

## I N D E X

	PAGE
Summons. . . . .	1
Complaint. . . . .	2
Answer. . . . .	5
Reply. . . . .	7
PLAINTIFF'S TESTIMONY:	
Anna Butler—Direct . . . . .	9
Cross. . . . .	37
Re-direct. . . . .	51
Mrs. Isabel Miller—Direct . . . . .	51
Cross. . . . .	63
John J. Toomey—Direct . . . . .	71
Cross. . . . .	74
Mrs. Mary Brown—Direct . . . . .	77
Cross. . . . .	84
Mrs. Elizabeth Healey—Direct . . . . .	85
Cross. . . . .	90
Michael Healey—Direct . . . . .	91
DEFENDANT'S TESTIMONY:	
Hannah Sweitzer—Direct . . . . .	95
Cross. . . . .	128
Re-direct. . . . .	149, 153
Re-cross. . . . .	152
John W. Hughes—Direct . . . . .	154

	PAGE
Patrick Butler—Direct . . . . .	156
Cross. . . . .	193
Mrs. Marie T. Armes—Direct. . . . .	206
Cross. . . . .	207
Re-direct. . . . .	209
Mulford T. Rose—Direct. . . . .	209
Cross. . . . .	212
Re-direct. . . . .	214, 215
Re-cross. . . . .	215
Mrs. Alice Strickland—Direct. . . . .	216
Cross. . . . .	217
Joseph J. Sansome—Direct. . . . .	218
Cross. . . . .	219
Re-direct. . . . .	220
Re-cross. . . . .	220
Recalled—Direct. . . . .	224
James Reed—Direct . . . . .	220
Cross. . . . .	222
Frank Cesario—Direct . . . . .	222
Cross. . . . .	224
Robert Kirscht—Direct . . . . .	226
Cross. . . . .	231
Re-direct. . . . .	245
Mrs. Josephine P. Kirscht—Direct. . . . .	249
PLAINTIFF'S REBUTTAL TESTIMONY:	
Mrs. Anna Butler—Recalled—Direct. . . . .	254
Recalled—Cross. . . . .	255

INDEX

III

	PAGE
Charge of the Court.....	257
Postea. . . . .	259
Judgment. . . . .	260
Assessment of Damages.....	261
Notice of Appeal.....	262
Reasons. . . . .	263

1

TABLE

## I N D E X

	PAGE
Summons .....	1
Complaint .....	2
Answer .....	4
Amendment to Complaint .....	5
Rule Amending Answer .....	7, 8
<b>PLAINTIFF'S TESTIMONY:</b>	
Catharine M. Burrichter—Direct .....	15
Cross .....	16
Earl Thomson—Direct .....	17
Cross .....	22
Motion for Non-suit .....	24
<b>DEFENDANT'S TESTIMONY:</b>	
Louis Wishnefsky—Direct .....	32
Cross .....	36
Abraham Kleiner—Direct .....	40
Cross .....	45
William Fields—Direct .....	47
Cross .....	50
William Evans—Direct .....	51
Cross .....	52

	PAGE
Emma Harper—Direct .....	53
Cross .....	55
William F. Makin—Direct .....	58
Recalled—Direct .....	68
Recalled—Cross .....	71
Catharine M. Burrichter—Recalled—Direct	77
Recalled—Cross .....	79
 PLAINTIFF'S REBUTTAL TESTIMONY:	
Catharine M. Burrichter—Recalled—	
Direct .....	82, 103
Recalled—Cross .....	85
Clarence Burrichter—Direct .....	91
Cross .....	93
William Grace—Direct .....	97
Cross .....	99
Harry Burrichter—Direct .....	99
Cross .....	101
Earl Thomson—Recalled—Direct .....	101
Recalled—Cross .....	103
 DEFENDANT'S REBUTTAL TESTIMONY:	
William S. Makin—Recalled—Direct .....	105
Recalled—Cross .....	106
Abraham Kleiner—Recalled—Direct .....	108
Frank Wishnefsky—Recalled—Direct .....	109
Clarence Burrichter—Recalled—Direct ...	111
Recalled—Cross .....	114

INDEX

III

	PAGE
Catharine M. Burrichter—Recalled— Direct .....	115
Harry Burrichter—Recalled—Direct .....	118
Postea .....	122
Judgment .....	123
Notice and Grounds of Appeal .....	124
Stipulation .....	125
Exhibit P1, Deed .....	126
Exhibit P2, Will of Catharine M. Burrichter ..	130
Exhibit P3, Deed .....	131

PAGE

111	General Introduction
112	Chapter I. The History of the
113	Chapter II. The History of the
114	Chapter III. The History of the
115	Chapter IV. The History of the
116	Chapter V. The History of the
117	Chapter VI. The History of the
118	Chapter VII. The History of the
119	Chapter VIII. The History of the
120	Chapter IX. The History of the
121	Chapter X. The History of the
122	Chapter XI. The History of the
123	Chapter XII. The History of the
124	Chapter XIII. The History of the
125	Chapter XIV. The History of the
126	Chapter XV. The History of the
127	Chapter XVI. The History of the
128	Chapter XVII. The History of the
129	Chapter XVIII. The History of the
130	Chapter XIX. The History of the
131	Chapter XX. The History of the
132	Chapter XXI. The History of the
133	Chapter XXII. The History of the
134	Chapter XXIII. The History of the
135	Chapter XXIV. The History of the
136	Chapter XXV. The History of the
137	Chapter XXVI. The History of the
138	Chapter XXVII. The History of the
139	Chapter XXVIII. The History of the
140	Chapter XXIX. The History of the
141	Chapter XXX. The History of the

SUMMONS.

(Filed Oct. 20, 1924.)

THE STATE OF NEW JERSEY, TO LOUIS WISHNEFSKY:

You are summoned to answer the annexed complaint of Catharine M. Burrichter in an action at law in the Supreme Court, wherein the said Catharine M. Burrichter demands of you the possession of a tract of land with the appurtenances, situate in the City and County of Camden, State of New Jersey and particularly described in the said complaint. And take notice that unless you file your answer to the said complaint with the clerk of the Supreme Court at Trenton within twenty days after service upon you of this writ and of the annexed complaint, judgment will be entered against you and you will be turned out of possession of said land.

Witness, Honorable WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, at Trenton, New Jersey, this 10th day of October, 1924.

EDWARD J. KELLEHER,  
*Clerk.*

D. T. STACKHOUSE,  
*Attorney.*

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30

## COMPLAINT.

NEW JERSEY SUPREME COURT.  
CAMDEN COUNTY.

---

10	CATHARINE M. BURRICHTER,	}	Action at Law. Complaint.
	<i>Plaintiff,</i>		
	v.		
	LOUIS WISHNEFSKY,	}	
	<i>Defendant.</i>		

---

1. Plaintiff, of the City and County of Camden, State of New Jersey, demands of the defendant the  
20 possession of ALL that certain tract or piece of land situate in the City and County of Camden, State of New Jersey, bounded and described as follows:

BEGINNING at a point one foot seven and one-half inches Eastwardly from a point in the Easterly line of a certain four-foot wide alley, said last mentioned point being located where the middle line of the party wall between premises Numbers 711 and 713 Broadway, if extended, would intersect the said Easterly line of said alley, said last mentioned point  
30 being located ninety-six feet West from the Westerly line of Broadway; extending thence (1) Northwardly and along the line of a certain fence the distance of two and five-eighths inches to a point; thence (2) westwardly along the northerly line of a certain foundation wall the distance of eight feet to an angle in the same located at the distance of eight and three-quarter inches Northwardly of the

said extended middle line of said party wall and at right angles thereto; thence (3) still westwardly along the northerly line of said foundation wall the distance of seven feet to a corner therein; thence (4) southwardly at right angles with the extended middle line of the said party wall the distance of six inches more or less to an angle formed by the intersection of this course with the Northerly line of said foundation wall; thence (5) Westwardly and along the Northerly line of the said foundation wall the distance of twelve feet to an angle in the same, located four and three-quarter inches northwardly from the center line of the said party wall and at right angles thereto; thence (6) westwardly and along the said northerly line of the said foundation wall the distance of six feet to a point in the extended middle line of said party wall; thence (7) extending along the extended middle line of said party wall the distance of thirty-three feet more or less Eastwardly to the place of beginning.

10

20

2. Plaintiff says that her right of possession to the same accrued on the twenty-fifth day of July, 1920; and that the defendant wrongfully deprives her of the possession thereof.

3. The venue hereof is laid in Camden County.

Plaintiff demands of the defendant the sum of \$5,000 damages.

D. T. STACKHOUSE, 30  
*Attorney for Plaintiff.*

---

Duly served the within summons and complaint October 16th, 1924, upon Louis Wishnefsky, personally, a true copy of the annexed writ, at his place

of business, 713 Broadway, City of Camden, County of Camden, New Jersey.

THOMAS W. JACK,  
*Sheriff.*

By JAMES E. HEWITT,  
*Under Sheriff.*

Sheriff fees, \$3.62.

A true copy.

10 EDWARD J. KELLEHER,  
*Clerk.*

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ANSWER.

(Filed Nov. 1, 1924.)

NEW JERSEY SUPREME COURT.  
CAMDEN COUNTY.

---

20	CATHARINE M. BURRICHTER, <i>Plaintiff,</i>	} Action at Law. Answer.
	v.	
	LOUIS WISHNEFSKY, <i>Defendant.</i>	

---

The defendant, Louis Wishnefsky, residing in the City and County of Camden and State of New Jersey, says that:

30 1. He denies the truth of the allegations set forth in the complaint filed in the above entitled cause.

BLEAKLY, STOCKWELL & BURLING,  
*Attorneys for Defendant.*

A true copy.

EDWARD J. KELLEHER,  
*Clerk.*

AMENDMENT TO COMPLAINT.

(Filed Feb. 5, 1925.)

NEW JERSEY SUPREME COURT.  
CAMDEN COUNTY.

10

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CATHARINE M. BURRICHTER, )  
                                  *Plaintiff,* )     Action at Law.  
                                  v.     )     Amendment to Com-  
LOUIS WISHNEFSKY,         )     plaint.  
                                  *Defendant.* )

---

The plaintiff hereby amends her complaint in the 20  
above cause in the following particulars, viz:

By correcting the description of the premises in  
the complaint so as to read as follows:

ALL that certain tract or piece of land situate in  
the City and County of Camden, State of New Jer-  
sey, bounded and described as follows:

BEGINNING at a point one foot seven and one-  
half inches Eastwardly from a point in the Easterly  
line of a certain four-foot wide alley, said last men-  
tioned point being located where the middle line of 30  
the party wall between premises Numbers 711 and  
713 Broadway, if extended Westwardly, would inter-  
sect the said Easterly line of said alley, said last  
mentioned point being located ninety-six feet West  
from the Westerly line of Broadway measured along  
the middle line and extended middle line of said

party wall; extending thence (1) Northwardly the distance of two and five-eighths inches to a point; thence (2) Eastwardly along the Northerly line of a certain foundation wall the distance of eight feet to an angle in the same located at the distance of eight and three-quarter inches Northwardly of the said extended middle line of said party wall and at right angles thereto; thence (3) still Eastwardly along the Northerly line of said foundation wall the  
10 distance of seven feet to a corner therein; thence (4) Southwardly at right angles with the extended middle line of the said party wall the distance of six inches more or less to an angle formed by the intersection of this course with the Northerly line of said foundation wall; thence (5) Eastwardly and along the Northerly line of the said foundation wall the distance of twelve feet to an angle in the same, located four and three-quarter inches Northwardly from the extended center line of the said party wall  
20 and at right angles thereto; thence (6) Eastwardly and along the said Northerly line of the said foundation wall the distance of six feet to a point in the extended middle line of said party wall; thence (7) extending along the extended middle line of said party wall the distance of thirty-three feet more or less Westwardly, to the place of beginning.

D. T. STACKHOUSE,  
*Attorney for Plaintiff.*

Consented to:

30 BLEAKLY, STOCKWELL & BURLING,  
*Attorneys for Defendant.*

A true copy.

EDWARD J. KELLEHER,  
*Clerk.*

RULE AMENDING ANSWER.

(Filed May 14, 1925.)

NEW JERSEY SUPREME COURT.  
CAMDEN COUNTY.

---

CATHARINE M. BURRICHTER,	} Action at Law.	10
<i>Plaintiff,</i>		
v.		
LOUIS WISHNEFSKY,	} Rule Amending	
<i>Defendant.</i>	} Answer.	

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It is hereby, on motion of Bleakly, Stockwell and Burling, attorneys for the defendant, that the answer filed on behalf of the defendant in this cause be and the same is hereby amended as follows: 20

By adding as a supplement to the existing answer the following specific defense:

DEFENSE.

That the defendant, and his predecessors, in title have for over twenty years prior to beginning of this suit, had possession of the land in dispute, adverse to the title and possession claimed by the defendant.

RALPH W. E. DONGES,  
*Judge.* 30

On motion of  
BLEAKLY, STOCKWELL & BURLING,  
*Attorneys for Defendant.*

A true copy.  
EDWARD J. KELLEHER,  
*Clerk.*

## RULE AMENDING ANSWER.

(Filed May 14, 1925.)

NEW JERSEY SUPREME COURT.  
CAMDEN COUNTY.

10

CATHARINE M. BURRICHTER,  
*Plaintiff,* }  
 v. }  
 LOUIS WISHNEFSKY,  
*Defendant.* }

Action at Law.  
 Rule Amending  
 Answer.

20 On application made by Bleakly, Stockwell and  
 Burling, attorneys for the defendant, for this purpose,  
 it is hereby ordered, that paragraph one of the  
 answer be and the same is hereby amended to read  
 as follows:

He defends this action as to a part of the premises  
 claimed in the complaint to wit:

30 BEGINNING at a point in the extended middle  
 line of the party wall between premises numbered  
 711 and 713 Broadway, said point being 4' and  
 eighteen one hundredths feet eastwardly from the  
 easterly line of a 4' wide alley; and said alley being  
 located at a distance of 96' westwardly from the  
 westerly line of Broadway; thence (1) eastwardly  
 along the northerly line of a certain foundation wall,  
 the distance of 5.5' to an angle in same. Said angle  
 being distant 3¼" north of the extended middle line  
 of party wall, between Numbers 711 to 713 Broadway;  
 thence (2) still eastwardly along northerly face

of foundation wall the distance of 6.5' to a corner in same, said corner being 8½" northwardly from the extended middle line of above mentioned party wall and at right angles thereto; thence (3) southwardly along said foundation wall, the distance of 7" to a corner therein; thence (4) eastward and still along the northerly face of said foundation wall the distance of 9.5' to an angle therein, said angle being distant 1⅜" northwardly from the extended middle line of above mentioned party wall; thence (5) still eastwardly and along the northerly face at said foundation wall, the distance of 5.5' more or less to a point in the extended middle line of the party wall between Nos. 711 and 713 Broadway; thence (6) westwardly and along said extended middle line of party wall the distance of 27' more or less to a point and place of beginning; as to which part he denies the truth of the matters contained in the complaint.

RALPH W. E. DONGES, 20  
*Judge.*

On motion of  
BLEAKLY, STOCKWELL & BURLING,  
*Attorneys for Defendant.*

A true copy.  
EDWARD J. KELLEHER,  
*Clerk.*

## TESTIMONY.

NEW JERSEY SUPREME COURT.  
CAMDEN COUNTY CIRCUIT.

---

10	CATHARINE M. BURRICHTER, <i>Plaintiff,</i>	}	Action at Law.
	v.		
	LOUIS WISHNEFSKY, <i>Defendant.</i>		

---

April Term, 1925. 5-11-25.

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20 APPEARANCES:  
For the plaintiff, D. T. STACKHOUSE, ESQ.  
For the defendant, BLEAKLY, STOCKWELL & BURLING, ESQS.

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Before DONGES, J., and a jury.

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30 (Mr. Stackhouse opens the case for the plaintiff to the jury.)

Mr. Burling: With permission of the Court, I would like to have leave to file an amendment to the answer in this cause. I have submitted it to Mr. Stackhouse, and I understand he has no objection to

the filing of the answer, although he feels it may be surplusage. I filed an answer in accordance with the practice act in ejectment matters, and I would like to make certain of the availability of this defense, and therefore ask leave to file this supplemental answer.

Mr. Stackhouse: May it please the Court, I do not object to its filing, but as Mr. Burling has indicated, it seems to me entirely unnecessary. The practice seems to be, as outlined by the Supreme Court in pursuance to the Practice Act of 1912, that under a general denial any defense practically can be introduced, and where a bill of particulars is asked for and furnished, the party is then limited by his bill of particulars, so that it would seem to me entirely unnecessary to file this defense, because, as I understand, the bill of particulars furnished by Mr. Burling contains exactly the same items, except to cumber up the record. 10 20

The Court: I suppose then there cannot be any objection to it.

Mr. Stackhouse: Only that the Supreme Court has struck out answers, I believe, under similar circumstances.

The Court: I think the practice in ejectment now is made to conform to that in other cases. 30

Mr. Stackhouse: That is true, but rule 185 of the Supreme Court says that the answer in ejectment shall conform to one of the forms prescribed by the schedule annexed to the Supreme Court rules. That provides for a general denial where the defendant defends for the entire premises in question,

and under that general denial the defendant is allowed to put in any defense practically; but if the Court thinks it is proper, if Mr. Burling wants to file it —

The Court: I think I will allow it; it cannot do any harm. I think, however, it is not necessary; that would be my view of it, that you could still raise the same question under your bill of particulars.

(Mr. Burling opens the case for the defendant to the jury.)

---

#### THE CASE FOR THE PLAINTIFF

Mr. Stackhouse: By agreement of counsel, in lieu of bringing up a number of deed books from the Register's office, counsel have agreed to submit abstracts of the deeds agreed upon.

The Court: I suppose there is no question about the record title of each of these parties?

Mr. Burling: No, sir.

The Court: I suppose from the openings of counsel that the real question is where, in fact, on the land the dividing line between the two properties is, and whether or not the fence was at a point where the southernmost limits of the wall erected by the defendant is.

Mr. Burling: Yes, sir.

The Court: The northernmost, I guess.

Mr. Burling: Yes, the northernmost limits of his wall.

Mr. Stackhouse: Yes, we are simply putting in this formal proof here.

The Court: Very well.

Mr. Stackhouse: The premises in question with other land were first conveyed by Howard M. Cooper to Catherine Holl by deed dated April 21, 1882, recorded April 22, 1882, in the Camden Register's office in book 104 of Deeds, page 670, conveying tract of land situated in the City of Camden, beginning on the west side of Broadway at a distance of twenty feet north of the north line of Pine Street, and running thence (1) northwardly along the west line of Broadway one hundred and twenty feet; thence (2) westerly at right angles with Broadway ninety-six feet to the east line of a four foot alley running from Pine Street to Line Street, parallel with Broadway; thence (3) southerly along the east line of said alley one hundred and twenty feet; thence (4) easterly at right angles with Broadway ninety-six feet to the place of beginning; being lots Nos. 4, 5, 6, 7, 8 and 9 on the map of the partition of lands late of Charity Kaighn, deceased. Catharine Holl made a deed to George W. Altemus, dated November 6, 1882, recorded November 11, 1882, in book 106, page 595, which conveyed premises situate in Camden beginning at a point in the west line of Broadway at the distance of one hundred and ten feet northward from the northwest corner of Broadway and Pine Street, and running thence (1) northward along the west line of Broadway, fifteen feet to a corner; thence (2) westward at right angles to Broadway ninety-six feet to the east line of a four

foot wide alley running from Pine Street to Line Street; thence (3) southward along the east line of said alley fifteen feet to a corner; thence (4) eastward at right angles with Broadway ninety-six feet to the west line of Broadway and place of beginning, together with the free use and privilege of said four foot wide alley in common with other owners thereon, and it is recited as being part of the same premises conveyed by Howard M. Cooper to Catharine Holl, recorded in book 104 page 670. George W. Altemus conveyed the premises described in the last mentioned deed to William Y. Sloan by deed dated March 24, 1888, recorded April 3, 1888 in book 136, page 37. These premises are recited as being the same premises which were conveyed by Catherine Holl to George W. Altemus by deed recorded in Book 406, page 595. William Y. Sloan conveyed the premises described in the two preceding deeds to Edwin C. Williams and Mary C. Williams, his wife, by deed dated August 1, 1891, recorded August 1, 1891, in Deed Book 165, page 408. The deed recited the same premises conveyed by George W. Altemus to William Y. Sloan by deed recorded in Book 136 page 37. Mary C. Williams, widow of Edwin C. Williams, conveyed the premises described in the last preceding deeds to Catharine M. Burrichter by deed dated January 15, 1902, and recorded in the register of deeds office on January 16, 1902, in Book 259 of deeds, page 643. This deed, being in my possession, I presume may be offered in evidence if there is no objection.

Mr. Burling: No objection.

Mr. Stackhouse: I ask that this be marked as Exhibit P1.

(Said paper is so marked.)

Mr. Stackhouse: I have the will book here from the Surrogate's office; Mr. Burling has waived the formal proof and admits it is the will book. Plaintiff offers in evidence Book of Wills from Camden County Surrogate's office Z Z containing the record of the will and probate thereof of Catharine M. Burrichter at page 450. I understand, Mr. Burling, that you waive formal proof of the identity of this 10 book.

Mr. Burling: I do.

