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For Defendant.

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Bill of Complaint.

BILL OF COMPLAINT.

Filed December 31, 1926.

In Chancery of New Jersey

To His Honor, Edwin Robert Walker, Chan- 10
cellor of the State of New Jersey:

The complainants, Maurice Schlesinger and
Herbert Herman, of the City of Newark, County
of Essex, and State of New Jersey, respectfully
show, that:

1. On the 20th day of April, 1926, complain-
ants were seized in fee simple of all that certain
lot, tract or parcel of land and premises, situate,
lying and being in the City of Newark, County of 20
Essex and State of New Jersey, described as
follows:

BEGINNING in the southerly line of Lyons ave-
nue at a point therein distant 60.33 feet easterly
from the easterly line of Clinton Place; thence
(1) south 42 degrees 19 minutes 30 seconds west
68.74 feet; thence (2) south 45 degrees 19 minutes
30 seconds east 39 feet; thence (3) south 42 de-
grees 52 minutes 30 seconds west 30 feet; thence 30
(4) south 45 degrees 19 minutes 30 seconds east
21.73 feet; thence (5) north 42 degrees 52 minutes
30 seconds east 102.46 feet to the southerly line
of Lyons avenue; and thence (6) along the same
north 48 degrees 48 minutes 30 seconds west
61.39 feet to the place of BEGINNING.

Together with the two-story brick building con-
taining four stores and four apartments now on
said premises.

Bill of Complaint.

2. On the date last mentioned, the complainants entered into a contract, in writing, with Michael Applebaum, of the City of Newark, County of Essex and State of New Jersey, wherein and whereby complainants agreed to convey said lands and premises, by deed of warranty, free from all encumbrances, except as thereafter stated, on or before the first day of June, 1926, to the said Michael Applebaum, in consideration of the payment by the said Michael Applebaum, of the purchase price, in the sum of \$47,800; by the payment of \$1,000 on the execution of the agreement; by the payment of \$7,000 on the delivery of the deed; by the payment of \$35,000 by accepting said conveyance subject to a mortgage held by the Star Building and Loan Association, which the said Michael Applebaum assumed and agreed to pay; the balance, together with whatever moneys are credited in the Building and Loan Association, on the shares pledged to secure said mortgage, by executing and delivering to complainants, the bond of the said Michael Applebaum, in double said balance, together with a purchase money mortgage, which is to be a second lien on said premises, conditioned for the principal to be paid in three years from the date of said mortgage, with interest at the rate of six per cent. per annum, payable semi-annually; said bond and mortgage to contain, in addition to the usual tax, insurance and interest default clauses, the following clauses:

That the principal sum is to be paid off as follows: \$1,000 at the end of two years from the date of said mortgage, and the balance at the end of three years from the date of said mortgage.

Bill of Complaint.

That in case default is made in the payment of two monthly instalments of principal and interest on the Building and Loan mortgage, which is a first lien on the said premises, the principal sum secured by said purchase money mortgage, shall become due and payable immediately thereafter.

That said Michael Applebaum is to have the privilege of paying said purchase money mortgage at any time before its due date, with interest to the date of payment.

The said agreement further provided, that the said deed was to be delivered, and the moneys paid, and title consummated at the office of Philip J. Schotland, 9 Clinton street, Newark, N. J., on the said first day of June, 1926, between the hours of ten o'clock in the forenoon, and four o'clock in the afternoon. A true copy of said agreement is hereto annexed and made a part hereof.

3. The said Michael Applebaum paid to the complainants the said sum of \$1,000 at the time of the execution and delivery of said agreement.

4. On the said first day of June, 1926, the complainants appeared at the office of Philip J. Schotland, in accordance with the terms of said agreement, and executed a deed for said lands and premises to said Michael Applebaum, and waited at said office all day, as provided by the terms of the agreement, ready to deliver said deed to said Michael Applebaum upon the payment of the said moneys, and the delivery of said bond and mortgage; said Applebaum did not appear to consummate said agreement.

Bill of Complaint.

5. Said Applebaum appeared at the office of Philip J. Schotland several days after said June 1, 1926, and stated that he was unable and unwilling to consummate said agreement and was willing to pay the complainants a sum to be agreed upon, to be released from his covenants under said agreement; negotiations were continued from time to time, for the purpose of arranging a settlement and cancellation of said agreement, but no agreement was arrived at and complainants having been, during all of said time, and still are, ready, willing and able and now tender themselves ready, willing and able to perform their part of said agreement, and upon being paid the purchase price, and receiving the bond and mortgage in accordance with the terms of said agreement, to deliver to the said Michael Applebaum said warranty deed, in full compliance with the terms of said agreement.

6. Defendant, Michael Applebaum, refused and still does refuse to accept said deed, and comply with the terms of said agreement.

Complainants are without adequate remedy in the courts of law, and therefore pray:

1. That the said Michael Applebaum, who is the defendant to this suit, may answer this bill of complaint and each statement therein made.

2. That the said Michael Applebaum may be compelled by the decree of this Court, to specifically perform the said agreement with the complainants, and to pay the complainants the remainder of the said purchase money, as and in by said agreement provided, and to execute and deliver to the complainants the bond and mortgage in the form, and as provided by said agreement.

Bill of Complaint.

3. That the said Michael Applebaum may be ordered, directed and decreed to execute a purchase money mortgage, to be given by him to the said complainants, and to pay said balance of said purchase price, in the manner, and at the times by him agreed to be paid in said agreement.

4. That in case the said Michael Applebaum should within the time limited by this Court, for the performance of said agreement, fail and neglect upon the tender of said deed, to pay said remainder of said purchase money as aforesaid, and execute and deliver said purchase money mortgage, then and in that event, the said sum together with interest and costs, may be and become a lien upon said lands and premises, in favor of the complainants, and that the said lands and premises may be sold under the direction of this Court, for the satisfaction of such lien so imposed on said lands and premises, and in case a deficiency should arise upon said sale, the said defendant may be ordered by this Court, to pay said deficiency, together with interest and costs to these complainants.

5. That the complainants may have such other and further relief as may be agreeable to equity.

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

PHILIP J. SCHOTLAND,
Solicitor for and of Counsel
with Complainants.

Exhibit C. 1.

THIS AGREEMENT made the twentieth day of April, in the year of our Lord one thousand nine hundred and twenty-six, *Between* MAURICE SCHLESINGER and ADELINE SCHLESINGER, his wife, and HERBERT HERMAN, single, of the City of Newark, in the County of Essex and State of New Jersey, party of the first part, and MICHAEL APPLEBAUM, of the City of Newark, in the County of Essex and State of New Jersey, party of the Second part,

WITNESSETH, that the said party of the first, for and in consideration of the sum of FORTY-SEVEN THOUSAND EIGHT HUNDRED DOLLARS to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenant and agreements hereinafter mentioned, made and entered into by the said party of the second part doth agree to and with the said party of the second part, that they the said party of the first part will well and sufficiently convey to the said party of the second part, his heirs and assigns by Deed of Warranty free from all encumbrance except as hereinafter stated, on or before the First day of June, 1926, 1926, all that lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Newark, in the County of Essex and State of New Jersey, and described as follows:—

BEGINNING in the southerly line of Lyons Avenue at a point therein distant 60.33 feet easterly from the easterly line of Clinton Place; thence (1) south 42 degrees 19 minutes 30 seconds West 68.74 feet; thence (2) south 45 degrees 19 minutes 30 seconds East 39 feet; thence (3) south 42 degrees 52 minutes 30 seconds west 30 feet; thence

(4) south 45 degrees 19 minutes 30 seconds East 21.73 feet; thence (5) north 42 degrees 52 minutes 30 seconds East 102.46 feet to the southerly line of Lyons Avenue; and thence (6) along the same North 48 degrees 48 minutes 30 seconds West 61.39 feet to the place of BEGINNING.

Together with the two story brick building containing four stores and four apartments now on said premises.

And the said MICHAEL APPLEBAUM for himself, his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns that he the said party of the second part will pay and satisfy or cause to be paid and satisfied unto the said party of the first part, the said sum of FORTY-SEVEN THOUSAND EIGHT HUNDRED DOLLARS as and for the purchase money of the foregoing described land and premises, in the following manner that is to say:

On execution of this agreement, for which this is also a receipt	\$1,000
On delivery of deed, cash	7,000
\$35,000 by accepting this conveyance subject to a mortgage held by the Star B&L Association, now a first lien on the said premises, which party of the second part assumes and agrees to pay.	

The balance, together with whatever money is credited in the Building and Loan as back shares, by executing and delivering to party of the first part *hid* bond in double said amount, together with a purchase money mortgage, which is to be a second lien on the said premises, conditioned for the principal to be paid in three years from the time of the consummation of this agreement,

Bill of Complaint—Exhibit C. 1.

with interest at the rate of six percent per annum, payable semi-annually, said bond and mortgage to contain, in addition to the usual tax, insurance and interest default clauses, the following clauses:

10 (a) That the principal sum is to be paid off as follows:—

\$1,000 at the end of two years from the date of said mortgage, and the balance at the end of three years from the date of said mortgage.

(b) That in case default is made in the payment of two monthly instalments of principal and interest of the Building and Loan Mortgage, which is a first lien on the said premises, then and in that event, the principal sum therein secured shall become due and payable immediately thereafter, notwithstanding anything herein to the contrary.

(c) That party of the second part herein is to have the privilege in said mortgage of paying off the principal sum therein secured at any time prior to the expiration of said mortgage, provided interest is paid to the date of payment.

30 Party of the first part agrees that prior to the consummation of this agreement, they are to make a connection to supply hot water to the tenants in the apartments, at their own expense.

This conveyance is made subject to a lease of the Sheldon Cleaners & Dyers, and to its terms and conditions; and to a lease to Otto Duchstein, and to its terms and conditions; it being distinctly understood that whatever securities party of the first part have received, are to be turned over to party of the second part at the time of the consummation of this agreement.

40

Bill of Complaint—Exhibit C. 1.

The apportionments are to be made either from, or added to, the purchase money mortgage herein to be given.

This conveyance is further made subject to four monthly tenancies above the stores.

10 Time is to be the essence of this contract, but in the event party of the second part is not ready to consummate the agreement on June 1st, 1926, in the event prior to June 1st, 1926, he deposits with Philip J. Schotland, the sum of two thousand dollars, in cash, as an additional deposit, the time for the closing is then to be extended until July 1st, 1926 and time is to be the essence at that time.

20 And it is further agreed by the parties to these presents that the said party of the second part his heirs, and assigns, may enter into and upon the said land and premises on the said day of settlement next ensuing the date hereof and from thence take the rents, issues and profits to his and their use.

30 And it is further agreed by the parties hereto that the said Deed shall be delivered and received at the office of Philip J. Schotland, 9 Clinton St., Newark, N. J. between the hours of ten in the forenoon and four o'clock in the afternoon on the said day of settlement next ensuing the date hereof.

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

40 Gas and electric fixtures, gas stoves, hot water heaters, and chandeliers, carpets, linoleum, mats

40

Bill of Complaint—Exhibit C. 1.

and matting in halls, screens, shades, awnings, ash cans, heating apparatus, if any, and all other personal property appurtenant to or used in the operation of said premises is represented to be owned by seller and is included in this sale.

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

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

It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor, except as shown on survey of Lemassena, and that there are no encroachments thereon, and that the buildings comply with municipal ordinances and regulations and the provisions of the New Jersey State Tenement House Act as enforced by the State Board of Tenement House Supervision, to be shown by the report of the department or board enforcing the same where such ordinances, regulation and said act apply.

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

40 If at the time for the delivery of the deeds, the premises or any part thereof shall be or shall have been affected by an assessment or assess-

Bill of Complaint—Exhibit C. 1.

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

And for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators.

IN WITNESS WHEREOF, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

MAURICE SCHLESINGER (L. s.)
HERBERT HERMAN (L. s.)
ADELINE SCHLESINGER (L. s.)
MICHAEL APPLEBAUM (L. s.)

Signed, sealed and delivered in the presence of

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

BE IT REMEMBERED that on this Twentieth day of April, in the year of our Lord One Thousand Nine Hundred and twenty-six, before me, the subscriber, A NOTARY PUBLIC OF NEW JERSEY, personally appeared, MAURICE SCHLESINGER AND ADELINE SCHLESINGER, his wife, AND HERBERT HERMAN, SINGLE, who I am satisfied are the gran-

Bill of Complaint—Exhibit C. 1.

tors in the within agreement named; and I, having first made known to them the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed;

10 And the said ADELINE SCHLESINGER, wife as aforesaid, being by me privately examined, separate and apart from her husband, did further acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, FREELY, without any fear, threats or compulsion of her said husband.

HELEN JEDELL,
Notary Public of N. J.

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30

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Answer and Counter-claim.

ANSWER AND COUNTER-CLAIM.

Filed January 29, 1927.

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i></p> <p>MAURICE SCHLESINGER and HERBERT HERMAN, <i>Complainants,</i></p> <p style="text-align: center;"><i>and</i></p> <p>MICHAEL APPLEBAUM, <i>Defendant.</i></p>	}	<p>10</p> <p><i>On Bill, &c.</i></p> <p><i>Answer.</i></p>
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The answer of Michael Applebaum, defendant, to the bill of complaint of Maurice Schlesinger and Herbert Herman, complainants. 20

The defendant answering, says:

1. Defendant believes it to be true that on April 20, 1926, the complainants had the legal title to the lands and premises mentioned and described in the bill of complaint, but he does not know whether they had an estate in fee therein.

2. Defendant admits that he joined in the execution of a contract in writing on April 20, 1926, for the sale to him of the lands and premises aforesaid by the complainants, and that the contract contained the agreements set forth in the bill of complaint, but he begs leave to refer to the original contract, which will be produced for more certainty. 30

3. Defendant admits that he paid to the complainants the sum of \$1,000.00, but says that \$500.00 of the said sum had been paid prior to 40

Answer and Counter-claim.

the execution of the contract for which he had received a preliminary receipt, and which receipt was taken from him when the contract was signed and a new receipt given to him for the \$1,000.00.

10 4. Defendant does not know whether or not the complainants attended at the office of Philip J. Schotland on June 1, 1926, and he admits that he was not there on that day, but he says that previously to that date he had notified the complainants that he would not perform the contract and had stated to them some of his reasons for not doing so.

