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New Jersey Court of Errors and Appeals

PHILIP MAX, *Complainant-Respondent,* *vs.* WILLIAM M. BECKELMAN and LEO STEINER, *Defendants-Appellants,* JOHN DUGHI, *Defendant-Respondent.*	On appeal from the Court of Chancery.

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

The petition of William M. Beckelman and Leo Steiner, the appellants in the above entitled cause, respectfully shows that:

Petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor LUTHER A. CAMPBELL, Chancellor of the State of New Jersey, bearing date April 11th, 1933, in a certain cause in said Court of Chancery wherein Philip Max was complainant and William M. Beckelman, Leo Steiner and John Dughi were defendants, in this respect to wit: that the said decree adjudges that the counterclaims of the defendants William M. Beckelman and Leo Steiner be dismissed; and that the said decree adjudges that the deed made by the complainant Philip Max to the defendants William M. Beckelman and Leo Steiner, was not drawn according to the true and actual intention and agreement of the parties

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thereto, in that through their mutual mistake there was omitted from said deed after the sentence reading, "Conveyance is subject to existing first mortgage in the sum of $6,000.00 held by Ada F. Love, and second mortgage in the sum of $4,000.00 held by John Dughi," the further clause reading, or which should have read, "the payment of which mortgages, according to the terms thereof, is hereby assumed by the parties of the second part;" and that said decree adjudges that the said deed be reformed and corrected by adding to the sentence now appearing therein and reading, "Conveyance is subject to existing first mortgage in the sum of $6,000.00 held by Ada F. Love, and second mortgage in the sum of $4,000.00 held by John Dugi," an additional clause reading as follows, "the payment of which mortgages, according to the terms thereof, is hereby assumed by the parties of the second part;" and that the said decree adjudges further that the defendants William M. Beckelman and Leo Steiner pay to the defendant John Dughi the sum of $4,480.00, the amount due on said bond and mortgage; and that said decree further adjudges that the defendants William M. Beckelman and Leo Steiner shall at all times exonerate and save harmless the said Philip Max from the payment of the sums due or to grow due on the mortgage and the bond which it was given to secure, made by Philip Max to John Dughi.

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

1. The said decree is contrary to the greater weight of the evidence adduced at the hearing and is contrary to law.

2. Complainant did not sustain the burden of proving beyond a reasonable doubt that a mutual mistake existed in the wording of the deed, so as to warrant the decree for reformation thereof.

3. The greater weight of the evidence established that no mutual mistake was made in the wording of the deed, but that it conformed to the true intention of the parties. 10

4. The greater weight of the evidence established that a mutual mistake existed in the drawing of the contract of the sale, which should have been corrected by a reformation of said contract of sale.

5. The evidence established that it was the intention of the parties as expressed by their words and conduct and by the original memorandum made by the complainant, to convey the premises subject to the existing mortgages, and that it was their intention that both the contract of sale and the deed should be drawn accordingly and should not contain any words of assumption of said mortgages. 20

6. The court erred in holding "That where a purchaser of land encumbered by a mortgage agrees to pay a particular sum as purchase money, and on the execution of the contract of purchase, the amount of the mortgage is deducted from the consideration, and the land conveyed subject to the mortgage, the purchaser is bound to pay the mortgage debt whether he agreed to do so by express words or not." 30

7. The Court erred in holding "That where the purchaser deducted or retained out of the purchase price as fixed or agreed upon, the amount 40

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

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

SAMUEL I. KESSLER,
HARRY STEINER,
Solicitors for and of Counsel with Appellants.

Notice of Appeal.

[Filed April 21, 1933.]

IN CHANCERY OF NEW JERSEY.

BETWEEN PHILIP MAX, *Complainant,* *and* WILLIAM M. BECKELMAN, *et als.,* *Defendants.*	On Bill, etc.

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The defendants, Leo Steiner and William M. Beckelman, hereby appeal from the final decree made in the above entitled cause on April 11, 1933, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes; which decree was advised by the Honorable ALFRED A. STEIN, Vice Chancellor.

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Dated: April 18, 1933.

KESSLER & KESSLER,
HARRY STIENER,
Solicitors for and of Counsel with Defendants Leo Steiner and William M. Beckelman.

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

SAMUEL I. KESSLER,
HARRY STEINER,
Of Counsel with Defendants Leo Steiner and William M. Beckelman.

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Bill of Complaint.

[Filed May 21, 1932.]

IN CHANCERY OF NEW JERSEY.

10 BETWEEN

PHILIP MAX,
Complainant,

and

WILLIAM M. BECKELMAN, *et als.,*
Defendants.

On Bill, etc.

To the Honorable Edwin Robert Walker, Chan-
20 *cellor of the State of New Jersey.*

The complainant, Philip Max, residing in the City of Newark, County of Essex and State of New Jersey, respectfully shows and alleges that:

FIRST CAUSE OF ACTION.

1. By deed dated March 27, 1924, acknowledged March 27, 1924, and recorded on April 3, 1924, in the office of the Register of Union County, in Book 936 of Deeds for said County, at page 483, etc.,
30 John Dughi and Carrie Doughi, his wife, conveyed to the complainant the premises commonly known as #1324-1324a North Broad Street, in the Township of Hillside, County of Union and State of New Jersey, and more particularly described as follows:

BEGINNING at a point in the West side of North Broad Street sixty (60) feet north from the north side of Ridgway Avenue; thence south 88 degrees
40 23 minutes west one hundred six feet and fifty-

nine one hundredths of a foot (106.59′) thence north 13 degrees 14 minutes west twenty-five (25) feet to a point; thence north 76 degrees 46 minutes east one hundred and five (105) feet to the westerly side of North Broad Street; thence south 13 degrees 14 minutes east forty-three feet and seventy-five one hundredths of a foot (43.75′) along the west side of North Broad Street; thence south 0 degrees five minutes west two and eight tenths (2.8) feet to the place of Beginning.

2. In partial payment of the consideration for the deed referred to in paragraph 1 hereof, said complainant executed to the said John Dughi a bond in the principal sum of $4,000.00, dated March 27, 1924, conditioned for the payment of said sum of $4,000.00, on March 27, 1929, together with interest thereon at the rate of six per cent. (6%) per annum, payable semi-annually.

3. To secure that payment of the bond mentioned in paragraph 2 hereof, said complainant also executed to the said John Dughi a purchase money mortgage (embracing the premises described in paragraph 1 hereof), which mortgage was dated March 27, 1924, acknowledged April 1, 1924, and recorded on April 3, 1924, in the office of the Register of Union County in Book 643 of Mortgages for said County at page 510.

4. At the time of the conveyance set forth in paragraph 1 hereof, the aforesaid premises were subject to a mortgage in the principal sum of $6,000.00 dated September 7, 1921, payable September 7, 1926, with interest thereon at six per cent. (6%) per annum payable semi-annually, which mortgage has been recorded on September 9, 1921, in Book 531 of Mortgages for Union

County, at page 235, etc., made by John Dughi, to Ada F. Love.

5. On or about May , 1925, complainant entered into a contract with the defendants, William M. Beckelman and Leo Steiner, a true copy of which marked Exhibit A is hereunto annexed and expressly made a part hereof. The counterpart of said contract, bearing the signature of Philip Max, was delivered to said William M. Beckelman and Leo Steiner, and is now in their possession; the other counterpart thereof, bearing the signatures of William M. Beckelman and Leo Steiner, was delivered to the complainant and is now in his possession, ready to be produced.

6. In performance of the obligations of said contract on his part to be performed, said complainant executed and delivered to the defendants, William M. Beckelman and Leo Steiner, a deed for the said premises which deed was dated July 8, 1925, acknowledged July 8, 1925 and recorded on July 10, 1925, in the office of the Register of Union County in Book 999 of Deeds for said County, at page 430, etc. Said deed is now in the possession of the aforesaid William M. Beckelman and Leo Steiner.

7. The complainant did not, in connection with the execution of said contract, and the aforesaid deed, employ any independent counsel, but engaged the same counsel who was the attorney and counsel of said William M. Beckelman and Leo Steiner.

8. Notwithstanding that the contract between the complainant and the aforesaid William M. Beckelman and Leo Steiner expressly provided

that they, the said William M. Beckelman and Leo Steiner, were to assume the mortgages then a lien upon the premises, and to pay the same according to the terms thereof, the deed executed and delivered by the complainant did not contain any covenant of assumption, upon the part of the grantees in said deed; such failure to include a covenant of assumption was the result of mutual mistake on the part of both the complainant and said William M. Beckelman and Leo Steiner, occasioned by the fact that both the complainant, as grantor, and the said grantees, were then and there represented by the same attorney and counsel.

9. As a result of the facts hereinabove set forth, the aforesaid deed does not contain the covenant of assumption of the payment of mortgages, properly required to be included in said deed to carry out the true intent, meaning and purpose of the aforesaid contract.

COMPLAINANT IS WITHOUT ADEQUATE REMEDY IN THE COURTS OF LAW AND THEREFORE PRAYS:

A. That William M. Beckelman and Leo Steiner, who are the defendants in this first cause of action of this bill of complaint, may answer this first cause of action, and each statement therein made, and that a writ of subpoena may issue commanding said William M. Beckelman and Leo Steiner the defendants in this action, to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

B. That said William M. Beckelman and Leo Steiner be directed to surrender the deed referred to in paragraph 6 hereof, to the end that same

may be reformed by the insertion therein of an express covenant of assumption, on the part of the grantees therein, requiring them to pay the mortgages set forth in paragraphs 3 and 4 hereof; or, in the alternative, that they be compelled to accept from the complainant a new deed with such covenant of assumption; and that they be compelled to re-record the reformed deed or the new deed whichever course may be directed by this Court.

C. That the complainant may have such further and other relief as may be just and equitable.

SECOND CAUSE OF ACTION.

1. The allegations of paragraph 1 of the first cause of action are hereby repeated.

2. The allegations of paragraph 2 of the first cause of action are hereby repeated.

3. The allegations of paragraph 3 of the first cause of action are hereby repeated.

4. The allegations of paragraph 4 of the first cause of action are hereby repeated.

5. The allegations of paragraph 5 of the first cause of action are hereby repeated.

6. The allegations of paragraph 6 of the first cause of action are hereby repeated.

7. The allegations of paragraph 7 of the first cause of action are hereby repeated.

8. The allegations of paragraph 8 of the first cause of action are hereby repeated.

9. The allegations of paragraph 9 of the first cause of action are hereby repeated.

10. On or about December 24, 1931, said Ada F. Love, as complainant, instituted an action in the Court of Chancery of New Jersey against the defendants herein, William M. Beckelman, Miriam Beckelman, Leo Steiner, Claire Steiner, John Dughi and Max Berlin (Chancery Docket 87, page 588), the purpose of which suit was to foreclose the mortgage referred to in paragraph 4 hereof, and also for the purpose of foreclosing encumbrances subsequent thereto, and particularly the mortgage referred to in paragraph 3 hereof.

11. Such proceedings were thereupon had in the suit mentioned in paragraph 10 hereof, so that on March 2, 1932, a final decree was entered therein a true copy of which, marked Exhibit B is hereunto annexed and expressly made a part hereof.

12. Such further proceedings were had therein so that on April 20, 1932, pursuant to a writ of fieri facias, issued pursuant to the aforesaid decree, the sheriff of Union County sold the aforementioned lands and premises to Ada F. Love for the sum of $100.00, with the result that nothing was realized toward the satisfaction of the second mortgage, to wit, the mortgage of John Dughi.

13. On May 2, 1932, an order was made in said cause, a true copy of which order, marked Exhibit C, is hereunto annexed and expressly made a part hereof.

14. On or about May 4, 1932, the aforesaid John Dughi, by his attorney, Mr. E. A. Merrill, demanded from the complainant that the said complainant pay to the said John Dughi the sum of $4,000.00, the principal sum of the mortgage (men-

tioned in paragraph 4 hereof), and the interest accrued thereon, and in default of such payment, informed the complainant that such would be brought to recover such deficiency. Complainant believes that it is the intention of said John Dughi to institute such suit or suits.

15. On or about May 10, 1932, complainant, by his attorney, Mr. Elias A. Kanter, called upon the said William M. Beckelman and Leo Steiner to discharge the foregoing liability; such request was made by written communication, a true copy of which, marked Exhibit D, is hereunto annexed and expressly made a part hereof. Both said William Beckelman and Leo Steiner have neglected to pay said $4,000.00, said interest or any part thereof.

16. In consequence of the facts herein alleged, complainant, notwithstanding the equitable duty of William M. Beckelman and Leo Steiner to pay the sums due on the mortgage of John Dughi, may be subjected to suit for, and payment of, such sums.

COMPLAINANT IS WITHOUT ADEQUATE REMEDY IN THE COURTS OF LAW AND THEREFORE PRAYS:

A. That William M. Beckelman, Leo Steiner and John Dughi, who are the defendants in this second cause of action of this bill of complaint, may answer this second cause of action, and each statement therein made, and that a writ of subpoena may issue commanding said William M. Beckelman, Leo Steiner and John Dughi, the defendants in this action, to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

B. That said John Dughi may be enjoined and restrained from bringing any suit against the complainant the object or purpose of which may be to enforce payment of any deficiency arising after foreclosure of the mortgage referred to in paragraph 3 hereof. 10

C. That an account may be taken of the amount due to said John Dughi on the mortgage mentioned in paragraph 3 hereof, and that the defendants, William M. Beckelman and Leo Steiner, be directed and ordered to pay said amount to the said John Dughi.

D. That the complainant may have such further and other relief as may be just and equitable. 20

THIRD CAUSE OF ACTION.

1. The allegations of paragraph 1 of the first cause of action are hereby repeated.

2. The allegations of paragraph 2 of the first cause of action are hereby repeated.

3. The allegations of paragraph 3 of the first cause of action are hereby repeated.

4. The allegations of paragraph 4 of the first cause of action are hereby repeated. 30

5. The allegations of paragraph 5 of the first cause of action are hereby repeated.

6. The allegations of paragraph 6 of the first cause of action are hereby repeated.

7. At the time of the delivery of the deed, referred to in paragraph 6 hereof, the amount due for principal and accrued interest on the mortgage mentioned in paragraph 4 hereof was the 40

sum of $6,113.00. At the time of the delivery of the deed, referred to in paragraph 6 hereof, the amount due for principal and accrued interest on the mortgage mentioned in paragraph 3 hereof, was the sum of $,060.00. As against the sum due to the complainant for the consideration for said deed, complainant, at the time of closing, allowed to the defendants, William H. Beckelman and Leo Steiner, a credit for each of the aforesaid amounts, then due on each of the respective mortgages aforesaid, and permitted the said defendants to retain such sums from the purchase price of the lands.

8. Notwithstanding the facts hereinabove set forth, and the equitable duty of the defendants, William M. Beckelman and Leo Steiner, to pay the mortgage debts for which credit was allowed to them and for the payment of which they were permitted to retain the aforesaid sums, for which they are liable as trustees, the aforesaid defendants failed and neglected to pay any or either of the aforesaid mortgage debts, and particularly the amount due to the defendant, John Dughi, more particularly referred to in paragraphs 10 to 14, both inclusive hereof.

9. Notwithstanding the facts hereinabove set forth, and the equitable duty of the defendants, William M. Beckelman and Leo Steiner, to pay the mortgage debts for which credit was allowed to them and for the payment of which they were permitted to retain the aforesaid sums, the aforesaid defendants failed and neglected to indemnify and save harmless the complainant from the payment of the aforesaid mortgage debts, and particularly from the payment of the sum due to the

defendant, John Dughi, more particularly referred to in paragraphs 10 to 14, both inclusive hereof.

10. The allegations of paragraph 10 of the second cause of action are hereby repeated. 10

11. The allegations of paragraph 11 of the second cause of action are hereby repeated.

12. The allegations of paragraph 12 of the second cause of action are hereby repeated.

13. The allegations of paragraph 13 of the second cause of action are hereby repeated.

14. The allegations of paragraph 14 of the second cause of action are hereby repeated. 20

15. The allegations of paragraph 15 of the second cause of action are hereby repeated.

16. In consequence of the facts herein alleged, complainant, notwithstanding the equitable duties of William M. Beckelman and Leo Steiner to apply the moneys received by them in satisfaction of the sums due to John Dughi, and to indemnify the complainant from the payment of such sums, may be subjected to suit for, and payment of, such sums. 30

COMPLAINANT IS WITHOUT ADEQUATE REMEDY IN THE COURTS OF LAW AND THEREFORE PRAYS:

A. That William M. Beckelman, Leo Steiner and John Dughi, who are the defendants in this third cause of action of this bill of complaint, may answer this third cause of action, and each statement therein made, and that a writ of subpoena may issue commanding said William M. Beckelman, Leo Steiner and John Dughi, the defendants 40

in this action, to answer this bill of complaint and to abide by such decree as this court may make in the premises.

B. That said John Dughi may be enjoined and restrained from bringing any suit against the complainant the object or purpose of which may be to enforce payment of any deficiency arising after foreclosure of the mortgage referred to in paragraph 3 hereof.

C. That an account may be taken of the amount due to said John Dughi on the mortgage mentioned in paragraph 3 hereof, and that the defendants, William M. Beckelman and Leo Steiner, be directed and ordered to pay said amount to the said John Dughi.

D. That it be decreed that William M. Beckelman and Leo Steiner are trustees for the complainant of the sum of $4,060.00, together with interest thereon, that is, for the amount delivered to them by the complainant for the purpose of payment and satisfying the sum due John Dughi, and that the said William M. Beckelman and Leo Steiner be directed to pay such either to the complainant, or directly to the defendant, John Dughi, to the end that the mortgage indebtedness due to the latter may be satisfied.

E. That William Beckelman and Leo Steiner be directed to indemnify and save harmless the complainant from the sum due John Dughi.

F. That the complainant may have such further and other relief as may be just and equitable.

KANTER & KANTER,
Solicitors for, and of Counsel with, Complainant.

EXHIBIT B.

IN CHANCERY OF NEW JERSEY.

BETWEEN ADA F. LOVE, *Complainant,* *and* WILLIAM BECKELMAN, *et als.,* *Defendants.*	On Bill to Foreclose, etc.

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This cause coming on to be heard in the presence of E. A. Merrill, Solicitor and of counsel with the complainant and it appearing that the complainants bill having been heretofore taken as confessed against William Beckelman and Miriam Beckelman, his wife, Leo Steiner and Claire Steiner, his wife, John Dughi and Max Berlin, the defendants, whereupon, and upon reading a report on file, made by Robert S. Snevily, Esquire, one of the Masters of this Court bearing date, on the 29th day of February, in the year of Our Lord One Thousand Nine Hundred Thirty Two, by which it appears that there was due to the complainant on the day of making of the said report, for principal and interest on her mortgage, the sum of Six thousand Three hundred Thirty ($6,-330) Dollars, that the same premises are comprised in the mortgage of the complainant and that it is necessary and advisable that the whole of the mortgaged premises should be sold to raise and pay the money so due as aforesaid; and no cause being shown or appearing to the contrary,

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It is thereupon, on this 2nd day of March, in the year of Our Lord One Thousand Nine Hundred and Thirty-two by Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chancellor doth, by virtue of the power and authority of this Court, hereby order, adjudge and decree that the said report, and all the matters and things therein contained, do stand ratified, and confirmed, and that the said mortgaged premises be sold to raise and satisfy the several sums of money due to the said complainant, that is to say, to the said complainant the aforesaid sum of Six Thousand Three hundred Thirty ($6,330.00) Dollars, and interest thereon, to be computed from the 29th day of February, in the year of Our Lord One Thousand Nine Hundred Thirty-two, being the date of the Master's Report, with the costs in this cause to be taxed; and to the complainant a counsel fee of $113.00 Dollars, and that a writ of fieri facias do issue for that purpose out of this Court, directed to the Sheriff of the County of Union, commanding him to make sale, according to law, of the said mortgaged premises, and that out of the money arising from such sale, he pay, to the complainant or to her solicitor, said debt, interest and costs; and in case more money should be raised by the said sale than be sufficient to answer such several payments, that such surplus be brought into this Court, to abide the further order of the Court, unless otherwise previously disposed of by the order of this Court; and that the said Sheriff make return without delay of his proceedings by virtue of the said writ.

And it is further ordered, adjudged and decreed that the defendants stand absolutely de-

barred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises when sold as aforesaid by virtue of this decree.

E. R. WALKER,
C. 10

EXHIBIT C.

IN CHANCERY OF NEW JERSEY.

BETWEEN ADA F. LOVE, *Complainant,* *and* WILLIAM BECKELMAN, *et als.,* *Defendants.*	Order Confirming Sale of Mortgaged Premises, etc.

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Upon reading and filing a report made by C. Wesley Collins, Under Sheriff of the County of Union, bearing date the 20th day of April, nineteen hundred and thirty-two, and the affidavit thereto attached, whereby it appears that on the 20th day of April, nineteen hundred and thirty-two, he sold at public Vendue, at the District Court Room, Court House, Elizabeth, N. J. (having first duly advertised the same), the lands and premises described in the writ of Execution issued to him in the above stated cause, to Ada F. Love, of No. 1260 Orchard Street, of the Town of Westfield, County of Union and the State of New Jersey, for the sum of One Hundred ($100.00)

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Dollars; being the highest bidder therefor, and that the said lands and premises were sold at the highest and best price the sale would bring in cash, and no cause being shown or appearing to the contrary;

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It is, on this 2nd day of May, nineteen hundred and thirty-two, ordered that the said sale be, and the same is hereby confirmed as valid and effectual in law. And it is further ordered that the said sheriff do execute a good and sufficient conveyance in the law to the said purchaser or her assigns for the said mortgaged premises so sold.

E. R. Walker,
C.

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EXHIBIT D.

May 9, 1932.

Leo Steiner, Esq.,
694 Haxton Avenue,
Orange, N. J.

and

30 William M. Beckelman, Esq.,
1172 Raymond Boulevard,
Newark, N. J.

Gentlemen:

Mr. E. A. Merrill, representing Mr. John Dughi, has recently called upon our client, Mr. Philip Max, to pay the sum of $4,000.00, representing the second mortgage on the property at 1324 North Broad Street, Hillside, N. J.

40 In behalf of Mr. Philip Max, we now respectfully call upon you to discharge the foregoing liability, for two reasons:

1. The contract expressly provided for your assumption of all mortgages.
2. You were, in fact, allowed, as against the purchase price, credit for the mortgages existing at the time of conveyance to you.

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I would appreciate your taking this up with your counsel at once, and letting me know of the result either directly or through him. In view also of the urgency of this matter, I would like to have such response with the greatest possible expedition.

Yours very truly,

ELIAS A. KANTER.

EAK:JAG.

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Amended Answer and Counterclaim.

[Filed September 19, 1932.]

IN CHANCERY OF NEW JERSEY.

BETWEEN PHILIP MAX, *Complainant,* *and* WILLIAM M. BECKELMAN and LEO STEINER, *et al.*, *Defendants.*	On Bill, etc.

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Defendant William M. Beckelman by way of amended answer to the bill of complaint filed herein, says that:

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FIRST CAUSE OF ACTION.

1. He has no knowledge sufficient to form a belief as to the allegations contained in Paragraph 1 and leaves the complainant to his proof thereof.

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2. He has no knowledge sufficient to form a belief as to the allegations contained in Paragraph 2 and leaves the complainant to his proof thereof.

3. He has no knowledge sufficient to form a belief as to the allegations contained in Paragraph 3 and leaves the complainant to his proof thereof.

4. He has no knowledge sufficient to form a belief as to the allegations contained in Paragraph 4 and leaves the complainant to his proof thereof.

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5. He admits Paragraph 5.

6. He admits Paragraph 6.

7. He denies the allegations contained in Paragraph 7.

8. He denies the allegations contained in Paragraph 8.

9. He denies the allegations contained in Paragraph 9.

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SECOND CAUSE OF ACTION.

1. The answer to allegations of Paragraph 1 of the first cause of action is hereby repeated.

2. The answer to allegations of Paragraph 2 of the first cause of action is hereby repeated.

3. The answer to allegations of Paragraph 3 of the first cause of action is hereby repeated.

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4. The answer to allegations of Paragraph 4 of the first cause of action is hereby repeated.

5. The answer to allegations of Paragraph 5 of the first cause of action is hereby repeated.

6. The answer to allegations of Paragraph 6 of the first cause of action is hereby repeated. 10

7. The answer to allegations of Paragraph 7 of the first cause of action is hereby repeated.

8. The answer to allegations of Paragraph 8 of the first cause of action is hereby repeated.

9. The answer to allegations of Paragraph 9 of the first cause of action is hereby repeated.

10. He has no knowledge sufficient to form a belief as to the allegations contained in Paragraph 10 and leaves the complainant to his proof thereof. 20

11. He has no knowledge sufficient to form a belief as to the allegations contained in Paragraph 11 and leaves the complainant to his proof thereof.

12. He has no knowledge sufficient to form a belief as to the allegations contained in Paragraph 12 and leaves the complainant to his proof thereof.

13. He has no knowledge sufficient to form a belief as to the allegations contained in Paragraph 13 and leaves the complainant to his proof thereof. 30

14. He has no knowledge sufficient to form a belief as to the allegations contained in Paragraph 14 and leaves the complainant to his proof thereof.

15. He admits Paragraph 15.

16. He denies the allegations of Paragraph 16 with reference to any equitable duty imposed 40

upon him, and as to the balance of said paragraph, he has no knowledge sufficient to form a belief.

THIRD CAUSE OF ACTION.

10 1. The answer to allegations of Paragraph 1 of the first cause of action is hereby repeated.

2. The answer to allegations of Paragraph 2 of the first cause of action is hereby repeated.

3. The answer to allegations of Paragraph 3 of the first cause of action is hereby repeated.

4. The answer to allegations of Paragraph 4 of the first cause of action is hereby repeated.

20 5. The answer to allegations of Paragraph 5 of the first cause of action is hereby repeated.

6. The answer to allegations of Paragraph 6 of the first cause of action is hereby repeated.

7. He denies the allegations contained in Paragraph 7.

8. He denies the allegations contained in Paragraph 8 excepting that he admits that he had failed and neglected to pay any or either of the 30 mortgage debts mentioned therein.

9. He denies the allegations contained in Paragraph 9 excepting that he has failed and neglected to indemnify and save harmless the complainant from the payment of said mortgage debts.

10. He repeats the answer contained in Paragraph 10 of the second cause of action.

11. He repeats the answer contained in Paragraph 11 of the second cause of action.

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12. He repeats the answer contained in Paragraph 12 of the second cause of action.

13. He repeats the answer contained in Paragraph 13 of the second cause of action.

14. He repeats the answer contained in Paragraph 14 of the second cause of action. 10

15. He repeats the answer contained in Paragraph 15 of the second cause of action.

16. He denies the allegations contained in Paragraph 16 and leaves complainant to his proof thereof.

First Separate Defense to First and Second Causes of Action. 20

By way of separate defense defendant says:

1. In and during the year 1925, the defendants Leo Steiner and William M. Beckelman became interested in the purchase of certain property owned by complainant and located at 1324-1324A North Broad Street, Hillside, New Jersey.

2. As a result of negotiations conducted by said defendants with complainant, a written memorandum was submitted to defendants by the complainant, setting forth the terms of purchase. It was therein provided that the premises were to be taken subject to certain mortgages which were then a lien on the premises in question. Said memorandum was written and signed by complainant, and a copy thereof is hereto attached and made a part hereof. 30

3. Thereafter it was agreed by and between the parties that a written contract of sale should 40

be drawn and executed embodying the terms contained in said memorandum.

4. In preparing said contract, the scrivener employed to do so used and filled in a printed form of contract which contained a printed clause that such mortgages were to be assumed by the purchasers. Though inadvertence and because of a mutual mistake of fact, this printed assumption clause was permitted to remain in the contract of sale when executed, contrary to the terms agreed upon in the memorandum above referred to.

5. Said contract was never intended to include a clause obligating the purchasers to assume such mortgages, but it was intended that such contract be drawn in accordance with the terms contained in the memorandum and it was at all times the intention of the parties that the premises were to be conveyed subject to such mortgages only.

6. At the time set for the closing of title, the attention of the parties was directed to said error and it was agreed upon by the complainant and defendants that such assumption clause which was mistakenly included in the contract, should be omitted entirely from the deed, but that the deed should be drawn according to the original intention of the parties as set forth in said memorandum.

7. Accordingly a deed was executed which contained the clause that the premises were to be taken subject to said mortgages, and the assumption clause above referred to was thereupon omitted from the deed by agreement of all of the parties.

8. Defendant states that the deed so drawn represented the final agreement of the parties hereto and was in accordance with the true agreement and intention of the parties.

FIRST SEPARATE DEFENSE TO THIRD CAUSE OF ACTION. 10

Defendant denies that there is any equitable duty imposed upon him to indemnify and save harmless the complainant herein from the payment of the mortgage debts mentioned herein, or that there is any equitable duty upon him to pay any or either of said mortgage debts.

SECOND SEPARATE DEFENSE. 20

Defendant hereby reserves the right to move at the hearing of the above entitled cause to strike out the three causes of action of said complainant, on the ground that they do not sufficiently state a legal or equitable cause of action.

By way of counterclaim exhibited against the complainant, defendant says:

1. In and during the year 1925, the defendant Leo Steiner and William M. Beckelman became interested in the purchase of certain property owned by complainant and located at 1324-1324A North Broad Street, Hillside, New Jersey. 30

2. As a result of negotiations conducted by said defendants with complainant, a written memorandum was submitted to defendants by the complainant, setting forth the terms of purchase. It was therein provided that the premises were to be taken subject to certain mortgages which were then a lien on the premises in question. Said 40

memorandum was written and signed by complainant, and a copy thereof is hereto attached and made a part hereof.

3. Thereafter it was agreed by and between the parties that a written contract of sale should be drawn and executed embodying the terms contained in said memorandum.

4. In preparing said contract, the scrivener employed to do so used and filled in a printed form of contract which contained a printed clause that such mortgages were to be assumed by the purchasers. Through inadvertence and because of a mutual mistake of fact, this printed assumption clause was permitted to remain in the contract of sale when executed, contrary to the terms agreed upon in the memorandum above referred to.

5. Said contract was never intended to include a clause obligating the purchasers to assume such mortgages, but it was intended that such contract be drawn in accordance with the terms contained in the memorandum and it was at all times the intention of the parties that the premises were to be conveyed subject to such mortgages only.

6. At the time set for the closing of title, the attention of the parties was directed to said error and it was agreed upon by the complainant and defendants that such assumption clause which was mistakenly included in the contract, should be omitted entirely from the deed, but that the deed should be drawn according to the original intention of the parties as set forth in said memorandum.

7. Accordingly a deed was executed which contained the clause that the premises were to be taken subject to said mortgages, and the assumption clause above referred to was thereupon omitted from the deed by agreement of all of the parties. 10

8. Defendant alleges that the deed so drawn between the parties represents the final agreement of the parties, and that the contract of sale previously entered into has merged in the provisions of the deed.

9. Defendant further states that the said deed was not drawn as a result of any mistake on the part of the defendants or complainant, and defendant further states that the assumption clause 20 included in the contract of sale did not represent the true intention of the parties and was inserted in said contract as a result of a mutual mistake of fact, which mistake was remedied by leaving any reference to such clause out of the deed.

Defendant is without adequate remedy in the courts of law and states that if it shall be found in the present cause of action that the deed should be re-formed in accordance with the terms contained in the contract of sale, and if relief shall 30 be granted to complainant on the first cause of action herein, then and in that event defendant prays:

1. That the contract of sale entered into between the parties hereto and more particularly described in the complaint herein, may be reformed by eliminating from its provisions the covenant of assumption of the mortgages, and that there may be substituted for such covenant a pro- 40

vision that the premises are to be taken subject to the existing mortgages on the premises, or, in the alternative, defendant prays that it may be decreed that the deed was drawn in accordance with the intention of the parties and was not the result of any mistake on their part, but represented the true agreement existing between the parties, and that all previous contracts and agreements merged in its terms.

2. That your defendant may have such other and further relief as may be equitable and just in the premises.

KESSLER & KESSLER,
Solicitors for Defendant,
William M. Beckelman.

Amended Answer and Counterclaim.

[Filed September 19, 1932.]

IN CHANCERY OF NEW JERSEY.

BETWEEN PHILIP MAX, *Complainant,* *and* WILLIAM M. BECKELMAN and LEO STEINER, *et als.,* *Defendants.*	On Bill, etc.

The defendant, Leo Steiner, by way of amended answer to the bill of complaint filed herein, says that:

Amended Answer and Counterclaim

FIRST CAUSE OF ACTION.

1. Defendant admits the allegations contained in paragraph 1, but prays leave to refer for certainty to the original deed.

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2. Defendant admits the allegations contained in paragraph 2, but prays leave to refer for certainty to the original bond.

3. Defendant admits the allegations contained in paragraph 3, but prays leave to refer for certainty to the original mortgage.

4. Defendant admits the allegations contained in paragraph 4, but prays leave to refer for certainty to the original mortgage.

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5. Defendant admits paragraph 5.

6. Defendant admits paragraph 6.

7. Defendant denies the allegations contained in paragraph 7.

8. Defendant denies the allegations contained in paragraph 8.

9. Defendant denies the allegations contained in paragraph 9.

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SECOND CAUSE OF ACTION.

1. Defendant admits the allegations contained in paragraph 1, but prays leave to refer for certainty to the original deed.

2. Defendant admits the allegations contained in paragraph 2, but prays leave to refer for certainty to the original bond.

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3. Defendant admits the allegations contained in paragraph 3, but prays leave to refer for certainty to the original mortgage.

4. Defendant admits the allegations contained in paragraph 4, but prays leave to refer for certainty to the original mortgage.

5. Defendant admits paragraph 5.

6. Defendant admits paragraph 6.

7. Defendant denies the allegations contained in paragraph 7.

8. Defendant denies the allegations contained in paragraph 8.

9. Defendant denies the allegations contained in paragraph 9.

10. Defendant admits the allegations contained in paragraph 10.

11. Defendant admits the allegations contained in paragraph 11.

12. Defendant admits the allegations contained in paragraph 12.

13. Defendant admits the allegations contained in paragraph 13.

14. Defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 14 and leaves complainant to his proof.

15. Defendant admits paragraph 15.

16. Defendant denies the allegation contained in paragraph 16 with reference to any equitable duty imposed upon him, and as to the balance of

said allegations, he has no knowledge or information sufficient to form a belief.

THIRD CAUSE OF ACTION.

1. Defendant admits the allegations contained in paragraph 1, but prays leave to refer for certainty to the original deed. 10

2. Defendant admits the allegations contained in paragraph 2, but prays leave to refer for certainty to the original bond.

3. Defendant admits the allegations contained in paragraph 3, but prays leave to refer for certainty to the original mortgage.

4. Defendant admits the allegations contained in paragraph 4, but prays leave to refer for certainty to the original mortgage. 20

5. Defendant admits the allegations contained in paragraph 5.

6. Defendant admits the allegations contained in paragraph 6.

7. Defendant denies the allegations contained in paragraph 7.

8. Defendant denies the allegations contained in paragraph 8, excepting that he admits that he has failed and neglected to pay any or either of the mortgage debts mentioned therein. 30

9. Defendant denies the allegations contained in paragraph 9, excepting that he admits that he has failed and neglected to indemnify and save harmless the complainant from the payment of said mortgage debts.

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10. Defendant admits the allegations contained in paragraph 10.

11. Defendant admits the allegations contained in paragraph 11.

10 12. Defendant admits the allegations contained in paragraph 12.

13. Defendant admits the allegations contained in paragraph 13.

14. Defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 14 and leaves complainant to his proof.

20 15. Defendant admits the allegations contained in paragraph 15.

16. Defendant denies the allegations contained in paragraph 16 and leaves complainant to his proof.

First Separate Defense to First and Second Causes of Action.

By way of separate defense defendant says:

30 1. In and during the year 1925, the defendants, Leo Steiner and William M. Beckelman became interested in the purchase of certain property owned by the complainant and located at 1324-1324A North Broad Street, Hillside, New Jersey.

2. As a result of negotiations conducted by said defendants with complainant, a written memorandum was submitted to defendants by the complainant, setting forth the terms of purchase. It was therein provided that the premises were to
40 be taken subject to certain mortgages which were

then a lien on the premises in question. Said memorandum was written and signed by complainant, and a copy thereof is hereto attached and made a part hereof.

