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TESTIMONY FOR COMPLAINANT.

Testimony for Defendant.

Complainant's Exhibits.

Petition of Appeal.

(Filed Jan. 23, 1923.)

To the Honorable, the Court of Errors and Appeals, in the last resort in all causes:

The petition of Magnolia Construction Company, a corporation of the State of New Jersey, the appellant in the above stated cause, respectfully shows that your petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 3rd day of January, 1923, wherein the said Magnolia Construction Company was complainant and the said Edward McQuillan was defendant, in these respects, to wit: that the said decree adjudges that the northeasterly wall of complainant's apartment house, mentioned in complainant's bill, encroaches on defendant's lot, at several points varying from 1.29 feet on the most northerly corner of said apartment house to .36 feet at the most easterly corner thereof; and that the conduct of the defendant did not operate to create an estoppel against him and in favor of the complainant; and that no license sufficient in law was granted by defendant to complainant to erect said northeasterly wall of complainant's said apartment house, where the same was so erected; and that the said alleged encroachment was not the result of a mistake in which both parties, complainant and defendant participated; and that under the circumstances of the case, defendant should not be required to re-

lease to complainant so much of his lands as is covered by the said alleged encroachment for a consideration to be fixed by the Court of Chancery, and paid by the said complainant; and that the conduct of the said parties, complainant and defendant, did not result in an implied agreement fixing the outside of the northeasterly wall of complainant's said apartment house as the boundary between their respective lands; and that the complainant is not entitled to the relief prayed for in its bill of complaint; and that the complainant's bill be dismissed.

And your petitioner humbly appeals from those parts of the said decree of the Chancellor which decrees as aforesaid, upon the ground that the same are erroneous, for that: the northeasterly wall of complainant's said apartment house does not encroach on defendant's lot at several points as so adjudged by said decree; and that the conduct of the defendant did operate to create an estoppel against him and in favor of the complainant; and that sufficient license in law was granted by the defendant to complainant to so erect the northeasterly wall of complainant's said apartment house; and that the said alleged encroachment was the result of a mistake in which both parties participated, and that under the circumstances of the case, the defendant should be required to release to complainant, so much of his land as is covered by the said alleged encroachment, for a consideration to be fixed by the Court of Chancery, and paid by complainant; and that complainant and defendant agreed that the outside face of the northeasterly wall of complainant's said apartment house should be the dividing or boundary line between the lands of said com-

plainant and defendant; and that complainant was entitled to the relief prayed for in its bill of complaint, and the bill of complaint herein should not have been dismissed.

Your petitioner therefore prays that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

GROSS & GROSS,
Solicitors and of Counsel with appellant.

I conceive that there is good cause for the appeal in the above entitled cause.

ISAAC GROSS,
Counsel.

Bill of Complaint.

(Filed Sept. 24, 1920.)

IN CHANCERY OF NEW JERSEY.

To his Honor, EDWIN ROBERT WALKER, Chancellor of the State of New Jersey:

Complainant Magnolia Construction Company, a corporation of the State of New Jersey, having its principal office in the city of Jersey City, County of Hudson, respectfully shows:

1. About the month of January, 1917, John H. Ehrehart being then the owner of the lands and premises hereinafter described, in fee simple conveyed the same to complainant in fee simple by deed of full covenant and warranty, free from all encumbrances, which said deed of conveyance was recorded in the office of the Register of the County

of Hudson and therein the said lands and premises are described as follows:

"All those lots, tracts or parcels of land and premises hereinafter particularly described, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, and more particularly described as follows:

"Beginning at a point on the Southeasterly side of Waldo Avenue distant Southwesterly eighty-five (85) feet more or less from the South corner of Newark Avenue and Waldo Avenue, which point is also in the northwesterly corner of that parcel of land conveyed by the New Jersey Junction Railroad Company *et al.* to Nicholas Nolan, by deed dated September 15th, 1900; and running thence, Southeasterly along the Southwesterly line of said parcel of land conveyed to said Nolan, parallel with the northeasterly line of land conveyed by Edward D. Adams and wife to the New Jersey Junction Railroad Company, by deed dated August 25th, 1886, recorded in the Office of the Register of said county in Book 426 of deeds at page 57, being the 15th described parcel of land in said deed; one hundred (100) feet.

"Thence northeasterly, parallel with Waldo Avenue twenty-five (25) feet to the southwesterly line of Newark Avenue.

"Thence southeasterly along the southwesterly line of Newark Avenue thirty (30) feet more or less to a point marked on a flagstone in the West sidewalk of Newark Avenue.

"Thence Southwesterly along the southeasterly boundary line of land conveyed by said Adams so aforesaid two hundred and thirty-two (232) feet to a stone monument.

"Thence northwesterly along the line of the Jersey City Cemetery thirty-seven feet and seven inches (37 ft. 7 in.) to a corner.

"Thence Southwesterly along the line of said Cemetery two hundred and sixty-five (265) feet to the southwesterly line of the tract hereby conveyed.

"Thence northwesterly along said line one hundred and twenty-four feet and nine inches (124 ft. 9 in.) to the southeasterly line of Waldo Avenue.

"Thence northeasterly along the said Waldo Avenue four hundred and seventy-four (474) feet more or less to the place of beginning.

"EXCEPTING THEREFROM, all that tract out of the aforementioned land conveyed by John H. Ehrehart *et ux* to the Jersey City and Harsimus Cemetery by deed dated November 1st, 1912, and recorded in the office of the Register of the county of Hudson, in Book 1124 of deeds for said county on pages 619 &c.

"IT IS EXPRESSLY UNDERSTOOD AND AGREED that the tract of land hereby conveyed has a frontage of 474 feet on Waldo Avenue, a depth of 123.50 feet on the southerly side and a depth of 100 feet on the northerly side and is approximately 474 feet wide in the rear."

2. That the said lands and premises so con-

veyed to complainant was entirely vacant and unimproved and by the description aforesaid, its most easterly point on the southerly side of Waldo Avenue was distant ninety-one feet and ninety one-hundredths of a foot (91ft. 90/100) westerly from the point of intersection of the southerly line of Waldo Avenue with the westerly line of Newark Avenue.

3. That at the time of the acquisition by complainant of said lands, there stood erected upon the lands of one Edward McQuillan immediately adjoining complainant's said lands, to the east, an old and dilapidated fence and also a very old and dilapidated shed of a temporary nature. Complainant was organized as a corporation in the State of New Jersey for the purpose of erecting buildings for dwelling and other purposes and acquired the said lands for a valuable consideration for the purpose of erecting and constructing dwelling houses thereon; and shortly after its purchase of the said lands, commenced and has since completed the erection of two two-story family brick houses on part of the said tract, and has also erected three large apartment houses thereon, each having a frontage on Waldo Avenue of fifty feet (50) by a depth of ninety feet (90) throughout.

4. That said lands are situated on a steep slope of a hill running down and easterly from Waldo Avenue and that it is necessary in erecting buildings upon said lands, to erect the foundation wall in the rear to a very considerable depth so that the rear part of such foundation wall will be at a level with the grade of Waldo Avenue. About September, 1917, complainant contemplated the erection of a large apartment house on its lands

immediately adjoining the lands of said McQuillan, to be known as No. 108 Waldo Avenue and to have a frontage of 50 feet in width on Waldo Avenue by a depth of 90 feet throughout and to adjoin immediately on the east, two apartment houses theretofore erected by it on said lands, and known as No. 100 Waldo Avenue and No. 104 Waldo Avenue.

5. For the purpose of having its property properly laid out and within its proper lines and to avoid encroaching upon the property of another, complainant had employed James Henderson, a competent and experienced surveyor, to survey the said lands and to stake it out and lay monuments for the purpose of fixing complainants boundary and line; and said James Henderson did actually survey the land for the purpose of complainant's then proposed building at No. 108 Waldo Avenue and fixed monuments and stakes, indicating complainant's boundaries and lines and among which was a mark upon the fence, part of which stood constructed upon the lands of said McQuillan,

6. About October 1, 1917, complainant let out contracts for the performance of work upon said apartment house, and especially for the construction of the foundation wall thereof and proceeded with the work thereon. Said McQuillan conducts a store or shop on Newark Avenue in the building immediately adjoining complainant's said lands on the east and had frequently watched and admired the building theretofore constructed by complainant and when the foundation walls were about to be built for the apartment house No. 108 Waldo Avenue and the excavations were being made therefor he was about the said work and watching it almost daily and when it became necessary to

build the easterly foundation wall for said building which immediately adjoins the said premises, it became necessary in order to erect the same to the line and boundary fixed therefor by complainant's said surveyor, to tear down part of the fence aforementioned and also to remove part of the shed above described. That complainant thereupon informed the said McQuillan that the said portion of his fence and shed were partly upon complainant's property as indicated by the surveyor's marks, monuments and stakes, which were then and there pointed out to him and requested the said McQuillan to verify the same and remove the portion so encroaching upon complainant's land so as to enable it to proceed with its work of constructing the foundation wall for the apartment house then being built by it.

7. Said McQuillan thereupon stated that there had been some doubt as to the dividing line between his lands and those of complainant and was satisfied that the lines as fixed by complainant's surveyor, were correct and thereupon said McQuillan tore down and removed the portion of said fence up to the point where indicated by the surveyor's mark and also the said shed for the purpose of permitting complainant and its contractors to proceed and erect its building up to the lines and marks so fixed.

8. Complainant thereupon, in the absolute belief that it was the owner of the lands up to the lines and marks so indicated, and assented, agreed to and acquiesced in by said McQuillan, proceeded with and constructed its foundation wall to said line, and thereafter constructed its said entire building up to said line and not beyond it, to a

height of four stories above the basement and providing apartments for seventeen tenants besides the facilities for the steam heating plant, coal and storage in the basement thereof, at a considerable expense. Said building costing complainant about $50,000.00 to construct and being similar in style to the other two buildings theretofore constructed by complainant on its said lands, the construction of which was also watched by said McQuillan.

9. Said McQuillan assisted in the laying of the lines for the erection of said easterly wall of complainant's building and was on the premises almost daily noticing the progress of the construction thereof until its final completion and occupation by complainant's tenants. Said McQuillan knew and understood the character of building and structure which complainant was about to erect upon its lands when he assisted in tearing down his fence and removing his shed, and in the laying of the lines for the construction of the complainant's wall as aforesaid and also knew that his agreement and assent and acquiescence to the erection of the foundation wall and the wall of the said building at the point where the same was being erected, was relied upon by complainant in the doing of its work.

10. Said Edward McQuillan never objected to complainant or to any of its contractors or employees to its knowledge, to the erection of the wall as the same was actually erected, nor did the said McQuillan ever claim any right or title to any part of the lands upon which said wall was being erected, but agreed to and acquiesced in the erection of the same until the bringing of the proceedings at law hereinafter referred to. Said building was completed about October 1st, 1918.

11. About November 15, 1918, and after the entire completion of said building, said McQuillan, for the first time, stated to complainant that its said apartment house slightly encroached upon his land and demanded of complainant that it purchase his entire property and pay for it an exorbitant price, as otherwise he intended to commence action against complainant to compel it to pull down its said wall, to which demand complainant would not accede.

12. Said McQuillan thereupon commenced an action in the Supreme Court of New Jersey, by the issuance of a summons tested November 25, 1918, a copy of which with the complaint thereunto annexed served upon this complainant, is hereto annexed, in which said action said McQuillan seeks to eject complainant from the lands alleged to be owned by him and upon which is standing the easterly wall of complainant's said apartment house. Such proceedings were had in said action at law, that the same has been noticed for trial at the Hudson County Circuit Court for the September, 1920, term of said court and the said Edward McQuillan intends to proceed with the trial thereof in said court.

13. The westerly line of Newark Avenue, which is taken as one of the monuments from which complainant's lands were surveyed, complainant is informed is not a definite and fixed line and while complainant believes that its said apartment house and the said easterly wall thereof stand erected entirely upon lands owned by complainant, it fears that because of the uncertainty of said westerly line of Newark Avenue, said McQuillan might, by some evidence or by the length of time of his possession,

be able to establish that some portion of said easterly wall stands erected upon lands belonging to him.

14. Complainant would not have erected the easterly wall of its said apartment house upon said lands had the said McQuillan objected or intimated that he was the owner of any portion thereof or had it not in good faith believed that it was the owner of said lands and every portion thereof; and irreparable damage and injury would now result to it were the said McQuillan permitted to carry out his threat and eject complainant from any part of said lands.

15. Complainant has at all times been in quiet and peaceable possession of said lands, except as aforesaid.

Complainant is without adequate remedy in the courts of law and therefore prays:

1. That Edward McQuillan, who is the defendant to this suit, may answer this bill of complaint without oath, and each statement therein made.

2. That the easterly or outside face of the easterly wall of complainant's apartment house, known as No. 108 Waldo Avenue, Jersey City, in a straight line along the same be fixed and established by the decree of this court as the boundary line between the lands of complainant and said defendant.

3. That the said Edward McQuillan, his agents and attorneys may be perpetually enjoined by the decree of this court from prosecuting the said action in ejectment in the New Jersey Supreme Court wherein he, said Edward McQuillan is plaintiff

and complainant Magnolia Construction Company is defendant, or from taking any other action or proceeding against this complainant by virtue of the premises or for the recovery of any portion of the lands upon which complainant's said wall stands erected or for any damages or compensation because of the erection of said wall or its occupation of the said lands or any part thereof.

4. That the title of complainant to the easterly wall of its apartment house known as No. 108 Waldo Avenue, Jersey City, and the lands on which the same stands erected and every part thereof, be established and confirmed by the decree of this court and its title thereto quieted and settled.

5. That a writ of subpoena may issue commanding said defendant to answer this bill of complaint and to abide by such decree as this court may make in the premises.

GROSS & GROSS,
Solicitors and counsel with
Complainant.

THE STATE OF NEW JERSEY.

To Magnolia Construction Company, a corporation:

YOU ARE SUMMONED to answer the annexed complaint of Edward McQuillan in an action at law in the Supreme Court. AND TAKE NOTICE that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed

(L.S.)

complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness: William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this twenty-fifth day of November, nineteen hundred and eighteen.

ENOCH L. JOHNSON,
Clerk.

COLLINS & CORBIN,
Attorneys.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

EDWARD MCQUILLAN, Plaintiff,	
v.	Action at Law.
MAGNOLIA CONSTRUCTION COMPANY, a corporation, Defendant.	COMPLAINT.

Plaintiff residing at 144 Erie Street, Jersey City, Hudson County, New Jersey says that:

1. On August 1st, 1917, plaintiff owned and possessed a certain lot of land in the City of Jersey City, aforesaid, described as follows:

> "SECOND TRACT: BEGINNING at a point in the southeasterly line of Waldo Avenue, distant southwesterly sixty (60) feet, more or less, from the south corner of Newark Avenue and Waldo Avenue, which point is also the north corner of a tract con-

veyed by Edward D. Adams and wife to the New Jersey Junction Railroad Company, by deed bearing date August 25, 1886, and recorded in the office of the Register of Hudson County, New Jersey, in Book 426 of deeds, page 57 &c. and running thence southeasterly along the northeasterly line of lands of New Jersey Junction Railroad Co., one hundred (100) feet; thence southwesterly and parallel with Waldo Avenue twenty-five feet (25); thence northwesterly and parallel with the first described boundary line, one hundred (100) feet to the southeasterly line of Waldo Avenue, thence northeasterly along said line of Waldo Avenue, twenty-five (25) feet to the place of beginning, containing fifty-nine one-thousandths (0.059) acres of land more or less."

2. Defendant on that day, had in course of construction an apartment house on the lot of land contiguous to and adjoining the said lot of land of the plaintiff, aforesaid, on the west.

3. Defendant on that day, in the construction of said apartment house, by its agents and servants, wrongfully entered upon the said land of the plaintiff, and dispossessing plaintiff from parts and parcels of his said lot of land aforesaid, constructed a part of said apartment house on plaintiff's said land.

4. The parts and parcels of plaintiff's said land so wrongfully entered upon, as aforesaid, have the following areas:

A. The front or the most northerly part of said apartment house on the east en-

croaches on the following part of plaintiff's said land: A strip of said land of plaintiff 25 feet in length, with a width at the northerly end thereof of 1.29 feet, and at the southerly end thereof, a width of .84 feet.

B. The rear or southerly part of said apartment house on the east encroaches on the following part of plaintiff's said land: A strip of land 25 feet in length, with a width at the northerly end thereof of .48 feet, and at the southerly end thereof .36 feet.

5. Defendant, by its agents and servants, as aforesaid, still keeps the plaintiff out of the possession of the said parts and parcels of land, as aforesaid, depriving him of the rents and profits thereof.

6. Said rents and profits amount to the sum of $1,000 a year.

7. Plaintiff's right to the possession of said land accrued on August 1st, 1917.

Plaintiff demands judgment for possession of said parcels of land aforesaid and $1,200 damages.

COLLINS & CORBIN,
Attorneys of Plaintiff.

Affidavit of Jacob Stallman, Annexed to Bill of Complaint.

IN CHANCERY OF NEW JERSEY.

Between MAGNOLIA CONSTRUCTION COMPANY, a corporation, Complainant, and EDWARD MCQUILLAN, Defendant.	On Bill, &c., AFFIDAVIT.

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

Jacob Stallman, being duly sworn, on his oath, deposes and says:

That in January, 1917, and prior thereto and since said date and until May 12th, 1920, I was president of the Magnolia Construction Company, a corporation, the complainant in the annexed bill of complaint named, and general manager and in charge of the conduct of its business, which was principally the construction of buildings and apartment houses. I have read the annexed bill of complaint and have personal knowlege of the facts therein set forth, and the same are true.

About January, 1917, complainant purchased of John H. Ehrehart the lands and premises situated on the southeast side of Waldo Avenue, Jersey City, described in the annexed bill of complaint and about said date recorded its deed therefor in the office of the Register of the County of Hudson.

That the said lands so conveyed to the said com-

plainant was entirely vacant and unimproved and by the said description and actual location its most easterly point on the southerly side of Waldo Avenue was distant 91.90 feet westerly from the point of intersection of the southerly line of Waldo Avenue with the westerly line of Newark Avenue.

That at the time of the acquisition by complainant of said lands, there stood erected upon the lands immediately adjoining complainant's said property to the east, an old and dilapidated shed and also a very old and dilapidated fence of a temporary nature, claimed to be owned by one Edward McQuillan. Complainant was organized as a corporation of the State of New Jersey, for the purpose of erecting buildings for dwelling and other purposes, and acquired its said land for a valuable consideration, for the purpose of erecting and constructing dwelling houses thereon; and shortly after its purchase of said property, commenced and has since completed the erection of two two-story family brick houses on part of the said tract, and has also erected three large apartment houses thereon, each having a frontage on Waldo Avenue, of 50 feet by a depth of 90 feet throughout.

That said lands are situated on a steep slope of a hill running down and easterly from Waldo Avenue and that it was necessary in erecting buildings upon the said lands, to erect the foundation wall in the rear to a very considerable depth so that the rear part of such foundation wall, would be at a level with the grade of Waldo Avenue.

About September, 1917, complainant contemplated the erection of a large apartment house on its lands immediately adjoining the lands of said McQuillan, which apartment house so to be erected, was to be known as No. 108 Waldo Avenue and

to have a frontage of 50 feet in width on Waldo Avenue, by a depth of 90 feet throughout and to adjoin immediately on the east two apartment houses theretofore erected by it on the said land and known as No. 100 Waldo Avenue and No. 104 Waldo Avenue. I was in charge of all of the work preparatory to and in course of construction of said building; and for the purpose of having the building properly laid out and within its proper lines and to avoid any possible encroachment upon the property of another, I employed James Henderson a competent and experienced surveyor to survey the said lands and to stake it out and lay monuments for the purpose of fixing complainant's boundary and line. Said James Henderson did actually survey the land for the purpose of our then proposed building at No. 108 Waldo Avenue and fixed stakes and laid monuments as well as by marks indicated complainant's boundary and lines, among which was a mark upon the fence above mentioned, part of which stood constructed upon the lands of said McQuillan.

About October 1st, 1917, we let out contracts for the performance of work upon said apartment house and especially for the construction of the foundation wall thereof and proceeded with the work thereon. Our stone mason contractor for the foundation work was Joseph Lupo. Said McQuillan conducts a store or shop on Newark Avenue in the building immediately adjoining complainant's said lands on the east, and, while the excavation work for the foundation walls for the said building was going on, as well as the construction work on the rear foundation wall, and thereafter while the building was in course of construction, was on the work almost daily and observed

and watched the progress of construction thereon as he had theretofore done while our previous building operations were going on upon said lands. He expressed to me on several occasions his interest in building and admired the buildings we were constructing and the work being done thereon. When it became necessary to construct the foundation wall of our said building at No. 108 Waldo Avenue, immediately adjoining the lands of said McQuillan, it became necessary in order to erect the same to the line and boundary indicated therefor by our said surveyor, Mr. Henderson, to tear down part of the fence aforementioned and also to remove part of the shed above described. Mr. McQuillan was on the property at the time and I indicated to him the lines staked out and marked by the surveyor and stated to him, said McQuillan, that he might verify the same and remove the portion of his fence encroaching upon complainant's lands and also the said shed so as to enable it to proceed with its work of constructing the foundation wall for the apartment house, then being built by it, and that the wall of complainant's said building would be constructed up to the line or mark indicated by its said surveyor. Said McQuillan thereupon stated that there had been some doubt as to the dividing line between his lands and those of complainant, and was satisfied that the lines fixed by complainant's surveyor were correct; and thereupon said McQuillan tore down and removed the portion of said fence up to the point where indicated by the surveyor's mark, and also the said shed for the purpose of permitting us to proceed and erect the building up to the lines and marks so fixed. After the tearing down of said fence and the removal of said

shed by said McQuillan, Mr. McQuillan assisted Mr. Lupo and myself in drawing a line from the rear foundation wall which had already been constructed, to the mark so fixed by Mr. Henderson and I told Mr. McQuillan that the said line would be the line up to which the foundation wall, as well as the easterly wall of our said building would be constructed and would constitute the boundary line between us. Mr. McQuillan said that that was thoroughly agreeable and held the said line in its place until it was fastened in its then position by some stones laid by Mr. Lupo and his employees.

Complainant thereupon in the absolute belief that we were the owners of the lands up to the lines and marks so indicated, agreed to and acquiesced in by said McQuillan, proceeded and constructed its foundation wall to said line and thereafter constructed its said entire building up to said line and not beyond it, to a height of four stories above the basement, and providing apartments for seventeen tenants besides the facilities for the steam heating plant, coal and storage in the basement thereof, at a cost of about $50,000 for the construction alone. Said building is similar in style with the other two buildings theretofore constructed by complainant on its said lands, the construction of which was also watched by said McQuillan, and of exactly of the same width of each of the said former buildings.

Said McQuillan was on the premises during the construction of said building at No. 108 Waldo Avenue, Jersey City, almost daily and noticed the progress of the construction thereof until its final completion and occupation by complainant's tenants. He often spoke to me about the construction of buildings and seemed to be very much

interested therein. Before the commencement of any work on the said last mentioned building I told him, said McQuillan, that we intended to erect a building on the lands immediately adjoining his property, 50 feet in width and that was on the land that we had vacant between the building last constructed by us, and his property. I also told him, in a neighborly way, that the building we were about to erect would be in a general way, similar to the building theretofore constructed by us on Waldo Avenue, with which he was well familiar. He knew what we were about to do and intended doing when he tore down part of his fence and removed his shed as aforesaid, for the purpose of permitting us to proceed with the erection of our said apartment house, and that we relied upon his assent and agreement that the line fixed by us was the correct boundary line between our property and his. Mr. McQuillan never objected to me or any other officer of the complainant or to any of its contractors or employees to my knowledge, to the erection of the wall, after the same was actually erected, nor did he ever claim any right or title to any part of the lands upon which said wall was being erected, but agreed to and acquiesced in the erection of the same until after its entire completion and shortly before the bringing of the action at law in ejectment hereinafter referred to. Said building was completed about October 1st, 1918.

About November 15, 1918, and after the entire completion and occupation of said apartment house, said McQuillan, for the first time, stated to me that our said apartment house slightly encroached upon his land, and demanded that we purchase his entire property and pay for it, $18,000.

That otherwise he intended to commence action against us to compel us to pull down our said wall, to which demand I could not accede because the price asked for the said property was far beyond its actual value and ridiculously high. In fact, we did not care to purchase his property at all. McQuillan thereupon commenced an action in the Supreme Court of New Jersey, by the issuance of a summons tested November 25, 1918, a copy of which with the complaint thereunto annexed, is annexed to the bill of complaint herein, in which said action said McQuillan seeks to eject complainant from the lands alleged to be owned by him and upon which is standing the easterly wall of complainant's said apartment house. Said action has been noticed for trial at the Hudson County Circuit, for the September, 1920, term of said court and the said Edward McQuillan intends to proceed with the trial thereof in said court and seek in said action to eject us from the lands in his said complaint described, which is the lands upon which he assented and acquiesced that the said wall be erected and the outside of which in a straight line he agreed should be the dividing or boundary line between our respective lands.

The westerly line of Newark Avenue, which is taken as one of the monuments from which complainant's lands were surveyed, I am informed is not a definite and fixed line, and while I believe our said apartment house and the said easterly wall thereof stand erected entirely upon lands owned by complainant, I fear that because of the uncertainty of said westerly line of Newark Avenue, said McQuillan might by some evidence or by the length of time of his possession of which we have no knowledge, be able to establish that some

portion of said easterly wall stands erected upon lands belonging to him.

Complainant would not have erected the said apartment house or the easterly wall thereof upon said lands, had the said McQuillan objected or intimated that he was the owner of any portion thereof or had he not acquiesced and consented to the erection thereof upon the lands where the same stands erected or had it not in good faith believed that it was the owner of said lands and every portion thereof, and irreparable damage and injury would now result to it were the said McQuillan permitted to carry out his threat and eject complainant from any part of said lands.

JACOB STALLMAN.

Sworn and subscribed to before me this 10th day of September, 1920.

Samuel Tartalsky,
Attorney at Law of N. J.

Affidavit of Joseph Lupo, Annexed to Bill of Complaint.

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

Joseph Lupo, being duly sworn, on his oath, deposes and says:

I am a stone mason contractor and the person who had the contract and performed work for the erection of the cellar and foundation walls of the apartment house constructed by the Magnolia Construction Company and known as No. 108 Waldo Avenue, Jersey City. Before we could lay our stone foundation it became necessary to have the boundary lines of the property fixed and drawn

and the trenches dug for the laying of the footings upon which the foundation wall was to be constructed. Mr. Jacob Stallman had charge of the construction work on this property for the Magnolia Construction Company and had the surveyor survey the property and stake it out as well as indicate by markings, the lines of the property. I saw one of these crow-foot marks on the fence running along the street line from the property situated easterly of the building we were constructing situated on the southwesterly corner of Waldo and Newark Avenues and which I was told belonged to Edward McQuillan. I had met Mr. McQuillan while performing other work for the Magnolia Construction Company upon other apartment houses, constructed by it adjoining the one at No. 108 Waldo Avenue and have seen him almost every day about the work while my job was in progress. He was at the property we were constructing almost daily while we were working at No. 108 Waldo Avenue while excavating the trenches for the foundation wall and erecting the rear wall thereof as well as the other foundation walls and observed with interest the progress of the work.

As we were about to construct the easterly foundation wall for said building at No. 108 Waldo Avenue, which wall immediately adjoins the lands of McQuillan, it became necessary if we were to build to the line indicated by the surveyor's mark on the fence, as aforesaid, to have part of the fence up to said mark, torn down and a small dilapidated shed inside of it removed further easterly on to the lands of McQuillan. Mr. McQuillan was at the property with Mr. Stallman and one of my men and myself when I heard Mr. Stallman

state to Mr. McQuillan that the Magnolia Construction Company's property had been surveyed and that its line ran to the surveyor's marking on the fence which Mr. Stallman pointed out to him and stated to him that he should remove the portion of his fence which encroached upon the Magnolia Construction Company's property and also the said shed, if he was satisfied that the said lines were correct, so as to enable us to proceed with our work of constructing the foundation wall for the apartment house and proceed with the work on the building and that the easterly wall of the building then to be erected would be constructed up to the line or mark so indicated by the surveyor. Mr. McQuillan stated that there had been some doubt as to the dividing line between his lands and those of the Magnolia Construction Company and was satisfied that the lines fixed and so marked by the surveyor were correct and said McQuillan thereupon tore down and removed the portion of said fence up to the point where indicated by the surveyor's said mark and also the said shed for the purpose of permitting us to proceed and erect the building up to the lines and marks so fixed. After the tearing down of said fence and the removal of said shed by Mr. McQuillan, he assisted me and Mr. Stallman in stretching and drawing a line from the rear foundation wall which had already been constructed, to the mark fixed by the surveyor on the said fence and Mr. Stallman stated to him that the said line would be the line up to which the foundation wall as well as the easterly wall of the building would be constructed, and that would be the boundary line between their properties. Mr. McQuillan expressed satisfaction with that and in fact held the line in

its place as indicated by the surveyor's mark and stake, until it was fastened in its then position by some stones which I and one of my employees laid and it was up to that line only that the said easterly foundation wall and the easterly wall of the said building was actually constructed. I was engaged on this job almost every working day and saw Mr. McQuillan there observing the work as it was going on almost daily. He has a store in his property immediately adjoining and I never heard any objection on Mr. McQuillan's part that the building, as it was being constructed, in any way encroached on his property, or that he had any fault to find with the building as it was being constructed. On the contrary he seemed to be satisfied and interested in the work and on many occasions expressed satisfaction with the improvement of the neighborhood by the Magnolia Construction Company's operations in building large apartment houses where theretofore there was nothing but unimproved overgrown vacant land. In fact the property owned by Mr. McQuillan on the corner consists of an old tumble down frame house on which he has had nailed up a sign "for sale" for as long back as I remember the property.

I have absolutely no interest in this matter, as I built the wall up to the line indicated by Mr. McQuillan and Mr. Stallman as the same had theretofore been laid out by the surveyor.

JOSEPH LUPO.

Sworn and subscribed to before me this 17th day of September, 1920.

Leon Lazarus,
Master in Chancery,
N. J.

Affidavit of Matrachisio Liborio, Annexed to Bill of Complaint.

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

Matrachisio Liborio, being duly sworn, on his oath, deposes and says:

I am a stone mason and in the months of September and October, 1917, was employed by Joseph Lupo, stone mason contractor, in the building of the foundation walls for property then being constructed by the Magnolia Construction Company, 108 Waldo Avenue, Jersey City, New Jersey. I recall that when we were about to commence work on the erection of the easterly foundation wall for said building, Mr. Stallman, who had charge of the work, spoke to Mr. Edward McQuillan who was the owner of the corner property adjoining and conducts a store therein; that the surveyor had indicated the line of the property of Magnolia Construction Company up to which it might construct its easterly wall by stakes and a mark on the fence which extended from McQuillan's property, and requested Mr. McQuillan to satisfy himself if the marking was correct, and if so, to remove the part of the fence and also the shed on the inside of it, so that we might proceed with our work and build a wall up to that line. Mr. McQuillan stated that he was satisfied that the lines and marks were correct and himself assisted in tearing down the fence and removing the shed so as to permit us to make our trench excavation and lay our easterly wall. It was also necessary in order that our line be clearly indicated that we stretch a line from the rear foundation wall to the front stake or mark where the

same was so indicated by the surveyor, on the fence, and Mr. Lupo, Mr. Stallman and Mr. McQuillan stretched the said line. Mr. McQuillan holding the street end of it until Mr. Lupo and myself fastened it at that point by laying of some stones. Mr. McQuillan was satisfied with the line as so extended and it was up to that line that we built the foundation wall and up to which the easterly wall of the said building was constructed. At no time did Mr. McQuillan object or find fault with anything that was being done although he was on the building almost daily.

MATRACHISIO LIBORIO.

Sworn and subscribed to before me this 10th day of September, 1920.
Samuel Tartalsky,
Attorney at Law of N. J.

Affidavit of James Henderson, Annexed to Bill of Complaint.

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

James Henderson, being duly sworn, on his oath, deposes and says:

I am a surveyor and have practised my profession in the City of Jersey City for the past 20 years. At the request of Mr. Jacob Stallman I surveyed and staked out property of said Magnolia Construction Company for the purpose of the construction of a building by it fifty (50) feet in width on Waldo Avenue by ninety (90) feet in depth and immediately adjoining westerly the lands of Edward McQuillan situated on the southwesterly corner of Newark Avenue and Waldo Avenue. I

indicated the lines for the construction of said building by stakes as well as by marking on a fence extending from the property of said McQuillan along the line of Waldo Avenue. After the completion of said building I was again requested to survey the same and find that the said building was constructed within the line so indicated and marked and staked out by me. The line of Newark Avenue is not a fixed or established line and I am of the opinion that the property so erected by said Magnolia Construction Company does not encroach upon the said property of McQuillan.

