INDEX

IN CHANCERY OF NEW JERSEY

Between JOHN K. HARMINA, *Complainant.* and JOSEPH SHAY, *Defendant.*	On Bill, etc.

NOTICE OF APPEAL

The defendant, Joseph Shay, hereby appeals from the whole and every part of the Final Decree made in the above entitled cause bearing date the second day of September, 1926, and particularly from such part thereof as decrees that the defandant shall specifically perform the contract therein mentioned and as awards the complainant a lien upon the property therein mentioned, to the Court of Errors and Appeals in the last resort in all causes.

Dated: September 23, 1926.

STAMLER, STAMLER & KOESTLER,

Solicitors for and of Counsel with the Defendant.

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

SAMUEL KOESTLER,

of Counsel with the Defendant.

PETITION OF APPEAL

NEW JERSEY COURT OF ERRORS AND APPEALS

JOHN K. HARMINA, *Complainant-Respondent* vs. JOSEPH SHAY, *Defendant-Appellant.*	On Appeal

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

The petition of Joseph Shay, the appellant in the above entitled cause, respectfully shows that your petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date the Second day of September, 1926, wherein the said John K. Harmina was complainant and the said Joseph Shay was defendant, in this respect, to-wit: that the said decree adjudges that the agreement of sale mentioned therein be specifically performed by the defendant and that the said defendant do pay to the complainant a certain sum of money and deliver a bond and mortgage and accept a deed of conveyance for said property and further decrees a lien upon said property in favor of the complainant for the unpaid purchase price. And your petitioner humbly appeals from the whole and each and every part and particularly from the portion above recited, upon the

ground that the same is erroneous for that the Chancellor should have decreed a dismissal of said bill of complaint and the title tendered by complainant to the defendant was unmarketable.

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

STAMLER, STAMLER & KOESTLER,

Solicitors for Appellant.

SAMUEL KOESTLER,

Of Counsel with Appellant.

ANSWER TO PETITION OF APPEAL

John K. Harmina, complainant-respondent, by Arthur M. Birdsall, his attorney, comes into Court and says there is no error either in the record and proceedings aforesaid, or in the making of the decree aforesaid, and he prays here that the Court may proceed to examnie as well the record and proceedings aforesaid, as the matters assigned as the grounds of appeal, and that the decree aforesaid, in manner aforesaid made, may in all things be affirmed, etc.

ARTHUR M. BIRDSALL,

Solictior for and of counsel with respondent.

BILL FOR SPECIFIC PERFORMANCE

IN CHANCERY OF NEW JERSEY

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

The complainant, John K. Harmina of the Borough of Spring Lake, in the County of Monmouth and State of New Jersey, respectfully shows that:

1. On August 24th, 1925, the complainant was lawfully in possession and seized of all those certain lots, tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the Borough of Belmar, in the County of Monmouth and State of New Jersey, being part of lot number 2906 on a plan of lots of the Ocean Beach Association, duly filed in the Clerk's Office of the County of Monmouth aforesaid, bounded and described as follows, to-wit:

Beginning at a point or stake in the easterly line of "F" Street as laid down on the aforesaid plan of lots, distant fifty (50) feet northerly from the northerly line of Sixth Avenue and Extending thence (1) easterly at a right angle to said "F" Street and along the southerly line of lot number 2905, one hundred feet; thence (2) southerly at a right angle to last mentioned course, fifty feet to the northerly line of Sixth Avenue; thence (3) westerly at a right angle to last mentioned course and along the said northerly line of Sixth Avenue, one hundred feet to the easterly line of "F" Street, and thence (4) northerly at a right angle to the last mentioned course and along the easterly line of "F" Street, fifty feet to the place of beginning.

Also, all that certain lot in the Borough of Belmar, County of Monmouth and State of New Jersey.

Beginning at a point or stake in the easterly line

of "F" Street, distant 50 feet northerly from the northerly line of Sixth Avenue, and extending from thence (1) easterly at a right angle to said "F" Street, one hundred feet; thence (2) northerly at a right angle to last mentioned course, six inches; thence (3) westerly at a right angle to last mentioned course, one hundred feet to the easterly line of "F" Street; thence (4) southerly at a right angle to last mentioned course and along the easterly line of "F" Street, six inches to the place of beginning.

2. On the date last mentioned the complainant entered into a certain agreement in writing with Joseph Shay, the within named defendant, wherein and whereby complainant agreed to convey the said lands and premises by deed of warranty, on or before January 2nd, 1926, to the said defendant, in consideration of the sum of Sixteen Thousand Dollars ($16,000), and the said defendant agreed to pay to complainant the said purchase price of Sixteen Thousand Dollars ($16,000) by the payment of Fifteen Hundred Dollars ($1500) at the time of the execution of said agreement; Twenty-five Hundred Dollars ($2500) on delivery of the deed on or before January 2nd, 1926; Seven Thousand Dollars ($7000) by assuming a mortgage covering the said premises, said mortgage being in the sum of $7500.00 on which mortgage the sum of Five Hundred Dollars has been paid, leaving the aforesaid balance due thereon of $7000; Five Thousand Dollars ($5000) by a purchase money bond and mortgage containing the usual interest, tax, assessment, insurance and installment default clauses, with interest at six per cent per annum, payable semi-anually for three (3) years. The said premises by the terms of said agreement in writing, were to be conveyed subject to restrictions contained in a deed from one Lewis to Harmina, the complainant, and subject also to covenants, conditions and restric-

tions appearing of record and Zoning ordinances, if any. And it was further agreed that the said deed should be delivered at the office of Arthur M. Birdsall, 701 Ninth Avenue, Belmar, New Jersey, between the hours of nine in the forenoon and five o'clock in the afternoon on the Second day of January, 1926. A true copy of the said written agreement is hereto annexed and made a part hereof.

3. The defendant paid to complainant the said sum of Fifteen Hundred Dollars ($1500) at the time of the execution and delivery of the said agreement in writing.

4. On January 2nd, 1926, the complainant attended at the said office of Arthur M. Birdsall in Belmar, New Jersey, between the said hours of nine in the forenoon and five o'clock in the afternoon and exhibited a General Warranty deed made by complainant and Julia Harmina, his wife, to Joseph Shay, the defendant, said deed covering the premises described in said agreement and drawn in accordance with the terms thereof. Complainant inquired at the said office, at the said time and place for the defendant in order to tender him the said deed. Complainant thereupon communicated with James D. Carton, attorney for the said defendant, who informed complainant that a survey of the said premises had been made and a part of the buildings on said lands extended over a restricted building line established in one of the original deeds of conveyance for the said lands and for this reason the defendant would not accept title to the said lands and premises. Complainant thereupon assured the defendant that the alleged violation of the building line restriction in no way violated the terms of the said agreement existing between complainant and defendant, and stated that he was willing to deliver the said Warranty deed in accordance with the said contract. Defendant refused to

accept the same and has continued in his refusal to accept the same because of the alleged encroachment of the buildings over the restricted building line. A true copy of the said General Warranty deed made by complainant to defendant is hereto annexed and made a part hereof.

5. Complainant has always been ready and willing and now tenders himself ready and willing to perform his part of the said agreement, and, on being paid the remainder of the said purchase money, with interest, and upon the execution and delivery by defendant to the complainant of the mortgage mentioned in the said agreement, to convey the said lands and premises to the said Joseph Shay by a Warranty deed duly executed by complainant, subject to the terms of the said written agreement.

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

1. That Joseph Shay, who is the defendant to this suit, may answer this bill of complaint and each statement therein made:

2. That the said Joseph Shay may be compelled by the decree of this court specifically to perform the said agreement with complainant, and to pay to complainant the remainder of the said purchase money, as in and by said agreement provided, with interest from the time said purchase money ought to have been paid, on the delivery by complainant to said Joseph Shay of a deed executed by complainant, as in said agreement provided.

3. That the defendant may be compelled to perform the said contract in its entirety and that the complainant may have such other and further relief as may be equitable.