Mr. Stackhouse: Now, it is also agreed between counsel that this copy which I have made and compared with the original may be used in place of keeping the record up here, and I ask that that be marked Exhibit P2.

(Said paper is so marked.)

20

---

CATHARINE M. BURRICHTER, SWORN.

By Mr. Stackhouse:

Q. Miss Burrichter, you are the daughter of Catharine M. Burrichter, the lady who is named as grantee in this deed from Mary C. Williams, widow 30 of Edwin C. Williams?

A. I am.

Q. And which has been marked Exhibit P1?

A. Yes.

Q. Were you acquainted with Mr. and Mrs. Williams?

A. I was.

Q. Is Mr. Williams dead or alive?

A. He is dead.

Q. Do you remember about when it was that he died?

A. August, 1901.

Q. And your mother died when?

A. July 25, 1920.

10 Cross-examination.

By Mr. Burling:

Q. Have you lived in the property continuously, Miss Burrichter?

A. I have lived in there since 1902.

Q. That was at the time it was acquired; you mean since it was purchased by your mother you lived there?

20 Mr. Stackhouse: This is hardly cross-examination, I think.

The Court: I suppose it is not strictly cross-examination.

Mr. Burling: Well, if your Honor please, I do not know how far you are going to permit me to examine as to the possession of the premises.

The Court: She has not testified to it.

30 Mr. Burling: I do not know whether it is the intention of the plaintiff to prove it otherwise or not.

The Court: I suppose if they do not you do not need to worry.

Mr. Burling: I will withdraw the question at this time.

EARL THOMSON, SWORN.

By Mr. Stackhouse:

Q. Mr. Thomson, what is your occupation, please?

A. Civil engineer.

Q. How long have you been engaged in that occupation?

A. Thirty-seven years.

10

Q. Where, in the City of Camden?

A. Camden, the City of Camden.

Mr. Stackhouse: Is there any question as to Mr. Thomson's qualifications?

Mr. Burling: There is not.

Q. Did you make a survey of the conditions surrounding premises No. 711 and 713 Broadway?

20

A. I did.

Q. When did you make that survey?

A. June 17, 1924. I will confirm that by reference to my notes—6/17/'24.

Q. Is this a portion of the survey which you made at that time?

A. This is.

Q. Now, referring to the division line between premises Nos. 711 and 713 Broadway, where is it indicated that a point on the west line of Broadway at a distance of one hundred and ten feet north of the northwest corner of Broadway and Pine Street is located?

30

A. Here in the center of the party wall.

Q. I guess, to give the jury the benefit of this, we had better bring it over here. Will you indicate again where that point is?

A. The point called for is a hundred and ten feet from Pine Street; it is indicated here in the center of a certain party wall between a two story brick dwelling, 711, and a two story brick 713. These black lines indicate the party wall; the red line indicates the center of this party wall, and the red line on the side the center of said party wall extended west.

Q. Does that line run at right angles to Broadway?

10 A. It does not.

Q. How near to a right angle to it does it run?

A. Well, it will be necessary to go into a little explanation, as Broadway from Line Street to Walnut, the west line of Broadway has encroached on Broadway for many years; beginning at Line and coming back to the true line of Broadway at Walnut, there is a bow there. This shows two conditions here. Some years ago the City fixed the line of Broadway, the west line, between Line and Walnut, and monumented it. At the time these houses were built, they were built from the same line of Broadway which was part of this encroachment, so the wall as built here at that time is not at right angles to the line of Broadway. It is, however, as we engineers have decided, the best evidence of what was intended as a right angle to Broadway are the walls themselves as they stand so erected.

20

By the Court:

30 Q. How far is the western line, the building line of Broadway out?

A. At this point?

Q. Yes?

A. From the line as established by the City, one side of the property is one foot seven and a quarter

inches in the street, that is, the building itself, and the east line one foot five.

Q. The east line?

A. The easterly line of this property. You see, it begins at nothing at Line Street, and increases below Pine; there by Hurleys, it is some two or three feet.

Q. I think it comes out further than that.

A. Further than that down below, about four feet at one point, then comes back; so the middle line of the party wall, we have assumed, and so has the title company —

10

Mr. Burling: I object to that.

The Witness: Oh, I beg your pardon—that the middle line of the party wall is the best evidence of their intention to right angle at that time; we have no means of determining what their lines of Broadway were when they built those houses.

20

The Court: You can put it on the easel, Mr. Thomson, if you can demonstrate it on the easel, and the easel will stand up long enough —

Mr. Stackhouse: Now, I want to offer in evidence a deed from Clara Fields, single woman, to Louis Wishnefsky, dated August 11, 1919, recorded in the Register of Deeds Office of Camden County in book 450 of deeds, page 162, which conveys premises situated in Camden, beginning at a point in the west line of Broadway at the distance of ninety-five feet north from the north line of Pine Street, in the extended middle line of the party wall between premises Nos. 713 and 715 Broadway, and extending thence northwardly along the west line of Broadway, fifteen feet in front or width to the extended mid-

30

dle line of the party wall between Nos. 711 and 713 Broadway, and extending thence westwardly of the same width between parallel lines at right angles to Broadway and through the center line of the said party walls ninety-six feet in length or depth to the line of a certain four feet wide alley, together with the free use, rights and liberty and privilege of said four foot wide alley in common with others bordering thereon forever, being premises 713 Broadway, and being the same premises which Daniel W. Saphore and Anna M., his wife, by deed dated May 16, 1907, granted and conveyed to Clara Fields, recorded in Book of Deeds No. 315, page 650 in the office of the Register of Deeds of Camden County. I will ask that this be marked Exhibit P3.

(Said paper is so marked.)

By Mr. Stackhouse:

20

Q. Taking this description, Mr. Thomson, beginning at a point in the west line of Broadway a distance of ninety-five feet north of the north line of Pine Street in the extended middle line of the party wall between 713 and 715 Broadway, does your plan indicate that beginning point?

A. No, it does not; that would be fifteen feet south of the beginning point here; that is 110, and this ninety-five.

30

Q. Now, does the plan indicate the extended middle line of the party wall between premises 711 and 713?

A. It does, the red line.

Q. That is the red line?

A. The red line beginning here on the west side of Broadway, and extended here to the alley westward,

that is, the middle line extended, the middle line of the party wall between 711 and 713 Broadway.

Q. And that line there shows a line absolutely through the center of the party wall between 711 and 713 Broadway, through the center line of the party wall back to the alley?

A. It does.

Q. Now, when you made your survey, what condition did you find north of the center line of that party wall between 711 and 713 in the rear of the lot? 10

A. We found various encroachments as shown here and noted, the first one being indicated at this point here, where the wall itself encroaches three-eighths of an inch; that is, it was three-eighths of an inch north of the middle line of the party wall extended, the foundation encroaching four and three-eighths inches at that point. At a point twelve feet west of the point last mentioned, the foundation encroached eleven and one-quarter inches, and the wall 20 one and one-half inches. At a point seven feet west from the last mentioned point, the wall encroached one and a half inches and the foundation six and seven-eighths. At the rear of the building, on the side of the alley, the wall itself encroached two and five-eighths inches.

By the Court:

Q. The brick wall? 30

A. The brick wall, yes, the foundation there was practically flush with it; the foundation was very irregular, very irregular as indicated, running from nearly twelve inches to a couple of encroachment.

Q. The brick wall was?

A. The brick wall was fairly regular, yes, but swung north as it went west.

Cross-examination.

By Mr. Burling:

Q. How did you measure that foundation, Mr. Thomson?

A. How did we measure it?

Q. Yes.

A. Why, from an off-set run through the yard.

10 Q. Did you measure that from the surface of the ground?

A. We had the whole foundation excavated to the bottom of it.

Q. You mean along the side?

A. Along the side, a space about that wide, a trench dug, and then took offsets in from an offset in the yard.

Q. From the depth—you mean the full depth of the foundation?

20 A. No, at the top, then as far down as we could see; we could see the bottom.

Q. That is what I am trying to arrive at; you saw the bottom of the foundation?

A. Yes.

Q. Was it a straight line or what might be called slopped over?

A. No, it was not slopped over.

Q. It was not?

A. No, sir.

30 Q. It was a straight line foundation?

A. Well, fairly, a very rough piece of work.

Q. What was the nature of the material?

A. Concrete.

Q. Not block but poured?

A. No, it was concrete, a regular concrete foundation.

By the Court:

Q. Made in forms?

A. They didn't look as though they used any forms; it looked as though they dug a trench and dumped it in, it was so irregular.

By Mr. Burling:

Q. Did it have a regular surface on the north side? 10

A. It was somewhat irregular.

Q. Do you mean by that pronounced or just wavy?

A. Wavy, but to all intents and purposes it was continuous; to all intents and purposes the encroachments that I have stated were the same, top and bottom.

Q. How far below the level of the ground did the foundation terminate?

A. Four feet.

Q. Well, did the foundation come to the surface 20  
of the ground?

A. The foundation showed in some places; in others not; they took that away for all I know.

Q. It was not flush with the surface of the ground?

A. That had been cleaned off before we made the measurements.

Q. Well, the ground was level there at that point—was the foundation below that level or was it above or equal to it?

A. No, I don't recollect, Mr. Burling, just at this 30  
moment.

Q. You don't know whether the wall started above the existing ground level at the point you made —?

A. Oh, it was fairly near the ground level, as far as I can recollect.

Q. You used a continuous line of what you call the center line of the party wall?

A. Oh, we projected the center line of the party wall back, and everything was referred to that.

Q. In a continuous line?

A. Oh, absolutely.

Q. Clear to the alley?

A. Into the alley.

PLAINTIFF RESTS.

10

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Mr. Burling: I would like to move at this time for a non-suit. There is no evidence before the Court of the alleged encroachment at the time of the entry of this suit; the only evidence before the Court at this time, if it please your Honor, is that of a survey made by Mr. Thomson at a date sometime antecedent to the beginning of this suit. There is no evidence before the Court here of the condition of the premises or of the possession at the time, or of any encroachment on the part of the defendant as the plaintiff alleged on the land as set forth in this paper title at this point in this trial.

Mr. Stackhouse: As I understand the law, the plea by the defendant or the answer admits possession of the premises in question at the time that the suit was commenced. I have had the surveyor describe the premises as indicated on the plan and the defendant has filed a general denial, which, under the law, admits possession of those premises at the time, consequently I respectfully submit that the law is that it becomes then a question of proof of paramount title by the defendant if he can establish it, in other words, that he claims title or possession at that time.

The Court: Well, have you established title in you or your predecessor, or possession of this land?

Mr. Stackhouse: Well, I think we have established the paper title.

The Court: Haven't you got to go further than that if you are relying on a paper title? I understand the rule to be that you have got to go to the Council of Proprietors or rather got to go back to the Proprietors if you are relying upon possession. 10

Mr. Stackhouse: Well, we are relying on a common grantor; in other words, Mr. Burling's client is estopped from saying we did not get good title from the same person that he got title. The common grantor was Howard M. Cooper.

The Court: That does not now appear. 20

Mr. Stackhouse: It appears in the evidence.

The Court: By what evidence?

Mr. Stackhouse: The evidence of the deed from Howard M. Cooper to Catharine Holl.

The Court: That does not yet appear, how the defendant traces his title. 30

Mr. Stackhouse: Well, it was admitted by counsel that Howard Cooper was the common grantor; in other words, that title was traced from Cooper.

The Court: I did not understand that that was admitted or stipulated.

Mr. Stackhouse: Yes, I understand that was admitted right at the outset of the case.

The Court: However, I shall hold this motion. You may go on with your case, Mr. Burling.

Mr. Stackhouse: If there is any question as to that, I would like to have it cleared up. I think Mr. Burling in his opening specifically said he  
10 claimed under the same deed from Howard M. Cooper to Catharine Holl that we claim, and that being the case I think our paper title is established.

The Court: I do not recall it, perhaps he did; at any rate, I shall hold this motion. If you want to supplement your proofs you may.

Mr. Stackhouse: Well, I do not see that there is any valid objection to my doing that. I am perfectly willing to put in the defendant's title as part  
20 of my case. I do not suppose Mr. Burling has any objection to it and it will probably save him the trouble of doing it.

Mr. Burling: I cannot oppose any offer you may make of the record of any deeds in the Register of Deed's Office; that is your privilege.

Mr. Stackhouse: All right, we have already referred to the deed from Howard M. Cooper to  
30 Catharine Holl, dated April 21, 1882, recorded April 22, 1882, in Book 104, page 670. That deed included both the Wishnefsky and Burrichter land. Catharine Holl by deed dated January 26, 1883, recorded January 27, 1883, in Book 107, page 457 conveyed to Henry S. Springer a piece of land in Camden beginning at a point in the west line of Broadway at

the distance of ninety-five feet north of the north line of Pine Street and corner to land of James W. Eldredge, and runs thence north along the aforesaid line of Broadway fifteen feet in front of width and extending of that width in a westerly course between parallel lines at right angles with Broadway ninety-six feet in length or depth to the east line of a certain four feet wide alley. Together with the free use in common for ingress, egress and water course of the said alley; recited as being part of a larger lot of land which Howard M. Cooper by deed dated the twenty-first day of April, 1882, recorded in the Register's office in Book 104 of Deeds page 670 granted and conveyed to Catharine Holl in fee simple. Henry S. Springer and wife made a deed to George W. Henry, dated June 1st, 1889, recorded June 1, 1889, in Book 144 of Deeds page 224 conveying the same premises described in the deed from Holl to Springer. This deed recites these premises as being the same premises conveyed by deed from Catharine Holl to Henry S. Springer. George W. Henry conveyed the premises described in the deed from Springer to George W. Henry by deed to Emma Davis, dated November 5, 1894, recorded November, 1894, in Book 200, page 387. This deed recites the premises as being the same conveyed by deed from Springer to Henry recorded in Book 144, page 224. Emma Davis conveyed the premises described in the last mentioned deed to George W. Henry by deed dated April 8, 1895, recorded May 20, 1895, in Book 205, page 625. This deed conveys the same premises as described in the last mentioned deed and recites there "Being the same premises as described in deed from George W. Henry to Emma Davis, recorded in Book 200, page 387." Emma Davis conveyed the same premises to Sarah C. Henry by deed Dated May 10, 1895, recorded May

11, 1895, in Book 205, page 533. This deed recites the premises described as being the same premises conveyed by deed from George W. Henry to Emma Davis, recorded in Book 200, page 387. Sarah C. Henry conveyed the premises described in the last mentioned deed to Theodore Brick by deed dated August 3, 1895, recorded August 5, 1895, in Book 207, page 500, recited as being the same premises conveyed by Emma Davis to Sarah C. Henry by

10 deed recorded in Book 205, page 533. George W. Henry conveyed the premises described in the last mentioned deed to James S. Henry, by deed dated October 25, 1895, recorded January 16, 1896, in Book 212, page 272, recited as being the same premises described in deed from Emma Davis to George W. Henry, recorded in Book 205, page 625. George W. Henry and Sarah C. Henry, his wife, Theodore Brick and Maria, his wife, and James. Henry conveyed the premises described in the last mentioned

20 deed to Harry Boogar by deed dated May 20, 1896, recorded May 23, 1896, in Book 213 of deeds page 586, the premises recited as being the same premises as were conveyed by deeds recorded in Book 144, page 224, Book page 387, Book 205 page 533, Book 205 page 625, Book 207 page 500 and Book 212 page 272. Harry Boogar and Gertrude, his wife conveyed the premises described in the last mentioned deed to Daniel W. Saphore and Anna M., his wife, by deed dated March 31, 1902, recorded March 31,

30 1902, in Book 260, page 666, which is recited as being the same premises which were conveyed by deed from Henry et al to Boogar, recorded in Book 213, page 586. Daniel W. Saphore and Anna M., his wife conveyed to Clara Fields by deed dated May 16, 1907, recorded May 17, 1907, in Book 315, page 650, the premises beginning at a point in the westerly line of Broadway at the distance of ninety-five

feet north from the northerly line of Pine Street in the extended middle line of the party wall between Nos. 713 and 715 Broadway, and extending thence northwardly along the said westerly line of Broadway fifteen feet in front or width to the extended middle line of the party wall between 711 and 713 Broadway, and extending thence westwardly of the same width between parallel lines at right angles with Broadway and through the center line of said party wall ninety-six feet in length or depth to the easterly side of a certain four feet wide alley, being premises 713 Broadway, and recited as being the same premises conveyed by deed from Harry Boogar and wife to Daniel W. Saphore and Anna M., his wife, dated March 31, 1902, and recorded in Book 260, page 666. The deed from Clara Fields to Louis Wishnefsky has already been offered in evidence as Exhibit P3. 10

The Court: You may go ahead, Mr. Burling. 20

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#### THE CASE FOR THE DEFENDANT

Mr. Burling: May it please your Honor, it is rather surplusage to read again into the record the same title, and I want to offer in evidence the deeds that have been referred to by Mr. Stackhouse, together with the stipulation on his part that in lieu 30 of the presentation of the official books from the office of the Register of Deeds of this County the same information may be used in lieu thereof.

Mr. Stackhouse: That is correct; I presume that in order that the jury may have these before them possibly these abstracts had better be offered.

The Court: Well, I suppose we will get just where I suggested we would anyhow. There is no question about the paper title of each of these parties to the land, as I understand it, described in the deeds.

Mr. Stackhouse: Apparently not.

The Court: It is a question of the location of a  
10 fence and whether or not —

Mr. Stackhouse: There has been adverse possession.

The Court: The defendant's wall was built within the line of the property which has been in his possession or that of his predecessors in title for the required length of time.

20 Mr. Burling: That is it, sir.

The Court: It seems to me that is all there is in this case; it seems to me as if every other question may be taken as being settled as far as the paper title goes.

Mr. Burling: Then possibly it might be less confusing to the jury not to put this in.

30 The Court: Yes, if there is any doubt about it, just stipulate that both plaintiff and defendant have paper title in the land described in the deed which has been read into the record, in each case from the grantor to each of the parties hereto.

Mr. Stackhouse: Tracing title to a common grantor.

The Court: Tracing title to a common grantor. That leaves us then, as I have said, two questions, perhaps, as to whether or not the property is in fact beyond the limits of the defendant's deed and on the property described in the plaintiff's deed, and if it is so located, whether or not the defendant has had twenty years of adverse possession of what I would term the encroachment. I think that is all there is, isn't it?

Mr. Burling: Yes; of course, your Honor has not ruled on the other question as to whether or not they are bound to prove possession in fact of their land.

The Court: Oh, I think they are not under this case of *Ridgefield Park v. New York Susquehanna & Western Railroad Company*, 85 law, page 278. (Reading opinion.)

Mr. Burling: But I go a point further—has the plaintiff proved in fact what your Honor has termed here an encroachment at the date of the beginning of this suit? I say the evidence up to date is only the testimony of a surveyor made at an examination prior to the entry of suit in this case, and no evidence before the Court that that existed at the time of the beginning of this suit.

Mr. Stackhouse: As I understand the law, the defendant admits possession of the premises by his plea.

The Court: Yes, I so understand it, the defendant by pleading a general denial admits possession of the property in question, so that we are in this situation: The plaintiff has established a legal title

and shows that the title of the plaintiff and the defendant go back to a common grantor; he says, "You are in possession of a certain tract of land" and the defendant says, "I admit I have got the land, and I now intend to hold it against you and everybody else."

Mr. Burling: Yes, but do we admit in that plea that it is not part of our paper title? In other  
10 words, we have a right to rely on it, as your Honor has well said, in two phases, if it is part of our paper title or if we hold it adversely.

The Court: I think under our cases that the plaintiff has made out a prima facie case that puts you to proof of how you hold it.

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20 LOUIS WISHNEFSKY, SWORN.

By Mr. Burling:

Q. Where do you live, Mr. Wishnefsky?

A. 713 Broadway.

Q. How long have you lived at that property?

A. Five years.

Q. Had you acquired title to the property from one Clara Fields by deed dated August 11, 1919?

30 A. Right.

Q. Did you take immediate possession after the execution of that deed—did you go into occupancy?

A. No, I rented.

Q. Well, when did you first go into possession of the property personally?

A. I moved in October 13, 1920.

Q. October, 1920?

A. Yes.

Q. And prior to that time, from the time you made the settlement and acquired the deed, you rented it to a tenant, is that correct?

A. Yes.

Q. At the time you acquired possession of that property, what sort of building was erected on the land?

A. A plain two story dwelling, old-time dwelling.

Q. Brick or ——?

10

A. Brick.

Q. Did it have a store in it at that time?

A. No, one window like a little store.

Q. Was there an elevation to reach the first floor?

A. Two steps.

Q. Now, you made some alterations to the property, didn't you?

A. Yes.

Q. And what time did you make those?

A. 1920; May 1, 1920, we started.

20

Q. And what sort of alterations were they, Mr. Wishnefsky?

A. A new building.

Q. Did you change the front—you did not change the front walls?

A. No, but we put in new walls, new windows.

Q. Where was the new wall, in the rear?

A. In the back, yes.

Q. But the front walls were not disturbed?

A. No, the same walls.

30

Q. Now, before you started the construction or had started the construction of this wall in the back, what was in the back?

A. Nothing.

Q. A vacant yard?

A. A vacant yard.

Q. What was back of the main building—was there anything back of your main building at all? Was there any frame building back of your main building?

