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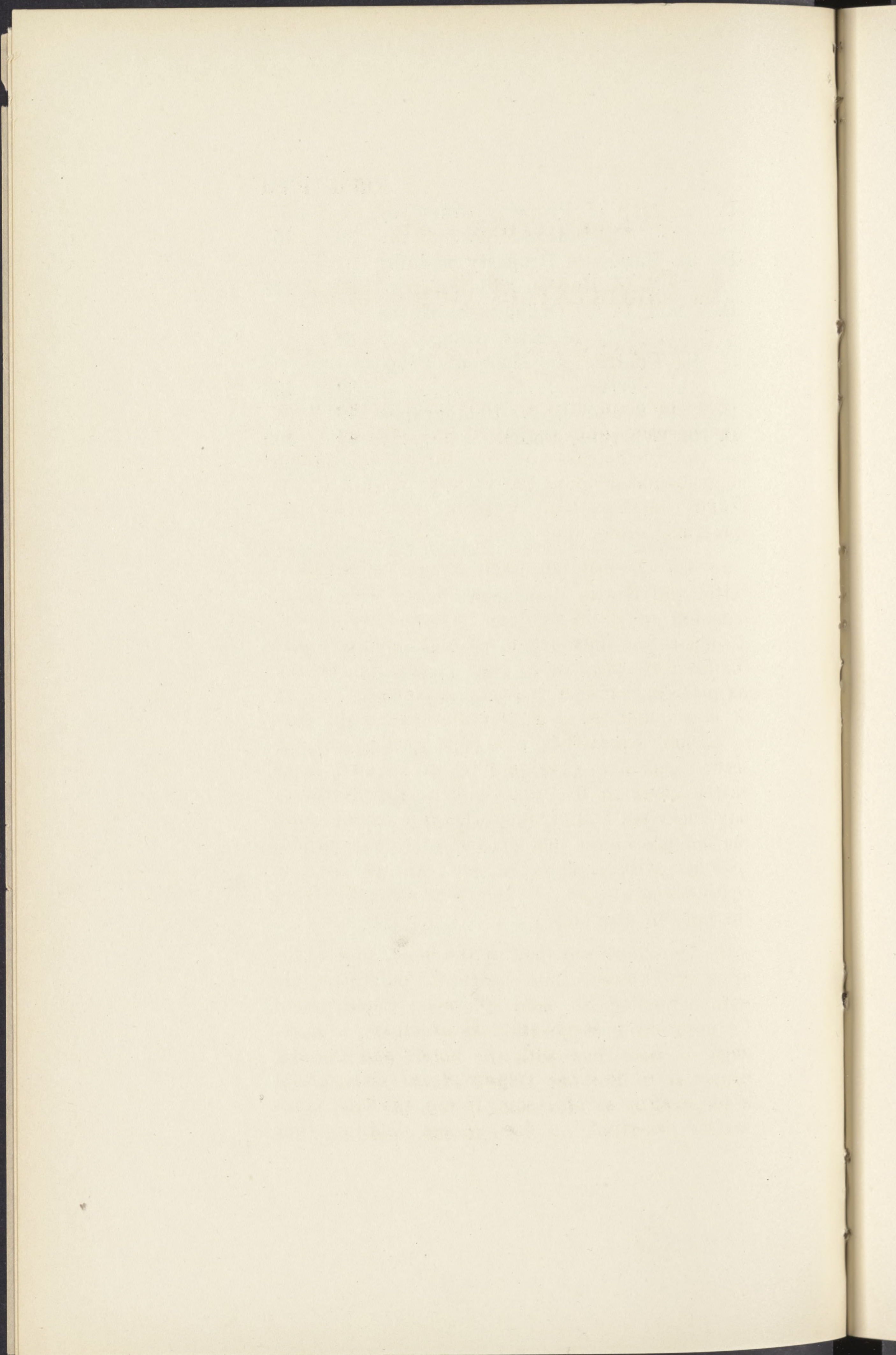

BILL TO FORECLOSE.

In Chancery of New Jersey

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

The complainant, Curtiss-Warner Corporation, a corporation duly organized and existing under the laws of the State of New Jersey, and having its principal office in the City of Newark in the County of Essex and State of New Jersey, respectfully shows that:

1. On October 24, 1922, Frederick R. Thirkettle and Hattie B. Thirkettle, his wife, being indebted to Philmar Construction Corporation, a corporation duly organized and existing under 20 the laws of the State of New Jersey, and having its principal office in the City of Newark, County of Essex and State of New Jersey, in the sum of $2,000, executed to it a bond of that date to secure that sum, payable $200, or as much more as the party of the first part therein desires to pay every six months from the date thereof, and the balance at the end of the three-year period, together with interest at the rate of six per 30 centum per annum, payable semi-annually from the date of the bond.

2. To secure payment of the bond, said Frederick R. Thirkettle and Hattie B. Thirkettle, his wife, executed to said Philmar Construction Corporation, a corporation as aforesaid, a mortgage of even date with the bond; and thereby conveyed to Philmar Construction Corporation, a corporation as aforesaid, in fee, the land hereinafter described, on the express condition that 40

such conveyance should be void if payment should be made according to the terms of the bond. Which mortgage, having been first duly acknowledged, and the certificate of acknowledgment duly endorsed thereon was recorded in the office of the Register for the County of Essex in Book S. 47 of Mortgages, pages 37-39, on January 12, 1923.

3. The mortgaged premises are described as follows:

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

Beginning at a point on the northwesterly side of Oak Street, said point being distant southwesterly 666.38 feet measured along the said northwesterly line of Oak Street from the intersection of same with the southwesterly line of Rhode Island Avenue; thence North 57 degrees 28 minutes West 100.59 feet; thence South 32 degrees 15 minutes West 40 feet; thence South 57 degrees 28 minutes East 100.42 feet to the aforementioned northwesterly line of Oak Street; thence along the same North 32 degrees 30 minutes East 40 feet to the point and place of Beginning.

Being the same premises conveyed to party of the first part therein by Philmar Construction Corporation, a corporation, by deed of even date therewith and not yet then recorded.

Said mortgage being given to secure part of the purchase money mentioned in the said deed.

It was expressly understood that said mortgage was second in priority to a mortgage nominally in the sum of $5,000, held by the Rich-

mont Building & Loan Association, then a first lien on the said premises, and in case default is made in the payment of two monthly instalments of dues and interest on the Richmont Building & Loan mortgage, then and in that event, the principal sum therein secured shall become due and payable immediately thereafter, notwithstanding anything therein to the contrary. 10

It was further expressly understood that the principal sum therein secured shall be payable as follows:

$200, or as much more as the party of the first part therein desires to pay, every six months from the date thereof; and the balance at the end of the three year period.

It was further expressly understood that party of the first part therein were thereby given the privilege to pay off the principal sum therein secured at any time prior to its expiration, provided interest was paid to the date of payment. 20

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity of the said party of the first part therein, of, in and to the same, and every part and parcel thereof, with the appurtenances. 30

Provided, always, and said presents are upon said express condition, that if the said party of the first part therein, their heirs, executors or administrators, should well and truly pay unto the said party of the second part therein, its successors or assigns, the said sum of money 40

mentioned in the condition of the said bond or obligation, and the interest thereon, at the time and times, and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then said presents, and the estate thereby granted, shall cease, determine
10 and be void.

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

5. The mortgage also contained an agreement
20 that the mortgagors, their heirs and assigns, would keep the buildings on the mortgaged premises insured against loss or damage by fire in a sum not less than the principal of the mortgage debt, and would assign the policy of insurance to the mortgagee, its representatives or assigns; and in default of so doing that the mortgagee, its representatives or assigns, should be entitled to effect such insurance, and the
30 premiums paid for the same by the mortgagee, or its assigns, with interest at six per centum per annum, should be a lien on said land added to the amount of the mortgaged debt and secured by the mortgage.

6. On August 24, 1923, the Philmar Construction Corporation, a corporation as aforesaid, assigned its mortgage to Solomon Berla, which assignment was recorded August 31, 1923, in Book 159 of Assignments of Mortgages for
40 Essex County, on page 389. On August 30,

1923, Solomon Berla assigned said mortgage to the F. L. & P. Investment Co., a corporation of New Jersey, which assignment was recorded August 31, 1923, in Book 159 of Assignment of Mortgages for Essex County, on page 391; on December 27, 1923, the F. L. & P. Investment Co., a corporation of New Jersey, assigned said mortgage to Solomon Berla, which assignment was recorded January 5, 1924, in Book 161 of Assignment of Mortgages for Essex County, on page 549; on December 31, 1923, Solomon Berla assigned said mortgage to Philmar Construction Corporation, a corporation as aforesaid, which mortgage was recorded on January 5, 1924, in Book 161 of Assignments of Mortgages for Essex County, on page 551; on May 26, 1925, the Philmar Construction Corporation, a corporation as aforesaid, assigned said mortgage to Curtiss-Warner Corporation, a corporation, as aforesaid, which said mortgage was recorded on May 27, 1925, in Book 173 of Assignments of Mortgages for Essex County, on page 196.

7. On April 24, 1923, an instalment became due of $200., and interest, and the said Frederick R. Thirkettle and Hattie B. Thirkettle, his wife, not being able to pay same, agreed that they would pay at the rate of $10. a week, until said instalment was paid, and would pay $100. and $33.50 interest, and $10. a week thereafter, until September 17, 1925, having paid in all $793.50, but in accordance with the terms of said mortgage, there should have been paid up to June, 1925, the sum of $1,400., besides interest. Not having continued payments and paid the amount called for in the bond and mortgage, the complainant elects to consider the entire balance of $1,206.50, together with interest from October 24, 1922, on the unpaid balances due.

8. On September 24, 1925, the balance of the principal sum secured by the complainant's bond and mortgage fell due, and remained unpaid for more than thirty days thereafter, and no part thereof has yet been paid.

9. The said lands and premises are held by Frederick R. Thirkettle and Hattie B. Thirkettle, his wife, who have been and still are in possession of the said premises.

10. Complainant says that the whole principal sum remaining on said bond and mortgage is now due, which is $1,206.50, together with interest from October 24, 1922, on unpaid balances.

Complainant is without adequate remedy in the courts of law, and therefore pray

1. That Frederick R. Thirkettle and Hattie B. Thirkettle, his wife, who are the defendants to this suit, may answer this bill of complaint and each statement therein made:

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

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

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

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

PHILIP J. SCHOTLAND,
Solicitor for and of Counsel with Complainant.

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ANSWER AND COUNTER-CLAIM.

IN CHANCERY OF NEW JERSEY.

Between 10 CURTISS - WARNER CORPORATION, a corporation, *Complainant,* *and* FREDERICK R. THIRKETTLE and HATTIE B. THIRKETTLE, his wife, *Defendants.*	*On Bill to Foreclose.* *Answer and Counter-claim.*

20 The defendants, Frederick R. Thirkettle and Hattie B. Thirkettle, his wife, of the City of East Orange in the County of Essex and State of New Jersey, answering the complainant's Bill of Complaint filed herein says:

1. They admit making, execution and delivering unto the Philmar Construction Corporation, a corporation, the bond and mortgage mentioned in paragraphs 1 and 2 of the Bill of Complaint filed herein; but they deny that they were in-
30 debted to the said Philmar Construction Corporation in the sum of $2,000 on October 24, 1922, or at any other time, and say that in truth and in fact on said date, they were indebted to the said Philmar Construction Corporation in the sum of $1,000 only by reason of the matters and things alleged in the counter-claim, hereinafter set forth, which are made a part hereof, as if same were herein fully set forth at length. As to the exact terms, covenants and conditions

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of said bond and mortgage, defendants have no knowledge or information sufficient to form a belief, and they beg leave to refer to said instruments for greater certainty when the same are produced. They have no knowledge or information sufficient to form a belief as to the registration or recording of said mortgages. 10

2. They have no knowledge or information sufficient to form a belief at this time as to whether said bond and mortgage contain the provisions referred to in paragraphs 3 and 4 and 5 of the Bill of Complaint, and, therefore, neither deny nor affirm said allegations; but they beg leave to refer to said bond and mortgage for greater certainty when produced.

3. They have no knowledge or information sufficient to form a belief as to the making of 20 any assignments of said bond and mortgage set forth in paragraph 6 of the Bill of Complaint, and, therefore, neither deny nor affirm the same, and, therefore, demand strict proof of said allegations.

4. They admit that on April 24, 1923, an instalment of $200. became due on said bond and mortgage, together with interest. They deny the other allegations in said paragraph, except 30 that they admit that since on or about April 24, 1923, they have paid on account of said bond and mortgage at the rate of $10. a week and that to this date they have paid the sum of $793.50. They admit that the difference between the principal amount of said bond and mortgage and the amount paid by them on account thereof is $1,206.50; but they deny that they are indebted in said amount or any part thereof, by reason of the matters and things alleged in the 40

counter-claims, hereinafter set forth, which are made a part hereof, as if herein fully set forth at length.

5. They deny paragraph 8 of the Bill of Complaint except that they admit that they have refused to pay the said sum of $1,206.50 with
10 interest claimed by the complainant.

6. They admit paragraph 9 of the Bill of Complaint.

7. They deny paragraph 10 of the Bill of Complaint and say that they are not indebted to the complainant in any sum by reason of the matters and things alleged in said counter-claims which are made a part hereof, as if herein fully set forth at length.

20 8. Defendants further answering say that to the extent of $1,000 the said bond and mortgage was without consideration, by reason of the matters and things alleged in the first counter-claim hereinafter set forth, which is made a part hereof as if same were herein fully set forth at length.

9. Defendants further answering say that said bond and mortgage were obtained by the
30 Philmar Construction Corporation from these defendants by means of fraud and the false representations alleged in the first counter-claim hereinafter set forth, which is made a part hereof, as if same were herein fully set forth at length. That the complainant in this suit accepted an assignment of said bond and mortgage with full knowledge of said fraud.

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By way of counter-claim these defendants say:

FIRST COUNTER-CLAIM:

1. In the month of May, 1922, the Philmar Construction Corporation, a corporation, was the owner of a large tract of land fronting on Oak street in the City of East Orange, County of Essex and State of New Jersey, which it had subdivided into a number of building lots of uniform size having a frontage of about 40 feet on Oak street and a depth of about 150 feet, upon which building lots it was preparing to build a number of one-family, six-room frame dwellings of uniform architecture, design, construction and detail, to be sold, that is both house and lot, for the sum of $6,500. 10

2. That on or about the 25th day of May, 1922, while the cellar excavating work was progressing, on said building lots, the said Philmar Construction Corporation exhibited said lots to these defendants, together with the uniform plans and specifications for the dwellings proposed to be erected thereon, and then and there offered to build a dwelling for these defendants, according to said plans and specifications on any one of several lots to be selected by defendants; and then and there offered to convey said dwelling to the defendants, together with the lot, upon the completion of the dwelling for the sum of $6,500, that is $650 for the lot and $5,850 for the building, said purchase price to be paid as follows: 20 30

$500 in cash, $5,000 by taking the conveyance subject to a building and loan mortgage in that amount, and the balance, to wit, the sum of $1,000 by the said Philmar Construction Corporation taking back a purchase money bond 40

and mortgage, to be amortized at the rate of $200 each six months, together with lawful interest thereon, the full amount to be paid within three years.

3. The defendants indicated a preference for the lot described in the mortgage sought to be foreclosed in this suit. Thereupon the said Philmar Construction Corporation represented to the defendants that this lot, together with the dwelling to be built thereon, would cost $7,500, for the reason that said lot was worth $1,650, because of the fact that it was a corner lot; and then and there represented to the defendants that it had dedicated a portion of its land, adjoining said lot to the said City of East Orange and that the said City of East Orange had accepted said dedication and had agreed to and would lay out a street thereon, to be known as Tremont avenue, so that the said lot would be a corner lot, and the said Philmar Construction Corporation then and there displayed and exhibited to the defendants, a map or survey which showed said lot to be situated at the corner of Oak street and Tremont avenue. The defendants relying upon the aforesaid representations, and believing the same to be true, thereupon accepted the said last-mentioned offer and on the 31st day of May, 1922, entered into a written agreement with the said Philmar Construction Corporation, a copy whereof is annexed hereto and made a part hereof and marked Exhibit "A," wherein and whereby they agreed to purchase the last-mentioned lot and the dwelling to be built thereon, for the sum of $7,500.

4. That relying upon the aforesaid representations, these defendants thereafter and on the

24th day of October, 1922, accepted a deed for the aforesaid lands and premises, in accordance wtih the last-mentioned agreement and as part of the purchase price therein provided, made, executed and delivered to the Philmar Construction Corporation, the bond and mortgage in the sum of $2,000, mentioned and described in the Bill of Complaint. 10

5. Defendants allege and charge that the aforesaid representations were false to the knowledge of the said Philmar Construction Corporation, and the complainant; that in truth and in fact said lot was not and has never been and is not now a corner lot; that the said Philmar Construction Corporation never made a dedication of any street rights to the said City of East Orange and if such a dedication was made, which these 20 defendants deny, the same was never accepted by the said City of East Orange.

6. These defendants allege and charge that the aforesaid false representations were made by the Philmar Construction Corporation, for the purpose of inducing them to pay $1,650 for the aforesaid lot, whereas, in fact, it was not worth more than $650.

7. By reason of the aforesaid fraud practiced 30 upon these defendants, by the said Philmar Construction Corporation, these defendants have sustained damages in the sum of $1,000, which sum, in equity, they are entitled to have set off as against the amount due on said bond and mortgage.

SECOND COUNTER-CLAIM:

1. These defendants repeat paragraphs 1, 2 and 3 of the first counter-claim. 40

2. In and by said agreement of purchase, dated the 31st day of May, 1922, the said Philmar Construction Corporation covenanted and agreed that in consideration of the purchase price for the property therein described, it would cement the sidewalks both in front and on the side of said lot and also do and perform the curbing work in front of and at the side of the lot.

3. The said Philmar Construction Corporation has failed, refused and neglected to perform said work and the defendants have been obliged to expend the sum of $300 in the performance of said work.

4. By reason of the aforesaid breach of contract by the Philmar Construction Corporation aforesaid, these defendants have sustained damages in the sum of $300 which sum in equity they are entitled to have set off as against the amount due on said bond and mortgage.

The complainants in this suit accepted the assignment of said bond and mortgage with full knowledge of the foregoing facts.

These defendants, therefore, pray:

1. That the Curtiss-Warner Corporation, the complainant in this suit may answer these counter-claims and each statement therein made.

2. That said complainant may be decreed to pay to the defendants the amount found due them on said counter-claims and account to them for the damages sustained by them by reason of the facts therein alleged.

3. That if the Court find that the principal of complainant's mortgage is now due, then that the amount so to be found due these defendants,

on said counter-claim may be credited on said mortgage debt, if any; and if the amount so found due the defendants shall exceed the amount of said mortgage debt, then that the complainant may be decreed to pay to these defendants the excess and deliver up said bond and mortgage for cancellation. 10

4. That it may be decreed that the said bond and mortgage were procured by fraud by reason of the matters and things alleged in the aforesaid counter-claim.

And that these defendants may have such other and further relief as may be just and equitable in the premises.

ISRAEL B. GREENE,
Solicitor for and of Counsel with Defendants. 20

Exhibit "A".

This Agreement made the thirty-first day of May, in the year of our Lord One Thousand Nine Hundred and Twenty-two

Between Philmar Construction Corporation, a corporation duly organized and existing under the laws of the State of New Jersey, and having its principal office in the City of Newark in the County of Essex and State of New Jersey party of the first part; 30

And Frederick R. Thirkettle, and Hattie B. Thirkettle, his wife of the City of Newark in the County of Essex and State of New Jersey party of second part;

Witnesseth, That the said party of the first part, for and in consideration of the sum of 40

Seventy-five Hundred Dollars to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that it the said party of the first part, will well and sufficiently convey to the said party of the second part, heirs and assigns, by Deed of Warranty free of all encumbrances except as hereinafter stated on or before the first day of October, 1922, ALL that lot tract , or parcel , of land and premises, hereinafter particularly described situate, lying and being in the City of East Orange in the County of Essex and State of New Jersey said premises known and designated as corner of Tremont avenue and Oak street; thence being forty feet on Oak street and one hundred feet on Tremont avenue.

Party of the first part are to erect a one-family dwelling on said premises as per plans and specifications only.

Page 3. Flooring—7/8″ x 2½″ Comb Grain Pine instead of Fir, same to be planed and scraped after plastering.

Page 4. Doors—all other doors throughout house to be single panel, Miracle Doors.

Page 4. Trim. Put up with picture moulding on bottom. In hall and bedrooms, picture moulding flush with ceiling.

Page 5. Medicine Closet; To be 20″ x 25″ instead of 16″ x 20″, 4 shelves—to be, lower 5¾″, next 5¾″, next 4½″, top 3″ apart.

Page 6. Cement walks—grading—surveying—building permits—filing of contracts to

be included in plans and to be paid for by builder.

Page 7. Entire kitchen and bath room to be painted with three coats of white paint and one coat of enamel. Living-room Dining-Room—Three bedrooms and Halls to be papered as selected by owner. All wood-work white. 10

Page 8. Wire according to plans excepting Living Room to have six outlets for wall lights—no ceiling light two outlets in each bedroom for wall lights—three base plugs in living room; 2 in dining room; two in kitchen—two outlets in bathroom for wall lights. Electric fixtures throughout as selected.

Page 11. Include—Cement street walk both in front and on side of lot, also, Curbing in front of and side of lot. 20

Page 13. Toilet in porcelain seat and cover and low flush box in white porcelain finish—Connection for hose front furnished by party of 2nd part. White enamel gas range as selected. Vent to outer air for gas range hood.

Steam boiler, either Richmont or Thatcher. 30

And the said Frederick R. Thirkettle and Hattie B. Thirkettle, his wife for themselves, their heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, its successors and assigns, that they 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 Seventy-five Hundred Dollars as and for the purchase money of the foregoing described 40

land and premises, in the following manner, that is to say:

On Execution of this agreement for which this is also a receipt..........	$ 200.00
When title passes and deed is delivered, cash	300.00
By assuming the payment of a Building & Loan mortgage which shall be a first lien on the said premises, which party of the first part are to procure...	$5,000.00

The balance, together with whatever amount is credited in the Building & Loan, as back shares, by executing and delivering to party of the first part, their bond in double said amount, together with a purchase money mortgage which shall be a second lien on the said premises, conditioned for the principal to be paid in three years from its date with interest at the rate of six per cent. per annum, payable semi-annually; said bond and mortgage to contain in addition to the usual tax and interest default clauses, the following clauses:

(a) That in case default is made in the payment of two monthly payments of dues and interest of the Building & Loan mortgage which is a first lien on the said premises, then and in that event, the principal sum therein secured shall become due and payable immediately thereafter notwithstanding anything thereinto the contrary.

(b) The principal sum secured in said mortgage shall be payable as follows: Two hundred dollars, or as much more as the party of the first part therein desires to pay, every six months from the date of said mortgage; and the balance at the end of the three year period.

(c) Party of the first part therein shall have the privilege to pay off the entire principal prior to the due date of the mortgage provided interest is paid to the date of payment.

It is expressly understood that in the event party of the first part are unable to procure a $5,000 B. & L. mortgage, then it agrees to add to its second mortgage, such amount that is unable to procure less than Five thousand dollars. 10

And It Is Further Agreed, by the parties to these presents, that the said part of the second part, their heirs and assigns, may enter into and upon the said land and premises on the said day of settlement next ensuing the date hereof, and from thence take the rents, issues and profits to them and their use. 20

And It Is Further Agreed, by the parties hereto, that the said deed shall be delivered and received at office of Philip J. Schotland, 9 Clinton St. Newark, N. J., between the hours of ten o'clock in the forenoon and four o'clock in the afternoon on the said day of settlement next ensuing the date hereof.

The rents of said premises, insurance premiums, water rents, taxes, and interest on Mortgage, if any, shall be adjusted, apportioned and allowed as of the day of delivery of said deed. 30

Gas and electric fixtures, gas stoves, hot water heaters and chandeliers, carpets, linoleum, mats and matting in halls, ash cans, heating apparatus, if any, 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.

In case the premises shall suffer injury beyond the ordinary wear and tear, the party of the first 40

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 expressly understood and agreed that premises hereby agreed to be conveyed are not derived from adversie possession, nor tax sales
10 nor to be what is commonly known as "A Martin Act Title." It is expressly understood, that the building is within the lines of the lot.

And for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators; and they hereby agree to pay, upon failure to perform the same, the sum of...........................
which they hereby fix and settle as liquidated
20 damages therefor.

In Witness Whereof, the said party of the first part has caused these presents to be signed by its President, attested by its Secretary and its corporate seal to be hereto affixed, and the said party of the second part have hereunto set their hands and seals the day and year first above mentioned.

PHILMAR CONSTRUCTION
30 CORPORATION,

Per Philip Herman,
Attest: Treas.

Louis E. Goldfarb,
Secy.

Frederick R. Thirkettle (l. s.)
Hattie B. Thirkettle.

Signed, sealed and delivered
40 in the presence of

REPLICATION AND ANSWER TO COUNTER-CLAIM.

IN CHANCERY OF NEW JERSEY.

Between CURTISS-WARNER CORPORATION, a corporation, *Complainant,* *and* FREDERICK R. THIRKETTLE and HATTIE B. THIRKETTLE, his wife, *Defendants.*	*On Bill to Foreclose.* *Replication and Answer to Counter-claim.*

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The complainant joins issue on the answer filed by the defendants in the above-entitled cause.

As to the counter-claim contained in said answer, complainant says:

1. It denies paragraph 1 of the first counter-claim, except that it admits that the Philmar Construction Corporation did own a large tract of land in the City of East Orange, fronting on several streets, which it subdivided into a number of building lots of various sizes, and on which it erected buildings which it sold at various prices.

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2. It denies paragraph 2 of said first counter-claim, but says that in truth and in fact, the said Philmar Construction Corporation entered into an agreement with the defendants, a copy of which is annexed to the answer and counter-claim, which sets forth the true facts connected

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with the purchase of the lands and premises by the defendants.

3. It denies paragraphs 3, 4, 5, 6 and 7 of the said first counter-claim, and says, that the true and only facts in connection with the purchase of the said property by the defendant from 10 the Philmar Construction Corporation are contained in the agreement annexed to said answer and counter-claim.

ANSWER TO SECOND COUNTER-CLAIM.

It denies all of the allegations contained in the second counter-claim.

By way of affirmative defense, complainant says:

20 1. That it purchased the bond and mortgage described in the bill of complaint from the Philmar Construction Corporation, without notice of any defect or claim of the defendants.

2. Defendants took title to said premises more than three years ago, and are still in possession of same.

3. On or about April 24, 1923, the defendants requested the Philmar Construction Cor- 30 poration to permit them to pay the payment then due, in very small payments, and requested indulgence so that the mortgage should not be called in at said time, and never made any claim of any kind on account of said mortgage, and procured from the said Philmar Construction Corporation an extension of time for the payment of the installments required to be paid by the terms of the mortgage, and never raised any question as to the validity of the mortgage, or 40 the amount of their indebtedness under said

mortgage, but made the monthly payments in accordance with the indulgence of the Philmar Construction Corporation, until the balance now owing on said bond and mortgage as set forth in the bill of complaint was arrived at.

PHILIP J. SCHOTLAND,
Solicitor and Counsel with Complainant.

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SPECIAL REPLICATION.

IN CHANCERY OF NEW JERSEY.

Between CURTISS-WARNER CORPORATION, a corporation, *Complainant,* *and* FREDERICK R. THIRKETTLE and HATTIE B. THIRKETTLE, his wife, *Defendants.*	*On Bill to Foreclose.* *Special Replication.*

The defendants by way of special replication to the complainant's answer to their counter-claim, say that:

1. They deny paragraph 1 of the affirmative defense.

2. They admit paragraph 2.

3. They deny paragraph 3 except that on or about April 24, 1923, they made arrangements for the amortization of the actual amount due on said bond and mortgage, in small payments. The other allegations in said paragraph they deny.

4. In all other respects these defendants join issue on the complainant's answer to their counter-claims.

ISRAEL B. GREENE,
Solicitor for and of Counsel
with Defendants.

ORDER OF REFERENCE.

IN CHANCERY OF NEW JERSEY.

Between CURTISS-WARNER CORPORATION, a corporation of New Jersey, *Complainant,* *and* FREDERICK R. THIRKETTLE and HATTIE B. THIRKETTLE, his wife, *Defendants.*	*On Bill, etc.* *Order of Reference.*

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This matter being opened to the Court by Philip J. Schotland, solicitor and counsel with the complainant, and Israel B. Greene, solicitor for defendants, Frederick R. Thirkettle and Hattie B. Thirkettle, his wife;

It is, thereupon, on this 17th day of February, 1926, ORDERED, that the above-stated cause be referred to Hon. M. L. Berry, one of the Vice-Chancellors of this Court, to hear the same for the Chancellor, and to report thereon to him and advise what order or decree should be made therein.

30

E. R. WALKER,
C.

I consent to the making of the above order.

ISRAEL B. GREENE,
Solicitor for Defendants.

A true copy.
THOMAS BARBER,
Clerk.

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Opening.

IN CHANCERY OF NEW JERSEY.

Between CURTISS-WARNER CORPORATION, *Complainant,* *and* FREDERICK R. THIRKETTLE and HATTIE B. THIRKETTLE, his wife, *Defendants.*	

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Transcript of testimony taken before Vice-Chancellor Maja Leon Berry, at the Chancery Chambers, Prudential Building, Newark, N. J., on June 15, 1926, at 10 A. M.

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Appearances:

Mr. Philip J. Schotland, for the complainant.

Mr. Israel Greene, for defendant.

Mr. Schotland: The complainant's case is admitted, as I understand, but the amount due under the mortgage, while the amount is admitted under the terms of the mortgage, is in dispute by virtue of a counter-claim.

30 The Court: So I understand.

Mr. Schotland: That being the case, I suppose that defendant had better go on with his counter-claim.

The Court: No, he admits by his answer the execution of the mortgage, but he denies that there is $2,000 due on the mortgage, and that there is only $1,000 due. I presume it is up to you to prove the amount that is owing you.

Mr. Greene: We also admit that the various

40 assignments— If counsel has certified copies of

the assignments, I make demand for them, or the originals.

Mr. Schotland: I have the original assignment to the present complainant. I have a reference to the intervening assignment.

Mr. Greene: I am willing to save time and have counsel offer in evidence the other interven- 10 ing assignments, excepting the assignment to the complainant. I think that may save time. I want to cross examine on the execution of this assignment.

Mr. Schotland: I offer in evidence the original mortgage and bond.

(Marked Exhibit C. 1 and C. 2.)

Mr. Schotland: I also offer an assignment which includes the mortgage in question, from the Philmar Construction Company to the Cur- 20 tiss-Warner Corporation, dated May 26, 1925, acknowledged the same day, and recorded May 27, 1925, in Book 173 of Assignment of Mortgages for Essex County, on pages 196 and 197.

Mr. Greene: I object to the offer, unless the due execution and delivery is proved.

Mr. Schotland: Under the evidence the fact that it is acknowledged, proves it, and is all the proof that is necessary, when the acknowledg- 30 ment is dated.

Mr. Greene: I think he should prove delivery in this case.

The Court: He has it, hasn't he? I will receive it. You may cross on it.

Mr. Greene: There is no one I can cross examine on it.

The Court: What is there about the assignment that isn't right? Is there anything wrong about the assignment? 40

Opening.

Mr. Greene: Except this. Our contention may be, we have alleged they have notice of our claim, and unless you rule that it does not make any difference whether they had notice or not.

The Court: Anyone taking the assignment of a mortgage, without taking a declaration, takes 10 it subject to the equity.

Mr. Greene: That is my understanding.

The Court: There is no question about that.

Mr. Schotland: This is not a negotiable instrument.

The Court: You admit by your answer that there has been $793.50 paid on account?

Mr. Schotland: Yes.

The Court: And that you have not paid the balance?

20 Mr. Greene: That is right.

Mr. Schotland: $1,206.50 with interest from October 24, 1922, on the unpaid balance.