4. That in case the said defendant Joseph Shay, should, within the time limited by this court for such performance of said contract, fail and neglect,

upon the tender of said deed, to pay the said remainder of said purchase money as aforesaid, that then and in that event the said sum, together with interest and costs, may be and become a lien upon the said lands and premises in favor of the complainant, and that the said lands and premises may be sold under the direction of this court for the satisfaction of such lien so impressed on said lands and premises; and in case a deficiency should arise upon said sale, that the said defendant may be ordered by this court to pay said deficiency, together with interest and costs to this complainant.

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

ARTHUR M. BIRDSALL,
Solicitor for and of Counsel with Complainant.

True Copy of Contract for Sale of Property Between Complainant and Defendant.

This Agreement, made the Twenty-fourth day of August, in the year of our Lord One Thousand Nine Hundred and Twenty-five, between John Harmina and Julia Harmina, his wife, of the Borough of Belmar, in the County of Monmouth and State of New Jersey, party of the first part; and Joseph Shay of the City of Elizabeth, in the County of Union and State of New Jersey, party of the second part:

Witnesseth, That the said party of the first part, for and in consideration of the sum of Sixteen Thousand ($16,000) Dollars to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said

party of the second part, that the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed of General Warranty free of all encumbrances except as hereinafter stated, on or before the Second day of January next ensuing the date hereof, all that certain lot, tract or parcel of land and premises hereinafter particularly described situate, lying and being in the Borough of Belmar, in the County of Monmouth and State of New Jersey, being part of lot number 2906 on a plan of lots of the Ocean Beach Association, duly filed in the Clerk's Office of the County of Monmouth aforesaid, bounded and described as follows, to wit:

Beginning at a point or stake in the easterly line of "F" Street as laid down on the aforesaid plan of lots, distant fifty (50) feet northerly from the northerly line of Sixth Avenue and extending thence (1) easterly at a right angle to said "F" Street and along the southerly line of lot number 2905, one hundred feet; thence (2) southerly at a right angle to last mentioned course, fifty feet to the northerly line of Sixth Avenue; thence (3) westerly at a right angle to last mentioned course and along the said northerly line of Sixth Avenue, one hundred feet to the easterly line of "F" Street, and thence (4) northly at a right angle to the last mentioned course and along the easterly line of "F" Street, fifty feet to the place of beginning.

Being the same premises conveyed to said John Harmina by Julius Lewis and wife by deed dated May 1, 1924, and recorded in the Monmouth County Clerk's Office in Book 1256 of Deeds, on pages 276, etc.

Also, all that certain lot in the Borough of Belmar, County of Monmouth and State of New Jersey.

Beginning at a point or stake in the easterly line of "F" Street, distant 50 feet northerly from the northerly line of Sixth Avenue, and extending from thence (1) easterly at a right angle to said "F" Street, 100 feet; thence (2) northerly at a right angle to last mentioned course, 6 inches; thence (3) westerly at a right angle to last mentioned course, 100 feet to the easterly line of "F" Street; thence (4) southerly at a right angle to last mentioned course and along the easterly line of "F" Street, 6 inches to the place of beginning.

Being same premises conveyed to John Harmina by William Fox and wife, by deed dated May 1, 1924, and recorded in the Monmouth County Clerk's Office in Book 1256 of Deeds, on pages 274, etc.

Above described premises being subject to covenants, conditions and restrictions contained in former deeds for the same premises.

Together with the shelves and shelving and permanent fixtures now constituting a part of the premises.

Subject to the restriction contained in deed from Lewis to Harmina that the premises hereby conveyed shall not, nor will be used for a period of five years from date of same for the sale of shoes, ladies or men's wearing apparel or dry goods. Said deed being dated May 1st, 1924.

And the said Joseph Shay for himself, his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, his heirs, executors, administrators and assigns, that the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the sum of Sixteen Thousand ($16,000) Dollars as and for the purchase money of the foregoing described land

and premises, in the following manner, that is to say:

On execution of this agreement for which this is also a receipt	$1500.00
On delivery of deed, cash on or before Jan. 2, 1926	2500.00
By assuming the mortgage at present a lien on the premises, and paying the same according to the terms thereof, said mortgage being in the sum of $7,500.00 on which mortgage there has been paid the sum of $500.00 leaving a balance due thereon of	7000.00
On Purchase Money Bond and Mortgage, same containing usual interest, tax, assessment, insurance and installment default clauses, and an agreement not to claim credit on the interest payable on bond and mortgage, by reason of any tax assessed, or to be assessed against the premises, with interest at six per cent payable semi-annually for three (3) years	5000.00

Provided, however, and it is expressly agreed that the said mortgage of $5000.00 shall continue as a second mortgage until the same shall be paid according to the terms thereof.

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

And the said party of the first part hereby agrees to pay to the licensed and authorized agent Dildine & Dildine of Belmar, N. J., a commission of five (5) per cent on the purchase price aforesaid.

And it is further agreed, by the parties to these

presents, that the said party of the second part, his heirs and assigns, may enter into the upon the said land and premises on the Second day of January next ensuing the date hereof, and from thence take the rents, issues and profits to and their use.

And it is further agreed, by the parties hereto, that the said deed shall be delivered and received at the office of Arthur M. Birdsall, 701 Ninth Avenue, Belmar, N. J., between the hours of nine o'clock in the forenoon and five o'clock in the afternoon on the said Second day of January next ensuing the date hereof.

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

Gas and electric fixtures, gas stoves, hot water heaters and chandeliers, screens, shades, heating apparatus, if any, is represented to be owned by seller and is included in this sale.

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

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

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

or board enforcing the same where such ordinances, regulations and said act apply.

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

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

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

And it is hereby agreed by and between the parties hereto that in case any street improvements are made, or have been made, upon which the property mentioned herein is located, up to the time of the delivery of deed, but not assessed, such assessment shall be borne by the party of the first part,

heirs, executors, administrators and assigns.

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

In Witness Whereof, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

JOHN HARMINA
JULIA HARMINA
JOSEPH SHAY
Signed, Sealed and Delivered
in the presence of
Raymond Dildine.

True Copy of General Warranty Deed from Complainant to Defendant.

This Indenture, made the Thirty-first day of December, in the year of our Lord One Thousand Nine Hundred and Twenty-five, between John K. Harmina and Julia Harmina, his wife, of the Borough of Spring Lake, in the County of Monmouth and State of New Jersey, party of the First Part; and Joseph Shay of the City of Elizabeth, in the County of Union and State of New Jersey, party of the Second Part:

Witnesseth, That the said party of the First Part, for and in consideration of One Dollar, and other valuable consideration, lawful money of the United States of America, to them in hand well and truly paid by the said party of the Second Part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the First Part being therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the Second Part, and to his heirs and assigns, forever, all that certain lot, tract or parcel

of land and premises, hereinafter particularly described, situate, lying and being in the Borough of Belmar, in the County of Monmouth and State of New Jersey, being part of lot number Twenty-nine Hundred and Six (2906) on a plan of lots of the Ocean Beach Association, duly filed in the Clerk's Office of the County of Monmouth aforesaid, bounded and described as follows, to-wit:

Beginning at a point or stake in the easterly line of "F" Street as laid down on the aforesaid plan of lots, distant fifty (50) feet northerly from the northerly line of Sixth Avenue and extending thence (1) easterly at a right angle to said "F" Street and along the southerly line of lot number twenty-nine hundred and five (2905). One Hundred (100) feet; thence (2) southerly at a right angle to last mention course fifty (50) feet to the northerly line of Sixth Avenue; thence (3) westerly at a right angle to last mentioned course and along the said northerly line of Sixth Avenue, One Hundred (100) feet to the easterly line of "F" Street, and thence (4) northerly at a right angle to the last mentioned course and along the easterly line of "F" Street, fifty (50) feet to the place of Beginning.

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

All that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Borough of Belmar, in the County of Monmouth and State of New Jersey.

