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Summons.

THE STATE OF NEW JERSEY :—To MORRIS BERKMAN
and ANNIE BERKMAN, his wife: 10

YOU ARE SUMMONED to answer the annexed complaint of Fannie Troum, in an action at law, in the Hudson County Circuit Court, and TAKE NOTICE that unless you file your answer to said complaint with the Clerk of the Hudson County Circuit Court of Jersey City, New Jersey, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you. 20

WITNESS, THOMAS BROWN, Esq., Judge of the Hudson County Circuit Court, at Jersey City, this 22nd day of October, Nineteen Hundred and Thirty.

GUSTAV BACH,
Clerk.

SECLAW & NESSANBAUM, 30
Attorneys.

Complaint.

HUDSON COUNTY CIRCUIT COURT.

10	<p style="text-align: center;">FANNIE TROUM, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">MORRIS BERKMAN and ANNIE BERKMAN, his wife, <i>Defendants.</i></p>	}	Action at Law.
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The plaintiff, Fannie Troum, residing in the City of Bayonne, County of Hudson and State of New Jersey, says that:

FIRST COUNT.

20

1. On July 3rd, 1930, she entered into a written contract with the defendants, Morris Berkman and Annie Berkman, his wife, whereby said defendants, in consideration of the sum of \$14,600, agreed to convey to the plaintiff, the premises commonly known as No. 888 Broadway, in the City of Bayonne, County of Hudson and State of New Jersey. A true copy of said contract is hereto annexed, marked "Schedule 1" and hereby incorporated by reference as though

30 fully set forth in this complaint and the terms and conditions of said contract are fully set forth in said "Schedule 1."

2. A true description of the premises to be conveyed by metes and bounds is as follows:

All that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Bayonne, in the County of Hudson and State of New Jersey, which is known as Lot No. 3 in Block 30 on

40

Complaint.

“Map of Property belonging to Richard Cadmus, situated in the Third Ward, City of Bayonne, July, 1871”, and more particularly described as follows:

BEGINNING at a point on the Southeasterly side of Broadway (formerly Avenue D) distant thereon Fifty (50) feet Southwesterly from the Southeasterly corner of East 42nd Street and said Broadway, thence running (1) Southwesterly and along the Southeasterly side of said Broadway, Twenty-five (25) feet to a point; thence (2) Southeasterly and parallel with said East 42nd Street, One hundred (100) feet to a point; thence (3) Northeasterly and parallel with said Broadway, Twenty-five (25) feet to a point; thence (4) Northwesterly and parallel with said East 42nd Street, One hundred (100) feet to the said Southeasterly side of Broadway, the point or place of beginning.

3. On September 1st, 1930, this plaintiff was ready to consummate the terms of the agreement mentioned in paragraph 1 of this complaint, but the defendants refused and were unable to convey according to the terms of the aforesaid contract for the following reasons:— The building on the premises to be conveyed encroached and projected for more than one-half ($\frac{1}{2}$ ") inch over lands adjoining on the northeasterly side and for three-eighths ($\frac{3}{8}$ ") inch over lands adjoining on the southwesterly side, and because the building erected on lands adjoining the rear of the lot to be conveyed in a southeasterly direction encroached (5") inches or more over the lands contracted to be conveyed.

Complaint.

10 4. On September 1st, 1931, these defendants were unable to convey the premises described in the contract because the title which they held was unmarketable and not in accordance with the terms of the contract because of various encroachments and projections of adjoining buildings over the lands to be conveyed and of encroachments and projections of the building to be conveyed over adjoining lands.

20 5. On or about October 7th, 1930, the plaintiff caused to be served on the defendants a notice making Monday, October 20th, 1930, at three o'clock in the afternoon, as time of the essence of the contract mentioned in "Schedule 1." A true copy of said notice is hereto annexed, marked "Schedule 2" and made part hereof.

30 6. On October 20th, 1930, at three o'clock in the afternoon, and for one-half hour thereafter this plaintiff was at the office of Adler & Adler, 473 Broadway, Bayonne, New Jersey, for the purpose of consummating the contract mentioned in "Schedule 1" and said plaintiff was ready to pay the purchase price and deliver the executed bond and mortgage and in all things to consummate said contract described in paragraph 1 of this complaint in accordance with its terms and conditions, but the defendants failed and refused to appear at said time and failed and refused to make conveyance in accordance with the terms of the aforesaid contract.

40 7. The plaintiff, in addition to the payment of the deposit of \$500, incurred an expenditure of \$200 for the fees of examination of title and for a survey, for which he is entitled to be repaid by the

Complaint.

defendants and for which they have refused to pay her. The plaintiff, at all times from the commencing September 1st, 1930, and up to and including the aforesaid October 20th, 1930, has been ready, able and willing to consummate the said contract mentioned in "Schedule 1" and to pay the balance of the purchase price and execute the bond and mortgage, but the defendants have failed, refused and neglected to make conveyance according to the terms of said contract. 10

SECOND COUNT.

1. All the allegations of the first count are hereby repeated and incorporated by reference, as though fully set forth herein. 20

2. On or about September 26th, 1930, the defendants agreed to the rescission of the contract mentioned in the first count and agreed to pay back to the plaintiff the deposit of \$500 and to reimburse the plaintiff for the expenditures incurred by her for examination of title and survey, which they have since refused and neglected to do.

Judgment will be demanded for the sum of \$700 besides lawful interest and costs of suit upon one or both of the foregoing counts. 30

SECLOW & NESSANBAUM,
Attorneys for Plaintiff.

TO THE DEFENDANTS:

TAKE NOTICE that if you intend to make a defense to this action, you shall file an affidavit of merits within ten days from the date of service upon you of this summons and complaint, or a 40

Schedules Annexed to Complaint.

plea or demurrer within twenty days therefrom, and that upon default of filing such affidavit, plea or demurrer, judgment will be entered against you.

SECLOW & NESSANBAUM,
Attorneys for Plaintiff.

10

SCHEDULE 1.

ARTICLES OF AGREEMENT, made the third day of July in the year of Our Lord One Thousand Nine Hundred and thirty, BETWEEN Morris Berkman and Annie Berkman, husband and wife, of the City of Bayonne, in the County of Hudson and State of New Jersey, party of the first part;

20

AND Fannie Troum of the City of Bayonne in the County of Hudson and State of New Jersey, party of the second part;

30

WITNESSETH, That the said party of the first part, for and in consideration of the sum of Fourteen Thousand, Six Hundred (\$14,600) Dollars to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that they the said party of the first part, will well and sufficiently convey to the said party of the second part, her heirs and assigns, by Deed of Warranty free from all encumbrances on or before the first day of September next ensuing the date hereof, all that lot, tract, or parcel of land and premises, hereinafter particularly described situate, lying and being in the City of Bayonne in the County of Hudson and State of New Jersey.

40

Being premises known as 888 Broadway, in the

Schedules Annexed to Complaint.

City of Bayonne, County of Hudson and State of New Jersey, located on the easterly side of Broadway, between 41st and 42nd Street, Bayonne, N. J. Description by metes and bounds to be inserted in deed. Said premises consist of a three-story frame building, containing two stores and five apartments located on a plot of ground approximatey 25' in width, front and rear, and 100' in depth throughout. The premises are to be conveyed free and clear of all encroachments. 10

The parties of the first part represent that all tenancies in said building are monthly tenancies except that the store in the northerly half of the said building is held by a lease which will expire on or about June 1, 1931.

It is expressly understood and agreed by and between the parties hereto, that immediately upon the delivery of the deed to the party of the second part by the party of the first part, said party of the first part will deliver up the possession of the flat now occupied by them to the party of the second part. 20

It is understood that all floor covering in hall, gas stoves, hot water heaters, screens, awnings, shades and lighting fixtures are part of the premises and are to be conveyed as part of the premises. 30

In the event first mortgage is called in party of second part agrees to subordinate lien of purchase money mortgage to a mortgage or mortgages not exceeding \$6,500.

And the said Fannie Troum for herself, her 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 she the said party 40

Schedules Annexed to Complaint.

of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part the sum of Fourteen Thousand, Six Hundred (\$14,600) Dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

10 On execution of this agreement \$ 500.00

By taking subject to a mortgage held by Robert Phillips in the sum of \$ 6,500.00

By cash to be paid when title passes \$ 3,600.00

20 By the party of the second part executing and delivering to the party of the first part a bond and mortgage which bond and mortgage shall bear same date as deed and shall be payable in monthly installments of fifty Dollars besides interest monthly until the full balance due is paid \$ 4,000.00

\$14,600.00

Said bond and mortgage shall contain the usual thirty day default clause as to installment and ninety day default clause as to taxes and other municipal charges.

30

Rents, taxes, water charges, interest, insurance premiums and all other charges shall be apportioned as of the day of passing of title.

The parties of the first part shall keep the premises insured until title is passed.

It is understood and agreed that the buildings upon the premises are within the boundary lines of the property as described in the deed.

40 Party of second part shall have privilege of paying off sum due on purchase money mortgage

Schedules Annexed to Complaint.

before maturity by paying balance of principal with interest to date of payment.

And the said party of the _____ part hereby agrees to pay to _____, a commission of _____ % on the purchase price aforesaid, said commission to be paid in consideration of services rendered in consummating this sale; said commission to become due and payable upon the execution of _____ 10

AND IT IS FURTHER AGREED, by the parties to these presents, that the said party of the second part, _____ heirs and assigns, may enter into and upon the said land and premises on the _____ day of _____ next ensuing the date hereof, and from thence take the rents, issues and profits to _____ and their use. 20

AND IT IS FURTHER AGREED, by the parties hereto, that said Deed of Warranty shall be delivered and received at the office of Adler & Adler, 473 Broadway, Bayonne, N. J., between the hours of ten in the forenoon and four o'clock in the afternoon on the said first day of September next ensuing the date hereof.

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. 30

IN WITNESS WHEREOF, the said parties have

Schedules Annexed to Complaint.

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

His

MORRIS X BERKMAN L. S.
mark

10

..... L. S.
(Annie Berkman in Jewish)

FANNIE TROUM L. S.

Signed, sealed and delivered
in the presence of

20 HARRY E. BERKMAN
EDWARD I. ADLER

State of New Jersey }
County of Hudson } ss.:

30 BE IT REMEMBERED, that on this third day of July, in the year of our Lord One Thousand Nine Hundred and thirty, before me, the subscriber, a Master in Chancery of New Jersey personally appeared Morris Berkman and Annie Berkman, husband and wife, and Fannie Troum, who, I am satisfied, are the persons 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.

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EDWARD I. ADLER,
Master in Chancery of N. J.

Schedules Annexed to Complaint.

SCHEDULE 2.

Mr. Morris and Mrs. Annie Berkman
888 Broadway
Bayonne, N. J.

Dear Sir & Madam:

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YOU ARE HEREBY NOTIFIED that I shall be at the office of Adler & Adler, 473 Broadway, Bayonne, N. J., on Monday, October 20th, 1930, at three o'clock in the afternoon for the purpose of consummating the contract to premises commonly known as 888 Broadway, Bayonne, New Jersey, said contract being dated July 3rd, 1930, and you are further notified that we shall deem and hereby do designate that time shall be of the essence of said Monday, October 20th, 1930 at three o'clock in the afternoon.

20

YOU ARE FURTHER NOTIFIED that at the said time and place we shall expect you to be prepared to convey title to the aforesaid premises in accordance with the terms and conditions of the said contract dated July 3rd, 1930.

Dated October 6th, 1930.

30

Yours, &c.,

FANNIE TROUM.

Copies to be served personally and copies to be served by registered mail.

I hereby deputize John Doolan to serve the within writ. Witness my hand and Seal this 22nd day of Oct., 1930.

40

WILLIAM V. O'DRISCOLL, Sheriff.
By Joseph Colford, Under Sheriff.

Affidavit of Merits.

Served within Summons and Complaint Oct. 22/30 personally on the defendants Morris Berkman and Annie Berkman, his wife, at 888 Broadway, Bayonne.

WILLIAM V. O'DRISCOLL, Sheriff.
By John Doolan S. D. S.

10

Filed:

Clerk's Office, Oct. 24, 1930,
Hudson County, N. J.

GUSTAV BACH.

Affidavit of Merits.

20

HUDSON COUNTY CIRCUIT COURT.

FANNIE TROUM,
Plaintiff,

v.

MORRIS BERKMAN and ANNIE
BERKMAN, his wife,
Defendants.

Action
at Law.

30

State of New Jersey }
County of Hudson } ss.:

MORRIS BERKMAN and ANNIE BERKMAN, being duly sworn, according to law, upon their respective oaths depose and say that they are the defendants in the above stated cause, and they believe

40

Affidavit of Merits.

that they have a just and legal defense to the said
action on the merits of the case.

his
MORRIS X BERKMAN.
mark

10

.....
Signature of Annie Berkman
in yiddish

Sworn to and subscribed before me this
29th day of October, 1930.

ALFRED M. COZZI,
Notary Public of N. J.

20

Filed:

Clerk's Office, Oct. 30, 1930.
Hudson County, N. J.

GUSTAV BACH,
Clerk.

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Answer and Counterclaim.

HUDSON COUNTY CIRCUIT COURT.

10	<p style="text-align: center;">FANNIE TROUM, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">MORRIS BERKMAN and ANNIE BERKMAN, his wife, <i>Defendants.</i></p>	}	Action at Law.
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Defendants residing in the City of Bayonne, County of Hudson and State of New Jersey answering the complaint of the plaintiff, say that,

- 20
1. They admit paragraphs 1 and 2 of the first count.
 2. They deny paragraphs 3 to 7 inclusive of the first count.
 3. They deny paragraphs 1 and 2 of the second count.

FIRST SEPARATE DEFENSE.

- 30
1. The property of the defendants more particularly described in the contract, copy of which is annexed to the complaint is free and clear of any encroachments.

SECOND SEPARATE DEFENSE.

- 40
1. Defendants were at all times ready, willing and able and still are ready, willing and able to make conveyance to the plaintiff of the premises described in the contract aforesaid, but said plaintiff has refused, and still does, to accept title to said premises.

Answer and Counterclaim.

THIRD SEPARATE DEFENSE.

1. Subsequent to the execution of the contract aforesaid, plaintiff claimed an encroachment of the building on the lands agreed to be conveyed upon lands to the South thereof, whereupon defendants agreed to procure title to so much of said premises to the South thereof and to deliver title so procured to the plaintiff, in addition to making conveyances of the premises by said agreement agreed to be conveyed and to pay all costs and charges for the procurement of such additional strip of land, so as to eliminate any claim of encroachment. Plaintiff agreed to permit the defendants to procure such additional title and agreed to accept conveyance thereof. Defendants thereupon entered into negotiations for the procurement of said strip of land, but after such negotiations were completed and said defendants were ready to accept title to such strip and to pay the cost thereof to the owner thereof, plaintiff informed the defendants that notwithstanding her previous agreement made, that she would not accept title to said strip or to the property agreed to be conveyed. Plaintiff is, therefore, estopped from making claim of an encroachment on the southerly side of the premises agreed to be conveyed. Defendants have at all times been ready, willing and able to procure deed of conveyance for the strip of land herein referred to and are still ready, willing and able so to do and to deliver title to said strip of land, together with the lands mentioned and described in the contract of sale.

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Answer and Counterclaim.

FOURTH SEPARATE DEFENSE.

10 1. Subsequent to the execution of the contract, copy of which is annexed to the complaint, plaintiff alleged an encroachment existing of the building on the land agreed to be conveyed upon property to the north thereof, which encroachment, plaintiff alleged, consisted of an overhanging of shingles or boards, to the extent of approximately one-half inch, which although defendants claimed did not exist, they agreed to remove prior to passing title, and same could have been removed without damage to the building. Plaintiff thereafter agreed, however, that upon procuring title to the strip to the South, as previously alleged, that she would waive any encroachment of the building to the north and informed the defendants that it would be unnecessary for them to remove the alleged encroachment to the north. Plaintiff has by agreement waived the removal of any alleged encroachment to the North of said premises and is now estopped from taking advantage of said alleged encroachment to refuse performance of the contract of sale made as aforesaid.

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FIFTH SEPARATE DEFENSE.

