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TESTIMONY.

For Complainant.

For Defendants.

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BILL OF COMPLAINT.

Filed, March 13, 1926.

In Chancery of New Jersey

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

Complainant, Security Bond and Mortgage Co., a corporation of New Jersey, having its principal place of business in the City of Newark, County of Essex and State of New Jersey, respectfully says:

1. On November 24, 1925, Bany Weiss and Lena Weiss, his wife, entered into a written contract with complainant whereby the said Bany Weiss and Lena Weiss, his wife, undertook and agreed to convey to the complainant, for the purchase price of Sixteen Thousand Dollars ($16,000.00), by Deed of Warranty, free from all encumbrances, excepting tenancies and a mortgage held by The Watson Building & Loan Association in the nominal sum of Twenty-seven Hundred Dollars ($2,700); all that lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Newark, County of Essex and State of New Jersey.

BEGINNING on the East line of Jones Street at a point therein distant three hundred seventy-five feet eight inches from the corner formed by the said line of Jones Street and the Northerly line of Springfield Avenue; thence running Easterly at right angles to said Jones Street eighty-eight feet more or less to the Easterly line of Sayres Coe, deceased, land; thence North-

erly along said line twenty-five feet; thence Westerly at right angles to said Jones Street eighty-eight feet more or less to the Easterly line of Jones Street; thence along the same Southerly twenty-five feet to the Place of Beginning.

2. A copy of said agreement is hereunto annexed, marked "Exhibit 1," and is hereby made part hereof.

3. Complainant thereupon caused an examination of the title to the above-described premises to be made and a survey of the above-described premises to be made.

4. Complainant further shows that in the title deed from Reinhard Heider and Maria J. Heider, his wife, to John Boepple and Johanna Boepple, dated July 9, 1875, recorded in Book I 18 of Deeds for Essex County, page 265, there appears the following condition: "This sale is further made with the following condition, that if said party of the second part shall receive all costs and interest and the amount paid for this property and other expenses laid out by the party of the second part *for* from the party of the first part in one year from date hereof, then the party of the second part or their heirs and assigns promise and agree to give to the party of the first part a Warranty Deed with the same conditions as mentioned in this Deed."

5. Complainant further shows that the outside lines of the front building erected on the above-described premises were, on January 24, 1926, and still are, not within the boundary lines of the property above mentioned as described in the Deed therefor; and that the said building is

not all within the boundary lines of the property as described in the Deed therefor.

6. Complainant charges that the said Bany Weiss and Lena Weiss, his wife, the defendants herein, have at no time been ready, willing and able to convey the premises aforesaid, and as hereinbefore described, to the complainant, in accordance with the terms and conditions of the said contract entered into between the said parties, and are not now ready, willing and able to convey the said premises to complainant in accordance with the said agreement dated November 24, 1925, hereunto annexed and marked "Exhibit 1," and complainant alleges and charges that the condition contained in said Deed from Reinhard Heider and Maria J. Heider, his wife, to John Boepple and Johanna Boepple, his wife, dated July 9, 1875, recorded in Book I 18 of Deeds for Essex County, page 265, renders the title to said premises conditional and defeasible, and complainant further charges that by reason of said Deed the said Reinhard Heider and Maria J. Heider, his wife, their heirs, executors, administrators or assigns, have an outstanding interest, interests, claim or claims in and to the title to said premises, and complainant further charges that the front building erected on said premises is not all within the boundary lines of the property as described in the Deed therefor, but encroaches upon adjoining lands and premises on the south. Complainant has incurred expenses as follows:

For searching title $100
For surveys 47

7. Complainant further charges that the said Bany Weiss and Lena Weiss, the defendants herein, have refused to return to the complain-

ant, upon its demand, said sum of One Thousand Dollars paid on account of the purchase price of said property, and the further sum of One Hundred Forty-seven Dollars, search fees and disbursements incurred by complainant as aforesaid.

8. Complainant further shows that the said Bany Weiss and Lena Weiss, his wife, the defendants herein, have placed the said premises above described on the real estate market for sale and that they are about to sell same to some other person or persons.

9. Complainant further shows that it has at all times been ready, willing and able to perform its undertakings and covenants contained in said agreement dated November 24, 1925, hereunto annexed and marked "Exhibit 1" and now tenders itself ready, willing and able to perform same.

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

1. That the said Bany Weiss and Lena Weiss, his wife, the defendants in this suit, may answer this bill of complaint, but without oath, and each statement therein made.

2. That a decree be made directing the said defendants to repay to the complainant the said sum of One Thousand Dollars paid on account of the said purchase price of the property, as above stated, and the further sum of One Hundred Forty-seven Dollars search fee and survey fee, with interest, and that said sum of One Thousand Dollars be impressed as a lien upon the land and premises hereinabove described, and in the event that the said defendants do not

pay the same to the said complainant, that the said property be sold to raise and satisfy the said sum to the complainant.

3. That in the meantime the defendants be enjoined and restrained from disposing of or encumbering, in any way, the said lands and premises.

4. That a Writ of Subpoena may issue commanding the said defendants, Bany Weiss and Lena Weiss, his wife, to answer this Bill of Complaint and to abide by such decree as this Court may make in the premises.

5. And that complainant may have such further or other relief in the premises as the nature of the case may require and as shall be agreeable to equity and good conscience.

And complainant will ever pray, etc.

COHEN & KLEIN,
Solicitors for and of Counsel with Complainant.

Exhibit 1.

ARTICLES OF AGREEMENT

MADE the twenty-fourth day of November, 1925 BETWEEN BANY WEISS and LENA WEISS, his wife, of the City of Newark in the County of Essex and State of New Jersey, party of the first part, hereinafter known as VENDOR; AND SECURITY BOND & MORTGAGE COMPANY, a corporation having its principal place of business in the City of Newark in the County of Essex and State of New Jersey, party of the second part, hereinafter known as VENDEE.

WITNESSETH, Said vendor for and in consideration of the sum of SIXTEEN THOUSAND Dollars to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said vendee, doth agree with the said vendee, well and sufficiently to convey to the said vendee, its successors and assigns, by Deed of Warranty free from all encumbrances, except as hereinafter stated, and free from all municipal, county or state taxes or assessments for improvements already made or in progress, whether such assessments are confirmed or prospective, subject, however, to restrictions of record, if any, and to Zoning Ordinances of the municipality in which the premises hereinafter mentioned are located, which restrictions and Zoning Ordinance are not violated by the erection or maintenance of the present buildings thereon, on or before the twenty-fourth day of January, 1926, next ensuing the date hereof, all that certain lot, tract, or parcel, of land and premises, commonly known and designated as No. 50 Jones Street, in the City of Newark, County of Essex and State of New Jersey, consisting of a two story and basement frame building, together with all appurtenances connected therewith, said land being more particularly described as follows:

BEGINNING on the east line of Jones Street at a point therein distant three hundred and seventy-five feet eight inches from the corner formed by the said line of Jones Street and the northerly line of Springfield Avenue; thence running easterly at right angles to said Jones Street eighty-eight feet more or less to the easterly line of Sayres Coe deceased land; thence northerly

along said line twenty-five feet; thence westerly on a line at right angles to said Jones Street eighty-eight feet more or less to the easterly line of Jones Street; thence along the same southerly twenty-five feet to the place of Beginning.

Being the same premises conveyed to the said parties of the first part by deed of Isaac Rosenthal and wife, dated July 9th, 1906, which deed is recorded in the Essex County Register's Office in Book H 40 of Deeds for said County, on pages 418-419.

This conveyance is made subject to existing monthly tenancies.

It is understood and agreed that said Bany Weiss, one of the parties of the first part, is to remain as a tenant in the basement at the monthly rental of $10., payable in advance.

AND the said vendee for itself, its successors and assigns, doth agree with the said vendors, their heirs, executors, administrators and assigns, that the said vendee will pay and satisfy, or cause to be paid and satisfied unto the said vendor the said sum of Sixteen Thousand Dollars as and for the purchase money of the foregoing described lands and premises, in the following manner, that is to say:

On execution of this agreement for which this is also a receipt.....	$1,000.00
On delivery of deed, cash.....	6,300.00
By taking premises subject to a bond and mortgage held by Watson Building and Loan Association, in connection with which all premiums and expenses have been paid, said mortgage being in the nominal sum of	2,700.00

In connection with said Building and Loan association mortgage the party of the first part hereto agree, to assign all their right, title and interest in and to the shares given as collateral security in connection with said mortgage, the party of the second part agreeing to pay for the same at their withdrawal value, as follows:

In cash, in addition to the $6,300. aforementioned.

By executing a purchase money bond and mortgage embracing the premises agreed to be conveyed; said bond and mortgage to contain a thirty days interest clause, 60 days tax clause, assessment, insurance and thirty days default clause, and an agreement not to claim credit on the interest payable on the bond and mortgage by reason of any tax assessed or to be assessed against the premises 6,000.00

Said bond and mortgage to be for a period of one year, with interest at 6% payable semi-annually and to be in the form employed by Fast and Fast and to be drawn by the attorneys of the mortgagee at the expense of the mortgagor who shall also pay the cost of recording said mortgage and revenue stamps on bond accompanying the same, said mortgage to contain clause of prepayment and 60 day prior mortgage default clause.

AND IT IS FURTHER AGREED by the parties to these presents that the said vendee, its successors and assigns, may enter into and upon the said lands and premises on the day of settlement and from thence take the rents, issues and profits to its and their use.

Rents of said premises, all insurance premiums, water rents, taxes and interest on mortgage, if any, shall be adjusted, apportioned and allowed as of the day of delivery of said Deed.

Gas fixtures, including gas ranges and gas water heaters, electric fixtures and chandeliers, window shades, screens, awnings, floor covering in halls, ash cans and heating apparatus, if any, and any other personal property attached and appurtenant to and used in connection with the premises are included in this sale.

In case the premises shall through or by any of the elements suffer injury beyond ordinary wear and tear, the vendor shall repair the damage before the date set for delivery of said deed or make an appropriate deduction from the purchase price herein stated.

IT IS EXPRESSLY UNDERSTOOD AND AGREED that the buildings upon the said premises are all within the boundary lines of the property as described in the deed therefor herein, and that there are no encroachments thereon except as hereinbefore stated.

IT IS EXPRESSLY UNDERSTOOD AND AGREED that the title to the land and premises hereby agreed to be conveyed is not derived from any Martin Act proceedings or any Act for the Sale of Land for non-payment of taxes or assessments, or adverse possession.

THE VENDOR AGREES to carry valid fire insurance for the full insurable value of said

building and in the event of a destruction by fire, constituting less than a twenty-five per cent loss as determined by the insurers, the vendor shall, with all reasonable dispatch, restore and rebuild the same in substantially the same condition as at the date hereof. In the event that the destruction by fire shall constitute more than a twenty-five per cent loss as estimated by the insurers, this agreement shall at the election of the vendee and upon five days written notice to the vendor, be at an end and the deposit returned upon the execution of mutual general releases.

AND IT IS FURTHER AGREED by the parties hereto, that the said Deed, purchase money hereinabove mentioned and all instruments necessary to carry out the true intention of this agreement, shall be received and delivered at the office of Fast and Fast, Union Bldg., Newark, N. J., between the hours of ten o'clock in the forenoon and four o'clock in the afternoon on said day of settlement.

IN WITNESS WHEREOF the parties of the first part have hereunto set their hands and seals, and the party of the second part has caused these presents to be signed by its President, attested by its Secretary and its corporate seal hereto affixed, the day and year first above written.

Bany Weiss (L. S.)
her
Lena (X) Weiss (L. S.)
mark

Security Bond & Mortgage Company
By Samuel Ehrenkranz Pres.

Witness:
Louis J. Cohen

Attest:
Fanny Kirschner

STATE OF NEW JERSEY, } *ss.*
COUNTY OF ESSEX. }

BE IT REMEMBERED, That on this twenty-fourth day of November, in the year of our Lord One Thousand Nine Hundred and twenty-five before me A Master in Chancery of N. J. personally appeared BANY WEISS and LENA WEISS, his wife, who, I am satisfied, are vendors mentioned in the within instrument and to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed: And the said LENA WEISS, wife aforesaid, being by me privately examined, separate and apart from her husband, acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, FREELY, without any fear, threats or compulsion of said husband.

Louis J. Cohen
Master in Chancery of New Jersey

ANSWER AND CROSS BILL OF COMPLAINT.

Filed May 4, 1926.

IN CHANCERY OF NEW JERSEY.

Between	
SECURITY BOND & MORTGAGE Co., a corporation, *Complainant,*	*On Bill, etc.*
and	*Answer and Cross Bill of Complaint.*
BANY WEISS and LENA WEISS, his wife, *Defendants.*	

The defendants, residing in the City of Newark, Essex County, New Jersey, answering the bill of complaint filed herein against them, respectfully show and allege:

1. That they admit the allegations contained in paragraph 1 of the bill of complaint.

2. That they admit the allegation contained in paragraph 2 of the bill of complaint.

3. That they have no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 3 of the bill of complaint.

4. That they deny the present existence of the condition referred to in paragraph 4 of the bill of complaint and point out that the condition, if such it was, was remised, released and quit-claimed by virtue of a deed given by Reinhard Heider and Maria J. Heider, his wife, to

Herman A. F. Meyer, dated December 11, 1891, and recorded in Book U 26 of Deeds for Essex County on page 56, the said Herman A. F. Meyer being at that time the record owner of the premises in question by virtue of a deed from John Boepple and Johanna Boepple, his wife, dated May 24, 1876, and recorded in Book U 18 of Deeds for Essex County on page 281.

5. That they deny the allegations contained in paragraph 5 of the bill of complaint.

6. That they deny the allegations contained in paragraph 6 of the bill of complaint and repeat paragraphs 4 and 5 of their answer.

7. That they admit the allegations contained in paragraph 7 of the bill of complaint and allege that the complainant is not entitled to the return of the money mentioned therein.

8. That they deny the allegations contained in paragraph 8 of the bill of complaint.

9. That they deny the allegations contained in paragraph 9 of the bill of complaint.

Further answering the bill of complaint defendants allege:

SEPARATE DEFENSE.

10. That for a short time prior to November 24, 1925, the date of the contract aforesaid, there had been considerable speculation in the purchase and resale of properties on Jones street, Newark, on which street defendants' property is situate. Said speculation was due in large part to widespread rumors to the effect that the City Commission of the City of Newark had officially decided to widen the street. Jones street is notorious for its extreme narrowness and vehic-

ular congestion. The prospective widening of the street would not only relieve it of this congestion but would also straighten out the bend between Belmont avenue on the south and Norfolk street on the north, thus making of the three streets one large north and south artery. The rumored improvements with the consequent real estate speculation caused an advance in property values on the street. This advance continued for some ten days. During this period the defendants were beseiged by speculators seeking easy profits. Offers of purchase at constantly higher prices were numerous. The complainant sought out the defendants at their home and after a discussion of terms the bargain was struck. Immediately thereafter the contract hereinbefore referred to was drawn and executed.

11. That a few days after the signing of the contract, namely on November 30th, an announcement was made by the chief engineer of the City of Newark to the effect that the City had no intention at that time of widening Jones street. This announcement received widespread attention through publication in that day's issue of the local newspapers. The tide of real estate speculation in Jones street immediately began to ebb. Prices of properties no longer continued to rise; in fact a recession set in.

12. That several days after the date set for the closing of title the defendants were notified that the complainant was rescinding the contract on the ground that the survey made for it had disclosed encroachments and defects. A copy of the survey was sent to the defendants.

13. That thereupon the defendants immediately ordered the property re-surveyed by another surveyor. Said survey did not show any encroachments or defects. A copy of said survey is attached hereto, marked Exhibit 1 and made a part hereof.

14. That complainant had another survey made and furnished defendants with a copy of same. Said survey shows that the main building on the premises in question has a cornice, a part of which extends over the land and premises adjoining on the south to the extent of one and one-half inches. Thereafter complainant filed its bill of complaint.

15. That defendants thereupon caused an inspection of said cornice to be made by an expert cornice maker in order to ascertain if the said cornice could be so altered or repaired as to come entirely within the lines as shown by complainant's survey. The said cornice-maker thereupon advised defendants that it was an easy matter so to repair the cornice and that the cost of same would be very slight.

16. That defendants thereupon advised complainant of their intention to repair the cornice so as to come entirely within the lines indicated by complainant's survey. That complainant answered by informing defendants, in effect, that it would not then permit the defendants to alter the building and convey but would stand upon its decision to rescind.

17. That the building upon the premises to be conveyed is an ancient one and of little value. That the objection of complainant to the alteration of the cornice is not based on any fear of impairment of the value of the property. That the defect complained of by complainant is not the real reason for its desire to rescind the

contract but only a cloak to cover its anxiety to withdraw from a contract hastily made and now seemingly so ill-advised. Complainant does not come into this Court with clean hands but sets up objections that are captious, frivolous and sham. That defendants are ready, able and willing to perform all the terms and conditions of said contract required to be performed by them and have so advised complainant.

And defendants by way of cross bill of complaint against complainant say:

1. That on the twenty-fourth day of November, 1925, and for many years prior thereto, they were the owners of all that certain tract and parcel of land and premises, situate, lying and being in the City of Newark, County of Essex and State of New Jersey, and more particularly described in paragraph 1 of the bill of complaint. The said premises are known as 50 Jones street, Newark, New Jersey.

2. That on the twenty-fourth day of November, 1925, they entered into a written agreement with complainant (defendant in cross bill) for the sale and purchase of the aforesaid premises, a true copy of which agreement is annexed to the bill of complaint.

3. That the deed for the tract of land and premises described in the bill of complaint was to have been delivered on the twenty-fourth day of January, 1926, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon, at the office of Fast & Fast, Union Building, Newark, New Jersey.

4. That the complainant (defendant in cross bill) was not present to receive the aforesaid deed at the time and place designated therefor.

Instead, complainant (defendant in cross bill) did repudiate the aforesaid agreement of sale and did send through its attorneys a letter to that effect to the attorneys of defendants (complainants in cross bill), a true copy of which letter is hereto annexed, marked Exhibit 2 and made a part hereof. In said letter complainant (defendant in cross bill) set up, as by reference to same will more fully appear, that the reason for said repudiation was the existence of encroachments and defects, as disclosed by its survey. Said reason however was not made in good faith but was merely a subterfuge and was not based upon any good and sufficient ground. Defendants (complainants in cross bill) aver that no encroachments or other defects exist, but that complainant (defendant in cross bill) endeavors to establish their existence in order to save itself from the obligations of the aforesaid contract of sale.

5. That although they deny that said title is defective in any of the respects set forth by complainant (defendant in cross bill), defendants (complainants in cross bill) nevertheless tender themselves ready and willing to do all things necessary to remedy said defects, if any; and more particularly to so alter the cornice of the building on the premises in question as to make the building conform to the terms of the agreement of sale with relation to the boundary lines and in accordance with the said survey of complainant (defendant in cross bill).

