(4)

INDEX

State of Demand—

STATE OF DEMAND

# Plainfield District Court

| | |
|---|---|
| AARON M. DICHTER<br>Plaintiff,<br>—vs—<br>HARRY ISAACSON and<br>DORA ISAACSON, his wife.<br>Defendants | ON CONTRACT<br>STATE OF<br>DEMAND |

The Plaintiff demands of the defendant the sum of Three Hundred Dollars for that;

1 On the 7th day of August, 1923, the plaintiff entered into a contract with the defendants herein for the purchase of property situated in the Borough of North Plainfield in the County of Somerset and State of New Jersey, said property being known and designated as No. 18 Willow Avenue and consisting of a one four-family apartment, on a lot 53 feet front and 166 feet deep, together with all improvements thereon, a true copy of which contract is hereto attached and made part hereof.

2 The said property herein mentioned was to be conveyed by the defendants herein mentioned free and clear of all encumbrances, excepting as stated therein; the only exceptions being made to outstanding martgages which were then liens upon the said property, in all other respects, the defendants herein covenant and agreed to convey the property free and clear of all encumbrances.

State of Demand—

3 Subsequent to the execution of the agreement herein mentioned and immediately thereafter, the plaintiff herein caused to have an examination of the title of the premises which were to be conveyed in the contract hereto attached and made part hereof.

4 By reason of a careful examination in the examination of title of premises to be conveyed in the contract herein mentioned, it was disclosed that in a certain deed, given by Louise B. Boice and Carrie C., his wife to Mary P. Bettman, one of the former owners of the property in question and which deed was dated June 14, 1882 and acknowledged June 17, 1882 and recorded June 23, 1882 in Book x 5, page 267, etc., in the County Clerk's office for the County of Somerset, the following restriction against the property in question, was disclosed; "That a dwelling house shall not be erected nearer to the road than 30 feet".

5 The plaintiff then procured F. A. Dunham, a civil engineer of the City of Plainfield, to survey the property in question and an accurate survey disclosed that the property in question was situate 26 feet and 11 inches away from the side of the road.

6 The plaintiff immediately notified the defendants of the defect in the record and also as to the restriction and encumbrance discovered against the property in question and demanded that the defendants clear the title so that the same shall be free and clear of the encumbrance discovered, but notwithstanding the same, the defendants have



State of Demand—

wholly failed to clear the encumbrance appearing on record so as to give the plaintiff a good and marketable title and free and clear of encumbrances in accordances with the contract hereto attached. Notwithstanding further requests made by the plaintiff to have the title cleared, the defendants have wholly refused to clear the title.

7 The plaintiff has requested of the defendants the return of the deposit of $100.00 in cash in addition to the sum of One Hundred Three Dollars and forty-one cents for legal expenses incurred in the examination of title and disbursements made and an additional sum of $35.00, expense incurred in making a survey, making a total demand of Two Hundred Thirty-eight Dollars and forty-one cents which sum the defendants have wholly refused to pay to the plaintiff, notwithstanding several demands made.

The plaintiff on the trial of the above case will ask for judgment for the sum of Two Hundred Thirty-eight Dollars and forty-one cents "Under an act to provide the measure of damages in certain actions on contract for the sale of Real Estate or any interest therein, under chatper 159 of the laws of 1915 on page 316".

JOSEPH J. MUTNICK,
Attorney of Plaintiff

AGREEMENT FOR SALE

Same as P-1.

BILL FOR SURVEY

Same as P-4.

Docket Entries—

DOCKET ENTRIES

State of New Jersey
County of Union ss.

IN THE DISTRICT COURT OF THE
CITY OF PLAINFIELD

| | |
|---|---|
| AARON M. DICHTER<br>Plaintiff,<br>—vs—<br>HARRY ISAACSON and<br>DORA ISAACSON, his wife.<br>Defendants | In an action upon Contract<br>Demand, $300.00<br>Att'y of Pl'ff<br>Joseph J. Mutnick<br>Att'y of Def'ts<br>W. S. Angleman |

A Summons was issued in the above stated cause Nov. 21, 1923, returnable Nov. 28, 1923, at ten o'clock A. M., and was returned by the Sergeant at Arms as follows:

I served the within summons on the within named defendants this 21st day of Nov., A. D. 1923 by reading the same to each of them and leaving each of them a true copy thereof.

GEORGE YORK
Sergeant at Arms

State of demand filed Nov. 21, 1923.

Adjourned to Dec. 5th. Adjourned to Dec. 12th. Adjourned to Dec. 19th. The plaintiff and the



Docket Entries—

defendant appearing the cause was tried Dec. 19th, 1923. The following witnesses were called and sworn for the plaintiff, Charles J. Kupler, Ernest Fiedler, Aaron Dichter, for the defendant, Harry Isaacson. The following exhibits were offered and marked in evidence by the plaintiff, (P_1) Agreement of Sale, (P_2) Deed, (P_3) Map of Survey, (P_4) Bill for Survey, (P_5) Bill for Search. Counsel summed up. Court reserved decision. Court announced conclusion March 5th, 1924 and gave judgment in favor of the above named plaintiff and against the above named defendant in the sum of Two Hundred and Thirty_eight Dollars and forty_one cents ($238.41). Notice of appeal filed March 19th, 1924. Appeal Bond filed March 19th, 1924. Orders extending time filed as follows: March 26, 1924. April 9, 1924, April 23, 1924, May 7, 1924, May 21, 1924, June 11, 1924, July 23, 1924. August 6, 1924. Sept., 10, 1924. October 1, 1924, October 29, 1924. November 19, 1924, December 31, 1924, April 15, 1925. State of case filed May 15, 1925.

Certified true copy.

ROBERT T. SKINNER,
Clerk of Plainfield District Court.

Notice of Appeal—

NOTICE OF APPEAL

# Plainfield District Court

| | |
|---|---|
| AARON M. DICHTER<br>Plaintiff,<br><br>—vs—<br><br>HARRY ISAACSON and<br>DORA ISAACSON, his wife.<br>Defendants | ON CONTRACT<br><br>NOTICE OF<br>APPEAL |

TAKE NOTICE that the defendants HARRY ISAACSON and DORA ISAACSON, his wife, hereby appeal to the SUPREME COURT OF NEW JERSEY from the judgment of the DISTRICT COURT OF THE CITY OF PLAINFIELD rendered in the above-stated action on March 5, 1924, and from each and every determination of such DISTRICT COURT in points of law made adversely to defendants' contentions.

Dated. March 18, 1924.

Respectfully,

WINFIELD S. ANGLEMAN.
Attorney of Defendants

To
Aaron Dichter, Plaintiff, or
Joseph J. Mutnick, Jr.,
Attorney for Aaron Dichter, Plaintiff.

Service acknowledged by plaintiff's attorney, March 18. 1924.



Order Extending Time—

ORDER EXTENDING TIME

# Plainfield District Court

| | |
|---|---|
| AARON M. DICHTER<br>Plaintiff,<br><br>—vs—<br><br>HARRY ISAACSON and<br>DORA ISAACSON, his wife.<br>Defendants | ON CONTRACT<br><br>ORDER<br>EXTENDING<br>TIME |

Application being made for an order to extend the time within which to agree upon or settle the case for appeal in the above-entitled cause, and on good cause shown,

IT IS ORDERED, on this Twenty-sixth day of March. Nineteen Hundred and Twenty Four, that further time be granted to agree upon or settle the case for appeal in the above-entitled cause, and that the time within which to agree upon or settle the case for appeal in the above-entitled cause be, and hereby is, extended to and including the Tenth day of April. Nineteen Hundred and Twenty Four.