Mr. Greene: I served Mr. Schotland with a notice on June 10th that at the final hearing I would move to make some amendments to the answer and counter-claim, which don't go to the merits but simply change the figures.

The Court: Have you any objection?

30 Mr. Schotland: What do you want to change?

Mr. Greene: I want to substitute the figure $600 for the figure $650, appearing in the second paragraph, and change the figure $5,850 to $5,900 and in the third paragraph substitute $1,600 for $1,650.

Mr. Schotland: I haven't any objection; I don't see the materiality.

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W. HUDSON MILLS, a witness produced on behalf of the defendants, being duly sworn according to law, testified on his oath as follows:

Direct examination by Mr. Greene.

Q Mr. Mills, where do you reside? A East Orange. 10

Q What is your business? A Civil engineer and surveyor.

Q How long have you been engaged in that profession? A About twelve years, something like that.

Q And you are the official surveyor and engineer for the City of Orange? A I am the assistant City Engineer.

Q And did you personally layout the Oak street and Tremont avenue, East Orange? A Yes. 20

Q Have you a map showing the layout of these streets? A I have.

Q Will you let me see them? A Which map do you want?

Q The ordinance map of the opening of Oak street. A Yes.

Q Yes. A That is the one.

30

Mr. Greene: Will you look at this, Mr. Schotland? I offer in evidence map of the opening of Oak street between Highland avenue and Tremont avenue, East Orange, dated December, 1922, approved W. D. Willegerod, City Engineer.

(Marked Exhibit D. 1.)

Q Are you familiar with the location of Mr. Thirkettle's property on this map? A I am. 40

Q Will you put a cross where his property is located? A I believe it is 40 foot front.

Q And is that property located at any corner? A No.

Q What is its location with respect to Tremont avenue? A The southerly line of Mr. Thirkettle's property would be in the prolongation of the northerly line of Tremont avenue, and on the westerly side of Oak street.

Q Where does Tremont avenue as shown on this map and with respect to Oak street? A The easterly curb line of Oak street, or easterly property line, I should say, of Oak street.

Q If the northerly line of Oak street were prolonged and the street cut through westerly would that make Mr. Thirkettle's property a corner lot? A You mean Tremont avenue?

Q Yes, Tremont avenue. A It would in that case.

Q But there is no corner there at the present time? A No.

Q Did you prepare a survey or map for the Philmar Construction Company at any time? A Yes, I did.

Q Have you the map here? A I think so.

Mr. Greene: I offer in evidence map of property of Philmar Construction Company of East Orange, New Jersey, drawn by W. Hudson Mills, dated April 21, 1922.

(Marked Exhibit D. 2.)

Q This was prepared by you, Mr. Mills, at the request of the Philmar Construction Company? A Yes; request of Mr. Philip Herman of the Philmar Construction.

Q You were paid by the Philmar Construction for doing it? A Yes.

W. Hudson Mills, direct.

Q What was the condition of the land in Oak street, East Orange, shown on this map at the time you made the survey? A Just a vacant tract.

Q Were there any streets cut through? A No streets at all.

Q With respect to the time when the Philmar Construction Company commenced building, how soon before or after that conveyance was this map prepared? A That map was made before any building was done. 10

Q That was in 1922? A Yes, whatever it says there.

Q Will you, by reference to the map tell us whether Tremont avenue is shown to run beyond Oak street? A No, it shows the same location as that ordinance map which was referred to a few moments ago. It ends at the easterly property line of Oak street. 20

Q Will you, by reference to the map tell us whether the westerly side of Oak street, as shown on this map, is shown to be divided into lots approximately 100 or 101 feet in depth and 25 feet in width, were ever modified or changed? A The frontages were changed to accommodate the buildings.

Q And to what measurement was it modified? A It varied somewhat; some were forty and some were more or less. I cannot tell you exactly what the modification was without reference to the individual map. 30

Q They were approximately uniform, weren't they? A Approximately.

Q And all of the same general character? A Yes.

Q Have you an accurate survey of the property of Mr. Thirkettle, prepared for the Philmar 40

Construction Company? A His individual property?

Q Yes. A Yes, known as 193 Oak street.

Mr. Greene: I offer in evidence survey of property 193 Oak street, East Orange, New Jersey, made by W. Hudson Mills, dated October 28, 1922.

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(Marked Exhibit D. 3.)

Q Mr. Mills, are you familiar with the time when Oak street and Tremont avenue were cut through? A You mean paved.

Q Curbed and paved? A Yes. I cannot tell you exactly.

Q Approximately? A But it happened in the following summer 1923, not quite a year, approximately a year after.

20

Q How long did it take before the streets were finally completed, both curbing and paving? A I cannot tell you exactly, the approximate time is about a month after they started.

Q Did it take more than a month in this case? A It might have taken two months, I cannot tell you exactly.

Q You had general charge and supervision for the City? A Yes.

30

The Court: This map, D. 3, was made by this witness for the mortgagee on October 28, 1922.

Mr. Greene: Four days after we took title.

Mr. Schotland: No, you took title December 4th, and the mortgage is dated October 24th, but acknowledged and closed as on December 4, 1922.

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W. Hudson Mills, direct.

The Court: The mortgage is dated the 24th of October, and not closed until December 4th, and acknowledged December 4th.

Q You were paid for this survey by the Philmar Construction Company? A Yes.

Q Have you an original map of the tract of land owned by the Philmar Construction Company made some time in 1919 or 1920? A No, I haven't. 10

Q Did you make such a survey? A No. The only original map that I made was the one that was offered in evidence. I have a map here. It is an old map that was made by Borrie and Kriner, I presume, a long time before Philmar took title, although I don't know. It is a tract of the whole property showing not only Philmar's holdings but also others. 20

Q You say at the time when they were erecting these large number of buildings on Oak street and Tremont avenue, there were no streets cut through at all? A No.

Q Are you familiar with the cost of curbing and paving? A Yes.

Q And also the cost of making sidewalks? A Yes.

Q Will you tell us how you measure the cost of building sidewalks and curbing? 30

Mr. Schotland: I object as immaterial.

The Court: I will receive it. It will depend on whether I find that a street ought to have been cut through. He may have waived all that.

A They vary. We pay all the way from 25 cents to 35 and 45 cents per square foot, and a 40

sidewalk is not less than four feet wide; that would run from a dollar a foot, approximately $1.50 per lineal foot, and new curbing averages about $1.75 per lineal foot.

Q Taking the survey which you made for the Philmar Construction Company, will you compute the number of feet of sidewalk and the number of feet of curbing that would have to be put down, if the street were cut through? A I can approximately.

Q Suppose you do that? A About $414.24, that is using a low rate for the sidewalk, and the average rate for the curbing, and not including the corner radius curb, which would have to be put in, and that is put in at a little higher price, about $2.50 a foot, and that would amount to about $37.50.

The Court: The total is what?

The Witness: About $451.74.

The Court: You have in your counter-claim a claim of $300.

Mr. Greene: But that is on the theory that they failed to do it.

The Court: You want to amend your counter-claim by reason of the fact that the curbing and sidewalk on Tremont avenue, which were in contemplation were never built?

Mr. Greene: That is right.

The Court: You may have such an amendment. I don't know whether it will do you any good or not, but I will allow you to amend.

Mr. Schotland: He has already got it in except he thought it was $300.

The Court: That is on another theory.

Cross examination by Mr. Schotland.

Q Who actually cut these streets through? A Do you mean who did the actual work?

Q Yes. A The City paid for it under contract with the Franklin Construction Company.

Q On these streets? A On Oak street and Tremont avenue. 10

Q Did the Philmar cut streets through themselves? A No, sir, they didn't do that.

Q Didn't you make the levels for the Philmar, and didn't they lay their own sidewalks? A Partly, not all of them.

Q On their land? A No, they laid most of them, but the City also laid some there.

Q And the sidewalks, were they cement sidewalks? A Yes.

Q And they were four feet wide? A They were five feet wide, as I recall. It was their option to put in not less than a four foot sidewalk. 20

Q But it actually did put in five feet? A Yes, five foot.

Q Did Mr. Thirkettle come to see you before he took title and ask you if Tremont avenue was going to be opened past his house?

30

Mr. Greene: I object as not proper cross examination.

The Court: I sustain the objection. You may bring it out, using him as your own witness.

Mr. Schotland: I will use him as my own witness, and ask him the question.

Q Did Mr. Thirkettle ever talk to you about Tremont avenue being opened past his house? A Yes. 40

Q When, the first time? A I cannot tell you the date, but at the time we were constructing the street.

Q And when was it that you were constructing the street? A I don't know the approximate date, but I gave evidence a little while ago telling when the street was approximately cut through.

10

Q That was the summer of 1923? A About that, approximately a year afterwards, after I made the original survey.

Q You made the original survey in April, 1922? A Something like that, I don't recall the date. I could refer to it.

Q And approximately a year after that the street was cut through, you were working on the street? A Yes, a little more than a year.

20

Q Well, was it as late as June, 1923? A I cannot tell you definitely, I don't know.

Q But anyhow, at that time you say Mr. Thirkettle talked to you about it? A At the time of the construction.

Q What did he ask you? A He asked me if the street was going to be cut through westerly from Oak street, and when he noticed that we were putting in sidewalks to continue the westerly curb line of Oak street southerly past his property, he merely asked me if the street was going through. I told him no.

30

Q What did you tell him? A No, I told him it was not going through at that time.

Q He was living there in the house at that time? A Yes.

Q Do you know whether it has ever been contemplated to put the street through?

Mr. Greene: I object.

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The Court: By whom?

Mr. Schotland: By the City of East Orange.

The Court: I don't think that is admissible.

Mr. Schotland: That is direct cross of his direct examination. He wanted to prove by him that they didn't contemplate. 10

The Court: He didn't ask anything about what the City contemplated. He asked him whether it had been done.

Mr. Schotland: He offered the map to show what the City contemplated cutting through.

The Court: There is no map, as I understand it, showing the street cut through.

Mr. Schotland: No, it has never been cut through. 20

Re-direct examination by Mr. Greene.

Q There were two particular takings, weren't there, by the City of East Orange for Tremont avenue, by two separate resolutions? A Tremont and Oak street?

Q Yes. A Yes.

Q There were several takings at that time? A There was one taking of Oak street and one taking of Tremont avenue. 30

Q When you say that Mr. Thirkettle spoke to you about whether Tremont avenue was going to pass his property, you didn't know at that time what the City of East Orange intended to do or what the Philmar Construction Company intended to do? A No.

Q You only knew about the thing you were directed to do? A I knew that Oak street was

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to be put right straight out, and Tremont was to stop at Oak street.

Re-cross examination by Mr. Schotland.

Q And you so informed Mr. Thirkettle? A Yes.

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Mr. Greene: I offer in evidence, with the consent of Mr. Schotland, ordinances Nos. 62 and 73 of the City of East Orange, relating to the opening of Oak street and Tremont avenue, and with the consent of Mr. Schotland, I excuse Mr. Rowley, the clerk of the City of East Orange, believing that there is no disputing the fact that the Philmar Construction Company never dedicated any lands to the City of East Orange, and the City of East Orange never accepted any grant or dedication for the extension of Tremont avenue so as to make the property in question a corner lot. Am I correct on that, that there was never any dedication for the extension of that street?

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Mr. Schotland: We didn't own it and couldn't dedicate it, but instead of offering the ordinances, why don't you just state the fact on the record.

30

Mr. Greene: There are descriptions and surveys here. I would rather mark it.

The Court: Unless you object to the form of the proof of the copies, I will admit it.

(Marked Exhibits D. 4 and D. 5.)

Mr. Schotland: I admit the fact to be that the City of East Orange has not passed any ordinance opening Tremont avenue west

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of Oak street, and that the complainant, nor its predecessor in title to the mortgage, its assignee, dedicated any lands for that purpose for opening any such street.

Mr. Greene: I want to show also by these two ordinances that there were two separate takings by the City. 10

I offer in evidence the articles of agreement between the Philmar Construction Company, and Frederick R. Thirkettle and Hattie B. Thirkettle, his wife, dated May 31, 1922, for the sale, erection and construction of the premises in question.

Mr. Schotland: No objection.

(Marked Exhibit D. 6.)

Mr. Greene: I call special attention to 20 the fact that on the first page of this contract it describes this property as the premises known and described as the corner of Tremont avenue and Oak street, there being forty feet on Oak street and one-hundred feet on Tremont avenue.

FREDERICK ROBERT THIRKETTLE, a wit- 30 ness produced on behalf of the defendants, being duly sworn according to law, on his oath testified as follows:

Direct examination by Mr. Greene.

Q Mr. Thirkettle, where do you reside? A 193 Oak street, East Orange.

Q How old are you? A Forty-five.

Q Are you married? A Yes. 40

Frederick Robert Thirkettle, direct.

Q What is your wife's name? A Hattie B. Thirkettle.

Q Your business is what? A I am a theatre manager and a park manager.

Q Do you know Mr. Philip Herman of the Philmar Construction Company? A Yes.

10 Q Will you tell us the facts and circumstances surrounding the purchase by you of the property on Oak street, East Orange? A I have known Mr. Herman and Mr. Goldfarb for quite some time.

Mr. Schotland: Doesn't the contract speak for itself?

The Court: Have you the plans here accompanying this contract?

20 Mr. Greene: I think I served notice to produce on the other side.

The Court: Have you them, Mr. Schotland?

Mr. Schotland: No. He didn't serve any such notice. My objection is it is embodied in the agreement, which he just offered in evidence.

The Court: I will not permit the alteration of the contract.

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A (Continuing.) I met a brother of Louis Goldfarb on Market street, and we got talking about his brother. And I asked him how they were making out. He said they were doing fine, that they just bought a big tract of land in East Orange and were going to build a lot of one-family houses. He said, "Where are you living now?" I said, "Springfield avenue." He said, "that would be a good chance for you to buy a

40 little house cheap." I said that would be a good

idea, and I said, "Maybe they would give me a pretty fair deal." He said, "Sure, if I see them, I will speak to them." So about a week and a half or two weeks later—

Q This was when? A Around in March, I think.

Q What year? A 1922. And he said, "If I see Philip or Louis, I will tell them and they will get in touch with you." So about a week or two weeks later, I believe, I saw Mr. Herman. 10

Q Which Herman? A Philip Herman.

Q What officer was he of the Philmar Construction Company? A I don't know. He was an officer of the corporation.

Mr. Greene: I think the acknowledgment shows he was president. Go on. 20

Mr. Schotland: It doesn't, he was treasurer.

A (Continuing.) I told him that I was interested in a house, but I didn't have an awful lot of money to pay down on a house. He says, "Oh, that is all right, we will take care of that. When can you come up and see it?" I said, "Well, whenever it is convenient to you, but I am working through the week, how about Sunday morning?" He said, "All right, next Sunday morning we will be there, over to the house with a car for you," and Sunday morning around 10 or 11 o'clock Mr. Philip Herman and Mr. Morris Herman, his son, came over in an automobile and we got in the car and drove up to this tract of Oak street and Tremont. We went in on the tract, and I said— 30

Q Before you go any further, will you tell us what the condition of this tract was on that 40

morning? A It was a dump, nothing there but a lot of old dump, cans and boilers and ashes, and Philip said, "This is all going to be fixed up. There will be houses all around there," so we went in and we drove into the end of the street, where a lot of ash wagons had been,
10 and we stopped in front of where 193 is now, with the car, and there were about seven or eight cellars dug and excavated, there were three of them, one where my house is now, and two next to it, were out of real ground, the only real ground that I could see around there, and I said, "This seems to be the highest point. I would much rather have it here (indicating)." He said, "Yes, the other end has already been sold," so Mrs. Mack and myself, we stood there and looked up and down these three. I said,
20 "How much, Philip?" He said, "$6,500." I said, "Yes. That is a lot of money." I said, "How much down?" He said, "$1,000." I said, "I haven't got that." He said, "How much can you pay?" I said, "I will probably get together $500," and he said, "That will be all right." He said, "Well, this one here is going to be nice," but I said, "What is this one here?" He said, "That is a corner." I said,
30 "Well, I would sooner take the corner," and he said, "I want a thousand dollars more for that lot. This is $600. I figure that is a thousand dollars more, $1,600 for the lot." So Mrs. Mack and I talked a few minutes. I said I would rather have the corner. He said, "Oh, yes, when that gets built up, it will be worth twice as much as it is now." And I said, "Figuring it from that angle, I would rather have the corner." And Mrs. Thirkettle spoke up and said, "I would
40 like to have it on account of a garage on the

side, if we get a car." I said, "All right, I think I will take the corner, Philip," and I said, "All I have got is $500," and he said, "I will arrange for a second mortgage to take care of the balance. When can you come down to the office?" He said, "As soon as you can, we will fix the papers up." So I think it was a week or two after, Mrs. Mack and I went down to the office.

Q Whose office? A Philmar Construction. They have a portion of the Curtiss-Warner office, on the second floor of No. 9 and 11 Clinton street, and saw there Mr. Philip Herman, and he went upstairs, I believe to Mr. Schotland's office, and fixed up the papers and brought them down, but in the meantime, I had penciled what I wanted on the agreement, such as doors, and floors and heater, different from the original plan. I penciled it down as to what I thought I wanted, and they made that agreement out and came down, and Mrs. Mack and I signed the agreement. I said, "Philip, I haven't got $500 with me now, but I can give you $200, and $300 when the house is finished," and we signed the agreement and went out.

Q When you were at the office of the Philmar Construction Company on Clinton street, did you see any maps or surveys showing the location of your property? A Yes.

Mr. Schotland: I served notice on the defendant to produce an original sketch, map and plan and survey, exhibited by the Philmar Construction Company to the defendant on or about May 31, 1922, showing or purporting to show the location of Tremont avenue and Oak street, East Orange.

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Frederick Robert Thirkettle, direct.

Mr. Schotland: You have already put it in evidence?

Mr. Greene: That isn't the one.

Mr. Schotland: That is the only one we ever had, the one Mr. Mills made.

10 Q Will you look at these exhibits and tell me whether you were ever shown any of these surveys or plans, or were you shown any other survey or plan at any time? A No, sir, not this one here. At the time that I was in the office with him discussing the building of the house, Mr. Herman had a bunch of plans, they were small ones, similar to—a little bit smaller than this one marked Exhibit D. 1, the size of the map, showing a front elevation, the side elevation, the general floor plan of the house, 20 the first floor and the second floor. It was about six or seven maps bound together, and on top of that, fastened with a clip, was a rough sketch showing the location of the lot, and I said, "Philip, can I take this?" He said, "No, this is the only one the architect has got, but I will see that you get one."

Q What did he show on that map? A It showed that this lot that I had selected was a 30 corner.

Q That is what you insisted upon that?

Mr. Schotland: I object to that.

Q These houses which were being built on Oak street, what was their general character? A All alike, except the dormers. He said, "There are going to be some that look like that and this." I said, "I would sooner have mine 40 just the same as the plans show," which was

one straight piece across the top, instead of the little tower. That was the only difference in the plans of all the houses.

Q How many of these houses had actually been built in that vicinity by the Philmar Construction Company? A I don't know. There are three streets of them. 10

The Court: At that time, how many were there?

Q At the time when you took title, how many of these houses had been built or under construction at that time? A When we signed the mortgage?

Q No, when you took title. A I don't know. They were going up, half of them completed on one side, and a couple of sticks up on another, I cannot tell. 20

Q Can you give an approximate idea whether a dozen or more? A They completed the houses on my side of the street first before they started the others.

Q You say their general character was about uniform? A Yes, the same.

Q At the time when you signed this agreement, and put in some modifications in the specifications, was there any discussion about extra compensation? A No. The only thing that was said—how I come to make the changes, there was a builder that lived up near there, and he has a house around the corner, he went into the house, and we got discussing how the house would be constructed, and he said, "If I would"— 30

Mr. Schotland: I object. 40

A (Continuing.) When I asked for these things Mr. Herman said, "You want to change it?" And I said, "That is what I want," so he crossed off a couple of things, I believe, and let the others go through.

Q Mr. Thirkettle, I show you three photo-
10 graphs, and ask you how recently those were taken? A About three years ago.

Q And who took them? A A photographer from the Newark Ledger.

Q At your request? A At my request.

Q I show you one photograph, and ask you what this photograph shows? A It shows the house that I live in.

Q Will you put a cross on the house that is yours? A (Witness does as requested.)

20 Mr. Greene: I offer these photographs in evidence. I want to show the general construction of these houses, they are all alike. I want to show that all of these houses are of the same general character, therefore, he could have had either one of them for the same price of $6,500, except this lot which was said to be a thousand dollars more.

The Court: I will admit them.

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Q What is the street shown in the foreground of this photograph? A Oak street.

(Three photographs marked Exhibits D. 7, D. 8, D. 9.)

Q Which way does your house face on this photograph? A Towards Tremont avenue.

Q East, west, north or south? Toward Newark or away from Newark? A Toward Newark.

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Q What does this photograph show? A A picture of the house that I live in.

Q What is the street in the foreground of that house? A Oak street.

Q I call your attention to the vacant lot at the left of the house on this picture. Whose lot is that? A I don't know who it belongs to but they told me it belongs to a Dr. Janeway. 10

Q I show you a third photograph, and ask you what this photograph shows? A It shows the corner of Tremont avenue and Oak street.

Q Looking which way, which direction? A Looking to the west.

Q Looking from your house or away from your house? A Away from my house.

Q And this street that is shown to the left of the photograph, left foreground, shows what? A Oak street. 20

Q And the street that meets it on the other side is what? A Tremont avenue.

Mr. Greene: I offer in evidence a paper being a true copy of a warranty deed made by the Philmar Construction Company to the defendant, dated October 24, 1922. This was copied from the record. It was acknowledged at the same time as the mortgage. 30

The Court: That was December what?

Mr. Schotland: December 4th. He is producing a deed which purports to be a true copy of the deed he received. I will consent, if he says it is a true copy, that that go in. The acknowledgment is not filled out. In the space where the recording is entered, the date is left out. The date is evidently December 4, 1922, which is the date when it was acknowledged. 40

Mr. Greene: I assume that the deed and mortgage were exchanged at the same time. I didn't prepare that copy.

The Court: The deed and mortgage were both executed and delivered that day?

Mr. Schotland: Delivered and recorded
10 on that day.

Q What was the condition of the land on Oak street and Tremont avenue, at the time you took title to this property? Were there any streets cut through? A No, no streets.

Q What was the condition of that portion of the land there which was used for highways? A It was all full of ashes and boilers and lumber, and everything else.

20 Q When you took this deed, where was the title closed? A In Mr. Jedel's office.

Q Mr. Schotland's office? A Mr. Schotland's office.

Q And the consideration was paid and you gave back this purchase money mortgage of $2,000? A Yes.

Q Who was present at that time? A No one but Miss Jedel and I.

Q Did you ask any questions about this
30 corner? A No.

Q At the time you closed? A No.

Q Why not? A Because I took it for granted that it was a corner.

Q Did you discuss the question of a corner with anybody connected with the Philmar Construction Company after you took title? A After I discovered that it wasn't a corner, I naturally asked where the corner was.

40 The Court: When did you discover that?

The Witness: I guess it was about a week after I spoke to Mr. Mills.

The Court: When was that, when did you speak to Mr. Mills?

The Witness: I think about a year after we had moved in there.

10

Q When did you move in? A In November, 1922, I think it was, or October, 1922, either one of those two months.

The Court: November, 1923, you discovered that your lot was not a corner, is that right?

The Witness: No, it wasn't quite that much. I think around August or September, around that time, 1923.

20

Q You say you spoke to Mr. Mills? A Yes.

Q How did you come to speak to him? A I walked out of the house one morning. I saw a bunch of surveyors out there, and they were dumping some curbing down, and he was putting stakes along, and I didn't say anything to him that day. The following day they were there again, and this day they laid the curbing down. Opposite my lot lay a couple of pieces that were round, and in front of my house it was all straight, running all the way over for about 60 or 70 feet the other side of my lot, and I said, "Where are the round pieces for this side?" He said, "What for?" I said, "Well, this is a corner." And he said, "Oh, no, it doesn't say so here," and I said, "It isn't a corner?" And I gave him quite an argument, why there wasn't a corner. He said, "It doesn't show a corner here at all."

30

40

Q Did you talk to anybody connected with the Philmar Construction Company? A I saw Mr. Herman about three weeks or a month after, and asked them about the corner. He said, "That is all right; we will take care of that."

Q Did you talk to anybody connected with
10 the Philmar Construction Company about the corner thereafter? A I mentioned it to him quite a number of times, both of them.

Q Both of whom? A Mr. Goldfarb and Mr. Herman.

Q And what did they say to you? A Well, from 1923, 1924, 1925, until last year, I was still waiting to see the corner. He said the street would go through, and then finally I spoke to Mr. Herman one day, and he said,
20 "What do you care about that? You got a cheap buy." And I said, "I know, but I want a corner," and he said, "I wouldn't worry about that," and the next time I spoke to Mr. Goldfarb, and he said, "Well, if you are not satisfied, we will take the house back."

Q When was that? A I guess last year some time.

Q What part of last year? A During the
30 theatre season, in September or October, somewhere around there.

Q That was the time when you refused to make any further payment? A I think it was around that time.

Q Did you make any improvements on your property after you entered into possession? A Oh, yes.

Q What improvements did you make? How much did you spend? A I did a lot of grading
40 and I put in top soil, and put in some trees

and shrubbery, and put in some radiation and several other little changes.

Q How much did you spend all told in improvements?

Mr. Schotland: How is that important?

The Court: It may have some bearing on his reason for refusal to accept the proposition of buying the property back? 10

A I should imagine offhand around a thousand or twelve hundred dollars.

Q When you spoke with Mr. Philip Herman about this $6,500 house, what terms did he offer you? A He wanted a thousand dollars down. I told him I didn't have it. He said, "How much have you got?" I said, "About $500." He said, "That will be all right." 20

Q What did he say about the balance? A He said that they would arrange the mortgages, they would get a building loan.

Q How many plans for these dwellings were you shown at the office of the Philmar Construction Company? A Only the one. That is all they had, was the one.

Q What did they say to you with respect to the general character of the other houses they were putting up there? A They said they were all alike. The only difference was the dormers, that is how I come to say that I wanted the one that had the straight piece across because I liked it better than the others, which showed two. 30

Q Who was with you at the office of the Philmar Construction when this agreement was prepared? A Mrs. Mack. 40

The Court: When was the building completed?

The Witness: The building was completed—it wasn't completed, we moved in in October, I think, of 1922, but the building wasn't completed. They were still working
10 on it up until almost into the winter. We were the first ones to move in on the whole tract, because we had given our landlord notice on Springfield avenue, we were going to move, and we thought the house would be finished before it was, and we moved in under very trying difficulties and spent a very troubled time for three or four months getting straightened out in the dead of the winter.

20 *Cross examination* by Mr. Schotland.

Q Do you know anybody on that whole tract that bought a house for $6,500?

Mr. Greene: I object.

The Court: I will receive it.

Q Do you? A No. Can I supplement that?

30 Mr. Schotland: You have answered the question.

The Court: Yes, go on, explain it, you may.

The Witness: After I had signed the agreement for the purchase of the property, and they got building the house, we were the first ones, I believe, that had bought, at least, we were told so.

The Court: You said he told you they
40 were sold down below?

The Witness: The two on the other end. We were the first to buy at this end, and he said—we got talking about building the house, and he said, "We have discovered we cannot build them for $6,500. Now, we are getting $6,800."

10

Q Do you know anybody on the tract that bought a house for $6,800? A No, I don't know anything about anybody's business on the tract.

Q But you say that you were asked $6,500? A Yes.

Q And that you agreed to pay $7,500 because it was a corner? A Yes.

Q And changing the character of the flooring didn't change the price? A No, sir.

20

Q Changing the character of the doors to be supplied, didn't change the price? A No, sir.

Q Adding picture molding in the halls and bedrooms, didn't change the price? A No, sir.

Q Changing the character of the medicine closet, didn't increase the price, and building shelves did not change the price? A No, sir.

Q Putting cement walks and grading, that had no effect on the price? A No, sir.

30

Q Painting the entire kitchen and bathroom with three coats of white paint and one coat of enamel, and the living room and dining room and three bedrooms and halls papered, according to paper selected by you, and making all the woodwork white, that had no effect on the price? A No, sir.

Q Adding to the wiring six outlets for wall lights in the living room and two outlets in each bedroom for wall lights, and three base plugs in your living room and two in the dining room

40

and two in the kitchen and two outlets in the bathroom for wall lights, and putting in electric fixtures as you would select them, that didn't change the price? A Did we get them?

The Court: This does not say they are to be added. It says, "Wire according to plans except living room to have six outlets for wall lights." This don't say whether these are additional or less.

10

The Witness: We haven't got them.

Q Were these additional to the specifications, or did you require less than the specifications called for?

Mr. Greene: I object. I think the specifications should be presented. I think the Court should have the whole information.

20

The Court: He may say, if he knows whether they are in addition or what it means.

A The majority of them are changes from the original plans, not additions, changes from the original specifications. This agreement was made after the house was being constructed. I didn't get all these things because they didn't want to give them to me.

30

Q Most of these items show what the change is. What I want to know is, what did the plans and specifications call for, regarding the painting of the kitchen and bathroom? A That I don't recall. They had it painted, and I wanted them enameled, and I asked for it. Philip said, "You can have it changed from the original."

40

Q On the original specifications it called for three coats of paint? A I don't think it did. I think it called for two.

Q And you had three put on and a coat of enamel beside? A No, I didn't get it. Don't say I had it put in because I didn't get it, Mr. Schotland. 10

Q You contracted for it? A Yes.

Q And that was to be without any extra cost of the building? A Absolutely.

Q The living rooms and dining room and hall and bedrooms, what did the specifications call for to be done to those?

> Mr. Greene: I object to that. The contract and specifications are the best evidence. 20
>
> The Court: If he knows let him answer it. If he doesn't know, he is not obliged to.

A At the time we discussed that, when Mr. Herman vivisected all these changes that I have —changes with reference to the boiler and other changes, he said you don't want to have any paper on there, we are going to paint the walls. I said, "It will look funny, a painted wall without anything on it first." He said, "We will 30 put it on." I said, "I would rather have the cove corners and ceiling." He said, "Put that in to," and in a majority of the cases we discussed how the house was to be constructed, outside of the original specifications, and they were enumerated on the agreement of sale, so there wouldn't be any dispute afterwards.

Q You haven't yet answered by question. I notice that the agreement of sale provides that the living room and dining room, three bedrooms 40

and hall are to be papered as selected by you. What did the original specification call for? Did that call for any papering or any paint in those rooms? A I don't recall.

Q Didn't the original specification simply leave them with the word "plaster," undecorated? A Oh, no, not to my knowledge.

10

Q Wiring. You provided in your agreement to get six outlets for wall lights in the living room? A Yes.

Q Do you know how many were called for by original plans? A None at all.

Q You provided in your agreement to have two outlets in each bedroom for wall lights. Do you know how many were called for by the original plans? A I don't think any were called for.

20

Q You provided in your agreement to have three base plugs in the living room, three in the dining room, two in the kitchen. Were there any base plugs called for in any of these rooms by the original plans? A I am not quite clear on that.

Q You provided in the agreement that there were to be two outlets in the bathroom for wall lights, were there any called for in the original agreement? A I cannot recall.

30

Q You provided that the electric fixtures throughout should be as selected by you. Was there any provision for you to select the fixtures in the original agreement? A Mr. Herman told me to go down and select them.

Q I mean in this agreement of purchase. A At the time that was made, he said you can go down and select your own fixtures.

The Court: This house was to be built according to plans and specifications?

40

Mr. Schotland: Yes.

The Court: This witness has just said that there were to be no outlets in the living room and there were to be no outlets in one of the other rooms.

Mr. Schotland: Centre light this shows instead. He said no outlets at all, but this modification shows, when it says "no ceiling light," the natural inference from it is that all that was provided for was ceiling light.

The Court: I wouldn't draw any inference from that. It is a question whether these are additional or in substitution for something else. If you have the plans and specifications why not produce them and let us see.

Mr. Schotland: This company is out of business. It was through with these houses over three years ago. We never knew this was going to come up until after the foreclosure suit was started. If we had them, I would have them here.