6. That at various times since the said twenty-fourth day of January, 1926, defendants (complainants in cross bill) tendered themselves ready, willing and able on their part to carry out said agreement of sale aforesaid, and that they

are now ready, willing and able to give to the complainant (defendant in cross bill) a deed of warranty for the aforesaid premises, meeting all the requirements of the said contract of sale aforesaid.

The defendants (complainants in cross bill), being without adequate remedy in the courts of law, pray:

a. That the complainant (defendant in cross bill), Security Bond and Mortgage Co., a corporation of New Jersey, may answer this cross bill and each allegation therein made, without oath, answer under oath being expressly waived.

b. That the bill brought by the complainant (defendant in cross bill) for the return of its deposit paid on account of the aforesaid agreement of sale be, by decree of this Court, dismissed with costs to be taxed; and that the said complainant (defendant in cross bill) may be decreed to specifically perform the said agreement of sale and to accept from the defendants (complainants in cross bill), by deed of warranty, subject only to such encumbrances as are provided for in the said contract, the premises mentioned and described in paragraph 1 of the bill of complaint; and that the said complainant (defendant in cross bill) be compelled to pay to the defendants (complainants in cross bill) the balance of the purchase price for the said premises and to do and perform all things required under and by virtue of the said agreement as this Honorable Court may direct.

c. That the defendants (complainants in cross bill) may have such other and further relief in the premises as the nature of the case may require.

ISIDOR B. GLUCKSMAN,
Solicitor for Defendants.

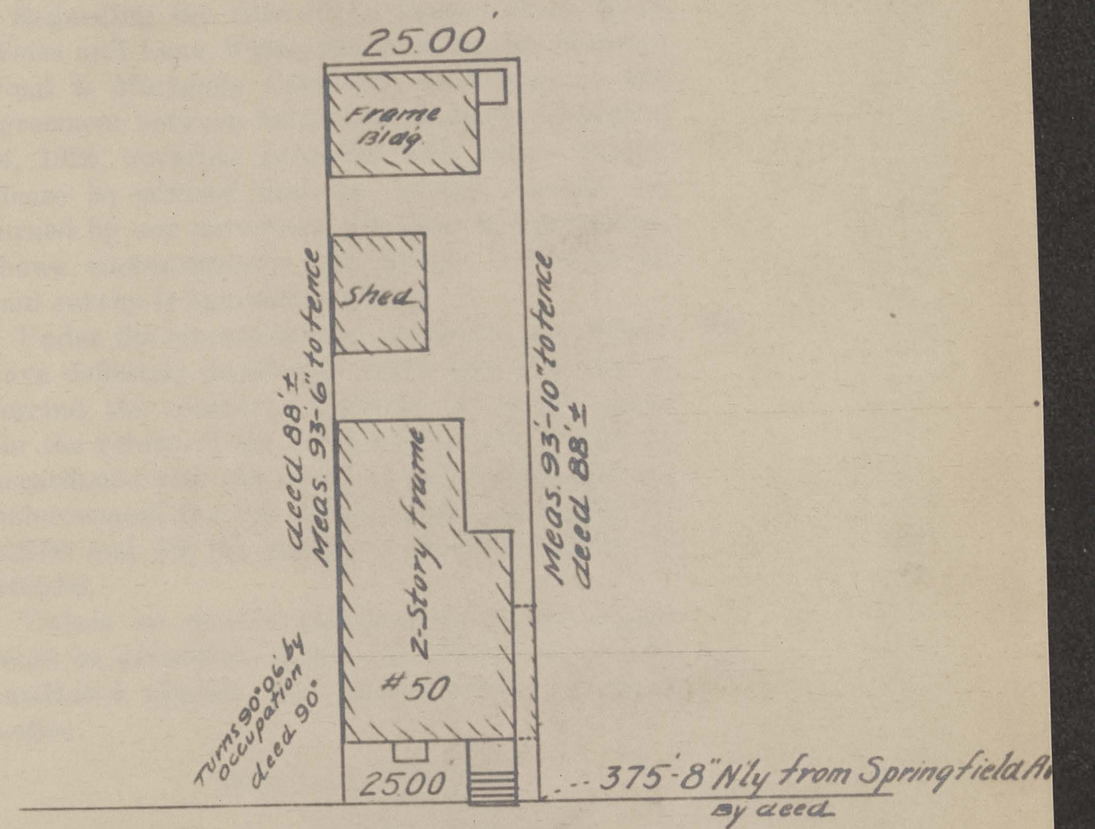
CLEMENT F. LEMASSENA
MUNICIPAL ENGINEER AND LAND SURVEYOR
STATE BANK BUILDING. 810 BROAD STREET, NEWARK, N. J.
PHONE MARKET 7686

MAP OF PROPERTY

BELONGING TO .....

LOCATED AT Newark, N J.

Exhibit 1.



JONES STREET

Surveyed for Fast & Fast

BK. NO. 238
SCALE 1 IN. = ... FT.
S-4330

SURVEYED Feb-8- 1926
C F Lemassena
SURVEYOR

Answer and Cross-bill—Exhibit 2.

Exhibit 2.

January 28, 1926.

Messrs. Fast & Fast,
Union Bldg.,
Newark, N. J.

Gentlemen:

Regarding the title to be passed from Bany Weiss and Lena Weiss, his wife, to the Security Bond & Mortgage Company, by virtue of the agreement between said parties, dated November 24, 1925, covering property #50 Jones Street, please be advised that the survey recently returned by our surveyors, Clawans & Kettenring, shows encroachments and defects. A copy of said survey is herewith enclosed.

Under the circumstances, therefore, our clients have definitely decided to reject this title and to rescind the contract. Demand is hereby made for the return of the deposit of $1,000.00 paid in accordance with the terms of said agreement, reimbursement for the survey made, amounting to $22.00 and for the search of title, amounting to $100.00.

Unless we receive reimbursement and repayment as aforesaid, within one week, suit will be instituted against the vendors without further notice.

Yours very truly,

COHEN & KLEIN,

By Philip Klein.

PK:GC
Encl.

REPLICATION TO ANSWER AND ANSWER TO CROSS BILL.

Filed May 12, 1926.

IN CHANCERY OF NEW JERSEY.

Between

SECURITY BOND & MORTGAGE Co., a corporation,
Complainant,

and

BANY WEISS and LENA WEISS, his wife,
Defendants.

On Bill, &c.

Replication to Answer and Answer to Cross Bill.

The complainant replying to the answer of the defendants herein says:

1. It joins issue with the allegations of Paragraph 4 of defendants' answer.

2. It joins issue with the allegations in Paragraph 5 of defendants' answer.

3. It joins issue with the allegations of Paragraph 6 of defendants' answer.

4. It joins issue with the allegation in Paragraph 7 of defendants' answer that the complainant is not entitled to the return of the money mentioned in Paragraph 7 in the bill of complaint.

5. It joins issue with the allegation contained in Paragraph 8 of defendants' answer.

6. It joins issue with the allegation of Paragraph 9 of defendants' answer.

7. It denies the allegations of Paragraphs 10 and 11 of defendants' separate defense and alleges that the allegations in Paragraphs 10 and 11 do not constitute an equitable defense to complainant's cause of action.

8. It admits the allegations of Paragraph 12 of defendants' answer.

9. It has no knowledge or informaton sufficient to form a belief as to the allegations contained in Paragraph 13 of defendants' answer.

10. It admits that it had another survey made, and furnished defendants with a copy of the same, but states that said survey shows other encroachments and defects than is alleged in Paragraph 14 of defendants' answer.

11. It has no knowledge or information sufficient to form a belief as to the allegations in Paragraph 15 of defendants' answer and alleges that the allegations in said Paragraph 15 do not constitute an equitable defense to complainant's cause of action.

12. It denies the allegations of Paragraph 16 of defendants' answer and alleges that said allegations do not constitute an equitable defense to complainant's cause of action.

13. It denies the allegations of Paragraph 17 and alleges that the allegations of said Paragraph 17 of defendants' answer do not constitute an equitable defense to complainant's cause of action.

And complainant, answering the cross bill of the defendants against the complainant, says:

1. It admits the allegations of Paragraph 1 of the cross bill.

Replication to Answer and Answer to Cross-bill.

2. It admits the allegations of Paragraph 2 of defendants' cross bill.

3. It admits the allegations of Paragraph 3 of defendants' cross bill.

4. It denies the allegations of Paragraph 4 of defendants' cross bill.

5. It denies the allegations of Paragraph 5 of defendants' cross bill.

6. It denies the allegations of Paragraph 6 of defendants' cross bill.

SEPARATE DEFENSE TO DEFENDANT'S CROSS BILL.

1. Complainant further alleges that the allegations set forth in defendants' cross bill do not constitute an equitable cause of action against the complainant, and that on or before final hearing it will move to strike out said cross bill on said ground.

COHEN & KLEIN,
Solicitors for and of
Counsel with Complainant.

Rejoinder.

REJOINDER.

Filed May 14, 1926.

IN CHANCERY OF NEW JERSEY.

Between

SECURITY BOND & MORTGAGE Co., a corporation,
Complainant,

and

BANY WEISS and LENA WEISS, his wife,
Defendants.

On Bill, &c.
Rejoinder.

The defendants (complainants in cross bill) join issue on the replication of the complainant.

ISIDOR B. GLUCKSMAN,
Solicitor for Defendants.

IN CHANCERY OF NEW JERSEY.

October 18, 1926.

Between

SECURITY BOND & MORTGAGE CO.,

Complainant,

and

FANNIE WEISS,

Defendant.

Transcript of shorthand notes of testimony taken in the above-entitled cause before his Honor, Alonzo Church, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of Messrs. Cohen & Klein, for complainant; I. B. Glucksman, Esq., for defendant.

Mr. Klein: I offer the contract in evidence. It is admitted in the answer.

(Paper marked Exhibit C. 1.)

EDWARD CLAWANS, sworn for the complainant.

Direct examination by Mr. Klein.

Q What is your business? A Civil engineer and land surveyor.

Q How long have you been in that profession? A Ten years and over.

Q Where did you obtain your education for that profession? A Cornell University.

Q Are you a graduate? A Yes, sir.

Q Holding what degree from that institution? A Civil engineer.

The Court: Is there any objection to the qualifications of this witness?

Mr. Glucksman: No. The qualifications are admitted.

The Court: The qualifications are admitted.

Q Did you make the survey of the property of Fannie Weiss on Jones street? A I did.

Q And is this a true representation of that survey? A It is.

Mr. Klein: I offer it in evidence.

The Court: Any objection?

Mr. Glucksman: No.

The Court: No objection, it will be admitted.

(Paper marked Exhibit C. 2.)

Q Referring to this survey, Mr. Clawans, tell us what it shows—will you tell the Court what it shows? Explain the survey so a layman might understand it. A On the southerly side of the building these are the following encroachments: Woodcut post is over 2 inches; and the metal of the metal overhang that is attached to the building is over ¾ of an inch, and the upper corner—in the lower corner the metals overhang, the metal is over 2 and 3/8ths inches.

Q You are speaking of the metal overhang. Is that attached to and part of the building itself? A Yes, sir.

Mr. Klein: That is all.

Edward Clawans, cross.

Cross examination by Mr. Glucksman.

Q Mr. Clawans, did you make that survey yourself? A I did.

Q What did you use as your starting point? A The intersection of Springfield avenue and Jones street.

Q What is the distance of that point from the nearest line of the lot? A To the point of beginning 375 feet and 8 inches.

Q Now, what is the nature of the monument on Springfield avenue and Jones street that you used as your starting point? A There are no monuments there.

Q There are no monuments there? A (Witness nods no.)

Q Does that make the starting point there definite or certain, definite or indefinite as regards the starting point of the different surveys? A Yes; it makes it definite.

Q It makes it definite. In spite of the fact there is no monument there? A Yes, sir.

Q Do you know how long that starting point has been in use by surveyors? A The Commissioner's notes show it to be at least 1856.

Q 1856? A Or thereabouts.

Q I see. Well, now, did you get that starting point, from a map? A There is no map as regards—Commissioner's notes; yes, sir; Commissioner's notes. You mean the intersection of Jones street and Springfield avenue?

Q You speak about a starting point at the intersection of Jones street and Springfield avenue? A That is right.

Q You also say there is no definite monument at that point? A No monument at that point.

Edward Clawans, cross.

Q I now ask you how did you get that starting point? A That starting point is secured by a series of surveys on Jones street made about between 1856 and the present time.

Q In other words, your starting point comes from the use of old maps, is that right? A Old surveys.

Q Old surveys? A Yes.

Q Do you know how long ago the properties on Jones street were occupied? A Why, I know the—that some of the buildings, the atlases will show it, I think, about 1883, some of those buildings.

Q Did you know of those buildings being occupied prior to the first date you mentioned, 1856? A Some of those buildings, you mean, being older than 1856? None—

Q I didn't mean, sir, of the buildings that are now standing, but I mean any of the buildings that were standing at that time? A Well, the Commissioner's notes show that about 1856 that there was a street, Jones street, and I suppose there was a street known as Jones street and that there were buildings there.

Q At any rate, were the lines marked out before that time, 1856? A You mean the deeds and records before 1856?

Q Yes. A There might have been some deeds before 1856.

Q You don't know? A I don't know.

Q What kind of tape did you use in making your measurements? A Spring balance tape.

Q What is the material? A That is the tape with a spring balance attached to it to secure a certain pull of twelve pounds so that—(interrupted).

Q Pardon me. I mean, what is the material of the tape itself? A Steel.

Q Steel tape? A Yes.

Q Did you make any allowance for the temperature? A Well, the temperature is corrected, that is the idea of using the spring balance tape.

Q I see. And that corrected itself automatically, as I understand you? A Yes, for that particular distance. If it were a distance over a thousand feet, then a correction might be made.

Q Can you tell me whether the measurement of the deed lines is in any way affected by the certainty or fixity of the street lines? A In some cases the fixity and certainty of street lines are accepted by surveyors as a fixed point and other surveyors use that particular point and agree to take that particular point as their point of beginning.

Q You are not answering my question. I asked you whether the measurement of deed lines is affected by the fixity or certainty of street lines? A Not necessarily.

Q But it may be? A It may be, yes.

Q So that, if there is any uncertainty in the street lines, the surveys might show the deed lines to be somewhat off, where they would be if the street lines were fixed, would it not? A That is right.

Q Now, as a matter of fact, there is some uncertainty as to the street line of Jones street, isn't there? A No, sir; I wouldn't say so.

Q You say there is not? A No, sir.

Q Is there any uncertainty as to the lines of the street a year or two ago? A I wouldn't say so.

Q You never heard of the opinion that there was any uncertainty in the street lines of Jones street? A I made some, about ten, surveys in

that particular block and I have always used a certain street line for Jones street as fixed.

Q You have no knowledge of any uncertainty in the street line? A No, sir.

Q Would you lend any weight to the opinion of surveyors in this city, namely Mr. Lehlbach, Borrie & Kreiner, to the effect that the line of Jones street was uncertain? A The question of taking the line of Jones street as accepted and of taking their line of Jones street is a matter of opinion.

Q You are not answering my question. I asked you whether their opinion that the street line of Jones street is uncertain would have great weight with you? A Yes, sir; it would.

Mr. Glucksman: That is all.

CHRISTOPHER M. MOOR, sworn for the complainant.

Direct examination by Mr. Klein.

Q What is your business? A Surveyor.

Q And you are employed by whom? A Borrie & Kreiner.

Q Surveyors of the City of Newark? A City of Newark.

Q How long have you been a surveyor? A Six years.

Mr. Glucksman: I will admit the qualifications.

The Court: Qualifications admitted.

Q You made a survey of this particular property on Jones street? A I worked on it.

Christopher M. Moor, cross.

Q And is this a true representation of the situation of this particular property? A It is.

Q What does that show with regard to the southerly line? A On the southerly side of the building, metal above the angle line is .012 over.

The Court: What does that mean?

Q What does that mean in feet or inches? A Inch and a half.

Q Inch and a half? A Inch and a half over.

Examined by the Court.

Q What is it that is over? A The metal above the angle line.

Q What does that mean, a part of the building? A A part of the building.

Q What part? A The second story.

The Court: Oh, all right.

Examined by Mr. Klein.

Q What else does it show? A And also it shows the cornice one inch over, just above the metal.

Cross examination by Mr. Glucksman.

Q Is surveying an exact mathematical science or not? A Why, there is a difference in questions there—somewhat. No, it is not exact. It is within— There is no such word as "exact."

Q Well, what I am driving at is this: Should the surveys made by surveyors agree as a rule or not? A Reasonably they should.

Q They should agree reasonably? A Reasonably, if they use the same beginning points.

Christopher M. Moor, cross.

Q If they use the same beginning points. What beginning point did you use? A Why, in fact, we used the same notes as Mr.— as, well— We used all data we have in our office.

Q Yes. You started to say you used the same notes as whom? A Well, as our own notes, as our own data.

Q You didn't mean Mr. Clawans used? A No; we didn't even know Mr. Clawans was making a survey.

Q And your survey, as I understand it, shows an encroachment of that metal overhang with about an inch and a half to the rear, is that right? A Right.

Q Now, this metal overhang is one of the sides of a porch extention, is it not? A Right.

Q How do you account for the fact that the survey of Mr. Clawans, who was on the stand before you, showed that encroachment to be an inch more than yours? Can you account for it? A That I can't state. We used data which we have in our office and the results are that we find an inch and a half over. I don't know how Mr. Clawans arrived at his conclusions.

Q Would you say from the circumstance that there is a discrepancy of an inch in your survey and the survey of Mr. Clawans that the exact line there cannot be accurately determined within an inch and inch and a half? A He might have taken a different part of the metal.

Q I don't think that answers my question. That is not responsive.

Mr. Klein: I think it does.

The Court: That is a perfectly understandable answer. You asked him to guess

at what the previous witness based his opinion on. He said perhaps, maybe from a different part of the metal. That is only his opinion—guess.

Q On these surveys—do both of those surveys agree as to which part of the building represents the greatest encroachment, whether it is the rear or front of that south side of the building? A You mean which survey shows the most serious encroachment?

Q No. My question is this: It has been testified that the south side of the building encroaches on the adjoining lot. A Yes, sir.

Q Is the encroachment of the south side of the building uniform or does it vary from front to back? A It varies.

Q From front to back? It varies from front to back? A Yes.

Q Now, on your survey, is it the front or back that shows the greatest encroachment? A It is the rear.

Q It is the rear. And how about the Clawans survey? A The rear?

Q The rear. So that both surveys show the rear part of the buildings will encroach more than the front part? A Right.

Q Now, my question is— Strike it out. That variance is how much on those two surveys? A We show it an inch and a half over; Clawans and Kettering show it two and three-eighths over.

Q So there is a variance of approximately an inch on the rear part of the building? A More or less.

Q More or less. Now, my question directed to you before was aimed at this point: Can you

make any explanation for the fact that there is a variance of an inch? A Yes, sir. It is very hard to take the same place on a metal extension as that.

Q But you both showed that encroachment to be on the rear part, did you not? A On the rear part, yes.

