme Court Commissioner appointed by the Supreme Court to take recognizance of bail.

The within bond and the sureties thereto are hereby approved of.

FREDERICK W. VAN BLARCOM,
 Supreme Court Commissioner.

The defendant-appellant having entered into
 30 recognizance agreeably to the statute in such cases made and provided, it is ordered that further proceedings be stayed on the judgment in the Supreme Court and in the original action until the said appeal now depending between the parties be determined.

FREDERICK W. VAN BLARCOM,
 Supreme Court Commissioner.

New Jersey Court of Errors and Appeals

LUCY B. KEYES and JAMES E.
KEYES, her husband,
Plaintiffs-Respondents,

vs.

JESSE KIMMEL,
Defendant-Appellant.

On Appeal
from Supreme
Court.

BRIEF OF DEFENDANT-APPELLANT.

Statement of the Case.

This appeal brings up for review a judgment of the Supreme Court, affirming the judgment of the Second District Court of the City of Paterson on appeal.

The sole ground of appeal in this court is that the Supreme Court affirmed the judgment whereas for one or more of the grounds filed in the Supreme Court (pp. 4-6) that court should have reversed the judgment (p. 126).

The action was based on a provision contained in a contract of exchange of real estate between Jesse Kimmel, party of the first part and Lucy B. Keyes party of the second part (Exhibit P-1, pp. 93-101), Jesse Kimmel giving a piece of real estate situate in Teaneck, New Jersey and receiving from Lucy B. Keyes, a piece of real estate situate in Passaic, New Jersey.

James E. Keyes was joined in the contract since he was husband of Lucy B. Keyes for the single

and exclusive purpose of cutting off his curtesy right. (p. 76, ll. 33-40). Lucy B. Keyes had title in her sole name to the property which she exchanged and took title in her sole name to the property which she received in exchange (p. 33, ll. 11-15, p. 76, l. 33 to p. 77, l. 13). Lucy B. Keyes referred to the transaction as a contract that *she* made with Jesse Kimmel (p. 17, ll. 9-11).

Lucy B. Keyes, the plaintiff, had assumed payment of a first mortgage of \$12,000.00 on the Tea-neck property, the property she was receiving in exchange, as part of the bargain and it was referring to this mortgage that the contract provision sued on provided:

“It is agreed, however, that in the event that said first mortgage aforementioned is called in and the full amount of the principal demanded by the mortgagees at any time prior to the expiration of three years from the date hereof, then and in such event the party of the first part (Jesse Kimmel) does hereby agree to secure and place a new first mortgage on the premises, not less than \$12,000.00 to take the place of the first mortgage aforementioned and agrees to pay all expenses for acquiring the same and in connection therewith. It being however understood and agreed that the party of the second part (Lucy B. Keyes) shall and will upon the said substitution taking place, pay over to the party of the first part the sum of \$150.00 in cash and nothing more,” (Parenthetical insertions ours). (See the contract Exhibit P-1, p. 95, l. 32 to p. 96, l. 10 and see the provision set out in the identical language in the plaintiff’s state of demand, p. 10, ll. 12-32).

The \$12,000.00 mortgage referred to in this provision is still in force and effect to this day having been extended by the mortgagee, Herman Le-

vine, executor of the estate of Joseph L. Steinberg, deceased. (See the extension agreement. Exhibit P-51, pp. 104-107). *For legal services in connection with the drawing of this extension Lucy B. Keyes paid and allowed herself to be charged \$400.00 to Lichtman, Steinberg and Lieberman attorneys.* (p. 28, l. 30 to p. 29, l. 5; p. 57, ll. 17-20; and see the check Lucy B. Keyes gave in payment for these legal services, Exhibit P-3, p. 103, ll. 20 to bottom). This extension was given to complete the record but no new first mortgage was required or in fact executed.

Three members of the bar, Jesse Kimmel, the defendant, A. M. Kolbright and Samuel Rosenfeld, testified that the services rendered in extending the mortgage were reasonably worth from \$125.00 to \$150.00 and no more (p. 72, ll. 12-17; p. 85, ll. 10-20; p. 88, ll. 10-21). *This testimony was not in any way contradicted or impeached.*

On July 12, 1929 Jesse Kimmel the present defendant had sued Lucy B. Keyes, the present plaintiff in the First District Court of the City of Paterson for breach of an agreement by Lucy B. Keyes to occupy the property in Passaic which by the contract here sued upon she had exchanged to Jesse Kimmel, as tenant for several years. That suit was tried on October 25, 1929 (p. 66, ll. 25-37). Lucy B. Keyes did not in that case file a set-off or counterclaim for the claim on which the present suit was brought (p. 67, ll. 10-11). Later on in this brief we will show that the contract was never breached by the defendant as he was never under a legal obligation to perform any act, but assuming plaintiff's contention for the moment to be true, the alleged breach if ever there was one, occurred upon the defendants failure in response to plaintiff's written demand to take care of the extension of the mortgage within three days from

August 14, 1929 long before the case between the parties in the First District Court of Paterson was tried on October 25, 1929 (See the letter of Lucy B. Keyes attorneys, written by her instructions on August 14, 1929. Exhibit P-2, pp. 102-103; also the testimony of plaintiff p. 20, ll. 17 to p. 24, l. 36). On August 14, 1929 the plaintiff knew definitely that she was going to pay \$400.00 for the legal services (p. 33, ll. 3-9).

The present suit was brought to recover the sum of \$400.00 paid and allowed to be charged for the legal services.

The judge gave judgment against the defendant for \$250.00 deducting the \$150.00 provided for in the contract. (p. 92, ll. 1-4; p. 96, ll. 2-10).

ARGUMENT.

POINT ONE.

The Court below erred in refusing to direct a verdict for the defendant on defendant's motion at the close of the whole case. Specification of determination with which appellant is dissatisfied in point of law, number 6, p. 5, l. 39 to page 6, l. 2); motion and exception (p. 88, l. 39 to p. 91 bottom).

At the close of the whole case the defendant made a motion for the direction of a verdict in his favor (p. 88, l. 39 to p. 91 bottom). The motion was made on three grounds, to wit: (a) that Lucy B. Keyes not having filed a set-off or counterclaim in the previous suit between her and Jesse Kimmel, she was barred from maintaining the present action under sections 60 and 61 of the District

Court Act; (b) that the four hundred dollar charge for legal services in drawing up the extension agreement was uncontradictedly shown to be unreasonable, and \$150.00 having without contradiction been shown to be the maximum reasonable charge, no recovery could be had against the defendant, giving the defendant the benefit of the \$150.00 allowance provided for in the contract; (c) that since the mortgage had been extended, the contract stipulation in question by its very language had not been breached, no mortgage having been required.

(A) Lucy B. Keyes not having filed a set-off or counterclaim in the previous suit between her and the defendant, she was barred from maintaining the present action under sections 60 and 61 of the District Court Act.

On July 12th, 1929 Jesse Kimmel, the present defendant sued Lucy B. Keyes, the present plaintiff, in the First District Court of Paterson for breach of an agreement by Lucy B. Keyes to occupy the property in Passaic which by the contract here sued upon, she exchanged to Jesse Kimmel as tenant (p. 66, ll. 25-37). James E. Keyes was joined in the contract involved herein, in the character of husband of Lucy B. Keyes (p. 93, ll. 10-11), for the sole purpose of cutting off his curtesy right which he had in the property which Lucy B. Keyes gave in exchange (p. 76, ll. 33-40). Lucy B. Keyes took title in her own name to the property which she received by the exchange (p. 33, ll. 11-15; p. 26, l. 33 to p. 77, l. 13). Lucy B. Keyes was the only party in interest outside of Jesse Kimmel in the whole transaction and the fact is that in referring to the transaction her at-

torneys in their letter of August 14, 1929 describe it as "Re: Lucy B. Keyes mortgage" (p. 102, l. 17). Lucy B. Keyes paid and allowed herself to be charged \$400.00 for the legal services rendered in drawing up the extension; see her check (Exhibit P-3, p. 1031, ll. 20 to bottom). The defendant's third specification of defense filed in response to plaintiff's demand for same denied that James E. Keyes ever had any rights by virtue of the contract.

"3. Denies that James E. Keyes has or ever had any rights by virtue of the contract and more particularly with reference to the provision of the contract set forth in paragraph No. 2 of the State of Demand" (p. 8, ll. 35-41).

It will be noted that the parties to the record in this case are "Lucy B. Keyes and James E. Keyes, *her husband*, plaintiffs vs. Jesse Kimmel Defendant" and we have gone into these facts in detail because the Supreme Court in its per curiam held that as the prior action in the First District Court of Paterson was between "Jesse Kimmel, plaintiff vs. Lucy B. Keyes defendant" there was no duty to file a counterclaim in that suit and the prior suit was no bar citing the well known ruling in *Reveruzzi vs. Caruso*, 86 N. J. L. 556 to the effect that joint and separate debts cannot be set off against each other (p. 123, ll. 12-18). In this ruling the Supreme Court overlooked the fact that if anyone had a right of recovery in this suit it was Lucy B. Keyes alone and that James E. Keyes, her husband, had no rights whatsoever in this suit, that in any event in this suit apart from its other phases judgment should have been given against the plaintiff "James E. Keyes her husband" and that the uncontradicted testimony showed:

“Q. And you said further in that clause: ‘And agree that the party of the second part, Mr. and Mrs. Keyes’ A. No. I didn’t mean that, I said ‘Party’ and meant but one party in particular, Mrs. Lucy B. Keyes.

Q. You didn’t say ‘Lucy B. Keyes’ in the clause did you? A. No.

Q. And the party of the second part in this contract is Lucy B. Keyes and Thomas E. Keyes, both of the City of Passaic and County of Passaic? A. *The only reason that Mr. Keyes was made a party was because this was an exchange and we had to cut off his curtesy right.*” (p. 76, ll. 25 to 40).

In other words this was the ordinary case of a spouse being joined in a contract involving real estate for the purpose of cutting off his martial right in the real estate. The contract names the parties “Lucy B. Keyes and James E. Keyes, *her husband*” and “Jesse Kimmel *single*” (p. 93, ll. 6-11). The plaintiff’s attorney drew the state of demand in this case joining “James E. Keyes *her husband*” as plaintiff as a sham device to avoid the failure to file a counterclaim in the former case. Why not continue the analogy and name the defendant as “Jesse Kimmel, *single?*”

It is significant that in the particular contract provision sued upon “the *party* of the second part” (p. 96, ll. 6-7) is referred to and that in the other part of the contract referring to the Passaic property which was to be conveyed by Lucy B. Keyes to Jesse Kimmel “the *parties* of the second part” are referred to (p. 96, l. 11).

