INDEX

TESTIMONY.

Plaintiffs' Witnesses.

Defendant's Witnesses.

PLAINTIFFS' EXHIBITS.

Complaint.

(Filed June 18th, 1929.)

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE COUNTY OF HUDSON.

FRANK JANITSCHECK and ROSE JANITSCHECK, Plaintiffs, vs. MELBRO REALTY CORPORATION, a corporation of New Jersey, Defendant.	On Contract. State of Demand.

Plaintiffs, residing in the City of Jersey City, in the County of Hudson and State of New Jersey, say that:

1. On April 24th, 1926, plaintiffs and defendant entered into a written contract, dated the 24th day of April, 1926, wherein and whereby defendant sold to the plaintiffs all that certain lot, tract, or parcel of land and premises, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, and which upon a certain sketch of the property surveyed for Sam and Morris Meltzer by James Henderson, surveyor, on the 19th day of September, 1925, is known, marked and distinguished as Lot No. 38 in Block 903, and more particularly known as and by street number 655 Liberty Avenue.

2. By the terms of said written agreement, defendant stipulated as follows: "All street assessments for the improvements of Liberty Ave-

nue shall be paid by the seller'' meaning that the defendant agreed to pay for any and all street assessments affecting said property on Liberty Avenue.

3. The City of Jersey City has assessed the said premises for the street improvements of Liberty Avenue, in the amount of Four Hundred Thirty-two dollars and ninety-four cents ($432.94), which assessments were duly confirmed on March 1st, 1929.

4. Plaintiffs informed defendant of the said assessments and requested the defendant to pay same in accordance with its agreement with the plaintiffs.

5. Defendant refused and still refuses to pay same until the present time, to the damage of the plaintiff in the sum of Four Hundred Thirty-two dollars and ninety-four cents ($432.94).

Wherefore, plaintiffs demand of the defendant the sum of Four hundred thirty-two dollars and ninety-four cents ($432.94), together with lawful interest and costs of suit.

ABRAHAM WARREN,
Attorney for Plaintiffs.

To the Defendant:

Take Notice that the plaintiffs demand that the defendant shall file a written specification of defenses intended to be made in the said action, on or before the time specified for appearance in the process issued in said cause.

ABRAHAM WARREN,
Attorneys for Plaintiffs.

Summons.

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE COUNTY OF HUDSON.

State of New Jersey To any Constable or Sergeant-at-Arms of said County, Summons.

State of New Jersey,
County of Hudson, ss:

(L. S.)

Melbro Realty Corporation (a corp. of N. J.) to appear before the District Court of First Judicial District of the County of Hudson, Lewis B. Eastmead, Judge, to be held at the Court Room, Dispatch Building, 404-38th Street, Union City, on the 26th day of June, 1929, at 10 o'clock in the forenoon to answer unto Frank Janitscheck and Rose Janitscheck, in an action upon contract.

Damages $432.94.

Witness, Lewis B. Eastmead, Esq., Judge of said District Court of the First Judicial District of the County of Hudson, aforesaid, the 18th day of June, 1929.

HENRY BENDER,
Clerk.

Abraham Warren,
Plaintiff's attorney.

I served the within summons June 21, 1929, on Melbro Realty Corporation by reading same to Mr. Newbaum and delivering to Mr. Newbaum a copy thereof.

JOSEPH CONWAY, Constable.
Sergeant-at-Arms.

Specification of Defenses.

(Filed June 26th, 1929.)

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE COUNTY OF HUDSON, N. J.

FRANK JANITSCHECK and ROSE JANITSCHECK, Plaintiffs, vs. MELBRO REALTY CORPORATION, a corporation of New Jersey, Defendant.	Specification of Defenses.

The following are the specification of defenses upon which the defendant, Melbro Realty Corporation, will rely upon at the trial:

1. All the allegations of the state of demand are denied.

2. The defendant is not indebted to the plaintiffs for any matter, reason or thing whatsoever.

3. The assessment for the improvement of Liberty Avenue is not chargeable against the defendant because of any contract or deed or for any other reason whatsoever.

SECLOW & NESSANBAUM,
Attorneys for defendant, Melbro Realty Corporation.

Service of a copy of the within specification of defenses is acknowledged this 26th day of June, 1929.

ABRAHAM WARREN,
Attorney for Plaintiffs.

Transcript of Clerk's Docket.

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE COUNTY OF HUDSON

(Filed April 29, 1930)

State of New Jersey,
Hudson County, ss:

No. 41517.

Before Lewis B. Eastmead, Esq., Judge.

Abraham Warren, plaintiffs' attorney.
Seclow & Nessanbaum, defendant's attorney.

In Contract. Demand $432.94.

FRANK and ROSE JANITSCHECK

vs.

MELBRO REALTY CORP.

A summons was issued tested June 18th A. D. 1929, returnable June 26th A. D. 1929 at 10 o'clock in the forenoon.

The Constable or Sergeant-at-Arms returned the summons as follows: I served the within summons June 21, 1929, on Melbro Realty Corp. the defendant by reading the same to Mr. Newbaum and delivering to Mr. Newbaum a copy thereof.

JOSEPH A. CONWAY, Constable.

Plaintiffs' demand was filed June 18th, A. D. 1929.

On the part of the plaintiffs, Frank Janitscheck.

On the part of the defendant, Samuel Meltzer, Morris Meltzer, James J. Dolan.

Whereupon it is on this eleventh day of September, A. D. 1929, by this Court considered and adjudged that said Frank Janitscheck and Rose Janitscheck, plaintiffs, recover against said Melbro Realty Corp., a corporation, defendant, the sum of $446.63 damages and $27.63 costs of suit.

Transcript issued September 11, A. D. 1929.

Notice of appeal filed September 23rd, 1929.

Bond of appeal filed September 23rd, 1929.

Costs:

Summons and copy	$ 1.50
Service and return	.60
Mileage	.70
Trial Fee	1.50
Attorney's fees	23.33
Transcript	.50
	$28.13

I hereby certify the foregoing to be a true transcript of the Clerk's Docket in the foregoing cause.
Dated - April 26th 1930.

Henry Bender
Clerk District Court of the First Judicial District of the County of Hudson.
(Seal of Court)

Notice of Appeal.

(Filed September 23, 1929.)

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE COUNTY OF HUDSON.

FRANK JANITSCHECK and ROSE JANITSCHECK, Plaintiffs, vs. MELBRO REALTY CORPORATION, (a corp. of N. J.), Defendant.	On Contract. Notice of Appeal.

To Abraham Warren, Esq., Attorney for Frank Janitscheck and Rose Janitscheck, plaintiffs:

Sirs:

Take Notice that the defendant, Melbro Realty Corporation, a corporation of the State of New Jersey, hereby appeals to the New Jersey Supreme Court, from the judgment of the District Court of the First Judicial District of the County of Hudson, rendered in the above action on the eleventh day of September, nineteen hundred and twenty-nine.

Dated, September 12th, 1929.

Yours, &c.,
SECLOW & NESSANBAUM,
Attorneys for Defendant.

Service of a copy of the within notice of appeal is acknowledged this 18th day of September, 1929.

ABRAHAM WARREN,
Attorney of Plaintiffs.

Specifications of Determinations and Directions Appealed From.

(Filed September 21, 1929.)

NEW JERSEY SUPREME COURT.

FRANK JANITSCHECK and ROSE JANITSCHECK, Plaintiffs, vs. MELBRO REALTY CORPORATION, a corporation of New Jersey, Defendant.	On Contract.

The defendant-appellant herein, herewith files its specification of determinations and directions of the District Court of the First Judicial District of the County of Hudson, with respect to which it is dissatisfied in point of law:

1. Said court erred in refusing to non-suit the plaintiffs when thereunto moved upon the opening of the plaintiffs' case and state of demand, whereas, said motion should have been granted for one or more of the following reasons urged in support thereof:

(a) That the assessment for the improvement which formed the basis of the suit was not confirmed until March 1st, 1929, the contract being made on April 1st, 1926. The assessment not being a lien until confirmed, the plaintiffs were not entitled to maintain any action thereon.

Specifications of Determinations and Directions Appealed From

2. Said court erred in refusing to non-suit the plaintiffs when thereunto moved at the close of the plaintiffs' case, whereas, said motion should have been granted for one or more of the following reasons urged in support thereof.

(a) That no action could be predicated upon the contract itself.

(b) The affirmative proofs showing that the work covered by the assessment was commenced about a year and one-half after the date of the covenant and that it was not confirmed until about three years after the covenant sued upon, that there was, therefore, no obligation upon the defendant to pay for this work.

(c) That payment of the assessment by the plaintiffs was voluntary and no recovery could be predicated thereon. That the assessment being payable in installments, the recovery should have been only for the overdue installments.

(d) That the improvement for which the assessment paid was not within the purview of the covenant in the contract nor within the contemplation of the parties to the contract under a legal interpretation of said covenant.

3. That said court erred in refusing to direct a verdict for the defendant, when thereunto moved, whereas, said motion should have been granted for one or more of the following reasons urged in support thereof:

Specifications of Determinations and Directions Appealed From

(a) The covenant was made April 24th, 1926, and the assessment was confirmed March 1st, 1929. There was no breach of this covenant.

(b) That the plaintiffs' action could not be based upon the covenant in the contract alone.

(c) That the improvements for which the assessment was confirmed was not within the contemplation of the parties nor within the purview of the covenant in the contract.

(d) That there was a voluntary payment of the assessment by the plaintiffs, for which they could not recover.

(e) That the assessment was payable in installments and the limit of recovery by the plaintiffs could be for overdue installments only.

(f) That the intention and meaning of the covenant appears from the evidence not to have included the asphalting, surfacing of the highway and that no recovery for the assessment for said surfacing could be predicated on said covenant.

(g) The proofs as to the improvements for which the assessment was confirmed showed that it embraced more than was contemplated by the covenant in the contract. The lump sum of the assessment which formed the basis of plaintiffs' suit could not legally form the basis for a judgment.

4. The said courts erred in admitting over the objection of the defendant, the bill for the assessment marked "Exhibit P-2."

Specifications of Determinations and Directions Appealed From

5. That said court erred in over-ruling the following question addressed by the attorney of the defendant to the plaintiff upon cross-examination:

"Q. Who prepared this contract?

Mr. Harber: I object, on the ground that it is immaterial and irrelevant.

The Court: What difference does it make if they were represented in the mere physical preparation of it?

Mr. Seclow: It still makes a difference.

The Court: Sustain the objection.

Mr. Seclow: Exception."

6. Said court erred in over-ruling the following questions addressed to Samuel Meltzer, a witness produced by the defendant:

"Did you pay for these improvements which were installed at the time that you made this contract?"

"Q. Which had been made on that street or which had been commenced up to that time?"

"Q. Now, you are now being sued for an assessment for an asphalt surfacing of Liberty Avenue, in front of the property, the lands which you sold. How long after you sold this property was that work on that asphalting commenced?"

7. Said court erred in refusing to permit the witness, Morris Meltzer, to answer the following question:

"Q. Now, did your company make any improvements there on that street?"

SECLOW & NESSANBAUM,
Attorneys for Defendant-Appellant.

Stipulation.

NEW JERSEY SUPREME COURT.

FRANK JANITSCHEK and ROSE JANITSCHEK, Plaintiffs, vs. MELBRO REALTY CORPORATION, a corporation of New Jersey, Defendants.	On Contract

The respective parties hereby stipulate that this appeal be argued at the May, 1930 term, and that the State of the case may be filed after the commencement of the October, 1929 term.

ABRAHAM WARREN,
Attorney for Plaintiff-Appellee.

SECLOW & NESSANBAUM,
Attorneys for Defendant-Appellant.

Stenographer's Minutes.

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE COUNTY OF HUDSON.

FRANK JANITSCHECK and ROSE JANITSCHECK, Plaintiffs, vs. MELBRO REALTY CORPORATION (a corp. of N. J.), Defendant.	Stenographer's Minutes.

Before Hon. Lewis B. Eastmead, Judge.

September 11th, 1929.

Appearances:

For the Plaintiffs, Abraham Warren, Esq., by Samuel Harber, Esq.

For the Defendant, Seclow & Nessanbaum, Esqs., by Alexander Seclow, Esq.

Stenographer sworn.

Mr. Seclow: I want to move for nonsuit on the opening of counsel and on the state of demand. It now appears conclusively by the opening of counsel and the state of demand, the contract was in writing. The covenant concerning the assessment is in the contract. The contract further says that the assessment was not confirmed until a considerable time after that, and therefore, this assessment not being a lien, I move for a nonsuit.

The Court: That depends on the language of the contract. It does not have to be a lien.

Mr. Seclow: It is in the record. There is a state of demand there, which sets it forth, of course, and which also gives the legal interpretation of it; but that is neither here nor there.

The Court: How can I grant a nonsuit on the opening, if, assuming what you say is true, there is nothing to show when this assessment was levied? The state of demand says: "All street assessments for the improvements of Liberty Avenue shall be paid by the seller."

Mr. Seclow: Paragraph 3 says that the assessment was duly confirmed on March 1st, 1929. The contract was made in April, 1926.

The Court: Yes; that is the precise language of the contract: "All street assessments for the improvements of Liberty Avenue shall be paid by the seller," and that was in 1926, and three years later the assessment comes along.

Mr. Harber: Yes; we are going to contend that is a legal question for your Honor to decide.

The Court: That would hold in perpetuity?

Mr. Harber: No; holds for the improvement of the street.

The Court: You mean any future assessment?

Mr. Harber: No; as to this assessment, we will show circumstances, if your Honor will permit me.

The Court: Is it conceded that this street was under process of improvement?

Mr. Seclow: Not until a year and a half after this property was sold. The facts of the case are these: That the vendors, at their own cost, performed certain improvements on that street. A year and a half later, or two years later, that street was surfaced—an entirely different improvement, certainly not within the contemplated purpose embodied in the language of their agreement.

The Court: At any rate, it seems this is a case I cannot rule on an opening.

Mr. Seclow: I merely make my motion, your Honor. I want to get the benefit of the motion. I think on the pleadings there is no cause of action shown.

The Court: I will decline a nonsuit on the opening, and you may have an exception, of course. I don't know whether that ruling will be the same, of course, when the facts are in, but I will deny a nonsuit on the opening.

Mr. Seclow: Exception.

FRANK JANITSCHECK, plaintiff, witness on his own behalf, being first duly sworn according to law, upon his oath testifies as follows:

Direct-examination by Mr. Harber:

Q. Mr. Janitscheck, I show you a contract dated the 24th of April, 1926, between the Melbro Realty Company and yourself and wife. Remember executing and signing this contract? A. Yes, sir.

Q. And at the time, or about the time that you made that contract, did you examine the

premises that you were buying? A. Well, I examined the premises at the time that I bought them—naturally.

Q. And what was the condition of the street known as Liberty Avenue? A. Well, at that time there was no Liberty Avenue where I was. That was all under construction, putting in sewers.

Q. You mean that the street was at that time being improved.

Mr. Seclow: It is objected to, if the Court please.

The Court: Sustain the objection.

Q. Tell us, what were they doing there? What was the condition of Liberty Avenue at the time you made the contract? A. The condition of Liberty Avenue was: It was a new settlement; there was a new street being cut through.

Q. Your house fronted on Liberty Avenue—the property that you were buying? A. Yes, sir.

Q. And Liberty Avenue was cut through as a street, opened up at the time? A. At the time they were working on it.

Q. And they were working on the improvement of that street?

Mr. Seclow: Objected to.

The Court: Sustain the objection.

Q. What were they doing with the street at the time you made the contract? A. Everything was torn open, ripped up. They were blasting from the sewers, which took about a year and a half.