Q So that, as far as a survey can show, there can be— You can't tell within an inch or so the exact line of the lot; is that right? A Why, yes, you should be able to tell; the line of the lot is not difficult, but as to what part of the metal is the question—

Q Then it is a matter of opinion on the part of the surveyor as to whether or not the metal does actually encroach an inch and a half? A It does encroach. There is no part of the metal you can pick that won't encroach in the rear.

Q In the rear. By that you mean the front does not encroach? A Why, we show it on a line in the rear—on the front.

Q Your survey shows it on a line? A Yes.

Q Do you know whether your survey was made from a map or from practical location? A From old field notes and data we have in our office which dates away back.

Q You don't know whether those field notes in your office come from old maps or not? A Why, that I couldn't say.

Q Are you familiar with the signature of Mr. Kreiner? A I am, yes.

Q Is that Mr. Kreiner's signature? A It is so.

Q Do you have any personal knowledge of any surveys that your office made for the Fidelity Union Trust Company of this city on the corner

of Springfield avenue and 15th avenue about a year and a half ago? A I don't recollect that; no.

Q You don't recollect that. Do you know whether Mr. Kreiner at the time he made— Do you know whether Mr. Kreiner a year or two years ago openly expressed the opinion that the line of Jones street was uncertain?

Mr. Klein: I object, your Honor please.

The Court: Yes; I will sustain the objection. If you want Mr. Kreiner's testimony you must bring him here.

(Discussion.)

Mr. Klein: We rest.

Mr. Glucksman: Mrs. Weiss.

FANNIE WEISS, sworn for the defendant.

Direct examination by Mr. Glucksman.

Q Mrs. Weiss, how long have you owned the Jones street property? A Twenty years.

Q Before last winter did any people ask you to sell your property to them? A Yes, sir.

Q Many people? A Yes.

Q Before last winter? A Yes.

Mr. Klein: Pardon me. I think I foresee the line of testimony that counsel for the defendant attempts to bring out. I want at this time to have noted on the record that I object to any testimony as to a real estate boom on Jones street and which my client— (interrupted).

The Court: How do I know he is going to do that?

Mr. Klein: He has said that in his answer. I think the issue is very clear on it.

The Court: When it comes up I will rule on it.

Mr. Klein: All right. I withdraw the objection.

Q What I started to ask you, Mrs. Weiss, was this: Before the winter of last year did people bother you much to buy your property from you?

Mr. Klein: I object, your Honor pleases, as absolutely immaterial whether a thousand people approached Mrs. Weiss.

The Court: I will sustain the objection.

Mr. Klein: The issue is very narrow in this case.

The Court: The issue in this case is whether or not the property extends over the other line.

Mr. Glucksman: Your Honor please, that is the issue, but the question has a bearing in this respect: As the case has proceeded the indication has already been that the crux of the testimony is going to be the testimony of the surveyors. They have already offered in evidence surveys to indicate that an encroachment exists. We, on our part, have a survey which shows that an encroachment does not exist.

The Court: Well, put it in.

Mr. Glucksman: In view of this conflicting evidence, however, there will be a question in your Honor's mind as to which of

these surveyors you are going to lend credence to. It seems to me, that in order to resolve that question in your Honor's mind, it becomes of the utmost importance to find out what motives lay in back of the party to this bill, and, it seems to me, that these questions are going to shed a lot of light on the testimony of the surveyors.

The Court: No; they won't help me at all. All I want to know is whether this thing encroaches or does not encroach.

Q Were you ready to close title when title was supposed to close? A Yes, sir.

Q Did you know anything about your house being on the next lot? A No.

Q When the building and loan association gave you the mortgage four years ago, did their lawyer say anything to you about the survey of your house and about its encroaching on the lot next door? A No, sir.

Mr. Glucksman: I offer it in evidence.

Mr. Klein: I object to it.

The Court: Well, that is not the way to prove a survey.

Mr. Klein: She is not a surveyor.

Mr. Glucksman: That may be true, but it didn't seem to me necessary to bring the surveyor down here. Here is a survey made in 1922, four years ago, before any contro versy arose as to the matter of encroachment, the existence or non-existence of the encroachment. We are trying to get at the truth of this matter. I think the survey speaks for itself.

The Court: No. If you want to introduce the survey, you must bring the man who made it, and allow your adversary the privilege of cross examination.

Mr. Glucksman: That is all, Mrs. Weiss.

Mr. Klein: No questions.

The Court: Anything further?

Mr. Glucksman: Yes, sir. I don't know whether I made a notice for an exception to the objection that was raised before to the fact that your Honor sustained the objection of my adversary.

The Court: You don't have to take exceptions in Chancery.

Mr. Glucksman: Is Mr. Lemassena here?

(No response.)

MAX DRILL, sworn for the defendant.

Direct examination by Mr. Glucksman.

Q Mr. Drill, what is your business? A Engineering contractor, building contractor.

Q And how long have you been a building contractor?

Mr. Klein: I admit Mr. Drill's qualifications. Drill Construction Company, is it?

Witness: As an engineer and contractor.

Mr. Klein: As a building contractor.

The Court: I don't know what he is going to prove.

Mr. Glucksman: The qualifications that I aim to admit are the facts that Mr. Drill is

informed as to the value of the properties and that he speaks with authority as to the cost of alterations of the property.

Mr. Klein: You mean the value of the real estate or buildings?

Mr. Glucksman: I mean the value of the physical buildings.

The Court: What has that to do with it?

Mr. Glucksman: It has this to do with my case, your Honor please: We, in our answer to complainant's bill, made an offer to give clear title before final decree. I am going to show by this man that clear title can't be given and I am also going to show what is the extent of the alterations, and what the amount of the abatement that the complainant should have, if any, is.

Mr. Klein: We object to that testimony on this ground, that we are not obliged to take the property in any altered state. We bought a particular property, not a modified property.

The Court: I suppose that is so.

Mr. Glucksman: If your Honor pleases, if I can show that this property can be altered without in any wise affecting the value of the property, the complainant gets just what he bargained for. It seems to me that the Court of Equity does not and never has aimed at small things—that it goes to the substance of the matter—and it seems to me that the Court of Equity would give the defendant this relief where the variance from what the complainants bargained for and what they are going to receive is so very slight as to be infinitesimal.

The Court: I don't know of any cases that maintain that position. There are a great many cases which hold that, if the building is over even an inch, it will have to be removed, and, if you alter the character of this building, then you are changing the *locus* that the man contracted to buy and are asking this Court to make a new contract between the parties, which cannot be done.

Mr. Glucksman: If your Honor please, we have already shown the nature of the encroachment to be such that this alteration can be made without really changing the character of the building.

The Court: I understand that, but this man may say that he would not have bought the property unless the eaves were three feet long, whatever it may be.

Mr. Glucksman: Yes. And your Honor—

The Court: If you pursue your theory to its logical conclusion, I might have bought a house with a porch; it turns out to be on the next lot; then you say, "Very well, I will take your porch off," and I can say, "No, I don't want the house without a porch." Of course, I admit that this seems to be a very small encroachment, and it does seem to me as if these people ought to get together, but if they insist on their legal rights I suppose they are entitled to them.

I don't think any testimony tending to show that this building can be so altered as to put it back on the lot is admissible. I won't allow it.

Mr. Glucksman: That is all, Mr. Drill.

CLEMENT F. LEMASSENA, sworn for the defendant.

Direct examination by Mr. Glucksman.

The Court: Do you admit the qualifications of Mr. Lemassena?

Mr. Glucksman: Your Honor please, I would like to go over the qualifications for this reason—

The Court: I don't think it is necessary. I know Mr. Lemassena, and I am perfectly satisfied with the qualifications.

Q Mr. Lemassena, did you make a survey of the property, 50 Jones street? A I did.

Q Have you your field notes with you? A I have.

Q Did you determine the lines for the property by reference to maps or practical locations? A Practical locations.

Q Practical locations? A Practical locations. That is the only way that the work can be done.

Q That is the only way that work can be done, with the commissioner's monuments which were erected, as I understand it, around 1856. Do those monuments still exist? A They do not.

Q Were the monuments that are now used for surveying Jones street placed before or after Jones street was occupied? A After Jones street was occupied.

Q How long did the old deed lines of Jones street exist before the present monuments and lines came into use? A About twenty-five years.

Q And what was the practical way of making a survey on Jones street? A The only thing

you can do on Jones street is to take each line independent. If you have a lot survey, you will have to take the adjoining lots. That is all you can do.

Q Is that what is known as surveying by means of interior occupation method? A That is what we call surveying by means of the interior occupation method.

Q And are the present monuments of Jones street clear or vague? A They are very vague, but the occupation is very clear.

Q Is this a copy of the survey which you made on 50 Jones street? A That is.

Q And does that truly represent the condition of the property? A That does. This work is based entirely on the adjoining occupation.

Q On the adjoining occupation? Is the building entirely within the lines? A Your building?

Q According to your survey. Yes, I mean our building. A It is. There is only two people who could be interested in those lines; that is the owners on Jones street. The building to the south is exactly twenty-five feet wide, front and rear, so, even if your building had been built up against it, it would still be clear. You can go still further south, but you would be occupying more ground than twenty-five feet, since that time, but we don't know the standpoint that was used when this map was made. In other words, they didn't have tapes to measure with until 1870—steel tape. They measured with chains, and our present standard, your twenty-five feet, is just covered by your building now, but the chances are the standard they used in those days would be larger, in which case you would have more ground. If the standard used at the time this property was laid out was larger than our

standard, which we don't know. We don't know what it is. You can have more ground and still have twenty-five feet under that standard.

Q In other words—

Q (By the Court.) There is no overhanging of the eaves on the other lot at all? A Absolutely no. Even if it was built against the other building it couldn't overhang the other lot, because the other lot is twenty-five feet front and rear.

Q The building to the south, you are speaking about? A The notes may show that a little clearer to you. This is fifty, this is adjoining the building; the two walls are together; it is twenty-five feet across there. If you go to the rear, it is the same way, twenty-five feet, but using our line, the way I interpreted it—which I don't know is right—I make it three inches off. You would be entitled—if you don't make any complaint, he is entitled to twenty-five feet and still there is a space for two inches. They call it overhang. As a matter of fact, we don't know much about these lines.

Mr. Glucksman: I offer the map.

(Map marked Exhibit D. 1.)

Q Mr. Lemassena, do you know whether the city has passed any legislation affecting the properties on Jones street? A They have passed something about widening the street; they are going to take ground to widen it.

Mr. Glucksman: I offer in evidence the minutes of the Board of Commissioners, June, 1926, pages 5 to 7 and 118 to 122.

Mr. Klein: I object to it.

(Discussion.)

The Court: I will sustain the objection.

Q Mr. Lemassena, I show you surveys—

Mr. Glucksman: May I have them marked?

(Surveys marked Exhibits C. 3 and C. 4.)

Q I show you surveys marked Exhibits C. 3 and C. 4 showing encroachments to the property, 50 Jones street, on the property adjoining to the south, and ask you if you can reconcile those surveys with your own, or if you can in any way explain the variances between the three surveys. A Well, the case of this survey of Clawans and Kettering, they show it right angles to Jones street. Not knowing where the line is, it would be impossible to turn a right angle. Other surveyors have made it different. They didn't survey at right angles; they took the lines of the old buildings. That is all they have got. If you you pick out an old house—the newer ones are about right angles—you find all old houses the line goes back through—the buildings often sit on askew to the street, which would indicate that the lot lines had absolutely run that way. Of course, that is assuming the land has buildings on.

Q How about the variance on Borrie & Kreiner's survey? A On Borrie & Kreiner's survey they also show it at right angles and you can see on both of these— On the Borrie & Kreiner survey, very clearly, if you take the old house that is to the south, you can see how the line runs off. In front they make the house practically on a line and in the back they make

it about five inches off. The building across the rear measures twenty-five feet, so, if they were right, the building to the south of it would have to be five inches over its south line, which cannot be, because the building has been there, maybe, fifty years—longer.

Q And would it be possible to reach the results shown on those two surveys, marked Exhibits C. 3 and C. 4, by using what is known in the surveying profession as the practical location or interior occupation method? A You mean, to get this result?

Q Could you get the result shown on those surveys marked Exhibits C. 3 and C. 4, which you have before you? A No; you could not.

Cross examination by Mr. Klein.

Q Mr. Lemassena, you say the southerly line of the lot in question, number 50 Jones street, is or is not a ninety-degree angle? A It is not a ninety-degree angle from the line we are using today.

Q Why didn't you show the degree of angle on your survey? A I did. Take a look. It is written there.

Q You show it on the northerly side, but I fail to see it on the southerly side. A The lot is the same width front and rear so it had to be parallel lines.

Q You say that the southerly line is absolutely fixed? A The southerly line is fixed by the northerly wall of the building to the south of your lot.

Q And you say the present condition of Jones street, or the condition at the time you surveyed it, is such that surveyors, surveyors

of good rank in this city, cannot differ. Do you say that? A On the line of Jones street?

Q Yes. A No—certainly, they can differ on the line of Jones street.

Q I asked you whether the surveyors may reasonably differ. A On the line of Jones street, yes.

Q And they may reasonably differ on the southerly line of this property? A They never can.

Q Borrie & Kreiner differ from you.

Mr. Glucksman: I object. The witness started to answer the question and my adversary cut him off.

The Court: Let him answer.

Witness: The occupation of the house will govern. The frame building to the south will always have to be taken on the line because there is only that twenty-five feet occupied there.

Q Why? A Because our records are too indefinite when we go back. It was laid out in 1835.

Q What records do you take for your survey? A Well, I took my deed.

Q Your deed? A Yes, sir.

Q Is that all you took? A No.

Q You availed yourself of the prior deed? A I took the deed and I took the occupation of these buildings along that street.

Q You have data in your office, have you not, Mr. Lemassena? A Yes.

Q And you use that data when a survey is required by anyone? A If it—

Q Where it applies? A If it applies, yes.

Q And that is the practice with all surveyors, is it not? A With some, yes.

Q Borrie & Kreiner have been in the surveying business in this city for how many years? A I don't know.

The Court: Well, you don't need to go into that.

Q From reading the surveys from Clawans and Kettering and the survey of Borrie & Kreiner, they have the southerly line of our property different from your survey, do they not? A Yes, sir.

Mr. Klein: That is all.

The Court: That is all.

Mr. Glucksman: That is all.

The Court: Well, now, what am I going to do? These men are all engineers and they figure—

Mr. Glucksman: You are right.

The Court: Somebody says "Who shall decide when doctors disagree?"

(Further discussion.)

EDWARD CLAWANS, recalled.

Examined by Mr. Klein.

Q What method did you use in making the survey of this property?

Mr. Glucksman: I object to this, your Honor, on this ground: I think the case has already been closed.

The Court: I will let him answer it. I want to get all the light there is in the matter. (To witness.) What method did you use?

Witness: The method of practical occupation.

Cross examination by Mr. Glucksman.

Q If you used the method of practical occupation, what did you find out to be the width of that building adjoining our property on the south? A I was interested in the building immediately on the north of us and also on the south. I find that building to be 25 feet.

Q And what did you find to be the amount of their frontage as established in their deed? A Twenty-five feet.

Q Then, doesn't that place their building, according to practical location, exactly on the lines and take up all of the 25 feet right up to the line of the building? A No, sir; because some of those practical locations on Jones street show that some of the buildings are over the line.

Q But don't you, when you say that you used the practical location method, mean that the practical location method governs and that all other lines were taken from actual existence and lines of the buildings? A All of the buildings that are old enough to be called practical occupation, yes.

Q How old is that building to the south? A That building is—well, new stucco has probably been put on, the last fifteen years, would make the stucco an inch and a half in thickness.

Q As a matter of fact, isn't that building to the south frame and not stucco? A Part stucco; stucco and frame.

Fanny Weiss, direct.

Mr. Glucksman: If your Honor please, I want to have rebuttal testimony to this.

FANNIE WEISS, recalled.

Examined by Mr. Glucksman.

Q Mrs. Weiss, in the twenty years that you have owned the property, how long did you live in it? A Eighteen years.

Q Eighteen years? A Yes.

Q Did you ever notice any stucco— A I never—

Q —on the sides of the building adjoining to the south? A I never stuccoed my house.

Q No. That isn't the question. The building adjoining on the south, is there any stucco on that? A No, sir.

Exhibit C. 1.

Contract. Same as Exhibit 1 attached to Bill of Complaint and printed in full on pages 5 to 11.

Exhibit D. 1.

Survey of property by C. F. Lemassena. Same as Exhibit 1 attached to Answer and Cross Bill.

ICE PHONE
HIT 5444

156 MARKET ST.
ROOM No. 206

SURVEY
OF PROPERTY BELONGING TO

SITUATED IN NEWARK, N.J.

JONES ST.

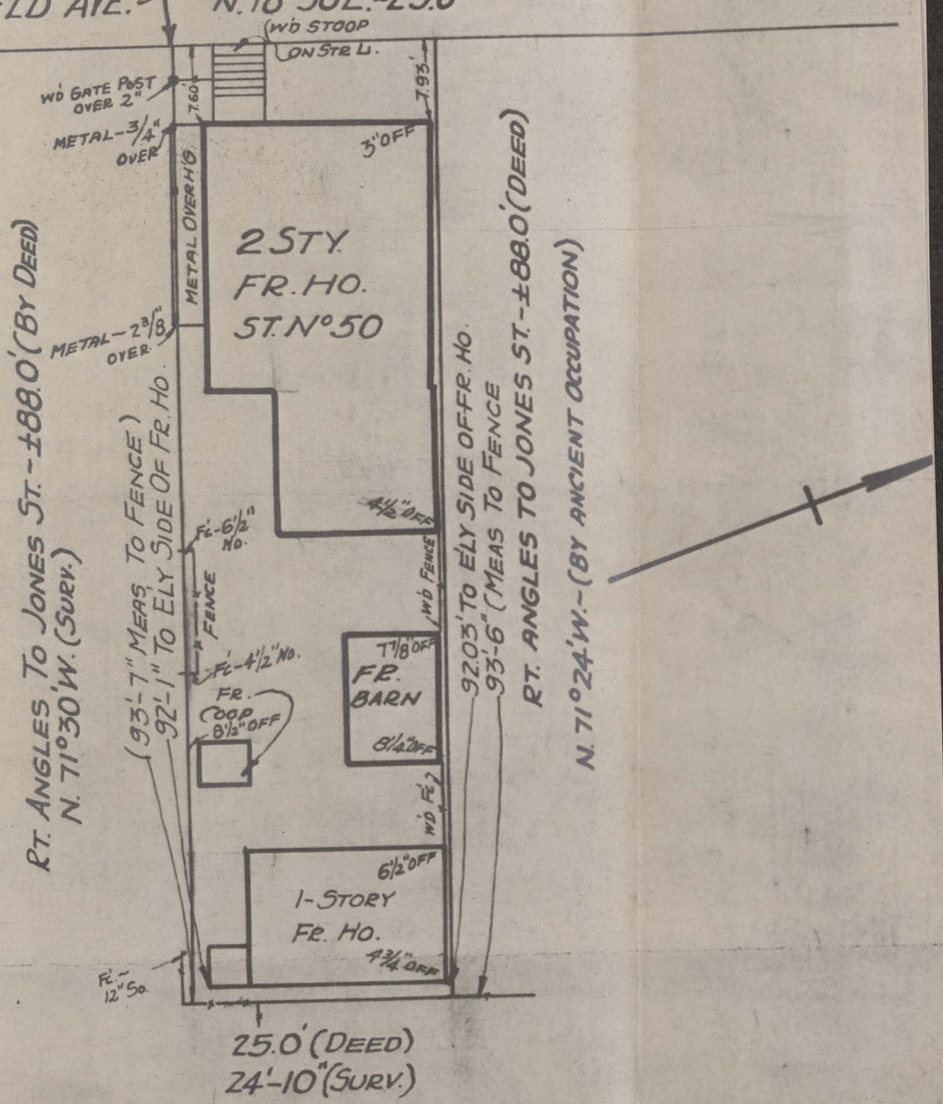


Exhibit C. 2.