5. Paragraph 5 of the bill of complaint is denied.

20 6. Defendant admits that he did refuse and still does refuse to accept a deed of conveyance of said property and to perform the said contract, for the reasons which he stated to the complainants prior to June 1, 1926, which were as follows:

30 1st: That it had been represented to him by the complainants that all the stores and flats were rented: namely, 4 stores at \$75.00 each, and 4 apartments at \$50.00 and \$55.00 each, and that defendant had ascertained after he had signed the contract that none of the flats or apartments were rented and only two of the stores; and that defendant did not want the property with the vacant apartments and stores, because he could not possibly carry it without having an income from it immediately.

40 2nd: Defendant also stated to the complainants in the latter part of May, 1926, at the same time that he informed them that he did not want to take the property because the apartments and

Answer and Counter-claim.

stores were not rented, that they had represented to him that they were going to put up a large theater next to the property, and that such representation was made before he entered into the contract, and that nothing had been done in the way of building a theater and he did not believe that they intended to build a theater and that was an additional reason why he did not want to carry out the contract. 10

3rd: At the same time defendant also told complainants that the cellar was full of water and he did not want to take a building of that kind and he had been told by Mr. Herman that when the moving picture theater was built, he would make a concrete wall against the building so that the water would not come in, and nothing had been done to remedy that defect and he did not want to take the property. 20

7. Defendant further says that he was advised by his counsel after the contract had been made and after he had notified the complainants that he would not take the property for the reasons aforesaid, that the title to the property was unmarketable, because there were encumbrances on the property in the nature of covenants of record, restricting the use of the land; and also, because there was on record a contract between a former owner and the New York & New Jersey Telephone Company granting to the said company the right to erect, maintain and renew its poles, wires and fixtures in front of and abutting the property which constitutes an encumbrance. 30

8. Defendant also contends that the contract is uncertain in that it does not make any pro-

Answer and Counter-claim.

vision for the assignment of the building and loan shares to him and the minds of the parties did not meet in that respect.

The defendant by way of counter-claim, says:

10 1. Prior to April 20, 1926, he was solicited by the complainants through their agent, one Samuel Herman, to purchase the lands and premises described in the bill of complaint, and he was told that the building was a new building and would be completed in a few weeks and that there were 4 stores and 4 apartments and that they were already rented, the stores at \$75.00 each per month, and the 4 apartments at \$50.00 and \$55.00 each per month.

20 2. Defendant saw the property in course of erection, but at that time there were no tenants in the building, and the said agent again solicited him to buy, and he agreed to buy relying upon the statements that had been made to him, and made a deposit of \$500.00.

30 3. The said agent of the complainants also told the defendant and it was also stated in the preliminary agreement that was signed when the \$500.00 was paid, that the complainants were going to put up a large theater next to the property and that they were working on the plans to build the theater and that the plans would be ready within a few weeks.

40 4. On April 20, 1926, a formal agreement in writing was prepared and signed by the complainants and defendant, and the defendant was asked to surrender the preliminary agreement and the receipt that he had for \$500.00, and he did surrender the same to the complainants.

Answer and Counter-claim.

5. A short time after the contract had been executed the defendant examined the property again and found that there was considerable water in the cellar, and he told the complainants or their agent aforesaid, that that was not satisfactory, and he was told that when the moving picture theater which was to be built, was put up, a concrete wall would be erected against the building which would keep the water out. 10

6. After the first of May, which was the time for tenants to move in and the building was ready for occupation, the defendant visited the building and found that two stores were rented and none of the flats and that the water was still coming in the building, and he went immediately to the complainants' agent and notified him that he, the defendant, had been deceived in reference to the building and the moving picture theater and that he could not possibly carry the property unless it was fully rented and that he wanted to give up the contract and wanted his money back, and he would not carry it out. This was in the latter part of May, 1926. 20

7. At the time the contract was executed the defendant employed an attorney to examine the title to the property, and his attorney afterwards reported to him that the records showed that there were restrictions on the record limiting the use of the land and that such restrictions had not been in any way discharged; and also, that there was on record a contract with the New York and New Jersey Telephone Company, which affected the use of the land and which constituted an encumbrance and made the title unmarketable. 30

Defendant prays that the contract aforesaid made by and between him and the complainants 40

Answer and Counter-claim.

on April 20, 1926, may be rescinded and that he may recover from the complainants the sum of \$1,000.00 which he deposited, together with interest thereon, and also, the reasonable expenses of having the title searched.

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SIDNEY A. BIERMAN,
Solicitor for and of Counsel
with Defendant.

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30

40

Replication and Answer to Counter-claim.

**REPLICATION AND ANSWER TO
COUNTER-CLAIM.**

Filed March 7, 1927.

IN CHANCERY OF NEW JERSEY.

Between

MAURICE SCHLESINGER and
HERBERT HERMAN,
Complainants,

and

MICHAEL APPLEBAUM,
Defendant.

10

*On Bill, etc.
Replication
and Answer
to Counter-
claim.*

The complainants join issue on the answer of the defendant, Michael Applebaum.

20

By way of answer to counter-claim, complainants deny the allegations contained in paragraphs 1, 2 and 3 of the counter-claim, admit the allegations in paragraph 4, deny the allegations in paragraph 5 and deny any representations made by them, or any authorized agent, that the building was or would be fully rented, and deny the allegations in paragraph 7.

30

PHILIP J. SCHOTLAND,
Solicitor and Counsel with Complainants.

Consent is hereby given to the filing of the within replication and answer to counter-claim as of time.

Dated March 5, 1927.

SIDNEY A. BIERMAN,
Solicitor and Counsel with Defendant.

40

Helen Jedell, direct.

IN CHANCERY OF NEW JERSEY.

May 25, 1927.

Between

10 MAURICE SCHLESINGER and
HERBERT HERMAN,
Complainants,

and
MICHAEL APPLEBAUM,
Defendant.

20 Transcript of shorthand notes of testimony taken in the above-entitled cause before his Honor, Alonzo Church, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of Philip J. Schotland for complainants, Sidney A. Bierman, (Frank Bradner), for defendant.

HELEN JEDELL, sworn for complainants.

Direct examination by Mr. Schotland.

30 Q Miss Jedell, you are managing clerk in my office? A I am.

Q And did you draw this contract between Maurice Schlesinger and Adeline D., his wife, and Herbert Herman, single, and Michael Applebaum, the defendant? A I did.

Q You are the subscribing witness? A I am.

40 Mr. Schotland: I offer the contract in evidence.

Helen Jedell, direct.

You have the original; this is a carbon copy. Suppose you put the original in.

Mr. Bierman: That is not witnessed.

Mr. Schotland: All right. I will put the copy in, duplicate of original.

(Copy marked Exhibit C. 1.)

10 Q Miss Jedell, where was this contract, Exhibit C. 1, drawn? A In our office.

Q And was it the day it bears date, April 20, 1926, or some other day? A No; it was that date.

Q The day it bears date? A Yes.

Q Who were present when the contract was drawn? A Mr. Applebaum, Mr. Bierman, Mr. Philip Herman, Mr. Herman, Samuel Herman, Mr. Maurice Schlesinger, Mr. Joe Herman and myself. 20

Mr. Schotland: The Court please, I would like to get through with Miss Jedell, with all she can testify to about the case, and I would therefore like to have her testify to everything which might first become competent on rebuttal in order to let her go back to the office.

Mr. Bradner: I haven't any objection. 30

The Court: All right, proceed.

Mr. Schotland: All right.

Q Now, at the time when this contract, Exhibit C. 1, was drawn, what, if anything— Strike that out. Will you please tell the Court exactly what happened in this in the presence of the persons that you have mentioned regarding the terms of this contract, Exhibit C. 1? A Well, 40

Helen Jedell, direct.

originally Mr. Herbert Herman, I think, Mr. Philip Herman, and, I think, Mr. Samuel Herman, came to the office with Mr. Applebaum and Mr. Bierman to draw the contract, gave me the terms—took down the terms and started to get ready to draw the contract. Mr. Philip Her-
 10 man called my attention to the fact that a preliminary receipt had been given and Mr. Applebaum loaned me that receipt for the purpose of getting the facts. I then dictated the contract and asked the question of Mr. Philip Herman as to whether the clause referring to the picture theatre is a part of this agreement.

Mr. Schotland: Just a minute.

Mr. Bradner: Let me ask right there. Was Mr. Applebaum there when this agree-
 20 ment—(interrupted).

Mr. Schotland: They were there then?

The Witness: Yes.

Mr. Bradner: They were both there then.

Mr. Schotland: Of course, I am putting this in without waiving my right when it is offered on the other side of the case to object to it. I am simply putting it in to save time.

30 Q I show you a paper dated April 17, 1926, and ask you is this the preliminary agreement you are talking about that was handed to you? A Yes.

Mr. Schotland: Suppose that be marked for identification?

(Paper marked C. 2 for identification.)

40 Q Now, go on. A A discussion arose at that time between Mr. Herman and Mr. Apple-

Helen Jedell, direct.

baum and it resulted in a conference between Mr. Bierman and Mr. Applebaum in an outer room—

Q Now, just a minute. What was the discussion? Tell us what was discussed. A A discussion arose as to why Mr. Philip Herman objected to making that part of the agreement as to the moving picture theatre a part of the trans-
 10 action at the time that the final agreement was drawn.

Q Well, now, let me get this clear. Are you referring to the clause in the preliminary agreement which has been marked C. 2 for identification: "We, Herman & Co. guarantee a moving picture theatre will be erected next to the building mentioned above. It is understood that check will be returned to Mr. Applebaum in the event
 20 the theatre will not be erected. This holds until Saturday, April 24, 1926." Signed by "Herman & Co., Samuel Herman." Is that the clause you are referring to? A Yes.

Q That was under discussion? A Yes, sir.

Q Now, what did Mr. Herman say about the clause when you came to draw the formal contract? A Mr. Herman said that absolutely he will not enter into the deal or have anything to do with Herman & Company representing such a
 30 moving picture theatre; he would much prefer to return the deposit right then and there, that the boys had originally taken. But that he will not be a part of the deal; Mr. Applebaum will have to take the property without that or he can't take it at all.

Q What did Mr. Applebaum say? A Mr. Applebaum then went out with Mr. Bierman and they held a conference.

Helen Jedell, direct.

Q And did they come back after they held a conference? A They came back and Mr. Bierman said, "I have advised Mr. Applebaum not to take the property, but Mr. Applebaum wants to take it anyhow. I haven't anything to say about it."

10 Q Then did you proceed to draw the contract, C. 1? A Then I proceeded to draw the contract.

Q Without putting in that guarantee as to the theatre? A Yes.

Q Now, what, if anything, was said about the rents? A There was not any discussion about the rents, except that I was asked by Mr. Bierman to set out those people that were in as tenants, which I did.

20 Q And those are mentioned in the contract? A Yes.

Q Now, after the— Oh, then, when the contract was finally signed, Exhibit C. 1, was there any additional deposit paid at that time? A I think there was, and that was when I received back that preliminary agreement, because that also contained a partial deposit, I think, of five hundred dollars, I am not certain.

30 Q Yes, yes. A That was delivered back, because the contract itself was a complete receipt for deposit and, I think, there was a five hundred dollars additional put up.

Q The contract speaks of the thousand dollars deposit? A This five hundred dollar deposit.

Q With a preliminary five hundred additional at this time. Now, after the contract was signed did Mr. Applebaum or his attorney, Mr. Bierman, get in touch—get into communication with

Helen Jedell, direct.

you between that date and June 1st, the time of consummating the agreement? A Yes; Mr. Applebaum did.

Q When? A I don't recall when, but I know it was before the time set for the closing. Mr. Applebaum came to the office and asked me whether I could get him absolved from the agreement, if he would pay a fee to us and return, and get back a portion of his deposit, and, if necessary, he would pay a fee and waive his deposit. I told him I would see what I could do, and I got hold of Mr. Schlesinger and Mr. Herman and asked them whether they would—(interrupted).

Q Never mind what you asked them. As a result of that request on his part you did talk, you say, to Mr. Schlesinger and Mr. Herman? A Yes.

Q The other parties to the agreement? A Yes.

Q And did you then see Mr. Applebaum again and report anything to him? A I sent for Mr. Applebaum, he didn't come in. I went up to his place. He was not there, but he sent his son down to ask what I wanted when I was up there and I told him that they wouldn't close on those terms, but, if he would come down, I had a suggestion which they made to me which might close up the agreement and absolve him from it.

Q Did he come down? A He did not come.

Q Now, you are talking before June 1st? A Yes.

Q Before the date of consummation? A Yes.

Q On June 1st. A Well, part of it was before and part of it after.

Helen Jedell, direct.

Q Well, I only wanted the part before June 1st. A My conference with him was before June 1st.

Q And with him personally? A Yes.

Q I see. On June 1st did you prepare a deed for the property in accordance with the terms of
10 the contract, C. 1? A I did.

Q I show you deed bearing date the 1st of June and acknowledged the 1st of June. Is this the deed you prepared? A It is.

Q And, after the deed was executed by Mr. and Mrs. Schlesinger and Mr. Herman what did you do with it? A I waited for him to come down, on June 1st.

Q For who? A For Mr. Applebaum to come down on June 1st to close the deal; in fact, I called Mr. Bierman prior to making the deed for
20 closing of the title in accordance with the agreement.

Q Yes. A Told him the deed was ready.

Q And, I noticed the agreement calls for the deed being delivered, title passing at my office on the 1st of June, between ten in the morning and four in the afternoon. Did you have the deed there ready on that full day during that time? A I did.

Q And he never appeared for it? A No.

Q And has this deed been kept in the same condition, ready to be delivered? A It has.

Q Ever since? A Ever since.

Q Now, after the 1st of June, did you have any further communications with Mr. Applebaum or Mr. Bierman? A Yes; I wrote several letters.

Q Well, I mean, conversation. A I am going to get to it. I went up to his home and he was reported to be ill in bed, but he sent his
40

Helen Jedell, cross.

son down to the office and I told his son that if his father would come down I had a suggestion to make which might absolve him from the agreement. He told me as soon as his father was better he would send him out, but I haven't seen him.

Cross examination by Mr. Bradner.