JOHN R. CONNOLLY,
Judge.

Similar orders extending the time made April 9, 1924, April 23, 1924. May 7, 1924. May 21, 1924. June 11, 1924, July 23 1924, August 6. 1924, September 10. 1924, October 1, 1924, October 29. 1924, November 19. 1924, December 31, 1924. April 15, 1924.

STATE OF CASE AS SETTLED BY COURT

# Plainfield District Court

| | |
|---|---|
| AARON M. DICHTER<br>Plaintiff, | ACTION AT LAW |
| —vs— | |
| HARRY ISAACSON and DORA ISAACSON, his wife,<br>Defendants | STATE OF CASE |

The parties failing to agree on a state of case, and having appealed to the Court to settle same, I do hereby setle the state of the case as follows:

Plaintiff sued to recover deposit and seach fees on a contract of sale of real estate (Exhibit P) alleging defendant's title was defective and unmarketable.

Plaintiff produced a deed in the chain of title, called the Bettman deed (Exhibit P).

This deed conveyed premises mentioned in contract and an adjoining lot, and contains a restrictive covenant, which plaintiff contended made the title unmarketable, and that defendant could not convey the title called for by the contract of sale unless he (defendant) removed this restrictive covenant.

These was uncontradicted evidence that, in violation of this covenant, the building on this lot in





question was erected about a year before the date of contract of sale and less than thirty (30) feet from the street, about twenty-six (26) or twenty-seven (27) feet.

The evidence further showed that title to this lot had been transferred four or five times following the Bettman deed before defendant became the owner, in none of which deeds was reference made to the restrictive covenants in that deed.

The street curves at this point. The house on the adjoining lot also conveyed in the Bettman deed was built slightly less than thirty (30) feet from the street.

Plaintiff gave the defendant a note for Four Hundred ($400.00) Dollars as mentioned in the contract, which became due approximately two weeks before date for closing title, which plaintiff refused to pay because he had theretofore learned from his counsel that the title was defective.

There was evidence that buildings on the same street in the same block were thirty (30) feet or more back from the street line, but there was no proof of any common agreement or covenant or building scheme to establish such a building line.

Plaintiff did not tender performance under the contract at the time and pdace fixed for closing but there was evidence showing that through their respecive attorneys and informal communications, all understood that the plaintiff claimed title was defective because of the restrictive covenant and vio-

State of Case As Settled by Court—

lation thereof in the Bettman deed. Plaintiff testified he was at his attorney's office several times on date for closing title, willing to take title, but not unless defendant removed the restriction referred to in the Bettman deed. Defendant was present at time and place fixed for closing, ready to give deed, but refusing to remove the restrictions mentioned in the Bettman deed, claiming they were not a cloud on the title, but plaintiff's attorney refused to close.

It did not appear that objection had been made at any time to the building being erected less than thirty (30) feet from the street.

Plaintiff proved damages of Two Hundred and thirty-eight dollars and forty-one cents ($238.41).

I found that plaintiff was entitled to a title free and clear of encumbrances other than those excepted in the contract. That defendant's title was unmarketable and not free from doubt, because of the restrictions in the Bettman deed, and that plaintiff was justified in refusing to take defendant's title unless defendant cleared the title of these restrictions. That defendant did not clear or offer to clear the title. That tender of performance by plaintiff was unnecessary because plaintiff had frequently informed defendant and his attorney of the objections to the title, which objections defendant insisted were not well founded, and that the parties knew from these communications before date for closing, defendant would not and did not intend to clear the title as plaintiff required, and that



State of Case As Settled by Court—

therefore tender of performance would be a mere gesture.

I therefore gave judgment for plaintiff for Two Hundred and thirty-eight dollars and forty-one cents ($238.41) damages.

Defendant excepted to the findings.

In witness whereof, I have hereunto set my hand this 21st day of April, 1925.

JOHN R. CONNOLLY

Judge of the District Court
of the City of Plainfield

Attest:

ROBERT T. SKINNER,

Clerk.

A true certified copy of orifiinal.

ROBERT T. SKINNER,
Clerk.

SPECIFICATION OF OBJECTIONS

(Filed, March 25, 1924)

# New Jersey Supreme Court

| | |
|---|---|
| AARON M. DICHTER<br>Plaintiff—Respondent<br>—vs—<br>HARRY ISAACSON and<br>DORA ISAACSON, his wife,<br>Defendants—Appellants | ON CONTRACT<br>ON APPEAL<br>SPECIFICATION<br>OF OBJECTIONS |

The following is a specification of the rulings, determinations, or decisions of the District Court of the City of Plainfield with respect to which the defendants-appellants are dissatisfied in point of law:

1 That there was a defect in the title of defendants to the lands agreed to be sold.

2 That the defendants were not able to carry out the agreement for sale because of a defect in the title to the lands agreed to be sold.

3 That the restriction set forth in the State of Demand was operative as to the lands agreed to be conveyed.

4 That defendants could not give title to the





lands agreed to be sold as called for by the agreement for sale.

5 That defendants breached the agreement for sale.

6 That plaintiff was not in default on the agreement for sale.

7 That plaintiff's failure to pay the $400 promissory note set forth in the agreement for sale did not breach the agreement for sale.

8 That plaintiff's failure to be present at the time fixed for passing title and making tender as required by agreement for sale did not breach the agreemnt for sale.

9 That plaintiff was entitled to recover on his State of Demand.

10 That judgment was given against defendants.

11 That judgment was given for plaintiff.

W. S. ANGLEMAN,

Attorney for Defendants-Appellants.

## PLAINTIFF'S EXHIBITS

### EXHIBIT P_1—AGREEMENT FOR SALE

ARTICLES OF AGREEMENT, made the 7th day of August in the year of Our Lord One Thousand Nine Hundred and Twenty-three between Harry Isaacson and Dora Isaacson, his wife, of the City of Plainfield, in the County of Somerset and State of New Jersey, of the First Part; and Aaron M. Dichter of the Borough of North Plainfield in the County of Somerset and State of New Jersey of the Second Part; Witnesseth, That the said party of the first part, for and in consideration of the sum of Twenty_four thousand two hundred dollars ($24,200) to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that they the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed of Warranty free from all encumbrance Except as herein mentiond, on or before the 15th day of October next ensuing the date hereof, all that lot, tract, or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Borough of North Plainfield in the County of Somerset and State of New Jersey and being known and designated as Number 18 Willow Avenue and consisting of one_four family stucco apartment house on a lot





approximately 53 feet front and 166 feet deep together with all improvements thereon.

