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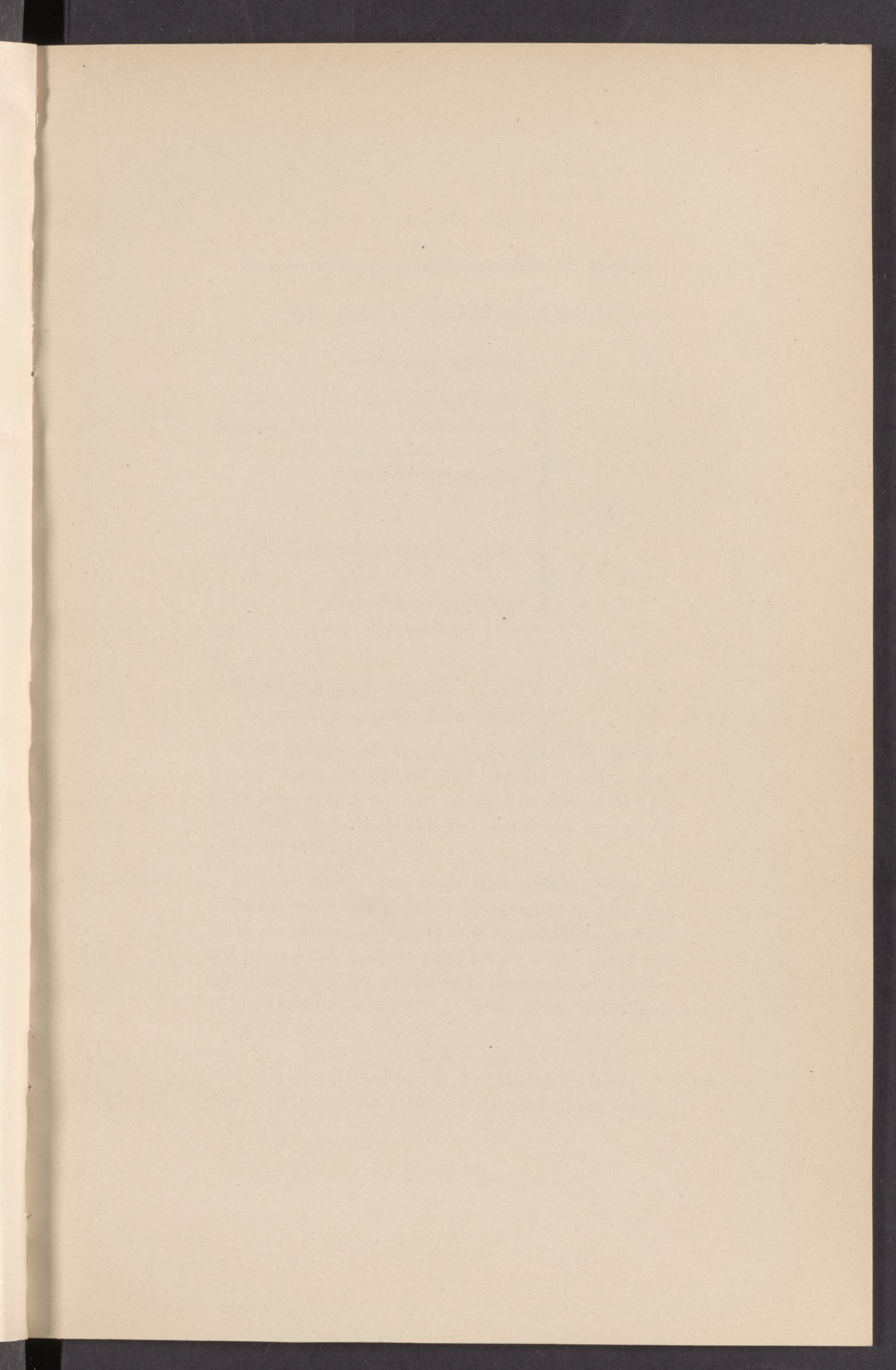
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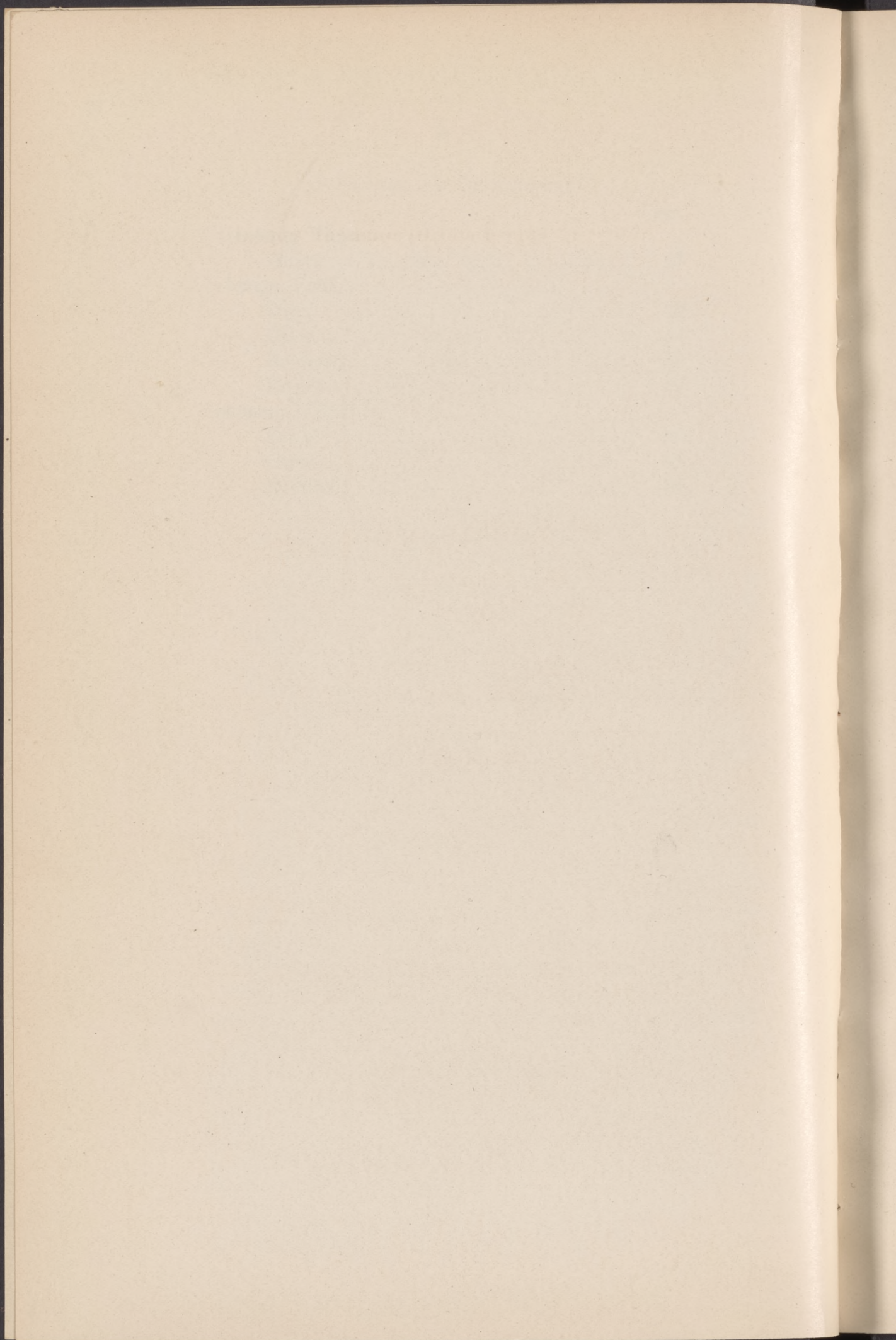
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Notice of Appeal and Grounds of Appeal.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

MORRIS FEDER, JACOB PACKER and
MINNIE TERRIS,
Plaintiffs-Appellants,

vs.

SAM SOLOMON and JULIA SOLO-
MON,
Defendants-Appellees.

10

On Appeal.

20

To:

Feder & Rinzler, Esqs.,
Attorneys of Defendants-Appellees.

Take Notice that the plaintiffs appeal to the New Jersey Court of Errors and Appeals from a judgment entered in this cause on the 21st day of November, 1925, in favor of the defendants and against the plaintiffs because:

30

1. The Trial Court erred in concluding that the plaintiffs were not justified in refusing to take title upon the ground that there was an encumbrance upon the property by reason of the presence of a party wall and that judgment should have been entered in favor of the plaintiffs instead of in favor of the defendants.

Dated, January 6th, 1926.

JACOB I. JAFFE, and
WEINBERGER & WEINBERGER,
Attorneys of Plaintiffs-Appellants.

40

Transcript of Pleadings for Trial.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

10	MORRIS FEDER, JACOB PACKER and MINNIE TERRIS, <div style="text-align: right;">Plaintiffs,</div>
	vs.
	SAM SOLOMON and JULIA SOLO- MON, <div style="text-align: right;">Defendants.</div>

20 Weinberger & Weinberger, Jacob I. Jaffe, attorneys
for plaintiffs.

Feder & Rinzler, attorneys for defendants.

Summons issued December 9, 1924.

Plaintiffs, residing in the City of Passaic, County of Passaic and State of New Jersey, say:

30 1. On the 6th day of April, 1923, the defendants entered into an agreement with the plaintiffs, whereby the said defendants agreed to convey to the said plaintiffs certain lands and premises situate in the City of Passaic, County of Passaic and State of New Jersey, for a consideration mentioned in said contract, copy of which is attached hereto and made part hereof.

2. On the execution of the contract, plaintiffs paid to defendants the sum of Fifteen hundred dollars (\$1500.00) on account of the purchase price.

40 3. Plaintiffs caused an examination to be made of the title to the premises so to be purchased, the rea-

Transcript of Pleadings for Trial

sonable expense of which amounted to Two hundred and fifty (\$250.00) dollars and they also caused a survey to be made of said premises, by reason of which survey the expense amounted to Two hundred dollars (\$200.00).

4. Said examination of title and survey, disclosed certain defects to the title to the said real estate agreed to be conveyed by the said defendants to the said plaintiffs, in that one of the walls of the said building agreed to be conveyed, is a party wall to the building adjoining said premises and that in that there were certain other easements affecting said premises outstanding, so that defendants could not convey the title to the said premises in accordance with the contract entered into between said plaintiffs and defendants. 10
20

5. That the said plaintiffs had knowledge that prior to and at the time of the execution of said contract, there existed a party wall which constituted an encumbrance, and the other easements affecting said premises which were then outstanding, but intending to deceive and defraud the said plaintiffs, represented in their contract that they would convey said premises free and clear of and from any and all encumbrances and would deliver a warranty deed. That the plaintiffs, relying on said representation, paid to the said defendants the sum of Fifteen hundred dollars (\$1500.00) as and for a deposit and entered into the said agreement. 30

6. On the 11th day of May, 1923, the plaintiffs called, with their attorney at the offices of Victor Greenberg, in the City of Passaic, ready and willing, and able to accept title to the said premises in accordance with said contract, but the defendants were un- 40

Transcript of Pleadings for Trial

able to deliver title to the said premises free and clear from the claims of other owners, by reason of said party wall mentioned.

10 7. Although defendants have been unable to deliver title to the said premises in accordance with the said contract, they still refuse to repay to the plaintiffs and fraudulently retain the amount so paid on account of the purchase price and the costs of examining title to the said premises, and the costs of survey, or either of them, although plaintiffs have demanded the return of said money, from the defendants.

Wherefore, plaintiffs claim the sum of Seventeen hundred dollars (\$1700.00) together with interest from April 6th, 1923, and costs of suit.

20 JACOB I. JAFFE, and
WEINBERGER & WEINBERGER,
Attorneys of Plaintiffs.

COPY OF AGREEMENT.

30 THIS AGREEMENT, made the 6th day of April in the year of our Lord One Thousand Nine Hundred and twenty-three

BETWEEN Sam Solomon and Julia Solomon, his wife, of the City of Passaic, in the County of Passaic, and State of New Jersey, party of the first part:

40 AND Minnie Terris, Morris Feder and Jacob Packer, of the City of Pasasic, in the County of Pasasic, and State of New Jersey, party of the second part;

Transcript of Pleadings for Trial

WITNESSETH, that the said party of the first part, for and in consideration of the sum of Forty thousand (\$40,000.00) dollars to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenant and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that they, the said party of the first part, will well and sufficiently convey to the said party of the second part, their heirs and assigns, by Deed of Warranty free from all encumbrance except two mortgages the first in the sum of \$10,000.00 and the second in the sum of \$8,000.00 on or before the eleventh day of May next ensuing the date hereof, all that lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Passaic in the County of Passaic, and State of New Jersey.

Being commonly known and designated as #220 1/2 Monroe Street, Passaic, N. J.; being a plot of ground 37 1/2 feet, more or less, front on Monroe Street, and 100 feet deep, more or less, on both sides.

Subject to existing leases and tenancies.

The said warranty deed is to contain a description by metes and bounds.

The parties of the first agree to convey all the lands and premises conveyed to them at this particular number as described, by former deeds.

The parties of the first part do hereby covenant and represent that the total net monthly rental income of the lands and premises herein conveyed, is the sum of \$358.00 per month, and that said representation is true and correct; and relying upon said representation the parties of the second part do hereby agree to purchase same, said representation being an inducement

Transcript of Pleadings for Trial

for the amount of the purchase price herein agreed upon.

10 It is further understood and agreed that in the event that the second mortgage as herein provided for, shall have been reduced to a sum less than eight thousand dollars, the difference between the actual principal sum due on the said mortgage, and the eight thousand dollars herein mentioned shall be paid by parties of the second part, upon closing of said title as herein provided for.

It is further understood and agreed that the title to the within mentioned lands and premises shall not be derived by virtue of any Martin Act proceedings.

20 AND the said Minnie Terris, Morris Feder and Jacob Packer, for their heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that they the said party of the second part, will pay and satisfy, or cause to be paid and satisfied unto the said party of the first part, the said sum of Forty thousand (\$40,000.00) dollars, as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

30 The sum of fifteen hundred dollars, upon the signing of this agreement, as a deposit on the purchase price, the receipt whereof is hereby acknowledged \$1,500.00

The sum of ten thousand dollars by the parties of the second part purchasing subject to and assuming a first mortgage, now against the said lands and premises in this sum

40 10,000.00

Transcript of Pleadings for Trial

The sum of eight thousand dollars by the parties of the second part purchasing subject to and assuming a second mortgage, now against said premises in this sum	8,000.00	
The sum of twenty thousand five hundred dollars in cash upon execution and delivery of the aforesaid warranty deed as herein provided	20,500.000	10
	<hr style="width: 100px; margin-left: auto; margin-right: 0;"/> \$40,000.00	

And it is further agreed, by the parties to these presents, that the said party of the second part, their heirs and assigns, may enter into and upon the said land and premises on the eleventh day of May, next ensuing the date hereof, and from thence take the rents, issues and profits to and their use. 20

And it is further agreed, by the parties hereto, that the said Deed of Warranty shall be delivered and received at the law offices of Greenburg & Galanti, 628 Main Avenue, Passaic, N. J., between the hours of twelve in the noon and four o'clock in the afternoon on the said eleventh day of May next ensuing the date hereof. 30

Taxes, insurance, rents, water, interest on both mortgages, &c., shall be adjusted as of the date of closing title.

And for the performance of all and singular the covenants and agreements aforesaid, the said parties to bind themselves and their respective heirs, executors and administrators; and they hereby agree to pay, upon failure to perform the same, the sum of which they hereby fix and settle as liquidated damages therefor. 40

Transcript of Pleadings for Trial

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

SAM SOLOMON (L. S.)

JULIA SOLOMON (L. S.)

MINNIE TERRIS (L. S.)

10 MORRIS FEDER (L. S.)

JACOB PACKER (L. S.)

Signed, sealed and delivered

in the presence of

Victor Greenberg,

Atty. at Law.

State of New Jersey,

County of Passaic, ss:

20 BE IT REMEMBERED, that on this sixth day of
April, in the year of our Lord, one thousand nine
hundred and twenty-three, before me, the subscriber
an Attorney at Law of N. J., personally appeared Sam
Solomon and Julia Solomon, his wife, who, I am sat-
isfied, are the Grantors in the within Agreement
named; and I having first made known to them the
contents thereof, they did acknowledge that they
30 signed, sealed and delivered the same as their volun-
tary act and deed, for the uses and purposes therein
expressed.

And the said Julia Solomon, wife, as aforesaid,
being by me privately examined, separate and apart
from her husband, did further acknowledge that she
signed, sealed and delivered the same as her volun-
tary act and deed, FREELY, without any fear,
threats or compulsion from her said husband.

VICTOR GREENBERG,

40 An Attorney at Law of N. J.

Transcript of Pleadings for Trial

(Endorsed.)

AGREEMENT FOR THE SALE OF PROPERTY.

SAM SOLOMON and JULIA SOLOMON, his wife,

to

MINNIE TERRIS, MORRIS FEDER and JACOB PACKER.

10

Dated, April 6th, 1924.

(Filed Dec. 13, 1924.)

20

Defendants, answering the complaint filed by the plaintiffs in the above states cause, say that:

1. They deny each and every allegation of paragraphs one, two, three, four, five, six and seven.

FIRST SEPARATE DEFENSE.

Defendants in all respects complied with the terms, conditions and provisions of said agreement.

30

SECOND SEPARATE DEFENSE.

Within the time fixed by said agreement and in accordance with the terms thereof, the defendants were ready, able and willing to convey said lands and premises to the plaintiffs exactly as their contract required them to do, but plaintiffs wilfully failed and refused to accept such conveyance or take title to said lands

40

Transcript of Pleadings for Trial

and premises as they were required to do by said contract.

THIRD SEPARATE DEFENSE.

10 The plaintiffs were not ready, able or willing to carry out the terms of said agreement or to accept title to said lands and premises in accordance with said agreement.

FOURTH SEPARATE DEFENSE.

20 Within the time as required by said contract defendants extended a warranty deed for said premises.

FIFTH SEPARATE DEFENSE.

The defendants admit that the plaintiffs had knowledge of the existence of said alleged body wall.

SIXTH SEPARATE DEFENSE.

30 The said wall was not a party wall but was a wall merely used by the adjoining owner of said lands and premises. The said alleged party wall was not an encumbrance within the purview and meaning of the terms of said agreement.

SEVENTH SEPARATE DEFENSE.

40 The building on said lands and premises is a business building and said building is located in a block on Monroe Street, and each building on both sides of the street is a business building and the entire lo-

Transcript of Pleadings for Trial

cality is and for many years has been a business district and the said alleged party wall is obvious and is discernible by the naked eye and plaintiffs either had actual knowledge or ought to have known of the existence of said wall, in fact plaintiffs actually saw the same. Said wall, within the purview and meaning of law is not an encumbrance or burden but is in fact a benefit to said lands and premises.

10

EIGHTH SEPARATE DEFENSE.

The plaintiffs formerly instituted a like action against the defendants under the same agreement and at the trial a judgment of nonsuit was entered in favor of defendants and against the plaintiffs but plaintiffs have not yet paid the costs of said judgment of nonsuit and by reason of such fact the above stated cause of action should be stayed until such costs are paid as required by law and unless they are paid the defendants will move to stay the above-stated cause of action until such payment is made, defendants hereby expressly reserving the right so to do.

20

FEDER & RINZLER,
Attorneys of Defendants.

Filed Dec. 29, 1924.

30

Plaintiffs, replying to the answer filed by the defendants in the above-stated cause, say:

AS TO FIRST SEPARATE DEFENSE.

Plaintiffs deny each and every allegation contained in said defense.

40

Transcript of Pleadings for Trial

AS TO SECOND SEPARATE DEFENSE.

Plaintiffs deny each and every allegation contained in said defense.

AS TO THIRD SEPARATE DEFENSE.

10

Plaintiffs deny each and every allegation contained in said defense.

AS TO FOURTH SEPARATE DEFENSE.

20

Plaintiffs have no knowledge as to what defendants mean by "extended a warranty deed" but if the same is intended for "tendered a warranty deed," then the same is denied.

AS TO FIFTH SEPARATE DEFENSE.

Plaintiffs have no knowledge as to what the defendants mean by "body wall" but if they mean "party wall" then the allegations with relation thereto are admitted.