Q Miss Jedell, are you quite sure that Mr. Bierman came in there with Mr. Applebaum and the others originally? A I can't say whether he came in at the same moment. I know he was there when we started our negotiations.

Q Had the agreement been fully prepared before he came? A I don't believe so, Mr. Bradner.

Q Don't you remember that after the agreement had been prepared that you yourself suggested to Mr. Applebaum that he should have his own lawyer there? A No; I don't remember that, Mr. Bradner.

Q Well, do you remember one of the Messrs. Herman stating during the conversation, that the plans for the theatre were being prepared in Mr. Schotland's adjoining room, at that time? A I never heard that.

Q You didn't hear that? A No.

Q Do you remember Mr. Bierman stating that it didn't make any difference whether that representation or statement was in the contract or not, that, if Mr. Herman said the theatre was going to be put up, that would be just the same. Did you hear that? A That never was said in my presence, Mr. Bradner.

Q Did you hear Mr. Applebaum say, "If Mr. Herman said that theatre is going to be put up
40

Helen Jedell, cross.

I will take his word for it. I don't have to have it in writing?" A That was never said in my presence.

Q Well, when Mr. Applebaum came and said that he was not going to carry it out or something to that effect, you knew that he did not intend to carry out the contract, didn't you? A
10 No; I didn't know that.

Q Didn't he tell you he wanted to get out of it, didn't want to go on with it? A He told me to see what I could do and offered a fee if I can accomplish it for him. That is all.

Q Well, did he tell you why he wanted to do that? A Well, he told me that he may not have the money because he expected to get about eight thousand dollars out of closing a title and he may not get it and pleaded with me for a
20 private consideration to get him out of it. That is all he told me.

Q Did he tell you that, unless the place was all rented he couldn't carry the building and loan? A No, sir; he didn't say that.

Q Didn't say anything about that? A Just cried to me about getting out.

Q And didn't say anything about the theatre at that time? A He did not, no, sir.

Q Did you report to the complainant what
30 Mr. Applebaum had said? A I asked them whether they would permit him to get out.

Mr. Schotland: You answered the question.

Q Just a minute. Did you report— A Yes.

Q —it to them? A Yes.

Q You also reported to them your failure afterwards to complete any further negotiations
40 with Mr. Applebaum, didn't you? A Yep.

Helen Jedell, re-direct.

Q Why was there such a long delay before this suit was brought? A Because I was negotiating all the time. I had written letters, written as late as October or November, or maybe later, to Mr. Applebaum.

Q To whom did you write the letters? A
10 And copies of which we have.

Mr. Schotland: To Mr. Applebaum, she said.

Q Did you write the letters to Applebaum?

A Yes.

Q You knew Mr. Bierman was his attorney, did you not? A Yes.

Q Did you write any letters to Mr. Bierman?

A No.
20

Mr. Bradner: That is all.

The Court: That is all, madam.

Re-direct examination by Mr. Schotland.

Q When did you receive the instructions from the complainant, if at all, to file the bill for specific performance?

Mr. Bradner: I object to that.
30

A About the time it was filed.

Mr. Bradner: I don't think it makes any difference. That might excuse counsel's delay but not the complainant's.

Mr. Schotland: There was no delay.

That is all, Miss Jedell.

I think that is all I need for a prima facie case. I won't spoil the order of the case by putting any more evidence in at this time.
40

Mr. Bradner: Mr. Applebaum.

Michael Applebaum, direct.

MICHAEL APPLEBAUM, sworn for the defendant.

Direct examination by Mr. Bradner.

Q Mr. Applebaum, what is your occupation?

10 A Hebrew education, Hebrew teacher; it comes New Years, perform services.

Q Do you know the Messrs. Herman, any of them? A I know the young men when they came to my place, the first time.

Q What was his name, his first name? A Herbert Herman the young man is; he sits over here.

Q Herbert Herman? A Yes.

20 Mr. Bradner: Herbert Herman, stand up. (Man stands up in court room.)

A The other one.

Mr. Schotland: You mean Sam.

The Witness: Sam Herman; this is the young man who comes first to my place.

Q And when you say your place, where do you mean? A Where I live, where my business is.

30 Q What business was that? A In the candy store.

Q Where was that? A 291 Belleville avenue.

Q And when did he come to your place? A It was April 16th, Friday morning.

Q Last year? A Last year.

Q What did he say to you? A He come in the store and he asked me—

Michael Applebaum, direct.

Mr. Schotland: Now, if your Honor please, I object to the preliminary conversation on the ground that the proceedings show that there was a written contract entered into, and admitted in the case. All preliminary conversations according to my understanding of the law, are merged in the written contract. 10

The Court: Well, I understand the law to be that if they can prove any misrepresentation which led to the filing of the agreement that it is admissible.

Mr. Schotland: I agree that is true, in the oral testimony then that can be introduced under that rule is the oral testimony dealing with the particular representations that they are complaining were made and are false. 20

The Court: I will allow the question.

Q What did he say to you? A He asked me if I am interested in buying a piece of property so I told him if I can get the small place to have a store for myself, he should make a store and we should have a flat upstairs in the back, then it would be very easy for us and we should pay so much rent, "Well," he says, "we haven't got any small piece of property." He says he has got a small piece of property in Lincoln avenue, but it is not built yet, but he has got only a big piece of property. He asked me how much money I had to invest, so I told him I had about twenty-five hundred dollars. 30

Q How much? A Twenty-five hundred. And if we can sell the store that we got now that we can have about six—about six thousand dollars. "Well," he says to me, "that would be good. 40

Michael Applebaum, direct.

Then I will speak business to you. We got a property in Lyons avenue consisting of four stores and four flats and," he said, "that takes five hundred a month," he put on the paper seventy-five dollars for stores and four flats fifty dollars. When I asked him how much—how
 10 that—he said, "You must pay three hundred and fifty dollars a month for the building and loan," taxes, insurance—of course, he didn't mention them, so I was thinking that is pretty good. I say, "It looks to be good, sixty-five hundred, that perhaps would be good for me."

Q Don't talk so fast. I can't follow you. A He said, "I got four stores and five—four apartments and next to that house will be a big moving picture." He explained to me, "If you go over
 20 in that section, that will be a moving picture and you will do some business and you will be rich, all your children will be able to study good," and he persuaded me, and, of course, I believed him, and I told him I didn't understand anything about property and I don't know anything about it, but just like you say, it would be very good. So he said, "Let's come over to see that place." I went over there and we saw the same thing like
 30 he said, all four flats, four stores, they all was ideal, except one store was occupied by a baker and I saw the property and he said, "Next to that will be a big moving picture" and I believed him and he said, "All the plans are ready; all the plans in it made by Mr. Schotland." Of course, I know Mr. Schotland, if he mentioned his name I had very much confidence in him. That is what he said.

Q Well, who—how did he know there was going to be a moving picture place there? A Who?

40

Michael Applebaum, direct.

Q How did he know that?

The Court: Well, that is—

A Well, he told me that there was going to be.

Q He told you there was going to be one there? A Yes; there was going to be a moving
 10 picture and "next week," he says, "you will find some signs on it, right there will be some signs how much the seats are going to be there, and," he said, "if not I will give you the agreement if you will not find any signs there that there is a moving picture, you will get your money back," so I went over.

Q Well, did anything happen the next day, the next day after the 16th? A Then we went after
 20 the 16th we went to make the agreement that was signed.

Q Where did you go to make the agreement? A He brought me over in Bank street, 73, Mr. Samuel Herman, he took me in his car and he brought me over there.

Q And what happened there? A There he made the agreement and he put in the agreement, "If you—"

Mr. Schotland: Preliminary agreement? 30

The Witness: Yes, sir; that is what he said, "If there is not a moving picture there you will get your money back, in a couple of days," he said, "the newspapers will have it," and, of course, I believed him; he mentioned Mr. Schotland's name and he said—(interrupted).

The Court: Now, wait a minute.

Mr. Schotland: I didn't know I was an architect.

40

Michael Applebaum, direct.

Q I show you Exhibit C. 2 for identification and ask you if that is the paper you received? A Uh huh.

Q On the following day, on April 17? A Yes; I see my signature there.

Q You signed it also, did you? A I see this
10 is my signature.

Mr. Bradner: I offer it.

Mr. Schotland: I object to it on the ground it is merged in the written agreement.

(Paper formerly marked C. 2 for identification, now marked Exhibit D. 1.)

Q "April 17, 1926, received from Mr. Apple-
20 baum the sum of five hundred dollars to apply as deposit on property located 242-246 Lyons avenue, Newark, N. J. Price of property \$48,000, building and loan \$35,000, cash \$8,000, balance second mortgage of which \$2,000 is to be paid within two years and balance last year. All expenses to be apportioned to date of settlement. Back shares building and loan to be paid by Mr. Applebaum. At date of settlement the sum of \$200 is to be paid by us to Mr. Apple-
30 baum. It is understood that an additional sum of \$500 is to be paid by Mr. Applebaum when agreement is drawn, April 20, 1926, date of closing June 1, 1926, time of essence. We Herman & Company, guarantee moving picture theatre will be erected next to the building mentioned above. It is understood that check will be returned to Mr. Applebaum in the event that theatre will not be erected. This holds until Saturday, April 24, 1926." Signed, "Herman & Co., Samuel Herman, Michael Applebaum."
40

Michael Applebaum, direct.

(Discussion.)

Q At the time that receipt was signed you paid five hundred dollars, did you? A Yes.

Q Did you afterwards go to Mr. Schotland's office that same day? A No, afterwards.

Mr. Schotland: Three days later? 10

The Witness: After we made the agreement, after, when the agreement was made, of course, I was waiting a couple of days, three or four days, see? I was looking at the Evening News to look to see if there would be advertised in the News for the moving picture. I see there was not any, so I went to Lyons avenue to see if they will put some signs on the ground and I see there
20 is not any sign of moving picture and I went over there in the flats, the stores is empty and the flats is empty, so I began to understand it isn't right.

Q I am not talking about that; I am talking about when you went to Mr. Schotland's office to sign up the real agreement? A It was about 4 o'clock. I went over with Sam Herman.

Q You went with Sam Herman? A Sam Herman and myself. 30

Q You went with him from where? Where did you start from? A From his office on Bank street.

Q Did you go to his office that day? A Yes; he told me I should meet him over there and he will bring me over to Mr. Schotland's.

Q Who else was there at Mr. Schotland's office? A At that time there was the family of Herman, they come after.
40

Michael Applebaum, direct.

Q How many of them? A The same that are here now, the same people.

Q That doesn't answer the question; how many were there then? A I didn't count; the same gentlemen that are now here.

10 Q Can you name them? A There is the— I only know the Hermans, but I don't know the first name. There was about—

Q Did you see Mr. Schlesinger there then? A Yes; Mr. Schelsinger was there.

Q And his wife? A They came after.

Q He was there too?

Mr. Schotland: He came after, he said.

20 Q When you came in there that day what was said? A What was said?

Q Yes; in Mr. Schotland's office. A Well, I was speaking. I spoke to Sam Herman. I said, "We are going to make an agreement. Wouldn't it be a good idea, why, the agreement—we shouldn't need any lawyer to go in, because that would make too much expense." "Well," he said, "that is all right, that is a good idea. You see, if I bring a lawyer it will cost me so much money," so I told Sam Herman we should write the agreement and be satisfied with one lawyer and not have two; that is what I told them.

30 Q Do you know whether the agreement was drawn up? A They were drawn up. Then, after the agreement was finished Mrs. Jedell said, "You must have somebody to read it over to you and you must put the signature," and I said, "I am going to call Mr. Bierman," and Mr. Bierman came over there.

40 Q Did you go out of the office? A No, I didn't go out of the office; they called up right in the office.

Michael Applebaum, direct.

Q And telephoned? A Yes.

Q And which Mr. Bierman did you mean, the gentleman sitting here, Sidney Bierman? A Yes; Sidney Bierman, yes.

Q After he came there what was said? A He looked at the agreement and he called me in the other room; he said, "How can you take a big 10 undertaking, so much money; how will you be able to keep it going?" So I explained to him.

Q I don't think you ought to tell what your counsel decided. What was said in the presence of the others? A You mean, who said?

The Court: When you went back into the room.

Q When you went back into the room after 20 you had been talking to Mr. Bierman, what was the talk then?

Mr. Schotland: In the room where Miss Jedell was?

Mr. Bradner: Yes.

A Who Miss Jedell was speaking to the people I don't know.

Q What anybody said. A I don't know 30 what they said.

Q When you came back there with Mr. Bierman— A Yes.

Q —was the contract then signed? A Yes—no, not signed.

The Court: What did you say before you signed it?

The Witness: Before I signed it Mr. Bierman came—

Michael Applebaum, direct.

Q Yes, before he signed the agreement.

The Court: When Mr. Bierman came and after you talked to him and went back in the room.

The Witness: Yes, sir.

10 The Court: Where the contract was; what did you say? That is what Mr. Bradner wants.

The Witness: I said, "You see, I am going to sign the agreement." I shouldn't say what he told me?

Q No. A I said, "I am going to sign the agreement, what is written there."

20 Q Did Mr. Bierman say anything there that the Hermans could hear? A Mr. Bierman said what the Hermans could hear? It is hard to remember.

Q You can't remember? A If anybody would begin a word or two words I might remember.

Q Well, you signed the agreement, did you? A Yes.

Q Anybody sign before you signed? A Somebody signed before me?

30 Q Yes. A I think the Hermans signed it.

The Court: That speaks for itself.

Mr. Bradner: Yes.

Q And, after you signed the agreement, what happened? A Then I began to look, after, when I went home.

40 Q No; right there in the room. Did you pay anything? A One thousand dollars I paid. She took the five hundred dollar check and she gave me the receipt for a thousand.

Michael Applebaum, direct.

Q You gave a check for a thousand dollars?

A Yes.

Q You had given five hundred dollars before that, hadn't you? A Yes—

Q Did you get your five hundred back? A They tore the check.

Q They destroyed it? A Yes. 10

Q What became of this other paper that you had? What was done with that? A That was a—I went—

The Court: What became of that paper?

The Witness: I don't know. I came over to my lawyer to ask for that paper. I didn't have it.

Q You didn't have it? A No. 20

Q Did you hear anything said about it when you were signing upon the contract in Mr. Schotland's room? A What do you mean? How they were speaking about something?