We submit that the judgment is erroneous for giving a judgment for “James E. Keyes, *her husband*” at all apart from the other phases of the case, that Lucy B. Keyes and Jesse Kimmel are the only actual parties litigant to this suit as they were in the previous suit and that the doctrine

of *Reveruzzi vs. Caruso* relied upon by the Supreme Court has no application to the case at bar.

The previous suit had been started on July 12, 1929 and tried on October 25, 1929 (p. 66, ll. 25 to bottom). On August 14, 1929 Lucy B. Keyes attorneys wrote a letter to defendant demanding that within three days thereafter the defendant take care of extending the mortgage and that in default thereof they would arrange to have the same done (Exhibit P-2, pp. 102-103 and Exhibit P-3, p. 103). Lucy B. Keyes admitted in open court that this letter was written by her specific instructions and that she knew on August 14, 1929 what she was going to allow herself to be charged for legal services to the penny, namely \$400.00 for services in extending the mortgage (p. 32, l. 35 to p. 33, l. 10). *So it will be seen that two and one half months before the previous case between the parties was tried on October 25, 1929 Lucy B. Keyes knew that the defendant was not going to take care of the extension and exactly to a penny what she was going to pay to have it done.* Having failed to file a counterclaim or set-off in the previous suit, for her alleged claim she was barred from maintaining the present action by sections 60 and 61 of the District Court Act. Those sections provide as follows:

“60. * * * ; and if the defendant have any account, demand or cause of action, he shall be permitted to discount, set-off or counterclaim the same against the account, debt, or demand of such plaintiff, but a copy of his account, demand, or cause of action so intended to be set off, or counterclaim shall be filed with the clerk on or before the time specified for appearance in the process or summons, or *on or before the final hearing*, or, if on a warrant then at the time of the hearing of the cause, and further shall cause a

copy of his account, demand or cause of action so intended to be set-off or counterclaim to be served upon the plaintiff or his attorney at the time of such filing with the clerk; and in default thereof the said account, demand or cause of action, shall not be considered on the trial of said cause; but if the said warrant shall not have been executed three days prior to the hearing, then the said defendant, if he have any account, demand or cause of action to set-off or counterclaim, and will enter into a recognizance as directed in the fifty-first section of this act, shall be allowed further time not exceeding three days, to deliver to the said clerk, such copy of his account, demand or cause of action as aforesaid; and further deliver a copy thereof to the plaintiff or his attorney" Chapter 271, Laws of 1927, page 499.

"61. If any defendant neglect or refuse to deliver a copy of his account, demand or cause of action against such plaintiff, he shall forever thereafter be precluded from having or maintaining any action for such account, demand or cause of action or from setting off or counterclaiming the same in any future suits; or provided, always that where the balance found to be due to said defendant exceeds the sum of three hundred dollars, then the said defendant shall not be precluded from recovering his account, demand or cause of action against such plaintiff in any other court of record having cognizance of the same. Chapter 132, Laws 1922, page 231; Cum. Supp. to Comp. Stats, page 966.

Quite obviously under these statutory provisions, the defendant in any District Court Suit if he has any "account, demand or cause of action" against the plaintiff he may set off or counterclaim

such "account, demand or cause of action" up until "on or before the final hearing" and if he fails to do so he can no longer sue on his claim. The statute is clear; it was designed to prevent the multiplicity of legal controversies and the defendant having failed to file a counterclaim in the previous suit, was barred from maintaining the present action.

The reasoning of the District Court was that Lucy B. Keyes cause of action was not in existence on July 12th, 1929 the return date specified in the summons in the previous suit and that therefore the statute did not apply (p. 89, l. 34 to p. 90, l. 29). *But this ignores the fact that statute in express terms provides for the filing of the set off or counterclaim not only "on or before the time specified for appearance in the process or summons" but also "on or before the final hearing."*

The Supreme Court's per curiam also held that "It is not clear that the defendant's breach was complete or that the damage therefrom had been suffered at the time of the first action" (p. 123, ll. 9-13). In the first place the previous suit was tried on October 25th, 1929. The defendant says that by the proper construction of the contract provision sued upon he never became liable to perform any act as we shall later argue, but assuming for the moment that he did, the contract provision does not fix any time within which he is to secure a new first mortgage. In recognition of this fact, by Lucy B. Keyes direction the following letter was sent to the defendant by her attorneys:

August 14th, 1929.

"Kimmel & Kimmel, Esqs.,
Romaine Building, Paterson, N. J.
Re Lucy B. Keyes mortgage

Gentlemen:

This is to advise you for the second time

that the mortgage now held by the estate of Joseph Steinberg, for which mortgage is due and being called in for payment by the mortgagee unless additional charges of Four Hundred (\$400.00) Dollars are paid to the attorneys representing the estate.

Of course you realize that under our contract any amount over and above One Hundred and Fifty (\$150.00) Dollars for the renewal or replacement of the mortgage is to be paid for by you. *Unless within three days from the date of this letter you inform us that you can replace the said mortgage for a lesser amount we shall authorize without further delay the attorneys for the estate of Joseph Steinberg to proceed to close the transaction pertaining to the renewal of the said mortgage, and we shall hold you liable for the difference between One Hundred and Fifty (\$150.00) and Four Hundred (\$400.00) Dollars in accordance with our contract with you.*

Very truly yours,

SPINDEL & BERR."

Exhibit P-2, pp. 102-103.

The effect of this letter sent at Lucy B. Keyes' direction was to fix a deadline, namely three days from August 14th, 1929 or August 17, 1929 before which the defendant could decide to perform the act demanded by Lucy B. Keyes which fixation of time she had the right to make by the notice, as the contract made none. After that he was in default if Lucy B. Keyes was right in her contention as to defendant's liability under the provision of the contract sued on. *The breach occurred August 17th, 1929 on defendant's failure to comply with Lucy B. Keyes written demand or never.* It was therefore clear that the breach, if ever there was a breach, did occur before the first action tried on

October 25, 1929 *and not as the Supreme Court said.*

In the second place the Supreme Court's holding that it wasn't clear that the damage from the breach was complete at the time the first action was tried which is without the citation of any authority, is immaterial in point of law as well as not in accord with the facts.

In the case of E. O. Painter Fertilizer Company vs. The Kiltone Company 105 N. J. L. 109 (E & A 1928) the plaintiff had in 1913 purchased from the defendant a product which defendant represented, would act as a destroyer of insects and as a stimulant to the growth and productiveness of tomato plants. The plaintiff shortly afterwards resold this product to one, Peters, upon the same representation as to the effect of the product that was made to it by defendant. Peters used it with the result that his 1914 tomato crop was destroyed; he sued plaintiff in 1916 for damages to the said crop and judgment was entered against the plaintiff in 1922. In 1925 plaintiff brought suit against the defendant to recover for the damages resulting from the false representation, to wit, the amount of Peters judgment. This court *held* that the cause of action arose immediately upon the breach of the warranty which took place when the false representation was made on the making of the sale and not when Peters recovered his judgment and that therefore the action was barred by the Statute of Limitations, not having been brought within six years. Said this court by Chief Justice Gum-
mere:

"The breach of warranty occurred upon the delivery of its product by the defendant to the plaintiff and the latter's right of action arose immediately upon such breach, and did not at all depend upon whether it (the plaintiff) had suffered consequential damages by

reason thereof. Gogolin v. Williams, 91 N. J. L. 266."

In 13 Corpus Juris 699, Title "Contracts," it is laid down:

"(801). *D. Time to sue - 1. In General.*
As a general rule, on an agreement to do a particular thing, the right of action is complete on the failure to do the thing at the time and in the manner to which he has agreed * * *"

It is an obvious corollary that if the contract fixes no time of performance of the act in question and the party claiming the right to performance by notice fixes the time for performance as he has the right to do, which was the case here, then the right of action is complete on the failure to do the thing at the time thus fixed.

As to the facts, Lucy B. Keyes, herself, testified as follows:

"Q. Barney Berr, your attorney, was your duly authorized agent with respect to this mortgage that is the subject matter of this suit, is that correct, Mrs. Keyes? A. Yes.

Q. Referring now to Plaintiff's Exhibit P-2, did you specifically authorize Mr. Barney Berr or Mr. Morris Spindell, either of the members of Spindell and Berr, to write that letter? A. Yes.

Q. Now, referring to that letter Mrs. Keyes, you knew on August 14th, 1929 that the amount of that money that it would cost you for the mortgage would be four hundred dollars, didn't you. You knew on that day—
A. Yes.

Q. Is that correct? And this mortgage that we are speaking of now is a twelve thousand dollar mortgage on a piece of property in West Englewood sometimes known as

Teaneck, New Jersey, is that correct? A. Yes.

Q. The title to which is in your name, is that correct? A. Yes." (p. 32, l. 35 to p. 33, l. 17).

We therefore submit that the cause of action, if any, arose on August 17, 1929 long before the previous suit was tried on October 25th, 1929; that under the cited law whether there was consequential damage or not was immaterial; and that aside from even this the damage if legally recoverable had accrued on August 17th, 1929 as Lucy B. Keyes own testimony shows long before the previous suit was tried on August 25, 1929.

We anticipate a contention that as the present suit formally demands \$400.00 (p. 11, ll.12-14) therefore section 61 of the District Court Act does not apply as it exempts in the proviso cases "where the balance found to be due to said defendant exceeds the sum of three hundred dollars." The answer and it is a complete one, is that the proviso by its very terms exempts only cases where the balance found to be due to the defendant (that is defendant in the previous suit) exceeds the sum of three hundred dollars and although \$400.00 is demanded in the present suit only \$250.00 was awarded by the judgment.

We respectfully submit that Lucy B. Keyes (being the only actual plaintiff) having failed to file a counterclaim in the previous suit was barred from maintaining the present action.

(B) The four hundred dollar charge for legal services in drawing up the extension agreement was uncontradictedly shown to be unreasonable and \$150.00 having without contradiction shown to be the maximum reasonable charge, no recovery could be had against the defendant, giving the defendant the benefit of the \$150.00 allowance provided for in the contract.