3. Thereafter it was agreed by and between the parties that a written contract of sale should be drawn and executed embodying the terms contained in said memorandum. 10

4. In preparing said contract, the scrivener employed to do so used and filled in a printed form of contract which contained a printed clause that such mortgages were to be assumed by the purchasers. Through inadvertence and because of a mutual mistake of fact, this printed assumption clause was permitted to remain in the contract of sale when executed, contrary to the terms agreed upon in the memorandum above referred to. 20

5. Said contract was never intended to include a clause obligating the purchasers to assume such mortgages, but it was intended that such contract be drawn in accordance with the terms contained in the memorandum and it was at all times the intention of the parties that the premises were to be conveyed subject to such mortgages only. 30

6. At the time set for the closing of title, the attention of the complainant was directed to said error in the contract and to the fact that the deed provided that the property was taken subject to the mortgages, and the complainant consented to accept the deed as delivered.

7. Defendant states that the deed so drawn represented the final agreement of the parties 40

hereto and was in accordance with the true agreement and intention of the parties.

First Separate Defense to Third Cause of Action.

10 Defendant denies that there is any equitable duty imposed upon him to indemnify and save harmless the complainant herein from the payment of the mortgage debts mentioned herein, or that there is any equitable duty upon him to pay any or either of said mortgage debts.

Reservation of Right of Motion.

Defendant hereby reserves the right to move 20 at the hearing of the above entitled cause to strike out the three causes of action of said complaint, on the ground that they do not sufficiently state a legal or equitable cause of action.

By way of counterclaim exhibited against the complainant, defendant says:

1. In and during the year 1925, the defendants, Leo Steiner and William M. Beckelman became interested in the purchase of certain property owned by the complainant and located at 1324- 30 1324A North Broad Street, Hillside, New Jersey.

2. As a result of negotiations conducted by said defendants with complainant, a written memorandum was submitted to defendants by complainant, setting forth the terms of purchase. It was therein provided that the premises were to be taken subject to certain mortgages which were then a lien on the premises in question. Said memorandum was written and signed by com- 40 plainant and a copy thereof is hereto attached and made a part hereof.

3. Thereafter it was agreed by and between the parties that a written contract of sale should be drawn and executed embodying the terms contained in said memorandum.

4. In preparing said contract, the scrivener employed to do so used and filled in a printed form of contract which contained a printed clause that such mortgages were to be assumed by the purchasers. Through inadvertence and because of a mutual mistake of fact, this printed assumption clause was permitted to remain in the contract of sale when executed, contrary to the terms agreed upon in the memorandum above referred to.

5. Said contract was never intended to include a clause obligating the purchasers to assume such mortgages, but it was intended that such contract be drawn in accordance with the terms contained in the memorandum, and it was at all times the intention of the parties that the premises were to be conveyed subject to such mortgages only.

6. At the time set for the closing of title, the attention of the complainant was directed to said error in the contract and to the fact that the deed provided that the property was taken subject to the mortgages, and the complainant consented to accept the deed as delivered.

7. Defendant alleges that the deed so drawn between the parties represents the final agreement of the parties, and that the contract of sale previously entered into has merged in the provisions of the deed.

8. Defendant further states that the said deed was not drawn as a result of any mistake on the

part of the defendants or complainant, and defendant further states that the assumption clause included in the contract of sale did not represent the true intention of the parties and was inserted in said contract as a result of a mutual mistake of fact, which mistake was remedied by leaving any reference to such clause out of the deed.

Defendant is without adequate remedy in the courts of law and states that if it shall be found in the present cause of action that the deed should be re-formed in accordance with the terms contained in the contract of sale, and if relief shall be granted to complainant on the first cause of action herein, then and in that event defendant prays:

1. That the contract of sale entered into between the parties hereto and more particularly described in the complaint herein, may be re-formed by eliminating from its provisions the covenant of assumption of the mortgages, and that there may be substituted for such covenant a provision that the premises are to be taken subject to the existing mortgages on the premises, or, in the alternative, defendant prays that it may be decreed that the deed was drawn in accordance with the intention of the parties and was not the result of any mistake on their part, but represented the true agreement existing between the parties, and that all previous contracts and agreements merged in its terms.

2. That your defendant may have such other and further relief as may be equitable and just in the premises.

HARRY STEINER,
Solicitor for Defendant, Leo Steiner.

MEMORANDUM.

Newark, N. J. May 13, 1925.

Received from Wm. M. Beckelman $500.00 as deposit on property located at 1324-1324A North Broad St., Hillside, N. J. 10

Price $14,500.

Terms $500. receipt of which is hereby acknowledged.

$4,000. cash to be paid on passing of title.

$10,000. subject to existing mortgages.

(Signed) PHILIP MAX. 20

Witness
J. PAUL NEUWIRTH.

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Complainant's Replication and Answer, respectively, to Amended Answer and Counterclaim of Leo Steiner.

[Filed September 26, 1932.]

IN CHANCERY OF NEW JERSEY.

90—309.

BETWEEN PHILIP MAX, *Complainant,* *and* WILLIAM M. BECKELMAN and LEO STEINER, *et als.,* *Defendants.*	On Bill, etc.

Complainant joins issue upon the denials contained in the amended answer of Leo Steiner.

In reply to the defense, captioned "first separate defense to first and second causes of action" of said answer, and not anticipated in the bill of complaint, the complainant, by leave of Court granting permission to file special replication, says that:

1. The allegations of paragraphs 1, 2 and 3 of the said defense are admitted. Complainant, however, further says that the "memorandum", a copy whereof is annexed to the ammended answer and counterclaim of Leo Steiner, was not intended as the complete and final contract between the parties thereto, and that it was, in fact, superseded by the contract, Exhibit A annexed to the bill of complaint, enlarging the obligations of the complainant, and that it was, in pursuance of the

said last mentioned contract, that the complainant conveyed the property therein referred to and, in all other respects, performed the terms thereof.

2. The allegations of the first sentence of paragraph 4 of said defense are admitted. The allegations of the second sentence of said paragraph 4 are denied. In amplification of said denial, complainant repeats the allegations made in paragraph 1 above. 10

3. The allegations of paragraphs 5, 6 and 7 of said defense are denied. In amplification of said denial, complainant repeats the allegations made in paragraph 1 above.

In reply to the defense, captioned "first separate defense to third cause of action" of said answer, and not anticipated in the bill of complaint, the complainant, by leave of court granting permission to file special replication, says that: 20

1. Complainant joins issue upon said defense.

2. Complainant will move to strike the allegations thereof, on the ground that the allegations thereof are conclusive at law only and state no facts in defense of this cause. 30

By way of Answer to the Counterclaim, Complainant says that:

1. The allegations of paragraphs 1, 2 and 3 of the counterclaim are admitted. Complainant, however, further says that the "memorandum", a copy whereof is annexed to the amended answer and counterclaim of Leo Steiner, was not intended as the complete and final contract between 40

the parties thereto, and that it was, in fact, superseded by the contract, Exhibit A annexed to the bill of complaint, enlarging the obligations of the complainant, and that it was, in pursuance of the said last mentioned contract, that the complainant conveyed the property therein referred to and, in all other respects, performed the terms thereof.

2. The allegations of the first sentence of paragraph 4 of said pleading are admitted. The allegations of the second sentence of said paragraph 4 are denied. In amplification of said denial, complainant repeats the allegations made in paragraph 1 above.

3. The allegations of paragraphs 5, 6, 7 and 8 of said counterclaim are denied. In amplification of said denial, complainant repeats the allegations made in paragraph 1 above.

First Separate Defense to Counterclaim.

1. The defendant, Leo Steiner, because of his laches and the change of circumstances by which the complainant is now affected, is not equitably entitled to the relief sought for by his counterclaim.

Second Separate Defense to Counterclaim.

1. The defendant, Leo Steiner, is equitably estopped from claiming that Exhibit A, annexed to the bill of complaint, is not the final contract between him and the complainant, because the complainant acted in reliance thereon, performed the terms thereof and cannot now, because of the change of circumstances affecting the complain-

ant, be restored to the position which he would otherwise be entitled to occupy upon the granting of the equitable relief sought by said Leo Steiner.

OBJECTION TO COUNTERCLAIM.

At or before the trial of this cause, complainant will move to strike out the counterclaim of Leo Steiner on the ground that the allegations thereof do not constitute an equitable cause of action in favor of Leo Steiner against the complainant.

KANTER & KANTER,
Solicitors for and of counsel with complainant.

Complainant's Replication and Answer, respectively, to Amended Answer and Counterclaim of William M. Beckelman.

[Filed September 26, 1932.]

IN CHANCERY OF NEW JERSEY.

90—309.

BETWEEN PHILIP MAX, *Complainant,* *and* WILLIAM M. BECKELMAN and LEO STEINER, *et als.*, *Defendants.*	On Bill, etc.

Complainant joins issue upon the denials contained in the amended answer of William M. Beckelman.

In reply to the defense, captioned "first separarate defense to first and second causes of action" of said answer, and not anticipated in the bill of complaint, the complainant, by leave of court granting permission to file special replication, says that:

1. The allegations of paragraphs 1, 2 and 3 of the said defense are admitted. Complainant, however, further says that the "memorandum", a copy whereof is annexed to the amended answer and counterclaim of William M. Beckelman, was not intended as the complete and final contract between the parties thereto, and that it was, in fact, superseded by the contract, Exhibit A annexed to the bill of complaint, enlarging the obligations of the complainant, and that it was, in pursuance of the said last mentioned contract, that the complainant conveyed the property therein referred to and, in all other respects, performed the terms thereof.

2. The allegations of the first sentence of paragraph 4 of said defense are admitted. The allegations of the second sentence of said paragraph 4 are denied. In amplification of said denial, complainant repeats the allegations made in paragraph 1 above.

3. The allegations of paragraphs 5, 6 and 7 of said defense are denied. In amplification of said denial, complainant repeats the allegations made in paragraph 1 above.

In reply to the defense, captioned "first separate defense to third cause of action" of said answer, and not anticipated in the bill of complaint,

the complainant, by leave of court granting permission to file special replication, says that:

1. Complainant joins issue upon said defense.

2. Complainant will move to strike the allegations thereof, on the ground that the allegations thereof are conclusive at law only and state no facts in defense of this cause.

By Way of Answer to the Counterclaim, Complainant says that:

1. The allegations of paragraphs 1, 2 and 3 of the counterclaim are admitted. Complainant, however, further says that the "memorandum", a copy whereof is annexed to the amended answer and counterclaim of William M. Beckelman, was not intended as the complete and final contract between the parties thereto, and that it was, in fact, superseded by the contract, Exhibit A annexed to the bill of complaint, enlarging the obligations of the complainant, and that it was, in pursuance of the said last mentioned contract, that the complainant conveyed the property therein referred to and, in all other respects, performed the terms thereof.

2. The allegations of the first sentence of paragraph 4 of said pleadings are admitted. The allegations of the second sentence of said paragraph 4 are denied. In amplification of said denial, complainant repeats the allegations made in paragraph 1 above.

3. The allegations of paragraphs 5, 6, 7 and 8 of said counterclaim are denied. In amplification of said denial, complainant repeats the allegations made in paragraph 1 above.

First Separate Defense to Counterclaim.

1. The defendant, William M. Beckelman, because of his laches and the change of circumstances by which the complainant is now affected, is not equitably entitled to the relief sought for by his counterclaim.

Second Separate Defense to Counterclaim.

1. The defendant, William M. Beckelman, is equitably estopped from claiming that Exhibit A, annexed to the bill of complaint, is not the final contract between him and the complainant, because the complainant acted in reliance thereon, performed the terms thereof and cannot now, because of the change of circumstances affecting the complainant, be restored to the position which he would otherwise be entitled to occupy upon the granting of the equitable relief sought by said William M. Beckelman.

Objection to Counterclaim.

At or before the trial of this cause, complainant will move to strike out the counterclaim of William M. Beckelman on the ground that the allegations thereof do not constitute an equitable cause of action in favor of William M. Beckelman against the complainant.

Kanter & Kanter,
Solicitor for and of Counsel
with Complainant.

Rejoinder of Defendant, William M. Beckelman.

[Filed September 28th 1932.]

IN CHANCERY OF NEW JERSEY.

10

BETWEEN PHILIP MAX, *Complainant,* *and* WILLIAM M. BECKELMAN and LEO STEINER, *et als.,* *Defendants.*	On Bill, etc.

20

Defendant William M. Beckelman by way of rejoinder to complainant's replication, says that:

1. Defendant denies the affirmative allegations of complainant's replication.

By way of reply to complainant's answer to the counterclaim herein, defendant says that:

1. Defendant denies the allegations contained in complainant's answer to the counterclaim.

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2. Defendant denies the allegations contained in the first separate defense to counterclaim.

3. Defendant denies the allegations contained in the second separate defense to counterclaim.

KESSLER & KESSLER,
Solicitors for and of Counsel
WILLIAM M. BECKELMAN.

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Replication.

[Filed September 28th, 1932.]

IN CHANCERY OF NEW JERSEY.

10 BETWEEN

PHILIP MAX,
Complainant,

and

WILLIAM BECKELMAN and LEO STEINER, *et als.,*
Defendants.

On Bill, etc.

20 Defendant, Leo Steiner, residing in the Town of Orange, in the County of Essex and State of New Jersey, says that:

1. He joins issue with the complainant in his answer to the counterclaim.

2. He denies the allegations contained in the first separate defense to the counterclaim.

3. He denies the allegations contained in the second separate defense to the counterclaim.

30 HARRY STEINER,
Solicitor of the Defendant,
Leo Steiner.

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Answer and Counterclaim of the Defendant, John Dughi.

[Filed June 1, 1932.]

IN CHANCERY OF NEW JERSEY.

90—309 10

BETWEEN

PHILIP MAX,
Complainant,

and

WILLIAM BECKELMAN, *et als.,*
Defendants.

20

ANSWER TO SECOND CAUSE OF ACTION.

1. This defendant admits the allegations in paragraphs 1 to 14 of this cause of action, both numbers inclusive.

2. This defendant leaves complainant to his proof of the allegations in paragraphs 15 and 16 of this cause of action.

30

ANSWER TO THIRD CAUSE OF ACTION.

1. This defendant admits the allegations in paragraphs 1 to 6 of this cause of action, both numbers inclusive.

2. This defendant leaves complainant to his proof of the allegations in paragraph 7 of this cause of action.

3. This defendant admits the allegation in paragraph 8 of this cause of action that the defendants 40

William M. Beckelman and Leo Steiner have not, nor has either of them, paid this defendant the amount due him on the bond and mortgage described in paragraphs 2 and 3 of the first and second causes of action, and leaves complainant to his proof of the other allegations in said paragraph.

4. This defendant leaves complainant to his proof of the allegations in paragraph 9 of this cause of action.

5. This defendant admits the allegations in paragraphs 10 to 14 of this cause of action, both numbers inclusive.

6. This defendant leaves complainant to his proof of the allegations in paragraphs 15 and 16 of this cause of action.

By Way of Counterclaim to the Second and Third Causes of Action.

This defendant, John Dughi, residing at Westfield, Union County, New Jersey, as to the complainant, Philip Max, and the defendants, William M. Beckelman and Leo Steiner, says that:

1. On March 27, 1924, this defendant, John Dughi, was the owner in fee of certain lands in the Township of Hillside, County of Union, and State of New Jersey, which said lands are fully described in paragraph 1 of the First Cause of Action of the complaint.

2. On March 27, 1924, defendant, together with Carrie Dughi, his wife, conveyed said lands to the complainant, Philip Max by warranty deed re-

corded April 3, 1924, in the Register's office of Union County, in Book 936 of Deeds for said County, at page 483. A certified copy of said deed, and the record thereof, will be produced upon the hearing of this cause if required. 10

3. On March 27, 1924, the complainant, Philip Max, executed and delivered to complainant his bond in the principal sum of $4,000, payable April 1, 1929, with interest at 6%, payable semi-annually. Said obligation was to secure the balance of $4,000 due and owing by said Philip Max to this defendant as a part of the purchase price of the lands conveyed, as set forth in paragraph (2).

4. As a further security, and on March 27, 1924, complainant executed and delivered to defendant his purchase money mortgage, covering the lands conveyed to him by defendant, which said mortgage was, on April 3, 1924, recorded in the Register's office of Union County, in Book 643 of Mortgages for said County, at page 510. 20

5. On July 8, 1925, said complainant executed and delivered to the defendants Leo Steiner and William Beckelman, a warranty deed of the same lands, which deed was recorded on July 10, 1925, in the Register's office of Union County, in Book 999 of Deeds for said County, at page 430. 30

6. Said lands were conveyed by said Philip Max to said Leo Steiner and William Beckelman subject to the aforesaid mortgage made by Philip Max to this defendant in the principal sum of $4,000, and in consideration thereof the sum of $4,000 was deducted from the purchase price of said lands and the said grantees, Leo Steiner and William 40

Beckelman, defendants herein, thereby assumed the payment of the obligation, which the said mortgage secured.

10 7. On September 7, 1921, this defendant being then the owner of said lands and indebted to one Ada F. Love, in the principal sum of $6,000, executed and delivered to said Ada F. Love his mortgage in the principal sum of $6,000, dated September 7, 1921, and recorded September 9, 1921 in the office of the Register of Union County, in Book 531 of Mortgages for said County, at page 235.

8. Said Leo Steiner and William Beckelman purchased said lands subject to the lien of said 20 mortgage above referred to.

9. On December 24, 1931, said Ada F. Love filed her bill in Chancery to foreclose the said mortgage in the principal sum of $6,000, and said Leo Steiner and William Beckelman were parties defendant in that action.

10. A final decree was filed on March 2, 1932, a Chancery execution was duly issued, and the property was sold on April 20, 1932, for the sum of 30 $100 to said Ada F. Love, which said sale was confirmed by the Chancellor on May 2, 1932.

11. The entire sum of $100 was insufficient to pay Sheriff's fees and costs, foreclosure costs, and the principal and interest due upon said bond and mortgage of said Ada F. Love.

12. There remains due and unpaid on the bond and mortgage of this defendant, on account of his said mortgage, the entire principal sum of $4,000, 40 with interest thereon from March 27, 1931.

Answer and Counterclaim of the Defendant, John Dughi

13. Prior to the commencement of this suit, this defendant demanded severally of the complainant, and of the defendants, Leo Steiner and William M. Beckelman, the said sum of $4,000 and interest, but the said Philip Max, Leo Steiner, and William M. Beckelman failed and refused to pay any part thereof, and have ever since failed and refused to pay the same to complainant.

14. This defendant demands that the complainant, Philip Max, and the defendants William M. Beckelman and Leo Steiner, or one or more of them, pay said principal sum of $4,000 with interest from March 27, 1931, and his costs and other charges.

E. A. Merrill,
Solicitor for and Counsel with
Defendant, John Dughi.

Answer to Counterclaim of Defendant, John Dughi.

[Filed June 10, 1932.]

IN CHANCERY OF NEW JERSEY.

10 90—309

BETWEEN

PHILIP MAX,
Complainant,

and

WILLIAM BECKELMAN, *et als.,*
Defendants.

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The defendant, Leo Steiner, by way of Answer to the Counterclaim of the defendant, John Dughi, says that:

1. He has no knoweldge sufficient to form a belief as to paragraph 1.

2. He has no knoweldge sufficient to form a belief as to paragraph 2.

30 3. He has no knowledge sufficient to form a belief as to paragraph 3.

4. He has no knoweldge sufficient to form a belief as to paragraph 4.

5. He admits paragraph 5.

6. He admits so much of paragraph 6 that alleges that said lands were conveyed subject to the mortgages mentioned therein and denies the rest of the allegations of said paragraph.

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Answer to Counterclaim of Defendant, John Dughi

7. He has no knoweldge sufficient to form a belief as to paragraph 7.

8. He admits paragraph 8.

9. He has no knowledge sufficient to form a belief as to paragraph 9. 10

10. He has no knowledge sufficient to form a belief as to paragraph 10.

11. He has no knowledge sufficient to form a belief as to paragraph 11.

12. He has no knowledge sufficient to form a belief as to paragraph 12.

13. He admits so much of paragraph 13 that demand was made of this defendant and that he failed and refused to pay any part thereof. He has no knowledge to form a belief as to the balance of said allegations. 20

First Separate Defense to Counterclaim.

1. There is no privity of contract between the defendant John Dughi and this defendant or any equitable obligation upon this defendant to pay any part of the mortgage made by the complainant to the defendant John Dughi. 30

2. The defendant, Leo Steiner, hereby reserves the right to move at the hearing of the above entitld case to strike out the counterclaim on the ground that it sets forth no cause of action.

Harry Steiner,
Attorney for Defendant,
Leo Steiner. 40

Answer to Counterclaim of Defendant, John Dughi.

[Filed June 11, 1932.]

IN CHANCERY OF NEW JERSEY.

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BETWEEN PHILIP MAX, *Complainant,* *and* WILLIAM BECKELMAN, *et als.,* *Defendants.*	On Bill, etc.

20

The defendant William M. Beckelman by way of answer to the counterclaim of the defendant John Dughi, says that:

1. He has no knowledge sufficient to form a belief as to Paragraph 1.

2. He has no knowledge sufficient to form a belief as to Paragraph 2.

3. He has no knowledge sufficient to form a belief as to Paragraph 3.

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4. He has no knowledge sufficient to form a belief as to Paragraph 4.

5. He admits Paragraph 5.

6. He admits so much of Paragraph 6 that alleges that said lands were conveyed subject to the mortgages mentioned therein and denies the rest of the allegations of said paragraph.

7. He has no knowledge sufficient to form a belief as to Paragraph 7.

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Answer to Counterclaim of Defendant, John Dughi

8. He admits Paragraph 8.

9. He has no knowledge sufficient to form a belief as to Paragraph 9.

10. He has no knowledge sufficient to form a belief as to Paragraph 10. 10

11. He has no knowledge sufficient to form a belief as to Paragraph 11.

12. He has no knowledge sufficient to form a belief as to Paragraph 12.

13. He admits so much of Paragraph 13 that demand was made of this defendant and that he failed and refused to pay any part thereof. He has no knowledge to form a belief as to the balance of said allegations. 20

First Separate Defense to Counterclaim.

1. There is no privity of contract between the defendant John Dughi and this defendant or any equitable obligation upon this defendant to pay any part of the mortgage made by the complainant to the defendant John Dughi.

2. The defendant William M. Beckelman hereby reserves the right to move at the hearing of the above entitled cause to strike out the counterclaim on the ground that it sets forth no cause of action. 30

Kessler & Kessler,
Solicitors for Defendant,
William M. Beckelman.

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Replication of the Defendant, John Dughi, to the Answer of the Defendant, William M. Beckelman.

[Filed June 13, 1932.]

IN CHANCERY OF NEW JERSEY.

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90—309

BETWEEN PHILIP MAX, *Complainant,* *and* WILLIAM M. BECKELMAN, *et als.,* *Defendants.*	On Bill, etc.

20

The defendant, John Dughi, by way of replication to the answer of the defendant, William M. Beckelman, to the counterclaim of the said defendant, John Dughi, says that:

(1) The defendant, John Dughi, joins issue on the answer of the defendant, William M. Beckelman, to the counterclaim of said defendant, John Dughi.

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E. A. MERRILL,
Solicitor of the defendant,
John Dughi.

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Replication of the Defendant, John Dughi, to the Answer of the Defendant, Leo Steiner.

[Filed June 13, 1932.]

IN CHANCERY OF NEW JERSEY.

90—309 10

BETWEEN PHILIP MAX, *Complainant,* *and* WILLIAM M. BECKELMAN, *et als.,* *Defendants.*	On Bill, etc.

20

The defendant, John Dughi, by way of replication to the answer of the defendant, Leo Steiner, to the counterclaim of said defendant, John Dughi, says that:

(1) The defendant, John Dughi, joins issue on the answer of the defendant, Leo Steiner, to the counterclaim of said defendant, John Dughi.

E. A. MERRILL,
Solicitor of the Defendant,
John Dughi. 30

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Opinion.

IN CHANCERY OF NEW JERSEY.

Docket 90—309

10 BETWEEN

PHILIP MAX,
Complainant,

and

WILLIAM M. BECKELMAN, *et als.,*
Defendants.

Appearances:

20 Messrs. Kanter & Kanter (Mr. Elias Kanter appearing) Solicitor for Complainant.

Messrs. Kessler & Kessler (Mr. Samuel Kessler appearing) Solicitor for Defendant William M. Beckelman.

Mr. Harry Steiner, Solicitor for Defendant Leo Steiner.

Mr. Earl A. Merrill, Solicitor for Defendant
30 John Dughi.

STEIN, *V. C.*

John Dughi and wife conveyed to complainant premises in the Township of Hillside, Union County, this State. In payment of the consideration for the deed, complainant gave his bond and mortgage in the sum of $4,000. The conveyance was subject to a mortgage in the sum of $6,000 held by Ada F. Love.

40 In May, 1925, a receipt to William M. Beckelman was signed by complainant for $500 deposit

for the premises—the purchase price mentioned being $14,500—$4,000 of which was to be paid in cash and $10,000 subject to existing mortgages. This transaction was not closed, but later in the same month and year complainant entered into a contract with William Beckelman and Leo Steiner to sell the property to them for the same consideration. The contract was the usual printed form and provided for the payment of the purchase price as follows: $500 on the signing of the agreement, $4,000 on the delivery of the deed and $10,000 "By assuming the mortgages at present a lien on the premises, and paying the same according to the terms thereof". Subsequently, a deed was executed by the complainant to Beckelman and Steiner "in consideration of One Dollar and other good and valuable consideration".

The vendor and the purchasers did not meet during any of the formal negotiations or at the closing of title. Leo Steiner is a brother of Harry Steiner, a lawyer, and the scrivener who drew the contract of purchase and the deed. He was the solicitor representing the purchasers and Max instructed him to prepare the deed. The deed does not follow the contract with respect to the assumption of the mortgages, but reads that the "Conveyance is subject to existing first mortgage in the sum of $6,000 held by Ada F. Love and second mortgage in the sum of $4,000 held by John Dughi." However, at the closing of title, a closing statement was furnished to complainant prepared by the scrivener, Harry Steiner, on which statement it appears that the sum due on account of the two mortgages, plus the accrued interest was deducted, and the purchasers, Beckelman and Steiner, given credit for the amount of the mort-

gages and accrued interest as part payment of the purchase price.

On December 24, 1931, Ada F. Love foreclosed her mortgage for $6,000, and at the sale purchased the premises for $100. Thereafter, Dughi, the holder of the second mortgage of $4,000 demanded payment of complainant and brought suit at law (now pending), and complainant in turn made a like demand upon Beckelman and Steiner, and this bill is now brought to reform the deed wherein it fails to follow the contract and recite the assumption clause, and that Beckelman and Steiner be decreed to pay Dughi the amount due for principal and interest on the mortgage of $4,000. Dughi, a party defendant in the proceedings, has filed answer and counterclaim, in which he demands that the complainant, Philip Max, and the defendants William M. Beckelman and Leo Steiner, or one of them be decreed to pay to him the principal sum of $4,000, and interest and costs due on his mortgage.

The evidence satisfies me beyond question that the scrivener was the solicitor for the purchasers and that the complainant simply did what is quite usual in such matters, namely, instruct the scrivener to prepare the deed for him; he did not have the benefit of independent advice. The scrivener, Harry Steiner, says that he explained the change in the deed from the contract wherein it provided that the sale was "subject to" the mortgages. This is denied by the complainant who says he did not read any part of the deed except the description, and that if the word "subject" was called to his attention it meant the same as "assume". Complainant had a right to entertain that belief, because at the time of the closing of title the con-

tract was followed, in that the principal and interest due on the mortgages were deducted from the purchase price. It is clear to me that the deed was made to read "subject to" the mortgages by a mutual mistake. The change was unknown to any of the parties; it was made by the scrivener or someone in his office, without the knowledge of the parties or their consent.

The defendants, Beckelman and Steiner in their answer to the complaint pray reformation of the contract for sale wherein it provides for the assumption of the mortgages, alleging that the inclusion of the assumption clause was the result of mutual mistake. The evidence does not bear out this defense.

The deed recites that the consideration for it is "One Dollar and other good and valuable consideration". When the contract is examined it is found that the other good and valuable consideration was the purchase price of $14,500, the major part of which purchase price was to be paid by assuming the mortgages presently a lien on the premises of $10,000. At the closing of title instead of paying that sum in cash, it was deducted, plus the accrued interest. In this situation, the deed will be reformed to include the assumption. It is only common honesty that the purchasers be required either to pay the mortgages or stand primarily liable for the same.

Where the purchaser of land encumbered by a mortgage, agrees to pay a particular sum as purchase-money, and, on the execution of the contract of purchase, the amount of the mortgage is deducted from the consideration, and the land conveyed subject to the mortgage, the purchaser is

bound to pay the mortgage debt, whether he agreed to do so by express words or not.

"This obligation results necessarily from the very nature of the transaction. Having accepted the land subject to the mortgage, and kept back enough of the vendor's money to pay it, it is only common honesty that he should be required either to pay the mortgage or stand primarily liable for it." *Heid* v. *Vreeland,* 30 N. J. Eq., 591.

Even if the defendant purchasers cannot be said to have assumed the payment of the mortgages under their contract which so provides in express language, and the premises were intended to be conveyed subject to the mortgages, the equitable doctrine, long and well established is, that where the purchaser deducted or retained out of the purchase price, as fixed or agreed upon, the amount of the mortgage debt, equity will there raise or impose upon his conscience an obligation to indemnify his grantor, if the latter himself be personally liable for the payment of the mortgage debt, and this although the premises were conveyed subject to the mortgage as is claimed by the purchasers in the instant case.

Reeves v. *Cordes,* 108 N. J. Eq., 469;
Tichenor v. *Dodd,* 4 N. J. Eq., 454;
Thayer v. *Torrey,* 37 N. J. L., 339;
Friedman v. *Zuckerman,* 104 N. J. Eq., 322.

Decree will be that the deed be reformed so that it will include the assumption of the mortgage of Dughi by Beckelman and Steiner and reference be made to a master to determine the amount due on the mortgage of Dughi, and the defendants Beckelman and Steiner pay the amount so found to be due to Dughi.

Final Decree.

[Filed April 11th, 1933.]

IN CHANCERY OF NEW JERSEY.

90—309

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BETWEEN PHILIP MAX, *Complainant,* *and* WILLIAM M. BECKELMAN, LEO STEINER and JOHN DUGHI, *Defendants.*	On Bill, etc.

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This cause having come on for final hearing in the presence of Mr. Elias A. Kanter of Kanter & Kanter, solicitors of the above named complainant, Mr. Samuel I. Kessler of Kessler & Kessler, solicitors of the above named defendant, William M. Beckelman, Mr. Harry Steiner, solicitor of the defendant, Leo Steiner, and Mr. Earl A. Merrill, solicitor of the defendant, John Dughi; and the Court having read and considered the pleadings herein, having heard and considered the evidence adduced at the hearing and having also heard and considered the arguments of respective counsel; and the Court being of opinion that the complainant, Philip Max, has sustained and proved the allegations of his bill of complaint and is entitled to relief as hereinafter granted, that the defendant John Dughi, has sustained and proved the allegations of his counter-

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claim and is entitled to relief as hereinafter granted, that the allegations of the counterclaim of William M. Beckelman have not been sustained and proved and that said counterclaim should be dismissed, and that the allegations of the counterclaim of Leo Steiner have not been sustained and proved and that said counterclaim should also be dismissed; and due notice of the settlement and entry hereof having been given, and the Court, upon and prior to the entry hereof, having further heard the aforesaid solicitors of the respective parties,

It is, on this Eleventh day of April, A. D. 1933, ORDERED that the counterclaim of the defendant, William M. Beckelman, be and hereby is dismissed.

It is further ORDERED that the counterclaim of the defendant, Leo Steiner, be and hereby is dismissed.

It is further ORDERED, ADJUDGED and DECREED, that the deed made by the complainant, Philip Max, to the defendants, William M. Beckelman and Leo Steiner, which deed was dated July 8th, 1925, acknowledged July 8th, 1925 and recorded on July 10th, 1925, in the office of the Register of Union County in Book 999 of Deeds for said County, at page 430, was not drawn according to the true and actual intention and agreement of the parties thereto, in that, through their mutual mistake, there was omitted from the said deed after the sentence, reading "Conveyance is subject to existing first mortgage in the sum of $6,000 held by Ada F. Love and second mortgage in the sum of $4,000 held by John Dughi", the further clause reading, or which should have read "the payment of which mortgages, according to the terms

thereof, is hereby assumed by the parties of the second part''.

It is further ORDERED, ADJUDGED and DECREED, that the aforesaid deed, in order to accord with the true and actual intention and agreement of the parties thereto, shall henceforth, both at law and in equity, be deemed to have been corrected and reformed by adding to the sentence, now appearing therein, reading ''Conveyance is subject to existing first mortgage in the sum of $6,000 held by Ada F. Love and second mortgage in the sum of $4,000 held by John Dughi'', an additional clause, reading as follows, to wit, ''the payment of which mortgages, according to the terms thereof, is hereby assumed by the parties of the second part''.

It is further ORDERED, ADJUDGED and DECREED, that the amount now due and payable upon the mortgage (and the bond which it was given to secure) made by Philip Max to John Dughi, dated March 27th, 1924, acknowledged April 1st, 1924 and recorded on April 3rd, 1924, in the office of the Register of Union County, in book 643 of Mortgages for said County, at page 510, is the sum of FOUR THOUSAND FOUR HUNDRED AND EIGHTY DOLLARS ($4,480.00), said sum being stipulated and agreed upon (by all of the parties hereto, by their respective solicitors in open Court, upon the signing of this decree) as being the correct amount due on said mortgage (and bond aforesaid).

It is further ORDERED, ADJUDGED and DECREED, that the defendants, William M. Beckelman and Leo Steiner, within 20 days from the date hereof, pay to the defendant, John Dughi, the sum of

Four Thousand Four Hundred and Eighty Dollars ($4,480.00), the sum referred to in the last previous paragraph hereof, together with interest thereon from the date hereof at the rate of 6% per annum, and that, in default of such payment within the time aforesaid, execution for said sums may issue without further order.

It is further ORDERED, ADJUDGED and DECREED, that the defendants, William M. Beckelman and Leo Steiner, shall, at all times hereafter, exonerate and save harmless the said Philip Max from the payment of the sums due or to grow due on the mortgage (and the bond which it was given to secure) made by Philip Max to John Dughi, dated March 27th, 1924, acknowledged April 1st, 1924 and recorded on April 3rd, 1924, in the office of the Register of Union County, in book 643 of Mortgages for said County, at page 510.

It is further ORDERED, ADJUDGED and DECREED, that the aforesaid John Dughi, upon receiving payment of the aforesaid sum of Four Thousand Four Hundred and Eighty Dollars ($4,480.00), and interest thereon from the date hereof, as hereinabove directed to be paid to him by William M. Beckelman and Leo Steiner, shall deliver to Philip Max the aforesaid Mortgage (and the bond which it was given to secure) now held by him, with a proper endorsement thereon enabling the Register of Union County to cancel same of record.

It is further ORDERED, ADJUDGED and DECREED, that John Dughi, his agents, servants and attorneys, be and hereby is enjoined and restrained from bringing any action against Philip Max on the bond made by Philip Max to John Dughi

(secured by the aforesaid mortgage) during the continuance of any or all of the following periods:

First: Until the expiration of the time, hereinabove limited and set, within which William M. Beckelman and Leo Steiner are to pay to John Dughi the sum of Four Thousand Four Hundred and Eighty Dollars ($4,480.00) and interest.

Second: In the event that an appeal be taken by any of the parties defendant from this decree or any part thereof, until the remittitur on any such appeal be filed, or until the appeal be dismissed.

Third: In the event of any execution being issued for the satisfaction of the sums decreed to be paid by William M. Beckelman and Leo Steiner to John Dughi, until a return of the writ of execution.

Fourth: Until the expiration of such further and other period as this Court may allow, pursuant to further proceedings herein, and on at least five days' notice from Philip Max to John Dughi.

It is further ordered, adjudged and decreed, that the defendants, William M. Beckelman and Leo Steiner, pay to the complainant, Philip Max, said complainant's costs herein to be taxed, in which costs the Clerk of this Court shall also tax, in favor of the said complainant against the said defendants, the sum of $66.50 (same being the complainant's disbursement for a copy of the evidence taken at the hearing), and in which costs the Clerk of this Court shall also tax, in favor of the said complainant against the said defendants, the further sum of $75, the counsel fee allowed to said

complainant as against the said defendants, William M. Beckelman and Leo Steiner; and it is further ORDERED that execution for such costs and counsel fee may, without further order of this Court, issue at and after the expiration of 20 days from the date of service of a true copy of such taxed bill of costs upon the solicitors of William M. Beckelman and Leo Steiner, severally and respectively.

It is further ORDERED, ADJUDGED and DECREED, that the defendants, William M. Beckelman and Leo Steiner, pay to the defendant, John Dughi, said John Dughi's costs herein to be taxed, and it is further ORDERED that execution for such costs may, without further order of this Court, issue at and after the expiration of 20 days from the date of service of a true copy of such taxed bill of costs upon the solicitors of William M. Beckelman and Leo Steiner, severally and respectively.