Q Yes. The old paper, the other paper. A I mean by that the old paper, whether they shall speak anything about it?

Q Yes. A I didn't hear anything speak about it. I don't know what they were speaking. 30

The Court: You didn't hear anybody speaking about this paper?

The Witness: Yes; that they should take this property on the agreement.

The Court: Who said?

The Witness: Sam Herman and Miss Jedell, they should take that paper under the agreement. 40

Michael Applebaum, direct.

Q Is that all you can remember that was said then? A What I said to them?

Q Anybody said. Anybody said in that room at that time. Anything that was said about this property. A They all said there was going to be a theater, that is all. He told me himself that
10 Mr. Schotland staying in the other room and making the plans, the plans ready and they waiting that Fabian should come to sign it; that is what they told me.

Q Who told you that? A Mr. Herman himself.

Q Mr. Herman, Sr.? A Yes.

Q Who heard him say that? A I think, Mr. Bierman was standing there and heard that, and so I told to Mr. Bierman Mr. Herman said that. I believe that. I wouldn't listen to what
20 Mr. Bierman said, because, I said, I got confidence in those people; they will surely make that theater.

Q Well, was that before or after you had signed the contract? A That was before.

Q Yes. A Eh?

Q That was on the 20th of April? A Yes, that was.

Q When did you go to look at the property after that? A The next day I was over there.

30 Q Yes? A I come over there once. Of course, I didn't understand as good—(interrupted).

Q Was the property being delivered then a new place? A Yes; that was finished.

Q It was finished up? A But I went downstairs—

Mr. Schotland: I don't think that is quite fair to—

Michael Applebaum, direct.

The Witness: I said, finished, you know, the rooms was ready, everything was ready.

Q And everything was ready? A And I went downstairs in the cellar. I saw there was water there so I asked the gentleman, Sam Herman, "Why is there water there?" He said,
10 "We will fix up the water to go out, and, when we start building the moving picture we will make that store right close there."

Q When did you go there again? A The next three or four days I went again.

Q When was the last time you went there? A It was May, between the 12th and 13th, I was there. I went a couple of times.

Q When you went there the last time, what did you find there? A I find there the three
20 stores was empty.

Q The three stores empty? A Yes.

Q And what else? A And two flats was empty, but on the other side, on the left side, there was people living there.

Q And how about the moving picture theater, anything being done to put up that? A Didn't move at that time, there was no moving picture sign go there.

Q What did you do? Did you go to see anybody? A I tried to go around to ask people,
30 but I see what some people tell me, there would never be a moving picture there. People didn't tell you right. There will never be a moving picture there.

Q Never mind about that. Did you ever see anybody about it? A I went to see Mr. Sam Herman. Of course, I was out of the bed, in ten days I lost so much money, so I went over there to beg them what they can do for that, so Sam
40

Michael Applebaum, direct.

Herman said, "I am going to speak to Mr. Schlesinger to see what I can do for you."

Q What did you say to Mr. Herman? A Then I come again and they said, "Don't come over to bother us; we are busy people." So I went to Miss Jedell and asked her perhaps she
10 can do something for me.

Q Now, we will go back to the first time when you went down there, and you saw some stores and flats were vacant. A Yes.

Q And there was nothing to show that the moving picture was being put up. Did you go to see Mr. Herman? A Yes, sir.

Mr. Schotland: Your Honor please, I don't think that any rule that has been
20 enunciated yet would make testimony as to the vacancies competent, in view of the fact that the agreement affirmatively says the conveyance is to be made subject to a lease—

The Court: I understand that, Mr. Schotland. I agree with you. He knew what was in the lease and what was not when he signed this agreement.

Mr. Schotland: Yes.

Q You went to see Mr. Herman, after you
30 had been down there the last time. Now, what did you say to him? A To Samuel I said, "What can you do for me?" He said he will speak to Mr. Schlesinger.

Q What can he do for you, what do you mean? A I said, "How can I carry it, the stores are idle, the rent is idle, the moving picture—how can I carry it? I can't carry the same." If they hadn't persuaded me to buy it I would never buy it. They said they are going to help me.
40

Michael Applebaum, direct.

They made all kinds of promises. Of course, I believed them. I had confidence when they told me.

Q What difference did it make whether the stores were rented or not, or the flats?

Mr. Schotland: I object to that. 10

The Court: I will sustain the objection.

Q You just stated that you told them the stores were vacant and the flats were vacant and the moving picture was not going up. A Yes, sir.

Q What did he say to that? A He said, "I can't help it. You bought it, you must keep it." He promised he would speak to Mr. Schlesinger, "And see what we can do."
20

Q Well, did you ever see him again? A They told me not to come to the office. I stopped.

Q Then what did you do? A Then I went over to Miss Jedell and said perhaps she can do something and she said she was over, and I told her the same thing, everything was idle and nothing is rented and the moving pictures is not there; she said, "What can I do for you? Why don't you go to your own lawyer; he shall give you advice." She said, "You made so much expense, agreement and everything." I said, "I will stand the expense." I paid in the thousand dollars and take off the expense that I made and they shall give me back.
30

Q Have you any of the letters that you received from Mr. Schotland's office? A No. She was herself—my son told me she was herself in the office, but I wasn't there for about three or four months ever since.
40

Michael Applebaum, cross.

The Court: Did you get any letters from Miss Jedell?

The Witness: There was one time she sent somebody to go over to see her; that was all.

10 The Court: She sent word for you to come to see her?

The Witness: Yes, sir.

The Court: When was it?

The Witness: That was in October, about.

The Court: October?

The Witness: About in October.

The Court: Did she ever write you any letters?

20 The Witness: No ma'am—no, sir.

Cross examination by Mr. Schotland.

Q Mr. Applebaum, what was your business, at the time when you made this contract? A The same thing.

Q Candy store? A I am a teacher myself, but the last couple of years I become sick, so we took the store.

30 Q We don't need that. You were in business running a confectionery store on Belleville avenue? A Yes, sir.

Q How long have you been in that business? A In that business, I don't stand in that business; I got a son what is about twenty-seven years old; he was running the business seven years and now there is another one there.

Q How long were you running that business? A Ten years. More than ten years.

40 Q What is that? A More than ten years.

Michael Applebaum, cross.

Q More than ten years? A Yes.

Q How long did you personally run it? A Never happened that I should, because I had a son who is over—who was over there seven years.

Q You had your children run it for you? A Yes.

Q You yourself— A I come in to help them. 10

Q Did you ever own any property? A Yes; we had one.

Q And were you selling a piece of property about the same time that you were buying this?

A Yes, it was sold.

Q It was sold? A Yes, sir.

Q And there is where you were getting the money to pay in eight thousand dollars on this property? A No; the twenty-five hundred I had left, that was from the property. 20

Q What is that? A The twenty-five hundred dollars I had left, that was from the property.

Q You agreed to put in eight thousand dollars in this property, did you not? A We thought to sell the store, of course.

Q No. You agreed that you were going to invest eight thousand dollars in purchasing this property? A Yes, sir. 30

Q And you expected to have that eight thousand dollars by using the money that you had left out of the property that you sold at that time? A Uh huh.

Q And, also, to sell the candy store? A That would be together.

Q You expected, also, to sell the candy store? A Yes, sir.

Q Did you ever sell the candy store? A Well, we tried to sell the store. 40

Michael Applebaum, cross.

Q You did not succeed? A The reason I couldn't sell it, I couldn't sell.

Q Please answer me. A I tried to sell, perhaps I would sell, if they would take over the property, perhaps I could sell it.

Q You did not succeed in selling it? A I would be able to sell that store.

Q I show you a carbon copy of a letter dated October 15. Will you look at it and see if that will refresh your recollection as to having received that letter from my office? A Yes; that was the copy.

Q You did receive that? A Yes. I say I received that letter; I received one letter.

Q That is the letter Miss Jedell testified about?

20 The Court: He said he got one.

The Witness: I told you I got one.

The Court: He said he got a message.

Mr. Schotland: A message. He denied he got the letter.

The Witness: No; I said before, I got the letter.

The Court: Let it be marked.

(Paper marked Exhibit C. 3.)

30 Q Now, Mr. Applebaum, when you came to my office on April 20, the time when the regular contract was drawn, you say Miss Jedell suggested to you that you should get your own lawyer? A Yes, sir; after that, she said, of course—

Q She insisted on that? A Yes; I should bring a lawyer.

40 Q And it was because she suggested it you telephoned for Mr. Bierman? A Uh huh.

Michael Applebaum, cross.

Q And he came over to my office? A Uh huh.

Q And he represented you, then? A Uh huh.

Q This is before this contract was closed? A Yes.

Q And before the contract was signed? A 10 Yes.

Q At the time when you were in my office and Miss Jedell was drawing this contract, didn't talk come up and didn't the Hermans say that they will not consent to putting into the contract an agreement that they are going to build a moving picture theatre? A I didn't get that.

Q Didn't they object to putting into the contract or agreement to put up a moving picture theater? A No.

Q What is that? A Nobody objected there; nobody didn't say anything. I was there, but nobody said it.

Q They did not? A No.

Q You knew it was not put in that contract, didn't you? A What do you say?

Q You knew that the agreement to build a moving picture next door was not put into the contract, didn't you? A Well, they didn't put it in any contract.

Q I know that, but didn't they say they refused to put it in? A They didn't say "refused." They say "We can't put it right away, because it will take another couple of days," that is what they told me.

Q Can you tell me what they said about agreeing in what you call the big contract? A Uh huh.

Q Tell me what they said about agreeing to build a moving picture theater. A Yes; they said—

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30

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Michael Applebaum, cross.

Q In that contract. A What Herman said?

Q Yes. A Well, I don't know. I thought they going to put everything that is written there, but they said, "We can't put it right away; it will take another couple of days," that is what he told me.

10 Q Didn't you, on your direct examination start to tell us that in spite of what your lawyer told you— A Uh huh.

The Court: He did say so.

Q When they refused to put it in the contract, but told you a moving picture theatre was going to be there, you were satisfied and took the contract, didn't you say that? A You mean the second contract?

20 Q Yes. That is what I am talking about all the time. A The second contract?

Q Yes. A But they asked me for that.

Q What did they ask you? A If we should put in the agreement, because my lawyer told me, in order to buy this they wouldn't put in the agreement, the mortgage.

30 Q They said they will not put it in the agreement? A Yes; my lawyer told me they wouldn't put it in the agreement. I said, "What is the difference? So long as they say they are going to make it, they will surely make it. What is the difference whether they put it in the agreement or not?" That is what he told me.

Q Let me understand it clearly: At the time they were making the second contract they told you they will not put in the contract the agreement to build a moving picture theater next door? A Uh huh.

40

Michael Applebaum, cross.

Q They told you—

The Court: Is the answer "Yes?"

The Witness: I say, "Yes, yes."

Q And your lawyer, Mr. Bierman, told you not to make the contract if they refused to put that in, didn't he? A Mr. Bierman told me not to sign the contract. 10

Q Yes. He told you not to sign the contract unless they put that in, didn't he? A I get mixed.

Q Didn't you say so a little while ago? A He asked me should I put it in the agreement— Mr. Bierman told me they didn't put the moving picture in the agreement to be guaranteed. I answered, "They said they will be in another day or two days; we can't stop the agreement on account of this," so I was satisfied. 20

Q I don't understand—

Mr. Bradner: I don't believe he understands what you are driving at.

Mr. Schotland: I don't understand.

Mr. Bradner: He is mixing up the conversation in the room and the private conversation with Bierman, that is the trouble. 30

The Court: Did Mr. Bierman tell you not to sign the big contract, if they did not put the moving picture in the big contract?

The Witness: He told me that.

The Court: Yes, and you signed it anyway?

The Witness: Yes, I signed it, with confidence, they promised.

The Court: You said, "I will sign it anyway?" 40

Michael Applebaum, cross.

The Witness: Yes, sir.

The Court: Did you? Did you say that?

The Witness: Yes, sir; I signed it because I got confidence the people are going to build a moving picture.

10 Q Now, all this talk—didn't they tell you at the time the big contract was signed, that they had sold that ground next door to Fabian and that they did not know when he would be ready to build or if he would put a moving picture theater there and that is why they wouldn't agree to it now in the agreement, and if you want, you can have your five hundred dollars back? Didn't they tell you that? A They didn't tell me that.

20 Q Didn't they offer you back the five hundred dollar deposit? A They didn't tell me that. They only told me the plans isn't finished and in another couple of days there will be signs in the paper and signs on the ground.

The Court: Did they offer to give your back five hundred dollars?

The Witness: Nobody did.

The Court: Didn't—

30 The Witness: Nobody said they would give me the money back.

The Court: What did they say about the five hundred dollars? Did they say anything about the five hundred dollars?

The Witness: At that time?

The Court: Yes.

The Witness: They want to give me the five hundred dollars back.

The Court: Did they give it to you back, offer it to you?

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Michael Applebaum, cross.

The Witness: I can't remember whether they say they offer me back the money.

Mr. Schotland: Stand up, Mr. Philip Herman.

You recognize Mr. Philip Herman?

The Witness: Yes.

10

Q He was there at the time? A Yes.

Q Didn't he say to you, "Mr. Applebaum, I won't guarantee a moving picture theatre; take back your check if you want." A No; he didn't say that to me.

The Court: What did he say? Now tell us what he did say.

The Witness: He didn't tell me anything. The only thing when I come in and I said— 20 when I come in from the other room, Mr. Herman, the gentleman said, "What is the use you stay so long and you stay over? If there be so much trouble, to stay in there like that." "Let us finish all together." I can't remember all in one room. Somebody said—I didn't hear everything.

Q When he said, "Let's finish all together," did he say, "I will give you back the five hundred 30 dollars?" A He didn't tell me that. He said, "What is the use—"

Q Didn't he tell you that they had the plans all ready, that the plans for the theatre were made by Mr. Lehman, the architect? A Lehman?

Q Yes. A Well, he said plans was ready, Fabian must come to consent to it.

Q They did mention Fabian's name, didn't they? A Yes.

40

Michael Applebaum, cross.

Q And didn't they say the man who prepared the plans was Lehman, the architect? A No; not at that time they didn't say that.

Q They said that Mr. Schotland prepared the plans for the theatre? A They said the plan is with Mr. Schotland and the same evening when
10 I made the agreement, I signed, Mr. Herman was standing near me and he said, "Mr. Schotland is in the next room, he is preparing everything; in a couple of days we will be signing the paper and everything."

