

mitted there was not, it would clearly be a question.

Rinzol vs. Lovgar Structural Co., 97 N. J. L. 162, 163, 164.

(Errors and Appeals, 1922. Walker, 43)

### REFUSAL TO ALLOW QUESTION

The second, and only other ground, advanced for these appeals is the refusal of the trial court to permit the following question on cross-examination of defendant Barclay when called as plaintiff's witness:

"Have you been convicted of driving an automobile on the fifth of April while under the influence of intoxicating liquor?"

That this was not error would seem to need the slightest argument. In the first place, it was not cross-examination; in the second place, it was not limited as to its application to the facts of the accident, i. e. he might have become under the influence after the accident and been convicted of being in a condition not at all present at the time of the accident although present on the next day; in the third place, a judgment of the trial court in such a matter has no bearing on the present suit such as this; and, lastly, defendant's counsel refused to disclose his purpose in asking it.

Case, p. 54, lines 30-40; p. 55, lines 1-40.

It is respectfully submitted that the judgments should be affirmed.

John W. Lazrus, *by*  
Attorney for Plaintiff.

W. S. Anglemann,  
of Counsel.

October Term, 1927.

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*Complaint.*

**JUDGMENT RECORD.**

**New Jersey Supreme Court**

CHANCELLOR UNION LAND COM- PANY, a corporation, <i>Plaintiff,</i>	} <i>Judgment Record.</i>	10
<i>vs.</i>		
SOL JAFFE and ESTHER JAFFE, <i>Defendants.</i>	} <i>Action at Law.</i>	
	} <i>On Postea.</i>	
	} <i>Judgment of Non-Suit.</i>	

Wilfred H. Jayne, Jr., attorney.

Sol Jaffe and Esther Jaffe, the defendants in this cause, were summoned to answer unto Chancellor Union Land Company, the plaintiff therein, in an action at law upon the following complaint:

(Summons issued May 8, 1926.)

The plaintiff, a corporation, having its principal office in the City of Newark, County of Essex and State of New Jersey, says that:

1. On August 13, 1925, the plaintiff and the defendants entered into a written agreement for the sale and conveyance of a certain tract of land situated on Third avenue in Belmar, Monmouth County, New Jersey. A duplicate original of the said agreement is in possession of the defendants and the original will be produced at the trial.

2. Under the terms of the said agreement the defendants agreed to convey, for the sum of \$40,000.00, the said land to the plaintiff and the defendants further agreed, covenanted and guaranteed to the plaintiff that the said land

*Complaint.*

was without restrictions of any kind, nature or character whatsoever.

3. Pursuant to the said contract the plaintiff paid to the defendants a deposit of \$2,500.00.

10 4. Thereafter the plaintiff caused an examination to be made concerning the title to the said premises and discovered that the said land was not free from restrictions in accordance with the agreement of the defendants and that the said land was restricted and still is restricted and encumbered and that there are outstanding interests and liens against the said land which affect same and diminish the value thereof.

20 5. The said liens and restrictions are set forth in deed dated January 22, 1875, recorded August 29, 1879, in Book 315, page 384 of deeds for Monmouth County, New Jersey, and are as follows:

30 "and the said party of the second part for himself, his heirs and assigns, does covenant and agree to and with the said The Ocean Beach Association, their successors and assigns, that he the said party of the second part, his heirs and assigns shall not sell or suffer to be sold on the said premises hereby conveyed any spirituous or intoxicating liquors nor violate any of the provisions contained in said Act of Incorporation, by-laws, rules or regulations made by the said association at any time."

40 6. The land which the defendants agreed to convey in the agreement aforementioned was at one time owned by one Isabella G. Holbrook, who was made a defendant in an action at law in the New Jersey Supreme Court and this property was later sold by the Sheriff of Mon-

*Complaint.*

mouth County on a judgment execution. The records of Monmouth County do not show whether the said Isabella G. Holbrook was married at the time of the delivery of the Sheriff's deed, which deed was recorded in Book 759 of Deeds for Monmouth County, New Jersey, at page 150.

10 7. If the said Isabella G. Holbrook was married at the time of the delivery of the said Sheriff's deed her husband has or had an outstanding interest in the said property which materially decreases the value of the same.

8. On December 13, 1925, the date set in said contract for the consummation thereof, the defendants were unable and still are unable to convey the said premises to the plaintiff in accordance with the terms, conditions, covenants and representations contained in said contract.

9. The plaintiff has expended the sum of \$500.00 in examining the title to the said premises which amount is chargeable to the defendants.

Judgment will be demanded in the sum of \$3,000.00, together with interest and costs of this suit.

E. R. McGLYNN,  
Attorney for Plaintiff.

(Filed May 11, 1926.)

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*Answer and Counter-claim.*

The defendants, Sol Jaffe and Esther Jaffe, his wife, who reside in the Township of Lakewood, County of Ocean and State of New Jersey, answering the complaint filed in the above-entitled action, say that:

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## FIRST DEFENSE.

1. They will object at the trial that the complaint fails to allege a cause of action.

## SECOND DEFENSE.

1. They deny all and every the allegations set forth and contained in said complaint.

## THIRD DEFENSE.

20

1. They deny that they were unable to grant and convey the premises mentioned in said complaint in accordance with the terms of the agreement in writing made on August 13, 1925, as in said complaint it is alleged, but on the contrary were ready, able and willing to perform all and every the covenants and obligations by them to be performed under and by virtue of the terms of said agreement, and the said plaintiff wilfully refused to perform said agreement.

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By way of counter-claim against the plaintiff, the defendants say that:

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1. On August 13, 1925, plaintiff entered into a certain agreement in writing with the defendants wherein the plaintiff contracted and agreed to purchase of the defendants the certain lands and premises described in the agreement mentioned in the complaint in this action, subject to covenants, conditions and restrictions contained in former deeds for said premises on or before

*Answer and Counter-claim.*

December 13, 1925, and to pay to defendants as and for the purchase price the sum of Forty Thousand Dollars at the times and in the manner stated in said agreement.

2. The plaintiff pursuant to the terms of said agreement and in partial performance thereof paid to defendants the said sum of Fifteen Hundred Dollars upon the execution of said agreement and the further sum of One Thousand Dollars on October 13, 1925. 10

3. On December 13, 1925, the defendants between the hours of 9 o'clock in the forenoon and 5 o'clock in the afternoon of said day attended at the office of Arthur M. Birdsall, 701 Ninth avenue, Belmar, New Jersey, with a warranty deed conveying the lands and premises described in said agreement to the plaintiff in manner and form and in strict conformity with and in performance of the agreement in writing mentioned in said complaint, and the defendants were then and there ready, able and willing to perform all and every the obligations and covenants by them to be performed under and by virtue of said agreement. 20

4. Plaintiff failed, neglected and refused to appear at said time and place to receive the said deed of conveyance in accordance with said agreement and pay the balance of the purchase price as therein and thereby required, and although defendants did thereafter apply in a friendly manner to plaintiff at divers times requesting the plaintiff to perform said agreement, the plaintiff has, notwithstanding said requests, failed, neglected and refused to perform said agreement, to accept the said deed of conveyance 30

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*Reply.*

and pay the balance of the purchase price pursuant to the terms of said agreement.

Defendants therefore demand of the plaintiff as damages—

(a) The sum of Five Thousand Dollars.

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WILFRED H. JAYNE, JR.,  
Attorney of Defendants.

(Filed May 26, 1926.)

The plaintiff replying to the answer and the counter-claim of the defendant says that:

It denies each and every material allegation set forth in the third defense of the answer of the defendants.

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The plaintiff, answering the counter-claim of the defendants says that:

1. It admits the execution of a certain agreement for the purchase of certain lands and premises described therein but it denies that said agreement was made subject to covenants, conditions and restrictions contained in former deeds to said premises.

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2. It admits the allegations contained in paragraph two of the counter-claim.

3. As to the allegations contained in paragraph three of the defendants' counter-claim the plaintiff has no knowledge thereof sufficient to form a belief and, therefore, leaves the defendants to their proof.

4. Plaintiff admits that it has refused to carry out the agreement in accordance with its terms for the reason that the defendants are

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*Judgment of Non-suit.*

unable to convey to the plaintiff a good and sufficient title to the said lands free and clear of all covenants, restrictions and encumbrances in accordance with the contract.

E. R. McGLYNN,  
Attorney of Plaintiff.

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(Filed May 28, 1926.)

This case was tried before the Honorable Worrall F. Mountain, Circuit Court Judge, with a jury, at the Essex Circuit, on Wednesday, June 15, 1927, the same having been referred by an order of the Chief Justice.

At the conclusion of the plaintiff's case, the defendant moved for a judgment of non-suit and the same was granted.

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Whereupon it is adjudged a judgment of non-suit in favor of the defendants against the plaintiff, to be entered herein, with costs.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and that the defendants Sol Jaffe and Esther Jaffe do recover of the said plaintiff Chancellor Union Land Company, a corporation, their costs which have been taxed at the sum of

Costs \$

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Judgment entered July 8, 1927.

WM. S. GUMMERE,  
C. J.

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*Certificate of Clerk.*

I, EDWARD J. KELLEHER, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above-stated cause as the same remains of record in my office.

10 In TESTIMONY WHEREOF I have set my hand and the seal of said court at Trenton, this 15th day of July, A. D., nineteen hundred and twenty-seven.

(SEAL) EDWARD J. KELLEHER, Clerk.

