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TESTIMONY.

For Plaintiff,

For Defendant.

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NOTICE OF APPEAL.

Filed June 7, 1928.

FIRST DISTRICT COURT OF THE CITY OF NEWARK.

JACOB ROSENTHAL, *Plaintiff,* vs. JOSEPH ENGEL, *Defendant.*	*On Contract.* *Notice of Appeal.*

To Jacob Rosenthal, plaintiff, or, David M. Litwin, attorney for plaintiff.

SIR:

TAKE NOTICE that the defendant, Joseph Engel, hereby appeals to the New Jersey Supreme Court from the whole of the judgment of the First District Court of the City of Newark, rendered in the above stated action on the 29th day of May, 1928.

COHEN & KLEIN,
Attorneys for Defendant.

Dated June 6, 1928.

Service of a copy of the within notice of appeal is hereby acknowledged this 6th day of June, 1928.

DAVID M. LITWIN,
Attorney for Plaintiff.

SUMMONS.

ESSEX COUNTY,
THE STATE OF NEW JERSEY. *ss.*

To any Constable of said County, or to the Sergeant-at-Arms of the (SEAL) First District Court of the City of Newark. SUMMON Joseph Engel to appear before the First District Court of the City of Newark to be held at the City Hall, Broad street (ground floor), in said city, on the tenth day of November, Nineteen Hundred and twenty-seven, at ten o'clock in the forenoon, to answer unto Jacob Rosenthal in an action upon contract wherein the plaintiff demands from the defendant Five Hundred Dollars. Hereof fail not.

WITNESS, CECIL H. MACMAHON, Esq., Judge of said court at Newark, as aforesaid, the 31st day of October in the year One Thousand Nine Hundred and Twenty-seven.

LOUIS HECHT,
Clerk.

STATE OF DEMAND.

Filed October 31, 1927.

FIRST DISTRICT COURT OF THE
CITY OF NEWARK.

JACOB ROSENTHAL, *Plaintiff,*	*On Contract.*
vs.	*State of Demand.*
JOSEPH ENGEL, *Defendant.*	

The plaintiff demands of the defendant the sum of Five Hundred Dollars ($500.00) on a certain check a true copy of which is as follows:

Newark, N. J., Oct. 25, 1927. No. 166
FIDELITY UNION TRUST COMPANY
IRONBOUND FERRY BRANCH
STREET
Pay to the order of Jacob Rosenthal $500.00
Five Hundred 00/XX Dollars
(Signed) Joseph Engel.

Said check was presented for payment, but payment thereof was refused.

Judgment will be claimed in the sum of Five Hundred Dollars ($500.00) and costs of suit (plaintiff hereby waiving any amount due it in excess of $500.00) in principal.

D. M. LITWIN,
Attorney for Plaintiff.

State of Demand.

FIRST DISTRICT COURT
of Newark, N. J.

SUMMONS ON CONTRACT

Jacob Rosenthal,

Plaintiff,

vs.

Joseph Engel,

Defendant.

Demand	$500.00
Summons	2.10
Mileage	
Listing Fee	1.50
Attorney's Fee (5%)	

Returnable November 10, 1927.

David M. Litwin,
800 Broad St., Newark, N. J.
Attorney for Plaintiff.

SUMMONS AND STATE OF DEMAND.

To the Defendant:

TAKE NOTICE, that the plaintiff demand that the defendant shall file written specifications of defenses intended to be made in said action on or before the time specified for appearance in the process issued in said cause.

D. M. LITWIN,
Plaintiff's Attorney.

COUNTER-CLAIM.

Filed Nov. 17, 1927.

FIRST DISTRICT COURT OF THE
CITY OF NEWARK.

JACOB ROSENTHAL, *Plaintiff,*	*On Contract.*
vs.	*Counter-claim.*
JOSEPH ENGEL, *Defendant.*	

By way of counter-claim against the plaintiff, the defendant says:

FIRST COUNT.

1. On or about October 25, 1927, plaintiff and defendant entered into a written contract, whereby plaintiff agreed to sell to the defendant, premises described as follows:

Premises in the City of Newark, County of Essex and State of New Jersey.

BEGINNING in the southerly line of Market Street at a point therein distant westerly 44 feet 10 inches from the westerly line of Jackson Street; thence southerly 20 degrees 45 minutes west 40 feet; thence southerly 38 degrees 26 minutes west 58 feet 10 inches; thence northerly 51 degrees 5 minutes west 25 feet; thence north 38 degrees 42 minutes east 48 feet 3 inches; thence northerly 20 degrees 45 minutes easterly 42 feet 6 inches to Market Street; thence southerly 69 degrees 51 minutes easterly along Market Street 27 feet to the place of BEGINNING,

by deed of warranty free from all encumbrances on or before November 1, 1927, for the purchase price of Nineteen Thousand Dollars; that on account of said purchase price, defendant delivered to the plaintiff his check for Five Hundred Dollars as set forth in the state of demand; that said contract contained the following clause:

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

That the buildings upon said premises are not all within the boundary lines of the property as described in the deed therefor, but portions of said building encroach over and upon Market street, and also encroach over and upon premises located both to the east and the west of plaintiff's premises in question; that the building does not comply with the municipal ordinances and regulations, nor with the provisions of the New Jersey State Tenement House Act as enforced by the State Board of Tenement House Supervision, but the building on said premises violates the Tenement House Act in that two dark rooms each, right and left apartments, second and third floors and one dark room on the first floor, left apartment, must be lighted by windows as pro-

vided by paragraph 122 of the Tenement House Act.

2. Thereafter defendant rescinded said contract and demanded back from the plaintiff his said check, which plaintiff refused to return.

SECOND COUNT.

1. The allegations contained in the first count are repeated and made part of this count.

2. Subsequent to the making of said contract, defendant caused a survey to be made of said premises, at an expense to the defendant of Forty Dollars.

Judgment will be claimed by the defendant against the plaintiff on both counts of this counter-claim, in the total sum of forty dollars.

COHEN & KLEIN,
Attorneys of Defendant.

SPECIFICATION OF DEFENSES.

Filed November 17, 1927.

FIRST DISTRICT COURT OF THE
CITY OF NEWARK.

JACOB ROSENTHAL, *Plaintiff,* vs. JOSEPH ENGEL, *Defendant.*	*On Contract.* *Specification of Defenses.*

1. Defendant denies the allegations contained in the state of demand.

2. On or about October 25, 1927, plaintiff and defendant entered into a written contract, whereby plaintiff agreed to sell to the defendant, premises described as follows:

Premises in the City of Newark, County of Essex and State of New Jersey.

BEGINNING in the southerly line of Market Street at a point therein distant westerly 44 feet 10 inches from the westerly line of Jackson Street; thence southerly 20 degrees 45 minutes west 40 feet; thence southerly 38 degrees 26 minutes west 58 feet 10 inches; thence northerly 51 degrees 5 minutes west 25 feet; thence north 38 degrees 42 minutes east 48 feet 3 inches; thence northerly 20 degrees 45 minutes easterly 42 feet 6 inches to Market Street; thence southerly 69 degrees 51 minutes easterly along Market Street 27 feet to the place of BEGINNING,

by deed of warranty free from all encumbrances on or before November 1, 1927, for the purchase price of Nineteen Thousand Dollars; that on account of said purchase price, defendant delivered to the plaintiff, his check for Five Hundred Dollars as set forth in the state of demand; that said contract contained the following clause:

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

That the buildings upon said premises are not all within the boundary lines of the property as described in the deed therefor, but portions of said building encroach over and upon Market street, and also encroach over and upon premises located both to the east and the west of plaintiff's premises in question; that the building does not comply with the municipal ordinances and regulations, nor with the provisions of the New Jersey State Tenement House Act as enforced by the State Board of Tenement House Supervision, but the building on said premises violates the Tenement House Act in that two dark rooms each, right and left apartments, second and third floors and one dark room on the first floor, left apartment, must be lighted by

windows as provided by paragraph 122 of the Tenement House Act.

3. Plaintiff misrepresented to the defendant the rental income of said premises, by informing the defendant that the rentals aggregated more than they actually do.

4. Plaintiff is not entitled to recover on said check because of failure of consideration for which the check was given.

COHEN & KLEIN,
Attorneys of Defendant.

NOTICE TO PRODUCE.

FIRST DISTRICT COURT OF THE
CITY OF NEWARK.

JACOB ROSENTHAL, *Plaintiff,*	*On Contract.*
vs.	*Notice to Produce.*
JOSEPH ENGEL, *Defendant.*	

To David M. Litwin, Esq., attorney of defendant.

SIR:

TAKE NOTICE that you are required at the trial of this cause to produce the deed to Jacob Rosenthal covering premises on the southerly line of Market street, Newark, New Jersey, known as No. 528 Market street, in said City of Newark, New Jersey, and agreed to be conveyed by Jacob Rosenthal to Joseph Engel by agreement between said parties dated October 25, 1927, and all other letters, documents, writings, relating to the issue involved in this cause, and that in default thereof, secondary evidence will be adduced.

COHEN & KLEIN,
Attorneys of Defendant.

Dated March 7, 1928.

Service of a copy of the within notice is hereby acknowledged this 7th day of March, 1928.

D. M. LITWIN,
Attorney of Plaintiff.

TESTIMONY.

FIRST DISTRICT COURT.
NEWARK, N. J.

JACOB ROSENTHAL,
Plaintiff,
vs.
JOSEPH ENGEL,
Defendant.

March 8, 1928.

Before Hon. Cecil H. MacMahon, *J.*

Appearances:

David M. Litwin, Esq., for the plaintiff.

Cohen & Klein, Esqs., by Philip Klein, Esq., for the defendant.

James S. Slavin, official stenographer.

JACOB ROSENTHALL, the plaintiff, called as a witness on his own behalf, being duly sworn, testified as follows:

Mr. Litwin: If your Honor please, one of my witnesses, Morris Cohen, attorney, is on his way down. If he should not get here in time, I will put him on later.

By the Court.

Q How much is due on that check, Mr. Rosenthal? A Five hundred dollars.

The Court: The check is offered in evidence. Plaintiff rests.

(The paper referred to was received in evidence and marked Plaintiff's Exhibit 1.)

JOSEPH ENGEL, the defendant, called as a witness on his own behalf, being duly sworn, testified as follows:

Direct examination by Mr. Klein.

Q Mr. Engel, you entered into an agreement with Jacob Rosenthal on October 25, 1927? A Yes.

Mr. Litwin: I admit the agreement in evidence.

(The paper referred to was received in evidence and marked Defendant's Exhibit 1.)

By Mr. Klein.

Q After you signed this agreement and gave Mr. Rosenthal this check, what did you do with reference to the transaction? A Why, I went home. Then I went up to Rosenthal's office. Rosenthal promised me that he would give me clear title to that property and I came home from the lawyer's office. I went to my neighbor's, who was supposed to be my next door neighbor, and he told me—

Mr. Litwin: I object.

The Court: Objection sustained.

By Mr. Klein.

Q Don't tell us what he told you. You had a talk with Weiss? A Yes, I had a talk with Weiss.

Edward Clawans, direct.

Q As a result of the conversation you had with Mr. Weiss, what did you do? A The next morning I went and stopped payment on the check.

Q You stopped payment on the check? A Yes, sir.

The Court: That is all; call your next witness.

EDWARD CLAWANS, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. Klein.

Q Mr. Clawans, you are a surveyor? A Yes.

Mr. Klein: Do you admit his qualifications?

Mr. Litwin: Yes.

Mr. Klein: Qualifications admitted.

By Mr. Klein.

Q Did you make a survey of the premises on Market street described in the agreement marked D. 1? A I did.

Q And you have your original survey map with you? A I have.

Q Produce it, please.

(The witness produced the map.)

Mr. Klein: I offer the survey in evidence.

Mr. Litwin: I object to it, if the court please, upon the ground that it was made on November 8, 1927. The agreement calls for

closing on November 1, 1927, and is dated October 25, 1927, and from the face of it it appears that time was of the essence, and they didn't rescind their agreement based upon facts known to them on or before November 1, 1927. Any facts that were ascertained by them subsequent to the closing date are entirely irrelevant and immaterial. I base my objection upon the three reported cases: one by Vice-Chancellor Stevens, the case of Gurber *vs.* Matrisk and the case of the City of Newark *vs.* Lindsley. I think two of these cases went to the Court of Errors. The point involved is that although the agreement may be silent as to time being of the essence, where it appears both from the agreement and by testimony adduced outside the agreement that time was intended by the parties to be of the essence, that time is of the essence; my further ground is that we are in a court of law where time is always of the essence, and if anything was discovered after the date set for closing, they are too late.

I call your Honor's attention to the case of Barry *vs.* Ruskin, reported in 133 Atlantic, 128, and affirmed in 135 Atlantic, where a search had been ordered from a title company in Atlantic County, and after the date fixed by the agreement certain discrepancies arose in the title and the Court said: "You will have to take title as is."

The Court: There is a counter-claim filed in this case; was there a counter-claim filed in the cases you cited?

Mr. Litwin: If I remember the facts in Barry *vs.* Ruskin, the Atlantic case, there was a counter-claim.

The Court: I will take the testimony subject to your objection and look into the matter later on. Let me have the survey. Mark it for the present "C. 2," for convenience.

(The paper referred to was marked "C. 2," for convenience.)

By the Court.

Q What does the survey show? A The survey shows that the roof cornice of the building encroaches in the street fifteen inches, the store corners, five inches on the westerly side, and the brick front is a half inch over the line and the rear where the line deflects, the brick footing across is two inches over; the frame is 4¼ inches over on the westerly side, and the easterly side brick footing across is two inches over, and the frame 7½ inches over the line.

Q When did you make the actual survey or field work, whatever you call it? A November 8, 1927.

Q Had the building been there for some time when you made the survey? A There are two parts of the building; the main building was there, but there was a new frame addition put on.

Q When? A In the rear—I don't know.

Q What I am asking you is this: Had the building, as shown in the survey, been in that position for some time? A The whole building—

Q For months or years? A The new frame addition might have been completed about the time, because he was still painting.

Q But the main building had been there some time?

The Court: Will you admit that, Mr. Litwin?

Mr. Litwin: What is that?

The Court: That the main building had been there some years at the time the survey was made.

Mr. Litwin: It must have been. It is there over twenty years.

The Court: And the frame addition was erected when? Prior to making this agreement of sale?

Mr. Litwin: Yes.

The Court: Anything further from this witness?

Mr. Klein: Nothing further.

Cross examination by Mr. Litwin.

Q Were you furnished with a description from which to make your survey? A Yes, sir.

Q Have you that description here? A I think I have.

Q What is your beginning point? A Beginning on the southerly line of Market street at a point therein distant westerly forty-four feet, ten inches, from the westerly line of Jackson street.

Q Is the distance as given on your survey of 44.85 the same as 44 feet 10 inches, westerly from Jackson street? A Yes, sir.

Q There are several monuments at the intersection of Market street and Jackson street, are there not? A Market street? There used to be a monument. There is no longer a monument there.

Q What monument did you measure your distance of 44 feet 10 inches from? A This is a survey by occupation—ancient occupation.

Q And not by measurement? A No. It is ancient occupation.

Q Is it an accurate survey made by measurement? A The line of Jackson street will be fixed from this line here, 44.85, because there isn't a monument there any longer at Jackson and Market street.

Q Is there a monument at the next block up? A No. The monuments have all been removed.

Q I mean to say, in a survey by occupation you have to measure first of all the adjoining property, am I right? A Right.

Q What is the measurement of your property? A I know the property adjoining on the east was smack up against the line. I measured several properties and the old building occupied the entire plot.

Q Were you furnished with a description of the adjoining property toward Market street? A Toward Market street? I have old survey notes—

Q Were you furnished with a description of the property running toward Market street? A No, but the description would have been taken from an old survey—

Q Please answer my question. A I was not furnished with a description of the adjoining property.

Q What is the width of the adjoining property as you measured it by occupation, as you call it? A On the adjoining property on which side—east or west?