30

AS TO SIXTH SEPARATE DEFENSE.

The inconsistent allegation alleged are denied. First the defendants contend that the same is a party wall and second that it constitutes an encumbrance.

AS TO SEVENTH SEPARATE DEFENSE.

40

The plaintiffs deny each and every allegation contained in said defense.

Transcript of Pleadings for Trial

AS TO EIGHTH SEPARATE DEFENSE.

Plaintiffs admit the allegation alleged in said paragraph with regard to the nonpayment of costs on a nonsuit voluntarily suffered by the plaintiffs but deny that the defendants are entitled to the relief prayed for in said paragraph in that the said plaintiffs hereby tender into court the costs due and owing to the defendants on said nonsuit.

10

JACOB I. JAFFE,
WEINBERGER & WEINBERGER,
Attorneys of Plaintiffs.

Dated, Jan. 8, 1925.

Filed, Jan. 8, 1925.

20

30

40

Postea.

NEW JERSEY SUPREME COURT,
 PASSAIC COUNTY.

10	MORRIS FEDER, JACOB PACKER and MINNIE TERRIS, Plaintiffs, vs. SAM SOLOMON and JULIA SOLO- MON, Defendants.	}	Action at Law.
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20 This case was tried on September 25th, 1925, before me in the New Jersey Supreme Court, Passaic County, without a jury by consent of counsel for the plaintiffs and counsel for the defendants given in open court.

I do hereby render judgment in favor of the defendants with costs to be taxed.

CLIFFORD L. NEWMAN,
 Judge.

30 A true copy.

EDWARD J. KELLEHER,
 Clerk.

Judgment.

NEW JERSEY SUPREME COURT.

MORRIS FEDER, JACOB PACKER and MINNIE TERRIS, Plaintiffs, vs. SAM SOLOMON and JULIA SOLO- MON, Defendants.	}	Action at Law. On Postea. Judgment for Defendants.	10
		Feder & Rin- zler, Attorneys.	

Judgment entered this twenty-first day of Novem-
 ber, A. D., nineteen hundred and twenty-five in favor
 of defendants and against the plaintiffs for the sum
 of thirty-nine dollars and ten cents costs.

Costs \$39.10

20

WM. S. GUMMERE,
 C. J.

A true copy.

EDWARD J. KELLEHER,
 Clerk.

30

40

Testimony.

NEW JERSEY SUPREME COURT,

PASSAIC CIRCUIT.

10	MORRIS FEDER, JACOB PACKER and MINNIE TERRIS,	}	At Law.
	Plaintiffs,		
	vs.		
	SAM SOLOMON and JULIA SOLO- MON,	}	
	Defendants.		

Paterson, N. J., September 25, 1925.

20 Before: Hon. Clifford L. Newman, Judge and a jury.

Appearances:

For plaintiffs, Jacob I. Jaffe, Esq., and Messrs. Weinberger & Weinberger.

For defendants, Messrs. Feder & Rinzler.

30 (A jury was called and sworn, and counsel for the respective parties opened to the jury.)

The Court: It seems to me that you might agree on most of the essential facts. Most of it is simply a question of law.

Mr. Weinberger: I would like to offer in evidence contract. Mr. Rinzler waived the production of the subscribing witness. Is that correct?

Mr. Rinzler: I waive the proof of signatures.

40 Paper marked Exhibit P1.

Mr. Weinberger: Have you any objection to the offering of the map?

Plaintiffs' Witness, Russell S. Wise, Cross

Mr. Rinzler: I don't know anything about it, sir.

Mr. Weinberger: I will call Mr. Wise.

RUSSELL S. WISE sworn:

Direct-examination by Mr. Weinberger.

Q. Mr. Wise, you are by profession what? A. 10
Civil engineer and surveyor.

Q. How long have you been in that line? A. Since
1900—25 years.

Q. Graduate of what institution? A. I am not a
graduate, but I attended the Brooklyn Polytechnic.

Q. With what municipalities are you connected and
have you been civil engineering and surveying for?

Mr. Rinzler: We will waive proof of
qualification. 20

Q. I show you a sketch and ask you whether this
was drawn under your supervision? A. It was.

Q. What does that represent, Mr. Wise? A. That
represents a survey or a location of the brick build-
ing at No. 220 Monroe Street, Passaic.

Q. What is the scale of the map or survey? A.
The scale of the map is 2 feet equals one inch.

Q. Now, will you come down here, please, and 30
just—

Mr. Rinzler: May I examine him?

CROSS-EXAMINATION by Mr. Rinzler:

Q. Mr. Wise, you did not have this contract before
you when you made that survey, did you? A. No,
sir.

Q. You just went down to the property without 40
any information at hand and made a survey? A. I

Plaintiffs' Witness, Russell S. Wise, Cross

simply was ordered to locate the building as it existed on the ground in relation to the deed.

Q. Were you given a deed for this property? A. I saw the deed of the property.

Q. What deed? A. The copy of the deed of the property.

10 Q. What deed? A. I don't remember now. All we get is the description.

Q. We would like to know? A. I could not name any—

Q. I would like to know what deed it was? A. I couldn't tell you, because all we get is a description from a deed.

Q. What names were in the deed? A. I told you what I surveyed up. I can give you the names, yes—
20 Minnie Terris, Morris Feder and Jacob Packer.

Q. Have you that deed here? A. No, sir, I never had it.

The Court: Was the deed from them or to them?

The Witness: That is the name on the paper I had, for the description.

The Court: Didn't you have a description from any deed?

30 The Witness: All we get is a copy of the deed or get the deed from them and we take our information to make surveys.

The Court: What deed did you take it from?

The Witness: I can't tell you now. I don't recall.

Q. You have no description here from which you made the survey, have you? A. No.

Q. You haven't, have you? A. No, I have not.

40 Q. As a matter of fact you know there never was a deed that you had in your possession to Minnie Terris, isn't that so?

Plaitiffs' Witness, Russell S. Wise, Re-direct

Mr. Weinberger: I object to it as not proper cross-examination.

The Court: There is nothing now to authenticate the map so far.

Mr. Weinberger: He says he went down to measure the premises 220 Monroe Street.

The Court: That doesn't mean anything. We are going by deed. 10

Mr. Rinzler: I object to the admissibility of that survey.

The Court: Let me see the contract. On what theory are you offering it?

Mr. Weinberger: On the theory he was given a description and went down and examined the property. He went down to examine the property 220 Monroe Street as evidenced by a description. I will connect that up. 20

The Court: Let me see your contract. That is what the contract says, "former deeds."

Mr. Weinberger: It says the deed is to contain metes and bounds.

The Court: I know it does.

RE-DIRECT EXAMINATION by Mr. Weinberger: 30

Q. Did you go down to 220 Monroe Street? A. Yes, sir.

Q. Did you make a survey of the property known as 220 Monroe Street? A. I did.

Mr. Rinzler: I object to that as leading.

Q. And 220 1/2 Monroe Street? A. I don't recall the one-half; I recall the 220. 40

Q. I show you a photograph for the moment and

Plaintiffs' Witness, Russell S. Wise, Re-direct

ask you whether this is the building you went down to survey? A. It is.

10 The Court: Well, I don't see that it makes any difference about a building. He went down to survey a building. These people owned some property here and I assume the natural way to survey a man's property is to take his deed or a copy of it.

The Witness: I did have a description when I surveyed it.

Mr. Weinberger: I might say this. Probably Mr. Wise is confused with reference to the deed. I do not think there was a deed made. All there was down was a contract.

20 The Court: The contract contains no description by metes and bounds. I do not see how he could survey a contract.

Mr. Weinberger: The contract says this, "Known as 220 and 222 1/2 Monroe Street, being a plot 37 1/2 feet more or less front on Monroe Street and 100 feet deep on both sides," and it specifically mentions the numbers of the building.

The Court: That may be very true.

30 Mr. Weinberger: That sets forth the exact property he went down to survey, the number of the building.

The Court: Well, he has not yet shown that there is any official marking of where 220 Monroe Street is.

Q. Did you make a survey of this particular property—

40 Mr. Rinzler: I object.

Mr. Weinberger: I am describing the property as 220.

Plaitiffs' Witness, Russell S. Wise, Re-direct

The Court: Let us not waste time. If he has the deed let us have it. If he did not, let us know it.

Q. By what did you make it? A. I had a description.

Q. From whom did you get the description? A. 10
From Mr. Jaffe.

Q. Have you the description that you got from Mr. Jaffe? A. No; all we get is either the search, what they call a search with a description in it, and from that we take a record of the direction of the lot and make the survey from that.

Q. Pursuant to the description given you by Mr. Jaffe, did you make a survey? A. I did.

Q. Of what property was that? A. 220 Monroe 20
Street.

Q. Is this the survey from the sketch of Mr. Jaffe?
A. That is.

Q. That he gave you? A. Yes.

Q. What does that show?

Mr. Rinzler: I object to it.

The Court: I will sustain the objection. Let us see what he had. You are proving from the top down. 30

Q. I show you a piece of paper and ask you—

The Court: Why don't you put Mr. Jaffe on and let us see what description he gave him.

Mr. Weinberger: All right. We will take him off for a minute.

(Witness temporarily withdrawn from the stand.)

Plaintiffs' Witness, Jacob I. Jaffe, Direct

JACOB I. JAFFE sworn:

Mr. Rinzler: If Mr. Jaffe now says that that is the paper he gave, we will admit it. It will save time.

10 Mr. Weinberger: No; Mr. Jaffe take the stand.

Direct-examination by Mr. Weinberger:

Q. Mr. Jaffe, you are a member of the bar of the State of New Jersey? A. I am.

Q. You had charge of handling this real estate transaction, did you, for Messrs. Terris, Packer and Solomon? A. I did.

20 Q. Did you cause a survey to be made of this property? A. Yes.

Q. What did you do with reference to having the survey made? Tell us in your own words. A. I called Mr. Wise of the firm of Wise & Watson—

Mr. Rinzler: I object. Why not say what description he gave them?

30 A. I asked them to locate and survey the premises 220 and 220 1/2 Monroe Street and gave him a description which I obtained from a search that I had previously made, and the property was described as follows: "Beginning at a point on the northerly side of Monroe Street distant 163.47 feet easterly from the corner formed by the intersection of said northerly side of Monroe Street with the easterly side of Columbia Avenue, and running thence (1) Northerly, passing through the center of the party wall and parallel with Columbia Avenue 100 feet; thence (2) easterly and parallel with Monroe Street 40 37.34 feet; thence (3) southerly and passing through the center of the party wall and parallel with the first

Plaintiffs' Witness, Jacob I. Joffe, Direct

course 100 feet to the said northerly side of Monroe Street; and thence (4) westerly along the same 37.34 feet to the point or place of beginning."

The Court: Where did you get that description from?

The Witness: I got that description from the deed given by Hyman Goldberg and Ellen Goldberg, his wife, to Sam Solomon and Julia Solomon, deed dated September 30, 1919, and recorded on the first day of October, 1919, in Book 227 of deeds, Register's office, Passaic County, 331. 10

Q. Where did you get the deed from, the description in the deed? A. I did not have the deed. I located the property by running a search, Sam Solomon, grantee, and then I located the deed from Hyman Goldberg and then came across a description. 20

Q. Now, then, when you got the description you say by searching the records and you gave that by phone to Mr. Wise and Mr. Wise then—you asked Mr. Wise to do what? A. I asked Mr. Wise sometime afterwards to make a survey.

Q. While you are on the stand, Mr. Jaffe, did you make a charge for services rendered in making a search of this property? A. I did. 30

Q. How much was it? A. \$150.

Q. Was the bill paid for the survey to Mr. Wise? A. I paid it personally.

Q. How much? A. \$50, I think.

Q. Is your charge of \$150 for searching the title a reasonable charge concerning the sum involved?

A. Yes, I think so.

*Plaintiffs' Witness, Jacob I. Joffe, Cross**CROSS-EXAMINATION by Mr. Rinzler:*

Q. Mr. Jaffe, you tried this case as counsel for the plaintiff in this very case in December of 1924, involving the same property and the same parties and the same issue? A. Yes.

10 Q. You sat by here when Mr. Feder, your then client in that case and here your client, testified he paid you \$30? A. He paid \$30 on account. I could not make a search for a \$40,000 property for \$30.

Q. Do you remember you then asked your client, Mr. Feder, "Who made the search for you," and the answer given, "Mr. Jaffe." Remember asking him, "How much did you pay for it?" Is that correct? A. I may have asked the question.

20 Q. And he answered \$30? A. He paid \$30 on account.

Q. Was his answer \$30? A. I don't recall his answer. That is not the fact.

Q. You tried the case for him, didn't you? A. Yes, but that is not the fact.

Q. Now, Mr. Jaffe, the description that you read I understand you copied from a former deed—

30 Mr. Weinberger: I object.

Mr. Rinzler: I am asking him, and I am entitled to have my question asked before counsel interrupts me.

The Court: Have you finished your question?

Mr. Rinzler: No, I have not.

The Court: Proceed.

(Question repeated by stenographer.)

040 Q. —which you found on record, that being a former deed respecting this particular property in suit; is that correct? A. It was a deed—

Plaintiffs' Witness, Russell S. Wise, Direct

Q. Is that correct, Mr. Jaffe; yes or no. A. It was a deed to Sam Solomon.

Q. Is that correct? It was a former deed for the property in question in this suit? A. A deed former to the Feder deed, yes.

Q. Involving the same property in suit here? A. Yes. 10

The Court: Is that the deed which put the title to the property in these defendants.

The Witness: Yes, sir.

Q. Do you mind reading the first and third course for me again, so I can compare it with my own description? A. "Northerly"—

Mr. Weinberger: You have the deed? 20

The Witness: "Northerly passing through the center of the party wall and parallel with Columbia Avenue 100 feet." That is the first, and the third is: "Southerly and passing through the center of the party wall and parallel with the first course 100 feet."

Q. That is all.

RUSSELL S. WISE recalled: 30

Direct-examination continued by Mr. Weinberger:

Q. Now, Mr. Wise, you made that map, if I understand you correctly, in accordance with the description which Mr. Jaffe gave you; is that correct? A. Correct.

Mr. Weinberger: I desire to offer that in evidence. 40

Plaintiffs' Witness, Russell S. Wise, Direct

Mr. Rinzler: I have no objection.
Paper marked Exhibit P2.

Q. Will you just state to the jury what this survey shows with reference to party walls?

Mr. Rinzler: I object to it as leading.

10 The Court: I will permit it.

Q. Just take your pointer and explain to the jury what it shows? A. In locating the property the deed stated that the point of beginning was located 163.47 feet easterly from Columbia Avenue.

Q. Just look at the deed? A. And that the first course ran in a northerly direction 100 feet passing through the center of a party wall and parallel with Columbia Avenue. In a description, as we engineers understand, when a deed distinctly says—

20

Mr. Rinzler: I object. He should be asked questions.

A. I am explaining how I ran the deed out.

The Court: It doesn't make any difference about that now.

Q. What does that show? Where is the party wall?
30 A. The line was drawn parallel with Columbia Avenue in accordance with the deed and the westerly part of the party wall is $4 \frac{1}{8}$ inches west of the deed line; the easterly part of the party wall at Monroe Street is $7 \frac{7}{8}$ inches east of the party wall.

The Court: In other words, the line of the property runs through the center of a party wall or somewhere in the party wall?

40 The Witness: It runs in the party wall, yes.

The Court: Is that so on both sides?

The Witness: Yes.

Plaintiffs' Witness, Russell S. Wise, Cross

Q. How many inches did you say this party wall was on the adjoining property owners then? A. 4 1/8 inches west of the deed line.

Q. How many inches is the party wall on the adjoining property owners' line in the easterly direction? A. 7 1/2 inches.

Q. And that party wall begins where and ends where? A. It begins at Monroe Street and it runs for—the easterly property line begins at Monroe Street and runs for a distance of 38 feet. 10

The Court: What difference does it make, Mr. Weinberger?

Mr. Weinberger: I just want to show—

The Court: If it is an encumbrance one inch is as much as seven. 20

Mr. Weinberger: That is all.

CROSS-EXAMINATION by Mr. Rinzler:

Q. Mr. Wise, when did you first see the party walls; when you approached the buildings? A. Yes.

Q. You mean from the sidewalk or from the rear? A. Both from the sidewalk and the rear.

Q. In other words you made your observation and saw the party walls from your observation at the rear of the building and also the front; is that correct? 30

A. Yes, correct.

Q. No further questions.

The Court: Does that condition still prevail there?

The Witness: As far as I know, yes.

The Court: Do you know? Has it been moved, the building?

The Witness: Why, I don't know. I have not been down there in two months. 40

Plaintiffs' Witness, Morris Feder, Direct

The Court: Up to two months ago had it been moved?

The Witness: Not up to two months ago, no, sir.

10 MORRIS FEDER sworn:

Direct-examination by Mr. Jaffe:

Q. Mr. Feder, where do you live? A. 138 Monroe Street, Passaic.

Q. You are one of the plaintiffs in this suit? A. Yes.

20 Q. I show you this photograph and ask you whether or not that truly represents 220-220 1/2 Monroe Street, Passaic? A. Yes, sir.

Mr. Jaffe: I offer that in evidence.
Paper marked Exhibit D1.

Q. I show you another photograph and ask you whether or not that represents the rear of the premises 220-220 1/2 Monroe Street? A. Yes.

30 Mr. Rinzler: I want to know whether this shows the condition at the time in question in this suit.

The Court: You say the wall runs through there.

Mr. Rinzler: Yes, sir.

The Court: Why go through all this? The defendant says that the survey there is correct and the line runs through a party wall. The fact seems to be admitted.

40 Q. Mr. Feder, when you bought this property did you know there was a party wall? A. No, sir.

Plaintiffs' Witness, Morris Feder, Cross

Q. Did you look at the property before you bought it? A. No.

Q. Do you remember the date of making this contract for the buying and selling of this particular property? A. It was some day in April, 1923.

Q. Did anybody tell you—did Mr. Solomon tell you there was a party wall? A. No, sir. 10

The Court: Why go into that, Mr. Jaffe?

Mr. Jaffe: Except the defendants—

The Court: He claims that. It is not denied.

Q. Did you pay \$1,500 on account? A. Yes, I got the check.

Mr. Rinzler: We admit that. 20

Mr. Jaffe: All right.

Mr. Weinberger: If your Honor please, I think there was a question omitted of Mr. Wise. I don't know whether your Honor wants us to supplement that by proof. Mr. Jaffe testified to paying Mr. Wise \$50 for a survey, and while Mr. Wise is here, if your Honor will let me ask the question, we can let him go. 30

Mr. Rinzler: I won't require any such testimony. I will admit if he goes on the stand again he will testify to that amount.

Mr. Weinberger: All right.

CROSS-EXAMINATION by Mr. Rinzler:

Q. Mr. Feder, you testified in a similar case here between the same parties involving the same matter last year, didn't you? A. Yes, sir. 40

Plaintiffs' Witness, Morris Feder, Cross

Q. You then said that you saw the property, didn't you? A. What's that?

Q. Didn't you at that trial last year testify that you saw the property before you signed the contract? A. Not before I signed the contract.

10 Q. Didn't you say so in this court last year? A. Yes, yes.

Q. You did, didn't you? A. I did, yes.

Q. Now, you testified at an examination before trial at your lawyer's office, that is, Mr. Jaffe's office in the Lawyers Building, a few weeks ago, did you not? A. Yes, sir.

Q. And the date of that was August 3, 1925? A. Yes.

20 Q. You were examined and Jacob Packer and Minnie Terris, the other two plaintiffs? A. Yes.

Q. You were sworn there to tell the truth, weren't you? A. Yes.

Q. Well, now, do you say that you saw the property before you signed the contract or you didn't? A. If I see before I signed the contract?

Q. Yes. A. That was only a deposit.

30 Q. I am asking you now— A. Not on a deposit. On the deed I gave a deposit. It was not on the contract at all.

The Court: Answer the question.

A. No, not before the contract.

Q. So you did not see the property before you signed the contract? A. No.

40 Q. Do you remember being asked at Mr. Jaffe's office at the examination before trial as follows: "And you saw what the construction was and what the condition was?" You were asked that question, weren't you? A. I couldn't get you, what you mean.

Plaintiffs' Witness, Morris Feder, Cross

Q. You were asked this question: "And you saw what the construction was and what the condition was?" Do you remember being asked that? A. On when?

