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BILL OF COMPLAINT.

In Chancery of New Jersey

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

The complainant, Excelsior Trust Company, a banking corporation of the Commonwealth of Pennsylvania, doing business in the City of Philadelphia, respectfully shows that:

1. On the 9th day of November, nineteen hundred and twenty-five, Joshua Bodek, of Philadelphia, Pennsylvania, being indebted to William J. Ryan, Inc., a corporation of the State of New Jersey, in the sum of Sixty-three Thousand Four Hundred and Ninety Dollars (real debt) executed a bond in that sum payable Nine Thousand Seventy Dollars upon completion of improvements and notice thereof as set forth in the mortgage accompanying said bond; and the balance of Fifty-four Thousand Four Hundred Twenty Dollars within three years from the date of said bond.

2. To secure payment of said bond, said Joshua Bodek executed to said William J. Ryan, Inc., a mortgage of even date with the bond; and thereby conveyed to it in fee, the land hereinafter described, on the express condition that such conveyance should be void if payment should be made according to the terms of the bond. Which mortgage, having been first duly acknowledged, was recorded in the Clerk's Office of Cape May County on November 21, 1925, in Book 230 of Mortgages, page 487.

3. The mortgaged premises are described as follows: ALL those certain tracts or parcels of land and premises hereinafter particularly described, situate in the City of North Wildwood in the County of Cape May and State of New Jersey, BEING Lots 3 and 4, Block 301; Lots 3 and 4, Block 302; Lots 9, 27, 28, 29, 30 and 31, Block 304; Lots 9, 10, 11, 25, 27, 28, 29, 30, 31, 33, 47 and 48, Block 305; Lots 1 and 9, Block 306; Lots 6, 37, 38, 39, Block 413; Lots 2, 8, 16, 17, 18, 19, 20 and 21, 35, 36, 37, 38, 39, 40, 41 and 42, Block 415; Lots 22, 23, 32, 33, 34, Block 417; Lots 22, 23, 32, 33, 34, Block 418; Lots 18, 19, 24 and 32, Block 419, as shown on "Plan of Land in City of North Wildwood, Cape May County, N. J. Wm. J. Ryan, Inc., Owners and Developers, made by Harry E. Weir, Civil Engineer, dated August 27, 1925, filed, or intended to be filed, in the County Clerk's Office of said County."

UNDER AND SUBJECT to the restrictions, conditions and reservations as in deed from Wm. J. Ryan, Inc. to Joshua Bodek are set forth.

4. On November 9, 1925 said William J. Ryan, Inc., a corp. &c., by written assignment, assigned said mortgage to Ocean City Title and Trust Company, a corp. &c., which said assignment was duly recorded in said Clerk's Office in Book 25 of Assignments of Mortgages, page 458, on November 27, 1925.

5. On January 2, 1926 said William J. Ryan, Inc., a corp. &c., by written assignment assigned said mortgage to Carlton Godfrey, which said assignment was duly recorded in said Clerk's Office in Book 26 of Assignments of Mortgages, page 118, on January 4, 1926, subject to assign-

ment set forth in Paragraph 4 of this bill of complaint.

6. On January 18, 1926 said William J. Ryan, Inc., a corp. &c., by written assignment, assigned said mortgage to John F. Kelley of Philadelphia, and Augustine B. Repetto, of Atlantic City, which said assignment was duly recorded in said Clerk's Office in Book 26 of Assignments of Mortgages, page 267, on February 2, 1926, subject to assignment set forth in Paragraph 4 and 5 of this bill of complaint.

7. On April 28, 1926 said Ocean City Title & Trust Company, a corporation of the State of New Jersey, re-assigned said mortgage to said William J. Ryan, Inc., a corporation, &c., which said assignment was duly recorded on April 29, 1926 in Book 27 of Assignments of Mortgages page 152.

8. On April 28, 1926 said Carlton Godfrey reassigned said mortgage to said William J. Ryan, Inc., a corp. &c., which said assignment was duly recorded on April 29, 1926 in Book 27 of Assignments of Mortgages page 154.

9. On April 28, 1926 said William J. Ryan, Inc. a corporation, &c., assigned said mortgage to Joseph Seltzer, which said assignment was duly recorded in said Clerk's Office in Book 27 of Assignments of Mortgages page 158 on April 29, 1926.

10. Said Joseph Seltzer on said April 28, 1926 assigned said mortgage to Excelsior Trust Company, a banking corporation of Pennsylvania, complainant, which said assignment was duly recorded in said Clerk's Office in Book 27 of As-

signments of Mortgages, page 162, on April 29, 1926.

11. By a declaration of trust dated January 12, 1926 and recorded in the Clerk's Office of said County on the 20th of said January in Book 413 of Deeds, page 444, said Joseph Bodek makes known and declares that he holds Lots 18 and 19, Block 419, and Lot 6, Block 413, in the premises herein described in trust for one Harry Frankel, his heirs and assigns; by a like declaration of trust dated on said day and recorded on said day in said Clerk's Office in Book 420 of Deeds, page 304, said Joseph Bodek makes known and declares that he holds Lots 3 and 4, Block 301; Lots 3 and 4, Block 302; Lots 9, 27, 28, 29, 30, 31, Block 304; Lots 9, 25, 27, 28, 29, 30, 31, 33, 10, 11, 47, 48, Block 305; Lots 1 and 9, Block 306; Lots 37, 38, 39, 6, Block 413; Lots 2, 8, 16, 17, 18, 19, 20, 21 35, 36, 37, 38, 39, 40, 41, 42, Block 415; Lots 22, 23, 33, 34, 32, Block 417; Lots 22, 23, 32, 33, 34, Block 418; Lots 18, 19, 24, 32, Block 419, in trust for the following named persons, their heirs and assigns, and in the amounts therein set forth, to wit: Joshua Bodek, one-fourth interest; David Frankel, one-fourth interest; Michael Lipkowitz, one-fourth interest; Dr. Morris A. Weinstein, one-eighth interest; Herbert Weiner, one-eighth interest, and by an assignment dated the 13th day of December 1926 and recorded on the 21st day of said December in said Clerk's Office in Book 445, page 483, said Michael Lipkowitz has assigned, transferred and set over unto the said David Frankel, his heirs, all his right, title and interest in and to the premises described in the declaration of trust hereinabove referred to.

Whatever interest said David Frankel, or his wife, Sadie Frankel, Michael Lipkowitz and his wife Tillie Lipkowitz, Morris A. Weinstein and Amelia Weinstein, his wife, Herbert Weiner (single man), Harry Frankel or his wife Anna Frankel or Joshua Bodek and his wife Nancy Bodek may have by virtue of the respective declaration of trust are subordinate and subject to the interest of complainant.

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

13. The improvements were completed and notice thereof as provided in said mortgage was duly given, and on May 9, 1927 an installment of Nine Thousand and Seventy Dollars fell with six months' interest, on complainant's bond and mortgage and remained unpaid for more than thirty days thereafter, and no part thereof has yet been paid. Complainant has selected that the whole principal sum with all unpaid interest shall be now due.

14. Said Joshua Bodek, Nancy Bodek, his wife, David Frankel, Saidie Frankel, his wife, Michael Lipkowitz and Tillie Lipkowitz, his wife, Morris A. Weinstein, and Amelia Weinstein, his wife, Herbert Weiner (single man), Harry Frankel and Anna Frankel, his wife, have always been in possession of the mortgaged premises.

15. The whole principal sum of Sixty-three Thousand Four Hundred and Ninety Dollars is

due upon complainant's bond and mortgage with interest thereon from November 9, 1926.

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

(1) That Joshua Bodek, Nancy Bodek, his wife, David Frankel, Sadie Frankel, his wife, Michael Lipkowitz, Tillie Lipkowitz, his wife, Morris A. Weinstein, Amelia Weinstein, his wife, Herbert Weiner (single man), Harry Frankel and Anna Frankel, his wife, who are the defendants to this suit, may answer this bill of complaint without oath and each statement therein made.

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

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

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

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

(signed) COLE & COLE,
Solicitors for and of Counsel
with Complainant.

Amendment to Bill.

IN CHANCERY OF NEW JERSEY.

Between	
EXCELSIOR TRUST CO., *Complainant,*	*On Bill to Foreclose.*
and	*Amendment to Bill.*
JOSHUA BODEK, *et al., Defendants.*	

Subpoenas not yet having issued in the above-entitled cause, complainant hereby amends its bill as follows, by adding paragraph 10½:

10½. By agreement of Consolidation duly approved by the proper authorities and recorded in the County of Philadelphia on March 28, 1927, Charter Book No. 97, page 29, the said Excelsior Trust Company merged with and become known as the Colonial Trust Company, which is made party complainant.

(signed) COLE & COLE,
Solicitors for Complainant.

ANSWER.

IN CHANCERY OF NEW JERSEY.

Between

EXCELSIOR TRUST COMPANY, a corporation of Pennsylvania, also known as Colonial Trust Company,
Complainant,

and

JOSHUA BODEK, NANCY BODEK, his wife, DAVID FRANKEL, SAIDE FRANKEL, his wife, MICHAEL LIPKOWITZ, TILLIE LIPKOWITZ, his wife, MORRIS A. WEINSTEIN, AMELIA WEINSTEIN, his wife, HERBERT WEINER (single man), HARRY FRANKEL and ANNA FRANKEL, his wife,
Defendants.

On Bill, &c.

Answer.

The joint and several answer of Joshua Bodek, Nancy Bodek, his wife, David Frankel, Saide Frankel, his wife, Michael Lipkowitz, Tillie Lipkowitz, his wife, Morris A. Weinstein, Amelia Weinstein, his wife, Herbert Weiner (single) Harry Frankel and Anna Frankel, his wife, defendants to the bill of complaint above named.

These defendants to so much of the said bill of complaint as they are advised is material for them to make answer unto, answering say:

1. They believe it to be true that on or about the 9th day of November 1925, Joshua

Bodek, above named, executed a bond in the sum of $63,490. real debt to William J. Ryan, Inc., which said bond obligated the said Joshua Bodek to pay $9,070. upon completion of improvements and notice thereof as set forth in the accompanying indenture of mortgage. Said bond also contained a further provision for the payment of $54,420. within three years from the date thereof, but for greater certainty these defendants call for the production and inspection of said bond.

2. They likewise believe it to be true that contemporaneous with the execution of said bond, the said Joshua Bodek executed to said William J. Ryan, Inc., a mortgage upon certain lands and premises in the City of North Wildwood in the County of Cape May and State of New Jersey, which mortgage contained a condition somewhat as described in the second paragraph of said bill, but for greater certainty these defendants pray leave to inspect and prove the said mortgage, or a certified copy thereof. The said mortgage, among other things, expressly provided that:

> "The installment of principal of $9,070 hereinbefore mentioned, shall be payable upon completion by the party of the Second Part (William J. Ryan, Inc.) its successors or assigns, of the following improvements to the land now or formerly belonging to the party of the Second Part, of which land the lots herein described are a part, namely, the necessary clearing of said land, the filling of the low area up to a grade approximately equal to the grade of the present County road, the necessary grading to estab-

lish a uniform grade of the streets, the graveling of all roads, and the installing of concrete sidewalks, curbs and sewers, and upon the sending of notice of such completion by said party of the Second Part, its successors or assigns, by letter addressed to said party of the First Part (Joshua Bodek) at No. 425 Market Street, Philadelphia, Pennsylvania."

These defendants admit that the said mortgage, having been first duly acknowledged, was recorded in the Clerk's Office of Cape May County, at or about the time in the second paragraph of the bill of complaint stated.

3. These defendants believe the third paragraph of the bill correctly describes the premises covered by and included in said mortgage, but for greater certainty they beg to refer to the original or a certified copy thereof.

4. These defendants are entirely ignorant of the allegations contained in the 4th, 5th, 6th, 7th, 8th, 9th and 10th paragraphs of said bill, and they call for proof thereof. They believe it to be true that by agreement of consolidation the said Excelsior Trust Company on or about the 28th of March 1927, became merged with and known as Colonial Trust Company, the complainant, by amendment herein.

5. These defendants believe the allegations of the 11th paragraph of the bill of complaint are correct, but for greater certainty they call for the production of the declarations of trust and assignments of interests, or certified copies thereof in said 11th paragraph of the bill of complaint referred to.

Answer.

6. These defendants admit the 12th paragraph of said bill.

7. These defendants deny that the improvements were completed and notice thereof as provided in said mortgage was duly given on May 9, 1927. They say and show that the improvements hereinabove specified and in the mortgage accompanying said bond specifically agreed by the mortgagee to be made before the said installment of $9,070 shall become due, have not, nor have any of them been made. That is to say, the land has not been cleared, the low area thereof has not been filled up to the grade approximately equal to the grade of present County road; the necessary grading to establish a uniform grade of the streets has not been made, nor have all the roads been graveled, concrete sidewalks, curbs and sewers have not been installed as agreed, and hence these defendants insist that the said installment of $9,070 is not due upon said bond and mortgage, nor any part thereof, nor has the complainant any right to foreclose the same.

8. The 14th paragraph of said bill is denied.

9. The 15th paragraph of said bill is denied.

These defendants pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

IRVING SHENBERG,
Solicitor for Defendant.

Of Counsel.

REPLICATION.

IN CHANCERY OF NEW JERSEY.

Between

COLONIAL TRUST COMPANY (formerly Excelsior Trust Company),

Complainant,

and

JOSHUA BODEK, *et al.*,

Defendants.

On Bill to Foreclose.

Replication.

Complainant joins issue on the answer of the several defendants.

COLE & COLE,
Solicitors of Complainant.

AMENDMENT TO BILL.

IN CHANCERY OF NEW JERSEY.

Between EXCELSIOR TRUST COMPANY, a corp. &c., *Complainant,* *and* JOSHUA BODEK, *et ux, et al.,* *Defendants.*	*Amendment to Bill.*

It is on this day of September, 1929, ORDERED that the bill of complaint in the above cause be amended by adding the following paragraphs:

14a. The bond and mortgage above referred to provided that the mortgagors should pay taxes on the mortgaged premises within ninety days after the same became payable, and furnish tax receipts for the taxes so paid as therein provided and in the event of default in either of these provisions, the whole principal debt should at the option of the mortgagee become due and payable. In violation in the provisions of covenant the mortgagor failed to pay taxes assessed on the mortgaged premises for the years of 1926, 1927 and 1928, and also failed to produce tax receipts for said taxes, as a result of which the complainant has elected to collect the entire principal debt due on said bond and mortgage.

COUNTER-CLAIM.

IN CHANCERY OF NEW JERSEY.

Between		
COLONIAL TRUST COMPANY, *Complainant,*	*On Bill to Foreclose.*	
and	*Counter-claim.*	
JOSHUA BODEK, *et al., Defendants.*		

Joshua Bodek, Nancy Bodek, his wife, David Frankel, Saide Frankel, his wife, Michael Lipkowitz, Willie Lipkowitz, his wife, Morris A. Weinstein, Amelia Weinstein, his wife, Herbert Weiner (single) Harry Frankel and Anna Frankel, his wife, further answering said bill of complaint with leave of the Court and by way of counter-claim against the complainant, these answering defendants say:

1. The mortgaged premises described in the complainant's bill were part of a large tract of land owned by the said William J. Ryan, Inc., a New Jersey corporation; some time prior to September 5, 1925, said William J. Ryan, Inc., caused said tract to be surveyed and laid out in building lots by Harry E. Weir, a civil engineer, and surveyor, of Wildwood, New Jersey, and the map or plan of the development so prepared was entitled, "Plan of Land in City of North Wildwood, Cape May County, N. J., Situated East of Surf Ave. to the Atlantic Ocean and from 100 Ft. S. W. of Fifth Ave., to Fifteenth Ave.—Wm. J. Ryan, Inc., Owner & Developer, 401 Land Title Bldg., Phila. Pa."

Counter-claim.

2. Some time prior to September 5, 1925, said William J. Ryan, Inc., employed one, Joseph P. Day, an auctioneer, to sell the lots shown on the aforesaid plan, or some of them, at public auction. Said Joseph P. Day, as auctioneer, advertised eight hundred and sixty-seven of the lots shown on said plan to be sold at public auction commencing Saturday afternoon, September 5, 1925, and caused said sale to be widely advertised by publications in various newspapers, by the distribution of circulars and advertising literature by mail; and by hand bills distributed to the public generally; and by signs erected upon said premises.

3. On September 9, 1925, and for some time prior thereto, and for some time thereafter, there was erected on said lots a large wooden sign, bearing the following inscription:

"WILLIAM J. RYAN, INC—OWNERS & DEVELOPERS

605 Franklin Trust Building, Phila.

Sewer Contract Awarded to Versaggi Bros.

Curbs—Sidewalk Contract Awarded to Versaggi Bros.

Sand fill Contract Awarded to United Dredging Co.

Grading & Graveling Cont. Awd. to Graython-Nickerson.

ALL WORK and IMPROVEMENTS to be FINISHED BY JULY 15th, 1926.

Engineering Work in Charge of Harry E. Weir."

Counter-claim.

4. The literature, advertisements and signs issued by the said Joseph P. Day to the public in general by and through the mediums aforesaid contained a positive representation that the said William J. Ryan, Inc., would, at its own expense, improve the lots to be sold at said auction sale by doing all of the necessary clearing, filling the low area up to a grade approximately equal to the grade of the then present County Road, doing all the necessary grading to establish a uniform grade of the streets, graveling of roads, installing concrete sidewalks and curbs and installing sewers. A similar promise and assurance was made at said sale by the said Joseph P. Day or such employee of his as conducted the sale, by public announcement.

5. Immediately before said sale commenced the said Joseph P. Day, auctioneer, or his representative in charge, read or caused to be read terms and conditions of the sale, and the seventh of said conditions provided as follows:

> "SEVENTH: The seller agrees, at its own expense, to improve the above mentioned property as follows: Do all the necessary clearing, fill the low area up to a grade approximately equal to the grade of the present County Road, do all the necessary grading to establish a uniform grade of the streets, gravel all roads, install concrete sidewalks and curbs and install sewers."

6. Defendant, Joshua Bodek, attracted by the aforesaid advertising literature and other representations, attended the said sale, and in reliance on the aforesaid promise, warranty and representation regarding the improvements to

be made to the said lots, became the purchaser at said sale of some 58 of said lots, at a total price of $90,700., in addition to which he paid auctioneer's fees at $15. per lot. The several lots covered by complainant's mortgage were included among the aforesaid 58 lots, and the total price which the defendant, Joshua Bodek agreed to pay for the particular lots covered by complainant's mortgage, exclusive of auctioneer's fees aforesaid, was $90,700.

7. At said auction sale, defendant, Joshua Bodek, signed certain memoranda of sale, each of which was on a printed form, preceded by the terms and conditions of sale hereinbefore set forth.

8. Defendant, Joshua Bodek, became the purchaser of the aforesaid lots in reliance upon the aforesaid representation and promise that the improvements hereinbefore mentioned and referred to would be made and completed by the said William J. Ryan, Inc.

9. In reliance upon the aforesaid promise, representation and warranty, and pursuant to the terms of the arrangement, defendant, Joshua Bodek, paid to the said William J. Ryan, Inc., on account of the purchase price of said lots, auctioneer's fees and settlement expenses, the sum of $27,882., and on November 9, 1925, said William J. Ryan, Inc., conveyed to the defendant, Joshua Bodek, the lots purchased by him as aforesaid, which deed was recorded in the office of the Clerk of Cape May County in Book 413 of Deeds, at page 295. In order to secure the balance of the purchase price of said lots, defendant, Joshua Bodek, executed and delivered to said William J. Ryan, Inc., a certain purchase

money mortgage, being that referred to in the original bill of complaint herein.

10. In said mortgage it was expressly provided that the initial installment of principal, namely $9,070. should be payable upon completion by William J. Ryan, Inc., its successors or assigns of the following improvements to land belonging to said William J. Ryan, Inc., of which the lots in said mortgage described are a part, namely: The necessary clearing of said land, the filling of the low area up to a grade approximately equal to the grade of the present County Road, the necessary grading to establish a uniform grade of the streets, the graveling of all roads, and the installing of concrete sidewalks, curbs and sewers, and upon the sending of notice of such completion by the said William J. Ryan, Inc., its successors or assigns, by letter addressed to said defendant, Joshua Bodek, at No. 425 Market street, Philadelphia, Pennsylvania.

11. The first installment of interest on complainant's said mortgage fell due on May 9, 1926. Under date of May 5, 1926, a letter was received by this defendant, Joshua Bodek, from the Ocean City Title & Trust Company, enclosing a bill for six months' interest upon the said mortgage, and stating that the said interest was payable to said Trust Company; that said mortgage had been sold to the Excelsior Trust Company (now the Colonial Trust Company), Philadelphia, "who will look to you for future payments on account of principal and interest." The letter further stated:

> "We wish to advise you that sufficient money has been deposited with this Company to pay for the completion of the im-

provements on this tract, and that this Company has guaranteed to the holders of your mortgage completion of the said improvements."

By letter dated May 11, 1926, from the Excelsior Trust Company, assignee as aforesaid, the said Excelsior Trust Company announced its recent purchase of said mortgage and stated:

"The semi-annual interest which will be due on May 9, 1926, you are authorized to pay to the Ocean City Title & Trust Company, and thereafter make all payments of interest and principal to this Company."

12. In reliance upon the aforesaid letters, and in the belief that the said William J. Ryan, Inc. would in good faith, as in duty it was bound to do, carry forward and complete said improvements, defendant, Joshua Bodek, shortly thereafter paid the aforesaid semi-annual installment of interest to the Ocean City Title & Trust Company.

13. On October 14, 1926, the defendant, Joshua Bodek, received a letter from William J. Ryan, Inc., written on behalf of the complainant herein, which said letter contained a notification that the improvements specified in the mortgage had been completed. On October 16, 1926, this defendant, received from William J. Ryan, Inc., a letter also stating that the improvements specified in the mortgage had been completed, asserting that $9,070. on account of the principal of said mortgage was therefore due, and requesting payment thereof to said Excelsior Trust Company. Demand was made likewise for the second installment of interest, $1,904.70 which was in due course paid by this defendant, Joshua Bodek.

Counter-claim.

14. Meantime this defendant, Joshua Bodek, had executed and delivered, and caused to be recorded the several declarations of trust in the bill of complaint referred to to the parties therein named, and touching the lots therein specified, and in the latter part of November 1926, these defendants learned for the first time that the said improvements had never at any time been made, and that the said William J. Ryan, Inc. has entirely and absolutely failed to carry on, perform and complete said improvements; that the representations made by the said William J. Ryan, Inc., and by the said Joseph P. Day, auctioneer, on behalf of said William J. Ryan, Inc., were and are false and untrue, and were made with the intent and purpose of fraudulently inducing this defendant, Joshua Bodek, to become the purchaser of the aforesaid lots; that the representations as aforesaid made by the Ocean City Title & Trust Company with respect to the carrying on and completing of said improvements, were and are false and untrue, and that the statements contained in the letters from William J. Ryan, Inc. to this defendant Joshua Bodek were false and untrue; that the lots purchased by the defendant, Joshua Bodek, have and had not been cleared or graded, that the roads have and had not been graveled; that concrete sidewalks and curbs have and had not been installed and that sewers have and had not been installed; that under a restrictive covenant, subject to which said defendant, Joshua Bodek, took title to the said lots, the erection and maintenance of cesspools and privies upon said lands are prohibited, and that in the absence of a sewerage system and sewarage connections, said lots are valueless for building pur-

poses; and that by reason of the failure of said William J. Ryan, Inc., to lay out streets and roads and to grade said lots and to lay and install sidewalks and curbs, said lots are inaccessible; that the adaptability of said lots for building purposes and the sale and disposition of them on any profitable basis whatsoever depended entirely upon said improvements being completed, and that by reason of the failure of the said William J. Ryan Inc., to carry forward and complete said improvements, said defendant, Joshua Bodek, was induced to pay over to said William J. Ryan, Inc., a large sum of money in cash, and obligate himself to pay a still larger sum by the giving of the mortgage aforesaid, to the great injury, damage and loss of these defendants.

15. These defendants further charge that said lots are practically worthless and cannot be built upon, nor readily marketed because of the non-completion of the aforesaid improvements; that this defendant, Joshua Bodek, was induced to purchase said lots upon the representation and promise that said improvements would be made, and that the failure of the said William J. Ryan, Inc. to perform and complete said improvements, is a gross fraud upon these defendants, because of which these defendants have heretofore rescinded and hereby rescind the contract between this defendant, Joshua Bodek and the said William J. Ryan, Inc. and all instruments given thereunder and in connection therewith.

16. These defendants are ready and willing to reconvey or unite in a reconveyance of said lots to William J. Ryan, Inc. or to the complain-

ant, upon being repaid by the said William J. Ryan, Inc., or the complainant, the sum of money heretofore paid by defendants to said William J. Ryan, Inc., with legal interest thereon, and the interest upon said mortgage paid as aforesaid by this defendant, Joshua Bodek.

17. These defendants further charge that the Colonial Trust Company is not a bona fide holder of said bond and mortgage, but merely holds the same in trust for the use and purpose of the said William J. Ryan, Inc., or if it be the absolute holder thereof, took the same with full knowledge of the matters and things hereinabove alleged and that said mortgage by reason of the fraudulent conduct and misrepresentation and deceptive practices perpetrated on defendants by said William J. Ryan, Inc., as hereinbefore set forth, is without consideration, fraudulent and invalid and unenforceable as against these defendants, and these defendants charge that they are entitled to have said bond and mortgage delivered up, surrendered and cancelled.

These defendants are without adequate remedy in the courts of law, and therefore pray:

1. That complainant's bill as against these defendants may be dismissed with costs.

2. That the mortgage and the bond accompanying the same, held by the complainant and in this action sought to be foreclosed, may be decreed to be invalid and unenforceable as against these defendants, and may be delivered up, surrendered and cancelled.

Counter-claim.

3. That Colonial Trust Company and William J. Ryan, Inc., may answer the premises, and that a subpoena may issue for that purpose.

IRVING SHENBERG,
Solicitor for Defendants.

ROBERT H. MCCARTER,
Of Counsel.

CONCLUSIONS.

IN CHANCERY OF NEW JERSEY.

Between

COLONIAL TRUST COMPANY, *Complainant,*

and

JOSHUA BODEK, *et al., Defendants.*

On Bill to Foreclose.

Conclusions.

Grantor of premises situate in North Wildwood, in which a municipal sewerage plant was in operation, agreed inter alia to "install sewers" within a certain period. Upon application of the State Board of Health, an injunction was obtained against the City of North Wildwood restraining it from permitting additional connections to be made to said sewerage plant until certain disposal plants were erected;

HELD: that the performance of the said contract to "install sewers" was suspended until the removal of said injunction.

Messrs. Starr, Summerill & Lloyd and Emerson L. Richards, Esquire, for complainant.

Messrs. McCarter & English for defendant Joshua Bodek.

William J. Ryan, Inc. was the owner and developer of a large tract of land in North Wildwood, in the County of Cape May, and on Labor Day, 1929, through Joseph P. Day, sold at public auction a large number of lots upon said tract of land. The defendant, Joshua Bodek, acting for a syndicate, purchased in his own name 58

lots of land. In compliance with a memoranda of sale and of a contract of purchase and sale which he signed, these lots were conveyed to him and he executed, as part consideration therefor, the purchase money bond and mortgage set forth in the bill.

On the 12th day of January, 1926, by two certain declarations of trust executed by said Joshua Bodek, he made known and declared that he held certain of said lands and premises in trust for certain therein named persons, and in the amounts therein set forth.

The brief for defendant states "the legal and equitable situation, however, is just the same as if Mr. Bodek alone were interested."

The bill sets forth further that said bond and mortgage contained an agreement that if any installment of interest or principal should remain unpaid for thirty days after the same should fall due, then the whole principal sum, with all unpaid interest, should, at the option of the mortgagee, its representatives or assigns, become immediately due; that "the improvements were completed and notice thereof as provided in said mortgage was duly given, and on May 9, 1927, an installment of Nine Thousand and Seventy Dollars fell due with six months' interest, on complainant's bond and mortgage and remained unpaid for more than thirty days thereafter, and no part thereof has yet been paid. Complainant has elected that the whole principal sum with all unpaid interest, shall be now due."

An amendment to said bill averred that by legal consolidation the said Excelsior Trust Company merged with and became known as the Colonial Trust Company, which is made a party defendant.

Conclusions.

The answer of Bodek and the beneficiaries under the declaration of trust denies that the improvements were completed and notice thereof duly given on May 9, 1927, as provided in said mortgage; that the improvements specified in the mortgage accompanying said bond specifically agreed by the mortgagee to be made before the installment of $9,070. should become due have not or have any of them been made, therein specifically repeating that which was to have been made, and pray for a dismissal of the bill, and by way of counter-claim allege that in the latter part of November, 1926, the defendants ascertained for the first time that said improvements had never at any time been made and that William J. Ryan, Inc. had entirely refused to carry on, perform and complete said improvements; that the said representations made by William J. Ryan, Inc. were and are false and untrue and were made with the intent and for the purpose of fraudulently inducing this defendant, Joshua Bodek, to become the purchaser of these lots; that the notice given by the Ocean City Title & Trust Company was false and untrue; that by reason of the absence of a sewerage system and sewerage connections, said lots are valueless for building purposes; that by reason of the failure of said William J. Ryan, Inc. to lay out streets and roads and to grade said lots, said lots are inaccessible, and that by reason of the failure of said William J. Ryan, Inc. to carry on and complete said improvements, said defendant, Joshua Bodek, was induced to pay over to said William J. Ryan, Inc. a large sum of money and to execute the mortgage aforesaid, to the great injury, damage and loss of the defendant; that the lots are practically

worthless and cannot be built upon; that the defendants are ready and willing to reconvey to the complainant this land upon being paid by William J. Ryan, Inc., or the complainant, the sums of money heretofore paid by defendant to William J. Ryan, Inc., with legal interest. They also allege that the Colonial Trust Company is not a bona fide holder of said mortgage and pray that the bill may be dismissed, that the mortgage and bond accompanying same be decreed to be invalid and unenforceable, and that it may be delivered up, surrendered and cancelled.

The claim of the defendants, as specified in their brief, is that the contracts of purchase were induced by certain fraudulent misrepresentations made by the vendor, William J. Ryan, Inc., at the time of the sale, and that the contracts of sale contained an agreement with respect to the improvements, in which a material default has been made.

The representations are three-fold. The first was contained on a sign which sat on the premises on the date of the auction sale, and read as follows:

"WILLIAM J. RYAN, INC.—OWNERS & DEVELOPERS
605 Franklin Trust Building, Phila.

Sewer Contract Awarded to Versaggi Bros.

Sand fill Contract Awarded to United Dredging Co.

Grading & Graveling Cont. Awd. to Graython-Nickerson.

ALL WORK and IMPROVEMENTS to be FINISHED BY JULY 15th, 1926.

Engineering Work in Charge of Harry E. Weir."

Conclusions.

An examination of Exhibit B. 1 and as enlarged by B. 2 and B. 3 completely refute this claim and together with the testimony as given, show conclusively that the wording upon the sign at the time of the sale was not as claimed by the defendant, but was an advertisement of the public auction.

Second, was orally by Mr. Ryan, president of the vendor, to the effect that money had been provided for the building of a sewerage disposal plant.

I find as a fact that Mr. Ryan did not represent that he had provided for the building of a sewerage disposal plant.

Third, by the auctioneer reading as follows:

> "SEVENTH: The seller agree, at its own expense, to improve the above mentioned property as follows: Do all the necessary clearing, fill the low area up to a grade approximately equal to the grade of the present County Road, do all the necessary grading to establish a uniform grade of the streets, gravel all roads, install concrete sidewalks and curbs and install sewers."

This last representation read by the engineer was also embodied in the memoranda of sale signed by Mr. Bodek and, therefore, aside from the representations, became a material part of the contract for sale. The full material language of the memoranda of sale in that connection is as follows:

> "The said deed of conveyance shall contain the following conditions, restrictions and limitations, which are intended to be and shall be taken as covenants to run with the land, and which are intended to be and shall

be taken as conditions of the said conveyance and one of the express considerations thereof, viz.''

''RESTRICTIONS

''That no dwelling or building for business purposes shall be built or erected on the lots offered in this sale to cost less than $3,500 on all lots facing on Numbered Avenues between Surf Avenue and the Ocean front; and $4,000 on the lots facing on Surf Avenue; and $5,000 on all lots facing on the ocean. That no building of any description shall be at any time erected within 35 feet of the curb line of any lots east of Surf Avenue, but that said space between said house line and street line shall be always left open and clear for the purpose of light and air; that no cesspool shall be dug on said premises, and no privy shall be allowed thereon; that no store buildings (except on the ocean front and Surf Avenue), public garage, slaughter house, bone boiling establishment, pig-pen, chicken house, or anything of an offensive or unsightly character shall be erected, kept or maintained upon said premises.

''SIXTH: The seller is not required to send any notice to any purchaser, and if any purchaser neglects to call at the time and place specified in the Memorandum of Sale hereto annexed, to receive his deed, he will be charged with interest thereafter on the whole amount unpaid of his purchase price, provided the seller shall deem it proper to extend the time for the completion of said purchase.

Conclusions.

"SEVENTH: The seller agrees, at its own expense, to improve the above mentioned property as follows: Do all the necessary clearing, fill the low area up to a grade approximately equal to the grade of the present County Road, do all the necessary grading to establish a uniform grade of the streets, gravel all roads, install concrete sidewalks and curbs and install sewers.

"NINTH: The seller reserves the right to complete all development work now in progress or contemplated without hindrance of any sort from the purchaser, and reserves to itself the right to enter upon said premises for this purpose."

Fourth, by the provision in the signing of the additional memorandum of sale wherein it was agreed that the improvements were to be completed one year from the date thereof, and in the provisions and in a reservation in a deed made by Ryan, Inc. to Bodek wherein the following appears:

"Reserving unto said party of the first part, its successors and assigns 'the free right of access in and upon said premises for the purpose of making the following improvements to the land now or formerly belonging to said party of the first part, of which land the lots herein described are a part, namely: the necessary clearing of said land; the filling of the low area up to a grade approximately equal to the grade of the present County Road; the necessary grading to establish a uniform grade of the streets; the graveling of all roads; and the installing of concrete sidewalks, curbs and sewers.' "

Conclusions.

On or about May 6, 1926, the defendant received a letter from the Ocean City Title & Trust Company enclosing a bill for six months' interest then due, giving notice that the mortgage had been sold to the complainant and advising him that sufficient money had been deposited with that company to pay for the completion of the improvements on this tract and that "this company has guaranteed to the holders of your mortgage completion of the said improvements."

I find that the seller has substantially complied with that part of his agreement wherein he agreed to do "all the necessary clearing, fill the low area up to a grade approximately equal to the grade of the present County Road, do all the necessary grading to establish a uniform grade of the streets, gravel all roads, install concrete sidewalks and curbs."

There remains, therefore, the determination of the question, whether Ryan, Inc. has "installed sewers" and if not, is such failure a sufficient ground for the defendant to rescind his contract?

The proof is: Ryan, Inc. caused sewer pipes to be laid along the lands in question and up to the point where they should be connected with one of the main lines of the North Wildwood sewerage system, then installed in the street forming one of the boundaries of the Ryan Tract. The City refused to permit said pipes so laid by Ryan, Inc. to be connected with the municipal sewerage system because some time after the sale of Ryan, Inc., the State Board of Health had secured an injunction against the municipality, restraining it from tapping the municipal sewerage system then in use by additional pipes, which injunction was not vacated

until along about March 20, 1928, when permission was given by the State Board of Health to connect the sewers on the Ryan tract with these of the City of North Wildwood. Shortly thereafter the Borough Council accepted said sewerage extension and took it over as a part of the sewerage system of the Borough.

Considerable testimony has been elicited and much argument had concerning the laying of the sewerage pipes. It is sufficient to say that the delay in the use of these pipes as a completed system was caused by the action of the State Board of Health in obtaining said injunction, which injunction was not based upon any defect in the system as laid by Ryan, Inc. or upon any other default upon its part, but was entirely by reason of the failure of the Borough of North Wildwood to erect a suitable sewerage disposal plant.

An exception to the general rule, that where performance becomes impossible subsequent to the contract the promissor is not therefore discharged, is recognized by the later cases, where the event creating the impossibility is one which cannot reasonably be supposed to have been within the contemplation of the parties at the time of the contract. In such cases general words in the contract will not impose an absolute liability to perform or to answer in damages, although such words are broad enough to include the contingency which has arisen. 13 *Corpus Juris* 640. This principle is enunciated by Mr. Justice Jacksen in the Supreme Court of the United States in the *Chicago, Milwaukee & St. Paul Railway Company, Plaintiff in Error* v. *Hoyt,* 149 U. S. Supreme Court Reports, 1 at p. 14; 37 Law Ed. 625.

Conclusions.

Performance of a contract cannot be compelled where it would involve a violation of law. Hence a contract is discharged when after it has been entered into the performance is made unlawful. *Schmoele, et al.* v. *Atlantic City Railroad Co.,* 108 N. J. Eq. 353. This does not apply, however, where the impossibility created by the law is only temporary. 13 Corpus Juris 646.

In *Krause* v. *Board of Trustees of School Town of Crothersville, Supreme Court of Indiana,* 70 N. E. Rep. 264, in applying this rule, Chief Justice Gillott said: "There have been decisions to the effect that substantial performance of covenants will be required where exact performance has become impossible. This proposition is no doubt true, as a general rule, especially in equity. *Eaton* v. *Lyon,* 3 Ves. Jr. 690. If the essence of an undertaking can be performed, that will be required. Thus, if a man covenanted to build and complete a house by a certain day, the existence of the plague will excuse him, but he will be required to perform his undertaking afterwards."

Where the law interposes to prevent the performance of a contract, but such probation is for a limited time, performance of the contract will be suspended while the law is in force, but the parties will not be discharged from its performance. *School District No. 16 of Sherman County* v. *Howard,* 96 N. W. 666; 5 Neb. 340.

To the same effect, the laws of the United States laying an embargo for an unlimited time, and afterwards repealed, did not extinguish a promise to deliver debentures to be obtained at the custom house, but operated a suspension only during the continuance of those laws. *Baylies* v.

Fettyplace, 7 Mass. 325; Amer. Digest Vol. II, 1694.

It has been held that equity will not rescind a conveyance of land to a railroad company in consideration of passes to be issued to the grantor for life, upon the passage of a statute forbidding further issuance of passes by the railroad company, if it has substantially complied with its contract, and the land has materially increased in value since the conveyance. *Cowley* v. *Northern P. R. Co.,* 68 Wash. 558; 123 Pac. 998; 41 L. R. A. New Series 559.

So in *Baily* v. *De Crespigny,* L. R. 4, Q. B. 100, a leading case, where premises were leased for a term of years, and the lessor covenanted that he would not permit any messuage to be erected on a lot fronting the demised premises, and, during the term, this lot was taken and a railroad station erected thereon by act of Parliament, it was held that the lessor was thereby discharged from his covenant, performance having become impossible by act of the law.

In *Doe ex. dem. Anglesea* v. *Bugeley,* 6 Q. B. 107, in speaking of the non-performance of a condition in a lease because forbidden by law, it is said by Lord Denman, *Ch. J.:* "But even if the condition were not performed, it appears to us that the non-performance would in this case be excused, as being by act of law, and involuntary on the part of the lessee; and the cases cited in the argument, and to be found in *Bac. Ab. tit. Condition* (a), 2 (vol. 4. p. 161 &c.). *Com. Dig. tit. Condition* (L. 1) and the case of *Brewster* v. *Mitchell* (1 Salk. 198), support this view of the case." It follows what has been said, that the defendant cannot be mulcted in damages because of, and only because of, its

observance of a law making further performance of the contract on its part impossible. 41 L. B. A. 563.

There can be no question but that the injunction obtained by a Department of State against a third party, neither of the parties to this action being parties thereto, was the cause of the inability of Ryan, Inc. to connect its sewer line to the disposal outlet, and it is as manifest that neither Ryan, Inc. or Bodek had in contemplation any possibility of any event occurring which would prevent such connection.

These comments are made assuming but not deciding that it was the duty of Ryan, Inc., under its contract, to "install sewers," to furnish and provide a workable, useable sewerage system. If the views above expressed are correct in that, by reason of the legal action taken, Ryan, Inc. was excused from the performance of the contract, at least until such time as, under the law, it became possible to perform, it is unnecessary to determine whether the words "install sewers" are sufficiently broad enough to be construed to mean to install pipes and other constructions in and underground upon the property of the defendant to such point as would permit the legal disposal of the water drainage or other matter, or whether the defendants were in a position to rescind, nor any other phase of the case.

FINAL DECREE.

Filed August 19, 1931.

IN CHANCERY OF NEW JERSEY.

Between

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES (successor by merger to the Colonial Trust Company),

Complainant,

and

JOSHUA BODECK, NANCY BODECK, DAVID FRANKEL, SAIDE FRANKEL, MICHAEL LIPKOWITZ, TILLIE LIPKOWITZ, MORRIS A. WEINSTEIN, AMELIA WEINSTEIN, HERBERT WIENER, HARRY FRANKEL and ANNA FRANKEL,

Defendants.

On Bill, &c.

Final Decree.

This cause coming on to be heard in open court, in the presence of Lewis Starr, of Starr, Summerill and Lloyd, Emerson Richards, and George J. Schorr, of Wolf, Block, Schorr & Solis-Cohen, of the Philadelphia bar, solicitors for complainant, and Harvey F. Carr, of Carr & Carroll, and Robert McCarter, of McCarter & English, solicitors for the defendants, and the Court having considered complainant's bill and defendants' answer thereto and other pleadings therein; and having taken testimony and proof and having

read and considered the same, and having heard and considered the argument of counsel, and being of the opinion that the complainant has satisfactorily established the averments in its bill of complaint, which would entitle it to a decree, and that the defendants have failed to establish to the satisfaction of the Court either the averments of their answer or the averments of their counter-claim, or any reason why the complainant should not be decreed the relief prayed for in its bill of complaint, and the defendants having particularly failed to establish the averments in paragraph 7 of their answer; and it appearing from the proof that the agreement wherein all the necessary clearing, filling of the low area up to grade approximately equal to the grade of the present county road, and the doing of all necessary grading to establish a uniform grade of the streets, the graveling of all roads, the installing of concrete sidewalks and curbs, and the duly giving of notice thereof as provided in the agreement of purchase and in the mortgage was done; and it appearing that the delay in the laying of the sewerage pipes as a completed system and in the use of these pipes as a completed system was caused by the action of the State Board of Health in obtaining an injunction against the City of North Wildwood, which injunction was not based upon any defect in the system as laid out by Ryan, Inc., or upon any other default upon its part, but was entirely by reason of the failure of the Borough of North Wildwood to erect a suitable sewerage disposal plant, and created no default upon the part of the complainant, and by reason of such injunction proceeding, Ryan, Inc. was excused from the performance of the contract until such time as under the law, it became possible to perform the same; and

that the defendants failed to establish any misrepresentations or fraud on the part of the complainant or any person or persons through whom the complainant obtained the said mortgage and bond, or on the part of any person or persons acting for or on behalf of them or any of them, as alleged in the said counter-claim; and it further appearing through the proof that an installment of *$9,070* of the principal of said bond and mortgage, with twelve months' interest, was due and payable at the time of the filing of the bill, and that taxes upon the mortgaged premises for the years 1926 and 1927 were due and unpaid, and said interest and taxes had so remained due and unpaid for more than thirty days prior to the filing of the bill, and that complainant had elected that the whole principal sum and all unpaid interest should be paid;

It Is, on this 19th day of August, 1931, Ordered, Adjudged and Decreed that the counterclaim of the defendants be and the same is hereby dismissed with costs to the complainant named above; and

It Is Further Ordered, Adjudged and Decreed that the mortgaged premises be sold to raise and satisfy the amount due the said complainant, The Pennsylvania Company for Insurance on Lives and Granting Annuities, to wit the sum of $63,490. with interest thereon from November 9, 1926, with its costs, which shall include a counsel fee of Twenty-five hundred 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 Cape May, commanding him to make sale according to law of said mortgaged premises, and out of the moneys arising from such sale pay to said Pennsylvania Company for In-

surances on Lives and Granting Annuities, or its solicitors, its said debt, interest and costs; and in case more money shall be raised from said sale than shall be sufficient to answer such payments, that such surplus be brought into this Court to abide the further order of this Court; unless otherwise previously disposed of by order of this Court; and that said sheriff make return without delay of his proceedings by virtue of said writ; and

It Is Further Ordered, Adjudged and Decreed that the said Joshua Bodeck, Nancy Bodeck, David Frankel, Saide Frankel, Michael Lipkowitz, Tillie Lipkowitz, Morris A. Weinstein, Amelia Weinstein, Herbert Wiener, Harry Frankel and Anna Frankel, defendants in the above entitled bill of complaint, stand absolutely debarred 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.

Respectfully advised,

R. H. Ingersoll,
V.-C.

A true copy.

Ferd Garretson,
Clerk.

NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

Between

COLONIAL TRUST COMPANY, formerly EXCELSIOR TRUST COMPANY, with whom has been added as complainant The Pennsylvania Company for Insurances on Lives and Granting Annuities,
Complainants,

and

JOSHUA BODEK, *et als.*,
Defendants.

On Bill, &c.

Notice of Appeal.

The defendants, Joshua Bodek, Nancy Bodek, his wife, David Frankel, Saide Frankel, his wife, Michael Lipkowitz, Willie Lipkowitz, his wife, Morris A. Weinstein, Amelia Weinsten, his wife, Herbert Weiner (single), Harry Frankel and Anna Frankel, his wife, hereby appeal from the final decree made in the above-entitled cause by the Chancellor on the advice of Vice-Chancellor Ingersoll, on the 19th day of August, 1931, and from the whole and every part thereof to the Court of Errors and Appeals in the last resort in all causes.

Dated, August 24, 1931.

McCARTER & ENGLISH,
Solicitors for and of Counsel with Defendants.

Notice of Appeal.

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

ARTHUR F. EGNER,
Of Counsel with Defendants.

PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

COLONIAL TRUST COMPANY, formerly EXCELSIOR TRUST COMPANY, with whom has been added as complainant The Pennsylvania Company for Insurances on Lives and Granting Annuities,
Complainants-Respondents,

and

JOSHUA BODEK, *et als.,*
Defendants-Appellants.

On Appeal from Chancery.

Petition of Appeal.

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

The petition of Joshua Bodek, Nancy Bodek, his wife, David Frankel, Saide Frankel, his wife, Michael Lipkowitz, Willie Kipowitz, his wife, Morris A. Weinstein, Amelia Weinstein, his wife, Herbert Weiner, Harry Frankel and Anna Frankel, his wife, appellants in the above cause, respectfully show:

Your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey, upon the advice of Robert H. Ingersoll, Vice-Chancellor, bearing date the 19th day of August, 1931, in a suit therein pending, wherein Colonial Trust Com-

pany, formerly Excelsior Trust Company, with whom has been added as complainant The Pennsylvania Company for Insurances on Lives and Granting Annuities, are complainants, and your petitioners are defendants, in this respect, to wit: The said decree adjudged that there was due the complainants for principal and interest due upon the mortgage being foreclosed in the said proceedings the sum of $63,490.00, together with interest and costs, and adjudged that the mortgaged premises described in the bill of complaint be sold to raise and satisfy the amount of money due the complainants, with interest and costs, including a counsel fee, and directed a writ of fieri facias for that purpose to issue to the Sheriff of the County of Cape May; and the said decree is further erroneous in that it adjudged that the counter-claim of your petitioners be dismissed with costs.

And your petitioners humbly appeal from the decree aforesaid on the ground that the same is erroneous, for that the Chancellor should have dismissed the bill of the complainants, and should have decreed in favor of your petitioners the relief prayed for by them in their said counter-claim.

Your petitioners therefore pray that the final decree of the Chancellor be in the particulars aforesaid reversed, set aside and for nothing holden, and that this Court may direct the Court of Chancery to enter a decree granting the petitioners the relief prayed for by them in their counter-claim; and that your petitioners may

have such further relief in the premises as to this Court shall seem meet.

McCARTER & ENGLISH,
Solicitors of Petitioners.

G. W. C. McCARTER,
Of Counsel.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

Between	
MAX SMITH and BERNARD M. SHOTKIN, *Complainants,*	*Action at Law.*
and	*Final Hearing.*
WILLIAM J. RYAN, INCORPORATED, *Defendant.*	
Between	
COLONIAL TRUST CO., *Complainant,*	*On Bill, etc.*
and	*Final Hearing.*
MAX SMITH, *et als.*, *Defendants.*	

Atlantic City, N. J.,
September 26, 1929.

Before HON. ROBERT H. INGERSOLL, Vice-Chancellor.

Appearances:

Lewis Starr, Esq., and Emerson L. Richards, Esq., for Colonial Trust Company.

Harvey S. Carr, Esq., for Max Smith and Bernard M. Shotkin.

Robert H. McCarter, Esq., for Joshua Bodek.

C. L. Cole, Esq., for defendant Esibil.

Opening.

Mr. Cole: I have a motion to amend our counter-claim by setting up default in the non-payment of taxes as a reason why the principal debt is due. I notified counsel by telegram day before yesterday, thought I notified them two or three weeks or months ago, but I couldn't find the letter, so I took the precaution to telegraph.

Mr. Carr: Your Honor please, I represent the complainant in the case of Max Smith against William J. Ryan, Incorporated, and the complainant in Bernard M. Shotkin against William J. Ryan, Inc., et als., and at the same time represent the same persons as defendants in the foreclosure suit of the Colonial Trust Company against those defendants. Has your Honor in mind the condition of the pleadings?

The Court: No, I would like to have you give me that. I haven't had an opportunity. What have you to say as to Judge Cole's amendment?

Mr. Carr: We have no objection to it.

Mr. Starr: In the two foreclosure suits in which we appear I make the same application to amend the bill by inserting the clause inserting an amendment for non-payment of taxes and the claim that the entire principal debt of the mortgage it due. I have here copies of those amendments.

Mr. Carr: There is no objection, your Honor, on the part of the clients I represent.

There is a suit of Max Smith against William J. Ryan, Inc., and one of Bernard M. Shotkin against Ryan, Inc. These two suits were brought for the purpose of rescinding an agreement to purchase a certain property in the City of North Wildwood, on the ground that the seller

had not performed the conditions. In its origin these suits were based upon substantially these facts:

William J. Ryan, Inc., had a large land development consisting of some eight or nine hundred lots. A public sale was held by Joseph Day, New York auctioneer. At the time the sale was held the improvements had not been made, although possibly some of them were in progress. There was a large sign displayed announcing that the improvement which consisted of filling the lots substantially to grade, making streets and the laying of sidewalks and curbs, the installation of sewers would be completed by July 15th, 1926, this sale having been made on Labor Day, which was September 5th, 1925. As the lots were bought in the customary conditions of sale were signed by each bidder, and then on the 9th of September of the same year, the individual contracts were merged into, as to each buyer, into one contract which embraced the terms substantially of the individual contracts, but modified them to some extent, and in the September 9th agreement, which really superseded the individual contracts based upon the bids at the sale, it was provided that all of the improvements which I have just referred to should be completed within one year from the date thereof, which would have brought it to September 9th, 1926, and also provided that time was of the essence of the agreement. The terms of sale were substantially these, the bidder paid ten per cent. at the time of the making of the bid, and paid fifteen dollars for each deed, the deed to each lot, paid fifteen dollars to the auctioneer, and then at the time fixed for settlement he was to pay, and in this case did pay, the remaining twenty per cent.,

so that thirty per cent. of the purchase price was paid, that settlement being, I don't remember just when, but, however, within thirty or sixty days after the date of the sale. A purchase money mortgage was given back in each case which provided that one-seventh thereof, which represented ten per cent. of the purchase price, was to be paid on the completion of the improvements and the certification of that fact. But, of course, that payment did not become due by its terms until the completion of the improvements. That condition was inserted in the mortgages and then in the conditions there was inserted a condition that the seller should have a right of access to the property and entry thereon for the purpose of completing the improvements. And the deed contained the further restriction that no cess-pools should be built upon the properties. Within the year the improvements were not completed, in fact, I believe some of them are not yet completed, but the most serious thing of all was the non-completion of the sewer. It so happened that proceedings were pending by the State Board of Health against the City of North Wildwood for the purpose of restraining them from emptying sewage into the waters of Grassy Sound, and polluting the waters. That bill was filed in 1923 and moved, I guess, not any too rapidly. That proceeding was pending at the time of this sale and later in 1927, I think it was, the State issued an injunction, mandatory injunction compelling or directing the municipal authorities to devise a proper system of sanitary sewage disposal, notice of which they had three months in advance of the date of the injunction, from emptying any of their sewage into the waters of Grassy Sound, so that the City of Wild-

wood was in no position to take over the added burden of this sewage from this large tract of land. As a matter of fact, while pipes were laid, they were directly ineffective as a sewerage system, and we claim they were not a sewer at all because the pipes were not only badly made, about twenty per cent. of them were crushed, a large portion of the system was clogged with sand, and was so laid that it had to be relaid some time in the summer of 1928, about eighty per cent. of all the pipes had to be taken up and relaid and it was not until the summer of 1928 that these pipes were connected so as to make it really a sewerage system. Our claim is, of course, that the pipes laid in the ground and not connected with any sewerage system were merely pipes and were not a sewerage system, and one of our difficulties was that we could make no use of this property at all, that we could not use cess-pool and there was no sewerage system. In fact, Mr. Shotkin applied to the local authorities for permission to build a house, or permit, and was refused on the ground that there was no sewerage system. Now in all the mortgages, as I have said, there appears that condition that the first installment of ten per cent, of the purchase price, being part of the principal, was not due until the completion of the improvements. We say they were not completed, some never completed, but what were completed were not completed until perhaps a year or two after the time mentioned, and therefore we say that we have the right to rescind, that we have rescinded, that we owe nothing on these mortgages, because they form part of the consideration, and the prayer of the complainant's bill in the two cases that I represent is, first, that the agreement

be rescinded and delivered up for cancellation and the mortgages be delivered up for cancellation, that the seller return the part of the purchase price already paid, and that the buyer have a vendee's lien upon the land in question if not paid. That, in brief, is the story.

Mr. McCarter: May it please your Honor, the case of Bodek has not yet been referred to. Mr. Sheinberg and I represent Joshua Bodek and some of the other parties defendant to a foreclosure bill filed against them by the Excelsior Trust Company, now the Colonial Trust Company. We filed an answer setting up the facts as outlined by Mr. Carr. Mr. Carr's position was slightly different in this respect, that before the commencement of the foreclosure against his client he had filed a bill to be relieved of the obligation evidenced by the bond and mortgage for the reasons stated, and he asked, as he stated to you, in that bill for relief along those lines, positive relief. We had filed no such bill before the filing of this foreclosure bill against us, and our original answer to that foreclosure bill was simply an answer setting up all this alleged fraud in the contract and asking to be relieved. It has occurred to us that we ought to get permission to file a counter-claim seeking the same general relief aggressively that Mr. Carr has in his bill, namely, that I have prepared a counter-claim which I notified Mr. Cole, who is the solicitor, by telegraph, that I would ask permission to file, that is, that the complainant's bill as against us, these bills may be dismissed, that the mortgage and bond being the same held by the complainant and in this action sought to be foreclosed, be decreed to be invalid and unenforceable as against these defendants and may be de-

livered up, surrendered and cancelled, and that the Trust Company, and so forth, answer the cross bill or counter-claim. We ask leave now to file that counter-claim.

The Court: Any objection, Judge Cole?

Mr. Starr: We have no objections if the allegations in the counter-claim will follow the allegations in the counter-claim in the Smith case, so we will not be confronted with anything that is novel in the situation of which we have no notice.

Mr. McCarter: We are relying on the same ultimate facts.

Mr. Starr: If the facts are the same, we have no objection. Of course we don't want to be confronted with—have you the counter-claim there, Mr. McCarter?

Mr. McCarter: Yes, I will give you a copy.

Mr. Starr: I think the gentlemen are in error when they say—Mr. Carr is in error when he says the bill to rescind and cancel the agreement of purchase was filed before the foreclosure proceedings.

Mr. McCarter: That I understood to be the fact.

Mr. Starr: The bill to foreclose the Smith mortgage was filed February 17, 1928.

Mr. Carr: Judge Starr, you are right on that, as to one of these cases, our bill was filed first, that is the Shotkin case. In the Smith case the foreclosure bill was filed first and later it was agreed to put them together.

Mr. Starr: The situation is this, there are two foreclosure suits here, one to foreclose the mortgage given by Jesse Bodek to Ryan & Company, and subsequently assigned to the Excelsior Trust Company, and that bill was filed

on the 28th of January, 1928, apparently that was the first bill filed. The Smith bill was apparently filed on the 17th of February, 1928. That bill was filed to foreclose the mortgage which was made at the time the settlement agreement with respect to these various lots and contained the provision a first installment due upon the completion of the improvements referred to in the mortgage. The balance of the principal of the mortgage to be paid within three years from the date, and I think it was dated some time in November, 1925. So that the principal of the mortgage would have been due November, 1928, and the first installment of approximately ten per cent. was made payable upon the completion of the improvements and notice given under the terms of the mortgage. The mortgage contained the usual covenants of default, payment of interest, payment of taxes and production of tax receipts, and provided that default in any of these provisions the entire principal sum should fall due. In that Bodek suit the only issue raised by the answer as originally filed was the fact that the improvements were not completed so as to make a default in the payment of the first installment. Now I understand Mr. McCarter has filed a counter-claim, asked leave to file a counter-claim raising the same questions as are raised in the Smith case as presented by Mr. Carr, so that the issues upon those two cases are substantially the same.

The counter-claim, Senator Richards calls my attention to the fact, is based upon the fact that the first installment is not due because of the failure on the part of the mortgagee to complete the improvements.

Now the next bill that was filed was on behalf of the Excelsior Trust Company to foreclose the mortgage given by Smith. That bill was filed on the 17th of February, 1928, and in that suit there was a counter-claim presented in July, 1928, and the mortgage has the same provisions with respect to the payment of the installment, the taxes and default clauses are exactly the same, so that the counter-claim in that case raises substantially the same question as involved in the Bodek case.

The Shotkin case, in which I don't appear, the bill was filed in June, 1928, so that was filed after both of these foreclosure bills were filed, as I understand. Is that right, Mr. Carr, the Shotkin case, the independent case was started after the foreclosure proceedings?

Mr. Carr: No, Judge Starr, I think it is the other way, because in the Shotkin case the counter-claim was filed by the Colonial Trust Company in which they seek by their counter-claim to foreclose—

Mr. Starr: I think you are mistaken.

Mr. Cole: Counter-claim is filed by Isibil, not by the Colonial Trust, Colonial Trust is no party to that proceeding.

Mr. Starr: The Smith bill was filed on the 17th of February, 1928, the Bodek bill was filed on the 28th of January, 1928, and your independent bill in favor of Shotkin was not filed until the 16th of June, 1928, six months after the bill to foreclose.

Mr. Carr: I think you are perfectly right.

Mr. Starr: Now the independent bill by Smith to get relief was filed May 25th, 1928. That preceded the Shotkin bill by a few days, and the

issues are substantially raised on the amended bill are substantially the same as alleged in the counter-claim. Now that is the condition of the pleadings and I desire to introduce Mr. Shorr of the Philadelphia Bar, who is associated with us in this case.

Mr. Carr: Your Honor please, Mr. McCarter asked me a question the other day that I found it difficult to answer. He said, "Are you for the complainant or the defendants?" I told him for both. I don't know just how your Honor would prefer this to start. I make the suggestion that since the real issue here is the making of these improvements within the time limit, that the burden of establishing perhaps it wasn't done may be upon us in order to entitle us to the relief we are asking for, and it seems to me, therefore, perhaps we had better start with these complainants in the Smith and Shotkin suit.

Mr. Starr: I don't agree with the gentleman in that respect. I think these foreclosure bills were started first and we are entitled to put the proofs in under the foreclosure bills.

Mr. Carr: I haven't any real objection one way or the other, but I would like your Honor to indicate whichever course is preferable in your Honor's judgment. The facts have all got to come out one way or the other.

The Court: Only a matter of procedure. Suppose we let the foreclosure of the mortgages, the bills, the foreclosure bills act as the moving party.

Mr. Starr: May it appear on the record also that we will file an answer to the counter-claim in the Bodek case in the same line as the one filed in the Smith case?

The Court: I take it that should be done.

Mr. Cole: I assume, may it please your Honor, that this testimony is to be introduced applies to all the case as it may apply.

The Court: It is agreed between counsel, I take it, that the testimony of all witnesses shall apply to each case in so far as it actually does?

Mr. Starr: That is satisfactory to us.

Mr. Carr: Satisfactory to us.

Mr. Cole: I would like to say in respect to the Shotkin case, in which I am interested, that it will be our contention that anything that occurred before the making of the written contract set up in the bill has been merged in that contract. There can be no parol testimony of any events, talks or contracts before the writing and it will be our contention that that written agreement, in so far as the improvements are concerned, was merged in the bond and mortgage. Your Honor will observe that the allegation is, which is true, that the written agreement provides that this work is to be done within a year. The bond and mortgage simply says it is to be done, and I shall contend, at least in the Shotkin case, that there is no time mentioned, except the time which the law will imply, which will be a reasonable time, and in the case of Shotkin there was an assignment of the mortgage to my client, Isibil, and I shall contend we have an equity there against any contention that may be made as to that mortgage.

Mr. Starr: If your Honor please, I offer in evidence original bond made by Max Smith to W. J. Ryan, Incorporated, dated November 9, 1925, in the penal sum of $52,115, conditions of

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the payment of the just sum of $26,057.50, as follows:

$3,722.50 upon completion of improvements and the balance of $22,335 within three years from the date hereof, together with interest thereon payable semi-annually at the rate of six per cent. per annum. Containing the default clause with reference to the payment of installments, interest, taxes, and the right to foreclose on default for the entire amount due.

(Bond admitted in evidence and marked Exhibit S. 1.)

I offer in evidence mortgage accompanying the bond just referred to, dated the same date, between the same parties, conditioned for the payment of the same amount of money covering premises described in the bill of complaint, containing this clause, and I will read into the record the clause with relation to the improvements:

"The installment of principal of $3,722.50 hereinbefore mentioned shall be payable upon completion by the party of the second part, its successors or assigns, of the following improvements to the land now or formerly belonging to the said party of the second part, of which land and lots herein described are a part, namely, the necessary filling of said land, the filling of the low area up to a grade approximately equal to the grade of the present County road, the necessary grading to establish the uniform grade of the streets, the graveling of all roads, the installing of concrete sidewalks, curbs and sewers, and upon the sending of notice of such completion by said parties of second part, its successors or assigns, by a letter addressed to the party of the first part, at No. 721 Arch street, Philadelphia, Pennsylvania."

The mortgage is acknowledged, recorded in the Clerk's Office of Cape May County, November 21, 1925, in Book 233 of Mortgages, page 427.

(Mortgage admitted and marked Exhibit B. 2.)

Gentlemen, do you desire to introduce in evidence the various assignments showing the evolution of title to this mortgage from the time the mortgage is created until the title became vested in the complainant? The bill alleges the assignments and the answers say, "We have no knowledge."

Mr. McCarter: Speaking for Mr. Bodek, I should be quite willing, without offering all these documents and burdening the record, the facts of these several assignments and declarations of trust by Mr. Bodek and so forth would be conceded.

Mr. Starr: They are all stated in the bill and the answers deny knowledge of the facts, but, of course, we will prove them if you consent to the facts set forth in the bill.

Mr. McCarter: These coincide with those facts?

Mr. Starr: I haven't examined them, but Mr. Shorr tells me that they do.

Mr. McCarter: I am asking whether the assignments conform with the allegations of the bill?

Mr. Shorr: They do.

Mr. McCarter: All right, admit the allegations of the bill.

Mr. Starr: If your Honor please, in the Bodek case I offer in evidence an exemplified copy of the bond referred to in the bill of complaint. It is dated the 9th day of November, 1925, made

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by Jesse Bodek to the J. W. Ryan, Inc., in the penal sum of $126,980, condition for the payment of the sum of $63,490 as follows: $9,070 upon completion of improvements and notice thereof as set forth in the accompanying indenture of mortgage, and the balance of $54,420 within three years from the date hereof, together with interest thereon payable semi-annually at the rate of six per cent. per annum, and with the usual default clause with respect to the payment of taxes and the foreclosure for default, and also for your Honor's information and the information of counsel, that the original bond is on file in the Court of Common Pleas of Philadelphia where judgment was entered. Under their practice the bond must be filed, and this is an exemplified copy.

(Copy admitted in evidence and marked Exhibit B. 1.)

I also offer in evidence an original mortgage given by Bodek to W. J. Ryan, Inc., dated the same day as the bond, between the same parties, for the same amount of money and some condition covering the premises described in the bill with this clause:

"The installment of principal of $9,070 hereinbefore mentioned shall be payable upon completion by the party of the second part, its successors and assigns, of the following improvements to the land now or formerly belonging to said party of the second part, of which land the lots herein described are a part, namely the necessary clearing of said land, the filling of the low area up to a grade approximately equal to the grade of the present County road, the necessary grading to establish a uniform grade of the streets, the gravelling of all roads and the installing of

concrete sidewalks, curbs and sewers and upon the sending of notice of such completion by said party of the second part, its successors and assigns, by a letter addressed to said party of the first part at 425 Market street, Philadelphia, Pennsylvania.''

The mortgage is duly acknowledged, recorded in the County Clerk's office of Cape May County on November 21, 1925, in Book 230 of Mortgages, page 487, etc.

(Mortgage admitted in evidence and marked Exhibit B. 2.)

Mr. Starr: May we have the same stipulation in the Bodek case in respect to the assignments as we made in the Smith case?

Mr. McCarter: Yes.

The Court: Mr. McCarter has already done so.

CHARLES L. LITZENBERG, sworn.

Direct examination by Mr. Starr.

Q Do you have any official connection with the Colonial Trust Company of Philadelphia? A Assistant Treasurer.

Q Have you knowledge of the amounts of interest and principal paid on the Smith mortgage for $26,057.50, and also the mortgage of Bodek? A I have.

Q Has any payment been made on account of the principal of either of those mortgages? A There has been a payment on account of principal of the Smith mortgage but not of the Bodek mortgage.

Q Tell us when that payment on account of principal was made? A On the Smith mortgage, May the 5th, 1927, $1,116.63.

Q Is that on account of the principal? A It is on account of principal.

Q And that payment was made when? A May the 25th, 1927.

Q On account of principal? A Yes, sir.

Q Now was that a credit on this mortgage of twenty-six thousand some odd dollars or on the other mortgage that you hold? A That was credited on the $26,000. mortgage.

Q Any other payments of principal? A October the 1st, 1927, $277.37.

Q And that was credited on which of the mortgages? A On the $26,000 mortgage.

Q So that your accounts show that there have been credited on account of the $26,000 mortgage by way of principal, $1,493, is that right? A That is correct.

Q Now was there any payment equalling $3,722.50 on account of the principal of the mortgage? A Not on account of that mortgage, no.

Q Now any payments of interest have been made on that mortgage, the $26,000 mortgage? A Yes, the interest has been paid up to 11/9/1926.

Q The interest due on the 9th of September, 1926, was paid, was it? A Up to that date.

Q What about the interest which fell due—what was the amount paid on that date? A On June 15th, 1926, received $52.11; on December 9th, 1926, $781.73.

Q The first installment of interest fell due in May of 1926, was that paid? A That was paid, $52.11.

Q And the balance was unpaid? A No, the balance, I think was remitted to Ocean City, we only held the mortgage there for a period, we

didn't collect the full six months' interest May the 9th.

Q Then the interest, so far as you are concerned, was paid in full to the 9th of May, 1926? A 9th of November.

Q 9th of November, 1926? A Yes.

Q Was the payment due May, 1927, paid? A No.

Q Any part of it? A No, sir.

Q And the installment which fell due in November, 1927, was any part of that paid? A No, sir; the interest has been past due since November the 9th, 1926.

Q Which is it, 1926 or 1927? A 1926.

Q Now, have you given us all of the payments of interest made on this mortgage? A Yes, sir.

Q And the interest is in default from what date? A From November the 9th, 1926, to date.

Q Let's have the amount of the Bodek mortgage, please. Have any payments been made on account of the principal of that mortgage? A No payments have been made.

Q Any payments on account of interest? A Yes, on June 24th, 1926, we received $126.98.

Q That covered what period? A That covered the interest up to May 9th, 1926.

Mr. McCarter: What was the amount of that, please? A $126.98.

Mr. McCarter: On June 24th? A On June 24th we received that payment.

Q And that payment—that paid the interest to what date? A Paid the interest to May the 9th, 1926.

Q Any payments been made since May 9th, 1926? A On December the 14th, 1926, received

$1,904.70, representing the interest to November the 9th, 1926.

Q Any other payments of interest? A No. The interest has been past due since November the 9th, 1926, to date.

Q No interest, then, has been paid on this mortgage from the 9th of November, 1926, is that right? A That is correct.

Mr. Starr: There is an allegation in these bills of the merger between the Excelsior and the Colonial Trust Company. That is admitted, is it?

Mr. Carr: If counsel assures us that is the fact.

Mr. Starr: I assure you that is the fact.

Mr. McCarter: When was it?

Q When did the merger occur between the Excelsior Trust Company and Colonial Trust Company? A 17th of March, 1927.

Mr. Starr: Will you admit that without further proof?

Mr. Carr: Yes.

Cross examination by Mr. Carr.

Q Mr. Litzenberg, were those payments made to you that you speak of? A I believe I had the correspondence.

Q I ask you whether the payments were made to you? Were they? Answer it yes or no. A That I just can't recall, whether came to me by letter or—

Q Beg pardon? A Can't recall whether it came to me by letter.

Q You have no knowledge as to whether they were made to you or not; isn't that true? A Yes, sir.

Q And you have simply been testifying from records not kept by you; isn't that true? A I kept these records partially. They bear my figuring, excepting that posting.

Q May I ask you who it was that came in and paid you the money, if anybody did? A That I don't know.

Q You don't remember Mr. Smith ever coming in and making any of these payments, do you? A No, I don't.

Q You don't remember having received Mr. Smith's check for any of these payments, do you? A No.

Q As a matter of fact, was there ever any payment made to you that you know of amounting to exactly the sum of $1,116.63? I am speaking now of your own knowledge and the payment to you.

Mr. Richards: If your Honor please, if there is any bank record here from which he can refresh his memory, if he hasn't any, we are entitled to have it.

The Court: The difficulty is, Senator, the gentleman doesn't seem to desire any. He doesn't ask for any or hasn't stated there are any.

A Of course, this is several years old, I can't remember all the transactions, we had quite a lot of correspondence on it, and records.

(Question repeated.)

A I just don't know what to do; if I have the records I think I can show how the payments were received.

Q I am asking you whether you have any recollection now of Mr. Smith having paid you personally $1,116.63? A No.

Q And have you any present recollection of Mr. Smith or anybody else having paid you the sum of $99 in July, 1927? A No, they were not paid to me. I think I can explain where the payments came from.

Q Let's see whether we can't shorten this. Were any of these payments made directly to you? A When you speak of direct, you mean handed them to me?

Q Yes, Mr. Smith either handed you a check or the money to you personally; did that occur at all in this transaction? A No.

Q So that none of these moneys were paid to you directly; isn't that right? A Yes.

Q And if paid at all, were paid to some other officer or employe of the bank, isn't that true? A Yes, sir.

Q And your knowledge or all the knowledge you have is derived from records kept by some one else; isn't that true? A Well, I personally kept some of the records.

Q But the record doesn't start with your direct knowledge of money paid to you, does it? A Yes, the record does start with money paid.

Q Money paid by Mr. Smith to you? A Well, the first payment didn't come through Mr. Smith, was paid to the Ocean City Title and Trust Company and then sent to us.

Q I am speaking of the payments that you have just testified to, did Mr. Smith personally pay to you any of those sums? A No.

Q Have you any recollection of anyone having personally paid to you those sums? A No.

Q You didn't have them, or, as a matter of fact, did you? A Don't think they did make the payment?

Q Direct to you? A No.

Q So that anything that you have testified to would be the result of information given to you by others, either the Ocean City Title Company, or officers or employes of the bank; is that not true? A Yes, under my supervision, of course, in other words, it is impossible for me—

Q Pardon me; can't you answer that question without qualification?

(Qustion repeated.)

A Yes.

Mr. Richards: If your Honor please, I think we have a right to have the answer stand as it was.

The Court: I think you are entitled to that; permit it to remain. He has already re-answered it.

Mr. Carr: I have not asked to have it stricken out, your Honor. I attempted to trace it a little further. Now, if your Honor please, it seems to be apparent that this gentleman has not testified to anything he knows of his own knowledge, and it may be that this testimony has some importance, and I am compelled to ask that it be stricken out.

The Court: I will refuse the application to strike.

Cross examination by Mr. McCarter.

Q I want to ask the witness a question or two with respect to the Bodek payments. Is the information that you have with reference to the two payments that you designated as having been made by Mr. Bodek information derived from the Ocean City Title and Trust Company? A As I recall the first payment—

Q Will you answer my question, please? Is it from information derived by you from the Ocean City Title and Trust Company? A As I was going to say, as I recall that payment came from the Ocean City Title and Trust Company.

Q What? A That first payment came from the Ocean City Title and Trust Company, as I recall it.

Q Came from them? A They were to collect the first six months' interest and remit the portion to us.

Q I am not asking you what they were to do. I am asking you if the payment was made to the Ocean City Title and Trust Company and by them information to that effect was given to you? A Yes.

Q That was it, eh? A Yes.

Q You don't know of your own knowledge, do you, that $126.98 on the 24th of June, 1926, was paid to the Ocean City Title and Trust Company? A No.

Q Except as you are informed by the Ocean City Trust Company? A That is all.

Q You knew that the Ocean City Title and Trust Company had been the assignee of this mortgage, didn't you, before the Excelsior Trust Company was? A I don't believe they were the assignee on it, no.

Q I beg pardon? A I don't believe they were the holders of the mortgage prior to that time.

Q Well, you knew they had some interest in the matter? A Yes.

Q And all that you know touching that first payment that you speak of, namely $126.98, is that the Ocean City Title and Trust Company wrote or informed your company that Mr. Bodek had paid that sum on account of interest; is that right? A Yes, sir.

Q So that went in your records? A Yes.

Q Now you spoke of a second payment on December 14, 1926, of which you spoke of a payment of $1,904.70; am I right? A Yes, sir.

Q Now was that payment also made to the Ocean City Title and Trust Company? A No, that was made direct to the Excelsior Trust Company.

Q Made to the Excelsior Trust Company? A Yes.

Q On December 14th? A December 14th, as I have it here.

Q What personal information have you upon that subject? A I believe there would be a letter accompanying that payment. I don't have it here, though.

Q You didn't receive the money personally or the check? A That I don't recall.

Q Beg pardon? A I don't recall that.

Q Did you make the entry in the memorandum before you that that money had been received that day, or did somebody else? A Some one else.

Q So that, Mr. Litzenberg, so far as either of these payments is concerned, you really have no personal knowledge whatever, have you? A

I can't recall just directly receiving it. Of course it is most always done by correspondence, and we generally refer to our correspondence.

Q Won't you answer my question?

(Question repeated.)

A No.

Mr. McCarter: Of course, your Honor, we are not standing on a technical question, but the amounts paid and upon what theory they were paid is, I think, of great importance to this case; therefore, that is the reason we are making a point of this.

The Court: Any further cross examination?

By Mr. Starr.

Q Mr. Litzenberg, what are the records from which you have been testifying? A These are what we term the mortgage record.

Q Of what corporation? A I have both here, I have the original record of the Excelsior Trust Company and after the merger they were transferred.

Q Are those the original records of the two corporations? A Yes, sir.

Q Have you personally anything to do with the keeping of those reords? A At the time before the merger I did; in fact, the original record of the Excelsior Trust Company is in my handwriting.

Q And the merger occurred when? A March the 17th, 1927.

Q How many payments were made, interest, on the Bodek mortgage prior to the merger?

Mr. Carr: I object if he is testifying except from his own knowledge.

The Court: He is now testifying records are in his handwriting. I will permit it.

(Question repeated.)

A Why, the payments, I said that they were entirely, the last payment of that interest was not in my writing, all up to that date was. I beg to correct that.

Q Do you know as a fact that is the record of that Trust Company? A Positively.

Q How many payments were made of interest on the Bodek mortgage after the merger? A Apparently no payments made.

Q Now, on the Smith mortgage, how many payments of interest were made prior to the merger? A Two payments were made prior to the merger.

Q Were those entries in your handwriting? A All of the entries in that case are in my handwriting.

Q And you are testifying from that record? A Yes.

Q Did you have any correspondence with either Mr. Bodek or Mr. Smith in relation to these mortgages? A Yes, sir.

Mr. Starr: I call upon Mr. Carr for letter dated May 11th, 1926, from the Trust Company to Max Smith, and, Mr. McCarter, the same date to Mr. Bodek.

(Letter produced by Mr. McCarter offered, received in evidence and marked Exhibit B. 3.)

Mr. Carr: Judge Starr, we don't seem to be able to find that.

Mr. Starr: Here is the carbon copy. May we put that in?

Mr. Carr: We haven't any absolute recollection, my client says he knows he got some sort of a notice of the assignment to the Excelsior.

(Carbon copy of letter offered, received in evidence and marked Exhibit S. 3.)

Mr. Starr: The Bodek letter is dated May 11th, 1926, and reads as follows:

"Mr. Jesse Bodek, 44 North 3rd street, Philadelphia, Pa. Dear Sir: This company has just purchased and acquired title to a certain mortgage of $63,490 given by you to William J. Ryan, Incorporated, covering a number of lots at Wilwood, New Jersey, which mortgage is dated November 9, 1925, recorded in Cape May County Clerk's Office, in Mortgage Book 230, page 487. The semi-annual interest which will come due on May 9, 1926, you are authorized to pay to the Ocean City Title and Trust Company, and thereafter make all payments of interest and principal to this company. Very truly your, W. A. Welsh, Treasurer."

Mr. Starr: The Smith letter, S. 3., is dated "May 11th, 1926. Mr. Max Smith, 721 Arch street, Philadelphia, Pa. Dear Sir: This company has just purchased and acquired title to a certain mortgage of $26,057.50, given by you to William J. Ryan, Inc., covering a number of lots at Wildwood, N. J., which mortgage is dated November 9, 1925, of record in Cape May County Mortgage Book 253, page 427. The semi-annual interest which will come due on May 9, 1926,

you are authorized to pay to the Ocean City Title and Trust Company, and thereafter make all payments of interest and principal to this company. Very truly yours, W. A. Welsh, Treasurer."

Mr. Starr: I call upon Mr. McCarter for a letter dated November 26, 1926, addressed by the company to Mr. Joseph Bodek.

(Letter produced, offered, received in evidence and marked Exhibit B. 4.)