JAMES HENDERSON.

Sworn and subscribed to before me this 18th day of September, 1920.
Patrick J. Murphy,
Notary Public,
N. J.

Order Amending Complaint.

(Filed Oct. 17, 1922.)

IN CHANCERY OF NEW JERSEY.

Between

MAGNOLIA CONSTRUCTION COMPANY,
Complainant,
and
EDWARD MCQUILLAN,
Defendant.

} On Bill, &c.

The complainant herein making application to the court at the hearing of this cause for the

amendment of the description of the lands and premises set forth in paragraph 1 of the bill of complaint herein; it is on this 17th day of October, 1922,

ORDERED, that the description of the lands and premises set forth in paragraph 1 of complainant's bill be and the same is hereby amended to read as follows:

"ALL that certain plot, piece, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, more particularly described as follows:

BEGINNING at a point on the southeasterly side or line of Waldo Avenue, distant thereon ninety-one and ninety one hundredths (91.90') feet from the corner formed by the intersection of the southeasterly side of Waldo Avenue with the southwesterly side or line of Newark Avenue, thence running (1) southwesterly along the southeasterly side or line of Waldo Avenue four hundred and seventy-four (474') feet to a point; thence returning to the place of beginning which point is also in the northwesterly corner of that parcel of land conveyed by the New Jersey Junction Railroad Company, et al., to Nicholas Nolan by deed dated September 15, 1900, and recorded in the Register's Office of Hudson County in Book 763 of Deeds for said County, page 507; and running thence (2) southeasterly along the southwesterly line of said parcel of land conveyed to said Nolan parallel with the northeasterly line of land conveyed by Ed-

ward D. Adams and wife, to the New Jersey Junction Railroad Company by deed dated August 25, 1886, recorded in the Office of the Register of Hudson County in Book 426 of Deeds for said County at page 57 being the 15th described parcel of land in said deed, one hundred (100′) feet to a point distant twenty-five (25′) feet southwesterly from the southwesterly line of Newark Avenue; thence running (3) southwesterly and parallel with the southwesterly line of Waldo Avenue two hundred and seven and twenty-two hundredths feet (207.22) to a point; thence running (4) again southwesterly two hundred and sixty-five feet (265′) to a point distant one hundred and twenty-four and seventy-five one hundredths feet (124.75′) from the end of the first course run; thence running (5) northwesterly one hundred and twenty-four and seventy-five one hundredths feet (124.75) to the southeasterly line of Waldo Avenue at the end of the first course run.

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

And further ORDERED that all proceedings had herein, continue as if the said amended description had originally been set forth in the bill of complaint.

E. R. WALKER,
C.

Respectfully advised,
James F. Fielder,
V. C.

Order to Show Cause.

(Filed Sept. 24, 1920.)

IN CHANCERY OF NEW JERSEY.

Between

MAGNOLIA CONSTRUCTION COMPANY, a corporation,
Complainant,

and

EDWARD MCQUILLAN,
Defendant.

On Bill, &c.

Upon reading and filing the bill of complaint and the affidavits thereto annexed in the above entitled cause; it is on this 24th day of September, 1920,

ORDERED, that the defendant Edward McQuillan show cause before this court, at the Chancery Chambers, Jersey City, on the twenty-ninth day of September, 1920, at ten o'clock in the forenoon of that day, why the said Edward McQuillan should not be enjoined and restrained from further prosecuting said action commenced by the said Edward McQuillan against the said Magnolia Construction Company in the New Jersey Supreme Court, and now therein pending, which is more fully referred to in the bill of complaint herein, and why the said Edward McQuillan should not be further enjoined and restrained from taking any other or further action or proceeding against said Magnolia Construction Company because of the premises or because of any alleged trespass

or encroachment by the said Magnolia Construction Company upon the lands of said Edward McQuillan in the said bill mentioned;

And it is further ORDERED, that service of a copy of this order and the bill of complaint and affidavits upon which it is founded, which may be certified by the solicitors of complainant, upon the defendant Edward McQuillan or upon his solicitor within three days from the date hereof, be deemed good and sufficient service.

E. R. WALKER,
C.

Respectfully advised,
Eugene Stevenson,
V. C.

Order for Temporary Injunction.

(Filed Nov. 15, 1920.)

IN CHANCERY OF NEW JERSEY.

Between MAGNOLIA CONSTRUCTION COMPANY, a corporation, Complainant, and EDWARD MCQUILLAN, Defendant.	On Bill, &c.

This matter coming on to be heard on order to show cause made on September 24, 1920, in the presence of Gross & Gross, of counsel with the complainant, and Collins & Corbin, of counsel

with the defendant, and the court having read the bill of complaint and affidavits thereto annexed and affidavits read and filed herein on behalf of said defendant and having heard the arguments of counsel thereon; it is on this 15th day of November, 1920,

ORDERED, that the complainant pay to the said defendant or to his solicitors, the costs of the September, 1920, term of the Hudson County Circuit Court, in the action pending in the New Jersey Supreme Court, wherein Edward McQuillan is plaintiff and Magnolia Construction Company is defendant, in ejectment, which said action is more particularly referred to and mentioned in the bill of complaint herein; and it is

FURTHER ORDERED, that said complainant enter into bond with sufficient surety to be approved as to form and sufficiency by one of the Special Masters of this court in the penal sum of $250 conditioned for the payment by said complainant to said defendant of all damages and costs which may be awarded to him, the said defendant, either in said action of ejectment at law, or in this court, in case the ultimate decision of this court in this cause shall be against the said complainant; and it is

FURTHER ORDERED, that upon payment or tender of said costs and notice to the solicitors of said defendant of the giving and filing of said bond with the Clerk of this court, and until the further order of this court in the premises; the said defendant, Edward McQuillan, his agents and attorneys, be and they hereby are enjoined and restrained from further prosecuting said action

commenced by him, the said Edward McQuillan against the said Magnolia Construction Company, in the New Jersey Supreme Court and now therein pending, in ejectment, which said action is more fully mentioned and set forth in the bill of complaint herein, and from taking any other or further action or proceeding against the said Magnolia Construction Company, because of the matters in the bill of complaint set forth or because of any alleged trespass or encroachment by the said Magnolia Construction Company, upon the lands of the said Edward McQuillan in the bill of complaint mentioned, without the leave of this court by further order herein.

E. R. WALKER,
C.

Respectfully advised,
Eugene Stevenson,
V. C.

A true copy.

JESSE R. SALMON,
Clerk.

Answer and Counterclaim.

(Filed Jan. 10, 1921.)

IN CHANCERY OF NEW JERSEY.

Between

MAGNOLIA CONSTRUCTION COMPANY, a corporation,
Complainant,

and

EDWARD MCQUILLAN,
Defendant.

On Bill, etc.

The answer of the defendant, Edward McQuillan, and the counterclaim of said defendant against the complainant, Magnolia Construction Company, a corporation.

This defendant, answering the bill of complaint, says that:

1. This defendant admits the conveyance to complainant referred to in said paragraph; but as to whether said lands are correctly described in said paragraph, prays reference to said deed when produced and proved before this Honorable Court.

2. This defendant admits that the said lands and premises were entirely vacant and unimproved at the time of the said conveyance to complainant; but as to the description of said lands and premises and the most easterly point thereof, prays reference to the said deed when produced and proved before this Honorable Court.

3. This defendant admits that at the time of the acquisition by complainant of said lands, there stood erected upon the lands of this defendant immediately adjoining complainant's said lands to the east, a fence and a shed. This defendant has no knowledge or information sufficient to form a belief as to the other allegations in said paragraph, except that he admits that complainant has erected on said lands the houses mentioned in said paragraph.

4. This defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph 4, except that he admits that said lands are situated on a steep slope of a hill running down and easterly from Waldo Avenue.

5. This defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph 5.

6. This defendant has no knowledge or information sufficient to form a belief as to the allegation in paragraph 6, that about October 1, 1917, complainant let out contracts for the performance of work upon said apartment house and especially for the construction of the foundation wall thereof and proceeded with the work thereon. This defendant admits that he conducts a store or shop on Newark Avenue, immediately adjoining complainant's said lands and that he observed the building theretofore constructed by complainant and was in and about the premises when the foundation walls were about to be built for the apartment house No. 108 Waldo Avenue, and excavations were being made therefor. He admits that he tore down part of the fence mentioned and also

removed part of said shed. This defendant admits that complainant thereupon informed this defendant that the said portion of his fence and shed were partly upon complainant's property as indicated by the surveyor's marks, monuments and stakes. This defendant denies that complainant requested this defendant to verify the said surveys, marks, monuments and stakes, or that he was under any legal duty so to do. This defendant says that he removed said fence and shifted said shed about 2½ feet so as to afford complainant plenty of room in its construction work.

7. This defendant admits that he tore down said fence and removed said shed for the purpose of permitting complainant and its contractors to erect its building; but denies the other allegations of said paragraph.

8. This defendant denies that he assented, agreed to and acquiesced in the lines and marks mentioned in said paragraph. He admits that said complainant proceeded with and constructed its foundation wall on said building on said lands; but has no knowledge or information sufficient to form a belief as to the other allegations in said paragraph.

9. This defendant denies that he assisted in the laying of the lines for the erection of said easterly wall of complainant's building. He admits that he was on his own premises almost daily during the construction work of complainant. He says that he knew generally the character of building and structure which complainant was about to erect, but denies that he agreed, assented, or acquiesced to the erection of the foundation wall and the wall of the said building at the point

where the same was being erected. He further says, that at the time said wall was being erected he had no knowledge that the said wall encroached on his property.

10. This defendant denies paragraph 10 and says that he was not aware that complainant's property encroached on his property until shortly prior to July 25, 1918, when defendant employed a surveyor to make a survey of said property. Such survey showed that complainant's property encroached on the property of defendant 1.29 feet at the front of defendant's lot. Thereupon this defendant immediately notified complainant of the result of said survey and complainant's president denied to this defendant that the said wall encroached on the property of this defendant.

11. This defendant denies paragraph 11, except that he admits that he notified complainant that he intended to commence an action in ejectment against him; and this defendant says, that in the latter part of July, 1918, he notified complainant that its apartment house encroached on his land.

12. Paragraph 12 is admitted.

13. This defendant denies that the westerly line of Newark Avenue is not a definite and fixed line. He has no knowledge or information as to the belief or fears of complainant mentioned in said paragraph, but denies that the said westerly line of Newark Avenue is uncertain.

14. As to the allegations of paragraph 14, this defendant says that he objected to defendant as soon as he had knowledge of the encroachment of the easterly wall of complainant's apartment house on his said lands, and further says that any

damage or injury which will result to complainant from said encroachment is due to the act of complainant and its surveyor in not properly locating the line upon which complainant erected the said easterly wall of its apartment house.

15. As to the allegations in paragraph 15, this defendant has no knowledge or information sufficient to form a belief, except that it denies that complainant has been in quiet and peaceable possession of the land of this defendant upon which the easterly wall of complainant's apartment house encroaches as aforesaid.

16. And for further answer, this defendant says that by an act of Legislature of the State of New Jersey entitled: "An Act for the Prevention of Frauds and Perjuries," all contracts and agreements relating to lands, except as therein is excepted, are required to be reduced to writing and signed by the party or parties to be bound thereby; and that the said agreement in the said bill mentioned and therein alleged to have been made and entered into by this defendant, and the said complainant, was not reduced to writing and executed pursuant to the said statute and, therefore, this defendant insists that the same is void as against this defendant and that he cannot be affected thereby, and this defendant claims the same benefit as if he had pleaded the same statute in this cause; and this defendant for the reasons and under the circumstances aforesaid is advised and insists that the said complainant is not entitled to any relief against this defendant touching the matters complained of in the said bill.

17. And for further answer this defendant says that the said agreement in the said bill mentioned,

and therein alleged to have been made and entered into by this defendant and the said complainant, was and is without consideration moving to this defendant and is therefore void as against this defendant.

18. And for further answer this defendant says that during the pendency of the action in ejectment referred to in said bill of complaint, and on May 25, 1920, the complainant and this defendant by their respective attorneys, entered into an agreement in writing for a settlement of the matters in difference between them. A true copy of said agreement of settlement consisting of a letter dated May 21, 1920, signed by Isaac Gross, one of the attorneys of complainant, and a letter dated May 25, 1920, signed by Edward A. Markley, one of the attorneys of this defendant, together with draft of the agreement referred to in said letters, is annexed hereto, made part hereof and marked schedule "A." Thereafter the said agreement was executed by the complainant; but complainant now claims that said executed agreement has been lost. On August 2, 1920, the said complainant attempted to repudiate said agreement and on August 4, 1920, the said complainant by its said attorney, Isaac Gross, although admitting that said agreement had been entered into and executed by the complainant, insisted upon said agreement being reframed; to which insistence this defendant refused to agree on the ground that said agreement had been duly entered into by the said parties and said agreement had been signed by the complainant.

19. And for further answer this defendant pleads the said agreement embodied in said schedule "A" in bar to the whole of said bill of complaint.

By way of counterclaim against complainant, the defendant, Edward McQuillan, says that:

1. On May 25, 1920, the complainant and the defendant by their respective attorneys entered into an agreement in writing of the tenor set forth in schedule "A" annexed hereto, comprising a letter dated May 21, 1920, signed by Isaac Gross, attorney for the complainant, and letter dated May 25, 1920, signed by Edward A. Markley, attorney for this defendant, and draft of agreement referred to in said letters. Thereafter the said agreement referred to in said letters was executed by the complainant.

2. Complainant by its said attorney has informed this defendant that the said agreement, so as aforesaid, executed by complainant has been lost; and this defendant charges the fact to be that said agreement executed as aforesaid by complainant has been lost.

This defendant therefore prays:

1. That said complainant, Magnolia Construction Company, may answer this counterclaim and each statement herein made.

2. That the said lost instrument may by decree of this Court be reestablished.

3. That said complainant by its proper officers may be decreed to reexecute said lost instrument; this defendant hereby offering to reexecute said lost instrument on his part.

COLLINS & CORBIN,
Solicitors of Defendant.

SCHEDULE "A."

GROSS & GROSS,
Counsellors at Law,
15 Exchange Place.

Jersey City, N. J. May 21, 1920.

Edward A. Markley, Esq.,
c/o Collins & Corbin,
239 Washington St., City.

McQuillan *v.* Magnolia Construction Co.

Dear Ed:

We have finally gotten to correcting the agreement in this matter and are enclosing a copy herewith, which we hope you will find satisfactory. If so, please return with your O. K. so that I may have it executed for you.

Very truly yours,

(Signed) Isaac Gross.

IG/FC
Enc.

COLLINS & CORBIN,
Counsellors at Law
243 Washington Street,

Jersey City, May 25, 1920.

McQuillan v. *Magnolia Construction Co.*

Isaac Gross, Esq.,
15 Exchange Place,
City.

Dear Isaac:

Your favor of the 21st in the above, together

with copy of agreement with paragraph 3 redrafted received. I herewith return same. You will note that I have given the agreement as redrafted my approval. Kindly have the original signed and executed by the Magnolia Construction Company and send it to me at your earliest convenience. Also kindly correct the third line of the third paragraph, first page, so as to read "108-110 Waldo Avenue."

Very truly yours,

(signed) Edward A. Markley.

Eam.LC

THIS AGREEMENT, made the day of 1920, between EDWARD McQUILLAN, of the City of Jersey City, County of Hudson, State of New Jersey, party of the first part, and MAGNOLIA CONSTRUCTION COMPANY, a corporation of the State of New Jersey, having its principal office in the City of Jersey City, aforesaid, party of the second part.

WHEREAS the party of the first part is the owner in fee simple of a certain parcel of land known as 112 Waldo Avenue, in the said City of Jersey City, which is more particularly described in a certain deed dated June 24, 1910, recorded in the Register's Office of the County of Hudson in Book 1074 of Deeds for said County at page 158 &c., the said parcel of land being referred to in said deed as "Second Tract"; and,

WHEREAS the party of the second part is the owner in fee simple of a certain parcel of land known as 108 Waldo Avenue, in said City of Jersey City, which is more particularly described in a certain deed dated October 16, 1916, recorded in

the Register's Office of the County of Hudson in Book 1239 of Deeds for said County at page 487 &c., the said parcel of land being immediately adjoining to and on the west side of said parcel of land owned by the party of the first part; and,

WHEREAS the party of the second part has erected a brick building upon its said parcel of land and the party of the first part alleges that part of the east wall thereof is upon his said parcel of land and that said erection is a trespass thereon, and the parties hereto are desirous of settling all questions as to the ownership of said wall and all differences between them relating to the said alleged trespass; and,

WHEREAS there are encumbrances on the said brick building of the party of the second part, and the parcel of land upon which it has been erected, as follows, viz: The Business Men's Building & Loan Association having a mortgage which is dated December 13, 1918, and recorded in the Register's Office of the County of Hudson in Book 934 of mortgages at page 328 &c.; one Ripley Watson having an agreement dated December 13, 1918; for the benefit of the said The Business Men's Building & Loan Association for the assignment of rents of the said brick building, the said agreement being recorded in the Register's Office of the County of Hudson in Book 1299 of Deeds at page 128 &c.; one Cornella E. Watson having a mortgage on said property and other property, which mortgage is dated January 30, 1919, and recorded in the Register's Office of the County of Hudson in Book 937 of Mortgages, at page 390 &c; one Max Berman having a mortgage on the said property and other property, which mortgage is dated March 3, 1919,

and recorded in the Register's Office of the County of Hudson in Book 945 of Mortgages, at page 11 &c;

WITNESSETH, That the parties hereto in consideration of the mutual promises and agreements herein contained, agree as follows:

1. The party of the first part, his heirs and assigns, shall be entitled at any time hereafter to use the said wall aforesaid, either wholly or to such height and extent as he or they may require for the erection of any building upon his said land in the same way and to the same extent as though the said wall was the property of the said party of the first part.

2. Said party of the first part, his heirs and assigns, in the erection of any such building upon his land, shall be entitled to extend the said wall and to build such extension along the line of the present wall, but not to a greater width than the wall now standing.

3. If it shall become necessary to the said party of the second part, its successors and assigns to repair or re-build the whole or any part of the said wall, the said party of the second part its successors, and assigns may re-build the same upon the lands upon which the same now stands erected and the same shall then be subject to all of the conditions of this agreement. The said party of the second part, its successors and assigns shall be under no obligation to re-build or reconstruct the said wall or any part thereof but may build a new wall for the exclusive use of its property on its own land, without tearing down the said wall aforesaid, unless the entire demolition

of the said wall should become necessary; and in such event the said new wall shall be free of any claims or rights of the said party of the first part therein or thereto. It being the intention that if at any time the parties of the first part shall have made use of the present wall as hereinbefore provided for, then the said party of the second part, its successors and assigns in repairing or rebuilding the same, shall not damage or injure the property of the party of the first part nor remove the said wall from its present location, unless the entire demolition or removal of the said wall shall be necessary or required, because of its physical condition or weakness. Nothing herein contained shall be construed or considered as an admission either express or implied that the lands upon which the said wall now stands erected or any part thereof is the property of the said party of the first part. In the event that the said wall requires such repairing or rebuilding as aforesaid, the expense thereof shall be borne by the said party of the second part, its successors and assigns; provided the necessity therefor is not caused by the said party of the first part; and if the said wall is so rebuilt entirely on the same spot upon which the same now stands erected, it shall be substantially of the same size as the wall now standing thereon.

4. The title of the respective parties in the land upon which the said wall stands shall in no way be affected by this agreement, but the rights of the parties hereto in said land shall remain the same with the same force and effect as though this agreement had not been executed, and if any one or more of the mortgages hereinbefore re-

ferred to or any other mortgage or encumbrance on said land at this time should be foreclosed, then the party of the first part is to have the right to press his present action in ejectment and for mesne profits with the same force and effect as though this agreement had not been executed.

5. Subject to the foregoing exceptions, the said wall shall be deemed to be a party wall in all respects.

6. This agreement shall be regarded as perpetual and at all times be construed as a covenant running with the land.

AND for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, successors and assigns.

IN WITNESS WHEREOF the party of the first part has hereunto set his hand and seal, and the party of the second part has caused its corporate seal to be affixed and attested by its secretary and these presents to be signed by its president, the day and year first above written.

Signed, sealed and delivered
in the presence of:

.....(L. S.)

MAGNOLIA CONSTRUCTION COMPANY

(By).....

President.

Attest:

.....

Secretary.

Replication and Answer to Counterclaim.

(Filed Jan. 21, 1917.)

IN CHANCERY OF NEW JERSEY.

Between

MAGNOLIA CONSTRUCTION COMPANY, a corporation,
Complainant,

and

EDWARD MCQUILLAN,
Defendant.

On Bill, &c.

Complainant joins issue on the answer of defendant, Edward McQuillan.

By way of answer to the counterclaim of the said defendant, complainant says that:

1. It denies that by virtue of the letters referred to in paragraph 1 of the counterclaim of said defendant, an agreement was entered into of the tenor set forth in schedule "A" annexed to the answer and counterclaim herein, and says that a series of letters and correspondence took place between the attorneys for the said respective parties which resulted in no agreement, and that although the said parties intended that the said proposed draft of agreement should be executed by complainant and defendant before the same became effective, the said defendant never executed the same.

2. That the said alleged agreement was abandoned by both parties, complainant and defendant,

and with notice of such abandonment the said defendant thereafter proceeded with the prosecution of its action of ejectment in the bill of complaint herein referred to.

3. That before the execution of said agreement by both parties, in the manner that it was intended that the same should be executed, it was further intended by the said parties that the same should be delivered by each of the said parties to the other and complainant alleges and insists that the said agreement never was delivered by it and that the same never became effective, and that the draft of agreement, a copy of which is annexed to the answer and counterclaim herein is not a true copy of the agreement which the said parties intended to enter into, and furthermore that the same does not bar or affect the complainant's right of relief as prayed for in its bill of complaint herein.

GROSS & GROSS,
Solicitors of Complainant.

Replication to Answer to Counterclaim.

(Filed Jan. 30, 1921.)

IN CHANCERY OF NEW JERSEY.

Between MAGNOLIA CONSTRUCTION COMPANY, Complainant, and EDWARD McQUILLAN, Defendant.	On Bill and Counterclaim.

The defendant joins issue on the answer of the complainant to the counterclaim of the defendant.

COLLINS & CORBIN,
Solicitors of Defendant.

Final Decree.

(Filed Jan. 3, 1923.)

IN CHANCERY OF NEW JERSEY.

Between MAGNOLIA CONSTRUCTION COMPANY, Complainant, and EDWARD MCQUILLAN, Defendant.	(46-688). On Bill and Counterclaim.

This cause coming on to be heard on bill, answer and replication, and on counterclaim, answer and replication, in the presence of Gross & Gross, of counsel with the complainant, and Collins & Corbin, of counsel with the defendant; and the pleadings having been read and evidence having been taken and the arguments of counsel thereon having been heard, and the Court having duly considered the said pleadings, proofs and arguments; and it appearing to the Court that the northeasterly wall of complainant's apartment house encroaches on defendant's lot at several points, varying from one and twenty-nine hundredths feet at the most northerly corner of said apartment house to thirty-six hundredths of a foot at the most easterly corner thereof; and it further appearing to the Court that the conduct of the defendant did not operate to create an estoppel against him and in favor of the complainant; and it further appearing to the Court that no license sufficient in law

was granted by the defendant to complainant; and it further appearing to the Court that the said encroachment was not the result of a mistake in which both parties participated and that under the circumstances defendant should not be required to release to complainant so much of his land as is covered by the encroachment for a consideration to be fixed by this Court and paid by complainant; and it further appearing to the Court that the minds of the parties did not meet on the agreement mentioned in the counterclaim, and that said agreement was not signed by defendant or its execution authorized by complainant's Board of Directors, or delivered by complainant; and the Court being of opinion that the complainant is not entitled to the relief prayed in its complaint and that the defendant is not entitled to the relief prayed in his counterclaim,

It is thereupon, on this 3rd day of January, in the year of our Lord One Thousand Nine Hundred and Twenty-three, by Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED that the Chancellor does by virtue of the power and authority of this Court hereby ORDER, ADJUDGE and DECREE that the bill of complaint in above stated cause, be and it hereby is dismissed without costs.

And it is further ORDERED, ADJUDGED and DECREED that the counterclaim of the defendant filed in said cause, be and it is hereby dismissed without costs.

E. R. WALKER,
C.

Respectfully advised,
JAMES FIELDER,
V. C.

Conclusions.

IN CHANCERY OF NEW JERSEY.

Between MAGNOLIA CONSTRUCTION COMPANY, Complainant, and EDWARD MCQUILLAN, Defendant.	48-688. On Bill, &c.

December 4, 1922.

Messrs. GROSS & GROSS for Complainant.
Messrs. COLLINS & CORBIN for Defendant.

FIELDER, V. C.

Complainant acquired title to a vacant plot of land on the southeasterly side of Waldo Avenue, near Newark Avenue, in Jersey City, upon which it subsequently erected a four-story brick and stone apartment house. Complainant employed an experienced surveyor to make a survey of its plot and to stake and otherwise mark the lines thereof and thereafter it constructed the northeasterly foundation wall of its building up to and along the line designated and marked by its surveyor as its northeasterly property line and erected and completed its apartment house on such foundation. A subsequent survey made by the same surveyor shows the apartment house wholly within complainant's property lines. Defendant owns a lot immediately adjoining on the northeast, which, except for a shed thereon, is vacant and shortly after

complainant's building was completed, he caused his lot to be surveyed by another experienced surveyor, from which survey it appears that the northeasterly wall of complainant's apartment house encroaches on defendant's lot at several points, varying from 1.29 feet at the most northerly corner of the house to thirty-six hundredths of a foot at the most easterly corner thereof. Negotiations between the parties for a settlement failed and defendant commenced an action in ejectment against complainant, whereupon complainant filed its bill in this court praying that defendant be restrained from proceeding with his suit at law and from bringing any other action against complainant for the recovery of the lands upon which complainant's building stands and further praying that the northeasterly, or outside line of the wall of complainant's apartment house, continued in a straight line to the rear of its plot, be fixed and established as the boundary line between the lands of the parties.

The first question to be determined is as to the true location of that boundary line and the testimony of the two surveyors is all the evidence on the subject. As to this evidence, I think it sufficient to say that complainant's surveyor established such boundary line by measuring a distance from the line of Newark Avenue, which latter line is not monumented and that he accepted the line of Newark Avenue as built on, as the true and recognized line of that avenue and used the buildings on Newark Avenue as monuments from which to measure the distance from the line of Newark Avenue to complainant's lands, given in complainant's deed. The deed to complainant, besides stating that distance, also fixes complainant's property

lines with reference to other old and established property lines, all of which can be located definitely from fixed and accepted monuments and from old maps on file in the Hudson County Register's office, but complainant's surveyor failed to make use of such old property lines, monuments and filed maps and seems to have relied wholly on the line of the buildings on Newark Avenue as the true line of that avenue and to have taken his measurements with reference to that line only. Defendant's surveyor, however, used the data I have mentioned and he finds that the buildings on Newark Avenue, encroach on that avenue and that those buildings therefore, do not mark the true line of Newark Avenue and that complainant's property cannot be accurately located and staked out by measurements taken from the building line of Newark Avenue. I find as a fact, that complainant's survey was incorrect and that its building encroaches on defendant's lot to the extent above mentioned and as shown by defendant's survey.

Complainant contends that because defendant assisted in fixing the dividing line between their properties and acquiesced in the location of that line, he misled complainant into believing that the line upon which complainant erected its building, was the true dividing line between them and because defendant stood by and saw complainant erect its building on such line, without objection, defendant is now estopped from asserting his rights to so much of his lands as is found to be covered by complainant's building. No actual fraud is alleged, nor is it pretended that complainant informed defendant that it intended to build on defendant's land, or that defendant gave com-

plainant express consent to so build. The facts upon which complainant must base its contention are that when defendant bought his lot, there was no fence separating it from the adjoining plot and that defendant did not then cause his lot to be surveyed, but erected a fence and shed on what he guessed to be his southwesterly line; that complainant afterward acquired title to the adjoining plot and had a survey thereof made and when complainant was ready to start its foundation, one of its officers showed defendant the line marks made by its surveyor and told defendant that his fence and shed encroached on complainant's plot and requested defendant to remove them; that because defendant had erected his fence and shed without the aid of a survey and because complainant had caused its property to be surveyed, defendant thought complainant's surveyor was right and he moved his shed and took down his fence; that later, defendant assisted complainant's workmen to stretch a line, by holding one end at a crow-foot mark made on the sidewalk by complainant's surveyor, while the other end was held by one of complainant's employees at the surveyor's stake which purported to mark complainant's rear line and that defendant's business took him to the locality almost daily and he saw the foundation wall laid and the apartment house erected on that line and made no objection; that some time after the building was completed and occupied, defendant caused his lot to be surveyed and then, for the first time, discovered that complainant's building was actually on his lot and that he then informed complainant of the facts shown by his survey.

To entitle complainant to the benefit of an es-

toppel against defendant, it must appear that defendant, through some act done, or statement made by him, or by his silence when he should have spoken, influenced complainant to believe that it was building on its true property line and that complainant acted on a belief created by defendant. In this case both parties acted in ignorance of the actual facts and what defendant did and said was induced by complainant's statement that a survey had been made and that the line upon which it desired to build, had been fixed by its surveyor. In fact, complainant had better opportunity than defendant to know the true situation, because of its survey and it was the result of its own act and opinion that it built on the line fixed by its surveyor and not because of anything defendant said or did. Defendant did not know the true line, but accepted what complainant pointed out as the true line and what he did, was not with the intention of influencing complainant, but rather his acquiescence in the line followed from what complainant told him. Under these circumstances there is no estoppel to operate in favor of complainant. (Mutual Life Ins. Co. *v.* Norris, 31 N. J. Eq., 583; Sumner *v.* Sexton, 47 N. J. Eq., 103; Perkins *v.* Moorestown Co., 48 N. J. Eq., 499).

Nor can complainant claim to hold the land in question by virtue of a parol license from defendant, because such claim would be to an interest in land which, under the Statute of Frauds, must be evidenced by a writing. It is true that in certain special cases a court of equity will give relief against the operation of the statute, for the purpose of preventing a fraud, but in all such cases in which a parol contract, passing an interest in land, has been validated, the contract itself has

been required to be proved to the point of demonstration. In the instant case there is no evidence of an actual license granted by defendant to complainant and the most that can be inferred from defendant's acts is an implied license and that is not sufficient (Lawrence *v.* Springer, 49 N. J. Eq., 289; Hartman *v.* Powell, 68 N. J. Eq., 299, 800).

Finally, complainant contends that if part of its building encroaches upon defendant's land, such encroachment is the result of a mistake in which both parties participated and that under the circumstances this court should require defendant to release to complainant so much of his land as is covered by the encroachment, for a consideration to be fixed by this court and paid by complainant and complainant cites McKelway *v.* Armour, 10 N. J. Eq., 115, as authority for its contention. In the instant case the mistake as to the location of the line in question, originated with complainant and was based on supposed facts shown by a survey procured by it. Its officers showed defendant the surveyor's marks and pointed out a line which such officers asserted was its line and defendant, ignorant of the true facts and being misled by complainant into believing that the line upon which complainant proposed to build was the true line, was in no position to register any objection and therefore acquiesced. I do not think that a property owner who sees his adjoining neighbor about to build and also sees, or is assured, that the dividing line between them has been established by his neighbor's surveyor, is bound to procure a survey of his own, under penalty of being compelled to give a part of his land to his neighbor at a price to be fixed by a court, in case it is subsequently ascer-

tained that the neighbor made a mistake and I am therefore unwilling to subscribe to the contention made by complainant in this regard. (Haggerty *v.* McCann, 25 N. J. Eq., 48; Kirchner *v.* Miller, 39 N. J. Eq., 355.)

In his counterclaim defendant alleges that after the encroachment in question was discovered, the parties entered into an agreement in writing touching the occupancy of defendant's land by complainant's building, which agreement defendant prays may be established as a lost instrument and enforced. After the parties had negotiated for a settlement of their differences, defendant's solicitors attempted to put into writing the terms of an agreement and sent or delivered such writing to complainant's solicitors. I am not satisfied from the evidence that the minds of the parties had met on the terms, or that the agreement was signed by defendant, or that complainant's board of direcotrs had authorized its execution by complainant's officers; neither do I find any evidence of delivery of such an agreement by complainant.