A. A summer kitchen, I think it was, a frame summer kitchen.

Q. You tore that down, did you?

A. Yes.

Q. Was the same sort of building adjacent to you  
10 at 711?

A. Built the same; they are all built the same.

Q. Now, what sort of division existed between No. 711 and 713 at that time, going back to the alley?

A. A fence, a frame fence.

Q. What kind of fence?

A. Straight boards.

Q. How high was that fence?

A. About five feet, like a person, high about five feet.

20 Q. Was it solid boards?

A. No, regular fence boards.

Q. Yes, I did not mean by "solid" the goodness of the boards, but whether it was one continuous fence, one right on top of the other?

A. Yes.

Q. One continuous fence, a tight fence?

A. Tight fence, yes.

Q. How high about was it?

A. Like a person, high five feet, five and a half  
30 apparently.

Q. What was the appearance of the fence—did it have the appearance of being old or new?

A. An old fence.

Q. That was there when you went into possession?

A. Yes.

Q. How far did the fence extend back?

A. Up to the end of the alley.

Q. Up to the alley?

A. Yes.

Q. Now, when you constructed or had constructed this property, did you keep the walls, the foundation thereof to the south side of the fence?

Mr. Stackhouse: I object. Now, just a moment; it is not shown that the witness knows where that construction was. Perhaps he does, but it is not shown.

10

The Court: I do not think it has been shown, Mr. Burling.

Q. Were you present when the wall was built?

A. Yes, sir.

Q. You saw it built?

A. Yes.

Q. Were you living there all the time that it was built?

20

A. No, I lived in 707 Broadway.

Q. While the alterations were going on?

A. Yes.

Q. But were you there daily?

A. I must be there, yes.

Q. And you were the one in possession of the property?

A. The contractor had the property.

Q. You had the contractor doing work for you?

A. Yes.

30

Q. But you were the one in charge of it?

A. Yes.

Q. And it was your property?

A. Yes.

Q. Did you see, as the progress of the work went on, the construction of this wall?

A. Yes.

Q. In fact, you saw it constructed?

A. Yes.

Q. Did you see the progress of the work as it went on?

A. Yes, sir.

Q. Now, as it went on, what have you to say as to where it was placed with respect to this fence?

A. You couldn't put that building up against this fence, we couldn't take down the fence, the lady from  
10 the next house would not let us take down the fence, the old fence.

Q. So the fence was maintained while you went on to build?

A. Yes.

Q. And you built on your side of the fence?

A. My side of the fence.

Q. And the fence was still maintained while you were building?

A. While we were building.

20 Q. And you continued that course in that position, or saw the work continued in that position?

A. Yes.

Q. Until it arrived at a state of completion?

A. Yes, up to the roof.

Cross-examination.

By Mr. Stackhouse:

30 Q. Now, Mr. Wishnefsky, who was it built this back building for you?

A. Who built it?

Q. Yes.

A. Mr. Kleiner.

Q. He is a contractor?

A. Yes.

Q. And he had entire charge practically of the construction of that building?

A. Right.

Q. And you say that you were there all the time?

A. I was there.

Q. What business were you engaged in at that time?

A. The store business; I had a store.

Q. Did you have a store at that time at 713 Broadway?

10

A. 707 Broadway.

Q. 707 Broadway?

A. Yes.

Q. And what kind of store were you running there?

A. Ladies' ready to wear.

Q. Well, did you have any one working in the store at the time?

A. Yes.

Q. Who was working for you?

20

A. Two girls.

Q. Were you doing much business at that time?

A. Well, a little.

Q. You were doing quite a business, weren't you—you were kept pretty busy; that is right, isn't it?

A. Well, some days we are busy, some days we are not busy.

Q. Most of the time this building was going on, you were doing quite a good bit of business, weren't you?

30

A. During the day, we are not doing much business there.

Q. Oh, during the day you spent your time hanging around this building operation?

A. Yes.

Q. And left the store to the two girls?

A. Two girls and my Mrs.

Q. How old are the girls?

A. I don't know, they are all eighteen years.

Q. Eighteen years anyway. Now, you say when this wall was built by Mr. Kleiner that it was built within the line of the fence?

A. Yes.

Q. And it was not necessary to do anything to the fence at all?

A. Mr. Kleiner wanted to take down the fence one  
10 day, and the lady next door would not let him take  
down the fence.

Q. Wouldn't let him take down the fence?

A. No, she held the fence this way, she would not  
let him take down the fence.

Q. Well, didn't you say a few minutes ago it  
wasn't necessary to do anything to the fence at all?

A. It was in good condition.

Q. I know, but do you mean to say now that it  
was not necessary to move the fence an inch?

20 A. It was necessary to move it to give him room  
to work.

Q. Well, where did they move it to?

A. What do you mean? He took it up and took  
it down, put a line on; he put a line to make a sur-  
veyor's line.

Q. Now, the fence you say at that time formed the  
division line between the two properties?

A. Right.

Q. And is it not a fact, if you were there to see  
30 what was going on, that the fence was knocked down  
without any permission from anybody at all?

A. Knocked down?

Q. Yes.

A. They want to take him down, the builders, and  
Mrs. Burrichter would not let them take it down.

Q. Well, was the fence taken down?

A. No, only one or two boards, maybe three.

Q. Mr. Kleiner built the wall there?

A. Yes.

Q. And he built the foundations?

A. Yes.

Q. What kind of foundation was that?

A. I couldn't say; I am not a builder.

Q. Did you watch the building of it?

A. I don't know even the name, what he called the stuff he put in the foundation; I never built before.

10

Q. Do you know whether or not it was a stone foundation?

A. I couldn't say.

Q. As a matter of fact, wasn't it a foundation which was made by pouring liquid into the ground there to make it?

A. I couldn't say; I never built before, and I have no knowledge about buildings.

Q. That is the first building that you ever built, is that right?

20

A. Yes, that is right.

Q. Now, you still say, do you, that the fence was not—the building which you built there was built to the south of the line of that fence as it stood there when you moved?

A. Yes.

Q. That is correct, isn't it?

A. Yes.

Q. And there were only two boards of the fence taken down?

30

A. Two or three boards of the fence taken down, yes.

Q. After Miss Burrichter ——?

A. Stopped us.

Q. Stopped you?

A. Yes.

Q. You were out there, weren't you, at the time Miss Burrichter protested against the fence being taken down?

A. I wasn't outside, I was inside, in the store.

Q. You were not there?

A. I was inside, in back of the store. We have a summer kitchen; I never talked to Mrs. Burrichter before.

10 Q. So that whatever took place with reference to the fence took place between Miss Burrichter and Mr. Kleiner—that is right?

A. Yes.

Q. And you weren't there to hear what went on?

A. No.

---

ABRAHAM KLEINER, SWORN.

20 By Mr. Burling:

Q. In May, 1920, Mr. Kleiner, were you engaged by Mr. Wishnefsky, the defendant in this case, to make some alterations to premises 713 Broadway, Camden?

A. Yes.

Q. At that time you were a contractor, were you?

A. Yes.

Q. How many years standing?

A. How long?

30 Q. Yes, how much experience had you had at that time?

A. Twenty-two years.

Q. Twenty-two years you built in Camden?

A. Yes.

Q. Among the things that you did there, I understand, was the construction of a wall on the north-erly side of the premises 713, is that correct?

A. Yes, sir.

Q. Now, when did you enter on the premises for an inspection of it?

A. Well, sometimes in the first week in May, I presume, 1920.

Q. At that time did you see any indication of anything that separated the premises No. 711 from 713?

A. There was a fence.

Q. What was the nature of that fence?

A. It was an ordinary fence, an old fence. 10

Q. Was it a wooden fence?

A. A wooden fence, yes.

Q. Solid in character?

A. Solid in character, yes.

Q. Now, how high was it?

A. Oh, about four to five feet.

Q. Built of boards?

A. Yes.

Q. And that continued, I presume, from the alley in the rear running eastward how far? 20

A. Back to the building at that time.

Q. At that time was there a frame building back?

A. No, there was a front building brick, and then there was a small like a kitchen in the rear of the building, a summer kitchen out of frame.

Q. Did the appearance of the property at 711 appear to be of the same nature?

A. They all looked alike, yes.

Q. And was there the same kind of frame out-kitchen or out-building there? 30

A. Yes.

Q. Is that still there?

A. I don't know.

Q. Was it there at the time when you built?

A. At that time it was, yes.

Q. And this fence running back from there to the alley?

A. Yes, sir.

Q. What sort of foundation wall did you construct on the northerly side?

A. Concrete foundation.

Q. Concrete?

A. Yes.

Q. Was that poured or blocks?

A. It was poured.

Q. And above the foundation—what was the  
10 depth of the foundation?

A. I could not remember today what it was.

Q. Well, off-hand?

A. I simply followed the building code at that time.

Q. Well, how many feet in depth was it approximately?

A. I presume it was from three to four feet.

Q. And on top of the wall, what sort of building was there constructed?

20 A. Brick.

Q. How many course brick?

A. Nine inch brick.

Q. What is that, commonly called two course brick?

A. That is one brick in width.

Q. And that was placed on the foundation wall?

A. Exactly.

Q. Now, in constructing this foundation, you were in actual physical charge there of the work, weren't  
30 you?

A. Yes.

Q. In personal observation of what was going on daily?

A. Yes.

Q. In constructing that wall with respect to the fence, where did you build it?

A. Why —?

Q. I will withdraw that question. While you were building this wall, the fence was maintained, wasn't it?

Mr. Stackhouse: I object to that as leading.

The Court: Yes, I think that is rather leading on a material point.

Mr. Stackhouse: Let him tell what he did or 10 what happened.

Q. While you were constructing this wall, what was the situation with respect to this fence?

A. Well, before I started to put anything into this place for the wall, we had a survey taken or a survey given.

Mr. Stackhouse: I object to anything in the nature of a survey unless the surveyor is here. 20

By the Court:

Q. Well, you can't tell what the result of a survey was, because you don't know—you did not make it?

The Witness: No, your Honor.

The Court: Just answer the question but do not tell the result of the survey at all; what you saw and what you did. 30

The Witness: Well, I was to stretch a line from my foundation wall, and I found that the fence is in my way. I asked the lady next door to give me permission to remove it, and she said her fence is too long a time here, I shouldn't touch it, and I started my work leaving the fence there.

By Mr. Burling:

Q. Did you continue your work in the same fashion?

A. Yes, I went up as far as the roof and the fence was still there, but later, in a month or so, I can't remember exactly, the fence has been removed by somebody.

Q. When you had run your foundation and run  
10 your line wall up two stories in height, was it?

A. Yes.

Q. Was the fence still standing?

A. All the time.

Q. The fence was still there?

A. Yes.

By the Court:

Q. Had it been moved?

20 A. No, sir.

Q. Had not been moved?

A. It had been moved after we got up to the height of the roof with our building, then I noticed it has been moved.

By Mr. Burling:

Q. But during the course of construction, did you  
move the fence?

30 A. No, sir.

Q. And it continued in its original position as you have described it?

A. Absolutely.

Q. All during the course of construction of your work?

A. Absolutely.

Q. Clear to the time when you had completed your brick work to the roof?

A. Yes, sir.

Cross-examination.

By Mr. Stackhouse:

Q. Mr. Kleiner, when you started to build there, Miss Burrichter came up and protested against anything being done with that fence—that is a fact, isn't it? 10

A. Exactly.

Q. Do you know the lady?

A. Yes, sir.

Q. Is this she sitting here at my left?

A. Yes, sir.

Q. She came out and put her hands on the fence, wasn't it?

A. I don't know whether she did put—I wasn't going to take the fence down in spite of her. 20

Q. You were not going to take the fence down?

A. Not in spite of her.

Q. Isn't it a fact that you were then engaged in knocking part of the fence down when she came out of there?

A. No, sir.

Q. Isn't it a fact that you told her at that time that if she did not take her hand off the fence you would give her what you were giving the fence? 30

A. No, sir.

Q. You answer that question no, is that right?

A. Yes, sir.

Q. You know Miss Burrichter's brother?

A. Yes.

Q. Is he in the Court room?

A. Yes.

Q. Sitting back here?

A. Yes.

Q. Isn't it a fact that when you were building this wall Mr. Burrichter came to you and asked you to keep the fence up there so that the dog would not get out?

A. Perhaps he did.

Q. And isn't it a fact that while Mr. Burrichter was there that the fence was moved back by you a  
10 distance of something like eighteen inches?

A. No, sir.

Q. It was not?

A. No, sir.

Q. Now, you say that the fence was in your way.

A. Within an inch or so, if I can remember.

Q. Within an inch or so?

A. Yes.

Q. In other words, you were short of working space about an inch, is that the idea?

20 A. One inch, yes.

Q. So that you only would have to have moved the fence about an inch in order to give you enough room?

A. To put my line on, that is all.

Q. But still you say that you did not move the fence at all during the progress of your building?

A. No, sir.

Q. But let it remain exactly where it was?

A. Exactly.

30 Q. And you built the building no further north than the line of the fence?

A. No, sir.

Q. Is that right?

A. Yes, sir.

By the Court:

Q. On which side of the fence were the fence posts?

A. On the other side, the lady's side.

Q. All of them?

A. All of them.

By Mr. Stackhouse:

10

Q. How deep was this foundation?

A. I couldn't remember.

Q. Now, have you done very much building?

A. I have done quite some building.

Q. As a matter of fact, isn't this foundation only two feet six inches deep?

A. I don't know.

Q. You don't know whether it is or not?

A. I don't know that it is, no, sir.

Q. You don't know how deep it is?

20

A. No, sir, I couldn't tell you.

Q. It might be one foot deep as far as you know?

A. Perhaps it is, yes.

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WILLIAM FIELDS, SWORN.

By Mr. Burling:

30

Q. Mr. Fields, you are the father of Clara Fields, aren't you?

A. I am.

Q. And you lived at one time in premises No. 713 Broadway, did you?

A. I did.

Q. Did you live there from the time that your daughter acquired the title, bought the property?

A. I lived there about six or seven years.

Q. Well, now, did you live there ——?

A. I lived there until I sold it to Mr. What-do-you-call-him.

Q. Did you live there from the time that your daughter bought it?

A. Yes, as soon as I could get in it.

10 Q. Well, your daughter bought it according to the papers on record in 1907?

A. Yes.

Q. And your daughter sold it to Mr. Wishnefsky in the year 1919?

A. Yes, sir, that is right.

Q. Now, during that time, did you occupy the property with your daughter?

A. Yes.

Q. Your daughter today is where?

20 A. Home, 518 Linden Street.

Q. She is ill, isn't she?

A. Not very well.

Q. And you remember when these properties were built by Mr. Holl?

A. Well, I remember when they were started, but I was away; I had property down at Wildwood, and I was down there when the building was going on.

Q. Did you do some work on them then?

A. Yes.

30 Q. That was somewhere around 1882, was it?

Mr. Stackhouse: Now, just a moment; there has not been any evidence here as to when these properties were built.

The Court: No.

Mr. Burling: Well, I will withdraw it.

Q. Can you remember the year when they were built—how many years ago, approximately, if you can remember, were they built?

A. About forty, forty-two.

Q. Were they all built together?

A. Yes, sir.

Q. As one operation?

A. Yes, the row right through. I did the masonry. 10

Q. What?

A. The stonework, the foundation work on the whole row. We commenced at Pine Street, and carried the row through to Line.

Q. Before you lived at 713, where did you live?

A. 6th and Pine. No, excuse me, I lived where the Eagle Building is, 415 Broadway.

Q. Now, when you lived in the property, was there a fence between you and the property 711 back?

A. There was. 20

Q. Was that fence there at the time you sold the property, your daughter sold the property?

A. Yes, sir.

Q. Was it in the same condition during the entire time that you lived there?

Mr. Stackhouse: I object; now, just a moment. It seems to me counsel is testifying rather than the witness.

30

Mr. Burling: I will withdraw the question.

Q. What condition was the fence in during the time that you were there?

A. Well, in pretty fair condition; we put a board on it now and then maybe.

Q. Was there any change made in the location of the fence while you lived there?

A. No that I know of.

Cross-examination.

By Mr. Stackhouse:

Q. Now, Mr. Fields, your daughter was Clara  
10 Fields, wasn't she?

A. She was.

Q. And she bought this property in 1907, didn't she?

A. I just don't remember the year she bought it.

Q. Well, you did not move into the property until she bought it, did you?

A. No, sir, I bought it for her.

Q. You bought it for her?

A. Yes.

20 Q. But a deed was made in her name?

A. Yes.

Q. Is she still living?

A. Yes, sir.

Q. Now, you say that prior to this time that you lived—that is, up to the time that you bought this property for your daughter—you lived where the Eagles' Building is now?

A. Yes, 415 Broadway.

Q. And how long had you lived there?

30 A. Why, only about twenty years, I guess, as near as I can tell, something like that.

Q. Prior to that you lived at 6th and Pine?

A. Yes, sir.

WILLIAM EVANS, SWORN.

By Mr. Burling:

Q. Mr. Evans, where do you live?

A. I live 563 Royden.

Q. How long have you lived in Camden?

A. About forty years, since 1873.

Q. What is your present occupation?

10

A. Janitor of the Camden City Library.

Q. Where do you live now?

A. 563 Royden.

Q. Are you familiar with properties at 713 and 711 Broadway?

A. Not as much as I am with 719 and 717.

Q. Why do you make that statement?

A. I lived in them both.

Q. When did you live in 717 and 719?

A. About fourteen years ago.

20

Q. How long did you remain at that particular—live there?

A. That I couldn't tell you exactly; I think I have lived in that row for about, as near as I can tell, fifteen years.

Q. Do you know the names of your neighbors at that time?

A. Yes.

Q. Who lived in 713 Broadway?

A. 713?

30

Q. Yes, sir.

Mr. Stackhouse: What time? I think the period should be fixed.

A. 713—Mrs. Burrichter lived there, didn't she?

Q. You know where Mr. Wishnefsky now lives, don't you?

A. Yes.

Q. Do you know at the time you were living where you stated who lived in his property at that time?

A. I mostly forget who did live there.

Q. Well, do you have a recollection of the premises and the rear of the property at that time?

A. Yes, sir.

Q. What sort of boundary conditions existed between those properties at the time you lived there?

10 A. They were nearly all alike.

Q. What was the nature of them?

A. Six roomed houses with a kitchen in the back, a bay window in the back.

Q. Well, what if anything extended from the back of the building to the alley?

A. Nothing.

Q. Anything to separate the properties at all?

A. A fence.

Q. What was the nature of the fence?

20 A. A regular plowed and grooved fence.

Q. Well, during the time that you have occupied the properties I have referred to, did you see any change made in the location of those fence lines?

A. Not while I lived there.

Cross-examination.

By Mr. Stackhouse:

30 Q. You lived in property 709, did you say?

A. 719 and 717.

Q. You said you lived there for fifteen years?

A. As near as I can tell.

Q. Now, to when does that carry you back?

A. I can't give you the date, but I can give you the reason why.

Q. I don't care about the reason why; I want to know ——?

- A. I could present —
- Q. I want to know if you remember when you first moved in there?
- A. No, I do not.
- Q. You don't remember?
- A. No.
- Q. So that you don't know to what time the fifteen years extends back, do you?
- A. Sir?
- Q. You don't know to what period the fifteen years 10 you have referred to goes back, do you?
- A. I don't know the date, no, sir.
- Q. Now, your observation —?
- A. I am janitor of the Camden City Library.
- Q. Now, just a moment.

Mr. Burling: I think he misunderstood you, Mr. Stackhouse; he thought you said "occupation" and started to answer you.

The Witness: I did.

20

(Question repeated.)

Q. Your observation of the conditions was obtained from your knowledge of them while you lived down there, isn't that true?

A. Yes.

Q. Of 719?

A. Yes, sir.

30

EMMA HARPER, SWORN.

By Mr. Burling:

Q. Mrs. Harper, where do you live now?

A. I live 728 Berkley.

Q. How long have you lived in Camden?

A. Nearly all my life.

Q. Were you familiar with properties on Broadway known as No. 713 Broadway?

A. I lived 709 Broadway for over eleven years.

Q. When was that period of time?

A. About six years ago we had moved.

Q. And prior to six years ago you lived there for eleven?

10 A. For over eleven years.

Q. At what number? 709, I believe, if I am not mistaken. I am not very good on remembering numbers.

Q. Now, what sort of building was on 709?

A. Well, it was a six room, frame back shed.

Mr. Stackhouse: Just a moment, I object to that; it is not material. We are not interested in that property at all.

20

The Court: I do not think that is material.

Q. Have you any recollection of what sort of building was on No. 713?

A. The same; they were all built alike.

Q. Have you any recollection whether there was any division, separation, if any, between premises 713 and 711 in the rear of the property?

A. Do you mean the fence?

30 Q. Whatever was there, if you recollect?

A. Nothing but a board fence ran from the alley, to the alley.

Q. Well, was there a board fence between 713 and 711?

A. There was.

Q. To your observation and knowledge during the

time that you lived there, was that fence in the same condition and position?

A. The same condition; I never seen any carpenter there to build any fence.

Q. Or any change in the location?

A. Or any change; I was a great homebody.

Cross-examination.