Q Toward Market street. Your beginning point was toward Market street, am I right? A The beginning point was from Jackson street, along Market. I have some old survey notes which—

Edward Clawans, cross.

Q Please answer my question. What was the width of the adjoining property, toward Jackson street, as you measured it on the 8th of November? A I don't know. I would have to look through my notes.

Q Have you a completed sketch? A The original notes belong to an old firm.

Q Have you a completed sketch? A Yes.

Q Look at that and tell me what distance you have indicated on the sketch for the adjoining property?

The Court: On the east?

Mr. Litwin: On the east.

A I have one, 42 total measurements. I have a notation here of 22½ inches; 29 feet, total measurements.

Q Twenty-nine feet total measurement? A Yes.

Q Did you measure the property located on the corner of Jackson and Market streets, on the same side? A I have a notation here, "one inch in street."

Q Did you measure the width of the property at the corner? A I must have measured it, because I show a notation in here, "one inch in street."

Q Well, did you measure it? A I must have measured it.

By the Court.

Q Can't you answer the question? Did you measure it? A I did measure it; yes, sir.

By Mr. Litwin.

Q Which is it, "must have" or "did"? A I did.

Q Are you positive of that? A Yes.

Q What is the width of the property on the corner? A I have it marked "42 feet, total measurement."

Q What is 42 feet, total measurement? A I don't know right now; I would have to refresh my mind.

Q Refer to the old notes. A I have it marked in here, "42 feet, total measurement."

Q Your beginning point is 42 feet, 10 inches; so you have a discrepancy there of two feet, ten inches? A In making this survey I didn't have the adjoining deed at all, the adjoining deed on the easterly side. I know the westerly side of the building has always been accepted as on the line—

Mr. Litwin: Just a moment. I object to that, if the Court please, as having been accepted always as being on the line, as hearsay.

The Court: I sustain the objection.

(The last question was read by the stenographer.)

The Witness: No, I wouldn't say I have a discrepancy of two feet, ten inches, because whereas I may have measured it, I forgot to record it. I noticed 42 feet, total measurement; 22 feet, 6½ inches—

Q What is the sum total of your measurements that you are relating? A Forty-two feet, 29, 71 feet—

Q You knew this case was coming up? A I did not.

Q When were you told to be here? Today? A Yes.

Edward Clawans, cross.

Q Suppose that the property adjoining on the east was over on the line, encroached on the adjoining property on the east: Would that give you an accurate starting point as to our property? A If the property encroached on the east, the basis would be—the beginning point as shown by the old notes on the property on the west was begun on the line. An old line was fixed as 71 feet, 10 inches, from the line of Jackson street, and you would have to measure from that point, east, to fix the line, and no record being made of the other property, then the point of the property would be by survey, but not by ancient occupation.

Q You refer to "old notes." Notes made by whom? A Notes made by Francisco & Barkhorn, made in the '80's.

Q Who were they? A They were probably established in 1850. They are not now in existence.

Q It is possible their old notes are wrong? A I wouldn't say their old notes are wrong.

The Court: It is possible, of course.

By Mr. Litwin.

Q Is it possible that your urvey is wrong by actual measurements? A By actual measurement? No.

Q You don't know where the monuments at the corner of Jackson and Market streets is and that is the only definite way of measuring it? A The monument is not there now.

By the Court.

Q You stated that your beginning point was 44.85 feet from the corner, westerly from the

west side of Jackson street, is that true? A That is true.

Q Now, you stated, as I understand you, that you really began to measure from the westerly line of the property in again 71 feet, 10 inches, accepting that line of the adjoining property, east; that line of the adjoining property or westerly of the line of the adjoining property; you accepted that as the standard from which you measured? A Yes.

Q You didn't begin your survey 44.85 feet from the corner, but you did begin it 71 feet, 10 inches from the corner and ran backwards? A Because—

Q You did that, didn't you? A Yes.

By Mr. Litwin.

Q When you got that starting point of 71 feet, 10 inches, west of Jackson street, that was because the description called for 71 feet, 10 inches, is that right? A I said I didn't see a description of the property immediately on the west.

By the Court.

Q You simply accepted the building line as it existed from ancient occupation, is that right? A To fix the line of Jackson street.

Q I am asking you simply this: You started on the westerly line of the property in question because you accepted the adjoining property's east line as the standard, is that right? A Yes.

By Mr. Litwin.

Q Is it possible for the property adjoining on the west to encroach over on our property by actual measurement? A No.

Q It is not possible?

The Court: He doesn't know that. He can't, because he already said the monument has disappeared.

By Mr. Litwin.

Q At most, the entire survey on this entire block would be nothing but a guess? A I wouldn't say that.

Mr. Litwin: That is all.

Re-direct examination by Mr. Klein.

Q If you did actually measure a survey of these premises in question and began at a point 44 feet, 10 inches, westerly from Jackson street, what would be the situation of these buildings with respect to the boundary lines of the description that you had, so far as the relation of the buildings to those boundary lines is concerned?

The Court: The witness has said he cannot fix the street line. The monuments have disappeared. That is his testimony.

By the Court.

Q What did you want to say, Mr. Clawans? A I say that probably at the time that Francisco & Barkhorn made the survey, the monuments were there, and they fixed the westerly line of this building here by that monument.

Q Where are those notes? A I showed you a copy of the notes.

Edward Clawans, re-direct.

Q Where are those notes? A I haven't the original notes.

Q Who has? A Mr. Sheperd's office. He is the successor to Francisco & Barkhorn. I say that the line of Jackson street—in order to fix the line of Jackson street, you have to measure 71 feet, 10 inches, and from that point measure 44 feet, 10 inches, to fix the easterly line.

By Mr. Klein.

Q Answer this: The building on the premises in question is how wide? A Twenty-seven feet.

Q And that is the distance, twenty-seven feet, of that width of the premises along Market street, is that correct? A That is right.

Q That is definite? A That is definite.

By the Court.

Q You have said, I think, that the building on the lot in question goes from one boundary line to the other, is that true? A Yes, sir.

Q Does the building on the west extend to the easterly boundary line of that lot? A Yes, sir.

Q Does the building on the east of the lot in question extend to the westerly boundary line of that lot? A Yes, sir.

Q And all these are by ancient occupation, are they? A Yes.

By Mr. Litwin.

Q So that, according to that, and basing your testimony upon that survey and upon your study of the neighborhood, every building would be over the line?

The Court: Depending upon where you begin.

Edward Clawans, re-direct.

By Mr. Litwin.

Q Is that right?

The Court: From his testimony, every building is where it ought to be and it can't be anywhere else.

By Mr. Litwin.

Q Let me ask you this: Isn't it a practice among surveyors that where a monument has disappeared, just like the case we hear here, that you can measure from the next block down if you can locate a monument at that point? A Practically all the monuments on Market street are all gone.

By the Court.

Q How about Jackson street? A Jackson street, on Jackson street there never was a monument.

By Mr. Litwin.

Q What is the block below, east of Jackson street? A There never was a monument there.

Q Did you look for it this time? A I did.

Q What is the nearest monument to this property? A There was a monument on the block on the westerly side, but it was at an angle; that monument was never checked, never accepted.

Q What is the nearest point there is a monument? A The nearest monument was a block west of this—in the block, at an angle.

Q That wasn't an accepted monument? A That wasn't an accepted monument.

Q At what point is there an accepted monument on this side of the street? A I wouldn't say there was an accepted monument down there at all.

Q There isn't an accepted monument along the entire length of Market street? A Not in this particular vicinity that the other surveyors have ever used or accepted.

Q Haven't you already measured from a monument that might be 2,000 feet from the premises you surveyed? A I have.

Q Wasn't there a monument a distance of about 2,000 feet from this location? A No.

Q Was there within 3,000 feet? A I couldn't say off-hand.

Q The average city block is 200 feet? A Yes.

Q And there wasn't a monument? A There is a monument.

Q An accepted monument? A I have never used it.

Q Was there an accepted monument within fifteen city blocks of this location? A I have to look at the commissioner's notes.

Q Didn't you do that the time you made the survey? A I did.

Q Have you a record of that? A I haven't the commissioner's notes here.

Q Couldn't you check the monument at the corner of Market and Jackson from the nearest accepted monument on Market street? A No.

Q Why not? A Because those commissioner's notes—

Q You are talking about the map of 1856? A I am talking about the commissioner's notes of 1856. The land around Market street was laid out prior to 1856, whereas the land—the lines were laid out before the commissioner's notes

were made. In some places the monuments are accepted, in other places the monuments are not accepted. That is in the commissioner's notes, as far as the calculation is concerned.

Mr. Klein: That is all.

By Mr. Litwin.

Q Hasn't there been a change in the northerly line of Market street?

The Court: In what period?

Mr. Litwin: From the beginning of the records. The time Robert Treat came here.

The Witness: I couldn't answer that.

By Mr. Litwin.

Q In order to determine the line of Market street, wouldn't it be necessary to search the records in the engineer's office to tell where the actual line of Market street is? A I have taken the line from old notes.

Q You depended entirely upon their notes? A Their notes.

Q If Market street had been narrowed or widened—

The Court: Never mind that question. It is apparent.

The Witness: I will say this: In checking the line of Market street, I took the old notes. The center line of the car tracks is pretty near the center line of the street. In checking the center line of the car tracks and the old notes, we accepted the old notes as correct as to the line of Market street.

CHARLES McCLOSKEY, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. Klein.

Mr. Klein: If the Court please, I think Mr. Clawan took back his original map. Can we file a blue print?

The Court: Mr. Litwin, you have no objection to the blue print?

Mr. Litwin: No.

The Court: The blue print can be used.

Q You are a tenement house inspector? A Yes.

Q Were you on November 10, 1927? A Yes. I made the inspection of the property at 528 Market street that day.

Q You made the inspection of the property at 528 Market street that day? A Yes.

Q What did you find? A I found there had been a number of violations recorded against the property and all had been removed except one.

Q What was that? A Each of the right—

Mr. Litwin: I desire to enter objection to this testimony upon the ground that the inspection was made after November 1st, the time fixed for closing according to the agreement.

By the Court.

Q Did you say what date you made the inspection? A This inspection was made November 11th.

The Court: I will note your objection.

By the Court.

Q The violations had all been removed except one. Go on. A Two dark rooms existed on each of the apartments on the third floor and one dark room on the first floor, left apartment. These violations had existed for several years. The original inspection upon which the violation had been reported was on the 12th of August, 1925.

By Mr. Klein.

Q Is this the report of your commissioner (indicating)? A This notice was sent to the owner or the attorney for the owner, notifying them.

Q Is that Slane's signature? A Yes.

Mr. Klein: I offer this report in evidence.

Mr. Litwin: I object to it.

Mr. Klein: The contract calls for it, if your honor please. There is a clause in the contract which says that the report of the tenement house department shall be accepted as proof of the existence or non-existence of violations.

The Court: I will take it in connection with his testimony, subject to objection.

Mr. Litwin: I object on the ground that this is not formally proved.

The Court: It is identified as his signature. Mark it "D. 2" for identification.

(The paper referred to was marked "D. 2" for identification.)

Mr. Klein: That is all.

Charles McCloskey, cross.

Cross examination by Mr. Litwin.

Q At the time you inspected the property on November 11th, how many families were actually living in the property? A My recollection is that the property was not occupied at the time, but I am not sure.

Q Occupation by three families made it a tenement house? A Or arranged for occupation of other families.

Q Are you familiar with the tenement house law? A Yes.

Q Are you familiar with this: * * * any portion thereof which is rented, leased or let or hired out to be occupied or is hired, etc. So the question of arrangement does not enter into it at all, does it? A It is to let out.

The Court: Don't answer the question.

By Mr. Litwin.

Q Have you been to the property recently? A No; that was my last visit there.

Q Mr. McCloskey, if the violations existed, why has that certificate been issued by your department? A Why, this is dated the 5th of March, 1928.

Q Yes. A The violations may have been removed since that time. My inspection was the 11th—

The Court: Just a minute, sir. Answer the question only.

By Mr. Litwin.

Q Is this Mr. Slane's signature? A Yes.

Q That is the seal of your department? A Yes.

The Court: Is that your first exhibit?

Mr. Litwin: No.

That is all.

Mr. Cohen: I wanted to put the deed in evidence. I gave Mr. Litwin notice to produce the deed.

Mr. Litwin: I haven't got it. In the absence of that, I have an abstract of the deed.

Mr. Litwin: I haven't got it. In the absence of that, I have an abstract of the deed.

Mr. Klein: May I offer that in evidence?

Mr. Litwin: It is admitted in evidence.

(The paper referred to was admitted in evidence and marked "D. 3.")

JOSEPH ENGEL, recalled as a witness on his own behalf, testified as follows:

Direct examination by Mr. Klein.

Q Mr. Engel, after you stopped payment on the check, did you talk with Mr. Rosenthal? A Why, Rosenthal called me up—

The Court: Did you talk to him after you stopped payment?

The Witness: Yes, sir.

Joseph Engel, direct.

By Mr. Klein.

Q How soon after you stopped payment on the check did you and Mr. Rosenthal talk to each other? A Why, the next morning.

Q What was said by you and what was said by him? A Mr. Rosenthal called me up on the 'phone and he asked me why I stopped payment on the check. I told him, "The deal is off on account of he gave me the wrong agreement." He was supposed to give me an agreement to sign which was to have a clear title. I was told by my neighbor—

The Court: No.

Mr. Klein: Don't tell us what he told you.

By Mr. Litwin.

Q Is this your signature, Mr. Engel, or did you send this letter to Mr. Rosenthal? A Yes, sir.

The Court: All right.

(The paper referred to was marked "P. 3" for identification.)

By Mr. Litwin.

Q You didn't say anything in that letter that the title was no good?

The Court: The letter speaks for itself, sir.

By Mr. Litwin.

Q When you sent that letter, you knew that the title, according to your opinion, was no good,

is that right? A Not in the letter I didn't say that.

Q But you knew at that time— A I told him on the phone.

Q Answer the question. A Yes, sir.

Q At the time you sent that letter— A Yes.

Q (Continuing) —to Rosenthal, you knew in your own mind that the title was no good, is that right? A I didn't know about it that time.

Q You stopped payment on the check at the time you knew the title was no good? A Because the survey was made after that.

By the Court.

Q What time did you send the letter? A I can't tell exactly.

Mr. Litwin: It is post marked October 26.

By the Court.

Q What day did you have the talk on the telephone with him? A The next morning.

Q What is the date?

Mr. Litwin: The check is dated October 25 and the agreement was the 25th. That was the 26th.

By the Court.

Q So you sent the letter the next day? A Yes, sir.

Q That was after you had the talk with your neighbor? A Yes, sir.

Q That was the only information you had about the title? A Yes, sir.

Morris H. Cohen, direct.

By Mr. Litwin.

Q You weren't at Cohen's office on November 1, to close title, were you? A I was there just once.

Q Just the time you drew the agreement? A Yes.

Q That was the only time you were there? A Yes.

Q Weren't you at Cohen's office a couple of days later?

The Court: A couple of days later than what?

Mr. Litwin: A couple of days after you signed the agreement weren't you at Mr. Cohen's office?

A I can't remember.

Mr. Litwin: That is all.

Mr. Klein: We rest.

MORRIS H. COHEN, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows, in rebuttal.

Mr. Litwin: Mr. Klein produced a bill for $40.00, which is a reasonable charge for the survey. I will admit that.

The Court: The letter that was identified by Engel is now marked "P. 3."

(The paper referred to was received in evidence and marked "P. 3.")

Mr. Litwin: I also offer the envelope with it.

Morris H. Cohen, direct.

Direct examination by Mr. Litwin.

Q Mr. Cohen, you are an attorney? A Yes, sir.

Q Did you draw the agreement that has been marked in evidence, between Mr. Rosenthal and Mr. Engel? A May I see it? This is a copy of the agreement.

Q At the time you drew the agreement I believe you represented both Rosenthal and Engel? A Yes, sir.

