INDEX.

Plaintiff's Exhibits.

New Jersey Supreme Court

CHARLES SERVENTI,
Plaintiff,

vs.

JOHN B. CELLA, *et als.*,
Defendants.

10

Notice of Appeal and Grounds.

To COLLINS & CORBIN,
Attorneys for Appellees:—

Take notice that the appellants John B. Cella, Joseph A. Cella and Carlo D. Cella appeal to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in this cause on the following grounds:

1. Because the Supreme Court refused to grant defendants' motion to non-suit the plaintiff at the close of the plaintiff's case, which refusal was erroneous.

2. Because the Supreme Court refused to permit the defendants to introduce testimony showing mistake in the execution of the agreement, which formed the basis of the suit, which refusal was erroneous.

3. Because the Supreme Court directed the jury to render a verdict in favor of the plaintiff, which direction was erroneous.

HOPKINS & HERR,
Attorneys for Appellants.

Recognizance

DETROIT FIDELITY AND SURETY COMPANY

Home Office: Milwaukee and Cass Avenues
DETROIT, MICHIGAN

KNOW ALL MEN BY THESE PRESENTS, That we, John B. Cella, Joseph A. Cella and Carlo D. Cella of 23 Pomander Walk, Ridgewood, New Jersey, as principals and Detroit Fidelity and Surety Company, a corporation organized under the laws of the State of Michigan, authorized to do business in the States of New York and New Jersey, and having an office and place of business at No. 1 Newark Street, Hoboken, New Jersey, as Surety, jointly and severally acknowledge ourselves to owe unto Charles Serventi, the plaintiff, in the sum of Two thousand eight hundred eighty six and 32/100 ($2,886.32) Dollars to be made and levied of our and each of our goods, chattels, lands, and tenements, here and real estate to the use of the said Charles Serventi, his executors, administrators and assigns, if failure be made in the following conditions:

WHEREAS John B. Cella, Joseph A. Cella and Carlo D. Cella have taken an appeal to the Court of Errors and Appeals of New Jersey from Supreme Court, Hudson County, to remove a certain judgment obtained by the said Charles Serventi in an action at contract in the said Supreme Court, Hudson County, as appears of record in the said Court, said judgment being for the sum of One thousand four hundred forty three and 16/100 ($1,443.16) Dollars costs.

NOW, THEREFORE, the condition of this recognizance is such that if the said John B. Cella,

Recognizance.

Joseph A. Cella and Carlo D. Cella in said appeal, shall prosecute the said appeal with effect, and also pay and satisfy (if the said judgment be affirmed) all the damages and costs adjudged in the former judgment, and all costs and damages to be awarded for delay of execution, then this recognizance to be void, else to remain in full force.

Dated, December 31st, 1926.

JOHN B. CELLA
JOSEPH A. CELLA
CARLO D. CELLA

DETROIT FIDELITY AND SURETY COMPANY
By (Signed) EDWARD M. STACK (SEAL)
Attorney-in-Fact.

GA 23377

DETROIT FIDELITY & SURETY COMPANY
Home Office
Milwaukee and Cass Avenues
DETROIT, MICHIGAN

STATE OF NEW JERSEY }
County of Hudson } ss.
City of Hoboken }

On this 31st day of December, 1926, before me the subscribed Notary Public for the State of New Jersey, duly commissioned and sworn, personally came Edward M. Stack, to me known and who being by me duly sworn did depose and say: that he resides in the City of Hoboken, N. J.; that

he is the Attorney-in-Fact of the Detroit Fidelity & Surety Company, the Corporation described in and which executed the within instrument; that he knows the Seal of said Corporation; that the Seal affixed to said instrument is such Corporate Seal; that it was so affixed by order of the Board of Directors of said Corporation; and that he signed his name thereto by like order; and that the within instrument was signed, sealed and delivered by him as his free and voluntary act and deed as Attorney-in-Fact of the Detroit Fidelity & Surety Company, and as the free and voluntary act and deed of the said Detroit Fidelity & Surety Company; and further that the said Detroit Fidelity & Surety Company is duly authorized and licensed to transact the business of becoming Surety on all bonds, undertakings and other obligations in the State of New Jersey, in conformity with the Insurance Laws of said State, and that it has received a Certificate of such Authority from the Commissioner of Insurance of the State of New Jersey, and that such Certificate has not been revoked; that the Detroit Fidelity & Surety Company is duly incorporated under the Laws of the State of Michigan, and is authorized by the Laws of that State and under its Charter to become Surety on all bonds, undertakings and other obligations; that it has on deposit with the Treasurer of the State of Michigan good securities worth at par or at market value at least Two Hundred Fifty Thousand Dollars ($250,000.00), held as security for all holders of its obligations, and has a fully paid up and unimpaired Capital of One Million Dollars ($1,000,000.00); that the said Company has appointed the Commissioner of Banking and Insurance of the State of New

Jersey, and his successors in office, as their true and lawful Attorney for the State of New Jersey, upon whom process of Law can be served, and has filed in the office of the Commissioner of Banking and Insurance a written statement, duly signed and sealed, certifying such appointment, together with the residence and office of such Attorney, with the State of New Jersey; and further that at a regular meeting of the Board of Directors of the said Detroit Fidelity & Surety Company, held on the 28th day of June, 1921, a quorum being present, the following By-Laws were duly adopted:

"Article VII, Section 1. All bonds and undertakings are to be signed by the President or by one of the Vice-Presidents, and are to be attested by the Secretary or one of the Assistant Secretaries; or by Attorneys-in-Fact duly authorized to execute bonds on behalf of the Company."

"Article IX, Section 1. The President or any Vice-President shall have power and authority to appoint resident Vice-Presidents, resident Assistant Secretaries and Attorneys-in-Fact, and to authorize them to execute on behalf of the Company and attach the Seal of the Company thereto, bonds and undertakings, recognizances, contracts of indemnity and other writings obligatory in the nature thereof."

(SEAL) EDWARD M. STACK
Attorney-in-Fact.

Sworn and subscribed in the City of Hoboken, in the County of Hudson and State of New Jersey, this 31st day of December A. D., 1926, before me,

Recognizance.

a Notary Public for the State of New Jersey duly commissioned and sworn.

FRANK A. KING
(SEAL) *Notary Public.*

STATE OF NEW YORK,}
County of New York.} ss.:

BE IT REMEMBERED, That on this 3rd day of January in the year of our Lord One Thousand Nine Hundred and Twenty-seven, before me, the subscriber, a Master in Chancery of the State of New Jersey, personally appeared JOHN B. CELLA, JOSEPH A. CELLA, and CARLO D. CELLA who I am satisfied, are the persons who executed the within instrument to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

FRANK PASCARELLA
Master in Chancery of New Jersey

I hereby approve the above recognizance as to form and sufficiency of surety.

J. RAYMOND TIFFANY
Supreme Court Commissioner of New Jersey

Summons.

THE STATE OF NEW JERSEY

To

John B. Cella, Joseph A. Cella and Carlo D. Cella.

You are summoned to answer the annexed complaint of Charles Serventi, in an action at law in the New Jersey Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the New Jersey Supreme Court, at Trenton, New Jersey, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness WILLIAM S. GUMMERE, ESQ., Chief Justice of our Supreme Court at Trenton, N. J., this 14 day of August, Nineteen Hundred and Twenty-three.

EDWARD J. KILLEHER
Clerk.

[L. S.]

HARLAN BESSON
Attorney.

Complaint.

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

CHARLES SERVENTI,
Plaintiff,
vs.
JOHN B. CELLA, JOSEPH A. CELLA and CARLO D. CELLA,
Defendants.

Action at Law.

Plaintiff, who resides in the City of Hoboken, in the County of Hudson and State of New Jersey, says that:—

1. On or about the Seventh day of February, A. D. Nineteen Hundred and Twenty-three, the defendants and the plaintiff entered into a contract in writing, subscribed by the defendants and the plaintiff, whereby it was mutually agreed that the said defendants should sell to this plaintiff, certain real estate therein described, pursuant to the terms of said contract, a copy of which is annexed hereto, made part hereof and for better identification marked Appendix "A".

2. By the terms of said contract, defendants agreed to deliver a certain deed to contain the usual full covenants and warranty, on March 15th, Nineteen Hundred and Twenty-three as therein prescribed.

3. The plaintiff then and there deposited in the hands of the said defendants, the sum of One thousand ($1,000.00) dollars as and for a part of the

said purchase money to be retained by them on account of the purchase money, if the plaintiff should complete his purchase and receive his deed, but to be to and for the use of this plaintiff and to be returned to him if the defendants should fail to fulfill their agreement and fail to give a good and sufficient deed at the time and pursuant to the said agreement.

4. At the time of the execution of the said contract, the said premises were subject to a certain encumbrance which constituted a defect in the title of the said premises and which encumbrance is created by the terms of a certain agreement made between one Michael Uhring and Louis Elleau, dated May 22nd, 1878, and recorded in the Hudson County Register's office in Book 322 of deeds for Hudson County, page 690, a copy of which agreement is hereto annexed, made part hereof and for better identification marked Appendix "B"; that defendants knew of the existence of said agreement and said encumbrance and have been and are unable to carry out the terms of the said contract marked Appendix "A".

5. On or about March 19th, Nineteen Hundred and Twenty-three, at the office of Harlan Besson, #84 Washington Street, Hoboken, N. J., the defendants tendered a deed to the plaintiff which contained the following clause:—

> "Subject, however, to the terms of a certain agreement made between Michael Uhring and Louis Elleau dated May 22nd, 1878, and recorded in the Hudson County Register's office in Book 322 of Deeds, page 690. Together with all of the rights and privileges as granted in said agreement to said Michael Uhring by said Louis Elleau."

Complaint.

Which deed was not in conformity to the terms of the contract; that the plaintiff was prepared to carry out and perform all things to be performed by him under the terms of said contract, but refused to accept the deed in manner and form as tendered by the defendants.

6. On or about April 1st, Nineteen Hundred and Twenty-three, plaintiff demanded from the defendants the return of the deposit money of One thousand ($1,000.00) dollars paid on account of the purchase price as above alleged and also the reasonable cost of examining the title to said premises by plaintiff's attorney which amounted to the sum of One Hundred and Twenty-five ($125.00) dollars.

7. The defendants have refused to return the said sum of One thousand ($1,000.00) dollars and to pay the reasonable costs of examining the title to said premises.

8. On March 19th, Nineteen Hundred and Twenty-three, the plaintiff had in readiness the sum of Forty-four thousand ($44,000.00) dollars in cash for the purpose of carrying out the terms of said agreement and that by reason of the defendants' failure to perform, plaintiff lost a large sum of money as interest on the sum of money held available by him to perform his part of the contract.

Plaintiff demands as damages the sum of Three thousand ($3,000.00) dollars, together with interest and costs.

HARLAN BESSON,
Attorney for Plaintiff.

Complaint.

Appendix "A".

