INDEX

Bill of Complaint 1

Affidavit of Max Snider 17

Affidavit of William H. Satterthwait 30

Schedule A 34

Schedule B 41

Order to Show Cause 49

Answering Affidavit of Walter Reade 51

Replying Affidavit of Max Snider 63

Order for Restraint 66

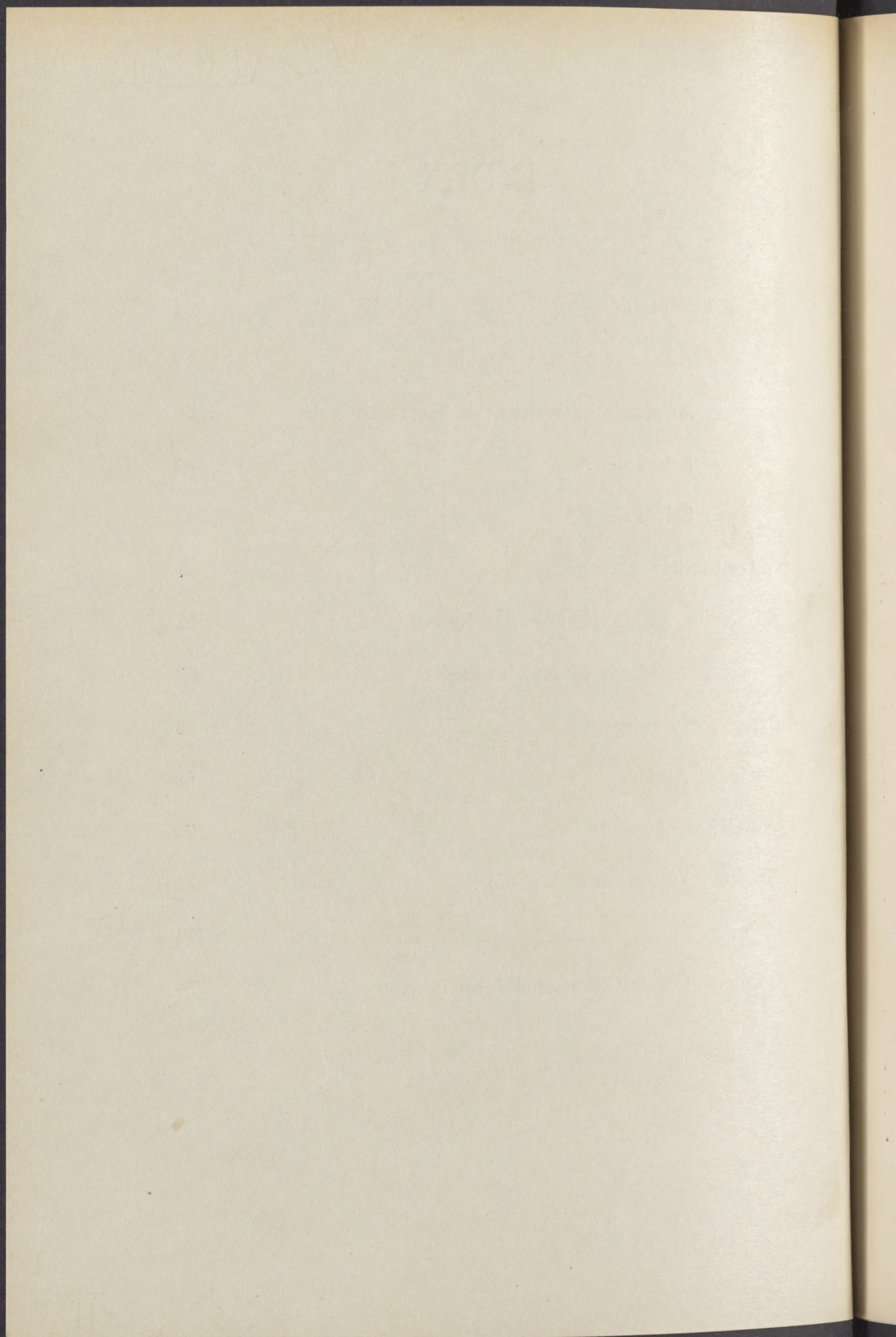
Notice of Appeal 68

Petition of Appeal 70

Answer to Petition of Appeal 73

Order 74

Opinion of Vice Chancellor John Bentley 78



BILL OF COMPLAINT

IN CHANCERY OF NEW JERSEY

TO THE HONORABLE EDWIN ROBERT WALKER,
CHANCELLOR OF THE STATE OF NEW JERSEY:

Complainant, Max Snider of the Borough of Freehold, in the County of Monmouth and State of New Jersey, respectfully shows:

1. On July 29th, 1922 Charles H. Clayton and Lizzie Clayton, his wife, conveyed to complainant in fee simple, the following described lands and premises: 10

> All that certain house and lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the Borough of Freehold, in the County of Monmouth and State of New Jersey, nearly opposite the banking house of the Freehold Banking Company on the southerly side of Main Street.
>
> FIRST TRACT: BEGINNING in the Main Street of said Borough at the beginning corner of said lot conveyed by John B. Throckmorton to James M. Hartshorne, deceased, running thence (1) south thirty-six degrees and fifteen minutes east three chains, thence (2) north sixty-three degrees east twenty-three links, thence (3) south sixteen degrees east ninety links, thence (4) south seventy-seven degrees east sixty-three links, thence (5) south eighty-seven degrees east fifty-three links, thence (6) in a southerly direction to a stake standing at the end of the first course referred to in a deed from D. C. Perrine and wife to James S. Lawrence dated April 28, 1856 recorded in the Clerk's Office of the County of Monmouth in Book M-6 of Deeds Folio 581 etc., be the distance more or less, thence (7) south forty-five degrees and thirty minutes west one chain and eighty-three links to the middle of Throckmorton Street, thence (8) in a northerly direction up the middle of said street ninety links, thence (9) north forty-eight degrees east one chain and twenty-four links, thence (10) north forty-two degrees west seventy- 20 30

40

three links, thence (11) south forty-eight degrees west thirty-four links, thence (12) north thirty-six degrees and fifteen minutes west four chains and twenty-seven links to the aforesaid Main Street, thence (13) in an easterly course along said Main Street to the beginning, be the distance more or less.

10 Being the same premises that were conveyed to Phoebe Ann Lawrence, deceased, by Edward T. Wyckoff and wife and Joseph T. Scudder and wife who claimed title to the same under the Will of James S. Lawrence, deceased, by deed dated September 30, 1868, recorded in the Clerk's Office of Monmouth County in Book 208 of Deeds page 448 etc.

20 Excepting out of said premises a small parcel of land conveyed by the said Phoebe Ann Lawrence to the Squankum and Freehold Marl Company by deed dated December 18, 1868 recorded December 19, 1868 which said parcel of land was conveyed subject to a right of way across the same as recited in said last mentioned deed.

30 Excepting also out of said premises a piece or parcel of land conveyed by said Phoebe Ann Lawrence to John D. Buckelew Trustee, by deed dated December 18, 1868 recorded in the Monmouth County Clerk's Office in Book 211 of Deeds, page 136 etc., which said deed after the description of the land conveyed contains the following recital: to wit, "The foregoing description includes a strip of land this day conveyed to the Squankum and Freehold Marl Company, twenty-five feet wide, that is to say, ten feet wide on the north side and fifteen feet wide on the south side of the central line of the railroad, but said strip is excepted and reserved and is not conveyed by this deed, the party of the first part reserving to herself and her heirs and assigns forever a right of way twelve feet wide from some point east of the beginning in said first described line and extending to either Throckmorton or South Street and the said party

40

of the first part hereby releases the said party of the second part from all obligations to construct or maintain any fence along said land line herein first described."

Being the same premises conveyed to Charles H. Clayton by Nelson Armstrong by deed dated March 8, 1909 and recorded in the Monmouth County Clerk's Office in Book 845 of Deeds, Page 166, etc.

Excepting out of the above described lands a piece or parcel of land described as follows:

BEGINNING at a stone a corner of lands of Edward Simonson, and in line of land of Charles H. Clayton, also the northwest corner of a tract of land conveyed by James M. Ayres and wife to the Freehold and Jamesburg Agricultural Railroad, thence running (1) north two degrees and forty-six minutes west along line between lands of said Clayton and said Simonson twenty-eight feet and ninety-seven hundredths to a corner, thence (2) north seventy-four degrees and twenty-two minutes west still along said line twenty-seven feet and eighty-nine hundredths to a stake in same, thence (3) south thirty-seven degrees and fifty-three minutes east forty-six feet and eight hundredths to the place of beginning. Being the same premises conveyed to Edward Simonson by Charles H. Clayton and wife, by deed dated June 16, 1911 and recorded in the Monmouth County Clerk's Office in Book 906 of Deeds, Page 477.
Deeds, Page 477.

SECOND TRACT: BEGINNING at a stake in line between lands of C. H. Clayton and Edward Simonson at the third corner of a tract of land conveyed by said Clayton to said Simonson by deed dated June 16, 1911 and recorded in Book 920 of Deeds, Page 335, etc., said stake being forty-six feet and eight hundredths on a course of north thirty-seven degrees and fifty-three minutes west from a stone the northwest corner of a tract con-

veyed to the Freehold and Jamesburg Agricultural Railroad of James A. Ayres and wife, thence running (1) north seventy-four degrees and twenty-two minutes west along said line between Clayton and Simonson fifty feet and twenty-four hundredths to a corner, thence (2) north twelve degrees and twelve minutes west still along same twenty-eight feet to the northwest corner of said Simonson's land, thence (3) south fifty-nine degrees and twenty-five minutes east forty-eight feet and sixteen hundredths to a stake, thence (4) south thirty-seven degrees and fifty-three minutes east twenty-one feet and two hundredths to the place of beginning.

Being the same premises conveyed to Charles H. Clayton, by Edward Simonson and wife, by deed dated June 16, 1911 and recorded in the Monmouth County Clerk's Office in Book 920 of Deeds, Page 335, etc.

This deed is intended to include all the rights of way conferred upon the said Charles H. Clayton and the owners and tenants of the property first above described, in and by a certain deed made by Joseph L. Donahay and wife to James McNinnie dated February 10, 1913 and recorded in the Monmouth County Clerk's Office in Book 946 of Deeds, Page 270, etc., and any and all other rights of way appurtenant to the said premises.

Complainant is still the owner of said premises.

2. There is erected on said lands and premises a frame and brick building, part of which is designed for a theatre.

3. On August 28th, 1924 complainant entered into a lease with the United Theatres of America, Inc. for the theatre building. A true copy of said lease is attached hereto and made a part hereof, and marked schedule "A."

4. Said lease provided among other things that it was to commence on August 1st, 1924 and terminate on September 1st, 1929; that the United Theatres of America, Inc. were to pay the annual rent of $6000.00 to complainant for the use of the said theatre building and that the building will be used as a moving picture theatre and for other theatrical purposes but for no other purpose. The lease also contained a provision against its being assigned and it further provided for the deposit by the United Theatres of America, Inc. with complainant of $1000.00 in cash and $5000.00 in bonds. 10

5. On or about the 14th day of December, 1925 the United Theatres of America, Inc. executed an assignment of the hereinbefore described lease to one Clarence A. Cohen of the City, County and State of New York. The assignment was on condition that the consent of complainant was obtained. 20

6. Thereafter and on January 4th, 1926 an agreement was entered into between complainant and said Clarence A. Cohen, wherein and whereby complainant leased to said Clarence A. Cohen the hereinbefore described theatre building and returned to the United Theatres of America, Inc. the $1000.00 in cash and $5000.00 gold bonds which had been deposited with complainant by said United Theatres of America, Inc. by the terms of the lease between complainant and United Theatres of America, Inc. 30

7. The agreement made between complainant and Clarence A. Cohen provided for the elimination of certain provisions of the original lease between the complainant and the United Theatres of America, Inc. and for the addition to said lease of various provisions set forth in said agreement. A true copy of said agree-

ment is annexed hereto and made a part hereof and marked Schedule "B".

8. In and by the agreement of January 4th, 1926 between complainant and Clarence A. Cohen, it was among other things provided that the lessee (Clarence A. Cohen) should have the privilege to sublet or assign the lease to a corporation formed for operating the said theatre, without the consent of said complainant and that the said Clarence A. Cohen should within three months from the date of the agreement erect in front of the theatre building a Marquis to advertise and attract attention to the theatre both in the day time and at night and that the term of the lease should be extended to September 1st, 1934 and that said Clarence A. Cohen would deposit with the complainant the sum of $6000.00 in cash subject to interest at the rate of 4 per cent. payable annually which sum was to be held in trust and to be returned to said Clarence A. Cohen on the 1st of August, 1934 subject to the complainant deducting from said fund of $6000.00 any arrearages of rent.

9. The said agreement of January 4th, 1926 further provided that the premises were to be occupied solely for the purpose of the theatre and that "unless in an unavoidable circumstance and during June, July and August" theatrical performances and moving picture shows were to be held not less than three of the six days in each and every week of the term and that the said premises were not to lie idle or to be untenanted at any time during said term.

10 An option was given by complainant to said Clarence A. Cohen of purchasing the said premises for the sum of $115,000.00.

11. To secure to said Clarence A. Cohen the return of the sum of $6000.00 so deposited with complainant as aforesaid, complainant on January 4th, 1926 executed a mortgage to said Clarence A. Cohen in the sum of $6000.00 which said mortgage by its terms is payable on August 28th, 1934 and covers "all that tract or parcel of land and premises hereinafter particularly described situate, lying and being in the Borough of Freehold in the County of Monmouth and State of New Jersey, mentioned in an agreement dated January 4th, 1926 between the above mentioned parties; and recorded in the County Clerk's Office of Freehold, New Jersey." The said mortgage having been duly executed and the certificate of acknowledgement having been duly endorsed thereon was recorded in the County Clerk's Office of Monmouth County in Book 736 of Mortgages on Page 147. The agreement dated January 4th, 1926 between complainant and said Clarence A. Cohen is incorporated at length in said mortgage and is recorded as part thereof.

12. On January 13th, 1926 Clarence A. Cohen assigned said mortgage to The Freehold Theatre Company, a corporation of the State of New Jersey which said assignment was on January 26th, 1926 recorded in the County Clerk's Office of Monmouth County in Book 95 of Assignments Page 228.

13. The Freehold Theatre Company is a corporation owned and controlled by Walter Reade who operates a chain of moving picture theatres in the State of New Jersey and he was at and prior to January 4th, 1926 (the time when the agreement between complainant and said Clarence A. Cohen was entered into) the operator and had control of the only other theatre in Freehold which theatre is known as the Strand Theatre. The Strand Theatre was at that time and still is

10

20

30

40

operated as a moving picture theatre. The complainant's theatre is known as the Embassy Theatre and is a larger theatre than the Strand Theatre.

14. After the agreement between complainant and the said Clarence A. Cohen and in or about the 15th day of January, 1926, the Embassy Theatre (complainant's theatre) was opened under the same management as the Strand Theatre. The two said theatres were managed by William H. Satterthwait. The said Embassy Theatre remained open until the Saturday before Decoration Day of the year 1926. It was then closed until September, 1926, when it was opened and operated for about three months at the admission price of ten and fifteen cents. Moving pictures were shown but the theatre had no music. After that the admission price was discontinued and theatre remained open for three nights a week as a free theatre until in or about the month of February, 1927 when it was closed and has not been opened or operated as a theatre or as anything else since that time.

15. At the time of the agreement of January 4th, 1926 the Embassy Theatre was a completely equipped moving picture theatre. Since that time the theatre building and its equipment have suffered great damage for various reasons to wit; The theatre building has not been heated since in or about the month of February, 1927 and the dampness has gotten into the walls, the metal ceiling and various other parts of the building, thereby causing the plaster to peel and the paint on the walls to peel off, the metal ceiling to rust and break open, the seats to warp and crack; the theatre has not been cleaned for a long time thereby allowing a great accumulation of dust to get into the building and ruining the draperies and other hangings in the building. The roof has not been repaired and it leaks

badly. One moving picture machine has been completely removed and parts of the other machine have been removed; some of the furnishings have been removed to wit; chairs, settees, tables, fire extinguishers, lamp shades, electric light bulbs, piano, music stands, stage foot lights, part of the scenery and part of the electrical generating equipment. The greater portion, if not all of the equipment that was removed, has been taken to the Strand Theatre. It was moved at the special instance and request of The Freehold Theatre Company and/or Walter Reade and/or Trenton Theatre Building Company; some of the plumbing has been ripped out and some of the office equipment has been taken. The moving picture machines were worth at the time of the agreement of January 4th, 1926, approximately $1000 apiece. The electrical generating equipment is worth about $3700 and the damage to the building and the loss of the equipment amounts to approximately $25,000.

16. The theatre owned by complainant had been operating for some years prior to the lease to Cohen and had been extensively advertised as a theatre. It has a much more favorable location in Freehold than the Strand Theatre and enjoyed wide patronage, whereas the Strand Theatre had not been operated successfully and had, in about 1925, failed.