Beginning at a point or stake in the easterly line of "F" Street, distant fifty (50) feet northerly from the northerly line of Sixth Avenue, and extending thence (1) easterly at a right angle to said "F" Street, one hundred (100) feet; thence (2) northerly at a right angle to last mentioned course, six

(6) inches; thence (3) westerly at a right angle to last mentioned course, one hundred (100) feet to the easterly line of "F" Street; thence (4) southerly at a right angle to last mentioned course and along the easterly line of "F" Street, six (6) inches to the place of Beginning.

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

The first above described tract being the same premises conveyed unto the said John K. Harmina by Julius Lewis and wife, by deed dated May 1st., 1924 and duly recorded in the Monmouth County Clerk's Office in Book 1256 of Deeds, on pages 276 &c., and the second described tract being the same premises conveyed unto the said John K. Harmina by William H. Fox and wife, by deed dated May 1st., 1924 and duly recorded in the Monmouth County Clerk's Office in Book 1256 of Deeds, on pages 274 &c.

Subject, also, to the lien and operation of a certain indenture of mortgage in the sum of $7,500.00 on which mortgage there has been paid the sum of $500.00 leaving a balance due thereon of $7,000.00, which mortgage the said party of the second part hereby agrees to assume and pay as a part of the consideration hereof.

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

Also, all the estate, right, title, interest, property, claim and demand whatsoever, of the said property of the First Part, of, in and to the same, and of, in and to every part and parcel thereof.

To Have And To Hold, all and singular, the above described land and premises, with the appurtenances, unto the said party of the Second Part, his heirs and assigns, to the only proper use,

benefit and behoof of the said party of the Second Part, his heirs and assigns forever.

And the said John K, Harmina does for himself, his heirs, executors and administrators covenant and agree to and with the said party of the Second Part, his heirs and assigns, that the said John K. Harmina, is the true, lawful and right owner of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the Second Part, hereby made or intended to be made, for the above described land and premises, can or may be charged, altered or defeated in any way whatsoever; except as aforesaid.

And also that the said party of the First Part now has good right, full power and lawful authority to grant, bargain, sell and convey the said land and premises in manner aforesaid;

And also, that John K. Harmina will WARRANT, secure, and forever defend the said land and premises unto the said Joseph Shay, his heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever.

In witness whereof, the said party of the First Part have hereunto set their hands and seals the day and year first above written.

John K. Harmina (L. S.)
Julia Harmina (L. S.)

Signed, Sealed and Delivered in:
the presence of:
Horatio Clayton.
Duly acknowledged.

ANSWER

IN CHANCERY OF NEW JERSEY

Between JOHN K. HARMINA, *Complainant.* and JOSEPH SHAY, *Defendant.*	On Bill, etc.

The defendant, Joseph Shay, residing in the City of Elizabeth, in the County of Union and State of New Jersey, says:

1. He admits Paragraph 1.
2. He admits Paragraph 2.
3, He admits Paragraph 3.
4. He has no information concerning the statement in Paragraph 4 and, therefore, neither admits nor denies the same, but says prior to the said Second day of January, 1926, defendant through his attorney had many conferences with the attorney of the complainant concerning the violation of the conditions in the deeds to complainant's property covering the matter of building restrictions.

5. He denies Paragraph 5.

This defendant further says that he entered into a contract for purchase, attached to the Bill of Complaint, in good faith and was and is anxious to carry out the terms of said contract at such time as the complainant is able to carry out the terms of said contract by the removal of the encroachments of the buildings on said lot. That

after entering into said contract defendant caused a survey of said lot to be made with the physical location of the buildings on said lot and found the fact to be that the buildings not only encroached over the street line of F Street, in the Borough of Belmar, but also encroached some fourteen feet over the restricted building line on the Sixth Avenue side of said lot and called upon the complainant to either remove said encroachments or to return to defendant the deposit paid on account of said contract. That the lot referred to in said contract, namely 2906, as shown on a plan of lots of the Ocean Beach Association, duly filed in the Clerk's Office of the County of Monmouth, was originally conveyed by the Ocean Beach Association to one John R. Irons by Deed dated February 7, 1883, recorded in the Monmouth County Clerk's Office in Book 365, at pages 246 &c. That said deed contained the following provision:

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

That a corporation known as the Ocean Beach Association was incorporated under the Laws of

the State of New Jersey on March 13th, 1873, Public Laws 1873, Page 1089. Said corporation was authorized to purchase and sell lands and was specifically empowered to require any grantee from it to make and maintain such style and character of improvements on the lands conveyed or the streets fronting thereon as might seem most expedient for securing a uniform system of development and improvements. That said Association purchased a tract of land extending from the Atlantic Ocean to Shark River, in Monmouth County, with the intent of promoting the seaside resort which is now known by the name of Belmar. It at once laid out streets and avenues through the property east of F Street and filed maps thereof. The streets running north and south being designated by the letters of the alphabet and the avenues running east and west, at right angles with the streets, being designated by numbers. The streets were laid out sixty feet wide and the avenues eighty feet wide. Before any lots were sold by the Corporation its Board of Directors on June 9th, 1873, passed the following Resolution:

> "Resolved that it is highly important to maintain uniformity in the line of buildings on the main avenues of the Association, and for securing said object, that no building be erected on said avenues nearer to the line of same than twenty feet."
>
> This resolution was entered upon the minutes of the Corporation.

The said Ocean Beach Association was, prior to the said Seventh day of February, 1883, seized and possessed of the premises now owned by the complainant and referred to in the contract contained in complainant's Bill, the premises being known as Lot No. 2906 on a Map of Ocean Beach and by it,

on the Seventh day of February, 1883, conveyed to Joseph R. Irons, as aforesaid, containing the covenant hereinbefore set out, providing that the grantee and his heirs and assigns should not violate any of the provisions contained in said Act of Incorporation, by-laws, rules or regulations made by said Association at any time. That title to said Lot No. 2906 has been conveyed by various deeds from the said John R. Irons to the said complainant, complainant having purchased same from Julius Lewis by Deed dated May 1st, 1924 and recorded in the Monmouth County Clerk's office at Freehold, in Book 1256 of Deeds, pages 276 &c. That said deed contains the following provisions:

"Subject to covenants, conditions and restrictions contained in prior deeds for said premises."

That the contract between complainant and defendant, a copy of which is attached to the Bill of Complaint, contained a provision as follows:

"Above described premises being subject to covenants, conditions and restrictions contained in former deeds for the same premises."

All of said deeds referred to Lot 2006 as being shown on a Plan of lots of the Ocean Beach Association duly filed in the Clerk's office of Monmouth County, as aforesaid.

That said contract also contained the following provision:

"It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor, and that there are no encroachments

thereon and that the buildings comply with the municipal ordinances and regulations and the provisions of the New Jersey State Tenement House Act as enforced by the State Board of Tenement House Supervision, to be shown by the report of the department or board enforcing the same where such ordinances, regulations and said act apply."

Said contract also contained the following provision:

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

That the deed referred to in complainant's Bill as proposed to be tendered to the defendant refers to said lot as No. 2906 on lots of Ocean Beach Association Map and then provides as follows:

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

and after referring to the mortgage encumbrance existing on said premises provided that said premises—"are not encumbered by any mortgage, judgment or limitation, or by any encumbrance whatsoever."

This defendant further answering says that the buildings erected on said premises are erected in violation of the express conditions contained in the charter, by-laws and regulations of the said Ocean Beach Association in that the building on said lot encroaches over the street line of F Street thirteen one-hundredths of a foot in express violation of the provisions of the contract entered into between the parties and that said building as erected on said lot violate the regulations promulgated by said Ocean Beach Association to which said lot was made subject by the various convey-

ances of said lot in that said building encroaches the restricted distance of twenty feet from the street line. That said building in the rear encroaches and violates said provision being set back from the street line of said Sixth Avenue but nineteen and thirty-five one-hundredths of a foot and that the front half of said building encroaches said building restriction and is within seven and twenty-five one-hundredths of a foot of said street line instead of being set back twenty feet as required by the provisions of prior deeds to said premises, as is shown on a survey of said lot made by Claude W. Birdsall, Engineer and Surveyor, a blue print of said survey being hereto attached and by this reference made a part of this Answer.