The bill of complaint and the counterclaim will be dismissed.

IN CHANCERY OF NEW JERSEY.

Between MAGNOLIA CONSTRUCTION COMPANY, Complainant, and EDWARD MCQUILLAN, Defendant.	On Bill, &c.

TRANSCRIPT OF SHORTHAND NOTES OF TESTIMONY taken on final hearing in above stated cause at Chancery Chambers, Jersey City, October 17, 1922, before his Honor, JAMES F. FIELDER, Vice Chancellor.

APPEARANCES:

GROSS & GROSS (Mr. ISAAC GROSS) for Complainant.

COLLINS & CORBIN (Mr. MARKLEY and Mr. NEWTON) for Defendant.

COMPLAINANT'S CASE.

JACOB STOLLMAN, sworn as a witness on the part of the complainant, testifies as follows:

Direct examination by Mr. Gross:

Q. What is your business? A. Builder.

Q. You have been a builder in Jersey City for how long? A. Twelve years.

Q. Were you in 1917 and 1918 president of the Magnolia Construction Company, the complainant in this suit? A. Yes, sir.

Q. The Magnolia Construction Company ac-

quired a certain piece of property from John H. Ehrhard on the easterly side of Waldo Avenue, did it not? A. Yes.

Q. That was sometime in 1916. A. Yes.

Mr. Gross. I ask leave to refer to the deed when it is produced to establish the description and also date of the conveyance.

Q. What did you do with the property after you got it from Ehrhard? A. Before passing title Mr. Henderson made a survey for the whole entire plot of ground and be made out the boundary lines for Mr. McQuillan's property and the boundary lines of the Pennsylvania Railroad Company, all around the entire plot.

Q. What do you mean by "made out the boundary lines"? A. Mr. Henderson made a survey and put out the—

By the Court:

Q. Put stakes on the corners? A. Put stakes on the corners, and then we started to build.

By Mr. Gross:

Q. Where did you start to build? A. Started from the two-family house.

Q. Where was that? A. On Waldo Avenue, on the same plot of ground.

Q. How far was that from the corner of Newark Avenue westerly? A. From the corner of Newark Avenue—I will figure it up in a second—it was 91.90, 150 and 80, that is, 321.90, from Newark Avenue to the first two-family house.

Q. Then afterwards did you build any other houses on the tract? A. Then after that we started to build two twelve-family houses.

Q. What was the numbers of those? A. 100 and 104 Waldo Avenue.

By the Court:

Q. Two twelve-family houses? A. Two twelve-family houses.

By Mr. Gross:

Q. Which was nearest Newark Avenue—100 or 104? A. 104.

Q. How wide was 100 Waldo Avenue? A. Fifty feet frontage.

Q. And 104 Waldo Avenue? A. Also fifty feet.

Q. How far from Newark Avenue was the nearest line of 104 Waldo Avenue? A. 141.90 feet from Newark Avenue.

Q. Did you afterwards build any other houses? A. After we almost finished these we started to build a sixteen-family house next to Mr. McQuillan's property.

Q. Was that immediately adjoining No. 104? A. Yes, sir.

Q. On the east? A. On the east—on the same side—on the east side.

Q. How wide was that building? A. Fifty feet frontage.

Q. About when did you begin to build that house? A. I think about September, 1917, I believe, if I am not mistaken,—September or maybe before September—about that time—in the fall of 1917.

Q. You spoke of having had Mr. Henderson make a survey of this entire tract? A. Yes.

Q. (Showing witness.) I show you a blue print and ask you whether that is the survey which Mr. Henderson made for you? A. Yes, sir; this is the survey Mr. Henderson made.

Q. Have you the survey made for the building 108 Waldo Avenue? A. Yes, sir.

Q. Where is it? A. I think you got them in your papers, I believe.

Q. (Showing witness.) Is this the survey? A. Yes; this is the survey—91.90 from the corner of Waldo Avenue.

Mr. Gross: I offer both of these in evidence, subject to verification of the figures by Mr. Henderson.

Mr. Newton: I think at this time they should be marked for identification.

(Marked C-1 for identification and C-2 for identification.)

Q. After you had this survey marked C-2 for identification made by Mr. Henderson for 108 Waldo Avenue, what did you do in the way of proceeding with the construction of a building on that lot? A. Well, we started to excavate the property. We took out permits in the Tenement Department to build apartments and we started to build the apartments. First, we started to excavate the rear wall because it was on lower ground and we started to build the back wall first.

Q. How high is that wall? A. About twenty-six or twenty-eight feet high from the ground. stone foundation, more or less, I cannot say exactly the height of that.

Q. And what else did you do? A. Then we were excavating at the same time, we started to excavate at the back on the boundary line until we came to—

Q. Until what? A. We started to excavate there on the back, which there was no fence there, but in the front, right to the boundary line, and Mr. McQuillan was there the same time.

Q. Tell us where you are talking about excavating now. A. We started to excavate on this side.

By the Court:

Q. Say "east" or "west." A. The easterly wall.

By Mr. Gross:

Q. Is that the wall adjoining McQuillan's property? A. Yes. We excavated there, at the same time Mr. McQuillan was there, and Mr. McQuillan have seen that, the line was the mark on the fence, the surveyor's mark on the fence; and Mr. McQuillan removed part of the fence where it was encroaching on our property.

Q. What sort of a mark was on the fence? A. We made a mark like—

Q. You know what it is? A. A mark like—

By the Court:

Q. A crow-foot? A. A crow-foot about half an inch thick in the fence.

By Mr. Gross:

Q. Whose fence? A. Mr. McQuillan's fence; the old fence was there, and the mark was on the fence.

Q. Where was that fence running from and to where was it running? A. It was running from the front side—

By the Court:

Q. Running from Waldo Avenue? A. From Waldo Avenue.

Q. What direction? A. Two directions; one alongside with our—

Q. Say "east" or "west" or "north" or "south"? A. This is the east side.

Q. And it ran from Waldo Avenue in what direction? A. The east side fence runs down to the east side of the lots.

Q. The fence ran from Waldo Avenue? A. From Waldo Avenue.

Q. Toward the rear of your lot? A. Toward the rear of our lots.

By Mr. Gross:

Q. Was there any fence running along Waldo Avenue on the street line? A. On the front, straight with the sidewalk.

Q. From where was that fence running and to where was it running? A. From Mr. McQuillan's house to our buildings, the same as the frontage on Waldo Avenue.

Q. To your lot? A. To our lot, yes, sir.

Q. I show you a photograph and ask you whether that is a photograph of the fence? A. Of the fence right here. There is Newark Avenue on this side.

Q. Which side—to your left? A. On this side, to the left.

Q. Your building? A. To the right; here is the fence.

Q. Where was the crow-foot mark? A. Right here on the fence.

Q. The old fence? A. The old fence.

By the Court:

Q. You have spoken of two fences; which fence is this? A. On the front.

Q. The photograph is of the front fence along Waldo Avenue? A. The front fence, on Waldo Avenue.

By Mr. Gross:

Q. Now, did you have any talk with Mr. McQuillan before you built that foundation wall? A. Well, Mr.—

The Court: —Yes or no.

Q. Did you talk with him? A. Yes, sir; I did.

Q. Was that before you built the foundation wall or after, that you spoke to him about this? A. Before we built?

By the Court:

Q. Tell us just what you had to say to him? A. Well, Mr. McQuillan have seen that; I showed him that crow-foot on the fence.

Q. On which fence? A. On the front fence, on Waldo Avenue.

By Mr. Gross:

Q. What did you say to him; how did you come to show it to him? Tell us what you said. A. Mr. McQuillan seen that fence, as soon as I started to build—I mean that crow-foot—all the time—the way the surveyor marked this out.

By the Court:

Q. What did you say to Mr. McQuillan and what did he say to you? A. I showed him the crow-foot and he remove that fence. He said: "All right, Mr. Stollman."

By Mr. Gross:

Q. What did you say to him? A. I told him his fence is encroaching on our property, and Mr. McQuillan said: "All right, I will remove the fence right away," and started to work on that and re-

moved the fence. The wall was to be the fence between us.

Q. Up to where; how much of the fence did he remove? A. He removed—I don't know—about ten or twelve inches—something like that; he removed that front fence.

Q. With respect to the crow-foot, how far did he remove the fence? A. To the crow-foot.

Q. Up to the crow-foot? A. Up to the crow-foot.

Q. What was done after that? A. Then after that we started to lay the footing and the stone. It was made ready to lay the footing, the stone, and Mr. McQuillan helped us to straighten the line from crow-foot to crow-foot, from one end to the other, according to the surveyor mark; from the surveyor mark Mr. McQuillan helped us to straighten the line.

Q. Answer my questions. You testified that he helped you straighten the line. Where was there a line? A. On Waldo Avenue where it runs to the foundation—I mean the crow-foot on Waldo Avenue, the surveyor mark.

Q. Was this line running from the sky down or across the street or where? A. Where the survey shows.

By the Court:

Q. Tell us where the line was. A. The line of the fence?

Q. Of the fence. A. The surveyor mark.

Q. On the front fence or on the side fence? A. On the side fence.

By Mr. Gross:

Q. You told us there was a crow-foot on the front fence. A. Yes.

Q. Now, you told us that he straightened the line? A. Yes, sir.

Q. Where did that line run to and where did it run from? A. The line ran from the cemetery; there was one mark on the stone where the cemetery is and and then another mark was made on the fence by the surveyor, and this way we straightened together the line.

By the Court:

Q. Let me see if I understand what you mean. You said when Henderson made the survey he put in stakes on the corners? A. Yes, sir.

Q. He had a stake in the rear corner of your property? A. Yes, sir.

Q. And on the northeasterly line of your property, didn't he? A. Yes, sir.

Q. Are you talking about running the line from the mark on the front fence on Waldo Avenue to the stake in the rear? A. Yes, sir.

Q. Is that what you are talking about? A. From the mark on the front fence to the stake in the rear.

Q. That would be along McQuillan's rear line, would it? A. Yes, sir.

By Mr. Gross:

Q. Who ran that line; who straightened that line? A. Mr. McQuillan himself.

Q. Who else? A. I was there the same time and Mr. Lupo plumbed that down to put the stones.

Q. Who is Mr. Lupo? A. The stone mason.

Q. What part of the line did Mr. McQuillan straighten out? A. On the front, on Waldo Avenue side.

By the Court:

Q. I thought you were talking about the line along McQuillan's lot? A. Mr. McQuillan was on the front line where the sidewalk is, and he held the line, and Mr. Lupo's line was in the back where the cemetery is; on the back fence he held the line.

Q. I understand that you took a line, a cord, and one end was placed at the corner on Waldo Avenue? A. Yes.

Q. And the other end on the stake in the rear of your lot? A. Yes.

Q. And what did McQuillan do? A. Mr. McQuillan was holding the line on Waldo Avenue.

By Mr. Gross:

Q. That is, near the crow-foot on the fence? A. Near the crow-foot on the fence.

Q. Now, do you remember a shed inside of McQuillan's fence? A. There is a little shed, an old shed—

Q. Do you remember it? A. Yes; I remember it.

Q. Was anything done to that shed? A. Mr. McQuillan moved that shed.

Q. Just tell us how he came to move it. Did you have any talk with him about it? A. Before we moved—

Q. What did you tell him? A. Before we moved that shed—before he moved that shed—then we talked this matter over, and Mr. McQuillan removed the shed from the line.

By the Court:

Q. What counsel is asking you about is what you said to McQuillan? A. I said to Mr. McQuillan his shed is encroaching six inches on our lot, and Mr.

McQuillan said: "All right; I am going to remove that right away,' and he moved it.

By Mr. Gross:

Q. He moved the shed? A. He moved the shed.

Q. Where did he move it? A. On his side, on the north side, near Newark Avenue; on his own side.

By the Court:

Q. He moved it off your line back on his own property? A. On his own property.

By Mr. Gross:

Q. Did you fix your line according to this cord that was stretched, as you say, by Mr. McQuillan holding it at one end? A. Yes, sir.

Q. Did you build your foundation wall up to that line? A. Yes, sir.

Q. Did you go outside of that line? A. No, sir.

Q. Was McQuillan around the property? A. Every day; sometimes twice a day; sometimes he was there twice a day.

Q. Where is his business? A. That time, and when we were building there, he was a motorman or conductor, and at the same time he had a store over on Newark Avenue and Waldo Avenue.

Q. Right around the corner? A. Right around the corner.

Q. Did he ever day anything about your encroaching over on his property? A. He never said anything until the building was finished and rented; he didn't say a word.

By the Court:

Q. When was that? A. That was about, I think about a year—about I think 1918—yes; 1918.

Jacob Stollman, direct.

By Mr. Gross:

Q. You finished that building about November, 1918? A. About November, 1918.

Q. Tenants were in the building? A. Tenants were in the building.

Q. Was McQuillan around watching you putting up this building? A. Yes, sir; he was there every day.

Q. What did he come there for? A. His business is right there, and he came there every day, and he used to tell me he is glad we are building up on the place around there; it would improve the neighborhood.

Q. Now, this photograph that you referred to, is that a correct picture of the fence? A. Yes, sir.

Q. What is this to the left? A. This is Mr. McQuillan's building right near the corner—on the corner.

Q. That is the rear of his building on the corner? A. His building on the corner.

Q. On the front, in stone or brick, what is that? A. That is our building.

Q. That is the wall of 108 Waldo Avenue? A. 108.

Q. Does the shanty or shed that you talked of appear in this photograph? A. There (indicating) is the shanty inside, next to the building.

Q. Is that it where I mark "A"? A. That is right there.

Q. Where I mark "A"? A. Yes.

Q. Is that the way that frame building on the corner and this fence stood about the time you built? A. Yes, sir.

Q. It appeared that way? A. Yes, sir.

Mr. Gross: I offer that photograph in evidence.

Mr. Newton: No objection.

The Court: Can you fix the date about when it was taken?

Q. Can you tell us about the date when these photographs were taken? A. I think about 1918, but I don't remember the month, which month it was taken.

By the Court:

Q. You know about when you started to build and you know how far the wall had gotten as shown in the photograph? A. The photographs were taken in 1918.

By Mr. Gross:

Q. Was it when you had finished the building? A. After the building is finished.

Q. About how long after? A. Well, about six months.

By the Court:

Q. Then it was taken in 1918 because you said the building was finished and occupied in November, 1918. A. A photographer on Grove Street took the pictures.

Q. If you don't know when they were taken, say so. A. I don't remember when it was taken.

(Photograph marked Exhibit C-3.)

By Mr. Gross:

Q. I show you another photograph and ask you what that shows? A. It shows Waldo Avenue here, and here is Newark Avenue.

Q. Newark Avenue is to the left with the car tracks? A. With the car tracks is Newark Avenue, and straight ahead is Waldo Avenue.

Q. Does it show your apartment house on Waldo Avenue? A. Yes; this is the apartment house.

Q. What is the corner frame building? A. This is Mr. McQuillan's property.

Q. This was taken at the same time, was it? A. At the same time.

Mr. Gross: I offer that photograph in evidence.

(Marked Exhibit C-4.)

Q: I show you another photograph and ask you what that shows? A. This is our property 108 Waldo Avenue, and this on the corner is Mr. McQuillan's property.

Q. The frame house? A. The frame house. Here is the fence.

Q. Between Mr. McQuillan's building and your building? A. Between Mr. McQuillan's building and our building.

Q. Is that the fence on which the crow-foot had appeared? A. Yes, sir.

Mr. Newton: I understand he says he does not know when these photographs were taken.

The Court: He says he cannot fix the date, but it was after their building was finished.

Q. Was that the condition that existed immediately after the completion of your building—the same situation? A. The same—the same.

Q. Any changes made? A. No, sir.

(Photograph is offered and marked Exhibit C-5.)

Q. I show you another photograph and ask you what that is? A. This is the corner of the property.

Q. That (indicating) is the top of Mr. McQuillan's house? A. The top of Mr. McQuillan's property.

Q. Was that taken the same time? A. Same time.

Q. The condition of Mr. McQuillan's property as shown on this photograph, was that the condition of Mr. McQuillan's property for some years before you commenced building? A. Yes, sir.

Mr. Gross: I offer that photograph.

Mr. Newton: I object. I do not see what purpose there can be in showing the upper structure.

The Court: I don't know. It may have some bearing. I will admit it.

(Photograph is marked Exhibit C-6.)

Mr. Gross: You will admit the commencement of the action in ejectment.

Mr. Newton: We have a copy of the pleadings.

Q. Had you, at any time up to the completion of this bulding, heard that there was any claim by Mr. McQuillan that there was any encroachment of your building over on his line? A. No, sir; he didn't say anything.

Q. What did your building cost you to build? A. $55,000.

Q. I forgot to ask you: Did you also take down the fence that ran along Mr. McQuillan's line that you testified about? Was that taken down, the fence that ran from Waldo Avenue to the rear? A. Mr. McQuillan took that down.

By the Court:

Q. The whole fence? A. The front of the fence—I mean the line—he took down the whole

fence from the front right to the side of our building.

By Mr. Gross:

Q. You mean alongside— A. Alongside of our building.

Q. You say after you completed your building McQuillan first told you that he claimed there was an encroachment of your building over on his? A. When the building was completed and rented, Mr. McQuillan said to me: "You received a letter off my lawyer?" I said: "No, sir; I didn't receive any letters." He said, "Yes; you did." I said: "No; I didn't receive any letters." He said: "I want you to buy my corner building. You will have to pay me $18,000 for the corner building." That is what he told me; I should buy the land of him for $18,000. I said: "I don't want to buy any land."

Q. What did he say, if you did not buy? A. He said: "If you don't want to buy the land, I am going to tear down the wall." I said: "What do you mean? What wall?" This is the first time he told me something about the wall.

Q. What did he tell you about the wall? A. He said: "You encroach on my property."

Q. What did you say to that? A. "I don't know anything. We have a survey made by the City Surveyor. Jim Henderson is the surveyor. Everything is all right, and you never said a word before, and I don't know anything, and everything is all right."

Q. Had you received any letters from a lawyer up to that time? A. I didn't receive a letter that time when Mr. McQuillan was there.

Cross examination by Mr. Markley:

Q. You remember getting a number of letters from me, Mr. Stollman, don't you, about this matter? A. Yes, sir.

Q. And you came down to my office? A. Yes.

Q. A number of times? A. I came down.

Q. Before I started suit? A. Yes, sir.

Q. And you talked this matter over with me, didn't you? A. Yes; I did.

Q. Many times? A. Yes.

Q. And you never said anything to me about Mr. McQuillan saying you could come over on his land, did you? A. Who come over on whose land?

Q. Mr. McQuillan. You never told me that Mr. McQuillan said to you that you could come over on his land, did you? A. I think I told you the same thing. I told you that Mr. McQuillan helped us straighten the line.

Q. Did you ever tell me that Mr. McQuillan said to you that you could come on his land with your building? A. Mr. McQuillan didn't say anything I should come over on his land, but he helped us to straighten the line.

Q. These photographs, Mr. Stollman, were all taken at one time, were they not? A. Yes, sir.

Q. And they were all taken after the side wall of your apartment house had been erected? The picture shows that? A. Yes.

Q. I am referring to Exhibits C-3, C-4 and C-5. A. I gave the order to take the photographs at the same time.

Q. These three photographs show that your apartment house is up? A. Yes.

Q. Four stories and basement? A. Yes.

Q. At the time the pictures were taken? A. Yes, sir.

Q. And they also show that the fence is up, don't they? A. Yes; the fence is up. The fence was up all the time.

By the Court:

Q. Answer "Yes" or "No." A. Yes.

By Mr. Markley:

Q. So that at the time when the apartment house was up all the way, the fence was still there? A. Yes.

Q. These pictures were taken prior to July, 1918, were they not? A. I don't know the date when they were taken.

Q. Were they taken in 1918? A. I gave the order to Mr. Johnson; I don't remember the date.

Q. Haven't you got anything by which you can refresh your recollection as to when the pictures were taken? A. You must ask Mr. Johnson.

By the Court:

Q. Can't you tell by looking at the photographs how far the building was progressed? A. The building was finished.

By Mr. Markley:

Q. The shades are up in the building; tenants were in the building? A. Yes.

By the Court:

Q. You testified before that building was finished in November, 1918? A. Yes.

Q. Then the photograph was taken after November, 1918? A. Yes.

By Mr. Markley:

Q. Are you sure about that? A. Yes; the photograph was taken after the bulding was finished.

Q. Yes. But when was the building finished? A. 1918—1917—no; 1918. That is right; 1918.

Q. You are not sure about that? A. I am sure 1918 the building was finished.

Q. Eh? A. The building was finished 1918.

Q. Can you tell us when during the year 1918 that building was finished? A. I cannot say exactly the date—1918.

Q. As a matter of fact, the fence at the present time is down altogether, is it not; there isn't any fence up any more? A. There is a fence.

Q. On Waldo Avenue? A. On Waldo Avenue.

Q. What part of the fence that appears in Exhibit C-3? A. This here fence.

Q. Is that a board fence? A. A board fence.

Q. Next to your apartment—still there now? A. Still there now.

Q. In the same shape? A. In the same shape.

Q. As it appears on this picture? A. Yes.

Q. There is a little gate in the fence the same as it is there? A. There is, the same.

Q. Is the building next to the gate in the fence the same as it appears now? A. Yes, sir.

Q. Just like that now? A. Yes, sir.

Q. Are you still president of this company? A. Not now. Since May 12, 1920, there is a different man president of the company.

Q. You are out of the company since 1920? A. 1920.

Q. You are not with the company? A. I am with the company, but I am not president of the company.

Q. What are you? A. Treasurer.

Q. You still have a stock interest in the company? A. No.

Q. Are you a director of the company? A. Treasurer of the Company.

Jacob Stollman, cross.

Q. Are you a director? A. Yes.

Q. You are a director, too? A. Yes.

Q. Then you have some stock in the company? A. No; I haven't got any stock.

By the Court:

Q. Haven't you any interest in the company at all? A. No.

By Mr. Markley:

Q. Are you an employee of the company? A. Yes.

Q. Working for the company? A. Yes.

Q. For a salary? A. Yes.

Q. Mr. McQuillan had his place of business right by there, didn't he? A. McQuillan got his place—

Q. On Newark Avenue, right around the corner? A. Yes.

Q. He has a store? A. He has a store there.

Q. He does not live there? A. I don't know where he lives.

Q. You know he does not live there? A. I don't know; I never asked him.

By Mr. Gross:

Q. If you know, how far is this easterly wall of your building, 108 Waldo Avenue, from the point of intersection of the line of Newark Avenue and Waldo Avenue? A. Ninety-one feet and ninety-hundredths.

(Angelo Zingaro sworn as interpreter.)

JOSEPH LUPO, sworn and examined through interpreter, as a witness on the part of the complainant, testifies as follows:

Direct examination by Mr. Gross:

Q. What is your business? A. Stone mason.

Q. You had a contract to do the stone mason work on the Magnolia Construction Company's building, 108 Waldo Avenue? A. I made two buildings.

Q. Did you have a contract for 108 Waldo Avenue, the last building? A. Yes, sir.

Q. (Showing witness.) Is this the contract you had for building the wall? A. I just look at my signature.

Q. Is this the contract that you made? A. Yes, sir.

Mr. Gross: I offer this in evidence, not for the matters that are set out in the contract, but simply to fix the date when this was done.

Mr. Newton: No objection to that.

(Marked Exhibit C-7.)

The Court: What is the date of it?

Mr. Gross: September 27.

By the Court:

Q. When did you start work? A. I don't remember the date. 1917, in September some time.

By Mr. Gross:

Q. Was it about the time you signed this contract? A. Yes, sir.

Q. Do you know Mr. McQuillan? A. Yes.

Q. When did you see him? A. At the time I began the job.

Q. Well, did you do another job on Waldo Avenue for the Magnolia Construction Company before this one? A. Yes, sir.

Q. Did you see Mr. McQuillan while that job was being done, too? A. No, sir.

Q. Didn't you see him when you did the building before this? A. Not the first building.

Q. Well, did you see him when this building was being put up? A. Yes; I seen him when we started the second building.

Q. At 108 Waldo Avenue? A. Yes, sir.

Q. How often did you see him on the building 108 Waldo Avenue? A. Between three and four times during the week.

Q. Where did you see him? A. Right on this property, right on the sidewalk, right alongside of his property.

Q. Alongside of the work? A. Yes.

Q. What was he doing alongside of the work? A. Just looking at doing the work.

Q. Do you remember when you began to lay the foundation for this building 108 Waldo Avenue? A. Yes, sir.

Q. Was Mr. McQuillan there? A. Yes.

Q. Did you fix a line or stretch a line before you did any work? A. Yes, sir.

Q. Who was there when you stretched the line? A. Myself, the foreman and also Mr. McQuillan.

Q. Did you notice any crow-foot mark on the fence? A. Yes; there was a mark on the fence.

Q. How did you stretch the line with respect to that mark? A. First we raised the back wall level with the street and then we brought a line level with the back wall to a mark on the sidewalk, in the front.

Q. What is this back wall that you are talking

about? Is that the wall that you built up to the grade, from the slope of the hill to the grade of Waldo Avenue? A. There was the big wall where the high end is behind the house; in the mean time they built up the back wall.

Q. Was there any stake in the back? A. Sure; a stake of the surveyor.

Q. Did you stretch the line from that stake to the crow-foot on the fence? A. Yes, sir.

Q. This fence runs along Waldo Avenue, does it? A. Yes.

Q. Who was there when you stretched that line? A. The foreman and Mr. McQuillan. The foreman asked Mr. McQuillan if this mark was all right, and Mr. McQuillan answered and said: "I suppose according to the surveyor mark, I think it is all right."

Q. Was Mr. McQuillan there when the line was stretched? A. Yes, sir.

Q. What did he do? A. In the mean time he held one end of the line.

Q. Who was holding one end of the line? A. Mr. McQuillan.

Q. How long did he hold the end of the line? A. Just until I set the first corner stone—just a few minutes. Who set the first corner stone? A. I was holding the plumb, and the other mason was setting the stone.

Q. Was that stone set up to the line that Mr. McQuillan held? A. Yes, sir; exactly the same.

Q. What became of the fence? A. When we stretched the line the fence was in the way and he removed the fence.

Q. Who removed the fence? A. I, the other stone mason and Mr. McQuillan.

Q. Do you know anything about the shanty in

the back inside of the fence? A. The shanty was touching the line and we had the line—the shanty was touching the line, and we had to remove the shanty, also.

Q. Who removed the shanty? A. I and the other mason and the owner also.

By the Court:

Q. By the "owner" do you mean Mr. McQuillan? A. Yes, sir.

By Mr. Gross:

Q. After the shanty was removed, was the line clear? A. Yes, sir.

Q. Did you build up to that line? A. Yes; the same where the line was shown.

Q. Do you know whether the whole of the building all the way up to the top is built on that line? A. I made the stone wall work and I know it is.

By the Court:

Q. When you say the fence was moved, what fence do you mean? A. There was two fences, one on the street side and one alongside of the building where we were building.

Q. I am asking you which fence was moved? A. The one that was on the side, not the one on the street.

By Mr. Gross:

Q. Was any part of the fence on the street moved or taken away? A. Oh, yes; the one on the street side, they had to remove that, too.

Q. Did they move it up to the crow-foot? A. The mark was on the fence, and then we moved the fence. We pulled the line according to the sidewalk mark all the way back.

By the Court:

Q. Was there a surveyor's mark on the sidewalk too? A. We removed the fence, but before we removed the fence I put the plumb in the line and marked the sidewalk first, because they claimed the fence had to be removed. We put the line—put the plumb—on the sidewalk and put the mark on the sidewalk and then removed the fence.

By Mr. Gross:

Q. Did McQuillan help in removing part of that fence? A. I don't remember—about four years ago. I remember he held the line; I remember he helped remoce the shanty, but—five years old—I cannot remember if he was helping remove the fence, too.

Cross examination by Mr. Newton:

Q. Who made the mark on the sidewalk? A. Myself.

Q. How did you make that mark? A. I touch the line in the back surveyor's stake, and then I put the plumb over the line according to the mark that was on the fence, and I placed the mark on the sidewalk.

Q. Who were there when that line was stretched? A. I was there and Mr. McQuillan and Mr. Stollman was in the front where they put the mark and the other stone mason was in the back holding the line.

By Mr. Gross:

Q. Do you know where the other men are that worked for you on this job? A. Yes; I know where they are.

Mr. Gross: Now, I will state to Your Honor, with regard to Mr. Henderson, I had his house on the wire; they cannot get him at the City Hall, and the one that answered the telephone said they understood he was coming down here. He is not here. All I have to prove is the survey made by him and as to the point where he took his line.

The Court: You may call him when he comes in.

DEFENDANT'S CASE.

EDWARD McQUILLAN, the defendant, sworn as a witness in his own behalf.

Direct examination by Mr. Markley:

Q. Where do you reside? A. 144 Erie Street.

Q. Your place of business is where? A. 467 Newark Avenue.

Q. That is right around the corner from Waldo Avenue? A. Waldo Avenue and Newark Avenue; yes, sir.

Q. You are the defendant in this suit that is brought here? A. I believe so.

Q. Now, it has been testified by Mr. Stollman and the man who was just on the witness stand that at a time when they were erecting this apartment house adjoining your property on Waldo Avenue that you were there and moved over to your side of the line at that point a shed in the rear. Did you do that? A. Yes. I removed all, the fence, sheds and all.

Q. What conversation was there between you preceding that? A. He told me I was over on his line. I knew it because when Ehrhardt bought

that property he had no fence there and I didn't know, and I had no survey and I attempted to put the fence up as near as I could judge twenty-five feet—my deed calls for twenty-five feet—and I put up the fence as near as I could without any survey.

Q. You had no survey made? A. No.

Q. Did he say anything to you at the time when you had this talk about his having a survey; did he say he had a survey? A. Sure he had a survey.

Q. Did he tell you that? A. He told me he had a survey.

Q. Did he say to you that your shed, this shed in the rear, was over on his land according to his survey? A. Yes.

Q. And he asked you to move it? A. Yes; according to—

Q. You put it over? A. I put it over two or three feet.

Q. Was that at the same time when you discussed the boundary fence between the two properties? A. I never discussed it.

Q. Sir? A. I never discussed it, the boundary, because I was not in a position to discuss it; I never had a survey.

Q. Was that at the same time that you took down the boundary fence between the two lots? The boundary fence, did you take that down at the same time? A. I took down the fence and moved the sheds at the same time.

Q. How about the fence up at the front, on Waldo Avenue? A. Well, it shows on the picture how much I took down. The picture shows how much I took down; the balance I didn't take down; I only took down three or four feet in order to give them a chance to work without interfering with the fence.

Q. Did you at that time know that the building was encroaching on your line? A. I did not.

Q. Did he say to you that he was going to put his building over on your line? A. He did not.

Q. And then when you did later have a suspicion that he was on your line, what did you do? A. I measured it, and Mr.—whose property I acquired lately, I measured from him over to the apartment and it was not twenty-five feet, and I came to the conclusion that either Mr.—was over on me or the apartment was over on me.

Q. What did you do then? A. I went down to see Mr. Dunham and had him make a survey.

Q. And then you received in due time Mr. Dunham's survey? A. Yes, sir.

Q. (Showing witness.) Is this the survey that you received? A. Yes; I believe it is.

(Marked D-1 for identification.)

Q. And then after you found that he was over on your line, from examining this survey marked D-1 for identification, what did you do then? A. I told him so and he laughed at me. He told me that it could not be possible. There was nothing to do, and I communicated with my lawyer.

Q. You came down and saw me? A. Yes.

Q. And then I took the matter up from that time on? A. Yes.

Q. Did you at that time when you went to him and told him he was over on your line, tell him that you wanted $18,000 for your property? A. No; I did not.

Q. You had not at that time acquired the corner property, had you? A. No; I had not.

Q. Or the other property? A. No; I had not.

By the Court:

Q. You did not own the corner of Waldo Avenue Avenue and Newark Avenue at that time? A. No.

Q. Did you have a contract to buy it at that time? A. No, sir.

Q. Were you occupying it? A. No; I was not.

By Mr. Markley:

Q. There was a grocery store on the corner? A. Yes.

Q. You subsequently bought it from the lady who owned the grocery store? A. Yes.

Q. Can you fix the date when you purchased the grocery store property on the corner? A. I could not fix the date. It is probably about two years now as near as I can get to it.