16a. At a foreclosure sale in 1925, the Strand Theatre was struck off to Walter Reade by the Sheriff of Monmouth County, which bid was assigned by said Walter Reade to the Trenton Theatre Building Company, and the deed for the property was given by the said Sheriff to said Trenton Theatre Building Company, which owned the property since the early part of the year 1926, and still owns the same. The Trenton Theatre Building Company is a corporation owned and con-

10

20

30

40

trolled by Walter Reade. The Strand Theatre is known in Freehold as Reade's Strand Theatre and has been extensively advertised as such.

17. The theatre of complainant seats approximately 1037 people, whereas the Strand Theatre seats approximately 900 people.

10

18. Shortly after the agreement was signed with Cohen, a large sign was placed in front of complainant's theatre reading "Reade's Embassy Theatre." This was the first notice complainant had that Walter Reade had anything to do with the theatre. During the negotiations with Cohen for the lease of the theatre by him, it was represented to complainant by the agent who negotiated the lease for Cohen that Cohen was actually independent and that Walter Reade had nothing to do with the leasing of the theatre. Complainant has expressed his unwillingness to lease his theatre to Walter Reade, feeling that if said Reade got control of his theatre it would suffer because of Reade's greater interest in the theatre property he owned, to wit, the Strand Theatre.

20

18a. Complainant has been advised that the Freehold Theatre Company is absolutely without funds and is unable to make payment of rent. This information was conveyed by Walter Reade in the form of a letter, on June 18, 1928, to the attorneys who then represented the complainant.

30

19. Complainant has received no rent for the theatre building since April, 1929. On or about April 30, 1929 he received a letter which reads as follows:

40

April 30, 1929.

Mr. Max Snider
West Main St.
Freehold, N. J.
Dear Mr. Snider:

We are omitting sending you rent check this month for the payment of rent for the Strand Theatre, Freehold, as we are applying the amount against interest due us on the $6000.00 security held by you.

10

We have computed this interest from Jan. 4, 1926 to June 4, 1929 or 3 years and 5 months at 4 per cent., a total of $820.00. We shall apply the balance of $320.00 due us against June rent and on June 1st, you will receive a check for $180.00.

Kindly acknowledge receipt of this letter, so that there will be no misunderstanding.

20

Yours very truly,

WALTER READE

Complainant has not paid the interest on the $6000.00 deposit (secured by mortgage hereinbefore set forth.) The mortgage and agreement by its terms called for the payment of interest annually so that if the interest is deductible from accrued rent, only three years interest is deductible or $720.00. There is due and owing to complainant the sum of $2000.00 for rent less three years interest on the security deposited under the lease to wit; $720.00 or $1280.00 for rent.

30

20. There has been placed in the theatre lobby in the middle doors thereof two signs, one reading "Reade's Embassy Theatre for sale or lease at attractive figures for commercial purposes only, Inquire Strand Theatre," the other reading "This building for

40

sale or lease at attractive figures for commercial purposes, Inquire Strand Theatre."

21. Complainant charges that the lease was procured by said Clarence A. Cohen for Walter Reade and that Walter Reade was in fact the principal in the negotiations and in the agreement for lease entered into between complainant and said Clarence A. Cohen.

10

22. Complainant charges that it is and was the design of said Clarence A. Cohen, Walter Reade, The Freehold Theatre Company and/or Trenton Theatre Building Company, to keep complainant's theatre closed so that the Strand Theatre would gain the entire patronage of the people of Freehold and vicinity.

23. Complainant charges that the said Clarence A. Cohen, Walter Reade, The Freehold Theatre Company and/or Trenton Theatre Building Company, its officers and agents, or some of them, are acting in concert to ruin the theatre property of complainant and its contents.

20

24. Complainant charges that his theatre property has been damaged to a great extent in being closed for so long a time in that it has lost the benefit of the advertising heretofore made in behalf of it as a theatre and that people in Freehold and vicinity will have gotten out of the habit of going to it, if and when it is reopened as a theatre.

30

25. Complainant charges that the assignment by Clarence A. Cohen to the Freehold Theatre Company of the lease of the said theatre (if such assignment has been made, although complainant has no notice of it) is in violation of the terms of the lease between complainant and the United Theatres of America, Inc. and of the agreement between complainant and Clarence A. Cohen.

40

26. Complainant charges that the removal and changes as herein set forth are in violation of paragraph five of the lease.

27. Complainant charges that the manner in which the theatre has been kept is in violation of paragraph seven of the lease.

28. The male toilet existing in the theatre has been inaccessible to tenants occupying the stores in the front part of the theatre building in violation of paragraph eight of the lease.

29. Complainant avers that he is entitled to the surrender of the premises and the cancellation of the lease and agreement under and by virtue of paragraph fifteen of the lease.

30. Complainant charges that the marquis provided for in paragraph two of the agreement of January 4th, 1926, has not been erected, in violation of the terms of said agreement.

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

I.

That The Freehold Theatre Company, a corporation of the State of New Jersey, Clarence A. Cohen, Walter Reade, United Theatres of America, Inc. and Trenton Theatre Building Company, a corporation of New Jersey, who are defendants in this suit, may answer this bill of complaint and each statement therein made.

II.

That a decree may be made cancelling the lease for the United Theatres Company, Inc., the agreement

10 20 30 40

with Clarence A. Cohen and the assignment by Clarence A. Cohen to the Freehold Theatre Company, a corporation of the State of New Jersey.

III.

That a decree may be made cancelling the mortgage executed by complainant to Clarence A. Cohen and assignment by Clarence A. Cohen to The Freehold Theatre Company.

IV.

That a decree may be made for the removal of Clarence A. Cohen, The Freehold Theatre Company, United Theatres of America, Inc. and/or Walter Reade as tenants of said theatre building.

V.

That a decree may be made adjudicating as to the damage suffered to the theatre building, its contents, by waste, failure to repair, removal, or from any other cause and that an adjudication be made as to the damage suffered in the good will of the theatre.

VI.

That a decree may be made requiring the United Theatres of America, Inc., The Freehold Theatre Company, Clarence A. Cohen, Walter Reade and Trenton Theatre Building Company, or one or more of them, to pay to complainant the amount of which he may be found to have suffered by reason of waste, failure of repair, removal or from any other cause, and from loss of good will in and about the said theatre building.

VII.

That a decree may be made that United Theatres of America, Inc., The Freehold Theatre Company, Clarence A. Cohen, Walter Reade and Trenton Theatre Building Company, or one or more of them, pay the rent of the said theatre building.

VIII.

That a decree may be made that the deposit to complainant under the terms of the said agreement with Clarence A. Cohen be forefeited and that it be the property of complainant.

IX.

That a decree may be made enjoining and restraining the defendants, United Theatres of America, Inc., The Freehold Theatre Company, Clarence A. Cohen, Walter Reade and Trenton Theatre Building Company, their servants, and agents, from removing any of the contents of complainant's theatre building, or any part of the building itself.

X.

That the defendants, United Theatres of America, Inc., The Freehold Theatre Company, Clarence A. Cohen and Walter Reade, their servants and agents, may be enjoined and commanded to forthwith open the theatre and run it as a theatre in accordance with the terms of the lease and agreement referred to herein; and that the said defendants, United Theatres of America, Inc., The Freehold Theatre Company, Clarence A. Cohen and Walter Reade may be enjoined and commanded to forthwith erect a marquis in the front of said theatre building.

10 20 30 40

XI.

That a decree may be made adjudicating in what respects the defendants, United Theatres of America, Inc., The Freehold Theatre Company, Clarence A. Cohen and Walter Reade, or one or more of them, have violated the terms of the agreement and lease and that the said defendants, United Theatres of America, Inc., The Freehold Theatre Company, Clarence A. Cohen, Walter Reade and Trenton Theatre Building Company, or one or more of them, may be enjoined and commanded to replace the property which may have been removed, and to repair the theatre so that it may be in the same condition it was when the lease was entered into and that they may be enjoined and commanded to do all things which by the lease and agreement they were to do.

XII.

That a decree may be made adjudicating the amount in which the complainant has suffered damage by reason of the failure of the said defendants to do and perform the various covenants and conditions of the said lease and agreement, and that they or one or more of them may be decreed to pay to the complainant the amount so found due.

XIII.

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

JOHN L. RIDLEY,

Solicitor for and of counsel with complainant.

Filed August 16, 1929.

BILL OF COMPLAINT

AFFIDAVIT OF MAX SNIDER

State of New Jersey }
County of Monmouth } ss.

MAX SNIDER of full age being duly sworn according to law on his oath deposes and says:

1. On July 29th, 1922, Charles H. Clayton and Lizzie Clayton, his wife, conveyed to me in fee simple, the following described lands and premises:

10

All that certain house and lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Borough of Freehold, in the County of Monmouth and State of New Jersey, nearly opposite the banking house of Freehold Banking Company on the southerly side of Main Street.

FIRST TRACT; BEGINNING in the Main Street of said Borough at the beginning corner of said lot conveyed by John B. Throckmorton to James M. Hartshorne, deceased, running thence (1) south thirty-six degrees and fifteen minutes east three chains, thence (2) north sixty-three degrees east twenty-three links, thence (3) south sixteen degrees east ninety links, thence (4) south seventy-seven degrees east sixty-three links, thence (5) south eighty-seven degrees east fifty-three links, thence (6) in a southerly direction to a stake standing at the end of the first course referred to in a deed from D. C. Perrine and wife to James S. Lawrence dated April 28, 1856 recorded in the Clerk's Office of the County of Monmouth in Book M-6 of deeds Folio 581 &c., be the distance more or less, thence (7) south forty-five degrees and thirty minutes west one chain and eighty-three links to the middle of Throckmorton Street, thence (8) in a northerly direction up the middle of said street ninety links, thence (9) north forty-eight degrees east one chain and twenty-four links, thence (10) north forty-two degrees west seventy-three links, thence (11) south forty-eight degrees

20

30

40

west thirty-four links, thence (12) north thirty-six degrees and fifteen minutes west four chains and twenty-seven links to the aforesaid Main Street, thence (13) in an easterly course along said Main Street to the beginning, be the distance more or less.

10 Being the same premises that were conveyed to Phoebe Ann Lawrence, deceased, by Edward T. Wyckoff and wife and Joseph T. Scudder and wife who claimed title to the same under the Will of James S. Lawrence, deceased, by deed dated September 30, 1868, recorded in the Clerk's Office of Monmouth County in Book 208 of Deeds page 448 &c.

20 Excepting out of said premises a small parcel of land conveyed by the said Phoebe Ann Lawrence to the Squankum and Freehold Marl Company by deed dated December 18, 1868, recorded December 19, 1868 which said parcel of land was conveyed subject to a right of way across the same as recited in said last mentioned deed.

30 Excepting also out of said premises a piece or parcel of land conveyed by said Phoebe Ann Lawrence to John D. Buckelew Trustee, by deed dated December 18, 1868 recorded in the Monmouth County Clerk's Office in Book 211 of Deeds, Page 136 &c., which said deed after the description of the land conveyed contains the following recital: to wit, "The foregoing description includes a strip of land this day conveyed to the Squankum and Freehold Marl Company, twentyfive feet wide, that is to say, ten feet wide on the north side and fifteen feet wide on the south side of the central line of the railroad, but said strip is excepted and reserved and is not conveyed by this deed, the party of the first part reserving to herself and her heirs and assigns forever a right of way twelve feet wide from some point east of the beginning in said first described line and extending to either Throckmorton or South Street and the said party of the

first part hereby releases the said party of the second part from all obligations to construct or maintain any fence along said land line herein first described."

Being the same premises conveyed to Charles H. Clayton by Nelson Armstrong by deed dated March 8, 1909 and recorded in the Monmouth County Clerk's Office in Book 845 of Deeds, Page 166 &c. Excepting out of the above described lands a piece or parcel of land described as follows: 10

BEGINNING at a stone a corner of lands of Edward Simonson, and in line of land of Charles H. Clayton, also the northwest corner of a tract of land conveyed by James M. Ayres and wife to the Freehold and Jamesburg Agricultural Railroad, thence running (1) north two degrees and forty-six minutes west along line between lands of said Clayton and said Simonson twenty-eight feet and ninety-seven hundredths to a corner, thence (2) north seventy-four degrees and twenty-two minutes west still along said line twenty-seven feet and eighty-nine hundredths to a stake in same, thence (3) south thirty-seven degrees and fifty-three minutes east forty-six feet and eight hundredths to the place of beginning. Being the same premises conveyed to Edward Simonson by Charles H. Clayton and wife, by deed dated June 16, 1911 and recorded in the Monmouth County Clerk's Office in Book 906 of Deeds, Page 477. 20

SECOND TRACT: BEGINNING at a stake in line between lands of C. H. Clayton and Edward Simonson at the third corner of a tract of land conveyed by said Clayton to said Simonson by deed dated June 16, 1911 and recorded in Book 920 of Deeds, Page 333 &c., said stake being forty-six feet and eight hundredths on a course of north thirty-seven degrees and fifty-three minutes west from a stone the northwest corner of a tract conbeyed to the Freehold and Jamesburg Agricultural Railroad of James A. Ayres and wife, thence run- 30

40

ning (1) north seventy-four degrees and twenty-two minutes west along said line between Clayton and Simonson fifty feet and twenty-four hundredths to a corner, thence (2) north twelve degrees and twelve minutes west still along same twenty-eight feet to the northwest corner of said Simonson's land, thence (3) south fifty-nine degrees and twenty-five minutes east forty-eight feet and sixteen hundredths to a stake, thence (4) south thirty-seven degrees and fifty-three minutes east twenty-one feet and two hundredths to the place of beginning.

10

Being the same premises conveyed to Charles H. Clayton, by Edward Simonson and wife, by deed dated June 16, 1911 and recorded in the Monmouth County Clerk's Office in Book 920 of Deeds, Page 335, etc.

This deed is intended to include all the rights of way conferred upon the said Charles H. Clayton and the owners and tenants of the property first above described, in and by a certain deed made by Joseph L. Donahay and wife to James McNinnie, dated February 10, 1913 and recorded in the Monmouth County Clerk's Office in Book 946 of Deeds, Page 270, etc., and any and all other rights of way appurtenant to the said premises.

20

I am still the owner of the said premises.

2. There is erected on said lands and premises a frame and brick building, part of which is designed for a theatre.

30

3. On August 28th, 1924 I entered into a lease with the United Theatres of America, Inc., for the theatre building. A true copy of said lease is attached hereto and made a part hereof.

4. Said lease provided among other things that it was to commence on August 1st, 1924 and terminate on September 1st, 1929; that the United Theatres of

40

America, Inc. were to pay the annual rent of $6000.00 to me for the use of the said theatre building and that the building will be used as a moving picture theatre and for other theatrical purposes but for no other purposes. The lease also contained a provision against its being assigned and it further provided for the deposit by the United Theatres of America, Inc., with me of $1000.00 in cash and $5000.00 in bonds. 10

5. On or about the 14th day of December, 1925, the United Theatres of America, Inc., executed an assignment of the hereinbefore described lease to one Clarence A. Cohen of the City, County and State of New York. The assignment was on condition that my consent be obtained.

6. Thereafter and on January 4th, 1926, an agreement was entered into between me and said Clarence A. Cohen wherein and whereby I leased to said Clarence A. Cohen the hereinbefore described theatre building and returned to the United Theatres of America, Inc., the $1000.00 in cash and $5000.00 gold bonds which had been deposited with me by said United Theatres of America, Inc., by the terms of the lease between me and the United Theatres of America, Inc. 20

7. The agreement made between me and Clarence A. Cohen provided for the elimination of certain provisions of the original lease between me and the United Theatres of America, Inc., for the addition to said lease of various provisions set forth in said agreement. A true copy of said agreement is annexed hereto and made a part hereof and marked Schedule "B." 30

8. In and by the agreement of January 4th, 1926, between me and Clarence A. Cohen, it was among other things provided that the lessee (Clarence A. Cohen) should have the privilege to sublet or assign

 40

the lease to a corporation formed for operating the said theatre, without my consent and that the said Clarence A. Cohen should within three months from the date of the agreement erect in front of the theatre building a Marquee to advertise and attract attention to the theatre both in the day time and at night and that the term of the lease should be extended to September 1st, 1934 and that said Clarence A. Cohen would deposit with me the sum of $6000.00 in cash subject to interest at the rate of 4 per cent. payable annually which sum was to be held in trust and to be returned to said Clarence A. Cohen on the first of August, 1934, subject to me deducting from said fund of $6000.00 any arrearages of rent.

9. The said agreement of January 4th, 1926 further provided that the premises were to be occupied solely for the purpose of the theatre and that "unless in an unavoidable circumstance and during June, July and August" theatrical performances and moving picture shows were to be held not less than three of the six days in each and every week of the term and that the said premises were not to lie idle or to be untenanted at any time during said term.

10. An option was given by me to said Clarence A. Cohen purchasing the said premises for the sum of $115,000.00.

11. To secure to said Clarence A. Cohen the return of the sum of $6000.00 so deposited with me as aforesaid, I, on January 4th, 1926 executed a mortgage to said Clarence A. Cohen in the sum of $6000.00 which said mortgage by its terms is payable on August 28th, 1934, and covers "all that tract or parcel of land and premises hereinafter particularly described situate, lying and being in the Borough of Freehold in the County

of Monmouth and State of New Jersey, mentioned in an agreement dated January 4th, 1926 between the above mentioned parties; and recorded in the County Clerk's Office of Freehold, New Jersey." The said mortgage having been duly executed and the certificate of acknowledgment having been duly endorsed thereon was recorded in the County Clerk's Office of Monmouth County in Book 736 of Mortgage on Page 147. The agreement dated January 4th, 1926 between me and said Clarence A. Cohen is incorporated at length in said mortgage and is recorded as part thereof.