Respectfully advised,

ALFRED A. STEIN,
V. C.

LUTHER A. CAMPBELL,
C.

Transcript of Testimony.

IN CHANCERY OF NEW JERSEY.

November 15, 1932.

BETWEEN

PHILIP MAX,
Complainant,

and

WILLIAM M. BECKELMAN, *et als.,*
Defendants.

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Transcript of shorthand notes of testimony taken in the above entitled cause before his Honor ALFRED A. STEIN, Vice Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of Kanter & Kanter, Esqs. (by Elias Kanter) for complainant; Kessler & Kessler, Esqs. (by Samuel Kessler) for defendant William M. Beckelman; Harry Steiner for defendant Leo Steiner; Earl A. Merrill.

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The Court: Now, gentlemen, what is this about?

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Mr. Kanter: This case, sir, the complainant is making suit under three causes of action, as follows: it is on the reformation of a deed by which he conveyed property, the complainant being Philip Max, conveyed property to the defendant, Beckelman and Steiner; secondly, on the deed as reformed for the reformation of that deed by the inclusion therein of a clause conforming to the clause in the contract that the purchasers were to

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assume and pay the existing mortgages and for the final execution to compel the defendant to save us harmless from the liability on those prior existing mortgages which have since gone in default and the property has been sold, resulting in
10 an entire loss on the second mortgage by us, the amount due on that mortgage that we may in turn pay to the holder of that mortgage and thus be exonerated from liability on our bond or by having this Court decree that they pay them directly so that we won't be sued on the bond at law.

The Court: Suit pending?

Mr. Kanter: No, your Honor, the suit was threatened by the holder of a mortgage, the holder being represented by Mr. Merrill, and, of course,
20 Mr. Merrill held on until I could bring this suit, and have the questions involved determined, of course, making Mr. Merrill's client a party to the present action, and we are at issue in most of the matters, as far as I can determine from the pleadings, subject to correction by counsel for the defendants Beckelman and Steiner—

Mr. Kessler: May we state our own case?

Mr. Kanter: Perfectly willing, and that is the substance of our cause of action, and I have no ob-
30 jection to their stating their own case.

Mr. Kessler: We represent two defendants, the main defendants, Beckelman and Steiner, who were the purchasers of property from the complainant. The agreement which resulted in the deed was in its origin in a receipt—in a written memorandum signed by the complainant in which he agrees upon the deposit being paid to him to convey the property to Beckelman and Steiner under a certain condition. The specific condition
40 in this suit is that the property is to be conveyed

subject to this mortgage for $4,000 in the written memoranda. Now, they then went to an attorney. This was done outside of an attorney's office. They then went to an attorney's office, Mr. Steiner, in this case a brother of one of the defendants, who was the scrivener of the agreement, and in the printed form of the agreement there is a printed clause which provides that the property is to be conveyed and the party to assume the mortgage.

Your Honor will bear in mind it was not written in by the scrivener, it was in the written form, contrary to the agreement. At the time the agreement was signed the scrivener did not realize or did not observe the error.

The Court: Contrary to the agreement?

Mr. Kessler: Contrary to the original agreement, the memorandum was then—said the property was to be taken subject to. That the complete agreement was drawn in the lawyer's office and in this signed agreement which followed the memorandum agreement, so to speak, call it that, there is a printed clause which was not stricken out by the scrivener, which should have been stricken out, to follow out the terms of the memorandum agreement.

The Court: I don't know as I follow you. You say the original memorandum agreement prepared by the parties without counsel provides for the property to be sold subject to.

Mr. Kessler: To be sold subject to, yes.

The Court: And—?

Mr. Kessler: And when they got to the scrivener, the scrivener drew a completed agreement, trying to follow that agreement out, I suppose, seeing "subject to mortgage" he permitted a

printed clause to remain in the contract which says "an assumption".

The Court: Oh, I see.

Mr. Kessler: And then when they got to the closing he followed the original agreement and
10 said that the agreement was to be subject. When a deed was drawn, that the property was sold subject to the deed itself says "subject to", following the original agreement. Counsel says that was an error. We say it was not an error, it was according to the plan and terms of the contract.

The Court: Yes. All right. Have you finished?

Mr. Kessler: Yes, your Honor.

Mr. Kanter: May I have one further word?
20 Your Honor will find there is a marked difference of opinion between myself and the other gentleman on the questions of law.

The Court: Well, we haven't come to that yet, just pointing out now the question of fact.

Mr. Kanter: Independent of those facts, sir, we will ask your Honor to give us the relief, independent of any relief by way of reformation. That is, whether they assumed it or did not assume, they are obliged to exonerate us from this liability.

30 The Court: Why?

Mr. Kanter: That is a more difficult question.

The Court: Why?

Mr. Kanter: Well, this was a contract—

The Court: If they assumed, that is one thing; if they did not assume, that was another thing.

Mr. Kessler: And it is a different thing.

Mr. Kanter: I realize the difficulty.

The Court: I never realized how difficult it was until recently when I tried to write an opinion on
40 the thing.

Mr. Kanter: We will come to that legal question. We will pass on that when we get to it.

The Court: Yes. I don't see what the fact is.

Mr. Kanter: I think it might help your Honor if I were to read from the complaint, the answer, so we get down the admitted facts without much trouble. It is admitted—it is alleged in our bill of complaint— 10

The Court: Follow your answer, please.

Mr. Kessler: Yes.

Mr. Kanter: And admitted by the answer of all the defendants that the property in question which is described in Paragraph 1 of the bill of complaint was conveyed by John Dughi and Carrie Dughi, his wife, to the complainant, Philip Max, by deed dated March the 27th, 1924, and recorded on April 3, 1924, in the office of the Register of Union County in Book 936 of Deeds of that county, at page 483, and that the premises are commonly known as 1324-1324-A North Broad Street, Hillside, Union County, New Jersey. 20

It is alleged in Paragraph 2 of the bill, and admitted by the answers of the defendants, that in partial payment of the consideration for the deed from Dughi to Max, we executed, Max executed to Dughi a bond in the sum of $4,000, principal sum dated March 27th, 1924, and conditioned for the payment of that amount on March 27th, 1929, together with interest at six per cent. payable semi-annually. I might say, parenthetically, that is the bond on which we now ask exoneration. 30

Also it is alleged in Paragraph 3 of the bill of complaint and admitted by the answers of the defendants that to secure the payment of that bond, Philip Max executed to John Dughi a pur- 40

chase money mortgage, embracing the premises referred to in Paragraph 1 of the bill. That mortgage was dated March the 27th, 1924, acknowledged April 1st, 1924, and recorded on April 3, 1924, in the office of the Register of Union County, in Book 643 of Mortgages, page 510.

It is alleged in Paragraph 4 of the bill, and admitted by the answers of the defendants, that at the time of that conveyance from Dughi to Max, the property was already subject to a prior mortgage in the sum of $6,000, dated September 7, 1921, payable September 7, 1926, with interest at six per cent., payable semi-annually, which mortgage was recorded on December 9, 1921, of Book 53 of Mortgages of Union County, at page 235. That mortgage having been made by John Dughi to Ada F. Love.

Now, it is admitted in Paragraph 5 of the bill that on May blank, 1925, the complainant entered into a contract with the defendant, Beckelman, a true copy of which is annexed to the bill, and with the Court's permission I would now like to introdue in evidence the counterpart of that contract in the complainant's possession which was signed by the defendants Beckelman and Leo Steiner. It is approved, it appears to have been signed in the presence of Harry Steiner without calling the subscribing witness—

The Court: Admitted without objection?

Mr. Kessler: I just want to see the copy we have.

The Court: Yes.

Mr. Kessler: We waive the formal proof of it.

Mr. Kanter: The one—I am going to introduce the one that was delivered to us, and is in our pos-

session and ask the stenographer to mark it as Exhibit C-1.

Mr. Kessler: Immaterial.

(Paper marked Exhibit C-1.)

The Court: What is the difference? 10

Mr. Kessler: At the time of the signing of the lease, the complainant called—subject to certain leases involved, which is not involved in this case, so it is immaterial, substantially the same, although there is that difference.

The Court: It is offered, I suppose, for the purpose of showing what it provides with reference to "subject to", or "assumption of" the mortgage?

Mr. Kanter: Yes, sir. I did not know their 20 copy was different, because our copy is the one that is admitted by the pleadings.

It is alleged in Paragraph 5 of the bill, and admitted by the answer, that in performance of the obligations of that contract—alleged in Paragraph 6 and admitted by the answer, that in the performance of the obligation, contract now Exhibit C-1 would—that is, Max executed to the defendants, Beckelman and Steiner, a deed dated July 8, 1925, and acknowledged July 8, 1925, and re- 30 corded July 10th, 1925, in the office of the Register of Union County, Book 999 of Deeds, page 430, and we allege the deed is now in the possession of the defendants, Beckelman and Steiner, and I ask counsel for it.

(Paper produced by counsel.)

Mr. Kanter: Counsel has produced that deed and I will offer it in evidence, with your Honor's permission.

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(Deed marked Exhibit C-2.)

Mr. Kanter: Now, at this point, I observe that there are some denials in the answer and some portions are admitted. I wish to introduce in evidence—it is alleged in Paragraph 10 of the second cause of action that on December the 24th, 1931, Ada F. Love, as complainant, instituted a suit in this court against the defendants, William M. Beckelman, Miriam Beckelman, Leo Steiner, Claire Steiner, John Dughi and Max Perlman, chancery docket 87, page 588, for the purpose of foreclosing the first mortgage on that property. I find I telephoned for that on Thursday to the clerk and asked him to send both of those up. The clerk only sent the one file up.

Mr. Kessler: We admit it.

Mr. Kanter: Paragraph 10 of the foreclosure suit is admitted.

We then allege in Paragraph 11 that on March 2nd, 1932, a final decree was made in that case, copy of which is marked Exhibit B, annexed to the bill of complaint.

Mr. Kessler: The decree is substantially that complainant is entitled to his money.

Mr. Kanter: Whatever it was, and the defendant John Dughi, was entitled to the sum of $4,000, is that right?

Mr. Kessler: Yes.

Mr. Kanter: $4,000 plus the costs.

The Court: On—?

Mr. Kanter: On this mortgage. The exact terms of the figure were—

The Court: Well, you need not go into it in detail.

Mr. Kessler: It is admitted, whatever the decree says.

Mr. Kanter: Annexed to the— It is admitted there were over $4,000 owing to defendant Dughi and it is alleged in the—

The Court: On first mortgage?

Mr. Kanter: No, on the second mortgage. The first mortgagee bought it in. Not sufficient to cover, I think, even the first mortgage. Is that right?

Mr. Kessler: $150.

Mr. Kanter: It is alleged in Paragraph 12 of the second cause of action that a writ of fieri facias was issued on April 20, 1932— No, I beg your Honor's pardon. —correct that, please,— it is stated in Paragraph 12 of the second cause of action that on April 20, 1932, the premises were sold in that foreclosure case by the Sheriff of Union for $100 to the complainant, Love, so that nothing was realized for the satisfaction of the Dughi mortgage. That has been denied by the answers, but I understand it is now admitted by the defendants. Is that correct?

Mr. Kessler: We do not— We have no knowledge, but if counsel says that is what happened, we will not raise a question on it.

Mr. Kanter: I say that is the fact.

Mr. Kessler: We do not raise the question.

Mr. Kanter: And we allege that on May 2nd, 1932, in Paragraph 13 of the second cause of action, that the order of confirmation was made, in that case, that has not been admitted, but I understand it is not now denied.

Mr. Kessler: If counsel says that is what happened we will not raise that.

Mr. Kanter: I might say to your Honor, if there is any question—

The Court: The only thing you are contending is there was no assumption of the mortgage.

Mr. Kessler: Yes, sir.

The Court: Everything else you admit transpired?

10 Mr. Kanter: Very well.

The Court: "Pretty much" you admit everything?

Mr. Kessler: Yes.

The Court: I did not leave the door open. Pretty much you admit.

Mr. Kanter: If there is any doubt as to what occurred in the Love-Dughi foreclosure I will ask leave to introduce the file.

The Court: I just wonder why we make it so
20 apparently difficult for ourselves. If that is true, so far as the other side is concerned, and everything is pretty much admitted excepting the question of the assumption of the mortgage, what else is there in this case that we need—

Mr. Kanter: It is admitted, I might say. Paragraph 15 of our second cause of action complained —that Mr.—we called upon the defendants Beckelman— No. Withdrawn. Mr. Merrill in behalf of Mr. Dughi called upon us for the payment of
30 $4,000 and interest accrued thereon. We want to make a complete cause of action. We were called upon to make good that deficiency arising from Mr. Dughi. Mr. Beckelman, the defendant, said they had no knowledge, but I now demand, as we were called upon to make good that deficiency, they admit we were called upon to pay that money.

Mr. Kessler: If you say so, we have no reason to deny it. I assume Mr. Merrill would call upon you.

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Mr. Kanter: It is admitted that they did not—

The Court: The thing is a nullity.

Mr. Kanter: Mr. Merrill testified he did not get the money.

Mr. Kessler: And you would not be here if he had. 10

Mr. Kanter: And we would not be here if he had, and that is substantially the important allegations of the complaint, the bill of complaint. There are several clauses. We say the amount due— Just get this correct. On the John Dughi mortgage, as of the date of the filing of this bill, was $4,060, at least, and I think that Mr. Merrill will be satisfied if he gets that amount of money. Is that right, Mr. Merrill?

Mr. Merrill: I don't know the amount. 20

Mr. Kanter: I will put down the amount due on the Dughi mortgage, $4,060 as of the date of filing. As a matter of fact, it was $200 more.

Mr. Merrill: Well, the amount— If that is reliable, we can ascertain it.

Mr. Kanter: I understand also that Mr. Kessler— I heard Mr. Kessler in his opening statement to the Court state to your Honor that a common scrivener was employed by Mr. Max, by the defendant Steiner in the drawing of a contract, 30 Exhibit C-1. That fact was stated by Mr. Kessler at the opening.

Mr. Kessler: I did not use the words "common scrivener" because this gentleman is not as common as all that.

Mr. Kanter: I mean a scrivener common to both parties, of course.

The Court: Common to both parties.

Mr. Kessler: That is a fact, though.

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The Court: They both went to the same scrivener.

Mr. Kanter: Your Honor I will say the— No, they did not do that. That was not quite the fact. What happened was this, that the— Mr. Max was not represented by any other attorney, that the paper was, as a matter of fact, prepared by Mr. Harry Steiner, at the request of the defendants, Steiner and Beckelman and submitted to—

Mr. Kessler: Now, that is not the fact.

Mr. Kanter: Isn't that it?

Mr. Kessler: No.

The Court: I imagine you will have no difficulty in agreeing on that.

Mr. Kessler: The letters, as a matter of fact—

The Court: That is one of the things that these gentlemen agreed on. I suppose you are relying on something having transpired there by way of mistake?

Mr. Kessler: Yes. What was clearly a mistake.

Mr. Kanter: Now that is now before your Honor.

The Court: I suspicioned that earlier in the statement that you would probably get to the point where the scrivener made the mistake which one of the parties did not understand it to be the way it was.

Mr. Kanter: Now, the fact shows—

The Court: That will be the question of fact to be determined whether or not there was such a mistake.

Mr. Kanter: Now, the facts before your Honor were these, that there was a mistake because, if your Honor will look at Exhibit C-1 your Honor will find that—

The Court: I don't know whether, by looking at them, there was a mistake or not. I suppose

the parties could make a—draw up a receipt and all that sort of thing and afterwards sit down and draw up a final contract where they would agree and if the minds met, that would be the contract, wouldn't it?

Mr. Kanter: Yes. 10

The Court: If they did not meet—

Mr. Kanter: Yes.

The Court: —surely one thing or the other does not seem to be so.

Mr. Kanter: That is right.

The Court: And you assume it is not so.

Mr. Kanter: That is so.

The Court: That is something we will have to find out when we hear the testimony.

Mr. Kanter: Well, Mr. Max. 20

Philip Max, sworn for Complainant.

The Court: I think I understand quite clearly what it is all about now. It is a question now whether the first paper which they fixed up among themselves was the understanding without change, or whether there was a subsequent change. 30

Mr. Kanter: Of course, the first paper is relied on as a matter of defense.

Mr. Kessler: There is an assumption of law that the deed is the final word until they can prove to the contrary.

The Court: Final word unless some mistake happened.

Mr. Kessler: Yes.

Direct examination by Mr. Kanter.

Q. Mr. Max, I show you a paper which is now in evidence Exhibit C-1, and ask you whether—has 40

that been in your possession since May, 1925? A. It has.

Q. How did you originally get that paper? A. From the office of Mr. Harry Steiner.

Q. And do you recall going to Mr. Steiner's office on that day for this paper? A. I do.

Q. Did you at that time sign a counter part of this paper with your signature on it? A. Yes, sir.

Q. This one is signed by Beckelman. A. Yes, I signed the other one.

Q. And the other one was left in Mr. Steiner's office? A. It was.

Q. Mr. Harry Steiner? A. Harry Steiner.

Q. Do you recall any discussion with reference to the contents of this paper? A. I do.

Q. With whom did you have that discussion? A. With Harry Steiner.

Q. Was Mr. Joseph Steiner or Mr. William M. Beckelman there? A. No.

Q. Was neither of them? A. Neither one.

Mr. Kessler: You mean, Leo Steiner?

Mr. Kanter: Leo Steiner, I beg your pardon.

Q. And you say this was in Harry Steiner's office? A. Harry Steiner's office.

Q. And did you employ any attorney to represent you in the drafting of this contract? A. I did not.

Q. I notice that the name "Harry Steiner, counsellor-at-law, Branford Place" is endorsed on this contract. As far as you know, was that drawn by Harry Steiner? A. It was.

Q. Exhibit C-1? A. It was.

Q. You say you had no attorney? A. I did not.

Q. Now, what was the subject matter of your conversation with Mr. Steiner on the occasion that this paper was delivered to you? A. We discussed the assessment matter.

Q. The assessment matter? A. Yes, we discussed the assessment matter and I told him I did not like that because it would bring me in for a lot of responsibility, which did not exist, but he said not to worry about it, and leave it go, it is a regular contract, that always goes through his office, and let it go at that, so I left it go.

Q. At that time, in May, 1925, what were the market conditions with reference to this property in Hillside?

Mr. Kessler: Objected to, your Honor, immaterial as to what the market condition was.

The Court: What do you want to prove?

Mr. Kanter: I want to show, your Honor, that there was a good deal of activity. This is near, as your Honor knows, where the present State Highway crosses and the City was making the Township, rather, was making a number of improvements, it was a serious question in everybody's mind as to what was being done there lending relevancy to the discussion concerning assessments.

The Court: Well, how is this assessment thing of any importance to me?

Mr. Kanter: Your Honor will see it is very important, because Mr. Steiner says in his answer that this paper was taken out of the drawer by one of his stenographers, secretaries, and was drawn up without his ever having seen it, without his having known what was in the paper, and it was drawn as the result of a mistake. This contract says the deed

is the result of a mistake. There is no question. There is a question before your Honor—

The Court: There is nothing in the contract about that.

10 Mr. Kanter: Yes, there is.

The Court: Where? Well, I will allow it.

Mr. Kanter: Now—

The Court: Read the question.

(Question read as follows: "At that time, in May, 1925, what were the market conditions with reference to this property in Hillside?")

A. Well, it was highly speculative. It was—

20 Q. And what was the City doing with reference to it? A. They—

Mr. Kessler: Oh, I object to it, your Honor.

Q. The Township—

Mr. Kanter: I just want to bring out the condition which prompted Mr. Max to discuss this with Mr. Steiner.

The Court: About assessments?

30 Mr. Kanter: Yes.

The Court: Why can't he get down to that?

Q. You discussed the assessment question with him? A. I did.

Q. What did you say to him and what did he say to you? A. Well, I said that there would bring me in for a lot of—that is the way I understood the law, which I overheard by some lawyers, was that in the event they make the contract and there is assessments levied, when they all become

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due, then I wouldn't be getting any money out of the property, but he said, "There is no chance of that. Let it go at that, the way things look, so I let it go at that.

Q. What did he say about the contract? A. He said the contract is a regular form going through his office, that is why he didn't want to change it. 10

The Court: Well, now, let me ask you something. Did you notice that clause about the assumption?

The Witness: I did.

The Court: Eh?

The Witness: I did.

Q. Now, come to that assumption, you notice this clause by the assumption, "by assuming"— the words here "by assuming" the word "Mortgage" is printed and there is a little "s" in writing. A. "Assumes" yes. 20

Q. Wait a minute— "By assuming the mortgage". Look at it, and the little "s" after the "mortgage". Was that in there before you signed the contract? A. That was in before I signed— before I signed, yes.

Q. Yes. And did you see that clause "by assuming the mortgages" in there— A. I did. 30

Q. —before you signed the contract? That meant nothing to you? A. It was very important to me.

Q. Did you know Mr. Beckelman at that time? A. No, I did not.

Q. Well, did you know him by reputation? A. I did.

Q. And did that clause assume importance in your mind?

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Mr. Kessler: Objected to, your Honor.

A. Yes.

Mr. Kessler: The paper must speak for itself. Whether it assumed importance or not is immaterial. I don't know what counsel is driving at, but it certainly is not material what is inside of his mind.

The Court: It won't help me any.

Q. You see the letter "s" written in after the printed word "mortgage" in the clause, now reading "By assuming the mortgages at present a lien on the premises and paying the same according to the terms thereof?" The letter "s" had been written in before you got it? A. It was.

Q. You conveyed the property to Mr. Dughi—

Mr. Kanter: Withdrawn.

Q. You conveyed the property to Mr. Leo Steiner and William Beckelman on July 8th, 1925? A. I did.

Q. Did you employ an attorney to prepare that deed for you? A. I did not.

Q. I call your attention to the deed, Exhibit C-2, and ask you whether the printed words now thereon "Harry Steiner, counsellor-at-law, 24 Branford Place, Newark, New Jersey" were on there at the time you— A. Yes, sir, it was.

Q. —and in whose office was that deed signed? A. Harry Steiner's office.

Q. Did you employ any attorney to prepare that deed for you? A. I did not.

Q. How did the execution of that deed come about? A. I told Steiner—Harry Steiner to prepare it.

Q. And did he make a charge for that? A. Why—

Q. Did he make the charge for that? A. He did.

Q. I don't care why.

The Court: It was not enough.

Mr. Kanter: It was not enough. That is just the trouble.

The Court: All right.

Mr. Kanter: When you prepared the deed— Did you ask his advice concerning the deed?

Witness: I did.

Q. What did you say to him? A. I asked him if he thought the deed was all right and he said it was.

Q. You signed the deed. A. I did.

Q. And closed the title. A. I did.

The Court: Let me see the deed.

Mr. Kanter: That is all.

Cross examination by Mr. Kessler.

Q. Did you read the deed? A. I compared the description with the other one.

Q. No, no. Did you read the deed? A. The old one.

Q. The old one? A. Yes, sure, I did, I compared it.

Q. And you looked it over, you looked at every clause in the deed, you read every clause in the deed? A. I compared the description.

Q. You said you read the deed. Did you read every clause in the deed?

The Court: The contract. Is the contract there? Yes.

Q. Did you read every clause in the deed? A. I compared the description in the deed.

Q. Aren't you going to answer my question? I asked you whether you read the deed. You said yes. Now I ask you whether you read every clause in the deed. A. Not every clause in the deed.

Q. Why not? A. Because I was only interested in the description that I was conveying the right property, and there was no money involved there.

Q. You read every clause in the contract? A. I did.

Q. When you saw the clause in the contract "Assumption of mortgage" you didn't say anything to Mr. Steiner about that? A. Repeat that.

Q. When you saw the contract in which it said "Beckelman and Steiner are to assume the contract" you didn't say anything to Steiner about that. A. It was not necessary.

Q. No. You did not say anything. A. It was not necessary.

The Court: Why don't you answer. Say Yes or No.

A. How will that—?

Q. I will persist in it.

The Court: Don't argue with him.

Q. Did you say anything to him? Yes or No. A. About that?

Q. About the assumption. A. No.

Q. As a matter of fact, you had signed a receipt, had you not, and had received a deposit— A. I did.

Q. Before this contract was signed? A. Yes.

Q. Is that correct? And that receipt is in your handwriting, is it not? I show you a paper. Every

word that is in your handwriting? A. That is right.

Q. You are sure about that? A. Positive.

Q. You signed it? A. Yes.

Q. I call your attention to the fact that this receipt says "Of the $4,000 cash to be paid on passing of title, $10,000 subject to existing mortgages." Is that right? 10

Mr. Kanter: Just a minute. I object to counsel asking questions concerning this receipt, which is not in evidence, and which concerns matters of defense purely.

Mr. Kessler: I ask it be marked for identification.

The Court: Mark it. 20

(Receipt marked D-1 for Identification.)

Q. Referring to the receipt which you say is in your handwriting, every word of it that has been written—

The Court: Mark it for identification?

Mr. Kessler: Yes.

Mr. Kanter: Yes.

The Court: Put that in your question.

Mr. Kessler: Yes. 30

Q. Referring to Exhibit D-1 for Identification, I call your attention to this part of the receipt "Terms, $500, receipt of which is hereby acknowledged". A. Yes.

Q. "$4,000 cash to be paid on passing of title." A. Yes, sir.

Q. "$10,000 subject to existing mortgages." A. Yes.

Q. Yes. That is right. You wrote that, did you not? A. Yes, sure. 40

Q. Well, you intended, then, when you drew this receipt, the mortgages were to be subject to, did you not? A. No, they are to pay the mortgages.

Q. You wrote this part? A. I wrote, that is the way I understood it.

10 Q. You wrote it out? A. I am no lawyer.

Q. No. Listen to me. You wrote it out. A. Yes, I did.

Q. Who dictated it? A. Paul was there at the time.

Q. Paul who? A. Paul Neuwirth.

Q. He was your agent? A. Yes.

Q. And he dictated it? A. Well—

Q. Yes or No. A. Partly.

Q. Well, who did the rest? A. I did.

20 Q. You and he both together? A. Yes.

Q. Framed this receipt? A. We did.

Q. Mr. Steiner, the attorney, was not there, nor— A. No.

Q. —any of the two defendants who are now involved, they were not there? A. No.

Q. You both framed this receipt? A. We did.

Q. And when you wrote that "subject to existing mortgages of $10,000" you knew what that meant?

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Mr. Kanter: I object to that. It doesn't make any difference whether he knew or did not know.

The Court: Let him—

Mr. Kanter: It doesn't make any difference, purely a matter—

The Court: Please! This is the man who now complains knowing about this situation, I want to know if he understood all the things.

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Q. Is that all, you mean? A. Yes.

Q. You knew that was different from assuming the mortgage, didn't you? A. No.

Q. "Subject to" was different from "assuming"? A. Well, to me—to me, I didn't know. I only knew they were to assume it. 10

Q. As a matter of fact— A. I don't know the legal language.

Q. As a matter of fact, you never met Mr. Leo Steiner or Mr. Beckelman in this deal, did you? A. No.

Q. At any time? A. No.

Q. This deal was closed between your agent, Mr. Neuwirth— A. Yes.

Q. —who represented you in negotiating with him and you— A. Yes. 20

Q. —never met him in these transactions? A. No.

Q. And you have never met him to the date in Mr. Steiner's office in the closing of title? A. No.

Q. That is correct? A. That is correct.

Q. Now, Mr. Max, you say that at the time the agreement was signed you went to Mr. Steiner—Mr. Harry Steiner's office the attorney? A. I did.

Q. Are you sure about that? A. Positive.

Q. You are positive? A. Positive. 30

Q. As a matter of fact, you never went to Mr. Steiner's office until the closing of title, the passing of the deed. Isn't that so? A. No, I was there on two occasions.

Mr. Kessler: I call upon counsel to produce letter dated June 1st, 1925.

Mr. Kanter: I cannot produce it.

Q. I show you copy of a letter written to you by Mr. Steiner and ask you to read it, and ask 40

you if you did not receive the original of that letter? A. Not to my knowledge.

Q. That does not refresh your memory? A. No.

Q. That Mr. Steiner wrote you? A. No, it don't.

10 Q. Saying he sent a letter to Mr. Neuwirth, the —the contract to Mr. Neuwirth and would you sign same and return it to him? A. No.

Q. Isn't it a fact that you called up Mr. Steiner, that is the attorney, and you talked to him on the telephone and that you had your copy of the contract, which I now show you, and ask that it be marked for identification.

(Contract marked D-2 for Identification.)

20 Q. Didn't you have this contract marked D-2 for Identification before you when you talked to Mr. Steiner on the telephone, and didn't you call his attention to the fact that you wanted included in this contract the following clause, "And subject to the terms of a certain lease held by one Mittelman and for one of the stores on said premises, a copy of which lease has been delivered to Paul Neuwirth, said premises aforementioned contain therein a one-story brick building with 30 two stores therein and is commonly known and designated as Number 1324-1324a North Broad Street in the Township of Hillside, County of Union and State of New Jersey." Didn't you on the telephone ask Mr. Steiner to include that in his contract? A. Not that I remember.

Q. And isn't it a fact that he said "You sign the contract which you have" which has been offered in evidence, which does not contain this clause which I have stated, "and that when you 40 deliver that signed contract by—"

Mr. Kessler: Withdraw that, I am confusing the question.

Q. Isn't it a fact that Mr. Steiner said to you for you to sign—send this contract back and he would insert that which I have just read to you in your contract, and that he would take back the contract signed by Mr. Beckelman, that he would take back the contract signed by Mr. Beckelman and Mr. Leo Steiner, which was then in the possession of Mr. Neuwirth, and that you signed your one contract and returned it to Mr. Neuwirth, who, in turn, delivered it to Mr. Steiner. Isn't that the way it happened? A. Not that I know of.

Q. And isn't it the fact that you never came to see Mr. Steiner until the time of the execution and delivery of the deed? A. I was there on two occasions.

Q. Yes. You are sure about that? A. I am almost sure of that.

Q. Not quite sure? A. That is, I am pretty sure of that.

Mr. Kessler: Where is that letter? I ask that letter be marked for identification, please, the letter that was shown to the witness and dated June 1st, 1925.

(Letter of June 1st, 1925, marked D-3 for Identification.)

Q. When did you tell Mr. Steiner to draw the deed and in what manner? How did you tell him? A. I cannot remember that.

Q. Was it at the time of signing the contract when you were in his office? A. Well, no, I left that to them.

Q. Well, you were to deliver the deed. You said that you engaged him to draw a deed for

you. Now, when did you say you engaged him? A. Well, he was handling everything, so, when he had it ready I came down and signed it.

Q. Please answer my question, if you can. A. I cannot remember the exact details.

10 Q. When was it you asked him to draw the deed? A. I don't remember the exact day and hour how it come about.

Q. As a matter of fact didn't you telephone him to draw the deed after you received a letter from him dated July 6th, 1925? A. I drew it.

Mr. Kessler: I ask you to produce the original and now show you the copy.

Mr. Kanter: I have no objection to your using the copy.

20 The Court: When this title was finally closed, was there, as a matter of fact, an allowance made?

Mr. Kanter: Yes, sir.

The Court: For the bond and mortgage, interest, and so forth?

Mr. Kanter: My associate called my attention to the fact that I forgot to introduce that in evidence. I have it with me and I will.

30 The Court: Whether or not, following out the language of the contract, whether it be subject to or whether it be assuming if, as a matter of fact, there was the allowance made to the—

Mr. Kanter: Yes, sir.

The Court: —for the bonds and mortgage and interest due—

Mr. Kanter: Yes, sir.

The Court: —at that particular time.

40 Mr. Kanter: Yes.

The Court: That will throw a lot of light on the whole subject.

Mr. Kanter: Yes, and I forgot to introduce it.

Mr. Kessler: I ask this be marked for identification. 10

(Letter of July 6th, 1925, marked D-4 for Identification.)

(Discussion going on while stenographer was marking exhibit.)

The Court: After all, there doesn't seem to be very much need for any misunderstanding in these things. Let us get right down to what happened. Let us get the facts. 20 Sometimes what the parties do in performing their contract helps me to determine what they intended.

Mr. Kanter: May I interrupt this cross examination? I would like to introduce this in evidence.

The Court: You can wait until he finishes up his thought.

Q. Isn't it a fact that Mr. Steiner wrote you a letter to be ready to close it, and he asked you 30 whether you wished him to draw the deed or whether you wanted to have your own attorney draw the deed, and as a result of that, you called him up and asked him to draw the deed. A. I don't remember getting the letter, but if he has a copy, maybe I got the letter.

Q. Isn't it a fact after you had that conversation with him about drawing the deed, and then came to his office on the day fixed for the closing, that was the first time you were there? Does that 40

refresh your memory? A. I think I was there once before. I was there all right, twice.

Q. When you executed this deed, closed it, did you see that clause in there (showing witness paper) following the description? A. Which one? This one?

Q. All the clauses following the description, did you read them? A. Yes, I looked them over.

Q. All right. Made no complaints, said nothing about it? A. No.

Q. Mr. Steiner said nothing to you? A. No. I just asked him if it was all right, if he thought it all right. He said, yes.

Q. Isn't it a fact that Mr. Steiner at the time of the closing—you and Mr. Steiner were the only people there, the purchasers were not there at the time? A. Yes. Only he and I.

Q. Just you and he. Isn't it a fact that he said to you and he called it to your attention that the deed was drawn subject to the mortgages, in accordance with the original agreement and you said, "Oh, that is all right". A. What is that?

Q. Isn't it a fact that Mr. Steiner called your attention to the fact that the deed was drawn in accordance with the original agreement memoranda which is marked Exhibit D-1— A. No.

Q. And you said, "Oh, that is—" A. That it was subject to—

Q. —And you said that was all right? A. You get me mixed up on the "subject". I don't know what that means.

Q. I have only adopted the language you yourself used, Mr. Max. A. Well, I used it one way. By me it means that they don't pay the mortgage.

Q. I don't care what it means. The Court will say as to that. A. That is the way I understood that.

Q. Didn't he tell you he had drawn this deed in accordance with the original memoranda? A. No.

Q. And didn't say anything about that? A. No.

Q. Nothing was said by you or him? A. Nothing at all. I only read the description, the land I was conveying. 10

Q. You also read this other clause, you said, too, following the description. A. I was primarily interested in the description.

Q. I don't care about that, Mr. Max, you read that. I want to know if you read it, not if you suspected it or changed it. I asked you whether you read the typewritten clause following the description and you said Yes. A. I don't remember whether I read over this. 20

Q. Wait. So, when I asked you a moment ago whether you read the clauses following the description, you said, Yes, and you say you now don't remember. A. I thought this was all the description.

Q. You read it all, didn't you?

The Court: If you will answer questions, you will help me a whole lot.

Witness: I am sorry, your Honor. 30

The Court: You don't have to fence with counsel. You don't get anywhere. You don't help yourself a bit. You don't improve your case any with me. The question is very simple, whether you read those clauses. Now, you did or you did not.

Witness: Well, I don't remember.

The Court: You keep—you give me the impression you are trying to hide something.

Witness: I am not, your Honor. 40

The Court: Well, then, don't be telling me about this description all the time.

Witness: Well, that is what I always look at.

The Court: You either read the clauses in the contract or you did not.

Witness: I did not.

The Court: Didn't read any of them?

Witness: I— Oh, in the contract? Yes. I read the whole contract.

The Court: What about the deed?

Witness: The deed. I did not read the whole deed.

The Court: Well, what part did you read? That is what he wants.

Witness: The financial statement, that is what I was interested in.

The Court: Oh, no. What part of the deed did you read?

Witness: Oh, the description, your Honor.

The Court: That is what he is—

Witness: Yes.

The Court: —questioning you upon, what you read in the deed.

Witness: The description.

The Court: And he has shown you the clauses on the first page of the deed and asked you about them and you keep on telling me about the description.

Witness: That is—

The Court: Remember when you are answering a lawyer, it is not answering him so much as it is telling me.

Witness: I know. I am sorry.

The Court: If you want to hurt yourself with me, go ahead and do it.

Witness: No, I don't want to.

The Court: I am very frank to tell you, that sort of thing does not impress any judge.

Talk out honestly and straightforward. I will determine this case eventually the best I can and part of my determination will depend upon how the witnesses act.

Witness: I know, your Honor.

The Court: I will back my conclusions based on whether or not I believe people. I have got to do that. This may resolve itself into a question of who I am going to believe.

Now, be careful about that and answer the questions that are asked you.