Q. That was some time after you spoke to Mr. Stollman about this property? A. Yes.

Q. This boundary line question? A. Yes.

By the Court:

Q. Explain this to me. I do not understand it. If you did not own the corner property on Waldo Avenue and Newark Avenue at the time they started the foundation wall of 108 Waldo Avenue, what right did you have to move the fence and shed? A. There is a twenty-five foot lot extending between the corner property, that did belong to me.

Q. South of the corner of Waldo and Newark Avenue was a twenty-five foot lot? A. Yes.

Q. On Waldo Avenue, that you did own? A. Yes, sir.

Q. That lot was right next to Mr. Stollman's apartment house? A. That is right.

Edward McQuillan, cross.

Cross examination by Mr. Gross:

Q. You say that before Mr. Stollman and Mr. Stollman's company commenced the construction of the building at 108 Waldo Avenue, they spoke to you about your fence encroaching over on his property? A. Yes, sir.

Q. And you testified that that was your judgment, too? A. No; I did not testify it was my judgment. I knew I was over.

Q. You knew you were over? A. I knew I was.

By the Court:

Q. You mean the sheds? A. Sheds and fence both. They were over to the extent of probably two feet.

By Mr. Gross:

Q. You only moved the shed and the fence up to the point where you thought you were not over any more, is that it? A. I moved in entirely the whole entire length of the one hundred feet. The photograph shows how much of the front of the fence I removed.

By the Court:

Q. How far north did you move the shed or fence? A. North I moved the shed about three feet—two and a half to three feet; that is, down to the cemetery at the extreme end, and the photograph shows how many feet I moved the front fence.

Q. Can you tell me in feet? A. About four feet or five feet of the front fence.

Q. What I want to know is: Did you take the fence down entirely? A. Entirely.

Q. You did not move it and set it up again? A.

No; no, his wall, we agreed his wall would be the fence. That was the condition.

Mr. Markley: The fence that is down altogether is the boundary fence between the two lots.

The Court: That is right.

Q. Do I understand alright that the fence that you took down entirely was the fence on your southerly line between your line and 108 Waldo Avenue? A. Yes, sir.

Q. You took down about four feet of that? A. Took it all down.

Q. On the dividing line between your Waldo Avenue lot and 108 Waldo Avenue, you took the fence down entirely? A. Yes.

By Mr. Gross:

Q. Did you take down any part of the fence running along the front on Waldo Avenue? A. I did.

Q. How much of that did you take down? A. The photograph shows about four feet. As near as I can remember, something like that.

Q. Is this photograph marked Exhibit C-3 the one that you refer to? A. Yes, sir.

Q. Where does that show three feet was taken down? A. It shows right to here. I had it running up like that. You can see how the boards are there now.

Q. You mean you— A. I took right down to here.

Q. Did you see a crow-foot mark, a surveyor's mark, on the fence? A. I seen one on the fence.

By the Court:

Q. On what fence? A. Right up to here.

Q. On the front fence or the side fence? A. On the front, on Waldo Avenue.

By Mr. Gross:

Q. That is the fence running along Waldo Avenue; is that correct? A. Yes.

By the Court:

Q. Did you take that front fence down up to the crow-foot mark or beyond the crow-foot mark? A. I took it down towards that end. I took that fence all the way down for three or four feet.

Q. Up to the crow-foot? A. Past it.

Q. Beyond the crow-foot? A. Yes.

By Mr. Gross:

Q. They had made a mark on the sidewalk where the crow-foot was on the fence, had they not? A. I don't know about that; I didn't see it; they might have or might not.

Q. At any rate, they built the wall up to the point where the crow-foot was on the fence, didn't they? A. No; the fence was down.

Q. Up to the point where the crow-foot was— A. The fence was down before they started.

Q. This property that you say you acquired subsequently to the building by Mr. Stollman of his house, is that the extreme corner property? A. Extreme corner? Well, the extreme corner—

Q. (Indicating.) This property on the corner? A. Yes; this property here on the corner I acquired.

Q. Shown on Exhibit C-6? A. That is the property I acquired.

By the Court:

Q. South of the corner of Waldo and Newark Avenues? A. Yes, sir.

Edward McQuillan, cross.

By Mr. Gross:

Q. But you had acquired and had owned a lot intervening between this property and the Magnolia Construction Company's property at 108 Waldo Avenue, some time prior to that, had you not? A. Yes.

Q. You say that you first ascertained that there had been an encroachment after Mr. Stollman had completed his building, when you made measurements with a tape? A. Yes, sir.

Q. And that was the first time you spoke to him about it; is that correct? A. Correct.

Q. You notice this sign on the house shown in Exhibit C-6 reading "For Sale"? A. I do.

Q. That has been on there for a number of years, has it not? A. It has been on there for about three years.

Q. Is that all? A. That is all.

Q. Put on their at your solicitation? A. By me.

By the Court:

Q. I understood you to say that you had owned that corner on Newark Avenue and Waldo Avenue only two years? A. That is so.

Q. You say the sign has been on the building three years? A. Yes.

Q. Did you have it in your hands to sell as agent? A. I didn't have it as agent. The property was owned by three people, Mr. Fall, Mr. Brod and Mr. McAra wanted to sell collectively, and I was willing to act with them.

Q. Did you have any interest in the other property? A. I owned the lot on Waldo Avenue and the lot going through the center.

Q. The sale was to include your lot? A. Yes.

Q. And the corner that you did not own at that

time? A. I owned next to the corner between them.

By Mr Gross:

Q. How long prior to that had you this agreement with Mr. Fall and the others who held this property that you subsequently bought; how long did you have that agreement to sell this property collectively? A. There was no contract, but I agreed to it. I put the sign up there.

Q. How long prior to this? A. It was subject to their approval; if they did not accept, nothing doing.

Q. How long prior to Mr. Stollman's building that house was it that you had this agreement or arrangement? A. I think it was after Mr. Stollman had the house up. I think I had it up there for about a year and a half.

Q. You subsequently acquired title to all that property? A. After that, yes.

By Mr. Markley:

Q. So that you now own not only the twenty-five foot lot on Waldo Avenue but the corner and on Newark Avenue right down to the cemetery? A. I do.

Q. You bought all the other titles out? A. I did.

Q. And I believe you have since then improved the property on Newark Avenue? A. I have.

Q. Improvements being made now? A. I have.

Mr. Markley: We offer in evidence the deed covering this twenty-five foot lot on Waldo Avenue from Elizabeth De Mott and husband to Edward McQuillan, dated June 24, 1910, recorded in the Register's office of Hudson County July 2, 1910, in Book 1074

of Deeds for Hudson County, page 158. The property in question is the tract described as the second tract in this deed.

(Deed is marked Exhibit D-2.)

Q. This store of yours is right around the corner from the building? A. Right around the corner.

Q. You have been there for a number of years? A. The deed tells you.

Q. Since 1910, is that it? A. Yes.

Q. You had an interest in the property around the corner since then, since 1910? A. Since that date.

Q. So that you now own a lot adjoining the Magnolia Construction Company property on Waldo Avenue and own this property around the corner backing up on it; is that correct? A. That is correct.

Mr. Gross: This lot on Waldo Avenue he acquired in 1910.

Mr. Markley: Yes.

Q. At that time you had the two tracts in this deed? A. The lot and the tract going out on Newark Avenue, 467 Newark Avenue.

EDWARD MARKLEY, sworn as a witness on the part of the defendant, testified as follows:

Direct examination by Mr. Newton:

Q. You are a counsellor at law of this State? A. Yes.

A. And a solicitor of this court? A. I am.

Q. And one of the firm of Collins & Corbin, solicitors for defendant? A. Yes.

Mr. Gross: I will admit what Mr. Markley will testify to.

Mr. Markley: Suppose I state it.

Q. Go on and state it. A. In the early part of August Mr. McQuillan came to my office with this survey which has been marked D-1 for identificatio, and said that he wanted to know what he could do about the conditions shown on the survey. I said that perhaps the best thing would be to write a letter to the owners of the adjoining property; which I did. In fact, I remember I sent several letters at various times to Mr. Stollman, who was president of the company. He came down to see me at least half a dozen times, probably as many as a dozen. During none of these conversations did Mr. Stollman state to me that Mr. McQuillan knew that in erecting the apartment house, that Stollman or his company was over on McQuillan's line. The only point made by Mr. Stollman was that the survey made by his engineer indicated to him that he was not over. We discussed for some time with Mr. Stollman direct the question of entering into an agreement with respect to this wall which we claimed was on Mr. McQuillan's property, but due to the fact, as I remember it, that there were several mortgages on the property held by building and loan associations represented by Judge Robert Carey, we were unable to do anything with regard to adjustment of the matter, and I therefore instituted this ejectment suit in the Supreme Court. After the institution of the ejectment suit and after it was at issue, or while we were putting it at issue, I had several talks with Mr. Isaac Gross, and again we tried to compromise it by an agreement. I believe we each took turns at drafting an agreement. Finally, we practically agreed on the form of the agreement with the exception of Paragraph No. 3, and Mr. Gross and I got together one day and we together drafted

Paragraph No. 3, so that it was satisfactory to both sides. I then saw Mr. McQuillan and got his approval, and Mr. Gross was to have his stenographer draft the agreement and send it to me as finally drawn, which he did. I had a talk with Mr. McQuillan, got his signature. I put "O. K.—Collins & Corbin" on the draft and sent it back to Mr. Gross. I believe it was signed by Mr. McQuillan.

By Mr. Gross:

Q. It was signed by Mr. McQuillan? A. I think it was. I may be mistaken. It may not have been signed. I am not sure. We did agree. The terms were all settled. Mr. Gross was to have the Magnolia Construction Company execute it. There was some delay at the time in regard to having it executed. I finally was advised by Mr. Gross that it was executed and that I could have it. Later I was advised by Mr. Gross that it was lost and he could not find it although he had looked thoroughly through his files for it, and he said he would try and have another copy signed. Later I got another letter in which he said that the personnel of the company had changed and for that reason the new president would not sign the agreement and he could not get them to sign it; and it was after that that this bill was filed in this court, enjoining the law action.

Mr. Newton: I offer in evidence letter dated April 16, 1920, from Collins & Corbin to Isaac Gross, copy being offered by consent.

(Marked Exhibit D-3.)

Mr. Markley: It was after that letter, I

remember, that Mr. Gross and I got together and redrafted Paragraph 3.

Q. Then you had some intervening correspondence as to the phraseology of Paragraph 3? A. Yes.

Mr. Newton: I offer in evidence letter dated May 21, 1920, from Isaac Gross to Edward A. Markley.

(Marked Exhibit D-4.)

Mr. Newton: I offer letter dated May 25, 1920, from Edward A. Markley to Isaac Gross, copy being offered by consent.

(Marked Exhibit D-5.)

Mr. Newton: I offer letter dated August 2, 1920, from Isaac Gross to Edward A. Markley.

(Marked Exhibit D-6.)

Mr. Newton: I offer in evidence letter dated August 3, 1920, from Collins & Corbin to Isaac Gross, copy by consent.

(Marked Exhibit D-7.)

Mr. Newton: Copy of agreement offered in evidence.

(Marked Exhibit D-8.)

Mr. Newton: Copy of letter to Mr. McQuillan offered in evidence.

(Marked Exhibit D-9.)

Mr. Newton: Letter of August 4, 1920, from Isaac Gross to Edward A. Markley.

(Marked Exhibit D-10.)

Cross examination by Mr. Gross:

Q. Do you remember when you first wrote to the Magnolia Construction Company concerning this alleged encroachment? A. If I have the let-

ter file, I can probably tell. I believe my first letter was dated September 7, 1918. I have a copy of it here, if you would like to see it.

Q. This is the first letter you wrote to Mr. Stollman about it? A. I would not be positive. I think so.

Q. You will notice in the address on that letter it had been addressed to Baldwin Construction Company? A. Yes.

Q. Isn't that the way the letter was sent out by your office, addressed to the Baldwin Construction Company, and returned for non-delivery? A. It may have been, but I remember—

Q. Are you not sure about it? A. I would be pretty sure it went out that way, although I am not positive.

Q. You mean it went out addressed to the Baldwin Construction Company? A. Yes.

Q. Don't you know it was returned to your office for non-delivery? A. No; it was not.

Q. You are sure of that? A. Positive, because I remember now that Mr. Stollman came in and showed me the letter and said I had addressed it wrongly to the Baldwin Construction Company, and I immediately wrote over my copy, "Magnolia."

Q. Don't you know that your office gave Mr. McQuillan that letter after it was returned in the mails and Mr. McQuillan gave it to Mr. Stollman? A. I don't think so.

Q. You don't think so? A. My recollection is quite clear—I may be mistaken—that Mr. Stollman came in and said that it was addressed to the Baldwin Company and his company was the Magnolia. I may be mistaken about that.

By the Court:

Q. That may have been. He may have brought the letter in and told you that McQuillan handed it to him? A. Yes; it may be so.

By Mr. Gross:

Q. Talking of this agreement, don't you know that McQuillan had not signed that agreement? A. No. My recollection is that he had.

Q. That he had signed it? A. That he had. I may be mistaken about that. That is my recollection. I say I may be mistaken.

By the Court:

Q. What agreement do you mean—the final copy? A. The final copy as it was. Mr. Newton is going to produce it in a minute.

By Mr. Gross:

Q. Had you taken Mr. McQuillan's acknowledgment on it? A. I don't know.

Q. It had never been delivered to you, though? A. No.

Q. This agreement had never been delivered? A. No. As I recall it, after I had received it from you in its final form I had McQuillan come into the office, and I read it to him, and I asked him if he approved it, and I gave him my suggestion and recommended that he accept it, and he said he would take my recommendation. My recollection is that he signed it—I may be wrong about him signing it— and I put my approval on it.

Q. It never got back to you or McQuillan? A. No; I sent the original and a copy back to you.

Q. After my communicating with you to the effect that the Magnolia Construction Company

would not sign, you served notice of trial in the law action? A. I believe I did—yes, on April 15th.

Q. No. It was in August? A. Yes; I sent it to you.

Q. You were ready to proceed under that notice of trial with your action of ejectment? A. Yes.

Mr. Newton: I offer in evidence copy of the agreement.

Mr. Gross: Is that the copy of the paper I sent you?

Mr. Newton: It is.

By Mr. Newton:

Q. Is that the copy of the agreement on which you endorsed your approval? A. Yes. Paragraph 3 is—

Mr. Newton: I offer it in evidence.

(Marked Exhibit D-11.)

By Mr. Gross:

Q. The change of 108-110 Waldo Avenue does not appear to have been made? A. I don't know. I have not looked at it. It says: "Whereas the party of the second part is the owner in fee simple of the lot known as 108 Waldo Avenue." The party of the second part is the Magnolia Construction Company.

By Mr. Newton:

Q. That was to be changed to what? A. My recollection is it was to be changed to 108-110 Waldo Avenue, my thought being that 110 was the lot immediately next to Mr. McQuillan.

JAMES HENDERSON, sworn as a witness, on the part of the complainant, testified as follows:

Direct examination by Mr. Gross:

Q. You are a surveyor? A. Yes, sir.

Q. And are employed by the City of Jersey City? A. Yes.

Q. To survey and lay out lands in Jersey City? A. Yes.

Q. Were you employed by the Magnolia Construction Company to survey this property on Waldo Avenue, Jersey City? A. Yes, sir.

Q. Do you remember when that survey was made? A. I do not recall the date; I think it was about 1916.

Q. That was about the time they bought the property? A. I think so.

Q. And did you afterwards also make a survey for the construction of a building at 108 Waldo Avenue? A. Yes, sir.

Q. I call your attention to this blue print marked C-1 for identification, and ask you whether that is the survey that you made? A. It is.

Q. And what does that cover? A. That covers all the property facing Waldo Avenue owned by the Magnolia Construction Company.

Q. That covers the entire tract, in other words; is that it? A. Yes, sir.

Q. You testified that you made a survey for the construction of a building at 108 Waldo Avenue. Did you make another survey of 108 Waldo Avenue after the completion of that building? A. Yes, sir.

Q. I show you the paper marked C-2 for identification and ask you whether that is the blue print of the survey you made after the completion of 108 Waldo Avenue? A. Yes.

Q. What did you find to be the beginning point of the property of the Magnolia Construction Company from the point of intersection of the southwesterly line of Newark Avenue and the easterly line of Waldo Avenue? A. I find it to be a point 91.90 feet southwesterly from the intersection of Newark Avenue and Waldo Avenue.

Q. And how did you get that point? A. I intersected the two lines, the line of Waldo Avenue and the line of Newark Avenue, made my calculation, went by my calculated distance and established that point.

Q. Is there any fixed line, any definite or fixed line of Newark Avenue at that point? A. The line of Newark Avenue as built upon.

Q. Is that the recognized line of Newark Avenue? A. Yes; I would say so.

Q. Which was your beginning point in making the measurement and calculation as you have testified to—what was your beginning point? A. It was a point 91.90 feet southwesterly from the intersection of the southeasterly line of Waldo Avenue and the southwesterly line of Newark Avenue.

Q. Where did you fix the point of intersection of the two streets? A. By using the line of Newark Avenue as built upon, with the recognized line of Waldo Avenue.

By the Court:

Q. Any monuments? A. Not that I know of.

By Mr. Gross:

Q. You used the buildings along the street as monuments? A. I used the buildings along Newark Avenue as monumenting Newark Avenue.

Q. Therefore, in getting this point, the beginning point of the Magnolia Construction Company

property, as the distance of 91.90 feet from the line of Newark Avenue, from what line of Newark Avenue is that the distance? A. That is the line of Newark Avenue as built upon.

Q. Did you take the corner building? A. Yes, sir; I took the corner building; I took the farthest projection of the corner building.

Q. In your survey of 108 Waldo Avenue, after the completion of that building, what did you find the distance from the nearest point of the building to the point of intersection of the line of Newark Avenue and Waldo Avenue? A. From the intersection of the building?

Q. No; the intersection of the street lines? A. I found it to be 91.99 feet.

Q. Ninety-nine hundredths? A. Yes; because this building is nine-hundredths clear.

By the Court:

Q. You had not finished your answer. 91.99 feet from where? A. From the intersection of the two lines of Waldo Avenue and Newark Avenue.

Q. In other words, you make the building nine-hundredths of a foot clear? A. Yes, sir.

By Mr. Gross:

Q. Is there any point where that building encroaches over on the property adjoining it on the northeast? A. No, sir.

Q. Prior to the construction of this house, did you stake out the lot? A. Yes, sir.

Q. Did you find the building to have been constructed within the lines staked out by you? A. Yes, sir.

Cross examination by Mr. Markley:

Q. When you made this survey, Mr. Henderson, that has been first referred to, dated September

30, 1916, which covers, as I understand you to say, all of the property of the Magnolia Construction Company and other property in addition, what comprehending data did you have to do that? A. I had a description furnished by Mr. Stollman. That is all.

Q. Did he give you the deed of his property? A. I do not recall whether he gave me the deed, but he gave me a description.

Q. You don't remember seeing the deed? A. I am not positive. No; I don't remember seeing the deed.

Q. When you made this survey which merely shows the house, No. 108, November 14, 1918, what comprehending data did you have then from which to make your survey? A. Why, I had my notes from the original survey.

Q. Anything else? A. That is all.

Q. Well, did your notes include the description he had given you? A. My notes were the result of using that description.

Q. He had given you a written description? A. Yes.

Q. And then you made some notes? A. Not of the description of the property. I made notes of my survey.

Q. You actually made a survey of the ground, as I understand it? A. Yes.

Q. After you made these notes? A. Yes, sir.

Q. Where are they? A. I didn't know the case was up to-day. I just telephoned my home and my wife told me I had to be here. I thought it was the twenty-fourth instead of to-day.

Q. You have the original notes? A. I have them home.

Q. And the description? A. I don't know as I have the description. I don't save descriptions.

Q. You do not save descriptions. You do not believe you saved this description? A. I do not save any.

Q. Then you did not save this one? A. No.

Q. Did you make another survey on November 14, 1918? A. On that street, do you mean?

Q. Yes. A. I do not recall. I don't know that I did.

Q. You must have made some measurements in order to determine the distance of this house from the corner of Newark Avenue? A. I don't understand you.

By the Court:

Q. I think what Mr. Markley means is: Did you actually re-survey the property? A. Oh, yes.

The Court: You did not mean did he survey some other property?

Mr. Markley: No, sir.

Q. Did you re-survey this property? A. Yes; from points I had established on my original survey I located that house.

By Mr. Markley:

Q. So that you actually did measure the distance of this house from the corner point of Newark Avenue and Waldo Avenue, as you have described it? A. Yes.

Q. And in that way you determined the position of the house with reference to the corner? A. Yes, sir.

Q. And your whole testimony is based on that, is it? A. Yes.

Q. I want to show you a description of the property of the Magnolia Construction Company contained in the bill of complaint in this cause. Will

you look at that and see whether that is the description that you had? A. I cannot say that this is the description.

Q. You cannot say that it is? A. I cannot say that it is. It seems to me that my description started 91.90 feet from the intersection of these two lines.

Q. How does that start? A. It starts eighty-five feet. I thing it excepts something out of this.

Q. It says "eighty-five feet more or less"? A. My starting point was not eighty-five feet from the corner.

Q. It says "eighty-five feet more or less." That means something in engineering, does it not? A. Yes; "more or less," within a foot I would say.

Q. Within a foot? A. Yes.

Q. It further says: "Which point is in the northwesterly corner of that parcel of land conveyed by the New Jersey Junction Railroad Company, *et al.*, to Nicholas Nolan, by deed dated September 15, 1900." Now, then, did you try to determine or fix the point which is the point in the northwesterly corner in that parcel of land? A. No other way than by reference to our city map.

Q. You made no attempt to fix it in any way except by going there on the ground and looking at the house line of Newark Avenue, of the various houses that were on the house line, and say, "That is the point"? A. No; I made a search for a record to determine if there was a fixed line on Newark Avenue, and I could not find any fixed line. So, in the absence of any fixed line or any width of Newark Avenue, I took the line as monumented by the buildings and made my survey accordingly.

Q. So that if the measurement from the building line forming the corner of Newark Avenue

and Waldo Avenue, as you have testified, is not accurate, then your survey is all wrong, is it not? A. If the building as shown on that corner does not monument the line of Newark Avenue, my survey is not right.

Q. Now, where did you get the distance of ninety-one feet and nine-tenths from? A. That was furnished by Mr. Stollman by description.

Q. You did not have any distance known as "eighty-five feet more or less"? A. I cannot recall that.

Q. "Eighty-five feet more or less" is something entirely new to you now? A. Yes, sir.

Q. And when this description which is contained in the bill of complaint fixes the point from which the measurements are to be made as a point in the northwesterly corner of that parcel of land conveyed by the New Jersey Junction Railroad Company to Nicholas Nolan, by deed dated September 15, 1900, you had never had your attention called to that point, had you? A. No, sir.

Q. And, of course, you had not had your attention called to the description contained in the deed to Mr. McQuillan of his property at that point? A. No, sir.

Q. Now, then, in trying to fix the dividing line between Mr. McQuillan's property and the Magnolia Construction Company's property adjoining, which is described there as No. 108, is it? A. Yes.

Q. (Continuing.) You did not try to determine McQuillan's property by figuring sixty feet more or less from the south corner of Newark Avenue and Waldo Avenue, did you? A. I gave Mr. McQuillan all that I could find that he had title to, that he had a record of.

Q. I did not ask you that. I asked you: Did

you take into consideration that his deed fixes the beginning point in the southeasterly line of Waldo Avenue distant southeasterly sixty feet more or less from the south corner of Newark Avenue and Waldo Avenue, which point is also the north corner of a tract conveyed by Edward D. Adams and wife to the New Jersey Junction Railroad? A. No, sir.

Redirect examination by Mr. Gross:

Q. You were furnished with a description to make this survey from, were you not? A. Yes.

Q. You do not know what deeds the descriptions were taken from, do you? A. I do not.

Q. Do you remember that we furnished these to you? A. I do not recall.

Q. But you used the descriptions which were furnished to you to guide you in fixing the line of this property of the Magnolia Construction Company? A. Yes, sir.

ISAAC GROSS, sworn as a witness on the part of the complainant, testifies as follows:

Direct examination:

First, with respect to the alleged agreement that was to be entered into between the Magnolia Construction Company and Mr. McQuillan. That agreement had never been signed by Mr. McQuillan, although it had been approved by Mr. Markley and forwarded to me to have executed by the Magnolia Construction Company. It had never been delivered, and after my client refused to re-execute it and deliver such agreement, we were served with notice of trial in the ejectment suit in the Supreme Court.

The survey which Mr. Henderson made was

made upon descriptions that I had furnished him from deeds which I had taken out in the Register's office and of which I have here the manuscript. This particular Edward D. Adams—

Mr. Markley: I would like to ask the purpose of this testimony. It is entirely hearsay. I assume we are confined to the description in the bill of complaint.

The Court: Mr. Henderson said he got the description from somebody. He says he does not know where the description came from.

Mr. Markley: I would like to ask whether it is your purpose to prove by your notes what description you gave to Mr. Henderson?

Mr. Gross: Yes.

Mr. Markley: I object to that because Mr. Henderson's notes are the best evidence of what description he followed in making his survey.

The Court: The difficulty is that Mr. Henderson says he does not think he has the description.

Mr. Markley: He has his notes, his own description. His survey was based upon his own notes.

The Court: I will allow Mr. Gross to testify as to that he did.

The Witness (Continuing.): I handed them to Mr. Henderson personally at my office: Description in a deed made by Edward D. Adams and Fannie A. Adams to the New Jersey Junction Railroad Company, dated August 25, 1886, recorded in the Register's Office in Book 426 of Deeds, page 57,

the fifteenth parcel described in that deed; deed from John D. Patch and Ann, his wife, to Andrew McAra and Margaret H. McAra, his wife, dated August 1st, 1870, recorded in the Register's Office of Hudson County in Book 216 of Deeds, page 383; then the deed from the New Jersey Junction Railroad Company and the New York Central and Hudson River Railroad Company to Nicholas Nolan, dated September 15, 1900, and recorded in Book 763 of Deeds, page 507; deed made by Elizabeth M. De Mott to Edward McQuillan, which deed is dated June 24, 1910, recorded in the Hudson County Register's Office in Book 1074 of Deeds, page 156, which covers two tracts of land; that is all.

Cross examination by Mr. Markley:

Q. When did you do that? A. This was in 1916.

Q. In 1916? A. Yes. About the time that the Magnolia Construction Company purchased this property and proposed to erect the two two-family houses at the further end of the lot.

Q. Did you give him the description from each one of these deeds? A. Yes. I had them typewritten and handed them to him.

Q. How about 1918? A. I did not give him any descriptions then.

Q. You did not give him anything in 1918? A. I did not order the survey in 1918. I assume Mr. Stollman did that.

Q. So that you gave no orders with reference to that land surveyed in 1918? A. No.

Q. What you did was in 1916? A. Yes.

Q. When they were contemplating the building construction? A. Yes.

Q. You had this survey made? A. Yes.

Q. And for that purpose, gave these descriptions which you have referred to? A. Yes. I made out and I also gave him a description from the deed of John H. Ehrhard to the Magnolia Construction Company. My belief is that I gave him the original of that deed. It has been lost ever since. I do not know whether he lost it or Mr. Dieffenbach, but one or the other lost that deed.

Q. At the time you gave him these descriptions, the buildings were not there, were they? A. There were not any buildings there, although the company was then excavating, as I believe, for the two two-family houses, which were subsequently built.

Q. With respect to this agreement, you remember I suppose receiving that agreement with my approval? A. Yes; asking for a slight change to be made. In fact, you insisted on that being made all through the corespondence.

Q. I was insisting that you ought to put in 108. A. It was 108, and my client refused to include 110.

Q. I was in error when I thought that the lot of the Magnolia Construction Company immediately adjoining and contiguous to McQuillan's lot was 110; I was in error about that. A. It is 108 as I understand it; I don't know much about it.

Q. Then you had it executed by the company as 108? A. Yes; I had it signed by Mr. Stollman.

Q. It was executed by the company? A. Yes; I should say it was.

Q. And you had it on your desk, did you not? A. I had it on my desk or had it put away in the files.

Q. After it was executed? A. Yes.

Q. And you were going to mail it to me, as I understand it? A. Yes; I was.

Q. And the only reason you did not mail it was because of the fact that your desk, as I recall it, was piled up with things and as soon as you got to it, you would mail it? A. Yes; that is so; and then they came in and asked me whether I had sent it to you, and after I said "No," they said they would not enter into the agreement. I could not find the papers.

Q. I had telephoned to you on a number of occasions? A. That is so.

Q. Asking for the agreement and you said it was mislaid on your desk and as soon as you found it you would mail it to me? A. Yes; you were going to have it executed by Mr. McQuillan and send me one of the duplicates.

Mr. Gross: I now desire to offer in evidence these two surveys marked for identification C-1 and C-2.

Mr. Markley: I would like to enter the objection that they are not made in accordance with the description contained in Paragraph 1 of the bill of complaint.

The Court: Objection overruled.

(Papers heretofore marked C-1 for identification and C-2 for identification marked in evidence Exhibit C-1 and Exhibit C-2.)

FREDERICK DUNHAM, sworn as a witness on the part of the defendant, testifies as follows:

Direct examination by Mr. Markley:

Q. You are City Engineer?

Mr. Gross: I will admit the qualifications of Mr. Dunham.

A. I am connected with the City as Harbor Engineer and Consulting Engineer.

Q. How long have you been an engineer? A. Well, I have been in the surveying business in Jersey City since 1882.

Q. You have made numerous surveys in Jersey City during that time? A. Many thousands of them.

Q. Did you have occasion, for instance, to survey any of this property in the immediate vicinity of Mr. McQuillan on Waldo Avenue near Newark Avenue? A. Yes; I, at various times, surveyed the property for the City cemetery which abuts the property of McQuillan and the Magnolia Construction Company in the rear, and made various surveys on Waldo Avenue and Newark Avenue.

Q. You have been all over that ground up there? A. Yes.

Q. And did you, at the request of Mr. McQuillan make a survey of Lot 6A, which you have described on a survey dated July 25, 1918, marked D-1 for identification? A. Yes; on July 24, 1918, Mr. Bush of my office made that survey, and since that time for the purpose of testifying in this case I have verified it myself.

Q. You have gone over it yourself? A. Yes.

Q. And checked it? A. Yes.

By Mr. Gross:

Q. You mean you went up on the ground and— A. Yes; I have checked it so that I could swear to it myself.

By Mr. Markley:

Q. Now, then, do you remember my giving you this deed from DeMott to McQuillan? A. Yes.

Q. Did you have that deed when you re-checked this survey? A. I did.

Q. Now, then, will you just describe what you

did and how you did it in fixing the points which you fixed as the points embracing the McQuillan lot? A. Well, the governing point of the whole situation is the northeasterly corner of the lands owned or conveyed to the New Jersey Junction Railroad Company, and that point is not fixed from Newark Avenue. The deeds all describe it as being sixty feet, more or less, from Newark Avenue while the maps show it as being 66.9 feet from Newark Avenue, a difference of 6.9 feet between the descriptions and the actual distance.

Q. And the measurement on the ground? A. Yes.

Q. All right. A. The governing point, however, as all of these deeds describe it, is the northeasterly corner of the lands conveyed to the New Jersey Junction Railroad. That was the northeasterly corner of the property of Henry Abel and others. That property is shown on a map which is filed in the Register's Office, made by Garret S. Van Horn, "Surveyed and monumented June, 1858, according to the original deeds and lines, by Garret S. Van Horn, Surveyor and C. E. of the Town of Bergen." That map shows that the northeasterly corner of the lands of Abell were 66.9 feet from the corner of Newark Turnpike to Jersey City. It also shows that that line is a continuation of the westerly line of the turnpike extended northerly to Waldo Avenue, in other words, there is an angle in the Newark Turnpike just south of Waldo Avenue, and from that point running southerly toward Jersey City the line of the Turnpike was established. There was a locust post set in the westerly line of the Turnpike at the southerly line of Patrick Devine and on the northerly line of Patrick Devine, 232.8 feet west of the Turnpike, there was a stone monument, which stone monu-

ment you will see is referred to in these deeds to the Junction Railroad and to the Magnolia Construction Company.