Mr. Starr: "November 26, 1926. Mr. Jesse Bodek, 44 North 3rd street, Philadelphia, Pa. Dear Mr. Bodek: We have been advised by Mr. Harry E. Weir, Civil Engineer, that the improvements on the Ryan tract at North Wildwood, New Jersey, have been completed. As you know, we hold a mortgage in the amount of $63,490, of which you are mortgagor, and that there is an installment payment of $9,070 due on completion of the improvements. Will you, therefore, please send your check for this amount at once? We would also like to have a check for the interest which was due November 9th, in the amount of $1,904.70. Thanking you for giving this your immediate attention, we are, very truly yours, C. A. Litzenberg, Assistant Treasurer."

Q Now, Mr. Litzenberg, will you say whether or not the interest, whether any interest was paid after the sending of this letter of November 26th, 1926, Exhibit B. 4.? A Interest in the amount of $1,904.70 was paid December 14, 1926.

Q That was after the sending of this letter to Mr. Bodek? A Yes, sir.

Q Does that letter refresh your recollection as to the source from which that interest money came? A No, it does not.

Q What say? A No, it does not.

Q Is that one of the entries which was in your handwriting on the records, $1,904.70? A No, that is not in my handwriting.

Q Can you tell us whose handwriting it is? A Yes, it is in Mr. Mead's handwriting, our general ledger bookkeeper.

Q Is he still with the company? A No, sir.

Q Where is he, do you know? A He is with the Mitten Bank in Philadelphia.

Mr. Shorr: Mr. Mead or Mr. Welsh?

A Mr. Mead.

Q Was this bookkeeper under your direction and supervision? A Yes, sir.

Mr. Starr: Mr. McCarter, I ask for the letter of January 21, 1927, sent by Litzenberg to Bodek.

(Letter produced, offered and received in evidence, marked Exhibit B. 5.)

Mr. Starr: "January 21, 1927. Mr. Jesse Bodek, care D. Frinkil, No. 44 North 3rd street, Philadelphia, Pa. Dear Mr. Bodek: Re mortgage $63,490, on North Wildwood lots.

"Payment of $9,070 on account of the principal of the above mortgage is long past due. By reason of complaints concerning some of the details of the improvements we have refrained from pressing you for payment up to this time. It now appears that all matters complained of have been attended to in every

respect as requested by the lot owners, and we might add at considerable expense to W. J. Ryan, Inc. There is, therefore, no reason whatsoever for further delay, and we will ask you to see that said amount of $9,070 is paid to us not later than February 1, 1927. Unless payment is received as requested we will be obliged to turn this matter over to our counsel for action.

"Trusting, however, you will not make this necessary, we are, Very truly yours, C. L. Litzenberg, Assistant Treasurer."

Mr. Starr: Now, Mr. Carr, will you let me have the letter dated November 26, 1926, addresesd by Mr. Litzenberg to Max Smith?

(Letter produced, offered, received in evidence and marked Exhibit S. 4.)

Mr. Starr: "November 26th, 1926. Mr. Max Smith, 721 Arch street, Philadelphia, Pa.

"Dear Mr. Smith: We have been advised by Mr. Harry E. Weir, Civil Engineer, that the improvements on the Ryan tract in North Wildwood, N. J., have been completed. As you know, we hold a mortgage in the amount of $26,057.50 on which you are the mortgagor, and that there is an installment payment of $3,722.50 due upon completion of improvements. Will you, therefore, please send your check for this amount at once? We would also like to have a check for the interest which was due November 9th, in the amount of $781.73. Thanking you to give this your immediate attention, we are, Very truly yours, C. L. Litzenberg, Assistant Treasurer."

Q Now, Mr. Litzenberg, I ask you whether or not any payment of interest was made on the Smith mortgage after the sending of the letter of November 26, 1926?

Mr. Carr: We object, unless he speaks of his own knowledge.

The Court: I will permit it.

A There is a payment of $781.73 on December the 9th, 1926.

Q That is about two weeks after the sending of this letter? A That is in November, yes.

(Letter of Ida L. Smith, dated February 1st, 1927, offered, received in evidence and marked Exhibit S. 5.)

Mr. Starr: Written to the Excelsior Trust Company, attention Mr. C. L. Litzenberg, in re mortgage $26,057.50, on the letterhead of Max Smith & Company:

"Gentlemen: Acknowledging your recent favor, beg leave to advise that Mr. Max Smith is confined in the Jefferson Hospital, having undergone recently a serious operation. I believe my husband will be confined to the hospital for at least three more weeks. The last information on these lots that Mr. Smith had before going to the hospital was that some improvement were yet to be completed, and he had no knowledge otherwise. You no doubt know there are others interested with Mr. Smith, and when he leaves the hospital, I hope that will be within about three weeks, he will get together with the other people at interest with reference to this matter. Mr. George Shorr who, I under-

stood, represented you in the assignment of these mortgages, knows Mr. Smith is confined to the hospital, and I would appreciate very much your kind indulgence until Mr. Smith get back to us and able to take this matter up with you. I am, Sincerely yours, Ida L. Smith."

Mr. Starr: I call for a letter of Mr. Carr dated May 4th, 1927, written by Mr. Shorr, of Wolf, Black, Shorr and Solis Cohen, to Max Smith.

Mr. Carr: I don't think we have that.

Mr. Starr: Here is the copy of it.

Mr. Carr: May I say this notice to produce these letter was only received yesterday, and I never personally heard of the letters. I went through my files and gave them to my client and asked him to hunt them up.

We have not been able to find very many of them up to this time, nor has my client any immediate recollection of having received this letter. My suggestion is that it be held in abeyance until we see at the noon recess whether he has any recollection or whether the letter can be found.

Mr. Starr: Notice was sent last Monday or Tuesday.

Mr. Carr: I mean it is only recently in this case, and we immediately sent it over to the client, and I had no personal knowledge of any of these letters.

Mr. Starr: Maybe I avoid the necessity of producing the letter. What is your answer, that you haven't had any such letter?

Mr. Carr: My client says he has no recollection of it. I want to talk to him at recess and see whether he can recall it from any other circumstance. Immediately he doesn't remember it, and I haven't been able to find the original in this brief period.

Q Now, after May 4th, 1927, or about that time, were there any credits made of interest on the Smith mortgage?

Mr. Carr: I make the objection, unless the witness knows of his own knowledge he can't testify from records of the bank, not proved by the person having the immediate source of knowledge.

The Court: I will permit it.

A You say May the 4th, 1927?

Q Yes. A Payment on account of interest?

Q Yes, interest or principal?

Mr. Carr: May I ask to what the witness is referring?

The Court: You are entitled to do that.

Mr. Carr: To what are you referring, Mr. Litzenberg?

A I am referring to our mortgage record, where we record all payments.

By Mr. Carr.

Q Is that the same record you previously looked at? A Yes.

Q Is this the mortgage record? A Yes, these are all our mortgage records, that is transferred from this card file.

Q Which is the immediate paper that you are referring to in order to answer the pending question? A This (indicating). I can answer from either one, because these payments were transferred to this one.

Q To which were you referring? A The white sheet.

Q The white sheet marked at the head "56 lots, North Wildwood"; is that the one? A Yes. Pardon me, that is the wrong one. This is the one.

Q The white sheet marked at the head, "33 lots in North Wildwood!" is that it? A Yes.

By Mr. Starr.

Q That has to do with the $26,000 mortgage? A Yes.

By Mr. Carr.

Q Who made the entries here; whose writing is that? A That I can't answer.

Q You don't know whose writing it is? A No.

Q You didn't make those entries at all? A I didn't make those.

Q And your answer will be solely from the information you obtained from looking at this record, would it not? A Yes, sir.

Mr. Carr: Your Honor please, I shall object to it.

By Mr. Starr.

Q What is that record, Mr. Litzenberg? A This is the mortgage record which we keep a record of all mortgage transactions.

Q What have you, if anything, to do with the keeping of the record by way of actually keeping, or supervision? A Well, as an officer of the institution it would be under my supervision.

Q Do you know that that is the record that is kept in the ordinary course of business with reference to mortgages? A Yes, sir.

Q And particularly this mortgage? A Yes, sir.

Mr. Starr: I think it is competent, your Honor.

The Court: Sustain the objection. He testified he don't know who wrote it, his supervision was evidently only nominal with respect to that paper.

By Mr. Starr.

Q After May 4th, 1927, do you remember receiving any money for interest on the Smith mortgage from Mr. Shorr? A There was a payment received on May 25th, 1927, but wasn't on account of interest; account of principal.

Q Account of principal of this mortgage, credited on account of principal? A Yes, $1,116.63 was credited on account.

By Mr. Carr.

Q Pardon me, may I see whether this gentleman has testified from his own knowledge? Are you testifying now from some record of the bank when you say moneys were received from Mr. Shorr? A That is the only thing I have to testify from.

Q From the record you were just testifying from then? A Yes.

Mr. Carr: I ask this be stricken out.

The Court: Yes.

By Mr. Starr.

Q Have you any recollection of receiving moneys from Mr. Shorr on account of this Smith mortgage being foreclosed, either on account of principal or interest? A No, sir.

By Mr. McCarter.

Q Now, Mr. Litzenberg, you know, do you not, that the mortgage about which you have been interrogated as to payment, was in existence some time, a year or more before the Excelsior had any connection with it, do you not? A No, I don't know that without referring to papers. I don't recall the papers now.

Q Do you know where the land was located? A Only as North Wildwood.

Q Beg pardon? A Only as North Wildwood.

Q Did you ever visit North Wildwood? A No, sir.

Q During the years 1925 and 1926 and 1927? A No, sir.

Q You didn't see this land or have present knowledge of the thing or any improvements on it, did you? A I didn't see it, but I understood what was to be done there.

Q Please answer my question. You didn't see the land and had no personal knowledge of any of the improvements that were made or lacking upon the property? A No, sir.

Q Did you know the terms of the mortgage and the character of the improvements that were to be made? A Yes, sir.

Q How did you know that? A It is stated in the mortgage as to the improvement, and there was separate agreements that went with the mortgage.

Q I beg pardon? A There was other agreements with the mortgage papers which stated what was to be done.

Q Now you wrote the letter of November 26th, 1926, which is B. 4, you say that you have been advised by Mr. Harry E. Weir, a Civil Engineer, that the improvements on the Ryan tract in North Wildwood have been completed. Was that information from Mr. Weir the basis of your writing that letter of November 26th? A I believe it was, yes.

Q Did you see Mr. Weir personally? A I think that was by letter.

Q Won't you please speak out? A I think that was by letter. I didn't see him personally.

Q Who showed you a letter from Mr. Weir? A That I don't remember.

Q What? A I don't remember that.

Q Well, do you remember a letter? A I think I remember seeing a letter. I haven't been able to locate it. I think we had a certificate or a letter, I don't know whether a letter or certificate.

Q You don't know who presented that? A No, sir.

Q Now, after writing that letter, if not before, you had heard that there was some question about these improvements having been made, hadn't you? A Yes.

Q You had heard that before and you heard that after writing the letter of November 26th, didn't you? A Yes, sir.

Q What? A Yes, sir.

Q What information had you, before writing the letter of November 26th, questioning the completion of the improvements? A I don't recall all those transactions.

Q I beg pardon? A I say I can't recall all those transactions without having the correspondence.

Q Can't you remember from what source you got the information previous to writing the letter of November 26th questioning the completion of the improvements?

Mr. Starr: If your Honor please, I object to that line of examination on the ground that it is not cross examination. This witness was simply put on the stand to testify as to payments made of interest and principal, and he identified the letters that were introduced in evidence, and it seems to me that any examination with reference to his knowledge of the contents of those letters is entirely foreign to the direct examination.

The Court: You offered in evidence letters written by this witness. Now he is being cross examined as to some of the facts stated by him or some of the statements made by him in those letters. I will permit it.

(Question repeated.)

A May I see the letter of November 21st?

Q I have miscalled the 21st; it is the 26th. (Letter dated the 26th, marked B. 4, handed the witness.) A As I said, I believe there was a certificate from Mr. Weir which I saw which prompted me to write that letter. He was the engineer.

Q You are not answering the question at all. Please pay attention to the question.

(Question repeated.)

A I thought I answered it. I say, as near as I can remember, it was a certificate by Mr. Weir, or a letter from him, to the effect the improvements were made.

Q Apparently you don't understand me, Mr. Litzenberg. You have told us that notwithstanding the letter of November 26th, in which you refer to the statement by Mr. Weir, the engineer, that you had heard questions raised as to whether the improvements had in fact been made, and I am asking you from what source you heard those questions. A I beg pardon. I answered that in error. I was thinking it was the second letter which I wrote stating that we had not been pressing for payment, it was in that period in which I heard the improvements were not made.

Q Now, then, you modify your statement that you had heard before writing the letter of November 26th, that the completion of the improvements was questioned. That was a mistake, was it? A It was a mistake. I didn't hear it before that first letter.

Q Now I notice that in your second letter of January 21st, Exhibit B. 5, written two months after the letter of November 26th, you say: "By reason of complaint concerning some of the details of the improvements, we have refrained from pressing you for payment up to this time." Do you remember making that statement in that letter? A Yes, sir.

Q Who made those complaints? A We had other mortgages on the same tract.

Q Who made those complaints? Please answer my question. A I am trying to answer the question who made the complaints.

Q The fact you had other mortgages does not answer the question. I want to know what individuals made the complaints which you allude to in your letter of January 21st. A We held several mortgages there and it would be necessary for me to go through my correspondence to see which ones complained on it.

Q Had you heard it from several sources? A I think so; two or three of the other mortgagors that complained.

Q To you? A By letter, yes sir.

Q How early after November 26th did you get or receive those letters? A That I would have to refer to my correspondence.

Q Have you got it there before you? A I don't believe I have it all here, but possibly our attorney has some.

Q Is it in the room? Do you have it, Mr. Shorr?

Mr. Shorr: I have got some correspondence. What correspondence are you looking for?

A Looking for the first letters from the other mortgagors as to the improvements not being made.

(File handed to witness.)

Q As quickly as you can. A May I ask the date of that last letter?

Q January 21st, 1927. A I don't have that correspondence with me apparently.

Q Did you see Mr. Weir between November 26th, 1926, and January 21st, 1927? A I have never seen Mr. Weir.

Q Who did you see to clear up the matter of the complaints that had been made to you, whom did you see? A There was other mortgages held by Peopels Bank and Trust Company, and they were looked after by them.

Q I am asking you whom you saw to clear up the complaints because of which you say in your letter of January 21st, 1927, you deferred for two months pressing the claim; whom did you see that cleared it up for you? Who told you anything about it that led you to say now all fixed up, Mr. Ryan? A I don't know which one it was, the Peoples Bank and Trust Company had some of the mortgages there and they had it inspected by some one, I haven't those records.

Q Can you remember whom you saw or what occurred that led you after the expiration of practically two months to say in your letter of January 21st: "By reason of complaints concerning some of the details of the improvements, we have refrained from pressing you for payment up to this time, but it now appears that all matters complained of have been attended to in every respect"? Now who did you see that led you to make that statement in your letter of January 21st? Can't you remember? A I don't remember the exact person, either Mr. Grosscup or possibly Mr. Felix, or Mr. Spence, who were then vice-presidents or presidents of the Peoples Bank, who also held some of the

mortgages and we were working in conjunction with.

Q Officers of another trust company up in Philadelphia? A That was the Peoples Bank and Trust Company, all three Colonial Trust Company.

Q Beg pardon? A All three banks are now the Colonial Trust Company.

Q On January 21st, 1927, when you wrote that letter, the merger had not taken place. I understand that your statement in the letter of January 21st, that it now appears that all matters complained of have been attended to in every respect was based on information disclosed to you by some gentlemen who were officers of the Peoples Trust Company? A Yes, sir.

Q And based entirely upon what they said to you, you wrote the letter of January 21st? A Yes, sir.

Q Have you the letter of the Ocean City Title and Trust Company remitting to you $126.98, or referring to with you? A Not unless Mr. Shorr has it among his correspondence, which I haven't.

Mr. Starr: Here is the correspondence, if you want to look at it.

A No, sir; I don't have the letters.

Q Was the information conveyed to you by letter or by word of mouth? A I believe it was conveyed by letter.

By Mr. Carr.

Q Mr. Litzenberg, you stated that other agreements with the mortgage papers, there were other agreements with the mortgage papers that

stated what should be done in the way of improvements. With those other papers, or was there among those other papers the agreements of sale?

Mr. Starr: If your Honor please, this witness hasn't said anything of the kind, as I recall it.

The Court: Yes, he said so.

Mr. Starr: If he said it, I won't insist on my objection, but I certainly didn't hear it.

The Court: Yes, he said there were other agreements.

A There was an agreement, I believe, with the Ocean City Title and Trust Company.

Mr. Starr: That is not what he is talking about.

(Question repeated.)

Q —such as I now show you in this case, an agreement between William J. Ryan, Incorporated, and Max Smith, for the sale of a number of lots appearing there?

Mr. Cole: On behalf of Esibil, I object, no matter what he said on direct examination, can't bind Esibil about some other writing.

The Court: That is true.

A I can't remember.

Mr. Starr: As I understand it, the question is whether or not there were other

papers, that is, these other papers included the contracts of sale, and this witness has said something about an agreement with the Ocean City Title and Trust Company.

The Court: And the question has since been repeated, and he says he can't remember.

Q There were some other papers with the mortgage which informed your company what improvements were to be made. You did testify to that, didn't you? A Yes, I was referring to that paper.

Q What were those other papers? A There was an agreement, I believe, with the Ocean City Title and Trust Company.

Q Between the Ocean Title and Trust Company and whom? A I think it is with the Excelsior, I can show the photostatic copy of it.

Q An agreement relating to the improvements to be completed? A Yes.

Q Have you the photostatic copy of that?

Mr. Starr: I object; has nothing to do with this examination at all.

The Court: Sustain the objection.

Mr. Carr: Your Honor please, I didn't have a chance to say anything. The thought I had in mind was this, that it is important to show whether or not this mortgagee, when he took the assignment of this mortgage, knew of the situation, knew what was to be done, in other words, seeking to charge him with notice. He said when he got the mortgage there were some other papers.

The Court: I am not preventing you from proving that on your own case, if you de-

sire to. Sustain the objection. It is not cross examination of this witness.

Mr. Carr: May I do so by making it part of my case?

Mr. Starr: My objection, if your Honor please, I haven't any objection for counsel to show or, rather, elicit from this witness, although I do not think it is competent or material to elicit the existence of some agreement of sale on which the mortgages were predicated. Of course, we will argue they are not competent in this proceeding because all of the agreements were merged in the mortgage, but I object to this witness being interrogated with reference to a contract between the Peoples Company and some other corporation.

The Court: I have ruled upon it and overruled the offer.

Mr. Carr: I now ask whether I may ask it as a part of my main case while this witness is here.

The Court: Is there any objection?

Mr. Starr: I object to that as not material.

The Court: Sustain the objection.

Mr. Carr: Then I will ask you to keep this witness here so we may examine him in our case.

By Mr. Carr.

Q Were you able to tell me what the other agreements were that were with the mortgage papers when you got them, just to identify them now? A That one I had in mind was just the one I spoke about.

Q I beg pardon? A That one I had in mind was just the one I spoke about with the Ocean City Title.

Q You spoke of it in the plural, did you mean to limit it to the agreement with the Ocean City Title? A That is the only agreement I know of.

Q Well, you said there were other agreements. A If I said plural, I didn't mean that.

Q You meant only the one? A Yes.

Q For the purpose of identification, that was an agreement between the Excelsior Trust Company and the Ocean City Title and Trust Company? A I believe it is.

Q And delivered to you at the same time that the mortgage was delivered? A I just can't say when it was delivered.

Q You found them together when you took charge of the matter; is that right? A Yes.

Mr. Starr: Mr. Carr, have you that letter dated November 26th, 1926, written by this witness to Max Smith?

Mr. Carr: Yes, sir; I have. Judge Starr, I think there was a call for the letter of January 21st, from Max Smith to the Excelsior Trust Company. I have it here. Do you want it in response to the call?

Mr. Starr: I don't recall that I called for it.

Mr. Carr: The call is the letter dated January, 1927.

Mr. Starr: I haven't called for it here.

Mr. Carr: Called for by Cole and Cole, who were the solicitors until today.

Mr. Starr: I haven't called for it today.

Mr. Carr: Notice to produce.

Mr. Starr: You were noticed to produce certain papers. I am not obliged to call for all the papers covered in that call.

By Mr. Starr.

Q Now, Mr. Litzenberg, you wrote this letter of November 26th, 1926, S. 4, to Mr. Smith. Did you get any reply to that letter from anybody? A I haven't been able to find any reply.

Q I show you a letter and ask you whether that was a reply to it? A Yes, that is a reply to it.

Q Letter dated December 4th, 1926, addressed to the plaintiff, signed by S. L. Cohen.

Mr. Starr: Mr. Carr replied that this letter was authorized by Max Smith to be written by Mr. Cohen, and I offer it in evidence.

(Letter received in evidence and marked Exhibit S. 6.)

Mr. Starr: "December 4, 1926. Excelsior Trust Company, Germantown and Lehigh avenues, Philadelphia, Pennsylvania. In re Ryan tract, North Wildwood.

"Gentlemen: Mr. Max Smith, whom I represent, has turned over to me your letter of November 26th, with instructions to advise you that the improvements have not yet been completed in reference to the interest which was due on November 9th, advises that there will be a meeting between Mr. Smith and the several persons interested with him in the above-mentioned ground

some time early next week, at which time this matter will be taken up. Mr. Smith further states that through advertisement and promises by Mr. Ryan and his agents, the City of Wildwood assessed this property as improved lots for year 1926, on which they put quite a large assessment, whereas the improvements were not even yet completed and the same would have been assessed as unimproved lots if Mr. Ryan and his agents had not made representations. In view of the representations made at the time of the sale and at settlement by Mr. Ryan and these agents, Mr. Smith will incur quite a loss, and he emphatically feels it is up to Mr. Ryan to take care of the 1926 taxes. I would like to hear from you by return mail so we can take this matter up at the time of the meeting which will be held Tuesday, December 7th, 1926."

(Letter from Max Smith to George Shorr, dated June 25th, 1927, offered, received in evidence and marked Exhibit S. 7.)

Mr. Starr: "Dated June 25th, 1927. Mr. George Shorr, Packard Building, Philadelphia, Pa.

"Dear Sir: Enclosed find check for $1,356.25, which pays $1,341.25 on the principal and $15 interest on the note that was made out to me by Peikin for his payment on the Wildwood lots. I am enclosing the letter which I have received from Peikin, which is self-explanatory. You will see that I am put in the middle in this case. I am sorry this is the best I can do. The whole burden is put on my shoulders. Counsel

for the bank returned note for $1,341.25 to me so I can return it to Peikin."

By Mr. McCarter.

Q Is the letter of Mr. Cohen that has just been offered in evidence one of the letters that you had in mind as indicating complaints after writing your letter of November 26th? A No, I didn't have that one in mind.

Q That is an additional one to those you had in mind? A I don't recall what the dates are of it now, but I remember Garfield was one.

Q Judge Starr read a letter of December 4, 1926, from Mr. Cohen on behalf of Mr. Smith, in which he made complaints about the failure to make the improvements, and I understand you to say that you did not have that letter in mind when you were answering my questions before? A I didn't remember it, no.

Q Now, recurring again to this letter of January 21st, 1927, which you wrote, in which you say: "By reason of complaint concerning some of the details of the improvements, we have refrained from pressing you for paying up to this time, but it now appears that all matters complained of have been attended to in every respect, as requested by the lot owners, and we might add at considerable expense to William J. Ryan, Inc." Remember saying that? A Yes, sir.

Q Who told you that W. J. Ryan, Inc., had made considerable expenditure in completing these improvements? A I don't recall.

Q What? A I don't recall.

Q That is all.

Mr. Carr: Just a moment. Judge Starr, have you any objection to having offered the letter Judge Cole, or Cole & Cole, called for, letter of exactly the same character as that addressed to the Attorney-General's client?

Mr. Starr: I don't seem to have a copy of that letter. I haven't any objection if you were to put it in.

By Mr. Carr.

Q Your signature, is it not, Mr. Litzenberg?

Mr. Starr: This is exactly the same letter as the Bodek letter, isn't it?

A Yes, that is my signature.

Mr. Carr: No, it is the same as the January 21st letter, except as to the amount.

Mr. Cole: I don't believe it is necessary, but I object to any attempt to bind Mr. Esibil, my client, in my case.

The Court: Sustain the objection, then, offer can only be made at this time by consent. You can have it identified.

Mr. Carr: Judge Cole's objection to the order?

Mr. Cole: I am simply objecting so far as Mr. Esibil, and it can't bind him.

The Court: No objection being made as to the timeliness, I will admit it.

(Letter admitted in evidence and marked Exhibit S. R. 8.)

Mr. Carr: This letter reads:

"January 21st, 1927. Mr. Max Smith, 721 Arch street, Philadelphia, Pa. Dear Mr. Smith: In re mortgage of $26,057.50, on North Wildwood lots. Payment of $3,722.50 on account of the principal of the above mortgage is now past due. By reason of complaints concerning some of the details of the improvements, we have refrained from pressing you for payment up to this time, but it now appears that all matters complained of have been attended to in every respect as requested by the lot owners and we might add at considerable expense to William J. Ryan, Inc. There is, therefore, no reason whatsoever for further delay, and we will ask you to please see that the said amount of $3,722.50 is paid to us by not later than February 1, 1927. Unless payment is made as requested we will be obliged to turn this matter over to our counsel for action. Trusting, however, that you will not make this necessary, we are, Very truly yours, C. L. Litzenberg, Assistant Treasurer."

Mr. Carr: May I ask counsel whether I may have the benefit of Mr. McCarter's cross examination to our letter of the same purport addressed to Mr. Bodek?

Mr. Starr: So far as I am concerned you may.

Mr. Carr: Any objection to that?

Mr. McCarter: No.

Mr. Carr: I don't want to repeat the same thing, the subject matter is the same.

Mr. Starr: Mr. Carr, will you produce a letter written by Mr. Schorr to Max Smith, dated May 4, 1927?

George J. Schorr, direct.

GEORGE J. SCHORR, sworn.

Direct examination by Mr. Starr.

Q Mr. Schorr, you are a member of the Philadelphia Bar? A Yes, sir.

Q Were you also attorney in 1927 for the Excelsior Trust Company and the Colonial Trust Company? A For the Excelsior Trust Company in connection with this particular matter. For the Peoples Bank and Trust Company generally.

Q Did you know Max Smith? A I do.

Q Did you ever receive any moneys from Smith on or about the 4th of May, 1927, in payment of either principal or interest on the mortgage being foreclosed in these proceedings? A Yes, sir; I did.

Q How much? A I don't remember the amounts, but the amounts are recorded in the copy of a letter that is in my file there.

Q I show you a carbon copy or what purports to be a letter dated May 4th, 1927, sent to Max Smith. Did you send that letter to him? A Yes, sir.

Q Is that a copy of it? A That is a copy of it.

Mr. Starr: I called on the other side for the original, and I offer the copy in evidence.

By Mr. Starr.

Q Mr. Schorr, you dictated this to a stenographer, I presume, did you not? A Yes, sir.

Q And entrusted to the stenographer the mailing of the letter, didn't you? A Yes, sir.

Q So you have no personal knowledge as to its being mailed? A That is correct.

Mr. Carr: If your Honor please, I object to the use of it.

By Mr. Starr.

Q What have you to say with reference to the carbon copy, what is your recollection as to this particular paper which is introduced in evidence, or, rather, which I intend to introduce in evidence? A Recollection as to what?

Q As to the carbon copy, the sending of the letter. A I dictated the letter, it was written by a stenographer and signed by me in the usual course of my business, given to the stenographer for mailing and sealing and mailing and stamping, also in the usual course of business. The stenographer is no longer with me. I don't know where she is now. I know that Mr. Smith received this letter because of subsequent conversations with him—

Mr. Carr: Just a moment. You are volunteering like most lawyers do, and I object to the volunteering.

Mr. Starr: I renew my offer.

The Court: Admitted.

(Letter admitted in evidence and marked Exhibit S. 9.)

Mr. Starr: "May 4, 1927. Mr. Max Smith, 725 Arch Street, Philadelphia, Pa.

"My dear Max: I am in receipt from you of the following: Check of Louis Berkowitz for $1,341.25. Check of Max Smith, $1,341.25. Check of Samuel L. Cohen for

$1,351.25. Note of Peikin Brothers of $1,341.25. (This note does not bear interest on its face, but I understand you will see that the interest is paid thereon); certificate No. 7 for 30 shares and No. 74 for 10 shares of the stock of the Wildwood Pier and Realty Company which I am to try to sell for $1,250. It is understood, of course, that the above are accepted only to secure the payment of one-half of the installment of interest due on your mortgages held by the Colonial Trust Company secured on the lots at North Wildwood. I will have to take up with the Colonial Trust Company the question of whether it is willing to accept the note of Peikin Brothers, and I will also have to ascertain whether the stock can be sold for $1,250. I understand that Cohen will supply the difference between whatever is realized on the stock and the sum of $1,341.25 in accordance with our telephone conversation of yesterday. I will deposit the checks I have here, and if any of the checks are not paid or if the note is not paid or the stock certificates are not sold, you will be responsible for and make up the difference so that we can go ahead and deposit the checks and credit on account of the installment of principal whatever amount is collected on the checks. Very truly yours, G. J. Schorr, for Wolf, Bock, Schorr and Solis Cohen."

Q Now, what conversation had you with Mr. Max Smtih in relation to the receipt by you of the checks and notes referred to in this communication? A Mr. Smith related to me the

diffculties he had in getting the members of the syndicate to put up their share of the money. He told me how hard-up they were, the market had declined, didn't want to put any more money into this dead venture, but, of course, he was on the bond and the other fellows were not, and they let him fish for the matter and he said it was with the greatest difficulty he was able to get them to do something.

Q Do you recall when that conversation occurred? A Well, that conversation occurred almost every time I asked him for money, which was quite frequently. I knew Mr. Smith personally, had represented him on several occasions, and called him on the telephone a number of times and got him to come into the office a number of times, and he always related the same difficulty.

Q In your demand for money from him, to what mortgages were you referring? A I was referring to the two mortgages which Mr. Smith had given executed to William J. Ryan & Company, Incorporated, had been subsequently assigned, one of them went to the Peoples Bank & Trust Company, the other went to the Excelsior Trust Company.

Q Is one of those mortgages the one now being foreclosed in this proceeding? A Yes, sir; that is the twenty-six thousand and some odd dollar mortgage.

Q What knowledge have you of the receipt by Mr. Max Smith of the letter written by you on May 4th which is represented by Exhibit B. 9? A Why, on subsequent occasions I discussed with him the question of paying some more money and he told me that, he referred to this payment that he had made, and to matters that

were mentioned in the letter, and I think some of my subsequent correspondence also mentions the same subject matter. The letter I wrote to Mr. Cohen afterwards was on the same date in connection with the check that had been enclosed, was one of the checks mentioned in my letter to Mr. Smith. Later I wrote him on May 20th, Mr. Max Smith—

Mr. Carr: I object unless it is shown he received it.

The Court: Sustain the objection.

Mr. Starr: I call for the letter of May 20th, 1927, written by Mr. Schorr to Max Smith.

Mr. Carr: We haven't it.

(Copy produced, offered in evidence and marked Exhibit S. 10.)

Mr. Starr: "May 20th, 1927. Mr. Max Smith, 725 Arch Street, Philadelphia, Pa.

"My dear Max: In reference to your mortgages on the North Wildwood lots held by the Colonial Trust Company, I have been unable to find a purchaser for the hundred shares of the Wildwood Pier and Realty Company stock in the name of Samuel L. Cohen, and I am returning the two certificates, No. 74 for 70 shares, and No. 7 for thirty shares, both in the name of Samuel L. Cohen, and unendorsed. Will you please get the additional cash promptly? Samuel Cohen told me he had an offer of seven or eight hundred dollars for these certificates. Perhaps you can get him to sell for that price and lend him the difference. At any rate, will you please proceed to get this

matter cleared up as soon as possible, as you realize the bank is pressing for money."

Q Do you recall in this correspondence whether you got any reply to that or if not a reply by letter did you have any conversation with Mr. Smith in reply to it? A I got a letter subsequently from Mr. Smith, not in connection with the note, not in connection with the stock, but in connection with the note of Peikin.

Q That is the one that has already been introduced in evidence? A June 25th.

Q Now, Mr. Schorr, the checks received as indicated in letter S. 9, particularly the check of Max Smith for $1,341.25, what did you do with that check? A Those checks were deposited in our accounts and subsequently the amounts were remitted to the Colonial Trust Company.

Q On account of what? A On account of the installment of principal payable upon completion of the improvements.

Q Had you any conversation with Mr. Bodek about those mortgages? A I had conversations with Mr. Bodek I should say about three or four times between the time when we made settlement under those mortgages and the time when we instituted foreclosure proceedings.

Q What was the purport—

Mr. McCarter: One moment. I want to know what they were and when they were.

The Court: Entitled to that.

Mr. Starr: I don't know whether you are entitled to that, Mr. McCarter, party to the suit. However, I am perfectly willing.

Q When were the conversations according to the best of your recollection, and where were

they held? A Conversations always involved that same subject matter; if my recollection serves me rightly, I had one or two of them on the telephone with Mr. Bodek, one in my office. I can't remember where the others took place, but I know I had at least four and probably more conversations with Mr. Bodek.

Mr. McCarter: Will you give the dates, about? I don't mean the specific dates, but between what times?

A I should say in the spring of 1927 and the summer of 1927, as near the time as I can fix.

Q Have any conversations after November 1926? A All these conversations that I refer to were after 1926. Of course, I had other conversations with Mr. Bodek prior to that time which related to the settlement, when they made settlement for the property in November, 1925.

Q I am not talking about that. I am talking about the conversations which occurred after November, 1926, about this mortgage which is being foreclosed; what were those conversations? A Mr. Bodek told me substantially the same thing that Mr. Smith had told me.

Mr. McCarter: I don't care—

The Court: Sustain the objection.

Q I don't want that. What did he say? A I asked him for money, asked him why he didn't pay the installment of principal on the mortgage, and he told me that he had other members in the syndicate with him, that those men did not want to come through, nobody seemed to have any money, everybody was down and out.

I called his attention to the fact one of the men I knew was a member of his syndicate was a man that had wealth, and said certainly he can pay up, he said, "No, he refuses to go along, and won't do a thing."

Q Recall anything else that was said? A No, we just talked generally about that subject. That is all I can recall.

Cross examination by Mr. McCarter.

Q Have you undertaken to give all the conversations on these four occasions? A No, sir; I couldn't give you all the conversations, Mr. McCarter.

Q He spoke of the fact, did he not, on more than one of these occasions or at least at one of them about the fact that the improvements that had been promised had not been made? A He didn't say that. What he said was that some one or maybe more than one of the members of his syndicate had said that to him, and his attitude was, Mr. Bodek's attitude was—

Q Not what his attitude was, what he said. A Substantially what he said was, I charged Mr. Bodek with these things as excuses for their not putting up the money, and he assented to that, I don't remember whether he just said yes, or whether he nodded his head, but I remember that his attitude was, as indicated by his actions—

Mr. McCarter: I object. You are a lawyer. You know perfectly well that is not competent.

The Court: Yes.

A I can't say Mr. Bodek specifically said yes that is true.

Q What did he say? A He said that they were the excuses made there by these members of the syndicate for not putting up their share.

Q Did he say what improvements were lacking? A No, sir.

Q Was each of the conversations a repetition of the same thing, four conversations? A Substantially.

Q So that four times you asked him the same question and four times he made substantially the same answer? A That is correct.

Q Do you mean to say that on none of these occasions he himself stated as the reason for not making the payments the fact of the failure to make the improvements? A No, sir.

Q You don't mean to say that, or you do say that? A I do mean to say that.

Q He did not mention the fact that the improvements had not been made as an excuse for the failure to make the payments you desired? A No, sir; not as coming from him, merely as coming from other members of the syndicate to him.

Q Well, he said he had not been down there, didn't he? A I don't recall his having said that.

Q But that people who had been there had told him that the improvements had not been made? A Except as an incident to him, the members of his syndicate had told him.

Q I am asking you that, whether it wasn't substantially what he said, while he had no personal information on the subject at the time of the conversation, that he had been told that by members of the syndicate, as you call

them, that these improvements had not been made? A No, he didn't put it that way, Mr. McCarter. The way he put it was that he was willing to pay his share but that the other members of the syndicate did not want to put it up, and they gave him as an excuse that the improvements were not completed, and so on.

Q You mean to say he told you in so many words that he was willing to pay his share? A Yes, sir.

Q He did? A Yes, sir.

Q When? A It was in the spring of 1927?

Q Why didn't you take it? A He didn't want to give it to me. He was waiting for the others to put up their share.

Q He was willing to give it and you were unwilling? A He said he was willing to give it to me if the others would put up their share.

Q Did he mention who the members of what you call his syndicate were? A I don't recall whether he mentioned it or not, but I happen to know a man named Frankel was, I can't tell whether he mentioned it or not. On one occasion—

Q One moment. A You asked me a question, Mr. McCarter.

Q Don't be so zealous. Are you counsel for the Excelsior Trust Company?

Mr. Richards: I insist he be allowed to finish his answer.

The Court: Yes, I think that answer was not finished when Mr. McCarter interrupted.

A I was going to say the only time I recall he mentioned the matter was in connection with Mr. Frankel's name, when I mentioned it to him,

one occasion I mentioned to him, pointed out Mr. Frankel was well able to pay, he said he didn't want to do a thing. Outside of that I don't recall any conversation as to members of the syndicate.

Q He didn't mention who the members of his syndicate were? A Not that I can recall, no.

Q Are you counsel for the Excelsior Trust Company or the Colonial Trust Company? A Yes, sir.

Q And you have been throughout, ever since they became interested in this mortgage? A The Colonial Trust Company under the name of Colonial did not become interested in these mortgages until they merged with the Peoples Bank and Trust Company and with the Excelsior Trust Company. Prior to that merger we represented the Peoples Bank and Trust Company who had taken some of these mortgages. I say, however, we represented the interest of the Excelsior Trust Company in connection with the mortgages that they had purchased.

Q Are you also counsel for Mr. Ryan? A Yes, sir; we are counsel for Mr. Ryan.

Q And have been ever since the making of this mortgage? A Since before the making of the mortgage.

Q Before the making? A Since the time they made these sale agreements Mr. Carr referred to before.

By Mr. Starr.

Q Now, as the result of your interviews with Mr. Bodek, were you able to collect any money on account of the principal and interest on the Bodek mortgage? A No, sir.

Q That is all. A And I might say I didn't try to collect interest as such. I was mostly concerned with my conversations with both Mr. Bodek and Mr. Smith with the question of installment on principal.

PETER L. PETERSON, sworn.

Direct examination by Mr. Starr.

Q Mr. Peterson, have you any official connection with the Borough of North Wildwood? A City.

Q City of North Wildwood? A I have.

Q What is your official connection? A Tax collector.

Q How long have you been tax collector? A Since 1913.

Q Have you the tax duplicates here for the years 1926 and 1927? A Yes, sir.

Q And 1928? A And 1929.

Q How are these assessments made; by block and lot number? A Block and lot numbers; yes, sir.

Q Referring to the tax duplicates for 1926 and particularly lots 3 and 4, block 301.

Mr. McCarter: Where is the duplicate?

Mr. Starr: I asked him if he had it here.

A I have them here in the room.

Q Produce it, please.

(Book produced.)

Q Lots 3 and 4, block 301, for 1926, refer to the tax duplicate, and tell us what the amount

of taxes for 1926 on those lots was, and whether it has been paid. A The tax was $23.60 per lot, and not paid.

Q Has any portion of it been paid? A No, sir.

Q Now is it more convenient to go through 1926 duplicates or take those lots in 1927 and 1928? A It will be more convenient to go through the 1926.

Q Then look at the block, in 1926, lots 3 and 4, block 301. A The tax on each lot is $23.60, and unpaid.

Q Any portion of it paid? A No, sir.

Q Lots 9, 27, 28, 29, 30 and 31, in block 304. A Lot 9 is that?

Q Lot 9 first. A Lot 9, the tax is $28.32.

Q Any portion of it been paid? A No, sir.

Q 27, 28, 29, 30 and 31, block 304. A Tax on each is $23.60.

Q Any portion of it been paid? A No, sir.

Q Lots 1 and 9 in block 306? A 1, the tax was $28.32; and 6, the tax was $23.60.

Q 9? A $28.32.

Q Any portion of either of those assessments been paid? A No, sir.

Q Lot 9, 10 and 11, in block 305. A The tax on 9 is $28.32; 10 and 11, $23.60.

Q Any portion of that tax been paid? A No, sir.

Q 25, 27, 28, 29, 30, 31, 33, in block 305? A Tax is $28.32 on 25.

Q Any portion been paid? A No, sir.

Q 27? A 27, 28, 29, 30, and 31, tax is $23.60.

Q Apiece? A Yes, sir.

Q Any portion of that ever been paid? A No, sir.

Q 33? A Tax is $28.32.

Q Any portion of that ever been paid? A No, sir.

Q 47 and 48, any portion of the taxes on those lots been paid? A No, sir.

Q What is the amount? A $23.60 apiece.

Q Lot 6 in block 413? A $23.60.

Q Any portion of that been paid? A No, sir.

Q Lot 37, 38 and 39 in the same block 413? A $23.60 per lot.

Q Any portion of it been paid? A No, sir.

Q Now, turn to block 415, lot 2? A Tax is $23.60.

Q Any portion of it been paid? A No, sir.

Q Lot 8, same block? A $23.60.

Q Any portion of that ever been paid? A No, sir.

Q 16, 17, 18, 19, 20, 21, in the same block? A $23.60 per lot.

Q Any portion of it been paid? A No, sir.

Q In the same block, lot 35, 36, 37, 38, 39, 40 and 41? A $23.60 per lot.

Q Any portion of that ever been paid? A No, sir.

Q Lots 22 and 23, block 417? A $23.60 per lot.

Q Any portion of that ever been paid? A No, sir.

Q Lots 32, 33 and 24, in block 417? A The tax is $23.60 on 33 and 34, and $28.32 on 32.

Q Any portion of that ever been paid? A No, sir.

Q 22 and 23, block 418? A Tax is $23.60 per lot.

Q Any portion of that ever been paid? A No, sir.

Q Lots 32, 33, 34, in block 418? A 32, the tax is $28.32; 33 and 34, it is $23.60.

Q Any portion of it been paid? A No, sir.

Q Now, in block 419, lots 18 and 19? A Tax on each lot is $23.60.

Q Any portion of it ever been paid? A No, sir.

Q 24 in the same block? A $23.60.

Q Any portion if ever been paid? A No, sir.

Q Lot 32 in the same block? A $28.32.

Q Any portion of that ever been paid? A No, sir.

Q You have been testifying from what book? A From the First and Second Ward tax duplicates of the City of North Wildwood.

Q The original books kept by the City? A Yes, sir.

Q And that shows the assessment and also the non-payment of the tax? A Yes, sir.

Mr. Starr: I offer that book in evidence.

Mr. McCarter: I don't think it is necessary to do that. It seems to me that would encumber the record, to offer the book in evidence. His evidence goes in, and now I will say further, Judge Starr, that now I have learned the system that was adopted by the City, I won't require proof of the subsequent years if the witness will say that he knows they were not paid.

Q Now, Mr. Peterson, with respect to the same lots for the years 1927 and 1928, do you know whether or not any taxes have been paid upon those lots? A I do.

Q Have any of the taxes been paid? A They have not.

Q They are all delinquent for those two years, 1927 and 1928, the same as 1926? A Yes, sir.

Peter L. Peterson, cross.

By Mr. McCarter.

Q When do your taxes become due, Mr. Peterson? A June first and December first of each year, semi-annually.

Q Under the general tax law? A Yes, sir.

Q The map lot and block numbers that you have in your duplcate was made by the city engineer? A The map was made by the city engineer, yes, sir.

Q Were the taxes for 1926 the first taxes that were imposed upon these particular lots and blocks? A In lots and blocks; yes, sir.

By Mr. Cole.

Q May I inquire of this witness now as to the lots covered by the mortgage of Shotkin?

The Court: Yes.

By Mr. Cole.

Q Referring to lots 27, 28, 29, 30 and 31, block 302, I ask you whether the taxes for any of the three years 1926, '27 and '28 have been paid on those lots? A I think the 1926—

Mr. Carr: We haven't any doubt for those years.

Mr. Cole: I understand so far as the lots described by Shotkin in the mortgage is concerned, the taxes for 1926, '27, and '28 have not been paid?

Mr. Carr: My client says he is not sure about 1926. They have not been paid for 1927 and 1928.

A Give me the lot numbers again.

Q 27, 28, 29, 30 and 31, block 302. A They have been paid.

Q What? A They are paid for 1926.

Q Lots 23, 24, 34 and 35 in block 305? A They have been paid.

Q Lots 25 and 31 in block 412? A Both paid.

Q Lots 10 and 11, block 415? A Paid.

Q Date of payment? A First half was paid June 30th, 1926, and the second half January 28th, 1927.

Q Lots 8 and 9, block 416? A Paid.

Q At the same time? A Same date, yes, sir.

Q Were all these payments at the same time? A Yes, sir.

Q Do you know of your personal knowledge who paid those taxes? A My recollection is it came by check from, I think by Mr. Shotkin.

Mr. Starr: Mr. Carr, may we make the stipulation that the taxes for 1926, 1927 and 1928 on the properties covered by the Smith mortgage have never been paid?

Mr. Carr: We may so stipulate.

Mr. Starr: All three years in default?

Mr. Carr: We didn't pay any taxes.

Mr. Starr: The duplicates show the lots were assessed for those three years' taxes, have never been paid; is that right?

Q Is that right. A Yes, sir.

Mr. Carr: All right, we will take that.

(Recess taken until 1:45 o'clock P. M.)

AFTERNOON SESSION.

Trial of the cause resumed at 1:45 P. M.

ANTHONY G. FELIX, sworn.

Direct examination by Mr. Starr.

Q Mr. Felix, you live where? A Cynwid, Montgomery County, Pennsylvania.

Q Which of these three banks involved in this matter have you been connected with? A To some extent with all of them. I was Vice-President of the Peoples Bank and Trust Company, Director of the Excelsior Trust Company, and I am now Vice-President of the Colonial Trust Company.

Q Did you ever have any conversation with Mr. Bodek in relation to the mortgage which is being foreclosed in these proceedings? A I did.

Q Do you remember when it was? A Not exactly. It was in the early part of, around the middle of 1927, over a period of perhaps three or four months.

Q Was it before or after November, 1926? A After.

Q And where were these conversations held? A In my office.

Q Now tell us what was said by Mr. Bodek in relation to the mortgage which is being foreclosed here. A Well, I sent for Mr. Bodek to see why he was not making these payments.

Mr. McCarter: You speak a little indistinctly.

A I sent for Mr. Bodek to find out why we were not receiving payment for this installment,

and Mr. Bodek expressed himself substantially as being willing to do his share, but he had a syndicate which were rather inclined to drop the property, and he could not assume the burden for all of the syndicate, so we then negotiated together several times with a view of trying to arrange some sort of an extension of the mortgage and the payments that would be acceptable to his syndicate and the bank, without success.

Q What did he say in response to your inquiry as to why he did not pay the money? A He said that his syndicate would not put up their share and that he could not pay for all of them.

Q Did he ever give you as an excuse for not paying the installment that the improvements had not been completed? A No.

Q Was there anything said at all in any of these conversations about the improvements? A I don't recall any conversation about that excepting he might have mentioned that some of his syndicate were giving out that as an excuse or that he had heard there was some complaint about improvements.

Q Did he ever say that he was not inclined to pay on that account? A No; absolutely not. As a matter of fact, he told me that his relationship with the other banks in Philadelphia had been entirely good, and that he did not intend to stick a bank in this case if he could avoid it, and he was very much interested in trying to work out a plan which would be suitable to his syndicate and permit him to take up his share of the mortgage. As a matter of fact, we were discussing the question of dividing the mortgage according to the respective interests and getting the bonds from each of the syndicate according to the amount of their interest.

Q Was that ever accomplished? A No.

Q Now, covering what period of time did the negotiations continue with Mr. Bodek? A I saw Mr. Bodek several times, I am not certain just how many times, I should say it covered a period of perhaps two or three or four months, something of that kind.

Cross examination by Mr. McCarter.

Q You were connected, were you, Mr. Felix, with the Colonial or the Excelsior in 1926? A Yes.

Q And January, 1927? A I was. I was a director.

Q Did you have personal charge of this particular set of mortgages? A Yes, I did, after the mortgages were purchased. I had nothing to do with the purchase of the mortgages.

Q You knew from the start of the interest of your company in this mortgage of Mr. Bodek's, that there was certain improvements to be made? A Yes.

Q Did you see the letter that Mr. Litzenberg wrote, which has been offered in evidence, dated November 26, 1926?

Mr. Starr: I object, if your Honor please, as not cross examination.

The Court: I think I will admit it.

Q Did you see that letter? A I seen it subsequent to the time it was written, or seen copies of it.

Q Never mind glancing at the other lawyers. I am asking you if you saw that letter before it was sent? A I didn't see it before it was sent.

Mr. Richards: I object.

Mr. Starr: There is no warrant for that accusation at all, entirely uncalled for.

The Court: Yes, let that be stricken.

(Question repeated.)

A No, I did not.

Q When did you see it? A I don't recall; some time after it was written.

Q You were then aware that the claim was made that the improvements had not been perfected, as required?

Mr. Starr: If your Honor please, I object as not cross examination. This examination of Mr. Felix was limited exclusively to conversations with Mr. Bodek.

The Court: Yes, I will sustain the objection.

Q Well, did you send for Mr. Bodek or did he come to your office on the occasions when you had these talks? A I am not certain. I think I sent for him, but I am not sure. It has been quite a time ago now. I sent for him.

Q How many talks did you say you had? A Perhaps three or four.

Q And on each occasion the subject of conversation was the same? A The subject of conversation after the first interview was as to how we might arrange for an extension of this mortgage that would be agreeable to his syndicate and to the bank.

Q So that the conversations after the first conversation were entirely with reference to negotiations to modify the contract? A Correct.

Q And so much of the conversation with reference to the reason the interest was not paid or the installment of principal was not paid that you have recited was at the first conversation? A That is right.

Q You recall the fact that Mr. Bodek claimed and said that some of his friends or associates or syndicate claimed that the improvements had not been made, don't you recall that? A No, I am not certain of that.

Q What? A I am not certain of that. The substance of the conversation—

Q One moment. A The substance of the—

Q One moment. I am not asking you the substance. I am asking you the specific question, is it or is it not a fact that in this conversation Mr. Bodek told you that some of his friends or associates or syndicate claimed the improvements had not been finished? A I think he did. I am not sure.

Q He did say it? And that they gave that as an excuse for not coming over, as you expressed it? A No.

Q He didn't say that? A Mr. Bodek said that they wanted to drop the property—

Q I didn't ask you what he said. I asked you if he did not say that specific thing. A No.

Q Did he say that he had seen the property? A That he had seen the property?

Q Since the day he was on the ground at the sale? A I don't recall any remark like that.

Q Had you ever seen it? A I have, yes.

Q When did you first see it? A About year and a quarter ago, I think in the fall—winter of—

Q Before your company took an assignment? A No, afterwards.

Mr. McCarter: I would like to ask this witness a question that is not cross examination, or ask him to remain, just as counsel prefers, to make him my witness.

Mr. Starr: I think Mr. Felix is a banker in Philadelphia and would like to have the question asked rather than to come back tomorrow, so we will let you make him your witness.

The Court: Yes.

Direct examination by Mr. McCarter.

Q I show you Exhibit B. 5, being the letter of January 21st, 1927, on the letterhead of the Excelsior Trust Company, which Mr. Litzenberg stated that he wrote, this morning. You directed that letter to be sent, did you not? A No, I did not.

Q What? A I did not.

Q You know it was sent? A I knew after it was sent that it had been been sent.

Q You had personal charge on behalf of your company, did you not, of this matter? A More directly Mr. George Schorr had charge of the matter. He was counsel for the bank and familiar with the matter from the very beginning, and we acted on his instructions. Now, I don't recall having issued any direct instructions to send out this letter.

Q Well, did you instruct the reservation of efforts to collect as were threatened in the letter of November 26th, pending the making of further improvements? A Probably.

Q So that you knew between November 26th, 1926, and January 21, 1927, that the further improvements such as were required by the mort-

gage had to be made and were in fact made, didn't you?

Mr. Richards: I object to that, if your Honor please, such as required by the mortgage is a conclusion and not warranted either by the mortgage or certainly not warranted in this form of the question. The mortgage is here and that is for your Honor to determine what it required.

(Question repeated.)

The Court: I will sustain the objection to the form of the question.

Q You were familiar with the mortgage? A With the mortgage, yes.

Q And you were familiar with the clause which you knew read: "The installment of principal of $9,070 hereinbefore mentioned shall be payable upon completion by the party of the second part, William J. Ryan, Inc., its successors or assigns, of the following improvements to the land now or formerly belonging to the party of the second part, of which land the lots herein described are a part, namely the necessary clearing of such land, the filling of the low areas up to a grade approximately equal to the grade of the present County road, the necessary grading to establish a uniform grade of the streets, and gravelling of all roads and the installing of concrete side walks, curbs, sewers, and so forth." Now I ask you whether or not you do not recall that between November 26, 1926, and January 21, 1927, further work upon the improvements that were included in the clause of the mortgage I just read to you, were made by or on behalf of Mr. Ryan's company? A I knew nothing about

the improvements. I knew about the clause in the mortgage.

Q Well, you have told us that you knew that it was claimed by certain people after November 26, 1926, that the improvements had not been made.

Mr. Starr: I object, if your Honor please, as I understand the testimony of this witness, he has never made any such statement.

Mr. McCarter: I think he has.

(Question repeated.)

Mr. Starr: The only testimony the witness has given is with reference to a conversation with Mr. Bodek.

Mr. McCarter: I asked him generally now; he is my witness now.

The Court: He is Mr. McCarter's witness, but I think the premise is broader than his testimony. I will sustain the objection.

Q Am I incorrect in the recollection, Mr. Felix, that you have not told us since I commenced to examine you here, that you knew that certain improvements had been made between November, 1926, and January, 1927? A I know nothing about those improvements. Our letter went out at the instance of our counsel.

Q You had not heard that they had been made? A I heard that they were made, I don't recall when.

Q Very good. You heard that certain improvements were made? A Yes.

Q When did you see the letter of January 21, 1927, or a copy of it? A It might have been weeks or months after the letter was written.

Q To the best of your recollection, when was it? A I couldn't say as to that.

Q You couldn't say? A No.

Q Didn't you see it when it was sent? A I did not.

Q You are sure about that? A Absolutely.

Q Did you see it within a week? A No, I think not.

Q Well, did you see it within a month? A Well, my best guess about when I saw it—

Q We don't want any guesses. Who took the responsibility of withholding a demand for preemptory payment between November 26, 1926, and January 21, 1927, certainly Mr. Litzenberg did not, did he? A I should say that Mr. Schorr did.

Q Mr. Schorr? A Yes.

Q You put the matter in Mr. Schorr's hands? A It was in his hands from the beginning.

Q He was your attorney? A Entirely.

Q Did you have any curiosity when you did see this letter of January 21, 1927, to ascertain who the persons were and what the complaints were that were referred to in the letter in this language: "By reason of complaints concerning some of the details of the improvements"? A No, I did not.

Q Had no interest in that? A Not particularly.

Q What? A Not particularly. We had too many things to collect, sometimes where we got a letter of refusal and paid very little attention to.

Q You evidently paid some attention to those things, you deferred action for two months. A Well, we are deferring action on first mortgage interest in a lot of matters now.

Anthony G. Felix, direct (by defendants).

Q Have you or your counsel a copy of the agreement that was made between your company and the Ocean City Title Company?

Mr. Starr: I object to that, if your Honor please; immaterial and irrelevant.

Mr. Cole: I object to it, too, on behalf of my client, wholly irrelevant, and certainly is not permissable in this case.

The Court: It may be offered by Mr. McCarter for the purpose of showing knowledge on the part of this witness. It does not affect your client, of course.

Mr. Starr: The Ocean City Title Company is not a party to this suit.

Mr. McCarter: I don't care, his company is.

The Court: I will admit it. It may be subject to being stricken if not connected.

(Question repeated.)

Q Concerning this North Wildwood property?
A I think so.
Q Will you produce it?

Mr. Schorr: Will a photostat copy do?

Mr. McCarter: Sure, if you say that is a photostatic copy, that is perfectly satisfactory. Is this what I asked for?

Mr. Schorr: That is one of them. I think there were two of them.

Q Upon our call the other side produces an agreement made the 28th of April, 1926, by the Ocean City Title and Trust Company, a corporation of the State of New Jersey—

Mr. Cole: I object to the reading of that until it is admitted, and I object to its admission upon two grounds, on behalf of my client, first it is not an original contract, and secondly can't bind my client, purely collateral.

The Court: Objection sustained, so far as Judge Cole's client is concerned.

Mr. McCarter: I don't care anything about Judge Cole. He is a very fine fellow, but he and I are not in the same side here. I take it it is good in my case.

Mr. Starr: I repeat the objection that I made before, that this agreement itself is not material in this controversy, and it is only as I understood your Honor to say, was only to be offered or examined or produced on the question of knowledge, and this the gentleman's own witness, and I doubt very much the propriety of cross examining his own witness.

The Court: I haven't seen any cross examination as yet.

Mr. Starr: He has not asked the question whether or not this witness had knowledge of the matters about which he is trying to secure the testimony, but merely calls for the production of this paper. We object to its introduction in evidence because immaterial and irrelevant and between parties that are not parties to this record.

Mr. McCarter: I think your Honor will see the agreement is very material.

The Court: Admitted.

Mr. McCarter: I wasn't going to read the paper when Judge Cole interrupted me.

What I was going to do was to say that they produced a title—

Mr. Carr: Your Honor please, so far as Judge Cole is concerned, the situation was explained. Judge Cole and I happen to be in conflict in this particular case, so I would like to be heard just a moment on that. I haven't seen this paper, but it develops that it charges the company with notice, then I think it would be relevant, and I would ask your Honor to at least defer that ruling until we find out what is in the paper. May I have that abeyance?

The Court: Yes.

Q Will you please look at the photostatic copy of the agreement which is produced by your counsel, and say if you are familiar with that document? A Yes.

(Paper offered in evidence.)

Mr. Starr: May my objection be noted on the ground stated before?

The Court: Yes. And is admitted, it is subject to its being stricken if not shown to be relevant and material.

(Paper admitted and marked Exhibit B. A. 1.)

Mr. McCarter: Naming the parties, dated the 28th of April, 1926: "By and between the Ocean City Title and Trust Company, a corporation of New Jersey, hereinafter called the Title Company, and the Excelsior Trust Company, a corporation of the State of Pennsylvania, hereinafter called the company.

"Whereas Joseph Selzer of the City of Philadelphia, has suggested to company to purchase from him certain mortgages made by various persons to William J. Ryan, Inc., and assigned by the latter to the said Joseph Selzer, a list of such mortgages attached hereto, marked Schedule A and made a part hereof; Company, that is the Trust Company, is willing to purchase said mortgages on condition that the Title Company undertakes to see that the improvements mentioned in some of said mortgages be made and paid for, and agrees to do certain other things, all as hereinafter fully set forth; Title Company is willing to undertake the agreement requested by the company in order to induce the company to purchase said mortgages, and in further consideration of its title charges, insuring the title to the company.

"Now, therefore, in consideration of the promises for the purchase of said mortgages by the company in hand paid by the company to the Title Company, the receipt of which is hereby acknowledged, the Title Company agrees as follows:

"Title Company in addition to the issuance of the title insurance policy insuring the company as assignee of mortgagee of said mortgages, hereby agrees to and with the company, its successors and assigns, and hereby insures the company, its successors and assigns, that all of the improvements mentioned in some of the said mortgages will be completed and paid for on or before August 15, 1926, free and clear of any liens or claims of contractors, subcontractors, me-

chanics or material men. Said improvements consist of the following work and materials to be done and furnished upon the tract of land in North Wildwood, N. J., of which lots mentioned in said mortgages are a part, to wit, the necessary clearing of the said tract, the filling of the low area up to a grade approximately equal to the grade of the present County road, the necessary grading to establish a uniform grade of the streets, the gravelling of all roads and installing of concrete sidewalks, curbs and sewers."

That is the language of the mortgage.

"5. Title company will forthwith notify in writing all of the owners of the said lots, that all of the encumbrances existing immediately prior to the sale of the said lots by William J. Ryan, Inc., to the various mortgagees named in said mortgages, have been paid and discharged, and that there is sufficient money in the hands of Title Company to pay for said improvements, and the Title Company has guaranteed to the holders of said mortgages the completion of the improvements. Title Company agrees that out of the consideration paid by company for said mortgages, there will be set aside by Title Company the sum of $145,000 which Title Company hereby agrees shall be used only for the payment for said improvements and for no other purpose. Title Company agrees to and with the company, its successors and assigns, that Title Company will issue in the future from time to the then holders of the said mortgages Title Company's policies insuring said holders in any

new mortgages to be taken by them, covering any lots released from said present mortgages under the terms of the release clause contained in said present mortgages without cost to company, its successors or assigns, or the then holders of said mortgage, it being understood that the Title Company has agreed with William J. Ryan, Incorporated, that the lots mentioned will be charged with the cost thereof. Expressly understood and agreed that these agreements and the benefits and advantages to be derived therefrom may be assigned by company and that any and all future holders of such mortgages shall be assumed assignees thereof, although they shall have no express written assignments, each of said holders shall be separately and independently entitled to the benefits and advantages of this agreement. In witness whereof", and so forth.

Included in the list are the mortgages made by Jesse Bodek, Max Smith, E. Louis Rosen and others, none of which are familiar to me, don't seem to be involved in this litigation.

Q Now, was the money mentioned in that agreement paid to Title Company in order to—

Mr. Starr: Immaterial, and I object to it.

Mr. McCarter: Won't you let me finish it?

The Court: Don't answer until the question is finished.

Q —out of the proceeds of this mortgage?

Mr. Starr: I object as immaterial and irrelevant.

The Court: Sustain the objection.

Q What effort did you make or was made on behalf of the Excelsior Trust Company or later the Colonial Trust Company to see that the improvements referred to in that agreement were made?

Mr. Starr: I make the same objection, immaterial and irrelevant.

The Court: I will permit it.

A I know nothing about the efforts. All the efforts that were made, if any, in connection with these measures were made through Mr. Schorr's office, to the best of my knowledge and belief.

Q Was the whole thing turned over to Mr. Schorr? A Practically, yes.

Q Did the executive vice-presidents of this company exercise no function whatever with reference to this whole matter? A Practically.

Q What? A Practically so.

Q Was he, Mr. Schorr, the company in this matter? A He was counsel for the company.

Q What? A He was counsel for the company, and represented it for the company.

Q So you as vice-president took no interest whatever although this particular matter was in your particular charge? A Yes, I took an interest in it to the extent trying to collect the money from time to time.

Q Collect what money? A But the legal side of the question—

Q I am not talking about the legal side of the question. My question did not involve a legal question whatever.

(Question repeated: "What effort did you make or was made on behalf of the Excelsior Trust Company or later the Colonial Trust Company to see that the improvements referred to in that agreement were made?)

Mr. Richards: If your Honor please, may I introduce this objection again? It seems to me they are altogether at sea, I can't understand how this can possibly be germane to this issue. There is no claim upon our part, so far as there mortgages are concerned, that we were under any obligation to see that they were made. We had a mortgage and bond, the mortgage presumably for a sum of money of which we were the holders. Now, Mr. Carter undertakes to interrogate this witness to ask him why we didn't see those improvements were made. There was no obligation on our part, there was no contractual obligation at any place on our part to see that they were made. We were to be paid if they were made. Now the only question is whether or not they were made, not whether we were to see that they would be made. How can it possibly be a legal line of inquiry?

Mr. McCarter: The question, your Honor, I think is misconceived by Senator Richards, and the object of the question. I am not fighting now the question of whose duty it was to do this. It appears by this document made the 28th of April, 1926, you will observe a year and more after the mortgage was made—

Mr. Starr: No, Mr. McCarter, that mortgage was made in November of 1925.

Mr. McCarter: Then nine months, just the period of gestation, November to April.

Mr. Starr: It is five months.

Mr. McCarter: All right, five months after the agreement was made, the mortgage was made calling upon the other side the duty of making the improvements, this company entered into an agreement with the Title Company, by which the proceeds of the mortgage which this company was to pay to Mr. Ryan, the assignor of the mortgage, were to be applied to these proposed improvements. Now this gentleman has professed an entire ignorance of the lack of improvements and everything else except some idle gossip and the whole contention in this case so far as the defense is concerned is based upon the fact that the improvements were not made and these people knew that they were not made, and that we have a right, I think, to follow that up. Now here is an obligation and the part of the Title Company and the Excelsior Company to apply certain money to the very making of these improvements, and I say I have a right to show that this man knew all about the improvements that were to be made and was interested to the tune of over a hundred thousand dollars in seeing that they were made and was interested therefore in knowing that they were not made.

Mr. Richards: If your Honor please, the agreement was that they should be completed some seven months after this agreement here was entered into. Now the proof that this agreement was entered into, that was the basis of Judge Starr's objection,

would not serve to prove that they had not been made. There was all the time in the world to make them and to at least get them under way. Now we can go into the question of this naturally side issue to show that this money was paid, that it was paid out again to the contractors and all that sort of thing, but will your Honor be enlightened on the subject? The trouble with Mr. McCarter's whole proceeding is that he is trying to show this document, to show or to prove inferentially that the improvements were not made when the document was made for the purpose of making the improvements. That is the objection as far as the document is concerned, but my objection to the question was based upon the very evident false premise that lay in the question itself.

The Court: I will permit the question.

(Question repeated.)

Q No effort to my knowledge. I didn't know the improvements were made or not made.

Q Do you wish to go on record, Mr. Felix, as stating in view of this agreement entered into solemnly between your company and the Trust Company or the Title Company of Ocean City, that your company and you as the executive officer had no interest in knowing whether these improvements were not made? A We had the insurance of the Ocean City Title and Trust Company that they would be made.

Q So that you at least concede that for a certain consideration by this agreement the Ocean City Company undertook to see that they were made?

Mr. Starr: I object to that, if your Honor please.

The Court: Sustain the objection.

Mr. McCarter: Well, that speaks for itself.

Q Now on the 28th of April, when this agreement was entered into, to what extent had the improvements not been made? A I don't know.

Q What? A I don't know.

Q You don't know? A I don't know anything about the improvements. I never saw the ground even until about a year ago.

Q You were president at the time of this agreement, were you not?

Mr. Starr: I object to that.

The Court: Sustain the objection.

Q Did your company not know when they entered into this agreement anything about the condition of the improvements being made or not being made?

Mr. Starr: I object to that, if your Honor please.

The Court: Sustain the objection.

Q Did your company take any interest in seeing whether the obligation of the Title Company was fulfilled?

Mr. Richards: Probably a very valuable question to us in the future, but I think it is irrelevant to this case, if your Honor please.

The Court: Do you object?

Mr. Richards: Yes.

The Court: Sustain the objection.

Q So far as you know—who did know on behalf of the Excelsior Trust Company or connected with the Excelsior Trust Company the condition of the improvements; who did know that? A I don't know.

Q You don't know? A No.

Q Then, so far as you know, when the company wrote to Mr. Bodek under date of January 21, 1927, to the effect "that it now appears that all matters complained of have been attended to in every respect as requested by the lot owners, and at considerable expense to William J. Ryan." the company was saying, so far as you know, what they didn't know anything about? A I presume that that letter was written at the instruction of our counsel who did know.

Q Your counsel was Mr. Schorr? A Right.

Q Did you know that Mr. Schorr was also the counsel of Mr. Ryan or Ryan, Incorporated? A Yes.

Q Then your statement is that so far as the improvements being completed on the 21st of January, 1927, the company knew nothing, so far as you know, outside of what knowledge Mr. Schorr, its counsel, had? A No, the company knew through its counsel, I think it had sufficient knowledge.

Q I am not asking you that legal or philosophical question. I am saying, do you say that so far as you are aware, the company knew nothing outside of what its counsel, Mr. Schorr, knew? A Mr. Schorr represents the company just as I do. I am an official of the company and so is he, he acted for the company.

Q Your answer to my question then is that except as Mr. Schorr knew, the company knew nothing? A To the best of my knowledge that is correct.

Q Who did know if you did not? A I don't know of anyone else that knew. I don't know what everybody in our place knows.

Q Mr. Litzenberg didn't know, did he? A I presume not.

Q Mr. Smyth didn't know, the president? A I think not.

Q Mr. Nash, the vice-president, did not know? A Not to my knowledge. I can't answer.

Q So the only one that knew anything about it was Mr. Schorr? A I can't answer what other people knew.

Q So far as you are aware? A As far as I am aware, that is correct.

Q The whole thing was in Mr. Schorr's hands? A As far as I know.

Q He knows more than anyone connected with the company? A I don't know, I would have to cross examine every one in the place, some three hundred employes.

Q I think that you have told us that you had personally particular charge of this particular series of mortgages? A I did. I didn't say I had sole charge.

Q Now this mortgage was to secure the payment of a true debt of $67,490, didn't you know that? A Yes.

Q Your company paid about $40,000 for it, didn't they?

Mr. Starr: Object to that.

The Court: Sustain the objection.

Q And was it not the arrangement that you exacted from Mr. Ryan at the time you took the assignment that a certain part of the proceeds, if not all the proceeds of your purchase of that mortgage should be sent to the Trust Company or Title Company of South Jersey, and applied by it or held by it as security for its guarantee that the improvements would be made?

Mr. Richards: Now just a moment, may I untangle Mr. McCarter? I presume he is referring to the Ocean City Title and Trust Company, if that is the purpose of his question, while it is by himself, I think we would like to have it go in, is it so understood, Mr. McCarter?

Mr. Cole: I want to object to it on behalf of my client. Please your Honor, the question here is the fact of that bond and mortgage, upon its face, and this agreement they are talking about is different parties which can't possibly be involved in this suit.

The Court: So far as Judge Cole is concerned, the objection is sustained. I will permit the question otherwise. It is corrected, of course.

Mr. Starr: Put the proper names in.

The Court: Corrected to the Ocean City Title and Trust Company.

(Question repeated: "And was it not the arrangement that you exacted from Mr. Ryan at the time you took the assignment that a certain part of the proceeds, if not all the proceeds of your purchase of that mortgage should be sent to the Ocean City Title and Trust Company and applied by it

or held by it as security for its guarantee that the improvements would be made?")

A I can't answer that. I did not attend the settlement and I did not negotiate the purchase of the mortgages.

Q You don't know? A I don't know.

Q That question Mr. Schorr would know? A I think that he would.

Q What? A I think that he would, yes.

Q I notice that this agreement, Exhibit B. A. 1., provides that the Title Company agrees with your company and insures it that all of the improvements mentioned in said mortgages will be completed and paid for on or before August 15, 1926. Do you know why that date, August 15, 1926, was specified?

Mr. Richards: That is objected to, if your Honor please, on the general ground we have already stated.

The Court: This witness testified he had nothing whatever to do with the making of this agreement and had no knowledge of it, and I don't know how he can be questioned as to why certain clauses were put in the agreement.

Mr. McCarter: He may know that date, yet he may not have made the agreement.

The Court: He said he had no knowledge.

Q You don't know? A I do not.

Q Do you know upon what basis or upon what information or whose statement your company under the hand and signature of your assistant treasurer, in its letter of January 21, 1927, stated both to Mr. Max Smith and to Mr.

Bodek, "that it now appears that all matters complained of have been attended to"?

Mr. Starr: The witness has already answered that question, if your Honor please.

The Court: Yes, I think so. I think he has answered it.

Mr. McCarter: I haven't asked that question before.

Mr. Starr: We object to it.

The Court: Sustain the objection.

Q Do you know what expense William J. Ryan, Incorporated, had been put to in making these alleged additions and improvements between November 26, 1926, and January, 1927?

A I do not.

Mr. Carr: I am asking that we may have the benefit of the examination of this gentleman in the Smith case and in the other case that I represent.

The Court: Certainly. That is the agreement.

Mr. Cole: Do you mean the Shotkin case?

Mr. Carr: Of course.

Mr. Cole: Of course, it is subject to my objection.

The Court: Certainly.

Mr. Richards: Of course all the objections go to the same.

Cross examination by Mr. Carr.

Q Do you know, Mr. Felix, whether there was any formal certificate issued to your company

on the completion of the improvements? A If you mean whether I ever seen that certificate, I do not.

Q Have you any knowledge of such an action? A I heard a certificate was issued, yes.

Q Have you ever seen it? A No, not to my recollection.

Q Was that an engineer's certificate? A I understand that he is an engineer.

Q I beg pardon? A I don't recall, but my recollection is that that man is an engineer.

Q Who? A Referred to in the letter, I have forgotten his name.

Q Nobody mentioned in the letter that I have. A There is one letter, I think, isn't there?

Q Mr. Weir, you mean? A Yes.

Q Is the certificate that you have in mind, a photostat of which I now show you dated October 8, 1926, is that the certificate you had in mind? A I don't think I ever saw the certificate. I have heard reference to a certificate several times, and I assume he issued the certificate, but I don't recall having seen it.

Q So far as you have any knowledge at all, is the certificate of April 8, 1926, the one to which you had reference? A I never saw any.

Mr. Starr: The witness has already said he had no knowledge whatever, why speculate?

The Court: Sustain the objection.

Q Then you have no personal knowledge of ever having seen any certificate from any one? A That is correct.

Q But you were the gentlemen who had this in particular charge for your bank; am I right? A That is right.

JAMES KOCH, sworn.

Direct examination by Mr. Starr.

Q Mr. Koch, where do you reside? A Ocean City.

Q Are you at the present time connected with the Ocean City Title and Trust Company? A Yes, sir.

Q In what capacity? A Secretary and treasurer.

Q How long have you been secretary and treasurer? A Since January 1st, 1926.

Q January 1st, 1926? As secretary or treasurer of the Ocean City Title and Trust Company, have you ever received from Max Smith any payments of interest on account of the principal of the mortgage being foreclosed in these proceedings? A Yes, sir.

Q Will you give us the times and amounts? A Generally—

Mr. Carr: May I ask to what the witness is referring?

A I have a letter here signed by Samuel L. Cohen who represented Mr. Max Smith, dated June 7, 1926, in which he enclosed a check in the amount of $2,034.90, and $781.72 respectively.

Mr. Carr: What was the date of that?

A June 7, 1926.

Q Any of that payment on account of principal? A No, sir.

Q Did you receive any other payments from Smith on account of the Smith mortgage being foreclosed? A No, sir.

Q What disposition did you make of the moneys received in June, 1926? A We retained for Mr. Ryan the portion of that interest due to Mr. Ryan up until the time the mortgages were sold to the Excelsior and the People's Trust Company; the balance was mailed to the Excelsior and the People's Trust Company, balance due to them.

Q Were any payments of principal or interest made after the mortgages were assigned to the Trust Company of Philadelphia? A This payment was made to us after that assignment was made, that was on account of the first six months' interest on the mortgage.

Q And were any other payments collected either for principal or interest on that mortgage after that date? A No, sir.

Q What about the Bodek mortgage, did you collect any interest on that? A That was collected, but I cannot state the amount. The only records unfortunately which I have been able to locate is the amount which we paid to the Excelsior Trust Company, first portion of it.

Q What was that amount? A $126.98.

Q The date of that payment? A The date of the letter which we wrote to the Excelsior Trust Company enclosing this amount was June 23, 1926.

Q And had the payment been made by Bodek before that date? A Yes, sir.

Q You can't give us the exact date? A No, I cannot. It was apparently in June some time.

Q But the exact amount? A The exact amount is $1,904.70.

Q Now the mortgage is dated November, 1925. This payment, you say, was in June, 1926? A Yes, sir.

Q Will you say whether or not it was a payment of first six months on that mortgage? A I haven't any correspondence from Mr. Bodek here, or the correspondence which I wrote to Mr. Bodek.

Q Was there any other interest due in June, 1926, except the six months' interest which fell due in May, 1926? A No, sir.

Cross examination by Mr. McCarter.

Q How do I understand, Mr. Koch, that you divided that payment of $1,904.70 between the Excelsior people and somebody else? A $126.98 went to the Excelsior Trust Company and the balance to Mr. Ryan.

Q Sure about that? A It went to Mr. Ryan's account.

Q Now just tell us the fact, what is correct? A That I cannot tell you. Unfortunately I did not bring those records with me today. I only have absolute figures, and I do not have the correspondence in connection with the payment of that particular interest payment outside of the letter directed to the Excelsior Trust Company.

Q Did Mr. Ryan have an account or Ryan, Incorporated, have an account with your company? A Yes, sir.

Q Independently altogether of this contract between your company and the Excelsior? A Yes, sir.

Q And your recollection is that the difference betwen $126.48, and $1,904.70 went to Ryan's account? A It went to an account which we had as agent for Mr. Ryan. Mr. Ryan also had a personal account with us.

Q Well, whose account did this go to? A The agent account which we intended as an account for the collection of all payments on this particular contract.

Q Was that a personal account with Mr. Ryan or account with the corporation? A Account with the corporation.

Q On what theory was the division made? A I beg pardon?

Q On what theory was the division made into $126.48 and the balance of $1,904.70, on what basis? A The $126.98 was apparently the amount of interest which was due the Excelsior Trust from the time they purchased it to the maturity of the interest period.

Q Did you write this letter to Mr. Bodek? A Yes, sir; I have a copy of it here.

(Letter offered in evidence.)

Mr. Cole: I object to the letter so far as the estoppel is concerned.

(Letter admitted in evidence and marked Exhibit B. A. 2, no objection being made as to timeliness.)

Q This letter then you wrote prior to the receipt of the check that you have alluded to amounting to $1,904.70? A Yes, sir.

Q How soon after the sending of that letter is it your recollection that Mr. Bodek made that payment? A It was at least thirty days; more

than thirty days, I wrote him another letter on June 14th.

Q We will come to that. One letter at a time. Now, I notice that in this letter of May 5th, marked B. A. 2, you say, "We wish to advise you that sufficient money has been deposited with this company to pay for the completion of the improvements on this tract and this company has guaranteed to the holders of your mortgage the completion of such improvements." You remember that statement? A Yes.

Q How much money was deposited?

Mr. Richards: That is objected to, if your Honor please, as incompetent.

The Court: Sustain the objection.

Mr. McCarter: Make him my witness, your Honor.

Mr. Cole: Would he be competent then? I object also.

The Court: Sustain the objection.

Mr. McCarter: Doesn't it bear upon the question of how far the improvements had gone, sir, on the 5th of May, as to how much money was put up for their further completion? Of course it is our contention that this whole thing centers around the faithful observance of the covenant in the mortgage referred to and by an arrangement between the Excelsior and the Ocean City Company the Excelsior puts up a certain amount of money and the Ocean City Company writes to Mr. Bodek that a certain amount has been put up, and upon that letter he makes a payment. Now aren't we entitled to know how

much had been put up, and doesn't that indicate, can't we argue from the amount that was put up what was the state of this improvement at that time?

The Court: It certainly is not admissable at the present time, and I will sustain the objection.

Q What effort did your company make and what steps did you take on behalf of your own company to learn the progress of the completion of the improvements?

Mr. Starr: Object to it as not cross examination.

The Court: Sustain the objection.

