INDEX.

Bill of Complaint.

(Filed May 24, 1927.)

In Chancery of New Jersey

To His Honor, Edwin Robert Walker, Chancellor of the State of New Jersey:

The complainants, Fannie Dorfman, Camfield Building and Loan Association and Max Kummel, all of the City of Newark, Essex County, New Jersey, say that:

1. On November 1st, 1923, the complainant, Fannie Dorfman and her husband Abraham Dorfman, acquired title to premises commonly known and designated as #85 Goodwin Avenue, Newark, N. J., by warranty deed from Harry Kaplan and wife, dated November 1st, 1923, and recorded in the Register's Office of Essex County on November 2nd, 1923, in Book E-69 of deeds for said County, page 455. A more particular description of these premises is as follows:

> BEGINNING on the westerly line of Goodwin Avenue at a point therein distant southerly three hundred twenty-eight feet and sixty-five one-hundredths of a foot from the intersection of the same and the southerly line of Nye Avenue; from thence running in a course North fifty degrees, forty-nine minutes thirty seconds West one hundred and twenty-five feet; from thence running in a course south thirty-nine degrees, twenty-four minutes thirty seconds west twenty-

nine feet and six inches; from thence running in a course South fifty degrees, thirty-five minutes thirty seconds East one hundred and twenty-five feet to the Westerly line of Goodwin Avenue, and from thence running Northerly along the Westerly line of Goodwin Avenue in a course North thirty-nine degrees, twenty-four minutes, thirty seconds East thirty feet to the point or place of BEGINNING.

2. Thereafter, to wit, on February 15th, 1926, by deed of that date Abraham Dorfman, the husband of the complainant, conveyed to Fannie Dorfman, the complainant herein all his interest in the aforesaid property, thus vesting the entire legal title in the complainant, Fannie Dorfman.

3. When the complainant and her husband acquired title to the property by the aforesaid warranty deed from Harry Kaplan, the conveyance was made expressly subject to a mortgage held by the Camfield Building and Loan Association, originally given to secure the sum of $9,500, and at the same time the complainant, Fannie Dorfman, and her husband executed to Harry Kaplan, their grantor, a purchase money bond and mortgage in the nominal sum of $2,770. Both of these mortgages then constituted liens against the property and the mortgage held by the Camfield Building and Loan Association of Newark, N. J., is still open of record and is a lien upon the land and the building erected thereon.

4. On July 9th, 1924, the complainant and her husband, Abraham Dorfman, executed an additional mortgage of $1,000, to the Camfield Building

and Loan Association which mortgage was duly recorded in the Register's Office of Essex County, and is still open of record and constitutes a lien upon the aforesaid property.

5. Thereafter, to wit, on May 24th, 1926, complainant Fannie Dorfman, and her husband, executed a bond and mortgage in the sum of $2,500, to the complainant Max Kummel, covering the aforedescribed premises, and said mortgage, having been duly recorded, is still open of record and constitutes a lien upon the aforesaid property.

6. Kalman Lieb and Joseph Dashefsky, defendants in this suit, on or about November 1st, 1920, acquired title to premises immediately to the south of #85 Goodwin Avenue, which property belongs to the complainant, Fannie Dorfman, and sometime thereafter commenced and completed the erection of a two and one-half story building upon their premises.

7. Sometime in the year 1923, and prior to the conveyance to complainant Fannie Dorfman, Harry Kaplan, the complainant's grantor, commenced the erection of three two-family dwelling houses on the westerly side of Goodwin Avenue, Newark, N. J., the most southerly house of which, on November 1st, 1923, the said Harry Kaplan conveyed to complainant and her husband, as aforesaid.

8. Complainants charge that Kalman Lieb, one of the defendants in this suit, lived in the building #89-91 Goodwin Avenue, Newark, N. J., adjacent to the complainant's building, while Harry Kaplan, complainant's grantor, was erecting the building at #85 Goodwin Avenue, Newark, N. J., now owned

by the complainant, and that throughout the erection of complainant's said building, running over a period of 6 months, in the year 1923, the said defendant, Kalman Lieb, and the said defendant, Joseph Dashefsky, and on many occasions while the construction and erection of the building was in progress, were present and saw the structure rise, and saw it finished, and at no time from the commencement of the excavation for the foundation of the building, throughout the construction, and through to its completion, did the defendants, Kalman Lieb and Joseph Dashefsky, ever raise a word of protest or sound a warning to the said Harry Kaplan that the building he was erecting on #85 Goodwin Avenue, Newark, N. J., was over the line or that it encroached on their land, but the said defendants stood by and permitted the building to proceed to completion.

9. Complainants show that on or about August 13th, 1926, Kalman Lieb and Joseph Dashefsky, instituted an ejectment suit against Fannie Dorfman in the Essex County Circuit Court and that on the 26th day of April, 1927, upon the trial of the said cause, the Court directed a verdict in their favor and judgment was accordingly entered awarding to Kalman Lieb and Joseph Dashefsky the possession of the premises described in their complaint as follows:

> BEGINNING at a point in a line at right angles to Goodwin Avenue distant 73.25 feet westerly from a point in the westerly line of Goodwin Avenue 358.65 feet southerly from the southerly line of Nye Avenue, said beginning point being in the westerly side of the building known as No. 87 Goodwin

Avenue; thence (1) southerly along the side of said building 1.04 feet; thence (2) Easterly along the southerly side of said building 53.25 feet to the easterly side of said building; thence (3) northerly along the easterly side of said building 0.92 feet; and (4) westerly at right angles to Goodwin Avenue 53.25 feet through the said building known as No. 87 Goodwin Avenue to the place of BEGINNING.

10. Complainants charge that by reason of the defendants' silence, when the duty was upon them to speak, and by reason of their conduct as is outlined in paragraph 8 above, Kalman Lieb and Joseph Dashefsky are estopped to deny, dispute or interfere with complainant's title or her right to maintain her building when it stands and particularly that portion which encroaches upon the land of the defendants Lieb and Dashefsky, as is alleged.

11. Complainants further say that the defendants, Kalman Lieb and Joseph Dashefsky, failed and neglected to utter a word about this alleged encroachment to Harry Kaplan and to the complainant until on or about August 21st, 1925, almost two years after the complainant had come into the ownership and possession of the property, and complainants therefore charge that the said defendants, Kalman Lieb and Joseph Dashefsky, are guilty of laches and are precluded from denying complainant's title or interfering with the building or any part thereof or molesting the complainant in the peaceable possession of that portion which extends over the line onto the land belonging to Kalman Lieb and Joseph Dashefsky, as is alleged.

12. Complainants show that between the northerly side of the building owned by Lieb and Deshefsky and the southerly side of the building owned by the complainant, Fannie Dorfman, there is a distance of approximately nine feet which is used by the said defendants as a driveway.

13. Complainants further show that Kalman Lieb and Joseph Dashefsky, by their attorneys, have ordered an execution to issue upon the judgment obtained by them in the ejectment suit in the Essex County Circuit Court and that they threaten to have the Sheriff of Essex County execute the said writ and tear down that portion of the complainant's building which encroaches, as is alleged, over and on to the land of the said Kalman Lieb and Joseph Dashefsky.

14. Complainants charge that the defendants, Kalman Lieb and Joseph Dashefsky, in failing to give to the person who erected the building at No. 85 Goodwin Avenue, Newark, N. J., viz., Harry Kaplan, the complainant's grantor, notice of the alleged encroachment, are estopped to proceed with the writ in ejectment and are barred by their laches in attempting to enforce their legal right to the complainant's detriment and irreparable injury.

15. Complainants further say that unless the defendants are prevented from proceeding with their threatened execution, numerous suits will follow and this multiplicity of suits will result because:

(a) Three buildings are involved, viz., #85 Goodwin Avenue, #83 Goodwin Avenue and #81 Goodwin Avenue.

(b) The building to the north of complainant's property and owned by Ethel Goodman and known as #83 Goodwin Avenue encroaches on the land belonging to the complainant to practically the same extent as the building of the complainant is alleged to encroach on the land of the defendants, Lieb and Dashefsky, and if these defendants will not be enjoined from proceeding with their execution, the complainant will be obliged to commence an ejectment suit against Ethel Goodman in the Essex County Circuit Court and another suit in the Court of Chancery; and

(c) Ethel Goodman, the owner of #83 Goodwin Avenue will be obliged to commence an ejectment suit against one Dittler, who is the owner of property #81 Goodwin Avenue, being immediately to the north of Ethel Goodman's property, the building on Dittler's land encroaching on Goodman's land to approximately the same extent that Goodman's building encroaches on Dorfman's land and that Dorfman's building is alleged to encroach on the land of the defendants Kalman Lieb and Joseph Dashefsky.

16. The three buildings known as Nos. 81, 83 and 85 Goodwin Avenue, Newark, N. J., were constructed by Harry Kaplan, complainant's grantor, and these encroachments, one upon the other were caused by the use by the said Harry Kaplan of surveys made by one Amos O. Nisenson, Civil Engineer and Surveyor, who in making his measurements, commenced from a monument stone placed at the southwest corner of Goodwin Avenue and Nye Avenue, Newark, N. J. This monument stone, it later developed, as is alleged, was incorrectly placed 1.41 feet south of the true intersecting point

of the southerly side of Nye Avenue with the westerly side of Goodwin Avenue, as ascertained by precise mathematical calculations, thus throwing out of line the three buildings which Harry Kaplan had erected in reliance upon the aforesoid surveys.

16a. When the complainant's grantor, Harry Kaplan, erected the building at #85 Goodwin Avenue, Newark, N. J., he was under the honest belief that he was constructing the building within the boundary lines of the lot and that he did not encroach upon the lands of Kalman Lieb and Joseph Dashefsky; moreover, Kalman Lieb and Joseph Dashefsky looked on as the building progressed in construction and said nothing, also honestly believing that the building at No. 85 Goodwin Avenue, Newark, N. J., was within the boundary lines of the lot and that it did not encroach on their land.

17. Complainants further say that unless Kalman Lieb and Joseph Dashefsky and the Sheriff of Essex County, and their servants and agents, are enjoined and restrained by a writ of injunction issuing from this honorable Court, enjoining and restraining them and each of them from ripping or tearing down the alleged encroachment of the aforesaid building, that incalculable and irreparable damage will be done to the complainant Fannie Dorfman, the title holder of the property, because, if that alleged encroachment is attempted to be removed, and since it extends for about one foot in width along the entire south side of the building which is approximately fifty-three feet long, the whole side of the building including the foundation walls and stairs would be left open and

exposed to the elements; the safety of the inmates would be greatly endangered; the stability of the structure would become highly precarious and would be liable to sudden subsidence and become wrecked.

18. Complainant, Fannie Dorfman, having acquired title to the land and premises hereinabove mentioned by warranty deed from Harry Kaplan, looks to him for any loss she may sustain by reason of an adverse decree, if any should perchance be rendered in this cause, and makes him a party defendant for the purpose of rendering him amenable to the decree of this honorable Court and to save herself harmless from loss.

19. The complainant, Camfield Building and Loan Association, has a substantial pecuniary interest in the building of the complainant, Fannie Dorfman, holding mortgages upon the same in the nominal sum of $10,500 and if Kalman Lieb and Joseph Dashefsky are not restrained and enjoined from exercising the execution which issued upon the judgment in the ejectment suit in the Essex County Circuit Court, that the security afforded by the structure would become greatly and seriously impaired and depleted, and would inflict a great hardship and loss upon the complainant Camfield Building and Loan Association, and its directors and stockholders.

20. The complainant, Max Kummel, holds a mortgage upon the said building in the sum of $2,500, subsequent to the mortgages held by the Camfield Building and Loan Association, and unless the defendants Kalman Lieb and Joseph Dashefsky are enjoined and restrained from ripping or

tearing down that portion of the building at No. 85 Goodwin Avenue, Newark, N. J., which encroaches, as is alleged, upon the defendant's land, the security afforded by the building would become a total loss to this complainant, Max Kummel, and he would suffer irreparable damage.

Complainants are without adequate remedy in the Courts of Law and therefore pray:

1. That Kalman Lieb, Joseph Dashefsky, and Harry Kaplan, who are the defendants in this suit, may answer this Bill of Complaint and each statement therein made.

2. That a writ of injunction issue restraining and enjoining the defendants Kalman Lieb and Joseph Dashefsky, and Conrad Deuchler, Sheriff of Essex County, from ripping down, tearing, molesting, or in any way interfering with the structure known as #85 Goodwin Avenue, Newark, N. J., and particularly with that portion which is described in Paragraph 9 of this Bill of Complaint.

3. That the defendant Harry Kaplan render himself amenable to what ever decree this honorable Court may make in the premises.

4. That this Court enter a decree confirming in Fannie Dorfman, the title to the strip of land described in Paragraph 9 of this Bill of Complaint.