And the said Aaron M. Dichter for his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that he he said party of the second part, will pay and satisfy or cause to be paid and satisfied, unto the said party of the first part the said sum of Twenty_four thousand two hundred dollars ($24,200.00) as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

$4,500 in cash upon delivery of deed and closing of title. $100.00 by deposit and part purchase price receipt of which is hereby acknowledged. $400.00 by promissory note given by said party of the second part hereto unto the said party of the first part, which note shall mature on October 1st next, and which note shall bear no interest. $11,000.00 by assuming a first mortgage now upon premises which mortgage the said party of the first part hereto covenants shall run for a period of five years from January, 1923 and bears interest at 6 per cent. and which is held by Harry Laub. $2,650.00 by assuming payment of a certain second mortgage which is security for the payment of a note of $2,650.00 subject to renewals upon payment of $100.00 on account of principle every three months together with interest, said note will become due next on September 30, 1923, and the said party of the first part hereto covenants and agrees to secure proper in-

Plaintiff's Exhibits—
Exhibit P_1—Agreement for Sale—

dorsement thereon· $2,700.00 by assuming payment of a third mortgage against the premises, which mortgage is security for the payment of promissory note held by Messrs. Kohn and Israelski and which note is subject to renewals upon payment of $100·00 and interest every three months and the said party of the first part hereto covenants and agrees to secure proper indorsement thereon· Said note to become due on September 30 next· Said parties of the first part further covenant that both the second and third mortgage herein mentioned run until the same is paid off according to the arrangement herein mentioned. $2,850·00 by giving back unto the party of the first part hereto a purchase money mortgage which mortgage shall be paid off at the rate of $1,000.00 yearly together with interest at the rate of 6 per cent·, until paid from day of its making· This property is being sold subject to a lease upon premises which expires one year from October first next, and which lase has been given Thomas Krinsman; the said rental of said lease being $70.00 per month; it is further agreed by the party of the first part hereto that this property is to be conveyed free and clear of lease with the exception of the lease above mentioned and the said parties of the first part further agree to serve notice upon Mr· Libby, one of the tenants now occupying one of the apartments and serve such notice on September 1st.

Providing that the said Aaron M. Dichter, the purchaser· shall give notice of such desire to have notice served and further on condition that the said Aaron M· Dichter shall compensate the said



Plaintiff's Exhibits—
Exhibit P_1—Agreement for Sale—

party of the first part for all losses of rental up to the closing of title, by reason of vacancy of the tenant Mr· Libby on October 1st· The said parties of the first part covenant that Mr· Abrams and Mr. Bushnell are at the present time monthly tenants running from month to month under no lease.

The purchaser Aaron M· Dichter stipulates that the first broker who approached him on the sale of the property was Mr· Abraham Kwint and the said party of the first part recognizes Abraham Kwint as the broker in this transaction and agrees to pay him $200·00 for commission. Said commmission to be paid at the closing of title·

And it is further Agreed, by the parties to these presents, that the said party of the second part, his heirs and assigns, may enter into and upon the said land and premises on the 15th day of October 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 the office of Joseph J· Mutnick, 127 Watchung Avenue, Plainfield, N. J., between the hours of 9 in the forenoon and 5 o'clock in the afternoon on the said 15th day of October next ensuing the date hereof·

In Witness Whereof, the said parties have here-

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

HARRY ISAACSON (L S)

DORA ISAACSON (L S)

AARON M. DICHTER (L S)

Signed, Sealed and Delivered
in the presence of

ABRAHAM KWINT

EXHIBIT P_2—BETTMAN DEED

This Indenture made the Fourteenth day of June in the year one thousand eight hundred and eighty two

Between Lewis B. Boice and Carrie C. Boice, his wife, of the Township of North Plainfield in the County of Somerset and State of New Jersey parties of the First Part

And Mary P. Bettman, wife of John M. Bettman of the same place, party of the Second Part

Witnesseth That the said parties of the first part for and in consideration of the sum of Fifteen Hundred ($1500) Dollars 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 and





before the sealing and delivery of these presents the receipt whereof is hereby acknowledged and the said parties of the first part therewith fully satisfied contened 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 to the said party of the second part and to her heirs and assigns forever

All that certain tract of parcel of land and premises hereinafter particularly described situate lying and being in the Township of North Plainfield in the Couty of Somerset andState of New Jersey and is known and designated as a portion of Lot Number Fourteen (14) in Block D. as the same is laid down on a certain Map entitled Building Lots in Washington Park North Plainfield, N. J., property of W. J. Roome, J. R. Dunham, Eng. and Surveyor dated June1. 1872 and filed in the Clerk's Office of Somerset County July 9. 1872 and is thus described

Beginning at a point in the centre of Willow Avenue distant Four Hundred and thirty four and five hundreths (434.05) feet in a North Easterly direction along the Centre of said Avenue from a point in the Centre of said Willow Avenue where the same is intersected by the Centre line of Sycamore Avenue and is a corner of a lot of land heretofore conveyed by said Roome to John McGingan thence along said line of said lot in a course of North sixteen degrees and twenty minutes west one hun-

dred and fifty two (152) feet more or less to a point in the rear line of lot Number Four (4) Thence along the line of that lot in a course of North Eighty one degrees and forty seven minutes East seventy nine (79) feet to a point and is a corner of Lot Number Fifteen (15) thence along the line of said lot in a course of South sixteen degrees and twenty minutes East one hundred and forty nine and seven tenths (149.7) feet to a point in the Centre of Willow Avenue thence along the Centre of the same in a course of South Eighty nine degrees and four minutes west Forty seven and five tenths (47·5) feet to a point thence still along the Centre of the same South Seventy one degrees and forty six minutes west Thirty one and Sixty five hundreths (31·65) feet to the place of beginning be said measurements more or less· Being the same premises conveyed to the said Lewis B· Boice by deed of William J· Roome and wife dated May 1, 1874 and recorded in Book S No. 4 of Deeds for said Somerset County at page 457 &c·

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

And also all the estate, right· title, interest, property claim and demand whatsoever, dower and right of dower of the said parties of the first part of in and to the same and of in and to every part and parcel hereof





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 her heirs and assigns to the only proper use benefit and behoof of the said party of the second part her heirs and assigns forever

And the said parties of the first part do for themselves their heirs executors and administrators covenant and grant to and with the said party of the second part her 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 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 inended 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 parties 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 the said Lewis B· Boice and his heirs will Warrant secure and forever defend the said land and premises unto the said party of the second

part her heirs and assigns forever aga'nst the law_ful claims and demands of all and every person or persons freely and clearly freed and discharged of and from all manner of encumbrances whatsoever

And the said party of the second part for her_self her heirs executors administrators and assigns doth covenant and agree to and with the said party of the first part their heirs or assigns that the premises hereby conveyed shall be held for the purpose of erecting a dwelling house or dwelling houses thereon and that any such dwelling house shall not be erected nearer to the road than thirty feet and that the sa'd party of the second part her heirs or assigns shall not nor will at any time for_ever after erect make carry on nor cause or suffer to be carried on in any manner on any part of the said premises any livery stable slaughter house tal_low chandlery smith shop forge furnace or brass foundry nail or other iron factory whatsoever or any gas works or any manufactory for the making of any glass starch glue varnish vitriol turpentine or ink or for tanning dressing preparing or keeping skins hides or leather or any distillery brewery sugar bakery or for theatrical or equestrian per_formances or any other manufactory trade business or calling whatsoever which may be in any way noxious or offensive to the neighboring 'nhabitants under the penalty of one thousand dollars liquidated damages in the premises and the further sum of one hundred dollars for every ten days the said nuisance shall be continued to be sued for 'n any court of law having cognizance thereof and recov_





ered by the owner or owners of the property next adjoining to the premises where such violation of such covenant exists or is permitted to the use of such owner or owners suing for the same

In Witness Whereof the parties to these presents have hereunto interchangeably set their hands and seals the day and year first above written.