10

12. On January 13th, 1926 Clarence A. Cohen assigned said mortgage to The Freehold Theatre Company, a corporation of the State of New Jersey, which said assignment was on January 26th, 1926 recorded in the County Clerk's Office of Monmouth County in Book 95 of Assignments, Page 228.

20

13. The Freehold Theatre Company is a corporation of which Walter Reade is vice president and treasurer and I believe that it is owned and controlled by said Walter Reade. The said Walter Reade operates a chain of moving picture theatres in the State of New Jersey and he was at and prior to January 4th, 1926 (the time when the agreement between me and said Clarence A. Cohen was entered into) the owner and had control of the only other theatre in Freehold which theatre is known as the Strand Theatre. The Strand Theatre was at that time and still is operated as a moving picture theatre. My theatre is known as the Embassy Theatre and is a larger theatre than the Strand Theatre.

30

14. After the agreement between me and the said Clarence A. Cohen and in or about the 15th day of January, 1926 the Embassy Theatre (my theatre) was

40

opened under the same management as the Strand Theatre. The two said theatres were managed by William H. Satterthwait. The said Embassy Theatre remained opened until the Saturday before Decoration Day of the year 1926. It was then closed until September, 1926, when it was opened and operated for about three months at the admission price of ten and fifteen cents. Moving pictures were shown but the theatre had no music. After that the admission price was discontinued and the theatre remained open for three nights a week as a free theatre until in or about the month of February, 1927, when it was closed and has not been opened or operated as a theatre or as anything, also since that time.

15. At the time of the agreement of January 4th, 1926 the Embassy Theatre was a completely equipped moving picture theatre. Since that time the theatre building and its equipment have suffered great damage for various reasons to wit; The theatre building has not been heated since in or about the month of February, 1927 and the dampness has gotten into the walls, the metal ceiling and various other parts of the building, thereby causing the plaster to peel and the paint on the walls to peel off, the metal ceiling to rust and break open, the seats to warp and crack, the theatre has not been cleaned for a long time thereby allowing a great accumulation of dust to get into the building and ruining the draperies and other hangings in the building. The roof has not been repaired and it leaks badly. One moving picture machine has been completely removed and parts of the other machine have been removed; some of the furnishings have been removed to wit; chairs, settees, tables, fire extinguishers, lamp shades, electric light bulbs, piano, music stands, stage foot lights, part of the scenery and part of the

electrical generating equipment. The greater portion, if not all of the equipment that was removed, has been taken to the Strand Theatre. It was moved at the special instance and request of The Freehold Theatre Company, Trenton Theatre Building Company and/or Walter Reade; some of the plumbing has been ripped out and some of the office equipment has been taken. The moving picture machines were worth at the time of the agreement of January 4th, 1926, approximately $1000.00 a piece. The electrical generating equipment is worth about $3500.00 and the damage to the building and the loss of other equipment amounts to approximately $25,000.00.

10

16. The theatre owned by me had been operating for some years prior to the lease to Cohen and had been extensively advertised as a theatre. It has a much more favorable location in Freehold than the Strand Theatre and enjoyed wide patronage whereas the Strand Theatre had not been operated successfully and had in or about 1926 failed. It was bought in by Walter Reade at a sheriff's sale.

20

17. My theatre seats approximately 1307 people whereas the Strand Theatre seats approximately 900 people.

18. Shortly after the agreement was signed with Cohen, a large sign was placed in front of my theatre reading "Reade's Embassy Theatre." This was the first notice I had that Walter Reade had anything to do with the theatre. During the negotiations with Cohen for the lease of the theatre by him, it was represented to me by the agent who negotiated the lease for Cohen that Cohen was actually independent and that Walter Reade had nothing to do with the leasing of the theatre. I had expressed his unwillingness to lease

30

40

my theatre to Walter Reade feeling that if said Reade got control of my theatre it would suffer because of Reade's greater interest in the theatre property he owned to wit; the Strand Theatre.

19. I have received no rent for the theatre building since April, 1929. In or about April 30th, 1929 I re-
10 ceived a letter which read as follows:

April 30, 1929.

Mr. Max Snider

West Main St.,

Freehold, N. J.

Dear Mr. Snider:

20 We are omitting sending you rent check this month for the payment of rent for the Embassy Theatre, Freehold, as we are applying the amount against interest due us on the $6000.00 security held by you.

We have computed this interest from Jan. 4, 1926 to Jan. 4, 1929 or three years and five months at 4 per cent., a total of $820.00. We shall apply the balance of $320.00 due us against June rent
30 and on June 1st, you will receive a check for $180.00.

Kindly acknowledge receipt of this letter, so that there will be no misunderstanding.

Yours very truly,

Walter Reade.

40

I have not paid the interest on the $6000.00 deposit (secured by mortgage hereinbefore set forth). The mortgage and agreement by its terms called for the payment of interest annually so that if the interest is deductible from accrued rent, only three years interest is deductible or $720.00. There is due and owing to me the sum of $2000.00 for rent less three years interest on the security deposited under the lease to wit; $720.00 or $1280.00 for rent.

20. There has been placed in the theatre lobby on the middle doors thereof two signs, one reading "Reade's Embassy Theatre for sale or lease at attractive figure for commercial purposes only, Inquire Strand Theatre," the other reading "This building for sale or lease at attractive figures for commercial purposes, Inquire Strand Theatre."

21. I charge that the lease was procured by said Clarence A. Cohen for Walter Reade, and that Walter Reade was, in fact, the principal in the negotiations and in the agreement for lease entered into between me and said Clarence A. Cohen.

22. I charge that it is and was the design of said Clarence A. Cohen, Walter Reade, Trenton Theatre Building Company, and/or The Freehold Theatre Company, to keep my theatre closed so that the Strand Theatre would gain the entire patronage of the people of Freehold and vicinity.

23. I charge that the said Clarence A. Cohen, Walter Read, Trenton Theatre Building Company and/or The Freehold Theatre Company, its officers and agents, or some of them, are acting in concert to ruin the theatre property of deponent and its contents.

10 20 30 40

24. I charge that my theatre property has been damaged to a great extent in being closed for so long a time, in that it has lost the benefit of the advertising heretofore made in behalf of it as a theatre, and that the people in Freehold and vicinity will have gotten out of the habit of going to it, if and when it is re-
10 opened as a theatre.

25. I charge that the assignment by Clarence A. Cohen to The Freehold Theatre Company of the lease of the said theatre (if such assignment has been made, although I have no notice of it) is in violation of the terms of the lease between me and the United Theatres of America, Inc. and of the agreement between me and Clarence A. Cohen.

26. I charge that the removal and changes as here-
20 in set forth are in violation of paragraph five of the lease.

27. I charge that the manner in which the theatre has been kept is in violation of paragraph seven of the lease.

28. The male toilet existing in the theatre has been inaccessible to tenants occupying the stores in the front part of the theatre building, in violation of
30 paragraph eight of the lease.

29. I aver that I am entitled to the surrender of the premises and the cancellation of the lease and agreement under and by virtue of paragraph fifteen of the lease.

30. I charge that the marquee provided for in paragraph two of the agreement of January 4th, 1926, has not been erected, in violation of the terms of said agreement.

40

AFFIDAVIT OF MAX SNIDER

31. On June 18, 1928, Walter Reade wrote a letter to the attorney then representing me stating that The Freehold Theatre Company is absolutely without funds and is unable to make payment of rents.

32. At a foreclosure sale in 1925, the Strand Theatre was struck off to Walter Reade by the sheriff of Monmouth County who assigns his bid to the Trenton Theatre Building Company. Thereafter the sheriff executed a deed for the property to said corporation. This corporation still owns the Strand Theatre. It is known in Freehold as Reade's Strand Theatre and has been extensively advertised as such.

33. I have read the bill of complaint herein and all the matters and things therein stated are true to the best of my knowledge, information and belief.

Subscribed and Sworn to before me
This 15th day of August, 1929

MAX SNIDER

Ed. G. Forman

Notary Public of N. J.

Filed August 16, 1929.

10

20

30

40

AFFIDAVIT OF WILLIAM H. SATTERTHWAIT

State of New Jersey } ss.
County of Monmouth }

WILLIAM H. SATTERTHWAIT, being duly sworn according to law, on his oath deposes and says:

1. I reside at 42 Hudson Street, Freehold, New Jersey. I was manager of Reade's Strand Theatre and Reade's Embassy Theatre from the early part of 1926, until the Embassy Theatre closed in the early part of the year 1927, and of the Strand Theatre until September, 1928. The Embassy Theatre, which is a theatre owned by Max Snider, was opened on January 15, 1926, as a regular moving picture theatre, showing feature films, with music. It was operated from January 16, 1926, until the Saturday before Decoration Day of the same year. The theatre remained closed until September, 1926, when it was opened again and was operated as a ten and fifteen cent show. It ran five or six reel feature pictures, but had no music. The theatre remained open for three months with the admission price of ten and fifteen cents, when the admission price was discontinued and it was open for about three nights a week with no admission charge, and it stayed open with no admission until about February, 1927, when it was closed, and has not been reopened since.

2. Both the Strand Theatre and the Embassy Theatre (Max Snider's theatre) were under the operation and control of Walter Reade, who operates a chain of moving picture theatres in the State of New Jersey.

3. While I was manager of the Strand Theatre and of the Embassy Theatre, a great deal of the equipment of the Embassy Theatre was removed to the Strand

Theatre, by the direction of Walter Reade. A spot light and one moving picture machine was taken out of the Embassy Theatre and moved to the Strand Theatre. Value of the moving picture machine which was removed is approximately $1000. A set of scenery, valued at approximately $300, was removed from the Embassy Theatre and taken to the Strand Theatre at Walter Reade's direction. Office equipment, chairs, some stage lights, were taken from the Embassy Theatre to the Strand Theatre on Mr. Reade's orders.

10

4. I am familiar with the Embassy Theatre as of the time it came under my management, and have inspected the theatre premises recently. The following is a list of some of the equipment which was in the theatre at the time it came under my management and which is now not in the theatre: Six fire extinguishers; electric bulbs; shades; piano; music stands; chairs in music pit; footlights; stage flood lights; chairs for foyer; chairs for stage; cylinder head of electric generating equipment; draperies; chairs for dressing rooms. The metal ceiling in the theatre has several rust holes in it. The walls of the building are cracking and peeling; the wash bowl in one of the dressing rooms has been torn from the wall; the theatre is filled with dust and dampness.

20

Sworn to before me this

15th day of August, 1929

WILLIAM H. SATTERTHWAIT

30

FORMAN A. RHODER

Notary Public

Filed August 16, 1929.

40

AFFIDAVIT OF ALBERT L. YETMAN

State of New Jersey
County of Monmouth } ss.

ALBERT L. YETMAN, of full age, being duly sworn according to law, on his oath deposes and says:

1. I reside at 94 Center Street, Freehold, New Jersey. I was the moving picture operator in the Embassy Theatre. I worked in said theatre prior to 1926, for the United Theatre of America, Inc. I worked there afterwards when it was conducted as Reade's Embassy Theatre. The theatre has not been operated as a theatre or as anything else since early in 1927.

2. About the middle of January, 1926, until the Saturday before Decoration Day, it was operated as a high-class moving picture theatre, showing feature films, with music; it was closed on the Saturday before Decoration Day, and was not opened until September of that same year, when it was opened as a ten and fifteen cent moving picture showhouse, showing feature reels, without music. It was run as a ten and fifteen cent showhouse for about three months; then the admission charge was discontinued and it was operated three nights a week without admission until February, 1927, when it was closed, and has remained closed since.

3. The Embassy Theatre was a fully equipped moving picture theatre in the year 1926. Since that time one of the moving picture machines has been removed to the Strand Theatre, and a great deal of other equipment has been taken out.

4. I have read the affidavit of William H. Satterthwait and know that the equipment enumerated by him as having been removed, has been removed from the theatre, and know that the damage set forth by

him as having been done to the theatre has actually been done.

ALBERT L. YETMAN

Sworn to before me this
15th day of July, 1929

ED. G. FORMAN,

Notary Public of N. J.

10

Filed August 16, 1929.

20

30

40

SCHEDULE A

THIS AGREEMENT made this twenty-eighth day of August, 1924, Between Max Snider of the Borough of Freehold, County of Monmouth and State of New Jersey, party of the first part, the lessor;

10 And the United Theatres of America, Inc., of the City of New York, County and State of New York, party of the second part, the lessee.

WITNESSETH: In consideration of the rent hereinafter reserved and of the covenants herein, the lessor hereby leases and rents to the lessee all that certain building occupied as a theatre with the entrance thereto situated on the south side of West Main Street in the Borough of Freehold, New Jersey, together with all the furnishings, furniture, fixtures, mechanisms and 20 appliances now in the said premises which belong to and are useful in the operation of a moving picture theatre for a period of five years from the first day of September 1924 until the first day of September 1929, to have and to hold the same unto the said lessee, its successors and assigns for the said term and any extensions thereof at the annual rent of Six Thousand Dollars to be paid in equal monthly instalments of Five Hundred Dollars on the first day of each and every 30 month during the said term, in advance.

2. The lessee hereby agrees that it will rent and occupy the above described premises for the term above mentioned as a moving picture theatre and for such other theatrical performances as may be desirable, but for no other purpose ,and that it will pay therefor, the annual rent of Six Thousand Dollars in equal monthly instalments of Five Hundred Dollars on the first day of each and every month of the term, in advance.

40

SCHEDULE A

3. The lessee may in its discretion erect in front of said premises in the usual manner and within the rules prescribed by the ordinances of the Borough of Freehold, a Marquis to advertise and attract attention to the theatre both in the day time and at night.

4. The lessee will, at its own expense, as soon as conveniently may be after possession hereunder is acquired, install a new ventilating system so that the building occupied by the theatre may be thoroughly ventilated; this work to be completed on or before January 1, 1925. 10

5. The lessee will not remove from said building or transfer within the building or make any essential alterations in any of the fixtures or furnishings of the said premises without the consent of the lessor first had and obtained. 20

6. The Lessee hereby agrees that all new furnishings or fixtures provided by it, for use in the theatre, either as a replacement of that now there or as an addition thereto, shall upon the termination of this lease belong to and become the property of the lessor without any expense to him, except always musical instruments as piano and organ.

7. The lessee hereby agrees to replace all of such furniture and fixtures when the same shall be broken or damaged, whether by ordinary wear and tear or otherwise to the end that the premises shall be kept always in A 1 condition. 30

8. The lessee hereby agrees to permit tenants occupying stores in the front part of the demised premises to use in any reasonable manner, the male toilet now existing in the theatre.

 40

9. The lessee hereby agrees to apply for and have a separate water meter installed to care for all of the premises hereby demised and to pay the installation charges and rent of such meter and all water and sewer bills as charged by the Borough as shown by said meter.

10. The lessee hereby assumes full responsibility for the heating of the theatre, that is to say, the firing of the furnace and the control of the heating in the radiators in the theatre and in the lobby; and the ashes and waste are to be removed and disposed of by the lessee.

11. The lessee will not assign this lease to any other person whatsoever or any interest in it or permit a transfer of the stock of the lessee corporation or both, to any one or to any competing corporation or organization that will in any way inure to the damage or detriment of the lessor in his premises during this term or any extension thereof.

12. The lessee assumes responsibility for all electric lighting of the premises and will pay all bills incurred for the same or for any other use of electricity on the premises demised that may be required in excess of that provided by the dynamos on the premises or in case of a shut down of said dynamos.

13. It is mutually understood and agreed that the lessee shall have the first refusal of the said premises for the further period of five years.

14. It is mutually understood and agreed that the lessor will pay all taxes and assessments of the said premises except only the water and sewer; and that upon the fulfillment of the term of this agreement by the lessee the lessor will assure to the said lessee the quiet and peacable enjoyment of the said premises for the uses of a theatre.

15. It is further mutually understood and agreed between the parties that in the event of a breach in any of the above mentioned conditions or in the event that the lessee commits any waste or damage to the premises that this lease shall thereby be surrendered and rendered null and void and the lessor may immediately reenter the same as though such agreement had never been made. 10

16. It is mutually understood and agreed that in case of fire whereby the premises shall be seriously damaged or destroyed, the lessee shall be relieved of further obligation to pay rent and the premises shall be forthwith surrendered to the lessor.

17. It is further mutually understood and agreed that as security for the payment of the rent hereby reserved that the lessee upon the signing of this agreement will deposit with the lessor One Thousand Dollars 20 in cash and Five Thousand Dollars in bonds, to wit; five Barnes Finance Company 7 per cent. convertable sinking fund Gold Bonds of One Thousand Dollars each, numbers M 65, M 66, M 67, M 68, and M 69, which said bonds and cash, except the coupons which are to be returned to the lessee when due, the lessor agrees to hold in trust for the lessee until the first day of August 1929, and on that day to return the same to the said lessee when the last monthly payment of rent 30 is made; provided, however, that in the event that default shall be made by the lessee in any payment of rent, the same may be withheld and deducted from this fund of Six Thousand Dollars in addition to any other proceedings that may be taken for the surrender of the lease; and provided that the lessee may, if there is no renewal, pay $1000 on November 1, 1928, and $1000 each two months thereafter, upon each payment one of said bonds shall be returned to the lessee.