30 1. Subsequent to the execution of the contract of sale, copy of which is annexed to the complaint, claim was made that premises to the rear consisted of a shed extending over upon the lands agreed to be conveyed. Defendants thereupon agreed to arrange for a removal of such alleged encroachment, although they denied the existence thereof prior to the passing of title, but plaintiff agreed to waive the procurement of such removal if title were procured to the strip of land to the

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Answer and Counterclaim.

South, as hereinbefore alleged and plaintiff is, therefore, estopped from taking advantage of such alleged encroachment as a ground for the avoidance of the contract of sale heretofore mentioned.

SIXTH SEPARATE DEFENSE.

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1. The building upon the lands and premises agreed to be conveyed under the contract of sale, copy of which is annexed to the complaint, has been erected and has stood as erected for a period in excess of 20 years in the condition in which it now exists, and if said building extends over either to the north or south or both on adjacent premises, defendants have obtained title to so much of the premises to the North and South of the curtilage described in the contract of sale by adverse possession and no encroachment therefore, exists on adjacent premises either to the North or South.

20

COUNTERCLAIM.

By way of counterclaim against the plaintiff, the defendants say,

1. On July 3, 1930, they entered into a contract with the plaintiff, under which they agreed to purchase the premises mentioned and described in the agreement annexed to the complaint and marked "Schedule 1."

30

2. Notwithstanding the written agreement entered into and the agreement upon the part of the plaintiff to make payment for the said premises in the amount of \$14,600 plaintiff has refused and still does refuse to accept title to said premises.

40

Answer and Counterclaim.

10 3. Plaintiff agreed under said contract to make payment to the defendants in the sum of \$3600 and to execute a mortgage in the sum of \$4000 and to accept title subject to a mortgage in the amount of \$6500, but said plaintiff has refused and neglected so to do, although the defendants are ready, willing and able and have been ready, willing and able to consummate the said contract and there is now due and owing to the said defendants the balance agreed to be paid in the amount of \$7600.

To the damage of the defendants \$7600.

BRENNER & KRESCH,
Attorneys of Defendants.

20 Filed:

Clerk's Office, Nov. 8, 1930.
Hudson County, N. J.

GUSTAV BACH,
Clerk.

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Demand for Bill of Particulars.

HUDSON COUNTY CIRCUIT COURT.

<p style="text-align: center;">FANNIE TROUM, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">MORRIS BERKMAN and ANNIE BERKMAN, his wife, <i>Defendants.</i></p>	}	Action at Law.	10
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To Brenner & Kresch, Esqs., Attorneys of the
Defendants:

SIRS:

PLEASE TAKE NOTICE, that the plaintiff in the
above entitled cause demands, within ten days
from the service hereof, a bill of particulars as
follows: 20

1. The plaintiff demands the following bill of
particulars with reference to the matters con-
tained in the Third Separate Defense:

a. Who are the persons who actually are al-
leged to have made the agreement mentioned in
the third separate defense? 30

b. Was said agreement verbal or written?

c. Where and upon what date was such alleged
agreement made?

d. Have the defendants acquired title to the
strip of land mentioned in the said third separate
defense?

2. The plaintiff demands the following bill of 40

Demand for Bill of Particulars.

particulars with reference to the matters contained in the Fourth Separate Defense:

10 a. Who are the persons who actually made the agreement alleged to have been made in the fourth separate defense with reference to the encroachment?

b. Was said agreement written or verbal?

c. Where and upon what date was said alleged agreement entered into?

d. State *verbatim* the terms and contents of said agreement.

20 3. The plaintiff demands the following bill of particulars with reference to the matters contained in the Fifth Separate Defense:

a. Name the persons between whom the alleged agreement mentioned in the fifth separate defense, with reference to the removal of the encroachment, was made.

b. Was said agreement verbal or in writing?

c. Where and upon what date was said alleged agreement entered into?

30 d. State *verbatim* the contents and terms of the said alleged agreement.

e. Name the person or persons with whom the defendants are alleged to have arranged for the removal of the encroachment mentioned in the fifth separate defense.

40 4. The plaintiff demands the following bill of particulars with reference to the matters contained in the Sixth Separate Defense:

a. Upon what date was the shingled portion of

Demand for Bill of Particulars.

the building to be conveyed constructed, erected or applied, and which portion encroaches over the lands adjoining on the northerly side as set forth in the sixth separate defense?

b. When was the portion of the building to be conveyed erected, which portion encroaches over the lands adjoining on the southerly side, as alleged in the sixth separate defense? 10

5. The plaintiff demands the following bill of particulars with reference to the matters contained in the counterclaim:

a. If the parties entered into any agreement with reference to the subject matter of the contract, marked Schedule 1, since the making of said contract, please state: 20

(1) The contents and terms of said agreement or agreements.

(2) Were said agreement or agreements verbal or in writing?

(3) When and where were said agreements made?

(4) Between what persons were said agreements made? 30

(5) Upon what date was the wall of the building to be conveyed, and which encroaches over lands adjoining on the south, erected?

(6) Upon what date were the shingles or such part of the wall of the building to be conveyed, which encroaches over lands adjoining on the north, erected?

(7) On September 1st, 1930, and since said time, has the building to be conveyed encroached 40

Demand for Bill of Particulars.

over lands adjoining on the northerly side, and if so, to what extent?

10 (8) On September 1st, 1930, and since that time has the building to be conveyed, or any portion thereof, encroached over lands adjoining on the southerly side of said building?

(9) On September 1st, 1930, and since that time has the building erected on the lands adjoining on the east of the lands to be conveyed at the southeasterly side encroached over the lands to be conveyed, and if so, to what extent?

Dated November 8th, 1930.

Yours, &c.,

20

SECLOW & NESSANBAUM,
Attorneys for Plaintiff.

Filed:

Clerk's Office, Jan. 19, 1931.
Hudson County, N. J.

GUSTAV BACH,
Clerk.

30

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Bill of Particulars.

HUDSON COUNTY CIRCUIT COURT.

<p align="center">FANNIE TROUM, <i>Plaintiff,</i></p> <p align="center"><i>v.</i></p> <p align="center">MORRIS BERKMAN and ANNIE BERKMAN, his wife, <i>Defendants.</i></p>	}	<p align="center">Action at Law. 10</p>
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To Messrs. Seclow and Nessenbaum, Attorneys
of Plaintiff:

TAKE NOTICE, that the following are the par-
ticulars heretofore demanded: 20

1. a. Plaintiff through her husband as her
agent.

b. Verbal.

c. On several occasions. The exact date de-
fendants are unable to fix. At home of defend-
ants.

d. No.

2. a. Plaintiff through her husband as her 30
agent.

b. Verbal.

c. On several occasions. The exact date de-
fendants cannot give. At home of defendants.

d. Cannot give language *verbatim*. Substan-
tially it was to the effect as stated in the answer.

3. a. Plaintiff through her husband as her 40
agent.

Bill of Particulars.

b. Verbal.

c. On several occasions. Exact date defendants cannot give. At home of defendants.

10 d. Cannot give language *verbatim*. Substantially it was to the effect as alleged in the answer.

c. Defendants did not arrange for removal because plaintiff waived same.

4. a. Defendants do not admit encroachments, but say that if alleged encroachment exists, it is to the rear of the premises and that the building agreed to be conveyed was erected more than twenty years ago.

20 5. a. (1) Contents and terms as set forth in several separate defenses.

(2) Verbal.

(3) At home of defendants on several occasions.

(4) Defendants, members of defendants' family and the plaintiff through her husband as agent.

(5) More than 20 years ago.

30 (6) Do not admit encroachment. If any exists, building was erected more than 20 years ago.

(7) No.

(8) No.

(9) No.

Yours very truly,

40 BRENNER & KRESCH,
Attorneys for Defendants.

Dated November 17th, 1930.

Notice of Motion to Strike Out.

Service of the within Bill of Particulars is hereby acknowledged this day of November, 1930.

.....
Attorneys of Plaintiff.

Filed:

10

Clerk's Office, January 19, 1931.
Hudson County, N. J.

GUSTAV BACH,
Clerk.

Notice of Motion to Strike Out Answer and Counter Claim.

HUDSON COUNTY CIRCUIT COURT.

20

FANNIE TROUM,
Plaintiff,

v.

MORRIS BERKMAN and ANNIE
BERKMAN, his wife,
Defendants.

Action
at Law.

To Brenner & Kresch, Esqs., Attorneys for the Defendants:

30

TAKE NOTICE, that on Friday, November 28th, 1930, at ten o'clock in the forenoon, or as soon thereafter as the motion can be heard, we shall apply to the judges HENRY E. ACKERSON, JR., or THOMAS BROWN or such judge as may be hearing motions for an order striking out the answer and counterclaim filed by the defendants in this cause and for summary judgment, and that the grounds of our application are as follows:

40

Notice of Motion to Strike Out.

1. That the answer and counterclaim are sham, untrue and frivolous.
2. That paragraphs 2 and 3 of the answer are untrue and sham.
- 10 3. That the allegations of paragraph 1 of the first separate defense are sham and untrue.
4. That paragraph 1 of the second separate defense is sham and untrue.
5. That paragraph 1 of the second separate defense is frivolous and does not set forth a legal defense.
6. That paragraph 1 of the third separate defense is sham and untrue.
- 20 7. That paragraph 1 of the third separate defense is frivolous and does not set forth a legal defense.
8. That paragraph 1 of the fourth separate defense is sham and untrue.
9. That paragraph 1 of the fourth separate defense does not set forth a legal defense and is frivolous.
- 30 10. That paragraph 1 of the fifth separate defense is sham and untrue.
11. That paragraph 1 of the fifth separate defense does not set forth a legal defense and is frivolous.
12. That paragraph 1 of the sixth separate defense is sham and untrue.
- 40 13. That paragraph 1 of the sixth separate defense does not set forth a legal defense and is frivolous.
14. That the counterclaim is sham and untrue.
15. That paragraphs 2 and 3 of the counterclaim are sham and untrue.

Affidavit of Fannie Troum.

16. That paragraphs 2 and 3 of the counterclaim do not set forth a legal cause of action or counterclaim and that said paragraphs 2 and 3 of said counterclaim are frivolous.

AND YOU WILL FURTHER TAKE NOTICE, that at the argument of the said matter we will read and offer the original affidavits which are hereto annexed and a true copy of which is hereby served upon you. 10

Dated November 24th, 1930.

Yours, &c.,

SECLOW & NESSANBAUM,
Attorneys for Plaintiff.

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Affidavit of Fannie Troum.

HUDSON COUNTY CIRCUIT COURT.

<p style="text-align: center;">FANNIE TROUM, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">MORRIS BERKMAN and ANNIE BERKMAN, his wife, <i>Defendants.</i></p>	}	Action at Law.	30
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State of New Jersey }
County of Hudson } ss.:

FANNIE TROUM being duly sworn according to law, deposes and says:

1. I am the plaintiff in the above entitled cause. On July 3rd, 1930, I entered into a contract with the defendants, Morris Berkman and Annie Berkman, his wife, for the purchase of premises commonly known as No. 888 Broadway, in the City of 40

Affidavit of Fannie Troum.

10 Bayonne, County of Hudson, and State of New Jersey, which is a three story frame dwelling containing two stores and five apartments on a plot of ground twenty-five feet in width by one hundred feet in depth throughout. That a true copy of said contract is hereto annexed, marked "Schedule 1," made part hereof and herein incorporated by reference.

20 2. That I employed Adler & Adler, attorneys-at-law of this State, who have an office at No. 473 Broadway, Bayonne, New Jersey, to examine this title and attend to the other legal matters appertaining thereto, and that said law firm examined said title and also obtained by my instructions a survey of said premises. That annexed hereto is a true copy of said survey, marked "Schedule 2," made part hereof and herein incorporated by reference.

30 3. That shortly after said survey was completed, it was submitted to me by Mr. Edward I. Adler and I instructed him that I would not take title unless the defendants would convey the premises free and clear of any encroachments and projections which existed in violation of the contract set forth in "Schedule 1." Subsequently, the defendants informed me that they were unable to clear these matters up and they offered to return the deposit if some compromise was made concerning the lawyer's fees. This I agreed to, but the defendants have never returned said deposit nor paid the fees for the examination of title or for the survey.

40 4. I never authorized my husband or any other person to modify the terms of the contract marked "Schedule 1," which is hereto annexed,

Affidavit of Fannie Troum.

except as to the arrangement for the rescission of the contract upon repayment of the deposit and a portion of the lawyer's charges, nor have I ever entered into any agreement with the defendants as to the modification of the contract mentioned in "Schedule 1," or any of its terms, nor have I waived any of its provisions in any conversation with the said defendants or with anyone else at any time except that I consented to the rescission of the said contract upon condition that the defendants would repay the deposit and pay such portion of the fees for examination of title and survey as Mr. Adler would designate. I have never authorized my husband to make any concessions or waive any of my rights or make any arrangements concerning the property mentioned in the contract annexed hereto and marked "Schedule 1," either as to encroachments or mislocations, nor did I ever enter into an arrangement as set forth in the third, fourth, fifth and sixth separate defenses of the defendants' answer and counter-claim filed by the defendants, nor did I ever authorize my husband, or any other person, to enter into any such alleged agreements or arrangements at any time, and as a matter of fact, I know that such arrangements, agreements and conversations were never entered into because the defendants informed me that they would not and could not convey the premises according to the terms of the contract, and I informed them that under no circumstances would I accept a conveyance except in accordance with the terms of the contract, and said defendants informed me that they had caused to be made a survey by another surveyor, namely, Walter L. Clarkson, to check up the survey made by my surveyors, Steiner &

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Affidavit of Fannie Troum.

Jaeger, and that their surveyors had given them a survey showing that the building projected or eneroached over adjoining lots on both sides and the building erected on the adjoining property en-croached over the rear of lands contracted to be conveyed to me.

10 5. On October 1st, 1930, I caused to be served upon Brenner & Kresch, Esqs., attorneys-at-law who were then representing and acting for the de-fendants in this matter, a letter which is hereto annexed, marked "Schedule 3," made part hereof and herein incorporated by reference.

20 6. On October 6th and 7th, 1930, I caused to be served upon both defendants on both dates a notice making time of the essence of said contract, a true copy of which notice is hereto annexed, marked "Schedule 4," made part hereof and herein incorporated by reference.

7. On October 10th, 1930, I caused to be served upon the aforesaid Brenner & Kresch, a letter, a true copy of which is hereto annexed, marked "Schedule 5," made part hereof and herein in-corporated by reference.

30 8. On October 17th, 1930, I caused to be served upon the said Brenner & Kresch another letter, a true copy of which is hereto annexed, marked "Schedule 6," made part hereof and herein in-corporated by reference.

40 9. On October 20th, 1930, I caused to be served upon the aforesaid Brenner & Kresch another let-ter, a true copy of which is hereto annexed, marked "Schedule 7," made part hereof and herein incorporated by reference.

10. The defendants since the making of the

Affidavit of Fannie Troum.

contract mentioned in "Schedule 1" and on September 1st, 1930, the time designated in said contract for the closing of title, and on October 20th, 1930, at three o'clock in the afternoon, the time designated for the closing of said contract in the notice dated October 6th, 1930, nor ever since that time, have not been ready, or able to convey the premises mentioned in the contract in "Schedule 1" according to the terms of said contract because of the encroachments and projections shown in the survey mentioned in "Schedule 2" which encroachments still exist and which encroachments have existed for a period less than twenty years and which encroachments are as follows: The south wall of the building encroaches and projects from one-half inch to three-eighths inch over lands belonging to persons other than the defendants adjoining on the southwest side, the north wall of the building to be conveyed encroaches for a distance of one-half inch over lands belonging to persons other than the defendants and adjoining on the northeasterly side, and a building erected on lands of some persons other than the defendants adjoining the premises contracted to be conveyed on the southeasterly side and which building encroaches and projects for a distance of five inches over the lands contracted to be conveyed.

11. On October 20th, 1930, at 3 P. M., the time stated in the notice hereunto annexed, marked "Schedule 4," and at all times prior thereto, I was ready, able and willing to consummate the contract marked "Schedule 1," being ready to deliver the bond and mortgage required under the said contract, pay the balance of the purchase price and all other matters and things provided by said contract in order to fully consummate the same.