LOT NUMBER
BLOCK NUMBER
MAP NUMBER
FIELD BOOK 8-3

NEWARK, N. J. JAN. 25, 1926

CLAWANS & KETTENRING
CONSULTING ENGRS. & LAND SURVEYORS

SCALE:- 1" = 15.0'

CLAWANS & KETTENRING
CIVIL, MECHANICAL ENGRS. & SURVEYORS

0 BROAD STREET
09 KINNEY BLD'G.

BORRIE & KREINER

SUCCESSORS TO YOUNG & BORRIE
SURVEYORS & MUNICIPAL ENGINEERS
NEWARK, N. J.
PHONE 1009 MULBERRY

MAP OF PROPERTY

BELONGING TO.....

LOCATED AT..... Newark N.J.

JONES STREET.

N18°30E

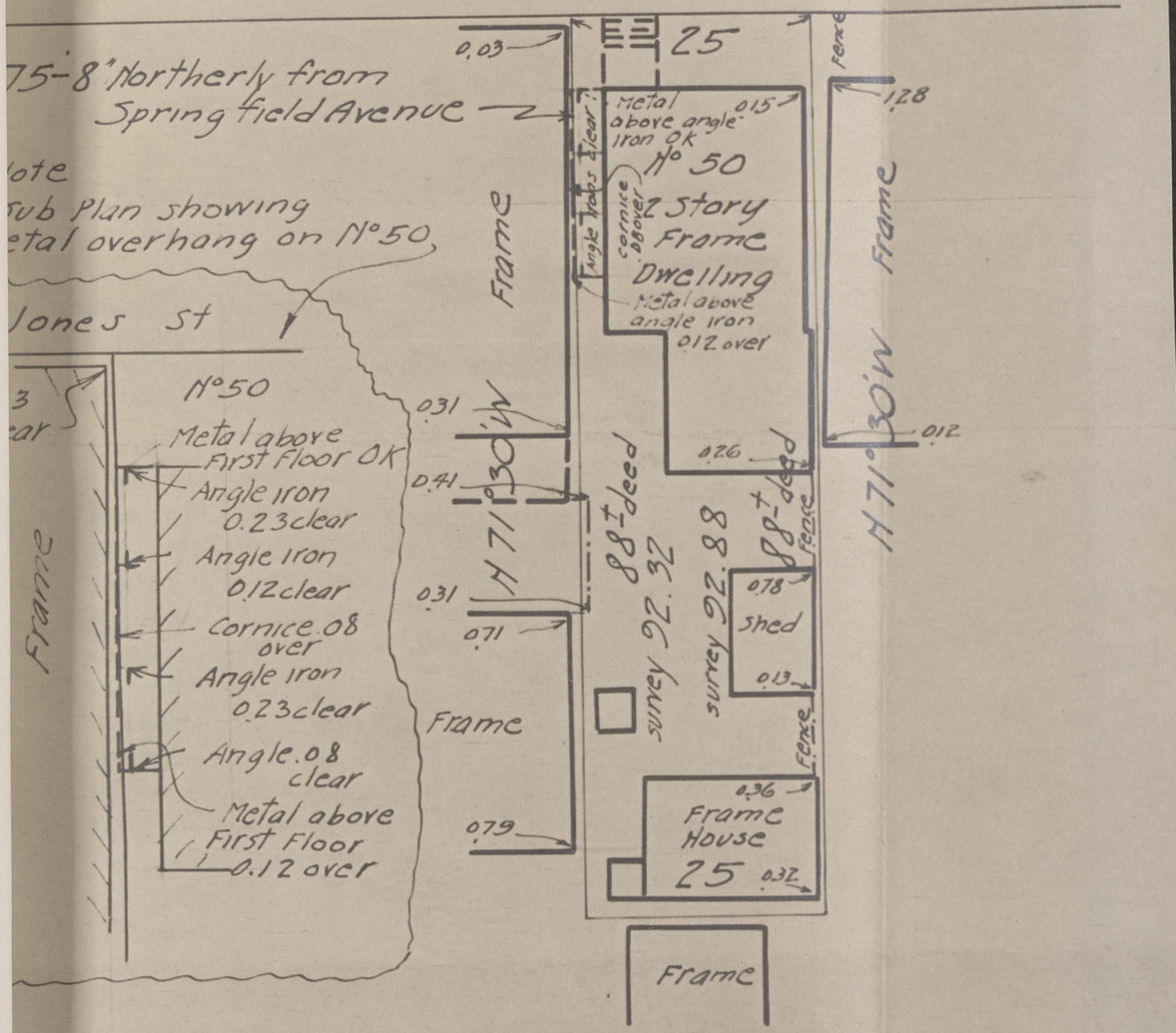


Exhibit C. 4.

SURVEY NO. 26—134
MAP NUMBER.....
TAX SHEET.... 238
SCALE 1 IN.—16 FT.

"IMPERIAL" TRACING CLOTH

NEWARK, N. J. February 20th 1926
Borrie & Kreiner
SURVEYORS

Opinion.

OPINION.

Filed December 10, 1926.

IN CHANCERY OF NEW JERSEY.

Between	
SECURITY BOND & MORTGAGE Co., *Complainant,*	*On Bill, etc.*
and	*Opinion.*
BANY WEISS and LENA WEISS, his wife, *Defendants.*	

Messrs. Cohen & Klein for complainant.
Isidor B. Glucksman, Esq., for defendants.

CHURCH, *V.-C.*

On November 24, 1925, defendants contracted to sell to complainant premises in Newark known as 50 Jones street. The contract contained the following clause "The buildings upon the said premises are all within the boundary lines of the property as described in the deed therefor herein, and there are no encroachments thereon." On January 28, 1926, complainant informed defendants that it would rescind the contract on account of encroachments. Complainant filed a bill for rescission. Defendants counter-claimed for specific performance.

At the hearing complainants produced two surveyors, whose qualifications were admitted, who testified that the building on the premises encroaches on premises to the south. Defendants produced one surveyor, whose qualifica-

tions were admitted, who testified that there were no encroachments.

The question, therefore, is, is this a marketable title, which defendants can compel complainant to take? In the case of Doutney *v.* Lambie, 78 N. J. Equity, 277, the Court of Errors and Appeals, speaking through Mr. Justice Parker said: "Specific performance of a contract to purchase real estate will not be decreed if the marketability of the title depends on the establishment of a fact and that fact is in reasonable doubt." The learned Justice cited Barger *v.* Gery, 64 N. J. Equity, 263, and Potter *v.* Ogden, 68 N. J. Eq. 409. In the latter case the Court said, at page 412, "I think that any decision of mine in this cause is controlled by my decision in the case of Barger *v.* Gery, 64 N. J. Equity, 263. The rule which I found supported by the authorities in that case is that a title dependant on a fact must be regarded as marketable when (1) the fact is so conclusively proved in the suit for specific performance that a verdict against the existence of the fact would not be allowed to stand in a court of law; and (2) there is no reasonable ground for apprehending that the same fact cannot be in like manner proved if necessary at any time thereafter for the protection of the purchaser."

In the case of Herring *v.* Esposito, 94 N. J. Equity, 348, a clause similar to the one in the present case was considered. Two surveyors testified that there was an encroachment and two that there was not. Vice-Chancellor Bentley said at page 349, "I feel that under the elementary rule, there is at least such a doubt created in my mind that I am obliged to find as a fact that an encroachment exists."

In Pasternack *v.* Alter, 95 N. J. Equity, 377, Vice-Chancellor Lewis followed the rule laid down in Doutney *v.* Lambie, *supra.* He quoted at page 378 Tillotson *v.* Gesner, 33 N. J. Equity, 313, as follows: "The purchaser should have a title which shall enable him not only to hold his land but to hold it in peace and if he wishes to sell it be reasonably sure that no flaw or doubt will come up to disturb its marketable value."

The learned Vice-Chancellor, at page 379, quoted as follows from the case of Van Riper *v.* Wickersham, 77 N. J. Equity, 232, at page 237, "The principle adopted by courts of equity in matters of specific performance is that they will not compel a purchaser to take a title of which there is a reasonable doubt, and such doubt is held to exist if the purchaser desiring to sell the lands would be adversely affected by such doubt * * * so it is the uniform rule in this State to decline to decree performance where such doubt exists though rested on grounds merely debatable, but which might visit upon the purchaser litigation in that regard and that too where at law the title might in fact be declared good."

See also Goldstein *v.* Ehrlick, 96 N. J. Equity, 52, and Schiff *v.* Alexander, 130 Atlantic, 133.

Applying the law as above cited to the facts in the present case, we find that two surveyors say there are encroachments, and one says there are none. The weight of the evidence is therefore in favor of the existence of the encroachments. Moreover, there is clearly such a doubt in the matter as under the cases makes the title unmarketable.

I will advise a decree denying the prayer for specific performance and allowing the prayer for

rescission with a return of the deposit and such reasonable search and survey fees as complainant may have expended.

FINAL DECREE.

Filed December 21, 1926.

IN CHANCERY OF NEW JERSEY.

Between

SECURITY BOND & MORTGAGE Co., a corporation,
Complainant,

and

BANY WEISS and LENA WEISS, his wife,
Defendants.

On Bill, etc.

Final Decree.

This cause coming on to be heard in the presence of Cohen & Klein, solicitors of complainant, and Isidor B. Glucksman, solicitor of the defendants, and the Court having examined the pleadings and having taken proof orally in open court, and having heard and considered the arguments of counsel thereon, and it appearing to the satisfaction of the Court that the defendants, Bany Weiss and Lena Weiss, his wife, were on the 24th day of November, 1925, seized in fee simple of all that certain tract, parcel of land and premises, situate, lying and being in the City of Newark, County of Essex and State of New Jersey, and more particularly described as follows:

BEGINNING on the east line of Jones street at a point therein distant three hundred seventy-five feet eight inches from the corner formed by the said line of Jones street and the northerly line of Springfield avenue; thence running easterly at right angles to said Jones street eighty-eight feet more or less to the easterly line of Sayres Coe, deceased, land; thence northerly along said line twenty-five feet; thence westerly at right angles to said Jones street eighty-eight feet more or less to the easterly line of Jones street; thence along the same southerly twenty-five feet to the place of BEGINNING.

That on the 24th day of November, 1925, the said defendants, Bany Weiss and Lena Weiss, his wife, entered into an agreement in writing with complainant, Security Bond & Mortgage Co., a corporation of New Jersey, wherein and whereby said defendants agreed to convey the said lands and premises by deed of warranty on or before January 24, 1926, to the said Security Bond & Mortgage Co., and that the said Security Bond & Mortgage Co. agreed to pay therefor the sum of Sixteen Thousand Dollars by the payment of One Thousand Dollars, which was paid at the execution of said agreement, and the balance as in said contract more particularly mentioned, and it further appearing to the satisfaction of the Court that the defendants agreed that the buildings upon the said premises are all within the boundary lines of the property as described in the deed therefor herein, and that there are no encroachments thereon, and it further appearing that there is clearly a doubt as to the marketability of the title to the premises

in question by reason of the possibility that a portion of the building erected upon said premises encroaches upon adjoining premises on the south, and the Court being of the opinion that the complainant is entitled to rescind the contract made by and between the parties to this suit as prayed for in its bill of complaint filed herein; and the Court being of the opinion that the defendants were not entitled to the specific performance of the aforesaid agreement as prayed for in their counter-claim filed herein, it is on this 21st day of December, 1926,

ORDERED, ADJUDGED and DECREED that the contract between the complainant and defendants be and the same is hereby rescinded; and it is

FURTHER ORDERED, ADJUDGED and DECREED that the defendants, Bany Weiss and Lena Weiss, his wife, pay to the complainant, Security Bond & Mortgage Co., a corporation of New Jersey, the sum of One Thousand Dollars, the amount paid by the complainant to the defendants upon the execution of the agreement above mentioned, together with interest thereon from November 24, 1925, being a total of One Thousand Sixty-four Dollars, which shall be and become and is hereby impressed as a lien upon the said lands and premises in favor of the said complainant, to the end that said lands and premises may be sold pursuant to law and under the direction of this Court to satisfy such lien, and in case a deficiency should arise upon such sale, the said defendants may be ordered by this Court to pay such deficiency; and it is

FURTHER ORDERED, that the said defendants pay to the said complainant the sum of One Hundred Dollars as and for a reasonable search fee for the examination of the title to the aforesaid premises; and it is

FURTHER ORDERED, that the said defendants pay to the said complainant the sum of Twenty-five Dollars as and for the reasonable cost for making surveys of the aforesaid premises; and it is

FURTHER ORDERED, that said defendants pay to the said complainant the cost of this suit to be taxed, including a counsel fee of $200.00, which is hereby allowed to said complainant; and it is

FURTHER ORDERED, that a true but uncertified copy of this decree be served on the solicitor of said defendants within ten days from date hereof.

E. R. WALKER,
C.

Respectfully advised,

ALONZO CHURCH,
V.-C.

NOTICE OF APPEAL.

Filed December 23, 1926.

IN CHANCERY OF NEW JERSEY.

Between	
SECURITY BOND & MORTGAGE Co., a corporation, *Complainant,*	*60-411.*
and	*On Bill, etc.*
BANY WEISS and LENA WEISS, *Defendants.*	*Notice of Appeal.*

The defendants hereby appeal from the final decree made by the Chancellor on the advice of Vice-Chancellor Church in the above-entitled cause on the twenty-first day of December, 1926, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated December 21, 1926.

ISIDOR B. GLUCKSMAN,
Solicitor of Defendants.

MICHAEL S. PRECKER,
Of Counsel.

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

MICHAEL S. PRECKER,
Of Counsel with Defendants.

Service of a copy of the within notice of appeal is hereby acknowledged this 21st day of December, 1926.

COHEN & KLEIN,
Solrs. of Complt.

PETITION OF APPEAL.

Filed December 31, 1926.

New Jersey Court of Errors and Appeals

Between	
SECURITY BOND & MORTGAGE Co., a corporation, *Complainant-Respondent,*	*On Appeal from Chancery.*
and	*Petition of Appeal*
BANY WEISS and LENA WEISS, *Defendants-Appellants.*	

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

The petition of Bany Weiss and Lena Weiss, the appellants in the above-entitled cause, respectfully shows that your 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, bearing date December 21, 1926, in a certain cause in the said Court of Chancery, wherein Security Bond & Mortgage Co., a corporation of New Jersey, was complainant, and the said Bany Weiss and Lena Weiss were defendants, in this respect, to wit: that the said decree adjudges that the contract recited in complainant's bill be rescinded for the reasons therein set forth, that the deposit paid under the terms of the contract be returned to complainant, together with interest, amounting in all to Ten Hundred and Sitxy-four (1064) Dollars, and a lien in that

amount impressed upon the lands and premises in question in favor of the said complainant, that defendants pay to complainant the sum of One Hundred (100) Dollars as and for its search fee, Twenty-five (25) Dollars for surveys, and also the costs of suit, in which shall be included a counsel fee of Two Hundred (200) Dollars.

And your petitioners appeal from the decree of the Court, which decrees as aforesaid, upon the ground that the same is erroneous, in that the Court held that there was "clearly a doubt as to the marketability of the title to the premises in question by reason of the possibility that a portion of the building erected upon said premises encroaches upon the adjoining premises on the south," whereas your petitioners believe that the mere "possibility" of an encroachment is not sufficient to raise such a doubt as will render a title unmarketable; and in that the preponderance of the evidence is to the effect that no encroachment in fact existed; and in that, even if such encroachment did exist, the Court improperly denied the defendants' right to remove it and give clear title before final decree; and in that the Court erroneously excluded evidence of the "Jones Street boom" and of the Minutes of the Board of Commissioners to the great prejudice of defendants.

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

ISIDOR B. GLUCKSMAN,
Solicitor for Appellants.

MICHAEL S. PRECKER,
Of Counsel with Appellants.

ANSWER TO PETITION OF APPEAL.

Filed December 31, 1926.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between SECURITY BOND & MORTGAGE CO., a corporation, *Complainant-Respondent,* *and* BANY WEISS and LENA WEISS, *Defendants-Appellants.*	*On Appeal from Chancery.* *Answer to Petition of Appeal.*

The answer of Security Bond & Mortgage Co., a corporation, the above-named respondent, to the petition of appeal of Bany Weiss and Lena Weiss, the above-named appellants.

This respondent, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto, nevertheless, admits that a decree was, on December 21, 1926, 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 this respondent begs leave to refer thereto when the same shall be produced.

This respondent is advised and believes that the said decree is agreeable to Equity; and it prays that the same may be affirmed with costs to be taxed in favor of this respondent.

COHEN & KLEIN,
Solicitors for and of
Counsel with Respondent.

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

New Jersey Court of Errors and Appeals

Between

SECURITY BOND & MORTGAGE Co., a corporation,
Complainant-Respondent,

and

BANY WEISS and LENA WEISS,
Defendants-Appellants.

On Bill, etc.

On Appeal from Chancery.

BRIEF FOR DEFENDANTS-APPELLANTS.

Statement of the Case.

Complainant's bill prays for a return of a deposit, together with interest and costs, paid to defendants on account of the purchase price of certain lands and premises, and alleges the following facts:

On November 24, 1925, the defendants contracted to sell to complainant certain premises in the City of Newark, New Jersey, commonly known as 50 Jones street. The contract contained a clause that "the buildings upon the said premises are all within the boundary lines of the property as described in the deed therefor herein, and that there are no encroachments thereon." A deed of warranty was to be delivered on January 24, 1926. A copy of the said contract is annexed to the bill of complaint. The deposit money required under the contract was paid. Complainant had a search of the title to defendants' property made and also had the property surveyed. The search disclosed a defect in the title and the survey showed that the building of the premises in question encroached

upon the premises adjoining on the south. For these reasons the defendants were unable to carry out the terms of the said contract and same was unenforceable against the complainant.