Q Didn't they tell you that what Mr. Schotland was preparing was the contract selling the land to Mr. Fabian? A No; they didn't—

Q And that Mr. Lehman, the architect, was making plans for Mr. Fabian for a moving picture theatre? A They didn't say that; they
20 didn't mention it.

Q What did they say about Mr. Fabian? What did Mr. Fabian have to do with it? A He is the man that buys the theatre.

Q They told you he is the one that is buying it for the theatre? A Yes.

Q That is what I asked you before. Didn't they tell you they had sold the land to Mr. Fabian, that he bought it for that theatre, but
30 that they didn't know when, or if ever, he would build, that is why—

The Court: Don't ask such long questions.

A They didn't tell me anything that they sold. They told me they got plans for the moving picture and that there will be in the Evening News all. I didn't ask him all that.

Michael Applebaum, re-direct.

Q I will put that up. They told you that Mr. Fabian, the moving picture theatre operator had bought the place for a moving picture theatre, didn't they? A They didn't say anything. They only told me they got plans and Mr. Fabian will have a moving picture. They don't tell me buy
10 or sell; they don't say a word.

Mr. Schotland: All right; that is all.

Re-direct examination by Mr. Bradner.

Q You went out of the room with Mr. Bierman, didn't you? A Yes, sir.

Q In another room? A Uh huh.

Q Did Mr. Bierman take the contract in the other room with him that day? A Yes. You mean the contract what they were writing?
20

Q Yes. A No.

Q The one that had just been written out. A No, he didn't tell me anything, because it was laying on the table.

Q Had it been read over out loud before? A Somebody read it over?

Q Had somebody read it out loud? A The agreement, you mean?

Q Yes. Mrs. Jedell, she read the agreement.

Q Did Mr. Bierman read it? A He didn't
30 read it; she read it over and he looked and see it.

Q Now, when you came back with Mr. Bierman, who spoke first, when you got back in the room where they all were. A He spoke to me?

Q Who spoke to anybody? What was the first thing that was said when you went in the room? A The day the agreement was written?

Q Yes. A Mr. Herman himself, he was speaking to me, he said, "What is it to take so long?" He asked what takes so long with
40

Fannie Applebaum, direct.

the conversation. I asked him how it is the moving picture and all that stuff. He said, "They are going to build and don't be afraid and we will draw everything for you."

Q He said that? A Yes.

10 Mr. Bradner: That is all. Mrs. Applebaum.

FANNIE APPLEBAUM, sworn for the defendant.

Direct examination by Mr. Bradner.

Q Do you know Sam Herman? A Yes.

20 Q Did you see him on April 16th at the store? A I—this young man came in the store, this one.

Q Yes. A And took me over there on Lyons avenue and showed me the property.

Q He showed you the property? A Yes. And he showed me the lot next to the property and he said, "Here will be a theatre and it will hold 4,000 people, you know. You will make very good business in this place, because that is very good for candy parlor and ice cream store."

30 Q You are the wife of Mr.— A Applebaum.

Q How did you get home? Did he take you home? A No; he took me to his father and he built a place on West Kinney street and my street.

Q Did he take you back home with his father? A Yes; with his father.

40 Q Never mind about that. Did you hear any of the talk between him and your husband? A No, no; I never heard that. I know only what he talked to me.

Fannie Applebaum, direct.

Q They were talking there at the store, weren't they? A No; that was on the way he was talking to me.

Q I am not talking about that. When he came to the store he talked to Mr. Applebaum, didn't he? A Well, I wasn't there.

Q He talked to you? A Not in the store. 10 That was on the way, you know.

Q Did he ever talk to your husband? A I never was present when he talked to my husband.

Q You didn't hear what he said to your husband? A No.

Q You only know what he said to you? A Yes.

Q And you have told that. A Yes.

Q And at that time when you were down there, do you know whether any of the stores or 20 any of the flats were occupied? A That was idle.

Q The time you went there? A Yes.

Q The first time? A Yes.

Q All idle? A Well, he told me for two stores he has got leases.

Mr. Schotland: I object to that.

The Court: Yes.

The Witness: Two stores is idle. He 30 has got plenty of people.

Mr. Schotland: No questions.

Sidney A. Bierman, direct.

SIDNEY A. BIERMAN, sworn for the defendant.

Direct examination by Mr. Bradner.

10 Q Mr. Bierman, are you an attorney and counsellor-at-law? A I am.

Q You were sent for to go to Mr. Schotland's office on April 20, 1926, were you not? A Yes; on that date. I don't remember the day.

Q When you got there, who were there? A When I came there Mr. Applebaum was there, Miss Jedell was behind her desk and three or four Hermans and Schlesingers were there—I don't know their names, their first names.

20 Q Yes. What was said? A When I came there I found an agreement which is now in evidence, all prepared. I looked it over and discussed it a few times with Miss Jedell and then I took Mr. Applebaum out into the hall and had a conversation with him. Before I went out I also saw that preliminary agreement. When I came back, in front of everybody I said, "Now Herman—Hermans, we cannot enforce this preliminary agreement, and, even if it is put into the contract, I don't think my client could enforce such an agreement, and Mr. Applebaum had to be satisfied to take it." Mr. Applebaum 30 said, "If Mr. Herman will give me his word that he is going to build that theatre, I will be satisfied." And Mr. Herman, or Schlesinger—I don't know which one—but one of them replied that that theatre is going up, that it is going to seat

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Sidney A. Bierman, cross.

four thousand people and that plans were already prepared for it and after—and I said to Mr. Applebaum, "Are you satisfied?" And he said, "Yes; I will sign the agreement," and the agreement was executed.

Cross examination by Mr. Schotland.

10

Q Well, didn't Mr. Herman refuse to put into the agreement a covenant that he was going to build a moving picture theatre? A Mr. Herman didn't say anything about that subject. I was the one who approached the subject first. I said that that agreement was not enforceable.

Q Well, why wasn't that clause put in, the same as it was in the preliminary agreement? A You mean, why wasn't the preliminary agreement put in— 20

The Court: Yes; why was it?

Mr. Schotland: No; why wasn't that clause inserted in the final paper?

A Because, in my mind, it was not enforceable and I thought it would be irrelevant to put it in and Mr. Applebaum said he is satisfied, if Mr. Applebaum said he is satisfied if Herman gives them their word that they are going to put up the theatre. 30

Q Well, you mean to tell us, Mr. Bierman, that you advised Mr. Applebaum that, if the Hermans didn't keep their word about building a moving picture theatre, he could not hold them to that work? A Applebaum was very anxious to take the property and he—

Q Yes. Pardon me. That is just what I want to find out. You told Mr. Applebaum that, if the Hermans did not keep their word about building 40

Sidney A. Bierman, cross.

a moving picture theatre, he could not hold them to it? A Yes; and Applebaum said, "I will take their word."

Q And he said he would take the property, anyway? A Yes; if they will give him their word they are going to build it.

10 Q You told him not to sign the contract, didn't you? A I advised him against buying the property.

Q You heard his testimony here, did you not? A Yes.

Q Now, you told him not to sign the contract unless that clause was in, did you not? A I didn't tell him not to sign the contract unless the clause was in. I advised him what I thought was best, in my mind, that guarantee of the theatre not being enforceable I advised him that way.

20 Q Did you tell him that he would have to take the property whether the theatre was built or not, before the contract was signed? A I didn't say anything to him about that.

Q But you told him that he would not be able to enforce—to force them to build the theatre next door? A He said he would be satisfied.

30 The Court: Did you or did you not tell him?

The Witness: What was the question?

Q You told him he could not enforce the agreement to build a theatre next door? A I didn't tell him that.

Q Didn't you say so, a little while ago?

The Court: You just reiterated it over and over again.

Sidney A. Bierman, re-direct.

Re-direct examination by Mr. Bradner.

Q I understood you to say it was in the contract that the preliminary agreement was not enforceable? A Yes; that is what was in my mind.

The Court: That is not what he said.

Mr. Schotland: Very ingenuous.

Q What did he say?

The Court: I know what he said. You need not have him repeat it.

Mr. Bradner: I think the witness—

The Court: Well, if you want him to repeat it, go ahead.

Mr. Bradner: I would like to have read to him what he said.

The Court: No. You go ahead and ask him anything you choose.

Mr. Bradner: He is being put in the position of giving advice that I don't understand that he did give.

The Court: Ask him any question that you please.

Q Did you give any advice to Mr. Applebaum, in the presence of the Hermans? A Yes.

Q What did you say, in the presence of the Hermans? A In the presence of the Hermans I said that that guarantee of a theatre was not enforceable.

Mr. Bradner: That is all.

Sidney A. Bierman, re-cross.

Re-cross examination by Mr. Schotland.

Q And he said he will take the property anyway? A He signed the agreement, yes.

Q Did he say he will take the property anyway? A I don't know whether he said it in
10 those words. He signed the agreement.

Q Substantially did he say that? A Probably he said it.

Mr. Schotland: All right. That is all.

Re-direct examination by Mr. Bradner.

Q But that was all that was said? A No.

Q What else was said? A He said, "I will take the word of Mr. Herman, if Mr. Herman
20 promises that he will build the theatre, I am satisfied." He said, "I am a rabbi, and his word is sufficient to me."

Re-cross examination by Mr. Schotland.

Q Did he say he was a rabbi? A Yes; he did.

Q You know he is not a rabbi, don't you? A I know he is a rabbi.

30 Q Did you hear what he said he is, under oath here? A Under oath he said he was a rabbi and I know that he—

Q You heard him say he is a rabbi here in court?

A Voice: Yes; I got papers.

The Court: I don't think it makes any difference whether he is a rabbi or not.

Sidney A. Bierman, further re-direct.

Further re-direct examination by Mr. Bradner.

Mr. Bradner: I would like to examine Mr. Bierman on this other branch of the case. We set up as another defense to this suit that the title is not marketable.

The Court: That is the first I heard of
10 that.

Discussion.

Q Did you make the search of this property, the title? A Yes, yes.

Q What did you find?

Mr. Schotland: I object to that. I want
20 an original record for any such claim.

The Court: Yes. You will have to get something more than that.

Mr. Bradner: Well, will your Honor permit me to produce that later?

The Court: No; I am going to decide the case today. If you haven't got any further proof than searching the record, that is not sufficient for a thing of that kind. If there is actually a pole set up on this property
30 under an actual agreement, you can testify to the fact the pole is there and then you can produce, if you can, the agreement by which it is there. If it is there, there is no agreement, why, it can be cut down, of course.

Q Do you know whether the pole is there? A Yes.

Q How do you know it? A Last week, I think it was on Tuesday of last week, I was up

Sidney A. Bierman, further re-direct.

at the property and saw the pole in the back yard of this property.

Q What kind of a pole? A An electric pole.

Q And do you know whether there is on record what purports to be an agreement?

10 Mr. Schotland: I object to that.

The Court: I will sustain the objection. If there is an agreement on record, of course, it should be produced.

Mr. Bradner: Well, if your Honor please, I don't want to risk a case because I haven't got a record here, I cannot produce a record.

The Court: That is your own fault.

Mr. Bradner: I can get a certified copy. I will produce it.

20 The Court: You should have had it here this morning. You will have to conclude your case, Mr. Bradner; I cannot string the thing along. You knew you were going to try this case and if you had any evidence to submit, you should have had it.

Mr. Bradner: I certainly was under the impression that we could prove what we found out by proving the record by the examiner who examined it. That we have done and oftentimes have been allowed to produce the paper afterwards.

30 The Court: Well, in Chancery—

Mr. Bradner: I offer to do that. I will send up and get a certified copy of that agreement and hand it to your Honor. It is on record. There is no question about it.

Mr. Schotland: As affecting this particular spot there is every question in the world about it.

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Philip Herman, direct.

The Court: You will have to produce now some further evidence than you have already produced. If this record affecting this property exists, it should have been produced or a certified copy of it.

Mr. Bradner: Well, I am unable to do that at this minute. 10

The Court: Very well. Then have you finished with this witness?

Mr. Bradner: That is all.

The Court: That is all.

Mr. Schotland: That is all.

Mr. Bradner: I will ask just one question, if I may. (To witness.) When you were down there last week, was there anything to show that moving picture place was being built? 20

Mr. Schotland: I object. It doesn't make any difference whether it is being built now or not.

The Court: I will allow it.

The Witness: No; there was not.

Mr. Schotland: That is all; we rest.

30 PHILIP HERMAN, sworn for the complainants.

Direct examination by Mr. Schotland.

Q Were you up in my office, when Miss Jedell drew the contract in this case? A Yes, sir.

Q What, if anything, did you say about the agreement to build a moving picture theatre? A I didn't say anything up there. Now, Mr. Bierman call out him and told him he wouldn't allow 40

Philip Herman, cross.

him to sign any agreement except they put this clause in, so I told him I wouldn't put anything in; this moving picture place is sold to Mr. Fabian and I can't guarantee when Mr. Fabian is going to build; the plans were made by Mr. Lehman. I told Applebaum, "You can call up
10 Mr. Fabian and ask him, before you sign the agreement, or here is your check back."

Q That is what you said? A Yes, sir.

Q Now, at the time the preliminary agreement was signed did you then intend to build a moving picture theatre? A Yes.

Q But, between the preliminary agreement and drawing the— A Regular agreement.

Q —regular agreement, you sold it to Mr. Fabian? A Mr. Fabian, the land.

20 Q And that is what you told him about Fabian, that you couldn't get— A Exactly.

Cross examination by Mr. Bradner.

Q You mean to say that on Friday—on Saturday, April 17th, you intended to build a theatre yourself? A We agreed to build it ourselves, because we order plans for it.

30 Q Who drew those plans? A Mr. Lehman made a sketch for us first, and then—(interrupted).

Q You were going to put up a moving picture theatre to hold four thousand people? A Not four thousand.

Q How many? A It was about twenty-five or twenty-eight hundred.

Q Yes. And when did you sell the lot of Fabian? A Oh, just a week later.

Q One week later than that? A Yes.

40 Q That would be on the 23rd? A I don't remember the time.

Philip Herman, cross.

Q It was a week after that? A About a week.

Q A week after you got the five hundred dollars? A It was, I think, a week or a few days—it was a few days, I know, after we got the deposit.