 40

18. It is further mutually understood and agreed that the lessor shall not be responsible in damages for any disturbance on the demised premises growing out of any condition that exists at the time of the execution of this agreement.

19. This agreement shall bind the heirs, executors, administrators, successors and assigns of both of the parties.

20. It is further agreed too that the lessee will carry liability insurance to protect the lessor against personal damage suits such as injury to the Public.

21. It is further understood that lessor will not be responsible for heat in the two radiators in the theatre lobby.

IN WITNESS WHEREOF, the said MAX SNIDER has hereunto set his hand and seal and the said UNITED THEATRES OF AMERICA, INC., has hereby caused those presents to be signed by its president and attested by its secretary, and its corporate seal to be hereto affixed by order of its board of directors on the day and year first above written.

Signed, Sealed and Delivered
in the Presence of

MAX SNIDER (L. S.)

UNITED THEATRES OF AMERICA, INC.

By F. E. NEMEC,
Vice President.

Attest:

W. F. Cawthorne,
Treasurer.

BILL OF COMPLAINT
SCHEDULE A

Seal of

United Theatres of America

Delaware

Incorporated 1924.

10

20

30

40

SCHEDULE A

State of New Jersey
County of Monmouth } ss.

BE IT REMEMBERED, that on this twenty-eighth day of August in the year of our Lord One Thousand Nine Hundred and Twenty-four, before me, the subscriber, a Notary Public of the State of New Jersey, personally appeared MAX SNIDER, who I am satisfied, is the lessor mentioned in the within instrument, to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

HARRIE I. HOZA,
Notary Public for New Jersey
My Commission expires April 10, 1928.

Received from F. E. NEMEC representing the UNITED THEATRES OF AMERICA, INC., a check for Fifteen Hundred Dollars, being Five Hundred Dollars rent for the month of September 1924, of the demised premises, and the One Thousand Dollars cash security for rent and five Barnes Finance Company 7 per cent. Convertible Sinking Fund Gold Bonds of One Thousand Dollars each, numbers M 65, M 66, M 67, and M 68, and M 69 being the bonds mentioned in the said lease which together with the said One Thousand Dollars are held in trust by me as therein stated.

Dated, Freehold, N. J.

August 28, 1924.

M. SNIDER (L. S.)

SCHEDULE B

THIS AGREEMENT made this fourth day of January, Nineteen Hundred and Twenty-six, between Max Snider of the Borough of Freehold, County of Monmouth and State of New Jersey, party of the First Part, —and—Clarence A. Cohen of the City and State of New York, party of the Second Part:

WHEREAS, on August 28th, 1924, the party of the first part hereto entered into an agreement of lease with the United Theatres of America, Inc., wherein the party of the first part hereto demised to the said United Theatres of America, Inc. certain theatre property on West Main Street in the Borough of Freehold for the term of five years from the first day of September, 1924, at an annual rental of six thousand dollars to be paid in monthly instalments of five hundred dollars on the first day of each and every month during the said term in advance, as in said lease will more fully appear; and

WHEREAS, the said agreement of lease in paragraph eleven thereof provides that the lessee will not assign said lease to any other person whatsoever during the term therein stated or any extension thereof; and

WHEREAS, the United Theatres of America, Inc. now desires to assign the said lease to Clarence A. Cohen and has requested the consent of the party of the first part hereto to such an assignment by said corporation, and the said Max Snider, party of the first part hereto, having consented to such an assignment in consideration of certain alterations and additions to be made to said lease, as hereinafter set forth, and which alterations and additions the said Clarence A. Cohen, party of the second part hereto has accepted; and

SCHEDULE B

WHEREAS, the United Theatres of America, Inc. has heretofore on the 15th day of December, 1925, executed an assignment of the said lease of August 28th, 1924, and the same is now held by Clarence A .Cohen, the party of the second part hereto; and

WHEREAS, the said United Theatres of America, Inc. did deposit with the said Max Snider, party of the first part hereto, One Thousand Dollars in cash and five Barnes Finance Company 7 per cent. sinking fund gold bonds of One Thousand Dollars each, as security for the payment of rent, which one thousand dollars cash and bonds are to be returned to the said United Theatres of America, Inc. at the time of the execution of the assignment of said lease; NOW THEREFORE

THIS AGREEMENT WITNESSETH: that for and in consideration of the recitations above set forth and of the covenants and agreements, understandings and undertakings of the parties hereinafter set forth, and of one dollar by each party to the other in hand duly paid at or before the ensealing and delivery of this agreement, the receipt whereof is hereby acknowledged, the parties to this agreement hereby agree as follows:

1. That the agreement of lease made between MAX SNIDER of the first part and the United Theatres of America, Inc. of the second part, dated August 28th, 1924, and the assignment thereof by the United Theatres of America, Inc. to Clarence A. Cohen, dated December 15, 1925, (which said asseignment is hereby consented to and accepted by the party of the first part hereto as valid and effectual in every particular), are hereby made a part of this agreement upon the same terms and conditions as therein stated, except as hereinafter set forth.

SCHEDULE B

1½. Lessee shall have the privilege to sublet or assign this lease to a corporation formed for operating the said theatre without the consent of the party of the first part; but in the event that an assignment is desired to any other person or corporation, the lessee shall first secure the consent of the said Max Snider. This is in substitution of paragraph eleven.

2. The party of the second part hereto shall within three months from the date hereof erect in front of the demised premises in the usual manner and within the rules prescribed by the ordinances of the Borough of Freehold, a Marquis to adbertise and attract attention to the theatre, both in the day time and at night. This provision shall be interpreted as in substitution of paragraph three of the said original lease.

3. It is further mutually understood and agreed that the term of the lease of August 28, 1924, shall be and it is hereby extended from the date of its expiration on September 1, 1929, for five years until September 1, 1934, and that the rent reserved by the party of the first part and hereby agreed to be paid by the party of the second part shall be Six Thousand Five Hundred Dollars for the two years commencing September 1, 1929, and ending August 31, 1931, payable in equal monthly instalments of five hundred forty-one dollars and sixty-six cents on the first day of each month of said two years, and the rent reserved and agreed to be paid shall be seven thousand dollars for three years commencing September 1, 1931, and ending August 31, 1934, payable in equal monthly instalments of five hundred eighty three dollars and thirty-three cents on the first day of each and every month of the said last three years. It is understood that this provision shall be in substitution of paragraph thirteen of the said lease of August 28, 1924.

10

20

30

40

SCHEDULE B

4. It is further mutually understood and agreed that as security for the payment of the rent reserved in said original lease and as hereinbefore set forth, that the party of the second part upon the signing of this agreement will deposit with the party of the first part Six Thousand Dollars in cash, subject to interest at the rate of four per cent. (4%), payable annually, which sum the said party of the first part agrees to hold in trust for the party of the second part until the first day of August, 1934, and on that day to return to the said party of the first part when the last monthly payment of rent is made, as hereinafter provided, subject nevertheless to this provision: that should the party of the second part default in any of the payments of rent and be in arrears of rent at any time during the term of the lease as contemplated by this agreement, the said arrearages may be withheld by the party of the first part and deducted from his fund of Six Thousand Dollars in addition to any other proceedings that the party of the first part may take for the surrender of this lease. It being understood and agreed that this paragraph shall be in substitution of paragraph seventeen of the lease of August 28th, 1924, and that the one thousand dollars cash and five one thousand dollar bonds of the Barnes Finance Company, mentioned in said paragraph seventeen, shall be returned to the United Theatres of America, Inc. and their receipt therefore annexed to and made a part of this agreement.

5. It is further mutually understood and agreed:

(a) That the party of the second part hereto will permit the party of the first part hereto to enter upon the said premises at any and all times during the term hereby demised for the purposes of inspection and repair.

(b) That the party of the second part will provide to the party of the first part and to the members of his family, (not more than three persons in all), free admission to the theatre for all performances and pictures that may be therein held or exhibited.

6. That the party of the second part will at all times during the term herein and in said lease of August 28, 1924, specified, occupy the demised premises solely for the purpose of a theatre and that (unless in unavoidable circumstances and during June, July and August) he will hold therein performances and moving picture shows not less than three of the six week days in each and every week of the term herein contemplated, and that he will not permit the said premises to lie idle or be untenanted at any time during the said term.

10

7. The party of the first part hereby expressly covenants with the party of the second part in consideration of the terms hereof and of the further consideration of one dollar that the party of the second part shall have the option, to be exercised within one year from the date hereof and not afterward, of purchasing the said demised premises for the sum of One Hundred and Fifteen Thousand Dollars ($115,000.00) terms and conditions to be arranged.

20

8. The ventilation mentioned in paragraph four of the original lease, having been provided by the United Theatres of America, Inc., the said paragraph is hereby abrogated.

30

9. Upon performing all and singular the covenants of the said lease of August 28, 1924, and of this agreement which is supplemented thereto, the party of the second part or his assigns, shall have quiet and peaceable enjoyment of the said premises during the term hereby demised.

40

10. At the expiration of the term herein contemplated, on August 31, 1934, or any sooner termination thereof, the party of the second part or his assigns will give up and surrender unto the party of the first part the said demised premises in as good condition as at the commencement of the term, damages by the elements alone excepted.

10

11. This agreement shall bind the heirs, executors, administrators and assigns of each of the parties.

IN WITNESS WHEREOF, the parties to these presents have executed this agreement in duplicate and have hereunto interchangeably set their hands and seals the day and year first above mentioned.

Signed, Sealed and Delivered
in the Presence of

20

W. C. B. SCHLESINGER

MAX SNIDER (L. S.
CLARENCE A. COHEN (L. S.)

THE UNITED THEATRES OF AMERICA, INC., having applied for and secured the consent of Max Snider to assign the lease of August 28, 1924, to CLARENCE A. COHEN, and having executed such assignment, does hereby further acknowledge receipt of one thousand dollars in cash and five thousand dollars gold bonds of the Barnes Finance Company, heretofore filed by the United Theatres of America, Inc. with the said Max Snider as security for the payment of rent of the premises described in the said lease of August 28, 1924, and hereby discharges and releases the said Max Snider from all further obligation in regard thereto under the terms of paragraph seventeen of the said lease of August 28, 1924.

30

40

SCHEDULE B

IN WITNESS WHEREOF, the said United Theatres of America, Inc. have caused this declaration to be signed by its president and attested by its secretary and its corporate seal to be hereto affixed the fourth day of January, 1926.

UNITED THEATRES OF AMERICA, INC. 10

By F. E. NEMEC, President.

Attest:

W. F. CAWTHORNE, Secretary.

Seal United Theatres of America, Inc.

Incorporated 1924

Delaware 20

30

SCHEDULE B

State of New Jersey, } ss.
County of Essex. }

BE IT REMEMBERED that on this fourth day of January 1926, before me a Notary Public of New Jersey, personally appeared Max Snider, who, I am satisfied is one of the persons named in the within agreement; and I having first made known to him the contents thereof, he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

10

FRED B. HANDLON
Notary Public of New Jersey,
My Commission expires
May 18, 1930.

20

State of New York, } ss.
County of New York }

BE IT REMEMBERED, that on this fourth day of January, in the year of Our Lord One Thousand Nine Hundred and Twenty-six, before me a Notary Public of the State of New York, County of New York, personally appeared

30

Clarence A. Cohen, who I am satisfied is the person named in the within agreement; and I having first made known to him the contents thereof, he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

W. C. B. SCHLESINGER.

Filed August 16, 1929.

40

ORDER TO SHOW CAUSE

IN CHANCERY OF NEW JERSEY.

Between MAX SNIDER, Complainant, —and— THE FREEHOLD THEATRE COMPANY, et als Defendants.	On Bill, &c. ORDER TO SHOW CAUSE.

This matter being open to the court by John L. Ridley, solicitor of the complainant, and the court having read the bill of complaint in the above entitled cause and the affidavits thereunto annexed;

It is, on this 16th day of August 1929, Ordered that the defendants, The Freehold Theatre Company, Clarence A. Cohen, Walter Reade, The United Theatres of America, Inc., and Trenton Theatre Building Company, show cause before the Chancellor, at the Chancery Chambers, 1 Exchange Place, Jersey City, New Jersey, on Monday the 26th day of August 1929, at the hour of ten o'clock in the forenoon (daylight saving time) or as soon thereafter as counsel can be heard, why the said defendants, The Freehold Theatre Company, Clarence A. Cohen, Walter Reade, The United Theatres of America, Inc., and Trenton Theatre Building Company should not be restrained and enjoined according to the prayer of said bill, and why the lease between complainant and The United Theatres of America, Inc., the agreement with Clarence A. Cohen, the assignment of lease and the mortgage made by complainant to Clar-

ence A. Cohen should not be canceled and the defendants Clarence A. Cohen, The Freehold Theatre Company, The United Theatres of America, Inc., and Walter Reade be removed as tenants in complainant's theatre building, and why the said defendants should not be compelled to recompense the complainant for any damage suffered by him and why the said defendants should not be compelled to pay the rent of said theatre building and why the deposit made with complainant as security under the terms of lease for the theatre building should not be forfeited to complainant.

It is further Ordered that the defendants, The Freehold Theatre Company, Clarence A. Cohen, Walter Reade, The United Theatres of America, Inc., and Trenton Theatre Building Company, their and each of their servants and agents, in the meantime, and until the further order of this court in the premises, desist and refrain from removing any part of complainant's theatre building or its contents.

It is further ordered that copies of said bill of complaint and the affidavits thereunto annexed and of this order (which maybe certified by the solicitor of the complainant as true copies) be served on said defendants within 5 days from the date hereof.

Respectfully advised

JOHN BENTLEY,
V. C.

E. R. WALKER,
C.

Filed August 16, 1929.

FILED AUGUST 29, 1929.

ANSWERING
AFFIDAVIT OF WALTER READE

IN CHANCERY OF NEW JERSEY

Between	
MAX SNIDER,	
Complainant,	On Bill, Etc.
—and—	ANSWERING AFFIDAVIT.
THE FREEHOLD THEATRE COMPANY, et als,	
Defendants.	

10

State of New Jersey
County of Monmouth } ss.

20

WALTER READE, being duly sworn upon his oath according to law deposes and says that he is the President of the Freehold Theatre Company, and the agent thereof for the purpose of executing the within affidavit, and that on or about the 13th day of January, 1926, the Freehold Theatre Company, defendant herein, took an assignment of the lease mentioned in paragraph's (6) and (7) of the bill filed herein and marked Schedule "A and B" and went into and took possession of the said premises, and conducted the said premises as a motion picture theatre and for other theatrical performances, and at said time refunded to Clarence A. Cohen the sum of $6,000.00 which the said Clarence A. Cohen had deposited with the complainant as security for the rent as mentioned in paragraph (4) of the assignment of lease marked Schedule "B" and took an assignment of the mortgage referred to in paragraph (12) of the bill of complaint filed;

30

40

2. That at the time of the taking of the assignment of the lease marked Schedule "B" from Clarence A. Cohen the Freehold Theatre Company, defendant herein, had the right under the agreement made by the defendant, Clarence A. Cohen, and the complainant, to take said assignment without notice to the complainant.

10

3. Since the leasing of the premises from the said Clarence A. Cohen the defendant, Freehold Theatre Company, continuously operated the premises as a motion picture theatre, and for no other purpose until February ,1927;

4. Under the agreement marked Schedule "B" mentioned in paragraph (9) of the bill of complaint, dated January 4th, 1926, it is provided that the premises were to be occupied solely for the purpose of the theatre and that "unless in an avoidable circumstance, etc., and under said agreement the defendant corporation, Freehold Theatre Company, made every effort to run and operate the said premises as a motion picture theatre, but the same became a losing proposition and the burden imposed upon it by the amount of rent involved and the overhead expense in the operation of the said premises compelled the defendant corporation to operate the same as alleged in paragraph (14) of the said bill of complaint;

20

30

5. The defendant, Freehold Theatre Company, made every effort to comply with the terms of the lease of August 24th, 1924, and assignment of January 4th, 1926, marked Schedule "A and B", but due to the aforesaid reasons your deponent found it impossible to sustain the losses that the said premises incurred, and that in the month of February, 1927 the complainant called at the office of the defendant corporation

40

in New York City and that at that time after the true conditions were made known to him of the expenses involved and incurred in the operating of the motion picture theatre of the complainant, the complainant at that time consented that the motion picture theatre could be closed and remain closed as long as the defendant coroporation had paid the rent. 10

6. Your deponent further states that in the past eighteen months the motion picture industry has so changed that this building has become antiquated, and useless as a motion picture theatre, that in order to operate the same as a motion picture theatre the defendant would be compelled to spend great sums of money in order to meet the competition of today. That formerly the motion picture business was a silent one, while today all modern moving pictures are equipped with sound producing machines, and that to operate 20 the premises in question with the equipment as therein contained would incur great loss and the theatre would not do any business and impose a great hardship upon the complainant.