CONTRACT OF SALE.

NOTICE.

Stoops, areas and cellar steps of many buildings encroach upon the street, and City of New York claims the right, if it so desires, to remove same. If such encroachments are of a substantial character, title may be unmarketable until the same are removed. The question as to the substantial character of such encroachments and as to the probable removal of same by the City is largely a matter of opinion. Each purchaser must decide these questions of fact for himself. Your attention is called to the fact that this contract provides that title is to be conveyed subject to such encroachments, if any.

The observance of the following suggestions will save time and trouble at the closing of the title:

THE SELLER.

First: Should bring with him all insurance policies and duplicates.

Second: He should also bring the tax and water receipts of the current year, and any leases, deeds and agreements relating to the premises.

Third: When there is a water meter on the premises it should be read.

Fourth: If there are mortgages on the premises to be conveyed, the seller should produce receipts showing to what date the interest has been paid, and if the principal has been reduced

evidence of such reduction, in form to be recorded, must be produced and recorded.

Fifth: If the grantor is a married man, his wife must join in the execution of the deed.

Sixth: The seller should furnish to the purchaser a full list of tenants, giving the names, rent paid by each, and date to which rent has been paid.

THE PURCHASER

Should be prepared with money or a certified check drawn to his own order. The certified check may be an approximate amount and money may be provided for the balance of the settlement.

TITLE GUARANTEE & TRUST CO.

176 Broadway, New York.
271 West 125th Street, Harlem.
370 East 149th Street, (Near Third Avenue, Bronx)
Mineola, L. I.
175 Remsen Street connecting with 196 Montague Street } Brooklyn
160-08 Jamaica Avenue, Jamaica.
Bridge Plaza North, L. I. City.
90 Bay St., St. George, S. I.

Insures Titles Receives Deposits Accepts Trusts
Capital and Surplus $18,500,000.

Clarence H. Kelsey, President
Frank Bailey, Vice President
Clinton D. Burdick, 2d Vice President
J. Wray Cleveland, 3rd Vice President
Frederick P. Condit, 4th Vice President
Clarence C. Harmstad, Treasurer, Mgr. Banking Dept.
Horace Anderson, Secretary
Frank L. Sniffen, Vice President in charge B'klyn Banking Dept.

Raye P. Woodin, Vice President in charge Jamaica Branch.
Randall Salisbury, Mgr. Manhattan Mtge. Dept.
John W. Shepard, Ass't Treasurer
Loren H. Rockwell, Ass't Treasurer
Stephen T. Kelsey, Ass't Treasurer
Nelson B. Simon, Ass't Secretary
David Blank, Ass't Secretary
Harold W. Hoyt, Ass't Secretary
Fred H. Freeman, Ass't Secretary
Clarence F. Lamont, Ass't Secretary

AGREEMENT, made and dated February 7th, 1923, between John B. Cella, Joseph A. Cella and Carlo D. Cella, hereinafter described as the seller, and Charles Serventi, hereinafter described as the purchaser.

WITNESSETH, that the seller agrees to sell and convey, and the purchaser agrees to purchase all that lot or parcel of land, with the buildings and improvements thereon, in the City of Hoboken, County of Hudson, State of New Jersey, known as 99 Washington Street, and 59-61 First Street, being 25 feet on Washington Street by 100 feet on First Street more or less, bounded and described as follows:—

Commencing at a point formed by the intersection of the easterly line of Washington Street with the southerly line of First Street, running thence (1) easterly, along the said southerly line of First Street, one hundred feet (100) ft. to an alley now called Court Street, thence (2) southerly, along the westerly line of said Court Street, twenty-five (25 ft.) to a point; thence (3) westerly, parallel with First Street, one hundred feet (100 ft.) to

the easterly line of Washington Street, and thence (4) northerly, along said easterly line, twenty-five feet (25 ft.) to the point or place of beginning, subject to such state of facts as an accurate survey may show.

The seller agrees to pay off the first mortgage of Five thousand dollars ($5,000.00) now a lien on the premises, and to take back a purchase money second mortgage for $10,000.00 for two years at 6% which shall be subject and subordinate to a three year first mortgage of no more than $25,000.00 to be procured by the purchaser.

The purchaser agrees to pay the seller the sum of Fifty-five Thousand Dollars ($55,000.00) as follows:—

One Thousad Dollars, receipt of which is hereby acknowledged.	$1,000.00
Forty-four Thousand Dollars in cash on delivery of deed.	$44,000.00
Ten Thousand Dollars by seller taking back a two year purchase money mortgage at 6%.	$10,000.00
	$55,000.00

The expenses of recording purchase money mortgage, together with U. S. Revenue Stamps on bond, and any mortgage tax shall be borne by the purchaser.

The purchase money mortgage shall be drawn by the seller's attorney and the fees therefor of not more than $10.00 shall be paid by the purchaser.

Said premises are sold subject to:

1. Building restrictions and regulations in

resolution or ordinance adopted by the Council and Common or City Commissioners of the City of Hoboken.

2. Encroachments of stoops, areas or cellar steps, if any, upon any street or highway.

All personal property appurtenant to or used in the operation of said premises is represented to be owned by the seller and is included in this sale.

This sale covers all right, title and interest of the seller of, in and to any land lying in the bed of any street, road or avenue, opened or proposed, in front of or adjoining said premises, to the centre line thereof, and all right, title and interest of seller in and to any award made or to be made in lieu thereof, and in any award for damages to said premises by reason of change of grade of any street; and the seller will execute and deliver to the purchaser, on closing of title, or thereafter, on demand, all proper instruments for the conveyance of such title and the assignment and collection of any such award.

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

The following are to be apportioned:

1. Rents and interest on mortgages.
2. Rents of gas ranges.
3. Insurance premiums on existing policies.
4. Taxes and water rates for the calendar year.

If there be a water meter on the premises, the seller shall furnish a reading to a date not more than thirty days prior to the time herein set for closing title and the unfixed meter charge for the intervening time shall be apportioned on the basis of such last reading.

All notes or notices of violation of law or municipal ordinances, orders or requirements noted in or issued by the Tenement House Department, Fire Department, Building Department, Labor Department, Health Department, or other State or Municipal Department having jurisdiction, against or affecting the premises at the date hereof, shall be complied with by the seller and the premises shall be conveyed free of the same, and this provision of this contract shall survive delivery of the deed hereunder. The seller shall furnish the purchaser with an authorization to make the necessary searches therefor.

The deed shall be in proper statutory short form for record, shall contain the usual full covenants and warranty, and shall be duly executed and acknowledged by the seller, at the seller's expense, so as to convey to the purchaser, the fee simple of the said premises, free of all encumbrances except as herein stated.

All sums paid on account of this contract, and the reasonable expense of the examination of the

title to said premises are hereby made liens thereon, but such liens shall not continue after default by the purchaser under this contract.

The risk of loss or damage to said premises by fire until the delivery of the deed is assumed by the seller.

The deed shall be delivered upon the receipt of said payments at the office of Carlo D. Cella, No. 120 Broadway, New York City, at 11 A. M. o'clock on March 15th, 1923.

The stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors and assigns of the respective parties.

The parties agree that no one brought about this sale and there are no broker's commissions to pay.

Witness the signatures and seals of the above parties.

Carlo D. Cella for himself (L. S.)
John B. Cella & Joseph A. Cella (L. S.)
Charles Serventi (L. S.)

In presence of
Chas. A. Kingsland

Appendix "B".

Michel Uhring — Agreement.
To — Dated
Louis Elleau — May 22, 1878.

This indenture made this twenty-second day of May in the year One thousand eight hundred

and seventy-eight, Between Michael Uhring of the City of Hoboken, County of Hudson and State of New Jersey, of the one part and Louis Elleau of the same place, party of the other part. Witnesseth

Whereas the said Michael Uhring is the owner of a certain lot of land and premises situate, lying and being in the City of Hoboken in the County of Hudson and State of New Jersey and which on a map of Hoboken made by Charles Loss and duly filed in the Clerk's office of the County of Bergen situated and described as follows:—

Commencing at a point formed by the intersection of the easterly line of Washington Street with the southerly line of First Street, running thence (1) easterly, along the said southerly line of First Street, one hundred feet (100) ft. to an alley now called Court Street, thence (2) southerly, along the westerly line of said Court Street, twenty-five (25 ft.) to a point; thence (3) westerly, parallel with First Street, one hundred feet (100 ft.) to the easterly line of Washington Street, and thence (4) northerly, along said easterly line, twenty-five feet (25 ft.) to the point or place of beginning.

And Whereas the said Louis Elleau is the owner in fee of the lot of land contiguous to and immediately adjoining the said lot of land of said Michael Uhring on the Southerly side hereof bounded and described as follows: "Commencing at a point in the Easterly line of Washington Street distant twenty-five feet southerly from the southerly line of First Street and running thence Easterly and parallel with First Street, One hundred feet to the Westerly line of Court Street; thence Southerly along the Westerly and parallel

with First Street, One hundred feet to the easterly line of Washington Street; and thence Northerly along Easterly line of Washington Street Twenty-five feet to the point or place of beginning.

And Whereas said Louis Elleau has built or erected a building upon his said lot beginning at a point about forty-two feet Easterly from the Easterly line of Washington Street and extending Easterly about twenty-two feet. The northerly wall of which building stands partly that is to say, at the westerly and thereof five and one half inches and at the easterly end thereof four and three quarter inches upon the lot of land of said Michael Uhring.

And Whereas the said parties to these presents have agreed that the said wall shall stand and be used by the parties aforesaid respectively as and for a party wall so far as the said Michael Uhring shall see fit to use the same as such.

And Whereas the said Michael Uhring is about to erect a building upon the rear part of his said lot the full width thereof and desires to have and enjoy three windows in the Southerly side of the said building which he is about to erect on the second story of said building.

And Whereas the said Louis Elleau has one window in said party wall which he desires to use and enjoy.

Now therefore the said Louis Elleau for himself, his heirs, executors and assigns hath and by these presents doth in consideration of the premises, grant unto the said Michael Uhring, his heirs and assigns the right and privileges to have, hold, use and enjoy the said wall hereinbefore mentioned as and for a party wall and also to enter

and rest the beams of his said intended building unto and upon said wall and also to build upon and continue said party wall to the full height of the building about to be erected he the said Uhring to cap and finish the same in a proper manner at his own expense and the said Louis Elleau for himself, his heirs and assigns doth further grant unto said Michael Uhring, his heirs and assigns, the right and privileges to make and use three windows in the southerly wall in each story above the first story of said building which he the said Michael Uhring is about to erect and also to enjoy the light and air therefrom so long as he the said Louis Elleau, his heirs or assigns do not desire to use the rear part of said lot for the purpose of erecting a building thereon, the said Louis Elleau reserving unto himself, his heirs and assigns the right to erect any building upon the whole or any part of his said lot of land as fully and entirely as if these presents had not been made. And the said Michael Uhring for himself, his heirs and assigns had by these presents doth grant unto said Louis Elleau, his heirs and assigns the right and privileges to have and enjoy one window in each story of his said building above the first story in the said party wall and to enjoy the light and air therefrom so long as he the said Michael Uhring, his heirs and assigns do not desire to use that part of his said lot for the purpose of erecting a building thereon, the said Michael Uhring reserving unto himself, his heirs and assigns the right to erect and build any building upon the whole or any part of his said lot of land as fully and entirely as if these presents had not been made. And the said parties to these presents for themselves, their heirs and assigns

do covenant and agree each with the other that they shall and may respectively have and enjoy the light and air from the windows now in or to be put into their respective buildings until the same are or may be obstructed by some building hereafter in good faith erected and also that they shall and will respectively desist and refrain from erecting any wall, screen or other obstruction for the sole purpose of excluding the light or air from the said windows or any of them nor do any other act or thing to obstruct or hinder the full and free enjoyment of light and air as aforesaid, except it be by the erection in good faith of a building or buildings upon the said lots respectively.

