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*Notice of Appeal.*

**NOTICE OF APPEAL.**

Filed March 11, 1926.

FIRST DISTRICT COURT OF THE CITY  
OF NEWARK.

JOHN J. McNULTY, <i>Plaintiff-Appellant,</i>	}	<i>On Contract.</i>	10
<i>vs.</i>		<i>Notice of</i>	
DENNIS O'CONNELL, <i>Defendant-Appellee.</i>		<i>Appeal.</i>	

To Dennis O'Connell or Howe & Davis, attor-  
neys, National Bank Building, Orange, New  
Jersey. 20

SIRS:

PLEASE TAKE NOTICE that the plaintiff, John  
J. McNulty, appeals from the verdict and judg-  
ment of non-suit rendered in favor of the de-  
fendant and against the plaintiff in the above  
cause, at the aforesaid court, to the Supreme  
Court of the State of New Jersey, on this 6th  
day of March, 1926.

Dated at Newark, N. J., March 6, 1926. 30

Respectfully yours,

ABRAHAM ALBOUM,  
Attorney for John J. McNulty,  
Plaintiff-Appellant.

Service of a true copy of the within notice of  
appeal is hereby acknowledged this 9th day of  
March, 1926.

HOWE & DAVIS,  
Attys. for Dennis O'Connell, 40  
Defendant-Appellee.

Summons.

**SUMMONS.**

To any Constable in said County or to the Ser-  
geant-at-Arms of the First District Court.  
ESSEX COUNTY, ss.

10 The State of New Jersey SUMMON  
Dennis O'Connell to appear before  
(SEAL) the First District Court of the City  
of Newark, to be held in the City Hall,  
Broad street (ground floor), in the  
said city, on the 5th day of January, 1926, at ten  
o'clock in the forenoon, to answer unto John J.  
McNulty, in an action on contract to the damage  
of the plaintiff five hundred dollars. Hereof  
fail not.

20 WITNESS, CECIL H. MACMAHON, Esq., Judge  
of said Court at Newark, aforesaid, the twenty-  
first day of December, in the year one thousand  
nine hundred and twenty-five.

CHARLES R. BALDWIN,  
Clerk.

First District Court.

30 TAKE NOTICE, that the plaintiff's state of de-  
mand in the within action has been filed with the  
Clerk of this Court, and that a trial will be  
demanded on the return day of this summons.

Yours, &c.,

ABRAHAM ALBOUM,  
Attorney for Plaintiff.

To the within named defendant or to whom it  
may concern.

40 Newark, N. J., Dec. 21, 1925.

Summons.

#98005.  
169 Eagle Rock Ave., West Orange, N. J.  
First District Court of Newark, N. J.  
Summons on Contract.

John J. McNulty 10  
vs.  
Dennis O'Connell.

Demand .....\$500.00  
Summons ..... 2.10  
Mileage Wright ..... .48  
Listing Fee ..... 1.50  
Attorney Fee ..... 15.00

Returnable January 5th, 1926.

Abraham Alboum, 130 Market St., 20  
Newark, N. J.,

Attorney for Plaintiff.

The said defendant not being found, I  
served the within summons Dec. 23rd,  
1925, by leaving a copy thereof at his  
residence with a member of his family  
above the age of fourteen years, inform-  
ing her of its contents. 30

Walton E. Wright,  
Constable.

40

*State of Demand.*

**STATE OF DEMAND.**

Filed December 21, 1925.

FIRST DISTRICT COURT OF THE CITY  
OF NEWARK.

10	JOHN J. McNULTY,	}	<i>Plaintiff,</i>	<i>On Contract.</i>
	<i>vs.</i>		<i>State of</i>	
	DENNIS O'CONNELL,		<i>Defendant.</i>	

The plaintiff demands from the defendant the sum of five hundred dollars for that:

- 20    1. On or about March 23, 1923, the plaintiff and the defendant entered into a written lease, a true copy of which lease is attached to and made part hereof.
- 30    2. Under the terms of said lease the defendant leased to the plaintiff that piece of land which is part of property known as 169 Eagle Rock avenue. Dimensions eight feet four inches, *more or less*, by one hundred feet, *more or less*, with the privilege to the plaintiff to build a structure on said property.
- 3    3. Relying upon the terms of said lease, the plaintiff erected a building on said property eight feet front by about thirty feet deep in which building the plaintiff continued to conduct his business.
- 40    4. Some time prior to February 10, 1925, Graziella Vacca and Felece Vacca, owners of property adjoining the property of the defendant herein on the north, instituted a suit in the

*State of Demand.*

Court of Chancery of New Jersey against the plaintiff and the defendant herein, setting forth that the plaintiff's building encroached upon the lands of the said complainants to the extent of nine inches on the southwesterly corner thereof and tapering to a point about twenty feet, measured along the side thereof in a northeast- 10  
erly direction, where it ceases to encroach as aforesaid. And said complainants prayed for a decree compelling the removal of said building. On October 20, 1925, a final decree was entered in the aforesaid chancery action enjoining the said John J. McNulty from further maintaining, and commanding him to remove from the lands of the complainants the building which en-  
croaches upon the land of the complainants to the extent as aforementioned; and said decree 20  
further ordered the said John J. McNulty to pay the costs of suit and counsel fee of one hundred dollars.

5. On or about December 17, 1925, in pur-  
sueance of the terms of said final decree, the said John J. McNulty, the plaintiff herein, paid to William A. Lord, solicitor for the complainants in the aforesaid chancery suit, the sum of one hundred sixty-four dollars and eighty-two cents, 30  
being the taxed costs and counsel fee in the said chancery action.

6. As a result of the aforesaid final decree the plaintiff herein is now obliged to expend, in addition to the above, divers large sums of money for the temporary occupancy of his build-  
ing on the land of said Vacca, for the removal of the aforesaid building, and other expenses incidental thereto, and for the additional pay-  
ment of rent. 40

*State of Demand.*

7. The plaintiff charges that the defendant is responsible for the expenditure of all of the aforesaid moneys, occasioned by the defendant herein in leasing to the plaintiff the property set forth in the annexed lease, and the plaintiff alleges that the defendant leased to the plaintiff property of which the defendant was not the owner and is not now the owner.