7. That in the month of February, 1927, the Freehold Theatre Company, on account of lack of funds and loss of business was compelled to cease the operating of the theatre, but this was done only after it had received the consent of the complainant herein; 30

8. That for the past eighteen months the building has been closed and that the complainant has never once notified the defendants herein to open the theatre nor complained in any way of the non-performance of the terms and conditions of the said contract or failure to live up thereto, and that the first intimation that your deponent had of any dissatisfaction on the part of the complainant as to the way the premises were being handled is when the defendant above named

 40

was served with a bill of complaint and rule to show cause in the above entitled action;

9. Your deponent further says, that the complainant, in his delay and refusal in the past eighteen months or prior thereto, while the defendant corporation, Freehold Theatre Company, was in possession of the premises, to give notice of any violation of the lease or the assignment thereof, to the defendant's waived the terms and conditions set forth therein on his part, and the said complaiant is guilty of latches; and that he has not acted in this matter in good faith;

10. Your deponent further says, that during the tenancy of the defendants in the premises described, your deponent has come in contact with the complainant on numerous occasions, that, since February 19th, 1927, which is more than eighteen months, the complainant has never orally or by a written notice, ever complained to your deponent or to the defendant corporations, of any violation of the terms of the lease, nor has done anything to show that he was dissatisfied with the defendants possession of the premises, and although as mentioned above, the complainant permitted the removal of the furniture and consented to the closing of the theatre.

11. Your deponent states that the time he took over the assignment of the lease for the premises from Clarence A. Cohen on the 13th day of January, 1926, with the consent and in accordance with the agreements made and entered into between Max Snider and Clarence A. Cohen, that the theatre at that time had no patronage, and that the only patronage that it afterwards acquired was due solely to the operation of the said premises by the defendant corporation,

Freehold Theatre Company, through their moving pictures and money spent for advertising; that on account of the nature of the building it was impossible to get people to go to the said theatre, and by reason of the fact that the said building is closed does not effect any loss of patronage as it never had any; your deponent believes that because of the revolutionizing of the motion picture industry the said premises will never be of any value as a theatre unless a great deal of money is spent to remodel the said building and install the latest sound picture equipment, and that by reason thereof your deponent believes that he is complying with the condition in the lease which states that the building shall be used and operated as a theatre unless there is an unavoidable circumstance; 10

12. Under the terms of the agreement dated January 4th, 1926, Schedule "B", the defendant was not compelled to heat the said premises, nor was there any active duty on the part of the defendant as provided for in the terms of the agreement dated January 4th, 1926 to make any repairs to the building; 20

13. Your deponent further says, that none of the equipment of furnishings, as specified in paragraph (15) of the bill filed herein, were ever removed from the premises except first by the consent and permission of the complainant, Max Snider; nor has any of the goods or furnishings mentioned been damaged or harmed in any respect, nor are they in such a condition that they cannot be replaced or restored to the same condition as they were at the beginning of the lease, with the exception of the usual wear and tear as provided for in the said lease and assignment marked Schedule "A and B"; 30

14. Your deponent does not know, nor has he any knowledge that any of the plumbing work has ever

 40

been ripped out or any of the office equipment taken from the premises; the motion picture machines are still in the premises and are as in good condition as they were at the time of the agreement of January 4th, 1926; Schedule "B", the electrical generating equipment outside of the usual wear and tear still remains in the said building, and are in as good a condition as at the time the defendant corporation took possession of the premises;

15. That none of the furnishings have been removed from the said premises to your deponent's knowledge, and that if any has been removed, it was removed with the consent of the complainant and at the time of the expiration of the said lease and the surrender of the premises by the defendant, Freehold Theatre Company, to the complainant, the same will be restored in accordance with the terms of the lease;

16. Your deponent further says that the defendant, Freehold Theatre Company, paid its rent up to April, 1929, as set forth in the bill of complaint, and that at the time stated in the letter therein referred to, that it was charging off the interest due under the mortgage taken as security for $6,000.00 deposited for a period of three years and five months, which the complainant had failed to pay according to the terms of the agreement or agreements mentioned in the bill of complainant;

17. The complainant is guilty of a violation of the agreement marked Schedule "B" in that he has failed to pay interest on the $6,000.00 deposit which he has as security for the rent to your deponent;

18. For the arrearages of rent the complainant had the right as alleged in paragraph (4) of the assignment of lease, marked Schedule "B" to deduct from

the deposit of $6,000.00 any arrearages of rent due and owing to him, and that his failure to so deduct as provided for in the lease and in the assignment of lease gives the complainant no remedy in this Court as the amount due is a certain fixed sum and readily ascertainable; it is not such a complicated account as requires the interference of this Equitable Court;

10

19. Your deponent states that the Freehold Theatre Company took an assignment of the lease of Clarence A. Cohen for the theatre premises in question and referred to as Schedule "B" and which assignment of lease is dated the 4th of January, 1926, and that the said defendant corporation operated it in accordance with the terms of the lease from that day until February, 1927, and that the said theatre was operated in accordance with the terms of the lease and the rent paid regularly up until April, 1929;

20

20. Your deponent further says that the defendant, Freehold Theatre Company, has no knowledge of any negotiations or any statements made by Clarence A. Cohen to the complainant relative to the leasing of the premises to the defendant corporation as he had no authority to act in any capacity for the defendant corporation herein;

21. Your deponent further says, that Clarence A. Cohen, defendant, was not engaged or authorized to act as the agent for it, nor your deponent individually; nor does the agreement dated January 4th, 1926, marked Schedule "B" contain any clause prohibiting the said Clarence A. Cohen from assigning or subletting the said theatre property in question to your deponent or to any corporation or corporations in the chain of theatres owned or controlled by the said Walter Reade or Trenton Theatre Building Company, or any other

30

40

subsidiaries of the said corporations;

22. Your deponent further says that the complainant's charges, that the lease was procurred by the defendant, Clarence A. Cohen, for your deponent individually or for the defendant corporations in which your deponent is interested, is not true; nor is it true that there was a design on the part of your deponent; the defendant, Freehold Theatre Company, or Trenton Theatre Building Company, or any other defendant in which your deponent is interested, as a stockholder or director, to keep the complainant's theatre closed so that the other theatre known as the "Strand Theatre" belonging to the defendant would gain the patronage of the people of Freehold; nor is it true that your deponent or the Freehold Theatre Company, or Trenton Theatre Building Company, defendants, by its officers or agents, or anyone acting for or on their behalf were acting in concert to ruin the theatre property of the complainant and its contents;

23. Your deponent further says that the assignment by Clarence A. Cohen, defendant, to the Freehold Theatre Company, defendant, of the lease mentioned was not in violation of the terms of the lease between the complainant and the United Theatres of America, Inc., marked Schedule "A" and the agreement between the complainant and Clarence A. Cohen, defendant, marked Schedule "B";

24. That the building known as the "Embassy Theatre", the premises in question has not deteriorated, nor has the defendant allowed the said premises to suffer any waste or damage, and that the complainant has never raised a question in the past eighteen months, that by reason of the fact that the premises have been closed, that the theatre would in any way

suffer by reason of loss of patronage or otherwise;

25. That the reason that the defendant did not erect a Marquee on the said premises in accordance with the conditions of the lease, was because the complainant told the officers and agents of the defendants that it was not necessary and they need not do it, and never in the past eighteen months since the said building has been closed has the question of the erection of the marquee ever been called to the attention of the defendants; and

10

26. Your deponent further says that the said building has never been let or occupied for any other purpose than for theatrical purposes and a moving picture theatre;

27. Your deponent further says, that there has been no violation of any of the terms of the lease or of the assignments of the said lease on the part of the defendant corporations now in possession of the premises; nor has anything been done to prevent the tenants occupying the stores in the front part of the building from the use of the male toilets in the said building;

20

28. By the terms of the lease and the assignments thereof, marked Schedule "A" and B", if there is any damage in and about the building, it is reserved to the defendant, Freehold Theatre Company, by provisions thereof, to give up and surrender to the complainant the demised premises in good condition as at the commencement of the term, damage by the elements alone excepted and the usual wear and tear;

30

29. Your deponent further says, that the relief asked by the complainant of this court is inconsistent; that in paragraph (29) of the Bill of Complaint, he avers that he is entitled to the surrender of the prem-

40

ises and cancellation of the lease and agreements under and by virtue of paragraph (15) of the lease and in the prayer for relief by paragraph (2), the complainant further asks for concellation of the lease, and by paragraph (8), ask for the removal of the defendants as tenants in said theatre building, and in paragraph (10), the complainant asks that the defendants may be enjoined and commanded to forthwith open the theatre and run it as a theatre in accordance with the terms of the lease and agreement referred to herein; and that the said defendants may be enjoined and commanded to forthwith erect a marquee in front of said theatre building, and in other paragraphs of the prayer for relief, the complainant asks the Court to make certain adjudications, all of which are inconsistent with one another;

30. Your deponent further says, by the bill of complaint filed herein, the complainant has adequate remedy in the Courts of Law for any damages that the may have sustained, if any;

31. Your deponent further says that the bill of complaint and the order to show cause herein is not cognizable in a Court of Equity, and that the same were not filed in good faith for the purposes as set forth, and that the said complainant has complete remedy for any damages that he may have sustained, if any, in the Court of Law.

32. Your deponent states and is informed and believes that it is true, that the reason for the above action is solely because of the fact that the defendant, Freehold Theatre Company, did not pay the rent for the said premises from April, 1929, and that if it had paid the rent in accordance with the terms of the lease, this action never would have been instituted;

ANSWERING
AFFIDAVIT OF WALTER READE

33. Your deponent further says that he makes this affidavit for and on behalf of the Freehold Theatre Company as heretofore stated, that he never individually, nor as agent or representative of the Trenton Theatre Building Company ever negotiated any business for any of these defendants other than the Freehold Theatre Company; that your deponent is not, nor ever has been interested in the lease and assignment of lease marked "A" and "B" in the bill, individually, nor has the Trenton Theatre Building Company ever had any interest in this matter, although your deponent is an officer of said corporation; 10

34. Your deponent states that the aforesaid action is brought not because of the fact that the said premises have been closed and that by reason thereof it has suffered loss of patronage, or for any of the other violations which he sets forth in his bill which have not taken place; but solely for the reason that the defendant company, Freehold Theatre Company, has not paid its rent, notwithstanding the fact that the complainant has in his possession $6,000.00 from which to deduct any arrearages, and that the complainant in the month of June, 1929, agreed that if the defendant paid the back rent that it could continue in possession until the expiration of the said lease, and at that time no mention was made of the fact by the complainant to the defendant that on account of the failure of the defendant corporation to operate the building as a theatre would injure the premises and the only thing that was uppermost in the complainant's mind was the receiving of the rent; notwithstanding the fact that the complainant at that time and at the present time owes to the defendant corporation or Freehold Theatre Company interest on its deposit which it admits in his bill of complaint. 20 30

 40

Sworn and subscribed to before me

this 22nd day of August, 1929.

WALTER READE.

MATILDA BERG,

10 Notary Public of New Jersey.

My Commission expires June 5, 1933.

Filed August 29, 1929.

20

30

40

FILED AUGUST 29, 1929.

REPLYING

AFFIDAVIT OF MAX SNIDER

IN CHANCERY OF NEW JERSEY

Between	
MAX SNIDER, Complainant,	
—and—	On Bill, Etc. AFFIDAVIT
THE FREEHOLD THEATRE COMPANY, et als Defendants.	

State of New Jersey, }
County of Hudson. } ss.

MAX SNIDER of full age being duly sworn according to law on his oath deposes and says:

1. I am the Complainant in the above entitled case.

2. I read the affidavit of Walter Reade dated Aug. 22, 1929.

3. It is not true that I consented that the motion picture theatre could be closed and remain closed as long as the defendant Corporation had paid the rent as alleged in Paragraph 5 of said affidavit.

4. It is not true that the closing of the theatre was done by my consent as alleged in Paragraph 7 of said affidavit.

5. It is not true that I never complained about a non-performance of the terms and conditions of the

10

20

30

40

contract as alleged in Paragraph 8 of said affidavit. I complained a number of times to the manager of the theatre and also made a personal complaint to Mr. Reade. I saw Mr. Reade to make my complaint shortly after the theatre was closed.

6. The allegations of Paragraph 10 of the said affidavit are not true. I complained to Mr. Reade about the violation of the terms of the lease, and to others connected with The Freehold Theatre Company. I did not permit the removal of furniture nor consent to the closing of the theatre. On one occasion I discovered that a moving picture machine was being removed. I protested and finally consented it could be removed for use on election night on the express condition that it would be returned immediately after election. This happened the day before election of 1928.

7. The allegations of Paragraph 13 of the affidavit are not true. No consent was ever given by me for the removal of goods and furniture except as hereinbefore specified.

8. The allegations of Paragraph 25 of said affidavit are not true. The facts are as follows:

I had caused the notice to be sent through the attorney who then represented me, protesting about the failure to have the Marquee erected. This notice was sent shortly after the time of the erection of the Marquee had expired. A Mr. Bryan who represented either The Freehold Theatre Company or Walter Reade then sent for me and I met Mr. Bryan and Mr. Reade at Mr. Reade's New York Office. Mr. Bryan and Mr. Reade requested me for an extension of time to erect the Marquee. I consented that the erection of the Marquee be deferred until immediately after Christmas, 1926.

REPLYING
AFFIDAVIT OF MAX SNIDER

9. It is not true as stated in Paragraph 34 of said affidavit, that I made an agreement in June, 1929. There were some negotiations tending towards the settlement of the difficulties with respect to the theatre which were never consummated.

MAX SNIDER

10

Subscribed and sworn to
before me this 29th day
of August, 1929.

IRENE WALSH,

Notary Public of New Jersey.

Filed August 29, 1929.

20

30

40

ORDER FOR RESTRAINT

IN CHANCERY OF NEW JERSEY

MAX SNIDER, Complainant, —and— THE FREEHOLD THEATRE COMPANY, et als Defendants.	On Bill, Etc. ORDER FOR RESTRAINT PENDING FINAL HEARING.

10

This matter being opened to the Court by John L. Ridley, solicitor of the complainant in the presence of Tumen & Tumen, solicitors of the defendants, The Freehold Theatre Company, Walter Reade and Trenton Theatre Building Company, no one appearing for the defendants Clarence A. Cohen and the United Theatres of America, Inc., and the court having considered the bill of complaint and affidavits filed herein and the affidavits on the part of the said defendants, and having heard and considered the arguments of counsel, and being satisfied that the complainant is entitled to an order restraining the said defendants, The Freehold Theatre Company, Walter Reade, Trenton Theatre Building Company and Clarence A. Cohen and their and each of their servants and agents from removing any part of complainant's theatre building and its contents and that the complainant is entitled to the immediate possession of the leased premises to wit; the theatre building and its contents, the said premises being described at length in the bill of complaint herein;

20

30

40

ORDER FOR RESTRAINT

And it appearing that copies of the bill of complaint and the affidavits thereunto annexed and the order to show cause made in this matter on the 16th day of August, 1929, (certified by the solicitor of the complainant as true copies) have been duly served in the manner therein directed;

It is, on this 10th day of September, 1929, ORDERED that the said defendants The Freehold Theatre Company, Walter Reade, Trenton Theatre Building Company and Clarence A. Cohen, their and each of their servants and agents be, and they are, each and every one of them hereby enjoined and commanded to desist and refrain from removing any part of the contents of complainant's theatre building or any part of the building itself, until the further order of this Court; and

10

It is further ORDERED that the said defendants The Freehold Theatre Company, Walter Reade, Trenton Theatre Building Company and Clarence A. Cohen and their and each of their servants and agents be and they are, each and every one of them hereby enjoined and commanded to forthwith vacate the complainant's theatre building and to surrender the same up to complainant; and

20

It is further ORDERED that the immediate possession of the complainant's theatre building is hereby given to complainant, the said possession to continue in complainant until the further Order of this court.

30

Respectfully advised,

E. R. WALKER,
C.

Malcolm G. Buchanan,
V. C.

Filed September 10, 1929.

40

FILED SEPTEMBER 16, 1929.

NOTICE OF APPEAL

IN CHANCERY OF NEW JERSEY

Between
MAX SNIDER,
Complainant,

—and—

10

THE FREEHOLD THEATRE COMPANY, WALTER READE and TRENTON THEATRE BUILDING COMPANY,
Defendants.

On Bill, Etc.
NOTICE OF APPEAL.

The defendants, The Freehold Theatre Company, Walter Reade, and Trenton Theatre Building Company, hereby appeal from so much of the Order for Re-

20

straint Pending Final Hearing made in the above entitled cause on the 10th day of September, 1929, as directs said defendants, their and each of their servants and agents be, and they are, each and every one of them thereby enjoined and commanded to forthwith vacate the complainant's theatre building and to surrender same up to the complainant; and directs that the immediate possession of the complainant's theatre building be thereby given to the complainant,

30

the said possession to continue in complainant until the further Order of this Court.

Dated September 16th, 1929.

TUMEN & TUMEN,
Solicitors for Defendants.

JONAS TUMEN,
of Counsel.

40

NOTICE OF APPEAL

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

JONAS TUMEN,

Of Counsel with Defendants.