Q. Let me ask you, again, Mr. Max, when you executed this deed did you read all of the typewritten— A. I did not.

Q. —paragraphs? And you are sure of that? A. Positive.

Q. Now, you are positive you did not read it? A. Positive.

Q. What did you mean by saying, before, that you did read all the clauses following the description and then say later on you are positive you did not, and now you recollect? A. Now I recollect.

Q. You did not recollect until two minutes ago? A. No.

Mr. Kessler: O. K. That is all.

Redirect examination by Mr. Kanter.

Q. Mr. Max, I show you a paper and ask you when this paper was handed to you and by whom? A. This was handed me by Mr. Beckelman.

Mr. Kessler: Who?

Mr. Kanter: "Mr. Beckelman."

Witness: I mean, Mr. Steiner.

Q. Oh; you never saw Mr. Beckelman, I understand? A. No.

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Q. There is no doubt about that fact? A. No.

Mr. Kessler: No. Mr. Leo Steiner.

Mr. Kanter: Mr. Leo Steiner. No. That is the question, in my understanding.

Witness: No.

Q. And this paper was handed to you by Mr. Harry Steiner? A. The lawyer, Mr. Harry Steiner.

Q. On what occasion? A. At the closing when the deed was signed.

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Q. All right. And this represents the adjustment of the consideration of the allowances as of July 1st, doesn't it? A. It does.

Mr. Kanter: You have seen it?

Mr. Kessler: I have not.

Q. I ask you, the name now appearing thereon "William Beckelman, Kinney Building, City" was that on the paper at the time? A. No.

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Mr. Kessler: This is—

Mr. Kanter: I am telling the Court, the address, William Beckelman, Kinney Building, was not on there.

Mr. Kessler: This looks as though it might be a signed statement. I don't want to confuse the Court's mind.

The Court: Yes. Then I won't have to remember.

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Mr. Kessler: Strike it out.

Mr. Kanter: Now, Mr. Kessler objects to the use of the numerals "1925" on that.

Mr. Kessler: No, not that. $6,000— $4,000, that was not there. Ask him if that was there.

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Q. Did you notice the numerals written in ten "$6,000—$4,000" were they in there at the time that paper was delivered to you? A. No.

Q. That is just a pencil notation of your own? A. It was.

Mr. Kessler: Otherwise it is all right.

Mr. Kanter: The rest of the statement is as delivered to you.

The Court: It has been admitted that this witness constructed it and it is agreed that paper represented the allowance, and so forth, at the time of closing.

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(Paper marked Exhibit C-3.)

Q. Mr. Kessler examined you on this paper, D-1, which he called the memorandum, memorandum agreement or memorandum contract. Do you see it before you now? A. I do.

Q. What time of day was this signed by you? A. In the morning.

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Q. And what was the language accompanying the signing of that paper by Mr. Neuwirth?

Mr. Kessler: Whose language, please? I object. Mr. Neuwirth is the agent for this man. It is not binding upon us, any language between those two.

The Court: What was the language of the agent? Who drew this?

Mr. Kanter: Not the language of the agent, under what circumstance it was delivered.

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The Court: Read the question.

(Question read as follows: "And what was the language accompanying the signing of that paper by Mr. Neuwirth?")

Mr. Kanter: That is wrong. Strike it out.

The Court: Strike it out. Withdrawn.

10

Q. What was said at the time this paper was delivered?

The Court: By whom?

Q. By you.

Mr. Kessler: Objected to, if your Honor please, conversation between the principal and his agent, not in the presence of the defendant.

20

Mr. Kanter: I want to show this paper was not intended as the contract, and it was understood by Mr. Steiner—Mr. Steiner was to draw a contract for his client.

Mr. Kessler: The paper speaks for itself.

The Court: No. Outside of that I do not see how that could in any way help me, what he might have said when he signed this receipt, to a real estate agent.

Mr. Kanter: I withdraw it.

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The Court: What good would that do me?

Mr. Kanter: I withdraw the question.

The Court: Even though it was competent, it wouldn't help me any.

Q. What time of the day was the paper, Exhibit C-1, delivered to you—Exhibit— A. This was signed later in the day.

The Court: Were all these papers signed on the same day?

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Mr. Kanter: Yes.

Q. Now, I call your attention to the name appearing as the subscribing witness to this contract and ask whether you saw Mr. Harry Steiner sign this paper. A. No.

The Court: That is exhibit what, now? 10

Q. You didn't see Harry Steiner? A. No—

The Court: You are speaking of Exhibit—?

Mr. Kanter: Exhibit C-1.

Q. But it was delivered to you that— A. That day.

Q. —day, and Mr. Steiner told you those were the signatures of those parties? A. Yes.

Q. And you signed Exhibit D-2 that same day? 20 A. I did.

Q. D-2 for identification. And about how many hours after Exhibit C-1—Exhibit D-1 for identification was signed? A. About five, six hours.

Q. You mean, some considerable— A. Yes.

Q. —later period?

Mr. Kanter: That is all.

Recross examination by Mr. Kessler.

Q. Do I understand you correctly and did you 30 tell the Court that this Exhibit D-1 for identification, which is dated the 13th day of May, 1925, was signed on the same day that these two contracts were signed? A. It was.

Q. Are you sure about that? A. Positive.

Q. Is there any doubt about that? A. I don't think so.

The Court: Well, you ought to know.

Q. It is very important, that question. A. I am 40 positive.

Q. There is no doubt about that in your mind? No doubt about that? A. No doubt about that.

Q. No doubt in your mind that in the morning you signed this memorandum and in the afternoon you signed these contracts? A. Right.

10 Q. You went to Mr. Steiner's office the same day to sign them? A. Yes, later in the day.

Q. You are sure about that now? A. Positive.

Mr. Kessler: All right.

Mr. Kanter: That is all.

Mr. Kessler: May I ask Mr. Max one question, your Honor?

(Mr. Max recalled.)

20 *Examined by Mr. Kessler.*

Q. Mr. Max, you are and were the owner of a considerable number of pieces of real estate in this State and elsewhere? A. No.

Q. What do you mean by that?

Mr. Kanter: That is an answer to the question: "You are and were the owner of considerable real estate".

30 Q. What do you mean by that?

Mr. Kanter: I object to that, because the witness is now called upon to interpret Mr. Kessler's question.

The Court: Well, now, let me—I would like to understand that myself.

Do you know?

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Q. Do you?

The Court: Do you know? The question was asked you whether you are or whether you were the owner of considerable real estate in New Jersey.

Witness: Yes.

The Court: And you say you never—

Witness: No.

The Court: You never were and you are not now?

Witness: No.

Q. Did you ever own any real estate at all? A. I did.

Q. How many pieces? A. Oh, about three—four.

Q. No more than that? A. Off and on.

Q. Well, I am speaking off and on; how many pieces all together off and on did you own? A. Oh—

Q. In the last ten years. A. —about seven.

Q. In the last ten years? A. About seven.

Q. Seven pieces? A. About seven.

Q. And you sold them? A. No.

Q. How many did you sell? A. All but two.

Q. So that you were quite familiar with the—you had gotten familiar with the closing of titles, had you not? A. Yes.

Mr. Kessler: That is all.

Mr. Kanter: That is all. Complainant rests.

Mr. Kessler: Mr. Paul Neuwirth.

PAUL NEUWIRTH, sworn for Defendant.

Direct examination by Mr. Kessler.

Mr. Kessler: I don't know if the practice is here whether we should move for a dismissal on the ground they have not proven there was any mutual mistake or whether your Honor wants to hear the case.

The Court: If you move to dismiss. I won't do it anyway.

Mr. Kessler: I won't move.

Q. You were the agent—

The Court: I don't want to be abrupt. The reason I won't dismiss is because the papers are all running one way and another here, and the explanation which one witness —party gives—I can't tell—I won't dismiss it.

Mr. Kessler: I think your Honor should not.

The Court: And then, of course, there is the fact all the time here present that at the time of closing, these parties did deduct the amount of these mortgages.

Mr. Kessler: Is your Honor familiar with the Colonial Woodworking case?

The Court: My difficulty is just now I am familiar with so many different cases I cannot tell exactly—I am going to hear your argument after a while, but I do know there is this deduction of principal and interest, which becomes quite interesting in these questions.

Mr. Kessler: The Court of Errors and Appeals says that it doesn't make any difference. Did your Honor read that case?

The Court: That, of course, alone would make no difference, but it might with other things.

Mr. Kessler: The Court of Errors points out exactly what other thing must be present.

The Court: Yes. 10

Mr. Kessler: Which, of course, has not been proven in this case.

Q. Mr. Neuwirth, you were the agent involved in the sale of this property from Mr. Max to Beckelman and Steiner? A. Yes, sir.

Q. I show you Exhibit D-1 for identification, and ask you whether you witnessed that signature of Mr. Max? A. I did.

Q. And whose handwriting is that whole contract in? A. I think it is Mr. Max's. Yes. 20

Q. Did you discuss with Mr. Beckelman and Mr. Steiner the question of whether the mortgages that were then on the property, which they were purchasing, was to be subject to or to be assumed by them? A. No.

Q. You did not discuss with them, you say? A. You asked me whether I discussed with them whether they were purchasing the property assumed or subject to the mortgages. I don't think I discussed it with them. 30

Q. Did they discuss it with you? A. I don't make any such distinction. I don't think so.

Q. How did it come this memorandum provided it was to be subject to. Was that to be—

Mr. Kanter: Object to the question on the ground it is argumentative with his own witness.

The Court: Well, now, the question is—?

(Question read.) 40

The Court: Answer the question.

Q. How did it come—

Mr. Kessler: Let me reframe it.

Q. Who suggested that in this memorandum which I show you, Exhibit D-1—

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The Court: Assuming somebody did, who suggested it, if you know?

Q. If you know, that conveyance was to be made subject to the mortgages? A. I can't remember now, it is almost seven years ago.

Q. You can't remember now? A. No.

Q. Now, do you remember whether you had a discussion with Mr. Beckelman about these mortgages, or Mr. Steiner? A. I don't remember about

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having had any discussion.

Q. When you say you don't remember, does it mean to say you may have had and have forgotten or are sure that you did not have? A. As I say, it was over seven years ago, I am not sure I never had any such discussion.

Q. The time is 1925. We want to know whether you are sure you never had any such discussion or whether you do not now remember it. A. I don't remember.

30

Mr. Kanter: I object. It is not a proper question. It is sort of impeaching his own witness.

Mr. Kessler: Not at all. We are entitled to know what he means.

The Court: I will hear it.

Q. What is your answer? A. My answer is I don't remember.

Q. You may have or you may not have, as far

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as you now know?

The Court: He doesn't remember.

Q. You received from Mr. Beckelman a check for $500 which was delivered to Mr. Max?

Mr. Kanter: Mr. Kessler, would you mind, I would like to look at Mr. Neuwirth. 10

Mr. Kessler: He is a nice fellow to look at.

Q. You received from Mr. Beckelman a check for $500, which you delivered to Mr. Max at the time this contract was signed? A. Evidently.

Q. Right. And did you deliver that to Mr. Max? A. I presume so.

Q. At the time of signing the contract? Do you remember that, or don't you? A. I believe I did. 20

Q. Yes. And do you know when you sent this—when you delivered this agreement to Mr. Steiner, and if so, to whom? A. No.

Q. I show you a letter dated May 20, 1925, and ask you whether that letter is signed by you. A. Yes, that is my signature.

Q. Yes. And did you send that letter to Mr. Harry Steiner, the attorney in this case? A. Yes, I wrote that letter.

Q. And did you send it on the day which it appears dated? A. No, I can't remember that. 30

Q. Well, would you date your letters any other date than the day you sent it out?

Mr. Kanter: I object.

A. I—

Mr. Kanter: I object to the question as being argumentative.

Mr. Kessler: Not at all, your Honor.

The Court: I will allow it. Go on. 40

A. I wrote the letter on that date and I presume it was sent out the same day, but I cannot swear it was.

Mr. Kessler: I ask the letter be marked for identification.

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Mr. Kanter: I object to its being marked for identification, because this letter must be offered at a time—

Mr. Kessler: I offer it.

Mr. Kanter: —to show it is competent.

Mr. Kessler: I offer it now, your Honor.

Mr. Kanter: I object to his offer at this time.

Mr. Kessler: The letter is offered for the purpose of contradicting the complainant who says that on the same day he signed this contract, the memorandum, he also signed the contract. This shows he never had the contract until days afterwards, that he could not sign it.

20

The Court: Let it go in so far as it will, if at all— This letter is only on that one point.

Mr. Kanter: Showing it on the date. This is not the letter. This is a letter written by Paul, by Mr. Neuwirth to Mr. Steiner and certainly it is not contradictory of anything that happened, that he might testify to.

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The Court: Referring to—?

Mr. Kanter: Referring to a date. He said, I understand— Suppose the witness is mistaken about the date?

The Court: All right. It may or may not affect the credibility. It is only offered on the question of whether the memorandum and contract were signed on the same day.

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Mr. Kanter: Objection withdrawn.

The Court: Affecting the credibility. It may or may not do it.

Mr. Kanter: All right.

The Court: It was seven years ago, or something like that. 10

Mr. Kessler: I offer it. Before this letter is marked, may I ask to have the receipt, offered by Philip Max, D-1 for identification, marked in evidence?

(The letter formerly marked D-1 for Identification, now marked Exhibit D-1.)

Mr. Kessler: I offer agreement D-2 for Identification in evidence.

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(Letter marked D-2 for Identification now marked Exhibit D-2.)

Mr. Kessler: I now offer the letter signed "Paul" dated May 20th, in evidence.

(Letter marked Exhibit D-3.)

Q. Mr. Neuwirth, we served you with a subpoena duces tecum to produce letters written to you by Mr. Steiner, dated May 27th, and I ask you whether you have found such a letter? A. No, 30 I don't keep files, that was back—

Q. I show you a copy of a letter and ask you if you received the original of that letter? A. I can't remember.

Q. Will you say you didn't receive it? A. I wouldn't say that I did not receive it, no.

Q. I show you letter in response to your letter of May 20th, which has been offered, Exhibit D-3, enclosing the contract for signatures. A. Maybe —yes. 40

Mr. Kessler: I offer that for identification.

(Letter marked D-6 for Identification.)

Q. As far as you know, these two, the complainant and the two defendants never met in this deal? You were the go-between as agent for the complainant? A. I don't remember them ever having met.

Mr. Kessler: You may examine him.

Cross examination by Mr. Kanter.

Q. Mr. Neuwirth, from the context of these letters, it would appear to me that the contract as signed in one case by the Beckelmans, was handed to you by somebody. Who was it? A. The contract or the deed?

Q. The contract, not the deed. Well, you remember—

Mr. Kanter: Withdraw that question.

Q. Mr. Kessler asked you whether you remembered seeing this Exhibit D-1 signed by Mr. Philip Max, that is a memorandum? A. Yes.

Q. Now, after it was signed, what did you do with it? A. I presume I sent it to Mr. Harry Steiner.

Q. And who told you to send it to Harry Steiner? A. I don't remember where it was sent. I only said I presumed it was sent to him. I can't say definitely—

Q. You mean to indicate that is your best recollection? A. Well, I can't even say that.

Q. Well, it got out of your possession. A. Yes.

Q. And into whose hands? A. It evidently did. I don't know into whose hands it got. You ought to know.

Q. Well, I didn't get it from you, did I? A. No.

Q. Well, now, tell us, whom did you give it to? A. Well, as I told Mr. Kessler, it is over seven years ago. I can't remember what I did with an agreement.

Q. Well, you didn't give it back to Max, did you? A. No, Max signed it and gave it to me.

Q. Yes. Now, whom did you give it to? A. I presume I gave it to Mr. Harry Steiner.

Q. All right. Then, that is your best recollection, you gave it to Mr. Harry Steiner. A. I may have given it to Mr. Beckelman.

Q. All right. Your recollection is you gave it to either Mr. Beckelman or Mr. Steiner. Now, I show you—do you recall these papers, Mr. Neuwirth? A. No, I don't remember if I ever saw either of these. I don't remember whether I ever saw either of these.

Q. Now, in your letter of May 20, 1925, you—A. Yes.

Q. —you write to Mr. Harry Steiner. A. Yes.

Q. I ask you whether your memory is that this was written "Please draw up the contract of sale with the terms mentioned therein, with this exception that the title is to be taken on July the 1st, instead of August the 1st." Now, did the memorandum, Exhibit D-1, accompany that letter of May the 20th? A. "Also receipt for $500 deposit." I presume it did. It says there "Also receipt for the $500 deposit."

Q. All right. Then you go on and say in your letter of May 20th "I would suggest that you submit the contract to Bill and Leo so it will meet with their approval before you send it to me to be given to Mr. Max." By submitting the contract to

Bill and Leo, you meant Mr. William Beckelman and Mr. Leo Steiner? A. That is right.

Q. Now, is your memory refreshed as to whether you got the contract from Harry Steiner or from Bill Beckelman—William Beckelman or Leo Steiner? A. Are you talking about those contracts?

Q. Yes, sir. A. No, I don't remember whether I ever saw them or not.

Q. Well, you apparently were referring to a formal contract to be executed. A. Then I asked him to "Please draw up a contract of sale."

Q. "Please draw the contract of sale." This memorandum was sent to Steiner? A. Yes.

Q. Memorandum, Exhibit D-1. A. Yes.

Q. With the request that he draw up a contract —a formal contract of sale? A. Yes.

Q. Is that right? A. Yes, sir.

Q. Now, did you ever see these formal contracts of sale, Exhibits— A. I don't know whether—

Q. —C-1 and Exhibit D-1? A. I don't know whether I did or not.

Q. You don't recall? A. No, sir.

Q. Were they brought by you— Were you present at the closing? A. No. I am sure of that.

Q. You are sure you were not? A. Uh huh.

Q. And did you go to Mr.— Were these signatures on Exhibit C-1 of Mr. Beckelman and Mr. Steiner signed in your presence? A. I don't think so.

Q. Was the signature of Philip Max on Exhibit D-2 signed in your presence? A. I don't think so.

Q. Your recollection is that all these signatures on Exhibit C-1 and on Exhibit D-2 were signed outside of your presence? A. Yes, sir.

Q. You never had anything to do with the actual signing of the formal contracts or procuring the signatures to the formal contracts? A. I don't think I did.

Mr. Kanter: That is all.
Mr. Kessler: That is all, Mr. Neuwirth. Mr. Steiner.
Mr. Kanter: All right. Just a minute.

Q. Do you know on what date these contracts Exhibits C-1 and D-2 had been prepared? A. No.

Mr. Kanter: That is all, Mr. Neuwirth.

HARRY STEINER, sworn for defendant.

Direct examination by Mr. Kessler.

Q. Mr. Steiner, you are a practicing attorney and solicitor of this court? A. I am.

Q. And have been for how long? A. About ten years.

Q. Is Mr. Leo Steiner, one of the defendants in this case, your brother? A. Yes.

Q. You represented him with one William Beckelman, the other defendant in this case? A. I did.

Q. And I ask you when, for the first time, did you see this memorandum?

Mr. Kanter: Mr. Kessler, I cannot hear a word you say.
Mr. Kessler: I can't help that. I will talk louder.

Q. D-1 in evidence.

The Court: You should stay back.
Mr. Kessler: I must deliver the paper.

The Court: Yes, I know, but after you do that, I mean.

Mr. Kessler: Yes.

The Court: Please. Counsel is entitled to hear.

10 A. I received this memorandum, together with a letter from Mr. Neuwirth, the date of the letter is May 20th, Mr. Neuwirth—

Q. Exhibit D-3, which I show you now? A. Yes. Mr. Neuwirth sent me a letter dated May 20, containing this memorandum agreement dated May 13th and the deed to the property into Max, and in his letter he requested me to draw a contract—

Q. The letter speaks for itself, Mr. Steiner, you need not read the letter. And that was the first 20 time, May 20th or the day thereafter? A. I did—

Q. That you for the first time saw Exhibit D-1? A. That is right.

Q. Which is the memorandum agreement. In response to that letter, did you talk to Mr. Beckelman and Mr. Steiner about it? A. Yes, sir.

Q. Yes. And did you prepare such an agreement? A. I did.

Q. I show you Exhibits D-1 and D-2, C-1 and D-2, and ask you whether those are the agree- 30 ments you prepared? A. They are.

Q. And after you prepared them do you remember what you did with them? A. Yes. I mailed them to Mr. Neuwirth, together with the letter.

Q. With a letter? A. With a letter.

Q. I show you Exhibit D-6 for Identification and ask you whether that was the letter. A. Under May 27th, I returned them to Mr. Neuwirth, telling him that I was enclosing contract signed 40 by Mr. Beckelman and Mr. Steiner.

Q. Is that the copy of the letter? A. That is.

Mr. Kessler: I offer that letter in evidence.

(Letter formerly marked D-6 for Identification now marked Exhibit D-6.) 10

Q. When was the next time you heard anything further about this contract? A. A few days after that Mr. Max called me up.

Q. Had you ever met Mr. Max before that? A. I had not.

Q. He called you up. You mean, on the telephone? A. Yes, sir.

Q. And did you talk to him and he talk to you? A. Yes.

Q. What did you say to each other? A. Why, he stated that I had not included in the contract the fact that the premises were subject to a certain lease and also the type of building on the lease. 20

Mr. Kanter: This is what date?

A. (Continuing.) And Mr. Max said to me that I had not included in the lease those items, and I sent him a letter.

Q. I show you Exhibit D-3 for Identification and ask you whether you sent him that letter? A. Yes, on June 1st I sent a letter to Mr. Max, of which this is a copy. 30

Mr. Kessler: I offer it.

A. (Continuing.) Asking him to return the copy which I had sent him signed by Mr. Beckelman and Mr. Steiner that I would make the changes suggested.

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Mr. Kessler: I offer this in evidence.

(Letter formerly marked D-3 for Identification now marked Exhibit D-3.)

Q. This letter, dated June 1st, is addressed to
10 Mr. Max and dated June 1st, "In looking in my files I find that I have already delivered to Mr. Neuwirth a contract signed by Mr. Beckelman and Mr. Leo Steiner for delivery to you. If you will return this copy with a copy signed by you, I shall make the changes suggested by you." Eventually, did the contract come back to your hands, signed by Mr. Max? A. Yes.

Q. Mr. Max said, Mr. Steiner, that he came to your office and in your office the contract—the copy
20 of the contract which he signed, was signed in your office. Is that so, or not? A. That is not so.

Q. Was he ever in your office at any time? A. Not up to the closing of title.

Q. Is that the only time that he was ever there? A. Yes.

Q. Did I ask you, or did you tell me how you received this copy of the contract signed by Mr. Max? A. No.

Q. How did you receive it? A. I don't recall.
30 I presume it was mailed to me.

Q. Presume what? A. It was mailed to me, but it was not delivered to me.

Q. I show you a letter marked D-4 for Identification, and ask you whether you sent that letter to Mr. Max.

Mr. Kanter: I call your attention that it is dated July 6th.

Q. Dated July 6th. A. I did.

40 Mr. Kessler: I offer the letter in evidence.

(Letter formerly marked D-4 for Identification, now marked Exhibit D-4.)

The Court: Did you draw the deed too?

Witness: Yes, sir, I did.

Q. Now, on the day— 10

The Court: Pardon me. How do you explain—Attached to the contract—it reads "By assuming the mortgages

"10,000."

and the deed that you prepared, says "the conveyance is subject to existing first mortgage in the sum of $6,000 held by Ada F. Love and the second mortgage in the amount of $4,000 held by John Dughi". 20

Witness: The agreement of the parties as conveyed to me through Mr. Neuwirth by this original memorandum of May 13th, was it?

The Court: Are you telling about the agent, now?

Witness: Yes. So that the premises were to be taken subject to the mortgages and in his memorandum—the letter so states—and in his memorandum he says, "Draw a contract in accordance with that." That was 30 the understanding of all the parties.

The Court: That is according to the agent?

Witness: Yes, sir.

Q. And according to the receipt signed by Mr. Max? A. Receipt signed by Mr. Max which set forth all the terms of the contract.

Q. His signature—

The Court: Well, then, you drew the contract? 40

Witness: Yes, sir, and failed—

The Court: Which states "by assuming the mortgage".

Witness: That was a mistake on my part.

10 Q. How did it happen? A. I gave my stenographer the memorandum and asked her to draw a contract in accordance with the agreement and the deed for the description, and the form contained printed clause which I included—which I did not notice, and therefore included it, changed in accordance with the instructions I had received.

Q. And did you observe it at any time before the closing of title?

20 Mr. Kanter: I object to that.

The Court: What is that?

Mr. Kanter: Did he observe it? What difference does it make whether he observed it?

Mr. Kessler: I am going to—

The Court: I might make a difference.

Q. Did you observe it at any time before the closing? A. Yes, sir, I did.

30 Q. And what happened at the closing? A. At the closing I had drawn the deed in accordance with the original memorandum, and the understanding of the parties as I knew it existed, at that time, and told Mr. Max that I had made the change in accordance with that understanding, subject to the mortgage and he said that was all right; he looked at the deed, went over it very carefully, turned every page and read everything in it and signed it.

40 Q. And executed it in your presence? A. Yes, sir.

Mr. Kessler: You may cross examine.

Cross examination by Mr. Kanter.

Q. Mr. Steiner, Max was not represented by any other lawyer, was he? A. He was not.

Q. You saw this original memorandum given you, you say, some time around May 20 or 21, through the mail by Mr. Neuwirth? A. That is right.

Q. And by "memorandum" I mean Exhibit D-1. Is that right? A. That is right.

Q. And following that memorandum—following the receipt of that memorandum, did you consult with your clients, Beckelman and Steiner? A. Oh—

Q Did you, yes or no? A. I believe I did.

Q. All right. And following that conference between your clients and yourself, you directed your stenographer or secretary to draw a contract, did you not? A. I directed her to draw a contract in accordance with the terms of that memorandum?

Q. Yes. And after you gave that direction to your stenographer, you looked at the contract, didn't you? A. Yes, sir.

Q. And you saw the contracts, Exhibits D-1 and D-2, didn't you? A. I did.

Q. Then you knew what those contracts contained, didn't you? A. I did not.

Q. Do you mean to tell me that as a lawyer, who had then been practicing for about five years, you did not know the terms of the contract, Exhibit D-1 and D-2? A. Looking at them? I do mean to say the fact the assuming clause in there was a mistake.

Q. That is for the Court to decide. A. I didn't know at the time it was in there.

Q. You looked at the contracts before sending them out, did you not? A. I presume I did.

Q. Well, did you or did you not? A. I presume I did.

Q. Can't you answer more definitely as a lawyer, that you did or you did not? A. I looked at them, yes, sir.

Q. And you had your clients sign them? A. I did.

Q. You advised them to sign them? A. I did.

Q. And you corrected in the printed form the word "Mortgage" to "Mortgages" didn't you? A. That I don't recall.

Q. Well, look at them, please. You see that clause there, Mr. Steiner, marked "by assuming the mortgage" you wrote in the letter "s" did you not? A. There appears to be an "s" after "Mortgage".

Q. You wrote that in, didn't you? A. That I don't recall.

Q. Well, you saw it before you sent out the contracts? A. I don't recall whether I did.

Q. You witnessed them, did you not? A. I witnessed the signatures of Beckelman and Steiner, not the signature of Max.

Q. All right. Now, did that contract conform with the written memorandum between the parties originally?

Mr. Kessler: Objected to. The papers speak for themselves, your Honor.

The Court: That is so, isn't it?

Mr. Kanter: Sir?

The Court: I think that is so, isn't it?

Mr. Kanter: Yes, but the witness has said this is the result of a mistake, this particular

clause in the contract is the result of a mistake.

The Court: I will allow the question.

Q. Did the contract, Exhibit C-1, conform with the contract, Exhibit D-1? A. Very apparently not. 10

Q. No. There were lots of changes in there, were there not?

Mr. Kessler: Objected to, your Honor, that question.

The Court: Well, there were some changes.

Mr. Kanter: Lots of changes.

The Court: I don't know whether a lot; there were some changes. 20

Mr. Kessler: No changes, your Honor. I don't want to argue. There were no changes, according to the memorandum, because it was devoid of any conditions, except two or three additions, devoid of any changes.

Mr. Kanter: Wait a minute.

Q. The contract, Exhibit C-1, was drawn as a result of your conference with Beckelman and Steiner, was it not? A. Not solely, it was drawn mainly as the result of the receipt of the memorandum— 30

The Court: Well—

A. —and their directions to draw it in accordance with that memorandum.

The Court: Well—

Q. Yes. But you did not draw C-1 in accordance with memorandum D-1, did you? A. I have 40

already told you I did not on account of a mistake on my part solely.

Q. In that one particular? A. That is right.

Q. All right. Let's see. Is there anything in this contract of May 13th, 1925— A. No. All the printed clauses—

Q. Wait a minute. A. —in the contract are not in the original memorandum.

The Court: Wait for the question.

Witness: Yes, sir.

The Court: It is always a good thing for a lawyer to remember, sometimes, he is a witness. That is what you are now. You will get yourself in trouble if you try to play lawyer up there.

Q. Was there anything in the contract, Exhibit D-1, which provided for the adjustment of insurance premiums, water rates, taxes or interest on mortgages? A. There was not.

Q. Was there anything in the contract— That clause was contained in your form C-1, was it not?

The Court: If you want me to know the contract or to reform, don't make more clauses out of the original memorandum, you don't have to.

Mr. Kanter: And increasing the burden of the vendor.

The Court: Whatever it is, I mean, they are before me. I see all this.

Mr. Kanter: Well, it is a fact, is it not— I would like to have it formally on the record—that the obligations of the vendor, Max, were considerably increased from the obligations in C-1, from that which they were in C-1—pardon me, obligations of the vendor,

Max, as expressed in the contract, Exhibit C-1 were considerably increased from that as expressed in the document D-1.

Mr. Kessler: That is objected to, your Honor. The documents speak for themselves. The Court can see them. 10

Mr. Kanter: Well, you as a lawyer knew that.

The Court: In the event of your requiring him to have—spread in full on the record, it will be so stressed.

Mr. Kanter: Yes.

(To Witness): As a lawyer, you knew that?

The Court: You can argue that up above, if you want to.

Mr. Kanter: No, I don't. 20

The Court: That can be the only object of the record, otherwise, it is here before me, and if the record goes up, you will have all the exhibits printed.

Q. You knew, as a lawyer, did you not, that the obligations of the vendor under this contract Exhibit C-1, were materially different and increased from the obligations in the contract D-1.

Mr. Kessler: Objected to, your Honor. 30

The Court: Let him answer.

Mr. Kessler: The contract speaks for itself.

The Court: Let him answer that question. Of course, you knew?

Witness: Yes, sir.

Q. And as the duties of the vendor were increased or changed, so was the obligation of the vendee.

40

Mr. Kessler: Well, objected to.

Q. Was it not?

Mr. Kessler: If your Honor please, that is not a proper question.

The Court: No. Leave a little something for me.

10

Mr. Kanter: Very good. I withdraw it.

Q. Now, when you came to close the title, was it as a result of a letter from you—

Mr. Kanter: Withdrawn.

Q. You say that Max called you up some time around May the 27th or June the 1st, and asked you to correct the contracts. Is that right? A. That is right.

20

Q. And you made the corrections solely in the paper which— A. Which he signed.

Q. —which he had signed? A. That is right.

Mr. Kessler: The other way around, your Honor.

Mr. Kanter: Exhibit D-2? No, not which he signed.

Mr. Kessler: Which was delivered to him.

Witness: Mr. Max already had a copy signed by Beckelman and Steiner and did not return it to me to make the change.

30

Mr. Kanter: Let's get this straight. Around May 27th or June 1st—

Mr. Kessler: I am in error about that.

Mr. Kanter: You are in error. I thought so.

Mr. Kessler: I withdraw that.

Mr. Kanter: My statement was correct, then, Mr. Kessler?

Mr. Kessler: Yes.

40

Q. It is correct, is it not, that you made the correction solely upon the copy that was in your possession? A. That is right. I had asked Mr. Max to send them both back to me so I could correct them, and he only sent the one I signed and retained the one I sent him. 10

Q. Wait a minute. On June 1st, Exhibit D-2 had been in your possession some days, had it not? A. I don't think so.

Q. All right. When you came to close this title—the fact, however, is, that the correction was made only on the copy which you had? A. That is a fact.

Q. And not on the copy signed by Mr. Beckelman? A. The reason being that he did not return it to me for change. 20

Q. Well, how long prior to the change did you have Max's signature on there? A. Oh, I presume when it came in the mails I made the change suggested by him at his request.

Q. On July the 8th you remember closing this title, do you? A. I have a recollection of it.

Q. It is a fact that Mr. Max was in your office on that day? A. Yes, sir.

Q. And it is a fact, is it not, that he engaged you to draw the deed? A. Yes, he requested me to draw it. 30

Q. You were paid for that? A. My recollection was I made a charge of ten dollars to him and he kicked, and I cut it to five dollars.

Mr. Kessler: I move to strike it out as not responsive.

Q. You were paid for the charge?

Mr. Kessler: I don't think counsel can— 40

The Court: Now, what is this? You were paid, weren't you?

Witness: Yes.

Mr. Kanter: Yes.

10 Q. And you made up the statement of closing, Exhibit C-3? A. I did.

Q. And it was upon this basis that the property was sold and the difference paid to Mr. Max? A. That is right.

Q. Is that right? Now, you said— Did Max ask you whether the deed you had prepared was a proper one for him to sign? A. No, he didn't— he looked it over himself.

Q. You were paid for the services? A. I was paid for the deed.

20 Q. Didn't Max ask you the question whether this was the right deed? A. He did not.

Q. And you did not offer any advice thereon? A. I told him what it contained.

Q. No. You didn't offer any advice thereon? A. I told him what the deed contained.

Q. Yes. A. And he in turn looked that over carefully himself.

Q. And what did you say the deed contained? A. Told him it was a deed for the premises and

30 was subject to the mortgages and that change had been made from the contract.

Q. You told him that the only difference between the deed as prepared by you and the deed as provided for in the contract was that it was— the deed provided that the property is to be subject to the mortgages, whereas the contract was by assuming the mortgages? A. I told him that that charge was in the deed.

Q. Is that the only change you told him of? A.

40 Yes.

Q. Now, up to that time—up to the time that the deed was signed by Max there was no suggestion by you to Max that the contract was a mistake, was there? A. No.

Q. You never informed Max that the contract was a mistake? A. I didn't know it myself until I went to draw the deed. 10

Q. All right. And then when you came to draw the deed you said, "The change that I am going to make in the deed, the only change I am going to make the property subject to the mortgages instead of assuming the mortgages." A. Yes, sir.

Q. Is that right? A. Yes.

Q. And Max said all right? A. That is right.

Q. Did you tell him about any other changes you made in the property—in the deed? A. I don't think so. 20

Q. Did your contract provide, for example, for the giving of a full covenant warranty deed (handing witness paper)? A. My deed of warranty.

Q. Did it say full covenant warranty? A. Yes.

Q. What kind of deed did you prepare? Don't look at the label. Look at the deed. A. Well, I took the form of warranty deed that I had and drew that up.

Q. Was it your practice to take papers by their labels and not look at their contents? 30

Mr. Kessler: Object, your Honor.

Q. Isn't it a fact the deed you prepared differed also from the contract in pressing the further obligation upon Max of a full covenant warranty instead of the usual warranty deed?

Mr. Kessler: I object. The paper speaks for itself. 40

Q. Why did you prepare the deed in the form you did prepare it by including the further assuming full covenant warranty instead of the regular warranty in the contract?

10 Mr. Kessler: I object.

The Court: I think it is plain, he just picked up a form and drew it up where it said warranty on it.

Q. Is that your explanation as the Court understands it? A. Yes.

Q. And that is the best explanation you can make? A. That is the only one.

Mr. Kessler: I object to whether it is the best one. It is the explanation.

20

Q. You were dealing with a layman, weren't you, Mr. Steiner? A. Yes, sir.

Q. You knew Max was not a lawyer. A. Yes.

Q. And you knew he called upon you to prepare the proper deed? A. At one time I suggested that we have his attorney and he said he was fully conversant with titles himself.

Q. But he was willing to engage you. A. Yes.

30 Mr. Kanter: Yes. That is all, Mr. Steiner.

Mr. Kessler: That is all, Mr. Steiner.

Mr. Beckelman, please.

William Beckelman, sworn for Defendant.

Direct examination by Mr. Kessler.

Q. Mr. Beckelman, you were one of the defendants in this case? A. Yes.

Q. You are the gentleman that signed the con-

40 tracts involved in the purchase of this property. A. Yes.

Q. You never met Mr. Max, did you? A. No.

Q. You dealt through whom? A. Mr. Neuwirth.

Q. Yes. And at the time you agreed to purchase this property and sent a check of $500 to Mr. Neuwirth, did you discuss with him at all as to the question of the mortgages? A. Yes, sir. 10

Q. That were then on the property? A. Yes, sir.

Q. Were you apprised of what the mortgages were? A. Yes, sir.

Q. And what did you say to him about the mortgages? A. I told him that Leo Steiner and I would buy the property subject to the existing mortgages.