LEWIS B. BOICE (L S)

CARRIE C. BOICE (L S)

MARY P. BETTMAN (L S)

Sealed and Delivered in
the presence of

ISAAC BROKAW

State of New Jersey
County of Somerset ss.

Be it Remembered that on th's seventeenth day of June in the year of our Lord one housand eight hundred and eighty two before me subscriber one of the commissioners in said County for taking ac_knowledgement and proof of Deeds personally ap_peared Lewis B. Boice and Carrie C. Boice his wife who I am satisfied are the grantors in the within Deed of Conveyance named and I having first made known to them the contents thereof they did sev_erally acknowledge that they signed sealed and de_livered the same as their voluntary act and deed for the uses and purposes therein expressed

Plaintiff's Exhibits—
Exhibit P_2—Bettman Deed—

And the said Carrie C. Boice being by me privately examined separate and apart from her said husband did further acknowledge that she signed sealed and delivered the same as her voluntary act and deed freely without fear threats or compulsion of her husband.

ISAAC BROKAW
Commissioner of Deeds

State of New Jersey
County of Somerset ss.

I, Frederick N. Voorhees, Clerk of said County do hereby certify the foregoing to be a true and correct copy of a certain Deed given by Lewis B. Boice and Carrie C. Boice, his wife to Mary P. Bettman dated June 14th. 1882 as the same is recorded in my office June 23d, 1882 in Book X No. 5 of Deeds on pages 267 &c.

In Witness Whereof, I have here unto set my hand and affixed the seal of said County this 17th day of November 1923.

(SEAL)

FRED. N. VOORHEES,
Clerk.

EXHIBIT P_3—MAP

Exhibit P_3—Map—



Plaintiff's Exhibits—
Exhibit P_4—Bill for Survey—
Exhibit P_5—Bill for Search—

EXHIBIT P_4—BILL FOR SURVEY

Nov. 14, 1923.

AARON M. DICHTER
F. A. DUNHAM
Civil Engineer—Surveyor
109 Park Avenue
Phone 610

| | | |
|---|---|---|
| Oct. 6_16 | To survey and locating lines and corners of property on Willow Ave. North Plainfield, with locations, calculations, maps, and expense. | $35.00 |

EXHIBIT P_5—BILL FOR SEARCH

| | |
|---|---|
| Services rendered in examination of title to premises purchased from Harry Isaacson | $75.00 |
| Disbursements in drawing bond and mortgage | 10.00 |
| Drawing contract for the Sale of property | 5.00 |
| Tax Search | 2.75 |
| U. S. District Court | 2.90 |
| N. J. Supreme Court | 7.76 |
| | $103.41 |

SUPREME COURT OPINION
(Filed, March 18th, 1926)

No. 482 October Term 1925

# New Jersey Supreme Court

AARON M. DICHTER,
Plaintiff-Respondent

vs.

HARRY ISAACSON, et al,
Defendants-Appellants

Appeal from Plainfield District Court

Argued October Term 1925, Decided January Term 1926.

JOSEPH J. MUTNICK,
For Plaintiff-Respondent,

WINFIELD S. ANGELMAN,
For Defendants-Appellants.

Argued Before Parker, Minturn and Black, J: J:

PER CURIAM:

This action was tried in Plainfield District Court, without a jury, and judgment for the plaintiff for $238.41.

The action was instituted by a vendee to recover deposit money, and search and surveyor's fees, because of the vendor's inability to convey by good and marketable title, in accordance with the terms of the agreement between them.

The plaintiff produced a deed in the chain of title (known as the Bettmen deed, dated 1882) which conveyed the locus in quo, and an adjoining lot, and which contained a covenant restric-

ting the erection of a dwelling house thereon, nearer than thirty feet from the road. The premises in question had thereon a dwelling built a year before the date of contract, which stood about twenty-six feet and eleven inches from the road, and to which no objection had ever been made because of its propinquinty to the road. The title had been transferred four or five times since 1882 by deeds which contained none of the restrictive covenants of the Bettmen deed. The house on the adjoining lot included in the Bettmen deed was located slightly less than thirty feet from the road.

There was evidence that the buildings on the same block were located thirty feet or more back from the road, but there was no proof of the common agreement, covenant or scheme to establish such line as a modus vibendi. The defendants contend that the situation thus existing does not show a defective title.

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 tnder 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.

The judgment will be affirmed.



RULE OF AFFIRMANCE

(Entered, April 29, 1926)

# New Jersey Supreme Court

| | |
|---|---|
| AARON M. DICHTER, Plaintiff-Respondent | Rule of Affirmance |
| vs. | |
| HARRY ISAACSON, et al, Defendants-Appellants | Remittuer |

This cause having been duly argued at the October term of this Court by Joseph J. Mutnick, of the counsel for the Plaintiff-Respondent and Winfield S. Angleman, of counsel for the defendants-appellants and the court having considered the same and being of the opinion that the judgment for the plaintiff entered in the Plainfield District Court should be affirmed:

It is thereupon Ordered and Adjudged that the Judgment in the Plainfield District Court from which an appeal is taken in this cause be and the same is hereby affirmed with costs to the plaintiff respondent; and that the said record is hereby remitted to the Court below to be proceeded with according to law and the practice of said court.

Rule Entered April 29, 1926.

On Motion of

Joseph J. Mutnick

Attorney for Plaintiff.

NOTICE OF APPEAL
(Filed, June 3, 1926)

## Supreme Court of New Jersey

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| AARON M. DICHTER,<br>Plaintiff-Respondent<br>vs.<br>HARRY ISAACSON and<br>DORA ISAACSON, his wife,<br>Defendants-Appellants | Action at Law<br>On Contract<br>On Appeal from<br>Plainfield District<br>Court.<br><br>Notice of Appeal |

TAKE NOTICE that the defendants-appellants appeal to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the ground that the Supreme Court erred in affirming the judgment under review.

W. S. ANGLEMAN,
Attorney for Defendants-Appellants

To

Joseph J. Mutnick, Jr.,
Attorney for Plaintiff-Respondent.



## NEW JERSEY COURT OF ERRORS AND APPEALS

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|---|---|
| AARON M. DICHTER,<br>Plaintiff—Respondent<br>—vs—<br>HARRY ISAACSON and<br>DORA ISAACSON, his wife,<br>Defendants—Appellants. | ACTION<br>AT LAW<br><br>ON CONTRACT |

# Brief for Defendants-Appellants

This is an appeal from a judgment of the Supreme Court affirming a judgment of the Plainfield District Court for $238.41 rendered in favor of the plaintiff in a suit to recover deposit moneys and surveyor's and search fees on the ground that a restrictive covenant in a deed more than forty years ago rendered the title defective and unmarketable.

FACTS

The restrictive covenant is contained in a deed called the Bettman deed conveying the premises in question and an adjoining lot.

Case, Bettman Deed, Exhibit P-2, p. 24, lines 12, etc.

This covenant restricts building nearer the street than thirty feet and contains the old-fashioned nuisance clause and provided for a penalty of $1,000 liquidated damages and $100 for every ten day's continuance.