Affidavit of Harry Jaeger.

12. The deponent has incurred charges of \$150 for the fee of Adler & Adler and \$25 for the survey made by Steiner & Jaeger, making a total of \$175, which charges are reasonable and were necessarily incurred.

10 13. I verily believe, that there is no defense to the above named action and that the answers of both defendants are filed merely for the purpose of delay.

FANNIE TROUM.

Sworn and subscribed to before me
this 22nd day of November, 1930.

CHESTER H. THOMPSON,
Notary Public of N. J.

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Affidavit of Harry Jaeger.

HUDSON COUNTY CIRCUIT COURT.

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<p>FANNIE TROUM, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>v.</i></p> <p>MORRIS BERKMAN and ANNIE BERKMAN, his wife, <i>Defendants.</i></p>	}	<p>Action at Law.</p>
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State of New Jersey }
County of Hudson } ss.:

40 HARRY JAEGER, being duly sworn according to law, deposes and says:

1. I am a licensed engineer of the State of

Affidavit of Harry Jaeger.

New Jersey, and have been an engineer and surveyor since 1906, since which time I have been practicing my profession in the City of Bayonne. Since said time I have made thousands of surveys in said City of Bayonne. I am a member of the firm of Steiner & Jaeger, which firm made the survey, of which a true copy is hereto annexed and marked "Schedule 2." 10

2. On November 11th, 1915, I surveyed for the purpose of erecting a proposed building by Sarah Gallagher on Lot No. 2 in City Block 124 on the Tax Maps of the City of Bayonne, and which premises are commonly known as 890 Broadway, Bayonne, New Jersey, and which premises immediately adjoin on the North side of premises shown on the annexed survey marked "Schedule 2." At the time said lot was surveyed, viz.: on November 11th, 1915, the building now erected on premises commonly known as 888 Broadway, Bayonne, N. J., was three-fourths inch clear of the lot line of lot No. 2 in said Block on the northerly side and said building did not project or encroach over the lands on the northerly side commonly known as 890 Broadway, aforesaid. Some time after November 11th, 1915, the northerly wall of the building of the defendants erected on Lot No. 3 in City Block 124 and commonly known as 888 Broadway, Bayonne, N. J., was shingled and said shingles and other materials which were placed on said wall have caused said wall on the northerly side of the defendant's building at 888 Broadway to encroach and project over and beyond the northerly line of Lot No. 2 aforesaid for a distance of one-half inch, which projection and encroachment is over and upon premises commonly known as 890 Broadway and being Lot No. 2 in City Block No. 124. 20
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Affidavit of Harry Jaeger.

10 3. On April 20th, 1928, Mateo Cozzo employed me to survey lot No. 4 in City Block 124, being commonly known as 886 Broadway, Bayonne, New Jersey, which lot immediately adjoins on the southerly side of the lot of the defendants shown in the annexed survey marked "Schedule 2." At the time there existed an encroachment of the building erected on the defendants' lands over the lands adjoining on the southerly side said lands on the southerly side being Lot 4 in City Block 124 aforesaid. Said encroachment consisted of a triangle with a base of one-half inch in width on Broadway and tapering down to zero at a distance fifteen feet at right angles from Broadway, said encroachment being one-half inch
20 at its widest point on Broadway and extending back fifteen feet from said Broadway. Subsequently, after April 20th, 1928, when said survey was made by me, an addition was erected to the building commonly known as No. 886 Broadway, owned by the defendants, and said addition is approximately thirty feet long and commences at a point about fifteen feet at right angles from Broadway, and said addition to the said building of the defendants encroaches for a distance of three-eighths inch over and beyond the
30 southerly line of Lot 3, which is the defendants' lot, and encroaches over and upon Lot 4, in City Block 124, commonly known as 886 Broadway.

40 4. There is also an encroachment of a building over the rear of Lot 3, which is the defendants' lot, to a distance of five inches, the building being erected on adjoining lands and a portion of said building projecting and encroaching for a distance of five inches aforesaid over the lands commonly known as 888 Broadway.

Affidavit of Samuel Troum.

5. All of the said encroachments and projections are set forth in "Schedule 2," which is hereto annexed, and which "Schedule 2" is a true copy of a survey which was made by me in cooperation with my associate on August 8th, 1930. The encroachment of one-half inch of the building of the defendants over lands adjoining on the northerly side and the encroachment of three-eighths inch of the building of the defendants over lands adjoining on the southerly side, did not exist twenty years ago, but were created after the times hereinbefore stated. 10

HARRY A. JAEGER.

Sworn and subscribed to before me this 22nd day of November, 1930. 20

FRANK J. ZIOBRO,
Attorney at Law of N. J.

Affidavit of Samuel Troum.

HUDSON COUNTY CIRCUIT COURT.

<p style="text-align: center;">FANNIE TROUM, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">MORRIS BERKMAN and ANNIE BERKMAN, his wife, <i>Defendants.</i></p>	}	<p>30</p> <p>Action at Law.</p>
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State of New Jersey }
County of Hudson } ss.: 40

SAMUEL TROUM, being duly sworn according to law, deposes and says:

1. I am the husband of Fannie Troum, the

Affidavit of Samuel Troum.

10 plaintiff in the above entitled cause, and my attention has been called to the answer and counterclaim filed by the defendants. My attention has been directed to the third separate defense, fourth separate defense, fifth separate defense and sixth separate defense, of the said answer, wherein it is alleged that an agreement was made by the plaintiff, waiving the provisions, or some of the provisions of the contract with reference to the conveyance of the premises described in the contract marked "Schedule 1," annexed hereto, subject to encroachments and projections. I never entered into any arrangement, agreement or stipulation with the defendants, whereby I agreed on behalf of the plaintiff or on behalf of anyone else

20 to waive any of the provisions of said contract, nor did I ever state as alleged in the bill of particulars that the plaintiff would waive any of the provisions of the said contract, nor have I ever stated to the defendants or to anyone else that the plaintiff would be willing to take title to the premises in question, subject to any of the encroachments or mislocations, nor did the defendants ever inform me that the overhanging shingles mentioned in the fourth separate defense

30 of the answer could be or would be removed. As a matter of fact, such shingles cannot be removed without damage to the building. Furthermore, I was never authorized by the plaintiff to enter into any arrangements or agreements with the defendants, whereby any of the provisions of the contract would be waived, modified or altered. As a matter of fact, the plaintiff in this matter, in my presence, insisted at all times to the defendants, that she would not consummate said contract un-

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Affidavit of Samuel Troum.

less the conveyance was made free and clear of all encroachments and projections in accordance with the terms of the contract.

2. Furthermore, the defendants, at no time while negotiations were being carried on, did deny the existence of the encroachments or projections, but exhibited a survey which they had made by Walter L. Clarkson, an engineer, which showed such encroachments and projections, and they endeavored to make an arrangement with the plaintiff whereby the plaintiff would accept a conveyance of the premises subject to said encroachments and projections, if the plaintiff would accept a concession in the price of \$500 which was offered by the defendants, which price concession the plaintiff refused to accept.

SAMUEL TROUM.

Sworn and subscribed to before me
this 21st day of November, 1930.

ISRAEL LIPSCHITZ,
Master in Chancery
of New Jersey.

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Affidavit of Edward I. Adler.

HUDSON COUNTY CIRCUIT COURT.

	<p style="text-align: center;">FANNIE TROUM, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">MORRIS BERKMAN and ANNIE BERKMAN, his wife, <i>Defendants.</i></p>	}	Action at Law.
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State of New Jersey }
County of Hudson } ss.:

EDWARD I. ADLER, being duly sworn according to law, deposes and says:

- 20 1. I am a member of the firm of Adler & Adler, practicing attorneys-at-law of the State of New Jersey, and I am a practicing counselor-at-law of the State of New Jersey.
- 30 2. On or about September 23rd, 1930, and at various times prior to said date, the defendants discussed with me the possibility of procuring from the plaintiff an agreement to accept the title to the premises described in contract marked "Schedule 1" subject to the encroachments, and I informed them that the plaintiff would not accept the title subject to any encroachments or projections. These encroachments and projections were shown on the survey of which a copy is hereto annexed and marked "Schedule 2," and another survey had been obtained by the defendants from Walter L. Clarkson, surveyor and engineer of the City of Bayonne, for the purpose of checking up the survey of Steiner & Jaeger. The said survey of Clarkson was turned over to the defendants and
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Affidavit of Edward I. Adler.

such survey showed encroachments and projections in some cases greater in extent than shown on the survey of Steiner & Jaeger.

3. I had previously discussed with the plaintiff the matter of rescinding the contract upon repayment of the deposit of \$500 and legal and surveyor's expenses incurred, and the plaintiff authorized me to close the rescission of the contract mentioned in "Schedule 1" hereto annexed if her deposit were returned to her and a portion of the legal expenses and surveyor's charge was paid by the defendants. The defendants, on or about September 23rd, 1930, in the presence of their daughter, Sarah Berkman, informed me that if the plaintiff could not be induced to accept the title, subject to the encroachments, that they would go through with the rescission of the contract on the terms stated, and that they would leave the details of this rescission to their daughter, Sarah Berkman. That an appointment was made whereby Sarah Berkman was to call at my office on September 27th, 1930, at three o'clock in the afternoon, for the purpose of consummating this rescission, and when said appointment was made, I informed the defendants that having been authorized by the plaintiff to compromise the matter of legal fees and survey fee, that the plaintiff would accept the return of the deposit and \$75 on account of said expenses in settlement of the rescission. Neither Sarah Berkman or the defendants appeared on September 27th, 1930, at three o'clock in the afternoon, nor since said time, for the purpose of disposing of this matter in accordance with the arrangement for the rescission.

4. At all times since the making of the survey and up to September 23rd, 1930, in my conversa-

Schedules Annexed to Adler Affidavit.

tion with the defendants and their daughter Sarah Berkman, I informed them that the plaintiff insisted on conveyance in accordance with the terms of the contract, and that the plaintiff would not accept a conveyance unless the conveyance was made free and clear of any encroachments and projections.

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5. My fees for the examination of title in this matter are \$150, which is a reasonable fee, and the fee of Steiner & Jaeger, the surveyors, for the survey is \$25, which is likewise a reasonable fee for said survey.

EDWARD I. ADLER.

Sworn and subscribed to before me
this 24th day of November, 1930.

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ALEXANDER SECLOW,
Master in Chancery
of New Jersey.

SCHEDULE 1.

ARTICLES OF AGREEMENT, made the third day of July in the year of our Lord One Thousand Nine Hundred and Thirty, between Morris Berkman and Annie Berkman, husband and wife, of the City of Bayonne, in the County of Hudson and State of New Jersey, party of the first part; and Fannie Troum of the City of Bayonne in the County of Hudson and State of New Jersey, party of the second part;

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WITNESSETH, That the said party of the first part, for and in consideration of the sum of Fourteen Thousand Six Hundred (\$14,600) Dollars, to

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Schedules Annexed to Adler Affidavit.

be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered to and with 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, her heirs and assigns, by Deed of Warranty free from all encumbrance on or before the first day of September next ensuing the date hereof, all that lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Bayonne in the County of Hudson and State of New Jersey. 10

Being premises known as 888 Broadway, in the City of Bayonne, County of Hudson and State of New Jersey, located on the easterly side of Broadway, between 41st and 42nd Street, Bayonne, N. J. Description by metes and bounds to be inserted in deed. Said premises consist of a three-story frame building, containing two stores and five apartments located on a plot of ground approximately 25' in width, front and rear, and 100' in depth throughout. 20

The premises are to be conveyed free and clear of all encroachments. 30

The parties of the first part represent that all tenancies in said building are monthly tenancies except that the store in the northerly half of the said building is held by a lease which will expire on or about June 1, 1931.

It is expressly understood and agreed by and between the parties hereto, that immediately upon the delivery of the deed to the party of the second part by the party of the first part, said party of the first part will deliver up the 40

Schedules Annexed to Adler Affidavit.

possession of the flat now occupied by them to the party of the second part. It is understood that all floor covering in hall, gas stoves, hot water heaters, screens, awnings, shades and lighting fixtures are part of the premises and are to be conveyed as part of the premises.

10 In the event first mortgage is called in, party of the second part agrees to subordinate lien of purchase money mortgage to a mortgage or mortgages not exceeding \$6,500.

20 And the said Fannie Troum, for herself, her 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 she, the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the sum of Fourteen Thousand Six Hundred (\$14,600) 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	\$ 500.00
	By taking subject to a mortgage held by Robert Phillips in the sum of	\$ 6,500.00
30	By cash to be paid when title passes	\$ 3,600.00
	By the party of the second part executing and delivering to the party of the first part a bond and mortgage which bond and mortgage shall bear same date as deed and shall be payable in monthly installments of fifty dollars besides interest monthly until the full balance due is paid	\$ 4,000.00
40		<hr/> \$14,600.00

Schedules Annexed to Adler Affidavit.

Said bond and mortgage shall contain the usual thirty day default clause as to installment and ninety day default clause as to taxes and other municipal charges.

Rents, taxes, water charges, interest, insurance premiums and all other charges shall be apportioned as of the day of passing of title. 10

The parties of the first part shall keep the premises insured until title is passed.

It is understood and agreed that the buildings upon the premises are within the boundary lines of the property as described in the deed.

Party of the second part shall have privilege of paying off sum due on purchase money mortgage before maturity by paying balance of principal with interest to date of payment. 20

And the said party of the _____ part hereby agrees to pay to _____, a commission of _____ % on the purchase price aforesaid, said commission to be paid in consideration of services rendered in consummating this sale; said commission to become due and payable upon the execution of

AND IT IS FURTHER AGREED, by the parties to these presents, that the said party of the second part, _____ heirs and assigns, may enter into and upon the said land and premises on the day of _____ next ensuing the date hereof, and from thence take the rents, issues and profits to _____ and their use. 30

AND IT IS FURTHER AGREED, by the parties hereto, that said Deed of Warranty shall be delivered and received at the office of Adler & Adler, 473 Broadway, Bayonne, N. J., between the hours of ten in the forenoon and four o'clock in the afternoon on the said first day of September next ensuing the date hereof. 40

Schedules Annexed to Adler Affidavit.

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.

10 IN WITNESS WHEREOF, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

his
MORRIS X BERKMAN (L. S.)
mark

..... (L. S.)
(Annie Berkman in Jewish)

FANNIE TROUM (L. S.)

20 Signed, sealed and delivered
in the presence of

HARRY E. BERKMAN.
EDWARD I. ADLER.

State of New Jersey }
County of Hudson } ss.:

30 BE IT REMEMBERED, that on this third day of July, in the year of our Lord One Thousand Nine Hundred and thirty, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Morris Berkman and Annie Berkman, husband and wife, and Fannie Troum, who, I am satisfied, are the persons 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.

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EDWARD I. ADLER,
Master in Chancery of N. J.

Schedules Annexed to Adler Affidavit.

SCHEDULE 3.

October 1st, 1930.

Brenner & Kresch, Esqs.,
Times Building,
Bayonne, N. J. 10

Gentlemen:

Mrs. Troum has consulted us with reference to the purchase of property at 880 Broadway and has turned over to us your letter of September 26th, 1930, which she received from Mr. Adler, who is no longer representing her in the matter.

The survey made for Mrs. Troum discloses three encroachments: Projection of the building to be conveyed over adjoining lands on both sides and encroachment of building in the rear over the lands contracted to be conveyed. 20

We have not yet consulted with Mr. Adler concerning the other matters affecting this title and we assume that these are the only objections.

Mrs. Troum is willing to give the seller until October 15th, 1930 to clear up these objections, time however to be made of the essence. If your clients will enter into such a stipulation, we shall be glad to prepare it and send it to your office. 30

We are sending this reply to your letter by messenger so as to avoid delay.

Very truly yours,

SECLOW & NESSANBAUM,

By S.

AS:P

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Schedules Annexed to Adler Affidavit.

SCHEDULE 4.

Mr. Morris and Mrs. Annie Berkman,
888 Broadway,
Bayonne, N. J.