By Mr. Stackhouse:

10

Q. Now, Mrs. Harper, where do you live at the present time?

A. 728 Berkley, been there three years.

Q. You lived there three years?

A. We have.

Q. And prior to that time you lived where?

A. That was in Gibbstown; my husband was a weighmaster in Gibbstown.

Q. How long did you live in Gibbstown?

20

A. Two years.

Q. Prior to the time you lived in Gibbstown, where did you live?

A. I lived the most of the time on Broadway, 709; he was there five years.

Q. You lived there for five years?

A. No, lived there eleven years and a half, about, but my husband worked in Gibbstown for five years, he was down there, and three years I stayed in Camden.

30

Q. Now, let me understand you; you have lived in your present residence for three years; where you live now you have lived for three years?

A. Three years.

Q. Prior to that time you lived in Gibbstown?

A. I lived in Gibbstown two years, when I left the Broadway house, 709.

Q. So five years ago you lived on Broadway, is that right?

A. Pretty near, yes.

Q. Pretty nearly six years ago, you lived on Broadway?

A. I didn't write it down to keep any date of it.

Q. No, but it has been pretty nearly six years ago that you lived on Broadway?

A. I did.

10 Q. And you lived at 709?

A. 709 Broadway for eleven years about, and a half or so.

Q. Eleven years back of that time; that brings us up to about sixteen years ago, doesn't it?

A. Yes, about.

Q. Where did you live prior to that time?

A. Well, I lived on Sycamore Street twenty-one years.

Q. Sycamore Street is about —

20 A. Between third and fourth.

Q. Sycamore Street is about six or seven squares away from this place, isn't it?

A. Sure, I guess it is.

Q. So that your observation of this place extends back to the time that you commenced to live on Broadway; that is right, isn't it?

A. But I know what went on when we lived on Broadway, I know there was a board fence —

30 Q. Wait a minute; that is not an answer to the question. I am asking you whether your observation of these conditions which existed on Broadway was not derived from what you saw while you were living there?

A. I seen enough.

The Court: No, you don't know anything back of the time you moved there, do you, about these properties, the fence?

The Witness: Well, I visited there for a while, a year after I left I visited there; I visited my daughter.

Q. No, earlier, you didn't know anything about it before you moved to 709, did you?

A. No, I didn't know anything about it.

The Court: That is what the lawyer is asking you. 10

The Witness: I didn't know anything about it until after we moved there. After we moved there—

The Court: Wait; you have answered, madam.

By Mr. Stackhouse:

Q. Are you here under subpoena?

A. I am not. 20

Q. You came up here voluntarily?

A. I came up of my own free will.

Q. Now, Mrs. Harper, you and Miss Burrichter, didn't you, had a little unpleasantness, about eleven years ago?

A. Ask the other people who lived in the same house before I went there.

Q. Just answer the question.

A. Yes, we did.

Q. And that unpleasantness arose from the fact that you wanted to put your mother in the Alms House, didn't it? 30

A. No more than she wanted to put her mother, so there.

Q. Sit down.

A. My mother had the soul of a saint.

The Court: I don't think we want to thresh out their differences, Mr. Stackhouse.

Mr. Stackhouse: Well, I have a right to show interest.

The Witness: You haven't a right to ask everything.

10 The Court: Wait a moment. I don't think we are going to thresh out the details of the things she said. They had some difference of opinion.

The Witness: We certainly did.

The Court: That is all, madam.

Mr. Stackhouse: I think I will let it go at that.

20

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WILLIAM F. MAKIN, SWORN.

By Mr. Burling:

Q. Mr. Makin, you are an engineer associated with the firm of Remington & Vosbury in Camden City?

A. Yes.

Q. How long have you been associated with them?

A. Now, about ten years.

30

Mr. Burling: Is there any question about his qualifications, Mr Stackhouse?

Mr. Stackhouse: I do not know the young man. I suppose if he is associated with Remington & Vosbury, he is probably all right. Ask him a question or two. I won't be too insistent.

Q. You do the field work and surveying or at least part of it for that firm, don't you?

A. Yes.

Q. You have done it for how long?

A. For approximately eight years, since I have been there.

Q. You live in Camden County, Camden City?

A. Camden and vicinity, yes.

Mr. Stackhouse: Oh, I guess he is all right. 10

Q. Mr. Makin, in February, 1925, did you make a survey of the property No. 713 Broadway, expressly with respect to the wall between that and 711?

A. Yes, sir.

Q. Is that a linen print of the result of your labor?

A. Yes.

Q. Did you make that yourself, the linen print?

A. Yes.

Q. Is that made as a result of a physical survey 20 of the location I have referred to?

A. Yes.

Q. Transcribed from your notes to this piece of paper?

A. Yes.

Mr. Stackhouse: Suppose I ask him for the purpose of clearing up this thing:

By Mr. Stackhouse:

30

Q. Mr. Makin, there are several different colors indicated on this plan; will you kindly explain what they mean? Take, for instance, the black; what does the black mean?

A. The black lines on here show the physical conditions as they are. The black line through the center here is the center line of the party wall, and in

the rear the extended red lines show the present brick walls as they are; the blue lines show the foundation as it encroaches over the center of the wall. The green line shows the new location of Broadway. I guess that is about all the colors that there are on there.

By the Court:

10 Q. Now, the red lines—there are two; there is a broken red line; is that the center of the party wall or is that the exterior line of the wall?

A. No, that is the exterior line of the brick wall.

By Mr. Burling:

Q. You say this line indicates the middle of the party wall, is that it?

A. That is it.

20 Q. Continued on back to the alley, and the conditions that show beyond this point here are reflected on the continuation of the middle of the party wall, is that it?

A. The extension of the center line of the party wall, yes.

Q. Now, what is the nature of these buildings?

A. Why, they are two story brick buildings.

Q. What is the nature of the building here?

A. That is the same.

30 Q. What is the nature of that building?

A. That is a one story frame with a brick wall.

Q. Is there any building on this land back here?

A. No, there is nothing there.

Q. What is the nature of the building on here?

A. That is a two story brick building.

Q. Can you show, using your center of the party wall protracted to the alley, with respect to the wall and foundation what the condition is?

A. Part of the wall extends over the red line and the foundation also.

Q. Well, to what extent—what is your gross amount at any one point of the foundation that indicates it to be over?

A. The foundation, eight and a half inches.

Q. And what is the gross amount of the wall at any one point?

A. Well, it is a half inch.

Q. Any maximum point?

A. Yes.

10

By the Court:

Q. Then the maximum of the encroachment of the foundation wall you say is eight and a half inches?

A. Eight and a half.

Q. That is beyond the center line of the party wall if projected to the four foot wide alley?

A. Yes.

20

By Mr. Burling:

Q. What distance does that cover, Mr. Makin? First define it at the alley; is there any encroachment either of the wall or foundation at the alley?

A. Well, the foundation sets one and a quarter inches off the line.

Q. That is, on Wishnefsky's side of the line?

A. On Wishnefsky's side of the line.

Q. At the alley?

A. Yes.

30

Q. In other words, using the center line of the party wall protracted, there is no overlap there, is there?

A. No overlap.

Q. Then follow that out and explain that, when you come back to normal.

A. Beginning at the wall and running for a length of eight and a half feet, we have the foundation extending over three and a quarter inches and the building one quarter of an inch. Extending six and a half feet further, we have the foundation over eight and a half inches; extending two and a half feet further we have the building over one-half an  
10 inch and the foundation an inch and a half.

Mr. Stackhouse: May I interrupt you just a moment? It seems to me, may it please the Court, that this in fact is an attempt to overcome the effect of the answer. In other words, as I understand the effect of the answer, it admits possession or title of the premises in question at the time of the commencement of the suit. Now, this gentleman is brought here for the evident purpose of showing that  
20 that plea is not true; in other words, there is no disclaimer here for any part of his land.

Mr. Burling: It just occurred to me, if it please your Honor, if that is the situation, in the interest of my client I would like to move to amend the pleadings to entitle me to this claim for that portion that seems to be in dispute through the engineer's surveying the present physical conditions.

30 The Court: In other words, you want to disclaim any title or right of possession to so much of the land as is claimed by the plaintiff as is not within the limits of the encroachment as testified to by this witness.

Mr. Burling: Yes.

The Court: Why should not that be done?

Mr. Stackhouse: It seems a little late in the day to do it; that is the only thing.

The Court: It eliminates that much, and gives you a right, I suppose, to have possession of whatever is disclaimed that is within your description.

Mr. Stackhouse. (After further argument.) I think Mr. Burling should supply me with amended pleadings here. 10

The Court: Mr. Burling may amend by formally filing an amended answer which may be served today—I think you ought to do it forthwith—and Mr. Stackhouse be served a copy of it so he will be apprised of exactly what the situation is. You may amend if you follow that course.

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At this point a recess was taken until Wednesday morning, May 13, 1925, at 10 o'clock, A. M.

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Camden, N. J., May 13, 1925.

Trial of the cause resumed at 10 o'clock, A. M., pursuant to adjournment; in the presence of counsel for the respective parties.

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10 WILLIAM S. MAKIN, resumed.

Mr. Stackhouse: Are you going to present the amendment?

Mr. Burling: Yes, sir.

Mr. Stackhouse: That, if it please the Court, I assume, is the proposed amendment of the answer which limits the dispute to a smaller portion of the premises in question. Your Honor's ruling last night was, as I understood, that it should be filed immediately in order that I might have an opportunity to check up on the description. Mr. Burling asked me if he was to get it to me this morning whether that would be sufficient. I did not want to crowd him, and I told him yes, but I assumed that when he said this morning he meant early in the morning. This was presented to me at a quarter before ten this morning at my office, when I was very busily engaged in some other work, and I have not had a chance to look over it or check it up. I find that these descriptions are apt to be somewhat tricky—I don't mean that in an invidious sense, but I mean that they are hard to grasp by going over them cursorily. Up to this time I have not had an opportunity to go over this description and see exactly what it means with respect to this.

The Court: I suppose that the description is intended to conform to the map, which the witness now on the stand identified as the result of his survey.

Mr. Stackhouse: I do notice here in the very beginning of the description somewhat of a discrepancy. For instance, it says here, "Beginning at a point in the extended middle line of the party wall, &c., said point being four feet more or less eastwardly from the easterly line of a four foot wide alley," and then goes on to locate the alley. That point, four feet more or less, does not seem to me to mean very much; in other words, the more or less seems to take any vitality away from the four feet. In other words, that may mean five feet, six feet, two feet, three feet, or almost anything. 10

The Court: (After argument.) I suppose the plaintiff is entitled to know exactly what you claim and what you disclaim, and a beginning point located four feet more or less probably hasn't that definiteness which it should have where a party says, "You are in possession of my land," and you say, "I am not in possession of all of it, but in possession of a part of the land that you claim." They are entitled to a more definite description than that, Mr. Burling. 20

Mr. Burling: I asked the engineer to get all the data he had in hand. 30

The Court: I suppose that is excessive caution on the part of the engineer, but I doubt if it is what a party who says, "My land has been taken," is entitled to have.

Mr. Burling: It is intended to mean the point where the foundation would pass over the fictitious line of the extended party wall. Now, the best measurement that he had on this survey was an eight-foot point, and he had to scale that where it indicated to him as passing over that point, which is four feet as near as he can estimate it from that one line.

- 10 The Court: Well, if the easterly line of the alley is located, it seems to me there ought to be a point at which the encroachment begins, and the engineer ought to be able to locate that point, given the easterly line of the alley, which I understand is definitely located.

- 20 Mr. Burling: (After argument.) Will your Honor permit me to do this: I do not want to delay the trial, but this witness is through testifying, and I will send him right to his office to bring his calculating books and see if he cannot measure that by calculation. If Mr. Stackhouse will permit that, as soon as he is finished, I will have him go calculate that and I will have him fix that point with definiteness.

- 30 Mr. Stackhouse: Well, what does that mean? Does that mean that there is going to be another case put in here to be tried while that is done? I have been waiting around here, my witnesses and myself for five days, and if we put another case in here which may take two or three days, —

The Court: Well, are you so embarrassed that you cannot go on with the understanding that the description will conform with the map, the understanding that there will be a formal disclaimer as

to anything else except so much of the encroachment of the wall over the center of the party wall extended as is shown on this map?

Mr. Stackhouse: Well, of course, that should be done before the matter goes to the jury, if it goes to the jury.

The Court: I suppose you are entitled to have the record certain, but if that is the understanding, I presume you know, don't you, just what you are dealing with? You have the map, and if the description on forms to what is shown on the map, you know pretty well what you are dealing with. 10

Mr. Stackhouse: Well, I think I can deal with the matter in that way, provided that this course is made certain before the end of the trial. There is no actual disclaimer here, of course, except by inference in this amendment. 20

Mr. Burling: That is drawn in accordance with the rules of the Supreme Court.

The Court: I suppose they merely claim the right to possess a certain amount of land which is less than you claim, and that leaves you an undisputed right to the remainder.

Mr. Stackhouse: He defends this action as to part of the premises claimed in the complaint, to wit, and then goes on and describes it. 30

The Court: Yes, as to the balance he admits your possession. If they are actually in possession of more than they claim the right to be, then you are entitled to your judgment against them in any event for so much, if not for the whole.

Mr. Stackhouse: So much as we can prove.

The Court: Yes, for example, if the jury adopts the Thomson survey instead of the Remington & Vosbury survey, then clearly they are in possession of some land which they now disclaim any right to have; in other words, they have hitched their wagon to the star of this survey and are bound by it; if the Remington & Vosbury survey is not correct,  
10 they are sunk to use the vernacular.

Mr. Stackhouse: Well, I think we can proceed along that line.

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WILLIAM MAKIN, resumed.

By Mr. Burling:

20

Q. Will you locate that point, Mr. Makin, where you were interrupted?

The Witness: Was the last distance seven feet?

The Court: Well, if you are confused about it, I would suggest that you start over, if there is any confusion; just commence, if you will, at this point back here and describe what that indicates, and follow the course around.  
30

A. At the rear of the building, at the alley, the building sets back one and a quarter inches; extending eastwardly eight and a half feet, the building is over one-quarter of an inch and the foundation three and one-quarter; extending still eastwardly six and a half feet, the foundation is over eight and

a half inches; extending two and a half feet eastwardly, the building is over a half an inch and the foundation one and a half inches; extending seven feet further, the building is one inch back of the line, and the foundation is one and three-eighths inches over the line; extending eight and a half feet further, the building is back three inches and the foundation five-eighths of an inch. At the rear of the frame dwelling, in the rear of 711, the foundation and the building is two and a quarter inches 10  
over the line.

The Court: Which way?

The Witness: South of the line.

Mr. Stackhouse: Well, now, that is east of the premises in dispute, so I do not think he can go into that at all.

The Court: You mean the frame building back of the Burrichter property is on the line, is that what you mean? 20

The Witness: I haven't got that far yet.

Mr. Stackhouse: Just a moment. Mr. Burling, the premises in question as described in the complaint are all west of the Burrichter house, so I do not think it is necessary to confuse the Court or the jury by going into the physical conditions which 30  
are adjoining or adjacent to the Burrichter property, because those conditions are not being litigated at the present time.

Mr. Burling: No; I suppose, though, if they show on the plan, the whole thing may be explained, all the physical conditions.

Mr. Stackhouse: I thought probably it might give rise to some confusion, that is all; we are talking about something that is not in the case.

The Court: Then it is not in controversy, of course, no controversy about that. All right; go ahead.

10 The Witness: At the back of the brick house and the beginning of the frame house, the brick wall extends over the line, that is, the old brick wall extends over the line one and three-quarter inches.

Mr. Stackhouse: Just a moment; I want to say here that I am not admitting this testimony without objection; I would like to have an objection entered on the record.

The Court: Very well, you may.

20

Mr. Stackhouse: I understand, then, the testimony is admitted and your Honor will permit me an exception?

The Court: Yes.

The Witness: From that point through to Broadway is the center line of the party wall.

By Mr. Burling:

30

Q. Well, did you carry that point back to the alley?

A. I began to the alley, and went through to Broadway.

Q. Did you come up the party wall then back to the alley? Now, you carry that line from back to the alley —

By the Court:

Q. You started at the alley and came to Broadway, is that it?

A. Yes, sir.

By Mr. Burling:

Q. Now, indicate the extended party wall through the alley. 10

A. Well, it would be the same thing.

Q. No, indicate it on the map.

A. The center line of the party wall is indicated.

Q. Is it a dark line?

A. A black line.

Q. What does the red line indicate?

A. The red line indicates the brick wall.

Cross-examination.

20

By Mr. Stackhouse:

Q. Now, Mr. Makin, when was this survey made?

A. The survey itself was made April 3, 1924.

Q. April 3, 1924?

A. Yes.

Q. Now, this is indicated as February, 1925—  
what does that mean?

A. Well, the survey was checked over and found to be in the same condition, except that we had 30  
failed to locate the foundation in the first survey.

Q. Now, when you say the survey was checked over, for what purpose was it checked over?

A. To determine where the foundation was; we had left it off of the first survey.

Q. I see, and the survey that you refer to as the

first survey, was that also made for Mr. Wishnefsky?

A. Yes, sir.

Q. Or through Mr. Burling's office?

A. Yes.

Q. Have you produced that first survey here?

A. No, I have not.

Q. Have you it here?

A. No, I have not.

10 Q. Is it available?

A. Why, I suppose it is, yes.

Q. How long would it take you to get it?

A. Why, about twenty minutes, I suppose.

Q. It is a mere matter of going up to 5th and Cooper and back again; it wouldn't take you that long, would it, to get it?

A. I have to look through the files to get it.

20 Q. Now, when you went back there to check up on the foundation, what did you do in order to locate the foundation, that is, physically on the ground?

A. Why, before, we had gone out there the foundation had been dug up and exposed, and they had been covered over again, and there was about two or three inches of dirt on top of the foundation, and we took a rod and pushed down in the ground along the edge of them, followed the edge of them along.

Q. You did not excavate?

A. No, we did not excavate.

30 Q. In other words, you did not turn up the foundation at all; you simply went around, poking down there with a stick to find out where it was?

A. A steel rod.

Q. Well, we will say a steel stick then, if you like that better.

A. You can call it a steel stick.

Q. Who was there at the time that you made the checking up?

A. Why, the two fellows that I have working with me.

Q. Wasn't Miss Burrichter there?

A. Possibly she was out there; I can't say for sure. I was talking to her while I was there, and I don't exactly remember whether she was in the yard or not; she might have been.

Q. As a matter of fact, she was there while you 10 were working around there?

A. She might be.

Q. How did you get in the yard—did you ask her permission to get in there?

A. I asked her permission.

Q. And she gave you permission to go in, didn't she?

A. Yes.

Q. And she was there, as a matter of fact, during part of the time that you and your men were pok- 20 ing around in the ground with this steel rod?

A. She was at home, yes.

Q. So that the method that you used to ascertain these conditions which appear upon this map was not to uncover the foundation, but simply to go around pushing around with this steel rod in the ground—that is right, isn't it?

A. Not exactly pushing, I wouldn't call it.

Q. Well, you poked around until you found you struck — 30

A. We poked around in the ground.

Q. And you assumed that when you struck an obstruction that that was part of the foundation—that is right, isn't it?

A. Yes, that is right.

Q. Well, if there had been a brick there from

some other source, you might have thought that was part of the foundation?

A. Well, you couldn't use a steel rod to the edge of the brick; if you did it would slide off, for the length of the brick is at most eight inches, whereas if you ran — Say, this was covered up with dirt, and you ran right along here, you would still continue along the edge of it; it wouldn't slide off of it.

Q. And by that means of poking a steel rod down  
10 in the ground you could ascertain the difference between the concrete foundation and a brick which might be there?

A. Certainly.

Q. Well, suppose there were a number of bricks there?

A. Well, they would have to be laid in some kind of straight formation.

Q. Now, you mean, Mr. Makin, to tell the jury  
20 by this very crude method of approaching the subject that you were able to find out where that foundation was?

A. I think so, yes.

Q. You think so?

A. Yes.

Q. Now, Mr. Makin, could you recognize another survey which was made by Remington & Vosbury?

A. I certainly would, if I made it.

Q. The witness is shown what purports to be a  
30 plan marked "Survey and plan of property in the City of Camden, April, 1924, Remington & Vosbury, Civil Engineers, Camden, N. J.," with an apparent delineation thereon of premises 711 Broadway, and is asked if he recognizes that as a plan made by Remington & Vosbury?

A. I do.

Q. This plan, Mr. Makin, shows an encroachment

of the face of the building there at that end of five and one-eighth inches, doesn't it?

A. It does, yes.

Q. Down by the alley?

A. That is right.

Q. Now, then, when you poked around in the ground with this steel rod down there by the alley, did you find such a condition as this, that the wall, the brick wall, extended over the foundation to the north for a distance of around six inches without  
10 any support under it except the ground itself?

A. Where is that, on the end at the alley?

Q. Yes.

A. I can't say that I did.

Q. You can't say that you did?

A. No.

Q. And it would be a very unusual thing, wouldn't it, to build a brick wall of that kind without any foundation under it?

A. Why, I should think so, yes. 20

Q. I would think so also.

Mr. Stackhouse: Now, may it please the Court, the witness has made reference to another survey which was made by Remington & Vosbury for the purpose of checking up—or rather, this survey was made for the purpose of checking up on that. I would like to have that produced if I could. I did not know that there was any such thing in existence up to this time. 30

The Court: Well, you may suspend the cross-examination.

Mr. Burling: Perhaps that is the survey you have right there, Mr. Stackhouse; I think, if I am not mistaken, I loaned that to you.