Defendants' answer and cross bill of complaint pray for a dismissal of complainant's bill and for a decree of specific performance on the basis of the following allegations:

That on the aforesaid 24th day of November, 1925, and for many years prior thereto, the defendants were the owners of the premises in question, using same as their home. Shortly before the above mentioned date a real estate boom was born that enveloped all the properties on Jones street, on which street the premises in question are situate. The cause of the boom was a rumored widening of the said street by the muncipal authorities, in anticipation of which improvement speculators rapidly bid up the prices of properties throughout the street by trading in contracts. One of these speculators was the complainant. It, through its agents, sought out the defendants in the solitude of their home, importuned them with offers, harassed them with bickering and finally prevailed upon them to sell their home. A couple of weeks later the short-lived boom came to a sudden end upon the publication in the local press of an official denial that any street widening had been authorized. And on January 29, 1926, the defendants received a letter from complainant reciting the above-mentioned title defect and encroachment and advising them of complainant's decision to reject the title. A copy of said letter is annexed to defendants' answer and cross bill and marked Exhibit 2. Defendants immediately ordered a survey of their property and search of their title to be made. The survey

disclosed that no encroachments existed. A copy of said survey is attached to defendants' answer and cross bill and marked Exhibit 1. The search revealed that the alleged title defect had been cured many years before by an instrument which was properly set forth in the public title records. The survey of complainant disclosed that the alleged encroachment consisted of a small strip of metal overhang of a second story extension. Complainant refused to accept the offer of defendants to so repair the alleged encroaching part as to bring it within the lines as shown by complainant's survey. Defendants were therefore convinced that the allegations of complainant's bill were not made in good faith but were only a subterfuge advanced by the complainant for the purpose of slipping out of a contract originally very promising but ultimately very disagreeable to it. Defendants averred that the alleged encroachment and title defect were part and parcel of a scheme concocted by the complainant for the purpose of cheating the defendants of the fruits of their agreement and that complainant was coming into the court of equity with unclean hands. As an earnest of their good faith the defendants offered to remove the alleged encroachment at their own cost and expense, if any encroachment were proved at final hearing, in order that they might give complainant clear title in accordance with its survey before final decree.

At the hearing the following facts developed: The complainant waived its objection to the title defect and proceeded only on the allegation relative to the encroachment. Its first witness, Mr. Clawans, a surveyor, explained a survey made by him (Exhibit C. 2), according to which there was an encroachment of a portion of the

south side of defendants' building upon the property adjoining on the south (S. C., p. 25, ll. 29-39). The extent of the encroachment according to his survey was a quadrangular strip running from ¾ inches in the front to 2 3/8 inches in the rear (S. C., p. 25, ll. 31-38). The nature of this encroachment according to his testimony was a woodcut post and metal overhang (S. C., p. 25, ll. 31-39). Complainant's other witness, also a surveyor, Mr. Moor, explained a survey, Exhibit C. 4, made by the firm of Borrie & Kreiner, by whom he was employed (S. C., p. 29, ll. 29-30), showing an encroachment of similar character (S. C., p. 30, ll. 8-13). Its extent, however, varied from that of Clawans & Kettenring, being a narrower triangular strip running from a point in the front of the extension (S. C., p. 33, ll. 22-26) to a width of 1½ inches in the rear (S. C., p. 32, ll. 23-33). Defendants' surveyor, Mr. Lemassena, explained the survey, Exhibit D. 1, made by him, according to which no encroachments existed (S. C., p. 41, ll. 19-23). How can the variances between these three surveys be explained?

By examination of the survey of Clawans & Kettenring, Exhibit C. 2 (opposite p. 48), it will be noted that the northern boundary of the premises in question is drawn at an angle corresponding to the angle of ninety degrees and six minutes employed in the making of the Lemassena survey, Exhibit 1 (opposite p. 18). Exhibit C. 2 recites that the northern boundary is fixed by the ancient occupation of the building to the north. It will be seen that the drawing of the line in that manner clears all the buildings on the premises in question with a few inches to spare. In fixing the southern boundary of the premises, Exhibit C. 2 does not follow the same

principle of using the ancient occupation of the building on the south, although that building is 50, or more than 50, years old (S. C., p. 44, ll. 1-9). The effect of running the southern boundary of the premises in question according to the occupation of the building on the south would be to place that line along the northern wall of that building (S. C., p. 44, ll. 35-37). Now, if we examine the survey of Borrie & Kreiner, Exhibit C. 4 (S. C. opposite p. 48), it will be seen that the running of the line that way would also not only clear all the buildings on the premises in question, but would spread out the lot of defendants' premises to a width of more than 25 feet in the rear. Instead of doing this Clawans & Kettenring run that southern line of the premises in question at right angles to the line of Jones street, Exhibit C. 2, the effect of which is not only to give the defendants a rear lot width of two inches less than what they are entitled to by deed, but also to cause their building to encroach on the south boundary. Borrie & Kreiner on the other hand run the northern and southern boundaries at right angles to the present line of Jones street, Exhibit C. 4, thus not only disregarding both the southern and northern occupations, but also causing the building on the premises in question to encroach on the southern boundary. Mr. Lemassena on the other hand, using the interior occupation of the old buildings both to the south and to the north as a guide, runs his northern and southern boundary lines at an angle of ninety degrees and six minutes to the line of Jones street, and places these lines 25 feet apart at such points as would not only not distrub the occupation of the premises adjoining on both sides, but also so as to clear all the buildings of the premises in question. Whether defendants are within their rights in

claiming the land as thus surveyed is discussed *infra.*

It further developed at the hearing that the defendants owned the property for some twenty years, during eighteen of which it served as their home (S. C., p. 48, ll. 11-14). The defendants' attempts to introduce evidence of the Jones street boom and of the minutes of the Board of Commissioners of the City of Newark relative to the ordinance for the widening of Jones street were both frustrated by the rulings of the Court (S. C., p. 35, l. 12 to p. 36, l. 14 and p. 42, l. 38 to p. 43, l. 6). So too, defendants' effort to introduce testimony of a building expert going to the minuteness of the alleged encroachment and the possibility of its removal at a nominal cost and without diminution of the value of the property was foiled by the Court's adverse ruling as to the admissibility of this evidence (S. C., p. 39, ll. 30-39).

The final decree advised by Vice-Chancellor Church on December 21, 1926, adjudged that "there is clearly a doubt as to the marketability of the title to the premises in question by reason of the possibility that a portion of the building erected upon said premises encroaches upon the adjoining premises on the south" (S. C., p. 53, l. 38 to p. 54, l. 7). The decree also ordered and adjudged that the contract in question be rescinded, that the defendants repay to complainant the deposit of $1,000 previously paid by it on account of the purchase price of the property together with interest, amounting to $1,064 in all; that the said amount be impressed as a lien upon the premises in question in favor of complainant; that the defendants pay to complainant the sum of $100 as and for its search fee, $25 for the cost of its survey and also the

costs of suit to be taxed, including a counsel fee of $200 (S. C., p. 54, l. 16 to p. 55, l. 12).

Thereafter defendants gave notice of appeal to this Court from the said decree as stated above (S. C., p. 56).

The petition of appeal was filed in due course (S. C., pp. 57-58) and an answer thereto was filed in common form (S. C., p. 59).

Specification of Grounds of Appeal.

The appellants respectfully urge that the final decree of the Court of Chancery was erroneous in the following respects:

1. The Court erred in holding that the mere possibility that defendants' building encroaches upon the premises adjoining on the south is sufficient to cast such a doubt on the title as will render it unmarketable.

2. The Court erred in not finding that in point of law and fact the evidence was conclusive of the non-existence of encroachments.

3. The Court erred in denying defendants' right to remove the alleged encroachment and to thereby give clear title before final decree.

4. The Court erred in excluding evidence of the "Jones Street boom" and of the minutes of the Board of Commissioners relative to an ordinance providing for the widening of Jones street.

In support of the foregoing grounds of appeal the defendants will maintain the following propositions:

I. The mere possibility of the existence of encroachments does not render a title unmarketable; to merit that finding the existence of encroachments must be fairly probable.

II. Assuming that the building is not within the boundary lines, despite an express covenant to the contrary in the agreement of sale, a court of equity may nevertheless compel specific performance, if the vendors can alter the building without impairing its value and can give clear title before final decree, where time is not of the essence of the agreement.

III. The interpretation given to express covenants concerning encroachments and buildings within boundary lines by our courts, was not intended as an invitation to use those covenants as instruments of oppression, and an unconscionable speculator cannot use such a covenant as a subterfuge to withdraw from a contract freely made and fair to all parties.

IV. Evidence purporting to show that complainant bought the property of defendants as a speculation in a market which was riding upon the swell of a real estate boom and repudiated the contract as soon as the market broke is admissible.

V. Evidence purporting to show that the city had passed an ordinance providing for the widening of the street on which the premises in question are situate, the effect of which will be to tear down the building which is the subject matter of the case *sub judice,* bears on the "bona fides" of complainant and is admissible.

VI. The lines of a property as established by practical location should be accepted as the true boundaries and inconsistent descriptions should be rejected as false.

VII. Judged by the standard of practical location the building of defendants is entirely within the lines of the property as described in the deed therefor.

VIII. Summary.

POINT I.

The mere possibility of the existence of encroachments does not render a title unmarketable; to merit that finding the existence of encroachments must be fairly probable.

According to the wording of the final decree it appears that the conclusion of the Vice-Chancellor was based on the finding "that there is clearly a doubt as to the marketability of the title to the premises in question by reason of the possibility that a portion of the building erected upon said premises encroaches upon the adjoining premises on the south" (S. C., p. 53, l. 38, to p. 54, l. 7). At the time that the decree was made defendants pointed out that the possibility of the existence of encroachments was insufficient to sustain a finding of unmarketability. In support of this contention, the following statement is quoted from Pomeroy's "Equity Jurisprudence": "The rule is now well established that equity will not compel an unwilling purchaser to accept a doubtful title which will expose him to the expense and hazard of litigation. It will not force him to buy a lawsuit. He need not take a title unless it is marketable. * * * But a threat or even the possibility of a contest will not be sufficient. The doubt must be considerable and rational, such as would and ought to induce a prudent man to pause and hesitate; not based on captious, frivolous and astute niceties, but such as to produce real bona fide hesitation in the mind of the Chancellor" (Vol. V, sec. 2223).

The thought obtrudes itself that the encroachment complained of by the complainant, viz., a small strip of galvanized iron sheathing, is just such a one as Pomeroy may have had in mind when he said "captious, frivolous and astute niceties." Certainly, this piece of tin, for it appears to be nothing more, would not produce in the mind of the ordinary, prudent person a "considerable and rational" doubt such as to cause him "to pause and hesitate." Not if he wanted to honestly carry out the terms of the contract.

And in the case of *Barger* v. *Gery,* 64 N. J. Eq. 263, Vice-Chancellor Stevenson quoting the New York Court of Appeals observes (on p. 270) that "if the existence of the alleged fact which is supposed to cloud the title is a possibility merely, or the alleged outstanding right is a very improbable and remote contingency, which according to the ordinary experience has no probable basis, the Court may compel the purchaser in such a case to complete his title." It is apparent that the Court was emphasizing the distinction between a mere possibility of a defect in title and its probability. So in our case. If the alleged encroachment is only a possibility it does not seem that the Court was warranted in denying specific performance.

POINT II.

Assuming that the building is not within the boundary lines, despite an express covenant to the contrary in the agreement of sale, a court of equity may nevertheless compel specific performance, if the vendors can alter the building without impairing its value and can give clear title before final decree, where time is not of the essence of the agreement.

This point was made by the defendants at the hearing. That time was not of the essence of the agreement is apparent from the contract (S. C., pp. 5-11). Neither the nature and circumstances of the contract nor the conduct of the parties made it so. In their answer and cross bill defendants, while denying the existence of encroachments, nevertheless offered to remove the encroachment alleged by complainant to exist, if same were proved at the hearing, in order that they might give clear title before final decree (S. C., p. 17, ll. 23-35). At the hearing defendants put on the stand a Mr. Drill, whose qualifications as a building expert were admitted (S. C., p. 37, ll. 32-34). The purpose of his testimony was to prove that the alleged encroachment could be remedied by removing the galvanized iron sheathing and re-setting it in such manner as to place it within the line suggested by complainant as the true boundary; that the cost of such a job would be nominal, and that the value of the building would not be impaired by the alteration. These facts were stated to the Court upon the objection of complainant to the admission of the testimony (S. C., p. 38, l. 12, to p. 39, l. 18). The Court ruled that the proffered testimony was inadmissible (S. C., p. 39, ll. 35-39).

But the propriety of the point herein urged seems to follow directly from the rule propounded by our present Chief Justice in the leading case of *Gerba* v. *Mitruske,* 84 N. J. Eq. 141, that "where the time of performance is not of the essence of the contract the complainant is entitled to a decree if a clear title can be given by him at the time of the making thereof" (p. 143). That rule has been followed by a long line of cases, including *Verney* v. *Dodd,* 96 N. J. Eq. 129; *Randolph* v. *General Investors Co.,* 96 N. J. Eq. 227, and *Cavanna* v. *Brooks,* 97 N. J. Eq. 329, to quote only a few of the more recent. True, none of these cases involved the existence of encroachments or buildings extending over boundary lines. But is there anything about this kind of encumbrance that excludes it from the purview comprehended by the rule of the learned Chief Justice? And if there is no reason for thus excepting it, why wasn't the rule of *Gerba* v. *Mitruske* invoked in those cases where specific performance was refused? In order to satisfactorily answer this question it becomes necessary to examine those cases seriatim.

The leading case dealing with an express covenant against encroachments or buildings over the boundary lines is *Herring* v. *Esposito,* 94 N. J. Eq. 348, cited in the opinion of the case *sub judice* (S. C., p. 50, ll. 32-40). Upon examination of this case it appears that the principle of *Gerba* v. *Mitruske* was not raised. And for a very good reason. For it also appears that no offer to remove the encroachments before final decree was made by the party seeking specific performance. Vice-Chancellor Bentley in his opinion observes: "I am obliged to find as a fact that an encroachment exists" (p. 349). His finding was inevitable in view of the absence of any offer to remove the encroachment.

So, too, in *Goldstein* v. *Ehrlich,* 96 N. J. Eq. 52, cited in the opinion of the case *sub judice* (S. C., p. 51, ll. 29-30). Vice-Chancellor Backes says: "The proofs show that they (*i. e.,* the buildings) are not (within the boundary lines). They encroach" (p. 52). And in *Schiff* v. *Alexander,* 3 N. J. Mis. Rep. 817, cited in the opinion of the case *sub judice* (S. C., p. 51, l. 30), the Supreme Court held that: "The buildings are not within the boundary lines and there is an encroachment in the rear" (p. 822). Nothing in any of these cases of an offer to remove encroachments before final decree. Nothing of encroachments that were removed before hearing. In all these cases the use of the present tense arrests the attention of the inquirer: buildings that "encroach"; an encroachment that "exists"; buildings that "are" not within the boundary lines. How could the Court find otherwise, failing the offer to remove encroachments or to bring the buildings within the lines in order to give clear title before final decree?

This failure to make such an offer is strongly emphasized in the very case to which the Vice-Chancellor gives so much space in his opinion, viz., *Pasternack* v. *Alter,* 95 N. J. Eq. 377 (S. C., p. 51, ll. 1-28). In that case Vice-Chancellor Lewis makes a point of the fact that: "They therefore claimed that the vendors did not tender a good, clear and marketable title, and insisted that the defects should be remedied. This the complainants refused to do, and the testimony fails to show that the objections made to the title were removed by the complainants" (p. 378). It appears from the above that the Vice-Chancellor in the case *sub judice* has fallen into the fallacy of not distinguishing between those cases where the encroachment exists at the time

of hearing and those where the encroachment is removed at hearing or an offer to remove before final decree is made.

At the hearing the Vice-Chancellor held that the removal of the encroaching portion of the building would change the locus contracted for and would be tantamount to asking the Court to make a new contract between the parties (S. C., p. 39, ll. 5-13). That, however, does not appear to be the law. The case of *Doherty* v. *Egan Waste Co.*, 91 N. J. Eq. 400, involved the encroachment upon the adjoining premises of the building to be conveyed. The defendant refused to take title. While the suit was pending and fully seven months after title was to have passed the building in question was totally destroyed by fire. Nevertheless, Vice-Chancellor Griffin in that case decreed specific performance, saying (p. 408): "Time is not of the essence of this contract, and the complainant was certainly in a position to perform on December 5, 1917" (the date of the fire). Apparently, the intervention of nature, the happening of an unforseen, adventitious event, in destroying the building, had removed the encroachment and enabled the complainant to give clear title before final decree. And specific performance was granted despite the complete annihilation of the subject matter of the controversy. *A fortiori* the mere modification of the subject matter, and one so slight as that proposed by defendants, can hardly constitute such a change as would charge a court of equity with writing a new contract for the parties.

The question of the removal of encroachments came up for decision also in the case of *Wyatt* v. *Bergen,* 98 N. J. Eq. 502. In this case time was of the essence of the contract. Vice-Chancellor Griffin made the following observation: "In Herring, *et al. v.* Esposito * * * the case was on final hearing, with the encroachment continuing at the time of final decree; here the case is on final hearing with the encroachment removed; but the principle, it seems to me, is the same in both cases, whether the encroachment existed at the time of final hearing, where time is not of the essence of the contract, or on the day appointed for the closing of the contract, where time was made of its essence" (p. 507). If this case means anything it clearly means that an encroachment must be removed before the date set for passing title only when time is of the essence of the contract; when time is not of the essence the encroachment may be removed at any time before final decree, and if so removed specific performance will be allowed.

The refusal of the Court to permit testimony of the expert builder also precluded evidence as to the amount of an abatement, in the event that specific performance with an allowance for the cost of the removal of the encroachment was decreed. However, in view of the fact, as defendants at the hearing offered to prove (S. C., p. 42, ll. 31-40), that the city authorities had passed an ordinance providing for the widening of Jones street and for the destruction of the building in question, it may well be that the complainant would not be entitled to any abatement, in the same way as in *Doherty* v. *Egan Waste Co.*, 91 N. J. Eq. 407, Vice-Chancellor Griffin determined that the destruction of the building by the fire removed that element of the case from further consideration.

POINT III.

The interpretation given to express covenants concerning encroachments and buildings within the boundary lines by our courts was not intended as an invitation to use those covenants as instruments of oppression and an unconscionable speculator cannot use such a covenant as a subterfuge to withdraw from a contract freely made and fair to all parties.

The interpretation of express covenants regarding encroachments and buildings within the boundary lines, which is now recognized as the law of our state, seems to have been voiced for the first time by Vice-Chancellor Bentley in the leading case of *Herring* v. *Esposito, supra.* As pointed out by the learned Vice-Chancellor in that case, a distinction has to be drawn between the contract containing such a covenant and the contract which omits it. The law of our state with respect to encroachments and buildings over the boundary lines, in cases where the contract did not contain the express covenant, had always been that the extent or materiality of the encumbrance determined the marketability or unmarketability of the title. If the encroachment were slight or if the building were over the line only a matter of an inch or two, the courts were inclined to waive the defect and decree specific performance. But, Vice-Chancellor Bentley concluded, when the parties added an express covenant covering these things to their agreement, they intended something more than could be read into the agreement which lacked the covenant. And that "something more" was a rigid adherence to the letter of the contract. So that, if the agreement contained such a covenant and an encroachment was discovered, specific performance should be denied no matter how slight

the extent of the encroachment might be. To decide otherwise, the learned Vice-Chancellor observed, would be, not to interpret the agreement, but to create a new agreement which the parties had not intended.