Now, from the records in my office which go back a great many years, I find that R. W. Post, in 1895, established this line of Abell's and he showed it to be at an angle of eighty-six degrees and fifty-six minutes with Waldo Avenue, and 66.9 feet from the old Turnpike on the southerly line of Waldo Avenue and 109.9 feet from the old Turnpike measured along the northerly line of Waldo Avenue. Now, I have checked that out and I checked it out many years ago when I surveyed the property of Patrick Devine, which was later purchased by the Jersey City Cemetery, and I find that this westerly line of the Turnpike south of the angle extended, checked 109.9 feet from the old building at the northwesterly corner of Newark Avenue and Waldo Avenue and that the old buildings at the southwesterly corner of Waldo Avenue and Newark Avenues were about a foot and a half into the street.

Q. Into Waldo Avenue? A. Into the Turnpike or Newark Avenue, and that the distance as shown upon the Abell map of 399.5 feet from the westerly line of a street unnamed on the Abell map, which is the second street westerly from Newark Avenue —it is now known as Elizabeth Street—and the northeasterly corner of the Abell property, is correct.

Q. Now, having these lines fixed in that fashion, is this survey that you made, made in accordance therewith? A. This survey is made in accordance with the line as defined upon the Abell map, and in my judgment is the correct northeasterly corner of McQuillan's lot, known as Lot 6A, Block 502,

the northeasterly corner of the Abell property and the northeasterly corner of the land of the New Jersey Junction Railroad Company.

Q. So that the corner of Newark Avenue as fixed by the building line plays no part in fixing the dimension of the lot? A. No.

Q. Having thus fixed your lines and determined the location of McQuillan's lot 6A, what did you find with respect to the building adjoining it on the west, as to whether or not it encroached? A. I found that the building adjoining on the west encroached at the front corner 1.29 feet.

Q. It runs to a point, does it not? A. And at the rear corner of the building—well, that was on line.

Q. Well, that was right on the line? A. It was on line. I found that the building had been laid at approximately ninety degrees or at right angles to Waldo Avenue, and that, in my judgment, is wrong, because all the data that I have, show that the angle should be eighty-eight degrees and fifty-six minutes, which is a minutes and four degrees off a right angle, and the building is built at a right angle.

Q. The easterly wall of the apartment house on the westerly side of McQuillan's lot, is of brick, is it not? A. There is a light shaft in the center of it.

Q. Take the front part of that wall, from the street back, how long is it before you come to the break? A. Twenty-six feet.

Q. And then at the end of the break in the wall in the front where you have the light shaft, what is the encroachment there? A. Eighty-four hundredths of a foot.

Q. So that for a distance of twenty-six feet from

the front of the building to a point twenty-six feet in the rear, that wall tapers from an encroachment of 1.29 feet to eighty-four hundredths of a foot? A. Yes.

Q. Then there is a break where there is a light shaft? A. Yes; there is an air and light shaft of 17.3 feet.

Q. The building does not encroach there because it is back from the line? A. Yes; it sets back.

Q. Then you come to the wall out over the line again? A. Yes, when you come to the corner of the rear portion of the wall and that encroaches at that point forty-eight hundredths of a foot. From there back to the extreme rear corner of the building is 25.5 feet.

Q. When you reach the rear point of the building— A. The rear corner of the building is on line.

Q. That appears on the survey that you have made, marked D-1 for identification? A. Yes.

Mr. Markley: I offer the survey in evidence.

(Marked Exhibit D-1.)

Cross examination by Mr. Gross:

Q. Did you examine the description in a deed made by Elizabeth W. White to Edward McQuillan for the property at the corner of Newark Avenue and Waldo Avenue? A. No.

Q. You did not? A. No.

Mr. Gross: Have you that deed?

Mr. Markley: No; I have not.

Mr. Gross: I have a description taken out and compared. I want to read it to Mr. Dunham. It is from a deed dated June 10, 1920.

Q. "Beginning at a point where the southerly

line of Newark Avenue intersects the easterly side of Waldo Avenue, and thence running along the easterly side of Waldo Avenue sixty-six feet nine inches; thence at right angles or nearly so with said line and easterly fifteen and a half feet; thence at right angles with the last named line and parallel with Waldo Avenue to and through the middle of the party wall of the building now of lot herein described and the building next east of the one herein described, fifty-five feet and four inches to the southerly line of said Newark Avenue; and thence westerly, along the southerly line of said Newark Avenue to the point or place of beginning." Now, would you say that that description included the property as occupied and in possession of McQuillan? A. No.

Q. Why not? A. Why, it says sixty-six and nine-tenths feet, but McQuillan's deed goes back, of course, to the New Jersey Junction Railroad, which is the northeasterly corner of lands originally of Abell; which has nothing whatever to do with the corner property.

Q. Where do you get that property? There was no such description as that in this deed. A. I am not surveying by that deed. I am surveying by McQuillan's deed.

Mr. Markley: I do not see the materiality of this deed.

Q. This deed fixes as a monument in the description the property line of Newark Avenue, does it not? A. No.

Q. What does it fix? A. It does not fix anything.

Q. It refers to the southerly line of Newark Avenue where it intersects the easterly line of Waldo Avenue. What do you call that? A. It may be in

two or three different places. Surveyors differ as to that. Mr. Henderson's and mine have already differed as to where that is.

Q. According to your calculations, the way you fix it, the building of McQuillan on the corner projects over and encroaches on the public highway or Newark Avenue in feet how much? A. About a foot and a half.

Q. If you put him within the line, put him on the line of Newark Avenue, I mean his building on the line of Newark Avenue, so that he does not encroach on the highway, then there is no encroachment here; isn't that so? A. No; that would not be so.

Q. Why not? A. Because that northerly line of McQuillan, the northerly line of the New Jersey Junction Railroad Company, going back to Abell, is fixed entirely independent of that corner of Newark Avenue, because Newark Avenue is a very uncertain line.

Q. What do you mean by that? A. Why, it cannot be located in many places within four or five feet.

Q. You use the building line as the line of Newark Avenue, don't you? A. No. I have something better to use than that.

Q. What do you use? A. I use the line of Newark Avenue, that is, south of the angle, running toward Jersey City, produce that on straight, and then check it up with the old property line on the northerly side of Waldo Avenue, and then check it from that point southerly to the westerly line of Elizabeth Street; all of which are shown on the Abell map. Now, when I check myself to that extent, I know that I am right, independent of whatever may happen in Newark Avenue, because New-

ark Avenue is very uncertain, as I have said, and there is a discrepancy running into four or five or six feet.

Q. Coming back to my question: If you put McQuillan's building on Newark Avenue as not encroaching upon that street, then you have no encroachment of 108 Waldo Avenue; isn't that so? A. What you mean, as I understand you, is that if you accept the building on the corner of Waldo and Newark Avenues, that is, the front of the McQuillan building, as being correct, and giving him sixty-six feet and nine inches and then twenty-five feet, there would be no encroachment of the brick building.

Q. Yes. A. That is correct.

Q. And McQuillan's building has been standing there for how long, have you any idea? A. On Newark Avenue?

Q. Yes. A. Well, over forty years to my knowledge.

Q. Do you know of any place on Newark Avenue where the building line is taken as the line of the street in Newark Avenue? A. Where the building lines are taken?

Q. Yes. A. In some cases, yes, sir. In many cases, no.

Defendant Rests.

Mr. Gross: I desire to offer in evidence certified copy of deed made by John H. Ehrehart and wife, to Magnolia Construction Company, dated October 16, 1916, recorded in the office of the Register of Hudson County, October 19, 1916, in book 1239 of deeds for said county, p. 487.

Marked Exhibit C-8.

Mr. Gross: I also offer in evidence, deed of Elizabeth W. White, to Edward McQuillan, dated, June 10, 1920, recorded June 11, 1920, in book 1358, p. 528.

Marked Exhibit C-9.

Mr. Gross: I offer in evidence deed made by N. J. Junction Railroad Co. and N. Y. Central and Hudson River Railroad Co. to Nicholas Nolan, dated September 15, 1900, and recorded in the office of the Register of Hudson County, February 20, 1901, in book 763 of deeds, page 507.

Marked Exhibit C-10.

Mr. Gross: I also offer in evidence certified copy of deed by Mamie Bird, to Edward McQuillan, dated June 1, 1920, recorded June 1, 1920, in the office of the Register of Hudson County, in book 1359 of deeds, p. 462.

Marked Exhibit C-11.

Mr. Gross: I desire to move for an amendment of the description contained in the bill of complaint, so that it would include the description set forth in the deed from Mr. Ehrehart to the Magnolia Construction Company. As I stated before, the bill was hurriedly prepared and the original deed lost, and I was obliged to use what I believed to be an accurate description, which I found amongst my papers, but which now turns out to be inaccurate.

The Court: The amendment that I will allow, will be this: To insert in place of the description contained in the bill of complaint, the description contained in the deed from Ehrehart to the Magnolia Construction Company, covering the premises in question.

Case Closed.

Exhibit C1

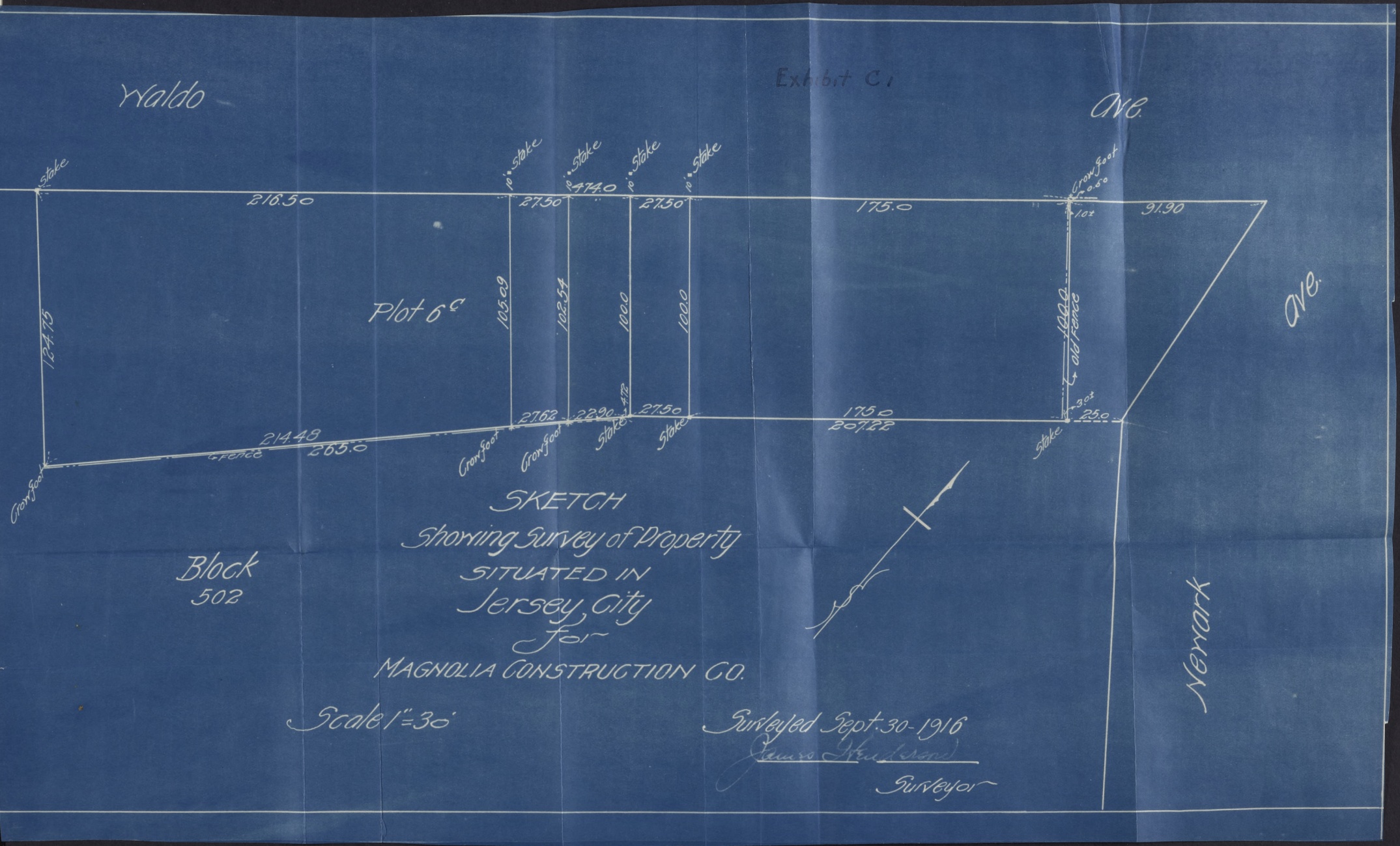

Waldo
Ave.
Stake
10' Stake
10' Stake
10' Stake
10' Stake
Crow Foot
+0.50
216.50
27.50
474.0
27.50
175.0
91.90
+1.0'
Plot 6
124.75
105.09
102.54
100.0
100.0
Lane
Old Fence
Ave.
+3.0'
25.0
27.62
22.90
27.50
175.0
207.22
214.48
Fence
265.0
Crow Foot
Crow Foot
Stake
Stake
Stake
SKETCH
Showing Survey of Property
SITUATED IN
Jersey City
for
MAGNOLIA CONSTRUCTION CO.
Block
502
Scale 1"=30'
Surveyed Sept. 30-1916
James Henderson
Surveyor
Newark

Exhibit C2

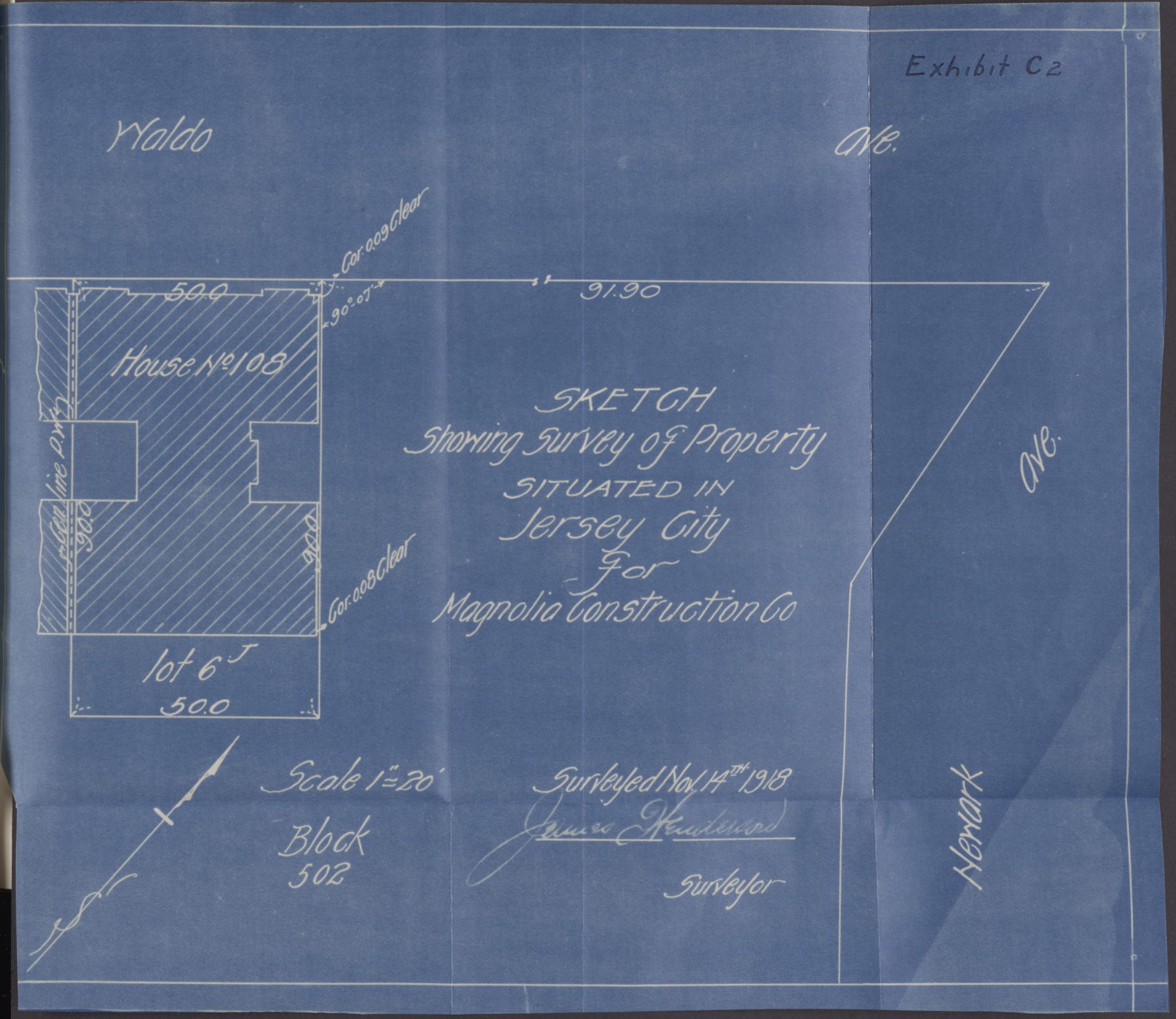

Waldo
Ave.
Cor. 0.09 Clear
50.0
90°-07'
91.90
House No. 108
Left line of House
90.0
90.0
Cor. 0.08 Clear
lot 6
50.0
SKETCH
Showing Survey of Property
SITUATED IN
Jersey City
For
Magnolia Construction Co
Ave.
Scale 1"=20'
Block
502
Surveyed Nov. 14th 1918
James Henderson
Surveyor
Newark

Exhibit C-7.

AGREEMENT, made and entered into this twenty-seventh day of September, nineteen hundred and seventeen, between Magnolia Construction Company, a corporation of the State of New Jersey, party of the first part; and Joseph Lupo, of the City of Jersey City, County of Hudson and State of New Jersey, party of the second part;

WITNESSETH; the said party of the second part does hereby agree, for the consideration hereinafter mentioned, on or before the twenty-seventh day of October, 1917, to finish and complete all the stone mason work necessary and required in the erection of the foundation walls, and concrete footings and pointing up all the stone work on interior and exterior, in a good first class and workmanlike manner, for the sum of 7 1/2 per cubic foot, actual measurement, said work to be done in accordance with the plans and specifications for the erection of building at #108 Waldo Avenue, Jersey City, N. J.

The said party of the first part does hereby agree to pay the said party of the second part, for the said work, at the aforesaid rate, in installments as the said work progresses, in the discretion and to the satisfaction of Jacob Stollman.

It is understood between the parties hereto, that this contract is to include labor only.

IN WITNESS WHEREOF, the parties hereto

have hereunto set their hands and seals the day and year first above written.

Signed sealed and delivered in
the presence of
Isaac Gross.

Magnolia Construction Company
Magnolia Construction Co.
By Jacob Stolman.
President.
Joseph Lupo (L. S.)

Exhibit C-8.

Deed by John H. Ehrehart and Frances L. Ehrehart, his wife, to Magnolia Construction Company, dated October 16, 1916, recorded October 19, 1916, in the Register's office of Hudson County in book 1239 of deeds, p. 487, conveying the lands described as follows:

> BEGINNING at a point on the southeasterly side or line of Waldo Avenue, distant thereon ninety-one and ninety one hundredths (91.90) feet from the corner formed by the intersection of the southeasterly side of Waldo Avenue with the southwesterly side of Newark Avenue Avenue, thence running (1) southwesterly along the southeasterly side or line of Waldo Avenue four hundred and seventy-four (474) feet to a point; thence returning to the place of beginning which point is also in the northwesterly corner of that parcel of land conveyed by the New Jersey Junction Railroad Company, *et al,* to Nicholas Nolan, by deed dated September 15, 1900, and recorded in the Register's Office of Hudson County, in

Book 763 of Deeds for said County page 507; and running thence (2) southeasterly along the southwesterly line of said parcel of land conveyed to said Nolan parallel with the northeasterly line of land conveyed by Edward D. Adams and wife, to the New Jersey Junction Railroad Company by deed dated August 25, 1886 recorded in the office of the Register of Hudson County in book 426 of deeds for said County at page 57, being the 15th described parcel of land in said deed, one hundred (100) feet to a point distant twenty-five (25) feet southwesterly from the southwesterly line of Newark Avenue; thence running (3) southwesterly and parallel with the southwesterly line of Waldo Avenue two hundred and seven and twenty-two hundredths feet (207.22) to a point; thence running (4) again southwesterly two hundred and sixty-five feet (265) to a point distant one hundred and twenty-four and seventy-five one hundredths feet (124.75) from the end of the first course run; thence running (5) northwesterly one hundred and twenty-four and seventy-five one hundredths feet (124.75) to the southeasterly line of Waldo Avenue at the end of the first course run.

Exhibit C-9.

Deed by Elizabeth W. White, widow to Edward McQuillan, dated June 10, 1920, recorded in the Register's Office, Hudson County, June 11, 1920, in book 1358 of deeds p. 528, conveying the following lands:

BEGINNING at a point where the southerly side of Newark Avenue intersects the easterly side of Waldo Avenue, thence running along the easterly side of Waldo Avenue sixty-six feet and nine inches; thence at right angles or nearly so with said line and easterly fifteen and one half feet; thence at right angles with the last named line and parallel with Waldo Avenue, to, and through the middle of the party wall of the building now on lot herein described and the building next east of the one herein described fifty-five feet four inches to the southerly line of said Newark Avenue thence westerly and along the southerly line of said Newark Avenue to the point or place of beginning, nineteen feet.

Exhibit C-10.

Deed by New Jersey Junction Railroad Company and New York Central and Hudson River Railroad Company, to Nicholas Nolan, dated September 15, 1900, recorded February 20, 1901 in the Register's office of Hudson County in book 763 of deeds p. 507, conveying the following described lands:

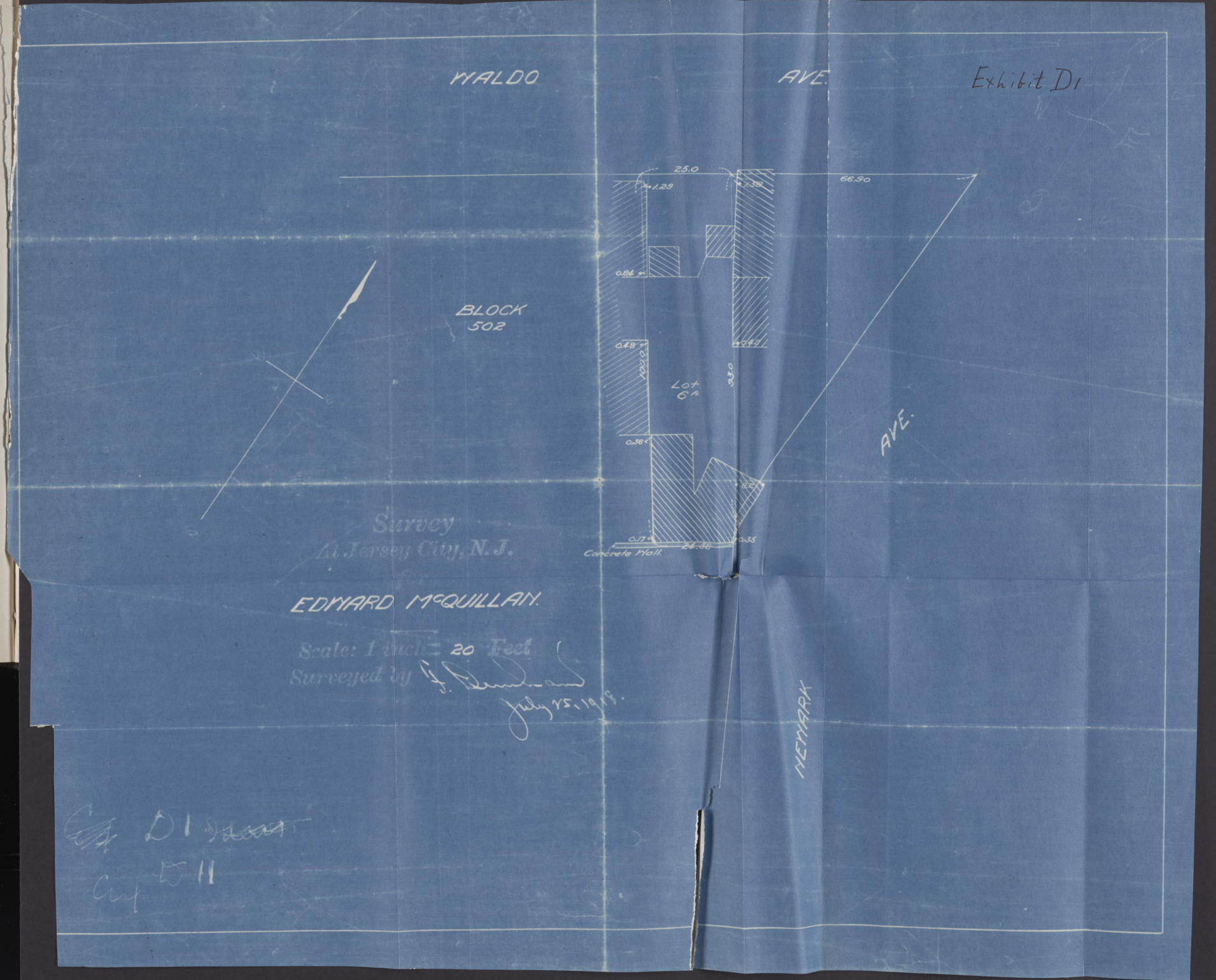
BEGINNING at a point in the southeasterly line of Waldo Avenue, distant southwesterly sixty (60) feet more or less from the south corner of Newark Avenue and Waldo Avenue which point is also the north corner of the tract conveyed by Edward D. Adams and wife to the North Jersey Junction Railroad Company by deed bearing date August 25, 1886 and recorded in the office of the Register of Hudson County New Jersey in Book 426 of deeds page 57 &c., and running thence southeasterly along the northeasterly line of lands of the parties of the first part one hundred (100) feet; thence southwesterly and parallel with Waldo Avenue, twenty-five (25) feet; thence northwesterly and parallel with the first described boundary line one hundred (100) feet to the southeasterly line of Waldo Avenue; thence northeasterly along said line of Waldo Avenue twenty-five (25) feet to the place of beginning, containing fifty-nine one thousandths (0.059) acres of land more or less.

Exhibit C-11.

Deed by Mamie Bird to Edward McQuillan, dated June 1, 1920, recorded June 1, 1920, in the Register's Office of Hudson County in book 1359 of deeds p. 462, conveying the following described lands and premises:

BEGINNING at a point in the westerly line of Newark Avenue distant southerly from the southwesterly corner of Newark Avenue and Waldo Avenue, 38 feet measuring along the line of said Newark Avenue and being the point of intersection of the centre line of the partition wall between the house now standing on the lot hereby conveyed and the one on the lot next northerly with the westerly line of Newark Avenue; thence along said centre line westerly parallel with Waldo Avenue and beyond to a depth of 45 feet, more or less to the westerly line of lot numbered 62 as the same is laid down on a map now on file in the Register's Office of said Hudson County and entitled "Map of the Estate of Samuel L. Walde, deceased, situate on Bergen Heights, Hudson City, Hudson County, N. J., made by G. I. Van Horn, Surveyor, on January 28th, 1863"; thence along said westerly line of lot numbered 62, a distance of 15½ feet southerly; thence easterly in a direct line and parallel with Waldo Avenue to Newark Avenue; thence northerly along the westerly line of Newark Avenue 19 feet more or less to the point of beginning.

Exhibit D1



Survey
of Jersey City, N.J.

EDWARD McQUILLAN.

Scale: 1 inch = 20 Feet
Surveyed by

July 15, 19[illegible].

D1

Exhibit D-2.

Deed by Elizabeth M. De Mott (formerly Elizabeth M. Staib) and John L. De Mott, her husband to Edward McQuillan, dated June 24, 1910, recorded in the Hudson County Register's Office in book 1074 of deeds p. 158, containing full covenants and describing two tracts of land, as follows:

FIRST TRACT: Beginning at a point in the westerly line of Newark Avenue, distant southerly from the southerly corner of Newark and Waldo Avenues, thirty-eight (38) feet, measuring along the line of said avenue being the point where the partition wall between the house now built on the lot herein described and the house now built on the lot next adjoining on its southerly side intersects said westerly line of Newark Avenue, thence running westerly through the centre of said partition wall, parallel with Waldo Avenue, a distance of forty-five (45) feet more or less to the westerly line of lot No. 62, as the same is laid down on a map on file in the Register's Office of said Hudson County and entitled, "Map of Estate of Samuel L. Waldo, deceased," situate on Bergen Heights, Hudson City, Hudson County, New Jersey, made by G. I. Van Horne, Surveyor, and C. E., January 28, 1863," thence northerly along said westerly line of lot No. 62 a distance of about fifteen and one half (15½) feet to the point where the southerly boundary of the lot heretofore conveyed by John D. Patch and wife to Daniel McAra and Margaret, his wife intersects it, thence easterly along said

boundary of McAra's lot, parallel with Waldo Avenue to the aforesaid westerly line of Newark Avenue, thence along the said westerly line of Newark Avenue, a distance of nineteen (19) feet more or less to the place of beginning.

SECOND TRACT: Beginning at a point in the southeasterly line of Waldo Avenue, distant southwesterly sixty (60) feet, more or less, from the south corner of Newark Avenue and Waldo Avenue, which point is also the north corner of a tract conveyed by Edward D. Adams and wife to the New Jersey Junction Railroad Company, by deed bearing date August 25, 1886, and recorded in the office of the Register of Hudson County, New Jersey, in book 426 of deeds, page 57 &c., and running thence southeasterly along the northeasterly line of lands of New Jersey Junction Railroad Co. one hundred (100) feet; thence southwesterly and parallel with Waldo Avenue, twenty-five feet (25) thence northwesterly and parallel with the first described boundary line, one hundred (100) feet to the southeasterly line of Waldo Avenue, thence northeasterly along said line of Waldo Avenue, twenty-five (25) feet to the place of beginning, containing fifty-nine one thousandths (0.059) acres of land more or less.

Exhibit D-11.

THIS AGREEMENT made the day of , 1920, between EDWARD McQUILLAN, of the City of Jersey City, County of Hudson, State of New Jersey, party of the first part, and MAGNOLIA CONSTRUCTION COMPANY, a corporation of the State of New Jersey, having the principal office in the City of Jersey City, aforesaid, party of the second part.

WHEREAS the party of the first part is the owner in fee simple of a certain parcel of land known as 112 Waldo Avenue, in the said City of Jersey City, which is more particularly described in a certain deed dated June 24, 1910, recorded in the Register's Office of the County of Hudson in book 1074 of Deeds for said County at page 158, &c., the said parcel of land being referred to in said deed as "Second Tract"; and,

WHEREAS the party of the second part is the owner in fee simple of a certain parcel of land known as 108 Waldo Avenue, in said City of Jersey City, which is more particularly described in a certain deed dated October 16, 1916, recorded in the Register's Office of the County of Hudson in Book 1239 of Deeds for said County at page 487, &c., the said parcel of land being immediately adjoining to and on the west side of said parcel of land owned by the party of the first part; and,

WHEREAS the party of the second part has erected a brick building upon its said parcel of land and the party of the first part alleges that part of the east wall thereof is upon his said parcel of land, and that said erection is a tresspass thereon, and the parties hereto are desirous of settling

all questions as to the ownership of said wall and all differences between them relating to the said alleged trespass; and,

WHEREAS there are encumbrances on the said brick building of the party of the second part, and the parcel of land upon which it has been erected, as follows, viz: The Business Men's Building & Loan Association having a mortgage which is dated December 13, 1918, and recorded in the Register's Office of the County of Hudson in Book 934 of mortgages at page 328, &c.; one Ripley Watson having an agreement dated December 13, 1918; for the benefit of the said The Business Men's Building & Loan Association for the assignment of rents of the said brick building, the said agreement being recorded in the Register's Office of the County of Hudson in Book 1299 of Deeds at page 128, &c.; one Cornella E. Watson having a mortgage on said property and other property, which mortgage is dated January 30, 1919, and recorded in the Register's Office of the County of Hudson in Book 937 of Mortgages, at page 390, &c.; one Max Berman having a mortgage on the said property and other property, which mortgage is dated March 3, 1919, and recorded in the Register's Office of the County of Hudson in Book 945 of Mortgages, at page 11, &c.;

WITNESSETH, That the parties hereto in consideration of the mutual promises and agreements herein contained, agree as follows:

1. The party of the first part, his heirs and assigns, shall be entitled at any time hereafter to use the said wall aforesaid, either wholly or to such height and extent as he or they may require for the erection of any building upon his said land

in the same way and to the same extent as though the said wall was property of the said party of the first part.

2. Said party of the first part, his heirs and assigns, in the erection of any such building upon his land, shall be entitled to extend the said wall and to build such extension along the line of the present wall, but not to a greater width than the wall now standing.