Mr. Litwin: Will your Honor let me have a ruling as to whether you will follow this course of time in your court or—

The Court: The Court remains mute.

By Mr. Litwin.

Q Prior to the drawing of the agreement, Mr. Cohen, was there anything said by Mr. Engel about when title was to be taken? At a certain date?

Mr. Klein: I object to the question on the ground that the agreement is a complete agreement and speaks for itself.

The Court: What is the object of the testimony, Mr. Litwin?

Mr. Litwin: I want to show by the conduct of the parties and by their conversation at the time the agreement was drawn that they desired time to be of the essence.

The Court: The witness represented both parties. I will allow him to answer the question.

Mr. Klein: Exception.

A As I recall it, he was anxious to take title as soon as possible.

By Mr. Litwin.

Q When you say "he," whom do you mean? A Engel.

Q Did he say why he was anxious to take title as soon as possible? A He did, but I don't recall the reason.

Q Did he say anything about being anxious to take title in order to collect the rent on the first of the month? A That may have been the reason, but I don't recall it.

Q Did he also say he wanted to take title on the first of November because of the fact that he wanted to get a store into these premises? A He suggested the date, the first of November—the date of closing title.

Q Was he at your office at a date subsequent to the date of the agreement and prior to November 1? A He was.

Q Did he direct you in any way to make a search on the property? A At what time?

Q Between the time you drew the agreement and November 1. A I was directed to make a continuation search at the time of drawing the agreement by Engel, and subsequently he came up to the office and told me not to search the property.

Q How many days after drawing that agreement was that? A I think two or three days.

Q Did he tell you why? A The very day after the drawing of the agreement.

Q Did he tell you why? A Yes, he did.

Q Why? A He told me he paid too much for the property.

Morris H. Cohen, cross.

Q What else? A I don't recall any other reason that he gave me.

Mr. Litwin: That is all.

Cross examination by Mr. Klein.

Q Mr. Cohen, do you recall speaking to me over the telephone regarding this matter?

The Court: When?

By Mr. Klein.

Q Subsequent to the signing of the agreement and before November 1, the date set for closing? A I remember talking to you, Mr. Klein, over the telephone. I don't remember whether it was before or after the 1st of November.

Q Do you remember calling me up on November 1?

The Court: How is that material?

Mr. Klein: I think Mr. Litwin attempted to advance the theory that time was of the essence. I want to show that there was something done.

The Court: Ask him in plain language: "Did you say so-and-so."

By Mr. Klein.

Q After November 1, 1927,Mr. Cohen, did you tell me that the time to close title would be extended?

Mr. Litwin: I object to that unless it is shown that Mr. Cohen was authorized to do that, under the case by Vice-Chancellor Bent-

ley in Jersey City, that the attorney is a limited agent and cannot bind the client unless he has express authority as to the extension of the time.

The Court: I will take it subject to your objection.

A I told you, Mr. Klein, that I thought that the time for closing title might be extended.

By Mr. Klein.

Q At the time you spoke to me over the phone, Mr. Cohen, wasn't Rosenthal in your office? A I don't believe he was.

Q Do you recall another conversation with me over the telephone a day or two subsequent to the first telephone conversation, in which you spoke to me about a new agreement to be entered into between the parties with a lower price?

Mr. Litwin: I object to that as not binding on the plaintiff.

The Court: I sustain the objection.

Mr. Klein: That is all.

Re-direct examination by Mr. Litwin.

Q Was Rosenthal at your office, accompanied by his wife, on November 1, ready to close title? A Both signed the deed on November 1. I have the deed.

Q Have you it here? A I think it is in my brief case.

Mr. Litwin: I offer it in evidence.

The Court: It will be marked.

(The paper referred to was received in evidence and marked "P. 4.")

Mr. Litwin: That is all.

JACOB ROSENTHAL, recalled as a witness in behalf of the plaintiff in rebuttal, testified as follows:

Direct examination by Mr. Litwin.

Q Mr. Rosenthal, at the time that this agreement was drawn, were you present with Mr. Engel at Cohen's office? A Yes, sir.

Q Did Mr. Engel say anything about the closing date in the agreement? A Why, Cohen—

By the Court.

Q Did he say anything? A Yes. He said he wanted title to be taken November 1.

By Mr. Litwin.

Q Did he say why? A Yes. He said he was living—as a matter of fact, he lives in the house now himself.

Q In this same house? A In the same house, upstairs. He was a tenant and he said he wanted to save—save paying rent to me and collect rent from them.

By the Court.

Q How long had he been living there as a tenant? A Oh, about September—

Q A month or so? A Had he been prior?

Q Yes. A About two months prior; two or three months prior to this contract.

Jacob Rosenthal, direct.

By Mr. Litwin.

Q Did you have a conversation with Mr. Engel over the phone the following day? A Yes, sir.

Q What was said between you? A Why, when I came to my office I found a notation on the desk to call—

By the Court.

Q What did he say to you? A He wanted me to come down to see him to his place of business, which is across the street from this very building in question. I asked him what the purpose was and he said he will tell me when I get there. I didn't go over that day. Instead of that, I went to the bank—

The Court: Just answer the questions.

By Mr. Litwin.

Q What did he say to you and what did you say to him? A He didn't tell me what he wanted.

Q Did you go down to his place of business? A Not that day.

Q When did you go down to his place of business? A After I had received that letter from him.

Q What did he say to you? A He said to me to see Mr. Cohen; he thought Mr. Cohen will tell me all about it.

Q You referred to a letter. Is that the letter that has been offered in evidence here? A (No answer.)

Jacob Rosenthal, cross.

By the Court.

Q Is it? A After this letter, yes, sir.

By Mr. Litwin.

Q From the time that this agreement was drawn up, have you done anything in the building on these premises? A No, sir.

Q I show you a certificate by the Tenement House Board and ask you whether you got that in the mail? A Yes, sir, in the mail.

Mr. Litwin: I offer this in evidence.

(The paper referred to was received in evidence and marked "P. 2.")

Cross examination by Mr. Klein.

Q Did you speak to me at my office subsequent to November 1, 1927? A Yes, sir.

Q What did you say to me about this matter?

The Court: Ask him in plain language: "Did you say so-and-so."

By Mr. Klein.

Q Did you say that you would let Mr. Engel still have the property at a reduction of $200.00, if he went through with the deal?

Mr. Litwin: I object to that as being immaterial.

The Court: I sustain the objection.

Mr. Klein: No further questions.

The Court: Is it stipulated that the building which covered the entire plot has been in

that position for over twenty years? You admit that?

Mr. Litwin: Yes.

The Court: You agree to that?

Mr. Klein: Only a part of it; the main building.

The Court: Yes. It has been where it is over twenty years?

Mr. Klein: I don't know whether that is so or not.

The Court: Where is the property? Market street?

Mr. Litwin: Yes, Market street.

Mr. Klein: Yes, forty years. That is, as I understand it. The old part has been there much longer than twenty years, but the new part—

The Court: I am not talking about the new part. That is not the subject of this suit.

Mr. Klein: The complaint is all about the new part. That is, as to the front line.

Mr. Litwin: No, as to the side line.

The Court: Let me see the survey.

JACOB ROSENTHAL, recalled as a witness by the Court, testified as follows:

By the Court.

Q Mr. Rosenthal, look at the survey. How long has the main building, fronting on Market street, been where it is? A Over forty years.

Edward Clawans, direct.

Q How long has the part marked "addition" in the rear of that building been there? A About the same length of time.

Q The same length of time? A I believe, yes.

By Mr. Litwin.

Q Why is it marked "new frame addition," if you know? A Because they took off the old clapboards to put new clapboards on.

Q On the outside? A Yes.

Q Was there any change made in the outer line? A Yes.

By the Court.

Q Or in the foundation? A No, sir.

EDWARD CLAWANS, recalled as a witness on behalf of the defendant, testified as follows:

Direct examination by Mr. Klein.

Q So far as that portion of the building which is designated in your survey as a new addition is concerned, can you tell us how old that part is? A That is very recent.

By the Court.

Q Do you know, sir? Do you know when it was originally built? A No, I don't know when it was originally built.

The Court: Therefore, he doesn't know.

Edward Clawans, direct.

The Witness: I know this, your Honor, that the survey was made in 1890. Here is a copy of the sketch.

The Court: Wait a minute.

By the Court.

Q The survey made in 1890 is what? A On these same premises.

Q What does that show? A It shows the porch, coming out straight, instead of at an angle.

Q That was in 1890? A Yes.

Q Since then you have no information about it? A No, sir.

The Court: That is all.

By Mr. Klein.

Q What part of it were they painting when you were there, Mr. Clawans?

The Court: That makes no difference.

Mr. Klein: I ask for an exception.

The Court: Now, Mr. Klein, you prepare a letter, referring to the cases in your argument which you think support your defense. Send it to me, and a copy to Mr. Litwin.

If Mr. Litwin thinks it is necessary to answer it, he can.

Mr. Litwin: Within what time?

Mr. Klein: Within a couple of days.

Certificates of Stenographer and Judge.

I, JAMES S. SLAVIN, a stenographer duly appointed to report stenographically the evidence given before the First District Court of Newark, New Jersey, in the case of Jacob Rosenthal *v.* Joseph Engel, do hereby certify that the foregoing is a true and correct transcript of the evidence given on the eighth day of March, 1928, before Hon. Cecil H. MacMahon, Judge of the First District Court of Newark, New Jersey, in said matter.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this ninth day of June, 1928.

JAMES S. SLAVIN.

I, CECIL H. MACMAHON, Judge of the First District Court, of Newark, New Jersey, do hereby certify that the foregoing is a transcript of the evidence given upon the trial of the case of Jacob Rosenthal *v.* Joseph Engel, on the eighth day of March, 1928, as certified to by James S. Slavin, the stenographer appointed to report such evidence stenographically.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 12th day of June, 1928.

CECIL H. MACMAHON,
Judge.

Exhibits P. 1 and P. 2.

EXHIBIT P. 1.

Newark, N. J. Oct 25 1927 No. 166
FIDELITY UNION TRUST COMPANY 55-9
FERRY
IRONBOUND BRANCH
STREET

Pay to the
order of Jacob Rosenthal $500.00
Five hundred 00/xx Dollars
Joseph Engel

Payment Stopped
Payment Stopped
Payment Stopped

EXHIBIT P. 2.

Certificate No. 216-1928 Plan No. 306 1927
BOARD OF TENEMENT HOUSE SUPERVISION
OF THE
STATE OF NEW JERSEY
Offices: 1060 Broad Street
Newark, N. J., 3/5 1928

THIS IS TO CERTIFY, That the alteration to tenement house known as 528 Market Street located in the City of Newark State of New Jersey, conforms to the requirements of the Tenement House Act.

ISSUED in accordance with the provisions of Par. 183, of Chapter 61, P. L. of New Jersey of 1904, approved March 25, 1904, on this 5th day of March 1928 to Jacob Rosenthal owner of said tenement house.

BOARD OF TENEMENT HOUSE SUPERVISION,

(SEAL) C Ray Swain
Secretary.

Exhibits D. 3 and P. 3.

EXHIBIT D. 3.

Conrad Deuchler, Sheriff
to
Jacob Rosenthal.

BK. S. 75 p. 523,
Deed.
D. Jan. 4, 1927
Ack. Jan. 11, 1927
Rec. Jan. 20, 1927.

Beg. the southerly line of Market St at a point therein dist. Westerly 44 ft 10 in fr. the Westerly line of Jackson Street, thence Southerly 20° 45′ West 40 ft; thence Southerly 38° 26′ West 58 ft. 10 in.; thence Northerly 51° 5′ West 25 ft; thence North 38° 42′ East 48 ft. 3 inches; thence Northerly 20° 45′ Easterly 42 ft. six inches to Market St; thence Southerly 69° 51′ Easterly alg. Market St 27 ft. to the place of beg.

EXHIBIT P. 3.

ENVELOPE

Mr J. Rosenthal
800 Broad st
City

Newark Oct 26 6:30 PM 1927 N. J.

J Engel
527 Market st
City

Mr Rosenthal!

I want to ask you, if you would be so kind and send me the check, I am willing to pay you, your expenses or troubles and also the lawyers work what he spent on account the agreement.

Mr Rosenthal I am telling you I am not in the position to settle the House if I could I would

Exhibit P. 4.

be to glad to do it. I might do it later on you was telling me that you vant my money and you are going to Court, just do it if you have an Iron Hart, because you kno this is money vich dont belong to you, I vas vorking for it hart.

Mr Rosenthal do you forget that we have a good God, He wouldn't ~~for for~~ forget me and he wouldn'nt forget you to, If you vant such money?

So up to you, its is very ease to go wrong that my hebrew Teacher set but what the end of it? please Mr Rosenthal send me my check I am a father of small children with a honest ~~Im-~~ Jewish feelings for to poor to thanking you that you pay attention to this, and think it over what your dooing. Engel

If you think you deserve this money you think wrong, because the house will cost you more then enogh.

EXHIBIT P. 4.

THIS INDENTURE, Made the 1st day of November in the year of Our Lord One Thousand Nine Hundred and twenty seven BETWEEN JACOB ROSENTHAL and BECKIE ROSENTHAL, his wife, of the City of Newark in the County of Essex and State of New Jersey party of the first part; and JOSEPH ENGEL, of the City of Newark in the County of Essex and State of New Jersey party of the second part:

WITNESSETH. That the said party of the first part, for and in consideration of ONE DOLLAR ($1.00) and other good and valuable consideration, lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before

Exhibit P. 4.

the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part being therewith fully satisfied, contented and paid, have given, granted, bargained sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part, and to his heirs and assigns, forever, ALL that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Newark in the County of Essex and State of New Jersey

BEGINNING in the Southerly line of Market Street at a point therein distant Westerly 44 feet 10 inches from the westerly line of Jackson Street; thence southerly 20 degrees 45 minutes west 40 feet; thence southerly 38 degrees 26 minutes west 58 feet 10 inches; thence northerly 51 degrees 5 minutes west 25 feet; thence north 38 degrees 42 minutes east 48 feet 3 inches; thence northerly 20 degrees 45 minutes easterly 42 feet 6 inches to Market Street; thence southerly 69 degrees 51 minutes easterly along Market Street 27 feet to the place of BEGINNING.

Being same premises conveyed to Jacob Rosenthal by Conrad Deuchler, Sheriff, by deed dated the 20th day of January, 1927, recorded in Book S-75 for Deeds of Essex County, page 523, etc.

This conveyance is made expressly subject to a mortgage originally in the sum of $15,000.00 held by Hudson & Essex Building & Loan Association.

TOGETHER with all and singular the houses, buildings, trees, ways, waters, profits, privileges, and advantages, with the appurtenances to the same belonging or in anywise appertaining, and

Exhibit P. 4.

the reversion and reversions, remainder and remainders, rents, issues and the profits thereof, and of every part and parcel thereof;

Also all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof,

To Have and to Hold, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to the proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever:

And the said parties of the first part, do for themselves, their heirs, executors and administrators covenant and agree to and with the party of the second part, his heirs and assigns, that the said parties of the first part, are the true, lawful and right owners of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever:

And Also that the said party of the first part now have good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid;

And Also that the said parties of the first part will Warrant secure, and forever defend the said

Exhibit P. 4.

land and premises unto the said party of the second part, his heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever.

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

In Witness Whereof, the said party of the first part have hereunto set their hands and seals the day and year first above written.

JACOB ROSENTHAL (L. S.)
BECKIE ROSENTHAL (L. S.)

Signed, Sealed and Delivered
in the presence of

Helen D. O'Keefe.

Exhibit D. 1.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

BE IT REMEMBERED that on this 1st day of November in the year of our Lord One Thousand Nine Hundred and twenty seven, before me, the subscriber, personally appeared JACOB ROSENTHAL and BECKIE ROSENTHAL, his wife, who, I am satisfied, are the grantors mentioned in the within Instrument to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

And the said BECKIE ROSENTHAL, being by me privately examined, separate and apart from her said husband, further acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, FREELY, without any fear, threats or compulsion of her said husband

HELEN D. O'KEEFE,
Notary Public of N. J.
(SEAL)

EXHIBIT D. 1.

