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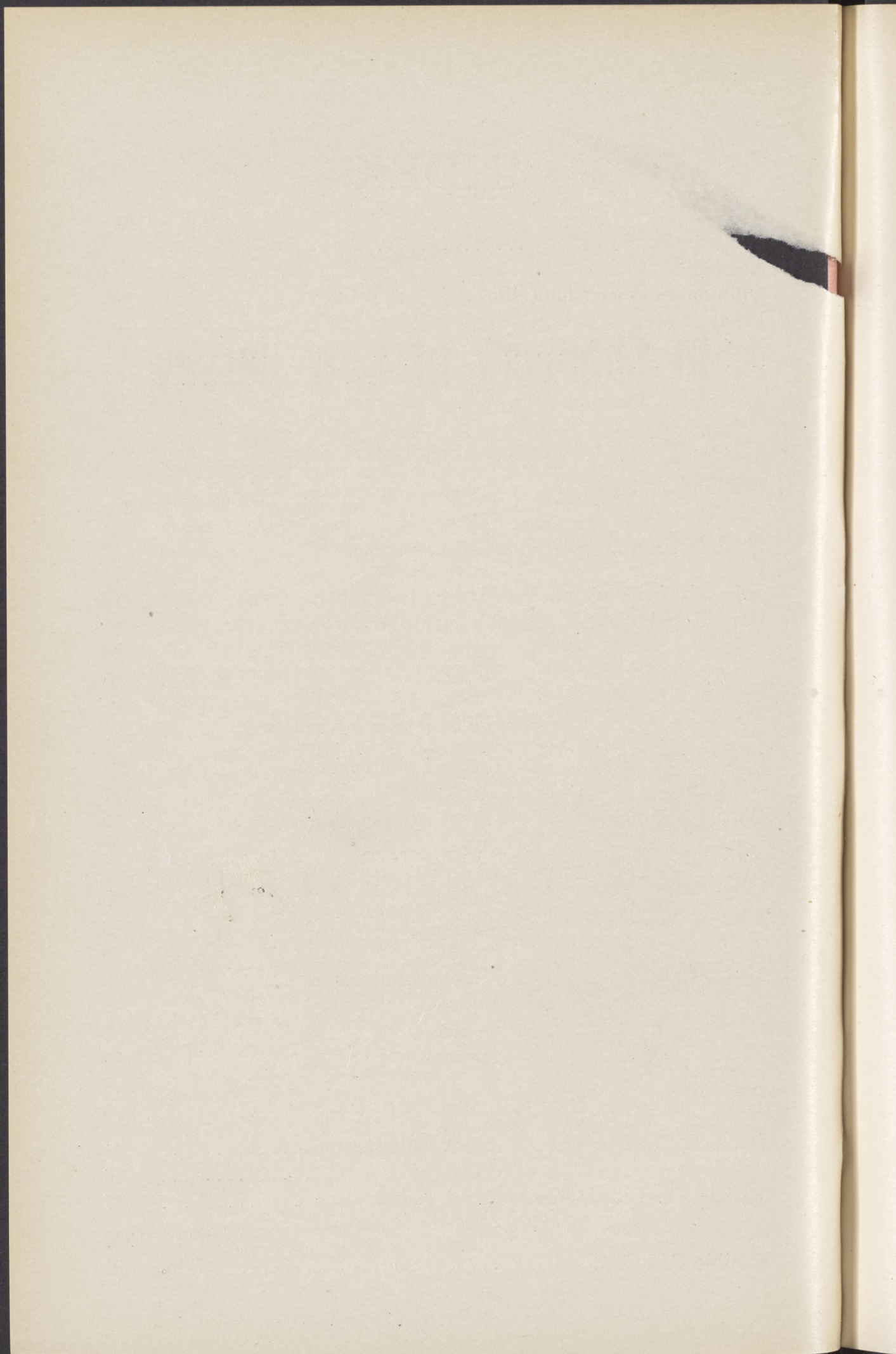
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*Bill of Complaint.*

**Bill of Complaint.**

Filed February 8, 1918.

# In Chancery of New Jersey

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*To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey.*

The complainants, William A. Kelly and Michael F. McLaughlin, residing in the City of Newark, in the County of Essex and State of New Jersey, respectfully show:

1. On October 23, 1917, complainants as party of the first part entered into a contract in writing with Barnet Chinich and Joseph Densky, party of the second part, whereby the said party of the first part, in consideration of the sum of \$9,000, agreed with the party of the second part, that the party of the first part would convey to the party of the second part, by deed of warranty free from all encumbrances, on or before January 15, 1918, premises in the Village of South Orange, in the County of Essex and State of New Jersey, which premises consist of a tract of land more particularly described as follows:

20

BEGINNING on the westerly line of Holland avenue at a point distant one hundred feet and fifty-two-hundredths of a foot northerly from the northerly line of South Orange avenue; thence running along the westerly line of Holland avenue north twenty-one degrees, fifteen minutes east one hundred and fifty-two one-hundredths of a foot; thence north sixty-eight degrees forty-five minutes west two hundred and eighteen feet and thirty-six one-hundredths of a foot; thence south eighteen degrees nine minutes west twenty-nine feet and twelve one-hundredths of a foot; thence south thirteen degrees nine minutes west seventy-one feet and twenty-three one-hundredths of a foot; thence south three degrees forty-seven minutes west twenty-four feet and sixty-five one-hundredths of a foot; thence south seventy-five degrees, thirteen minutes east two hundred feet and fifty-five one-hundredths of a foot to the place of BEGINNING.

30

40

*Bill of Complaint.*

2. Said Barnet Chinich and Joseph Densky agreed that they would pay complainants the said sum of \$9,000 in the following manner: \$300 upon the signing of said agreement, \$500 on December 2, 1917, and the balance on January 15, 1918.

10 3. It was further agreed between the parties that the party of the second part might enter upon the premises on January 15, 1918, and that the deed should be delivered and received at the office of Charles F. Herr, 772 Broad street, Newark, New Jersey, on January 15, 1918, between 10 A. M. and 3 P. M.

20 4. On January 15, 1918, between the appointed hours, complainants tendered the said Barnet Chinich and Joseph Densky, at the office of Charles F. Herr, 772 Broad street, Newark, New Jersey, a valid conveyance for the lands and premises described in said agreement, and demanded the purchase price of the said property, but defendants refused to carry out said agreement, refused to accept said conveyance and declined to pay the consideration therefor.

5. Complainants have always been ready and willing and now are ready and willing to carry out all the agreements and covenants on their part to be performed under said contract, but defendants refuse to perform or carry out the same.

30 6. Complainants are entitled to have the said contract performed by the said defendants, Barnet Chinich and Joseph Densky, and complainants are entitled to specific performance of said contract.