By the ruling of the trial judge the defendant was allowed to recover \$400.00 for the legal services in extending the mortgage from which was deducted the \$150.00 which defendant was allowed by the provision of the contract sued upon (p. 92, ll. 2-7; p. 96, ll. 2-17). This \$400.00 was paid to Samuel Steinberg for legal services in extending the mortgage (p. 57, ll. 17-20); these services consisted of 10 conferences of one hour each with Mrs. Keyes, the writing of three or four letters, the making of a search for which Samuel Steinberg paid \$20.00 to a searcher, the procuring of a tax search for \$2.00, 6 conferences one of which took two to three hours, the drawing of the extension agreement, and the visiting of the mortgaged property twice (p. 58, l. 17 to p. 61, l. 1). It appeared from the uncontradicted testimony of three members of the bar that it was unnecessary to make a search for an extension as nothing subsequent in point of time could affect the mortgage which was an existing lien on the premises (p. 71, ll. 4-18; p. 85, ll. 6-10; p. 88, ll. 3-7); furthermore the defendant when he had bought this property had a title guarantee policy on it (p. 71, ll. 4-40). The defendant is a member of the bar of this state and qualified to testify as to the reasonableness of the charge. He testified as follows on this point:

“Q. You are an attorney at law of the State of New Jersey?”

Mr. Berr: Admitted.

Q. And as such have you had occasion to close real estate deals? A. Very often (p. 68, l. 38 to p. 69, l. 3).

Q. Did you at any time have occasion to get this twelve thousand dollar mortgage from Mr. Steinberg through the office of Evans, Smith & Evans on this very property?

Mr. Berr: Objected to on the ground it is immaterial because of the fact the question doesn't fix the time—improper question.

(Discussion)

The Court: Question allowed.

A. I did.

Q. And how much were the legal charges? A. I think it was either fifty-five or sixty-five dollars that Mr. David Smith charged me.

Q. Now, it has been testified here that Mr. Steinberg had ten conferences, approximately ten hours; that he wrote four letters, and paid a searcher twenty dollars, and had a tax search which cost him two dollars; that he had six conferences lasting from two to three hours, with Mr. Herman Levine, the executor, drew the extension mortgage, and went to the property twice and spent eight hours, approximately, on these two occasions. Would you say for an extension that it was necessary for Mr. Steinberg to make a search? A. No.

Mr. Berr: Objected to on the ground that it is immaterial.

The Court: He has a right to show in his opinion the reasonableness or unreasonableness of the charge.

Mr. Berr: This is an action brought upon a breach of contract.

The Court: I know, but the contract doesn't specify the exact amount that will be paid.

(Discussion)

The Court: I have already ruled they

have a right to go into the charges—the reasonableness of this charge.

Mr. Berr: Exception.

A. No. The reason is when I bought that property I had a title guarantee policy on it, and when the firm of Evans, Smith & Evans were taking care of this mortgage lien of twelve thousand dollars I turned that policy over to them.

Q. When was that, about, do you remember? A. Oh, they made a search of the premises at the time the lien was made.

Q. And for whom did they make the search? A. They made the search for the Steinberg estate.

Q. And that's the same estate from which Mrs. Keyes got this extension, as has been testified? A. That's the same estate.

Q. What would you say, therefore, would be a reasonable charge for the services rendered by Mr. Steinberg as outlined by me just a moment ago? A. *I should say one hundred or one hundred and twenty-five dollars would be good compensation for all that work (pp. 70 to 72).*

A. M. Kohlrigh, a practicing attorney of this state testified:

“Direct-examination by Mr. Kimmel:

Q. Mr. Kohlrigh, you are a practicing attorney of this state? A. I am, sir.

Q. And as such, have you had occasion to close extension of mortgages? A. A few.

Q. Mr. Steinberg, the man that closed this extension of mortgage, testified on cross-examination that he had ten conferences lasting about one hour each; wrote four letters, paid twenty-two dollars for a search and tax search, had six conferences of two or three hours each with the executor of the estate of Joseph Steinberg, drew an extension agreement; and went to the property

twice and spent about four hours each time. Now, from your experience would you say that a search and a tax search were necessary for the extension of a mortgage? A. I would not.

Q. And for the outlined services rendered by Mr. Steinberg, what would you say would be a reasonable charge? A. May I ask which Mr. Steinberg it is?

Q. Of Lichtman, Steinberg and Lieberman? A. My answer would take into consideration the attorneys reputation and the time he has been practicing at the bar. Considering Mr. Steinberg's reputation and the length of time he has been practicing, I would say that one hundred and fifty dollars—

Mr. Berr: I don't think that Mr. Kohlright should be permitted to answer the questions until I cross-examine him as to his qualifications.

The Court: You should have said so. Proceed.

By Mr. Berr:

Q. How long have you been practicing? A. August 10th, 1928.

Q. How many titles have you closed within the two years? A. Oh, about a dozen.

Q. How many? A. About a dozen. During my clerkship of over two years, I dare say I closed maybe a dozen or so.

Q. Do you ever work on Sundays? A. Sometimes.

Q. Do you ever work evenings? A. Yes.

By Mr. Kimmel:

Q. Now, what do you say the reasonable charge for these services would be Mr. Kohlright? A. I say taking into consideration the length of time Mr. Steinberg had been practicing and his reputation as a lawyer, I think one hundred and fifty dollars—to do the work you have outlined, a fee of one hun-

dred and fifty dollars would be sufficient taking into consideration that a search is not necessary for an extension.

Cross-examination by Mr. Berr:

Q. Now, then, Mr. Kohlright, if a search was made, regardless of what the reason was, how much would you increase the value? A. Complete search or a continuation?

Q. A search for a mortgagees protection? A. That would all depend.

Q. What kind of search would you have made? A. I would make a continuation if I had gotten the search I have heard described from Evans & Smith.

Q. If a full search was made, would twenty dollars be reasonable? A. Twenty dollars is very reasonable.

Q. And if it was a continuation search, would twenty dollars still be reasonable—I mean to a client? A. To a client, yes.

Q. And would you add that twenty dollars to the— A. I would.

Q. And do you think a lawyer should charge by the hour in the course of his practice? A. I don't think that a lawyer can charge for services by the hour. I mean an attorney of standing like Mr. Steinberg.

Q. Or an attorney of standing like Mr. Kimmel? A. Of yourself.

Q. In view of the fact that Mr. Kimmel asked you the question concerning the hours of labor, your figure of one hundred and fifty dollars is more or less of a group figure? A. I am taking into consideration what the reasonableness of the charge would be for such services, assuming that it required that length of time, together with the attorney that does the work—taking into consideration his reputation at the bar and the length of time he has been practicing.

Q. So, then, if we say a man spends eight hours in conference, and two Sunday morn-

ings of four hours each examining a piece of real estate, and the man comes back to his office when he is otherwise not there evenings to keep appointments, running over a period of twenty hours spent on behalf of the client, and draws an extension, and in fact makes a search, whether it be necessary or not, then he is only entitled to one hundred and seventy dollars? A. Absolutely. I'd do it every day in the week for that much." (pp. 84-87).

Samuel Rosenfeld a practicing attorney of this state testified:

"Q. Mr. Rosenfeld, you are a practicing attorney of the State of New Jersey? A. Yes, sir.

Q. And as such, have you had occasion to close real estate matters? A. Yes, I have.

Q. You had occasion to close mortgages, that is? A. Yes.

Q. Now. Mr. Steinberg, the man that closed this extension mortgage, stated that he made a search and a tax search. Is it necessary to make a search and a tax search when you extend a mortgage? A. In my opinion, no.

Q. And he says he had ten conferences lasting approximately ten hours; that he wrote four letters; that he had six conferences with the executor of the estate of Joseph L. Steinberg lasting from two to three hours; drew an extension, and went to the property on two occasions and spent about eight or ten hours there all together in connection with the work of closing, what would you say would be a reasonable charge therefore? A. Oh, I think from one hundred and twenty-five to one hundred and fifty dollars." (pp. 87-88).

This testimony was not contradicted or impeached in any way by the plaintiff. *In fact not*

even Samuel Steinberg, the attorney who made the charge, although he testified in the case, pages 53 to 61, did not testify that the \$400.00 charge was reasonable nor was he asked to rebut the defendant's testimony on the point, although a witness in the matter.

The plaintiff's attorneys position on this point was that defendant, according to his contention having breached the contract was liable for any sum expended for services in extending the mortgage whether reasonable or not (p. 71, ll. 19-33) and that the contract provision says "all expenses for acquiring the same and in connection therewith" (p. 76, ll. 9-16). Surely this is an untenable doctrine. Could the defendant have paid \$1,000.00 for services and charge it to defendant? Or \$5,000.00? Or \$10,000.000? The line must be drawn somewhere and the line of cleavage is the one which separates the reasonable from the unreasonable. The defendant is not to be put at the uncontrolled mercy of the plaintiff. There is no case in this state in which the point has been raised but all the textbooks and the cases from the various jurisdictions are clear on the point.

Said the court in *A. Leschen & Sons Pipe Co. v. Mayflower & M & R Co.*, 35 L. R. A. (N. S.) 1; 97 C. C. A. 465; 175 Fed. 855 (1909):

"Where the language of an agreement is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that the contract is susceptible of two constructions, one of which makes it fair, customary and such as prudent men would naturally execute, while the other makes it unequitable, unusual or such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred to that which makes it an unusual, unfair or improbable

contract. *Pressed Steel Car Co. v. Eastern R. Co.*, 57 C. C. A. 635, 637, 121 Fed. 609, 611; *Coghlan v. Stetson*, 22 Blatshf 88, 19 Fed. 727, 729; *Jacobs v. Spaulding*, 71 Wis. 177, 186, 36 N. W. 608; *Russell v. Allerton*, 108 N. Y. 288, 292, 15 N. E. 391"—page 8 of 35 L. R. A.

In *Jensen v. Perry* 12 Am. St. Rep. 888. (1889), 126 Pa. St. Rep. 495 a written contract entered into between principal and agent whereby the latter was to sell a certain article, contained a provision by which the former was to furnish the agent "with sufficient samples of his said article, and printed matter in the nature of advertisements relating thereto as might be called for by said Perry." *Held.* Under this provision the employer was not bound to submit to an unreasonable and unconscionable demand by his agent for samples, and what was a reasonable quantity was an issue in the case and not to be determined by the agent alone. Said the court at page 890, 12 Am. St. Rep. 888:

"We cannot agree to this exposition of the contract. The Agent may demand what is fairly and reasonably sufficient for the purposes of his undertaking and no more. He is bound to exercise good faith towards his principal. If he fails to do this, or if he makes unnecessary or oppressive demands upon him, he violates the contract and becomes himself a wrongdoer."

In *Farmers Savings Bank v. Jameson*, 175 Ia. 676, 157 N. W. 460 the defendant gave a general guaranty for a certain person which did not fix the amount for which it was given. *Held.* That it would be construed for a reasonable amount only; and accordingly it would not be construed as imposing an obligation upon the guarantor for an

amount in excess of that which the bank to which the guaranty was given was permitted by law to lend to any one debtor.