The State of Demand, however, is based solely on a violation of this covenant in that a house is built on said lot nearer the street than thirty feet, namely 26 feet, 11 inches, and no objection is made to the nuisance clause.

Case, State of Demand, p. 4, lines 12-25.

This covenant was not included in any subsequent deed, although the property had been transferred four or five times following the Bettman deed and before defendants became owners.

Case, Case as Settled by Court, p. 11, lines 10-14.

The proof was that the house on the other tract is built nearer the street than thirty feet,

Case, Case as Settled by Court, p. 11, lines 17-20.

that the house on the premises in question was built about a year ago about 26 or 27 feet from the street,

Case, Case as Settled by Court, p. 10, lines 39, 40, etc.

and it did not appear that any objection had been made thereto at any time,

Case, Case as Settled by Court, p. 12, lines 17-19.



and that the street curved at that point.

Case, Case as Settled by Court, p. 11, line 17.

There was no proof of any common agreement or covenant or building scheme to establish such a building line.

Case, Case as Settled by Court, p. 11, lines 31-33.

Plaintiff did not tender performance.

Case, Case as Settled by Court, p. 11, lines 35 and 36.

Defendant was present at time and place fixed for closing, ready to give deed, but plaintiff's attorney refused to close.

Case, Case as Settled by Court, p. 12, lines 9-14.

Plaintiff had given a $400 note as part of deposit money on signing contract, which became due about two weeks before time set for closing, and which plaintiff had refused to pay.

Case, Case as Settled by Court, p. 11, lines 21-26.

The sale was for $24,200, and the only down payment was $100 in cash and this $400 note. BUT $4,500 was to have been paid on passing title.

Case, Agreement for Sale, p. 16, lines 20-23; p. 17, lines 21-27.

The Court found that the title was unmarketable and not free from doubt because of the re-

striction, that plaintiff was justified in refusing to take title, and that tender of performance by plaintiff was unnecessary.

Case. Case as Settled by Court, p. 12, lines 27-34.

The Court gave judgment for plaintiff for $238.41.

Case, Docket Entries, p. 7, lines 13-18.

Case, Case as Settled by Court, p. 13, lines 8-10.

This amount was made up as follows:

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| Deposit money, | | $100.00 |
| Case, Agreement for Sale, p. 17, line 22. | | |
| Surveyor's fees, | | 35.00 |
| Case. Bill for Survey, Exhibit P-4, p. 27. | | |
| Examination of title | $75.00 | |
| Drawing bond and mortgage | 10.00 | |
| Drawing contract of sale | 5.00 | |
| Tax search | 2.75 | |
| U. S. District Court | 2.90 | |
| N. J. Supreme Court | 7.76 | |
| | | 103.41 |
| Case, Bill for Search, Exhibit P-5, p. 27 | | |
| | | $238.41 |



## SPECIFICATION OF OBJECTIONS

There are eleven objections to the District Court's rulings.

Case, Specification of Objections, pp. 14-15.

For purposes of argument they may be discussed under three headings: 1. No defect in title; 2. Defendants did not breach the agreement of sale; 3. Plaintiff was in default.

## I. NO DEFECT IN TITLE

As to any claimed defect in title, plaintiff is limited to the one objection set up in his State of Demand, namely, the erection of a house nearer the street than thirty feet, because, as was said in

Shack vs. Dickenhorst, (not officially reported). 122 Atl. Rep. 436, 437 (Errors and Appeals, Oct. 11, 1923, Gummere, Ch. J.)

> "On the contrary, under elementary rules, the existence of every fact upon which his right of action depends must be specifically averred in his complaint. In the absence of such an averment as we have indicated, the presumption is that no such fact exists, and, consequently, no liability on the part of the defendant is shown."

Moreover, the covenant is a single covenant and is comprised in but a single, though long, sentence. The covenant having been broken by the owner of the adjoining lot, by building his house nearer the street than thirty feet, the covenant goes into the discard as a whole, as he would have no stand-

ing to complain of a violation in one part when he had violated it himself in another.

The covenant is an independet covenant and provides for liquidated damages, if broken. No assignment of the covenant having been shown, it is limited to those making it, and does not run with the land.

The general doctrine of the common law is that the burden of a covenant does not run with the land.

Spencer's Case, 1 Sen. Lead. Cases.

Asterberry vs. Oldham, 29 Ch. D, 700.

The case of

Zelman vs. Kaufherr, 76 N. J. Eq. 52 (Chancery, 1909. Stevens, V. C.)

is very much in point. Vice Chancellor Stevens said in that case

(at p. 54, lines 3, etc.)

"The only conceivable litigation would be either an action at law for damages or a bill for mandatory injunction. The action at law could only be brought against complainant, for it was she, and she only who broke the covenant. On a bill for mandatory injunction to protect restrictive building covenants, courts of equity have laid down two rules and applied them with much strictness: (1) the application must be promptly made (citing cases); (2) the common scheme of building bust have been actually preserved (citing cases) * * * * * * * * Not only have they stood by



while complainant was building, but they have themselves violated the same covenant (citing cases)."

The present limitation of suits respecting title to land is thirty years.

P. L. 1922. p. 315.

This covenant dates back to June 14, 1882, a period over forty-one years from date set to pass title (Oct. 5, 1923), and has not appeared in the title since.

The defect in the title must be a substantial one.

Scheinman vs. Block, 97 N. J. L. 404.
(Supreme Court, 1922, Parker. J.)

Restrictions placed upon the use of lands conveyed in fee are always to be construed strictly, and ambiquities and uncertainties are to be resolved in favor of the owner's unrestricted use of the land.

Underwood vs. Herman & Co., 82 N. J. Eq. 353. (Errors and Appeals, 1913, Minturn, J.)

There was not any substantial defect in this title.

## II. DEFENDANTS DID NOT BREACH AGREEMENT

As defendant was present at time and place fixed for closing, ready to give deed, there was no breach of the agreement on defendants' part.

## III. PLAINTIFF WAS IN DEFAULT

The minute plaintiff failed to meet the note for $400 on Oct. 1, which was part of the down payment, he breached the agreement, and defendants were under no obligation to do another thing, until plaintiff had made good his default. The reasoning in

Thomas vs. Killheffer, 98 N. J. L. 359 (Supreme Court, 1923, Parker, J.)

applies. Plaintiff could not say on Oct. 1 that defendants would not complete their contract on Oct. 15. On Oct. 1 defendants could not possibly have been in default. Plaintiff having broken a part of the contract he was to perform before defendants were required to perform theirs, plaintiff was in default and had no standing to bring suit against defendants. Plaintiff had no right to repudiate his contract before the time fixed for settlement.

Kadow vs. Cronin, 97 N. J. L. 301.
(Errors and Appeals, 1922, White, J.)

Plaintiff also breached the agreement by not being present at the time fixed for passing title. Could it be that the $4,500 he was than to put up plus the $400 note which he would have to make good, kept him from the scene of action? There is no proof that he was in a financial position to meet the payment necessary. It must be remembered that he only had $100 up on a $24,000 purchase. Was he merely taking a flyer in the hope of disposing of his contract at a profit before the day of reckoning?



It would seem that he was trying to get from under, as the attorney's bill included the charges for drawing the contract of sale, and the bond and mortgage, which he never showed up to execute, items which the Court included in the damages awarded, but which clearly the statute does not authorize.