10 Dear Sir and Madam:

YOU ARE HEREBY NOTIFIED that I shall be at the office of Adler & Adler, 473 Broadway, Bayonne, N. J. on Monday, October 20th, 1930, at three o'clock in the afternoon, for the purpose of consummating the contract to premises commonly known as 888 Broadway, Bayonne, New Jersey, said contract being dated July 3rd, 1930, and you are further notified that we shall deem and hereby
20 do designate that time shall be of the essence of said Monday, October 20th, 1930, at three o'clock in the afternoon.

YOU ARE FURTHER NOTIFIED that at the said time and place we shall expect you to be prepared to convey title to the aforesaid premises in accordance with the terms and conditions of the said contract dated July 3rd, 1930.

30 Yours, &c.,

FANNIE TROUM.

Dated:
October 6th, 1930.

Copies to be served personally and copies to be served by registered mail.

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Schedules Annexed to Adler Affidavit.

SCHEDULE 5.

October 10th, 1930.

Brenner & Kresch, Esqs.,
 Times Building,
 Bayonne, N. J. 10

Re: Title 880 Broadway
 Bayonne, N. J.

Gentlemen:

We received your letter of October 8th, 1930,
 yesterday, but did not respond to it at once be-
 cause we were obliged to discuss the matter with
 Mr. Adler and our client. 20

You have apparently been misinformed as to
 the character of the negotiations preceding your
 entry into this matter. Both Mr. Adler and Mrs.
 Troum inform us that the statement as to the al-
 leged refusal of Mrs. Troum to accept the convey-
 ance if it be made according to the contract is in-
 correct. That as a matter of fact, when Mrs.
 Troum ascertained that the building to be con-
 veyed encroached over both sides and that a build-
 ing adjoining in the rear encroached over the 30
 lands to be conveyed, she quite naturally refused
 to take the property under such condition.

Mr. Adler informs us that after considerable
 discussion with the sellers, they decided that they
 would not or could not clear up these matters and
 they stated that they desired to rescind the con-
 tract by the repayment of the deposit to Mrs.
 Troum. The question then arose as to the search
 fees and this matter was satisfactorily disposed
 of by Mr. Adler making a concession. The sellers 40

Schedules Annexed to Adler Affidavit.

were to return to Mr. Adler's office for the purpose of consummating this rescission, but instead of doing so Mr. Adler received a letter from you.

10 Of course, Mrs. Troum has been and is still willing to consummate this transaction as she is legally bound to do, providing the sellers will convey according to the terms of the contract, and it was for the purpose of bringing this matter to a conclusion one way or the other that the notice was served. We note in your letter that this notice occasioned some surprise. We cannot understand this in view of the fact that we wrote you on October 1st, stating that Mrs. Troum was willing to give the Berkman until October 15th, 1930, to clear up the objections, providing time was made of the essence. To this letter, we did not have a response and Mrs. Troum had no other alternative but to serve the notice on your clients.

20 If the sellers were at all able to convey according to their contract, they have had ample time prior to October 1st, 1930, and their failure to remove the objections is due entirely to their own decision to rescind the contract.

30 In our letter of October 1st, we suggested that time be made of the essence as of October 16th, 1930, and because you did not reply a notice was served increasing this period to October 20th, 1930. It is our opinion that the sellers have been afforded much more than a reasonable time to clear up these objections and Mrs. Troum will, therefore, insist on closing this matter as stated in her notice of October 6th, 1930.

Very truly yours,

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SECLAW & NESSANBAUM,

By S.

AS:P

Schedules Annexed to Adler Affidavit.

SCHEDULE 6.

October 17th, 1930.

Berkman to Troum.

Brenner & Kresch, Esqs. 10
 Times Building
 Bayonne, N. J.

Gentlemen:

Upon receipt of your letter of October 16th,
 we communicated with our clients relative to its
 contents. Both Mr. & Mrs. Troum were as-
 tounded by the statements contained therein, in-
 asmuch as they carried on no negotiations with
 Berkman since the day we sent you the first letter. 20

If the Berkman will convey according to the
 terms of the contract, Mrs. Troum will be ready
 to consummate this contract on Monday, October
 20th 1930, the time stated in their notice. In the
 meantime, we are examining title to the adjoin-
 ing tracts upon which the building encroaches to
 ascertain the parties in interest, so that we may
 pass upon any instruments you may have at the
 closing of title, such as deeds and releases of
 mortgages, if the property to be conveyed shall 30
 be encumbered by mortgages. Of course, the en-
 croachment over the rear of the premises will
 have to be removed.

Very truly yours,

SECLOW & NESSANBAUM

By S.

AS:AS

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Schedules Annexed to Adler Affidavit.

October 20th, 1930.

SCHEDULE 7.

Berkman to Troum.

10 Brenner & Kresch, Esqs.
Times Building
Bayonne, N. J.

Gentlemen:

20 Answering your letter of the 20th instant which was delivered at 4.50 P. M. by messenger and by whom we are forwarding this reply, we beg leave to state that Mr. Adler informs us that the sellers knew about the three encroachments prior to your entrance into this matter, and that on September 26th 1930 they had agreed to rescind and to repay the deposit and had actually made an appointment to meet in Mr. Adler's office the following day for that purpose.

30 Furthermore, in our letter of October 1st 1930 and in our letter of October 10th 1930 we called this matter to your attention. Inasmuch as the Berkman's were not ready to convey in accordance with the notice which was given them, we are commencing suit for the deposit, search fees and survey.

Very truly yours,

SECLOW & NESSANBAUM

By S.

AS:AS

40 Service of a notice of motion to strike out answer and true copies of the affidavits hereto

Affidavit of Morris and Annie Berkman.

annexed are acknowledged this 24th day of November, 1930.

BRENNER & KRESCH,
Attorneys for Defendants.

Filed Clerk's Office Jan. 19, 1931. 10
Hudson County, N. J.

GUSTAV BACH,
Clerk.

**Affidavit of Morris Berkman and Annie
Berkman.**

HUDSON COUNTY CIRCUIT COURT. 20

<p>FANNIE TROUM, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>v.</i></p> <p>MORRIS BERKMAN, <i>et al,</i> <i>Defendants.</i></p>	}	Action at Law.
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State of New Jersey }
County of Hudson } ss.: 30

MORRIS BERKMAN and ANNIE BERKMAN, of full age, being duly sworn, according to law, on their respective oaths, depose and say:

1. We are the defendants in the above entitled cause.
2. The answer and counterclaim filed by us are neither sham or frivolous, but to the contrary, we verily believe that we have a good defense to the above entitled cause on the merits of the case. 40

Affidavit of Morris and Annie Berkman.

10 3. It is true that we entered into a contract for the sale to Fannie Troum of premises owned by us at No. 888 Broadway, Bayonne, a copy of which contract is annexed to the complaint. At the time that this contract was drawn, Samuel Troum, the husband of the plaintiff was present and all negotiations were carried on with him, although title was to be taken in the name of Fannie Troum and the contract was signed by her. All arrangements, however, as to price, terms and the manner of the performance of the contract were discussed with Samuel Troum, his wife taking no part in such negotiations, but she merely signing the contract.

20 4. After the contract was signed, all further negotiations were undertaken for us by our daughter, Sarah Berkman, who acted as our agent and her affidavit is annexed hereto.

his
MORRIS X BERKMAN.
mark

.....
SARAH BERKMAN in Yiddish.

30 Sworn to and subscribed before me
this 4th day of December, 1930.

CHARLOTTE BRIGADIER,
Notary Public of N. J.

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Affidavit of Sarah Berkman.

HUDSON COUNTY CIRCUIT COURT.

<p style="text-align: center;">FANNIE TROUM, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">MORRIS BERKMAN, <i>et al,</i> <i>Defendants,</i></p>	}	Action at Law.	10
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State of New Jersey }
County of Hudson } ss.:

SARAH BERKMAN, of fully age, being duly sworn, according to law, upon her oath deposes and says:

1. I am the daughter of Morris and Annie Berkman, the defendants in the above-entitled cause, and at the request of my parents acted for them in carrying on negotiations with Samuel Troum, who I know was acting for his wife, Fannie Troum. 20

2. About two weeks after the contract had been executed, Samuel Troum came to the home which I occupy with my parents and stated to me that he and his wife Fannie Troum had, subsequent to the execution of the contract, discussed the advisability of accepting title to the premises agreed to be conveyed and that they had determined that the property was not of the value that they had agreed to pay for the same; that they had made a bad bargain and were anxious to have the contract rescinded. I told Samuel Troum at the time that no one had forced him or his wife to agree to purchase the property; that no misrepresentation had been made concerning the 30 40

Affidavit of Sarah Berkman.

10 same and that it was worth the amount they had agreed to pay and could not consent to a rescission of the contract, as my parents might have lost a purchaser by reason of their having made the contract. This, however, did not satisfy him and he left, saying that they did not intend to take title.

20 3. Several days later I received word from Samuel Troum that the property agreed to be conveyed encroached upon adjoining property. I went to his place of business with Harry Jaeger, his surveyor, and Edward Adler, his attorney, to confer with him concerning the claimed encroachment. He claimed at that time that the building overlapped on the premises to the north owned by a party named Higgins. I showed him that the only encroachment on that side was to the extreme rear of the property and that no part of the building overlapped, except the shingles at that portion, which could very easily be cut down or reset, so that no encroachment would exist, and said that we were willing to have this work done immediately to overcome any objection. We at the same time spoke about a claimed encroachment on the south side, but he said that there was no particular objection to this, as the adjoining owner on the south, a man named Cozzo, was friendly with him, and, he was satisfied, would make no objection to the overlapping. No definite understanding was had at that time, but he promised to get in touch with me a few days later and let me know whether it would be necessary to reset or shave down the overlapping shingles to the north of the property. A few days later he called at my home and said that it would not be necessary to reset or shave down the shingles to

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Affidavit of Sarah Berkman.

the north side, but he wanted an arrangement made by my parents with Cozzo concerning the claimed encroachment on the south side and I told him that I would immediately confer with Cozzo and see if an arrangement could be made. He promised to call again within a few days after I had had an opportunity to confer with Cozzo. A few days later he called again and I had seen Cozzo in the meantime, who said that he had no objection to the overlapping and would sign an agreement to that effect at any time that I would have such agreement prepared and submitted to him for signature. This information I gave to said Samuel Troum. Troum then changed his previous attitude and said that an agreement would not be sufficient, but that I must secure a deed from Cozzo conveying title to so much of his property, as the building encroached upon. I told him that I was satisfied that this deed could be procured and asked him that if arrangements were made to procure the same, whether title would then be accepted and he told me that it would be. We at the same time discussed the claimed encroachment on the Higgins property to the north and also a claimed encroachment to the east of the property. This encroachment consisted of overhanging eaves to the extent of 5" forming a part of a dwelling on lands adjoining to the east of our property. Same did not interfere in any way with the use of the building on our lands, as the overlapping portion is at the extreme end of a yard to the rear of our house and 25' to 30' away from the house itself. This encroachment could have been overcome at little, if any cost by merely taking off the overhanging portion without in anywise damaging or interfering

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Affidavit of Sarah Berkman.

ing with the building, of which said eaves formed a portion. He said that it would not be necessary to arrange for the removal of same and also that it would not be necessary to reset or shave down the shingles, but that if arrangements were made to procure a deed from Cozzo, that title would be
10 accepted.

4. I subsequently conferred with Cozzo and he agreed to make conveyance of the strip in question which would overcome any claim of encroachment on the southerly side for the sum of \$350. Cozzo was ready to execute a deed at that time or at any later time that I presented the necessary papers to him. I again communicated with Troum and he called at my house and I related to him the
20 result of the conference with Cozzo and he said that if the deed was procured and delivered to him at the time of passing title that he would accept a conveyance and that he would immediately arrange with his attorney, Mr. Adler to complete the search and fix a date for passing title. I gave this information to Cozzo and he was ready to execute the deed which I intended to procure and deliver to Troum under my agreement with him.

30 5. I subsequently, however, received word from Edward Adler to call at his office and went there, believing that it was for the purpose of arranging a time to pass title. I met Troum at this office, and disregarding all previous agreements made, Troum insisted that he did not wish to take the title, but wanted the return of his deposit and expenses. I explained to him that he had previously agreed that he would accept the title and that I had gone to considerable trouble in arranging to
40 eliminate the encroachments. He did not deny

Affidavit of Sarah Berkman.

his previous agreements but insisted that title would not be accepted. His attorney, Mr. Adler, attempting to convince me that my parents would have to make return of the deposit and expenses, but that if they would be willing to rescind the contract, that Troum would accept the return of the deposit of \$500 and one-half of the expenses. I explained to Mr. Adler at that time that inasmuch as he was acting for Troum, that I felt that I should have the benefit of advice of some other lawyer. To this no objection was made and I consulted with my present counsel. They communicated with Edward Adler by letter, copy of which is annexed hereto, made a part hereof and marked Exhibit 1. Mr. Adler conferred with my counsel over telephone in answer to this letter and I am informed by them that Adler claimed that his client would not accept title and I was then advised by my counsel to do nothing further.

6. Subsequently a letter was received by my attorneys from Messrs. Seclow & Nessenbaum, which was answered by my attorneys under date of October 8th, copy of said letter being annexed hereto, made part hereof and marked Exhibit II.

7. After this letter was written, I again conferred with Mr. Troum directly and he again said that he would accept the title if deed were procured from Cozzo, and I conveyed this information to my attorneys, who wrote to Messrs. Seclow & Nessenbaum, under date of October 16th, 1930, copy of which letter is annexed hereto, made a part hereof and marked Exhibit III.

8. Troum evidently denied any conference between him and myself, as my attorneys were so

Affidavit of Sarah Berkman.

informed by Seclow & Nessenbaum, but the fact remains that there was such a conference and my parents were prepared to procure the deed, and as a matter of fact had received a reassurance from Cozzo that he would make the conveyance.

10 I was subsequently informed by my counsel that they had further negotiated with Messrs. Seclow & Nessenbaum, who then insisted not only on receiving a deed from Cozzo, but made the additional demand which had never been previously made, that releases be procured from any mortgagee holding a mortgage on the Cozzo property. Although this was the first time that such demand had been made, my parents were willing to accede to this request and my attorneys again conferred

20 with Seclow & Nessenbaum, requesting them to advise us the person or persons from whom release would have to be procured, but that as the date of October 20th, upon which they insisted that title should be passed was so close at hand that it might be difficult to procure same within that short time, and requested some additional time to complete the negotiations. Although these new demands made further time necessary, Seclow & Nessenbaum refused to give additional

30 time as requested in letter from my attorneys under date of October 20th, 1930, copy of which is hereto annexed, made a part hereof and marked Exhibit IV, to which was received a letter, stating that suit was being commenced.

9. We have done everything we could possibly do to procure good title to the premises agreed to be conveyed and all negotiations were made by us which would permit the conveyance of a marketable title, but each time we were ready to convey, new demands were made upon us and I be-

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Affidavit of Sarah Berkman.

lieve that it was the intention of the plaintiff to refuse to accept title as stated to me in the first conversation related before there was any question of encroachments and that they were merely looking for an excuse to evade accepting title and to drag the matter beyond the date fixed for closing and the extension times agreed upon with a view of formulating a basis for a suit to compel a return of the deposit and expenses as first demanded. Neither the deposit, expenses nor any part thereof did my parents ever agree to repay, nor have they or I agreed upon the reasonableness of the expenses claimed. 10

10. The fact of the matter is that no encroachment exists, although the surveys purport to show the existence thereof because the building standing upon the lands agreed to be conveyed has stood in its present condition for a period of more than 20 years and, therefore, in so far as it overlaps on either side, title has been obtained to adjacent property by adverse possession. 20

11. Even after suit was instituted, Troum continued to negotiate with me and said that he would accept title with all claimed encroachments as they existed if we would allow \$1,000 off of the purchase price. This proposition we refused to consider, but told him that inasmuch as we were obliged to pay Cozzo \$350 to procure the deed that to save expense of litigation we would be willing to allow him \$500 off of the purchase price. He said that he might be willing to accept this and would let me know in a few days. He did not, however, let me know and I was surprised when I received word from my attorneys that an 30 40

Affidavit of Alfred Brenner.

application was being made to have judgment entered in favor of the plaintiff.

SARAH BERKMAN.

10 Sworn to and subscribed before me
this 4th day of December, 1930.

CHARLOTTE BRIGADIER,
Notary Public of N. J.