In *Clark on Contracts*, page 598, section 219 it is said:

“(4). If possible without going contrary to the manifest intention of the parties a contract will be so construed as to render it reasonable rather than unreasonable. If the terms of the contract itself leave its meaning in doubt, the court will ascribe to the parties, an intention to enter into a fair agreement, and will adopt the construction which makes the contract equitable.”

In *Page On The Law of Contracts*, page 3549, section 2053 it is said:

“2053. *Contract construed to be fair and reasonable* - As between two constructions, each probable, one of which makes the contract fair and reasonable and the other of which makes it unfair and unreasonable, the former should always be preferred.”

In *Williston, The Law of Contracts* (1920), Volume 2, page 1203, section 620 it is said:

“A construction which makes the contract fair and reasonable will be preferred to one which leads to harsh or unreasonable results” citing:

A. Leschen & Sons Co. v. Mayflower etc. Mining Co. 175 Fed. 855, 97 C. C. A. 465; Pressed Steel Car Co. v. Eastern Ry. Co., 121 Fed. 609, 57 C. C. A. 635; Little Cohaba Coal Co. v. Aetna L. Ins. Co., 192 Ala. 42, 68 South 317, Ann Cas. 1917 d 863; Letchworth v. Vaughan; 77 Ark. 305, 90 S. W. 1001; Stein v. Archibald, 151 Cal. 220, 90 Pac. 536; Savage v. Smith 170 Cal. 472, 150 Pacific 353; Mac Donald v. Aetna Indemnity Co. 90 Conn.

226, 96 Atl. 926; Harz v. Peterson, 80 Ill. App. 21; F. Conway Co. v. Chicago 274 Ill. 369, 113 N. E. 703; Blitz v. Union Steamboat Co., 51 Mich. 558, 17 N. W. 55; B. Siegel Co. v. Codd, 183 Mich 145, 149 N. W. 1015; McCartney v. Guardian Trust Co., 274 Mo. 224, 202 S. W. 1131; Gillet v. Bank of America, 160 N. Y. 549, 55 N. E. 292; Wigand v. Bachman-Bechtel Brewing Co., 222 N. Y. 272; 118 N. E. 618; Fleischman v. Fwigeson, 223 N. Y. 235, 119 N. E. 400; Bingell v. Royall Ins. Co., 240 Pa. 412, 87 Atl. 955; Bank of Old Dominion v. Mc Veigh, 32 Grath 530; Allemonz v. Augusta Natl. Bank, 103 Va. 243, 48 S. E. 897.

The District Court judge recognized this undoubted rule of law. Thus after discussion of counsel of both sides he ruled:

“The Court: I know but the contract doesn’t specify the exact amount that will be paid.”

(Discussion)

“The Court: I have already ruled they have a right to go into the charges—the reasonableness of this charge” (p. 71, ll. 27-33).

And again at page 75, lines 30 to 31:

“The Court: The defendant is entitled to the reasonableness of that charge.”

Notwithstanding this ruling in accordance with the principle of law hereinabove cited, notwithstanding the absolutely uncontradicted testimony of three members of the bar that \$125.00 to \$150.00 and no more was a reasonable charge for the services, the District Court Judge held the charges to be reasonable and allowed a recovery therefor (p. 91, ll. 16-17) This he stated:

“I think that I will have to hold that it was reasonable” (p. 91, ll. 16-17).

In view of the uncontradicted and unimpeached testimony on the point, this ruling and the refusal to direct a verdict was error.

In *Szmonski v. Central Railroad Co.* 102 N. J. L. 271 (Sup. Ct. 1926), affirmed 103 N. J. L. 508 (Ct. Err. and App. 1926) for the reasons expressed in the Supreme Court, the court said at page 279 of 102 N. J. L. 271:

“Upon this branch of the case, the facts being without dispute, a court question was presented whether the plaintiff at the time of his injury was engaged in interstate commerce. We think he was not so engaged and that therefore the motion for a direction of a verdict for the defendant made by its counsel, which motion was denied should have prevailed. For this error judgment must be reversed. Judgment is reversed.”

In *Walls v. Christos*, 104 N. J. L. 81 (Ct. Err. and App. 1927) in headnote 3 it is said:

“3. Where the facts are not in dispute, and the legal inference to be drawn therefrom is indisputable, it is the duty of the trial court to direct a verdict.”

In *Lippincott v. Royal Arcanum* 64 N. J. L. 309 (Ct. Err. and App. 1900) the court said at page 311:

“The unimpeached testimony in the case is conclusive upon this point and a verdict for the plaintiff cannot be supported without disregarding it. This being so it was the duty of the trial court to control the jury in its action and direct a verdict for the defendant. *Baldwin v. Shannon*, 14 Vroom 596; *Crue v. Caldwell*, 23 Id. 215; *Haines v. Merrill Trust Co.*, 27 Id. 312.

The judgment under review should be reversed.”

The Supreme Courts per curiam on this branch of the matter held:

“It is contended that the \$400.00 charge was unreasonable; but the disbursement was actually made and we do not consider the refusal to direct a verdict was erroneous on this point” (p. 123, ll. 18-22).

The District Court disregarded the uncontradicted and unimpeached facts. The Supreme Court disregarded the settled rule of law hereinabove cited that a contract must be construed reasonably and not unreasonably. Either ruling is erroneous. Moreover, whether there was collusion between Lucy B. Keyes and the attorney who was allowed to make the \$400.00 charge and what it was, the defendant was in the nature of things unable to prove as Lucy B. Keyes and the attorney making the charge were the only parties having knowledge of that. *But it is convincingly dispositive that the uncontradicted and unimpeached testimony showed the charge to be unreasonable; that although the attorney to whom the charge was allowed, testified in the case, he did not testify that the charge was a reasonable charge; that he was not called upon by Lucy B. Keyes to rebut the testimony given by defendant's witnesses on the point, although present at the trial.*

The Supreme Courts ruling amounts to no more than saying in the analogous case that a murderer is to be excused because he succeeded in killing his man. If the violation of a rule of a law is to be excused by the very fact of the violation then there is no use in having rules of law. We submit that the judgment below compelling the defendant to pay an admittedly unreasonable charge is unjust and unconscionable. It was because a reasonable charge would not exceed one hun-

dred and fifty dollars that the defendant agreed to the provision sued upon being placed in the contract. He testified:

“A. The reason I agreed to the one hundred and fifty dollars in there is this: In case the Steinberg Estate had to be paid that twelve thousand dollar mortgage and somebody else placed a different mortgage on that place they would have to make a complete tax search and full United States Supreme Court search, and I figured that one hundred and fifty dollars would cover any attorney for all his expenses, and the way we arrived at the one hundred and fifty dollars was that I would be sure that I would be covered and not have to stand any loss in case the Steinberg mortgage was paid off and a new first mortgage had to be gotten. No attorney would charge more than one hundred and fifty dollars, I don't think for taking care of that entire transaction (p. 78, ll. 10-26).

We submit that the uncontradicted and unimpeached testimony showed the charge to be unreasonable, one hundred and fifty dollars being the greatest reasonable charge; that under the law the contract had to be construed reasonably and not unreasonably; that the testimony being uncontradicted and unimpeached it was the duty of the court to direct a verdict as the defendant was entitled to a one hundred and fifty dollar allowance under the contract; that the court erred in refusing to direct a verdict for defendant.

(C) Since the mortgage had been extended, the contract stipulation in question by its proper construction had not been breached, no new mortgage having been required.

The contract provision on which it is sought to hold defendant liable is as follows:

“It is agreed, however, that in the event that said first mortgage aforementioned is called in and the full amount of the principal demanded by the mortgagees at any time prior to the expiration of three years from the date hereof, then and in such event the party of the first part does hereby agree to secure and place a new first mortgage on the premises, not less than \$12,000.00 to take place of the first mortgage aforementioned and agrees to pay all expenses for acquiring the same and in connection therewith. It being understood that the party of the second part shall and will upon said substitution taking place, pay over to the party of the first part the sum of \$150.00 in cash and nothing more.” (Exhibit P-1, p. 95, l. 32 to p. 96, l. 10 and see the provision set out in the identical language in the plaintiff’s state of demand, p. 10, ll. 12-32).

It will be observed that in plain terms the contract provides that in the event the mortgagee demanded the full amount of the mortgage and refused to continue the mortgage for a period of three years from the date of the contract, then the defendant agreed to obtain a new first mortgage to take the place of the mortgage, for which he was to receive an allowance of \$150.00.

Notwithstanding the plaintiffs testimony that the mortgage was “Called in” (p. 18, ll. 35-36) a reading of the state of the case makes it apparent

that the mortgage was never in any real sense of the words called in and the record is barren of any testimony that the full amount of the principal was demanded by the mortgagee or anyone in his behalf. While Samuel Steinberg, the attorney of the mortgagees estate testified on direct examination that he notified Mrs. Keyes that he expected payment of the money (p. 54, ll. 20-24), his own letter, his very first communication to Mrs. Keyes, his letter of August 5, 1929 (p. 54, ll. 8-9; Exhibit P-9, p. 110) shows that all he did was to advise Mrs. Keyes that "This mortgage fell due on June 9, 1929 and has not been paid" (p. 110, ll. 22-23) and then went on to suggest a continuation of the loan "for a period of two years, if you desire" (p. 110, l. 25). And in fact the mortgage is still in force and effect to this day having been extended by the mortgagee for two years as suggested by Samuel Steinberg in his letter (See the extension agreement, Exhibit P-5, pp. 104-107). From this it must be quite obvious that the mortgagee never in fact "called in" the mortgage or demanded the full amount of the principal of it but was in fact content and desirous of extending same for two years which he did. Therefore the defendant was at no time required to place a new mortgage on the premises and never became liable.

It will be observed that the stipulation in defining the defendant's liability requires him to "secure and place a new first mortgage on the premises not less than \$12,000.00 to take place of the first mortgage aforementioned."

The Terms "Extension" and "renewal" have definite legal meanings widely differing in scope and character.

In 27 Cyc. 1412 section XVIII B., 3, g. Title "Mortgages" the former is dealt with as follows:

“(11). Extension of Time of Payment. An agreement by a mortgagee to extend the time for payment of the debt secured by the mortgage whether indorsed on the instrument or otherwise evidenced will continue the lien of the mortgage and all his rights and remedies thereunder for the new period.”

The term “renewal” or as applied to the case at bar “new mortgage” means an entirely different mortgage given in substitution and in place of the existing one. The idea of novation is involved. The point is thus brought out in Bouviers Law Dictionary, Vol. 3, Page 2880, Definition, “Renewal.”

“Renewal - A change of something old for something new; as the renewal of a note; the renewal of a lease, See Novation.”