5. That this Court may settle the respective rights of the complainants and defendants.

6. That a writ of subpoena may issue, commanding said defendants to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

7. That this Court may give to the complain-

ants such other and further relief as to the Court may seem meet.

MICHAEL G. ALENICK,
Solicitor for and of Counsel
with Complainants.

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

FANNIE DORFMAN, being duly sworn according to law upon her oath deposes and says:

1. I am the complainant in the foregoing Bill of Complaint mentioned. I have had the same read to me and I am familiar with the contents thereof and the matters and things therein set forth are true.

2. I am the owner of the land and premises commonly known and designated as #85 Goodwin Avenue, Newark, New Jersey. I acquired title to the same as tenant by the entirety with my husband Abraham Dorfman by deed from Harry Kaplan and wife dated November 1, 1923, and recorded November 2, 1923, in the register's office of Essex County in Book E 69 of deeds for said county on Page 455 and by another deed from Abraham Dorfman, my husband, dated February 15, 1926, and recorded February 16, 1926, in the register's office of Essex County in Book W 73 of deeds for said county on Page 251; vesting the entire legal title in me. The property is located on the westerly side of Goodwin Avenue and is more particularly described in paragraph 1 of the Bill of Complaint. The dimensions of the lot are 30 feet front, 29.50 feet rear and 125 feet deep. There is erected on said lot or curtilage a two family

frame dwelling house with a brick and cement foundation and the dimensions of said building are approximately 25 feet by 53 feet.

3. This building was constructed by Harry Kaplan, my grantor, during the year 1923 and the structure was completed on or about November 1, 1923, the date when I took title.

4. Harry Kaplan at the time he was erecting the building, title to which I afterward acquired, was also constructing two other buildings of the same type as #85 Goodwin Avenue. These buildings were known as 83 Goodwin Avenue and 81 Goodwin Avenue, the building at #83 being north of and adjacent to my building and #81 being north of and adjacent to #83 Goodwin Avenue.

5. Before the construction work on these buildings was commenced, I am informed, Harry Kaplan had surveys made and had the lots upon which the buildings were to be erected staked out and thereafter erected the buildings within the boundary lines as shown in the surveys.

6. When I took title to the property at #85 Goodwin Avenue, Newark, New Jersey, from Harry Kaplan as aforesaid, the conveyance was made expressly subject to a mortgage held by the Camfield Building & Loan Association in the sum of $9,500.00, and at the same time I and my husband executed a purchase money bond and mortgage in the sum of $2,770.00 to Harry Kaplan covering same premises.

7. Subsequently, to wit, on July 9, 1924, I and my husband executed an additional mortgage of $1,000.00 to the Camfield Building & Loan Association which mortgage was recorded in the

register's office of Essex County in Book L 51 of mortgages for said county on Page 397, and this mortgage is still open of record and a lien upon my property.

8. On May 24, 1926, I and my husband executed a mortgage in the sum of $2,500.00 to Max Kummel, covering the same premises #85 Goodwin Avenue, Newark, New Jersey, and the mortgages totalling $10,500.00 held by the Camfield Building & Loan Association and the mortgage of $2,500.00 held by Max Kummel are still open of record and are subsisting liens against the property.

9. I entered into the ownership and possession of the premises #85 Goodwin Avenue, Newark, New Jersey, on or about November 1, 1923, and never knew nor did I receive any notice of any alleged encroachment until almost two years after I had acquired title to the premises.

10. Kalman Lieb, the defendant, lived in the building adjoining my house on the South before and at the time I moved into my property at #85 Goodwin Avenue and he still lives there and at no time since November 1, 1923, until near the latter part of the year 1925, did he say anything to me about any alleged encroachment nor did the defendant Kalman Lieb and Joseph Dashefsky ever make any effort to establish the fact of the existence of an alleged encroachment until on or about August 13th, 1926, when they commenced an ejectment suit against me, charging that my building projected approximately one foot over my line and upon the land of the said Kalman Lieb and Joseph Dashefsky. Until that time I was absolutely innocent of knowledge of the existence of an alleged encroachment.

11. As a result of the said ejectment suit the trial Court on April 26th, 1927, directed a verdict in favor of Kalman Lieb and Joseph Dashefsky awarding to them the possession of the strip of land about one foot wide and extending approximately 53 feet along the entire South side of my building, a more particular description of the strip being set out in paragraph 9 of the Bill of Complaint.

12. On April 28, 1927, the defendants Kalman Lieb and Joseph Dashefsky caused a writ of execution to be sued out directed to the Sheriff of the County of Essex, commanding him to cause Kalman Lieb and Joseph Dashefsky to have possession of the same property as is set forth in paragraph 9 of this Bill of Complaint.

13. Between the Northerly side of the building owned by Kalman Lieb and Joseph Dashefsky and the Southerly side of the building owned by me, there is a distance of about 9 feet which is used by the said defendants Kalman Lieb and Joseph Dashefsky as a driveway.

14. Defendants, Kalman Lieb and Joseph Dashefsky, do not require the foot of ground upon which my building encroaches, as is alleged, because the 9 foot more or less space, is ample for the purpose of a driveway for which purpose the space is now used. To chop off 53 feet of my building will not be of any especial benefit to the defendants Kalman Lieb and Joseph Dashefsky, but will cause irreparable damage to me and to the mortgagees who have mortgages on the property.

15. Kalman Lieb and Joseph Dashefsky by their attorneys have threatened to proceed with the execution and have the Sheriff execute the writ and

have threatened to rip and tear down that portion of my building which they say encroaches on their land.

16. I have caused a survey to be made of my property which discloses that the building at #83 Goodwin Avenue on the North of my building encroaches on my land to practically the same extent as my building is alleged to encroach on the land of Kalman Lieb and Joseph Dashefsky and I am informed that the building on the North of #83, namely #81, encroaches on #83 to virtually the same extent as the building on #83 encroaches on my land and practically as far as my building is alleged to encroach on the lands of Kalman Lieb and Joseph Dashefsky, and I fear that unless my rights are given proper adjudication and unless I am awarded adequate relief, a multiplicity of suits will inevitably follow between the owners of the respective properties, the mortgagees, previous owners, etc.

17. I fear that unless Kalman Lieb and Joseph Dashefsky, and the Sheriff of Essex County, their servants, and agents, are enjoined and restrained by a writ of injunction issuing from this honorable Court, enjoining and restraining them and each of them from ripping or tearing down the alleged encroachment of the aforesaid building, that incalculable and irreparable damage will be done to me, the title holder of the property, because, if that alleged encroachment is attempted to be removed, and since it extends for about one foot in width along the entire south side of the building which is approximately fifty-three feet long, the whole side of the building including the foundation walls and stairs would be left open and exposed to the ele-

ments; the safety of the inmates would be greatly endangered; the stability of the structure would become highly precarious and would be liable to sudden subsidence and become wrecked.

18. I further fear if my building is permitted to be injured or substantially impaired by a partial demolition thereof, the security afforded to the mortgagees, by the structure would become tremendously impaired, endangered and rendered worthless and they, the said mortgagees, would consequently suffer irreparable damages.

her
FANNIE X DORFMAN.
mark

Sworn and subscribed to before me this 25th day of May, 1927

HARRY LIPSCHUTZ,
A Notary Public
of New Jersey.

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

HARRY KAPLAN, being duly sworn according to law, on his oath deposes and says:

1. By deed from Louis H. Fried and Belle Helen Fried, his wife, dated February 27th, 1923, and recorded March 5th, 1923, in the Register's Office of Essex County in book R 67 of deeds for said county on page 547, I became the owner of a tract of land on the westerly side of Goodwin Avenue, Newark, N. J., upon which I erected certain buildings, the most southerly one of which by deed dated November 1st, 1923, I conveyed to complainant, Fannie Dorfman, and her husband.

2. Before I commenced the construction of any buildings I caused the lands which I had purchased on Goodwin Avenue to be surveyed and staked out by a reputable surveyor, viz., Amos O. Nisenson, and when so surveyed and staked out, I commenced the erection of three two-family dwelling houses.

3. Some time prior to the commencement of any work by me on the construction of my buildings, the defendants Kalman Lieb and Joseph Dashefsky had erected a two and a half story building on a lot adjacent to my properties on the south and the defendant Kalman Lieb was in the possession and occupancy of an apartment in the aforesaid building which he had erected with Joseph Dashefsky, and was fully apprised by me that I intended to erect a two story, two family dwelling house on the lot adjacent to the land of the said Kalman Lieb and Joseph Dashefsky, and throughout the erection of the building now owned by the complainant Fannie Dorfman, and known as #85 Goodwin Avenue, said construction work running over a period of about six months in the year 1923, the said defendants Kalman Lieb and Joseph Dashefsky were present on many occasions while the construction and erection of the building was in progress and saw the structure rise and saw it finished, and at no time from the commencement of the excavation for the foundation of the building, throughout the construction and through to its completion, did the defendants Kalman Lieb and Joseph Dashefsky ever raise a word of protest, or sound a warning to me that the building I was erecting at #85 Goodwin Avenue, Newark, N. J., was over the line or that it encroached on their land, but the said

defendants stood by and permitted the building to proceed to completion. When I attempted to put some scaffolding on the building at #85 Goodwin Avenue, after it was in process of erection, and attempted to set foot on the adjacent land belonging to Kalman Lieb and Joseph Dashefsky, they told me to keep off and although they saw me proceed with the work of erecting the structure, said nothing at all about its being over the line.

4. When I erected the building at #85 Goodwin Avenue, Newark, N. J., I believed I was and still believe that the building is within the boundary line of my lot and was entirely innocent of knowledge or notice of the existence of an alleged encroachment, and it was about the time that an ejectment suit was commenced against Fannie Dorfman, the complainant, about August, 1926, that I first became aware that there was any question about the correctness of the position of the building that I had erected at #85 Goodwin Avenue, or that there was an alleged encroachment of the building on the land of the defendants Kalman Lieb and Joseph Dashefsky.

5. I employed a competent surveyor to make a survey of my land before the building was commenced, and another survey after the building was finished, and the surveys showed the building to be within the boundary lines of the lot. I relied upon the accuracy and correctness of the survey and erected my building depending thereon and had no reason to suppose nor believe at this time that my building encroached on the land of Kalman Lieb and Joseph Dashefsky, and although the defendants saw my building go up they said nothing, but allowed me to proceed. And I was fur-

ther lulled into a sense of security by reason of the fact that between the southerly wall of the building I was erecting at #85 Goodwin Avenue and the northerly side of the building on the lands of the defendants Kalman Lieb and Joseph Dashefsky, there was a driveway of approximately nine feet, which allowed ample room to the defendants for ingress and egress by automobiles. The removal of the alleged encroachment will cause untold hardship and inflict irreparable damage on the complainant Fannie Dorfman. If one foot of the building which is alleged to encroach to the length of fifty-three feet, more or less, is cut away, the building will be in a hazardous condition; it may subside and cave in and endanger the lives and property of the inmates.

HARRY KAPLAN.

Sworn and subscribed to before me this 24th day of May, A. D. 1927.

ABRAHAM FENSTER,
An Attorney at Law
of New Jersey.

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

EDGAR LEISS, being duly sworn according to law upon his oath deposes and says:

1. I am the Solicitor for the Camfield Building and Loan Association, which is one of the complainants in the foregoing bill of complaint mentioned. I have read the bill of complaint and am familiar with the contents thereof and the matters and things therein set forth are true, to the best of my knowledge, information and belief.

2. The Canfield Building and Loan Association is the holder of two mortgages, aggregating the sum of $10,500.00, which were placed on property #85 Goodwin Avenue, Newark, New Jersey, which is at present owned by the complainant, Fannie Dorfman, the said property being more particularly described in paragraph 1 of the bill of complaint. These mortgages were placed upon the property before the ejectment suit referred to in the bill of complaint was instituted; the first of said mortgages is in the sum of $9,500.00, having been executed by Harry Kaplan and Bessie Kaplan, his wife, on July 11th, 1923, and recorded in the Register's office of Essex County in Book H-49 of Mortgages for said County on page 8, and the other mortgage of $1,000, bearing dated July 9th, 1924, and recorded July 14th, 1924, in the Register's Office of Essex County in Book L-51 of Mortgages for said County on page 397, having been executed by the complainant, Fannie Dorfman, and her husband. These mortgages are still open of record and are liens on the land and premises described in paragraph 1 of the bill of complaint.

3. I examined the title to the premises before the mortgages were placed on the property and I also examined surveys made by Amos O. Nisenson, a reputable and competent surveyor, and these surveys show the building erected upon the premises to be within the boundary lines of the lot, and show no encroachments.