The Court: I think anybody would know that where a house is wired for electricity, there will be outlets in every room, and particularly in the living room, so that I don't take his testimony on that score as proving anything at all. I don't think he knows.

Mr. Schotland: I take it as meaning that there were no outlets other than the ceiling light. It shows one ceiling light outlet.

Q That is what you meant, wasn't it? A I meant that the only addition to my knowledge, outside of the original plan, was, the specification called for a light in the ceiling in the centre

of the room, and I said I would much rather have them on the wall. He said, "You can have that. It is only a question of running a piece of wire," so we eliminated the ceiling light and put in wall lights.

Q Instead? A Naturally, to light up the room.

10

Q There were no provisions for base plugs? A I cannot recall.

Q And you selected the kind of outlet and gas range and steam boiler that you wanted? A No, sir.

Q You have it specified? A There are lots of things specified that I didn't get.

Q You selected them? A No, I did not.

Q You saw what you got when you went into the house, didn't you? A I cannot say that I did, because the house was incomplete when we went into it.

20

Q But it was completed shortly after you went into it? A Some three or four months, I believe.

Q Under the terms of the mortgage that you gave, I see that you were required to pay $200, or as much more as you could, on account of the principal every six months?

30

Mr. Greene: I object to that as the mortgage speaks for itself, and second I don't think that is a matter to be brought out on our defense. We admit the amount that is due if the mortgage is permitted to stand. Their contention that there were some modifications later is a burden on their own case to prove. It must be confined to the issues brought out on my direct examination.

40

The Court: I will overrule the objection.

Q (Last question repeated.)

Mr. Greene: I object—

Mr. Schotland: We don't deny that the mortgage speaks for itself. It is preliminary. 10

The Court: Do you recall it or don't you?

A Yes.

Q You having taken title on December 4th, the $200 would become due. You recall that? A Yes.

Q Did you go to Mr. William Harris in May of 1923, and ask him to arrange for an extension of the payment? 20

Mr. Greene: I object to that on the ground that it is not proper cross examination and improper to inject that issue on the defense.

The Court: You have alleged fraud and misrepresentation, and you are asking for an abatement. You admit that he paid so much on the mortgage. You deny that he is liable for any balance. Now, Mr. Schotland desires to show that this witness, who happens to be the mortgagor, has waived any claim to any abatement by reason of his accepting title, and acting on that acceptance and making a payment on the mortgage after he knew what the situation was. Your only objection is that they are using the defendant to prove this, instead of using him as their own witness. 30

40

Mr. Greene: Yes, besides the fact that it is not an issue in the case.

The Court: I will sustain it on that ground. If you want to use him as your own witness, you may do so.

Mr. Schotland: This is the party himself. I am using him to bring out a state of affairs inconsistent with his attitude on his direct examination, and inconsistent with his demand. I have a right to bring out everything that he did, and I am not limited to direct cross examination of a party, even in an action at law, not less in equity. The latitude is much greater with a party than with an ordinary witness. I am attacking his credibility in an indirect way on his claims as to what he testified to on his direct examination. His objection or claim is that he wasn't getting a corner, or that he was promised a corner. He cannot come and ask for a rebate and take advantage of it and never make any complaint, and then, when the time has expired, suddenly come in and not submit himself to cross examination on what he did by not testifying directly.

The Court: You can show it. You don't have to depend on this witness to show it.

If the complainant, or anyone representing him, goes on the stand and testifies to this, that is conclusive of those facts unless he goes on the stand and denies it. I am not doing you any injustice by ruling as I have.

Mr. Schotland: I feel that you are by not letting me examine him on this, to lay a foundation for getting the correspondence

from his attorneys in, upon which I relied. I don't want to go to the trouble of calling Mr. Harris to testify as to his authority.

Q (Last question read.)

The Court: You may ask him if Mr. Harris represented him in any negotiations between the parties. 10

Q Did Mr. Harris represent you in negotiations with the holder of the mortgage for extensions of time on the payment of the installments of the principal?

Mr. Greene: I object to that. That is putting the same question in another way. 20

The Court: I said you might ask him if Mr. Harris represented him in negotiations without mentioning what they were.

Mr. Schotland: I am taken by surprise by your ruling. As a rule in the cross examination of a party in equity—I am perfectly willing to limit the question as your Honor suggests, but I don't catch how far your Honor's suggestion goes in the limitation. 30

The Court: I merely say that you may ask this witness if Mr. Harris was acting with his authority when he negotiated with complainants in reference to this mortgage.

Q Did Mr. Harris act for you, and with your authority, in negotiating with the holders of this mortgage in question, for extensions of time in the payment of it? 40

Mr. Greene: I object.

The Court: That is the very point which I have been trying to make myself clear on. While I was willing that you should show that Mr. Harris represented this defendant, I was not willing that you should inject in
10 the question the fact that a request for an extension was made.

Mr. Schotland: That is what I didn't quite understand. Will your Honor frame the question for me?

The Court: Leave out what you said about the extension.

Q Did Mr. William Harris represent you in negotiating about the mortgage, with the holders
20 of it?

Mr. Greene: I object.

The Court: I will admit it.

The Witness: Can I explain?

The Court: Just answer the question.

Q Did Mr. Harris represent you, or did he not, in negotiating with the mortgagee? A As
30 a friend.

The Court: By your authority?

The Witness: Yes, as a friend.

Q Did you make the payments through Mr. Harris? A Yes, sir.

Q As a result of those negotiations? A Yes.

Q You know then, that in May, 1923, before the first installment on this mortgage became due, you applied for an extension of time in
40 which to pay?

Mr. Greene: I object to that question.

Mr. Schotland: That is preliminary to going right into his direct cross examination as to his conversation with Mills fixing that time, and the continuation of those things as to that.

The Court: It is the very question which I overruled. I may be wrong on it. If I am wrong I want to be shown, but I have already ruled on that other question. 10

Haven't you a record of the payments when they were made?

Mr. Schotland: I have.

Q Mr. Thirkettle, when was it that you had your conversation with Mr. Mills?

20

The Court: He testified in August or September.

Mr. Schotland: May I have the privilege of cross examining this witness?

The Court: Go on.

Q When was it that you had your conversation with Mr. Mills, when you actually ascertained the fact to be that your house was not a corner and that the street was not going to be cut through? 30

Mr. Greene: I object.

The Court: He has already testified that he had a conversation with Mr. Mills with respect to this street going through. The question is perfectly proper cross examination of that particular line of examination. Let us not be quite so technical, and we will get along more rapidly. 40

A I believe it was in the latter part of the summer of 1923, I presume around August or September. I am not quite clear on that.

Q When did you start to make your payments on this mortgage, do you recall? A I cannot recall now.

10 Q You paid the interest on this mortgage for the first six months, did you not?

Mr. Greene: I object.

The Court: You have already proved that that is so. Now you want to contradict your own proof.

Mr. Schotland: In a court of equity, I take it, that even though we may have made a mistake charging the defendant too much,

20 we are in duty bound to stay with clean hands, even after we get in, and correct the error, and I charge him with something that we admit.

The Court: Do you want to give him credit now for interest which he paid?

Mr. Schotland: I want to give him credit. I notice a record that he did pay interest due on June 4, 1923.

30 The Court: All right. You may ask him if he did.

Q Didn't you pay that first six months interest? A I believe we sent a check for $60 for the interest.

Q And when did you send that? A I don't recall. At the time I saw Mr. Harris. I told him that I was out of a position, and I wasn't in a position to meet the payment, and he said that he would speak to Miss Jedel and make

40

some arrangement whereby we could pay interest, and let the other go on for a while, something to that effect.

Q Then when did you begin to make your payments on account of the principal? A I cannot recall that.

Q Didn't you start your payments on account of the principal in March, 1924, by bringing Mr. Harris' check for $100 to be turned over on account of this— 10

Mr. Greene: I object. I think that is going far afield on our side of the case.

The Court: I will admit it.

Q Do you recall that? A I recall that I asked Mr. Harris to see what he could do toward helping the thing out. At that time I wasn't working, and he said that he would see Miss Jedel, and see what he could do, and I believe there was a payment of $100, but I cannot recall the date or what it was. 20

Q Don't you remember that it was on March 28, 1924, that you brought that $100 from Mr. Harris to pay on account of this mortgage? A I cannot recollect the exact date.

Q Then you made an arrangement to pay $10 a week after that, didn't you? Mr. Harris told you a couple of days after he saw Miss Jedel that it would be all right to pay $10 a week? A And I have done it very regularly and religiously since that time. 30

Q Beginning with March 31, 1924? A I don't recall the date.

Q But it was beginning with that time that you paid the ten dollars a week, after $100? A I cannot recall the date. 40

Q It was starting with the week after you paid the $100 that you began to pay ten dollars a week? A It was shortly after that, I believe.

Mr. Greene: I think we admit that in our answer.

10

Q When you paid this $100 that was in the year 1924, you remember that, don't you? A I guess it was.

Q When you paid this $100, that was a considerable time after your conversation with Mr. Mills, wasn't it? A A couple of months, yes.

Q Why didn't you then raise the question that you didn't owe the money on this mortgage, that you had been defrauded? A Because I didn't know it. I met Mr. Herman about two

20 weeks before I spoke to Mr. Harris, and Mr. Herman said, "It is all right, you have a corner there, that street has gone through, you have the corner there"—about two weeks prior to my conversation with Mr. Harris—I was still getting a corner. "It is all right, you will get a corner, a street is going through." Irrespective of what Mr. Mills told me, the street is going through.

30

Q Which conversation with Mr. Harris do you refer to? A I don't know. Mr. Harris is a friend of mine, and I have been in his office a number of times. I don't know which one you refer to.

Q When you say that you talked with Mr. Herman two weeks before your conversation with Mr. Harris, I want to know which conversation with Mr. Harris you are referring to? A The one where he said that he saw Miss Jedel and if we paid $100 that everything would be

40 all right, that she would accept ten dollars a

week. It is about two or three weeks prior to that that I met Mr. Herman and he told me that we were still going to have a corner, that it was all right.

Q When was that conversation? A The exact date I don't know, but I know that it was just prior to the conversation with Mr. Harris. 10

Q You came to my office yourself and saw Miss Jedel and talked to her about getting an extension of the terms, didn't you? A No. The last time I was in Miss Jedel's office was the date we signed the mortgage and the deed.

Q Didn't you go and talk to Miss Jedel and ask her to arrange an extension for you on the mortgage? A No, sir.

Q Sure? A Positive.

Re-direct examination by Mr. Greene. 20

Q At the time you spoke to Mr. Mills, was there any activity on the part of building, any building activity going on on the part of the Philmar Construction Company in your community? A Yes.

Q What was going on? A Building houses.

Q About how many were still under construction? A If I recall correctly, the houses on Oak street were almost completed. They were working on Grant avenue, I think, the next street over from Oak street. 30

Q When the first six months' principal and interest came due, did you then know that there was to be no corner past your lot? A No, sir.

Q These modifications that appear in the specifications referred to in this contract for purchase and sale, had they been agreed upon between you and Mr. Herman before you came to sign the contract? A Yes. 40

Frederick Robert Thirkettle, re-direct.

Q How many of these modifications that are referred to in this agreement were actually installed in the house? A Will you read them?

Q The first item, seven-eighths inch flooring by two and one-half inch cone-grained pine. Do you know whether that was put in? A Yes, we
10 did get cone-grained pine. We were told that the flooring was better than the other one.

Q All other doors throughout the house to be single-panel Miracle doors. Was that put in? A Single-panel doors? I don't know whether they were Miracle or not. The Miracle door is made by the Miracle people. It is the construction of the door, but they are single-panel doors.

Q Who suggested the name of Miracle doors? A Another builder on another street up there,
20 who said they were the best doors.

Q Do you know what kind of doors they have in the specifications or don't you? A I don't recall it, but I know they were not single panel.

Q What about picture molding, a trim? "Put up all picture molding flush with the ceiling?"

Mr. Schotland: It is immaterial whether that was put in or not in this case.

The Court: You examined him on that.
30
Mr. Schotland: I examined him on my examination as to his statement as to whether or not there was any extra charge for that.

The Court: It seems to me that neither counsel is anxious for the Court to get the complete story.

Mr. Schotland: I will sit down the moment you say that, because I do want you to get the facts.
40

Frederick Robert Thirkettle, re-direct.

Q Mr. Thirkettle, will you look at this specification and tell us what things were not put in besides those you have already mentioned? A The flooring, the medicine closet—

The Court: Answer the question. The question is did you get it or didn't you? 10

The Witness: Not this medicine closet. I got another one. Cement walks, grading and so forth. I got that except the walk on the side of Tremont avenue, or is supposed to be. Kitchen and bathroom, all we got was two coats of white paint and one coat of enamel, not three good coats. Living room papered. They were not papered, they were painted. We finally agreed on painting instead of paper. All woodwork, and so forth, it is all a cream color. From the original plans it shows there was a drop fixture in the center of each room, and we didn't like that, so later that was changed for side lamps. 20

The Court: Did you get them, is the question.

The Witness: No, we didn't get any wall lights at all. We got the cement walk on on the front but not on the side of the lot. 30

Q Toilet and porcelain seat cover, and light flush box. A We got that. We got a connection for hose on the house, which is on the side. White enamel gas range; we didn't have an opportunity to select the range. The ranges were put in all alike. Gas range heater, we got that. Steam boiler, we didn't get that. We got another one, a Continental in place of it.

40

The Court: When you made the first payment on your mortgage, you knew all of these defects that you have now referred to?

The Witness: No, sir.

The Court: When did you find out that you didn't get all that your contract pro-
10 vided for?

The Witness: We agreed upon that, that we wasn't to get them, like the boiler.

The Court: Why take up time if it was agreed on?

Q Did you employ Mr. Harris as attorney to act for you? A No.

Q Did you pay him any fee? A No.

20 The Court: What difference does it make whether he was an attorney or agent? In fact, he was an attorney, but he was acting for him as a friend, with his authority.

MRS. HATTIE THIRKETTLE, a witness produced on behalf of the defendants, being duly sworn according to law, on her oath testified
30 as follows:

Direct examination by Mr. Greene.

Q You are the wife of the witness who just preceded you on the witness stand? A I am.

Q And did you accompany your husband to the Oak street property when Mr. Herman exhibited the land to your husband? A I did.

Q In the early part of 1922? A Yes.

Q What day of the week was it? A On
40 Sunday.

Q Who conveyed you to the premises? A Mr. Herman and his son.

Q They called for you in a car? A Yes.

Q When you came upon the premises, what was the condition of the land? A Just an ordinary dump, just everything on it.

Q What did Mr. Herman exhibit to you at that time, what did he say to you? A Just the place where they were going to build houses, just lots. 10

Q What was the conversation at that time? A We were to take one of the houses for $6,500, and he took us up to the end; there was a corner house, he said, that would be a thousand dollars more, as that was a corner house, so we talked it over and we decided that we wanted the corner.

Q Did he say anything about the general character of the dwellings that were going to be erected on the land there? A He just showed us pictures of that, what they were going to be. 20

Q Did he offer any particular lot to you? A No, we could have any lot we wanted.

Q What did he say? A Any lot we wanted, it was up to us to choose.

Q For how much? A For sixty-five, except the corner. 30

Q Did you accompany your husband to the office of the Philmar Construction Company to sign the agreement? A I did.

Q Who else was there besides you and your husband? A Mr. Herman. I found Mr. Goldfarb in another office.

Q What was the conversation there? A He went up to Mr. Schotland to have the agreement of sale fixed up, and then he came down and we signed it. 40

Q Was there any discussion about the modifications subsequently, in the construction of the house? A Just what Mr. Mack and they agree, and what they didn't agree to they crossed off.

Q Was there anything said at that time as to any extra charge for these changes? A No,
10 there was none at all.

Q Were you shown any plans or drawings or sketches or maps at that time? A Yes.

Q What was shown to you? A There were several of them altogether. I don't know much about maps.

Q What do you remember seeing? A There was a map of the house and of the street and of the side. It showed the houses in most every style. It showed the sides and back and front.

20 Q Did this plan show anything with respect to the location of the house? A It was a corner.

Q Did it show it to be on a corner? A He said, "There is your house, that is the corner lot."

Q What improvements, if any, has your husband made upon the premises? A We have graded—of course, there was nothing done to it. We have had it all graded and put different things in the house that were necessary, such as
30 radiators and that sort of stuff.

Q Do you know the approximate cost of the improvements? A I cannot just say.

Q Were you present when title was closed with your husband at that time? A No, Mr. Mack went down alone.

Cross examination by Mr. Schotland.

Q At the time when your husband took the
40 deed, you signed a mortgage, didn't you? A

We were not together when we signed it. Mr. Mack went one morning and I came down another day.

Q What kind of a map did you see showing this house as a corner? A They were all together. It was one big map, and they were all together. Little maps of different things, that shows the house and front and side and back. 10

Q Have you ever seen architects' plans for a building? A Not particularly. Only my own. No, I never saw any others.

Q Did you see the architect's plans for the building of this house? A They were at the office, yes.

Q And this map that you are talking about, was that a part of the architect's plan of the building? A No, that was a separate map by itself. 20

Q How big was it? A Like that (indicating).

Q Was it this map (indicating)? A I don't think it was as large as that.

Q Was it this map (indicating)? A I just tell you, I didn't look at it that way.

Q You didn't look at it? A Not that way. He said, "There is your lot, and that is a corner lot," and he pointed to it, and naturally I took his word. Not knowing blue prints, I wouldn't know much about it. 30

Q It was one which showed a lot of lots? A Yes, it showed all the lots.

Q And streets? A Yes.

Q Will you look at this map. Here is Oak street and Tremont avenue. Did he show you them— A No; our house was right on the end absolutely.

Q Where? A There was no line drawn here on the map, I am positive. 40

Q I show you Exhibit D. 2. Do you recognize here the location of your house? A Yes.

Q That is your house? A Supposed to be.

Q Oak street with Tremont avenue running opposite your house? A It was supposed to go right on through.

10 Q But it only goes to your house? A Now, but it wasn't supposed to.

Q Do you recognize this as the map that you saw? A I cannot tell you exactly, but it did not look as large.

Q It was a map like this (indicating)? A Yes, similar to that.

Mr. Schotland: That is Exhibit D. 2.

Mr. Greene: I would like to make a reservation, to put in rebuttal if necessary.

20

MISS HELEN JEDELL, a witness produced on behalf of the complainant, in rebuttal, being duly sworn according to law, on her oath testified as follows:

Direct examination by Mr. Schotland.

30 Q You are the managing clerk in my office? A I am.

Q Did you have charge of the mortgage in question on behalf of the Philmar Construction Corporation, and on behalf of the Curtiss-Warner Corporation after it became the owner? A I did.

Q During the time that you had charge of it on behalf of the Philmar Construction Corporation, the original mortgagee, did you receive any

40 communication from any attorney on behalf of

Mr. Mack or Thirkettle, this defendant? A I did.

Q I show you letter dated May 29, 1923—

Mr. Greene: I will admit all letters of Mr. Harris for whatever they are worth.

Mr. Schotland: I offer that letter in evidence, dated May 29th, from Mr. Harris to Miss Jedel. 10

(Marked Exhibit C. 6.)

Q Did you arrange that with Mr. Harris? A I did.

Q In December, 1923, following the settlement made after the letter of May 29th, did Mr. Mack make the payment then of $400 on the principal? A No, I don't think he did. 20

Q Did you then take that up with Mr. Harris? A I did.

Q And did you receive this letter dated January 18th, from Mr. Harris? A I did.

Mr. Schotland: I offer that in evidence.

(Marked Exhibit C. 7.)

Q After the receipt of that letter did you take that matter up personally with Mr. Harris? 30 A I did.

Q What arrangement, if any, did you make? A I think at that time it was that I wrote Mr. Harris that Mr. Thirkettle—

Mr. Greene: I object.

Q I want the conversation. A The conversation was first of all, there was a letter then—

Q The conversation, I want the conversation. A The conversation was if Mr. Mack would pay 40

our fees, which he had never paid, for closing the title, for his end of it, that since Mr. Harris personally wanted it as a favor, we would take $10 a week until he paid off the mortgage, provided the payment was made very promptly and every week. Mr. Harris assured me that it
10 would be with his own check, and would be so made.

Q Was that arrangement ever carried out? A That arrangement was carried out for a certain length of time.

Q I show you letter dated March 28, 1924, from Mr. Harris. Did you receive that? A I did.

Mr. Schotland: I offer that in evidence.

(Marked Exhibit C. 8.)

20

Q Did you receive the $100 mentioned in this letter? And the $33.50 that Mr. Harris says he advanced? A I did.

Q And after that did you receive the $10 a week regularly? A Yes.

Q How? A By check from Mr. William Harris' office.

Q You got Mr. Harris' personal check for
30 that weekly? A Yes.

Q Until the amount that is credited in the bill was paid? A Yes.

Q In giving credits in the bill, did you make up the figures for the bill of complaint? A Yes.

Q Will you check up your figures in the bill of complaint and state whether or not you gave the defendant credit for the $33.50 on account of the mortgage, instead of crediting that for
40 my fee? A That particular $33.50 was turned

over by me to the Philmar Construction Company. The $33.50 was turned over for our fee and was in addition.

Q There is no error on that? A There is no error on that.

Q Then there is due on this mortgage $1,206.-50 with interest from the date of the mortgage, six months later? A That is correct.

Q Did you collect any interest on account of the part of the principal that has been paid? A I collected every week the $10, and Mr. Harris asked me not to make any figures of interest, to simply take $10 a week until it was all paid up, and then we would make an adjustment of just how much interest there would be from week to week at that time, and I complied with his request.

Q Before you closed your settlement with Mr. Harris, did Mr. Thirkettle himself come in to see you? A He did.

Q About this mortgage, I mean? A Yes.

Q What did he say about it? A He came in, when I showed him the letter about the fee, Mr. Thirkettle personally came there and paid that fee, and while he was there, he asked me to please use my influence, any influence that I would have with the members of the Philmar Company, to not press him, if he would pay $10 a week, and assured me that the $10 a week would be paid promptly by him to Mr. Harris until the complete mortgage was paid.

Q Can you give us the date of that visit? Do you recall it? A I don't recall it. I know it was a few days later, after that letter.

Q Will a carbon of your letter of March 26th refresh your recollection as to the date?

Mr. Greene: I object to that. There is no notice to produce served upon me.

Mr. Schotland: I will not introduce the letter. It is something from which the witness may refresh her recollection as to the date of the conversation with Mr. Mack, that is all.

10

A I don't remember the date, except that it complied with that letter.

The Court: Having seen that letter, have you any recollection now as to the date?

The Witness: No, I have not.

Q As to any length of time after or before that letter? A Oh, within a day or two of that letter.

20

Q And the letter is dated March 26, 1924? A Within a few days of March 26, 1924.

Q On that occasion, or on any other occasion did either Mr. Thirkettle or Mr. Harris make any complaint to you or intimate that there was any defense to the mortgage?

Mr. Greene: I object to that. She is not one to whom to complain.

30

Mr. Schotland: She was the person with whom they both carried on their negotiations and made their payments.

The Court: I don't think that makes much difference. I don't think it helps you very much nor hurts the other side very much if no complaints were made. I will admit the question nevertheless.

A Never.

40

No cross examination.

PHILIP HERMAN, a witness produced on behalf of the complainant, in rebuttal, being duly sworn according to law, testified as follows:

Direct examination by Mr. Schotland.

Q Is the Philmar Construction Company in existence today? A No. 10

Q When it was in existence, what officer were you? A Treasurer.

Q And did you devote your time to the business of the company? A Yes, sir.

Q You carried on the negotiations with Mr. Thirkettle regarding the sale of this particular house? A Yes.

Q When you showed Mr. Thirkettle the place where your company was building the houses, what price did you ask him? A I told him I would sell it to him for $7,000. 20

Q Did you tell him $6,500? A No, sir.

Q How many houses did your company build on that tract? A I think about 60.

Q Did you sell any for $6,000?

Mr. Greene: I object.

The Court: I will receive it. It may have some bearing on it. 30

A No, sir.

Q The price you asked him, you say, was $7,000? A Yes.

Q Then how did you come to make an agreement with him for $7,500? A When we went down to the office and we started and looked over the work as supposed to be, he said he wanted some better work, so we arranged what work he wants, we wrote it on a piece of paper, 40

and Mr. Goldfarb figured it up, it will be $500 difference, so we told him we will charge him $7,500 for the house, according to the work he wants to have done, because the other houses were done according to plans and specifications.

Q Did you tell him that you were selling him
10 a corner? A No, sir.

Q What was said about a corner? A When I went down with him, I think it was on a Sunday, we took along the map, this map what we got here.

Q I show you Exhibit D. 2. Is that the map that you mean? A Yes, that is the map.

Q What changes, if any were made from that map? A These is 25 foot lots. He made it out 40 feet, some 40 feet, some 41.

20 Q Instead of using 25 foot lots, you made all the lots 40, did you, and more? A Yes.

Q Is that the only change you made on the map? A Yes.

Q Did you ever have any other map made of this building than this one Exhibit D. 2? A No, that is the only one, because that is the first one on the street.

Q Did you show a copy of this map just like this, Exhibit D. 2, to Mr. Thirkettle? A
30 Yes.

Q And to Mrs. Thirkettle? A Yes, sir.

Q You say that is exactly the way it was? A Yes, that was Mr. Mack's house, the last one.

Q The last lot shown on this map is the one that Mr. Thirkettle picked out? A Yes, except he has 40 by 100.

Q Go on and tell us what was said about a corner? A When I was to be with Mr. Mack
40 there, I show him the tract. I said, "Mr. Mack

you can have which one you want, I will charge you $7,000;'' two was sold already. One I sold for seventy-two and one for $7,000. ''You can have which you want, but I would advise you to take this last one because this is a butt street. Sometime the street will go through. It will be a corner, because there is no house around that corner in that section.'' So he talked it over with his wife. He said, ''I think you are right, I better take this last one in case a street is cut through, there will be a corner.''

10

Q Did you charge him anything extra because it was a corner? A No, sir, I told him to take any one he wants for $7,000, I don't charge him nothing extra for this house.

Q Can you read and write English yourself? A No, not much.

20

Q Who had charge of putting in the special clauses in the agreement that were put in? A Mr. Goldfarb.

Q Mr. Thirkettle says that when you took him on the tract, he asked you how much for the house and you told him $6,500? A Never I told him sixty-five.

Q And he said that when he picked out this lot, you told him that is a corner and you wanted $1,000 more for the corner? A I never talked to him, and I told him I want $7,000, and he was satisfied. Then he went down to the office and looked over plans and specifications.

30

Q You told us that you said that the extra $500 is for the extra work? A Yes.

Q Who figured up the cost of the extra work to make up that $500? A Mr. Goldfarb.

Q He is the general builder? A He is a better figurer than I, and he figured it out.

40

Q Did Mr. Thirkettle ever, after he took the title and moved into that house, ever talk to you about the house not being a corner? A Never.

Q Did he ever tell you that it is not a corner, and did you tell him, "never mind, I will attend to it, it is going to be a corner?" A
10 I never say one word.

Q You never had any conversation with him about it? A Never, he never asked me, the only way he was talking once was, a year later, when Mr. Mills laid out the streets, so I say at that time—he asked me, he said, "Mr. Herman, you think the street will be cut through?" I said, "You ask Mr. Mills, he is an engineer and he can tell you better," and he called him over and asked him.

20 Q Were you there when he asked him? A Yes.

Q Did you hear Mr. Mills answer? A Yes.

Q Is that the same as he testified, as Mr. Mills testified? A Exactly the same. That is the time I was there, too. We laid out the streets at that time.

Q And he told you that it was not going through? A Mr. Mills told him it wouldn't go
30 through. He asked me, I said I don't know. I said you had better ask Mr. Mills.

Q Did he make any complaint to you at that time? A No, he never said a word.

Q When was the first time that you ever knew that he complained that he didn't get a corner? A I never knew it until now.

Cross examination by Mr. Greene.

40 Q How old are you? A About 54.

Philip Herman, cross.

Q And how long have you been a builder? A About twenty years.

Q In the City of Newark and Essex County? A Yes.

Q And during that time about how many houses have you erected either you directly or indirectly for any corporation? A I don't know, I cannot remember. I built a lot of houses, apartments and different things. 10

Q You have had a great deal of experience in building? A Yes.

Q And in the past four or five years you have made a specialty of building a large area of houses of similar construction? A Yes.

Q You built a large area of houses of a similar nature in Irvington? A Yes.

Q And they were on the same general plan as these houses in East Orange? A Some were the same, some were changed. 20

Q You had one or two plans for these houses, but they were of the same general structure? A I changed the front a little bit.

Q But these little changes in the slope of the roof didn't change the price of the house, did they? A No.

Q And you say you were building about sixty houses? A That is it. 30

Q At the time Mr. Thirkettle went and looked at the property with you, were there any streets cut through there? A No, not yet.

Q And were any cellars excavated there? A Yes.

Q Did you show Mr. Thirkettle any plans and specifications up there? A No, not there, in the office.

Q And you told him that you had sold two houses, one for $7,200 and one for $7,000? A Yes. 40

Philip Herman, cross.

Q You only asked him $7,000? A Yes.

Q Isn't it a fact, Mr. Herman, that you told Mr. Thirkettle that this particular house was going to be a corner? A No, sir.

Q Why did you put in the agreement, if it wasn't to be a corner, why did you call it a
10 corner? A Mr. Mack was in the office, and I told him this street will be cut through. I said, "You had better take that house, the last house," so he insists to put in the agreement in case it shall go through, we shall cement the sidewalk for him. That is what he said.

Q So that you didn't expect to charge him extra for the sidewalk? A No, sir.

Q So that this extra sidewalk work was not included in the $500 which you spoke of? A No.

20 Q You didn't charge him anything for this sidewalk? A No.

Q So that you say the modifications were the ones for which you charged the extra $500? A Yes.

Q If you sold one of the houses there for $7,200, why did you offer to sell it to him for $7,000? A Because Mr. Mack, I know him for some many years, he tried to beg me, he said,
30 "Give me a little cheaper." I said, "I cannot afford it." I said, "You come down and talk it over with Mr. Goldfarb. I asked him $7,300, and he may let you have it." He jewed me down $300.

Q Had you ever sold any of these houses for less than $7,000? A No.

Q Did you ever sell any for $6,800? A No.

Q You didn't sell any for $6,800? A No, not one.

Q Sell any for $6,900? A No.
40

Philip Herman, cross.

Q You sold them either for $7,000, or above? A Up to $7,500; after, we raised it higher.

Q You started off with a certain price and then raised it? A We started off with $7,000.

Q You were satisfied to get what you could at first? A We figured out on account, we couldn't afford to sell them for $7,000, we started with $7,000 and then raised it up to $8,000, to $8,500. 10

Q You were not to charge anything extra for getting the building loan mortgage, were you? A No.

Q If it wasn't the agreement that this should be a corner, why did you have that put into the agreement? A That I explain, Mr. Mack insisted when he was in the office, he said if this will ever—if the street will be cut through, you give me the sidewalk, so I talked it over with Mr. Goldfarb and found it would cost us about $125 to $150, at the highest. 20

The Court: That is not the question. The question is why, if you did not think this was a corner, did you describe it as a corner in the agreement?

The Witness: Yes, because he insists on putting it in for a corner because that was the last house. 30

Q How did you know there was going to be a street cut through at all? A I don't know.

Q You just guessed at it? A Yes.

Q You at that time hadn't made any dedication to the City of East Orange? A No.

Q You didn't know anything about the City of East Orange wanting this property for a street? A No, I never knew it will be cut through. 40

Philip Herman, cross.

Q You didn't know the position that that street would be in, or position of Oak street, did you? A No.

Q Why did you just pick out this house to be a corner? A You see this is the last house. When we finished the last house, there were no
10 houses around, and Tremont avenue stops right there by this house.

Q Did you own the land immediately to the left of that house? A No.

Q How could you gamble on that being a corner when you didn't own the land which came up to that house? A I told Mr. Mack and he buys it, not for a corner, he knew it wasn't a corner.

Q If you knew it was a corner, it was worth
20 more than an inside lot, wasn't it? A If I knew it is a corner; I knew it is not a corner.