Defendant, therefore, shows that complainant has not tendered a deed in compliance with the terms of said contract and is not able to tender a deed in compliance with same and, defendant, therefore, prays that he may be hence dismissed with his cost.

DURAND, IVINS & CARTON,

Solicitors of Defendant.

STIPULATION

IN CHANCERY OF NEW JERSEY

JOHN K. HARMINA,
Complainant.

vs.

JOSEPH SHAY,
Defendant.

ON BILL, etc.

It is hereby stipulated by and between the parties hereto that the following are the facts in this case and that the conclusions of the Court on the same shall be final.

That on August 24th, 1925, complainant entered into a written agreement with the defendant for the sale of premises in the Borough of Belmar, Monmouth County, New Jersey, known as part of lot number Twenty-nine hundred and six (2906) on a plan of lots of the Ocean Beach Association; said premises constitute a tract of land having a frontage of approximately fifty (50) feet on the easterly side of "F" Street and a frontage of approximately one hundred (100) feet on the northerly side of Sixth Avenue; that a large building is erected thereon consisting of two stores facing on "F" Street and the rest of the building consisting of rooms for dwelling purposes; that the selling price mentioned in said agreement is $16,000.00, and that the agreement recites the payment of $1500.00 at the time of the execution of the agreement and provides for the payment of $2500.00 on delivery of the deed, on or before January 2, 1926, $7000.00 by assuming a mortgage covering the said premises, and $5000.00 by a purchase money bond and mortgage

to be executed by the purchaser to the seller at the time of passing title, on or before January 2, 1926, payable in three years, with interest at six per cent per annum, payable semi-annually.

The said premises were to be conveyed subject to covenants, conditions and restrictions appearing of record, and said contract also contained a clause that the buildings upon the said premises are all within the boundary line of the property as described in the deed therefor and that there are no encroachments thereon.

The said premises were originally conveyed with the restriction that no building or part thereof should be erected nearer than twenty feet from the lot line on said Sixth Avenue. This building line restriction has been violated by the erection of buildings over the said restricted line by approximately fourteen feet, on the Sixth Avenue side and by thirteen one-hundredths of a foot encroachment over the street on the F Street side.

The violation of the building line restriction occurred about twenty-five years ago when the buildings were erected and no action has been taken by any person or corporation during this period of time.

Complainant has been ready to convey the premises by deed of General Warranty as provided for in the said contract and defendant has been unwilling to accept the title to the premises because of the physical location of the buildings over the restricted area or building line.

The matter in issue is whether or not the defendant can be compelled to accept title to the premises under the terms of the said contract with the buildings so erected in violation of the said building line restriction.

ARTHUR M. BIRDSALL,
Attorney for Complainant.

DURAND, IVINS & CARTON,
Attorneys for Defendant.

CONCLUSIONS

COURT OF CHANCERY OF NEW JERSEY

Chambers of Maja Leon Berry, Vice Chancellor.
Toms River, N. J., July 28, 1926.

Arthur M. Birdsall, Esq.
701—9th Avenue,
Belmar, N. J.

Durand, Ivins & Carton
Asbury Park, N. J.

Gentlemen:

I have examined with care the stipulation in the case of John K. Harmina v. Joseph Shay and I am of the opinion that the complainant is entitled to a decree requiring the defendant to specifically perform and that the encroachment of the building beyond the building restriction line is not a valid objection to the taking of title, in view of the fact that the building has stood in this position for a period of twenty-five years or more. The physical condition of the property in this respect must have been perfectly obvious to the purchaser. The encroachment on the F Street street line is so infinitesimal that I do not consider it a valid objection to the decree.

Very truly yours,

MAJA LEON BERRY.

MLB:ELS

FINAL DECREE

IN CHANCERY OF NEW JERSEY

JOHN K. HARMINA,
Complainant.
vs.
JOSEPH SHAY,
Defendant.

ON BILL, etc.

This cause having been submitted to the Court by a Stipulation agreed upon by the parties hereto, and with the consent of the parties that the conclusions of the Court on the same should be final, and the Court having examined the same, and the pleadings filed in this cause; and it appearing to the satisfaction of the Court that the complainant, John K. Harmina was, on the Twenty-fourth day of August, nineteen hundred and twenty-five, seized in fee simple of all that certain lot, tract or parcel of lands and premises situate, lying and being in the Borough of Belmar, in the County of Monmouth and State of New Jersey being part of lot number 2906 on a plan of lots of the Ocean Beach Association, duly filed in the Clerk's Office of the County of Monmouth aforesaid, bounded and described as follows, to wit:—

BEGINNING at a point or stake in the easterly line of "F" Street as laid down on the aforesaid plan of lots, distant fifty (50) feet northerly from the northerly line of Sixth Avenue, and extending thence (1) easterly at a right angle to said "F" Street and along the southerly line of lot number 2905, one hundred feet thence (2) southerly at a

right angle to last mentioned course, fifty feet to the northerly line of Sixth Avenue; thence (3) westerly at a right angle to last mentioned course and along the said northerly line of Sixth Avenue, one hundred feet to the easterly line of "F" Street, and thence (4) northerly at a right angle to the last mentioned course and along the easterly line of "F" Street, fifty feet to the place of Beginning.

Also, all that certain lot in the Borough of Belmar, County of Monmouth and State of New Jersey.

Beginning at a point or stake in the easterly line of "F" Street, distant fifty (50) feet northerly from the northerly line of Sixth Avenue, and extending from thence (1) easterly at a right angle to said "F" Street, one hundred feet; thence (2) northerly at a right angle to last mentioned course, six inches; thence (3) westerly at a right angle to the last mentioned course, one hundred feet to the easterly line of "F" Street; thence (4) southerly at a right angle to last mentioned course and along the easterly line of "F" Street, six inches to the place of Beginning; that on the said Twenty-fourth day of August, nineteen hundred and twenty-five, the said complainant John K. Harmina and his wife, Julia Harmina, entered into an agreement in writing with the defendant Joseph Shay, wherein and whereby said complainant and his said wife agreed to convey the said lands and premises by deed of warranty, on or before the Second day of January, 1926, to the said Joseph Shay, and the said Joseph Shay agreed to pay therefor the sum of Sixteen Thousand Dollars, by the payment of Fifteen Hundred Dollars, which was paid at the execution of said agreement, and by the payment of the remainder of the purchase price upon delivery of said deed by the payment of Twenty-five Hundrd Dollars in cash, and the execution of a

purchase money mortgage in the sum of Five Thousand Dollars, payable three years after date with interest thereon at the rate of six per cent per annum, payable semi-annually, and by assuming payment of a mortgage already covering the said premises in the sum of $7500, on which said mortgage the sum of $500 had been paid, leaving a balance due on the same of Seven Thousand Dollars, the said title to be passed on the Second day of January, 1926; that said premises were by the terms of said agreement to be sold with the shelves and shelving and permanent fixtures constituting a part of the said premises; that the said premises were to be conveyed subject to covenants, conditions and restrictions appearing of record, and said agreement also contained a clause that the buildings are all within the boundary line of the property as described in the deed therefor, and that there are no encroachments thereon;

And it further appearing that the said premises were originally conveyed with the restriction that no building or part thereof should be erected nearer than twenty feet from the lot line on said Sixth Avenue, and that the said building line restriction has been violated by the erection of buildings over the said restricted line by approximately fourteen feet on the Sixth Avenue side, and by thirteen one-hundredths of a foot encroachment over the Street of the "F" Street side, and that the said violation of the said building line restriction occurred about twenty-five years ago when said buildings were erected, and that no action has been taken by any person or corporation during this period of time;

And it further appearing to the satisfaction of the Court that the said defendant has refused and failed to perform said agreement on his part on the grounds that said premises are encumbered because of the buildings thereon extending over the

restricted building lines and because the building line restriction referred to in the original conveyance for said premises has been violated and is in violation of the terms of the contract between the parties and that the complainant cannot convey a clear and unencumbered title to said premises because of the violation of said building line restriction.