Q. This is dated 1924; now, is that the survey to which you made reference?

A. Both plans were made up at the same time, and it shows that line exactly the same as it is on there.

Mr. Stackhouse: If you say that that shows the line the same as it is on there, I will waive the production of the other survey.

10 Mr. Burling: If I understand, there was only one other survey made; we furnished you that before this second checking was made. There is no question I directed this second checking to be made by the engineer.

Mr. Stackhouse: No, that is not apparently the case. You had the original survey — The Court will pardon the colloquy between counsel?

20 The Court: Yes.

Mr. Stackhouse: By Remington & Vosbury, when I don't know, but this survey was made for the purpose of checking that up.

Mr. Burling: That is right. (After argument.) I am perfectly willing to have submitted here whatever Remington & Vosbury otherwise made.

30 The Court: Well, suppose we suspend for the present the cross-examination of the witness and let him produce any survey or data that is in his possession or that of Remington & Vosbury which he made. You may do that now.

Mr. Burling: Also, Mr. Makin, make that check that the Court wants and give us that figure with definiteness; do that right away.

CATHARINE M. BURRICHTER, recalled.

By Mr. Burling:

Q. Miss Burrichter, you live in premises No. 711 Broadway, don't you?

A. Yes, sir.

Q. And how long did you live there?

A. Since February 1, 1902.

Q. You remember the Fields, don't you?

10

A. Yes, sir.

Q. They were your neighbors?

A. Yes.

Q. Miss Clara Fields?

A. Yes.

Q. And her father?

A. Yes.

Q. And they lived there in the adjoining property, No. 713, didn't they?

20

A. Yes, sir.

Q. Who lived there prior to the Fields?

A. Saphores.

Q. You mean Mr. Daniel W. Saphore and wife?

A. Yes.

Q. You knew them both?

A. Yes.

Q. How long did they live there?

A. That I couldn't say.

Q. Well, you lived there before they moved in, didn't you?

30

A. About the same time.

Q. About the same time?

A. Yes.

Q. So they were there practically as long as you were?

A. About.

Q. And lived there and made that their home?

A. Well, for a few years.

Q. Well, they made it for a few years until they sold it to Fields?

A. Yes.

Q. Then Fields moved in and lived there from that time on?

A. Well, Fields lived there a short while.

Q. Now, at the time you moved into the property, was there a fence between your property and No. 711?

A. There was.

Q. Did that fence continue up until the time of the construction of the building that is alleged in this case?

A. That I couldn't say.

Q. Why do you mean you can't say?

A. Well, I was away two years.

Q. During the time that you were there, the fence was there, wasn't it?

A. Oh, yes.

Q. There was no change in the fence while you were there?

A. Not while I was there.

Q. No change either in the character or location of the fence?

Mr. Stackhouse: Now, just a moment; this is Mr. Burling's witness, and he is asking very leading questions. I am willing to be liberal enough, but this is not cross-examination; it is direct.

The Court: No, I suppose not.

Q. Well, was there any change in the location of the fence while you were there?

A. I couldn't say.

Q. I mean, while you were there, was there any change in the location?

A. I don't understand you.

Q. While you were there, living in the property, was there any change made to the fence?

A. Not that I know of.

Q. When you came back after that hiatus of two years had elapsed, a fence of the same nature was still there, wasn't it? It was a wooden fence, was it?

10

A. Yes.

Q. And it still remained there on the property, is that true?

A. Yes.

Q. And remained there up to the time of the construction —

Mr. Stackhouse: I object to that as leading.

Q. Did it remain there until the time of the construction of the wall and the instigation of the work in this case?

20

Mr. Stackhouse: It seems to me that that question is equally leading.

The Court: Well, I suppose she may be asked if she knows about the location about it; I suppose that is what Mr. Burling wants.

Mr. Burling: I will not press it any further, sir.

30

Cross-examination.

By Mr. Stackhouse:

Q. Now, Miss Burrichter, you have been asked with reference to change in the location of the fence; at any time during the time that you were living

in No. 711 Broadway, and by that, I mean up to the present, was there any change made in the location of the fence by anybody?

A. You mean repairs?

Q. No, I am speaking by any one, by Mr. Wishnefsky or any one else?

The Court: No, the witness inquires whether you mean repairs?

10

Mr. Stackhouse: No, I don't mean repairs; I mean a change in the location of the fence, moving it either north or moving it south.

A. I don't get you.

Q. I will put it a little different. As a matter of fact, Miss Burrichter, at the time that Mr. Wishnefsky was building his building, or rather, making alterations in the rear there by the erection of a  
20 new building, didn't he move that fence?

Mr. Burling: I object to that, because I confined my direct examination up to the time of the commencement of any work. Now, this is the plaintiff in this case, and according to the rules I suppose I would be bound by her testimony. I think it is only fair that I be properly protected in that respect; he can call her as his own witness in rebuttal.

30 The Court: I suppose the cross-examination should be limited to the scope of the direct examination.

Mr. Stackhouse: As I understand it, that rule does not apply to a party to a suit.

The Court: It does not apply to the cross-exami-

nation of an adverse party, but after all, this is your client; you cannot assume to prove your case by cross-examination of your client, who was called to prove and was examined about only a part of the matters involved in the case.

Mr. Stackhouse: She was asked, if I remember rightly, whether there was any change in the location of the fence.

10

The Court: Up to the time that the work was begun by the defendant on the extension to the building; I think it was limited to that, so in that situation I think on cross-examination you are not entitled to prove your case with this witness.

Mr. Burling: With the production of the information that has been promised here, the defendant will rest his case.

20

Mr. Stackhouse: Now, will the Court hear a motion at side-bar?

The Court: Yes.

Mr. Stackhouse: Wait a minute, I will defer that.

Mr. Burling: I would like to have an opportunity of offering this in evidence; I have not formally done that.

30

Mr. Stackhouse: I won't make that motion at this time. I understand that you rest, Mr. Burling?

Mr. Burling: Yes.

DEFENDANT RESTS.

## PLAINTIFF'S REBUTTAL.

CATHARINE M. BURRICHTER, recalled.

By Mr. Stackhouse:

Q. Miss Burrichter, you remember when Mr. Wishnefsky commenced the construction of his  
10 building in the rear?

A. I do.

Q. And what was the first knowledge that you had about the building being constructed?

A. Well, when I got up in the morning I heard them knocking at the fence, and I went out to them, and they told me they were going to take the fence down, as they were going to build, and I objected to it.

Q. And in what way did you object to it?

20 A. Well, I objected to taking the fence down because I had a valuable dog there that I did not want to get out, for one thing.

Q. Who did you object to?

A. The contractor.

Q. Is that the gentleman who was on the stand here yesterday?

A. Yes.

Q. And in what way did you signify your objection to the work?

30 A. I put my hands on the fence.

Q. And what did he say to you, if anything?

Mr. Burling: I do not see that that is material, may it please your Honor; I haven't any objection, but it seems to me the whole issue was whether or not the fence was down, and whether she objected.

The Court: I think it may be answered; answer the question.

(Question repeated.)

A. He said that if I did not take my hands off the fence, he would give my hands what he was going to give the fence.

Q. Did you take your hands off the fence?

A. I did; about three boards came down, and I 10 had to step back.

Q. Were you there at any time after that?

A. I was there every day.

Q. And what was done with the fence after this incident that you have related?

A. Well, there were two colored men there; they dug holes around the posts and pushed the fence in; took the back post entirely out, cut it off.

Q. When you say they pushed the fence in, what do you mean by that? 20

A. Pushed it in toward my side.

Q. Further north?

A. Yes, sir.

Q. Now, how far can you say that the fence was pushed?

A. Fully eighteen inches at the rear.

Q. And how far at your house line?

A. Well, I should imagine probably nine inches. I don't mean exactly up to the rear of the kitchen; it ran very close there. 30

Q. Well, was the fence taken down entirely at that time?

A. At the time of the building?

Q. Yes.

A. No.

Q. Was there any one else there at the time that this happened, the fence being moved?

A. Yes, sir.

Q. Who was there?

A. My neighbor, Mr. William Grace.

Q. And any one else?

A. No one else there except the working men.

Q. The fence is not there now, as I understand it?

A. No, sir.

Q. When was the fence eventually taken down?

A. Well, after the wall was part way up, above  
10 the fence line, quite some time.

Q. Now, what was the idea in leaving the fence up at all if they were building there?

A. I don't get you.

Q. What purpose was there in leaving the fence there if they were building a wall?

A. Well, I don't know.

Q. Was the fence left there at your suggestion or any one who was acting for you?

A. Well, yes, I insisted upon something there to  
20 protect my dog from going astray in the neighborhood.

Q. Was Mr. Wishnefsky there at any time during the time that this was going on?

A. I didn't see him.

Q. Well, if he had been there, would you have seen him?

A. I surely would.

Q. Is it a fact, Miss Burrichter, that Mr. Wishnefsky was there on the job practically all of the  
30 time that the work was going on?

A. I didn't see him.

Q. Well, would you have seen him had he been there?

A. I would.

Cross-examination.

By Mr. Burling:

Q. Miss Burrichter, were they on your land to move the fence?

A. Oh, their own.

Q. Did they come over on your land to move the fence?

A. No, they done it from their side.

10

Q. Which side were the fence posts on?

A. Both sides.

Q. Fence posts on both sides?

A. Yes.

Q. Well, did you personally physically see them lift the fence and move it?

A. I did.

Q. And how?

A. By digging around the posts, pushing the posts in, taking the center post that was on their side; they ripped that off the fence.

20

Q. How could they dig out on your side?

A. They did not dig on my side; they dug from, their own side.

Q. If they did not dig on your side, how could they push the fence posts back?

A. Easy.

Q. How?

A. They dug in around my land from underneath the fence.

30

Q. Now, do you mean that they dug underneath the fence, is that it?

A. Why, yes, they couldn't dig through it; they did not take the bottom boards off.

Q. You mean they dug a tunnel underneath the fence made an excavation around back of the post so it could be pushed back?

A. So it could be pushed back, digging up my plants with it.

Q. How could they dig up your plants when they weren't on your side at all?

A. From underneath.

Q. Did they take the dirt entirely out from underneath?

A. You could not very well dig around there underneath a fence without the plants partly falling  
10 through.

Q. You mean to say that they took earth off of your land?

A. I do, and threw it under this way.

Q. How do you mean, pulled it down on to their own property?

A. You mean the dirt?

Q. Yes.

A. Well, some of it, yes; it went both ways.

Q. They made a hole on your side by removing  
20 the dirt?

A. No, they didn't make no hole — Yes, sure.

Q. There was a hole left on your side of the property by digging underneath the fence, is that it?

A. They pushed it back, yes.

Q. Was it all pushed back together?

A. No.

Q. How many feet of fence are there there?

A. I couldn't say.

Q. Have you any idea of the distance from the  
30 shed to the back of the alley?

A. I wouldn't like to say.

Q. You haven't any idea of that?

A. Well, maybe forty-five feet; I am not very good at that.

Q. How was it done—was it all done at once?

A. It was done in one day.

Q. And how many people were working on moving the fence?

A. The contractor and a couple of colored men.

Q. Three men altogether?

A. Yes.

Q. And they moved the whole fence at once?

A. And I wouldn't say there was not another one there, but I do know there were two.

Q. And they moved the whole fence at once?

A. Well, I don't know what you mean by "at 10 once."

Q. You say the whole line of the fence was changed?

A. It was; they slanted it from my house to the back alley.

Q. Well, the fence was slanted, you mean?

A. Yes.

Q. But the base of it was not changed?

A. What do you mean by "base"?

Q. I want to know what you mean by the slant- 20  
ing of the fence—inclined—is that what you mean, running toward your property?

A. Was the fence leaning?

Q. Yes,

A. Yes, it was.

Q. Then the position of the fence was not changed, but an incline of the fence was made, is that it?

A. Yes, the fence was pushed in.

Q. I don't just understand what you mean. 30

A. Up here is my house and that post was taken away; then there was another post here in the center; that post was taken away. Then there was posts in between on my side, and they dug around them, see, clear in on my land, and pushed them in further, they dug in beyond the posts.

Q. And moved the fence line?

A. Yes.

By the Court:

Q. Moved the posts?

A. Well, the posts went over with the fence; the posts were fastened to the fence.

By Mr. Burling:

10 Q. I can't understand how he could do that when it was a continuous fence; it was one solid fence from the alley to the building. They did not cut it and sever it into sections, did they?

A. Well, it was easy to do.

Q. There was not a severing of the fence in sections?

A. Well, yes, the fence was joined in the center.

Q. But they did not cut them and move a section back and then go up and move another section back?

20 A. No, but they cut the posts off, the posts in the center.

Q. How do you mean, by cutting it off?

The Court: At the top of the ground?

The Witness: Yes, at the top of the ground.

Q. Saw them off, do you mean?

A. Yes.

Q. Did you see them saw it off?

30 A. I certainly did.

Q. Who did you see saw it off?

A. The contractor.

Q. The gentleman who was here yesterday?

A. Yes; the colored men did the digging.

Q. He actually sawed the posts off?

A. Yes.

Q. And then pushed the whole fence, you say, back?

A. Yes.

Q. Do you know how far back it was pushed?

A. I measured myself eighteen inches.

Q. Where did you measure it?

A. With a yard stick.

Q. When?

A. Right away when he was working at it, as soon as he got it back. 10

Q. Did you do anything at that time when they were moving the fence on what you thought was your land?

A. Did I do anything?

Q. Yes.

A. I objected; that was all.

Q. Well, did you take any legal action to stop them?

Mr. Stackhouse: I object to that as immaterial and irrelevant. 20

The Court: The objection is sustained; I do not think it is material whether she did or not.

Mr. Burling: It seems to me, may it please your Honor, we ought to try to get the real story in the situation. I want to know what her conduct was in that situation.

The Court: She said she objected; now, I suppose her further objection by legal proceedings is evidenced by this suit. I do not think it is material whether or not she took any legal proceedings at that time. (After further argument.) The objection will be sustained. 30

Q. How far did you pursue your objection? Did you complain to Mr. Wishnefsky when you saw them moving the fence? Whom did you complain to?

A. The contractor.

Q. Did you complain to any one else?

A. Yes, Mr. Wishnefsky.

Q. The same day?

A. Yes, sir.

Q. Where did you make that complaint?

10 A. In his store, 707 Broadway.

Q. You went to the store and made complaint?

A. Yes.

Q. That same day?

A. I wanted him to come out there.

Q. What other objection did you make?

A. Well, there was nothing to do after the fence was moved back but let them go on. I had a mother who was in a dying condition at the time.

20 By Mr. Stackhouse:

Q. Now, Miss Burrichter, you say you went into Mr. Wishnefsky's store and made a complaint to him about the condition; what did he say to you in reply to your complaint?

A. I asked him if he would come out there, that they had moved the fence over and was taking my land. He said he had nothing to do with it, he left it absolutely to his contractor, therefore he refused  
30 to come out, and I went on home.

Q. Is that the only conversation with him with reference to the fence?

A. Yes.

CLARENCE BURRICHTER, SWORN.

By Mr. Stackhouse:

Q. Mr. Burrichter, you are a brother of Miss Burrichter who was just on the stand?

A. Yes, sir.

Q. Do you remember an incident which involved the construction of this wall in the rear of 713 10 Broadway?

A. Yes, sir.

Q. Just tell the Court and jury if you will, just what happened within your own immediate knowledge with reference to the wall, and what, if anything, was done with the fence at that time?

A. Mr. Grace telephoned over that they were moving the fence.

Mr. Burling: I object to that.

20

The Court: Yes.

The Witness: I thought he asked me that question.

Q. Just tell what you saw actually on the ground when you went over.

A. You mean concerning —

Q. In consequence of the telephone conversation, 30 you went over to the ground—is that what we are to understand?

A. Yes.

Q. All right, when you got over there, what did you find going on?

A. I found my sister was objecting to this man taking down the fence.

Q. Yes; what happened then?

A. Then the contractor suggested that they dig in the trench anyhow to his men, and they started digging the trench.

Q. Now, did you see anything happen to the fence at that time?

A. No, sir.

Q. Was anything done with the fence?

A. When they dug the trench, they moved the  
10 fence; that is, they would dig up to a post hole, then take a trowel and dig around it, and then push the fence in. The fence was flimsy, and they could push it in anywhere from a foot or two feet.

Q. How far did they push the fence in?

A. I should say in the center about a foot. As they went on, they increased it; at the back end they possibly cut off about eighteen inches. There were two posts at the back of that fence that was made from floor joist; they were about ten inches wide.  
20 They cut off just outside of those two posts, and they removed that section of the fence; then several men lifted the fence over, nailed two sections together. They then completed the trench and poured in the concrete.

Q. Do you know where these fence posts were located—are they all on one side or all on the other?

A. I think there were several on each side and of various sizes; some one inch wide, some three or four inches. On our side they were straight four by  
30 fours.

Q. At the time that you got there in response to this telephone message, had the fence been moved at all then?

A. No, it had not been moved.

Q. Well, how is it that the fence was not taken down entirely?

A. We had a valuable dog, and we did not want

him running loose; that was the reason we objected to the fence being removed.

Q. Well, did you make any request with reference to the fence being —

A. Why, my sister had done that before I got there.

Q. Who else was there, if any one, beside your sister?

A. Mr. Grace.

Q. Mr. Grace?

A. Yes, sir.

10

Cross-examination.

By Mr. Burling:

Q. How would the removal of the fence affect the dog, Mr. Burrichter? Wouldn't the new building with a high wall be still better protection?

A. Yes, but during the course of the building they 20 would leave it open three or four weeks.

Q. Well, the fence was not open at any point, as I understand.

A. It was open at the back section, sir, where they cut the post out.

Q. You mean it was actually severed?

A. Oh, yes.

Q. And how much was it severed?

A. About eighteen inches, I should say, eighteen inches.

30

Q. Sawed down?

A. Sawed right down and the section taken off.

Q. How high was the fence?

A. I guess about five feet.

Q. How many feet in the alley was that?

A. It is right at the corner of the 713 property, that is, the south side, at the alley.

Q. That is, right at the alley junction, you mean?

A. Yes. No, no, between the two properties; that is, they sawed on 711.

Q. Well, was there any sawing at the junction between — There is a fence in the rear, isn't there, running along the alley?

A. Yes.

Q. What was done at the junction of the fence there?

10 A. As I told you, they took that section out and moved the fence over.

Q. Took the whole section out?

A. Took the section out, yes.

Q. And sawed straight down through the wood?

A. Yes.

Q. And moved it in sections, then?

A. Oh, no, no; they moved the whole fence line right over.

20 Q. I know, but if they sawed it down, they must have created a section, didn't they, or sector?

A. As I told you, the two posts were nailed to the back fence, the alley, and they sawed down — I can explain it to you this way: This is the back fence; they sawed down through the fence to the ground; they tore this section out. Now, this is the party wall between the two. They then moved that section of the fence over and nailed it together.

Q. Now, was that course pursued all along?

30 A. You mean the same width? Oh, the fence was irregular.

Q. Was that same course of conduct pursued, moving it as they went along?

A. Oh, yes, they moved as they went along the fence.

Q. Carried out the same program as they went along?

A. Yes.

Q. And severed each section, and moved it back?

A. No, they cut but one place at the alley.

Q. Well, how were the other sections moved?

A. Well, the other section, the far end, that is, the east end, stood as it was as far as I know. Of course, I got there after that had occurred.

Q. How long were you there as an actual fact while the work was being done?

A. A whole day; I stayed there the rest of the day; I should say it was 9 o'clock in the morning, 10 and I stayed there until they quit that night. I visited there ten times a day, sir; I work half a square from there, and I saw the operation from beginning to end, until the building got so high I could no longer see it. I work right across the street.

Q. The fence was still standing, wasn't it?

A. Yes, in a sense it was still standing. It was a very irregular fence; it began to fall, and after they got four or five feet out, it began to fall to pieces. 20

Q. You don't know when they did the physical work on the foundation that was back of the fence?

A. I saw they had a line up after they moved the fence over.

Q. Yes, but how far did you see where they put those lines, where they constructed the foundation for the building? You did not stay there during that operation?

A. No, but I passed there a great many times; I stayed there a whole day, yes. 30

Q. Did they do any pouring of concrete foundation while you were there that day?

A. Yes, I saw them pour concrete several days.

Q. Well, that day, I said?

A. No, I don't think they poured concrete the first day; they dug the trench that day.

Q. Did you go there the next morning?

A. Every day, yes.

Q. You were there the next morning when they started work?

A. Yes.

Q. What time did you go the next morning?

A. Why, I left there at half past eight.

Q. You left there at half past eight the next morning?

A. Yes.

10 Q. You were not there the next day?

A. Not all day, no.

Q. You do not know, as a matter of fact, where the exact location of the pouring of the concrete walls was, do you, the foundation?

A. No, not from measurement.

By Mr. Stackhouse:

20 Q. Now, Mr. Burrichter, you said that you saw them have a line there?

A. Yes.

Q. Do you mean by that a line, a cord?

A. After they moved this fence over they put up a line, yes, sir, a white line.

Q. What did that line consist of, a cord?

A. Yes, an ordinary cord.

Q. And where did the cord extend from and to where?

30 A. Why, somewhere in the front to a stake they had driven in the alley, about in the center of the alley.

Q. And was that done before or after the fence was moved over?

A. They put that line up after the fence was moved.

Q. Now, when they put the line up after the fence was moved, how close to the south line of the fence as moved did they put the line?