Whether, in view of the common practice which obtains in connection with the drawing of agreements of sale, the ratiocination of the learned Vice-Chancellor would stand the test of a pragmatist is a dubious question, but one which is not immediately pertinent to this inquiry. More germane, however, is this point: what effect did the learned Vice-Chancellor in formulating the principle and the courts in applying it intend to give to the interpretation of that covenant? Clearly this, that the covenant was to be used as a shield to protect the purchaser in such cases where he felt the need for that added protection. No rational person would have the temerity to suggest that a court of equity would countenance, far less intend, that this covenant should be used by the unscrupulous as a sword instead of as a shield. As a matter of fact, such a use strikes at the cardinal principles of equity, for it seeks to procure a court of conscience to pander to base and illegitimate purposes. Nor does the complainant need to be tainted by acts involving moral turpitude in order to place him without the pale of the court of equity. Bad faith is sufficient; for the question is not one of degree or extent of evil conscience, but only of the fact of the existence of *mala fides.* As Pomeroy puts it: "It is not alone fraud or illegality which will prevent a suitor from entering a court of equity; any really unconscientious conduct, connected with the controversy to which he is a party, will repel him from the forum whose very foundation is good conscience," Pomeroy's

"Equity Jurisprudence," Vol. 1. sec. 404; quoted with approval by Vice-Chancellor Bergen in *Vulcan Detinning Co.* v. *American Can Co.,* 70 N. J. Eq. 600, and by Vice-Chancellor Leaming in *Pendleton* v. *Gondolph,* 85 N. J. Eq. 317.

And in the latter case the Vice-Chancellor also observed (p. 313): "It is a maxim of equity that he who comes into a court of equity must come with clean hands, and in the ordinary application of that maxim a court of equity denies its remedies to a complainant who has been guilty of bad faith, fraud or unconscionable acts in the transaction which forms the basis of his suit." How can we reconcile the noble attitude of our court of equity in the above cases and in innumerable others with any approval by it of the use of the covenant in question in a spurious or surreptitious way in order to conceal insincere or unscrupulous motives? Such reconciliation cannot be! A distinction must be made between the abuse of the covenant and its proper use. The interpretation of the covenant in the case of *Herring* v. *Esposito, supra,* did not change the nature of the law behind the decision. The fundamental fact is still one of marketability of title. The covenant merely adds a refinement which restricts the application of the law as to the marketability of the title.

The above viewpoint finds support in the case of *Model Plan Agency* v. *Dimond,* which has just been reported in 5 A. R. 70. In that case complainant brought a bill for rescission, basing his claim of unmarketability on the ground that the vendors' title rested on adverse possession, contrary to an express covenant in the agreement of sale to the effect that title shall "not be derived from adverse possession." In his opinion, Vice-Chancellor Berry declared (p. 75):

"The purpose of the term 'adverse possession' in the contract was not, in my judgment, to afford an excuse for non-performance, but rather to insure the vendee a good title not subject to successful attack in the courts." A similar situation exists in the case *sub judice* and defendants assert that complainant seeks to invoke the covenant in question as an excuse for non-performance, rather than to insure a good title for itself.

For these reasons it becomes necessary, when it is sought to ascertain whether the covenant in question is being used as a safeguard or as a weapon of oppression, to inquire into the circumstances surrounding the making of the contract as well as its repudiation. What is the character of each of the parties to the agreement? If on the one hand there stand an old couple who have used the premises in question as their home for many years and on the other hand there stands a corporation whose obvious interest in the agreement is speculation, the courts of equity immediately are put on guard to see to it that the old couple are not unfairly dealt with. Was the corporation interested in the land or in the building and what light, if any, is thrown on this point by the allegation that a real estate boom prompted the interest of the corporation in the purchase of the premises in question? Finally, was there a collapse in realty values which affected this property and was that the real reason for the corporation's repudiation of the contract? All these questions have an important bearing on the fact as to whether the covenant in question is being used in the way the courts intended it should be, or whether it is being used by an unscrupulous party as a subterfuge to withdraw from a contract that was freely made and was fair in all its terms.

POINT IV.

Evidence purporting to show that complainant bought the property of defendants as a speculation in a market which was riding upon the swell of a real estate boom and repudiated the contract as soon as the market broke is admissible.

This would seem to follow as a corollary to the point which precedes it. At the hearing the defendants attempted to introduce testimony in substantiation of the above proposition. To pave the way for such evidence one of the defendants, Mrs. Weiss, was placed on the stand and was asked whether she had been greatly bothered prior to the winter of 1925-1926, by people who wanted to buy her property (S. C., p. 35, ll. 12-14). The object of this question was to show a condition of inactivity in the real estate of that locality in the period which preceded the making of the agreement in question, that was to lead the way to other evidence showing a period of greatly increased activity and of rapidly rising prices, which heralded the real estate boom alleged in defendants' answer and cross bill (S. C., p. 13, l. 31 to p. 14, l. 20). The purpose of this testimony was to lay the basis of proof that the objection made by complainant was really a subterfuge and not the true reason for its desire to rescind, and that the change in the real estate market and the collapse of property values motivated the complainant's resort to the courts and in turn the attitude which the surveyors consciously or unconsciously brought to their work (S. C., p. 36, ll. 5-11). The Court prevented the development of this line of proof by ruling that the only evidence in which the Court was interested was that bearing directly on the

existence of the encroachment (S. C., p. 36, ll. 12-14).

Defendants respectfully submit that this ruling was highly prejudicial to their case and constitutes reversible error. The encroachment alleged by complainant is slight both in nature and in extent. The motives of complainant to rescind, as alleged by defendants, were very strong. Is the gap between a clear survey and an encroachment, as slight as complainant alleges, so large, that even honest, albeit over-zealous, surveyors and a deeply motivated employer cannot bridge it? At any rate it would appear that the circumstances surrounding the case were such that a complete inquiry into these facts, with a view to determining whether the results obtained by the surveyors were in any way colored by the anxiety of complainant to withdraw from the agreement, was warranted. And surely the proffered evidence was admissible from another viewpoint, viz: its bearing on the bona fides of complainant.

POINT V.

Evidence purporting to show that the city had passed an ordinance providing for the widening of the street on which the premises in question are situate, the effect of which will be to tear down the building which is the subject matter of the case "sub judice," bears on the "bona fides" of complainant and is admissible.

The above point has been adverted to elsewhere in this brief. It was raised at the hearing while Mr. Lemassena was on the stand testifying on behalf of the defendants. In answer to a question concerning some action that had been taken by the city authorities affecting the properties

on Jones street he told of an ordinance that had been passed for the widening of that street, whereupon defendants offered in evidence the minutes of the Board of Commissioners, June, 1926, pages 5 to 7 and 118 to 122 (S. C., p. 42, ll. 31-40). Upon objection of complainant the Court rejected the proferred evidence (S. C., p. 43, ll. 3-6). In order to provide a basis for a review of this ruling defendants quote herewith the pertinent and material parts of the excluded evidence:

"An ordinance to provide for the opening and widening of Jones street, from Springfield avenue to South Orange avenue; the opening and widening of Norfolk street, from South Orange avenue 100 feet northerly; and the opening of Fourteenth avenue from Hayes street to Jones street.

The Board of Commissioners of the City of Newark, Do Ordain:

Section 1. That Jones street from Springfield avenue to South Orange avenue shall be opened and widened as a public street or highway, on the easterly side thereof, by the addition thereto of the following described tract:

BEGINNING at the northeasterly corner of Jones Street and Springfield Avenue; thence running easterly along the northerly line of Springfield Avenue 80 feet 6 inches more or less to the division line between lots 19 and 20 of block 238 on the Newark City Tax Map; thence northerly 167 feet more or less to a point in the division line between lots 25 and 26 of Block 238 in the Newark City Tax Maps distant 34 feet measured easterly at right angles to Jones Street; thence northerly parallel with Jones Street 575.86 feet more or less to a point in the division line between lots 49 and 50 of block 238 on the Newark City Tax Map; thence northerly 256.72 feet more or less to a point in the southerly line of South Orange Avenue, distant 138.18 feet more or less measured easterly along the southerly line of South Orange Avenue from the southeasterly corner of Jones Street and South Orange Avenue; thence westerly along the southerly line of South Orange Avenue 138.18 feet more or less to the southeasterly corner of Jones Street and South Orange Avenue; thence southerly along the easterly line of Jones Street 1023.25 feet more or less to the place of BEGINNING.

* * * * * * * * * * * *

Section 6. That this ordinance shall take effect immediately and all ordinances or parts of ordinances inconsistent with the provisions of this ordinance, be and the same are hereby repealed."

(Minutes Board of Commissioners of Newark, N. J., June, 1926—pp. 5-7.)

"The ordinance having been read three times was then declared to be upon its third and final passage.

The roll being called, the ordinance was declared adopted by the following votes:

Yeas; Commissioners Brennan, Gillen, Howe, Murray."

(Minutes Board of Commissioners of Newark, N. J., June, 1926—p. 122.)

Defendants' property, being on the eastern side of Jones street, is among those affected by the ordinance. Defendants intended to show through their surveyor, Mr. Lemassena, that the major part of the building on the premises in question is included in the portion of land which is to be taken over by the city for the widening. And too, defendants were prepared to show that all that portion of the building which is alleged by complainant to encroach on the adjoining premises is included in that part of the building to be so taken over by the city and torn down. And while the passing of the ordinance may not *ipso facto* effect the physical removal of the encroachment, as the fire did in the case of *Doherty* v. *Egan Waste Co., supra,*

it does quite definitely take the encroachment out of the category of those actual incumbrances such as may render a title unmarketable. In this connection it therefore becomes pertinent to inquire whether complainant brings his action in good faith.

The complainant made a bargain with defendants freely. The contract was fair in its terms. Neither party questions these facts. It now appears that the city is about to condemn a part of the property. It is going to tear down that portion of the building which complainant alleges encroaches on the adjoining property. What matters it if the encroachment really exists? Does the complainant sincerely believe that the alleged encroachment will make the property unsalable? Does the complainant feel that the alleged encroachment will subject it in the future to the hazard of litigation? Is it a probability that anyone who may be interested in purchasing from the complainant will pause or hesitate because of the possibility that a strip of metal sheathing encroaches on the adjoining property? The complainant must know that anyone who may want to purchase the property in the future, will familiarize himself with the notorious fact that the City of Newark is at work on a program of widening Jones street and that it will compel the tearing down of the building, and that the alleged encroachment will not matter one iota to a prospective buyer. The facts are too evident to warrant further comment. The signs point clearly to a case of a speculator starting out to buy something, becoming faint-hearted because of untoward developments and then persisting in a course of action previously decided on, for reasons that it alone can explain. But one thing appears certain: the complainant does

not really fear that the alleged encroachment will make the property in question unmarketable; the complainant did not come into the court of equity with clean hands.

POINT VI.

The lines of a property as established by practical location should be accepted as the true boundaries and inconsistent description should be rejected as false.

One of the earliest of New Jersey cases which involved the question of discrepancies in surveys made by different surveyors was *Jackson* v. *Perrine,* 35 N. J. Law 137. In resolving the doubts that were raised concerning the true boundaries Mr. Justice Depue laid down the rule (p. 147): "A monument in a line gives greater certainty in the location of the line than can be obtained by measurements from an external monument to a beginning corner." And in explanation he added: "An element of uncertainty, arising from liability to mistake in making measurements, exists with respect to the latter, which does not enter into the former * * *. One call or the other must give way. Upon general principles, that must yield in which the element of uncertainty, arising from measurements, exists." The ruling commends itself from a common sense as well as a juridical point of view, and its efficacy in later years, when more accurate surveys became possible as a result of instruments of finer precision, is its best tribute.

The next decision of our upper courts bearing on the point in question appears to be that made by the Supreme Court in the case of *Spottiswoode* v. *Morris & Essex R. R. Co.,* 61 N. J. Law 322. In that case the defendant laid claim

to a strip of land having a width of four rods under a grant made to it some fifty years before the case reached the courts. However the defendants shortly after the time that it had received its grant erected fences, which encompassed a strip of land of a width of only three rods. The balance of its property amounting to a strip of one-half rod on each side was claimed by the plaintiff under adverse possession. The Court upheld the rights of the plaintiff as paramount, Mr. Justice Depue observing (p. 339): "The general doctrine of the law is that where the true location of premises conveyed by a deed is doubtful, a practical location by consent of the parties will aid in the construction of the deed, and in some instances be conclusive as to the boundaries thus fixed, although the acquiescence be for a less period than twenty years." The judgment entered in conformity to the Court's ruling was taken on appeal to the Court of Errors and Appeals and there affirmed for the reasons given in the opinion of Mr. Justice Depue, 63 N. J. Law 667.

In *Alt* v. *Butz,* 81 N. J. Law 156, the Supreme Court through Mr. Justice Minturn delivered itself as follows upon the point in question (p. 158): "In legal theory the doctrine of a practical location is equitable in its nature, arising from the principle of estoppel *in pais*, the fundamental conception of which is the doing of an act by a party in interest, or his acquiescence in the doing of an act by another which would naturally lead to the inference of the existence of a status or the establishment of a condition upon which either party in interest may act to his prejudice if the act be disavowed. It is used to preclude a party from maintaining by evidence that which he had before expressly or tacitly denied; or disproving that which he had before expressly or tacitly admitted, when the other party has acted upon the faith of the admission or denial in such a manner that he will be injured unless the same is held conclusive." Applying the above rule to the situation of defendants the following facts appear: Defendants have a second story porch extension which complainant alleges encroaches upon the adjoining premises to the south. Complainant is trying to arrogate to itself a position which the owner of the premises adjoining on the south could not himself maintain, as the latter by his tacit admission, having permitted the erection of the extension in the first instance and in the second instance having stood idly by for many years while the extension existed, would thereby be precluded from disproving the right of defendants to hold the ground which they had thus assumed. And surely if the owner of the adjoining premises could not assert such a claim, the marketability of the premises of defendants can never become the subject of a successful lawsuit by reason of the encroachment alleged by complainant.

In the case of *Model Plan Agency* v. *Dimond, supra,* Vice-Chancellor Berry refers to the proposition under discussion in the following way (5 A. R. 72): "Aside from this, however, the descriptions in the early deeds ran to monuments such as other property lines and street lines, and the rule of law is that where there is a variance between a point of distance and a monument, the monument controls." In the case *sub judice* the controlling monument is the building adjoining the premises in question to the south.

The case which comes closest to the one *sub judice* on the point herein argued is *Doherty* v.

Egan Waste Co., supra, wherein the proposition in question is exhaustively discussed and quite definitely decided. In that case, too, the premises in question were located on a street whose buildings were for the most part very old and very closely built together. There, too, the surveyors, disagreed on the essential fact as to the existence of encroachments. There, too, were map-made surveys and surveys based on interior occupation. In the course of his comprehensive oppinion, disclosing a thorough analysis of the subject, Vice-Chancellor Griffin observed (p. 405): "Upon the foregoing facts the lines of the property as established by practical location should be accepted as establishing the true boundaries of the premises in question, and other descriptions inconsistent therewith should be rejected as false." And in support of his opinion the learned Vice-Chancellor cited the cases of *Jackson* v. *Perrine, Spottiswoode* v. *Morris & Essex R. R. Co.,* and *Alt* v. *Butz,* which have been discussed above.

POINT VII.

Judged by the standard of practical location the building of defendants is entirely within the lines of the property as described in the deed therefor.

In order to determine the truth or falsity of the above claim it becomes necessary to review and analyze the testimony of the surveyors who took the stand on behalf of the litigants. While it is true that two surveyors testified for complainant that an encroachment existed and but one surveyor testified for defendants that there was no encroachment, defendants nevertheless urge that the character of the testimony was such that, not only did the complainant fail to

discharge the burden of the proof by the preponderance of the evidence, but that the evidence is conclusive as to the absence of encroachments.

Since it is established, according to the rule laid down by Mr. Justice Depue in *Jackson* v. *Perrine, supra,* that "a monument in a line gives greater certainty in the location of the line than can be obtained by measurements from an external monument to a beginning corner," it is fitting that our analysis should commence with an inquiry into the beginning points that were used by the three surveyors. The following excerpt is quoted from the cross examination of Mr. Clawans, testifying in behalf of complainant:

> "Q What did you use as your starting point? A The intersection of Springfield avenue and Jones street.
>
> Q What is the distance of that point from the nearest line of the lot? A To the point of beginning 375 feet and 8 inches.
>
> Q Now, what is the nature of the monument on Springfield avenue and Jones street that you used as your starting point? A There are no monuments there." (S. C., p. 26, ll. 8-17.)

From the cross examination of Mr. Moor, who also testified for complainant, the following quotation is taken:

> "Q * * * What beginning point did you use? A Why, in fact, we used the same notes as Mr.—as, well—we used all data we have in our office.
>
> Q Yes. You started to say you used the same notes as whom? A Well, as our own notes, as our own data.
>
> Q You didn't mean Mr. Clawan's used? A No; we didn't even know Mr. Clawans was making a survey." (S. C., p. 31, ll. 5-13.)

The direct examination on this point of Mr. Lemassena, who testified on behalf of defendants, follows:

> "Q And are the present monuments of Jones street clear or vague? A They are very vague, but the occupation is very clear.
> Q Is this a copy of the survey which you made on 50 Jones street? A That is.
> Q And does that truly represent the condition of the property? A That does. This work is based entirely on the adjoining occupation." (S. C., p. 41, ll. 12-19.)

Later on he continues to say: "The building to the south is exactly 25 feet wide, front and rear" * * * (S. C., p. 41, ll. 25-27). "the other lot is 25 feet front and rear" (S. C., p. 42, ll. 12-13). * * * "the building has been there, maybe, 50 years—longer" (S. C., p. 44, ll. 8-9).

From the above testimony several facts are apparent. First, the beginning point used by one of complainant's surveyors was far enough from the nearest lot line to raise the element of uncertainty adverted to by Mr. Justice Depue, *supra.* Second, that element of uncertainty is further emphasized by the testimony of this surveyor that there are no monuments to mark the beginning point and by the testimony of defendants' surveyor that the monuments on Jones street are very vague. Third, the fact that the only witness to precede Mr. Moor on the stand was the other of complainant's surveyors, Mr. Clawans, is indicative of the point that Mr. Moor started to say that he used the same notes as Mr. Clawans, but becoming aware of the *faux pas,* he interrupted his line of thought, began to tergiversate, lost himself in some meaningless obfuscations and ultimately denied that he knew of a survey having been made by Mr. Clawans.