In Witness Whereof the parties to these presents have hereto set their hands and seals the day and year first above written.

MICHAEL UHRING
LOUIS ELLEAU.

Signed, Sealed and delivered in the presence of the words "Sixteen feet and Eight inches" on the third page erased and "twenty-two feet" interlined before execution.

JOHN C. BESSON.

STATE OF NEW JERSEY, }
County of Hudson. } ss.:

BE IT REMEMBERED, That on this 28th day of May, in the year of our Lord One Thousand, eight hundred and seventy-eight, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Michael Uhring and Louis

Answer to Complaint.

Elleau, who, I am satisfied, are the grantors mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

JOHN C. BESSON,
Master in Chancery of New Jersey.

Answer to Complaint.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

CHARLES SERVENTI,
Plaintiff,
vs.
JOHN B. CELLA, JOSEPH A. CELLA and CARLO D. CELLA,
Defendants.
} Action at Law.

The defendants, residing in the City of Hoboken, County of Hudson and State of New Jersey, say that:

1. They deny the first paragraph, but admit they signed the paper writing referred to in said first paragraph.

2. They deny the second paragraph.

Answer to Complaint.

3. They deny the third paragraph, but admit that they received One Thousand (1000) Dollars from the plaintiff.

4. They deny the fourth paragraph, but admit that the agreement made between Michael Uhring and Louis Elleau, particularly set forth in said paragraph, relates to said premises.

5. They admit that, "On or about March 19th, Nineteen Hundred and Twenty-three, at the office of Harlan Besson, #84 Washington Street, Hoboken, N. J., the defendants tendered a deed to the plaintiff which contained the following clause:

> 'Subject, however, to the terms of a certain agreement made between Michael Uhring and Louis Elleau dated May 22nd, 1878 and recorded in the Hudson County Register's Office in Book 322 of Deeds, page 690. Together with all of the rights and privileges as granted in said agreement to said Michael Uhring by said Louis Elleau.' "

and also that the plaintiff refused to accept the deed in the manner and form as tendered by the defendants, but deny all the other allegations of paragraph five.

6. They admit that, "On or about April 1st, Nineteen Hundred and Twenty-three, plaintiff demanded from the defendants the return of the deposit money of One Thousand ($1,000.00) Dollars," and "also the reasonable cost of examining the title to said premises by plaintiff's attorney," but deny all the other allegations of paragraph six.

Answer to Complaint.

7. They admit the seventh paragraph.

8. As to the statement in the eighth paragraph, "On March 19th, Nineteen Hundred and Twenty-three, the plaintiff had in readiness the sum of Forty-four Thousand ($44,000.00) Dollars in cash for the purpose of carrying out the terms of said contract," these defendants have not any knowledge or information thereof sufficient to form a belief. They deny all the other allegations of paragraph eight.

First Separate Defense.

That the agreement particularly set forth in the first paragraph of the complaint was executed by the plaintiff and these defendants through a mutual mistake as to its contents, both the plaintiff and defendants believing that it set forth the true agreement made between them with respect to the sale of the property, to wit: that the said property was to be sold subject to the terms of a certain party wall agreement, made between Michael Uhring and Louis Elleau, dated May 22nd, 1878 and recorded in the Hudson County Register's Office in Book 322 of Deeds, page 690; and the defendants have been ready and willing, and have offered to perform the true agreement between themselves and the plaintiff, but the plaintiff has wrongfully refused to perform said agreement.

Second Separate Defense.

These defendants further say that the agreement between Michael Uhring and Louis Elleau, more particularly referred to in the fourth paragraph of the complaint, is not an encumbrance,

Reply to Answer to Complaint.

but a valuable appurtenant to the premises therein described.

HOPKINS & HERR,
Attorneys of Defendants.

Reply to Answer to Complaint.

NEW JERSEY SUPREME COURT,

Hudson County.

Charles Serventi, *Plaintiff,* *vs.* John B. Cella, Joseph A. Cella and Carlo D. Cella, *Defendants.*	Action at Law.

Plaintiff for reply says that:

He denies the allegations of the first and second separate defenses.

Objection in Point of Law.

Plaintiff objects that the answer discloses no defense to the plaintiff's cause of action and before or on the trial plaintiff will move to strike out the answer as sham or frivolous and also move to enter judgment final in his favor.

COLLINS & CORBIN,
Attorneys of Plaintiff.

Order Amending Complaint.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

CHARLES SERVENTI,
Plaintiff,
vs.
JOHN B. CELLA, JOSEPH A. CELLA and CARLO D. CELLA,
Defendants.
} Action at Law.

The attorneys for the respective parties consenting thereto:

It is on this day of February, Nineteen Hundred and Twenty-six, ordered that Paragraph 6 of the complaint filed herein be and the same is hereby amended to read as follows: "On or about April 1st, Nineteen Hundred and Twenty-three, plaintiff demanded from the defendants the return of the deposit money of One thousand ($1,000.00) dollars paid on account of the purchase price as above alleged, and also the reasonable cost of examining the title to said premises by plaintiff's attorneys which amounted to the sum of One Hundred and Fifty ($150.00) dollars."

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

COLLINS & CORBIN,
Attorneys for Plaintiff.

HOPKINS & HERR,
Attorneys for Defendants.

Amendment to Complaint.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

CHARLES SERVENTI,
Plaintiff,
vs.
JOHN B. CELLA, JOSEPH A. CELLA and CARLO D. CELLA,
Defendants.
} Action at Law.

Paragraph 6 of the complaint is amended so as to state that the reasonable cost of examining the title is $150.00 instead of $125.00.

COLLINS & CORBIN,
Attorneys of Plaintiff.

We consent to the above amendment.

HOPKINS & HERR,
Attorneys of Defendants.

Postea.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

CHARLES SERVENTI,
Plaintiff,

vs.

JOHN B. CELLA, JOSEPH A. CELLA and CARLO D. CELLA,
Defendants.

Action at Law.

This case was tried before Judge Willard W. Cutler with a jury at the Hudson Circuit on November 22, 1926.

At the direction of the Court the jury rendered a general verdict against the defendants and in favor of the plaintiff for Thirteen Hundred and Seventy-five Dollars and Thirty-four Cents ($1,375.34).

WILLARD W. CUTLER,
Circuit Court Judge.

Judgment.

NEW JERSEY SUPREME COURT.

CHARLES SERVENTI,
Plaintiff,

vs.

JOHN B. CELLA, JOSEPH A. CELLA and CARLO D. CELLA,
Defendants.

This case was tried before Judge Willard W. Cutler with a jury at the Hudson Circuit on November 22, 1926.

At the direction of the Court the jury rendered a general verdict against the defendants and in favor of the plaintiff for Thirteen Hundred and Seventy-five Dollars and Thirty-four Cents ($1,375.34).

Whereupon it is adjudged that the plaintiff Charles Serventi, do recover of the said defendants John B. Cella, Joseph A. Cella and Carlo D. Cella, the sum of Thirteen Hundred and Seventy-five Dollars and Thirty-four Cents damages, together with his costs, which have been taxed at the sum of sixty-seven dollars and eighty-two cents, making in the whole the sum of Fourteen hundred and Forty-three dollars and sixteen cents.

$1375.34	
67.82	
$1443.16	

Judgment entered November 24, 1926.

WM. S. GUMMERE, *C. J.*

Case.

NEW JERSEY SUPREME COURT.

CHARLES SERVENTI,
Plaintiff,

vs.

JOHN B. CELLA, JOSEPH A. CELLA and CARLO D. CELLA,
Defendants.

Tried Monday, November 22, 1926 before CUTLER, *J.* and a Jury.

COLLINS & CORBIN (EDWARD A. MARKLEY) for Plaintiff.

HOPKINS & HERR (HERMAN G. VORBURGER) for Defendants.

Mr. Vorburger: If your Honor please, in this case there are several legal defenses presented by the answer, which, if your Honor decides in favor of the defendant, will dispose of the case without any testimony, because the facts themselves, as I understand it, are admitted by the pleadings,—that is, most of the facts—and this is a suit which involves a question as to whether a certain party wall agreement was an incumbrance or not. A contract was made and the plaintiff refused to take title on the ground that a certain party wall agreement was an incumbrance. One defense is that it was not an incumbrance, and the party wall agreement is set forth in the pleadings here, and it seems to me if your Honor found

that was not an incumbrance, that would dispose of the case.

The Court: If there is any way of saving time, I would be glad to do it.

Mr. Markley: I was going to suggest to your Honor that we have a brief, and then we will put in these documents. My case won't take over five minutes to put in.

The Court: That will be a better way. The jury will be sworn.

(Both sides open to the jury.)

Mr. Markley: Now I offer the agreement or contract of sale dated February 7, 1923 between the plaintiff and the defendants.

(Admitted and marked Exhibit P-1 in evidence.)

Mr. Markley: Now I offer in evidence the deed which was tendered on March 19, 1923.

(Admitted and marked Exhibit P-2 in evidence.)

Mr. Markley: This, your Honor, is the deed which was tendered by Messrs. Cella to the plaintiff, Charles Serventi, on March 19, 1923. It is now P-2. It describes this property and at the end of the description appears the following:

"Subject however to the terms of a certain agreement made between Michael Uhring and Louis Elleau dated May 22nd, 1878 and recorded in the Hudson County Registrar's Office, in Book 322 of Deeds, page 690."

That is the deed that was offered to Mr. Besson.

It is stipulated that that was the deed offered to Mr. Besson and that Mr. Besson refused to ac-

cept it, first on the ground that it contained that "subject" clause, and secondly, that the agreement referred to was in fact an incumbrance and made the title unmarketable.

Mr. Markley: I also offer in evidence Mr. Besson's bill, which I understand is not disputed, as being a reasonable bill—$150 for the search.

(Admitted and marked in evidence P-3.)