Q. Before you signed that contract? A. No, sir.

Q. Do you remember being asked this question: "You went down there to look at it," meaning the property? A. Yes. 010

Q. Before you signed the contract? A. Not before. The same day when we signed the contract, that night.

Q. Do you say you were not asked that question at the examination before trial? A. Yes.

Q. You were not asked that question, were you? A. Well, what is it?

Q. You went down there to look at it, meaning the property, before you signed the contract? A. At the same day when we signed the contract was it, at night. 20

Q. Didn't you testify in answer to that question at Mr. Jaffe's office: "Yes," that you did go down to see the property before you signed the contract? A. Not before we signed that contract.

Q. Then weren't you asked this question: "So you saw it and knew it?" A. I knew it what?

Q. This property—knew the property? A. I knew the property. 30

Q. You answered that, "I knew it, because I am a builder"? A. I know the property, yes, but not about the party wall.

Q. You have been a builder since 1912? A. Yes.

Q. You know what a party wall is? A. I know, but I—

Q. You know what a party wall is? A. Yes.

Q. You have built a lot of buildings with party walls? A. Yes. 40

Plaintiffs' Witness, Morris Feder, Cross

Q. You can tell a party wall when you see it? A. You could tell it?

Q. You can tell a party wall when you see it? A. Yes, when we know.

Q. Yes or no. A. No; we can't see it before we know in the search.

10 Q. You have been a builder for how many years? A. Since 1913.

Q. 1912, isn't it? A. 1912 sometime.

Q. You have passed up and down Monroe Street hundreds of times before you signed this contract? A. Yes.

Q. You very well know the kind of district the property is located in? A. Yes.

Q. It is a very, very busy business district, isn't it? 20 A. Yes.

Q. All Monroe Street from beginning to end is a very busy street? A. Yes.

Q. And most of the properties are business properties? A. Yes.

Q. There are hundreds of stores on both sides of the street? A. Yes.

Q. And all the buildings in this block are full of stores, aren't they, the ground floor? A. Yes.

30 Mr. Weinberger: I object to this as not proper cross-examination.

(Discussion.)

The Court: You may proceed.

Q. There are three stores in this building, too, aren't there? A. Yes, sir.

Q. There are stores in every building on both sides of the street in the block where this property is lo- 40 cated; is that correct? A. Yes, sir.

Q. Now, before you signed this contract you never

Plaintiffs' Witness, Morris Feder, Cross

had any discussions or conversations with either Mr. Solomon or his wife, did you? A. No, sir.

Mr. Jaffe: I object to it as immaterial—

Q. As far as you know neither Mrs. Feder or Mister—as far as you know neither Mrs. Terris or Mr. Packer had any conversation with either Mr. Solomon or Mrs. Solomon? A. No, sir. 10

Q. You knew the type of building that is, didn't you? A. Did I know what?

Q. You knew the type of building that was, the kind of a building, the type of a building; you knew that? A. I knew the building, yes.

Q. You knew that building before you signed the contract? A. I knew it for passing by all the time.

Q. But you did not go to either the front of that building or to the rear of it? A. No, sir. 20

Q. To look at it before you signed the contract? A. No, sir.

Q. Did you or not testify at the examination before trial that you did go to look? A. No.

Q. At the building? A. No, sir.

Q. Did not. All the buildings in that block and all on Monroe Street are built right in close alignment with each other? A. One to the other, yes. 30

Q. One right after the other? A. Yes.

Q. That is the same with the buildings in this block on Monroe Street? A. Not all the buildings. It is only these three buildings.

Q. I mean the buildings are all close together? There are not lots between—no land? A. No, no land, no.

Q. I mean each building is a whole building, it is enclosed by front walls, isn't it? A. The cornice— 40

Q. It has a front wall, hasn't it? A. The front. Of course it is a front on it.

Plaintiffs' Witness, Morris Feder, Cross

Q. It has a rear wall? A. Yes.

Q. Then the sides of the buildings are protected by walls, so that the building is not open; that is correct, isn't it? A. No.

Q. That is correct? A. Correct, yes.

Q. You have a roof there? A. Yes.

10 Q. Now, these walls are part on the property in question and part on the adjoining property? A. Yes.

Q. You mean the side walls? A. The side walls, yes.

Q. What kind of stores were in this particular building at that time?

The Court: That doesn't make any difference.

20 Q. There were three business stores, weren't there?
A. Three stores.

Q. The agent that got you to buy this property is Mr. Nathan Solomon, isn't it? A. Not Nathan Solomon. He has no interest in this business.

Q. Nothing at all. Did he ever discuss with you about buying that property? A. Nothing of the kind.

Q. Did Mr. Nathan Solomon ever talk to you about buying the property? A. Nothing of the kind.

30 Q. Did he ever show you the property? A. Nothing of the kind.

Q. You know Mr. Nathan Solomon when you see him? A. I knew him very good.

Q. This is Mr. Nathan Solomon, isn't it? A. Yes, sir.

Q. And he never showed you that property before the contract was signed? A. Never showed me anything.

40 Q. Now, you never went to Mr. Greenburg, Victor Greenburg, to take title, did you? A. Why, what is the use going?

Plaintiffs' Witness, Morris Feder, Cross

Q. Did you, yes or no? A. Yes, we went, through Mr. Jaffe.

Q. I say you did not go? A. We were going with him.

Q. Were you at Mr. Victor Greenburg's office on May 11, 1923? A. I did not go.

Q. You didn't go, did you? A. No; I sent my lawyer there. 10

Q. None of you went except Mr. Jaffe went? A. Jaffe, our lawyer, yes.

Q. You did not go there, nor did Mrs. Minnie Ter- ris or did Jacob Packer?

The Court: What difference does it make?

Mr. Rinzler: I think it is very material.

The Court: If there is any encumbrance on the property that was not removed he did not need to go. 20

Mr. Rinzler: I won't press the question.

Q. When did you first find out about this party wall? A. When we went down to Mr. Jaffe to look for the search if it was ready.

Q. When was that? A. It was before we took title.

Q. How long before? A. Well, I think about a month or so we went down to see if the search is made, so he told me then. 30

Q. One minute. You learned a month before you were supposed to take title that there were party walls there? A. Yes.

Q. You never asked Mr. Solomon or his wife to return the money that you paid him? A. No, never asked for it.

Q. Yet you knew a month before title was to be closed that there was a party wall there? A. Yes. 40

Q. You never asked for the money back, did you? A. No, sir.

Plaintiffs' Witness, Morris Feder, Cross

Q. Now, this contract was prepared in the law office of Mr. Victor Greenburg? A. Yes.

Q. And Mr. Victor Greenburg read the contract to you people, didn't he?

10 Mr. Weinberger: I object. The contract is offered.

The Court: He is presumed to know the contract.

Mr. Rinzler: Very well.

By Mr. Jaffe:

20 Q. Mr. Feder, have you asked for the return of \$1,500 since the date fixed for closing title by Mr. Solomon? A. Well, the time when we heard that the search said it is a party wall—when the party said this is a party wall, so we said—

Q. One moment.

By Mr. Rinzler:

Q. Do you remember Mr. Victor Greenburg was at his office when you and the others signed this contract here? A. Yes.

30 Q. Did or did not Mr. Victor Greenburg say to you that he would get the deed, put the description in the contract?

Mr. Weinberger: I object to that.

A. He didn't say.

Q. Didn't you say?

Mr. Weinberger: I object to that, if the Court please.

40 The Court: I can't tell until I hear the question.

Q. Didn't you say to Mr. Victor Greenburg, "Never

Plaintiffs' Witness, Morris Feder, Re-direct

mind the deed, we will take it as the Solomons got the property"? A. No, sir.

The Court: That doesn't make any difference.

Mr. Rinzler: That is all.

RE-DIRECT EXAMINATION by Mr. Jaffe:

10

Q. Now, Mr. Feder, have you asked Mr. Solomon for the return of \$1,500? A. That was the time.

Q. Did you ask him, yes or no? A. Yes.

Q. Did you ask me to get it?

Mr. Rinzler: I object to that as leading.

Mr. Jaffe: All right.

Q. Did you get \$1,500 back? A. I didn't get it.

20

Q. Did you get any of the expense involved in making the search? A. No, sir.

The Court: When did you ask him for this?

The Witness: I asked him, your Honor, Judge, when we heard the search—the title wasn't any good.

The Court: When was that?

The Witness: It was the time before taking title, when we heard the party wall on it.

30

The Court: Was it a month ago or six months?

The Witness: Month ago before that we had to take title on it.

The Court: A month ago?

The Witness: Before we had to take title on it.

The Court: When was the title fixed?

Mr. Rinzler: May 11, 1923.

The Court: April, 1923, then.

40

*Plaintiffs' Witness, Morris Feder, Re-cross**RE-CROSS EXAMINATION by Mr. Rinzler:*

Q. Didn't you testify a few minutes ago that you never asked the Solomons about returning money to you? A. Well, before—

10 Q. That you never asked them to return the money?
A. You said before, but not when we heard the title is no good.

Q. I asked you if you ever asked the Solomons to return the money to you and you said no? A. That was a question when we had to go to the lawyer.

Q. Did you say no or not? A. I said no when you asked me when.

20 Q. Didn't I ask you when you were examined at Mr. Jaffe's office, whether or not you ever demanded that the Solomons return the money to you? A. I didn't talk with Solomon.

Q. Did I ask you a question at Mr. Jaffe's office? A. Yes.

Q. Didn't you say no, sir? A. Well, the question?

Q. Didn't you say no, sir, in answer to that question?

30 Mr. Weinberger: I submit the question and answer should be read. That is not the proper way.

The Court: That is not in the proper form. It is not necessary. You are dragging this case out unduly, it seems to me.

Mr. Rinzler: I think it is very material, if your Honor please. I want to show different statements he made there.

40 The Court: What difference does it make? However, go ahead and ask him.

Q. Didn't you testify when you were examined at

Plaintiffs' Witness, Jacob Packer, Direct

Mr. Jaffe's office that you never demanded the money back from the Solomons? A. I didn't have to demand. I had my lawyer. He demanded.

Q. Didn't you say you never demanded it back? Yes or no. A. To Jaffe, yes.

Q. But you never demanded the money back? A. To our lawyer. We demanded, yes. 10

Q. Don't you want to answer the question? A. Yes.

Q. Did you personally ever demand the money back from the Solomons? A. Not me personally; no, sir.

Q. You never did, did you? A. No, sir. We had our lawyer.

Q. That is all. 20

JACOB PACKER called:

The Court: What do you want to show by Mr. Packer?

Mr. Jaffe: Practically the same; examination of the property, no disclosures made as to the party wall. 30

The Court: Nobody has said there were any.

Mr. Jaffe: All right, we rest.

Mr. Weinberger: I just want to put Mr. Jaffe back on the stand to show a demand for the money.

Plaintiffs' Witness, Jacob I. Jaffe, Direct

JACOB I. JAFFE recalled:

Direct-examination by Mr. Weinberger:

Q. Mr. Jaffe, did you make a demand for the return of these moneys, \$1,500? A. I did.

10 Q. When? A. The time fixed for closing the title, when I came to Mr. Greenburg's office and Mr. Solomon and Mrs. Solomon were there.

Q. What happened? A. Why, I told them that in view of the fact that the search disclosed a party wall existing on the premises my clients could not go through with the contract and would not go through, and I said they want their money back and the expenses.

20 Q. What was the answer you got? A. They said they will have to take the property as we took it.

The Court: When was that?

The Witness: On the day fixed for closing title.

The Court: What day?

The Witness: May 11, 1923.

Q. Did you get the money back? A. No, sir.

Q. That is all.

30 No cross-examination.

PLAINTIFFS REST.

Motion for a Nonsuit.

Mr. Rinzler: Now, if your Honor please, I respectfully move for a nonsuit upon the following grounds:

40 In the first place, if your Honor please, the cause of action as it appears to be set out and

alleged in the complaint is upon the theory of fraud. There is not one scintilla of evidence in this case that any fraud was committed.

The Court: I suppose that does not affect the cause of action; it only affects the form of damages. They are making no other charge for damages than the actual deposit. I do not suppose that would make any particular difference.

10

Mr. Rinzler: That was the theory of their case and I prepared on that theory. The second ground is that the evidence shows affirmatively on the plaintiff's own case the following state of facts: That the contract upon which they bring this suit provides that the property is what is commonly known and designated as Nos. 220-220 1/2 Monroe Street, Passaic, New Jersey, being a plot of ground 37 1/2 feet more or less front on Monroe Street, and 100 feet deep more or less on both sides. The parties of the first part, the contract states, agreed to convey all the lands and premises conveyed to them at this particular property, as described by former deed. Now, the plaintiffs have produced no evidence, if your Honor please, to show that the property is other than as described by former deed. Quite on the contrary, they have testified, or Mr. Jaffe, plaintiffs' attorney, has testified to a description contained in one of the former deeds, and that very former deed states in its first and third courses that there is a party wall on the one side of the building and the other wall on the other side of the building is likewise a party wall.

20

30

The Court: The difficulty with that, Mr. 40

Rinzler, is that the contract also provides that it shall be free of encumbrance; so we get right back to the question of whether the party wall is an encumbrance or not.

Mr. Rinzler: But the contract says, "Free from encumbrances," and can mean nothing more than free from encumbrances excepting otherwise specified in the contract.

10 The Court: Is there any specification in the contract of a party wall?

20 Mr. Rinzler: Yes, by a reference to the former deed, which as a matter of express agreement of the parties by this very contract which they offered in evidence is made part of the contract, and those former deeds, at least the one that Mr. Jaffe testified to, described the property by referring to these two party walls. Now, they cannot say that they are getting any description other than what their contract called for, because it calls for a description as described by former deeds, and that is what they got. If it said subject to a mortgage, they would have to take subject to a mortgage. (Cites Kaplan vs. Bernstein. Also Burns vs. Thomas, 86 Atlantic 382; Johnson vs. Algar, 65 New Jersey Law 363.)

30 Then, if your Honor please, we go to the point that it is not under the evidence in this case an encumbrance, because this Court of Errors and Appeals decision, which I have just read to your Honor, parts of its opinion inferentially says that it is not an encumbrance, and because the decisions of our sister states hold by the great weight of authority that a party wall, so-called, is not an encumbrance,
40 but the courts treat it as a benefit to the build-

ing, to both buildings, because they each get mutual support to their respective buildings by that so-called party wall. Now, there is but one exception to that rule that says that it is not an encumbrance, and that is where the two respective owners agree by their contract that they shall be mutually bound to keep and maintain that wall in its then state or condition and repair it when necessary or rebuild it when destroyed. Those facts must appear by express agreement made between the parties who are the owners of the building whose support is gotten by this party wall. Here the evidence is silent of any such contract, and where the fact is, as here, that there was no such contract made between the owners, then the law is well settled, as was stated by the New York courts in three cases and by the Massachusetts Court and by the Iowa Court, that such a party wall is not an encumbrance, and the only thing that makes it an encumbrance is the fact that the parties agree by their contract to rebuild it or keep it in repair or maintain it.

The Court: I will permit the plaintiff to show what kind of a party wall it is, if they want to offer any testimony.

Mr. Weinberger: Mr. Wise, take the stand. 30

The Court: I assumed a party wall was a wall put up by agreement between the two adjoining owners.

Mr. Rinzler: There is no such evidence.

Plaintiffs' Witness, Russell S. Wise, Direct

RUSSELL S. WISE recalled:

Mr. Rinzler: May I protect my client's position by another objection at this time to recalling this witness?

10 The Court: You may. The Court reopens the case.

Mr. Harry Weinberger: If your Honor please, may I call your attention to this: I take it that the point counsel seeks to raise now would bring him within an exception. I think that the burden would devolve upon him, would it not, as a matter of defence, to show what a party wall is?

The Court: What does the testimony show?

20 Mr. Harry Weinberger: He concedes for the purpose of the record that it is a party wall, as I understand it. He now seeks to differentiate between a party wall of one type and a party wall of another. Wouldn't that be a matter of defence?

The Court: Well, you may take your choice.

Mr. Harry Weinberger: I just wanted to get your Honor's views.

30 *Direct-examination by Mr. Harry Weinberger:*

Q. Mr. Wise, what kind of a wall is there on the easterly side of 220-220 1/2 Monroe Street, Passaic?

A. It is a 12-inch wall extending through a portion of the series of brick buildings and it is what is known to us as a party wall.

Mr. Rinzler: I object.

The Court: Strike it out.

40 Q. Is it a party wall?

Plaintiffs' Witness, Russell S. Wise, Direct

Mr. Rinzler: I object.

The Court: Sustain the objection.

Q. Well, what is it? Will you just come down here a minute and take this pointer? Where does the wall begin from, Mr. Wise? A. Well, begins at Monroe Street.

10

Q. How high is the wall? A. It is, I think, a three-story brick building, as I recall it, and the deed line runs through the brick wall from the beginning to the end of the brick building. In other words, if this wall belonged—

Mr. Rinzler: I object.

A. —a brick building—

Mr. Rinzler: I object to that speculative statement. 20

The Court: I cannot tell just what the statement is going to be.

A. If this brick wall belonged to the brick building known as No. 220—if the entire wall belonged to that, then the adjoining building would have no wall whatever of its own.

The Court: Is it one common wall or is it two walls joined together? 30

The Witness: It is a common wall. There is no joint whatever in it.

Q. And this wall, you say, regarding that as the wall of our building, 220 Monroe Street, would that encroach on the other property? A. It would.

Mr. Rinzler: I object to that as calling for a conclusion. 40

The Court: That is a conclusion. The answer will be stricken out.

Plaintiffs' Witness, Russell S. Wise, Cross

Q. Is or is not this wall on the property you surveyed? A. The wall—

10 Mr. Rinzler: I object. He has already testified before on direct-examination that the wall stands partly on this property and partly on the other.

The Court: I do not think there is any use going over it; we have been all through it.

Q. Now, with reference to the wall on the other side, the party wall on the other side—

Mr. Rinzler: I object to that characterization of counsel.

20 Q. Well, what is there on the side? A. There is a brick wall.

Q. Where is it? A. From the line as described in the deed the westerly portion of the brick wall is 4 1/2 inches on No. 220 Monroe Street, and the easterly portion of the brick wall is 7 1/2 inches on the adjoining property.

The Court: Is that a common wall the same as the other one?

30 The Witness: Yes, a common wall.

CROSS-EXAMINATION by Mr. Rinzler:

Q. Mr. Wise, the common wall on the one side of this building is used in common to support this particular building in suit and also the adjoining building? A. Yes.

Q. Adjacent to that side? A. Yes.

Q. Likewise, on the other side? A. Yes.

40 Q. The common wall on the other side of the build-

Defendants' Witness, Victor Greenburg, Direct

ing is used as a support in common to support that building and the adjacent building on that side? A. Yes.

PLAINTIFFS REST.

The Court: I will hear you further.

(Discussion.)

10

The Court: I will hold your motion in abeyance. You may proceed.

VICTOR GREENBURG, sworn:

Direct-examination by Mr. Rinzler:

Q. Mr. Greenburg, you are a member of the bar of New Jersey? A. I am. 20

Q. Are you the Mr. Greenburg mentioned in this contract? A. I signed it.

Q. Exhibit P1? A. I signed this paper.

Q. It was drawn and prepared by you? A. Yes.

Q. I notice this contract says: "Parties of the first part agree to convey all the lands and premises conveyed to them at this particular number as described by former deed." A. Yes, I dictated that. 30

Q. How did it come about that you inserted such a clause?

Mr. Weinberger: I object. It speaks for itself.

The Court: It makes no difference. The contract speaks for itself.

Mr. Rinzler: I ask an exception.

Q. What, if anything, did Mr. Feder or Mr. Pack- 40
er say when that provision was inserted?

Defendants' Witness, Victor Greenburg, Direct

Mr. Weinberger: I object to it as irrelevant, incompetent and immaterial.

The Court: Sustain the objection.

Mr. Rinzler: I am not attempting to vary or alter the terms of the contract.

The Court: What is the purpose?

10

Mr. Rinzler: To show that one of the plaintiffs says they want to take the same property as these defendants got, as the Solomons got.

The Court: I will sustain the objection, if that is the purpose.

Mr. Rinzler: I ask an exception.