4. If the portion of the building which is alleged to encroach upon the lands of the defendants Kalman Lieb and Joseph Dashefsky is permitted to be torn down, the building will probably crumble, its stability would be undermined, and it would

be liable to deterioration and ruin. If the defendants are not enjoined from tearing down, or causing that portion of the building which is alleged to encroach upon their land to be torn down, the security afforded to the Camfield Building and Loan Association and its directors and stockholders will be imperiled, and the said Camfield Building and Loan Association and its directors and stockholders will suffer great and irreparable loss and damage.

EDGAR LEISS.

Sworn to and subscribed before me this 24th day of May, A. D. 1927.

GERTRUDE A. CROWELL,
Notary Public of N. J.

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

MAX KUMMEL, being duly sworn according to law, on his oath deposes and says:

1. I am one of the complainants in the foregoing Bill of Complaint mentioned. I have read the same and am familiar with the contents thereof and the matters and things therein set forth are true to the best of my knowledge, information and belief.

2. I am the holder of a $2,500 mortgage, dated May 24th, 1926, and recorded June 2, 1926, in the Register's Office of Essex County in Book D 57 of Mortgages for said County on page 524, executed to me by the complainant, Fannie Dorfman, and Abraham Dorfman, her husband. This mortgage is unpaid and is still open of record and is a lien on the land and premises described in paragraph

1 of the Bill of Complaint. This mortgage is subsequent to the mortgages aggregating $10,500 held by the Camfield Building and Loan Association.

3. I had no knowledge or notice of the existence of an alleged encroachment of a portion of the building at No. 85 Goodwin Avenue, Newark, N. J., upon the lands belonging to Kalman Lieb and Joseph Dashefsky at the time that I advanced money and received the mortgage that I now hold on the aforesaid property and only learned of it a few days ago.

4. If the defendants, Kalman Lieb and Joseph Dashefsky, are permitted to proceed with the execution on the judgment recovered by them in the ejectment suit, the security afforded to me by the stability of the structure will be seriously imperiled and unless the defendants, as aforesaid, are enjoined and restrained from tearing down or causing to be torn down that portion of the building, which my mortgage embraces, which encroaches on the defendant's land, as is alleged, the entire building is apt to crumble, subside and be wrecked and rendered uninhabitable, and I would consequently suffer irreparable loss and damage.

MAX KUMMEL.

Sworn and subscribed to before me this 24th day of May, A. D. 1927.

DAVID ROSKEIN,
An Atty. at Law of N. J.

Answer and Counterclaim.

(Filed June 8, 1928.)

IN CHANCERY OF NEW JERSEY.

Between

FANNIE DORFMAN, *et als.*,
Complainants,

and

KALMAN LIEB, *et als.*,
Defendants.

} On Bill, &c.

The answer of the defendants, Kalman Lieb and Joseph Dashefsky, and the counterclaim of Kalman Lieb and Joseph Dashefsky against the complainants Fannie Dorfman, Camfield Building and Loan Association and Max Kummel.

These defendants, Kalman Lieb and Joseph Dashefsky, answering the bill of complaint say, that:

1. They admit the allegations contained in paragraph 1 of the complaint.

2. They admit the allegations contained in paragraph 2 of the complaint.

3. They admit the allegations contained in paragraph 3 of the complaint.

4. They admit the allegations contained in paragraph 4 of the complaint.

5. They admit the allegations contained in paragraph 5 of the complaint. Defendants further say that at the time the said Fannie Dorfman and her

husband executed a bond and mortgage in the sum of $2,500 to Max Kummel, one of the complainants, as set forth in said paragraph 5, that they knew that their premises encroached on the premises of these defendants and that the lien of the said mortgage is inferior to any rights of these defendants in the premises that the said Max Kummel may have, and further say that the aforementioned mortgage was placed on the said premises for the purpose of diminishing the equity and rights of these defendants.

6. They admit the allegations contained in paragraph 6 of the complaint.

7. They admit the allegations contained in paragraph 7 of the complaint.

8. They admit the allegations contained in paragraph 8 of the complaint.

9. They admit the allegations contained in paragraph 9 of the complaint.

10. They deny the allegations contained in paragraph 10 of the complaint.

11. These defendants, answering paragraph 11, say it is true that they did not utter a word about the alleged encroachment to Harry Kaplan and to the complainant until on or about August 21, 1925, as set forth in said paragraph, because it was not until that date that they were first apprised that the said premises encroached on their land, and immediately upon being so informed they notified the complainant, Fannie Dorfman. These defendants, in further answer to said paragraph deny that they were guilty of laches and are precluded from denying complainant's title or interfering

with the building or any part thereof or molesting the complainant in the peaceable possession of that portion which extends over the line on to the land belonging to these defendants.

12. They admit the allegations contained in paragraph 12 of the complaint.

13. They admit the allegations contained in paragraph 13 of the complaint.

14. These defendants, answering paragraph 14, deny they are estopped to proceed with the writ in ejectment or that they are barred by the alleged statement that they are guilty of laches, in attempting to enforce their legal rights and further say that the allegations set forth in said paragraph are a conclusion of law and they will move to strike out the said paragraph at or before the trial of this cause.

15. Defendants, answering paragraph 15, say it is untrue that there will be a multiplicity of suits as set forth in said paragraph, and, as a matter of fact, there are only three other parcels involved as set forth in said paragraph, and only three law suits would result therefrom between different parties. Defendants admit the balance of said paragraph.

16. They admit the allegations contained in paragraph 16 and 16A of the complaint.

17. They admit the allegation contained in paragraph 17 insofar as it refers to the removing of the building to the extent to which it encroaches on defendants' lands, but defendants say the said building can be repaired and restored and that during the course thereof the safety of the inmates

would not be endangered, nor the stability of the structure become highly precarious and would not become wrecked as set forth in the balance of said paragraph.

18. In answer to paragraph 18 defendants say that they are not interested in said paragraph by reason of the fact that it refers to the defendant Harry Kaplan.

19. These defendants, answering paragraph 19, say that it is true that the Camfield Building and Loan Association has a mortgage on the said premises and if the execution obtained in a court of law is executed the premises can be repaired for a reasonable sum and their security in the said premises will not be diminished to any great extent, and further say that the said Camfield Building and Loan Association was grossly negligent in placing their mortgage on the aforementioned premises without first obtaining an accurate survey as to the location of the building to ascertain whether or not they were placing a mortgage on land not owned by the complainant, Fannie Dorfman, and the said negligence of the said Building and Loan Association shall not be deputed on these defendants who are entirely innocent in the premises.

20. Defendants, answering paragraph 20, say that the mortgage placed on the said premises by Max Kummel for $2,500, as set forth in said paragraph, was placed thereon about a year after the complainant, Fannie Dorfman, was apprised of the existing encroachment, and defendants are informed and believe that the said mortgage was placed on the aforesaid premises so as to diminish these defendants' equity in the premises so mort-

gaged, and further say that the complainant Max Kummel, was grossly negligent in not obtaining an accurate survey of the premises mortgaged before placing the same thereon, and further say that if the execution obtained by these defendants be executed, the premises can be repaired and the security of the said Max Kummel will be very little impaired and that the premises can be repaired and not suffer irreparable damage.

SPECIAL DEFENSE.

By way of special defense against the complainants, these defendants say:

1. On or about July, 1925, these defendants contracted to sell their premises to one Harry E. Katz and that by reason of the aforementioned encroachment the said Harry E. Katz refused to take title to the premises. That these defendants in endeavoring to compel the said Harry E. Katz to take title to said premises, instituted a specific performance action in this Honorable Court and a final hearing was had thereon and decree advised by the Honorable John H. Backes, denying the relief sought by these defendants in said action. Leave is asked to refer to the said final decree for more certainty. That by reason of said action these defendants were compelled to expend approximately $500 for search fees, counsel fees, surveys and expert testimony and were likewise compelled to expend the sum of $575 for approximately one and one-half feet of land adjoining so as to comply with the agreement aforementioned as entered into with said Harry E. Katz.

2. That immediately upon being apprised by the said Harry E. Katz, through his attorneys, Pit-

ney, Hardin and Skinner, of the existing encroachment these defendants, through their solicitors, in July or August, 1925, immediately apprised the complainant Fannie Dorfman of said encroachment, and the complainant Fannie Dorfman, through her solicitors, for a period of over one year endeavored to effect an amicable adjustment of the situation but without avail. That these defendants to protect their rights then proceeded with the ejectment action in 1926 and judgment in ejectment was given as set forth in the bill of complaint in this cause. That by reason thereof these defendants were compelled to expend approximately $600 for counsel fee, witness fees and expert testimony in the said ejectment action, all of which was due entirely to the acts of the complainant, Fannie Dorfman.

3. Defendants further say that they are ready, able and willing to convey to the complainant, Fannie Dorfman, the aforementioned described premises as set forth in paragraph 9 of the complaint filed herein on the condition that the said Fannie Dorfman pay to these defendants the amount of money they were actually compelled to expend by reason of the aforementioned encroachment on defendants' premises to the extent as aforementioned.

COUNTERCLAIM.

By way of counterclaim against complainants Fannie Dorfman and Max Kummel, the defendants Kalman Lieb and Joseph Dashefsky say:

1. On or about July , 1925, these defendants contracted to sell their premises to one Harry E. Katz and that by reason of the aforementioned encroachment the said Harry E. Katz refused to take

title to the premises. That these defendants in endeavoring to compel the said Harry E. Katz to take title to said premises, instituted a specific performance action in this Honorable Court and a final hearing was had thereon and decree advised by the Honorable John H. Backes, denying the relief sought by these defendants in said action. Leave is asked to refer to the said final decree for more certainty. That by reason of said action these defendants were compelled to expend approximately $500 for search fees, counsel fees, surveys and expert testimony and were likewise compelled to expend the sum of $575 for approximately one and one-half feet of land adjoining so as to comply with the agreement aforementioned as entered into with said Harry E. Katz.

2. That immediately upon being apprised by the said Harry E. Katz, through his attorneys, Pitney, Hardin and Skinner, of the existing encroachment these defendants, through their solicitors, in July or August, 1925, immediately apprised the complainant, Fannie Dorfman, of said encroachment, and the complainant Fannie Dorfman, through her solicitors, for a period of over one year endeavored to effect an amicable adjustment of the situation but without avail. That these defendants to protect their rights then proceeded with the ejectment action in 1926 and judgment in ejectment was given as set forth in the bill of complaint in this cause. That by reason thereof these defendants were compelled to expend approximately $600 for counsel fee, witness fees and expert testimony in the said ejectment action, all of which was due entirely to the acts of the complainant, Fannie Dorfman.

3. That the mortgage placed on the said premises by Max Kummel about a year after the complainant, Fannie Dorfman, was apprised of the existing encroachment, the defendants are informed and believe was placed on the said premises so as to diminish these defendants' equity in the premises so mortgaged, by reason of the alleged encroachment.

4. That it became the duty of the complainant, Fannie Dorfman, to immediately apply to this Honorable Court for a temporary restraint when the action in ejectment was instituted in the Essex County Circuit Court by these defendants and not stand idly by and allow these defendants to go to trial in the said ejectment action and await the outcome thereof, by reason of which action on the part of the complainant, Fannie Dorfman, these defendants were compelled to expend approximately $750 for counsel fee, expert testimony and witness fees in addition to the aforementioned expenditures set forth in the answer filed herein, amounting in all to approximately $1,800.00.

These defendants, Kalman Lieb and Joseph Dashefsky, therefore pray:

1. That the said complainants, Fannie Dorfman and Max Kummel, may answer this counterclaim, without oath, and each statement therein made.

2. That said complainants Fannie Dorfman and Max Kummel may be decreed to account for and pay over all money expended by these defendants by reason of their negligent acts, on condition that these defendants execute, together with their respective wives, a warranty deed for the strip of

land on which the encroachment exists as set forth in the bill of complaint.

3. That this Court give to these defendants such other and further relief as may seem just and equitable in the premises.

SAUL AND JOSEPH E. COHN,
Solicitors of Defendants,
Kalman Lieb & Joseph Dashefsky.

Replication and Answer to Counterclaim.

(Filed June 11, 1927.)

IN CHANCERY OF NEW JERSEY.

Between

FANNIE DORFMAN, *et als.*,
Complainants,

and

KALMAN LIEB, *et als.*,
Defendants.

} On Bill, &c.

REPLICATION.

The complainants join issue on the Answer of the defendants Kalman Lieb and Joseph Dashefsky, and on their Special Defense.

ANSWER TO COUNTERCLAIM.

As to the counterclaim contained in said Answer complainants say:

1. They have not sufficient knowledge or information to form a belief as to the truth of the

allegations contained in Paragraph One and therefore deny the same.

2. They have not sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph Two, and therefore deny the same; except that the complainant Fannie Dorfman admits that on or about August 22, 1925, a registered letter was received by her purporting to give notice of an alleged encroachment, and that an ejectment suit was brought and judgment rendered in favor of defendants.