Mr. Markley: Now I have here the agreement which is the subject matter of this controversy—a copy of it—but I will offer the original record. It is an agreement dated May 22nd, 1878 between Michael Uhring and Louis Elleau, recorded in Book 322 of Deeds for Hudson County, beginning at page 690, 691, 692 and part of page 693.

The Court: What parts of that agreement form an incumbrance?

Mr. Markley: I think it better for me to read the whole business.

(Agreement read to the Court.)

Mr. Markley: And I offer that as P-3. It is not to be marked as I understand.

The Court: Oh no, you can't mark the record.

Mr. Markley: Now I want to offer the deed from John B. Cella and the other two defendants to George F. Caldes, made May 14, 1924, of which I have a certified copy here, recorded in the Registrar's Office on May 16, 1924, at 10:21 A. M., as numbers 6297, wherein it appears the same property was sold on May 14, 1924, for three thousand dollars more than we were to pay for it.

Mr. Vorburger: I object if the court please on the ground it is entirely incompetent, irrelevant and immaterial whether the property was sold

afterwards or was not sold afterwards. The whole inquiry here is whether these people were justified in refusing to take the title.

The Court: I don't think it is justifiable now to your case; I don't think it is competent.

Mr. Markley: Exception.

(Marked P-4 for identification.)

Mr. Markley: Now I offer in evidence the opinion of Vice-Chancellor Griffin. The Court of Chancery refused to reform this contract—and the final decree thereon.

Mr. Vorburger: I object if the court please. That is also entirely incompetent, irrelevant and immaterial, and on the further ground that there is nothing set up in the pleadings to show any sort of defense to which this might be applicable.

Mr. Markley: They have set up in one of their defenses, and counsel has opened to the jury, that something else ought to have been in this agreement.

The Court: Yes, but this court can't put it in. I am not going to admit that.

Mr. Markley: Exception. May I have it marked for identification?

The Court: Yes.

(Marked P-5 for identification.)

(Order of Vice Chancellor John Bentley dismissing bill marked P-6 for identification.)

Mr. Markley: Plaintiff rests.

Mr. Vorburger: I respectfully move for a nonsuit on the ground that the plaintiff has not shown any right to recovery in this case and that the

agreement which he sets forth is not an incumbrance.

(Argument.)

The Court: I am going to hold that that is an incumbrance and you can't recover. Of course you can take your appeal from my ruling.

Mr. Vorburger: Might I have an exception noted?

The Court: Yes.

Mr. Vorburger: Now then the defendant wants to go in and show the question of mistake, and I would like to be heard on that question.

The Court: I will hear you.

(Argument.)

Mr. Vorburger: And I would also like to offer to prove by Mr. Cella that there was a mistake made in the execution of this contract; that both Mr. Cella and the plaintiff in this case intended that the contract should contain a provision that the property was sold subject to this party wall agreement in question; that the agreement was actually dictated in that way and that both parties signed it believing at the time that it would contain that clause, and I would like to offer proof to show that.

The Court: I refuse to accept that evidence. The Court holds you can't reform an instrument in this court.

Mr. Vorburger: Exception.

(Defendants rest.)

The Court: It is admitted that if the plaintiff is entitled to a verdict, it would be $1375.34.

TESTIMONY CLOSED.

Judge's Charge.

The Court: Now gentlemen of the jury, this case hangs on a question of law. It is not a question for the jury to decide, and if there is any error about it, it is error of the court, and not your error. It is admitted that if the plaintiff is entitled to a verdict he is entitled to a verdict for $1,375.34; and under the evidence the court's opinion or finding is that the plaintiff is entitled to a verdict for that amount; so I direct you to find a verdict in favor of the plaintiff and against the defendants in the sum of $1,375.34, and the defendants may enter their objection and exception to my ruling. That will bring up the old question.

Plaintiff's Exhibit 1.

(Same as Appendix "A" to Complaint.)

Plaintiff's Exhibit 5 for Identification was read by the trial judge but ruled out as evidence to be submitted to the jury, and is as follows:

Plaintiff's Exhibit 5 for Identification.

COURT OF CHANCERY OF NEW JERSEY

JOHN GRIFFIN

Vice Chancellor

CELLA *vs.* SERVENTI.

Messrs. Hopkins & Herr, 51 Newark St., Hoboken, N. J.

Harlan Besson, Esq., 84 Washington St., Hoboken, N. J.

Gentlemen:

The bill in this cause is filed to reform a contract entered into between the complainant and defendant for the sale of lands. The complainant says that, by inadvertence and a mutual mistake, a clause touching a party wall and an agreement was omitted from the contract. This is denied by the defendant.

> "When the evidence in demonstration of mistake is doubtful, or equivocal, or strongly contradicted, so that it is impossible for the mind to reach a strong conviction as to the truth, the court will not change what is written. * * * Until a mistake has been established by such force of proof as leaves no rational doubt of the fact, no change in the writing sought to be reformed is entitled to be called a correction." *Hupsch* vs. *Resch,* 45 N. J. Eq., 657 (663); aff'd. 46 N. J. Eq., 609.

While the testimony of the complainant was rather persuasive, yet, as the burden of proof is placed upon him to show the mistake, and as I am inclined to the view that he has not sustained this burden, the bill should be dismissed.

At the close of the case a suggestion was made

by the Court as to the effect of this encroachment; and the complainant contends that it is not an encroachment; and both parties ask me to decide this question.

The defendant rejected the title; and complainant afterwards sold the property for a larger sum. The defendant sued at law for the return of the purchase price and search fees. Complainant then, conceiving that he had not an adequate defense at law, filed his bill in this court to restrain the prosecution of the suit, to the end that when the contract was reformed he could then return to the court of law and successfully defend the action.

As the court has declined to reform the contract, the complainant in the law suit stands in precisely the same position as before filing the bill, with the law suit still pending.

The case which counsel now desire to present to the Court is a pure action for damages based on a breach of the contract, a thing which this Court has no original jurisdiction to determine. *Shaw* vs. *Beaumont Co.,* 88 N. J. Eq., 333; *Red Jacket Tribe* vs. *Hoff,* 33 N. J. 441; *Little* vs. *Cooper,* 10 N. J. Eq., 273; *Brown* vs. *Edsal,* 9 N. J. Eq., 256. These cases were decided before the *Chancery Act of 1915, p. 184, Secs. 8 and 9,* went into effect. Those sections were construed by me in *Water Works Equipment Company* vs. *McGovern,* 93 N. J. Eq., 520, at p. 523. But the precise question in this case was not there presented. There, in order to enter the final decree in this Court, if a jury had been demanded, this Court would have had to stay the proceedings on the bill until the suit at law had been determined—such ascertainment at law being within the scope of the relief prayed for in the bill. This act does not apply, and therefore the case must be decided

Plaintiff's Exhibit 5 for Identification.

under the pre-existing law. Here a suit at law is brought upon the contract. The defendant at law found that it was necessary to have his contract reformed in order to defend, and when the Court decides either for or against reformation the injunction should be dismissed and the parties allowed to proceed with their suit at law. Therefore, two things will be perceived: first, the court of law first obtained jurisdiction to try this common law suit for damages for breach of the contract, which suit was stayed in order to hear the complainant in this Court on the question of reformation. If this Court should determine this question of reformation and then decide the case for damages it would oust the court of law of a jurisdiction previously obtained. Second, the question of the right of the plaintiff at law to damages is not in any sense germane to the issue presented by the complainant here in his bill, and is not within the Act of 1915, *supra*. When the parties ask this Court to decide this question, they, in fact, ask it to take jurisdiction of an action at law, pure and simple, for damages, and substantially to the same extent as if the bill had not been filed.

The bill will be dismissed, leaving the parties to litigate their suit at law.

The foregoing memorandum, being merely for the guidance of counsel in ascertaining the views of the Court, is not to be published, printed nor filed; if an appeal is taken, however, counsel will notify me of that fact in writing, have the testimony written up and forwarded to me, and I will then prepare and file a formal opinion.

Yours truly,

JOHN GRIFFIN.

New Jersey Court of Errors and Appeals

CHARLES SERVENTI,
Plaintiff-Respondent,

vs.

JOHN B. CELLA, JOSEPH A. CELLA and CARLO D. CELLA,
Defendants-Appellants.

Action at Law On Appeal from New Jersey Supreme Court.

BRIEF FOR DEFENDANTS-APPELLANTS.

This is an appeal from a judgment in the sum of $1,443.16 entered in the Supreme Court on a verdict rendered by a jury at the Hudson Circuit on the direction of the late Willard W. Cutler, *C. C. J.*

Facts.

Plaintiff as purchaser and defendants as sellers entered into a contract in writing on February 7, 1923, for the sale of a parcel of realty with buildings thereon, situated on the southeast corner of Washington and First Streets in the City of Hoboken. The contract as signed is Appendix "A" of the complaint (Case, page 11). The purchase price was $55,000. and plaintiff paid a deposit of $1,000. for the recovery of which with search fee of $150. this suit is brought.

Plaintiff sets up in his complaint (1) that the property in question was subject to a party wall agreement dated May 22, 1878, between Michael Uhring, a previous owner of said property, and Louis Elleau, then owner of the adjoining prop-

erty, and (2) that said party wall agreement which is Appendix "B" of complaint (Case, page 17) was not in the contract of sale, but was in the deed tendered at the closing and (3) that plaintiff rejected title because said agreement was an incumbrance.

Defendants' defenses allege that (1) said party wall agreement is not an incumbrance and (2) that the contract of sale by inadvertence and mutual mistake failed to recite that the property was being sold subject to said party wall agreement. These allegations of the defenses are denied by the plaintiff.

For the information of the court, it is well to state that these defendants brought a suit in chancery to restrain this action at law and to reform the contract of sale and that Vice Chancellor Griffin, after hearing, denied reformation to the complainants and dismissed the bill. The unofficial opinion of Vice Chancellor Griffin (Case, page 36) was offered at the trial of this action by plaintiff, and was read by Judge Cutler and ruled out as evidence to the jury.

This relief in equity was sought before the decision in the case of *Feder* vs. *Solomon,* 3 N. J. Misc. Rep. 1189, affirmed Vol. IV, No. 45, N. J. Adv. Rep. 1852.

POINT I.

The Uhring-Elleau party wall agreement is not an incumbrance, but is on the contrary a valuable appurtenant.

This point embraces the first ground of appeal (Case, page 1, line 24), to wit, that plaintiff should have been non-suited (Case, page 33, line 31).

This agreement, which plaintiff contends is an incumbrance, for convenience, may be divided into two parts: (1) That which refers to party wall and its use as such for lateral support, and (2) that which refers to enjoyment of light and air over the adjoining premises.

Upon the argument before Judge Cutler, plaintiff did not contend or stress the objection that the agreement as to party wall was an incumbrance but rather that the agreement as to enjoyment of light and air was. It is well, however, to examine both elements of the agreement.