7. Complainants are without adequate remedy in the Courts of law and therefore pray

40 (1) That Barnet Chinich and Joseph Densky, who are the defendants to this suit may answer this bill of complaint without oath and each statement therein made; that the said defendants, Barnet Chinich and Joseph Densky, may be ordered and directed by the decree of this Honorable Court to accept a conveyance of the lands and premises in said contract of sale, and hereinabove described as by the said contract of sale agreed and that they may be ordered and directed to pay to complainants the amounts by them in said contract of sale agreed to be paid upon the delivery of said conveyance, and that complainants may have such other and further relief in

*Answer.*

the premises as the nature of the case may require and as shall be agreeable to equity and good conscience.

(2) That a writ of subpoena may issue commanding said defendants to answer this bill of complaint and to abide by said decree as this Court may make in the premises.

CHARLES M. MYERS,  
*Solicitor for and of Counsel with Complainants.*

10

**Answer.**

Filed

Defendants BARNET CHINICH and JOSEPH DENSKY, residing in the City of Newark, County of Essex and State of New Jersey, answering Bill of Complaint exhibited against them, respectfully state:

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(1) Defendants deny paragraph one of the Bill of Complaint.

(2) Defendants deny paragraph two of the Bill of Complaint.

(3) Defendants deny paragraph three of the Bill of Complaint.

(4) Defendants admit the offer of a paper, which might have been deed described in paragraph four of complaint but of which fact they had no knowledge. Defendants deny that any tender was made under any existing agreement.

30

(5) Defendants neither deny nor affirm paragraph five of Bill of Complaint.

(6) Defendants deny paragraph six.

Defendants therefore pray that the Bill against them exhibited be dismissed with costs against the complainants.

BLATT & LESSER,  
*Attorneys for Defendants.*

40

*William A. Kelly, direct.*

IN CHANCERY OF NEW JERSEY.

*Between*

WILLIAM A. KELLY, *et al.*,

*Complainants,*

*and*

BARNET CHINICH and JOSEPH DENSKY,

*Defendants.*

Transcript of shorthand notes of testimony and proceedings in the above entitled cause before Hon. John E. Foster, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, on May 21st, 1918, at 10 A. M.

20 Appearances:

Mr. Charles M. Myers, for complainants.

Mr. Louis B. Lesser and Mr. David H. Yonteff, for defendants.

WILLIAM A. KELLY, sworn for complainants.

*Direct examination* by Mr. Myers.

Q Where do you live? A 26 Stanley Road, South Orange.

30 Q You are in partnership with Kelly & McLaughlin of the leather business? A Yes.

Q Do you also own in partnership with him any real estate? A Yes.

Q Where? A South Orange; Stanley road and South Orange avenue.

Q Is that also known as Holland avenue? A Holland is the road in back of it.

Q Do you own with him the property on the west side of Holland avenue 100 52/100 feet from South Orange avenue?

40 A Yes.

Q Do you know Barnet Chinich and Joseph Densky? A Yes, sir; I met them.

Q Did you ever have any dealings with them with reference to that property? A We sold them the property.

Q Who were your agents? A Cohn & Stern.

*William A. Kelly, direct.*

Q As a result of the negotiations between your agents, yourself and the defendants, did you meet anywhere? A When the deal was supposed to have been consummated, we met at Mr. Charles F. Herr's office.

Q And who was representing you at that time? A Mr. Cohn and Mr. Stern. 10

Q What lawyer? A Mr. Conway was representing us at that time.

Q What time of the day did you go there first? A I went there in the morning between ten and eleven first.

Q When was it, do you remember?

*Mr. Lesser.* I agree that the date of the agreement is October 23, 1917.

Q Who all were present? A Mr. Chinich and Mr. Densky and Mr. Cohn and Mr. Stern and Mr. McLaughlin and myself and Mr. Conway and Mr. Charles F. Herr. 20

Q When was the contract drawn, if the contract was drawn? A That morning.

Q Who drew that? A That was drawn by Mr. Herr's stenographer, all typewritten by her; it was drawn up by Mr. Charles F. Herr, I believe, and Mr. Conway, and they talked it over.

Q Was it signed that morning? A No, sir; there was some little changes made in the contract and it was left until we went out to dinner; we were to come back at two o'clock, when we were to sign it and get a check. 30

Q Did you come back at two o'clock? A Yes, we did.

Q Was Mr. Conway with you at that time? A Not at that time.

Q Were all the others present? A All the others were present through the deal.

Q And at that time was the contract read to you or shown? A A contract was read to us and everything was perfectly satisfactory.

Q Tell us what occurred from the time the contract was read to you. A These gentlemen, Mr. Chinich and Mr. Densky, either one of them, said that he had heard when he had been out to dinner, that there was a law in South Orange preventing you from putting up a four-story building, and if that was so, they didn't want to buy this property. We told them that it 40

*William A. Kelly, direct.*

wasn't so, that you could put up any building you wanted if you complied with the laws as regarding the building material, and there was a check drawn for \$300, left in Mr. Herr's care; the deeds were all signed up.

Q The agreement? A The agreements were signed up.

10 Q (*By the Court.*) By whom? A Mr. McLaughlin and myself and Mr. Chinich and Mr. Densky.

Q (*By the Court.*) Did anyone witness it? A Mr. Herr and our own party; that was about all.

Q What was then said, if anything, by anyone, after the contract was signed and the check made out and signed? A After stating that they heard that they couldn't build a four-story building in South Orange—

20 Q (*By the Court.*) That was before they had made out a check and signed the contract they made that statement? A Yes, I believe it was spoken of before that.

Q (*By the Court.*) Mr. Myers asks you what was done after they made out the check and signed the contract; what was done with the check and papers? A Mr. Herr asked permission to hold that check until they found out if there was a law preventing their building a four-story building in South Orange, stating that if there was no law preventing them from building that in South Orange, that Mr. McLaughlin would stop in and get that check in a couple of days after.

30 Q (*By the Court.*) And the contract? A And the contract.

Q (*By the Court.*) And then you left? A Yes.

Q (*By the Court.*) Was there anything else said? A No, except by Mr. Cohn; he said, "Everything is all right now and agreed upon, will you pay us a commission when you get your money," and they said, "Yes."

40 Q I show you a paper and ask you whether that is the paper that was signed by you and Mr. McLaughlin and Mr. Densky and Mr. Chinich? A Yes, that is the paper that was signed by all four.

Q You saw all four sign? A Yes.

Q Did you see Judge Herr sign? A He was the one that handed the paper to us.

Q (*By the Court.*) He signed in the corner? A Yes, and had us all sign it.

*William A. Kelly, cross.*

Q Did he take an acknowledgment from you, do you remember; do you remember whether he asked you if that was the paper that you signed? A Yes, he had some legal talk there; I guess that is what he was saying at the time.

Q The paper still shows the name of Kelly and McLaughlin, does it not? A Yes.

Q And it shows the beginning of what purports to be two names? A Yes.

Q And those two names and the seals, if there were any opposite, are torn from the paper? A Yes.

Q You didn't tear them off? A No, sir.

Q (*By the Court.*) When did you next see that paper? A When Mr. McLaughlin brought it up to the office; he came up very, very indignant.

Q About how long after the day in question? A That must have been over a week, a week or eight days.