THIS AGREEMENT made the 25th day of October, in the year of our Lord One Thousand Nine Hundred and twenty seven BETWEEN JACOB ROSENTHAL, of the City of Newark, in the County of Essex and State of New Jersey party of the first part; AND JOSEPH ENGEL, of the City of Newark in the County of Essex and State of New Jersey party of second part;

Exhibit D. 1.

WITNESSETH, That the said party of the first part, for and in consideration of the sum of NINETEEN THOUSAND ($19,000.00) DOLLARS, to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that his the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed of Warranty free of all encumbrances on or before the 1st day of November next ensuing the date hereof, ALL that certain lot, tract, or parcel, of land and premises, hereinafter particularly described situate, lying and being in the City of Newark in the County of Essex and State of New Jersey

BEGINNING in the Southerly line of Market Street at a point therein distant Westerly 44 feet 10 inches from the westerly line of Jackson Street; thence southerly 20 degrees 45 minutes west 40 feet; thence southerly 38 degrees 26 minutes west 58 feet 10 inches; thence northerly 51 degrees 5 minutes west 25 feet; thence north 38 degrees 42 minutes east 48 feet 3 inches; thence northerly 20 degrees 45 minutes easterly 42 feet 6 inches to Market Street; thence southerly 69 degrees 51 minutes easterly along Market Street 27 feet to the place of BEGINNING.

AND the said party of the second part for himself, his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, his heirs, executors, administrators and assigns, that the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said

Exhibit D. 1.

party of the first part, the said sum of NINETEEN THOUSAND ($19,000.00) DOLLARS, as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

On Execution of this agreement for which this is also a receipt (FIVE HUNDRED DOLLARS) .....$	500.00
On delivery of deed, cash (FIFTEEN HUNDRED DOLLARS).	1500.00
By assuming the mortgage at present a lien on the premises, and paying the same according to the terms thereof, held by Hudson & Essex Building & Loan Association, (FIFTEEN THOUSAND DOLLARS)	15000.00
On purchase money Bond and Mortgage, same containing usual interest, tax, assessment, insurance and installment default clauses, and an agreement not to claim credit on the interest payable on bond and mortgage, by reason of any tax assessed, or to be assessed against the premises, with interest at 6% payable semi-annually, for two (2) years (TWO THOUSAND DOLLARS)	2000.00
TOTAL	$19000.00

IT IS UNDERSTOOD AND AGREED that all adjustments of taxes, water, interest and insurance credits due the seller on all payments made on premises to Hudson & Essex Building & Loan Association are to be added to the second mort-

Exhibit D. 1.

gage of TWO THOUSAND ($2000.00) DOLLARS above referred to and the said mortgage is to be increased in conformity to said adjustment.

The seller hereby guarantees that he will secure the signature of Beckie Rosenthal, his wife, to the Deed conveying her dower right to the purchaser in and to the premises in question.

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

And the said party of the part hereby agrees to pay to the licensed and authorized agent
a commission of % on the purchase price aforesaid.

And it is Further Agreed, by the parties to these presents, that the said part of the second part, his heirs and assigns, may enter into and upon the said land and premises on the 1st day of November next ensuing the date hereof, and from thence take the rents, issues and profits to his and their use.

And it is Further Agreed, by the parties hereto, that the said deed shall be delivered and received at office of MORRIS H. COHN, #60 Park Place, Newark, N. J. between the hours of ten o'clock in the forenoon and four o'clock in the afternoon on the said 1st day of November next ensuing the date hereof.

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

Gas and electric fixtures, gas stoves, hot water heaters and chandeliers, carpets, linoleum, mats

Exhibit D. 1.

and matting in halls, screens, shades, awnings, ash cans, heating apparatus, if any, and all other personal property appurtenant to or used in the operation of said premises is represented to be owned by seller and is included in this sale.

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

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

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

It is expressly understood and agreed that the title to the land and premises hereby agreed to be conveyed is not derived from any proceedings or any Act for the Sale of and for non-payment of the municipal taxes or assesments, or by adverse possession.

The premises above described are sold subject to restrictions appearing of record, and zoning ordinances, if any.

If at any time before the delivery of the deed the premises or any part thereof shall be or shall have been affected by any assessment or

Exhibit D. 1.

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

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

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

In Witness Whereof, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

JACOB ROSENTHAL (L. S.)
JOSEPH ENGEL (L. S.)

Signed, Sealed and Delivered
in the presence of

M. H. Cohn.

Exhibit D. 1.

In consideration of mutual promises and agreements herein stated, we hereby agree to extend the date for the delivery of deed and execution of this contract to
at same hour and place
WITNESS hand and seal this
day of A. D. 19 .

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

BE IT REMEMBERED, That on this 25 day of October in the year of our Lord One Thousand Nine Hundred and twenty seven, before me, the subscriber, M. C. C. of N. J., personally appeared JACOB ROSENTHAL who, I am satisfied, is the grantor mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon he acknowledged that, he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

And the said being by me privately examined, separate and apart from said husband , further acknowledged that signed, sealed and delivered the same as voluntary act and deed, FREELY, without any fear, threats or compulsion of said husband

M. H. COHN,
M. C. C. of N. J.

Exhibit D. 2.

EXHIBIT D. 2.

STATE OF NEW JERSEY

BOARD OF TENEMENT HOUSE SUPERVISION
1060 Broad Street
Newark, N. J.

November 10, 1927.
Referring to tenement house
528 Market St., Newark, N. J.

Messrs. Cohen & Klein,
207 Market Street,
Newark, N. J.

Gentlemen,

Complying with the request contained in your communication of November 4, 1927 we are sending you herewith a list of violations of the Tenement House Act, on the above premises, as shown by an inspection made on November 9, 1927:

Two dark rooms each, right and left apartments, second and third floors and one dark room first floor, left apartment must be lighted by windows as provided in Par. 122 of the Tenement House Act.

Very truly yours,
C. RAY SWAIN,
Secretary.

Excerpt from TENEMENT HOUSE ACT, Paragraph 186,—"In case of the transfer of any tenement house it shall be the duty of the grantor or grantee of such tenement house to file with the said BOARD a notice of such transfer, stating the name of the new owner, within thirty days of such transfer."

SPECIFICATION OF DETERMINATIONS.

Filed June 15, 1928.

NEW JERSEY SUPREME COURT.

JACOB ROSENTHAL, *Plaintiff-Appellee,* *vs.* JOSEPH ENGEL, *Defendant-Appellant.*	*On Appeal from the First District Court of the City of Newark.* *Specification of Determinations.*

The following is a specification of determinations of the First District Court of the City of Newark, with respect to which the defendant-appellant is dissatisfied in point of law:

1. The District Court erred in granting judgment for the plaintiff and against the defendant.

2. The District Court erred in rendering a judgment for the plaintiff and against the defendant upon the facts.

3. The District Court erred in rendering judgment for the plaintiff against the defendant as matter of law.

4. The District Court erred in its failure to grant the defendant a judgment on his counter-claim against the defendant on the facts.

5. The District Court erred in its failure to grant a judgment in favor of the defendant on his counter-claim and against the plaintiff as matter of law.

Specification of Defenses.

6. The District Court erred in granting judgment in favor of the plaintiff against the defendant for the reason that the building upon the premises in question, belonging to the plaintiff, under contract to be sold to the defendant, was not all within the boundary lines of said premises, and that encroachments existed, and this being a fact, the plaintiff was guilty of a breach of said contract, and the defendant was under no duty or obligation arising out of said contract.

7. The District Court erred in rendering judgment in favor of the plaintiff and against the defendant, for the reason that the contract of sale entered into between the plaintiff and the defendant expressly provides that "It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor, and that there are no encroachments thereon and that the buildings comply with municipal ordinances and regulations and the provisions of the New Jersey State Tenement House Act as enforced by the State Board of Tenement House Supervision to be shown by report of the department or board enforcing the same where such ordinances, regulations and said act apply;" that the evidence adduced at the trial of this cause in the District Court disclosed that the building upon the premises in question is not all within the boundary lines of the property as described in the deed therefor; that the evidence adduced at said trial of this cause disclosed that the buildings upon the premises in question did not comply with the regulations and provisions of the New Jersey State Tenement House Act as enforced by the State Board of Tenement House Supervision to be shown by report of the board or the department.

Specification of Defenses.

8. The District Court erred in rendering judgment for the plaintiff against the defendant for the reason that the contract of sale between the plaintiff and defendant, aforementioned, was not a valid contract of sale, and was not enforceable by the plaintiff against the defendant.

9. The District Court erred in rendering judgment for the plaintiff against the defendant for the reason that there was a failure on the part of the plaintiff of the consideration mentioned in said contract of sale between the plaintiff and the defendant.

10. The District Court erred in permitting the witness, Morris H. Cohen, to answer the following question over objection:

"Q Prior to the drafting of the agreement, Mr. Cohen, was there anything said by Mr. Engel about when title was to be taken? At a certain date?"

11. The Court erred in sustaining the objection to the following question asked by defendant's attorney of the witness, Jacob Rosenthal, the plaintiff:

"By Mr. Klein.

Q Did you say that you would let Mr. Engel still have the property at a reduction of $200 if he went through with the deal?"

12. The District Court erred in refusing to permit the witness, Edward Clawans, to answer the following question:

"By Mr. Klein.

Q What part of it were they painting when you were there?"

Dated June 14, 1928.

COHEN & KLEIN,
Attorneys for Defendant-Appellant.

Specification of Defenses.

Service of a copy of the within specification of determinations is hereby acknowledged this 14th day of June, 1928.

DAVID M. LITWIN,
Attorney for Plaintiff-Appellee.

TRANSCRIPT OF CLERK'S DOCKET.

FIRST DISTRICT COURT.
Newark, N. J.

JACOB ROSENTHAL,
Plaintiff,

vs.

JOSEPH ENGEL,
Defendant.

Plaintiff's costs.

Summons	$ 2.10	Oct. 31
Listing	1.50	Nov. 9
Attorney fee	25.00	
	$28.60	

David M. Litwin, plaintiff's attorney, 527 Market street.

A state of demand was filed and a summons in the above-stated cause was issued on the thirty-first day of October, 1927, returnable on the tenth day of November, 1927, wherein the plaintiff demands of the defendant the sum of five hundred dollars.

The summons and state of demand was served and returned as follows:

I served the within summons November 2, 1927, on the defendant, Joseph Engel, by reading it to him and giving him a copy thereof.

MARTIN B. ROSE,
Constable.

1927

Nov. 10 This cause was adjourned to Nov. 17, 18; Dec. 2, 16, 23; Jan. 6, 13, 20, 27; Feb. 2, 9, 17, 24; Mar. 2, 8.

Nov. 17 Specification of defenses filed.

Nov. 17 Counter-claim filed.

1928

Mar. 8 The plaintiff and defendant appearing, the cause was tried at this time.
James S. Slavin, stenographer, sworn.
Plaintiff and Morris H. Cohn, sworn.
Check, report, letter and deed in evidence.
Defendant, Edward Clawans and Charles McCloskey, sworn.
Agreement, survey, tenement house report and deed in evidence.
The evidence being closed the Court reserved decision.

May 29 The Court rendered judgment in favor of the plaintiff and against the defendant in the sum of five hundred dollars ($500.00) damages with costs, whereupon judgment is rendered in favor of the plaintiff and against the defendant in the sum of five hundred dollars damages with costs.

June 7 Notice of appeal.

June 7 Appeal bond filed—$1.00.

Transcript of Clerk's Docket.

I, LOUIS HECHT, Clerk of the First District Court of the City of Newark, in the County of Essex and State of New Jersey, do hereby certify that the foregoing is a true copy of the record and proceedings in the case of Jacob Rosenthal *v.* Joseph Engel, as taken from the First District Court Docket No. 236, page 112694.

Dated June 14, 1928.

LOUIS HECHT,
Clerk.

(SEAL)

MEMORANDUM.

Filed May 29, 1928.

In this case the defendant gave the plaintiff a check for $500.00 on an agreement for the purchase of real estate, the agreement being in writing. The next day the defendant stopped payment on his check and sought escape from his contract. No legal excuse has been advanced for the breach of the contract by the defendant.

Judgment for plaintiff $500.00.

OPINION OF SUPREME COURT.

Filed March 11, 1929.

NEW JERSEY SUPREME COURT.

No. 417 October Term, 1928.

JACOB ROSENTHAL,
Respondent,

vs.

JOSEPH ENGEL,
Appellant.

Argued October 2, 1928. Decided February , 1929.

On appeal from First District Court of Newark.

For appellant: Cohen & Klein.

For respondent: David Litwin.

Before Justices Trenchard, Kalisch and Lloyd.

Per Curiam:

This was an action in the First District Court of Newark to recover on a check for $500 given to the defendant as deposit money at the execution of an agreement between the plaintiff as vendor and the defendant as purchaser for the sale of property in the City of Newark. The check was given on October 25, 1927, and on the following day payment was stopped, defendant writing a letter stating that he could not go on with the transaction, but giving no reason other than his inability to meet the payments. When the case came on for trial it was sought to show

that the property was subject to encroachments of various kinds and this became an issue of fact as we think for the trial court. The case was heard by the judge without a jury who gave judgment for the plaintiff. The defendant appeals and files twelve specifications of determinations with which he is dissatisfied in point of law, the substance of which is that the court erred for various reasons in giving judgment for the plaintiff.

The crucial point in the case was whether the evidence so clearly established the existence of the encroachments as to require a finding by the trial judge in favor of the defendant on that issue. Our reading of the testimony convinces us that it was not of a character to justify the withdrawal of the question as one of fact. A surveyor who was called by the defendant gave testimony from which it might be inferred that the encroachments existed but his testimony was based largely on an old survey which had not been proved and was far from conclusive that said encroachment did exist.

A tenement house inspector testified that there were violations of the tenement house law in the property but there was nothing to indicate that this could not have been removed at the time fixed for settlement.

Under the circumstances we think that the question presented was one of fact, which cannot be here reviewed and that the judgment cannot consequently be disturbed.

It is, therefore, affirmed.

ORDER AFFIRMING JUDGMENT.

NEW JERSEY SUPREME COURT.

No. 417 October Term, 1928.

JACOB ROSENTHAL, *Plaintiff-Respondent,* *vs.* JOSEPH ENGEL, *Defendant-Appellant.*	*On Contract.* *Order Affirming Judgment.*

This cause having been duly argued at the October Term, 1928, of this Court, by Philip Klein of counsel for the appellant, and David M. Litwin, of counsel for the respondent, and the Court having inspected the record and judgment below and considered the grounds of appeal therein,

It is, thereupon, on this day of March, 1929,

ORDERED, that the judgment of the First District Court of the City of Newark be in all things affirmed, with costs, and the record be remitted to the Court below to be proceeded with according to law and the practice of said Court.

Entered March 21, 1929, on motion of

DAVID M. LITWIN,
Attorney for Respondent.

Due and legal service of a true copy of the within order is hereby acknowledged this 26th day of March, 1929.

COHEN & KLEIN,
Attorney for Defendant-Appellant.

NOTICE OF APPEAL AND GROUNDS

NEW JERSEY SUPREME COURT.

JACOB ROSENTHAL, *Plaintiff-Appellee,* *vs.* JOSEPH ENGEL, *Defendant-Appellant.*	*On Appeal.* *Notice of Appeal and Grounds.*

To David M. Litwin, Esq., attorney of plaintiff-appellee.

TAKE NOTICE that the defendant-appellant, Joseph Engel, appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment of the New Jersey Supreme Court, on the following grounds:

"Because the Supreme Court erred in affirming the judgment rendered by the First District Court of the City of Newark."

COHEN & KLEIN,
Attorneys of Defendant-Appellant.

April 10, 1929.

Service of a copy of the within Notice of Appeal and Grounds is hereby acknowledged this 11th day of April, 1929.