Filed September 16, 1929.

10

20

30

40

FILED SEPTEMBER 16, 1929

PETITION OF APPEAL

NEW JERSEY COURT OF ERRORS AND APPEALS

MAX SNIDER, Complainant-Appellee, —vs.— THE FREEHOLD THEATRE COMPANY, WALTER READE and TRENTON THEATRE BUILDING COMPANY, Defendants-Appellants.	ON APPEAL FROM THE COURT OF CHANCERY. PETITION OF APPEAL.

10

To the Honorable the Court of Errors and Appeals in the Last Resort in all Causes:

20

The petition of The Freehold Theatre Company, Walter Reade, and Trenton Theatre Building Company, the appellants in the above entitled cause, respectfully shows that:

1. Your petitioners find themselves aggrieved by an Order of Restraint Pending Final Hearing made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date September 10th, 1929 in a certain cause in said Court of Chancery wherein the said Max Snider was the Complainant, and The Freehold Theatre Company, Walter Reade, and Trenton Theatre Building Company, were defendants in this respect, to wit, that the said Order adjudges that the said defendants, The Freehold Theatre Company, Walter Reade, and Trenton Theatre Building Company, and their and each of their servants and agents be and they are, each and every one of them hereby enjoined and commanded to forthwith vacate the complainant's theatre building

30

40

and to surrender the same up to complainant, and further Ordered that the immediate possession of the complainant's theatre building is hereby given to complainant, the said possession to continue in complainant until the further Order of this Court.

And your petitioners appeal from that part of the Order of the Chancellor which decrees as aforesaid upon the ground that the same is erroneous in that said decree was improvidently granted because there was want of equity in complainant's bill. 10

2. There was want of due diligence on the part of the complainant below, Max Snider, in the prosecution of his suit against your petitioners.

3. The complainant below, Max Snider, has been and is in possession of the premises in controversy pursuant to the terms of the Order and is operating the same as a theatre in his own name, which said theatre, before this Order was granted, was controlled and was operated as a Reade theatre, and in the event of the defendant-appellants being sustained on final hearing in the Court of Chancery, the said defendant-appellants cannot be placed back in the same position that they were before this Order was issued, because the said theatre will be run for a period of time under a new name, and under a new management, thus interfering with the trade name and reputation of the defendant-appellants. 20 30

4. The injury to be prevented by the injunctive Order, if there is such an injury, is not such injury as is irreparable.

5. The defendant-appellants should not be restrained under the Order in the control of the premises because there is an adequate remedy provided by the

 40

Courts of Law if there has been a breach of contract between the parties, and there is also a definite fund from which damaages can adequately be assessed in favor of the said Max Snider.

6. A preliminary injunction cannot be used for the purposes of taking property out of the possession of one, and putting it into the possession of another.

7. The granting of the injunction to the complainant below is giving to him the full measure of relief to which he may be entitled on final hearing.

Petitioners therefore pray that the said decree of the said Chancellor may be, in the particulars aforesaid reversed, set aside and for nothing holden, and that petitioners may have such other relief in the premises as to this court shall seem proper.

TUMEN & TUMEN,

Solicitors for Defendant-Appellants.

JONAS TUMEN,

of Counsel with Defendant-Appellants.

Filed September 16, 1929.

10

20

30

40

FILED SEPTEMBER 20, 1929.

ANSWER TO PETITION OF APPEAL

NEW JERSEY COURT OF ERRORS AND APPEALS

MAX SNIDER, Complainant-Appellee, —vs.— THE FREEHOLD THEATRE COMPANY, WALTER READE and TRENTON THEATRE BUILDING COMPANY, Defendants-Appellants.	ON APPEAL FROM THE COURT OF CHANCERY. ANSWER TO PETITION OF APPEAL.

10

The answer of Max Snider the above named appellee, to the Petition of Appeal of The Freehold Theatre Company, Walter Reade and Trenton Theatre Building Company, the above named Appellants.

20

This Appellee, not admitting the truth of all or any of the matters in the said Petition of Appeal contained, for answer thereto nevertheless admits that an Order was, on the 10th day of September, 1929, made and entered in the Court of Chancery of New Jersey, in the above entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said Order, this Appellee begs leave to refer thereto when the same shall be produced.

30

This Appellee is advised and believes that said Order is agreeable to equity; and he prays that same may be affirmed with costs to be taxed in favor of this Appellee.

JOHN L. RIDLEY,

Solicitor for and of Counsel with Appellee.

40

FILED SEPTEMBER 30, 1929.

ORDER

IN CHANCERY OF NEW JERSEY

Between MAX SNIDER, Complainant, —and— THE FREEHOLD THEATRE COMPANY, et als, Defendants.	On Bill, Etc. ORDER

This matter being opened to the Court by Tumen & Tumen, solicitors for the defendants, The Freehold Theatre Company, Walter Reade and Trenton Theatre Building Company in the presence of John L. Ridley, solicitor for the complainant, and it appearing that the said defendants The Freehold Theatre Company, Walter Reade and Trenton Theatre Building Company have appealed to the Court of Errors and Appeals from an Interlocutory Order made in this cause on the 10th day of September, 1929, and the said defendants The Freehold Theatre Company, Walter Reade and Trenton Theatre Building Company alleging that unless all further proceedings in this cause are stayed pending the disposition of said appeal by said court, it will be impossible to restore them to their former postion;

And the court having heard the arguments of counsel and having duly considered the matter, and being of the opinion that the effect of the order of September 10th, 1929 wherein it is recited:

ORDER

"It is further ORDERED that the said defendants The Freehold Theatre Company, Walter Reade, Trenton Theatre Building Company and Clarence A. Cohen and their and each of their servants and agents be and they are, each and every one of them hereby enjoined and commanded to forthwith vacate the complainant's theatre building and to surrender the same up to complainant; and

It is further ORDERED that the immediate possession of the complainant's theatre building is hereby given to complainant, the said possession to continue in complainant until the further order of this court."

should be stayed pending the determination of said appeal by the Court of Errors and Appeals on condition that the arrearages of rent for the premises owned by the complainant be forthwith paid and that the rent accruing in the future under the terms of the lease between complainant and Clarence A. Cohen be paid as it accrues as provided in said lease and that said appeal be prosecuted at the October, 1929 Term of the Court of Errors and Appeals, but that the effect of said order in other respects and any other proceedings in the cause should not be stayed;

And it further appearing that the defendants The Freehold Theatre Company, Walter Reade and Trenton Theatre Building Company paid the accrued rent for said premises up to and including September 1st, 1929 (being $2541.66) and that the complainant has paid to the defendant, The Freehold Theatre Company three years interest on the mortgage held by it on the complainant's property;

It is on this 30th day of September, 1929, ORDERED that all further proceedings under that part of the Order of this court dated September 10th, 1929 wherein it was

ORDER

"Ordered that the said defendants, The Freehold Theatre Company, Walter Reade, Trenton Theatre Building Company and Clarence A. Cohen and their and each of their servants and agents be and they are, each and every one of them hereby enjoined and commanded to forthwith vacate the complainant's theatre building and to surrender the same up to complainant;"

10 and wherein it was further

"Ordered that the immediate possession of the complainant's theatre building is hereby given to complainant, the said possession to continue in complainant until the further Order of this court."

be and the same are hereby stayed pending the determination of said appeal by the Court of Errors and Appeals, or until the further Order of this court; and

It is further ORDERED that the application of the defendants The Freehold Theatre Company, Walter

20 Reade and Trenton Theatre Building Company to stay all further proceedings in this cause except as hereinbefore allowed, be and the same is hereby denied and the complainant is hereby given leave to proceed in the cause in all other respects; and

It is further ORDERED that the said defendants The Freehold Theatre Company, Walter Reade and Trenton Theatre Building Company pay to the complainant the rent for the premises described in the

30 bill of complaint herein as it falls due under the terms of the lease between complainant and Clarence A. Cohen, pending the determination of the said appeal by the Court of Errors and Appeals; and

It is further ORDERED that the defendants The Freehold Theatre Company, Walter Reade and Trenton Theatre Building Company bring on this appeal for argument at the October, 1929 Term of the Court of Errors and Appeals; and

40

ORDER

It is further ORDERED that the complainant have leave to apply for a vacation, modification of this Order or for such other relief as may be just on five days notice to defendants The Freehold Theatre Company, Walter Reade and Trenton Theatre Building Company or their solicitors, in the event of defendants The Freehold Theatre Company, Walter Reade and Trenton Theatre Building Company failure to pay the monthly rent for said premises hereafter as the same falls due under the terms of said lease and/or in the event of the defendants The Freehold Theatre Company, Walter Reade and Trenton Theatre Building Company failure to bring on this appeal for argument at the October, 1929 Term of the Court of Errors and Appeals.

10

Respectfully advised,

MALCOLM BUCHANNON,
V. C.

20

The foregoing Order is hereby approved as to form.

JOHN L. RIDLEY,
Solicitor of Complainant.

Filed September 30, 1929.

30

40

FILED OCTOBER 16, 1929.

OPINION

IN CHANCERY OF NEW JERSEY

Between MAX SNIDER, Complainant, —and— THE FREEHOLD THEATRE COMPANY, et als, Defendants.	On Bill, Etc. OPINION

10

October 16th, 1929.

JOHN L. RIDLEY, Esq.,
For the Complainant.

20

TUMEN & TUMEN, Esq'rs.,
For the Defendants.

OPINION

BENTLEY, V-C.:—

30

On motion for temporary injunction.

The bill and affidavits disclose that the complainant was the owner of land at Freehold, New Jersey, upon which a building has been erected designed for the display of moving pictures, which he formerly leased to the United Theatres of America and subsequently to one Cohen who, in turn, assigned the lease to the defendant Freehold Theatre Company. Among other covenants accompanying the demise was one re-

40

quiring the leasee to use the premises for no other purpose than that of a theatre and to "hold therein performances and moving picture shows not less than three of the six days in each and every week of the term herein contained, and that he will not permit the said premises to lie idle or be untenanted at any time during the said term", excepting during the months of June, July and August and "unless in unavoidable circumstances." This lease was subsequently assigned to the defendant Freehold Theatre Company. 10

There are a great many controverted charges laid in the bill which cannot be adequately determined in advance of the final hearing. There are, however, certain facts sufficiently proved for the purpose of this motion.

It is alleged in the bill that at the time of the execution of the lease the premises in question constituted "a completely equipped moving picture theatre" that a great deal of the equipment thereof had been removed and that much if not all thereof has been taken to another theatre operated in Freehold by the defendant Walter Reade, the controlling stockholder of the defendant Freehold Theatre Company, and of a number of other corporations through which he runs a large number of moving picture theatres in different localities. It is also charged that some of the plumbing has been removed from the demised premises. Neither of these charges is denied. The first, the defendants attempt to meet by saying that such removals have been with the knowledge and assent of the complainant. This is categorically denied and the explanation is made by the complainant that the one single piece of property which he consented might be taken from the premises on a single occasion was a machine for projecting pictures upon a screen. He says that this 20 30

40

consent was only given (for obvious reasons) because it was to be utilized for election purposes at the close of the political campaign of 1928, and that such permission was only granted upon the express condition that the apparatus would be immediately returned after the election.

10 I am fully aware of the rule laid down and uniformly followed by the Court of Errors and Appeals in Citizens Coach Co. v. Camden Horse R. R. Co., 29 N. J. Eq., 299. At page 306 the Chief Justice said it was the "general" rule that if the facts alleged in the bill of complaint and supporting affidavits are controverted under oath no preliminary injunction should issue. But, of course, that great judge did not lay down that rule as being absolute and inflexible, because he expressly said not only that it was the general rule

20 but, "to make assurance double sure," said that it was "subject to but a few exceptions." Now, one of those exceptions, and an outstanding one, is that a bare categorical denial shall not suffice to rob the complainant of his remedy, but that it must be a denial that will appeal to the conscience of a reasonable man. Temporary injunctions are allowed for the sole purpose of preventing irreparable injury. It would be a sad state of affairs and a blot upon equity jurisprudence if a reckless respondent could put it beyond the power of

30 the court to make amends to one who has been injured in his property rights, leaving it nothing to substitute therefor but the punitive consequences that might be visited upon the offender. Cold comfort to him who has been despoiled. Now, it seems clear to me, in reviewing all the circumstances of this motion, that every reasonable probability supports the complainant and contradicts the defendants. Men who acquire property of this value (the option agreement accom-

40

panying the lease shows that the parties thereto agreed upon the consideration of $115,000.) take care of their property. To my mind it is unbelievable that the complainant would have sat by and watched his premises be dismanteled by the defendants. Of course, circumstances may at times cause one to submit to some such thing for reasons of expediency but it is fair to suppose that if there were any such corroborating circumstances they would be presented to the court, and the defendants' proofs are barren of any such attempt. 10

The charge that portions of the plumbing have been carried away is not in any way denied. The single individual who swears to an affidavit for the defendant, namely, the defendant Reade, contents himself with saying that he has no knowledge thereof. It would be a strange thing if the **deus ex machina** of multitudinous activities such as this defendant is operating would be familiar with every last fitting appurtenant to the freehold, especially as in this case where it was in one of many theatres and one which he had closed up after securing control thereof in the same town in which he was operating another with which it might compete. 20

In the next place it is charged that there has been a breach of the covenant not to discontinue the performances or exhibitions in the complainant's theatre building. This is not denied. In explanation Reade's affidavit says that since he acquired possession of the demised premises the moving picture industry has been radically affected by the introduction of the cinematograph accompanied by sound, and that as the apparatus contained in this building is not adapted to the exhibition of such pictures, which have taken the popular fancy, it would be impossible to secure any attendance sufficient to meet the expense of operation. That may 30

 40

very well be, but it is through no fault of the complainant. Now, if the defendants persist in demanding the benefits flowing to them from the lease, without complying with the covenants upon the part of them or one of them to be carried out, the result would be that the complainant, while it is true he will continue to be entitled to the rent reserved, will, nevertheless, be sub-
10 jected, as he points out, to a perpetual loss arising out of the fact that those members of the public who attend such entertainment will grow out of the habit of resorting thereto. Surely, I may take judicial knowledge of that tendency on the part of individuals which causes them to continue to patronize a place of business with which they have become familiar and with the treatment of the proprietors thereof they are contented. That was a contingency upon which the parties bargained and against which it was agreed by them
20 that the complainant should be protected. If this right is violated I know of no rule of damages whereby the complainant can be compensated. I must confess that it is a novel argument that a leasee should be absolved of the consequences of his solemn promise made upon a valid consideration, because compliance therewith may cost him some money. I am at a loss to understand, from a practical standpoint, why there should be such a vigorous defense to this action. It seems to
30 me, for the reasons I have expressed, that there can be no question about the breach of the conditions of the lease and the defendants clearly show by their proof that the demise has no further operating value.

Finally, it is urged that the court is without jurisdiction because there will be an adequate remedy at law. As to many of the issues this is true, but the bill prays, and if the complainant can substantiate the allegations thereof he will be entitled to, a cancellation

40

of the lease in question, cancellation of a mortgage which he executed to the leasee to secure the return of a large deposit that was made to guarantee the payment of rent, and to an injunction forbidding the defendants or any of them from removing any more of the contents and parts of the demised premises.

There should be a mandatory injunction returning possession of the premises to the complainant and a prohibitory injunction to prevent the removal of any portion thereof. 10

20

30

 40

162 162OCT.1.1929

New Jersey Court of Errors and Appeals

Between MAX SNIDER, *Complainant-Appellee,* and FREEHOLD THEATRE COMPANY, WALTER READE and TRENTON THEATRE BUILDING COMPANY, *Defendants-Appellants.*	On Appeal from the Court of Chancery.

BRIEF OF COMPLAINANT-APPELLEE.

Statement of Facts.

The complainant, Max Snider, filed his bill of complaint in the Court of Chancery on August 16, 1929, praying for the cancellation of a lease on his theatre, for the cancellation of a mortgage held by the lessee encumbering the theatre, for an injunction preventing the defendants from removing the contents of the theatre building, for an injunction removing the defendants from the theatre building and putting complainant in possession and for damages, etc.

The bill alleges that complainant is the owner of a frame and brick building in Freehold, N. J., a part of which was designed for a theatre; that a five-year lease had been entered into on August 28, 1924, with United Theatres of America, Inc., at the annual rental of $6,000 a year; that on January 4, 1926, the lease was assigned by United Theatres

New Jersey State Library

of America, Inc., to Clarence A. Cohen. The assignment was by complainant's consent, and was incorporated in an agreement between complainant and Cohen whereby the original lease was amended and supplemented. The agreement between Cohen and complainant provided that the lease might be assigned to a corporation to be formed for the purpose of operating the theatre. The records of the County Clerk's office in Freehold County indicate that the lease was assigned to the Freehold Theatre Company, although no notice thereof was given to complainant. The agreement between Cohen and complainant provided for an extension of the lease for five additional years and an increase in the rent for the first two years to $6,500 a year, and for the last three years to $7,000 a year. An option was given to purchase the premises for the sum of $115,000. The sum of $6,000 was paid by Cohen to complainant as security for the payment of the rent and the complainant executed a mortgage to Cohen in the sum of $6,000 to secure to Cohen the return of said deposit. The lease and the mortgage are recorded in the County Clerk's office in Freehold, and an assignment of the mortgage to Freehold Theatre Company is of record in the Clerk's office. The Freehold Theatre Company is a corporation owned and controlled by Walter Reade, the operator of a chain of moving picture theatres who also controls the corporation owning the only other theatre in Freehold, known as the Strand Theatre (complainant's theatre being known as the Embassy Theatre). The original lease and the agreement modifying it among other things provide:

(1) That a marquee be erected by defendants within three months from December 15, 1925, in front of complainant's property (Case, p. 43, fol. 10).