A. I should say there was a foot of space between the line and the fence; I should estimate that.

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WILLIAM GRACE, SWORN.

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By Mr. Stackhouse:

Q. Mr. Grace, where do you live, please?

A. Now?

Q. Yes.

A. I live 509 Pine.

Q. Did you live there in 1920?

A. No, sir.

Q. Where did you live then?

A. 709 Broadway.

20

Q. Have you known Miss Burrichter for some time?

A. Yes.

Q. Quite a long time?

A. Yes, sir.

Q. Now, do you remember the building of the back building there at 713 Broadway?

A. I do.

Q. Were you present at the time they started to build?

30

A. I was.

Q. Now, what was it that you saw there with reference to the building and with reference to the fence which formerly stood there?

A. Well, I saw them start to tear the fence down, and they had a valuable dog, so they moved it over far enough for the dog to get out, and I chased the

dog and got the dog, and then went to the telephone and telephoned for Chick Burrichter that they were tearing the fence down, and I also ran down and told Mr. Millhouse that kept that ice cream saloon that they were going to take the alley, and I thought they were going to close the alley off; he had a pushcart and he could not get in it. I also went down to her other brother that works down at Lew Allen's meat market and told him about it.

10 Q. Did you go back there after that?

A. I went back there, yes.

Q. What did you see happen there after you went back?

A. Well, Kattie went out there and put her hand on a post, and this guy here says, "If you don't get your hand off the post, I will give you what the post is going to get," and her brother was there then.

Q. Did she take her hand off the post then?

A. I guess she had better or she would have got  
20 hit, yes.

Q. Did you see anything done to the fence after that?

A. Well, I didn't see much done, because I had to go to work.

Q. Well, what happened during the time that you were there?

A. Well, they sawed off the fence post and moved  
30 it over; in the rear it was wide enough for the dog to get out. He was a pretty good sized dog; I don't know how far it was, eighteen or twenty inches, I guess, wide back there.

Q. How far over did they move the fence?

A. I can't just exactly state, but it was eighteen or twenty inches in the rear, and it was a frail fence, and it all came over.

Q. In the front did they move the fence there at any time you were there?

A. I guess they had to move some of it to get the foundation down there. Of course, I wasn't there all the time, because I had to go to work.

Q. How long were you there?

A. I was there for a couple of hours in the morning; I was there all morning because I didn't go to work until afternoon.

Q. How much of the fence did they move during the time you were there?

10

A. I guess they moved it all, altogether. They moved the back section first; I remember that.

Q. What means did they take to move the fence?

A. Well, they dug underneath and sawed the posts off on some of them; I seen them working around there. Of course, I had nothing to do with it, but I lived right next door to her for five years, and she had a very sick mother upstairs at that time, and of course, her mind was on her mother, I imagine, but they did move the fence, because if they didn't move the fence they could not have got the foundation there, I guess.

20

Cross-examination.

By Mr. Burling:

Q. That is a supposition on your part—you don't know where they put the foundation, do you? You did not see it placed?

A. No, I wasn't there at the time they placed it.

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HARRY BURRICHTER, SWORN.

By Mr. Stackhouse:

Q. Mr. Burrichter, you are also a brother of Miss Burrichter, who was on the stand a few minutes ago?

A. Yes.

Q. Do you remember this construction of the rear building there at 713 Broadway?

A. Some of it.

Q. What was your first knowledge of it?

A. Why, they sent Mr. Grace for me claiming that these people —

The Court: Don't tell what he said.

10

Q. Just confine yourself to what you saw when you went down there.

A. When I got there, why, this trench looked like they were trying to dig, you know, when I got there, but if my recollection serves me right, that was the first time—I was there several times; I don't know whether it was the first or the last; the main part I know is—the same as that was the fence, this was sawed. (Indicating) It was a beaded board fence, ran this way, north and south, and they had sawed right straight through like this. I said to the colored man, "What does that mean?" He says, "We have got to move that fence over." I said, "You have got no right to move that." He said, "Well, we can't get the foundation in without it." I said, "You might get in trouble over that." So he talked around a little while and went away. So my mother sent for me the next day, or maybe the day after, and I went back; at any rate, there had been a trench

20

30

dug, the same as this was the post here, they had dug from their side, and there was room enough to push that post over. When I went back, this part of the fence was gone, that part that had been sawed, that had been pushed over and tacked to the other part.

Q. Who was there at the time that you were there?

A. Well, there were several there; there was a

couple of colored men, and I guess it was the contractor, but I didn't talk a thing to them, only asked that one man that time.

Q. How far was the fence moved over that you saw to the north?

A. Well, I should say around a foot and a half.

Q. At what point?

A. That would be at the southeast corner of the fence.

10

Q. You mean with reference to the alley?

A. Yes, the alley. I don't know how far it was in at the house, but my mother told me they had started in —

The Court: Don't tell what she said.

Cross-examination.

By Mr. Burling:

20

Q. You did not see the actual construction of the

A. No, sir.

EARL THOMSON, recalled.

By Mr. Stackhouse:

Q. Mr. Thomson, when you made this survey a plan of which has already been produced and I am now holding it, what method did you use to ascertain where the foundation was located?

30

A. We projected the line of the party wall through the yard and measured from that line.

Q. I know, but what did you do on the ground? Did you use a steel rod, poking it down?

A. Oh, no, the foundations were exposed for their whole depth and length; they were dug down and cleaned off, dug down possibly a foot or eighteen inches outside of them and the body of the foundations was all exposed.

Q. And how deep were the foundations?

A. I want to correct my testimony yesterday; you asked me yesterday and I said four feet, about. I find—I did not refer to my notes—the foundations  
10 were thirty-one inches, two feet seven, not four feet.

Q. Now, Mr. Thomson, you have been a surveyor, I believe, a civil engineer for twenty-four years?

A. Thirty-seven.

Q. Thirty-seven years—pardon me. Is the method of sounding with a steel rod considered in the engineering profession an accurate way of measuring a foundation which is underground and not exposed?

A. I should not like to use that method, particularly  
20 in a litigated case.

Q. Well, would you consider it accurate?

A. It is more or less liable to inaccuracy.

Q. Would you say it was rather more liable or less liable to inaccuracy?

A. Well, you are always in doubt as to what you strike; you cannot be sure unless it is exposed to your view.

Q. Do you or do you not consider the uncovering of the foundation such as was used when you made  
30 the survey the best method?

A. Why, yes, that is absolutely accurate, because you see everything right there, the whole thing in view.

Cross-examination.

By Mr. Burling:

Q. That opportunity was afforded you by the plaintiff in this case—it was on her own land, wasn't it?

A. Yes.

Q. You had to have access to make such an examination? 10

A. Yes.

Q. And I understood you to say yesterday that your observation showed them to be walls right down?

A. Yes.

Q. Concrete walls?

A. Yes.

Q. And it was a poured concrete proposition?

A. A poured concrete proposition. 20

Mr. Stackhouse: May I recall Miss Burrichter for a question or two?

The Court: Yes.

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CATHARINE M. BURRICHTER, recalled.

By Mr. Stackhouse:

30

Q. Miss Burrichter, you are shown a plan marked "Survey and plan of property in the City of Camden, dated April 24, 1924, Remington & Vosbury, Civil Engineers," and I ask if that was a plan which was delivered to you by Remington & Vosbury pursuant to your employment of them to have a survey made?

A. Yes.

Q. Did you pay them for the plan?

A. Yes.

Q. Now, at the time Mr. Makin was down there to make this last survey on the foundations, did you or did you not afford him an opportunity to dig down in order to find out —

A. I suggested it.

Q. Did he follow the suggestion?

10 A. I suggested to him he open a trench there as we had before.

No cross-examination.

Mr. Stackhouse: I am not quite clear, if it please the Court, whether I offered this plan in evidence in my original case or not; I should have done so.

20 The Court: I was under the impression you had.

Mr. Stackhouse: If I have not, I would like to offer it.

The Court: Very well, it will be received.

Mr. Stackhouse: And I would also like to offer this plan of Remington & Vosbury's.

The Court: It may be marked.

30 (The plans in question are marked respectively Exhibits P-5 and P-6.)

Mr. Burling: If it pleases your Honor, in offering that survey, you will notice it is predicated on a right angle of Broadway, whereas the other surveys are predicated on using the partition wall ex-

tended. I ought to have the benefit of having Remington & Vosbury explain that in offering that survey.

The Court: Very well, you may; the witness was to be recalled for some further explanation anyhow, I understood.

PLAINTIFF RESTS.

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DEFENDANT'S REBUTTAL

WILLIAM S. MAKIN, recalled.

By Mr. Burling:

Q. Can you give me that distance?

A. Yes, four feet and eighteen hundredths.

20

Mr. Burling: I would like to put that in, four feet, eighteen hundredths.

The Court: That is four feet and a little over two inches?

The Witness: Yes.

Mr. Burling: I think you were on cross-examination, Mr. Makin, when the Judge ordered a suspension of the cross-examination.

30

The Court: You asked for the production of some other date.

The Witness: Since I looked at the records, I find that I made a mistake in a remark that I made before about having made another plan of that same thing before without foundations on it. I made several plans in there, three or four of them, and I have two other plans here, one is a copy of that or corresponds to it, and the other one is the one that I mentioned adjoining that, which agrees with it.

10 Cross-examination.

By Mr. Stackhouse:

Q. Is this the map —

A. Well, it is a blueprint taken from it.

Q. A blueprint of that plan?

A. I think it is.

20 By the Court:

Q. When you say "that plan" which plan do you refer to?

Mr. Stackhouse: He has indicated the plan which has been marked Exhibit P-6.

The Court: The Burrichter plan made by Remington & Vosbury?

30 Mr. Stackhouse: Yes.

The Witness: Yes, that is a blueprint taken from that tracing.

Q. Now, this plan is also dated April, 1924.

A. That is right.

Q. For whom was that plan made?

A. Mr. Wishnefsky.

Q. And both these plans were made in April, 1924?

A. They were both made at the same time.

By Mr. Burling:

Q. They were predicated, weren't they, on a line

Mr. Stackhouse: Now, just a moment; I object to that as leading. Let the witness testify as to what they were predicated on. 10

Q. Were they predicated on a line running at right angles to the line of Broadway?

A. Yes.

Q. And the plan as referred to here, as I understand, is a continuation of the center of the party wall extended? 20

Mr. Stackhouse: I object to that.

A. Yes.

The Court: It may stand.

Mr. Stackhouse: Mr. Burling, you are a very skillful witness.

Mr. Burling: I object to that statement; I think we hashed it over so much, I just wanted to bring that out. 30

The Court: Yes, make your objection to the Court and I will deal with it.

ABRAHAM KLEINER, recalled.

By Mr. Burling:

Q. Mr. Kleiner, in constructing the foundation of this wall with respect to the location as to where the fence was when you originally went upon the  
10 job, where did you put it?

A. Put it alongside the fence.

Mr. Stackhouse: I think this has already been gone into in the original case.

The Court: It was, it was done, but whether as fully as counsel now desires to in view of the rebuttal, I don't know.

20 Mr. Burling: I don't want to prolong the trial; perhaps it has been sufficiently enough to bring out the facts here. After I had recalled him, I refreshed my memory and recall he testified to this yesterday.

The Court: He did testify to that, although there might be some new matter.

Q. Did you make any threats to Miss Burrichter in the removal?

30

The Court: I think he denied that yesterday.

Mr. Burling: All right, that is all.

No cross-examination.

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FRANK WISHNEFSKY, recalled.

By Mr. Burling:

Q. Mr. Wishnefsky, were your instructions to your contractor to build this foundation and wall on the southerly side of the fence line as it originally existed? 10

Mr. Stackhouse: I object to that.

The Court: I don't think what his instructions were is material. It is a question what the physical conditions are. He is bound, I suppose, by what his contractor does.

No cross-examination. 20

BOTH SIDES REST.

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Mr. Stackhouse: May it please the Court, with respect to the land which is admittedly occupied by the defendant under the amended answer, the only attempt to justify the invasion of the plaintiff's rights in that respect is by means of title acquired by what is commonly termed adverse possession. Now, I respectfully submit that the defendant has failed to carry the burden of proof requisite to sustain that title. The law is laid down in this State in the case of *Foulke v. Bond*, 41 New Jersey Law, 527, is that in order to acquire title by adverse possession the 30

possession must be actual and exclusive, adverse and hostile, visible and notorious, continued and uninterrupted. Notoriety of the adverse claim under which possession is held is a necessary constituent of the title by adverse possession; therefore the occupation or possession must be of that nature that the real owner is presumed to have known that there was a possession adverse to his title under which it

10 relying on title derived from such source must prove possession in himself or those under whom he claims of such character as is calculated to inform the true owner of the nature and purpose of the possession to which the lands are subjected.

The Court: (After argument.) I imagine there is no dispute as to what the law is. Mr. Burling, you have not shown twenty years uninterrupted possession of the premises you are claiming. The

20 nearest you came to it was by Miss Burrichter. Evidently recognizing that there might be some hiatus, the effort was to get out of Miss Burrichter testimony that for twenty years or more, that is, from 1902, when she went into the property, until the present time, or until this building was constructed, at any rate, there had been no change; but her testimony did not go that far. She said there was a lapse of two years when the fence line may have been moved; that she was not acquainted with the

30 physical conditions for two years, so it does not show twenty years of uninterrupted possession; assuming that there is a dispute as to whether or not the fence line was moved, leaving that out, taking only the question of adverse possession, I think you have not established that the fence was where it was at the time that the building by the defendant was constructed. In that situation it seems to me that Mr. Stackhouse's motion must be granted.

Mr. Burling: Will your Honor grant me the right to open this case and call the brothers in this matter? I want to protect my client the very best I can. I do not know what they are going to say, but it seems to me —

The Court: Very well, I will afford you that opportunity.

Mr. Stackhouse: Well, of course, that is a matter 10  
for the discretion of the Court over which I have no control.

The Court: I can imagine that he might be under some difficulty on that point unless the witnesses he is going to call had continued an interrupted knowledge of the physical conditions there, but I will grant the opportunity if he wants it.

Mr. Stackhouse: I do not know that it will do 20  
me any good to take an exception to that, but I will take one any way for what it is worth.

(Exception noted for the plaintiff.)

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THE CASE FOR THE DEFENDANT.

CLARENCE BURRICHTER, recalled.

30

By Mr. Burling:

Q. You are the son of Catharine M. Burrichter,  
Mr. Burrichter?

A. Yes, sir.

Q. And you lived at premises No. 711 Broadway,  
did you?

A. Yes, sir.

Q. And what period of time did you live there?

A. About twenty-one years—nineteen years, I don't know, approximately twenty years, as near as I can remember.

Q. Continuously?

A. No, sir.

Q. And what period of that time were you away?

A. About three years.

10 Q. When were those three years?

A I think about 1910, two years; 1915, several months, something like that, off and on.

Q. The period of time that you were away, was your sister there at home with your mother?

A. Well, as far as I know she may have been there; I don't know.

Q. I thought you just told me that she was.

A. Just told you what?

20 Q. That your sister was at home at the time you were away?

A. Yes, I imagine she was, as far as I know.

The Court: I don't suppose while he was away he knew where she was. The witness ought to be asked what he knows, not what he surmises.

Mr. Burling: Well, I will call the sister then to establish it. I only want the truth in this case, and that is all I want, if the Court please.

30 Mr. Stackhouse: You are cross-examining your own witness.

Q. During the time that you were there, was there a fence that you described in this matter?

A. Yes, sir.

Q. And that remained in the same status during that time?

Mr. Stackhouse: I object to that as leading.

The Court: I suppose it is leading.

Q. During the time that you were at home there was a fence there, was there, that you described?

A. Yes.

Q. And its position during the time that you were there, did that fence remain in the same location?

A. As far as I know.

Q. Well, you saw it daily, didn't you?

A. Yes, I saw it daily.

Q. And you saw no one make any changes to it?

10

Mr. Stackhouse: I object to that as leading and cross-examination.

Q. Did you see any one make any changes to it?

A. I don't recall it.

Q. Sir?

A. I don't recall seeing any one.

Q. And you were there every day?

20

Mr. Stackhouse: I object to that as leading.

The Court: Yes, you are leading.

Q. Well, were you there every day practically?

A. No, sir.

Q. Well, you made it your home?

A. Yes, sir.

Q. And you slept there, didn't you?

A. Not always.

Q. Were you away at irregular times?

A. Sometimes I remember being away, once three months, and still maintaining my residence there.

30

Q. And was the fence there in that same condition?

A. As far as I know, yes, sir.

Q. You know, as a matter of fact, don't you, whether it was or was not?

Mr. Stackhouse: I object.

The Court: I suppose that calls for a conclusion;  
10 the objection is sustained.

Cross-examination.

By Mr. Stackhouse:

Q. You say you were away a couple of years?

A. Yes, sir.

Q. From that locality?

A. Yes.

20 Q. You don't know what went on during that time, do you?

A. No, sir.

Q. You don't know whether the fence was moved?

A. No, sir.

Q. Don't know whether it was rebuilt or not, do you?

A. No, sir.

Q. And don't know whether its location was changed during that time?

30 A. No, sir.

Q. And so far as you know, it might have been either one way or the other during the time that you were away?

A. Oh, yes.

Q. During its entire length?

A. Sir?

Q. I say, it might have been moved throughout its entire length during the time that you were away?

A. Yes.

Q. In other words, you don't know anything about the fence during the time that you were away?

A. Not when I was away, no, sir.

Q. Now, that period was when—I think you testified to it?

A. I think the first period was about 1910, if I remember rightly, and I was away again 1915. I am not sure of those dates; it was along that line. 10

By Mr. Burling:

Q. Prior to 1910, you were there continuously?

Mr. Stackhouse: I object to that as leading.

Q. Were you there prior to 1910 continuously?

A. As near as I can remember, yes, sir. 20

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CATHARINE M. BURRICHTER, recalled.

By Mr. Burling:

Q. During the period of the absence of your brother, as he has just described, from premises 711 Broadway, were you at the property living with your mother? 30

A. No, sir, in the year 1909, and 1910, we were in California, and the house was closed; there was no one there.

Q. For how long a period of time?

A. We started away in 1909, came back the later part of 1910; during that time there was no one living there.

Q. Well, when you left the property, the fence was as you have described heretofore in your testimony, wasn't it?

Mr. Stackhouse: I object to that as leading.

Q. Was the fence in the condition when you left during that period of time as you have described?

10 Mr. Stackhouse: Now, may it please the Court, it does seem to me that this examination should be governed to this extent: Counsel first asks a leading question, and when that is objected to and the answer indicated to the witness by the form of the question, then the question is reframed so as to get practically the same answer.

The Court: What is pending?

20 (Question repeated.)

The Court: She may answer it if she knows.

Mr. Stackhouse: Which period of time is referred to, may I ask?

30 Mr. Burling: The period of time that she has described heretofore for the Court that there had been no change in the fence during the time she lived there; I asked her whether when she came back from California the fence was in the same position as when she left.

A. I can't say.

Q. Well, can't you tell?

A. I can't say, because for many months I was ill after I went to California that I never got in the yard.

Q. Did you look at it when you got back in the yard?

A. I don't know as I did.

Q. If it had been changed, would you not have noticed it?

A. I can't say that I would.

Q. You mean to say in this court room before the jury that you couldn't say whether or not, living there all the years that you have lived there, that that fence had not been changed?

10

Mr. Stackhouse: I object to that as cross-examination and not direct.

The Court: I suppose it is cross-examination. I do not think you are entitled to cross-examine her upon the theory that she is hostile and is not telling the truth, and that you have got to wring the truth out of her. That is the theory upon which cross-examination of the witness is permitted.

20

Q. The question I want to ask is, when you returned from California whether the fence was in the same position and condition in which it was when you left Camden?

A. There was a fence there when I returned, but I could not say whether it was in the same position or condition.

Q. Was there anything to indicate any change in it?

A. I spent very little time in the yard.

Q. Was there anything there to indicate any change in it either in its location or character?

A. I couldn't say.

Q. You mean to say you couldn't tell whether there was anything to indicate whether there was any change in the character of the fence?

30

A. I simply know there was a fence there; that is all I know.

Q. You knew the nature of the fence before you left?

A. No, I did not; I had not seen the fence for months before I left for California.

Q. Well, you saw it, didn't you, before you left?

A. I did not; I was sick for many months that I never got in the yard.

10 Q. Well, now, the last time when you saw it, you saw the fence, the nature and location of it, didn't you?

A. I couldn't say.

---

HARRY BURRICHTER, recalled.

By Mr. Burling:

20

Q. Mr. Burrichter, how long did you live in premises No. 711 Broadway?

A. I haven't been there for twenty-one years.

Q. Haven't been there for how long?

A. About twenty or twenty-one years.

Q. Since you left there?

A. Yes.

Q. Did you visit there?

A. Sure, went there to see my mother.

30

Q. Did you stay any continuous length of time?

A. Oh, I might have stayed an hour or two at a time.

Q. No, I mean live there or stay there any period of time?

A. No.

No cross-examination.

Mr. Burling: I am forced to rest, if it please your Honor.

Mr. Stackhouse: I do not think, may it please the Court, that this testimony has relieved the situation at all which existed at the time I made my original motion.