Q. I don't care what it took about. Tell us, what else were they doing? A. Well, there was no pavement or anything down. The only thing that was made was sidewalks, and we had no level surface down there at the time.

Q. Was that the condition of the street at the time you made the contract? A. It was absolutely unpassable.

Q. Was it ripped up? A. It was an impossibility to go through with trucks, except for the delivery of materials.

The Court: It had a sewer in 1926 as of the date of this contract? The condition you speak of existed at that time?

A. Absolutely.

Q. And when you went to make the contract, you provided for—

Mr. Seclow: It is objected to.

Mr. Harber: Let me finish the question.

Mr. Seclow: His intentions are not good.

Q. Knowing that to be the condition, as you described, you provided for the payment by the vendor of the improvement of this street, didn't you, at the time you made the contract?

Mr. Seclow: Objected to.

The Court: Sustain the objection.

Q. Knowing that condition to be as you say it was, you then made this contract?

Mr. Seclow: Objected to.

The Court: Sustain the objection.

Q. How long before the date of this contract did you see the condition of that street, as you described? A. I saw the condition of the street when I gave the deposit on the house.

Q. Was that the time you made this contract, dated April, 1926?

Mr. Seclow: Objected to; the contract speaks for itself.

The Court: That is not the question.

Q. At the time you gave the deposit, was this contract made?

Mr. Seclow: Objected to; it speaks for itself.

A. No; that contract was made a few days after.

Q. After you saw this condition? A. Absolutely.

Q. And then you made this contract? A. Sure.

Mr. Harber: I offer the contract in evidence.

Contract offered in evidence, marked Exhibit P-1.

Q. Now, you took title to that property, didn't you? A. Yes, sir.

Q. Described in that contract in evidence; is that right? A. Yes, sir.

Q. And did you thereafter get a bill from the City of Jersey City for the improvement of Liberty Avenue? A. Yes, sir; I received an assessment bill.

Q. And is this the assessment bill that you received? A. (Witness looks at paper.) That is the bill.

Q. And did you pay that assessment bill? A. I paid the full amount of that bill.

Mr. Harber: I offer this assessment bill in evidence.

Mr. Seclow: I don't want to object to this bill because of its authenticity I will assume that it is an authentic bill; but I want to object to it because the pleadings allege that the assessment was confirmed on March 1st, 1929, and presumably this bill shows payment of an assessment which was confirmed several years after the contract. I therefore object to the admission of that bill on the ground that it is irrelevant and incompetent and immaterial—not to its authenticity.

The Court: The ground of your objection is, it is immaterial and irrelevant?

Mr. Seclow: Yes; incompetent, immaterial and irrelevant. He cannot bind us by paying bills upon which there is no obligation upon us to pay. The obligation must first be shown.

The Court: It is admitted, I take it, for the purpose of the record, that this property does lie on Liberty Avenue, somewhere between North Street and Secaucus Road?

Mr. Seclow: I will even admit that that bill is a bill for the assessment on that property, as stated in this complaint; but I deny that this bill has any evidentiary force, because it is not binding on us; that is, assuming that he paid this bill and several other bills, the mere payment by him of a bill cannot bind us.

The Court: In the absence of contract, of course.

Mr. Seclow: In the absence of contract, and in view of the contract in this case.

The Court: I take it you are not conceding, or not admitting, that this would not bind you in the event I should find that this is such a street assessment as is contemplated by the contract; that is not the point, is it?

Mr. Seclow: No; if your Honor finds that we have to pay that bill, then I am not objecting to the proof of payment or method of proving the damages; but I contend that there has been no basis laid whereby we must respond to pay these damages.

The Court: Which, I suppose, brings us to the meat of the case, as to whether this amount is to be paid by the defendant. I will overrule your objection, and allow it to be marked in evidence. You may have an exception, of course.

Mr. Seclow: Exception.

Assessment bill offered in evidence, marked Exhibit P-2.

Q. You say you paid that bill; is that right? A. I did.

Q. And after you paid that bill, did you notify the Melbro Realty Company of the assessment? A. I notified them before I paid the bill.

Q. Did you notify them after you paid the bill? A. I did. As a matter of fact, the reason I had to pay the full amount of the bill—I only paid part of the bill—account of taking a different mortgage, a Building and Loan mortgage; they told me I would have to pay the full amount of the bill before they could pass on the mortgage.

Q. And you did? A. Yes; and they were notified at the time, also, to pay for this bill, and they said they wouldn't do it.

Q. Did they ever pay it since that? A. They never did.

The Court: Who never paid it?

Mr. Harber: The defendant, the Melbro Realty Company.

Q. Did they give you the money back? A. They never gave me the money back.

Q. By the way, do you still live in that property? A. I still live there.

The Court: Still own it?

Q. Do you still own the property? A. I still own it.

CROSS-EXAMINATION by Mr. Seclow as follows:

Q. You took title about a month after you made the contract? A. Approximately; yes.

Q. Were you represented by a lawyer when this contract was prepared? A. I was.

Q. Who was the lawyer? A. The lawyers were Manetti and Echentille.

Q. They were your attorneys—they searched the property for you? A. Absolutely.

Q. The Melbro Realty Company, they weren't represented at that contract?

Mr. Harber: Objected to, on the ground it is immaterial and irrelevant.

The Court: It is immaterial.

Mr. Seclow: It might be, your Honor, in this case.

The Court: How? If they are not represented by counsel, that is their own peril.

Mr. Seclow: No, it is not. It is material in this case, because, if your Honor is going to find in this case there is any perpetuity in the language, there is a line of decisions as to the contract.

The Court: As to who drew the contract, you mean?

Mr. Seclow: There is a big difference in the construction of that contract.

The Court: Well, if it is for that purpose, I will allow it.

A. They were represented by a lawyer.

Q. Who was their lawyer? A. Some law-

yer in Bayonne. I think Lazarus—no, it wasn't Lazarus; it was a different name.

Q. Don't you know that that contract was drawn by your attorneys, and they didn't have the benefit of any lawyer there? A. I wouldn't say that, because the same lawyers drew four other contracts on the same street at the same time.

Q. From your answer I would say that you are not positive? A. In which respect?

Q. Whether or not they were represented by a lawyer? A. They were represented by a lawyer.

Q. You don't know the name of their lawyer? A. I don't know the name of their lawyer. He was a Bayonne lawyer, but I don't know the name.

Q. But the contract was prepared by your lawyer?

Mr. Harber: I object, your Honor.

The Court: Sustain the objection.

Q. Who prepared this contract?

Mr. Harber: I object, on the ground it is immaterial and irrelevant.

The Court: What difference does it make if they were represented in the mere physical preparation of it?

Mr. Seclow: It still makes a difference.

The Court: Sustain the objection.

Mr. Seclow: Exception.

The Court: I am assuming, of course, that if they had a lawyer there, that he

would read this contract before permitting his clients to sign.

Mr. Seclow: But if they had not, it is material.

The Court: I don't know. As the evidence now stands, they did have an attorney.

Q. Had you ever been on Liberty Avenue, where your property is situated, before you bought that property? A. Well, I would have to say exactly as it happened.

The Court: Read the question.

(Question read.)

A. Well, I was there when I gave a deposit on the house, and looked it over. It was a few hours before.

Q. That was about the date of this contract? A. No; that was about a week or two before that contract.

Q. Were you ever there before those houses were erected there? A. No. I wasn't there before.

Q. So you don't know the condition of that street before any houses were erected there, do you? A. I don't know how it was five years ago. Naturally not, because I had nothing to do there previously.

Q. You don't know the condition of that street a month before the contract was prepared?

Mr. Harber: I object; it is not material.

Mr. Seclow: This is cross-examination.

It is material. This witness before testified that the street was all torn up, and you couldn't deliver mail there. He left the impression on this Court that this was a brand new street.

The Court: No, he didn't. I was raised "back of the hill," as you call it, so I know it wasn't a brand new street.

Q. How long after you took title was the curb finished in front of your house?

Mr. Harber: I object on the ground it is immaterial and irrelevant.

The Court: The curb?

Mr. Harber: The question is how long after he took title was the curb finished.

Mr. Seclow: I want to show the various processes in there, because they are only claiming payment for an assessment for which they paid for only one process; and it is very material, because this court is asked now to determine what particular part of this asphalt improvement we will pay for, and I think it is very vital to this case that we show the various things were done there and when they were done. As a matter of fact, I think in the present posture of the testimony, your Honor cannot give a decision. It does not show what was done, and when.

The Court: I will overrule the objection.

A. Well, the sidewalks and curbs were laid in by the builder. There was a curb there which

had to be removed, because it had not been put in in the proper manner.

The Court: The question was, when was the curb in front of your house put in?

A. I don't know.

The Court: Was it there when you took title, or was it put in after?

A. I tell you, the street was in a condition, it was a manhole.

The Court: Do you know what a curb is?

A. I know what a curbstone is. I remember, after they finished the improvements, they took old curbs out and replaced them with new ones.

The Court: Do you know when that was done?

A. When they replaced was when they were through with the sewer; about a year and a half later.

Q. When you drew that contract, was there a curb in front of your house? You can answer that, "yes" or "no." A. There was a curb there.

Q. Was there a sidewalk in front of your house? A. There were new sidewalks there, new concrete sidewalks.

Q. Did you have a sewer running from your house into a sewer in the street? A. Yes.

Q. So there must have been a sewer in the street. A. As far as these houses were built, they were put in a temporary sewer.

Q. There was one in front of your house? A. Yes.

Q. To which your house was connected? A. That's right.

Q. Now, how long after you drew this contract was the space between the two curbs leveled or graded? A. When they got finished with the sewers.

Q. And that was about the time you signed this contract? A. They were working on it at the time of the contract.

Q. When you took title, which was about a month later, was the sewer finished? A. No.

Q. How long after you took title was the sewer completed? A. Approximately a year and a half.

Q. Now, they subsequently surfaced that highway—the space between the curbs; didn't they? They put an asphalt surface on there. How long after your deed was delivered to you was that surfaced? A. That was surfaced when they were through with the sewers. They surfaced the streets and finished it off.

Q. How long after? A. A year and a half after the sewers were finished, then they went to work and paved the street.

Q. How long after? A. A month or so.

Q. How long did it take them to surface it? A. I would say about two months.

Q. Didn't you tell me before that the sewer in front of your house was completed about the time that you took title? A. The sewer was completed at the house, and they were working further on; but the sewer wasn't completed through the street.

Q. Will you tell me when the sewer was completed in front of your house? A. When I took

title to my house, it was connected with the sewer they were working on through the street.

Q. Was that sewer in front of your house completed when you took title? A. Yes, it was.

Q. And how long after you took title was the road being surfaced in front of your house? A. I would say somewheres around seventeen months after.

Q. Have you the deed here to your house? A. I believe my attorney has it.

Mr. Seclow: I call on counsel to produce the deed.

Q. Did you give it to him? A. I gave him some papers.

The Court: Was there notice to produce?

Mr. Harber: There was none. The deed is a matter of record.

The Court: If you haven't got the deed, and you haven't served notice, you cannot get it.

RE-DIRECT EXAMINATION by Mr. Harber, as follows:

Q. At the time you purchased this house, you say it was connected with the sewer? A. That's right.

Q. What happened to the sewer before the entire sewer in the street was finished? A. That sewer at the time they were working ahead. There was rock there. They had to blast the rock until they reached a connection on

North Street, in order to make it one sewer. It wasn't a complete sewer.

Mr. Seclow: I object to that question.

The Court: It was answered.

Mr. Seclow: The witness was asked one question. I can only anticipate one answer. There was nothing in the question to anticipate his answer.

The Court: The proper motion is a motion to strike out. I will let it stand.

RE-CROSS EXAMINATION by Mr. Seclow, as follows:

Q. You took title, and a deed was delivered to you pursuant to this contract, wasn't it?

Mr. Harber: I object, on the ground the deed was the best evidence. This is not re-cross examination.

The Court: He can answer "yes" or "no." He doesn't have to tell what is in the deed.

Q. You received the deed under your contract? A. Surely.

Q. You say now you haven't got that deed here? A. Yes.

Mr. Seclow: If the Court please, I move for a nonsuit, on the following grounds: The general rule is that a contract merges in a deed. There has been no deed produced here by the plaintiff, upon whom there is the affirmative burden to prove the case. Now, if a deed was delivered—

and it appears by the testimony that a deed was delivered—every covenant in this contract, with the exception of perhaps certain prospective covenants that are not covered by the deed, would be merged in the deed. In other words, the deed swallows up the contract; and there is nothing before this Court now by the plaintiff to show the consummation of this contract. As a matter of fact, there is nothing here to show he is entitled to sue for breach of warranty. There is no covenant of warranty here. He sues on the deed for the violation against encumbrances. There is no suit can be maintained on this contract, except for specific duty; and there is no action that can be predicated on this contract, and if there is any, it must be predicated on this deed; and my first ground is that no action can be predicated on this contract, and if there is any action in there, it is merged in the deed, and they must show affirmatively that it is not merged.

Now, assuming that some action can be predicated on this contract, we have the evidence in this posture: There is nothing before this Court to show what that assessment is for. To be sure, there is an assessment there. He pays some money. We don't know what it is for. We don't know whether it is within the purview of this contract. The case is bare of that; and for that reason there ought to be a nonsuit.

It appears conclusively that a bill for

an assessment was paid about three years after this contract was made, and that that bill was confirmed about three years afterward. Assuming that this contract would cover the work, the improvement for which this assessment was paid, that was not a lien at the time that our covenant was made; and the words of this contract are not sufficient to take in all future assessments that may ever be imposed on this property, because, if that were the case, they may be called in here as long as time lasts—and it is possible, because this is a corporation, which may be chartered forever—to pay other assessments on there. That is just what they are asking your Honor to do. Now, I say for that reason there ought to be a nonsuit. This assessment was not a lien at the time that the contract was made. It became a lien and became confirmed a long time afterward, and there is no obligation to pay it, assuming that this contract can be considered as some covenant upon which we are liable.

I still have another ground. It appears now that this assessment was paid voluntarily by the plaintiff. I cite the case of Bradley vs. Dyke. In that case the Court says this, 57 New Jersey Law, page 471:

"Nor could the plaintiff succeed in his suit on the covenant of warranty, inasmuch as he voluntarily paid off these taxes, being the supposed encumbrance, and under such circumstances an evection

could not be imputed. The principles of law on this subject are entirely settled."

Now, he did not have to pay that assessment. He says he was going to get a building and loan mortgage. That was a voluntary payment.

The Court: What does this case say?

Mr. Seclow: It says there is no eviction. There is no chance of eviction. He was not threatened with any. He went in and paid off the taxes voluntarily. If he could show, for instance, the city was going to sell his property for non-payment of taxes, and there was a chance for eviction, it would be different.

The fifth ground is: If your Honor will see that assessment bill, you will find it is payable in intsallments over a period of five years; and if the first payment is made within a certain time, he has the right to pay this periodically. This being so, the most that he could sue on would be the installments that were now overdue or were overdue at the inception of this suit.

I will cite, your Honor, a case on this point. That is the case of Holzapfel vs. The Hoboken Manufacturers, Court of Errors and Appeals, 104 Atlantic, page 209—and there is an earlier case there of Devlan vs. Wells, 65 Law, 213. In the first case I cited, the Court says this:

"Section 21 of the Practice Act of 1912 does not support a suit and entry of judgment therein for moneys not due at the time of beginning the action, though

they be installments to accrue, and though there is already a right of action for installments in arrear.''

The Court: What kind of a contract was it?