3. If it shall become necessary to the said party of the second part, its successors and assigns to repair or rebuild the whole or any part of the said wall, the said party of the second part its successors, and assigns may rebuild the same upon the lands upon which the same now stands erected and the same shall then be subject to all of the conditions of this agreement. The said party of the second part, its successors and assigns shall be under no obligation to rebuild or reconstruct the said wall or any part thereof but may build a new wall for the exclusive use of its property on its own land, without tearing down the said wall aforesaid, unless the entire demolition of the said wall should become necessary; and in such event, the said new wall shall be free of any claims or rights of the said party of the first part therein or thereto. It being the intention that if at any time the parties of the first part shall have made use of the present wall as hereinbefore provided for, then the said party of the second part, its successors and assigns in repairing or rebuilding the same, shall not damage or injure the property of the party of the first part nor remove the said wall from its present location, unless the entire demolition or removal of the said wall shall be necessary or

required, because of its physical condition of weakness. Nothing herein contained shall be construed or considered as an admission either express or implied that the lands upon which the said wall now stands erected or any part thereof is the property of the said party of the first part. In the event that the said wall requires such repairing or rebuilding as aforesaid, the expense thereof shall be borne by the said party of the second part, its successors and assigns; provided the necessity therefore is not caused by the said party of the first part; and if the said wall is so rebuilt entirely on the same spot upon which the same now stands erected, it shall be substantially of the same size as the wall now standing thereon.

4. The title of the respective parties in the land upon which the said wall stands shall in no way be affected by this agreement, but the rights of the parties hereto in said land shall remain the same with the same force and effect as though this agreement had not been executed, and if any one or more of the mortgages hereinbefore referred to or any other mortgage or encumbrance on said land at this time should be foreclosed, then the party of the first part is to have the right to press his present action in ejectment and for mesne profits with the same force and effect as though this agreement had not been executed.

5. Subject to the foregoing exceptions, the said wall shall be deemed to be a party wall in all respects.

6. This agreement shall be regarded as perpetual and at all times be construed as a covenant running with the land.

Statement as to Certain Exhibits.

AND for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, successors and assigns.

IN WITNESS WHEREOF, the party of the first part has hereunto set his hand and seal, and the party of the second part has caused its corporate seal to be affixed and attested by its secretary and these presents to be signed by its president, the day and year first above written.

..... (L.S.)

Signed, sealed and delivered
in the presence of:

MAGNOLIA CONSTRUCTION COMPANY

(By) .....
President

Attest:

.....
Secretary

Statement as to Certain Exhibits.

Defendant's Exhibits D-3, D-4, D-5, D-6, D-7, D-8, D-9 and D-10 are letters concerning the preparation of the agreement D-11, and it is agreed by counsel are not material or relevant to the subject-matter of this appeal and are omitted from this record by consent.

New Jersey Court of Errors and Appeals

MAGNOLIA CONSTRUCTION CO., Complainant-Appellant, *v.* EDWARD MCQUILLAN, Defendant-Respondent.	On Appeal from Court of Chancery. Heard Below Before FIELDER, V.C.

BRIEF OF APPELLANT.

State of the Case.

Complainant and defendant were the owners of adjoining properties. Complainant, in anticipation of building upon its property, had a survey made (p. 62, p. 102). The lines were staked. Complainant commenced to build a sixteen-family house upon its property next adjoining that of defendant (p. 63). It found that there was a fence erected by defendant within the line of complainant's property, as shown by the survey, and that there was also erected upon defendant's property a shed encroaching upon complainant's property, as shown by the survey. Defendant was present with the officers of complainant, and removed, with employees of complainant, the fence and the shed (p. 65). Defendant helped to run the line of complainant's wall (pp. 68, 69). Complainant's officers stated to defendant that the shed was encroaching six inches on complainant's lot, to which defendant replied, "All right, I am going to remove that right away," and he removed it

(p. 61). The line of complainant's building was fixed according to a cord which was stretched by defendant holding one end (p. 71). The foundation wall was built up to that line (p. 71). Nothing was said by defendant indicating that there was any question about the building erected by complainant being on its line until after the building had been finished and rented. The wall is four stories high (Photos C3-4-5).

Defendant swore that complainant's president came to him and told him he had a survey and that the shed on defendant's property was over on complainant's land, "according to his survey"; that complainant's president asked him to move it, whereupon he moved the shed. He participated in drawing the line. He says that he thought his shed was over on complainant's line (p. 90):

> "You say that before Mr. Stollman and Mr. Stollman's company commenced the construction of the building at 108 Waldo Avenue, they spoke to you about your fence encroaching over on his property? A. Yes, sir.
>
> "Q. And you testified that that was your judgment, too? A. No; I did not testify it was my judgment. I knew I was over.
>
> "Q. You knew you were over? A. I knew I was."

He says he did not realize that he was mistaken in his judgment that he was over until (p. 88) he acquired certain other property, and then:

> "A. I measured it, and Mr. ————, whose property I acquired lately, I measured from him over to the apartment, and it was not twenty-five feet, and I came to the conclusion that either Mr. ———— was over on me or the apartment was over on me."

Whereupon he had a survey made by Mr. Dunham (pp. 88, 113), which survey shows that com-

plainant and defendant were mistaken as to the line, and that, in fact, complainant, was over on defendant. The Henderson survey (that of complainant), on the contrary, shows (p. 102) that the line run by complainant and defendant is the true line.

The difference between the surveys, as pointed out by the Vice-Chancellor (p. 55), is that Henderson accepted the line of Newark Avenue, as built upon, as the true and recognized line of that avenue, and used the buildings on Newark Avenue as monuments from which to measure the distance from the line of Newark Avenue to complainant's lands as given in complainant's deed, whereas reference to other old and established property lines, all of which, says the Vice-Chancellor, can be located definitely from fixed and accepted monuments and from old maps on file in the Hudson County Register's Office, indicates that the buildings on Newark Avenue encroach on that avenue and that those buildings, therefore, do not mark the true line of Newark Avenue and that complainant's property cannot be accurately located and staked out by the method pursued by Henderson, and the Vice-Chancellor found as a fact that complainant's survey is inaccurate, and that complainant's building does encroach on defendant's lot as shown by defendant's survey.

After discovery by defendant of the fact that complainant's house appeared to encroach upon his land, and after ineffectual efforts had been made to get together, a suit in ejectment was commenced (p. 12), whereupon this bill was filed praying for an injunction, the theory of the bill being that there had been such conduct upon the part of defendant as that there was a practical location of the boundary line, and defendant was equitably estopped from proceeding with his suit

in ejectment, or that there was a license granted by defendant to complainant to occupy the land in question which should be protected by a court of equity. Defendant answered and also filed a counterclaim alleging that the parties had reached an agreement and prayed that complainant be compelled to re-execute a written instrument claimed by defendant to have been lost.

Upon the theory of practical location the testimony of defendant (pp. 90, 91) is of importance.

> "Q. What I want to know is: Did you take the fence down entirely? A. Entirely.
>
> "Q. You did not move it and set it up again? A. *No; no, his wall, we agreed his wall would be the fence. That was the condition.*"

It is suggested in the testimony of complainant's president that after defendant had seen this building erected defendant came to complainant and said (p. 76):

> "A. He said, 'I want you to buy my corner building. You will have to pay me $18,000. for the corner building.' That is what he told me; I should buy the land of him for $18,000. I said: 'I don't want to buy any land.'
>
> "Q. What did he say, if you did not buy? A. He said, 'If you don't want to buy the land, I am going to tear down the wall.' I said: 'What do you mean? What wall?' This is the first time he told me something about the wall.
>
> "Q. What did he tell you about the wall? A. He said: 'You encroach on my property?'"

Defendant denies this.

In any event the ejectment suit was started which would have the effect, if successful, of compelling complainant to slice off from their building a portion of it 100 feet long by four stories high by one foot wide.

Upon the matter of estoppel the Vice-Chancellor

treated the case as one of pure equitable estoppel, and he held inasmuch as there was no proof that defendant knew the true boundary line, it did not appear that defendant through some act done or statement made by him or by his silence when he should have spoken, influenced complainant to believe that it was building on its true property line and that complainant acted on a belief created by defendant and that both parties acted in ignorance of the actual facts, and therefore there was no estoppel. He did not consider the doctrine of practical location apart from the doctrine of equitable estoppel.

Upon the matter of license he held that defendant's case was not one of those in which the Court would enforce a parol license.

He held that defendant had failed to sustain the charges of the counterclaim and that there had been no meeting of the minds of the parties with respect to an agreement.

He thereupon dismissed the bill and counterclaim, and from that portion of the decree dismissing this bill this appeal is taken.

Before proceeding to the argument we desire to refer to the fact that the decree (p. 52), among other things, recites—"that the northeasterly wall of complainant's apartment house encroaches on defendant's lot at several points, varying from one and twenty-nine hundredths feet at the most northerly corner of said apartment house to thirty-six hundredths of a foot at the most easterly corner thereof."

Whatever may be the judgment of the Court upon the issue as to whether the bill should be dismissed it is submitted that the decree should be modified so that it will not appear that this finding is *res adjudicata* in the ejectment suit. Upon that issue, which is one purely of law, com-

plainant is entitled to his trial at law with a jury. The Vice-Chancellor did not need to determine that fact. The claim of the complainant was that, whether it encroached or not, it was entitled to have the suit in ejectment enjoined upon the ground of estoppel as applied in the doctrine of practical location. The issue before the Court of Chancery was not whether there was an encroachment, but whether there was a practical location which worked an estoppel and whether, because of that fact, the suit in ejectment should be enjoined.

We urge that the case is clearly within McKelway *v.* Armour, 10 N. J. Eq., 115, approved and applied by this Court in Anglesey *v.* Colgan, 44 N. J. Eq., 203, and Megie *v.* Bennett, 51 N. J. Eq., 281; and that the Vice-Chancellor instead of following the doctrine of the McKelway case as recognized by this Court in the Anglesey and Megie cases, treated it as circumscribed by what the Chancellor said in Kirchner *v.* Miller, 39 N. J. Eq., 355. The Vice-Chancellor, while referring to the McKelway case, does not mention the two cases in this Court directly in point.

ARGUMENT.

I.

Relief should have been granted complainant upon the doctrine of practical location.

The fixation of boundary lines by practical location is well recognized in the law. In some instances the rules applicable to estoppel *in pais* apply; in other instances, the rules of strict contract. The Vice-Chancellor in his conclusions has not referred to this doctrine, treating the case rather as one of strict estoppel *in pais.*

In this, we urge, he erred.

A critical examination of all the cases which have been decided in the various jurisdictions upon the matter of the fixation of boundaries by practical location is impossible. They are varied. Many of them contain statements of broad import which are contradicted by others. The statements of the judges are not at all in harmony.

So far as applicable to this case, however, these rules may be fairly deduced, we think, from the authorities.

First.—Where the boundary between two owners is doubtful, or where there is a dispute and the owners agree upon a line and settle the line, the fixation by practical location is binding, even if there be no writing and whatever the true line may be, and even if the parties have not built to the line; provided there is a fence or something to indicate the line.

Second—If the owners intended, the line being one which can, with certainty, be determined, to agree upon the true line, and by mistake agreed upon an inaccurate line, either party may disavow the agreement, provided the elements are present which would permit equity to relieve against a mistake.

Third.—If the owners intended to agree upon the true line, but by mistake agreed upon an inaccurate line, and, acting upon that mistake, one of the parties has changed his position so that the parties cannot be put in *statu quo* without loss and injury to one of the parties, the other party cannot repudiate upon discovering the mistake.

There are other rules, of course, which are applicable to cases of fraud and misrepresentation or concealment of material facts, but none of these apply in the case at bar, for here there is no charge

or intimation that complainant concealed or knowingly misrepresented any fact, or that it failed in any duty toward defendant, or that it was negligent.

It is submitted that the case at bar falls within both the first and the third rules heretofore referred to.

We have examined a great many cases bearing upon the subject-matter, and while there may be found general language in some of them to the effect that a boundary line agreed upon by mistake is not binding, it will always be found that the Court is dealing with the concrete situation before it, and that the language is applicable only to the particular situation dealt with. While a boundary line agreed upon by mutual mistake may not be binding under some instances, under quite different conditions is may be binding. The rule is better expressed that a boundary line agreed upon under such a mistake as that a court of equity will relieve the parties against its consequences, will not be binding upon the parties.

Of course, it is a *sine qua non* for relief in equity against the consequence of mutual mistake that the parties may be put in *statu quo.*

There is no case which we have been able to discover save perhaps Proctor *v.* Putnam Machine Co., 137 Mass., 159, hereafter noted, in which a court has compelled a land owner to demolish a building, or a substantial part of a building, where the building has been erected upon a line agreed upon by the parties upon the ground that the party complaining was laboring under a mistake at the time he made the agreement. There are, on the other hand, many cases where the boundary line has been agreed upon by mistake and the agreement has been held not binding, but these are cases in which no improvements had been made and

where the attempt has been to hold the parties to a naked agreement into which they had entered by mistake.

The general rule is stated under the title "Boundaries," 4 Ruling Case Law, Sec. 72, page 131:

> "The validity of parol agreements establishing disputed boundry lines may operate by way of estoppel. * * * Similarly it has been held that an agreement fixing a boundary line under the belief that it is the true line, when in fact it is not, is not binding, and may be set aside by either party when the mistake is discovered, unless there is some element of estoppel which prevents it, as where the rights of innocent third parties have intervened. Under this principle even a parol agreement as to boundaries may be enforced when it would be inequitable for either party to ignore it and to endeavor to set up the true line. The erection of improvements after entering lands in accordance with an agreement as to the location of a boundary line, may amount to an estoppel, but the mere making of declarations and admissions, as to position of boundary lines, when made in good faith and by mistake and in ignorance of the true location of the line does not work an estoppel."

The author then says:

> "In a case where there is no dispute or disagreement about the true boundary parties are not estopped from asserting the true boundary by acquiescence in the maintenance of buildings and fences erroneously located, where such acquiescence is for less than twenty years."

Reference to the case of Hass *v.* Plantz, 56 Wis., 105, 43 Am. Rep., 699, cited by the author as authority for this last statement, shows that the Court there was speaking not about the maintenance of

buildings *and* fences, but about "building and maintaining OF fences," which is quite a different thing, and the Court held that there was no evidence to support the instruction of the Court which was under discussion. The legal sufficiency was not disputed of the law contained in the following instruction:

> "The second instruction assumes that there was an agreement as to the line, and thereby an adoption of such line, and that the plaintiff built his fence and made his improvements in accordance therewith, when there was no evidence whatever as to such an agreement."

In the case at bar there is plenary evidence of such an agreement.

The general doctrine is also considered in 9 Corpus Juris, under title "Boundaries," Sec. 192. etc. In Section 192 the author says with respect to the theory of practical location:

> "In legal theory the doctrine of a practical location is equitable in its nature, arising from the principle of estoppel *in pais*, the fundamental conception of which is the doing of an act by a party in interest, or his acquiescence in the doing of an act by another which would naturally lead to the inference of the existence of a status or the establishment of a condition upon which either party in interest may act to his prejudice if the act be disavowed. It is used to preclude a party from maintaining by evidence that which he had before expressly or tacitly denied; or disproving that which he has before expressly or tacitly admitted, when the other party has acted upon the faith of the admission or denial in such a manner that he will be injured unless the same is held conclusive."

And Section 193.

This statement of the author is taken from the

opinion of Justice Minturn in Alt *v.* Butz, 81 N. J. L., 156, at page 158, with which case we shall subsequently deal.

Washburn on Real Property, 6th Ed., Vol. 3, Sec. 1903, page 87, says:

> "Numerous questions have arisen between parties owning adjoining lands from fixing the dividing-lines between them, or constructing division-fences separating them, wherein it has been attempted to apply the doctrine of estoppel, excluding the right to change these, if afterwards found not to conform to the true division lines. Many of these cases will be found collected in 2 Smith's Leading Cases (5th Am. Edition, p. 649). But the decisions have been so variant, that a few of them ought properly to be mentioned before attempting to deduce any rule applicable to such cases."

The author then considered numerous cases holding that there might be practical location, and some holding that where the line is practically located by mistake it might be subsequently corrected, and finally he says (Sec. 1903, pp. 91-92):

> "In the case of Adams *v.* Rockwell, cited in note 1 on the preceding page (16 Wend., 285), an element of estoppel was recognized as applicable to cases where the line had been agreed upon by mistake, and could be ascertained, and that was in the words of the headnote: 'If, during such acquiescence, expensive improvements, by the erection of buildings or otherwise, had been made by the occupant of the premises in dispute, the owner would have been estopped from setting up the true line.'"

A leading case cited for the rule that where the parties intend to agree upon the true line but by mistake agree upon a false line there is no estoppel is Schraeder Mining and Manufacturing Com-

pany *v.* Packer, 129 U. S., 688; 32 L. Ed., 760. The headnote of that case is:

> "Owners of adjacent tracts of land are not bound by consent to a boundary which has been defined under a mistaken apprehension that it is the true line, each claiming only the true line wherever it may be found; and in such case, neither party is precluded or estopped from claiming his own rights under the true one, when discovered."

But in that case there was not involved the building of buildings by one party upon the faith of the mistake. The case expressly recognizes the rule that if there were a dispute with respect to the line the mistaken line would be binding.

Nor was there any element of one of the parties building upon the faith of the mistake in Knowlton *v.* Smith, 36 Mo., 507; 88 Am. Dec., 152. In that case the Court expressly said that the agreement would not estop one of them from claiming to the true line upon its discovery, provided the rights of innocent third parties had not intervened.

Nor was there any such element in Randleman *v.* Taylor, 94 Ark., 511; 127 S. W., 723; 140 Am. State Reports, 141, and the Court said in that case (p. 143):

> "In such cases the agreement is not binding, but may be set aside by either party when the mistake is discovered unless there is some element of estoppel which prevents him."

But in Le Compte *v.* Lueders, 90 Mich., 495; 30 Am. State Reports, 450, the Court held:

> "Purchasers of town lots have the right to locate their lot lines according to the stakes set by the platter of the lots, and no subsequent survey can unsettle such lines.

> "It was said by Mr. Justice Cooley in that case (Flynn *v.* Glenny, 51 Mich., 580), 'The question afterwards is, not whether the stakes were where they should have been in order to make them correspond with the lot lines as they should be if the platting were done with absolute accuracy, but it is, whether they were planted by authority, and the lots were purchased and taken possession of in reliance upon them. If such was the case, they must govern, notwithstanding any errors in locating them' " (p. 452).

In Idaho Land Co. *v.* Parsons, 31 Pac. Rep., 791, the line was one which could be ascertained with certainty. It had never been run. The owner of one of the tracts suggested to the husband of the owner of the other tract that they employ a surveyor to run the line. The husband responded that he was a surveyor, and would himself run the line. He ran the line, he carrying the surveying instrument and the other party carrying the chain. Upon this line a fence was built. Subsequently the grantee of the wife of the husband who had run the line attempted to recover upon the claim that the line run was not the true line, "that the appellant's grantor, and respondent undertook to find or ascertain the true boundary line between the tracts of land; that a mistake was made as to its true location, and for that reason appellant is not bound by the line established," citing Schraeder Mining and Manufacturing Company *v.* Packer, 129 U. S., 688; 32 L. Ed., 760; Hatfield *v.* Workman, 14 S. E., 153; Quick *v.* Butler, 28 N. E., 926. The Court considered these cases and distinguished them. It did not decide the case upon the ground of adverse possession. It said (p. 792):

> "This decision, however, is not based on that ground. We only state this as a circum-

> stance that might justly be taken into consideration. We think that, under the facts of this case, it would be unjust and inequitable to permit the appellant to recover said land."

The reasons given by the Court for distinguishing those cases heretofore referred to apply with equal force to distinguishing them from the case at bar. The Court finally concludes (p. 793):

> "When coterminous proprietors of land, in good faith, agree upon, fix and establish a boundary line between their respective tracts of land the line so established is binding upon them and those holding under them."

An interesting case is Levy *v.* Maddux, 81 Tex., 210; 16 S. W., 877. Defendant desired to build a house and had a survey made. A surveyor was also engaged by the plaintiff, and another survey made, and the two surveys agreed. Thereupon plaintiff and defendant agreed that the line as fixed by the surveyors should be the line between them and upon the faith of that agreement defendant built the wall of his house on the agreed line. The plaintiff afterwards claimed that the line was erroneous. The Court, in affirming the judgment for defendant, said (p. 878):

> "This court has frequently passed on questions of boundary, and, as has been frequently cited, these ~~statements~~ settlements of boundary are common, beneficial, approved, and encouraged by the courts, and ought not to be disturbed, though it was afterwards shown that they had been erroneously settled. Convenience, policy, necessity, justice, all unite in favor of such an amicable settlement. While the large majority of cases passed upon in this State present questions of acquiescence, partition, compromise and arbitration, still agreements of a recent date where there was doubt and whether the parties were right or wrong in

> their belief that the line they established and agreed upon as the boundary of their land was precisely where it ought to be, have been encouraged, favored and upheld in a number of cases."

The doctrine of practical location has been recognized in all its force in this State and the intimation in the case decided is that if a line be located by mistake, if there be an equitable consideration present in favor of the line located, neither party can repudiate the agreement and that one equitable consideration is the building of improvements by one of the parties.

In Baldwin *v.* Shannon, 43 N. J. L., 597, the Court held that where there was no ambiguity or uncertainty in the description, and, therefore, evidence of practical location was properly excluded, and said (p. 602):

> "Nor is there any element appearing in the case from which an estoppel can be deduced as arising from such location. *No improvements were made by the defendant,* upon land of the plaintiffs by the inducement of any act or work of the plaintiffs which, in law, would exclude the plaintiffs from asserting their right to the ground covered by their deeds." (Italics ours.)

In the case at bar the improvements were made upon the lands in question upon the faith of the acquiescence by the owner of the adjoining lands in the correctness of the line.

The act which creates the estoppel against defendant is the act of acquiescence. It was this act of acquiescence which induced complainant to build.

It is the settled law of this State that where there is doubt with respect to a boundary, practical location is binding and conclusive upon the

parties even if, after the practical location is made, it appear that the correct line could have been established and that the one established by practical location is incorrect.

Alt *v.* Butz, 81 N. J. L., 156;
Spottiswoode *v.* Morris & Essex R. R. Co., 61 N. J. L., 322;
Albanesius *v.* Peerless Rubber Co., 75 N. J. L., 340;
McCullough *v.* Absecon Beach Land and Improvement Co., 48 N. J. E., 170;
Doherty *v.* Egan Waste Co., 91 N. J. E., 400.

But it is likewise recognized that even where there is no ambiguity and the parties intend to run a correct line and in error run an incorrect line the parties may be precluded from afterwards taking advantage of their mistake.

In Den D. Haring *v.* Van Houten, 22 N. J. L., 61, the Supreme Court said, at page 69:

> "But if there were doubts upon the point, nay, if it were clear that the plaintiff's lot was located erroneously and against the intention of the parties to the conveyance, I am of opinion that the acts of the plaintiff since he came into possession, and the influence of those acts upon the rights of others, conclude him as to the location. If the plaintiff, upon the purchase of his lot, had erected a building sixty-nine feet in length, covering his entire front, and if the entire block had subsequently been sold and built upon, all the lots conforming to the plaintiff's location, and depending upon it, it would not be pretended that the plaintiff could afterwards, upon discovering that his building encroached upon the street oust the next adjoining proprietor, and he the next, thus unsettling the titles throughout the entire block. If the mistake were discovered within a year after it occurred, and after the

> buildings were erected, it would be too late to correct it."

The only case, the language of which goes to the extent of indicating that, notwithstanding the erection of a structure by mistake, there is no estoppel is that of Proctor *v.* Putnam Machine Company, 137 Mass., 159, in which the Court recognized that a different rule had been established in other States, but declined to consider the authorities from the other states holding that the matter had been settled in Massachusetts. A reference to the cases referred to by the Court indicates, it seems to us, that the matter had not been settled.

In Tolman *v.* Sparhawk, 46 Mass., 469, relied upon by the Court for authority, there had been no improvements. The Court cited Adams *v.* Rockwell, and said, page 477:

> "However this may be, we are well satisfied, that on principles of law well established, it (equitable estoppel) cannot so operate, where the agreement to establish an erroneous line is founded on a mistake; the parties supposing the line agreed upon to be the true boundary; nor unless the occupant shall have made improvements on the premises, between the true and the erroneous lines, exceeding in value the value of the land without such improvements; nor even then, if the occupant making the improvements may be entitled to recover from the owner of the land the value of the improvements. * * * In the second place, whatever improvements have been made by the tenants, they will be entitled to receive the value of them from the demandant, unless she should elect to relinquish her estate according to the provisions of the Rev. Sts. c. 101, Secs. 29-34. And thus equal justice will be done to both parties."

In Proprietors of Liverpool *v.* Prescott, 7 Allen (89 Mass.), 494, the Court held, page 496:

> "We are of opinion that it was rightly held at the trial that there is no estoppel under such circumstances. There is nothing in the case to show that there was any 'standing by,' and permitting the expenses to be incurred without notice, which was the case put in Thayer *v.* Bacon, 3 Allen., 165, 85 Mass., 163."

In Thayer *v.* Bacon, 85 Mass., 163 (3 Allen.), the Supreme Court said, page 165:

> "If the demandant, with a knowledge or reason to believe that the tenant supposed the lines run by the surveyor were the true lines, stood by, and allowed the tenant, without notice or objection, to make expensive outlays upon the premises, he might be estopped from denying that he had adopted the line which was the basis of the tenant's action. But the prayer for instructions wholly omits the element of any knowledge by the demandant of the tenant's expenditures."

The case of Gray *v.* Kelley, 190 Mass., 184, 76 N. E., 724, referred to by our Supreme Court in Alt *v.* Butz, 81 N. J. L., at page 159, is applicable. In that case it was held that the statement that the owner of land, when a wall was being erected by the adjoining owner on a line which varied from the record boundary, that he was glad the wall was being built straight, and that "we will give and take," was relevant in an action involving the location of the boundary, as tending to show a present exchange sufficient to support title by adverse possession, and not merely a willingness to exchange in the future.

In Katz *v.* Kaiser, 154 N. Y., 291, 48 N. E., 532, referred to by the Court in Alt *v.* Butz, *supra*, the Court of Appeals of New York said:

> "It is the settled rule in this State, resting upon public policy, that a practical location

> of boundaries, which has been acquiesced in for a long series of years, will not be disturbed" (p. 533).

And in St. Bede College *v.* Weber, 168 Ill., 324, 48 N. E., 165, likewise referred to by the Supreme Court, the Illinois Supreme Court said, page 167:

> "It has been held in many cases that where owners of adjoining lands agree upon the dividing line, take and hold possession of their respective tracts, and improve the same in accordance with such division, each party will be estopped from afterwards asserting that the line so agreed upon is not the true line, although a sufficient time has not elapsed to raise the bar of the statute of limitations. * * * In the case at bar the court instructed the jury that mere acquiescence in the location of this alleged division line was not sufficient to establish it as the division line, but that the preponderance of the evidence must show that such line was agreed upon by the then owners of the land, and that they and their successors occupied according to it, and acquiesced in it as such division line. While there is room for argument upon the question of fact as to whether or not there was such alleged agreement, we cannot say that the jury were not authorized to find as they did, and we can not see that they were misled to the prejudice of the plaintiff by the instructions."

And this case was followed by the later Illinois case of Steidl *v.* Link, 246 Ill., 345, 92 N. E., 874, in which the Illinois Court subscribed to the doctrine. It seems to us, that, if there was no knowledge upon the part of the owner, nevertheless, if he agreed with the adjoining owner with respect to a line, although that line might have been reduced to certainty, and improvements were built in accordance with the line so agreed upon, there was estoppel.

The defendant in the case at bar does not deny

the practical location. He cannot deny it. He himself swore (p. 91), "No; no, his wall, we agreed his wall would be the fence. That was the condition."

He says that he should be relieved from this agreement which has been acted upon by complainant because of mistake.

But there are two essentials necessary before relief can be granted upon that ground. The mistake must not have resulted from the defendant's own negligence. Nor will it be relieved against "if the party could by reasonable diligence have ascertained the real facts nor where the means are open to both parties and no confidence reposed." Nor will relief be granted upon the ground of pure mistake unless the parties can be put in *statu quo.*

In the case at bar complainant employed a surveyor to make the survey before it ran its line. What more could it have done? That survey showed that defendant's shed and fence encroached upon the land of complainant. Defendant's attention was drawn to this fact. He was advised that the survey so showed. It did so show. There was no fraud or concealment or suggestion thereof. Defendant upon being presented with this state of affairs has an election either to acquiesce in the survey made by complainant's surveyor, or to dispute it. He might have stood upon his line as it was and required complainant to bring suit against him or he might have done that which complainant did, retain a surveyor and have a survey made. Had complainant instituted suit in ejectment and recovered upon the strength of this survey, defendant not defending because he thought the survey was correct, could he subsequently avoid the judgment, after complainant had built, because he was mistaken? Is he in any

better position because he did not require suit but acquiesced before suit was brought? We do not refer to the legal situation but to the practical equitable situation.

He might from the first at least have done that which he did do immediately after complainant's building was erected, to wit (p. 88):

> "A. I measured from him over to the apartment and it was not twenty-five feet, and I came to the conclusion that either Mr..... was over on me or the apartment was over on me."

What he did do was to accept the survey made by complainant's surveyor. By accepting that survey he made the complainant's survey his own. He adopted it. The surveyor was not an employee of the complainant. He was an independent contractor, licensed by the State, and made what he considered to be a proper survey. Adopting the survey which was produced by complainant, defendant acquiesced and removed his fence and buildings, knowing that complainant intended to erect a substantial building and agreed with complainant that (p. 93), "his wall would be the fence; that was the condition." Perhaps he did *not* know the true line, but he *did* know that complainant was relying on his acquiescence in the line as shown upon the survey, and that relying upon that acquiescence intended to build a building.

As stated by the United States District Court, 173 Fed., 319 (Murray *v.* Paquin), page 329, the means of knowledge was open to defendant as well as to complainant; the defendant might have made measurements or he might have had a survey made. He did neither. Can he now, after complainant has acted upon his acquiescence, re-

pudiate that acquiescence when the means of knowledge was as open to him at the time he acquiesced as now?

In Murray *v.* Paquin, 173 Fed., 319, there was involved the purchase of land. The contract had been executed. The lot was described by metes and bounds. A subsequent survey disclosed that the westerly boundary—that the back end of the lot was further easterly than was supposed by either party and ran through the barn. It was sought to rescind upon the ground of mistake. The Court denied relief, saying (p. 328):

> "* * * the record shows that they had the same opportunity the defendant had for getting the true facts, and failed to avail themselves of the information which was readily at hand. They were furnished defendant's deed to the property and the chain of title for their examination. They placed the examination of the title in the hands of competent attorneys, and altogether should have known just as well as defendant could have known everything about the lot and its proper and true boundaries. * * * What is now said to be the truth about this strip of land was not known to either party at the time of sale. It could have been ascertained by the defendant by careful examination of the deeds and a simple measurement of the lot. The defendant, Murray, could have ascertained it in exactly the same way and had the same opportunity for doing so. It was a mutual mistake—an honest mistake; both parties being in ignorance, and both having the same opportunity for ascertaining the truth."

The Vice-Chancellor seemed to think that there was something to be attributed against complainant because it had the survey. He said:

> "In fact, complainant had better opportunity than defendant to know the true situa-

> tion, because of its survey, and it was the result of its own act and opinion that it built on the line fixed by its surveyor and not because of anything defendant said or did."

Complainant was not negligent. It obtained a survey; and for that is it to be punished? The Vice-Chancellor holds that the survey was incorrect, but complainant did not know that. Defendant, on the other hand, did not obtain a survey. He accepted the survey of complainant.

Complainant did not build its building, as the Vice-Chancellor said, as the result of its own act and opinion. It built its building because defendant acquiesced in the survey of complainant. Defendant helped to run the line. Defendant agreed that the wall of the building should be the boundary line.

It is, therefore, submitted that, under the cases, assuming now that the line was one which was not in dispute or uncertain and that it was fixed by the parties by mistake, there are equitable considerations present which prevent defendant from taking advantage of his mistake, and that the case is within the language of Mr. Justice Minturn in Alt *v.* Butz, 81 N. J. L., 156, at page 158.