Affidavit of Alfred Brenner.

HUDSON COUNTY CIRCUIT COURT.

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FANNIE TROUM,
Plaintiff,

v.

MORRIS BERKMAN, *et al,*
Defendants.

Action
at Law.

State of New Jersey }
County of Hudson } ss.:

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ALFRED BRENNER, of full age, being duly sworn, according to law, upon his oath, deposes and says:

1. I am a member of the firm of Brenner and Kresch, the attorneys for the defendants in the above entitled matter.

40 2. I was consulted by Sarah Berkman relative to the title to premises agreed to be conveyed by her parents to Fannie Troum, and immediately

Affidavit of Alfred Brenner.

communicated with Edward I. Adler, my letter being annexed hereto and made a part hereof and marked Exhibit I.

3. I received a telephone call from Edward Adler in response thereto and told him that my clients were prepared to eliminate any question of encroachment and had engaged me to draw the necessary papers and have same executed, but that it would be foolish for me to put them to that expense, unless his clients were prepared to accept title. He promised to get in touch with Mr. and Mrs. Troum for the purpose of ascertaining their attitude and to communicate with me again. I later received a call from him and during the conversation with him, he stated that under no circumstances would his clients accept title and I then told him that I would do nothing toward procuring the execution of the necessary documents to insure good title unless I heard from him to the contrary. I heard nothing further from him and, therefore, assume that as he said title would not be accepted under any circumstances that same would not be accepted and did not, therefore, continue negotiations looking toward the execution of said documents.

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ALFRED BRENNER.

Sworn to and subscribed before me
this 4th day of December, 1930.

CHARLOTTE BRIGADIER,
Notary Public of N. J.

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Exhibits Annexed to Foregoing Affidavits.

EXHIBIT I.

Sept. 26, 1930.

Messrs. Adler and Adler,
Bergoff Bldg.,
10 Bayonne, N. J.

Attention Edward I. Adler.

Dear Ed:

I have been consulted by Mr. Morris Berkman, the owner of property No. 888 Broadway, who entered into a contract for the sale thereof to your client Troum. I understand that survey
20 made by you would seem to indicate that there is a slight encroachment of this property on adjacent property to the south. This survey has not been verified by my clients, but assuming that the same existed they have entered into negotiations with the property owner to the South, with a view of obtaining a deed for so much of his property as will cause the encroachment to be eliminated.

I am informed, however, by Miss Berkman, who
30 called here today, that in an interview with you, it was stated that Troum insists that he will not accept title to the property even though this additional portion upon which the encroachment exists is secured, but to the contrary that he now insists on a return of his deposit. If this is his attitude, it is contrary to agreement previously made that title would be accepted if the encroachment could in some manner be removed. We are prepared to complete negotiations looking toward the acquisition of the additional property, but do not wish to
40 do so if your client intends to attempt to repudiate his contract.

Exhibits Annexed to Foregoing Affidavits.

Failing to hear from you to the effect that your client will accept the property if the encroachment is cleared up in the manner indicated, we will assume that he does not intend to keep his agreement and it would, therefore, be foolish for us to continue the negotiations to acquire the property mentioned. If, however, he intends to perform his agreement, we will continue negotiations now under way and will ask for a reasonable time to consummate the same. 10

Very truly yours,

(Signed) ALFRED BRENNER.

EXHIBIT II. 20

Oct. 8, 1930.

Messrs. Seclow & Nessenbaum,
Bergoff Bldg.,
Bayonne, N. J.

Gentlemen:

We represent Morris and Annie Berkman, upon whom notice was served by your office informing them that your client, Fannie Troum will be prepared to accept title to property 880 Broadway on October 20th, 1930. This notice occasioned both our clients and ourselves considerable surprise. When we were first engaged in the matter, we were informed that your client objected to passing title because of a claimed slight encroachment of the building being conveyed upon the property to the South thereof. Negotiations were then entered into with the owner of 30 40

Exhibits Annexed to Foregoing Affidavits.

10 the adjacent property to procure a deed conveying to our clients a sufficient amount of his property, so as to relieve the encroachment. While these negotiations were pending, information was received from the office of Adler and Adler, formerly representing Mrs. Troum that she would not accept title, even though the encroachment was removed by the conveyance aforesaid. We then told them that nothing further would be done by us toward negotiating with the other owner, unless Mrs. Troum would accept the title. They agreed to confer with her and we are informed did so and we received a further assurance from them that under no circumstances would title be accepted. Negotiations with the adjacent owner, therefore, were discontinued.

20 If your client has again changed her attitude and our clients are given a reasonable opportunity to again negotiate with the adjacent owner and we are advised to that effect, such negotiations will be resumed. Under those circumstances, however, we would have to ask for a little additional time as you undoubtedly realize that once a settlement is practically completed and then broken off, there is always difficulty in re-
30 newing without additional time being consumed. We will be pleased to hear further from you after you have conferred with your client.

Very truly yours,

(Signed) BRENNER and KRESCH.

Exhibits Annexed to Foregoing Affidavits.

EXHIBIT III.

Oct. 16, 1930.

Messrs. Seclow & Nessonbaum,
 Bergoff Bldg.,
 City.

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Re: Berkman-Troum Title.

Gentlemen:

From information received from my client, it seems that he and your client have been in consultation with each other concerning the acquisition of the necessary property to remove any claim of an alleged encroachment, your client stating that he is anxious to take title and that the adjoining owner would be willing to make a conveyance for a consideration. My people thereupon immediately conferred with the adjacent owner and finally arrived at a figure of \$350 which they are willing to pay. 20

I suggested, however, that it might be a good plan to deliver this amount to you for your client, so that you may negotiate direct and procure the deed directly in the name of your client, rather than have two separate deeds drawn. If this meets with your approval, I will be glad to deliver check to you in that amount. If you would prefer to have me procure the deed, I will do so, but would suggest that you prepare it, as the survey that I may have may conflict with yours and I would rather have it drawn in accordance with the dimensions as they appear on your survey. As soon as this has been taken care of, I presume that title can be passed, as both sides now seem anxious to go through with the deal. 30 40

Exhibits Annexed to Foregoing Affidavits.

I tried to get you on 'phone today, but unfortunately did not find you in.

Very truly yours,

(Signed) ALFRED BRENNER.

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EXHIBIT IV.

October 20, 1930.

Seclow & Nessianbaum, Esqs.,
Bergoff Bldg.,
Bayonne, N. J.

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Re: Berkman-Troum Title.

Gentlemen:

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Relative to the encroachments mentioned by you, we are ready to give a clear title to the premises in question, but in view of the fact that you have called our attention to the encroachment existing on both sides of the premises agreed to be conveyed, and in view of the fact that the survey made for our client only shows an encroachment on the south side, we must, therefore, request additional time to investigate, and if the encroachments are found to exist on the north side, we shall be obliged to secure a good title for your clients.

It seems that your clients are not acting in good faith in urging these objections as we feel

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Notice.

that they are using these reasons to get their deposit back.

Very truly yours,

(Signed) BRENNER and KRESCH.

SEK:G

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Filed:

Clerk's Office, Jan. 19, 1931,
Hudson County, N. J.

GUSTAV BACH,
Clerk.

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Notice.

HUDSON COUNTY CIRCUIT COURT.

<p style="text-align: center;">FANNIE TROUM, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">MORRIS BERKMAN and ANNIE BERKMAN, his wife, <i>Defendants.</i></p>	}	<p>Action at Law.</p>	30
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To Brenner & Kresch, Esqs., attorneys of the defendants:

SIRS:

YOU WILL PLEASE TAKE NOTICE, that on Thursday, February 5th, 1931, at ten o'clock in the fore-

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Order Striking Out Answer, etc.

noon, we shall proceed to have damages assessed in the above matter before a jury drawn from the general panel at the Court House, Jersey City, N. J., pursuant to the order made by the Honorable THOMAS BROWN, Judge of the Hudson County Circuit Court, a true copy of which order is hereto annexed.

Dated January 21st, 1931.

Yours, &c.,

SECLOW & NESSANBAUM,
Attorneys for Plaintiff.

20 **Order Striking Out Answer and Counter-claim, Etc.**

HUDSON COUNTY CIRCUIT COURT.

30	<p style="text-align: center;">FANNIE TROUM, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">MORRIS BERKMAN and ANNIE BERKMAN, his wife, <i>Defendants.</i></p>	}	Action at Law.
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40 This matter being opened to the Court by Sec-
low & Nessianbaum, attorneys for the plaintiff
upon an application to strike out the answer and
counterclaim upon the ground that the same is
partly sham and partly frivolous, and said appli-
cation praying for summary judgment, and the
matter having been argued by Alexander Seclow,

Order Striking Out Answer, etc.

Esq., on behalf of the plaintiff, and by Alfred Brenner, Esq., on behalf of the defendants, and the Court having considered said arguments and the affidavits submitted by the respective parties in support and in opposition to said application, and it appearing that the said answer and counterclaim should be stricken out; 10

It is on this 21st day of January, 1931, ORDERED that the answer and counterclaim of the defendants, Morris Berkman and Annie Berkman, his wife, is hereby stricken out; and it is further

ORDERED that judgment summary be and is hereby entered in favor of the plaintiff, Fannie Troum, and against the defendants, Morris Berkman and Annie Berkman, his wife; and it is further 20

ORDERED that the plaintiff proceed before a jury from the general panel to assess her damages, and that such jury be empaneled on Thursday, the 5th day of February, 1931, at ten o'clock in the forenoon, and that the plaintiff give at least fifteen days' notice of her application to assess such damages.

THOMAS BROWN, 30
Judge.

A true copy

SECLAW & NESSANBAUM,
Attys. of Plaintiff.

Order of Continuance.

Service of a copy of the within notice is acknowledged this 21st day of January, 1931.

BRENNER & KRESCH,
Attorneys for Defendants.

10 Filed:

Clerk's Office, Feb. 9, 1931.
Hudson County, N. J.

GUSTAV BACH,
Clerk.

Order of Continuance.

20

HUDSON COUNTY CIRCUIT COURT.

FANNIE TROUM,
Plaintiff,

v.

MORRIS BERKMAN and ANNIE
BERKMAN, his wife,
Defendants.

} Action

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The matter of assessment of damages before a jury having been brought on, on Thursday, February 5th, 1931, at ten o'clock in the forenoon, as stated in the plaintiff's notice, and the parties having agreed to a continuance of said matter to Monday, February 9th, 1931, at ten o'clock in the forenoon;

It is on this 5th day of February, 1931,

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Rule for Judgment.

ORDERED, that said matter be continued until said time.

A. DAYTON OLIPHANT,
Judge.

We consent to the above order.

SECLOW & NESSANBAUM, 10
Attorneys for Plaintiff.

BRENNER & KRESCH,
Attorneys for Defendants.

Filed:

Clerk's Office, Feb. 9, 1931,
Hudson County, N. J.

GUSTAV BACH, 20
Clerk.

Rule for Judgment.

HUDSON COUNTY CIRCUIT COURT.

<p>FANNIE TROUM, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>v.</i></p> <p>MORRIS BERKMAN and ANNIE BERKMAN, his wife, <i>Defendants.</i></p>	}	<p>Action at Law.</p>	30
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Summons and complaint having been duly issued and served in this cause upon both defendants, who filed an answer and counterclaim, and

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Rule for Judgment.

10 the Court upon application of the plaintiff having struck out said Answer and Counterclaim by order dated January 21st, 1931, which order directed Summary Judgment in favor of the plaintiff and against the defendants, and further directed that the plaintiff proceed before a Jury drawn from the general panel to assess her damages, upon fifteen days' notice, and said notice having been given and the matter having been continued by consent of Counsel and order of this Court to February 9, 1931, and a jury having been impaneled on February 9, 1931, at which time the plaintiff appeared with her witnesses, and the defendant by their attorney, Alfred Brenner, there appearing on behalf of the plaintiff, Alexander Seclow, and testimony having been submitted to the jury, and the jury having been charged by the Honorable Dayton A. OLIPHANT, whereupon the jury returned a verdict in favor of the plaintiff and against the defendant in sum of \$665.60.

20 Wherefore, it is on this 10th day of February, 1931, ORDERED, that judgment interlocutory and final be entered in favor of the plaintiff, Fannie Troum, and against the defendants Morris Berkman and Annie Berkman, his wife in the sum of \$665.60 besides costs to be taxed.

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A. DAYTON OLIPHANT,
Judge.

On motion of

SECLOW and NESSANBAUM,
Attorneys for Plaintiff.

Rule actually entered February 10, 1930.

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Judgment.

HUDSON COUNTY CIRCUIT COURT.

FANNIE TROUM, <i>Plaintiff,</i> <i>v.</i> MORRIS BERKMAN and ANNIE BERKMAN, his wife, <i>Defendants.</i>	10
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Judgment entered February 10, 1930.

Damages	\$665.60	
Costs	63.00	
	\$728.60	20

SECLOW & NESSANBAUM,
Attorneys.

Judgment On Verdict in the above entitled cause was entered in this Court on the 10th day of February in the year of our Lord One Thousand Nine Hundred and Thirty-one in favor of the Plaintiff Fannie Troum and against the Defendants Morris Berkman and Annie Berkman, his wife, in a plea of Action at Law for the sum of Six Hundred Sixty-five Dollars and Sixty Cents, damages and Sixty-three Dollars cost of suit. 30

Judgment entered and signed this 10th day of February A. D. 1931.

A. DAYTON OLIPHANT,
Judge. 40

Notice of Appeal and Grounds.

HUDSON COUNTY CIRCUIT COURT.

10	<p style="text-align: center;">FANNIE TROUM, <i>Plaintiff-Appellee,</i> <i>v.</i> MORRIS BERKMAN and ANNIE BERKMAN, <i>Defendants-Appellants.</i></p>	<p style="font-size: 4em; line-height: 1;">}</p> <p>Action at Law. On Appeal.</p>
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To: Seclow & Nessianbaum, Esqs., Attorneys for
Plaintiff-Appellee.

SIRS:

20 TAKE NOTICE that the appellants, Morris Berkman and Annie Berkman, appeal to the Court of Errors and Appeals, in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following grounds:

1. That the Judge of the Hudson County Circuit Court struck out the answer of the appellants.
- 30 2. That summary judgment was ordered entered in favor of the plaintiff-appellee and against the defendants-appellants.
3. That the Judge of the Hudson County Circuit Court struck out the counterclaim of the defendants-appellants.

4. That a verdict was directed in favor of the

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Recognizance.

plaintiff-appellee and against the defendants-appellants.

BRENNER & KRESCH,
Attys. of Defendants-Appellants.

Service of the within Notice of Appeal and Grounds is hereby acknowledged this 20th day of February, 1931. 10

SECLOW & NESSANBAUM,
Attys. of Plaintiff-Appellee.

Filed:

Clerk's Office, Feb. 21, 1931.
Hudson County, N. J.

GUSTAV BACH, 20
Clerk.

Recognizance.

HUDSON COUNTY CIRCUIT COURT.

<p>FANNIE TROUM, <i>Plaintiff-Appellee,</i> <i>v.</i> MORRIS BERKMAN and ANNIE BERKMAN, <i>Defendants-Appellants.</i></p>	}	<p>Action at Law. On Appeal.</p>	30
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State of New Jersey }
County of Hudson } ss.:

BE IT REMEMBERED that on this 20th day of February, 1931, personally appeared before me, one 40

Recognizance.

10 of the Commissioners appointed by the Supreme Court to take recognizances of bail, Morris Berkman and Annie Berkman, Abraham Mendelwager and Abraham Miller, all of the said County of Hudson, who jointly and severally acknowledge themselves to owe unto Fannie Troum, the plaintiff above named the sum of Seventeen Hundred (\$1700) Dollars to be made and levied of their and each of their goods and chattels, lands and tenements, hereditaments and real estate to the use of the said Fannie Troum, her executors, administrators and assigns if failure be made in the following condition.