Mr. Seclow: I suppose that was an installment contract. But he has a right—and it is a vital thing in this case, your Honor—to pay those installments over a period of years. Why does he come in and make us pay them, assuming that he has the right, at one time? It is a permanent improvement on the property. It is not a yearly tax, which is divided over a period —in some places it is ten years.

The Court: What have you to say on the point in his testimony that he asked for the payment of your clients, but they refused?

Mr. Seclow: He doesn't say when he asked. His testimony as to refusal is not clear. He says he paid it because he had to go and get a mortgage. Now, even if he asked us to pay it, a reasonable time must have elapsed. We must have been given a reasonable opportunity. He says he asked, he had to get a mortgage, he went out and paid it. That is his testimony. Now, the rule, in cases of this kind, if the Court please, of *caveat empter* applies. He saw what he was getting, and it was up to him to find out whether the assessment was confirmed. As a matter of fact, it could not have been confirmed, because they did not start on the work for seventeen months afterward; and I say,

your Honor, that this covenant in the contract—assuming there is a basis for recovery for any tax in a suit on the covenants in a deed—that this covenant cannot embrace the asphalt surfacing of a street, which is strictly a different improvement from sewer, curb, sidewalk, and the grading.

Your Honor well knows—and if your Honor will see that bill there, it is just for surfacing—Liberty Avenue was an old street. There was a street there. There was a sewer. There was water. There were sidewalks there; and seventeen months afterward this street was surfaced, and we were asked to pay for it; and I submit, your Honor, there is no liability, and I think, for all of these reasons, there ought to be a nonsuit.

The Court: It seems to me that the language of this covenant is: "All street assessments for the improvements of Liberty Avenue shall be paid by the seller;" that it is broad enough to cover assessments of every kind that might be considered in the nature of assessments in that street; and I think it is broad enough to take in even an assessment for surfacing.

With respect to the first point raised, that there is a merger in the deed, it seems to me obvious this is the sort of covenant that cannot be merged in the deed, when the contract is made a month before passing title. The language of the covenant is very broad. It says: "All

the street assessments for the improvements of Liberty Avenue shall be paid by the seller." It is unrestricted as to time, and it seems to me that, of course, it cannot be construed as meaning that the grantor will be held in perpetuity, for all future. Still, it is broad enough, in my judgment, to cover an assessment that is reasonably within the time mentioned in the contract. It does not seem to me that an assessment of this kind, levied three years after the passing of title, is such a long time as to be unreasonably within the purview of the contract.

I also find the other grounds raised by counsel to be without substance.

I will deny the motion.

Mr. Seclow: Exception.

SAMUEL MELTZER, witness on behalf of defendant, being first duly sworn according to law, upon his oath testifies as follows:

Direct-examination by Mr. Seclow:

Q. You are connected with the defendant corporation as an officer? A. Yes.

Q. What is your office? A. Treasurer.

Q. And you signed a contract marked Exhibit P-1? A. Yes, sir.

Q. Do you know who drew this contract? A. Attorney by the name of Echentille, in West New York.

Q. Do you know whose attorney he was? A. Mr. Janitscheck took me down there, and he told me he wanted Mr. Echentille to draw the contract.

Q. Did you have a lawyer present with you when that contract was prepared?

Mr. Harber: I object, on the ground it is immaterial and irrelevant.

The Court: It is immaterial and irrelevant, except for the one purpose, the construction of the contract being against the parties who drew it. I will allow it for that purpose.

A. No, sir.

The Court: Did you have a lawyer there when it was executed?

A. No, sir.

Q. Did you have a lawyer there when it was prepared? A. No, sir.

The Court: Did your company have a lawyer at the time that this contract was executed?

A. Yes, sir—no, sir; not at the time the contract was.

The Court: Did you have a regular lawyer at the time, or didn't you?

A. We always have a regular lawyer.

The Court: Who was your regular lawyer in 1926?

A. The office of Seclow & Nessanbaum.

The Court: Are they from Bayonne?

A. Yes, sir.

Q. Now, this particular property here, was

that one house there, or were there more houses built on this development?

Mr. Harber: I object, on the ground it is immaterial and irrelevant.

The Court: It is immaterial.

Mr. Seclow: Exception.

Q. Did you yourself have anything to do with the improvement of that street?

Mr. Harber: I object on the ground it is immaterial.

The Court: Sustain the objection, unless you want to show he helped them dig the ditches.

Mr. Seclow: Exception.

Q. Do you know who improved, who laid the sewer in front of this house? A. Yes, sir.

Q. Who laid the sewer?

Mr. Harber: I object, unless the time is fixed.

The Court: Yes, fix the time.

Mr. Seclow: I withdraw the question.

Q. Was there a sewer lying in front of this house at the time the plaintiff drew this contract? A. Yes, sir.

Q. Do you know who installed that sewer? A. It was installed by a contractor that was hired by myself.

Q. Was that sewer installed before this contract was drawn? A. Yes, sir.

Mr. Harber: I object, on the ground it is immaterial and irrelevant.

The Court: I don't think it is material. We are only concerned in improvements maintained by the municipality.

Mr. Seclow: It is very material. If we can show that all improvements were done when this man took the house, and three years later they saw fit to have the street surfaced, they cannot recover.

The Court: Maybe on a street by and through a governmental authority; not a private sewer.

Mr. Seclow: This is not a private sewer. I am trying to show here that this man developed the whole street, but your Honor won't let me show it. Here is a man comes in, buys a big tract, develops the street, lays a sewer, and under the supervision of the city authorities, and dedicates it to the city.

The Court: Why don't you show the supervision of the city authorities?

Mr. Seclow: I tried to show he developed the whole tract, but your Honor overruled my question. I can only adduce this evidence a piece at a time.

Q. Now, was there curbing in that street when you sold this property? A. Yes, sir.

Mr. Harber: I object, on the ground that it is immaterial and irrelevant.

The Court: I don't see the materiality of it, but I will allow it.

A. Yes, sir.

Q. Were there sidewalks there in front of that

property when you made this contract, marked Exhibit P1? A. Yes, sir.

Q. Did you pay for these improvements which were installed at the time that you made this contract?

Mr. Harber: I object, on the ground that it is immaterial and irrelevant.

The Court: Sustain the objection.

Mr. Seclow: Exception.

Q. Now, at the time the deed for this property was delivered, had you paid for all the improvements? A. Yes, sir.

Q. Which had been made on that street or which had been commenced up to that time?

Mr. Harber: I object, on the ground the question is vague, immaterial and irrelevant and calls for a conclusion.

Mr. Seclow: Whether he paid for them?

The Court: Sustain the objection.

Mr. Seclow: Exception.

Q. Now, you are now being sued for an assessment for an asphalt surfacing of Liberty Avenue, in front of the property, the lands which you sold. How long after you sold this property was that work on that asphalting commenced?

Mr. Harber: I object, on the ground that the question is indefinite. That is not the testimony in the case, and that is not the issue in the case as to the asphalt alone.

The Court: Sustain the objection.

Mr. Seclow: Exception.

The Court: The assessment bill calls for an improvement of Liberty Avenue, between North Street and Secaucus Road, and does not designate what it consists of. You may have an exception, of course.

Q. Now, you said that the sewer and the curb and the sidewalk were in at the time you sold this property to this man? A. Yes, sir.

Q. This plaintiff. Do you know who paid for this work?

Mr. Harber: I object, on the ground that the question has already been passed upon and ruled out by the Court.

Mr. Seclow: Does counsel want this case to be tried on an eviction, and have these people pay for something which they paid already?

Mr. Harber: Counsel is not trying this case on an eviction, but what is presented by way of evidence to the Court.

Mr. Seclow: I consented that the bill be put in. If we had a man here from the city, he would tell us it is for asphalting alone.

Mr. Harber: It is not.

The Court: I cannot decide what the bill is for in the absence of proof.

Q. Do you know, Mr. Witness, what that assessment bill is for that the plaintiff has proved?

Mr. Harber: I object, on the ground that the bill speaks for itself.

The Court: It is not within his knowledge. It is a bill made out by the Department of Revenue and Finance of the City of Jersey City.

Mr. Seclow: Do you know?

A. I don't know what that particular bill is for. He never brought it to me.

Q. Now, I ask you this direct question: Did the City of Jersey City, or anybody except yourself, lay the sewer in that street?

Mr. Harber: I object, on the ground that the question is vague, indefinite, and immaterial.

Mr. Seclow: If he laid the sewer in there himself, then someone else couldn't have done it.

The Court: Do you mean that the question relates to the entire length of this street.

Mr. Seclow: In front of that house.

The Court: Then frame your question to in front of these particular premises.

Mr. Seclow: I will withdraw the question.

Q. Do you know who laid the sewer in that street in front of that house and in front of the adjoining property there? A. Yes, sir.

Q. Who laid it? A. A contractor hired by the Melbro Realty Company—I cannot think of his name.

Q. Who paid for it? A. The corporation.

Mr. Harber: I object. It is immaterial and irrelevant.

Q. You say you paid for the sewer in that street? A. Yes, sir.

Q. To a contractor? A. Our corporation did.

Q. The city didn't lay that sewer, did it? A. Not in front of our premises, the property we built.

The Court: Into what sewer would the particular sewer in front of the property empty; the city sewer?

A. Into the Secaucus Road sewer, which is a city sewer.

Q. Did you yourself lay that? A. Yes, sir.

Q. You laid the city sewer into Secaucus Road? A. Yes, sir; then the city continued from our property. We got permission from the city to lay our own sewer. We were putting up some buildings.

The Court: Who built the Secaucus Road sewer into which it emptied?

A. That was there all the time. Then the city permitted us to build a sewer under our property. We were building some twenty-six houses, and got a permit from the city to construct a sewer.

Q. How about the sidewalks and the curbs? A. All improvements except the asphalt, we had to put up there while we were putting up those buildings.

Q. Did you ever make application to the city to lay asphalt there? A. No, sir.

Q. Did you? A. No, sir.

Q. Did you ever sign a petition, while you

owned that property, to have the street asphalted? A. No, sir.

Q. Did you know that they were going to asphalt that street, at the time you made this contract, in the near future? A. No, sir.

Q. Do you know when that street was asphalted? A. Yes, sir.

Q. When? A. It was, I believe it was six or seven months after the property was sold that they started to improve that street, that they started to asphalt the street there.

Q. After what? A. After we had sold the property to Mr. Janitscheck.

Q. Was all the work finished prior to that? A. We were all completed in front of our buildings. We sold the houses, and left the job.

The Court: Was the asphalt completed in front of this property?

A. The asphalt was not started yet.

CROSS-EXAMINATION by Mr. Harber as follows:

Q. When you sold this house to the plaintiff, wasn't the street, Liberty Avenue, ripped up from one end to the other? A. No, sir.

Q. It wasn't? A. No, sir.

Q. Were they building a sewer at that time in that street? A. What do you mean by "they"?

Q. The City of Jersey City—were they building a sewer in that street at the time you sold

this property to the plaintiff? A. In front of the premises, do you mean?

Q. All the way along Liberty Avenue, including the front of these premises? A. No, sir.

Q. Was there any sewer being built in Liberty Avenue? A. No, sir; not just then. The sewer was all completed.

Q. Was all completed? A. Yes, sir.

Q. Was the road ripped up at the time you sold this property? A. It was a dirt street.

Q. Was the road dug up? A. What do you mean by "dug up"?

Q. Were they blasting in that street? A. No, sir.

Q. Were they excavating the street for the purpose of laying a sewer? A. No, sir.

Q. Nothing of that kind was going on in Liberty Avenue at that time? A. No, sir.

Q. Now, you were building how many houses at the time—or, how many houses did you own at the time you sold this particular house to the plaintiff? A. I couldn't say.

Q. You don't know how many houses? A. I don't know how many I owned at the time, but how many I sold previous to that.

Q. Weren't all your houses along Liberty Avenue, between North Street and Secaucus Road? A. Yes, sir.

Q. And didn't you occupy the greater part of that distance between North Street and Secaucus Road, on Liberty Avenue? A. Yes, sir.

Q. And do you know who authorized the im-

provement of that street at the time you sold this property to the plaintiff? A. No, sir.

Q. You don't know anything about it? A. I do not.

Q. And you owned ninety per cent of the property, didn't you, on Liberty Avenue, between North Street and Secaucus Road. Didn't you? A. Well, I think it was about seventy per cent, about eighty-nine per cent.

Q. And at no time did you ever know who authorized the improvement of this road? A. That's right.

Q. You didn't petition, did you? A. That's right.

Q. And you didn't request the improvement of this road? A. Not that I remember.

The Court: Or your company?

A. Not that I know about.

Q. Did your company, the Melbro Realty Company, have anything to do with the authorization of the improvement of that street on which you owned eighty or eighty-five per cent of the property, as you say? A. Not that I know of.

Q. You or the company never knew anything about it? A. No, sir.

Q. Did you know anything about the improvement of Liberty Avenue, or did you or your company, at the time you sold this property to the plaintiff, or any time thereafter? A. What do you mean by "know about"?

Q. Did you know that the street was being improved? A. No, sir; not when the property was sold.

Q. When did the Melbro Company sell the last house on that street? A. I don't remember.

Q. Can't you tell us how long ago? A. Probably about two years ago.

Q. You say that the last house that the company sold was about two years ago? A. About that.

Q. So you owned no property there two years back? A. No, sir.

Q. Is that it? A. That's right.

Q. Now, were there any improvements going on there two years ago, on that street, while your company owned property there? A. I think there was.

Q. And what were they? A. Paving the street.

Q. Anything else? A. Not that I know of.

Q. Not that you know of. Can you swear there were no other improvements two years ago other than asphalt on the street? A. It all depends where.

Q. On Liberty Avenue, between North Street and Secaucus Road? A. Well, they were probably putting some tar there before putting the top coat of asphalt there.

Q. Other than the asphalt? A. You will have to describe more definitely as to what improvements.

Q. Were there sewer improvements being made there two years ago? A. No, sir.

Mr. Seclow: Street improvements?

A. No, sir.

Q. Were there any improvements except as-

phalting to Liberty Avenue between those intersecting streets? A. No, sir.

The Court: Did Mr. Janitscheck notify your company about these assessments in question?

A. Yes; he was down to see me about two months ago.

Q. And when was that? A. I should say about two months ago.

Q. Did he tell you all about the assessments? A. Yes, sir.

Q. Did he show you the bill? A. No, sir.

Q. Did he tell you how much the assessments amounted to? A. He did tell me.

Q. And how much did he tell you? A. I don't remember.

Q. Did he show you this bill? A. Why, he showed me this bill, and he showed me another slip of paper that he got in the City Hall.

Q. Do you mean this slip of paper? A. No, sir.

The Court: Didn't you say before that he didn't show you any bill? Didn't you say before, when testifying, that he hadn't shown you any bill?

A. I don't remember saying it.

Q. Is that the slip of paper? A. Yes, sir. I wouldn't say it is this, but he had a slip of paper. I remember there were three figures there. I don't remember if this is the same, but I remember there were three figures there.

Q. There are three figures there? A. I couldn't say it is the same slip of paper.

Q. You wouldn't say that was the slip of paper he showed you with this bill, would you? A. I don't remember.

Q. Now, he asked you to pay those assessments, didn't he? A. No, sir.

Q. He didn't? A. No, sir.

The Court: Why did he come to see you?

A. He said to me he got the bill from the City Hall, and he went to see them about it, because this was $75 more than any of the rest on the block. He brought me a slip, which the officials told him the curb had to be straightened out and the manhole had to be raised or lowered, according to the grade, and there was an additional charge of $75, and he thought I ought to give him the $75.