Q If you knew that was going to be a corner, you would have asked more money for it? A I don't think I would ask him. I think I would sell him for the same price.

Q If that was a corner, do you say that a corner lot would not be worth any more than if it were an inside lot? A The land is very
30 cheap there, the whole lot was seven or eight hundred dollars.

Q But you would charge him something for the fact that it was a corner? A Maybe I give it for the same price, because that is the last house. It is no benefit to me.

Q You say now that that lot as a corner lot, if it were a corner lot, would have the same value as an inside lot? A If it is a filled piece of ground, the whole piece of land is seven to eight hundred dollars.
40

Philip Herman, cross.

Q You have been in the business for twenty years. I want to know from you whether in your judgment that lot as a corner lot had a greater value than an inside lot? A Sure, a corner lot is worth a little more.

Q And didn't you charge him more because you thought it was going to be a corner lot than if you thought it would be an inside lot? A No, because I knew it is not a corner. 10

Q How much more in your judgment is that lot worth as a corner lot than as an inside lot? A The difference?

Q Yes. A If the lot is worth $800, it is worth a couple of hundred dollars difference, I think about $200.

Q That is all? A That is the highest it is worth. 20

Q You don't think it is worth $1,000? A No, the whole lot is $800. I sold lots there for $800 each.

Q You say that you showed Mr. Thirkettle a certain plan at your office? A Yes, sir.

Q You referred to this plan which was prepared on April 21, 1922? A Yes, I show him the plan.

Q Did you show him a plan which showed 40 foot front lots or 25 foot? A 25. 30

Q But he was agreeing to buy a 40 foot lot? A Yes.

Q Didn't you show him a plan which showed a 40 foot lot? A I did, yes.

Q You did? A Yes.

Q Where is that plan? A I don't know where it is now. It is over four years, the corporation dissolved. We don't keep all plans here.

40

Q Didn't that plan which showed a 40 foot frontage— A Yes.

Q —show also this lot as a corner lot? A No, sir. The plan would show the same like this.

Q Did you know the property right across the street from this, the other side of Oak street? Did you have any corner lot on this tract? A No.

10

The Court: You didn't have any corner lots at all?

The Witness: No; all the same. On this side of Oak street is the same thing. This is Tremont avenue (indicating).

Q Didn't you own this? A Yes.

20

Q This (indicating) is a corner lot, isn't it? A Yes.

Q What did you sell the house on that lot for? A The same price. This (indicating) I sold for $7,000.

Q What did you sell this one for (indicating)? A For $7,200.

Q And this one? A After we raised it, I sell it for $7,800; that is two years later.

30

Q What were these lots in here (indicating), $7,000? A $7,000, every one. This is sold for $7,000 after a year later. I couldn't afford to sell them for $7,000.

Q Mr. Herman, isn't it a fact that you put that provision in the contract about this lot being a corner lot, because you showed Mr. Thirkettle this corner lot on the map, and because he insisted that it should be provided for in the contract? A No, sir, I never told him it is a corner lot, and never promised to give him a corner lot.

40

Philip Herman, cross.

Q Mr. Thirkettle didn't have any lawyer present when this contract was drawn? A I don't think he had any. I think Mr. Goldfarb took him upstairs and made out a piece of paper or receipt.

Q How many of these items that are called for in the amended specification were actually installed? A Everything according to what the specification called for we put in, and the extra work we arranged for to put in. 10

Q Were all the extra work, or modifications of the work that are shown in this agreement, performed? A Yes.

Q Everything? A Yes.

Q Didn't leave out anything? A According to this contract?

Q Yes. A We gave him everything he was entitled to. 20

Q You say that Mr. Thirkettle never complained to you about this corner? A Never, I never heard it.

Q You were present when he spoke to Mr. Mills? A Yes.

Q Did he talk to you at that time? A He talked to me first. He asked me what is Mills going to do, lay out the street? I said yes. He said, "What do you think this will be, cut through the street?" I said, "I don't know, you had better ask Mr. Mills. He is the engineer, he can tell you better." He called Mr. Mills over and asked him, and Mills told him. I didn't believe it because it don't show on the record. 30

Q Isn't it a fact, Mr. Herman, that about two or three weeks before Mr. Mack stopped payment that you met him on Market street? Before he stopped making payments, isn't it a fact that he spoke to you on Market street, and asked 40

you when this corner was going to be put in? A No, sir.

Q You say he never spoke to you? A He never spoke to me.

Re-direct examination by Mr. Schotland.

10

Q Mr. Herman, you said you showed him a map showing the forty foot lot. I show you Exhibit D. 3, is this the map you have in mind, or a copy of it? A This is the survey of the house, forty feet.

Q Is that the one you meant? A Yes.

Q Did you have any other one built forty feet? A No, sir, that is the only one.

20

LOUIS E. GOLDFARB, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath testified as follows:

Direct examination by Mr. Schotland.

Q Mr. Goldfarb, when the Philmar Construction Company was in existence, you were what

30 officer? A Secretary.

Q And did you close this contract in connection with Mr. Thirkettle? A I did.

Q Where? A In my office.

Q Who were present? A Mr. Thirkettle, Mr. Herman; I don't remember whether Mrs. Thirkettle was there or not, and myself.

Q When negotiations were started, what was the price? A $7,000.

Q Was there any other price mentioned? A The price was mentioned of $7,000, but I met

40

Mr. Thirkettle. In other words, Mr. Herman reported that he had a prospect of $7,000.

Mr. Greene: I ask that that be stricken out as hearsay.

The Court: Strike out the portion that is hearsay. 10

A (Continuing.) When Mr. Thirkettle got the price, it was $7,000.

Q What caused the change? A Some additional work. He wanted whatever the plans and specifications provided for. This was a standard house we were building, and this additional work is the work that is shown on this agreement.

Q Is that the work that is shown on this agreement, Exhibit D. 6, in different typewriting from the rest of the contract? A Yes, I had that typed out in my office, separate from your office. You sent it from your office. The top of the agreement. And I took this down on my typewriter in my office. 20

Q All of these modifications, then, were done in your office in the presence of Mr. Thirkettle? A Yes.

Q How did you figure that out, the $500? A The items that were wanted were more numerous than is enumerated on this page. Mr. Thirkettle and I were waiting until we got down to this, and the price was set out $500, and it was agreed between us that it was worth that. For example, we referred to page 3 of the specifications. The specifications are not attached to this; they were attached to this (indicating). The flooring there calls for fir, and fir flooring is a very cheap flooring. 30

Q And what does fir flooring cost a thousand? A At that time I think around $45. 40

Q And what did he substitute?

Mr. Greene: Cone grain.

A The finest grade in pine, that was $110 at that time, and the laying was the same, because the pine was a harder flooring than the fir.

10 Q How many feet of flooring did you use in this house? A I don't know, about 1,800 feet area to a house.

Q How much did you figure the difference in the flooring? A I really don't remember, I didn't take it exactly item for item; we took it altogether. I ran over $500, and we set a lump sum of $500 as being all right, and it was agreed upon.

Q That is what made the price of that $7,500? A Yes.

20

Q Was the fact that the location is described in this agreement as premises known and designated as the corner of Tremont avenue and Oak street taken into consideration in the price at all? A Not for one dollar.

Q Did you charge anything additional because it is a corner or will be a corner? A No, sir; absolutely not.

Q How do you account for the reference to

30 this lot as a corner? A I will show you. I told him it would be a corner. It was my impression that it was.

Q The witness is referring to Exhibit D. 2 now. A Prior to Mack, we had sold a lot of houses there.

Q On what street? A On Oak street. That was the street of the entire development. Here is Rhode Island avenue, here is Oak street, Tremont avenue was open, and when we bought this

40 tract, from the Newark side Oak street was open

Louis E. Goldfarb, direct.

as far as where we bought the tract, from about half the line of Oak street.

Q Half of the line of the lots which you bought? A Yes. Then when Thirkettle came down I said to him, it was, I thought, located on the corner. I said, "Mack, look, Tremont avenue has got to be opened all the way through to the East Orange line; we will give you a corner here which will give you the total benefit." He said, "What benefit have I got?" I said, "When they open that up I will put it down for you." He said, "All right, put that in the agreement." He got that corner. We had no street number. If you will notice on all the agreements of sale there are no street numbers. We designated just where that was going to be.

10

Q And they made no charge because of the fact of its being a corner? A I honestly was under the impression that it was a corner, but I didn't own the land here. I took it for granted because Tremont avenue was opened to Oak street, that they would have to continue it right through.

20

Q You assumed that that would be the condition? A Absolutely.

Q And when he raised the objection that if they did continue it, he will be paid for the curbing and sidewalk? A Yes, so I said I would do, when they done it.

30

Q That is why it is in the agreement? A Yes.

Q Tremont avenue has not been opened? A It has been to Oak street. It was always open to Oak street. Beyond that it has not been.

Q So that this property has not become a corner? A No.

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Q Did Mr. Thirkettle ever complain to you about the fact that he bought a corner and didn't get a corner? A He did complain to me about five weeks at Miner's Theatre where he is manager. I said to him, "You ought to be ashamed of yourself, what we did for you, to allow this to go to foreclosure." He said, "It is his business, and I am going to defend. You promised me a corner, I want a corner." I said, "You surprise me. I don't want to talk with you on the subject. Go as far as you like." That is the only time he ever complained to me, that we promised him a corner lot and he hasn't got it.

Q That is five weeks ago? A Five weeks ago today or six weeks, one of the last shows they had there.

Q Did you have any conversation with him about telling him if he wasn't satisfied you would take the house back? A Yes.

Q What did you say? A I said, "John, you certainly got a bargain from us. I will return every dollar the house cost you," and he said, "I want $9,500 for the house." I said, "I am not interested in buying, but I want to show you you have no complaint on your purchase," and we dropped the conversation.

Q Are you still willing to pay back every dollar it cost him and take the house? A Yes.

Cross examination by Mr. Greene.

Q How old are you? A Forty-one.

Q What has been your experience as a builder? A Quite extensive.

Q How many years' experience have you had? A About twelve years or fifteen years.

Q In the City of Newark and vicinity? A Yes.

Q And in that time—can you say roughly how many million dollars of property you have turned over in that time? A I think I built in the last four years about four million dollars' worth of property. 10

Q And in the other eleven years? A I have no record.

Q Mr. Goldfarb, you are an officer of both the Curtiss Corporation and also the Philmar Corporation? A Yes.

Q When the Philmar Construction Company went out of business, it turned everything over to the Curtiss-Warner? A No, the Curtiss-Warner had an interest in the Philmar, and when the Philmar dissolved, it turned over to the Curtiss-Warner its interest that it had in any money and mortgages and other securities. 20

Q The Curtiss-Warner Corporation succeeded to the Philmar Construction Company? A To its assets.

Q And the old officers became officers of the new company? A No, the old officers of the Philmar were never officers of the Curtiss-Warner except myself.

Q You are positive you were present when this contract was signed? A I didn't say so, when the contract was signed in Schotland's office. 30

Q You are positive that it was signed in Mr. Schotland's office? A I don't know where it was signed. I was present when this contract was drawn, all the facts and figures put in.

Q Drawn where? A My office.

Q This contract was drawn in your office? A This part (indicating). 40

Q The specification part? A Yes, from here down (indicating). There were two different typewriters used, part of it was drawn in Schotland's office and the other part in mine.

Q Were you present when the contract was signed? A I don't remember; I don't think so.

10 Q Where was it signed, do you know? A I believe it was signed in Mr. Schotland's office, I cannot say.

Q What makes you believe that? A All our contracts are signed there.

Q You say you made some computations for this extra work. Is that correct? A Yes; I was present when the contract was signed. There is my signature. I didn't remember it, but I must have been.

20 Q Was it signed in Mr. Schotland's office? A I believe it was.

Q You say you made some computations for this extra work? A Yes.

Q And it ran up to more than $500? A It did.

Q Was Mrs. Thirkettle present when these negotiations were going on? A I don't know; I believe she was the first time I met John, I am not sure.

30 Q Isn't it a fact that you were nowhere near the spot where this contract was signed? A It is not a fact.

Q And that you didn't participate in the slightest degree in the computation? A That is not so. That is absolutely not true. Nothing would be done in that company without me.

Q I want to get you on record squarely? A That is absolutely so.

Q You say you were always under the impression that this was a corner? A Yes.

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Q What gave you that impression? A On account of this layout. If you come here, I will show you. Tremont avenue runs from Munn avenue, Newark. That has been opened for a great many years, because prior to that, about five years prior, we built some homes, and when we acquired this tract I concluded that Tremont avenue would be opened all the way through, because the ground next to that we knew was vacant.

Q Didn't Tremont avenue form a part and parcel of your tract? A Part of it did.

Q Had you made a dedication to the city? A That was opened and dedicated long before we acquired it.

Q Who dedicated it? A I don't know, the previous owner, probably.

Q You say Tremont avenue was opened at the time you began your construction? A Yes, opened up to Grant avenue.

Q Did you hear the testimony of Mr. Mills, the engineer, who said it wasn't opened at the time you made the survey? A I don't care; I know that I know it was opened at the time, because I built houses there five years prior to acquiring this property.

Q You want us to believe that after all the experience you have had, you put something in the contract simply on a gamble and guess? A I wasn't gambling; I wasn't giving anything away.

Q You provided in the contract that this man would get a corner lot? A Yes.

Q Did you have a corner lot at that time? A It was my impression it would be a corner lot.

Q So that you undertook to give a man something about which you were not certain? A That is correct.

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Q It was therefore your suggestion and not Mr. Herman's suggestion that this be put in the contract? A Yes, on account of the request that he made about the cementing and curbing. I said, "If it is ever opened, we will do the cementing and curbing for you."

10 Q Why did you put that in writing? A I will tell you, Mr. Greene, we built 240 houses and in eleven months we have taken as low as a ten dollar deposit and as high as a $500 deposit, and said that if the people didn't want it, we were glad to return their money, and we would sell them just that fast; it made no difference to me whether Mack took the house or didn't.

Q Do you want us to believe that this lot, as a corner lot, didn't make any difference in value?
20 A I didn't say that it didn't make any difference in value.

Q Is there any difference in that lot as a corner? A You see, if this lot as a corner belonged to us in fee, with the assessment paid, the value of that lot would be a thousand dollars more than the value at the time Mack purchased it. The assessment on that 100 foot front on Tremont avenue would have cost a
30 thousand dollars. The cutting and the grading and surfacing of the street, understand that, but as a lot as it is, with the city cutting it, with the assessments being levied against it, it wasn't worth any more than an inside lot.

Q You know, as a fact, that Mr. Thirkettle has made improvements on the property? A He put some seed on his lawn and planted a few shrubberies; that is all he did to my knowledge.

Q You got for this property whatever you
40 could, starting with a low figure when you first

began to build, and then went up? A The cost increased as we went along.

Q You sold them below $7,000? A We did sell ten of them for all cash below $7,000. That was $6,900 all cash, without any mortgage.

Q You say you sold another house before Mr. Thirkettle came down to bargain for his house? A Yes. 10

Q How many had you sold? A Between eight and twelve.

Q Did you hear Mr. Herman testify that only two were sold before that? A Two adjacent to Mr. Thirkettle's. You see, this street is about 1,500 feet long.

Q What happened to the plans and specifications for this house? A I don't know; it is a matter of four years. 20

Q Didn't you use these plans and specifications for other houses which you built since that time in other sections? A These are very similar (indicating), but not these (indicating).

Q You had plans and specifications for them? A Yes, must have had.

Q Who made them? A M. J. Nagle.

Q Were they very much different? A I guess we improved on the living room and we improved on the dining room. We made it a little larger by cutting out a little cut. 30

Q That was the only difference? A We had a sun parlor where the open porch is. If you have the photograph, I will show you what I mean.

Q Tell us. A I would rather point it out to you and show you the difference.

Q Suppose you tell us. A Where the photograph shows an open porch, we changed it to a sun parlor and got something like eight or nine 40

hundred dollars more a house for it. That was up on Grant avenue, out of the same tract.

Q You say today that a lot as a corner lot is worth a thousand dollars more than an inside lot? A With the assessments paid?

Q Without the assessments paid. A It is not worth any more. Of course, don't misunderstand me. If we own that as a corner with the assessments paid, the actual value would be a thousand dollars more, but you have got 100 feet of assessments to pay and 100 feet of grading.

By the Court.

Q The assessments which you refer to are assessments for the laying of the sidewalks and curbs? A No.

Q What? A The assessment that I refer to is the concrete paving of the street itself, and the cutting of the street down to grade. In developing a tract, sometimes you have five or six foot to cut, sometimes it means five or six foot fill; sometimes it is even more, because it was a dump there previous. They dump garbage and ashes and stuff of that kind, and the land was very low, and if that street had to be cut through, it would have had to be filled to grade, and then graded and foundation put in on account of the softness of the ground.

Q It is an assessment for the street, then? A Yes.

Q And not for the sidewalks and curbing? A No.

Q You didn't expect to put in these sidewalks and curbs for nothing? A I agreed to put that in if they opened the street.

Q And yet you thought they were going to open the street? A I did.

Louis E. Goldfarb, re-cross.

Q Were you willing to make an agreement which would obligate you to spend four or five hundred dollars additional on sidewalks? A Not as much as that. We have laid hundreds of thousands of square feet of walk, and we know exactly what it costs. We have laid sidewalks as low as 4½ cents a square foot. It depends on the volume. If you can keep a mixer working steady, and straight line of walk, you can lay it for 4½ cents, and we laid all the walks on the entire tract, then graded it. 10

Q But you didn't lay this at the same time you laid the others? A No; this in front of his home, that is 40 feet front. We laid the walk, but we didn't lay it on the side, because the street wasn't opened.

Q Suppose you laid it separately? A It would cost me about 20 cents a square foot maximum. There is 100 feet by 4 would be 400 feet, and the curb, if I put in a granite curb, it would cost about $1.25; a bluestone, 90 cents, and concrete curb 60 cents. 20

Q What do you estimate the total cost would have been? A What curb do you want me to figure on?

Q The kind you expected to put in. A The cost to me would be $80 for the sidewalk and $80 for the bluestone curb, 100 feet lineal curb, $80; 400 square feet of walk at 20, $80, total, $160. 30

Re-cross examination by Mr. Greene.

Q What are Miracle doors worth? A Today or at that time?

Q At that time. A About $7.50 each.

Q What were the ordinary doors? A $2.15. 40

New Jersey State Library

Q How many doors were necessary in this house? A They run about 18 doors to a house.

Q So that the difference would be about $40? A I don't know, whatever it is.

Q You were to put up picture molding, is that right? A Whatever it says there.

10 Q What kind of trim was this? A White wood.

Q And what did the original plans and specifications call for? A White wood.

Q So that there was no change in that? A So far as the quality is concerned, no.

Q Did the original plans and specifications call for picture molding? A No.

Q What is the value of picture molding per foot? A The molding itself is $20 a thousand, 20 and we estimate about 3 cents a foot for putting it up, that makes $50.

Q When did you estimate the cost of completing that specification? A I don't remember. Everything was itemized at that time, and the cost arrived at I cannot tell you.

Q Where is that sheet? A Destroyed a long time ago.

Q In your own handwriting was it? A Yes.

Q What did the original specification call for 30 with respect to paint in the bathroom? A All the houses were standard type. We gave it a coat of surfacer, white coat of paint, and the ceiling got the same treatment. Kitchen received a coat of enamel and the bathroom a coat of enamel.

Q In what respect is this modification of page 7 different from the original plan and specification? A The modification is this, instead of putting on the coat of surfacer, that was a com-40 position, that is substitution for paint. We put

that first coat on, therefore you could put another coat on; it wasn't first class work, so we substituted actually paint instead of the surfacer, with an additional coat.

Q What is the difference in the price? A Per room of about $14.

Q And this was the bathroom and kitchen, that would be $28? A Whatever we stipulated there. I don't know how many rooms there were. 10

Q I want to get your figures so I have an opportunity to compare them with standard prices. What is the difference in building with the modification of specification on page 8, about wiring? What did you estimate the cost at that time? A I don't know how many outlets there were, but we estimate 12, and an additional outlet for chandelier, necessary to complete it. It is four for switches and four for the outlets. The original plan provides for a chandelier in the center of the room only. 20

Q What did this modification provide for? A According to plan, it calls for wiring according to plan, except living room to have six outlets for wall, that gives you five additional outlets.

Q Side lights? A Yes.

Q Did you ever install side lights? A No, not in a standard job. 30

Q Did you ever in this case? A I think they were installed; I don't have anything to do with the actual building of the home.

Q Isn't it a fact that this was never installed? A I don't know. I was told by Mr. Herman they were installed.

Q Can you estimate the difference in the cost of that item? A If there were six outlets, they were $8.00 each, for the actual outlet, and two 40

outlets in each bedroom, that made it four more, that is twelve times eight—and five extra would be nine times eight is seventy-two for that. Then we had to furnish the fixtures.

Q Who was to select those? A Mr. Thirkettle.

10 Q Do you know whether he selected any fixtures? A I don't know. Naturally he did because we completed it.

Q The item on page 13, toilet and porcelain seat and cover, and light box flush box and white porcelain finish. A The standard type was to go in, and this was something that he wanted in different.

Q What is the difference in cost? A I don't remember what the difference in cost is on that.

20 They run to a standard type, costing about $14; these cost around thirty or thirty-five.

Q Did you install a Richmond Thatcher Boiler, as called for? A No, we installed a Continental, I think.

Q Is that as good or more expensive or less? A It does not cost any more or less, and it is as good as either one. They have given satisfaction up there.

30 Q Did you charge him anything extra for that? A No.

Q Did you charge him for extra work on the installation of the boiler? A No, he was entitled to a boiler.

Q Was there any more difficult work in installing the Continental than the one called for here? A No.

Q You say all of these items figured up to more than $500. You said it took $500? A It was a little over $500.

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Louis E. Goldfarb, re-direct.

Re-direct examination by Mr. Schotland.

Q You said you sold ten of these houses for all cash, where you didn't have to finance a mortgage, for $6,900. Were they to ten different parties? A One man purchased them for speculation, and he resold them. 10

By Mr. Greene.

Q This man who bought these houses, was Mr. Solomon Berla? A Yes.

Q And he bought for cash or bought it on account of the money due him for work or materials furnished by him on the job? A No, sir, for cash. Spot cash, and the deal was closed in Schotland's office.

Q He wasn't the plumber on the job? A He was. 20

Q You say he didn't do the work, the plumbing work? A He had his plumbing work in it when he bought the houses.

Q When did he buy the houses, after you sold to Mr. Thirkettle or before? A After.

Q Your statement before that you had already sold ten houses before you negotiated a sale to Thirkettle isn't correct? A I didn't say that. I say there were 12 houses sold before Thirkettle purchased, but I did say I sold ten for $6,900 but that was not part of the twelve that were sold. 30

By Mr. Schotland.

Q They were other houses on that tract? A Yes.

COMPLAINANT RESTS.

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FREDERICK R. THIRKETTLE, recalled in rebuttal.

Direct examination by Mr. Greene.

Q Mr. Thirkettle, when was the last time you saw Mr. Philip Herman about this corner? A Last year, in the summer, I believe, or in the spring, sometime in the summer. I met him on Market street, and I walked with him toward the little Alley at the Lawyers' Building up as far as Halsey street. I said to him, "Philip, I am still waiting for the corner." He said, "Mack, you should worry, your house is worth a lot more money, even if you haven't a corner; you got the best end of the deal, the houses are worth more money." I said, "No, but I bought a corner." We stood on the corner for 15 or 20 minutes arguing about the corner. I immediately left him and went down to your office and said to you—

Q You consulted me about the matter? A Yes.

Q And did I advise you—

Mr. Schotland: I object.

The Court: No.

Q What did you do as a result of seeing me? A I paid, I think, one or two more weeks after that, until I saw you again.

Q And as a result of that second visit, what did you do? A Stopped payment.

Q Who was present at the time when this agreement was signed, was Mr. Goldfarb present? A No, sir.

Q Did Mr. Goldfarb have anything to do in figuring the cost of these modifications in the

specifications? A Not to my knowledge, Mr. Herman was the only one present. Mr. Herman left the room supposedly to go to Mr. Schotland's office, I don't know where he went with the agreement.

Q Did you have any conversation with Mr. Goldfarb on the day when this agreement was signed? A Not until after it was signed. 10

Q Was there any computation of figures made in your presence about the extra cost for this alleged work? A No, sir.

Q And who was present with you at that time? A My wife and Mr. Herman and the young lady that worked in the office, and myself.

Cross examination by Mr. Schotland.

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Q You know Mr. Philip Herman cannot read or write English, don't you? A Not to my knowledge.

Q Didn't you work for him at one time? A No, sir, for the Federal Wallpaper Company that he was interested in. I was the Custodian for the United States District Court in the store that he used to own.

Q You knew that he couldn't read or write? A I beg your pardon. I never thought much whether he could read or write. 30

Q Mr. Thirkettle, look at Exhibit D. 6. You notice that all of these modifications of the specification are on a different typewriting machine than the rest of the agreement, don't you? A I never noticed that.

Q Look at it and see? A Yes, sir.

Q Didn't Mr. Goldfarb in your presence dictate an agreement—dictate to the girl in the office of the Philmar Construction Company these 40

modifications which are on a different typewriter from the rest of the agreement? A I brought in the pencil list of what I wanted. Mr. Herman took it in to Mr. Goldfarb, who was in another office and came out to the girl, and Mr. Philip Herman and I argued over these different things and as to what they should be and should not be, not Mr. Louis Goldfarb.

Q Mr. Louis Goldfarb was there then, was he? A No; in another office. I have already explained that. But not in the room where this agreement was made out.

Q Wasn't Mr. Goldfarb there when the agreement was signed? A I think they took it in to have him sign it as president of the corporation; that is what he said.

Q He was there, and you say he was not in the same room? A That is it.

Q Who was the one that I read off these modifications? Who dictated that to the girl? A I wrote on a piece of paper these things here, and Philip said, "I don't know whether we can do this or not," so he went out, came back, and had three or four of these things scratched out, and we argued over them. Some he left in that had been scratched out, and some he put back in again.

Q Wasn't that all in Mr. Goldfarb's presence? A No, sir.

Q And wasn't Mr. Goldfarb the one who did the scratching out, and the one who did the dictating? A No, sir.

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MRS. HATTIE B. THIRKETTLE, recalled in rebuttal.

Direct examination by Mr. Greene.

Q Were you present when this agreement was signed? A I was.

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Q Did you see Mr. Goldfarb present? A No.

Q At any time while you were there? A No, he was not.

Q Did your husband in your presence have any negotiations with Mr. Goldfarb? A He did not.

Q Did you notice Mr. Goldfarb compute the cost of any of the items? A Not in my presence.

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Q Were you present when the agreement was signed? A Yes, I was.

Q Was Mr. Goldfarb in the same room where it was signed? A No, he was not.

Cross examination by Mr. Schotland.

Q Didn't you testify on your direct examination that you were not present when it was signed at the same time with your husband, but that you came down later? A Oh, yes, we signed separately, but not the mortgage in Miss Jedel's office.

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Q Were you present there? A Yes, both together.

Q Did you hear who it was that dictated these special clauses to the stenographer in the office? A I did not. Mr. Herman was the man we did the business with, the morning we signed our agreement.

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Q Did you see who dictated to the stenographer? A No.

Q Did you take part in the discussion over the terms? A Mr. Mack and I talked that over at home, it was written down, and talked it over between Mr. Herman and Mr. Goldfarb.

10 Q Did you take part in the discussion over the terms that took place in the office of the Philmar Construction Company? A What terms do you mean?

Q These special clauses. A It was just wrote down, when we signed it, there was nothing talked over that day when we went down to sign it.

Q There was no discussion about that in your presence at all? A Not that day, the day we went down to sign it. It was all agreed that they

20 were to do these things for us, and what they didn't intend doing they scratched out.

Q But the day the agreement was signed there was no discussion whatever about the terms in your presence? A No.

Mr. Greene: We are through, with this exception, but it seems to me that the testimony brought out by the defendant as to the cost of these special items, I think entitles

30 us to an opportunity to get an expert to answer their explanation. I think we can show—I am quite certain we can, if given an opportunity, by expert testimony, that the prices which were given by Mr. Goldfarb and Mr. Herman are absolutely unreasonable and far beyond the fact, and I think we should have an opportunity of calling a real estate expert to testify to the difference in value of that lot as a corner lot, and as an inside

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lot, unless your Honor has made up his mind that the fact that there was an agreement that we were to pay an extra $1,000 for the corner lot—if there is any doubt, I ask for an opportunity on those two points.

The Court: If I should find that Mr. Thirkettle was entitled to a corner lot under his agreement, then the question of the difference in the value between what he got and what he would have gotten is a very material matter, and as the case stands now, it would be a matter of pure speculation, it would be a pure guess on my part, as to the difference in the value. For my own part, I do not want to leave the situation in that shape at all. If the case had been closed without any suggestion of any further testimony, I should have done the best I could with it, but since the offer has been made to submit testimony on that by an expert, I am going to receive it. I will give you an opportunity to bring some expert here, if you want to.

Mr. Schotland: May I suggest that your Honor select a person and let him go and examine it and give the figure, the difference in value as of that time, with and without the street assessment for paving and grading. The only thing to be considered would be the question of the difference in value of a corner lot and an inside lot as it was at that time.

Mr. Greene: That is agreeable to me.

The Court: I will select as an expert Mr. Frank H. Taylor of East Orange, New Jersey.

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Appraisal of Property.

APPRAISAL OF PROPERTY

Situate and Known as
#193 Oak Street, East Orange,

And Described in Agreement of Sale as Premises
Known and Designated as Corner of
10 Tremont Avenue & Oak Street,
40 feet front on Oak Street
By
100 feet deep on Tremont avenue.

Agreement dated May 31st, 1922.

Property owned by
F. R. Thirkettle

Made By
Frank H. Taylor, President
20 *FRANK* H. TAYLOR & SON, Inc.
Note First Name.
Expert Realtors—Appraisers—Auctioneers.

#530 Main Street, East Orange, N. J.
#314 Bloomfield Ave., Montclair, N. J.

It must be understood that the values given are for property free and clear of all easements, restrictions and rights of way unless specified.

The premises have been appraised at a fair 30 market value with reference to the most advantageous uses to which they can be put by private persons or corporations.

By "Market Value" is meant the price the property would sell for in cash or on terms equivalent to cash when offered for sale by one who desires, but is not obliged to sell to one who desires, but is not obliged to buy.

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Appraisal of Property.

State of New Jersey } ss.
County of Essex }

Frank H. Taylor, of full age being duly sworn according to law on his oath saith that he has resided in the City of East Orange, New Jersey for the past forty-five years and has been engaged in the real estate business as Agent, Broker and Appraiser for the past forty years and that during the past twenty five years he has specialized as an expert real-estate appraiser and has been employed as Appraiser by the D., L. & W. Railroad Company, the Essex County Park Commission, the Essex County Board of Freeholders, the City of East Orange, South Orange and other municipalities, and has acted as commissioner in condemnation proceedings and has had over twenty years experience in condemnation matters.

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Deponent further saith that he is familiar with property situated and known as #193 Oak street, East Orange, and that he knew the existing physical condition and value of property located at #193 Oak street, East Orange, as of May 31st, 1922, and that previous to that time and since that date he has sold property in the neighborhood.

Deponent further saith that on May 31st, 1922, property consisted of vacant lot having a frontage of 40 feet on Oak street by a depth of 100 feet, that the street was unimproved and that the neighborhood had not yet been developed into a residential section, that Oak street was paved during the year 1923, and assessments for paving being confirmed, March 1924.

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Deponent further saith that he has considered fully the real estate conditions as existed as of May 31st, 1922 and the spring and summer of

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that year, and that in his opinion the value of said lot at that time was the sum of One Thousand Dollars ($1,000).

Deponent further saith that there existed no increase of value for the particular lot herein mentioned on the basis of it being a corner.

10 Deponent further saith that in his experience in handling moderate priced vacant property sold for residential purposes corner lots commandeered no greater price than inside lots and that it has only been during the past few years when corner lots have been in demand due to the growth of the City and then only on corner lots available for commercial or apartment house sites, that there has been an increased value to corner lots varying from 25% and upwards according to location.