And it further appearing that the complainant has always been and still is ready and willing in all things to comply with the terms of said contract on his part.

And the Court being of the opinion that the claim of the defendant in refusing to accept title because of said building line restrictions is not well founded in that no action has been taken by any person or corporation during the twenty-five year period said violations have existed and that such building line restriction is not an encumbrance against said premises at this time and does not constitute a valid objection to the taking of title, and that the complainant is entitled to the specific performance of the aforesaid agreement as prayed for by him in his Bill of Complaint filed herein.

It is on this 2nd day of September, nineteen hundred and twenty-six, ordered, adjudged, and decreed that the said agreement be in all things specifically performed by the said defendant, and that the said defendant, on the 30th day of September, nineteen hundred and twenty-six, at the hour of two o'clock in the afternoon, at the office of Durand, Ivins & Carton in the City of Asbury Park, County of Monmouth and State of New Jersey, upon delivery of a Warranty Deed for and possession of said premises, pay to the complainant the sum of Twenty-five Hundred Dollars, with interest thereon from the Second day of January, Nineteen hundred and twenty-six, together with the taxed

costs of this suit as hereinafter allowed, and that the rents of said premises, insurance premiums, water rents, taxes, and interest on mortgage to be assumed as aforesaid, shall be apportioned and allowed as of the said Second day of January, nineteen hundred and twenty-six, and at the same time that said defendant make, execute and deliver in due form of law to the complainant John K. Harmina, his bond in the penal sum of Ten Thousand Dollars, for the payment of Five Thousand Dollars in three years from the second day of January, nineteen hundred and twenty-six, with interest at the rate of six per cent per annum, and, payable semi-annually, and at the same time, make, execute and acknowledge in due form of law and deliver to the said complainant John K. Harmina, a purchase money mortgage on said lands and premises in the sum of Five Thousand Dollars, payable in three years from the said Second day of January, Nineteen hundred and twenty-six, with interest at the rate of six per cent per annum, payable semi-annually, upon the delivery at the same time and place by the complainant John K. Harmina, and Julia Harmina, his wife, to the defendant, Joseph Shay, a warranty deed, duly executed and acknowledged by the said complainant John K. Harmina, and his wife, Julia Harmina, conveying to the said Joseph Shay the said lands and premises in fee, subject to the lien of a mortgage for $7500.00 on which there is due the sum of Seven Thousand Dollars.

It is further ordered, adjudged and decreed that if, at the time and place aforesaid, the said defendant should fail or neglect to pay the sum of Twenty-five hundred Dollars, with interest at hereinbefore mentioned, together with said taxed costs as hereinbefore mentioned, or fail and neglect to make correct apportionments and allowances of rents

taxes, insurance premiums, water rents, and interest on mortgage as hereinbefore mentioned, and to deliver the bond and mortgage hereinbefore described, duly executed and acknowledged, upon the tender of said deed and possession, the aforesaid sums of Twenty-five Hundred Dollars, with interest thereon as aforesaid, and Five Thousand Dollars, together with interest thereon from the Second day of January, nineteen hundred and twenty-six, and the amount of water rents, insurance premiums, taxes, and interest on said mortgage of Seven Thousand Dollars, from the said Second day of January, Nineteen Hundred and Twenty-six, together with the taxed costs of this suit as hereinbefore mentioned, shall be and become and are 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 that in case a deficiency should arise upon such sale, the said defendent may be ordered by this court to pay such deficiency.

It is further ordered that said defendant pay to the said complainant the costs of this suit to be taxed, including a counsel fee of Fifty Dollars, which is hereby allowed to said complainant.

It is further ordered that true but uncertified copies of this decree and of said taxed costs be served on the solicitor of said defendant within five days from the date hereof.

Respectively indorsed,
MAJA LEON BERRY, V. C.

E. R. WALKER,
C.

BOROUGH OF BELMAR
PART OF LOT No. 2906 MONMOUTH COUNTY,
MAP OF BELMAR NEW JERSEY.

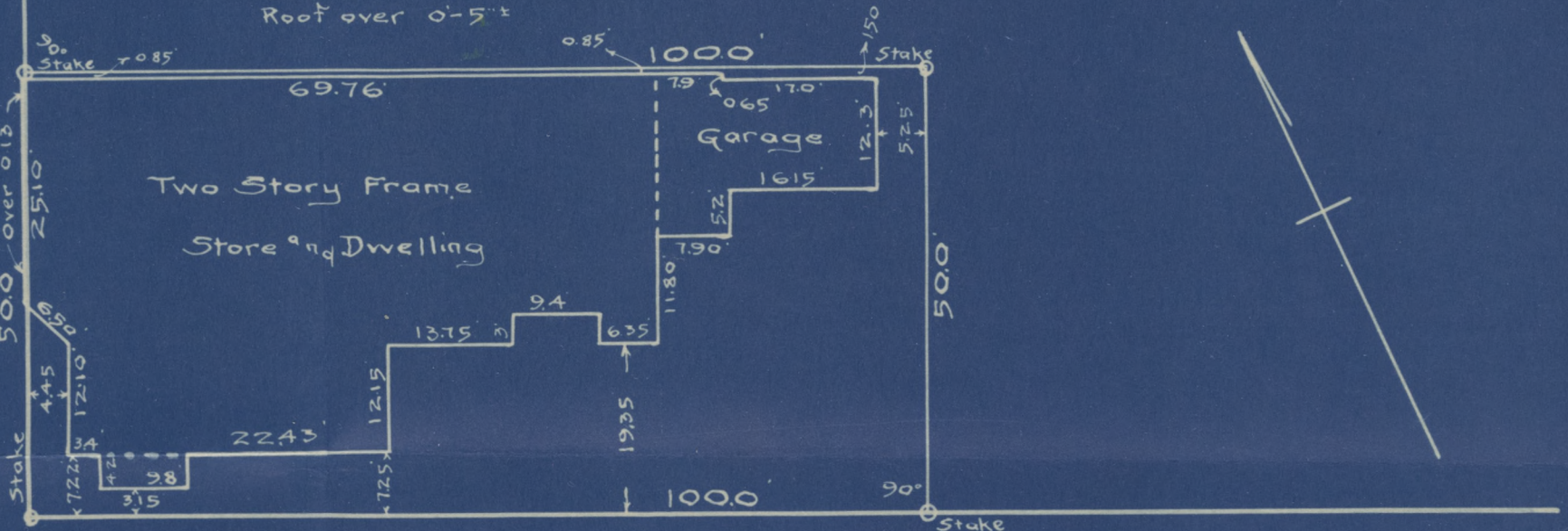
Scale: 1" = 20'
Surveyed March 28, 1924.

Claude W. Birdsall
Licensed Municipal Engineer and Surveyor.
Belmar, N. J.

F ST.

LOT No. 2905

Roof over 0'-5" ±



SIXTH ST.

NEW JERSEY COURT OF ERRORS AND APPEALS

JOHN K. HARMINA
Complainant-Respondent

vs.

JOSEPH SHAY
Defendant-Appellant.

On Appeal

BRIEF FOR APPELLANT

This appeal brings up a decree of the Court of Chancery compelling the appellant, as vendee, to specifically perform a contract for the purchase of real estate located in the Borough of Belmar. County of Monmouth and State of New Jersey.

Facts

Complainant, being the owner of the property in question, entered into a contract in writing to sell the same to the defendant for $16,000.00, Case page 5. Said contract provided for payment of the consideration by part cash, by assumption of the mortgage then upon the property and by execution of a second purchase money bond and mortgage. Contract also provided that the premises were subject to covenants, conditions and restrictions contained in former deeds for the same premises and also a clause,

> "It is understood and agreed that the buildings upon said premises are *all within the boundary lines of the property as described in the deed therefor,* and that there are no encroachments thereon and that the buildings comply with municipal ordinances and regulations."