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*Notice and Grounds of Appeal.*

**NOTICE OF APPEAL.**

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

CHANCELLOR UNION LAND Co., <i>Plaintiff,</i>  <i>vs.</i> SOL JAFFE, <i>et al.,</i>  <i>Defendants.</i>	}	Action <i>at Law.</i>  Notice of <i>Appeal.</i>
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To Wilfred H. Jayne, Jr., attorney of defendants.

TAKE NOTICE that the plaintiff appeals from the whole of the judgment entered in this cause, to the New Jersey Court of Errors and Appeals, on the following grounds:

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1. The following questions were objected to and objections sustained:

To the witness, Joseph Kahan:

“Q Who prepared this contract, someone representing your company or someone representing Mr. and Mrs. Jaffe?”

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“Q Did this contract marked Exhibit P. 1 contain, when it was first presented to you, all of the typewritten matter which it now contains, or was something added to it after it was first presented to you and before it was executed?”

“Q Before the delivery of this contract, Exhibit P. 1, did Mr. Jaffe make any representations to you or make any representations in your presence with regard to whether or not the property owned by him was subject to any restrictions?”

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Notice and Grounds of Appeal.

10 "Q Was anything said by Mr. Jaffe to you or any other officer of the plaintiff corporation prior to the execution of this contract or at the time the contract was being discussed with Mr. Jaffe by the officers of your company in regard to the use to which your company desired to put this property after it was acquired?"

To the witness, Benjamin Eber:

"Q Will you tell me from the search which was made or which you caused to be made whether or not the title to the property described in that contract was subject to any restrictions?"

"Q Was any attempt made to explain to you or to disprove your contention that there was an outstanding interest?"

20 The following offer was made by the attorney of the plaintiff:

Mr. McGlynn: "Instead of taking up the time I have two more witnesses whom I offer to put on the stand and ask the same questions, that is, in reference to the circumstances surrounding the execution of the contract and the fact that the contract when first presented did not contain the clause on the second page, that that was then inserted by the vendor before execution."

30 2. Because the trial court granted the defendants' motion of non-suit and entered a judgment of non-suit thereon.

STEIN, McGLYNN & HANNOCH,  
Attorneys of Plaintiff-Appellant.

Service of a copy of the within notice is hereby acknowledged this 9th day of July, 1927.

WILFRED H. JAYNE, JR.,  
Attorney of Defendant-Appellee.

Opening.

TESTIMONY.

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

June 14, 1927.

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CHANCELLOR UNION LAND Co., <i>Plaintiff,</i>	}	<i>Action at Law.</i>
vs. SOL JAFFE, <i>et al.</i> , <i>Defendants.</i>		

Before Hon. Worrall F. Mountain, J., and a jury.

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For the plaintiff appears Edward R. McGlynn.  
For the defendants appear Simandl & Simandl (by Harold Simandl).

(A jury is called and sworn.)

Mr. McGlynn opens for the plaintiff.

Mr. Simandl opens for the defendants.

(Argument.)

Adjourned to June 15, 1927, at 10 o'clock A. M.

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*Opening.*

SECOND DAY.

June 15, 1927.

Continued pursuant to adjournment.

Present, counsel as before stated.

10 The Court: I should think it would be very hard for the vendor to explain that second representation.

The Court of Errors has had this to say about these repugnant clauses, referring to an English case where a defendant has entered into a clear personal covenant and then ~~entitled~~<sup>endeavored</sup> by the proviso to relieve themselves of the personal liability: "If a man covenants in his own name for the performance of some particular act or duty and then seeks by proviso to relieve himself from it the proviso will be rejected as being repugnant to the covenant."

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This very carefully drawn instrument made out, provides that the man who owns this property will sell it to the purchaser and that the purchaser will take it and he will sell it subject to all restrictions. Now, having made that covenant in the early part of the agreement, he relieves himself of liability in the latter part of it by saying, for some reason or other, "and the party of the first part hereby states there are no restrictions on the herein mentioned premises." Of course, if you did not have him in the court room you would probably say to him, "What do you mean, you did or you did not?" You are supposed to know the use of English and when you say it will be sold subject to restrictions, but there are no restrictions, what do you mean by that? I think the latter clause is repugnant to the first because it relieves the vendee from what

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*Joseph Kahan, direct.*

he has agreed to do in the early part of the agreement.

Now, shall we proceed?

Mr. McGlynn: I am ready.

Mr. Simandl: We can stipulate the facts if that is your Honor's construction.

Mr. McGlynn: I do not want to stipulate anything. I want to put it in and to have the record right.

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JOSEPH KAHAN, sworn in behalf of the plaintiff.

*Direct examination by Mr. McGlynn.*

Mr. McGlynn: I offer the contract in evidence.

Mr. Simandl: No objection.

(Same is marked Exhibit P. 1.)

20

Q Are you one of the officers of the Chancellor Union Land Company, the plaintiff in this case?

A Yes, sir.

Q Did you take part in the negotiations which led up to the execution and delivery of this contract Exhibit P. 1?

Mr. Simandl: I object as immaterial.

The Court: I will admit it.

A Yes, sir.

Q Were you present at the time this contract Exhibit P. 1 was executed by Mr. and Mrs. Jaffe?

A Yes, sir.

Q In the office of your company? A Yes, sir.

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*Joseph Kahan, direct.*

Q Who prepared this contract, someone representing your company or someone representing Mr. and Mrs. Jaffe?

Mr. Simandl: I object as immaterial.

The Court: Sustain the objection.

10 Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Did this contract marked Exhibit P. 1 contain, when it was first presented to you, all of the typewritten matter which it now contains, or was something—

Mr. Simandl: I object as immaterial.

20 The Court: You may finish the question.

Q Added to it after it was first presented to you and before it was executed.

Mr. Simandl: I object to the question as immaterial and incompetent.

The Court: Sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

30 Exception noted as ground of appeal.

Q (By the Court.) It was finally signed with all those conditions in there? A No, your Honor, when he brought the contract—

Mr. Simandl: I object.

The Court: Proceed.

Mr. McGlynn: Is there any objection to the introduction of the two checks?

40 Mr. Simandl: No.

*Joseph Kahan, direct.*

Mr. McGlynn: I offer in evidence check dated August 18, 1925, to the order of Sol Jaffe made by the Chancellor Union Land Company in the sum of \$1,500.

(Same is marked Exhibit P. 2.)

Mr. McGlynn: I offer a check in evidence dated October 13, 1925, to the order of Sol Jaffe and Esther Jaffe in the amount of \$1,000. 10

(Same is marked Exhibit P. 3.)

Q These two checks marked Exhibit P. 2 and P. 3 were checks given by your company as deposits on account of the purchase price of this property? A Yes, sir.

Q Whom did your company retain for the purpose of examining the title to this property when the title was delivered? A Mr. Eber. 20

Q What you did thereafter was done on his advice? A Yes, sir.

Q Before the delivery of this contract, Exhibit P. 1, did Mr. Jaffe make any representations to you or make any representations in your presence with regard to whether or not the property owned by him was subject to any restrictions? 30

Mr. Simandl: I object as not being within the issue and further on the ground this is an attempt to alter a written instrument and the instrument speaks for itself.

The Court: Sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal. 40

*Joseph Kahan, direct.*

Q Was anything said by Mr. Jaffe to you or any other officer of the plaintiff corporation prior to the execution of this contract or at the time the contract was being discussed with Mr. Jaffe by the officers of your company in regard to the use to which your company desired to put this property after it was acquired?

Mr. Simandl: I object as immaterial. The contract speaks for itself.

The Court: Sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Did you have any knowledge at all as to whether or not this particular property described in contract P. 1 was, or was not, restricted? A Yes, sir.

Mr. Simandl: I object.

The Court: The objection was too late.

Q You answered the last question yes. Did you understand the last question?

Mr. Simandl: Objected to.

The Court: Sustain the objection.

Q You answered the last question yes. Did you mean that you did or you did not?

Mr. Simandl: I object as there was nothing uncertain about the question or about the answer.

The Court: Sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

*Benjamin Eber, direct.*

Exception noted as ground of appeal.  
Cross examination waived.

BENJAMIN EBER, sworn in behalf of the plaintiff.

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*Direct examination by Mr. McGlynn.*

Q You are a member of the Bar of the State of New Jersey? A I am.

Q Were you retained by the Chancellor Union Land Company to search a title or cause a title of this property described in Exhibit P. 1 to be searched? A I did.

Q Will you tell me from the search which was made or which you caused to be made, whether or not the title to the property described in that contract was subject to any restrictions?

Mr. Simandl: I object on the ground that it is immaterial.

The Court: Sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

30

Q What was the cost, reasonable cost, of the search that you had made for the plaintiff in this case?

Mr. Simandl: I object as there has been nothing proved that they are entitled to any damages as yet.

The Court: They may prove it. I will admit it.

40

*Benjamin Eber, direct.*

A \$350.

Q In connection with your search of the premises did you ascertain whether or not there was any defect in the title owned by the defendants in this case?

10 Mr. Simandl: I object on the ground it is calling for a conclusion.

The Court: I will admit it.

A Yes, sir.

Q Explain what you found. A I found that the title was encumbered by restrictions.

Q I do not mean that.

Mr. Simandl: I move that that be stricken out, that answer.

20

Mr. McGlynn: I consent.