*Mr. Myers.* I offer in evidence agreement for the sale of property, between William A. Kelly and Michael F. McLaughlin and Barnet Chinich and Joseph Densky, dated October 23rd, 1917.

Marked Exhibit C. 1 for identification.

*Court.* Is there any question about its having been signed?

*Mr. Lesser.* No, but I object to it.

*Court.* Your objection goes to the failure of formal proof by the subscribing witness? I think it is competent. It is not admissible without the proof of the subscribing witness.

*Mr. Lesser.* If the Court is merely going to admit it for the purpose of having it clear that this paper in question—

*Court.* Yes; what weight is to be attached to it must be considered later.

It is offered and admitted.

Marked Exhibit C. 1.

*Cross examination by Mr. Lesser.*

Q When the papers were offered for signature, what did Mr. Chinich or Mr. Densky say to Judge Herr; in what words, or what words were used? A Either one of them—I don't

*William A. Kelly, cross.*

know which one—said that they had heard that there was a law in South Orange preventing four-story buildings and apartment houses; I believe they specified four-story buildings, or over.

10 Q And then what was next said by Judge Herr or them? A The next said was by Mr. McLaughlin, stating that there was no law preventing a four-story building.

Q And then what? A Then Mr. Herr and the rest of the parties seemed perfectly satisfied to sign the papers and send them along properly.

Q (*By the Court.*) They were signed? A Yes.

Q After Mr. McLaughlin's statement? A After Mr. McLaughlin's statement.

20 Q Nothing else said by anyone? After Mr. McLaughlin had said that there was no such law, was anything else said by any one in the party? A They asked permission to hold them.

Q (*By the Court.*) What was said about it; give us the language, and what did you or Mr. McLaughlin say in reply? A I think it was Judge Herr said that if the papers were signed, he would want permission to hold them for a couple of days until Mr. Densky and Mr. Chinich satisfied themselves that there was no such law to prevent them from putting up this contemplated building.

30 Q Do you remember whether he said something like this: "You are all busy men; you sign the papers"—speaking to Chinich and Densky, he said, "You sign all the papers and check and leave them with me, and when you let me know, I will turn them over"? A No, sir.

Q You didn't hear that? A I didn't hear any such words.

Q During the course of the negotiations in the morning, was there any talk about a four-story brick apartment building?

A It was understood that that was what was to be built there.

40 Q (*By the Court.*) Was it understood from something that was said? A Yes, they told us what they were going to build, the amount of money they were going to spend on it, and practically the way it was going to be built.

Q And you told them as a matter of fact and made it part of the negotiations that the building was to be set back a certain distance so as not to interfere with your house next door?

A That was all put in that agreement of sale.

*Michael F. McLaughlin, direct.*

Q And at the same time they informed you that it would not pay them to build a building less than four stories on such an expensive lot? A I don't know that they said that, because it was understood that that was what they were going to build; that was all planned.

Q Calling your attention again to the time of the signature on these papers, didn't Chinich or Densky or both refuse to sign, and then Mr. Herr advised them that as all were busy, they sign and leave the papers in his possession; isn't that correct? A I didn't hear of any objections to signing at all; there was a little discussion about what they heard outside about not being able to build a four-story building; that was talked over for quite some little time and then we signed; I didn't hear anybody object to signing at all, because they didn't object to signing the check and leaving it there for Mr. McLaughlin to get a day or two later.

Q (*By the Court.*) Was the suggestion made by any one but Mr. Herr that the papers be left with him until they found out if a four-story building could be erected? A I don't think so. I don't think there was anything said by anybody but Mr. Herr.

Q And Mr. Herr did not represent you, did he? A On account of Mr. Herr being such a friend of Mr. McLaughlin, he said everything was all right in Mr. Herr's hands, yes.

Q Did you have an attorney at the time in that transaction? A Yes.

Q Who was your attorney? A Mr. Conway.

Q And he was there pending all the negotiations in the morning? A Yes.

Q Who asked you to go to Mr. Herr's office? A I don't remember that; we were to go there and meet the whole party.

Q Didn't you understand that Judge Herr was the attorney for Chinich and Densky? A Yes, they understood that.

MICHAEL F. McLAUGHLIN, sworn for complainants.

*Direct examination by Mr. Myers.*

Q You were a partner with the last witness in property on Holland avenue in South Orange? A Yes.

Q You arranged the sale of that property? A Yes, sir.

Q Did you meet Mr. Chinich and Densky? A Yes.

*Michael F. McLaughlin, direct.*

Q Where did you first meet them? A They were brought to our office by Mr. Cohn and Mr. Stern.

Q And they were your agents for the sale of the real estate? A Yes.

10 Q You were present at both sessions on the twenty-third of October at Judge Herr's office? A I was.

Q When was the contract which has been offered in evidence signed? A It was signed after we came back from lunch.

Q You signed it as Mr. Kelly has testified to? A Yes.

Q You saw all the others sign? A Yes.

20 Q Was there anything said just before or just after the paper was signed by either Mr. Chinich or Mr. Densky with reference to the possibility of erecting any kind of a building on the property? A Before the paper was signed there was talk about the law allowing a four-story apartment house to be constructed in South Orange.

Q Who made that talk? A That was made by Mr. Densky and his partner after they came in from lunch.

Q Was that statement or question answered by either you or Mr. Kelly? A It was answered by me, and I said that I had positive information from the authorities in South Orange that there was no law prohibiting the building of a four-story house—four-story apartment in South Orange, and that the sky was the limit if they complied with the law.

30 Q Had there been prior to that statement any comment by the prospective purchasers as to what they intended to build on that lot? A Yes.

Q And what did you understand? A They were to build a very handsome four-story apartment house and it was to cost in the neighborhood of about \$90,000.

40 Q After you told them that the sky was the limit, what next happened? A There was some talking; they appeared to have some doubts, and then Mr. Herr stated that it would be well for the contract to be signed by all parties, and then if there was a law forbidding the building or prohibiting the building of any such four-story apartment, that the thing wouldn't go through.

Q And if there was no law, what was Mr. Herr to do? A That there wouldn't be any question about Densky and his partner taking the property and building on it.

*Michael F. McLaughlin, cross.*

Q What was to become of the contract? A The contract and check was to be handed to us and Mr. Herr asked if we had any objections for him to hold that check and contract until they found out if the law was all right, allowing them to build this, and that he would turn the same over to me.

Q (*By the Court.*) How long was he to hold it? A A day or two. 10

Q What happened then; you all left? A Yes, we left.

Q When did you come back or communicate with Mr. Herr? A I think the next day or day after I called him up on the phone and asked him about that, and I think he told me that it was off, that they couldn't build.