It is submitted that as the principal of the mortgage was never demanded by the mortgagee and no new mortgage in fact necessitated, the mortgagee having proved willing to extend the same, the very condition on which the contract stipulation made the defendant's liability depend never happened, and there was no basis for holding the defendant liable.

The plaintiff made an insincere attempt to get around this, by showing that she had given a purchase money second mortgage for \$6500.00 to the defendant on the property which she alleged would become a first mortgage if the first mortgage were paid off (p. 36, l. 40 to p. 37, l. 28) which second mortgage had been assigned by the defendant and that the assignee had refused to sign a subrogation (p. 39, ll. 4-10). But the obvious answer is that the second mortgage (Exhibit D-1, pp. 111, 117) contained in it a provision that

it was to be subrogated to any first mortgage in the sum of \$12,000.00:

“The mortgagee hereby subrogates the within mortgage to any first mortgage in the sum of \$12,000.00 either existing on the premises in question or to be subsequently placed thereon” (p. 112, ll. 23-26).

This provision was by express stipulation of the second mortgage made to bind an assignee thereof:

“All of the covenants and conditions herein contained shall be for the benefit of and bind the heirs, executors, administrators, successors and assigns of the respective parties hereto.” (p. 117, ll. 23-26).

It will therefore be seen that if a new first mortgage had in fact been necessitated (although it has been shown that none was) the plaintiff would have had the greatest facility in cancelling the first mortgage and placing a new one without having any subrogation agreement signed by the second mortgagee, one already being contained in the body of the second mortgage. The defendant's pretense on this point is shown to be what it is, a mere pretense.

We respectfully submit that by the true construction of the agreement the defendant is clearly shown not to be liable.

But even should it be thought that there is any ambiguity in the contract provision it is pointed out to the court that this provision was drawn and inserted in the contract by plaintiff's attorneys (p. 73, ll. 14-34). That being the case, the rule of law applies that:

“It is the rule that where a contract is ambiguous it should be construed most strong-

ly against the party preparing it, or employing the words concerning which doubt arises". *Kislak v. Muller*, 100 N. J. Eq. 110, 116 (Ch. 1926).

Accord—*Stones Adm'rs v. United States Casualty Co.*, 34 N. J. L. 372, 375 (Sup. Ct. 1871); *Fletcher v. Interstate Chemical Co.*, 94 N. J. L. 332 (Sup Ct. 1920); *affd.* 95 N. J. L. 543 (E & A 1921); *American Litho Co. v. Commercial Insurance Co.*, 81 N. J. L. 271 (Sup. Ct. 1911).

We respectfully submit that for all the reasons argued under this point, the court erred in refusing to direct a verdict for the defendant, on defendant's motion made at the close of the whole case.

POINT TWO.

1. The Court below erred in ruling over defendant's exception that "I think I shall rule that an extension would be just the same as a substitution". Specification No. 4 (p. 5, ll. 23-26); Ruling and exception (p. 27, ll. 37-40).

2. The Court below erred in allowing the following question to the witness Lucy B. Keyes over defendant's objection: "Q. One minute, Mrs. Keyes, please until the question is finished, did Mr. Jesse Kimmel take any steps of any kind or character pertaining to the substitution, renewal, replacement or extension of the first mortgage that was being called in by the first mortgagee up to the present date, if you know?" (Specification No. 5 (p. 5, ll. 29-38; question (p. 25, ll 23-30); exception (p. 27, ll. 40-41).

The District Court expressly held that an extension would be just the same as a substitute or renewal (p. 27, ll. 37-40). This point involves the construction of the contract which we have already discussed under subdivision C of point 1. We have shown thereunder that the contract expressly contemplated a situation where the principal of the mortgage was demanded and received by the mortgagees and "a new first mortgage" (p. 95, l. 39) necessitated; that the mortgage having been readily extended by the mortgagee and no new first mortgage having been required the defendant in this case was not liable as the contract was not breached.

We have also shown that the terms extension and substitution or renewal are terms of definite

legal purport and effect of a character differing widely from one another. It follows therefore that in making this ruling the court below fell into error.

The question to Mrs. Keyes, the plaintiff, involved in subdivision 2 of this point presents the same point. It was answered by her over plaintiff's objection and exception, after being repeated by the stenographer, "No" (p. 28, l. 29). The question was objected to by the defendant since it ignored and varied the contract provision, in that it asked as to "Substitution, renewal, replacement or extension" thereby slurring over the plain distinction between extension and renewal etc., which we have heretofore pointed out (p. 25, ll. 30 to bottom). The contract, as we have already observed merely required the defendant to obtain a "New first mortgage" in the event the mortgage was actually called in, *i. e.*, the full principal demanded and received by the mortgagee. See the provision (p. 95, ll. 31 to p. 96, l. 10).

The definition of the expression "call in" is as follows:

"to call in. 1. To collect, as debts."

Funk & Wagnalls Dictionary (1929) page 378, under the definition of "call".

It was in this sense that the expression "called in" was used. It must be construed with reference to the surrounding language. After referring to the mortgage being called in the provision defines defendant's liability and what he is obligated to do, namely "then and in such event the party of the first part agrees to secure and place a new first mortgage on the premises, not less than \$12,000.00, to take place of the first mortgage aforementioned." Since the defendant was thus obligated merely to get *a new first mortgage* of neces-

sity that contemplated a situation where the old first mortgage was "called in" in the sense that its amount had been collected and received by the mortgagee.

In allowing this question the District Court again fell into error. It is apparent from this that this erroneous view, prejudicial to the defendant, persisted throughout the entire case.

We respectfully submit that the court below erred in making the ruling herein discussed and also in allowing the above question.

POINT THREE.

1. **The Court below erred in giving judgment in favor of the plaintiffs instead of the defendant.** Specification No. 7 (p. 6, ll. 3-4), judgment of the court (p. 92, ll. 3-6).

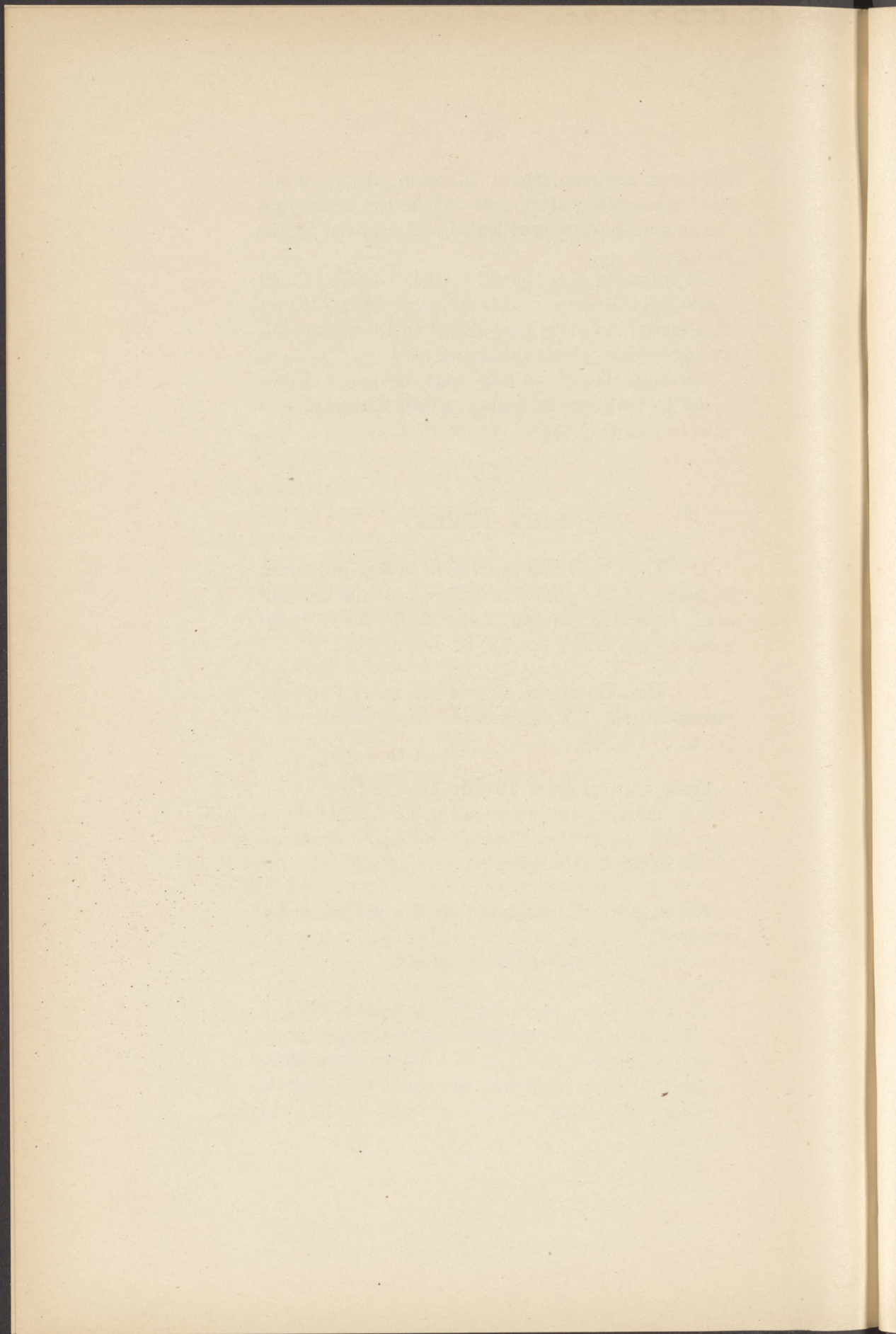
2. **The Court below erred in not giving judgment for the defendant.** Specification 10 (p. 6, ll. 19-20).

These matters have already been argued under one or more of the previous points. They have been inserted so that there should be no doubt as to the scope of this appeal.

We respectfully submit that the judgment be reversed.

Respectfully submitted,

KIMMEL & KIMMEL,
Attorneys of defendant-appellant.
David Kimmel,
Of Counsel.



New Jersey Court of Errors and Appeals

<p style="text-align: center;">LUCY B. KEYES and JAMES E. KEYES, her husband, <i>Plaintiffs-Respondents,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">JESSE KIMMEL, <i>Defendant-Appellant.</i></p>	}	<p>On Appeal from Supreme Court.</p>
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BRIEF OF THE PLAINTIFFS-RESPONDENTS

Statement of the Case

This is an action which was instituted by Lucy B. Keyes and James E. Keyes, her husband, as plaintiffs, against Jesse Kimmel, as defendant, in the Second District Court of the City of Paterson, which case was tried on the 11th day of June, 1930, before the Honorable Foster W. Freeman, Judge of said Court, without a Jury.