30 A I found a defect in a sheriff's sale to one—there was a conveyance made by Sheriff Bogardus of Monmouth County to one Hannah M. Lyons, dated September 19, 1905, and recorded September 30, 1905. It was sold by virtue of a certain writ issued out of the New Jersey Supreme Court of the State of New Jersey and directed to the Sheriff of Monmouth County and commanded to the goods and chattels of Bella G. Holbrook, the defendant in your county, caused to be made the sum of \$48,956.39 and so forth.

Q What did the record in Monmouth County show in reference to the defendant Bella G. Holbrook, whose name you just mentioned and whose land was sold by virtue of the execution?

40 A The title was derived from one Louis J. Lyons and the record indicated that the Louis J. Lyons departed this life on or about the 31st day of October, 1897.

*Benjamin Eber, direct.*

Q Who did he leave surviving as his heirs at law? A He left surviving Hannah M. Lyons, Isabella Lyons and Bertha E. C. Lyons, daughters.

Q What did the record show subsequent to his death in regard to the disposition of the one daughter, whose name you have not mentioned now? A There is a conveyance by Bertha E. C. Lyons, unmarried, to Hannah M. Lyons. 10

Q That, then, put a two-thirds interest in Hannah? A Yes, sir.

Q And she was granted the sheriff's deed you mentioned? A Yes, sir.

Q Does the record show any conveyance resulted or ever became executed by the husband of Isabella G. Holbrook?

Mr. Simandl: I object. Before there is any interest there must be the birth of an issue. The mere fact that there is a marital status does not create an issue in this State since the Married Woman's Act, and further than that the burden is upon the plaintiff in this case to show something which is not merely conjecture or speculation, but it must show a statement of facts which give rise to an absolute doubt upon the title, or as some courts have said, the doubt upon the title must be rational doubt or a real doubt. 20 30

The Court: I will admit it.

Defendants' counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q (Question read.) A No.

Q Did you bring these facts which you have just testified to to the attention of the then attorney of Mr. and Mrs. Jaffe? A I did. 40

*Benjamin Eber, cross.*

Q Was any attempt made to explain to you or to disprove your contention that there was an outstanding interest?

Mr. Simandl: I object.

10 The Court: Sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Prior to this suit, which is now being tried, did Mr. and Mrs. Jaffe file a bill in the Court of Chancery for specific performance of this contract?

20 Mr. Simandl: I object on the ground that it is immaterial.

The Court: Sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Was that chancery bill dismissed later?

Mr. Simandl: I object.

30 The Court: Sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

*Cross examination by Mr. Simandl.*

40 Q In that same record there is also a record of a notice of *lis pendens*, is there not, in the year of 1902, May, 1902?

*Benjamin Eber, cross.*

Mr. McGlynn: I object as not cross examination.

The Court: Sustain the objection.

Q Did you find, in your search of the title of record, of a chancery proceeding between Hannah M. Lyons and Bertha E. C. Lyons and Isabella G. Holbrook in 1902? 10

Mr. McGlynn: I object as not cross examination.

(Argument.)

The Court: That is immaterial.

Q You wrote a letter to Mr. Jay on January 14, 1926, is that right? A I believe so; I can't recall the date. 20

Mr. McGlynn: Instead of taking up the time, I have two more witnesses whom I offer to put on the stand and ask the same questions, that is, in reference to the circumstances surrounding the execution of the contract and the fact that the contract when first presented did not contain the clause on the second page, that that was then inserted by the vendor before execution. 30

The Court: It was inserted by the vendor before either party executed it?

Mr. McGlynn: Yes, instead of putting that on.

The Court: You will object, Mr. Simandl?

Mr. Simandl: Yes, your Honor.

The Court: I would sustain the objection and allow Mr. McGlynn an exception.

PLAINTIFF RESTS.

*Motion for a Non-suit.*

Mr. Simandl: I make a motion to non-suit the plaintiff in this case on the ground that where a vendee has shown no right to rescind a contract and refused to perform it, he cannot recover the money he has paid upon it.

10 The Court: I will grant your motion.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(The jury retires.)

Mr. McGlynn: I do not want to have it misunderstood that I did not tender myself willing to perform in accordance with my theory of the contract, defendant's theory being he did not have to give a deed of the restrictions; isn't that right?

20

Mr. Simandl: I simply used the expression in the case of Steinbock against Patten-gill, wherein the Court said that where a vendee seeks to recover money and refuses to perform—

Mr. McGlynn: I merely want it on the record that I offered to prove; I was ready, willing and able if the deed was given to me without restrictions.

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Mr. Simandl: That you did not want to perform without the restrictions.

The Court: The record will have to stand the way it was before the jury was discharged.

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*Exhibit P. 1.***EXHIBIT P. 1.**

(All words printed in italics were typewritten in the original agreement.)

THIS AGREEMENT made the *Thirteenth* day of *August*, in the year of our Lord One Thousand Nine Hundred and *Twenty-five* 10

BETWEEN *SOL JAFFEE AND ESTHER JAFFEE*, his wife, of the *Borough of Belmar* in the County of *Monmouth* and State of *New Jersey*, party of the first part;

AND *CHANCELLOR UNION LAND CO.*, a body corporate, having its principle office in of the *City of Newark*, in the County of *Essex* and State of *New Jersey*, party of the second part;

WITNESSETH, That the said party of the first part, for and in consideration of the sum of *FORTY THOUSAND (\$40,000) Dollars*, to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that the said party of the first part, will well and sufficiently convey to the said party of the second part, *its successors* and assigns, by Deed of *General Warranty* free of all encumbrances *except as hereinafter stated*, on or before the *Thirteenth* day of *December* next ensuing the date hereof, *ALL that certain lot tract, or parcel, of land and premises, hereinafter particularly described situate, lying and being in the Borough of Belmar in the County of Monmouth and State of New Jersey, as shown on Map of Belmar, N. J., 1915, Clyde Potts, C. E., bounded and described as follows:* 20 30 40

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Exhibit P. 1.

Beginning at the point of intersection of the southerly line of Third Avenue with the westerly line of Ocean Avenue and extending from thence (1) Westerly, along the southerly line of Third Avenue, 250 feet to the easterly line of lot number 502 as shown on said map; thence (2) 10 Southerly, along the easterly line of lot number 502, One Hundred Fifty (150) feet to the rear line of lot number 601 on said map; thence (3) Easterly, along the rear line of lot number 601 and 600, One Hundred (100) feet to the westerly line of lot number 9; thence (4) Northerly along the westerly line of lot number 8 and 9, fifty (50) feet to a point; thence (5) Easterly, along the southerly line of lot number 7, One hundred 20 fifty (150) feet to the westerly line of Ocean Avenue; thence (6) Northerly, along the westerly line of Ocean Avenue, 100 feet to the point or place of Beginning.

Together with all household furniture and furnishings now contained in and on the said premises.

Subject to covenants, conditions and restrictions contained in former deeds for the same premises.

30 AND the said Chancellor Union Land Co. for itself, its successors and assigns, doth covenant, promise and agree to and with the said party of the first part, his heirs, executors, administrators and assigns, that the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the said sum of

40 FORTY THOUSAND (\$40,000) . . . . Dollars.  
as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

Exhibit P. 1.

On Execution of this agreement for which this is also a receipt	\$1,500.00	
On October 13, 1925, cash	1,000.00	
On delivery of deed, cash on or before Dec. 14, 1925	1,000.00	
By assuming the mortgage at present a lien on the premises, and paying the same according to the terms thereof	10,000.00	10
On Bond and Mortgage, same containing usual interest, tax, assessment, insurance and installment default clauses, and an agreement not to claim credit on the interest payable on bond and mortgage, by reason of any tax assessed, or to be assessed against the premises, with interest at six per cent. payable semi-annually for four (4) years	15,000.00	20

And the second mortgage may be paid off at any time before maturity in full or in part in multiples of not less than Five Hundred (\$500.) Dollars and the party of the first part is to postpone his second mortgage to any first mortgage that the party of the second part may obtain, 30 providing, however, that the first and second mortgage shall not be of a total amount of more than Twenty-five Thousand (\$25,000.) Dollars.

And the party of the first part hereby states there are no restrictions on the herein mentioned premises.

This Contract is entered into upon the knowledge of the parties as to the value of the land and whatever buildings are upon the same, and not on any representations made as to character or quality.

*Exhibit P. 1.*

And the said party of the part hereby agrees to pay to the licensed and authorized agent a commission of % on the purchase price aforesaid.

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

20 AND IT IS FURTHER AGREED, by the parties hereto, that the said deed shall be delivered and received at office of *Arthur M. Birdsall, 701 Ninth Avenue, Belmar, N. J.*, between the hours of *nine* o'clock in the forenoon and *five* o'clock in the afternoon on the said *Thirteenth* day of *December* next ensuing the date hereof.

The rents of said premises, insurance premiums, water rents, taxes, and interest on Mortgage, if any, shall be adjusted, apportioned and allowed as of the day of delivery of said deed.

30 Gas and electric fixtures, gas stoves, hot water heaters and chandeliers, carpets, linoleum, mats and matting in halls, screens, shades, awnings, ash cans, heating apparatus, if any, and all other personal property appurtenant to or used in the operation of said premises is represented to be owned by seller and is included in this sale.

The risk of loss or damage to said premises by fire or otherwise until the delivery of said deed is assumed by the party of the first part.

40 In case the premises shall suffer injury beyond the ordinary wear and tear, the party of the first part, shall repair the damage before the date set for delivery of said deed or make an appropriate deduction from the purchase price herein stated.