(1) As to use of the party wall as such. Uhring (from whom defendants derived title) and Elleau, the parties to said party wall agreement, agreed that the wall which was partly on the property of each, should stand and be used as a party wall (Case, page 19, lines 18-22) and that Uhring might use the same as such and continue the same to the height of the building to be erected (Case, page 20, lines 3-4).

In *Feder* vs. *Solomon,* 3 N. J. Misc. 1189, the facts were very analogous to the facts in this case, to wit, the purchaser rejected title because of a party wall and sued to recover his deposit. In a very learned opinion, that court said:

> Newman, *C. C. J.* (page 1191) " * * * The Court said (referring to Burns *vs.* Thomas, 81 N. J. E. 168, 86 Atl. Rep. 382):
>
> 'The case is the ordinary case that occurs in our compactly built cities, of a building with party walls. A building is none the less a complete building because one of its side walls requires, or is strengthened by a supporting wall of an adjoining building. The right of mutual easements in such cases is well recognized, and each building is re-

garded, as complete in itself. The language used by Chief Baron Pollock in Richards *vs.* Ross, 9 Exch. 218, by the New York Court of Appeals in Rogers *vs.* Sinsheimer, 50 N. Y. 646, and the Supreme Court of Massachusetts in Carlton *vs.* Blake, 152 Mass. 176, 25 N. E. 83, sufficiently vindicates this definition of a building.'

"The better opinion seems to be that a wall standing equally on both lots and held in common by the adjoining proprietors is not an incumbrance, but a valuable appurtenant which passes with the title to the property. Maupin on Marketable Title to Real Estate, page 326 (citing cases).

"In Hendrick *vs.* Stark, 37 N. Y. 106, 93 Am. Dec. 549, where there was no covenant to maintain and rebuild the wall, the Court of Appeals of that state said:

'A party wall, creating a community of interest between adjoining proprietors is in no just sense to be deemed a legal incumbrance upon the property.

'A party purchasing a hotel and premises at public auction, without being informed that part of the walls of the hotel adjoining other buildings are party walls, cannot for that cause, refuse to complete the purchase.

'As between adjoining proprietors maintaining party walls, their mutual easement in walls is a benefit and not a burden to each of them. It is a valuable appurtenant which passed with the title to the property.'

"This doctrine was approved by the same court in Bull *vs.* Burton, 227 N. Y. 101. To the same effect is Schaeffer *vs.* Blumenthal, 169 N. Y. 221.

"29 R. C. L., page 507, Sec. 232, lays down the following rule:

'In the case of the sale of a city building, the fact that the side walls are party walls

does not constitute such an incumbrance or defect in the title as will relieve the purchaser from completing the purchase. * * * For as has been said since the title acquired by the purchaser will extend only to the middle of the party walls, it is obvious that the mutual easement for their support is a benefit and not a burden to him as well as the adjacent proprietors. It is a valuable appurtenance, which passes with the title of the property, and its value to him is not diminished by the fact that it is equally beneficial to the adjacent owners. Also, though the erection of a party wall creating a community of interest between neighboring proprietors, there is no just sense in which the reciprocal easement for its preservation can be deemed a legal encumbrance on the property. The benefit thus secured to each is not converted into a burden by the mere fact that it is mutual and not exclusive.'

"Prof. Reeves in his work on Real Property at page 294, says:

'It is because of its characteristics as above explained that the existence of a party wall on a lot of land, and the ordinary covenants relating to it, do not constitute an incumbrance within the meaning of the covenant against encumbrances in a deed of the land or in the contract for its sale.' "

The facts in re the party wall as such in the Uhring-Elleau agreement are identical with the facts in *Feder* vs. *Solomon, supra.*

(2) As to enjoyment of light and air over adjoining premises.

A party wall does deprive the owner of property of the use of that part of his property upon which the party wall stands so long as it shall stand, for any other purpose. Yet the benefits to be derived from the party wall so

greatly outweigh this burden that this court has quite properly held a party wall not to be an incumbrance but a benefit. (*Feder* vs. *Solomon, supra.*)

By the same logic and reasoning, that part of the Uhring-Elleau party wall agreement which relates to the enjoyment of light and air by either property over the adjoining property confers reciprocal benefits which greatly outweigh any burden. The owner of the property in question has the right and privilege to have three windows in the southerly wall in each story of the rear building above the first story and to enjoy the light and air therefrom, so long as the owner of the adjoining property does not erect a building upon the rear of the lot or any part thereof. (Case, page 20, lines 10-23.) This is undoubtedly a benefit and a valuable appurtenant to the property in question.

As against this benefit, is the agreement that the owner of the adjoining property may have the right and privilege to have and enjoy one window on each story of his building above the first story until such time as the owner of the property in question shall erect a building which may shut out said light and air from the one window of each floor in the building on the adjoining property. (Case, page 20, lines 23-39.) Further both owners agree (Case, page 21, lines 7-15):

> "That they shall and will respectively desist and refrain from erecting any wall, screen or other obstruction for the sole purpose of excluding the light or air from the said windows or any of them nor do any other act or thing to obstruct or hinder the full and free enjoyment of light and air as aforesaid, except it be by the erection in good faith of a building or buildings upon the said lots respectively."

Is this covenant by the owner of the property in question not to erect a wall or screen (in other words a spite fence) to shut out the light and air of his neighbor from one window in each story above the first floor, an incumbrance?

It is submitted that it is not for the following reasons:

(*a*) The erection of such a wall or screen has no beneficial value to the owner. At most it is a technical right.

In *Mollenhauer* vs. *Wolfe, 118 Misc. Rep. (N. Y.) 390, s. c. 193 N. Y. Supp. 348,* plaintiffs sought to enjoin defendant from erecting windows in a party wall overlooking plaintiff's property. The Court (Supreme Court, Special Term) said:

> Cropsey, *J.* (193 N. Y. Supp. at p. 351) "In any event the plaintiffs will suffer no damage from the existence of the windows, and equity should not interfere to uphold what at most is a technical right. McCann *v.* Chasm Power Co., 211 N. Y. 301, 105 N. E. 416; Thompson *vs.* Ft. Miller Pulp & Paper Co., 195 App. Div. 271. And this rule has been applied in an action similar to the one at bar. Herrman *v.* Hartwood Holding Co., Inc., 193 App. Div. 115, 121, 183 N. Y. Supp. 402."

(*b*) Deprivation of the right to erect such a wall or screen is even less of a burden than his being deprived of the use of that part of his land on which the party wall is situated for any purpose but the party wall while it stands. A fortiori, if the existence of the party wall is not an

incumbrance, neither is the agreement not to erect a spite wall or screen.

(*c*) The agreement actually confers a benefit upon and is a valuable appurtenant to the property in question in that it *(1)* permits the use of three windows on each floor above the first and the enjoyment of light and air over the adjoining property and *(2)* the adjoining owner covenants not to erect a spite wall or fence, which he otherwise would have a right to do, to shut off this enjoyment of light and air to the property in question.

The agreement is *(1)* reciprocal, *(2)* mutually beneficial and if anything the benefits to the property in question are greater than to the adjoining owner, and *(3)* the respective benefit to each owner so outweighs the respective burden that in the language of *Feder* vs. *Solomon, supra,* it is a valuable appurtenant. Proof of its benefit was indirectly shown by plaintiff (Case, page 32, lines 34-36), in that the property in question was subsequently sold to others than plaintiff for $3,000. more than plaintiff agreed to pay therefor.

POINT II.

Purchaser knew or should have known of the existence of the windows in question and was on notice of the possible existence of any rights of the owner of the adjoining property to the enjoyment of light and air therefrom.

This point embraces the second and third grounds of appeal (Case, page 1, lines 29-37), to wit, that evidence of the mistake in writing the

contract should have been admitted and that the court should not have directed a verdict for plaintiff.

In *Freedman* vs. *Kensico Realty Co., Vol. IV, No. 8, N. J. Adv. Rep. 379* at page 382, the Court said:

> Fielder, *V. C.* "Courts do not aid a purchaser of real estate who is carelessly indifferent to the use of ordinary caution before entering into a contract, when he is left free and uninfluenced to make examination of the property and to exercise his own judgment in determining whether or not to buy. The doctrine of caveat emptor is applicable to the purchase of real estate, and is applied as well in equity as at law. Demman *vs.* Mentz, 63 N. J. E. 613; Industrial Savings & Loan Co. *vs.* Plummer, 84 N. J. E. 184, 92 A. 583; Hawthorne *vs.* Odenson, 94 N. J. E. 588, 120 A. 797."

In *Sutphen* vs. *Therkelson,* 38 N. J. E. 318, the court said at page 324:

> Runyon, *C.* "In the present case the defendant bought his lot knowing that to build upon it such a building as he proposes would darken the hotel and inflict irreparable injury on that property. The *quasi* easement claimed by the complainants was apparent to him and evidently was continuous. He is chargeable with knowledge that the law would forbid him so to occupy the lot and would prevent him from doing so. He is without ground of complaint."

In this case the owner of the property in question is not forbidden to erect a building to shut off the light and air of his neighbor (Case, page 20, lines 23-39), although in the *Sutphen* case,

the owner of the servient property was forbidden so to do.

In this case plaintiff Serventi, at the time of signing the contract of sale knew of the existence of the windows in the building adjoining which overlooked the property in question. That there might be an easement or a quasi-easement "was" in the words of RUNYON, *C., supra,* "apparent to him." At that time he also knew of the agreement. Proof of these facts was excluded by the trial judge. (Case, page 34, lines 19-31.) This was erroneous.

As was apparently the case in *Feder* vs. *Solomon, supra,* and *Freedman* vs. *Kensico Realty Co., supra,* the purchaser wanted to "welch" on his purchase. So did this plaintiff, Serventi. He took advantage of a scrivener's omission in typing the contract, and unfortunately for the sellers they were unable to prove beyond a "rational doubt" (Case, page 36, lines 27-40), that they were entitled to reformation. The sellers (these defendants) have, however, always maintained that the party wall agreement was not an incumbrance (Case, page 37, lines 2-3).

For the foregoing reasons appellants pray that the judgment herein should be reversed and judgment rendered in favor of defendants-appellants.

Respectfully submitted,

CARLO D. CELLA,
Attorney at Law,
Defendant in person and
for other defendants.

JOHN W. OCKFORD,
Of Counsel.

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

New Jersey Court of Errors and Appeals

CHARLES SERVENTI, *Plaintiff-Respondent,* *vs.* JOHN B. CELLA, JOSEPH A. CELLA and CARLO D. CELLA, *Defendants-Appellants.*	*Action at Law.* *On Defendants' Appeal from New Jersey Supreme Court.*

BRIEF IN BEHALF OF THE PLAINTIFF-RESPONDENT.

1.

Statement of the Case.

This appeal brings before this Court for review a judgment of the Supreme Court rendered at the Hudson Circuit in an action wherein the plaintiff sought to recover his deposit of $1,000 (and his admittedly reasonable search fee of $150.00) with interest, which deposit was made upon execution of a contract for the sale of certain real estate in the City of Hoboken wherein the plaintiff was the purchaser and the defendants were the vendors.