~~It is most respectfully submitted that the judgment of the Supreme Court affirming the judgment of the Plainfield District Court should be reversed.~~

~~W. S. ANGLEMAN,~~
~~Attorney and Counsel for~~
~~Defendants-Appellants.~~

~~May Term, 1927.~~

The statute is as follows:

"Whenever any person shall contract to sell real estate or any interest therin, and shall not be able to carry out such contract because of a defect in the title to such real estate or interest therein, the person with whom such contract was made, or his legal representative or assigns, shall be entitled to recover from such vendor, in an action for the breach of such contract, not only the deposit money, with interest and costs, but also the reasonable expenses of examining the title and making survey, except where the contract shall provide otherwise; provided, this act shall not limit the recovery where the purchaser may seek to recover for the deceit or fraud of the vendor."

P. L. 1915, p. 316.

The District Court found

> "that defendant's title was unmarketable and not free from doubt, because of the restrictions in the Bettman deed."

Case, p. 12, lines 27-29

In that conclusion the Supreme Court agreed.

Case, p. 9, lines 30-40

In an action at law for breach of contract to convey, want of good title must be established and the question whether the title is marketable is not involved. The discretionary power of a court of equity with respect to a title which is doubtful, though good, is not within the province of a court of law. Chancellor Runyon declared there might be a good title at law which a court of equity would not force on an unwilling purchaser.

Meyer vs. Madreperia, 68 N. J. L 258, 267, (cases cited), 268

(Errors and Appeals, 1902, Magie, Ch.)

It would seem that the District Court, basing its judgment on unmarketability of title, and the Supreme Court in affirming on the same ground, had confused the equitable question with the legal one.

Respectfully submitted,
W. S. Hagaman,
Attorney and Counsel for
Defendants-Appellants.

May Term, 1927.



**NEW JERSEY**
**COURT OF ERRORS AND APPEALS**

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|---|---|
| AARON M. DICHTER,<br>Plaintiff—Respondent<br>—vs—<br>HARRY ISAACSON and<br>DORA ISAACSON, his wife,<br>Defendants—Appellants | ACTION AT LAW<br><br>ON CONTRACT |

# Brief for Plaintiff-Respondent

This is an appeal from the judgment of the Supreme Court affirming a judgment of the Plainfield District Court for $238.41 rendered in favor of the plaintiff in a suit to recover deposit moneys and surveyor's and search fees on the ground that a restrictive covenant in a deed in the chain of title rendered the title of the defendants—appellants, defective and unmarketable.

## FACTS

The facts as set forth in the State of Demand filed in the above case and brought out in the testi mony are briefly as follows:

On August 7, 1923 the plaintiff had entered into an agreement for the purchase of property from the defendants. The agreement called for a warranty deed free from all encumbrances excepting certain encumbrances which were then liens against the property, and which were specifically mentioned. The said liens of which mention was made being outstanding mortgages against the property.

Case, Agreement for Sale, Exhibit P-1, p. 16 line 20 etc.

The plaintiff caused an examination of the title to be made. This examination of the title discloses a restriction embodied in a deed (deed being marked Exhibit P-2 p. 20, lines 22 etc in the case) which deed is dated June 14, 1882 and recorded June 23, 1882 in Book X 5 page 267 in the Clerk's office for the County of Somerset. This deed had been given to one Mary P. Bettman, wife of John Bettman, and the restriction contained in the deed reads as follows:

> "And the said party of the second part for herself, her heirs, executors, adminis trators, and assigns doth covenant and agree to and with the party of the first part, their heirs or assigns that the premises hereby conveyed shall be held FOR THE PURPOSE OF E RECTING A DWELLING HOUSE OR DWELLING HOUSES THEREON, AND THAT ANY SUCH DWELLING HOUSE SHALL NOT BE ERECTED NEARER TO THE ROAD THAN THIRTY FEET, and that the said party



> of the second part, her heirs, or assigns shall not, nor will at any time forever hereafter erect, make, carry on nor cause or suffer to be carried on in any manner on any part of said premises, any livery stable, slaughter house, tallow chancley, smith shop, forge furnace or brass foundry, nail or other iron factory whatsoever or any gas works or any maunfactory for the making of any glass, starch, glue, varnish vituol turpentine or ink or for tanning, dipping, preparing or keeping skins, hides or leather or any distillery, brewery, sugar, bakery or for theatrical or equestrian performances or any other maunfactory trade business or calling whatsoever which may be in any way noxious or offensive to the neighborhood inhabitants under the penalty of $1,000 liquidated damages in the premises and the further sum of $100.00 for every ten days that the said nuisance shall be continued, to be sued for in any court of law having cognizance thereof and recovered by the owner or owners of the property next adjoining to the premises where such violation of such covenant exists or is permitted to the use of such owner or owners sueing for the same.

Case, Bettman Deed, Exhibit P—2, p. 24 lines 12 etc.

Following the examination of the title the plaintiff-respondent caused a survey to be made; as a re-

sult of which accurate survey it was disclosed that the house erected upon the premises in question was but twenty seven feet from the road on one side and Twenty-six and eleven hundredths feet from the road on the other side, therefore causing a violation of the restriction in the Bettman deed.

Case, Case as settled by court p. 10, line 39.

The plaintiff-respondent then called the same to the attention of the defendants and informed them that he would not accept title unless he was given a title which would be free from the restriction mention in the Bettman deed

Case, case as settled by court p. 11, lines 35 etc

The facts from the testimony further showed that even on the day upon which title was to be passed there was on deposit a certified check with Joseph J. Mutnick, at his office, at 127 Watchung avenue, at which place title was to be passed; the amount of the check being sufficient to cover the full purchase price but due to the outstanding restriction as set forth in the Bettman deed marked Exhibit P-2, the plaintiff-respondent refused to accept such title and was, however, ready and willing to accept a title which would be free and clear of the restriction embodied in the Bettman deed.

Case, case as settled by court p. 12, lines 5 etc. and 33 etc.

The testimony further brought out the fact that there was also as payment of the purchase price a



promissory note given by the plaintiff-respondent, to the defendants-appellants, which note had not been met, for the reason, as the plaintiff respondent stated that he would not want to make further payment on the purchase price or on this note, at a time when he was informed that title was defective.

Case, case as settled by court p. 11 lines 21 etc

A further fact evinced by the testimony of one Ernest Fiedler, an examiner of titles, disclosed the fact that the restriction embodied in the Bettman deed had in no wise been avoided or removed from record in any of the subsequent deeds in the chain of the title in question.

Case, case as settled by court p. 12, lines 32 etc

The contention of the defendants-appellants, is to the effect there was no restriction set forth which was operative as to the lands to be conveyed, but plaintiff-respondent contends that the same is a restrictive covenant, running with the land and restricting its use. Any limitation restricting the use of property constitutes a restrictive covenant. A reasonable construction of the same will not permit of this conclusion that it was personal covenant. The restriction although embodied in one paragraph includes two separate distinct clauses as to how the property is to be used.

The first clause restricts the use of the land as to what dwellings and how suchdwellings are to be constructed on the lands in question. The second clause contains the general well known "nuisance clause" which at that time existed and for which

there was a standard form and which appears in the second clause of the restriction in the Bettman Deed.