*Exhibit P. 1.*

It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor, and that there are no encroachments thereon and that the buildings comply with municipal ordinances and regulations and the provisions of the New Jersey State Tenement House Act as enforced by the State Board of Tenement House Supervision, to be shown by the report of the department or board enforcing the same where such ordinances, regulations and said act apply. 10

It is expressly understood and agreed that the title to the land and premises hereby agreed to be conveyed is not derived from any proceedings or any Act for the Sale of Land for non-payment of the municipal taxes or assessments, or by adverse possession. 20

The premises above described are sold subject to restrictions appearing of record, and zoning ordinances, if any.

If at any time before the delivery of the deed the premises or any part thereof shall be or shall have been affected by any assessment or assessments which are or may become payable in annual installments of which the first installment is then due or has been paid, then for the purposes of this contract all the unpaid installments of any such assessment, including those which are to become due and payable after the delivery of the deed, shall be deemed to be due and payable and to be liens upon the premises affected thereby and shall be paid and discharged by the seller thereof, upon the delivery of the deed. 30

AND it is hereby agreed by and between the parties hereto that in case any street improvements are made, or have been made, upon which 40

Exhibit P. 1.

the property mentioned herein is located, up to the time of the delivery of deed, but not assessed, such assessment shall be borne by the party of the first part heirs, executors, administrators and assigns.

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

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

20 SIGNED, SEALED AND DELIVERED  
IN THE PRESENCE OF

R. M. Holmes, as to—Sol Jaffe.  
R. M. Holmes, as to—Esther Jaffe,

CHANCELLOR UNION LAND COMPANY,  
Joseph Kahan, President.

ATTEST:

30 Samuel Bean,  
Secretary.

In consideration of mutual promises and agreements herein stated, we hereby agree to extend the date for the delivery of deed and execution of this contract to at same hour and place.

Chancellor  
Union Land Co.

40 (SEAL) WITNESS hand and seal this  
day of A. D. 19

Exhibit P. 1.

STATE OF NEW JERSEY }  
COUNTY OF MONMOUTH } ss.

BE IT REMEMBERED That on this 13 day of August, in the year of Our Lord One Thousand Nine Hundred and 25, before me the subscriber, a Notary Public of New Jersey, personally appeared Sol Jaffe and Esther Jaffe, his wife, who, I am satisfied, are the grantors mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that, they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed. 10

And the said Esther Jaffe being by me privately examined, separate and apart from her said husband, further acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, FREELY, without any fear, threats or compulsion of said husband. 20

ROBERT M. HOLMES,  
Notary Public of N. J.

Robert M. Holmes.  
Notary Public.  
(SEAL)

30

40

Exhibits P. 2 and P. 3.

**EXHIBIT P. 2.**

CHANCELLOR UNION LAND           No. 431  
 COMPANY  
   Newark, N. J. August 13, 1925.  
 Pay to the order of Sol Jaffee       \$1,500 00/100  
 10 Fifteen Hundred 00/100 .....Dollars  
 CLINTON TRUST COMPANY           Joseph Kahan,  
   NEWARK, N. J.                    President.  
   Samuel Bean,  
   Secretary.

Indorsed:  
Sol Jaffe

**EXHIBIT P. 3.**

20 CHANCELLOR UNION LAND           No. 489  
 COMPANY  
   Newark, N. J. October 13, 1925.  
 Pay to the order of Sol Jaffee &  
       Esther Jaffee .....\$1,000 00/100  
 One Thousand 00/100 ..... Dollars  
 CLINTON TRUST COMPANY           Joseph Kahan,  
   NEWARK, N. J.                    President.  
   Samuel J. Savit,  
 30    Treasurer.

Indorsed:  
Sol Jaffe and Esther Jaffe.

**New Jersey Court of Errors and Appeals**

CHANCELLOR UNION LAND COM- PANY, a corporation, <i>Plaintiff-Appellant,</i>  <i>vs.</i> SOL JAFFE and ESTHER JAFFE, <i>Defendants-Respondents.</i>	}	<i>On Appeal          from          Supreme          Court.</i>
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**BRIEF OF PLAINTIFF-APPELLANT.**

**Statement of the Case.**

Plaintiff sued to recover back its deposit money paid under an agreement for the purchase of certain real estate, and to recover search fees expended, by reason of the alleged inability of the defendants to perform in accordance with their agreement.

The trial of the cause in the Supreme Court, Essex Circuit, resulted in a judgment of non-suit. This is an appeal from such judgment and the following grounds of appeal are urged:

1. The refusal of the Trial Court, on objection, to admit answers to certain questions put to the witnesses.
2. The judgment of non-suit.

**The Facts.**

On August thirteenth, nineteen hundred twenty-five, defendants and plaintiff entered into a written agreement for the sale of certain property belonging to the defendants and located at Belmar, New Jersey. The price agreed upon was forty thousand dollars, and title was to close on

December thirteenth of that year. Under the terms of the agreement plaintiff paid twenty-five hundred dollars on account of the purchase price. Thereafter, plaintiff caused a search to be made of the premises and learned that there were restrictions of record affecting the premises and also what appeared to be a defect in the title (State of Case, p. 17, l. 15 to p. 19, l. 37).

These facts were communicated to the defendants (p. 19, l. 40) and no effort being made to remove the objections, plaintiff rescinded its contract and demanded the return of the money paid by it under the contract. The return of the deposit money having been refused, plaintiff commenced this suit.

The determination of the question whether plaintiff was entitled to rescind and recover its deposit money rests upon the construction to be given to the agreement (State of Case, pp. 23 to 29). The parties used a long form of printed agreement, with full covenants, and supplemented or modified it to suit their particular purpose.

The printed form contained this clause:

"The premises above described are sold subject to restrictions appearing of record, and zoning ordinances, if any" (p. 27, ll. 22-24).

The agreement also contained the following pertinent clauses which are typewritten where now italicized:

"The said party of the first part, for and in consideration of \* \* \* etc. \* \* \* will well and sufficiently convey to the said party of the second part, *its successors* and assigns, by deed of *General Warranty* free of all incumbrances *except as hereinafter stated* \* \* \* *all that certain* lot, tract, etc., \* \* \* bounded and described as follows" (Here follows description) \* \* \*.

"*Subject to covenants, conditions and restrictions contained in former deeds for the same premises*" (State of Case, p. 23, l. 20; p. 24, l. 28).

Further down in the contract appears this typewritten clause:

"*And the party of the first part hereby states there are no restrictions on the herein mentioned premises*" (State of Case, p. 25, l. 33).

The Trial Court refused to allow any testimony to be introduced to prove the circumstances under which the apparent conflicting clauses were inserted in the agreement, or how and where the clauses were inserted in the agreement under which the defendants expressly represented and asserted that there were no restrictions on the premises or whether the contract had been prepared by the vendor or vendee, or whether the vendor knew the use for which the vendee desired this property so as to show the purpose of the representation inserted by the vendor in the contract as to restrictions, nor to prove that the property was subject to restrictions, nor to prove that the vendor had not explained or disproved whether or not the outstanding interest was or was not in existence.

## ARGUMENT.

### I.

The existence of restrictions on the property entitled the plaintiff to rescind and recover back its deposit money.

Accordingly, it was error to refuse to permit the witness Benjamin Eber to answer this question:

"Q Will you tell me from the search which was made or which you caused to be

made, whether or not the title to the property described in that contract was subject to any restrictions?"

It is submitted that the consideration of the Court may be focused upon the two typewritten clauses of the agreement to the comparative exclusion of the printed provision.

It is a cardinal rule of construction that where a contract is partly printed and partly written, and there is a conflict between the printing and the writing, the writing will prevail.

13 C. J., page 536;

*Williston on Contracts*, Vol. II, Sec. 622.

The parties to the agreement apparently wholly ignored the existence in it of the printed provision for in one part of the agreement there is restated the contents of the printed provision while in another the effect of the printed clause is removed by the express representation that there are no restrictions. It is the two typewritten clauses which present the difficulty which it is attempted to resolve in this cause.

The learned Trial Court, when the case started, indicated its view of the law applicable to the case in its comment found on pages 12 and 13 of the State of the Case, and of which the following is an excerpt:

"I should think it would be very hard for the vendor to explain this second representation.

"The Court of Errors has had this to say about these repugnant clauses, referring to an English case where a defendant has entered into a clear personal covenant and then endeavored by the proviso to relieve themselves of the personal liability: 'If a man covenants in his own name for the performance of some particular act or duty and then seeks by proviso to relieve himself from it,

the proviso will be rejected as being repugnant to the covenant.'"

It is respectfully pointed out that the hypothetical situation indicated by the Court is entirely unlike the facts of the instant case. In the case at hand the second clause is not a proviso in form but a clear and distinct representation by the seller of an existing fact. Furthermore, the first clause is a covenant of the *seller* who agrees to convey subject to conditions, covenants and restrictions. Thereafter, in the agreement, the seller represents that there are no restrictions; thus he does not "relieve himself from" his covenants but adds to it an additional obligation. Consequently, the applicability of the hypothetical case presented by the Court and the reasons for the rule quoted, fall together. Those considerations which may militate against a party's relieving himself from a liability already assumed do not present any reasons against his *adding to* that liability.

The case which the learned Trial Judge undoubtedly had in mind and in which appear the lines quoted by him, is

*Vickers v. Electrozone Commercial Company*, 67 N. J. L. 665.