Mr. Justice Minturn said:

> "In legal theory the doctrine of a practical location is equitable in its nature, arising from the principle of estoppel *in pais*, the fundamental conception of which is the doing of an act by a party in interest, or his acquiescence in the doing of an act by another which would naturally lead to the inference of the existence of a status or the establishment of a condition upon which either party in interest may act to his prejudice if the act be disavowed."

In the case at bar the acquiescence of defendant in the building of this building under the

circumstances naturally led complainant to the inference of the establishment of the boundary as a status.

Upon that status complainant acted by erecting its building.

This condition existing,

> "the doctrine is used to preclude a party from maintaining by evidence that which he has before tacitly admitted when the other party has acted upon the faith of such admission upon the ground that he will be injured unless the same is held conclusive."

The learned Justice in that case also said that this rule applied to the doctrine of practical location and that it presupposed a dispute or an uncertainty between adjoining owners regarding the true line. But, as indicated by the cases heretofore cited, that dispute or uncertainty may be a dispute or uncertainty arising merely because the line has not been run. It does not require that the line be incapable of ascertainment. If it did most of the learning upon the subject has been beside the point. Even if the line is certain and is fixed by mistake, nevertheless, under the cases heretofore referred to, including in this State, Den Haring *v.* Van Houten, there may be a practical location by mistake which will be held conclusive if one of the parties has acted to his prejudice.

The decision in Alt *v.* Butz, 81 N. J. L., 156, has no application to the case at bar, for in that case, as Justice Minturn says:

> "At the time the alleged agreement was made the parties knew what the proper line was and they were aware of the fact that the old building was over the line."

It being found that *each party knew* where the line actually was and that the old building was

over the line, consent that the new building should likewise be built over the line was clearly in violation of the Staute of Frauds. There was no play in the case for the doctrine of practical location. The statement of the Court *obiter,* with respect to the effect of a mistake, is correct so far as it goes, but it does not take into consideration a case in which improvements have been made by one party relying upon the act said to have been induced by mistake.

The broad statement of the Massachusetts Court in Proctor *v.* Putnam Machine Company 137 Mass., 159, is opposed to the weight of authority and leads to manifest inequity. It is recognized by the Massachusetts Court that some decisions in other States have established a different rule.

But the facts in the case at bar are sufficient to bring it within the first rule heretofore stated, that is: That where there is any doubt or uncertainty with respect to a line and the parties agree upon a practical location, that location is conclusive, and neither of the parties subsequently can show the true line even if it can be ascertained.

That this is the law is established by the cases.

> La Mont *v.* Dickinson, 189 Ill., 628; 60 N. E., 41.

Steidl *v.* Link, 246 Ill., 345; 92 N. E., 874, in which case the Court said (p. 875):

> "Where the owners of adjoining lands agree upon a dividing line which is in dispute between them, and each party takes possession in accordance with such agreement, neither party can afterwards assert any rights contrary to such agreement. * * * It would be manifestly inequitable to permit plaintiff-in-error to repudiate his agreement with reference to the location of this building after

defendants-in-error had expended money in erecting a building upon their lot."

Kitchen *v.* Chantland, 103 Iowa, 618; 8 Am. & Eng. Anno. Cases, 81;
Albanesius *v.* Peerless Rubber Co., 75 N. J. L., 340;
Doherty *v.* Egan Waste Co., 91 N. J. E., 400,

and cases cited.

What is meant by uncertainty? In the case at bar complainant retained a competent surveyor who made a survey which indicated that the line is at the place which was agreed upon by the parties. Subsequent to the erection of the building defendant retained an equally competent surveyor who made a survey which indicated that the line is not at the place agreed upon by the parties. Each surveyor testified, complainant's surveyor, page 102; defendant's surveyor, page 113. The Court comes to the conclusion (p. 55) that defendant's surveyor is right and that complainant's surveyor is wrong, and for the reasons stated on page 55.

Where two surveyors, equally competent, produce surveys showing a different state of facts, it would seem that there was some uncertainty. When complainant received its survey it went upon the land and there discovered that defendant had buildings erected upon its land as indicated by the survey. Immediately there was a silent dispute between the parties. Complainant, by its survey, insisted that its line ran as there shown, and defendant, by the maintenance of his building, insisted that the line was not as shown by complainant's survey. Whereupon the parties got together and defendant agreed to take as the true line that shown by complainant's survey.

In order that the doctrine of practical location may have play, it is not necessary that the uncertainty be of any particular degree, nor is there necessity that there should be a dispute in addition to undertainty, nor is there any necessity that the dispute, if required, should be of any particular bitterness.

As the Iowa Court said in Kitchen *v.* Chantland, 130 Iowa, 613; 8 Am. & Eng. Anno. Cases, 81, at page 83:

> "Contrary to defendant's contention, the rule of law is well settled, that if there be doubt *or* uncertainty *or* a dispute as to the true location of a boundary line, the parties may by parol fix a line which will, at least when followed by possession with reference to the boundary so fixed, be conclusive upon them, although the possession may not have been for the full statutory period." (Italics ours.)

The mere fact that the doubt can be removed and the line run with certainty does not prevent the doctrine operating if, at the time the line was agreed upon by practical location, there was doubt or uncertainty.

It is submitted, therefore, that there was such doubt as to the actual location of the line as to make the practical location agreed upon by the parties conclusive in any event it having been acted upon.

II.

Complainant is entitled to maintain his building upon the line in question by virtue of parol license.

Upon this point the case is within the principle of:

> Raritan Water Power Co. *v.* Veghte, 21 N. J. E., 463;
> Morton *v.* Morton, 47 N. J. E., 158;
> Van Horn *v.* Clark, 56 N. J. E., 476.

In Polakoff *v.* Helphen, 89 Atl., 996, the Court said, page 998:

> "An examination of these cases will disclose the accepted rule in this state to be that, when the agreement or license, whether founded in parol or in writing, is clearly established, and includes either express or implied authorization by the licensor for the licensee to occupy the land of the licensor, and the license has been executed by possession in such manner that its revocation would be operative as a fraud upon the licensee, a court of equity will protect the licensee against such a revocation, and preserve for the licensee such rights as the licensor expressly or impliedly conferred."

In the case at bar while it is true that, at the time the agreement was made, that complainant should erect its building along the line fixed by the parties, neither of the parties supposed that the building to be erected would be on the lands of defendant, nevertheless, it must have been assumed by the parties at the time that if, in fact, the line was not the true one and the building did, in fact, encroach upon the land of defendant, it might be permitted to remain there. The conduct of the parties was such as that it must be inferred

that defendant intended to permit complainant to maintain its building upon the land of defendant, if, in fact, the building encroached, for any other understanding would have been absurd.

It cannot for a moment be assumed that complainant and defendant intended that complainant might erect its building, but if it subsequently appeared that the line was not the true one it should tear its building down.

The acquiescence of defendant in the line, coupled with the erection of the building by complainant in accordance with that line must be considered a license by defendant to complainant to use the property for the purpose of erecting a building, whether the property be the property of defendant or complainant.

The Vice-Chancellor suggested that the contract showing an implied license must be proved to the point of demonstration. It was, we submit. The Vice-Chancellor further suggests that an implied license is not sufficient, but that is contrary to the statement of the Court in Polakoff *v.* Halphen, 89 Atl., 996.

LASTLY.

The case is within the doctrine of McKelway v. Armour, 10 N. J. E., 115, approved by this Court in Anglesey v. Colgan, 44 N. J. E., 203, and again by this Court in Megie v. Bennett, 51 N. J. E., 281.

In McKelway *v.* Armour, 10 N. J. E., 115, the complainant had erected a valuable dwelling house, by mistake, on the land of defendant. Defendant lived in the vicinity; saw complainant progressing from day to day with the improvements, did not suspect the erections to be upon his

lot until some time after their actual erection when, to his surprise, he discovered the mistake.

The Court relieved complainant, giving defendant the option either to take the lot with the improvements and pay the value of the improvements to be ascertained upon equitable principles by a master, or permit complainant to take the lot upon making payment to defendant of an equitable consideration. In that case it was said, page 118:

> "It is very true, as was urged upon the argument, the complainant is the most to blame in this matter. A diligent examination of the deed to Armour, and an actual measurement of the land, would have decided the difficulty. But it was a vacant lot of land, plotted out upon a map only, and the mistake was one which might occur to the most careful and diligent man. *The fact of Armour's standing by, and participating in the mistake, is an important feature in the case.*"

It appears, therefore, in this case that complainant was the more to blame for the mistake, and yet relief was granted to him.

In the case at bar there was no negligence on the part of complainant whatsoever. It did what it could. It engaged an independent surveyor. If there was any negligence, it was on the part of defendant who accepted, without question, the survey made by the independent surveyor.

The Court below distinguished the case at bar from the McKelway case by the fact that complainant's survey had been accepted by defendant as the true line; that he was not in a position to urge any objection and, therefore, acquiesced. But in the McKelway case the situation was stronger in favor of defendant for he had no knowledge whatever that complainant was building upon his land. No question was raised about it. In the instant case there *was* a question raised and acquiescence

by defendant. The length to which the Court intended to go in the McKelway case is indicated by what the Chancellor said in Kirchner *v.* Miller, 39 N. J. E., 355, cited by the Court below. The Chancellor said, page 358:

> "Although in that case Armour saw McKelway building on his land, he did not know or suspect that the building was being erected on his land, but supposed it was being built on McKelway's land. The decision seems to have been based on the ground of mutual mistake. The court, in fact, compelled Armour, who was in nowise in the wrong, to sell his property to McKelway at a price to be fixed by the court, or to exchange properties with McKelway, or to pay for the improvements which McKelway had put on his, Armour's lot, although they had been so put on that lot, not only without Armour's knowledge, but without any suspicion on his part that McKelway was putting them on his, Armour's property. The principle of the case is that where one by mistake puts improvements on another's land, mistaking it for his own, equity will, in a proper case, compel the latter to sell and convey the land to the former, at a price to be fixed by the court, unless he will consent to pay for the improvements. The exercise of such a judicial power, unless based upon some actual or implied culpability on the part of the party subjected to it, is a violation of constitutional right."

But as to this latter statement see what the Court of Errors and Appeals said in the Anglesey case, 44 N. J. E., 203, at page 209.

The Chancellor indicated in the Kirchner case, at page 359, that the McKelway case might have gone too far and that the doctrine should not be enforced against a person who did not know at the time he stood by that the land upon which the

building was being built was his and not that of the person building.

Here again the later opinion of the Court of Errors and Appeals in the Anglesey case must be considered, for the Court of Errors and Appeals expressly approved the McKelway case, realizing its import, for the Court said (p. 209):

> "It will be observed that in this case relief was granted to the complainant, although it was adjudged that he was more in fault than his opponent."

The Chancellor in the Kirchner case, after referring to the Armour case, as I have indicated, distinguished it by holding (p. 360):

> "To warrant the interference of equity in favor and upon the application of the person who has expended his money upon another's land, there must obviously be some hardship against which he ought in conscience to be protected; as that through his mistake he has expended money upon another's land, of which that other ought not, under the circumstances, to have the benefit. Where there is no hardship there is no ground for interference. This case is not one for the application of the doctrine. In McKelway *v.* Armour, the complainant had built a valuable dwelling-house upon the defendant's land, which he must lose unless the court granted him relief."

In the Kirchner case there was a mistake on the part of the surveyor of the complainant and a building was built on the land indicated by the survey. Defendant knew that the complainant was building his building, but did not participate in the fixation of the line nor had he any suspicion of an encroachment. The building which was erected, however, was a wooden building (p. 360), and the cost of removing that part of it which was

on defendant's land and closing up the side again would not exceed one hundred dollars.

There was no reason, therefore, for the interference of equity. The Court said:

> "The complainant's claim is that inasmuch as he, misled by the mistake of the surveyor, honestly but mistakenly assumed that he was the owner of a strip of land which in fact belonged to the defendant, and consequently built a part of his house on it, he is, on that state of facts alone, although the defendant neither did nor said anything to confirm him in his mistake, and in fact did not know that there was a mistake, entitled in equity to a decree that the defendant convey the land to him at a price to be fixed by the court, or accept land on the other side of his lot in exchange for it."

In the case at bar defendant participated in the mistake.

In the case of American Dock and Improvement Co. *v.* Trustees of Public Schools, 39 N. J. E., 409, at page 450, the Chancellor expressly approved the doctrine of the McKelway case, saying:

> "A notable instance of its application is to be found in McKelway *v.* Armour, 2 Stock., 115, where one upon whose land another had, by his own mistake alone (supposing the land to be his own property), built a house, was compelled to accept the alternative of conveying the land to the latter for due consideration, or paying for the improvements."

Haggerty *v.* McCanna, 25 N. J. E., 48, was cited by the Court below. It has no application to the case at bar.

The Court said, page 51:

> "On the argument it was urged that on the ruling of this court in McKelway *v.* Armour,

2 Stockt., 115, the relief sought might be granted. But the decision in that case was expressly put on the ground of the complainant's mistake as to the location of a vacant lot, plotted out on a map only, a mistake which the court said was one which might occur to the most careful and diligent man, *and the fact that the defendant stood by and participated in the mistake, which latter consideration was regarded as a most important feature in the case.* In the present case the defendant, during all the time during which the improvements were made, was an infant, *and incapable, therefore, of either the participation or the acquiescence which were so essential elements in that case. Besides, the mistake here was one from which the most ordinary care would have guarded the complainant. No relief can be afforded him on the ground of mistake.*"

In the case at bar there was the participation and acquiescence by defendant in the mistake and the mistake was one which ordinary prudence would not guard against, for the complainant did what he could do to guard against any mistake, to wit, employed a competent surveyor.

There are two cases in this Court which we urge settle the matter in favor of complainant:

Anglesey *v.* Colgan, 44 N. J. E., 203;
Megie *v.* Bennett, 51 N. J. E., 281.

This Court said, at page 209 of 44 N. J. E.:

"The case of McKelway *v.* Armour, 2 Stock., 115, is of analogous nature to the present one, and, as it is conceived, was decided upon a correct principle. It does not appear to have been brought to the attention of the court below. The facts and the action taken by the Chancellor are thus stated in the syllabus of the reported case:

" 'Complainant erected a valuable dwelling

house, by mistake, on the land of the defendant; defendant lived in the vicinity, saw complainant progressing from day to day with the improvement, and admitted he did not suspect the erection to be on his lot until some time after its actual erection, when by actual measurement, to his surprise, he discovered the mistake. The court relieved the complainant, putting the defendant to as little inconvenience as possible.'

"It is obvious that the complainant in the reported case was not possessed of as strong a claim to equitable consideration as the present appellant has. In both cases the feature is presented of a controversy growing out of a mutual mistake, and in the case from the report it is expressly stated in the opinion, that although Armour stood by while the improvement was being made, he did not suspect that his lot was being occupied. The Chancellor also declares that McKelway was most at fault. His language is:

"'It is very true, as was urged upon the argument, the complainant was most to blame in this matter. A diligent examination of the deed to Armour and an actual measurement of the land would have decided the difficulty. But it was a vacant lot of land, plotted out upon a map only, and the mistake was one which might occur to the most careful and most diligent man.'

"It will be observed that in this case relief was granted to the complainant, although it was adjudged that he was more in fault than his opponent."

Chief Justice Beasley then stated, page 209:

"In the case now in hand either of these parties, by having his lot located or measured, could have discovered the mistake in the placing of the house, and, in this particular, *if negligence is to be imputed, they must share it equally.* But, beyond this, according to a well-established rule of law, negligence must be attributed to the respondent, *as she made no in-*

> *vestigation with respect to the rights of the appellant,* although when she took her title the grantor of the appellant was in visible possession of the premises in dispute, holding under a mortgage which plainly indicated that it was designed to be an incumbrance, not upon a fragment of the building, but upon the whole of it. If the valuable and well-known doctrine that a person who is put on the alert by existing circumstances is to have imputed to him all the knowledge that a proper investigation would have disclosed to him, is ever to have force, it seems to me that it must be taken as the principle of decision in the present instance."

This Court in that case approved the doctrine of McKelway *v.* Armour, which case granted relief, although there was more blame attributable to complainant than to defendant. It stated that where either party might have discovered the true facts and hence the mistake was made due to not having the lot located and measured, if negligence was to be imputed they must share it equally and relief would be granted. But this Court went further and held, it is submitted, that under circumstances such as are present in the case at bar there was negligence on the part of defendant.

In the case at bar defendant had his fence and shed upon a certain portion of what he had supposed to be his land. Complainant came to him with a survey and said that the land upon which the fence and shed were erected belonged to complainant and that complainant was going to erect a valuable building thereon. Defendant had put his fence and shed upon the land because he thought it was his land. The claim on the part of complainant to land which defendant supposed belonged to him certainly was sufficient to, in the language of the Court of Errors and Appeals in the Anglesey case, put him on the alert. He might have discovered the true facts by having a survey

of his own made. Instead of that he acquiesced.

In Megie *v.* Bennett, 51 N. J. E., 281, this Court, speaking through Mr. Justice Reed, again referred to the doctrine of McKelway *v.* Armour and Anglesey *v.* Colgan and approved them, and said (p. 288):

> "In the first-named case, a person who had built a house over on the lot of another by mistake, both owners being ignorant of the exact location of the line of division, was permitted to hold as much of the land as was covered by the house, upon making compensation for it."

This is the latest pronouncement of this Court upon the subject which we have been able to find, but the case was referred to by Vice-Chancellor Leaming in Camden and Atlantic & Ventnor Land Co. *v.* Mason, 91 N. J. E., 25, but not applied. The Vice-Chancellor quoted that portion of the language of the Chancellor, in which the Chancellor said (p. 28):

> "The fact of Armour's (the lot owner) standing by and participating in the mistake is an important feature in the case."

Upon the view of the law of the Court below, the fact that defendant did not know the true facts would prevent the application of the doctrine. But in none of the cases stated did the defendant know the true facts.

It was defendant's participation in the mistake, that is, it was the mutual mistake which was made the basis of relief. It, therefore, follows that the rule which is stated at the beginning of this argumeant as properly deducible from the cases, to wit, where a boundary is fixed which may be definitely ascertained, by mutual mistake, and one party relying upon that mutual mistake places improvements upon the land so that the parties

cannot be placed in *statu quo*, the other party will not be permitted to take advantage of the mistake and to repudiate the fixation of the boundary, represents the law of this State as settled by this Court.

It is respectfully submitted that the decree brought up should be reversed and the record remitted with directions to enter a decree either

(1) Enjoining defendant from prosecuting the present suit in ejectment, or any proceeding to eject, or molest complainant in the occupancy of the land, and that the title of complainant to said strip in dispute be settled, or

(2) That defendant be enjoined from prosecuting the suit in ejectment or from taking any other proceeding to molest complainant so long as the building now erected upon said strip of land remains, or

(3) That defendant be directed to release to complainant the strip of land upon which the building stands and which may lie between the line as fixed by the parties and line as it should be drawn upon compensation being paid by complainant to defendant to be fixed by a Master.

That under the circumstances of this case there is relief in equity.

See:

Anglesey *v.* Colgan, 44 N. J. E., 203;
Parsons *v.* Hartman, 30 L. R. A., 129; and the
Note to Merriman *v.* Walton, 30 L. R. A., 799.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

MAGNOLIA CONSTRUCTION CO., *Complainant-Appellant,* and EDWARD McQUILLAN, *Defendant-Respondent.*	*On Appeal from Court of Chancery.*

REPLY BRIEF OF APPELLANT.

I.

In the discussion of the facts on pages 6 and 7 of appellee's brief we feel that appellee has omitted to recite two important bits of testimony coming from the appellee himself (p. 90);

> "Q You say that before Mr. Stollman and Mr. Stollman's company commenced the construction of the building at 108 Waldo avenue, they spoke to you about your fence encroaching over on his property? A Yes, sir.
>
> Q And you testified that that was your judgment, too? A No; I did not testify it was my judgment. *I knew I was over.*"

This testimony not only indicates acquiesence on the part of defendant in the position taken by complainant that defendant was encroaching on its property but it was corroboration coming from defendant of the accuracy of complainant's survey and complainant's position.

Defendant had testified, page 86:

> "Q What conversation was there between you preceding that (the removal)? A He told me I was over on his line. *I knew it because when Ehrhardt bought that property he had no fence there and I didn't know,* and I had no survey and I attempted to put the fence up as near as I could judge twenty-five feet—my deed calls for twenty-

five feet—and I put up the fence as near as I could without any survey."

Page 88:

"Q And then when you did later have a suspicion that he was on your line (that is, that the survey was encroaching—the appellant was encroaching on appellee's property) what did you do? A I measured it, and Mr.——whose property I acquired lately, I measured from him over to the apartment and it was not twenty-five feet, and I came to the conclusion that either Mr.——was over on me or the apartment was over on me."

If defendant could do this after the building was erected he could have likewise done it before the building was erected.

Pages 90, 91:

"Q You did not move it (the fence) and set it up again? A *No, no, his wall, we agreed his wall would be the fence, that was the condition.*"

This clearly indicates an agreement on the part of defendant to a location of the line. It likewise indicates an agreement that the wall to be erected should be considered the fence.

It is this wall which defendant agreed should be considered as the fence that defendant now asks to have removed because erected by mistake.

On page 15 counsel says that McQuillan did not adopt complainant's survey; that "all that he did was to move his buildings clearly beyond the crow-foot mark." The testimony hereinbefore referred to indicates, we insist, that he did much more than this. He acquiesced in complainant's survey because he knew, he says, he was over. He agreed that complainant's wall should constitute the fence. This is active conduct on his part which is more than merely moving the building beyond the crow-foot mark.

II.

On page 18 of his brief counsel refers to the case of *McKelway* v. *Armour,* 10 N. J. E. 115, decided by Chancellor Williamson in 1854, and says, page 19: "It seems to us that the Chancellor grounded his decision on the fact that the mistake was excusable and might occur to a careful man, being a vacant lot of land plotted on a map only."

In the case at bar complainant engaged a person it supposed to be a competent surveyor. It attempted to protect itself and did everything which an ordinarily prudent man would do to protect himself.

Counsel says that complainant in the case at bar represented that its survey was correct. We do not think that the evidence bears this interpretation except as it may be inferred from the presentation of the survey. What complainant did was to state that the shed of defendent was over on complainant's land "according to his survey" (p. 87).

This was a true statement and defendant says that he knew he was over (p. 90).

In the McKelway case the Chancellor excused complainant for not getting a survey. Certainly, complainant in the case at bar should not be punished because he did that which the Chancellor in the McKelway case said would be excused.

In *Haggerty* v. *McCanna,* 25 N. J. E. 51, referred to by counsel on page 19 of his brief, Chancellor Runyon did not criticise the case of McKelway *vs.* Armour but held that it did not apply. And it is quite apparent that it did not because as the Chancellor says:

> "The complainant's mistake in this case was in assuming, as he says he did, from the fact that his wife had administered on McCanna's estate, that she was the owner of the lot of land in question. He appears to have made no inquiry whatever on the subject."

This was a mistake, of course, from which he could not be relieved. It has no application to the case at bar because complainant in the case at bar did everything which a reasonably prudent man would do.

Moreover, the Chancellor did not rest his decision exclusively upon that ground for he said:

> "In the present case the defendant, during all the time during which the improvements were made, was an infant, and incapable, therefore, of either the participation or the acquiescence which were so essential elements in that case" (The McKelway and Armour case).

It is true that the same Chancellor criticised the McKelway *vs.* Armour case in *Kirchner* v. *Miller,* 39 N. J. E. 355. But the ground upon which the Chancellor denied the relief was that:

> "In McKelway *vs.* Armour, the complainant had built a valuable dwelling house upon the defendant's land, which he must lose unless the Court granted him relief. Here there is no hardship to justify a call upon equity for relief. * * * The cost of removing the part which is on the defendant's land, and closing up the side again, would not exceed $100."

In view of the representations by this Court in *Anglescy* v. *Colgan,* 44 N. J. E. 203, at p. 209 (reversing the Court of Chancery, which had denied the injunction) and in *Megie* v. *Bennett,* 51 N. J. E. 281, at p. 288 (again reversing the Court of Chancery) the criticism of Chancellor Runyon of the McKelway case we submit must be disregarded.

Counsel on page 23 of his brief says: "Even if complainant is free from negligence, then we submit that before any Court will take away defendant's land from him, he must be guilty of actual or implied culpability, otherwise the land of a man in no way at fault is being taken for private use and, as Chancellor Runyon said in the Kirchner case, the exercise of such a power unless based upon culpability, is a violation of constitutional

right." And page 24— "If the constitutional rights of a land owner are to be preserved, McKelway *vs.* Armour must be construed in the way it has been construed by this Court in the Anglescy and Megie cases. There must be actual or implied culpability."

The difficulty with this argument is that in *McKelway* v. *Armour* there was no culpability either actual or implied upon the part of defendant. And this Court did not so construe the case either in the Anglescy or Megie cases.

Chancellor Runyon himself in *Kirchner* v. *Miller,* 39 N. J. E. at p. 358, quite clearly made it apparent that there was no culpability, actual or implied, upon the part of defendant in the Armour case. He said:

> "The decision seems to have been based on the ground of mutual mistake. The Court, in fact, compelled Armour, who was in nowise in the wrong, to sell his property to McKelway at a price to be fixed by the Court, or to exchange properties with McKelway, or to pay for the improvements which McKelway had put on his, Armour's lot, although they had been so put on that lot, not only without Armour's knowledge, but without any suspicion on his part that McKelway was putting them on his, Armour's property."

In the Anglescy case (44 N. J. E. 203, at p. 209) this Court said:

> "The case of McKelway *vs.* Armour, 2 Stock, 115, is of analogous nature to the present one, and, as it is conceived, *was decided upon a correct principle.* * * * It is obvious that the complainant in the reported case was not possessed of as strong a claim to equitable consideration as the present appellant has. In both cases the feature is presented of a controversy growing out of a mutual mistake, and in the case from the report it is expressly stated in the opinion, that although Armour stood by while the improvement was being made, he did not suspect that his lot was being occupied. * * * It will be observed that in this case relief was granted to the complainant, al-

> though it was adjudged that he was more in fault than his opponent."

And see *Megie* v. *Bennett,* 51 N. J. E. 281, at p. 288.

This Court in the *Megie* v. *Bennett* case in referring to the McKelway case said:

> "In the first named case, a person who had built a house over on the lot of another by mistake, both owners being ignorant of the exact location of the line of division, was permitted to hold as much of the land as was covered by the house, upon making compensation for it."

How, in the face of the language of the judges of this Court in delivering the opinions in the two cases last referred to counsel can contend that this Court has construed the McKelway case as having been decided upon the theory of actual or implied culpability upon the part of defendant we cannot imagine.

But if actual or implied culpability upon the part of defendant is necessary we have it in the case at bar. Complainant did everything which a reasonable man could do to ascertain the true situation, he employed a competent surveyor.

Having employed that surveyor and obtained a survey he takes it to defendant and presents it to him. Defendant acquiesces in the line and swears that he acquiesced in the line because he knew he was over.

He then made an agreement that the wall to be erected upon the line agreed upon should be the fence.

When the complainant insisted that defendant was over on its line defendant certainly was put upon the alert within the meaning of the language of this Court in *Anglescy* v. *Colgan,* 44 N. J. E. 209. He could have had a survey made or he could have done that which he did after the wall was erected, *to wit,* measure from the adjoining property. He did neither, but acquiesced because he said that he knew he was over.

This Court in the Anglesey case said (p. 209):

> "In the case now in hand either of these parties, by having his lot located or measured, could have discovered the mistake in the placing of the house, and, in this particular, if negligence is to be imputed, they must share it equally."

This Court did not suggest that no relief should be granted under those circumstances. On the contrary, it said that the McKelway case was decided upon a correct principle.

We have in the case at bar every element present in the McKelway case. But we have in addition an express agreement upon the part of defendant that the wall to be erected should constitute the fence. We do not, therefore, have a mere looking on and a seeing of the building of improvements as in the Armour case without defendants suspecting that the improvements were being built on his land. We have more than this. We have active acquiescence, and we have facts brought to the attention of defendant which at least put him on the alert.

The case of *Camden, Atlantic & Ventnor Land Co.* v. *Mason,* 91 N. J. E. 25, decided by Vice-Chancellor Leaming, referred to by counsel on page 21 of his brief, has no application in the case at bar. In that case the Vice-Chancellor said:

> "The evidence discloses that the building was erected on the lot owned by defendant Baker without her knowledge or consent and at a time when she was absent and had no knowledge or means of knowledge that the building was being erected."

And he likewise said (p. 28):

> " * * * the public records fully appraised complainant of the location of those lots and reasonable care would have disclosed that the building here the subject of controversy was not on any of the mortgaged lots. Such negligence should, I think impel this court to deny the extraordinary relief here sought against the consequences of complainant's negligence."

The Vice-Chancellor referred to the McKelway case and said:

> "* * * but in that case the lot owner saw the improvements progressing from day to day, and while he did not realize that they were being made on his lot had at least equal opportunity with the complainant to know the boundary lines of the lots; and in the reported opinion in that case the learned Chancellor says: 'The fact of Armour's (the lot owner) standing by and participating in the mistake is an important feature in the case.'"

In the case at bar we have facts analogous to those present in McKelway *vs.* Armour and not in any wise analogous to those dealt with in Camden, Atlantic & Ventnor Land Co. *vs.* Mason. The Vice-Chancellor expresses doubt as to the soundness of the doctrine of *Bright* v. *Boyd,* 1 Story 478; 2 Story 607 and says that it is unnecessary to determine how far the principles of that case should be applied in this jurisdiction and while he notices McKelway *vs.* Armour he does not notice two cases in this Court, Anglescy *vs* Colgan and Megie *vs.* Bennett approving the doctrine of McKelway *vs.* Armour.

It seems to us that these two cases have settled the application of the principle of Brown *vs.* Boyd in this jurisdiction.

Respectfully submitted,

ISAAC GROSS,
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Of Counsel with Appellant.

GROSS & GROSS,
Of Counsel.

New Jersey Court of Errors and Appeals

Between MAGNOLIA CONSTRUCTION COMPANY, Complainant-Appellant, and EDWARD MCQUILLAN, Defendant-Respondent.	On Appeal from Chancery.

BRIEF FOR DEFENDANT-RESPONDENT.

(1)

Abstract of the Case.

Complainant and defendant are adjoining land owners. Complainant employed a surveyor to make a survey of its land and to stake the lines thereof Subsequently it erected a four-story brick and stone apartment house on its land within the lines marked by the surveyor. Defendant, shortly after complainant's building was completed, caused his lot to be surveyed by another surveyor, which survey showed that the northeasterly wall of complainant's building encroached on defendant's lot.

Complainant filed its bill to restrain an action in ejectment begun by defendant against complainant to recover the said land on which complainant had encroached, and further praying that the northeasterly line of the wall of complainant's apartment house and the continuation

thereof, be fixed and established as the boundary line between the lands of both parties. The bill averred certain facts under which it was alleged that complainant was either estopped from asserting his title to so much of this land thus encroached on, or that he had given complainant a parol license to occupy such land.

At the hearing it was further prayed (though there was no such specific prayer in the bill) that if there was an encroachment it was the result of a mistake in which both parties participated, and the Court should, under the circumstances, require defendant to release to complainant the land encroached on for a consideration to be fixed by the Court of Chancery.

Defendant filed a counterclaim averring that the parties had entered into a written agreement settling their differences; that such agreement had been lost and praying that it be established as a lost instrument and enforced.

The final decree dismissed the bill and the counterclaim.

From such final decree complainant alone appealed from that part thereof dismissing its bill of complaint.

The questions involved are:

(a) What is the true boundary line between the lands of complainant and defendant?

(b) Is defendant estopped from asserting his rights to so much of his land as is found to be covered by complainant's building?

(c) Can complainant claim to hold the land encroached on by virtue of a parol license from defendant?

(d) Should defendant be required to release to complainant so much of his land as is covered by the encroachment, for a consideration to be fixed by the Court of Chancery?

(2)

Brief of the Argument.

I.

Defendant's survey fixed the true location of the boundary line between the lands of complainant and defendant.