The plaintiff will therefore ask for judgment against the defendant for the sum of five hundred dollars, and cost of suit.

ABRAHAM ALBOUM,  
Attorney for Plaintiff.

THIS INDENTURE, made the Twenty-third day of March, One Thousand Nine Hundred and Twenty-three, between Dennis O'Connell and Eli Marcus and John J. McNulty, Dennis O'Connell of the First part;

WITNESSETH, That the said party of the first part has Let and by these presents does grant, demise, and to farm let, unto the said party of the second part who is Eli Marcus and John J. McNulty that piece of land of which is part of property known as One Hundred Sixty Nine Eagle Rock Ave. Dimensions Eight feet Four inches, more or less, by One Hundred feet, more or less, with appurtenances, for the term of Three years from the first day of April, One Thousand Nine Hundred Twenty-three, at the Yearly Rent or Sum of as herein specified. Twenty Five Dollars per month for the year Nineteen Hundred Twenty three.

Thirty Dollars per month for the year Nineteen Hundred Twenty four.

*State of Demand.*

Thirty Five Dollars per month for the year Nineteen Hundred Twenty five, to be paid in equal payments.

And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises, and to remove all persons therefrom.

And the said party of the second part do covenant to pay to the said party of the first part, the said yearly rent as herein specified.

And that at the expiration of the said term, the said party of the second part will quit and surrender the premises hereby demised in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted.

It is also agreed by the Party of the First Part that the said Parties of the Second Part will have the privilege of renewing said lease for a term of not more than two years at the monthly rental for the year of Nineteen Hundred Twenty six, at Forty Dollars per month, and for the year of Nineteen Hundred Twenty seven at the rate of Forty Five Dollars per month.

And the said party of the first part does covenant that the said party of the second part on paying the said yearly rent, and performing the covenants aforesaid shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid. Excepting as hereinafter stated.

It is agreed by the Party of the First Part that he will allow said Parties of the Second Part to build, or place structure on said prop-

*State of Demand.*

erty at the expense of the Parties of the Second Part, including the furnishing of water, gas, and electricity, at the expense of the Parties of the Second Part.

10 It is also agreed by the Party of the First Part that he will allow said Parties of the Second Part to remove any or all building at the expiration of lease, providing, however, that no damage shall be done to any adjoining property.

Signed.

Witness.

20 Subscribed to and sworn to before me this 26th day of March, 1923.

Henry P. Maurer  
Notary Public

For value received, I sell, assign and transfer to John J. McNulty, all my right, title and interest in this lease.

Eli Marcus.

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*State of Demand.*

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

Be it Remembered, That on this twenty-sixth day of March, in the year of our Lord One Thousand Nine Hundred and Twenty-three, before me, a notary public, personally appeared Eli Marcus and John J. McNulty, who, I am satisfied is the lessor in the within indenture of lease named; and I having first made known to them the contents thereof, they did acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed. And the said Eli Marcus and John J. McNulty being by me privately examined, separate and apart, did further acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, freely, without any fear, threats or compulsion.

Eli Marcus.  
J. J. McNulty.  
Dennis O'Connell.

Witness—James J. McGonnell.

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*Transcript of Clerk's Docket.*

**TRANSCRIPT OF CLERK'S DOCKET.**

FIRST DISTRICT COURT OF THE CITY OF NEWARK.

10	#98005 JOHN J. McNULTY,  <i>and</i> DENNIS O'CONNELL,	}	<i>Plaintiff,</i>  <i>Defendant.</i>	<i>On Contract.</i> <i>Transcript</i> <i>of Docket</i> <i>and Pro-</i> <i>ceedings.</i>
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Abraham Alboum, plaintiff's attorney.

PLAINTIFF'S COSTS.

20	Summons .....	\$2.10 Dec. 22.
	Mileage .....	.48
	Listing fee .....	1.50 Jan. 4.

#169 Eagle Rock Ave., West Orange, N. J.

A summons in the above-stated cause was issued on the 21st day of December, 1925, returnable on the 5th day of January, 1926, wherein the plaintiff demands of the defendant the sum of five hundred dollars.

The plaintiff filed his state of demand December 21, 1925.

The summons was served and returned as follows:

The said defendant not being found, I served the within summons December 23, 1925, by leaving a copy thereof at his residence with a member of his family over the age of fourteen years, informing her of its contents. Walton E. Wright, Constable.

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*Transcript of Clerk's Docket.*

January 5, 1926. This cause was adjourned to January 15, 22, 29, February 5, 11, 1926.

January 14, 1926. Demand for bill of particulars filed.

January 29, 1926. The plaintiff and the defendant appearing, the cause was tried and determined at this time.

Plaintiff and Arthur Willis sworn.

Lease, decree and taxed bill of costs in evidence.

No witnesses for defendant.

The evidence being closed, the Court reserved decision.

March 4, 1926. Judgment of non-suit entered.

March 11, 1926. Notice of appeal filed.

March 11, 1926. Appeal bond filed.

FIRST DISTRICT COURT OF THE CITY OF NEWARK.

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

I, CHARLES R. BALDWIN, Clerk of the First District Court of the City of Newark, do hereby certify that the foregoing transcript of docket, page No. 98005, and summons and state of demand, is a true copy of the record of the proceedings in the matter wherein John J. McNulty was plaintiff and Dennis O'Connell was defendant, and that the judgment above set forth stands open and unpaid of record.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Newark, New Jersey, this eleventh day of March, A. D. nineteen hundred and twenty-six.

CHARLES R. BALDWIN,

(SEAL)

Clerk.

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*Agreed State of Case.*

**AGREED STATE OF CASE.**

FIRST DISTRICT COURT OF THE CITY  
OF NEWARK.