The action so filed in the said court was an action on contract based upon a certain contract which is more specifically designated as Exhibit P-1, Case, pages 93-101, which contract was a contract of exchange; Jesse Kimmel, the defendant-appellant, being the party of the first part and the plaintiffs-respondents being the party of the second part.

The suit filed in the said court was based on a certain covenant, agreement and provision contained in the said contract, to wit, the following provision:

"It is agreed, however, that in the event that said first mortgage aforementioned is called in and the full amount of the principal demanded by the mortgagees at any time prior to the expiration of three years from the date hereof, then and in such event the party of the first part does hereby agree to secure and place a new first mortgage on the premises, not less than \$12,000.00, to take place of the first mortgage aforementioned and agrees to pay all expenses for acquiring the same and in connection therewith. It being however understood that in the event such substitution of first mortgage shall become necessary, that the party of the second part shall and will upon such substitution taking place, pay over to the party of the first part the sum of \$150.00 in cash and nothing more."

It appears that, notwithstanding the said agreement or provision as heretofore set forth, the defendant-appellant, Jesse Kimmel, after being notified, Case, page 43, lines 27-36; Case, page 44, lines 26-33; Case, page 61, lines 35-40, and Case, pages 62 and 63, up to line 21, of the fact that the mortgagee was calling in the \$12,000.00 mortgage by his conduct in failing to replace the mortgage for the period of five or six months, violated and breached the provisions of said contract as aforementioned to the plaintiffs-respondents' damage. Due to defendant-appellant's breach, plaintiffs were compelled to make arrangements for a renewal by way of an extension of the said mortgage, mentioned in said provision for an additional period of time and were compelled to pay and expend the sum of \$400.00 therefor, which extension of mortgage was obtained on December 9th, 1929, Case, page 45, lines 4-7, see Exhibit P-5;

Case, pages 104-107, and see Exhibit P-3, Case, page 103.

It further appears that the said defendant-appellant, notwithstanding the demands of plaintiffs, never made payment of any part of the said \$400.00 expended for the said extension; that the extension was obtained after a replacement of the first mortgage could not be secured due to the refusal of the defendant-appellant's assignee and client to sign a subrogation, to the new mortgage contemplated. See Case, page 46, lines 23-40; Case, page 47, lines 1-17; Case, page 54, lines 2-40; page 55, lines 17-20.

The evidence disclosed further that the law firm of Lichman, Steinberg & Lieberman were counsel and attorneys for the estate, which was the mortgagee holding the said \$12,000.00 mortgage; and that they had been instructed to collect the amount of money due on said mortgage, Case, page 54, lines 8-19. In conformity with such instructions, Mr. Samuel Steinberg, a member of the said law firm representing the mortgagees, notified Mrs. Keyes that the mortgage was due and that the estate expected to be paid and further that they, the firm aforementioned, were authorized to collect the said money for the estate in full payment for the said mortgage, Case, page 54, lines 20-40; Case, page 55, lines 1-4.

After hearing all the testimony, the Court found as a fact that it was within the intention of the parties at the time that particular provision in the contract aforementioned was entered into, that an extension should be equivalent to a substitution; and further found as a fact that the charges made and paid over by the plaintiffs-respondents, to wit, \$400.00, were reasonable charges under the circumstances in this particular case, and gave a judgment in favor of the

plaintiff in the sum of \$250.00, giving defendant-appellant a credit of \$150.00, which sum under the contract the plaintiffs-respondents agreed to contribute towards the expense for the reinstatement or extension or replacement of the mortgage in question.

ARGUMENT

POINT I

The Court below did not err in refusing to direct a verdict for the defendant on the defendant's motion at the close of the whole case.

The said motion was based upon three grounds, and we say that the Court was absolutely right in refusing to direct the verdict for the defendant for the following reasons:

The first ground advanced by counsel for the defendant-appellant, was that Lucy B. Keyes one of the party plaintiffs in this cause of action had not filed a set-off or counterclaim in the case that was previously tried between her and the present defendant-appellant, and that by reason of that fact, plaintiffs were barred from maintaining the present action, counsel advancing as his support, Sections 60 and 61 of the District Court Act. Referring specifically to Section 61 of the District Court Act, it provides among other things, in effect; that if a set-off or counterclaim is not filed in a suit between the respective parties where a cause of action exists in favor of the defendant against plaintiff in said cause, that then and thereafter the defendant shall be barred, but contains the additional proviso however, as follows:

Provided, always that where the balance found to be due to the said defendant exceeds the sum of \$300.00 then the said defendant shall not be precluded from recovering his account, demand or cause of action against such plaintiff in any other court of record having cognizance of the same.

Chapter 132, Laws 1922, page 231; 1 Cum. Supp. to Comp. Stats. page 966.

The present issue as the record discloses is between Lucy B. Keyes and her husband James E. Keyes, as against the present defendant-appellant. The cause of action set forth in the present case is based as the facts and the pleadings set forth upon a contract which was executed by Jesse Kimmel, party of the first part, and James E. Keyes and Lucy B. Keyes, party of the second part. Sections 60 and 61 of the District Court Act is not applicable in this case, in that, where a cause of action is in more than one person, assuming now for present argument that the cause of action would arise when the defendant-appellant contends it would, the said cause of action so accruing cannot be set-off or counterclaimed. The rule of law is that joint and separate debts cannot be set off against each other. (Citing *Reverizzi vs. Caruso*, 86 N. J. L., 556) which case construes the application of Sections 60 and 61 of the District Court Act. Justice Black in his opinion filed in that case, quotes Chancellor Green as follows:

“The general rule in equity as well as at law is that joint and separate debts, or debts accruing in different rights cannot be set-off against each other. At law, under the statutes of set-off, the rule is inflexible; but in equity, special circumstances give rise to exceptions.”

The case of *Naylor vs. Smith*, 63 N. J. Law 506, 44 Atl. 649, is an apt illustration, where a set-off was disallowed in a suit under the Mechanics' Lien Act, and the set-off arose in a different right. In the case at bar, the right of action which arose by reason of the execution of the contract which was involved in this case was joint as a matter of law in favor of Lucy B. Keyes and James B. Keyes.

It is contended by the defendant-appellant that the breach under the contract entered into by and between Jesse Kimmel and Lucy B. Keyes and James E. Keyes occurred on August 17th, 1929, on defendant's failure to comply with Lucy B. Keyes' written demand, or never. It is our contention that where a contract provides for the performance of a certain act by a party thereto in the event a certain condition should arise in the future and subsequently such condition does occur, and the necessity of the party bound by the provision to comply therewith is brought home to such party, to wit, in the present case, the defendant-appellant, he has a reasonable time within which to comply with the provision contained in that agreement. The District Court found as a fact by his ruling in connection with the entry of the judgment in this cause in the said Court that such a period of time as did elapse, to wit, four or five months was a reasonable length of time under the circumstances as disclosed by the testimony showing the communications by the attorney representing Lucy B. Keyes and James E. Keyes, and the said Jesse Kimmel. We call this Court's specific attention to the fact that the extension of the first mortgage in question was executed on December 9th, 1929. It is our contention that it was within the right of the defendant-appellant any time prior thereto to inform

plaintiffs-respondents, that he had made arrangements to replace, substitute or extend the said mortgage and comply with the provision in the contract. We contend further that up to the time the extension agreement was actually executed and the first mortgage extended or the said defendant-appellant had actually refused to comply with the provision in the contract pertaining to the replacement of the said first mortgage in the sum of \$12,000.00, no cause of action and no right of action accrued to the plaintiffs-respondents until and after, first, a reasonable length of time had expired, which period of time would be purely a question of fact dependent upon the circumstances, and secondly, until and after the plaintiffs-respondents had proceeded, by reason of the failure of the said defendant-appellant to comply with the said contract provision within such reasonable time, to procure an extension or substitution of such first mortgage at an expense to them.

The action instituted in the District Court was based on a duo-fold theory. First, it was encumbered upon the defendant-appellant, under the provisions in the said contract, to obtain a new first mortgage in substitution of the then existing mortgage of \$12,000.00, in the event that mortgage then existing upon the premises was called in or the principal thereof demanded by the mortgagees before the expiration of three years from the date of said agreement; and secondly, that he, the said defendant-appellant would pay all expenses in connection therewith and therefore. Plaintiffs in the suit in the District Court instituted their suit upon the said duo-fold provision and sought judgment in their favor in an amount which they were compelled to expend to procure

the extension of the then existent first mortgage after the same had been called in for payment. It was the duty we say of the plaintiffs-respondents to minimize damages and minimize expenses that might be disbursed, in order to effect that which the parties intended when they incorporated into their contract the clause which was the basis of the suit in the case at bar. The plaintiffs-respondents did that by calling upon the defendant-appellant to either replace the said mortgage or make arrangements for the extension of the present mortgage if he could at a lesser sum than the sum that was demanded of plaintiffs-respondents by the mortgagees. It was the further duty of the plaintiffs-respondents to give the defendant-appellant a reasonable length of time within which to conform and comply with the terms of the provision in the said contract after having given him notice of the fact that the first mortgagee had called in and demanded the payment in full of the \$12,000.00 mortgage. There is nothing in the testimony adduced throughout the entire case that indicates that the defendant-appellant, Jesse Kimmel, did at any time definitely say that he would not comply with the provisions in the contract, but on the contrary the testimony of Mrs. Keyes greatly indicates that Mr. Jesse Kimmel, the defendant-appellant, kept her and her husband in doubt as to whether or not he was or was not going to obtain the extension or renewal or substitution of the then existent \$12,000.00 mortgage lien. We say further, that the right of action that accrued under the contract, which is the basis of the present cause of action, arose in favor of both Mrs. Lucy B. Keyes and Mr. James E. Keyes, and that by reason of the fact that such cause of action arose in both of the plaintiffs-respondents jointly and for their equal benefit the present plaintiffs-respondents could not have

as a matter of law counterclaimed in the former District Court suit instituted by and between Jesse Kimmel and Lucy B. Keyes.