3. They deny Paragraph Three.

4. They deny Paragraph Four and further say that the allegations set forth in said Paragraph are conclusions of law and they will move to strike out the said Paragraph at or before the trial of this cause.

Defendants pray that the counterclaim be dismissed, with costs by the complainants most wrongfully sustained.

MICHAEL G. ALENICK,
Solicitor of Complainants.

SPECIAL NOTICE.

To Messrs. Saul & Joseph E. Cohn, Solicitors of Defendants Kalman Lieb and Joseph Dashefsky.

SIRS:

PLEASE TAKE NOTICE, that at or before the trial of the above cause I will move before the above Court to strike out the special defense and the Counterclaim filed herein on the following grounds:

Replication and Answer to Counterclaim.

1. The Special Defense and the Counterclaim, on their face, lack equity.

2. The Special Defense and the Counterclaim fail to state a cause of action.

3. The Special Defense and the Counterclaim are immaterial, incompetent and irrelevant.

4. The Special Defense and the Counterclaim are calculated to becloud the issue.

5. The Special Defense and the Counterclaim are inequitable.

6. The Special Defense and the Counterclaim are sham and/or frivolous.

6/10/27

Respectfully,

MICHAEL G. ALENICK,
Solicitor of Complainants.

R.S.

Stipulation of Facts.

(Filed May 23, 1928.)

IN CHANCERY OF NEW JERSEY.

Between

FANNIE DORFMAN, CAMFIELD BUILDING AND LOAN ASSOCIATION and MAX KUMMEL,

Complainants,

and

KALMAN LIEB, JOSEPH DASHEFSKY and HARRY KAPLAN,

Defendants.

} On Bill, &c.

1. Complainant, Fannie Dorfman, is the owner of a two-story dwelling house located on the westerly side of Goodwin Avenue. The defendants, Kalman Lieb and Joseph Dashefsky, as tenants in common, own the property adjacent to the complainant's building on the south. The southerly wall of complainant's building encroaches upon the land of the defendants, Kalman Lieb and Joseph Dashefsky .92 of a foot on Goodwin Avenue and runs along the length of the southerly wall of the complainant's building about 53 feet; in the rear the encroachment is 1.04 feet over the defendant's land.

2. Complainant, Fannie Dorfman, acquired title to her property on November 1st, 1923, by warranty deed from the defendant, Harry Kaplan, who built the house in that year. Said deed was recorded in the Register's Office of Essex County on November 2nd, 1923; in Book E69 of Deeds for

said County on page 455. At the time Harry Kaplan was erecting complainant's building, the building on the adjacent premises of Lieb and Dashefsky had already been completed and was occupied by them. Before Harry Kaplan started to build, he had a survey made and built the house within the boundary lines as established by his surveyor. He relied upon his surveyor and in erecting the building, Harry Kaplan acted in perfect good faith and in the honest belief that he was constructing the building within the boundary lines of the lot and that the building did not encroach upon the lands of Lieb and Dashefsky. The latter, on the other hand, looked on as the building progressed in construction and said nothing, and without knowledge that the building Harry Kaplan was erecting at No. 85 Goodwin Avenue, was encroaching on their land.

3. The first intimation which Lieb and Dashefsky received of the existence of the encroachment on their land of the No. 85 Goodwin Avenue building was about July 20th, 1925, almost two years after the building had been constructed, and immediately so notified Dorfman. This was the first time that Dorfman received any intimation of an alleged encroachment.

4. The deed from Kaplan to Dorfman, recorded in Book E69 of Deeds for Essex County, page 455, as aforesaid, conveyed the land and premises by metes and bounds but the building extends beyond the description set forth by said metes and bounds in said deed.

4. On or about June 1, 1925, Lieb and Dashefsky contracted to convey their premises to one

Harry Katz and at the closing of title were informed for the first time that the building owned by complainants encroached upon their premises. They thereupon immediately notified the complainant, Fannie Dorfman, and proceeded and instituted an action of specific performance in this Court to compel the said Harry Katz to take title to the said premises and praying for relief in this Honorable Court, standing ready and willing to allow an abatement of the strip of land on which the encroachment existed, which the defendant in said action, Harry Katz, refused. Final hearing was had in the matter and decree was entered by the Honorable John H. Backes denying a decree to compel said Harry Katz to take title to said premises. Lieb and Dashefsky were compelled to expend approximately $1,800 for witnesses, experts and counsel fee in said action and in the action instituted in the Essex County Circuit Court. They repeatedly endeavored to effect a settlement with the complainants in this cause of action prior to their instituting action in the Essex Circuit Court, but without avail.

4a. The complainants, on the institution of the Essex County Circuit Court action on ejectment, did not apply to this Honorable Court for equitable relief but filed an answer and went to trial in the law Court action and after a judgment was rendered against them, they now come to this Honorable Court and seek relief, after ones having tried the case in Essex County Circuit Court.

5. In August of 1926, Lieb and Dashefsky commenced an ejectment suit in the Essex County Circuit Court and on April 26th, 1927, a judgment carrying costs was rendered awarding to them the

possession of the strip of land upon which the complainant's building encroached, viz., .92 of a foot front on Goodwin Avenue, and running along one entire side of the house, 53.25 feet, with a rear of 1.04 feet. The value of that strip is about $125.00.

6. Lieb and Dashefsky caused a writ in ejectment to issue and threatened to tear down that portion of complainant's building which encroached on their land. Complainant applied to this Court for relief and an injunction was issued pending final hearing.

7. When Dorfman purchased the property from Kaplan, the contract contained the following provision:

> "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." * * *

8. When complainant, Dorfman, on November 1st, 1923, took title to the property, Harry Kaplan executed and delivered the usual form of full warranty deed and accompanied it with an affidavit of title in which he deposed among other things as follows:

> "Deponent further says that the said premises (referring to No. 85 Goodwin Avenue, Newark, N. J.) * * * *are now free and clear of* all taxes, encumbrances or liens by mortgage decree, judgment or by statute, or by virtue of any proceeding in any Court or filed in the office of the Clerk of any County or Court in this State, *and of all*

other liens and claims of every nature or description, save and except a mortgage in the nominal sum of $9500 held by the Camfield Building and Loan Association."

9. The affidavit of title also contained the following:

"Deponent makes this affidavit to induce Abraham Dorfman and Fannie Dorfman, his wife, to accept a deed for said premises, and pay the consideration therefor, knowing that said Abraham Dorfman and Fannie Dorfman, his wife, relies upon the truth of the statement herein contained."

10. The conveyance by Harry Kaplan to Dorfman was made expressly subject to a $9,500 mortgage held by Camfield Building and Loan Assso-ciation, one of the complainants. The latter had no knowledge nor notice of the existence of the encroachment when it loaned out the money in 1923 nor afterwards until on or about the time the ejectment suit was instituted in August, 1926. There is due to the Building and Loan Association at this time approximately $8,000 on its mortgage.

11. Max Kummel, another one of the complainants, holds a second mortgage on the Dorfman property amounting to $2,500. This mortgage was placed on the property on May 24th, 1926, more than three months before Lieb and Dashefsky commenced suit in the Essex County Circuit Court. Max Kummel did not have a survey made and had no knowledge nor notice of the existence of the encroachment of the No. 85 Goodwin Avenue building until on or about April, 1927, when the judgment was rendered in favor of Lieb and Dashefsky in the ejectment suit.

Stipulation of Facts.

12. Between the southerly wall of complainant's building and the northerly side of Lieb and Dashefsky's building is a grassy space of 6–8 feet wide.

13. The encroachment can not be removed except at a considerable cost to the complainants.

14. The defendants, Lieb and Dashefsky, have repeatedly offered and now stand ready and do offer to convey the aforementioned strip of land upon being paid their actual loss and costs by reason of said encroachment and are willing to prove in open Court the amount of their actual loss, if this Court shall so direct.

We, the undersigned, Solicitors for the respective parties hereto, hereby stipulate and agree that the foregoing facts are correct and we hereby agree to submit the case to His Honor, Vice-Chancellor John H. Backes thereon.

MICHAEL G. ALENICK,
Solicitor of Complainants.

SAUL and JOSEPH E. COHN,
Solicitors of Defendants,
Kalman Lieb and Joseph Dashefsky.

LEVY, FENSTER & MCCLOSKEY,
Solicitors of Defendant Harry Kaplan.

Final Decree.

(Filed May 9, 1928.)

IN CHANCERY OF NEW JERSEY.

Between

FANNIE DORFMAN, *et als.*,
Complainants,

and

KALMAN LIEB, *et als.*,
Defendants.

This cause coming on to be heard in the presence of Michael G. Alenick, Solicitor of Complainants Fannie Dorfman, Camfield Building and Loan Association, and Max Kummel, and Michael Silver for Saul and Joseph E. Cohn, Solicitors of Defendants Kalman Lieb and Joseph Dashefsky, and Saul Tischler, for Levy, Fenster and McCloskey, Solicitors of defendant Harry Kaplan, and the Court having examined the pleadings and having taken proofs orally in open Court, and having heard and considered the stipulation of facts and the arguments of counsel and it appearing to the satisfaction of the Court that the encroachment of Complainant's building upon the land of the defendants, Kalman Lieb and Joseph Dashefsky, arose because of a mutual mistake of fact and that the complainant is entitled to relief on terms, and it further appearing that as against the defendant, Harry Kaplan, the complainant has not sustained her claim for re-imbursement,

It is on this 8th day of May, 1928, ORDERED, AD-

JUDGED and DECREED that the defendants Kalman Lieb and Joseph Dashefsky be and they are hereby perpetually enjoined and restrained from and are hereby commanded to desist and refrain from ripping down, tearing, molesting or in any way interfering with the building commonly known and designated as No. 85 Goodwin Avenue, Newark, New Jersey, or with the peaceable possession thereof by the complainants or their heirs, executors, administrators, successors or assigns; and

It is further ORDERED, ADJUDGED and DECREED that the defendants Kalman Lieb and Joseph Dashefsky upon the payment to them or to Saul and Joseph E. Cohn, their Solicitors, of the sum of $125.00 which was agreed in open court to be the value of the strip of land hereinafter described plus the costs of ejectment suit, including a trial fee in that suit of $100.00, shall convey to the complainant Fannie Dorfman by Bargain and Sale Deed the strip of land upon which the complainant's building at No. 85 Goodwin Avenue, Newark, New Jersey, encroaches on the land of the said defendants, Kalman Lieb and Joseph Dashefsky, to wit,

> BEGINNING at a point in a line at right angles to Goodwin Avenue distant 73.25 feet westerly from a point in the westerly line of Goodwin Avenue 358.65 feet southerly from the southerly line of Nye Avenue, said beginning point being in the westerly side of the building known as 85 Goodwin Avenue; thence (1) southerly along the side of said building 1.04 feet; thence (2) easterly along the said southerly side of said building 53.25

feet to the easterly side of said building; thence (3) northerly along the easterly side of said building 0.92 feet; and (4) westerly at right angles to Goodwin Avenue 53.25 feet through the said building known as No. 85 Goodwin Avenue to the place of BEGINNING.

The dimensions are more or less,

the intention being that all the land shall be conveyed whereon the complainant's house encroaches and,

It is further ORDERED, ADJUDGED and DECREED that so far as the defendant Harry Kaplan is concerned the bill of complaint be and the same is hereby dismissed without prejudice and

It is further ORDERED, ADJUDGED and DECREED that neither party is entitled to costs.

E. R. WALKER,
C.

Respectfully advised,
JOHN H. BACKES,
V.-C.

We hereby consent to the making and entry of the foregoing.

.....
Solicitors of Defendants Kalman Lieb and Joseph Dashefsky.

LEVY, FENSTER & MCCLOSKEY,
Solicitors of Defendant Harry Kaplan.

Order Amending Final Decree.

IN CHANCERY OF NEW JERSEY.

Between

FANNIE DORFMAN, *et als.*,
Complainants,

and

KALMAN LIEB, *et als.*,
Defendants.

On Bill, etc.
Order.

The Solicitors of the parties hereto appearing in open court, it is, on this 29th day of May, 1928, ORDERED that the final decree in this cause, entered on May 8th, 1928, be, and the same is hereby amended by striking out on page 2, eleventh line, the words "Bargain and Sale Deed," and substituting therefor the words "Deed of Release."

EDWIN ROBERT WALKER,
Chancellor.

Respectfully advised,

JOHN H. BACKES,
V.-C.

Amended Notice of Appeal.

(Filed May 26, 1928.)

IN CHANCERY OF NEW JERSEY.

Between

FANNIE DORFMAN, *et als.*,
Complainants,

and

KALMAN LIEB, *et als.*,
Defendants.

} On Bill, &c.