It is respectfully submitted that a reading of that case discloses that the basis for the decision rested on other grounds than the mere order in which the respective clauses in question appeared.

In that case the third and fourth clauses of an agreement for the sale and purchase of certain products provided that the buyers were to pay for those products at a certain rate and were to buy at least a certain quantity. The fifth clause provided that in the event the buyers failed to purchase the agreed amount, the agreement

was to become null and void and all rights of the buyers thereunder were to be forfeited. In an action by the seller for breach of contract for failure to purchase the agreed amount of their product, the buyers contended that the fifth clause provided the exclusive remedy. The Court held it did not and that the action for breach of the third and fourth clauses was maintainable.

The Court indicated however, that it did not place its decision on the mere order of precedence but upon a construction of the contract in the light of the intention of the parties. The Court first examined the practical situation presented as is evidenced by these portions of its opinion found on page 673 of the case:

“The effect of this contention of the plaintiffs in error, regarded from a practical standpoint, results in a *reductio ad absurdum*.”

“Such business folly, not to say stupidity, will not readily be inferred to have been within the intention of the vendors. The insistence that the fifth clause furnished the exclusive remedy, is unreasonable \* \* \*”

The Court then observed that the fifth clause was a proviso in form, beginning “if the parties of the second part shall fail to order and purchase, etc.” and stated that such proviso was inconsistent with the clear covenant of the buyer previously expressed. The opinion then contains the rule concerning “repugnant and incompatible” clauses as given in

2 Pars. Cont. Ed. 1860, 26, and Ed. 1873, 513.

Immediately thereafter, the opinion indicates that this could not have been the basis of their decision for it states:

“The proper effect of the fifth clause was to afford the vendors additional protection

against default by the vendees, not at all incompatible with the retention of their right to seek damages at law for such default.”

It seems clear therefore, that the Court did not consider the two clauses as repugnant and so there was no occasion to apply the rule of prior position in the contract. There then appears the following, which it is submitted, presents the true basis for the decision:

“Story Cont. 660, states the rule as to repugnant clauses in another form, not dependent upon the mere order of precedence in which they are framed in the instrument, thus: ‘But whenever one portion of a contract is wholly repugnant to the rest of it, and is irreconcilable with the manifest intention of the parties, as apparent upon a consideration of the whole instrument, it will be stricken out.’ Again, in Section 661, in speaking of the effect of contradictory stipulations occurring in contracts, he says: ‘If the subsequent stipulation contradict and restrict what was distinctly stated, and *constituted a principal inducement* (italics are the Court’s) to the contract, it will be of no effect.’

“There can be no doubt but that the principal inducement to the contract we are considering was the purchase and payment for the patented mixtures, and therefore the case falls within the meaning of the above statement of the law. Clark Cont. Ed. 1894, 589, Ch. 10, in giving the subsidiary rules of construction which govern the interpretation of contracts, mentions two which are of some pertinence. He says: ‘A contract will, if possible, be construed so as to render it reasonable, rather than unreasonable,’ and, ‘where it is susceptible of two meanings, will be given the meaning which will render it valid.’”

An examination of the cases discloses that the rule that the earlier of two repugnant clauses governs is invoked only where the intentions of the parties cannot be ascertained in any other way. Where such intention can be deduced from the contract itself, it is always enforced.

The text-writers have this to say concerning the rule:

“It was early laid down ‘that, in a deed, if there be two clauses so totally repugnant to each other that they cannot stand together, the first shall be received, and the later rejected.’ The same doctrine has been held in some modern cases applicable to contracts in general. It is obvious, however, that such a rule is extremely artificial, and can only be accepted as a last resort. In most recent cases where it has been applied the later clause was in consistent with the general purpose of the contract, and for this reason alone might have been disregarded.”

*Williston on Contracts*, Vol. II, Section 624.

“A rule sometimes laid down, though rarely observed, is that in case of conflict between two clauses, that first in place is to control, at least if the first clause is in harmony with the rest of the contract. This rule has little to recommend as a contract is entered into as an entirety and not word by word. It is used to justify meanings reached by the application of other principles of construction, and its practical value is slight. It is said the rule that the first of two irreconcilable clauses shall prevail is ‘a rule of last resort to be applied only when all reasonable modes of reconciling the apparent repugnancy have failed.’ This rule is also subordinate to the rule that the intention of the parties deduced from the entire instrument is to prevail over the apparent intention of the separate parts of the instrument.”

Page on Contracts, Vol. 4, Sec. 2037.

Story’s rule, placing emphasis upon ‘the manifest intention of the parties’ and the ‘principal inducement to the contract’ has been quoted *supra*.

Our Courts have similarly indicated a desire to enforce the intention of the parties before invoking the rule of thumb based upon the position of the clauses. The Vickers case above, which quotes and adopts the rule given by Story, is one example.

Another case which indicates that the rule of precedence is not exclusive, is *Horwitz v. American Surety Co.*, 85 N. J. L. 98 (Sup. Ct. 1913). That case dealt with a conflict between two separate agreements and the Court enforced the later one, but the opinion contains this statement:

“It seems impossible to reconcile these conflicting clauses of the contract, and therefore one or the other must give way. \* \* \* The usual rule, as stated by the Court of Errors and Appeals in *Vickers v. Electrozone Co.*, 38 Vroom 665, 675, is that in deeds and other instruments *inter vivos* the earlier clause prevails. Another rule is to ascertain the manifest intention of the parties and disregard what is repugnant to such intention. Story Cont. 660; 9 Cyc., §583. If these repugnant provisions had been contained in the original contract of suretyship, the limitation would probably have had to fall under either of the above rules. But this point need not be and is not decided because of the change made by the supplemental agreement.”

The Court there plainly indicated that it did not consider the rule of prior position to be the sole solution of a case of repugnant clauses and approved, with equal emphasis, the rule of “Manifest intention.”

A very carefully considered case which gives the attitude of the Court rather clearly is *Ash-*

*more v. Transportation Co.*, 28 N. J. L. 180, (Supreme Ct. 1860).

In that case a towing company agreed to tow a canal boat "at the risk of the owner and master of the boat, and subject to the stipulations following: first, the said master expressly agrees to have a competent man at the helm of his said boat at all times while the tow is in motion; second, the said master expressly guarantees that his boat is seaworthy and reasonably fit for the trip undertaken." The boat grounded and was lost by reason of the negligence of the servants of the towing company. In an action brought by the owner of the boat, the plaintiff had a judgment. A rule to show cause was then obtained and, at the argument, it was contended that under the agreement, the boat was towed "at the risk of the owner." The Court examined the contract as a whole and concluded that that could not have been the intention of the parties and dismissed the rule. The attitude of the Court can best be found in these portions of the opinion which follow:

"Whelply, *J.* (after stating the contention of the defendants), 'We can hardly suppose the owner of a tow would willingly and knowingly enter into an agreement of that import,' \* \* \*

"We must resort to construction to reach the legal import of the agreement. In doing this, the whole agreement must be examined, not that stipulation only which contains the words at the risk of the master and owner of said boat, but all the stipulations.

"I think the broad language of the first stipulation must be limited by the actual intent of the parties, as shown by the agreement as a whole.

"What is the object of the stipulations required of the master of the tow? (The learned Judge then examined the stipulations and concluded):

"The whole agreement, taken together, obviously means that the tower is to be exempt from the risks incidental to ordinary careful navigation, but not from those caused by his own negligence or that of his agents, if the boat is seaworthy and reasonably fit for the purpose of the trip."

"Van Dyke, *J.* (p. 196), 'It seems to me that the contract itself, taken altogether, clearly shows that the parties, at the time of making it, could not, either of them, have contemplated the construction now contended for; for if the plaintiffs were to take all the risks and the defendants none, why were the plaintiffs required to stipulate that the boat was seaworthy?'"

It is respectfully submitted that this case goes much further than is necessary for the case at bar. In that case a clear unambiguous provision was held to have been overridden by a subsequent stipulation, a stipulation which itself was not in conflict with the prior provision but which contained an inference contradictory to the earlier provision, and this inference was accepted as controlling because the Court believed that was the true intention of the parties.

In the instant case there can be no question as to the manifest intention of the parties. The first clause is one in daily routine use; it bears all the marks of having been taken, as a part of the description, from an earlier document. The second clause is unusual and different; it expresses an intention applicable to this particular agreement alone; it indicates a consciousness of the parties as to what they wanted in their contract, and it is respectfully submitted, represents their true and deliberate intention. As such, it should be enforced by the Court.

Our argument thus far has been based upon the hypothesis that these two clauses in question are wholly repugnant and irreconcilable. In the event that this Court adopts that view, it is submitted that the latter clause should nevertheless control since it expresses the true intent of the parties.

But we do not believe the two clauses in question should be treated as repugnant. They are reconcilable, or, at most, only partly conflicting.

There is a well-settled rule of the law of contracts that where general provisions and special provisions are in conflict, the special provisions override the broader ones insofar as they conflict, for, it is reasoned, in the special provision the parties have focused their attention on that particular phase of the agreement, a phase which may have been absent from their minds when they used the broad and general language.

In this connection, the following statements from the treatises are pertinent:

"If general words are used in connection with specific words, the specific words generally follow the intention of the parties with greater exactness, and accordingly, the general terms thus used are to be regarded as limited by the specific words, whether the specific words precede the general words or follow them."