10	JOHN J. McNULTY,  <i>vs.</i>  DENNIS O'CONNELL,	<i>Plaintiff,</i>  <i>Defendant.</i>	<i>On Contract.</i> <i>On Appeal.</i> <i>Agreed State</i> <i>of the Case.</i>
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The plaintiff and the defendant hereto, by their respective attorneys, submit the following as the state of the case for appeal:

20 1. On or about March 23, 1923, the defendant leased to the plaintiff vacant ground with the privilege of building thereon a lunch room.

2. The written lease reads as follows: "That piece of land which is part of property known as one hundred sixty nine Eagle Rock Ave. Dimensions eight feet four inches, *more or less*, by one hundred feet, more or less, with the appurtenances, for the term of three years."

30 Being the property connected with the building known as #169 Eagle Rock avenue.

3. The survey shows that the building was over about nine inches, but that and the survey both show that at a point about twenty feet back from the street line, the building ceased to encroach. The depth of the building was thirty feet and the survey also shows that at the rear of the building, or approximately thirty-two feet back from the street line, the building is nine

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*Agreed State of Case.*

and three-quarters inches off the line. In other words, at a point about twenty feet away from and back of the street line, the building did not encroach. As this angle continued to widen toward the rear of the property, there was more than eight feet four inches or in the rear not less than eleven feet. While for a portion of the depth, or approximately twenty feet from the front, on which the building stands, the width is less than eight feet four inches, the width for the balance of the depth is more than eight feet four inches.

10

4. The plaintiff built a lunch room on said premises *eight feet* front and rear by about thirty feet in depth. The plaintiff remained in undisturbed possession until some time prior to February 10, 1925, when the owner of the adjoining property instituted chancery suit compelling plaintiff and defendant herein to remove part of said lunch room on the ground that it encroached upon the adjoining land to the extent of *nine inches in width in front* and tapering to a point about twenty feet in depth, where it ceased to encroach, and on October 20, 1925, a final decree was entered in chancery compelling the plaintiff to remove that part of his lunch room which encroached as aforesaid, and as a result of which the plaintiff suffered the damages for which he sues.

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5. The plaintiff has not entirely removed the encroachment and his lunch room still encroaches two and three-eighths inches on the adjoining owner's land, and this portion of the encroachment was not removed for the reason that such removal would make it impossible to use the lunch room. The survey introduced in evidence

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*Motion for Non-suit and Exception to Ruling.*

shows that the actual frontage of the defendant's land upon which the lunch room stands is only *seven feet two and one-half inches*, tapering to a depth of approximately twenty feet. Copy of survey attached hereto. Defendant moved for non-suit on the ground that wording of the written lease established the rights of the parties and prevented recovery by plaintiff.

The Court reserved decision and on March 4, 1926, granted the defendant's motion for non-suit and the plaintiff's exception to the ruling was allowed.

ABRAHAM ALBOUM,  
Attorney for Plaintiff.

HOWE & DAVIS,  
Attorneys for Defendant.

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*Robinson & Winston, Surveyors*

Motion for Non-suit and Exception to Ruling.

shows that the actual frontage of the defendant's land upon which the lunch room stands is only seven feet two and one-half inches, tapering to a depth of approximately twenty feet. Copy of survey attached hereto. Defendant moved for non-suit on the ground that wording of the written lease established the rights of the parties and prevented recovery by plaintiff.

The Court reserved decision and on March 4, 1926, granted the defendant's motion for non-suit and the plaintiff's exception to the ruling was allowed.

ABRAHAM ALBOUM,  
Attorney for Plaintiff.

HOWE & DAVIS,  
Attorneys for Defendant.

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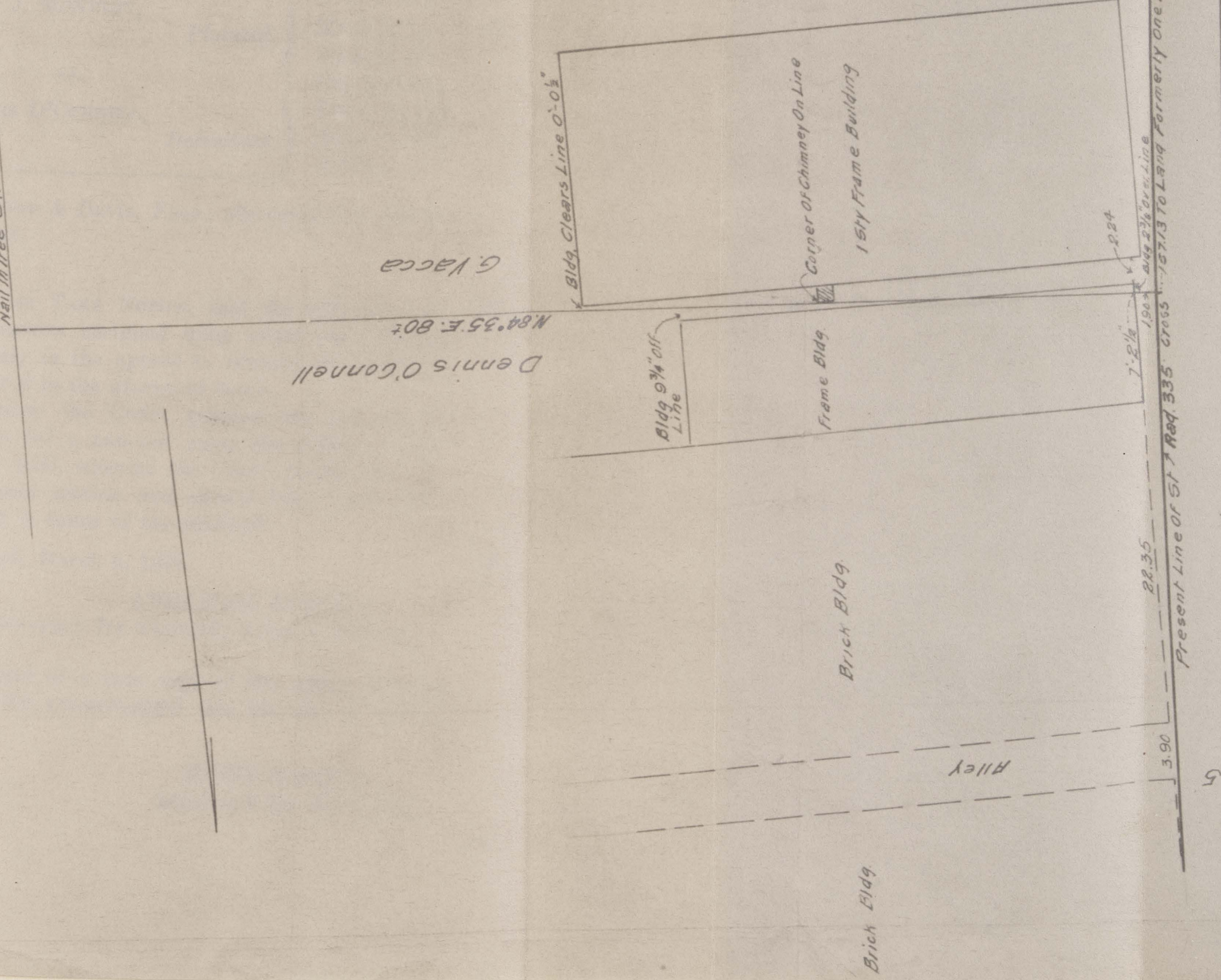
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*Thomas H. Winston, Surveyor*  
*New Canaan, N.J.*  
*Dec. 23-1925*