Q. On the day when the contract called for the closing of title— A. Well, there was lots of time before that contract was signed or dictated.

20

Mr. Weinberger: I object to the witness volunteering anything.

The Court: Wait.

Q. Well, after this contract was signed, did you talk to either of these plaintiffs? A. Yes; after the contract was executed and Mr. Packer and Mr. Feder—I asked them if they were going to have this search made, and they said yes, make it, so consequently I made one of my title folders out; a day or so later they told me to hold back on it, so I never went ahead with the search.

30

Q. Did they tell you why they wanted you to hold back? A. Well, I couldn't say directly whether they told me why. I had my own impressions.

The Court: Just a minute.

40

(The Court and counsel have a discussion at side bar.)

Defendants' Witness, Sam Solomon, Direct

The Court: Members of the jury, inasmuch as this case is going to involve largely a question of law, counsel have agreed that it should be tried and disposed of by the Court, so that the Court may have time to digest the various arguments, which will relieve you from further responsibility in this case. You may, therefore, be excused until Monday morning. 10

Q. That is all, Mr. Greenburg.

SAM SOLOMON, sworn.

Direct-examination by Mr. Rinzler:

Q. Mr. Solomon, you are one of the defendants in this case? A. Yes. 20

Q. Julia Solomon, the remaining defendant, is your wife? A. Yes.

Q. You are familiar with the neighborhood, the type of neighborhood in Monroe Street where this property is located? A. Yes, sir.

Q. Is that a business or residential district? A. Business. 30

Mr. Rinzler: Maybe we can agree on these facts, Mr. Weinberger?

Mr. Weinberger: It may be stated what they are. It is all on the record now.

Q. Well, are there stores all along the both sides of Monroe Street, in the block where this property is located? A. Yes.

Q. Is all Monroe Street a business district? A. Yes. 40

Defendants' Witness, Sam Solomon, Direct

Q. Are the buildings built right next to each other?

A. Yes, sir.

Q. Close together or apart? A. Close.

Q. Were they that way at the time this contract was signed? A. By this agreement.

10 Q. The contract for the purchase and sale; that is correct? A. Yes.

Q. Has ever since the condition that then existed been the same as it is now? A. Yes.

Q. On the day when the contract called for closing title did you and your wife go to Mr. Victor Greenburg's office to give title? A. Yes.

Q. Did you have a deed prepared ready to sign to give title if they were willing to take it, these plaintiffs? A. Yes.

20

The Court: I understand the basis of their complaint is that the title was subject to encumbrances, so all you need to show is that they were ready to tender them a deed, because they have not done anything on their part that would put you in default. Their theory is that they did not need to tender anything.

30

Mr. Rinzler: Your Honor appreciates my attitude in offering this testimony. It is merely that I should have the benefit of it in case the necessity arises. It may not be necessary, but is just in case of emergency.

The Court: I do not think, if it is for an emergency, it is of any benefit. They have not charged you with default, in their complaint; their case stands or falls on the title.

40

Mr. Rinzler: Your Honor feels that if the plaintiffs are wrong in their theory or con-

Defendants' Witness, Sam Solomon, Direct

tention, then we do not have to make a tender?

The Court: Of course not. Their suit is based on the theory that you had no title.

Mr. Harry Weinberger: I do not know that that is the law. I think there is a duty devolving upon him to show absolute compliance with the tenor of the contract. 10

The Court: But they are not suing you.

Mr. Harry Weinberger: I think the converse is equally true.

The Court: The complaint says the title was defective; nothing about there being any default. You cannot recover unless the title was defective.

Mr. Harry Weinberger: Your Honor will appreciate the fact that there is a duty devolving upon them to show a compliance with the tenor of that contract. 20

The Court: Not as far as this complaint is concerned. There is no such duty on them. I have not read it, but the opening is that the property was subject to an encumbrance. They are suing to get their money back.

Mr. Harry Weinberger: Perhaps I did not make my position clear to you. The law, irrespective of what the easement there may be, is that a party wall is an encumbrance. There nevertheless is always that duty to show that they performed or were in a position to perform. 30

The Court: They are not plaintiffs. They are defendants.

Mr. Harry Weinberger: I think that makes no difference. 40

Defendants' Witness, Sam Solomon, Direct

The Court: The suit is based on the fact that you have an encumbrance. That is what the complaint says.

10 Mr. Harry Weinberger: I go a step farther. I am prepared to argue as a matter of law in this case that unless there is damage shown, you can still recover your \$1,500.

The Court: There is no such claim on the part of the plaintiffs.

Mr. Harry Weinberger: I think that is the law. I mean that is the law as pleaded.

The Court: I have not read the pleadings. I assumed the opening corresponded with the pleadings.

20 Mr. Harry Weinberger: That is the law.

The Court: I am not willing to say it is not the law, but that is not the law in this case.

Mr. Harry Weinberger: I think the law in this case necessitates absolute proof of tender.

The Court: I do not think so.

Mr. Harry Weinberger: That would be my insistent.

The Court: There is no such claim in the complaint.

30 Mr. Harry Weinberger: For the purposes of the record, I will say this to your Honor, that we do not agree with your Honor's ruling on it, and may we have our exception noted?

The Court: There is nothing to ask an exception to as far as you are concerned.

Mr. Harry Weinberger: Your Honor seems to be of the opinion—

40 The Court: Nothing before me upon which you can take an exception.

Mr. Harry Weinberger: Your Honor seems to have ruled—

Defendants' Witness, Sam Solomon, Direct

The Court: You cannot take an exception to my overruling Mr. Rinzler's offer.

Mr. Harry Weinberger: I think the record will show that you have ruled that it will be unnecessary to prove—

The Court: My ruling was that Mr. Rinzler need not show that. If anybody can take an exception I think it would be him. Proceed. 10

Q. Are these two former deeds for this particular property in question, Mr. Solomon? A. Yes.

Mr. Rinzler: May I have them marked in evidence?

Papers marked Exhibits D1 and D2.

Mr. Harry Weinberger: I make formal objection to them on the ground it is not properly proven. There is no proof showing that these are proper evidence. 20

The Court: If they are recorded I will admit them.

Q. Is Defendants' Exhibit D1 the deed whereby you and your wife acquired title to this property; in other words, you bought the title under that deed? A. Yes.

The Court: You said deeds. What is the other deed? 30

Mr. Rinzler: The other deed is a deed whereby the grantors of this particular deed acquired title from other parties.

The Court: The preceding deed?

Mr. Rinzler: The preceding deed.

Q. Now the side walls of this building stand partly on your land and partly on the land next to it? A. Yes. 40

Defendants' Witness, Sam Solomon, Cross

Q. And those side walls support your building and the buildings next to your building? A. Yes.

The Court: You did not build the building?

The Witness: No, sir.

10 *CROSS-EXAMINATION by Mr. Harry Weinberger:*

Q. You are Sam Solomon and your wife is Julia Solomon? A. Yes.

Q. The wall of your building stands over on the land of the next owner too, does it not? A. I don't know how it stands too.

20 Q. You don't know anything about how the wall stands; is that right? A. What do you mean?

Q. You don't know how the wall of your building stands that you agreed to sell? You didn't know there was a party wall there, did you? A. No, I did not.

Q. You never knew it when you signed the contract? A. No, sir.

Q. And the first time you knew it was when they refused to take title because there was a party wall there; is that right?

30 Mr. Rinzler: I object.

Q. That is right, is it?

Mr. Rinzler: I object to it as not proper cross-examination.

The Court: I will permit it.

Q. That is right, is it? A. I don't know if that is right.

40 Q. Don't you know whether that is right? Isn't it true that the first time you knew there was a party wall was when they refused to take the title? A. That is what they complain now. That is what they just read.

Defendants' Witness, Sam Solomon, Cross

Q. That is the first time you ever knew about it; is that right? A. Yes.

Q. You mean to say you didn't know it when you signed the contract; is that true? A. I didn't know what?

Q. What I just asked you, and you said you didn't know until the contract—they refused to go through with the contract. A. I know that I had a property and whatever is in the papers, what I bought, that is the way I sold. 10

Q. I ask you if it is now true that you never knew of it when you signed the contract? A. That it was a party wall?

Q. Yes, you never knew it? A. No, sir.

Q. That is true? A. Yes, sir.

Q. How long had you owned the building up to the time you sold it? A. About two years, I believe; I don't remember exactly. 20

Q. You got your deed on the 30th of September, 1919? A. Yes.

Q. You owned it up to the time you signed the contract of the 6th of April, 1923; is that right? A. Yes.

Q. When you learned that they didn't want to take title because there was a party wall there, because the wall stood on the next man's property, you refused to give them back the deposit, didn't you? 30

Mr. Rinzler: I object to that.

The Court: He has already admitted it.

Mr. Harry Weinberger: I beg pardon. I did not understand it.

Q. Well, now, when you took the deposit of \$1,500 you claimed you did not know there was a party wall; that is right, isn't it? A. I never surveyed the property. 40

Defendants' Witness, Sam Solomon, Cross

Q. You didn't know there was a party wall when you took the deposit? A. No, sir.

Q. You never said anything about that to Mr. Feder, did you, or Mr. Packer; that is true, isn't it?

A. I sold whatever I have.

Q. Answer the question. Packer or Terris? A.
10 He never asked for it and I—

Q. You never said anything about it; that is true, isn't it? A. No, sir.

Q. And the reason you didn't say anything about it was because you didn't know about it yourself; is that right now? Is that right? A. I didn't get you.

(Question repeated by stenographer.)

20 A. Yes, sir.

Q. I show you exhibit marked P2?

Mr. Harry Weinberger: I ask that it be corrected and marked Exhibit P1 instead.

Mr. Rinzler: My understanding is that you ruled, or at least commented it was not relevant nor material.

The Court: I do not think it was, but you
30 asked about it being a business section, so I suppose there could be no harm in permitting it to go in.

Mr. Rinzler: It is not in evidence now, as I understand.

The Court: I will permit it.

Mr. Harry Weinberger: I offer it formally as P1.

Mr. Rinzler: I object, because there is no
40 proof that the condition shown in this photograph correctly represents the condition as it was at the time the contract was made nor at the time when the title was to be closed.

Defendants' Witness, Sam Solomon, Cross

Mr. Weinberger: May I withdraw the photograph and prove it?

Q. Mr. Solomon, where do you live? A. 23 Summer Street.

Q. You lived on Monroe Street and had a business down there, did you, for a good many years? A. Yes. 10

Q. You are familiar with your own property, I take it? A. Yes.

Q. I show you a photograph and ask you whether you recognize the buildings on that photograph? A. Yes.

Q. Is that the way they were when you bought it? A. Yes.

Q. Is that the way they were when you sold them? A. Yes. 20

Q. That is a correct picture of what is actually on Monroe Street? A. Yes.

Q. Is that right? A. Yes.

Mr. Weinberger: I now offer the picture in evidence as Exhibit P3.

Photograph marked Exhibit P3.

Q. By the way, you said this is the way the building was when you bought it? 30

Mr. Rinzler: I object to it being admitted in evidence. You cannot admit it at this stage of the case.

The Court: It is too late. I have permitted it.

Mr. Rinzler: I ask an exception.

Q. I direct your attention to the fact that this photograph—by the way, you say that was the condition of the building when you bought it? A. Yes. 40

Defendants' Witness, Sam Solomon, Re-direct

Q. Did you notice the cornice there? A. Yes.

Q. When you bought it? It was the same way, was it? A. Yes.

Q. Looking at that, it looked like two different buildings to you, did it not?

10

Mr. Rinzler: I object.

Mr. Weinberger: I will withdraw it.

A. Shows the cornice.

Mr. Rinzler: There is no question pending.

Q. Mr. Solomon, that is all.

RE-DIRECT EXAMINATION by Mr. Rinzler:

20

Q. Did Mr. Jaffe ever demand or ask that you return the money that was paid to you and your wife as a deposit on this contract? A. No, sir.

Q. Did anybody ask you to return any money? A. No, sir.

Mr. Rinzler: I now offer in evidence the deposition that was taken in this case at the request of the defendant.

30

Mr. Weinberger: I object to that. That is not the proper way to prove it.

The Court: Examination before trial—you have to prove it.

Mr. Rinzler: Signed by the examiner to whom you referred the examination.

Mr. Weinberger: It must be filed.

Mr. Rinzler: It was filed. I just got it. Paper marked Exhibit D3.

40

*Defendants' Witness, Sam Solomon, Re-cross**RE-CROSS EXAMINATION by Mr. Harry Weinberger:*

Q. No one ever asked the money back from you; is that right? A. Until it was time to take title.

Q. Then they asked the money back from you?

A. Yes.

Q. Who asked it from you? A. Mr. Jaffe.

Q. Why did you a minute ago say that Mr. Jaffe never asked you for the money? A. That was the last thing, was taking title.

Q. Why is it you just said a minute ago that you were never asked for that money if the fact is Mr. Jaffe did ask you?

Mr. Rinzler: He says Mr. Jaffe asked him. Why question it?

The Court: You may ask him.

A. I thought the ones who bought the property, they never asked me.

Q. Mr. Solomon, weren't you just asked a moment ago by Mr. Rinzler, "Did Mr. Jaffe ever ask you for the return of the money?" And didn't you say he never did? A. Mr. Jaffe?

Q. Yes? A. Was mentioned, Mr. Jaffe?

Q. Didn't you make that answer to that question?

A. I answered nobody asked for money from the buyers that buy the property.

Q. You understood the question that you did answer? A. Yes.

Q. Then he did have somebody ask you for the money? A. Mr. Jaffe asked.

10

20

30

40

Defendants' Witness, Nathan Solomon, Direct

NATHAN SOLOMON sworn.

Direct-examination by Mr. Rinzler:

Q. Mr. Solomon, were you the agent that put through this sale of property in question? A. Yes.

Q. You negotiated the sale? A. Yes.

10 Q. Did you talk to Mr. Feder or Mr. Packer before the contract was signed? A. Yes.

Q. Did you show either Mr. Feder or Mr. Packer or Minnie Terris the property before they signed the contract? A. Mr. Packer and Mr. Feder.

Q. Mr. Feder and Mr. Packer? A. Yes.

Q. Did you show them the property before the contract was signed? A. Why, we were around that property for three days still until the—before the
20 contract was made we were working on that property for three days, before the sale was settled.

Q. And they looked at the property? A. Absolutely.

Q. Did Mr. Feder say anything to you?

Mr. Weinberger: I object on the ground it is immaterial.

The Court: Well, on that one point, about
30 knowledge of it, it may be of some relevancy on the question of the survey. On the other point I do not think it will make any difference. I will admit it for the one purpose.

Q. Did Mr. Feder say anything to you at that time?

A. With regard to what?

Q. With regard to any walls? A. I have been talking to Mr. Feder and Mr. Packer bargaining that building—

40 The Court: What did they say?

The Witness: And I told him you better hurry up

Defendants' Witness, Nathan Solomon, Cross

and buy that building for \$40,000, because I know the next building was offered \$42,000. It is in the same building. Mr. Feder says to me, "Why, the other building is worth \$2,000 more, because it has no party wall, and this has a party wall."

CROSS-EXAMINATION by Mr. Harry Weinberger: 10

Q. Were you the agent? A. Yes.

Q. Are you a licensed broker?

Mr. Rinzler: I object to it as not material.

Q. Were you a licensed broker?

The Court: It wouldn't make any difference in this case. 20

Mr. Harry Weinberger: Possibly not.

Q. Who did you take down to look at the building? A. Mr. Feder and Mr. Packer.

Q. When? A. We were working on that building—

Q. When? A. What month?

Q. Yes? A. I believe it was the month of May, if I am not mistaken; I don't know correctly. 30

Q. What year? A. Year?

Q. Don't ask me questions, sir. Kindly answer them? A. 1923.

Q. In May, 1923, you went down and looked at that property with Mr. Feder and Mister who? A. Mr. Packer.

Q. You remember that clearly, do you? A. Absolutely.

Q. You are positive when you say that it was May, 1923, that Mr. Packer and Mister who went with 40

Defendants' Witness, Nathan Solomon, Cross

you? A. Mr. Packer and Mr. Feder was bargaining on that property for three days.

Q. And they went down with you in May, 1923, to look at that building; is that right? A. We went down to look at that building.

10 Q. Is that right? A. Well, I said before I don't remember before exactly the month, but I think it was in May; I am not sure.

Q. Are you in doubt about it? A. It was either April or May.

Q. When you went down there who were you representing? A. Who I represent?

Q. Yes? A. At that time?

Q. Yes? A. Mr. Feder and Mr. Packer.

Q. You were their agent? A. Yes, they sent me—

20 Q. You were their agent?

Mr. Rinzler: I object. "They sent me," to what?

A. They sent me to buy the building. In fact Mr. Solomon didn't know the last minute, the time we went to the lawyer's office to make the contract, that Mr. Feder and Mr. Packer is buying that building.

Q. Well, whose agent were you?

30 Mr. Rinzler: I object. He has answered.
The Court: I will permit the question.

A. Mr. Feder and Mr. Packer.

Q. Who paid you your commission? A. No one paid me—

Mr. Rinzler: I object to it as immaterial.
The Court: I will permit it.

40 Q. Didn't get any commission at all? I don't hear you? A. I didn't get no—I was supposed to get commission when title was delivered.

Defendants' Witness, Nathan Solomon, Cross

Q. From whom? A. From Mr. Solomon, naturally.

Q. Whose agent were you? A. Mr. Packer and Feder sent me to buy the building for them.

Q. I ask you again, sir, who was to pay you your commission?

Mr. Rinzler: I object. I will withdraw my objection.

10

Q. Will you answer the question?

(Question repeated by stenographer.)

A. Mr. Solomon was to pay my commission.

Q. Did you have a writing for your commission?

A. No.

The Court: Which one of these men was it that said it was worth \$2,000 less?

20

The Witness: Mr. Feder and Mr. Packer.

Q. Which one said it? A. Why, Mr. Feder said it.

Q. You just told the Judge when he asked you the question that both of them said it? A. Well, they both, but Mr. Feder—

Q. Just a minute. Not too fast for me; I am a little slow, you see. Both of them said it? Which one said it—both or one? A. They both said it, this building is worth more because it hasn't no party wall.

30

Q. So Feder and Packer said to you that building was worth more because it didn't have a party wall; is that right? A. Yes, that is right.

Q. Now, you are sure of that? A. Yes.

Q. Did you tell that to Solomon? A. If I tell it to Solomon?

40

Defendants' Witness, Nathan Solomon, Cross

Q. Yes. You know he was paying you a commission. I suppose you told it to him? A. What, there is a party wall?

Q. Yes? A. Never.

Q. No; it was worth more because it didn't have a party wall? A. Which one?

10 Q. The one they were buying?

The Court: This one is worth less because it has a party wall.

Q. Which one? A. Solomon's is worth less.

Q. Did you tell that to Mr. Solomon? A. No.

Q. Didn't talk about the party wall to Mr. Solomon at all? A. I was talking—

Q. Did you or not? A. No.

20 Q. You mean to tell the Judge, do you, that you were sent there by Feder and by Terris and that they told you to go and buy the building for them and that you never told Solomon, "Why, this building isn't worth so much, because there is a party wall"? What is your answer? A. Mr. Solomon wasn't anxious to sell that building—

Q. Answer the question? A. Why, I said to Mr. Solomon?

30 Q. Yes? A. No.

Q. Did not? A. No.

Q. Why not?

Mr. Rinzler: I object to it as irrelevant.

The Court: I will permit it. Go ahead and answer.

A. Why, I didn't talk to Mr. Solomon. It wasn't to my interest to talk to Mr. Solomon.

40 Q. Didn't you want to make the sale? A. Yes, sir.

Defendants' Witness, Nathan Solomon, Cross

Q. Didn't you want to get it as cheap as you could for your people, Feder and Terris? A. Yes.

Q. Didn't you want to point out the bad parts of that building when you knew there was a party wall?

A. I didn't point them out the bad parts of that building. They themselves proved to me this is a party wall, therefore it is not worth so much. 10

Q. Why didn't you tell that to Solomon? You say you were their agent.

Mr. Rinzler: I object. He has answered.

The Court: I will permit it.

Q. You say you were their agent. They told you there was a party wall there. Why didn't you tell that to Solomon? A. That there is a party wall?