We say further, that in this case the present plaintiffs were suing for \$400.00. The plaintiffs asked the Court below by way of their pleading and the testimony adduced for a judgment of \$400.00. The former suit referred to was a suit that was pending and tried in the First District Court of Paterson. The present suit was tried in the Second District Court of Paterson. By reason of the fact that Section 61 provides, in effect, that where a set-off exceeds \$300.00 in amount, in the event the defendant in that particular suit does not set-off or counterclaim, he or she is not barred from further action based thereon, but may recover the amount so claimed in any other court of record having cognizance of the same, the plaintiffs-respondents are legally entitled to recover in this suit. We further contend that the covenant or provision contained in the contract which was the basis of this action provides in addition to other things, "then and in such event the party of the first part does hereby agree to secure and place a new first mortgage on the premises, not less than \$12,000.00, to take place of the first mortgage aforementioned and agrees to pay all expenses for acquiring the same and in connection therewith." We contend that this particular provision is what is known as a duofold agreement; by that we mean that the defendant-appellant agreed, first, if the said mortgage was called in or payment demanded that he would replace the same, and secondly, that he, the defendant-appellant, would pay all expenses for acquiring the same and in connection therewith. The testimony discloses that the plaintiffs-respondents waited for five or six months to give the defendant an

ample opportunity to procure a new mortgage or make satisfactory arrangements with the present mortgagee for the present mortgage to be extended for the period of time provided for in the contract. The defendant-appellant was entitled to a reasonable length of time to comply with the agreement, after being notified of the necessity of so doing. What is a reasonable time depends upon the circumstances and is purely a question of fact for the Court trying the issue to determine and pass upon.

The expenses for the preventing of the foreclosure of this mortgage aggregated \$400.00 to these plaintiffs, and as to whether or not the \$400.00 was paid by reason of a check signed by Lucy B. Keyes or was paid by reason of a check signed by anyone else does not determine in whose favor the cause of action for a breach of the provisions of the said contract may be. On the contrary, the contract itself, by reason of the parties executing the same, determines the liability or the cause of action.

We contend further that insofar as the contention by defendant-appellant that the present action was barred in that no counterclaim was filed in a prior suit. The contract very specifically says in effect that if he, Jesse Kimmel, would comply with the provisions of the contract pertaining to the replacement or substitution of the said first mortgage that then and in such event the plaintiffs-respondents were to contribute the sum of \$150.00 towards the expenses, in that the defendant-appellant had agreed by reason of the said provision to pay for all expenses in connection therewith, and in view of the fact that the defendant-appellant did not comply with the provisions we say that technically and legally from the wording of the very contract itself the defend-

ant-appellant was not entitled to a credit of \$150.00, and that the judgment of the Court below, the District Court Judge, should have been in the full amount of \$400.00.

It is argued by the defendant-appellant's counsel that in view of the fact that the judgment in the present suit was \$250.00; that the provision in Section 61 providing, in effect, that where a set-off exceeds \$300.00 in amount, in the event the defendant, in that particular suit, does not set-off a counterclaim, he or she is not barred from further action based thereon, but may recover the amount claimed in any other court, etc., does not apply. We contend, that that particular section does apply in the case at bar, because we say that the plaintiffs-respondents were entitled as a matter of law to the full amount disbursed by them in order to obtain that which the defendant-appellant had failed to obtain, contrary to his agreement after being given a reasonable opportunity so to do.

It is argued by counsel for defendant-appellant that since the mortgage had been extended, the contract stipulation in question by its proper construction had not been breached, no new mortgage having been required. In response to such contention, we refer this Court to the ruling of the Court below, see Case, page 29, lines 1-21. The liability of the defendant-appellant Jesse Kimmel is not dependent, we say, upon whether or not the mortgage referred to in this case was replaced, renewed, substituted or extended. The defendant-appellant agreed in the contract that in the event the mortgagee holding the mortgage of \$12,000.00 against the premises in question called in for payment or demanded the full amount of the said mortgage before the expiration of three years from the date of the said contract, that he, Jesse

Kimmel, would procure a new mortgage and pay the expenses for the obtaining of such new mortgage. The old mortgage was called in for payment by the mortgagee through their counsel and duly authorized agents. The plaintiffs-respondents gave notice to the defendant-appellant of the fact that the mortgagee was calling in for payment of their mortgage.

The failure to secure and place and pay for a new first mortgage after being notified that the old mortgage was being called in was the breach of the contract, for which breach these plaintiffs-respondents recovered damages. The liability of Jesse Kimmel under the contract provision arose notwithstanding the fact that the plaintiffs-respondents secured an extension at an expense to them. The measure of damage of the plaintiffs-respondents is the amount expended by them which was necessitated and caused by reason of the fact that the defendant-appellant Jesse Kimmel failed to comply with his agreement to replace a new first mortgage when the old one was called in, that is the narrow issue in this case.

The defendant-appellant made an agreement to do a certain thing, if a certain incident took place. The incident took place and the defendant-appellant was notified to that effect. Within a reasonable time the defendant-appellant failed to comply with his agreement. By reason of this breach and failure on the part of the defendant-appellant, the plaintiffs-respondents were compelled to expend the sum of \$400.00. We say, that whether or not that \$400.00 was expended for a renewal, substitution or extension of a mortgage is immaterial and does not affect or disturb the liability in this cause against the present defendant-appellant. The money was expended to prevent a foreclosure of the mortgage which the defendant

agreed to replace if it was called in, but failed to replace after reasonable notice of the necessity for so doing.

The Court properly denied the defendant-appellant's motion for a directed verdict in his favor for the reasons aforementioned, and for the further reason that we contend that the cause of action did not arise in favor of Lucy B. Keyes and James E. Keyes until the extension was executed and the \$400.00 payment made.

The time within which the defendant-appellant could have performed this agreement to replace the said mortgage, not being stated in the contract, we say as a matter of law is a reasonable time; and the Court by its judgment, having heard the testimony pertaining to the fact that Mr. and Mrs. Keyes waited for five or six months for Mr. Kimmel to take some affirmative action in taking care of this mortgage, passed upon the fact by inference, that six months or five months under the circumstances as set forth in this particular case was a reasonable time.

Defendant-appellant does not seriously contend that on the very day that the mortgagee called in the mortgage, or that on the very day that the defendant-appellant received notice to that effect, a cause of action arose in favor of the present plaintiffs-appellees. We say that the rule of law applicable in the case at bar is, that after Mr. Jesse Kimmel, the defendant-appellant, received notice that the mortgage demanded payment and was calling the mortgage in, he, Jesse Kimmel, had a reasonable length of time within which to comply with the requirements of the contract. If the Court should hold otherwise, the effect would be to penalize one in whose favor a covenant in a contract may be for extending a reasonable op-

portunity for compliance to the other party bound by the provision. This would certainly not be sound law.

The testimony adduced by counsel upon cross-examination, see Case, page 66, lines 15-20, is to the effect that the defendant-appellant kept plaintiffs in doubt as to whether or not he was or was not going to comply with the provisions of the contract pertaining to this particular mortgage in question. The testimony as given by Mrs. Lucy B. Keyes on cross-examination by Mr. Kimmel at Case, page 66, is:

“Q. Was it before or after the writing of this letter? A. I just could not tell you. You kept us so long in doubt about it—six months.”

The second ground advanced by counsel for the defendant-appellant in his motion was that the amount of \$400.00 was not a reasonable charge. There was an abundant, in fact, considerable testimony by Samuel Steinberg as to what work he actually did, for which \$400.00 was charged. This expenditure was necessitated by reason of the defendant-appellant's failure to comply with his contract. See Case, page 57, lines 17-40; page 58, lines 1-40; page 59, lines 1-40; page 60, lines 1-40; page 61, lines 1-25.

The Court having heard the testimony of Samuel Steinberg as to the detail amount of work that was necessitated by reason of the fact that arrangements were being made for the extension or renewal of this particular mortgage, and after having heard the witnesses for the defendant-appellant, passed upon the question as to the reasonableness of the charge, by finding as a fact, that the charges were reasonable. The Court said in Case, on page 90, line 40; page 91, lines 1-18,

that he holds that the charges were in fact reasonable, and this being a question of fact, and there being no jury, the Court properly found the charges reasonable as is recorded and stated in his findings aforementioned.

We contend in addition that the question as to whether or not the charges are reasonable or unreasonable are not material in this issue. The plaintiffs-respondents having proven that they were compelled to expend \$400.00 to obtain the extension, all due to the breach by defendant. In the absence of a charge of fraud, properly proven, and properly pleaded, and substantiated by evidence, that amount, as a matter of law, must be the amount of the judgment of the Court, if the plaintiffs have established their case as to the breach of the contract provision.

In this case it was the Court's function to pass upon, assuming that the defendant-appellant's contention is correct, the reasonableness of the charge and did so as heretofore stated.

Answering the contention of our adversary that where one of the contracting parties fails to fulfill his contract it is the duty of the other party to make reasonable exertion to mitigate his losses and not to incur unreasonable charges. We say that the plaintiff-appellees certainly evidenced their desire to mitigate and decrease their losses. This is evidenced by the fact that during the month of August, 1929, a communication was forwarded to Kimmel & Kimmel, which communication is in evidence known as Exhibit P-2, see Case, pages 102 and 103 to line 16, notifying them to the effect that the attorneys for the estate were requiring \$400.00, the following being part of that communication, as set forth, Case, page 102, lines 30-40—unless within three days from the date of this letter you inform us that you can replace the

said mortgage for a lesser amount we shall authorize without further delay the attorneys for the estate of Joseph Steinberg. Pertaining to defendant-appellant's contention that the contract pertained only to a new first mortgage, we call this Court's attention to the fact that first, the Court below found that as a fact that it was within the intention of the parties that the said provision cover an extension and that by reason of this fact, the fact that the mortgage was extended was in effect, insofar as liability under the clause was concerned, the same as if a new mortgage had been placed upon the premises to replace the old. The weak attempt on the part of the defendant-appellant himself, Jesse Kimmel, to create a situation which would prevent a replacement of the old mortgage with a new one was the instruction given by his firm, Kimmel & Kimmel, to the holder of the second mortgage not to execute the subrogation submitted to him, which being submitted, evidently was required by the mortgage. See Case, page 51, lines 18-40; page 52, lines 1-31.

POINT II

The Court below did not err in ruling over defendant's exception that "I think I shall rule that an extension would be just the same as a substitution."

In connection with this point it is our contention that the District Court Judge had the right as a matter of law to determine sitting as both Judge and Jury as to what the intention of the parties to the contract was when the provision which is the subject matter in the present case was inserted in the said contract. And we say,

that the Court was justified in finding that it was the intention of the parties to safeguard the present plaintiffs-respondents in the event the first mortgagee should attempt to threaten foreclosure upon the then existent mortgage lien.

As to the question under the designation of Point 2, to which the defendant-appellant has objection to, our answer is, that what a witness knows of her own knowledge is always evidential. The ending of the question was—If you know? Now, then, the answer to that question called for knowledge upon her part. If she knew, she had right to testify as to what her knowledge was; if she didn't know, her answer would have been, No. Her answer on the record was, No. In substantiating this question we further urge that counsel did not enter his objection nor take exception to the same and therefore cannot urge or advance his dissatisfaction at this time. The exception entered was entered to the court's ruling that an extension would be just the same as a substitution, see Case, page 27, lines 27-41.