As to the true boundary line between the lands of complainant and defendant, the evidence is as follows:

Complainant's surveyor, James Henderson, testified that the beginning point of the property of complainant is ~~90~~ 91.90 ft. southwesterly from the intersection of Newark Avenue and Waldo Avenue, and that in making the survey he intersected the two lines of Waldo Avenue and the line of Newark Avenue using "the line of Newark Avenue as built upon" (p. 103, ll. 10-20). He used the buildings along Newark Avenue as monumenting Newark Avenue (p. 103, l. 37). He said that in making the survey he used a description furnished by Mr. Stollman, complainant's officer (p. 105, l. 8). The testimony does not show what description Mr. Stollman furnished Mr. Henderson. Mr. Gross testified that he furnished Mr. Henderson with descriptions from certain deeds (p. 110, l. 35), including the deed to complainant, which is Exhibit C-8 (p. 124). This deed fixes the meas-

urement point of complainant's lot as "the northwesterly corner of that parcel of land conveyed by the New Jersey Junction Railroad Company, et al., to Nicholas Nolan, by deed dated September 15, 1900." Mr. Henderson on cross examination testified that his attention had never been called to any description which fixed the measurement point of complainant's lot as the northwesterly corner of land conveyed by the New Jersey Junction Railroad Company to Nolan (p. 108, l. 20).

It is apparent from reading the testimony of Mr. Henderson and Mr. Gross, that Mr. Henderson was either grossly careless in not availing himself of the governing point in all the descriptions handed to him, namely, the northwesterly corner of the New Jersey Junction Railroad Company land, or else insufficient descriptions were furnished him. Although Mr. Gross testified that he handed the descriptions to Henderson (p. 110, l. 35), Mr. Henderson when asked by Mr. Gross if he remembered whether these descriptions were furnished to him said, "I do not recall" (p. 109, l. 19).

Mr. Dunham, defendant's surveyor, testified that the corner of Newark Avenue as fixed by the building line plays no part in fixing the dimensions of defendant's lot (p. 117, l. 9). He said that the governing point of the whole situation is the northeasterly corner of the lands owned or conveyed to the New Jersey Junction Railroad Company. We recommend to the Court a perusal of his testimony at pages 115, *et seq.* as indicating the great care which he used in making his survey. He exhausted the records. His painstaking method is in striking contrast to the slipshod lack of method of Mr. Henderson.

Mr. Dunham proved to the point of demonstration that his survey is the correct one.

In the brief for appellant counsel urges that whatever may be the judgment of this Court upon the issue as to whether the bill should be dismissed, the final decree *sub judice* should be modified by striking out the recital (p. 52, l. 27) that the wall of complainant's apartment house encroaches on defendant's lot. It seems to us idle for counsel to say that the Vice Chancellor did not need to determine the fact of encroachment. That was the basic fact in the whole case. If there was no encroachment then complainant was entitled to its decree. On the other hand if there was an encroachment, then arose for decision the points considered by the Vice Chancellor in his conclusions as to estoppel, parol license and mutual mistake.

Complainant sought the aid of a court of equity. Defendant was proceeding at law and was enjoined. Complainant is surely bound by the decree of the Court of Chancery. Surely a suitor who has besought a court of equity and been defeated, cannot urge that he still can assert his defense at law.

The form of the decree followed the decision of Chancellor Walker in *Beall* vs. *New York & New Jersey Water Company,* 87 N. J. Eq. 390, in which case the Chancellor discusses at length the formal structure of decrees in equity and holds that it is proper to state in the recital preceding the decretal paragraphs an adjudication of the existence of facts warranting the decree.

II.

Defendant is not estopped from asserting his rights to his lands on which complainant's building encroaches.

There is no substantial dispute as to the facts. The defendant testified that Stollman came to him and said that a fence and shed on defendant's property were over the line (p. 87, ll. 1-15) as shown by a survey that Stollman had (p. 87, l. 13). McQuillan took down the fence and moved the sheds at the same time (p. 87, l. 32). Complainant's surveyor had put a crow-foot mark on McQuillan's fence and McQuillan testified that he took down all the fence on the dividing line (p. 91, l. 18); about 4 ft. of the fence on Waldo Avenue (p. 91, l. 25), and moved the shed two or three ft. so as to give complainant's contractor plenty of room to work in (p. 87, ll. 15-40).

Stollman, President of the complainant, testified that when the contractor started excavating McQuillan was present; that McQuillan removed part of the fence that was encroaching on complainant's property (p. 65), and that McQuillan helped Stollman to "straighten the line" (p. 68, l. 20); that is, a plumb line was run from a stake in the rear to the crow-foot mark on the fence on Waldo Avenue. McQuillan held the line on Waldo Avenue and Mr. Lupo, a stone mason, held the line in the rear of the lot (p. 70, ll. 10-20).

Lupo corroborated Stollman (p. 82, ll. 30-40).

It is not pretended that McQuillan knew that complainant intended to build on his land. Defendant accepted the statement of Stollman and complainant's survey that his fence and shed were over and removed them.

This all happened in September, 1917 (p. 81, l. 30; p. 123). Complainant then proceeded to erect its building and during all that time defendant had no idea that the building was encroaching on his land (p. 88, l. 2). McQuillan then one day measured his lot and discovered that he didn't have 25 ft. and came to the conclusion that either complainant was over on his land or his neighbor to the northeast was over (p. 88, ll. 10-15). Being in doubt, he went to Mr. Dunham and had him make a survey and the survey showed that the complainant was over on defendant's land 1.29 ft. at the northeasterly wall of complainant's building tapering off to an encroachment of .36 ft. at the most easterly corner of the apartment house (Exhibit D-1, facing p. 128). McQuillan then went to see Stollman, told him he was over and, says McQuillan, "he laughed at me. He told me that it could not be possible (p. 78, ll. 20-30).

Counsel for appellant make much of the fact that McQuillan held the plumb line. The bill of complaint was a bold attempt to torture this act of McQuillan into a case where a line being uncertain or in dispute is practically located. It will be recalled that the surveyor had put a crow-foot mark on defendant's fence. Defendant tore down the fence not only up to, but beyond the mark so as to give complainant's contratcor plenty of room to work. McQuillan being about to tear down the fence, it was necessary to preserve in some other way the surveyor's crow-foot mark. Accordingly, McQuillan did the natural thing and held the line.

To entitle complainant to the benefit of an estoppel against defendant, it must appear that defendant through some act done or statement made by him or by his silence when he should

have spoken, influenced complainant to believe that it was building on its true property line and that complainant acted on a belief created by defendant.

Mutual Life Insurance Co. vs. *Norris,* 31 N. J, Eq. 583. Foreclosure suit. Dispute was complainant's right to tack to their mortgage debt a payment made by them in discharge of an assessment imposed on the mortgaged premises by the municipality within which they were situate. Subsequent to the payment of the assessments the Court of Errors and Appeals held that the portion of the charter by which they were imposed, was a nullity and the assessments were thus deprived of all legal warrant. Complainant contended that defendants' application for the loan, accompanied as it was by a promise that the money should be used to pay the assessment, was such an admission of its validity as would, in equity, precluded him, after complainant had acted on it, from disputing it. Van Fleet, V. C., said (at p. 585):

> "Where both parties have equal opportunities of knowledge, and they both act in ignorance of the real state of the case, and the complainant's act, which he says was induced by the defendant, appears to be rather the result of his own will or judgment than the consequence of the defendant's act or representation, there can be no estoppel." (Citing cases.)
>
> "The main purpose of the doctrine is to prevent fraud; there can, therefore, be no estoppel without fraud, either actual or legal. Hence, to impart this virtue to a representation, it must be made by a person with knowledge of the truth, or, what is the same thing in legal ethics, by a person whose duty it is to know the truth, to one who is ignorant of

> it. And he must make it with the intention of influencing the conduct of another, or under such circumstances as to show that he had reason to believe, when he made it, that it would influence the conduct of another."

The case last cited was followed in *Perkins* v. *Moorestown and Camden Turnpike Co.*, 48 N. J. Eq. 499, decided by Vice Chancellor Green. Bill to restrain the erection of a toll-gate house on complainant's land. It appeared that the defendants without consultation with the complainant, commenced the construction of a toll-gate house on complainant's land; that complainant was away from home at the time and that when he first saw the work the cellar was dug and walled up; and when the matter was brought to his attention he objected, though mildly. The Vice Chancellor quotes the language above quoted from *Mutual Life Insurance Co.* vs. *Norris.* He further said (at p. 505):

> "A consideration of the case impresses me with the belief that both of these parties acted in ignorance of their own rights and those of the other party. I do not question that the defendants assumed that they had a perfect right, under their charter, to do exactly what they have done, and there is nothing to show that the complainant knew, or had reason to believe, that the acts of the defendants were an infringement upon his rights of property in the fee, which they were unauthorized to make."

III.

The doctrine of practical location has no application to the case at bar.

The doctrine has been very clearly defined in this State in *Alt* v. *Butz,* 81 N. J. L. 156, where Minturn, J., speaking for the Supreme Court, said (at p. 158):

> "In legal theory the doctrine of a practical location is equitable in its nature, arising from the principle of estoppel *in pais,* the fundamental conception of which is the doing of an act by a party in interest, or his acquiescence in the doing of an act by another which would naturally lead to the inference of the existence of a *status* or the establishment of a condition upon which either party in interest may act to his prejudice if the act be disavowed. It is used to preclude a party from maintaining by evidence that which he had before expressly or tacitly denied; or disproving that which he had before expressly or tacitly admitted, when the other party has acted upon the faith of the admission or denial in such a manner that he will be injured unless the same is held conclusive. *Shapley* v. *Abbott,* 42 N. Y. 443.
>
> The doctrine is applied, both in law and in equity, to prevent the commission of an act which in its consequences would work a fraud. *St. Paul and D. R. R.* v. *Blackmar,* 44 *Minn.* 514.
>
> Applied to the doctrine of practical location in the absence of the statutory period of adverse possession regarding boundary lines, it presupposes a dispute or an uncertainty between adjoining owners regarding the true line, and a mutual concession, or acquiescence

in a practical location of the line, as a *modus vivendi,* which the parties in interest cannot thereafter be heard to controvert.

Thus, in *Den* v. *Van Houten,* 2 Zab. 61, the doctrine enunciated by Chief Justice Green that where a line is not settled, acquiescence by the parties concerned, without a positive agreement, for a less period than twenty years will fix the boundary, is based upon the essential prerequisite of the uncertainty of the boundary line. The same theory is presented in the later case of *Jackson* v. *Perrine,* 6 Vroom 137, where Mr. Justice Depue enunciated the rule to be that 'In all cases where the language of a deed is of doubtful construction as to the boundaries, the construction given to it by the parties themselves, as shown by their acts and admissions, is deemed to be the true one, unless the contrary is clearly shown.'

So, it has been held in Massachusetts, that where the parties in locating the line merely agree to put a fence or building on a certain line, without any reference to where the actual boundary is, or if the fence or building was located otherwise than on the true line, through mistake, no estoppel arises, and either party may claim to the true line when it is discovered. *Proctor* v. *Machine Company,* 137 Mass. 159; *Proprietors* v. *Prescott,* 7 Allen 494; *Thayer* v. *Bacon,* 3 Id. 163.

Adjudications of similar import are to be found in *Gray* v. *Kelley,* 190 Mass. 184; *Katz* v. *Kaiser,* 154 N. Y. 294, and *St. Bede College* v. *Weber,* 168 Ill. 324.

No dispute or contention existed between the parties in the case at bar as to the location of the true line. It was apparently conceded by the defendant before he attempted to build, and his act therefore cannot be said to be influenced in legal effect so as to work an estoppel *in pais* by any legal concession by the plaintiffs of their rights in the premises."

And in *Baldwin* v. *Shannon,* 43 N. J. L. 596, Reed, J., speaking for the Supreme Court, said (at p. 601):

> "Now, I think the admission of evidence of what is termed practical location is permitted only in two instances, first, where the description in the deeds is ambiguous or uncertain in its application to the subject matter of the conveyance, and second, where the practical location may operate as an estoppel. *Jackson* v. *Perrine,* 6 Vroom 137; *Den, Harvy* v. *Van Houten,* 2 Zab. 61; *Baldwin* v. *Brown,* 16 N. Y. 359; *Tyler* v. *Eject & Adv. Poss.* 571.
>
> As there is no ambiguity or uncertainty in the description, the first ground upon which such testimony is admissible does not exist.
>
> Nor is there any element appearing in the the case from which an estoppel can be deduced as arising from such location. No improvements were made by the defendant upon land of the plaintiffs by the inducement of any act or work of the plaintiffs which, in law, would exclude the plaintiffs from asserting their right to the ground covered by their deeds."

It will thus be seen that there must either be, first, disagreement or uncertainty as to the true line arising from an ambiguous description or, second, estoppel to prevent the commission of an act which in its consequences would work a fraud.

In our view of the evidence in this case the conduct of the complainant and the defendant was substantially as follows:

Complainant's president, Stollman, had the survey made and the surveyor made his marks on McQuillan's fence. Stollman then said to McQuillan, "Your fence and your shed are over on our line." McQuillan said he knew they were over a couple of feet. There was no dispute; no resist-

ance on the part of McQuillan. He says he took down his fence entirely and moved the sheds back, not only 2 ft. but 2½ or 3 ft. There was no dispute or uncertainty. McQuillan assumed that the survey was correct. By no act or conduct of Stollman did he indicate that the survey was incorrect, or that his surveyor had any doubt or uncertainty. If, for example, Stollman had said to McQuillan, "Our surveyor is not sure of the line of Newark Avenue, but he thinks his survey is correct," and then McQuillan had acquiesced, there might be a clear case of estoppel. McQuillan was under no duty to procure a survey of his own in the absence of anything indicating to him that an encroachment was imminent.

In the typewritten copy furnished us of appellant's brief, counsel argue that where two surveyors equally competent produce surveys showing a different state of facts, it would seem that there was some uncertainty. But at the time when complainant contends that McQuillan's conduct worked an estoppel, there was only one survey in existence and that was of complainant's surveyor.

McQuillan at that time did not know, nor was he under a duty to verify complainant's survey in order to ascertain whether or not that surveyor had ignored the governing point fixed in all the deeds offered in evidence by complainant, namely, the corner of the tract conveyed to the New Jersey Junction Railroad Company. It is obvious from a reading of these deeds and the testimony of the surveyor, Henderson, that complainant's plight is due to the negligence of its surveyor.

But appellant's counsel seriously contends that there was a dispute between the parties as to the boundary line and he makes a unique contention

in that behalf. He says in his brief "when complainant received its survey it went upon the land and there discovered that defendant had buildings erected upon its land, as indicated by the survey. Immediately there was a *silent dispute* between the parties. Complainant by its survey insisted that its line ran as there shown, and defendant by the maintenance of his building line insisted that the line was not as shown by complainant's survey. Whereupon the parties got together and defendant agreed to take as the true line that shown by complainant's survey. In order that the doctrine of practical location may have play it is not necessary that the uncertainty be of any particular decree, nor is there necessity that there should be a dispute in addition to uncertainty, nor is there any necessity that the dispute if required should be of any particular bitterness."

We agree with the latter statement of counsel, for the dispute need not be accompanied by "force and arms." It was not necessary that McQuillan should have brandished a shillalah, or that Stollman should have gesticulated violently and retreated to his wall, or rather where his wall was projected. We confess, however, that the phrase "silent dispute" is a new one to us. We have heard of "silent contempt". Perhaps counsel means that McQuillan was "too proud to fight" for his land and some where in the realm of his mind disputed complainant's survey. We have been, however, unable to glean any such knowledge from any of the evidence in this case and if counsel are able to fathom the processes of McQuillan's mind and assert that he silently disputed complainant's survey, then we must admit that our learned adversary is gifted with powers truly telepathic.

It seems to us quite clear that there was no dispute and that there was no uncertainty in the plain calls and points in the descriptions which were furnished, or should have been furnished, to complainant's surveyor. The only uncertainty in the fixing of the line arose from the careless, slipshod work of complainant's surveyor.

With respect to estoppel, the cases cited under Point II of this brief are equally applicable here. The act, or the failure to act, of the person sought to be estopped, must be with knowledge, or, what is the same thing in legal ethics, by a person whose duty it is to know the truth, to one who is ignorant of it. *Mutual Life Insurance Company vs. Norris,* 31 N, J, Eq. 583.

It is urged by counsel for the appellant that McQuillan by accepting complainant's survey made it his own. It is asserted that the surveyor was "not an employee of the complainant;" that he was an independent contractor employed by the State and made what he considered to be a proper survey. There was nothing in the evidence to warrant this assertion. Henderson testified that he was employed by Jersey City and that he was also employed by the complaint (p. 102, 11, 10-20).

McQuillan did not adopt complainant's survey. All that he did was to move his buildings clearly beyond the crow-foot mark. Stollman does not testify that he even showed McQuillan the survey. All that he showed McQuillan was the crow-foot mark on the fence (p. 67, 1. 18). McQuillan testified that Stollman told him he had a survey (p. 87, 1. 13).

The estoppel cannot be based on any representations by McQuillan, for he made none. The rep-

resentations were all made by the complainant. All that defendant did was to acquiesce in what complainant told him. It is now contended that if what complainant told him is not true, then nevertheless, the defendant is bound as if it were true. If estoppel can be predicated upon any such representation, or rather misrepresentation, then one who flips a coin and says "heads I win, tails you lose" comes into equity with clean hands.

IV.

Complainant cannot claim to hold the land encroached on by virtue of a parol license from defendant.

It is well settled that such a license is within the provisions of the statute of frauds. *Alt* vs. *Butz,* 81 N. J. L. 156, 158.

Appellant seeks to take the instant case out of the statute under the familiar doctrine that the statute of frauds cannot be used as an engine of fraud.

There was no express license. Stollman himself admitted (p. 77, 11. 20-30) that McQuillan did not give him permission to come over on his land. "Mr. McQuillan didn't say anything I should come over on his land, but he helped us to straighten the line."

The phrase "he helped us to straighten the line" seems to us the whole of complainant's case. Stollman is not even accurate in his expression "straighten the line." All that McQuillan did was to hold the line so that it might be fixed after he tore his fence down.

It is well settled that such a parol license must be proved to the point of demonstration. *Lawrence* v. *Springer,* 49 N. J. Eq. 289. *Hartman* v. *Powell,* 68 N. J. Eq. 293, affirmed idem 800. There is no such proof in this case.

The doctrine of these cases is well known and we will not burden this brief by discussing them.

Complainant relies on *Polakoff* vs. *Halphen,* 83 N. J. Eq. 126, as contrary to the statement of the learned Vice Chancellor in his conclusions below that (p. 59) "an implied license is not sufficient." A brief reference to the facts in the case will show that it is in no way inconsistent with the earlier cases. There was a written license signed by complainant permitting defendant to build an addition in the rear of complainant's store. Complainant was the tenant and defendant the owner of the premises. It appeared that while the writing was silent as to the character of the building, both parties had agreed that its character was stipulated upon; and that the building as erected was in exact conformity with the plans agreed on. It seems to us that the Polakoff case is not at all in point, except as indicating a standard where estoppel will be invoked. And surely in the case *sub judice* complainant's showing is not anywhere near as strong as that of the licensee in the Polakoff case.

V.

The encroachment was not the result of mutual mistake; and defendant should not be required to release the land encroached on to complainant for a consideration to be fixed by the Court.

Complaint relies on *McKelway* v. *Armour,* 10 N. J. Eq. 115, decided by Chancellor Williamson in 1854. The facts of the case are reported in 8 N. J. Eq. 322, *sub. nom. Potts* v. *Arnow*—the Arnow is a blunder. McKelway had by mistake built on Armour's lot instead of his own which adjoined it. Armour supposed McKelway was building on his own property and did not suspect that he was in fact building on his. The matter first came before Chancellor Halsted on bill to reform a deed (8 N. J. Eq. 322). Chancellor Willamson did not agree with Chancellor Halsted that under the facts there was evidence of a mistake in the deed. He said (p. 118):

> "It is very true, as was urged upon the argument, the complainant is the most to blame in this matter. A diligent examination of the deed to Armour, and an actual measurement of the land, would have decided the difficulty. But it was a vacant lot of land, plotted out upon a map only, and the mistake was one which might occur to the most careful and diligent man. The fact of Armour's standing by, and participating in the mistake, is an important feature in the case."

The Chancellor thought that the mistake was an excusable one for he says as above quoted, that

it was one which might occur to the most careful and diligent man. He held that Armour should have the privilege of taking the improvements at a value to be ascertained by a Master, or if he preferred it to order a reference to a Master to ascertain the value of the lot and to decree a release to McKelway upon his paying Armour the valuation. It seems to us that the Chancellor grounded his decision on the fact the mistake was excusable and might occur to a careful man, being a vacant lot of land plotted on a map only. Neither McKelway nor Armour by any act did anything to influence the other. In the case at bar the complainant represented to the defendant that its survey was correct; that the survey was incorrect was due to the negligence of its surveyor; that negligence is attributable to it and its remedy for that negligence is not to take defendant's land away from him, but to sue the surveyor.

The McKelway case was distinguished by Chancellor Runyon in *Haggerty* vs. *McCanna,* 25 N. J. Eq. at p. 51. He held that the McKelway case had no application to the case then before him, because the mistake was one from which the most ordinary care would have guarded the complainant. The most ordinary care on the part of complainant's surveyor in the instant case would have resulted in a correct location of his line.

In *Kirchner* v. *Miller,* 39 N. J. Eq. 356, Chancellor Runyon refused to enjoin an action in ejectment in a case where the facts are quite similar to the case at bar. The parties were adjoining lot owners, the complainant desiring to build an extension to the house on his lot employed a competent surveyor to locate the line. The surveyor located the line driving stakes to show

where it was. One of these was at the front. The complainant built the extension nearly up to the line. A year after it was finished it was discovered that the extension encroached on defendant's lot to the extent of four or five inches. The surveyor had made a mistake in fixing the line and had located it six and a half inches too far west and to that extent on the defendant's land. The defendant sued in ejectment and bill was filed for an injunction to restrain him from prosecuting that suit and for other relief. The Chancellor in discussing the *McKelvay* case said (at p. 358):

> "The principle of the case is that where one by mistake puts improvements on another's land, mistaking it for his own, equity will, in a proper case, compel the latter to sell and convey the land to the former, at a price to be fixed by the court, unless he will consent to pay for the improvements. The exercise of such a judicial power, unless based upon some actual or implied culpability on the part of the party subjected to it, is a violation of constitutional right. No tribunal has the power to take private property for private use. The legislature itself cannot do it."

He dismissed the bill.

In *Anglescy* v. *Colgan,* 44 N. J. Eq. 203, complainant sought an injunction restraining the defendant from executing a judgment against him. The facts were that one K. being the owner of two lots designated on a map as lots 97 and 98 sold them to J. At the time of the sale there was a dwelling house on the property which it was then supposed stood on lot 97, but which in fact encroached two feet on 98. J. gave a purchase money mortgage to K. on lot 97. Both he and the mortgagee believe that the house stood upon

that lot exclusively. Judgment was afterward obtained against J. by virtue of which lot 98, being the lot encroached upon by the dwelling house was sold by the Sheriff and title thereto was there after vested in defendant. The inquiry therefore was whether the sale by the Sheriff of lot 98 carried that property to the purchaser divested of the equitable right vested by Kelly, the mortgagee, in that part of the dwelling house which encroached. Beasley, C. J., speaking for this court referred to *McKelway* vs. *Armour, supra.* He held that it could not be plausibly supposed that the purchaser when he bid at the Sheriff's sale supposed that in buying lot 98 he was buying two feet also off the house next door. He held that if there was any negligence it was in Colgan because when she took title she made no investigation with respect to the rights of the complainant, although he was visibly in possession of the premises. The *Colgan* case differs from the case at bar in that there was a situation which put Colgan on notice.

In *Megie* v. *Bennett,* 51 N. J. Eq. 281, Megie owned an island in Lake Hopatcong and Bennett agreed to buy a portion of it. He bought by reference to a map. Both the vendor and vendee erroneously supposed that the land extended to a certain stake along the lake front. Bennett improved the land in accordance with such supposition. This court followed *McKelway* vs. *Armour.* It is obvious from the report at p. 287 that Bennett's mistake was induced by Megie. Megie was familiar with the property and took Bennett on it and pointed out a stake as marking the line.

The latest pronouncement of our courts is *Camden, Atlantic & Ventnor Land Co.* vs. *Mason,* 91 N. J. Eq. 25, decided by Leaming, V. C. The defendant owned vacant lots and executed a build-

ing construction mortgage on the lots to complainant. By mistake one of the buildings was erected on a lot which was not included in the mortgage, and which was in fact owned by the defendant Baker. Complainant's bill sought to establish and enforce an equitable lien against that lot for the amount that the lot had been enhanced in value by reason of the money supplied by complainant for the construction of the building. The Vice Chancellor advised a decree dismissing the bill. He held that the defendant Mason, who erected the building, and complainant, who supplied the money, were both negligent in an extreme degree, and the sole cause of their unfortunate situation was to be found in their mutual culpable negligence. He says that the principle of *McKelway* vs. *Armour* will only be applied in two classes of case; the first class comprises cases in which the owner of a lot had stood by and suffered the improvements to be made, or had in some way directly or indirectly contributed to the occurrence of the mistake; and the second class comprises cases where the owner of the lot encroached on seeks relief in equity. We are not concerned with that class in the present case. That is the limit, he said, to which equity will go, and it will only go that far in a case which is free from negligence in the party seeking relief. In the case before him he denied relief because of complainant's negligence. He discussed the case of *Bright* vs. *Boyd,* 1 *Story,* 478, and says that:

> "The relief there awarded was declared to be in conformity to doctrines of the civil law, but was admittedly granted without common law precedent. Militating against the exercise of such power by the court is the obvious circumstance that its exercise neces-

> sarily includes the power to impose upon an innocent owner who had no knowledge that improvements were being made the burden of paying for improvements which were in no sense of a public nature and which may have been wholly contrary to the uses to which he desired to devote the property. I do not find that courts of equity have since been inclined to extend their powers beyond the limitations already referred to. Professor Pomeroy, in his work on *Equity Jurisprudence,* written forty years after *Bright* v. *Boyd,* declares the limitations to the power to afford relief to be those herein first stated. *3 Pom. Eq. Jur. § 1241 and note.* See also *2 Story Eq. Jr.* (13th ed.) *§ 799b; Ibid. § 1237 and note.* The power to revive the lien of encumbrances or debts which have been discharged through mistake rests upon essentially different principles and can in no way occasion hardship upon the property owner."

To justify the application of the principle therefore, the complainant must be free from negligence, and when we say the complainant we mean also his agent or surveyor. Counsel for appellant makes an attempt to show that the surveyor was not employed by the complainant, but that is contradicted by the surveyor's own testimony above mentioned (case p. 102). The surveyor by ignoring the governing point in the descriptions was extremely negligent.

Even if complainant be free from negligence, then we submit that before any court will take away defendant's land from him, he must be guilty of actual or implied culpability, otherwise the land of a man in no way at fault is being taken for private use and, as Chancellor Runyon said in the Kirchner case, the exercise of such a power unless based upon culpability, is a violation

of constitutional right. No tribunal has the power to do it. The legislature is powerless to do it.

The McKelway case had two features that distinguish it from the case at bar. The mistake was excusable and according to Chancellor Williamson, might have been made by a careful and prudent man.

If the constitutional rights of a land owner are to be preserved, *McKelway* vs. *Armour* must be construed in the way it has been construed by this court in the Anglescy and Megie cases. There must be actual or implied culpability. In the Anglescy case that took the form of failure of defendant to inquire when she was put upon inquiry and in the Megie case, Bennett's mistake in erecting an improvement over his line was induced by Megie, who pointed out a stake which he (Megie) erroneously supposed to mark the line. That is not the situation in this case. It is reversed, because complainant pointed out the line to the defendant and he moved his sheds beyond the line.

Complainant in the present case makes much of the fact that McQuillan saw the building being erected and made no protest. It is, of course, not disputed that he did not know it was encroaching on his land. There might be some merit in complainant's contention if it had gone ahead and built without a survey. It might then with some show of reason be said that McQuillan should have had a survey made himself, but where complainant has a survey made and shows it to defendant, defendant having no knowledge or suspicion that the survey is incorrect cannot be under a duty to investigate.

If it be said that complainant will suffer a hardship, unless equity interferes, then the answer is that defendant was not unreasonable. He

offered to enter into the agreement (Exhibit D-11) for a settlement and claimed in the court below that the agreement had been entered into (p. 43), but the learned Vice Chancellor held otherwise, and defendant has not appealed from that part of the decree. For the hardships to which complainant may be put, it has only its surveyor and itself to blame; and it presents no case justifying a taking of McQuillan's land for complainant's use. McQuillan is without taint of either actual or implied culpability and his right to his land should be preserved.

The decree below should be affirmed with costs.

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DAVID A. NEWTON,
EDWARD A. MARKLEY,
Of Counssl.

NEW JERSEY

Court of Errors and Appeals.

Between MAGNOLIA CONSTRUCTION COMPANY, *Complainant-Appellant,* *and* EDWARD MCQUILLAN, *Defendant-Respondent.*	*No. 65* *March Term,* *1923.* *On Appeal from Chancery.*

Brief for Respondent in Rejoinder to Reply Brief for Appellant.

This brief is filed by permission of the Court granted at the oral argument.

I.

In the reply brief under Point 1, counsel quote certain testimony of McQuillan and urge that such testimony indicates "corroboration coming from defendant of the accuracy of complainant's survey and complainant's position." In effect, what counsel says is that McQuillan's statement that he knew his fence was over indicates that McQuillan thereby confirmed the inaccurate, slipshod survey of complainant's surveyor and was likewise acquiescence on McQuillan's part in complainant's encroachment on his land.

It does seem to us rather straining a point for counsel to contend that because McQuillan knew his fence was over and took it down on the inducement of complainant, he must be held to have acquiesced in an inaccurate survey and an encroachment on his land.

Likewise, McQuillan's testimony that the wall was to be the fence is tortured by counsel into an agreement on the part of McQuillan that complainant might encroach on his land.

II.

On page 3 of the reply brief, counsel say:

> "In the case at bar complainant engaged a person it supposed to be a competent surveyor. It attempted to protect itself and did everything which an ordinarily prudent man would do to protect himself."

We take decided issue with the last sentence of the quotation. Neither in the main nor reply brief do counsel for appellant defend the work of the "competent" surveyor. On the contrary, the foregoing quotation is at least a tacit admission that the surveyor was negligent.

But if the surveyor is to be believed, complainant certainly did not furnish him with all the data he should have had to make an accurate survey. He said (p. 105, l. 8):

> "I had a description furnished by Mr. Stollman. That is all."

What that description was does not appear in the testimony. Complainant, in a Court of equity, was under the burden of showing that it gave the surveyor all the help it could.

Mr. Gross testified (p. 110) that he handed Mr. Stollman certain descriptions; yet the surveyor swore that his attention had never been called to the governing point in all the descriptions (p. 108, l. 20) and, as above, that he had a description furnished by Stollman "that is all."

In the light of this contradiction in the evidence, complainant's conduct was hardly that of an ordinarily prudent man.

The surveyor, had he been furnished with a proper description, undoubtedly would have followed it. Lawyers, when ordering a survey, usually furnish the surveyor at least with the description from the latest deed. It is evident that the description that Stollman furnished the surveyor was not taken from the deed to complainant (Exhibit C 8), for that referred to the corner of the New Jersey Junction Railroad Company land—the the governing point in all the deeds; and the surveyor testified that his attention was never called to that point. We are forced, therefore, to conclude that whatever description Stollman furnished Henderson was faulty, in that it lacked a reference to this governing point; and this conclusion is strengthened by complainant's failure to prove by Stollman just what that description was. Consequently, it follows that complainant's act in building on defendant's land was the direct result of its own negligence in furnishing to its surveyor a faulty description.

Counsel devote considerable space under Point II to our reading of the decision in McKelway v. Armour. Our contention is that this Court in *applying* that decision in the Megie and Angelescy cases found that in both cases the defendant was guilty of actual or implied culpability. It cannot

possibly be the law that a Court can take a man's land for private use when he is not at fault.

The culpability in the case at bar is in complainant and its surveyor. Both misled defendant into believing that they proposed to build on the true line. Unless complainant is to be permitted to profit by its own culpability, then defendnnt should be permitted to retain his land.

Nor can it be said that *both* complainant and defendant were negligent. Defendant's whole course of conduct was induced by complainant. He tore down his shed and moved his fence on the faith of complainant's statement that the crow-foot on the shed marked the boundary line. He was under no duty to go to the expense of procuring a survey. He was not building; and he was entitled to rest on the assumption that neither the complainant nor the surveyor were misleading him. He did not even attempt to put his shed close to the line; for he says he moved it beyond the crow-foot to give complainant plenty of rcom to work in. He put nothing in the way of complainant. And now that it appears that complainant misled him, it cannot be claimed that he was negligent because he acquiesed in what complainant told him was a fact.

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114 Ft. on
NEWARK AV.
24½ Ft.
FOR
SALE
91 Ft.
100 Ft.
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