*Nail In Tree S. 1° 52' W*

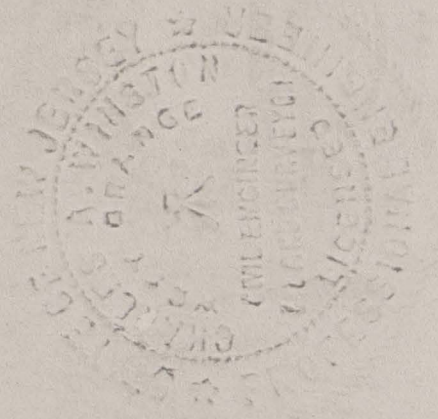


EAGLE ROCK AVE.

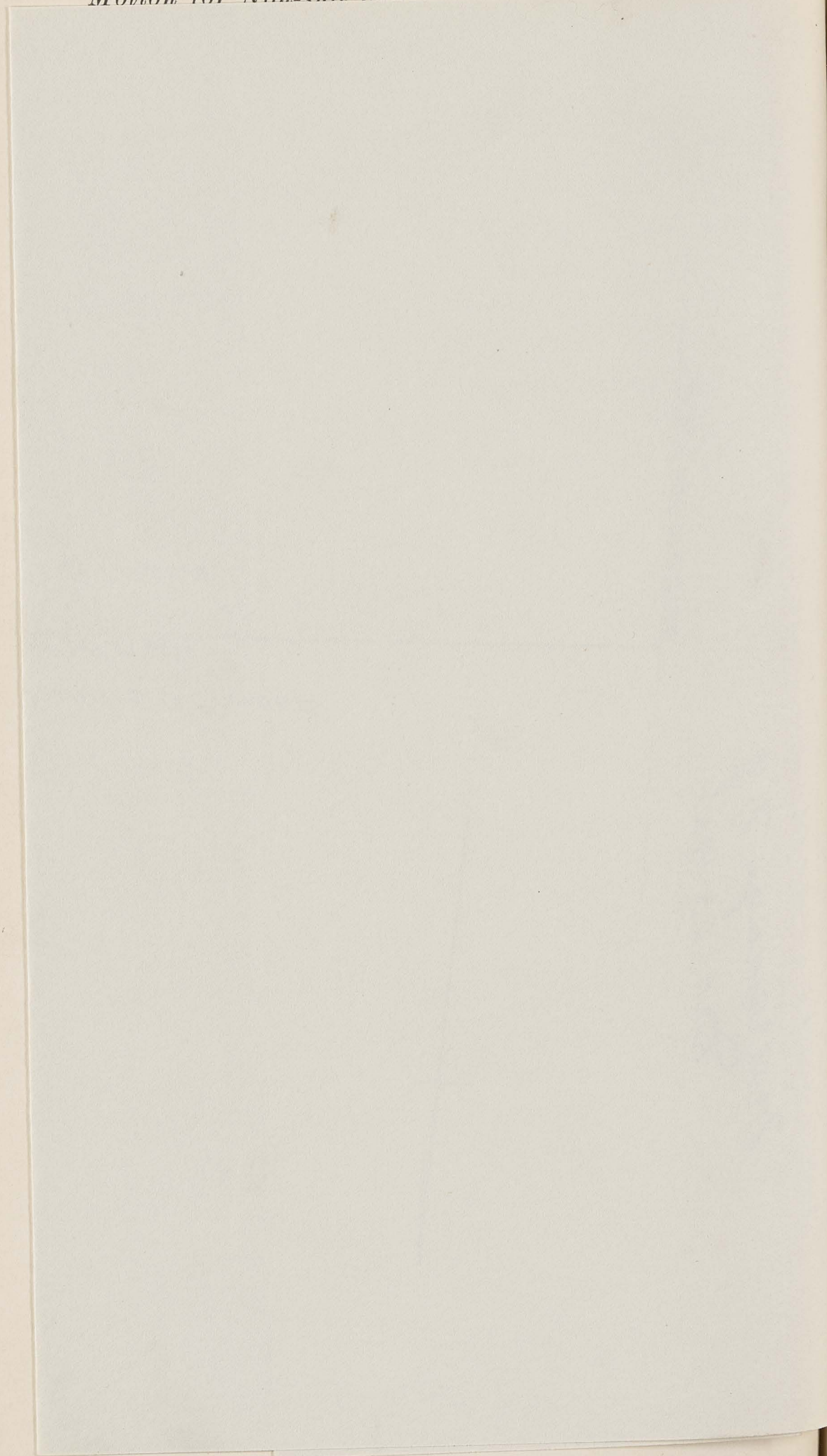
Property In West Orange, N.J.