Q Well, don't you know whether it was a week or two weeks? A I don't remember. I can't tell that. 10

Q And did you call up Mr. Bierman—you said you called up Mr. Bierman? A Oh, no; I didn't say I called up Mr. Bierman; he was in the office.

Mr. Schotland: He said he was called.

Q Mr. Bierman was called? A Was in the office, Mr. Schotland.

Q Well— A We were talking at that time. Mr. Bierman wanted to have put in the first agreement, an agreement we were going to build that moving picture place. I said I wouldn't do it because we sold the land to Mr. Fabian and I can't guarantee when Mr. Fabian is going to build it. 20

Q Did Mr. Bierman say that even if it was in there it would not be enforceable? A No, sir.

Q He didn't say that? A He never mentioned anything.

Q You didn't understand it? A I understand English, if he can talk. 30

Q Yes. Did you say or did you hear anybody say, "I will give you my word that the theatre is going to be built there?" A I didn't told him anything about my word I said we wouldn't put nothing—I told him, "You could call up Mr. Fabian and ask him before you sign the contract the agreement—go in the next room and call up Mr. Fabian," that is all I told him. 40

Mr. Bradner: That is all.

Philip Herman, re-direct.

Re-direct examination by Mr. Schotland.

Q What kind of a pole is in the back yard? A Wash pole, two-story wash pole.

Mr. Bradner: Two-story wash pole?

10 The Witness: A long pole.

Mr. Schotland: That is all. I won't call the others.

Mr. Bradner: No telegraph pole there?

The Witness: No.

The Court: The answer doesn't seem to allege it was there; it says it is "abutting on"; it doesn't say it is on the property.

Mr. Schotland: No, it doesn't.

20 The Court: "In front of and abutting the property."

Mr. Schotland: That is what it says. I thought they meant a street.

The Court: Are you through?

Mr. Schotland: I have a corroborating witness to the same effect, but I don't think it is necessary to take the time of the Court unless your Honor so desires.

30 The Court: Well, it is up to you. If you are through, I will decide the case.

Mr. Schotland: Well, I feel so certain, I don't want to—

The Court: You rest then, do you?

Mr. Schotland: Yes, sir.

The Court: I will advise a decree directing specific performance.

Exhibits.

Exhibit C. 3.

October 15, 1926

Mr. Michael Applebaum,
291 Belleville Avenue,
Newark, N. J.

10

Dear Sir:—

I sent for you last week, in order to see whether I could not settle the Schlesinger—Herman—Lyons Avenue matter with you in a nice way, but you didn't appear. If you don't call to see me Monday, October 18th, at 4 P M., I shall take it you desire me to proceed with suit, and don't want to settle this nicely.

If you cannot come at 4 PM., let me know what hour is convenient for you, but if you do not come, I shall start suit for specific performance.

20

Very truly,

Exhibit D. 1.

"April 17, 1926, received from Mr. Applebaum the sum of five hundred dollars to apply as deposit on property located 242-246 Lyons Avenue, Newark, N. J. Price of property \$48,000, building and loan \$35,000, cash \$8,000, balance second mortgage of which \$2,000 is to be paid within two years and balance last year. All expenses to be apportioned to date of settlement. Back shares Building and Loan to be paid by Mr. Applebaum. At date of settlement the sum of \$200 is to be paid by us to Mr. Applebaum. It is understood that an additional sum of \$500 is to be

30

Exhibits.

paid by Mr. Applebaum when agreement is drawn, April 20, 1926, date of closing June 1st, 1926, time of essence. We, Herman & Company, guarantee moving picture theater will be erected next to the building mentioned above. It is understood that check will be returned to Mr. Applebaum in the event that theatre will not be erected. This holds until Saturday, April 24, 1926."

Signed HERMAN CO.
MICHAEL APPLEBAUM

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30

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Final Decree.

FINAL DECREE.

Filed June 15, 1927.

IN CHANCERY OF NEW JERSEY.

Between

MAURICE SCHLESINGER and
HERBERT HERMAN,
Complainants,

and

MICHAEL APPLEBAUM,
Defendant.

10

On Bill, etc.
Final
Decree.

This cause coming on to be heard, in the presence of Philip J. Schotland, solicitor of the complainants, and Sidney A. Bierman, solicitor for, and Frank E. Bradner, of counsel with the defendant, and the Court having examined the pleadings, and having taken proofs orally, and in open court, and heard and considered the arguments of counsel thereon; and it appearing to the satisfaction of the Court that the complainants, Maurice Schlesinger and Herbert Herman, were, on the 20th day of April, 1926, seized in fee simple of all that certain lot, tract or parcel of lands and premises, situate, lying and being in the City of Newark, in the County of Essex and State of New Jersey:

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BEGINNING in the southerly line of Lyons avenue at a point therein distant 60.33 feet easterly from the easterly line of Clinton Place; thence (1) south 42 degrees 19 minutes 30 seconds west 68.74 feet; thence

40

Final Decree.

(2) south 45 degrees 19 minutes 30 seconds East 39 feet; thence (3) south 42 degrees 52 minutes 30 seconds west 30 feet; thence (4) south 45 degrees 19 minutes 30 seconds East 21.73 feet; thence (5) North 42 degrees 52 minutes 30 seconds east 102.46 feet to the southerly line of Lyons Avenue; and
 10 thence (6) along the same North 48 degrees 48 minutes 30 seconds west 61.39 feet to the place of BEGINNING.

Together with the two-story brick building containing four stores and four apartments now on said premises.

That on said 20th day of April, 1926, the said complainants, together with Adeline Schlesinger, wife of the complainant, Maurice Schlesinger,
 20 entered into an agreement, in writing, with the defendant, Michael Applebaum, wherein and whereby said complainants agreed to convey the said lands and premises, by deed of warranty, on or before the first day of June, 1926, to the said Michael Applebaum, and the said Michael Applebaum agreed to pay therefore, the sum of \$47,800, by the payment of \$1,000, which was paid at the execution of said agreement, and by the payment of the remainder of the purchase
 30 price, upon the delivery of said deed; by the payment of \$7,000, in cash, and by assuming a mortgage on said lands and premises, in the sum of \$35,000, and the execution and delivery of a purchase money mortgage for the balance of the purchase price, together with the amount credited on account of the first mortgage of \$35,000. The principal sum of said purchase money mortgage to be paid \$1,000, at the end of two years, and the entire balance at the end of three years from
 40 its date. And it further appearing to the satis-

Final Decree.

faction of the Court, that said defendant has refused and failed to perform the said agreement on his part, and that the said complainants have always been and still are ready and willing at all times to comply with the terms of the said agreement, on their part, and the Court being of the
 10 opinion that the complainants are entitled to the specific performance of the aforesaid agreement, as prayed for by them in their bill of complaint filed herein;

It is on this 13th day of June, 1927, ORDERED, ADJUDGED and DECREED, that the said agreement be in all things specifically performed by the said defendant, and that the said defendant, on the 11th day of July, 1927, at the hour of 10 o'clock in the forenoon, at the office of John P. Manning, Esq., in the City of Newark, in the County of
 20 Essex and State of New Jersey, pay to the said complainants, the sum of \$7,000, with interest thereon from June 1, 1926, together with the taxed costs of this suit, as hereinafter allowed, and at the same time make, execute and acknowledge, in due form of law, and deliver to the said complainants his bond in the penal sum of double the amount of the balance of the purchase price for the payment of \$1,000, in one year from the
 30 date of said bond, and the balance at the end of two years from the date of said bond, with interest at the rate of six per cent. per annum, and at the same time, make, execute and acknowledge in due form of law, and deliver to the said complainants a purchase money mortgage on said lands and premises, in the sum of the balance of the purchase price, payable \$1,000, on account of the principal thereof, in one year from its date, and the balance of the principal in two years
 40 from its date, with interest at the rate of six

Final Decree.

per cent. per annum, upon the delivery, at the same time and place, by said complainants, to said defendant, Michael Applebaum, of a warranty deed, duly executed and acknowledged by the said Maurice Schlesinger and Adeline, his wife, and Herbert Herman, conveying to the
 10 said Michael Applebaum the said lands and premises in fee.

It is further ORDERED, ADJUDGED AND DECREED, that if, at the time and place hereinbefore mentioned, the said defendant should fail or neglect to pay the said sum of \$7,000, with interest as hereinbefore mentioned, together with the said taxed costs as hereinbefore mentioned, and to deliver the bond and mortgage hereinbefore described, duly executed and acknowledged, upon
 20 the tender of said deed, the aforesaid sums of \$7,000, with interest as aforesaid, and the balance of the purchase price, for which said mortgage was to be given, together with interest thereon from the first day of June, 1926, together with the taxed costs of this suit as hereinbefore mentioned, shall be and become, and are hereby impressed as a lien upon the said lands and premises, in favor of the said complainants, to the end, that
 30 said lands and premises may be sold pursuant to law, and under the direction of this Court, to satisfy such lien, and that in case a deficiency should arise upon such sale, the said defendant may be ordered by this Court to pay such deficiency.

It is further ORDERED, that the said defendant pay to the said complainants the costs of this suit to be taxed, including a counsel fee of \$300 which is hereby allowed to said complainants.

Final Decree.

It is further ORDERED, that true, but uncertified copies of this decree, and of said taxed costs, be served on the solicitor of said defendant, within 10 days after the date hereof.

Respectfully advised,

ALONZO CHURCH,
 V.-C.

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Notice of Appeal.

NOTICE OF APPEAL.

Filed June 15, 1927.

IN CHANCERY OF NEW JERSEY.

10

Between

MAURICE SCHLESINGER and
HERBERT HERMAN,
Complainants,

and

MICHAEL APPLEBAUM,
Defendant.

On Bill, etc.
Notice of
Appeal.

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Notice is hereby given that Michael Applebaum, the defendant in the above-stated cause, appeals to the Court of Errors and Appeals in the last resort in all causes, from the final decree made by the Chancellor on the advice of Vice-Chancellor Alonzo Church, which decree bears date of June 13, 1927.

SIDNEY A. BIERMAN,
Solicitor for Defendant.

30

Dated June 15, 1927.

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

SIDNEY A. BIERMAN,
Solicitor for Defendant-Appellant.

Service acknowledged by Phil J. Schotland, Solicitor, June 20, 1927.

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Petition of Appeal.

PETITION OF APPEAL.

Filed June 30, 1927.

New Jersey Court of Errors and Appeals

Between

MAURICE SCHLESINGER and
HERBERT HERMAN,
Complainants-Respondents,

and

MICHAEL APPLEBAUM,
Defendant-Appellant.

On Appeal
from the
Court of
Chancery.
Petition of
Appeal.

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

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1. The petition of Michael Applebaum, the appellant in the above-stated cause, respectfully shows that your petitioner finds himself aggrieved by a decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date June 13, 1927, wherein the said Maurice Schlesinger and Herbert Herman were complainants and the said Michael Applebaum, defendant, in this respect, to wit:

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2. The said decree adjudges that the appellant shall specifically perform a certain contract in writing dated April 20, 1926, for the sale to him of certain lands and premises in the City of Newark, and that if the appellant shall refuse within the time limited by said decree to perform the same, the lands and premises may be sold and the appellant charged with any deficiency on such sale.

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Petition of Appeal.

3. Petitioner appeals from the said decree for these reasons:

10 (a) The defense set up in the answer to the bill of complaint, that the defendant had been misled by a representation made to him by the complainants that they were going to put up a large theater next to the property being sold to him and that such representation was not true; was sustained by the weight of the evidence.

(b) The contract between the parties shows on its face that no provision was made for the assignment of building and loan shares and the minds of the parties did not meet in that respect.

20 (c) The evidence in the case shows clearly that the defendant refused to perform the contract prior to the day named in the same for performance; that is, sometime in the latter part of May, 1926, and that the complainants did not file their bill until the latter part of December, 1926; which shows an acquiescence in the rescission of the contract by the defendant.

30 4. Petitioner alleges that the decree is erroneous and that a decree should have been made dismissing the complainants' bill and directing the complainants to pay back to the defendant his deposit money, &c.

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

SIDNEY A. BIERMAN,

Solicitor for and of Counsel with Appellant.

40 Service acknowledge by Philip J. Schotland, Solicitor, July 1, 1927.

Answer to Petition of Appeal.

ANSWER TO PETITION OF APPEAL.

Filed July 6, 1927.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

MAURICE SCHLESINGER and
HERBERT HERMAN,
Complainants-Respondents,

and

MICHAEL APPLEBAUM,
Defendant-Appellant.

*On Appeal
from the
Court of
Chancery.*

*Answer to
Petition of
Appeal.*

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The answer of the above-named complainants-respondents to the petition of appeal of the above-named defendant-appellant.

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These complainants-respondents not acknowledging all or any of the matters which in said petition of appeal are contained, to be true, for answer thereto, nevertheless, say and admit that a decree was on the 13th day of June, 1927, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition as is therein stated; but as to the substance and form therefor, these complainants-respondents pray to refer thereto when the same shall be produced; and these complainants-respondents are advised and believe that the said decree is agreeable to equity and pray that the same may be affirmed with costs to be adjudged to these complainants-respondents.

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Dated July 11, 1927.

PHILIP J. SCHOTLAND,
Solicitor for and of Counsel with
Complainants-Respondents.

40

New Jersey Court of Errors and Appeals*Between*

MAURICE SCHLESINGER and
HERBERT HERMAN,
Complainants-Respondents,

and

MICHAEL APPLEBAUM,
Defendant-Appellant.

On Bill, &c.
On Appeal
from Court
of Chancery.

BRIEF FOR APPELLANT.**Abstract of the Case.**

On April 17, 1926, complainants made a preliminary agreement with the defendant to sell to him certain property known as 242-246 Lyons avenue, Newark, N. J., for \$48,000, and title was to be closed on the following June 1st. Time was to be of the essence (Exhibit D. 1, p. 67).

In the same preliminary agreement, the complainants guaranteed that a moving picture theatre would be erected next to the building being sold; and also agreed that the deposit of \$500.00 made by the defendant would be returned to him in the event that the theatre was not erected.

On April 20, 1926, a formal agreement was executed by the parties (Exhibit C. 1, p. 6). In Exhibit C. 1, no representation was made to the grantee that a theatre would be erected. Neither is there any provision made for the assignment of building and loan shares, the sale being made subject to a building and loan mortgage; and Exhibit C. 1 expressly provides that time is to be of the essence after July 1, 1926.