Q. Nothing else was said? A. Nothing else.

Q. Didn't some lawyers notify you immediately after that to pay this bill? A. No, sir.

Q. Didn't you go to see these lawyers? A. No, sir.

Q. How many times were you notified? A. Once from one lawyer.

Q. You didn't pay any attention to it? A. No, sir; then I got another letter from another lawyer.

Q. Do you know when you were sued in this case? A. Do I know when I was sued?

Q. Yes? A. What do you mean?

Q. When were you served with the papers in this case? A. I wasn't served personally.

Q. Do you know when the suit was instituted against you? A. About five months ago.

Q. Was it before or after this suit that you had this conversation with Mr. Janitscheck? A. I believe it was after.

Q. After the suit? A. Not after the suit, but after I got the first letter from the first lawyer.

Q. Now, did you pay any bills for the adjoining houses, which you sold to Mr. Janitscheck? Did you pay any assessment bills for the adjoining houses? A. No, sir.

Q. This curbing that you said was in front of Mr. Janitscheck's house at the time you sold the premises to him—was that ripped up by the City of Jersey City when they improved Liberty Avenue? A. I don't know.

Q. Was any part of the curbing ripped up in front of any of those houses which you owned along that block? A. I don't know.

Q. Don't you know as a fact that the curbing which you had was a temporary curbing, which had to be removed by the city in the improvement of Liberty Avenue? A. That curbing wasn't ours. I don't know what the city was going to do, if it was going to improve the street or not.

Q. You didn't put in the curbing you are talking about? A. We did.

Q. Was it connected with any other sewer? A. Yes, sir.

Q. Wasn't it connected with a sewer on Liberty Avenue? A. It was connected with a sewer on Secaucus Road.

Q. Was it connected with a sewer on Liberty Avenue after the sewer in Liberty Avenue was

finished? A. Was it connected with the sewer on Liberty Avenue?

Q. With the sewer that was in at the time you sold the property. Was it connected with the main sewer on Liberty Avenue? A. Certainly.

Q. Did your company pay for the benefit of that connection? A. Yes, sir.

Q. When? A. Before we put the sewers in.

Q. Before you put the sewers in? A. Yes; when the permit from the city was signed.

Q. The sewer from Liberty Avenue wasn't finished at the time you sold the property to the plaintiff? A. It was.

Q. So you mean to say now that the sewer on Liberty Avenue, between Secaucus Road and North Street, was finished at the time you sold the property to the plaintiff? A. Yes, sir.

Q. Completely? A. Yes, sir.

Q. There is no doubt about that, is there? A. I don't think there is, because we paid for it.

Q. Now, who was present at the time of the making of this contract between you and Janitscheck, which is now in evidence? A. My brother, Morris Meltzer.

Q. Were you there? A. Yes, sir.

Q. And what office do you hold? A. Treasurer.

Q. Your brother is the secretary? A. President.

Q. And who else was there in the office of Echentille & Manetti? A. Mr. Janitscheck.

Q. Anybody else? A. I don't remember.

Q. How long did it take to draw this contract

in question? A. I don't remember how long it took.

Q. Can't you give us any time? A. Well, the usual time would be about a half an hour.

Q. I am not asking you what the usual time was. What was the time at this time? A. I don't remember; it is quite some time.

Q. You are familiar with contracts for the sale of real estate? A. Yes, sir.

Q. You have sold a lot of property? A. Yes, sir.

Q. You have made a lot of contracts? A. Yes, sir.

Q. You know what a real estate contract is? A. Yes.

Q. You are familiar with the legal terms, aren't you? A. Yes, sir.

Q. When this contract in evidence was made you were familiar with its terms? A. Yes.

Q. With the construction of the contract? A. Yes, sir.

Q. You read this contract? A. Yes, sir.

Q. You understood it at the time? A. Yes, sir.

Q. You signed it, didn't you? A. Yes, sir.

Q. There was no question about the understanding or the terms of the clauses in there, was there? A. No, sir.

Q. Who else read this contract besides you? A. That I don't know.

Q. Did your brother read it? A. I don't know whether he did or not.

Q. Did the lawyer, Echentille, read it before it was signed? A. Yes, sir.

Q. Did he explain all the terms and conditions in it? A. Yes, sir.

Q. And you understood them? A. Yes, sir.

Q. And in the contract, among other things, was this here clause: "All street assessments for the improvements of Liberty Avenue shall be paid by the seller?" A. Right.

Q. You understood what that meant at the time of making the contract, didn't you? A. Right.

Q. There wasn't any question about that? A. That's right.

Q. Are you sure you didn't have an attorney there? Will you now swear that there was no attorney there in Echentille's office at the time this contract was made, representing your company? A. I remember I had an attorney at one time.

Q. I am asking you, will you now swear that there was no attorney in Echentille's office at the time this contract was made, representing your company? A. I don't remember.

Q. Didn't you swear on direct-examination that you had no attorney representing you at that time? A. Will you permit me to explain?

Q. Didn't you swear on direct-examination that you had no lawyer at Echentille's office? A. That's right.

Q. That was true when you answered that? A. That's right.

Q. And you now say you can't remember. A. I had an attorney there.

Q. And who was the attorney? A. Mr. Nessanbaum.

Q. And he represented your company at the time you signed this contract? A. He tried to.

Q. He was there to represent you? A. He tried to.

Q. He read this contract, didn't he? A. No, sir.

Q. Did he go over the contract with you? A. No, sir.

Q. What was he there for? A. He tried to represent me.

Q. Did he represent you? A. No, sir.

Q. He didn't? A. No, sir.

Q. Did you send him away? A. He was thrown out.

Q. Before he was thrown out had the contract been signed? A. No, sir.

Q. And before he was thrown out he participated in the making of this contract? A. No, sir.

Q. Did he have anything to do with the making of this contract before he was thrown out? A. No, sir.

Q. You are sure about that? A. Sure.

Q. Why didn't you tell us before there was a lawyer who endeavored to represent you at this time? A. Not at this particular contract.

Q. He was there to represent you? A. Not at this particular time. Here was the situation: We had four deals at the time. I had a lawyer to represent me. Mr. Echentille objected to my having a lawyer. There was some objections raised on the passing. Mr. Echentille threatened if Mr. Nessanbaum didn't leave he wouldn't consent to the passing. I didn't have him represent me on any of these contracts.

The Court: Why did you sign the contract?

A. Well, we wanted to go through with the deal.

The Court: You didn't care how you closed, or what went in the contract?

A. Yes, we cared. We thought we could get along without him.

The Court: Why was he thrown out?

A. They had some misunderstanding. He objected to passing any titles until he left his office.

The Court: At the time this contract was prepared, did you have a lawyer there, or didn't you?

A. No, sir; I don't think so. I didn't have any lawyer, as far as I know.

Mr. Seclow: He did have a lawyer there on some previous contracts, and there was an argument there with Mr. Echentille.

The Court: At the time this Janitscheck contract was signed, did you or didn't you have a lawyer representing you in Echentille's office?

A. I don't think I did.

The Court: Is that your best answer, you don't think you did?

A. There were twenty-eight titles. I cannot remember every one of them.

The Court: If you can't remember, say so.

A. I can't remember.

Q. You didn't need a lawyer to understand this contract at the time you signed it, did you?

A. Probably did.

Q. You say you understood what this meant—

is that right—this clause in question? A. Well, I thought I did.

Q. You understood it, didn't you? A. I thought I did.

Q. Didn't you testify you understood? A. Yes, sir.

Q. Do you say now you understood it? A. I thought I did.

Mr. Seclow: Mr. Harber asked you if you understood what that clause meant about the assessments. What was your understanding of that? A. My understanding was that, at the time of making this contract, Mr. Janitscheck wanted to be sure that the sewer and water and sidewalk was all paid for, and we claimed that we had paid for it. Mr. Echentille put this clause in the contract, and we took it for granted that this clause covers the payment of that street.

The Court: You say at the time this clause was put in, they had all been paid?

A. Yes, sir; the bill was paid by us. Naturally I took it for granted this clause would take care of that.

The Court: How is it you had the clause read: "They shall pay for it," if they had already been paid?

A. I thought I understood the wording of it. I realize now that I didn't.

Defendant's Witness, Morris Meltzer, Direct

MORRIS MELTZER, witness on behalf of defendant, being first duly sworn according to law, upon his oath testifies as follows:

Direct-examination by Mr. Seclow:

Q. You are the president of the defendant, Melbro Realty Corporation? A. Yes, sir.

Q. Were you actively engaged in the business of this company when you built the houses on Liberty Avenue, between North Street and Secaucus Road? A. I took care of the whole works there.

Q. Before you commenced building these houses, was there any street there? A. There were just old curbs.

Mr. Harber: I object, on the ground it is immaterial and irrelevant.

The Court: I will allow it to stand.

Q. Now, did your company make any improvements there on that street?

Mr. Harber: I object, on the ground it is immaterial, incompetent, and irrelevant.

The Court: How is it material?

Mr. Seclow: I think it is very material, your Honor. They are suing here, and they are trying to collect from us for certain part of improvements that were made, and our effort in this case is to show that these improvements were not contemplated by the parties at the time—a distinct, separate thing done a long time afterwards. We are trying to show what they were doing there, that that was a

complete improvement they made, and they stopped; and sometime after this man took title something else took place there. That is our theory.

The Court: Do you mean to say that, assuming that improvements of some sort had been made by the Melbro Realty Company, that that improvement was intended to be covered by, "All street assessments for the improvements of Liberty Avenue shall be paid by the seller"?

Mr. Seclow: Yes.

The Court: You mean that, assuming that these people, the Melbro Realty Company, had put in this paving, that this clause is made to cover that situation?

Mr. Seclow: It is an effort of the lawyer, not knowing whether the city did it or it had been done by individuals. It is an effort of the lawyer to get an agreement from these people to pay for work that was done at the time.

The Court: I cannot see it. I will overrule it.

Mr. Seclow: Exception.

The Court: It seems to me this language is plain.

Q. Was there any asphalting done on that street before you conveyed the property to this plaintiff? A. No, sir.

Q. Had the improvements of that street, all the improvements except the asphalting, been

completed, fully completed, at the time that this plaintiff bought the property? A. Yes, sir.

Q. Have those improvements been paid for? A. Yes, sir.

CROSS-EXAMINATION by Mr. Harber, as follows:

Q. You remember when they asphalted the street, Liberty Avenue? A. No, sir.

Q. From curb to curb? A. No, sir.

Q. Don't you know? A. No.

Q. Don't know anything about the asphalting of that street? A. I did know when they asphalted it.

Q. When did they asphalt the street, Liberty Avenue, between Secaucus Road and North Street? A. Sometime in 1927, I think.

Q. That was after you sold the property to Janitscheck? A. About eighteen months later or so.

Q. And they had to rip up the curbing along Liberty Avenue to do that? A. I don't know that; I wasn't there.

Q. Didn't you own property—didn't your company own property on Liberty Avenue when the asphalt was laid on Liberty Avenue? A. No; before the improvements started we sold everything out, before the pavements started.

Q. You knew that the pavement was going to be put in there, didn't you? A. When?

Q. When? After you sold the house to Janitscheck, didn't you know the improvement of the street was to be made? A. Not at the time I sold it.

Mr. Seclow: I object to it. I suppose, in the natural course of events, every street is going to be improved.

Q. At the time you sold the house to Janitscheck, there was a dirt street there? A. Yes.

Q. After that they put an asphalt street there? A. About eighteen months later.

Q. They ripped up the curb on both sides? A. I don't know.

Q. You don't know when they commenced improving that with asphalt? A. No; not exactly.

Q. Were they blasting the street at the time you sold the house to Janitscheck? A. Not facing every house.

Q. Were they doing any blasting on that street? A. Where?

Q. On Liberty Avenue? A. Where?

Q. In the street, a block away? A. Yes.

Q. What kind of blasting were they doing there? A. I don't know; I wasn't watching there. Are you referring to place where his house faces, or ten blocks away?

Q. A block away? A. I wasn't watching there.

Q. Were they blasting there?

Mr. Seclow: I object.

The Court: What difference does it make?

Q. Did you know about this assessment? A. No.

Q. Never saw this bill before? A. I seen the bill; he came in with it.

Q. Did he talk to you? A. Yes.

Q. Did he show you the bill? A. He didn't show me a bill.

Q. Did he show you the bill? A. Yes, with another piece of paper.

Q. Is this the piece of paper? A. No; he had a figure on it of $75.00.

Q. Did he show you this piece of paper? A. A smaller piece of paper.

Q. Did he ask you to pay this bill? A. No, sir; he asked me to pay $75.00—I swear, honest to God. He said that's what he has to pay, I should pay the $75.00, and he would pay the difference.

Q. Your brother was there at the time? A. Yes; he came over to me first.

Q. How long after did you get a letter from your lawyer for the payment of the bill? A. My lawyer told me we have a suit pending.

Q. Did any lawyers write you you have a suit pending? A. No, sir; I didn't receive, until my lawyers told me of the suit.

Q. You didn't receive any letters? A. No.

Q. You didn't know about any assessments until you were sued? A. Until he came around and asked me for the $75.00.

Q. When was the last house sold by your company on Liberty Avenue? A. About two and a half years ago.

Q. Were they working in the street when you sold the last house? A. When I was called from the agent on the last deal, the street was finished.

Q. You mean the asphalt was finished? A. The asphalt was finished.

Q. Did you petition the City of Jersey City to improve the street? A. No, sir.

Q. You don't know who did, do you? A. I know only one thing: I know Mr. Janitscheck called me once I should go with him to help get signatures.

Q. Did you go? A. No; I told him I have no time.

RE-DIRECT EXAMINATION by Mr. Seclow:

Q. After the time this contract was made, was this street being used, this dirt street? A. Positive, it was a hard dirt street. When we put in the sewer, it was a little lower, but the sides were the same.

Q. And you say that, after he bought the property, he asked you to go to the City Hall to sign a petition to have the asphalt put on? A. Yes; because I know all the people that bought the houses—that was his question.

Q. Did you go with him? A. No; I told him I had no time.

Q. He asked you to do it? A. Yes, sir.

JAMES J. DOLAN, witness on behalf of defendant, being first duly sworn according to law, upon his oath testifies as follows:

Direct-examination by Mr. Seclow:

Q. Have you your records here, Mr. Dolan? A. Yes, sir.

Q. Mr. Dolan, you are in the office of the Street Department of the City of Jersey City? A. Yes, sir.

Q. The office of Michael A. Fagen, Director of Streets and Public Improvements; and what is your official capacity? A. Contract Clerk of Jersey City.

Q. Do you have custody of all the records for the improvement of streets in Jersey City? A. Yes, sir.

Q. I ask you to get your records for Assessment No. 819, so far as it affects Lot 30A, in Block 903. A. I haven't got those records, that is, to tell specifically what was done in front of that lot. I have the copy of the official assessment map, and have the proceedings from the beginning of the improvement to the completion of the job.

Q. Do you know what was done in front of that lot, so far as Liberty Avenue is concerned? A. I have the records here.

Q. Yes; from the records. (Witness refers to records.) A. No; I cannot tell you what was done in front of these lots from the records here. You will have to get the official records complete; the assessment map doesn't show.

Q. Between North Street and Secaucus Road. A. What was done?

Q. Do you know how near this property is to Secaucus Road? Do you know how near Lot 30A is? A. The map will show that. There is the assessment of the property. What block?

Q. In Block 903. A. $428.24. How that amount is made up, I cannot tell you from these papers here.

Q. You don't know what it is for? A. No; I know that it is for improving the street with

asphalt for the construction of a sewer on that street, from that point to an old sewer on Liberty Avenue, from North Street to where this point here, where the break is, and a new sewer comes from this point and across to Secaucus Road. There is an old sewer, and here is a new sewer which connects to the sewer on Secaucus Road. (Witness indicating on map.)