DAVID M. LITWIN,
Attorney of Plaintiff-Appellee.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

JACOB ROSENTHAL, *Plaintiff-Appellee,* *vs.* JOSEPH ENGEL, *Defendant-Appellant.*	*On Appeal from the Supreme Court.*

BRIEF OF DEFENDANT-APPELLANT.

Facts.

Plaintiff-appellee, Jacob Rosenthal, instituted suit in the First District Court of the City of Newark, on a check for $500.00, executed by the defendant-appellant on October 25, 1927, on which check the defendant-appellant stopped payment the following morning, October 26, 1927 (State of Case, p. 3, ll. 10-40).

The check had been given as a deposit for the purchase of property known as No. 528 Market street, Newark, New Jersey, owned by the plaintiff-appellee (State of Case, p. 54, ll. 9-11).

The agreement for the sale and purchase of said Market street property was in writing, duly executed by the plaintiff-appellee, Jacob Rosenthal, as vendor, and Joseph Engel, defendant-appellant, as vendee (State of Case, pp. 52-57).

Said agreement contained, among other provisions, the following clause:

> "It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor, and that there are no encroachments thereon and that the buildings comply with municipal ordinances

and regulations and the provisions of the New Jersey State Tenement House Act as enforced by the State Board of Tenement House Supervision, to be shown by the report of the department or board enforcing the same where such ordinances, regulations and said act apply'' (State of Case, p. 56, ll. 16-28).

On the morning following the execution of the said agreement, as a result of the conversation held between the defendant-appellant, Joseph Engel, and his next-door neighbor, Mr. Weiss, the defendant-appellant, Joseph Engle, stopped payment on the check (State of Case, p. 14, ll. 1-9), and rescinded the contract (State of Case, p. 32, ll. 1-16). The subject matter of the conversation between the defendant-appellant, Joseph Engel, and the said Mr. Weiss, was not testified to by the defendant-appellant by reason of an objection by plaintiff-appellee's attorney, which objection the Court sustained (State of Case, p. 13, ll. 30-34). The defendant-appellant, Joseph Engel, was a resident of the property which he had agreed to buy from plaintiff-appellee, and the said Mr. Weiss occupied the premises immediately adjoining (State of Case, p. 13, ll. 30-32).

The agreement aforesaid provided for the closing of title on November 1, 1927, there being a lapse of only seven days between the date of the agreement and the closing date provided in said agreement (State of Case, p. 53, ll. 16-17).

By reason of a survey made by Edward Clawans, Surveyor, whose qualifications were admitted (State of Case, p. 14, ll. 20-24), there was disclosed that there existed on the premises in question, owned by the plaintiff-appellee, and under said agreement to be conveyed to the defendant-appellant, the following encroachments:

1. The roof cornice of the building encroaches in the street fifteen inches.

2. The store cornice encroaches five inches in the street.

3. The brick front is one-half inch over the line.

4. In the rear the brick footing encroaches two inches.

5. The frame is four and one-quarter inches over on the westerly side.

6. The brick footing course in the rear on the westerly side encroaches six and one-quarter inches.

7. The brick footing on the easterly side is over two inches.

8. The frame is seven and one-half inches over the line.

9. The brick footing course in the rear on easterly side encroaches nine and one-half inches (State of Case, p. 16, ll. 10-22; and State of Case, p. 59).

The inspector of the New Jersey Tenement House Commission testified that an inspection of the property made on November 10, 1927, disclosed the following violations of the Tenement House Act:

1. Two dark rooms existed in each of the apartments on the third floor.

2. One dark room existed on the first floor of the left apartment (State of Case, p. 29, ll. 3-14). Said inspector testified that these violations had been in existence for several years past (State of Case, p. 29, ll. 11-14).

Defendant-appellant filed a counter-claim in the District Court, setting forth that by reason of the default of the plaintiff-appellee, Jacob Rosenthal, with respect to the provisions of the agreement relating to the encroachment clause and the Tenement House Act clause, said defendant-appellant was entitled to rescind said contract, and was entitled to damages resulting from the default of the said plaintiff-appellee, which was limited to $40.00, the cost of the survey incurred by the defendant-appellant (State of Case, pp. 5-7).

Defendant-appellant filed a specification of defenses, pursuant to plaintiff's demand. Said specification embodied, among others, the following defenses: that the building on the premises in question was not all within the boundary lines, that encroachments existed, and that said building did not comply with the Tenement House Act, contrary to the terms of the agreement, and that plaintiff was not entitled to recover on said check because of failure of consideration (State of Case, pp. 8-10).

The trial court, at the end of the case, reserved decision, and subsequently rendered judgment on May 29, 1928, in favor of the plaintiff and against the defendant, in the sum of $500.00, from which judgment the defendant appealed.

The Supreme Court filed an opinion affirming the judgment (State of Case pp. 70 to 71). An order affirming the judgment was entered (State of Case p. 72), from which order of affirmance the defendant appeals to this court.

ARGUMENT.

POINT I.

Defendant-appellant was lawfully entitled to stop payment on said check because of existence of encroachments.

The defendant-appellant, after the execution and delivery of the agreement between the plaintiff-appellee and the defendant-appellant, for the sale and purchase of premises No. 528 Market street, Newark, N. J., was lawfully entitled to stop payment on the check which he had given to the plaintiff on account of the purchase price of said premises.

Said contract contained the following provisions:

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

The question as to when a purchaser is legally entitled to stop payment on a check given as a deposit on account of the purchase price of real estate, is discussed in the case of *Thompson* v. *Killheffer*, 99 N. J. Law, p. 439, in an opinion by Mr. Justice Kalisch, for the Court of Errors and Appeals. There it was determined that a purchaser may stop payment on such a check where the contract between the vendor and the vendee

is not valid or enforceable, for in the cited case it is stated, *at page 441*:

> "We think in the posture of affairs, as above recited, the defendant was legally warranted in stopping payment of the check.
>
> "The Supreme Court, in reaching its conclusion that the plaintiff was entitled to recover, proceeded upon the theory that the contract between the parties was a valid contract of sale and was enforceable, for it cites Steinbach *v.* Pettingill, 67 N. J. L. 36, in support of the result reached. An examination of the facts of the cited case makes it obvious that those facts essentially differentiated it from the conceded facts in the case *sub judice,* in that in the Pettingill case the contract which gave rise to the controversy was valid and enforceable, whereas in the present case, even assuming that there was a contract of sale contemplated by Hall and the defendant, it was not a valid and enforceable contract of sale between the plaintiff and defendant."

The test to be applied, therefore, is to be found in the answer to the question: Is the contract between the vendor and the vendee a valid or enforceable one? A contract between two parties may be or may become invalid or unenforceable as between said parties for one of several reasons, to wit: said contract may be against public policy; said contract may be void because of some constitutional or statutory inhibition; said contract may be between parties of incompetency; said contract may have been procured by fraud or duress; or finally, said contract may be invalid or unenforceable as between said parties because it contains certain provisions which the covenantor cannot or does not live up to or fulfill, constituting a lack or failure of consideration.

It is the contention of the defendant-appellant that the plaintiff-appellee, in covenanting with

and representing to the defendant-appellant that the building on said premises is all within the boundary lines, and that there are no violations in said structure of the Tenement House Act, rendered said contract invalid and unenforceable on the part of the plaintiff-appellee as against the defendant-appellant, Joseph Engel, because said covenants and representations were untrue in fact, both on the day of the execution of the agreement and on the day set therein for closing of title. This being so, the rule announced in the case of *Thompson* v. *Killheffer, supra,* supplies the defendant-appellant with sufficient legal justification in stopping payment of the check given as a deposit on account of the purchase price.

The defendant-appellant, at the trial proved conclusively the existence of said encroachments and the violations of said Tenement House Act.

The surveyor, Edward Clawans, whose qualifications as a surveyor were admitted by plaintiff's attorney at the trial (State of Case, p. 14, ll. 20-24), testified that the following encroachments existed:

1. The roof cornice of the building encroaches in the street fifteen inches.

2. The store cornice encroaches five inches in the street.

3. The brick front is one-half inch over the line.

4. In the rear the brick footing encroaches two inches.

5. The frame is four and one-half inches over on the westerly side.

6. The brick footing course in the rear on the westerly side encroaches six and one-quarter inches.

7. The brick footing on the easterly side is over two inches.

8. The frame is seven and one-half inches over the line.

9. The brick footing course in the rear on easterly side encroaches nine and one-half inches. (State of Case, p. 59.)

Said surveyor was subjected to a rigid cross examination both by the plaintiff's attorney and the Court himself, with a view toward shaking the value of said testimony as to the boundary lines of the premises in question. Without admitting that the evidenciary value of the surveyor's testimony in this respect was diminished at all, the defendant contends that one portion of the surveyor's testimony stands out unshaken, uncontradicted, and indeed, unattacked or unquestioned. Reference is now made to his testimony that the building of the plaintiff-appellee encroaches on Market street to the extent of fifteen inches (State of Case, p. 16, ll. 12-15), in one particular, and five inches in another. This fact alone renders said contract unenforceable on the part of the plaintiff-appellee against the defendant-appellant.

In the case of *Schiff* v. *Alexander,* 3 N. J. Misc. Rep., p. 817, the facts are: The plaintiff brought suit to recover a deposit of $2,000.00 paid on account of the purchase price of certain real estate. The contract contained the following clause:

> "It is understood and agreed that the buildings upon said premises are all within the boundary lines as described in the deed therefor, and that there are no encroachments thereon, and that the buildings comply with municipal ordinances and regulations and the provisions of the New Jersey State

> Tenement House Act, as enforced by the State Board of Tenement House Supervision, to be shown by the report of the department or board enforcing the same where such ordinances, regulations and said act apply."

Plaintiff also sought to recover, in this suit, a $300.00 search and surveyor's fee. The basis of the suit was that the buildings were not all within the boundary lines, but that certain portions of the building extended over into the street, and that some rear portions of the building encroached over on adjoining premises. The defendant filed an answer denying the existence of the encroachments. Plaintiff moved to strike out the answer and for summary judgment and supported his motion by affidavits, including affidavits of two surveyors showing that the encroachments existed. The defendants failed to present any answering affidavits, but the Court, nevertheless, determined the motion on the merits of the separate defenses contained in the answer. *At page 822* the Court said:

> "The defendants having failed to file any affidavits or submit other proofs to offset the affidavits filed by the plaintiffs to the effect that the buildings upon the premises in question are not within the boundary lines thereof, and that there are encroachments thereon, the court concludes that the buildings are not within the boundary lines, and that there is an encroachment in the rear, and this being a fact, the defendants were guilty of a breach of the contract on their part and the plaintiffs were under no duty or obligation to go any further in the matter. Caporala *v.* Rubin 92 N. J. L. 463.
>
> "The second separate defense must therefore, be struck out.
>
> "The third separate defense alleges that the buildings erected upon the land described in the agreement were erected in accordance with the laws and ordinances of the State

of New Jersey, and if any windows or cellar entrances project over part of the sidewalk, that this was done by lawful municipal authority and does not whatever constitute a defect or encumbrance to the title, and that with regard to the encroachment of the gutter in the rear, the said encroachment is so immaterial and of such trifling effect that it can be disregarded.

"This defense is clearly frivolous.

"It is well to note, first, that there is no charge in the complaint that the provision in the contract against violation of municipal ordinances has been in any way violated. The charge in the complaint is that the buildings encroach upon the highway and that there is an encroachment upon the premises in question by reason of a gutter on a building in the rear, and the contract of sale expressly provides that it is understood and agreed that the buildings are all within the boundary lines of the property, and that there are no encroachments thereon. It becomes, therefore, immaterial whether the encroachments are extensive or only slight, and whether the buildings extend beyond the lines only a few inches or many feet, for the parties to a contract clearly have the right to make such stipulations in their contract as they see fit, so long as such stipulations do not violate the law or public policy.

"The same clause as contained in this contract was construed by Vice Chancellor Bentley in the case of Herring *et al. v.* Esposito, 119 Atl. Rep. 765, where the court said that to disregard this clause of the contract would be to draw a new contract for the parties upon which their minds have never met, and that is a policy that courts have universally refrained from acting upon, and the court further says that such a case is entirely distinguishable from the rule laid down in Van Blarcom *v.* Hopkins, 63 N. J. Eq. 466; Scheiman *v.* Bloch, 117 Atl. Rep. 389, and all other cases in which this specific clause is not contained.

"Counsel for the defendants in the case *sub judice,* however, imply that the case of Herring *v.* Esposito can be distinguished from the facts of the case being considered, because they say in that case the encroachment was at least two feet and one and five-eighth inches in the rear, and that the quoted case does not deal with encroachments upon the highway, authorized by municipal authorities, and that the case being one of novel impression, the court in the case *sub judice* is not necessarily bound by the pronouncement of the Vice Chancellor, but unfortunately this case has been followed in the law by the case of Goldstein *v.* Ehrlick, 2 N. J. Adv. R. 1166, where it is held that encroachments, even slight, are sufficient to warrant a rescission of the contract containing such a clause as above quoted."

In the case of *Herring* v. *Esposito,* 94 Eq. p. 348, Vice Chancellor Bentley, in considering a contract containing a similar clause regarding encroachments, says, *at page 350*:

"To disregard the clause of the contract quoted above would be to draw a new contract for the parties, upon which their minds have never met, and that is a policy that courts have universally refrained from acting upon.

"I want to expressly point out that this case is entirely distinguishable from Van Blarcom *v.* Hopkins, 63 N. J. Eq., 466; Scheinman *v.* Bloch, 117 Atl. Rep. 389, and all other cases in which this specific clause is not contained.

"I feel that under the often-stated rule the contract in this case cannot be properly read without the clause mentioned, and that the complainant is unable to perform his part of the agreement, and will, therefore, advise a decree dismissing the bill and directing the complainant to return to the defendant her deposit of one thousand dollars."

Following this line of thought, it cannot be questioned that the plaintiff-appellee would have been unable to obtain specific performance through the medium of our Courts of Chancery; in other words, in a suit for specific performance by the plaintiff-appellee against the defendant-appellant, based on the same facts as are presented to this court on this appeal, the vendor's bill would have been dismissed, and the vendor would have been directed to return the deposit to the vendee.

It is obvious that the policy both of the law and equity courts of New Jersey, has been definitely established with reference to agreements for the sale and purchase of real estate, which agreements contain an express stipulation against the existence of encroachments. This policy is to the effect that in cases involving such agreements containing such stipulations, where encroachments do exist, the vendor is deemed to be in default and guilty of a breach of contract. *Herring* v. *Esposito, supra; Schiff* v. *Alexander, supra.* And the policy further embodies the doctrine that the courts will direct such a defaulting vendor, whether he find himself in a court of equity or a court of law, to return to the vendee the down money or deposit which he received.

In the case of *White Way Corporation* v. *Heinle*, decided by the Supreme Court on July 16, 1928, 142 Atl. p. 667, suit was brought for the recovery and the repayment of moneys paid on account of the purchase price of real estate, on the ground that title was defective. Plaintiff received a verdict in his favor for the full amount of the moneys which had been paid to the defendant. This opinion holds:

> "It conclusively appeared that the front of the building upon this property encroached

> upon the public street; that is, that the eaves overhung the highway, and that the porch also constituted an encroachment. It was this fact, among others, that led the plaintiff to refuse to accept a conveyance. We think it was justified in doing so. It was entitled at law to have delivered to it a deed in strict conformity with the provisions of the agreement, or else to have its money back. It was not required to take property where the building encroached upon the public street to the extent which has been indicated, and thus subject itself to the liability of a law suit by the municipality, whose right to compel the removal of the obstructions could not be affected by lapse of time. Our conclusion is that the trial court was justified in directing a verdict for the plaintiff, and that the rule to show cause should be discharged."

With this in mind, the defendant-appellant, Joseph Engel, could say, as was said in the opinion in *Schiff* v. *Alexander, supra:*

> "In the case *sub judice,* the defendants were unable to perform the original contract either on the day fixed in the contract for performance, or at any other time."