20 WHEREAS, Morris Berkman and Annie Berkman, have appealed from the Hudson County Circuit Court to the Court of Errors and Appeals of New Jersey, a certain judgment obtained by said Fannie Troum in an action at law in said Circuit Court as appears of record in the said Circuit Court,

30 NOW, THEREFORE, the condition of this recognizance is such, that if the said Morris Berkman and Annie Berkman, his wife, defendants-appellants, shall prosecute the said appeal with effect and also pay and satisfy if said judgment be affirmed all the damages and costs adjudged in the former judgment and all costs and damages to be

Recognizance.

awarded for delay of execution, than this recognizance to be void, also to remain in full force.

his
MORRIS X BERKMAN, (L. S.)
mark 10

ANNIE BERKMAN, in Hebrew,
..... (L. S.)

ABRAHAM MENDELWAGER, (L. S.)

A. MILLER, (L. S.)

In presence of

FREDERIC E. CHAMBERLIN. 20

Taken and acknowledged before me, a Supreme Court Commissioner, this 20th day of February, 1931, and said recognizance being approved by me as to form and sufficiency.

FREDERIC E. CHAMBERLIN,
Supreme Court Commissioner.

Filed:

Clerk's Office, Feb. 21, 1931. 30
Hudson County, N. J.

GUSTAV BACH,
Clerk.

Clerk's Certificate.

STATE OF NEW JERSEY.

Hudson County, ss.:

I, GUSTAV BACH, Clerk of the County of Hudson
 aforesaid, and also Clerk of the Circuit Court and
 10 Court of Common Pleas, holden therein

Do HEREBY CERTIFY, That the foregoing is a
 true and correct copy of Summons and Complaint,
 Affidavit of Merits, Answer and Counterclaim,
 Demand for Bill of Particulars, Bill of Particu-
 20 lars, Notice of Motion to strike out Answer and
 Counterclaim, Affidavits, Notice, Order Striking
 out Answer and Counterclaim, Order of Continu-
 uance, Rule for Judgment, Judgment Record,
 Notice of Appeal and Grounds, and Bond on Ap-
 peal, in the case of *Fannie Troum, Plaintiff, v.
 Morris Berkman and Annie Berkman*, his wife,
 as the same is taken from and compared with the
 original as filed and recorded in my office. This
 certificate is issued so that the said cause may be
 removed to the Court of Errors and Appeals of
 the last resort of all causes, at Trenton, N. J., for
 adjudicature according to law.

30 IN TESTIMONY WHEREOF, I have hereunto set
 my hand and affixed the seal of said Courts and
 County, at Jersey City, this Tenth day of March,
 1931.

(Seal)

GUSTAV BACH,
Clerk.

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59 OCT. 1. 1931

New Jersey Court of Errors and Appeals

FANNIE TROUM,
Plaintiff-Appellee,

v.

MORRIS BERKMAN and ANNIE
BERKMAN,
Defendants-Appellants.

On Appeal

BRIEF OF APPELLANTS

Statement of Facts

Morris and Annie Berkman, husband and wife, agreed to convey property owned by them, No. 888 Broadway, Bayonne, New Jersey, to Fannie Troum. The property consisted of a three-story frame building, containing two stores and five living apartments, located on a plot of ground designated in the agreement "approximately 25' in width front and rear and 100' in depth throughout."

The agreement contained a provision "the premises are to be conveyed free and clear of encroachments" (Case, Schedule 1, pp. 6-10).

Title did not pass, Fannie Troum contending in her complaint (Case, pp. 2-6) and particularly under paragraph three thereof, that the building sought to be conveyed encroached for more than one-half inch on lands adjoining to the northeast

and three-eighths of an inch on lands adjoining to the southwest and that a building on an adjoining lot to the rear of the lot sought to be conveyed, encroached five inches.

Fannie Troum refused to take title and instituted suit for the recovery of deposit, searches and expenditures made in procuring a survey.

Answer and counterclaim was filed to the complaint (Case, pp. 14-18). The defenses interposed were several in number and will be commented upon at length in the argument.

Notice was given that motion would be made to strike out the answer and counterclaim and for the entry of summary judgment, affidavit being attached to the moving papers (Case, pp. 25-51).

Reply affidavits were served and filed by the defendants (Case, pp. 51-67). On January 21, 1931, order was made striking out the answer and counterclaim and ordering that damages be assessed by a jury (Case, pp. 68-69).

A verdict of the jury only as to damages was received and judgment entered thereon for \$665.60 damages besides costs (Case, pp. 71-73). From said order and judgment an appeal has been taken and grounds of appeal filed (Case, pp. 74-75).

A R G U M E N T

P O I N T I

The first and sixth separate defenses in the answer alleging that no encroachments existed and that title had been procured by adverse possession to portions of adjoining lands, constituted a meritorious defense, presenting a question to be passed upon by a jury. The trial court therefore erred in striking out the answer and counterclaim and directing the entry of summary judgment.

Plaintiff's engineer claimed that the building sought to be conveyed encroached on lands to the north (known as the Higgins property) one-half inch, and on lands to the south (known as the Cozzo property) about one-half an inch (Case, pp. 32-34).

Under the first separate defense (Case, p. 14), and sixth separate defense (Case, p. 17), the encroachments are denied and the allegations made that the building, belonging to the plaintiff, had been erected and stood in its then present condition for a period of more than 20 years, by reason whereof title to the portion of adjacent lands upon which the building No. 888 Broadway overlapped, had been acquired through adverse possession and no encroachment therefore existed.

This defense is supported by the affidavit of Sarah Berkman, a daughter of the defendants (Case, p. 59) in which she states in paragraph 10:

“The fact of the matter is that no encroachment exists, although the surveys pur-

port to show the existence thereof because the buildings standing upon the lands agreed to be conveyed has stood in its present condition for a period of more than 20 years and therefore, insofar as it overlaps on either side, title has been obtained to adjacent property by adverse possession."

Numerous decisions might be cited in support of the contention that occupancy for a period of 20 years creates title in the person occupying, by adverse possession. It will probably be sufficient, however, to direct attention to the leading case of *Lehigh Valley v. McFarlan*, 43 N. J. Law, 604, decided in this Court where the subject of adverse possession is most carefully and completely reviewed and the following language used:

"In this country, the prevailing doctrine is, that an exclusive and uninterrupted enjoyment for twenty years creates a presumption, *juris et de jure*, and is *conclusive* evidence of title whenever, by possibility, a right may be acquired by grant" (p. 618) * * *

* * * * *

"The owner of the servient tenement cannot overcome the presumption of right arising from an uninterrupted user of twenty years, by proof that no grant was in fact made. He may rebut the presumption by contradicting or explaining the facts upon which it rests; but he cannot overcome it by proof in denial of the grant. He may show that the right claimed is one that could not be granted away, or that the owner of the servient tenement was legally incapable of making, or the owner of the dominant tenement incapable of receiving such a grant. He may explain the user or enjoyment by showing that it was under permission asked and granted; or that it was secret and without means of knowledge on his part; or that the

user was such as to be neither physically capable of prevention nor actionable. But if there be neither legal incompetency nor physical incapacity, and the user be open and notorious, and be such as to be actionable or capable of prevention by the servient owner, he can only defeat the acquisition of the right on the ground that the user was contentious, or the continuity of the enjoyment was interrupted during the period of prescription" (p. 621).

Plaintiff denies that title by adverse possession was obtained by defendants to the extent of the alleged encroachment of the defendants' property on the Higgins property to the north and the Cozzo property on the south. But with the affirmance of the plaintiff that title by adverse possession was procured and the denial of this by the plaintiff, an issue of fact is presented.

It is therefore urged that as to this defense the defendants were entitled to be heard by a jury and the trial judge erred in deciding this issue of fact on *ex parte* affidavits.

POINT II

Plaintiff by her acts and conduct waives the objections to title and was estopped from asserting the existence thereof as a justification for refusing title to the premises agreed to be conveyed.

Defendants by the third, fourth and fifth separate defenses (Case, pp. 15-17) allege that the plaintiff waived alleged defects in title and alleged encroachments and plead estoppel.

Plaintiff claimed as a justification for refusing

title that three separate encroachments existed and depended upon an affidavit of Harry Jaeger, the engineer to support this contention. The encroachments claimed are as follows:

(a) The building on premises No. 888 Broadway, Bayonne, New Jersey, sought to be conveyed encroached on the land to the north (belonging to Higgins) to the extent of one-half inch (Case, p. 33, lines 20-40).

(b) Premises No. 888 Broadway, Bayonne, N. J., encroached on land to the south (belonging to Cozzo) to an extent of about one-half inch (Case, p. 34, line 135).

(c) A building on lands to the rear of No. 888 Broadway, encroached on the land sought to be conveyed to an extent of five inches (Case, p. 34, lines 35-40).

ENCROACHMENT A

Sarah Berkman, a daughter of the defendants, was entrusted by them to undertake all negotiations concerning the property to be conveyed (Case, p. 52, lines 19-22).

Concerning the alleged encroachment of defendants' property to the north in her filed affidavit, Sarah Berkman said:

“Several days later I received word from Samuel Troum (husband of the plaintiff) that the property agreed to be conveyed encroached upon adjoining property. I went to his place of business with Harry Jaeger, his surveyor, and Edward Adler, his attorney, to confer with him concerning the claimed encroachment. He claimed at that time that the building overlapped on the premises to the north owned by a party named Higgins.

I showed him that the only encroachment on that side was to the extreme rear of the property and that no part of the building overlapped, except the shingles at that portion, which could very easily be cut down or reset, so that no encroachment would exist, and said that we were willing to have this work done immediately to overcome any objection.

* * * No definite understanding was had at that time, but he promised to get in touch with me a few days later and let me know whether it would be necessary to reset or shave down the overlapping shingles to the north of the property. A few days later he called at my home and said that it would not be necessary to reset or shave down the shingles to the north side, but he wanted an arrangement made by my parents with Cozzo concerning the claimed encroachment on the south side and I told him that I would immediately confer with Cozzo and see if an arrangement could be made (Case, p. 54, lines 12-40; p. 55, lines 1-9).

During a later conversation, Troum again reiterated the previous arrangement to waive any encroachment that existed on property to the north, Miss Berkman stating

“He said it would not be necessary to arrange for the removal of the same and also that it would not be necessary to reset or shave down the shingles, but that if arrangements were made to procure a deed from Cozzo, that title would be accepted” (Case, p. 56, lines 1-10).

ENCROACHMENT B

Concerning the encroachment on the Cozzo property to the south, Miss Berkman says, in her affidavit:

“We at the same time spoke about a claimed encroachment on the south side, but

he said that there was no particular objection to this, as the adjoining owner on the south, a man named Cozzo, was friendly with him, and, he was satisfied, would make no objection to the overlapping" (Case, p. 54, lines 27-35).

Evidently the plaintiff later changed her mind concerning this alleged encroachment to the south, the affidavit of Miss Berkman continuing:

"But he wanted an arrangement made by my parents with Cozzo concerning the claimed encroachment on the south side and I told him that I would immediately confer with Cozzo and see if an arrangement could be made. He promised to call again within a few days after I had had an opportunity to confer with Cozzo. A few days later he called again and I had seen Cozzo in the meantime, who said that he had no objection to the overlapping and would sign an agreement to that effect at any time that I would have such agreement prepared and submitted to him for signature. This information I gave to said Samuel Troum. Troum then changed his previous attitude and said that an agreement would not be sufficient, but that I must secure a deed from Cozzo conveying title to so much of his property, as the building encroached upon. I told him that I was satisfied that this deed could be procured and asked him that if arrangements were made to procure the same, whether title would then be accepted and he told me that it would be" (Case, p. 55, lines 1-27).

Acting upon this agreement, Miss Berkman again conferred with Cozzo and later with Troum, she in her affidavit stating:

"I subsequently conferred with Cozzo and he agreed to make conveyance of the strip in question which would overcome any claim of

encroachment on the southerly side for the sum of \$350. Cozzo was ready to execute a deed at that time or at any later time that I presented the necessary papers to him. I again communicated with Troum and he called at my house and I related to him the result of the conference with Cozzo and he said that if the deed was procured and delivered to him at the time of passing title that he would accept a conveyance and that he would immediately arrange with his attorney, Mr. Adler to complete the search and fix a date for passing title. I gave this information to Cozzo and he was ready to execute the deed which I intended to procure and deliver to Troum under my agreement with him (Case, p. 56, lines 1-30).

As a result of this last conference, defendants naturally believed that title would be accepted and that it would be unnecessary to procure a deed from Cozzo until a new date should be fixed for passing title, which would be after the search had been completed.

Subsequently word was received by the defendants that they should call at the office of the attorney. They believing that they were summoned there for the purpose of passing title went to the office. Disregarding all previous conferences and arrangements, but not denying them, it was insisted that title would not be accepted, but to the contrary demand was made for the return of deposit and one-half of the expenses incurred.

Realizing that this was an entire change of attitude, Miss Berkman said that she felt that independent advice should be procured by her and she thereupon engaged counsel (Case, p. 56, lines 30-40; Case, p. 57, lines 1-23).

ENCROACHMENT C

The building on the property sought to be conveyed did not cover the entire lot. The rear portion consisted of a yard in back of the building. Over the yard there extended the eaves of a building facing the street to the east of that on which stands the premises No. 888 Broadway. This did not constitute an encroachment, as under the contract there was no description of the property to be conveyed by metes and bounds, it being agreed that a description by metes and bounds, should be inserted in the deed. In the contract an approximate width and depth are mentioned, the depth being fixed as approximately 100' throughout (Case, p. 7, lines 1-11). Under this description in the contract a deed given showing a depth of the lot as 99', 7" would have been sufficient and unobjectionable and there would have been then no encroachment.

Disregarding this fact, however, defendants were willing to procure the removal of the overhanging eaves referred to, but plaintiff did not insist that this should be done, but to the contrary agreed that this trifling objection would be waived, the affidavit of Miss Berkman continuing:

“This encroachment consisted of overhanging eaves to the extent of 5" forming a part of a dwelling on lands adjoining to the east of the property. Same did not interfere in any way with the use of the building on our lands, as the overlapping portion is at the extreme end of a yard to the rear of our house and 25' to 30' away from the house itself. This encroachment could have been overcome at little, if any cost by merely taking off the overhanging portion without in anywise damaging or interfering with the building, of which said eaves formed a por-

tion. He said that it would not be necessary to arrange for the removal of same and also that it would not be necessary to reset or shave down the shingles, but that if arrangements were made to procure a deed from Cozzo, that title would be accepted" (Case, p. 55, lines 30-40; p. 56, lines 1-10).

ENCROACHMENTS A, B & C

The several conferences referred to continued past the day fixed for passing title, to wit, September 1, 1930, but no point was made of this, plaintiff agreeing that the attorney would complete the search and then fix a date for passing title (Case, p. 56, lines 25-26).

After plaintiff had refused to abide by previous agreements and arrangements made and insisted that return of the deposit and a portion of the expenses be made, counsel was engaged who communicated with Adler, then representing the plaintiff.

A communication was then addressed to Adler, reciting that Miss Berkman had been informed by Troum that title would not be accepted even though the objections had been removed, but that negotiations would be continued to remove the encroachments unless the plaintiff intended to repudiate the contract (Exhibit 1, pp. 62-63). To this communication no letter was received, it being answered over telephone. During the telephone conversation, Adler was told that all preparations had been made to overcome the objection, but that it would be foolish to undergo the expense unless his clients were prepared to accept title. Adler promised to communicate with his clients, and evidently did so, as a call was received from him the same day in which he stated that under no circumstances would title be accept-

ed. Negotiations looking toward the removing of the encroachments was therefore discontinued (Case, p. 61, lines 1-40).

Nothing further was heard from the plaintiff or Adler until the receipt of the communication of October 1st, 1930 (p. 45) in which nothing was said concerning prior negotiations, but insisted that all encroachments should be removed although two had previously been waived. This communication was answered (Exhibit 2, pp. 63-64) and contained a recitation of what had previously occurred, requesting a little additional time because of the renewed demands.

Acting upon the suggestion of a more reasonable opportunity being afforded to complete negotiations to remove the encroachments, response was made on October 10, 1930 (Schedule 5, pp. 47-48) allowing only a few days additional, until October 20th, which under the circumstances could hardly be called reasonable.

In the meantime, without the intervention of either counsel, the clients themselves undertook to adjust their differences and arrangements were consummated to deliver and accept title. It was so stated in the communication of October 16th (Exhibit 3, pp. 65-66), but suggestion was then made that the deed be prepared by counsel for the plaintiff to convey title to so much of the Cozzo property as it was necessary to convey, so that there would be no conflict between the description in the deed and the encroachment shown in the survey.