The defendants appellants contend that by reason of the fact that a one thousand dollars penalty is provided as liquidated damages for the violation of the nuisance clause, that this would make the entire covenant a personal covenant with the land. A reasonable construction of the entire restriction certainly discloses the intention on the part of the parties to the deed to restrict the property as to the two modes; first to place a restriction upon the property as to what kind of dwellings and how such dwellings shall be erected as evidenced by the clear cut statement in the first clause of restriction. Then there is a second clause which sets forth the standard form of the well known "nuisance clause' where the intention is that the property shall not create any of the nuisances set forth.

It can be readily construed that the parties in drawing the restriction say, in reference to the last nuisance clause, as follows:—"And a further sum of One Hundred Dollars for every ten days the said nuisance clause shall be continued;" and the intention there being clearly that the same shall apply to the last clause as to the general nuisance clause and not as to the first clause which provides for the building restriction. If it were the intention of the parties that the penalty should be applied to the violation of the building restriction as well, then why did they not set it forth in clear and express language as they did with refedence to the violation of the nuisance clause? The parties also used the said word "nuisance" in the singular when speaking of the penalty imposed, which is another fact in ar-



riving to the conclusion that the penalty provided for simply is for the nuisance clause embodied in the second clause and does not refer to the building restriction set forth in the first clause of the paragraph.

Construing the language of the parties, a reasonable construction of the same leads to the conclusion, surely, that was the intention of the parties to restrict, first the building and dwelling thereon, as set forth in the first clause and secondly, the nuisance clause as set forth in the second clause of restrictions.

## ISSUES

The issues which arose are as follows:

1—What kind of a title did the contract call for?

2—What is a marketable title?

3—Was the plaintiff compelled to tender performance?

4—Is the restriction a cloud on the title or such a defect which entitled the plaintiff to recover for deposit and reasonable expenses for examining the title?

The first real objection of the defendants, appellants, is the fact that there is no defect in the title.

Specification of objections, p 14, lines 29, etc.

## WHAT KIND OF A TITLE DID THE CONTRACT CALL FOR?

The contract in question called for a warranty deed free and clear from all encumbrances.

Case, case as settled by court p 12, line 25, etc.

It therefore called for an unencumbered title and the burden of proof is on the vendor to show a good title where that is denied in the vendee's answer, or the vendee in his answer insists that the vendor exhibits his title or the vendee refuse to perform on account of alleged defects.

Cornell vs Andrus, 36 N J Equity, Page 321.

## WHAT IS A MARKETABLE TITLE

This is a term which when applied to real estate is used to designate a title free from restrictive doubt, one that is not only good but indubitable, a title in which there is no doubt involved, either as to matter of law or fact; a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear on such transactions, be willing and ought to accept; a title free from such doubts as would affect the market value of the estate, one which a prudent man with a knowledge of all facts and their legal bearings would be willing to accept; a title of such character as should assure to the vendee a peaceful enjoymnt of the property.



Doutney vs Lampie, 78 N J Equity, Page 277.

26 Cyc. page 818.

Van Keuren vs Siedler, 73 N J Equity, page 239, 66 Atlantic, page 920.

A contract to convey free and clear of all encumbrances requires a marketable title.

39 Cyc. page 1452.

## IS THE RESTRICTION A CLOUD IN THE TITLE OR SUCH A DEFECT WHICH ENTITLED THE PLAINTIFF - RESPONDENT TO RECOVER FOR DEPOSIT AND REASONABLE EXPENSES FOR EXAMINING THE TITLE?

The case of King vs Moor 18 N J Equity, page 397 sets forth the term "nuisance" as defined in our State, and the term "nuisance" as used in that case would have no application to the violation of the restrictive covenant; therefor from a reasonable construction of the language used by the parties, it can readily be seen that the penalty imposed was in reference to the nuisance clause as set forth in the second clause and not as to the building restriction as set forth in the first clause.

The defendants - appellants contend that the plaintiff - respondent is limited to one objection, namely, the erection of a house nearer the road than thirty feet. However, reference to the State of Demand, page 3, lines 32, etc. clearly show that the plaintiff - respondent's objection extends not only

to this thirty feet clause but also to the entire restriction included in the clause preventing the building of any other structure than a dwelling.

The sole exception made in the State of Demand was outstanding mortgages which were then liens upon the said property.

State of Demand, page 3, lines 32, etc.

Agreement for sale, Exhibit P-1, page 17, lines 27, etc.

To say that it is free from a reasonable doubt as to whether the restriction is a personal or a restrictive covenant is certainly to stretch one's imagination beyond reason. The text books on real property term real covenants which specifically restrict, limit and define the uses and purposes to which land described in the deed can be used, and lay down the following text:

> "Whether a covenant is real or personal depends on whether or not the limitation is against acts of the individual, or uses to which the land itself may be put without regard to the individual, making the prohibitive user."

In the case at bar the restriction by its terms and effects limit the use to which the land may be put; to wit, "that the land is to be used for dwelling or dwellings, only on condition, however, that such dwelling or dwellings be kept back at least thirty feet from the road."

Exhibit P-2, page 24, lines 12, etc.



It is clear, therefore, that the prohibition set forth in the restriction is as to acts that might be done purely upon the lands itself. Cases cited in support of same are:

Winifield vs Henning, 27 Equity, page 188.

De Gray vs Monmouth Club House, 50 N. J., Equity, page 329, 340.

Hayes vs Waverly, 51 N. J. Equity, page 345, 348.

Brewer vs Marshall, 18 N. J. Equity, page 337 —19 N. J. Equity 537.

Conover vs Smith, 17 N. J. Equity, page 51.

One of the last cases on the law with reference to the issue involved in this case is that of Smith vs Reidy, 92 N. J. Equity, 586, also reported in 113 Atlantic Reporter, page 774.

This case which was decided by Vice Chancelor Buchanan, is in full accord with the present case and covers the subject very fully. The law laid down in that case has been reiterated and upheld in later cases, namely, Brown vs Wencher, 120 Atlantic Reporter, page 62 and Elmora Development Co. vs Binder, 127 Atlantic Reporter, page 693. This later case was decided as recently as February, 1925. In the Smith vs Reidy case the issue confronting the court was whether or not specific performance should be granted against the vendee where there existed a doubtful restrictive building covenant? In that case there are cited practically all of the cases which the defendants - appellants in

the case at bar cited in support of their contention; namely:

Zelman vs Kaufher, 76 N. J. Equity, page 52.

Howland vs Andrus, 81 N. J. Equity, page 175.

Underwood vs Herman, 82 N. J. Equity, page 353.

Marsh vs Marsh, 90 N. J. Equity, page 25.

Vice Chancelor Buchanan in answering all of these cases says as follows:—

> "It does not necessarily follow, however, that because equitable relief would be denied in the enforcement of a doubtful covenant, a vendee who has contracted for a title without encumbrances will be compelled to accept a title where doubt exists as to whether or not it is subject to a restrictive covenant. IN THE ORDINARY CASE A VENDOR MUST TENDER A MARKETABLE TITLE AND A TITLE THAT IS DEFECTIVE OR DOUBTFUL IS NOT A MARKETABLE TITLE, and equity will not compell acceptance thereof by the vendee thereof. On the same principle it is obvious that where a vendee contracts for an unencumbered title and there is doubt as to whether or not the title is encumbered by a restrictive covenant equity will not compell acceptance thereof."