*Page on Contracts*, Vol. 4, Section 2026.

"If the first clause is general in terms, and the latter is particular, or if the latter clause is repugnant only to part of the earlier, it seems that the latter clause would be given full effect, and the earlier subjected to such qualifications as the latter might make necessary."

*Williston on Contracts*, Vol. II, page 1208.

Cases from other jurisdictions which recognize this rule are:

*Southern Surety Co. v. Greeneville*, 261 Fed. 929, (Cir. Ct. Appeals, 1920);

*Harrity v. Trust Co.*, 124 Atl. 493 (Pa. 1924);

*City of New York v. American Railway Traffic Co.*, 121 N. Y. S. 221 (Aff'd 128 N. Y. S. 1118).

The headnote in this case reads as follows:

"The first part of a clause in a contract between a city and a municipal contractor imposing in general terms, liability on the contractor for all accidents causing loss to the city must be held limited by a subsequent special provision restricting liability to cases of negligence, as otherwise such provision would be unnecessary and meaningless."

In our Courts the case of *Ashmore v. Transportation Co.*, is to the same general effect.

It is submitted, therefore, that inasmuch as these two clauses are at most only partly conflicting, the broad general clause must give way to the subsequent special provision insofar as it attempts to cover the subject matter more particularly dealt with by the specific clause.

There is another very serious reason why the Trial Court was wrong in taking the view it did of these two clauses in this agreement.

There are numerous pieces of real estate which, on the records, would appear to be subject to restrictions, and yet, the owner can safely and correctly represent and warrant that his property is not restricted as to use, as for instance, where restrictions are limited in point of time, expiring at a certain date, and the purchaser may not know

when the same expired, but the vendor does and he could represent that there were no restrictions affecting the property.

Another illustration would be where a tract is laid out with a uniform neighborhood scheme of restrictions and there is a complete change in the neighborhood. The real estate records would indicate that the property was subject to restrictions, yet the owner, knowing of the changed conditions, could properly represent, as did the defendants here, that there were no restrictions which affected the property.

In another sense, these two provisions are not conflicting at all but represent two separate and distinct undertakings by the defendants. The later clause is a *representation* separate and apart from their earlier covenant. Although coupled, it is true, with the whole agreement and an integral part thereof, it is an entirely new undertaking on their part.

An analogous case is presented in the case of an agreement to convey land "subject to existing leases" and thereafter, in the agreement, the owner states that the annual rental is \$5,000.00, let us say. The purchaser then discovers that the rental is considerably less than that. Can it be doubted that he would be entitled to rescind the contract and recover his deposit, even though the seller agrees to convey "subject to leases"? The representation of the seller was a material part of the contract, and it is elementary that for a breach of a material provision of a contract the injured party has a right to rescind and demand the return of the money paid on account.

A case closely in point is *Davis v. Scher*, 73 N. J. L. 155, (Sup. Ct. 1905).

In that case defendant agreed to convey to the plaintiff certain property which was described as "317 Springfield avenue, consisting of a three-story frame building with a store and two rooms on the first floor, six rooms on the second and four rooms on the third floor." When the vendee examined the property a month or so later he found there were only five rooms on the second floor and three on the third. He then rescinded and brought suit to recover his deposit.

The Court (Swayze, *J.*) said:

"The only question is whether the misrepresentation was so material as to justify a rescission of the contract. The Trial Judge found in favor of the plaintiff. We think he was right. The mere fact that the parties inserted in the contract this particular statement of the number of rooms on each floor indicates that they thought it was material at the time, and clearly, the number of rooms on each floor of a building of that character in a city like Newark may materially affect the income to be derived from the property. The right of the plaintiff to rescind does not depend on a fraudulent misrepresentation. It arises from the fact that he is not getting what he bargained for. The principle is the same that was stated by Justice Depue in *Wolcott v. Mount*, 7 Vroom 262, 264."

Other cases from our courts which indicate the nature of actionable misrepresentation are:

*Wise v. Fuller*, 29 N. J. E. 257 (Ch. 1878).

*Van Fleet, V.-C.* "It may be said, generally an actionable misrepresentation consists in a false statement respecting a fact material to the contract and which is instrumental in producing it. 2 Chit. on Con. 1044; 2 Pars. on Con. 275; *Taylor v. Fleet*, 1 Barb. 471. A remedy will lie against a vendor for falsely affirming that a greater rent is paid for the estate than is actually reserved, for that is a fact within his own knowledge.

Sugd. on Vend. 3; *Lysney v. Selby*, 2 Ld. Raym. 1118; *Dobell v. Stevens*, 3 B. & C. 673. And so a willful misrepresentation by a vendor affirming that the income from his public house has been greater than in truth it was, is an actionable fraud."

Analogous cases are:

*Dennison v. Grove*, 52 N. J. L. 144 (Sup. Ct. 1889);

*Conlan v. Roemer*, 52 N. J. L. 53 (Sup. Ct. 1889);

*Crosby v. Wells*, 73 N. J. L. 790 (Errors and Appeals, 1907).

Green, *J.*, at p. 801, "Furthermore it is to be remembered that fraud in representations of fact may be either in knowledge of their falsity or without knowledge of their truth or falsity, in coupling the representations with an express or implied affirmation or personal knowledge of their truth. See *Cowley v. Smythe*, (1884). 17 Vr. 380, 388, 391; *State, Cummings, Pros. v. Cass*, (1889) 23 *Id.* 77, 83, 85."

The famous case of *Wolcott v. Mount*, states a rule which, it is submitted, should be followed by this Court.

Depue, *J.* (in the Supreme Court, 36 N. J. L. 262, 265), "But in a number of instances it has been held that statements descriptive of the subject matter, if intended as a substantial part of the contract, will be regarded in the first instance as conditions, on the failure of which the other party may repudiate *in toto*, by a refusal to accept or a return of the article, if that be practicable \* \* \*"

Beasley, *J.* (in the Court of Errors and Appeals, 38 N. J. L. 496, 498)— "Whether the representation or affirmation accompanying a sale shall be regarded as a warranty or as *simplex commendatio* is a question to be solved by a search for the intention of the contracting parties."

That these rules are as applicable to contracts for the sale of land as to contracts for the sale of personalty, is evidenced by their adoption in the case of *Davis v. Scher, supra*, which dealt with such a contract and which cites and follows the above case.

The case of *Steinbach v. Pettingill*, 67 N. J. L. 36, cited by counsel for respondent before the Trial Court (State of Case, p. 22. l. 23), itself recognizes these principles of the law. The vendee there was denied relief because he had shown no right to rescind. But where the vendee can show misrepresentation or breach of contract, he has that right to rescind, and, as an incident to it, the right to recover money paid under the contract. *Thompson v. Killhefer*, 98 N. J. L. 359, (Sup. Ct. 1923), is a more recent case along the same lines. Manifestly, there is no arguing with the rule of these cases.

It is respectfully submitted however, that in the instant case there is both a breach of a material provision of the contract and a misrepresentation of a fact material to the contract. For either of these reasons, the purchaser has a right to rescind his contract and recover the money he has paid under it.

Consequently, it was error to exclude testimony intended to show that there were in fact restrictions upon the property and that, therefore, a material provision of the contract had been breached and a misrepresentation had been made as to a material fact.

## II.

Parol evidence is admissible to show the circumstances under which a writing was made to show the true intent of the parties at the time they entered into the agreement and to indicate the proper construction to be given it.

Accordingly, it was error to refuse to admit the answers to the following questions:

“Q Did this contract marked Exhibit P. 1 contain, when it was first presented to you, all of the typewritten matter which it now contains, or was something added to it after it was first presented to you and before it was executed? (State of Case, p. 14, l. 14.)

Q Before the delivery of this contract, Exhibit P. 1, did Mr. Jaffe make any representations to you or make any representations in your presence with regard to whether or not the property owned by him was subject to any restrictions? (State of Case, p. 15, l. 24.)

Q Was anything said by Mr. Jaffe to you or any other officer of the plaintiff corporation prior to the execution of this contract or at the time the contract was being discussed with Mr. Jaffe by the officers of your company in regard to the use to which your company desired to put this property after it was acquired?” (State of Case, p. 16, l. 1.)

And it was likewise error to exclude the proof of the circumstances attending the execution of the contract offered by counsel for the plaintiff.

“Mr. McGlynn: Instead of taking up the time I have two more witnesses whom I offer to put on the stand and ask the same questions, that is, in reference to the circumstances surrounding the execution of the contract and the fact that the contract when first presented did not contain the clause on the second page, that that was then inserted by the vendor before execution.” (State of Case, p. 21, l. 22.)

“The circumstances under which a writing was made may always be shown. The question the court is seeking to answer is the meaning of the writing at the time and place when the contract was made; and all the surrounding circumstances at that time necessarily throw light upon the meaning of the contract.”

*Williston on Contracts*, V. 11, Sec. 618, (p. 1198).

Our Courts have repeatedly recognized this rule:

*Ryer v. Turkel*, 75 N. J. L. 685 (Errors and Appeals, 1907) \* \* \* “It is to be accepted as settled law that as between the parties themselves oral evidence is not admissible to contradict a written agreement. \* \* \* Nevertheless the rule does not, in a proper case, forbid the throwing of light upon the meaning of the written agreement by evidence of the circumstances of the parties to it, or of their conduct after its execution, or of the condition of the subject matter.”