On March 19, 1923, when the deed for the premises was tendered, it contained at the end of the description the following subject clause:

> "Subject, however, to the terms of a certain agreement made between Michael Uhring and Louis Elleau, dated May 22, 1878, and recorded in the Hudson County Registrar's Office in Book 322 of Deeds, p. 690 (pp. 30-40)."

When this deed was tendered to the plaintiff and his counsel, Mr. Samuel A. Besson, of Hoboken (a practitioner of almost forty-five years'

standing at the time), on March 19, 1923, Mr. Besson advised the plaintiff not to accept it for two reasons; first, because the deed contained the subject clause quoted above while the agreement for the sale of the property provided that it was to be sold free and clear of all encumbrances except those expressly stated in the agreement, and this was not so stated; and secondly, the agreement to which the deed of conveyance was made subject was in fact an encumbrance and made the title unmarketable (p. 31, l. 40 to p. 32, l. 5).

It was admitted that Mr. Besson's bill for the search of $150.00 was reasonable (p. 32) and it was admitted that the agreement of sale did not make the sale subject to the agreement between Uhring and Elleau of May 22, 1878. The agreement of sale is annexed to the complaint as appendix "A" (p. 11).

The Uhring-Elleau agreement of 1878 is also annexed to the complaint and is printed as Appendix B (p. 17).

At the close of the plaintiff's case the defendants moved for a non-suit on the ground that the plaintiff had not shown any right of recovery because the agreement of 1878 was not an encumbrance and the plaintiff was bound to take the deed tendered which contained the provision making it subject to the agreement of 1878. The trial court denied that motion (p. 34, l. 10). The defendants did not offer any testimony except that their counsel stated that he would like to offer testimony to vary the terms of the written instrument so that it might be reformed at law, and the Court refused to accept such testimony (p. 34, ll. 20-30). The defendants then rested their case and admitted that if the

plaintiff was entitled to a verdict it should be for $1,375.34 (p. 34, l. 40). The Court found that only a legal question was involved and decided that question in favor of the plaintiff (p. 35, l. 10).

We shall hereinafter refer to the appellants as defendants and to the respondent as the plaintiff.

2.

Grounds of Appeal.

The grounds of appeal urged by the defendants are three in number but only two in point of fact, namely, first, that the Supreme Court erroneously directed a verdict in favor of the plaintiff, second, that the Supreme Court erred in refusing to non-suit the plaintiff, which, of course, it could not do if it properly directed a verdict for the plaintiff and thirdly, that the Supreme Court erroneously refused to permit the defendants to introduce oral testimony to vary the contents of a contract under seal, viz, the contract for the purchase of the property in question, for the purpose of reforming it by inserting some provisions therein, which the defendants claim had been omitted therefrom inadvertently by the defendants. This third ground of appeal is not argued in the brief of the defendants and is therefore waived.

Public Service Electric Co. v. *Board,* 88 N. J. L. 603;

Manda v. *U. S. Express Co.,* 85 N. J. L. 720.

3.

BRIEF OF THE ARGUMENT.

I.

The Supreme Court did not err in directing a verdict for the plaintiff.

The Supreme Court held that the plaintiff was entitled to his deposit of One thousand dollars ($1,000) and his search fee of one hundred and fifty dollars ($150) with interest (the reasonableness of the search fee was admitted, p. 32, ll. 5 to 10) on the ground that the agreement between Michael Uhring and Louis Elleau, dated May 22, 1878, was an encumbrance, and that therefore the plaintiff was not bound to take the property subject thereto when his agreement provided that he was to have the property free and clear of all encumbrances except those provided for therein. While we regard this ground upon which the direction was based as unassailable, there is another ground which was urged on the argument below which was omitted from the State of Case and that ground is also dispositive of the motion in favor of the plaintiff, namely, that the deed tendered to the plaintiff contained a clause making the conveyance subject to this agreement, whereas the plaintiff was entitled to a deed free and clear of any such subject clauses (p. 31, ll. 25 to 35). The rule is settled that the direction of verdict will be sustained, if correct, on any legal ground, *Solomon* v. *Public Service Railway Co.*, 87 N. J. L. 284.

(a)

The agreement dated May 22, 1878, between Michael Uhring and Louis Elleau was in fact an encumbrance and therefore the plaintiff was not obliged to take the property subject thereto.

The agreement will be found printed as Appendix B to the complaint (p. 17 *et seq.*).

The agreement for the purchase of the property is annexed to the complaint and printed as Appendix A (p. 11). It provides that the conveyance shall be "the fee simple of the said premises free of all encumbrances except as herein stated" and also the deed shall contain the usual full covenants and warranty (p. 16, ll. 30 to 40). The contract of sale between the plaintiff and the defendants does not provide for the sale of the property subject to the Uhring-Elleau agreement.

Turning to that agreement (p. 17) we find that Uhring, the predecessor in title of the plaintiff, had a lot of land 25 feet by 100 feet, at the southeasterly corner of Washington street and First street, in the City of Hoboken, of which 100 feet ran along the southerly line of First street and 25 feet along the easterly line of Washington street (p. 18, ll. 10 to 20). This is the same property described in the contract of sale between the plaintiff and the defendants (p. 13, l. 30 to p. 14, l. 5).

Elleau was the owner according to the agreement of 1878, of a lot of land contiguous to and immediately adjoining Uhring's lot, on the southerly side thereof and which lot was also 25 feet by 100 feet (p. 18, l. 30 to p. 19, l. 10).

The agreement of 1878 also shows that Elleau had built and erected a building upon his lot

beginning at a point about 42 feet easterly from the easterly line of Washington street (that is 42 feet back of the house line on Washington street) and that the building extended easterly about 22 feet. In short, that it was 22 feet long. The agreement also shows that the northerly wall of that building stood 5½ inches at the westerly end and 4¾ inches at the easterly end upon Uhring's lot, that is, on the land which the defendants agreed to sell to the plaintiff. It appears that the wall for a length of 22 feet encroached on the lot which the defendants agreed to sell to the plaintiff and that the width of the encroachment at the front of the building was 5½ inches and at the rear of the building 4¾ inches.

Then the agreement recited that the parties thereto have agreed that the said wall shall stand and be used by the parties "as and for a party wall so far as the said Michael Uhring shall see fit to use the same as such (p. 19, ll. 5 to 20)."

The agreement proceeds to recite that Uhring is about to erect a building upon the rear part of his lot to the full width thereof and desires to have and enjoy three windows in the southerly side of the said building (that is the side facing Elleau's lot and contiguous thereto). The agreement also recites that Elleau has one window in his building and forming part of the wall which he is to use and enjoy looking out upon Uhring's lot (p. 19, ll. 20 to 30).

The agreement then proceeds to set forth the agreement between the parties (p. 19, l. 30 *et seq.*

Elleau for himself, his heirs &c. doth

> "grant unto the said Michael Uhring, his heirs and assigns the right and privileges

> to have, hold, use and enjoy the said wall hereinbefore mentioned as and for a party wall and also to enter and rest the beams of his said intended building unto and upon said wall and also to build upon and continue said party wall to the full height of the building about to be erected he the said Uhring to cap and finish the same in a proper manner at his own expense and the said Louis Elleau for himself, his heirs and assigns doth further grant unto said Michael Uhring, his heirs and assigns, the right and privileges to make and use three windows in the southerly wall in each story above the first story of said building which he the said Michael Uhring is about to erect and also to enjoy the light and air therefrom so long as he the said Louis Elleau, his heirs or assigns do not desire to use the rear part of said lot for the purpose of erecting a building thereon, the said Louis Elleau reserving unto himself, his heirs and assigns the right to erect any building upon the whole or any part of his said lot of land as fully and entirely as if these presents had not been made (p. 19, l. 35 to p. 20, l. 25)."

In return the said Michael Uhring for himself, his heirs and assigns

> "doth grant unto said Louis Elleau, his heirs and assigns the right and privileges to have and enjoy one window in each story of his said building above the first story in the said party wall and to enjoy the light and air therefrom so long as he the said Michael Uhring, his heirs and assigns do not desire to use that part of his said lot for the purpose of erecting a building thereon, the said Michael Uhring reserving unto himself, his heirs and assigns the right to erect and build any building upon the whole or any part of his said lot of land as fully and entirely as if these presents had not been made. And the said parties to these presents for themselves, their heirs and assigns do covenant and agree each with the other that they

shall and may respectively have and enjoy the light and air from the windows now in or to be put into their respective buildings until the same are or may be obstructed by some building hereafter in good faith erected and also that they shall and will respectively desist and refrain from erecting any wall, screen or other obstruction for the sole purpose of excluding the light or air from the said windows or any of them nor do any other act or thing to obstruct or hinder the full and free enjoyment of light and air as aforesaid, except it be by the erection in good faith of a building or buildings upon the said lots respectively (p. 20, l. 25 to p. 21, l. 15)."

If the plaintiff is compelled to take the property subject to this agreement of 1878, it is plain that he would not get a lot 25 feet in width for its full depth of 100 feet, but a lot which at 42 feet from the front, would have a depth of only 24½ feet and that width would continue for a depth of 22 feet. This wall is not in fact a party wall at all but the wall of a building already constructed, the building itself being on one lot and the wall on the adjoining lot, with a window in it which is to remain giving the adjoining landowner light and air over the lot in question. That being the situation, Elleau the owner of the building and the wall says to Uhring, that the latter can use the wall as a party wall and for the purpose of entering and resting the beams of Uhring's intended building upon the wall; Uhring to have the further right to continue the wall to the full height of his intended building to be erected; Uhring to have the further right to make and use three windows in the wall in each story above the first story of the building to be erected; Uhring to have the further right to enjoy the light and air from those windows so long as Elleau or his heirs or

assigns do not desire to use that part of the lot for the purpose of erecting a building thereon.

In return for those rights and privileges, Uhring, for himself, his heirs and assigns grants to Elleau, his heirs and assigns

"(1) The right and privileges to have and enjoy one window in each story of his said building above the first story in the said party wall.

(2) To enjoy the light and air therefrom so long as the said Michael Uhring his heirs and assigns do not desire to use that part of his said lot for the purpose of erecting a building thereon.

(3) Uhring reserves the right to erect and build any building upon the whole or any part of his said lot.

(4) That both covenant that either may have and enjoy the light and air from the windows in question until the same are or may be obstructed by some building hereafter in *good faith* erected.

(5) That they shall and will respectively desist and refrain from erecting any wall, screen or other obstruction for the sole purpose of excluding the light and air from the said windows or any of them.

(6) That they will desist and refrain respectively from doing any other act or thing to obstruct or hinder the full and free enjoyment of light and air, except by the erection in good faith of a building or buildings upon the said lots respectively."