Mr. McCarter: Your Honor, I beg to suggest that it is part of our case, I am making this witness my witness now.

The Court: I think the Court will decline to permit the witness to be your witness at the present time. It is difficult enough to have an orderly procedure in the trial of the case.

Mr. McCarter: I quite agree with your Honor.

The Court: It is impossible for the Court to rule on the admissibility of evidence when it is inserted at all stages of the trial.

Mr. McCarter: You will have to remain, then, Mr. Koch.

Mr. Carr: Judge Starr, we call for the production of the original of this letter of June 7, 1927.

Mr. Starr: Mr. Koch, you have that letter, haven't you, June 7th, from Mr. Cohen? Mr. Carr wants to make use of it.

James Koch, cross.

By Mr. Carr.

Q Now, Mr. Koch, I show you letter dated May 5th, 1926, addressed to Mr. Max Smith, signed by James S. Koch, Treasurer, and ask you whether or not that is your signature? A Yes, sir.

Q And that letter was mailed to Mr. Smith, of course? A Yes, sir.

(Letter offered in evidence.)

Mr. Carr: I offer in evidence letter of May the 5th, 1926, just identified.

(Letter admitted in evidence and marked Exhibit S. R. 11.)

Q Now I call for the production of the original of letter dated June 7, 1926, addressed to the Ocean City Title and Trust Company, signed by Mr. Cohen.

(Letter produced.)

Mr. Carr: I now offer the letter just produced.

(Letter admitted in evidence and marked Exhibit S. R. 12.)

Q Now, Mr. Koch, I show you a letter dated June 9, 1926, addressed to Mr. Samuel L. Cohen, signed by James S. Koch, Treasurer, and I ask you whether or not that is your signature?

Mr. Starr: If your Honor please, I object to that letter on the ground that the statements made by Mr. Koch can't in any way bind the complainant here with respect to the facts with reference to the improvements,

and the Ocean City Title and Trust Company is not a party to this proceeding.

Mr. Richards: And of course there is no agency established at all between Mr. Koch and the complainants.

Mr. Carr: Your Honor please, the mortgage was assigned to the Colonial Trust Company or its predecessor upon the direct representation, notice to the mortgagors, that sufficient money had been deposited with the Ocean City Title and Trust Company for this very purpose. The Ocean City Title and Trust Company was further constituted the agent of the Trust Company in Philadelphia for the purpose of doing the very things. On both of those representations we paid certain moneys. That is the reason we make the offer.

The Court: Sustain the objection.

(Letter marked S. R. 13 for identification.)

Q Mr. Koch. you testified that there was received on June 7, 1926, two checks, one for $2,034.90, and one for $781.72. The $2,000 check was for the larger mortgage, I take it, was it not, the interest on the larger mortgage? A May I have that letter, please?

Q Yes, you may. A That is correct.

Q And the $781.72 was interest paid on the mortgage not sought to be foreclosed, the twenty-six or twenty-eight thousand dollars mortgage; is that right? A That was interest on the $26,000 mortgage.

Q The two together making a payment of $2,816.62? A Yes, sir.

WILLIAM J. RYAN, sworn.

Direct examination by Mr. Starr.

Q Mr. Ryan, where do you reside? A Philadelphia.

Q What is your business? A Real estate developer, and general real estate business.

Q How long have you been in that business? A About ten years.

Q What had you to do with the W. J. Ryan, Inc., to whom the mortgages were made that are being foreclosed in these proceedings? A What did I have to do with them?

Q Yes. A Well, I was the principal in it.

Q Did you have any official connection with it? A Yes, President.

Q President? A That is right.

Q Did that company own and develop a tract of land at North Wildwood? A They did.

Q I show you a map which has been loaned me by Mr. Carr purporting to depict the— A You mean identify the tract?

Q Yes. A That is absolutely—

Q Wait a moment, don't be too impetuous, —the property involved, and ask you to depict on that map the land which was the subject matter of your development. A You mean the entire tract?

Q The entire tract? A It is outlined here and these circles here, a map, a reproduction of the property with the riparian grant.

Q I notice Surf avenue. A Correct.

Q That is the land oceanward of Surf avenue? A That is correct.

Q Then the land north? A Fifteenth street.

Q Northeast of Fifteenth street, southwest of a line dividing block between Fifth and Sixth avenue? A Correct.

Q And is it a fact that on this map the land which was the subject matter of your development is laid out in blocks and streets? A Correct, as it appears on that, and the circles.

Q And the circles on the map indicate the four corners of your property? A That is correct, with riparian grant at the oceanward line, riparian grant, probably this runs five hundred foot each block, with the streets intervening.

Q And the map indicates the Riparian Commissioners' exterior line? A Yes.

Q And that is the exterior line out into the ocean? A Correct, as I understand it.

(Map offered, received in evidence and marked Exhibit S. R. 14.)

Mr. Starr: Now, Mr. Carr, please let me have the notice of the completion of the improvements which was served some time in October, 1926, and I make the same request from Mr. McCarter.

McCarter: Notice from whom?

Mr. Starr: I don't know; probably William J. Ryan, Inc.

Mr. McCarter: I think you ought to tell us what you are calling for. We have letters from both the Trust companies.

Mr. Starr: Let me have the one dated some time in October, 1926, from the Ryan Company to your respective clients, notifying under the provisions of the mortgage of the completion of the improvements.

Mr. McCarter: Is that what you mean (handing letter to Judge Starr)?

Mr. Starr: There seems to be another latter dated October 16th, 1926.

Mr. Carr: Mr. Starr, if you will let me see, if you don't mind, a copy of the letter.

Mr. Starr: And I ask for the photostatic copy of the engineer's certificate which was inclosed in this letter.

Mr. McCarter: Which letter?

Mr. Starr: October 16th letter.

Mr. Carr: I have got it right here.

Mr. Starr: I am asking from Mr. McCarter.

(Copy produced.)

Q Mr. Ryan, I show you a letter dated October 14, 1926, addressed to Mr. Bodek, on the letterhead of William J. Ryan, Incorporated, and ask you whether or not that letter was sent pursuant to the terms of the mortgage with reference to the improvements? A It was.

Mr. McCarter: I object pursuant to the terms of the mortgage, that is collateral.

The Court: Yes.

Mr. McCarter: Letter was sent, I suppose.

Mr. Starr: I think the witness has a perfect right to say the purpose for which it was sent.

Mr. McCarter: No, whether it was sent, whether pursuant to the terms of the mortgage or not is collateral, for the Court.

The Court: That is true; sustain the objection.

(Question repeated.)

A Yes, but this letter has to do with the covering of their tract.

Q But that letter was sent? A That was sent, yes.

Q I show you—

(Letter offered, received in evidence and marked Exhibit B. 6.)

Mr. Starr: "October 14, 1926. Mr. Jesse Bodek, 44 North 3rd street, Philadelphia.

"Dear Sir: We take pleasure in announcing that all improvements in the W. J. Ryan, Inc., tract in North Wildwood have been completed in accord with our agreement made at the time of sale. The necessary clearing of said land, the filling of the low area up to grade approximately equal to the grade of the present County road, necessary grading to establish the uniform grade of the streets, the graveling of all streets, the installing of concrete sidewalks, curbs and sewers. We would respectfully suggest that you make arrangements for a top soil to protect the sand fill on your property from the weather this coming fall or winter. We can recommend Veraggi Brothers, contractors in Wildwood, N. J., as competent to advise you in this matter. If you haven't received your tax bill nor paid same on lots at North Wildwood, we would suggest that you communicate at once with the Collector of Taxes, giving block and lot number, and requesting the tax bill for the same, that you may not be delinquent and subject to penalty."

Q I show you another letter dated October 16, 1926, and ask you whether that letter was

written by William J. Ryan, Inc., and sent to Mr. Bodek? A Yes that letter was sent by me.

Q Accompanying that letter was there a copy of the certificate of Mr. Weir? A Correct.

Q Is that the certificate that was mailed? A That is a photostatic copy of the certificate that was mailed at my instigation.

Mr. Starr: Offer in evidence the letter and the photostatic copy of certificate.

(Letter and certificate received in evidence and marked Exhibits B. 7 and B. 8.)

Mr. Starr: "Dated October 16, 1926. Mr. Jesse Bodek, 425 Market street, Philadelphia. Dear Sir: In behalf of the Excelsior Trust Company holder of mortgage of $63,490 on your North Wildwood lots, purchased from us, we beg to notify you that the improvements specified in the mortgage have been completed and there is due from you $9,070 on account of the principal of said mortgage. Please make payment at once of said sum of $9,070 to the Excelsior Trust Company of Philadelphia, Pa. Enclosed herewith is a photostatic copy of engineer's certification to the completion of the improvements. Very truly yours, W. J. Ryan, Inc., by George E. Manwaring, Vice-President."

The certificate is, "I, Harry E. Weir, Civil Engineer, do hereby certify that the improvement work of the Ryan tract in North Wildwood, N. J., has been completed according to the terms as recited in the plans and specifications, and contractors' agreements covering the same. Harry E. Weir, Engineer. Dated October 8th, 1926."

Mr. McCarter: Of course, your Honor, I take it that that certificate is only admissible as being the paper that accompanied the letter, that don't prove the facts therein stated. We are entitled to cross examine Mr. Weir and he has got to testify. There is nothing about the certificate that will be evidence of anything and our failure to object to the introduction of the certificate does not justify the conclusion by counsel that it is not proof of anything. The provision is that the improvement shall be made, not that any certificate shall issue or anything of that kind, and we are entitled to have proof that they were made, and the certificate of Mr. Weir without his presence here and proof of the fact independent of the certificate, of course, we contend is not evidence of that fact.

Mr. Starr: It is in evidence for what it is worth and I don't think your Honor wants to have any argument as to the effect of that certificate at the present time.

Now, Mr. Carr, may I have your papers?

(Papers produced.)

Q Mr. Ryan, I show you a letter dated October 16, 1926, addressed to Max Smith, signed W. J. Ryan, Inc., and ask you whether that letter went out from Ryan Company? A Correct; it did.

Q Accompanying that letter was the photostatic copy of the engineer's certificate which I show you? A Correct.

(Letter and certificate offered, received in evidence and marked Exhibits S. 15 and S. 16.)

Mr. Carr: I, of course, take the same position.

Mr. Starr: I don't think, your Honor, we will argue that has any probative force whatever. I think I am correct in saying Mr. Cole agrees with me.

"October 16, 1926. Mr. Max Smith, 721 Arch street, Philadelphia, Pa.

"Dear Sir: In behalf of Excelsior Trust Company, holder of mortgage for $26,057.50, on your North Wildwood lots purchased from us, we beg to notify you that the improvements specified in the mortgage have been completed and there is due from you $3,722.50 on account of the principal of said mortgage. Please make payment at once of said sum of $3,722.50 to the said Excelsior Trust Company ot Philadelphia, Pa. Enclosed herewith is a photostatic copy of the engineer's certificate to the completion of the improvements. Yours very truly, William J. Ryan, Inc., per George E. Manwaring, Vice-President."

And the engineer's certificate: "I, Harry E. Weir, Civil Engineering, do hereby certify that the improvement work on the Ryan tract in North Wildwood, N. J., has been completed according to the terms as recited in the plans, specifications, contracts and agreements governing the same. Harry E. Weir, Engineer. Dated October 8th, 1926."

(Further testimony adjourned until December 19, 1929.)

Atlantic City, N. J.,
December 19, 1929.

Trial of the cause resumed pursuant to adjournment.

Appearances as before noted.

Mr. Starr: If your Honor please, in the Smith foreclosure case, I will offer in evidence a certificate of search issued by the Ocean City Title & Trust Company with respect to the mortgage being foreclosed in the foreclosure suit, in which it is certified the legal fees are $22.20.

(Certificate of search admitted in evidence and marked Exhibit S. 17.)

In the Bodek foreclosure, I offer a similar search with respect to the property covered by that mortgage, in which it is certified that the fees are $67.65.

(Certificate of search admitted and marked Exhibit B. 9.)

WILLIAM J. RYAN, recalled.

Direct examination by Mr. Starr.

Q Mr. Ryan, when did you acquire the tract of land of which the premises covered by these two mortgages in suit is a part? A You mean when did I first enter into an agreement with it, or when did I actually acquire it?

Q Actually get title? A I think that was either in October or November.

Q What year? A 1925. I don't remember the exact date.

Q You had agreed to purchase the property when? A August the 22nd.

Q When you bought the property, what was the general character of the land? A Well, it was, you might say, virgin or barren. It was weeds about as high as this room, very wild looking.

Q Were there any streets through the land? A Not through the land.

Q And the land was bounded by what thoroughfare or what highway of North Wildwood on the— A Landwood side?

Q West. A Surf avenue.

Q And the easterly line or the northerly line of the tract was bounded by what highway? A I don't know the exact geography of that. Do you mean oceanward? If you will permit me to give the same, I—

Q Give the boundaries of the land. A Sixth street, Sixth avenue, I have forgotten which now, to 15th street, from Surf avenue to the riparian rights grant.

Q Is the land shown upon this tracing which is marked S. R. 14? A That is the map of it, exactly.

Q Was the land cleared subsequent to the time you made a bargain to buy it? A What do you mean by cleared?

Q Bushes cut down? A You mean after the agreement of purchase? No, I had it cleared.

Q No. Pardon me. A The question again, please.

(Question repeated.)

A Subsequent—

Q At the time you bought it? A I didn't quite get your question. What do you mean cleared, was the bushes off when I—

Q Did you take the bushes off or have them taken off? A I had them taken off, surely.

Q Now, the provisions of the mortgage that is being foreclosed are that the first installment is to be paid upon the completion of the following improvements to the land now or formerly belonging to the party of the second part, namely, the necessary clearing of said land. Was that done? A That was done.

Q When was it completed? A About the first week in September of 1926.

Q The next provision is the filling of low area up to a grade approximately equal to the grade of the present County road. Was that done? A That was done.

Q When was that completed? A That was completed some time in the early part of 1926, I just don't know the exact date, but the records would show that with the United Dredging Company. It was in the early part of 1926.

Q Was it prior to the first day of November, 1926? A Yes, it was done prior to September, the first week in September.

Q Was it brought up to a grade approximately to the grade of the then existing County road? A Yes, it was.

Q The next provision is that the necessary grading to establish a uniform grade of the streets. Was that done? A Completed.

Q Completed when? A That was done; I don't know the exact dates, Judge, but it was done all prior to September, the first week in September.

Q Of what year? A 1926.

Q Next provision, the graveling of all streets or all roads; was that work done? A That was completed also.

Q Completed when? A Prior to the first week in September, 1926.

Q Next is the installing of concrete sidewalks, curbs and sewers. Was that work done? A That was all done prior to the first week in September, 1926.

Q Mr. Ryan, I show you a photograph, an aerial photograph and ask you whether or not you had that photograph taken or were instrumental in having it taken? A Yes, I sent the aviator down to take it.

Q When was that taken? A If my memory serves me, somewhere in 1927, I think early part of 1927.

Q Having that photograph, did you compare the physical condition of the land as shown by that photograph? A No question about that, yes.

Q What have you to say as to whether or not it reveals the condition at the time the photograph was made? A It does reveal the condition, as it also was in September of the previous year.

Q I will ask you that later. How does that condition as shown by the photograph compare with the condition as it existed in September, 1926? A Relatively the same.

(Photograph offered in evidence.)

Cross examination by Mr. Carr.

Q Mr. Ryan, this, of course, is an aerial photograph, isn't it? A Correct.

Q Do you know how high the photographer was in the air? A I couldn't answer that.

Q Have you any idea at all? A Not the slightest.

Q You were not actually present when the airplane was there? A No, sir.

By Mr. McCarter.

Q Can you tell us, Mr. Ryan, in which direction we are looking now? A South.

Q How far south does the field of the photograph cover? A How far does it cover?

Q Yes, what is the farthest point south showing in the photograph? A Well, I would say the look of it there, it looks as though it comes pretty near to the end of Wildwood Crest, wouldn't you?

Q I am asking you. A What it looks to me.

Q How far is Wildwood Crest from the northerly end of the photograph? A Well, I don't know the exact dimensions but I presume it is a few miles.

Q Several miles? A I wouldn't say several; probably three or four miles.

Q And it includes the whole of the City of North Wildwood looking north and south anyway, looking to the ocean? A No, it doesn't take in North Wildwood, only my tract, a small portion of North Wildwood. North Wildwood extends further north.

Q Have the photograph toward you, so to speak? A That is correct.

Q Down to the bottom— A That is correct.

Q In other words, the whole of the City of Wildwood? A Not all of it; some of it down there.

Q In a direction along the ocean or, in other words, the whole of the City of Wildwood? A I would say so.

By Mr. Starr.

Q Does it cover your tract ? A It covers my tract, exactly.

Q Which part of the photograph covers your tract? A The lower part, that here, what the aviators call the close-up.

Q I show you an avenue that runs diagonally through the center of the photograph, what avenue is that? A That is Surf avenue.

Q And the avenue which is to the left? A Ocean avenue.

Q That is Ocean avenue? A Ocean.

Q Does that also run through your tract? A Runs through the tract.

Q What would you say whether or not your parcel or your tract is the one that is shown on the photograph without any buildings? A That is correct.

(Photograph received in evidence and marked Exhibit S. 18.)

Q Now, Mr. Ryan, I show you another photograph and ask you what that shows, how it was taken and when it was taken. A It was taken in May of 1927 by the same aviator.

Q What does it show? A Shows my tract and a portion of North Wildwood looking oceanward.

Q Is your tract the one which is shown on the map as having no buildings erected on it? A Correct.

William J. Ryan, cross.

(Photograph offered, received in evidence, and marked Exhibit S. 19.)

By Mr. Cole.

Q I suppose your answer is the same, that you were not physically present and don't know the altitude from which the picture was taken, is that true, Mr. Ryan? A That is correct.

Q Will that apply to these other several photographs that you are about to offer? A Relatively the same. I wasn't there.

By Mr. McCarter.

Q Would you say, Mr. Ryan, that they were all taken from about approximately the same altitude? A That I don't know. I can't answer that.

Q Doesn't an examination of the pictures lead you to conclude that, having reference to the apparent size of the houses on that Surf avenue?

Mr. Starr: I suppose the pictures themselves show that.

Mr. McCarter: Do you object to his giving it?

Mr. Starr: Not the slightest.

A I will give you any answer I can that I am competent to give you.

Q Will you answer that question?

(Question repeated.)

A From the appearance of them, I am not an expert, so it would be a pretty hard thing for me to answer that question, what altitude they were taken.

William J. Ryan, cross.

Q Did you give the photographer any instructions as to the altitude from which to take them ? A No, I did not.

Q What did you tell him to do? A I told him to fly down to Wildwood and get several shots of my tract of land down there, get some of them close up as he could, and get it from different angles. The result is the pictures.

By Mr. Starr.

Q I show you another photograph and ask you when that was taken and how and what it shows? A It was taken in May, 1927, also, and shows the Ryan tract, portion of North Wildwood, I would say, looking oceanward also.

Q Is your tract the one that is shown without any buildings on it? A That is correct.

(Photograph offered, received in evidence and marked Exhibit S. 20.)

Q I show you another photograph and ask you when that was taken, what it shows and how it was taken? A Taken in May, 1927. It shows a section more clearly of the Ryan tract, and a more complete view of the Ryan tract.

Q Is the Ryan tract shown there without any building on it? A Correct.

(Photograph offered, received in evidence and marked Exhibit S. 21.)

Q I show you another photograph and ask you what that shows and when it was taken, generally? A Taken in May, 1927, and it is apparently closer up than the rest of them, the Ryan tract, North Wildwood looking south.

Q All of these photographs, what have you to say with respect to the comparison between the appearance of your tract when the photographs were taken and September, 1927? A Relatively the same condition.

Q Any changes at all? A No changes. There may be one difference in there, the gravel over the lots, and I judge they graveled, I have just forgotten what period, but that was some time the latter part of 1926, that we covered the entire tract, the lots I am speaking about now, the streets, of course, were graveled, but the lots themselves in between, I had this graveled at the cost to me of $20,000.

(Photograph offered, received in evidence and marked Exhibit S. 22.)

Q When was that work done? A That was done in the latter part of, I think in 1926.

Q What was the necessity for putting the gravel on, Mr. Ryan? A The necessity was in the winter months the wind blows the sand and Mr. Weir told me—

Mr. Carr: I object.

A The fact that it was blowing out, we notified the owners to protect their lots and have them graveled, some of them demurred about it, and some of them didn't take any action on it, some of them felt that they shouldn't do it, and so on, so we talked it over with Mr. Schorr, and we decided we would put the gravel on ourselves, which we did at the cost of $20,000.

Q Had the area been filled to a grade approximately equal to the grade of the then

County Road before you put the gravel on? A Oh, yes, some of it higher.

Cross examination by Mr. Carr.

Q Mr. Ryan, I think you said you could tell by reference to the contract between the William J. Ryan, Inc., and the United Dredging Company when this work was commenced. Did you say that? A I think so, yes. That would show it.

Mr. Carr: Mr. Schorr, have you got the original of that contract?

Mr. Schorr: I think the Ocean City Title Company.

Mr. Carr: I have the certified copy. Suppose we use this. This is taken from the County Clerk's office.

Mr. Starr: I don't see any objection to using the certified copy.

Q Mr. Ryan, I show you a certified copy of the contract between William J. Ryan, Inc., and the United Dredging Company, certified by the Clerk of Cape May County, agreement bearing date the 3rd day of May, 1926. Will you glance at that and see whether that refreshes your memory? A I guess it is recorded there, and it is there. I guess it is O. K.

Q This contract was actually executed on May the 3rd, 1926, is that right? A Record is there, it must be.

Q Well, you are satisfied that is so? A Certtainly.

(Certified copy offered, received in evidence and marked Exhibit C. 1.)

Mr. Carr: Mr. Schorr produces an agreement between the same parties and bearing date the 3rd day of April, 1926—I presume these are the original signatures, Mr. Schorr, of the parties?

Q Mr. Ryan, are these the original signatures of the parties? A Yes, that is the original signatures. That says April the 3rd. I presume that is nearer correct than the other one.

Mr. Starr: I really don't know, we will put them both in.

(Agreement offered, received in evidence and marked Exhibit C. 2.)

Q Now, Mr. Ryan, no sewer whatever was laid by you, was it, in this 15th avenue drive immediately north of the beach-front lots? A That I can't answer. I don't know.

Q You have no knowledge whatever? A No, I can't tell whether that was laid in there physically or not. If that answers your question.

Q Up to the present time, you don't know yourself whether it was ever laid in this 15th avenue alley; is that true? A That is correct.

Q The alley I refer to marked on map S. R. 14, 15-foot drive, extending from 15th street to a point 100 feet north of 6th street? A Correct.

Q You understand my question to mean that, do you not? A Yes.

Q I am going to ask you if you won't refer to this map as I ask you questions. Isn't it a fact that lots 10 and 11, block 412, that as to those lots there never was any sidewalk there? A 10 and 12?

Q In Block 412? A 412, why, you are asking me if I know there was no sidewalk there?

Q Yes. A No, I don't know that there was no sidewalk there.

Q Do you know whether it was or was not? A So far as my knowledge serves me, yes, there was a sidewalk.

Q You feel certain as to that? A Yes, sir.

Mr. Schorr: Which number lots?

A Block 412, lots 10 and 11, did you say?

Mr. Starr: Yes, sir.

Q I ask you whether it is a fact that there never was any sidewalk as to block 413, lot 8? A Lot 8? You are referring now to the Boardwalk lot?

Q 413, lot 8. A That would be a Boardwalk front lot, no necessity for putting a sidewalk there, there is a Boardwalk in front of it.

Q I ask you whether the sidewalk, whether the street extended down to the Boardwalk? A Yes, to the runway, where the runways come from the Boardwalk, the streets were brought down to the end of the alley, and the runways came down to the end of the alley.

Q Do you say that in all cases that your sidewalk and your side streets extended down to the 15-foot alley? A That is correct.

Q You are positive of that, are you? A So far as my mind and eye serves me, it is absolutely correct.

Q You feel positive of that? A Yes, sir.

Q Will you say that there was a street and sidewalk in front of lots 10 and 11, block 412? A 412, yes, sir.

Q You say that, do you? A Yes, sir.

Q Do you say the same thing as to lot 8, block 413? A I have already answered that question by saying it is a Boardwalk front lot and not necessary to put a sidewalk in front of it. The Boardwalk is in front of it.

Q You say there was access to the Boardwalk, do you? A Yes, sir.

Q When was that done? A When the Boardwalk was completed, I don't know the exact date.

A Approximately? A That I can't answer, I don't know approximately.

Q No idea at all? A Beg pardon?

Q You have no idea at all? A I don't really remember when the Boardwalk was completed.

Q Can you give us, the date to us, within a few months' time? A No, I couldn't give it to you within a few months, the records of the completion of the Boardwalk would show that. That would answer your question better than I can answer it.

Q But you don't happen to recall? A I don't know of my own knowledge.

Q But, at any rate, there was no access to those lots until the Boardwalk was completed with its approaches? A Plenty of accesss to it. You could walk all around it.

Q I mean so far as the paved streets or sidewalk? A No necessity for it.

Q Just answer my question.

(Question repeated.)

A Yes, there was access to them.

Q By what means? A Streets leading down to them, and they could walk over to them.

Q You say the streets were completed? A Down to the 15-foot alley, yes.

Q Were sidewalks laid? A Beg pardon?

Q Were sidewalks laid? A Yes, sidewalks laid and curbs.

Q You say that the sewers were laid there, do you? A Where?

Q That you had completed the sewers by September, 1926? A Yes, the sewers were laid, that is correct.

Q Were they connected with anything? A Connected with, what do you mean, connected with anything?

Q Were the pipes connected with any outlet so that sewerage could be carried off? A To my knowledge, yes.

Q When were they connected? A That I can't answer.

Q You don't mean that they were connected in September, 1926, do you? A To my knowledge, so far as my knowledge was concerned, yes.

Q Didn't you know, as a matter of fact, that the Borough of North Wildwood was under injunction from disposing of its sewerage—

Mr. Starr: I object to that, if your Honor please. If there is any point to be made in respect to injunction proceedings, I think the record should be introduced.

The Court: I will sustain the objection.

Q Did you make any arrangement at all yourself with the Borough of North Wildwood for the connecting of these pipes? A None whatever.

Q So that all you did was to put the pipes in and made no arrangement with the city for connecting them? A I left in the hands of my engineer.

Q Did you ever make any arrangements yourself? A None whatsoever.

Q Did your engineer report to you that the pipes were connected? A He did.

Q When? A That I can't tell you, but we have got a certificate stating that the improvements were all completed, answering your question, so I guess you better refer to that, better than my memory.

Q You say that he reported to you that those sewer pipes had been connected? A Laid and connected.

Q He reported that to you? A Yes, sir.

Q You referred to some certificate from Mr. Weir, the engineer. I show you a photostatic copy of a certificate signed by Harry E. Weir, dated October 8, 1926, previously offered in evidence, and admitted in evidence as Exhibit S. 16, and ask you whether that is the certificate to which you refer? A That is right.

Q And your knowledge, then, your entire knowledge with relation to the sewer is based upon this certificate? A Correct.

Q And you have no personal knowledge whatever, have you? A No, I have no personal knowledge that the sewers were laid, that the pipes in there, I didn't see them connected physically, but I left it entirely in the engineer's hands, Mr. Weir.

Q Having received this certificate, you assumed that the sewers were connected up and in working order? A Correct.

Q Is that right? A And saw them laid myself.

(Question repeated.)

A Correct.

Q Of course, it was intended that the sewers should be connected up?

Mr. Starr: Wait, I object to that.

The Court: I sustain the objection.

Mr. Starr: Your Honor will have to pass on that contract to see what it means.

Q These photographs, the aeroplane photographs appear to be dated May 29, 1927. A Mr. Dowling, the man who takes them, he dates all his plates.

Q That is the correct date? A That is correct.

Q At that time there was no boardwalk there, was there, in front of your tract? A If it had been, it would have been on there.

Q The answer is that there was no boardwalk, isn't that right? A Yes.

Q What road was the County road referred to in the contract, is it indicated on the map here? A Well, I can't answer that question for you. You will have to refer to either Mr. Rice or Mr. Weir, they are the county engineers down there, better qualified to answer that.

Q I thought perhaps you knew the one that is intended by this reference. A I don't know.

Q You don't know? A No, I don't. It is several avenues back from Surf avenue, I don't know exactly which one.

Q Wouldn't appear on this map? A Wouldn't appear on this map, correct.

Q You didn't physically make any measurements or any determination of grade, did you? A No.

Q That you left to the engineer? A Naturally.

Q And you say that these lands were covered with gravel in the latter part of 1926? A Or the early part of 1927. I may be a little wrong in the date. I don't know the exact date of the month, but the latter part of 1926 or the early part of 1927, if my memory serves me correct.

Q Was that effective to keep the wind from blowing and drifting? A You mean was it necessary?

Q No, I mean did it accomplish the purpose of keeping the sand from drifting? A Quite so.

Q So that after it was put on there was very little loss of sand by blowing or by drifting; is that right? A I presume so.

Q Mr. Ryan, I show you a photograph of the sign, the top line of which reads, "William J. Ryan, Inc."—

Mr. Starr: I object. We will object to that photograph under these circumstances. I don't think it ought to be incorporated in the record what the photograph shows.

Mr. Carr: Merely going to identify it.

The Court: It may be marked for identification or the call to the question may so identify it. I will sustain the objection.

Q I show you a photograph of the sign and I ask you whether you have ever seen that sign before? A Yes, I ordered it.

Q You ordered that sign? A Correct.

Q And that was placed on the ground? A Yes, same sign is there now, only the wording is different.

Q Placed there before the sale, was it not?

Mr. Starr: I object to that, if your Honor please, immaterial.

The Court: I will permit that question.

Q It was placed there before the sale? A Not this sign, no, not this wording wasn't. The sign was there before the sale, and during the sale, but not this wording.

Q You say the wording was different? A On the original sign, yes. This is the same sign, but the wording was different from what is on there now.

Q I show you another photograph apparently of the same sign, that several lines have been obliterated. A That is right. Same sign, changed a number of times.

Q Now, do you say that—which, if either, of these two signs was there in September, 1925? A 1925? The sign was there, the physical sign of itself was there, but the wording of it was changed. Is that clear? If you are referring to the wording of the sign, if you will ask the question you are trying to get out, I will answer your question.

Q Thank you. There was a sign, that is this signboard whatever it might have had on it, was erected prior to the sale? A Correct, announcing the sale.

Q Announcing the sale? A Yes, the wording was different than it is today, announcing the sale on that sign, after that sale the sign was changed.

Mr. Starr: Wait a minute. No question. Don't volunteer anything.

Q Now, Mr. Ryan, the exact language appearing upon the smaller photograph which I am now showing you, was set forth in paragraph three of

the bill of complaint and in the answer filed in behalf of your company, William J. Ryan, Inc., admits the averments of paragraph three. A What is the averments? What are they?

Q The averments, I will read it to you? "On September the 9th, 1925, and for some time prior thereto and for some time thereafter, there was erected on said lots a large wooden sign, bearing the following inscription: 'William J. Ryan, Inc., Owners and Developers, 605 Franklin Trust Building, Philadelphia. Sewer contract awarded to Versaggi Brothers. Curbs and sidewalk contract awarded to Versaggi Brothers. Excavating contract awarded to United Dredging Company.

" 'Grading and graveling cont. awd. to Craythorn-Nickerson. All work and improvements to be finished by July 15, 1926. Engineering work in charge of Harry E. Weir.' "

And I ask you whether that refreshes your memory so that you are able now to say that the smaller photograph was erected and in position and with the language appearing thereon on or before September the 5th, 1925? A Is that referred to all this as before September, 1925, all this document?

Q Yes. A Well, that is untrue because this sign wasn't erected at that time. That is a mistake in the date because in September of 1925 I had made no contracts with Versaggi or anybody else outside of my engineer, nor had I made any arrangements for laying sewers, therefore I couldn't have advertised them on a sign, that there was sewers or anything, so there is something wrong in that, and this is—this sign wasn't erected, the sign itself physically was erected, the wording of it entirely different.

Q But technically the smaller photograph with the wording thereon appeared in the shape that you see it there earlier than the larger photograph, that the wording on the larger photograph which appears to have had obliterated several lines? A If you will let me answer your question.

Q Pardon me, I want to get straight on my dates on the sequence.

(Question repeated.)

A That is correct.

(Small photograph marked C. 3 for identification, and larger photograph marked C. 4 for identification.)

Q Do you know when the change was made between Exhibit C. 3 for identification, the small photograph, and the Exhibit C. 4 for identification, when the change was made? A I can't tell you the exact date because this wording was put on in the, April, May or June of 1926 (referring to C. 3 for identification), because we anticipated finishing by July 15th, that is the reason we put it there, we wasn't compulsory that we should finish before September, but we thought we would have it finished and we so put it on the sign.

Mr. McCarter: I wish to move to strike out so much of the witness' answer as said it was not compulsory to complete by July 15th.

The Court: Let it be stricken.

Mr. Richards: If your Honor please, I don't see why it should be stricken.

The Court: It is not responsive to any question at all, injected by the witness.

Mr. Richards: Your Honor, he was explaining—

The Court: Yes, he explained the facts. His conclusion is not admissible.

Q When do you say Exhibit C. 3 for identification was painted in the form that it appears? A I don't remember the exact date but it was some time, I would say, in probably April or May.

Q Of 1926? A 1926. I presume so. I cannot be exactly right on the date.

Q When do you say the change was made to produce Exhibit C. 4 by obliterating a part of the wording? A I should judge around the date that is on the sign, around July 15th, because we were not completed.

Q Do you know? A I don't know exactly, no. I couldn't give you the exact date.

Q Is that just conjecture? A It isn't a conjecture, because it was done for the specific purpose of changing the wording of the sign, and it must have been done just around July 15th.

Q Do you know that, or you just think it should have been done at that time? A No, it was done for that purpose. It was around that time, but the exact date I can't tell you.

By Mr. McCarter.

Q Mr. Ryan, I show you another photograph containing a picture of a sign, and ask you if you identify that as a photograph of the same sign appearing in Exhibit C. 3 and C. 4 for identification? A Same sign.

(Photograph marked B. 10 for identification.)

Q Can you tell me, Mr. Ryan, at the corner of what streets on the tract that sign is erected? A I am not quite sure but I think it is around 10th or 11th, I am not sure, can't tell you the exact streets.

Q Corner 10th or 11th and what? A Facing Surf avenue.

Q Facing Surf avenue? A That is correct.

Q I show you Exhibit S. 21, one of the aeroplane photographs and ask you if you can identify on that the location of the sign? A That isn't the sign.

Q That isn't the sign, isn't it? A We did have a sign there, but the sign you are referring to is this one here. Take notice this sign is—

Q No, just tell me. A No, it is not the same sign.

Q That is not the same sign I pointed to? A No.

Q Can you point out on S. 21 the location of the sign? A Yes (marking photograph with a circle around it with red pencil).

Q I show you another photograph and ask you if you recognize that as being a photograph of the portion of your tract? A Correct.

Q Can you tell us which way that photograph is looking and, if possible, what street corner it shows? A No, I can't. Just a second. I am trying to study for a second. Looks to me as though it is looking to Surf avenue, and this is Ocean avenue here, if I am correct. I don't know whether I am or not, looks as though looking towards Surf avenue.

Q At any rate on a horizontal line across the picture between the two X's you see on the border of the photograph outside the depicted part runs a street, does there not? A Yes, Ocean avenue.

(Photograph marked B. 11 for identification.)

Q I show you another photograph and ask you if you recognize that as being a photograph of a portion of the tract? A Correct.

(Photograph marked B. 12 for identification.)

Q I show you another photograph and ask you if you recognize that as a photograph of a portion of the tract? A I would say yes.

Q Is it a fact that the part of the photograph horizontally across the picture between the two X's on either margin represents a street? A I would say so.

(Photograph marked B. 13 for identification.)

Q I show you another photograph and ask you if you can identify that as a photograph of a portion of the tract? A That could and couldn't be. It looks as though it is.

Q It looks as though it is? A Looks as though it may be.

Q You are not sure of that one? A I am not sure of that one.

(Photograph marked B. 14 for identification.)

Q I show you another photograph and ask you if you identify that as a portion of the tract? A I can't identify that.

(Photograph marked B. 15 for identification.)

Q I show you another photograph and ask you if you can identify that as a portion of the tract? A That is the house. I recognize it, I don't know whether it is looking north of me or south of me. I don't know whether that is my tract or not. That house is at the end of my tract.

Q Which end of the tract? A It is the north end.

Q North end? A I think so. That looks like it after the brush was taken off of it.

(Photograph marked B. 16 for identification.)

Q I show you another photograph and ask you if you can identify that as a photograph of a portion of the tract? A That looks like it.

(Photograph marked B. 17 for identification.)

Q I show you another photograph and ask you if you can identify that as a photograph of a portion of the tract? A That could and couldn't be. I won't identify it because it is impossible to say. This may be taken out anywhere, that could be taken any place.

(Photograph marked B. 18 for identification.)

Q I show you B. 13 for identification, Mr. Ryan, and state whether or not the street which you have previously identified as running across between the two X's on that photograph shows signs of having been graveled? A I couldn't answer that.

Q You can't answer that? A No. It may or may not be gravel on it. I can't tell.

Q I show you B. 14 for identification, and ask you, Mr. Ryan, whether the street which you previously identified as running between the X's on the margin of that picture is graveled or not? A Isn't this the one I said I am not sure whether my tract or not?

Q I am asking you whether you can say that street on that photograph is graveled or not? A I would say it is not graveled.

Q Not graveled? A Not in that picture, I wouldn't say it was.

Q And I don't know whether you have told us this or not, Mr. Ryan, but I will ask you again, showing you C. 4 for identification, I ask you whether or not the attempted obliteration of certain portions of that sign was done at your direction or instruction? A What do you mean by attempted?

Q The light line across the middle of the sign, which made it more difficult to read? A No, it is a deliberate act to obliterate and change the wording on it. No attempt at all. It is deliberate.

Q You are still able to read it, aren't we? A You are there, yes.

Q I am asking you. A It was an attempt, wasn't it?

Q Yes, I thought so. I am asking you whether or not that was done at your instruction or direction? A Yes, it was. That is correct.

William J. Ryan, cross.

By Mr. Starr.

Q In answer to the last question put by Mr. McCarter, with respect to C. 4 for identification, can you tell us when the obliteration occurred, when it was done? A Sometime around July 15th, the date that was on there.

Mr. McCarter: Of what year?

A 1926.

By Mr. McCarter.

Q One more question. I overlooked something. I show you a piece of paper and ask you to tell me whether or not that is one of the maps and circulars that were handed out and circulated at the time of the auction sale? A Absolutely.

(Paper marked B. 19 for identification.)

By Mr. Starr.

Q Mr. Ryan, did I understand you to say that there were no curbs or sidewalks built on the streets which intersected at right-angles Surf avenue further toward the Ocean than the 15-foot alley? A That is correct.

Q Why were the sidewalks and curbs omitted in that area? A Well, that was on account of the Boardwalk going along, the runways running down from the Boardwalk, that it would have been useless to put a sidewalk there because the runway would take the place of it, as it is customary in all of the seashore resorts.

Q The runway would extend how far, the runway from the Boardwalk? A I think some-

wheres in the neighborhood of seventy to a hundred feet more, to take care of that.

Q And that was the reason why? A That was the reason why there were no sidewalks placed there.

Q Were the streets graveled toward the ocean from the 15-foot alley? A That I don't know. I can't answer that correctly. I think they were, though.

Q You were asked specially with relation to lots 10 and 12 in block 412, whether or not there was any sidewalk or curb built with respect in front of that lot?

The Court: There was some confusion about that. It was first 10 and 11, but in the midst of the examination it was 10 and 12 in block 412.

Q I will ask him as to both, then. Answer the question with respect to 10 and 11 and also 10 and 12, block 412? A That is correct.

Q Was there any sidewalk or curb in front? A Yes, the sidewalk was right to the end of every one of those lots.

Q Those lots are on the landward side of the 15-foot alley, as I understand it? A Correct.

Q Now, you were also asked specifically with relation to lot 8 in block 413. A Boardwalk lot.

Q This is a Boardwalk lot? A Yes.

Q There was no sidewalk built or curb in front of that lot? A Weren't necessary, no.

Q Why was that? A It wasn't necessary on account of the Boardwalk going in front of it.

Q Was the Boardwalk built? A It has been, yes.

Q It has been built? A It wasn't built at the time of the sale.

Q Do you remember when it was built? A I can't recall the exact time, but I think it was some time in 1927.

Q Is the Boardwalk in use at the present time? A It is.

Q Is that Boardwalk connected with the Boardwalk in front of or along the beach in along a portion of North Wildwood? A Beg pardon?

Q Is that new Boardwalk connected with the other Boardwalk in front of other portions of North Wildwood? A Yes, it runs all through Wildwood and North Wildwood.

Q That was built by whom? A By the city.

Q Now, does the Borough or City of North Wildwood extend beyond your tract toward the north? A Both ways, north and south.

Q And also on the west? A West.

Q Are there any houses in North Wildwood to the west of Surf avenue between Surf avenue and the bay? A Yes.

Q Is that improved, built up with houses? A Yes.

Q How about the portion to the north of your tract, is that improved by the erection of houses? A You mean oceanward from Surf avenue?

Q Oceanward from Surf avenue, yes, north of your tract. A North of my tract there is one house, I think there is probably about two or three houses.

Q South of your tract between Surf avenue and the Boardwalk, is that built up? A Oh, yes, quite.

HARRY E. WEIR, sworn.

Direct examination by Mr. Richards.

Q Mr. Weir, where do you live? A Wildwood, New Jersey.

Q What is your profession? A Civil Engineer.

Q How long have you been a civil engineer? A Twenty-five years.

Q Do you hold any official position? A City engineer of Wildwood, Borough engineer of Wildwood Crest, Borough engineer of Avalon, engineer of Wildwood Gables, private work.

Q Have you ever been County Engineer? A No, sir.

Q Have you assisted in county work? A I beg pardon?

Q Have you been engaged in county work at any time? A Not directly. Indirectly, yes.

Q Have you had any experience in laying out these real estate developments? A Considerable.

Q What ones did you lay out? A Wildwood Gables and the Ryan Tract in North Wildwood and many others, but those two in particular.

Q In the case of the Ryan tract did you design the improvements? A I did.

Q Were you the engineer in charge of the carrying out of the improvements? A I was.

Q Who were the contractors who did the work? A The sewer contract was let to Versaggi Brothers, the dredging contract, after considerable trouble locating a dredge, was let to the United Dredging Company. The sewer and sidewalk was let to Versaggi Brothers, and the supplemental contract let to H. M. Steelman, and

the grading and the graveling contract to rush the job was done by two people, Graythorn-Nicholson, and I. T. Wilson, the big majority of the work.

Q Who did the clearing of the land? A The clearing of the land first was done, part didn't need clearing because that was dredging operation, but cutting down the sand hills first was done by Craythorn-Nicholson, and putting up the board fence for the retaining the fill and the brush and wall needed at 15th and the ocean front was done by F. W. Schewers, Jr., before any work was done on the filling.

Q When was the clearing of the land done? A Clearing of the land was done in April and May of 1926.

Q That work was completed by the end of May, 1926, so far as the clearing was concerned? A I should say that was done around Decoration Day, 1926.

Q Now, then, the filling of the low area to a grade approximately equal to the grade of the present County road, who was that done by? A United Dredging Company, New York.

Q When was that completed? A That was completed early July.

Q What year? A 1926.

Q What county road was that that is mentioned in the contract and which I have just mentioned? A I should imagine what was meant by that would be Central avenue, North Wildwood.

Q Is that a county road? A Yes.

Q Was that the road that was referred to? A I should imagine it would be, yes.

Q And that was completed some time in July of 1926? A 1926, considerably, the fill was considerably higher than the county road.

Q Then the next item was the necessary grading to establish uniform grade of the streets; was that work done? A That was done.

Q Who did that? A I. T. Wilson.

Q When was that completed? A You mean grading or graveling or both?

Q Grading. A That was one contract; grading and graveling was one contract, I should say that was completed some time in September, 1926.

Q The necessary—the graveling of all roads, you say that was part of the same contract? A That was part of the same contract, grading and gravelling was one contract.

Q You say that was completed when? A That was completed in September, 1926.

Q First part or latter part of September, have you any idea? A May I refer to my notes?

Q Yes. Didn't you have them on a yellow sheet of paper a little while ago? A My work, my notes here, September the 8th, and I ordered Mr. Wilson to go in and do some work a little later on, on the 10th, to clean up some of the work, and put some more gravel on where I didn't think there was enough gravel on the road.

Q Mr. Wilson reported as complete on September the 8th? A I won't say Mr. Wison reported.

Q That is what you determined? A That is what I determined at that time, I considered that complete at that time when I looked over the work, and I ordered some more work done a little bit later.

Q When was that finished, do you remember? A About September 18th or 20th, somewheres in there.

Q What was this extra work that you required done? A Putting the streets, running the streets further out, that is 6th, 7th and 8th streets further on out from the alley, on the order of Mr. Ryan.

Q It was all done up to the alley? A Yes, sir, all done at that time up to the alley, to my best recollection of my notes.

Q Now, then, the installation of concrete sidewalks and curbs, who did that work? A Versaggi Brothers and H. M. Steelman.

Q When was that done? A That was done in August, 1926.

Q Do your notes show that? A Yes, sir. Payments show who paid.

Q Completed then? A Yes, sir.

Q Sewers? A Sewers were completed before the sand fill was made, sewers were completed by April the 15, 1926.

Mr. Carr: What date, did you say?

A April 26, 1926.

Mr. Carr: I thought you said April the 15th.

A Somewheres in there, Mr. Carr. I won't say April 15th or April 26th, somewheres in April, 1926.

Q Will you take your notes, Mr. Weir, and give me from those notes the date of the completion of the various items?

Mr. Carr: Haven't we already done that?

Mr. Richards: He has done it from his memory, but I would like to have him take it from his notes, if he may.

A The sewers in April, 1926. The sand fill in July, 1926; the curbs and sidewalks in August.

Q August, 1926? A 1926. And the grading and graveling, September, 1926.

Q The last work to be done, then, was done by about the 8th of September, 1926? A Substantially, yes.

Q Was there a little odds and ends that the contractors had to clean up after that? A Yes.

Q Which you required them to do? A Yes, sir.

Q When these little odds and ends were all done, did you then issue a certificate of completion? A I did.

Q When did you issue that? A October the 8, 1928—1926.

Q Now, I show you some aeroplane photographs and call your attention to S. 18; is that a fair picture of the conditions there? A Yes, sir, after the storm of February the 20th, 1927.

Q This picture was taken about May 29, 1927? A Yes, sir.

Q You say this shows the condition after the storm of February what? A 1927, February 19th and 20th, 1927.

Q There was a severe storm? A Yes, sir.

Q What kind of a storm? A Storm tide, about two and a half foot above normal to take out the, lot of our fence in front, to take out the section down here between 13th and 15th street.

Q On that picture, will you indicate what damage was done to the development? A The side line shows it here.

The Court: We are getting none of this, he is saying something, but—

Mr. Richards: He is doing more than that, and I will get it for you in a minute. Witness has indicated as best he can with a pencil the tide line on the photograph.

Q What damage was done by the ocean to the east of that tide line? A Cut down the beach about two and a half foot.

Q Did that do anything to the ends of the streets in the neighborhood of where it cut it down? A Took the Boardwalk, took the board fence out completely in its entirety.

Q Did it do anything to the fill that had been placed there? A From 13th to 15th street, a distance from, from 15th street to 11th, east of the line, 1,080 feet east of Surf avenue.

Q Did it take out any of the sidewalks? A Yes, sir.

Q And the street ends? A Yes, sir; some of it was put back.

Q What did you say? A Some of it was put back.

Q Who put it back? A Mr. Ryan and the Ocean City Title and Trust Company.

Q They did that when? A In February—in March, yes, covering the sidewalk ends, March, February and March, 1928.

Q You spoke about lot coverings, what had happened to the fill prior to March of 1927? A Well, whenever a fill is made by hydraulic dredging, the bar sand fill, if it isn't covered by hay or gravel or something to hold it, the winds will blow it about and naturally get in the streets and has to be something done to cover those lots, to protect those lots.

Q Was something done? A Yes, sir, it was.

Q What was it? A Contract was awarded by Mr. Ryan and the Ocean City Title and Trust Company to cover all those lots and the contract given to I. T. Wilson, ten cents a square yard.

Q What was it covered with? A Gravel, two inches of gravel.

Q That prevented any more of the sand blowing out? A Much as possible, yes.

Q Were these streets properly graveled? A Yes, certainly were.

Q Workmanlike manner? A Yes, sir.

Q Were the sidewalks and curbs laid properly, in a workmanlike manner? A They surely were.

Q Were the other improvements made in a proper and workmanlike manner? A Yes, sir.

Q Was there a municipal sewer in the Borough of North Wildwood? A Borough of North Wildwood?

Q Yes. A Yes, there was a sewer in the Borough of North Wildwood, City of North Wildwood.

Q Where was that sewer? A That sewer ran from practically every section of the town west of Surf avenue.

Q Surf avenue is the second street on this aeroplane map, S. 18? A That is true.

Mr. McCarter: Second street what direction, senator?

Mr. Richards: From the ocean.

Q So that this long street that runs admittedly through the center of the photograph, which you say is Surf avenue, had a sewer in it? A Surf avenue had a sewer in it, yes.

Harry E. Weir, cross.

Q Was that sewer in there at the time of this development? A It was.

Q How long had it been there? A Mr. Rice, the City Engineer, he can testify to that better than I can.

Q Had it been there some time before the development? A I should say at least ten years, to the best of my knowledge.

Q And, of course, before 1925? A Oh, yes.

Cross examination by Mr. Carr.

Q Mr. Weir, did you have charge of the making of the several contracts that were mentioned, this contract for the fill and for the sewer and sidewalk work and so on? A I drew the specifications. I had nothing to do with the contract.

Q You just drew the specifications? A Just drew the specifications.

Q I suppose the completed contracts came in your hands, however, to check up and supervise the work? A I naturally gave a certificate for the work that was done.

Q I beg pardon? A I gave a certificate for the work that was done.

Q So that you had to know the terms of the contract? A Practically know the terms of the contract as well as the specifications, yes.

Q Do you know when the contract for the sewer was awarded to Versaggi Brothers? A December, 1925.

Q And the dredging contract was when? A Won't give the exact date on that, I think May 3rd, if I remember right.

Q 1926? A 1926.

Q And the sidewalk contract to Versaggi Brothers? A Versaggi Brothers, their contract was given in February, 1926, because the sidewalks were put in on Surf avenue.

Q February, 1926? A February, 1926, the sidewalks were placed in Surf avenue before the fill was made.

Q And the graveling and so forth? A That was day's work, that wasn't any contract.

Q That wasn't a contract? A That wasn't a contract.

Q Mr. Weir, you recognize this map, S. R. 14, do you not? A Yes, sir.

Q That shows the Ryan tract? A Yes, sir.

Q Now, this 15-foot drive extended from Fifteenth street to a point beyond 6th street, there never was any sewer laid down in that, was there? A Yes, from 13th street north.

Q From 13th street northward? A Northward.

Q How far northward? A Up to the alley line, up to this little point here.

Q That is a hundred feet northwardly of 6th street? A Northward of 6th street.

Q Did you actually place those pipes there? A No, sir, Mr. Versaggi did that, I put the grades in there.

Q I mean, it was done under your— A Yes, under my supervision.

Q For the account of the Ryan Company, is that right? A Yes, there were two squares in here, and, as I told you, washed out in 1927.

Q Well, this sewer was all laid before 1927, wasn't it? A Yes, but these two squares were never in from 13th to 15th, were never in the alley.

Q They never were? A They never were in the alley, in those two squares.

Q That land was not physically washed out until September, 1926, was it? A No, but there was trouble over the front line with the Borough Council up there, that is the reason they were not put in.

Q The line that I am now indicating to you, is that the line of the 15-foot alley? A That is the line of the 15-foot alley.

Q Extending between what points? A Between a hundred feet south of 5th street to 11th street.

Q And from 11th street down to 15th street, was the 15-foot alley produced on the ground? A These two squares were not.

Q These two squares, indicating from 13th to 15th street, were not? A That place, not to the best of my knowledge and belief.

Mr. Richards: If your Honor please, the question as asked, I have no objection, and that is whether the alley was in between 11th and 13th street, and the answer to that was that it was in. Now, Mr. Carr has undertaken to ask him another question, and that is whether it was in between 13th and 15th street, and to that I wish to object on the ground it is immaterial because none of the mortgages in this suit are included in that section, excepting the three lots on the corner of 13th street in which the alley, of course, was not material.

Mr. McCarter: Bodek's lots in there.

Mr. Carr: One of Bodek's lots in there, and five of Mr. Smith's lots in there.

Mr. Richards: I think you are wrong about my objection as far as between 13th and 14th is concerned, but not between 14th and 15th, no lots involved in that neighborhood.

Mr. Carr: If your Honor please, it is cross examination.

The Court: I will permit the question. The difficulty now is that you are examining upon a paper that has never been presented to the Court either by identification, reference or anything else.

Q What is this paper? A This paper is a paper the contractor gave to me on, I couldn't tell you the date, I know it was in 1927.

Q What is the purport of it? A It is the number of feet of sewers.

Q Is it a sewer plan showing the sewer layout? A It is not my plan, no, my plan is here.

Q Simply the plan? A It is a plan of the contractor's at the time when I last saw him on the work. My plan is right here.

Q This sketch was handed to you by the contractor as showing the sewer layout, is that right? A At the time of payment when he asked for some money on the work.

((Paper marked C. 5 for identification.)

Q Now, Mr. Weir, referring to C. 5 for identification, between what points does it show the sewer along the 15 foot alley or drive? A From 11th to a hundred feet north of 6th street.

Q I show the balance of the alley—

The Court: I don't want to raise any objection, but what advantage can this be to

us? Here is the layout by somebody else entirely, and the witness is not asked whether he has checked it up, whether it is correct or anything else.

Mr. Carr: I intended to come to that.

The Court: You haven't done it. Why the necessity of confusing the Court on figures unless connected with this case?

Q Does that show, correctly show the sewer to be in position along the 15 foot alley or drive extending from 11th street to a point 100 feet north of 6th street? A It does.

Mr. Richards: I object to that question because it is very apparent that this paper has not been identified as to time, and therefore the premise that counsel tries to place upon it correctly shows the location of the sewers is impossible.

Q Will you fix the time?

The Court: I will permit the answer to remain until the time is fixed.

Q Fix the time, will you, Mr. Weir? A Time is in 1926; just the date I couldn't give you offhand now.

Q Spring or summer or fall? A I would say early fall.

Q Early fall of 1926? A Yes.

Q Now, I ask you whether there was any sewer laid under the alley from 11th street to 15th? A Yes.

Q Where? A From 11th to 13th.

Q When? A Immediately preceding that paper handed to me, or following that paper handed to me.

Q You mean following that? A Following that paper handed to me.

Q From 11th to 13th, you say? A Yes, sir.

Q A completed sewer pipe was put in there? A Yes, sir.

Q It would then extend from 11th street to 100 feet north of 6th, is that right? A Yes.

Q Then was there ever any sewer from 15th to 13th street? A No, sir.

Mr. Richards: I object to that on the ground is is immaterial, if your Honor please, no contractual requirements that required us to place a sewer in there.

The Court: I will permit it. I will have to determine that later.

A No, sir.

Q Never has been any in between these points? A No, sir, and that I will change.

Q There never has been, at any rate? A No.

Q That is true up to the present time? A That is true up to the present time.

The Court: Between what?

A On the alley between 13th and 15th.

The Court: You answered the question from 11th to 13th.

A He asked from 11th to 15th.

Harry E. Weir, cross.

By the Court.

Q Was the sewer laid from 11th to 15th? A 11th to 13th, he asked from 11th to 15th.

Q You said yes. Was it laid 11th to 15th? A Not to 15th, no.

Q Then you didn't mean it was when you said yes? A No, I said 11th to 13th, not 11th to 15th.

Mr. Richards: Your Honor please, he answered the question when Mr. Carr asked whether any sewer, of course the answer was yes, but it wasn't laid all the way.

By Mr. Carr.

Q Now, Mr. Weir, you say there was some trouble in these two between 13th and 15th, you said there was trouble, you couldn't hold it, it wouldn't stay? A Why, the storm tide took everything out, you tried to put in there, took the storm sewer and everything out of there, and there was trouble over in North Wildwood locating the Boardwalk.

Q You had your sewer work complete, I think you said, by July, 1926? A Yes.

Q The storm tide hadn't come along then? A It hadn't, they intended to put sewerage in there.

Q But the storm tide had not come in up to that time and interfered with any of your work then, had it? A Not any, never my purpose to put any sewer in there.

Q Mr. Weir, referring now to S. R. 14, block 413, lots 6, 8 and 9, under this sewer layout, would have had no sewer connection whatever, could it?

Mr. Richard: I object to that.

The Court: The engineer can state.

A Yes. Run a lateral there, easy enough to them.

Q Was there any existing pipes with which lots 6, 8 and 9 in block 413 could have made a direct connection with the sewer? A That is with the sewer on the 13th street.

Q How would lot 6 and 8 reach 13th street? A Could cross the lots same as you do in a lot of other places.

Q You mean could cross somebody else's lots and make connection with the sewer? A Have to yes.

Q Where is that? A Many places do it.

Mr. Carr: I ask that be stricken out.

The Court: Yes.

Q Your idea is lots 6 and 8, block 413, could be connected to the sewer by crossing private property of some one else's? A Come out on the street front, toward the street front, without crossing, nothing to stop that.

Q There is no pipe in the 15 foot drive, is there? A No, but you could run a pipe up the 15 foot drive.

Q Why didn't you do it, then? A The simple reason why it wasn't done, I didn't know anything about this contract, there was a dispute between Mr. Ryan—

Q Just a moment—

The Court: You asked that question.

A Why, for the simple reason it was too dangerous to do it on account of the sides there, afraid it wouldn't hold.

Q You think it wouldn't hold? A No, that is true.

Q So, therefore, it wasn't, so far as your layout of the sewer was concerned, it wasn't intended to provide for the lots in block 412 and 413 facing the ocean, bordering on the 15 foot drive? A I don't show it on the plan.

Q No provision was made for it? A No, sir.

Q So that the owners of lots that I have just referred to would have no means of sewer connection except by crossing private land? A Yes, sir, they would go up the alley.

Q But you say the alley was too dangerous in that location to build the sewer? A At that time; not now.

Q It was then? A Yes.

Q At that time no provision was made to take care of those lots facing the ocean and bordering on the 15 foot drive, and in block 412 and 413, that is true, isn't it? A I don't know just how you want me to answer that question.

(Question repeated.)

Mr. Richards: I object to any reference to 412, I think it should be limited entirely to the lots that are in controversy here which are the corner of block 413.

Mr.Carr: We have several lots in there, 6, 8 and 9.

The Court: In 412 or 413?

Mr. Carr: 413, if your Honor please.

The Court: I will sustain the objection at the present time to the question.

Mr. Carr: I will amend my question by referring to 413.

A Yes, they could have connection by going in the street, up the alley and into the street.

Q But you made no provision for it? A I made no provision in that plan.

Q As your plan stood, they had no means of connection, had they? A Going up the alley, yes.

Q Well, they would have to do this, in other words, they would have to build a sewer to reach your sewer, is that your idea? A Always have to lay a lateral.

Q I am asking you whether it is your idea that the lot owners would have to build that sewer in a location which you say was too hazardous to build it? A That is true, they would have to build the sewer.

Q That is what they would have to do? A Yes, sir.

Q So far as the Ryan Company went, the work you were doing for them, you made no direct provision to serve those lots? A Not on that plan, no, sir.

Q Now, Mr. Weir, when you say that in July, 1926, this sewer system was complete, do you mean to say that it was connected and a serviceable sewer?

Mr. Richards: I object to that, if your Honor please, connected up to what?

Mr. Starr: That is what I would like to know.

The Court: I will sustain the objection.

Q Was the sewer connected to any means or any outlet whatever? A Yes.

Q Yes? A Yes.

Harry E. Weir, cross.

Q To what was it connected? A It was connected to the manhole at 11th and Surf avenue, North Wildwood.

Q So that it was feeding into—so that it drained into the municipal system? A No, sir.

Mr. Richards: I object to that.

Mr. Carr: Cross examination, if your Honor please.

Mr. Richards: If your Honor please, our contract was to install a sewer. Now it is our contention, and I suppose largely the controversy here as to whether or not it was our duty to connect this sewer with the sewer of North Wildwood. Now, if we made the physical connection then we claim that we were, that we had performed our contract, and therefore it is immaterial, from our standpoint, whether or not this actually flowed into the North Wildwood sewer or not by reason of something that the City of North Wildwood may have done.

The Court: The question now seems to be whether or not it was connected to the sewer of North Wildwood.

Mr. Richards: That question he has answered yes.

The Court: Now he is being cross examined as to whether it actually was connected or not, it may be a physical connection and yet a blocking so that there is no connection. On cross examination that is, I take it, the purpose.

Mr. Carr: I want to see whether this was a really serviceable sewer.

The Court: Cross examination, I will permit it.

Mr. Richards: If your Honor please, that is the very point, he says a serviceable sewer. We say that is immaterial.

The Court: I don't know unless you want to raise the entire question right now whether it is advisable or not, if you want to argue that question now it is probably the basis of the whole thing. I admitted that and think the proper way probably will be for me to admit this evidence and then as to the weight of it later, I think we will hear it all together.

Mr. Richards: I really wish to make my objection so that your Honor will understand our position.

The Court: I will permit the question.

(Question repeated.)

Mr. Richards: With the understanding it is subject to being stricken, the whole line stricken later.

The Court: Yes, if it becomes necessary.

(Question and answer repeated.)

Q With what was this sewer system which you designed on the Ryan tract connected in July, 1926, or by October 8, 1926? A Connected to the main—connected to the pump station in Surf avenue at 11th street in the City of North Wildwood.

Q Did that permit—was application made to the Borough of North Wildwood to make connection with its system? A It was.

Q And refused, was it not? A I can't answer whether it was refused or not.

Q You made the application? A I made the application, yes.

Q You had charge of it? A Yes, but—

Q Wait a moment. Then you learned, did you not, that the Borough of North Wildwood was under injunction restraining it from emptying untreated sewage into the waters of the bay?

Mr. Cole: May it please your Honor, on behalf of Esibill, I object, because that reaches the very nut of this case, on the question of the sewer. I say we are not responsible for an objection raised by the Borough of North Wildwood. I don't see how we could be.

Mr. Richards: If your Honor please, I object to this on the ground just made by Judge Cole, and on the further ground that the injunction proceedings are the proper evidence and not this witness's conclusion.

Mr. Carr: We have ordered those files.

The Court: I will sustain the objection upon the latter ground.

Q Do you know when it was that this sewage system was accepted by the Borough of North Wildwood and physical connection permitted? A I do not.

Q Do you know that it had not been accepted or physical connection made up until May, 1928? A Yes, I think it was before that.

Q You think it was before? A Yes, sir.

Q How much before that do you think it was? A I couldn't answer. Mr. Rice can testify to that.

Q Have you no idea? A No, sir.

Q Well, it certainly was not in that condition on October 7th, 1926, was it?

Mr. Richards: Wait a moment. In that condition, has that anything to do—

Mr. Carr: In that position.

Mr. Richards: I object to that question.

The Court: I sustain the objection based upon an objection which was not objected to, but which was objectionable, to a statement of facts there, of course it is difficult to tell, which is now referred to.

Q I ask you whether on October 6th, 1926, this sewerage system was so connected that it would carry off the house sewerage for which it was designed? A It would carry it off to a point 11th and Surf avenue.

Q To a point 11th and Surf avenue? A Yes, sir.

Q Then what happened to it there?

Mr. Richards: If your Honor please, there was in the former question injected the words "for which it was designed." Now it seems to me that is, of course, objectionable, but I want to of course object to this question on the same ground we have been objecting to the others.

The Court: I will permit the question.

A That is up to North Wildwood to take care of it after that point.

Mr. McCarter: That is not responsive.

The Court: Let me understand, however. Has there ever been any sewerage in this? How can a man answer what happens to something which has not existed? That was the question. What happens to it?

Mr. McCarter: Your Honor, certainly a man can say if he knows an outlet does not lead anywhere sewerage could not, he don't have to have any practical test to determine that.

The Court: That is not the question. The question is what happens to sewerage, not to the system.

Mr. Richards: Quite obvious, there wasn't a house from which there could be sewerage.

The Court: I sustain the objection.

Q Mr. Weir, you said you made a connection between this sewerage system which you designed and the municipal system? A Yes, sir.

Q Did you say that? A Yes, sir.

Q And at what point? A 11th and Surf avenue.

Q Was there anything which would permit the sewerage or any sewerage that was intended to pass through your pipe, was there anything which would carry it off beyond this point of 11th and Surf avenue?

Mr. Richards: That is objected to.

The Court: I will permit it.

A It is up to the City of North Wildwood to take it from that point.

Mr McCarter: I move to strike that out.

The Court: Let it be stricken.

(Question repeated.)

A Yes.

Q What? A Why, the manhole at 11th and Surf avenue.

Harry E. Weir, cross.

Q What I want to know, was this system so connected with the Borough of North Wildwood's municipal system so as to permit sewerage to pass out of this system into the municipal system and there be taken care of?

Mr. Richards: That is objected to.

The Court: I will permit it.

A Yes, on proper authority.

Q Which had not yet been obtained, isn't that right? A Yes, sir.

Q And that authority had not been obtained on October 7th, 1926, had it?

Mr. Richards: That is objected to as immaterial.

The Court: I think this witness said he did not know, in reply to that some time ago.

Mr. Carr: He hasn't said as to this date, your Honor please.

The Court: I will permit it. Can you answer as to that date?

A I must answer no on that question.

The Court: The Court wants to understand whether that is what he intends to mean or not, you mean that there had been no permit at that time?

A No, sir.

The Court: I ask you a question and you say no, sir, on that; you mean that you don't know. I want to know whether or not there was a permit at that time.

Harry E. Weir, cross.

A No, sir, your Honor, Judge, I can't answer any further than that.

The Court: That is not the same question.

Mr. Richards: If your Honor had not asked it, I would have thought your question would have been objectionable.

The Court: The Court is going to ask another question, so I will sustain it.

By the Court.

Q Do I understand the facts to be from your testimony that this was connected with the North Wildwood sewer but that the Borough of North Wildwood there had already placed caps or obstruction there so the sewerage, if there was any, so it couldn't go through? A Not North Wildwood, no, State Board of Health.

Mr. Richards: Of course, the testimony is all, if your Honor please, objected to, but, of course, the fact was, if your Honor please, that the State Board of Health obtained an injunction in the Court of Chancery, restraining the Borough of North Wildwood from using any other sewer.

The Court: The difficulty of that is that you have objected to that being testified to and the original papers I think have not been introduced.

Mr. Richards: And that is the reason I will continue to object.

The Court: If you will agree to that—

Mr. Richards: And I still objected, they ought to be in, and I think it ought to be in

before this witness was cross examined about it.

The Court: Counsel informs us that they have it, but as yet have failed to put it in.

Mr. Carr: If your Honor please, we ordered that whole file down here at the former trial.

The Court: What file is it?

Mr. Carr: State Board of Health against the Borough of North Wildwood.

Mr. Cole: I don't see why we can't agree to it, only reason the sewer was not used was because the State Board of Health had an injunction against the Borough of North Wildwood.

Mr. Richards: Only reason we think the whole file should be in evidence.

Mr. Carr: If your Honor please, I would like to offer in evidence the files of this court in the case of the Department of Health of the State of New Jersey against the City of North Wildwood in the County of Cape May, bill and complaint filed September 12th, 1923, being docket 54, page 325, and with special reference to the bill and complaint and the final decree therein, said final decree having been entered on the 12th day of June, 1926.

I call your Honor's attention to the bill which has annexed to it a copy of a resolution of the then State Board of Health, I think it was—they have changed the title—and this statement in the bill:

"Afterwards, on September 27, 1911, the State Board of Health of the State of New Jersey issued a notice in writing to the

Borough of North Wildwood, now the City of North Wildwood, in the County of Cape May, etc., directing and commanding that the said City of North Wildwood in this county cease to pollute the waters of said tributaries of said Atlantic Ocean by sewerage from its sewerage system and make such other disposition of its sewage as shall be approved by the State Board of Health of the State of New Jersey prior to the first day of June, 1912. The first day of June, 1912, being not more than five years from the date of said notice, a copy of which notice is hereto annexed, etc., and that the said City of North Wildwood did not appeal from said notice to the Court of Chancery within six months after the service of the said notice upon the Collector of the said City of North Wildwood, nor have they at the present time taken such appeal, that the City of North Wildwood did not prior to the first day of June 1912, nor had it at the time of the filing of this bill of complaint ceased to pollute the waters, etc."— and then follows a prayer for injunction, but this discloses the situation where back in nineteen—far back as 1911 the State Board of Health had directed them to cease polluting the waters of the adjoining bays.

Mr. Richards: What do you want to do with that?

Mr. Carr: I have offered it in evidence.

Mr. Richards: We object, and our objection, if your Honor please, is based upon the fact that we were not obliged to do more than install a sewer system in this lot. Now the lots in question are within the Borough

of North Wildwod. The fact is that North Wildwood had a sewer system. The undisputed fact is that we installed this system and connected it to the North Wildwood sewer system. It is immaterial, from our viewpoint, that the City of North Wildwood had so conducted itself that it had been enjoined by the Court of Chancery from using its sewerage system or from so using it—

The Court: Hadn't been enjoined from using its sewer system at all.

Mr. Richards: So using as to pollute the waters of the streams surrounding it. Now, if the Borough of North Wildwood either by reason of that injunction or otherwise, failed to permit the sewerage, if any, to flow the system that we had built and connected to their system, that is not our fault. Our contract was completed and the fact that this municipal government, with a sewerage system, may have done something that from a public standpoint would prevent it from performing its municipal function, is not, of course, within the contract as we made it with these individuals. Now, we are foreclosing a mortgage upon these lots. In this mortgage we said that we would do certain things to these lots, and, among others, that we would install the sewerage system. This we did and therefore, it is immaterial, from my viewpoint, and certainly it seems to me it seems similarly immaterial whether or not the State stopped off and prevented this system from being used as a whole in a certain way. Now that is my first objection.

My second objection is that there is not in the pleadings, and there is no defense made, that immediately upon the date of settlement, which was the 8th of September, 1926—9th of September, 1925, that the parties repudiated this contract on the ground that the sewerage system was not installed according to their view of the contract. Now, they didn't do it then, and they did do it afterwards, and I call your Honor's attention to the very recent decision of Vice-Chancellor Leaming in the Murphy-Marshall case, in which he said:

"Under the circumstances it seems clear that defendant's rescission of this contract was wholly without justification. Complainant had no reason to believe defendant was in any way dissatisfied with the delay in filling, or that the arrangement of the settlement date to be postponed from time to time until filling should be completed"—"The rescission was only an equitable right."

There is no pretention that any such notice was given to us and that it should be at this late date relied upon as a defense to the foreclosure of these mortgages. Had we been given notice of that we would have at least had a right to have applied either to the Court of Chancery for a modification of the injunction, or we would have had a right to have proceeded against the municipal authorities to compel the installation of such a sewer system as would have met the requirements, and if your Honor will note in the injunction proceeding the restraint is only to go until such time as the Borough of North Wildwood evinces a disposition to

construct a proper disposal system, so that, from either viewpoint, either because it was not a part of our contract or because no notice was given that it would be relied upon as a ground of rescission, and this contract was immaterial.

Mr. McCarter: Your Honor please—

Mr. Cole: If your Honor please, on behalf of Mr. Esibill, I make the same objection to these proceedings going in.

Mr. McCarter: If your Honor desires to hear me now, of course, this question of the contract—

The Court: I am doubtful. I don't see the necessity of ruling upon the points raised by Senator Richards at this time. I will admit that specifically without ruling upon those points, I will admit such portions of this file as have been offered as being in evidence, that is, the final decree, the writ and bill, all that have been offered. Of course, if there is objection to that, you are entitled to the entire file.

Mr. Richards: I think we ought to have the entire file.

The Court: You are entitled to have the entire file.

Mr. Carr: The entire file is offered.

(File No. 1336, docket 34/325 offered and admitted in evidence.)

Recess taken until 1:30 o'clock P. M.

Harry E. Weir, cross.

AFTERNOON SESSION.

Trial of the cause resumed at 1:30 P. M.

HARRY E. WEIR, resumed.

Cross examination (resumed) by Mr. Carr.

Q Mr. Weir, at what point do you say the connection was made between the sewerage system and the municipal system, was it 11th and Surf avenue? A 11th and Surf avenue, yes.

Q Now, was there any physical barrier imposed between the sewerage system of the Ryan tract and the municipal system?

Mr. Richards: That is objected to unless it is included in the question by whom it was.

The Court: I will permit the question.

(Question repeated.)

Mr. Richards: Then, if your Honor please, I think there ought to be another objection made there, and that is that there was no obligation at all on our part to install a sewer system. Our contract as approved in the mortgage is merely to install sewers, and not a sewerage system, so, therefore, the question seems to me objectionable on that ground.

The Court: I will permit it. You may answer.

A They were approved by Council before they were sent to Trenton.

Q Mr. Weir, won't you answer my question, please?

(Question repeated.)

A No.

Q Was there a brick wall between the Ryan sewerage system and the municipal system? A Yes.

Q Placed there by whom? A Placed there by the City of North Wildwood, sir.

Q In other words, it was not so connected, that is, the Ryan and the municipal system was not so connected as to permit the flow of sewage from the Ryan pipes to the municipal pipes? A That is connected in there, yes.

Q Mr. Weir, please answer my question.

(Question repeated.)

A No.

Q When you say no, do you mean that sewage could not pass from the Ryan pipes to the municipal pipes because of this brick wall? A Yes.

Q That is what you mean? A Yes.

Q And until permission was obtained from the City, that barrier would still stand, would it not? A From the State.

Q From the State Board of Health? A From the State Board of Health, yes.

Q But ultimately you would secure permission from the City when the State Board of Health has approved, isn't that the way it goes? A That is true.

Q So that finally you must have the approval of the City of plans that have previously been approved by the State Board of Health, isn't that true, in all these operations? A You certainly have to get permission from the City authorities, that is true.

Q And they in turn have the plans approved by the State? A The plans were approved by the State before they were started.

Q Beg pardon? A Plans were sent to the State and approved by the City before the work was ever started for the installation.

Q Then the approval of the State had not been secured? A No, sir.

Q Then at some later period, as you understand it, the State approved certain plans and a connection was made, is that right? A Yes, sir, that is true.

Q And in fact, the final connection was not made until June or July of 1928, was it? A I don't know.

Q Weren't you following the matter up? A It wasn't up to me.

Q I say, weren't you following the matter up? A No, sir.

Q You live right down there, don't you? A Yes, sir.

Q Not very far from this tract? A Not very far.

Q I think I have had the honor of calling on you there. A I think you have.

Q Now, I show you a photograph and I ask you if in a general way you recognize the locality? A Yes, I recognize the locality.

Q Do you recognize the locality? A Yes, sir.

Q And where is that locality, please? A Somewheres east of Surf avenue, I should say it was around 8th or 9th street, somewheres in there.

Q That would be on the Ryan tract, would it not? A Yes, that is on the Ryan tract.

(Photograph marked C. 6 for identification.)

Q I show you another photograph and ask you whether you recognize that location? A Yes, that is on the Ryan tract, just where it is I couldn't tell you off-hand.

Q Would that be on Surf avenue? A No.

Q Can you tell me approximately where it would be? A It might be on Ocean avenue.

Q Probably is Ocean avenue? A I imagine it is Ocean avenue.

(Photograph marked C. 7 for identification.)

Q I show you another photograph and ask you to look at it and tell me whether you are familiar with that location? A Whether I am familiar with it?

Q Yes, do you recognize the location? A Yes, sir, I do, I recognize it. I recognize it that there has evidently been a sewer laid there after the other sewer was put in.

Q And where would you say this was? A I would say that was on Ocean avenue somewheres northeast of 15th street, just what streets I couldn't tell you.

Q And on the Ryan tract? A Yes, on the Ryan tract.

(Photograph marked C. 8 for identification.)

Q Do you recall having seen the physical situation indicated by photograph Exhibit C. 6 for identification? A No.

Q Never did see it? A Never saw that.

Q I ask the same question as to Exhibit C. 7 for identification? A Never saw it.

Q Never saw the physical situation represented by that picture? A By that photograph, no, sir.

Q I ask you the same question as to photograph C. 8 for identification? A No, sir.

Q I ask you whether you were in Wildwood on or about May the 4th of 1928? A May the 4th, 1928, I was in Chicago, Illinois.

Q How long were you in Chicago? A Three weeks.

Q When did you go? A Some time in April, had a good game of golf out there, too.

Q Returned when? A Oh, just before Memorial Day.

Q That is 1928? A 1928.

Q Did you know whether or not the sewer which you had laid in the Ryan tract, that a very large part of it had to be or was, in fact, taken up and relaid and that about twenty per cent. of the pipes were crushed, full of sand, did you ever know that?

Mr. Richards: That is objected to, if your Honor please.

The Court: I will permit it.

A Expected it.

Q Beg pardon? A Expected it.

Q You had no thought of it then? A I knew it, expected it.

Q You say you inspected it? A I expected it.

Q You expected that to happen, did you? A Yes, sir.

Q The eighty per cent, of it— A Not eighty per cent., no, sir.

Q —would have to be taken up and relaid? A Not eighty per cent. of it.

Q How much, in fact, was taken out? A I don't know. I couldn't tell you.

Q More than half, was it not? A I don't know.

Q No idea at all? A I haven't any idea.

Q Wasn't some of this work in progress when you were right down there in Wildwood living close to this job? A I think there was one square taken up, yes, that I remember.

Q Can you remember more than one square? A Well, I know there was some taken up, considerably taken up, but how much I don't know.

Q A lot of it was taken up, wasn't there? A I can't answer that question. I don't know.

Q Haven't any idea how much was taken up? A I haven't any idea how much was taken up, no.

Q Weren't you interested at all A No, I was not.

Q You said you had expected it, what did you mean you had expected it? A You do always expect when a fill is made after a sewer is put in that you will always get more or less breaks, that the sewer will have to be put in, I always expect that, always expect that because your upward pressure will cause that in your sewer joints, there is no getting away from that.

Q That is, if you choose to put your sewer down before the fill, you are going to have trouble with the pipes? A Invariably you are, unless you have iron.

Q Invariably you will have trouble with your pipes unless what, you say? A Unless you put iron pipes down.

Q If you have iron pipes, you don't experience that? A You don't have much of it.

Q What pipes were used here? A Vitrified pipe.

Q You would expect some of them to crush? A Always do, always look for it.

Q A good many of them crushed? A I wouldn't say a good many.

Q What percentage had you figured on going bad? A I had figured about twenty to twenty-five per cent. breaking right away.

Q You mean twenty to twenty-five per cent. of your total line you expected would break? A Breakage.

Q You would have to take it up and replace? A Different places, yes.