The Court: (After argument.) I do not think it goes quite far enough, Mr. Burling. I think that the burden is upon you, when you seek to establish a claim, a right of possession, to show a continued possession of the property in the condition and on the line of the structure which you seek to make establish your right. I do not think you have done that. Of course, it may be difficult perhaps, but I do not think you have done it, and I think the motion must be granted. 10

(Exception noted for the defendant.) 20

The Court: (To the jury.) Ladies and Gentlemen, you may return your verdict in favor of the plaintiff, or you may return a verdict of guilty in this case.

Mr. Stackhouse: Now, may it please the Court, just a moment: There has been what practically amounts to a disclaimer here for part of the premises in question, and I take the effect of that, that that is practically the defendant's saying, "If you can prove that I am over on your ground, I have no business there." Now, that still leaves open the question of whether or not they are guilty for the premises which we claim. The direction of a verdict, as I understand it, would comprehend merely the premises which are in the amended answer. 30

The Court: Yes, I suppose it would; as to the rest, they say you are entitled to possession.

Mr. Stackhouse: In other words, it is a verdict of guilty as to the entire premises described in the complaint then?

The Court: No, I suppose if they are not actually in possession of any part, and they say they are not  
10 and say, "We do not withhold it from you"——

Mr. Burling: That is a matter for the engineers, isn't it?

The Court: I suppose if you say they are in possession of more than they claim to be in possession of, the jury has got to decide.

Mr. Stackhouse: That is exactly what we do say.  
20

The Court: Then I suppose in that situation, they say, "We are in possession of only a part, and we claim the right to only a part." That is the effect of their answer. Now, you say, "It is not true that you are in possession of only what you claim; you are in possession of more," and they say that is not true and I suppose that is a jury question.

Mr. Stackhouse: That is the point I am trying to  
30 make.

The Court: Very well, then, I suppose that is a jury question; I think you will have to go to the jury.

Mr. Stackhouse: Well, my motion, understand me, was that so far as this land which is embraced in the description in the amended answer, that I

made a motion for the direction of a verdict, to that extent. If your Honor simply directs a verdict of guilty generally, why, it would only comprehend that land, but it seems to me that we are entitled to go a little bit further than that and have the right to the premises described in the complaint determined as a question of fact. We are entitled to a verdict to that extent anyway, and a verdict to a further extent should the jury, as a matter of fact, find that they are actually in possession of land 10 which we say they are in possession of, but to which they disclaim title or right of possession.

The Court: I suppose that is a jury question. Then the directed verdict will not be made, and the jury will have to decide the question of fact as to the amount of land which the defendant is in possession of.

Mr. Stackhouse: I think I am still entitled to a 20 verdict of guilty for the amount that they say they are in possession of.

The Court: Well, perhaps, but I shall not direct that if you insist upon having the other question of fact determined; in other words, I will have to take care of anything in my charge.

Mr. Stackhouse (After further argument): It seems to me that I am perhaps in a position that whichever way I decide I will probably afterward 30 come to the conclusion that I may have decided wrongly, but I think I will adhere to my original motion and simply ask for the direction of a verdict of guilty.

The Court: Very well, ladies and gentlemen, you may return your verdict of guilty in this case.

Mr. Stackhouse: It was stipulated between counsel that damages should be assessed at six cents.

The Court: You may return a verdict of six cents damages.

Mr. Stackhouse: The effect of that, I understand, applies to the description as set forth here.

- 10 The Court: It would apply to so much as the defendant, by his answer, admits he is in possession of; that is the effect of it. You may return your verdict.

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POSTEA.

(Filed May 19, 1925.)

20

NEW JERSEY SUPREME COURT.  
CAMDEN COUNTY.

CATHARINE M. BURRICHTER,  
*Plaintiff,*

v.

LOUIS WISHNEFSKY,  
*Defendant.*

Action at Law.  
Postea.

30

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The above cause was tried before the Honorable Ralph W. E. Donges, Circuit Court Judge, and a jury, at the Camden Circuit on the twelfth and thirteenth days of May, 1925.

The jury rendered a verdict in favor of the plaintiff and against the defendant of guilty; and assessed the damages of the plaintiff against the defendant at six cents.

RALPH W. E. DONGES,  
*Circuit Court Judge.*

A true copy.

EDWARD J. KELLEHER,  
*Clerk.*

10

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JUDGMENT.

NEW JERSEY SUPREME COURT.

---

CATHARINE M. BURRICHTER,  
*Plaintiff,* )  
v. )  
LOUIS WISHNEFSKY,  
*Defendant.* )

20

Judgment

---

Whereupon it is adjudged that the plaintiff, Catharine M. Burrichter, do recover of the said defendant, Louis Wishnefsky, the possession of the whole of the property mentioned and described in the complaint, and six cents damages, together with her costs which have been taxed at the

Judgt. for Possession  
Damages \$ .06  
Costs 62.47  
\$62.53

30

sum of sixty-two dollars and  
forty-seven cents, making in  
the whole the sum of sixty-two  
dollars and fifty-three cents.

Judgment entered May 19th, 1925.

WM. S. GUMMERE,  
C. J.

10 A true copy.  
EDWARD J. KELLEHER,  
Clerk.

---

NOTICE AND GROUNDS OF APPEAL.

(Filed June 2, 1925.)

NEW JERSEY SUPREME COURT.  
CAMDEN COUNTY.

20

---

CATHARINE M. BURRICHTER, Plaintiff,	}	Action at Law. Notice and Grounds of Appeal.
v.		
LOUIS WISHNEFSKY, Defendant.		

---

30 To D. Trueman Stackhouse, Esq., Attorney for  
Appellee:

Take notice, that the plaintiff appeals to the Court of Errors and Appeals of the State of New Jersey, from the whole of the judgment entered in this case, upon the following ground:

The trial Court directed a verdict against defendant and in favor of the plaintiff when thereunto

moved by counsel for plaintiff, whereas said Court should have denied said motion and should have submitted to the jury for decision the questions involved in the issues.

BLEAKLY, STOCKWELL & BURLING,  
*Attorneys for Appellant.*

Service of a copy of the within notice of appeal is hereby acknowledged this 27th day of June, 1925.

10

D. T. STACKHOUSE,  
*Attorney for Appellee.*

A true copy,  
EDWARD J. KELLEHER,  
*Clerk.*

---

STIPULATION.

20

(Filed Sept. 15, 1925.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

---

CATHARINE M. BURRICHTER,  
*Plaintiff-Appellee,* )  
v. )  
LOUIS WISHNEFSKY,  
*Defendant-Appellant.* )

Action at Law.  
Stipulation. 30

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It is hereby stipulated by the plaintiff, through her attorney, D. Trueman Stackhouse, and by the defendant, through his attorneys, Bleakly, Stockwell

and Burling, that a certain plan of premises Nos. 711 and 713 Broadway, Camden, New Jersey, known and designated as "Survey and Plan of Physical Conditions in City of Camden," made by Remington and Vosbury, Civil Engineers, Camden, N. J., in February, 1925, which said plan was testified from at the trial of this cause in the New Jersey Supreme Court, and offered in evidence by the defendant but not marked as an exhibit by the court  
 10 stenographer, be made a part of the record and printed with the state of the case on appeal to this court.

D. TRUEMAN STACKHOUSE,  
*Attorney for Plaintiff.*  
 BLEAKLY, STOCKWELL & BURLING,  
*Attorneys for Defendant.*

A true copy.

20 THOMAS F. MARTIN,  
*Clerk.*

---

EXHIBIT P1.

DEED.

(U. S. Documentary Stamp 25 cents)  
 (Series of 1898)

30 THIS INDENTURE, MADE THE Fifteenth day of January, in the year of our Lord one thousand, nine hundred and two (1902) BETWEEN Mary C. Williams, of the City and County of Camden, and State of New Jersey, widow of Edwin C. Williams, deceased, of the first part, and Catharine M. Burrichter, widow, of the City, County and State aforesaid, of the second part:

WITNESSETH, That the said party of the first part,

for and in consideration of the sum of Twenty Nine Hundred Dollars, lawful money of the United States of America, well and truly paid by the said party of the second part, to the said party of the first part, at and before the ensealing and delivering of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, enfeoffed, released conveyed and confirmed, and by these presents doth grant bargain sell, alien, enfeoff, release, convey and confirm, unto the said party of the second part, her heirs and assigns, ALL that certain lot or piece of land with messuage or tenement thereon erected, situate in the City and County of Camden and State of New Jersey; described as follows, to wit:—Beginning at a point in the west line of Broadway, at the distance of one hundred and ten feet northward from the northwest corner of Broadway and Pine Street; and running thence (1) northward, along the west line of Broadway, fifteen feet to a corner; thence (2) westward, at right angles to Broadway, ninety six feet, to the east line of a four feet wide alley, running from Pine Street to Line Street; thence (3) southward, along the east line of said alley, fifteen feet to a corner; thence, (4) eastward, at right angles to Broadway, ninety six feet to the west line of Broadway, and place of beginning. Together with the free use and privilege of said four feet wide alley, in common with other owners bordering thereon. Being the same premises which William F. Sloan and wife, by deed dated the first day of August, A. D. 1891, of record in the office of the Register of Deeds of Camden County, in Book No. 165 of Deeds, page 408, &c., granted and conveyed unto the said Edwin C. Williams and Mary C. Williams in fee simple, as joint tenants; the said Edwin C. Williams having departed this life on or about the fifteenth day of August, 1901, the sole

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title to said premises thereupon vesting in the survivor, the said Mary C. Williams: And of which, Frank C. Brace and Anna E. Brace his wife, by deed dated Dec. 13th, 1901, of record in said Register's office, in Book No. 259 of deeds, page 311 &c. quit-claimed and conveyed unto the said Mary C. Williams all and every right, title and interest therein which the said Anna E. Grace, the only surviving heir at law of the said Edwin C. Williams, might or  
10 could have or claim by reason of such relationship. TOGETHER with all and singular, the buildings, improvements, woods, ways, rights, liberties, privileges, hereditaments and appurtenances, to the same belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and the profits thereof, and of every part and parcel thereof; AND ALSO, all the estate, right, title, interest, property, possession, claim and demand whatsoever, both in law and equity, of the  
20 said party of the first part, of, in and to the said premises, with the appurtenances:

TO HAVE AND TO HOLD the said premises, with all and singular the appurtenances, unto the said party of the second part, her heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, her heirs and assigns forever.

AND the said Mary C. Williams, for herself, her heirs, executors and administrators, doth by these  
30 presents covenant, grant and agree to and with the said party of the second part, her heirs and assigns, that she, the said Mary C. Williams and her heirs, all and singular the hereditaments and premises, herein above described and granted, or mentioned and intended to be so, with the appurtenances unto the said party of the second part, her heirs and assigns, against her, the said Mary C. Williams and

her heirs, and against all and every other person or persons whomsoever lawfully claiming or to claim the same or any part thereof by, from, through or under her, them or any of them. SHALL and WILL WARRANT and forever DEFEND.

IN WITNESS WHEREOF, the said party of the first part to these presents hath hereunto set her hand and seal dated the day and year first above written.

Mary C. Williams (Seal) 10

Signed, sealed and delivered

in the presence of

James F. Baker

State of New Jersey, }  
Camden County, } ss.

BE IT REMEMBERED, that on this Fifteenth day of January in the year of our Lord one thousand, nine hundred and two before me, a Commissioner of Deeds of said County and State personally appeared Mary C. Williams widow who, I am satisfied is the grantor mentioned in the above deed of conveyance, and having first made known to her the contents thereof she acknowledged that she signed, sealed and delivered the same as her voluntary act and deed. All of which is hereby certified. 20

James F. Baker

Commissioner of Deeds.

## DEED.

Mary C. Williams

To

Catharine M. Burrichter

Received at CAMDEN, N. J., Jany  
16 1902 at 330 P. M., and Recorded in  
Book No. 259 of Deeds page 643 in the  
Office of the Register of Deeds, &c.,  
of CAMDEN COUNTY.

10

Isaac W Coles

Register

Jany 16-02 at 330 P M

West Jersey Title and Guaranty  
Company

## EXHIBIT P2.

20 In the name of God, Amen.

I, Catherine M. Burrichter (widow of Henry J. Burrichter, deceased), of the City of Camden, in the County of Camden and State of New Jersey, being of sound and disposing mind, memory and understanding, do make and publish my last will and testament in form and manner following, that is to say:

I give, bequeath and devise all my estate, of what nature or kind soever (real, personal and mixed), and wheresoever situate, unto my beloved daughter,  
30 Catherine M. Burrichter, Junior,—to her, her heirs and assigns, absolutely, forever; and I constitute and appoint my said daughter, Catherine M. Burrichter, Junior, sole executrix of this my last will and testament.

In making my said will as aforesaid, I am moved neither by lack of affection for my three sons nor by greater regard for my said daughter, but solely by

a conviction that my sons are better able to provide for and maintain themselves without assistance from me than is my daughter. I regret that my estate is insufficient to enable me to make adequate and equal provision for all of my children, but I have confidence enough in my sons to feel that they will fully appreciate my motives and will cheerfully acquiesce in and approve my wishes in this matter.

In witness whereof, I the said Catherine M. Burrichter, have hereunto set my hand and seal this 10  
twenty-fourth day of April, nineteen hundred and six.

(signed) Catharina M. Burrichter (SEAL)

Signed, sealed, published and declared by the said Catherine M. Burrichter as and for her last will and testament, in the presence of us, who, at her request, in her presence, and in the presence of each other, have immediately thereafter subscribed our names hereto as witnesses.

(Signed) Raymond R. Donges 20  
(Signed) Wilbert V. Pike.

---

EXHIBIT P3.

DEED—PLAIN WARRANTY.

THIS INDENTURE, MADE THE Eleventh day of August in the year of our Lord one thousand nine hundred and nineteen (1919) BETWEEN Clara 30  
Fields, (Single) of the City and County of Camden and State of New Jersey of the first part, and Louis Wishnefsky, of the same place of the second part: WITNESSETH, That the said party of the first part, for and in consideration of the sum of ONE DOLLAR and other valuable considerations lawful money of the United States of America, well and

truly paid by the said party of the second part to the said party of the first part, at and before the ensembling and delivering of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, release, convey and confirm, unto the said party of the second part, his heirs and assigns, ALL that certain tract or parcel of  
10 land and premises situate in the City and County of Camden and State of New Jersey, Bounded and Described as follows:

BEGINNING at a point in the West line of Broadway at the distance of ninety-five feet North from the North line of Pine Street, and in the extended middle line of the party wall between Nos. 713 and 715 Broadway, and extending thence Northwardly along the said West line of Broadway, fifteen feet in front or width to the extended middle line of the  
20 party wall between Nos. 711 and 713 Broadway, and extending thence Westwardly of that same width between parallel lines at right angles to Broadway and through the centre lines of said party walls, Ninety-six feet in length or depth to the East line of a certain four feet wide alley.

Together with the free use, right, liberty and privilege of said four feet wide alley, in common with others bordering thereon, forever.

BEING premises No. 713 Broadway; and being  
30 the same premises which Daniel W. Saphore and Anna M. his wife, by deed dated May 16th, 1907, granted and conveyed to Clara Fields, recorded in book of deeds number 315 page 650 and etc., in the Office of the Register of Deeds of Camden County.

TOGETHER with all and singular, the buildings, improvements, woods, ways, rights, liberties, privileges, hereditaments and appurtenances, to the same:

belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and the profits thereof, and of every part and parcel thereof;

AND ALSO, all the estate, right, title, interest, property, possession, claim and demand whatsoever, both in law and equity, of the said party of the first part, of, in and to the said premises, with the appurtenances:

TO HAVE AND TO HOLD the said premises, with all and singular the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever. 10

AND the said party of the first part, for herself, her heirs, executors and administrators, doth by these presents covenant, grant and agree to and with the said party of the second part, his heirs and assigns, that she the said party of the first part, for her heirs, all and singular the hereditaments and premises herein above described and granted, or mentioned and intended to be so, with the appurtenances, unto the said party of the second part, his heirs and assigns, against her the said party of the first part, her heirs, and against all and every other person or persons whomsoever lawfully claiming or to claim the same, or any part thereof, SHALL and WILL WARRANT and forever DEFEND. 20

IN WITNESS WHEREOF, the said party of the first part to these presents has hereunto set her 30

hand and seal dated the day and year first above written.

Clara Fields (Seal)

Signed, sealed and delivered  
in the presence of  
Howard F. Lupton.

(Twelve Dollars in U. S. Documentary Stamps)

State of New Jersey }  
Camden County, } ss.

10 BE IT REMEMERED, that on this 11th day of August in the year of our Lord one thousand nine hundred and nineteen (1919) before me, Howard F. Lupton, a notary public for New Jersey personally appeared Clara Fields, (Single) who, I am satisfied is the grantor mentioned in the above deed or conveyance, and I having first made known to her the contents thereof she acknowledged that she signed, sealed and delivered the same as her voluntary act and deed. All of which is hereby certified.

20

Howard F. Lupton

Notary Public for New Jersey

DEED.

Clara Fields, (Single)

TO

Louis Wishnefsky.

713 Brdy

Dated August 11th 1919.

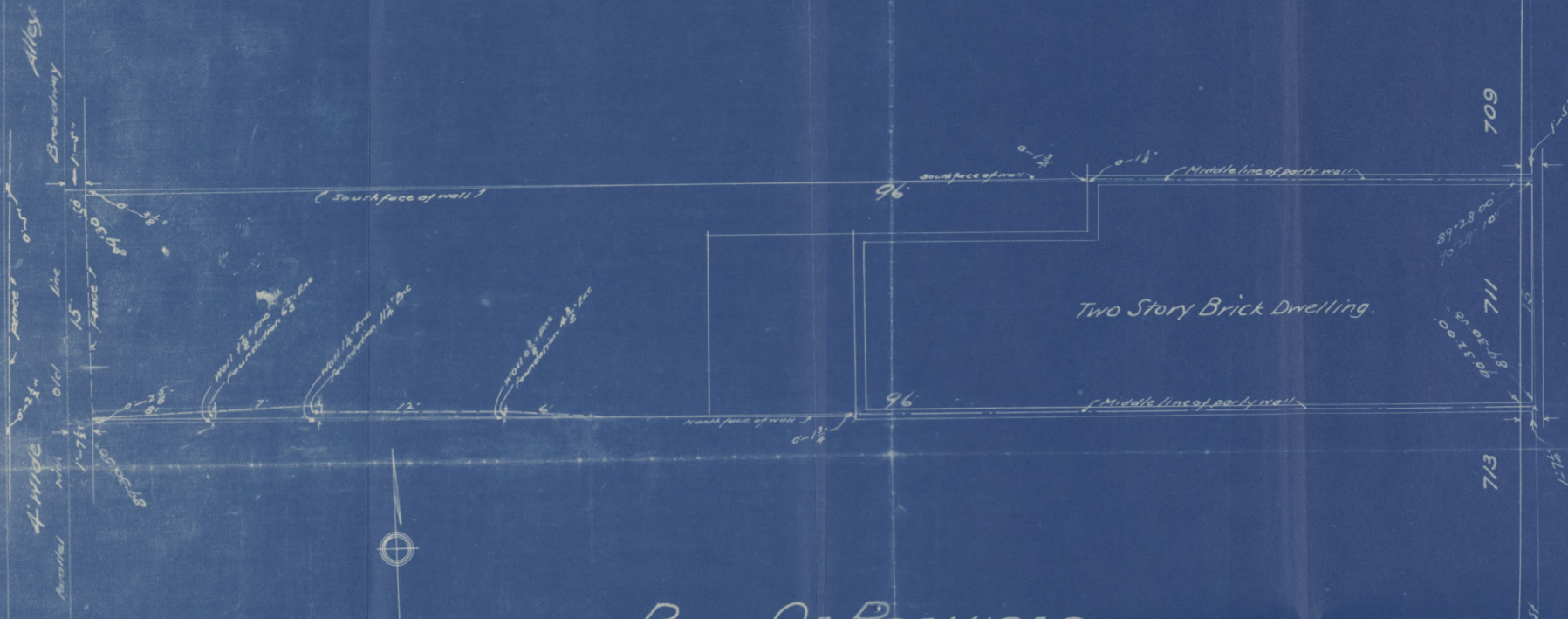
30

Received in the Register of Deeds office of the County of Camden N. J. on the 12th day of August A. D. 1919 at 422 o'clock in the afternoon, and recorded in Book 450 of DEEDS for said County, on pages 162 &c.