That the plaintiff was not acting in good faith as late as October 16th, 1930, in agreeing to accept the conveyance is indicated by the contents of the affidavit of Sarah Berkman, in which she states:

“That subsequent to the delivery of the communication of October 16th, demand was made for the first time not only that deed should be procured from Cozzo, but release must be obtained from any mortgagee holding a mortgage on the Cozzo property. This, in spite of the fact that the conveyance of a one-half inch strip from the Cozzo property, would have been sufficient to overcome any claimed encroachment. It would of course have been impossible within a few days remaining up to October 20th, to meet this new demand, and this was made known to plaintiff’s counsel and additional time requested. There was also the additional request that defendants be made acquainted with the name of the mortgagees from whom releases were to be obtained, but no answer was ever made to such inquiry” (Case, p. 58, lines 10-35).

Instead of answer being made to these reasonable requests, suit was instituted. Even after this time, negotiations were continued, plaintiff expressing a willingness to waive all claimed encroachments, if deduction was made in the purchase price. This in itself was a clear indication of the fact that the plaintiff was not so much interested in obtaining perfect title as he was to repudiate her bargain, or at least obtain a reduction in the price agreed to be paid (Case, p. 59, lines 25-40; p. 6, lines 1-2) and supports the allegation of Miss Berkman that within two weeks after the contract was signed, there was an attempt by the plaintiff to procure a rescission of the contract, it being claimed that the plaintiff had received the worst of the bargain, a definite statement being made at that time prior to alleged encroachments being found, that title would not be accepted (Case, p. 53, lines 26-40; p. 54, lines 1-10).

The conduct of the plaintiff in making demands which, when met, she refused to accept, but which she met with new demands, continuing this policy throughout the negotiations, was conduct of such nature as to estop her from taking advantage thereof to the detriment of the defendants.

It is of course conceded that denials are made by the plaintiff, but this presents a question of fact within the province of the jury and not the Court to decide.

Our courts have recognized the right to invoke the doctrine of estoppel and concisely stated the rule in *Gold v. Schneider*, 130 Atl. 133; 2 M. 179:

“Manifestly, the trial court was correct in invoking the doctrine of estoppel against him, for, as was declared in *Thorne v. Mosher*, 20 N. J. Eq. 257, a party is not allowed to take advantage of an act done, or the omission to do it, where such act or omission was designedly caused by himself.”

Defendants will undoubtedly contend that the present action is governed by what was said in *Schiff v. Alexander*, 130 Atl. 133; 3 M. 817.

In that case motion was made to strike out an answer. Attention, however, is directed to the fact that although plaintiff's motion was supported by affidavits, no affidavits were submitted in support of the answer, the Court stating:

“Plaintiffs' motion, however, is fully supported by affidavits, and especially by the affidavits of two surveyors, showing that the defects above mentioned, in fact, exist. The defendants, however, have not presented any affidavits or any proofs as required by rule 80 of the Supreme Court (Revision 1919), which provides: ‘The answer may be struck out and judgment final may be entered upon motion and affidavits as hereinafter

provided, unless the defendant, by affidavit, or other proofs, shall show such facts as may be admitted by the judge hearing the motion, sufficient to entitle him to defend'."

The trial judge went further than he was obliged to in considering the answer made without the support of affidavits. Under the defense, an estoppel was alleged. It was held, however, that the separate defenses set forth in the answer, could under no circumstances show an estoppel as the only effect was to alter the contents of a written instrument. *Gold v. Schneider*, *supra*, was commented upon, the Court saying:

"This was a clear case of a change of position caused by the conduct of the opposite party, which is the real test of an estoppel, and for the further reason that the defendant in the last-mentioned case was able to perform the contract as originally written, to purchase the property covered by bank mortgages. 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. Therefore, assuming that the plaintiffs did agree to take two houses instead of four, the defendants did not change their position, because they were unable to convey the four houses according to their agreement, and the mere fact that plaintiffs were willing to take two houses instead of four did not produce a change of position on the part of the defendants to their detriment, which is an essential element of estoppel, and, furthermore, there was no consideration whatever for the plaintiffs in accepting two houses instead of four, because the statement of the defendants that they agreed to release the plaintiffs from their obligation to take the four houses could

not be a consideration, for the reason that there was no obligation on the part of the plaintiffs to take these four houses because of the defects already mentioned, hence, there was no obligation to release the plaintiffs from."

In the present case what is said by the Court in the case cited, is not pertinent. Defendants were able to carry out their contract as originally written. The encroachment to the north of the property could have been eliminated, and they were prepared to eliminate it. The encroachment to the south they likewise could have overcome by the procurement of a deed for one-half inch of property to the south, which would have relieved any encroachment. As to the claimed encroachment to the east, there was no actual encroachment as has previously been shown, but this likewise could have been overcome at little or no expense to the defendants. As to the encroachment on the north, however, plaintiff waived the necessity of its removal by agreement to that effect and did the same concerning the alleged encroachment to the east, making a definite agreement that on procuring the strip to the south, that title would be accepted. It was only by reason of the conduct of the plaintiff that the encroachments complained of were not removed.

"To warrant the Court in striking out a plea as false or sham, it must be so palpably false or insufficient in law as to enable the Court to conclude that the defendant is seeking a delay or trifling with the process of the law." (Muhlenbeck *v.* Town of West Hoboken, 2 M. 7.)

POINT III

The agency of Samuel Troum for his wife, Fannie Troum, presents a jury question.

Although Fannie Troum denies that her husband was authorized to act for her in the transaction, this question is put in issue by the affidavit of Sarah Berkman, who alleges that Troum was acting for his wife (Case, p. 53, lines 20-25), which is coupled with the fact that throughout the transaction all negotiations were undertaken by him (Affidavit, pp. 53-60).

A clear cut issue of fact is presented by this affirmation and denial, which is within the province of a jury to determine.

POINT IV

The counterclaim should not have been stricken out.

Without reiterating previous arguments made, the fact remains that if title was not conveyed by reason of the actions and conduct of the plaintiff, there is a breach thereof by her which would entitle the defendants to recover on their counterclaim. Same therefore should not have been stricken out.

CONCLUSION

It is respectfully submitted that there was error in striking out the answer and counterclaim and entering summary judgment, upon the following grounds:

1. Title obtained by adverse possession to premises over which there was a claimed overlapping is a complete defense to the allegation of existing encroachments.

2. The doctrine of estoppel invoked by the defendants presents a meritorious defense and the facts upon which estoppel is claimed to rest should have been submitted to a jury.

3. The disputed agency of husband for wife, presented a jury question.

BRENNER & KRESCH,
Attorneys and of Counsel with
Defendants-Appellants.

ALFRED BRENNER,
Of Counsel.

59

59 OCT.T.1931



New Jersey Court of Errors and Appeals

FANNIE TROUM,
Plaintiff-Respondent,

v.

MORRIS BERKMAN and ANNIE
BERKMAN, his wife,
Defendants-Appellants.

On Appeal from
Circuit Court.

RESPONDENT'S BRIEF.

Facts.

This is an action by a vendee against a vendor for the return of the deposit moneys and for the payment of search fee and survey fee, and the basis of the action is the inability and failure of the vendor to convey a business and dwelling property in accordance with the sale contract. The contract not only provided that the conveyance was to be made by deed of warranty, free from all encumbrances, but also provided that the premises were to be conveyed by a metes and bounds description and that the premises consist of a three-story frame building, containing two stores and five apartments located on a plot of ground approximately twenty-five feet wide in front and rear and one hundred feet in depth throughout, and furthermore, "that the premises are to be conveyed free and clear of all encroachments" (Case, p. 7).

The survey of Steiner & Jaeger, who made the survey on behalf of the respondent, showed that the southerly side wall of the building to be conveyed encroached for a distance of one-half inch over adjacent lands known as 886 Broadway, and that the northerly side wall of the building to be conveyed encroached three-eighths of an inch over adjacent lands known as 890 Broadway. Both adjacent lots are owned by persons other than the vendors. Both encroachments were created within the period of twenty years (Case, pp. 33, 34). In addition to the projections of the building to be conveyed over adjoining lands, a portion of a dwelling house erected on lands adjoining on the east projected to the extent of five inches on the lands contracted to be conveyed (Case, pp. 55, 34). The vendors also had the property surveyed by Walter L. Clarkson, the City Engineer, for the purpose of checking up the Steiner & Jaeger survey. Clarkson's survey showed encroachments greater in extent than the survey obtained by the respondent (Case, pp. 37, 39).

The appellants being unable to give good title, it was agreed by the parties to rescind the contract and repay the deposit in addition to the amount in compromise of search and survey fees. This rescission was not consummated by the appellants (Case, pp. 28, 39). A letter to the appellants' attorneys suggesting a further allowance of time to afford them an opportunity to clear up the encroachments not being answered, a notice making time of the essence was given on October 6th, 1930 (Case, pp. 45, 46).

The appellants were not ready to close the title on September 1, 1930, the date fixed by the contract, nor on October 20, 1930, the date fixed to be of the essence, at which latter date they did not even appear. Suit was thereupon commenced by

the respondent for the return of the deposit, and for search and survey fees. The appellants filed an answer with numerous defenses. The first three denied the existence of the encroachments. The third separate defense set up an agreement alleged to have been made subsequent to the date of the contract whereby the appellants were to obtain a strip of land over which the building encroached and the subsequent refusal to accept by the respondent. The fourth separate defense again denies the existence of the encroachment mentioned in the third separate defense and alleges an agreement to waive another encroachment if the first mentioned encroachment were disposed of by obtaining title, and an estoppel. The fifth separate defense alleges an agreement concerning the removal of the structure of an adjoining landowner, and an estoppel. The sixth separate defense alleges title by adverse possession (Case, pp. 14, 15, 16, 17).

In answer to a demand for particulars the appellants stated that the alleged agreements were verbal, that they were made by the respondent's husband and among other particulars it was stated that the encroachments were not admitted (Case, pp. 23, 24).

Notice of application was given to strike out the answer and counterclaim with supporting affidavits of the respondent, the surveyor, her former attorney and her husband. There were answering affidavits of the appellants, their attorney and their daughter, who acted for her parents. The answer and counterclaim were struck out and there was an order for summary judgment and that the respondent proceed before a jury to assess her damages, which was done on notice in the presence of the parties and their counsel.

ARGUMENT.

POINT I.

There was no legal proof of the agency of Samuel Troum.

The appellants allege that after the encroachments were called to their attention, certain verbal agreements in reference thereto were made by Samuel Troum as his wife's agent. There is not even a pretense that any negotiations were carried on with the respondent. Of course, if there be no competent proof of the alleged agency, the principal is not bound, and the entire defense fails. The answer made no mention of any agency. The defenses resting on the alleged verbal agreements are clearly violative of the practice act and the rules and were properly stricken.

“Acts and contracts may be stated according to their legal effect, but, in so doing, the pleading should be such as fairly to apprise the adverse party of the state of facts which it is intended to prove; thus an act or promise of a principal (other than a corporation), if, in fact, proceeding from an agent known to the pleader, should be so stated; and the obligation of a husband to pay for necessaries furnished to his wife, whom he has driven from his house, should be stated according to the facts.”

P. L. 1912, page 388, Supreme Court Rule 35.

The allegation as to the agency was elicited in the bill of particulars (Case, p. 23). The appellants in Point III of their brief point out that the affidavit of Sarah Berkman states that Samuel

Troum was acting for his wife. This mere assertions falls far short of legal proof. No agency can be implied from the mere assumption of authority in carrying on the conversations. Nor can agency be implied from the marital relation. This can occur only where the husband is charged for necessities purchased by his wife and not supplied by him. The ground of the liability is his neglect to perform a legal duty. *Wanamaker v. Ulizio*, 102 N. J. L. 166, 130 Atl. 555. The rule is stated in *30 Corpus Juris*, 620, as follows:

“The husband has no original or inherent power to act as his wife’s agent, his authority arises only from her appointment.”

In *Yadwin v. Arnold*, 110 Atl. 903, 95 N. J. 500, this Court held that even a real estate broker who has written agreement for commission has no power to sell lands.

In *Strauss v. Rabe*, 127 Atl. 188, 97 N. J. E. 208, affirmed 130 Atl. 920, 98 N. J. E. 700, Vice-Chancellor BENTLEY held:

“When a vendor delivers a written contract for the sale of land to an attorney, and asks the latter to represent him upon the passing of title, without further instructions, and it is known to the purchaser that the contract, by its express terms, has fixed a final, specific day upon which the deed is to be delivered, the purchase money paid, and the other matters in the contract adjusted and concluded, the charter of the agent’s powers fixes them, and the purchaser cannot thereafter claim the benefit of any treaty with the agent not found within the contract, either expressly or by necessary implication, unless the act of the agent is either expressly or impliedly ratified by his principal. If it is sought by the purchaser to modify any of the terms of the contract, or impose a new one in any material

matter affecting the principal's right, the former must, under the cases just cited, make certain, at his own peril, that the agent's authority is sufficient to permit him to perform such act. In *Dickerson v. Hodges*, 43 N. J. Eq. 45, 10 A. 111, a solicitor filed a disclaimer which was not signed by the defendant, and which the complainant thereupon moved to strike out, which motion was granted upon the ground that the authority conferred by a retainer does not permit a solicitor to give up any of the substantial rights of his client. It is pointed out that he has no right to give up his client's security without payment, or accept part payment in satisfaction of a debt, and, in short, he cannot surrender a substantial right of his client, without his client's consent. *Howe v. Lawrence*, 2 Zab. 99."

This applied with much greater force to the husband, who of course is not shown to have had any authority in the matter, and the alleged agreement to accept a bad title presents a much stronger case than the mere consenting to an extension of time. This was followed in *Rapps v. Tulenko*, 140 Atl. 244, 102 N. J. E. 207, where Vice-Chancellor FALLON held that a solicitor is not regarded as having implied authority to extend time for the closing of title. Compared to the more serious matter of agreement to accept a bad title, as it is charged the agents did here, it is quite a trivial matter.

In *Wechsler v. Clarke*, 146 Atl. 786, 7 M. 627, the Supreme Court held that an attorney had no implied authority to buy window shades for a client.

No express authority on the part of the husband is shown. There is a statement that he carried on the negotiations which culminated in the written contract (Case, p. 52). No authority can be implied from which the alleged agent can afterward make new agreements to vary the solemn

obligation entered into by the principal. *Strauss v. Rabe, supra*. And under this case the seller should make certain of the agent's authority at his peril. Even if any authority can be implied, the respondent certainly repudiated any such implication by her insistence in her various notices, that the conveyance be made in accordance with the written contract. There was an absolute denial of the agency in the affidavits of the respondent

In *Falkenstein v. Gibson*, 108 N. J. E. 251, this Court recently followed the established principles enunciated by the foregoing authorities.

POINT II.

The alleged agreements of waiver are in violation of the Statute of Frauds.

In *Schiff v. Alexander*, 130 Atl. 133, 3 M. 817, the Supreme Court had for review an order striking out an answer and counterclaim by Judge ACKERSON in a case very similar to this. In that case, there were encroachments and the contract provided against them. As in the instant case, the answer denied the truth of the allegations as to the defects, which were obviously untrue in view of the affidavits submitted by both sides. As in the instant case, there was no question as to the encroachment, and in the cited case, an attempt was made to set up a new agreement, constituting a waiver, as in the instant case, and Judge ACKERSON held that:

"It seems entirely clear that the defendants by their first separate defense, are seeking to change and vary the terms of a written agreement by an oral one, which is not permissible under the authority of *Bowers v. Glucksman*, 68 N. J. Law 146, 52 A. 218; *Lippincott v.*

Bridgewater, 55 N. J. Eq. 208, 36 A. 672; Kerzner *v.* Chanin, 98 N. J. Law 35, 118 A. 693.

"For this reason, therefore, the first separate defense should be struck out as both sham and frivolous."