Q And before your job was wholly complete so that the sewer would carry off, these pipes would carry off the sewerage, you would have to take care of these expected replacements? A No, sir; she could carry through there.

Q She might carry through? A She might carry through there.

Q Although twenty per cent. of the pipe might be crushed? A It may be sanded and I have seen sewer pipe crushed for years and still carry off the sewerage.

Q You would expect a system where twenty-five per cent. of the pipe was crushed to carry off the sewerage, would you? A If it was in different places, it might, yes, sir.

Q I ask you whether you would expect it, having regard now to this particular operation? A Probably.

Q Now, with regard to this particular operation, did you expect twenty-five per cent. of the pipes to crush and go bad? A Yes.

Q You did? A Yes.

Q Would that be caused by the, you say the upward thrust of the pipes? A It might be caused by the upward pressure of the water, it might be caused by the downward weight of the sand, it might be caused by inferior bracing of the pipe, anything might happen.

Q But you would expect at least twenty-five per cent. of it to go bad? A I would look for twenty, we had the same thing happen to Wildwood Gables.

Q After you put this down, did you check it up to see how much had gone bad? A No, sir.

Q Well, before you got it working, don't you expect to inspect your pipes and see whether they will carry off the sewage? A We didn't have any water there, didn't have any houses to see whether it was necessary or not.

Q And if you had had the houses there, you couldn't have connected anyhow, could you? A Then you would have to find your leaks, if you had trouble then you would know where your leaks were, you wouldn't know otherwise.

Q With it plugged at the corner of 11th and Surf avenue, you wouldn't expect any house drainage to empty in it, would you? A If there had been a house on the tract, there would have been a connection.

Mr. Carr: I ask that be stricken out as not responsive.

The Court: It is not responsive.

Q Now you made no test of this system to see whether there were leaks or broken pipes?

Mr. Richards: That is objected to, if your Honor please, not called upon to put a system in.

The Court: He answered and said that he did not. He answered the same question a short time ago, if he made any test.

Q Now, Mr. Weir, you knew of the sewerage situation of the Borough of Wildwood before you made application for your plans, didn't you? A Yes.

Q That is, you knew that they had been forbidden from emptying their sewage into the adjoining waters? A No, they had not done that.

Q You knew there was some trouble there, didn't you? A Yes.

Q All that you knew before you made the application, isn't that right? A I didn't know there was an injunction at that time.

Q No, but you knew that the Borough was having some trouble about their sewage system, didn't you? A Everybody has down there.

Q But you knew that, didn't you? A That is true, yes.

Q Did you look into it to see what the trouble was to determine whether or not—

Mr. Cole: That is objected to.

The Court: Don't answer this.

Q Did you endeavor to ascertain what the situation was and whether or not you would be able to permit the permit to connect this Ryan system with the municipal system?

Mr. Cole: I object. He can't bind these litigants.

The Court: Sustain the objection.

Q Well, at any rate, you knew, did you not, that the State Board of Health had begun some proceedings against the Borough of North Wildwood?

Mr. Cole: Object to that for the same reason.

The Court: Sustain the objection.

Mr. Carr: If your Honor pleases, this gentleman represented Mr. Ryan, and it may well be that he communicated with him, I don't know, I can only go step by step.

Mr. Cole: Don't matter whether he did or not.

The Court: I will sustain the objection.

Q Mr. Weir, do you know, as a matter of fact, that it was not until August the 16th, 1927, that this system was finally part of the and connected with the municipal system?

Mr. Richards: That is objected to because the question is the system, if your Honor please, and not a part of our contract.

Mr. Carr: If the objection is to the word "system," I will say sewer pipes.

The Court: Permit the question.

A It was not up to me to do that.

Q No, no, no.

(Question repeated): "Mr. Weir, do you know as a matter of fact that it was not until August the 16th, 1927, that these sewer

pipes were a part of and connected with the municipal system?''

A I don't know, and didn't care.

Q Didn't know and didn't care? A No.

By Mr. McCarter.

Q Mr. Weir, you testified this morning that sewers were laid in certain streets and were not laid in certain other streets. I forget for the moment the avenues that you eliminated. With particular reference to this little alley along near the ocean front. Did you inspect the progress of the laying of the sewers yourself, or did you act on the report of the contractor? A I had my men on the work besides myself.

Q What was your own personal knowledge as to what portion of the fifteen-foot alley actually did have sewers laid in it? A I went over the work myself.

Q Yes, sir, I am asking you to limit your answer to what you yourself observed personally and not by the report of anybody else. A I observed there were two squares from 11th to 13th where they weren't laid, which I ordered in and which were put in.

Q You observed then there were no sewers from 13th to 11th? A Yes, sir.

Q Did you personally observe any place where sewers were in in the alley now? A Yes, sir.

Q Where? A From 13th to 6th.

Q When did you make that observation? A August, 1926.

Q In August, 1926? A Yes, sir.

Q You are sure of that? A Yes, sir.

Harry E. Weir, cross.

Q Now, it was on October 8th, 1926, that you dated your certificate of the completion of this what will I call the contract improvements, was it not? A Yes, sir.

Q At that time when you made that certificate, do I understand that you say you expected about twenty-five per cent. of the sewers laid to crush or break and have to be relaid? A Yes, sir.

Q And you had expected that at all times prior thereto? A Always look for repairs.

Q Now you testified in answer to Mr. Carr's question that there was in place a wall of some kind so that the sewerage, had there been any, could not pass from the sewers of the Ryan tract into the municipal system. When were you first aware of the existence of that barrier? A December, nineteen—

Mr. Cole: I object to that as being immaterial to the issue in this case.

The Court: I will permit it. You may answer.

A December, 1925.

Q December, 1925? A Yes.

Q And you made some application, did you not, to the city authorities of North Wildwood for the removal of that barrier? A Not to North Wildwood, no.

Q You made no application whatever? A No, not to North Wildwood.

Q To whom did you make application? A State Board of Health.

Q The application was refused, was it not? A Yes, sir.

Q But you are sure you made absolutely no application to the city authorities? A I made application to have the plans approved first, yes, in October, 1925, which is on the records in the Borough of North Wildwood.

Q You are sure you made absolutely no application to the city authorities for the removal of this barrier? A Not to the best of my knowledge, no.

Q You know, as a matter of fact, don't you, that the city authorities refused permits for the erection of houses on this tract by reason of the existence of that barrier? A I do not.

Q You do not? A No, sir.

Q Do you know as a matter of fact that the city itself refused to permit the barrier to be removed? A I do not.

Q You do not? A No, sir.

Q I show you Exhibit B. 14 for identification and ask you if you do not recognize that as being the picture of a portion of the Ryan tract? A Yes.

Q I also show you Exhibit B. 15 for identification, and ask you the same question? A Yes.

Q I ask you the same question with respect to B. 16 for identification. A I won't vouch on that. I don't know.

Q I ask you the same question with respect to B. 17 for identification. A Yes.

Q And I ask you the same question with respect to B. 18 for identification. A I can't answer that.

Q You don't know, you mean? A I don't know.

Q Now, I ask you the same question with respect to B. 13 for identification. A I can't

answer. It looks like it, and at the same time I can't tell.

Q I ask you to look at C. 4 for identification, do you recognize that as a picture of a sign that was on the premises at some time? A Yes, sir.

Q How tall was that sign? A The sign itself, or the whole sign?

Q How high above the ground level was the top of the sign? A About eight feet.

Q Now I ask you to look at B. 14 for identification, and tell me whether or not you can say that the road indicated in the middle of the picture, horizontal line between the two X's on the margin, appears to be graveled or not? A It was graveled and sand blew over it and that is the reason Mr. Ryan covered it later on.

Q Do you not see in the line of the highway evidences of grass or brush of some kind? A That is hay, no doubt of it.

Q And it appears to be growing, or at least in place, doesn't it? A No.

Q You say it is not? A No.

Q Your explanation of the presence of that grass or hay, as you call it, is that it blew there, is that it? A Absolutely.

Q You notice in the foreground that the man's right foot is considerably lower that the level of the sidewalk, do you not? A That is true.

Q I should say about two feet; wouldn't you? A No.

Q You wouldn't? A No, wouldn't say over a foot.

Q How do you account for that difference in grade? A Might have blown out.

Harry E. Weir, cross.

Q Would you expect it to blow out. A Yes, more than that would blow out of the ground, might have settled, in fact.

Q How was this property brought to the grade of the streets? A Hydraulic dredge.

Q That means pumping water from the bottom of some waterway near by in which sand was in suspension, having the water flow away and leave the sand there, isn't that true? A That is true.

Q When the property was filled in that way, did you testify this morning that you would expect the sand to blow away? A That is true.

Q So that when the system of grading and levelling as planned was entered upon, you expected it not to be one which would, so to speak, stay put, didn't you? A That is true.

By Mr. Cole.

Q Mr. Weir, won't you look at the map of this tract (referring to R. 15), got it before you —look at this map which has been introduced, and see whether the sewerage pipes which were laid on the tract were available to lots 27, 28, 29, 30 and 31 in block 302, and lots 23, 24, 34 and 35 in block 305, lots 25 and 31 in block 412, lots 10 and 11, block 415, lots 8 and 9 in block 416. A Yes, sir, they were.

Q About this brick structure in Surf avenue, did you personally know who erected it? A The brick structure was part of the existing manhole.

Q Was that a part of the system of the sewerage of North Wildwood? A Yes, sir, that was their pump station.

Re-direct examination by Mr. Richards.

Q Now, Mr. Weir, referring to the map S. R. 14, there was a sewer in Surf avenue, was there not? A Yes, City of North Wildwood sewer, yes.

Q And you constructed a sewer in Ocean avenue, is that correct? A That is correct.

Q And in 14th street? A Yes.

Q One in 15th street, 14th, 13th and on down to 6th street? A That is right.

Q And you also constructed a sewer running east and west in the alleyways shown upon this map near the ocean, that is the fifteen-foot drive from a point in 13th street to a point in 6th street? A That is correct.

Q Why didn't you run a sewer in the alley from this same point in 13th street to 15th street? A At the time of the sale and afterwards, before the sewers were completed, there was some dispute between William J. Ryan and the City of North Wildwood relative to the location of a boardwalk from 16th street to 14th street and that was the reason that the sewer was not put in the alley in those two blocks.

Q Now was it possible for the lot owners who purchased lots south of the 15-foot alley and toward the ocean in block 413, which is the block between 14th and 13th streets, to obtain sewer connection? A By running a lateral, yes, to the sewer.

Q That is these lots faced towards the boardwalk? A Yes, sir.

Q And south of the 15-foot drive? A Yes sir.

Q The rear lot faced upon the drive? A Yes, faced upon the drive, the rear of the lot.

Q And by making the ordinary lateral connection they could obtain sewer connections with the sewer in 13th street?

Mr. Carr: We object. We have gone all through this. We have been through and over all of this testimony.

Mr. Richards: You went through it your way. I am going to go through it my way.

Mr. McCarter: I object, not to the Senator going through it in his way, but to the use of the word "ordinary" in his question.

The Court: I will sustain the objection to the use of the word "ordinary," overrule Mr. Carr's objection.

Q By making a connection such as is usual in such cases, could the sewer have been connected with the— A Yes.

Mr. McCarter: I object.

The Court: Sustain the objection, and have the answer stricken.

Mr. Richards: If your Honor please, I presume the connection would have to be the connection such as would be proper for the purpose.

The Court: That is not the question.

Q Could the lot owners south of the 15-foot drive in block 413 have made a suitable connection to the sewer at 13th street? A Yes.

Q How? A By running a lateral from the sewer to the manhole at the end of the sewer in 13th street.

Q Is that the workman-like manner of doing that? A No.

Harry E. Weir, re-direct.

Q What is the workman like manner? A The workman-like manner, if there had been an accommodation there, if we knew what was going to happen about this boardwalk line so that we could properly protect the front, then we would have run the sewer further down on 13th and 14th street.

Q I ask you this question, when you said by running a lateral in there, what I want to know is, is that the ordinary and usual method of making the connection? A That is to the sewer, yes, sir.

Q You said there was trouble between the City of North Wildwood and Ryan about the location of the Boardwalk. How did that affect the laying of the sewer?

Mr. Carr: Objected to as calling for a conclusion.

The Court: I will permit that. He is, I take it, an expert on that subject.

A For the simple reason it cut across, diagonally across from the corner of 16th street to the corner of 14th street, and that would naturally affect the alley there on the block 412, which would practically shut the whole alley off.

Q So that the location of the Boardwalk had to first be determined before you could lay a sewer in these two blocks? A That is true.

Q So far as the alley was concerned? A Yes, sir.

Q Now was the sidewalks all brought down to the 15-foot alley? A Yes, sir; except there might have been a block here or a block there out, but they were all brought down to the 15-foot alley.

Q And that was done by the 8th of September, 1926? A Yes, sir; it was. Some was taken out in February, 1927, in the storm.

Q And the gravel was all in place at that time? A It certainly was.

Q Some of these pictures that have been shown to you for identification seem to show sand over the streets. What is the reason for that? A The reason for that is that on every sand fill you will find the sand blows and the impression was made here by Mr. McCarter with the showing at a couple of little places where a man's foot was lower than, considerably lower than the ground elevation, there is a finished profile which was paid for by Mr. Ryan for the fill-in place, showing that practically the whole of the ground was a foot above grade.

Mr. Carr: I object to what it shows, if your Honor please, and it is evidently—

The Court: Yes.

Q Who made this? A I did for my own profile.

(Question repeated.)

A Sand will blow, and you can't help it unless it is protected on the lots.

Q And later this was protected? A That was done later, yes, sir.

Q Now, there are numerous of these real estate developments in which the sand has been pumped into place, aren't there? A Yes, sir.

Q And the same thing occurs to all of them? A All of them.

Q Now, you have produced some section drawings here, marked at the bottom of them, "Harry E. Weir, 7/25/1926, civil enginer," on one and the other "Harry E. Weir, Civil Engineer, 7/25/26," and I ask you what they are? A They are the final sand fill measurements taken up after the completion of the job, before payments were made, section taken every hundred foot along the whole tract.

Q Now taking, we will say, section 1 on the one dated 7/25/26, what does the lower line represent? A Lower line represents the original bottom.

Q Then there is a shaded section here with grades showing, what does that represent? A That is the established grade.

Q Show the section. A This is the established grade.

Q Second line from the bottom is the established grade? A This is the finished grade.

Q Which is the finished grade? A That line, this is the established grade, this is where the grading ceased. Those lines in there show the condition of the contour after the fill, shows the elevation of the fill, that shows the average grade and that shows the original bottom.

Q Then there is a line marked "One foot above grade," that is over grade? A Contractor was allowed payment for one foot above grade and one foot below grade.

Q Now, then, do these contours all the way down show the condition of the fill? A Shows the condition of the finished fill.

Q Of the finished fill as of that date? A As of that date, yes, sir.

Q That was July of 1926? A That is when the final estimate was made of it, work was com-

pleted before that and final payment, payment was made in Mr. Schorr's office.

Q And this sewer, did you have an inspector on the sewer? A Yes, sir.

Q Who was he? A I think his name was Jordan.

Q Was he paid for by you or by the City? A Paid for by me.

Q Did the City have an inspector on the job? A City asked to have appointed an inspector, he was appointed, on the suggestion of somebody up in the North Wildwood Council.

Q Did he report to you or to the City? A He reported to both of us, I guess.

Q Do you know? Don't guess about it. Do you know whether he did or not? A He reported to me. I don't know whether he reported to the City or not.

Q But he was appointed on the suggestion of the City? A Yes, sir.

Q What was he doing there, who was he working for? What were his duties there? A He was there to see the work was done right.

Q For Mr. Ryan or for the City? A For Mr. Ryan and for me and for the City, too.

Q By the way, were there two different types of sewers on this job? A Yes, sir.

Q What were they? A Sanitary sewer and storm sewer.

Q Were both installed? A Yes, sir.

Q And this sewer that Mr. Carr questioned you about I presume he referred to the sanitary sewer? A Yes, sir; he did.

Q These sewer pipes ran to a manhole at 11th and Surf Place, is that right? A That is right.

Q What was this manhole? A That was the pump that was submerged by the City of North Wildwood for raising the sewer from a lower level to a higher level.

Q And that was part of the then existing sewage system of North Wildwood? A Yes, sir.

Q Did you run your pipes into that manhole? A Yes, sir.

Q Where was this obstruction that you were asked about by Mr. Carr and Mr. McCarter? A It was the side wall of the chamber, the pump chamber, and connected directly into the pump chamber.

Q Then that was an obstruction in the sewage system of North Wildwood? A Yes, sir.

Q Barring sewage that might accumulate in this pump chamber from going over into the Wildwood system, is that correct? A Into the North Wildwood system; yes, sir.

Q But there was nothing to prevent the sewage from going into this pump chamber?

Mr. McCarter: I object, as leading.

The Court: It is very leading.

Q Was there anything to prevent the sewage from going into the pump chamber? A Not if we were allowed to make connections, no.

Q A minute ago, Mr. Weir, I think you said to me that you had run your pipes into the pump chamber? A We had.

Q Was there anything that was in the pipes went in the pump chamber, yes or no? A Except a little bit of the last wall.

Q This pump chamber was part of the sewerage system of North Wildwood? A That is correct, North Wildwood, yes.

Q I ask you if you had run your pipes into that chamber? A Yes.

Q Did you? A Yes.

Q What do you mean by running them into there, did you run them physically into the chamber or up to the chamber, which? A Up to it, into and up in it, not all the way through it.

Q So that the wall that obstructed the flow of sewage from the pipe into this pump chamber was the wall in front of the pipe, wasn't that correct? A That is correct.

Q Who prevented you from tearing out that wall? A State Board of Health.

Q Did the City of Wildwood ever object to your tearing out the wall? A Not to my knowledge and belief.

Q Did they ever try to prevent you from doing it? A Not to my knowledge and belief.

Q What did you get from the State Board of Health? What did the State Board of Health do that prevented you from tearing out the wall? A State Board of Health objected—

Mr. Carr: I object. What did they do?

The Court: Sustained.

A That is what I am trying to answer, Mr. Carr.

Mr. Carr: If your Honor please—

The Court: I will sustain the objection. What did they do?

A They objected to making the connection.

The Court: Let that be stricken. What did they do?

A They objected to making the connection.

The Court: Let that be stricken. You are drawing a conclusion. What did the State Board of Health do?

A I don't know how to answer it.

The Court: Witness cannot answer the question.

Q Were you served by any notice from the State Board of Health? A Yes.

Mr. Carr: That is probably leading.

Q Have you got it here? A No, I haven't got it.

Q The pipes were brought up to this manhole some time in the summer of 1926? A Yes, sir.

Q By the summer of 1928, was the wall in the manhole removed? A I believe it was.

Mr. Carr: I object to what you believe.

The Court: Sustain the objection.

Q Can you tell us, not what you believe, can you tell us? A Yes.

Q It was? A Yes.

Q Could the pipes in the Ryan tract have been used for sewerage purposes between the summer of 1926 and 1928 as the condition then was? A Yes.

Q And that irrespective of the fact that this partition continued in the manhole? A Yes, sir.

Q Why was that? A For the simple reason why a 12-inch pipe don't catch up, or will carry

many, many gallons of sewage for a year or two, three years, if they have to.

Q Now, as a matter of fact, were there any houses build upon the Ryan tract during the period from the summer of 1926 to the summer of 1928? A No.

Q Are there any there now? A No.

Q So that this sewer has never really been used—

Mr. Carr: I object.

Q —since it has been constructed actually?

The Court: I will permit it, if he can answer.

A Never has been used.

Q You were asked about some of the pipe breakage, and you said you expected it. Is this the usual method of constructing a sewer in some localities along the Jersey coast? A I prefer not to do it.

Q I didn't ask you that. I asked you if it was the usual system? A No.

Q What is the usual system? A The usual system is unless you have got a deep fill, to make your fill first and put your sewers in afterwards.

Q I asked you a different question, Mr. Weir. I asked you if this was the usual type of sewer. A Yes, usual type of sewer, yes.

Q This vitrified pipe sewer is such as is used in all of the small resorts along the Atlantic coast, isn't it? A Yes, sir; all vitrified pipe used.

Q Was it an approved material? A Pipe was good pipe, Class A pipe.

Q Was this approved by the various boards of health? A All I can tell you is it was a good American sewerage pipe, that is all I can tell you, best grade of pipe.

Q Now the only difference, then, in construction was that the pipe was laid first and the fill put it on top of it? A Put in on top.

Q Rather than excavating afterwards? A Instead of excavating afterwards, I do know that, so the big sewer that they talk about was in the ground and that was O. K.

Q Now, did the City accept the sewers as laid? A After the repairs were made, yes.

Mr. Carr: I object to that.

The Court: Yes, your method of proof, acceptance by the City cannot be filed. I sustain the objection.

Q The same type of material was used to replace the sewer, damaged sewer pipe, was it not? A Yes, sir.

Q Do you know whether the replacements were made at a proper and satisfactory manner? A I couldn't tell you, don't know.

Q You didn't make them? A No, sir.

Q Do you know who did make them? A Partly do and partly do not, because I wasn't there all the time.

Q But part you do know about who made them? A I. T. Wilson made a few of them, I should think I. T. Wilson did the rest of the work.

Q You don't know for whom they did the work, do you? A I think the Ocean City Title and Trust Company, but I won't be sure.

Harry E. Weir, re-direct.

Q Do you know when this breakage in the pipes occurred? A No, sir; I do not.

Q It was presumably some time after the system or the pipes were laid, is that right?

Mr. McCarter: I object to presuming.

The Court: Sustain the objection.

Q Was it done before the acceptance of the sewer pipes or afterwards?

Mr. Carr: I object.

The Court: Sustain the objection, not proof that they were accepted.

Mr. Richards: Isn't it possible for us to show that those pipes were in proper shape at the 6th or 8th of September?

The Court: There has been no proof of any acceptance.

Q Was it done before or after the acceptance by you of the sewerage work which I think you said was on the 8th of October, 1926?

Mr. Carr: I object, your Honor. There has been no statement of acceptance.

The Court: Technically it is not an acceptance; he gave a certificate that it was completed. To that extent it may have been an acceptance on his part. With that explanation I will admit it.

Mr. Richards: That was the question I was going to ask, if your Honor please.

A I gave an acceptance for payment to the best of my knowledge at that time, best of my knowledge and belief it was in good shape.

Q And as far as you could determine there was at that time no breaks in the pipes?

Mr. Carr: I object, your Honor. That is awfully leading, sir. Senator Richards is doing the testifying.

The Court: Very leading. I will sustain the objection. It is objected to as leading.

Q Could you tell whether or not at that time there was any breaks in the pipes? A None had appeared on the surface.

Mr. Carr: I object to the answer as not responsive to the question.

The Court: I will permit it to remain.

Q Now, were all of the improvements that were made on the property such as the graveling of the streets, laying of the sidewalk, the filling to grade, the leveling off and the installation of the sewer pipes done in the same manner and according to the same general plan as was done in the other various developments in the neighborhood?

Mr. Carr: I think it is very leading, if your Honor please, certainly invites an answer yes or no.

The Court: Permit the question.

A I consider the improvements done in a thorough manner in every respect.

Q That doesn't answer the question.

(Answer stricken by consent.)

(Question repeated.)

Harry E. Weir, re-cross.

A Yes.

Q Now, when did you complete your work and leave the job? A February or March, 1928—1927.

Q You were asked by Mr. Carr concerning what the City did with reference to these sewer pipes in August of 1927, and you said you didn't know, and you didn't care. What did you mean by that answer? A For the simple reason what I meant by that answer was for the simple reason—

Mr. Carr: I object, if your Honor please. We don't want, if your Honor please, the opinion.

The Court: I will permit it. You may answer.

A Well, I had not been on the work any longer, it was turned over to the City Engineer in North Wildwood, and he had charge of the work, that is the reason I didn't care anything about it.

By Mr. Carr.

Q Mr. Weir, you said in response to a question by Senator Richards as to the method of laying these pipes, that is to say, laying them before the fill, that you preferred not to do it that way. You did say that, didn't you? A Yes, I believe I did.

Q Will you tell me how your preference not to do it that way was overcome? A Why, if an engineer has time to finish a job he will always wait until the fill is made before he will put any sewers in, and besides that, to save the owner money.

Q It is preferable in all cases, then, to put pipes in after the fill has been made, is that true? A Well, it all depends. It depends—

Q Pardon me? A Depends on the depth of your fill over your sewers.

Q In a case like this, whatever the depth was, isn't it preferable to lay the pipes after the fill has been completed? A I should say one-half of this work could have been done in safety.

Q Mr. Weir, if you can answer my question yes or no, I wish you would. A I will answer your question no, if you want that question, Mr. Carr, put that way.

(Question repeated.)

A No.

Mr. Richards: If your Honor please, what is meant by preferable in this case? I can't understand the question.

The Court: The witness seems to understand it, answers no.

Q What is the answer? A No.

Q It is not preferable? A No.

Q Then it is better to lay the pipe first and put the fill on top of it and smash twenty-five per cent. of the pipe, that is the better way of laying it, isn't it? A You asked a combined blanket question if all this pipe couldn't have been laid preferably afterwards, and I say no.

Q I am going to ask you this, is it better so far as this job is concerned to put your pipe down before you fill, and put your material on

top of it, and bust twenty-five per cent. of the pipe and have to take it up, and make replacements, is that a better method of construction than to put your pipes down after the fill is in?

Mr. Richards: If your Honor please, that is objected to. It has a lot of assumptions in it for which there is no warrant in the testimony.

The Court: I will sustain the objection.

Mr. Carr: What were the unwarranted assumptions?

The Court: The point upon which it is overruled is this, you asked which is better, do you mean for the man who is laying it, the contractor, general public or whom? There are many elements in there, and I sustain the objection.

Mr. Carr: I will try to clarify it.

Q So far as the workman is concerned and producing a working sewer, a sewer that will work, is it better to put your pipe down before the fill, or is it better to put your pipe down after the fill has been made? A On this job in particular?

Q Yes, job just like this. A Not all of it, no.

Q Can you amplify that just a little bit? You haven't thrown much light on it. A Yes, 11th street from Surf avenue to Ocean avenue, all of Ocean avenue from 13th street to practically to 11th street and 9th street, and some other squares of the city, all the pipe was not broken by a long ways, where it was covered.

Q I am asking you whether you get a better result so far as the working sewer is concerned

by laying it after the fill has been made, do you or do you not? A Not all the time.

Q Do you ever get better results? A Sometimes, yes.

Q Then why did you say, "I preferred not to do it that way"? A Well, where it was exposed, out of the ground.

Q That is your only reason? A Yes, sir.

Q It is true that you did prefer not to do it the way you did? A Not all of it.

Q Your statement had no qualifications before, you said, "I preferred not to do it that way." A Where it is exposed.

Q You want to qualify it now? A You asked a question, Mr. Carr, you asked that question, Mr. Carr, where it was exposed, and I said where it is exposed, no. You asked that question yourself.

Q What I would like to know, you having testified in response to a question of Senator Richards that you preferred not to do it that way, I ask you whether you wish that answer to stand without qualification, or whether you want to qualify it. A Let it stand.

Q Stand as is? A As is.

Q I think you also said that the usual system is to make the fill first and put the sewers in afterwards; you did say that, didn't you? A I said that, yes.

Q Now, when you testified that this work was done in the same manner as other developments in the neighborhood, do you know of any other developments in the neighborhood where the pipe was put down first and the fill afterwards? A Yes.

Q Where was that done? A Wildwood Gables.

Q Wildwood Gables? A Yes, sir.

Q They had the same kind of trouble? A Yes, sir.

Q Beg pardon? A Somewhat.

Q Considerable trouble? A You happened to be on the work and know a little bit about it.

Q I don't know anything about anything.

The Court: Doesn't help the Court any, colloquy between witness and counsel.

Q But you did have trouble there, didn't you? A Some little.

Q Is that the only job that you know of around there where the sewer pipe was laid before the fill, Wildwood Gables? A There is a lot of times it is laid both ways, Mr. Carr. Personally you asked the question here point blank, I think what I mean by qualifying that answer was we never like to lay it above the ground unless it has got some covering over it.

Q You said in response to Senator Richards that this work was done in the same manner as other developments in the neighborhood. A I don't think he asked about sewers particularly, I thought he asked on the whole job as a whole.

Q You didn't mean your answer to apply to sewers generally, did you? A Yes.

Q When you said generally in the same manner, that you meant it to apply to that method? A If it was covered, yes, if the pipe was covered before the fill was made, yes.

Q That is, your position is that it is the general rule in developments in that neighborhood to lay the sewer pipes first and to make the fill afterwards? A Takes you much less cost to lay it, takes that much less for excavation.

(Question repeated.)

A Depends on the amount of fill on top of the pipe.

Q Well, you say it is the usual rule to do it, as you have stated? A Depending on the fill, on top of the pipe.

Q Beg pardon? A Depending on the fill on top of the pipe, your covering on top of your pipe.

Q What I am trying to find out is what is the usual rule for that kind of a job, is there any usual rule at all? A No, depends on the amount of fill you have got on your pipe.

Q And then there is no usual rule? A There is no usual rule on that, for an engineer to use his own judgment on it.

Q Then when you said it was done in the same manner as other developments in the neighborhood, you had no standard at all to go by, did you? A I don't know exactly what you are driving at, at that.

Q Perhaps not. Is there any usual method at all in the neighborhood? A No, an engineer uses his own judgment according to the time he has to do the work in.

Q Then when you say it was done in the same manner as in the developments in the neighborhood, other developments are done by methods that are not uniform, some ones one way and sometimes the other, is that right? A It would depend on conditions.

By Mr. McCarter.

Q Why didn't you in this particular case, Mr. Weir, fill first and then lay the pipes after-

wards instead of laying the pipes first and filling afterwards? A Why, for the simple reason that at that time, and you are well aware that the conditions for dredging around the country was difficult, it was all you could do to get a dredge, you couldn't get a dredge for love or money, and Mr. Ryan got a dredge on that job just as quick as he could possibly get a dredge there, Hill Dredging Company couldn't promise him a dredge until November, 1926, unfortunately, United Dredging Company had a dredge at Wildwood Gables, had struck a job where the single dredge couldn't do the work, had to have another dredge like it, and I understand Mr. Ryan was able to pick up that dredge, when he picked it up, that is the answer.

Q Therefore, under this set of circumstances you were willing to pursue what you thought was the best possible course? A He had a certain time limit to make his improvements, and everything was done to try to finish up on time.

Q But you thought it the least desirable course? A What do you mean least desirable?

Q English language. What is your understanding of it? A You mean the least desirable course what?

Q Can't you understand the question? A No, you haven't said I understood what you mean on it.

The Court: I can't see any difficulty to understand the question.

Q You thought the method that was pursued was the least desirable course? A You mean in laying the sewers?

Q Yes. A Yes, that is true.

Harry E. Weir, re-cross.

Q You testified that the reason the sewer was not laid in the alley south of 13th avenue was because there was a dispute with the City as to the location of the Boardwalk, is that correct? A That is correct.

Q Why did that prevent the laying of a sewer in the alley? A Because the Boardwalk would cut across there, and cut one alley out complete.

Q Well, if the Boardwalk dispute would prevent the laying of the sewer, why wouldn't it equally prevent the laying of a lateral by the lot owner? A Lot owner could lay a lateral, nothing to stop him on that.

Q If a lateral could be laid in the ground and not stopped by the dispute with the City along this alley, why couldn't a sewer be laid by the Ryan company? A Why, because didn't want to lay the sewer until the Boardwalk line was settled. That was the reason.

Q Didn't want to do it? A Until the Boardwalk line was settled, that was my doings, no one else's.

Q You were the engineer for the Ryan Company on the job. Now, I have in my hand these profiles produced by you which Senator Richards did not offer, and I would like to ask you to look at them again and identify them as the profiles concerning which Senator Richards questioned you. Are they the same ones? A They are the profiles prepared by the United Dredging Company and myself, I believe.

(Profiles marked B. 20 and 21 for identification.)

Q They were both prepared at the same time, Mr. Weir? A Yes, sir; different sections.

Q Different sections? A Yes, sir.

Q One supplements the other? A You continue along the map section from one, two and three, four, along there. I guess you will want the original plan with that, if you want that.

Q When you gave your certificate of the completion of the improvements on October 8th, 1926, you testified, I believe, that no defects in the sewer system appeared on the surface, is that correct? A That is correct.

Q You don't know or did not know at that time whether or not any of the pipes had, as a matter of fact, crushed in the ground? A No, sir; I did not.

Q You had reason to expect about twenty-five per cent. of them was crushed, didn't you? A I looked for it.

Q You referred in your re-direct by Senator Richards to an inspector who had some inspection to do in connection with the laying of the sewers and said that he was an inspector for the City as well as others. Was he employed by the City? A He was asked to be put there by the City. I paid the bill.

Q You paid the bill? A Yes, sir.

Q You said that in spite of the lack of connection with the North Wildwood system, this group of pipes in the Ryan tract could have been used two or three years for domestic sewage. How could it possibly have so been used? A Why, your sewer pipe will carry a considerable amount of water for two or three years before you ever have to drain it out, if you wanted to do it.

Q Where will it go to? A Stay in the sewer pipe.

Q Stay in the sewer pipe? A Yes, sure.

Harry E. Weir, re-cross.

Q And it would just gradually fill up? A Sure.

Q Wouldn't that effect sort of a cesspool? A Might, yes.

By Mr. Cole.

Q Mr. Weir, how do the breaks in the sewer pipe that occur after they were laid manifest themselves? A Why, sewer pipe, your Honor, Judge, is liable to show up any time a break could happen.

Q How is it detected or discovered? A Discovered on the street by caving in your gravel in the street.

Q Then there is a sinking? A Sinking, yes.

Q Can you recall when it was after these pipes were laid and completed that the first breakage manifested itself? A No, I don't. I couldn't tell you.

Q Was it a matter of weeks or months? A Oh, it was a matter of two or three months, anyhow.

By Mr. McCarter.

Q One question I neglected to ask you. When was this dispute with the City about the Boardwalk line determined, do you know? A The dispute started around October, 1925, and it lasted—

Q When was it settled? A I don't know.

Q When was the Boardwalk built? A 1927.

Q Is there any reason why the sewer can't be laid on the alley southerly from 13th avenue at any time since then? A I have had nothing to do with it after February or March, 1927.

Q You are unable to answer why it has not been built since? A I don't know.

By Mr. Richards.

Q Did you call it to anybody's attention that the sewer had not been put in in the alley in those two blocks? A No, I think that is my own neglect.

Q Now, with regard to this question asked by Mr. Carr, about whether or not the pumping in of the sand on top of the sewer was the least desirable course, was that the course that was followed at Wildwood Gables? A Part of it.

Mr. McCarter: I object, as immaterial what course was followed at Wildwood Gables.

The Court: The question, however, has been propounded several times whether done in the same manner as others in that locality. I will permit the question.

A Yes.

Q Was it done on any other development near this development that you know of? A Not that I know of.

Q Have you ever seen it done in the vicinity of Atlantic City? A Don't know much about Atlantic City. I know it is done in the past in a lot of places.

CHARLES W. CRAYTHORN, sworn.

Direct examination by Mr. Starr.

Q Mr. Craythorn, where do you reside? A Wildwood.

Q What is your occupation? A General contractor.

Q Do you know the location of the Ryan tract? A Yes, sir.

Q About which we have been talking today? A Yes, sir.

Q Did you have any contract with reference to the improvement of that parcel of land? A Yes, sir.

Q What particular work did you have to do with? A We graded off the sand hills on the brow of the beach, graded them into the low spots before, to get ready for the filling or dredging.

Q Before even the dredging was started? A Yes, sir.

Q What area of the tract did you work on? A On the brow of the beach, the whole length of it.

Q How far back from the beach? A Well, we took off the high spots, took the high spots off and graded them in westward.

Q How did you take them off? A With scoops and teams.

Q When did you commence? A The last of April.

Q What year, Mr. Craythorn? A 1926.

Q When did you finish your work? A About the middle of June, middle to last of June.

Q How much of the area of the tract did you fill in in that way? A Not over—not ten per cent. of it.

Q After you had finished that work was or was not the fill up to grade? A Where we took the top of the sand hills off and brought

it to grade westward, as far as the sand or surplus sand would reach.

Q Then after that the dredging was done? A Yes, sir.

Q Did you do any other work on the tract? A No, sir.

Q Nothing else? A No, sir.

Q And you were finished by the middle of June, 1926, is that right? A Yes, sir.

Cross examination by Mr. Carr.

Q Mr. Craythorn, is your company Craythorn & Nickerson? A Yes, sir.

Q Did you have the grading and graveling contract?

Mr. Starr: I object as not cross examination.

The Court: Sustain the objection, not cross examination.

Q What was your—did you have a contract for grading? A We were doing it day's work, percentage basis.

Q When were you first employed to do that work? A In April, 1926.

Mr. Carr: I would like to ask this witness a question that may not be cross examination, but, if objected to, I will have to ask the witness to remain.

The Court: Any objection to the question being asked?

Mr. Starr: I don't know what it is.

The Court: Don't answer this until it is determined.

Q Mr. Craythorn, was there a contract awarded to you or your company for grading and graveling?

Mr. Starr: Now, if your Honor please,—I don't want to object to that.

A Yes, sir.

Q When was that awarded? A That was—I am not certain about the date, but it was either in May or first—around the first of May or the last of April while we were working on the front.

Q Either April or May, 1926? A Yes, 1926, while we were doing work on the front, then we assumed the other contract.

Q Was there a written contract? A No, sir; verbal, had not any writing yet.

Q At any rate, your agreement was reached in April or May, 1926, for the grading and graveling? A Yes, sir.

COURTLAND STEELMAN, sworn.

Direct examination by Mr. Starr.

Q You live where, Mr. Steelman? A Wildwood Crest.

Q What is your occupation? A Contracting.

Q In business for yourself or with somebody else? A H. M. Steelman & Son, the firm was.

Q Are you the son? A Son.

Q Do you do general contracting? A General contracting.

Q Do you know the location of the Ryan tract at North Wildwood? A Yes, sir.

Q Was your firm employed to do any work in connection with the improvement of that tract? A To lay concrete sidewalks and curbs.

Q Covering what portion of the tract? A We started in at 6th avenue north and worked south.

Q How far? A I think it was about 10th or 11th street, I won't say sure on that.

Q Did you do all of the concrete work for the construction of curbs and sidewalks? A No.

Q Who else was employed? A Versaggi Brothers.

Q Did the work that you did and the Versaggi Brothers include all of the construction of curbs and sidewalks on the tract? A Yes.

Q When did you start your work? A In August, or last of July or the first week in August, 1927.

Q What year? A 1927—1926, I mean.

Q Which is it, now? A '26.

Q When did you finish your work? A In the first week in September, same year.

Q The work was entirely completed first week in September, 1926? A Yes, sir.

Q Was there any—were there any sidewalks or curbs built oceanward of the 15-foot alley? A That I couldn't say. We took our stakes from the engineer, and I really couldn't say the location of the alley.

Q Will you say whether or not the work that you did was done in a good workmanlike manner or otherwise? A Good workmanlike manner.

No cross examination.

Israel T. Wilson, direct.

ISRAEL T. WILSON, sworn.

Direct examination by Mr. Starr.

Q Where do you live? A Wildwood.

Q What is your occupation? A Contractor.

Q Do you know the location of the Ryan tract? A I do.

Q Did you do any work on that? A Yes, sir.

Q In the improvement of it? A Yes, sir.

Q What work did you do? A The grading and graveling of the streets.

Q What did you do in conjunction with the grading of the streets? A Why, leveled them down and got them in shape for the fill, to put the gravel on.

Q Did you do the work after the fill or before? A After the fill, yes, sir.

Q You leveled them off? A Leveled the streets and put the gravel on.

Q What have you to say as to the grade or the height of the grade of the streets that you finally covered with gravel? A Well, it must have been very good, the streets were accepted by the City of North Wildwood, so it must have been all right.

Q The grading that you did bring up the streets to grade in that vicinity? A Yes, sir.

Q When did you start to grade the streets? A Why, somewhere the latter part of July or the first of August.

Q When did you finally complete? A The final completion was within a week of September the 17th, that is, the completion of the streets. There was other work that I had to go back

and do, of course, before the streets were accepted.

Q The work that you did originally was completed in September, 1926? A Yes.

Q Is that right? A Streets; yes, sir.

Q Was the, or was or was not the grading of the streets and the graveling of those streets finished in September, 1926? A That is my recollection; yes, sir.

Q Did you do any other work excepting the graveling and grading of the streets? A After the streets were graveled and graded and before we could get them accepted, the sand had blowed over a lot of places, and we had to go over the streets and remove the sand that had blown on them out of the lots.

Q As of the time you finished the work, was the sand, had the sand blown from the lots on to the streets then? A Yes, sir; some places the streets were covered and had wind-rows of sand across them where it had blown.

Q Was the grading and graveling of that street done in a good workmanlike manner before the wind blew the sand from the lots? A Yes, sir.

Q When did you complete the work of the releveling after the sand had been blown from the lots, when did you complete that? A The releveling of what?

Q The streets? A You mean the cleaning of the sand from the streets?

Q Whatever it is, whatever you did I don't know. A Well, I imagine it was maybe a month, close to it.

Q That is, of the same fall, 1926? A 1926, that was taking off where it had blown on the streets, fast as you would put the gravel in, the

sand would blow a pile, and get a little pile started, and then, of course, before the streets were accepted we had to go over them and take this sand off.

Q You speak about accepting the streets, when did the Borough of North Wildwood accept the streets, do you know? A I don't just remember, some time, I think, that fall. Now, as I say, I don't know.

Q After you finished your work, was everything done in a good workmanlike manner? A Yes, sir.

Q Did you lay any of the gravel on the lots? A Yes, sir.

Q When did you do that work? A That was after that, I think that was—that was after we got the streets built and the sand kept blowing so fast Mr. Ryan decided he would have the lots covered to hold them from blowing any more.

Q You mean by that that the sand blew from the lots off the places that had been filled? A Yes, sir.

Q What did you do to correct that? A That is where we covered it with this gravel.

Q Gravel again? A Yes, sir.

Q And at Mr. Ryan's suggestion? A Yes.

Q When did you complete that work? A Well, that was, I imagine, a month or six weeks later than the streets were completed.

Q Before you put this additional gravel on, were the lots graded up to grade? A Far as I know; yes, sir. Of course, I have nothing to do with that whatever, but I know that the lot of the sand was taken off.

Q The provision in this mortgage was that at the time the filling of the lot up to grade practically equal to the grade of the present

County road, was or was not that the condition before you put the initial gravel on? A I don't know the grade of the county road. I should say that it was.

Q The blowing of the sand occurred after that, is that a fact, after they had been graded and filled in? A Yes, sir; sure. That was before it was covered with this gravel.

Q About when did you finish that additional work of graveling? A That is the lot covering?

Q Yes. A I don't just remember, I imagine took around a month or six weeks, something like that.

Q Was it finished in the year 1926 or 1927, as you recall? A I think it was in 1926. I wouldn't be positive on that, but I think it was.

Cross examination by Mr. Carr.

Q You said that you did not know the grade of the County road, yet you say that it was, that is, that the grade was approximately that of the County road. You really didn't know the grade? A I don't know, no, the grade of it.

Q So that your answer there is more or less of a conjecture? A My understanding—

Q Your answer is more or less of a conjecture, is it not? A It is, yes.

By Mr. Starr.

Q How did the grade of the lots before you put the gravel on compare with the grade of the sidewalks? A Well, some places it was a little low and other places a little high, but, of course, in this pumping in you are bound not to get perfectly level, that is impossible.

Israel T. Wilson, cross.

Q Was there much difference in the grade or difference between the grade of the sidewalks and grade of the lots before you put the gravel on? A Some places there was but, as I say, the stuff blowed, of course, some spots made along there—

Mr. Carr: I object to him thinking and ask it be stricken out.

The Court: Yes.

By Mr. Carr.

Q When the gravel was put on, didn't it hold the sand from being blown? A Yes.

Q And that gravel was put on there probably by October or November, 1926? A I don't just remember when it was put on, put on some time in the fall.

Q I think you said it was about a month or six weeks after you had completed your street work, and that you said was in July of 1926 —September of 1926? A September.

Q I ask you now whether it would then be in October or November, 1926, that the graveling operation was completed? A I couldn't say, I don't know.

Q Bearing in mind the period of time you stated, a month or six weeks after the completion of the other work, doesn't that enable you to fix it rather close?

Mr. Starr: I object to that, your Honor is just as capable of determining that as the witness.

The Court: Sustain the objection.

Q Was it about Thanksgiving, 1926? A I couldn't say, don't remember.

Q You think it was in the latter part of 1926? A I don't remember.

Q Can you say it was not in 1926? A I don't understand your question, I don't know whether it was in 1926 or 1927, as I say. I haven't any way of remembering it.

Q Don't know whether it was in 1927? A No doubt it was either in 1926 or 1927.

Q Can't you fix that more closely than that? A No.

ROSS VERSAGGI, sworn.

Direct examination by Mr. Starr.

Q Mr. Versaggi, where do you live? A North Wildwood.

Q How long have you lived there? A Last twenty years.

Q What is your occupation? A General contractor.

Q Do you do business for yourself or associated with anybody? A Versaggi Brothers.

Q Who is your brother, what is the name of the brother? A There is five of them, want to know all of them?

Q No, I think I will let it go at that. Did you have any contract to do any improvements on the Ryan tract? A We had.

Q You know where the Ryan tract is, do you? A Yes, sir.

Q What work did you do with reference to the improvement of that tract, I mean your firm?

A We did the sanitary and storm sewer, curbs and sidewalks.

Q Talking about the curbs and sidewalks first, covering what portion of the area did you build the sidewalks and curbs? A I should say about sixty or sixty-five per cent., not quite sure.

Q On what streets did you build the sidewalks and curbs? A We began at 15th street and going towards 6th.

Q Began at 15th and ran towards 6th street? A Yes.

Q Now did you build the sidewalks and curbs on the front, ocean front, or back along Surf avenue? A Well, from Surf to a point about four hundred feet east of Ocean avenue.

Q When did you start work on the curbs and sidewalks? A I think we started around last week in July or the first week in August of 1926, but previous to that we laid some curb and sidewalk on Surf avenue.

Q I want you to tell me when you first did any work there? A 1925, before Christmas we laid some curb and sidewalk along Surf avenue.

Q How much? A For the whole entire length of Surf avenue.

Q That is the sidewalk and curb? A And curbs; yes, sir.

Q You started that work when? A We started that before Christmas in 1925.

Q When did you finish that? A We finished that same year because that is the only place was up to grade then.

Q So you finished that before the first of January, 1926, is that right? A Correct.

Q Then where did you start to work with the curbs and sidewalks? A Then with the

curbs and sidewalk then we started to lay after the tract was filled.

Q You mean after the pumping in occurred? A After the pumping in, the sand fill up the whole tract, then start to lay sidewalk and curb then.

Q When did you start that work? A That was last week in July, I think, the first week in August.

Q I didn't catch it. A Between the last of July, first week in August.

Q What year? A 1926.

Q When did you finish that work? A Somewhere around the first week in September, I can't recall exactly the date, because we was going in there, patching up some little few things in there, but I know was the first week, between the first and 10th of September, 1926.

Q Was the entire job completed between the 1st and 10th of September, 1926? A Yes, sir.

Q Was that work that you did there in the way of curbs and sidewalks done in a good, workmanlike manner? A Yes, sir.

Q Who gave you the grades for the construction of the sidewalks and curbs? A The engineer.

Q Mr. Weir? A Mr. Weir or his assistant, I can't recall that.

Q Were those sidewalks and curbs laid in accordance with the grades given? A Yes, sir.

Q When you laid the sidewalks and curbs in the summer or the fall of 1925, was the surrounding land up to grade or not, the lots and the streets? A They were all up to grade.

Q All up to grade? A Yes, sir.

Q Had the streets then been graveled? A Well, they was graveled, working at the same time was laying the curb and sidewalk.

Q That was going on at the same time? A Yes.

Q That work was completed between the first and the 10th of September, 1926? A Yes, sir.

Q Let's speak about the sanitary sewers first, when did you start to build the sanitary sewers? A I think was some time around December or January, after Christmas.

Q Can't you be any more accurate than that? A That was a little after Christmas of the 25th, came into the 26th year.

Q What? A That was about the beginning of 1926, 1926.

Q That is the sanitary sewers? A Yes.

Q When did you finish that work, of the sanitary sewer? A Some time in April.

Q What year? A 1926.

Q Was it all completed by that time? A It was from the property line on Mr. Ryan tract all over the whole tract.

Q Sanitary sewers were completed then? A From the property line of the tract up to the whole entire tract.

Q What do you mean by that, Mr. Versaggi? A The property line means about fifteen feet from the foot of the curb at the point easterly of Surf avenue, fifteen feet from the intersection Surf and 11th street.

Q And on that land how far is the various streets, 6th, 7th, 8th, 9th and so forth? A All over through the street wherever suitable supposed to be put in there.

Q How far toward the ocean did the sewer run, sanitary sever? A Was an alleyway on

about four hundred feet easterly of Ocean avenue.

Q Ocean? A Ocean, easterly of Ocean.

Q Now, will you say whether or not the work that you did of laying the sanitary sewers was done in a good workmanlike manner or not? A Yes, sir.

Q What sort of material did you use? A We used planks underneath for base foundation for the pipe work, pipe that was anywhere else.

Q Terra cotta pipe or iron pipe? A Terra cotta pipe.

Q Was the method of construction the same as you would pursue in other places of that same character? A Exactly.

Q When you completed that work, I don't know whether you have given us the date or not, completed the sanitary sewers, was there any indication of collapse of the pipes on the surface? A None I know.

Q Did you examine the surfaces of the streets where the sewer pipes had been put in to see whether any of the pipes had collapsed when you finished the work? A We did not. I didn't notice any, anyhow.

Q You didn't notice any? A No.

Q Did you make any inspection, did you look it over to see whether any broken and collapsed, or if there was and holes in the street caused by the collapsing of the pipes? A You can't notice any crushing, anything of that kind unless sewage in action.

Q If sewer pipe collapses, would it manifest itself on the surface of the street? A Naturally.

Q Did you see any place where that collapsed? A No, sir.

Q So far as the storm sewers are concerned, tell us what sort of construction that was. A About the same methods of the sanitary sewer, except a larger size pipe.

Q How large were those pipes? A About fifteen-inch concrete pipes.

Q How were they laid in the ground, in planking same as the other? A Exactly.

Q On what streets were the storm sewers laid? A Be laid on 15th street from Ocean towards the ocean, towards the beach.

Q On 15th street? A Yes.

Q On any of the other streets? A 9th street also.

Q Anywhere else on 9th street? A Front portion, from Ocean avenue towards the beach.

Q On any other street? A I don't know whether was at the intersection Ocean and 9th avenue towards 10th, they wanted drainage from 10th street down to 9th, then on to the ocean.

Q Were those storm sewers laid so that they sloped toward the ocean? A Water cleared; yes, sir.

Q Water cleared would run down the pipes toward the ocean, is that right? A Yes, sir.

Q Did you give us the size of those pipes? A Fifteen inches.

Q Was that work done in a good workmanlike manner or otherwise? A Yes, sir.

Q When did you start on the storm sewers? A After we laid the sanitary sewer, but at the same time when we recall, maybe, we was working both sewers at the same time.

Q What month was it? A That was early in the spring, around March.

Q What year? A 1926.

Q When did you finish the storm sewers? A April the 15th.

Q It was all done by April 15th, is that right? A Approximately, yes.

Q Of 1926? A 1926.

Q After the storm sewers had been completed, did you look on the surface of the streets to see whether there was any manifestation of breaking pipes or collapsing? A We didn't notice any.

Q Didn't see any? A No, we didn't see any. We was working right along in the tract was filled, and I didn't notice any.

Q When you were laying these pipes, both the sewer and the sanitary, were the streets up to grade? A Yes, sir.

Q All been pumped in and up to grade, is that right? A Not when laid the pipes.

Q Not when you laid the pipes? A No.

Q How about the sewer pipe? A No.

Q Was the sidewalk and curbing in when you laid the sewer pipes? A No, sir; except Surf avenue.

Q Was there an inspector there to watch your work on the job? A Yes, sir.

Q Who was it? A I couldn't just recall,—Charlie Jordan.

Q Did you have a written contract or was it done by word of mouth? A Written contract.

Q Do you know by whom Mr. Jordan was appointed inspector? A That is something I don't know. I know he was looking after the work to be laid properly.

Q Did he inspect the sanitary sewers as well as the storm sewers? A Positively.

Q Was he on the job frequently? A Yes, sir.

Q Or every day or seldom? A Was on the job every day, worked as far as my recollection goes.

Cross examination by Mr. Carr.

Q What was the date of the written contract, Mr. Versaggi? A Beg pardon?

Q What was the date of the written contract, Mr. Versaggi? A Some time in December, 1925.

Q December, 1925? Have you got the contract with you? A No.

Q Weren't you notified to bring it?

Mr. Starr: I think the contract is here. If you will wait a minute we will produce it.

(Contract produced.)

Q I show the witness paper marked contract agreement dated this blank day of October, 1925, between William J. Ryan, Inc., a corporation of New Jersey, and Versaggi Brothers, relating to a system of sanitary sewers on the William J. Ryan, Inc. tract in the City of North Wildwood and so forth, and ask you whether that is the contract that you entered into for the sewers? A Yes, sir.

Mr. Starr: I don't think it is material to encumber the record, the date is the important thing, blank day of October, 1925.

Mr. Carr: But we prefer to offer it.

(Contract offered, received in evidence and marked Exhibit C. 9.)

Ross Versaggi, cross.

Q Did you learn later that a number of pipes had crushed or become crushed? A No, sir.

Q Never heard of that? A No, sir.

Q Up to the present moment did you ever hear that pipes or a large part of them had to be taken up—

Mr. Cole: I object on behalf of Esibill.

Q —have you ever heard up to the present time that any of the pipes had to be taken up and relaid?

Mr. Cole: Not cross examination.

The Court: Sustain the objection.

Mr. Carr: On this theory, he said he did it in a good, workmanlike manner.

Mr. Cole: Has heard about them breaking doesn't help us.

The Court: Sustain the objection.

Q You never knew that the pipes had become broken, or any of them?

Mr. Cole: I object. The same question.

The Court: Sustain the objection.

By Mr. McCarter.

Q Had Versaggi Brothers ever had any previous experience in laying sewers before this job? A Yes, sir.

Q How long have you been doing it? A About ten years previous to that.

JOHN S. MacNUTT, sworn.

Direct examination by Mr. Starr.

Q What is your name? A John S. MacNutt.

Q By whom are you employed now? A Colonial Trust Company, Philadelphia.

Q In December, 1926, for whom did you work? A Excelsior Trust Company, now merged with the Colonial.

Q I show you a piece of paper that is marked "Joshua Bodek," and I ask you what it is. A It is the original entry mortgage record of the Excelsior Trust Company.

Q Did you have anything to do with the making of that entry or the entries on that paper? A Yes, sir.

Q What? A I posted this entry—this is my handwriting.

Q Which entry is that? A That is the entry showing the payment of interest on December 14, 1926.

Q $1,904.70? A That is correct.

Q That is in your handwriting, isn't it? A Yes, sir.

Q And is this one of the records of the Colonial Trust Company, rather the Excelsior Trust Company? A That is right.

Q As it was originally and now merged with the Colonial? A That is the record.

Q Were these moneys received and entered by you on that sheet? A Yes, sir, posted from an entry.

Q What date? A On the authority of Mr. Litzenberg.

Q Mr. Litzenberg gave you the authority and this is the paper that is marked credit 12/14/1926

whose handwriting is that? A That is Mr. Litzenberg, assistant treasurer.

Q From that you made the entry in this, call it ledger account, do you? A That is the original record.

Mr. Starr: I offer it in evidence, if your Honor please, reason for that, Mr. Litzenberg was here and testified to the receipt of the money, but the entry was not in his handwriting, and some objection made, and now we have got the gentleman who made the entry so as to supplement it.

Mr. McCarter: We don't dispute that.

Mr Starr: Mr. McCarter does not dispute the fact of the payment by Bodek on the 14th of December, 1926 of $1,904.70 interest. That is right, isn't it?

Mr. McCarter: Correct.

Recess taken until 10 o'clock A. M., December 20th, 1929.

Atlantic City, New Jersey,
December 20, 1929.

Trial of the cause resumed at 10 o'clock A. M.

JAMES F. KOCH, recalled.

Direct examination by Mr. Starr.

Q What is your official connection with the Ocean City Title and Trust Company? A Treasurer.

James F. Koch, recalled, direct.

Q How long have you been treasurer? A Since the first of the year, 1926.

Q Were you treasurer at the time of the making of the improvements to the Ryan tract? A The majority of them.

Q The moneys that were expended in that operation of improvements passes through whose hands, to your knowledge? A Mine.

Q As the treasurer? A Of the Trust Company.

Q Did you make all the disbursements? A Yes, sir.

Q I wish you would state in a general way, without going into details, how much money in all was disbursed by the Ocean City Title and Trust Company in the various improvements to the Ryan tract.

Mr. McCarter: I submit, if your Honor please, that is immaterial how much money it cost to perform their contract, might have got a very good deal for it and might have been stung, but it makes no difference as between the complainants and ourselves.

The Court: That is probably true, but I can see no harm.

Mr. Starr: The materiality, there may be a question in this case of substantial performance and I think it is material on that ground.

The Court: I will permit it.

Mr. Starr: That question may arise for your Honor's determination.

Q Now, Mr. Koch, answer the question, please. A $233,000.

James F. Koch, recalled, cross.

Q Did that include the expense of relaying the sewers? A Yes, sir.

Q And was that paid by your company? A Yes, sir.

Q For whom? A For William J. Ryan.

Q And what was the expense incident to that? A In relaying the sewers?

Q Relaying the sewers. A $17,860.

Q And that money was disbursed when? A Pardon me. You mean the money for relaying the sewers?

Q Relaying the sewers? A 1928.

Q What portion of the year? A It covered a period from the first of May until the first of July.

Cross examination by Mr. Carr.

Q Mr. Koch, you have in your custody all of the papers and accounts relating to this transaction, haven't you? A Yes, sir.

Q Will you tell me what the contract price was for the original laying of the sewer, I think it would be a contract with Versaggi Brothers. A It is a contract, but in actual figures, says so much per foot, which that contract was submitted here yesterday.

Q Can you tell by reference to your account how much was paid under the original contract? A Sanitary sewers, $12,247.86.

Q $12,247.86? A $12,247.86.

Q That covered the entire cost of the sanitary sewer, is that right? A Yes, sir, that was all paid to Versaggi Brothers.

Q Was the relaying given to some other contractor? A Yes, sir.

Q Who was the contractor? A E. Riley Mixner Company.

Q And they were paid, I think you said, $17,860? A Yes, sir.

Q Do you know when they completed their work? A The Mixner Company, about the first of July.

Q Completed about July 1st, that would be 1928, would it not? A Yes, sir.

Q Were you down there on the ground while that work was going on, that relaying of the sewers? A At different times.

Q Generally speaking, was it in progress from May the 1st to July the 1st of 1928? A Yes.

Q Do you know whether on July 1st, 1928, or thereabouts, it was finally connected to the municipal system? A Yes.

Q I show you three photographs, Exhibits C. 6, C. 7 and C. 8 for identification, and ask you whether you recognize the scene depicted by the photographs?

Mr. Cole: I object, may it please your Honor. This is not cross examination, and I don't like to see the case go in in this way.

The Court: Sustain the objection.

Q Have you there a memorandum showing how your total of $233,000 was reached? A Yes, sir.

Q Included within that 233 was the expense of relaying the sewers, as I understand it? A Yes, sir.

Q Have you got a memorandum there showing what the graveling or re-graveling item amounted to? A I have the cost which we have itemized under streets and grading.

James F. Koch, recalled, cross.

Q The item I am referring to, Mr. Koch, is this: It has been testified that at a later period all of the lands were covered with gravel, that is, after the street work had been completed and then gravel was put on the ground. Can you identify that item? A I can't tell you the exact figures, I could probably at a later date get the exact figures, but it is in round figures $20,000, that is for covering the lots.

Q About $20,000, and when was that money paid? A During the early part of, or, rather, covered a period of the first of January, 1927.

Q January 1st, 1927? A And our last payment ran June the 10th of the same year.

Q That is June the 10th, 1927? A Yes.

Q Now was that work in progress between those dates, that is, from January 1st, 1927, to June 10th, 1927? A I would think so.

Q Did you make your payments as the work progressed? A We made payments on the engineer's, Mr. Weir's certificates, as they were presented to us.

Q There were payments made during the progress—

Mr. Starr: One moment, if your Honor please. If he is going to make use of the certificates.

Mr. Carr: You have these certificates here, haven't you? A Yes.

Mr. Carr: Only a question of his referring to them.

Q They are the engineer's certificates covering this graveling feature that I am now talking about? A Yes.

James F. Koch, recalled, cross.

Q Do you need to refer to them? A The exact amounts.

Q I want to get the dates between which the work or payments were made and the work done. A No, I have the dates here.

Q Beg pardon? A I have those dates itemized here.

Q When did the work of graveling begin, when did it end approximately. A I would think that it finished about June the first, from the dates that I have in my payments.

Mr. Starr: If your Honor please, this witness apparently, I don't know whether he has the necessary qualifications by way of knowledge to state that fact.

The Court: I think that is true. He can say when the payment was made.

Q Can you tell by reference to the engineer's certificates? A Yes.

Q Will you refer to them? A The dates which I paid the money?

Q Now, about the engineer's certificates, have you them here, are they here? A Yes.

Q Will you refer to the certificates? Suppose you take the first one and last one dealing with this graveling operation.

Mr. Richards: If your Honor please, may I point out that this item on which Mr. Carr is cross examining at this moment was not within the contract and it would seem to me to be quite irrelevant.

The Court: I think it is admissible. It was work that was apparently found either necessary or advisable to be done.

Mr. Richards: It was a purely voluntary thing, if your Honor please, that is the point about it, if he went in and did other work that was not under the contract.

The Court: I don't know whether it was or not, and it is just opened. I can't rule on that at the present time.

Mr. Richards: If your Honor please, that contract is before you.

The Court: The contract is before me, but it is not so definite a term as to be able to say without hearing the testimony. That contract that it shall be graded up to a certain point.

Mr. Richards: I beg your pardon, I think, if your Honor please, it says it shall be—

The Court: Substantially the same height as the County road.

Mr. Richards: Filled with sand, I think it says. It is in the mortgage.

The Court: And it has been testified to now that the purpose of this graveling was to retain the sand. I take it that that is a proper part of it certainly to say a thing it shall be done, if it is done in such manner that there is to be no permanent result from there, it is very questionable.

Mr. Richards: If your Honor please, let me point out to you that not only are all of these real estate developments done in the one way by pumping sand in them, and that has been considered performance in all these cases, the Legislature recognized that fact, and in the session of 1928 passed an act permitting municipalities that were so situated and where sand was drifting to go in and

upon the lots and to place gravel or other material there and assess it against the lots, showing that even the Legislature has recognized that this drifting sand is a part of these developments and that, to say that because we went in there and did what the Legislature has given the municipality authority to do, was any part of our contract, it would seem to me to be extending the meaning of this contract way beyond what the language says, and all the testimony here is that Mr. Ryan went in and did this voluntarily after the improvement was completed.

Mr. Cole: I would like to add, please your Honor, it seems to me the reading of that contract shows that it was only to the street, it rather excludes the notion that the lots are to be graveled.

The Court: No question about that, the streets were to be graveled, but I rather think it is permissible on this ground, it is admissible to divide, if counsel sees fit to do it, the payment of the $233,000 which was testified to on direct examination, that the entire amount expended was two hundred and thirty-three thousand, now if that was of importance to show that, it may be of importance on cross examination to show that some of that $233,000 was not work and labor performed in accordance with the terms of this contract.

Mr. Richards: If your Honor please, I concede that, but the point is that he is now asking him for the dates when it was completed, which has nothing to do with the question. He has already answered the other question.

The Court: I will permit the question.

Q Now, Mr. Koch, can you give me those dates? A I want to correct a statement which I have made in the dates, that that graveling was completed. I referred to only the dates on which we made payments. I have here the final bill presented to me by Mr. Woolson, and given by Mr. Weir, dated April the 8th, 1927.

Q April the 8th, 1928. May I see it a moment? That is the final bill, you say? A Yes, sir, it so states in the wording, I believe.

Q So that the work was completed approximately on April the 8th, 1927?

Mr. Starr: I object to that, if your Honor please. That is not the final bill is dated that day, there is nothing to indicate when the work was completed.

The Court: Sustain the objection.

Q Have you anything in your records to show when it was completed? A No, other than that.

Q This is the last bill rendered and is dated April the 8th, 1927?

Mr. Cole: I want to object to it as not being cross examination. I can't see how this is cross examination of the question how much money was spent for work.

The Court: I will permit it.

A Yes.

Q What is the first bill rendered? A That unfortunately I do not seem to be able to locate as itemized similar to this. I have other bills which I have paid to Mr. Woolson, but it does

not state exactly whether for re-graveling or whether it is gravel.

Q This may be objected to as not cross examination. I will ask the question that is now asked because I don't want to keep Mr. Koch here until this trial is over. Mr. Koch, do you know of your own knowledge from your familiarity with this work the approximate time when the graveling operation was completed?

Mr. Starr: Objected to, not cross examination.

The Court: Sustain the objection.

Mr. Carr: All right, I will ask Mr. Koch to remain.

Q Mr. Koch, I can't ask you that question at this time. I can ask it later, so I will have to ask you to stay.

By Mr. McCarter.

Q Mr. Koch, you have given us some of the items making up this $233,000. The sanitary sewers I have and the cost of relaying the sewers. I wish you would give me the other items that go to make up that sum of $230,000.

A Storm sewers.

Q How much? A $4,786. I don't think you are interested in the cents; just give you the even amounts?

Q That is near enough. Curbs and sidewalks, $35,989. Bulkheading, $6,577. Engineer's fees, $19,600. Dredging, $68,948. Streets and grading, $65,288. Relaying and repairing sewers, $17,860. Miscellaneous bills, $1,300.

Q Now, can you give me the dates of the first and last payments in each of those items?

James F. Koch, recalled, cross.

Mr. Starr: I object to that, if your Honor please, as not material.

Mr. McCarter: Your Honor has ruled, I think on that.

The Court: I have permitted it.

A Sanitary sewers, first payment December the 9th, 1925, last payment August 12th, 1926. Storm sewers, first payment April the 23rd, 1926, last payment October the 16th, same year. Sidewalks, first payment December 22, 1925; last payment October 16th, 1926. Bulkheads, first payment, May 21st, 1926; last payment July 16, 1927. Engineer's fees, first payment June 19, 1926; last payment March 12, 1928. Dredging, first payment July 1st, 1926; last payment August 7, 1926. Streets and grading, first payment August 10, 1926; last payment, January 26, 1928. Relaying of the storm sewers, relaying and repairing sewer, first payment May 17, 1928; last payment August 6, 1928. There are several various miscellaneous items I don't think you care for.

Q No, that is all, thank you.

By Mr. Starr.

Q The amount of $17,000 which you say was paid for relaying the sewers, did that include the storm sewers as well as the sanitary sewers? A Yes. You want me to answer that fully?

Q I wanted to know the facts, whether it included both. A It did, and it also included covering the streets after they were relaid.

Q Covering the surface of the streets? A Yes.

William C. Epler, direct.

By Mr. Carr.

Q How much of that was for the storm sewer? A That I can't tell you. That was done on time and material.

Q You don't know what proportion of this applied to the storm sewer and what to the sanitary sewer? A No, sir.

Q No record of that at all? A No, sir.

Q Have you any idea as to the relative proportions?

Mr. Starr: I object to that unless it is shown he has some personal knowledge.

Mr. Carr: I am trying to find out whether he has or not.

The Court: If he has knowledge, I will admit it, otherwise not.

Q Do you know anything about it? A No, sir, other than as the bills were presented to me.

Q And there was no separation? A No, sir.

Q But all of them were approved, I presume, by Mr. Weir, the engineer? A The relaying was not.

Q Who passed on and approved the bills? A The City Engineer, Mr. Rice.

WILLIAM C. EPLER, sworn.

Direct examination by Mr. Starr.

Q What is your name, sir? A William C. Epler.

Q Mr. Epler, are you the City Clerk of North Wildwood? A I am.

Q How long have you been City Clerk? A Three years.

Q Have you the minutes of City Council here? A I have.

Q Will you please turn to the minute of May, I think it is May 17th or May 18th, 1928, with respect to the acceptance by the City of the sewers on the Ryan tract? A It is May the 19th.

Q May the 19th, what year? A 1928.

Q Turn to that record, please, and read the minute of the proceedings of the City Council with reference to the acceptance of the sewers on the Ryan tract. A We have one here May 17th, 1928, letter received from William J. Ryan asking for certified copy, then we have report of Mr. Rice to the Honorable Mayor and Council.

Q I am asking, Mr. Epler, about the action which the City Council took on May 19, 1928, with reference to the Ryan sewers. A Report of Engineer Rice, sewer Ryan tract. We hereby certify the sanitary sewer extension in what is known as the Ryan tract in the following named sections of the street has been put in good condition in accordance with plans approved by the State Department of Health: 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th and 15th avenues, from Surf avenue southeasterly to the alley, Ocean avenue from 100 feet northeasterly of 6th avenue to 15th avenue, and in the alley from 100 feet northeastwardly of 6th avenue to 10th avenue. L. M. Rice, City Engineer.

Recommendation of the Sewer Committee: To the Mayor and Council: The City Engineer and the Inspector have reported that the sanitary sewer extension system in what is known as the Ryan tract is laid upon the following streets

named, and is now in satisfactory and workable condition. We hereby recommend to counsel that the same be accepted and taken over as part of the sewage system of the City: 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th and 15th avenues, from Surf avenue to the alley: Ocean avenue from 100 feet northeasterly of 6th avenue to 15th avenue, and in the alley 100 feet northeasterly from 6th avenue to 10th avenue. Clarence Bradshaw, Elmer Hewitt and Thomas Spencer, Sewer Committee.

Resolution accepting sewer system on Ryan tract:

Be it resolved by the Mayor and Common Council of the City of North Wildwood, in the County of Cape May; whereas the City Engineer and Inspector have reported that the sanitary sewers have been laid in what is known as the Ryan tract in the following named sections of streets and the said Sewer Committee has recommended same be accepted by the City as part of the sewage system.

Therefore be it resolved and it is hereby recommended same be taken over as a part of the sewage system of the City: 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th and 15th avenues from Surf avenue southeasterly to the alleys; Ocean avenue 100 feet northeasterly of 6th avenue to 15th avenue, and in the alley from 100 feet northeasterly to 6th avenue to 10th avenue, providing same meets with the approval of the State Board of Health. The above resolution offered by Hewitt and seconded by Bradshaw, vote being taken Hewitt, aye; Spencer, aye; Bradshaw, aye.

Q What page of the minutes? A 363 and 364.

Q Was there any action taken subsequently to that time, I mean after the 19th of May, 1928, or was that the last the Council did? A I have one here August 7th, 1928, report of engineer Rice and the resolution: I respectfully report since the adoption of the resolution May 28th, conditionally accepting what is known as the Ryan tract easterly of Surf avenue from 6th to 15th avenue, as a part of the City sewer system, that a leak that had developed at the connection to the sewer pit at 11th and Surf avenues, has been repaired, and that the trenches have been refilled with and as directed, to the grade of the under side of the gravel, and that the old gravel preserved with the addition of new gravel, has been put on to a depth equal to the original gravel and compacted. I would recommend that the completed work be accepted and that the Inspector appointed by the City be discontinued as of August 4th, 1928, the date the work was completed. L. M. Rice, City Engineer.

Q What was the action taken by the Borough Council on that report? A "On motion of Spencer, seconded by Bradshaw, report of City Engineer be accepted and copy of this report sent to the State Board of Health, also a letter sent by the City Clerk to State Board of Health asking for their approval of same."

Q What action did the Council take? A That was the action of Council, motion of Spencer, seconded by Bradshaw, above report of the engineer be accepted and copy of this report sent to the State Board of Health, also a letter sent to the State Board of Health asking for approval of the same.

Q Did you get any response from the State Board of Health with respect to approval? A

August 21st, 1928, a letter was received from the State Department of Health approving the report of Engineer Rice, and giving permission to use the sewers on the tract known as the Ryan tract. On motion of Hewitt, seconded by Bradshaw, same be received and filed.

Mr. Carr: Mr. Epler, we have no questions, but we will want you to remain with your books and records.

CHARLES JORDAN, sworn.

Direct examination by Mr. Starr.

Q Mr. Jordan, where do you live? A I live North Wildwood.

Q What is your occupation? A Well, fisherman, and I work for the sewer, for the City on sewer work, build manholes and attend to the sewers, repair them.

Q Did you have anything to do with inspecting the construction of the sewer on the Ryan tract? A Yes, sir, I was inspector there.

Q Inspector? A Yes.

Q Do you know who recommended your appointment?

Mr. Carr: I object as immaterial and irrelevant.

The Court: Sustain the objection.

Q How long were you there on the job? A I was there until the sanitary sewers was finished.

Q Did you start at the time they began to build the sanitary sewer? A Yes, sir.

Q Then you were there during the entire operation, were you? A Yes, sir, the sanitary sewers.

Q What were your duties with respect to the inspection? A I was to see that it was laid on the grade, no broken pipes put in, and see that they were cemented, the joints, properly.

Q Now what have you to say as to how the work was done? A I should say the work was done in first-class shape.

Q What was the method of construction? A Why, some of it was laid underground, some was laid on top of the ground.

Q Were any pilings used? A Yes, sir.

Q Some of it laid on piling? A I don't know whether you would call it piling or not, three by fours.

Q From your inspection and from your observation, were those sewers laid properly? A Yes, sir.

Mr. Carr: I object to that, if your Honor please.

The Court: I will sustain the objection.

Q From your observation, would you say whether or not the work was done in a good, workmanlike manner?

Mr. Carr: I object to that, if your Honor please.

The Court: I will permit that.

A Yes, sir, the work was done in first-class shape.

Q Were you there after the sand was pumped in? A No, sir.

Q Didn't make any inspection after that? A No, sir.

Cross examination by Mr. Carr.

Q Mr. Jordan, you said you were a fisherman, did you not? A Yes, sir.

Q Is that your principal business? A No, I just do that when I am not working for the City on the sewers, I just work on repair jobs, of course it is not steady work.

Q Have you had any other experience in inspecting sewer construction? A I worked on sewers, say, probably ten years off and on.

Q Had you ever inspected a construction job before? A Not on sewers. I have built them.

Q Had you ever inspected a job before where the sewer was laid, pipes were laid, before the fill? A No, sir.

Q First job of that kind you had ever seen, wasn't it? A Yes, sir.

Q When you left it, the pipes were all exposed, the fill had not occurred, I mean, when you completed your inspection? A Yes, sir.

Q Practically all on top of the ground, weren't they? A Yes, sir, some of them trussed up, some of them banked up, and covered with mud, some of them.

Q Some of them were trussed up and some of them were lying right on the surface of the ground? A Yes, what was lying on the surface were covered, we covered them that wasn't too high, probably a foot or two off the foot, they were covered with sod, but when was a little higher than that, we had them on trestles, piling, two by fours.

William C. Epler, recalled, direct.

Q And your knowledge of the sewer ends before the building was started? That is right, isn't it? A I beg pardon?

Q I say your knowledge of the sewer pipes, sewer system, ends before the filling began? A Yes, sir.

WILLIAM C. EPLER, recalled.

Direct examination by Mr. Starr.

Q Now, Mr. Epler, won't you turn to the minutes of the City Council of North Wildwood under date of October 27, 1925, and read the minutes on that, the minute that has reference to the North Wildwood tract of Ryan? A The Ryan map on the beach front?

Q Pardon me—that has nothing to do with the sewer, that is the map—refer to the minutes of November 17, 1925. A November 17, 1925, sewer plans of the Ryan tract—page 391, sewer plans for the Ryan tract.

Whereas the Sewer Committee and City Engineer have approved the plans and specifications for the extension to the sewer system southeasterly of Surf avenue and connect with the present sewer at Surf and 11th avenue, presented to Council by William J. Ryan, Incorporated, intended to be installed by said corporation.

Therefore be is resolved that the said plans and specifications be and the same are hereby approved by this Council, and that the City Clerk is hereby instructed to forward the same to the State Board of Health for approval by the Department. The above offered by Hewitt and

seconded by Bradshaw, roll being called, Hewitt, aye; Hahn, aye; Roberts, aye; Sayres, aye; the Mayor declared the resolution adopted.

Q Turn to the minutes of December 1st, 1925, please, and read what reference there is with regard to the sewer plans on the Ryan tract. A December 1st, 1925, a letter was read from the State Board of Health in regard to the sewer plans on the Ryan tract, on motion of Hewitt, seconded by Bradshaw, the same be received and filed.

Q Have you that letter? A I have a copy of that letter.

Q Read it, please. A "State Department of Health, Trenton, New Jersey, December 3rd, 1925, William J. Ryan, Incorporated, North Wildwood, N. J., Gentlemen"—

The Court: Just one minute, how can that be the minute of December first and the letter is dated December 3rd?

Mr. Richards: He is mistaken. The letter that that refers to is the minute of December 15th.

Q Is that the letter referred to in the December first meeting or the December 15th meeting? A This is the letter to William J. Ryan.

Q Was that letter read? A This was read to Council December the first.

Q Turn to the minutes of December 15th, 1925, and read. A I think it is—that was December 15th, 1925, another letter—a letter was read from the State Board of Health in regard to the Ryan tract and refusing to grant permission to lay sewers on the same. On motion of

Hewitt, seconded by Bradshaw, the same was received and filed.

Q Have you a copy of that letter which was read at the December 15th meeting? A This must be the letter, because it says, "Your application for permission to construct sanitary sewers"—

Mr. Carr: What is the date of that letter, Mr. Epler?

A This is December 3rd, 1925. This is the one that refers, this is in the minute of December 15th, this is the one: "Trenton, December 3rd, 1925, William J. Ryan, Incorporated, North Wildwood, New Jersey. Gentlemen, your application for permission to construct sanitary sewers in realty development located between Surf avenue and Atlantic avenue and between 15th avenue and 6th avenue, North Wildwood, was submitted at a meeting of the Department of Health of the State of New Jersey, held on December 1st, 1925. Inasmuch as the municipality of North Wildwood is under orders from this Department to construct a sewerage plant, and inasmuch as the construction of the said sewer lines covered in your application would increase the amount of pollution in certain waters of this State, it was, on motion, that no permission be issued to construct said sewers as requested at this time, and that notification be sent you as above. Very respectfully, H. B. Costello."

Q Was that the letter read at the meeting of December 15th? A December 15th.

Q When was the disposal plant built, if at all? A Not at that time.

Q When was it built later? A 1928.

William C. Epler, recalled, direct.

Q What part of the year was it? A It was finished November of 1928, the sewerage disposal.

Q When was it started? A Started in the early part of 1928, or the latter part of '27, I don't know.

Q Turn to the minutes of April 6th, 1926. A In reference to sewer disposal?