Q And then what did you do or say? A Then— I don't know whether I came down that week or the following—it was the latter part of the week, I think, I came down about the middle of the week to find out what the trouble was, and I went in the office— 20

Q (*By the Court.*) Of Mr. Herr? A Yes, and Mr. Herr wasn't there, and his clerk in the office told me that the deal was off, and went to the safe and brought out the two contracts, and with the names and Chinich and his partner torn off, and I wanted—I asked then and there—I got a little bit hot under the collar; and I asked then and there, why those names were torn off without our consent or without our being present, and he said he didn't know that; they were torn off all right, and I took one of the contracts and handed him back the other, and put it in my pocket, and told him that I would see our lawyer about it. 30

Q Anything said about the check? A When I went in I asked for the check and the contract, and they said there is nothing doing; that the deal was off.

Q You didn't get the check, but you did get the contract? A Yes.

*Cross examination by Mr. Lesser.*

Q Do you remember the young man you spoke with in Judge Herr's office? A Yes, I think he is a soldier now. 40

Q His name is Edgar Leiss? A I think so.

Q Do you remember seeing Edgar Leiss on the day of signing that contract? A In the office?

Q Yes. A I think he was there.

*Michael F. McLaughlin, cross.*

Q When you came in to get this paper, which you call a contract, did you ask for Judge Herr? A Yes.

Q And what were you told? A They told me he was out.

Q Then what did you say next? A I said I came in for the check and contract.

10 Q Then what did Mr. Leiss say? A He told me that the deal was off.

Q And he went to the safe and brought the papers? A Yes.

Q Your names were on those papers, isn't that correct? A Yes.

Q And he was returning to you your signatures, isn't that correct? A He was returning the contract that we had signed and that the other people had signed.

20 Q Who was supposed, if anybody, to deliver those papers to you, if Chinich and Densky were to be satisfied?

*Mr. Myers.* I object to the form of the question. There isn't any testimony that they were to be satisfied; they were to ascertain if there was a law.

*Court.* Satisfied about a law, I suppose you mean, or to be satisfied generally; which do you mean?

*Mr. Lesser.* Satisfied generally.

*Mr. Myers.* I object.

30 *Court.* There isn't any proof in the case to warrant that.

Q Who were to be satisfied that the law permitted the building of a four-story apartment building in South Orange? A I suppose the parties to the contract and our counsel, Judge Herr.

Q (*By the Court.*) Chinich and Densky? A Yes.

Q That was what was said? A Yes.

Q That they were to have certain time to see that the law was as you stated, and if they did, then the papers were to be delivered to you? A Yes, sir; that is right.

40 Q Who was to deliver to you the papers if Chinich and Densky were satisfied—to be satisfied as to the law in South Orange? A I cannot answer that question, because Mr. Counsellor Herr may have designated himself or designated some of his employees to hand that check over, and contract over to us; I cannot answer that.

*Michael F. McLaughlin, cross.*

Q (*By the Court.*) When he made the suggestion, as I understand you, that he hold the papers after they had been signed, and hold the check, to give them time in which to look up to see if the law was as you represented, was anything said in connection with his holding the papers, and delivery of the papers by him to you? A Not specifically himself, I don't think, because he asked permission to hold the check and the papers. 10

Q Until they looked up the question of law? A Yes, whether the apartment could be built or not.

Q (*By the Court.*) But there was nothing said about who was to deliver or who was to turn the papers over to you definitely? A The way I understood it—

Q (*By the Court.*) Was there anything more said? A No; that satisfied both Mr. Kelly and myself.

Q (*By the Court.*) And satisfied them as well? A Yes, sir; as soon as Mr. Herr, who we all know— 20

Q (*By the Court.*) You left the office of Mr. Herr with the matter in that condition? A Yes, sir.

Q Did Mr. Chinich or did Mr. Densky, or counsel for them, Judge Herr, ever tell you that they were satisfied as to the law, that they could build a four-story brick apartment building?

*Mr. Myers.* I object.

*Court.* What difference would it make; if the conditions were as he states, it is immaterial whether they were to be satisfied. Suppose they were unreasonable and wouldn't be satisfied. The fact is, what was the law, if this was the condition on which the papers were deposited in escrow. If the arrangement by which the paper was deposited with Mr. Herr is as Mr. McLaughlin and Mr. Kelly have testified, and if the law, as Mr. Kelly called it, relating to the erection of the buildings in South Orange, was such as he described it, they could or could not be satisfied; it doesn't make any difference; there was the law. Suppose they never made any investigation to be satisfied. 30 40

Q Did Chinich and Densky ever express to you that they were satisfied with the state of the law in South Orange as to the building of a four-story brick building?

*Michael A. Fitzsimmons, direct.*

*Mr. Myers.* Objected to.

*Court.* I will let him answer it.

A. After we left Mr. Herr's office I didn't see or had no conversation at all with Densky and his partner.

10 Q (*By the Court.*) Therefore, they never expressed to you satisfaction or dissatisfaction? A No, it was a question of finding out.

Q (*By the Court.*) Did they ever after the paper was signed express satisfaction or dissatisfaction? A No

MICHAEL A. FITZSIMMONS, sworn for complainants.

*Direct examination by Mr. Myers.*

Q Mr. Fitzsimmons, you are the Village Clerk of the Village of South Orange? A Yes.

20 Q How long have you been the Village Clerk? A Seventeen years.

Q You are at the present time? A Yes.

Q You have charge of the books and record of the village? A Yes.

Q Have you with you the book of ordinances of the Village of South Orange? A Yes.

Q Have you examined the ordinances of the Village of South Orange to ascertain whether there is any prohibition against the erection of a four-story apartment house in South Orange?

30 *Mr. Lesser.* I object as immaterial.

*Court.* I am inclined to agree with him. I think it is part of their case, if I find there was a contract entered into by them with you. Now, they asked to be relieved from the performance of that contract on the ground that you misled them by your statement or representation that there was no such law. Let them show it. If they make any point of it, I will let you put it in in rebuttal. I will sustain the objection.

*Charles F. Herr, direct.*

CHARLES F. HERR, sworn for defendants.

*Direct examination* by Mr. Lesser.

Q Do you recall on October 23rd last, at your office, the conference or meeting between Chinich, Densky, Kelly, McLaughlin, Mr. Conway, Mr. Stern, Mr. Cohn and yourself? A Yes. 10

Q With reference to a deal on some property? A Yes.

Q Whom were you representing? A Chinich and Densky.

Q Do you recall what happened in the morning concerning the deal, how far you went concerning the contract? A I don't remember whether it was in the morning or afternoon; I remember that I drew a contract, and pending the conference a question arose as to whether a four-story apartment could be erected on the land about to be sold, and both Chinich and Densky didn't feel disposed to sign the contract until they ascertained that fact. I told them—I said, "You sign this contract and avoid the necessity of coming back here again, and ascertain whether you can build the house that you desire." That was agreed upon, and the contracts were signed and left with me. Chinich and Densky were to find out whether such a building could be put up, and if they came back and let me know that such a building could not be put up, the contract was not to be delivered or no contract at all made; the agreement was to be at an end. I held the contract—I don't know—a day, I think, possibly, and Mr. Chinich and Densky came back and informed me that they could not put up such a building, and I said, "Well, that ends the agreement." I believe I gave them one copy, or I left the two copies with my clerk—I am not sure which—for the purpose of destroying the contract and delivering the check. 20 30

Q (*By the Court.*) Had there been a check given to you at the time the contract was signed? A Yes; I don't remember what the amount was; I think I left the check with him to be delivered to Mr. McLaughlin.