The defendants, Kalman Lieb and Joseph Dashefsky, hereby appeal from the final decree made in the above entitled cause on the 8th day of May, 1928, by the Chancellor on the advice of Vice-Chancellor, John H. Backes, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in All Causes.

Dated May 16, 1928.

SAUL AND JOSEPH E. COHN,
Solicitors for and of Counsel with Defendants, Kalman Lieb and Joseph Dashefsky.

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

MICHAEL SILVER,
Of Counsel with Defendants, Kalman Lieb and Joseph Dashefsky.

Petition of Appeal.

(Filed August 4, 1928.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

FANNIE DORFMAN, *et als.*,
Complainants-Appellees,

and

KALMAN LIEB, *et als.*,
Defendants-Appellants.

On appeal from the Court of Chancery.

To the Honorable the Court of Errors and Appeals in the Last Resort in All Causes:

The petition of Kalman Lieb and Joseph Dashefsky, the appellants in the above entitled cause, respectfully shows that:

1. Petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of his Honor, John H. Backes, Vice-Chancellor, bearing date May 8, 1928, in a certain cause in said Court of Chancery wherein Fannie Dorfman and others were complainants and the said Kalman Lieb and Joseph Dashefsky and others were defendants, in this respect, to wit:

(a) That said decree perpetually enjoined and restrained said defendants, Kalman Lieb and Joseph Dashefsky from ripping down, tearing, molesting or in any way interfering with the building

commonly known and designated as 85 Goodwin Avenue, Newark, New Jersey, which building encroaches upon land of said defendants, Kalman Lieb and Joseph Dashefsky.

(b) That said decree ordered said defendants, Kalman Lieb and Joseph Dashefsky, upon payment to them or their solicitors of the sum of $250.00 to convey to the complainant Fannie Dorfman, by deed of release said strip of land so encroached upon.

(c) That said decree adjudges that the encroachment of complainant's building upon the land of the defendants, Kalman Lieb and Joseph Dashefsky, arose because of a mutual mistake of fact.

And petitioners appeal from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that:

1. That said decree is an unconstitutional usurpation of the rights of the defendants, Kalman Lieb and Joseph Dashefsky.

2. The Court found as a fact that there had been a mutual mistake of fact in respect to the matters in controversy.

3. That the Court should not have granted the relief prayed for because the complainant, Fannie Dorfman, had elected to defend the ejectment suit involving the property in controversy in the Essex County Circuit Court.

4. That the complainant was not entitled to relief prayed for because of laches in failing to apply to this Court for relief immediately upon discovery of the encroachment and/or upon the institution of the ejectment suit in the Essex County Circuit Court.

5. That said matters in controversy herein involved were decided in favor of the defendants, Kalman Lieb and Joseph Dashefsky, by a court of competent jurisdiction and the matters therefore are *res adjudicata.*

6. That said decree is inequitable and unjust so far as these defendants are concerned.

7. That said decree presupposes a finding of facts to substantiate an estoppel in *pais* against the defendants, Kalman Lieb and Joseph Dashefsky, from prosecuting their writ of ejectment in accordance with the judgment in the Essex County Circuit Court. No such facts to warrant such a finding are present in this case.

8. That said decree compels the defendants, Kalman Lieb and Joseph Dashefsky, to execute a deed of release upon payment of a certain stipulated sum to them and therefore is mandatory in its nature. Facts as presented in this case do not warrant the issuance of a mandatory injunction, there being no agreement on the part of these defendants to convey said property.

9. Said decree is in effect a decree for specific performance of land and is therefore erroneous in that there was no agreement in writing between the parties.

10. The Court erred in making the decree as aforesaid inasmuch as there was no concealment of facts by these defendants, Kalman Lieb and Joseph Dashefsky, and therefore there was no foundation for equitable interference.

11. Said Court had failed to take any action on the counterclaim filed by these defendants.

Petitioners therefore pray that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that petitioners may have such other relief in the premises as to this Court shall seem proper and especially the relief prayed for in the counterclaim filed by these defendants.

SAUL and JOSEPH E. COHN,
Solicitors for Appellants,
Kalman Lieb and Joseph Dashefsky.

MICHAEL SILVER,
Of Counsel with Appellants,
Kalman Lieb and Joseph Dashefsky.

Answer to Petition of Appeal.

(Filed August 14, 1928.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between FANNIE DORFMAN, *et als.*, *Complainants-Appellees,* and KALMAN LIEB, *et als.*, *Defendants-Appellants.*	On Appeal from the Court of Chancery.

The answer of Fannie Dorfman, Camfield Building and Loan Association and Max Kummel, the above named appellees, to the petition of appeal of Kalman Lieb and Joseph Dashefsky, the above named appellants.

These appellees, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admit that a decree was, on the 8th day of May, 1928, made and entered in the Court of Chancery of New Jersey, in the above entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree, these appellees beg leave to refer thereto when the same shall be produced.

These appellees are advised and believe that the said decree is ageeable to equity and is not unconstitutional, and they pray that the same may be affirmed with costs to be taxed in favor of these appellees.

MICHAEL G. ALENICK,
Solicitor for and of Counsel
with Appellees.

Case.

IN CHANCERY OF NEW JERSEY.

Between

FANNIE DORFMAN, *et als.*,
Complainants,

and

KALMAN LIEB, *et als.*,
Defendants.

November 16, 1927.

For Complainant, MICHAEL G. ALENICK.
For Defendants Dashefsky and Lieb, Messrs. SAUL & JOSEPH E. COHN.
For Defendant Kaplan, Messrs. LEVY, FENSTER & MCCLOSKEY (Mr. SAUL TISCHLER).

Mr. Alenick: I represent the complainant in this case, who is the owner of a piece of property located on the west side of Goodwin Avenue, Newark, known as No. 85. Adjacent to the complainant's property to the south the defendant owns a four family dwelling house. Our building was erected in 1923. The defendant's building was erected a short time prior to that. The defendant saw our building going up and said nothing about any encroachment. We did not know we encroached at the time. The encroachment was not discovered until about two years after my client had taken title to the property, and it was discovered an ejectment suit was instituted by the defendants in this case and the trial in the Circuit Court resulted in a judgment in favor of the present defendants for the strip of land upon which our building was erected; this strip of land was covered by a portion of our building, 92/100 of

a foot in front, on Goodwin Avenue and running along the entire side of the building, about 53 feet, and at the rear it is about a foot and 4/10. The defendants obtained a judgment for the possession of that strip of land, and threatened to tear off that portion of our building, and we therefore came into this court and your Honor issued a restraining order restraining the defendants from tearing down that portion of the building until the determination of this suit. Now the pleadings of the complainant set forth that our building was erected without knowledge of the encroachment.

The Court: On your part?

Mr. Alenick: Yes, sir; and the answer of the defendants admits, or says, that that was the fact. It was a mutual mistake, and in that posture of the case I respectfully submit to your Honor that it falls squarely within the decisions in this state, in 10 and 94 Equity, where the Court of Chancery and the Court of Errors and Appeals have determined that where a situation such as in our present case arises that the court will grant relief in this way, it will decree that the person whose building encroaches shall pay the fair and reasonable market value of that particular land to the owner of that land and obtain a deed for it and an injunction will issue restraining the tearing down of that building, and for the convenience of the court I prepared a short memorandum setting forth that point and have annexed thereto the two decisions I referred to.

The Court: They looked on while you were building?

Mr. Alenick: Yes, sir.

The Court: And saw what you were doing and assumed that you were on your own land?

Mr. Alenick: Yes, sir. It was a clear case of mutual mistake. There is no doubt about that.

The Court: Can counsel agree on the facts?

Mr. Tischler: We say this, that we did not know at any time, while we looked on, that that property was encroaching on our land. We did not know until an action was instituted.

Mr. Cohn: The defendant Dashefsky built their building in 1920. A man by the name of Harry Kaplan then purchased the land adjacent to his building on which this building is now situate—the building encroaching—and he proceeded in 1923, Kaplan did, and put up this building and that now encroaches on our land. He subsequently sold that building by warranty deed to the present complainant, and we at no time knew of this encroachment, and I desire to call your Honor's attention—

The Court: But you knew he was building.

Mr. Cohn: We saw he was building, but we didn't know he was encroaching on our land. If we had we would have stopped him immediately.

The Court: Kaplan didn't know.

Mr. Cohn: I don't think so. He went by the survey. He had a survey made. He stayed within the survey.

The Court: Showed his good faith.

Mr. Cohn: Yes, sir.

The Court: Can't you agree on the facts?

Mr. Cohn: Only we say it is not mutual mistake.

The Court: That is a matter of law.

Mr. Cohn: Yes.

The Court: Can't you agree on the facts as you both have stated them?

Mr. Cohn: I think we can.

The Court: Submit it and submit your authorities, will you?

Mr. Cohn: Yes; we can do that. Personally I think it is a question of law.

The Court: Absolutely so. Kaplan built within his survey?

Mr. Cohn: Yes. I think they should have had a survey made, not depend on the survey of Kaplan.

Mr. Tischler: I represent Mr. Kaplan, the original builder. The purpose of the complainant's suit was to make Kaplan pay for whatever amount they have to pay. They say they have a warranty deed and that by virtue of the warranty deed we are liable to pay any damages that they suffer by reason of the alleged encroachment.

The Court: You will either have to make good here or in the law court.

Mr. Tischler: Our contention is we sold the land metes and bounds and this building is without those metes and bounds and therefore there has been no breach of any warranty.

The Court: Do you want to recover under your warranty in this court?

Mr. Alenick: Yes, your Honor.

The Court: If you have to make compensation your suit against Kaplan is to reimburse you?

Mr. Alenick: That is right. To answer for any damages which we may be assessed.

The Court: Kaplan says that the building is within the description contained in his deed. Do you admit that?

Mr. Alenick: That is not so. That has already been tried out in the law court, and it has been determined that the building is beyond the boundary.

The Court: Your deed warranteed—

Mr. Tischler: Land and premises. And this was without the description in the deed. When they bought the property we showed them a survey which survey showed the building within the

land. They took the description of that survey and put it in a deed. It turns out now—we were not a party to the ejectment suit—that that building goes outside of those lines, outside of the description, therefore we contend we have not breached any warranty, because we sold the land by the description.

The Court: Can't that fact be agreed upon?

Mr. Tischler: Yes, sir.

The Court: And I determine then whether you should pay over?

Mr. Tischler: Yes, sir. Of course, I had no part in the proceedings in the law court where they held the building is without the line. I don't know whether that should be *res adjudicata* as far as I am concerned.

The Court: Can't you agree to the facts that are expected to be proved here?

Mr. Tischler: The only fact that I am worried about is whether that building is without or within those lines. Our survey showed it was within the lines.

The Court: Then you cannot agree that it was over the line. Did Kaplan build within the line; within his description?

Mr. Alenick: He did not. We contend that it has been established that he did not build within the line.

The Court: It has been established that the Kaplan building overreaches your line by a certain number of inches?

Mr. Cohn: Yes, sir.

The Court: But does the Kaplan description extend to the line over which they built; that is the point?

Mr. Cohn: No; it does not.

The Court: What Kaplan did was to build

these number of inches over the line—over his description.

Mr. Tischler: But we only conveyed inside the line.

The Court: Yes. And you only guaranteed that. You can agree upon that?

Mr. Tischler: Yes, sir; I think we can agree upon that.

The Court: Then the question in that respect would be, whether the warranty extended beyond a warranty of the title of the land within the description, not a warranty, if there is such a warranty, that the buildings are within the description.

Mr. Tischler: There is no such warranty in the deed.

The Court: The question then is whether the fact that the building is over the line in the description it is included within any of the warranties that you made.

Mr. Tischler: That is right.

Mr. Alenick: Here is one more question your Honor will have to decide, and I think testimony will have to be taken on that point, that is what is the value per front foot for land on that street.

The Court: Can you agree on that; what it is reasonably worth?

Mr. Alenick: We say it is worth $80 a front foot.

Mr. Cohn: We contend that it is worth from $135 to $150.

The Court: How many inches?

Mr. Cohn: 94/100 of a foot by 60 feet in depth.

The Court: If I decide it I will give you $135. The amount is not enough to entertain me. There will be no contention. Let the agreement embody that, that the complainants claim the property is

worth $90 a foot, or whatever you say, and the other side claim it is worth $135, and then if they succeed I am not going to bother with the amount very much, it is so small, I am going to give you the full benefit. I think you better consent to a decree.

Mr. Cohn: I do not think I will.

The Court: You are going to make this party pull his house down?

Mr. Cohn: No; he can very easily move his house away.

The Court: What kind of a house is it?

Mr. Cohn: Two family house, frame building.

The Court: How much cost?

Mr. Cohn: $1100. We have had $2200 expense already on the property.

The Court: You need this foot of land?