The survey of the property disclosed that the building upon the premises was not within the lines of the description, but that the front of the building encroached upon F Street to the extent of approximately 1½ inches. The stipulation upon which the case was heard and the answer filed in the cause shows that the appellant refused to take title because, the premises were originally conveyed with the restriction that no building or part thereof should be erected nearer than 20 feet from the lot line of Sixth Avenue, and that this restriction had been violated by the erection of the building over the restricted line by approximately 14 feet on the Sixth Avenue side, although the said building had been constructed approximately twenty-five years before suit, and thereupon suit was instituted which resulted in the entry of a decree in the ordinary form, compelling the vendee to take title and to pay the consideration.

From this decree, the defendant vendee has appealed and now raises the following questions of law:

1. The title tendered is not marketable.
2. To compel defendant to take title would be subjecting him to a great hardship.
3. The decree modifies the contract between the parties.

POINT ONE

The Title Is Not Marketable

It will be observed that the contract has in it the following clauses:

"It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor, and that there are no encroachments thereon and that the buildings comply with municipal ordinances and regulations." "This contract is entered into upon the knowledge of the parties as to the value of the land and whatever buildings are upon the same, and not on any representations made as to character or quality."

It is well settled by numerous decision of the Court of Chancery and of this Court that where there is any question as to the marketability of the title, the discretionary right and power to compel specific performance shall not be exercised and a few of the cases so indicative are: *Van Riper* vs. *Wickersham,* 77 N. J. Eq. 232; *Simpson* vs. *Klipstein,* 89 N. J. Eq. 543 and *Smith* vs. *Reidy,* 92 N. J. Eq. 589, also *Sharpe* vs. *Stretch,* 98 N. J. Eq. 225.

This title is defective in two aspects. In the first place there is a 20 foot restrictive covenant under which no building is supposed to be constructed nearer to the line of Sixth Avenue than 20 feet. Most of the main building, which runs to a depth of approximately 70 feet, overlaps this line, as disclosed by the survey. The bay which is 9.8 feet wide is within 3.15 feet of the street line of Sixth Avenue, while the section of the building which runs back from within 4.45 feet of F Street for a distance of approximately 35 feet, is within

7¼ feet of the street line of Sixth Avenue, while the remainder of the main building is .65 of a foot overlapping the 20 foot restrictive line.

Secondly, the front of the building on F Street for a width of over 25 feet overlaps the street line by .13 of a foot or slightly in excess of 1½ inches.

The building as disclosed by the survey which is in the case, shows the same to be a two-story frame store and dwelling. It is true that the building has been constructed some twenty-five years ago and that there is no danger of litigation by injunction to compel the removal of the same, insofar as the violation of the 20 foot restrictive covenant is concerned, but we will consider this proposition under the next point of our Brief and demonstrate that this works a hardship to the vendee which should prevent a decree for specific performance going against him.

By reason of the first recited covenant, we urge that the case is clearly within the doctrine adopted by Vice Chancellor Bentley in the case of *Herring* vs. *Esposito,* 94 N. J. Eq. 348. There the building on the adjoining lot encroached upon the premises in question to the extent of 2 inches in front and ¾ of an inch in the rear and as this showed a violation of an expressed covenant, the Court held that it could not reform or modify the contract and refused specific perforcance.

In the instant case the contract expressly provides that the building is within the lot line as mentioned in the description. The description, by reference to the Bill of Complaint and to the contract, case pages 4 and 5, clearly discloses that the lot line runs along the line of F Street and a part of the building is without that line and is in violation of an expressed covenant.

To decree specific performance, although of such a small amount, would be to modify the contract made between the parties and enforce a new contract. Furthermore, it is not pleaded or offered in evidence that the municipality consents to such a violation and it is settled that the municipality has a right, at any time, to compel the removal of that part of the building that is over the line, and that the statute of limitations will not run against the municipality. See *South Amboy* vs. *N. Y. & Long Branch Railroad Co.,* 66 N. J. L. 623.

The learned Vice Chancellor said that this encroachment upon the street of ½ inch was infinitesimal and gave it no consideration. He, however, overlooked the decision of Vice Chancellor Lewis in *Pasternack* vs. *Alter,* 65 N. J. Eq. 377 where specific performance was refused when the building on the adjoining property encroached 2 inches.

We also call attention to the case of *Doherty* vs. *Egan Waste Company,* 91 N. J. Eq. 400, where the building was over the line from 1 inch to 1½ inches, although the encroachment could readily be removed because only clapboards were extended, and the Court decreed specific performance, but allowed an abatement in the price, to pay for the cost of making the building conform to the true line.

While it is true that the instant case was submitted on stipulation and no evidence was offered as to the cost of removing this huge building back 1½ inches or the cost of cutting off 1½ inches of the building and reconstructing it, nevertheless, this Court should take judicial notice of the fact that to accomplish either of those feats would entail a huge expense and no provision is made in the decrees referring the matter to a master to ascertain these costs or provide for an abatement of the

John K. Harmina vs. Joseph Shay, Case #127, October Term, 1926.

Appellant's Brief, page 5, paragraph 2, line 2 should read:

"one and one-half inches" instead of "one-half inch."

STAMLER, STAMLER & KOESTLER
Of counsel for Appellant.

price if the defendant is ever compelled by the municipality to remove the building.

POINT TWO

The Decree Works a Hardship on the Defendant

It is well settled that the Court of Equity should not decree specific performance where it will work a hardship on the defendant. *Rodman vs. Zilley,* 1 N. J. Eq. 320; *Plummer vs. Keppled,* 26 N. J. Eq. 481; *Migel* vs. *Bachofen,* 96 N. J. Eq. 608; *Stoutenburgh* vs. *Tompkins,* 9 N. J. Eq. 322; *Ely* vs. *Perrine,* 2 N. J. Eq. 322; and *Van Dyne* vs. *Vreeland,* 11 N. J. Eq. 370.

Equity will not decree specific performance of contract with compensation unless it can do equity to all the parties before it. *Brisbane* vs. *Sullivan,* 86 N. J. Eq. 411.

The particular instance in which we claim a hardship would be worked upon Shay in compelling him to take the property is that although the restrictive covenant insofar as it relates to the frontage on Sixth Avenue cannot be subject to an injunction at this time in reference to the present structure, nevertheless, it cannot be said that Shay would not be subject to litigation in respect to the twenty foot restrictive convenant if he attempts to reconstruct the building or erects a new structure in case of voluntary demolition or destruction by fire of the present building. This particular point has never been decided in New Jersey, although in the case of *Shmidheiser* vs. *States Ave. Construction Co.,* 94 N. J. Eq. 522 this court affirmed the decree of Vice Chancellor Leaming on a point which was somewhat similar.

In that case there had previously been a decree of the Court of Chancery denying injunctive relief to persons who sought to enforce a restrictive covenant on the ground that at the time of the former suit they were in laches and therefore when the building was torn down and a new structure of the same character and for the same purpose was to be constructed the court again refused to give an injunction.

While it is pointed out by Vice Chancellor Buchanan in the case of *Smith* vs. *Reidy,* supra, that injunction might not lie where there was doubt as to a restrictive covenant, he nevertheless did not compel an unwilling vendee to specifically perform the contract by acceptance of the conveyance, and there can be no doubt that when Shay went to this property and inspected it, he saw this building constructed to a point within six feet of Sixth Avenue, and when the contract was tendered to him, subject to restrictions of record, he had the right to assume that this building was not constructed in violation of covenants or restrictions which were alluded to in the contract.