Q. Do you know who laid the sewer at this point, the present sewer in front of this property, the present sewer that is here now? A. Under this contract?

Q. No; do you know whether the owners laid this sewer or the city laid it? A. From other records, the Melbro Realty Company constructed a sewer in that street.

Q. If they constructed it, would the city charge them? A. There would be a charge for what they call a lateral benefit into the main sewer.

Q. Do you know what that charge is? A. No; I couldn't tell you that.

The Court: What does this indicate: 18-inch vitreous pipe sewer, all the way up to here?

A. A man by the name of Eugene Hill made application for the building of Liberty Avenue. He made the petition for it in October, 1925. Now, the petition came along.

The Court: When did the petition come?

A. When the deposit is made with the City Clerk. I didn't know I would be asked that question, so I haven't it.

The Court: Is a copy of the petition here?

A. Yes.

The Court: What is the date of it?

A. I can't tell it. The petition has no date. This man came along and asked for the improvement of the street. He may return that six or seven months after.

The Court: What is that, in 1926 he asked for construction, also for construction of 18-inch vitreous pipe sewer; is this in 1926?

A. Yes. The petition is presented, together with deposit. After that the move is the introduction of preliminary ordinance to begin. All the owners of the property are notified. Here is the ordinance that was presented together with the beginnng of the improvement.

Mr. Harber: When was it presented?

A. May 18th, 1926. At that time we concluded to have new cement sidewalk, but we found that the owners wanted the old sidewalk which they had, which was a flagging pavement, in preference to the cement sidewalk. So we had the ordinance amended from the original, and that is shown by a resolution, which follows: "That the ordinance heretofore introduced at meeting held May 18, 1926, entitled: 'An ordinance to improve all that part of Liberty Avenue between North Street and Secaucus Road, in the City of Jersey City' be amended by striking out the following: 'To have new cement walks five feet in width laid on each thereof,' and to substitute therefor the following: 'To have the present bluestone flagging relaid to the legal grade and new bluestone flagging laid where necessary on each side thereof.' "

The Court: And that is dated when?

A. June 15th, 1926. The ordinance itself is finally adopted at the hearing on June 22nd.

The Court: Also 1926?

A. Yes.

Mr. Harber: And when did the work commence?

A. The next move after that is the adoption of the specifications, which here are adopted on June 29th, 1926. Bids are received July 13th, 1926. Contract is awarded on August 3rd, 1926. The next is, notify the contractor when to begin. Here is the contract. Contract for improvement of Liberty Avenue is dated September 17th, 1926, and known as Contract 2619. The contractor is notified and sent a copy of the contract on September 24th. We had several of them. He is notified to begin within five days from date.

The Court: That is all in 1926?

A. All in 1926. Then the final confirmation of the improvement is on March 1st, 1929.

Q. Do you know when the work was accepted by the city? A. Accepted as complete?

Q. Yes. A. The date for the acceptance of this, we find that it is dated on June 25th, 1928.

Q. That is when it was accepted? A. Accepted. The work under Contract No. 2619 be and the same is hereby accepted.

Q. Do you know what the charge is for connecting up with that main sewer for this lot? A. No, sir; it all depends on the lateral benefit.

Q. Can you say what this charge is; what the maximum charge would be? A. No; it all depends if there were temporary improvements there, and the size of the sewer, and where it emptied. It varies in different cases.

FRANK JANITSCHECK, recalled to the stand in rebuttal, testifies as follows, on behalf of the plaintiff:

Direct-examination by Mr. Harber:

Q. When you went to see the Meltzer brothers, you had this paper, which is in evidence, the bill? A. Yes.

Q. Also this paper? Did you show them this paper (showing paper to witness)? A. Yes.

Q. Did you demand payment of the bill? A. I demanded payment of the full amount of the bill.

Mr. Seclow: I object to the paper, on the ground that it is incompetent.

The Court: Sustain the objection.

Mr. Seclow: I move for a direction on behalf of the defendant, on the following grounds:

The first is that it now appears conclusively that this assessment was not confirmed until March 1st, 1929. The contract was made on April 24th, 1926. It, therefore, appears that there was no breach at that time of the terms of this contract; that, if there was any breach, it occurred a long time thereafter. Now, as a

matter of fact, the contract, the wording of the contract says that all street assessments shall be paid. It doesn't say, your Honor, that they are to pay for the cost of the improvement, but it says that they shall pay for the assessments; and that assessment was not confirmed, there was no such thing as a legal assessment until March 1st, 1929. If there was any liability to pay any assessment, it was for such assessment as might be imposed in a reasonable time, and I submit that three years is not a reasonable time.

I further submit, your Honor, as a second ground, that this contract merged in the deed; that suit should be based, not on the breach of the covenant of this contract, but on the breach of the covenants in the deed, if any. That there is no deed in this case. No deed has been produced. It might well be that this particular covenant sued on in the contract is completely covered and its entire aspect changed by the deed; and I submit for that reason there should be a direction for the defendant. If that were so, I assume it would have been produced. I never saw the deed, your Honor. I assumed they would have the deed here.

The third ground is this: That it now appears conclusively that, when this property was sold, the vendors—the present defendants—had constructed, or the curb had already been constructed; sidewalks had already been constructed, sewer had already been constructed; that all improvements were in that street except the laying of the pavement.

Now, we are confronted with this situation: Assuming that there is some liability on the

part of these defendants to pay for improvements, for assessments, under this contract, for how long a period are they liable to pay for improvements, and what should be the nature of the improvements that these people must pay for? Now, it is conceivable that arches may be erected on that street. It is conceivable that very, very elaborate lighting system may be erected that would cost thousands and thousands of dollars—perhaps as Fifth Avenue has. It is conceivable that they may have an elaborate system of traffic signals of arches there. Now, how long are we liable for these improvements, and to what extent are we liable? We gave them a street that was usable—a dirt street. There are lots of dirt streets that are used. He saw the dirt street. He doesn't say that he never knew or anticipated that there was going to be an asphalt street. As a matter of fact, the testimony is uncontradicted that he came to Morris Meltzer and asked him to go to the City Hall with a petition to get asphalt on there, thinking that Meltzer owned other property there. He himself was the one that obtained this improvement, and now he asks us to pay for it. I submit that it is not within the contemplation of this contract that this improvement, which was not commenced until a long time afterwards and was not completed until, as they said, seventeen or eighteen months later—was not within the contemplation of the covenant of this contract, and for that reason we are not answerable for it.

I further submit that this was a voluntary payment made by him, and for that reason he cannot recover.

I further submit that this assessment was payable in instalments, and that, if he took it upon himself to pay all his money at one time, he cannot hold us, except for the overdue instalments.

I further submit that it has been conclusively shown and brought out by counsel, on cross-examination of the defendant, Meltzer—that is, of the treasurer, Samuel Meltzer—he asked him, "You knew that this covenant was going in there"? He said, "Yes." "You read it"? "Yes." "You knew what it meant"? "Yes." We have his uncontradicted construction of a contract which may be ambiguous, and he said that it covers only the sewer, curb and sidewalks; and that is in the case without contradiction. We have that. We have the uncontradicted testimony of both Meltzers that this plaintiff came to them, and he said, "Here, there is a difference of approximately $75.00 between my house and the other house, due to the fact that, in order to lay the grade," or something of that sort, "They had to change the grade of the curbing and pull away the old curb you had put there, and they had to put new curbs there." He wanted $75.00; therefore that shows, your Honor, that nobody contemplated at any time that the asphalt was to be paid for, and that shows, your Honor, that if this contract is ambiguous, what the parties were about; and the contract, without contradiction, was prepared by the attorney of the vendee, and it must be construed against him, even if the defendant had an official attorney there, which, of course, is doubtful. He drew the contract, and it must be construed against him.

I submit, your Honor for all these reasons there should be a direction of the verdict.

I want to advance a further reason, and there should be a six-cent judgment; and that is this: The burden of proof is on the plaintiff to prove every element, not only the liability, but the extent of the damage. The plaintiff has put in a bill, which does not show what the improvement was for. It is conceivable it might be for some improvement that is not even in there. No attempt was made to show what it was for. Counsel thought he didn't have to pay it—but I submit he has not shown it; but if it should appear that there is any part of this improvement we do not have to pay for, the plaintiff would have anticipated it and submitted his items, and he did not do it. Therefore, I submit that, if your Honor finds any liability there, that the judgment must be for nominal damages only.

The Court: The motion will be denied, for the purpose of the record, and you may have an exception.

This case contains a provision that all street improvements on Liberty Avenue shall be paid by the seller. It seems to me there can be no question at all as to what the intention of that sort of covenant in the contract means. It means all assessments to be assessed for the improvement of Liberty Avenue whatever shall be paid. It is a continuing covenant, and I think it was not merged in the deed.

The deed was executed, according to the testimony, something about a month after the covenant, and the only thing in doubt is the duration of that particular covenant. It is true

that the covenant is very, very broad. It is unlimited as to time, and if this were a case where the covenant was sought to be enforced after the lapse of what in law might be considered beyond a reasonable time, I would place a different construction on it.

However, under the facts in this particular case, it now appears that this particular improvement, for which the charge is made by the plaintiff, and which he claims is based on an improvement which was started, according to the records of the City Clerk, which was put in evidence by the defendant, within a month after the signing of the contract, or within two months after the signing of the contract. The improvement was contemplated and started, in fact, a year before the property was sold. A petition was made for the laying of the asphalting, and work for the laying of the pavement was started in September, 1926, a few days before the passing of the contract.

It is common knowledge that when improvements are contemplated, taxpayers and residents in the neighborhood know for months before. There is no doubt in my mind at all that the Melbro Realty Company knew exactly what was contemplated there, when they signed this contract. I am further convinced they knew exactly what they were signing, and I believe they actually had the benefits of counsel at the time of the signing, and I don't believe they would be entering into preliminary contracts for the sale of real estate without the benefit of counsel. The plaintiff says they did have counsel, and the defendant denies it, and I am inclined to believe that the story he tells is to

be believed more than the defendant. I was quite convinced that the defendant was not telling the truth and nothing but the truth.

It follows, therefore, that, inasmuch as I have found that the improvement claimed in the plaintiff's state of demand, or the bill for the improvement which he paid, is within the meaning of this contract, there should be a judgment for the plaintiff of the amount he claims.

In this case the defendant is very fortunate. He has the benefit of the stenographic record in the entire case, and there is no question but what, if this Court is in error in deciding the case that is about to be decided, that that error can be cured in the upper court, so that no injustice of any kind can result to the defendant company by reason of the erroneous judgment of this court, if this Court does err in what it is about to do.

On all the facts in the case and all the testimony, there should be a verdict for the plaintiff of $443.63, and there will be a judgment now in this case for that amount.

Certificate of Stenographer.

I, Frieda H. Lipschitz, a stenographer duly appointed to report stenographically the evidence given before the District Court of the First Judicial District of the County of Hudson, in the case of Frank Janitscheck and Rose Janitscheck, plaintiffs, vs. Melbro Realty Corporation (a corp. of N. J.), defendant,

Do Hereby Certify that the foregoing is a true and correct transcript of the evidence given on the 11th day of September, 1929, before Honorable Lewis B. Eastmead, Judge of said Court, in said matter.

In Witness Whereof, I have hereunto set my hand this 20th day of September, 1929.

FRIEDA H. LIPSCHITZ.

Certificate of Judge.

I, Lewis B. Eastmead, Judge of the District Court of the First Judicial District of the County of Hudson,

Do Hereby Certify the foregoing transcript in the case of Frank Janitscheck and Rose Janitscheck, plaintiffs, vs. Melbro Realty Corporation (a corp. of N. J.), defendant, as the state of case for appeal in the above-stated cause.

Dated, September 20th, 1929.

LEWIS B. EASTMEAD,
Judge.

Exhibits.

Exhibit P-1.

THIS AGREEMENT,

MADE the twenty fourth day of Apr, in the year of our Lord, One Thousand Nine Hundred and Twenty-six,

BETWEEN MELBRO REALTY CORPORATION, a corporation of the State of New Jersey, party of the First Part; having their business office at Bayonne, in the County of Hudson and State of New Jersey,

AND FRANK JANITSCHECK and ROSE JANITSCHECK, his wife, of the City of Union City, in the County of Hudson 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 Nine Thousand ($9000.00) 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 it, the said party of the First Part, will well and sufficiently convey to the said party of the Second Part, their heirs and assigns, by Deed of full covenant and warranty, free from all encumbrance except as hereinafter mentioned, on or before the Twenty-second day of May 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 City of Jersey City, in the County of Hudson and State of New Jersey, and which upon a certain sketch of property surveyed for Sam and Morris Meltzer, by James Henderson, Surveyor, on the 19th day of September,

1925, is known, marked and distinguished as lot Number Thirty (30 A) in block Number 903 and more particularly described as follows:

BEGINNING at a point in the northwesterly side or line of Liberty Avenue, distant southwesterly three hundred and seventy-four one hundredths (300.74′) feet from the point of intersection of the northwesterly side or line of Liberty Avenue with the southwesterly side or line of Secaucus Road and from said beginning point running (1) southwesterly and along the northwesterly side or line of Liberty Avenue twenty-seven (27′) feet to a point; thence (2) northwesterly and at right angles or nearly so to the said northwesterly side or line of Liberty Avenue, one hundred nineteen and ninety one hundredths (119.90′) feet to a point; thence (3) northeasterly or nearly so twenty-seven and sixteen hundredths (27.16′) feet to the westerly corner of lot known, distinguished and marked as lot Number twenty-nine A (29 A) on the aforementioned sketch of property of Sam and Morris Meltzer, and thence (4), running southeasterly and parallel to the second course run one hundred sixteen and ninety-four (116.94′) feet to the point or place of beginning.

Said premises being more particularly known and designated by and as the street number 655 Liberty Avenue.

It is understood and agreed by and between the parties hereto that the description to be written in the deed, bond and mortgage, etc. mentioned in the within agreement shall be by metes and bounds and in accordance with survey to be made

by the party of the second part at his own proper costs and expense.

The purchase money mortgage herein mentioned shall contain a subordination agreement whereby the parties of the first part will permit the party of the second part to raise a first mortgage to replace the present first mortgage now a lien on the premises hereby contracted to be conveyed in an amount not exceeding the sum of $4500.00. Any amount in excess shall be paid in reduction of the purchase money mortgage.

AND the said party of the second part, for themselves, their heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the First Part, its successors and assigns, that they the said party of the Second Part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the First Part, the said sum of Nine Thousand ($9000.00) Dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

Deposit for which this is also a receipt...	500.00
By taking the premises subject to a first mortgage held by the Coward Estate which will have approximately two years to run from the date of the closing of title	4500.00
By executing and delivering a purchase money bond and mortgage to run for a period of two years from the date of closing of title, with interest at six (6%) per-cent payable monthly together with an installment on account of the principal of Fifty ($50.00) Dollars (or more at the option of the ob-	

ligors) and payable monthly at the same time that the interest payment is made, and a further payment on account of the principal in addition to the above installments at the end of the sixth month from the date of said mortgage, which payment shall be not less than Five Hundred ($500.00) Dollars.. 4000.00

Total: $9000.00

Taxes, insurance premiums, interest on mortgages and all other adjustments are to be apportioned and allowed as of the date of closing of title.

All street assessments for the improvements of Liberty Avenue shall be paid by the seller.

The party of the first part will furnish to the attorneys of the party of the second part proper releases of all mechanic's claims against the premises in question.

AND IT IS FURTHER AGREED, by the parties to these presents, that the said party of the Second Part, their heirs and assigns, may enter into and upon the said land and premises on the Twenty-second day of May next ensuing the date hereof, and from thence take rents, issues and profits to them and their use.