Q Delivered to whom? A To Kelly & McLaughlin.

Q The check? A Yes. The check was their check as part payment. 40

Q Wasn't that check— A I mean Chinich and Densky's check, to be paid back.

Q Were you to deliver—did you agree with Kelly and McLaughlin to deliver to them at all—did you say to Kelly & Mc-

*Charles F. Herr, direct.*

Laughlin that you would turn the papers over to Kelly & McLaughlin at any time until Chinich and Densky told you to do so? A No, sir; it was absolutely understood that they were to be the sole judges as to whether this contract was to be delivered or not.

10 Q That was the understanding? A There is no doubt of it.

Q How long have you represented Chinich and Densky? A I should say ten or twelve years, possibly fifteen.

Q Wasn't it merely as their adviser that you suggested the signing to save time and save coming back?

*Mr. Myers.* Objected to.

*Court.* Objection sustained.

20 Q Just exactly, why did you advise them to sign the agreements? A So as to avoid the necessity of the parties coming back. That was the only reason.

Q That it was merely a matter of convenience, wasn't it? A That is all.

Q Were these contracts considered as made with the signing—

Objected to.

Objection sustained.

30 Q (*By the Court.*) Why didn't you embody in the contract—didn't it occur to you—a provision that if it were found that the parties could not build such an apartment house as they desired the contract was to be at an end or not in effect? A The question was practically raised after the contract had been drawn and the hesitancy on the part of Chinich and Densky to sign, and the agreement had practically been consummated so far as the terms were concerned, with that exception. It wasn't to be a part of the contract.

40 Q (*By the Court.*) What was your understanding? If you had not heard from Chinich and Densky within a reasonable time, what were you to do with the check and contracts? A There wasn't anything to be done with it; there was no understanding as to that; they were to come back and let me know one way or the other.

Q You said that Chinich and Densky were to be the sole deciders of the fact, or you said that they had the sole disposition of this matter. Do you mean exactly that?

*Charles F. Herr, cross.*

*Mr. Myers.* Objected to.

A They were to be the sole judges as to whether there was to be a contract.

Q In answer to a question you said that Chinich and Densky were to be the sole judges as to whether there was to be a contract or not.

10

*Court.* That isn't what he testified to.

Q Do you mean exactly that which you said in your last answer, with its full legal effect?

*Mr. Myers.* I object to that.

*Court.* Suppose you state what they said about the delivery, if anything. State what was said by them, or Mr. McLaughlin, or Mr. Kelly.

*Witness.* I don't remember the exact wording of all these people at that time. I remember in detail that that was the arrangement and the conclusion that was made, that Chinich and Densky were to come back and tell me whether they could put up such a building. If they came back and told me that they could not put up the building the contract was to be at an end; there was to be no agreement and the papers were to be destroyed. If they could put up the building, then the papers were to be delivered.

20

Q (*By the Court.*) If they told you they could put up the building, not whether they could as a fact? A If they came back and told me they could not put up the building, that was to be the end of it.

30

Q Were you authorized to ever deliver to Kelly & McLaughlin until you heard something from Chinich and Densky? A No, sir.

*Cross examination by Mr. Myers.*

Q You don't want us to understand that Mr. Kelly and Mr. McLaughlin agreed that the contract was to be at an end if the vendees came back and told you that they could not put up the building? A That is what I want you to understand, and that is what the arrangement was.

40

Q Do you remember Mr. McLaughlin saying that the sky was the limit, when the conversation was had between them as to how

*Charles F. Herr, cross.*

high they could build? A I wouldn't say; I wouldn't say he did not use those words; it is some time ago, and the number of transactions I have; I cannot remember the details.

10 Q You see, Judge, what would be in your opinion the necessity for having the contract executed if it was to be at the sole desire of the vendees as to whether the contract was to be enforced or not? A As a matter of convenience to the parties.

Q They had to come back to let you know? A Only Chinich and Densky.

Q You were not concerned as to whether Kelly & McLaughlin lost any time, were you? A I didn't—as I say, it was simply done for the convenience of all concerned, including Kelly & McLaughlin.

20 Q (*By the Court.*) How were you to make delivery if they were satisfied, by mail or send for McLaughlin & Kelly? A There wasn't anything said as to how the delivery was to be made.

Q Do you remember Mr. McLaughlin calling you on the 'phone within a day or two? A I do not.

Q Do you remember any conversation with Mr. Conway, who at that time represented Kelly & McLaughlin, after Densky or Chinich had told you that there was a law that prevented the erection of the building?

*Mr. Lesser.* I object as immaterial.

30 *Court.* It may be; I will hear it.

A You mean whether Conway had a conversation with me?

Q Yes. A He might have had.

Q Do you remember if he had such a conversation? A I think so.

Q Do you remember saying to him that if your clients, or the vendees, were given a bond in the sum of \$100,000, that the contract would be as it had originally been signed?

40 *Mr. Lesser.* I object as immaterial. I think it is a new condition which the Judge could not possibly make.

*Court.* That may be true, but I will hear it, to see what was said or done between them.

A I think there was such a conversation after the notice or intimation or some statement of the suit going to be brought;

*Barnet Chinich, direct.*

it wasn't anywhere near at the time that the contracts were signed; it was some time subsequent to that.

Q (*By the Court.*) Do I understand that your recollection of the matter is now, that these contracts signed by Mr. McLaughlin and Mr. Kelly were to be left in your possession, representing the defendants, without any limit as to time, and until the defendants notified you that they were or were not satisfied with the situation? A There was no time mentioned; no, sir. 10

Q (*By the Court.*) There was a time for closing the contract? A Yes.

Q (*By the Court.*) I mean independent of that. That was the only limit? A They were to go and find out; of course, my understanding of it was—

Q (*By the Court.*) Your supposition was that they must do it within a reasonable time? A Yes. 20

Q How soon after the twenty-third of October, the day the contract was signed, did either or both of the vendees come in and tell you that they could not build? A My recollection is that it was a day or two; possibly three days, at the outside; a very short time afterwards.

Q Whom were you acting for? A Chinich and Densky.

Q Was Mr. Conway representing Mr. McLaughlin and Mr. Kelly at the time the contracts were executed and the deposit with you made? A I think Mr. Conway was there, but I am not sure about that. 30

Q There was some statement that he was there during the negotiations, but not that he was there at the time the papers were executed or signed.

*Mr. Myers.* The testimony is that he was not.

BARNET CHINICH, sworn for defendants.

*Direct examination by Mr. Lesser.*

Q You are a partner with Mr. Densky mentioned in this deal? A Yes. 40

Q Do you remember the day when you signed the alleged contracts—when these papers were made? A I do; in October some time.

Q You remember the time? A Yes.