The contract also contains a clause "This contract is entered into upon the knowledge of the parties as to the value of the land and whatever buildings are upon the same, and not on any representations made as to character of quality." The vendor may argue that this estops Shay from claiming that anything was misrepresented, but our argument is not based upon the question of misrepresentation but on what a reasonable man had a right to assume when he went to the property and saw the building. The contract expressly says that Shay had a knowledge of whatever buildings are upon the land, and we agree with this. Shay saw the building and the natural inference that any one would draw is that it was lawful property and

legally located, and while Shay does not run any danger of being compelled to remove the existing structure, nevertheless, the covenant is there, running with the land, and the same does not make it as readily salable as without such covenant.

There is also a question which has not been definitely settled in this state, as to the right of Shay to demolish the building and construct on the same line as the existing building an entirely new building. This point is not decided in the case of *Shmidheiser* vs. *States Ave. Construction Co.,* Supra.

It may be argued by the respondent that Mr. Shay expressly agreed to take the property subject to restrictions and that, therefore, he is bound by the conditions which result, and this ordinarily would be so were it not that we are invoking a special equity principle to relieve Shay from the hardship of this contract. The contract also says there were no representations. Therefore, when Shay views this property and sees its location upon the ground, as a reasonable man, he has the right to assume that it is lawfully and properly constructed in the position in which he finds it, and that the effect of his assuming to take subject to a restrictive covenant did not in any way mitigate against the location of the present building or its successor.

It may be that this Court will ultimately decide that under the circumstances such as are here present, in the event of the present structure being entirely destroyed by fire, Shay would have a right to construct on the same lines, but this would not relieve Shay from the possibility of litigation because after a loss by fire, it may be impossible to determine the exact location of the old building and suit may be brought against him for an overlap of an inch or two and thus he is subject to the possibility of litigation.

Furthermore, Shay does not get what he bargained to buy because some one in inquiring, now has a record from the Chancery suit that the property is subject to a 20 foot restriction, and that the building is over the line and Shay cannot as readily dispose of the property. He has something which is not so readily salable, and therefore the specific enforcement of this contract against Shay works a hardship against him.

POINT THREE

The Decree Modifies the Contract Between the Parties

The contract expressly provides that the building is wholly within the lot line as described in the deed. It is a conceded fact that the entire front of the building is 1½ inches outside of the lot line and on the public highway. This building, by reason of its location, illegally narrows the street and may be removed at any time by the municipal authorities. *Bloom* vs. *Orange* 91 N. J. L. 377, cited with approval in *Bier vs. Walbaum* 4 N. J. Advanced Reports, 251.

The answer filed in this case clearly sets out the incorporation of the Ocean Beach Association and its laying out of the streets adjoining the property in question. The answer alleges encroachment over the street line of F Street, cases page 22. The stipulation shows that the twenty foot restriction has been violated and also that the building encroaches over the street line of F Street by .13 of a foot, case page 25.

Thus it must at once be apparent that the case comes clearly within the rule laid down by Vice

Chancellor Bentley in the case of *Herring* vs. *Esposito,* Supra and the only question is whether this Court will adopt the principle so laid down.

The case of *Scheinman* vs. *Block,* 117 Atl. 389, affirmed by this Court without opinion in 119 Atl. 926, is not an authority against the conclusion reached by Vice Chancellor Bentley in the Herring case, for the reason that the contract in the Scheinman case did not contain an express provision and for the further reason that the overlap or encroachment was not on the public highway.

Mr. Justice Parker in writing the opinion for the Supreme Court in the Scheinman case readily recognizes the distinction because he says:

> "Primarily such encroachments on the street are nuisances at common law."

and cites *Durant* vs. *Palmer,* 29 N. J. L. 544 and *Temperance Hall Association* vs. *Giles,* 33 N. J. L. 260.

Vice Chancellor Berry, who advised the decree in the instant case, was undoubtedly led into error in following the remark made in the Scheinman case that the encroachment could be removed at nominal cost and did not appreciate the distinction between a small encroachment on the property in question and where the encroachment of the building was on a public street.

It is proper for the Court to decree specific performance where the matter of objection is of small moment and advanced for the purpose of preventing specific performance where the vendee desires to seek an excuse for avoiding his contract, but such is not the case here.

The situation which is now presented is that Mr. Shay is perfectly willing to take this property if he is assured by a court of last resort that his title is

absolutely and wholly unquestionable and that not even the municipality can eject him from his position.

It follows, without any argument, that any construction given or determination made, either by this Court or the Court of Chancery, cannot be binding upon the municipality insofar as it would have the right at any time to compel the removal of so much of the building as overlaps the street line of F. Street.

That the Court will not adjudicate upon the rights of parties who are not present in the litigation is indicated by this Court in the case of *Franklin vs. Creth,* 97 *N. J. Eq.* 538.

This Court has determined that it is the right of the municipality to maintain ejectment against a person unlawfully encroaching upon a public highway. *Riverside vs. Pennsylvania R. R. Co.,* 74 *N. J. L.* 478; *Ocean Grove vs. Berthall,* 63 *N. J. L.* 312 *and Asbury Park vs. Hawxhurst,* 64 *N. J. L.* 582.

This Court held in the case of *Jersey City vs. Hall,* 79 *N. J. L.* 559, that the statute of limitations constituted no bar to the action of ejectment instituted by public authorities.

Conclusions

The stipulation admitting the line of F Street plus the blue print survey showing the line of F Street as a street, conclusively show that the two story building for a distance of twenty-five or more feet encroaches upon the public highway to an extent of 1½ inches.

> "It is elementary that lapse of time will not impair the right of the public to cause its removal." See *South Amboy vs. N. Y. & Long Branch R. R. Co., supra.*

In the case of *Whittingham vs. Hopkins*, 70 *N. J. L.* 328, this Court had before it the laying out of a public road which would pass through an incompleted building to be a dwelling house. The Court said:

> "If after the road is laid out they become dwelling houses, they are then encroachments upon the road."

and so it is in the instant case the building being over the street line was an encroachment upon the public road. The mere fact that the building has been there twenty-five years does not give the owner of the fee the right against the wishes of the municipality to remove the encroachment. It is under the cases above cited and particularly mentioned by Mr. Justice Parker in the Scheinman case supra, a public nuisance and the learned Vice Chancellor did not consider the application of the principle for which we are contending, but instead followed the decision of the Supreme Court and the affirmance of this Court in the Scheinman case.

The doctrine in the Scheinman case was that there was an encroachment on *private property* in which the public had no interest and where the cost of correcting it was *very small.* In this case the cost of correcting the encroachment upon the public highway must of necessity be very large because it is a two story building, twenty-five feet or more in width and it would either require the moving back of the entire building, or the cutting off of 1½ inches and reconstructing it. This places upon Mr. Shay a burden which he did not assume under the contract and there is no provision in the decree which would do equity to him.

We feel, that under the circumstances, Mr. Shay should not have been compelled to take the prop-

erty at all, and that the defect is of such great consequence that it is one where the direction of making an allowance for the deficiency should not apply and that the decree below should be set aside in toto.

Respectfully submitted,

STAMLER, STAMLER & KOESTLER,
Solicitors for Appellant.

New Jersey Court of Errors and Appeals

JOHN K. HARMINA,
Complainant-Respondent,

v.

JOSEPH SHAY,
Defendant-Appellant.

BRIEF OF COMPLAINANT-RESPONDENT.

Statement of Facts.

The facts stated in appellant's brief are substantially correct, with these two important exceptions:

FIRST.—The stipulation of facts upon which the matter was submitted to the Court of Chancery contained the following clause: *"The Conclusions of the Court on the same* (referring to the stipulation) *shall be final."* (Italics ours; S. C., p. 24).

SECOND.—The survey appended to the state of case, while it shows an encroachment of some part of the building of approximately one and one-half inches on F Street, does not show whether this encroachment is of a foundation wall, window, belt, sill, eaves or gutter.

The Vice-Chancellor had before him not only this survey, but also the benefit of any admissions that may have been made by counsel as to the nature of this encroachment, and held as a fact that,

"The encroachment on the F Street street line is so infinitesimal that I do not consider it a valid objection to the decree" (S. C., p. 26).