His testimony on this score not only stamps him as an unreliable witness, but indicates that the second surveyor for complainant also used the beginning point which the first surveyor used. Fourth, the occupation of Jones street clearly establishes the deed lines and the occupation of the adjoining premises was the basis of the survey made by defendants' surveyor. Lastly, the building adjoining on the south is an ancient one, its width on the front and rear is exactly the same as the width of the lot, and the boundary between the premises of defendants and the premises adjoining on the south would necessarily be coincident with the northerly line of the old building aforesaid.

As to the method of procedure adopted by the three surveyors, after using the beginning points as above set forth, the following excerpts from their testimony will prove illuminative:

Cross examination of Mr. Clawans:

> "Q I now ask you, how did you get that starting point? A That starting point is secured by a series of surveys on Jones street made about between 1856 and the present time.
> Q In other words, your starting point comes from the use of old maps, is that right? A Old surveys.
> Q Old surveys? A Yes" (S. C., p. 27, ll. 4-11).
>
> * * * * * * * * * * *
>
> "Q At any rate, were the lines marked out before that time, 1856? A You mean the deeds and records before 1856?
> Q Yes. A There might have been some deeds before 1856.
> Q You don't know? A I don't know.
> Q What kind of tape did you use in making your measurements? A Spring balance tape" (S. C., p. 27, ll. 28-35).

Cross examination of Mr. Moor:

"Q Do you know whether your survey was made from a map or from practical location? A From old field notes and data we have in our office which dates away back.

Q You don't know whether those field notes in your office come from old maps or not? A Why, that I couldn't say" (S. C., p. 33, ll. 27-33).

Direct examination of Mr. Lemassena:

"Q Did you determine the lines for the property by reference to maps or practical locations? A Practical locations.

Q Practical locations? A Practical locations. That is the only way that the work can be done" (S. C., p. 40, ll. 21-28).

* * * * * * * * * * *

"Q Were the monuments that are now used for surveying Jones street placed before or after Jones street was occupied? A After Jones street was occupied.

Q How long did the old deed lines of Jones street exist before the present monuments and lines came into use? A About 25 years.

Q And what was the practical way of making a survey on Jones street? A The only thing you can do on Jones street is to take each line independent. If you have a lot survey, you will have to take the adjoining lots. That is all you can do.

Q Is that what is known as surveying by means of interior occupation method? A That is what we call surveying by means of the interior occupation method" (S. C., p. 40, l. 32, to p. 41, l. 11).

* * * * * * * * * * *

"Q (By the Court.) There is no overhanging of the eaves on the other lot at all? A Absolutely no. Even if it was built against the other building it couldn't overhang the other lot, because the other lot is 25 feet front and rear" (S. C., p. 42, ll. 8-13).

* * * * * * * * * * *

"Q I show you surveys marked Exhibits C. 3 and C. 4 showing encroachments to the property, 50 Jones street, on the property adjoining to the south, and ask you if you can reconcile those surveys with your own, or if you can in any way explain the variances between the three surveys? A Well, the case of this survey of Clawans and Kettenring, they show it right angles to Jones street. Not knowing where the line is, it would be impossible to turn a right angle. Other surveyors have made it different. They didn't survey at right angles; they took the lines of the old buildings. That is all they have got. If you pick out an old house—the newer ones are about right angles—you find all old houses the line goes back through—the buildings often sit on askew to the street, which would indicate that the lot lines had absolutely run that way. Of course, that is assuming the land has buildings on.

Q How about the variance on Borrie & Kreiner's survey? A On Borrie & Kreiner's survey they also show it at right angles and you can see on both of these—on the Borrie & Kreiner survey, very clearly, if you take the old house that is to the south, you can see how the line runs off. In front they make the house practically on a line and in the back they make it about five inches off. The building across the rear measures 25 feet, so, if they were right, the buildings to the south of it would have to be five inches over its south line, which cannot be, because the building has been there, maybe, 50 years—longer.

Q And would it be possible to reach the results shown on those two surveys, marked Exhibits C. 3 and C. 4, by using what is known in the surveying profession as the practical location or interior occupation method? A You mean, to get this result?

Q Could you get the result shown on those surveys marked Exhibits C. 3 and C. 4, which you have before you? A No;

you could not'' (S. C., p. 43, l. 12, to p. 44, l. 18).

Cross examination of Mr. Lemassena:

''Q Mr. Lemassena, you say the southerly line of the lot in question, number 50 Jones street, is or is not a ninety-degree angle? A It is not a ninety-degree angle from the line we are using today.

Q Why didn't you show the degree of angle on your survey? A I did. Take a look. It is written there.

Q You show it on the northerly side, but I fail to see it on the southerly side. A The lot is the same width front and rear, so it had to be parallel lines.

Q You say that the southerly line is absolutely fixed? A The southerly line is fixed by the northerly wall of the building to the south of your lot.

Q And you say the present condition of Jones street or the condition at the time you surveyed it, is such that surveyors, surveyors of good rank in this city, cannot differ? Do you say that? A On the line of Jones street?

Q Yes. A No—certainly, they can differ on the line of Jones street.

Q I asked you whether the surveyors may reasonably differ? A On the line of Jones street, yes.

Q And they may reasonably differ on the southerly line of this property? A They never can.

Q Borrie & Kreiner differ from you?

Mr. Glucksman: I object. The witness started to answer the question and my adversary cut him off.

The Court: Let him answer.

Witness: The occupation of the house will govern. The frame building to the south will always have to be taken on the line because there is only that 25 feet occupied there.

Q Why? A Because our records are too indefinite when we go back. It was laid out in 1835.

Q What records do you take for your survey? A Well, I took my deed.

Q Your deed? A Yes, sir.

Q Is that all you took? A No.

Q You availed yourself of the prior deed? A I took the deed and I took the occupation of these buildings along that street.'' (S. C., p. 44, l. 20 to p. 45, l. 35.)

No explanation, analysis, comment or argument need be made by defendants in connection with the above testimony. It has been quoted at length because it constitutes the best proof defendants can offer of the point herein raised. Whatever corroborative evidence may be required can be obtained from the surveys of the witnesses (S. C., opposite pp. 18 and 48). But one thing more need be added and that is that complainant furnished defandants' testimony with the highest compliment it could offer, viz: by recalling its surveyor to the stand after defendants' case was in for the purpose of having him testify that he too had made his survey by means of the ''practical occupation'' method (S. C., p. 46, l. 35 to p. 47, l. 9). Defendants in closing challenge complainant to produce any testimony that will substantiate this statement, whose nature beggars description.

POINT VIII.

Summary.

The title of defendants cannot be said to be unmarketable on the basis of the mere possibility that an encroachment exists. Something more nearly approximating the probable is necessary to taint the title; something which provides at least a likelihood that the owner of the prop-

erty will be visited with vexatious and to him unsuccessful litigation. But even upon the assumption that the building of defendants was not within the boundary lines of the property, as alleged by complainant, and this despite an express covenant in the agreement of sale which provided to the contrary, a court of equity may nevertheless compel specific performance if the vendors can alter the building without impairing its value and can give clear title before final decree, where time is not of the essence of that agreement. The interpretation given by our courts to express covenants of this kind was not intended as an invitation to the world that they be used as instruments of oppression, nor will the court of equity permit unconscionable persons to use such a covenant as a subterfuge to withdraw from a contract freely made and fair to all parties. For this reason any evidence that purports to show that the complainant bought the property of defendants as a speculation on a rising real estate market and repudiated the contract upon the market's breaking is admissible. So too, is evidence admissible that tends to establish the fact that the city had passed an ordinance providing for the widening of the street, on which the premises in question are situate, the effect of which will be to condemn and destroy the building in question, since it bears on the "bona fides" of complainant who urges a cause inconsistent with these facts.

It is the well established law of our state that the lines of a property, as fixed by practical location, are accepted as the true boundaries and descriptions that are inconsistent therewith must be rejected as false. Judged by this practical standard the evidence demonstrates that the building of defendants is entirely within the lines of the property as described in defendants'

deed. It is therefore respectfully submitted that the decree of the Court of Chancery should be set aside and for nothing holden, and that this Honorable Court should order a decree entered for the defendants dismissing complainant's bill and granting defendants the relief of specific performance of the agreement of sale as prayed for in their counter-bill of complaint.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

Between SECURITY BOND & MORTGAGE Co., a corporation, *Complainant-Respondent,* *and* BANY WEISS and LENA WEISS, *Defendants-Appellants.*	*On Bill, &c.* *On Appeal from Chancery.*

BRIEF FOR RESPONDENT.

Statement of the Case.

Complainant filed its bill alleging that on November 24, 1925, the defendants agreed to sell to the complainant, for the price of sixteen thousand dollars ($16,000), by deed of warranty, free from all encumbrances, excepting tenancies and a mortgage held by Watson Building and Loan Association, in the original sum of $2,700, premises on the easterly line of Jones street, in the City of Newark, New Jersey, known as No. 50 Jones street, and more fully described in said bill of complaint. The contract contained the following clause: "It is expressly understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor herein, and that there are no encroachments thereon." The complainant alleged that outside lines of the building erected on the premises in question, were not within the boundary lines. On this ground the complainant chose to rescind the cantract and demanded the return of the deposit paid by it to the defendants of $1,000, together

with the reasonable search fee incurred by the complainant. The answer of the defendants, among other things, denied the existence of the encroachments. By way of cross bill, the defendants prayed for specific performance of the contract against the complainant.

The final hearing disclosed the following facts: The witnesses called by the complainant, Edward Clawans, of Clawans and Kettenring, and Christopher M. Moor, employed by Borrie & Kreiner, both of whose qualifications as surveyors were admitted by the defendants' solicitor, testified that encroachments existed by the building on the premises in question, upon the premises adjoining thereto on the south. Mr. Clawans testified in explaining the survey marked "Exhibit C. 2" that a wood cut post encroached on adjoining property two inches, and the metal of the metal overhang attached to the building is over the line three-quarters of an inch at one point, and at another, two and three-eighths inches (State of Case, p. 25, ll. 29 to 39). Mr. Moor testified in explaining the survey made by him for Borrie and Kreiner, that on the southerly side of the building in question, there was a metal overhang that encroached one and one-half inches upon the adjoining premises (State of Case, p. 30, ll. 1 to 13); and also that the cornice above the metal was over the line one inch (State of Case, p. 30, ll. 26 to 29); and also that every part of the metal extension on the southerly side of the building in question encroached in the rear upon the adjoining premises (State of Case, p. 33, ll. 19 to 26). The defendants produced but one surveyor, Clement F. Lemassena, who testified that a survey made by him disclosed no encroachments by the building in question upon adjoining premises.

The Vice-Chancellor who heard the case, determined the weight of the evidence was therefore in favor of the existence of encroachments (State of Case, p. 51, ll. 34 to 36); and advised a decree granting the prayer of the complainant, ordering the defendants to repay the deposit of $1,000, with interest, and the payment of reasonable search and survey fees and a counsel fee to the complainant, and denying the prayer of the defendants for specific performance (State of Case, p. 51, ll. 39 to 40). From the decree of the Court of Chancery, the complainant appeals and assigns various grounds on appeal as the basis for its contention that the decree of the Court of Chancery was erroneous.

Issue.

The questions raised in this suit resolve themselves into but one issue: Is the building in question all within the boundary lines of the property as described in the deed therefor?

ARGUMENT.

POINT 1.

The evidence established as a fact that the building on the premises in question was not all within the boundary lines of the deed therefor, and that encroachments existed.

The Vice-Chancellor found as a fact that the building in question was not all within the boundary lines of the deed therefor, and that part of said building encroached upon the premises to the south of the defendants' property. The Vice-Chancellor, in his opinion, states that two surveyors testified to the existence of en-

croachments, and one says that there are none, and that, therefore, the weight of evidence is in favor of the existence of the encroachments (State of Case, p. 51, ll. 31 to 36). The qualifications of all the surveyors were admitted. Each explained the method used by him in making said surveys. The certainty with which the defendants' surveyor, Clement F. Lemassena, at one point stated that the building in question did not encroach upon adjoining premises, is entirely destroyed by his other testimony. In this respect, particular attention is called to the following testimony of Mr. Lemassena:

Question (by the Court): There is no overhanging of the eaves on the other lot at all?

Answer: Absolutely no. Even if it was built against the other building, it couldn't overhang the other lot, because the other lot is twenty-five feet front and rear.

Question: The building to the south, you are speaking about?

Answer: The notes may show that a little clearer to you. This is fifty, this is adjoining the building; the two walls are together; it is twenty-five feet across there. If you go to the rear, it is the same way, twenty-five feet, but using our line, the way I interpreted it—which I don't know is right—I make it three inches off. You would be entitled—if you don't make any complaint, he is entitled to twenty-five feet and still there is a space for two inches. They call it overhang. As a matter of fact, we don't know much about these lines'' (State of Case, p. 42, ll. 8 to 27). This admission on the part of the defendants' only surveyor, that he is unable to tell whether his interpretation as to the location of the building line in question is correct, is

enough to neutralize at least the effect of his other apparently definite testimony. The Vice-Chancellor hearing the testimony could arrive at no conclusion other than one favorable to the complainant when he considered that the only surveyor produced by the defendants was himself indefinite and uncertain that his interpretation of the location of the lines was a correct one. With practically the entire field of competent surveyors at their command, the defendants chose to rely upon but one surveyor, admittedly uncertain in his testimony, to fortify them in their defense against the allegations of complainant's bill of complaint and in their attempt to induce the Court of Chancery to grant them their prayer for relief in their cross-bill for specific performance against the complainant. Why were no other surveyors produced by the defendants? What logical inference can be drawn from their failure to obtain the testimony of other surveyors, other than but one surveyor could be found in the City of Newark or vicinity to substantiate their contention that their building was all within the boundary lines of their premises? The dates contained on the three surveys in evidence tell the following story: The survey made by Clawans and Kettenring, who are civil, mechanical engineers and surveyors, is dated January 25, 1926. This survey was made in the ordinary course of searching the defendants' title, and immediately upon its receipt, was forwarded to the defendants upon the rescission of the contract by the complainant (State of Case, p. 14, ll. 33 to 38). The survey made by the defendants' surveyor, Clement F. Lemassena, is dated February 8, 1926, and showed the property to be clear. The survey made by Borrie and Kreiner, is dated February 20, 1926, showing the existence of encroachments.

In other words, the chronological order shows that complainant's first survey disclosed encroachments, whereupon the defendants obtained a survey showing the property to be clear, after which the complainant obtained its second survey again showing the existence of encroachments. Long before suit was instituted, therefore, the defendants were put on their guard that at least two reputable surveyors agreed as to the existence of encroachments, as compared with their one survey.

The first point of the defendants' brief may be disposed of by pointing out that the Vice-Chancellor found as a fact not that there was a mere possibility of encroachments, but that the weight of the evidence is in favor of the existence of the encroachments in question (State of Case, p. 51, ll. 34 to 36). It may perhaps be said that the wording in the final decree was unfortunately chosen in stating:

> "It further appearing that there is clearly a doubt as to the marketability of the title to the premises in question by reason of the possibility that a portion of the building erected upon said premises encroaches upon adjoining premises on the south" (State of Case, p. 53, l. 38, to p. 54, l. 7).

The final decree filed in this suit was, of course, based upon the written opinion of the Vice-Chancellor. The preliminary portion of the final decree signed by the Vice-Chancellor, containing apparent adjudications of fact, is not important so far as the intrinsic validity of the decree itself is concerned, and even if the draft of the final decree had contained no recital of apparent findings of fact or of other matters involved in this suit, still that part of the final decree adjudicating the rights of the parties and granting proper relief will be sustained as

valid in a proper case. In the case of *Bull* v. *International Power Co.*, 84 N. J. Eq. p. 209, at p. 215, Chancellor Walker said:

> "In a decree in Chancery there need not be in the ordering or mandatory part an adjudication of the existence of facts warranting the making of such decree, although they *may* be stated in the recitals preceding the decretal paragraph, or may, for that matter, be omitted entirely."

POINT 2.

The building in question being not within the boundary lines of the premises, contrary to the express covenant in the agreement against encroachments, a Court of Equity will not compel specific performance of said contract.

The argument set forth by the defendants in Point 2 of their brief, would apply to a contract for the sale and purchase of real estate where there was no express covenant that the buildings on the premises in question are all within the boundary lines of said premises. The reasoning in the cases cited by the defendants and embodied in the decision of *Gerba* v. *Mitruske,* 84 N. J. Eq. 141, does not apply to the issue raised in this case. With respect to the principles enunciated in said case, it is contended that the only objection to the title was comprised of an incorporeal right capable of extinction, in which event the premises in question and the title thereto remained unaffected and unchanged, but in our case, nothing but a physical act could change the building on the premises in question, to bring it within the boundary lines of the premises of the defendants. In instances of agreements for sale and purchase of real property where no express covenant is contained regarding encroachments, a vendor might per-

haps have the right to remove said encroachments and compel the vendee to accept title with an abatement in the purchase price thereof. That has been the well established law in this State. Equally well established, however, has become the principle that in instances of agreements for the sale and purchase of real property, which contained an express covenant against encroachments, a vendee is not compelled to accept title encumbered by existing encroachments. In the case of *Herring* v. *Esposito,* 94 N. J. Eq. 348, Vice-Chancellor Bentley denied the vendor his claim for relief for specific performance of his contract. In that case, the purchaser produced two surveyors who testified that the building on the premises of the vendor encroached upon the lot adjoining to the west of the said premises; the vendor also produced two surveyors, both of whom testified that no encroachment existed on the premises in question. Vice-Chancellor Bentley accepted the testimony of the surveyors for the purchaser and stated that the reports of the surveyors having created a doubt in his mind, he is obliged to find as a fact that an encroachment exists. This case has been followed in *Goldstein* v. *Ehrlich,* 96 N. J. Eq. 52, in which Vice-Chancellor Backes, in interpreting a contract containing a similar express covenant in regard to encroachments, stated:

> "* * * He (the complainant) is not obliged to take title with the encroachments. They are slight, but nevertheless substantial, and specific performance would not be decreed against him." Vice-Chancellor Backes further stated: "A valid reason for refusing specific performance, such as a defect in the title, warrants a rescission of the contract."

In the case of *Schiff* v. *Alexander,* 130 Atl. p. 133, the Supreme Court had before it for consideration, a real estate contract embodying a clause similar to the one in question. The facts there were that the buildings encroached upon the highway, and that there was an encroachment upon the premises in question by reason of a gutter on a building in the rear. The Supreme Court held at page 136:

> "It becomes, therefore, immaterial whether encroachments are extensive or only slight, and whether the buildings extend beyond the lines only a few inches or many feet, for the parties to a contract clearly have the right to make such stipulations in a contract as they see fit, so long as such stipulations do not violate the law or public policy."