Mr. Cohn: Do we need it?

The Court: Do you need it? Dog in the manger?

Mr. Cohn: No; not exactly dog in the manger.

The Court: You want me to get him to spend $1100, do you?

Mr. Cohn: Yes; I do.

The Court: All right. I am going to tell you you are going to have a pretty tough time in getting me to do it.

Mr. Cohn: You decided a case of this same character.

The Court: If I am bound to you are going to get it but I am going to see that you are not if I can help it. Under the circumstances it is wholly inequitable.

March 5, 1928.

Mr. Alenick: There will not have to be any testimony taken.

The Court: You have agreed on all the facts?

Mr. Alenick: Not all. There are a few we do not agree on.

The Court: What are you here for, to argue it?

Mr. Alenick: Practically that. At the outset I would like to acquaint your Honor with the facts upon which there is no disagreement. The complainant, Dorfman, is the owner of a two-story dwelling house located on the westerly side of Goodwin Avenue; the defendants, as tenants in common, own the property adjoining the complainant's building on the south; the southerly wall of the complainant's building encroaches on the land of the defendant 92/100 of a foot and runs along the length of the southerly wall of the complainant's building about 50 feet; in the rear the encroachment is 1.04.

The Court: At the rear of your house?

Mr. Alenick: Yes. In the front it is 92/100, then it runs along the southerly wall 50 feet and the rear dimension is 1.04.

The Court: No encroachment back of that?

Mr. Alenick: No. There is a garage in the rear.

The Court: You are not over in the rear with the garage?

Mr. Alenick: No.

The Court: No division fence line or anything?

Mr. Alenick: No. The complainant, Fannie Dorfman, acquired title to her property November 1, 1923, from Harry Kaplan, the defendant, who built the house in that year. The deed was recorded in the register's office in Book 69 of Deeds, page 455. At the time Harry Kaplan was erecting the complainant's building the building of the defendants had already been built and was occupied by them.

The Court: Who were the plaintiffs in the law suit?

Mr. Alenick: Lieb and Dashefsky.

The Court: Why is Kaplan in?

Mr. Alenick: He gave us a warranty deed. If the judgment goes against us he will be responsible.

The Court: It would be *res adjudicata?*

Mr. Alenick: Yes. Before Kaplan started to build he had a survey made and built the house within the lines established by the survey. I am reading the facts agreed upon. (Reading) Paragraph 16a of the bill. This allegation is admitted in the answer. Now I say, in view of that admission of these facts which I have just narrated, the law is very clear on the point and its application is very simple. I say our case is on all fours with the case of Magnolia Construction Co., 94 Eq. 736.

Mr. Cohn: Kaplan deeded to the wife and husband and then later the husband conveyed to his wife. The stipulations of facts should be the same as the bill.

Mr. Tischler: Our contention is we had no covenant in the deed—we did not convey the building; we only conveyed the land. We sold them certain lands by metes and bounds and the building extends outside of the metes and bounds. I contend that there has been no breach of any covenant.

Mr. Cohn: Does your Honor think it leaves the field open for fraud?

The Court: No. I do not think that men would pay out a lot of money, crib 92/100 of a foot of land and take the chance of a lawsuit. I think that men when they put out their money to put up a building they want to put the building on their own land and not ground-inch on their neighbor. Self-protection.

Mr. Cohn: I still think the law is with me on

the subject. I would like to submit a brief. I do not want to spend any time on it if your Honor's mind is made up.

The Court: My mind is made up but it may be unmade. As I go along I make up my mind what I shall do and something may develop to show me I am wrong. My mind is never made up until the decree is signed.

Mr. Alenick: I move to strike out the counter-claim.

The Court: It is too late now.

Mr. Tischler: We conveyed this property without any house on it. There is no question here about title within the bounds of the deed. The house was built afterwards. There were several covenants in the deed.

The Court: Whether I can hold Kaplan will depend on whether you could, regardless of this ejectment suit, have gone into a court of law and recovered under your covenant with Kaplan. If you could not I cannot. Could you at law recover against Kaplan?

Mr. Alenick: I think I could.

The Court: You are over on the other man's land. You went over under a situation where it would not be right to allow him to tear down your property. It also is not right that you should be able to use his lot without paying, and we say, "don't you tear that property down, we will give you the value of it." That is all. Compensation. You have got to pay that out. Now your right to recover from some one else depends upon whether he bargained—meaning thereby his covenant?

Mr. Alenick: I would like to submit a memorandum on that.

Opinion, May 3, 1928.

IN CHANCERY OF NEW JERSEY.

Between

FANNIE DORFMAN, *et als.*,
Complainants,

and

KALMAN LIEB, *et als.*,
Defendants.

} Opinion.

On Final Hearing.

For Complainants, MICHAEL G. ALENICK.
For Defendants, SAUL & JOSEPH E. COHN.

BACKES, Vice-Chancellor:

The bill is to restrain the execution of a judgment in ejectment, the result of which would be to tear down the southerly wall of the dwelling of the complainant, Fannie Dorfman, at 85 Goodwin Avenue, Newark, which stands over in defendant's yard .92 of a foot at the street line, extending back 53 feet, where the encroachment is 1.04 of a foot. The complainant holds title from one Kaplan, who built the house in 1923. He, at the same time, built two others on the two adjoining lots on the north, and each encroaches, approximately, to the same extent on the lots to the south. Before building Kaplan had the lots surveyed and the house on the lot in question was put within the line of the survey. At that time the defendants lived next door, saw the erection going on and made no objection. Kaplan and the defendants were of the belief that the house was within his lot. They all were igno-

rant of the true situation. The complainant purchased laboring under the same mistaken notion. Two years later the defendants discovered the mistake and sued in ejectment and recovered. A preliminary injunction to restrain the execution of the judgment was granted. The complainant is entitled to relief upon terms. The case is controlled by McKelway *v.* Armour, 10 N. J. Eq. 115, where the complainant built on the wrong lot, and by Magnolia Construction Co. *v.* McQuillan, 94 N. J. Eq. 342, where the complainant's apartment house encroached on the neighboring lot a few feet. These cases are not distinguishable in principle from the one in hand because in the first the house was built entirely on the defendant's lot and in the other the defendant, under the impression that the complainant's survey was correct, moved his fence to accommodate the structure and helped in the measurements. The incidents in the latter case were alluded to by the court as evidence of the defendant's mistaken belief, not as exculpating circumstances. Both cases were decided solely on the equities resulting from mutually mistaken state of mind. In Kirchner *v.* Miller, 39 N. J. Eq. 355, relief on the ground of mutual mistake was denied because the complainant would suffer no hardship in being required to tear down and reconstruct an encroaching wooden structure at a cost of $100. The opinion criticized McKelway *v.* Armour as penalizing an innocent owner out of his property. A guilty owner would be estopped because of his fraud, not mutual mistake. That equity will relieve from the consequences of a mutual mistake is established law in this state, and the doctrine is recognized in the Kirchner case.

Opinion.

The defendant will be decreed to convey the strip by a bargain and sale deed upon the payment of the value of the land, which was agreed in open court to be $125, and the costs of the ejectment suit, including a trial fee in that suit of $100.

Kaplan, the complainant's grantor, is a defendant, and the complainant calls upon him for reimbursement of the award. The bill alleges that he conveyed by warranty deed. Thre is no allegation of the breach of any covenant, but it is argued that the covenant of seizin and the one against encumbrances was breached. That the house stands in part on the adjoining lot is not a breach of the covenant of seizin. Burke *v.* Nichols, 34 Barb. 430; aff'd 2 Keyes (N. Y.) 67. The encroachment of the house on the adjoining land is not a breach of the covenant against encumbrances. Murphy *v.* Skelley, 5 Adv. Rep. 1592.

In the briefs the complainant relies on the stipulation in the contract of sale between Kaplan and Dorfman which reads that "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." This, of course, cannot be entertained. No issue is made of it in the pleadings and consequently it is not decided whether this is an independent covenant or is merged in the deed. Long *v.* Hartwell, 34 N. J. L. 116; Merchants, &c., Co. *v.* Mercer Realty Co., 99 N. J. L. 442.

Neither party is entitled to costs.

New Jersey Court of Errors and Appeals

FANNIE DORFMAN, *et al.*, *Complainants-Appellees,* *v.* KALMAN LIEB, *et al.*, *Defendants-Appellants.*	On Appeal from Chancery.

BRIEF OF DEFENDANTS-APPELLANTS.

Statement of Facts.

Complainant-appellee, Fannie Dorfman, is the owner of a dwelling house which encroaches upon the adjoining land of the defendants-appellants, Lieb and Dashefsky.

On or about June 1, 1925, almost two years after the building had been erected, the defendants herein contracted to convey their premises to one Harry Katz, and at the closing of title were informed for the first time that the building owned by the complainant encroached upon their property. They thereupon notified the complainant, Fannie Dorfman, and also unsuccessfully prosecuted an action of specific performance in the Court of Chancery to compel the said Harry Katz to take title to said premises.

The defendants thereafter repeatedly endeavored to effect an amicable settlement with the complainant in regard to the encroachment, but without avail. Finally the defendants were com-

pelled to institute suit in ejectment in the Essex County Circuit Court to secure possession of their strip of land, and judgment in their favor was accordingly entered on April 26, 1927.

The complainants thereupon filed this bill in the Court of Chancery to enjoin the execution of this judgment in ejectment. The defendants, in answering this bill, denied the right of the complainants to any equitable relief on the ground that there was no misconduct, culpability, negligence or acquiescence whatsoever on the part of the defendants for which their own rights could in any way be molested; that the complainants were precluded from relief because they had had their day in court when they had strenuously and stubbornly opposed and gone to trial in the Circuit Court ejectment suit, instead of immediately applying to the Court of Chancery for relief if relief in that Court was available; and in addition the defendants herein filed a counterclaim setting forth that because of their impossibility to consummate the sale to Harry Katz and because of the prosecution of the ejectment suit, the defendants, Lieb and Dashefsky, were compelled to expend approximately $1,800.00 for witnesses, experts and counsel fees; for which they demanded reimbursement in the event the injunction was granted. This the defendants claimed, in view of the fact that all this expense was sustained solely through the fault of the complainants' encroachment and not through any fault of their own.

The learned Vice-Chancellor's decree in this cause granted the injunction and awarded the defendants $125.00 for the value of the land and $100.00 counsel fee and costs for the prosecution of the ejectment suit. It is from this decree that defendants appeal for the reasons hereafter stated.

POINT I.

The decree in favor of complainants should be reversed because it is an unconstitutional usurpation of the defendants' rights, in that it takes their private property for private use.

Chancellor RUNYON in 39 Equity 358, in commenting that the Rule of Mutual Mistake of Fact was unjustifiably applied in the *McKelway* case, said:

> "The exercise of such judicial power unless based on some actual or implied culpability on the part of the party subjected to it, is a violation of a constitutional right. No tribunal has the power to take private property for private use. The legislature itself cannot do it."

Taking of private property for private use does not lose its taint of unconstitutionality merely by reason of the fact that the nominal market price of the land will be paid for it. A property owner has the right to his property, secure to do with it lawfully as he sees fit and can only be denied same when a paramount power, as the state, claims his property for a *public* use. There, payment of the market price is just compensation and only then because the property is being taken for a public use—not, as in the present case, where the property is taken for private use.

POINT II.

The decree granting relief to complainant is inequitable.

To affirm the allowance of an injunction in the present case would result in the encroachment with impunity by any adjoining landowner upon

the lands of his neighbor under the pretense of mistake.

It is unreasonable to require a neighbor to make a certifying survey of his land every time an adjoining landowner erects a building near his land.

To sustain the injunction would be penalizing the defendant for not expending moneys, and making a certifying survey, merely to altruistically make certain that his neighbor is building on his own land.

Vice-Chancellor LEAMING, in *DuPont* v. *Buckley* (96 Equity 466) cites Judge STORY:

> "Where each party is equally innocent and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying *no foundation* for *equitable interference.* It is strictly *damnum absque injuria.* 1 Story Equity Juris, p. 151."

POINT III.

The case at issue does not fall within the purview of McKelway v. Armour (10 Equity 115) or Magnolia Construction v. McQuillan (94 Equity 739).

The *McKelway* case and the *Magnolia* case, both of which invoke the Rule of Mutual Mistake of Fact, and both of which are relied upon by the complainants, do not affect the determination of the case at issue, because after an analysis of the above named cases it will be perceived that they are clearly distinguishable from the facts in question.

The case at issue is distinguishable from the *Magnolia* case, in that in the *Magnolia* case, the defendant actually participated in the mistake "by

removing the shed and fence and participating in ascertaining the line according to the survey to the extent of holding a measuring tape along the line between the front and rear monuments established by the survey."