Q April 6th, I think it has to do with the resolution. A "Be it resolved by the Mayor and Common Council of the City of North Wildwood, County of Cape May, and State of New Jersey, that our Solicitor, Jonathan Hand, Esq., be and is hereby authorized and empowered and directed to consent to the entry of a final decree in proceedings directed in the Court of Chancery of this State by the Department of Health of New Jersey against the said municipality in the matter of the erection of a sewerage disposal plant in order to secure additional time within which to permit said sewer disposal plant, and that the said solicitor be given authority and power to represent the said municipality in any further litigation that may arise in relation thereto, and that he be substituted as attorney or solicitor of court in the place and stead of our former solicitor, Mr. Oliver Bright. The above resolution offered by Hewitt and seconded by Bradshaw. The roll being called resulted as follows: Hewitt, aye; Roberts, aye; Bradshaw, aye; Sayres, aye; Spencer, aye. All in the affirmative, the president declared the resolution adopted.

Q What is the page of that minte? A Page of it 451.

William C. Epler, direct (by defendants).

Cross examination by Mr. McCarter.

Q Will you turn to the date of April 5th, 1927, Mr. Epler, and see if there is some letter from Mr. Shotkin in New York City. A Is that April 5th or April 8th?

Q April 5th, 1927.

Mr. Starr: What is the page?

A 121.

Q What is the minute, please? Will you read it?

Mr. Cole: What is this, Mr. McCarter?

Mr. McCarter: More about sewers.

Mr. Cole: Is it a letter from Shotkin?

Mr. McCarter: Request for information and action on it by the Board.

Mr. Cole: From Mr. Shotkin?

Mr. McCarter: Yes, sir.

Mr. Cole: I object. I don't see what Mr. Shotkin may have written the Borough of North Wildwood has to do with or how it can effect us.

The Court: I will sustain the objection, as not cross examination.

COMPLAINANTS REST.

WILLIAM C. EPLER, recalled.

Direct examination by Mr. McCarter.

Q Turn to April 8th where you were when I had you there before. A 1927?

Q Yes. Have you a minute with respect to a letter from Bernard Shotkin? A Have I a letter in these minutes, page 107, April the 5th, 1927, a letter was read from Bernard Shotkin of New York City, asking for information—

Mr. Cole: I object, please your Honor, to any letter from Mr. Shotkin to the City. It cannot bind Mr. Esibill. I don't see how it can be relevant to the issue in this case.

Mr. Carr: If your Honor please, the minute will disclose that this letter was received asking for certain information and referred to the City Engineer, Mr. Shotkin, inquiring as to connection with the sewer line. Mr. Shotkin later followed that up by a request for a permit to connect and was refused by the proper authority in Wildwood, and we want to connect those things up.

The Court: I will permit it.

A "Letter was read from Bernard Shotkin of New York City asking for information as to whether or not the City of North Wildwood had allowed the connection of the sewer line for the Ryan tract. On motion of Bradshaw seconded by Spencer, the communication was ordered received and referred to the City Engineer."

Mr. Cole: That you say is April, 1925?

A That was April the 5th, 1927.

Mr. Carr: Was the meeting held on April the 8th? I am mixed in my dates.

William C. Epler, direct (by defendants).

A We had two meetings.

The Court: April the 5th was the first date called for?

A Yes, we had two meetings.

By Mr. Carr.

Q Was this letter received April 8th or April 5th? A April 5th.

Q Will you turn to the minutes of April 19th, 1927, referring to streets on the Ryan tract? A Report of L. M. Rice to the Mayor and Council, April 19, 1927. We have examined the following sections of streets on what is known as the Ryan tract and report that the same has been graded and graveled and ready for maintenance and acceptance by the City: 6th, 7th, 8th, 9th, 10th and 11th avenues, Surf avenue to the 15-foot drive north of 950 feet, 12th avenue, 320 feet southeast from Ocean avenue, 13th avenue, 280 feet southeast from Ocean avenue, 14th avenue, 295 feet southeast from Ocean avenue, 15th avenue northeast one-half 270 feet southeast from Ocean avenue, Ocean avenue from a point 100 feet northeast of 6th avenue to 15th avenue. Respectfully submitted, Elmer Hewitt, Thomas Spencer, Clarence Bradshaw, Street Committee, L. M. Rice, City Engineer. On motion of Hewitt, seconded by Bradshaw, the above report be received and filed."

With a resolution: "Whereas the City Engineer and Street Committee have reported certain streets or avenues, the same as shown on the map filed in the County Clerk's Office entitled Plan of Lots in the City of North Wildwood, Cape May County New Jersey situate east of

Surf avenue and the Atlantic Ocean and from 100 feet southwest of 5th avenue to 15th avenue, William J. Ryan, Inc., owners and developers, 401 Land Title Building, Philadelphia, Pennsylvania, as having been graded and graveled.

"Therefore, be it resolved that the section of the streets as mentioned and set forth in the said report be and the same are hereby accepted for maintenance by the City.

"The above offered by Hewitt and seconded by Spencer, the roll being called resulting as follows: Hewitt, aye; Bradshaw, aye; Spencer, aye; Eisenhower, aye. All voting in the affirmative, the President declared the resolution adopted."

Q Will you turn to the minutes of meeting of March 20th, 1928, please? A March the 20th, 1928?

Mr. Starr: What is the page?

A Page 328. Yes, a formal resolution was received from the State Board of Health in regard to the Ryan tract, and letter was received from the State Board of Health in the form of a resolution granting permission to connect sewers of the Ryan tract to those of the City of North Wildwood. On motion of Hewitt, seconded by Shivers, same be received and filed.

Mr. Starr: And there was a resolution?

A This letter was in the form of a resolution. I have it here.

Mr. Starr: I think we are entitled to have that to complete the record. However, if Mr. Carr don't want it to go in.

Mr. Carr: We are not pledged to secrecy at all.

Mr. Starr: The situation is that it completes the record.

"Department of Health, State of New Jersey, Honorable Herbert M. Shivers, Dear Sir: At a meeting of the Department of Health, State of New Jersey, held March 6th, 1928, the following preamble and resolutions were adopted: Whereas application has been duly made to Department of Health of the State of New Jersey as provided in Chapter 210 of the Session Laws of 1890, amended by Chapter 72 of the Session Laws of 1900, Chapter 213 of the Session Laws of 1904, supplemented by Chapter 135 of the Session Laws of 1907, and in accordance with Chapter 297 of the Session Laws of 1908, as amended by Chapter 309 of the Session Laws of 1912, and in accordance with Chapter 288 of the Session Laws of 1915 as amended by Chapter 94 of the Session Laws of 1922, and so much of Chapter 87 of the Session Laws of 1921 as herewith applies, and in accordance with requirements of the rules and regulations of the Department of Health of the State of New Jersey applying to the construction of sewerage projects in this State, for approval of the conditions under which the City of North Wildwood proposes to build sewerage works, consisting of sewerage extension in the above municipality on the tract known as the Ryan tract, situated east of Surf avenue to a point 100 feet south of 5th avenue, to 15th avenue, on the above streets, 5th avenue,

6th avenue, 7th avenue, 8th avenue, 9th avenue, 10th avenue, 11th avenue, 12th avenue, 13th avenue, 14th avenue and 15th avenue, as shown on plans entitled Plan of sanitary sewers, Ryan Tract, situated North Wildwood, New Jersey, dated September, 1925, a profile sheet, sanitary and storm sewers, proposed grades, elevations and approximate present surface, undated, typical design for rectangular manhole to be part of series, the above to be constructed according to specifications entitled, Proposal and specifications undated, according to resolution dated November 18, 1925, and letter dated February 28, 1928, in North Wildwood sewerage, from the above-mentioned lands, to be discharged into the sewerage system into the municipality sewerage disposal plant, and the affluent therefrom to the Hereford Inlet, therefore be it resolved the plans and specifications being satisfactory, application for the same are hereby approved and permission is hereby granted to the City of North Wildwood to build said works in accordance with plans and specifications.

Be it further resolved that permission is further given to operate the said plant, when constructed, in accordance with the said plans and specifications subject to the aforementioned laws, and further subject to the provisions of Chapter 23 of the Session Laws of 1918 and the rules and regulations of the Department of Health of the State of New Jersey applying under such law, the permission to operate being subject to the following conditions: First, the permit is revokable at any time or subject to modification or

change when and in the judgment of the Department of Health of the State of New Jersey such revocation, modification or change shall be necessary.

Two: The issuance of this permit shall not be deemed to affect in any way the action by this Department on any further application that may be made for permission to discharge additional sewerage or affluent in the waters of this State.

3. That both the sewer and sewerage disposal works as shown by plans approved this day shall be finally constructed in complete comformity with such plans already approved and amendments thereto.

4. That in the examination of plans and specifications the Department of Health of the State of New Jersey does not examine into the structural features or designs, such as thickness of concrete, adequacy of reinforcing, or the efficiency of any of the mechanical equipment or apparatus. The approval of plans and specifications does not include the approval of any of these features. Signed, D. C. Bowen, Director. Dated March 7, 1928."

Q Will you read the minutes of March the 28th, 1928, relating to the appointment of an inspector on the Ryan tract? A I have the minutes, March, 1928.

Q March 28th, 1928.

Mr. Starr: Look at page 332 and that may help you.

A Repairing of sewers, Ryan tract. The Mayor spoke of the work being done by I. T. Wilson,

and thought it was necessary to have an inspector upon the work. On motion of Spencer, the Clerk be instructed to write to Mr. Ryan to make an allowance to grant same, the Mayor to appoint one inspector and Mr. Ryan to pay the wages to said inspector.

Q Mr. Epler, I show you a letter dated March the 15th, 1926, I am informed the correct date is 1927, but it appears here 1926, addressed to Bernard Shotkin, Philadelphia, signed by D. C. Godfrey, Building Inspector for the City of North Wildwood. Is that Mr. Godfrey's signature? A That is Mr. Godfrey's signature, yes.

Q Is that the official letter head of the City of North Wildwood? A That is Mr. Godfrey's official letterhead.

Q Is he Building Inspector? A He is Building Inspector.

Q Was he at that time, that is, May 15th, 1927, was he the Building Inspector of the City of North Wildwood? A He was the Building Inspector at that time, yes, sir.

Mr. Cole: I object to it, it can't bind Mr. Esibill.

Mr. Carr: I offer the letter, if your Honor please.

Mr. Cole: I want to say to your Honor, my theory about this is we are bound to do only what our mortgage called for, and that if we did that we are not responsible for the acts—

Mr. Richards: May I also suggest to your Honor there is another reason the letter is not admissible, and that is the mere writing of a letter asking for a building per-

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mit could not result in any official action within the scope or authority of this official. Had they proceeded under the building ordinance of the City of North Wildwood and applied with their plans and specifications, then the question would have arose whether or not he could build and whether or not the thing that he was going to build required such a thing as a sewer connection, for instance. Now, I think that to simply write a letter and say, "Will you get me a building permit to build something," the nature of which is not disclosed by him, by having that letter here, then permitting this to go in evidence, saying no, we won't give you a building permit, merely on the strength of that letter, would clearly be erroneous, because the only legal way in which this man could have ascertained whether a building could be built on this place was to have presented the plans and specifications, and very likely then if it had been refused he would have had a remedy by mandamus, and certainly he didn't do that, so it is immaterial, and certainly is not the proper kind of proof in this case.

The Court: I will hear you, Mr. Carr.

Mr. Carr: Your Honor please, when a man goes to the Building Inspector and is told that no permit will be granted because of the fact the sewer is not connected, and so forth, it would be an idle thing to go and then prepare definite plans when you already had a ruling that no permits would be granted on account of the conditions existing there, we were entitled, of course, under

our contract to have a sewer that was usuable, and when we go and ask to build houses and they say no, we won't let you build houses there because there is no sewer, and your Honor may have observed and probably has observed that there is a restricted covenant in the deed which prohibits the use of cesspools, not being able to use a cesspool, and having no sanitary sewerage connection, we couldn't do anything, we couldn't build any houses. This is for the purpose of building houses, those lots were acquired, and were obligated as to a system, and obligated as to a sanitary sewer, and one of the elements of our case, we didn't get what we bought, to wit, the completed operation with the improvement specified, the sewer.

Mr. McCarter: In the first place—

The Court: Perhaps it might be wise for me to suggest my reason for the present ruling, might save some time. I will decline to accept in evidence this letter in the absence of any proof showing that the writer had any authority whatever to issue such a letter, to write such a letter.

Mr. McCarter: I can't answer that.

The Court: That is why I interrupted you, Mr. McCarter. The present condition of the proof is such the letter is inadmissible.

(Letter marked C. 10 for identification.)

Q Mr. Epler, do the records you have here contain any reference to the building inspector and his authority, any ordinance creating the office of building inspector and defining his duties? A I think Mr. Godfrey could answer

that. You see I haven't got the ordinance book with me.

Q Mr. Godfrey is here? A Yes, Mr. Godfrey is here.

Q Well, we can find out from him.

Cross examination by Mr. Starr.

Q Turn to the minutes of September 21, 1927—

Mr. Starr: If your Honor please, this I ought to have put in before, but I overlooked it, and it is not cross examination, has to do with a letter from the State Board of Health in respect to the disposal plant, page 221.

A September 21, 1927, a letter was received and read by the City Clerk from the State Board of Health, giving this city permission to proceed with the sewer disposal plant. On motion of Hewitt, and seconded by Spencer, the same be received and filed.

Q Have you the letter there? A I think I have.

Q Read it, please. A Department of Health, State of New Jersey, Honorable George A. Riddle, Mayor. Dear Sir: A meeting of the Department of Health of the State of New Jersey, held September 3rd, 1927, the following preamble and resolutions were adopted:

As provided by Chapter 210 of the Session Laws of 1899, as amended by Chapter 72 of the Session Laws of 1900, and by Chapter 313 of the Session Laws of 1904, and in accordance with Chapter 297 of the Session Laws of 1908, as

amended by Chapter 309 of the Session Laws of 1912, and also in accordance with Chapter 288 of the Session Laws of 1915, for approval of the conditions under which the City of North Wildwood proposed to build a sewerage works consisting of (see attached sheet) and to operate the plant for sewerage flow not to exceed 2,110,000 gallons per diem, additions to the sewerage system as shown on plan 25 and number 1, entitled, Addition to sewer system, map dated August, 1927, (4) entitled Addition to sewer system, dated August, 1927, (2) entitled Additions to sewer system details dated August, 1927; (3) entitled Additions to sewer system 10th street pumping station, dated August, 1927; (1) entitled sewerage treatment works general plan of site dated August, 1927.

(4) Addition sewerage treatment works plant dated August, 1927.

(1) entitled sewerage treatment works plan elevation 1125, dated August, 1927.

One, entitled sewerage treatment works, technical section, dated August, 1927.

(2) entitled sewerage treatment works, technical superstructure plan, dated August, 1927.

(6) entitled sewerage treatment works, pumping station, dated August, 1927.

(2) entitled sewerage treatment works, outflow, dated August, 1927.

Specifications dated 1927, and engineer's report on sewerage treatment plant additions to the sewerage system of North Wildwood, New Jersey, dated 1927.

Resolved that the plans and specifications accompanying said application be and the same are hereby approved and permission is hereby

given to the City of North Wildwood to build said works in accordance with the plans and specifications.

Be it further resolved that permission is further given to operate this said plant when constructed in accordance with said plans and specifications, the permission to operate being subject to the following conditions:

(1) That the permit is revokable at any time or subject to modification or change when and in the judgment of the Department of Health of the State of New Jersey such revocation, modification or change shall be necessary.

(2) The issuance of this permit shall not be deemed to affect in any way action by said department or any future application that may be made for permission to discharge additional sewerage or affluent in the waters of this State.

(3) That both the sewer system and the sewer disposal works shown by the plan approved this day shall be duly constructed in complete conformity with such plans or approved amendments thereof.

(4) That in the examination of plans and specifications the Department of Health of the State of New Jersey does not examine into the structural features of the design such as thickness of concrete, adequacy of reinforcing, or the efficiency of any of the mechanical equipment of apparatus. The approval of plans and specifications does not include the approval of any of these features.

(5) That the sewerage treatment plant is to be under the supervision of an operator holding a license for primary and secondary treatment plant, issued under the rules and regula-

tions governing the examination and licenses for sanitary treatment plant operators, approved April 6th, 1926.

(6) That a sound alarm as well as a visual alarm system be installed in the works pumping station.

(7) That the hydraulically operated head valve be so constructed that the same can be operated without shutting down and that it shall only be operated and in force for a period of two years from the date of approval.

Dated September 14, 1927. (Signed) D. C. Bowen, Director."

MAX SMITH, sworn.

Direct examination by Mr. Carr.

Q Mr. Smith, where do you live? A 2100 Walnut street, Philadelphia.

Q How long have you lived in Philadelphia? A About forty years.

Q Mr. Smith, do you remember attending a public sale held by William J. Ryan, Inc., at North Wildwood, on September the 5th, 1925? A Yes, sir.

Q Who was conducting that sale, if you remember? A Day.

Q Joseph P. Day? A Yes.

Q I show you a lithographed copy of map of certain lots at North Wildwood previously marked B. 9, for identification, and I ask you whether copies of that character were distributed at that sale?

Mr. Starr: I object, if your Honor please. I assume, if your Honor please, the object in offering this map is to take advantage of a statement here, "Improvements guaranteed full riparian rights."

Mr. Carr: I want to put it in evidence for whatever it may be worth.

Mr. Starr: I object to the introduction of this paper or any testimony in connection with it, because this is a suit upon a mortgage, or to foreclose a mortgage, and contains a provision with reference to the improvement, and all antecedent arrangements, either verbal or written, were merged in the contract which is evidenced by that mortgage, and it seems to me whatever occurred prior to the creation of that mortgage is immaterial here.

Mr. Carr: If your Honor please, this is evidential for some purpose, that is clear. I think later we can consider for what purpose, but certainly the maps handed out at the time of the sale are evidential as to whether or not there was a merger, that is a question probably that will have to be argued later.

The Court: I will permit the map: I agree at the present time with Judge Starr's suggestion that it can have no effect upon the contract made unless there is some ambiguity in the contract.

Mr. McCarter: Might I have something to say on that, these purchasers and mortgagors really stand, at least my client certainly does, not only a contract but on direct representations. Now the law, as I under-

stand it, is very well settled, that no matter what the parol evidence rule may be, as to the merging of all antecedent agreements in the final and completed contract, it certainly does not prohibit a person who has been misled by misrepresentations from relying on these collateral misrepresentations as a ground of relief on the basis of equitable jurisdiction from fraud.

The Court: I will permit the map. The effect of it I will have to consider.

(Question repeated.)

A Yes, sir.

Q Was a copy of such map handed to you at the sale? A Yes.

Q And prior to your making purchases? A Yes, sir.

(Map offered in evidence.)

Mr. Starr: My objection will be noted.

Mr. Cole: Of course, I have the same objection on the part of Mr. Esibill.

(Map admitted and marked Exhibit B. 19.)

Q Mr. Smith, you say you attended the Joseph P. Day sale on the Ryan tract at North Wildwood on the 5th of September, 1925? A Yes, sir.

Q What was the condition of the land at the time of the sale? A Why, it was just a lot of land, no improvements there or anything, just a lot of wild land like, you would say.

Q Just wild, unimproved land, is that right? A Yes, sir.

Q Were there a large number of bidders at that sale? A Yes, sir.

Q You were one of the bidders, were you not? A Yes, sir.

Q Did you see any signs displayed at or near the place of the public sale? A About a square from the tent.

Q I show you a photograph, the top line of which reads, "William J. Ryan, Inc."

Mr. Starr: Wait a moment. I don't think it proper to have in the records by statements something that is not yet in by proof.

Mr. Carr: I am just identifying the top line.

Q I show you photograph C. 3 for identification, and I ask you whether you ever saw the original of that sign and if so where?

Mr. Starr: I object, if your Honor please, on the same ground as stated before, that any statements contained on this sign is merged with the making of the mortgage which contains the obligation with respect to the improvements, immaterial and irrelevant.

Mr. Cole: It may be a little premature, but we all know where this is leading. Now the mortgage that I am foreclosing by the counter-claim for Esibill provides when the money is to be paid, and I submit that there can be no proof here to affect that mortgage unless the testimony proposed is to go to a distinctly collateral matter, setting up some alleged fraud and fact set forth in the mortgage. My contention is that this proof is not collateral, this attempted proof of some

alleged false representation, because the terms of that mortgage show that our money is to be paid us not as to any certain date, but as to a certain event, and that event is the doing of certain work. Now this sign has on it when the work is to be finished. Now there is nothing in that mortgage that shows that we agreed to finish at any certain time. It may be argued that it should have been done within a reasonable time therefore wasn't done within that time, but I don't see how something that was said on the sign or some statement made before the execution of this mortgage can be binding, and I submit it is an effort to change the terms of this contract, not by setting up some distinct fraud that is collateral to the making of the agreement, but an effort to vary the terms of this mortgage.

Mr. Carr: If your Honor please, we do propose to show that this was a fraudulent statement of fact contained on this sign, that at the time this sign was displayed on September the 5th, no one of those statements was true, no sewer contract had been awarded to Versaggi, no sand fill contract had been awarded to the United Dredging Company, no contract had been made for the curbs, sidewalks and so forth, no contract had been made for grading and graveling. We propose to show that as a material misrepresentation of the fact and that it in reliance upon that we entered into these contracts, in other words, that is the fraud which attacks the very basis of the contract itself. It is not a question of merging. We don't claim after the July 15th date there

is nothing became absorbed in our final contract, which was dated November the 9th. They had one year in which to do that work. We agreed with Judge Cole that that part became merged, if there was a valid contract, but we set up the charges of fraud here, every one of these statements were untrue when made, and it was a vital thing to people who were going out there and looking at this waste land, and buying it at the price of city lots, to know that they were going to get this work done, and get it done by a definite time, and it was of vital importance to them to know that these various contracts had been awarded, so that there was a reasonable probability of performance on the part of the seller.

Mr. McCarter: On behalf of Mr. Bodek and his associates whom I represent, there is a further justification for the admission of this photograph. In Mr. Carr's case various individual articles of agreement, admissions of purchase that were signed at the occasion were merged in one large contract in which there was given a specific time for completion of improvements. That was not done in the case of Mr. Bodek, and his mortgage contained simply the clause that these improvements shall be made. Now, of course, that didn't give them a right to complete the improvements, when a contract is signed as to time the law implies it shall be completed in a reasonable time. The time which they advertised at the sale is certainly evidence of a reasonable time, because it is the time that they apparently thought was the time within which the improvements

could be completed, and it is the time that they held out. That is, therefore, a reason for the relevancy and materiality and competency of this sign as to Mr. Bodek and associates, beyond any reason advanced by Mr. Carr. I also want to point to your Honor's attention the fact in the counterclaim we filed, we have specifically set out and relied on this sign as inducing to the making of the contract and as a result of which we claim relief against the mortgage and the cancellation of the whole business. It is common practice for mortgages under foreclosure to be set aside for misrepresentations including the contract other than those, other than that contained in the mortgage. I can read among other cases a case in 99 Equity, decision by Vice-Chancelor Berry, where the representation was made that the sale of lots, that lot number 4 was a corner lot, or would be a corner lot, because a development like this lot number 4 was not the corner lot, when the street was cut through, and the mortgagor depended on the ground that was misrepresentation, and was held entitled to successfully defend by Vice-Chancellor Berry. I cite that case only as one example of which the books are full.

Mr. Richards: If your Honor please, in answer to Mr. McCarter's last citation, I want to point out the apparent error, because there is a signed contract by Mr. Bodek, to carry on the argument further, if your Honor will turn to the answer filed by Smith, after setting out all the matters that they propose to set out here by way of testimony, they

come to the sixteenth paragraph which reads as follows:

"These defendants further charge that the said lots are practically worthless and cannot be built upon, nor readily mortgaged, because of the non-completion of the aforesaid improvements; that the defendant Max Smith was induced to purchase said lots upon the representation and promise that the said improvements would be made, and that the failure and refusal of said William J. Ryan, Incorporated, to perform and complete such improvements is a gross fraud upon these defendants, because of which these defendants have heretofore rescinded and hereby rescind the contract between said defendants and Max Smith, and said William J. Ryan, Inc., and all instructions given thereunder and in connection therewith.

"Seventeen: These defendants are ready and willing to recovey said lots to William J. Ryan, Inc., after having been paid by it all sums of money paid by the defendants to William J. Ryan, Inc., with legal interest thereon, and the interest as aforesaid paid on said mortgages by these defendants."

Now it will be noted that there was no rescission pleaded, and there is no proof at the present time of any rescission excepting the rescission in the answering bill. Now I submit that they can't do this in this way. If there was a material fraudulent misrepresentation upon which they were entitled to have this mortgage rendered up and cancelled, they were obliged to do that in another proceeding. In other words, they were obliged, first of all, upon the discovery

of the fraudulent and material misrepresentation and the fraud, to show that none of these things were true at that time. Presumably they knew them to be true at that time—to have proceeded immediately. Now, they didn't do that. On the other hand, they continued to pay their interest and paid their interest up until December of 1927, long after, in fact, two years after this alleged misrepresentation was made. Now, their remedy, if they had a remedy, if they were entitled to a remedy, was to have proceeded here originally to have this cancelled, and I say that in the hands of the Colonial Trust Company at this time they are not entitled to raise the defense that there was fraud in the inception of that contract, that they can't do that in this foreclosure proceeding. I don't know what Judge Starr may have to add to that, but that is my position.

Mr. Starr: I think Senator Richards has stated the ground on which I made the motion to exclude the testimony.

Mr. Carr: If your Honor pleases, of course the Colonial Trust Company stands in no superior position here to that of Ryan. They stand precisely in Ryan's shoes, and Ryan had assigned to them by this mortgage a part of the consideration price which he received here. Much of what Senator Richards has said will appear later in the case, that is the question of our paying interest. We deny that we paid any interest whatever after we knew of the facts. This gentleman was sick in the hospital in Philadelphia. What he paid up to that time was

upon their representation that the improvements had been made. We will meet all of that when we come to it, but we are not through now. We say that we entered into this contract because they told us that these several contracts had been awarded, not would be awarded but had been awarded, and the reliance upon that statement, which was untrue in fact to their knowledge, but, of course, not to ours, we entered into these contracts and never knew that wasn't true even until it developed later on. That went on until some time in 1927. Mr. Smith lives in Philadelphia. He was sick in the hospital nigh unto death for months, and knew nothing about what was going on locally at Wildwood, but that we will come to later, but, if your Honor please, it is absolutely settled by a multitude of cases that a material misrepresentation of facts, acted upon by either part in the belief that it is true, is a ground for the rescission of a contract. May I say this as to the pleadings, if your Honor please, we set up in paragraph 3 of our bill for rescission the very words contained on this sign, and in the answer to number three, the Ryan Company admits that sign was there. The Trust Company, as would naturally be the case, say, "We have no knowledge or information," and call upon us to make proof thereof. Naturally if the pleadings indicate that that was not a proper issue here, they accept that issue, if your Honor please, and Ryan admits that that sign was there, that those representations existed. Now certainly you can't conduct a sale and stand up there and say,

"We have made our contract with the United Dredging Company for filling—"

The Court: If the statement you have just made is correct, the matter should be excluded. Why should I take time to have testimony that this sign is here if it is admitted?

Mr. Carr: It is not admitted as far as the Trust Company is concerned, if your Honor please.

Mr. Starr: There is no engagement or contract in the mortgage being foreclosed that Ryan would do anything with respect to these improvements. The only way in which the improvements are mentioned is, just as Judge Cole said, that the first instalment of ten per cent. is payable when the improvements are completed. Now, if these things occurred prior to the execution of that mortgage, they are material so far as the foreclosure of the mortgage is concerned, and if they constituted the contract between Ryan and these purchasers, it is an independent contract for which the purchaser would have a right of action against Ryan, but, in view of the fact that the mortgage itself contains no obligation on the part of anybody to make these improvements, but merely fixes a time that the first instalment of ten per cent. is due, if there is any breach or misrepresentation with reference to anything that occurred prior to the creation of that mortgage, that is an independent matter between the Ryan Company and these purchasers for which the Colonial Trust Company, the mortgagee, is in no way responsible. The question so far as these

mortgages is concerned, is whether or not these improvements were completed at the time this bill was filed; anything independently of that, it seems to me, is a contract not contained, so far as the mortgage is concerned, but is independent between the other parties for which the Colonial Trust Company would not be in any way responsible.

The Court: We are trying four separate cases. I am not prepared to now finally rule upon this matter as to its final effect. I will permit the photograph to be offered in evidence.

Mr. Cole: May it please your Honor, in order that we won't be renewing objections, will it be understood that this objection, which I think goes to the foundation of all the misrepresentations be an objection to all the testimony so we won't be said to be bound by any?

The Court: Without question you are entitled to that.

Mr. Starr: We ask the same privilege so far as the complainants are concerned.

(Question repeated.)

Mr. Carr: Meantime I will now offer the photograph which was used for identification.

The Court: I will sustain the objection at the present time.

(Offer withdrawn.)

(Question repeated.)

A At North Wildwood, the day of the sale.

Q And the day of the sale was, as I understand it, September the 5th, 1925? A Yes.

Q Did you read that sign? A I did, and particularly about the improvements.

Mr. Starr: I object, if your Honor please, to the voluntary statement.

The Court: Yes, let that be stricken. Read the sign?

Q Did you read all of that sign? A I did.

Q Was the sign there in the shape that it appears in Exhibit C. 3 for identification on September 5, 1925? A Yes, sir.

Q And prior to your making any bid at this sale, is that right? A Yes, sir.

Mr. Carr: I now offer it.

The Court: Subject to the objection heretofore made, I will admit it on that condition.

(Photograph admitted and marked Exhibit C. 3.)

Q Was any reference made by the auctioneer to the facts stated on that sign during the progress of the sale? A There was a reference made, yes.

Q What reference did he make? A He said that the improvements would be finished—

Mr. Starr: This taken subject to our objection?

The Court: Certainly.

A The improvements would be finished before July 15, 1926, look at the sign, he even mentioned it, looked at it, I don't know whether Mr. Day or his representative, he mentioned and

called attention to look at the sign because some people asked him about the improvements and didn't see the sign.

Q That is, the auctioneer conducting the sale, is that right? A Yes, sir.

Q Did you bid at this auction sale? A Yes, sir.

Q Do you know how many lots you bid in? A I don't know, I think it was eighty-nine or something like that. You have a record there.

Q About eighty-nine lots? A Yes.

Q In making your bid did you rely in any way upon the representations appearing in the sign? A Yes, sir.

Q At the sale did you sign certain memorandums presented to you by the auctioneer? A Yes, sir.

Q Are those the various memorandums which you signed at the time of the sale showing your bid and so forth? A Yes, sir.

(Papers offered in evidence.)

Mr. Cole: Mr. Carr, does it include the formal contract entered into?

Mr. Carr: A formal contract was entered into a few days later which really took over all.

Mr. Starr: Without taking time, it will be admitted, subject to our objection.

(Paper admitted and marked Exhibit C. 11.)

Q Now later and on September the 9th, 1925, did you enter into an agreement in writing with William J. Ryan, Inc., relating to the lots purchased at public sale? A I think so, yes.

Q I show you a paper dated the 9th day of September, 1925, between William J. Ryan, Inc., and Max Smith, apparently signed by Ryan Company, Inc., by Ryan, President, by yourself as an individual, and so forth, and having annexed thereto a schedule of a number of lots with a total purchase price of $134,125, and I ask you whether that is the agreement entered into on that date? A Yes, sir.

Mr. Starr: I suppose that would be accepted under the same arrangement as before?

The Court: Yes.

(Paper offered, received in evidence and marked Exhibit C. 12.)

Mr. Carr: I have a certified copy of the deed from Ryan to Smith.

Mr. Starr: That is to be taken with the same objection?

The Court: Yes.

Mr. Starr: I now offer in evidence original deed William J. Ryan, Inc., to Max Smith, dated November 9, 1925, and recorded in the Clerk's Office at Cape May Court House, Book 413 of Deeds, page 299.

(Deed admitted in evidence and marked Exhibit C. 13, subject to objection.)

Mr. Carr: I now offer in evidence certified copy of a mortgage dated November 9, 1925, Max Smith to William J. Ryan, Inc., and conditioned for the payment of the just sum of $67,830, the original of which is recorded in the County Clerk's Office of Cape May County in Book 230 of Mortgages, page 483.

(Certified copy admitted in evidence and marked Exhibit C. 14.)

Mr. Carr: I now offer in evidence letter from the Ocean City Title and Trust Company, dated May 5, 1926, addressed to Max Smith.

(Letter received in evidence and marked Exhibit C. 15.)

Mr. Cole: On behalf of Mr. Esibill, I am objecting to all these letters of the Ocean City Title and Trust Company. I don't see how they can bind anybody.

Mr. Carr: I now offer SR. 13 for identification.

Mr. Starr: I object to that, if your Honor please. It is a letter written by the Ocean City Title & Trust Company. It seems neither Ryan nor the complainant in these foreclosure suits would be bound by the statements contained in that communication.

Mr. Cole: I don't recall any proof in this case that justifies the Ocean City Title & Trust Company assuming to bind anybody with respect to these mortgages.

Mr. Carr: The testimony so far seems to be that the Ocean City Title & Trust Company had charge of the improvements, that moneys were paid to them and they were disbursing all the moneys and apparently acting as the agent for the Ryan Company in doing so. We are attempting to show, if your Honor please—

Mr. Cole: Would you attempt to show some authority?

Mr. Carr: We are attempting to show how our conduct was influenced by the state-

ments being given, that is, assurances. We continued making our payments.

The Court: I will sustain the objection to S. 13 for identification in the present condition of the proof.

Mr. Carr: If your Honor please, there is already in evidence letter addressed to Joshua Bodek from the Ocean City Title & Trust Company of the same general character, and offered by the parties here, recognize apparently the Ocean City Title & Trust Company. They have made the offer of precisely the same thing themselves.

The Court: They may do that, and if it is not objected to they still have the right to object to your doing it.

Mr. Starr: No, this is an entirely different set of facts in the two communications.

Mr. Carr: Your Honor, as I recall the testimony thus far, the Ocean City—first, there was an agreement in evidence here at our early hearing in September whereby there was deposited or to be deposited with the Ocean City Trust Company, Title & Trust Company, a sum of money. The Ocean City Title & Trust Company were to guarantee to the mortgagees the completion of improvements, and for that purpose they were collecting the moneys from these various contracts. The testimony further shows that they were the parties who disbursed the moneys for all of these improvements. Agreement BA. 1 in evidence, Title Company, in addition to the issuance of its title insurance policy insuring company as assignee of the said mortgages, hereby

agrees to and with the company, its successors and assigns, and hereby insures company, its successors and assigns, that all the improvements mentioned in the said mortgages will be completed and paid for on or before August 15, 1926, free and clear of any liens and claims of contractors, subcontractors, mechanics and materialmen, said materials constituting all the work and materials to be done and furnished upon the tract of land in North Wildwood, and then follows the exact language of the agreements themselves. Title Company will forthwith notify in writing all of the owners of said lots, that all the encumbrances existing immediately prior to the sale of the lots by Ryan to the various mortgagees named in said mortgages have been paid and discharged.

Title Company agrees that out of the consideration paid by Company for said mortgages, there will be set aside by the Title Company the sum of $145,000 which Title Company hereby agrees shall be used only for the payment of the said improvements and for no other purposes.

Title Company agrees to and with the Company and so forth that Title Company will issue in the future from time to time to the then holder of the said mortgage, Title Company's policies insuring such holders under new mortgages to be taken by them covering any lots released from said present mortgages under the terms of the release clause contained in the mortgage, and so forth.

It seems to me, if your Honor please, the whole contract of the Ocean City Title & Trust Company certainly warrants the inference that they were not mere strangers.

The Court: Let me see your letter that you are now offering.

Mr. Starr: The objection, I suppose the letter is offered to charge the complainant with some statements of fact made in that communication written by the Ocean City Title & Trust Company. Nothing in the contract or anything in the case to show that they had any authority whatever to bind the complainant by any statement as to the matters connected with the litigation. Of course, they were to do certain things in the way of making advances, but that is not to create them general agents so that they have any authority to make any statements to bind this complainant.

The Court: Sustain the objection. I see nothing in this that authorizes the Ocean City Title—

Mr. Carr: May I add this, if your Honor please: The Ocean City Title Company was the company collecting the interest on these mortgages up to that time. They later assigned them over to the Trust Company in Philadelphia. It certainly has appeared here that the Ocean City Title Company did have in its possession several hundred thousand dollars, that it did supervise all of these improvements, that it made all the payments on them, so I can't see why they are not authorized to make that statement.

The Court: If counsel had not interrupted me I could have completed my state-

ment, with this, that there is nothing in the agreement or nothing yet proven which authorized the Ocean City Title Company to make any guarantee as to when these improvements shall be completed, which is one of the essential items in that letter. That is my basis of overruling the offer.

Mr. Carr: Well, if your Honor please, isn't it admissible on this theory, the Ocean City Title Company sent us a notice upon which they requested us to make payments. We in reply say we are making these payments, but we are making them subject to these statements that you have made. It at least explains why, and at least does away with the assertion that we were going ahead and paying without any protest, they were the only people to pay to.

The Court: If your offer is now made that that letter is offered in accordance with the suggestion of the Court, there was no authority to guarantee that the improvement should be made, it presents a different question altogether from what it does offering the entire letter. If you offer the entire letter, I overrule it.

Mr. Carr: If I knew how to offer parts of it, I would, your Honor, but I am offering it for the purpose I mentioned, explanatory of our payments.

The Court: You limit the offer for that purpose?

Mr. Carr: Well, I—

The Court: It is useless to argue it further, then. I have ruled.

Mr. Carr: I will limit it for that purpose.

The Court: I will admit it for that purpose.

Mr. Starr: What is the purpose, if Mr. Carr will please state the purpose.

Mr. Cole: As I understand, counsel said his purpose now is to state why they paid the interest on the mortgages, in other words, a defense against our claim that he waived his right by paying the interest.

Mr. Starr: Is that the limitation?

Mr. Carr: Yes.

(S. R. 13 for identification admitted as above as Exhibit S. R. 13.)

Q Mr. Smith, after you bought these lots, where were you living? A Same place.

Q Philadelphia? A Yes.

Q Did you see these lots for—when did you see the lots after you had bought them? A Not until I think this year was the first time I saw it.

Q Not until this year? A July.

Q July of this year? Can you tell me what payments you actually made under the contract or purchase? A Yes. I paid $1,335 auction fees.

Q To the auctioneer? A Yes.

Q You mean for the auctioneer's fees and charges? A Fees. I paid on that same day a deposit of $13,412.50, at the time of settlement paid the Title Company $939.

Mr. Starr: I move that be stricken out, if your Honor please. That hasn't anything to do with the consideration.

Mr. Carr: We make a claim for it in our bill, if your Honor please.

The Court: I will permit it.

A Same day paid the cash at the settlement, $26,825.

Q How much do those several items amount to? A $42,511.50.

Q Did you make any interest payments after that time? A Yes.

Q Suppose you tell me what you paid? A On May the 9th, 1926, paid $2,034.90. May the 9th, paid $781.72.

Q They were interest payments, were they? A Yes, on two different mortgages.

Q Then what about all the interest payments? A December the 9th, 1926, paid $2,034.90. November the 9th, 1926, paid $781.72.

Q Did you make payment on May 4th, 1927? A Yes.

Q What was the amount of that payment? A $5,365.

Q To whom was that payment made, I mean what person? A Mr. Schorr, George Schorr.

Q Mr. George Schorr, this gentleman seated here? A Yes.

Q In what form was that payment of May 4th, 1927, made? A Some was paid and some was interest, and the other was on the principal.

Q Yes, but what I would like to know is how the money itself was made up, was it one check or several checks, or what was it? A No, several checks and a note.

Q How was that payment made up? A May 4th payment?

Q Yes. A Made up of different items—I know my check was thirteen hundred and, it was in four-fifths, divided in four-fifths, one-fourth of $5,365 was one of my checks.

Q How much was your check? A Thirteen and something, I don't know.

Q Were there several checks each in the same amount? A Yes, there were several checks, yes, and then there was a note for that amount.

Q Whose note was it? A Maurice Peikin, Peikin Brothers, Atlantic City.

Q Of Atlantic City? A Yes.

Q There were two checks and one note, each in the same sum, is that right? A Same amount, I think it was $1,341.25.

Q And they together aggregated $5,365, is that correct? A That is correct, yes.

Q And that payment you made personally, did you say, to Mr. George Schorr? A Yes, sir.

Q Will you now tell me what total sum you have paid, that is, the total of the figures you have just testified to? A All together?

Q Yes. A $53,509.74.

Q Now I ask you whether you paid any money either on principal or interest to anyone in this transaction after May 4th, 1927? A No, sir.

Q Mr. Litzenberg testified to payments received at his bank, the Colonial Trust Company, as follows: May 5th, 1927, $1,116.63. Some date in July, 1927, $99. October, 1927, $207.37. Making a total of $1,493, which he said was paid on account of the principal of the $26,000 mortgage. I ask you whether in fact you made any such payments to anyone? A Well, no, I didn't, but I think the note of Peikin was renewed several times and paid off in installments like, and I guess that is where these payments were made after that.

Q But you yourself made no payments whatever after May 4th, 1927, is that correct? A That is correct.

The Court: Wasn't that the agreement that was made when Mr. Litzenberg was on the stand and there was no question about these payments?

Mr. Starr: That had reference to Mr. Bodek's case.

Q Mr. Litzenberg also testified that by records of his bank, it appeared there was a payment made on account of interest on the $26,000 mortgage on November the 9th, 1926, of $52.11, and on June the 15th, 1926, there was a payment made on account of interest of $781.73. A What date?

Q June 17th, 1926. A We paid May the 9th here.

Q You paid May the 9th interest in full; is that right? A Yes, paid on both mortgages $781.72, and $2,034.90.

Q Mr. Smith, I show you Exhibit S. 16, being certificate of Harry E. Weir, dated October 8th, 1926, already admitted in evidence. Did that come to you enclosed in some letter? A Yes, sir.

Q I show you Exhibit S. 4, letter from the Chelsea Trust Company, dated November 26th, 1926, addressed to yourself. You received and read that letter, did you? A Yes, sir.

Q Payments which were made by you—in making payments made by you after the date of the Weir certificate of October 8th, 1926, and after the date of the letter of November 26th, 1926, were they or were they not made upon the representations contained therein that the improvements had been completed? A Yes, sir.

Q Had you any knowledge at the time any of these payments were made that the improve-

ments were not completed? A Not until after I got that notice and the letter, I thought they were.

Q You made your payments, then, believing the improvements to have been completed? A Yes.

Mr. Starr: I would suggest, if your Honor please, decidedly leading.

The Court: Leading and also a repetition of what has just been testified to.

Q Now in the winter of 1926, that is, January, February or March, were you in good health? A 1926, yes. 1927 I wasn't.

Q Were you ill in 1927? A Yes, sir.

Q How long were you ill? A I was in the hospital three months, convalescing about four or five months.

Q Convalescing after that, you mean, four or five months? A Yes, sir.

(Recess taken until 1:30 o'clock P. M.)

AFTERNOON SESSION.

Trial of cause resumed at 1:30 o'clock P. M.

MAX SMITH, resumed.

Cross examination by Mr. Starr.

Q Mr. Smith, had you any knowledge of the Ryan tract before the day of the sale? A I did not.

Q You had never seen it before? A Never saw it before.

Q Were you present at the time of the sale? A Yes.

Q When did you next see the property? A Only at the time of the sale.

Q When did you next see it? A This last July, 1929.

Q So that you never visited the property from the time of the sale until July, 1929? A Correct.

Q Is that right? A Yes, sir.

Q You had some associates with you, didn't you? A I did.

Q Who were they? A Markowitz, Cohen, Peikin—there was five of us.

Q Were they down at the sale, too? A Some of them were there, yes.

Q When did they become interested in your purchase? A Same day.

Q You had what share? A One-fifth.

Q How did the other gentlemen— A Had one-fifth.

Q Each had one-fifth? A Yes.

Q This photograph that you have testified about, alleging to be a picture of the sign, where was that sign located? A It was facing Surf avenue, about a block from the tent.

Q Do you know where 15th street is? A Well, I might know, there was no streets laid out at that time, I wouldn't know any streets, I know what was a big piece of land.

Q Where was the tent located? A The tent was located further towards the Boardwalk.

Q Do you know where the tent was located with respect to the streets that were opened up at right angles to Surf avenue? A Well, is

6th street north or is 15th street south? I don't know.

Q That is right, where was the tent located? A I had been out there near 13th or 14th street, somewheres around that section. I can't just place it because if it was south it was around near 14th or 15th street.

Q Where was the sign located? A It must have been a block from there, facing on Surf avenue.

Q Block in which direction? A A block south—I mean north.

Q Which is it? A North, and towards Surf avenue from the Boardwalk or from the beach, possibly about 12th street.

Q You never saw this sign that you speak of but once, that is the day of the sale? A The day of the sale.

Q Is that right? A That is right.

Q Were there more than one auctioneer? A Only one that I know of.

Q Do you know who that was? Do you know his name? A It wasn't Mr. Day, I think it was one of his men. I really don't remember his name.

Q What did he say with respect to the improvements? A Somebody asked him about the improvements, and he says, "The sign will tell you that."

Q Is that all he said? A He says, "The sign will tell you that, that it will be completed July 15th, 1926."

Q Is that all he said? A That is about all that I can remember that he said. I remember that particularly.

Q Was that before you bought? A Just in the buying, yes, right at the buying time.

Q Was that statement made while the sale was going on, or before the sale started? A Before the sale started.

Q You made no inquiries or asked no questions? A No, I saw the sign.

Q Any of your party—

Mr. Starr: I move that last be stricken out as voluntary on his part.

The Court: Yes, it will be stricken.

Q Did any of your party make any inquiries of the auctioneer in your presence? A I really don't know. I know somebody did. I just don't know what party.

Q When did you make your first payment on this property? A Same day.

Q That was the auctioneer's fees? A Yes, same day or the next day.

Q Did you make a deposit that day? A Yes.

Q Of $13,412.50, is that the amount you paid for your deposit? A I believe it was paid in two days.

Q What do you mean by that? A Sale was carried over until the following day. I know the amount was that much, probably one or two checks, I don't remember exactly what it was.

Q You say you paid the Title Company $900? A At the time of settlement, yes.

Q Was that for title insurance? A I guess so. I don't know.

Q Don't you know? A Sure.

Q Who made the settlement for you? A Mr. Schorr made all the settlements.

Q And the settlements made where? A In Mr. Schorr's office.

Q And you were there, were you? A Yes, I was there.

Q And were your associates there? A Some of them.

Q Who of your associates were there? A I don't remember now.

Q Can't tell us? A No.

Q Cohen was there, wasn't he? A Cohen was there, yes.

Q Now at the settlement you gave Schorr a check for $26,825, is that right? A Possibly.

Q Can't you give us the figures? A That is the figures. I gave you the figures. I gave it before. I don't know whether it was in one check or five checks, that I can't tell you, but that was the amount.

Q Now, to what date have you paid interest on this mortgage being foreclosed? A Up until what date?

Q Up until what date? A The last interest was paid on May the 4th.

Q I didn't ask you that. I want to know the date to which interest has been paid. A Oh, to which interest has been paid?

Q Yes. A May the 4th, 1927.

Q Now, you don't mean that. These mortgages were dated November 9th, 1925, and under the terms of the mortgages the interest became payable every six months. Now was the interest due in May, 1926, paid? A That is the next due dates?

Q You just told me the mortgage was dated on the 9th day of November, 1925. How much interest have you paid, up to what date? A The last payment I made was May the 4th, that is all I know.

Q And that carried the interest to what date? A Until May the 4th.

Q Didn't you pay it every six months? A Yes, I haven't paid anything since, might have been due in April, I don't know, but it was paid in May.

Q I am telling you it was due in May and November. A Well, it was paid in May.

Q The 9th of May? A May the 4th, 1927, is the last interest I paid.

Q Did that pay up until the 9th of May, 1927? A Yes.

Q Are you sure about that? A I am not positive, no. I would have to figure out.

Q Can't you figure it out? I want to know the date to which the interest has been paid by you on this mortgage. Figure it out for us. A Yes, May. It was paid up until May, 1927.

Q Now the amount of the mortgage being foreclosed is $26,057.50. What was the amount of the other mortgage? A Sixty some odd thousand.

Q Do you know? A I don't.

Q When did you pay the first interest and how much did you pay? A First interest was paid May the 9th, 1926.

Q That was the first six months that came due? A Yes.

Q How much did you pay? A I paid two payments, $2,034.90 and $781.72.

Q The smaller amount was on the $26,000 mortgage? A I presume it was, yes.

Q The larger amount was on the larger mortgage? A Yes.

Q Next payment of interest was when? A December.

Q What year? A Same year.

Q You paid the same amounts? A Same amounts, yes.

Q And were they both payments made on the 9th of December? A Yes.

Q What? A Well, I have got down here December 9th and November the 9th. It might have been December.

Q Which one was it? A I don't know, either one.

Q That payment matured or became due on the 9th of November, 1926, did it not? A It was due on the 9th of November, yes. I guess we possibly paid the smaller one on the 9th of November and the larger one on the 9th of December.

Q Have you got your checks here? A No, I haven't. I have got here November 9th, $781.72, December 9th—

Q What are you reading from? A From a slip I got here, records of what I paid.

Q What did you make the records up from? A From my own records.

Q Your books? A Yes.

Q Now, did you pay any more interest on these mortgages, either of the mortgages? A I paid on May the 4th, 1927.

Q Interest? A Interest and part of principal.

Q How much did you pay interest and how much principal? A I paid $5,365.

Q How much interest and how much principal? A I haven't got that figured out.

Q You don't know? A No. The interest would be $2,034.90, $781.72. The difference is on the principal.

Q I am trying to find out, Mr. Smith, whether it was principal or interest or merely on principal. A No, it was principal and interest.

Q Did you write a letter to Mr. Schorr to indicate what it was about? A No, I gave Mr. Schorr the money, he knew all about it. He knew what it was for.

Q And you went to Mr. Schorr's office and gave him a check or several checks? A Yes.

Q Is that right? A Yes.

Q Get a receipt? A I suppose I did.

Q Don't you know whether you got a receipt or not? A I don't, no.

Q I show you Exhibit S. 9, a letter addressed to you, dated May 4, 1927, read that letter and see whether that covers the moneys which you paid at that time. A Yes, sir.

Q Now you are mistaken, aren't you, when you say part of that money paid to Schorr covered interest? A Interest and principal.

Q Read the letter and tell me whether it covers any interest at all? A I see now that it is only principal.

The Court: I can't hear you, Mr. Smith.

A It is only to pay half of the principal, or part of the installment. That is an error on my part.

Q Then it is a fact, isn't it, that you have only made two payments of interest on the mortgage? A Yes.

Q And the last payment of interest was in December, 1926, and that paid the interest up until November 9th, 1926. Is that right now? A One minute now. I don't know. I will have to look that up.

Q Have you any records there of the payment of any money in interest after— A I mean the last payment, whether it was principal and interest and part—no, that is Mr. Schorr's letter. That isn't my letter, you know.

Q It was given to you as a receipt for the money paid, wasn't it? A After it was paid, sure, he sent me a letter.

Q Did you make any complaint about the fact that the receipt showed it was a payment of principal and not interest? A Well, I might not have paid any attention to it.

Q I ask you again, I want to know to what date you paid interest on that $26,000 mortgage? A I will have to figure it out.

Q Well, figure it out and tell me. A How much were both mortgages?

Q One mortgage was $26,057.50, and I don't know anything about the other one. You will have to supply that.

Mr. Schorr: $67,830.

The Court: I want to give you all the time, gentlemen, but I am wondering what we are doing now.

Mr. Starr: Trying to find out whether there was any interest paid after November, 1926.

Mr. Carr: Judge, we don't charge any interest paid.

Mr. Starr: The witness has so stated, and I am trying to test his recollection.

Q Can you give us the information, Mr. Smith? A I can give you as near as I can get.

Q All right. A Looks like part of it was half the principal which amounted to $3,655, and the interest was $1,290, something like that.

Q Is that accurate or not? A Well, it is not accurate, no.

Q I ask you the question again, whether you were not in default in the payment of your

interest that fell due on the 9th day of November, 1926? A No.

Q Did you pay your taxes in 1926? A No.

Q Pay your taxes for 1927? A No.

Q And the last day that you paid any interest was when? A May the 4th, 1926.

Q Now which is it? A 1927.

Q I show you S. 9 again and ask you whether or not your recollection of the statements contained in that receipt are correct? A The amount of money, yes.

Q The whole business, the whole receipt, does it truthfully show what happened? A I don't know whether he applied that on the payment of the interest or payment of the principal.

Q You say you were sick. When were you taken ill? A January, 1927.

Q And you were away from your business how long? A I was almost six months.

Q Well, you got back in active operation by the first of July? A Around May.

Q May, 1927? A And then I went away again.

Q Before you were taken ill did you have any conversation with any of your associates with relation to the property in North Wildwood? A None whatever, no.

Q Before you were taken sick? A Yes.

Q These gentlemen paid their share of the money which was turned over to Schorr on the 4th of May, 1927, didn't they? A They paid their share, yes, all but one.

Q Which one defaulted? A Cohen, he gave some sort of—

Q Some stock? A Stock, yes.

Q That was not accepted? A No.

Q Did you have any talk with him at all about the Ryan operation down there at the time the moneys were paid? A Every time we paid it we were talking about the improvements, whether they were completed. They were promised.

Q All right, what was the subject of the conversation? A About the improvements, I just can't recall exactly.

Q Can't you tell us what was said between you, what you said to them and what they said to you? A What they said to me?

Q Yes. A Who is "they"?

Q Your associates, we are talking about them. A Yes, they kept on saying that the improvements were not completed.

Q When after May, 1927, did these gentlemen make these statements to you? A When after May?

Q Yes. A Why, even before they have made the statements to us.

Q I am asking you after. A I just can't recall, they seem to have gone down there and and looked at it, and came back and said it was in very deplorable condition, the sewer wasn't made, or something, I am not sure, and we stopped payment.

Q What say? A After that we stopped making payments.

Q Before May, 1927, did you ever talk with them? A Well, we kept on talking about the improvements not being finished, no.

Q How early did you talk about that? A Even right after July, 1926, when it wasn't completed.

Q How frequently did you meet your associates? A Possibly every time the interest dates were to be met.

Q Did you talk about the fact that the improvements had been completed each time you got together? A Each time after the 1926 in July, and when we paid it, we paid it with protest.

Mr. Starr: I move that be stricken out.

The Court: Stricken.

Q Each time you met these gentlemen, I am speaking now of your associates, after July, 1926, you discussed the question that the improvements were not completed? A Yes, sir.

Q Is that right? A That is right.

Q Did you personally make any investigation to ascertain in what respect they were not completed? A No, I did not.

Q Who did you leave that to? A Well, I was in no physical condition at that time or I couldn't leave my business.

Q That was in 1926, before? A There was nobody went down there to see it until 1927, after that.

Q You haven't answered my question yet; did you personally make any investigation? A No, I did not. I told you that.

Q Did you leave that to your associates? A No, they didn't, either. That is, I don't think they did. They never said they did.

Q Did you have any conversation with Mr. Schorr, when you paid the money, about the improvements not being completed? A I always did, yes, he always promised that they would be.

Q Wait a moment. I didn't ask you that. Don't want any voluntary statement. Did you talk to Mr. Schorr at the time you made the

payment to him in May, 1927, about the fact that the improvements had not been completed? A I believe I did.

Q What did you say? A I don't remember.

Q Can you give us approximately what you said? A No, I can't give you anything I said.

Q What was the subject of the conversation? A Well, I don't remember; I can't remember truthfully.

Q You know you talked about the fact that the improvements had not then been completed? A I really didn't know that, either.

Q You just said so a moment ago, didn't you? A I might have talked about it. I might not. I wouldn't say for sure, because I was very sick at the time, I will be candid with you, I didn't care much about improvements or anything else.

Q You visited Schorr at his office, did you not? A Possibly.

Q You were well enough to go down to see him? A Well, I wasn't just sick in bed at the time, but I wasn't well, I think Mr. Schorr could tell you that himself.

Q You can't remember what was said, then, about the improvements? A No, I really can't remember.

Q You never had enough interest in this property from the time the sale was made until July of 1929, to go down personally and see for yourself what the physical condition of the land was? A Well, I just didn't know at the time I guess something happened.

Q Can't you answer my question? A What was the question?

(Question repeated.)

A I had the interest in the property, sure.

Q Well, did you have sufficient interest to go down and look the property over? A I didn't have the time.

Q Were you in business all during that time? A Well, part of it, yes, and part I wasn't.

Q What part of the time were you out of business? A I went out of business in 1928.

Q Were you continually in business before that time? A Yes, sir.

Q From the date of the sale? A Yes.

Q Why didn't you go down to see it in 1928? A I don't know nothing. If my associates went, that was good enough.

Q That is it.

By Mr. Cole.

Q Do you know Mr. Bernard Shotkin? A Do I know him? Yes.

By Mr. Starr.

Q Did you ever make any application to any of the municipal authorities in Wildwood for a building permit to put up any buildings on this tract? A I did not; no.

Q Did anybody do it for you? A Not that I know of.

Q Did you authorize anybody to make an application in your behalf to put up any buildings on this tract? A I guess not. I wouldn't say. I don't know.

By Mr. Cole.

Q Do you know Mr. Shotkin intimately? A Not intimately, no.

Q What? A Not intimately.

Q How long have you known him? A I have known him for possibly ten years.

Q Did you see him there on the day of the sale when you bought? A Yes, sir.

Q Would you have made your purchases if you had thought that these improvements would not be completed by July 15th, 1926? A Possibly not.

Q Possibly? A Yes.

Q Can't you tell us whether you would or not? A Well, I would not, no.

Q You would not? A I would not.

Q They had to be completed by July 15th, or you would not have purchased, is that correct? A Yes.

Q That is correct, is it? A That is correct, yes.

Q Now, did you read the formal agreement you signed? A What was the formal agreement? When?

Q With Mr. Ryan for the purchase of the lots? A What time? What agreement are you talking about?

Q Don't you remember the formal agreement you made with Mr. Ryan? A Lots?

Q By him. A What date was that?

Q I show you Exhibit C. 12 and ask you whether you signed that? A When was that, what date?

Q Look at it. A Yes.

Q You signed that, didn't you? A Yes.

Q You read it? A Well, I might have read it. I don't remember.

Q Don't you know whether you did or not? A I don't know, chances are I did.

Q Did you notice that that agreement provided that this work was to be completed in one year after the date of the agreement, and the agreement is dated September, 1925? A Well, possibly I did see that.

Q Well, having seen that and having known that you were relying on the work being completed by July 15, 1926, did you find any fault with that provision in the agreement? A Could I get my money back?

Mr. Carr: Objected to as immaterial and irrelevant.

The Court: I will permit this question.

Q What is the answer? A Did I find fault with it?

(Question repeated.)

A Well, I really don't know. I couldn't answer that.

Q In other words, the fact that the agreement provided a different date and a later date for the completion of the work than that you relied upon made no impression on you at all, did it? A I—

Q Did it? Say yes or no. Did it make any impression on you? A Certainly it made an impression on me.

Q Was it favorable or unfavorable after you made the agreement? A Unfavorable.

Q Did you take it back to Mr. Ryan and tell him that was wrong? A No, I did not.

Q You accepted it, didn't you? A I did, yes.

Q You knew, of course, you were bound by the terms of that agreement? A I guess I did.

Joshua Bodek, direct.

Q You knew, of course, you couldn't get any more than that agreement provided, didn't you? A At that time, yes.

Q At that time? That is all.

By Mr. Carr.

Q Mr. Smith, I think you stated on cross examination that nobody went down to see it, meaning the land in question, until 1927. Did you say that? A I didn't go down.

Q You didn't go down at all? But did you say that nobody went down to see it until 1927? A Not that I know of. I really don't know.

Q When you made payment on May the 4th, 1927, had you any knowledge whatever that the improvements were not completed at the time you made the payment? A No, I did not, only from Mr. Weir's, that letter that we got from Weir, that all the improvements were made, that we took it for granted it was all right, engineer's agreement.

Q And you knew nothing to the contrary at that time? A No, I didn't.

JOSHUA BODEK, sworn.

Direct examination by Mr. McCarter.

Q You are one of the defendants, Mr. Bodek? A Yes, sir.

Q Where do you live? A Philadelphia.

Q What is your occupation, may I ask? A Builder.

Q Did you attend the sale? A Yes, sir.

Q When was that sale held? A Labor Day, 1925.

Q Did you observe any sign on the premises? A Yes, sir.

Q Where was the actual sale held, any tent or structure of any kind on the premises? A In a tent on the premises.

Q Can you give us in a general idea what portion of the tract as a whole that tent was erected on? A At the end of the tract, it was about 15th or 14th street.

Q On the southerly end of the tract? A That is right.

Q Where was this sign that you noticed? A About a block or two north of it.

Q I show you Exhibit C. 3 and ask you whether or not that is a picture of the sign which you saw?

Mr. Starr: Understood taken subject to our objection.

Mr. Cole: Taken subject to our objection without any renewal of it as an objection.

The Court: Certainly.

A Yes.

Q Did you notice the sign before you made any bids or purchases of lots? A Yes, sir.

Q Did you attach any importance to the sign? A Yes, sir.

Q Did you attach any particular importance to any portion of the sign or any of the statements thereon? A To the improvements and when they are to be completed.

Q You did purchase some lots, then? A Yes, sir.

Q Did you sign certain contracts in connection with each lot? A Yes, sir.

Joshua Bodek, direct.

Q I show you a group of yellow sheets, Mr. Bodek, and ask you to look at them and tell me whether they are the contracts of purchase which you signed? A Yes, sir.

(Papers referred to offered, admitted in evidence and marked Exhibit B. 22.)

Q On signing these various contracts, B. 22, did you make the deposit payments therein recited in each case? A Yes, sir.

Q Did you go ahead with the contract and closed and get a deed and execute a purchase money mortgage? A Yes, sir.

Q Do you recall when that took place? A Probably two or three months later.

Q I show you a letter dated November 5, 1925, addressed to you, 425 Market street, Philadelphia, signed Morris Wolf, for Wolf, Patterson, Block & Schorr, and ask you if you received that letter? A Yes, sir.

Q Looking at that letter can you refresh your recollection as to the exact date of the closing? A Yes, sir.

Q When was that exact date? A November the 9th.

Q 1925? A 1925.

Mr. McCarter: I offer this letter in evidence.

(Letter received in evidence and marked Exhibit B. 23.)

Q Previously to receiving this letter, Exhibit B. 23, did you receive a letter dated September 29, 1925, addressed to you from the Ocean City Title & Trust Company which I show you? A Yes, sir.

Mr. McCarter: I offer that in evidence.

Mr. Starr: I object to that letter, if your Honor please, on the ground we are not responsible for the statements contained in that communication, speaking now of the complainant, not bound by the statements made by the Ocean City Title & Trust Company.

The Court: I will permit it.

(Letter received in evidence and marked Exhibit B. 24.)

Q Mr. Bodek, you did attend at the closing, I understand? A Yes, sir.

Q Did you at that time make an additional cash payment? A Yes, sir.

Q What was your total cash payment for these lots purchased by you? A Twenty-seven —about $210.

Q Did you receive a deed on that date? A Yes, sir.

Q I show you a document and ask you if that is the deed which you received on that day? A Yes, sir.

(Deed offered, received in evidence and marked Exhibit B. 25.)

Q At the same time did you execute the purchase money bond and mortgage which has been put in evidence as part of the mortgagee's case? A Yes, sir.

Q Now, Mr. Bodek, after receiving the deed in November, 1925, did you pay any further installments or any installments of interest and of purchase money? A Yes, sir.

Q As testified to on the part of the complainant? A Yes, sir.

Q I show you Exhibit BA. 2, being a letter from the Ocean City Title & Trust Company dated May 5, 1926, addressed to you, and ask you if you received that letter? A Yes, sir.

Q I show you Exhibit B. 3, being a letter from the Excelsior Trust Company to you, and ask you if you received that letter? A Yes, sir.

Q I show you Exhibit B. 4, being a letter from the Excelsior Trust Company to you dated November 26, 1926, and ask you if you received that letter? A Yes, sir.

Q I show you Exhibit B. 5, being a letter from the Excelsior Trust Company to you dated January 21, 1927, and ask you if you received that letter? A Yes, sir.

Q I show you Exhibit B. 5, being a letter William J. Ryan, Incorporated, to you, dated October 14, 1926, and ask you if you received that letter? A Yes, sir.

Q I show you Exhibit B. 7, being a letter from William J. Ryan, Inc., to you, dated October 26, 1926, and ask you if you received that letter? A Yes, sir.

Q I show you Exhibit B. 8, being a photostatic certificate by Harry E. Weir, dated October 8, 1926, and ask you if you received that letter? A Yes, sir.

Q Did that come enclosed in any one of these letters? A I believe so.

Q Exhibit B. 7, did it not? A Yes, sir.

Q After the date of taking title when next did you go down to see the property in question? A Some time during the summer months of 1926.

Q After receiving the last of these letters that you have just identified, October of 1926, when next did you visit the property? A In February of 1927.

Q What was the occasion of your going then, why did you go down there then? A There was, I knew there would be another interest payment due, and I went down to find out in what condition the improvements had gone.

Q Now I show you Exhibit C. 4 for identification, being a photograph and ask you if you were present when that photograph was taken? A Yes, sir.

Q When was that photograph taken? A February the 27th, 1927.

Q Who also was present when that was taken? A Mr. Lipper, and Mr. Frankel, and the photographer.

Mr. McCarter: I offer this in evidence.

(Photograph admitted in evidence and marked Exhibit C. 4.)

Q Is this the same sign, eliminating any possible change in the painting of it, is it the same board structure that you saw there the day of the sale? A Yes, sir.

Q When you were down in the summer of 1926, was the sign in the condition which it was when you saw it the day of the sale or was it in the condition which appears in Exhibit C. 4? A When I was down when?

Q Summer of 1926, you testified. A It was in the condition of the picture I saw.

Q When you were down there February 27, 1927, was that the first time you saw of this sign in the condition appearing on Exhibit C. 4? A Yes, sir.

Q Now I show you a group of photographs marked B. 10, B. 11, B. 12, B. 13, B. 14, B. 15, B. 16, B. 17 and B. 18 for identification, and ask you to state whether or not those photographs were also taken on the Ryan tract on February 27, 1927? A Yes.

Mr. McCarter: I offer these photographs in evidence.

(Photographs admitted in evidence and marked Exhibits B. 10 to B. 18, inclusive.)

Q I show you Exhibit B. 10, is that the same sign as shown in C. 4? A Yes, sir.

Q Are you able to tell us just where Exhibit B. 11 was taken? A The exact street you want?

Q Yes, and if not the exact street, which direction it was looking? A It was looking towards the northeast, I guess.

Q Are you able to say the street? A No, I am not, the way we took the pictures, we picked out the lots were interested in, and took pictures of the general block where we were interested in.

Q Does this picture, B. 11, depict one of the lots in which you were interested? A Yes, sir.

Q What is that dark patch in the center of the photograph? A That is a pool of water and ice.

Q Was that on one of the lots in which you were interested? A It was on the block, I don't know exactly whether it was on the lot.

Q I show you B. 12 and ask you if you can identify the exact location of that? A No, I can't. It was in the block that I was interested in.

Q What is the dark patch in the center of that photograph? A Water.

Q I show you B. 13 and ask you if you can tell us just exactly where that was taken? A It was one of the lots that I was interested in.

Q Is that a picture of you in the center there? A Yes, sir.

Q I show you B. 14 and ask you if you can tell me exactly where that was taken? A That was in the block where I was interested.

Q Is that a picture of you in the center there? A Yes, sir.

Q Can you tell me about how great is the distance in elevation between your left foot and right foot in that picture? A About three feet, I should judge.

Q I show you B. 15 and ask you if you can tell me exactly where that was taken? A It was in a block in which I was interested in the lots.

Q I show you B. 16 and ask you the same question? A It was in the block where I was interested in.

Q I show you B. 17 and ask you the same question? A It was in a block that I was interested in.

Q And I show you B. 18 and ask you the same question? A It was in a block that I was interested in.

Q What is that light patch in the center of the photograph? A Water and ice.

Q Now, Mr. Bodek, tell me generally when you went down February 27th, and examined the property, what can you say with respect to the condition of the roads, whether graveled or not? A They were not.

Q What was the condition of the land other than the roads, was there gravel on that surface or not? A No.

Q You paid no interest on this mortgage subsequently to that visit, did you? A Yes, sir; I paid no interest.

Q Paid no interest since then? A Yes, sir.

Q Will you state whether or not in making payments of interest that you did make you relied upon the statements with respect to improvements as having been made, guaranteed or to be made, contained in the letters, or more of them, B. 2 to B. 7, inclusive, and the certificate of Mr. Weir, Exhibit B. 8? A I did.

Q I show you again Exhibit B. 14 and direct your attention particularly to the dark patches appearing in what seems to be the road, and ask you what they were. What were they? A They were growths, weeds and so forth.

Q Did they appear to be growing there or blown there as stated by Mr. Weir? A No, they were growing there.

Cross examination by Mr. Starr.

Q Mr. Bodek, did you sign any formal agreement to purchase these lots outside of those which were signed at the time of the sales? A I don't remember. My best recollection is that I did not.

Q I show you a paper which is dated 9th of September, 1925, and ask you whether or not that is your signature attached to it? A Yes, sir.

Q Having been shown that paper, will you say whether or not you were mistaken in your statement that you signed no formal agreement? A I am mistaken. I signed this paper, yes.

Q Did you notice in this agreement before you signed it that there was a statement that the seller agreed to complete with one year the improvements? A I did, sir.

Q You have paid nothing on account of the principal of this mortgage? A No, sir.

Q The last payment of interest was on the 14th of December, 1926? A Yes, sir.

Q And that paid up until the 9th of November— A November 9th.

Q —1926? A That is right.

Q You became in default on the mortgage on the 5th day of May, 1927? A Yes, sir.

Mr. McCarter: I object, came in default. That assumes the whole case.

The Court: Yes, sustain the objection.

Q You became in default in the payment of interest which fell due on the 5th day of November, 1926? A I guess so.

Q Don't you know that to be a fact? A I suppose it is.

Q You didn't pay any taxes in 1926? A No, sir.

Q Or 1927 or 1928? A No, sir.

Q Why didn't you pay the taxes in 1926? A Wasn't supposed to until the ground was all improved.

Q Where did you get that understanding? A I wanted to know the improvements would go in first before—

Q Where did you get the understanding you were not to pay the taxes until the land was improved? A I just figured it out myself.

Q Figured it out in your own mind? A Yes.

Q There was no statement of that kind made? A No.

Q The next time after the sale occurred, which was September 1925, that you were on the premises, was in the summer of 1926? A Yes, sir.

Q What month was it? A I don't remember exactly whether it was July, August or June, but it was around that time of the year.

Q What did you go to North Wildwood for? A Probably to take a bath or something, and look at my lots.

Q Make any investigation with respect to the improvements? A No, just casually, went to Wildwood to spend the week-end.

Q Did you observe whether or not the improvements were completed? A Completed?

Q Yes. A They were not supposed to be completed.

Q I didn't ask you that. Did you make any observation whatever with reference to the physical condition of the land so far as the improvements were concerned? A Yes, sir.

Q What did you find out then? A That they were improving the land.

Q How far had the improvements progressed? A You couldn't tell because the ground was just being improved.

Q What was the physical condition of the ground as you saw it the month you were there? A The weeds had been cut off and there has been some pumping of sand, probably some curbing, that is about as much as I can remember.

Q You don't know what month it was? A In either June, July or August, it was during the summer.

Q Can't remember any more accurate than that? A No, sir.

Q The next time you were down there, was in February, 1927, is that right? A Yes, sir.

Q When you made the payment in December, 1926, did you make any further investigation to ascertain how the improvement had progressed? A No, sir.

Q Did you make any inquiry of anybody with respect to that? A No, sir.

Q Why did you take a photographer in February, 1927? A To take pictures.

Q For what purpose? A To show the true condition of the land.

Q Getting ready for a lawsuit then, were you? A No, sir; not particularly.

Q Didn't have that in your mind at all? A Didn't have it in mind.

Q Had you it in mind to resist the payment of the mortgage? A If the condition of the soil remained as it was, I had that in mind, I suppose.

Q If the condition remained as it was, and only if condition remained as it was when you saw it in the summer of 1926? A When the next payment of interest was due.

Q When was it due? A I suppose in May.

Q That was your object in taking the photographer down there? A Yes, sir.

Q Did you make any inquiry of Mr. Ryan or anybody else as to how the improvements were progressing? A Did I?

Q Yes. A No.

Q Now after February, 1927, when were you next on the ground? A After February, 1927, I don't believe I went back to the ground.

Q Never been there since? A No. I sent down for an engineer to give me a report, though.

Q When was that? A That was probably a month or two after that.

Q After what, March, 1927? A A month or two would make it around April or May.

Q You never made any complaint to Mr. Ryan or the Ocean City Title Company with reference to the fact that the improvements were not then completed? A No.

Q You knew the Colonial Trust Company held this mortgage, did you not? A Colonial Trust at that time?

Q Or Excelsior? A Excelsior probably I knew, yes.

Q You knew that and didn't make any complaint to them? A I didn't know the Excelsior, there was so much juggling of mortgages, I didn't know who held it.

Q Did you make complaint to anybody with relation to the improvements? A I don't think so.

Q You paid your interest, didn't you, to the Excelsior? A Sir?

Q You paid the interest to the Excelsior? A In December, yes.

Q In 1926? A That is right.

Q Did you make any complaint to them, to the Excelsior, when you paid that interest? A In December?

Q Yes. A No.

Q What happened between the summer of 1926 and February, 1927, that induced you to go down to see what the physical condition was at the latter date? A Well, I received a notice that the ground was fully completed.

Q When, in November, 1926? A Yes, sir.

Q After that you paid the interest in December? A Paid my interest.

Q Do you know a man named Weinrott? A Judge Weinrott?

Q George Weinrott. A George H.?

Q Yes. A Yes.

Q In April, 1927, did you have any talk with him with respect to these mortgages or the mortgages that were held by the Trust Company against you on the Wildwood property? A Yes, sir.

Q Who was interested in this syndicate besides yourself? A Mr. Davis Frankel, M. H. Lipper and Dr. Weinstein.

Q Any others? A Herbert Weiner.

Q You had what share of it? A One-fourth.

Q All of the other gentlemen had a quarter? A No.

Q Now, was it divided? A It was divided, Mr. Frankel had a quarter, Dr. Weinstein and Herbert Weiner had a quarter, and Mr. Lipper had a quarter.

Q Do you remember what the conversation was between you and Weinrott in relation to the Wildwood mortgages? A No.

Q Don't remember anything? A Oh, I remember that Mr. Felix had sent for me to discuss the mortgages, settlement of some kind.

Q And you went to see him? A Yes, sir.

Q Was it before or after that you had the talk with Weinrott? A It was before, before I seen Mr. Felix.

Q And you talked with Mr. Weinrott? A Yes, sir.

Q Did you authorize Mr. Weinrott to make a proposition to the Trust Company with ref-

erence to a settlement of the mortgage? A No, sir.

Q Did you tell him to make any proposition at all? A Except get a general proposition from Mr. Felix, I didn't have anything, I didn't want anything to come from me.

Q What was the result? A The result was that between the different conversations that I had with Mr. Felix, there was an agreement drawn which I refused to sign, in other words, we couldn't agree on the improvements—he had in that agreement that—

Q You say the agreement was drawn? A By Mr. Schorr, Mr. Felix turned the matter over to Mr. Schorr, Mr. Schorr drew an agreement, and in that agreement—

Q I am not asking you about the agreement. When was that, do you recall? A I do not, but I could refer to my file, and I can give you the exact date.

Q You don't know what month it was? A I could give you the exact date, if I can refer to my file. I have the agreement and copy of the letter from Mr. Weinrott addressed to Mr. Weinrott.

Q Go ahead, you say you have a letter from Weinrott? A Not from Weinrott, a letter written between Colonial Trust Company to Mr. Weinrott, just happened to get into my file, how it got there I don't know. What was that you wanted?

Q I want to know the date when this proposed agreement was made or, rather, when it was suggested. A The date wasn't filled in, but it is in April, 1927.

Q Did you know that Mr. Weinrott had communicated with the Trust Company after

having a conversation with you about the mortgage? A Yes.

Q Did you see a copy of the letter that was sent by Mr. Weinrott to the Trust Company? A No.

Q Mr. Weinrott tell you what was in the letter? A I don't believe so.

Q I show you a letter dated April 1, 1927, addressed to William F. Kurtz, and signed George H. Weinrott, and ask you whether you ever saw that communication or a copy of it? A I don't believe I ever saw that, never asked me to see it.

Q Does this letter show the substance of the conversation you had with Mr. Weinrott? A No, we didn't talk anything like that at all.

Q Nothing like it at all? A Coming down to terms, anything like it.

Q Any part of it accurately show the conversation between you and Mr. Weinrott? A No.

Q What? A No.

Q None of it? A No.

Q Did you tell Mr. Weinrott you and the parties interested were willing to pay a ten per cent. installment at that time on the mortgage? A No, we had general discussion.

Q Answer that question. A No, sir.

Q Or anything like it? A No, sir.

Q Did you offer or agree to pay any portion of the installment then due on the mortgage? A No, sir.

Q You were on the bond accompanying this mortgage, were you not? A Yes, sir.

Q And you were anxious to avoid the personal responsibility of yours on the bond, weren't you? A Generally.

Q Didn't you tell Weinrott that? A What?

Q That you were anxious to avoid your personal responsibility on the bond? A I don't believe we talked about that.

Q Can you say yes or no as to whether or not you did tell him that? A No.

Q You didn't tell him that? A No.

Q It is a fact, isn't it, that you wanted to be relieved of your personal responsibility? A Certainly it is a fact.

Q And you were anxious to have these other gentlemen, your associates, assume some of the personal responsibility in that transaction, weren't you? A They did assume it.

Mr. Starr: I didn't ask you that. I move it be stricken out, if your Honor please.

The Court: Let it be stricken out.

(Question repeated.)

A Certainly.

Q And you told Weinrott that, didn't you? A No, sir.

Q Did you say anything like it to Weinrott? A Not that I can remember.

Q Why is your recollection so faulty with respect to that matter? Can't you remember what he told you? A You want to know what I talked to Weinrott about?

Q I am asking you the questions. A I said no.

Q Now did you say to Mr. Weinrott that you and your associates were willing to pay ten per cent. as the installment on the mortgage, twenty-five per cent. then, and notes for the balance, expiring within four months? A No.

Q Or nothing like it? A No.

Q Did you have any talk with Weinrott with reference to the method by which the installment of ten per cent. was to be paid? A No.

Q Did you have any talk with Weinrott about the carrying charges on the mortgage? A No.

Q Did you say to Weinrott that you and your associates would pay the carrying charges on the mortgage as the same became due? A No.

Q Or nothing like it? A I answered no. What do you mean by nothing like it?

Q Anything like that, not the identical language, but did you make any statement to Weinrott with reference to the carrying charges on the mortgage? A No.