Scale 1" = 10'

1467-16-118.



*Motion for Non-suit and Exception to Judgment*



*Reasons.*

**REASONS FOR APPEAL.**

FIRST DISTRICT COURT OF THE CITY  
OF NEWARK.

JOHN J. McNULTY,  vs.  DENNIS O'CONNELL,	Plaintiff,  Defendant.	} <i>On Contract.</i> } <i>Reasons for</i> 10 } <i>Appeal to</i> } <i>the Supreme</i> } <i>Court of the</i> } <i>State of New</i> } <i>Jersey.</i>
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To Howe & Davis, Esqs., attorneys for defendant.

SIRS:

PLEASE TAKE NOTICE, that the following are the reasons assigned upon which the plaintiff will rely in the appeal to reverse the judgment rendered in the aforesaid court. 20

Because the Court granted the defendant's motion for a non-suit upon the evidence given at the trial, whereas the Court should have denied said motion and should have rendered a verdict in favor of the plaintiff.

Dated, March 6, 1926. 30

ABRAHAM ALBOUM,  
Attorney for Plaintiff, John J. McNulty.

Service of a true copy of the within reasons is hereby acknowledged this 9th day of March, 1926.

HOWE & DAVIS,  
Attorneys for Defendant.

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*Opinion of Supreme Court.*

**OPINION OF SUPREME COURT.**

NEW JERSEY SUPREME COURT.

No. 427, May Term, 1926.

JOHN J. McNULTY, <i>Plaintiff-Appellant,</i>  <i>vs.</i> DENNIS O'CONNELL, <i>Defendant.</i>	}	<i>On Appeal</i> <i>from the</i> <i>First District</i> <i>Court of the</i> <i>City of</i> <i>Newark.</i>	10
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Submitted May 14, 1926; decided  
Before Justices Kalisch, Katzenbach & Lloyd.

For the appellant, Abraham Alboum.  
For the respondent, Howe & Davis. 20

PER CURIAM:

This is an appeal by the plaintiff below from a judgment of non-suit rendered by the First District Court of the City of Newark. The suit was instituted to recover the taxed costs of a suit in the Court of Chancery and damages growing out of the expenditure of money for the removal of a part of a building, which the plaintiff thought had been located on the land of the defendant below but in fact had been built in part upon the land of others, namely Grazulla Vacca and Felice Vacca. The following are the facts: On March 23rd, 1923, Dennis O'Connell leased to Eli Markus and John J. McNulty a parcel of land which was part of a property known as 169 Eagle Rock avenue. In the lease the dimensions of the parcel leased were given as 8 feet 4 inches, more or less, by 100 feet, more or less. Later Markus assigned his rights in 40

*Opinion of Supreme Court.*

the lease of McNulty. McNulty built a refreshment stand upon the property. The stand had a frontage of 8 feet. It extended back about 30-odd feet. It subsequently developed that the parcel of ground leased only had a frontage of 7 feet 2½ inches. The lot was wider as it approached the rear line but for 20 feet from the front the stand encroached upon the land of the Vaccas. The Vaccas instituted proceedings in the Court of Chancery for the removal of that portion of the stand built upon their land and were successful in obtaining a decree. McNulty removed the encroachment and then began the present action against O'Connell, claiming that O'Connell was responsible for the loss which he had been subjected to in removing the encroachment upon the Vacca property. The Trial Court gave a judgment of non-suit as has been stated.

The agreed state of the case was settled by the attorneys of the parties. It recites the facts above stated. It further states that the defendant moved for a non-suit on the ground that the wording of the lease (referring to the words "more or less") established the rights of the parties and prevented recovery by the plaintiff. The Court reserved decision and subsequently granted the defendant's motion for a non-suit. The contention of the appellant is that this case falls within that class of cases where property has been conveyed by a description, more or less, and subsequently it has been found that there was a very considerable deficiency in the amount of land sold and an allowance for the deficiency of land has been made. *Couse v. Boyles*, 4 N. J. E. 212, which was a suit for the foreclosure of a purchase money mortgage. The land described was 135 acres more or less. A survey showed a

*Opinion of Supreme Court.*

difference of between 22 and 34 acres. In the case the Court said:

"When land is sold as containing so many acres 'more or less,' if the quantity on an actual survey and estimation, either over-running or falling short of the contents named be small, no compensation should be recovered by either party. The words 'more or less' must be intended to meet such a result. But if the variance be considerable, the party sustaining the loss should be allowed for it. And this rule should prevail where it arises from mistake only, without fraud or deception."

In the case of *Weart v. Rose*, 15 N. J. E. 290, a deficiency of 6.12 acres where the land was described as 115 acres was held not to entitle the purchaser to an abatement in the price. These cases were between mortgagor and mortgagee. The present case is between lessor and lessee. We think the cases referred to are not a precedent for holding in the present case that the lessor should bear the loss sustained by the lessee. The defendant had guarded the description of the property by the words "more or less." It seems to us that it was the duty of the plaintiff under such circumstances to have proceeded cautiously and perhaps have had a survey made before proceeding to build. The plaintiff was apprised by the words "more or less" that the dimensions were not accurate. He acted as if the dimensions were accurate. This we think he had no right to do. He should be responsible for his mistake in assuming that the description was accurate.

The Trial Court in finding as it did that the plaintiff was not entitled to recover, must have found if it considered the argument advanced

*Opinion of Supreme Court.*

10 by the plaintiff, as we presume it did, that there was no substantial deficiency in the amount of ground leased. This was a finding of fact which will not be disturbed in this Court if there be evidence to support it. *Duff v. Prudential Insurance Co.*, 90 N. J. L. 646. There was evidence to support it. The judgment below is affirmed with costs.

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*Order Affirming Judgment.*

**ORDER AFFIRMING JUDGMENT.**

NEW JERSEY SUPREME COURT.