AND IT IS FURTHER AGREED, by the parties hereto, that the said Deed of full covenant and warranty, shall be delivered and received at the office of Manetti & Echentille, #388 Bergenline Avenue, Union City, New Jersey, between the hours of ten in the forenoon and five o'clock in the afternoon on the said Twenty-second day of May next ensuing the date hereof;

IN WITNESS WHEREOF, the said party of the First Part, hath caused its corporate seal to be hereunto affixed and attested by its Secretary and these presents signed by its President and the party of the Second Part have hereunto set their hands and seals the day and year first above mentioned.

MELBRO REALTY CORPORATION

By.....President.

Attest

SAMUEL MELTZER

Secretary.

(Seal)

FRANK JANITSCHEK [L. S.]

ROSE JANITSCHEK [L. S.]

Witness as to party of Second Part,
ALBERT J. MANETTI

STATE OF NEW JERSEY,
COUNTY OF HUDSON. } ss.:

BE IT REMEMBERED, That on this 24th day of April, Nineteen hundred and Twenty-six, before me the subscriber, an Attorney-at-Law of New Jersey, personally appeared SAMUEL MELTZER and made proof to my satisfaction that he is the Secretary of MELBRO REALTY CORPORATION, the Grantor named in the foregoing Instrument; that he well knows the corporate seal of said corporation; that the seal affixed to said Instrument is the corporate seal of said corporation; that the said seal was so affixed and the said Instrument signed and delivered by MORRIS MELTZER who was at the date

thereof the President of said corporation, in the presence of this deponent, and said President, at the same time acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, and as the voluntary act and deed of said corporation, and that deponent, at the same time, subscribed his name to said Instrument as an attesting witness to the execution thereof.

SAMUEL MELTZER

Subscribed and sworn to before me this 24 day of April, A. D. 1926.

ALBERT J. MANETTI,
Attorney-at-Law of New Jersey.

Exhibit P-2.

No. 819

CHAPTER 152, LAWS 1917
And Acts amendatory thereof and supplementary thereto

DEPARTMENT OF REVENUE AND FINANCE
BUREAU OF COLLECTIONS AND DEPOSIT
CITY HALL

Jersey City, N. J., March 1 1929

Mr. Melbro Realty Corp.,

TO THE MAYOR AND ALDERMEN OF JERSEY CITY, Dr.

Assessment Improvement of Liberty Ave. bet. North St. and Secaucus Road.

Assessment Confirmed March 1 1929

This assessment is now due and payable and may be paid on or before

without interest. Payments not made when due will draw interest from date of confirmation of assessment.

"This assessment is due and payable immediately after confirmation and interest at the rate of 6% will be added to the amount of the assessment unless the entire assessment is paid within two (2) months from the date of confirmation, and should said full assessment be paid within two (2) months, no interest will be charged.

This assessment may be paid at the option of the owner in five equal yearly installments. If paid in this manner, the first installment must be paid within two (2) months from the date of confirmation of the assessment and the remaining installments in one, two, three and four years from date of said confirmation, with interest at the rate of 6% per annum upon the unpaid installments.

If this assessment is paid in installments, in case any such installment shall remain unpaid for thirty (30) days from and after the time when the same shall have become due and payable, the whole assessment or balance due thereon shall become and be immediately due and payable together with all accrued interest."

JAMES RADIGAN, City Collector

Block No.	Lot No.	Assessor's No.	Street	Amount Assessed
908	2	92	Liberty Ave.	597 43

Paid May 18/1929

If you want your receipted bill returned by mail put your address below

Name ..... Address .....

Opinion.

(Filed May 19, 1930.)

NEW JERSEY SUPREME COURT.

No. 426—May Term 1930.

Frank Janitscheck, *et ux.*,
Plaintiffs-Respondents,

v.

Melbro Realty Corporation,
Defendant-Appellant.

Argued May 6th, 1930: Decided May 19th, 1930.

Before—Justices Black and Case.

For the Plaintiffs-Respondents, Messrs. Abraham Warren and Samuel Harber.

For the Defendant-Appellant, Messrs. Seclow & Nessanbaum.

Per Curiam.

This suit was brought in the First District Court of Jersey City to recover the sum of $432.94 an assessment for street improvements against lot No. 38 in Block 903 and known as street No. 655 Liberty Avenue, Jersey City, N. J. The basis of the suit is a written agreement dated April 4th, 1926; which contains this covenant "all street assessments shall be paid by the seller." The assessment was confirmed March 1st, 1929. The case was tried by the Court without a jury resulting in a judgment for the plaintiffs for $432.94. The defendant appeals and files seven specifications of determinations with respect to which it is dissatisfied in point of law.

Affimance.

The trial Court among other things found as a fact; "the improvement was contemplated and started, in fact, a year before the property was sold. A petition was made for the laying of the asphalting, and work for the laying of the pavement was started in September, 1926, a few days before the passing of the contract." The case calls for no extended discussion, as we are in accord with the view taken and expressed at some length by the trial Court at page 70 of the record. We find no error in the exclusion of testimony. The judgment of the First District Court of Jersey City is therefore, affirmed.

Affirmance.

(Filed May 23, 1930.)

NEW JERSEY SUPREME COURT.

FRANK JANITSCHECK, *et ux.*, *Plaintiffs-Respondents*, *v.* MELBRO REALTY CORPORATION, *Defendant-Appellant.*	On Appeal from District Court. Order of Affirmance.

On Appeal from the District Court.

This matter having been duly argued at the May, 1930 term of this Court, by Seclow and Nessanbaum of counsel for the defendant-appellant, Melbro Realty Corporation, and Samuel Harber, counsel for the plaintiffs-respondents, Frank Janitscheck, *et ux.*, and the Court having considered the same and finding no error in the record or proceedings in the District Court,

Affimance.

It is thereupon, on this 23rd day of May, 1930,

ORDERED and adjudged that the judgment of the District Court, removed by the appeal in this cause, be and the same is hereby affirmed, with costs; and that the record be remitted to the First Judicial District Court of Hudson County, to be proceeded with in accordance with this judgment, and the proceedings of said court.

Entered May 23rd, 1930. On motion of

ABRAHAM WARREN,
Attorney for Plaintiffs-Respondents.

SAMUEL HARBER,
Of Counsel.

A true copy.

FRED L. BLOODGOOD,
Clerk.

Notice and Grounds of Appeal.

(Filed July 12, 1930.)

NEW JERSEY SUPREME COURT.

FRANK JANITSCHECK and ROSE JANITSCHECK,
Plaintiffs-Respondents,

v.

MELBRO REALTY CORPORATION, a corporation of New Jersey,
Defendant-Appellant.

To ABRAHAM WARREN, Esq., Attorney for the Plaintiffs-Respondents:

TAKE NOTICE that the appellant, Melbro Realty Corporation, appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment entered in this cause on the following grounds:

1. That the Supreme Court erred in affirming the judgment of the District Court of the First Judicial District of the County of Hudson.

2. The Supreme Court affirmed the judgment of the District Court of the First Judicial District of the County of Hudson, although there was error in doing so in these and other respects:

(a) The undisputed testimony in the case showed that at the time of the making of the contract and the delivery of the deed, the assessment which formed the basis of the action had not been confirmed. There was, therefore, no basis to permit the recovery of the respondents.

(b) That the improvement which formed the basis for the assessment upon which the suit was brought had not even been authorized or commenced at the time of the making of the contract or the delivery of the deed from the appellant to the respondents and that there was, therefore, no breach upon which any recovery could be premises.

(c) That the damages recovered by the respondents against the appellants was not within the contemplation of the parties.

(d) That there was a voluntary payment of the assessment by the respondents for which no recovery should be allowed. That the following questions were improperly excluded:—Question addressed by attorney of appellant to respondent upon cross examination:

"Q. Who prepared this contract?

"Mr. Harber: I object, on the ground that it is immaterial and irrelevant.

"The Court: What difference does it make if they were represented in the mere physical preparation of it.

"Mr. Seclow: It still makes a difference.

"The Court: Sustain the objection.

"Mr. Seclow: Exception."

Questions addressed to Samuel Meltzer, a witness produced by the appellant:

"Q. Did you pay for these improvements which were installed at the time that you made this contract?

"Q. Which had been made on that street or which had been commenced up to that time?

"Q. Now, you are now being sued for an assessment for an asphalt surfacing of Liberty Avenue, in front of the property, the lands which you sold. How long after you sold this property was that work on that asphalting commenced?"

Question addressed to Morris Meltzer, a witness produced by the appellant:

"Q. Now, did your company make any improvements there on that street?"

Dated June 6th, 1930.

Yours, &c.,

SECLOW & NESSANBAUM,
Attorneys for Defendant-Appellant.

Service of a copy of the within notice and grounds of appeal is acknowledged this 9th day of June, 1930.

ABRAHAM WARREN,
Attorney for Plaintiffs-Respondents.

New Jersey Court of Errors and Appeals

FRANK JANITSCHECK and ROSE JANITSCHECK, *Plaintiffs-Appellees,* *v.* MELBRO REALTY CORPORATION, a corporation of New Jersey, *Defendant-Appellant.*	On Appeal.

BRIEF AND POINTS FOR APPELLANT.

Statement of Facts.

This appeal brings up for review a judgement of the Supreme Court affirming a judgment of the District Court against a vendor of a two-family house in Jersey City, for breach of a covenant in a contract of sale.

The covenant upon which the action is based, and for the alleged breach of which damages were recovered, is embodied in a written contract dated April 24, 1926, and reads as follows:

> "All street assessments for the improvement of Liberty Avenue shall be paid by the seller."

The improvement for which the assessment was subsequently made by the municipality was commenced about seventeen or eighteen months after title was taken (Case p. 27). The assessment was confirmed by the municipality on March 1, 1929 (Case pp. 2 and 65), almost three years after the date of the covenant.

The sole question for the trial court to determine, was whether the covenant in the contract imposed upon the seller the burden of paying the assessment confirmed on March 1, 1929.

POINT I.

The improvement is not a legal assessment because not confirmed when the covenant was entered into.

The covenant reads:

> "All street assessments for the improvement of Liberty Avenue shall be paid by the seller."

The vendees' suit was not based on a covenant to pay for an improvement. It was founded on an agreement to pay for "*all street assessments* for the improvement," etc. This clearly limits and defines the scope of the obligation, and the intention of the parties is quite apparent. The words "for the improvement of Liberty Avenue" are modifying words, and simply bring down to a narrower classification the kind or type of assessments that the parties contemplated.

Since the seller agreed to pay for *assessments*, it is pertinent to inquire whether or not there was a legal assessment. The contract was executed April 24, 1926. The assessment was not confirmed until March 1, 1929, almost three years later. In *Cadmus* v. *Fagan*, 4 Atl. Rep. 323; 47 N. J. L. 549, Mr. Justice MAGIE, speaking for our court of last resort, said:

> "To overthrow it, would, in my judgment be disastrous * * *. It vastly increases litigation in covenants of this sort, if the time at which these liens attach themselves to lands is open to the uncertainty of parol testimony. My conclusion is that the lien of the original

> assessment in this case attached to the land, *not when the work was completed,* but when the assessment was confirmed."

In the instant case, the work had not been even commenced until a long time after the contract of sale was made and the deed delivered. The deed was delivered about one month after the contract was made (Case p. 22), about May 24, 1926. The contract for the improvement was not made by the municipality until September 17, 1926 (Case p. 65). The improvement itself was not completed until about June, 1928 (Case p. 65). The obligation of the seller could be no greater than if this were an action upon a breach of the covenant against encumbrances in a deed. What is an assessment must remain in our law a fixed, exact and determinable concept. When our courts are called upon to construe its meaning, there must be but one answer. There can be no assessment in legal contemplation until it becomes a lien, and it is not a lien until it is confirmed. In *Bradley* v. *Dyke,* 32 Atl. Rep. 132; 57 N. J. L. 471, Chief Justice BEASLEY, speaking for this Court, stated the rule as follows:

> "When this supplement declares that the assessment at a certain date shall be and become a full and complete lien on the lands, a negation is involved that such tax has already attached as a lien before that date * * * antecedently to that period they subject the lands to a mere liability to a future lien."

A situation less favorable to the vendor than in the instant case was presented in *Lyczak* v. *Margulies,* 151 Atl. Rep. 64. In that case the City of Jersey City had, prior to the execution and delivery of the deed, undertaken and *completed* the improvement. The order confirming the improvement was signed by the Judge of the Circuit Court on the same date as the deed. This order, how-

ever, was not filed and entered in the minutes until twenty-two days after the date of the deed. In reversing a judgment of the trial court, which held the improvement a lien, our Supreme Court accepted as undebatable the proposition that until confirmation there can be no assessment in legal contemplation, and that, notwithstanding the improvement had been completed and the order of confirmation signed at the date of the deed, the failure to make the order a part of the record resulted in a failure of confirmation, without which the assessment lacked the element of a lien or encumbrance.

POINT II.

The trial court's construction of the contract cannot be sustained.

That the trial judge could not possibly premise his conclusion of liability by accepting the prevailing legal construction as to what constituted a lien is quite obvious. It was, therefore, necessary for him to find some other theory upon which to rest the liability. The decision was based on the "*intention*" of the parties (Case pp. 70-71). This was stated by the Court as follows:

> "This case contains a provision that all street *improvements* on Liberty Avenue shall be paid by the seller. It seems to me there can be no question at all as to what the intention of that sort of covenant in the contract means. It means all assessments to be assessed for the improvement of Liberty Avenue whatever shall be paid. It is a continuing covenant and I think it was not merged in the deed."

It will be noted that at the very opening of the Court's decision there is a salient omission. The language of the covenant is that:

> "All street *assessments* for the improvement of Liberty Avenue shall be paid by the seller."

By the omission of the word assessments the object of "shall be paid" ceases to be assessments and becomes "improvements." We submit that this attempt to paraphrase the contract does violence to its meaning. One may pay an assessment, or a tax, but not an improvement. The improvement is that which brings about the assessment, and the assessment is the imposition and lien to be paid. The distinction is not a mere verbal quibble, but an analysis of the language used to determine what the obligation of the vendor was. The word "assessment" was used advisedly and its presence in the covenant cannot be brushed aside without making for the parties that for which they did not bargain.

The plaintiff did not produce his deed. Presumably no mention of the covenant was made in the deed. The deed undoubtedly contained a covenant against encumbrances. If the vendors' construction of the mooted covenant is correct, and that it means what it says, and nothing more, that it means *assessments* are to be paid, then the covenant should be construed as in every other case where a covenant against encumbrances was construed. The deed given pursuant to the contract did result in a merger, because the covenant against encumbrances amply embraced all liens and assessments. We contend there is nothing in this covenant to exalt it beyond the ordinary covenant in a deed, merely because it mentions a type of work for which an assessment may be imposed.

The trial judge then proceeds with his conclusions in the following words (Case pp. 70-71):

> "The deed was executed, according to the testimony, sometime about a month after the

> covenant, and the only thing in doubt is the duration of that particular covenant. It is true that the covenant is very, very broad. It is unlimited as to time, and if this were a case where the covenant was sought to be enforced after the lapse of what in law might be considered beyond a reasonable time, I would place a different construction on it."

The Court finds that the covenant is unlimited as to time, and that therefore it is for the Court to say within what time it is reasonable to enforce it. It is not quite clear whether this has reference to the remedy or the substantive rights of the plaintiffs. If the covenant gave the vendee an absolute right of action upon the confirmation of the lien he would have sixteen years from the date of the covenant within which to commence suit, the contract being under seal. If the obligation of the vendor to pay the assessment was absolute, the vendee could sue within the time of the statutory limitation. But his prompt effort to enforce his alleged right seems to have had a deciding influence in the Court's determination (Case p. 71). If the right didn't exist, the vendee's diligence in suing should have no weight.