The case at issue is distinguishable from the *McKelway* case in that in the *McKelway* case, the mistake consisted in the complainant building completely on a wrong lot, no question of encroachment on an adjoining lot; thus making possible an exchange of lots as equitable relief. Besides in the *McKelway* case, one standing by could realize that the mistake was being made because the structure erected was out of place to a degree of over twenty-five feet—not an adjoining encroachment where presence alone would not give knowledge of encroachment. In this present case, there is not the slightest iota of evidence that defendants participated in the complainants' encroachment in any way whatsoever.

In both the *Magnolia* and *McKelway* cases, the defendant not only was present, but participated in the mistake, thereby making himself liable by implied acquiescence; but here defendants did not participate in the mistake, did not acquiesce to the mistake, merely as a next door neighbor had seen the building erected. Having no knowledge of the encroachment, not having participated in the mistake, not having done anything that even impliedly expressed their acquiescence to the encroachment, the defendants are in no way estopped from securing the relief prayed for, especially so, since the complainants, the owner, the building and loan association, and the mortgagee were negligent in not causing surveys to be made properly and for themselves individually.

As expressed by Chancellor ZABRISKIE in *Dillett* v. *Kemble* (23 Equity 58):

"To make acquiescence a fraud, the party charged must know or have reason to believe that the act is done under a mistake; knowledge of its being done is not sufficient."

Dillett v. *Kemble,* 23 Equity 58;
Haggerty v. *McCanna,* 25 Equity 48;
Sumner v. *Seaton,* 47 Equity 103;
Friel v. *Turk,* 93 Equity 425.

POINT IV.

Application of the rule of mutual mistake of fact is unwarranted where mutuality of mistake does not exist.

In the present case, the defendants did not participate in any manner whatsoever in the mistake; neither did they acquiesce to the mistake. It is therefore evident that the defendants were not parties to any *mutual mistake of fact.*

In the leading cases which invoke the Mutual Mistake of Fact Rule, the *McKelway* and *Magnolia* cases, we find that participation by the defendant was regarded as an important factor in coming to the conclusion that mutuality of mistake existed. However, in the case at hand, there is no evidence of even the slightest participation in the mistake by the defendants. The complainants encroached upon the defendants' land, but defendants did nothing from which it could be inferred that they participated in the mistake or acquiesced to the mistake.

Chancellor WILLIAMSON in the *McKelway* case said:

"The fact of Armour's standing by and participating in the mistake, is an important feature in this case."

In the *Magnolia* case, Justice BERGEN said:

> "Then he (the defendant) was mistaken, and his subsequent conduct in moving the fence and shed, and helping measure the proposed line shows that he was mistaken."

It is clear that participation in the mistake is a deciding factor in invoking the Rule of Mutual Mistake of Fact, and that essential element of the Rule is entirely lacking, there having been no participation on the part of the defendants here.

In addition, there was no acquiescence, express or implied, to the mistake by the defendants. It is conceded that the defendants did nothing else than notice construction of their neighbor's house.

Chancellor RUNYON in *Kirchner* v. *Miller* (39 Equity 359) in criticizing the *McKelway* case, quotes Lord CRANWORTH in *Ramsden* v. *Dyson*, L. R. (1 H. of L.) 129-141:

> "It will be observed that to raise such an equity *two* things are required, first, that the person expending the money suppose himself to be building on his own land; and secondly, that the real owner, *at the time of the expenditure*, knows that the land belongs to him and not to the person expending the money in the belief that he is the owner."

POINT V.

The decree is inequitable in that it grants relief to complainants where the mistake is the result of their own negligence.

The complainants in this suit were unquestionably negligent in not first carefully ascertaining the true limits of their property. The complainants, knowing that they were building right to the line of their property, should have used care in

making certain that there could be no possible error. Decisions in our Court of Chancery hold that such negligence as is present in this case, is sufficient to bar the complainants' relief.

The mistake must be as to a fact, not only known to the party, but one which he could not by reasonable diligence have ascertained. *Graham* v. *Berryman,* 19 Equity 29.

> "Mistake, within the meaning of equity, is an erroneous mental condition, conception or conviction, induced by ignorance, misapprehension or misunderstanding, but without negligence."
>
> 2 *Pom Eq. Juris.,* p. 839, cited in *DuPont* v. *Buckley,* 96 Equity 467.

Chancellor RUNYON in *Dillett* v. *Kemble* (25 Equity 66):

> "Equity will not assist a man whose condition is attributable to his failure to exercise that diligence which may be fairly expected from a reasonable person. This rule has been applied where the negligence was that of counsel."

And in the same case Chancellor RUNYON said:

> "Equity will not relieve a person from the effects of a mistake which is the result of his culpable negligence."

(Culpable negligence here consisted of complainant, before building, making an incomplete search for encumbrances, thereby allowing a judgment lien to be later filed against the building and lands.)

POINT VI.

The complainants are precluded from any relief at the present time by reason of the fact that they are guilty of laches.

From a careful perusal of the facts and circumstances of this case, it is easily ascertainable that complainants have been unnecessarily delinquent in not having the matter adjudicated at a much earlier date; that they were satisfied to let the matter rest, did not apply for equitable relief, but defended and went to trial in the Circuit Court ejectment suit, and now, at this late date, they claim that equitably they are entitled to the relief they ask for. Whatever their claim, the laches of which they are guilty must preclude their right of relief at the present time.

POINT VII.

The sum of $250.00, which the Court allowed as compensation for taking of private property for private use, is entirely inadequate and inequitable.

Counsel for the complainants has blatantly described the fact that the defendants herein asked for $1,800.00 compensation when the land is estimated at approximately $125.00, but complainants' counsel forgets that the defendants' claim of $1,800.00 is not for the land only, but for the *actual* expenses incurred by reason of complainants' encroachment upon defendants' land, as was admitted in the stipulation of facts (Case, p. 36, fol. 20) and as outlined and itemized in defendants' special defense and counterclaim filed in this cause (State of Case, pp. 27-31). If defendants are not accorded their right to their property which had been unlawfully encroached upon, then

surely they are entitled to the *actual* damages incurred by reason of complainants' act, which damages besides the market value of the land, include losses and expenses sustained through their inability to consummate the contracted sale of their property because of complainants' encroachment thereon, actual cost of ejectment suit to establish right to land encroached upon, actual expenditures sustained by reason of complainants' present suit; certainly all this expense would never have come about except for complainants' negligent encroachment. According to the learned Vice-Chancellor's decree the defendants, besides having their land taken away, must sustain an actual loss of $1,500.00 for *not* having done anything wrong. Certainly the sum of $125.00 market value of the property together with a nominal fee of $100.00 with costs for the ejectment suit, does not, within equity or reason, justly compensate the defendants for the taking of their property. Surely this case comes within the well established doctrine of "He who seeks equity, must do equity." The complainants, desiring relief from their own mistake, ought in all fairness be willing to properly reimburse the defendants for the actual damage and expenses they sustained.

POINT VIII.

The decisions of the Court of Chancery and the opinions of the Chancellors are consistently against invoking the Rule of Mutual Mistake of Fact in a situation similar to the one before us.

Review of the decisions of the Court of Chancery in reference to the facts involved, has repeatedly refused to invoke the Mutual Mistake Rule except in the *McKelway* and *Magnolia* cases,

and both of these cases are clearly distinguishable from the case at issue.

Graham v. *Berryman*, 19 Equity 29;
Dillett v. *Kemble*, 25 Equity 66;
Haggerty v. *McCanna*, 25 Equity 48;
Voorhis v. *Murphy*, 27 Equity 664;
Sumner v. *Seaton*, 47 Equity 103;
Perkins v. *Moorestown Turnpike*, 48 Equity 499;
Friel v. *Turk*, 95 Equity 425;
DuPont v. *Buckley*, 96 Equity 467.

CONCLUSION.

For the reasons above stated and especially because the decree of the Court of Chancery is an unconstitutional usurpation of the defendants' rights, because the decree granting relief to the complainants is inequitable, because the decree does not differentiate the case at issue from the *McKelway* and *Magnolia* cases, because the application of the Rule of Mutual Mistake of Fact is unwarranted in the present case, because the decree grants relief in spite of complainants' negligence and laches, because the sum of $250.00 which the Court of Chancery allowed as compensation is entirely inadequate and inequitable, and because the decisions of the Court of Chancery are consistently against invoking the Rule of Mutual Mistake of Fact to situations similar to the one at issue, we respectfully submit that the injunction granted by the Court of Chancery be dissolved; or, in the alternative, that said decree be amended so as to award adequate compensation to the defendants for the taking of their property.

Respectfully submitted,

SAUL & JOSEPH E. COHN,
Solicitors of Defendants-Appellants,
Lieb and Dashefsky.

[9704]

LAZARUS PRINTING COMPANY, 51 CLINTON ST., NEWARK, N. J.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

FANNIE DORFMAN, CAMFIELD BUILDING AND LOAN ASSOCIATION, and MAX KUMMEL, *Complainants-Appellees,* *vs.* KALMAN LIEB, JOSEPH DASHEFSKY and HARRY KAPLAN, *Defendants-Appellants.*	*On Appeal from Chancery.*

BRIEF OF COMPLAINANTS-APPELLEES.

Facts.

The facts in this case have been stipulated and will be found in the State of the Case, page 34. For the sake of clearness, however, it may not be amiss to recite those facts which are particularly essential.

Complainant, Fannie Dorfman, is the owner of a two-story dwelling house located on the westerly side of Goodwin avenue, Newark, N. J. The defendants, Kalman Lieb and Joseph Dashefsky, as tenants in common, own the property adjacent to the complainant's building on the south. The southerly wall of complainant's building encroaches upon the land of the defendants, Kalman Lieb and Joseph Dashefsky, .92 of a foot on Goodwin avenue and runs along the length of the southerly wall of the complainant's building about 53 feet; in the rear the encroachment is 1.04 feet over the defendants' land.

Complainant, Fannie Dorfman, acquired title to her property on November 1, 1923, by warranty deed from the defendant, Harry Kaplan,

who built the house in that year. At the time Harry Kaplan was erecting complainant's building, the building on the adjacent premises of Lieb and Dashefsky had already been completed and was occupied by them. Before Harry Kaplan started to build, he had a survey made and built the house within the boundary lines as established by his surveyor. He relied upon his surveyor and in erecting the building, Harry Kaplan acted in perfect good faith and in the honest belief that he was constructing the building within the boundary lines of the lot and that the building did not encroach upon the lands of Lieb and Dashefsky. The latter, on the other hand, looked on as the building progressed in construction and said nothing, *also honestly believing* that the building at No. 85 Goodwin avenue, Newark, New Jersey, was within the boundary lines of the lot and that it did not encroach on their land. (Case, p. 8, ll. 20-24, and Case, p. 25, ll. 32-33.)

The first intimation which Lieb and Dasheskfy received of the existence of the encroachment on their land of the No. 85 Goodwin avenue building was about July 20, 1925, almost two years after the building had been constructed, and immediately so notified Dorfman. This was the first time that Dorfman received any intimation of an alleged encroachment.

In August of 1926, Lieb and Dashefsky commenced an ejectment suit in the Essex County Circuit Court and on April 26, 1927, a judgment carrying costs was rendered awarding to them the possession of the strip of land on which the complainant's building encroached, viz., .92 of a foot front on Goodwin avenue, and running along one entire side of the house, 53.25 feet, with a

rear of 1.04 feet. The value of that strip is about $125.00.

Lieb and Dashefsky caused a writ in ejectment to issue and threatened to tear down that portion of complainant's building which encroached on their land. Complainant applied to this Court for relief and an injunction was issued pending final hearing.

The conveyance by Harry Kaplan to Dorfman was made expressly subject to a $9,500 mortgage held by Camfield Building and Loan Association, one of the complainants. The latter had no knowledge nor notice of the existence of the encroachment when it loaned out the money in 1923 nor afterwards until on or about the time the ejectment suit was instituted in August, 1926. There is due to the Building and Loan Association at this time approximately $8,000 on its mortgage.

Max Kummel, another one of the complainants, holds a second mortgage on the Dorfman property amounting to $2,500. This mortgage was placed on the property on May 24, 1926, more than three months before Lieb and Dashefsky commenced suit in the Essex County Circuit Court. Max Kummel did not have a survey made and had no knowledge nor notice of the existence of the encroachment of the No. 85 Goodwin avenue building until on or about April, 1927, when the judgment was rendered in favor of Lieb and Dashefsky in the ejectment suit.

Between the southerly wall of complainant's building and the northerly side of Lieb and Dashefsky's building is a grassy space of 6-8 feet wide.

The encroachment cannot be removed except at a considerable cost to the complainants.

Although by his decree, Vice-Chancellor Backes awarded to Kalman Lieb and Joseph Dashefsky the sum of $125.00 which was the agreed value of the strip of land, and in addition allowed them $100.00 for counsel fee in the ejectment suit, nevertheless they are not content. They seek to make complainants pay $1,800 for that which admittedly is only worth $125.00.