JOHN J. McNULTY, <i>Plaintiff-Appellant,</i> vs. DENNIS O'CONNELL, <i>Defendant-Respondent.</i>	}	<i>Order          Affirming          District          Court          Judgment.</i>	10
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This cause coming on to be heard at the May Term, 1926, in the presence of counsel of the respective parties and the case having been read and argument of the counsel, as well as the record of proceedings duly considered upon the appeal set forth and specified; 20

IT IS, thereupon, ORDERED, ADJUDGED AND DECREED that the judgment rendered by the First District Court of the City of Newark be and the same hereby is affirmed with costs, and the record be remitted to the Court below to be proceeded with according to law and the practice of said Court.

Entered March 22, 1927. 30

On motion of,  
 HOWE & DAVIS,  
 Of Counsel with Respondent.

A true copy.  
 EDWARD J. KELLEHER,  
 Clerk.

40

*Notice of Appeal.*

**NOTICE OF APPEAL.**

Filed March 25, 1927.

**NEW JERSEY SUPREME COURT.**

10	JOHN J. McNULTY, <i>Plaintiff-Appellant,</i>  <i>vs.</i> DENNIS O'CONNELL, <i>Defendant-Appellee.</i>	<i>On Contract.</i> <i>On Appeal</i> <i>from First</i> <i>District</i> <i>Court of</i> <i>Newark.</i> <i>Notice of</i> <i>Appeal.</i>
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To Howe & Davis, Esqs., attorneys for defendant-appellee:

Sirs:  
PLEASE TAKE NOTICE that the plaintiff, John J. McNulty, appeals from the verdict and judgment of non-suit rendered in favor of the defendant and against the plaintiff in the above cause, to the New Jersey Court of Errors and Appeals, on this 22nd day of March, 1927.

Dated at Newark, N. J., March 22, 1927.

Respectfully yours,  
ABRAHAM ALBOUM,  
Attorney for John J. McNulty,  
Plaintiff-Appellant.

Service of a true copy of the within notice of appeal is hereby acknowledged this 23rd day of March, 1927.

HOWE & DAVIS,  
Attorneys for Dennis O'Connell,  
Defendant-Appellee.

*Grounds of Appeal.*

**GROUND OF APPEAL.**

Filed March 26, 1927.

**New Jersey Court of Errors and Appeals**

10	JOHN J. McNULTY, <i>Plaintiff-Appellant,</i>  <i>vs.</i> DENNIS O'CONNELL, <i>Defendant-Appellee.</i>	<i>On Appeal</i> <i>from New</i> <i>Jersey</i> <i>Supreme</i> <i>Court.</i>  <i>Grounds of</i> <i>Appeal.</i>
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John J. McNulty, the plaintiff-appellant, as and for the grounds of his appeal from the judgment rendered against him in the above cause, hereby specifies and assigns the following:

1. Because the Court granted the defendant's motion for a non-suit upon the evidence given at the trial, whereas the Court should have denied said motion and should have rendered a verdict in favor of the plaintiff.

2. The Supreme Court erred in affirming the judgment of the First District Court of the City of Newark, New Jersey.

Dated at Newark, N. J., March 22, 1927.

ABRAHAM ALBOUM,  
Attorney for Plaintiff-Appellant.

Service of a true copy of the within grounds of appeal is hereby acknowledged this 23rd day of March, 1927.

HOWE & DAVIS,  
Attorneys for Dennis O'Connell,  
Defendant-Appellee.

103 MAY 1 1927

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

## New Jersey Court of Errors and Appeals

JOHN J. McNULTY, <i>Plaintiff-Appellant,</i>  <i>vs.</i>  DENNIS O'CONNELL, <i>Defendant-Appellee.</i>	}	<i>On Appeal          from          Supreme          Court.</i>
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### BRIEF FOR PLAINTIFF-APPELLANT.

This is the appeal of John J. McNulty from a judgment of the Supreme Court affirming a judgment of non-suit entered against him in favor of the defendant in the First District Court of Newark on March 4th, 1926.

### FACTS.

On or about March 23, 1923, the defendant leased to the plaintiff vacant ground with the privilege of building thereon a lunch room.

The written lease reads as follows: "*That piece of land which is part of property known as one hundred sixty-nine Eagle Rock Ave. Dimensions eight feet four inches, more or less, by one hundred feet, more or less, with the appurtenances, for the term of three years.*" Being the property connected with the building known as No. 169 Eagle Rock Avenue.

The plaintiff built a lunch room on said premises eight feet front and rear by about thirty feet in depth, and remained in undisturbed possession until some time prior to February 10, 1925, when the owner of the adjoining property instituted Chancery suit to compel plaintiff herein to remove part of said lunch room on the

ground that it encroached upon the adjoining land to the extent of *nine inches in width in front* and tapering to a point about *twenty feet in depth*, where it ceased to encroach, and on October 20, 1925, a final decree was entered in Chancery ordering this plaintiff to remove that part of his lunch room which encroached as aforesaid, and plaintiff sued to recover the taxed costs paid in the Chancery suit and the moneys expended in removing the encroachment.

The survey introduced in evidence and made part of the printed State of Case, shows that the actual *width in front* of the leased land is *only seven feet two and one-half inches*, tapering to a depth of approximately twenty feet. As this angle continued to widen toward the rear of the property, there was more than eight feet four inches or in the rear not less than eleven feet.

The survey also shows that the plaintiff had not entirely removed the encroachment and his lunch room still encroached *two and three-eighths inches* on the adjoining owner's land, and this portion of the encroachment was not removed for the reason that *such removal would have made it impossible to use the lunch room*.

The difference between *seven feet two and one-half inches* actual measurement and *eight feet four inches* as set forth in the lease is *thirteen and one-half inches* or *thirteen and one-half per cent.* of the quantity leased.

### POINT I.

#### The Trial Court erred in granting a non-suit.

The question involved in this case is a novel one. Most, if not all of the decisions involving the construction of the words *more or less*, are between vendor and purchaser or between mortgagor and mortgagee, and not, as in the case at bar, between lessor and lessee, and do not cover the question of deficiency of width in front of property.