Again it is plain that the enjoyment of Uhring's property is restricted in a number of ways. The property as stated is on the corner of Washington and First streets. Washington street is the leading thoroughfare of Hoboken. If Uhring desired to erect an advertising sign or a fence or any other structure, except a *building,* he could not do it. Neither could any heirs

or assigns of his do it. Also if a building was contemplated it would have to be the erection of a building *in good faith* and therefore if an attempt was made to erect a building, the question would arise whether it was being constructed and erected for the purpose of obstructing the light and air of the adjoining property owner or in good faith.

To sum it up, nothing could be built on the lot which the defendants desire to sell to the plaintiff, that is the Uhring lot, except a building erected in good faith and not for the purpose of obstructing the light and air of the adjoining property owner. If Uhring wanted to put up a large advertising sign or a wall or screen or trees on his property, facing the main thoroughfare, Washington street, he could not do so. If he desired to put up a screen for motion picture display he could not do so. If he desired to put up a shed, garage or any other structure of that character, he could not do so.

Counsel for the defendants, rests his contention that this agreement is not an encumbrance on the case of *Feder* v. *Solomon,* 3 N. J. Misc. Rep. 1189, affirmed 4 N. J. Advanced Rep. 1852. However, an examination of that case clearly shows that it is not in point.

The affirmance in the Court of Errors was on the opinion below written by Newman, *C. C. J.,* who made certain findings of fact and conclusions of law in the case which was tried before him without a jury. See 3 N. J. Misc. Rep. 1189. In that case the Court found as a fact (p. 1190) "that two sides of the brick building erected on the premises were part of a wall used in common by the owners of the premises about to be conveyed and the adjoining owners on each side,

and that the lines of the premises in question on each side run through the center of this wall, the situation thus presented being what is commonly called a party wall."

The Court further found as a fact (p. 1190) *"that there is no agreement between the respective adjoining owners and the plaintiffs or their predecessors in title as to the maintenance or repair of these walls."*

Judge Newman then proceeded to consider the authorities on the question whether a mere party wall as such, was an incumbrance on the property. The description of the property in that case was "No. 220 and 220 1/2 Monroe street," being a plot of ground having a frontage of 37½ feet, *more or less,* on Monroe street and a depth of 100 feet, *more or less* (p. 1189)."

The Court refers to *Burns* v. *Thomas,* 86 Atl. 382 and the description of the property showed that the westerly line of the lot ran through the center of a party wall. Quoting from the language of this Court in that case, Judge Newman says (p. 1191):

> "The case is the ordinary case that occurs in our compactly-built cities, of a building with party walls. A building is none the less a complete building because one of its side walls requires, or is strengthened by, a supporting wall of an adjoining building. The right of mutual easements in such cases is well recognized, and each building is regarded as complete in itself. The language used by Chief Baron Pollock in Richards *v.* Rose, 9 Exch. 218, by the New York Court of Appeals in Rogers *v.* Sinsheimer, 50 N. Y. 646, and the Supreme Court of Massachusetts in Carlton *v.* Blake, 152 Mass. 176; 25 N. E. Rep. 83; 23 Am. St. Rep. 818, sufficiently vindicates this definition of a building."

At p. 1191, Judge Newman further says:

> "The better opinion seems to be that a wall standing equally on both lots, and held in common by the adjoining proprietors, is not an encumbrance, but a valuable appurtenant which passes with the title to the property."

It will be noted that in each instance so far referred to the wall stood equally on both lots and was held in common by adjoining proprietors and there were no obligations with respect to light or air or the maintenance of windows in the wall so that one owner might have light and air through the party wall from the adjoining lot, and there was no prohibition preventing the construction or erection of any wall, fence, screen, sign or other structure, with the single exception of a building erected in good faith.

Judge Newman at the bottom of page 1192 clearly points out that a distinction is to be recognized where there is a covenant as to maintenance and rebuilding the wall. He says, *"In that case there being a covenant running with the land, it is recognized as an encumbrance because of such perpetuity."* To show that such a distinction is well recognized, he refers to *O'Neal* v. *Van Tassel,* 137 N. Y. 297, and quoting from the opinion of the Court of Appeals of New York in that case, he says (p. 1193):

> "But the chief point of distinction consists in the fact that there is here a covenant running with the land, which compels the owner to rebuild and repair, and, when rebuilt, it must be on the same spot, of the same size, and of similar materials as when originally constructed. Such a covenant cannot be regarded in any other light than as a perpetual encumbrance, which, in the case of urban property, restricts its free use and enjoyment, and may seriously embarass the owner in respect to its future improvement. If he desired to build, enlarge or rebuild, he might be compelled to build an entirely independent wall upon his own premises, and thus further reduce the available space on his own lot, and still be liable upon his continuing obligation to repaid or rebuild the party wall."

At page 1193, Judge Newman further cites numerous authorities for the proposition that in the absence of an agreement between the joint owners of a party wall there is no obligation to rebuild the party wall upon the part of either and for that reason it is not be regarded as an encumbrance.

It is clear that the situation presented in the case of a party wall without agreement of any kind is quite different to that presented in the case at bar where numerous *"grants"* are made by the owner of the property in question, including an agreement of the predecessor in title of the defendants to build upon and continue said party wall to the full height of the building to be erected and the obligation upon his part to cap and finish the same in a proper manner at his own expense (p. 20, ll. 1-10).

Ordinarily, the owner of a building on one side of a party wall has no right to maintain windows in it looking through the wall over the adjoining lot, or the right to insist upon and receive light and air through these windows from the adjoining lot, or the right to insist that the adjoining lot owner do nothing upon his lot which will interfere with light and air coming through those windows, except it be by the construction or erection of a building in good faith and not for the purpose of interfering with the light and air and window space given by the agreement.

These obligations imposed by the agreement of 1878 on the lot in question are of additional burdens entirely foreign to a party wall and clearly an encumbrance which prevents the owner of the lot from having the full enjoyment thereof and restricts his enjoyment to a certain specified use in a certain manner, and the right to use the lot in that manner depends on the good faith of the owner and not on his absolute right to do as he pleases with his property.

We therefore respectfully submit that the case of *Feder* v. *Solomon, supra,* is not an authority for the defendants, but on the contrary it is dispositive of this case in favor of the plaintiff.

II.

The plaintiff was entitled to a direction of verdict because the tender of a deed by the defendants which made the conveyance subject to the Uhring-Elleau agreement of 1878 was not in conformity with the terms of the agreement of sale.

As shown above, the contract of sale between the plaintiff and the defendants provided as follows (p. 16, ll. 30-40).

> "The deed shall be in proper statutory short form for record, *shall contain the usual full covenants and warranty,* and shall be duly executed and acknowledged by the seller, at the seller's expense, *so as to convey to the purchaser, the fee simple of the said premises, free of all encumbrances except as herein stated.*"

The contract of sale did not provide that it was to be subject to the agreement of 1878. Therefore the conveyance was to be free and clear of it. On March 19, 1923, the parties met in the office of Mr. Samuel Besson, counsel for the plaintiff in Hoboken and a deed bearing

that date was tendered to the plaintiff and his counsel containing the following subject clause (p. 31, ll. 20-35):

> "Subject however to the terms of a certain agreement made between Michael Uhring and Louis Elleau dated May 22, 1878 and recorded in the Hudson County Registrar's Office, in Book 322 of Deeds, page 690."

It appears when this deed was tendered to the plaintiff and his counsel, Mr. Besson, that Mr. Besson advised the plaintiff to refuse to accept it, first, on the ground that it contained that "subject" clause, and secondly, that the agreement referred to was in fact an encumbrance and made the title unmarketable (p. 31, l. 40 to p. 32, l. 5).

The law is well settled that the tender of a deed must be of one which conforms to the terms of the contract or it will be as if no tender had been made, 39 Cyc. 1549.

In *Waters* v. *Bew,* 52 N. J. E. 787, it was held that under an agreement for the sale of lands, the purchaser is entitled to a deed describing the land in the words of the agreement *without any limitations other than those therein agreed upon.*

In the case at bar, immediately following the description of the property and at the end of the description appeared the "subject" clause, *supra* (p. 31, ll. 25-30).

The purchaser may refuse the deed tendered by the vendor if it contains any condition, restriction or reservation not warranted by the contract. 39 Cyc. 1557.

In *Krah* v. *Wassmer,* 75 N. J. E. 109, 115, affirmed by this Court on the opinion below (78

N. J. E. 305), it was held by Howell, *V.-C.*, that a purchaser having bargained for land understanding that he was to receive title free of encumbrance, can insist upon a conveyance free of restrictive covenants.

An examination of the authorities cited *supra,* demonstrates that the defendants did not tender a proper deed. Since the contract provided for deed containing full covenants and warranty, which deed should convey to the plaintiff the fee simple of the premises free of all encumbrances, except those stated therein, the defendants plainly had no right to make the conveyance subject to the agreement between Uhring and Elleau of May 22, 1878.

Whether the agreement of 1878 is or is not an encumbrance in point of law is immaterial. If it was not an encumbrance, making the conveyance to the plaintiff subject to its terms and obligations, was improper. Plaintiff had a right to insist upon a deed which was in conformity with his contract and not one which would be subject to the obligations of an agreement which the contract said nothing about. If the plaintiff had accepted the deed, he would have waived the right to object to its form. He would thereby purchase the property subject to the agreement and if it proved in fact as well as in law an encumbrance, he would have no right of action against the defendants, notwithstanding that by his contract he bought free and clear of the encumbrance.

If he had accepted the deed and if a controversy arose with the adjoining property owner over the rights and obligations imposed by the agreement of 1878, the plaintiff alone would have to bear the burden of the law suit and he would have no right of action against the defendants

who agreed to convey free and clear of this encumbrance.

If the agreement of 1878 did not impose obligations, it would not be an agreement because the very purpose of the agreement was to give certain rights called grants in the agreement to the owner of the building whose wall encroached. These rights in favor of the adjoining land and obligations against the lot which the plaintiff sought to purchase run with the land because the agreement says it is to bind the heirs and assigns of Uhring. The insertion of the clause in the deed tendered to the plaintiff making the conveyance subject to the agreement of 1878 certainly limits the scope of the covenants and warranty which the defendants were bound to give with their deed, and therefore is a violation of their contract of sale which provided for a full covenant and warranty deed free from encumbrance.

We therefore respectfully submit that for this reason the direction of verdict in favor of the plaintiff was proper.

III.

The plaintiff was not chargeable with knowledge of the existence of the agreement of 1878 at the time he made his contract with the defendants as alleged in Point II of defendants' brief.

It is difficult to understand this contention of the defendants. The authorities cited are not in point. Until counsel for the plaintiff examined the record title to the property, plaintiff had no knowledge of the obligations imposed by the agreement of 1878. His principal authority, *Freedman* v. *Kensico Realty Co.,* 4 N. J. Adv.