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FRANK H. TAYLOR.

Sworn and subscribed to before me
this day of June, 1926.

HARRY A. TAYLOR.
(NOTARY SEAL)

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CONCLUSIONS OF VICE-CHANCELLOR.

IN CHANCERY OF NEW JERSEY.

Between CURTISS - WARNER CORPORATION, *Complainant,* *and* FREDERICK R. THIRKETTLE, *et als.,* *Defendants.*	*On Bill to Foreclose.* *On Final Hearing.* *Conclusions.* 59/487

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Philip J. Schotland, Esq., for complainant.
Israel B. Greene, Esq., for defendants.

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BERRY, *V.-C.*

This is a suit to foreclose a purchase money mortgage on which it is admitted there is an unpaid balance of $1,206.50 with interest from October 24, 1922. The defendants set up, by way of counter-claim, their right to an abatement, first, of the sum of $1,000, representing the increased price of the lot purchased on the basis of its being a corner lot, which it was not, and second, of the cost of construction of cement sidewalks and curbs the full length of the lot on the street which the lot was supposed to abut but did not.

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The original mortgage was in the sum of $2,000, was given to secure a part of the purchase price of the property therein described and was subject to a first building and loan mortgage of $5,000. In May, 1922, the Philmar Construction Company was engaged in develop-

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ing a tract of land in East Orange, New Jersey, and had divided the same into lots and plots and was erecting thereon a large number of houses. These houses were all constructed according to a common plan and were similar in appearance. In the latter part of May, 1922, the defendant
10 was importuned by the Company to purchase one of these lots and a house to be erected thereon, and a Mr. Herman, an officer of the Company, took the defendants in his automobile to the tract and showed them a house in the course of erection. He offered to sell any lot in the tract, with a house erected thereon, according to the plans and specifications, which were exhibited, for the sum of $6,500. The defendants expressed a desire for a corner lot and were shown the lot which they eventually pur-
20 chased and were told that it was a corner lot but that the price of that lot, by reason of its being a corner lot, with a house erected thereon, would be $1,000 more than the other lots and that the Company would sell them that lot with a house erected thereon for $7,500, accept a cash payment of $500 and take the balance of the purchase price in first and second mortgages of $5,000 and $2,000 respectively. The first mort-
30 gage was to be a building and loan mortgage to be arranged by the vendor. The defendants desired some changes in the specifications for the house to be built, and a written contract, providing for the sale of the lot and the building of the house, was entered into between the Philmar Construction Company and these defendants. This contract was dated May 31, 1922, and the property was therein described as "the premises known and designated as the corner of Tremont avenue and Oak street and being 40
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feet on Oak street and 100 feet on Tremont avenue.'' At the date of the contract the tract of land which was being developed was characterized by some of the witnesses as a ''dump,'' no streets being laid out and improved at that time. The line of Oak street and the line of Tremont avenue to the eastward of Oak street were apparent because houses had already been constructed or were in course of construction on those streets. The line of Tremont avenue to the westward of Oak street, however, was not delineated, as no houses had been erected at that point. The land there was vacant and barren. It was quite apparent, however, that if Tremont avenue were extended to the westward of Oak street, the lot which the defendant purchased would be a corner lot. The changes in the specifications for the house desired by the defendants were finally agreed upon and reduced to writing and made a part of the contract. Philmar Construction Company proceeded with the construction of the house and the defendants took possession of it and moved into it in October of that year, before its final completion. The deed for the lot purchased and the mortgage which is the subject of this suit were dated October 24, 1922, but executed and delivered December 4, 1922. The property is correctly described in the deed by metes and bounds without any mention of the lot as a corner lot. The $500 cash payment required by the contract was made by the defendant, $200 on the signing of the contract and $300 on the delivery of the deed. Some time during the following summer when sidewalks and curbs were being constructed by the city on Oak street, the defendant noticed that this sidewalk and curb extended beyond the point

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where Tremont avenue, if extended, would intersect the westerly line of Oak street, and called Mr. Herman's attention to the matter and inquired of him as to whether Tremont avenue was not to be extended beyond Oak street. Mr. Herman referred the defendant to the City Engineer, who was present, and the City Engineer informed the defendant that the city ordinances did not then provide for the extension of Tremont avenue. Tremont avenue has never been extended, the sidewalks and curbs, which under the terms of the contract were to have been constructed along Tremont avenue at the side of the defendants' lot, have never been built and the defendants' lot is not a corner lot. It is now admitted by all the parties that there is no present intention or immediate prospect of Tremont avenue being extended so as to make the defendants' lot a corner lot. There is a sharp conflict in the testimony of the defendants and that of the witnesses Herman and Goldfarb, who were officers of the Philmar Construction Company and who executed the agreement of sale, with respect to the representations made at or about the time the contract was executed. All of the preliminary arrangements with respect to the sale were conducted by the witness Herman and he testified that there was never any offer of the house and lot for $6,500, but that the original price asked was $7,300, afterwards reduced to $7,000, and that $500 was added to the purchase price on account of changes in the specifications of the house. The witness Goldfarb testified that none of the houses and lots in that tract were sold for less than $6,900 and that at the time of this sale none of them had been sold for less than $7,000. He also testified that

there was $500 added to the purchase price on account of the changes in the specifications for the house. Both the defendants, however, testified positively to the offer of other houses and lots for $6,500 and to the addition of $1,000 to that price for the house and lot purchased because the lot was a corner lot, and also to the fact that no extra compensation was to be added for the changes in the specifications. Their story has the ring of truth, and I am constrained to accept their version as to what happened. In addition to this, it is quite apparent from the negotiations which resulted in the changes in the specifications that no additional compensation was to be asked for them because it is admitted that the list of changes was reduced to writing by Mr. Thirkettle and handed to Mr. Herman to submit to Mr. Goldfarb; that some of the suggested changes were O. K.'d by Mr. Goldfarb and others refused. If additional compensation was to have been allowed for whatever changes were suggested by the purchaser, there is no apparent reason for Mr. Goldfarb's refusal to make all the changes suggested. It is admitted by both Herman and Goldfarb that at the time of these negotiations and at the time the contract was executed they knew that the lot purchased by the defendants was not a corner lot; that Tremont avenue had not been laid out by the city or dedicated and that there was no present intention on the part of the city authorities to extend Tremont avenue beyond Oak street. The land which would have been included in Tremont avenue, if extended, was not a part of the Philmar tract and was not owned by that Company. The defendants relied completely upon the representations of the officers of Phil-

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mar Construction Company as to the character of the lot purchased, as, from the condition of the land, it is obvious they were obliged to do. There is not the slightest doubt in my mind but that Mr. Herman, in negotiating a contract with the defendants and realizing that they preferred
10 a corner lot, seized upon this fact as an opportunity to boost the price of the house and lot and exacted of the defendants a price $1,000 in excess of what he otherwise would have obtained and this was done with a complete knowledge of the fact that the lot was not a corner lot; that there was no immediate prospect of its being made a corner lot and that there would, consequently be no sidewalks and curbs to construct on Tremont avenue. This conduct of Mr. Herman was approved and acquiesced in by Mr.
20 Goldfarb, when he joined in the contract of sale, and, in my judgment, constituted a fraud on the defendants from which they are entitled to be relieved unless the objections advanced by the complainant against such relief are sound.

At the hearing the question arose as to the difference in the value of the lot purchased by the defendant and the value of the same lot if it had been a corner lot. At that time I was under
30 the impression that the question was of some materiality to this issue, and by consent of counsel the opinion of an expert real estate appraiser was obtained on that question and he has reported that there was no difference in the value of this lot as a corner lot or as an inside lot at the time of the purchase. This expert also says, however, that corner lots available for commercial or apartment house sites have an increased value of 25% and upwards over inside lots. The witness Goldfarb testified that this

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lot, if it were a corner lot, and if Tremont avenue were laid out and improved, would have a value of $1,000 more than inside lots. But, upon reflection, it seems to me that the question as to the actual value of this lot as an inside or corner lot should have very little weight in view of the fact, as I find it, that the Philmar Construction Company exacted $1,000 more for the lot on the basis of its being a corner lot than it would have required if it had been an inside lot. The right to relief is based not so much upon the difference in the value of the lot as it is and as it was supposed to be, as upon the misrepresentation which was used as a lever to raise the price on the defendants.

Goldfarb's statement that the lot with the street built would be worth $1,000 more than inside lots rather confirms in my mind the idea that the representation that the lot was worth $1,000 more because it was a corner lot was made at the time of the negotiations.

It is estimated by the City Engineer who was sworn as a witness on behalf of the defendants, and whose experience and qualifications on this point are unquestioned, that the curbing and sidewalks along the line of the defendants' lot on Tremont avenue, if extended, would cost $451.74. The complainants claim, however, that the cost would have been very much less, if constructed by the Philmar Construction Company as a part of the general operation. Obviously, as the street was not cut through or laid out at the time this operation was going on, this sidewalk and curb could not have been constructed at that time. It is equally obvious that the City Engineer is impartial and disinterested and I am inclined to accept his estimate of the cost of

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such construction, based as it is, upon his wide experience in such matters.

The complainant urges the following points against the defendants' plea for abatement and extinguishment of the mortgage which is the subject of this foreclosure:

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1. That there was no fraud in the inception of the mortgage in that the defendants were not charged anything extra for the lot as a corner.

2. That defendants cannot maintain their counter-claim for sidewalks and curbing because the same is for unliquidated damages.

3. That the defendants cannot maintain their counter-claim on the ground that the lot is not a corner lot, because there is no provision in the executory contract of sale whereby the Phil-

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mar Construction Company was bound in the future to make the lot in question a corner lot, and that the executory contract merges in the deed.

4. That the defendants are estopped from setting up their claim in abatement by their laches and conduct in procuring extensions of time and making payments on account of the mortgage without objection.

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I will consider these objections in their order.

I.

This objection may be quickly disposed of as I have already found as a fact that there was a fraudulent representation by the Philmar Construction Company that the lot sold to the defendants was a corner lot and that $1,000 was added to the purchase price on the basis of its being a corner lot. This resulted in increasing

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the purchase money mortgage which is the subject of this foreclosure by the amount of $1,000 and clearly, if not barred by the other points raised by complainants, defendants are now entitled to an abatement in the amount of the mortgage to the extent of this overcharge.

The principle that abatement may be allowed on foreclosure of a purchase money mortgage on account of fraud is well settled. 10

Shannon *v.* Marselis, 1 N. J. Eq. 413;

O'Brien *v.* Hulfish, 22 N. J. Eq. 472;

Dayton *v.* Mellick, 32 N. J. Eq. 570; on appeal 34 N. J. Eq. 245;

Kuhnen *v.* Parker, 56 N. J. Eq. 286;

Redrow *v.* Sparks, 76 N. J. Eq. 133;

Peterson *v.* Reid, 76 N. J. Eq. 377, on appeal 80 N. J. Eq. 450; 20

Hawthorne *v.* Obenson, 94 N. J. Eq. 588.

In O'Brien *v.* Hulfish, *supra,* Chief Justice Beasley said:

> "I think there is no doubt that where a sale of real property is effected by deceit, and a mortgage given for the whole or a part of the purchase money, relief in equity will be given to the party defrauded in a suit on the mortgage, whenever such course is necessary to reach a just result. Fraud, as a general rule, gives jurisdiction to a court of equity, and there can be no reason why, when the process of foreclosure is being used as a means of giving effect to a deception, such process should not be restrained and controlled as to prevent an injustice." 30

and further:

> "If it be true, as he asserts, that he has been cheated into an agreement to pay more 40

for the title to this property than it is worth, a court of conscience will not permit the excess over what is justly due to be exacted."

In Dayton *v.* Mellick, *supra,* Chancellor Runyon said:

"Dayton, by means of the misrepresentations of the contents of the farm, was enabled to obtain a mortgage for $572 more than he otherwise would have got, and than, in equity he ought to have had. He should account for it in this suit."

In the same case, on appeal, Justice Parker said:

"If a vendor fraudulently represents the number of acres to be greater than the actual number conveyed, and thereby induces the vendee to give more for the tract that he otherwise would, the vendee is entitled to an abatement."

This same principle applies to any misrepresentation which results in the payment of a higher purchase price than otherwise would be paid. The first point argued, therefore, cannot prevail.

II.

Counsel for complainant cites Corson *v.* Bailey, 3 N. J. Adv. Repts. 926, and Mirkin *v.* Bowker, 133 Atl. Rep. 41, in support of this point. Neither of these cases, however, has any application to the case *sub judice.* In both of these cases the counter-claim sought to be asserted arose out of transactions wholly independent and having no relation whatever to the origin of the mortgage therein sought to be foreclosed, and were matters

of strict set-off. Counsel for complainant has evidently failed to distinguish between a counter-claim based upon strict set-off and one based upon the right of recoupment. Set-off is a purely statutory right and is strictly limited by the statute to liquidated damages. 4 Comp. Stats. p. 4836; 1 Comp. Stats. 433; Roseville Trust Company *v.* Barney, 88 N. J. L. 146, reversed 89 N. J. L. 550, but this principle approved. Norton *v.* Sinkhorn, 63 N. J. Eq. 313. On the other hand, recoupment is a common law right. 24 R. C. L. 793, and applies to unliquidated as well as liquidated damages. Norton *v.* Sinkhorn, *supra.* Counter-claim may include either set-off or recoupment or both. In the Sinkhorn case, Chief Justice Depue said:

> "But the defendant's claim, as set out in the answer, is not a counter-claim for liquidated damages, such as would constitute it a set-off. The claim set out in the answer is for unliquidated damages arising from the failure of the complainant to perform his contract according to its terms. The distinction between a set-off and recoupment is well settled. Recoupment, at common law, was a claim in reduction of the amount due to the party. * * *
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> The doctrine of recoupment had been adopted in courts of equity long before it was introduced by statute, into the practice of courts of law. * * *
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> The principle that lies at the foundation of this doctrine is that the amount which the plaintiff is entitled to recover shall be abated or reduced by reason of his own failure to perform obligations which, by the

same contract, devolved upon him, whereby the defendant has sustained damages.

In substance and effect, it may be likened to the reduction of the amount recoverable upon a contract because of a failure of consideration."

10 The application of this language to the present issue is obvious. It was a part of the mortgagee's contract to construct sidewalks and curbs. This part of the contract has never been performed. The cost of such construction was included in the purchase price of the property and it may be assumed was covered by the mortgage and an abatement of the amount it would have cost to construct that sidewalk and curb should be allowed. As stated above, the estimate of the cost of those sidewalks and curbs was $451.74.
20 The mere fact that the damages sought to be set up as an abatement of the mortgage debt in a suit to foreclose the mortgage are unliquidated does not prevent equity from granting the abatement.

Coster *v.* Monroe Mfg. Co., 2 N. J. Eq. 467;
Couse *v.* Boyles, 4 N. J. Eq. 213;
O'Brien *v.* Hulfish, *supra*;
Kuhnen *v.* Parker, *supra*;
30 Peterson *v.* Reid, *supra*.

In Peterson *v.* Reid, *supra,* the mortgagees had conveyed to the mortgagor certain lowlands of small value and covenanted to fill in the same and the purchaser gave a mortgage for the price based upon the value of the land filled in. Upon proceedings brought to foreclose the purchase money mortgage, the defendant sought an abatement from the mortgage debt for the damages sustained by reason of the mortgagee's

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failure to carry out this covenant. Vice-Chancellor Stevenson said, at page 383:

> "If a man conveys a parcel of unimproved land and at the same time covenants to erect a valuable building upon it, and takes back a purchase money mortgage based on the valuation of the land with the building on it, and then completely defaults in his covenant to erect the building, is it possible that under any system of jurisprudence in a civilized state he would be permitted to foreclose his purchase money mortgage for the entire amount, while the unfortunate mortgagor would be left to an action at law for his damages which he might never be able to collect?"

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This case was reversed in the Court of Errors and Appeals (80 N. J. Eq. 450) on the ground that the defendant, who was an assignee of the original mortgagor, had no standing to ask for an abatement because he bought the premises subject to the mortgage. The latest case affirming the principle referred to by Vice-Chancellor Stevenson in the Peterson case is that of Holloway *v.* Hendrick, 3 N. J. Adv. Repts. 1217, in which the Court of Errors and Appeals affirmed the decision of the Court of Chancery in the opinion of Vice-Chancellor Fielder, in which he said:

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> "Finally, the defendants claim that the house which Mountain Lakes, Inc., agreed to construct upon the land in question does not conform to the house for which the defendants and Frank Hendrick contracted, and, therefore, the defendants owe nothing on the mortgage. This claim is stated in a nebulous fashion and the evidence does not

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> support it. Had it been established that the house was not constructed according to the contract, and had this been a purchase money mortgage, the defendants might be entitled to a set-off or to an abatement as against the mortgage debt, but this was not a purchase money mortgage."

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But in the instant case the mortgage which is the subject of the foreclosure is a purchase money mortgage.

III.

Complainant cites Davis *v.* Clark, 47 N. J. L. 338, and Long *v.* Hartwell, 34 N. J. L. 116, in support of this point. Neither of these cases is authority for the propositions for which cited.

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In Long *v.* Hartwell, Justice Van Syckle said:

> "The rule to be deduced from the authorities is, that the executed contract supersedes all prior negotiations and agreements, where the last contract covers the whole subject embraced in the prior one. But where the stipulation is to do a series of acts at successive periods, or distinct and separable acts to be performed simultaneously, the executory contract becomes extinct only as to such of its parts as are covered by the conveyances."

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But the deed which was delivered to the defendants in the instant case was not in performance of the agreement to either convey a corner lot or to build sidewalks and curbs. It is true that the deed conveyed the lot which was purchased, describing it by metes and bounds, but not as a corner; but it nevertheless did not convey a corner lot, which is what the vendor

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agreed to convey. It was, at best, a performance of such part of the contract as it purported to execute, namely, a conveyance of a particular piece of land. As well say that by the delivery of the deed for the lot the agreement to build the house was also executed. The delivery and acceptance of the deed in pursuance of an executory contract is perhaps *prima facie* evidence that it expresses the final intention of the parties, but only so far as it purports to carry into effect the executory contract. The cutting through of a street and building of sidewalks and curbs was executory even after the delivery of the deed. That part of the contract remained and still remains unfulfilled. There was no more a merger of these covenants in the contract by the delivery of the deed than there was a merger of the agreement to fill in the lowland upon the delivery of the deed in the case of Peterson *v.* Reid, *supra*, or than there would have been a merger by the delivery of a deed in the recent case of Holloway *v.* Hendrick of an agreement to build a house according to certain plans and specifications. In Roberts *v.* James, 85 Atl. Rep. 244, Justice Swayze, speaking for the Court of Errors and Appeals, held that a representation by the vendors that they intended to build a railway station and cement walks upon vacant lots entitled the vendees to avoid the contract where it appeared that the representations were false. The third point advanced by the complainant against defendants' claim for abatement is untenable.

IV.

There is nothing in the testimony which indicates any laches, estoppel or waiver on the

part of the defendants. The facts urged in support of this contention are that after the defendant discovered that his lot was not a corner lot, he continued making instalment payments on the mortgage and delayed his claim to an abatement to the point of waiver, and that he
10 is thereby estopped from now asserting the claim for abatement. It is true that the defendant learned in 1923 that his lot was not a corner lot, but it appears that he was subsequently assured by Mr. Herman or Mr. Goldfarb or both that Tremont avenue would be cut through and his lot made a corner lot. It is also apparent that defendant continued his complaints to both these witnesses, right up to within a short time before the filing of the bill and that he was repeatedly assured by one or both that he would
20 receive what he bought. His continuing to pay instalments due on the mortgage under these circumstances does not bar him from now asserting this claim. It is not suggested that the complainant has been placed in any worse position because of these payments by defendant and the evidence demonstrates that it has not. The position of the defendants, however, has been considerably changed by reason of the wrong doing
30 of the Philmar Construction Company, because relying upon the representations that the lot was a corner lot, they proceeded to and did make valuable improvements on the property, and this has changed their position so that they are not now obliged to rescind their contract.

The present suit is instituted by the assignee of the Philmar Construction Company. The Philmar Construction Company now being out of existence, the complainant has taken over, at least to a large extent, the assets of the mort-
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gagee. Mr. Goldfarb, who was the person most interested in the Philmar Construction Company, is also an officer and stockholder in the complainant company. He had full knowledge of the whole transaction of which this mortgage was a part and that knowledge will be imputed to the complainant assignee. 10

For the reasons herein expressed, I will advise a decree in favor of the defendants, and as it appears that the amount of the abatement to which the defendants are entitled is at least equal to the amount due on the mortgage, the decree will provide that that mortgage be surrendered for cancellation and that the excess of the abatement allowed, if any, be paid to the defendants by the complainant, with costs.

Decided July 27, 1926. 20

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FINAL DECREE.

59-487.

IN CHANCERY OF NEW JERSEY.

Between CURTISS - WARNER CORPORATION, *Complainant,* *and* FREDERICK R. THIRKETTLE, *et al., Defendants.*	*On Bill, etc.* *Final Decree.*

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This matter coming on to be heard in the presence of Philip J. Schotland, Esq., of counsel with the complainant, and Israel B. Greene, Esq., of counsel with the defendants, and the Court having examined the pleadings and taken proofs orally, in open court, and having heard and considered the argument of counsel aforesaid;

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And it satisfactorily appearing to the Court that the complainant, as the assignee of the Philmar Construction Corporation, a corporation, is the holder of a certain bond and mortgage made by the defendants, Frederick R. Thirkettle and Hattie B. Thirkettle, his wife, dated October 24, 1922, in the principal sum of $2,000, which mortgage was recorded in the office of the Register of Essex County, New Jersey, in Book S. 47 of Mortgages, pages 37-39, on which bond and mortgage there remains unpaid the sum of $1,206.50 and interest from April 24, 1922;

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And it further satisfactorily appearing to the Court that the said bond and mortgage sought

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to be foreclosed in this suit, were made, executed and delivered by the said defendants to the Philmar Construction Corporation, complainant's assignor, as part of the purchase price of $7,500 for the following described lands and premises, to wit:

> All that tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of East Orange, in the County of Essex and State of New Jersey: 10
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> Beginning at a point on the northwesterly side of Oak Street, said point being distant southwesterly 666.38 feet measured along the said northwesterly line of Oak Street from the intersection of same with the southwesterly line of Rhode Island Avenue; thence north 57 degrees 28 minutes West 100.59 feet; thence south 32 degrees 15 minutes West 40 feet; thence South 57 degrees 28 minutes East 100.42 feet to the aforementioned northwesterly line of Oak Street; thence along the same north 32 degrees, 30 minutes East 40 feet to the point and place of Beginning. 20

pursuant to a written agreement made between the defendants and the Philmar Construction Corporation, dated the 31st day of May, 1922; 30

And it further appearing to the Court that in and by said agreement, and as part of the said consideration money, the said Philmar Construction Corporation, among other things, undertook and agreed to cement the sidewalks, both in front and on the side of said lot, and also to do and perform the curbing work in front of and at the side of said lot; that said undertaking remains unperformed in part and that 40

the reasonable cost of the completion of said undertaking has been fixed at $206.50 by agreement between the parties.

And the defendants by their answer and counter-claim filed herein praying for an abatement of the said mortgage debt;

10 And it appearing that the amount to which the defendants are entitled as an abatement equals the amount unpaid on complainant's bond and mortgage;

And it appearing to the Court that the defendants are entitled to the relief prayed for by them, as hereinafter granted, it is thereupon on this 14th day of September, 1926,

Ordered, Adjudged and Decreed and the Chancellor by virtue of the power and authority
20 vested in him does hereby Order, Adjudge and Decree as follows:

1. That the Curtiss-Warner Corporation, the complainant herein, do surrender to the defendants, the said bond and mortgage and the assignment therefor, from the Philmar Construction Corporation, held by it, properly endorsed for cancelation, within 20 days after service upon it of a duplicate copy of this Decree, which may be certified to be a true copy by defendants'
30 solicitor.

2. That the said bond and mortgage be canceled and discharged of record and be and is hereby declared to be no longer a lien upon the above-described premises, against the defendants, or any person or persons claiming by, from or under them, or either of them, and that they and each of them be debarred and perpetually enjoined from collecting any money on said mortgage or upon the bond accompanying the same,

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Final Decree.

for which said mortgage was given as collateral security, either for principal or interest, and/or from setting up the same against the premises therein contained.

3. That the complainant pay to the defendants the cost of this suit to be taxed, which shall include the cost of one-half of the Court's copy of the testimony herein and that in default of the payment of said taxed costs within 20 days after the service upon the defendants of a certified copy of said taxed costs and this Decree, execution issue against the goods and chattels, lands, tenements, hereditaments and real estate of the said complainant, to make said taxed costs, according to the practice of this Court.

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E. R. WALKER,
C.

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Respectfully advised,

MAJA LEON BERRY,
V.-C.

A true copy.

ISRAEL B. GREENE,
Sol'r for Def'ts.

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NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

Between CURTISS - WARNER CORPORATION, a corporation, *Complainant,* *and* FREDERICK R. THIRKETTLE, *et al.,* *Defendants.*	*On Bill, etc.* *Notice of Appeal.*

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The complainant, Curtiss-Warner Corporation, hereby appeals from the Final Decree made in the above-entitled cause, by the Chancellor, on the advice of Vice-Chancellor Maja Leon Berry, on the 14th day of September, 1926, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

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Dated, October 15, 1926.

PHILIP J. SCHOTLAND,
Solicitor for and of Counsel
with Complainant.

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

PHILIP J. SCHOTLAND,
Of Counsel with Complainant.

Service of a true copy of the within Notice of Appeal is hereby acknowledged this 16th day of October, 1926.

ISRAEL B. GREENE,
Solicitor for Defendants.

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PETITION OF APPEAL.

New Jersey Court of Errors and Appeals

Between

CURTISS - WARNER CORPORATION, a corporation,
Complainant,

and

FREDERICK R. THIRKETTLE, *et als.,*
Defendants.

On Bill, etc.

Petition of Appeal.

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

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The petition of Curtiss-Warner Corporation, the appellant in the above-stated cause, respectfully shows, that your petitioner finds itself aggrieved by a Decree made in the Court of Chancery by his Honor Edwin R. Walker, Chancellor of the State of New Jersey, bearing date the 14th day of September, 1926, and filed in the said Court of Chancery on said last-mentioned date, in a cause wherein petitioner is the complainant and Frederick R. Thirkettle and Hattie B. Thirkettle, his wife, are the defendants, in this respect, to wit: That the said Decree ORDERS, ADJUDGES and DECREES that the Curtiss-Warner Corporation surrender to the defendants the bond and mortgage and the assignment therefor, from the Philmar Construction Corporation, held by it, properly endorsed for cancelation, within twenty days after service upon it of a duplicate copy of said Decree, and that

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the said bond and mortgage be canceled and discharged of record and be declared to be no longer a lien upon the premises owned by the defendants, or any person, or persons, claiming by, from or under them, or either of them, and that they, and each of them, be debarred and
10 perpetually enjoined from collecting any money on the said mortgage, or upon the bond accompanying the same, for which said mortgage was given as collateral security, either for principal or interest, and, or from setting up the same against the premises therein contained;

And your petitioner humbly appeals from those parts of the Decree of the Chancellor, which decrees as aforesaid, upon the ground that the same is erroneous, in that it adjudges the complainant not entitled to the relief prayed for,
20 when it should have granted the relief prayed for.

Your petitioner therefore prays that the said Decree of the said Chancellor may be reversed, set aside and for nothing holden. And that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

PHILIP J. SCHOTLAND,
Solicitor for and of Counsel
30 with Complainant.

Service of a true copy of the within Petition of Appeal is hereby acknowledged this 2nd day of November, 1926.

ISRAEL B. GREENE,
Sol'r and Counsel with Defendants.

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ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between CURTISS - WARNER CORPORATION, *Complainant-Appellant,* *and* FREDERICK R. THIRKETTLE, *et als.,* *Defendants-Respondents.*	*Answer to Petition of Appeal.*

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The answer of the above-named defendants-respondents to the petition of appeal of the above-named complainant-appellant. 20

These defendants-respondents not acknowledging all of any of the matters which in said petition of appeal are contained, to be true, for answer thereto, nevertheless, say and admit that a Decree was on the 14th day of September, 1926, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated; but as to 30 the substance and form thereof, these defendants-respondents prays to refer thereto when the same shall be produced; and these defendants-respondents are advised and believe that the said Decree is agreeable to equity and pray that the same may be affirmed with costs to be adjudged to these defendants-respondents.

Dated, November 10, 1926.

ISRAEL B. GREENE,
Of Counsel with Defendants-Respondents. 40

Exhibit C. 1.

This Indenture, Made the Twenty-fourth day of October in the year of our Lord One Thousand Nine Hundred and Twenty-two

Between Frederick R. Thirkettle and Hattie
10 B. Thirkettle, his wife, of the City of East Orange in the County of Essex and State of New Jersey party of the First Part;

And Philmar Construction Corporation, a corporation duly organized and existing under the laws of the State of New Jersey, and having its principal office in the City of Newark in the County of Essex and State of New Jersey party of the Second Part;

Whereas, the said party of the first part are
20 justly indebted to the said party of the Second Part, in the sum of Two Thousand Dollars, lawful money of the United States of America, secured to be paid by their certain bond or obligation, bearing even date with these presents, in the penal sum of Four Thousand Dollars, lawful money as aforesaid, conditioned for the payment of the said first mentioned sum of Two Thousand Dollars, lawful money as aforesaid, to the said party of the Second Part, its successors or
30 assigns, on the Fourth day of December which will be in the year One Thousand Nine Hundred and Twenty-five and interest thereon, to be computed from December 4, 1922 at and after the rate of six per cent. per annum, and to be paid semi-annually,

And It Is Thereby Expressly Agreed that should any default be made in the payment of the said interest or instalment of principal or of any part thereof, on any day whereon the same
40 is made payable, as above expressed, or should

any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in this mortgage, and become due and payable, and should the said interest or instalment of principal remain unpaid and in arrears for the space of thirty days, or said tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien, or any or either of them remain unpaid and in arrears for the space of ninety days, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods as the case may be, the aforesaid principal sum of Two Thousand Dollars with all arrearage of interest thereon, shall, at the option of the said party of the Second Part, or its legal representatives, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, anything therein before contained to the contrary thereof in anywise notwithstanding: as by the said bond or obligation, and the condition thereof, reference being thereunto had, may more fully appear.

Now, THIS INDENTURE WITNESSETH, That the said party of the First Part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar, to them in hand paid by the said party of the Second Part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have, granted, bargained, sold, aliened, released, conveyed and confirmed,

Exhibit C. 1.

and by these presents do grant, bargain, sell, alien, release, convey and confirm, unto the said party of the Second Part, and to its successors and assigns forever,

All that tract or parcel of land and premises, hereinafter particularly described, situate, lying
10 and being in the City of East Orange in the County of Essex and State of New Jersey.

Beginning at a point on the northwesterly side of Oak street, said point being distant southwesterly six hundred and sixty-six feet and thirty-eight one-hundredths of a foot measured along the said northwesterly line of Oak street from the intersection of same with the southwesterly line of Rhode Island avenue; thence North fifty-seven degrees twenty-eight minutes West one
20 hundred feet and fifty-nine one-hundredths of a foot; thence South thirty-two degrees fifteen minutes West forty feet; thence South fifty-seven degrees twenty-eight minutes East one hundred feet and forty-two one-hundredths of a foot to the aforementioned northwesterly line of Oak street; thence along the same North thirty-two degrees thirty minutes East forty feet to the point and place of Beginning.

30 Being the same premises conveyed to party of the first part by Philmar Construction Corporation, a corporation, by deed of even date herewith and not yet recorded.

This mortgage being given to secure part of the purchase money mentioned in the said deed.

It is expressly understood that this mortgage is second in priority to a mortgage nominally in the sum of Five thousand dollars held by the Richmont Building & Loan Association, now a
40 first lien on the said premises, and in case de-

Exhibit C. 1.

fault is made in the payment of two monthly instalments of dues and interest on the Richmont Building & Loan mortgage, then and in that event, the principal sum herein secured shall become due and payable immediately thereafter, notwithstanding anything herein to the contrary.