Judge ACKERSON struck a defense out which stated that one of the encroachments was trivial. This could likewise be applied to the affidavits submitted as to the triviality of one of the encroachments. The counterclaim was likewise stricken out in the following language:

"This counterclaim is not only sham, but it is frivolous, and does not set forth a cause of action. It is based upon the contract of sale already referred to, which under the statute was required to be in writing, and that contract provided that the rents were to be apportioned as of the day of the delivery of the deed, thus clearly indicating that the premises were to be rented; therefore any agreement to the effect that said premises should not be rented, and made by parol, would be an attempt to vary or alter the terms of this written instrument by parol, and this of course could not be done. Kerzner *v.* Chanin, 98 N. J. Law 38, 118 A. 693."

In *Grossman v. Brick*, 139 Atl. 490, 5 M. 1016, a counterclaim was likewise stricken out by the Hudson County Common Pleas and a judgment was entered for search fees. The judgment was upheld by the Supreme Court.

In *Kesselman v. Cohen*, 135 Atl. 348, 5 M. 31, an attempt was made to vary the terms of a lease in the same manner that the attempt is here made to vary the terms of the contract. The Supreme Court held this to be improper.

In *Falkenstein v. Gibson*, 108 N. J. E. 251, recently decided by this Court evidence to modify a solemn agreement was not permitted.

POINT III.

Even if respondent had agreed to waive defects, she was entitled to change her mind.

The allegations of the answer, in view of all the circumstances in the case, present a defense which is not merely untrue, but which is fantastic. It is hardly conceivable that purchasers, represented by an attorney and who are paying for the services of an attorney and who go to the trouble and expense of procuring a survey, would agree to take the property subject to three encroachments, especially where such an unusual situation exists of a house built on the full lot so far as the width is concerned, and encroaching over both sides and both encroachments having existed for a relatively short period, and in addition to which there is a five-inch encroachment of an adjoining building over the lands to be conveyed. However, even if these allegations are taken at their face value the answer should be stricken out as frivolous because a purchaser who is buying property has a right to change his mind. We shall merely cite a few of the cases which hold this.

In *Goldstein v. Ehrlick*, 124 Atl. 761, 96 N. J. Eq. 52, Vice-Chancellor BACKES said:

“I need not decide this issue of fact. The complainant was entitled to the property according to the terms of the contract. He was not bound to take the bond. If he, in fact, consented to take it in lieu of a good title, he had the right to change his mind.”

In *Hartman v. Church Const. Co.*, 139 Atl. 484, 101 N. J. E. 512, affirmed 143 Atl. 917, 6 A. R. 1582, Vice-Chancellor CHURCH had to review a similar situation. He held as follows:

“Complainant insists that defendant knew of the existence of the condemnation proceedings, and was willing to take subject thereto and try to make a profit from the board of education.

“In case of *Goldstein v. Ehrlick*, *supra*, it was arranged that complainant would take title upon defendant’s giving an indemnity bond. Complainant claimed that the defendant refused to take it.

“Vice-Chancellor BACKES said (96 N. J. Eq. 52), at page 762:

“I need not decide this issue of fact. The complainant was entitled to the property according to the terms of the contract. He was not bound to take the bond. If he, in fact, consented to take it in lieu of a good title, he had the right to change his mind.”

“It seems to me that this reasoning applies to the present case. If defendant did agree to take subject to condemnation proceedings, he had the right to change his mind and stand squarely on the contract.”

POINT IV.

The respondent was legally justified in refusing title because of the encroachments.

In *Herring v. Espositio*, 119 Atl. 765, 94 N. J. E. 348, Vice-Chancellor BENTLEY, for the first time in any recorded case in this State, was confronted with a contract which expressly provided against encroachments. There was an encroachment of two inches or less of an adjoining building over the lands to be conveyed. He held that this was a violation of the covenants of the contract, although the rule in equity prevails that although one is unable to convey the entire lands contracted to be conveyed, a court of equity will compel

specific performance and give an abatement. He held, however, that this would be making a contract for the parties which they did not themselves make.

In *Isserman v. Welt*, 139 Atl. 237, 101 N. J. E. 634, Vice-Chancellor BERRY was confronted with a similar covenant, except that in that case there was a slight encroachment over the highway, and that there was a permissive ordinance, but the Vice-Chancellor nevertheless stated that he would not make a new contract for the parties.

In *Goldstein v. Ehrlick*, 124 Atl. 761, 96 N. J. E. 52, Vice-Chancellor BACKES held, in construing a similar contract, that an encroachment of two and five-eighths inches over the highway rendered the title unmarketable according to the terms of the contract.

In *Wyatt v. Bergen*, 130 Atl. 595, 98 N. J. E. 502, affirmed 130 Atl. 597, 98 N. J. E. 738, Vice-Chancellor GRIFFIN reiterated the rule as follows:

“Where the encroachment is slight, the court might decree specific performance with an abatement of the purchase price (*Scheinman, et al. v. Block*, 97 N. J. Law 404, 117 A. 389, affirmed 98 N. J. Law 517, 119 A. 926; *Doherty v. Egan Waste Co.*, 91 N. J. Eq. 400, 406, 111 A. 499); yet, where the contract contained a covenant that there were no encroachments, the rule seems to be otherwise.”

In that case, an adjoining building encroached about three inches over the lands to be conveyed.

In *Vassar Holding Co. v. Wuensch*, 135 Atl. 88, 100 N. J. E. 147, Vice-Chancellor CHURCH was confronted with a situation where no metes and bounds were set forth, but merely the common numbers of the building, and the building encroached from one to one and one-half inches over

the highway. In that case, the contract did not even provide against encroachments, but conveyance was to be made by warranty deed, and the Court held that:

“Anything that impairs the use or transfer of the property; anything which constitutes a burden on the title; a burden on the land depreciative of the value” is a breach of the contract.

In *Jawitz v. Caldwell Inv. Co.*, 142 Atl. 181, 6 A. R. 1111, Vice-Chancellor BACKES had to consider a contract with a provision as to encroachments very nearly similar to the instant case. In that case there was a provision

“That there are no encroachments thereon”

and the Court held that:

“A dispute over a two-inch encroachment would ordinarily seem trifling, but the materiality of the present encroachment is emphasized by the contract, to convey, by metes and bounds, the two-inch strip free of encroachment. The complainant is entitled to recover.”

In *White Way Corporation v. Heinle*, 142 Atl. 667, 6 M. 742, the Supreme Court was called upon to review a judgment in a directed verdict for the plaintiff. There was no special covenant against encroachments, but merely that title was to be conveyed by warranty deed free from encumbrances, and the Court held:

“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 jus-

tified 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."

Every attorney who has had any considerable experience in conveyancing would reject a title with even the slightest encroachment because of the possibility of litigation. Where the encroachment is over lands of private ownership, lawyers and title companies are far more reluctant to pass a title, than where the encroachment is over the highway, because it is well known that municipalities do not frequently disturb encroaching owners, and that very frequently special ordinances are passed to legalize the encroachment. Yet, in one of the cases above cited, even in spite of this ordinance, the Court held that it would be making a new contract between the parties. That in the absence of the vacation of the street, such ordinance would be deemed to be insufficient. Of course, where a street is vacated, the abutting owner owns the land to the center of the street.

On page 10 of the appellants' brief under the caption "Encroachment C," it is contended that a conveyance of ninety-nine feet seven inches would have been sufficient. It is argued that in view of the terms of the contract an approximate depth was to be conveyed. This is not so. The contract provided for a conveyance of a specific lot, by common number, which lot is shown by the survey to be 25' x 100'. The intention was clear. The further description was merely intended for a more complete identification, and the use of the word "approximately" cannot give the sellers a license to lop off a piece of the lot which is a single unit because it may suit their purpose to do so (Case, p. 7).

Furthermore, under any rules of construction, the office of the word "approximately" must be limited as modifying and relating to the width, not the depth. The use of the word "throughout" immediately following the words "100 feet in depth" would of itself negative any suggestion of indefiniteness.

POINT V.

Time was of the essence.

At the outset, it must be borne in mind that this is an action at law and not in equity, and while the rule in equity is that even if time be not made of the essence, it may be so made by either party, the rule at law is that time is of the essence unless the contrary appears on its face. This distinction is laid down in *Pietsch v. Stirling Home Builders, Inc.*, 117 Atl. 475, 97 N. J. 451, opinion by Justice KATZENBACH. The decision was affirmed by the Court of Errors and Appeals, 119 Atl. 926, 98 N. J. L. 569. This case holds:

"At law, a time stipulated in a contract for its performance is of its essence, unless a contrary intent appears from the face of the contract, or unless there is evidence of a waiver of the time fixed for its performance by the party seeking rescission of the contract."

However, we are not obliged to rely upon this principle, inasmuch as time was made of the essence by a notice. The first notice was dated October 1st, 1930, and was addressed to Brenner & Kresch, attorneys of the defendants, which was in the form of a letter, suggesting to Brenner & Kresch that if they would enter into a stipulation making time of the essence, they could have until October 15th, 1930, to clear up the objections. This letter was

delivered the same day. There having been no response to this suggestion, a formal notice was served on October 6th, 1930, on the defendants themselves, designating October 20th, 1930, at three o'clock in the forenoon (Case, pp. 45, 46, 47, 48, 49) as the essence of the contract. In the early case of *King v. Ruckman*, 20 N. J. E. 316, the Chancellor said:

"The established doctrine of equity is, that in general time is not of the essence of a contract for the sale of land. But it is now also settled that in such contracts time may become of the essence of the contract, either by being made so by the contract itself, or from the nature and situation of the subject-matter of the contract, or by express notice given, requiring the contract to be closed or rescinded at a stated time, which must be a reasonable time, according to the circumstances of the case."

In *Orange Society v. Konski*, 121 Atl. 448, 94 N. J. E. 632, affirmed 122 Atl. 753, 95 N. J. E. 254, Vice-Chancellor BACKES held that:

"Where time is regarded as a formality only, and the period has gone by, or where it is of the essence, and there is a waiver, the time for closing the title may nevertheless be made of the essence by formal demand that it be closed by a given day, if the time allowed is reasonable."

In *Thommessen v. Absecon Land Co.*, 130 Atl. 518, 98 N. J. E. 696, the Court of Errors and Appeals held that the mere failure of the defendant to appear at the time set in the contract was sufficient to justify the rescission, even though time was not made of the essence and there was no legal excuse for such absence.

In *Barry v. Ruskin*, 133 Atl. 528, 99 N. J. E. 730, where the contract did not make time to be of

the essence, Vice-Chancellor BERRY nevertheless held that time was made of the essence by a letter, whereby an extension of one week was held to be reasonable. It will be noted that a letter was sent to Messrs. Brenner & Kresch on October 1st, 1930, that the plaintiff would be ready to take title if time would be made of the essence and that the appellants could have until October 15th, 1930, to remedy the defects. That although this letter was ignored, a new notice was given making time as of the essence as of October 20th, 1930, giving the appellants in addition to the period which they already had for the correction of the defects, if they could be corrected at all, the period of twenty days, a very long period considering that less than sixty days was allowed for the passing of title under the contract.

In *Reade v. McKenna*, 134 Atl. 371, 99 N. J. E. 764, affirmed 137 Atl. 918, 101 N. J. E. 304, Vice-Chancellor BERRY held that in extending time for the closing of contract of sale, time would be deemed as of the essence, although not expressly so stated.

In *Wachung Realty Co. v. Llewellyn Corporation*, 126 Atl. 326, 96 N. J. E. 498, Vice-Chancellor BACKES held that two days' extension given for the performance of the contract without any express words to that effect would make time of the essence. We call attention to the fact that the subject-matter was not unimproved lands, but business property.

In *Franklin v. Welt*, 131 Atl. 585, 98 N. J. E. 602, Vice-Chancellor BERRY held that the mere silence of a person receiving a letter designating a time and place for the closing of a contract is an acquiescence. In that case the encroachment had been removed after the time designated for the

closing of title, the contract having made no provision that time was of the essence.

In *Mecray v. Goldman*, 142 Atl. 9, 102 N. J. E. 559, time was made of the essence by notice. This case was affirmed 147 Atl. 911, 105 N. J. E. 583.

In *Merlis v. G. & M. Corporation*, 143 Atl. 139, 6 A. R. 1339, Vice-Chancellor FALLON held that a letter from the purchaser's solicitors to the vendor's solicitors would be regarded as making time of the essence although the letter did not expressly so state.

POINT VI.

There was no adverse possession as to two encroachments, and the doctrine has no application as to the third encroachment.

It is quite bewildering to follow through the maze of defenses interposed by the appellants. Sarah Berkman, the daughter, declares in her affidavit (Case, p. 59), that no encroachments exist and that the property has stood in its present condition for more than twenty years, and that therefore title has been obtained to the adjacent property by adverse possession. In the same affidavit (Case, p. 55) she refers as a fact to the five-inch encroachment of an adjoining building and that it could easily be removed. The affidavit does not state her age, nor the source of her knowledge as to the time of existence of the encroachments. There is but the *ex cathedra* pronouncement of their existence for more than twenty years, and this in the same paragraph as the denial of their very existence. As to the encroachments of the side walls of the building the statement is palpably false. That the appellants obtained a second sur-

vey is not denied in the answering affidavits, nor is it denied as charged in the moving affidavits that their survey made by Clarkson showed greater encroachments than the Steiner & Jaeger survey (Case, p. 38). Nor is there any attempt in the answering affidavits to refute the precise details as to the creation of the encroachments of the side walls by Harry Jaeger, the surveyor, which beyond the shadow of a doubt prove their non-existence for twenty years (Case, pp. 33-34).

The doctrine of adverse possession has no application to the five-inch encroachment of the adjoining building encroaching on the third side of the lot, except that the adjoining owner of the building might invoke its aid as against the owner of the lands which the appellants agreed to sell. If it has existed for more than twenty years the adjoining owner now has an easement upon part of the lands which had been agreed to be conveyed free of incumbrances.

Brownback v. Spangler, 101 N. J. E. 388,
139 Atl. 524.

Twenty years' adverse possession may even vest actual title in the disseisor.

Elmora Development Co. v. Buider, 127
Atl. 693, 97 N. J. E. 126.

POINT VII.

There was no estoppel.

The defenses urged under the doctrine of estoppel are barren of any fundamental elements upon which such estoppel may be premised. There must be a change of position by the one asserting the estoppel. The rule is stated in the following language in *21 Corpus Juris*, 1133:

“It is essential to an equitable estoppel that the person asserting the estoppel shall have done or omitted some act or changed his position in reliance upon the representations or conduct of the person sought to be estopped.”

Gold v. Schneider, 130 Atl. 133, 2 M. 179.

The appellants did nothing to alter their position because of the alleged verbal agreement to waive one or two encroachments if a deed were obtained for the third. October 20, 1930, the date designated as of the essence (Case, p. 46), found them in exactly the same position as when the encroachments were first called to their attention. They had done nothing more than discuss the amount for which the strip covered by one of the encroachments could be obtained from the adjoining landowner.

“Furthermore, the doctrine of estoppel has no application in cases where the representations or conduct which are claimed to give rise to it tend only to induce the party to do some act which he is already legally bound to do.” 21 *Corpus Juris*, 1135.

This Court in *Musconetcong Iron Works v. Delaware L. & W. R. Co.*, 78 N. J. L. 717, 76 Atl. 971, reiterated the five essentials of equitable estoppel and held that:

“A person induced by false representations to do an act which it was his duty to do, cannot be heard to say that he was prejudiced by such false representations.”

In the instant case it is claimed that the appellants treated with the adjoining landowner for the purpose of clearing up their own title, which they were legally bound to do. Even had their negotiations resulted in clearing up their one encroachment, they were but doing that which they were

legally obliged to do. If this doctrine can be extended as the appellants contend, a vendor agreeing to convey property free and clear, could allege a conversation with a vendee whereby the vendee had agreed to waive the payment of mortgages and other encumbrances against property if the vendor would remove a judgment or other lien against the property. Such a hypothesis is untenable, yet this is precisely the position taken by the appellants.

Further:

“In order to create an estoppel *in pais* the party pleading it must have been misled to his injury; that is, he must have suffered a loss of a substantial character or have been induced to alter his position for the worse in some material respect.” 21 *Corpus Juris*, 1135.

There is no suggestion in this case of prejudice to the appellants. Their conduct was characterized by inaction and an effort to drag out the closing of the title.

CONCLUSION.

The judgment should be affirmed, with costs.

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