POINT III

1. The Court below did not err in giving the judgment in favor of the plaintiffs instead of the defendant.

2. The Court below did not err in giving judgment for the defendant, but for the reasons heretofore set forth entered a legal and proper judgment.

These matters have already been argued under one or more of the previous points.

For the reasons submitted, the plaintiffs-respondents respectfully submit that the judgment of the Supreme Court affirming the judgment of the District Court, was wholly and legally justified and should be affirmed. That this appeal be dismissed and that these plaintiffs-respondents be allowed tax costs of the appeal proceedings.

Respectfully submitted,

SPINDEL & BERR,

Attorneys for Plaintiffs-Respondents.

SPINDEL & BERR,

Of Counsel.

New Jersey Court of Errors and Appeals

<p style="text-align: center;">LUCY B. KEYES and JAMES E. KEYES, her husband, Plaintiffs-Respondents,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">JESSE KIMMEL, Defendant-Appellant.</p>	}	<p>On Appeal from Supreme Court.</p>
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Brief of Defendant-Appellant in Reply to Brief of Plaintiffs-Respondents.

This brief is filed to point out and answer mis-statements and inaccuracies in the brief of plaintiffs-respondents. On page No. 2 of their brief, plaintiffs-respondents refer to "defendant-appellant's breach," as if that were an admitted fact in the case. This is not so; defendant-appellant has consistently maintained that he never, by the proper construction of the contract provision sued on, has been guilty of a breach; this is argued and shown under point one, subdivision (c) of our original brief, at page 28 of same.

Continuing on page 2 of their brief plaintiffs-respondents assert that they were "compelled to make arrangements for a *renewal by way of an extension of the said mortgage*, mentioned in said provision for an additional period of time and were compelled to pay and expend the sum of \$400.00 therefor which extension of mortgage was obtained on December 9th, 1929." The expression "renewal by way of an extension" is obviously a designed

and artful inaccuracy. A renewal is a change of a new mortgage for an existing one. Bouviers Law Dictionary, Vol. 3, page 2880, Definition, "Renewal." An extension is the continuation of the life of an existing mortgage, extending the time for payment. 27. Cyc. 1412, Section XVIII B., 3, g., Title "Mortgages." It is our contention that the contract provision sued on obligates the defendant only to obtain "a new mortgage" in the event one is necessary and as this was not so, the old mortgage having been extended there never was a breach.

In stating that plaintiffs were obliged "to pay and expend \$400.00 therefor," plaintiffs-respondents evidently desire to create the impression that they expended \$400.00 for an extension. The uncontradicted testimony of plaintiff's own witness, Samuel Steinberg is to the contrary and shows that not one cent was paid to the mortgage as a consideration for the extension, the mortgagee not having required any payment, being satisfied to continue the mortgage, but that \$400.00 was allegedly paid to Lichtman, Steinberg & Lieberman, attorneys-at-law for legal services in drawing the extension—

"Q. Mr. Steinberg, you have testified that your charge was four hundred dollars for services?

A. That's right.

Q. That constituted legal services didn't it?

A. Yes. (p. 57, ll. 17-21)

And he then, described the legal services. Lucy B. Keyes, the plaintiff in giving the check to Lichtman, Steinberg and Lieberman for these services

endorsed on the check the following statement of what the payment was for:

“Endorsed—Legal services in re extension of 1st mortgage on West Englewood property.” (Plaintiff’s Exhibit P-3, p. 103).

Plaintiffs-respondents assert at the foot of page 3 of their brief that “the court found as a fact that it was within the intention of the parties at the time that particular provision in the contract aforementioned was entered into that an extension should be equivalent to a substitution.” This is a positive misstatement of the fact. The case is absolutely barren of any testimony as to the intention of the parties at the time the contract provision was entered into. A reading of the state of the case fails to show any. Furthermore such evidence if offered would have been inadmissible as an attempt to vary the terms of a written instrument by parole evidence.

Naumberg v. Young, 44 N. J. L. 331.

The District Court held *as a matter of law* in construing the contract provision sued on, that an extension was the same as a substitution.

“The Court: I think I shall rule that an extension would be just the same as a substitution.” (p. 27, ll. 38-40).

And in this ruling on the law we submit he erred as we have pointed out at under point two of our original brief, pages 33 to 35.

The plaintiffs-respondents argue that the prior District Court suit between Jesse Kimmel, plaintiff and Lucy B. Keyes, defendant, did not bar the present one citing the well known ruling in Reveruzzi v. Caruso, 86 N. J. L. 556 to the effect that joint and several debts cannot be set off

against one another. But the fact is, and we have so shown in our original brief, that the right if any in this case was in Lucy B. Keyes alone and therefore was a several right in her, as James E. Keyes had not even a possible right, he having been joined in this contract of exchange of real estate between Jesse Kimmel and Lucy B. Keyes merely to cut off his curtesy right in the real estate Lucy B. Keyes was conveying in exchange. The contract provides, starting with the conclusion of the provision sued on as follows:

"It being however understood that in the event such substitution of first mortgage shall become necessary, that the *party* of the second part shall and will upon said substitution taking place pay over to the party of the first part the sum of \$150.00 in cash and nothing more.

The *parties* of the second part agree to convey to the party of the first part * * *

(Exhibit P-1, p. 96, ll. 2 to 12).

In other words James E. Keyes is a party to only that part of the contract relating to the exchange of his wife's, Lucy B. Keyes real estate for the sole purpose of cutting off his curtesy right and in that part of the contract "*parties*" are referred to. All other parts of the contract are for the benefit and obligation of Lucy B. Keyes alone and in them "*party*" or Lucy B. Keyes is referred to. Therefore the case of *Reveruzzi v. Caruso* is inapplicable.

Plaintiffs-respondents assert at pages 6 and 7 of their brief that defendant had a reasonable time within which to comply with the duty said to arise from the contract provision sued on. They cite no authority for this assertion and it is in fact inaccurate. The contract provided "It is agreed, however, that in the event such first mortgage is

called in and the full amount of the principal demanded *then and in such event* the party of the first part agrees to secure and place a new first mortgage on the premises——.” Thus it will be observed that the contract itself fixes the time for action if there was a breach (it is our contention there was not), namely, when the first mortgage is called in, according to the plaintiff’s own contention this occurred long before the prior suit between Jesse Kimmel, plaintiff and Lucy B. Keyes, defendant was tried which was on Oct. 25th, 1929. See the letter of Lichtman, Steinberg & Lieberman upon which Lucy B. Keyes relied upon as calling in the mortgage, which letter was written Aug. 5, 1929, Exhibit P-8, page 110. Apart from this the letter written by Lucy B. Keyes attorneys’ at her specific direction (Exhibits P-2, pp. 102 to 103), fixed August 17, 1929 as the date before which defendant must act, thereby creating a deadline after which defendant was in default if Lucy B. Keyes was right in her contention as to the construction of the contract. Having failed to act by that time, defendant then became liable if Lucy B. Keyes contention was sound. The assertion of plaintiff-respondent that Lucy B. Keyes had been kept in doubt for five or six months is wholly irrelevant. The question is, when did the breach, if any, occur and it occurred if at all on the failure to comply with Lucy B. Keyes written demand to act in three days from August 14, 1929; her right of action if any came into existence then. Other phases of this branch of the case commented upon by the plaintiffs-respondents we have sufficiently covered, we submit, in our original brief.

A gross misstatement and perversion of the facts

on the part of plaintiffs-respondents is contained in the following extract from their brief, page 16:

“The weak attempt on the part of the defendant-appellant himself, Jesse Kimmel, to create a situation which would prevent a replacement of the old mortgage with a new one was the instruction given by his firm, Kimmel & Kimmel, to the holder of the second mortgage not to execute the subrogation submitted to him, which being submitted was evidently required by the mortgage”.

Nowhere is there any testimony that the first mortgagee required a subrogation. The second mortgage (Exhibit D-1, pp. 111 to 117) contained in itself a provision that it was to be subrogated to any first mortgage in the sum of \$12,000.00 existing or to be subsequently placed;

“The mortgagee hereby subrogates the within mortgage to any first mortgage in the sum of \$12,000.00 either existing on the premises in question or to be subsequently placed thereon” (p. 112, ll. 23-26).

This provision was by express stipulation of the second mortgage made to bind an assignee thereof:

“All of the covenants and conditions herein contained shall be for the benefit of and bind the heirs, executors, administrators, successors and assigns of the respective parties hereto” (p. 117, ll. 23-26).

The holder of this second mortgage was advised by Kimmel & Kimmel not to sign a separate and independent subrogation agreement submitted to him at Lucy B. Keyes instance because he would then be postponing his mortgage to two prior mortgages of \$12,000.00 each. As there was a sufficient subrogation contained in the second mortgage it-

self, there was no honest or legitimate necessity for a separate instrument of subrogation. We doubt the sincerity of the plaintiffs-respondents in making the quoted assertion.

Plaintiffs-respondents assert at the bottom of page 14 of their brief:

“The court having heard the testimony of Samuel Steinberg as to the detail amount of work that was necessitated by reason of the fact that arrangements were being made for the extension or renewal of this particular mortgage and after having heard the witnesses for the defendant-appellant, passed upon the question as to the reasonableness of the charge by finding as a fact, that the charges were reasonable.”

Undoubtedly plaintiffs-respondents are trying to create the impression that there was a conflict of testimony as to the reasonableness of the charge for the services in drawing the extension. *This is absolutely not so.* Samuel Steinberg, the person making and allowed to make the charge testified at pages 53 to 61. We submit his testimony to the court's inspection. On direct-examination he simply testified to making the charge and the amount of the charge, viz., \$400.00 (pp. 53 to 57). It was on cross-examination by defendant's counsel that the details of the services were brought out (pp. 57 to 61). *But nowhere does Samuel Steinberg testify that the charge was reasonable.* Three witnesses on the part of the defendant, all members of the bar, eg., the defendant, A. M. Kolbright, and Samuel Rosenfeld testified in response to proper questions on the point which recited what the details of the services were, that the *charge was unreasonable and that \$150.00 was the maximum reasonable charge.* (pp. 58 to 88). Their

testimony on this point is quoted in our original brief. In view of their absolutely uncontradicted and unimpeached testimony, the District Court's findings of fact that the charge was reasonable is error and his failure to direct a verdict was error in accordance with the rule of law governing the direction of a verdict.

We have indicated and pointed out the more glaring misstatements and inaccuracies in the plaintiffs-respondents' brief. Their whole brief must be read with great caution.

We respectfully submit that the judgment below be reversed.

KIMMEL & KIMMEL,
Attorneys of Defendant-Appellant.

DAVID KIMMEL,
Of Counsel.