Prior to the time for closing title the defendant notified complainants that he would not take the property.

On October 15, 1926, complainants' attorney wrote a letter to defendant requesting him to call to see if some arrangement could not be made for a settlement (Exhibit C. 3, p. 67).

The bill of complaint was filed on December 31, 1926, and there is no excuse made in the bill or in the testimony for the delay in filing the bill. The bill prays specific performance of Exhibit C. 1, and the defendant sets up in his answer on page 14 three specific defenses, as follows:

1. That it had been represented to him by the complainants that all the stores and flats were rented, which was not the fact; and that he had told the complainants he could not take the property with vacant apartments and stores because he could not carry it.

2. That he had also told the complainants in the latter part of May, 1926, that they had represented to him that they were going to put up a large theatre next to the property; and that nothing had been done in the way of building a theatre and he did not want to carry out the contract.

3. That he also told the complainants the cellar was full of water and that Mr. Herman had told him when the theatre was built a concrete wall would be put up to keep the water out, and that nothing had been done.

An additional defense was made that there were telephone poles upon the land which made the title unmarketable (Par. 7 of the Answer, p. 15). The further defense was made in par. 8, p.

15, that no provision was in the contract for the assignment of the building and loan shares; that the minds of the parties did not meet in that respect.

The defendant also filed a counter-claim to recover the deposit, &c.

At the hearing the Vice-Chancellor refused to permit counsel for the defendant to supply records which he did not have in court, and thereby excluded the defense of unmarketability of title because the telephone poles were in the ground (p. 61).

Testimony was taken on both sides relating to the alleged representations set up by the defendant and as to the fact that no theatre had been erected; and at the close of the case (p. 66) the Vice-Chancellor without giving any reason, stated, "I will advise a decree directing specific performance." He had already stated (p. 61, l. 25) that he intended to decide the case then. There was no argument on either side. Thereupon a final decree was made in favor of the complainants (p. 69) and this appeal is from that final decree.

Specifications of Reasons for Reversal.

1. The defense sets up in the answer that the defendant had been misled by a representation made to him by the complainants, that they were going to put up a large theatre next to the property being sold to him, and that such representation was not true, was sustained by the weight of the evidence.

2. The contract between the parties shows on its face that no provision was made for the assignment of building and loan shares, and the minds of the parties did not meet in that respect.

3. The evidence in the case shows clearly that the defendant refused to perform the contract prior to the day named in the same for performance, and that the complainants did not file their bill until December 31, 1926, fully six months afterwards, which shows an acquiescence in the rescission of the contract by the defendant.

These reasons are the same as stated in the petition of appeal (pp. 75 and 76).

BRIEF OF ARGUMENT.

1. Exhibit D. 1, p. 67, at p. 68, states expressly: "We, Herman & Co., guarantee moving picture theatre will be erected next to the building mentioned above."

This was a preliminary receipt. When the parties met on April 20th to execute a final contract no reference was made in the contract to the erection of the moving picture theatre. The defendant testified (p. 32, l. 30) in speaking as to what was said to him at the time of making the preliminary receipt (Exhibit D. 1), that Mr. Herman said to him: "Next to that will be a moving picture theatre," and I believed him, and he said: "All the plans are ready, all the plans in it, made by Mr. Scott." On page 33, line 10, he testified: "There was going to be a moving picture and next week," he says, "you will find some signs on it; right there will be some signs how much the seats are going to be there." And on page 36, line 20, he testified: "I spoke to Sam Herman. I said, 'We will go to make an agreement, wouldn't it be a good idea why the agreement we shouldn't need any lawyer to go in because they would make too much expense.' 'Well,' he said, 'that is all right, that is a good idea. You say if I bring a lawyer it will cost

money, so much money.' If so, I told Sam Herman we should write the agreement and be satisfied with one lawyer and not have two. That is what I told him." He then proceeded to testify that Miss Jedell suggested to him that he should have somebody read over the agreement, and he called Mr. Sidney Bierman, and he went out of the room with his attorney. After that there was considerable testimony as to what occurred, and he came back into the room with this attorney. At the top of page 40 he testified: "They all said there was going to be a theatre, that is all he told me himself, that Mr. Schotland staying in the other room and making the plans, the plans ready, and that we—that Fabian should come to sign it; that is what they told me." He testified further: "Mr. Bierman was standing there and heard that, so I told Mr. Bierman Mr. Herman said that. I believed that. I didn't listen to what Mr. Bierman said, because I said I got confidence in those people, they will surely make that theatre," and that was before the contract was signed. And on page 48, on cross examination (l. 30) he testified: "My lawyer told me they wouldn't put it in the agreement, and I said, 'What is the difference so long as they say they are going to make it, they will surely make it; what is the difference whether they put it in the agreement or not.'" The witness admitted that Mr. Bierman told him not to sign the contract unless the agreement was in it in reference to the theatre. And at the bottom of page 49, he testified in answer to questions by the Court that he signed the contract with confidence, they promised. And at the top of page 50, he testified: "I signed it because I got confidence the people are going to build the moving picture." And at the bottom of page 53, he testified that Mr. Herman asked him when he came back in

the room with his attorney: "What is it that takes you so long?" He asked me what takes so long with the conversation. I asked him how it is; the moving picture and all that stuff. He said they are going to build and "don't be afraid and we will draw everything for you." On page 43, the defendant testified that he had told the complainants that the stores were vacant and the flats vacant and the moving picture not going up, and that Mr. Herman said, "I cannot help it, you bought it you must keep it." But he promised he would speak to Mr. Schlesinger. He further testified (l. 20) that he tried to see the complainants again and they told him not to come to the office, and he stopped.

Mrs. Fanny Appelbaum testified (p. 54, l. 25) that Sam Herman showed her the property and stated to her: "Here will be a theatre that will hold 4,000 people. You will make very good business in this place because that is very good for a candy parlor and ice cream store."

Mr. Bierman testified (p. 56, l. 20) that he looked over the agreement and discussed it a few times with Miss Jedell, and then took Mr. Appelbaum out into the hall, and when they came back, he stated in front of everybody: "Now, Herman, we cannot enforce this preliminary agreement and even if it is put into the contract, I do not think my client could enforce such an agreement; and Mr. Appelbaum had to be satisfied to take it." Mr. Appelbaum said: "If Mr. Herman will give me his word that he is going to build that theatre I will be satisfied." "And Mr. Herman, or Schlesinger, I don't know which one, but one of them replied that that theatre is going up; that it is going to seat 4,000 people and that the plans were all prepared for it and after—I said to Mr. Applebaum,

'are you satisfied'? and he said, 'Yes, I will sign the agreement' and the agreement was executed."

Miss Jedell testified in behalf of the complainants (p. 23, l. 30) that Mr. Herman stated at the meeting in Mr. Schotland's office that he would not enter into the deal or have anything to do with Herman & Co., representing such a moving picture theatre. She then testified that Mr. Appelbaum and Mr. Bierman went out of the room, and at the top of page 24, she stated that Mr. Bierman said that he had advised Mr. Appelbaum not to take the property and that Mr. Appelbaum wanted to take it, and that she then proceeded with preparation of the agreement, without putting the guarantee in it.

Philip Herman testified (p. 63, l. 40) that Mr. Bierman called him out and told him (Appelbaum) that he would not allow him to sign any agreement except they put this clause in "so I told him I wouldn't put anything in this moving picture place sold to Mr. Fabian and I cannot guarantee when Mr. Fabian is going to build, the plans were made by Mr. Lehman."

On cross examination Herman testified (p. 64, l. 30): "Q You were going to put up a moving picture theatre to hold 4,000 people? A Not 4,000. Q How many? A About 2,500 or 2,800. Q Yes, and when did you sell the lot to Fabian? A Oh, just a week later. Q One week later than that? A Yes. Q That would be on the 23rd? A I don't remember the time."

The weight of this evidence shows clearly that the defendant was induced to purchase the property because he believed that a moving picture theatre was to be erected next door which would be very beneficial to him in the kind of

business that he proposed to carry on there. The fact that the representation is not made a part of the contract, does not preclude the defendant from setting up the defence.

Carskaddon v. Kennedy, 40 N. J. Eq. 259.

Neither is it important to show that the representation was made intentionally. The complainants might have believed that Fabian would put up a theatre. *The only question to be considered is whether the defendant was misled.*

Bowker v. Cunningham, 78 N. J. Eq. 158. And see also, *In Re N. J. Refrigerating Co.*, 5 N. J. Adv. Rep. 127, citing *Eitel v. von Fell*, 55 N. J. Eq. 670; *Blau v. Public Service, etc. R. Co.*, 90 N. J. Eq. 280.

It is clear that the defendant was actuated by some strong influence, and the only reasonable inference from the facts proved is that he believed that the purchase of the property would be a good thing for him because the moving picture theatre would be there. Under such circumstances the Court ought not in the exercise of sound discretion to compel him to take the property.

2. **There is no provision in the contract for an assignment of the building and loan shares held by the complainants.** It seems that no one thought anything about it and the subject was not discussed when the contract was prepared. The inference is possible that the complainants thought of it and purposely refrained from saying anything.

The Court cannot direct the complainants to assign the shares and therefore, the contract is unenforceable. *V.-C. Griffin* says, at page 85, in *Street v. Harris*, 93 N. J. Eq. 83: "Bearing in

mind that the contract provides that the conveyance shall be subject to the building and loan mortgage now encumbering the property and did not provide for the placing of a new mortgage for that amount upon it, and turning to the condition of this bond and mortgage which provides that the mortgage shall be paid by the payment of one dollar per month per share on this very stock standing in the name of the complainant and pledged as collateral, it is quite unlikely that Mr. Harris intended to continue paying on stock standing in the name of Mrs. Street and not in his own until the mortgage was cancelled or the shares mature." And for the reason that the contract made no provision for the assignment of the shares to the purchaser, the bill in the case cited, was dismissed.

In this case, the contract, at page 7, provides that the purchaser is to take the property subject to a mortgage for \$35,000 held by the Star Building & Loan Association; and on p. 8, l. 12, subd. b, the contract provides that in case default is made in the payment of two monthly installments of principal and interest of the building and loan mortgage, the principal sum shall become due and payable immediately. The contract also provides (p. 7, ll. 22, 23), that the purchaser is to give a mortgage for the balance of the purchase money together with whatever money is credited in the building and loan back shares. This shows clearly that shares of stock had been put up as collateral and the shares were being paid for; and brings this case squarely within the decision by *V.-C. Griffin* in the case cited.

3. The complainants knew that the defendant did not intend to carry out the contract, some time before July 1, 1926, and they did not file their bill until December 31, 1926.

It has been decided frequently that in cases of this nature the complainant must seek relief promptly. Moreover, time is expressly made the essence of the contract, which would obligate the complainants to act promptly.

In this case, there was a definite refusal to perform and the bill should have been filed immediately.

Ketcham v. Owens, 55 N. J. Eq. 344;
Agens v. Koch, 74 N. J. Eq. 528.

And also, the facts in this case indicate that the complainants acquiesced in the abandonment of the contract by the defendant. In *Faulkner v. Wassmer*, 77 N. J. Eq. 537, a purchaser had complained to the vendor that restrictions were being violated by other parties, and the vendor said: "Start something if you think you have any rights." The purchaser delayed for four months after that conversation and this Court held that he was barred by acquiescence.

The delay of the complainants for six months, it is submitted, shows acquiescence in the abandonment of the contract and therefore, the complainants are not entitled to any equitable relief.

4. The appellant is entitled to a decree that the deposit money shall be paid back to him together with interest, and his reasonable costs and charges.

It is respectfully submitted that the decree from which the appeal has been taken should be reversed and a decree made in favor of the

appellant for the recovery of his deposit money, &c.

SIDNEY A. BIERMAN,
FRANK E. BRADNER,
Of Counsel with Appellant.

New Jersey Court of Errors and Appeals

Between

MAURICE SCHLESINGER and
HERBERT HERMAN,
Complainants-Respondents,

and

MICHAEL APPELBAUM,
Defendant-Appellant.

On Bill, etc.
On Appeal
from Court
of Chancery.

BRIEF FOR COMPLAINANTS-RESPONDENTS.

Facts.

On April 17, 1926, Herman & Company, who were not the owners of the property in question, but were the owners of an adjoining property, and acting as agents for the complainants, entered into a preliminary agreement with Michael Appelbaum, the defendant, whereby they agreed to sell the defendant premises in question, and accepted a preliminary deposit of \$500, with the express understanding that the \$500 check was to be returned to the defendant in the event that a theatre will not be erected, and said preliminary agreement provided that it holds until Saturday, April 24, 1926. This agreement is D. 1, and appears on pages 67-68 of the State of the Case.

On April 20, 1926, the complainants, who are the owners of the premises, and were at the time of the making of said contract, entered into a formal contract containing all of the terms, agreeing to convey the premises to the defendant, and in which the defendant agreed to purchase on said terms, which contract is Exhibit C. 1 and appears on pages 6-12, inclusive of the

State of the Case. The defendant, after having paid \$1,000 as a deposit on account of the purchase price, did not consummate the agreement, C. 1, and complainants brought this suit for specific performance of the said agreement. The defendant filed an answer and counterclaim, in which he admitted the making of the contract sued upon, the payment of the deposit and his refusal to comply with the agreement, and in the answer justifies his refusal on three grounds:

First—That it had been represented that all the stores and flats were rented, and that after he signed the contract he found that none of the flats or apartments were rented, and only two of the stores.

Second—That complainants had represented that they were going to put up a large theatre next to the property, and that nothing had been done in the way of building a theatre.

Third—That the cellar was full of water.

Defendant also sets up that he had been advised by counsel that there was on record a contract between a former owner and the New York and New Jersey Telephone Company, granting a right to erect, maintain and renew its poles, wires and fixtures *in front of* and abutting the property which he claimed constitutes an encumbrance. Defendant also claimed that the contract is uncertain, in that it makes no provision of the assignment of the building and loan shares to him.

The learned Vice-Chancellor, having heard the evidence on all these matters, and finding the facts to be as complainants alleged, and not as defendant pleaded, ordered a decree for specific performance. From this decree defendant has

appealed to this Court on three grounds, and the respondents in this brief will consider only those three grounds in the same order in which the appellant considers them.