Edward W. Delacroix,

Register

Chg Jno O. Wilson



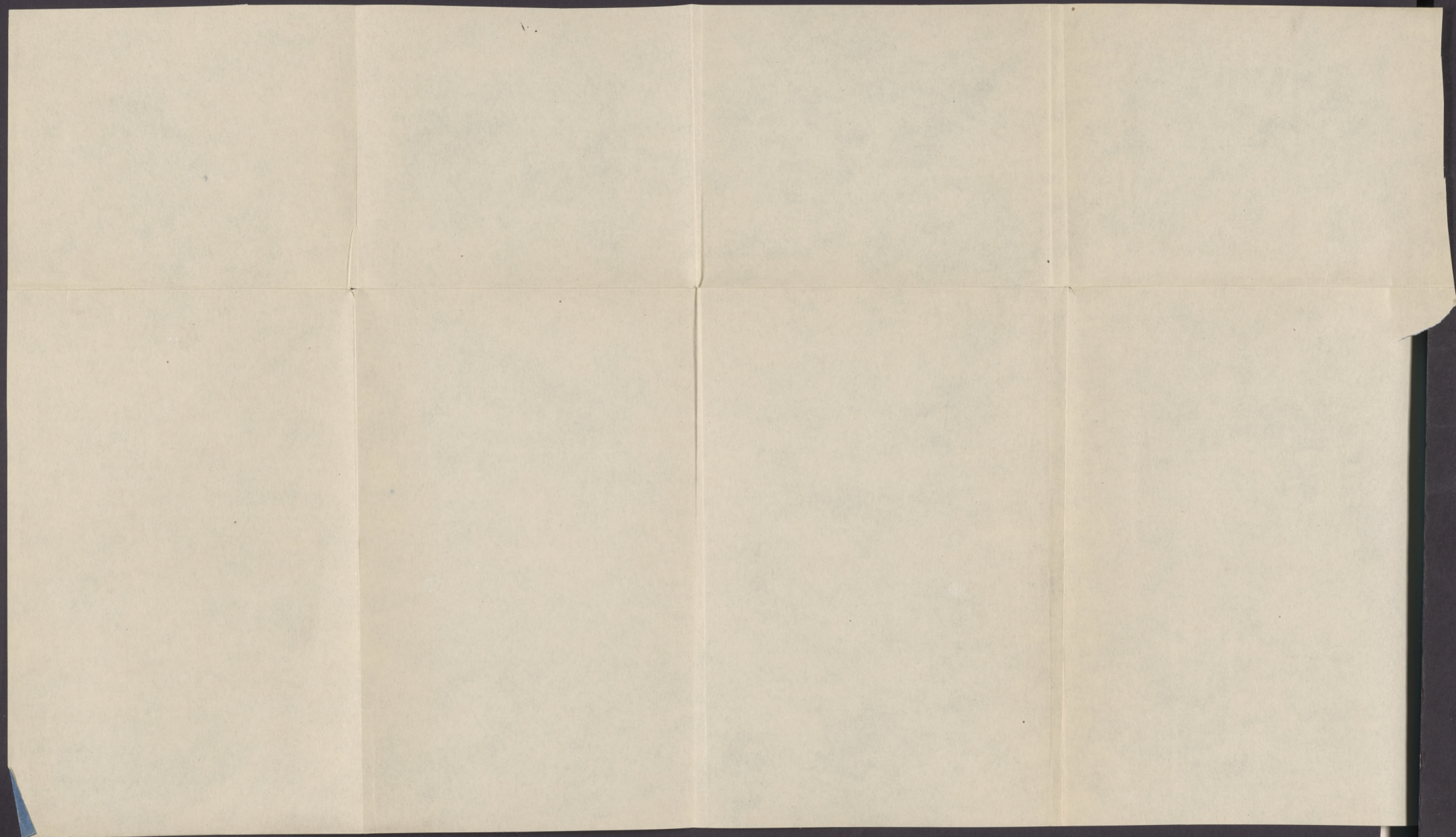
PLAN OF PREMISES  
 N<sup>o</sup> 711 BROADWAY  
 CAMDEN, N. J.  
 Scale 1"=6' Survey & Plan  
 June 23<sup>rd</sup> 1924

By  
 Carl Thoman C. E.  
 James Lennon C. E.

Note  
 Black lines and figures indicate physical conditions  
 Red . . . . . Determination of Title.

E.P.5

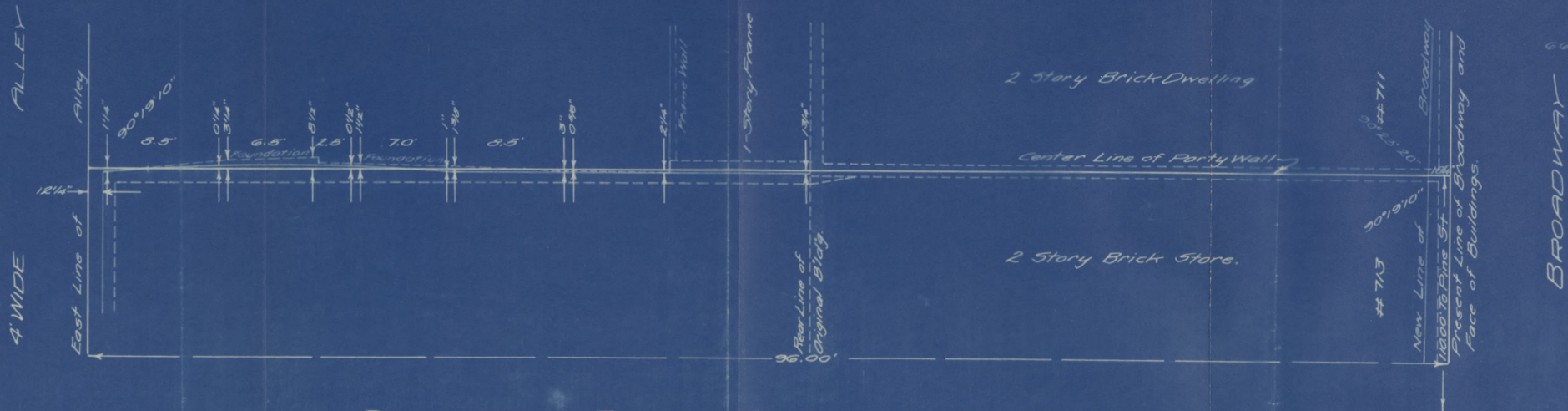
BROADWAY





107

PLAN SHOWING THE RELATION BETWEEN PRESENT BUILDINGS  
AND THE CENTER LINE OF A PARTY WALL BETWEEN Nos. 711 & 713 BROADWAY.



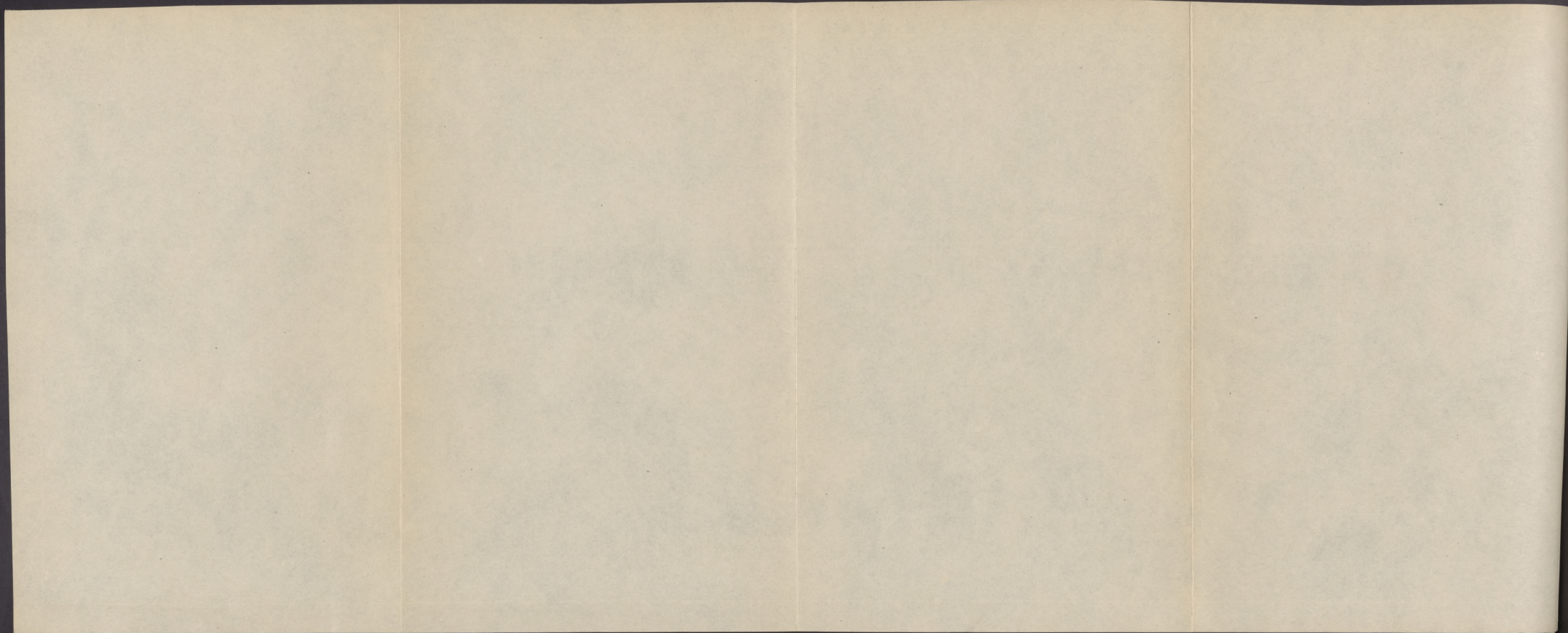
SURVEY AND PLAN OF PHYSICAL CONDITIONS  
IN  
CITY OF CAMDEN

Scale 1" = 6'

Feb. 1925.

REMINGTON & VOSBURY  
CIVIL ENGINEERS  
CAMDEN, N. J.

Walter Vosbury



# New Jersey Court of Errors and Appeals

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CATHARINE M. BURRICHTER,  
*Plaintiff-Appellee,*

v.

LOUIS WISHNEFSKY,  
*Defendant-Appellant.*

---

ON APPEAL FROM SUPREME COURT.

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BRIEF FOR PLAINTIFF-APPELLEE.

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## STATEMENT OF FACT.

The parties in this brief will be referred to by their original designation of plaintiff and defendant; and the parenthetical references are to the pages of the State of the Case.

The statement of facts in the case contained in the defendant's brief are substantially correct.

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## BRIEF OF THE ARGUMENT.

Counsel for the plaintiff does not take issue with the statements of the law as contained in the de-

fendant's brief; but maintains that the citations have no bearing upon the matters in controversy. There was no jury question because there were no facts from which the jury could have drawn any inference favorable to the defendant.

The defense was founded purely upon adverse possession, and the Court, at the conclusion of the case, directed a verdict in favor of the plaintiff on the ground that the defendant had failed to prove the elements involved in such defense. That the trial Court committed no error in taking this action we submit will be found to be demonstrable.

#### I.

In the case of *Foulke v. Bond*, 41 L. 527, the Court prescribed the elements of title by adverse possession by stating that, "in order to acquire title by adverse possession the possession must be actual and exclusive, adverse and hostile, visible or notorious, continued and uninterrupted."

It remains, therefore, to consider just how far the defendant's evidence measured up to the standard of these requirements.

#### II.

The defense of adverse possession is one which apparently is not looked upon with favor by the law; and it will not take the serious step of depriving a man of property to which he has acquired title and give it to another unless upon the strictest proof of the elements of adverse possession. A defense of this kind is as unfavored as the defense of the

Statute of Limitations; and unless such defense comes clearly within the Law as expounded by the Courts, it must necessarily fail.

It may be difficult, and in a great many cases it may be impossible, to establish all of the elements surrounding the defense of adverse possession; but this, unfortunate as it may be for the party who asserts it, does not relieve him from the burden of strict proof.

III.

As to actual and exclusive possession, the suit was instituted October 10, 1924, so that the burden of proving adverse possession must show that such possession, with its various elements, extended back at least until October 10, 1904.

The first attempt to prove adverse possession was by the witness William Fields, who testified (p. 48):

“Q. Well, your daughter bought it according to the papers on record in 1907?

A. Yes.

Q. And your daughter sold it to Mr. Wishnefsky in the year 1919?

A. Yes, sir, that is right.”

On page 49 a further examination took place:

“Q. Before you lived at 713, where did you live?

A. 6th and Pine. No, excuse me, I lived where the Eagle Building is, 415 Broadway.

Q. Now, when you lived in the property was there a fence between you and the property 711 back?

A. There was.”

It is obvious, therefore, that the knowledge of the witness, Fields, extended only from the year 1907 to the year 1919, and it fell far short of showing actual and exclusive possession; or whether such possession was adverse and hostile, and further, it was so vague and indefinite as not to show that it was continued and uninterrupted.

The testimony of the witness Evans (p. 51) is also very vague and indefinite; but upon its most favorable construction could not be said to extend beyond fourteen years back of the time of trial, which took place in 1925, which would carry his recollection back to the year 1910 or 1911. Whatever value his testimony might have had was overcome by his statement, on cross-examination (p. 52):

“Q. You said you lived there for fifteen years?

A. As near as I can tell.

Q. You don't know to what period the fifteen years you have referred to goes back, do you?

A. I do not know the date, no, sir.

Q. Your observation of the conditions was obtained from your knowledge of them while you lived down there, isn't that true?

A. Yes, sir.”

The testimony of the witness, Emma Harper, according to her own admission (p. 57), extended back to the time that she moved to 709 Broadway, adjacent to the premises in question, which was about seventeen years prior to the trial. She testified as follows (p. 56):

“Q. Pretty nearly six years ago you lived on Broadway?

A. I didn't write it down to keep any date of it.

Q. No, but it has been pretty nearly six years ago that you lived on Broadway?

A. I did.

Q. And you lived at 709?

A. 709 Broadway for eleven years about, and a half or so."

And on page 57:

"Q. \* \* \* You didn't know anything about it before you moved to 709, did you?

A. No, I didn't know anything about it."

The plaintiff was called by the defendant's counsel as the defendant's own witness (pp. 77, &c.). Nothing definite, however, developed from her testimony as to the locations of the fence or the continuity of the alleged possession.

The witness, Clarence Burrichter (p. 112), testified that he lived at 711 Broadway for about twenty years, but was away from there for about three years during that period.

The plaintiff, on being recalled (p. 115), testified that (p. 118) she was absent in California during 1909 and 1910, when the house was closed; and that prior to that time "I was sick for many months, that I never got in the yard."

This is practically all of the evidence of adverse possession on the part of the defendant. It is obvious that there was no evidence of actual and exclusive possession. There was no evidence that such alleged possession was adverse and hostile. There was no evidence that it was visible or notorious. There was no evidence that it was continued and uninterrupted.

## IV.

Upon well-settled principles relating to title by adverse possession, the claimant must prove it by clear and convincing evidence. Chief Justice Green went so far as to say, "beyond a reasonable doubt."

*Rowland v. Updike*, 28 N. J. L. 101;

*Myers v. Folkman*, 86 N. J. L. 29; 90 A. 1051.

In ejectment the defendant can never defend his possession against the plaintiff upon a title in himself by which he could not recover the possession if he were out and the plaintiff in possession.

*Northern R. Co. v. Demarest*, 94 L. 68; 108 A. 376.

"Where plaintiff proves title in himself, the burden is cast upon defendant to prove that he has been in possession for the statutory period necessary to give him a right to possession superior to plaintiff's right. To sustain such burden, defendant must prove that he and those under whom he claims have held adverse possession for twenty years. If the defendant fails in such proof, it is immaterial whether plaintiff has been in possession at any time within twenty years, for the legal title draws to it the possession, and defendant must overcome that status *by clear and convincing evidence.*"

*Northern R. Co. v. Demarest, supra.*

The above cases go to the general rules involving the proof of adverse possession.

V.

With respect, however, to the various elements, the possession must first be actual and exclusive. There is nothing, however, in the defendant's testimony which in the first place, shows actual possession for a period of twenty years by the defendant or any one of his predecessors in title; and further than this the case is barren of any testimony showing exclusive possession.

It being required to be exclusive, that must necessarily mean excluding any predecessor in title of the plaintiff; and there is nothing to show that, assuming that there was any actual possession by the defendant's predecessors in title, that such possession was inconsistent with the situation, where it might have been shared with the real owner to the exclusion of any possession of the plaintiffs or her predecessors in title. 2 C. J. 120.

VI.

The adverse possession must also have been adverse and hostile. The case is likewise without any proof of these elements.

"Where the possession of land is separate from the title, the Law will not presume that the possession is adverse; but *every presumption is in favor of possession in subordination to the true owner.*"

*Johnson v. A. C. R. Co.*, 73 L. 767; 64 A. 1061;

*Wittke v. Wittke*, 3 A. R. 1542; 130 A. 598.

It is, therefore, obvious that instead of any pos-

session which may be proved by the defendant alleging title by adverse possession being a fact presumed to be adverse, the presumption is just the other way, viz: that any such possession is presumed to have been permissive, and the burden of proof is on the party alleging adverse possession to show that such was the situation.

The legal effect of the defendant's proof, therefore, was that he was there by permission of the plaintiff or her predecessors in title; and in this state of the proof it could not be said that the possession which the defendant claims, could have grown into adverse possession. Its mere continuance for the statutory period could not ripen into a hostile right.

*P. R. R. Co. v. Hulse*, 59 L. 54; 35 A. 790.

## VII.

The possession must also have been visible or notorious. There was nothing in the case which goes to show that such was the situation.

“The possession must be so open, visible and notorious as to raise the presumption of notice to the world that the right of the true owner is invaded intentionally and with a purpose to assert a claim of title adversely to his, or so patent that the owner could not be deceived and such that if he remains in ignorance it is his own fault.”

2 C. J. 75;

*Cobb v. Davenport*, 32 L. 369;

*Cornelius v. Giberson*, 25 L. 1;

*Foulke v. Bond*, *supra*.

As above stated, there is not a scintilla of evidence in the case which would go to show that the character of the alleged possession was so visible and notorious as to apprise the owner that it was intended to maintain a possession hostile to such owner. Neither was there any evidence in the case which showed that the alleged possession was continued and uninterrupted.

### VIII.

The ordinary rule that where a state of facts is once shown to exist, its continuance is presumed, does not apply to the elements of proof in adverse possession.

“Possession which is permitted to prevail against a clear title by record should be clearly proven to be accompanied by all the requisites of an adverse occupation, including *positive* evidence of the continuity and territorial extent of the possession.”

*Baldwin v. Shannon*, 43 L. 596;

*Munger v. Curley*, 57 A. 306.

It is to be noted in the above cases the Court makes use of the term “positive evidence,” which obviously excludes any presumptive evidence. This is as it should be, for the claimant being in possession by means of a wrong, or more than ordinary burden should be cast upon him to show that his wrong has developed into a legal right. Several other jurisdictions adopt this view:

*Lynde v. Williams*, 68 Mo. 360;

*Woods v. Hull*, 90 Tex. 228; 38 S. W. 165;

*Atkinson v. Smith* (Va.), 24 S. E. 901;

*Jakne v. McMahon*, 21 Cal. A. 781; 133 P. 21;  
*Holdfast v. Shepard*, 28 N. C. 361.

In *Jakne v. McMahon*, *supra*, the Court held that instead of the alleged adverse possessor being presumed to have been continuously in possession after he had once proved possession, the holder of the legal title is the one who is presumed to have been in possession within the time required by Law.

In other words, if the claimant by adverse possession fails to make a complete chain of continuity of possession, then the holder of the legal title is presumed to have been in possession at the time that there is no positive proof that the claimant was in possession.

In *Lynde v. Williams*, *supra*, the Court followed this line of reasoning, stating:

“It is true that the existence of many things, once proven to exist, are presumed to continue; but we do not regard that rule of presumption as applicable to the present instance. The books indeed lay down that a *seisin* once proven or admitted is presumed to continue until a *disseisin* is proved; but it certainly can not be true that if you once establish the existence of a *disseisin* at one period, its continuance must, therefore, be presumed until the contrary appears. Under such a ruling, and theory of the Law, the transfer of the title of the true owner to a mere disseisor would, it must be confessed, be greatly facilitated; and the real owner, in consequence of a few months' adverse possession, at some remote and forgotten period, would frequently be presumed out of his estate.”

“The adverse possession necessary to bar a right of entry must be actual possession continued for twenty years. If there be an intermission of occupancy or of the acts which constitute the actual possession for an intervening period during that time, although during such period the party may have continued to claim title, pay taxes and may have surveyed the tract, the Statute will not bar.”

*Cornelius v. Giberson, supra.*

“Repeated acts of trespass upon unoccupied land will not constitute possession or oust the true owner whose title by Law draws possession to him for that purpose; possession must be notorious, continued and exclusive.”

*Cornelius v. Giberson, supra.*

The analysis of the testimony demonstrates that the defendant failed to sustain the burden of proof in this respect.

A hiatus occurred in the testimony of nearly every witness, and the attempt to link the testimony of one witness with that of another still fell far short of the requirements of the law in this respect.

### VIII.

It is submitted, therefore, that the trial Court committed no error in directing a verdict in favor of the plaintiff; and further, that had he not done so, his action in refusing to direct such a verdict would have been erroneous.

There was no proof that the alleged possession was actual and exclusive. On the contrary the only inference to be drawn from the testimony was that

if there was any proof of actual possession—(there was none of exclusive possession)—there was no proof that that possession was not shared with the holder of the then legal title under some permissive occupancy. Neither was there any proof that the alleged possession was adverse and hostile, because the Law in this State is that possession is presumed to have been permissive and clear and convincing evidence must be produced to overcome such presumption.

There was no proof that the alleged possession was visible or notorious. We have been unable to give any analysis of alleged testimony on this point because no testimony whatever was produced; nor was there any testimony of continued and uninterrupted possession. The testimony which was attempted to be produced, fell far short of any such proof. Neither was there any testimony that such possession was under any claim of right or intention to assert title as against the holder of the legal title.

#### IX.

We respectfully contend, therefore, that the judgment of the Supreme Court should not be disturbed.

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with Plaintiff-Appellee.*