It is further expressly understood that the principal sum herein secured shall be payable as follows: 10

Two hundred dollars, or as much more as the party of the first part desires to pay, every six months from the date hereof; and the balance at the end of the three year period.

It is further expressly understood that party of the first part herein are hereby given the privilege to pay off the principal sum herein secured at any time prior to its expiration, provided interest is paid to the date of payment. 20

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and revisions, remainder and remainders, rents, issues and profits thereof. And also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the First Part, of, in and to the same, and every part and parcel thereof, with the appurtenances: To Have and to Hold, the above granted and described premises with the appurtenances, unto the said party of the Second Part, its successors and assigns, to its and their own proper use, benefit and behoof forever. Provided Always, and these presents are upon this express condition, that if the said party of the First Part, their heirs, executors or administrators, shall well and truly 30

40

pay unto the said party of the Second Part, its successors or assigns, the said sum of money mentioned in the condition of said bond or obligation, and the interest thereon, at the time and times, and in the manner mentioned in the said condition, according to the true intent and meaning
10 thereof, that then these presents, and the estate hereby granted, shall cease, determine and be void.

And the said party of the first part for themselves, their heirs, executors and administrators, do covenant and agree to pay unto the said party of the Second Part, its successors or assigns, the said sum of money and interest, as mentioned above and expressed in the conditions of the said bond.

20 And It Is Agreed that neither the mortgagors, nor the heirs or assigns of the mortgagors, shall be entitled to any credit on the interest payable on this mortgage for the taxes which may be levied on the mortgaged premises or for any part of such taxes.

And it is also agreed by and between the parties to these presents, that the said party of the First Part shall and will keep the building or buildings erected and to be erected upon the
30 lands above conveyed insured against loss or damage by fire, in some safe and responsible Insurance Company or Companies, to an amount not less than Two Thousand Dollars, and assign the policy and certificate thereof to the said party of the Second Part as collateral security for the payment of the principal and interest aforesaid; and in default thereof, it shall be lawful for the said party of the Second Part to effect such insurance, and the premium and
40 premiums paid for effecting the same shall be a

lien on the said mortgaged premises, added to the amount of the said bond or obligation, and secured by these presents, and payable on demand with legal interest.

In Witness Whereof, the said party of the First Part, have hereunto set their haids and seals the day and year first above written. 10

FREDERICK R. THIRKETTLE (L. S.)
HATTIE B. THIRKETTLE (L. S.)

Signed, Sealed and Delivered in the presence of

Helen Jedell.

State of New Jersey, } *ss.* 20
County of Essex. }

Be It Remembered, That on this Fourth day of December in the year of our Lord, One Thousand Nine Hundred and twenty-two before me, the subscriber, a Notary Public of New Jersey personally appeared Frederick R. Thirkettle and Hattie B. Thirkettle, his wife, who, I am satisfied are the mortagors mentioned in the within Indenture, 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; 30

And the said Hattie B. Thirkettle, wife as aforesaid, being by me privately examined, separate and apart from her said husband, further acknowledged that she signed, sealed and delivered the same as her voluntary act and deed,

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Exhibit C. 1.

Freely, without any fear, threats or compulsion of her said husband.

HELEN JEDELL,
Notary Public of N. J.

10

MORTGAGE

Frederick R. Thirkettle and Wife

To

Philmar Construction Corporation
a Corporation,

Dated October 24, 1922

Received in the Register's Office of the County of Essex N. J., on the 12th day
20
of January A. D., 1923, at 12:02 o'clock in the afternoon, and recorded in Book S. 47 of Mortgages for said County, on pages 37-39

HOWARD S. DODD
Register

PHILIP J. SCHOTLAND
Counsellor at Law
9 Clinton St., Newark, N. J.

30

Stamp:
Compared
by
33 & 19

40

Exhibit C. 2.

Know All Men by These Presents, that Frederick R. Thirkettle and Hattie B. Thirkettle, his wife, of the City of East Orange, in the County of Essex and State of New Jersey, are held and firmly bound unto Philmar Construction Corporation, a corporation duly organized and existing under the laws of the State of New Jersey, and having its principal office in the City of Newark, County of Essex and State of New Jersey, in the sum of Four Thousand Dollars lawful money of the United States of America to be paid to the said Philmar Construction Corporation, a corporation, its successors or assigns: To which payment well and truly to be made, they bind themselves, their heirs, executors and administrators, jointly and severally firmly by these presents. Sealed with their Seals and Dated the Twenty-fourth day of October One Thousand Nine Hundred and twenty-two.

10

20

The Condition of the Above Obligation Is Such, That if the above bounden Frederick R. Thirkettle and Hattie B. Thirkettle, his wife, their heirs, executors or administrators, shall well and truly pay, or cause to be paid, unto the above named Philmar Construction Corporation, a corporation, its successors or assigns, the just and full sum of Two Thousand Dollars the Fourth day of December which will be in the year One Thousand Nine Hundred and twenty-five and the interest thereon, to be computed from December 4, 1922, at the rate of six per cent. per annum, and to be paid semi-anuually, without any fraud or other delay, then the above obligation to be void, otherwise to remain in full force and virtue.

30

40

Exhibit C. 2.

And It Is Hereby Expressly Agreed, That should any default be made in the payment of the said interest or instalment of principal or of any part thereof, on any day whereon the same is made payable, as above expressed, or should any tax, assessment, water rent, or other munici-
10 pal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in the mortgage accompanying this bond, and become due and payable, and should the said interest or instalment of principal remain unpaid and in arrear for the space of thirty days, or said tax, assessment, water rent, or other municipal or governmental rate, charge, imposition or lien, or any or either of them remain unpaid and in arrear for the space of ninety days then and from thenceforth, that
20 is to say, after the lapse or expiration of either of the said periods as the case may be, the aforesaid principal sum of Two Thousand Dollars with all arrearage of interest thereon, shall, at the option of the said Philmar Construction Corporation, a corporation or its legal representatives, become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then
30 have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

It is expressly understood that the mortgage accompanying this bond is second in priority to a mortgage nominally in the sum of Five thousand dollars, held by the Richmont Building and Loan Association, now a first lien on the said premises described in the mortgage accompanying this bond, and in case default is made in the
40 payment of two monthly instalments of dues and

Exhibit C. 2.

interest on the Richmont Building & Loan mortgage, then and in that event, the principal sum secured by this bond and the mortgage accompanying shall become due and payable immediately thereafter, notwithstanding anything herein to the contrary.

It is further express understood that the principal sum secured by this bond and the mortgage accompanying shall be payable as follows: 10

Two hundred dollars, or as much more as the party of the first part desires to pay, every six months from the date hereof, and the balance at the end of the three year period.

It is further expressly understood that party of the first part herein are hereby given the privilege to pay off the principal sum secured by this bond and the mortgage accompanying at 20 any time prior to its expiration, provided interest is paid to the date of payment.

FREDERICK R. THIRKETTLE L. S.
HATTIE B. THIRKETTLE L. S.

Signed, Sealed and Delivered
in the presence of

HELEN JEDELL
(Revenue stamp attached.) 30

BOND

Frederick R. Thirkettle and Wife

To

Philmar Construction Corporation
a Corporation

Dated, October 24, 1922

40

Exhibit C. 3.

Know all Men By These Presents, that Philmar Construction Corporation, a corporation of New Jersey, party of the first part, in consideration of the sum of One Dollar and other good and valuable consideration, lawful money of the
10 United States of America, to it in hand paid by

Curtiss-Warner Corporation, a corporation of New Jersey, party 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, its successors or assigns, the following:

20 A certain Indenture of Mortgage bearing date the 17th day of October, 1924, made by Jacob Heller to Philmar Construction Corporation, a corporation, on lands in the Town of Irvington, in the County of Essex and State of New Jersey, to secure the payment of the sum of Twenty-one hundred dollars, which mortgage is recorded in the office of the Register of the County of Essex and State of New Jersey, in Book H. 52 of Mort-
30 gages, pages 287-288.

A certain Indenture of Mortgage bearing date the 17th day of October, 1924, made by Morris Comander and Esther Comander, his wife, to Philmar Construction Corporation, a corporation, on lands in the Town of Irvington, in the County of Essex and State of New Jersey, to secure the payment of the sum of Nine Hundred and Eighty Dollars, which mortgage is recorded in the office of the Register of the County of Essex and State

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Exhibit C. 3.

of New Jersey, in Book H. 52 of Mortgages, pages 286-287.

A certain Indenture of Mortgage bearing date the 27th day of August, 1924, made by Louis Jurke and Marie Jurke, his wife, to Philmar Construction Corporation, a corporation, on lands in the Town of Irvington, in the County of Essex and State of New Jersey, to secure the payment of the sum of Twenty-five hundred dollars, which mortgage is recorded in the office of the Register of the County of Essex and State of New Jersey, in Book A. 52 of Mortgages, pages 416-417.

A certain Indenture of Mortgage bearing date the 24th day of October, 1922, made by Frederick R. Thirkettle and Hattie B. Thirkettle, his wife, to Philmar Construction Corporation, a corporation, on lands in the City of East Orange, in the County of Essex and State of New Jersey, to secure the payment of the sum of Two thousand dollars, which mortgage is recorded in the office of the Register of the County of Essex and State of New Jersey in Book S. 47 of Mortgages, pages 37-39.

Together with the bond or obligation therein described, and the money due and to grow due thereon, with the interest. To Have and To Hold, the same unto the said party of the second part, its successors or assigns forever, subject only to the proviso in the said Indenture of Mortgage mentioned: And it does hereby make, constitute, and appoint the said party of the second part, its true and lawful attorney, irrevocable, in its name, or otherwise, but at its 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 it might or could do

Exhibit C. 3.

if these presents were not made: And it does hereby covenant, promise and agree, to and with the said party of the second part, there there is now due and owing upon the said Bond and Mortgages the following sums:

On the Thirkettle mortgage, $2,000. and interest.
10 On the Jurke mortgage.... $2,500. and interest
On the Comander mortgage $ 980. and interest
On the Heller Mortgage .. $2,100. and interest.

In Witness Whereof, the Philmar Construction Corporation, has caused these presents to be signed by its President, attested by its Secretary and its corporate seal to be hereto affixed this 26th day of May, in the year of Our Lord One thousand nine hundred and twenty-five.

PHILMAR CONSTRUCTION CORPORATION

20 Per MAURICE SCHLESINGER,
President (SEAL)

Attest:

Louis E. Goldfarb,
Secretary.

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

30

Be It Remembered, That on this Twenty-sixth day of May, in the year One Thousand Nine Hundred and Twenty-five before me, the subscriber, a Notary Public of New Jersey personally appeared Louis E. Goldfarb known to me to be the Secretary of the Philmar Construction Corporation, a Corporation, the assignor within named, who being by me duly sworn on his oath said and made proof to my satisfaction that he is such Secretary, and that he well knows the

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Exhibit C. 3.

Common Seal of said Corporation, and that the Seal affixed to the within Assignment of Mortgage is such Common Seal and was thereto affixed by Maurice Schlesinger the President of said Corporation, and that the said Assignment of Mortgage was by the said President also signed and delivered as and for the voluntary act and deed of said Corporation in the presence of said Deponent, who thereupon subscribed his name thereto as attesting witness. 10

LOUIS E. GOLDFARB.

Sworn and subscribed before me,
at Newark, New Jersey this 26th
day of May A. D., 1925.

HELEN JEDELL,
Notary Public of N. J. 20

ASSIGNMENT OF MORTGAGES.

Philmar Construction Corporation
a Corporation
to
Curtiss-Warner Corporation,
a Corporation.

Dated May 26, 1925. 30

Compared By 38 & 10

Received in the Register's office of the County of Essex, N. J. on the 27th day of May A. D., 1925 at 9:53 o'clock in the fore-noon, and Recorded in Book 173 of Assignments of Mortgages for said County, on pages 196-197.

Howard S. Dodd
Register 40

Exhibit C. 6.

Law Offices of
WILLIAM HARRIS

Newark, N. J. May 29, 1923

Miss Helen Jedell,
10 c/o Philip J. Schotland,
Union Bldg.,
Newark, N. J.

My dear Miss Jedell:

John A. Mack, the purchaser of 193 Oak Street, upon which the Filmar Construction Co. has a second mortgage, under the terms of which he has to pay $200 instalment on June 4th, came to me in reference to same.

I have known Mr. Mack a very long time, and 20 know he is not in a position at the present time to meet the instalment due in June. I would consider it a personal favor, if you would have Mr. Goldfarb and the Filmar Construction Co. postpone this payment for six months. I am sure that if you will take it up with Mr. Goldfarb, he will do this favor.

I am going to Europe on Saturday, so will you kindly let me know by Friday if this extension will be granted. Mr. Mack is paying his 30 B. & L. promptly, and will continue so to do.

Kind regards,

Very truly yours,
WILLIAM HARRIS

40

Exhibit C. 7.

Law Offices of
WILLIAM HARRIS

Newark, N. J. Jan. 18, 1924.

Miss Jedell, 10
% P. J. Schotland,
Union Bldg.,
Newark, N. J.

My dear Miss Jedell:

Please do not start any foreclosure re Johnny Mack without first seeing me. I want to take this matter up with you personally but have been so busy could not do so, but probably will do so on Monday or Tuesday of next week.

Very truly yours, 20

2. WILLIAM HARRIS

Exhibit C. 8.

Law Offices of
WILLIAM HARRIS

Newark, N. J. March 28, 1924. 30

Miss Helen Jedell,
c/o Philip J. Schotland, Esq.,
Union Building,
Newark, N. J.

My dear Miss Jedell:

I just had a talk with Jonny Mack and he is going to pay to you on Monday morning, $100.00 and $10.00 on every Monday after that. Your bill of $33.50 I am personally advancing. 40

Exhibit C. 8.

If Johnny Mack falls down on his payment on Monday, or on any Monday thereafter, you are at liberty to do as you want in a foreclosure procedure.

I appreciate your courtesy in this matter and hope to reciprocate at some future date.

10

Very truly yours,

WILLIAM HARRIS

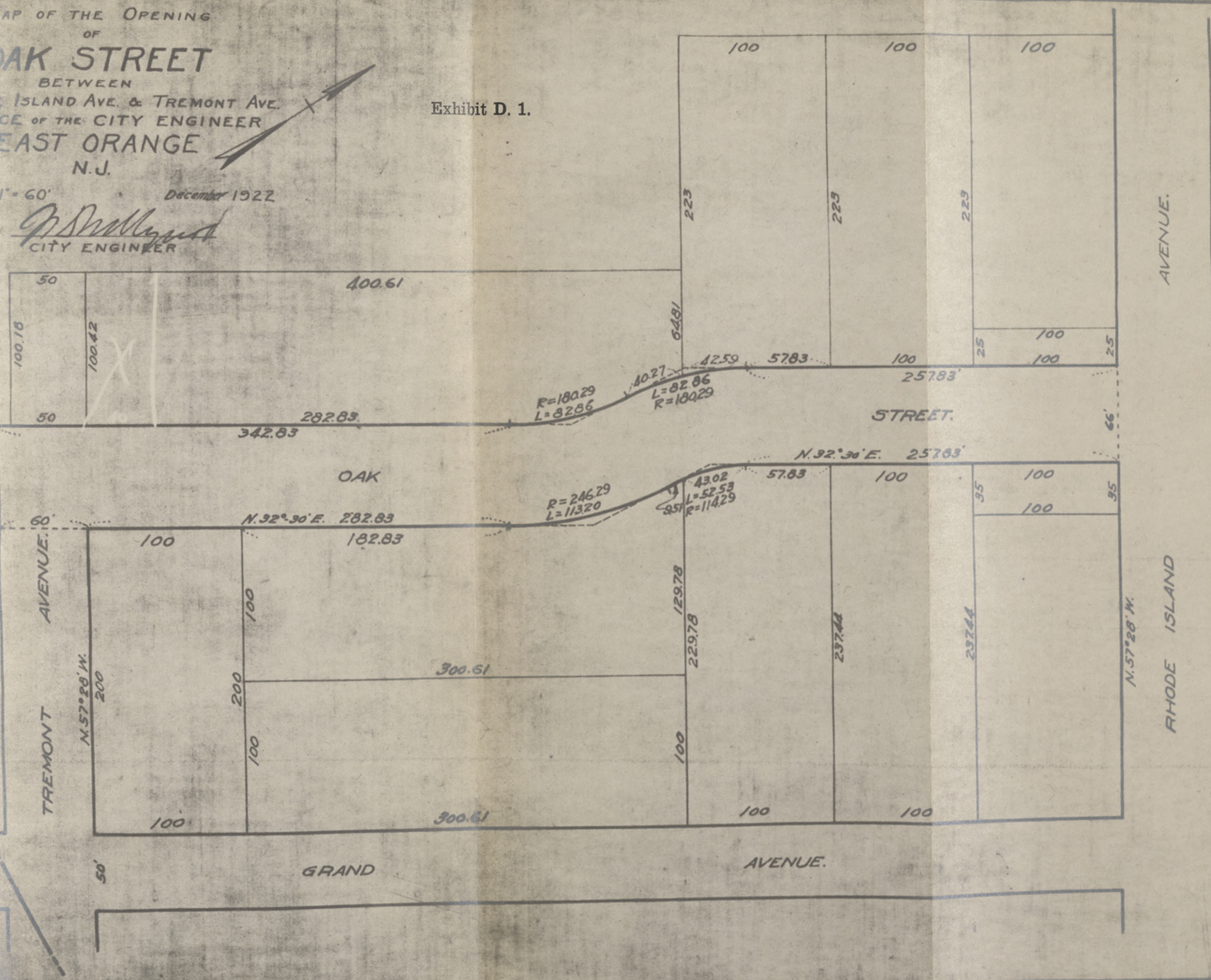
P. S. Johnny just brought in this $100—
1-9

20

30

40

Exhibit D. 1.



OAK STREET

GRAND AVENUE

TREMONT AVENUE

RHODE ISLAND AVENUE

CITY LINE

N. 32°15' E.

N. 32°30' E.

N. 57°28' W.

N. 6°10' E.

Rad. 180.29

Tan. 42.17

300'

66'

50'

100.42 100.53 100.65 100.76 100.87 100.98 101.10 101.21 101.32 101.43 101.55 101.66 101.78 101.90 89.64 77.38 66.81

84.56

237.44

229.78

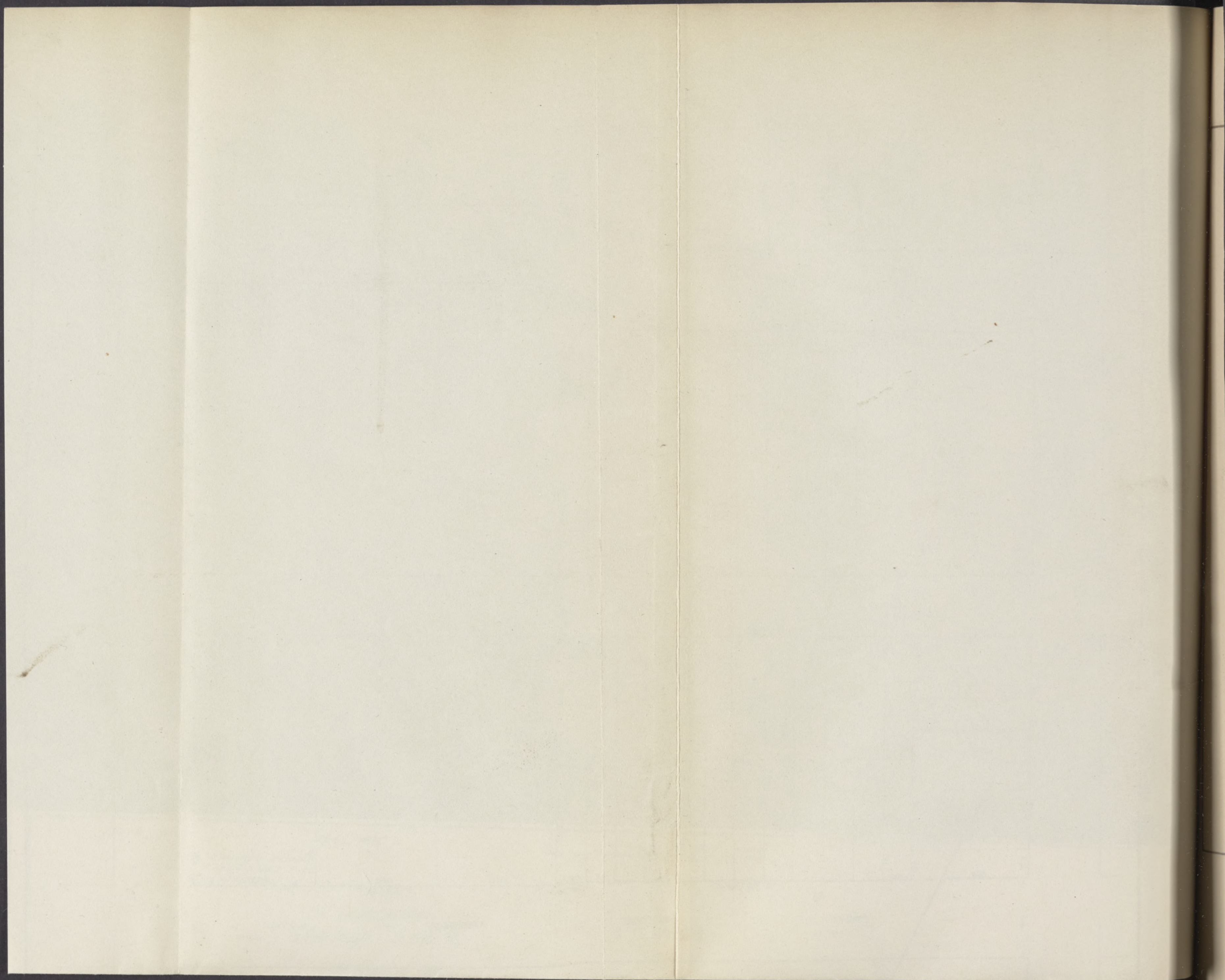
202.56

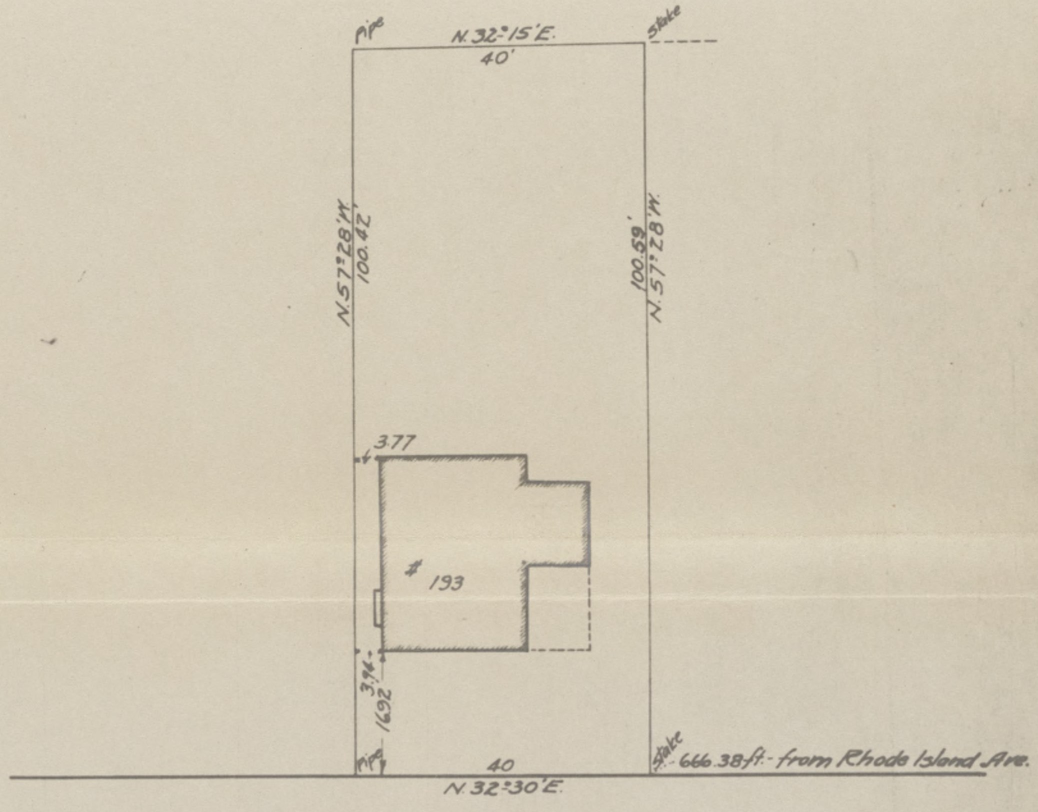
104.73 117.10 129.70

62.44

82.56

25.61





OAK STREET

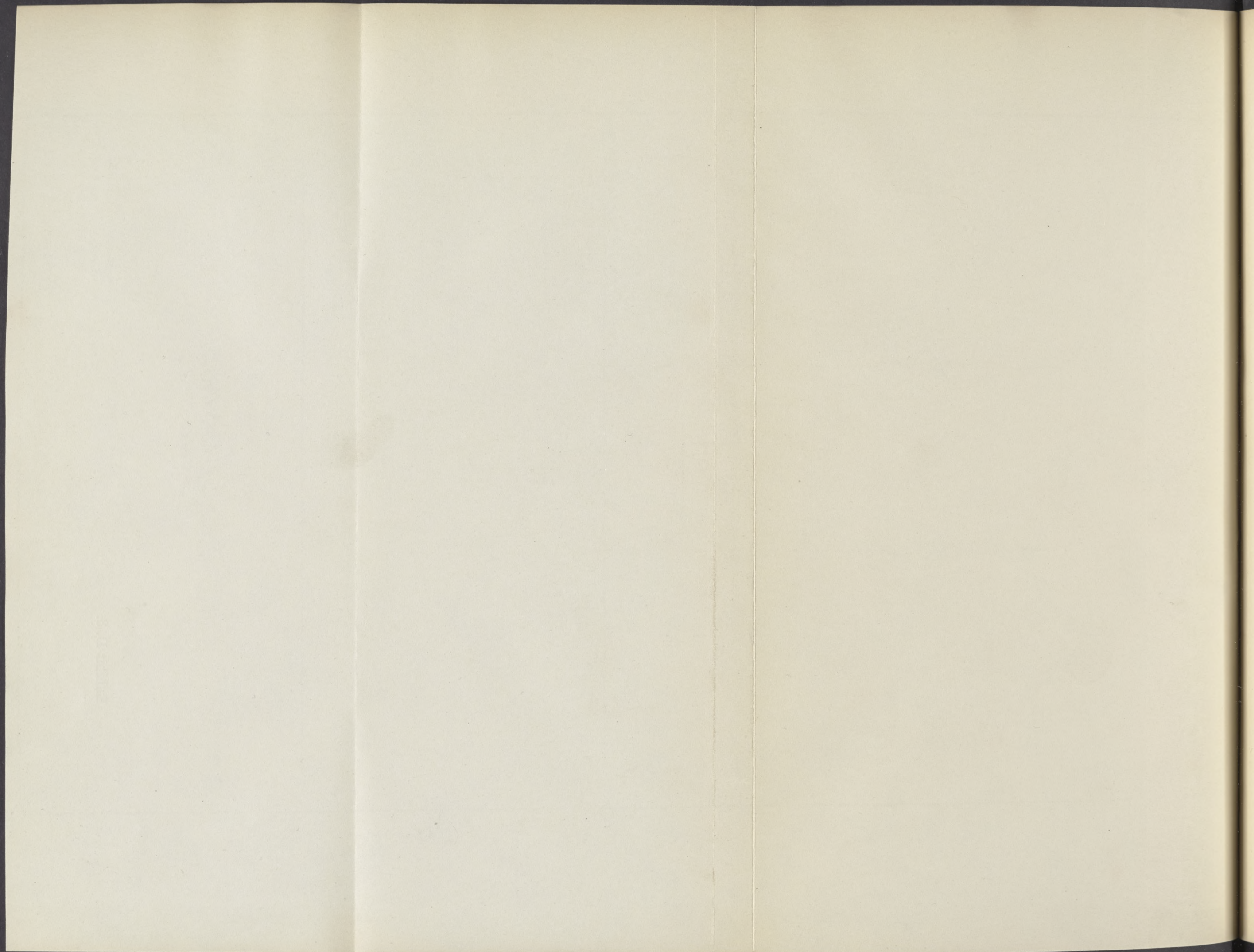
MAP OF PROPERTY
IN
EAST ORANGE
N.J.

Surveyed by W. Hudson Mills
CIVIL ENGINEER & SURVEYOR
EAST ORANGE, N.J.

Exhibit D. 3.

Scale 1"-20'

October 28, 1922



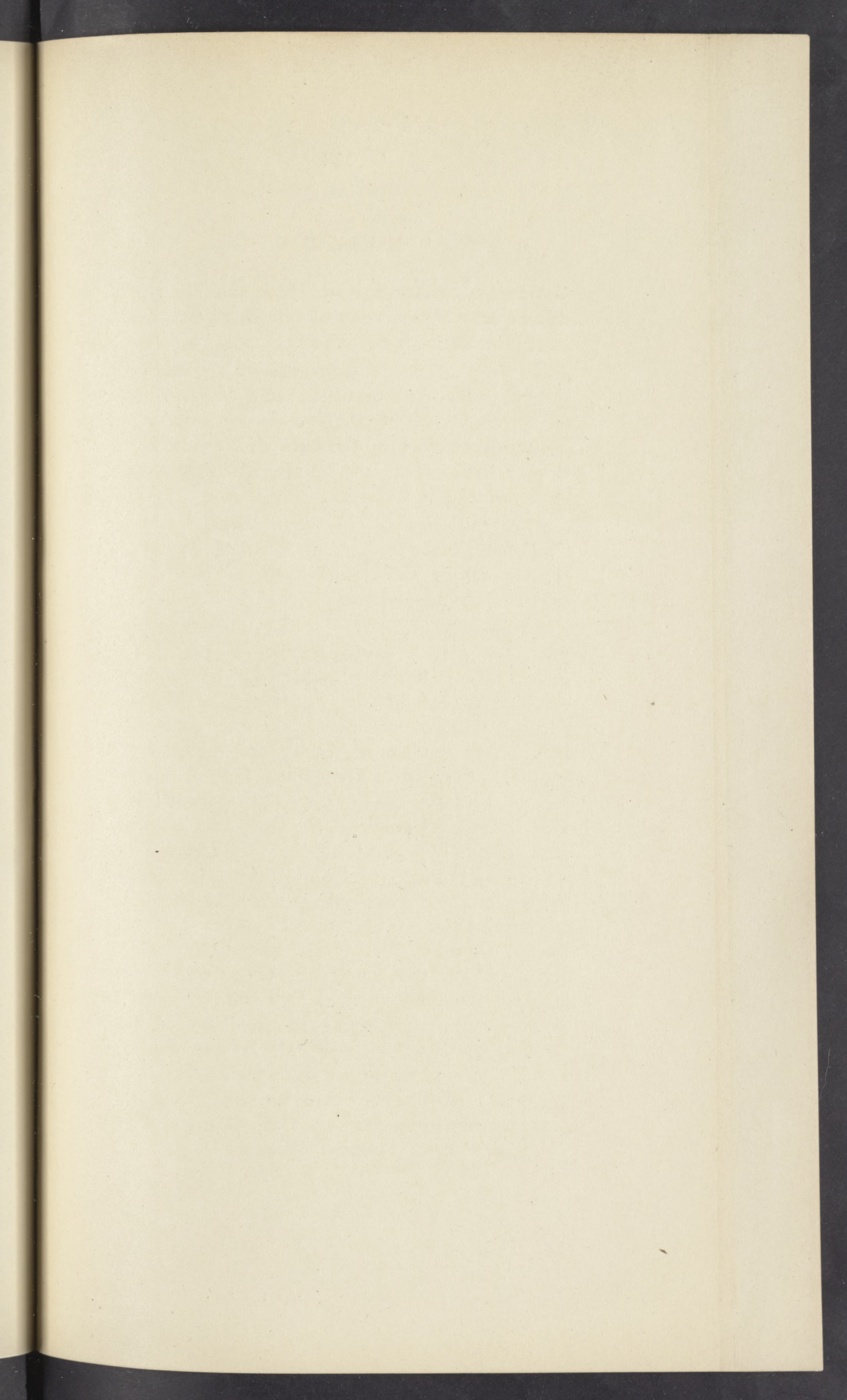


Exhibit D. 6.