Q. Was Mr. Leo Steiner with you or were you alone? A. I believe I was alone. 20

Q. And was that the understanding to deliver the check to him? A. Yes.

Q. And thereafter did you see this receipt, Exhibit C-1, in Mr. Harry Steiner's office? A. I believe so.

Q. And isn't the agreement thereon— Was there any change between you and Mr. Max or with his agent that you were to take this property other than subject to the mortgages?

30

Mr. Kanter: I object to that question because, clearly, the agreement was changed.

(Question read.)

Mr. Kessler: That is the most germane thing of the whole case.

The Court: I will allow it.

Q. Was there? A. No.

Q. You never saw the deed that was delivered to Mr. Steiner, did you? A. I don't remember that. 40

Q. As a matter of fact, did you read the agreement?

Mr. Kessler: I will withdraw that.

Q. Did you see the agreement that you signed, the agreement dated—marked Exhibit D-2— No, that is not the exhibit. —C-1, that you signed. A. That is my signature.

Q. Did you read the agreement when you signed it? A. I don't imagine so.

Q. Mr. Steiner was your lawyer? A. Yes, sir.

Q. He advised you to sign it? A. Yes, sir.

Mr. Kessler: That is all. You may examine.

Cross examination by Mr. Kanter.

Q. Mr. Beckelman, what is your business? A. Security dealer.

Q. How long have you been in that business? A. About seven years, six years.

Q. And before you went in the security business, what was your business? A. Public accountant.

Q. Yes. You had received legal training, had you not? A. In a commercial way.

Q. Yes, quite an extensive course at the University in law? A. Commercial law, yes.

Q. And you had to pass an examination of that in order to be admitted as a certified accountant, didn't you? A. No, I never was admitted as a certified accountant.

Q. You passed examinations in law, didn't you? A. Yes.

Q. Now, you say you saw this Exhibit D-1, didn't you? A. I believe so.

Q. Where did you see it, first? A. I don't know where. I imagine, if I saw it, I saw it at Mr. Steiner's office.

Q. Your recollection as to what happened is a little indefinite? A. That is right.

Q. And then you and Mr. Steiner discussed the terms of the contract? A. I imagine so. 10

Q. At any event Mr. Steiner was your lawyer? A. Yes.

Q. And you thought any paper that he saw fit to prepare on the subject of contracts was the proper paper? A. Yes.

Q. And one that you were willing to sign? A. Yes, sir.

Q. And in reliance upon that you signed Exhibit C-1 and D-2? A. Yes, sir. 20

Q. You did not see Mr. Max between that time and the time you received the deed, did you? A. I never saw Mr. Max.

Q. Never spoke to Mr. Max at any time? A. No.

Q. Is that true, even to the present time, Mr. Beckelman? A. That is right.

Q. Now, you were quite anxious to hold on to this property, were you not? 30

Mr. Kessler: I object to that as immaterial.

Mr. Kanter: Question of trust.

The Court: "Hold on to"?

Mr. Kanter: Yes.

Q. How long did you hold on to this property?

Mr. Kessler: Objected to as immaterial.

The Court: "How long you held it?" 40

Mr. Kanter: Yes.

Mr. Kessler: Yes. This is after the closing of the title.

The Court: You mean, after he took this title?

10 Mr. Kanter: Yes.

The Court: What difference does that make? How will it help me in any way?

Mr. Kanter: The question is, they say the contract was a mistake, and the question is as to when the claim arose is very significant as to how they acted in reference to the property and until when.

Mr. Kessler: It does not appear these people ever knew there was such a mistake in

20 the contract.

Q. You didn't know of any mistake in the contract? A. No.

Q. You didn't know that the contract was in any event—was different from the deed, did you? A. No.

Q. You didn't know that the deed was different from the contract? A. No.

Q. Or the contract different from the memo-

30 randum? A. No.

Q. Anything that your lawyer did on the subject met with your approval? A. That is right.

The Court: He was your partner in the transaction?

Witness: No.

Mr. Kessler: No, no.

Mr. Kanter: No.

The Court: The brother is a lawyer?

Witness: The brother is not a lawyer.

40

Q. Now, do you recall in the course of the affidavits made by— Just a minute. A motion was made, you were told, were you not, that in the course of these proceedings that the answer that you interposed in this case originally was sham. You know that, don't you? A. What do you mean, it was sham? 10

Q. Untrue.

Mr. Kessler: He may not know that. If he signed an affidavit, ask him if he signed an affidavit.

The Court: Well, do you know upon motion being made to strike out your answer? Do you? Were you told about it?

Mr. Kanter: Yes. He signed an affidavit. 20

Witness: Well—

The Court: You were told about it?

Witness: No doubt when counsel prepared an affidavit I signed it, no doubt, refusing the complainant's—

The Court: Do you remember having signed such a paper?

Witness: Yes, sir.

The Court: That is what he is talking about. 30

Witness: Yes.

The Court: Show him the affidavit.

There are a couple of motions in here. There was a motion to strike the answer?

Mr. Kanter: Yes, in that affidavit.

The Court: Let's see. Affidavit, affidavit —there are a lot of them here.

Mr. Kanter: I thought it was an affidavit by Mr. Beckelman. I find the affidavit was made by Harry Steiner. 40

Witness: I beg your pardon?

Q. Until when did you own this property?

Mr. Kessler: Objected to, if your Honor please, immaterial.

The Court: I will allow it.

10 A. Until the foreclosure.

Q. When was that? A. A few months back.

Q. Yes. And there was quite a change in the value of that property?

Mr. Kessler: Objected to.

Q. (Continuing.) Shortly before that time, was there not?

Mr. Kessler: That is very true.

The Court: What difference does it make?

20

Q. Didn't you, up to that time, up to the time the foreclosure suit was instituted, go to Mr. Merrill and his client, Mr. Dughi and ask for a continuance of the mortgages?

The Court: Why shouldn't he? I mean—

Mr. Kanter: Without suggesting he was not liable on the bond?

The Court: I think that of itself would not—

30

Mr. Kessler: The record—

The Court: I mean, that would not make him liable, would it?

Mr. Kanter: If it won't help your Honor, I won't press the question.

The Court: I don't see where it hepls me any at all. I conclude he was looking after his equity that he put in there. A lot of people are trying to help themselves every old way now. Most of them are not succeeding very well.

40

Mr. Kanter: The question does not help?

The Court: No.

Mr. Kanter: Withdraw the question.

The Court: The question I am interested in whether you—your bill was filed to reform this deed. Dependent on that you have a couple of other causes of action. If you fail on the first one, your other two won't do you much good, as I can see. You want this deed reformed. You want me to put in that deed there was an absolute assumption of these mortgages.

Mr. Kanter: Yes.

The Court: And the fact it was not there was a mistake. You want the instrument reformed. You want to bend your efforts towards showing me there was a mistake here, that affected the parties, and the fact that the deed which was finally given is subject to the mortgages rather than assuming them and that helps me.

Q. The point of your transaction—your actions in this case, whatever were the right papers to be drawn and executed you left entirely to Mr. Steiner, did you not? A. Harry Steiner, yes.

Q. Harry Steiner. I beg your pardon. He was your lawyer. A. Yes.

Q. And he was Leo Steiner's lawyer, was he not? A. Yes.

Q. And the character of the papers, the form of the papers, the contents of the papers are matters which you left entirely to him? A. Yes.

Mr. Kanter: That is all.

Mr. Kessler: That is all, Mr. Beckelman. Mr. Leo Steiner, please.

Mr. Kanter: May I recall Mr. Beckelman for one moment, please?

The Court: Yes. Mr. Beckelman.

Q. Mr. Beckelman, after the title was closed, you received a copy of this statement from your lawyer? A. I imagine—

Q. Statement Exhibit C-3? A. I imagine so.

Q. Is it your recollection whether you did or not? A. I don't recall offhand. I say, I imagine so.

Q. You mean to say that you believe you did? A. Yes, I believe I did.

Q. And did you make any objection to any items on that statement? A. I don't think I did.

Q. Between you and Mr. Steiner you furnished approximately the net balance, the $3800, is that right, towards the purchase of this property? A. Yes.

Examined by Mr. Kessler.

Q. Did you ever authorize Mr. Steiner in your behalf to change the subject to the mortgages to an assumption? A. No.

Mr. Kessler: That is all.

Examined by Mr. Kanter.

Q. Did you ever object to the clause in the contract that the property was to be made subject to—

The Court: No, it was to be assumed.

Q. —that the mortgages were to be assumed? A. No.

Q. Did you ever object to the inclusion for your benefit of all other terms in that contract, Exhibit C-1? A. No.

Q. Did you ever object to the terms of the deed giving you a full covenant warranty deed? A. No.

Q. Did you ever object to anything that Mr. Steiner did for you? A. No.

10

Examined by Mr. Kessler.

Q. Did you ever read this contract?

Mr. Kanter: I object to that question.

Mr. Kessler: He said—

Mr. Kanter: I object to that question "Did you ever read this contract?"

Mr. Kessler: Your Honor has not—

Mr. Kanter: I object to that.

The Court: Why?

20

Mr. Kanter: Because it was his lawyer who prepared it, it was his own job.

The Court: Sometimes we read what our lawyers prepare.

A. I don't believe I did.

Mr. Kessler: That's all, Mr. Beckelman. Mr. Steiner, please.

LEO STEINER, sworn for defendant.

30

Direct examination by Mr. Kessler.

Mr. Kessler: I forgot to state to your Honor in my opening that in addition to an answer that we filed, we filed a cross bill, asking for reformation of this contract. If your Honor would come to the conclusion there ought to be a reformation of the deed, because the contract too states that it is assumed, we say under our case, that the contract should

40

be reformed so that the contract should read "Subject to" so that your Honor will have that in your mind in consideration of the case.

10 Q. Mr. Steiner, you are one of the defendants in the case? A. Yes.

Q. Did you ever meet Mr. Max in this case? A. No.

Q. Did you ever meet Mr. Neuwirth in connection with this case or did you do all your business through Mr. Beckelman? A. Most everything was through Mr. Beckelman.

Q. When you say "mostly" was everything or wasn't it? A. Well, I recall something, originally, 20 I think that Mr. Neuwirth—I happened to mention that to Mr. Neuwirth, but he claims my recollection is not so good. I don't know whether I should bring it up or not, but—

Q. What did you have to do with Mr. Neuwirth in connection with this case? A. Originally I was under the impression that Mr. Neuwirth and Mr. Beckelman were going to purchase that property, and, later on, Mr. Neuwirth changed his mind, and I believe I took his conversation something to that 30 effect. That is the only thing I remember talking to Mr. Neuwirth about.

Q. But you never discussed terms with him. You left that all to Mr. Beckelman, your partner, or did you? A. Well, no. I knew how much was to be paid for the property.

Q. I am not talking about that. I asked you whether you discussed with Mr. Beckelman, we know you discussed with your partner—I don't mean Beckelman, I mean Mr. Neuwirth. A. No.

40 Q. You never met Mr. Max? A. No.

Mr. Kessler: That's all.

Mr. Kanter: Wait a minute, Mr. Steiner.

Cross examination by Mr. Kanter.

Q. The original memorandum of May the 13th, 1925, signed by Max, was one to which you never intended to be a party, is that right, Mr. Steiner? A. Well, that I don't remember.

Q. Well, you notice the paper of May 13th did not designate you as a purchaser? A. Well, whether—

Q. Now, wait a minute.

The Court: Yes.

Q. Will you answer that question for me? A. What was the question?

(Question read as follows: "Well, you notice the paper of May 13th did not designate you as a purchaser?")

Mr. Kanter: Exhibit D-1.

A. It did not designate me as a purchaser.

Q. Exhibit D-1 was not intended to include you as a purchaser? A. Well, that I don't know whether it was intended. It did not show it.

Q. Nor did you intend to be a purchaser when that was drawn? A. Well, that I couldn't agree with.

Q. You cannot say that you did intend to be a purchaser when that was drawn? A. Yes, sir, I did intend to be a purchaser when that was drawn.

Q. Did you instruct Mr. Neuwirth that you were going to be one of the purchasers of this property? A. Mr. Neuwirth knew about it, yes, whether I told him directly—I believe I did tell him, yes.

Q. That you were going to be a purchaser? A. Yes.

Q. But your name was omitted from this memorandum, D-1, by mistake. A. That I don't know.

Q. Well, you saw the paper, Exhibit D-1. A. Yes.

Q. And you saw your name was not included
10 therein? A. Yes, sir.

Q. You wanted to be included as a purchaser, didn't you? A. Evidently.

Q. Sure.

The Court: Well—

Q. And you instructed your brother and also Harry Steiner to include you as a purchaser in the contract of purchase? A. Yes, sir.

Q. What is your business? A. I am with L. F.
20 Rothschild & Company, stockbrokers.

Q. Stockbrokers? A. Yes.

Q. And you read the contract? A. I don't remember.

Q. You did not care whether you read it or not? A. No, I wouldn't say that.

Q. You left it to your brother to draw the proper memorandum there? A. Possibly, yes, if I read any part of the contract I would read any changes from any printed forms.

30 Q. You— A. They were issued to.

Q. I see. Now, did you notice the changes in the written form as differing from Exhibit D-1, looking at the last page of that printed form? A. The only changes I see is of the dates.

Q. I don't care what you see. You saw those changes, did you not? A. Evidently.

Q. Whether you see any legal significance in that is immaterial just now. A. Evidently.

Q. You saw those changes? A. Evidently.

40

The Court: What do you mean "evidently"?

Witness: Well, I—

The Court: You mean they were all left to be seen.

Q. Now, did you see them?

The Court: Did you see them, that is what he means.

Witness: One thing, Judge, when seven years have gone by you don't remember every one of the details.

The Court: You say "evidently can be seen". He wants to know if you saw them.

Mr. Kessler: If you—

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

Witness: To be perfectly frank, ordinarily, I read the typewritten changes. That is all I can say. Now, whether I did that in this particular thing, I would just be guessing.

Q. Now, you saw this memorandum, Exhibit D-1, that is the paper approximately of 50 or 75 words. You saw that, didn't you? A. Yes, sir.

Q. You saw the paper, Exhibit C-1, was quite a document. A. That is right.

Q. You saw that, didn't you? A. Yes.

Q. Did you look it over at all? Did you read anything in there? A. Except from what I have told you.

Q. Did you read how much you were to pay for the property? A. Yes, sir.

Q. Did you read how you were to pay for it? A. (Witness pauses.)

Q. Did you? Yes or no. A. Well, if my memory were as good as that, I could do a lot of other things.

Q. Now, you are a stock broker, aren't you? A. Well, if you want to call me that.

Q. You called it that yourself. A. No. I said I was employed by L. F. Rothschild, stockbrokers. I am not a stockbroker.

10

The Court: Stockbrokers are now suffering from lapse of memory.

Mr. Kessler: They have a good excuse if they did.

Witness: I didn't say that.

The Court: I don't know whether stockbrokers' memories are any better than ours.

Mr. Kanter: And they deal with—

The Court: Stockbrokers, I imagine, while they handle a lot of legal documents, very rarely look into them, read what the conditions are, the conditions of the contract, and so forth.

20

Q. Did you read how much you were to pay for the property? A. I believe I did.

Q. Did you read how you were to pay for the property? A. What do you mean "how"?

Q. The terms of payment, what the terms of payment were? A. The terms of payment?

30

Q. Yes. A. Well, as a—

Q. Did you read it? Yes or no. Can't you answer? A. To be perfectly frank, I cannot answer that unless I want to guess at the answer. If you want me to guess, I will guess.

Q. The only thing you read was that you were to pay $14,500 for the property. Is that right? A. I don't remember whether that was the only thing or not. I told you I ordinarily read changes in documents. Now, whether I read it in this particular document or not, I don't remember.

40

Q. How could you know whether there was a change or not unless you read it? A. Well, if I read it, if I did look for changes, I must have read it. Now, whether I looked for it in this particular instance, I can't tell you.

Q. Did you read to see whether the contract price was correctly expressed? A. If I read the changes, I evidently did. 10

Q. Now, please don't argue with me. Did you look to see whether the contract price was correctly expressed?

Witness: Your Honor, counsel is asking me to guess at a question. I cannot guess at it.

The Court: Then you can simply say "I don't know". 20

Witness: I don't know.

Mr. Kanter: All right.

The Court: Why all this arguing back and forth?

Witness: Well, that is—

The Court: That is what you mean, you don't know whether you read this or not.

Witness: No, I don't remember.

The Court: Is that what you are trying to tell me? 30

Witness: Yes.

The Court: All right.

Q. Then, if Mr. Beckelman read it in your presence— A. Well, that I don't remember, either.

Q. —were you there with him when he signed the contract? A. I don't remember that.

Q. Do you remember whether you discussed terms, the terms of the contract? A. Whether I discussed the terms of the contract? 40

Q. Yes. A. Well, we naturally must have discussed some terms.

Q. Well, did you discuss how you were to pay for the property? A. We probably did. I don't know.

10 Q. Where did this discussion take place? A. That I don't remember.

Q. In Mr. Steiner's office? A. That I don't remember.

Q. Did it take place before you affixed your name to the contract, Exhibit C-1? A. The chances are I did, yes.

Q. Was Exhibit C-1 before you? A. That I don't know.

Q. Well, in any event— A. Which is C-1, may

20 I ask?

Q. This paper I now hold. A. That I don't know. We may have discussed it prior to that, we may have discussed it subsequent to that.

The Court: Was that C-1?
Mr. Kanter: Yes, Exhibit C-1.

Q. You had C-1 before you when you had your discussion, didn't you? A. I don't know.

Q. Well, how many days before this contract,

30 Exhibit D-1 was signed by you did you have paper Exhibit C-1, the memorandum agreement? A. I don't remember.

Q. Then you don't recall any discussion about this contract, Exhibit C-1 or D-1 whatever? A. Well, we naturally had discussions with regard to the purchase of the property.

Q. But you did have discussions? A. But—

Q. Pardon me. Did you finish your answer? A. —whether it was prior to or subsequent to

40 that, that I don't know.

Q. Well, you had the contract in your possession before you got the deed, didn't you? A. In my possession?

Q. Yes. A. I probably signed it before, yes, sir. Whether I had it in my possession or whether I signed it in my brother's office, that I don't know.

Q. Well you saw the contract before you got the deed, didn't you? A. Evidently.

Q. Now, did you between that time and July the 8th call to anybody's attention that there was anything wrong in that contract? A. What date is July 8th, may I ask?

Q. July 8th was the closing date, July 8th, 1925. A. Did I between that date?

Q. Between the time you first examined the contract and July 8th, 1925, call to anybody's attention that any terms in that contract were incorrect? A. No.

Q. As far as you knew, all the terms there were satisfactory and agreeable and correct? A. As far as I knew.

Q. And as far as Mr. Beckelman knew that was so. Isn't that true? A. That I couldn't say.

Q. Well, you discussed it with Mr. Beckelman? A. Well, I don't know whether my discussions were prior or subsequent to the contract.

Q. You got the contract some time before July the 8th, 1925, signed by Max, didn't you? A. Evidently.

Q. Between the date that you so received the contract and July the 8th, 1925, you and Beckelman discussed the terms of that contract, didn't you? A. You mean, between the contract and the deed?

Q. Yes, the deed was delivered July the 8th, 1925. A. I don't know whether discussions took place prior or subsequent to the signing of the contract. I think I have mentioned that twice.

Q. Well, now, I am asking you again. A. Yes.

10 Q. And you signed the contract some time prior to July 8th, 1925. Can you fix that in your mind? A. I cannot fix it except for the fact I must have signed the contract prior to the deed.

Q. All right. Now, between the time that you signed the contract, whatever date that was— A. Yes, sir.

Q. —whether it was May 27 or June the 1st, or whatever date it was, and July 8th, 1925, you discussed this contract that had been signed by you

20 with Mr. Beckelman, didn't you? A. I don't know whether I discussed it prior to or subsequent to the contract.

Q. You don't recall whether you discussed it with Beckelman before signing or after? A. That is correct.

Q. But there was a discussion at some time? A. There certainly was.

Q. And the contract as you signed it, you found incorrect?

30

Mr. Kessler: I object. This witness said he did not read it, he just signed it.

The Court: That is as I understood him right along. He doesn't know whether he signed what he read or not.

Mr. Kanter: He said he did not discuss it after he signed it.

Witness: No. That I did not say.

The Court: Of course, there is a burden

40 on you, you know, in your own case, to show there was some mistake here.

Are you through?

Mr. Kanter: These witnesses show in fact there was a mistake in the deed.

Q. Now, did you know the difference between taking the property "subject to" and "assuming the mortgages"? A. Yes, I would. 10

Q. You did? A. Yes, sir.

Q. All right. What was the difference as you then knew? A. As far as I know—

Q. The same as it is now? A. If you assume a mortgage—

Mr. Kessler: Wait a moment—

A. —it is the same as assuming another mortgage, as far as I would know. 20

Q. Now, you say that you knew that clause was not in Exhibit D-1? A. That it was not in Exhibit D-1?

Q. Yes. A. Yes, D-1. May I ask—

Q. The one I am showing you in my hand. A. You mean, the assumption is not in it?

Q. Yes. A. In favor of this—

Q. I asked you whether you knew it. A. Yes, certainly.

Q. You discussed that fact at the time, didn't you? A. I might have discussed it prior to that, being—prior to that receipt being issued. That I don't know, when I discussed it. 30

Q. Now, when you came to sign Exhibit D-1— A. Uh huh.

Q. —did you—Pardon me. —when you came to sign Exhibit C-1, which I now show you, hold in my hands, containing your signature, did you in any way suggest to your lawyer, Mr. Harry Steiner, or did Mr. Beckelman suggest to Mr. 40

Steiner that that contract, Exhibit C-1 differed from Exhibit D-1? The contract C-1 differed from Exhibit D-1. A. I don't imagine I could have mentioned anything to him, because if I had seen any difference I probably would, and, not
10 having seen it, I did not.

Q. You accepted the benefits of the contract Exhibit C-1, didn't you?

Mr. Kessler: Objected to, your Honor, the contract speaks for itself, the legal effect of it.

The Court: What do you mean by "benefits"?

Mr. Kanter: Why, we had to convey the
20 property subject to these terms.

The Court: Yes.

Mr. Kanter: Not subject to D-1.

The Court: This D-1 does not contain all of the terms of the contracts?

Mr. Kanter: Of course not.

Mr. Kessler: It doesn't have to in common practice.

The Court: The only thing I am interested in is determining whether or not there was
30 fraud or mistake happened here; when the deed finally came through "subject to" instead of "assuming the mortgages"; the receipt originally did not intend any assumption, very plain, when the contract was signed it contained language "assuming"; by assuming the printed form, and the "$10,000" was written outside the printed words in the contract by "assuming". Now, the deed, when it came through was made "subject to
40 the mortgages". Now, the burden, of course,

is on you to show me this contract when it was drawn, the way it was drawn, was intended to be a real change, an understanding between the parties—

Mr. Kanter: Well, Mr. Kessler—

The Court: —instead of buying it as the owner here, when he signed this receipt said, and as is witnessed by the agent "subject to the mortgages". This transaction is no different from most real estate transactions. They start off frequently by the receipt, then they draw a contract and that contract carries with it a lot of printed stuff.

The only thing that is in this case is whether or not this property was conveyed subject or whether the mortgages were assumed. You want me to reform the deed; you want me to make it comply with the contract. The other side say "Well, that contract was a mistake, we want you to reform that contract when you come to that point and put in there 'subject' ".

Now, all I am trying to find out is, what was the real intent and purpose of the parties, whether there was any mistake or whether there was any fraud practiced. If there was no mistake or fraud, the deed—that is going to be their final agreement, as far as I am concerned.

Q. Mr. Beckelman, Mr. Kessler suggested that this contract, Exhibit D-1, was not intended to represent the final word between the parties. Was that in accordance with your understanding?

Mr. Kessler: Objected to. Never mind what I said to the Court. He is not bound by what I said to the Court.

Q. I am asking you what your understanding was.

The Court: You may ask the question, leaving Mr. Kessler out.

10 Mr. Kanter: Yes. Strike out "Mr. Kessler". Withdrawn.

Q. Was it your understanding that Exhibit D-1 was not to represent the final contract between you and Mr. Max?

Mr. Kessler: That is objected to, your Honor. These papers speak for themselves.

The Court: Let him answer if he can.

Q. What do you say? A. In other words, now
20 just let me get this correct, you are asking me whether this letter was to be the final thing prior to the deed. Is that what you mean?

(Previous question read as follows: "Was it your understanding that Exhibit D-1 was not to represent the final contract between you and Mr. Max?")

A. I did not necessarily expect it to be the final understanding, no, sir.

30 The Court: Will you pardon me just a moment? We will take a five minute recess.

Q. Nor was it—and Mr. Beckelman did not expect that to be the final contract between himself and Mr. Max, did he?

Mr. Kessler: Objected to.

A. That I can't tell.

Mr. Kessler: Withdraw the objection.

40

Q. You know that from your conversations with him, don't you?

Mr. Kessler: Objected to.

Mr. Kanter: Withdrawn.

Q. When you first came to your counsel in defense of this case, you suggested and stated to him what your defenses were to be? 10

Mr. Kessler: May I ask—I don't think I heard it.

The Court: Whether he stated his defenses to you when he came to you.

Did you state your defenses to Mr. Kessler when you came to him?

Witness: Why, no, I wouldn't necessarily say so—not exactly. I think it would be up to him to tell me. 20

The Court: No, no, no. Your answer, now. You see how ridiculous your answer is for an intelligent man "It wouldn't necessarily be so". That is not an answer to the question. The question is whether you did state them.

Witness: Well, that I don't know, your Honor. That I don't know.

The Court: Well, then, say so.

Witness: I did not— 30

Q. This suit was instituted in May of this year, and you received a subpoena some time in the latter part of May or early part of June of this year, didn't you, Mr. Steiner? A. I received—I believe it was—

Mr. Kessler: May I suggest the subpoena was acknowledged by counsel and never served upon Mr. Steiner, as a matter of fact. 40

Q. Mr. Steiner acknowledged service of subpoena for you?

The Court: What good is all this?

Mr. Kanter: I want to show the defenses he now interposes are different from those originally alleged, to show the inconsistency.

10

The Court: Originally what?

Mr. Kanter: As originally urged.

Mr. Kessler: By whom?

Mr. Kanter: By his counsel.

Mr. Kessler: Why make that statement?

The Court: No.

Mr. Kanter: Well, let's see whether that is true.

The Court: Well, suppose it is true. What was the defense originally urged?

20

Mr. Kanter: Why, his defense originally urged was that the deed carries out the terms of the contract. Now he comes back and he says, no, the original memorandum, which none of the parties intended as a final instrument, was the original contract, the second contract was a mistake.

The Court: Good thought. I might be able to—I might even rest my decision on either one of those two things.

30

Mr. Kanter: The question is, what is the fact?

The Court: Well, that is for me to determine. I mean, he makes that one defense, and then makes the other defense. Those things might enter into a good defense. Of course, the first agreement expressed something. The last agreement is generally the agreement of the parties, unless, as you suggest in your complaint, that last thing was a mistake, that

40

the first thing—that the thing that should have been done was to follow out the contract, the formal contract of the parties. If I could find in this case—I am asked to find one of several things: if the deed as it was finally prepared, did not contain the contract of the parties by mistake, and, on the other hand, the other side asks me to remember that there never was any intention to have any such contract as that which was drawn, that the language in that contract was an entirely mistaken thing, that understanding to convey subject, and then they say "That was our agreement and by mistake the former contract carried the other language" and now say "Look at the deed, the deed is right, it was the final agreement of the parties. There it it."

Mr. Kanter: But they—

The Court: So all those defenses—I mean, you wouldn't blame a fellow for adding a little, new defense here and there. You have probably done it yourself. I have.

Mr. Kanter: No, but my clients must not do that.

The Court: I know, but this is—

(Mr. Kanter laughs.)

The Court: After all, in a—

Mr. Kanter: It is a—

The Court: I never forget that I was a practicing lawyer and what my hardships were; I used to add a few defenses once in a while, my clients knew once in a while.

Mr. Kanter: I see. But my client didn't though.

The Court: Legal defenses.

Mr. Kessler: At least, you hoped so.

Q. Now, Mr. Steiner, it was never suggested by you to Mr. Harry Steiner that the contract, Exhibit C-1, were erroneously—was erroneously drawn?

10 Mr. Kessler: Your Honor, we went all over that.

Q. Was it? A. As far as I know, I did not say a word to him.

Q. And as far as you know did Mr. Beckelman in your presence ever say a word to Mr. Steiner on that subject?

Mr. Kessler: He went over that and explained he did not read the terms.

20 The Court: I know, but it won't hurt to ask what for, if counsel feels better. We have been all over that.

Mr. Kanter: Have we?

The Court: Yes, back and forth. I don't object to counsel doing that sort of thing, because, once in a while you can catch a fellow napping.

Mr. Kanter: No.

Mr. Kessler: There is no use going all over it again.

30 The Court: I get a little tired of it myself once in a while.

Mr. Kanter: I did not realize I asked the question.

The Court: He has asked it several different ways and got several different angles and always the same answer more or less.

Q. Now, from 1925, the time you got this conveyance, until the time this suit was brought, Mr.
40 Steiner, was there any effort on your part made

to reform the terms of the contract between you and Mr. Max?

Mr. Kessler: I object, if your Honor please. We were perfectly satisfied with the deed as the final contract. There is no reason why we should make any complaints. 10

Mr. Kanter: There is no question of the deed being reformed, the contract was to be reformed.

Mr. Kessler. Oh, no, the deed.

Mr. Kanter: No, sir. You say the contract is reformed.

Mr. Kessler: I am not going to argue with counsel.

The Court: All right. 20

The answer is what?

Witness: No, we made no effort at all.

The Court: All right.

Mr. Kanter: That is all.

The Court: Anything further?

Cross examination by Mr. Kessler.

Q. I think you said, Mr. Steiner, that this memorandum contract—

Mr. Kanter: Oh, wait a moment. Just one moment more. 30

Examined by Mr. Kanter.

Q. Before this suit was brought Mr. Merrill called on you to pay this $4,000, didn't he?

Mr. Kessler: Objected to as immaterial.

The Court: I will allow it.

Mr. Kessler: There is no reason at all why they should be.

The Court: I will allow it. 40

Q. Didn't he? A. I received a letter from Mr. Merrill, I believe, yes.

Q. Yes. And didn't you, in aswer to Mr. Merrill's demand for payment of $4,000 say to him the reason you would not pay it is because the contract was erroneously drawn? A. I turned the letter over to my brother.

Q. Did you suggest to Mr. Merrill in any way that you thought the contract was erroneously drawn? A. I personally made no suggestion.

Q. Nor did Mr. Beckelman, to your knowledge? A. To my knowledge, no.

Mr. Kanter: That is all.

Cross examination by Mr. Kessler.

Q. Mr. Steiner, you suggested that this original memorandum agreement was not your intention, that that was to be the final word. Did you mean by that that any of the terms contained in the original agreement were to be changed in anywise? A. No, but I expected some agreement to be drawn up.

Q. You mean, some additional agreement, some legal form agreement, is that what you mean? A. Well, I know very well in different experiences I have had before that an ordinary receipt very rarely is the final contract drawn up in that situation.

Q. Did you ever authorize your brother to make any changes from the terms of the receipt as they appeared then? A. No.

Mr. Kessler: That is all.

Examined by Mr. Kanter.

Q. You never compared them with the terms as changed by them?

Mr. Kessler: Objected to. The witness already said he did not read the contract and didn't know.

Mr. Kanter: That is for the Court to say.

Mr. Kessler: Certainly he didn't.

The Court: We have gone over that thing about forty itmes, he did not. 10

Mr. Kanter: But, your Honor might decide otherwise.

Mr. Kessler: That is all, Mr. Steiner.

The Court: Is there anything else, gentlemen?

Mr. Kanter: That is all.

Mr. Kessler: We rest.

Mr. Kanter: We rest. Does your Honor want to hear it orally? 20

The Court: Yes, I will hear you.

Mr. Kanter: Mr. Merrill suggests he would like to have something to say on Dughi's part.

Mr. Merrill: I mean, in summing up.

The Court: In summing up, all right.

Mr. Kessler: Your Honor has suggested that there is a final contract which counsel seems to confuse the contract with the deed. The deed is a contract that is the final word. Now, that contract we are perfectly satisfied with because we contend it clearly expresses the intentions of the parties. 30

Now, we contend that under the law, as your Honor has suggested, you must either find fraud or mistake, but the mistake is limited under our cases to a mutual mistake; that the burden of proof is upon the complainant; he asserts the mis- 40

take was made. We are resting our entire case on what Mr. Max says.

This first memorandum agreement is in his own handwriting. Your Honor will observe the kind of a—the character of that hand, it is a splendid handwriting and apparently a very intelligent fellow. He says "In giving you a receipt for $500 we are—I am giving this property subject to the mortgages". We were not then present. He was under no influence of our counsel or our client, and he himself is delivering a receipt to his own agent, who in turn delivered it to us, and says "I am going to sell you this property subject to." Then it comes into the hands of Mr. Steiner and he draws the contract and digs up the printed form of contract and we cannot forget we are practicing attorneys, as your Honor has suggested it, you all know in course of our practice we assume certain things and we overlook printed forms. Now, in these printed forms it was assumed—first observed by Mr. Max who says he observed it, but he says he said nothing about it, nor did Mr. Steiner say anything about it. He therefore knew that there was a change in the printed form of contract as against the receipt which he had delivered in his own handwriting, so that he realized that we made a mistake; that he suggested—that he said to Mr. Max—to Mr. Steiner, "Now, I am going to give you certain other conditions which are not there. In consideration of that you must assume these mortgages."

He doesn't see a word about that, but he sees the assumption and says nothing about it, clearly shows he realizes that we made the mistake and he kept his mouth shut and then it comes to the closing. I don't charge him with bad faith in

making that statement. Now, he may have seen that, and it did not impress itself upon him, the same as I think my clients may have seen the word "Assumed" and that it did not make any impression on them. They sort of passed it by casually in reading the paper, relying entirely upon the lawyer. Now, when it comes to the final closing, Mr. Steiner says to Mr. Max—"The contract, you will observe, says 'assumed', the original agreement here, this says 'subject to' and I have drawn the deed 'subject to' ". He says, "All right," he doesn't even deny that, he doesn't remember.

Now, the burden of proof is upon him to show a mutual mistake and it clearly—the original intention between the parties is all set, it is not something we drew up, and he signed and he could not read, and he didn't know what we put into it, and he wrote it out not in our presence, and, undoubtedly, the original intention between the parties is to take the property subject to the mortgages. Now, there is nothing ever happened according to the evidence on the part of Mr. Max or anybody else, nothing has ever happened to change that original intention between the parties, except the mistake of Mr. Steiner's stenographer, and, of course, the mistake must be charged to him. That mistake he observed, never called Mr. Steiner's attention to it, for following the original agreement is "subject to", didn't say a word to him, let him draw the final deed, and Mr. Steiner is a very reputable lawyer in this community and he said and testified, denied that he called it to his attention, so that the final contract in the form of the deed merely expresses the original intention between the parties, and there was nothing in it contained to in any way indicate that there was a

change. Counsel has made a great to-do about the contract which was signed, that is, the legal contract contains many clauses that the original memorandum does not contain. Well, that is not such a mysterious thing. It may be for laymen, but it is not mysterious for us as lawyers. We know a receipt is given with the intention that whatever is expressed in that receipt is to be the contract subject to such other things as lawyers usually put in, and your Honor has put it in many times in your office and we have done it. Everybody has done it, your Honor, taken the receipt, and then drawn the legal form contract that contains many other clauses, but it is not even suggested by the witnesses, counsel may suggest it—that as a consideration of his agreement to certain other conditions he insisted upon an assumption. Now, if he says that, it might raise a question of fact in your Honor's mind as to who is telling the truth on the question of the burden of proof, but he has not even suggested it, so how could there be a mutual mistake in this case when there was never discussion about it; when you have the original memorandum and the final memorandum in the form of a deed, both expressing exact ideas of this between the parties and the memorandum paper in making the mistake. Now, we suggest that we need no reformation in our paper because it expresses our thoughts. I think the great weight of the evidence of such a paper signed by Mr. Max who apparently appears to be a very intelligent man, that we are entitled to reformation, but we do not ask it because the final paper expressed the intention between the parties.