(2) That the lessee will occupy the premises solely for the purposes of a theatre, and will hold moving picture shows (unless in unavoidable circumstances and during June, July and August) not less than three of the six week days in each and every week during the term of the lease, and that the premises shall not lie idle or untenanted at any time (Case, p. 45, fol. 10).

(3) The lessee could not remove any of the contents of the theatre building or make any essential alterations in any of its fixtures or furnishings without complainant's consent (Case, p. 35, fol. 20).

(4) Tenants of the stores in the building to be given access to the male toilet in the theatre (Case, p. 35, fol. 40).

(5) The lessee was to keep the premises in an A-1 condition and replace broken or damaged furniture or fixtures when the break or damage occurred, *whether or not the damage or break was* caused by ordinary wear and tear or otherwise (Case, p. 35).

(6) The annual rent of $6,000 is to be paid in equal monthly installments of $500 on the first of the month, in advance (Case, p. 34).

(7) The lessee is to assume full responsibility for heating of the theatre (Case, p. 36).

(8) On breach of any condition, or in the event of the lessee committing any waste or damage to the premises, the lease is to be surrendered (Case, p. 37).

The bill of complaint alleges violation of practically all of the terms of the lease, and on August 16, 1929, an order to show cause was issued restraining the defendants from removing any of the contents of the theatre.

An answering affidavit was filed by the defendants Freehold Theatre Company, Walter Reade and Trenton Theatre Building Company; the de-

fendants United Theatres of America and Clarence A. Cohen did not appear.

The Court of Chancery, after hearings, granted a preliminary injunction commanding the defendants to vacate the theatre and to surrender it up to complainant, and further restraining the defendants from removing any part of the contents of complainant's theatre or any part of the building itself.

POINT I.

The preliminary injunction was properly issued.

The general rule that no preliminary injunction should issue where the facts constituting the claim of the complainant are controverted under oath is well recognized (*Citizens Coach Co.* v. *Camden Co.*, 29 Equity 299), but, as Chief Justice Beasley said in that case, "this rule is subject to exceptions" (p. 306), and as Vice-Chancellor Bentley said in this case:

> "One of those exceptions and an outstanding one, is that a bare categorical denial shall not suffice to rob the complainant of his remedy, but that it must be a denial that will appeal to the conscience of a reasonable man" (Case, p. 80).

The defendants in their answering affidavit not only fail to deny material allegations of the complaint, but their denial of other allegations was such a denial as does not "appeal to the conscience of a reasonable man."

The bill alleges the failure of the defendants to pay $2,000 in accrued rent (Case, pp. 10-11).

The *defendants'* affidavit *does not deny* this.

The premises were to be operated as a moving picture theatre and for no other purpose (Case, p.

6). The defendants say that the theatre was run until February, 1927; that because it could not be operated at a profit, it was closed and that the complainant consented to the closing of the theatre. The defendants further say that the building has become antiquated, that it would require a large sum of money to place the theatre in operating condition, and that "to operate the premises in question with the equipment as therein contained would incur great loss and the theatre would not do any business and impose a great hardship * * *."

The bill alleges that the moving picture machine, worth $1,000, has been removed from the building and the electric generating equipment, worth $3,700, has been put out of commission; that the building has not been heated; that through dampness, due to lack of heat, the plaster and paint are peeling off; the seats are warped; the metal ceiling has rusted and broken open, and the greater part of the equipment, such as chairs, settees, tables, fire extinguishers, lamp shades, electric light bulbs, piano, music stands, stage footlights and office equipment have been taken out, and that the plumbing has been ripped out; that great quantities of dust have gathered in the theatre and that the draperies and other hangings have been ruined (Case, pp. 8-9).

Defendants say that none of the equipment or furnishings have ever been removed except by permission of the complainant, nor are they in such a condition that they cannot be replaced or restored to the same condition as they were in at the beginning of the lease, with the exception of the usual wear and tear as provided for in said lease. And they further say that they do not know, *nor have they any knowledge, of any plumbing being ripped out,* and that the electric generat-

ing equipment, outside of the usual wear and tear, still remains in the building (Case, pp. 55-56); *that none of the furnishings have been removed, to defendants' knowledge,* but that when they have, they were removed with complainant's consent and will be returned at the expiration of the lease.

A marquee was to be erected (Case, p. 43).

The defendants say that it was not erected because complainant consented that it should not be erected (Case, p. 59).

The bill alleges that the defendants have been endeavoring to lease the premises for commercial purposes in violation of the terms of the lease (Case, pp. 11-12).

The defendants say that it has not been so leased, but *do not deny the attempt* (Case, p. 59).

Can it be said that the denials on the part of the defendants are such denials as are required by the rule laid down in the *Citizens Coach Co.* case (*supra*)? Vice-Chancellor Bentley said:

> *"It seems clear to me in reviewing all the circumstances of this motion, that every reasonable probability supports the complainant and contradicts the defendants. Men who acquire property of this value (the option agreement accompanying the lease shows that the parties thereto agreed upon the consideration of $115,000) take care of their property. To my mind, it is unbelievable that the complainant would have sat by and watched the premises be dismantled by the defendants"* (Case, pp. 80-81).

The defendants *do not deny* that *they have failed to pay rent;* they *do not deny* that *portions of the plumbing have been carried away;* they *do not deny* that *they have breached the covenant to conduct moving picture performances* in the theatre; they *do not deny* that the *theatre has not been kept*

in A-1 condition, and that *they have not replaced broken or damaged furniture and fixtures* on the occurrence of the damage or break; they *do not deny* that they *are attempting to lease the theatre premises for commercial purposes.*

The breach of any of the undenied allegations of the bill of complaint is sufficient, under the terms of the lease, to vacate the lease.

A careful reading of the sole affidavit submitted on behalf of the defendants, to wit, the affidavit of Walter Reade, would indicate that it was the affidavit of one who, to say the least, is careless of what he says. The affidavit says he has no knowledge of any plumbing work being removed; that he has no knowledge of any of the furnishings being removed, etc., but does not indicate in any way when he saw or was in the theatre.

On the other hand, the bill of complaint is verified not only by the affidavit of the complainant but by the former manager of complainant's theatre and of Reade's theatre, and by the moving picture operator in complainant's theatre; and the former manager of the theatre makes his affidavit after having inspected the theatre (Case, pp. 30-31).

The charge of complainant that Reade, as the owner of the only other theatre in Freehold, is desirous of continuing in possession of complainant's theatre in order to keep it closed so that it may lose its good-will and that patronage may be diverted to the theatre owned by Reade, is not denied in such a manner as would be convincing. The fact is that the theatre is closed, that it has been closed for some time, and although the defendants say it could not be operated successfully and that it would cost a great deal of money to install "talkies" in the theatre, yet the most vigorous defense has been interposed to the complainant's action.

The charge is made in the bill of complaint that the defendant, Freehold Theatre Company (the holder of the lease on the theatre), is without funds (Case, pp. 10, 29). *The defendants do not deny this* and admit that the theatre was closed on account of lack of funds (Case, p. 53).

The affidavit of Reade is vague as to any details. There are no dates shown in the affidavit when it is alleged that complainant gave permission for the removal of equipment or of the waiver of the erection of the marquee, etc., nor are any surrounding circumstances shown which might lend veracity to the affidavit. The complainant denies giving permission for the removal of any of the equipment from the theatre except that on his discovery that the defendants were removing a moving picture machine, after protesting he finally consented that it could be removed for use on Election Night on the express condition that it would be returned immediately after Election.

The affidavit of Reade was apparently drawn under a misconception of the terms of the lease. The lease specifically provides "the lessee hereby agrees to replace all of such furniture and fixtures when the same shall be broken or damaged whether by ordinary wear and tear or otherwise to the end that the premises shall be kept always in A-1 condition" (Case, p. 35). The affidavit of Reade contents itself with saying that the goods and furnishings are all right and "with the exception of the usual wear and tear as provided for in the said lease and assignment marked Schedules A and B"; that he has no knowledge of any plumbing work having been ripped out or of any of the office equipment taken from the premises and that the electrical equipment is all right except for the usual wear and tear.

Paragraph 15 of Reade's affidavit (Case, p. 56) is rather an astonishing statement. Reade swears

that he has no knowledge of any furnishings having been removed, and then swears that if any were removed the complainant permitted such removal.

The preliminary injunction gave to complainant two things: It prevented the removal of any more of the contents of the theatre or parts of the building itself, and gave the complainant possession of the theatre; but this appeal is taken only from that part of the order which gives to complainant possession of the theatre.

Vice-Chancellor BENTLEY said (Case, pp. 81-82):

> "In the next place it is charged that there has been a breach of the covenant not to discontinue the performances or exhibitions in the complainant's theatre building. This is not denied. In explanation Reade's affidavit says that since he acquired possession of the demised premises the moving picture industry has been radically affected by the introduction of the cinematograph accompanied by sound, and that as the apparatus contained in this building is not adapted to the exhibition of such pictures, which have taken the popular fancy, it would be impossible to secure any attendance sufficient to meet the expense of operation. That may very well be, but it is through no fault of the complainant. Now, if the defendants persist in demanding the benefits flowing to them from the lease, without complying with the covenants upon the part of them or one of them to be carried out, the result would be that the complainant, while it is true he will continue to be entitled to the rent reserved, will, nevertheless, be subjected, as he points out, to a perpetual loss arising out of the fact that those members of the public who attend such entertainment will grow out of the habit of resorting thereto. Surely, I may take judicial knowledge of that tendency on the part of individuals which causes them to continue to patronize a place

of business with which they have become familiar and with the treatment of the proprietors thereof they are contented. That was a contingency upon which the parties bargained and against which it was agreed by them that the complainant should be protected. If this right is violated I know of no rule of damages whereby the complainant can be compensated. I must confess that it is a novel argument that a lessee should be absolved of the consequences of his solemn promise made upon a valid consideration, because compliance therewith may cost him some money. I am at a loss to understand, from a practical standpoint, why there should be such a vigorous defense to this action. It seems to me, for the reasons I have expressed, that there can be no question about the breach of the conditions of the lease and the defendants clearly show by their proof that the demise has no further operating value."

By a recent case, this Court laid down the rule which was followed by Vice-Chancellor Bentley in granting the injunction herein.

Scherman v. *Stern,* 93 N. J. E. 626.

"3. While the general rule is that a preliminary injunction will not issue where the material fact in complainant's bill and affidavits, on which the complainant's right depends, is met by a full, explicit and circumstantial denial under oath, yet, where the denial lacks these essential qualities, and upon the entire showing from both sides it appears reasonably probable that the complainant had the right claimed, the injunction may issue."

This case clearly comes within this rule. Some of the allegations of the complainant's bill are not denied and others lack the essential qualities of being full, explicit and circumstantial denials under oath.

POINT II.

The preliminary injunction does not grant to complainant the full measure of relief to which he is entitled on final hearing.

The complainant will be entitled on final hearing to:

(1) A cancellation of the lease.

(2) A cancellation of the mortgage incumbering his property and given by him to secure the return of the deposit made by defendants as security for rent.

(3) Pecuniary damages for waste, removal of furniture, electric equipment, etc.

(4) Possession of his property.

(5) An injunction preventing the removal of any of the contents of the building or any part of the building itself.

(6) Damages for breach of other conditions of the lease.

All that the preliminary injunction herein did was to preserve the *status quo.* It prevented the removal by the defendants of any more of complainant's property and it gave to complainant possession of his theatre.

The failure of the defendants to operate the theatre and allowing it to remain idle constitute irreparable damage. The leasing of the theatre for commercial purposes would constitute irreparable damage. Irreparable damage was defined in *Scherman* v. *Stern* (*supra*), as follows:

> "An injury is irreparable when it cannot be adequately compensated in damages or when there exists no certain pecuniary standard for the measurement of the damage."

Justice Trenchard said (p. 631):

> "Acts destroying a complainant's business, custom and profits do an irreparable injury and authorize the issue of a preliminary injunction."

What measure can be devised which would show to what extent the patronage of complainant's theatre would be diverted through the continued closing of the theatre or its rental for commercial purposes? As Vice-Chancellor Bentley so aptly said:

> "Surely, I may take judicial knowledge of that tendency on the part of individuals which causes them to continue to patronize a place of business with which they have become familiar and with the treatment of the proprietors thereof they are contented. That was a contingency upon which the parties bargained and against which it was agreed by them that the complainant should be protected. If this right is violated I know of no rule of damages whereby the complainant can be compensated" (Case, p. 82).

Perhaps the strongest argument on behalf of the complainant is in the fact that the defendants not only admit that the theatre has not been run as such but state that they closed it because of lack of funds and that now the theatre is untenanted and will require large sums of money in order to get it to a condition to properly function as a theatre.

If the defendants cannot run the theatre as such, in what way can they be harmed if the complainant be given possession and allowed to operate the theatre? What benefit to defendants is an idle building?

The temporary possession of the theatre given to complainant by the preliminary injunction does

not deprive defendants of any right they may be entitled to on final hearing, as a sale or lease of the premises by complainant would always be subject to defendants' right under their recorded lease.

POINT III.

Complainant's bill shows an equitable cause of action.

There are two remedies sought by the bill of complaint which are within the exclusive jurisdiction of the Court of Chancery, to wit, *injunction* and *cancellation.*

It is true that resort might be had to the courts of law to dispossess the defendants from the theatre building; but on the removal of the defendants from the building the premises would still be burdened with the lease, which does not expire until 1934, and by a mortgage in the sum of $6,000. In the event of a resort to the courts of law in an action seeking possession of the theatre and damages, the defendants might very well have continued to remove the contents of the building, pending the trial. In equity alone can this be remedied by injunction. In an action at law looking for possession of the premises, pending the hearing of the action, irreparable injury may be suffered by the complainant through the continued divergence of complainant's patrons unless restrained by injunction. In an action at law, pending hearing, the premises may be leased by the defendants for commercial purposes causing irreparable injury.

Injunction is an equity remedy exclusively.

> *Pomeroy's Equity Jurisprudence,* 4th Ed., Vol. 1, Secs. 170, 171;
> 32 *Corpus Juris,* Sec. 458, p. 287.

Cancellation of instruments is within the exclusive jurisdiction of equity.

> 9 *Corpus Juris*, Sec. 6, p. 1160;
> *Pomeroy's Equity Jurisprudence*, 4th Ed., Vol. 1, Secs. 110, 112, p. 128.

Equity will always issue its injunction to prevent the violation of contracts.

> *Pomeroy's Equity Jurisprudence*, 4th Ed., Vol. 4, Sec. 1341.

An advertisement of the theatre property for use for commercial purposes is sufficient in itself to invoke the jurisdiction of the Court of Chancery to prevent the defendants from violating their agreement to use the theatre for moving pictures and theatrical performances only.

It is respectfully submitted that the order of the Court of Chancery should be affirmed.

Respectfully submitted,

John L. Ridley,
Solicitor for and of Counsel
with Complainant-Appellee.

162
162OCT.T.1929

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

New Jersey Court of Errors and Appeals

Between

MAX SNIDER,
Complainant-Appellee,
and
FREEHOLD THEATRE COMPANY, WALTER READE and TRENTON THEATRE BUILDING COMPANY,
Defendant-Appellants.

On Appeal from the Court of Chancery.

BRIEF OF DEFENDANT-APPELLANTS.

The complainant filed a bill in the Court of Chancery of New Jersey on August 16, 1929, for the purpose of cancelling a lease of a theatre in Freehold, New Jersey, called the "Embassy," *to evict the tenants* and to cancel a mortgage given to secure the deposit of $6,000.00 paid under the lease. The bill alleges waste committed by the tenant and the removal of fixtures belonging to the premises and prays for a restraint against the removal of fixtures and an adjudication of damages for the alleged waste. It also prays for a forfeiture of the deposit under the lease and a *mandatory injunction* compelling the defendants to re-open the theatre.
(State of Case, pp. 13, 14, 15, 16.)

The bill and affidavits annexed allege that the complainant leased the premises from August 1, 1924 to September 1, 1929 for moving pictures and other theatrical purposes to the United Theatre Company. Thereafter this lease was assigned and a new agreement was executed on January 4, 1926, between the complainant and

Clarence A. Cohen, one of the defendants. This second agreement changed some of the provisions of the first lease and permitted an assignment. In accordance therewith, this agreement was assigned to the Freehold Theatre Company.
(State of Case, pp. 5-6).