The unquestionable fact being that the plaintiff-appellee, Jacob Rosenthal, was, on the day fixed for the closing of title, or at any other time, unable to perform the terms of his contract, said contract on his part was invalid and unenforceable as against his purchaser, defendant-appellant.

The contract between the plaintiff and defendant being invalid and unenforceable on the part of the plaintiff-appellee, the defendant-appellant, Joseph Engle, was legally excused from making a tender of the purchase price on the day fixed by the contract for performance, or at any other time. The contract between the plaintiff and

the defendant demanded compliance with its provisions from both the plaintiff and the defendant simultaneously.

In other words, plaintiff was obligated to deliver a deed to the defendant, in strict accordance with the terms and provisions of the contract (*White Way Corporation* v. *Heinle, supra*), in return for which the defendant was under obligation to pay the purchase price in the manner stated in the contract. This question is discussed in the case of *Caporale* v. *Rubine,* 92 N. J. Law, p. 463, where Mr. Justice Kalisch, speaking for the Court of Errors and Appeals, *at page 465,* says:

> "It is obvious from the agreement between the parties that there was to be a concurrent performance by both, since the performance of one was the consideration of the performance of the other. Neither was required to make a tender first.
>
> "The legal rule is well stated by Chief Justice Ewing in Ackley *v.* Richman, 10 N. J. L. 304 (at p. 306), where he says: 'The parties to a contract for the sale of land, unless there is something peculiar in its structure, expect and intend the performance on each part at the same time. The delivery of the deed and the payment of the money are to be simultaneous. Each supposes he is to perform upon a correspondent performance on the other part. Neither supposes he is bound to perform if the other neglects or refuses, and is to resort after performance to a remedy on the covenant. Neither supposes he is liable to an action by the other, when the other has not performed, or offered to perform.' "

So in the present case, the defendant Joseph Engel, did not suppose that he was liable to an action by Jacob Rosenthal when the said Jacob Rosenthal had not performed or offered to per-

form. By performance is meant not merely the tender of a deed, without regard to the other provisions of the contract between the plaintiff and defendant, but, on the contrary, the tendering of a deed, coupled with the performance of the other terms and provisions of said contract by him, the said Jacob Rosenthal, to be performed.

Furthermore, in considering this phase of the question, the following excerpt from *Schiff* v. *Alexander, supra,* should be borne in mind:

> "* * * the court concludes that the buildings are not within the boundary lines, and that there is an encroachment in the rear, and this being a fact, the defendants were guilty of a breach of the contract on their part and the plaintiffs were under no duty or obligation to go any further in the matter."

So in the instant case, the fact is that the building was not all within the boundary lines and encroachments existed, and this being so, the plaintiff-vendor, Jacob Rosenthal, was guilty of a breach of the contract on his part and the defendant-vendee, Joseph Engel, was under no obligation of going further in the matter.

The plaintiff at the trial was content to prove a prima facie case on the check on which payment was stopped, and which check formed the basis and the only basis of his action against the defendant. Then he rested. Not one solitary jot of evidence did plaintiff offer to resist the contention of the existence of encroachments. He produced no surveyor to contradict the one called by the defendant. The only evidence before the trial court relating to encroachments was given by defendant's witness, Edward Clawans, whose qualifications plaintiff admitted. The plain-

tiff knew that at the trial the defendant would rely on the existence of encroachments as a defense, for the defendant, pursuant to plaintiff's demand, filed a specification of defenses on November 17, 1927, whereas the trial did not occur until March 8, 1928—a lapse of almost four months, during which time plaintiff had ample time to verify by survey of his own, whether or not encroachments existed. The fact that plaintiff failed to produce at the trial, a surveyor to rebut the defense of encroachments, can result in but the one inference that he himself, the plaintiff, was satisfied that encroachments did, in fact, exist, and rebuttal of this fact was impossible.

For the reason, therefore, that plaintiff vendor was guilty of a breach of his contract with the defendant vendee, in the particulars hereinabove set forth, the defendant vendee was entitled to treat said contract as a nullity, which he did. As a consequence thereof, the plaintiff vendor was not entitled to any of the benefits flowing from said contract, and the judgment of the trial court should have been for the defendant and not for the plaintiff.

POINT II.

Defendant-appellant was lawfully entitled to stop payment on said check because of the existence of violations of the Tenement House Act.

The defendant-appellant, Joseph Engel, had another ground for being relieved of his obligation to go through with the contract, by reason of the fact that Tenement House violations existed. The contract provided that the premises were to be conveyed free and clear of any violation of the Tenement House Act, and provided further that the report of the Tenement House

Department shall be accepted as proof of the existence or non-existence of violations. This provision of the contract was not lived up to by the plaintiff-appellee, the vendor, Jacob Rosenthal. The testimony adduced by Charles McCloskey, Tenement House Inspector, and the report marked D. 2 of the Tenement House Department, disclose the existence of the following violations:

1. Two dark rooms exist in each of the apartments on the third floor.

2. One dark room exists on the first floor of the left apartment (State of Case, p. 29, ll. 3-10). The inspector testified that he made his inspection on November 10, 1927, and that these same violations which he found on that date had existed for several years, the original inspection, disclosing said violations, having been made on August 12, 1925 (State of Case, p. 29, ll. 10-14).

From this testimony, which is uncontradicted and unattacked, it conclusively appears that the plaintiff-appellee, the vendor Jacob Rosenthal, neither on the date of the execution of the contract, October 25, 1927, nor on the date fixed by said contract for performance, November 1, 1927, was in a position to convey said premises to the defendant-appellant, the vendee, Joseph Engel, free and clear of Tenement House violations, as proven by the report of the Tenement House Board (State of Case, p. 60), nor in accordance with the terms of said contract.

In the case of *Moran* v. *Borrello,* 4 Misc. Rep. p. 344, the suit was for the recovery of deposit and search fees by a purchaser's assignee against the vendor, on the ground of defendant's inability to give title in accordance with the contract. Judgment was rendered by the District

Court in favor of the plaintiff for the return of the deposit and damages incurred in making a search of title. On appeal there were two points raised by the appellant: the one relating to lack of proper tender by the purchaser, with respect to which point the Court said, *at page 344:*

> "The first point is that there is no evidence that plaintiff tendered, or was ready, willing and able to tender, a bond properly executed by John McHugh, the assignor. Tender by plaintiff was excused, since defendants were unable to perform. But it was incumbent upon plaintiff in an action for damages for breach of contract, to show that she was ready and willing to perform."

The second point related to the question of the compliance of the building with the regulations of the State Board of Tenement House Supervision, to be shown by the report of the secretary, etc., with respect to which the Court said *at page 345:*

> "The next point is that there was no legal excuse for the plaintiff's failure to make a tender. The contract provided: 'It is understood and agreed that the buildings comply with the regulations of the state board of tenement house supervision, to be shown by the report of the secretary, where such * * * regulations apply.' The inspector's report showed certain structural violations for which the defendants at the time of the closing of title offered to deduct $200 from the purchase price, but the plaintiff demanded $500 therefor.
>
> "The defendants contend that this provision had reference to violations existing at the time the contract was entered into, and not as of time of closing the title. We think the contract contemplated the passing of a marketable title at the time of the delivery of the deed, and the plaintiff could not have anything short of that forced upon him. Upon this point it is also urged that

> the tenement-house violations, if any, were unsubstantial and did not justify rejection of the proferred title. They were sufficiently substantial to justify the defendants in making an allowance therefor, and in any event they were specially provided for as an encumbrance in the contract of the parties."

This latter case of *Moran* v. *Borello* emphatically substantiates the position of the defendant-appellant herein, in two particulars: one, that he was excused from making a tender by reason of the inability of his vendor from performing the contract in accordance with its terms; and two, that the violations of the Tenement House Act, as shown by the report of the Secretary of the State Board of Tenement House Supervision, were sufficient legal excuse and justification for his refusal to go through with the contract. This placed the said defendant-appellant, the vendee, Joseph Engel, in the position of being relieved of the obligations imposed upon him by the contract.

The opinion of the Supreme Court filed in this case regarding this point, states that, (State of Case, p. 71, ll. 26 to 30):

> "A tenement house inspector testified that there were violations of the tenement house law in the property but there was nothing to indicate that this could not have been removed at the time fixed for settlement."

It was not for the defendant to remove the violations of the Tenement House Act nor is it important to consider or discuss whether the violations could have been removed at the time fixed for settlement. The important question is: "Were the violations removed by the plaintiff vendor at the time fixed for settlement?"

Strell v. *Zisman,* 136 Atl., p. 801, at p. 802:

> "The covenant that the building comply with the Tenement House Act was of no greater effect than the usual one with respect to incumbrances. If such covenants can be and are satisfied at the time of the decree, there is no breach. The complainant was diligent in removing the objection and the delay was not unreasonable. Under such circumstances, performance is timely if conveyance can be made at the time of the decree. Gerba *v.* Mitruske, 84 N. J. Eq. 141, 94 A. 34."

It is clear that the plaintiff in this case failed to show to the Court that the violations were of such a character that they could be and were satisfied at the time fixed for settlement. The Tenement House Inspector who testified to the existence of violations stated that his inspection was made on November 10, 1927, (State of Case, p. 28, ll. 20 to 23).

On the doctrine in the case of *Thompson* v. *Killheffer, supra,* and *Steinbach* v. *Pettingill, supra,* the plaintiff vendor is entitled to retain the proceeds of a check given as a deposit for the sale of lands only in the event that the contract between the plaintiff vendor and the defendant vendee is valid and enforceable. In view of the fact that in the instant case the plaintiff vendor was unable to convey title to the defendant vendee in accordance with the terms of the contract because of the existence of tenement house violations which were not remedied at the time fixed for settlement, the contract on the part of the plaintiff vendor was invalid and unenforceable by him, and he was not entitled to retain the proceeds of the check given as a deposit. If, under the circumstances in this case, it is adjudged that plaintiff is entitled to retain the deposit, then he is unjustly enriched. The

retention of a deposit is not the measure of damages to which a vendor is entitled in an action against the vendee for breach of contract, and the only theory upon which a vendor may retain possession of a deposit is that not only has his vendee defaulted in the performance of the terms, but that he himself, the vendor, has been ready, willing and able to perform the contract which in itself is a valid and enforceable contract. The plaintiff vendor in this case, Jacob Rosenthal, did not and could not prove that he was able to perform the contract in accordance with the terms. On the contrary, the only proof in the case is to the effect that his lands and premises did not conform to the covenants of the contract to be performed by him.

In the case of *Davis* v. *Scher,* 73 N. J. Law, p. 155, at p. 156, Mr. Justice Swayze says:

> "The right of the plaintiff to rescind does not depend on a fraudulent misrepresentation. It arises from the fact that he is not getting what he bargained for. The principle is the same that was stated by Justice Depue in Wolcott *v.* Mount, 7 Vroom 262, 264.
>
> "It is argued in the present case that on September 1st, the day for performance of the contract, the number of rooms might have been as stated in the contract. In the absence of proof, the conditions existing on August 10th would be presumed to continue, but aside from that consideration, the plaintiff had the right to rescind at once upon discovering that the building differed materially from the description."

It cannot be argued that the defendant, because of his alleged breach of contract in refusing to take title from the plaintiff on the day set for performance, lost all his legal rights in the contract. It may be that because of his

failure to perform, he lost his right to rescind. If so, the defendant vendee still is entitled to such redress as is practicable under the circumstances. Defendant availed himself of such redress by filing a counter-claim demanding of the plaintiff the sum of $40.00, which was the net loss to him by reason of plaintiff's inability to perform the contract in accordance with its terms.

Wolcott, Johnson & Co. v. *Mount,* 36 N. J. Law, p. 262, at p. 266:

> "The right to repudiate the purchase for the non-conformity of the article delivered, to the description under which it was sold, is universally conceded. That right is founded on the engagement of the vendor, by such description, that the article delivered shall correspond with the description. The obligation rests upon the contract. Substantially, the description is warranted. It will comport with sound legal principles to treat such engagements as conditions in order to afford the purchaser a more enlarged remedy, by rescission, than he would have on a simple warranty; but when his situation has been changed, and the remedy, by repudiation, has become impossible, no reason supported by principle can be adduced, why he should not have upon his contract such redress as is practicable under the circumstances. In that situation of affairs, the only available means of redress is by an action for damages. Whether the action shall be technically considered an action on a warranty, or an action for the non-performance of a contract, is entirely immaterial."

Consequently, since the defendant-vendee owed no obligations to the plaintiff-vendor in said contract, the judgment of the trial court should have been for the defendant, and not for the plaintiff.

POINT III.

Plaintiff was not entitled to recover on said check for the reason that there was a failure of consideration for which the check was given.

The check forming the basis of this action was given by the defendant-appellant to the plaintiff-appellee as a deposit and on account of the purchase price of the premises mentioned in the agreement. The check moved from the defendant to the plaintiff as the consideration for the covenants, terms and representations contained in said agreement, which were to be performed or lived up to by the plaintiff, as vendor. The defendant was entitled to a strict conformity, on the part of the plaintiff, with the provisions of the agreement, or else to have his money back. *White Way Corporation* v. *Heinle, supra:*

> "It was entitled, at law, to have delivered to it a deed in strict conformity with the provisions of the agreement or else to have its money back."

Nothing could be more emphatic or more comprehensible than this succinct and pointed statement of the law by the Supreme Court. If the vendor does not strictly conform with the provisions of the agreement, there results a failure of consideration, as a result of which the vendee is entitled to have his money back.

In the instant case, the default of the plaintiff, with reference to that provision of the agreement relating to the non-existence of encroachments and violations of the Tenement House Act, constituted failure of consideration attributable to the plaintiff, Jacob Rosenthal, as a result of which the defendant, Joseph Engel, was entitled to have his money back.

It avails plaintiff nothing to contend that he tendered a deed on the date set in the agreement

for performance, and that the defendant failed to appear at the time and place of performance, and failed to tender the balance of the purchase price, as provided in the agreement. While time is generally of the essence of a contract at law, yet in the instant case, due to the breach of said contract by the plaintiff, said plaintiff cannot be heard in a court of law to complain of a breach by the defendant when he himself, the plaintiff, at that very time was in default. In 13 *Corpus Juris,* p. 689, is found the following statement of law:

> "Where both parties fail to perform their mutual covenants on the day named, they will be held to have waived its strict performance as to time, although it will be unimpaired as to its effect."

It has often been stated that a tender need not be made when said act amounts merely to an idle gesture. The defendant-appellant contends that the tender of the deed by the plaintiff on November 1, 1927, at the office of the attorney, Morris H. Cohn (State of Case, p. 38, ll. 30-40), was a mere idle gesture. Nothing could indicate the truth of this contention better than reference to the State of Case, from which it appears that the summons in this suit was issued out of the First District Court of the City of Newark, on October 31, 1927, one day before the date on which the said alleged tender was made (State of Case, p. 2, ll. 21-24). The agreement between the parties was dated October 25, 1927 (State of Case, p. 52, ll. 30-35). The following day, October 26, 1927, the defendant stopped payment on his check given to the plaintiff as a deposit (State of Case, p. 14, ll. 1-6). The date for performance of said agreement, as provided therein, was November 1, 1927. Suit was instituted on

October 31, 1927, one day before the date set for performance.

The plaintiff himself could not have regarded the date of closing as of the essence, when he, himself, instituted this suit prior to said date. If plaintiff had regarded the date set for performance in said agreement as being of the essence, he would not have elected to institute this suit on the check given merely as a deposit, prior to the closing date provided in said agreement, but would have waited the arrival of said essential date and then, having made a proper tender, in accordance with all the terms of the agreement, he would have preserved to himself all those rights and remedies which would have flowed from a default by the defendant in failing to make payment of the purchase price.

The return date of the summons of this suit was November 10, 1927, nine days after the date set for the closing of title (State of Case, p. 2, ll. 16-17). So that plaintiff knew, when he started suit, that no decision in this case could possibly be rendered before the closing date provided in said agreement. This conduct by the plaintiff, and his subsequent conduct in continuing negotiations with defendant (State of Case, p. 41, ll. 20-33), eradicated from the contract the feature that time was of the essence.