*Barnet Chinich, direct.*

10 Q What happened there that morning with reference to the building of a four-story brick apartment; what was said? A We was going to go to Judge Herr's office; we had to talk some suggestions over, and it was agreed about the price and to draw the contract; then Mr. Conway start to read the dimensions from the ground, and he start to read it, it is a village; when I bought that ground, I expected it was South Orange avenue, four-story building; as soon as he mentioned it is a village, I said to Mr. Densky, "Mr. Densky, we will not sign the agreement, because I am afraid there is a different law there." I went in to Judge Herr, and I said, "Judge, we will not sign the agreement before we find out if we can build a four-story apartment without any trouble."

20 Q Were Mr. McLaughlin and Mr. Kelly present at this time? A Yes. Judge Herr said to him, "You hear, gentlemen, what Mr. Chinich said." "We hear that." Then we went again for lunch. After we had lunch and went into architect Bottelli and asked him if he knows the rules about the Village of South Orange, and he said he don't know anything about it; he is asking the building department. He telephoned to the building department between one and two o'clock and someone answered him on the phone, the inspector is not there, the inspector will be in between nine and ten; we could find him always in the morning. We come back to Judge Herr and told Judge Herr we will not sign the agreement before we find out everything about that lot, and Judge Herr said to us, "Well, gentlemen, what is the use to come again; you always busy people; you sign the agreement and I will keep the agreement with me with the check. If you come back, if you say deliver the agreement or not, I will give back the agreement with the check." Judge Herr said to Mr. Kelly and Mr. McLaughlin, "You satisfied?" He said, "Well, we are satisfied." Then I said, "Judge, we will not sign the agreement with the check to anybody, just except to your—in your hands, because you are a lawyer," and we signed, and went out to South Orange to the inspector.

30

40

Q You signed the papers? A Yes.

Q And left them with Judge Herr? A Yes, and the check.

Q Now, what happened? A Then we went to South Orange to the building department.

*Barnet Chinich, direct.*

Q How long after that was this? A A day or two. The weather was bad at that time, it was raining; we were there and asked the inspector if we could build a four-story apartment; he said to us, "You cannot build four-story buildings because it is a village; you cannot find in the whole village one apartment four-story."

Q What did you say then? A Then I say, "It is the law here you cannot build four-story?" He said, "If you are going to build four-stories it will be the first building in the whole village, four-story."

10

*Mr. Myers.* I object to the answer as not responsive.

Q And then what happened? A Then he said, "In case you start to build a four-story building, the trustees of the village will have a meeting and stop you in the middle of the building." Then we came back to Judge Herr and said, "Judge, we cannot do nothing; we got to have returned the check with the agreement." He returned to us the check and he tore off the signatures, and that is the end of the whole business.

20

Q Mr. Chinich, were you actually afraid to go into this deal on account of this building?

*Mr. Myers.* I object to it.

*Court.* Objection sustained.

Q When you left the inspector's office did you believe that you could or could not build a four-story brick apartment building without any trouble in South Orange?

30

*Mr. Myers.* Objected to.

*Court.* I will sustain it. It is not a question of what he believed; he stated the information he had. The mere fact that he might have a belief based on erroneous information, that might suit his purpose or convenience, or for some reason, is not at all material to me. I want to know the facts, and I want to hear the facts.

Q How much was this lot supposed to cost? A \$9,000.

Q How much was the building you contemplated putting up going to cost? A \$95,000, and I was afraid to go ahead with the building, because I couldn't loan the whole money somewhere else.

40

*Court.* Strike out the last part of his answer.

*Barnet Chinich, cross.*

10 Q Did you ever authorize Mr. Herr to deliver that paper that is in evidence here; did you ever tell Judge Herr to deliver that paper and the check, showing you the paper, Exhibit C. 1; did you ever tell Judge Herr to give this paper and the check to Kelly and McLaughlin? A No, sir; I permitted him to tear off my signature and return the check to me back.

*Cross examination by Mr. Myers.*

Q When you went up to South Orange, you went there for the purpose of finding out if there was any law against a four-story building, didn't you? A Yes.

Q And you say that the building inspector told you that they wouldn't permit a four-story building? A Yes, sir.

Q Is the building inspector here today? A I didn't see him; I don't know.

20 *Mr. Lesser.* He has not been subpoenaed.

Q What is the building inspector's name?

*Mr. Lesser.* C. T. Schwarze.

30 Q Tell us the exact conversation between you and Mr. Schwarze; what was the question you asked him? A I asked him if I could build a four-story apartment without any trouble, and he told me, "You cannot. Of course, you be the first here in the village to build a four-story apartment." He says, "If you want to build a four-story apartment, then the Board of Trustees will hold a meeting and stop you in the middle of the building."

Q Did you ask him if there was any law to prevent it? A Yes, sir; I asked him.

Q And did he say that there was a law to prevent it? A He said, "You cannot build it." I didn't ask him about the law.

Q You asked him if there was a law; did he say yes, there was a law or there was no law?

*Mr. Lesser.* I object.

*Court.* Objection overruled.

40 A I asked him if I could build; he says, "You could not."

Q How did he know whether you could build or not; he didn't know whether you had money enough to build? A He said, "You be the first in the village to build a four-story apartment."

*Barnet Chinich, cross.*

Q He told you there were no four-story buildings in South Orange? A He said, "You take a walk right with the car; if you see some building four-story; you won't see one."

Q When did you make up your mind that if you bought the lot you were going to put up a four-story building on it? A When I was speaking with Mr. Kelly and Mr. McLaughlin; just only I bought for a four-story building. 10

Q When did you first make up your mind to build such a building? A Before I went to it.

Q And after you looked at the lot you decided that if you bought the lot, the only building that you would put up there would be a four-story apartment house? A Yes.

Q Did you ever make any inquiries in South Orange before that? A No, sir.

Q You had been there and had looked at the property itself in company with the agents, hadn't you? Mr. Cohn and Mr. Stern took you up and showed you the lot? A They took me. 20

Q Did you go and look at the lot before you bought it? A Yes; I never was further away.

Q (*By the Court.*) Did you go to the lot? A Yes.

Q How long were you talking about buying the lot before you signed the contract?

*Court.* When did you first begin to talk about buying it?

*Witness.* A few days.

Q How long; a week or month? A No months; about a week or two. 30

Q And during that week or two you didn't ask anybody in South Orange whether you could build a four-story building? A No, sir.

Q Did you ever go through South Orange to find out if there was a four-story building in it? A No.

Q Did you inquire or make any inquiry of anyone else, either personally or through anybody— A No, sir.

Q To find out if what the inspector told you was true? A No, because I see myself no four-story buildings, after when I come from the building department. He said I wouldn't find one four-story building. 40

Q Did you look through the village to see if that is so? A Yes.

*Barnet Chinich, cross.*

Q When you spoke to Mr. Schwarze and told him that you were going to build on this lot, didn't you ask him whether you could build an apartment more than three stories high?

A I asked him the question only for four-stories.

10 Q And didn't he tell you that the only thing that you might be compelled to do would be to make the hall and first story fire-proof? A He didn't tell me that.