Q. Yes? A. I know that they would buy the building even if there was a party wall, because they were anxious to buy the building. 20

Q. Why didn't you tell that to Solomon? A. Well, I wasn't experienced whether I got to tell them or not.

Q. What is your answer? A. I didn't know whether I got to tell that to Solomon.

Q. You were trying to buy the building? A. I was trying to buy the building for him. 30

Q. As cheap as you could? A. For \$40,000.

Q. Why, there was something that wasn't as good as the next building, because there was a party wall?

A. That is what they told me.

Q. Yet you did not go to Solomon and say give them this price, for there is a party wall there? A. I tried to get forty thousand.

Q. Aren't you related to Solomon? A. No.

Q. Aren't your families related? A. No, sir. 40

Q. No member of your family is related to the Solomon family? A. No, sir.

Defendants' Witness, Nathan Solomon, Cross

Q. Eh? A. We coming from the same town, that is all.

Q. I am talking about the family now. I am not talking about the town. There are some of your relatives that are relatives of his? A. No, sir.

10 Q. There are not? Well, now, let's see, Mr. Solomon—what did Mr. Feder say to you about this building being worth \$2,000 less than the other building? What did he say? A. I told Mr. Feder and Packer, "You better hurry up and buy that building for the \$40,000, because I know the next building was offered the day before for \$42,000."

Q. Who owned the next building? A. Lapitski; and Mr. Feder said to me, "Well, look at the other building, hasn't got no party wall and this has a party wall."
20

Q. One party wall or two? A. I couldn't tell you, one or two; whether he said wall or walls I don't remember.

Q. Are you the Nathan Solomon who got this receipt from Mr. and Mrs. Solomon? A. Yes, sir.

Q. Do you know Dave Lapitski? A. Yes.

Q. Did you and he buy that building? A. Did I and Lapitski buy that building?

30 Q. Yes? A. Yes, he was connected in that sale, too.

Q. Did you and he buy that building? Yes or no? A. Feder and Packer buy the building.

Q. You never bought it?

Mr. Rinzler: I object to that as immaterial.

Q. Did you ever buy that building? A. What?

Q. Did you buy that building? A. I bought it for
40 them.

The Court: Which building?

The Witness: 220 Monroe Street.

Defendants' Witness, Nathan Solomon, Cross

The Court: The same one we are talking about?

The Witness: Yes.

Mr. Rinzler: I would like to know what he means by that.

The Court: For whom did you buy it?

The Witness: For Packer and Feder.

10

Q. Now, let's get this straight. You say that you didn't buy that building with Lapitski, did you? Answer my question? A. No, sir.

Q. You didn't give a thousand dollars deposit? A. I bought the building for Packer and Feder.

Q. Did you give a deposit? A. Their check.

Q. Did you also get a writing from Solomon that you were the agent and going to get a commission from them? A. No, sir.

20

Q. Did you make an arrangement for commission? A. No, sir.

Q. Didn't you say you did make an arrangement with Solomon for commission? A. Not in writing.

Q. Didn't you make an arrangement, I asked you, for commission? A. Yes, after the title was delivered.

30

Q. So you were the agent to collect commission from Solomon and you got this receipt, didn't you, from Mr. and Mrs. Solomon that you were the buyer; is that right? A. I got the receipt of Mr. Solomon, yes.

Mr. Weinberger: I offer that for identification.

Mr. Rinzler: I object to it as immaterial.

The Court: What is the purpose?

40

Mr. Harry Weinberger: For the purpose of

Defendants' Witness, Nathan Solomon, Re-direct

attacking directly the credibility of this witness.

The Court: I will admit it.

Paper marked Exhibit P4 for identification.

10 Mr. Rinzler: Maybe I will consent to it going in evidence.

(Examines paper.)

Q. You say you got Mr. Feder's check to pay that thousand dollars? A. Packer and Feder's.

Q. Do you know? A. I don't remember.

Mr. Rinzler: If you wish to offer this you may.

Paper marked Exhibit P4.

20

RE-DIRECT EXAMINATION by Mr. Rinzler:

Q. You say you were to get commissions only when title was closed? A. Yes, sir.

Q. Only if title was closed? A. Yes.

30 Q. You have talked about this exhibit which is offered in evidence, marked Exhibit P4, mentioning your name and David Lapitski as buyers. Were you buying that for yourself and David Lapitski or somebody else?

Mr. Weinberger: I object on the ground that it speaks for itself.

The Court: Does the paper say anything about it?

Mr. Weinberger: It says it sells it to Solomon.

40 The Court: I will permit it.

Q. Were you acting for yourself or were you acting for somebody else? A. For the reason that I—

Plaintiffs' Witness, Jacob Packer, Direct

Q. Were you buying it for yourself? A. I was—
I bought that building for Packer and Feder.

Q. Are they the same people suing here? A. Yes.

Q. Who gave the money to pay a deposit down?
A. Mr. Packer and Feder.

Q. Was it after this paper was signed that they
signed the contract to buy the property? A. No; 10
they gave me a thousand dollars and I went down
with their thousand dollar check and I gave it to
Solomon and he wanted to know who was buying the
building, and I said, "I am buying the building; here
is a thousand dollars check deposit; give me a re-
ceipt for it." Then we went to the lawyer to sign
a contract, and then we went to the broker, Mr.
Packer and Feder delivered five hundred more, which 20
Mr. Solomon claims he wants to be a deposit.

DEFENDANTS REST.

Plaintiffs' Testimony in Rebuttal.

JACOB PACKER sworn.

Direct-examination by Mr. Harry Weinberger: 30

Q. Mr. Packer, did you ever know there was a party
wall up to the time that the search was made? A.
No.

Q. Did you ever say to Mr. Solomon this property
costs less than the other because there is a party wall,
or did you ever know about it? A. I didn't talk with
Solomon before Lapitski was the agent, and I came
in and Mr. Lapitski called me in the house to give 40
deposit, and he was sitting there, and when I gave

Plaintiffs' Witness, Morris Feder, Direct

him a check they went together, and I saw them went together to Solomon, but I didn't talk to him.

Q. Didn't talk to Solomon at all? A. No; only David Lapitski.

Q. Did you at any time say anything about a party wall? A. No.

10 Q. Did you know there was a party wall? A. No.

Q. Did you ever hire him to be the agent in this matter for you? A. No; Lapitski was—told me I should buy that house.

No cross-examination.

20 MORRIS FEDER recalled.

Direct-examination by Mr. Harry Weinberger:

Q. Mr. Feder, I think you were asked whether you knew there was a party wall there until the search was made?

Mr. Rinzler: I object.

A. No, sir.

30 Mr. Rinzler: I object to it as not proper rebuttal.

The Court: You may ask him whether he had a conversation.

Mr. Weinberger: I will withdraw the question.

Q. Did you ever send Solomon as your agent to buy this property? A. No, sir, not me.

40 Q. Did you at any time ever know there was a party wall there until the search was made and you found it out? A. No, sir.

Plaintiffs' Witness, Morris Feder, Cross

Mr. Rinzler: I object.

The Court: I will permit it.

Mr. Rinzler: I ask an exception on the ground it is not rebuttal.

The Court: He is now denying your defense.

Mr. Rinzler: I ask an exception. 10

Q. Did you ever say to Mr. Solomon that the property that you were buying was worth less than the next because there was a party wall? A. Nothing of the kind. Never me talking.

CROSS-EXAMINATION by Mr. Feder:

Q. You testified on direct-examination you didn't know any Solomon as agent, did you? A. Solomon? Not me—Packer. 20

Q. Then you did know; if Packer, your partner, knew he told you? A. Lapitski were and not Solomon.

Q. You testified you didn't know Solomon as agent involved in this property? A. Yes.

Q. Then you do know now? A. Solomon—

Mr. Weinberger: I object on the ground that no one says he was agent. 30

A. Solomon was jumping over to Lapitski.

Q. I am repeating that question. Did you or did you not know Solomon connected with this property, 220 Monroe Street? A. Not first time. After the contract he was a partner to Lapitski.

Q. Didn't you give a thousand dollar check? A. Not me.

Q. Who gave it to him? A. Packer—not Solomon. 40

Plaintiffs' Witness, Morris Feder, Cross

Q. Were you partners at that time with Packer?

A. Yes.

Q. He was your partner? A. Yes.

Q. How long was he a partner? A. He is in partners with me already since 1913.

10 Q. Didn't you know they were buying this property, 220 Monroe Street? A. I went down the street and he said, "I gave Lapitski a check for a thousand dollars." Nothing of the kind. Solomon came after and he wanted commission Lapitski, and he got hold Lapitski and he wanted a thousand dollars.

Q. Weren't you at the building with Solomon? A. No, sir.

20 Q. Didn't you go down with Solomon before you gave him a thousand dollars, with Packer? A. No, sir.

Q. You weren't there at all? A. No, sir.

Q. You bought a building without looking at it? A. Of course I know it from the outside.

Q. That is all.

BOTH SIDES REST.

30 Mr. Rinzler: May I make a motion for judgment for the defendant on the ground which I argued before? Before I do that, I was going to renew my motion for nonsuit.

The Court: You see under the practice one doesn't have to make that motion now.

Mr. Rinzler: I make a motion for what would be the equivalent of a direction of verdict in favor of the defendant on the grounds which I urged in my argument on the motion for nonsuit.

40 The Court: Yes.

Mr. Harry Weinberger: I don't want to make any motion. I would like to ask a judgment for the plaintiffs, sir.

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NEW JERSEY SUPREME COURT,

PASSAIC CIRCUIT.

MORRIS FEDER, JACOB PACKER and MINNIE TERRIS, Plaintiffs, vs. SAM SOLOMON and JULIA SOLO- MON, Defendants.	}	Action at Law.	10
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For plaintiffs, Jacob I. Jaffe, Esq., and Messrs.
Weinberger & Weinberger.

For defendants, Messrs. Feder & Rinzler.

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Findings of Fact and Conclusions of Law.

NEWMAN, J.:

This case was tried before the Court without a jury. I find the facts to be as follows:

On the 6th day of April, 1923, the defendants entered into a contract with the plaintiffs whereby the defendants agreed to convey to the plaintiffs certain lands and premises in the City of Passaic, known and designated as No. 220 and 220 1/2 Monroe Street, being a plot of ground having a frontage of 37 1/2 feet, more or less, on Monroe Street, and a depth of 100 feet, more or less. The purchase price was the sum of \$40,000. The contract further provided that the premises were to be conveyed free of all encumbrances with the exception of two mortgages, the first in the sum of \$10,000 and the second

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Opinion

in the sum of \$8,000. The plaintiffs paid \$1,500 deposit and were to pay the difference in cash on or before May 11, 1923, the date fixed for the closing of title.

10 After the signing of the contract the plaintiffs caused a search of the premises to be made, for which they incurred an expense of \$150 and also caused a survey to be made at an expense of \$50, both of which charges I find to be reasonable.

20 I further find that the two sides of the brick building erected on the premises were part of a wall used in common by the owners of the premises about to be conveyed and the adjoining owners on each side, and that the lines of the premises in question on each side run through the center of this wall, the situation thus presented being what is commonly called a party wall.

I find that the district in which these premises are located is a business district; that the buildings are closely built; that the building on the premises in question contains stores; and that there is no agreement between the respective adjoining owners and the plaintiffs or their predecessors in title as to the maintenance or repair of these walls.

30 The plaintiffs allege that these party walls were an encumbrance on the property, and for that reason they declined to accept the deed and pay the balance of the purchase price and have instituted this suit for a recovery of the initial payment of \$1,500, together with the reasonable expenses of the search and survey thus incurred. There is no dispute as to the essential facts, but the parties have joined issue on this interesting question of law.

40 No case in this state has been called to my attention where the question has been flatly decided,

Opinion

and the only case approaching a solution of the point involved is the opinion of the Court of Errors and Appeals in this state in *Burns vs. Thomas*, reported in 86 *Atlantic*, p. 382. In that case complainant had agreed to buy a lot in Jersey City 25 feet in width, together with a four-story brick apartment dwelling situated thereon. The deed as delivered described the westerly line of the lot as running through the center of a party wall standing partly on the premises thereby conveyed and partly on the premises next adjoining thereto. Complainant sought to have the deed reformed by including the whole of such party wall on such westerly side, on the theory that the contract provided for a four-story building but that the description in the deed as given did not include a complete building. The Court said, at page 383:

“The case is the ordinary case that occurs in our compactly built cities, of a building with party walls. A building is none the less a complete building because one of its sidewalls requires, or is strengthened by, a supporting wall of an adjoining building. The right of mutual easements in such cases is well recognized, and each building is regarded as complete in itself. The language used by Chief Baron Pollock in *Richards vs. Ross*, 9 *Exch.* 218, by the New York Court of Appeals in *Rogers vs. Sinsheimer*, 50 *N. Y.* 546, and the Supreme Court of Massachusetts in *Carlton vs. Blake*, 152 *Mass.* 176, 25 *N. E.* 83, 23 *Am. St. Rep.* 818, sufficiently vindicates this definition of a building.”

The better opinion seems to be that a wall standing equally on both lots, and held in common by the adjoining proprietors, is not an encumbrance, but a

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valuable appurtenant which passes with the title to the property. Maupin on Marketable Title to Real Estate, p. 326 (citing cases).

In *Hendricks vs. Stark*, 37 N. Y. 106, where there was no covenant to maintain and rebuild the wall, the Court of Appeals of that state said:

10 "A party wall, creating a community of interest between adjoining proprietors is in no just sense to be deemed a legal encumbrance upon the property.

"A party purchasing a hotel and premises at public auction, without being informed that part of the walls of the adjoining other buildings are party walls, cannot, for that cause, refuse to complete the purchase price.

20 "As between adjoining proprietors maintaining party walls, their mutual easement in walls is a benefit and not a burden to each of them. It is a valuable appurtenance, which passes with the title of the property."

This doctrine was approved by the same court in the case of *Bull vs. Burton*, 227 N. Y. 101. To the same effect is *Schaefer vs. Blumenthal*, 169 N. Y. 221.

30 27 R. C. L., p. 507, Sec. 232, lays down the following rule:

"In the case of the sale of a city building the fact that the side walls are party walls does not constitute such an incumbrance or defect in the title as will relieve the purchaser from completing the purchase. *

* *

40 "For as has been said since the title acquired by the purchaser will extend only to the middle of the party walls, it is obvious that the mutual easement for their support is a benefit, and not a burden, to him as well

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as the adjacent proprietors. It is a valuable appurtenance, which passes with the title of the property, and its value to him is not diminished by the fact that it is equally beneficial to the adjacent owners. Also though the erection of a party wall creates a community of interest between neighboring proprietors, there is no just sense in which the reciprocal easement for its preservation can be deemed a legal encumbrance on the property. The benefit thus secured to each is not converted into a burden by the mere fact that it is mutual and not exclusive."

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Professor Reeves in his work on Real Property, at page 294, says:

"It is because of its characteristics, as above explained, that the existence of a party wall on a lot of land, and the ordinary covenants relating to it, do not constitute an encumbrance within the meaning of a covenant against encumbrances in a deed of the land or in a contract for its sale."

20

There is a distinction to be recognized where there is a covenant as to maintenance and rebuilding the wall made between the adjoining owners. In that case, there being a covenant running with the land, it is recognized as an encumbrance because of such perpetuity. That distinction was recognized by the Court of Appeals of New York in the case of *O'Neal vs. Van Tassell*, 137 N. Y. 297, in which that Court said:

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"But the chief point of distinction consists in the fact that there is here a covenant running with the land, which compels the owner to rebuild and repair, and when rebuilt it must be on the same spot, of the same size, and of similar materials as when

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POOL & LUNCH ROOM
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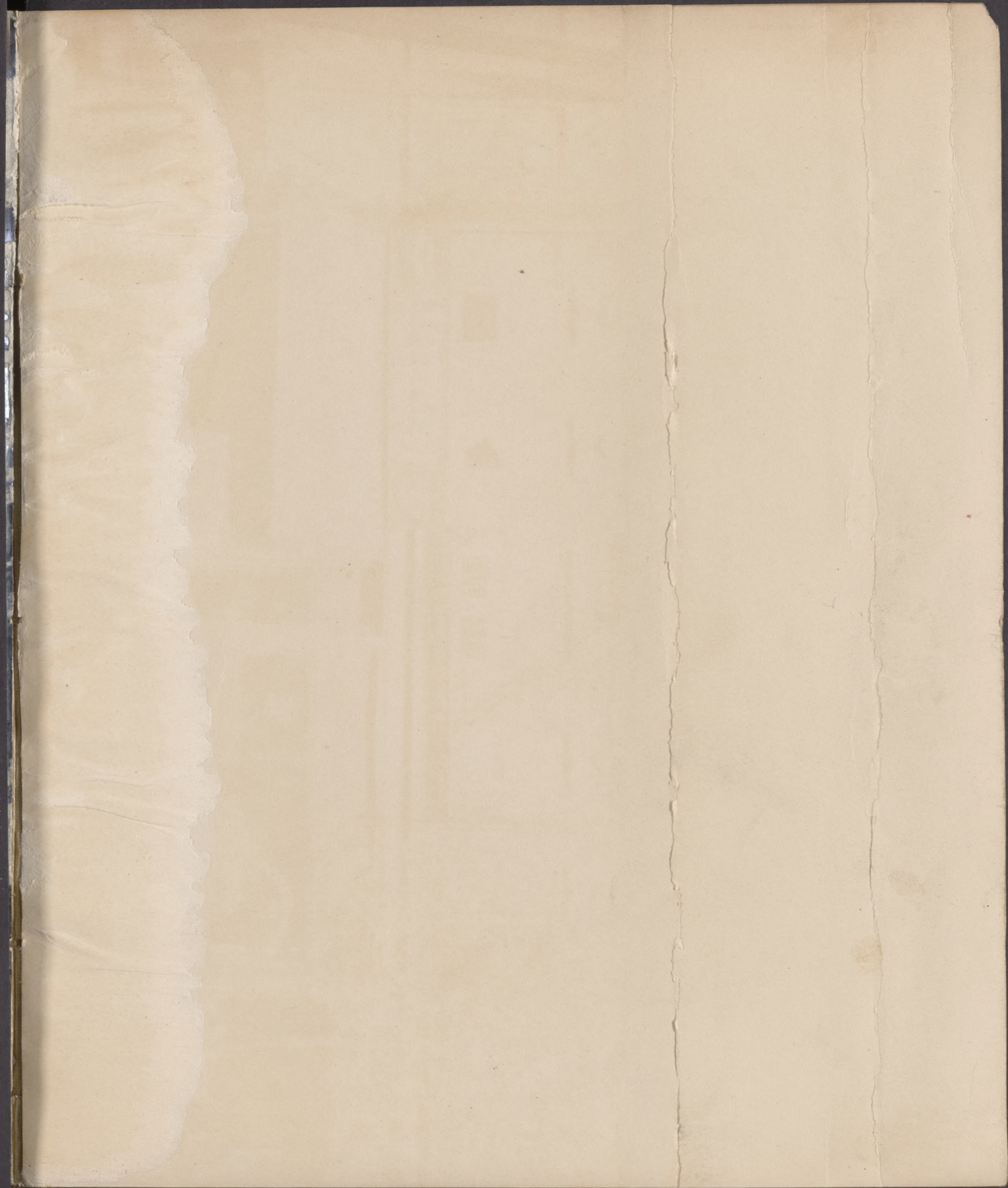
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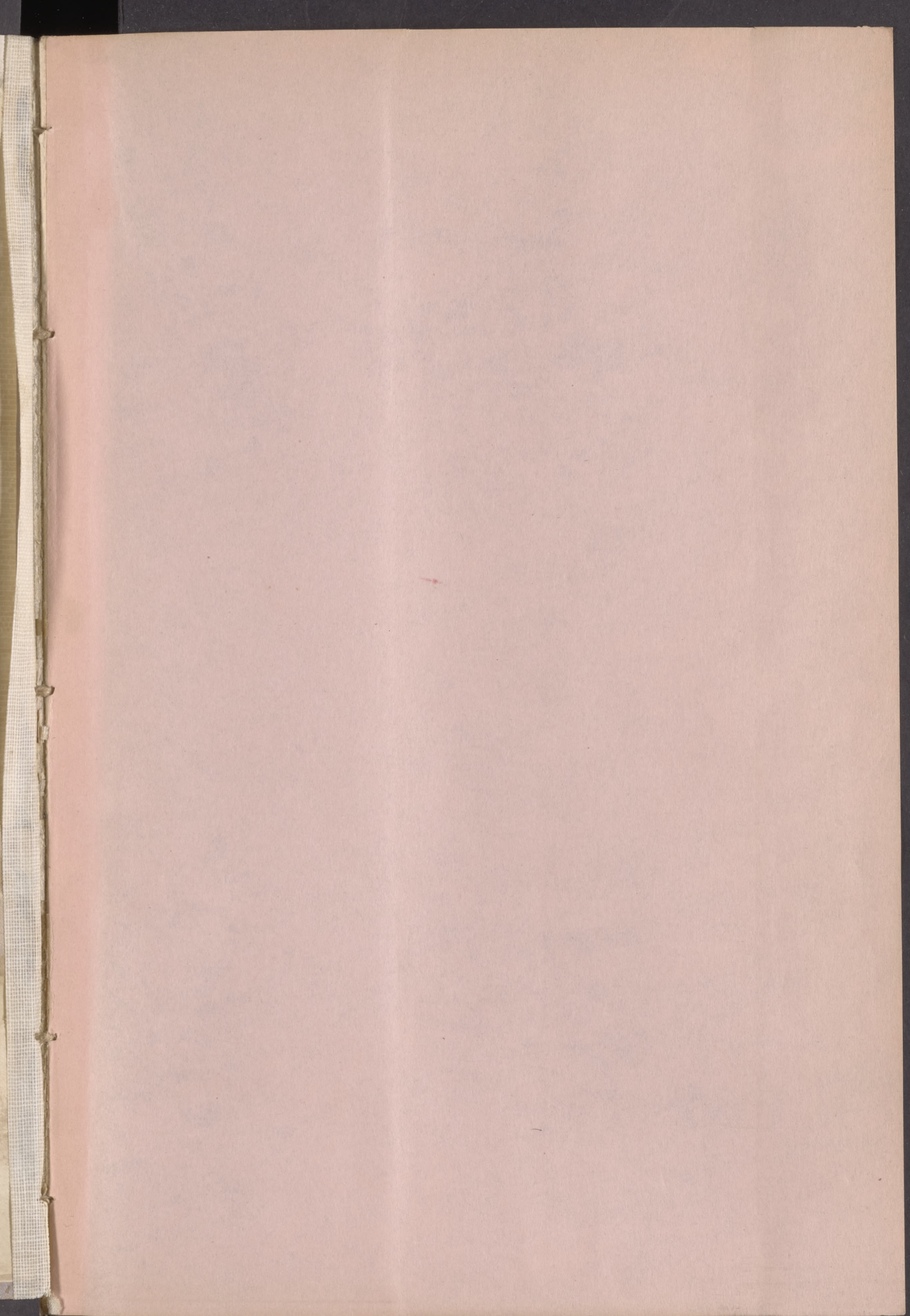
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**NEW JERSEY COURT OF ERRORS AND
APPEALS**

MORRIS FEDER, JACOB PACKER and
MINNIE TERRIS,
Plaintiffs-Appellants,

vs.