It was testified to by the plaintiff, which was uncontradicted, that the stopping of the payment of the check was the result of a conversation which he had with his neighbor, Mr. Weiss, on October 26, 1927. That this conversation related to the existence of encroachments can hardly be doubted, from excerpts of the testimony, that the defendant told plaintiff, on said date, October 26, 1927, that he would not go through with the deal because plaintiff could

not give him clear title (State of Case, p. 13, ll. 24-32).

(State of Case, p. 32, ll. 1-15.)
(State of Case, p. 33, ll. 3-4.)
(State of Case, p. 33, ll. 35-40.)
(State of Case, p. 40, ll. 1-20.)

The survey obtained subsequently from the surveyor, Edward Clawans, who testified (State of Case, p. 59), and the report of the Tenement House Board of Supervision, and the testimony of the inspector, Charles McCloskey (State of Case, p. 60), substantiate the position taken by the defendant that there was a failure of consideration on the part of the plaintiff. Even if time be of the essence of the contract, then the testimony of the surveyor and the Tenement House inspector should be given full probative value because their testimony is supplemental and cumulative, and relate back, to the primary position taken by the defendant and his original contention, that plaintiff could not give him "clear title." If time be not of the essence of the contract, and this is the contention of the defendant, then a reasonable time would be allowed to the defendant to enable him to make a search which would involve the obtaining of a survey and a Tenement House report. Said survey and Tenement House report were obtained by the defendant within a reasonable time, for the survey was obtained on November 8, 1927 (State of Case, p. 59), and the Tenement House report on November 10, 1927 (State of Case, p. 60). When we consider that the agreement was drawn on October 25, 1927, providing for closing on November 1, 1927, that suit was instituted October 31, 1927, greater promptitude on the part of the defendant could hardly be expected. Defendant, therefore, acting immediately upon

obtaining information, which information was later verified by the procurement of a survey and Tenement House report, was entitled to stop payment on the check when he did. If defendant was not entitled to stop payment on the check when he did, then surely the law provides him with sufficient legal justification and supplies him with a legal defense, by way of confession and avoidance, to any action which the plaintiff could bring against him on said check. In other words, to invert the proposition, if plaintiff had received payment of said check, then the defendant, in a suit against the plaintiff to recover the amount of the deposit, would have been entitled to receive back said deposit. *Schiff* v. *Alexander, supra. Herring* v. *Esposito, supra. White Way Corporation* v. *Heinle, supra. Moran* v. *Borrello, supra.*

In the case of *Dichter* v. *Isaacson,* 4 Misc. Rep. p. 297, the Supreme Court held, *at p. 298*:

> "The plaintiff gave in part payment of the deposit money a note for $400, which fell due about two weeks before the date fixed for the closing of the title, and which plaintiff neglected to pay because of his knowledge of the alleged defect in the title, and defendants' refusal to rectify the same. The plaintiff made no tender of the purchase price. The defendants contend the situation thus outlined shows a default in plaintiff, notwithstanding plaintiff's repeated professed willingness to accept title, provided it were made marketable.
>
> "The trial court found that the plaintiff under this agreement was entitled to receive from defendants a deed of conveyance free and clear of the restrictions mentioned, and that, as defendants made no effort to convey such title, tender of the consideration by plaintiff was unnecessary. In that conclusion we concur."

In the instant case, defendant was entitled to receive a deed conveying the premises with the building thereon to be within the boundary lines and in compliance with the Tenement House Act and since, as was held in the case of *Dichter* v. *Isaacson, supra,* plaintiff made no effort to convey such title, tender of the consideration by the defendant, Joseph Engel, was unnecessary, because plaintiff's consideration, which would have entitled him to receive the purchase price, failed.

There having been a failure of consideration on the part of the plaintiff, he being guilty of a breach of the contract, and having instituted this suit prior to the date set for performance in said contract, said plaintiff was not entitled to recover on said check against the defendant; on the other hand, the defendant was entitled to receive payment in the amount of the damages which he proved, being $40 for survey fees, on the counter-claim filed by the defendant.

POINT IV.

The Trial Court erred in permitting the witness Morris H. Cohen to answer the following question over objection:

> "Prior to the drafting of the agreement Mr. Cohen, was there anything said by Mr. Engel about when title was to be taken? At a certain date?"

This question, to be found in (State of Case, p. 35, ll. 21-25), called for oral testimony designed to alter, modify or vary the written contract between the plaintiff and defendant, and the objection by defendant's counsel to said question, should have been sustained. Furthermore, the question was asked of Morris H. Cohen,

who was the attorney acting for both parties at the time the contract was drafted, and it is to be presumed that he as attorney for both, embodied in said contract all of the terms upon which they had agreed.

The admitted purpose of this question was to show, by the conduct of the parties and their conversation, that they desired time to be of the essence, according to the statement of plaintiff's counsel (State of Case, p. 35, ll. 33-37).

It is submitted that this testimony was harmful and injurious to the defendant for the reasons stated.

POINT V.

The District Court erred in sustaining the objection to the following question asked by the defendant's attorney, of the witness Jacob Rosenthal, plaintiff:

> By Mr. Klein: Q Did you say that you would let Mr. Engel still have the property at a reduction of $200 if he went through with the deal? (State of Case, p. 41, ll. 30-33).

This question was relevant and material to the issue, and should have been allowed.

The plaintiff urged that time was of the essence of this contract (State of Case, p. 15, ll. 1-27). While time is generally of the essence of a contract at law, yet the parties, by their conduct, may prolong the time within which a contract is to be performed, and the purpose of this question was to elicit from the plaintiff himself whether or not he still continued negotiations with the defendant relative to the purchase of plaintiff's premises, subsequent to the date

fixed for the performance of the contract. Furthermore, time is not deemed to be of the essence of a contract unless both parties to a contract so consider it, and it can hardly be said that the plaintiff considered that time was of the essence when subsequent to the date, he engaged the defendant or his attorney in conversation, in which he attempted to induce the defendant to go through with the deal.

POINT VI.

The District Court erred in refusing to permit the surveyor, Edward Clawans, to answer the following question:

> By Mr. Klein: Q What part of it were they painting when you were there? (State of Case, p. 44, ll. 21-23).

This question was asked in order to show that part of the building on the premises of the plaintiff, was so recent that at the time he made his survey, November 8, 1927, plaintiff's agents were still working on said building. It had been brought out by the plaintiff that the building was an old one, and this question was intended to show that part of said building was of recent construction, and that some of the encroachments complained of were located on that part of the building, which was of recent construction.

The exclusion of this question, it is contended by the defendant, was harmful and injurious to him.

The defendant, therefore, respectfully contends that the judgment of the trial court should not have been in favor of the plaintiff and against the defendant on the check given as a deposit, as aforesaid; on the contrary, the judgment of

the District Court should have been in favor of the defendant and against the plaintiff.

Respectfully submitted,

COHEN & KLEIN,
Attorneys of Defendant-Appellant.

New Jersey Court of Errors and Appeals

JACOB ROSENTHAL, Plaintiff-Appellee, vs. JOSEPH ENGEL, Defendant-Appellant.	On Appeal from the Supreme Court.

BRIEF OF PLAINTIFF-APPELLEE.

Facts.

On October 25, 1927, the plaintiff-appellee, Jacob Rosenthal, and the defendant-appellant, Joseph Engel, entered into a written agreement for the sale of certain real estate by the said plaintiff-appellee to the defendant-appellant, for the sale price of $19,000, payable $500 on the signing of the agreement; $1,500 in cash on the date of closing title, which was to be one week later, on November 1, 1927, and the balance of the purchase price was to be represented by a building and loan mortgage then on the property, and a purchase money second mortgage was to be executed at the time of closing (State of Case, pp. 52-58). The $500 deposit was in the form of a check drawn by the defendant-appellant to the order of the plaintiff-appellee, dated October 25, 1927 (State of Case, p. 46, ll. 1-19). Payment was stopped on said check by the defendant-appellant on the morning after the agreement was drawn, to wit, on October

26, 1927 (State of Case, p. 14, ll. 1-8). On the same date the defendant-appellant wrote a letter to the plaintiff-appellee by which he rescinded his contract of purchase, upon the ground that he was not in a position to consummate the agreement (State of Case, p. 47, ll. 22-40, to p. 48, ll. 1-20).

Suit was brought to recover the sum of $500 upon this check and judgment was entered in favor of the plaintiff-appellee and against the defendant-appellant in the sum of $500, from which the defendant appealed to the New Jersey Supreme Court, which court affirmed the judgment of the District Court and filed an opinion (State of Case, pp. 70-71), and thereafter an order affirming the judgment was entered (State of Case, p. 72), from which order of affirmance the defendant appeals to this Court.

ARGUMENT.

POINT I.

The defendant-appellant, by stopping payment of the check, breached his contract in advance of the time for performance by the plaintiff-appellee, and thereby excused the plaintiff-appellee from performance.

The defendant-appellant stopped payment of the check sued upon, on October 26, 1927, the morning after the agreement was drawn, and also on the same date wrote a letter to the plaintiff-appellee, the envelope in which the letter was contained being marked October 26, 1927. The letter was marked in evidence as Exhibit P-3 for the plaintiff-appellee (State of Case, p. 47, ll. 22-40, and p. 48, ll. 1-20). The letter is the most important evidence

in the case and bears repetition at this point. The letter reads as follows:

"Mr. Rosenthal!!

I want to ask you if you would be so kind and send me the check. I am willing to pay you your expenses or troubles and also the lawyers work what he spend on account the agreement.

Mr. Rosenthal, I am telling you I am not in the position to settle the house. If I could, I would be glad to do it. I might do it later on. You was telling me that you want my money and you are going to Court, just do it if you have an iron hart, because you kno this is money vich dont belong to you. I was working for it hart.

Mr. Rosenthal do you forget that we have a good God. He wouldn't forget me and he would'nt forget you to, if you want such money?

So up to you, it is very ease to go wrong that my hebrew Teacher set, but what the end of it?

Please Mr. Rosenthal send me my check. I am a father of small children with a honest Jewish feelings for to poor to.

thanking you in that you pay attention to this, and think it over what your doing.

Engel.

If you think you deserve this money you think wrong, because the house will cost you more then enogh."

The defendant-appellant sought to justify his rescission of the contract because of some supposed conversation with a next door neighbor regarding the title to the premises (State of Case, p. 13, ll. 24-41; p. 14, ll. 1-8. Also p. 32, ll. 1-18). However, in the letter written by the defendant-appellant, above set forth and referred to as Exhibit P-3 for the plaintiff-appellee, the defendant-appellant did not mention anything about the title, but

based his ground for rescission upon the following statement in the letter:

> *Mr. Rosenthal, I am telling you I am not in the position to settle the house If I could, I would be glad to do it. I might do it later on."*

It seems that the defendant-appellant regretted his bargain and desired to release himself from the contract. This is further substantiated by the evidence of Morris H. Cohen, as follows:

> "Q. Did he direct you in any way to make a search on the property? A. At what time?
>
> Q. Between the time you drew the agreement and November 1. A. I was directed to make a continuation search at the time of drawing the agreement by Engel, and subsequently he came up to the office and told me not to search the property.
>
> Q. How many days after drawing that agreement was that? A. I think two or three days.
>
> Q. Did he tell you why? A. The very day after the drawing of the agreement.
>
> Q. Did he tell you why? A. Yes, he did.
>
> Q. Why? A. *He told me he paid too much for the property"* (State of Case, p. 36, ll. 26-40).

The plaintiff-appellee contends that the supposed conversation had with the neighbor never occurred, for the neighbor was not produced at the trial.

Reference is also made to the following testimony of the defendant-appellant:

> "Q. At the time you sent that letter— A. Yes.
>
> Q. (Continuing) —to Rosenthal, you knew in your own mind that the title was no good, is that right? A. *I didn't know about it that time"* (State of Case, p. 33, ll. 9-13).

By stopping payment on the check and sending the letter above set forth without having any knowledge whatsoever as to the condition of plaintiff-appellee's title, or any knowledge as to whether the plaintiff-appellee could perform his contract, the defendant-appellant affirmatively breached his contract in advance of the time for performance, and thereby placed it out of his power to thereafter complain of any default or breach that the plaintiff-appellee might thereafter make in the terms of the contract. The rule in such cases is as follows:

> "Where a contract embodies mutual and interdependent conditions and obligations, and one party either disables himself from performing, or repudiates in advance his obligations under the contract and refuses to be longer bound, thereby indicating such repudiation to the other party, the latter party is not only excused from further performance on his part, but may, at his option, treat the contract as terminated for all purposes of performance, and maintain an action at once for the damages occasioned by such repudiation, without awaiting the time fixed by the contract for performance by the defendant."

O'Neill v. *Supreme Council,* 70 N. J. Law, 410;

Samel v. *Super,* 85 N. J. Law 101;

Holt v. *United Life Insurance,* 75 N. J. Law 795;

Ferba v. *Cona,* 89 N. J. Law 135.

POINT II.

In order that the rescission shall be effective, it must be based upon facts within the defendant-appellant's knowledge at the time.

Rescission has been defined to be "A term which imports an entire abandonment of a contract by one party on account *of some act done or omitted to be done by the other,* which puts it out of the power of the one or the other to perform it according to its terms." *Galloway* v. *Holmes,* 1 Dougl. (Mich.) 330-346. Likewise, "The purchaser, in rescinding for a defect in the vendor's title, must act promptly in discovering the defect, or his right to rescind for that reason will be waived." 39 *Cyc.* 1429. It follows by analogy that a person cannot rescind without having proper grounds therefor, and cannot use information that comes to him subsequently as the basis of such attempted prior rescission.

The defendant-appellant, at the time he rescinded, had absolutely no knowledge of the title to the property, and he did nothing in this case towards examining the title prior to the time fixed for closing by the agreement, to wit, November 1, 1927. The surveyor made his survey on November 8, 1927 (State of Case, p. 16, ll. 22-23). The inspection by the inspector of the New Jersey Tenement House Board was made on November 10, 1927 (State of Case, p. 28, ll. 20-22), so that any facts that might point to a default on the part of the plaintiff-appellee which came to the defendant-appellant's knowledge subsequent to the date fixed for closing in the agreement, to wit, November 1, 1927, cannot be made the basis for rescission on October 26, 1927.

POINT III.

Time was of the essence of the contract both at law and by circumstances, and in order to reject title for any defect, the objections to title must be made on the date fixed for the consummation of the agreement or they are waived.

> "At common law the general rule is that time is to be regarded as of the essence of the contract."
> 39 Cyc. 1337.

The Court of Chancery of this State has likewise adopted the theory that time is of the essence although not stated in the contract, where the underlying circumstances attendant to the execution of the agreement indicate that the parties intended that time shall be of the essence.

> *Agens* v. *Koch,* 74 N. J. Eq. 528;
> *Gerba* v. *Metriska,* 84 N. J. Eq. 79. Affirmed 84 N. J. Eq. 141;
> *City of Newark* v. *Lindsley,* 114 Atl. 794 (not officially reported).

The testimony in this case is that the contract is dated October 25, 1927, and was to be consummated on November 1, 1927 (State of Case, pp. 52-58), or only a period of seven days later, and further, that the defendant-appellant told Mr. Morris H. Cohen, the scrivener of the agreement that he was "anxious to take title as soon as possible," and that the defendant-appellant "suggested the date, the first of November, the date of closing title" (State of Case, p. 35, ll. 22-24; p. 36, ll. 1-2. Also testimony of plaintiff-appellee (p. 39, ll. 19-33).