ARGUMENT.

I.

The preliminary receipt, Exhibit D. 1, with which appellant begins his argument is of no force and effect whatsoever, as has been settled in this State beyond peradventure of a doubt.

Tansey v. Suckoneck, 98 N. J. Eq. 669;

Schneider v. Crawford, 99 N. J. Eq. 249;

Venino v. Naegele, 99 N. J. Eq. 183;

Thompson v. Kilheffer, 99 N. J. L. 439;

Kuskin, et al. v. Guttman, et al., 98 N. J. Eq. 617.

The only point about Exhibit D. 1 is that it contains a representation made by Herman & Company, who are strangers to the agreement, C. 1, and strangers so far as the parties to this suit are concerned, that they, Herman & Company, would erect a theatre next door to this property. Appellant now claims that he relied on that representation in entering into the agreement, C. 1, although C. 1 does not contain any such representation. The appellant, himself, testifies on cross examination regarding the drawing of the contract, Exhibit C. 1, on page 46, as follows:

“Q Now, Mr. Applebaum, when you came to my office on April 20, the time when the regular contract was drawn, you say Miss Jedell suggested to you that you should get your own lawyer? A Yes, sir; after that she said, of course—

Q She insisted on that? A Yes; I should bring a lawyer.

Q And it was because she suggested it you telephoned for Mr. Bierman? A Uh, huh.

Q And he came over to my office? A Uh, huh.

Q And he represented you, then? A Uh, huh.

Q This is before this contract was closed? A Yes.

Q And before the contract was signed? A Yes."

And on page 48, referring to the theatre representation, line 27, to top of page 50, as follows:

"Q They said they will not put it in the agreement? A Yes; my lawyer told me they wouldn't put it in the agreement. I said, 'What is the difference? So long as they say they are going to make it, they will surely make it. What is the difference whether they put it in the agreement or not?' That is what he told me.

Q Let me understand it clearly: At the time they were making the second contract they told you they will not put in the contract the agreement to build a moving picture theatre next door? A Uh, huh.

Q They told you—

The Court: The answer is 'Yes'?

The Witness: I say, 'Yes, yes.'

Q And your lawyer, Mr. Bierman, told you not to make the contract if they refused to put that in, didn't he? A Mr. Bierman told me not to sign the contract.

Q Yes; he told you not to sign the contract unless they put that in, didn't he? A I get mixed.

Q Didn't you say so a little while ago? A He asked me should I put it in the agreement—Mr. Bierman told me they didn't put the moving picture in the agreement to be guaranteed. I answered, 'They said they will be in another day or two days; we can't stop the agreement on account of this,' so I was satisfied.

Q I don't understand—

Mr. Bradner: I don't believe he understands what you are driving at.

M. Schotland: I don't understand.

Mr. Bradner: He is mixing up the conversation in the room and the private conversation with Bierman; that is the trouble.

The Court: Did Mr. Bierman tell you not to sign the big contract, if they did not put the moving picture in the big contract?

The Witness: He told me that.

The Court: Yes, and you signed it, anyway?

The Witness: Yes, I signed it, with confidence; they promised.

The Court: You said, 'I will sign it anyway'?

The Witness: Yes, sir."

And on page 52, lines 23-27, as follows:

"Q What did they say about Mr. Fabian? What did Mr. Fabian have to do with it? A He is the man that buys the theatre.

Q They told you he is the one that is buying it for the theatre? A Yes."

The appellant's solicitor, Mr. Bierman, who represented the appellant at the time of the drawing and signing of the contract, after testifying regarding the moving picture theatre representation in one way, and then trying to explain that he referred to the preliminary agreement, as a comparison of his testimony, on pages 58-59, shows, finally testified on re-direct, at the bottom of page 59, line 30, to bottom of page, and on re-cross on page 60, lines 1-14, as follows:

"Q Did you give any advice to Mr. Applebaum, in the presence of the Hermans?

A Yes.

Q What did you say, in the presence of the Hermans? A In the presence of the Hermans I said that that guarantee of a theatre was not enforceable.

Mr. Bradner: That is all.

Q And he said he will take the property anyway? A He signed the agreement, yes.

Q Did he say he will take the property anyway? A I don't know whether he said it in those words. He signed the agreement.

Q Substantially, did he say that? A Probably he said it.

"Mr. Schotland: All right. That is all."

On behalf of the complainants, Mr. Philip Herman testified at the bottom of page 63 line 37 to bottom of page and top of page 64, to line 13, as follows:

"Q What, if anything, did you say about the agreement to build a moving picture theatre? A I didn't say anything up there. Now, Mr. Bierman call out him and told him he wouldn't allow him to sign any agreement except they put this clause in, so I told him I wouldn't put anything in; this moving picture place is sold to Mr. Fabian and I can't guarantee when Mr. Fabian is going to build; the plans were made by Mr. Lehman. I told Applebaum, 'You can call up Mr. Fabian and ask him before you sign the agreement, or here is your check back.'

Q That is what you said? A Yes, sir."

And Helen Jedell testified on behalf of the complainants, page 23, line 25 to bottom of page, and page 24, to line 15, as follows:

"Q Now, what did Mr. Herman say about the clause when you came to draw the formal contract? A Mr. Herman said that absolutely he will not enter into the deal or have anything to do with Herman & Company representing such a moving picture theatre; he would much prefer to return the deposit right then and there, that the boys had originally taken. But that he will not

be a part of the deal; Mr. Applebaum will have to take the property without that or he can't take it at all.

Q What did Mr. Applebaum say? A Mr. Applebaum then went out with Mr. Bierman and they held a conference.

Q And did they come back after they held a conference? A They came back and Mr. Bierman said, 'I have advised Mr. Applebaum not to take the property, but Mr. Applebaum wants to take it anyhow. I haven't anything to say about it.'

Q Then did you proceed to draw the contract, C. 1? A Then I proceeded to draw the contract.

Q Without putting in that guarantee as to the threare? A Yes."

The evidence was therefore clear and overwhelming that on account of the changed situation between the preliminary agreement and the formal contract, C. 1, Herman & Company absolutely refused to make any representation that a moving picture theatre would be erected, and the defendant agreed to purchase the property, notwithstanding the positive refusal to make any such representation a part of or a basis for the contract, and the offer, if appellant was not satisfied, to return the preliminary deposit to him.

The law of the cases cited by appellant in his brief, therefore, does not apply to the situation here involved, and all of the evidence having been introduced on both sides regarding the oral conversation, the appellant had the full benefit of every opportunity to prove his claim without the rules of evidence having been interposed against him, and the Court, by its decree, found the facts in favor of the complainants, and respondents respectfully submit that such finding was in accordance with the clear weight of the evidence, and should be affirmed.

II.

The second point raised by the appellant is that there is no provision in the contract for an assignment of the building and loan shares held by the complainants, and appellant cites and relies upon *Street v. Harris*, 93 N. J. Eq. 83, as authority that the contract was not complete, and the minds of the parties had not met; but appellant completely overlooks the fact that the contract, Exhibit C. 1, after providing for the payment of the purchase price by means of \$1,000 deposit and \$7,000 in cash and \$35,000 by accepting the conveyance subject to a mortgage held by the Star B. & L. Association, which he assumes and agrees to pay, provided that "the balance, together with whatever money is credited in the building and loan as back shares, by executing and delivering to party of the first part his bond in double said amount, together with a purchase money mortgage which is to be a lien on the said premises, conditioned for the principal to be paid in three years from the time of the consummation of this agreement, with interest at the rate of 6% per annum * * *; that in case default is made in payment of two monthly instalments of principal and interest of the building and loan mortgage, which is a first lien on the said premises, then and in that event the principal sum therein secured shall become due and payable immediately thereafter, notwithstanding anything herein to the contrary."

Respondents respectfully submit that the above provisions fully cover the building and loan mortgage and its shares and differ completely from the situation before Vice-Chancellor Griffin in *Street v. Harris*. Here all the necessary provisions for adjusting the credits on the building and loan mortgage are contained in the contract,

and while a formal provision to assign the shares is not contained in it, there is not a word of evidence introduced to show that a formal assignment was necessary, asked for or refused. On the contrary, there is no mention of this point so far as the testimony before the Court goes; there is a passing mention of it in the answer.

Complainants respectfully submit, however, that by the terms of this contract, C. 1, no formal assignment of the shares was necessary, as there is an equitable assignment on the face of the contract, and that if the Court requires a formal assignment, the complainants would certainly execute same, as was probably the intention gathered from the terms of the contract itself.

III.

The third point argued on this appeal by appellant is "laches." This point was not set up in the answer, nor was there any testimony whatsoever introduced on behalf of the defendant-appellant, which would show that the defendant has brought himself within the rule to be able to raise the question of "laches" as enunciated by Vice-Chancellor Green in *Tynan v. Warren*, 53 N. J. Eq. 313, which rule has never been questioned, and is as follows:

"The rule that 'laches' in bringing suit will deprive one of his remedy is not applied, unless such neglect has so prejudiced the other party, by loss of testimony or means of proof, or changed relations, that it would be unjust to now permit him to enforce his rights."

The rule applied to cases like the one at bar is referred to by Vice-Chancellor Emery in *Ketcham v. Owens*, 55 N. J. Eq. 344, as follows:

"Where one party arbitrarily, or otherwise, notifies the other that he will not per-

form the contract, the bill, as the cases say, must be filed speedily, unless, indeed, the party to whom notice is given be in possession under the contract, in which case the continuance of possession will be considered as continual assertion of right under the contract, and exclude the notion of acquiescence in the abandonment."

And the learned Vice-Chancellor cites cases to support this rule, in which a delay of three and one-half years was held fatal, and goes on to say that in the English courts a year seems to have been fixed as the limit of time for filing bill, and then says:

"Without undertaking to fix so short a limit in the present case, as is fixed by the cases above referred to (and he there refers to *Watson v. Reid*, 1 Russ. & M. 236, and *McDermid v. McGregor*, 21 Minn. 111, but does not mention the length of time in those cases), or to say that any special limit should be fixed, it seems to me that the delay from April, 1890, when the notice was given, to August, 1893, is a bar to relief in this case."

The same learned Vice-Chancellor, in *Agens v. Koch*, 74 N. J. Eq. 528, which is also cited in appellant's brief, held, under the circumstances of that case:

"A delay in bringing suit from October to February was not 'laches,' under the facts of that case."

In the case at bar, the only evidence of any repudiation, if it can be called evidence, on that point, is the testimony of the defendant himself, on direct examination, beginning with line 30, on page 42, of the State of the Case, and ending with the middle of page 44, as follows:

"Q You went to see Mr. Herman, after you had been down there the last time. Now, what did you say to him? A To Samuel I said, 'What can you do for me?' He said he will speak to Mr. Schlesinger.

Q What can he do for you, what do you mean? A I said, 'How can I carry it, the stores are idle, the rent is idle, the moving picture—how can I carry it? I can't carry the same.' If they hadn't persuaded me to buy it I would never buy it. They said they are going to help me. They made all kinds of promises. Of course, I believed them. I had confidence when they told me.

Q What difference did it make whether the stores were rented or not, or the flats?

Mr. Schotland: I object to that.

The Court: I will sustain the objection.

Q You just stated that you told them the stores were vacant and the flats were vacant and the moving picture was not going up. A Yes, sir.

Q What did he say to that? A He said, 'I can't help it. You bought it, you must keep it.' He promised he would speak to Mr. Schlesinger, 'and see what we can do.'

Q Well, did you ever see him again? A They told me not to come to the office. I stopped.

Q Then what did you do? A Then I went over to Miss Jedell and said perhaps she can do something and she said she was over, and I told her the same thing, everything was idle and nothing is rented and the moving pictures is not there; she said, 'What can I do for you? Why don't you go to your own lawyer? He shall give you advice.' She said, 'You made so much expense, agreement and everything.' I said, 'I will stand the expense.' I paid in the thousand dollars and take off the expense that I made and they shall give me back.

Q Have you any of the letters that you received from Mr. Schotland's office? A No; she was herself—my son told me she was herself in the office, but I wasn't there for about three or four months ever since.

The Court: Did you get any letters from Miss Jedell?

The Witness: There was one time she sent somebody to go over to see her; that was all.

The Court: She sent word for you to come to see her?

The Witness: Yes, sir.

The Court: When was it?

The Witness: That was in October, about.

The Court: October?

The Witness: About in October.

The Court: Did she ever write you any letters?

The Witness: No, ma'am—no, sir."

and that shows that the appellant was then informed by Mr. Herman that he bought the property and must keep it, and that being aware of the fact that the complainants always insisted on the performance of the contract, he tried to buy his way out of it by asking Miss Jedell to interpose in his behalf, and finally she wrote him the letter which appears as Exhibit C. 3, on page 67 of the State of the Case, on October 15, 1926, notifying him that suit for specific performance would be started.

The facts in the case at bar clearly show that the appellant was, at all times, informed that complainants would insist on the performance of the contract by him, and, therefore, he never sued to recover the deposit, although it was a large sum, \$1,000, on the theory that complainants acquiesced in his abandonment of the contract, because he knew that they never would acquiesce in the abandonment of the contract, and that he never positively asserted that he would abandon the contract and would not take title. The only evidence in the case regarding the de-

lay in bringing suit is that given by Helen Jedell, on page 29, lines 1-10, as follows:

"Q Why was there such a long delay before this suit was brought? A Because I was negotiating all the time. I had written letters, written as late as October or November, or maybe later, to Mr. Applebaum.

Q To whom did you write the letters? A And copies of which we have."

Complainants respectfully submit that under the circumstances of this case the time that elapsed between the latter part of October, when the defendant was threatened with specific performance suit, and the latter part of December, when the bill was actually filed, does not constitute "laches" on the part of the complainants, as the delay was caused by the defendant himself, seeking negotiations for a settlement without being compelled to consummate the agreement which he knew that the complainants were insisting upon, according to his own testimony, and according to all of the testimony in the case.

Complainants respectfully submit that the decree directed by the learned Vice-Chancellor is in accordance with the law as applied to the facts of this case, and should be affirmed.

Respectfully submitted,

PHILIP J. SCHOTLAND,
Solicitor for and of Counsel with
Complainants-Respondents.