Q Did you have any talk with Weinrott with reference to an extension of the mortgage which the Excelsior Trust Company or the Colonial Trust Company held against you? A With certain provisions.

Mr. Starr: I move that be stricken out, your Honor please.

The Court: Yes.

Mr. McCarter: It struck me it was an answer.

The Court: No, it must be yes or no.

(Question repeated.)

A Did I have any conversation with Mr. Weinrott with reference to the extension of the mortgage? I did.

Q What was it? A We spoke of the improvements that were to be completed we would go into certain arrangements with the Colonial Trust Company. That is as far as my conversation went with him.

Q That is all that was said about the extension? A That is about all.

Q You qualify the answer, Mr. Bodek. A About all.

Q Was there anything else said about it? Can't you give us a definite answer one way or the other? A I can sit here for a half an hour and tell you the exact words, I can if you want to know that.

Q Can you answer my question. A You are asking me a direct question if there was anything in reference to the mortgage?

Q Your answer was that was about all that was said. A That was all, then.

Q Did you tell Mr. Weinrott that as a reason for the extension, that the mortgage expired in November, 1928, if you got an eighteen months' extension it would give you and the other ones an opportunity to sell their lots with the third mortgage? A No.

Q Nothing of that kind? A No.

Q How many talks did you have with Mr. Weinrott about the matter? A Probably three or four.

Q All in the month of April? A I guess it was in March and April, or somewheres around thereabouts.

Q Was it after you had been down to Wildwood and had the photographs taken? A Yes, sir.

Mr. Starr: May I have this letter of April 1st, 1927, marked for identificaton?

(Letter marked S. 23 for identification.)

Q Do you remember a meeting in Mr. Weinrott's office on or about the 5th of May, 1927, in

which Dr. Weinstein, Mr. Frankel and yourself were present? A I remember Mr. Frankel but I don't remember Dr. Weinstein.

Q Now, I show you a letter dated 6th, 1927, written by Mr. Weinrott to the Colonial Trust Company, and ask you whether that refreshes your recollection? A This is just some fantasy, I guess, of Mr. Weinrott. Mr. Frankel and I, can we explain that?

Q The question is whether this letter which I show you, dated May 6th, 1927, refreshes your recollection as to what occurred at that meeting? A There wasn't any meeting. I can explain to you, and it will help you too, Judge, if you don't mind, it will help everybody.

Q Was there a meeting at which you, Weinstein and Frankel were present? Can't you tell us that? A Dr. Weinstein was not present.

Q Did you have any talk about the bond which the Colonial Trust Company held against you at that meeting, whenever it was, whether Weinstein was there or not? A Weinrott wasn't there. I had my business with Mr. Weinrott, I was connected in business with him and Mr. Frankel came up to see me, and Mr. Weinrott would walk in, and we would talk to him off and on, don't you know, and I suppose he just wrote one of those letters to get himself in right with Mr. Felix.

Q That is your supposition, is it? A That is all.

Q Now, upon the occasion in which he speaks of a meeting at his office the night before, was there any talk there with respect to your bond? A I suppose I spoke to Mr. Frankel about it while Mr. Weinrott was present.

Q What did you say? A What did I say in reference to the bond?

Q Yes. A That I was worried that I am going to be in default of my payment of interest and principal on account of the ground not being improved, and I will, they will put my bond on record.

Q That is what you said? A Yes, sir.

Q Did you suggest that Mr. Weinrott make a proposition in your behalf to the Trust Company? A I don't think so, no.

Q What? A No.

Q Any talk of any kind about that? A Yes.

Q What did you tell him about making a proposition to the Trust Company for you? A Mr. Felix made the proposition to Mr. Weinrott which he gave to me.

Q I am asking you whether you made any proposition to Mr. Weinrott which he was to convey to the Trust Company? A He presented me with an agreement—

Q Answer the question.

(Question repeated.)

A I did not.

Q Was there any talk between you and Weinrott with reference to the funding of this mortgage which the Trust Company held and making it payable in five years? A There was a general talk about funding, improving certain conditions in which an agreement was drawn which was never executed by reason of certain difficulties.

By Mr. Cole.

Q What is your best judgment as to the month in 1926 you were in Wildwood? A What is my what?

(Question repeated.)

A The end of June or July and August, the exact month I can't remember. It was during the summer period.

Q What is your present understanding as to the time when the improvements were to be completed? A As a reasonable time in 1926, in other words, near July 15th, I figured—

Q Has that always been your understanding? A Yes, sir.

Q Upon what do you base that understanding? A Why, I base it that you can never carry out a contract with, to the exact letter of the law, a month or two doesn't really make much difference.

Q So your idea was a reasonable time? A That is right.

Q Did there come a time when you intended to repudiate this mortgage? A Yes, sir.

Q When was that? A That was in February 27th, 1927.

Q At the time you were on the ground and had the pictures taken? A Yes, sir.

Q You then resolved to repudiate the mortgage? A Yes, sir.

Q Upon the ground that the work had not been completed within a reasonable time, I suppose? A Not completed in a workmanlike manner and condition that it was.

By Mr. Starr.

Q Did you ever make an application to the municipality of North Wildwood for a permit to put up a house? A I don't recall.

Joshua Bodek, re-direct.

By Mr. McCarter.

Q You said on cross examination by Judge Starr that you do not know how this letter of April 21st, 1927, to Mr. Weinrott from Mr. Felix came to be in your possession, and I ask you to look at the stamp in the corner of the letter and see if that refreshes your recollection at all? A Oh, yes, it is addressed to me by Mr. Weinrott saying, "Joshua Bodek, read, correct and return at once."

Q Was there anything came to you with that letter? A Yes.

Q These various documents that you hold in your hand? A Yes, sir.

Q I ask you whether or not this draft of letter from somebody to be sent to the Colonial Trust Company is the agreement which you referred to as having been proposed and not being satisfactory to you? A Yes, sir.

Q I see around paragraph seven some pencil notations. Who put them on? A I did.

Q When? A At the time I received it.

Q As expressing your—

Mr. Starr: I object to that, if your Honor pleases. The paper is not in evidence.

Mr. McCarter: What of it?

Mr. Starr: You are asking with reference to the appearance of it, the contents, without having it in evidence.

Mr. McCarter: And I think it is very proper to explain some pencil notations on the agreements.

Mr. Richards: He is also leading the witness.

Mr. McCarter: Leading ground was well taken.

Q Why did you put on the pencil notations?
A Because paragraph seven was all wrong.

Mr. McCarter: I offer this in evidence.

Mr. Starr: That letter wasn't referred to, at all, the second letter wasn't referred to, the third letter wasn't referred to. I didn't examine upon any of these papers except the agreement, I examined him about an agreement, and I suppose that may be admissible, but the other letters were not referred to in the examination. I never saw them, don't know anything about them.

The Court: I will admit the agreement only.

Mr. McCarter: The letter ought to go in, your Honor, the letter he was distinctly shown by Judge Starr.

The Court: That first letter may.

(Letter and agreement admitted in evidence and marked Exhibits B. 26 and 27.)

Q Mr. Bodek, I invite your attention to the documents which have been excluded from admission as a part of Exhibit 26 and 27, and ask you whether you received them at the same time as you received the rest of B. 26? A Yes, sir.

Q Will you state whether or not the execution of those documents was contemplated as a part of the proposed agreement?

Mr. Starr: I object to that.

A Yes, sir.

The Court: Sustain the objection. You haven't connected the other side of the case at all with any proposed agreement. It may be that they are connected with it, but it hasn't been so connected as yet in any way.

Mr. McCarter: I will reframe my question.

Q I will ask you whether the documents which I have just shown you and which were received by you along with Exhibit B. 26—

Mr. McCarter: Your Honor, perhaps, hasn't become advised of the fact that Exhibit B. 26 is a letter from the Colonial Trust Company.

The Court: Yes, I haven't had any connection with that at all. The only offer, as I understand it, a bundle of papers or communications which was handed to this man by someone with whom he has offices.

(Question withdrawn.)

Q State whether or not, Mr. Bodek, that these documents which I now show you, which were physically attached to B. 26 but which have not been admitted in evidence as part thereof, were received by you along with the rest of the B. 26 as part of the agreement of adjustment therein proposed? A Yes, sir.

Mr. McCarter: Now, I offer them in evidence.

Mr. Starr: On that basis I suppose they are admissible.

(Letters admitted and marked Exhibit B. 28.)

Joshua Bodek, re-cross.

Q Now, Mr. Bodek, Mr. Felix testified in his examination that you did not ever give an excuse for not paying the installment that the improvements had not been completed, is that correct? A No.

By Mr. Starr.

Q What did you say to Mr. Felix? A That the improvements were not completed.

Q You told him that? A Yes.

Q And that is all? A We had a general talk about everything.

Q Then on the occasion— A As far as having Mr. Schorr draw up an agreement—

Q I didn't ask you that.

Mr. McCarter: You asked what his talk was, Judge Starr.

Q About improvements, what was your conversation between you and Mr. Felix about the improvements? A That I said I wanted the improvements to be completed, I wanted a sewer disposal plant so it could be connected and everything else.

Q And you knew at that time that the sewers had not been connected? A I knew there was no disposal plant there.

Q That is all you said to Mr. Felix about the sewers? A About the improvements?

Q Yes. A General conditions of the land and so forth.

Q What else did you talk about in the way of improvements besides the sewers? A That is about all.

Q And the lead pencil notation around number seven on this agreement is in your hand-

writing, is it? A I would have to look at it. I didn't have a chance to see it. Yes.

Q You had talked with Mr. Schorr about the improvements, did you not? A I believe so.

Q And you told him that your associates were using an excuse of the improvements not being completed in order to avoid their responsibility to you, didn't you? A Not in those exact words.

Q What did you say? A I said that I and my associates were not going to pay on account of the improvements.

Q Didn't you tell Mr. Schorr that your associates were refusing to pay because all the improvements had not been completed? A Right.

Q Told them that they were using that as an excuse for not making payments to you? A Not as an excuse, they were not paying on account of the improvements.

By Mr. McCarter.

Q Something was said about a sewerage disposal plant. Mr. Ryan ever make any statement to you with reference to a sewerage disposal plant? A Yes, sir.

Q When? A During the sale.

Q What did he say?

Mr. Starr: I object to that, if your Honor please.

The Court: I will permit it on the same condition.

A That there was money provided for a sewerage disposal plant.

Joshua Bodek, re-cross.

By Mr. Starr.

Q That was made at the sale? A Yes, sir.

Q Did you know Mr. Ryan before the day of the sale, had you had meet him before? A No, sir.

Q How did that conversation come about? A Why, we met in the tent, I had in my mind of some kind different people went over to ask him different questions, and I was there asking him one question.

Q And that is the question you asked him? A Yes.

By Mr. Cole.

Q When was the talk with Mr. Felix that you have just referred to? A It was during March and April of 1927, those months.

Q After you had determined in February, of course, that you were going to repudiate the mortgage? A That is right.

Q That is right, isn't it? A Yes.

By Mr. McCarter.

Q I will ask Mr. Bodek to read these pencil marks that are part of the exhibit. I don't believe anybody else can. A "All wrong"—this refers, I suppose, to paragraph seven. "All wrong. Improvements must be done, also sewers must be completed and paid for by Colonial."

LOUIS BERKOWITZ, sworn.

Direct examination by Mr. Carr.

Q Mr. Berkowitz, where do you live? A Camden.

Q Did you attend the sale at North Wildwood on September the 5th, 1925? A On Labor Day, yes.

Q It ran for a few days? A Yes.

Q Whom did you go down there with? A I went down myself and I met Mr. Smith over in Wildwood.

Q Have you an interest with Mr. Smith in the lots purchased by Mr. Smith? A I was with Mr. Smith at the time.

Q You were with him? A Yes.

Q How much interest did you have in that matter? A I had a one-tenth. I had at that time one-fifth interest and I got somebody on my fifth.

Q You had a one-fifth interest? A Yes.

Q I show you Exhibit C. 3 and I ask you whether or not you saw the sign therein shown on September the 5th or on Labor Day, 1925? A Yes, sir.

Q Will you say whether or not it contains the language just as it appears there? A Yes, sir.

Q That was the sign that you saw, is that right? A That is right.

Q Did you see that before you entered into an arrangement with Mr. Smith to bid on some of these lots? A Well, I seen that Mr. Smith was there before me.

Q But you saw the sign? A I saw the sign; yes, sir.

No cross examination.

Michael H. Lipper, direct.

MICHAEL H. LIPPER, sworn.

Direct examination by Mr. McCarter.

Q Mr. Lipper, what is your occupation? A Real estate.

Q Where do you live? A Philadelphia.

Q Was your name formerly Lippowitz? A Exactly.

Q You are one of the parties to this case? A I am.

Q Did you attend the sale? A I did.

Q Did you see a sign down there near the sale? A I did.

Q I show you Exhibit C. 3 and ask you to state whether or not that is a photograph of the sign in the condition that you saw it? A It is.

Q Did you have any conversation with Mr. Ryan at the sale? A I did.

Q Where was he? A In the tent.

Q What did Mr. Ryan say to you and what did you say to him?

Mr. Starr: That, of course, is accepted under the same ruling.

The Court: Certainly.

A He said there was enough money provided to build a sewer disposal plant.

Q How did that conversation come to take place? A I saw other people speak to him and I got around the same crowd and I asked him the question.

Q What put your mind on sewers or sewer disposal plant?

(Question withdrawn.)

Michael H. Lipper, cross.

Q How did you come to discuss the question of sewers? A I heard a rumor in the tent going to be some trouble with sewers.

Q Are you interested through Mr. Bodek in this case? A I am.

Q You are one of his syndicate, so to speak? A I did.

Q Did you go down with him February 27th? A I did.

Q I show you Exhibits B. 10 to B. 18 inclusive, and ask you if you were present when those photographs were taken? A I was.

Q Do they truly represent the conditions that you saw? A They do.

Q I invite your attention particularly to B. 14 and ask you to tell me what those dark patches in the road were? A Growth of weeds.

Q Do they appear to be growing there or were they blown there as has been testified for the other side? A Grown there.

Q Was there any gravel on that road that you could see at that time? A No.

Cross examination by Mr. Starr.

Q No gravel on any of the streets? A There was on Surf avenue.

Q No gravel anywhere except on Surf avenue? A That is all.

Q None on the intersecting streets and none on Ocean avenue? A I didn't pay particular notice of all the streets, the streets that we were interested in.

Q How many streets did you examine? A Four streets.

Q No gravel? A No.

Q What were the numbers of those avenues? A Can't recall.

Q You said you heard some rumor about trouble with sewers; what did you hear? A Told them wouldn't be able to get sewers.

Q Who told you that? A I heard that rumor in the tent.

Q What? A I heard that rumor in the tent.

Q Who said it? A I don't know.

Q What were the exact words that you heard? A They won't—"They will have trouble with the sewers."

Q Somebody said they would have trouble with sewers? A Yes.

Q That is all you heard? A That is all I heard.

Q Was Mr. Bodek about when that was said? A No, sir.

Q Any other member of your syndicate about when that was said? A No, sir.

Q And you don't know who said it? A No, sir.

Q Do you know how the conversation came about? A No, sir.

Q All you heard was out of a clear sky somebody said there was going to be trouble about getting sewers? A That is right.

Q Notwithstanding that, you went ahead and became a member of the syndicate? A No, sir.

Q Notwithstanding that you went ahead and became a member of the syndicate? A I went down with the intention to buy, of being a member of the syndicate.

Q Didn't you get in on the deal at all? A I was in, that was during the intermission, I was in already.

Q Then this statement was made after you had bought or before? A During the intermission.

Q Answer the question, please, was it before or after you bought? A After.

Q Did you make investigation to find out what the trouble with sewers was? A I walked over to Mr. Ryan and I asked him, he said there is money provided for sewers, and a sewer disposal plant.

Q That is what he said? A That is what he said.

Q That satisfied you? A It did.

Q Did you sign one of the formal agreements? A I did not.

Q You were making a speculation, weren't you?

Mr. McCarter: Object to that as immaterial.

The Court: Sustain the objection.

By Mr. McCarter.

Q You said something that Mr. Ryan said that money had been provided. Were any further details gone into as to the method of providing or anything to that effect? A They are going to pay for it.

By Mr. Cole.

Q Would you mind telling us why you didn't tell that in your direct examination, that last thing you just said? A I didn't hear that.

Q You were asked about, two or three times about this sewerage plant, and you didn't mention this last statement you have made until

your attention was called to it by counsel. Why didn't you tell that in the first place? A It wasn't asked.

Q What? A I am answering the questions.

Q Now when this person that you don't know and didn't know told you there was something wrong about the sewage disposal plant, what did you say to him, if you said anything? A Say to who?

(Question repeated.)

A I didn't know him.

Q Well, you may not have known him, but still may have said something to him. Did you make any reply to him or ask him any questions after you heard him make the statement? A I did not.

Q Now, when you went to Mr. Ryan, after having heard this, what did you say to him? A I told him what I had heard.

Q What did you say to him? A Told him having trouble with sewers, what going to do about it.

Q Say what the trouble was? A Told him about the sewer disposal.

Q What did you tell him the trouble with the sewers was? A Going to have trouble.

Q Or didn't you know what the trouble was? A I didn't know what the trouble was.

Q So you didn't tell him then? A I told him what I heard.

Q What did you tell him? A Going to have trouble with the sewer disposal, he said, "We have provided money for that."

Q That is all.

Atlantic City, N. J.,
June 12, 1930.

Trial of the cause resumed at 10 o'clock, A. M.

Appearances as before noted.

LEAMING M. RICE, sworn.

Direct examination by Mr. Carr.

Q Mr. Rice, what is your profession? A Civil engineering and surveying.

Q How long have you been a civil engineer and surveyor? A About thirty or thirty-five years.

Q Do you occupy any official position with the, is it the City or Borough of North Wildwood? A City.

Q City of North Wildwood? A City engineer.

Q How long have you been the city engineer of North Wildwood? A Twenty-five years.

Q Last past? A Last past.

Q You are familiar with the so-called Ryan tract, are you not? A Yes.

Q Know its location? A Yes.

Q As city engineer of North Wildwood, did you have anything to do with the relaying of the sewers on the Ryan tract? A Yes.

Q Did you personally supervise that work? A I did.

Q Can you tell me about what proportion of the entire sewer was relaid? A Well, approximately eighty per cent.

Q About eighty per cent. was relaid? A Yes.

Q Can you tell me, by reference to the plan of the Ryan tract, S. R. 14, on which streets the sewer was not relaid, I mean the original sewer remained? A It was not, remained on 11th street from Ocean to Surf.

Q That is one block, is it not? A One block, yes, sir, and two blocks each way from 11th on Ocean.

Q On Ocean avenue for two blocks each way, that would be from 11th to 9th in one direction, and 11th to 13th in the other? A Yes.

Mr. Richards: You mean 11th to 12th or 11th to 13th, which?

Mr. Starr: No, 11th to 13th.

Q Am I correct in that, Mr. Rice? A Yes, sir, there was part of that block was dug up and it was found it was not necessary to relay it, and that was filled in again.

Q Which block? A Part of block from 11th to 12th.

Q So, of the original system, have you stated all that remained unchanged? A Yes.

Q And the original system, I think it has been testified, covered all of the streets shown on S. R. 14 as the Ryan plan, excepting, if I recall correctly, a certain 15-foot drive, and on that drive extending from 13th to 15th; is that correct? A Yes, I found no evidence of it having been laid in the alley from 13th to 15th.

Q No evidence of sewer from 13th to 15th? A No.

Q But with that exception the plan called for a sewer pipe on every one of the streets? A It had been laid in all the other streets, yes, sir.

Q Now, what did you find to be the condition of the pipes, that is when your excavation was made and the pipes were exposed, what did you find the condition of the pipes to be? A Quite a number of them were broken, some were crushed, practically entirely, and others cracked, and they were out of line.

Q Can you give me an idea of what percentage of the pipes were crushed? A Probably approximately one-third of them were—it was necessary to replace approximately one-third of the pipes.

Q Crushed? A Either crushed or cracked, broken in such a manner it was necessary to replace it with new.

Q Now, I show you photograph C. 6 for identification—

Mr. Starr: One moment, if your Honor please. It seems to me this witness should not be permitted to be interrogated with reference to a paper which is not yet in the case.

Mr. Carr: I am going to ask him whether he can identify it for the purpose of putting it in the case.

Mr. Starr: I understood it had been proven before and merely marked for identification for cross examination of some particular witness. If you are going to use this witness to prove the photograph, I haven't any objection to it.

Mr. Carr: Yes, that is what I am going to do.

Mr. Starr: I haven't any objection to that.

Q —and I ask you whether you can, if you can say whether or not to your knowledge that shows the conditions existing there on the 4th of May, 1928? A Yes, at about that time, I wouldn't say the exact date, whether the 4th of May, but during May.

Q During the month of May it bore that appearance, did it? A Yes.

Q Will you tell me what that photograph indicates as to position, that is, what view it shows? A Looking westwardly along 9th avenue, from 9th and Ocean.

Mr. Carr: I now offer the photograph.

Mr. Starr: This photograph was evidently taken in 1928, and my thought is that the conditions at that time, which was nearly three years subsequently to the making of these contracts, my thought is that they may not be evidential of any matter which is in issue in this case, and I do not think yet there is any proof as to when that photograph was taken. It may be I am mistaken about that.

The Court: The evidence now is that that is the condition during the month of May of that year.

Mr. Starr: That is three years after this sale occurred.

The Court: I will admit it. The probative effect is, of course, entirely different.

(Photograph admitted and marked Exhibit C. 6.)

The Court: It is the photograph that is admitted and not the printing thereon.

Q I show you a photograph, Exhibit C. 7 for identification, and I ask you whether that, to your knowledge, correctly portrays the conditions existing there during the month of May, 1928? A Yes.

Q And what view does that disclose? A That is on Ocean avenue southerly of 9th avenue.

(Photograph offered in evidence.)

Mr. Starr: I make the same objection.

(Photograph admitted and marked Exhibit C. 7.)

Q I show you photograph marked C. 8 for identification, and I ask you whether to your knowledge that discloses the conditions that existed there during the month of May, 1928? A Yes.

Q And what view does that disclose? A That is on Ocean avenue south of 9th.

Q And looking in which direction? A Looking southerly.

(Photograph offered in evidence and admitted and marked Exhibit C. 8, subject to the same objection.)

Q Now, Mr. Rice, can you tell me when the work of relaying the sewers began? A About the 20th of March.

Q Of what year? A 1928.

Q And continued until what time? A May 19, 1928.

Q Had you supervision of that work during that whole period? A Yes.

Q When, if at all, was a physical connection made between the sewer on the Ryan plan and

the municipal system? A That was in the early part of May, 1928.

Q Early part of May, 1928? A Yes.

Q Up until that time had there been any physical connection between the sewer on the Ryan tract and the municipal sewer, do you know?

Mr. Starr: I think it ought to be established in advance that question, the knowledge of this witness, whether he made any investigation.

The Court: Yes.

Q I mean, to your knowledge? A Not to my knowledge.

Q And where was the point of connection between the two systems? A At Surf and 11th avenues.

Q And what was there at that point? A There was what was termed as a sewer lift at that point, practically a square concrete box.

Q Practically a square concrete box? A Yes, with a pumping station, pump inside to pump the sewage.

Q In your work have you found that there was or was not a physical connection between the two systems before you began your work of relaying?

Mr. Starr: I object to that, if your Honor please. It is shown this witness has never made any investigation as to whether there was a physical connection or not. I think that ought to be established first.

(Question withdrawn.)

Q During the progress of the relaying of this pipe at some time you came to this point of connection between the two systems, did you not? A Yes.

Q When you reached the point of connection between these two, the point where these two systems would connect, did you find there was or was not a physical connection? A There was not.

Q There was not? A No.

Q Are you able to tell me the date of the approval by the State Board of Health of the sewage disposal plant of Wildwood? A I would have to refer to my notes. There was a letter received from the State on March 20, 1928, granting permission to the City to connect the Ryan tract sewers and the sewerage system.

Q What was the date of that? A March 20, 1928.

Q Was that the first permission to make this connection? A Yes.

Q Now, Mr. Rice, it has been testified that these sewer pipes were laid before the hydraulic fill was made, after the pipes were placed in position sand was pumped in by means of hydraulic dredges or a hydraulic dredge, and these pipes were then covered with a deposit of sand and so on. In your judgment is that a practical arrangement for sewer construction?

Mr. Starr: I object to that, if your Honor please.

The Court: Sustain the objection.

Mr. Carr: May I be heard, if your Honor please?

The Court: I am sustaining at the present moment that there has been no qualification at all of the witness upon that point.

Mr. Starr: That is not the ground of my objection. The ground of my objection, if your Honor please, is that there is nothing in this contract, nothing in any negotiation between the parties as to the method by which this sewer system was to be laid, it is utterly immaterial, it seems to me, whether or not they adopted the proper method or not, long as the sewers were laid.

The Court: I will permit the question.

(Question repeated.)

A My previous experience indicates to me that it is very hazardous to lay them before you pump. It is almost impossible to hold all your pipes in position.

Q What proportion of pipe would you expect to either be crushed or forced out of position?

Mr. Starr: Same objection, if your Honor please, same ground.

The Court: I will permit it.

A Well, it would practically be impossible to say that. In this—I may say in this particular case there was probably twenty-five per cent. of the pipe that was either broken or out of place caused by the pumping in of the sand.

Q Well, would you expect such a result? A I would expect up to that proportion.

Q And with that portion of the pipes crushed or out of position, could such a sewer function?

Mr. Starr: I object to that, same ground as stated before, immaterial and irrelevant.

The Court: Permitted.

A No.

Q It could not function? A No.

Q It has been testified by Mr. Weir, I think, that the sewer which you actually saw there could have been used by house connections for sanitary and sewage purposes for the period of two or three years without it being connected to the municipal system. I ask you whether, in your judgment, that could have been done? A If the pipe had all remained in good condition and the State would have permitted it, that could have been done, but under the conditions of having the fact that the pipe was partly destroyed by the pumping in, it would not have been possible to even use it for that.

Q Have you ever known the State to approve of any such method?

Mr. Starr: I object to that.

The Court: Sustain the objection.

Q As an engineer, are you able to say what is meant by the word "sewer"?

Mr. Starr: I object to that.

The Court: I will permit that.

Mr. Starr: If your Honor please, it seems to me that that question must be determined by your Honor, the proper construction of this contract.

The Court: Yes, without question that is true, but the Court may need assistance for that purpose.

Mr. Starr: If there is any ambiguity, or anything of that kind, but there is nothing, as

I view the situation in the case, that would justify your Honor holding that there is any ambiguity in the interpretation of this contract.

The Court: I will permit the question.

A When the sewer is spoken of, the general term "sewer" is used, I consider it a system of underground conduits or pipe extended to carry off any substance, any water or other affluent from the toilets, or waste water from the houses in a municipality.

Mr. Starr: I move that be stricken out, if your Honor please, as not responsive to the question.

The Court: I will permit it to remain.

Q In other words, what is sometimes called excrementitious matter? A If that is in the dictionary.

Cross examination by Mr. Starr.

Q Now, Mr. Rice, you wouldn't assume that that would be the definition of the word "sewers" if you were in a contract with reference to a municipality where there was a sewer system? A Yes, designed to carry these matters off, away from the community.

Q There was a sewer system in North Wildwood, wasn't there, up to this plant, up to this property? A Up to the property.

Q In operation? A Yes.

Q Now, would your definition of the word "sewers" imply that there was to be a disposal plant in connection with the sewers built on this particular property?

Mr. Carr: I object. I don't think he has said anything about the disposal plant.

The Court: I will permit the question, cross examination.

A No.

Q Now, were you the engineer of North Wildwood in 1925 and 1926 and 1927? A Yes.

Q Did you have anything to do with the supervision of the improvements that were carried on on the Ryan tract? A All I did in connection with that was approve the plans which were sent to the State Board of Health.

Q Did you have anything to do with the supervision of the work of construction? A No.

Q When were you first called in to either examine or supervise the work of construction? A The spring of 1928.

Q At that time you found that there had been sewer pipes laid over the entire tract? A Yes, practically.

Q Do you know when they were laid? A Only during 1926.

Q These pipes, then, had laid in the ground for two years unused before they were brought to your attention, is that right? A Approximately, I would say, yes, or a year and a half.

Q How did the matter come under your supervision, by direction of the municipal authorities? A In the beginning, yes, they applied to the City to take over the extension of the system into the Ryan tract.

Q When was that application made? A My recollection is it was in the spring of 1928, shortly before.

Q You knew, of course, that eventually this system would have to be approved by you as

city engineer before it would be accepted by the City, didn't you? A Yes.

Q And you also knew of the manner in which they were laying sewer pipes in 1926? A Yes, I knew of it.

Q Did you raise any objection as to the method used?

Mr. Carr: I object, if your Honor please, not cross examination, and it wasn't this gentleman's business in any way to say anything in regard to it.

The Court: I will permit it.

A No.

Q You didn't call anybody's attention to the fact that in your opinion the method adopted for laying the sewer pipes was improper? A No, the matter had not been referred to me in any way by the City, I didn't figure I had anything to do officially with it.

Q You knew eventually that would come under your supervision, didn't you? A I presumed it would, yes.

Q And you also, as engineer, had approved the plans of the system prior to the time that they began work? A Yes.

Q Was there anything in that approval to indicate the method by which they were to lay the pipes? A No.

Q Then after two years, you went on and let them lay the pipes in the way they did without any question as to whether it was improper or otherwise? A Yes.

Q Now, as a matter of fact, Mr. Rice, don't you know of instances in Cape May County or along the shore where the same method of

construction of sewers as adopted here has been in vogue elsewhere? A No, I don't, not personally.

Q Ever heard of any other method or any method of that kind used? A No, not laying them before it was pumped in. I don't know of any personally. I never heard of any.

Q Never heard of any? A No.

Q Now, have you had any experience in either rebuilding or supervising the construction of systems installed by that method? A Yes, what we term surface drainage sewer.

Q Where was that? A That was in Wildwood.

Q Did they use that method there? A Yes.

Q Then that is one instance in Wildwood where they have used the same method of putting pipes on the ground and pumping in afterwards? A Yes.

Q Now, any other instances that you know of? A No.

Q Now, your first connection with this, first intimate connection with this operation was in the month of March, 1928, is that right? A Yes.

Q What first attracted your attention to the fact that there had been some breaking in the sewerage pipes or some crushing of those pipes? A Well, shortly after the application was made to take the sewers over, the matter was referred by the City to the Sewerage Committee and the city engineer to investigate and report back as to whether it was in working condition, and an attempt was made to, the sewer pipes and manholes were full of water, an attempt was made to pump them out, and they didn't pump out.

Q That was the first time it was brought to your attention? A Yes.

Q Now, calling your attention to Exhibit C. 6, which apparently is a photograph of some highway down on that operation, that picture was taken after you had started to relay the sewers, was it not? A Yes.

Q And it was taken during the process of relaying before the streets were re-surfaced; is that a fact? A Yes.

Q So the work, the completion of the work had not—so that the work of relaying had not been completed when this photograph C. 12 was taken? A No.

Q Now, the same thing is true with respect to C. 7, is it not? A Yes.

Q That shows the trench that was dug in the streets while the relaying of the pipes was going on before it had been filled in and the street surfaced? A Yes.

Q And C. 8 shows the same thing, does it not? A The same thing.

Q Now, subsequently to the time that these photographs were taken, the streets were re-surfaced and put in shape and accepted by the City, were they not? A Yes.

Q When was that work completed, do you know? A Not without referring to my book.

Q If you will please refer to it. A That was in September or October, 1926, that the graveling of the streets was completed.

Q And did that work come under your supervision? A No.

Q Did the work of regraveling the streets after the sewer pipes had been relaid come under your supervision? A Yes.

Q When was that work completed? A That was completed in August of 1928.

Q So that the sewers had been laid and the streets graveled in 1926? A Yes.

Q And subsequently when the sewers were relaid, streets were graveled in 1928, in August? A Yes, sir.

Q And that work was done to your satisfaction? A Yes.

Q So that the sewer system was eventually installed, connection made with the disposal plant according to your satisfaction as engineer? A Yes.

Q And the streets were subsequently graveled to your satisfaction? A Yes.

Q And the Borough then accepted the sewer system and accepted also the streets? A Yes.

Q You knew, of course, that the relaying of the sewer pipes and the resurfacing was done at the expense of Mr. Ryan? A Yes, I knew that.

Q There was no expense imposed upon the City— A No.

Q —or municipality with reference to that work? A No.

Q The expense of your supervision was also paid by Mr. Ryan, was it not? A There was an arrangement with the Ocean City Title Company and Mr. Ryan that they would pay the expense of the engineering and of the inspector.

Q That was not imposed upon the City or municipality? A No.

By Mr. Carr.

Q Mr. Rice, you have been asked with reference to other pipes laid on top of the ground when the pumping was done afterward, and I

think you replied that you had an experience with a surface water sewer in North Wildwood? A In Wildwood.

Q In Wildwood, was it? Tell me what your experience was with that, won't you, please? A We laid the pipe on the surface and we found when they were, when they started to pump in, that the pipe began to move, the fine sand would run under the pipes and raise them, so that they were humped, and then we tried to hold them by sinking them, but we never did really succeed in holding them in a satisfactory shape for the drainage, and that was my experience up to, I think in 1904 or 1905, and from that time I figured it was not practical to lay any pipes where the dredging was to be done afterward.

Q How long was that pipe in length? A My recollection is that there were four lines of pipe, possibly eight hundred to a thousand feet in length.

Q You mean in all the four lines of eight hundred or a thousand feet apiece, which do you mean? A From eight hundred to a thousand feet.

Q So that it made altogether around four thousand feet? A Three to four thousand feet.

Q You never attempted that form of construction afterwards? A How is that?

Q Did you ever attempt that form of construction afterwards? A Not afterwards, no.

Q On solicitation of other counsel, I will ask this question, although I think it has been previously asked, was there any sewer laid in the 15-foot alley from 13th to 15th?

The Court: He has testified he found no indication of any sewer there.

Mr. Carr: I so recalled it, but counsel didn't agree.

The Court: He said he found no indication of any sewer laid in that alley.

Q You said that the first time the sewers were called to your attention, an attempt was made to pump the water and it didn't pump out, can you tell me when that was? I don't think you fixed any date. A That was either in February or the early part of March, 1928.

Q February or March, 1928? A Yes.

Q I am not sure that you stated the date of the acceptance of these streets by the City. I find a memorandum of a resolution dated April 19, 1927, appearing, I think, on page 950 of the minute book, "City engineer reported that the Ryan tract were up to grade and ready for maintenance and acceptance by the City. Resolution that the streets be accepted for maintenance by the City approved."

I ask you whether that is the first date of the approval and acceptance of the streets by the City? A Yes.

Q April 19, 1927? A April 19, 1927.

Mr. Starr: Now, if your Honor please, in that connection I think there is a mistake in the testimony and we might as well have it corrected now, on page 346, about midway of the page is a question by, I don't know whether an examination by myself at that time or not, but "Will you turn to the minutes of April 19, 1927, referring to streets on the Ryan tract"—the answer is "Report of L. M. Rice to the Mayor and Council, April 19, 1928."

Now, evidently the witness misread 1928 for 1927, or the stenographer got it 1928.

Mr. Carr: I think the minute books are here.

Mr. Starr: May we have the transcript changed, because unquestionably, the year stated in the answer as 1928 ought to be 1927, so that there may be no misunderstanding as to that. May we have the record amended then, to show the fact?

The Court: All counsel consent to that correction.

By Mr. Starr.

Q Now, Mr. Rice, this surface water sewer you say was laid in 1904 in Wildwood, what had you to do with the original installation of that system? A I laid that at that time under the direction of Baker Brothers, the owner of the property.

Q You were the engineer? A I was the engineer.

Q And you are the chap that designed the method, is that right? A In that particular case, I didn't exactly design the method, they decided what they would put in and told me to do it, I suppose I did it in that sense.

Q What was the size of that pipe? A That was 12-inch pipe.

Q What was the size of the pipe in the Ryan tract? A That runs from eight and ten.

Q Different size pipe? A Yes, different size pipe.

Q Does it make any difference as to the depth of the fill on the pipe as to whether or not, in your opinion, the pipe should be installed

before the pumping is done? A That depends on the condition of the natural surface, if it is solid sand, I would say no, if there is muck or a little mud under it, the weight will break your pipe.

Q The Ryan tract was solid sand, wasn't it? A Not all of it, no.

Q Most of it? A I found in relaying it there were several places where the pipe had settled and that had caused it to break.

Q How many—where were those places? A I would say possible, take it all together, I would say probable the length of five to eight hundred feet, anyway, on that kind of bottom.

Q With the exception of five to eight hundred feet, the condition of the soil was that of solid sand, was it not? A Practically, yes.

Q And the entire number of pipes laid approximated how many lineal feet? A I couldn't tell you very close, offhand, now; I have forgotten that exact amount.

Q Considerable? A Yes, way up in the thousands.

Q So that the part that was installed on the muck was substantially a very small portion of the entire amount? A Yes, a small proportion.

Q Could the situation which you find there in the crushing of the pipe have been the result of replacing the sand trenches and not the result of pumping in? A Well, if the sand had been filled properly around the pipes, it could have had some connection with it, yes.

Q How deep on an average were the trenches in which these various sewer pipes were laid on the Ryan tract? A From three to six feet.

Q How did you get the street open, did you have to use picks to dig up the gravel that was on the top? A They did use picks, yes.

Q There was a hard surface of gravel on the streets which had to be removed before you could replace the pipes? A Yes.

JACOB J. CRESKOFF, sworn.

Direct examination by Mr. Carr.

Q Mr. Creskoff, are you a civil engineer? A Yes, sir.

Q And surveyor? A Yes, sir.

Q How long have you been practicing that profession? A Since graduating from college, for about eight years.

Q About eight years last past? A Last past.

Q Of what school are you a graduate? A University of Pennsylvania, class of 1922.

Q What department of school? A Civil engineering.

Q Do you know the Ryan tract at North Wildwood? A Yes.

Q Did you at any time go over this tract with a view of ascertaining its condition? A Yes.

Q When did you do that? A May the 4th, 1928.

Q May the 4th, 1928? Did you go over it for the purpose of seeing whether the lots were up to grade, and things of that sort? A I went over it for the purpose of ascertaining which, if any, of all the improvements as outlined in the Ryan contract with Mr. Bodek, were fulfilled.

Q Let me ask you what you found with regard to the gradings of lots? A You have a printed copy or, rather, typewritten copy of my results there.

Mr. Starr: May this testimony, if your Honor please, be taken under the objection as stated in the testimony of Mr. Rice, because it is too far remote from the date to be admissible?

The Court: I will permit it.

Q Are you able to testify accurately, without the use of your memorandum? A Except for a very few spots, the writing seems to have been loaded up with dirt in some places.

Q I mean, unaided by your memorandum, are you able to testify accurately? A I don't believe so. I know I couldn't.

Q Did you find any locations where there were no pavements and curbs? A Yes, I did.

Q Will you tell me first, with regard to Block 412, what, if anything, you found missing there? A Could you loan me one of those typewritten copies that I made up?

Mr. Carr: There will be no objection to that, referring to his own memorandum?

Mr. Starr: He says he can't testify except as to that.

A I can.

Mr. Starr: I think we ought to have the best evidence, then, rather than to use a substitute.

A I made that copy myself.

Mr. Starr: You mean to say you made this typewritten copy from your original memorandum?

A That is right.

Mr. Starr: I haven't any objection, then, to use the copy.

Mr. Carr: More legible.

Mr. McCarter: Why don't we ask that the witness look that over and state whether or not the memorandum which he holds in his hand accurately sets forth what he found there at the time, and put in evidence, and there you are?

Mr. Starr: I won't consent to that.

Q (Repeated.) "Will you tell me first with regard to Block 412 what, if anything, you found missing there?" A I don't have Block 412 in this examination.

Q You haven't got 412 down? A No.

Q Have you got Block 413? A Yes.

Q What do you find with reference to Block 413? A May I have a copy of the Ryan tract at the same time?

Q Yes, you may. A Block 413 on the lots that I examined, I found on one lot no fill, that is to say—

Q Suppose you identify the lot. A That is Boardwalk lot between 13th and 14th.

Q Give me the lot number, won't you? A Number 6.

Q What about it? A Number 6, Block 413.

Q What about it? A No fill, so far as I could notice, no sidewalks and curbs, no sewer.

Q And what else did you find in that block? A Lot number 37.

Q In that block? A Yes.

Q This is Block 413? A Block 413, lot 37, I found sidewalks and curbs in good condition, the street in passable condition, sewer crushed.

Mr. Richards: Now, if your Honor pleases, it seems to me the first part of that answer ought to be stricken because of the very force of Judge Starr's objection now becomes apparent, this is in 1928, and not at the time of the performance of the contract, and there is other testimony to show that other elements, that is storms intervened to change the situation there so that, it seems to me, all that part of the answer should be stricken.

The Court: No, it cannot be stricken. Of course, your argument is more to the value of the testimony, the probative force, than it is to its admission. I will permit it.

Q What I would like you to do, if you can, conveniently and expeditiously, is to tell me where, if at all, you find pavements, curbs, streets, not physically in existence at the time you made your examination.

Mr. Richards: Of course, it is the same thing.

Mr. Starr: If this testimony is to be taken, may it be under the objection as stated before.

The Court: Under the objection, yes. This question is very close to being objectionable.

Now you have entirely changed your question from what it has been.

Mr. Starr: Maybe I didn't catch the question.

(Question repeated.)

Mr. Starr: I suppose as to the pavements, sidewalks and curbs, they are exposed, fixed and immovable, but so far as the streets are concerned, it seems to me entirely irrelevant.

Mr. Carr: Simply intended to minimize time.

The Court: I will permit it. It may be taken, of course, over that objection.

Mr. Starr: You see we have four elements, we have the streets, we have the sidewalks, we have the curbs and the sewers, and it seems to me there ought to be some—

Mr. Carr: Deal with each separately?

Mr. Starr: Yes, so we can cross examine intelligently.

Mr. Richards: If your Honor please, if I may butt in, it seems to me that the test is whether or not these things were done at the time agreed to be done and not at some future date. Now, any date beyond that date seems to me to be incompetent.

The Court: Yes, unless it is connected up, it has no probative force at all, but, nevertheless, I do not feel that I can limit the examination to just the particular date. I will permit it subject to the same objection. I had your point in mind clearly. You may proceed.

A In Block 306, lot number 1.

Q What about it? A I find that the sidewalks and curbs have settled about a foot below that of the surrounding sidewalks and curbs.

Q Go on. A Block 413, lot 6, I find no sidewalks.

Mr. Starr: Block 413, lot 6?

A Yes, I find no sidewalk nor curb. Block 415, lot 2, no sidewalk or curb. Block 415, lot 8, no sidewalk or curb. The remainder of the sidewalks and curbs I find either in good or passable condition. So far as the pavement, that is to say, the street is concerned, in front of lot 3 of Block 301, the street was in poor condition.

Mr. Starr: If your Honor please, it seems to me we are entitled to have better information than that.

The Court: Yes.

Q May I ask you whether the list that you have there refers only to Mr. Bodek's lots? A Yes.

Q The list that you are now referring to? A That is true.

Mr. Starr: Mr. Carr, may I inquire, you propose to offer this testimony as testimony with reference to any other lots except the Bodek lots?

Mr. Carr: I thought he had covered more than the Bodek lots. I will straighten it out and see.

Q Did you make an examination of these properties in August of 1927?

Mr. Starr: He has already said he examined them in May, 1928.

Mr. Carr: It may be possible he made two.

A I lived in Wildwood from 1926 on, and I was very well acquainted with all the lots in the Ryan tract and, in fact, I noticed the construction and closely observed the construction of all the improvements to the Ryan tract.

Mr. Starr: I move that be stricken out, if your Honor please, as not responsive to the question.

The Court: No, it is not responsive.

Q I am asking you whether you did see these in August of 1927? A What do you mean by these?

Q I mean the Ryan block. A Yes.

Q Did you at that time make any checking up of certain lots for the purpose of seeing whether there was sidewalks and things of that sort? A Yes.

Q Did you make a report on it at one time? A I believe I did.

Q Are you able to recall what you found at that time without the aid of your memorandum, or report, at that time? A Just in general terms.

Q Could you testify more accurately by reference to your memorandum at that time? A No, this memorandum only has reference to the May, 1928, examination of Mr. Bodek's lots.

Q Have you had anything to do, in your work, with sewage plants, and so forth? Are you familiar with that class of work? A Sewer systems, not plants.

Q Sewer systems? A Yes.

Q What familiarity have you had with that kind of work? A Well, in the first place, for three years I was assistant engineer of bridges and sewers for the City of Philadelphia, and second place at the present time I am now construction engineer for the Pennsylvania State Highway Department and I constructed or, rather, designed and constructed a sewer system for Monterey Village near Pensacola, in 1926, that is about all that I have had to do with sewers.

Q Did you see these sewer pipes being installed in the Ryan operation? A Yes.

Q Saw them yourself, did you? A Yes.

Q You know, of course, that they were laid before the fill was made? A Yes, I do.

Q What can you say as to that method of construction as to its feasibility or workability?

Mr. Starr: I object, if your Honor please. The witness has not shown such qualifications as to justify.

The Court: Sustain the objection.

Mr. Carr: On the basis of qualification?

The Court: Yes, that is the objection that has been made.

A I am registered by the State of New Jersey.

Mr. Starr: No question. You are so anxious to testify.

The Court: I sustain that. There hasn't been the slightest testimony that he has ever had experience with a sewerage system of this nature at all. It may be an entirely different method.

Q What is the character of the work you did in the City of Philadelphia that came under your supervision? A Designing of bridges and sewers.

Q You designed sewers? A Yes.

Q Sanitary sewers? A We have a combined system in Philadelphia, both sanitary and storm combined.

Q What was the character of the sewer system in Florida? A That was a sanitary system.

Q What general character? A Well, it was just a mushroom development, it was designed to serve eventually about three thousand acres of land subdivided into lots.

Q What kind of pipe? A Vitrified tile.

Q Was a vitrified tile job down in Wildwood? A Yes.

Q Generally speaking, did this Florida job bear any relation or any resemblance to the Wildwood job?

Mr. Starr: Objected to, if your Honor please.

The Court: I will permit it.

Mr. Starr: If your Honor please, that permits this witness to make comparison without stating the facts. It seems to me your Honor must have the facts and then determine whether or not there is any comparison.

The Court: This is a preliminary question I will permit.

A In what respect do you want the similarity drawn?

Q I really don't know. A They were both similar in that they were tile systems, I believe that the Ryan tract is smaller than three thousand acres, I don't know just what the extent of it is. The method of construction is entirely different because in my—

Mr. Starr: That ends the proposition.

Cross examination by Mr. Starr.

Q Now, Mr. Creskoff, you spoke first with reference to lot number 6 in Block 413. Have you the map there? A Yes.

Q That is located on the beach front, isn't it? A Yes, located on the beach front.

Q What do you say was the trouble with that? A Trouble with it was that there was no fill, no sidewalks or curbs and no sewer.

Q You mean no sidewalks or curbs along the front? A I was examining to see how far the contract was fulfilled.

Mr. Starr: I move that be stricken out, if your Honor please.

The Court: Let that be stricken. Answer the question.

Q Answer the question. A No, there was no sidewalks or curbs.

Q Along the front towards the ocean, is that right? A That is right.

Q And there were no sidewalks or curbs on any of those lots adjoining that particular lot? A No, there was not.

Q So far as your observation went there were no sidewalks or curbs along the fronts of

any of the lots which bordered on the ocean? A That is right.

Q Now, you say there was no sewer, how do you know there wasn't any sewer? Did you dig up the street to find out? A Didn't have to.

Q Why not? A Because I had a map available of Mr. Weir.

Q Then the result of that examination was not from your personal examination of the lot? A Yes, it was, because I checked up on the map to see if it was correct.

Q Did you dig up the street to see whether there were any sewer there? A I didn't have to because—

Mr. Starr: I move that be stricken out.

The Court: Yes, let that be stricken out.

Q Did you do it? A No. May I explain why it wasn't necessary?

Q You say there was no fill on that, what do you mean by that? A By fill I mean that the surface of the lot in that locality was not approximately equal to the surface of the adjoining lot.

Q Did you say there was no fill at all? Had there been any fill on any of these lots? A That I couldn't say.

Q Well, can you tell us why you testified there was no fill if you don't know? A Well, I could just testify by seeing the physical conditions adjoining.

Q Was there any indication of a fill? A No.

Q No pumping in at all? A Not that I could notice.

Q Was that lot in the same condition as the other lots in that vicinity fronting the ocean? A I can't say that.

Q What? A Approximately the same, but I can't say.

Q Was there any fill in the adjoining lots, for instance, you have testified as to 6, was there any fill in 5 or 7? A I can't say. I have no record here.

Q Did you look to see? A No.

Q You simply looked at 5 and did not observe the condition of the other two lots adjoining? A I just looked at the lots I was supposed to examine, yes, sir.

Q Did you look to see what the condition of the adjoining lots was? A In just a general way.

Q What was that condition? A Looked about the same.

Q The next you spoke about was Block 306, lot 1. What did you say the trouble with that lot was? A Sidewalks and curb had settled about a foot.

Q The sidewalk was there? A Yes.

Q And the curb was there? A Yes.

Q And there had been a settling of that sand so that the sidewalk was below the grade of the adjoining property, is that right? A That is right.

Q And the curb was in the same condition? A That is right.

Q All that would have to be done was to shore it up and put some sand underneath it to hold it and bring it up to grade, that could be done, couldn't it? A I suppose it could be done.

Q Now the next is Block 413, lot 6, that is another one facing the Boardwalk.

The Court: 413, lot 6, is the one you have testified to.

Mr. Starr: He has testified about that twice, then.

(Question withdrawn.)

Q 415, what was the number of the lot in 415? A Eight, 2 and 8.

Q These two lots, 2 and 8, are also fronting the ocean and you found the same condition there as you did in lot 6, Block 413? A With one exception.

Q What is the difference? A Why, 415 had a sewer which was clogged, the others didn't have any sewer.

Q Which lot was clogged, the sewer in front of which lot was clogged? A 415, 2 and 8.

Q Sewers then in front of both lots, you say the sewer was clogged in front of one? A In back of the lots, not in front of them.

Q Back of the lot, in the alley? A In the alley.

Q There was a line of sewer in that alley? A Yes.

Q You say it was clogged? A Yes.

Q How do you know it was clogged? A By looking into the manholes.

Q Explain what do you mean by it? A Well, there are, there is a stretch of pipe and there are openings by which people can inspect the pipe to see whether it is all right, if anything goes wrong, to find out what is wrong, the way you do that, you get down in the manhole and you look to see whether the pipe is clear or

no, if it is clogged, if you place a flashlight at the other manhole, you can't see the flashlight.

Q What did you do in respect to this investigation? A I just investigated.

Q What did you do? A The method of procedure was the same.

Q What did you do, that is what I want to know? A I answered that.

Q Tell me again, I didn't understand it. A I looked into a manhole at one end, the location of which I had from the plan, and tried to see through the pipe.

Q Did you get down into the manhole? A Yes.

Q Have anybody there to help you? Did you have anybody at the other end of the manhole? A Yes, Mr. Schoenberg.

Q Mr. Schoenberg was down there and he had a flashlight at one end of the pipe and you were at the other, is that the way it happened? A That is right.

Q You say it was clogged? A That is right.

Q It had sand in it? A It had sand in it.

Q There were two manholes in that alley, were there? A I believe there were. I can't say as to the plan.

Q Do you know? A There must have been.

Q You don't know whether there was another manhole that Schoenberg, did he go down a manhole, too? A As I recall it, he must have done.

Q Have you any recollection on the subject? A Why, there would be nothing to fix that in my mind particularly.

Q You spoke something about Block 306, lot 3? A 306, 3?

The Court: 301, 3, wasn't it? He answered the street was in poor condition and you objected and stricken, and no other testimony.

Mr. Starr: I guess we better leave it that way, then.

Q You went down there to make this very accurate and careful examination at the suggestion of Mr. Bodek, is that right? A That is right.

Q What you have testified has been the result of your examination? A That is right.

Q That is all you found? A That is all.

By Mr. McCarter.

Q Have you testified fully as to everything you found? A Only on what I did testify.

Q Did you find there—

Mr. Starr: If your Honor please, it seems to me this is not re-direct examination.

The Court: Yes, I think you have opened the question and have asked him if he has testified to everything he found.

Mr. Starr: What I said was this, I said, my recollection is, of the testimony you have given as the result of your examination.

The Court: Yes.

Mr. Starr: Now, it seems to me if they are to make any other complaint with reference to this, it was incumbent on them to put it in their main case.

Mr. McCarter: Be that as it may, I don't think further argument is needed, your

Honor, I am counsel for another party here, and I have not examined the witness yet at all.

Mr. Starr: It was your duty to examine him before I cross examined him.

The Court: Should have been done then.

Mr. Starr: I think you waived your right by letting me take the examination before you started him.

Mr. McCarter: Of course, if your Honor rules so, that is the end of it, but I didn't think there was any special order as to the procedure between the parties.

The Court: In this posture I will permit you to examine.

Q Now, Mr. Creskoff, you made a complete examination of each of Mr. Bodek's lots, did you? A Yes.

Q If you can, without repeating your testimony as to the lots you told us about already, will you tell what you found with respect to the physical conditions that you made an examination about as to each of the Bodek lots beginning with Block 301?

Mr. Starr: Have we had that before?

Mr. McCarter: I think we may save time by going through and maybe repeating rather than endeavoring to eliminate.

Mr. Starr: I object to this, if your Honor please.

The Court: Yes, should not be repeated. He may take what has not been testified on. 301, lot 3, there has been no testimony

concerning it. There was testimony which was stricken.

Q What did you find with respect to the fill on Block 301, lot 3? A The fill is approximately two feet below the elevation of the curb. The street was in poor condition, the sewer—

The Court: That is the same answer that was stricken before and should be stricken now without any motion.

Q What do you mean by poor?

Mr. Starr: There is another objection, if your Honor please. This contract, as I recall it, provided for the grade to be regulated by the County road, and the basis of the grade was the County road, and it seems to me doesn't make any difference how far below the curb.

Q Then eliminate the street and tell me how about the sewer then? A I found the sewer being repaired and replaced at that point. The same was true of lot 4.

Mr. Starr: Same block?

A Same block.

Q Turn to Block 302, what did you find there with respect to the fill? A Block 302, lot 3, the fill was O. K.

Q What did you find with respect to the sewers? A The sewers were being replaced.

Q What about—

Mr. Starr: If your Honor pleases, it seems to me that is objectionable and ought

to be stricken in both cases. What has that got to do with the issue here, whether or not the sewer was being replaced?

The Court: I can't see where it is admissible. It has been testified by witnesses that it was being replaced by Mr. Ryan, at Mr. Ryan's expense. Now, I can't see how it is going to assist us any by this witness to testify what was being replaced.

Mr. McCarter: It may possibly be cumulative, if the Court please, but, at the same time, the fact that it was being replaced at Mr. Ryan's expense, or anybody else's expense, isn't so important as the fact that the condition of the sewers was such that it required replacement. That is the important feature in the case really, although the testimony may possibly be cumulative, I submit it is entirely proper for us.

The Court: I will permit it.

Q Pass on to the next lot there. A Lot 4, Block 302, sewer being replaced; Block 304, lot number 9, street was in passable condition, sewer was being repaired and replaced.

The Court: So I can understand it, the street, was it an impassable condition because of the work that was being done on it by reason of the sewers being replaced?

Mr. Richards: May I call your Honor's attention to the fact the testimony is that, this testimony relates to a period nearly a year after the City had accepted the streets.

Mr. Starr: Over a year, April, 1927, May 1928.

Mr. Richards: A year and one month.

The Court: Yes, so far as the streets are concerned.

Q I am asking you to tell me what you found out as to the grade and fill and the sewer.

Mr. Richards: That part may be stricken?

The Court: That part may be stricken.

A Block 305, lot 10, the fill is three feet below the elevation of the curb, the sewer is being repaired and replaced; same is true of lot number 11 in the same block. Number 47 of the same block, the sewer is being repaired and replaced. Number 48 of the same block, sewer is being repaired and replaced. Block 306, lot 1—

The Court: You have had that.

Q Skip that. A Block 413, lot 37, sewer crushed. 413, lot 38, sewer crushed. Same of lot 39 of the same block. Block 415, lot number 2, no fill, sewer clogged. Same is true of number 8 of the same block.

The Court: You have had both of those.

A Number 16 of the same block, the fill is two feet below grade, sewer being repaired and replaced. The same is true of 17, 18, 19, 20 and 21 of the same block. Lot 35, the same block, the fill is four feet below the elevation of the curb. The sewer is being repaired and replaced. 36 of the same block, in the same condition, 37 of 415, fill is four feet below elevation of the curb. Sewer being repaired and replaced. 38, 39, 40, 41 and 42 of the same block, in the

same condition, in both cases. Block 417, lot 22, fill was two feet below grade, and sewer was being repaired and replaced. Lot 23 of the same block, the same. Lot 32 of the same block, fill is one foot below elevation of the curb, and sewer is being repaired and replaced. 33 and 34, the same block, in the same condition. Block 418, number 22, fill two feet below elevation of curb, sewer being repaired and replaced. The same is true of 23, 32 and 34, of the same block.

Block 419, lot 18, fill is two and a half feet below elevation of curb, and the sewer is being repaired and replaced. The same is true of 19 and 24 of the same block. Lot 32, block 419, sewer is being repaired and replaced.

By Mr. Starr.

Q You spoke of the fill being below the elevation of the curb. You mean the fill of the lot? A Yes.

Q Did you make any, take any elevations to see how that fill or the fill of any of these lots compared with the grade of the County road? A I did not take them myself, but I know what they are.

Q I didn't ask you that. A No, I didn't.

Q You didn't take them? A No.

Q So you made no measurements to see whether or not they correspond with the fill of the County road? A No.

Q And that applies to all of the fill of the various lots? A That is true.

Q Did you find whether there was any dishing in the fill of the street in front of any of these lots? A I don't believe so.

Q Streets up to grade, then, were they? A Compared to the curb, I am always talking about relative to the curb.

Q Was there any indication that the streets were below the grade of the curb or the County road? A Just where I say that they are in poor condition.

Q What is that? A In cases where I stated that the streets were in poor condition.

Q You were there while they were rebuilding the sewers? A Yes, on that day.

Q Work was going on? A Yes.

Q They were digging up streets and putting in new sewers? A Yes.

Q That is the fact, isn't it? A Yes.

Mr. McCarter: We rest.

Mr. Carr: We rest.

Mr. Cole: I want to offer in behalf of Shotkin—

Mr. Carr: With the possible reservation of exhibits, I would like to check them up, that have been offered and identified and not yet offered, I would like to consider them offered.

Mr. McCarter: Make the same reservation. I think they are all in.

Mr. Cole: I offer the bond of Shotkin.

(Bond received in evidence and marked Exhibit C. S. 1.)

Mr. Cole: I offer the mortgage.

(Mortgage received in evidence and marked Exhibit C. S. 2.)

Mr. Cole: I offer the assignment of the mortgage from Ryan to Esibill.

(Assignment received in evidence and marked Exhibit C. S. 3.)

Mr. Cole: I offer the search.

(Search received in evidence and marked Exhibit C. S. 4.)

Mr. Cole: I rest so far as Shotkin is concerned.

Mr. Richards: If your Honor please, while nothing else is going on here, for a moment, I would like to suggest in the record that since this case has been in course of trial the Colonial Trust Company of Philadelphia, one of the complainants, has been merged with the Pennsylvania Company for the Insuring of Lives and Granting Annuities, I think the full title is, as of April, 1930, and I would like to move to amend to make the merged company, the Pennsylvania Company for the Insuring of Lives and Granting Annuities be made party complainant, and that an amendment of the pleadings for that purpose be allowed.

The Court: That may be done.

Mr. Richards: This company having succeeded to all the rights, credits and assets of the Colonial Trust Company.

The Court: I think you better prepare a formal order for that purpose so it will be in the file.

Mr. Starr: I don't think it is absolutely necessary, but we can do it.

The Court: It will be noted on the testimony, but there should be a formal order.

COMPLAINANTS' REBUTTAL.

WILLIAM J. RYAN, recalled.

Direct examination by Mr. Starr.

Q Mr. Ryan, did you have a photograph taken on the day that the sale occurred in 1925? A The Joseph P. Day people did, at my instruction.

Q Were you present at that sale? A Yes, I was.

Q I show you a photograph which is marked W 323 G, and ask you whether or not that is a picture of the tent which was taken at the time of the sale? A That is.

Q Will you say whether or not that photograph accurately depicts the tent and the automobiles that were present at the time of the sale? A Essentially, yes.

Q Does it also show the sign or portion of the sign which was on the property at the time of the sale? A It does.

Q Where is that sign located? A At, I should judge, between 10th and 11th, I think, or 11th and 12th.

Q Facing what street? A Facing Surf avenue.

Q Is that the main thoroughfare that runs in front of the property? A Correct.

Q Is that what is called the County road? A No, the County road I understand is further back.

Q But this is Surf avenue? A Surf avenue.

Q Where on this photograph is the sign indicated? A Indicated right here.

Q To the extreme left side, about midway between the top and bottom of the photograph? A That is right.

Q Can you say whether or not that picture actually shows the conditions on the day of the sale when the tent was there and when the sale was going on? A Positively.

Q And the automobiles were around the tent? A No question about it.

Q Now, was there any other sign on the property at the time of the sale than the one which is shown on this photograph which I show you? A Other than this? Yes, one other sign at the 6th street end of the half block, sort of diagonally across, catching the automobiles as they come in.

Q What was on that sign? A Same wording on this. Identically the same.

(Photograph offered, received in evidence and marked Exhibit R. 1.)

Q I show you Exhibit C. 3, and ask you whether at the time of the sale there was any sign on the property showing as shown by this photograph? A You referring to the physical sign itself or the lettering on it?

Q I am referring to the sign and what is on the sign. A The physical sign was there, but the lettering on this particular photograph was not.

Q You mean the frame was there? A The frame was there.

Q But the wording? A The wording was not there.

Q Now, when, according to your recollection, was the painting or the words placed on the

sign as shown in Exhibit C. 3? A As shown on this?

Q C. 3? A Some time in 1926, after we had made our contracts with these various contractors to put in the improvements.

Q How long after the sale? A I would say four or five or six months.

No cross examination.

WALTER H. EVANS, sworn.

Direct examination by Mr. Starr.

Q Mr. Evans, what is your occupation? A Surveyor and photographer.

Q How long have you been engaged in the business of taking photographs? A Twenty-six years.

Q Located where? A Philadelphia.

Q Have you also been engaged in the business of enlarging photographs? A Yes, sir.

Q For how long? A Same time.

Q I show you Exhibit R. 1, and ask you whether or not you made an enlargement of a portion of that photograph showing the sign on the left-hand side? A I did, sir.

Q I show you these two photographs and ask you whether or not they are the enlargements which were taken from the photograph exhibited to you? A They are, sir.

Q Were they taken under your personal supervision? A They were taken by me all the way through, I focused the camera, developed the plates and made the enlargements.

Q The whole performance was by you then, is that right? A No one else had a hand in it except a stenographer.

(Two photographs offered, received in evidence and marked Exhibits R. 2 and 3.)

Q Mr. Evans, can you assist the Court in telling us what the enlargment shows with respect to the wording on the sign as shown in Exhibit R. 1? A It shows, of course the exact wording that is on the little sign, the sign itself is somewhat out of focus, when you come to enlarge it, that, of course, enlarges, the blurriness enlarges with the enlargement. I made a negative that was two and a half times, approximately, the size of the original, then tried different sizes of enlargement to try and and get this printing sharper, and I submitted both enlargements made.

Q How does it read on the enlargement? A As far as I can see, there is one word I cannot make out, that is the first word. The second word looks like "1000 lots with improvements to be sold by public auction." And then the bottom portion of the sign is hidden by the tops of automobiles.

Q Now, is there anything in that enlargement similar to Exhibit C. 3? A No, sir.

Q No similarity whatever, is there? A No, sir.

No cross examination.

THOMAS G. YOUNG, sworn.

Direct examination by Mr. Starr.

Q Mr. Young, where do you reside? A Wildwood.

Q What is your occupation? A Sign painter.

Q How long have you been in that business? A Twenty years.

Q Did you paint any signs on the Ryan tract, North Wildwood, in 1925? A I did.

Q Do you remember when you first went up there for the purpose of painting signs? A Well, when I first went up there, the boards were in the raw state, we didn't have time, that was before the sale, and we didn't have time to cut them out, and we covered them with oilcloth, and painted over the oilcloth. That was ordered through, I think, a man by the name of Farrell, Joseph Farrell, for Joseph P. Day.

Q Do you remember when that was? A That was before the sale. The date I couldn't exactly say.

Q Did you personally do the mechanical work on the sign? A I done the lettering on the sign.

Q What in your recollection was there on that sale? A Just so many lots for a sale on it, and so on and so forth, and Joseph P. Day signature at the bottom.

Q Were you there present at the sale? A Yes, sir.

Q Was that sign on the premises at the time of the sale? A I believe it was. In fact, I know it was.

Q How many signs were there? A Well, now, there was quite a number of signs there,

but a lot of them pertained to the blocks, I done all that work for Day on that particular tract.

Q Was the sign about which you have testified announcing the sale of a number of lots, was that sign there on the day of the sale? A Yes, sir.

Q Did you subsequently make any change in the signs that were located on the property? A Twice.

Q Do you remember when it was? A I believe in either the fall of 1926 or the spring of 1927 I changed it to the contractors, and so on and so forth.

Q Now, that, you say, in the fall of 1926? A Either the fall of '26 or the spring of 1927.

Q Did you change it more than once? A Yes, sir. It has been changed since then.

Q When was the last change made, do you remember? A I believe latter part of 1927 or early part of 1928.

Q I show you Exhibit C. 3, which has been testified to be a photograph of a sign on the Ryan tract, when was that sign painted by you? A That must have been right after we tore the oilcloth off, after the sale.

Q That sign was up there after the sale, then, was it? A Yes, sir.

Q You have testified that the second sign that was put there had relation to the contractors, is that the sign? A This is the second sign.

Q Have you any definite knowledge of how long after the sale that sign was put there? A No, I couldn't say.

Q Your best recollection? A After the sale.

Q After the sale? A Probably a year.

Q The sale was in 1925? A 1925.

Thomas G. Young, in rebuttal, cross.

Q Was there any sign of that kind painted by you, sign shown by Exhibit C. 3, on the property on the day of the sale? A Only the temporary signs, there were two temporary signs.

Q I am speaking about this sign, C. 3, was that sign on the property on the day of the sale? A No, sir, not that particular copy.

Q I am speaking about the lettering. A No.

Q The lettering on the sign was not there on the day of the sale? A No, sir.

Q I show you Exhibits R. 2 and R. 3, and ask you whether or not you can identify those photographs as enlargements of the sign that was on the property on the day of the sale? A Yes, sir.

Q They are enlargements, are they? A Yes, sir, they are the same as on there on the day of the sale.

Q I show you a photograph, R. 1, can you recognize that as a picture of the tent and the people there on the day of the sale? A Yes.

Q I call your attention to the sign in the extreme left-hand side, look at that and tell me whether or not that is the location of the sign about which you have been examined as being present on that day of the sale? A Yes.

Q Now, Mr. Ryan has said there were two signs on that day, were they both the same? A Positively. One was a little larger than the other, that is all.

Q But the lettering was the same? A Practically the same.

Cross examination by Mr. McCarter.

Q You say the sign there the day of the sale was covered with oilcloth, Mr. Young? A Yes.

Q When did you make the first change, taking off the oilcloth and painting on the actual boards? A They took one of the signs down, I believe, and took it over to Cape May, and the other one I had orders, Harry Weir, he could give you the dates better than I can, I kept no records of that stuff, but shortly after the sale that Weir came in with me to give me the order to paint the sign.

Q To paint it on the actual boards? A On the actual boards.

Q How many changes did you make on the sign altogether? A I believe there was two with paint.

Q In other words, there were three signs in all, one on oilcloth and two on boards, is that right? A Yes.

Q I show you Exhibit C. 4, and ask you if you recognize that as a picture of the sign at any stage of the game? A Yes, I do.

Q Did you put that whitewash or whatever it was that partially obliterates some of the lettering, did you put that on? A That I can't say.

Q You don't remember that ? A No, I don't.

Q You, of course, paint many signs? A Yes, I do.

Q Just one job in a great many to you, wasn't it? A That is right.

Q And your memory as to the sign and what was on it and when you put the different letterings on is not very clear after these five years, is it? A Not very.

Mr. Starr: Mr. Carr, may we have a stipulation on the record that the date of the dredging company contract between the Ryan

Company and the United Dredging Company was the 3rd day of May, 1926?

Mr. Carr: What does it show here?

Mr. Starr: This certified copy shows May, but I understand the original in the possession of the Dredging Company was 3rd day of April.

Mr. Carr: The original appears to be, if your Honor please, unquestionably dated the 3rd of April, 1926, while the certified copy for some reason is the 3rd of May, 1926, so I would presume that the original—

Mr. Starr: Already introduced in evidence as Exhibit C. 2.

The Court: There is no point made of the difference in the date?

Mr. Carr: No, sir. I suppose it must have been an error.

The Court: From the County Clerk? Why not mail it to him and ask him to either correct it or say the certificate is incorrect?

Mr. Starr: It is immaterial one way or the other except we had some understanding about the date.

Recess taken until one o'clock P. M.

AFTERNOON SESSION.

Trial of the cause resumed at 1 o'clock P. M.

WILLIAM J. RYAN recalled:

Direct examination by Mr. Starr.

Q Mr. Ryan, were you in court this morning when Mr. Shotkin testified? A Part of the time, not all of it. I wasn't here when he started.

Q Pardon me? A I wasn't here when he started. I was here for part of it.

Q He testified that upon three occasions, I believe, you had talks with him in which you stated that you had deposited with the municipal authorities in North Wildwood sufficient money to build a sewage disposal plant, the first time indicated by him was the night before the sale in 1925. Did you ever have any conversation with Mr. Shotkin with reference to that subject matter? A None whatsoever.

Q Did you ever tell him that you had deposited with the Borough of North Wildwood any money with which a sewage disposal plant was to be constructed? A None whatsoever.

Q Do you remember whether or not you had a conversation with him the night before the sale? A I recall meeting him at the Queen Hotel the night before the sale.

Q Upon that occasion did you tell him that you had deposited the money? A None whatsoever.

Q Deposited with the Borough the money? Was there any conversation that you can recall about the sewage disposal plant at that time? A The question never came up.

Q In any of your conversations with Mr. Shotkin, was there any allusion to any sewerage disposal plant? A None.

Q He also said that after he had stopped payment on a check which had been given as a down payment for some of these lots, that you had a talk with him in which you repeated the same statements about the sewage disposal plant, and that he said because of your statements he would go on with the contract and make the check good. Did any conversation of that kind occur? A Never discussed that subject with Mr. Shotkin in any way, shape or form. The check was not payable to me. It was payable to Joseph P. Day, and his arrangements were with Day and not with me at the time of the sale, and these subsequent meetings he was talking about.

Mr. Carr: Move that be stricken out as not responsive.

The Court: Yes, I think that is true.

Mr. Starr: That is not responsive.

Q Do you recall whether or not you had any conversation with him with respect to his non-payment or his stopping payment of that check? A Had no conversation with him whatsoever in connection with it.

Mr. Starr: Now, Mr. Carr, I am referring to page 378 of the record.

Q Were you present at the same during all the time the property and lots were being sold? A I was.

Q Where were you located with respect to the auctioneer? A I was alongside of the platform or the stand that he uses to auction from.

Q And were you close enough to hear the announcements made by him? A I was.

Q Mr. Smith testified on page 378, that the auctioneer made reference to the facts stated on the sign during the progress of the sale, and stated that the improvements would be finished before July 15, 1926, and advised the prospective purchasers to look at the sign, calling attention to the sign itself. Did or did not that occur? A Untrue. No statements were made by the auctioneer or anybody else.

Q Were any statements made by the auctioneer or anybody else connected with the sale at the time the lots were offered for sale as to the time when the improvements would be completed? A The improvements were not discussed in any way, shape, or form, either verbally or any other way, or statements in regard to the improvements in any way, shape or form, other than stated in the contract, there was no announcement made of it only as it was read from the contract.

Q The auctioneer or the person who was acting as auctioneer made no verbal statements as to the improvements, is that right? A None whatsoever, only reading the terms of the sale as printed in their form.

Q Is it a fact that he did read the terms of the sale? A They always do, that is involved.

Q I don't care what they always do.

Mr. Carr: I object.

The Court: Yes.

Q Whether they did in this case? A Yes.

Q Read the details of the terms of sale? A Absolutely in writing, all the bill of sale, docu-

ment that every purchaser signed, it specifically stated there, and he read that verbatim as it was.

Q Was there any conversation between you and Mr. Shotkin at any time when he asked you whether or not you were giving him the same terms as the other purchasers were getting, was there any talk about that? A The only reference I can recall to that was in Mr. Wolf, Block & Schorr's office, when we were making terms with them to give them mortgages, he told me that he was going to go along with them, and I wasn't concerned at all with him, and he simply was in there, and that is the only conversation I recall, that he told him he was going to get the same terms as the others, he had agreed, and it was in Mr. Schorr's office, and so far as I was concerned, I had no conversation whatsoever about it.

Q What is your recollection as to the discussion about terms in your presence? A Simply that he was going to have the same terms as the rest of the group that had demanded more time.

Q There was a change in the terms as finally carried out as set forth in the contract? A That is right.

Q State the conversation with any of these gentlemen with reference to that change. A The change came about in this way, that the terms of sale was twenty down and twenty, thirty days, and balance over a period of two years, and after the sale was over, there was a number of the groups that had purchased that banded themselves together and made a demand that they wanted settlement, and wanted us to take back a mortgage of sixty per cent., a purchase

money mortgage, which wasn't determined, that was on September the 7th of 1925, Labor Day, some of them threatened to stop payment on the checks if they did not get these terms. Mr. Wolf made the arrangements with them to meet at Mr. Wolf's office on Tuesday, which was done.

Q You were there? A I was present and the terms were agreed to, to give them purchase money mortgages for sixty per cent., they were to pay, some of them, I believe, paid ten and some twenty, as I recall it, of the purchase price, and the balance was, sixty was to be, or, rather, seventy per cent., in mortgage, ten per cent. of that seventy was to be paid when the improvements were completed.

Q And that was the way the mortgages were finally drawn, was it? A That was the way they were finally drawn with all of this entire group, including Mr. Shotkin.

Q Now on page 464 Mr. Shotkin testified, on page 464, speaking of a conversation with Mr. Ryan, he says: "I am one of your prospective customers. Could I talk with you for a couple of minutes?" And you said, "Sure." He said, "Mr. Ryan,"—"I got him out on the porch"—"I am in the millinery business, and never bought real estate before, but I have purposely come down here a couple of days before this sale to make inquiries, to get a knowledge of the values around, and want to make an investment." That he then said to you, "They say that the City of North Wildwood has an injunction against it that because they haven't got an adequate sewerage disposal plant, and they tell me that this plot of ground is almost as big as the entire township of North Wildwood." That he said, among other things, "I

want to know one positive thing. There is no use of my buying if there is no sewerage disposal plant built. What do you expect to do about it?" And that you replied, "I personally put up enough money with the treasurer of North Wildwood to build a sewerage disposal plant to take care of these lots personally. I will make that, make a miracle city out of it." Did any such conversation occur? A None whatsoever.

Q Anything like it? A Nothing like it.

Q He also said on page 467, speaking of Mr. Shotkin, "So I stopped payment on the check after I got to Philadelphia, I went to the Colonial Trust Company, which I was depositor in, Mr. Felix was vice-president then, and Wolf, Patterson, Block and Schorr represented me, at the same time, Mr. Schorr there, I went and stopped payment on the check, so Mr. Ryan, a couple of days later, Mr. Ryan sent for me." "He said, 'Shotkin, you are a good business man, aren't you'?" Shotkin replied, "Yes, I hope so." And that you said, "Why did you stop payment on this check?" And that Shotkin replied: "Mr. Ryan, when I go to do business with people and they extend me credit on merchandise, they give it to me because they have faith in me, they don't sell me something at a certain price, and certain terms, and then come around and give the other fellow different terms and price," and that you replied, "What do you mean?" And that Shotkin said, "Well, you are giving somebody five per cent. down, long time to pay it, me you want twenty per cent. down, and ten per cent. every month," and that Shotkin said, "That is not a square thing." And that you relied, "Well, I will take care of you." Did that conversation occur? A Never had a

conversation with Mr. Shotkin in any way, shape or form. I didn't even know his name. The check that is referred to—

Mr. Carr: I object to that.

The Court: Yes.

Mr. Starr: That answers the question.

Q At the same time he testified that he said, "Ryan, if you do that thing about giving people different terms, I don't believe that you are going to put this plant up," referring to the sewerage plant, and that you replied, "Shotkin, I honestly put that money up to build the sewerage disposal plant with the treasurer of North Wildwood." And that he then signed the agreement. Did such a conversation occur? A Never. Agreements were signed in Wolf, Block, Schorr—

Mr. Carr: I object.

The Court: Yes. That answers the question.

Q Now, he also says, on page 470, "I went to Mr. Ryan and told him that he had not made complete, he had not kept his contract about finishing his improvements as he had agreed, and I couldn't get a permit to build on it, I couldn't sell my property because it wasn't marketable, nobody would buy it on account of that sewerage disposal plant, they couldn't build on it, that I offered—" that he, Shotkin, then offered you a deed "where we rescinded out contract," and that you, Ryan, "tried to hit me with a club." Did anything of that kind ever happen? A No.

William J. Ryan, in rebuttal, cross.

Q I show you, Mr. Ryan, paper which is entitled, "Sale by auction, terms and conditions of sale." Look at that paper, and tell me, is that a copy of one of the papers that were read off by the auctioneer at the time of sale? A It is actually one of them, yes.

Q That is one of them? A Yes.

Q That is the purchaser for one of the lots? A That is correct.

(Paper offered in evidence.)

Mr. Starr: It is Bodek's contract.

Mr. McCarter: We have the yellow sheet in which is an identical copy of it.

Q Now, I show you Exhibit B. 22, which is the yellow memorandum, several yellow memorandums with reference to the sale to Bodek, and I call your attention to the first page, and will you say whether or not the terms and conditions there stated were the ones that were read by the auctioneer at the time of the sale? A Every word of it read distinctly and plainly.

Cross examination by Mr. Carr.

Q Mr. Ryan, one of the last questions asked by Judge Starr which involved some reference to a club, you said nothing of that kind occurred. Will you say that there was no paper or rescission served on you at that time and no deed tendered to you? A No deed tendered to me whatsoever.

Q And no notice of rescission served? A If you want me to tell what happened—

Q No, pardon me. Do you say that no notice of rescission was served on you at that time? A Absolutely no.

Q And no deed? A No deed.

Mr. Starr: I find I have omitted one or two questions.

By Mr. Starr.