Q Didn't he tell you that there were no restrictions in the village—in the code of the village of South Orange against a four-story building? A No, sir.

Q And didn't he tell you that all that you had to do was to conform with the tenement house law of the State? A I asked him—

Q (*By the Court.*) Did he tell you that? A No, sir.

20 Q After you talked to him a little while, did he go out and come back again into the room? A No, sir.

Q He didn't? A No, sir.

Q And didn't he at any time during this conversation tell you "There is no bar to the erection of an apartment of any size that you care to build, provided you conform to the provisions of the State Tenement House Law"; did he tell you that?

*Mr. Lesser.* I object.

*Court.* It is proper cross examination.

30 A He didn't tell me nothing.

Q Nothing of that kind? A Nothing of that kind.

Q What did he tell you, if he didn't tell you any of the questions I asked you? A He told me only you could not build four-story apartment.

Q You didn't ask anybody else? A No, sir.

Q You didn't go to the village clerk and ask him if there was an ordinance or law against it, did you? A I didn't ask nobody.

40 Q Who went with you? A Mr. Densky, my partner.

Q He was with you at the time this whole conversation took place? A No.

Q Was anyone there with Mr. Schwarze? A No.

Q What time of the day did you see him? A In the morning.

*Barnet Chinich, re-direct—re-cross.*

Q How soon after that did you see Mr. Herr? A I cannot remember, a day or two.

Q Why did you wait a day? A It was a heavy rain at that time and we couldn't go.

Q A heavy rain didn't prevent you going to South Orange? A We didn't go to Judge Herr. I was not so busy. I signed on that condition I could get my check any time. 10

Q The conditions upon which Mr. Herr held that contract and check were that if you found out that you could build a four-story building, then you were to tell Mr. Herr that and he would then deliver one contract and the check to Kelly and McLaughlin; isn't that correct? A On that condition we signed the contract.

*Re-direct examination by Mr. Lesser.*

Q You say for two weeks before you arranged to purchase this you knew about the lot and you had been to look at it; is that right? A I looked just only at the lot. 20

Q Did you know that that lot was in the Village of South Orange before you went into Judge Herr's office? A No.

Q What first attracted your attention to the fact that it was in the Village of South Orange? A As soon as he start to read the description.

Q Who read the description? A Mr. Conway.

Q What did you do at that time when you heard the word "Village"? A I said—I called up Mr. Densky, and I said, "Mr. Densky, we will not sign the agreement until we find out we can build a four-story apartment without any trouble." 30

Q Is that the reason you didn't inquire before?

*Court.* That is too suggestive.

Q State again, Mr. Chinich—

*Court.* Why state it again? I don't want repetition.

*Re-cross examination by Mr. Myers.*

Q The contract had some restrictions in as to the way the building was to be built, didn't it? A Yes. 40

Q You were satisfied, of course, with those restrictions? A Yes.

Q Why didn't you, having some, as you say, information concerning the objection to a four-story building, have it put

*Joseph Densky, direct.*

in the contract, together with the other restrictions? A I always considered that is South Orange avenue; I didn't know it is a village.

10 Q You don't understand the question. (Last question repeated.) Why didn't you, having some, as you say, information concerning the objection to a four-story building, have it put in the contract, together with the other restrictions, that you were not to take the property unless you found you could build his four-story building; why didn't you have that put in the contract? A We didn't want at that time to sign the agreement, and on that condition we signed the agreement, because Judge Herr said to us, "What is the use of coming again; you sign the agreement now; then anything you find out, if you say to deliver the agreement with the check, all right; if not, I will return it back."

20 Q You spoke about a four-story building before you signed the contract? A Yes.

Q And Mr. Kelly or Mr. McLaughlin told you that the sky was the limit, didn't they; you could build as high as you liked? A No, sir.

Q They didn't say that? A No, sir.

JOSEPH DENSKY, sworn for defendants.

*Direct examination by Mr. Lesser.*

30 Q You are a partner of Mr. Chinich? A Yes.

Q Who was just on the stand? A Yes.

Q You were in on this deal? A Yes.

40 Q Tell us what happened with reference to the signing of the papers; at the time of the signing what happened, or in the afternoon? A I met Mr. Kelly and Mr. McLaughlin in Judge Herr's office, and we come together and Mr. Kelly asked me what kind of a building we want to build there; I told him we buy that lot only to build a four-story apartment house; he said to me, "Only four-story, not less?" We say it don't pay to build three-story, but four-story; he said, "You have to make some restriction, you have to move from the line, according to my house, because you cannot spoil Mr. Kelly's house." I said, "All right, what you make about the restrictions and everything and the price." After some man was there—I don't know his name—he start to read that description of the lot, and he mentioned there that same village; we was

*Joseph Densky, direct.*

figuring that South Orange is just the same like South Orange avenue. Mr. Chinich said maybe there is some different rule; maybe we have some trouble if we build a four-story apartment. He said to me, we can sign the agreement; we have to find out; maybe we can find out something. That was about twelve o'clock. At the same time we left the office, everybody, and go for lunch, and we had our lunch in about fifteen minutes and we tried to go to the architect and ask him some information about South Orange; he start to look at his books. 10

Q Who was that? A Mr. Bottelli; we would try with him, but we try to ask him rules about South Orange, because we don't know the section; he start to look at the books and he said: "Well, I haven't got the books from South Orange; I cannot tell you nothing, no information about South Orange rules." We told him maybe we could find something from the building department, because we figure that the building department in South Orange is like Newark; we can find out there. He start to telephone to the building department, but no one answered him, and maybe the janitor answered him, and he said the building department inspector is there only from nine to ten o'clock in the morning; if you want to find out, you have to find out every morning, and the architect said to me, "Well, I cannot tell you nothing about the rules." After it was about one o'clock we come together again in Judge Herr's office, maybe half-past one, and Judge Herr said, "Well, boys, everybody is ready to sign the agreement"; I said to Judge Herr, "We cannot sign the agreement today; we cannot sign it because we don't know the rules of South Orange; we want to build in South Orange, because we consider it is South Orange avenue, and I hear it is a village; there may be some different rules, because we want to build a four-story apartment without any trouble, because we have to invest lots of money; we don't want to get in trouble." Judge Herr said to us, "Well, what is the use of losing time; I am busy and you are busy and Mr. Kelly and Mr. McLaughlin is busy, you sign the contract and the check and leave them with me, and I keep them for you," and I told him, "If you give me a few days' time to find out," and he said, "Yes, sure, you have to have time to find out." I said, "Well, all right, Judge, we can sign on that condition, "if you give me a few days, and on another condition, if you keep the agreement with the check by you, and you are my 20 30 40

*Joseph Densky, direct.*

10 lawyer; if we find we can build a four-story apartment without any trouble, because we don't want no trouble, because we have to invest a lot of money of some one else." I told that to Judge Herr, if we couldn't sign the agreement, only he shall keep the agreements with the check, and we find out if we could build a four-story building without any trouble; Judge Herr said, "Well, boys, everybody is satisfied like Mr. Densky said?" Mr. Kelly and Mr. McLaughlin talked together, and he said, "Well, all right, you can keep the agreement with the check; let him have the few days to find it out." After that the weather was bad—I don't remember—

Q (*By the Court.*) You signed the papers then? A Yes, and left it with Judge Herr; he shall keep it.