*Morris Canal, etc. Co. v. Matthiesen*, 17 N. J. E. 385; (Ch. 1866) \* \* \* “It is a well established rule that where the construction of a written agreement is doubtful the court may look to surrounding circumstances and avail itself of such light as they may afford in ascertaining the true meaning of the terms and language employed.”

*Fletcher v. Interstate Chemical Co.*, 94 N. J. L. 332, 333, 334, (Sup. Ct. 1920), *Trenchard, J.* \* \* \* “The cardinal rule in the construction of all contracts including contracts of sale, is that the court must, if possible, ascertain and give effect to the mutual intention of the parties, as far as that may be done without the violation of legal principles (citing cases).

“While a written instrument must be construed according to the intent of the parties as manifested by the instrument itself, yet where the construction is doubtful, the court

may look into the surrounding circumstances, and avail itself of such light as they may afford in ascertaining the true meaning of the language and terms employed (citing cases)."

At the trial of the case at bar, the learned Trial Judge gave no effect to the clause, "And the party of the first part hereby states there are no restrictions on the herein mentioned premises."

An investigation into the circumstances attending the execution of the contract would have revealed exactly how that clause came to be put into the contract. It might and would, it is respectfully alleged, have disclosed that the parties discussed the question of restrictions; that they bargained for a sale of property without restrictions; that this was a material feature of their bargain, and that, overlooking the preceding routine clause, they inserted this clause as the deliberate expression of their intention concerning the question of restrictions. That intention of the parties once known, should have been enforced as their true agreement, for in the construction of all contracts the primary rule is to give effect to the intention of the parties, and to all the terms of their agreement so far as is possible.

It was error, therefore, to refuse to receive evidence on this point.

### III.

**A contract will be construed most strongly against the party preparing it.**

Accordingly, it was error to exclude the answer to the question:

"Q Who prepared this contract, someone representing your company or someone rep-

resenting Mr. and Mrs. Jaffe?" (State of Case, p. 14, l. 1.)

"Since one who speaks or writes can by exactness of expression more clearly prevent mistakes in meaning than one with whom he is dealing, doubts arising from ambiguity of language are resolved in favor of the latter; and as he will ordinarily be the promisee of the promise in question, it is sometimes stated that the contract, if ambiguous, will be construed in favor of the promisee."

*Williston on Contracts*, V. II, Sec. 621.

*Fletcher v. Interstate Chemical Co.*, *supra*, adopts this rule at page 334 of the opinion:

"And this view is strengthened by the fact that the ambiguous words in question were the words of the defendant, and the rule is, that where a contract is ambiguous, it will be construed most strongly against the party preparing it or employing the words concerning which the doubt arises (*American Lithograph Co. v. Commercial, etc. Co.*, 81 N. J. L. 271), the reason for the rule being that a man is responsible for ambiguities in his own expressions and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the court will adopt a construction by which they would mean another thing more to his advantage."

It is respectfully submitted, therefore, that it was harmful error to exclude testimony showing which of the parties prepared the contract, and to exclude testimony which would have assisted the Court in properly construing the agreement.

## IV.

The testimony showed a defect in the title and the judgment of non-suit was therefore error.

Another serious reason apparently overlooked by the Trial Court as to why the plaintiff should have been paid its deposit was the fact that there was an outstanding interest in the husband of one Isabella G. Holbrook, who was the owner of a one-third interest in the property by reason of her being one of three heirs at law of one Louis J. Lyons, her father. Surely, if her maiden name was Lyons and at the time of the sheriff's sale, September 30, 1905 (see State of Case, pp. 26, 18, ll. 22, *et seq.*), it was Holbrook, she must have been married, and it was the duty of the vendor to either prove or disprove the existence of an outstanding interest in her husband in her one-third ownership of the property.

"Whether the validity of the title depends upon facts which are not of such a character as to be susceptible of proof at any and all times by those who may need to prove them for their protection, our courts hold that title in such a case should not be forced upon a vendee (citing cases)."

*Deseumeur v. Rondel*, 76 N. J. E. 394, at p. 402.

The Court having excluded the question (State of Case, p. 20, ll. 1-13), was clearly in error.

It is respectfully and strenuously urged that for the reasons herein set forth, the judgment of non-suit should be reversed and a new trial granted.

STEIN, McGLYNN & HANNOCH,  
Attorneys of Plaintiff-Appellant.

## New Jersey Court of Errors &amp; Appeals

CHANCELLOR UNION LAND COMPANY, a corporation, <i>Plaintiff-Appellant,</i>	On Appeal from Supreme Court.
—vs—	BRIEF OF DEFENDANTS RESPONDENTS.
SOL AND ESTHER JAFFEE, <i>Defendants-Respondents.</i>	

## STATEMENT UNDER THE RULES

The plaintiff-appellant brought its action against the defendants to recover a deposit paid by it to them on account of the purchase price for certain real estate which the latter agreed to sell to the former for the sum of Forty Thousand Dollars. The plaintiff based its claim upon the alleged inability of the defendants to perform in accordance with the terms of the agreement. The trial of the cause in the Supreme Court, Essex Circuit resulted in a judgment of non-suit. An appeal was entered from this judgment.

## ABSTRACT OF THE PLEADINGS

The complaint sets out the execution of the agreement in writing (Exhibit P-1) case page 23 et seq. It further alleges that by the contract defendants were obliged to convey to plaintiff the land without restrictions of any kind. That twenty-five hundred (\$2500.00) dollars had been deposited on account of the agreement. That an examination of the title disclosed restrictions of record and a further defect in the title, i. e., that there was an outstanding curtesy interest in the husband of one Isabella G. Hollbrook. That the defendants on the date set

for consummation of the agreement were unable to convey the premises in accordance with the terms of the contract as alleged.

THE ANSWER denied an inability to perform, and alleged that the defendants were ready, willing and able to perform the contract and the refusal of the plaintiff to perform.

A COUNTER-CLAIM was filed, alleging the willingness and ability of the defendants to perform, and the refusal and failure of the plaintiff to perform in accordance with the terms of the contract.

THE REPLY of the plaintiff joined issue with the answer and admitted its refusal to carry out the agreement, for the reason that defendants were unable to convey free from restrictions. NO ALLEGATION OF FRAUD OR MISREPRESENTATION OR DECEIT IS CONTAINED IN THE PLEADINGS.

#### THE FACTS

The contract having been admitted in evidence, the Trial Court undertook to construe it as a matter of law, to determine whether or not by the terms of the contract, the defendants were required to convey the real estate without restrictions, as was contended by the plaintiff.

The contract discloses *first* a typewritten clause reading as follows:

"Subject to covenants, conditions and restrictions contained in former deeds for the same premises." (See state of case, page 24, line 28.

Following this clause, there appears provisions with respect to the payment of the purchase price and provisions for a second mortgage, and thereafter appears this clause in typewriting, which will be hereafter referred to as the "second clause:"

"And the party of the first part hereby states there are no restrictions on the herein mentioned premises."

See case p. 25, line 33.

Following these typewritten clauses in the *printed* form appears the following:

*"The premises above described are sold subject to restrictions appearing of record and Zoning Ordinance, if any.*

See case page 27, line 21.

The Trial Court concluded that the contract *did not require* the defendants to convey the premises free of restrictions. Having arrived at this construction of the contract, the Trial Court refused to permit, over objection, certain testimony which was immaterial to the issue. The plaintiff having failed to establish a legal cause of action, which required its submission on the facts to the decision of the jury, the Court on motion of the defendants granted a non-suit.

### GROUNDS OF APPEAL

The appellant urges the following grounds of appeal: (1) The refusal of the Trial Court over objection to admit certain testimony. (2) That the Court erroneously non-suited the plaintiff.

### ARGUMENT

#### POINT I

#### THE PLAINTIFF AGREED TO PURCHASE THE PREMISES SUBJECT TO RESTRICTIONS.

By the provisions of the first typewritten clause and also the printed clause, the plaintiff agreed to accept a conveyance *subject to restrictions*.

This suit is brought upon the theory that the contract provided for a conveyance *without restrictions*. The appellant bases its suit upon what it conceives to be, a correct construction of the second typewritten clause. Under the circumstances, the appellant must concede that the typewritten clauses are *wholly in conflict*.

To arrive at what it conceives to be the correct construction of the contract, appellant insists that the first typewritten clause and the printed clause should fall, and the second typewritten clause control. This contention is contrary to the established law of this State. If the clauses are in such conflict that they cannot stand together, the rule has been settled in this state, by this Court in the case of *Vickers v. Electrozone Commercial Co.*, 67 N. J. L. 665; 52 Atlantic 467, adversely to the contention of appellant:

"So it is a general proposition that, where clauses are repugnant and incompatible, the *earlier prevails* in deeds and *other instruments inter vivos*, if the inconsistency be not so great as to avoid the instrument for uncertainty." (Italics mine)

This rule is followed in the case of *Horwitz vs. American Surety Company*, 85 N. J. L. 98.

This rule has been recognized by the United States Circuit Court of Appeals for the Second Circuit in the case of *Ralph Harper vs. Adolph Hochstim*, 278 Fed. 102, wherein Judge Hough for the Court said:

"A still older rule in the construction of instruments inter vivos is that the earlier of two supposedly inconsistent clauses prevails over the latter; and this canon of interpretation has lately been insisted on by high authority." Quoting *Vickers v. Electrozone Commercial Co.*, supra.