ARGUMENT.

The whole case simmers down to this: The encroachment exists because of a mutual mistake of fact. Paragraph 16A of the bill of complaint (C. 8, l. 11), asserts it and the answer (C. 25, l. 32), admits it. Under these circumstances, the case at bar falls squarely within the case of *McKelway* v. *Armour,* 10 N. J. E. 115 and *Magnolia Construction Co.* v. *McQuillan,* 94 N. J. E. 739, and it is respectfully submitted that the decision in those cases controls this one.

It remains to answer the points raised by appellants' brief. This will be done under the following heads:

I. The decree is constitutional.

II. The decree is equitable.

III. Complainants are not chargeable with negligence or laches.

IV. The sum awarded the defendants is ample and fair.

V. The decree is in conformity with established cases.

POINT I.

The decree is constitutional.

The defendants seem to doubt the right of equity to grant relief in a case where the Court has found as a fact that *mutual mistake* existed.

The question is whether Chancery usurps the defendants' constitutional right when it alleviates complainants' hardship, as was done in the case *sub judice*. This court has always had the power to render a decree such as was rendered in the present case and it has been held to be due process of law.

In 12 *C. J.* 1254, section 1044, citing *McKelway* v. *Armour,* 10 E. 115, the rule is thus pronounced:

> "It is due process of law to allow, against the absolute owner, full remuneration to the occupant in good faith, under color of title who has by improvements added to the value of the estate. The owner may be given his election to relinquish his title to the land on the payment to him by the occupant of the value of the land unimproved"; citing cases.

As was said in the case of *Griswold* v. *Bragg,* 48 Fed. 519:

> "There is a natural equity which rebels at the idea that a bona fide occupant and reputed owner of land * * * should lose the benefit of the labor and money which he had expended in the erroneous belief that his title was absolute and perfect."

The Court has granted relief so frequently in such cases, without any question arising as to its being "a taking of private property for private use," that the validity and correctness of the decree can hardly be disputed.

The constitutional prohibition prevents a tribunal from giving A's property to B, even with compensation, where the former has done noth-

ing to foster the belief that B, or the complainant here, was the owner of the land encroached upon. However, in the instant case, the defendants themselves, not knowing the true boundary, allowed the complainant, who was also mistaken, to encroach on their land. When these facts are established, Chancery may decree that defendants release that portion of the land, for a consideration, so as to prevent a hardship upon the complainant. *Equity disallows the defendants in such a case from claiming the land and thereby subjecting the other party to a hardship.* There is something so manifestly right and just in such a decree, that it would be strange indeed, if the people in their organic law should have prohibited such equitable decrees. The due process clause does not apply to a case of this kind. The Court is not arbitrarily depriving the defendants of their property as was contemplated in the due process clause of the constitution.

Many states have enacted the "Occupying Claimants' Laws." These laws declare that a person who occupies land under the impression of ownership and makes improvements, the successful claimant who owns the land must pay for the improvements or sell the land in the unimproved state. These laws, which accomplish the same result as the decree in our courts, were held to be constitutional. *Ross* v. *Irving,* 14 Ill. 171; *Jones* v. *Carter,* 12 Mass. 314; see cases cited in 12 Corp. Jur. 1254, section 1044.

The dicta in *Kirchner* v. *Miller*, 39 E. 358, to which counsel for defendants adverts, in discussing the constitutionality of such rulings, merely holds that it would be a usurpation of the defendants' rights if such a decree were made and *no mutual mistake existed.* The case concedes that where mutual mistake causes a

hardship, equity has the power to relieve the complainant and it is not a taking of private property for private use in contravention of the constitution.

Our Chancery courts have always been vested with the unquestionable right to relieve a complainant from *hardship* in cases of mutual mistake. Commencing with *McKelway* v. *Armour,* 10 E. 115, continuing with *Magnolia Construction Co.* v. *McQuillan,* 94 E. 736, and up to the present day, equity has consistently rendered such decrees with no question as to their constitutionality. It is an inherent power of this Honorable Court to alleviate *Hardship,* especially where the defendants themselves have contributed to this condition.

POINT II.

The decree is equitable.

The defendants in their brief under Point II, entitled, "The decree granting relief to complainant is inequitable," cite the case of *DuPont Chemical Co.* v. *Buckley,* 96 E. 466. That case treated with a *mistake in representing* pine tanks to be cyprus tanks. It obviously has no relevancy to the case before us.

As was pointed out under Point I of this, the complainants' briet, and as can be deduced from the facts hereinabove recited, there is something so manifestly fair and just, sensible and humane in the making of the decree which was rendered in this case, that it causes one to wonder why the defendants impugn it.

When it is remembered that the encroachment came into being because of a mutual mistake of fact (C. 40, l. 34) and that its existence was not

discovered until almost two years after the complainant's building was erected and when it is borne in mind that the entire south side of the complainant's building, over two stories high and extending about 53 feet deep, encroaches only about one foot over the defendants' land and that a grassy space of 6 to 8 feet separates the northerly wall of defendants' building from the southerly wall of complainant's building (C. 39, l. 12)—when all these things are recalled, the equity of the decree is discernable at a glance.

Moreover, when it is considered that irreparable damage might be committed by the defendants except for the decree which has been made in this cause and that the rights of innocent mortgagees are affected (C. 38, ll. 19-41), the decree takes unto itself additional equitable attributes.

In this connection, the opinion of Chief Justice Beasley in the case of *Anglescy* v. *Colgan,* 44 E. 203, is instructive. In the course of the opinion, that learned jurist says:

> "Very few persons, it is believed, in taking mortgages on premises apparently covered by a dwelling house, verify by actual survey of measurement the extent of the lot, or its exact location as described in the deed, and the consequence is that it is the general understanding that it is the obvious intent of both mortgagor and mortgagee that the encumbrance shall rest on an area of land commensurate with the dimensions of the building. Under such a condition of facts the suggestion never arises that the mortgage rests on only a portion of the building, leaving a fragment of it unincluded in the instrument."

Is it reasonable to suppose in the case at bar, that Camfield Building & Loan Association, the first mortgagee, and Max Kummel, the second

mortgagee, in placing mortgages on the property now owned by the complainant, Fannie Dorfman, would exempt from the lien of their respective mortgages one entire side of the building? Of course not!

In the case of *Straus* v. *Loudenslager,* 96 E. 678, it has been held that in a situation where the damage caused by an encroachment or easement is too inconsequential to justify the hardship that will flow from the enforced removal of the encroachment, when that encroachment arose through a mistake, equity will step in and grant relief.

It is therefore clear that the decree of the learned Vice-Chancellor in this case is essentially equitable.

POINT III.

Complainants are not chargeable with negligence or laches.

The defendants, under Point V of their brief, charge complainants with negligence in not carefully ascertaining the true limits of their property. Defendants state nothing to corroborate that charge. On the contrary the proofs indubitably show that complainant's grantor, who erected the structure, was circumspect in that, before he "started to build, he had a survey made and built the house within the boundary lines as established by his surveyor" (C. 35, l. 9).

Was that negligence? Was it negligence to engage a surveyor, presumably competent, to stake out the lot and then for the owner to erect the building within the lines fixed by the surveyor? Where was the culpable negligence of which de-

fendants complain? The answer is, there was none. Defendants' argument falls by its own weight.

Then under Point VI of their brief, defendants assert that complainants are barred from relief because of laches; that the equity suit should have been brought at an earlier date and that the complainants should not have waited until the outcome of the Circuit Court ejectment suit to bring their Chancery action. This point is untenable for the reason that since the encroachment itself was questioned and there was a likelihood of establishing the fact that no encroachment really existed, the action in Chancery would have been premature. When the Circuit Court finally determined the fact that the building of complainant's actually encroached on defendants' land and defendants threatened to chop and tear down a substantial part of complainant's building to their irreparable damage, then complainants immediately applied to equity to relieve them from that hardship and equity intervened. So the points of negligence and laches endeavored to be made by the defendants fails.

POINT IV.

The sum awarded the defendants is ample and fair.

Simply because the defendants at one time contracted to sell their property to a third party, who refused to take title and because the defendants thereafter instituted a specific performance suit against the third party and lost it and were obliged to expend moneys in that litigation to which these complainants were no party and in which they had no interest, the defendants are now trying to mulct the complain-

ants of the sum of $1,800. It's a plain case of a hold-up. Equity refused to permit it and in effect said to the defendants: "You admit that the value of your land on which complainant's building encroaches is worth only $125.00. Well, I'll order the complainants to pay you the $125.00 and in addition $100.00 for a trial fee in the ejectment suit." Nothing could be fairer than that.

Defendants seem to forget that just as they incurred expense in litigation so did the complainants. Throughout their brief defendants constantly harp on the expression "complainants' mistake," losing sight of the fact that the mistake was a mutual mistake and that it has been so adjudicated. Wherefore, all the more reason why Vice-Chancellor Backes' decision should be affirmed.

POINT V.

The decree is in conformity with established cases.

The point which opposing counsel raises is that the cases of *McKelway* v. *Armour* and *Magnolia Construction Co.* v. *McQuillan* are distinguishable from the one in issue because in those cases the defendants participated in the mistake. In the Magnolia case, the defendant *actively* participated in the mistake by removing the shed and fence and participated in ascertaining the line according to the survey by holding a measuring tape along the line between the front and rear monuments established by the survey.

In the McKelway case, the defendant, Armour, stood by and *passively* participated in the mistake and from day to day saw McKelway progressing with the erection of a building on a lot

that belonged not to McKelway, but to Armour, but at the time of the erection of the building *both* McKelway and Armour *believed* the lot on which the structure was rising, belonged to McKelway.

In other words, in one case the defendant actively participated in the mutual mistake and in the other case the defendant passively participated therein by seeing the structure go up and saying nothing and doing nothing.

What situation have we here? Harry Kaplan, complainant's grantor, erected the building at No. 85 Goodwin avenue, Newark, New Jersey, under the honest belief that he was constructing the building within the boundary lines of the lot and that he did not encroach on the lands of Kalman Lieb and Joseph Dashefsky. Moreover, Kalman Lieb and Joseph Dashefsky looked on as the building progressed in construction and *said nothing, also honestly believing* that the building at No. 85 Goodwin avenue was within the boundary lines of the lot and that it did not encroach on their land (*vide* paragraph 16A of Bill of Complaint) (C. 8, l. 11) and admission in answer (C. 25, l. 32). This, it is respectfully urged, is on all fours with the McKelway situation and constitutes *passive participation.*

Furthermore, if any effect is to be given to the affidavit of the defendant, Kalman Lieb, which was not signed nor sworn to but was attached to the notice of motion to strike the complaint signed by Saul and Joseph E. Cohn, the defendants' solicitors, and which was served on the complainants' solicitor on May 28, 1928, evidence is clear that not only did defendants passively participate in the commission of the mutual mistake, but also did *actively participate.*

Near the bottom of the first page of what purports to be Kalman Lieb's affidavit, appears this statement:

> "He * * * says in fact that the said Harry Kaplan asked permission of deponent to erect scaffolding on the building being erected at 85 Goodwin avenue, Newark, N. J., which scaffold hung over on the land adjoining, belonging to deponent and Joseph Dashefsky, and that he gladly gave such permission; * * *."

This statement is quite conclusive that the defendants both passively and actively participated in the mutual error. When opposing counsel in his brief states that his clients, the defendants herein, "did not participate in any manner whatsoever in the mistake; neither did they acquiesce to the mistake," he is obviously mistaken.

It is therefore beyond cavil that the case at bar falls squarely in the determination of *McKelway* v. *Armour,* 10 Eq. 115, and *Magnolia Construction Co.* v. *McQuillan,* 94 Eq. 736. In addition to the McKelway and Magnolia Construction Co. cases, the following are but a few of the vast number which support the right of equity to grant relief to the complainants:

Sumner v. *Seaton,* 47 N. J. E. 103;
Dellett v. *Kemble,* 23 N. J. E. 583;
Meredith v. *Sayre,* 32 N. J. E. 557;
Jarman v. *Freeman,* 78 N. J. E. 464;
Haggerty v. *McCanna,* 25 N. J. E. 48;
Friel v. *Turk,* 95 N. J. E. 425;
Straus v. *Loudenslager,* 96 N. J. E. 678.

Conclusion.

Having demonstrated that the decree rendered by Vice-Chancellor Backes in this case is constitutional, equitable, fair in its award to the de-

fendants, just in its protection to the complainants and is in harmony with the established law of this State, it is respectfully urged that the decree be affirmed.

Respectfully submitted,

MICHAEL G. ALENICK,
Solicitor for and of Counsel with
Complainants-Appellees.