POINT III.

The payment of the assessment was not in the contemplation of the parties.

Any construction of the covenant in the sale contract must not be conjectural and speculative, but sound and rational. In order to justify indemnification by the seller to the buyer it must first be found that the clear meaning of the covenant extends to assessments for improvements commenced and carried out in the future. Liberty Avenue was an old street (Case p. 25). The sellers built a large

number of houses there and laid the sidewalks, curb and sewers at their own cost (Case pp. 26-41-42). Assessment Number 819, which is the assessment this suit is based upon, was for an improvement which was let out by the municipality under contract 2619 on September 24, 1926, completed in June, 1928, and confirmed March 1, 1929 (Case pp. 62-65). Even the plaintiffs admitted that the work under this assessment did not commence until about a year and a half later.

The issue as to what the parties contemplated was squarely placed before the trial court in the motion for nonsuit (Case p. 35), where the Court, in denying the motion, stated:

> "It does not seem to me that an assessment of this kind, levied three years after the passing of title, is such a long time as to be unreasonably within the purview of the contract."

The trial court in his reasoning overlooked what should have been a vital consideration. Some fundamental principle should underlie the responsibility of the seller to answer for improvements, not merely from the standpoint of reasonableness of the time when they are made, but rather from the time they are brought into existence. All improvements other than those covered by the assessment in question were either in process or completed at the time of the contract and were subsequently paid for by the seller. Why should he be called upon to pay for any others? The testimony showed that neither the seller nor the buyer ever had in mind, spoke of or knew about the improvement which was subsequently made. Assuredly, they didn't have it in *their* contemplation.

The trial judge in reviewing certain facts and inferences in the decision was certainly not guided by the uncontradicted testimony in the case. He said (Case pp. 71-72):

"However, under the facts in this particular case, it now appears that this particular improvement, for which the charge is made by the plaintiff, and which he claims is based on an improvement which was started, according to the records of the City Clerk, which was put in evidence by the defendant, within a month after the signing of the contract. The improvement was contemplated and started, in fact, a year before the property was sold. A petition was made for the laying of the asphalting and work for the laying of the pavement was started in September, 1926, a few days before the passing of the contract.

"It is common knowledge that when improvements are contemplated, taxpayers and residents in the neighborhood know for months before. There is no doubt in my mind at all that the Melbro Realty Company knew exactly what was contemplated there, when they signed this contract. I am further convinced they knew exactly what they were signing, and I believe they actually had the benefits of counsel at the time of the signing, and I don't believe they would be entering into preliminary contracts for the sale of real estate without the benefit of counsel. The plaintiff says they did have counsel, and the defendant denies it, and I am inclined to believe that the story he tells is to be believed more than the defendant. I was quite convinced that the defendant was not telling the truth and nothing but the truth.

"It follows, therefore, that, inasmuch as I have found that the improvement claimed in the plaintiff's state of demand, or the bill for the improvement which he paid, is within the meaning of this contract, there should be a judgment for the plaintiff of the amount he claims."

The contract of sale was dated April 24, 1926; it was consummated one month later. The petition was introduced in May 18, 1926 (Case p. 64). There is nothing to show that the seller had any knowl-

edge of it. The Court's statement that the sellers knew exactly what improvement was contemplated is not based on anything in the case and is not a fair inference. An inference that is not borne out by the evidence and is even contrary to the facts should not be permitted to fix one's liability to another. Neighborhood gossip should not be crystallized into what amounts to a presumption of fact.

The contract for the work was not awarded until August 3, 1926, and the contract was entered into September 17, 1926 (Case p. 65). The work was not accepted by the City until June 25, 1928 (Case p. 65), bearing out the previous testimony of the plaintiff himself (Case p. 27).

POINT IV.

Appellant's construction of contract is the correct one.

If it is at all necessary to go beyond the plain meaning of the covenant in the contract because of ambiguity for the purpose of ascertaining the real intent of the parties, we will find the testimony is strongly in favor of the appellant's contention. The statements and claims of the buyer made after the payment of the assessment by him throw considerable light on his interpretation of the covenant (Case p. 48):

> "The Court: Why did he come to see you?
> "A. He said to me he got a bill from the City Hall, and he went to see them about it, because this was $75 more than any of the rest of the block. He brought me a slip, which the officials told him the curb had to be straightened out, and the manhole had to be raised or lowered according to the grade, and there was an additional charge of $75 and he thought I ought to give him the $75."

The plaintiff did not deny this testimony and it stands uncontradicted. It not only bears out the appellant's contention, but it offers a solution as to the motive which prompted the plaintiff to bring his suit. Obviously the surfacing of the highway with asphalt was accompanied by some change in grade necessitating changes in the manhole and curb. The plaintiff ascertained from the City Hall that $75 of the assessment went for this purpose. He expected the appellant to reimburse him for this because he undoubtedly believed some reparation was due him for work done in connection with the improvements *which existed at the time the contract was made.*

This contention is further fortified by the explanation given by the witness Samuel Meltzer (Case p. 55) as to the meaning of the covenant:

> "My understanding was that, at the time of making this contract, Mr. Janitscheck wanted to be sure that the sewer and water and sidewalk was all paid for, and we claimed that we had paid for it."

In *J. I. Kislak* v. *Muller,* 135 Atl. Rep. 673; 100 N. J. E. 110, the rule was reiterated that

> "Where a contract is ambiguous the interpretation placed upon it by the parties, by their conduct and actions and treatment of the same, will receive the same construction by the court."

POINT V.

The covenant was too indefinite and uncertain to warrant the recovery.

The assessment did not become a lien for almost three years. The improvement itself was not commenced or completed until a considerable period had elapsed. It is conceivable that with

the passage of time many improvements can be made which may be the subject of assessment. For how long a period is the seller to be bound to pay for them? Is it forever? If not, during what period short of eternity is the selling corporation to be liable? In *Oetjen* v. *Robinson Roders Co., Inc.*, 117 Atl. Rep. 629; 98 N. J. L. 282, our Court of Errors and Appeals had before it for construction a contract to extend and renew trade acceptances. The Court held that the agreement was unenforceable because of indefiniteness and uncertainty.

POINT VI.

The exclusion of testimony concerning the preparation of the contract was harmful error.

The trial court considered the covenant as ambiguous (Case p. 35). If this be so, it was a material factor in its construction, to consider who prepared it. In *J. I. Kislak, Inc.* v. *Muller,* 135 Atl. Rep. 673; 100 N. J. E. 110, our Court of Chancery reiterated the principle that:

> "It is a rule that where a contract is ambiguous it should be construed most strongly against the party preparing it."

An attempt was made at the trial of this case to show that the buyers' lawyer prepared the contract. The offer, however, was overruled as here appears (Case p. 23):

> "Q. Who prepared this contract?
> "Mr. Harber: I object, on the ground that it is immaterial and irrelevant.
> "The Court: What difference does it make if they were represented in the mere physical preparation of it?
> "Mr. Seclow: It still makes a difference.
> "The Court: Sustain the objection.
> "Mr. Seclow: Exception."

POINT VII.

The payment of the assessment being voluntary, there could be no recovery.

The assessment was paid voluntarily by the plaintiff (Case p. 21). There was no threatened eviction.

In *Bradley* v. *Dyke,* 32 Atl. 132; 57 N. J. L. 471, this Court held that:

> "Nor could the plaintiff succeed in his suit on the covenant of warranty, inasmuch as he voluntarily paid off these taxes, being the supposed encumbrance, and under such circumstances an eviction cannot be imputed."

It is true that in the *Bradley* case the Court was dealing with a breach of a covenant against encumbrances in a deed, but the rights of the plaintiff under the contract could never rise higher than if the suit were on a covenant.

The trial court should have non-suited or awarded nominal damages when so moved on this ground.

POINT VIII.

The rule of *caveat emptor* should have been applied.

In *Atlantic-Brigantine Hotel* v. *Island Development Co.,* 145 Atl. 330; 7 A. R. 484, the rule was laid down that:

> "In absence of fraud, when sale of land has been consummated by execution and delivery of deed, purchaser's measure of protection in matters of title is found in covenants which he exacts from vendor, and such covenants are not to be deemed broken until eviction, so that in buying without covenants of title

> doctrine of *caveat emptor* applies, and neither failure of, nor defects in, title affords ground for relief, in absence of fraud."

For some reason, best known to the plaintiffs, the deed was not produced. The presumption nevertheless remains that the contract merges in the deed, and we submit its non-production should militate against the party who failed to produce it. In *Brownback* v. *Spangler,* 139 Atl. Rep. 524; 101 N. J. E. 388, it was held that:

> "The acceptance of a deed for land is deemed *prima facie* full execution of an executory agreement to convey, and the rights of the parties are to be determined by the deed and not by the agreement."

And

> "The acceptance of a deed without a covenant against encumbrances raises the presumption that the grantee agreed to take title at his own risk as to encumbrances."

The motion for nonsuit and direction on this ground should have been granted.

POINT IX.

The judgment should be reversed, with costs.

Respectfully submitted,

SECLOW & NESSANBAUM,
Attorneys for Defendant-Appellant.

ALEXANDER SECLOW,
Of Counsel.

New Jersey Court of Errors and Appeals

FRANK JANITSCHECK and ROSE JANITSCHECK, *Plaintiffs-Respondents,* *v.* MELBRO REALTY CORPORATION, a corporation of New Jersey, *Defendant-Appellant.*	On Appeal.

SUPPLEMENTARY BRIEF OF APPELLANT.

POINT I.

The trial court's determination of facts was not warranted by the evidence and the case.

The trial court's conclusions as to liability were based very largely on a finding of fact which cannot be supported by anything in the case. The Court said (Case, p. 11) :

> "Work for the laying of the pavement was started in September, 1926, *a few days before the passing of the contract.*"

That this statement of the trial court to the effect that the work was started in September, 1926, *a few days before the passing of the contract,* was a determining factor in the case, is strongly indicated by the opinion of the Supreme Court

affirming the judgment, which opinion confined itself almost entirely to this finding of fact, and the very words of the trial judge are quoted verbatim (Case, p. 83).

The statement by the trial court that in September, 1926, the asphalting had been commenced and that it was a few days before the passing of the contract is a palpable error as will be seen from the undisputed proofs in the case. The contract was dated April 24, 1926. The plaintiff, in his testimony (Case, p. 22), stated that title was taken about one month after, which would place it about May 24, 1926, certainly not during September, 1926, as stated by the trial court.

That the asphalting was not started in September, 1926, as stated by the court is beyond any controversy, as conclusively appears from the following answers of the plaintiff himself:

> "Q. Was the sewer in front of your house connected when you took title? A. Yes, it was.
>
> "Q. And how long after you took title was the road being surfaced in front of your house? A. I would say somewheres around seventeen months after (Case, p. 28).
>
> "Q. How long after? A. A year and a half after the sewers were finished, then they went to work and paved the street" (Case, p. 27).

The records of the City show that the contract was not awarded until August 3, 1926, and the contract was not signed until September 17, 1926, and a copy of the contract was not sent to the contractor until September 24, 1926. The work was not accepted by the City until June 25, 1928 (Case, p. 65). The surfacing took about two months (Case, p. 27).

The admitted testimony is to the effect that the asphalting was not started until long after September, 1926, as stated by the court, and the undis-

puted proofs in the case certainly do not place the passing of title in September, 1926, as stated by the trial court, but many months thereafter.

The error in the statement of these salient facts by the trial court brought about an incorrect application of legal principles resulting in the holding of liability where obviously none existed.

For these reasons and the reasons stated in our former brief, the judgment should be reversed.

SECLOW & NESSANBAUM,
Attorneys of Defendant-Appellant.

ALEXANDER SECLOW,
Of Counsel.

APPEAL PRINTING CO., 22 THAMES ST., NEW YORK CITY

New Jersey Court of Errors and Appeals

FRANK JANITSCHECK AND ROSE JANITSCHECK, *Plaintiff-Appellees,* vs. MELBRO REALTY CORPORATION, a corporation of New Jersey, *Defendant-Appellant.*	On Appeal.

BRIEF FOR PLAINTIFF-APPELLEES, FRANK JANITSCHECK and ROSE JANITSCHECK

This case is before the Court upon an appeal taken by the defendant, Melbro Realty Corporation, a corporation of New Jersey, from a judgment rendered in the New Jersey Supreme Court affirming a judgment rendered in the First Judicial District Court of Hudson County, before the Honorable Lewis B. Eastmead.

Facts

On April 24, 1926, the plaintiff, Frank Janitscheck and Rose Janitscheck, and the defendant, Melbro Realty Corporation, a corporation of New Jersey, entered into an agreement for the sale of certain property located on Liberty Avenue, Jersey City, N. J., known as Lot 38 in Block 903, more commonly known as No. 655 Liberty Avenue, Jersey City, N. J., in which agreement among other clauses contained therein there was a covenant and provision that the defendant, Melbro

Realty Corporation, a corporation of New Jersey, the seller, agreed as follows:

"That street assessments for the improvement of Liberty Avenue, shall be paid by the seller," meaning that the defendant, Melbro Realty Corporation, agreed to pay for any and all street assessments affecting the said property on Liberty Avenue, Jersey City, N. J.

At the time of the making of the contract the street was beginning to have improvements thereon, it merely being a dirt road.

Due to the necessity of blasting, for the purpose of installation of sewers on Liberty Avenue, Jersey City, N. J., it took quite a while to asphalt the block, which commenced about one year and one-half after the contract.

There was a confirmation of the assessment for the improvement of Liberty Avenue, Jersey City, N. J., on March 1st, 1929, and the plaintiffs after applying for a first mortgage from the Building and Loan, were compelled to pay the full assessment, after first having demanded payment thereof from the defendant, pursuant to the contract provision.

Whereupon suit was instituted for the payment of the above mentioned assessment.

Defendant claimed a merger of the clauses in that a deed was subsequently executed, and further that it was never within the contemplation of the parties of an assessment confirmed three (3) years after the closing of the contract.

The Court found as a fact that it was within the contemplation of the parties, and further, as a matter of law and fact, that there was no merger of the specific clauses aforementioned, and thereupon gave a judgment for the plaintiff-appellees, Frank Janitscheck and Rose Janitscheck, in the

full sum of the assessment bill, which according to the evidence was paid by the plaintiff-appellees.

Point I.

The improvement is a legal assessment even though not confirmed when covenant was entered into.

The appellant contends that whereas, the assessment was only confirmed on March 1st, 1929, the contract having been made April, 1926, that therefore the assessment was not a lien on the property, due to the fact that it was not confirmed until three years after the entering into of the contract, and that therefore the plaintiffs were not entitled to maintain any action therefor, and further contends that here was no legal assessment, and thereupon made a motion to non-suit upon the opening of the plaintiffs' case.

The fallacy of such a motion could readily be seen, for the entire case depends upon whether we can maintain action, and depends upon the proof offered in the case as to the construction of the covenant sued upon and as to the intention of the parties, and certainly a motion for a non-suit at the opening is not available, as it is premature under the circumstances.

Regardless, nevertheless, of this fact as to whether a motion for non-suit was proper, the contention itself is not sound, for at the time of the institution of the suit the assessment had become a lien, and the question was out of the case, it appearing by the State of the Case that summons was issued out of the First Judicial District Court of the County of Hudson on the 18th day of June, 1929, it being three months after the confirmation of the assessment upon which suit was based.