The complainant charges in his bill and affidavits that the defendant has breached the conditions of this agreement in that contrary to the terms thereof it:

1. Closed the theatre and discontinued the operation thereof since February, 1927.
(State of Case, p. 8.)

2. Failed to erect a marquee in front of the theatre.
(State of Case, p. 13.)

3. Removed certain equipment and fixtures.
(State of Case, p. 9.)

4. Failed to pay rent since April, 1929.
(State of Case, p. 10.)

5. That the male toilet has been inaccessible to the other tenants in the building.
(State of Case, p. 13.)

An order to show cause was issued out of the Court of Chancery on August 16, 1929, containing an ad interim restraint against removing any of the contents of the theatre.
(State of Case, p. 49.)

The defendants filed an answering affidavit (State of Case, p. 51) which in the main, denied the material allegations of the bill and alleging that the theatre was continuously operated until February, 1927, in accordance with the agreement; that thereafter there was a change in the motion picture industry due to the invention of

"talking pictures" and that the theatre was unfit to display such pictures; that the defendants pointed this out to the complainant at a conference had between the complainant and the president of the defendant company at its New York office, *and that it was agreed between them that in view thereof, the defendant could discontinue operating the theatre providing it paid the rent. That thereupon the defendant discontinued operating the theatre for a period of over 18 months to the knowledge of the complainant and without objection from him, during which time rent was paid continuously.* (State of Case, pp. 52, 53, 56.) The defendant further alleges that the complainant agreed with the defendant that it would not be necessary to erect the marquee and never made any demand that it be erected thereafter.
(State of Case, p. 59.)

The defendant alleged that the complainant violated the agreement in that he failed to pay interest on the $6,000 deposited with him as security and the defendant, having paid the rent to April, 1929, informed the complainant that it was charging the interest accrued and owing from the complainant, to rent due from defendant.
(State of Case, p. 56.)

The charges of a design to divert patronage from the theatre owned by the complainant to another theatre owned by the defendant are denied as also is the charge that the defendant has done anything to prevent the use of the male toilets by the other tenants.
(State of Case, pp. 57, 58, 59.)

The defendant denies the charges of waste and the removal of equipment and furnishings.
(State of Case, pp. 55, 56.)

On September 10, 1929, on the usual preliminary hearing upon affidavits, the Court entered a *mandatory injunction*, commanding the defendant to vacate the building and to give immediate possession thereof to the complainant.
(State of Case, p. 66.)

POINT I.

A preliminary injunction is improper where the equity of the complainant is fully and explicitly denied.

There is no doubt that the entire equity of the complainant's bill and verifying affidavits have been met and adequately answered by the answering affidavit submitted by the defendants. In every instance every material allegation in the complainant's bill and affidavits have been met by a full, explicit and complete denial.

The defendants submitted an answering affidavit which specifically denied the material facts in the complainant's bill upon which he bases his rights of relief. The answering affidavit is full, explicit and detailed in meeting and controverting the allegations of the bill.

Feld v. *Kantrowitz*, 99 N. J. E. 847.

The Court of Errors and Appeals sustained the Court of Chancery in refusing a preliminary injunction in a similar situation. We quote from the opinion by Justice Parker at page 848:

> "The question of continuing or dissolving the preliminary restraint was heard in the usual manner on affidavits and counter-affidavits. One of these is by defendant Kantrowitz, and specifically asserts that he was the sole party interested in the contract at the beginning and thereafter, and that he never made any assignment of it, or of any interest therein, to any person except Rose

Zucker. In short, it specifically traverses the fundamental allegations of the bill, and this calls for the application of the well-settled general rule that when, by the answer and affidavits, the material facts in the bill upon which the complainant's equity depends are met by a full, explicit and circumstantial denial under oath, a preliminary injunction should not be granted. Ye Olde Staten Island Dyer and Cleaners *v.* Barrett Nephews & Co., 98 N. J. Eq. 702; Brunnetto *v.* Montclair, 87 N. J. Eq. 338; Schlemm *v.* Whittle, 86 N. J. Eq. 415; Meyer *v.* Somerville Water Co., 79 N. J. Eq. 613; Citizens' Coach Co. *v.* Camden H. R. Co., 29 N. J. Eq. 299."

On this theory, therefore, the preliminary injunction was properly denied and the stay properly vacated.

This rule was recognized as a firmly established principle by the Court of Errors and Appeals in the case of

> *Citizens' Coach Co.* v. *Camden Horse Railroad Company*, 29 N. J. E. 299.

Chief Justice Beasley in his opinion said at page 305:

> "In the third place: When this order for this injunction was made, every fact that created an equity in favor of the complainant was denied by the answer and proofs of the defendant. The order for the injunction was made on a rule to show cause, and, on this rule, the answer and accompanying affidavits were used by the appellants. The answer was that of a corporation, and was under the corporate seal and, therefore, was of no consequence on the motion referred to, except as it was explanatory of the meaning of the affidavits. Under such circumstances it was the sworn statements that were to be regarded, and it was upon them that the result of the motion should have been made to depend. These sworn

statements, as I have said, denied, as directly and emphatically as it was possible, every material allegation on which, in the bill, the prayer for an injunction rested.

The general rule, subject to but a few exceptions, is, that if the facts constituting the claim of the complainant for the immediate interposition of the court are controverted, under oath, by the defendant, the court will not interfere at the initial stage of the cause. This case plainly falls within the scope of this general rule, and it seems to me that, on this ground, also, this injunction should be dissolved."

We respectfully call to the Court's attention the following quotation from the answering affidavit submitted on behalf of the defendant with regard to the alleged spoliation of the premises, which has been made the basis of the opinion rendered by the Court below in this matter:

State of the Case, pages 55 and 56, paragraphs 13, 14 and 15:

"13. Your deponent further says, that none of the equipment of furnishings, as specified in paragraph (15) of the bill filed herein, were ever removed from the premises except first by the consent and permission of the complainant, Max Snider; nor has any of the goods or furnishings mentioned been damaged or harmed in any respect, nor are they in such a condition that they cannot be replaced or restored to the same condition as they were at the beginning of the lease, with the exception of the usual wear and tear as provided for in said lease and assignment marked Schedule 'A and B';

14. Your deponent does not know, nor has he any knowledge that any of the plumbing work has ever been ripped out or any of the office equipment taken from the premises; the motion picture machines are still in the premises and are as in good condition

as they were at the time of the agreement of January 4, 1926; Schedule 'B,' the electrical generating equipment outside of the usual wear and tear still remains in the said building, and are in as good a condition as at the time the defendant corporation took possession of the premises;

15. That none of the furnishings have been removed from the said premises to your deponent's knowledge, and that if any has been removed, it was removed with the consent of the complainant and at the time of the expiration of the said lease and the surrender of the premises by the defendant, Freehold Theatre Company, to the complainant, the same will be restored in accordance with the terms of the lease;"

The case now before the Court clearly comes within the purview of the cited cases and the principles laid down by them.

POINT II

A complainant should not be granted in limine by means of an injunction the full measure of relief to which he might be entitled on final hearing.

The Court of Chancery on the return of the order to show cause made an order, which among other things, provided:

"It is further ordered that the said defendants The Freehold Theatre Company, Walter Reade, Trenton Theatre Building Company and Clarence A. Cohen and their and each of their servants and agents be and they are, each and every one of them hereby enjoined and commanded to forthwith vacate the complainant's theatre building and to surrender the same up to complainant; and it is further ordered that the immediate possession of the complainant's theatre building is hereby given to complainant, the said possession to continue in com-

> plainant until the further order of this Court." (State of Case, pp. 66, 67.)

The effect of the order is to *dispossess* the defendant from the premises to which it claims to have the right to possession and to give them to the complainant after only a preliminary hearing upon affidavits and before a hearing of the case upon its merits.

The Court upon a preliminary hearing and before a full inquiry into the truth of the facts (which are clearly and materially in dispute), has granted to the complainant the full measure of relief to which he would be entitled only after final hearing. It has taken away from the defendant the possession of premises and placed it in the hands of the complainant and has prejudged the case before a full hearing upon the merits. This is a practice which has been condemned by the courts of this State on several occasions.

Aldrich v. *Union Bag & Paper Co.*, 81 E. 244 at 247.

Chancellor Walker citing the opinion of Chief Justice Gummere for the Court of Errors and Appeals in the case of McMillan *v.* Kuehnle, 78 E. (8 Buch.) 251, said:

> "It has been decided again and again that a preliminary injunction should not be awarded unless from the pressure of urgent necessity, and unless also the injury to be prevented pendente lite will be irreparable. This court was recently admonished by the Court of Errors and Appeals in McMillan *v.* Kuehnle, 78 N. J. Eq. (8 Buch) 251, not to award preliminary injunctions except to prevent irreparable injury. This cause, in its present posture does not call for extraordinary relief. For the same reason that a preliminary injunction will not issue in this

case a receiver pendente lite ought not to be appointed.

Another thing: To grant a preliminary injunction and appoint a receiver pendente lite in this cause would practically amount to giving the complainants the full measure of relief to which they may be entitled *on final hearing*, and, as I understand it, courts do not grant such relief. See National Docks Railway Co. *v.* Pennsylvania Railroad Co., 54 N. J. Eq. (9 Dick) 10; Pennsylvania Railroad Co. *v.* National Docks Railway Co., 53 N. J. Eq. 8 (Dick) 178, 194."

Spoor-Thompson Co. v. *Bennet*, 105 E. 108.

In this case an application was made for a temporary injunction. *The defendant did not submit any proof on his behalf* but merely appeared to contest the jurisdiction of the Court; nevertheless the Court denied the application. The Court said:

"The complainant, upon its bill and proofs in the matter sub judice cannot prevail in its application for an injunction in limine, notwithstanding *no proofs* are before the court in behalf of the defendants. It is a well established principle of equity that where there are conflicting rights to the possession of property the court will not in the inception of the case grant an injunction the effect of which would be to award possession and thus determine the merits of the controversy between the parties upon an ex parte application. *It is well settled that whenever a complainant's case is doubtful on the law or the facts a preliminary injunction will not issue. To justify the issuing of a preliminary injunction the case made by the complainant must exhibit a right free from doubt or reasonable dispute. To doubt is to deny.* Allman *v.* United Brotherhood of Carpenters, *supra* (at p. 155, bottom); Roberts *v.* Scull, 58 N. J. Eq. 396 * * *"

With regard to the object of a preliminary injunction the Court said:

"The object of a preliminary injunction is to preserve the subject-matter in controversy, without determining any question of right, and, '*it cannot be used for the purpose of taking property out of the possession of one party and putting it into the possession of another.*' 1 High Inj. (4th Ed.) Sec. 4; 1 Beach Inj. Sec 112. And being largely a preventive remedy injunction will not ordinarily be granted where the parties are in disagreement concerning their legal rights, until the right is established at law. * * *"

With regard to giving a party complete relief by preliminary injunction, the Court said, quoting High Inj. *supra,* Sec. 8:

"*To grant the injunction now sought by complainant would be giving to the complainant the full measure of relief to which it may be entitled on final hearing, and courts do not ordinarily grant such in limine.* It has been repeatedly held that a preliminary injunction should not be awarded unless from the pressure of urgent necessity, and unless also the injury to be prevented pendente lite will be irreparable. Aldrich *v.* Union Bag and Paper Co., 81 N. J. Eq. 244, 247, 248; McMillan *v.* Kuehnle, 78 N. J. Eq. 251; National Docks Railway Co. *v.* Pennsylvania Railroad Co., 54 N. J. Eq. 10. As indicated by Chancellor Walker in Aldrich *v.* Union Bag and Paper Co., *supra,* this court was admonished by the Court of Errors and Appeals in McMillan *v.* Kuehnle, *supra,* not to award preliminary injunctions except to prevent irreparable injury. In Citizens' Coach Co. *v.* Camden Horse Railroad Co., 29 N. J. Eq. 299 (at p. 303), it is said: 'And in the leading case of Bonaparte *v.* Camden and Amboy Railroad Co., Bald C. C. 205, 217, the cautionary words of Judge Baldwin are equally emphatic against a too frequent re-

sort to this writ.' He says: 'There is no power, the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion, and which is more dangerous in a doubtful case than the issuing of an injunction. It is the strong arm of equity that never ought to be extended unless in cases of great injury, where the courts of law cannot afford an adequate or commensurate remedy in damages' * * *''

With regard to granting mandatory injunctions before final hearing the Court said:

''Counsel for complainant stated, in argument, he appreciated that the relief sought in limine would be tantamount to a *mandatory injunction*. I am convinced that no such relief should be granted in the matter sub judice. It is rarely granted before final hearing, or before the parties have had full opportunity to plead all the facts in such a manner as will enable the court to see and judge what the truth may be. *It is always granted cautiously, and is strictly confined to cases where the remedy at law is inadequate. A preliminary mandatory injunction will be ordered only in cases of extreme necessity.* Bailey *v.* Schnitzius, 45 N. J. Eq. 178; Jersey City *v.* Coppinger, 101 N. J. Eq. 185; McCran *v.* Public Service Railway Co., 95 N. J. Eq. 22, 27, 28; Wakeman *v.* New York, Lake Erie and Western Railroad Co., 35 N. J. Eq. 496; Citizens' Coach Co. *v.* Camden Horse Railroad Co., *supra.*''

It is undisputed that the condition which existed at the time of the filing of the complainant's bill had been in existence at least eighteen months prior thereto, to his knowledge and without any objections from him. It can hardly be possible that the complainant could now claim that a condition which he permitted to exist for a period of eighteen months without any objection had suddenly become one which would bring

him within the rule that a preliminary injunction will not be awarded unless from the pressure of *urgent* necessity and unless also the injury to be prevented pendente lite would be irreparable.

How can the complainant show any irreparable injury? He has in his possession a fund of $6,000.00 belonging to the defendant. He has been adequately protected for rents accruing pending this appeal by the order of the Court of Chancery. (State of Case, p. 76.) He has a complete and adequate remedy at law for all damages to the premises and for defaults in payment of rent.

The complainant cannot show irreparable injury and has not exhibited a right, free from doubt or reasonable dispute, to a preliminary mandatory injunction depriving the defendant from possession and giving to the complainant the full relief which he may not be entitled to on final hearing.

POINT III.

The complainant's bill does not disclose an equitable cause of action and the Court should have dismissed the bill for lack of jurisdiction.

The Court of Errors and Appeals in the case of *San Giacomo* v. *Oraton Inv. Co.,* 6 Ad. Rep. 1365; 143 Atl. 329, an opinion by Justice Black said:

> "The system of courts set up in New Jersey under the Constitution, Art. 6, Sec. 1; the jurisdiction of the equity and common law courts is separate and distinct. The common law courts have exclusive jurisdiction to hear and determine controversies resting upon a purely legal basis and determined by the principles of the common law,

such as a money claim or a simple debt and the like, whether due or not. *The jurisdiction of the equity courts cannot be conferred over this class of subjects, by consent of counsel or acquiescence of a Vice-Chancellor.* The Court of Chancery was not competent to adjudicate the claim. The first requisite to constitute jurisdiction is, the court must have cognizance of the class of cases to which the one to be adjudged belongs. This principle is elementary and needs no citation of cases.'' (Page 329.)

In the case now before this Court, the primary relief sought by the complainant is the recovery of the possession of certain premises. There is a complete and adequate remedy furnished by the law courts in an action of ejectment or in a summary proceeding to dispossess the defendant which may be brought under the Landlord and Tenant Act. The facts are such as can be adequately and competently passed upon by the law courts and do not need the intervention of the Court of Chancery for the relief sought.

The complainant bases his right to recover upon a certain agreement. He alleges that there has been a breach of the condition of that agreement which justifies him in demanding the immediate possession of the premises notwithstanding the term granted under the agreement has not expired.

He bases his right upon a default in rent and on other specifically alleged defaults. These questions are not novel and are not involved but are presented to District Courts under the Landlord and Tenant Act daily.

The other relief prayed for by the complainant can be adequately remedied by a money verdict rendered by a law court of competent jurisdiction.

Pomeroy in his work on Equity Jurisprudence (4th Ed. Sec. 176 and 177) states the principle as follows:

> "The principle may be stated in its broadcast generality, that in cases where the primary right, interest, or estate to be maintained, protected, or redressed is a legal one, and a court of law can do as complete justice to the matter in controversy, both with respect to the relief granted and to the modes of procedure by which such relief is conferred, as could be done by a court of equity, *equity will not interfere even with those peculiar remedies which are administered by it alone, such as injunction, cancellation, and the like*, much less with those remedies which are administered both by it and by the law, and which therefore belong to its concurrent jurisdiction." (Sec. 176.)

> "In all cases where the plaintiff holds or claims to have a purely legal estate in land, and simply seeks to have his title adjudicated upon, or to recover possession, against an adverse claimant who also relies upon an alleged legal title, there being no equitable feature of fraud, mistake, or otherwise, calling for the application of equitable doctrines or the granting of peculiar equitable reliefs, the remedy at law is adequate, and the concurrent jurisdiction of equity does not exist. *A suit in equity, under its concurrent jurisdiction, will not be maintained to take the place of the action of ejectment, and to try adverse claims and titles to land which are wholly legal, and to award the relief of a recovery of possession.*" (Sec. 177.)

POINT IV.

The Order of the Court of Chancery should be reversed and the bill of complaint should be dismissed.

Respectfully submitted,

TUMEN & TUMEN,
Solicitors for Defendant-Appellants.

SAMUEL KAUFMAN,
JONAS TUMEN,
Of Counsel.