I have a great number of cases on the matter of proof, because the Court is very reluctant in

changing a written paper on the ground of mistake, and they go very far and expect a great deal of testimony. In Smith against the Colonial Woodworking Company, that case went to the Court of Errors & Appeals, was determined by the Court of Errors, and then upon application to Vice Chancellor Backes for a rehearing on the ground of mutual mistake, because in that Colonial case they suggested where they could prove mutual mistake that the Court might reform, and in that case brought the moving papers before Vice Chancellor Backes and he rendered an opinion which I have here. He clearly says that the amount of proof in the affidavit on the application did not even show sufficient mutual mistake to justify a reopening of the case. And the Court uses language there which I think is undoubtedly the law, that the Court is very reluctant and very careful and it must be a clear understanding between the parties, which has gone astray somewheres and that that mistake must clearly appear to be mutual, not by one party or the other, but they must have both intended something else, and there is nothing in this case to show that they intended anything else.

Under those circumstances, we think there should be a decision for the defendant.

Mr. Merrill: The defendant Dughi is especially interested because the second mortgage of $4,000 and interest has been cut out. The property was sold for $100. The defendants Beckelman and Steiner ask first to take over the mortgage. He is interested therefore in broadening the base so that the more parties who are liable, the more opportunity he has to recover some part or all of this $4,000.

Aside from that, he is interested as a matter of, I am going to call it, equity, although it might be limited to, perhaps, an allegation of morals, but I am going to call it a question of equity.

Knowing as we do know the method of transferring real estate, knowing as we do know the expectation of a seller that any bonds he has signed will be ultimately paid, or, found to be due from the grantee, it seems unethical to assess upon a prior owner a mortgage of this character if any equity, in fact, I am taking not only the practice of the parties, but the practice generally in the transferring of property, if, in fact, the burden should fall upon subsequent purchasers because in the case of that it simply means that he pays twice, and the case of Beckelman and Steiner it means they have escaped an obligation which I think all of us know in your minds, irrespective of what the proofs may be, that their practice should not be assented to because the value of the property has, in fact, diminished.

Now, on the question of reformation, I submit, if your Honor please, that if we are to go into technicalities to that extent that there can be in this case no reformation of the original agreement which is an agreement in which Steiner does not figure. This agreement is an agreement between Beckelman and Max. It was a prior agreement. Consequently, that agreement cannot be reformed. In order to make that the basis of changing, the reformation would not be here, the reformation would be in the subsequent contract, but the language here between Beckelman and Max cannot be made the basis of a reformation of a subsequent contract between Max on one hand and between Beckelman and Steiner on the other. So

it reduces on that basis simply to a question of reformation of the deed itself.

Now, when we come to examine the intent of the parties, isn't it proper, from an equity standpoint, to take what we all know to be the fact in one hundred thousand cases to one, and that is that the initial agreement is a crude sort of an agreement, that there is an intent that the purchase price shall represent exactly what it says it is and that the mortgages are to be passed along with all that that implies. In the event of a purpose to take property merely subject to and not assuming mortgages is so unusual that any attorney, if that were the fact, if that had been emphasized, if he knew that to be the intent of the parties—wouldn't any attorney make that an especial point of examination in the contract and change it?

Consequently, if the parties intended to take it subject, the first thing, naturally, an attorney would look at would be the assumption clause and make sure, make doubly sure—

The Court: You are talking about intent, and you are asking me to construe something. I do not construe that agreement personally. In reformation I do not go much by the intention of the parties. That becomes very material in construing a document. You can leave the intention out.

Mr. Merrill: Yes. In other words, as I understand it, it is not a construction, irrespective of this tendency.

The Court: Was it a fraud or was it a mistake or what was it?

Mr. Merrill: I realize that is a position which the Court may take.

The Court: It is the only position I can take.

Mr. Merrill: The point I am making, however—I won't go further in pressing it—was that as a matter of equity and good conscience an equity court ought, in construing a document, to take those things into consideration in giving weight to the testimony itself.

The Court: That is true.

Mr. Merrill: Consequently, in viewing the testimony of the parties, it seems to me that an equity court is justified in weighing that testimony, not only upon the equitable principles, but upon the actual practice of attorneys, that is used in personal property.

There is also one other question I think important and which I am not going to attempt to handle orally because it is too technical for that, and also because it cites three recent cases in the Court of Equity, which I feel ought to be made the subject of some thought and some citations by means of a written memorandum, because it seems to me the Smith case, and I don't know whether counsel read the other case or not—

The Court: The one written by Vice Chancellor Lewis.

Mr. Merrill: Yes.

Mr Kanter: Yes.

The Court: Eh? I have forgotten the title of it.

Mr. Merrill: I have a case dealing with the question of the collateral agreement which I consider is one of very considerable importance and I feel it is one that if the case were otherwise—

The Court: Vice Chancellor Lewis' case where the purchase price—where the mortgages were deducted from the purchase price, I have forgot-

ten just what was involved there, but he points them out.

Mr. Kanter: After the Smith case.

The Court: Yes, he points them out in quite an illuminating opinion.

Well, I interrupted. Had you finished? 10

Mr. Merrill: In view of the rather confused situation, the three cases in that particular matter, I would like to have an opportunity, if Mr. Kanter takes it up in his brief—

The Court: I don't know that they are confused, but they differentiate very carefully the various equitable principles.

Mr. Merrill: So I will rest now, except I would like an opportunity that upon a matter of reformation— 20

The Court: To submit a brief? You mean a brief?

Mr. Merrill: On that point.

The Court: What were you going to say, Mr. Kanter?

Mr. Kanter: Of course.

The Court: And do you want to submit yours by brief?

Mr. Kanter: On the question of law only. I would like to address myself to your Honor on the questions of fact. They are very clear now to your Honor, and I think if Mr. Salmon will take it down it will help a little to decide this question when your Honor comes to decide it. 30

The parties in this case did not meet when the original informal contract was drawn. Mr. Kessler, in the course of his oral argument for both defendants, Steiner and Beckelman, says that we all know that those are intended as sort of informal contracts, not intended to be binding in 40

completion, not intended to be complete instruments.

Mr. Kessler: I did not "say not intended to be complete instruments."

Mr. Kanter: I took that to be your statement, but to be added to by subsequent agreements. If that be so, sir, then there is a lot more reason for saying in this case that the formal contract, Exhibit C-1 was the actual contract between the parties.

Now, I submit to your Honor, judging these men, Beckelman and Steiner, as they appear on the stand that it is inconceivable to say that those men did not know exactly what was in the new contract, Exhibit C-1, and that they did not want to take advantage of those terms. They knew those terms increased and did, as a matter of fact, increase the burden of Mr. Max. Now, today, it is too late to remedy that condition. We were bound to convey free of all assessments, we were bound to see that our properties were within the boundary line, we were bound to take care of every single thing in there, we were bound to see that assessments were to be deducted, and it is significant, I think, that when Mr. Max called Mr. Steiner's attention to the assessment clause as not—as being unfair, because of the rapid changes that were going on down at Hillside, Mr. Steiner said, according to Mr. Max, and Mr. Steiner does not contradict he said it, "That is the proper form of contract that I used". Now, there was not any error on Mr. Steiner's part in telling the stenographer to get out a form contract and to get out a form he did not intend to use.

I suggested to your Honor, I say to your Honor, that was undoubtedly a fact present in the

minds of both parties when this contract of May 13th or May the 27th, I don't care what date it was drawn, may be honestly in error about the date because of the lapse of time, they were drawn at the same time. I can say that looking back seven years when both these contracts were drawn, on the same date, because it was drawn so close together, but assuming their version of it that the formal contract was made two weeks later than the informal contract, it reinforces my opinion of the fact that it was not a mistake, that the original contract when Mr. Steiner looked at it he said—I say he said, I am talking now, he did not so testify, but I say the fair inference is "Now, boys, this is not the kind of a contract you need, you ought to have a contract calling for all the building being in the boundary line, you ought to take care of the assessments, you ought to take care of the loss in the event of insurance, loss by fire, we are now closing title, you ought to take care of a number of things". And they said to him, "All right, Harry, you draw the proper contract that is necessary". And Harry did draw the proper contract that was necessary and he did draw the contract "by the assumption of mortgages" and he changed the word "mortgage" to "mortgages", and that was not any error on his part, and I do say that Mr. Steiner is a reputable lawyer and I do say that he submitted it to his client and his client said, "All right. Send it on to Max for signature" and they signed it first and Max signed it later. I don't know just how that occurred, but something of that kind must have happened. I say that is inferential. Your Honor must take from the testimony there was not any mistake in drawing that contract and Mr. Steiner

is taking an undue burden on himself when he says, "I gave this contract, my stenographer took it out by mistake." It was done because the clients wanted it, the clients wanted the additional terms and the change in fact occurred. Whether they said "in consideration of your putting in these additional terms" or not is immaterial. The forms were Mr. Steiner's. Is this the proper kind of contract, or, even if Max didn't say so, that new proposition in the new contract, C-1, was not submitted to Max and that new proposition was substituted for the old and there was no mistake about it. Now, at the end of seven years we cannot reform.

Now, Mr. Kessler said, "And did the mistake occur on the deed?" Of course, when the deed was drawn that deed does not conform to the contract, as you will see. It has the clause—I don't care how important or unimportant it is at the present moment. We had a convenant in there for further assurance. Now, surely that was not our burden. Surely Mr. Steiner prepared that deed. Surely we paid for it. Now, Vice Chancellor Backes in his most recent pronouncement, with which counsel apparently is not familiar, precisely under these circumstances, not where the mistake was mutual, if your Honor finds it was not a mutual mistake, but where the mistake was all on one side, induced as in this case, where the lawyer was acting, or held to be acting for both parties, the Court held that was sufficient warrant for granting a reformation of the instrument sued

on, and in that case, Grant against Grant, and Forman against Forman, your Honor has that, it is not necessary that both parties must either of them acted under mutual mistake, although I think it happened in this case, because Mr. Steiner certainly was acting for his brother and his associate, Mr. Steiner was certainly acting for us in drawing this deed, he did not act for us in drawing the contract, I never asserted it and Mr. Steiner never asserted it and the other side does not assert it that the deed was an offer and acceptance, a concluded bargain on both sides and not subject to reformation. Both parties understood it. It represents their final contract. Mr. Steiner said that one part of it was corrected, before it was delivered. Now, surely, they understood that. There was no basis for claiming an error.

Now, there is one further theory, Mr. Merrill has suggested that is the law, notwithstanding Smith against Colonial, and anything that has happened subsequent, the application before Vice Chancellor Backes was not to reform on the ground—not to open the decree to show mutual mistake, it was to show mistake in law.

I say it is the law today that where the consideration has been deducted from the purchase price at the time of the conveyance, it brings the equitable duty on the part of the purchaser to reimburse for those mortgages and I intend to prove that point to your Honor if I may be permitted.

The Court: Have your briefs in, all of you, before the end of this week.

Exhibit C-2.

FEV

19879

DEED.

10 PHILIP MAX

TO

LEO STEINER and WILLIAM BECKELMAN

Dated July 8th 1925

Received in the Registers Office of the County of Union on the 10 day of July A. D., 1925, at
20 8-19 o'clock in the forenoon and Recorded in Book 999 of DEEDS for said County, on page 430 &c.

EDWARD BAUER
Register

HARRY STEINER
COUNSELLOR AT LAW
20 BRANFORD PLACE
NEWARK, N. J.

30

THIS INDENTURE, Made the eighth day of July in the year of Our Lord One Thousand Nine Hundred and twenty five

BETWEEN PHILIP MAX (single) of the City of Newark in the County of Essex and State of New Jersey party of the first part;

AND LEO STEINER and WILLIAM BECKELMAN, both of the City of Newark in the County of
40 Essex and State of New Jersey party of the second part:

Exhibit C-2

WITNESSETH, That the said party of the first part, for and in consideration of One Dollar and other good and valuable consideration lawful money of the United States of America, to him in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part being therewith fully satisfied, contented and paid, has given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents does give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part, and to their heirs and assigns, forever, ALL that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township of Hillside in the County of Union and State of New Jersey.

BEGINNING at a point on the West side of North Broad Street, sixty (60) feet north from the North side of Ridgway Avenue, thence South eighty-eight (88) degrees twenty-three (23) minutes west, one hundred and six and fifty-nine one hundredths (106.59) feet; thence North thirteen degrees fourteen minutes West twenty-five (25) feet to a point, thence North seventy-six degrees forty-six minutes East, one hundred and five (105) feet to the Westerly side of North Broad St; thence South thirteen degrees fourteen minutes East forty-three and seventy-five one hundredths (43.75) feet along the West side of North Broad Street; thence South naught degrees five minutes West two and eight tenths (2.8) feet to the point and place of BEGINNING.

Exhibit C-2

Being the same premises conveyed to Philip Max by John Dughi, et als, by deed dated March 27, 1924 and recorded in the Register's Office of the County of Union in Book 936 of deeds, pages 483.

10 Conveyance is subject to existing first mortgage in the sum of $6000. held by Ada F. Love and second mortgage in the sum of $4000. held by John Dughi.

Conveyance is made subject to all restrictions of record, and to the terms of a lease held by Louis Mittelman, recorded in Book 887 page 237.

Together with all and singular the houses, buildings, trees, ways, waters, profits, privileges, 20 and advantages, with the appurtenances to the same belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and the profits thereof, and of every part and parcel thereof;

Also, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof,

30 To have and to hold, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, their heirs and assigns, to the proper use, benefit and behoof of the said party of the second part, their heirs and assigns forever:

And the said Philip Max does for himself, his heirs, executors and administrators covenant and agree to and with the said party of the second part, their heirs and assigns, that the said Philip 40 Max, is the true, lawful and right owner of all and singular the above described land and prem-

ises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever:

And also, that the said party of the first part now has good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid;

And also, that Philip Max will Warrant secure, and forever defend the said land and premises unto the said Leo Steiner and William Beckelman heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever.

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

Exhibit C-2

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

Philip Max [L. S.]

10 Signed, Sealed and Delivered in the present of }

Harry Steiner

[Three U. S. Internal Revenue Documentary Stamps affixed of the values of $2, $2 and 50¢, respectively.]

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

20 Be it Remembered, That on this eighth day of July in the year of our Lord One Thousand Nine Hundred and twenty five, before me, the subscriber, a Master in Chancery of New Jersey personally appeared Philip Max who, I am satisfied, is the Grantor mentioned in the within Instrument to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

30 Harry Steiner
A Master in Chancery of New Jersey

[Stamp]

Received
Union County
Registers Office
Jul 10 8 18-19 AM 1925
40 Elizabeth, N. J.
Edward Bauer, Register

Exhibit C-3.

July 1, 1925.

PHILIP MAX TO WILLIAM BECKELMAN

Purchase Price		$14,500.00	10
Deposit	$500.00		
1st mtge	6000.00		
Mar. 7 to July 1 Int. on same	113.00		
2nd mtge	4000.00		
Apr. 1 to July 1 Int. on same	60.00		20
Deed	5.00	10,682.50	
Stamps	4.50		
	10,687.50		
	Insurance	3,817.50	
	2.94		
	5.91		
	5.46	14.31	
		$3,831.81	30

40

Exhibit D-1.

[Letter Head of Interstate Milk and Cream Co.]

273-283 Elizabeth Avenue

Newark, N. J. May 13 1925

10

Received from Wm M. Beckelman $500 00 as deposit on property located at 1324-1324a North Broad St Hillside N. J.

Price $14,500.

Terms $500 receipt of which is hereby acknowledged.

$4,000 cash to be paid on passing of title

$10,000 subject to existing mortgages.

(Signed) Philip Max

20

Witnessed

J Paul Neuwirth

30

40

Exhibit D-2.

CONTRACT

For Sale of Property

10 PHILIP MAX and

TO

WILLIAM BECKELMAN and LEO STEINER

Dated May 1925

HARRY STEINER
COUNSELLOR AT LAW
20 24 BRANFORD PLACE
NEWARK, N. J.

THIS AGREEMENT made the day of May, in the year of our Lord One Thousand Nine Hundred and twenty five

BETWEEN PHILIP MAX (single) of the City of Newark in the County of Essex and State of New Jersey party of the first part;

30 AND WILLIAM BECKELMAN and LEO STEINER 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 Fourteen Thousand Five Hundred ($14,500) Dollars to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and 40 entered into by the said partys of the second part,

doth agree to and with the said partys of the second part, that they the said partys 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 on or before the first day of July next ensuing the date hereof, ALL that certain lot, tract, or parcel, of land and premises, hereinafter particularly described situate, lying and being in the Township of Hillside in the County of Union and State of New Jersey

BEGINNING at a point on the West side of North Broad Street, sixty (60) feet north from the North side of Ridgway Avenue, thence South eighty-eight (88) degrees twenty-three (23) minutes west, one hundred and six and fifty-nine one hundredths (106.59) feet; thence North thirteen degrees fourteen minutes West twenty-five (25) feet to a point, thence North seventy-six degrees forty-six minutes East, one hundred and five (105) feet to the Westerly side of North Broad Street; thence South thirteen degrees fourteen minutes East forty-three and seventy-five one hundredths (43.75) feet along the West side of North Broad Street; thence South naught degrees five minutes West two and eight tenths (2.8) feet to the point and place of BEGINNING.

Subject to existing tenancies, and subject to the terms of a certain lease held by one Mittelmen, for one of the stores on said premises, a copy of which lease has been delivered to Paul Neiwirth. Said premises aforementioned contains thereon a one story brick building with two stores therein and is commonly known and designated as #1324-1324 A North Broad Street, in the Township of

Exhibit D-2

Hillside, County of Union, and State of New Jersey.

And the said William Beckelman and Leo Steiner for themselves, their heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators 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 Fourteen Thousand Five Hundred ($14,500) Dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

On Execution of this agreement for which this is also a receipt	$ 500.00
On delivery of deed, cash	4000.00
By assuming the mortgages at present a lien on the premises, and paying the same according to the terms thereof	10000.00

On Bond and Mortgage, same containing usual interest, tax, assessment, insurance and installment default clauses, and an agreement not to claim credit on the interest payable on bond and mortgage, by reason of any tax assessed, or to be assessed against the premises, with interest at % payable for years

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

Exhibit D-2

And the said party of the part hereby agrees to pay to the licensed and authorized agent a commission of % on the purchase price aforesaid,

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

And it is further agreed, by the parties hereto, that the said deed shall be delivered and received at office of Harry Steiner, #24 Branford Pl. Newark, N. J. between the hours of ten o'clock in the forenoon and four o'clock in the afternoon on the said first day of July 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.

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

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

In case the premises shall suffer injury beyond the ordinary wear and tear, the party of the first part, shall repair the damage before the date set

for delivery of said deed or make an appropriate deduction from the purchase price herein stated.

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

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

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

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

Exhibit D-2

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

And for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors 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 parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

William Beckelman
Leo Steiner
Philip Max

Signed, Sealed and Delivered
in the presence of

In consideration of mutual promises and agreements herein stated, we hereby agree to extend the date for the delivery of deed and execution of this contract to
at same hours and place

Witness hand and seal this
day of A. D. 19

Exhibit D-2

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

Be it Remembered, that on this
day of May in the year of our Lord One Thousand
Nine Hundred and twenty five, before me, the
subscriber, a Master in Chancery of New Jersey
personally appeared Philip Max and
who, I am satisfied, are the
grantors mentioned in the within Instrument, to
whom I first made known the contents thereof,
and thereupon they acknowledged that, they
signed, sealed and delivered the same as their
voluntary act and deed, for the uses and purposes
therein expressed.

And the said

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, freely, without any fear, threats or compulsion of her said husband.

A Master in Chancery of New Jersey.

In consideration of ($) dollars
to in hand paid hereby
assign to
this contract and all rights thereunder.

Witness our hands and seals this
day of A. D. 19

Exhibit D-3.

[Letter Head of Royal Insurance Company Limited.]

Represented by
Lippman & Lowy, Inc.
44 Clinton Street
Newark, N. J.

10

May 20, 1925.

Mr. Harry Steiner,
20 Branford Place,
Newark, N. J.

Dear Harry:

Enclosed please find Deed for property at North Broad Street, Hillside, also receipt for the $500.00 deposit. Please draw up the Contract of Sale with the terms mentioned therein, with this exception: that Title is to be taken July 1st instead of August 1st.

20

I would suggest that you submit the Contract to Bill and Leo, so it will meet with their approval, before you send it to me to be given to Mr. Max.

Very truly yours,

30

Paul

Enc.
JPN/PT

40

Exhibit D-4.

July 6th, 1925

Mr. Philip Max,
Interstate Milk & Cream Co.
Elizabeth Avenue,
Newark, N. J.

Dear Sir:—

I will be ready to close the title on the Broad Street, Hillside, N. J. property, this Wednesday at 3 P. M.

Kindly let me know whether you wish me to draw the deed for the property also.

Very truly yours,

(Harry Stiener)

HS:H

Exhibit D-5.

June 1st, 1925

Mr. Philip Max,
Interstate Milk & Cream Co.
Elizabeth Avenue,
Newark, New Jersey. 10

Dear Sir:—

In looking in my files, I find that I have already delivered to Mr. Neuwirth, the contract signed by Mr. Beckelman and Leo Steiner, for delivery to you.

If you will return this copy with the copy signed by you, I shall make the changes suggested by you. 20

Very truly yours,

(Harry Stiener)

HS:H

Exhibit D-6.

May 27th, 1925

Mr. Paul Neuwirth, 30
#31 Clinton Street,
Newark, New Jersey.

Dear Paul:—

I am enclosing contract signed by Bill and Leo.

When you obtain Mr. Max's signature to the other copy kindly return to me.

Very truly yours,
(Harry Stiener) 40

HS:H
Enl.

211—N. J. Contract for Sale of Property
Full Covenants.

Ex Ident D2

Karkus Brothers, Inc.
Law Blank Publishers, Perth Amboy, N. J.

D-2

This Agreement

made the day of May, in the year of our Lord One Thousand Nine Hundred and twenty five

Between

PHILIP MAX ~~and~~ (single)

of the City of Newark in the County of Essex and State of New Jersey party of the first part;

And

WILLIAM BECKELMAN and LEO STEINER

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 Fourteen Thousand Five Hundred ($14,500) 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 they 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

on or before the first day of July next ensuing the date hereof, All that certain lot, tract, or parcel, of land and premises, hereinafter particularly described situate, lying and being in the Township of Hillside in the County of Union and State of New Jersey

BEGINNING at a point on the West side of North Broad Street, sixty (60) feet north from the North side of Ridgway Avenue, thence South eighty-eight (88) degrees twenty-three (23) minutes west, one hundred and six and fifty-nine one hundredths (106.59(feet; thence North thirteen degrees fourteen minutes West twenty-five (25) feet to a point, thence North seventy-six degrees forty-six minutes East, one hundred and five (105) feet to the Westerly side of North Broad Street; thence South thirteen degrees fourteen minutes East forty-three and seventy-five one hundredths (43.75) feet along the West side of North Broad Street; thence South naught degrees five minutes West two and eight tenths (2.8) feet to the point and place of BEGINNING.

Subject to existing tenancies, and subject to the terms of a certain lease held by one Mittelmen, for one of the stores on said premises, a copy of which lease has been delivered to Paul Neiwirth. Said premises aforementioned contains thereon a one story brick building with two stores therein and is commonly known and designated as #1324-1324 A North Broad Street, inthe Township of Hillside, County of Union, and State of New Jersey.

And *the said* WILLIAM BECKELMAN and LEO STEINER

for themselves,

their *heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part,* their *heirs, executors, administrators 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*

Fourteen Thousand Five Hundred ($14,500) Dollars

as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

On Execution of this agreement for which this is also a receipt	$ 500.00
On delivery of deed, cash	4000.00
By assuming the mortgages at present a lien on the premises, and paying the same according to the terms thereof	10000.00

On Bond and Mortgage, same containing usual interest, tax, assessment, insurance and installment default clauses, and an agreement not to claim credit on the interest payable on bond and mortgage, by reason of any tax assessed, or to be assessed against the premises, with interest at % payable for years

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

And the said party of the *part hereby agrees to pay to the licensed and authorized ag[illegible]*
a commission of *% on the purchase price aforesaid,*

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

And it is further agreed, *by the parties hereto, that the said deed shall be delivered and received at office of* Harry Steiner, #24 Branford Pl. Newark, N. J.

between the hours of ten *o'clock in the* fore *noon and* four *o'clock in the* afternoon *on the said* first *day of* July *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.

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

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

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

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

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

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

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

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

And *for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors 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 parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.*

Signed, Sealed and Delivered
in the presence of

Philip Max

In consideration of mutual promises and agreements herein stated, we hereby agree to extend the date for the delivery of deed and execution of this contract to

at same hour and place

Witness *hand and seal this*
day of *A. D. 19*

5629

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

Be it Remembered, *that on this* *day of* May *in the year of our Lord One Thousand Nine Hundred and* twenty five *, before me, the subscriber,*

A MASTER IN CHANCERY OF NEW JERSEY

personally appeared

PHILIP MAX and

who, I am satisfied, are *the grantor* s *mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon* they *acknowledged that,* they *signed, sealed and delivered the same as* their *voluntary act and deed, for the uses and purposes therein expressed.*

And the said

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, FREELY, without any fear, threats or compulsion of* her *said husband.*

A MASTER IN CHANCERY OF NEW JERSEY.

Contract

For Sale of Property

PHILIP MAX and

TO

WILLIAM BECKELMAN and LEO STEINER

Dated May *19*25

HARRY STEINER
COUNSELLOR AT LAW
24 BRANFORD PLACE
NEWARK, N. J.

In consideration of *($) dollars to* *in hand paid* *hereby assign to* *this contract and all* *rights thereunder.*

Witness *our hands and seals this*

day of *A. D. 19*

5629

New Jersey Court of Errors and Appeals

Between PHILIP MAX, *Complainant-Respondent,* *and* WILLIAM M. BECKELMAN and LEO STEINER, *Defendants-Appellants,* *and* JOHN DUGHI, *Defendant-Respondent.*	*On Appeal from the Court of Chancery.*

BRIEF OF DEFENDANTS-APPELLANTS.

Statement of the Case.

(Unless otherwise indicated all italics are supplied.)

The defendants Beckelman and Steiner appeal from a final decree in Chancery which reforms a deed delivered to them by complainant Max, in 1925, so that by the terms of the deed, *as reformed*, they assume, and by the decree they are required to pay, a certain mortgage of $4,000 held by the defendant Dughi.

Since this appeal presents for review the determination of the facts by the Court, we shall necessarily examine the facts at length in the body of this brief. At this point, therefore, we shall briefly recite those facts which are material.

The complainant and appellants *never met until the trial of the case.* In 1925, the complainant, through *his* agent, one Paul Neuwirth,

negotiated a sale from complainant to appellants of certain real estate then owned by complainant. This negotiation resulted in the payment of a deposit of $500 by the appellants to the complainant's agent and in the delivery by the complainant, through his agent, of the following memorandum or receipt (Exh. D-1, p. 179):

(Letter Head of Interstate Milk and Cream Co.)
273-283 Elizabeth Avenue
Newark, N. J. May 13, 1925

Received from Wm. M. Beckelman $500.00 as deposit on property located at 1324-1324a North Broad St., Hillside, N. J.

Price $14,500.

Terms $500 receipt of which is hereby acknowledged.

$4,000 cash to be paid on passing of title.

$10,000 subject to existing mortgages.

(Signed) Philip Max

Witnessed
J. Paul Neuwirth.

This instrument was composed by complainant and his said agent Neuwirth (p. 92, ll. 8-22) *and was entirely in the complainant's own handwriting* (p. 90, l. 40 to p. 91, l. 8).

Mr. Neuwirth, complainant's agent, then sent this memorandum to Mr. Harry Steiner, a member of the Bar, and a brother of appellant Leo Steiner, who was to represent the appellants in the transaction, together with his letter of May 20, 1925 (Exh. D-3, p. 187), which letter instructed Mr. Steiner to "please draw up the contract of sale *with the terms mentioned therein,* with this exception: that Title is to be taken July 1st instead of August 1st."

Upon receipt of Mr. Neuwirth's letter and enclosure, Mr. Harry Steiner turned the papers over to his stenographer, with instructions to prepare the contract called for by the memorandum. The stenographer used a *printed stationers form* for that purpose (Photostat of D-2, p. 180). This form contained among a large amount of printed matter, a clause obligating the purchaser to assume and pay the mortgage. In this respect, the contract differed from the memorandum, which, it will be observed, simply provided that the property be purchased *subject* to the mortgages and made no provision for any assumption of payment.

Whether or not the clause of assumption was permitted to remain in the contract by error or otherwise is in dispute. Mr. Harry Steiner says the presence of the clause was a mistake on his part (p. 122, l. 8). Complainant says the clause was properly included in the contract. Suffice it to say at this point, that the conract was signed by all the parties and as signed, contained such clause.

In due course, title was closed. The deed, at the request of the complainant was prepared by Mr. Harry Steiner. At the closing, there were present only the complainant and Mr. Harry Steiner, representing the purchasers. The deed as drawn and executed (Exh. C-2, p. 174) contains no assumption of the mortgages and contains no references to the mortgages as part of the consideration. The pertinent clause in the deed is as follows (p. 176, l. 10):

> "Conveyance is subject to existing first mortgage in the sum of $6,000 held by Ada F. Love and second mortgage in the sum of $4,000 held by John Dughi."

Mr. Harry Steiner says the assumption clause was intentionally omitted with the knowledge and approval of Max (p. 122, ll. 28-38). Mr. Max denies this (p. 99, ll. 1-4). Whether or not the clause in the deed conforms to the intention of the parties is the real issue in dispute.

Approximately six and one-half years later, the first mortgage on the premises was foreclosed, thereby wiping out Dughi the second mortgagee, who then made demand on Max, the bondsman, for payment of the amount owing upon his bond and mortgage and threatened suit. Thereupon complainant filed this bill.

The pleadings in this cause are quite important and therefore are summarized.

The bill of complaint contains three causes of action. The first cause of action seeks to reform the deed because of mutual mistake. It alleges that the contract of sale required Messrs. Beckelman and Steiner to assume payment of the mortgages but that the deed failed to contain the appropriate assumption clause. The bill alleges (p. 9, ll. 11-19):

> "Such failure to include a covenant of assumption was the result of mutual mistake on the part of both the complainant and said William M. Beckelman and Leo Steiner, occasioned by the fact that both the complainant, as grantor, and the grantees, were then and there represented by the same attorney and counsel."

The second cause of action, repeating the allegations of the first cause of action, prays that Messrs. Beckelman and Steiner be required to pay the amount owing on the Dughi mortgage.

The third cause of action alleges that inasmuch as Beckelman and Steiner received credit on the

purchase price for the amount of the Dughi mortgage, they thereby became liable in equity to indemnify complainant from liability thereon and to pay the mortgage themselves. (It will be observed that this cause of action is not based upon any alleged mutual mistake, nor upon any agreement of assumption.)

Beckelman and Steiner answered by stating that no mistake had occurred in the preparation of the deed; that a mistake had occurred in the inclusion of the covenant of assumption in the *contract;* that this error had been discovered prior to the passing of title and had been corrected with the approval of all parties, in the preparation of the deed, and that the said deed represented the true understanding and intent of the parties.

Beckelman and Steiner also filed a counterclaim asking that the *contract* be reformed to carry out the intent of the parties as represented by the *memorandum agreement* (Exh. D-1, p. 179) and that the covenant of assumption contained in the contract be eliminated.

The defendant Dughi, holder of the mortgage, answers and counter-claims. In substance, he joins in complainant's prayer for relief and asks that complainant and Beckelman and Steiner pay him the amount owing on his mortgage.

From the foregoing, it is apparent that complainant bases his right to relief upon two theories:

A—The covenant of assumption was omitted by mutual mistake

and

B—Irrespective of any mistake, complainant is entitled to relief because Beckelman

and Steiner received credit against the purchase price for the amount of the mortgage and hence are liable in equity for the payment thereof.

These pleadings are important because they indicate the sole basis upon which relief can be granted herein.

We submit that neither basis is sustainable upon either the law or facts.

POINT I.

No obligation of payment of a mortgage is imposed upon a grantee unless a covenant of assumption appears in the deed or the deed states that the mortgage was computed as part of the consideration monies.

(First, Sixth and Seventh Grounds of Appeal.)

We shall consider this topic separately and apart from the question of reformation presented in this case.

The rule stated above has been clearly enunciated by this Court in *Smith* v. *Colonial Woodworking Co. Inc.*, 110 N. J. E. 418, which case conclusively resolved any doubts that might have existed prior to its decision.

In that case, Mr. Justice Donges, speaking for this Court, carefully analyzes the early authorities and recognizes and restates the well-established rule that the *deed* expresses the final determination and intent of the parties, and that in the absence of fraud or reformation (which points we are not now considering but shall discuss hereafter in this brief), an agreement of assumption or a reference to the credit given to the grantee for the mortgage in question must

appear *in the deed itself* in order to charge such grantee with liability for payment of the mortgage debt. In that case, the Court said (at p. 420):

"We are of the opinion that the Vice-Chancellor erred in holding that there was an exchange of the properties, and conclude that there were sales of the properties between the several vendors and vendees. See *Haber* v. *Goldberg,* 92 N. J. L. 367. But in the case of sales, the defendant is in no better position. The law is that in the case of a sale of property subject to encumbrances, unless there is an assumption of the mortgage, or it is covenanted that the mortgages are part of the consideration money, the grantee is not obliged to assume the payment of such mortgage. Under the law there is no assumption of a mortgage unless such language appears *in the deed,* or it is said *therein* that the mortgages are part of the consideration money. See *Hartshorne* v. *Hartshorne,* 2 N. J. Eq. 349.

"In *Tichenor* v. *Dodd,* 4 N. J. Eq. 454, Chancellor Dickerson said that the purchaser of a mere equity of redemption does not assume an obligation to redeem; is liable to the value of the land only; and he may give up the land in satisfaction of the mortgage debt; but if, by the terms of sale, the mortgage money is to be taken as part of the consideration, equity raises upon the conscience of the purchaser an obligation to indemnify the mortgagor against the mortgage debt. In that case the deed contained the following clause: 'The above lots are conveyed *subject* to the payment of a certain mortgage thereon, given by the said David H. Tichenor to Oliver S. Halstead, James Daws and Enoch Bolles, for five hundred and twenty-five dollars and thirty cents, which said mortgage, or the amount thereof, is computed as so much of the consideration to be paid to the said David H. Tichenor.'

"In *Crowell* v. *Hospital of St. Barnabas,* 27 N. J. Eq. 650, Chief Justice Depue said that the purchaser of the equity of redemption is not liable for the mortgage debt; but may, by agreement, make himself liable, either by express assumption, or if the mortgage money is taken as part of the consideration.

"*Woodbury Heights Land Co.* v. *Loudenslager,* 60 N. J. Eq. 403, is to the same effect. Mr. Justice Garrison, speaking for this court, uses this language:

'In other words, the mortgage debt may by agreement, *if so stated in the deed,* be charged upon the unpaid purchase money, which is a different thing from the legal assumption of the mortgage debt by the grantee.' Citing *Crowell* v. *Hospital of St. Barnabas, supra.*

"Further, under the bill, answer and counterclaim as framed (there being no prayer to reform the deed to express the alleged undertaking, the prayer being only to be allowed credit on the mortgage), there was no question presented except that of whether Joachimsthal had assumed the payment of the mortgages or not, and this, as above stated, *was to be determined by the deed, because the deed is presumed to express the ultimate intent of the parties. Long* v. *Hartwell,* 34 N. J. L. 116; *Davis* v. *Clark,* 47 N. J. L. 338. Under the pleadings, therefore, the agreement of sale, the settlement papers and *everything that preceded the making of the deed were inadmissible, for this purpose* * * *."

and at page 423:

"In the instant case the parties made a sale. The deed purports to convey the equity of redemption, and expressed no agreement of assumption of mortgages by the grantee, or that the mortgage money was taken as part of the consideration money. *The law does not imply any of*

these things in the siutation given. The deed is conclusive evidence of the agreement, in the absence of fraud or reformation.''

It is our respectful contention that this case definitely excludes any implied covenant of assumption, arising merely from the fact that the mortgages formed part of the consideration money. Unless the *deed* contains an express covenant of assumption or it is *covenanted therein* that the mortgages form part of the consideration money, no such covenant will be implied. In the instant case, the deed was silent as to both these requirements, and we respectfully submit that the court below erred in giving any force to the argument that such a covenant may be implied or read into a deed when the deed is silent thereon.

The decision of the lower court moreover, in holding that a purchaser is bound to pay the mortgage debt whether he agreed to do so by express words or not, when *on the execution of the contract of purchase* the amount of the mortgage is deducted from the consideration, is in direct conflict with the Smith case. In the latter case the court definitely holds that the provisions of the *contract of sale* are not binding but become merged in the deed, and that everything which precedes the deed is inadmissible for this purpose.