Appellant cites case of Cadmus vs. Fagan, 47 N. J. Law, page 549, which merely holds that an assessment is a lien upon confirmation only. Granting that this is so, the confirmation having taken place before the institution of the suit, the lien was on the premises and therefore there was no question at all about the legality thereof, that point not having been raised at all in the suit.

Since the Court found as a conclusion and a fact that the assessment was within the contemplation of the parties, after having weighed the testimony, and construed the clause upon which the suit herein is based, and having further found that it includes future assessments, the time of confirmation is not material in the case as long as the confirmation of the assessment had taken place, and the lien had attached, at the time of the issuance of the summons in the suit.

Fifteen Corpus Juris, page 1275, holds where an improvement has been made at the time of an agreement to convey land, the land is benefitted thereby. The fact that the assessment was not actually made until after the deed will not relieve the grantor from liability. That the above rule of law holds good in any ordinary transaction, but in our case the defendant specifically agreed by the covenant contained in the contract to take care of any pay for all assessments.

It is further evident from the exact wording of the clause that the testimony given by the defendant, that some of the assessments had been paid off are not true, otherwise they would have inserted in the contract that all the assessments are paid off, and not that they covenant to pay off all future assessments.

Appellant cites case of *Lyczak* vs. *Margulies*, 151 Atl. Rep., page 64. That case is not in point,

merely holding that a lien of an assessment does not attach to the land until the confirming of the same, and that where an assessment had been confirmed at the time of giving of the deed, that contained a covenant against encumbrances, that, therefore, there was no encumbrance at the time, and the defendants were not liable. However, in the instant case, the suit was not upon a covenant against encumbrances but a clear and distinct covenant, to wit: "That all street assessments for the improvement of Liberty Avenue shall be paid by the seller." This covenant is clear and concise, and conveys the meaning of the parties at the time and clearly shows the contemplation of the parties in so far as it brings out the fact together with the testimony contained in the case that improvements were going on at the time, and all improvements were to be paid by the defendant. The distinction therefor can readily be seen in the covenant of the kind contained in the suit, and upon which the suit herein is based, and the covenant sued upon in the case cited by the appellant.

Point II.

The trial court's construction of the contract should be sustained.

This point is outlined by the appellant, and the reasons given therein were not argued or raised in the original brief from the District Court to the New Jersey Supreme Court, and therefore under the rules prevailing cannot be raised upon appeal from the Supreme Court to the Court of Errors and Appeals, citing 99 New Jersey Law, page 490, and cases cited therein, and also 98 New Jersey Law, page 831. How-

ever, in the event that they are allowed, appellees answer as follows:

The appellant under this point argues, First: That since the Court in its summation (case, pages 70, 71), based its conclusion upon the fact that the case contains a provision "That all street improvements of Liberty Avenue shall be paid by the seller" instead of "all street assessments for the improvement of Liberty Avenue shall be paid by the seller", that this makes a variance in the entire case.

However, it seems that the clause in the contract is even stronger than the Court's statement of improvements, for improvements could more readily mean present improvements than assessments, taking into consideration all of the facts and circumstances in the case, since it very clearly appeared from all of the evidence that no assessment was out by the time of the signing of the contract, and giving of the deed, and that there were improvements, and there would be an obvious reason for putting in a covenant like the one sued upon in this case, and it clearly shows the intention of the parties, which means that all future assessments for the improvement of Liberty Avenue shall be paid by the seller.

Appellant further argues that the covenant itself merged in the deed.

This point is amply discussed, and cases cited to show that an independent covenant in a contract does not merge in a deed under Point 8 of the brief, citing *Merchants and Traders Development Co.* vs. *Mercer Realty Co.*, 90 New Jersey Law, page 442; 99 New Jersey Equity, page 806: 34 New Jersey Law, page 116; also 100 New Jersey Equity, page 166; 100 New Jersey Equity, page 389.

The Court in its determination finds that the plaintiffs had sued within a reasonable time

upon the covenant, and that any assessment confirmed, even approximately three (3) years after the giving of the deed was within reasonable contemplation of the parties.

This construction is well founded taking into consideration all of the testimony of the case. That is to say: That the improvements had been going on at the time of the entry into of the contract, and the covenant herein sued upon, that the street had been dug up as appears by the evidence (case, page 27). Therefore the Courts' construction based upon the testimony is a very fair one in so far as it is based upon a reasonable time of the assessment sued upon, and should not be disturbed.

Point III.

The payment of the assessment was in the contemplation of the parties.

During the trial in the direct examination of the plaintiff, Frank Janitscheck (case, pages 16 and 17), it is clearly brought out that at the time of the entering into of the contract between the parties that the street upon which the house is located was absolutely impassable, it being further brought out that there was blasting going on for the purpose of curbing, sewerage and general improvement of the street, and on page 17 there is the question, "Was the street ripped up?" and the answer was that it was an impossibility to go through, except with trucks for the delivery of materials.

It further appears (case, page 27) in the cross-examination of the plaintiff, Frank Janitscheck, that after the sewerage improvements were completed, the surfacing of the street was commenced, that it was one continual improvement

from the time the house was purchased until the time of the final assessment in 1929.

Appellant in its proof argues that the evidence disclosed that the improvement for the asphalting was not commenced until one and one-half years after the contract, and that there was a separate improvement not within the contemplation of the parties, and based this argument on fact upon the evidence adduced in the testimony. The examination of the evidence, as above cited, together with the citation of evidence as cited by the appellant, in its own proof, shows a sharp conflict of fact as to whether or not there were improvements going on at the time of the consummation of the contract.

The Court in its findings held that there were improvements going on and that there was one continuous improvement, and that the improvements for which the suit herein was based was contemplated when the contract was entered into.

This finding of fact by the Court is not reviewable on appeal. Any question of fact determined by a District Court Judge is final and conclusive, between the parties, and the Supreme Court is confined on appeal to the consideration of questions of liability and determination of the legality of the admission or rejection of evidence.

Citing *Paonessar* vs. *Ruh,* 78 N. J. Law, p. 253.

Citing *Waldrons* vs. *Wells,* 84 N. J. Law, p. 245.

The plaintiff, Frank Janitscheck, in his examination by counsel, stated that due to the impassible condition of the street he provided in the contract that the improvements were to be paid for by the seller (Case, page 17).

The testimony also given by the expert from the city, called by the defendants, clearly shows that the improvements were going on at the time

of the deal between the plaintiffs and the defendant, and that these improvements continued until the asphalting was done one and one-half years after the closing of the contract, and that the assessment was only confirmed in 1929, and that it was the same improvement through the three years. Therefore if the Court found, as it did, that the clause contained in the contract was binding upon the defendant, then the fact that the assessment was confirmed three years later would not alter the situation. There is no positive proof whether the assessment bill upon which suit herein is based covers the asphalting alone or most of the improvements, and this was merely a question of fact determined by the Court.

The Court found, as a matter of law and fact (Case, page 70), that the covenant was a continuing one, and among other things that the improvements for which the assessment bill was rendered, and upon which suit herein is based was within the contemplation of the parties.

It was within the Court's province to draw any inference from all the testimony that it so desired, and it could readily from all the testimony as aforecited, draw the inference that it was within the knowledge of the defendant, besides being in the knowledge of the plaintiffs, that the improvements were going on at the time of the entry into of the contract, and the Court could make this inference, and the Court did find as a fact that such knowledge was imputable to the defendant.

Point IV.

Appellant's construction of the contract is not the correct one.

Counsel for appellant in this point is merely arguing a question of fact that has been determined by the Court, and argues upon the weight of evidence, which is not reviewable upon appeal in the Supreme Court from an appeal in the District Court.

The Court found from the evidence (Case, page 72) that the intention and meaning of the covenant included asphalting, surfacing of the highway, and that recovery could be had for the said assessment predicated upon the covenant. This finding is a fact by the Court, and could not be disturbed.

Appellant argues upon the testimony (Case, page 48) wherein he asked an officer of the defendant corporation a question as to why the plaintiff came to see the defendant about the assessment, and the defendant officer gave some explanation. However, the testimony, as given by the plaintiff himself (Case, page 21), says that the full amount of the bill was demanded, and payment thereof was refused, but the defendant corporation then raised an issue of fact which was determined in favor of the plaintiff by the Court, and is not reviewable.

Point V.

Covenant was not too indefinite and uncertain to warrant their recovery.

Appellant argues again that the improvement itself was not consummated or completed until a considerable period had elapsed.

This is contrary to the finding of fact by the Court. The Court having found that there was

a continual improvement of the streets which included sewerage, curbing, flagging and asphalting, and that the assessment upon which the suit herein was based was the outgrowth of the assessment which was consummated at the time of the entering into the contract.

Counsel cites case *Oetjen* vs. *Robinson Roders Co., Inc.,* 117 Atlantic Reporter, page 629.

However, this case was one which involved a trade acceptance. There was an agreement to renew the same. A reading of the case will disclose that there was a performance of this agreement in that there was a renewal of the trade acceptance, but the defendant claimed further a right of renewal. This of course was not within the provisions of the agreement, and therefore differs from the instant case in that we had a direct and clear agreement to pay for all assessments, and the Court found in several portions of the State of the Case that the contract was not too indefinite and uncertain, and that only reasonable time had elapsed before we had started suit.

Point VI.

Exclusion of the testimony concerning the provisions of the contract was not a harmful error.

Counsel for the appellant argues that the Court considered the covenant as ambiguous (Case, page 35).

This is not so and examination of the State of the Case upon that page will disclose that the Court found that the language of the covenant is broad enough to cover assessments of several kinds that might be considered in the nature of an assessment, and the Court went on further to say that he thinks it is broad enough even to

take in any assessments of surfacing, and that in his judgment it is broad enough to cover assessments that are reasonable, within the time mentioned in the contract, and that the assessment herein, although received three years after the passing of the title is not a long time as to be unreasonable within the purviews of the contract, and the Court denied the motion for a non-suit at that time.

The defendant contends that it was a harmful error for the Court (Case, page 23) to sustain the objection to the question as to who prepared the contract. The Court in sustaining the objection gave as its grounds that it was immaterial and irrelevant, and that it makes no difference as to who took care of the physical preparation of the contract as long as both parties were actually represented at the closing. The Court found as a conclusion of fact from the testimony as given by both sides, that the defendant was represented by counsel at the time of the drawing up of the said contract.

Clearly this question was objectionable because the testimony shows that there was counsel representing the defendant, and the further testimony (Case, page 51) shows that Samuel Meltzer, one of the officers of the corporation, representing the corporation at the closing, stated that he understood the contract, that he read the contract, and that there was no question about the understanding of the terms of the clauses therein, and that a lawyer read it to him, before it was signed, and that all the terms and conditions of the contract were explained (Case, page 52) and that he understood the clause upon which the suit herein is based, to wit: "All street assessments for the improvement of Liberty Avenue shall be

paid by the seller,'' and that there was no question about the understanding thereof.

This evidence of the defendant corporation officer, himself, together with the evidence given by the plaintiff to the effect that there was representation on behalf of the defendant (Case, page 23) clearly shows that the question is immaterial and irrelevant, it being represented at the closing, and the mere physical preparation as the Court terms it was not necessary, and that the question of the mere physical preparation of the contract was not essential in the case. This is a fact which shows that there was no ambiguity in the contract warranting any testimony as to the preparation of the contract, and clearly shows that the Court's ruling in sustaining the objection to a question of that kind was correct.

Point VII.

The payment of the assessment even if voluntary there could be recovery.

The testimony in the case shows (Case, page 21) that the assessment bill was not paid until the defendant, Melbro Realty Corporation was notified thereof, and that the reason that the full amount had to be paid was on account of the getting of a new mortgage, and that after payment had been asked of the defendant, and refusal thereof, the plaintiffs went ahead and paid the assessment bill.

This testimony of the plaintiff which remained uncontradicted and unrebutted shows that the assessment was paid only when the first mortgage had to be placed upon the premises, and the building and loan association putting the mortgage on the property demanded full payment of

the assessment before it would place the mortgage thereon.

Therefore, the plaintiffs were put in a position wherein they would have to lose the property unless they obtained the mortgage, and that one of the conditions for obtaining the same was the payment of the assessment. They first demanded payment thereof of the defendant, and upon refusal of the defendant to pay the same, they paid the assessment in full.

There was threatened eviction, even assuming for the sake of argument that eviction was necessary.

In the case of *Smith* vs. *Smith,* 90 N. J. Law, page 287, the Court held that actual eviction is not necessary before action will lie for the breach of covenant. It is sufficient that eviction may take place, and on page 287 of the opinion, the Court goes on to say that the right of the action on the covenant against encumbrances arises upon the existence of the encumbrance, irrespective of any knowledge upon the party of the grantee, or of any eviction of him, or of any actual injury against him, so that if he has paid off any encumbrance he is entitled to at least nominal damage, and he may recover the amount paid by him for the removal of the encumbrance, not exceeding the value of the estate.

Citing *Hartshorn* vs. *Cleveland,* 52 N. J. Law, page 473.

54 New Jersey Law, page 391, goes on further to say that actual eviction or disturbance of possession, unlike a suit for breach of covenant of warranty is not necessary as the condition precedent, without maintaining an action for breach of covenant against encumbrances. It is sufficient that eviction may take place.

Point VIII.

Rule of caveat emptor does not apply.

In the instant case we are not suing for an alleged fraud, when the sale of the land was consummated both parties went over the terms. The contract provided for the payment of improvements in the form of a covenant and is merely construction of the contract.

If the doctrine of caveat emptor applied, there would be no necessity for inserting covenants in the contract of this kind. Defendant says that the contract merged in the deed, and that the specific covenant upon which the suit herein was based was merged in the deed, and therefore the cause of action could not be maintained.

The rule is elementary that where there is a contract made and subsequently there is a deed made, all of the provisions of the contract are joined in the deed, and covered by the same, and that thereupon the contract will become merged in the deed.

Where a deed is made in pursuance of an executory contract to sell lands, in which there are independent and collateral provisions, such as in the instant case, the rule of merger does not apply, and the right of action will lie upon the provisions contained in the agreement alone without referring to the deed.

The Courts have so held in the case of *Merchants and Traders Development Co.* vs. *Mercer Realty Co.*, 90 N. J. Law, page 442.

The above case has been followed in its principle in 99 N. J. Equity, page 806, and in *Long* vs. *Hartwell*, 34 New Jersey Law, page 116.

The latter case holds to the general rule, that the acceptance of a deed for land is to be deemed full execution of an executory contract to convey. However, covenant collateral to the deed are ex-

ceptions to this rule. Also where the stipulation is to do a series of acts at successive periods, or distinct and separate acts to be performed simultaneously, the executory contract becomes extinct only as such of its parts are covered by the conveyance. This case is the leading one upon the subject, and has been followed by all later cases, citing 100 N. J. Equity, page 166; 100 N. J. Equity, page 389.

Counsel argues, at the conclusion of Point 8, that a motion for a non-suit and directions should have been granted.

Clearly by the facts presented in the case, such a course could not be followed by the Court, and the Court was correct in refusing this motion to do so.

Conclusion

The evidence in the case is construed by the Court, and the findings of the Court on the question of fact as contained on page 70 of the State of the Case, clearly shows the plaintiffs had the proper cause of action; that the covenant was a continuing covenant; that there was no merger when the deed was executed; that the defendant had benefit of counsel at the time of the closing of the contract; that the improvements were going on at the time of the contract, known by the defendant; and that the assessment in question was for the improvement within the contemplation of the parties.

The plaintiffs, therefore, ask that this Honorable Court do dismiss the appeal, and affirm the decision as rendered by the Honorable Judge of the District Court, and the Supreme Court.

Respectfully submitted,

SAMUEL HARBER,

Of Counsel for Frank Janitscheck and Rose Janitscheck.