The earliest case in New Jersey on this subject is *Couse v. Boyles*, 4 N. J. Equity 212, which was a suit to foreclose a mortgage. The mortgagor admitted the amount of the mortgage but set up as his defense that the mortgagee had sold him property described as one hundred thirty-five acres *more or less* and that actual survey showed a difference of between twenty-two and thirty-four acres, and the defendant asked for an abatement from the amount of the mortgage. The Court said:

“When land is sold as containing so many acres ‘more or less,’ if the quantity on an actual survey and estimation either overrunning or falling short of the contents named be small, no compensation should be recovered by either party. The words more or less must be intended to meet such a result. But if the variance be considerable, the party sustaining the loss should be allowed for it, and this rule should prevail where it arises from mistake only, without fraud or deception.”

The rule laid down in the cited case has been followed in New Jersey without change.

In the case at bar, the variance was considerable, as only a very small quantity of land was leased and for a certain specific purpose, and the facts show that the variance was so great as to have made it practically impossible for the tenant to adapt the leased property to the purpose for which it was intended.

The defendant's argument is that the *average area and width* is *more* and not *less*, but it is respectfully urged that where, as here, the width of the property in front is most important, a variance of *thirteen and one-half inches* is such a "considerable" variance for which the Court will grant relief for damages suffered by the tenant.

The following rules are taken from the case of *Bingham v. Madison*, Tenn. Supreme Court, reported in 47 L. R. A. page 267:

"It is well settled that a vendee of land, when it is sold in gross, or with the description 'more or less,' or 'about,' does not thereby, *ipso facto*, take all risk of quantity in the tract."

"It is also well established that the use of the words 'more or less,' or 'about' or similar words, in designating quantity, although they show a sale in gross, and not by the acre, covers only a reasonable excess or deficiency."

"It has also been held that, even when the parties saw the premises and knew the boundaries, it cannot prevent relief when there was mutual gross mistake as to quantity."

"And relief will be granted when the mistake is so material that, *if the truth had been known to the parties, the trade would not have been made.*"

All of these rules, particularly the last one, can very aptly be applied to the case at bar. It is fair to say that if McNulty knew the truth, the lease would not have been made as he would not have had sufficient space for his business.

**The number of inches in the case at bar is as important as the number of acres in the cited cases.**

The following cases are referred to as authorities favoring a recovery for the plaintiff:

*Straus v. Norris*, 78 N. J. Equity, page 488—79 Atl. Rep. 611.

*Melick v. Dayton*, (Court of Errors and Appeals) 34 N. J. Equity 624.

*Hawthorne v. Odenson*, (N. J. Court of Chancery) 120 Atl. Rep. 798.

*McMichael v. Webster*, (Court of Errors & Appeals) 57 N. J. Equity 295, 41 Atl. Rep. 714.

*Capstick v. Crane*, Court of Errors & Appeals) 66 N. J. Equity 341.

In the *Straus-Norris case, supra*, the vendee sued to recover back a portion of the purchase price, because of a deficiency, and a decree was entered for the complainant. The Court discusses in detail the principles involved in the case at bar and concludes that relief will be allowed where the variance is considerable.

## POINT II.

The Supreme Court erred in affirming judgment of non-suit.

Although the lease reads "*eight feet four inches more or less*", the plaintiff built on only *eight feet front and rear*, and it is respectfully urged that the plaintiff "proceeded cautiously" as suggested in the opinion of the Supreme Court. The actual width in front of the defendant's land was only *seven feet two and one-half inches*, and it cannot be said that the words *more or less* covered so great a deficiency, for the very reason that *seven feet two and one-half inches* in front did not give plaintiff sufficient space for his building.

Defendant's argument is, that plaintiff remained in possession even after the wall of his building was removed and suggests that consequently the width in front was sufficient for his building. But it will be observed that even after the wall was removed it still encroached *two and three-eighths inches* on the adjoining land. This proves conclusively that the width in front of the defendant's land was not sufficient for plaintiff's building, for if defendant's land had afforded sufficient space for the plaintiff to conduct his business, the wall would have been entirely removed from the adjoining land.

The Appellate Court is not being asked to review a finding of fact.

The Trial Court ruled, as a matter of law, that the words *more or less* prevented plaintiff from recovering damages. This ruling was made on a motion for non-suit and without consideration as to whether the variance was great or small.

No reported case has been found which deals directly with the question at bar, but reference is here made to the case of *Hostetter v. Merrick* (Court of Chancery) 112 Atl. Rep. 487 for support of plaintiff's argument.

In the cited case vendee sought specific performance with an abatement from the purchase price by reason of the vendor's inability to convey all the land embraced within the boundaries as described in the agreement of sale, which stipulated that the lot was thirty-four and one-half feet front and rear by one hundred feet in depth. It developed that the property was only thirty-four feet in front and a little over thirty feet in the rear, and by reason of this deficiency in the area of the lot the vendee sought compensation.

Although the Court denied the relief prayed for by the vendee, in disposing of the question the Court said,

"But I think no case \* \* \* is to be found in which relief has been given for deficiency in quantity of land in the absence of fraud unless it has satisfactorily appeared that the element of quantity of land was of the essence of the contract. Where a sale is by the acre or other unit of superficial contents, and a substantial mistake has been made touching the area, a vendee may be equitably awarded appropriate compensation for deficiency in the quantity, or where the mistake in quantity is so gross that it is clear the purchaser would not have contracted had he known the mistake, like relief may be awarded, \* \* \*."

In the case at bar the width in front was of the essence of the lease, and the *element of width* is analogous to the *element of quantity* in the cited cases, and it is respectfully urged that where, as here, a lease is given for a parcel of land, *eight feet four inches more or less* in width, and the

lessee has the privilege to build and does build, but only upon eight feet front and rear, and it appears that the actual width in front of the lessor's land is only seven feet two and one-half inches, that the words *more or less* do not protect the lessor against such a considerable deficiency, and that the lessee should recover the loss sustained by him on account of the deficiency.