In the case of *Barry* v. *Ruskin,* 99 N. J. Eq. 730, and affirmed by the Court of Errors and Appeals

in 100 N. J. Eq. 557, the contract was dated June 5, 1925, and provided for settlement on September 1, 1925. It appeared that the vendee did not order a search of the property until August 10, 1925, with the result that the title examination was not ready for closing on September 1, 1925, and thereafter time was made of the essence by notice, as of September 8, 1925. The Court held that inasmuch as the vendee delayed in ordering his examination of title and the same was not completed on the date set for consummation of the agreement, that he would have to suffer the consequences, and refused specific performance of the contract. In the case at bar, the defendant-appellant is in a much worse position in that he did nothing towards examining the title until long after the date fixed in the contract for settlement.

POINT IV.

The testimony in the case does not show that the plaintiff was in default at any time.

The testimony of Edward Clawans, the surveyor, was most indefinite, vague and independable. With the permission of the Court, reference is respectfully made to the following excerpts of the surveyor's testimony:

> "Q. What monument did you measure your distance of 44 feet 10 inches from? A. *This is a survey by occupation—ancient occupation.*
>
> Q. And not by measurement? A. *No. It is ancient occupation.*
>
> Q. Is it an accurate survey made by measurement? A. The line of Jackson Street will be fixed from this line here, 44.85, *because there isn't a monument there any longer at Jackson and Market Street.*

Q. Is there a monument at the next block up? A. *No. The monuments have all been removed.*

Q. I mean to say, in a survey by occupation you have to measure first of all the adjoining property, am I right? A. Right.

Q. What is the measurement of your property? A. I know the property adjoining on the east was smack up against the line. I measured several properties, and the old building occupied the entire plot.

Q. Were you furnished with a description of the adjoining property toward Market Street? A. Toward Market Street? *I have old survey notes—*

Q. Were you furnished with a description of the property running toward Market Street? A. *No, but the description would have been taken from an old survey—*

Q. Please answer my question. A. *I was not furnished with a description of the adjoining property* (State of Case, p. 17, ll. 38-40; p. 18, ll. 1-31).

* * * * * * *

Q. Did you measure the property located on the corner of Jackson and Market Streets, on the same side? A. I have a notation here, 'one inch in street.'

Q. Did you measure the width of the property at the corner? A. *I must have measured it,* because I show a notation in here, 'one inch in street.'

Q. Well, did you measure it? A. *I must have measured it.*

By the Court:

Q. Can't you answer the question? Did you measure it? A. I did measure it; yes, sir.

By Mr. Litwin:

Q. Which is it, 'must have' or 'Did'? A. I did (State of Case, p. 19, ll. 22-42).

* * * * * * *

Q. Your beginning point is 42 feet, 10 inch-

es; so you have a discrepancy there of two feet, ten inches? A. In making this survey I didn't have the adjoining deed at all, the adjoining deed on the easterly side. I know the westerly side of the building has always been accepted as on the line— * * * * No, I wouldn't say I have a discrepancy of two feet, ten inches, because *whereas I may have measured it, I forgot to record it.* I noticed 42 feet, total measurement; 22 feet, 6½ inches— (State of Case, p. 20, ll. 14-33).

* * * * * * *

Q. Suppose that the property adjoining on the east was over on the line, encroached on the adjoining property on the east: would that give you an accurate starting point as to our property? A. If the property encroached on the east, the basis would be—*the beginning point as shown by the old notes on the property on the west was begun on the line.* An old line was fixed as 71 feet, 10 inches, from the line of Jackson Street, and you would have to measure from that point, east, to fix the line, and *no record being made of the other property, then the point of the property would be by survey, but not by ancient occupation.*

Q. You refer to 'old notes.' Notes made by whom? A. *Notes made by Francisco & Barkhorn, made in the '80's.*

Q. Who were they? A. *They were probably established in* 1850. *They are not now in existence.*

Q. It is possible their old notes are wrong? A. *I wouldn't say their old notes are wrong.*

The Court: *It is possible, of course* (State of Case, p. 21, ll. 1-28).

* * * * * * *

Q. When you got that starting point of 71 feet, 10 inches, west of Jackson Street, that was because the description called for 71 feet, 10 inches, is that right? A. *I said I didn't see a description of the property immediately on the west* (State of Case, p. 22, ll. 20-26).

* * * * * * *

Q. *Is it possible for the property adjoining on the west to encroach over on our property by actual measurement?* A. *No.*

Q. *It is not possible?*

The Court: *He doesn't know that. He can't, because he already said the monument has disappeared.*

By Mr. Litwin:

Q. *At most, the entire survey on this entire block would be nothing but a guess?* A. *I wouldn't say that* (State of Case, p. 22, ll. 38-40; p. 23, ll. 1-13).

* * * * * * *

By the Court:

Q. You have said, I think, that the building on the lot in question goes from one boundary line to the other, is that true? A. Yes, sir.

Q. Does the building on the west extend to the easterly boundary line of that lot? A. Yes, sir.

Q. Does the building on the east of the lot in question extend to the westerly boundary line of that lot? A. Yes, sir.

Q. And all these are by ancient occupation, are they? A. Yes.

By Mr. Litwin:

Q. So that, according to that, and basing your testimony upon that survey and upon your study of the neighborhood, every building would be over the line?

The Court: Depending upon where you begin.

By Mr. Litwin:

Q. Is that right?

The Court: *From his testimony, every building is where it ought to be and it can't be anywhere else.*

By Mr. Litwin:

Q. Let me ask you this: Isn't it a practice among surveyors that where a monument has disappeared, just like the case we hear here,

that you can measure from the next block down, if you can locate a monument at that point? A. *Practically all the monuments on Market Street are all gone.* (State of Case, p. 24, ll. 21-40; p. 25, ll. 1-18).

By Mr. Litwin:

Q. Hasn't there been a change in the northerly line of Market Street?

The Court: In what period?

Mr. Litwin: From the beginning of the records. The time Robert Treat came here.

The Witness: *I couldn't answer that.*

By Mr. Litwin:

Q. In order to determine the line of Market Street, wouldn't it be necessary to search the records in the engineer's office to tell where the actual line of Market Street is? A. *I have taken the line from old notes.*

Q. You depended entirely upon their notes? A. *Their notes.*

Q. If Market Street had been narrowed or widened—

The Court: Never mind that question. It is apparent.

The Witness: I will say this: In checking the line of Market Street, I took the old notes. *The center line of the car tracks is pretty near the center line of the street.* In checking the center line of the car tracks and the old notes, we accepted the old notes as correct as to the line of Market Street" (State of Case, p. 27, ll. 12-40).

* * * * * * *

From the foregoing excerpts of the testimony, and references thereto, it appears that at best, the surveyor's opinion is formed upon some one else's information or notes which were not produced during the trial, and that there is grave doubt as to whether the surveyor has located the building proply at all.

The Court, very properly summarized the testimony of the surveyor when he said:

> "From his testimony every building is where it ought to be and it can't be anywhere else" (State of Case, p. 25, ll. 8-10).

The defendant-appellant, in his brief on page 8, by inference admits that there is great doubt as to the evidenciary value of the surveyor's testimony when he says:

> "Without admitting that the evidenciary value of the surveyor's testimony in this respect was diminished at all * * * ."

The defendant-appellant then makes the point that the building of the plaintiff-appellee encroaches on Market Street to the extent of fifteen inches. The surveyor testified in answer to the question "Hasn't there been a change in the northerly line of Market Street?

> The Court: In what period?
> Mr. Litwin: From the beginning of the records. The time Robert Treat came here.
> The Witness: *I couldn't answer that.*"
> (State of Case, p. 27, ll. 11-20).

* * * * * * *

From the foregoing testimony, and the remainder of the testimony on page 27, of the State of the Case, it appears conclusively that the surveyor did not locate the line of Market Street, and therefore could not testify as to the encroachment of the building or any part thereof over the line of Market Street. Because of this indefinite and vague testimony, the trial court found against the defendant-appellant on the question of fact as to whether the building actually encroached over its boundary lines.

It is also respectfully submitted that the survey attached to the State of the Case opposite page 58

should be expunged from the record of the case because the survey was not admitted into evidence by the trial court. This court is respectfully referred to the Court's ruling as follows:

> "The Court: I will take the testimony subject to your objection and look into the matter later on. Let me have the survey. Mark it for the present 'C-2,' for convenience" (State of Case, p. 16, ll. 1-9).

As to the evidence that the building in question violated the Tenement House Laws, it is respectfully submitted that the inspector testified that at the time of his inspection the property was not occupied (State of Case, p. 30, ll. 1-10).

It is respectfully submitted that the building upon the premises in question, at the time of the inspection, was not a tenement house within the purview of Section 2, Article 1 of the Tenement House Act, 4 C. S. 5323, which provides as follows:

> "A tenement is any house or building or portion thereof which is rented, leased, let or hired out to be occupied or is occupied as the home or residence of three families or more, living independently of each other, and doing their cooking upon the premises, or by more than two families upon any floor so living and cooking, but having a common right in the halls, stairways, yards, water closets or privies, or some of them."

The test as to whether a building is a tenement house is the *actual* renting, leasing, letting or hiring out as the residence of three families or more, and also as stated in Strell v. Zisman, 136 Atl., p. 801 (not officially reported) "doing their cooking upon the premises * * * . For all that appears they may have taken their meals elsewhere."

The tenement house inspector testified as follows

relative to his examination that was made on November 11th:

> "My recollection is that the property was not occupied at the time but I am not sure." (State of Case, p. 30, ll. 1-10).

The Supreme Court in its opinion (State of Case p. 71, ll. 26-30) says:

> "A tenement house inspector testified that there were violations of the Tenement House Law in the property but there was nothing to indicate that these could not have been removed at the time fixed for settlement."

The Appellant in his brief cites the above mentioned case of Strell v. Zisman, and it is respectfully submitted that the statement by the Court in the stated case that:

> "If such covenants can be and are satisfied at the time of the decree, there is no breach. * * * Under such circumstances performance is timely if conveyance can be made at the time of the decree"

is sufficient authority for the aforesaid finding by the Supreme Court in its opinion.

The State of the Case on page 60 has a paper set forth as an exhibit marked in evidence on behalf of the defendant-appellant. This exhibit was not marked in evidence but was merely marked for identification. The State of the Case, on p. 29, ll. 36-40, has the Court's ruling on this subject as follows:

> "The Court: It is identified as his signature. Mark it 'D-2' for identification.
>
> (The paper referred to was marked 'D-2' for identification).
>
> Mr. Klein: That is all." * * *

There was also placed in evidence on behalf of the plaintiff-appellee, a certificate issued by the

Board of Tenement House Supervision that the building did conform with the requirements of the Tenement House Act (State of Case, p. 46, ll. 20-40).

It is respectfully submitted that if the defendant-appellant still had the right to object to the title on November 9, 1927, after he had breached his contract on October 26, 1927, it is the contention of the plaintiff-appellee that the defendant-appellant has not shown the plaintiff-appellee to be in default upon the two points that he urges in defense of the suit.

The Court, in its memorandum filed in the cause found as follows:

> "In this case the defendant gave the plaintiff a check for $500.00 on an agreement for the purchase of real estate, the agreement being in writing. The next day the defendant stopped payment on his check and sought escape from his contract. No legal excuse has been advanced for the breach of the contract by the defendant.
>
> Judgment for plaintiff $500.00" (State of Case, opp. p. 66).

The law is settled that:

> "On appeal, where opposite conclusions might have been drawn from the testimony, that conclusion which is essential to support the judgment will be taken as found."
>
> *Upton* v. *Slater,* 83 N. J. Law, 373.
>
> "It is entirely settled that the determination of questions of fact by the Judge of the District Court sitting without a jury is final between the parties when there is legal evidence to support it."
>
> *Goldberg* v. *Reed,* (Court of Errors and Appeals), 97 N. J. Law 170.

It is therefore respectfully submitted that the finding of fact by the District Court, that the plaintiff-appellee was not in default, should not be disturbed.

POINT V.

There was a valuable consideration for the check sued upon.

The check forming the basis of this action was given by the defendant-appellant to the plaintiff-appellee as a deposit on account of the purchase price of the premises mentioned in the agreement. Upon the giving of the check, the plaintiff-appellee signed, executed and delivered a valid and binding agreement which obligated the plaintiff-appellee to carry out and perform the terms and obligations therein contained to be performed by him.

The Court of Errors and Appeals' opinion in *Thompson* v. *Killheffer,* 95 N. J. Law, p. 439, cited by the defendant-appellant on page 5 of his brief, while reversing the Supreme Court, whose opinion is written in 98 N. J. Law 359, did not reverse the statement of law by the lower court that if the agreement between the parties was valid and binding, the vendor had given a good consideration for the check given for the deposit, and was entitled to recover. The Court of Errors and Appeals differed with the Supreme Court as to whether there was a binding agreement.

The case of *Moran* v. *Borello,* 4 Misc. Rep., p. 344, cited by the defendant-appellant on page 17 of his brief, holds that the language used in the agreement made between the parties "contemplated the passing of a marketable title *at the time of the delivery of the deed,*" so that the question of consid-

eration does not enter into this case. In the case at bar, the contract is valid and enforceable.

I desire to point out to the Court that the case of *Dichter* v. *Isaacson,* 4 Misc. Rep. 297, cited by the defendant-appellant on page 27 of his brief, is not applicable to the case at bar in that in the cited case the plaintiff neglected to pay the note *"because of his knowledge of the alleged defect in the title and defendant's refusal to rectify the same."*

It is further respectfully submitted that the remaining cases cited by the defendant-appellant in his brief give rise to a cause of action because the knowledge of the defect was brought home to the person who rescinded at the time that he made his rescission, and further, because the party rescinding was not in default. In the case at bar the defendant-appellant had no knowledge whatsoever as to the condition of the title at the time that he breached his contract.

POINT VI.

The trial court did not err in permitting the witness Morris H. Cohen to answer the following question over objection:

> "Prior to the drafting of the agreement, Mr. Cohen, was there anything said by Mr. Engel about when title was to be taken? A. At a certain date?"

The question was directed as to whether it was contemplated between the parties whether time should be of the essence of the agreement, and this testimony is admissible under the authority of the cases of:

Agens v. *Koch,* 74 N. J. Eq. 528;
Gerba v. *Metriska,* 84 N. J. Eq. 79, affirmed 84 N. J. Eq. 141;
City of Newark v. *Lindsley,* 114 Atl. 794 (not officially reported).

POINT VII.

The District Court did not err in sustaining the objection to the following question asked by the defendant's attorney of the witness, Jacob Rosenthal, plaintiff:

> *"By Mr. Klein*:
>
> Q. Did you say that you would let Mr. Engel still have the property at a reduction of $200 if he went through with the deal" (State of Case, p. 41, ll. 30-33)?

The question is directed to a proposal of compromise between the parties after the cause of action accrued to the plaintiff-appellee. This is not evidential under the authority of the case of *Scheurle* v. *Husbands,* 65 N. J. Law 40, affirmed in 65 N. J. Law 681, and *Robinson* v. *Borough of Edgewater* (Court of Errors and Appeals), 98 N. J. Law 205.

It is also respectfully submitted that the District Court ruled properly on this question for two other reasons, firstly, the question asked was without the scope of the direct-examination and was not proper cross-examination, and, secondly, the witness was testifying in rebuttal and no foundation had been laid by the defendant-appellant in the case for the asking of this question.

POINT VIII.

The District Court did not err in refusing to permit the surveyor, Edward Clawans, to answer the following question:

> "*By Mr. Klein*:
>
> Q. What part of it were they painting when you were there" (State of Case, p. 44, ll. 20-23)?

A similar question had already been answered by the surveyor on page 16 of the State of Case, lines 33-35, the answer being, "The new frame addition might have been completed about the time, because he was still painting."

It is further respectfully submitted that the question is immaterial in that it is directed to something that happened after November 1, 1927, the date fixed in the agreement for the consummation thereof.

It is further submitted that the exclusion of this question was not harmful and injurious to the defendant-appellant.

The plaintiff-appellee therefore respectfully contends that the judgment of the District Court as affirmed by the Supreme Court in favor of the plaintiff and against the defendant should be affirmed.

Respectfully submitted,

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Attorney for Plaintiff-Appellee.