Q I am referring to page 452, Mr. McCarter, this refers to Bodek, page 451, question by Mr. McCarter: "Something was said about a sewerage disposal plant. Mr. Ryan ever make any statement to you with reference to a sewerage disposal plant?" And his answer was, "Yes." And that you told him there was money provided for a sewage disposal plant. Do you recall any conversation with Mr. Bodek to that effect? A None whatsoever.

Q Did such a conversation occur? A None ever took place anywhere.

Q Did you ever talk to Bodek about any sewage disposal plant? A Never.

Q Now, referring to Mr. Lipper's testimony, page 455, Mr. Lipper testified, in answer to a question put by Mr. McCarter, that he had a conversation with you in the tent and that you told him that enough money had been provided to build a sewer disposal plant. Do you know Mr. Lipper? A I don't even know him. Might know him if I see him, but I wouldn't know him by name.

Mr. Starr: Is Mr. Lipper in court?

(A gentleman stands up.)

A Yes, I know Mr. Lipper.

Q Did you ever tell him that enough money had been provided to build a sewage disposal plant? A Positively no.

Q And Mr. Lipper also, on page 459, during one of the intermissions at the sale said that he walked over to you, Mr. Ryan, and asked you, and that you said, "There is money provided for the sewers and sewer disposal plant." Did that conversation occur? A Never.

Cross examination by Mr. McCarter.

Q Did you ever talk to anybody during the sale at all? A Yes, I talked to a number of people during the sale.

Q Innumerable people, didn't you? A Surely.

Q They asked you questions about the sale and about the lots and about the proposition in general, didn't they? A Probably did.

Q You never knew Mr. Lipper before that day, did you? A Not that I recall.

Q Ever know Mr. Bodek before that date? A Not that I recall.

Q Did you have any conversation with either Mr. Lipper or Mr. Bodek at all the day of the sale? A Not that I recall.

Q That is all.

GEORGE H. WEINROTH, sworn:

Direct examination by Mr. Starr.

Q Mr. Weinroth, where do you live? A I live in Atlantic City.

Q How long have you lived here? A About five years.

Q What is your occupation? A I am a mortgage operator.

Q What do you mean by that? A I make loans on the construction of buildings, first mortgage loans on the construction of buildings.

Q How long have you been in that occupation? A About five years.

Q Do you know Mr. Bodek? A Yes, I do.

Q How long have you known him? A Twenty-five years, I guess.

Q Have you had any business relations with him? A Yes.

Q In what way? A He was associated with me.

Q Covering what period of time was he associated with you? A I would say 1927 and 1928.

Q Now, I show you a letter which is dated April 1st, 1927, and marked S. 23 for identification, 12/20/29, and ask you whether or not your signature, George H. Weinroth, is attached to that communication? A That is my name, but not my signature. The letter was dictated by me, but not signed by me.

Q It was sent out by your instruction? A Oh, yes, I dictated the letter.

Q By whose authority did you sent that letter to the Colonial Trust Company? A This letter was sent as the result of a conversation with Mr. Bodek.

Q Tell us what that conversation was. A As near as I can recall it, the conversation had to do with a mortgage that was given by Mr. Bodek, together with his bond, on a purchase that he had previously made, he and a group had previously made in Wildwood, and an attempt was made, through me, to—the mortgage at that time was in default, and he, Mr. Felix of the bank, asked me whether I knew Bodek, I told

him yes, that he was associated with me, and he said, "We have some difficulty here on a mortgage that is past due, and I would like to have you use your good influences with him to see if the mortgage could not be brought up to date, some arrangement made on the mortgage." I said, "I will be glad to do it," because Bodek was the kind of a fellow that you could talk to him, and I proceeded and spoke to him with reference to an arrangement that would be both satisfactory to him and his associates at the bank. I wasn't commissioned by anybody to handle this transaction or didn't have anything to do with any office. There was an installment due, and, if I remember correctly, I don't think the interest was paid, and some arrangement was to be—I was to present certain arrangements to Mr. Felix and certain propositions which I don't recall now, and I did present them, and I put my presentation in writing.

Q Now, can you tell from looking at that letter what the proposition was that Mr. Bodek authorized you to make to Mr. Felix? A The letter says itself enclosed—

Mr. McCarter: Wait a minute. I object.

Q I am asking as to your recollection of the letter, may I ask you this question first, how soon after your talk with Bodek did you write this letter? A Probably the same day or the following day.

Q Now after looking at that letter and refreshing your recollection, tell us what the arrangement was that Mr. Bodek told you to make to Mr. Felix.

Mr. McCarter: If your Honor please, I object to that. This is apparently an effort in settlement, which, as I understand the rule to be, is never admissible against the party making it. Here is the real controversy. Mr. Bodek possibly offered to settle it on certain terms, and I don't think that is admissible against him at all.

Mr. Starr: That is not the proof, if your Honor please.

Mr. McCarter: Offer of that nature is entirely without prejudice.

Mr. Starr: This is an effort to show that after this mortgage became in default and after the time Mr. Bodek says that he knew of the failure on the part of Ryan to make these various improvements, he made this proposition without reservation whatever, and it is without any idea of rescinding the contract, it is an admission, it seems to me, on his part that the defense now raised as to rescission, because of the default of Bodek, is a matter which since this suit was brought, your Honor knows if there is any right of rescission it must be exercised promptly, and if there has been a performance of the contract after knowledge, the right to rescind does not exist, and it is for that purpose this testimony is used, also for the purpose of contradicting Mr. Bodek, who was interrogated with reference to this specific matter when he was cross examined.

The Court: I will permit the question.

(Question repeated.)

A I remember it now. There were, I think, three or four men in this purchase, and Mr. Bodek

has given his bond and his mortgage on the purchase, without having received, as I remember it, any compensating bonds or mortgages to him by reason of his mortgage for the full amount, and a plan was submitted that would limit the interest of the parties to the liabilities, the liability of each of the parties, it was to be a separate transaction involving each man separately, and a default on one would not be a default on all. That was the purpose of this plan.

Q Now, can you recall whether or not there was anything else said by Bodek at the time, after having an opportunity to refresh your recollection by that letter? A There was ten per cent. to be paid on the mortgage, and I think that subsequently was reduced to five per cent., notes were to be given for the balance that was then due. The language, part of the plan was to postpone the payment for the mortgage by eighteen months in order to give them a chance to make some sales.

Q Do you recall anything else? A Absolutely, it was this division of responsibility between the parties in interest.

Q Now, was there any complaint made at that time by Mr. Bodek that the improvements on the property had,—at Wildwood had not been completed? A Not to my knowledge.

Q Nothing was stated in your presence with respect to that? A Nothing that had any bearing on this.

Q Did Mr. Bodek know that you were going to communicate to Mr. Felix by letter, submitting the proposition which he made? A I think so.

Q Was there any talk about it, about your writing the letter or submitting the proposition in writing? A I don't recall any.

Q I ask you this question now, did Mr. Bodek authorize you to submit the proposition contained in that letter to Mr. Felix?

Mr. McCarter: I object to that as leading and also calling for a conclusion.

The Court: Yes, I think we should have what he said to him concerning it.

Q What did Mr. Bodek say with respect to communicating with Mr. Felix the proposition which was talked about between you and Mr. Bodek at that time? A When Mr. Bodek and I both interviewed Mr. Felix, and it was as the result of that interview that Mr. Felix said to please write him of any decision or any proposition Mr. Bodek wanted to make.

Q Was that said in Mr. Bodek's presence, do you recall? A It was at the interview.

Q Was it said in such a way that he could hear what was talked between you and Felix? A I would presume so, yes. I don't know what he would hear.

Q Was he close enough, was he in the same room? A He was there at the interview.

Mr. Starr: If your Honor please, I offer the letter in evidence.

Mr. McCarter: I object for the reason stated before.

Mr. Starr: It seems to me this letter is the result, it is a proposition submitted to Mr. Felix in the course of an arrangement between Felix, Bodek and the writer, with reference to the subject matter, and I think Mr. Bodek is bound by the contents of the letter.

Mr. McCarter: I submit it is an offer of settlement and therefore is not admissible against him as an admission.

Mr. Starr: It is not an offer of settlement. It is an offer of adjustment of an outstanding liability on the mortgage without any suggestion that there was any defense to that mortgage. It is entirely inconsistent with the attitude which is now taken that these mortgages are of no value whatever because there was a default on the part of the mortgagee.

Mr. McCarter: Without going to such a stage, any offer, any settlement, any offer to pay a claim is inconsistent with the denial of liability, because the law favors settlements of controversies. That is why offers of settlement are excluded.

The Court: I will sustain the objection.

Q Now, Mr. Weinroth, I call your attention to another letter which is dated May 6th, 1927, addressed to Mr. Felix, and ask whether or not you either sent or authorized the sending of that communication? A Yes, I did.

Q Having an opportunity to read that letter, and refresh your recollection, will you say whether or not there was a meeting in your office on the 5th of May, 1927? A There was.

Q At which Dr. Weinstein, Mr. Frankel, Mr. Bodek and yourself were present? A Yes, they were.

Q What occurred at that meeting, what was said?

Mr. McCarter: I object, of course, on the same ground as before, just as objectionable

to have it come in orderly as to have it come in in the form of an offer of a witness's testimony, this is all on the line of an offer of settlement, and I object to any such testimony as incompetent.

The Court: I will admit the question.

(Question repeated.)

Q Between the various parties, Frankel, Weinstein, Bodek and yourself? A It was agreed first that the individuals present should present bonds covering their respective interests in the property, and that the thing be put entirely on an individual basis and that Bodek be relieved of all but his proportionate part of the liability. That in addition to that there was to be six per cent. paid off on the mortgage every six months as an amortization, six per cent. was to be paid in as amortization, and three per cent. on amortization and three per cent. on interest, as I understood, six per cent. mortgage. The mortgage was to be for five years, there was some considerable talk about the mortgage being extended for a longer period than it had originally been contemplated. It was talked that at that time the principal of the mortgage shall have been reduced by three per cent., that is all that took place at that meeting.

Q Now, at that meeting was there anything said by Bodek with respect to submitting the proposition to Felix? A Certainly.

Mr. McCarter: I object to that for the same reason.

The Court: I will permit that.

Q What did he say about that?

Mr. McCarter: Same objection.

The Court: Yes. You may proceed.

A I had turned over to Mr. Bodek for his perusal the letters that I had received from Mr. Kurtz or Mr. Felix, I don't recall which, and I had repeated to him the conversations I had with them, and I had showed him the letter that was sent or a copy of the letter that was sent to Mr. Felix or Mr. Kurtz, I don't remember which now. It was the offer and counter offer by both of the parties that caused these letters to go back and forth, and all our controversies were in writing with the exception of the original interview.

Q Calling your attention to Exhibit S. 23 for identification, do you say that you showed a copy of that communication to Mr. Bodek? A Yes, I did.

Q What, if anything, did he say in reference to it? A Nothing at all.

Q Made no comment one way or the other? A No.

Q Did he make any objection to the statements in the letter or the proposition that had been made? A No, I don't think so. If he had I would have sent a letter correcting it.

Mr. Starr: If your Honor pleases, I think that puts a different aspect on this letter, and I offer it in evidence.

Mr. McCarter: I renew my objection.

The Court: Sustain the objection. I think it is an unaccepted offer of compromise.

Q I notice the letter is addressed to Mr. Kurtz, letter S. 23. Who was Mr. Kurtz? A President of the Colonial Trust Company.

Q Who is Mr. Felix? A Vice-President.

Q This communication, which is dated May 6th, 1927, I ask to be marked for identification.

(Letter marked A. 1 for identification.)

Q Will you say whether or not you showed to Mr. Bodek a copy of this letter which is marked A. 1 for identification? A Yes.

Q What comment, if any, did he make? A None.

Q Did he indicate his objection or approval in any way, shape or form?

Mr. McCarter: I object to that as leading.

The Court: I will permit that question.

A No objection.

Mr. Starr: I make the same offer.

The Court: Sustain the objection.

Q When you were having your conversation with Mr. Bodek, did he say anything to you with reference to his resisting payment of these mortgages or decline to pay them? A No.

Q Was there any conversation at that time that you had with him as to a claim made by him that he was not liable under these mortgages? A No.

Mr. Starr: Now, if your Honor please, I renew my offer of these communications.

Mr. McCarter: I renew my objection.

The Court: Still sustain the objection.

Q Now, I show you another letter dated May 18th, 1927, addressed to Mr. Felix, and ask you

whether or not that was sent by you to Mr. Felix. A Yes, sir, I did authorize it.

Q Now, having an opportunity to refresh your recollection, would you say whether or not you had a conversation with Mr. Bodek shortly before the sending of that letter, with reference to his liability on the mortgages? A I did.

Q What happened at that time? A In the original proposal ten per cent. was to be paid, and in this proposal five per cent., the terms were changed from ten to five.

Q How did you come to make that proposition? A As a result of my conversation with Mr. Bodek.

Q Remember what he said about it? A Not accurately, no, exactly, of course, but the substance of it was that if the account would be reduced, that if the amount to be paid would be reduced to five per cent. instead of ten, that he and his people, whom he then repeated would be willing to go ahead and make the payments to the bank.

(Letter marked A. 2 for identification.)

Q What did you tell Mr. Bodek with respect to your activities in this matter? Why did you tell him that you were interested yourself in the matter? A First because I was doing business with the bank, one of their largest customers, and secondly because he was in my office, and thirdly because he is a relative of mine.

Q Now, did you tell Mr. Bodek anything with respect to the desire on the part of the Trust Company to call the mortgages because they were in default? A I don't think I understand the question.

George H. Weinroth, in rebuttal, cross.

Q What did you say with reference to the attitude of the Trust Company against Mr. Bodek and his associates with reference to these mortgages? A That the bank wanted to get him in current, wanted to make the loan current, and that there was a default. The bank asked me if I wouldn't do what I could along those lines.

Q In any of the interviews that you had with reference to that Mr. Bodek, with reference to the matter as exemplified in these three letters that you sent to the Colonial Trust Company, did Mr. Bodek ever raise any question as to his liability by reason of the fact that the improvements had not been finished? A Not to my knowledge.

Cross examination by Mr. McCarter.

Q Didn't he mention some complaints about improvements and sewers, for example? A Not to my knowledge.

Q You don't recall that at all? A Certainly not of sufficient importance to put in a letter.

Q Did he mention it at all? A Not that I recall.

Q Did he ever express dissatisfaction with anything about the purchase? A Other than the fact that he was the man who was taking the full responsibility without compensating liability of the other fellows.

Q Didn't he tell you that he had on record a deed of trust which disclosed the interest of the other fellows, as you call them, and provided for their assuming their share of the liability? A Not that I know of.

Q Never knew of that? A No.

Q All these conversations took place over what period of time? A Two or three or four months.

Q What months? A The dates of those letters, I don't recall what they are.

Q The letters were not offered in evidence, and I would like you to look at the letters again and refresh your recollection and tell me over what period of time. A Oh, I would say in March, April, May, I would say May or June, 1927.

Q Prior to that don't you remember Mr. Bodek mentioning to you some complaints that he had with respect to the improvements on the property? A Not that I can recall. I certainly would have put them in the letter if he had said so.

Q The proposition of adjusting the matter came to you first from the bank, didn't it? A Yes.

Mr. Starr: Senator Richards suggests that I again offer these letters that are marked for identification in order to get a ruling of your Honor after all of the testimony of Mr. Weinroth is in. Mr. Richards will probably justify it.

Mr. Richards: The point being, of course, that this is not a question of offering these letters as proof of a compromise or any suggestion of compromise, but in substantiation of the witness' testimony that Bodek did not, at the time of the discussions, ever raise the defense now raised here, never suggested it. It was not in his mind, and that, therefore, it is contradictory of his present position, contradictory of his personal evidence, and they are not offered to show a compromise, as a matter of fact, I don't think

the letters even do that. The witness' testimony and the letter show that there never was any payment there to come to the bank. The whole proposition was whether they would let the bank go ahead and foreclose their mortgages or whether they would revive the mortgages and make them current, as to past due, that being the proposition, the proposition was not whether they would resist payment of the mortgages, the question was whether or not they would permit the bank to proceed upon its contract or whether they would make a new contract with the bank, so that is not, to my notion, a compromise. It is not a question that there was a dispute between these people about this payment. There is no suggestion of that kind.

Mr. McCarter: Of course I renew my objection. I think the letters still speak for themselves.

The Court: I will make the same ruling. I think an examination of the letters, as the Court had an opportunity to do, in one of which it is stated that this is the best proposition I can secure from the parties, is certainly an indication at least that they are unaccepted offers of compromise.

Mr. Starr: We rest.

Mr. Carr: I want an opportunity to check our exhibits.

Mr. Starr: If the exhibits have been offered and not actually marked, it is generally understood that they shall go in.

(Argument adjourned until September 11th, 1930.)

Offer of Exhibits.

Mr. Cole: I don't intend to participate in the oral argument in the case of Shotkin against Esibill. There are just two legal points in that case and if satisfactory all around I will prepare a short memo and present it to your Honor and also other counsel. Of course I want the benefit of the oral argument in so far as it applies generally to all the cases, but otherwise I don't care to press it.

Exhibit B. 1.

EXHIBIT B. 1.

COPY

KNOW ALL MEN BY THESE PRESENTS that JOSHUA BODEK of the City and County of Philadelphia and State of Pennsylvania (hereinafter called the obligor) is held firmly bound unto WILLIAM J. RYAN, INC., a Corporation of the State of New Jersey, (hereinafter called the obligee) in the sum of One Hundred twenty-six Thousand Nine Hundred Eighty ($126,980.00) Dollars, lawful money of the United States of America, to be paid to the said obligee, its certain attorney, successors and assigns to which payment well and truly to be made, he does hereby bind and oblige himself, his heirs, executors and administrators firmly by these presents. Sealed with his seal. Dated the Ninth day of November in the year of our Lord One Thousand nine hundred twenty-five (1925). The condition of this obligation is such that if the above bounden obligor, his heirs, executors, administrators or any of them and shall and do well and truly pay or cause to be paid unto the above named obligee, its certain attorney, successors or assigns, the just sum of Sixty-three Thousand four hundred ninety ($63,490.00) Dollars; lawful money as aforesaid, as follows: Nine Thousand Seventy ($9,070.00) Dollars, upon completion of improvements and notice thereof as set forth in the accompanying indenture of mortgage; and the balance of Fifty-four Thousand Four Hundred twenty ($54,420.00) Dollars within three years from the date hereof, together with interest thereon payable semi-annually at the rate of six per cent per annum without any fraud or further delay, and for the production to the said

Exhibit B. 1.

obligee, its successors or assigns on or before the thirty-first day of December of each and every year, all receipts for all taxes or charges in the nature thereof for the current year assessed upon the premises described in an accompanying indenture of mortgage; then the above obligation to be void, or else to be remaining in full force and virtue. Provided, however, and it is hereby expressly agreed, that no credit shall be claimed or allowed on the interest above provided because of any taxes paid upon said premises, and that if at any time default shall be made in the payment of interest or installment of principal as aforesaid for the space of thirty days after any payment thereof shall fall due or in the payment of any tax or charge as aforesaid, for the space of ninety days after the same shall first become payable, or in such production of tax receipts as aforesaid on or before the day aforesaid, then and in either case the whole principal debt aforesaid shall, at the option of the obligee therein named, its successors, or assigns, become due and payable, and payment of such principal debt, and all interest thereon, shall be enforced and recovered at once, anything herein contained to the contrary notwithstanding.

(signed) Joshua Bodek (SEAL)

SEALED AND DELIVERED
in the presence of

(signed) Carlton Godfrey

* * * * * * * *

Exhibit B. 2.

To Any Attorney Of Any Court of Law in New Jersey or Elsewhere:

This is to authorize you to appear for me and in my stead, in any court of competent jurisdiction in case of breach of condition of the above bond and confess judgment for the penalty therein contained as of the last or any subsequent term, with costs of suit and release of errors, and this shall be your sufficient warrant.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this Ninth day of November A. D. 1925.

(Signed) Joshua Bodek (SEAL)

Sealed and Delivered
in the presence of

(signed)Carlton Godfrey.

EXHIBIT B. 2.

THIS INDENTURE, MADE THE Ninth day of November in the year of our Lord one thousand nine hundred and twenty-five.

BETWEEN JOSHUA BODEK, of the City and County of Philadelphia and State of Pennsylvania; of the first part, and WILLIAM J. RYAN, INC., a corporation of the State of New Jersey; of the second part:

WHEREAS, the said party of the first part in and by a certain obligation or writing obligatory, under his hand and seal duly executed, and bearing even date herewith, stands bound unto the said party of the second part in the sum of ONE HUNDRED TWENTY SIX THOUSAND

Exhibit B. 2.

NINE HUNDRED EIGHTY ($126,980.) DOLLARS; lawful money of the United States of America, conditioned for the payment, in lawful money as aforesaid, of the just sum of SIXTY THREE THOUSAND FOUR HUNDRED NINETY—$63,490.00) DOLLARS; as follows: Nine Thousand Seventy ($9,070.00) Dollars upon completion of improvements and notice thereof as hereinafter set forth; and the balance of Fifty-four Thousand Four hundred Twenty ($54,-420.00) Dollars within three (3) years from the date thereof and hereof; together with interest thereon, payable semi-annually, at the rate of six (6) per cent. per annum, without any fraud or further delay; and for the production to said Obligee its successors or Assigns, on or before the thirty-first day of December of each and every year, of receipts for all taxes or charges in the nature thereof for the current year assessed upon the premises hereinafter described:

Provided, however, and it was thereby expressly agreed, that no credit should be claimed or allowed on the interest above provided because of any taxes paid upon said premises, and that if at any time default should be made in payment of interest or instalment of principal as aforesaid for the space of thirty days after any payment thereof shall fall due, or in the payment of any tax or charge as aforesaid, for the space of ninety days after the same shall first become payable, or in such production of tax receipts as aforesaid, on or before the day aforesaid, then and in either such case the whole principal debt as aforesaid should, at the option of the obligee therein named, its successors or As*sgins*, become due and payable immediately, and payment of said principal debt, and all interest

Exhibit B. 2.

thereon, should be enforced and recovered at once, anything therein contained to the contrary notwithstanding, as in and by the said recited obligation, and the condition thereof, relation to the same being had, may more fully and at large appear.

NOW THIS INDENTURE WITNESSETH, that the said party of the first part, as well for and in consideration of the aforesaid debt or sum of SIXTY THREE THOUSAND FOUR HUNDRED NINETY ($63,490.00) DOLLARS; and for the better securing the payment thereof unto the said party of the second part, its successors and Assigns, in discharge of the said obligation above recited, as for and in consideration of the further sum of one dollar, in specie, well and truly paid to the said party of the first part by the said party of the second part, at and before the ensealing and delivery hereof, the receipt of which one dollar is hereby acknowledged, has granted, bargained, sold, released and confirmed, and by these presents does grant, bargain, sell, release and confirm, unto the said party of the second part, its successors and Assigns, ALL those certain tracts or parcels of land and premises hereinafter particularly described, situate in the City of North Wildwood in the county of Cape May and State of New Jersey.

BEING Lots 3 and 4, Block 301; Lots 3 and 4, Block 302; Lots 9, 27, 28, 29, 30 and 31, Block 304; Lots 9, 10, 11, 25, 27, 28, 29, 30, 31, 33, 47 and 48, Block 305; Lots 1 and 9, Block 306; Lots 6, 37, 38, 39 Block 413; Lots 2, 8, 16, 17, 18, 19, 20 and 21, 35, 36, 37, 38, 39, 40, 41 and 42, Block 415; Lots 22, 23, 32, 33, 34, Block 417; Lots 22, 23, 32, 33, 34, Block 418; Lots 18 19, 24 and 32, Block 419; as shown on "Plan of Land in City

Exhibit B. 2.

of North Wildwood, Cape May County, N. J., Wm. J. Ryan, Inc., Owners and Developers, made by Harry E. Weir, Civil Engineer, dated August 27, 1925, filed, or intended to be filed, in the County Clerk's Office of said County."

BEING the same land and premises which William H. Ryan, Inc., a corporation of the State of New Jersey, by deed bearing even date herewith and intended to be forthwith recorded in the Clerk's Office of the County of Cape May, granted and conveyed unto Joshua Bodek, in fee; this mortgage being given to secure a portion of the consideration therein mentioned;

UNDER and SUBJECT to the restrictions, conditions and reservations as in said deed set forth;

The side lines of Lots 1 to 9, inclusive, in Blocks 412 to 420, inclusive, and of Lots 7, 9, 11 and 13, Block 421, extend in straight lines at right angles to Surf Avenue, to the Riparian Commissioners Exterior Line in the Atlantic Ocean.

The instalment of principal, of NINE THOUSAND SEVENTY ($9,070.00) DOLLARS, hereinbefore mentioned shall be payable upon completion by the party of the second part, its successors or assigns, of the following improvements to the land now or formerly belonging to said party of the second part, of which land the lots herein described are a part, namely: The necessary clearing of said land, the filling of the low area up to a grade approximately equal to the grade of the present County Road, the necessary grading to establish a uniform grade of the streets, the graveling of all roads, and the instaling of concrete sidewalks, curbs and sewers; and upon the sending of notice of such completion by said party of the second part,

Exhibit B. 2.

its successors or assigns, by letter addressed to said party of the first part, at 425 Market Street, Philadelphia, Pennsylvania.

Any of the lots hereinbefore described may be released from the lien of this mortgage upon payment of the balance of the purchase price of the lots released (with accrued interest thereon); provided, however, that in lieu of the payment of the release price in cash, the party of the first part may execute and deliver his bond, warrant and mortgage to the party of the second part, its successors or assigns, which bond, warrant and mortgage shall cover the lot or lots released and shall be a first lien thereon, shall be for the balance of the purchase price due on said lot or lots, shall be in the same form and terms as this present mortgage and the accompanying bond and warrant, and shall be prepared, stamped and recorded at the expense of said party of the first part; same shall be payable within the then unexpired portion of the above mentioned term of three years.

Together with all and singular the buildings, improvements, woods, ways, rights, liberties, privileges, hereditaments and appurtenances to the same belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof:

To have and to hold the said hereditaments and premises above granted, or intended so to be, with the appurtenances, unto the said party of the second part its successors and Assigns, forever, under and subject as aforesaid;

Provided always, nevertheless, that if the said party of the first part, his heirs, executors, administrators or Assigns, do and shall well and

Exhibit B. 2.

truly pay, or cause to be paid, unto the said party of the second part, or to its certain Attorney, successors or Assigns, the aforesaid debt or sum of SIXTY THREE THOUSAND FOUR HUNDRED NINETY ($63,490.00) DOLLARS on the day and time hereinbefore mentioned and appointed for the payment thereof, together with interest for the same, in like money, and pay all taxes and charges, and produce tax receipts, in way and manner hereinbefore specified therefor, without any fraud or further delay, and without any deduction, defalcation or abatement to be made for or in respect of any taxes, charges or assessments whatsoever; that then and from thenceforth, as well this present indenture, and the estate hereby granted, as the said obligation above recited, shall cease, determine and become absolutely null and void, to all intents and purposes, anything hereinbefore contained to the contrary thereof in anywise notwithstanding. And the said party of the first part, for himself, his heirs, executors and administrators does covenant and grant to and with the said party of the second part, its successors and Assigns, that the said party of the first part, his heirs and Assigns, shall not, nor will apply for, or claim, any deduction by reason of this mortgage, from the taxable value of the said lands and premises; and that the said party of the second part, its successors and Assigns, shall and may from time to time, and at all times after default shall be made in the performance of the proviso or condition herein contained, peaceably and quietly enter into, have, hold, use, occupy, possess and enjoy all and singular the above granted and bargained premises, with the appurtenances, without the let, suit, trouble, hindrance or denial

Exhibit B. 2.

of the said party of the first part, his heirs or Assigns, or of any other person or persons whatsoever. And it is also further agreed, by and between the parties to these presents, that the said party of the first part shall and will keep the buildings erected and to be erected upon the lands above conveyed insured against loss or damage by fire, in some safe and responsible Insurance Company or Companies, to an amount not less than dollars, and assign the policy and certificate thereof to the said party of the second part as collateral security for the payment of the principal and interest aforesaid; and in default thereof, it shall be lawful for the said party of the second part to effect such insurance, and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises, added to the amount of the said bond and obligation, and secured by these presents, and payable on demand, with legal interest.

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

JOSHUA BODEK (seal)

Signed, Sealed and Delivered
in the presence of

Carlton Godfrey

Exhibit B. 2.

STATE OF PENNSYLVANIA }
PHILADELPHIA COUNTY, } SS.:

BE IT REMEMBERED, That on this ninth day of November in the year of our Lord one thousand nine hundred and twenty-five, before me, a Master in Chancery of New Jersey personally appeared JOSHUA BODEK who, I am satisfied, is the grantor mentioned in the above deed or conveyance, and I having first made known to him the contents thereof, he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed. All of which is hereby certified.

CARLTON GODFREY
Master in Chancery of New Jersey

12562 A-A-5965

MORTGAGE

JOSHUA BODEK
to
WILLIAM J. RYAN, INC.

(In pencil)
See Assign 12,635
" " #60
" " 1678

Dated November 9 1925

Received in the Clerk's office of the County of Cape May on the 21st day of Nov. A. D. 1925 at 12 o'clock noon, and recorded in Book 230 of Mortgages for said county, on pages 487

Ocean City
Title and Trust Company
Ocean City, N. J.

Exhibit B. 3.

EXHIBIT B. 3.

EXCELSIOR TRUST COMPANY
Germantown and Lehigh Avenues

Philadelphia, Pa. May 11, 1926

Mr. Joshua Bodek,
44 N. 3rd St.
Philadelphia, Pa.

Dear Sir—

This Company has just purchased and acquired title to a certain mortgage of $63,490.00 given by you to William J. Ryan, Incorporated, covering a number of lots at Wildwood, New Jersey, which mortgage is dated November 9th, 1925, and recorded in Cape May County in Mortgage Book #230, page 487.

The semi-annual interest which will come due on May 9th, 1926 you are authorized to pay to the Ocean City Title & Trust Company, and thereafter make all payments of interest and principal to this Company.

Very truly yours,

W A WELSH
W. A. WELSH
Treasurer

CLL:B

Exhibit B. 4.

EXHIBIT B. 4.

EXCELSIOR TRUST COMPANY
Germantown and Lehigh Avenues

Philadelphia, Pa.
November 26, 1926.

Mr. Joshua Bodek
44 N. 3rd Street
Philadelphia, Pa.

Dear Mr. Bodek:

We have been advised by Mr. Harry E. Weir, Civil Engineer that the improvements on the Ryan Tract in North Wildwood, N. J. have been completed.

As you know we hold a mortgage in the amount of $63,490. of which you are the mortgagor, and that there is an installment payment of $9070.00 due upon completion of the improvements.

Will you, therefore, please send your check for this amount at once. We would also like to have a check for the interest which was due November 9th, in the amount of $1,904.70.

Thanking you to give this your immediate attention, we are,

Very truly yours,

C. L. LITZENBERG

C. L. Litzenberg
Asst. Treasurer.

CLL:H

Exhibit B. 5.

EXHIBIT B. 5.

EXCELSIOR TRUST COMPANY
Germantown and Lehigh Avenues

Philadelphia, Pa.
January 21, 1927.

Mr. Joshua Bodek
c/o D. Frankil
44 North 3rd Street
Philadelphia, Pa.

Dear Mr. Bodek: Re: Mortgage of $63,490.
on North Wildwood Lots.

Payment of $9070. on account of the principal of the above mortgage is long past due. By reason of complaints concerning some of the details of the improvements we have refrained from pressing you for payment up to this time, but it now appears that all matters complained of have been attended to in every respect, as requested by the lot owners, and, we might add, at considerable expense to William J. Ryan, Inc. There is, therefore, no reason whatsoever for further delay, and we will ask you to please see that the said amount of $9070. be paid to us by not later than February 1, 1927.

Unless payment is made as requested we will be obliged to turn this matter over to our counsel for action.

Trusting, however, that you will not make this necessary, we are,

Very truly yours,

C. L. LITZENBERG

CLL:H

C. L. Litzenberg
Asst. Treasurer.

Exhibit B. 6.

EXHIBIT B. 6.

WILLIAM J. RYAN, INC.
REAL ESTATE
Franklin Trust Building
Chestnut at Fifteenth Street
Philadelphia

October 14, 1926.

Mr. Joshua Bodek
44 N. Third St.
Phila., Pa.

Dear Sir:

We take pleasure in announcing that all improvements in the Wm. J. Ryan, Inc. Tract at North Wildwood have been completed in accord with our agreement made at the time of sale. The necessary clearing of said land, the filling of the low area up to a grade approximately equal to the grade of the present County Road, the necessary grading to establish a uniform grade of the streets, the graveling of all streets, and the installing of concrete sidewalks, curbs and sewers.

We would respectfully suggest that you make arrangement for a top soil to protect the sand fill on your property from the weather this coming fall and winter. We can recommend Versaggi Bros., Contractors, in Wildwood, N. J. as competent to advise you in this matter.

If you have not received your tax bill nor paid same on lots at North Wildwood, we would suggest you communicate at once with the Collector of Taxes, giving Block and Lot numbers and re-

Exhibit B. 7.

questing tax bill for same, that you may not be delinquent and subject to penalty.

Very truly yours,
WILLIAM J. RYAN, INC.
By: G E. MANWARING

GEM:W

EXHIBIT B. 7.

WILLIAM J. RYAN, INC.
REAL ESTATE
Franklin Trust Building
Chestnut at Fifteenth Street
Philadelphia

October 16, 1926.

Mr. Joshua Bodek
425 Market Street,
Philadelphia, Pa.

Dear Sir:

In behalf of Excelsior Trust Company, holder of mortgage for Sixty-Three Thousand Four Hundred and Ninety Dollars ($63,490.00) on your North Wildwood Lots, purchased from us, we beg to notify you that the improvements specified in the mortgage have been completed, and there is due from you Nine Thousand and Seventy Dollars ($9,070.00) on account of the principal of said mortgage.

Please make payment at once of said sum of Nine Thousand and Seventy Dollars ($9,070.00) to the said Excelsior Trust Company, at Philadelphia, Pa.

Exhibit B. 8.

Enclosed herewith is a photostatic copy of Engineer's Certification to the completion of the improvements.

Yours very truly,

WM. J. RYAN, INC.
By G E MANWARING

EXHIBIT B. 8.

I, Harry E. Weir, Civil Engineer, do hereby certify that the improvement work on the Ryan tract in North Wildwood, N. J., has been completed agreeably to the terms as recited in the plans, specifications, contracts and agreements governing the same.

HARRY E. WEIR,
Engineer.

Oct 8th 1926

Exhibit B. 22.

EXHIBIT B. 22.

New York Office
67 Liberty St.
New York City
Telephone, Cortlandt 0744

Philadelphia Office
401 Land Title Building
Telephone
Rittenhouse 4717

JOSEPH P. DAY
Auctioneer

Sale at Public Auction of 867 lots at North Wildwood, N. J. Commencing Saturday Afternoon, September 5th, 1925

TERMS AND CONDITIONS OF SALE

The lots on the lithographed copy of the map of a section of the City of North Wildwood, New Jersey, distributed to the public before and during the sale, will be sold under the direction of the owner by Joseph P. Day, Auctioneer, upon the following terms and conditions:

FIRST: The purchaser will be required, at the time and place of sale, to sign a memorandum of his purchase and to pay on account of the purchase price to the Auctioneer twenty per cent. (20%) of the amount of his bid, for which the receipt of the Auctioneer as agent for the seller will be given, and also to pay to said Auctioneer, in addition, the Auctioneer's fee of $15.00 for each lot sold.

SECOND: The remainder of the purchase price will be required to be paid on the date of settlement and transfer of title, mentioned in the Memorandum of Sales hereto annexed, or at such later date to which settlement and transfer of title may be adjourned, at the office of THE INTEGRITY TRUST COMPANY, 717 Chestnut Street, Philadelphia, Pa., or at such other office

Exhibit B. 22.

as may be designated by the owner, when and where the deeds of the property will be ready for delivery. If title is not delivered to any lot or plot neither the seller nor the auctioneer shall in any event be liable to the purchaser except for the return of the deposit by the seller and auctioneer's fees paid to the auctioneer by the auctioneer.

THIRD: Any purchaser shall have the privilege of paying the balance of the purchase price as follows: Twenty per cent. (20%) thereof thirty days from the day of sale and the remaining 60% in 24 equal monthly installments with interest at 6% on the unpaid balance and accruing taxes and assessments as and when the same are by law due and payable. The time and times herein mentioned are of the essence and upon failure to make any payment when due, seller may cancel this agreement and retain all payments made theretofore as liquidated damages.

FOURTH: Biddings will be kept open after the property is struck down, and in case any purchaser shall fail to comply with any of the above conditions of sale, the premises so struck down to him, at the option of the seller, may be again put up for sale under the same terms of sale, and such purchaser will be held liable for any deficiency there may between the sum for which said premises shall be struck down upon the sale and that for which they may be purchased on the resale, and also for any and all expenses on such resale.

FIFTH: Upon full payment of the purchase money the said property will be conveyed in fee simple by a good and sufficient warranty deed describing the property by metes and bounds

or by lot numbers as shown on the above mentioned map, subject to any state of facts an accurate survey may disclose, free from all encumbrances except as herein otherwise stipulated, and except that all lots sold at said sale will be sold subject to the following conditions and restrictions, and subject to all taxes and assessments which may become a lien upon the property after December 31, 1925.

The said deed of conveyance shall contain the following conditions, restrictions and limitations, which are intended to be and shall be taken as covenants to run with the land, and which are intended to be and shall be taken as conditions of the said conveyance and one of the express considerations thereof, viz.:

RESTRICTIONS

That no dwelling or building for business purposes shall be built or erected on the lots offered in this sale to cost less than $3,500 on all lots facing on Numbered Avenues between Surf Avenue and the Ocean front; and $4,000 on the lots facing on Surf Avenue; and $3,000 on all lots facing on the ocean. That no building of any description shall be at any time erected within 35 feet of the curb line of any lots east of Surf Avenue, but that said space between said house line and street line shall be always left open and clear for the purpose of light and air; that no cesspool shall be dug on said premises, and no privy shall be allowed thereon; that no store buildings (except on the ocean front and Surf Avenue), public garage, slaughter house, bone boiling establishment, pig-pen, chicken house, or anything of an offensive or unsightly character

Exhibit B. 22.

shall be erected, kept or maintained upon said premises.

SIXTH: The seller is not required to send any notice to any purchaser, and if any purchaser neglects to call at the time and place specified in the Memorandum of Sale hereto annexed, to receive his deed, he will be charged with interest thereafter on the whole amount unpaid of his purchase price, provided the seller shall deem it proper to extend the time for the completion of said purchase.

SEVENTH: The seller agrees, at its own expense, to improve the above mentioned property as follows: Do all the necessary clearing, fill the low area up to a grade approximately equal to the grade of the present County Road, do all the necessary grading to establish a uniform grade of the streets, gravel all roads, install concrete sidewalks and curbs and install sewers.

EIGHTH: The seller reserves the right to complete all development work now in progress or contemplated without hinderance of any sort from the purchaser, and reserves to itself the right to enter upon said premises for this purpose.

WILLIAM J. RYAN, INC.,
Owner.

MEMORANDUM OF SALE

The undersigned has this 5 day of September, 1925, purchased the premises described on the map referred to in the above Terms of Sale as Lots No. 22/3 33/4 Block 418 for the sum of Thirty Eight Hundred Dollars and hereby promises and agrees to comply with the terms and con-

Exhibit B. 22.

ditions of the sale of said premises as above mentioned and set forth. Settlement and transfer of title to be October 7, 1925.

JOSHUA BODEK

Price per lot, $950 Purchaser

44 No 3rd St

Address Phila

RECEIVED from Joshua Bodek the sum of Four Hundred & Forty Dollars on account of the purchase price to be paid for the above described property this day sold to him and including the auctioneer's fee.

WILLIAM J. RYAN, Inc.

Owner.

Dated North Wildwood, N. J., September , 1925.

10%	500
~~20%~~ Deposit	~~$880~~
Auctioneer's Fee	$ 60
Total	~~$440~~
	560

No. 159

By JOSEPH P. DAY, as Agent.

Per Lawrence Garrett

EXHIBIT B. 23.

Law Offices
WOLF, PATTERSON, BLOCK and SCHORR
Twelfth Floor Packard Building
PHILADELPHIA

November 5, 1925.

Mr. Joshua Bodek,
425 Market Street,
Philadelphia, Pa.

Dear Sir:

As you are aware, settlement for the premises purchased by you at North Wildwood, New Jersey, is to take place, in accordance to your agreement of September 9, 1925 with William J. Ryan, Inc., on November 9, 1925 at 12 M. at the office of Ocean City Title & Trust Company, Ocean City, New Jersey, or other place fixed by William J. Ryan, Inc.

As a matter of convenience for all parties, William J. Ryan, Inc. has determined to make settlement on November 9, 1925 at 12 M. at the above address, 1204 Packard Building, Philadelphia.

Your deed and the bond and mortgage to be executed by you have been prepared and may be gone over by you in advance of the settlement if you will come to the above address to inspect them at any time after 9 A. M. Monday, November 9, 1925.

We are hoping at the same time that settlement certificates will be available, although William J. Ryan, Inc. is in no sense obligated to secure them for you.

We assume that you know the amount of money which you will be expected to pay at the time of

Exhibit B. 23.

settlement, but if you have any doubt about this, please advise us in order that settlements may be made with the least possible confusion on this question.

Very truly,
MORRIS WOLF,
V.

FOR WOLF PATTERSON BLOCK & SCHORR.
MW V

REGISTERED
RETURN RECEIPT

Envelope Front:

Wolf, Patterson, Block and Schorr
Twelfth Floor Packard Building
Philadelphia

REGISTERED
RETURN RECEIPT

Mr. Joshua Bodek,
425 Market Street,
Philadelphia, Pa.

8381

Stamped:
REGISTERED
No. 898517

Twenty cents U. S. Postage Stamps.

Stamped on back

Philadelphia Land
Nov 5
1925
Title S1A PA

Exhibit B. 24.

EXHIBIT B. 24.

OCEAN CITY TITLE AND TRUST COMPANY
Ocean City, N. J.

September 29th, 1925.

Mr. Joshua Bodek
44 North 3d Street
Philadelphia, Pa.

My Dear Mr. Bodek:

We beg to inform you that settlement has been made by William J. Ryan, Inc, for the tract at North Wildwood, New Jersey, from which you bought lots at the public auction sale conducted by Joseph P. Day, September 5th and 7th last.

We have made arrangements with William J. Ryan, Inc. according to which all contracts for the sale of lots have been assigned to us, and we have been directed by William J. Ryan, Inc. to make collection of all sums payable under the contracts and to attend to the making of settlements.

You will be glad to learn that a contract has been given out for the making of the improvements called for by your contract and actual work will begin within a few days.

Will you please indicate on the enclosed postal your intentions as to taking title to your purchase? Do you wish to take title thirty days from date of sale, or do you wish to exercise your option and pay the balance of the purchase price in installments as provided by your contract, securing your deed at the time of the final payment?

Exhibit B. 25.

We are familiar with your property, and vitally interested in the prosperity of the neighborhood and therefore, of yourself, and hold ourselves in readiness at any time to give you any information or other help which you may wish.

Yours very truly,

OCEAN CITY TITLE AND
TRUST COMPANY

JAMES F. KOCH
Asst. Treasurer.

RHN-B

EXHIBIT B. 25.

THIS INDENTURE, MADE THE Ninth day of November in the year of our Lord one thousand nine hundred and twenty-five.

BETWEEN WILLIAM J. RYAN, INC., a Corporation of the State of New Jersey, party of the first part, and JOSHUA BODEK, of the City and County of Philadelphia and State of Pennsylvania; party of the second part, WITNESSETH, That the said party of the first part for and in consideration of the sum of NINETY THOUSAND SEVEN HUNDRED ($90,700.00) DOLLARS, lawful money of the United States of America, well and truly paid by the said party of the second part, to the said party of the first part, at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, enfeoffed, released, conveyed and confirmed, and by these presents does grant, bargain, sell, alien, enfeoff, release, convey and con-

Exhibit B. 25.

firm unto the said party of the second part, his heirs and assigns,

ALL those certain lots, tracts or parcels of land situate, lying and bein in the City of North Wildwood, County of Cape May and State of New Jersey:

BEING Lots 3 and 4, Block 301; Lots 3 and 4, Block 302; Lots 9, 27, 28, 29, 30 and 31, Block 304; Lots 9, 10, 11, 25, 27, 28, 29, 30, 31, 33, 47 and 48, Block 305; Lots 1 and 9, Block 306; Lots 6, 37, 38, 39, Block 413; Lots 2, 8, 16, 17, 18, 19, 20 and 21, 35, 36, 37, 38, 39, 40, 41 and 42, Block 415; Lots 22, 23, 32, 33, 34, Block 417; Lots 22, 23, 32, 33, 34, Block 418; Lots 18, 19, 24 and 32, Block 419; as shown on "Plan of Land in City of North Wildwood, Cape May County, N. J., Wm. J. Ryan, Inc., Owners and Developers, made by Harry E. Weir, Civil Engineer, dated August 27, 1925, filed, or intended to be filed in the County Clerk's Office of said County."

UNDER AND SUBJECT to the conditions and restrictions of the Five Mile Beach Improvement Company; and to the following further conditions and restrictions; No dwelling or building for business purposes shall be built or erected on any of the lots forming part of the premises herein mentioned to cost less to build than $3500.00 in the case of any lots facing on numbered Avenues between Surf Avenue and the ocean front; less than $4000.00 on any of the lots facing on Surf Avenue and less than $3000.00 on any of the lots on the ocean front, and that no building of any description shall at any time be erected within thirty-five (35) feet of the curb line of any of the lots east of Surf Avenue (but in the case of corner lots, the curb line to be considered shall be the curb line in front and

not on the side of the lots), but that said space between said house line and street line always shall be kept open and clear for light and air; that no cesspool shall be dug on any of said lots, or any privy allowed thereon, and that no buildings for stores or business purposes (except on the ocean front and on Surf Avenue), public garage, slaughter house, bone boiling establishment, pig pen, chicken house, or anything of an offensive or unsightly character shall at any time be erected, kept or maintained upon any of said lots, the determination of what is offensive or unsightly to be left with William J. Ryan, Inc., its successors and assigns, whose decision thereon, however, shall not be unreasonable.

The side lines of lots 1 to 9 inclusive in Blocks 412 to 420 inclusive and of Lots 7, 9, 11, 13 Block 421 extend in straight lines at right angles to Surf Avenue to the Riparian Commissioners Exterior Line in the Atlantic Ocean.

SUBJECT, as regards any portion of said premises lying oceanward of a line parallel with and nine hundred sixty-five (965) feet oceanward at right angles from the southeasterly line of Surf Avenue (100 feet wide) to the terms and conditions established by the Riparian Commissioners of the State of New Jersey.

RESERVING, however, unto said party of the first part, its successors and assigns, a right of way or street sixty feet in width for Boardwalk or highway purposes, or both, across said premises, at a location to be determined by said party of the first part, its successors or assigns, the northwesterly line of said right of way being parallel with and not less than ten hundred seventy feet southeastwardly at right angles from

the southeasterly line of Surf Avenue except in Block 412.

RESERVING unto said party of the first part, its successors and assigns the free right of access in and upon said premises for the purpose of making the following improvements to the land now or formerly belonging to said party of the first part of which land the lots herein described are a part, namely: the necessary clearing of said land; the filling of the low area up to a grade approximately equal to the grade of the present County Road; the necessary grading to establish a uniform grade of the streets; the graveling of all roads; and the installing of concrete sidewalks, curbs and sewers.

TOGETHER with all and singular, the buildings, improvements, woods, ways, rights, liberties, privileges, hereditaments and appurtenances to the same belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and of every part and parcel thereof;

AND ALSO all the estate, right, title, interest property, possession, claim and demand whatsoever, both in law and equity, of the said party of the first part, of, in and to the said premises, with the appurtenances.

TO HAVE AND TO HOLD the said premises, with all and singular, the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs, and assigns, forever:

UNDER and SUBJECT to the conditions and restrictions hereinbefore mentioned.

Exhibit B. 25.

And the said party of the first part, for itself, its successors, does by these presents covenant, grant and agree to and with the said party of the second part, his heirs, and assigns, that it, the said party of the first part, its successors, all and singular the hereditaments and premises hereinbefore described and granted, or mentioned and intended so to be, with the appurtenances, unto the said party of the second part, his heirs, and assigns, against it, the said party of the first part, its successors, and against all and every other person or persons, whomsoever, lawfully claiming or to claim the same or any part thereof, by, through, from or under him, them, or any of them, SHALL AND WILL, WARRANT and forever DEFEND.

In Witness Whereof, the said party of the first part has caused these presents to be signed, by its President, attested by its Secretary and its Corporate Seal to be hereunto affixed the day and year first above written.

Signed, Sealed and Delivered
in the presence of

Carlton Godfrey

WILLIAM J. RYAN, Inc., (seal)

By WILLIAM J. RYAN
President.

Attest:—

John F. Kelley
Secretary.

(Documentary Stamps $91.00)

Exhibit B. 25.

STATE OF PENNSYLVANIA }
PHILADELPHIA COUNTY, } ss.:

BE IT REMEMBERED, That on this Ninth day of November, in the year of our Lord one thousand nine hundred and twenty-five; before me, a Master in Chancery in and for the State of New Jersey; personally appeared JOHN F. KELLEY, who by me being duly sworn, on his oath, saith, that he is the Secretary, of WILLIAM J. RYAN, INC., the grantor within named, and that WILLIAM J. RYAN is the President; that deponent knows the common or corporate seal of said grantor and that the seal annexed to the within Deed or Conveyance is such common or corporate seal; that the said Deed or Conveyance was signed by the said President and the seal of said grantor affixed thereto in the presence of deponent; that said Deed or Conveyance was signed, sealed and delivered as and for the voluntary act and deed of said grantor for the uses and purposes therein expressed, pursuant to a resolution of the Board of Directors of said grantor; and at the execution thereof this deponent subscribed his name thereto as witness.

JOHN F. KELLEY.

Sworn and subscribed the day and year aforesaid.

CARLTON GODFREY
Master in Chancery of New Jersey

Exhibit B. 25.

A-5965. 12328

DEED

William J. Ryan, Inc.,
to
Joshua Bodek.

Received, Nov. 21st, 1925 at 12 o'clock M., and recorded in the Clerk's Office of Cape May County, at Cape May Ct. House, New Jersey, in Book 413 of Deeds, pages 295

A. C. Hildreth
Clerk.

Ocean City
Title and Trust Company
Ocean City, N. J.

Exhibit B. 26.

EXHIBIT B. 26.

THE COLONIAL TRUST COMPANY
20 South Fifteenth Street
PHILADELPHIA

JOSHUA BODEK

Read, correct and return at once

GHW.

April 21, 1927.

Mr. George H. Weinrott,
6th & Chestnut Sts.,
Phila., Pa.

Dear Mr. Weinrott:

Enclosed you will find copies in duplicate, of letters prepared by Mr. Schorr in connection with the Wildwood transaction.

I will appreciate it if you will let me hear from you as promptly as may be possible.

Very truly yours,

ANTHONY G. FELIX

A G Felix
Vice-President

AGF:K
Encl.

Exhibit B. 27.

EXHIBIT B. 27.

April , 1927.

The Colonial Trust Company,
Philadelphia,
Pennsylvania.

Gentlemen:

With reference to the bond and mortgage of Joshua Bodek for $, which you hold, secured upon certain lots in North Wildwood, N. J., purchased from William J. Ryan, Inc., I beg to enclose herewith my check for $, which is my proportionate part of the installment of principal past due on said mortgage, said proportion being based on my proportionate ownership of the lots covered by said mortgage, said sum to be returned to me, however, as hereinafter provided, unless the following arrangements are carried out:

1. Mr. Bodek will convey to each member of the Syndicate for which he was acting in the purchasing and mortgaging of said lots a proportionate number of said lots, said proportion to be based on the purchase price paid for the same, according to interest of each such member in the transaction.

2. You will accept in lieu of the present mortgage the bond and mortgage, in form similar to the present mortgage, of each member of the Syndicate, securing upon the lots so to be conveyed to him, the proper proportion of the principal remaining due under the present mortgage, such new mortgages to have release clauses requiring the release of each lot upon payment of the balance of the purchase price of such lot as fixed by the schedule attached to the contract

Exhibit B. 27.

under which settlement was made for the lots by Mr. Bodek with William J. Ryan, Inc., provided that after the date named for the payment of the mortgage debt in the new mortgages, releases shall only be given in case of sale, and then only if the full amount realized from the sale is paid on account of the mortgage debt, which, however, shall not be less than the release price specified above.

3. Mr. Bodek's present bond shall either remain in effect or he shall give you a new bond, as you may elect.

4. The new mortgages shall be made payable at the time that the present mortgage is payable and you shall agree in writing that if you shall be paid on account of the principal thereof, at or before the date of maturity of such mortgages, the same proportion of such principal as the amount of the installment past due on the present mortgage bears to the total amount of the present mortgage, then you will extend the time of payment of such new mortgage or mortgages eighteen months from the date of maturity.

5. I will pay all expenses of arranging such new bonds and mortgages, preparation of papers and recording, but I understand that you have already provided for title insurance for same, and that you

The Colonial Trust Co. #2.

will not require the cost thereof from me.

6. It is understood that I am bound by the terms hereof, but that you will not be bound hereby unless all of the members of said Syndicate execute and deliver to you on or before May 10th, 1927, a letter of agreement with the same

Exhibit B. 27.

terms as herein contained, accompanied by similar proportionate payment of installment of principal past due on the present mortgage, and if any of such members of the Syndicate thereafter fail to carry out the terms of such agreements with you by June 25th, 1927, you shall have the right at any time thereafter and before such compliance by such members to terminate any or all of the agreements of such members who are willing to perform, as you may elect, and upon such termination you are to refund the payment made thereunder except as to those who shall have failed or refused to carry out the terms of such agreement, and as to those payments you may retain same and credit to the present mortgage debt.

7. It is understood that the improvements are accepted by me as completed in accordance with the terms of the present mortgage, and of all contracts relating thereto, and no claim shall be made by me in regard to any matter relating to such improvements.

Pencil notation.

all mony improvement must be done also sewers must be completed & paid for by Colonial

8. You agree, by collection of the check enclosed herewith, to carry out the arrangement herein contained if all other members of the Syndicate tender like arrangements by May 10th, 1927, and perform same, all as hereinbefore expressed.

9. The lots to be conveyed by Mr. Bodek to me are as follows:

and the new mortgage by me is to cover the same and is to be of the amount of $

Exhibit B. 28.

10. It is further understood that all of the members of said Syndicate are as follows:

Yours truly,

EXHIBIT B. 28.

April , 1927.

The Colonial Trust Company,
Philadelphia,
Pennsylvania.

Gentlemen:

We agree that the collateral bonds given by us respectively to the Peoples Bank and Trust Company and to the Excelsior Trust Company (which have merged with you), to secure the payment of the mortgages sold by William J. Ryan, Inc. to said trust companies on North Wildwood Lots, shall remain unaffected and unimpaired by any agreements that you may make extending the time for payment of all or any of such mortgages, and taking numerous bonds and mortgages in place of the present ones (but in aggregate amount not to exceed the present debts), and the liability of each of us under such bonds shall remain in full force and effect notwithstanding any agreement on your part.

WILLIAM J. RYAN, INC.
By: .....

Attest:
.....

Exhibit B. 28.

April , 1927.

Mr. Joshua Bodek,
Philadelphia,
Pennsylvania.

Dear Sir:

In connection with the North Wildwood lots purchased by you for the Syndicate of which I am a member, from William J. Ryan, Inc., I hereby agree that the agreement entered into with you by the members of the Syndicate indemnifying you by reason of the bond executed by you in connection with the mortgage on the said lots shall remain unaffected and unimpaired by any transaction with the holder or holders of such mortgages whereby they will take new separate mortgages to replace the existing mortgage, leaving your bond remaining, and we further agree that in case you shall give a new bond in place of the present bond, which new bond will be to secure payment of the separate mortgages, the said agreement of indemnity between you and the members of the Syndicate shall remain effective as respects any liability that you may have under such new bond with the same full force and effect as though said agreement of indemnity had provided specifically that you should be indemnified on the new bond.

Yours truly,

Exhibit BA. 1.

EXHIBIT BA. 1.

AGREEMENT made this 28th day of April A. D. 1926, by OCEAN CITY TITLE & TRUST COMPANY, a Corporation of the State of New Jersey, (hereinafter called "TITLE CO."), unto and with EXCELSIOR TRUST COMPANY a Corporation of the State of Pennsylvania, (hereinafter called "COMPANY").

WITNESSETH THAT:

1. Joseph Seltzer of the City of Philadelphia has requested Company to purchase from him certain mortgages made by various persons to William J. Ryan, Inc., and assigned by the latter to the said Joseph Seltzer. A list of said mortgages is attached hereto, marked "Schedule A" and is made a part hereof.

2. Company is willing to purchase the said mortgages on condition that Title Co. undertakes to see that the improvements mentioned in some of said mortgages are made and paid for, and agrees to do certain other things, all as hereinafter fully set forth.

3. Title Co. is willing to undertake the agreements requested by Company, in order to induce Company to purchase said mortgages and in further consideration of its title charges insuring the title of Company.

NOW, THEREFORE, in consideration of the premises and of the purchase of the said mortgages by Company and in further consideration of the sum of Five Dollars ($5.00) in hand paid by Company to Title Co., the receipt whereof is hereby acknowledged, Title Co. agrees as follows:

4. Title Co., in addition to the issuance of its title insurance policy insuring Company as as-

signee of mortgagee of the said mortgages, hereby agrees to and with Company, its successors and assigns, and hereby insures Company, its successors and assigns, that all of the improvements mentioned in some of the said mortgages will be completed and paid for on or before August 15th, 1926, free and clear of any liens or claims of contractors, sub-contractors, mechanics and/or material men. Said improvements consist of the following work and materials to be done and furnished upon the tract of land in North Wildwood, New Jersey, of which the lots mentioned in the said mortgages are a part, to wit:

> The necessary clearing of the said tract; the filling of the low area up to a grade approximately equal to the grade of the present county road, the necessary grading to establish a uniform grade of the streets, the gravelling of all roads and installing of all concrete sidewalks, curbs and sewers.

5. Title Co. will forthwith notify in writing all of the owners of said lots that all of the encumbrances existing immediately prior to the sales of the said lots by William J. Ryan, Inc., to the various mortgagors named in the said mortgages have been paid and discharged and that there is sufficient money in the hands of Title Co. to pay for said encumbrances and that Title Co. has guaranteed to the holders of said mortgages completion of said improvements.

6. Title Co. agrees that out of the consideration paid by Company for said mortgages, there will be set aside by Title Co. the sum of One Hundred Forty-Five Thousand Dollars ($145,000.), which Title Co. hereby agrees shall be

used only for payment for said improvements and for no other purpose.

7. Title Co. agrees to and with Company, its successors and assigns, that Title Co. Will issue in the future from time to time to the then holders of the said mortgages Title Co.'s policies insuring such holders any new mortgages to be taken by them covering any lots released from the said present mortgages under the terms of the release clause contained in said present mortgages, without cost to Company, its successors or assigns or the then holders of said mortgages, it being understood that Title Co. has agreed with William J. Ryan, Inc., that the latter's account will be charged with the cost thereof.

8. It is expressly understood and agreed that this agreement and the benefits and advantages to be derived therefrom may be assigned by Company and that any and all future holders of said mortgages shall be deemed assignees hereof, although they shall have no express written assignments, and that each of such holders shall be separately and independently entitled to the benefits and advantages of this agreement.

IN WITNESS WHEREOF the Ocean City Title & Trust Company has hereunto affixed its hand and corporate seal, by its proper officers, thereunto duly authorized, the day and year aforesaid.

Signed, Sealed and Delivered
in the presence of
G. J. SCHORR

OCEAN CITY TITLE & TRUST COMPANY
By WILLIAM E. MASSEY
President

Attest: JAMES F. KOCH
Secretary.

Exhibit BA. 1.

Made By	Principal Sum	Lots
Joshua Bodek	63,490.00	Nos. 3 & 4, Block 301; Nos. 3 & 4, Block 302; Nos. 9, 27, 28, 29, 30 & 31, Block 304; Lots 9, 10, 11, 25, 27, 28, 29, 30, 31, 33, 47 & 48, Block 305; Lots 1 & 9, Block 306; Lots 6, 37, 38, & 39, Block 413; Lots 2, 8, 16, 17, 18, 19, 20, 21, 35, 36, 37, 38, 39, 40, 41 & 42, Block 415; Lots 22, 23, 32, 33 & 34, Block 417; Lots 22, 23, 32, 33 & 34, Block 418, Lots 18, 19, 24 & 32, Block 419.
Harry A. Duffine	4,375.00	Nos. 6 and 7, Block 415;
David Garfield	32,007.50	Nos. 25, 26, 29, 30, 31, 32 & 33, Block 303; Lots 25, 26, 32 & 33, Block 304; Lots 19 & 20, Block 306; Lot 1, Block 415; Lots 3 & 4, Block 416.
E. Louis Rosen	2,660.00	Nos. 23, 24, 34, & 35, Block 306
Harry M. Seidenberg	3,465.00	Nos. 29, 30 & 31, Block 301.
William J. O'Brien	20,405.00	Nos. 1, 2, 8 & 9, Block 417; Lots 1 & 2, Block 418.
Morris Haber	6,160.00	Nos. 36, 37, 38, 39, 40, 41, 42 & 43, Block 299.
Benjamin Weinroth	14,910.00	Nos. 39, 40, 41, 42, 43, 44, 45 & 46, Block 300; Lots 23, 24, 25, 33, 34, & 35, Block 301.
Max Smith	26,057.50	Nos. 20, 21, 35, 36, 37, 38, 39 & 40, Block 412; Lots 14, 15, 16, 17, 18, 19, 20, 21, 22, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45 & 46, Block 301; Lots 27, 28, 29, 30 & 31, Block 307.
	$173,530.00	

Ocean City Title and Trust Co.

William C. Massey
President

SCHEDULE "A".

Exhibit BA. 2.

EXHIBIT BA. 2.

OCEAN CITY TITLE AND TRUST COMPANY
Ocean City, N. J.

May 5, 1926.

Mr. Joshua Bodek,
44 No. 3rd Street,
Philadelphia, Pa.

Dear Sir:

We enclose bill for $1904.70 representing six months interest on your mortgage amounting to $63,490.00, covering lots in the William J. Ryan, tract, North Wildwood, New Jersey. This interest is payable to the Ocean City Title and Trust Company.

This mortgage has been sold to the Excelsior Trust Company, Philadelphia, who will look to you for future payments on account of principal and interest.

We wish to advise you that sufficient money has been deposited with this company to pay for the completion of the improvements on this tract, and that this company has guaranteed to the holders of your mortgage, completion of the said improvements.

Very truly yours,

JAMES F. KOCH
Treasurer.

JFK-B.

30 MAY.1.1932

New Jersey Court of Errors and Appeals.

Between

COLONIAL TRUST COMPANY, formerly EXCELSIOR TRUST COMPANY, with whom has been added The Pennsylvania Company for Insurances on Lives and Granting Annuities,
Complainants-Respondents,

AND

JOSHUA BODEK *et als.*,
Defendants-Appellants.

On Appeal from Chancery.

BRIEF FOR APPELLANTS.

Statement.

This is an appeal from a decree advised by Ingersoll, *V. C.*, which decree foreclosed a mortgage made by the appellant Bodek and dismissed the counterclaim by him and the other appellants. This cause was commenced by a bill to foreclose a purchase money mortgage given by the defendant Joshua Bodek, who became the purchaser at an auction sale held Labor Day, 1925, by which William J. Ryan, Inc., through Joseph P. Day, sold lot by lot a large tract of land in the City of North Wildwood. Mr. Bodek was acting not only for himself, but for a syndicate, but he signed all the memoranda of sale for the 58 lots bought by him.

Thereafter the lots were deeded to him and he executed the purchase money bond and mortgage under foreclosure. Before foreclosure, however,

he executed a deed of trust to the other members of his syndicate, the co-defendants for whom this brief is filed, and the same was recorded, and for that reason the said co-defendants and the wives of such of them as are married have been joined as co-defendants in this case. The legal and equitable situation, however, is just the same as if Mr. Bodek alone were interested.

The bond and mortgage are to secure the sum of $63,490.00, payable as follows: $9,070.00 upon the completion of certain improvements (hereinafter more particularly referred to) and notice thereof, and the balance thereof three years from the date of the bond, which was dated November 9, 1925. The bond contained the usual clauses whereby if any installments of interest (which was payable at the rate of 6% per annum, semi-annually) should be in default for thirty days, or any tax for the space of ninety days, then the whole principal should become due and payable. With respect to the payment of the installment of principal of $9,070.00, the bond provided in detail:

> "The installment of principal of Nine thousand seventy dollars ($9,070.00), hereinbefore mentioned shall be payable upon completion by the party of the second part, its successors or assigns, of the following improvements to the land now or formerly belonging to said party of the second part, of which land the lots herein described are a part, namely; the necessary clearing of said land, the filling of the low area up to a grade approximately equal to the grade of the present County Road, the necessary grading to establish a uniform grade of the streets, the graveling of all roads, and the installing of concrete sidewalks, curbs and sewers; and upon the sending of notice of such completion by said party of the second part, its successors or assigns, by letter addressed to said party of the first part at #425 Market Street, Philadelphia, Pennsylvania."

The bill of complaint relied upon a default in the payment of the said installment of principal and also, by amendment, of interest and taxes. To this bill the defendants have filed an answer and counterclaim.

The execution of the bond and mortgage is admitted, as is the non-payment of the installment of principal and the non-payment of installments of interest and of taxes for a sufficient length of time to justify the complainant in electing to call the principal due, were it not for the other facts set up in the answer and counterclaim. So far as the installment of principal is concerned, the position of the defendants is that the improvements upon the making of which the installment was to be payable have not been made, so that the due date of the said installment has not arrived. With respect to the alleged defaults in the payment of principal and taxes, the same improvements, or, rather, the want thereof, are a defense and a ground for relief under the counterclaim by reason of the following facts:

The mortgage was a purchase money mortgage and the contracts of purchase (the lots having been separately bought) were induced by certain fraudulent misrepresentations made by the vendor, William J. Ryan, Inc., at the time of the auction sale; and, furthermore, the contracts of sale contained an agreement with respect to the improvements in which a material default has been made. The representations are three-fold:

1. Was contained on a sign which stood on the premises at the date of the auction and read as follows:

> "William J. Ryan, Inc.—Owners & Developers,
>
> 605 Franklin Trust Building, Phila.
>
> Sewer Contract Awarded to Versaggi Bros.
> Curbs-Sidewalk Contract Awarded to Versaggi Bros.

Sand fill Contract Awarded to United Dredging Co.

Grading & Graveling Cont. Awd. to Craython-Nickerson.

ALL WORK and IMPROVEMENTS to be FINISHED BY JULY 15th, 1926.

Engineering Work in Charge of Harry E. Weir."

2. Was orally by Mr. Ryan, president of the vendor, to the effect that money had been provided for the building of a sewerage disposal plant; and

3. By the auctioneer, reading as follows:

"SEVENTH: The seller agrees, at its own expense, to improve the above mentioned property as follows: Do all the necessary clearing, fill the low area up to a grade approximately equal to the grade of the present County Road, do all the necessary grading to establish a uniform grade of the streets, gravel all roads, install concrete sidewalks and curbs and install sewers."

This last representation read by the engineer was also embodied in the memoranda of sale signed by Mr. Bodek, and therefore aside from the representations became a material part of the contract for sale. The full material language of the memoranda of sale in that connection is as follows:

"The said deed of conveyance shall contain the following conditions, restrictions and limitations, which are intended to be and shall be taken as covenants to run with the land, and which are intended to be and shall be taken as conditions of the said conveyance and one of the express considerations thereof, viz.:

"RESTRICTIONS

"That no dwelling or building for business purposes shall be built or erected on the lots offered in this sale to cost less than $3,500 on all lots facing on Numbered Avenues between

Surf Avenue and the Ocean front; and $4,000 on the lots facing on Surf Avenue; and $3,000 on all lots facing on the ocean. That no building of any description shall be at any time erected within 35 feet of the curb line of any lots east of Surf Avenue, but that said space between said house line and street line shall be always left open and clear for the purpose of light and air; that no cesspool shall be dug on said premises, and no privy shall be allowed thereon; that no store buildings (except on the ocean front and Surf Avenue), public garage, slaughter house, bone boiling establishment, pig-pen, chicken house, or anything of an offensive or unsightly character, shall be erected, kept or maintained upon said premises.

"SIXTH: The seller is not required to send any notice to any purchaser, and if any purchaser neglects to call at the time and place specified in the Memorandum of Sale hereto annexed, to receive his deed, he will be charged with interest thereafter on the whole amount unpaid of his purchase price, provided the seller shall deem it proper to extend the time for the completion of said purchase.

"SEVENTH: The seller agrees, at its own expense, to improve the above mentioned property as follows: Do all the necessary clearing, fill the low area up to a grade approximately equal to the grade of the present County Road, do all the necessary grading to establish a uniform grade of the streets, gravel all roads, install concrete sidewalks and curbs and install sewers.

"EIGHTH: The seller reserves the right to complete all development work now in progress or contemplated without hindrance of any sort from the purchaser, and reserves to itself the right to enter upon said premises for this purpose."

It is true that on September 9, 1925, four days after the auction and the signing of the memoranda

of sale, the defendant Bodek executed a combined agreement of sale, containing in one document all of the lots purchased by him. It is also true that this combined agreement contained a provision that the improvements were to be completed within one year from the date thereof, that is to say, by September 9, 1926. We concede that the signing of this combined agreement is a waiver of the right Bodek theretofore had to rely upon the completion of the improvements at a date anterior to September 9, 1926, and amounts to an extension of the vendor's time to complete those improvements until that date. This, however, is the full extent and the only effect of the execution of the combined contract of sale upon the defendant's rights. Under the facts, as hereinafter more particularly will be shown, the delay in the improvements was so great that even with the extension to September 9, 1926, there is still a very material default and a material breach of the representations as so modified.

Thereafter, and on November 9, 1925, the defendant Bodek attended at the closing, paid an additional balance on the purchase price, making the total paid by him $27,882.00, received a deed for the lots and executed the bond and mortgage under foreclosure. The deed expressly reserved to the grantor, its successors and assigns:

> "The free right of access in and upon said premises for the purpose of making the following improvements to the land now or formerly belonging to said party of the first part of which land the lots herein described are a part, namely: the necessary clearing of said land; the filling of the low area up to a grade approximately equal to the grade of the present County Road; the necessary grading to establish a uniform grade of the streets; the graveling of all roads; and the installing of concrete sidewalks, curbs and sewers."

Thereafter and under date of May 5, 1926, the defendant Bodek received Exhibit BA-2, a letter from Ocean City Title and Trust Company, enclosing a bill for the six months' interest then coming due, stating that the mortgage had been sold to the complainant, and concluding:

> "We wish to advise you that sufficient money has been deposited with this company to pay for the completion of the improvements on this tract, and that this company has guaranteed to the holders of your mortgage, completion of the said improvements."

A few days later the defendant also received Exhibit B-3, a letter from the complainant dated May 11, 1926, authorizing the defendant to pay the installment of mortgage then due to the Ocean City Title and Trust Company. Relying upon Exhibit BA-2 and not having any information to the contrary, and the time for the completion of the improvements not having yet arrived, the defendant Bodek paid the installment of interest then due. Thereafter and under date of October 14, 1926, the defendant received Exhibit B-6, a William J. Ryan, Inc., announcing that all improvements had been completed; and under date of October 16th he received Exhibit B-7, to the same effect, and enclosing a photostatic copy of the certificate of the engineer, Harry E. Weir to the same effect, which is Exhibit B-8. These were followed up by a letter, Exhibit B-4, from the complainant (then named Excelsior Trust Company) dated November 26, 1926; but under date of January 21, 1927, the defendant Bodek received from the complainant Exhibit B-5, a letter saying, among other things:

> "By reason of complaints concerning some of the details of the improvements we have refrained from pressing you for payment up to this time, but it now appears that all matters complained of have been attended to in every

respect, as requested by the lot owners, and, we might add, at considerable expense to William J. Ryan, Inc. There is, therefore, no reason whatsoever for further delay, and we will ask you to please see that the said amount of $9070. be paid to us by not later than February 1, 1927."

The defendant Bodek had during the summer of 1926 paid a visit to his lots casually, and found that the improvements to his lots had not been completed, and in February, 1927, he paid a particular visit of inspection to satisfy himself whether it was true that the improvements had been completed, found that they had not, had taken the several photographs which he has offered in evidence, and refused to pay the installment of principal or any further interest or taxes.

On these facts he and his co-defendants say that there should be a decree dismissing the foreclosure bill, and a decree on their counterclaim for the cancellation and delivering up of the bond and mortgage, they being willing to reconvey the property upon repayment to them, with interest of the sum of $27,882.00, which they had expended in the purchase of the lots. If the facts with respect to the falsity of the representations and the breach of the purchase agreement as to the completion of the improvements are made out, the defendants are certainly entitled to the relief prayed for by them.

The Authorities.

Lurch vs. *Holder,* 27 Atl. 81 (Pitney, *V. C.,* 1893). This was an action to foreclose a purchase money mortgage on a farm. The defendants set up that their purchase of the farm had been induced by the vendor mortgagee's false representations. The defendants had occupied the farm for three years, during which time they had destroyed a

quantity of grape vines, and so had diminished the value of the farm. It was held that because the premises were not in as good condition as when purchased a simple rescission would not be allowed, but that the complainant would be given his option to accept the amount of the mortgage less the damages assessed, or to rescind and return the purchase money, less such sum as would compensate the complainant for the deterioration in the value of the farm.

Merchants, etc. Co. vs. *Mercer Realty Co.*, 99 Law, 442 (C. E. A., 1923). This case is cited to show that our Court of last resort has firmly established the doctrine that a covenant on the part of the vendor in an agreement for the sale of land is not merged in the deed of conveyance thereafter delivered where it is collateral and independent, and that a covenant that improvements on the premises had been paid for and that no assessments were pending is collateral and independent.

Curtiss-Warner Corporation vs. *Thirkettle*, 99 Eq. 806 (Berry, *V. C.*, 1926). This was a suit to foreclose a purchase money mortgage. At the time of the sale the vendor represented that the land was a corner lot and the contract of sale described the property as being located at the corner of O St. and T Ave. At that time and at the time of the delivery of the deed the property was being developed and T avenue was not actually cut through. The deed described the property by metes and bounds, but made no reference to being on the corner of T Avenue. The vendor obtained an increase in price on the representation that the lot would be a corner lot. The Vice Chancellor held that it was well settled that there could be an abatement in the amount of the purchase money mortgage on the ground of fraud, that the covenant was not merged in the deed, and that the fact that the purchaser continued to pay installments after knowledge that

the lot was not a corner lot does not estop him, because the vendor was assuring him that T Avenue would be cut through. The purchaser continued to protest. The Vice Chancellor said on page 813:

> "I think there is no doubt that where a sale of real property is effected by deceit, and a mortgage given for the whole or a part of the purchase money, relief in equity will be given to the party defrauded in a suit on the mortgage, whenever such course is necessary to reach a just result. Fraud, as a general rule, gives jurisdiction to a court of equity, and there can be no reason why, when the process of foreclosure is being used as a means of giving effect to a deception, such process should not be restrained and controlled as to prevent an injustice. * * *

and, again, on page 817:

> "In *Long* v. *Hartwell,* Mr. Justice Van Syckle said: 'The rule to be deduced from the authorities is, that the executed contract supersedes all prior negotiations and agreements, where the last contract covers the whole subject embraced in the prior one. But where the stipulation is to do a series of acts at successive periods, or distinct and separable acts to be performed simultaneously, the executory contract becomes extinct only as to such of its parts as are covered by the conveyances.'
>
> "But the deed which was delivered to the defendants in the instant case was not in performance of the agreement to either convey a corner lot or to build sidewalks and curbs. It is true that the deed conveyed the lot which was purchased, describing it by metes and bounds, but not as a corner; but it, nevertheless, did not convey a corner lot, which is what the vendor agreed to convey. It was, at best, a performance of such part of the contract as it purported to execute, namely, a conveyance of a particular piece of land. As well say that by the delivery of the deed for the lot the agreement to build the house was also executed."

To the same effect is *Ireland* vs. *Penn Motor Co.*, 100 Eq. 166 (Ingersoll, *V. C.*, 1926). See also *Kessler* vs. *Troast*, 101 Equity, 536 (Bentley, *V. C.*, 1927).

The defendants are entitled to a rescission of the whole contract of purchase, whether or not the defaults on the part of the vendors be considered as fraudulent misrepresentations, or as merely breaches of the contract on its part. It is, of course, elementary law that rescission may be had in equity for fraud. We do not contend that rescission may be had for every breach of contract. The law of New Jersey on this point is that where the breach can be compensated for by damages, rescission will not be allowed, but where it is so material that it cannot be compensated for by damages, or amounts to a complete repudiation by the party in default of his liability, then the offended party may have rescission. A good example of a case in which even at law the offended party was held to be entitled to rescission is *Board of Education* vs. *Kerr*, 93 Law, 240 (C. E. A., 1919). The action was on a building contract for failure to install a steam heating and ventilating apparatus in a school building. There was judgment in favor of the contractor, on the ground that the Board put itself in such a position that it prevented the contractor from filling his contract within the contract time, and that the Board did not have the building ready for the contractor's work within a reasonable time after that date. On appeal the Court of Errors and Appeals held that the contractor had the right to rescind the contract and treat it as abandoned by the Board. The contract between the parties required the building to be ready for work to be done by the contractor by September 1st. In the days following the contractor found the work on the building had not sufficiently progressed for him to proceed with his work, and wrote a letter of complaint, to which no reply was

received. The following July the contractor wrote, offering to do the job at cost plus 10%. The contract was afterward let to another contractor, and the Board sued to recover the excess of his bid over that of the defendant's. As above stated, it was held that the defendant had the right to rescind.

In the case at bar the matter of the sewers, without more, is certainly a material breach entitling the purchasers to a rescission. The latest date by which under the contract the sewers were to be completed was September 9, 1926. The sewers were not set to work until May, 1928. No cesspool or privy could be built on the premises because of a restrictive covenant against them, and the lack of sewers simply meant that the property could not be built upon or sold for building purposes within that time, or, in other words, only three months short of three years after the purchase. During that period the property was absolutely useless for the only purpose for which it could possibly be made use of. How can the purchasers be compensated in damages for the uselessness of the property during that time? What would the measure of damages be? It is obvious that no such computation can be made. The purchasers bought something which to all intents and purposes was nothing, and remained such for a period only three months less than three years. The vendor's permitting this breach to continue for such a time must be deemed to amount to repudiation on its part of the contract entitling the purchasers to a rescission.

Of course the defendants cannot keep the property and not pay for it. In their counterclaim they offer to do equity and reconvey the lots, but only upon reimbursement to them for the cash outlay. Of course without a restitution of their cash outlay there is no complete rescission, and, furthermore, it would be inequitable to require them to deed back the property and put them to an action for their money or leave them out of pocket.