Further, the opinion of the Vice-Chancellor that where the purchaser deducts from the purchase price the amount of the mortgages, equity will impose upon his conscience an obligation to indemnify his grantor, even though the premises are conveyed merely subject to the mortgage, is not in harmony with the doctrine enunciated in the *Smith* case. This Court has

definitely ruled that no such obligation will be imposed unless the deed itself contains a covenant of assumption, or it is expressly covenanted therein that the mortgages form part of the consideration money.

We are constrained to point out that the learned Vice-Chancellor in his opinion below, does not mention or cite the decision of this Court in the *Smith-Colonial Woodworking* case. No attempt is made to reconcile the facts in the case at bar with the decision in that case or to come within its rules, but it seems rather to have been wholly lost sight of by the lower Court, although called to his attention in the brief filed below by the defendants.

The learned Vice-Chancellor in his opinion, states the law to be as follows (p. 63, l. 20; p. 64, l. 28):

> "The deed recites that the consideration for it is 'One Dollar and other good and valuable consideration.' When the contract is examined it is found that the other good and valuable consideration was the purchase price of $14,500, the major part of which purchase price, was to be paid by assuming the mortgages presently a lien on the premises of $10,000.00. At the closing of title instead of paying that sum in cash, it was deducted, plus the accrued interest. In this situation, the deed will be reformed to include the assumption. It is only common honesty that the purchasers be required either to pay the mortgages or stand primarily liable for the same.
>
> "Where the purchaser of land encumbered by a mortgage, agrees to pay a particular sum as purchase money, and, on the execution of the contract of purchase, the amount of the mortgage is deducted from the consideration, and the land conveyed subject to the mortgage, the purchaser is bound to

pay the mortgage debt, whether he agreed to do so by express words or not.

"'This obligation results necessarily from the very nature of the transaction. Having accepted the land subject to the mortgage, and kept back enough of the vendor's money to pay it, it is only common honesty that he should be required either to pay the mortgage or stand primarily liable for it.' *Heid* v. *Vreeland,* 30 N. J. Eq. 591.

"Even if the defendant purchasers cannot be said to have assumed the payment of the mortgages under their contract which so provides in express language, and the premises were intended to be conveyed subject to the mortgages, the equitable doctrine, long and well established is, that where the purchaser deducted or retained out of the purchase price, as fixed or agreed upon, the amount of the mortgage debt, equity will there raise or impose upon his conscience an obligation to indemnify his grantor, if the latter himself be personally liable for the payment of the mortgage debt, and this although the premises were conveyed subject to the mortgage as is claimed by the purchasers in the instant case."

We submit that the Vice-Chancellor's opinion is in direct conflict with the decision of this Court in the *Smith* v. *Colonial Woodworking Co. Inc.,* case *supra.*

We are further constrained to point out that the authorities cited by the Vice-Chancellor are not convincing in support of his holding.

In *Reeves* v. *Cordes,* 108 N. J. Eq. 469, the pertinent portion of the Court's opinion must be regarded as dicta, for the reason that the complainant's bill was in fact dismissed and no relief whatsoever granted. It must also be observed that said case is a reported opinion of the Court of Chancery and not of this Court.

Tichenor v. *Dodd*, 4 N. J. Eq., 454 (also a decision of the Court of Chancery), is certainly not in point for the reason that in said case the *deed* itself recited that the conveyance was subject to the payment of a mortgage

> "which said mortgage, or the amount thereof is computed as so much of the consideration to be paid to the said David H. Tichenor."

Accordingly said case is in entire harmony with *Smith* v. *Colonial Woodworking Co. Inc.*, in that it appears *that the deed itself recited* that the mortgage was computed as part of the consideration.

Thayer v. *Torrey*, 37 N. J. L., 339 is a reported opinion of the Supreme Court and an examination of the opinion indicates that the Court's view is based largely upon *Tichenor* v. *Dodd, supra* and as has been observed the *Tichenor* case involved a deed which itself recited the credit allowed to the grantee.

Friedman v. *Zuckerman*, 104 N. J. Eq., 322 (also decided in the Court of Chancery), is the reported opinion of the Court upon a motion to strike the bill of complaint. The facts are not pertinent as it appears that in that case the mortgagee sought to hold the grantee liable for the mortgage debt directly by his bill. Complainant's bill was stricken, the Court deciding that a mortgagee cannot proceed directly against the grantee who has not assumed payment of the mortgage debt. The Court's comments in said case therefore necessarily are dicta.

Yet we observe that the Court in that case itself based its opinion in part upon the follow-

ing language contained in *Crowell* v. *Hospital of St. Barnabas*, 27 N. J. E. 650;

> "The mortgage debt may by agreement *if so stated in the deed,* be charged upon the unpaid purchase-money, which is a different thing from the legal assumption of the mortgage debt by the grantee."

and upon the following language contained in *Tichenor* v. *Dodd*, 4 N. J. E. 454:

> "*By the terms of the deed,* the mortgage money was to be taken as a part of the consideration; and, hence, the proposition that under such circumstances equity raises upon the conscience of the purchaser an obligation to indemnify the mortgagor is correct."

It is our respectful contention that our Courts will not imply an assumption by imposing an obligation on the conscience of the purchaser, and that this theory has been forever laid at rest by the decision in the *Smith* case. Indeed, the Court emphatically states that

> "The law does not imply any of these things in the situation given."

In order for the complainant to recover, therefore, there must appear either an express assumption in the deed, or an express covenant in the deed, that the mortgages have been computed as part of the purchase price. Neither of these requirements appear in the case at bar.

The question presented in the case at bar has been discussed in later decisions of our Courts in which the *Smith-Colonial* case has been cited. In the same matter an application for a re-hearing was made before Vice-Chancellor Backes. The Court denied the application saying (111 N. J. Eq. 313, at p. 314):

> "Further, there is nothing of proof in the moving papers that the deed does not truly

> state the understanding of the parties; nothing that words of assumption of the mortgage debt as part consideration of the purchase price were omitted from the deed by mutual mistake. Mutual mistake is essential."

And at page 315:

> "There is no newly discovered matter. The opinion of the Court of Errors and Appeals that, 'Under the law there is no assumption of a mortgage unless such language appears in the deed, or it is stated therein that the mortgages are part of the consideration,' we are bound to hold was the law at the time of the contract.' "

In the later case of *Latt* v. *Schwehm*, 10 N. J. Misc. 1050, the Supreme Court had under consideration a situation in which the contract of sale contained a covenant of assumption but in which the deed said "subject, however, to the existence and operation of two certain mortgages." The situation was identical with the case at bar. Recovery was sought on the ground that the covenant of assumption contained in the contract was a collateral agreement and as such did not merge with the deed, nor was it affected by the delivery of the deed. The Court in an opinion by Circuit Court Judge (now Vice-Chancellor) Sooy held as follows:

> "The true rule of law to be applied to the facts in this case is that stated in *Smith* v. *Colonial Woodworking Co.*, 110 N. J. Eq. 418.
>
> ' "The recognized rule is that the acceptance of a deed for land is to be deemed prima facia full execution of an executory agreement to convey, and thenceforth the agreement becomes void and the rights of the parties are to be determined by the deed and not the agreement. * * *' In *Long* v. *Hartwell*, 34 N. J. L. 116, it is stated

> as follows: 'Where in a deed there is an absence of covenants against encumbrances, the vendee cannot resort to the contract. Until consummated an executory contract is subject to modification. In all cases the deed when accepted is presumed to express the ultimate intent of the parties with regard to so much of the contract as it purports to execute—the rule to be deduced from all the authorities is, that the executed contract supersedes all prior negotiations and agreements, where the last covers the whole subject embraced in the prior one.' "

This factual question was resolved in favor of the defendant, the Court deciding that plaintiffs had released the defendants from the covenant of assumption and that they had agreed to and did in fact convey "subject to" the mortgages.

In the case of *Malcolm* v. *Lavinson*, 110 N. J. L. 63, this Court had a similar state of facts presented before it. Although the deeds in that case provided that the property be conveyed *subject* to the mortgages, the plaintiffs contended that an implied covenant of assumption arose from the fact that the amount of the mortgages was credited to the defendants as a part of the consideration. The Court held as follows (at p. 66):

> "The plaintiff contends that there is proof in the final settlement sheet that the amount of the third mortgage was credited to the defendants as a part of the consideration. We find no such proof * * *.
>
> "If there were such proof as the plaintiff contends, plaintiff's case would then resolve itself into the proposition that because of proof of an actual credit in the final settlement the defendants, under the law, are obligated to indemnify those who sold them the property and were subsequently obliged to pay the mortgage. This shift from a contractual obligation to an obligation by opera-

> tion of law, at once encounters two obstacles. First, the plaintiff has no rights except under assignment of the written contract; and second, the law raises no such implication from the mere crediting of a mortgage in satisfaction of the purchase price *unless the deed contains supporting recitals.* (Citing *Smith* v. *Colonial Woodworking Co.*)"

The rule must now be taken as conclusively settled, therefore, that no obligation rests upon a purchaser to indemnify the vendor for a deficiency resulting from a foreclosure, unless an express covenant of assumption appears *in the deed,* or unless it is expressly stipulated *in the deed* that the mortgages are to form part of the purchase price and be computed as such. The deed is the final expression of the parties' intention and the law will not imply or read into it a covenant which is not expressed therein. The mere fact that the amount of the mortgages was deducted in the statement of closing, will not give rise to an implied covenant of assumption unless there are supporting recitals in the deed itself.

In the case at Bar the deed contained no such supporting recitals nor was any assumption expressed therein. We submit therefore that the learned Vice-Chancellor was in error in his opinion that the complainant was entitled to the relief sought (p. 64, ll. 14-18):

> "Even if the * * * premises were intended to be conveyed subject to the mortgages."

On the contrary, upon the authority of *Smith* v. *Colonial Woodworking Co. Inc., supra,* complainant's case was groundless *unless* the deed be first reformed. Complainant's entire right to relief rested primarily upon a showing of such facts as would first entitle him to reformation of

the deed, after which the relief granted him would follow as a matter of course.

This, then, brings us to a consideration of the real issue in the case—did the proofs warrant a decree reforming the deed so as to include the assumption clause?

POINT II.

The deed expressed the true intent of the parties and should not be reformed.

(First, Second, Third and Fifth Grounds of Appeal.)

The theory of the complainant's case, as it appears from the bill of complaint and the proofs adduced at the final hearing, is that a *mutual mistake* on the part of the complainant and the defendants Beckelman and Steiner led to the omission of the assumption clause from the deed. *No fraud upon the part of anyone in the omission of said clause is alleged nor is there any proof in the case that would lend support to any charge of fraud.*

The sole factual question presented is, did the parties make a *mutual mistake?* The Vice-Chancellor concluded that they did and this conclusion, we submit, was not supported by, but was, in fact, contrary to, the greater weight of the evidence.

Before discussing the evidence and the proofs, we respectfully bring to the attention of the Court, the well-established principles governing the reformation of contracts.

A—*A mistake to be ground for reformation must be mutual and cannot be merely unilateral.*

In *Green* v. *Stone*, 54 N. J. E. 387 (Court of Errors and Appeals, 1896), Mr. Justice Depue (at p. 397) said:

> "The doctrine that a contract or deed will not be reformed for mistake, in the absence of fraud or imposition, unless the mistake was *mutual*, that is, *reciprocal and common to both parties, where each alike was under the same misconception* as to the terms of the written instrument, is the settled doctrine of courts of equity * * *
>
> "Equally explicit is the language of Chief Justice Ames, in *Dinan* v. *Providence R. R. Co.*, 5 R. I. 130, 135, where he said: 'If the court were to reform the writing to make it accord with the intent of one party only to the agreement, who avers and proves that he signed it as it was written by mistake, when it accurately expressed the agreement as understood by the other party, the writing, when so altered, would be just as far from expressing the agreement as it was before, and the court would be engaged in the singular office of doing right to one party at the cost of a precisely equal wrong to the other.' "

In *Herron* v. *Mullen*, 56 N. J. E. 839 (Court of Errors and Appeals, 1898), the defendant sought to have an assumption clause in a deed eliminated therefrom. (The opposite of the case at bar.) The Court said:

> "There is not the least evidence that the mistake was *mutual;* consequently there can be no reformation."

In *Gross* v. *Yeskel*, 100 N. J. E. 293 (Court of Errors and Appeals, 1926) at p. 295, appears the following language:

> "In any event, therefore, the mistake which will warrant reformation cannot be

unilateral but must be mutual, otherwise the sole ground for equitable interference is not presented by the proofs."

In *Howell* v. *Baker,* 106 N. J. E. 434 (Court of Chancery, 1930) at p. 438, it is stated:

> "This deed, under the circumstances could be reformed only on the ground of mutual mistake. *Green* v. *Stone, supra.* In this case the court of errors and appeals held that unless the assumption was put in the deed by mutual mistake no relief from the covenant could be afforded the grantee in a suit against him for deficiency; that if the mistake were unilateral only, the remedy was by rescission at a time when the status quo ante could be restored; that after foreclosure it was too late for rescission, and that the evidence to warrant reformation of a deed by elimination of the assumption clause must be clear and convincing, and that the evidence in that cause being in conflict was insufficient. It being too late to rescind and no mutual mistake affording a ground for reformation of the deed, I think it is clear that the complainant is liable under the covenant."

To the same effect is *Mullen* v. *Cronan,* 90 N. J. E. 392.

B—*The complainant has the burden of proving both the mistake and the mutuality thereof and his proof must be so clear and convincing as to remove all doubt and indicate the certainty of error.*

In *Green* v. *Stone,* 54 N. J. E. 387 (Court of Errors and Appeals, 1896) at p. 399, this Court held:

> "To justify the reformation of a deed executed, delivered, accepted and acted upon, on the ground that it did not correctly express the agreement made by the parties,

the proof must be clear and convincing, and *upon testimony that is unexceptionable,* both with regard to the agreement actually made by the parties and the mutuality of the mistake through which a different agreement was put in the deed. In *Rowley* v. *Flannelly,* 3 Stew. Eq. 612, 614, Vice-Chancellor Van Fleet says:

'When the evidence, in demonstration of mistake, is doubtful or equivocal, or strongly contradicted, so that it is impossible for the mind to reach a strong conviction as to the truth, the court will not change what is written. * * * Until a mistake has been established by such force of proof as leaves no rational doubt of the fact, no change in the writing sought to be reformed is entitled to be called a correction.' "

In *Birch* v. *Baker,* 81 N. J. E. 264 (Court of Chancery, 1913, at p. 269) the Court stated:

"The mistake which is equitable ground for reformation of a written contract must be clearly shown to have been a mutual mistake, and *the mistake must be established by such force of proof as leaves no rational doubt of the fact of mistake.*"

In *Giammares* v. *Allemannia Fire Insurance Co.,* 91 N. J. E. 114 (Court of Errors and Appeals 1919, at p. 119) this Court reiterated the rule, saying:

"Courts of equity do not grant the high remedy of reformation upon a probability; nor even upon the mere preponderance of evidence, *but only upon a certainty of error.* Pom. Eq. Jur. Sec. 859, cited in *Hupsch* v. *Resch,* 45 N. J. Eq. 657; affirmed, 46 N. J. Eq. 609, on the opinion of Vice-Chancellor Pitney in which he said, 'that he who asks to have a written instrument reformed must make out a perfectly clear case, free from doubt.' "

Brook v. *Cadillac,* 101 N. J. E. 55 (Court of Chancery, 1927, at pp. 56, 57 and 58):

> "Defendant asserts that there was no mistake on its part, and that the deed correctly sets forth the description of the property as it understood it was to be * * *.
>
> "Complainant, on the contrary, just as positively asserts that it was never the intention of the parties that the streets should be conveyed * * *.
>
> "In this state, to warrant reformation on the ground of mistake, it must appear in the absence of fraud, that the mistake was *mutual;* and the evidence to warrant reformation must be clear, unequivocal and convincing. The principles upon which this rule is established have been frequently enunciated by our courts.
>
> "It is also a well established rule that a deed is to be construed most strongly against the grantor. With the testimony in such sharp conflict, as indicated, and with the rules so clearly established as stated, it seems to me that the complainant has not produced the clear and convincing proof necessary to grant a reformation of the deed to defendant."

In *Woods* v. *Woods,* 105 N. J. E. 205 (Court of Errors and Appeals, 1929, at p. 208), it was again stated:

> "To warrant a reformation for mistake the demonstration of mistake must be clear and satisfactory, such as produces a strong conviction of the truth; and the burden is on the complainant. *Universal Security Co.* v. *American Pipe, etc. Co.,* 95 N. J. Eq. 752; *Crosley* v. *Superb Realty Co.,* 93 N. J. Eq. 228."

To the same effect also is *Higgins* v. *Linstra,* 104 N. J. E. 355.

With these principles before us, we turn to an examination of the testimony and proofs.

The proof is clear that the intent of Messrs. Beckelman and Steiner was that the property was to be purchased "subject to" the mortgages and that their said intent was communicated to the complainant, through complainant's agent, Mr. Neuwirth. Mr. Beckelman testified as follows concerning a discussion with Mr. Neuwirth:

> "Q And what did you say to him about the mortgages? A I told him that Leo Steiner and I would buy the property *subject to the existing mortgages*" (p. 133, ll. 15-18.)

This intent, throughout the transaction, remained unchanged in the mind of Mr. Beckelman.

> "Q * * * Was there any change between you and Mr. Max or with his agent that you were to take this property other than subject to the mortgages?* * * * A No" (p. 133, ll. 26-37).

and the intent of Mr. Leo Steiner similarly remained unchanged at all times:

> "Q Did you ever authorize your brother to make any changes from the terms of the receipt as they appeared then? A No" (p. 160, ll. 33-35).

As for Mr. Max's intent, he would have us believe that he intended that the mortgages were to be assumed. The facts, however, belie his words. *It is of course undisputed that the parties to the transaction never met and dealt through Mr. Neuwirth.* Mr. Max's intent, whatever it may have been, was never orally communicated to Messrs. Beckelman and Steiner. Obviously, Mr. Max, never having met them, did not do so, and Mr. Neuwirth, his agent, testifies that he never discussed with Messrs. Beckelman and Steiner the question of whether the mortgages were to be assumed or not (p. 109, ll. 23-34).

However, at the very inception of the transaction, Messrs. Max and Neuwirth (a real estate broker), together framed the memorandum agreement (Exh. D-1) written *entirely in Mr. Max's handwriting,* and that memorandum expressly recites that the sale is to be "subject to existing mortgages." This memorandum is admittedly the only indication of Mr. Max's intent which was ever communicated to Mr. Beckelman and Mr. Leo Steiner; and that memorandum was in entire accord with their own intent, which had been made known to Mr. Neuwirth, namely, to purchase the property subject to the mortgages.

We submit that the minds of the parties were in fact in entire accord on a purchase *subject to the mortgages.* At any rate, the very most that can conceivably be urged, accepting Mr. Max's unsupported statement at face value, is that he intended that the mortgages were to be assumed and that Messrs. Beckelman and Steiner intended to take subject to the mortgages. This, at most, would be a unilateral mistake, and as we have indicated *supra,* unilateral mistake is no basis for reformation.

We then pass on to the drawing of the contract. The printed portion of the contract contains in it the words "by assuming the mortgages at present a lien on the premises, and paying the same according to the terms thereof" and this language is followed by the figures $10,000.00. *It is upon this fact that complainant relies. Nothing else in the case supports his position.* There is no proof of any kind to prove or even intimate that Messrs. Beckelman and Steiner at any time intended to assume the mortgages; no conversations, no admissions, no collateral facts, no other documents, letters or other writings,

only this one fact, that the foregoing language does appear in the long-form contract.

The presence of those words in the contract is fully explained by Mr. Harry Steiner, a member of the Bar, who was the scrivener. His story is frank and understandable. He says (p. 122, ll. 10-17) that he gave his stenographer the memorandum and asked her to draw a contract in accordance with that agreement. The form used by the stenographer contained the *printed clause* which passed unnoticed by Mr. Harry Steiner. He assumed his stenographer had drawn the contract in accordance with the memorandum. He looked it over (p. 123, ll. 26-28) but *failed to notice the printed words* in dispute.

Much seems to be made of the fact that the letter "s" was written in the contract after the word "mortgage" in the clause in question. Mr. Steiner is uncertain who wrote it in and does not recall doing so himself (p. 124, l. 23). It might conceivably have been placed there by the stenographer after completing the draft, and conceivably by Mr. Harry Steiner himself. His eye might have caught the blank space after the word "mortgage" and prompted him to put in the letter "s" without mentally noting the word "assume" earlier in the clause.

Did the parties know of the existence of that clause in the contract? Messrs. Beckelman and Steiner both state (p. 134, ll. 13 and 14; p. 144, ll. 22-28) that they do not recall reading the contract. They signed it because it was drawn by their attorney, who advised them to sign it and they assumed it was proper without studying it. Mr. Max says that he *did* notice it (p. 87, ll. 12-

17) but says also that he never mentioned it or spoke of its presence to any one (p. 90, ll. 20-35).

We then come to the deed itself. Mr. Harry Steiner, when ready to close title, wrote Mr. Max of that fact and asked him whether he (Mr. Max) wished him to prepare the deed (Exh. D-4, p. 188). Mr. Max telephoned Mr. Steiner, requesting him to draw the deed and Mr. Steiner then did so and was paid $5.00 for his services by Mr. Max (p. 129, ll. 29-34).

Before drawing the deed, Mr. Harry Steiner observed that the contract did not conform to the intentions of the parties as expressed in their original memorandum and that the assumption clause had been erroneously left in the contract. He accordingly drew the deed in exact compliance with the intent of the parties as expressed in their original memorandum (Exh. D-1) which memorandum he had been instructed to follow in drawing the formal contract (p. 122, ll. 30-38). At the closing, he called Mr. Max's attention to the change he had made in order to conform to the intent of the parties and he testifies (p. 122, ll. 31-38) that Mr. Max:

> "said that was all right; he looked at the deed, went over it very carefully, turned every page and read everything in it and signed it."

Mr. Steiner further testifies that he at one time suggested that Mr. Max have an attorney present, but that Mr. Max refused, stating that he was fully conversant with titles himself (p. 132, ll. 25-27).

Mr. Max, questioned concerning this deed, after several contradictory and vague replies (p. 98, l. 11 to p. 101, l. 30) finally said he did not read any clauses in the deed except the

description (p. 101, ll. 27-32); that he asked Mr. Steiner if the deed was all right and Mr. Steiner said it was, whereupon he signed the deed.

We submit that the testimony respecting the deed, both from the standpoint of credibility of witnesses and probability, weighs in favor of Mr. Harry Steiner's version of the facts. Mr. Max was admittedly conversant with titles (p. 107, ll. 30-32) and experienced in real estate transactions. With respect to the contract which is favorable to his position, he says that he read "every clause in the contract" (p. 90, ll. 15 and 16). Respecting the deed, which is unfavorable to his position, he says that he read only the *description,* notwithstanding the fact that the deed was in fact the instrument which consummated the transaction and which represented the final monument of the parties.

The fact that the closing statement indicated that credit was given for the amount of the mortgages cannot be given any weight, for in every purchase of the equity of redemption, in calculating the value of that equity, the amount of the mortgages must necessarily be deducted from the value of the property. The closing statement therefore is equally consistent with either version of the transaction.

There is admittedly conflicting testimony regarding the making of the contract (Exh. D-2) and the deed and the presence of the words "assume" and "subject to" respectively in said instruments. Messrs. Beckelman and Steiner say they did not read the contract. Mr. Max says he did not read the deed.

Let us for the moment assume that the contract and the deed are the only proof of the

intent of the parties. Certainly, the presence of the word "assume" in the contract is no greater proof of the intent of the parties, than the presence of the word "subject" in the deed. On the contrary, the deed being the last expression of their intent, should have greater force. We submit that the very most that can be said for the complainant from these two documents, considering them alone, is that a unilateral mistake took place, and that, as we have seen, does not warrant reformation.

Fortunately, however, we are not relegated solely to these two instruments to ascertain the intent of the parties. Disregarding both these instruments, there is other proof in the case respecting the intentions of the parties. Considering first, Mr. Max's professed intent, the only proof of it is his statement of his intent on the witness stand. That intent, assuming it existed, was admittedly never communicated to Messrs. Beckelman and Steiner, either by Mr. Max, or by his agent, Mr. Neuwirth, who testified he never discussed the subject with them. Moreover his testimony as to what his intent was is refuted by the original memorandum, all in his own handwriting, which specifically recites that the sale is to be "subject to" the mortgages.

Respecting the intent of Messrs. Beckelman and Steiner, they testify that they intended to purchase "subject to" the mortgages and never changed their intent and had no knowledge of any instrument which indicated a contrary intent.

> "Denial under oath by the defendant that there was no mistake must itself be given considerable weight." *Lesser* v. *Demarest*, 72 Atl. Rep. 14 (not officially reported).

That intent they communicated to Mr. Max through his agent Mr. Neuwirth at the inception of the transaction, when Mr. Beckelman told Mr. Neuwirth they would buy the property subject to the mortgages. Mr. Max's written memorandum acknowledging receipt of their deposit and stating that the purchase was to be "subject to" the mortgages, confirmed their understanding of the transaction and certainly gave them every reason to believe that Mr. Max knew their intent and that the minds of the parties had in fact met on a purchase subject to the mortgages.

We submit that the proof is pursuasive that the parties at all times intended to consummate a transaction subject to the mortgages and that the chance presence of the printed assumption clause in the contract has prompted Mr. Max to bring these proceedings in an effort to avoid his obligation on the bond.

There is no fraud in the case. That is clear! *No fraud is charged in the bill, and none is indicated in the proofs.* Since the parties never met, the only fraud conceivably possible would have to be charged to Mr. Harry Steiner, the scrivener. Throughout the case, no one even suggested that possibility. Suffice it to quote the language of counsel for the complainant himself, who says (p. 171, ll. 32-33), "I do say that Mr. Steiner is a reputable lawyer," and Mr. Harry Steiner's testimony throughout is clear, non-evasive and understandable and in its material parts, stands uncontradicted. He is telling the truth.

Nor is there presented a situation savoring of double representation. Mr. Steiner represented his brother Leo Steiner and Mr. Beckelman and

no on else. Mr. Max asked him to draw the deed. He did so, and was paid $5.00 for drawing the deed. It is common knowledge that an attorney for one of the parties to a transaction is frequently requested to draw an instrument which should properly be drawn by the other party or his attorney and the presence of that fact, we submit, has no significance.

We have earlier in this brief, cited and quoted from the authorities to the effect that:

A—*A mistake to be ground for reformation must be mutual and cannot be merely unilateral,* and

B—*The complainant has the burden of proving both the mistake and the mutuality thereof and his proof must be so clear and convincing as to remove all doubt and indicate the certainty of error.*

We submit that the complainant's proof in the case at bar fell far short of the requirements established by our Courts.

It will be observed that the only witness produced on complainant's behalf was the complainant himself. His testimony, therefore, was necessarily uncorroborated, and in addition, to say the least, was of doubtful value. In many instances his recollection of the facts was either vague or unquestionably incorrect (as will appear *infra*). His manner of testifying did not lend credence to his story. It will be observed that the Vice-Chancellor himself was prompted to caution the complainant several times, as for example (p. 99, ll. 28-39):

> "The Court: If you will answer questions you will help me a whole lot.
>
> Witness: I am sorry, your Honor.

The Court: You don't have to fence with counsel. You don't get anywhere. You don't help yourself a bit. You don't improve your case any with me. The question is very simple, whether you read those clauses. Now, you did or you did not.

Witness: Well, I don't remember.

The Court: *You keep—you give me the impression you are trying to hide something.*"

The complainant, for example, at one point of his testimony, would have us believe that he did not know the distinction between the terms "assume" and "subject to:"

"Q 'Subject to' was different from 'assuming?' A Well, to me—to me, I didn't know. I only knew they were to assume it.

Q As a matter of fact— A I don't know the legal language" (p. 93, ll. 8-12).

However, even his very words above indicate that he did know the difference, for he says he "knew they were to *assume* it." Lest there be any doubt of the fact that complainant did know the distinction, we quote the following from his testimony (p. 87, ll. 29-33):

"Q Yes. And did you see that clause 'by assuming the mortgages' in there— A I did.

Q —before you signed the contract? That meant nothing to you? A It was very important to me."

Also (at p. 92, ll. 1-3):

"Q Well, you intended, then, when you drew this receipt, the mortgages were to be subject to, did you not? A No, they are to pay the mortgages."

Also (at p. 98, ll. 33-38):

"Q —and you said that was all right? A You get me mixed up on the 'subject.' I don't know what that means.

> Q I have only adopted the language you yourself used, Mr. Max. A *Well, I used it one way. By me it means that they don't pay the mortgage.*"

Obviously, complainant well knew the distinction in the meaning of the two terms.

Complainant was no novice in real estate transactions. In the course of ten years, he testified (p. 107, ll. 22-29), he had owned "about seven" parcels of real estate and had sold "all but two," indicating at least twelve real estate transactions, in which complainant had figured as either buyer or seller. By his own testimony, he was familiar with title closing:

> "Q So that you were quite familiar with the—you had gotten familiar with the closing of titles, had you not? A Yes" (p. 107, ll. 30-32).

Complainant similarly was vague and even contradictory in his testimony concerning his reading of his own deed before execution. He testified at first that "he looked over" all the clauses, following the description (p. 98, ll. 12 and 13), and later, that he did not remember whether he had read said clauses (p. 99, ll. 17-20), and finally, he was positive that he had read only the description and not the other typewritten clauses (p. 101, ll. 20-32). Can it be believed that he read merely the metes and bounds description in the deed and not the remaining clauses? In fact, it was during this testimony that the Court felt called upon to caution the witness (p. 99, l. 28; p. 101, l. 19).

In at least one material fact, complainant was patently wrong, as his story is wholly refuted by the undisputed facts and the exhibits introduced in evidence.

Complainant is positive, he says, that the original memorandum (Exh. D-1) and the formal contract (Exh. D-2) were signed the same day, five or six hours apart (p. 105, l. 20; p. 106, l. 12). The *undisputed* facts are that the memorandum is dated May 13, 1925 (Exh. D-1, p. 179) and although we cannot tell with certainty the day it was actually signed, it is necessarily a fact that it was signed on or before May 20, 1925, for on that day Mr. Neuwirth, complainant's agent, sent it with his letter of that date (Exh. D-3, p. 187) to Mr. Harry Steiner. The testimony is clear that Mr. Steiner knew nothing of the transaction until he received Mr. Neuwirth's letter, presumably the next day. Mr. Steiner then prepared the contract (Exh. D-2, p. 180). One copy, he had signed by Messrs. Beckelman and Leo Steiner and he then sent both copies, the one signed by Messrs. Beckelman and Leo Steiner, and the other unsigned, to Mr. Neuwirth on May 27th, with his letter of that date (Exh. D-6, p. 189) requesting Mr. Neuwirth to procure complainant's signature to the contract. Obviously therefore, on May 27th, at least seven days *after* complainant had signed the memorandum (Exh. D-1) he had not yet signed the formal contract (Exh. D-2). Complainant is therefore clearly in error in his testimony that the memorandum (Exh. D-1) and the contract (Exh. D-2) were both signed the same day.

Complainant was also mistaken in his statement (p. 84, ll. 8-13) that he signed the contract (Exh. D-1) in Mr. Harry Steiner's office for, as has been shown above, Mr. Steiner sent the contract, still unexecuted, to Mr. Neuwirth, complainant's agent, to procure the latter's signature.

We respectfully submit that there is not present in the case at bar any proof whatsoever of the existence of a *mutual mistake* in the drawing and execution of the deed. Mr. Max's testimony taken at face value, would establish at most only a unilateral mistake and as has been shown above, unilateral mistake is no basis for reformation. Moreover Mr. Max's testimony, uncorroborated, at times vague and conflicting, and in its material aspects entirely contradicted by defendants' witnesses, is certainly of doubtful value.

Analysis of Vice-Chancellor's Opinion.

After studying the testimony carefully, we have endeavored to analyze and to understand the reasons underlying the learned Vice-Chancellor's decision. An examination of his opinion indicates that his conclusions were largely founded upon three premises, one of law and two of fact. We submit, however, that all three premises are unsound.

First, the Vice-Chancellor was clearly of the opinion that the complainant was entitled to relief, irrespective of any reformation of the deed, and he so held in his opinion (p. 61, l. 20 to p. 64, l. 28). We submit, and have heretofore cited the authorities for our position, that the Vice-Chancellor was in error in his said premise and that in fact, upon the undoubted authority of *Smith* v. *Colonial Woodworking Co. Inc., supra,* reformation was a condition precedent to any relief whatsoever.

Manifestly, entertaining the opinion which he had respecting the law, and believing that reformation was not essential to the relief he was asked to grant the complainant, the Vice-Chancellor was not called upon to study the testimony

regarding the alleged mutual mistake with the thoroughness that would have been necessary if he regarded that alleged mistake as the primary basis for relief. He viewed reformation as largely incidental to the relief prayed for, whereas in fact, it was the very crux of the case. He was of the opinion that relief should be granted for the reason that the defendants had received credit for the amount of the mortgages, and he granted reformation as incidental thereto.

We believe that had the Vice-Chancellor realized that the complainant's right to reformation was a condition precedent to his relief, and was in fact the very crux of the case, he would have decided that the proof of mutual mistake charged by the complainant was lacking; certainly that it was not present in the degree required to warrant reformation under our authorities.

Secondly, the Vice-Chancellor regarded the complainant as a man unversed in real estate matters and ignorant of the distinction between the words "assume" and "subject to" (p. 62, ll. 35-38). In this, we submit he was mistaken, as the proofs show. First, it is a fact that Mr. Max had been a party to twelve real estate transactions in ten years, and it is common knowledge that real estate transactions without mortgages are rare. It is safe to assume that in practically all of said transactions, mortgages were involved and that Mr. Max had undoubtedly become familiar with the distinction in said terms. Furthermore, Mr. Max's own testimony, quoted at length earlier in this brief, indicates that he did in fact know the difference in the meaning of the terms.

This belief of the Vice-Chancellor, which we submit was erroneous, was undoubtedly a material element in his mind, as it lent to the case the possibility of imposition on Mr. Max. That element, we submit, was not present in fact.

Thirdly, the Vice-Chancellor entirely and consciously excluded the original memorandum (Exh. D-1) from his consideration of the case. He regarded that memorandum as a transaction which "was not closed" (p. 61, l. 4) and was later superseded by another and distinct transaction, evidenced by the contract (Exh. D-2). That position is not in accord with the proofs and the testimony of all the witnesses, including the complainant and his agent.

There was at all times *only one* transaction. That transaction originally was set forth in the memorandum (Exh. D-1) written by complainant with the assistance of his agent Mr. Neuwirth and entirely in the complainant's handwriting. This memorandum was the result of the oral negotiations had between Beckelman and Neuwirth and was the result of the payment of the deposit of $500.00. The purchase price and the terms of the transaction as finally closed and as expressed in the deed are identical with the terms of this original memorandum.

In fact, according to Mr. Max, the contract (Exh. D-2) was signed on the very same day as the memorandum (Exh. D-1), only five or six hours later. In that statement Mr. Max is mistaken, as we have heretofore shown, but obviously he himself regards the two instruments as one and the same transaction. It is undisputed that that memorandum (Exh. D-1) furnished the basis of the long form contract drawn by Mr. Harry Steiner, as Mr. Neuwirth, com-

plainant's agent, sent the memorandum to Mr. Harry Steiner with instructions to draw the contract in conformity with it. The contract, as drawn, was in fact based upon this memorandum in its material parts, and conforms with it except for the unintentional inclusion by the scrivener of the assumption clause, or rather, his omission to strike said provision from the printed form.

Nowhere is there any proof or indication that the original transaction, evidenced by memorandum D-1 was ever abandoned or replaced by another and distinct transaction. Counsel for the complainant himself refers to the two documents as the "informal" and the "formal" contracts (p. 169, l. 40; p. 170, l. 12) and that is exactly what they are.

That memorandum (Exh. D-1) is undoubtedly of great weight and assistance in the case, and in disregarding it for the reason stated by him, the learned Vice-Chancellor in fact excluded from his consideration a most material document. That document was written by Mr. Max in his own handwriting at the very inception of the transaction; it is admittedly the only expression of his intention ever communicated to the defendants; it conforms exactly to the expressed intent and understanding of the defendants from the very beginning to the very end of the transaction; and it conforms to the language of the deed itself, the final monument of the parties. Regarded in its true light, the memorandum (Exh. D-1) furnishes that additional proof which removes any doubt which might be occasioned by the conflict in the terms of the contract (Exh. D-2) and the deed. Instead, the memorandum was entirely disregarded by the Vice-Chancellor.