Rep. 379, deals with a case where the vendee filed a bill to have the contract rescinded on the ground that the vendee was induced to enter into the same through fraud and misrepresentation. The facts are in no way similar and the language of Fielder, *V.-C.*, which is quoted on page 9 of the appellants' brief, is with reference to an entirely different situation than that presented in the case at bar. The other authority, *Sutphen* v. *Therkelson,* 38 N. J. E. 318, is one which also presents a legal problem bearing not the slightest resemblance to that presented in the case at bar. There Allen's executors sold a lot with a hotel upon it to the complainants. Eight years later they sold an adjoining lot on the east side of the hotel to the defendant. The defendant was about to erect a building on his lot which would entirely destroy the complainant's light and air, and the question presented was not whether he was compelled to take the property from Allen's executors, but whether the complainant could enjoin the defendant from interfering with his light and air. It did not appear what kind of a deed the defendant had or whether before he took his deed he had a contract which provided for a conveyance to him free and clear of all encumbrances, and the language of Runyon, *C.*, quoted at page 9 of the plaintiff's brief is but a small part of the opinion, but clearly indicates that the defendant had already purchased his lot knowing the position of the building on the adjoining lot.

Counsel for the defendants at page 10 of his brief says that in this case and certain other cases, the purchaser wanted to "welch" on his purchase; that the plaintiff is taking the advantage "of a scrivener's omission in typewriting the contract." These statements cannot

be justified by any proof and in point of fact they are untrue.

The property in question has steadily increased in value and the defendants actually sold the property on May 14, 1924 (the plaintiff was to receive his deed on March 19, 1923), to George F. Caldes for $3,000 more than the plaintiff would have had to pay for it under his contract (p. 32, ll. 30-40).

The defendants having made $3,000 more, nevertheless are trying to retain the plaintiff's deposit of $1,000 and notwithstanding, say that the plaintiff is attempting to "welch" on his bargain.

We deal with the "scrivener's omission in typing the contract" in the next point.

Finally, we point out, first, that there is no ruling of the trial court to which exception was taken which raises the question argued under Point II of the defendants' brief; second, there is no ground of appeal which raises the question; and third, there is no testimony which shows that the plaintiff knew of the existence of any windows on the lot he was to purchase or that he was put on notice of the existence of any rights of the owner of the adjoining property. The present counsel for the defendants not having tried the case below are probably laboring under a misapprehension a sto what occurred, although the state of case indicates quite clearly that there was no evidence offered to substantiate the contention made in Point II of their brief.

IV.

The defendants had no right at law to ask to reform the contract so as to insert therein a provision that the sale was to be made subject to the agreement of 1878.

The Supreme Court held that the written agreement which was under seal and complete on its face could not be reformed in a court of law so as to insert therein a provision which was not there when the contract was executed (p. 34). While the second ground of appeal is directed to this ruling of the trial court (p. 1) this ground of appeal is not argued in the brief of counsel for the defendants and is therefore waived. *Public Service Electric Co.* v. *Board,* 88 N. J. L. 603, *Manda* v. *U. S. Express Co.,* 85 N. J. L. 720. However, there is no merit in the contention. After this action at law was instituted, counsel for the defendants filed a bill in Chancery to reform the contract for the sale of the property on the ground of mutual mistake and the Court of Chancery refused to reform the agreement and dismissed the bill (p. 36 *et seq.*). No appeal was taken.

It is interesting to note that the contract was drawn by one of the defendants, who is now the attorney of record in the present action, namely, Carlo D. Cella, in his New York office and that he is a lawyer while the plaintiff is a layman. For counsel for the defendants to say that the contract of sale through inadvertence failed to make the sale subject to the agreement of 1878 is to admit himself even out of a court of equity for certainly that is not a mutual mistake and only for fraud or mutual mistake can there be a reformation and not for inadvertence on the part of one of the parties. The Court of Chancery refused to find that there was any mutual

mistake and certainly there was no fraud and finally there was no pecuniary advantage to be gained by the plaintiff as shown in Point III. In conclusion, the law is settled that the lower court had no right to vary the terms of the written contract, under seal, by parol evidence. In the absence of ambiguity in the written agreement, which is complete, oral evidence can not be introduced to explain or vary it at law. If through mistake, an agreement in writing does not express the contract which the parties intended to make, the remedy is in equity to reform it, but until it is so reformed it is unassailable at law by parol testimony. *Van Horn* v. *Van Horn,* 49 N. J. Eq. 327. In the recent case of *Childs* v. *South Jersey Amusement Company,* 122 Atl. 803, Chief Justice Gummere speaking for this Court refers to the leading cases of *Van Horn* v. *Van Horn,* 49 N. J. Eq. 327, *supra,* and *Naumberg* v. *Young,* 44 N. J. L. 331, 339 and says:

> "If the written contract purports to contain the whole agreement and it is not apparent from the writing itself that something is left out to be supplied with extrinsic evidence, parol evidence to vary or add to its terms is not admissible."

V.

For these reasons we respectfully submit that the judgment below should be affirmed with costs to the plaintiff-respondent.

Dated February Term, 1927.

Respectfully submitted,

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OTMAR J. PELLET,
Of Counsel.

COLLINS & CORBIN,
Attorneys of Plaintiff-Respondent.

New Jersey Court of Errors and Appeals

CHARLES SERVENTI,
Plaintiff-Respondent,

vs.

JOHN B. CELLA, JOSEPH A. CELLA and CARLO D. CELLA,
Defendants-Appellants.

ACTION AT LAW
On appeal from New Jersey Supreme Court.

REPLY BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS.

Plaintiff in his brief (p. 10) says that the party wall agreement (~~Exhibit P-2,~~ Case, p. 17-21) is an encumbrance because it would prevent the erection of a large advertising sign facing Washington Street, Hoboken.

This contention is absolutely unsound. It is not only contrary to the law, but also to the facts.

There is no possible interference with advertising signs facing Washington Street. As a matter of fact said window does not face on Washington Street but is in the northerly wall of the Elleau building (Case, p. 19, l. 11 and p. 19, l. 30), and consequently faces north over the Uhring property, whereas Washington Street runs north and south.

In view of the fact that the office of Mr. Pellett of counsel for plaintiff is on Washington Street within a stone's throw of the so-called Elleau and Uhring properties, this misstatement is difficult to comprehend.

The agreement (Case, pp. 17-21) only forbids

a structure erected *for the sole purpose* of excluding the light or air from the adjoining windows (Case, p. 21, ls. 9-11).

The Contract of Sale (Exhibit P-1, Case, p. 8) provides that the property is being sold *"Subject to such state of facts as an accurate survey may show."* (Case, p. 14, ls. 3-5.)

A survey would show the condition with reference to the windows on the Elleau property overlooking the Uhring property. The survey would put the purchaser on notice of the existence of a possible easement of light and air by said windows.

Robeson v. *Pettenger,* 2 N. J. E. 57;
Barnett v. *Johnson,* 15 N. J. E. 481;
Green v. *Van Meter,* 54 N. J. E. 270.

Plaintiff also contends that if he is compelled to take the property, he would not get a lot 25 feet in width, "but a lot which at 42 feet from the front, would have a depth of only 24½ feet and that width would continue for a depth of 22 feet." (Brief, p. 8.)

This is absurd. The erection by Elleau of part of his wall on the Uhring property does not vest title to said strip in Elleau. Title remains in Uhring, not only to his entire lot but to all structures thereon from the center of the earth to the limit of the skies, no matter by whom erected. This is an elementary maxim of law.

This condition of ownership in Uhring is confirmed and ratified by Elleau in the Agreement of 1878. (~~Exhibit P-2.~~)(Case p 18 l 7-28)

Plaintiff further contends that the wall in question is not a party wall because it is not equally on both properties (Brief, pp. 11-12).

This is also absurd. The parties have agreed that it is a party wall (Case, p. 19, ls. 17-22).

Reeves on Real Property, Sec. 216, p. 289:

> "In all jurisdictions, they (party walls) may arise from express contract or covenant, including reservation of such rights in the conveyance of corporeal property, or from implied grant or contract, or from prescription."

It is established that a party wall need not be equally on both properties.

Further there is no proof that this wall was not equally on both properties, and even if it were not, plaintiff agreed to take same subject to such state of facts as an accurate survey would show.

Reeves on Real Property, Sec. 215, p. 288:

> "It is not necessary, however, that a party wall should stand with one-half of it upon each of the adjoining parcels of land. The greater portion or even all of it, may be on one side of the dividing line; or that line may run diagonally through the wall. The incorporeal rights and privileges are the same, in all such cases, and the only distinctions are as to the quantities of the corporeal substance which belongs to each proprietor. Each one owns the bricks and mortar, or other substantial materials, upon his side of the division lines, even though they may include very little, or the most, or the whole of the wall" *citing the following cases*: *Pearsall* v. *Westcott,* 30 N. Y. App. Div. 99, 102; *McVey* v. *Durkin,* 136 Pa. St. 418; *Barry v. Edlavit,* 84 Md. 98.

30 Cyc. 773: "It is not necessary that a party-wall should stand one-half upon each

> of the adjoining parcels of land; it may stand one half upon each, or wholly upon one, and may or may not be the common property of the two proprietors."

> Washburn on Real Property, Sec. 1301: "It does not seem to be necessary that a party-wall should stand half upon each of the adjoining parcels of land. It may stand half upon each or wholly upon one, and may, or may not, be the common property of the two proprietors."

The contention of plaintiff that where there is a covenant to maintain and rebuild the party wall, it is an encumbrance (Brief, p. 12), is sound.

But there is no such covenant on the part of either party in the Agreement of 1878 (~~Exhibit P-2,~~ Case, pp. 17-21). Plaintiff might as well argue that Article X of the Covenant of the League of Nations is an encumbrance, justifying the United States from rejecting membership in the League, (citing the United States Senate as authority) and therefore he is justified in rejecting title to the property in question.

In his brief (p. 13), plaintiff states:

> "In the case at bar where numerous 'grants' are made by the owner of the property in question, including an agreement of the predecessor in title of the defendants to build upon and continue said party wall to the full height of the building to be erected and the obligation upon his part to cap and finish the same in a proper manner at his own expense."

This is not a fact. At best it is twisting the facts to suit plaintiff's argument. Uhring, the predecessor in title of defendants, did not agree

that he *would* "build upon and continue said party wall." He was not bound so to do. On the contrary, *Elleau,* the adjoining property owner, "granted" him this right and privilege with a condition that if Uhring did so build, Uhring would cap and finish the wall at his expense. (Case, p. 19, l. 30 to p. 20, l. 10. Also see plaintiff's Brief, bottom, p. 6, *et seq.*)

Uhring only bound himself not to erect a spite fence or wall. (Case, p. 21, ls. 9-11.)

Respectfully submitted,

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JOHN W. OCKFORD,
Of Counsel.

NEW JERSEY COURT OF E

RICHARD T. KULICOWSKI,

Plaintiff-Appellant,

vs.

William E. McCULLOUGH,

Defendant-Appellee.

STATE OF CA

See below: Hinfurt, Black and Pas

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