In *Hawthorne* vs. *Odenson,* 94 Equity, 588, 601, Leaming, *V. C.,* said:

> "The relief to which defendant is entitled is a decree which shall place the parties where they were. This includes the cancellation of the deed of conveyance and bond and mortgage and the repayment to defendant of the moneys which he has paid, with interest, and also an allowance for such expenditures as defendant has made. Against this defendant will be charged for the reasonable value of the use and occupation of the premises during the period of his possession."

In the case at bar the defendants have had no use of the premises sold and have not occupied the same. There is no reason, therefore, in the present case for charging them with the reasonable value of the use and occupation.

Applying the Law to the Facts of Our Case.

The great weight of the evidence is that the misrepresentations were actually made. In the first place, a number of witnesses, including the defendants Bodek, Lipper and Shotkin, testified that at the date of the auction the sign was in the condition disclosed on the small photograph. This is contradicted by the witness Young, the sign painter, but on cross-examination he testified that the painting of this sign was just one job among many, and his memory as to it and what was on it and when he put the different letterings on it is not very clear after the five years intervening (Record, 425).

It is of course undisputed that at the date of the auction the various contracts referred to on the sign had not in fact been let. The defendant Bodek relied on the sign, and attached particular im-

portance to it (Record, 344). The defendant Lipper testified (it will be remembered that he was one of the syndicate for whom Bodek was acting) that Mr. Ryan at the time of the sale said to him:— "There was enough money provided to build a sewer disposal plant" (Record, 372). It is of course not even contended by the complainant that there ever was any fund provided to build a sewer disposal plant, or that a sewer disposal plant at any time was built by the vendor or on its behalf; and it is also undisputed that the reason the line of pipes laid by the vendor was not by public authority permitted to be connected up, so as to have any outlet, was because the State Board of Health would not permit any more untreated sewage to be discharged into the local waters.

Perhaps the clearest and plainest breach of covenant and misrepresentation is with respect to the sewer. The agreement in the contract of sale and representations with respect to the sewer have already been adverted to. This, of course, required sewers to be laid in every street shown on the map. It is undisputed that at no time has a sewer been laid in the 15 foot alley near the boardwalk, westerly of Thirteenth Avenue. That leaves these defendants' lots, six in block 413, wholly without a sewer. The excuse given was some dispute with the City of North Wildwood over the location of the boardwalk.

The restrictions contained in the deed and in the contract of sale prohibit the construction of any cesspool or privy. It follows that the property is absolutely useless for any building purposes whatsoever (we hardly believe it is contended that the property was bought for any other purpose or that it is suitable for any other purpose) unless a usable sewer is constructed. Mr. Weir, the vendor's engineer, testified (Record, 227) that the vendor did not want to lay a sewer along the alley past

this lot of the defendants until the dispute with the city was settled, and at the same time contended that the purchaser of the lot should himself connect with the sewer in 13th Avenue by constructing what Mr. Weir called a "lateral" through the alley —in other words—the purchaser should do what the vendor agreed to do, but was unwilling to do. This carries its own refutation.

But the foregoing is only a very small part of the breach with respect to the sewers. In the first place, 80% of the sewers had to be relaid and were not ready by September, 1926. This is the testimony of Mr. Rice (Record, 377). This was due to the fact that the sewer pipes were laid before the fill was made. The first pipes were laid in April, 1926 (Record, 185). Weir issued his certificate of completion October 8, 1926 (Record, 185). Weir himself testified that the pipes having been laid before the fill, he would expect up to 25% of them to crush (Record, 216), and that he expected this at the time he made the certificate of October 8, 1926 (Record, 221). He knew, then, that the certificate was false when made. He said he preferred not to use the method of laying the pipes before the fill (Record, 238), but did not explain why then he did so, although he said the usual system was to make the fill first and then put the pipes in afterwards.

Jacob Creskoff, a civil engineer, testified that on May 4, 1928, he examined and inspected the Bodek lots and found, among a number of additional physical defects, that the sewers passed some of the lots, for example, 2 and 8 in Block 415, and that opposite many more of the lots the sewer was being replaced.

With respect to the breakage, Mr. Rice, the defendant's civil engineer, testified (Record, 384) that it is very hazardous to lay pipes before the fill on account of breakage. Mr. Rice also testified that with the amount of pipes broken as there were ad-

mitted by Mr. Weir, namely, up to 25%, the pipes could not function as a sewer (Record, 385).

Aside from the breakage there was another fundamental defect in the sewers as laid. A system of pipes was laid as above stated, and with the above exceptions and qualifications, throughout the streets on the Ryan tract. They led down to a point of connection with the existing sewers of the City of North Wildwood at a manhole at 11th and Surf Avenue. Admittedly, however, in this manhole there was a brick wall between the Ryan pipes and the municipal sewer (Record, 211) which had been placed there by the City of North Wildwood (Record, 211). On account of that wall sewage could not pass from the Ryan pipes to the municipal sewers (Record, 211). All the last mentioned citations on page 211 are from the testimony of the vendor's engineer, Mr. Weir.

When the laying of the pipes was first contemplated by the vendor, the vendor made application for leave to connect with the existing municipal sewer, and this leave was refused by the State (Record, 221). It is of course fundamental that under the existing statutes the consent of the State board of health is just as essential as that of the municipality, and that the consent of the municipality could not be validly given without the concurring consent of the State board of health. This disapproval by the State board was given in December, 1925 (Record, 221). The approval by the State was not indicated until March, 1928 (Record, 353) and the sewer was not accepted by the City of North Wildwood as a sewer until May, 1928 (Record, 281); and it was early in the last mentioned month that physical connection with the municipal system was first made (Record, 233, 382). Previously to that time there had been no connection, so that there was no outlet out of which sewage could have flowed (Record, 382,

383). Our contention is that until the connection with the municipal system was made, the system of pipes under the streets in the Ryan tract, regardless of their broken condition, was not a sewer. The word "sewer" is defined in Webster's New International Dictionary as

1. Obs. or Dial. A ditch or drain.
2. Now: An artificial, usually subterranean conduit to carry off water and certain waste matter.

Mr. Rice, the defendants' civil engineer, was questioned and answered as follows (Record, 386):

> "Q. As an engineer are you able to say what is meant by the word sewer?
> A. When the sewer is spoken of, the general term 'sewer' is used, I consider it a system of underground conduits of pipe extended to carry off any substance, any water or other effluent from the toilets or waste water from the houses in a municipality."

The representations and the contract required the vendor to "install sewers." The mere laying of pipes under the streets did not constitute the installation of a sewer. From the nature of the requirement that a sewer is a pipe to carry off liquid there must be an outlet. No sewer was installed until the physical connection with the municipal sewer was made in May of 1928—that is—over a year and a half after September, 1926, when at the latest the sewer should have been installed.

The complainant may argue that it was not the vendor's fault that the public authorities would not permit the connection. To this several answers may be made. In the first place, it stands to reason that the public authorities would not have approved of the system of pipes on the Ryan tract as a sewer until all of the crushing and movements out of alignment had been repaired. As we have seen,

this had not all been done until May, 1928. In the second place, the vendor by its representations and by its contract assumed the duty of installing a sewer. The land was bought, the cash paid and the obligation of the purchase money mortgage assumed by these defendant purchasers, relying on the representation and covenant of the vendor that a sewer would be installed.

The materiality of the sewer is self-evident, particularly so when, as in this case, there were restrictions against the construction of a cess pool or privy. Being unable to build a privy or cesspool, and without a sewer that could be used, the lots in question were absolutely useless for building purposes. It is the vendor that assumed the obligation to install the sewer. Having assumed that obligation, it was incumbent on the vendor not only to lay a chain of pipes beneath the streets, but to accomplish everything necessary for those pipes to function as a sewer within a stipulated time, even if the vendor itself built the disposal plant or purification system required by the State Board of Health. The complainant apparently feels the force of this argument, for his witness Mr. Weir, the vendor's engineer, in an effort to escape from the situation gave the astonishing testimony (Record, 233) that even without the outlet at the manhole the pipes could have been used for sewerage purposes between the summer of 1926 and the actual physical connection of 1928, because, as said by him:—"For the simple reason, why, a twelve inch pipe don't catch up or will carry many gallons of sewage for a year or two, three years if they have to." Or, as later said by him (Record, 246, 247) "Why, your sewer pipe will carry a considerable amount of water for two or three years before you ever have to drain it out if you wanted to do it.

"Q. Where would it go to?
A. Stay in the sewer pipe. * * *

Q. And it would just gradually fill up?
A. Sure.
Q. Wouldn't that effect sort of a cesspool?
A. Might, yes."

This is, indeed, a filthy suggestion, and one directly in the face of the descriptive covenant in the deed, forbidding cesspools. Moreover, defendant's engineer, Mr. Rice, in this connection, when asked the same question as to whether the pipes could have been so used, said (Record, 385):

> "If the pipe had all remained in good condition and the State would have permitted it, that could have been done, but under the conditions of having the fact that the pipe was partly destroyed by the pumping, it would not have been possible to have even used it for that."

The vendor also agreed to "fill the low area up to a grade approximately equal to the grade of the present county road." The defendant Bodek's photographs, taken in February, 1927, and the defendant Bodek's testimony, and the testimony of Mr. Creskoff as to conditions in May, 1928, all show that material parts of the Bodek lots were not filled up to grade. Engineer Weir admits (Record, 224) that the property was about one foot below grade, and said he would expect it to be, because the sand with which the property had been filled would blow out. The fill was made by hydraulic dredging, that is, by pumping water from the bottom of a neighboring water course in which sand was in suspension, on to the place to be filled, in such a way that the water would flow away and deposit the suspended sand. Engineer Weir admitted that this system of fill was one which would not stay put (Record, 224). While the vendor did not agree to maintain the fill, we submit that a method of filling which in and of itself is so impermanent that by February, 1927, it would, by the mere action of

the wind, have blown away as much as it did, is not a satisfactory compliance with the obligation to fill. There must be some permanence. The job isn't done unless and until the surface is so weighted that the fine sand left by the hydraulic dredge will not blow away by the action of ordinary winds. The seriousness of this lack of fill appears also from the testimony of Mr. Creskoff (Record, 396 to 418).

With respect to the streets which by agreement and representation were to be established to a uniform grade and gravelled, it is significant that they were not accepted by the municipality until April, 1927.

To sum up, therefore, there was no sewer as such until May, 1928; the low places in the lots were not filled up to grade within time. These two defects, existing as extensively as the evidence indisputably shows that they did, are such a material and fundamental breach that it is obvious that the defendants cannot be compensated by any abatement, but that there must be a rescission of the mortgage and contract of purchase as prayed for. Of course the defendants on a rescission must reconvey the land. It is immaterial to them whether the reconveyance be to the present complainant, as assignee of the purchase money mortgage, or to the original vendor. On fundamental equitable principles, however, such as were acted upon by Pitney, *V. C.,* in *Lurch* vs. *Holder,* 27 Atl. 81, *supra,* the defendant should not be required to deed back the property except concurrently with a full rescission by the return to them of their cash outlay, with interest.

Of course the situation between the complainant as assignee of the purchase money mortgage and the defendants is for all purposes of this suit just the same as if it were between the original vendor and these defendants. An assignee of a mortgage takes subject to all defenses as between the mortgages and mortgagor—that is fundamental. Moreover,

it appears clearly from the correspondence, in particular complainant's letter Exhibit B-5, that the complainant had knowledge of the defects complained of.

Let there be no mistake. Performance of the contract made by the complainant's assignor has not been made impossible by law. The law has not forbidden the construction of sewers. The fact is that there was a delay on the part of the City of North Wildwood in putting into operation a sewage disposal plant as a result of which delay the State Board of Health would not permit the pipes on the Ryan tract to be connected with the municipal sewer. Who should suffer by reason of North Wildwood's delay, the defendants who bought lots relying upon their grantor's express covenant to "install sewers" (Record, 470), or the complainant whose assignor assumed that obligation? We submit the complainant. It has not shown why the obligation should not be performed. If the worst come to the worst the grantor should have built the disposal plant itself.

The learned Vice Chancellor has cited cases as supporting the principle that, to quote his opinion, "An exception to the general rule, that where performance becomes impossible subsequent to the contract the promissor is not therefore discharged, is recognized by the later cases, where the event creating the impossibility is one which cannot reasonably be supposed to have been within the contemplation of the parties at the time of the contract" (Record 32). To this there are several answers, each absolutely conclusive. In the first place, it is not the defendants that are seeking to excuse non-performance, but the complainant. It was the latter's assignor who undertook to install sewers and who did not. The Vice Chancellor's cases, therefore, are authorities in our favor. In the second place, the complainant cannot bring it-

self within the doctrine on the facts. Ryan's own engineer, Weir, testified that he knew of North Wildwood's difficulties with the State Board of Health when the contract in suit was made (Record, 218, 221). Indeed as long ago as 1911 the State had served notice on North Wildwood to cease polluting state waters (Record, 206). The suit in which the injunction was granted was started back in 1923 (Record, 206). It is, therefore, impossible for the complainant to say that its assignor did not contemplate the sewage disposal problem, or the attitude of the State Board of Health.

In the third place, the following cases in this state show that the decision of the Vice Chancellor on this point, which decision he supports by citations from other jurisdictions, is unquestionably not the law of New Jersey.

School Trustees of Trenton vs. *Bennett*, 27 L. 513 (Supreme 1859). Here a builder contracted with what we would now call a board of education to erect a school. The building fell down twice in the course of construction. The builders' guarantors in defense of an action brought against them offered to show, among other facts, that the building fell solely because the soil on which it stood had become soft and miry and unable to support the weight of the building. This defense was held to be insufficient, Whelpley, *J.*, for this court, saying, page 517:

> "This case presents the naked question, whether, where a builder as agreed by a contract under seal, with the owner of a lot of land 'to build, erect, and complete a building upon the lot for a certain entire price, but payable in arbitrary instalments, fixed without regard to the value of the work done, and the house before its completion falls down, solely by reason of a latent defect in the soil, and not on account of faulty construction, the loss falls upon the builder or the owner of the land.' * * *

"No rule of law is more firmly established by a long train of decisions than this, that where a party, by his own *contract,* creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; therefore if a lessee covenant to repair a house, though it be burned by lightning, or thrown down by enemies, yet he is bound to repair it."

Page 519:

"No matter how harsh and apparently unjust in its operation the rule may occasionally be, it cannot be denied that it has its foundations in good sense and inflexible honesty. He that agrees to do an act should *do it,* unless absolutely impossible. He should provide against contingencies in his contract. Where one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it, or rather the law leaves it where the agreement of the parties has put it; the law will not insert, for the benefit of one of the parties, by construction, an exception which the parties have not, either by design or neglect, inserted in their engagement. If a party, for a sufficient consideration, agrees to erect and complete a building upon a particular spot, and find all the materials, and do all the labor, he must erect and complete it, because he has agreed so to do. No matter what the expense, he must provide such a substruction as will sustain the building upon that spot, until it is complete and delivered to the owner. If he agrees to erect a house upon a spot where it cannot be done without driving piles, he must drive them, because he has agreed to do everything necessary to erect and complete the building. If the difficulties are apparent on the surface, he must overcome them. If they are not, but become apparent by excavation or the sinking of the building, the rule is the same. He must overcome them, and erect the building, simply because he has agreed to do so—to do everything necessary for that purpose.

> "The cases make no distinction between accidents that could be foreseen when the contract was entered into, and those that could not have been foreseen. Between accidents by the fault of the contractor, and those where he is without fault, they all rest upon the simple principle—such *is* the agreement, clear and unqualified, and it *must* be performed, no matter what the cost, if performance be not absolutely impossible."

Middlesex Water Co. vs. *Knappmann Whiting Co.,* 64 L. 240 (C. E. A., 1899). In that case a water company contracted to furnish water to a factory with a pressure sufficient for fire purposes. The factory was afterwards destroyed by fire by reason of the water company's failure to furnish sufficient water pressure. It was held that the company was liable, although the failure was due to a break in the pipes, without the company's fault. In delivering the unanimous opinion of this Court, Depue, *J.,* said, page 243:

> "The plant of the water company, with its pumping-station, is located at South Plainfield, and its principal main extends, in an easterly direction, from South Plainfield, through the villages of Metuchen, Woodbridge and Seawaren, to the village of Carteret, on Staten Island, a distance of about fifteen miles. Between Woodbridge and Carteret a main crosses a stream in which the tide ebbs and flows. The main at that point was laid at the bottom of the stream and was often submerged several feet below the tide. On the night of the 18th of May, 1898, a connection of the blow-off in the principal main of the water company gave way at a point where it crosses the stream, whereby water was discharged and the usual pressure was removed. The water company was not notified of the absence of pressure, about eleven o'clock in the evening of the 18th, and immediately the superintendent and others set out to find the cause. It was a difficult leak to find, owing to the fact that the opening was

under the waters of the creek. The men found it about four o'clock in the morning of the 19th. By that time the tide was so high that it was impossible to repair it, and it was necessary to wait until low tide, which occurred about noon of the 19th, and the superintendent began to open the gate, just west of the creek, at two o'clock, taking about twenty minutes to do so. On the day following the break in the pipe the defendant's factory caught fire, and, with its contents, was burned and destroyed, with a loss to the defendant of $16,889, after deducting insurance and salvage."

Page 249:

"The general rule of law applicable to such agreements is that 'where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although, in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burdensome or even impossible. *Poll. Cont. 362.* The exceptions to the generality of this rule of law are few and will be stated presently.

"The leading case on that subject is *Paradine* v. *Jane, Aleyn 26.* The decision in that case is stated in the opinion of Mr. Justice Whelpley in *School Trustees* v. *Bennett,* 3 Dutcher 513, with an extensive citation of cases to the same effect."

P. 251:

"The principle underlying all these cases is that where the contract is express, as it is in this case—to furnish water with a pressure sufficient for fire purposes—to do a thing not unlawful, the contractor must perform it, and if, by some unforeseen accident, the performance is prevented, he must pay damages for not doing it. No distinction is made between accidents that could be foreseen when the contract was entered into and those that could not have been foreseen. Where, from the result of such an accident, one of two innocent

> persons must sustain a loss, the law, as was said by Mr. Justice Whelpley, casts it upon him who has agreed to sustain it, or, rather, leaves it where the agreement of the parties has put it, and will not insert for the benefit of one of the parties, by construction, an exception which the parties have, either by design or neglect, omitted to insert in their agreement."

The two cases just cited are the leading cases in New Jersey and have been consistently cited with approval in later cases, among others, in *Board of Education* vs. *Empire, etc., Co.,* 83 L. 293, 296; by the present Chief Justice, speaking for the Supreme Court; and in *Mansfield* vs. *The County of Cape May,* 105 L. 242, a decision by this court in 1928.

It is respectfully submitted, therefore, that the decree appealed from should be reversed and a decree entered granting the appellants the relief prayed for in their counterclaim.

G. W. C. McCarter,
Of Counsel.

May Term, 1932.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES (successor by merger to the COLONIAL TRUST COMPANY),
Complainant-Respondent,

and

JOSHUA BODEK, *et als.*,
Defendants-Appellants.

ON APPEAL FROM COURT OF CHANCERY.

BRIEF ON BEHALF OF COMPLAINANT-RESPONDENT.

This appeal is from a decree of the Chancellor advised by Vice-Chancellor Ingersoll sustaining the right of the complainant-respondent to foreclose a mortgage covering real estate in North Wildwood, Cape May County, New Jersey.

The mortgage was given to secure the payment of the purchase money for unimproved land sold at

public sale in September, 1925. The mortgage was originally made to one Ryan and subsequently assigned to the complainant.

The principal defenses interposed by Bodek, the mortgagor, were:

First. Breach by Ryan and his representatives, of certain alleged covenants contained in the sales agreement and in the bond and mortgage.

Second. Fraud and misrepresentation on the part of Ryan and his agents, which induced Bodek to make the purchase and execute the bond and mortgage.

Because of this defense, Bodek claimed, by counter-claim, the right to rescind his purchase.

A number of questions arose during the trial, based upon the alleged defenses and the issues raised by the pleadings, but the learned Vice-Chancellor decided all of the questions predicated upon fraud and misrepresentation against the contention of Bodek, and held that there was no substantial breach of any of the covenants contained, either in the original agreement of sale or the bond and mortgage.

The Vice-Chancellor decided that, as questions of fact, the defendant, Bodek, was not entitled, by reason of the counter-claim, to rescind because of any one or more of the various allegations of fraud and misrepresentation.

The Vice-Chancellor also found, as a fact, that all of the covenants, made by Ryan, as set forth in

the papers involved in the transaction, were substantially performed and while not making any determination, as to the duty of Ryan, under his contract, to install sewers and furnish and provide a workable and usable sewage system, the performance, in strict accord with the contract, to install sewers, was suspended until the removal of an injunction issued upon the application of the State Board of Health to restrain the Borough of North Wildwood from permitting the various sewer pipes, installed by Ryan, to become connected with the sewage plant of that municipality, until certain disposal plants had been erected (C., p. 35, l. 3).

Before discussing any of the many other questions which arose during this litigation and which were discussed, but not decided by the Vice-Chancellor, it is our purpose to demonstrate that the conclusions reached by the Vice-Chancellor, are amply supported by the proofs submitted and the law applicable thereto and to establish the fact that the defendant, Bodek, was not entitled to rescind by reason of any matter or thing set up in the answer or counterclaim.

The following is a chronological history of important events with respect to this suit:

September 5, 1925, Public auction sale by Day.

September 9, 1925, Contract of purchase and sale between Ryan and Bodek.

November 9, 1925, Bond and mortgage given by Bodek.

June 24, 1926, Payment on account of interest thereon.

December 14, 1926, Payment on account of interest thereon.

June 1, 1926, Default in payment of taxes.

June 1, 1927, Default in payment of taxes.

June 1, 1928, Default in payment of taxes.

May 9, 1927, Default in payment of interest.

January 28, 1928, Bill filed to foreclose mortgage.

September 26, 1929, Counter-claim to rescind filed by Bodek in the foreclosure suit.

November 9, 1928, Balance of principal, after payment of installment made on completion of improvements, became due.

There was no independent action, on the part of Bodek, for rescission.

FACTS PRESENTED BY THE WRITTEN EVIDENCE UPON THE QUESTION, GENERALLY, OF RESCISSION.

While it is our contention that the terms of the contract of purchase and sale, dated September 9, 1925, were merged in the bond and mortgage, so far as concerned the time when the principal became due, yet it is important to note that upon the question of rescission, Bodek's contracts recited that 10% was paid at the execution of the agreement and provide that 20% be paid at the time and place of settlement and 70% be covered by the execution of a

purchase money bond and mortgage, which should provide that

> "a sum equal to 10% of said prices as and when "the improvements hereinafter mentioned are "completed and notice thereof is sent to buyer "by seller by letter addressed to buyer at the "address herein specified and the balance, which "will be 6/7ths of the amount of the mortgage, "on November 9, 1928, or earlier, at the option "of the buyer, with interest at the rate of 6% "per annum, payable semi-annually."

The contracts of sale contained a provision as follows (by mistake this exhibit is not printed, but counsel for appellant has consented to this reference to it):

> "Seller agrees that the money payable to him "under this contract and under the mortgage "herein provided for, and under all other con- "tracts and mortgages affecting the premises "sold by the Seller at public sale on September "5, and September 7, 1925, shall be paid to and "applied by Integrity Trust Company, or other "Trust Company selected by Seller, (being as- "signed for that purpose, if deemed necessary "by said Trust Company, which Company will "give notice that all payments are to be made "to it) as far as is necessary, after the pay- "ment of selling expenses, sums necessary to "remove existing encumbrances, title charges, "attorneys' fees and similar expenses, to the fol- "lowing improvements (which Seller agrees to

"complete within one year from the date of this "agreement, in accordance to the regulations of "the public authorities having jurisdiction "thereof) of the land belonging to Seller shown "on said plan, of which land the premises here- "in mentioned form a part, namely: The neces- "sary clearing of the same, the filling of the low "area up to a grade approximately equal to the "grade of the present County Road, the neces- "sary grading to establish a uniform grade of "the streets, the graveling of all roads, and the "installing of concrete sidewalks, curbs and "sewers, to perform which work Seller shall "have free right of access in and upon the lots "herein mentioned."

It was also provided in said contracts that the latter should supersede the memorandum of sale theretofore executed by the parties covering the same premises.

The bond and mortgage were conditioned:

"For the payment, in lawful money as afore- "said, the just sum of * * * as follows * * * "upon the completion of improvements and "notice thereof, as hereinafter set forth, and "the balance of * * * within three (3) years "from the date thereof and hereof, together with "interest thereon, payable semi-annually at the "rate of 6% per annum" (C., p. 451, l. 30).

The usual default clause with respect to the non-payment of installments, interest and taxes and the production of tax receipts, and the option of the obligee, in case of default, to collect the entire principal debt, was also inserted in the bond and mortgage.

In the mortgage, the following provision was inserted (C., p. 456, l. 25):

> "The installment of principal, of $9,070, here-
> "inbefore mentioned, shall be payable upon
> "completion by the party of the second part, its
> "successors or assigns, of the following im-
> "provements to the land now or formerly be-
> "longing to said party of the second part, of
> "which land the lots herein described are a
> "part, namely: The necessary clearing of said
> "land, the filling of the low area up to a grade
> "approximately equal to the grade of the pres-
> "ent County Road, the necessary grading to es-
> "tablish a uniform grade of the streets, the
> "graveling of all roads, and the installing of
> "concrete sidewalks, curbs and sewers; and
> "upon the sending of notice of such completion
> "by said party of the second part, its succes-
> "sors or assigns, by letter addressed to said
> "party of the first part, at No. 425 Market
> "Street, Philadelphia, Pennsylvania."

The bill of complaint alleges default in the payment of the installment which became due on the

completion of the improvements, and interest in each case payable on the 9th day of May, 1927.

On the first day of the final hearing, the bill of complaint was amended so as to allege the non-payment of the taxes assessed against the mortgaged premises for the years 1926 and 1927, prior to the filing of the bill (C., p. 14, l. 1 and C., p. 50, l. 30).

The claim was made in the bill that because of these defaults, the complainant has exercised its right to demand the payment of the entire principal sum on each mortgage and that the bills of complaint were filed for that purpose.

UPON THE QUESTION OF THE RIGHT OF BODEK TO RESCIND, AS ALLEGED IN THE COUNTER-CLAIM FILED BY HIM.

The principal basis of the claim of the right to rescission is a sign alleged to have been on the property September 9, 1925, which was supposed to read as follows:

WILLIAM J. RYAN
Owners and Developers
605 Franklin Trust Building
Philadelphia, Pennsylvania
Sewer contract awarded to Versaggi Bros.
Curbs-Sidewalk contract awarded to Versaggi Bros.
Sand Fill contract awarded to United Dredging Co.

Grading and Graveling Cont. awd.
to Craython-Nickerson
All work and improvements to be finished by
July 15, 1926.
Engineering work in charge of Harry E. Weir.
(C., p. 15, l. 22.)

Also upon assurances alleged to have been given by Day, the auctioneer, as to the improvements to be made as specifically referred to in the mortgage.

The clause, set forth in the conditions of sale, is as follows:

"Seventh. The seller agrees, at its own ex-
"pense, to improve the aforementioned prop-
"erty as follows: Do all the necessary clearing,
"fill in the low area up to a grade approxi-
"mately equal to the grade of the present
"County Road, do all the necessary grading to
"establish a uniform grade of the streets,
"gravel all roads, install concrete sidewalks and
"curbs and install sewers."
(C., p. 470, l. 16.)

Also that in the contract of sale and purchase dated September 9, 1925, hereinabove recited, was inserted the statement that the improvements would be completed within one year.

Also the provisions contained in the mortgage with respect to the payment of a first installment upon completion of the improvements.

Also the statement of the Ocean City Title & Guaranty Company that sufficient money had been deposited with the latter to pay for the completion

of the improvements, and that it was expected the same would be finished August 15, 1926.

Also that on or about October 15, 1926, Bodek received a letter from Ryan, Inc., giving notice that the improvements specified in the mortgage had been completed and demanding the payment of the initial installment of principal (C., p. 19, l. 22).

The statement is also made, in the counter-claim, that the defendant had declined and refused to pay installments of principal and interest; because Ryan had entirely and absolutely failed to carry on, perform and complete the improvements and also because of the representations aforesaid and because

> "the defendants have heretofore rescinded and "hereby rescind the contract between the de- "fendant, and the said William J. Ryan, Inc., "and all instruments given thereunder and in "connection therewith" (C., p. 21, l. 30).

UPON THE QUESTION OF THE LEGEND ON THE SIGN, IN EXISTENCE, AT THE TIME OF THE PUBLIC SALE, WHICH IS ALLEGED IN SUPPORT OF THE MAIN GROUND OF FRAUD AND MISREPRESENTATION.

Smith, Bodek and the witnesses, Berkowitz and Lipper, all testified that Exhibit C3 was a photograph of the sign on the property as it existed at the time of the sale. This testimony was produced

to support the claim that Ryan had been guilty of fraud and misrepresentation with respect to the contemplated improvements, and that he made a misstatement as to the fact of the making of the contracts for grading, filling in by use of dredging and the installation of sidewalks, curbs and sewers.

In the first place, the words on the sign, as stated by the defendant's witnesses, indicate quite definitely that the sign could not have been on the property at the time of the sale, for the reason that the various contracts, mentioned on the alleged sign, admittedly were not made until long after the date of the sale. It was not known, at the latter time, who would have the dredging contract or who would carry on the work of improving the property, as indicated in other respects.

Fortunately, the complainant was in a position to demonstrate conclusively, that the recollection of the defendant's witnesses, in this regard, cannot be relied upon, in the slightest degree. It appeared that when Ryan was first on the stand, he was confronted with a photograph, Exhibit C3, and he unequivocally stated without knowing what the subsequent testimony on the part of the defendants would be, that such sign was not there at the time of the sale and that the only sign in existence then, was one announcing the sale and that the sign, of which C3 was a photograph, was not installed until sometime in 1926 or 1927. It so developed that this testimony of Ryan, given in the early stages of the trial (C., p. 170, l. 2) was absolutely correct and

unqualifiedly corroborated by the evidence of disinterested witnesses, also by a photograph which was taken on the day of the sale. This latter photograph was produced, received in evidence on the last day of the hearing and marked R1 (C., p. 419, l. 20). An enlargement of the same shows that the legend thereon is not at all similar to that shown on C3 and is evidence of the fact that the defendants and their witnesses deliberately intended to mislead the Court as to the character of sign which was on the property the day of the sale. This situation was further corroborated by the testimony of Mr. Evans, the photographer who enlarged the photograph R1, from which it appeared that the latter carried the legend something like this, "A thousand lots with "improvements to be sold at public auction." The balance of the sign was not legible because of interference by tops of automobiles (C., p. 421, l. 4).

The contention of Ryan was further corroborated by the witness, Young, who painted the original sign before the sale. The words were painted on oil cloth and the same was tacked to the wooden sign (C., p. 422, l. 12). He also testified that the sign, as shown by Exhibit C3 was not placed there until a long while after the sale, either in the fall of 1926 or the spring of 1927 (C., p. 423, l. 18). This witness says that it was probably a year after the sale that the sign, as shown by Exhibit C3, was placed on the property. The witness also identified the enlargements.

While the defendant's evidence, as to the existence of sign Exhibit C3, has no material significance, regarding the substantial issues, in view of the fact

that the real contractual relation, between the parties, was dependent upon what was set forth in the mortgage, as discussed under another head of this brief, yet it is important to absolutely demonstrate the utter unreliability of the testimony of the defendants and their witnesses, upon any other controverted question of fact in the case.

It shows the extent to which the defendants and their witnesses were willing to go, to bolster up, what appears to be, a case with very little, if any merit. The atmosphere of the incident is more important than the actual occurrence.

There was not sufficient evidence to justify a finding of the right of rescission based upon fraud and misrepresentation and the finding of fact of the Vice-Chancellor should be sustained.

UPON THE QUESTION OF SUBSTANTIAL PERFORMANCE OF THE VARIOUS COVENANTS MADE BY RYAN.

If any contract existed with respect to completion of the improvements, by a specified time, such obligation was substantially performed.

From the testimony it is difficult to determine what the date of performance was to be. The clearing of the land was completed before the first week in September, 1926 (Ryan, C., p. 155, l. 17).

The filling in of the low area up to a grade, approximately equal to the grade of the present county

road was completed before the first of September, 1926 (C., p. 155, l. 27). See testimony of Craython (C., p. 249, l. 30) who says that the work was completed in June, 1926.

The necessary grading to establish the uniform grade of the streets and the graveling of all roads was completed according to the testimony of Wilson (C., p. 253, l. 37), in September, 1926. Ryan says that it was done before the first week of September, 1926, and the testimony of Craython (C., p. 250, l. 10) and Wilson (C., p. 254, l. 1) affirms these statements.

The dredging was completed prior to the first week in September, 1926 (C., p. 155, l. 14 Ryan). The contract for the dredging was made on April 3rd, 1926 (C., p. 426, l. 12).

The sidewalks and curbs were installed prior to the first week in September, 1926 (Ryan, C., p. 166, l. 10). This is corroborated by the testimony of Steelman (C., p. 252, l. 27) and Versaggi (C., p. 260, l. 20).

The storm sewers were finished in April, 1926 (Versaggi, C., p. 264, l. 4).

The sanitary sewers were finished in April, 1926 (Versaggi, C. p. 260, l. 29). The contract for the sewers was made with Versaggi in October, 1925.

It is true that after the dredging was done, the winds blew the surface sand off the lots and Ryan, without any obligation on his part so to do, resurfaced the whole operation with gravel at a cost to him of over $20,000. This work was completed and accepted by the Borough April 19, 1927 (C., p. 292, l. 13).

Furthermore, after the improvements were completed, there was a severe storm in February, 1927, and parts of the streets, grading and sidewalks were washed out. This was subsequently repaired and the work was completed.

Before the Borough would accept the sewer system, a considerable portion thereof had to be relaid because they were broken. This work was done by Ryan, and completed at a cost of over $17,000 (C., p. 278, l. 29).

The relaid sewers were accepted March, 1928 (C., p. 280, l. 13).

These improvements, being substantially completed, a failure in any minor particulars to perform, would not justify a right to rescind. Neither would a delay in doing any repair work, necessitated by the elements, give the defendants this privilege.

Any injury resulting from a failure to completely perform, within any specified time, where there had been a substantial performance, would result only in a diminution of the amount due on the mortgage by way of set-off to cover the expense of reparation.

Luce v. New Orange Industrial Association,
68 N. J. L. 31.

The original dredging contract was dated April 3, 1926 (C., p. 426, l. 12). It so happened that the certified copy, which was obtained from the County Clerk's office, was dated May 23, 1926. The orig-

inal probably is correct as to date. This demonstrates, beyond question, that the sign, a photograph of which was introduced by the defendants (C3) was not painted until after the making of the dredging contract, because the latter is referred to particularly therein.

The Boardwalk was built in 1927. This was not a part of the improvements to be performed by Ryan, but was a matter entirely up to the municipality. The delay in locating and erecting the Boardwalk would account for the fact that the sewers were not laid in the alley back of the Beach Front lots, at the same time the other sewer pipes were installed.

Some question was raised at the trial with respect to the failure to lay curbs and sidewalks with respect to each front lot and to connect these lots with the sewer pipes. This question was fully explained in a perfectly logical and reasonable manner by Mr. Ryan (C., p. 178, l. 31).

The only obligation relative to dredging was to fill in the low spots and bring the entire area up to the approximate grade of the county road. Any damage which may have been the result of storm tides or the blowing off of the fill, was a matter entirely up to the buyers, who were obliged to protect their property in a reasonable manner. The lot owners were notified that the wind was causing the

shifting of the sand and were requested to cover the same with gravel. No attention was paid to this notice and Ryan finally at the expense of something over $20,000, covered the same with gravel so as to protect it from high winds.

Approximately $233,000 was paid out by the Ocean City Title & Trust Company for the improvements on the Ryan tract as follows (C., p. 269, l. 39, *et seq.*):

Curbs and sidewalks	$35,989.00
Bulkheading	6,577.00
Engineer's fees	19,600.00
Dredging	69,948.00
Streets and grading	65,288.00
Relaying and repairing sewers	17,860.00
Regraveling	20,000.00

UPON THE QUESTION OF SEWERS.

The Vice-Chancellor makes no finding as to the character of the agreement of Ryan to build sewers. He holds the delay cannot be chargeable to Ryan.

It will be observed that there is no engagement on the part of Ryan to build or install an effectual sewerage system. The language of the obligation was to install sewers. Undoubtedly, this was done with the exception of a few lots along the ocean front, where it was established by proof to be inadvisable as to time until the exact location of the Boardwalk be determined.

Our contention is that any language showing any obligation to build sewers must be construed to

simply mean the installation of sewer pipes, and this is so only in connection with the surrounding circumstances. The community was not without a sewer system, otherwise it might have been interpreted as an agreement to install a complete sewerage system, in full operation. The Ryan tract comprised several blocks of land in the municipality of North Wildwood which has been equipped for years with a sewer system, one of the main lines of which, was installed in the highway which formed a boundary to the Ryan tract.

A reasonable and logical interpretation of the language employed, is to furnish such facilities as would afford the lot purchasers the opportunity of becoming connected with an established municipal plant. The parties were dealing with reference to a community which already had a sewer system and certainly it cannot be reasonably contended that Ryan obligated himself to build a main trunk sewer from the location of the pipes installed on his tract to such a place where there would be an outlet to the plant as a system in use. It was assumed that the pipes would eventually become a part of the municipal sewerage system, or connect with a disposal plant.

The fact that there had been an injunction obtained by the State Board of Health against the tapping of the municipal sewer system, then in use, by additional pipes, could not impose a greater obligation on Ryan than existed by the language employed in his contract. There is nothing to show

that Ryan knew of the controversy between the municipality and the State for sewage disposal. The injunction was entered against the municipality after Ryan had sold the lots to the various purchasers. All imperfections in the sewer and other improvements, applicable to the lot covered by the mortgage, were substantially corrected within a very short time after the certificate was issued by the engineer. All of this work was done at the expense of Ryan and the streets and sewers were accepted by the municipality and the State permitted connection to be made to the sewer pipes on the Ryan tract.

It was not shown that the method employed by the engineer in laying the sewer was improper, although it was known that some breakage would occur. The breakage was repaired and hence no complaint can now be made as to that.

The time for the completion of the improvements was not of the essence of the agreement. The clause in the agreement to that effect refers to the time of settlement of the amount due and not to the time of completion of improvements. In any event, as is argued herein, strict performance as to time was waived by the owners standing by and permitting Ryan to continue the improvements after the period had expired. If there was no time specified for the completion of the improvements, a reasonable time would be implied. The testimony shows that such completion was made within a reasonable time, particularly since no objection was made by the owners

before completion. If the mortgagee or Ryan had been notified of an election on the part of Bodek to rescind because of the failure to complete, Ryan could have then determined whether or not to go on with the improvements or leave matters as they were. There being an entire failure on the part of Bodek to act promptly, it does not lie in their mouths not to contend that a breach occurred even if the improvements were completed after a reasonable time or even after the expiration of any time limited in the contract.

The sewer pipes, as designed by Weir, were approved by the municipality on May 17th, 1925 (C., p. 286, l. 30). It is manifest, therefore, that there was no delay on the part of Ryan in arranging for this part of the work.

The Borough Council, after approving the plans designed by Weir, authorized the solicitor to consent to the entry of a final decree in the injunction proceedings instituted by the State Board of Health (C., p. 289, l. 12). This was not a matter participated in by Ryan. Ryan had no knowledge of the injunction when he started the improvements.

On April 19, 1928, L. M. Rice, the Borough Engineer, submitted to Borough Council the following report:

> "Q. Will you turn to the minutes of April "19, 1927, referring to streets on the Ryan "tract?

"A. Report of L. M. Rice to the Mayor and "Council April 19, 1927. We have examined "the following sections of streets on what is "known as the Ryan tract and report that the "same has been graded and graveled and ready "for maintenance and acceptance by the City: "6th, 7th, 8th, 9th, 10th and 11th Avenues, Surf "Avenue to the 15-foot drive north of 950 feet, "12th Avenue, 320 feet southeast from Ocean "Avenue, 13th Avenue, 280 feet southeast from "Ocean Avenue, 14th Avenue, 295 feet south-"east from Ocean Avenue, 15th Avenue north-"east one-half 270 feet southeast from Ocean "Avenue, Ocean Avenue from a point 100 feet "northeast of 6th Avenue to 15th Avenue. Re-"spectfully submitted, Elmer Hewitt, Thomas "Spencer, Clarence Bradshaw, Street Commit-"tee, L. M. Rice, City Engineer."

Whereupon, the Borough Council took the following corporate action (C., p. 292, l. 24):

"Whereas the City Engineer and Street Com-"mittee have reported certain streets or ave-"nues, the same as shown on the map filed in "the County Clerk's Office entitled Plan of "Lots in the City of North Wildwood, Cape "May County, New Jersey, situate east of Surf "Avenue and the Atlantic Ocean and from 100 "feet southwest of 5th Avenue to 15th Avenue, "William J. Ryan, Inc., owners and developers, "401 Land Title Building, Philadelphia, Penn-"sylvania, as having been graded and graveled, "Therefore, be it resolved that the section

"of the streets as mentioned and set forth in "the said report be and the same are hereby "accepted for maintenance by the City."

These had reference to the grading and graveling of the streets and so forth after the supplemental improvements had been completed by Ryan.

In September, 1927, the State Board of Health gave to the Borough permission to proceed with the erection of the sewage disposal plant (C., p. 295, l. 24).

On March 20, 1928, Borough Council received a communication from the State Board of Health granting permission to connect the sewers on the Ryan tract with those of the City of North Wildwood (C., p. 293, l. 23).

On May 19, 1928, Engineer Rice certified to the Borough Council that the sanitary sewer extension on the Ryan tract had been put in good condition, in accordance with the plans approved by the State Board of Health. Whereupon, the Borough Council accepted the same and took it over as part of the sewer system of the Borough (C., p. 281, l. 20).

Subsequently a leak developed, which made relaying of some of the pipes necessary, and finally, on August 7, 1928, the Engineer recommended that the completed work be accepted, which was done by appropriate resolution (C., p. 282, l. 12).

The principle of substantial performance is also involved in the question of sewers. Even if the agreement of Ryan was to have a complete system

installed and connected up with the municipal plant by a specified date, substantial completion would prevent rescission on that ground. At most, the right of the mortgagor would be an abatement of the mortgage to the extent of the damage sustained. This would be the decreased value of the lots caused by failure to have sewer connection after the date specified for completion up to the time the Borough accepted the system as a whole.

MEMORANDA OF LAW WITH RESPECT TO THE QUESTION OF RESCISSION UPON ANY OF THE GROUNDS ALLEGED AS A BASIS FOR THE EXERCISE OF SUCH RIGHT.

The equitable rule as to rescission incidental to this situation, is discussed by our Court of Errors in the case of *Clampitt v. Doyle,* decided in 1907 and reported in 73 Eq. 678, the syllabus of which is as follows:

> "A purchaser who has been led into a con-
> "tract of sale by false representations that en-
> "titled him to rescind the contract has but one
> "election to rescind which he must exercise
> "with reasonable promptitude after his discov-
> "ery of the falsity of the representations that
> "induced his purchase; beyond this mere delay
> "in the rescission of the contract may amount
> "to satisfactory evidence of an election to abide
> "by the contract notwithstanding the fraud."

Mr. Justice Garrison, who delivered the opinion of the Court of Errors in this case, used this language:

> "Assuming fraud in a vendor and its dis-
> "covery by the vendee, an election by the lat-
> "ter to rescind the contract of sale cannot fol-
> "low an election not to rescind; and mere delay,
> "*i. e.*, lack of reasonable promptness in rescis-
> "sion after the discovery of the fraud is evi-
> "dence from which an election not to rescind
> "may be inferred. There is, in fine, in equitable
> "contemplation but one juncture at which a
> "purchaser who has been induced by fraud to
> "enter into a contract of sale may elect on
> "that account to rescind the contract, and that
> "is upon his discovery of the fraud or within
> "a reasonable time thereafter; beyond this
> "period mere delay in rescission may be satis-
> "factory evidence of a waiver of the right to
> "rescind. That such election if made or when
> "made is final is also established law."

The same principles are involved in the following authorities:

Maioran v. Calabrese (Error and Appeals), 100 N. J. Eq. 315;
Ginsberg v. Wolters, 94 N. J. Eq. 532;
Kvedor v. Shapiro, 98 N. J. L. 225;
Dennis v. Jones, 44 N. J. Eq. 513;
Peoples v. Georgia Iron & Coal Co., 248 Fed. 886.

It will be observed that the cases above referred to have reference to fraud or misrepresentation on the part of the vendor. We submit that even if there be any contractual obligation on the part of Ryan evidenced by any declaration made by him either oral or written to complete the improvements, failure to do so is not evidence of fraud but is merely a breach of a subsidiary act.

In 27 Ruling Case Law, at page 646, the rule is stated as follows:

> "If an executory contract contains an agree-
> "ment on the part of the vendor to make street
> "improvements or the like, and such agreement
> "is independent of the agreement of the pur-
> "chaser to buy, its breach will not entitle the
> "purchaser to rescind; his remedy being an
> "action for damages."

In the case of *McMillan v. American Suburban Corporation,* 188 S. W. 615, a contract for the sale of certain land provided among other things that the American Suburban Corporation would guarantee the following:

A. That the streets and sidewalks on the property would be graded and shade trees planted.

B. That sidewalks would be laid in front of the walks.

C. That water pipes would be laid in Piedmont Place.

The land was sold on the installment plan, the vendor giving a bond to execute a deed on completion of the payments, which bond contained a guarantee that the vendor would lay water lines and sewers, etc. The buyer completed payments and went into possession. The vendor executed a deed from which it omitted the guarantee. The testimony showed that the vendor had spent a considerable sum of money in grading but that the water lines had not been laid before the suit was started, although laid before the conclusion of the suit. It was held that the buyer could not have a rescission of the contract in equity but was left to his legal remedy for damages for breach of the contract, the contract being executed.

In the case of *American Emigration Co. v. Adams,* 100 U. S. 61, the Supreme Court in its opinion made the following statement:

> "The allegations of the bill to the effect that "the Emigration Company has not fulfilled its "engagements with respect to the drainage and "settlement of the land, rest in covenant merely, "and afford no ground for avoiding the con- "tract. Where covenants are mutual and de- "pendent, the failure of one party to perform "absolves the other, and authorizes him to "rescind the contract. But here the contract "was largely carried into execution soon after "its inception. The engagement of the appel- "lants to introduce settlers and the like were "to be performed in the future; and their per-

"formance was not made a condition but, as be-
"fore stated, rested in covenant. In case of a
"breach they would lay the foundation of an
"action, but nothing more."

In the case of *Lucy v. New Orange Industrial Association,* 68 N. J. L. 31, in an opinion handed down by Mr. Justice VanSickle, our New Jersey Supreme Court held that where the plaintiff has paid the full consideration, the failure of the defendant to perform within a reasonable time one of the subsidiary acts does not, of itself, entitle the plaintiff to rescind the contract and sue for the money paid. His remedy is by suit for damages for failure to perform.

In the case just cited the defendant agreed to sell and convey by a warranty deed, two lots of land in East Orange and to commence on May 1, 1897, the construction of a manufacturing establishment upon other lands belonging to the defendant. The testimony discloses that the construction was not started upon the date set.

The Court held in its opinion that the agreement to commence the building of factories and to continue the building was subsidiary and could be compensated for by action for damages for failure to perform. It was not, in itself, ground for rescission.

Even assuming that the law as found in the *McMillan v. American Suburban Corporation, American Emigration Company v. Adams* and *Lucy v.*

East Orange Industrial Association cases, *supra,* for some unknown reason should not apply to the present case, nevertheless, the rule stated by Mr. Justice Garrison in *Clampitt v. Doyle, supra,* with respect to the exercise of the right to rescind in the case of fraud and misrepresentation, applies with even greater force to such right predicated upon the breach of a subsidiary portion of the contract.

There is a vital distinction between a rescission on the ground of concealed fraud, the investigation of which could not be expected, and a case where there is no fraud but merely an alleged failure to perform a subsidiary term of the contract. In the latter case it would seem logic to believe that the party should be expected to ascertain promptly whether the contract was performed or not, and if the party ascertains that the contract has not been performed, then, and in that event, if the party has a right to rescind, it is a right which must be exercised immediately, otherwise it is waived.

This principle is very well established in cases of the sale of personal property where it has been unanimously held that a buyer who seeks to rescind must act promptly upon discovering that the contract of sale has not been complied with.

Hirsch v. Verschuur, 93 N. J. L. 277; 108 A. 181;

J. J. Little & Ives Co. v. Lamb, 177 N. Y. S. 26 S.

A careful examination of the authorities and a study of the contract, deed and mortgage in the case at bar, would indicate that no right to rescind existed. However, should the right at one time have existed, it did not exist at the time it was sought to be exercised due to the vendee's failure to exercise the right promptly.

We wish especially to call the Court's attention to the case of *Murphy v. Marshall,* 151 Atl. 56, decided by our Court of Errors and Appeals during the last year. In this case the facts were as follows:

Complainants, as vendors, sought specific performance by their vendees of a contract for the sale of real estate and also a restraint of a pending action at law which had been brought by the vendee for the return of money paid by the vendee on account of the purchase price. A provision of the contract provided that lots were to be filled and graded and that settlement might be postponed until after this work had been done.

A decree was entered for the complainant.

On appeal the case was affirmed in a *per curiam* opinion in which the reasoning of Vice-Chancellor Leaming is adopted. In his opinion the Vice-Chancellor made the following statement which has a direct bearing on the present case at bar:

> "In the circumstances it seems clear that "defendant's rescission of his contract was "wholly without justification. Complainants "had no reason to believe defendant in any way

> "was dissatisfied with the delay in filling or "with the arrangement for the settlement day "to be postponed from time to time until fill- "ing should be completed. Equitably, complain- "ants were entitled to some notice of defen- "dant's change of attitude in the matter. But "no such notice was given. Had notice been "given to complainants, as it justly should have "been, of defendant's requirement that the "lots be filled at an early date, an oppor- "tunity would have been afforded complainants "to complete the fill before the date so speci- "fied. But in the absence of such notice, or "some notice of that nature, the rescission was "without equitable right."

Manifestly, the important question to determine is whether or not there was any right of rescission on the part of Bodek and whether the same has been properly exercised so as to preclude the complainant in the foreclosure proceeding from collecting upon the mortgage, as of the date when the installment was to be paid by the parties, upon which the improvements contemplated by the mortgage were to be completed, or any other subsequent date.

There can be no serious controversy with respect to the completion of any of the specified improvements, except as to the time when the sewers, as installed by Ryan, became part of the municipal sewerage system. It is obvious, from the testimony,

that there had been substantial completion and installation of the sewer pipes by October 1, 1926, or the date of the certificate of completion issued by the engineer. Without conceding that there was actual delay, with respect to the installation of the sewers, as a usable system, it is perfectly obvious that all the other improvements were substantially completed when the certificate was issued.

No intimation was ever given by Bodek of his determination to rescind until after the bills to foreclose had been filed. The first suggestion, from any source, so far as Bodek is concerned, was contained in the counter-claim which was filed on the day of the first hearing, to wit: September 28, 1929, after not only all of the improvements had been made, but also after the new sewage disposal plant had been built by the City and the sewer pipes on the Ryan tract attached to the City system.

At no time prior to these dates was the complainant, or any of its predecessors, as owners of the mortgages, or Ryan, the mortgagee, apprised of the fact that an effort would be made to rescind, either on the ground of fraud or of breach of contract.

The date upon which, as now claimed by Bodek, the improvements were to be completed, was not fixed as of any definite or certain period. The allegation is that the notice on the sign stated that they would be completed about July 15, 1926. The time fixed in the contract of sale and purchase was one year from September 9, 1925, although this time is

modified by the statement that the seller agrees to complete the improvements within one year from the date. Furthermore, there is no agreement on the part of the mortgagee to make the improvements. The mortgage merely provides that the installment will be due upon the completion thereof. This is also a matter which will be discussed herein under another head.

Under the terms of the mortgage, if there was any assumption of an obligation to complete the improvements, in the absence of any time being specified, the law would imply a reasonable time. It is perfectly obvious that the defendant, Bodek, made no claim to the mortgagee, or any other person interested as an owner of the mortgage, until after the bills to foreclose had been filed.

Every act which the defendant performed was in the nature of an affirmance of the contract to purchase and of the giving of the mortgage therefor, rather than a repudiation.

Bodek made payments on June 24, 1926, and December 14, 1926, on account of the mortgage. That these payments were made, was stipulated by Mr. McCarter (C., p. 286, l. 17). Bodek was also in default in the payment of interest on November 5, 1926. He also failed to pay the taxes for 1926 and 1927—each half year installment after June 1, 1926. Furthermore, there is nothing in the case to show that Bodek did anything to exercise his right of rescission, based either upon fraud or misrepresentation or breach of contract. The first occasion

upon which this question of rescission was injected in the litigation, was on the first day of the final hearing, when the answer was amended to incorporate a counter-claim for rescission. This was in September, 1929. As early as February 27, 1927, Bodek had a lot of photographs taken to show the condition of the *locus* and as to the improvements thereon. He knew then as much, with respect to this feature, as he did when the counter-claim was filed, and yet no intimation was given of his desire to be relieved from his contract. Bodek's attention was particularly directed to the statement, in the formal agreement of sale and purchase, that the improvements were to be completed within one year from September 9, 1925 (C., p. 352, l. 1). He saw the premises in question in the summer of 1926 and knew that the work of improvement was going on (C., p. 353, l. 18). He next saw the property in February, 1927, when the photographs were taken (C., p. 354, l. 4). In the meantime, he paid an installment with interest in December, 1926.

He also testified as follows (C., p. 354, l. 15):

"Q. Why did you take a photographer in "February, 1927?

"A. To take pictures.

"Q. For what purpose?

"A. To show the true condition of the land.

"Q. Getting ready for a lawsuit then, were "you?

"A. No, sir, not particularly.

"Q. Didn't have that in your mind at all?

"A. Didn't have it in mind.

"Q. Had you it in mind to resist the pay-
"ment of the mortgage?
"A. If the condition of the soil remained as
"it was, I had that in mind, I suppose.
"Q. If the condition remained as it was, and
"only if condition remained as it was when you
"saw it in the summer of 1926?
"A. When the next payment of interest was
"due.
"Q. When was it due?
"A. I suppose in May.
"Q. That was your object in taking the pho-
"tographer down there?
"A. Yes, sir.
"Q. Did you make any inquiry of Mr. Ryan
"or anybody else as to how the improvements
"were progressing?
"A. Did I?
"Q. Yes.
"A. No."

Bodek had never been on the property after February or March, 1927, and never made any complaint either to Ryan or the Ocean City Title Company that the improvements had not been completed (C., p. 355, l. 10). No application was made by Bodek for a permit to erect a house on the lots purchased (C., p. 364, l. 38).

From this testimony, it is again manifest that Bodek never had the slightest intention to avoid his contract, by way of rescission of mortgage, on the

ground of fraud or breach of contract. On many occasions, after he claimed that he knew that the improvements were not completed, until the time the bill to foreclose the mortgages was filed, he affirmed the contract by promises to pay and making an effort to secure a change in the terms of the mortgage and extension for the time of payment. Also to have accepted the mortgage with the separate bonds of each associate.

Bodek and some of his associates testified that statements had been made by Ryan to the effect that he had deposited sufficient money with the municipal authorities to build a sewage disposal plant. Therefore, Bodek knew, at the inception of the transaction that sewers could not be installed with respect to the Ryan operation and to connect with the municipal system, except by the construction of a disposal plant. This knowledge on the part of Bodek with respect to a question about the sewage disposal plant, was consistent only with the alleged misrepresentation.

Mr. Schorr testified that between the time the property was conveyed to Bodek, when the mortgage was created by the latter, and the date when suit was instituted in the foreclosure proceedings, he had four or five conversations with Bodek with respect to the mortgages (C., p. 100, l. 25), and also talked with him on the telephone. These conversa-

tions occurred after November, 1926, and in the spring and summer of 1927 (C., p. 101, l. 18).

Mr. Schorr testified as follows (C., p. 101, l. 33):

> "A. I asked him for money, asked him why "he didn't pay the installment of principal on "the mortgage, and he told me that he had other "members in the syndicate with him, that those "men did not want to come through, nobody "seemed to have any money, everybody was "down and out. I called his attention to the "fact one of the men I knew was a member of "his syndicate was a man that had wealth, and "said certainly he can pay up, he said, 'No, "he refuses to go along and won't do a thing.' "

The members of the syndicate used the excuse as to the improvements for not putting up their share, but Bodek did not take that attitude (C., p. 102, l. 28). He never said that the reason for not making a payment was the fact of the failure to complete improvements (C., p. 103, l. 25). Bodek always said

> "that he was willing to pay his share but that "the other members of the syndicate did not "want to put it up, and they gave him as an ex- "cuse, that the improvements were not com- "pleted, and so on" (C., p. 104, l. 22).

In none of these conversations did the question of rescission arise. This testimony of Schorr is not seriously disputed.

Mr. Felix, one of the Vice-Presidents of the complainant, had conversations with Bodek, in relation

to the mortgage being foreclosed, during the early part of 1927, covering a period of three or four months (C., p. 112, l. 28).

This is the testimony of Mr. Felix (C., p. 112, l. 38):

> "A. I sent for Mr. Bodek to find out why we "were not receiving payment for this install- "ment, and Mr. Bodek expressed himself sub- "stantially as being willing to do his share, but "he had a syndicate which were rather inclined "to drop the property, and he could not assume "the burden for all of this syndicate, so we then "negotiated together several times with a view "of trying to arrange some sort of an extension "of the mortgage and the payments that would "be acceptable to his syndicate and the bank, "without success. * * * He said that his syndi- "cate would not put up their share and that he "could not pay for all of them. * * *"

Bodek never urged as an excuse for not paying the installment that the improvements were not completed (C., p. 113, l. 18). He did, however, say that the members of the syndicate were giving out that as an excuse or that he had heard that there was some complaint about improvements (C., p. 113, l. 25).

The following colloquy with Bodek occurred (C., p. 113, l. 28):

> "Q. Did he ever say that he was not inclined "to pay on that account?
>
> "A. No, absolutely not. As a matter of fact, "he told me that his relationship with the other

"banks in Philadelphia had been entirely good,
"and that he did not intend to stick a bank in
"this case if he could avoid it, and he was very
"much interested in trying to work out a plan
"which would be suitable to his syndicate and
"permit him to take up his share of the mort-
"gage. As a matter of fact, we were discussing
"the question of dividing the mortgage accord-
"ing to the respective interests and getting
"bonds from each of the syndicate, according to
"the amount of their interests."

Upon this point, the testimony of Mr. Weinroth is particularly illuminating. In relating to conversations with Mr. Bodek, Mr. Weinroth testified as follows (C., p. 437, l. 33):

"A. As near as I can recall it, the conversa-
"tion had to do with a mortgage that was given
"by Mr. Bodek, together with his bond, on a
"purchase that he had previously made, he and
"a group had previously made in Wildwood,
"and an attempt was made, through me, to—
"the mortgage at that time was in default, and
"he, Mr. Felix of the bank, asked me whether
"I knew Bodek, I told him yes, that he was as-
"sociated with me, and he said, 'We have some
"difficulty here on a mortgage that is past due,
"and I would like to have you use your good
"influence with him to see if the mortgage could
"not be brought up to date, some arrangement
"made on the mortgage.' I said, 'I will be
"glad to do it,' because Bodek was the kind
"of a fellow that you could talk to him and I

"proceeded and spoke to him with reference to "an arrangement that would be both satisfac- "tory to him and his associates at the bank. "I wasn't commissioned by anybody to handle "this transaction or didn't have anything to "do with any office. There was an installment "due, and, if I remember correctly, I don't "think the interest was paid, and some arrange- "ment was to be—I was to present certain "arrangements to Mr. Felix and certain propo- "sitions which I don't recall now, and I did "present them, and I put my presentation in "writing."

This occurred about April 1, 1927. A letter of that date written by Mr. Weinroth to Felix was exhibited to the witnesses and the following question was put to Weinroth:

"Q. Now, after looking at that letter and re- "freshing your recollection, tell us what the ar- "rangement was that Mr. Bodek told you to "make to Mr. Felix" (C., p. 438, l. 36).

And he answered as follows:

"A. I remember it now. There were, I think, "three or four men in this purchase, and Mr. "Bodek has given his bond and his mortgage on "the purchase, without having received, as I "remember it, any compensating bonds or mort- "gages to him by reason of his mortgage for "the full amount, and a plan was submitted "that would limit the interest of the parties to

"the liabilities, the liability of each of the par-
"ties, it was to be a separate transaction in-
"volving each man separately, and a default
"on one would not be a default on all. That
"was the purpose of this plan.

"Q. Now, can you recall whether or not there
"was anything else said by Bodek at the time,
"after having an opportunity to refresh your
"recollection by that letter?

"A. There was ten per cent to be paid on
"the mortgage, and I think that subsequently
"was reduced to five per cent, notes were to
"be given for the balance that was then due.
"The language part of the plan was to postpone
"the payment for the mortgage by eighteen
"months in order to give them a chance to make
"some sales.

"Q. Do you recall anything else?

"A. Absolutely, it was this division of re-
"sponsibility between the parties in interest.

"Q. Now, was there any complaint made at
"that time by Mr. Bodek that the improve-
"ments on the property had—at Wildwood had
"not been completed?

"A. Not to my knowledge.

"Q. Nothing was stated in your presence with
"respect to that?

"A. Nothing that had any bearing on this.

"Q. Did Mr. Bodek know that you were going
"to communicate to Mr. Felix by letter, sub-
"mitting the proposition which he made?

"A. I think so" (C., p. 439, l. 38).

Bodek and the witness, Weinroth, had both been to see Mr. Felix and it was as a result of that interview that Mr. Felix asked him to write him any decision that Mr. Bodek wanted to make (C., p. 440, l. 35).

Referring to another interview which occurred May 5, 1927, the witness, Weinroth, testified as follows (C., p. 443, l. 11):

> "A. It was agreed first that the individuals "present should present bonds covering their "respective interests in the property, and that "the thing be put entirely on an individual basis "and that Bodek be relieved of all but his "proportionate part of the liability. That in "addition to that there was to be six per cent "paid off on the mortgage every six months as "an amortization, six per cent was to be paid "in as amortization, and three per cent on "amortization and three per cent on interest, "as I understood, six per cent mortgage. The "mortgage was to be for five years, there was "some considerable talk about the mortgage be-"ing extended for a longer period than it had "originally been contemplated. It was talked "that at that time the principal of the mort-"gage shall have been reduced by three per "cent. That is all that took place at that meet-"ing * * *. I had turned over to Mr. Bodek "for his perusal the letters that I had received "from Mr. Kurtz or Mr. Felix, I don't recall "which, and I had repeated to him the conversa-

"tions I had with them, and I had showed him "the letter that was sent or a copy of the letter "that was sent to Mr. Felix or Mr. Kurtz, I "don't remember which now. It was the offer "and counter offer by both of the parties that "caused these letters to go back and forth, and "all our controversies were in writing with the "exception of the original interview."

The following also appears at page 594:

"Q. When you were having your conversa- "tion with Mr. Bodek did he say anything to you "with reference to his resisting payment of "these mortgages or decline to pay them?

"A. No.

"Q. Was there any conversation at that time "that you had with him as to a claim made by "him that he was not liable under these mort- "gages?

"A. No."

Another conversation occurred between the witness and Bodek on May 18, 1927. The witness was asked whether he could remember what was said and he answered:

"Not accurately, not exactly, of course, but "the substance of it was that if the account "would be reduced, that if the amount to be paid "would be reduced, to five per cent instead of "ten, that he and his people whom he then re-

"peated would be willing to go ahead and make "the payments to the bank" (C., p. 446, l. 18).

The witness also testified that Mr. Bodek never raised any question as to his liability on the mortgage by reason of the fact that the improvements had not been completed (C., p. 448, l. 16).

So far as Bodek is concerned, as early as January 21, 1927, his attention was drawn to the fact that complaints were made in relation to the time for the completion of the improvements. It was nearly two years after this communication was sent to Bodek that he first intimated that he desired to rescind.

We contend, therefore, that Bodek failed to exercise, with reasonable promptitude, his right to rescind and refuse to purchase after the discovery of the alleged falsity of the representations or the breach of the contract on the part of Ryan Company, and that furthermore the conduct and acts show an affirmance of the contracts. Their failure to exercise the right of rescission, furnishes satisfactory evidence of an election to abide by the same, notwithstanding the alleged breach or fraud.

As evidence that the defendant, Bodek, never arrived at any determination to rescind until after the bills to foreclose were filed, is the fact that until this action was taken by the mortgagees, Bodek always retained full control over the property, in

order to take advantage of any rising market for the sale of real estate in that vicinity. No tender of the deed was ever made and no offer to return the title to Ryan Company was ever made until after the bills of complaint were filed and then only by allegations in the counter-claim.

UPON THE DEFINITION OF THE CONTRACTUAL OBLIGATION OF RYAN AND BODEK THE QUESTION OF MERGER MAY BE IMPORTANT.

The terms of any prior contract as to improvements were merged in the deed and mortgage given for a part of the purchase price, and, therefore, the time limited in the agreement was abandoned and a reasonable time substituted, if it can be said that the Ryan Company did assume any affirmative obligation respecting the improvements and the time of completion.

The deed from the Ryan Company contained the following clause as to improvements:

> "RESERVING unto said party of the first "part, its successors and assigns the free right "of access in and upon said premises for the "purpose of making the following improve- "ments to the land now or formerly belonging "to said party of the first part of which land "the lots herein described are a part, namely, "the necessary clearing of said land; the filling "of the low area up to a grade approximately "equal to the grade of the present County Road;

"the necessary grading to establish a uniform "grade of the streets; the graveling of all roads; "and the installing of concrete sidewalks, curbs "and sewers" (C., p. l.).

Manifestly there is no affirmative obligation on the grantor as to the work or the time of performance created thereby. In any event the terms of any prior contract were merged in the terms of the deed and mortgage.

In the leading case of *Davis v. Clark,* 47 N. J. L. (Errors and Appeals), in an opinion delivered for the court by the Chancellor, the law with respect to the question now under consideration was stated as follows:

"Where a deed is made and accepted in pur- "suance of an executory contract, the law pre- "sumes that it fully expresses final intentions "of the party as to so much of the contract as it "purports to execute. Long v. Hartwell, 5 "Vroom 116; Andrews v. Rue, 5 Vroom 402. In "this case the deed purports to convey the whole "of the property which was the subject of the "bargain and to execute the whole of the con- "tract."

In the case of *Long v. Hartwell,* 34 N. J. L. 116, Mr. Justice Van Sickle, in delivering the opinion for the court said:

"The rule can be deducted from the authori-

"ties that the executed contract supersedes all "prior negotiations and agreements, where the "last contract covers the whole subject em- "bodied in the prior one. But where the stipu- "lation is to do a series of acts at successive "periods of distinct and separable acts would "be performed simultaneously the executory "contract becomes extinct only as to such of its "parts as are covered by the conveyances."

It is submitted that the case of *Merchants & Company v. Mercer Realty Company,* 99 N. J. L. 442, and cases of a similar nature, have no application to the present case in view of the fact that in the cases last cited no attempt was made to have the deed or mortgage cover all the terms of the agreement. In the Mercer Realty Company case, *supra,* the Court of Errors and Appeals had before it a case where no attempt was made in the deed to cover all the elements of the contract. It is to be noted that in its opinion the Court was careful to point out that there was no merger, because the covenants in the executory contract were collateral to the deed. In the present case an examination of the mortgage and the deed given after the contract, clearly discloses that it was the intention of the parties to have the mortgage and deed cover all the elements of the contract. Both the mortgage and the deed contain clauses covering the question of improvements, etc., so that the case at bar falls squarely within the rule as established by *Davis v. Clark, supra.*

Where a deed is made and accepted in pursuance of an executory contract, the law presumes that it fully expresses the final intentions of the parties as to so much of the contract as it purports to execute.

Goldsmith v. Meyer, 97 N. J. L. 40.

In a well-known work the rule is stated as follows:

> "A subsidiary contract completely covering "the same subject-matter and made by the "same parties as an earlier agreement, but con- "taining terms inconsistent with the former "contract so that the two can not stand to- "gether, rescinds, substitutes and is substituted "for the earlier contract and becomes the only "agreement between the parties."

Williston's Wald's Pollock on Contracts, Third Edition, 816. See note 25 for cases.

THE OBLIGATION TO MAKE IMPROVEMENTS WAS AN INDEPENDENT CONTRACT.

Any agreement as to improvements was an independent covenant and the failure to comply therewith, by the mortgagee, at most would only entitle the owners to damages against Ryan, and would no more than entitle the mortgagor to a set-off against the mortgage, which would be limited to the differ-

ence between the value of the lots improved, as they should have been, and the value of the lots in the condition in which they were. In the absence of proof to the contrary, it must be assumed that there is no damage.

The fact that there is in existence an independent, and not a dependent contract is demonstrated, not only by the form of the agreement, but by the following:

(a) When the agreement as to improvements became merged in the mortgage, the latter made the first installment payable on the completion of the improvements. It made the balance payable in three years, regardless of whether or not the first installment was paid, or ever became due. This indicates, to some degree, that the value of the improvements was measured by the amount of the first installment, so that if the improvements were not made, the amount of the installment would be the limit of the allowance of the set-off.

(b) As the covenant in the contract of sale and purchase were merged in the mortgage, resort to the latter must be made to determine the intention. Since the latter contained no affirmative undertaking by the mortgagee to make the improvements, the right to foreclose cannot be impaired by the failure to make the improvements, unless the right depended solely on the completion of the improvements which was not the fact. Since there were additional defaults in the payment of taxes and interest, there can be no right to defend against the foreclosure.

THE COMPLAINANT POSSESSED THE RIGHT TO FORECLOSE INDEPENDENTLY OF ANY QUESTION AS TO IMPROVEMENTS.

The language of the mortgage is peculiar. It provides that a certain installment shall be paid upon the completion of the improvements and notice thereof, as therein set forth, and the balance within three years from the date thereof. Then follows a covenant to pay interest, installment of principal and taxes, with the usual clauses in making the entire principal due in case of the default in any of these covenants. The practical application of this situation is, that the right to foreclose came into existence immediately upon the happening of any one or more of the specified defaults.

The taxes for 1926 and 1927 were not paid. There was a default in the payment of interest on May 9th, 1927.

Under the terms of the mortgage, the amount recoverable upon default, was the entire principal sum, which would be the entire amount due, less the installment payable on completion of improvements, if such improvements were not completed at the time of final decree in the cause.

If the parties had intended that a failure to complete the improvements, with the resulting obligation to pay the first installment, as specified, would prevent any foreclosure of the mortgage, the parties would have so specified in the formal instrument written by them. The inevitable result of the situation, is that when the bill was filed in February, 1928, there had been defaults in the payment of in-

terest in May and November, 1927, and also default in the payment of taxes in June and December, 1926 and 1927. These defaults would entitle the mortgagee to declare the entire principal sum due and proceed to collect the same.

Undoubtedly all of the improvements have been completed at the present time and the contract, if any contract was made by Ryan, has been fully performed by now. If the improvements have not been completed by the time the final decree is entered in the case, then such final decree would cover the principal of the mortgage, with interest, less the installment payable upon the completion of the improvements, and upon substantial performance, less rebate for deficiency, if any, and the complainant would be entitled to foreclose the mortgage for such sum against the mortgaged premises.

It now being shown that when a decree will be made in this case all of the improvements will have been completed and the installment based thereon has become due, the result is that the complainant is entitled to recover, in this proceeding, by final decree the entire amount due on the mortgage.

The right to collect the balance of the principal of the mortgage, exclusive of the installment payable upon the completion of the improvements, came into existence upon any one default, either in the payment of interest or taxes, and this right cannot be denied merely because the Court may find that the improvements were not completed within any specified time limit, before the bill was filed. This must necessarily be the result even if the Court finds that the improvements were not completed until the

sewers were repaired and relaid and, the right to connect with the municipal sewer system acquired by action of the municipality.

Jordan v. Clark, 16 N. J. Eq. 243 and 247;
Clark v. Clark, 62 N. H. 267;
Johnson v. Van Velsor, 43 Mich. 208.

We have examined the authorities referred to in the opinion of the Vice-Chancellor and find that they amply support the propositions of law stated by him as a basis for the conclusion reached, as expressed in the opinion, but independently of the grounds given by the Vice-Chancellor, supporting the right of the complainant to foreclose the mortgage, we submit that a decree to this effect, in favor of the complainant, would be justified, upon any one or more of the grounds above referred to.

We submit the decree appealed from should be affirmed.

STARR, SUMMERILL & LLOYD,
Solicitors of Respondent.
LEWIS STARR,
EMERSON L. RICHARDS,
Of Counsel.

NEW JERSEY COURT OF ERRORS AND APPEALS.

May Term, 1932. No. 60.

Between

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES (successor by merger to the COLONIAL TRUST COMPANY),
Complainant-Respondent,

and

JOSEPH BODEK, *et als.*,
Defendants-Appellants.

ON APPEAL FROM THE COURT OF CHANCERY.

SUPPLEMENTAL BRIEF ON BEHALF OF THE COMPLAINANT-RESPONDENT.

Confusion has arisen respecting the name of the complainant-respondent in this case. The bill was

filed in the name of the Colonial Trust Company, and subsequently The Pennsylvania Company for Insurances on Lives and Granting Annuities was substituted as complainant, because of a merger. Some of the papers were filed in the name of the Colonial Trust Company and others in the name of the merged company.

This supplemental brief is filed on behalf of the complainant, because of the fact that the defendants' brief was not served until May 17, 1932. The original brief of the complainant was prepared prior to that time and no opportunity was afforded the complainant to answer any of the matters set up in the defendants' brief.

Of the three grounds alleged in the defendants' brief to justify a rescission of the defendants' mortgage, two only refer to misrepresentation and deceit.

The third ground urged is the breach, by Ryan and his successors, of the covenants contained in the mortgage, as well as the contract of sale, with reference to the nature and time for the completion of the improvements, on the occasion of which the payment of ten per cent of the face of the mortgage became due by the terms thereof.

The question of fraud and deceit, we think, has been effectively answered in our original brief, and it only becomes necessary to advert generally to the matter of the alleged breach of Ryan's covenant.

Photographs offered as exhibits by the complainant, and placed in the possession of the sergeant-at-arms, show definitely that there was no misrepre-

sentation whatever, because of the sign which the defendants allege was on the property at the time of sale.

Furthermore, the aerial photographs, which are also in the possession of the sergeant-at-arms, taken in the month of May, 1927, constitute the most potent support of the complainant's contention that there has been substantial, if not complete performance of the covenants, respecting the improvements. No minor breach thereof would justify rescission.

The learned Vice-Chancellor found as a fact that there is no merit in the contention of the defendants based upon fraud, deceit or misrepresentation.

We submit that the principle of law supported by *Clampitt v. Doyle,* 73 Eq. 678, referred to on page 23 of our original brief, applies equally upon the question of rescission, because of breach of contract, as well as fraud. It is perfectly manifest, therefore, that regardless of the ground upon which the learned Vice-Chancellor rejected the rescission, as claimed by the defendants, such right did not, in any event, exist respecting any alleged breach.

The chronological history of the dealings between the complainant and the defendants, set forth on page 3 of the original brief, shows that while the mortgage being foreclosed is dated November 9, 1925, no suggestion was made by Bodek that he was entitled to or even expected to exercise a right of

rescission, until the month of September, 1929, during which time the following events occurred.

To the original bill of complaint, which was filed January 28, 1929, the defendant, Bodek, filed an answer in which the only defense raised was the claim that the improvements had not been completed, in consequence of which the initial payment was not due at the time the bill was filed. This shows that in January, 1928, the defendants took the position that there had been no completion of the improvements, as required by the contract (C., p. 8).

From September, 1925, until September, 1929, a matter of four years, the defendants did nothing to show any intention to rescind. The counter-claim, for the first time, raising the question of rescission, was filed a long time after the improvement had been admittedly completed, and the sewer system, one of the matters in dispute, was approved and in use by the public, as part of the municipal plant. This happened in May, 1928, over a year before rescission was set up.

Furthermore, Bodek claims that he knew there had been a breach of Ryan's covenant to complete as early as February, 1927, when he had his photographs taken. These photographs, however, show the condition several months after the work was actually completed and the imperfections indicated were the result of the elements blowing the sand off the fill.

In November, 1926, and also again in the spring of 1927, Bodek had interviews with the witness, Schorr, in which no suggestion of rescission was

raised. He was trying to secure an extension and a change in the bond so that he, Bodek, would not be personally liable for the entire amount thereof. Bodek also stated to Schorr that the other members of his syndicate raised some question about the completion of the improvements but he did not intend to take that position. Reference will be found to this testimony on page 36 of our brief.

Early in 1927, Bodek had interviews with Mr. Felix, vice-president of the complainant, along the same general lines as the talk with Schorr. This is also referred to on page 36 of our brief.

About the same time, Bodek requested the witness, Weinroth, to intervene with the complainant for the purpose of arriving at a change in the details of the payment of the mortgage. He then made no claim that he was entitled to rescind by reason of non-performance by Ryan. Reference to this will also be found on page 39 of our brief.

At no time prior to the filing of the counter-claim in September, 1929, did Bodek state any intention to rescind. Every act, prior to that time, was evidence of his affirmance of the contract, which should be sufficient to require an affirmance of the decree appealed from, regardless of the grounds upon which the Vice-Chancellor based his conclusions.

The statements contained on page 7 of the appellants' brief are somewhat confusing. The Ocean City Title & Trust Company did write the letter dated May 5, 1926, and also did have in its possession or under its control, sufficient moneys to com-

plete the improvements, which were subsequently advanced.

Payments of interest by Bodek were not, as we claim, induced, to the slightest degree, by the communications referred to by the appellant, for the reason that no contention was made until 1929 that there was any breach by the complainant in that respect. The situation regarding the improvements, referred to in Exhibit D5, had reference to the fact that when the fill was made after the lots were conveyed, the new owners made no effort to protect the surface and the winds caused damage to the tract. Some question arose as to who was responsible for the same and finally Ryan assumed this responsibility by resurfacing. The unevenness of the surface, which was the result of the inspection made in 1927, was caused by this situation and was corrected by Ryan to the satisfaction of all concerned.

It is a fact that it became necessary to relay part of the sewer, as referred to on page 15 of the defendants' brief, but this was a result of conditions which came into existence two years after the work had started and was corrected by Ryan before the sewer system was accepted by the City in 1928, and put in use.

The statements contained on page 19 of the defendants' brief are also misleading because the fill was made long before the expiration of the year. There is no obligation on the part of the vendor to maintain the same, and, in any event, the situation was entirely cleaned up by Ryan and no complaint

was ever made by Bodek, that there was any default in this regard, until he instituted rescission proceedings in 1929.

Respectfully submitted,

STARR, SUMMERILL & LLOYD,
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LEWIS STARR and
EMERSON RICHARDS,
Of Counsel.