Argument.

The contract of sale herein provided that the premises were to be conveyed, subject to covenants, conditions and restrictions contained in former deeds for the same premises (S. C., p. 10). That the contract was entered into upon the knowledge of the parties as to the buildings upon the premises (S. C., p. 11), and that the buildings are all within the boundary lines of the property (S. C., p. 12). There is no covenant contained in the contract that the buildings are within the building-line restriction.

The purchaser having agreed to take subject to restrictions, cannot complain of the violation of the building-line restriction on the Sixth Avenue side. The only encroachment over the boundary lines of the property is the slight encroachment on the F Street side.

By submitting the matter to the Court of Chancery on stipulation, the respondent deprived himself of the opportunity of showing that the building-line restriction had been waived or abandoned in this particular neighborhood, and also the opportunity of proving that the F Street encroachment consisted not of the main foundation wall of the building, but of windows, a belt, gutters, eaves or sills.

LAW.

I.

The decision of the Court of Chancery on questions of fact will not be disturbed on appeal.

The Vice-Chancellor held that the encroachment of the building beyond the building-line restriction was not a valid objection to the taking of title in view of the fact that the building had stood in this position for a period of twenty-five years or more, and that the physical condition of the property must have been perfectly obvious to the purchaser, and further found as a fact that the slight encroachment on the F Street side was so infinitesimal that it was not a valid objection to a decree. Both of these findings were findings of fact drawn both from the survey and the statements and admissions of counsel on the hearing.

The materiality of a defect of title to real estate is a question of fact where such question depends on, and is an inference to be drawn from special circumstances.

> 39 *Cyc.*, 2122;
> *Stokes* v. *Johnson*, 57 N. Y., 673;
> *Pullman* v. *Levy*, 124 Atl., 466;
> *Peck* v. *McLaughlin*, 135 N. Y. Supp., 560.

The nature and extent of the encroachment in question, the fact that the building had stood in its present location for twenty-five years or more, that no action to compel the removal of such encroachment has even been taken, the distance between the building and the curb, the inference that when the building was erected measurements may have been taken from the curb instead of from the lot line, and that there may have been a discrep-

ancy between the curb line and the lot line due to the curb being slightly out of line, and that measurements in erecting buildings in Belmar are usually taken from the curb and not from the lot line, were all facts and inferences from which the Vice-Chancellor concluded that the title was marketable, and that the encroachments in question were no objection to the decree.

Irrespective of the stipulation hereinafter referred to, this Court should not disturb the findings of fact of the lower Court,

> "It is the accepted law that the findings of the Judge without a jury settles the facts. (Kalbfleisch *v.* Standard Oil Co., 43 N. J. Law, 260.) It is his province to settle the facts according to his views of the evidence. (Mayor, etc., Jersey City *v.* Tallman, 60 N. J. Law, 239; 37 Atl. 1026.) Such findings of fact are not reviewable on error. It is only where the facts found do not support the conclusion, that the judgment can be disturbed on error" (Bound Brook Stove Works *v.* Ellis, *et al.*, 98 N. J. L., 523; 122 Atl., 690).

In *Lapayowker* v. *Levitsky*, 130 Atl., 627, at page 628, the Court of Errors and Appeals said:

> "On this testimony, the Trial Judge gave judgment for the plaintiff, which was in accordance with the reliable evidence before the Court. It is settled in this Court, the findings of fact by a Trial Judge sitting without a jury settles the facts. When such findings of fact are supported by evidence, they are not reviewable on appeal."

II.

The decree does not work a hardship on the defendant.

The defendant admits in his brief that he could not be compelled to remove the Sixth Avenue encroachment, but argues that if the present build-

ing should be demolished or destroyed he might be subject to litigation should he attempt to rebuild on the present lines of the building. There are two complete answers to this argument. In the first place Courts deal only with facts and not with speculation. Whether or not the building will be removed, demolished or destroyed by fire, and the defendant desires to rebuild on the same lines is, of course, highly speculative. Indeed, from his attitude in this case it would seem that if the building should be demolished and rebuilt he would desire to keep within the building line. In the second place Shay loses nothing if he demolishes the building should he be forced to build within the restricted lines when he rebuilds. He then would have all that the contract gave him.

The argument advanced by the appellant that Shay does not get what he bargained for because some one in inquiring now has a record from the Chancery Court that the property is subject to a twenty-foot restriction, and that the building is over the line, and that Shay cannot as readily dispose of the property and that he has something which is not now so readily saleable, and, therefore, that specific performance of this contract would work a hardship against him is absurd. The first deed in the chain of title provided that the property was subject to the covenants, conditions and restrictions imposed upon it by the grantor, the Ocean Beach Association. All subsequent deeds contain the same clause. Any purchaser would, therefore, be put upon inquiry by examining the title to the property. The building in question has violated the building-line restriction of the Ocean Beach Association for twenty-five years or more. At any time during the last twenty-five years the question as to whether or not the building could be removed by injunction proceed-

ings might have arisen, but in so far as this building is concerned this question has now been settled by the decree of the Court of Chancery in this case. While not *res adjudicata* the decree would work an estoppel against any one who might hereafter attempt to enforce removal of the building by injunction proceedings.

III.

The decree does not modify the contract between the parties.

The contention advanced by the appellant in his brief that the decree modifies the contract of the parties because of the clause in the contract that the buildings are within the boundary lines of the lot, and the fact that some portion of the building admittedly encroaches on F Street to the extent of approximately one and one-half inches might be well taken under our decisions had not the parties by consent referred this matter to the Court below for its decision thereon.

The decree entered herein is, in fact, a consent decree. The first four lines of the decree are as follows:

> "This cause having been submitted to the Court by a stipulation agreed upon by the parties hereto, and with the consent of the parties that the conclusion of the Court on the same should be final" (S. C., p. 27).

In consenting that a decree be entered on their stipulation (S. C., p. 26) both parties waived the right to produce evidence, and to take advantage of any error of law or fact that the Court below may have made in arriving at a decision.

> "A mistake of law is not sufficient to authorize the vacation of a consent decree" (21

C. J. 816; Alcorn County *v.* Tuscumbia Drain District, 122 Miss. 401; 59 So. 798; Ingles *v.* Bryant, 117 Mich. 113; 75 N. W. 442.)

"While a consent decree partakes of the nature of both a contract and a decree, it is not strictly a judicial decree, but rather in the nature of a contract entered into with the solemn sanction of the Court. It is not *res adjudicata.* As a contract, it binds all the parties to the consent and their privies, but no one else, and being a contract it can be varied or vacated only by consent, except where, through fraud or mistake the minds of the parties have not met up its terms. *The consent upon which it is based being a waiver of the usual procedure anterior to a judicial decree and of all errors therein, and of the necessity of evidence.*" (Italics ours.) (21 C. J. 815; Young *v.* Young, 17 N. J. E. 161; Mooney *v.* Valentynoviz, 262 Ill. 355; Bayerque *v.* Jackson Water Co., 2 Fed. Cas. No. 1136; Ind. etc. Railroad Co. *v.* Sands, 133 Ind. 433; 32 N. E. 722.)

IV.

No appeal lies from the decree entered herein.

A decree based on consent, which is a waiver of evidence and error is not subject to appeal.

21 C. J., 817.

A judgment or decree entered in conformity with facts admitted by appellant will not be revised on appeal.

3 C. J. 672;
Cameron v. *Smith,* 171 Mich., 333;
Monteith v. *Manchester Rendering Co.,* 131 Atl., 440;
Rogers v. *Edward M. Rodrock Co.,* 120 Atl., 1 (not officially reported);

McCafferty v. *Celluloid Co.*, 104 Fed., 305;
Chicago Union Traction Co. v. *Brody*, 123
Ill. A., 331.

For the reasons above set forth the decree of the Court of Chancery should be affirmed, with costs.

Respectfully submitted,

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