The judgment of the Supreme Court should be reversed.

Respectfully submitted,

ABRAHAM ALBOUM,  
Attorney for Plaintiff-Appellant.

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## New Jersey Court of Errors and Appeals

JOHN J. McNULTY, Plaintiff-Appellant,	} On Appeal from Supreme Court.
vs.	
DENNIS O'CONNELL, Defendant-Appellee.	

### BRIEF FOR DEFENDANT-APPELLEE.

#### Facts.

On March 23, 1923, plaintiff and defendant entered into a written lease by the terms of which the defendant leased to the plaintiff the following premises: "That piece of land of which is part of property known as One Hundred Sixty Nine Eagle Rock Ave. Dimensions Eight feet Four inches, more or less, by One Hundred feet, more or less, with appurtenances."

The plaintiff thereupon proceeded to erect upon that strip of land a lunch room eight feet front and rear by about thirty feet in depth. He was undisturbed in his occupancy of this building from the time of the making of the lease in March, 1923, until February, 1925, when he was compelled to remove part of the building he had erected, by an order of the Court of Chancery of New Jersey. It appeared that he had erected that building so that a portion of it was nine inches over on the land of the adjoining owner. A survey was then made. This survey showed that the strip of land leased, "which is part of property known as #169 Eagle Rock Avenue," between the southerly wall of the building at that address and the property line of the prop-

erty adjoining on the south, had a width in front of only seven feet two and one-half inches. But as this strip of land went back, it grew steadily wider, so that a point of twenty feet back from the street, the property is only eight feet four inches wide. The strip continues to widen to the full depth of the property, so that the width is not less than eleven feet. The agreed state of the case (S. C., p. 13, l. 7) states, "As this angle continued to widen toward the rear of the property, there was more than eight feet four inches or in the rear not less than eleven feet. We have, then, a strip of land about eighty feet in depth, seven feet two and one-half inches wide in front and eleven feet wide in the rear, the width one-quarter of the distance back being eight feet four inches. The total area of the leased premises if it had been exactly eight feet four inches by 100 feet, would have been  $833\frac{1}{3}$  square feet. The actual area, taking the depth of eighty feet by seven feet two and one-half inches front and eleven feet in the rear, is 880 square feet. The actual area of the plot of land is, therefore, "more" and not "less"

The suit is based, then, not upon the fact that the total area is "less" rather than "more," but upon the fact that the frontage was not only "less," but in plaintiff's opinion less than he had a right to anticipate under the terms of the lease. It will be observed that the lease says nothing about eight feet four inches front by 100 feet in depth. It uses the word "dimensions," and the use of that word indicates that the property was eight feet four inches in average width, more or less, and 100 feet in average depth, more or less. The actual average width is more than eight feet four inches, being a trifle

over nine feet. The actual average depth is less than 100 feet, being about eighty feet. But it is not of the average depth that the plaintiff complains, but the width, and not the average width, but the width in front.

All these facts appearing on the plaintiff's case, the trial court granted the motion for a non-suit, and it was from this ruling that the plaintiff appealed to the Supreme Court, which affirmed the decision of the District Court.

#### LAW.

##### POINT I.

The trial court <sup>did not err</sup> ~~erred~~ in granting a non-suit.

No particular fault is found with the statement of law made in the appellant's brief. Our contention is that these authorities do not apply. The case of *Couse v. Boyles* refers to quantity and not to frontage. Taking the property as a whole, the appellant has been given all that it was agreed he should be given.

Counsel for appellant persists in applying the words "more or less" to the frontage of the leased premises instead of to the entire lot rented. As hereinbefore quoted, the average width of the lot is more than eight feet four inches rather than less. His justification for applying the use of these words only to the frontage rather than the rear does not appear.

The case of *Weart v. Rose*, 16 N. J. E., page 290, holds that "were it appears that the adjunct of quantity in a deed is used as description merely, and not as indicating the precise contents of the land conveyed, a mere deficiency in the quantity is not of itself evidence of a fraudulent

intent." It was also held that "where the difference between the actual and estimated quantity of acres of land sold in the gross is so great as to warrant the conclusion that the parties would not have contracted had the truth been known, in such care the party injured is entitled to relief in equity on the ground of gross mistake." In that case the land was described as 115 acres. There was a deficiency of 6.12 acres, and it was held that such deficiency would not entitle the purchaser to an abatement.

It is stated in the appellant's brief that the property was leased for a specified purpose, the conducting of a restaurant, and that the width of the property in front was most important.

An examination of the lease (pp. 6 to 8, inclusive), failed to reveal any mention of the purposes for which the premises were to be occupied. Nor does the agreed state of the case show that at the time the lease was made there was any definite understanding of the purpose for which the premises were leased. Appellant's argument is that if the frontage had not been eight feet four inches he would not have entered into the lease. The answer to this contention is that after being compelled to remove the wall, he continued to remain in possession and was not shown up to the time of the commencement of the suit to have removed. Had the frontage been insufficient he would not have been able to continue his business there. To make use of the premises, it was only necessary for him to make the front of the building narrower or to erect it at a greater depth. At a distance of less than twenty feet back from the street line he could have had his entire eight feet frontage.

The appellant was put on his guard by the use of the words "more or less." He chose to erect the building without verifying the exact width and without ascertaining what portion of the land he was safe in building upon. This being so, he cannot hold the defendant liable.

None of the cases quoted in the appellant's brief apply to the circumstances in the present case. They all refer to a deficiency in acreage. None of them refer to a deficiency in frontage, and, as it has been before shown, a deficiency in area does not exist in the present case.

It is respectfully contended that the appellant's case is based upon a misconception of the language of the lease and an attempt to read into it a meaning of which it is not capable. It is therefore urged that the appeal should be dismissed.

Respectfully submitted,

HOWE & DAVIS,  
Attorneys for Defendant-Appellee.

EDWARD L. DAVIS,  
Of Counsel.

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