SAM SOLOMON and JULIA SOLO-
MON,
Defendants-Appellees.

On Appeal
from the
New Jersey
Supreme Court.

BRIEF FOR THE PLAINTIFFS-APPELLANTS.

Statement of Facts.

This case was tried before the Court without a jury. Judge Newman, who tried the case, found the following facts:

“On the 6th day of April, 1923, the defendants entered into a contract with the plaintiffs whereby the defendants agreed to convey to the plaintiffs certain lands and premises in the City of Passaic, known and designated as No. 220 and 220 1/2 Monroe Street, being a plot of ground having a frontage of 37 1/2 feet, more or less, on Monroe Street and a depth of 100 feet, more or less. The purchase price was the sum of \$40,000. The contract further provided that the premises were to be conveyed free of all incumbrances with the exception of two mortgages, the first in the sum of \$10,000 and the second in the sum of \$8,000. The plaintiffs paid \$1,500 deposit and were to pay the difference in cash on or before May 11, 1923, the date fixed for the closing of title.

"After the signing of the contract, the plaintiffs caused a search of the premises to be made, for which they incurred an expense of \$150 and also caused a survey to be made at an expense of \$50, both of which charges I find to be reasonable.

"I further find that the two sides of the brick building erected on the premises were part of a wall used in common by the owners of the premises about to be conveyed and the adjoining owners on each side, and that the lines of the premises in question on each side run through the center of this wall; the situation thus presented being what is commonly called a 'party wall.'

"I find that the district in which these premises are located is a business district; that the buildings are closely built; that the building on the premises in question contains stores; and that there is no agreement between the respective adjoining owners and the plaintiffs or their predecessors in title as to the maintenance or repair of these walls.

"The plaintiffs allege that these party walls were an incumbrance on the property, and for that reason they declined to accept the deed and pay the balance of the purchase price and have instituted this suit for a recovery of the initial payment of \$1,500 together with the reasonable expenses of the search and survey thus incurred. There is no dispute as to the essential facts, but the parties have joined issue on this interesting question of law" (see opinion, case, p. 73).

We contend that the judgment of the learned Trial Court be reversed and that judgment be entered in favor of the plaintiffs and against the defendants for the sum of \$1,500, together with interest accrued, representing the deposit, \$150 as and for search fees, \$50 for survey fees, all of which were found reasonable by the Trial Court, for the reasons hereinafter discussed.

POINT I.

A contract may be rescinded in a proper case for the mistake of one party without a showing of fraud or inequitable conduct on the part of the other.

The facts in this case are undisputed and because of that the counsel for both parties agreed to submit this case to the Court sitting without a jury on the question of law involved.

There is no question that the plaintiffs were not informed by any person of the existence of these party walls.

The defendant, Sam Solomon, stated that at the time he entered into the contract he did not know of the existence of the party walls and was not informed of that until the plaintiffs refused to accept title because of these defects in title owing to the party walls (case, p. 55, lines 14-17).

It has been contended by attorneys for the defendants-appellees that the contract made, refers to former deeds and for that reason the plaintiffs-appellants were put on guard or given notice of former descriptions, and they should have known of the existence of party walls. This seems to be without foundation in law or in fact.

The Courts have repeatedly ruled that the intention of the contracting parties must be expressed in the contract and all of the terms in a transaction are supposed to have been included or merged in the contract. If, as in this case, the defendants-appellees did not know of the existence of the party walls at the time of the execution of the contract, they certainly did not intend to include or provide for the party walls by the clause in the contract, "The party of the first part (defendants-appellees) agree to convey all

of the lands and premises conveyed to them at this particular number as described by former deeds." If, therefore, this provision did not express the intention of the parties as to the party walls, then, we contend, there was a mutual mistake in the subject-matter and this contract should be rescinded.

It has been held, that :

"If a contract is entered into by a mutual mistake of the parties as to their rights, either may usually have it set aside." *Bach v. Interurban Railway Co.*, 171 N. W. 723; *Jeselsohn v. Park Trust Co.*, 135 N. E. 315.

In this state an almost similar situation arose as reported in the case of *Burns v. Thomas*, 81 N. J. Eq. 168, 86 At. Rep. 382, and in that case, Justice Swayze, speaking for the Court of Errors and Appeals said :

"There was no mutual mistake since each construction was equally open; the defendant might well think he was agreeing to sell only the lot particularly described, and the complainant that he was agreeing to buy the building by its exterior lines regardless of the land on which it stood. Their minds upon that theory, never met. THE COMPLAINANT MIGHT INDEED BE ENTITLED TO RESCIND FOR THE MISTAKE."

In the *Burns* case the purchaser discovered that his line ran through the center of a party wall and it is interesting to note that the Court said that before his acceptance of title he might have rescinded, and the decision of the Court was, however, for the defendant, merely because the complainant did not want to rescind but sought to compel the defendant to reform the deed previously given by the defendant to the complainant so as to include in the deed the land upon which the party wall stood. In the case at bar, the plaintiffs seek a rescission of the contract and

their demand for the return of the deposit, and this suit establishes their demand for a rescission.

The defendants state they did not know of the existence of the party walls, *and surely there is no claim therefor that the plaintiffs did.* An examination of the photographs, without a doubt, shows this building to be an independent building. In the front the cornices and roof of the building appear to be lower and entirely separated from the building on either the easterly or westerly side of same. There can be nothing which a purchaser can do in the examination of a building except to notice the general construction. As to the question of title, he must necessarily rely upon an examination of same by attorneys. If it can be said that by a provision of the type aforementioned, a purchaser must take property, then no one can, with security, enter into contracts on a sound basis. It would be necessary for him to first cause a search to be made before he can enter into a contract. It would be unbusinesslike and impracticable, for each purchaser to cause searches of title to be made for every building or piece of property he inspected with a view of purchasing.

We also call the attention of the Court to the terms of the contract. The first, "The said warranty deed is to contain a description by metes and bounds," certainly that clause cannot imply that the property in question had party walls. The next clause upon which the defendants-appellees rely as being notice, says as follows: "The parties of the first part (defendants-appellees) agree to convey all of the lands and premises conveyed to them at this particular number as described by former deeds." That clause cannot imply more than the description upon which the word "Described" again refers, to description by metes and bounds, and does not in any way give notice to the plaintiffs of the existence of party walls.

If the defendants intended to tell the truth about the property they should have stated the exact conditions of the building, for it has been held:

“If, however, a man professes to describe the article which he is selling, he must describe everything that is material. If he undertakes to tell the truth, it will not do for him to tell only part of the truth.” *Van Houten v. Morse*, 102 Mass. 414.

POINT II.

The vendor must deliver a marketable title free of all doubt.

In the numerous cases in this state and in other states it has been held that:

“Where there may be some question as to title, the purchaser cannot be compelled to take it.”

In the case of *Dobbs v. Narcros*, 24 N. J. Eq. 327, the Court said, as follows:

“The Court will never compel a purchaser to take a title where the point on which it depends is too doubtful to be settled without litigation. * * * Every purchaser of land has a right to demand a title which shall put him in all reasonable security and which shall protect him from anxiety, lest annoying, if not successful suit be brought against him, and probably take from him or his representatives, land upon which money was invested. He should have a title which shall enable him not only to hold his land, but to hold it in peace; and if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value.” *2 Parsons on Contracts*, 564.

In the case of *Tillotson v. Gesner*, 33 Eq., at page 326, the Court said:

“The true rule is stated in 3 *Parsons on Contracts* (6th ed.), 380, that if the character of the title be doubtful, although the Courts were able to come to the conclusion that, on the whole, a title could be made that would not probably be overthrown, this would not be good enough, for the Courts have no right to say that their conclusion, or their opinion, would bind the whole world, and prevent an assault on the title. The purchaser should have a title which shall enable him not only to hold his land, but to hold it in peace; and if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value. The Court cannot satisfactorily or conclusively settle a title in the absence of parties who are not before them in the suit to assert their estate or interest in the lands. These statements accord with the conclusions from cases in the notes to *Seton v. Slode*, 3 Lead. Cas. in Eq. 67, 79, 87, 88; *Fry on Spec. Perf.*, Chan. XVII, 347.”

These cases have been followed in this state throughout and have been the basis of authority for the leading states in the Union.

In the most recent case which we have been able to find, *Goldstein v. Ehrlick*, 96 N. J. Eq., page 52, the Court said in dealing with objections to titles where there were encroachments on a public street:

“They are slight, but nevertheless, substantial and specific performance would not be decreed against him (vendor).”

The rule as laid down in *Fry on Specific Performance*, Section 253, etc., is:

“The rule is laid down that the vendor must prove that its title is good beyond reasonable doubt and will not expose the defendant to litigation.”

In the case of *Doutney v. Lamby*, 78 N. J. Eq. 277 ; 78 Atl. 746, the Court said :

“The purchaser should have a title which shall enable him not only to hold his land but hold it in peace, and if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value.”

In the case at bar there is no doubt that the property is not as salable with the party walls as without them. The question as to whether or not a party wall is an encroachment is a mooted one and by the weight of authority, it appears to be an encroachment.

Considering the proposition merely from a practical angle, there is no doubt but what the owner could not do with the building as he pleased. He could not build higher without the consent of the adjoining owner, and if repairs were necessary and the adjoining owner refused to make them, he would subject himself to litigation for contribution. Neither can he tear the building down nor can he make changes in the wall for the purposes of putting in windows, doors or other openings because that would restrict the practical uses to be made of the wall, by the adjoining owners.

To demonstrate to what extent the Courts will go in declaring titles unmarketable, we call attention to the case of *Goldstein v. Ehrlick*, cited above, where the Court said :

“The padlock proceedings are a cloud on the title sufficient to prevent the enforcement of the contract.”

There is no doubt but what the sale of liquor is prohibited by Federal and State Legislation, and that no one can legally sell liquor in the building, and that the restriction of its sale in the premises is valid, but in this case the Court went further and said that even

though the law prohibits the sale of liquor, yet padlock proceedings constitute a cloud on the title.

Amongst the many definitions as to what constitutes an encumbrance, there appears in *Corpus Juris* the following:

“Anything that impairs the use or transfer of property; anything which constitutes a burden on the title, such as a lien, easement, or servitude, which although adverse to the interest of the land owner, does not conflict with his conveyance of the land in fee.” 20 *C. J. P.*, #1250.

In the notes under this definition the subject of a party wall is discussed, and the following general rule is laid down:

“As a general rule, party wall contracts and real estate improvements, either required or forbidden, are encumbrances. Thus a title conditioned that no mill, factory, brewery, or distillery shall be erected on the premises, is not a title free of all encumbrances.” *Batley v. Feerdoerer*, 162 Pa. 460, 29 A. 868-870. To same effect *Ensign v. Colt*, 75 Conn. 11, 52 A. 829, 831, 946; *Mackay v. Harmon*, 34 Minn. 168, 24 N. W. 702, 704; *Burr v. Lamaster*, 30 Nebr. 698, 546 N. W. 1015, 1016, 27 A. M. S. R. 428, L. R. A. 637; *Giles v. Dugro*, 8 N. Y. Super. 331, 335; *Segaeffler v. Niehling*, 13 Misc. 520, 34 N. Y. S. 693; 20 *C. J. P.*, 1250.

“The existence of an encumbrance does not depend upon the extent or amount of the diminution of value. If the right or interest of the third person is such that the owner of the servient estate has not so complete and absolute an ownership in his land or property as he would have if the right spoken of did not exist, his land is, in law, diminished in value and encumbered. *Mackay v. Harmon*, 34 Minn. 168, 24 N. W. 702, 704 (Quot. *N. Y. Tel. Co. v. State*, 169 App. Div. 310, 319, 154

N. Y. S. 1059). (2) The diminution of value which is made the test of an encumbrance is not, however, limited to cases where the thing granted is, by reason of some outstanding right or interest in a third person, of less pecuniary worth, but also extends to cases where the grantee, by reason of such outstanding interest, does not acquire complete dominion which the grant apparently gives. Therefore, an action may be maintained for a breach of the covenant against encumbrances by a grantee, where there was an outstanding term, although the land may not have been diminished in value thereby. Evidence as to such a term might be admissible on the question whether his damage should be substantial or only nominal, but would be entirely inadmissible to defeat recovery. *Demars v. Koehler*, 62 N. J. L. 203, 41 A. 720, 721, 72 Ams. R. 642." 20 C. J., p. 1251.

Testing out this last definition of law, it must be considered that in the case at bar, as to the proposed grant of thirty-seven and one-half (37 1/2) feet frontage and one hundred (100) feet in depth, as called by this agreement to convey, the grantor only had absolute dominion over thirty-seven feet and two inches (37' 2") inches of frontage, with respect to the remaining four (4) inches (or thereabouts), that is that part covered by the party wall, he shared dominion with the owner of the adjoining land, hence there was that outstanding interest in the third person, which defeated what would otherwise be his complete dominion.

In the case of *DeMars v. Philip* (Errors and Appeals), Chief Justice Magie, at the bottom of page 205, after pointing out how an encumbrance might even in a sense be of value to the lands, by reason of a general rent, nevertheless said that it would constitute an encumbrance:

"The reason is that the deed had not conveyed to him the complete dominion of the land which it purported to do."

In this case Chief Justice Magie further said:

"Prof. Greenlief declares that a breach of the covenant against encumbrances is shown when the proofs establish that a 'Third person has a right to or an interest in the land conveyed to the diminution of the value of the land, though consistent with the passing of the fee by the deed of conveyance. 2 *Greenleaf Evid.*, 242.' This definition of encumbrances is substantially that given by Chief Justice Parsons in *Prescott v. Trueman*, 4 Mass. 627. It was approved by Chief Justice Green in *Carter v. Denman's Executors*, 3 Zab. 260, 272.

"The diminution of value which is thus made a test of an encumbrance is not, however, to be understood as limited to cases where the thing granted is by reason of some outstanding right or interest in a third person, of less pecuniary worth, but also extends to and embraces cases where the grantee, by reason of such outstanding right or interest, does not acquire by the grant the complete dominion over the thing granted, which the grant apparently gives but is or may be deprived thereby of the whole or some part of its use or possession. The diminution of pecuniary value is important in the admeasurement of damages for the breach of this covenant, but does not form the test whether an outstanding right or interest is an encumbrance or not. If the thing granted be, or be liable to be diminished by the existence of an outstanding right or interest so that the grantee does not acquire the complete dominion which the grant purports to convey, then, although the diminution of pecuniary worth may not appear that the damages may be only nominal, such right or interest in an encumbrance."

POINT III.**The walls in question are party walls.**

Reeves in his treatise on real estate at page 290 says as follows:

“Probably the most prevalent illustration of this latter method of creating them is found in that large class of cases in which one person has built two or more connected houses in a row, with single walls (ordinarily eight or twelve inches thick) between them, and has subsequently sold them and the lots of land on which they stand respectively to different purchasers, or has sold one or more and retained the adjacent ones. Unless the deeds or contracts between the parties expressly provide otherwise, such walls thus become party walls by implication of law, whether the dividing lines are described as running through the centers of such walls, or simply through such walls, or the descriptions of the lots are only by courses or distances or simply by designation of the buildings.” *Richards v. Rose*, 9 Exch. 218; *Solomon v. Vintner's Co.*, 4 H. & N. 585; *Eno v. Del Vecchio*, 4 Duer (N. Y.) 53; *Bartridge v. Gilbert*, 15 N. Y. 601; *Brooks v. Curtis*, 50 N. Y. 639, 642; *Heartt v. Kruger*, 121 N. Y. 386; *Carlton v. Blake*, 152 Mass. 176; *Everett v. Edwards*, 149 Mass. 588; *Warfel v. Knott*, 128 Pa. St. 528; *Ingals v. Plamondon*, 75 Ill. 118; *Henry v. Koch*, 80 Ky. 391; *Kieatt v. Morris*, 10 Ohio St. 523.

POINT IV.

The Court erred in holding that party walls are not encumbrances and that the existence thereof do not justify the purchasers in refusing to accept title.

The cases in this state and throughout the country are to the effect that where there is an agreement to maintain a party wall, the purchaser would be excused from accepting title in the absence of an agreement providing for party walls in the contract of purchase. Since the Court implies an agreement for contribution in the event of disrepair of walls, we contend that by implication there is as much liability on the part of the owner of a party wall as there would be by express agreement and such an agreement would undoubtedly be an encroachment.

The case of *Campbell v. Meiser*, 4 Johns Chancery 334, and the case of *Hendricks v. Stark*, 37 N. Y., page 106, cited by the defendants at the time of the oral arguments in support of the view that a party wall is not an encumbrance can be differentiated from the case at bar. In that case the purchaser made no objection to the description when he was called upon to approve the deed which provided a party wall and in the mortgage to be executed by the purchaser the same description was included as was mentioned in the deed.

An examination of the decision indicates that the Court considered the conduct of the purchaser rather than coming out directly on all fours with the decision that a party wall is an encumbrance.

In the case at bar the plaintiffs did nothing to impress the defendants nor did they lead the defendants to believe that title would be accepted, nor did they approve the form and condition of the deed.

On the date fixed for closing title they rejected title because of the existence of party walls.

In the case of *Backot v. Fessenden*, 115 N. Y. Supplements 698, the question of a party wall arose and by implication the Court held that a party wall was such an encumbrance as would excuse the purchaser from accepting title. This is a much later case than the *Hendricks* case and it overruled the *Hendricks* decision.