Articles of Agreement, Made the Thirty-first day of May in the year of our Lord One Thousand Nine Hundred and twenty-two.

Between Philmar Construction Corporation, a corporation duly organized and existing under the laws of the State of New Jersey, and having its principal office in the City of Newark in the County of Essex and State of New Jersey party of the first part;

And Frederick R. Thirkettle, and Hattie B. Thirkettle, his wife, of the City of Newark in the County of Essex and State of New Jersey party of the second part;

Witnesseth, That the said party of the first part, for and in consideration of the sum of Seventy-five Hundred Dollars to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that it the said party of the first part, will well and sufficiently convey to the said party of the second part, their heirs and assigns, by Deed of Warranty free from all encumbrances, except as hereinafter stated, on or before the First day of October, 1922 or as soon as building is completed all that lot, tract, or parcel, of land and premises, hereinafter particularly described situate, lying and being in the City of East Orange in the County of Essex and State of N. J., the said premises known and designated as corner of Tremont Avenue and Oak Street; there being forty feet on Oak Street and one hundred feet on Tremont Avenue.

Exhibit D. 6.

Party of the first part are to erect a one family dwelling on said premises as per Plans and Specifications only.

Page 3. Flooring—⅞″x2½″ Comb Grain Pine instead of Fir, same to be planed and scraped after plastering.

Page 4. Doors—all other doors throughout house to be single panel, Miracle Doors. 10

Page 4. Trim. Put up with picture moulding on bottom. In hall and bedrooms, picture moulding flush with ceiling.

Page 5. Medicine Closet: To be 20″x25″ instead of 16″x20″, 4 shelves—to be, lower 5¾″, next 5¾″, next 4½″, next 4½″, top 3″ apart.

Page 6. Cement walks—grading—surveying —building permits—filing of contracts to be included in plans and to be paid for by builder. 20

Page 7. Entire kitchen and bath room to be painted with three coats of white paint and one coat of enamel. Living Room—Dining Room—Three Bedrooms and Halls to be papered as selected by owner. All woodwork white:

Page 8. Wire according to plans excepting Living Room to have six outlets for wall lights—no ceiling light; two outlets in each bedroom for wall lights—three base plugs in Living Room, two in Dining Room, two in kitchen—Two outlets in Bathroom for wall lights. Electric fixtures throughout as selected. 30

Page 11. Include—Cement street walk both in front and on side of lot, also, Curbing in front of and side of lot.

Page 13. Toilet in porcelain seat and cover and low flush box in white porcelain finish—Connection for hose front furnished by party of the 2d part. White enamel gas range as selected. Vent to outer air for gas range hood. 40

Exhibit D. 6.

Steam boiler, either Richmont or Thatcher:

AND the said Frederick R. Thirkettle and Hattie B. Thirkettle, his wife, for themselves, their heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, its successors and
10 assigns, that they 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 Seventy-five Hundred Dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

On Execution of this agreement for which this is also a receipt $200.00

When title passes and deed is delivered, cash 300.00

20 By assuming the payment of a Building & Loan mortgage, which shall be a first lien on the said premises, which party of the first part are to procure 5000.00

The balance, together with whatever amount is credited in the Building & Loan, as back shares, by executing and delivering to party of the first part, their bond in double said amount, together with a purchase money mortgage which
30 shall be a second lien on the said premises, conditioned for the principal to be paid in three years from its date with interest at the rate of six per cent per annum, payable semi-annually; said bond and mortgage to contain in addition to the usual tax and interest default clauses, the following clauses:

(a). That in case default is made in the payment of two monthly payments of dues and interest of the Building & Loan mortgage which is

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Exhibit D. 6.

a first lien on the said premises, then and in that event, the principal sum therein secured shall become due and payable immediately thereafter, notwithstanding anything therein to the contrary.

(b). The principal sum secured in said mortgage shall be payable as follows: Two hundred dollars, or as much more as the party of the first part therein desires to pay, every six months from the date of said mortgage; and the balance at the end of the three year period. 10

(c). Party of the first part therein shall have the privilege to pay off the entire principal prior to the due date of the mortgage, provided interest is paid to the date of payment. H. J.

It is expressly understood that in the event party of the first part are unable to procure a $5,000 B. & L. mortgage, then it agrees to add to its second mortgage, such amount that it is unable to procure less than Five thousand dollars. 20

And It Is Further Agreed, by the parties to these presents, that the said party of the second part, their heirs and assigns, may enter into and upon the said land and premises on the said day of settlement next ensuing the date hereof, and from thence take the rents, issues and profits to them and their use. 30

And It Is Further Agreed, by the parties hereto, that the said Deed shall be delivered and received at the office of Philip J. Schotland, 9 Clinton St., Newark, N. J., between the hours of ten in the forenoon and four o'clock in the afternoon on the said day of settlement next ensuing the date hereof.

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Exhibit D. 6.

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

Gas and electric fixtures and chandeliers, carpets, linoleum, mats, and matting in halls, 10 ash cans and heating apparatus, if any, are 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.

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.

20 It is expressly understood that the premises hereby to be conveyed are not derived from adverse possession, nor tax sale, nor is to be what is commonly known as "A Martin Act Title."

It is further expressly understood, that the building is within the lines of the lot.

And for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their re-30 spective heirs, executors and administrators; and they hereby agree to pay, upon failure to perform the same, the sum of which they hereby fix and settle as liquidated damages therefor.

In Witness Whereof, the said party of the first part has caused these presents to be signed by its President, attested by its secretary and its corporate seal to be hereto affixed, and the said party of the second part have hereunto set their

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Exhibit D. 6.

hands and seals the day and year first above mentioned.

PHILMAR CONSTRUCTION CORPORATION,

Per PHILIP HERMAN
Treasurer.

FREDERICK R. THIRKETTLE (L. S.) 10
HATTIE B. THIRKETTLE (L. S.)

Attest.

LOUIS E. GOLDFARB
Secretary

Signed, Sealed and Delivered in the presence of

In consideration of ($) dollars to 20
in hand paid hereby
assign to this contract and
all rights thereunder.

WITNESS hand and seal this
day of A. D. 192

30

40

Exhibit D. 6.

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

Be It Remembered, That on this Thirty-first day of May in the year of our Lord One Thousand Nine Hundred and Twenty-two before me, the subscriber, a Notary Public of New Jersey
10 personally appeared Louis E. Goldfarb who being by me duly sworn, doth depose and make proof to my satisfaction, that he well knows the corporate seal of Philmar Construction Corporation, a Corporation, the grantor mentioned in the within Indenture; that the seal thereto affixed is the proper corporate seal of the said company; that the same was so affixed thereto and the said Agreement signed and delivered by Philip Herman, who was at the date and execution thereof,
20 the Treasurer of said company, in the presence of the said deponent, as the voluntary act and deed of the said company, and that the said deponent thereupon signed the same as subscribing witness.

LOUIS E. GOLDFARB

Sworn and subscribed before me on
the day and year aforesaid.

30 Helen Jedell,
Notary Public of N. J.

CONTRACT

FOR THE
SALE OF PROPERTY.

Philmar Construction Corporation, a
Corporation

To

40 Frederick R. Thirkettle and Wife,
Dated May 31, 1922

Exhibit D. 10.

THIS INDENTURE, MADE the 24th day of October, in the year of our Lord One Thousand Nine Hundred and Twenty-two

BETWEEN Philmar Construction Corporation, a Corporation duly organized and existing under the laws of the State of New Jersey, and having its principal office in the City of Newark in the County of Essex and State of New Jersey, hereinafter known as the Grantor, 10

AND Frederick R. Thirkettle and Hattie B. Thirkettle, his wife, of the City of East Orange in the County of Essex and State of New Jersey, hereinafter known as the Grantees:

WITNESSETH, that in consideration of the sum of One Dollar and other good and valuable consideration the said Grantor does grant, bargain, sell and convey, unto the said Grantees their heirs and assigns, all that certain tract of land and premises situate in the City of East Orange in the County of Essex and State of New Jersey. 20

BEGINNING at a point on the northwesterly side of Oak street, said point being distant southwesterly six hundred and sixty-six feet and thirty-eight hundredths of a foot measured along the said northwesterly line of Oak street from the intersection of same with the southwesterly line of Rhode Island avenue; thence north fifty-seven degrees twenty-eight minutes west one hundred feet and fifty-nine hundredths of a foot; thence south thirty-two degrees fifteen minutes west forty feet; thence south fifty-seven degrees twenty-eight minutes east one hundred feet and forty-two hundredths of a foot to the aforementioned northwesterly line of Oak street; 30 40

New Jersey State Library

thence along the same north thirty-two degrees thirty minutes east forty feet to the Point and Place of BEGINNING.

TO HAVE AND TO HOLD, all and singular the above described land and premises, with the appurtenances, unto the said grantees, their heirs
10 and assigns forever:

AND the said party of the first part covenant with the said grantees as follows:

(1) That it is lawfully seized of the said land

(2) That it has the right to convey the said land to the grantees

(3) That the grantees shall have quiet possession of the said land and that the same are free from all incumbrances.

(4) That it will execute such further assur-
20 ances of the said land as may be requisite.

(5) That it has done no act to encumber the said land

(6) That it will warrant generally the property hereby conveyed.

IN WITNESS WHEREOF, the said grantor has caused these presents to be signed by its president, attested by its secretary and its corporate seal to be affixed the day and year above writ-
30 ten.

PHILMAR CONSTRUCTION CORPORATION

Per Maurice Schlesinger,
Pres.

Signed, Sealed and Delivered in the
Presence of

Attest:

LOUIS E. GOLDFARB, (SEAL)
40 Sec'y.

STATE OF NEW JERSEY, }
COUNTY OF } *ss.*

BE IT REMEMBERED That on this Fourth day of December in the year of Our Lord One Thousand Nine Hundred and Twenty-two, before me, the subscriber, a Notary Public of New Jersey personally appeared Louis E. Goldfarb, why being by me duly sworn doth depose and make proof to my satisfaction that he well knows the corporate seal of Philmar Construction Corporation, the grantor mentioned in the within Indenture, that the seal thereof affixed is the proper corporate seal of said Company, that the same was so affixed thereto and the said deed signed and delivered by Maurice Schlesinger who was at the date and execution thereof, the President of said Company, in the presence of said deponent, as the voluntary act & deed of the said Company, and that the said deponent thereupon signed the same as subscribing witness.

LOUIS E. GOLDFARB.

Sworn and subscribed before me on
the day and year aforesaid.
HELEN JEDELL
Notary Public of N. J.

WARRANTY DEED

Philmar Construction Corporation

To

Frederick R. Thirkettle, *et ux*

Dated October 24, 1922

Received in the Office of the County of Essex State of New Jersey, on the 12 day of Jan. A. D. 1923 at 11:56 o'clock in the Forenoon, and recorded in Book Q. 67 Page 298 of Deeds for said County, on pages

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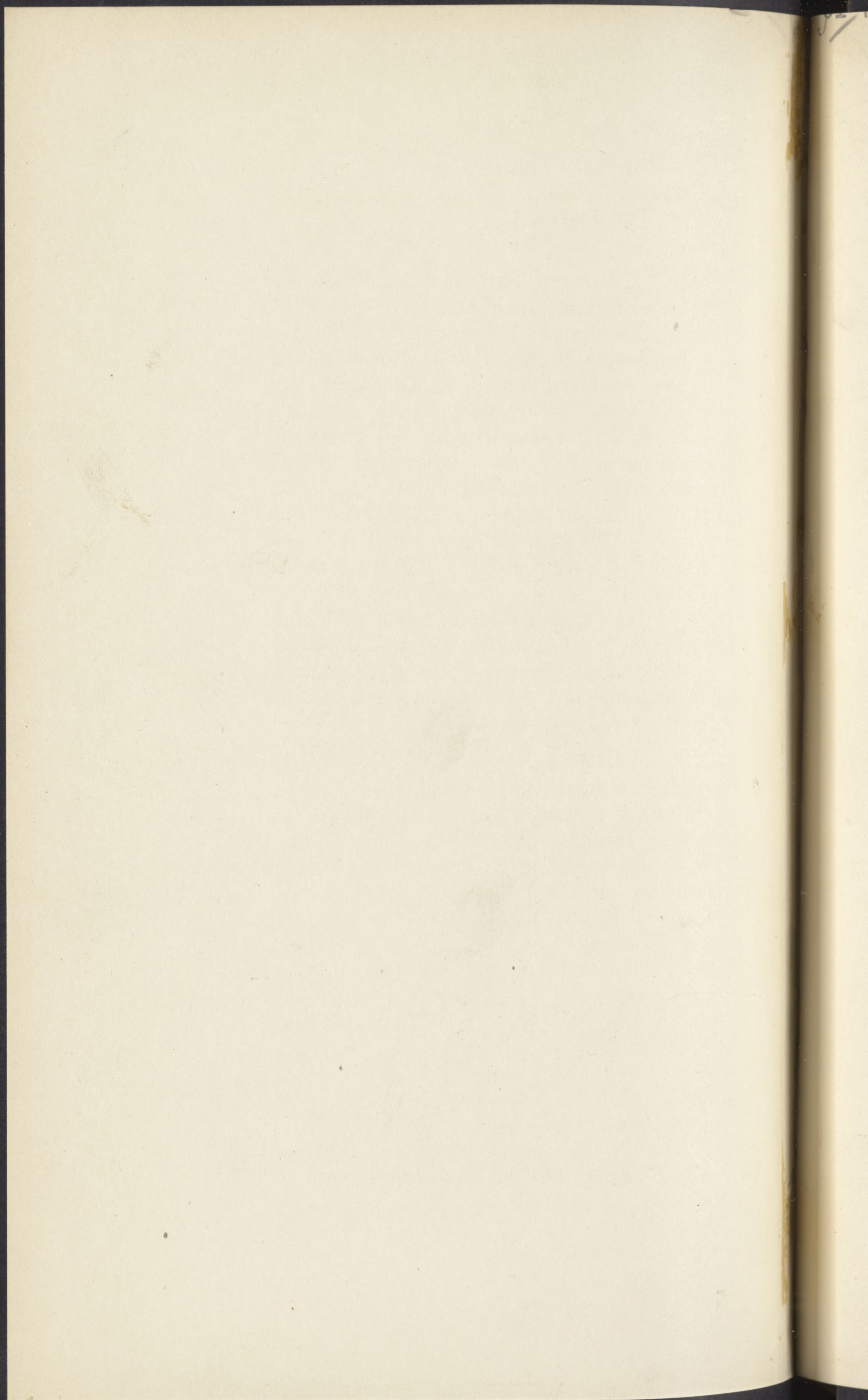

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between CURTISS-WARNER CORPORATION, a corporation, *Complainant-Appellant,* *and* FREDERICK R. THIRKETTLE, *et als., Defendants-Respondents.*	*On Bill, etc.* *On Appeal from Decree in Chancery.*

BRIEF FOR APPELLANT.

Facts.

This is a suit by the assignee of a purchase money mortgage to foreclose the same for the balance owing on it.

On the 31st of May, 1922, the defendants entered into a written agreement with the Philmar Construction Corporation, complainant's assignor, a copy of which agreement appears on pages 158-163 inclusive of the State of the Case, Exhibit D. 6, whereby the defendants agreed to purchase, for the sum of $7,500, the premises known and designated as corner of Tremont avenue and Oak street, in the City of East Orange, County of Essex and State of New Jersey, being forty feet on Oak street and one hundred feet on Tremont avenue, on which the Philmar Construction Corporation was required to erect a one-family dwelling house according to plans and specifications, before title passes. The purchase price was $7,500, to be paid $200, on the execution of the agreement, $300, in cash when title passes, and deed is delivered; $5,000, by as-

suming the payment of a Building & Loan mortgage to be a first lien on the land and premises, and the balance, by executing and delivering a purchase money mortgage (the mortgage in question), to be a second lien, conditioned for the principal to be paid in three years from the date of the mortgage, with interest at the rate of six per cent., and requiring $200, or as much more— as the defendants desired to pay, to be paid every six months from the date of the mortgage, and the balance at the end of the three year period. The agreement also provided that the Philmar Construction Corporation is to provide the cement walk and curbing, both in front and on side of lot. The defendants moved into and took possession of the house in October, or November, 1922. (Case, p. 49, ll. 10-13.) Title passed on December 4, 1922. (See Mortgage Exhibit C. 1, on pp. 140-146 of the State of the Case, showing same acknowledged December 4, 1922, and recorded January 12, 1923, and Deed Exhibit D. 10, on pp. 165-167 of Case, acknowledged December 4, 1922, and recorded January 12, 1923.) While the Agreement described the plot of ground upon which said house stands, as the corner of Oak street and Tremont avenue, it is in fact not a corner, as Tremont avenue has not been extended across Oak street, but only runs to Oak street. (See Exhibit D. 1, p. 157 of Case, and D. 2, immediately next to it.) When title passed, the defendants had been living in the house for several months.

In August, or September, of 1923, the defendant discovered that the lot, upon which his house stood, was not a corner lot, and would not be made a corner lot. (See Case, pp. 48-49.) The description in the mortgage, and in the deed of conveyance was by metes and bounds, and neither of them described a corner lot.

Defendants were unable to comply with the terms of payment of the mortgage, and in May, 1923, requested Mr. William Harris, an attorney and counsellor-at-law, to apply to the representatives of the complainant's assignor for an extension of time to pay the $200 installment on account of the principal of the mortgage, which was due on June 4th, until the following December. (See Case, Exhibit C. 6, p. 154.) The extension was granted, but the defendants did not pay the installment in December, 1923, but in January, 1924, wrote Exhibit C. 7, on page 155 of the Case; the "Johnny Mack" referred to in the correspondence is the defendant "Thirkettle," who was known as "Mack," and finally on March 28, 1924, the defendants through their then attorney, William Harris, by means of Exhibit C. 8, pages 155-156 of the State of the Case, made the arrangements to pay $100, on account of the principal after $400, had been long past due, and foreclosure proceedings had been threatened and agreed to pay $10, on every Monday after that time, which the defendants did, until the amount which has been credited on the mortgage, was paid. This arrangement was made more than six months after the defendants, according to their own testimony, knew that the lot on which the house stood would not become a corner lot, because the City of East Orange would not open Tremont avenue beyond Oak street, and the defendants continued to make the payments weekly for a year and a half after making said arrangement, without ever, in any of the correspondence, or in any of the communications with the attorney, having mentioned any defense to the mortgage, or any objection on the ground that the lot was not a corner lot.

On the 26th of May, 1925, the Philmar Construction Corporation, the original mortgagee,

and vendor, sold said mortgage, together with three other mortgages, which it owned, to the Curtiss-Warner Corporation, the complainant herein. (See Exhibit C. 3, pp. 150-153 of Case.) Said mortgage was assigned to the complainant a little less than two years after the defendants knew that the lot was not a corner lot, and the defendants continued to make the weekly payments for about six months after said assignment.

The Bill to Foreclose in this suit was filed December 2, 1925, and then the defendants came in with a two-fold counter-claim:

First: That they paid $1,000 more for the property than the regular price, because it was represented to be a corner, and demanded a reduction of $1,000, from the mortgage; and

Second: Because it not being a corner, the defendants did not put down the curbing, nor walk, on the Tremont avenue side of the house, and they demanded, by way of counter-claim, the unliquidated damages for the cost of putting down curbing and sidewalk along the side of the lot, as if it had been made a corner.

The learned Vice-Chancellor allowed the defendant both claims of the counter-claim, that is, he allowed the defendants to get back $1,000, so as to put them in the position that they would be, if they had not bought a corner house according to their claims, and in addition to putting them in the position of not buying a corner house, he allowed them in money the value of the curbing and sidewalk on Tremont avenue, which they would have been entitled to receive if they actually paid the additional $1,000. It is from this decree, that the complainant has appealed.

ARGUMENT.

I.

A purchaser who has been led into a contract of sale by false representations that entitle him to rescind the contract has but one election to rescind, which he must exercise with reasonable promptitude after his discovery of the falsity of the representations that induced his purchase. Beyond this mere delay in the rescission of the contract may amount to satisfactory evidence of an election to abide by the contract notwithstanding the fraud.

Clampitt, et al. v. *Doyle,* 73 N. J. Eq. 678; 70 Atl. 129.

In the instant case, defendants admit the making of the mortgage, admit the balance claimed as owing, and insist that because the plot of ground in question was described in the agreement to convey as a corner lot, but is not in fact a corner lot, that they are entitled on a counterclaim to set up against the enforcement of the purchase money mortgage in this foreclosure suit, three years after the conveyance and after the execution and delivery of the mortgage, the alleged claim that they paid $1,000 more than the asking price, on account of the fact that it was represented to be a corner lot, and also the cost of putting a curb down along the side of the lot, if it were a corner lot, and a four foot cement sidewalk.

The defendant, Thirkettle, himself, testified, at the bottom of page 48, and page 49, up to line 20, as follows:

> "The Court: When did you discover that? (The fact that the lot was not a corner lot).

The Witness: I guess it was about a week after I spoke to Mr. Mills.

The Court: When was that, when did you speak to Mr. Mills?

The Witness: I think about a year after we had moved in there.

Q When did you move in? A In November, 1922, I think it was, or October, 1922, either one of those two months.

The Court: November, 1923, you discovered that your lot was not a corner, is that right?

The Witness: No, it wasn't quite that much. I think around August or September, around that time, 1923.''

Thus demonstrating, beyond peradventure of a doubt, that if there was any misrepresentation, the defendants discovered it in August or September, 1923. True, on page 50, Thirkettle, on direct examination says, that about three weeks, or a month, after that, he spoke to Philip Herman, asking about the corner, and was told ''That is all right; we will take care of that,'' and later on was told ''What do you care about that? You got a cheap buy.'' And he replied ''I know, but I want a corner,'' and in reply to that was simply told ''I wouldn't worry about that,'' and was told by the other member of the complainant's assignor, Mr. Goldfarb, ''Well, if you are not satisfied, we will take the house back.'' This last conversation was about a year prior to the taking of testimony, and testimony was taken, as appears on page 26, June 15, 1926.

Even after all these conversations with Herman and with Goldfarb, when no promise was made to have a street cut through, so as to make the lot in question a corner lot, and when the defendant was told that he shouldn't worry because he got a bargain, and that if he wasn't

satisfied, he could have his money back, the defendant did nothing to disaffirm the contract, or to claim any defense under the mortgage, but continued his weekly payments under the terms of the courtesy extended to him by the complainant's assignor, and subsequently by the complainant. The defendants entered into possession in October, and the building was completed in December, when the title actually passed. Case top of page 52, where the defendant, Thirkettle, testified in answer to question by the Court:

> "The building was completed—it wasn't completed, we moved in in October, I think, of 1922, but the building wasn't completed. They were still working on it up until almost into the winter."

Although, as shown by the evidence referred to above, the defendants discovered in August, or September, 1923, that Tremont avenue would not be cut through, and the plot would not therefore become a corner, the following March 18, 1924, more than six months thereafter, the defendants caused their attorney, William Harris, to make the arrangement to pay $100, on account of the principal of the mortgage, and $10, every Monday thereafter, and on page 106, the defendant Thirkettle, testified on direct examination in rebuttal, that the last time he met Philip Herman, the treasurer of the complainant's assignor, was in the spring or summer of the year before, that is 1925, when Philip Herman refused to promise to make a corner, but told him "Mack, you should worry, your house is worth a lot more money, even if you haven't a corner; you got the best end of the deal, the houses are worth more money." And he said, "No, but I bought a corner"; that he then consulted his

present counsel, Mr. Greene, about the matter, and at line 30, he is asked:

> "Q What did you do as a result of seeing me? A I paid, I think, one or two more weeks after that, until I saw you again.
>
> Q And as a result of that second visit, what did you do? A Stopped payment."

By "stopped payment" he, of course, means "didn't continue to pay," and therefore the foreclosure proceedings were instituted.

Even after that, the defendants did not notify the complainant, or the complainant's assignor, of any objection to the validity of the mortgage, or the amount owing on it, but kept the benefit of the bargain, occupied the house, got full benefit of the fact that the house had been bought for much less than its real value, and simply allowed as much time to elapse as possible by defaulting, without any notice to the complainant, or its assignor. It is significant that the defendants got the benefit of complainant's, and complainant's assignor's indulgence by means of the letters written by Mr. Harris, on their behalf Exhibits C. 6, 7 and 8 on pages 154-156 of the Case, and never once, in any of the letters mentioned the fact that they were not satisfied with the bargain, because the plot was not a corner, and never once mentioned the fact that they were entitled to any allowance on account of that fact. Complainant's counsel tried very hard to cross examine the defendant, Thirkettle, about his conduct in this connection, but was not allowed to do so, and was not allowed to cross examine him regarding when he paid the interest, and when he paid the installments, as witness, pages 59-65 of the Case.

In this connection, complainant respectfully submits that the statement by counsel, as to the

proper rule to be applied in the cross examination, appearing on page 60, lines 10-30, is a correct statement, and that complainant should have been allowed the benefit of a complete cross examination of the defendant regarding his conduct in connection with the mortgage, after he discovered that the plot was not a corner. There was nevertheless more than enough testimony before the Court below to bring this case clearly within the rule of *Clampitt* v. *Doyle, supra,* and *Dennis* v. *Jones,* 44 N. J. Eq. 513; 14 Atl. 913.

In *Dennis* v. *Jones,* Chancellor McGill, speaking for this Court, asserts a rule that has never been questioned in the following clear language:

> "It is the rule that the defrauded party to a contract has but one election to rescind, that he must exercise that election with reasonable promptitude after discovery of the fraud, and that when he once elects he must abide by his decision.
>
> Bigelow, Fraud, 436. Delay in rescission of the contract is evidence of a waiver of the fraud, and an election to treat the contract as valid. Williamson *v.* Railroad Co., 29 N. J. Eq. 311, 319; Brown *v.* Insurance Co., 32 N. J. Eq. 809; Oakey *v.* Cook, 41 N. J. Eq. 350, 7 Atl. Rep. 495; Bigelow, Fraud, 438; 2 Pom. Eq. Jur. Sec. 817; Baird *v.* Mayor, 96 N. Y. 567; Farlow *v.* Ellis, 15 Gray, 229. So payments of purchase money, after knowledge of the fraud, are evidence to the same effect. Knuckolls *v.* Lea, 10 Humph. 577. And so, also, is the continued dealing with the property purchased. And in reference to the fraudulent transaction as if the contract were subsisting and binding. Bassett *v.* Brosn, 105 Mass. 551; 1 Story, Esq. Jur. (13th Ed.) 227; 2 Kent, Comm. (12th Ed.) 637; Vigers *v.* Pike, 8 Clark & F. 562; Schiffer *v.* Dietz, 83 N. Y. 300. I think in the case now considered it is plain that, after the appellants had knowledge of all the substantial features of the

> alleged fraud, and were fully aware of the deceit which had been practiced upon them, they so acted as to afford plenary evidence of an election to abide by their contract. Their election thus made was irrevocable."

In *Faulkner* v. *Wassmer,* 77 N. J. Eq. 537; 77 Atl. 341, Justice Garrison, speaking for this Court, explains that the rule laid down by *Dennis* v. *Jones,* supra, is not based upon the doctrines of laches, but upon a totally different ground, viz, that of conduct evidence.

None of the cases cited above, or the ones cited in those decisions, are any stronger to establish an estoppel by conduct evidence, than the instant case, and complainant respectfully submits that the defendants' counter-claim should have been dismissed, and a decree for the complainant entered.

II.

Assuming that the defendants have established a fraudulent representation, inducing the payment of $7,500, for said property, as a corner lot, the contract merged in the deed, except as to the collateral covenants, and the only collateral covenant is the one to put down a cement sidewalk along the side of the lot, and the curbing. Aside from that covenant, the agreement was merged.

Davis v. *Clark,* 47 N. J. L. 338;
Long v. *Hartwell,* 34 N. J. L. 116.

All that the defendants could, therefore, recover on their counter-claim would be the cost of the four foot sidewalk and the curbing, which is about $160. The defendants could not, of course, recover the $1,000, which they seek back, because they did not get a corner, and the cost

of the sidewalk, and curbing, in addition, as if they did get a corner, because the moment they are allowed to recover back the $1,000, they are relegated to the position of being purchasers of an inside house, and having paid the price according to their own testimony, that they were asked for an inside house, and at that price, there certainly would be no curbing along the side of the lot, and no sidewalk of an inside house.

Complainant respectfully submits that the learned Vice-Chancellor erred in allowing double damages. If the Court below found, as it ought to have found, that the $1,000, could not be recovered, because there was no fraud, and a merger, then the Court could have found in favor of the defendants on the counter-claim, for the cost of the sidewalk and the curbing, because that was an unperformed part of the bargain of complainant's assignor; but when the Court found that there was fraud, and that the defendants were entitled to $1,000, being the amount they were induced to pay, according to their evidence, on account of the fraud practiced upon them, then they certainly could not, in addition, be entitled to also recover the cost of the cement sidewalk and curbing.

Complainant therefore respectfully submits that the decree below should be reversed and a decree entered in favor of the complainant on this ground.

III.

The defendants on the counter-claim sought affirmative relief, and the burden was on them to prove their allegations. In the counter-claim, the defendants allege that they were asked $6,-500, for an inside house, and $7,500, for the house in question, because it was a corner lot, and both defendants, who are the parties entirely in interest, testified to that. All of the witnesses for the complainant deny that there was any such conversation, or arrangement, and they are not as interested in the result as the defendants, for either Goldfarb or Herman are only affected as members of a corporation involved, and not as the parties to suffer the entire loss, if a loss is to occur. The books of the Philmar Construction Corporation, the complainant's assignor, were brought to court for the purpose of showing that no house and lot, and there were over sixty houses built on that tract, which was developed by the Philmar Construction Corporation, was sold to anyone for $6,500, or any price near $6,500. The books were in court, and when both Goldfarb and Herman testified to that fact, if there was any question about it, the records would have been exhibited but these facts were not questioned.

Thirkettle, when asked on cross examination, if he knew of anybody who purchased a house for $6,500, admitted he did not. The clear weight of the evidence is with the complainant, that the defendant was not charged anything extra because of the representation that the lot in question was a corner lot, and the reason is very apparent, as given in Mr. Goldfarb's evidence, which the Court evidently misapprehended. See Case 98, lines 23-35:

> "You see, if this lot as a corner belonged to us in fee, with the assessment paid, the

value of that lot would be a thousand dollars more than the value at the time Mack purchased it. The assessment on that 100 foot front on Tremont avenue would have cost a thousand dollars. The cutting and the grading and surfacing of the street, understand that, but as a lot as it is, with the city cutting it, with the assessments being levied against it, it wasn't worth any more than an inside lot."

And in answer to the Court's question on page 100, lines 20-40:

"A. The assessment that I refer to is the concrete paving of the street itself, and the cutting of the street down to grade. In developing a tract, sometimes you have five or six foot to cut, sometimes it means five or six foot fill; sometimes it is even more, because it was a dump there previous. They dump garbage and ashes and stuff of that kind, and the land was very low, and if that street had to be cut through, it would have had to be filled to grade, and then graded and foundation put in on account of the softness of the ground.

Q It is an assessment for the street, then? A Yes.

Q And not for the sidewalks and curbing? A No.

Q You didn't expect to put in these sidewalks and curbs for nothing? A I agreed to put that in if they opened the street.

Q And yet you thought they were going to open the street? A I did."

The fact that there is no difference in value is further borne out by the report, under oath, of the disinterested witness, Frank H. Taylor, appointed by the learned Vice-Chancellor himself, with the consent of both parties, who agreed to abide by his report to the Court as to whether or not there was any difference in value, and on page 114, said Frank H. Taylor, says:

"Deponent further saith that there existed no increase of value for the particular lot

herein mentioned on the basis of it being a corner."