Another case upon which the complainant relies, is the case of *Wyatt* v. *Bergen,* 2 N. J. Misc. Reports p. 1169, in which case, at page 1174, Vice-Chancellor Griffin held that:

> "Where the encroachment is slight, the Court might decree specific performance with an abatement of the purchase price (Schienman, et al. *v.* Bloch, 97 N. J. Law 404; 117 Atl. Rep. 389; affirmed 98 N. J. Law 571; Doherty *v.* Egan Waste Co., 91 N. J. Eq. 400, 406; 11 Atl. Rep. 499); *yet, where the contract contained a covenant that there were no encroachments, the rule seems to be otherwise.*" (Italics ours.)

Defendants' brief, at page 18, cites the case of *Model Plan Agency* v. *Dimond,* reported in N. J. Adv. Reports, Vol. 5, No. 4, page 70, in which case Vice-Chancellor Berry had for consideration the interpretation of an express covenant that title to land does not depend upon adverse possession. However, a careful reading of the opinion by Vice-Chancellor Berry will disclose that he determined as a fact, at page 75, that:

> "I need only say that the defendant's title does not rest in adverse possession within

the meaning of the words as used in the contract."

Therefore, this case cannot be held to favor the defendants as an argument by analogy, the Vice-Chancellor having determined as a fact that the vendor's title did not depend upon adverse possession. In other words, if the fact had been determined that title did depend upon adverse possession, then it is logical to assume the Vice-Chancellor would have given a contrary decision and would not have dismissed the vendee's bill of complaint.

The principle which seems to form the basis of the decisions in the line of cases from *Herring* v. *Esposito, supra,* to *Wyatt* v. *Bergen, supra,* is one of intention of the parties to a contract. Where a real estate contract has been executed, with no express covenant against encroachments, a court of equity will, in a proper case, nevertheless, decree specific performance in favor of a vendor and against a vendee, if the encroachments are slight or unsubstantial, giving to the vendee an abatement in purchase price, commensurate with said defects. This being the law, there followed of necessity a degree of uncertainty in the minds of sellers and purchasers of real estate, whether encroachments existing upon a particular parcel were such as would move a court of equity either to grant or refuse a vendor, relief against a vendee for specific performance. Moreover, not alone from a legal standpoint, but as a practical proposition, marketability of real estate is seriously affected where encroachments exist. It is common knowledge that transactions involving the sale and purchase of real estate have failed of consummation merely because of the existence of encroachments, even though such encroachments

were slight, unsubstantial and inconsequential. To the lay mind, the mere existence of an encroachment, irrespective of its degree, constitutes a black mark against any particular piece of real estate. This is true even though that mental attitude on the part of the layman is in many instances illogical and unfounded. Therefore, in order to protect purchasers who, of course, know nothing of the physical condition of real estate, with respect to the possibility of encroachments, at the time that they enter into agreements to purchase, a very common practice has arisen among solicitors representing purchasers to insert the clause against encroachments for the protection of their clients. This clause, then, becomes one that is expressly embodied in the contract, interpreting the intention of the parties to said contract at the time of its execution and delivery. For this reason, Vice-Chancellor Bentley, in the *Herring* v. *Esposito* case, *supra,* and the other jurists in handing down the decisions quoted above, have determined to give effect to this express encroachment clause, by adjudging that parties to a contract must stand by that contract when express provision is made with regard to a particular subject matter. To do otherwise would undermine the very foundation upon which is built up the great mass of law pertaining to the interpretation of contracts and the performance of their terms. Nothing is more important in the law of contracts, and nothing is more fundamental than that courts will seek to give expression to the intent of the parties to said contract, as long as no law or public policy is contravened thereby. An analogy to the subject of the suspicion with which the average man views the question of encroachments may be found in the attitude of the average man to the question of tax titles. Those

trained in the law know very well that a perfected tax title will vest in its holder a complete right against the whole world; yet to mention to a prospective purchaser that a vendor's title depends in part upon a statute for the sale of the land by a municipality for non-payment of taxes, means the termination of pending negotiations with respect to that transaction. This is so even though said prospective purchaser is advised by his own solicitor that a perfected tax title is a good title. In other words, to mention Martin Act title or tax title or encroachment to a prospective purchaser, in the majority of cases, may result in the refusal of said prospective purchaser to continue his negotiations. To cover this contingency, and to protect his client in order to give him what he desires to purchase, the careful lawyer of today embodies in the contract of sale and purchase a clause that the title to the land is not derived from any Martin Act proceedings or any act for the sale of land for non-payment of taxes or assessments. When included in a contract, the courts will not compel a vendee to purchase where the vendor's title does depend upon Martin Act proceedings or any act for the sale of land for non-payment of taxes or assessments, not because said title may not be good, but because the intention of the parties was that the vendor sell and the purchaser buy a title which does not depend upon said proceedings. In other words, the courts regard the express intention of the parties to a contract as paramount where said contract leaves no room for doubt or elastic judgment. Another case map be cited to substantiate this point: *Miron* v. *Borello,* N. J. Adv. Reports and Weekly Law Review, Vol. 4, No. 15, p. 344. In this case, the contract provided that the buildings comply with the regulations of the

State Board of Tenement House Supervision. The inspector's report showed violations. The Supreme Court, in a *per curiam* decision, at page 345, stated:

> "Upon this point, it is also urged that the tenement house violations, if any, were unsubstantial and did not justify rejection of the proffered title. They were sufficiently substantial to justify the defendants in making an allowance therefor, and in any event, they were specially provided for as an encumbrance in the contract of the parties."

The refusal of the Court to permit testimony relative to the question of abatement in purchase price, was entirely proper, in that the issue in this suit precluded the granting of an abatement in view of the existence of the encroachment clause. Abatement is a proper remedy where encroachments are unsubstantial and where the contract fails to contain a clause against encroachments.

POINT 3.

The complainant is not deprived of the protection of the Court of Equity by reason of any act or conduct on its part.

Point 3 of defendants' brief attempts to invoke in their favor the maxim of "He who comes into equity, must come with clean hands." This maxim was interpreted in the case of *Neubeck* v. *Neubeck,* 119 Atl. p. 26, at p. 27, where Mr. Justice Trenchard says:

> "While the maxim 'He who comes into equity must come with clean hands' has a very wide application, it has also its limitations. It does not repel all sinners from courts of equity, nor does it apply to every unconscientious act or inequitable conduct on the part of the complainants. The inequity which deprives a suitor of a right to

justice in a court of equity is not general iniquitous conduct unconnected with the act of the defendant which the complaining party states as his ground or cause of action, but it must be evil practice or wrong conduct in the particular matter or transaction in respect to which judicial protection or redress is sought."

Of what reprehensible conduct was the complainant guilty, sufficient to deprive it of the protection of the court of equity? As a purchaser, it made a contract with the defendants. No allegation of unfairness is made by the defendants with respect to the execution of the contract or with respect to the terms contained in said contract. The defendants were the owners of the property and had been for many years; the complainant, therefore, was naturally a stranger to the property. The defendants were charged with knowledge as to the physical condition of their property, which knowledge could not be ascribed to the complainant other than what the complainant gained from its own observation or representations made by the defendants. From its own observation it was humanly impossible for the complainant to perceive the existence of the encroachments of which it complains. Moreover, not only did complainant not rely upon its own futile observation, with respect to the existence of encroachments, but received from the defandants an express and solemn covenant that there existed no encroachments. By what process of reasoning can the defendants be heard to complain now, that the complainant is acting unscrupuously and unconscionably in objecting to the existence of encroachments? These encroachments were not put there by the complainant, either directly or indirectly; no act or deed on the part of the complainant can ascribe to the complainant the re-

sponsibility of the existence of said encroachments. The only thing that the complainant did with respect thereto, was to discover the existence of said encroachments by employing competent engineers and surveyors of ability, unquestioned by the defendants themselves. Are the defendants in a position to question the motives of the complainant for raising its objections? Is it relevant or material for the defendants to do so? The motive of complainant's objection may lie in the fact that the complainant had sold the contract in question to a third party at a profit, and was compelled to return the benefits derived from such an assignment of the contract because complainant's assignee pointed out the existence of said encroachments, and because of their existence, refused to consummate the transaction. Clearly the sentimental arguments contained in the brief of the defendants in Point 3 and Point 4, are unfounded as matter of law and of logic. For example, it is suggested in the closing argument of Point 3 of defendants' brief, at page 19, that "on the one hand stands an old couple who have used the premises in question as their home for many years, and on the other hand there stands a corporation whose obvious interest in the agreement is speculation, putting the courts of equity immediately on guard to see to it that the old couple is not unfairly dealt with." If conditions were as the defendants, by their brief, would have this Court believe, then what was their conduct? Did they take advantage of the so-called speculative boom and rise in prices? Is their property, fronting twenty-five feet on Jones street, in the City of Newark, with nothing erected thereon but an ancient dilapidated building, worth $16,000? Can an inference be drawn as to the value of their property from

the fact that said property was encumbered by a mortgage only in the nominal sum of $2,700? Were not the defendants represented by counsel at the time of the execution of the agreement? The answers to these questions are not, of course, material or relevant to the issue in this suit, yet they are inspired by the character of argument employed by the defendants in their brief. The old theory of looking upon a corporation with suspicion whenever it makes a move, has long been exploded, and the attempt by the defendants, in their brief, to paint the picture of the defendants as an old couple upon whom a powerful corporation, the complainant, suddenly descended with intent to take undue advantage, will, of course, go for naught.

POINT 4.

The evidence purporting to show that the City of Newark had passed an ordinance for the widening of Jones street, was properly excluded.

With respect to Point 5, the complainant contends that no such purpose was expressed to the Court, underlying the offer in evidence of the ordinance of the City of Newark, providing for the widening of Jones street. As a matter of fact, the State of Case discloses that the solicitor for the defendants suddenly offered in evidence minutes of the Board of Commissioners, June, 1926, pages 5 to 7 and 118 to 122 (State of Case, p. 42, ll. 31 to 40). Nowhere in this offer did the solicitor for the defendants state that he offered in evidence any ordinance. He merely offered the minutes of the Board of Commissioners, without stating to what said minutes referred, nor did he state to the Court the purpose of said offer. Furthermore, the complainant respectfully contends that the proper procedure of the solicitor of the defendants should have been to read or attempt to read said ordinance in the record, and upon refusal of the Court to permit said ordinance in the record, to assign said refusal as a ground of appeal; but having failed to do this before the Court on final hearing, the defendants are now precluded from raising said point before this Court. It might be pointed out that the thought contained in Point 5 of the brief is in direct contradiction to the argument contained in Point 4 of their brief, and also in direct contradiction to the line of thought embodied in the abstract of defendants' answer and cross-bill of complaint to be found in the beginning of defendants' brief, which abstract is not in accord in many particulars with the answer filed by the defendants. Whether or not the City of Newark will widen Jones street, and whether or not the building in question will be torn down, is immaterial to the issue in this suit. The mere passing of an ordinance by the City of Newark for the widening of Jones street does not guarantee that action. A rescission or a modification of said ordinance is possible. There is nothing in the record to indicate that a rescission or modification has not taken place. Even if the ordinance still stands, the questions remain: When will the city condemn the property? When will it widen Jones street? When will it make an appropriation to cover said improvements? These questions are asked not because the answers to them are essential, but merely for the purpose of showing that the passing of an ordinance by the City of Newark is in itself of little consequence and materiality to the question involved in this suit.

POINT 5.

The evidence of complainant's surveyors furnished a proper basis for finding the fact to be that the building in question was not within the boundary lines of the premises, and that encroachments existed.

Answering Point 6 and Point 7, the Court's attention is respectfully called to the record containing the evidence given by the surveyors. Mr. Clawans, surveyor for the complainant, states that the intersection of Springfield avenue and Jones street is a definite starting point, and that it has been used continuously since 1856, as a starting point for measurements for property on Jones street (State of Case, p. 26, ll. 20 to 30). That being so, and having a distance to measure of three hundred seventy-five feet eight inches on the easterly side of Jones street, northerly from Springfield avenue, it needs no surveyor to understand that the beginning point of the defendants' premises in question was not difficult of location. Again we find that the method employed by Mr. Clawans was exactly that of practical occupation (State of Case, p. 47, ll. 8 and 9). The Court's attention is respectfully called to the three surveys in evidence and made part of the record (State of Case, opposite pp. 18 and 48). It will be noted that the surveys of Clawans and Kettenring and Borrie and Kreiner, surveyors for the complainant, are greatly more detailed than that of Clement F. Lemassena, surveyor for the defendants. Although the entire controversy relates to the southerly boundary line of the premises in question, it is, nevertheless, necessary to give a moment's attention to the northerly line as depicted on the three respective surveys. Those made by Clawans and Kettenring, and Borrie and Kreiner

show that the extreme northwesterly point of the building on the premises in question begins somewhat to the south of said northerly line and then continues easterly for a distance until a jog is depicted, which jog carries the wall of the said building northerly for a short distance and then the said wall runs easterly again until the extreme northeasterly end of said northerly wall is reached. The entire northerly wall of the building itself from its most westerly point to its most easterly point, is shown to be within the line on both these surveys, and both surveys agree in depicting a jog in this said northerly wall of the building. Now, turning to the Lemassena survey, we find that the northwesterly point of the building is depicted to be exactly on the line and then running easterly along said northerly wall of said building, we find that it continues exactly on the line, tapering off the line to the south as it approaches and ends in the northeasterly extremity of said building. On the Lemassena survey said northwesterly point of the building begins exactly in the northerly boundary line of the premises, and then said northerly wall runs *in a straight line* until it tapers off to the south as it approaches and ends. *Why, it is significant to ask, does Lemassena's survey fail to disclose the jog that is depicted on the surveys both of Clawans and Kettenring, and Borrie and Kreiner?* The answer to this question can only be left to conjecture and argument. Is it probable that a surveyor of Mr. Lemassena's standing overlooked the fact that there was a jog in the northerly building line? That is hardly possible and highly improbable. But it is probable, logical and fair to assume that, if the extreme northwesterly point of the building on defendants' premises in question, began exactly in the northerly boundary line,

as shown on the Lemassena survey, then, if Mr. Lemassena would have depicted on his survey the jog disclosed on the surveys both of Clawans and Kettenring and Borrie and Kreiner, the easterly portion of the northerly wall of the building, beginning with the jog and extending to the extreme northeasterly point of the building, would have been thrown over entirely toward the north and beyond the northerly boundary line of defendants' premises, causing said easterly portion of the northerly wall to encroach upon the adjoining premises to the north of defendants' land. In other words, Mr. Lemassena, in clearing the southerly line of defendants' land of encroachments, undoubtedly must have shifted the entire building to the north, and in order to prevent the easterly part of the north wall of the building from encroaching on the premises to the north of defendants' land, failed to disclose the existence of the jog in question.

The method of practical occupation, if it means anything at all, means that the surveyor observed physical conditions as they actually are. If Mr. Lemassena personally made an actual survey of the premises in question, with particular attention focused on the building erected on said premises, why did he not observe this jog in the northerly wall of said building? Furthermore, if he did observe this jog, especially when he was so particularly interested in locating the building on said premises by the method of practical (*i. e.* actual) occupation, why did he fail to depict this jog on the map, which he produced in evidence as the result of his alleged practical (*i. e.* actual) occupation method? It can hardly be said that this omission was due to failure to observe this jog. The naked eye could discern it; surely surveyors' instruments would

disclose it. The verbal testimony of Mr. Lemassena that he used the only possible method (that of practical occupation) is refuted by his own deed or act, in failing to show the actual condition of the northerly wall of said building. The surveyor having failed in this respect, it was a fair inference for the Vice-Chancellor to draw, that he failed in other material respects, making his testimony unreliable and of little or no value.

The Court's attention is respectfully called to the following excerpt of Mr. Lemassena's testimony:

Question: I asked you whether the surveyors may reasonably differ?

Answer: On the line of Jones street, yes.

Question: And they may reasonably differ on the southerly line of this property?

Answer: They never can (State of Case, p. 45, ll. 8 to 13).

Technical knowledge of the science of surveying need not be employed to realize that this testimony of Mr. Lemassena condemns his value as an expert in this case. He testifies that surveyors can differ on the line of Jones street, and yet cannot differ on fixing the southerly line of the premises in question, which southerly line runs easterly from the easterly line of Jones street. Common sense demonstrates beyond all doubt that if the easterly line of Jones street is drawn differently by different surveyors, then it *must* of necessity follow that said southerly line of said premises in question would have to be drawn to correspond with the way said easterly line was drawn.

For example, let us assume that a surveyor runs the line of Jones street to that of Spring-

field avenue at a fixed angle called "X" degrees, from which it would follow, let us assume, that the southerly line of defendants' property formed an angle to Jones street called "Y" degrees.

Now, if another surveyor ran said line of Jones street at a totally different angle to Springfield avenue, called "A" degrees, it would necessarily follow that the angle formed by the said southerly line of defendants' premises could no longer be at the same "Y" degrees to Jones street, but this latter angle would have to be changed to correspond with the "A" degrees angle.

Therefore, in testifying that the line of Jones street is a *variant,* whereas the southerly line of defendants' premises to said line of Jones street is a *constant,* Mr. Lemassena has evolved a novel but impossible theorem.

The defendants, in their brief, having given such apparently important significance to the method of practical occupation, allegedly used by their surveyor, Mr. Lemassena, it may be pertinent to point out here that a glance at the survey of complainant's surveyor, Mr. Clawans, will disclose that this survey is marked "Ancient Occupation." This designation was used on said survey, which was the first made in connection with defendants' title in question, long before suit was anticipated by either party and with no thought of having Mr. Clawans in court to testify for the complainant.

The testimony of Mr. Lemassena is therefore of little value for at least three reasons: First, he admitted himself that he was uncertain as to whether his interpretation of the boundary lines in question was correct (previously discussed in

this brief on p. 4); second, his survey admitted in evidence varies from that of Clawans and Kettenring and from that of Borrie and Kreiner in failing to depict accurately and truthfully the physical condition of the building on the premises, with special reference to the southerly and northerly walls of said building; and third, his attempt to convince the Court that the southerly line of defendants' premises is fixed without regard to the easterly line of Jones street, which he claimed was indefinite, should be disregarded as mathematically impossible. The Court is then left with complainant's surveyors whose testimony was characterized by succinctness, clarity and definiteness. Moreover, with respect to complainant's surveyor, Mr. Clawans, the Court has before it not only his verbal testimony that he used the practical occupation method, but also that immutable and incontrovertible testimony in the form of his survey, made long before this suit was instituted, marked by the designation, "Ancient Occupation." The evidence of complainant's surveyors, therefore, standing unchallenged as to method and results formed an adequate basis for the factual finding that encroachments did exist.

For the reasons, therefore, that the evidence established as a fact that the building on the premises in question was not all within the boundary lines of the deed therefor, and that encroachments existed contrary to the express covenant in the agreement against encroachments, and that the complainant is not estopped from invoking the aid of a court of equity by reason of any act or conduct on its part, and that certain evidence proffered by the defendants was properly excluded by the Vice-Chancellor at final hearing, and for the further reason that the

evidence of complainant's surveyors furnished a proper basis for the factual finding that the alleged encroachments did exist, the complainant respectfully contends that the decree made and entered in the Court of Chancery in this cause be affirmed.

Respectfully submitted,

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with Complainant-Respondent.