We submit that the learned Vice-Chancellor was in error in his major premises and in his conclusion of the law and the facts. Complainant was not entitled to a decree without reformation of the deed. Complainant was not entitled to reformation of the deed because he had shown no mutual mistake and no fraud. The most favorable version of the testimony, from complainant's point of view, will support no more than a case of unilateral mistake, and that, we submit and have shown, is not ground for reformation.

POINT III.

The formal contract (Exhibit D. 2) does not conform to the intent of the parties and should be reformed.

(First, Fourth and Fifth Grounds of Appeal.)

Both the facts and the argument relating to this topic have been discussed heretofore and we shall not unnecessarily repeat the same. We respectfully contend that the evidence established beyond any reasonable doubt, that the parties at all times intended to consummate a sale *subject* to the mortgages, and that the presence of the assumption clause in the contract of sale was the result of a mutual mistake of the parties, due to the error or oversight of the scrivener.

The proof which to a great extent establishes the fact of this mistake is in the language and handwriting of the complainant himself (Exh. D-1). The unimpeached testimony of Harry Steiner, the scrivener, conclusively establishes that the presence of the assumption clause was

a mistake and the mistake is fully and frankly explained. The record is devoid of any evidence to prove any change in the intention of the parties between the time of the original memorandum and the execution of the contract of sale. The parties did not meet during that time; no different agreement was ever reached or even discussed, and there can be no doubt that the contract, as drawn, did not express the intention of the parties, but was the result of a mutual mistake of fact.

We respectfully submit that the defendants have sustained the burden of proving that a mutual mistake of fact led to the presence of the assumption clause in the formal contract (Exh. D-2) and that the prayer of the defendants' counter-claim seeking reformation of said contract should be granted.

For the various reasons hereinbefore urged, it is most respectfully submitted that the decree of the Court of Chancery in this cause be reversed, to the end that a decree may be entered dismissing complainant's bill and granting reformation of the contract (Exhibit D. 2) as sought in the defendants' counter-claim.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

Between PHILIP MAX, *Complainant-Respondent,* *and* WILLIAM M. BECKELMAN and LEO STEINER, *Defendants-Appellants,* *and* JOHN DUGHI, *Defendant-Respondent.*	*On Appeal from Court of Chancery.*

BRIEF OF THE DEFENDANT-RESPONDENT, JOHN DUGHI.

Statement.

John Dughi, the defendant-respondent, conveyed the property here involved to the complainant, Philip Max, and took back, *in part payment of the purchase price,* a second mortgage in the principal sum of $4,000.00 (Case, p. 75, l. 15 *et. seq.*).

Subsequently, Max conveyed to the defendants-appellants, William M. Beckelman and Leo Steiner (Case, p. 174).

Thereafter the first mortgagee foreclosed and bought in the property for $100.00, cutting off Dughi's purchase money mortgage (Case, p. 79, l. 19 *et seq.*)

The contract of sale between Max, as vendor, and Beckelman and Steiner, as vendees, stipulated that the vendees should *assume payment* of both

mortgages (Case, p. 182, l. 23). But the deed stated that the conveyance was *subject* to said mortgages (Case, p. 176, l. 10).

This action was brought primarily for the reformation of the deed, to make it conform with the contract of sale (Case, p. 9, l. 38), and such was the decree of the Court.

Secondarily, the relief prayed, assuming the reformation of the deed, was a decree that the defendants Beckelman and Steiner were primarily liable for the payment of the debt secured by Dughi's second mortgage, and that they save the complainant harmless by paying to Dughi whatever was found to be due upon his said purchase money mortgage (Case, p. 13, l. 11; p. 16, l. 15). That relief, also, was decreed.

Dughi was made a party defendant, and in his answer set up his claim as against Max, Beckelman, and Steiner, or one or more of them (Case, p. 49).

Beckelman and Steiner, in their answers, alleged a receipt signed by Max, made prior to the contract of sale referred to above, acknowledging a payment by William M. Beckelman of $500.00 on account, and according to the terms of which the property was to be taken "subject to existing mortgages" (Case, pp. 54, 56). It was their contention that the *contract of sale* should be reformed to conform with this receipt, in which event the deed need not be reformed.

The relief prayed by the defendants, Beckelman and Steiner, was denied (Case, p. 66, ll. 17, 21).

Said defendants Beckelman and Steiner thereupon appealed.

The substance of the case will be found in four exhibits:

D-1. Acknowledging the receipt by Philip Max from *William M. Beckelman* of a deposit of $500.00 (Case, p. 179).

D-2. Contract between Max as vendor and Beckelman *and Steiner* as vendees for the sale of property (Case, p. 180).

C-2 Deed (Case, p. 174).

C-3. Memorandum showing how purchase price was paid (Case, p. 178a).

As a matter of law this defendant has the right to hold the complainant on his bond, and to disregard the defendants Beckelman and Steiner. To an action against complainant, on the bond, there could be no defense. But, in equity and good conscience, the defendants Beckelman and Steiner are primarily liable and should pay the debt. This defendant has, therefore, withheld his action at law, has taken an active part on complainant's behalf in this action, and submits this brief in support of complainant's rights.

Reduced to its basic elements the appeal is rested upon two objections, stated as follows in appellants' brief:

First—"The Vice-Chancellor entirely and consciously excluded the original memorandum (Exh. D-1) from the consideration of the case."

Second—"No obligation of payment of a mortgage is imposed upon a grantee unless a covenant of assumption appears in the deed or the deed states that the mortgage was computed as part of the consideration monies."

"The rule stated above has been clearly enunciated by this Court in *Smith* v. *Colonial Woodworking Co., Inc.*, 110 N. J. E. 418, which case conclusively resolved any doubts that might have existed prior to its decision."

"The learned Vice-Chancellor, in his opinion below, does not mention or cite the decision * * * but it seems rather to have been wholly lost sight of by the lower court."

These objections are met under Points I and II, below.

POINT I.

Exhibit D. 1 is merely a receipt. It is not an "Agreement," was not directed to the defendant Steiner, was not relevant or competent evidence, and Beckelman and Steiner are not entitled to have the contract of sale reformed to conform to the receipt to Beckelman alone.

In their respective separate defenses, in paragraph 5 of the petition of appeal, and in their brief, these defendants claim that the receipt of May 13, 1925 (Case, p. 179), should be taken as a primary agreement, and ask that the contract of sale (Case, p. 180) be reformed to conform to that receipt. If that were done the deed would, it is urged, be consistent with the receipt and with the contract of sale.

But their argument is without substance. This *receipt* was given by Philip Max to William M. Beckelman only. So far as appears Steiner was not interested. In any event it was not enforceable against him as an agreement or otherwise. But the contract of sale was by and between

Max as vendor and both Beckelman and Steiner as vendees, and the deed names Max as grantor and both Beckelman and Steiner as grantees. Admittedly this contract was executed subsequent to the giving of the receipt; in their brief defendants assert that "obviously, therefore, on May 27th, at least seven days *after* complainant had signed the memorandum (D-1) he had not yet signed the formal contract (D-2)"; obviously, the contract must be presumed to have been intended to express the final agreement of the three parties thereto upon the terms of the sale. Clearly, a formal written contract between *three* parties cannot be reformed to conform to a prior, and informal, receipt affecting two only of the parties, unenforceable as an agreement, and over the objection of one who was a party to both instruments.

The receipt of May 13, 1925, was properly and necessarily disregarded by the Court.

POINT II.

The Case of *Smith v. Colonial Woodworking Co. Inc.*, 110 N. J. E. 418, is not in point.

The rule is, undoubtedly, that a "deed, when accepted, is *presumed* to express the ultimate intent of the parties with regard to so much of the contract as it purports to execute." But such presumption is rebuttable. "The recognized rule is that the acceptance of a deed for land is to be deemed *prima facie* full execution of an executory agreement to convey * * *"; the presumption becomes conclusive only "in the absence of fraud or reformation."

Here reformation was specifically prayed. The decision in the *Colonial case,* therefore, has no application, and no relevancy. It was properly and necessarily disregarded, together with other cases cited in appellants' brief to the same effect.

When a deed is reformed it is the deed *as reformed* which is to be given effect.

POINT III.

It would be inequitable to permit the defendants Beckelman and Steiner to compel complainant to pay their debt.

The mortgage given by Max to Dughi was a *purchase money mortgage.* It represented *an interest in the land itself* and was not a mere loan with the land as a security. The distinction is real and valid. Beckelman and Steiner bought with notice that a portion of the *purchase price,* as between Max and Dughi, was unpaid. Max was liable to Dughi for a portion of the *purchase price* for the land, and when Beckelman and Steiner bought they deducted that very sum from *their* purchase price, and thereby, in good conscience, *assumed* the payment of the balance of the *purchase price* to Dughi. By the terms of their contract they agreed to pay $14,500 for the property (Case, p. 180, l. 35) and if allowed to escape that obligation Max must pay the debt of Beckelman and Steiner, and to that extent pay twice for the land. In the settlement memorandum (Case, p. 178a) $4,000 of the "purchase price" of $14,500 was deducted because payable to Dughi to discharge the obligation of Max to Dughi. In effect the court would thus permit Beckelman and Steiner to deduct that amount from the purchase price they *agreed to*

pay, and would sanction this method of forcing such reduction in the price. This would be clearly inequitable.

POINT IV.

Complainant vendor had no independent advice, but relied upon the attorney of the defendant vendees for the protection of his interest.

Both the contract of sale and the deed were drafted by Harry Steiner, the attorney of the defendant vendees, Beckelman and Steiner (Case, p. 84, l. 35; p. 88, l. 37); the vendor, Max, was not represented by counsel (Case, p. 84, l. 40), and was a layman. To change the word "assumes" in the contract to "subject to" in the deed was a change of major importance and far reaching consequences. It was a change which, brought to the attention of complainant vendor, might have resulted in an abandonment of the deal. It was opposed to his interest. Harry Steiner, acting as attorney for *all* the parties, had no right to make that change without first carefully explaining its purpose and effect to complainant. It would probably have immediately raised a controversy which would have compelled complainant to retain independent counsel, as he has since done. Appellants cannot now take advantage of conduct on the part of their own counsel so inequitable, the approval of which would give them an unconscionable advantage over the complainant vendor.

The assumption clause was included in the contract of sale by vendee's attorney, he had no instruction from the vendees to draw the instrument otherwise, and it never occurred to

him that either party had any "intent" other than the assumption of the debt by the vendees. If there was any other thought in his mind he was in duty bound to call the difference to the attention of the complainant vendor, and not having done so the defendant vendees are estopped to ask that the term used by their attorney, in the contract executed by them, be changed, by the court, to the irreparable injury of the complainant vendor.

The decree should be, in all respects, affirmed.

Respectfully submitted,

E. A. MERRILL,
Solicitor for and of Counsel
with Defendant-Respondent,
John Dughi.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

PHILIP MAX, *Complainant-Respondent,* *vs.* WILLIAM M. BECKELMAN and LEO STEINER, *Defendants-Appellants,* JOHN DUGHI, *Defendant-Respondent.*	*On Appeal, etc.*

Kanter & Kanter, solicitors for complainant-respondent.

Elias A. Kanter, of counsel.

BRIEF FOR COMPLAINANT-RESPONDENT.

Introductory Statement.

By this appeal, two of the defendants are attempting to procure the reversal of the decree below, basing their argument solely upon the contention that the Vice-Chancellor who heard the cause should have, *on the facts,* decided the controverted issues in favor of those defendants; we quote from the brief of the appellants: "Since *this appeal presents for review the determination of the facts* by the Court, we shall necessarily examine the facts at length in the body of this brief." See paragraph 2, on page 1 of appellants' brief.

We assume that this Court will respect, and adhere to, a finding of facts by a Vice-Chancellor, at least to the same extent that the Supreme Court would uphold the verdict of a jury, reached on conflicting evidence, when the verdict of a

jury is brought for review by a rule to show cause before the Supreme Court, the rule being that the finding of facts will not be disturbed, when the testimony is conflicting, even though the reviewing tribunal might have—if sitting as triers of the facts—reached a contrary conclusion. Indeed, we think that a finding of facts by a Vice-Chancellor is entitled to greater weight, and should in no instance be disturbed, unless his findings of fact are clearly and palpably wrong and in such disregard of the evidence as to indicate passion, prejudice or gross mistake, these being the minimum tests applied by the Supreme Court before setting aside any verdict of a jury. The appellants make no assertion—for indeed none can be made—that the finding of facts in the instant case was the result of passion or prejudice. The appellants, however, do make the argument that the Vice-Chancellor made a mistake is his conclusion of the facts, but the very extent and labored efforts of the appellants to demonstrate such a mistake indicate, far more eloquently than we can state, that they cannot complain of the absence of evidence fully justifying the Vice-Chancellor's conclusions, but that they are disappointed with the result.

In a similar situation before this Court, where an effort was made to reverse a Vice-Chancellor's conclusion of facts, Chief Justice Magie said:

> "I deem it unnecessary to pronounce upon the correctness of this view (whether, as a matter of law, a certain contract could or could not be established by parole evidence); for assuming it to be correct, the parole evidence adduced was held by the vice-chancellor to be insufficient to make out such an agreement; and *as the evidence was extremely contradictory, and as the decision*

> *thereon must have depended upon the credit given to the witnesses, I feel unable to say that the vice-chancellor, who saw and heard the witnesses, was wrong in his conclusion.* For this reason, I shall vote to affirm the decree."
>
> *Riddle* v. *Clabby*, 59 N. J. E. 573, 583; 44 Atl. 859, 863.

We, therefore, urge that the correct rule and the sound reasoning is that a Vice-Chancellor's conclusion of facts, based on conflicting evidence, should not be disturbed by this Court, and we urge that this fundamental rule, which manifests but a decent regard for the office of a very high judicial officer, is the fundamental rule to be borne in mind in the decision of this case.

POINT I.

The evidence established that the deed sought to be reformed, and reformed by the decree below, was insofar as such deed omitted the covenant of assumption of mortgages, the result of a mutual mistake between the parties to such deed acting through their common scrivener.

The bill of complaint (State of Case, pp. 6-21, both inclusive) was filed by Philip Max, against the defendants (who are the appellants herein) for the purpose, *first,* of reforming a deed made by Max to those defendants so that it might, when reformed, conform with the contract previously made between the parties by inserting in the deed the covenant (contained in the contract) on the part of Beckelman and Steiner assuming the payment of the mortgage encumbrances against the real estate and, *second,* of compelling those defendants to pay an already existing mortgage deficiency to the defendant, Dughi. The defendant, John Dughi, who does

not appeal, was made a party defendant because he had threatened to sue Max, the original obligor on the bond secured by the mortgage foreclosed.

There was no dispute on most of the facts, which are well and succinctly stated in the opinion of Vice-Chancellor Stein (State of Case, pp. 60-64). That there was no controversy over the facts is clearly indicated in the record itself, because Mr. Kessler, the solicitor of the defendants who now appeal, expressly so stated:

> "The Court: The only thing you are contending is there was no assumption of the mortgage.
>
> Mr. Kessler: Yes, sir."
>
> * * * * * * * *
>
> "The Court: 'Pretty much' you admit everything?
>
> "Mr. Kessler: Yes" (State of Case, top of p. 80).

The Vice-Chancellor found *as a fact* that the deed was the result of a mutual mistake (State of Case, bottom of p. 62, top of p. 63) being made to read "subject to" when it should have been "assume," and he also found that the contention of the defendants to the effect that the contract was erroneous was *not* borne out by the evidence (State of Case, p. 63, ll. 12 to 20). As we read the brief of the appellants, the meat of their argument is that the Vice-Chancellor erred in his conclusion of facts, because

A. On May 13, 1925, Max had given a receipt to William M. Beckelman (and we here stress that it was most informal and to William M. Beckelman *only*) for $500.00, now printed as Exhibit D. 1, page 179 of the State of the Case.

B. The contract subsequently entered into, dated May 1925, between Max and *both William M. Beckelman and Leo Steiner,* and of the most formal nature, was erroneous in having included therein that Messrs. Beckelman and Steiner were to assume the payment of the mortgages; see the photostatic copy of that agreement, as signed by Philip Max, and as Exhibit D. 2 now printed on page 180, etc. of the State of the Case.

C. The deed of conveyance, in omitting the covenant of assumption, was the result of an express agreement to that effect; that deed, making the conveyance "subject to the mortgages," is Exhibit C. 2 and printed at page 174, etc. of the State of the Case.

The appellants, in substance, claim that Exhibit D. 1 was the final and complete contract between the parties, under which Max was already obliged to convey, and the purchasers were obliged to take, *subject* only to the mortgages. In making such an argument, the appellants entirely overlook these important considerations:

First. That memorandum was made only to William M. Beckelman, and not with the two persons mentioned in the formal contract, that is, William M. Beckelman and Leo Steiner.

Second. That memorandum was *not* signed by any one of the subsequent purchasers, and, therefore, neither of them was under obligation.

Third. That memorandum did *not* contain at least the following additional obligations imposed upon the vendor, Max, by the terms of the complete contract, Exhibit D. 2, to wit:

1. Under D. 2, Max was required to give a warranty deed; under D. 1, a bargain and sale deed, without any covenants whatever, would have completely discharged Max's legal obligations.
2. Under D. 2, Max was required to convey miscellaneous personal property, appurtenant to, or used in connection with the operation of, the building; under D. 1, Max would have had the right to remove such personal property.
3. Under D. 2, the risk of loss by fire until delivery of the deed was assumed by Max; under D. 1, the risk of such loss, as a matter of law, would have been on the purchaser.
4. Under D. 2, Max was required to make good all damages to the building beyond ordinary wear and tear; under D. 1, the result of such damage would have been the risk of the purchaser.
5. Under D. 2, Max covenanted that all the buildings were within the boundary lines and that there were no encroaching structures; under D. 1, whether the buildings encroached on property of others or whether other buildings encroached upon the property would have been no excuse for the refusal to take title on the part of the purchaser, even if he were bound by the terms of Exhibit D. 1, which, of course, he was not, not having signed it.
6. Under D. 2, Max covenanted that the buildings would comply with local ordinances and the regulations of the Tenement House Act; under D. 1, Max was absolutely free of these obligations.

7. Under D. 2, Max had to convey a title not derived from any proceedings resulting from the sale of the property for non-payment of municipal taxes; under D. 1, there was no such restriction upon Max.

8. Under D. 2, Max covenanted to convey title not founded on adverse possession; under D. 1, he was under no such restrition and a tender of title founded upon adverse possession would have been a sufficient tender.

9. Under D. 2, Max covenanted to pay for all street improvements, made before the closing of title, *even where the municipality had made no assessment for such improvement;* under D. 1, a conveyance of the property to which no assessments had been attached would have been a complete legal discharge of the contract.

In other words, aside entirely from a change of the designated purchasers, Exhibit D. 2 ENLARGED THE OBLIGATIONS OF MAX IN AT LEAST NINE VITAL PARTICULARS, ALL FOR THE BENEFIT OF THE PURCHASERS. In spite of this cogent circumstance, the appellants—whose engagement was enlarged only by the assumption of the mortgages—now contend that Exhibit D. 2, in only the one particular where the obligation of the purchasers was enlarged, was the result of a mistake on their part, after they had received performance of Exhibit D. 2 in accordance with the terms of that contract, and not in accordance with the terms of the earlier memorandum, D. 1. The facts speak for themselves and lead to the inevitable conclusion that the present appellants did not wish to be bound—

as indeed they were not bound—by the terms of Exhibit D. 1, but wanted their counsel to prepare a more formal and complete instrument, and that only, when the facts giving rise to the loss occur, do they now assert that that contract, Exhibit D. 2, contained an error. It may be safely assumed that, had not Max given a warranty deed, and had he not in every particular complied with D. 2, the title would have been rejected. It comes with poor grace from the appellants now to say, after they had been advantaged by the complete performance of Exhibit D. 2, that they be excused from the complete and full effect of Exhibit D. 2 in the single clause of the covenant of assumption. It is striking to find that they do not claim that the other clauses of that contract, imposing substantial additional liabilities on Max, were the result of mistake. Manifestly, it is unfair to reject the burdens of a contract after having accepted the benefits thereof. The contract thus elaborately changed for the benefit of the appellants cannot be said to be the result of a mistake, and the Vice-Chancellor's conclusion of fact was that Exhibit D. 2 was *not* the result of any mistake.

Our contention that the deed given by Max to the appellants was given in performance of the contract of May 1925, Exhibit D. 2 is not merely the argument of counsel, but is founded also upon the *express admissions of that fact in the record,* from which we quote, in parallel columns:

5. "On or about May 1925, complainant entered into a contract with the defendants, William M. Beckelman and Leo Steiner, a true copy of which marked Exhibit A is hereunto annexed and expressly made a part hereof * * *." (That Exhibit A, annexed to the complaint, is printed at page 180 of the state of the case, as Exhibit D-2, apparently to save cost of duplicated printing.)
State of Case, p. 8, line 5, etc.

"5. He admits Paragraph 5." Amended answer and counterclaim of William M. Beckelman; State of Case, page 22, line 21.

"5. He admits Paragraph 5." Amended answer and counterclaim of Leo Steiner; State of Case, page 31, line 21.

"6. *In performance of the obligations of said contract on his part to be performed,* said complainant executed and delivered to the defendants, William M. Beckelman and Leo Steiner, a deed for the said premises (and then follows a description of the date, record, etc., of the deed)." (That deed is Exhibit C-2, printed at page 174 of the State of the Case.)
State of Case, p. 8, line 20, etc.

"6. He admits Paragraph 6." Amended answer and counterclaim of William M. Beckelman; State of Case, page 22, line 22.

"6. He admits Paragraph 6." Amended answer and counterclaim of Leo Steiner; State of Case, page 31, line 22.

In view of this record admission, that the deed was delivered pursuant to the contract, Exhibit D. 2, clearly recognizing that the parties themselves regarded Exhibit D. 2 as the contract by which they were bound, it is almost incomprehensible that the appellants should now assert that that contract was erroneous in any respect, when, at the time the parties were performing their several acts in respect thereto, they did not find it to be erroneous. The asserted claim of error in this contract is, as we see it, purely an afterthought.

In addition to all these circumstances, Exhibit D. 2 contains within itself *intrinsic evidence* that the particular clause under consideration was emphatically not the result of error. The prop-

erty was subject to two mortgages. The *photostatic copy* of that agreement (added to the State of the Case since the printing thereof) pictorially reproduces the original of that contract. The clause under consideration is printed on page 2, and the original *printing* is as follows:

> "By assuming the mortgage at present a lien on the premises, and paying the same according to the terms thereof."

The photostatic copy clearly shows that after the word "mortgage," the letter "s" was inserted with a pen, AND THE INSERTION OF THAT PLURAL ENDING SHOWS THAT THE SCRIVENER WHO WROTE IT HAD READ THAT CONTRACT FULLY AND HAD MADE THE NECESSARY GRAMMATICAL CORRECTION. This, to our way of thinking, entirely disposes of his testimony that he had instructed some stenographer in his office to prepare the contract and that he had never looked at the form. Counsel for the appellants, at the bottom of page 23 of their brief, say that "the printed portion of the contract contains in it the words 'by assuming the mortgages' "; this statement of counsel is *not* correct, because the printed form did *not* have the *plural word* "mortgages"; the word was *printed* in the singular form and the plural ending "s" *inserted in ink;* we emphasize this physical fact, because counsel for appellants draw, and would have this Court draw, an erroneous conclusion as to the very clause under special consideration. Furthermore, the contention of the defendants-appellants that this clause was left in the contract by mistake is no borne out by the testimony of Mr. Harry Steiner (the scrivener who drew both the

contract and the deed), *who was the witness for the appellants,* his testimony being:

> Q You looked at the contracts before sending them out, did you not? A I presume I did.
>
> Q Well, did you or did you not? A *I presume I did.*
>
> Q Can't you answer more definitely as a lawyer, that you did or you did not? A I LOOKED AT THEM, YES, SIR.
>
> Q And you had your clients sign them? A I did.
>
> Q YOU ADVISED THEM TO SIGN THEM? A I DID.
>
> Q And you corrected in the printed form the word "Mortgage" to "Mortgages" didn't you? A That I don't recall.
>
> Q Well, look at them, please. You see that clause there, Mr. Steiner, marked "by assuming the mortgage" you wrote in the letter "s" did you not? A There appears to be an "s" after "Mortgage."
>
> Q *You wrote that in, didn't you?* A *That I don't recall.*
>
> State of Case, page 124, lines 1-25, Testimony of Harry Steiner.

The testimony above quoted was, of course, persuasive and, indeed, conclusive that, in point of fact, *Exhibit D. 2 was the final and complete contract of the parties and that no part thereof was the result of any error.* Upon this conclusion, it was the natural consequence that the allegations of the counter-claim of the appellants should have been (as, indeed, it was) dismissed, and for the Court to examine whether the omission of the covenant of assumption of the mortgages, from the deed, was the result (as the appellants contended) of an oral agreement for such omission or whether it was not the result of mistake.

There is no doubt of the fact that both parties to the transaction were employing the common

scrivener, Mr. Harry Steiner, who also drew the deed with the covenant of assumption omitted. Of course, his duty was to draw the deed in accordance with the provisions of the contract, and that duty he owed to both the vendor and the purchasers. Whatever errors were committed were, therefore, the mutual errors of both of the parties, as they were acting through one agent; it is not to be presumed that that agent intended to defraud one party at the expense of the other. The fact that he drew a deed, different from the provisions of the contract, must necessarily be first ascribed to the circumstance of mistake, and necessarily a mutual mistake on the part of both parties to the deed, since both were acting through their common agent. Mr. Steiner, in testifying for the defendants, did not say that he intended to commit any fraud, and explained the omission of the covenant of assumption in the deed by saying that Mr. Max approved the clause which made the conveyance "subject" only to the mortgages. But, as is pointed out in the brief of the appellants (top of p. 4), Mr. Max denied the truth of Mr. Steiner's explanation. It thus became a conflicting issue of fact which the Vice-Chancellor had to decide and he decided correctly, and his decision should not be disturbed for at least the following reasons:

A. Mr. Steiner admitted that at least up to the time that the deed was signed by Mr. Max, there had been no suggestion by Mr. Steiner that the contract was a mistake and he had never informed Mr. Max that the contract was a mistake; Testimony of Mr. Steiner, State of Case, page 131, lines 1-10.

B. It had already been demonstrated, from the testimony quoted in the preceding paragraph,

that the contract, as a matter of fact, was not the result of any error.

C. It had already been demonstrated, from the testimony quoted in the preceding paragraph, that Mr. Steiner's recollection of the facts was by no means entirely clear.

D. With the fact established that the contract was not the result of error, it is entirely improbable that any discussion took place for the purpose of correcting any alleged error.

E. The deed drawn by Mr. Steiner was a *full covenant* warranty deed (Exhibit C. 2, State of Case, p. 174, and particularly p. 177, ll. 30-40); the contract provided for a simple warranty deed, and Mr. Steiner testified that the reason for that change was that he had simply picked up that form, that is, a full covenant warranty deed, and used it instead of the ordinary warranty deed; (State of Case, page 132, ll. 1-20). This, of course, indicated haste and very probably, inattention to the provisions of the contract, which, most probably, also explains why the clause for assumption of the mortgages was not included in the deed.

F. In order to establish that the deed was agreed to be changed—from the terms provided for by the contract—, the defendants-appellants assumed a burden of proof which the Vice-Chancellor found they had not sustained, and adopted the only rational explanation, most favorable to the defendants under the circumstances, not that a fraud was committed, but that the deed was the result of a mutual mistake, due to lack of attention on the part of Mr. Steiner, the common scrivener of both parties, both parties being, as they intended

to be, bound by the terms of the contract, Exhibit D. 2, in which no error had occurred and in respect to which no change had been made.

Under these circumstances, it was entirely within the province of the learned Vice-Chancellor to have found the factual issues in favor of the complainant, and that he did so find is exemplified by the recitals in the decree, reading:

> "This cause having come on for final hearing * * * and the Court being of opinion that the complainant, Philip Max, has sustained and proved the allegations of his bill of complaint * * *, that the allegations of the counter-claim of William M. Beckelman have not been sustained and proved, * * * and that the allegations of the counter-claim of Leo Steiner have not been sustained and proved * * *."
>
> State of Case, pages 65-66.

We respectfully submit that the conclusions of the Vice-Chancellor should not be disturbed.

POINT II.

The authorities cited by the appellants for reversing the decree are not relevant upon the facts as found by the Vice-Chancellor.

Under POINT I of their brief, the appellants refer to a few cases as authority for reversing the decree in the case at bar but, in our view, an analysis of those cases shows them to be inapplicable.

Smith v. *Colonial Woodworking Co. Inc.,* 110 N. J. E. 418, 160 Atl. 351, contains the following significant language (inadvertently not emphasized in appellants' brief):

> "Further, under the bill, answer, and counter-claim as framed (THERE BEING

> NO PRAYER TO REFORM THE DEED TO EXPRESS THE ALLEGED UNDERTAKING, the prayer being only to be allowed credit on the mortgage), there was no question presented except that of whether Joachimsthal had assumed the payment of the mortgages or not, and this, as above stated, was to be determined by the deed, because the deed is presumed to express the ultimate intent of the parties. * * * Under the pleadings, therefore, the agreement of sale, the settlement papers, and everything that preceded the making of the deed were inadmissible, for this purpose."
>
> *Smith* v. *Colonial Woodworking Co. Inc.,* 110 N. J. E. 418, 421.

In the case at bar, however, the prayer was for reformation and the pleadings and proofs were directed to that issue. Hence, the SMITH case is no authority against the complainant.

Malcolm v. *Lavinson,* 110 N. J. L. 63, 164 Atl. 318, involved an action at law by the grantor against the grantee, and in no way involved the issue of what relief should be accorded in the Court of Chancery where reformation is sought. This case is no authority against the complainant upon the facts here involved.

As far as we have been able to determine, the very able brief of the appellants does not raise or assert the proposition that the decree below is erroneous as a matter of law, but is directed rather to a criticism of the authorities and reasoning cited and given by the Vice-Chancellor. It has always been the law that the fact that no reasons were assigned in the Court below for the action taken, or even the fact that wrong reasons were assigned by the Court below is no ground for reversal. A few of the cases, illustrating and enunciating this rule are:

McMichael v. *Horay,* 90 N. J. L. 142, 100 Atl. 205, where Chancellor Walker, speaking for this Court, said:

> "* * * As a judgment entered upon a non-suit directed by the trial judge, and brought up for review, will be affirmed if correct on any legal ground, although the reason given by the court below is erroneous. Citing case."
>
> *McMichael* v. *Horay,* 90 N. J. L. 142, 146.

Meisel v. *Merchants' National Bank of Newark,* 85 N. J. L. 253, 88 Atl. 1067, where Justice Trenchard, speaking for this Court, said:

> "Moreover there is another view of the case which supports the judgment, AND THE RULE IS THAT A JUDGMENT WILL BE AFFIRMED, IF CORRECT ON ANY LEGAL GROUND, THOUGH ANOTHER REASON WAS RELIED UPON IN THE COURT BELOW. Gillespie *v.* John W. Ferguson Co., 78 N. J. L. 470, 74 Atl. 460."
>
> *Meisel* v. *Merchants' National Bank of Newark,* 85 N. J. L. 253, 255.

Beach v. *Palisade Realty & Amusement Co.,* 86 N. J. L. 238, 90 Atl. 1118, where the syllabus, *prepared by the Court,* states:

> "A direction of a verdict will be sustained, although the reasons given by the court below are incomplete or even erroneous, if in fact the direction was proper upon other grounds appearing in the case."
>
> *Beach* v. *Palisade Realty & Amusement Co.,* 86 N. J. L. 238.

Shauinger v. *Apter,* 96 N. J. E. 302, 125 Atl. 31, involved an appeal from the Court of Chancery to this Court, and in the fifth syllabus of that case, *prepared by this Court,* it is stated:

> "The duty of the Court of Errors and Appeals is to inquire whether there is any

> error in the judgment or order or decree appealed from, AND NOT WHETHER THE REASONS GIVEN FOR THE CONCLUSION ARE TENABLE. * * *"
>
> *Shauinger* v. *Apter,* 96 N. J. E. 302.

Benjamin v. *Benjamin,* 111 N. J. E. 400, 162 Atl. 612, where, on appeal from the Court of Chancery, Justice Trenchard, speaking for this Court, said:

> "The appellant says that the decree should be reversed because the ground stated by the Vice-Chancellor in his opinion is insufficient to sustain the decree advised by him. This point is ill-founded in law. The duty of this court on appeal from the court of chancery is to inquire whether there is any error in the decree appealed from, not whether the reasons given for the conclusion reached below are tenable. Of course, this court avails itself of the light that may be furnished by the reasoning of the opinion of the court below filed pursuant to the requirement of our State Constitution, art. 6, sec. 2, par. 5. Shauinger *v.* Apter, 96 N. J. E. 302, 125 Atl. 31."
>
> *Benjamin* v. *Benjamin,* 111 N. J. E. 400, 404.

POINT III.

The decree below is well founded both in law and in fact.

Notwithstanding the criticism made by the appellants of the Vice-Chancellor's citations of authorities, the decision below is well founded in the law which supports the right of the obligor of a bond to compel the grantee who assumes the payment of a mortgage to pay the mortgage indebtedness and to exonerate the obligor from the payment thereof. In the case

at bar, the legal right had to be enforced by suit in equity, because of the necessity for reformation of the deed, as well as for other equitable relief (not involved in this appeal). On the right of the obligor to compel the assuming grantee to indemnify the mortgagor, we refer to the following cases as full justification:

Tichenor v. *Dodd,* 4 N. J. E. 454, which, though decided in the Court of Chancery only, has been frequently cited with approval of this Court, and that even as recently as in the case of *Malcolm* v. *Lavinson,* 110 N. J. L. 63.

Crowell v. *Hospital of St. Barnabas,* 27 N. J. E. 650, 655, cited in this Court with the opinion by Justice Depue, which has always been regarded as a leading case and which has been cited frequently with approval.

Woodbury Heights Land Co. v. *Loundenslager,* 60 N. J. E. 403, 408, 45 Atl. 630, also a decision of this Court.

Holland Reform School Society v. *De Lazier,* 85 N. J. E. 497, 97 Atl. 253, also decided by this Court.

Howell v. *Baker,* 106 N. J. E. 434, 151 Atl. 117, which, though decided in the Court of Chancery only, is on the respectable authority of Vice-Chancellor Berry.

Malcolm v. *Lavinson,* 110 N. J. L. 63, 164 Atl. 318, decided by this Court with the opinion by Justice Case, which, although involving an appeal from a law court, necessarily discusses these principles, and refers to some of the cases above cited with apparent approval.

From the standpoint of the findings of fact, we consider that the opinion of the Vice-Chan-

cellor in the instant case is rather conclusive, when he says:

> "THE EVIDENCE SATISFIES ME BEYOND QUESTION that the scrivener was the solicitor for the purchasers and that the complainant simply did what is quite usual in such matters, namely, instruct the scrivener to prepare the deed for him; he did not have the benefit of independent advice. The scrivener, Harry Steiner, says that he explained the change in the deed from the contract wherein it provided that the sale was 'subject to' the mortgages. This is denied by the complainant who says he did not read any part of the deed except the description, and that if the word 'subject' was called to his attention it meant the same as 'assume.' Complainant had a right to entertain that belief, because at the time of the closing of title the contract was followed, in that the principal and interest due on the mortgages were deducted from the purchase price. It is clear to me that the deed was made to read 'subject to' the mortgages by a mutual mistake. The change was unknown to any of the parties; it was made by the scrivener or someone in his office, without the knowledge of the parties or their consent."
>
> OPINION of Vice-Chancellor, State of Case, page 62, lines 25-40 and page 63, lines 1-13.

It will be observed that the Vice-Chancellor's opinion is that he is satisfied "beyond question." In some details, the Vice-Chancellor was confronted with conflicting and contradictory evidence. His decision necessarily depended, to some extent, upon the credit that he was to afford to the testimony. He saw and heard the witnesses. Under such circumstances, as was pointed out in *Riddle* v. *Clabby,* 59 N. J. E. 573, 583, 44 Atl. 859, 863, this Court should not say

that Vice-Chancellor Stein was wrong. We have, of course, also demonstrated, by an analysis of the evidence under POINT I hereof, that the Vice-Chancellor was, as a matter of fact, absolutely right.

POINT IV.

The decree below should be affirmed.

For the reasons given in this brief, and in the companion brief submitted in behalf of John Dughi by his solicitor, Mr. Earl A. Merrill, we respectfully urge that the decree be affirmed.

Respectfully submitted,

KANTER & KANTER,
Solicitors of Complainant-Respondent.

ELIAS A. KANTER,
Of Counsel.

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