POINT V.

A party wall is an encumbrance even though there may be no express covenant to repair.

We think the learned Trial Court erred in holding as it did that a party wall is not an encumbrance where there is no express agreement to repair the walls. The weight of authority holds, even though there may be no express agreement to keep and maintain the walls in good condition, yet the law implies an agreement to the effect that there is a duty to contribute on the part of one owner to the other owner in the event repairs are made.

Tiffany on Real Property, on page 727, says:

“If the party walls become unsafe or ruinous they may be rebuilt by one of the adjoining owners, and the other will be compelled to pay part of the cost,” and cites as authority *Campbell v. Mesier*, 4 Johns. Chan. (N. Y.) 334; 2 *Gray's Cas.* 314.

POINT VI.**Reference to former deeds does not give purchaser notice of nature of title of seller.**

Counsel for the defendants argue that the mere mention to former deeds in the contract, gives the plaintiffs notice of the existence of these party walls, and the defendants seek to take advantage of the clause contained in the contract which provides as follows:

“The parties of the first part (the sellers and defendants) agree to convey all the lands and premises conveyed to them at this particular number as described by former deeds.”

The purpose of a contract is to express the true and exact terms resulting from negotiations between the parties. All of the parties should make known to each other whatever was intended to be expressed in the contract. In this case, if the sellers had informed the purchasers of the existence of these party walls, perhaps as uncertain as this clause might be, they might avail themselves of its benefits, but the testimony of the defendants, when asked whether or not they knew of these party walls, was that they did not know of these walls. How can it be argued that a reference to a matter of which they were entirely in ignorance can now be taken advantage of by them? While reference to instruments in the chain of title is binding to the vendee when he accepts a title, certainly reference to a deed in the chain of title in a contract should not, in any wise, bind him, when that reference had no significance to the sellers.

The case cited by counsel for the defendants, in support of their argument that the reference to a deed makes that deed binding on the contract, is not at all in point.

They refer to the case of *Hepperstall v. O'Donnell*, 165 Pa. St. 438; 30 Atl. 1003. In that case the contract, instead of referring to the premises by street numbers or any description at all, described premises situate in the City of Pittsburgh, and being the same premises described in a deed from the Dollar Savings Bank to O'Donnell, dated March 15th, 1889, and recorded in the Recorder's office in Book 626, page 402, containing ten (10) acres, together with all the buildings. The Court, in passing on the charge of the Judge in the lower courts in that case that the plaintiffs were not bound to search the records for the title of the defendants, and before the signing of the articles of agreement they had a right to rely upon the covenants of the defendants when the articles of agreement were signed, said:

"So far as this instruction relates to the title of the defendant, it was correct."

If a reference were made to a deed as in the case cited, then that deed may have become part of the contract, but a reference to the deeds generally, as in the case at bar, certainly the entire chain of title of the defendants could not become part of the contract and bind.

In all of the cases cited by the defendants as to the references to other instruments the Court deals with the chains of titles, and we do not intend to contradict that a purchaser is bound by the chain of title after he accepts title. On page 548, page 13 in *Cyc. of Law and Procedure*, there is a statement to the effect that:

"The deed referred to must be produced to identify property or the conveyance is insufficient to pass title," and quotes *Hammond v. Norris*, 2 Harr. & J. (M. D.) 130.

In this case there was no proof of a deed having been produced, and therefore a mere reference to other

deeds will not in anywise incorporate those deeds in the contract.

Counsel for defendants have heretofore cited the case of *Kaplan v. Bernstein*, Vol. 2, No. 34 N. J. Adv. Rep. (Misc.), page 763, but an examination of that case will show that it is entirely distinguishable from the case at bar and in nowise is that applicable.

In that case the plaintiffs sought from the defendants to specifically perform a contract and to purchase lands therein described, and the purchaser set up a defect in title in that there was an error in the description. But a reference was made in the incorrect deed to a former deed which was correct, and to maps, and the Court held that the title was marketable in that a reference to deeds and maps incorporates those instruments into this incorrect deed.

In the case at bar there was no claim made that the title was defective and that the chain of title as in the *Bernstein* case might cure all defects. The only contention on behalf of the plaintiffs is that there is a party wall which the plaintiffs and defendants knew nothing about and which was not provided for in the contract, and for that reason the plaintiffs demand a return of their deposit.

The case of *Scheinman v. Block*, 117 Atl. Rep. 389, upon which the defendants' counsel rely, is not applicable to the case at bar. In that case there was a four-inch encroachment of a dilapidated shed, and the Court said that this could easily be removed, and in so far as the porch extending into and beyond the street line was concerned, this was not a defect because that was permitted under the municipal regulations. In the case at bar, however, it would be absolutely impossible and impracticable to build walls on either side of the premises in question so as to give the plaintiffs independent and separate walls throughout the building so that the plaintiffs could exercise complete control and dominion over the property.

POINT VII.

Where the vendor is unable to convey a good title the purchaser is entitled to recover the purchase money paid with interest and expenses incurred in faith of the bargain.

In the early cases in this state the Courts followed the decisions of the English Courts where it was held that where the vendor is unable to deliver title through no fault of his own then the vendee is only entitled to recover the deposit plus the expenses. And in this state the leading case is *Drake v. Baker*, 34 N. J. Law 358.

This decision, however, has been modified by later decisions wherein the vendor was held responsible for all damages where he undertook to convey title in the hands of a third party, or represented that he would obtain the signature of a third party so as to give good title.

Upon the examination of all the authorities in this country and England, there is no doubt but what the purchaser is entitled to recover the deposit plus interest, and the necessary expenses entailed in the examination of title.

For the reasons above set forth, the judgment of the Trial Court should be set aside and judgment entered in favor of the plaintiffs-appellants.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

MORRIS FEDER, JACOB PACKER and
MINNIE TERRIS,
Plaintiffs-Appellants,

vs.

SAM SOLOMON and JULIA
SOLOMON,
Defendants-Appellees.

ON APPEAL
FROM JUDG-
MENT AT THE
PASSAIC CIR-
CUIT OF THE
NEW JERSEY
SUPREME
COURT.

BRIEF FOR DEFENDANTS-APPELLEES.

Statement of the Case.

This case was tried before the Court without a jury at the Passaic Circuit of the New Jersey Supreme Court on September 25th, 1925.

For convenience, plaintiffs-appellants will hereinafter be designated as plaintiffs, and defendants-appellees will be designated as defendants.

On April 16th, 1923, plaintiffs and defendants entered into a written contract (Case, p. 4), whereby plaintiffs agreed to purchase, and defendants to sell, on or before May 11th, 1923,

“all that lot, tract or parcel of land and premises, hereinafter particularly situate, lying and being in the City of Passaic, in the County of Passaic and State of New Jersey, being commonly known and designated as #220 and #220½ Monroe Street, Passaic, N. J.; being a plot of ground 37½ feet, more or less, front on Monroe Street, and 100 feet, deep, more or less on both sides”.

The foregoing description is in the exact language stated in the contract. The contract also provides:

“The said warranty deed is to contain a description by metes and bounds”, and also, “The parties of the first part agree to convey all the lands and premises conveyed to them, as described at this particular number Δ by former deeds”.

The interlineation, “as described”, indicated in the foregoing paragraph is exactly as it appears in the contract.

The contract then provided that the price is Forty Thousand (\$40,000.00) Dollars payable in the following manner: On the signing of the contract, Fifteen Hundred (\$1500.00) Dollars, which was paid; by taking the premises subject to a mortgage in the sum of Ten Thousand (\$10,000.00) Dollars, and another mortgage in the sum of Eight Thousand (\$8,000.00) Dollars; and by payment of the sum of Twenty Thousand Five Hundred (\$20,500.00) Dollars, in cash, upon execution and delivery of deeds. The date for the closing of title was fixed as May 11th, 1923, between the hours of twelve in the forenoon and four o'clock in the afternoon; and the place—the offices of Greenburg & Galanti, #688 Main Avenue, Passaic, N. J.

Plaintiffs rejected the title and refused to accept a warranty deed for the premises and brought this action to recover the sum of Fifteen Hundred (\$1500.00) Dollars, which they paid on the execution of the contract, plus reasonable search fees and reasonable costs for investigating the title.

The defendants did not erect the building (Case, p. 54, ls. 3-4).

Plaintiffs based their right of action solely upon the fact that the easterly and westerly boundary

lines of these premises ran through the center of a wall, which stood in common partly on the lands in question and partly on the adjoining lands, that is, half of the wall stood on the lands mentioned in the contract, and half on the lands of the adjoining owner. Plaintiffs' contention, therefore, is that these common walls are encumbrances, and that they were, therefore, justified in rejecting the title. This, of course, is denied by the defendants.

The complaint alleged in effect that defendants had knowledge of the existence of these common walls but intended to deceive and defraud the plaintiffs, representing in the contract that they would convey said premises free and clear of and from any and all encumbrances. Fraud was the gist of their action (Case, p. 2). *The complaint did not allege, however, that plaintiffs did not know of the existence of these common walls.*

There was not a scintilla of evidence in the case of fraud. The findings of fact and conclusions of law of the trial judge are shown at pages 73-78 of the printed state of the case. The trial judge found as a fact that the two sides of the brick building erected on the premises were part of a wall used in common by the owners of the premises about to be conveyed and of the adjoining owners, and that the lines of the premises in question on each side run through the center of this wall, and that the situation thus presented is what is commonly known as a party wall; that the district in which these premises are located is a business district; that the buildings are closely built; that the building on the premises in question contained stores; that *there is no agreement between the respective adjoining owners and the defendants or their predecessors in title as to the maintenance or repair of these walls.*

All these findings of fact are supported by the evidence.

The investigation of title disclosed that the "former deeds" in the chain of title to the premises contained the following description:

"Beginning at a point on the northerly side of Monroe Street distant 163.47 feet easterly from the corner formed by the intersection of said northerly side of Monroe Street with the easterly side of Columbia Avenue, and running thence (1) *Northerly, passing through the center of the party wall* and parallel with Columbia Avenue 100 feet; thence (2) easterly and parallel with Monroe Street 37.34 feet; thence (3) *southerly and passing through the center of the party wall* and parallel with the first course 100 feet to the said northerly side of Monroe Street; and thence (4) westerly along the same 37.34 feet to the point or place of BEGINNING." (Case, p. 22, ls. 31-41, and top of p. 23; p. 23, ls. 1-28; p. 24, ls. 27-42; p. 25, ls. 1-28.)

It should be noted that the first and third course of the description of this property as contained in those former deeds read as follows:

First course: "*Northerly passing through the center of the party wall* and parallel with Columbia Avenue 100 feet;"

Third course: "*Southerly and passing through the center of the party wall* and parallel with the first course 100 feet" (Case, p. 25, ls. 20-27).

The line of the property runs through the center of the party wall (Case, p. 26, ls. 30-42).

The trial judge concluded as a matter of law that these party walls which stand in common on the lands in question and on the lands of the adjoining owner, half of the wall on each, were

not an encumbrance and that the plaintiffs were not, therefore, justified in rejecting the title, and, therefore, concluded that judgment should be entered for the defendant (Case, p. 78).

We shall answer plaintiffs' points of law 1 and 6 together, and the others in the order stated in their brief.

As to Plaintiffs' Points I and VI.

This action was tried at law and not in a court of equity and was not brought to rescind the contract upon the ground of mistake or on any other ground. Furthermore, plaintiffs did not predicate their action upon the ground of mistake. By the complaint, plaintiffs based their action upon the ground of fraud. Both complaint and evidence are devoid of any allegation or charge of mistake. Furthermore, it should be noted that plaintiffs' contention, as stated in Point I, that a contract may be rescinded in a proper case for the mistake of one party, is an incorrect statement of the law. The well settled law of this state and other jurisdictions is that to rescind a contract upon the ground of mistake, the mistake must be mutual and not merely the mistake of one party.

Burns vs. Thomas, 81 N. J. Eq. 168, 86 Atl. Rep. 382;

Bach vs. Interurban Railway Co., 171 N. W. 723;

Jeselsohn vs. Park Trust Co., 135 N. E. 315.

This action was not brought to rescind the contract but was instituted at law to recover the deposit paid upon the theory that the contract was entered into by fraud. This charge of fraud,

however, has not been sustained for there is not a scintilla of evidence of any fraud or misrepresentation.

Plaintiffs knew of the existence of these party walls. Plaintiff, Morris Feder, testified that he knew the type and kind of the building before he signed the contract and that he gained his knowledge by frequently passing the building (Case, p. 33, ls. 12-20).

Mr. Nathan Solomon, produced as a witness for defendants, testified that he was the agent who negotiated the sale of this property and that before the contract was signed he spoke to plaintiffs Feder and Packer and showed them the property (Case, p. 60, ls. 1-15).

“Q. Did you show them the property before the contract was signed? A. Why, we were around that property for three days still until the—before the contract was made we were working on that property for three days, before the sale was settled.

“Q. And they looked at the property? A. Absolutely.

“Q. Did Mr. Feder say anything to you?

“Mr. Weinberger: I object on the ground it is immaterial.

“The Court: Well, on that one point, about knowledge of it, it may be of some relevancy on the question of the survey. On the other point I do not think it will make any difference. I will admit it for the one purpose.

“Q. Did Mr. Feder say anything to you at that time? A. With regard to what?

“Q. With regard to any wall? A. I have been talking to Mr. Feder and Mr. Packer bargaining that building—

“The Court: What did they say?

“The Witness: And I told him you better hurry up and buy that building for \$40,000, because I know the next building

was offered \$42,000. It is the same building. Mr. Feder says to me, 'Why, the other building is worth \$2,000 more, because it has *no party wall, and this has a party wall.*'"

Furthermore, plaintiffs' own witness, Mr. Russell S. Wise, the surveyor, testified that he observed the party wall when he first went to the building which indicates that the party walls can be seen by mere inspection (Case, p. 27, ls. 25-33).

Plaintiff, Morris Feder, testified:

"Q. Didn't you testify in answer to that question at Mr. Jaffe's office: 'Yes', that you did go down to see the property before you signed the contract? A. Not before we signed that contract.

"Q. Then weren't you asked this question: 'So you saw it and knew it?' A. I knew it what?

"Q. This property—knew this property? A. I knew the property.

"Q. You answered that, 'I knew it, because I am a builder'? A. I know the property, yes, but not about the party wall.

"Q. You have been a builder since 1912? A. Yes.

"Q. You know what a party wall is? A. I know, but I—

Q. You know what a party wall is? A. Yes.

"Q. You have built a lot of buildings with party walls? A. Yes" (Case, p. 31, ls. 23-41).

Furthermore, Mr. Feder testified that he was a builder since 1912 (Case, p. 31, at the bottom). It cannot be disputed that an expert builder can observe a party wall upon mere inspection. Furthermore, plaintiffs admitted that defendants made no representation to them regarding the existence of these party walls and that in fact

they held no conversation with plaintiffs about the building before the contract was signed (Case, p. 32, l. 41, and Case, p. 33, ls. 1-11).

The evidence also disclosed that plaintiffs knew of the existence of the party walls because they went to the building before the contract was signed and viewed it from front and rear (Case, p. 69, ls. 13-24).

Defendant, Sam Solomon, testified that he himself did not know that the easterly and westerly walls were party walls (Case, p. 54, ls. 10-40, Case, p. 55, ls. 1-20 and Case, p. 56, ls. 1-20). Since the defendant himself was ignorant of the existence of these party walls, he cannot be guilty of any fraud.

Furthermore, by the terms of the written contract, upon which this suit was brought, the property was to be conveyed subject to these common walls. The contract, after stating that the premises to be conveyed are situate in the City of Passaic, in the County of Passaic and State of New Jersey, reads:

“Being commonly known and designated as #220 and #220½ Monroe Street, Passaic, N. J.; being a plot of ground 37½ feet, more or less, front on Monroe Street, and 100 feet, deep, more or less on both sides.

“The said warranty deed is to contain a description by metes and bounds.

“The parties of the first part agree to convey all the lands and premises conveyed to them, at this particular number as described by former deeds.”

The “former deeds,” in the first and third course of the description, mentioned the party walls.

Plaintiffs did not deny that the property in question is situate at #220 and #220½ Monroe Street, and that the lands consist of a plot of

ground, 37½ feet, more or less, front on Monroe Street, and 100 feet, deep, more or less on both sides. Whilst the contract says that the deed of warranty shall be free from all encumbrances, we must read the other pertinent provisions of the contract which are quoted *supra* and construe them together. It is not denied by plaintiffs that the premises are known by the street numbers specified in the contract and that the size of the lands is as specified in the contract. The contract required that the warranty deed shall contain a description by metes and bounds and then provided that the defendants should convey "All the lands and premises conveyed to them, at this particular number *as described by former deeds*". Defendants tendered a deed of warranty in conformity with the contract, containing a description by metes and bounds and conveying to the plaintiffs, "All the lands and premises conveyed to them, at this particular number" (#220 and #220½ Monroe Street, Passaic, New Jersey) and the deed described the property the same as "described by former deeds".

Plaintiffs' witness, Mr. Jacob I. Jaffe, an attorney, testified that his search of the title disclosed that the first and third course of the description of the property as contained in former deeds reads as follows:

First course: "Northerly *passing through the center of the party wall* and parallel with Columbia Avenue 100 feet;"

Third course: "Southerly and *passing through the center of the party wall* and parallel with the first course 100 feet" (Case, p. 25, ls. 20-27).

Defendants' Exhibit D-1 is the deed whereby defendants acquired title to the premises in question, and Exhibit D-2 is the deed by which defend-

ants' predecessors in title acquired the ownership of this property. Both these exhibits also show that the first and third course of the description contained in these deeds reads:

First course: "Northerly *passing through the center of the party wall* and parallel with Columbia Avenue 100 feet;"

Third course: "*Southerly and passing through the center of the party wall* and parallel with the first course 100 feet."

Since the contract states that the warranty deed is to contain a description by metes and bounds and that the defendants agreed to convey all the lands and premises conveyed to them at this particular number as described by former deeds, it is important to note the description by metes and bounds contained in these former deeds, Exhibit D-1 and Exhibit D-2, and the deed from which plaintiffs' witness, Mr. Jacob I. Jaffe, read the description, and it is likewise important to note just what property is conveyed at this particular number by those former deeds. The property described in Exhibits D-1 and D-2 and in the deed from which plaintiffs' witness, Mr. Jaffe, read is the same description which we recited verbatim in the "Statement of the Case" at page 4 of this brief.

Each of these deeds contains a reference to the deeds whereby the grantors therein mentioned obtained title, specifying the book and page number where the deed is recorded.

Under the terms of the contract, defendants were not obliged to convey to the plaintiffs anything more than or different from the property specified in the former deeds, and this they were ready, able and willing to do, but plaintiffs nevertheless rejected the title.

Since the contract specified that the warranty deed is to contain a description by metes and bounds, and that the defendants shall convey all the lands and premises conveyed to them at this particular number as described by former deeds, the plaintiffs could not legally reject the title. The fact that there is a "party wall" is disclosed by reference to the first and third courses of the descriptions in the former deeds; and by the express provisions of the contract, the description contained in the "former" deeds is to be considered as part of the contract.

Reading the terms of the contract as a whole, the effect thereof is, that the defendants should convey the premises free and clear from all encumbrances, but that the warranty deed "is to contain a description by metes and bounds", and shall "convey all the lands and premises conveyed to them, at this particular number, as described by 'former deeds' ". The description is by metes and bounds, and the proposed conveyance by the defendants conveys all the lands and premises conveyed to them, at this particular number, *as described by former deeds*.

Maupin on Marketable Titles to Real Estate, at page 857, says:

"Where the *contract* refers to the land sold *as the same described in a certain deed*, and provides for a conveyance of the same *free from encumbrances*, and a deed is tendered describing the land precisely as described in the deed referred to, the purchaser cannot reject such deed on the ground that there is a private right of way over the premises." Citing *Hepperstall vs. O'Donnell*, 165 Pa. St. 438; 30 Atl. 1003.

And in *Lembeck & Betz Eagle Brewing Co. vs. Barbi*, 106 Atl. 552, affirmed in 109 Atl. 925, by the Court of Errors and Appeals, it was held:

“Every grantee is bound by everything that appears in his deed.