The Trial Court, whose duty it was to construe the written instrument as a matter of law, properly applied this established rule of construction and concluded that the *defendants were not obliged to convey without restrictions*.

In the case of *Smith vs. Fidelity & Deposit Co.* etc., 120 Atlantic Rep. 322, 323, the Court said:

"But the law will not make a better contract for the parties, then they themselves have seen fit to enter into, or alter it for the benefit of one party and to the detriment of the other. A judicial function of a Court of law is to enforce a contract as it is written."

One reason given by appellant in support of its contention, that the first typewritten and later printed clauses should fall and the second clause prevail is that it expresses the true intent of the parties. This reason is also unsound. It is conceded by appellant that this is a *valid and subsisting contract*. The minds of the parties having first met on the proposition, that the property was to be conveyed subject to restrictions, and a valid and subsisting contract having concededly resulted from the negotiations, it is logical to assume that their minds having thus met, continued in accord until the contract was executed. On the other hand, if there has been a mistake it is not remediable in this action.

The appellant next argues that the clauses are only partly conflicting. This contention is wholly inconsistent with the theory upon which plaintiff bases its suit. Assuming the clauses are consistent or partially so, a true construction under that assumption does not aid the appellant. The second typewritten clause is no more than an expression of the vendor's opinion upon the affect of the restriction already assumed by the purchaser under the earlier clause. Whether they affect or not, the purchaser thereby is not relieved of its obligation to accept the title subject to what appears in the records with respect to restrictions.

The appellant next argues that it might recover on the theory of fraud or misrepresentation.

The answer to that contention is, that it has failed to allege fraud or misrepresentation in its complaint. A further answer to that contention is, that the second typewritten clause, could not under the cir-

cumstances and the law as laid down by this Court in the case of Hagelin v. Lehmann, 126 Atl. 431; be the proper subject of such an action.

The contract discloses the existence of restrictions, subject to which, the plaintiff agreed to accept a conveyance, and in addition to this, the testimony of Kahan, an officer of the plaintiff corporation, *indicates knowledge of the existence of the restrictions before the contract was signed*. (Case P. 16, line 19).

Such knowledge is sufficient in itself, to preclude the appellant from successfully <sup>waging</sup> ~~judging~~ that the clause in question affords a basis for judicial action.

The case of Davis vs. Scher 73 N. J. L. 155 is authority for the principle, that a party to a contract, is not required to accept a tender of anything which materially differs from that for which he bargained.

This case and the other cases cited in appellant's brief, expounding the same principle, have no application to the question sub-judice.

In this case the plaintiff bargained for a conveyance *subject to restrictions*. It had no right to rescind on the ground that the records *disclosed restrictions*. In that state of the case a non-suit was properly granted. Steinbach v. Pettingill, 67 N. J. L. 36.

The Court, having correctly arrived at a construction of the contract which required the plaintiff to accept a conveyance subject to restrictions, testimony tending to show there were in fact restric-

tions of record was wholly immaterial and was properly excluded.

POINT II

THE INTENTION OF THE PARTIES IS TO BE GATHERED FROM THE INSTRUMENT ITSELF.

The Trial Court was not dealing with an ambiguous contract. The terms employed in each clause were clear and certain. The Court had to determine only what effect it would give to each of these clauses. The action was not based upon fraud. Under these circumstances, the Trial Court very properly invoked the established rule and excluded any oral testimony which related to conversations had between the parties prior to the signing of the contract.

This court has declared the established rule in *Rogers vs. Colt* 21 N. J. L. 708:

*"The contract must undoubtedly be construed according to the intention of the parties. But that intention should be gathered from the contract itself. If there be no ambiguity in the contract; if the contracting parties have declared their intention in plain and unequivocal language, there can be no construction against the words of the contract. We may not alter the terms which the parties themselves have adopted, or make a new contract for them. The construction must be agreeable to the common understanding of the terms used, without regarding technical meaning or grammatical propriety. And must be upon the whole contract, so that*

*one clause or phrase may qualify, enlarge, restrain, or even totally defeat another."*  
(Italics mine.)

This rule was followed by the Court in the case of *Bandholz vs. Judge* 62 N. J. L. 526, where the Court citing *Rogers vs. Colt*, supra said:

*"The written agreement of the parties was not ambiguous and its construction and interpretation were entirely for the Court \* \* \* \*. If the writing did not truly express the real agreement, the plaintiffs remedy was by reformation in Chancery \* \* \* \* \*. Nothing is better settled than that, in the absence of fraud or illegality where a written agreement is complete on its face, oral testimony will not be permitted either to contradict or to supply terms with respect to which the writing is silent and that the only criterion of the completeness of a writing as a full expression of the agreement of the parties is the writing itself."*

The cases cited in the appellant's brief do not conflict with the rule laid down in *Rogers vs. Colt*, supra.

They declare the exception to the rule which is employed *only in cases where the contract contains terms which are themselves ambiguous, doubtful and uncertain*. It is clear that the exception to the rule declared in those cases has no application to the contract sub-judice.

The trial Court by applying the established rules governing the construction of repugnant or con-

flicting clauses in a contract, *had no difficulty* in arriving at the warranted conclusion that the appellant had purchased the premises subject to restrictions.

Resort to parol evidence was not deemed necessary, or proper by the Trial Court. If the Court can arrive at a correct legal construction of the contract without oral evidence, there is nothing in the cases cited by the appellant which forbids a Court from so doing. They merely declare a rule which *permits* the court to resort to parol evidence in cases involving ambiguous contracts. They do not *compel* the court to resort to that testimony, if justice can be done, by adhering to the established rule.

The testimony offered would have the effect of altering, changing or contradicting the express terms used by the parties. Under all the circumstances and the established law the Trial Court properly excluded the testimony offered.

#### POINT III

THE RULE THAT A CONTRACT WILL BE CONSTRUED MOST STRONGLY AGAINST THE PARTY PREPARING IT, APPLIES ONLY TO AMBIGUOUS CONTRACTS.

This is borne out by a reference to the very authorities cited in appellant's brief.

The quotation from Prof. Williston's work, cited by appellant states:

"It is sometimes stated that the contract *if ambiguous* will be construed in favor of the promisee." (Italics mine.)

To the same effect is the opinion of the Court in Fletcher v. Interstate Chemical Co. 94 N. J. L. 332, 334 cited by appellant:

"\* \* \* the rule is that where a contract *is ambiguous*, it will be construed most strongly against the party preparing it, or employing the words concerning which the doubt arises." (Italics mine.)

We are not dealing with an ambiguous contract in this case. We have here, no latent or patent ambiguity. The terms employed in each clause are not uncertain or doubtful. The clauses themselves conflict. The Court, therefor, could not apply this rule, in construing the contract sub judice. As the evidence offered, would not materially aid the Court in construing the contract, its exclusion was not error sufficient to justify a reversal.

Ostergaard v. Greek, Catholic Cong. etc.  
75 N. J. L. 736.

#### POINT IV

THE PLAINTIFF FAILED TO PROVE A DEFECT IN THE TITLE. THE JUDGMENT OF NON-SUIT WAS PROPER.

The plaintiff attempted to prove that there was an outstanding right of curtesy in the husband of one Isabella G. Holbrook. (Case P. 18-19).

Even if it be assumed that the evidence offered warrants the inference that Isabella G. Holbrook had at one time or another married, this fact, standing alone would not be sufficient to establish an out-

standing interest in her husband, or cast a doubt upon the title.

In the case of Zelman et al v. Kaufherr, 76 N. J. E. 52; Vice Chancellor Stevens said:

"The doubt upon the title must be a rational doubt. Barger v. Gery 64 N. J. Eq. 263; or, as it has been otherwise characterized, "real and not fanciful" (Meth. Epis. Church v. Robertson 68 N. J. Eq. 433). There must it is said, be some debatable grounds on which the objection to the title can be justified. Vreeland v. Blauvelt 23 N. J. Eq. 483."

In the case of Bucci vs. Popovich 115 Atl. Rep. 95, at 98 affirmed by this Court 116 Atl. Rep 923 the Court said:

"I think that the reported cases which more closely approach the instant case are Porch v. Fries 18 N. J. Eq. 204, Middleton v. Steward, 47 N. J. Eq. 293, Bristol v. Skerry, 64 N. J. E. 624 and Winterbaum v. Duesel, 93 N. J. L. 82, from which I gather that the Married Woman's Act so changed the status of the husband with regard to his wife's lands that he has, *during her life, no interest or estate in them*, but that she holds them to her separate use as if she were a feme sole, free from his control, and that she can sell them with his assent, and if she so sells and conveys them she conveys them as she holds them, free from any interest or estate of her husband; that the Married Woman's Act *destroyed the estate of tenancy by the curtesy initiate*, but it does not defeat

the husband's curtesy at the death of his wife; *provided she has not aliened her estate before.*" (Italics mine).

There was no proof of the birth of issue, which would create an inchoate right of curtesy.

In the absence of such proof, under the decision in the case of Bucci v. Popovich supra, the testimony did not present facts sufficient to create a rational doubt upon the title, or at least such a doubt as would justify the plaintiff in rescinding on that ground.

The plaintiff having failed to establish a legal cause of action which required its submission on the facts to the decision of a jury, the Court was entirely warranted in granting a non-suit.

It is respectfully submitted that judgment under review should be affirmed.

WILFRED H. JAYNE, JR.

*Counsel for Respondents.*

Harold Simandl of Newark, N. J.  
On the Brief.

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