Another case cited by the defendants is the case of Scheinman vs Block 97 N. J. Law 404, also reported in 117 Atlantic Reporter, Page 389. This case is not analagous and does not involve the issues and questions in the case at bar. The question involved in this case is as to what would constitute a substantial defect in the title with reference to the encroachment upon the property sold and the question in that case was whether or not a four feet encroachment of a dilapidater shed was a substantial defect in the title and whether such defect gave rise to a right in the vendee to rescind his contract and the question of restrictions and violations of same are mentioned in part of the same. This case simply deals with an encroachment.



Vice Chancelor Buchanan in arriving at a disposition in the case of Smith vs Reidy lays down the law in that case to the effect that where the purchaser is not giving title which would be free from reasonable doubt, which shall enable him not only to hold the land but to hold it peacefully and if he wishes to sell it, would be reasonably sure that no flaw or doubt will come up to disturb its marktee value; that, unless a title is free from all those doubts and debatable question, specific performance would not be decreed against the vendee. When there is such doubt equity will not decree acceptance of such a title.

Applying this rule to the case at bar can it be said under the circumstance shown, as to the restrictive covenant whether it be personal or one running with the land, that it is clear beyond a reasonable doubt; that the true construction and legal effect of the covenant in the deed are not debatable questions? And the defendants taking the title are not subject to such restrictive covenant and will not

be exposed to litigation? That there exists no reasonable doubt or debatable question? And that there is no reasonable likeihood of the defendant having to litigate after taking title? Or that the market value of the property will not be affected?

Vice Chancelor Buchanan in part of his opinion in the case of Smith vs Reidy says:—"And as to the legal principal while it is absolutely settled in equity suits, and while it would seem clear that, being a rule of construction, it would be equally applied at law as in equity and while I know of no decision or dicta to the contrary, yet, on the other hand, such search as I have had opportunity to make discloses no decision at law in this State, where that rule has been laid down."

The Vice Chancelor goes on further in another portion of his opinion and explains what is meant by "Being exposed to litigation," and says with reference to that:—"What is meant, however, is I take it, the possibility that a reasonable man advised by ordinarily competent counsel might sue in respect of these covenant, in the expectation or belief that a successful outcome was not beyond the bounds of reasonable possibility."

The Vice Chancelor further states as part of his opinion—"I think there could be no doubt, therefore, that if the defendant had taken title, and the present suit had been brought by a neighbor seeking an injunction against the breach of these covenants, such relief would be denied;" but, says the Vice Chancelor, "Even though equitable relief would be denied in the enforcement of a doubtful covenant, a vendee who has contracted for a title without encumbrances will not be compelled to accept a title where doubt exists."



Can it be said that there is not at least a debatable question here as to whether or not the adjoining owner who obtained his title out of the same source, as the defendants, appellants, in the present case and who has a right to the benefits of the restriction by reason of the fact that he acquired title from a common source, would not have a right to at least the enforcement of the restriction as to solely dwelling houses being erected thereon?

The plaintiff-respondent, under his contract is entitled to a title free and clear of all restrictive covenants of every nature. Could it be said that if the plaintiff-respondent, were to erect a store upon the property purchased from the defendant-appellants, that he would not be restrained from doing so by the adjoining owner who acquired title from the same source and who are entitled to the enforcement of the restriction in the Bettman deed?

In the case of Wickershan 77 N. J. Equity Page 232, the court goes on to say in its opinion, "In suits by a vendor the purchaser will not be forced to complete the contract unless the title is free from reasonable doubt. If, however, there arises a reasonable doubt, concerning the title, the court without deciding the question regards its existence as sufficient reason for not compelling the purchaser to carry out his agreement"

Another objection interposed by the defendants is the law of 1922, Chapter 188 wherein thirty years' actual possession of lands serves as a bar to

all claims or actions that may be commenced by any person or persons, for the recovery of such lands. It has been held that this statue simply deals with adverse possession and is applied in ejectment suits for the recovery of land, but it has no application to questions involving encumbrances or restrictions. As the statute clearly says, "It is simply a bar for the recovery of any lands."

Unless excepted by the contract, or released, covenants restricting the use which may be made of the premises are such encumbrances as entitled the purchaser to refuse to perform. Krah vs Wassmer 75 N. J. Equity Page 109.

A purchaser cannot be compelled to accept property subject to building restrictions imposed by covennant in a deed or agreement unless excepted by the terms of the deed or contract, or released, even though a court of equity did not enforce them because conditions have changed since they were made, or because they have become obsolete and in-opperative by reason of non-observance.

39 Cyc. Page 1500.

The other main objection of the defendants-appellants, is to the effect they did not breach the agreemennt but that owing to the fact that the plaintiff-respondent, was himself in default. The vendee is not compelled to tender the purchase price where the vendor at the time of passing title is unable to give a good marketable title. Kohlrepp vs Ram 79 N. J. Equity Page 386.

A formal tender of the purchase money by the



purchaser is excused or waived if the vendor fails to perform a covenant which is precedent to the purchaser's obligation to pay, or if the vendor is unable to give a good title to the property sold, as where the property is encumbered at the time fixed for performance.

39 Cyc. Page 1562.

In the present case tender of performance by the plaintiff-respondent, was unnecessary because the parties knew that the defendants-appellants, had not, would not, and did not intend to clear the title and that therefore tender of performance would be merely a gesture.

Case, case as settled by court page 12 lines 32 etc.

The defendants-appellants, cited the case of Thomson vs Killheffer 98 N. J. Law Page 395 and also reported in 119 Atlantic reporter Page 770.

This case has absolutely no application to the question and issuance in the present case. This case deals with the recovery of a deposit by a purchaser in cases which are tainted with fraud and has no legal bearing on the present case. The defendants-appellants, also cited Kadow vs Cronin 97 N. J. Law 301, also reported in 116 Atlantic Reporter Page 427. That case also has no bearing on the present cause and is not analagous to it because that case terms with the right of the purchaser to repudiate a contract for the vendor's failure to pay off an encumbrance before the time fixed for settle-

ment and does not at all strike the question and issue involved in the present case.

Counsel for the defendants-appellants, seems to be laboring under the misapprehension that the plaintiff-respondent, was merely taking a flyer in the hopes of disposing of his contract before the date fixed for settlement; however a cursory examination of the State of Case as set forth by court page 12, lines 33 etc., clearly show that the plaintiff-respondent had frequently informed the defendants-appellants, at various times long in advance of the date fixed for settlement that he would take title on the date fixed provided the title was clear of the restriction in the Betman deed.

As to the contention of the counsel for the defendants — appellants involving damages, the Plainfield District Court held that the items awarded as damages were authorized by the statute which provides for the recovery of the deposit moneys with interest and incidental costs as well as the reasonable expenses of examining the title and making the survey.

As to the contention that the Supreme Court has confused the equitable question with the legal one, it must be remembered that the Court in basing its Judgment on the unmarketability of title, did so, solely in reference to the statute, upon which the suit was based.

*P. L. 1915, p. 316*

It is most respectfully submitted that the judgment of the Supreme Court affirming, the Judgment of the Plainfield District Court should be affirmed.

JOSEPH J. MUTNICK
Attorney and Counsel for
Plaintiff—Respondent