“A grantee is chargeable with knowledge of the title of his grantor as it exists in unbroken sequence on the records of the Clerk’s Office.”

So it was held:

“One claiming title to lands is chargeable with notice of every matter affecting the estate which appears on the face of any deed forming an essential link in the chain of instruments through which he derives his title, and also with notice of whatever matters he would have learned by an inquiry which the recitals in those instruments made it his duty to pursue.”

Roll vs. Rea, 50 N. J. L. 264; 12 Atl. 905.

And

“What will pass by certain descriptive words in a grant will be excepted by the same descriptive words in exception.

“Every purchaser of land takes title subject to any defects, reservation, and exceptions that are referred to in the deed by which he acquires title, or that may be ascertained by reference to his chain of title as spread forth upon the public records.”

Mitchell vs. D’Olier, 68 N. J. L. 375; 53 Atl. 467.

And in 53 Atl., at page 470, the opinion of the Court of Errors and Appeals, in the case of *Mitchell vs. D’Olier*, just cited, reads:

“The sole purpose of a description of land as contained in a deed of conveyance, is to identify the subject-matter of the grant. This may be done either by describing it in words at length, or by referring the reader to some other deed or record containing such a

description; and where a deed in this manner refers to another deed it has the effect of incorporating the latter deed into the description, so that what is therein described will pass. Mart. Conv., Par. 108.

“The same rules that are applicable to the identification of the subject-matter of a grant apply equally to the subject-matter of an exception. ‘That which will pass by words in a grant will be accepted by the same words in an exception.’ Shep. Touch. 100. * * *

“The plaintiff was charged with constructive notice of the exception as contained in the sheriff’s deed to Flanders, and must either trace back the reference to Mrs. D’Olier’s title therein contained or else be bound by whatever an examination of that title would have disclosed. * * *”

To the same effect is *Kaplan vs. Bernstein*, Vol. 2, No. 34 N. J. Adv. Rep. (Misc.), page 763, decided by Vice Chancellor Foster, on July 30th, 1924, citing *Mitchell vs. D’Olier, supra*, and 8 R. C. L. 1078, 1079, see 134, 135. So that by the reference in the contract for sale to the description by metes and bounds, and by the provision in the contract that the parties of the first part (the defendants) shall convey all the lands and premises conveyed to them, at this particular number, as described by former deeds, the former deeds are expressly made part of the contract in the same way and manner as though the description contained in those former deeds, including the first and third courses thereof which make reference to the lands passing through the center of the party wall, had actually been verbatim recited or inserted in the contract.

In *Kaplan vs. Bernstein, supra*, complainant sought a decree to compel defendants to specifically perform a written contract to purchase certain

lands on Mapes Avenue, in the City of Newark,
At page 763 the opinion reads:

“The defects in the bill pointed out by defendant as showing the title to the premises to be unmarketable are: (1) That the description in the deed under which complainant acquired title describes the property as being located on the southerly side of Maple Avenue, when in fact it is located on the southerly side of Mapes Avenue; and (2) that in the description of the property contained in this deed to complainant the second course is omitted.

“Title to the premises in question is derived from Weequahic Park Land and Improvement Company, who developed the tract on which the lot in question is located, and filed a map of the same about 1904.

“This company conveyed the premises in question and other property by reference to this map to Joseph and Blanche Conlombe.

“The Conlombes conveyed the lot in question to one C. A. Widmer, by deed dated April 2d, 1910, by reference to the map aforesaid. In this conveyance the error in the name of the street, and the omission on the second course in the description, first occur.

“Widmer, in 1910, sold to one Tuttle, by the same description, and subject to a mortgage in which the property is correctly described. In 1911 Tuttle sold to one Ondrak by the same description, and subject to the same mortgage, and in December, 1923, Ondrak sold to complainant by the same description, by recitals or reference to some of the preceding conveyances.

“It is admitted that the mortgage to which some of the above-mentioned conveyances were subject, and which was canceled of record in 1917, contains a complete and correct description of the premises in question.

“In all of the conveyances reference is made to the map of the Weequahic Land and

Improvement Company, which is on record in the office of the register of the county.

“From these references to the map, to the mortgages and to prior deeds, the incomplete description in complainant’s deed can be completed, and the quantity and location of the lands agreed to be conveyed can be readily ascertained.

“The reference to the map, it is conceded, cures the mistake in the name of the street, and it appears that the omitted course in the description can be ascertained and supplied from the map, the mortgage and the prior conveyances mentioned and referred to in the deed to complainant.”

Under these circumstances, plaintiffs could not legally reject the title, for by the express terms of the contract they were to get a deed of warranty, embodying the same description as contained in former deeds, subject to the party walls as provided in the first and third courses of the description. By the provision of the contract, plaintiffs received notice of the existence of the party walls and agreed to accept the deed subject to those party walls.

Furthermore, on the question of fraud and mistake regarding the existence of a party wall, in the case of *Freedman vs. Kensico Realty Co.*, decided Feb. 4, 1926, 131 App. Div. 916, the question of fraud and mistake was decided exactly adverse to the contention of the plaintiffs in the case at bar.

In that case, Vice Chancellor Fielder held:

“To entitle a party to interposition of a court of equity for fraud, there must be a suppression of facts which other party is bound in conscience and duty to disclose, and in respect to which he cannot innocently be silent.

“Failure of vendor to inform vendee that there was a party wall between two units of

a building purchased and inspected by vendee is not such fraud as to warrant rescission of purchase, in absence of inquiry by vendee or testimony that he would not have purchased had he known of party wall, or that party wall depreciated value of property or made it difficult to sell it as a whole or as separate buildings.

“In absence of a hidden defect in construction or condition of building, a vendor is under no obligation to explain to vendee the details or plan of construction.

“Courts do not aid a purchaser of real estate, in absence of trust relationship with vendor, who is carelessly indifferent to use of ordinarily caution before purchasing, when he is left free and uninfluenced to examine property and exercise own judgment whether or not to buy.”

So that, assuming even that the plaintiffs did not examine or inspect the building before they entered into the contract, they are nevertheless precluded from setting up ignorance of the existence of these common walls as a defense because they had the opportunity of examining and inspecting the building if they desired to do so, and their failure or neglect to make such observation or inspection precludes them from recovering on that account.

“The doctrine of *caveat emptor* is applicable to the purchase of real estate, and is applied both in equity and in law.” *Freedman vs. Kensico Realty Co., supra. Industrial Savings & Loan Co. v. Plummer*, 84 N. J. Eq. 184, 92 Atl. 583, decided by the Court of Errors and Appeals; L. R. A. 1915C, 613; *Rowe vs. Hannum*, 91 N. J. L. 271 102 Atl. 389-390, decided by this court; *Condon vs. Sandhowe*, 127 Atl. 101 (and cases cited).”

As to Plaintiffs' Points II, III, IV and V.

In the first place, the easterly and westerly walls of this building are not party walls. They are what is known as partition walls.

Freedman vs. Kensico Realty Co., supra.

But assuming, yet not conceding, that these walls are party walls, they are, nevertheless, not encumbrances.

Plaintiffs' counsel are laboring under an erroneous impression of the law. They fail to conceive the difference between a case where adjoining owners have entered into a contract whereby they mutually agree to maintain, keep in repair, or, if necessary, rebuild either a common wall or even a party wall, as compared with the situation such as here, where the common wall exists but there is no such agreement between the owners. There seems to be no question but that such a wall is considered an encumbrance *only where there is an agreement between the adjoining owners in respect to the maintenance, repair, or rebuilding thereof.*

Professor Reeves in his Work on Real Property, at page 294 (first two paragraphs), states:

“It is because of its characteristics, as above explained, that the existence of a party wall on a lot of land, and the ordinary covenants relating to it, do not constitute an encumbrance within the meaning of a covenant against encumbrances in a deed of the land or in a *contract* of its sale.”

Professor Reeves notes the distinction between a case where there is no agreement respecting the repair or rebuilding of the party wall, and

the cases where there is a party wall with such an existing obligation, for at page 294, of his Work, after his excerpt above quoted, this learned author says:

“But when to these is added a perpetual covenant, running with the land, to the effect that the adjoining owners and their heirs and assigns shall forever share equally the expense of repairing or rebuilding the wall, and that whenever rebuilt it shall be of the same size as before and of similar materials, the wall controlled by such a covenant constitutes an encumbrance upon the titles to both of the lots.”

Another author wrote:

“But the better opinion seems to be that a wall standing equally on both lots, and held in common by the adjoining proprietors, is not an incumbrance, but a valuable appurtenant which passes with the title to the property.” Maupin on Marketable Titles to Real Estate, p. 326. (Citing cases).

The courts of the State of New York recognize the distinction between a case where the adjoining owners are under an obligation to maintain, repair or rebuild a wall, and one, as the case at bar, where there is no such agreement. The well settled law of that state is, that in the absence of such an agreement, a party wall is not an encumbrance.

Hendricks vs. Stark, 37 N. Y. 106.

Schaefer vs. Blumenthal, 169 N. Y. 221.

To the same effect is the holding in *Weld vs. Nichols*, 17 Pick. (Mass.) 538; *Bertram vs. Curtis*, 31 Iowa, 46. Each of the foregoing cases are cited in Reeves on Real Property.

In *Musgrave vs. Sherwood*, 54 How. Prac. 338, (N. Y.), it was held:

“A party wall is not an encumbrance within a covenant to convey free from all encumbrances.”

This seems to be the general weight of authority. In 27 R. C. L. 507, Section 232, the following appears:

“In the case of the sale of a city building the fact that the side walls are party walls does not constitute such an incumbrance or defect in the title as will relieve the purchaser from completing the purchase. (Citing cases). For as has been said, since the title acquired by the purchaser will extend only to the middle of the party walls, it is obvious that the mutual easement for their support is a benefit, and not a burden, to him as well as the adjacent proprietors. It is a valuable appurtenance, which passes with the title of the property, and its value to him is not diminished by the fact that it is equally beneficial to the adjacent owners. Also though the erection of a party wall creates a community of interest between neighboring properties, there is no just sense in which the reciprocal easement for its preservation can be deemed a legal encumbrance on the property. The benefit thus secured to each is not converted into a burden by the mere fact that it is mutual and not exclusive” (Citing cases).

The Court of Errors and Appeals in *Burns vs. Thomas, supra*, deals with the question whether or not a party wall is an encumbrance. The opinion in part reads:

“Complainant agreed to buy, and defendant to sell, a lot in Jersey City, particularly described as ‘being part of plot 19 B in Block

1827, situated on the northerly side of Duncan Avenue easterly from West Side Avenue, being 25 feet in width in front and rear, and 125 in depth on both sides, together with a four-story brick apartment dwelling situated thereon'. *A deed was subsequently delivered describing the westerly line of the lot as running 'through the center of a party wall standing partly on the premises hereby conveyed and partly on the premises next adjoining westerly thereto'.* It was held that the deed should not be reformed so as to convey the whole wall."

At page 383, the opinion continues:

"The case is the ordinary case that occurs in our compactly built cities, of a building with party walls. A building is none the less a complete building because one of its side walls requires, or is strengthened by, a supporting wall of an adjoining building. The right of mutual easements in such cases is well recognized, and each building is regarded as complete in itself. The language used by Chief Baron Pollock in *Richards vs. Ross*, 9 Exch. 218, by the New York Court of Appeals in *Rogers vs. Sinsheimer*, 50 N. Y. 646, and the Supreme Court of Massachusetts in *Carlton vs. Blake*, 152 Mass. 176, 25 N. E. 83, 23 Am. St. Rep. 818, sufficiently vindicates this definition of a building.

"The complainant in this case took title by his deed to a complete house, although he acquired also an easement of support by the defendant's wall; but this easement of support does not differ in kind from the ordinary easement of support of a man's land in its natural state by his neighbor's land. That houses built in this manner are separate buildings sufficiently appears from the practice in this state in cases arising under the mechanics lien act." Citing *Johnson vs. Algar*, 65 N. J. L. 363, 47 Atl. 571.

In *Waterman vs. Taub*, 3 N. J. Misc. Rep. Vol. 3, Adv. Sheets No. 9, 216, plaintiff and defendant entered into a mutual contract for the sale and exchange of certain real estate. Plaintiff tendered performance on his part, defendant being the vendee. Plaintiff brought suit to recover \$500 damages alleged to have been sustained by him for search fees and broker's commissions.

Defendant insisted that the plaintiff did not have a marketable title, and that such title as he had was not in accordance with the terms of the contract, which was that the *locus in quo* was to be conveyed subject to two mortgages, and also subject to a sewer easement, *and the easement of existing party walls*.

The Supreme Court held:

“The burden of proof of the non-marketability of the title admittedly was upon the purchaser. The trial judge, in his conclusion, held that the title was marketable, and that it was subject to no encumbrances other than those specifically recognized in the contract. The alleged encroachment was a wall deviating one-half inch from a direct course, and a special encroachment on the sidewalk of from one to nine inches. The trial judge, however, seemed to consider this immaterial, and that conclusion, we think, may be sustained. *The reference in the contract to the party wall we consider is sufficient to eliminate the wall encroachment of half an inch—*”

The judgment of the trial court was affirmed.

At the trial below, on the oral argument, the court asked whether or not in the absence of an agreement, an adjoining owner was liable for contribution with respect to the maintenance of a party wall. We find that there is no such duty to contribute.

In *Hearty vs. Kruger*, 121 N. Y. 386, it was held:

“There is no duty on the part of an owner to rebuild a party wall destroyed by fire.”

In *Omar vs. Day*, 5 Fla. 385, it was held:

“The building of a party wall gives no claim for contribution from the owner of the adjoining lot, in the absence of any express agreement between the parties.”

And in *Antomarchi's Ex'r vs. Russel*, 63 Ala. 356, 35 Am. Rep. 40:

“In case a party wall is destroyed by fire, there is no implied agreement or obligation to contribute towards rebuilding it.”

And

“Where a party wall, which has been jointly built by two adjoining owners, one half on the land which each owns is destroyed, there is no obligation resting upon either to rebuild it or unite in building another party wall.”

Sherred vs. Cisco, 6 N. Y. Sup. Ct. (4 Sandf.) 480.

Also

“In the absence of a covenant creating the obligation, neither party is obliged to rebuild a party wall, which has been torn down by reason of its defective and unsafe condition.”

Reynolds vs. Fargo, 1 Sheld. 531.

In *O'Neal vs. Van Tassell*, 137 N. Y. 297, 33 N. E. 314, the New York Court of Appeals in a *per curiam* opinion, at page 315, held:

“But the chief point of distinction consists in the fact that there is here a *covenant run-*

ning with the land, which compels the owner to rebuild and repair, and when rebuilt it must be on the same spot, of the same size, and of similar materials as when originally constructed. Such a covenant cannot be regarded in any other light, than as a perpetual encumbrance, which, in the case of urban property, restricts its free use and enjoyment, and may seriously embarrass the owner in respect to its future improvement. If he desired to build, enlarge or rebuild, he might be compelled to build an entirely independent wall upon his own premises, and thus further reduce the available space on his own lot, and still be liable upon his continuing obligation to repair or rebuild the party wall”.

In that case, it is evident that the wall was regarded as an encumbrance *because there was an express covenant of the adjoining owners, running with the land* which obliged them to maintain and rebuild the wall, and it is in that respect distinguishable from the case of *Hendricks vs. Stark*, 37 N. Y. 106, where it was held that in the absence of such a covenant, such a wall is not an encumbrance. *Hendricks vs. Stark, supra*, is cited with approval in *O’Neal vs. Van Tassell*.

In *Hendricks vs. Stark, supra*, the court said :

“A party wall, creating a community of interest between adjoining proprietors is in no just sense to be deemed a legal encumbrance upon the property.

“A party purchasing a hotel and premises at public auction, without being informed that part of the walls of the adjoining other buildings are party walls, cannot, for that cause, refuse to complete the purchase price.

“*As between adjoining proprietors maintaining party walls, their mutual easement in walls is a benefit and not a burden to each of them. It is a valuable appurtenance, which passes with the title of the property.*”

In Bouvier's Law Dictionary, Volume 3, page 2503, we find:

“Where a building having a party wall is destroyed by fire, leaving the wall standing, the easement in the wall ceases. Citing Hoffman *vs.* Kuhn, 57 Miss. 746; 34 Am. Rep. 491; and so where the wall becomes unfit either from age or accident.” Citing Odd Fellows' Ass'n *vs.* Hegele, 24 Or. 16; 32 Pac. 679.

In the case of *Freedman vs. Kensico Realty Co.*, *supra*, the complainant, the vendee named in the contract made for the sale of real property, filed a bill to rescind the contract on the ground that he was induced to enter into the same through fraud and misrepresentation on the part of the vendor, and to recover the deposit paid by the vendee on account of the purchase price.

At the final hearing of the cause, the only ground upon which the vendee relied was that the wall between the units is a party wall, of which the vendor had full knowledge and fraudulently induced the vendee to enter into the contract without apprising him of the existence of such party wall.

The learned Vice Chancellor followed the rule of law laid down by this Court in *Burns vs. Thomas*, *supra*, and further decided that the existence of the party wall and the fact that the vendee was not apprised of that fact had no bearing upon the agreement entered into between the parties, and accordingly dismissed the bill of complaint. The Vice Chancellor in that case did not hold that a party wall was an encumbrance, and indicated that it would make no difference even if the existence of the party wall was not mentioned in the contract.

Under Point III of plaintiffs' brief, counsel quote from page 290 of Professor Reeves' treatise on Real Property. They omitted to include the following statement which appears in the same paragraph at page 291 in that treatise immediately after the part quoted by plaintiffs' counsel, to wit:

“Each purchaser is presumed to have contracted with reference to the actual condition of the properties at the time, and to have taken his house and lot with all the benefits and burdens which apparently belonged to them.”

The quotation from Professor Reeves' treatise on real property, cited by counsel for plaintiffs, merely indicates one of the methods by virtue of which party walls come into existence, but that author does not say that such a party wall is an encumbrance. On the contrary, at page 294, of the same volume, Professor Reeves holds that a party wall is not an encumbrance. The exact excerpt is quoted, *supra*.

Under Point V, plaintiffs' counsel quote an excerpt which they claim appears in Tiffany on Real Property, on page 727. In the first place, we find that that paging is incorrect, and that the statement appears at page 1343 in Volume 2 of the Second Edition of Tiffany on Real Property. Furthermore counsel omitted to give the full statement that appears in connection with the subject quoted from that treatise.

The whole statement of the law as found in Tiffany's work, at page 1343, is as follows:

“There is at least *one decision* to the effect that, if the party wall becomes unsafe or ruinous, it may be rebuilt by one of the adjoining owners, and the other will be compelled to pay part of the cost.”

Counsel, in their brief, omitted the first portion of the paragraph, to wit: "There is at least one decision to the effect that." A reading of the whole paragraph as it appears in Tiffany's Work, which is exactly as we recite the excerpt, *supra*, indicates that there are very few decisions to support that statement; he says there are "at least one decision to that effect."

It should be noted in addition that the author does not say in that paragraph that that statement of the law is applicable to a case where there is no agreement running with the land, obligating the adjoining owner to repair or rebuild the wall. On the contrary by what the author says at page 1350 (cited toward close of this brief) it is clear that he agrees that in the absence of an agreement there is no such obligation to repair or rebuild a party wall.

Counsel omitted to quote from page 1349 of that same work, where Mr. Tiffany says:

"In the absence of an express stipulation or prescriptive obligation to that effect, there is no requirement that the owner of the servient tenement put or keep it in proper condition for the exercise of the easement, though he must not actively obstruct its exercise. So the fact that the owner of a building has a right of support from an adjoining building does not entitle him to demand that the owner of the latter keep it in repair so as to furnish sufficient support, nor can the owner of an upper floor compel the repair of the lower floor by the owner thereof."

And at page 1350 of the same work, we find:

"That one has party wall rights in a wall or a part of a wall imposes no obligation on him, or on the owner of the wall, to reconstruct it when destroyed by fire or other accidental cause. And it would seem questionable, on principle, whether one person entitled

to use a party wall should have contribution from the other on account of expenditures for repairs, additions or reconstruction, undertaken by the former for his own benefit, though enuring to the benefit of the latter.” (And cases cited.)

CONCLUSION.

For the foregoing reasons, we respectfully submit that the judgment of the lower court be affirmed.

Respectfully submitted,
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