The question now arises, who is telling the truth, as to whether or not an increase of $1,000 in price was nevertheless procured from the defendants? On this question, the clear weight of the evidence is in favor of the version given by the defendants' witnesses, for their evidence is, that not one single house was sold for $6,500; that the price asked of the defendants was $7,000, and the agreement made for $7,500, because of the changes, and improvements, and additional work that the defendants required to be done on the house, over and above the specifications according to which it was intended to erect the house in question.

It is apparent that the evidence of Thirkettle given, beginning with page 53, and ending with page 56, in which he claims that there was to be no extra charge, because of the change in the character of doors to be supplied, that adding picture molding in the halls and bedrooms didn't change the price; that changing the character of the medicine closet and building shelves, which were not required in the original specifications, didn't change the price; that putting down cement walks and grading, which were not in the specifications, didn't change the price; that painting the entire kitchen and bathroom with three coats of white paint, and one coat of enamel, and living-room and dining-room and three bedrooms and halls to be papered with paper selected by the defendants, and making all the woodwork white, didn't change the price; that adding to the wiring, six outlets for wall lights in the living-room and two outlets in each bedroom for wall lights, and three base plugs in the living-room, and two in the dining-room, and two in the

kitchen, and two in the bathroom for wall lights, and putting in the electric fixtures as selected by the defendants, didn't change the price. The attitude of the Court on this, or on part of the testimony, given by the defendant Thirkettle in this connection, as appears on page 57, is somewhat surprising in view of the fact that it cannot be said that that attitude was brought about by the demeanor of the complainant, because no witnesses of the complainant had yet appeared, and that the fact that the plans and specifications could not be had and were not present in Court, was due to the estopped conduct of the defendants in never having raised any objection to the mortgage, until the foreclosure was started more than three years after the building was completed, and more than three years after the original mortgagee had gone out of business, and therefore did not have the plans and specifications.

The inferences contended for by complainant's counsel, and which the Court refused to follow, are apparent on the face of the Agreement D. 6, on page 159 of the Case, for it shows that the building to be erected was as per plans and specifications only, and then followed modifications referring to the pages of the specifications which were modified and added to. Furthermore, Thirkettle, the defendant, must have had the specifications with him, and must have consulted some expert and received the advice from the expert as to what improvements he should insist upon, for he testifies in his direct examination, on page 43, that it was a week or two after the original bargain that he came to the office of the Philmar Construction Corporation, but he says:

"In the meantime, I had penciled what I wanted on the agreement, such as doors, and

> floors and heater, different from the original plan. I penciled it down as to what I thought I wanted, and they made that agreement out and came down, and Mrs. Mack and I signed the agreement."

And on page 45, he testifies how he came to make the changes, that there was a builder that lived up near there, whom he consulted.

Mr. Philip Herman explains that he asked $7,000, for the property, and the price agreed upon was made $7,500, because of the changes, and additions, that the defendant wanted to be made in the building (pp. 79-80), and that it was Mr. Goldfarb, who figured up what extra work they would agree to put in for that $500. Mr. Goldfarb explains on page 91, and gives illustrations of the items of the extra work on pages 91 and 92, as to how he arrived at the $500 addition making the price $7,500.

It is clear from the evidence, that the probabilities are all with the complainant, as well as the weight, both in quality and in number, of the witnesses. An index as to whether the defendant, Thirkettle, is entitled to be believed as against the complainant's witnesses, in addition to the fact that he received a bargain from people who treated him as a friend, that he received every courtesy by way of extension of time to pay interest and principal, and then tries to avoid paying his just debts, is that Thirkettle, on page 67, lines 17-20, is asked the question:

> "Q Didn't you go and talk to Miss Jedell and ask her to arrange an extension for you on the mortgage? A No, sir.
>
> Q Sure? A Positive."

And Miss Jedell, who is certainly an entirely disinterested witness, and whose only connection with the case is, that she is the managing clerk

in the office of the solicitor for the complainant, and whose testimony was considered by defendants' solicitor so correct beyond a doubt that he didn't even cross examine her, directly contradicts Thirkettle in her testimony on page 77, lines 25-35, where she testifies:

> "Mr. Thirkettle personally came there and paid that fee, and while he was there, he asked me to please use my influence, any influence that I would have with the members of the Philmar Company, to not press him, if he would pay $10 a week, and assured me that the $10 a week would be paid promptly by him to Mr. Harris *until the complete mortgage was paid.*"

The maxim "*FALSUS IN UNO, FALSUS IN OMNIBUS*" particularly applies to Thirkettle, because the reason that he denied coming to the office and talking to Miss Jedell was because he knew that in his conversation, which took place more than six months after he discovered that he didn't get a corner lot, he asked Miss Jedell to use her influence with the Philmar Construction Corporation to accept $10 per week, and promised to pay promptly *until the complete mortgage was paid.*

Complainant therefore respectfully submits that the defendants have utterly failed to prove an intended fraud and have utterly failed to prove that they paid $1,000 more for the property in question, because it was a corner lot, than they would otherwise have had to pay, but, on the contrary, the clear weight of the evidence, supported by the documentary evidence, and the circumstances show that they were not charged anything because the officers of the Philmar Construction Corporation believed that the lot in question would become a corner lot. This results in a fraud in equity, because of the

fact that the representation, even though believed to be true, that the lot would be a corner lot, was made, and it turns out that it is not a corner lot, and under such circumstances the measure of damages to be applied is the difference between the value of what the defendants got, and what the contract called for, as laid down by both Chief Justice Beasley and Chancellor Zabriskie, in the leading case on the measure of damages, in a case of fraud, of *Crater* v. *Binninger,* 33 N. J. L. 513, which would be nothing as the agreed-upon evidence of Taylor is that there is no difference in value.

IV.

The law of the instant case, and the theory upon which it was submitted, is settled by the Court with the agreement of counsel, as appears on page 111 of the Case, as follows:

> "The Court: If I should find that Mr. Thirkettle was entitled to a corner lot under his agreement, then the question of the difference in the value between what he got and what he would have gotten is a very material matter, and as the case stands now, it would be a matter of pure speculation, it would be a pure guess on my part, as to the difference in the value. For my own part, I do not want to leave the situation in that shape at all. If the case had been closed without any suggestion of any further testimony, I should have done the best I could with it, but since the offer has been made to submit testimony on that by an expert, I am going to receive it. I will give you an opportunity to bring some expert here if you want it.
>
> Mr. Schotland: May I suggest that your Honor select a person and let him go and examine it and give the figure, the difference in value as of that time, with and without

the street assessment for paving and grading. The only thing to be considered would be the question of the difference in value of a corner lot and an inside lot as it was at that time.

Mr. Greene: That is agreeable to me.

The Court: I will select as an expert Mr. Frank H. Taylor of East Orange, New Jersey."

And, as referred to above, Mr. Taylor's evidence is, that there is no difference in value.

Complainant therefore respectfully submits, for the reasons above stated, that the decree appealed from should be reversed, and that a decree in favor of the complainant, in accordance with the prayers of the bill, be entered, with costs.

Respectfully submitted,

PHILIP J. SCHOTLAND,
Solicitor for and of Counsel with
Complainant.

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

New Jersey Court of Errors and Appeals

Between CURTISS-WARNER CORPORATION, a corporation, *Complainant-Appellant,* *and* FREDERICK R. THIRKETTLE, *et als., Defendants-Respondents.*	*On Bill, etc.* *On Appeal from Decree in Chancery.* *Sat Below* WALKER, *C.* BERRY, *V.-C.*

BRIEF OF DEFENDANTS-RESPONDENTS.

Statement.

The complainant brought this suit to foreclose a purchase money mortgage on which, admittedly, there is an unpaid balance of $1,206.50, with interest. The defendants, the mortgagors, resisted the foreclosure and by way of answer and counter-claim, set up their right to an abatement, *first,* of the sum of $1,000, representing an overpayment on the price of the lot purchased, which was fraudulently exacted from them by the false representation that the lot was a corner lot (which it was not); and, *second,* of the cost of laying the sidewalk and curbing on the side of the lot which was supposed to abut the street, but did not.

The learned Vice-Chancellor sustained both counter-claims; and it being determined that the amount of the abatement to which the defendants were entitled, equaled the unpaid balance on the mortgage, the Vice-Chancellor decreed that the mortgage be delivered up for cancellation, together with the bond secured thereby. From this decree, the complainant appeals.

Summary of the Evidence.

The superficial statement of fact in the appellant's brief makes it necessary to analyze the testimony pro and con with some degree of care.

The defendants' answer alleges and the testimony clearly shows the following facts:

In May, 1922, the Philmar Construction Corporation the complainant's assignor was engaged in developing a large tract of land in East Orange, New Jersey, fronting on what is now known as Oak street. It had divided this tract into building lots of uniform size, having a frontage of about forty feet on Oak street, and a depth of about one hundred feet, and was erecting thereon about forty one-family, six-room frame dwellings, according to common plan. In the middle of May of that year, Mr. Philip Herman, the treasurer of the company, conveyed the defendant and his wife, to this tract, in the hope of interesting them to purchase a home (pp. 41, 42). The defendants on arriving upon the scene, saw several dug-outs or cellar excavations (p. 42). Mr. Herman showed the defendants a picture of the type of house his Company intended to build on this tract. The defendant and his wife testified that Mr. Herman offered to sell them any one of these houses, together with the lot for $6,500 (pp. 42-43). The defendants showed a preference for the lot which they eventually bought; thereupon Mr. Herman stated that this lot would cost $1,000 more than any one of the other lots because it was a corner lot (pp. 42-43). The defendants after considering the matter, decided to purchase the lot in question, and the house to be built thereon for $7,500. Mr. Thirkettle testified that one of the reasons his wife wanted the corner lot was because she

wanted to build a garage on the Tremont avenue side of the house (pp. 42-43). Several days later, the defendants attended at the office of the Philmar Construction Company and there signed formal articles of agreement for the property (p. 43). The defendants testified that before the execution of this agreement, Mr. Herman showed them the uniform plans and specifications for the house, to which was attached a map, showing the lot in question, as a corner lot, located at the northwest corner of Oak street and Tremont avenue (pp. 43-44). Neither the plans, specifications, nor this map, were produced by the complainant at the final hearing, although a notice to produce was served upon its solicitor, and although a subpoena *duces tecum* was served upon Mr. Herman. Before coming to the office of the Philmar Construction Corporation, the defendant (at the suggestion of the builder), prepared a list of slight modifications in the uniform specifications, which changes Mr. Herman had previously agreed to make, without charge. Some of these changes were struck out by Mr. Goldfarb, while others which Mr. Herman had agreed to make without charge, were expressly provided for in the agreement (pp. 43, 45, 46). At the insistence of the defendant, the lot in question was described in said agreement as follows:

> "* * * said premises known and designated as *corner of Tremont avenue,* and Oak street, there being forty feet on Oak street and *one hundred feet on Tremont avenue.* * * *"

The agreement then provides that on said lot is to be erected a one-family dwelling *as per plans and specifications only.* It also provides for laying the sidewalks and curbing. Then follows a list of the agreed changes in the specifications. The Court's special attention is invited

to the fact that the depth of the lot is not described merely as "*100 foot in depth*" but as "*100 foot on Tremont avenue.*"

The defendants took title to the property and entered into possession by deed dated October 24, 1922, at which time the purchase money mortgage was delivered. The premises were not fully completed, and the defendants entered into possession because they were compelled to vacate their apartment (p. 35).

In the latter part of the Summer of 1923, Tremont avenue was cut through by the City of East Orange, as far as Oak street (p. 49). Mr. Thirkettle testified that he learned from Mr. Mills, the City Engineer, that Tremont avenue was then not to be cut through past his lot (p. 49); that he then inquired of Mr. Herman whether his lot was to be made a corner lot and Mr. Herman assured him that this would be done (p. 50). Mr. Thirkettle, relying upon the covenant contained in the agreement of sale, and upon Mr. Herman's assurances that the lot would be a corner lot, made improvements on this property, costing about $1,200 (pp. 50-51), and continued to make payments on the principal of the mortgage, although in smaller instalments than those provided in the bond and mortgage, because the complainant (at the request of Mr. Harris, a friend of his) agreed to accept smaller payments (pp. 62-65-66). In October, 1925, it became apparent to the defendant, that he had been defrauded, and that his lot would never be a corner lot. Upon advice of counsel, he refused to make any further payments on the mortgage.

Messrs. Herman and Goldfarb, the complainant's witnesses, deny the fraud and say that no charge was made for the lot being a corner lot;

that the agreed price for the property was $7,-000 and that the additional $500 represents the agreed cost for the extra work. Their testimony, however, is so contradictory and improbable as to be unworthy of belief and the Vice-Chancellor refused to believe them. The following are a few of the most flagrant contradictions and improbabilities in their testimony. Mr. Herman testified that he originally offered to sell any house and lot for $7,000 (pp. 81-84). A moment later he testified that he asked the defendant $7,300 but suggested that if he would go down to see Mr. Goldfarb, the latter might reduce the price to $7,000 (p. 84). Mr. Herman put it in these words "*He jewed me down $300*" (p. 84). Mr. Goldfarb says that the negotiations were started at $7,000 (p. 90). Again Mr. Herman testified that he told the defendant that up to that time he had sold but two houses, one for $7,200 and one for $7,000 (pp. 83-84). He denies having sold any houses for less than $7,000 (p. 84). Mr. Goldfarb contradicts this by saying, that he had sold "*a lot of houses*" at that time, and that he had sold ten houses for $6,900 (p. 99).

It is clear that at the beginning of the development, the houses were sold for whatever the builder could get; and as the sales increased, the prices were boosted to whatever the traffic would bear. The defendant testified that shortly after he purchased the property, Mr. Herman told him that he couldn't build the houses for $6,500 (p. 53). This was not denied by Mr. Herman.

Mr. Herman testified that he advised the defendant to take the lot in question, because, to use his own language, "*Sometime the street will go through; it will be a corner, because there is no house around the corner in that section*" (p. 81). Mr. Goldfarb claims that it was *he*

who told the defendant that it would be a corner. He also said that it was his impression that it was a corner (pp. 92-93).

Mr. Herman testified that he told the defendant as follows: "*You can have which you want, but I would advise you to take this last one because this is a butt street. Sometime the street will go through. It will be a corner, because there is no house around that corner in that section*" (p. 81), and again "*I told him this street would be cut through*" (p. 78).

Mr. Goldfarb testified, "*I told him it would be a corner, it was my impression that it was*" (p. 92). Later on, Mr. Goldfarb modifies his previous testimony by saying that he told the defendant as follows:

"*Mack, look, Tremont avenue has got to be opened all the way through to the East Orange line, we will give you a corner here which will give you the total benefit*" (p. 93). He testified as follows: "*I honestly was under the impression that it was a corner, but I didn't own the land here. I took it for granted, because Tremont avenue was opened to Oak street, that they would have to continue it right through*" (p. 93).

Mr. Herman at first denies that the defendant ever talked to him about the lot not being a corner, but later he admits that at the time the streets were laid out, the defendant did ask him as follows: "*Mr. Herman, you think this street will be cut through?*" (p. 89.) Mr. Herman admits that the lot as a corner lot would be worth $200 more than an inside lot (p. 87); whereas Mr. Goldfarb thinks that there is no difference in the value, but admits that the lot, with assessments paid, would be worth $1,000 more than an inside lot (p. 98).

On cross examination, Mr. Herman admits having shown the defendants a map showing the lot as a corner lot (p. 87), but on re-direct examination by his own counsel, he denies having shown such a map to the defendants (p. 90).

It is reasonable to infer that the defendant bargained and paid for a corner lot from the fact that Goldfarb always believed that it was, in fact, a corner lot.

The complainant's witnesses conveniently seized upon the modifications in the uniform specifications as an explanation for the $500 increase in the purchase price. According to Herman and Goldfarb, not only did they give the defendants a corner lot, without extra charge, but in addition, agreed to lay down the sidewalks and curbing at an expense which Mr. Mills estimated at about $225 (p. 34). This unwarranted solicitude and generosity, is highly suspicious, and a strain on the human will to believe, particularly in view of subsequent events and the Vice-Chancellor refused to believe it.

Mr. Thirkettle testified that many of the details provided for in the specifications (as modified), were omitted (pp. 68-69). It is reasonable to assume that if these details were to be compensated for, as extra work, that Herman and Goldfarb would have installed the same. It is admitted that the defendants had prepared a large penciled list of changes in the uniform specifications and that Goldfarb struck out quite a number of them (pp. 106, 108, 113, 72). If, as Goldfarb and Herman contend, this extra work was to be paid for, is it not strange that Goldfarb refused to do all this extra work, and instead struck out many items? This fact alone indicates that there was to be no compensation

for these minor changes in the specifications. This was the defendant's first venture in real estate and building; he knew nothing about construction, nor the cost thereof. He testified that he made up this list at the suggestion of a builder. It clearly appears from the evidence that he was a man of very limited means. In view of these circumstances, Goldfarb's story that the extra work was figured out mathematically and that $500 was agreed upon for the same is rendered improbable.

Admittedly, Goldfarb was not present during the first conversation between Herman and the defendants, at which the $6,500 offer was discussed. With respect to this conversation, the testimony of the defendant and his wife should prevail, as against the mere denial of Mr. Philip Herman. Mr. Morris Herman, a son of the former, who was present during this conversation, was not produced by the complainant to substantiate the testimony of his father. The plans, specifications, and the map thereto attached, were not produced; nor was Mr. Nadel (the architect, who drafted the same), produced to deny the existence of such a map. In the absence of this "*best evidence*" the complainant's assertion that $500 of the purchase price represented the extra work was and should be disbelieved.

Whatever doubt there may be as to whether the defendants bargained and paid for a corner lot is entirely dispelled by the clear and unambiguous language of the agreement of sale, and *that writing* is a clue to the entire case.

ARGUMENT.

Appellant's brief alleges four grounds for reversal of the decree of the Court below, and these we will discuss in the order in which they are argued in the appellant's brief.

Answer to Point I.

Under this point, counsel for the appellant argues that, admitting there was fraud in the inception of the sale, the defendants sole remedy was by rescission, and that the defendants' delay in that respect, amounts to an election to abide by the contract.

Before considering this point, it is important to observe that this contention is not made a ground of appeal, nor was the same argued in the Court below. In the Court below, counsel did contend that the defendants were estopped from asserting their claims in abatement, by reason of laches and their conduct in procuring extensions of time for making payments on account of the mortgage, without objection; but he did not contend that this conduct amounted to an *election,* nor did he discuss the question of *rescission.* Under these circumstances, this point should not be considered by the Court.

Erghart v. *Schroeder, et al.,* 116 A. 717; 92 N.J.E. 663;

Transparent Rubber Works v. *International Glass Co.,* 105 A. 299; 92 N. J. L. 461;

Shaw v. *Bender,* 90 N. J. L. 147; 100 A. 196;

Saffrin, et al. v. *Grillo,* 133 A. 772.

But aside from this objection, complainant's argument is without merit, because it assumes a false basis of fact. It is quite true that the de-

fendant in August or September, 1923, learned from Mr. Mills, the City Engineer, that Tremont avenue was then not to be extended past his house. But it is equally true that about three weeks thereafter the defendant spoke to Mr. Philip Herman, about the corner, and was told by Mr. Herman *"that is all right; we will take care of that"* (p. 50). The defendant also testified that he was subsequently assured by Mr. Herman or Mr. Goldfarb, or both that Tremont avenue would be cut through and that his lot would be made a corner lot. It is also apparent that the defendant made continuous complaints to Herman and Goldfarb, right up to within a short time before the institution of this suit, and that he was repeatedly assured by one or both of them that he would receive what he bought (pp. 50, 106). The dispute in the testimony on this point, presented a question of fact for the consideration of the learned Vice-Chancellor, and he resolved that question in favor of the defendants. (See opinion p. 130.)

Mere delay in rescinding the contract of itself, is not conclusive evidence of an election, but is entitled to *more* or *less* weight, according to the circumstances of the case. *Roberts* v. *James,* 85 A. 244; 83 N. J. L. 492.

In the present case, the delay, if any, was occasioned by the continued promises of Messrs. Herman and Goldfarb that the lot would be made a corner lot. The doctrine of estoppel is a creature of equity and governed by equitable principles, and it necessarily follows that the party who claims the benefit of an estoppel must not only be free from fraud, in the transaction, but himself have acted in good faith, otherwise no equity will arise in his favor. Pomeroy's Equity Jurisprudence, 4th Ed., Vol. 2, Sec. 813. Since

the complainant's assignor was guilty of fraud, hence its assignee, the complainant, is in no position to claim the benefit of an estoppel. The complainant asserts that the defendants have been guilty of laches, but does not suggest any facts to prove the same. The ordinary reasons which induce a Court of Equity to deny relief on the ground of laches, are not present in the case at bar. *Kelsey* v. *Agricultural Insurance Company,* 79 Atl. 539; (78 N. J. E. 378). It is not suggested that the complainant has been placed in any worse position by reason of the delay. The position of defendants, however, has been considerably changed by reason of the wrongdoing of the Philmar Construction Corporation, because relying upon the representations that the lot was a corner lot, they proceeded to, and did make valuable improvements on the property, and this has changed their position with respect to their ability to rescind the contract by reason of said fraud. *Robert* v. *James, supra.*

There is no laches, nor estoppel in this case, because there was no full knowledge on the part of the defendants that they had been defrauded until shortly before the institution of the foreclosure proceedings. To constitute an estoppel or laches there must be full knowledge and the party who claims the benefit of the estoppel must not have occasioned the same. One who has perpetrated a fraud against another, cannot be permitted to set up as a defense to his fraud that the defrauded party might have discovered the fraud, and protected himself against it in time. It does not alter the character or effect of the fraud that it was successful, and that the defrauded party might have protected himself against it and failed, either through oversight, neglect or otherwise. *Turner* v. *Kuehnle,* (N. J.)

62 Atl. 327; *Lloyd* v. *Hulick, et al.,* (E. & A.) 63 Atl. 616; *Giammares* v. *Alamania Fire Ins. Co.,* (N. J. Ch.) 105 Atl. Rep. 611; *Alexander* v. *Brogley,* 63 N. J. L. 307; 43 Atl. Rep. 888; *Aldrick* v. *Peckham,* 74 N. J. L. 711; 67 Atl. 345; *Dunstan Lithograph Co.* v. *Borgo,* 84 N. J. L. 623, 87 Atl. 334; *McDonald* v. *Central Railroad Co.,* 89 N. J. L. 251, 98 Atl. Rep. 391.

The defendants indulged the complainant with respect to the payment of the principal of the mortgage, but we fail to see how that can, in law, operate as an estoppel. The testimony shows that in May, 1923, the defendant was unable to meet the $200 instalment of principal and interest, because he was out of work, and through the intervention of a friend, the complainant agreed to accept $10.00 per week or $240.00 during a period of six months, instead of $200 every six months, as required by the mortgage. Tremont avenue had not as yet been cut through, and the defendant had no reason to anticipate that a fraud had been perpetrated upon him. The fact that he religiously continued to make these payments until he came to the conviction that he had been defrauded, operates in his favor, instead of militating against him, for it clearly shows that he was honest, that he regarded his obligation as solemn, and that he ceased to pay only after he had been advised by counsel that neither legally nor equitably was there any obligation to pay the balance of the mortgage under the circumstances of this case.

Counsel for the complainant does not suggest that the so-called extension was given in consideration of the defendants' waiving any of their rights, which they now assert; nor that the same was even in contemplation of the defendants at that time. Obviously, the reasons which induced

the complainant to indulge the defendants were, two in number. First, because Miss Jedell, complainant's agent, desired to do a favor to Mr. Harris, for personal reasons of her own; and second, because she considered it a wise policy not to precipitate the defenses set up to the mortgage. A similar charge of estoppel was sought to be interposed in the case of *Magee* v. *Reynolds*, 51 E. 113. That, too, was a bill to foreclose a mortgage. The mortgagor set up fraud in its procurement, and by cross-bill asked that it be delivered up to be cancelled. In disposing of a similar contention, Vice-Chancellor Pitney said at page 119,

> "But upon full consideration I have come to the conclusion that it was not the duty of Mr. and Mrs. Reynolds to commence suit to have this mortgage cancelled, and that their not doing so forms no ground of estoppel. They had a right to rely upon the well-settled rule of law that the purchaser of a chose in action of this character takes it subject to all equities, and that he has the power to protect himself by making inquiries at the proper sources; and, therefore, they are entitled to a decree that the complainant's bill be dismissed as to them, and that they are entitled to have the bond and mortgage delivered up to be cancelled."

The defendants were not bound to rescind, because their position with respect to rescission was altered, by the improvements they made upon the property. Mr. Goldfarb, if he is to be believed, offered to return the purchase price, but did not offer to pay for the improvements. The Philmar Construction Co. was dissolved and out of existence, and the purchase money mortgage was assigned to the present complainant. The defendants owed no duty to return the property to the complainant and were certainly not obliged to return it to the complainant with the

improvements, unless they could be re-established in *status quo.*

See *Roberts* v. *James, supra;*

Pedcock v. *Swift,* 51 N. J. E. 405, at 408;

Gill, Executor v. *Parker, Receiver,* 43 N. J. L. 430;

Doughten v. *Camden B. & L. Ass'n,* 41 N. J. E. 556.

Answer to Point II.

The cases of *Davis* v. *Clark* and *Long* v. *Hartwell,* are cited by the complainant in support of its contention that the acceptance of the deed operated to merge the executory contract in the deed, and extinguished the contract. A careful examination of these cases discloses that not only do they not assist the complainant, but sustain the contention of the defendants. The true principle reiterated in these cases is that the acceptance of a deed, in pursuance of an executory contract, is *prima facie* evidence that it expresses the final intention of the parties, *but only so far as it purports to carry into effect the executory contract.* We do not dispute that the defendants received a lot of the dimensions bargained for. The fact that the description in the deed is by actual measurements, made according to an accurate survey, has no bearing upon the question. The testimony clearly establishes that it was understood between the parties that the lot would be made a corner lot at sometime subsequent to the passing of title, when the streets would be cut through. The cutting of the street was executory and still remains unfulfilled. That part of the executory contract did not merge in the deed any more than the executory agreement to fill in the low land merged in the deed in the case of *Peterson*

v. *Reed,* 76 N. J. E. 377 (Reversed on other grounds; 80 N. J. E. 450). Whereas, in the ordinary case the mere acceptance of the deed raises the presumption that the executory contract merged in the deed, in the case at bar there is not even any presumption of a merger, because a comparison of the content of the deed and the contract does not indicate that a corner was conveyed. All that the deed indicates is that a lot was conveyed.

The question of merger of the executory contract in the deed, strictly speaking, has no bearing upon this case, since the fraud complained of is not the fraud in failing to give what the contract called for, but is based on the fraud in the inception of the contract. It is insisted that this fraud was a continuing fraud throughout the entire transaction. Even if there were no express undertaking to make the lot a corner lot, nevertheless the representation that it would be a corner lot was sufficient fraud to entitle the defendants to an abatement. In *Roberts* v. *James, supra,* Justice Swayze, speaking for our Court of Errors and Appeals held that a representation by a vendor that they intended to build a railway station and cement walks upon vacant lots, entitled the vendee to avoid the contract where it appeared that the representations were false. He held that a misrepresentation as to a man's state of mind, is a misrepresentation of a fact. Justice Swayze quotes Lord Bowen as having said,

> "* * * The state of a man's mind is as much a fact as the state of his digestion. It may be difficult to prove the state of a man's mind at a particular time, but, if it can be ascertained, it is as much a fact as anything else. * * *"

Counsel for the appellant argues that, conceding the defendants' right to an abatement of the $1,000 overpayment which was exacted on the basis of the lot being a corner lot—the defendants are not entitled to recover for laying the sidewalk and curbing, because then they are relegated to the position of being purchasers of an inside lot, which does not require any sidewalks or curbing. This argument wholly disregards the theory of the defendants' counter-claim that the purchase price of $7,500 was the *entire* consideration for a corner lot, with the sidewalks and curbing laid down. The curbing and sidewalk on Tremont avenue were in contemplation of the parties and formed part and parcel of the consideration of $7,500. The defendants' position on this point was made clear by the Vice-Chancellor when he permitted the amendment of the defendants' counter-claim to express that intention (see p. 34). The granting of this amendment is not appealed from.

Answer to Point III.

Under this point counsel for the appellant argues that the defendants failed to sustain their answer and counter-claims by adequate proof, and that the findings of the Vice-Chancellor are contrary to the weight of the evidence. We think that our previous analysis of the evidence shows sufficient justification for the finding of the learned Vice-Chancellor, and we, therefore, consider it unnecessary to make further reply to this point.

Answer to Point IV.

The appellant seems to make capital of the affidavit of Frank H. Taylor (p. 114), a real estate expert, in which he says that in May, 1922, there was no appreciable difference in the value of the lot in question as a corner lot, or an inside lot. At the final hearing the question arose as to the difference in value of the lot purchased and the value of the same lot, if it had been a corner lot. The learned Vice-Chancellor was then of the impression that the question was of some materiality to this issue, and by consent of counsel, the opinion of Mr. Taylor, an expert real estate operator was obtained on that question. He reported that there was no appreciable difference in this lot as a corner lot or an inside lot at the time of the purchase. This expert reported, however, that corner lots available for commercial or apartment house sites had an increased value of 25% and upwards over inside lots (p. 114). But, in his opinion, the learned Vice-Chancellor says that he has come to the conclusion that the statement of this expert is of no materiality in the case. He says in his opinion (p. 121),

> "* * * But, upon reflection, it seems to me that the question as to the actual value of this lot as an inside or corner lot should have very little weight in view of the fact, as I find it that the Philmar Construction Company exacted $1,000 more for the lot on the basis of its being a corner lot, than it would have required if it had been an inside lot. The right to relief is based not so much upon the difference in the value of the lot as it is and as it was supposed to be, as upon the misrepresentation which was used as a lever to raise the price on the defendants."

It is respectfully submitted that this conclusion of the learned Vice-Chancellor is logically and legally sound. It may well be, that from the standpoint of real estate market conditions then existing, there was no appreciable difference in the value of the lot, as a corner lot or as an inside lot, but the defendants were not concerned with its market value. They did not buy this property as a speculation. They bought it to establish a home for themselves. The defendants may have had many reasons for desiring a corner lot. One stated reason is that they wanted to build a garage on the Tremont avenue side of the house. Then, again, they, undoubtedly, considered the greater amount of light and air they would receive by living on a corner lot; the fact that they would have an eastern and southern exposure; the privacy which comes from not being immediately exposed to their next-door neighbor, as well as a possibility of increase in values. It will be recalled that Mr. Goldfarb testified that the lot, as a corner lot, with the assessments paid, would be worth $1,000 more than the next-door lot; and Mr. Taylor, in his affidavit admits that during the past few years, corner lots were selling 25% and upwards above an inside lot, according to location. The defendants paid $1,000 more for this lot for practical and æsthetic considerations. It may be that from a purely cold, commercial point of view, these considerations, or fancies or whims, if you desire to so call them, may have no actual monetary value; but that does not change the essential nature of their right to an abatement in this case. Let us assume that because of some irrational notion, a purchaser desired to own a house on the edge of a ravine; that because the builder assured the purchaser that the house would be on the edge of a ravine, the latter paid $7,000; and

then let us assume that no ravine was built. It may well be that from a real estate market standpoint, the house would not be worth $2,000, because it was built on the ravine, but can it be doubted that in such a situation the owners would be entitled to an abatement in the purchase price? The uniqueness of land, by reason of its location is a matter of such common knowledge, and is so well recognized in the law, that the matter need not be discussed at greater length. The fact that Herman and Goldfarb advised the defendant to purchase the lot in question because it might be a corner lot (if this testimony is to be believed) indicates that Herman and Goldfarb recognized the potential value (*intrinsic* or *intangible*), of a corner lot above an inside lot; and common sense tells us that real estate operators do not give away corner lots, without charging for them.

It is, therefore, respectfully submitted that the decree appealed from should be affirmed with costs.

ISRAEL B. GREENE,
Solicitor for and of Counsel with
Defendants-Respondents.