20 Q What happened then? A After we was in South Orange with him—I don't remember what day, maybe a day or two days, we go in South Orange by the inspector; we find him there between nine and ten.

Q Of what department? A From South Orange.

30 Q What was he inspector of, buildings or what? A Building inspector. I don't know, I think building inspector. We asked him if we can build a four-story building; he said, "What, a four-story building? That is South Orange," he said to me; "You know it is a village. Here is all the highest building is up to three story." I said, "Well, we like to do a business of more than that, for four-story building." He said, "Well, I will tell you, if you build a four-story building, I guess when you start to build, in the middle of the building the Board of Trustees of the village will raise a meeting and can stop you from the building; you will have lots of trouble." I told him, "We don't want to buy, because we don't look for trouble," and we left the office. After we take a walk around the whole village—it take about an hour and a half—and we didn't find one four-story building, only three-story; we come back to Judge Herr's office; we told him, "Judge, I don't think we can build a four-story building; maybe we get in trouble; we are not rich people; we want to have back my check and my signature from the agreement." Judge Herr

40 said, "Well, you are entitled to it, because you make it on that condition, you sign on that condition; you are entitled to get your check and your agreement back", and he give the check and he tore off the signature, and I left with him the

*Max Stern, direct.*

agreement because I know he is my lawyer and I didn't take the papers.

Q Have you seen Kelly and McLaughlin since that time? A No, I never saw them.

Q Did they ever call you up about this deal? A Never.

Q When was the first notice you had from Kelly and McLaughlin about this suit? 10

*Mr. Myers.* I object.

*Court.* I will receive it.

A Judge Herr told me at one time—he said, “Mr. Kelly and Mr. McLaughlin want to sue you”—

Q That is the first time you heard about this suit? A Yes.

Q How long after the agreement was made? A I don't remember exactly when it was; about three months.

*Cross examination by Mr. Myers.*

20

Q Did you ever tell McLaughlin and Kelly that you found out you couldn't build there? A I never saw them.

Q Did you ever tell them by writing to them or any other way? A No, I never saw them from that time.

Q (*By Mr. Lesser.*) Did you ever tell Judge Herr to turn over this paper, C. 1, and the check to Kelly and McLaughlin? A No, I never considered that is the agreement.

*Court.* Strike out the latter part of his answer.

MAX STERN, sworn for defendants.

30

*Direct examination by Mr. Lesser.*

Q You were the agent on this deal, or one of the agents? A Yes.

Q Were you present at the signing of these papers? A Yes.

Q Will you tell me what was said by Chinich and Densky immediately before the signing of the papers, if anything? A After the arguments?

Q Before signing the papers was there any argument? A There was argument.

40

Q What was it? A Over the conditions, all the conditions.

Q Before Chinich and Densky actually signed the papers, put their names down, was there anything said, especially about the building of a four-story apartment? A They said that

*Max Stern, cross.*

10 they found out the way we represent them, that we sold them a piece of property in South Orange for a four-story building apartment, and they hear Mr. Conway, or whatever his name is, read it is a village; so they talk over the matter, they will not sign the agreement until they find out that they would not have no trouble when they start to build; so Judge Herr said, "You sign the agreement, boys, and leave it with me with the check and when you find out there is no trouble, then you come back; and if there is no trouble, I will give the check with the agreement to who it belongs, if there will not be trouble."

*Cross examination by Mr. Myers.*

20 Q Wasn't there a statement made by Mr. Densky or Mr. Chinich that they heard there was a law against the building of a four-story building in South Orange Village; wasn't that what they said? A No, they didn't mention anything about a law; they mentioned only they expect to have trouble, the way they find out it is a village, they may have trouble.

Q Didn't they say they wanted to go up and inquire whether there was any law that prevented it? A No; maybe they did, but I didn't hear about it.

Q Didn't you tell me yesterday in my office that that is what was said actually, about a law? A No.

30 Q Didn't you tell me that in my office yesterday, that the question was raised by them, that there was a law in the Village of South Orange that prevented it, and they wanted to find out whether there was a law? A No, sir.

Q Did you say to me yesterday that the question was as to whether there was any trouble? A Trouble, yes.

Q You used that word? A Yes.

Q You said you represented to them they could build a four-story building? A Yes, that was the understanding.

Q That was while they were talking about buying the property? A Yes.

40 Q How long were they talking about buying the property? A Ten days or two weeks.

Q And during all that time there was talk between you and them as to whether they could build a four-story building?

A Yes.

Q You told them they could? A Yes.

*Max Stern, re-direct.*

Q You told them there was no law against it? A No, I didn't say anything about law; when I asked Mr. Kelly and Mr. McLaughlin if there is any restriction, he said he can put up any building at all.

*Examination by the Court.*

Q Were you the broker who made the sale? A Yes. 10

Q Did you get your commission? A No.

Q Did you claim it? A Not yet.

Q Have you ever claimed it? A No. We cannot claim it, the deal wasn't made.

Q Did you ever ask for commission from Kelly and McLaughlin? A No.

Q Why not? A Because I say we understand it the deal wasn't made.

Q Have you your agreement? A Yes. 20

Q Let me see it. Who told you that the deal wasn't made?  
A Mr. Densky.

Q What did he tell you about it? A He told me that he found out there is trouble; when they come to build, the law will prevent them, or the inspector; if they will give them a permit, the trustees might stop them after, when they are even up to the roof.

Q Did you think you had anything more to do with the transaction after that meeting in Judge Herr's office? A No.

Q Didn't you think you had performed your duty in effecting the sale up to that time? A I don't see why we should take it, if the sale don't go through. 30

Q You don't consider you are entitled to any commission?  
A No, not if the sale isn't through.

Q As the facts are, I want to know what you considered happened; was there a sale or no sale concluded at Judge Herr's office? A We considered it a sale, but after, when it went off, what can we do?

*Re-direct examination by Mr. Lesser.*

Q Is this the paper which you got for the commission?  
(Witness shown paper.) A Yes. 40

Q When did you get that, after the agreement was signed for the sale of the property or before? A I think it was before; it was at the time when the argument was.

*Max Stern, re-cross.*

Q What date is that? A October 23rd.

Q The same day of the contract? A Yes.

Q Isn't it a fact that after the contract was signed for the purchase of the property, that you called Mr. Kelly and Mr. McLaughlin out in the other room and said, "Now, we think we ought to have an agreement for our commission"? A Yes.

10 Q That was afterwards, wasn't it? A Yes; what do you mean?

Q After the contract was signed? A No.

Q When did you have that signed? A Just between—

Q Between what? A When the arguments were made, when the typewriting was done and all the conditions shall be made.

Q You mean they signed the agreement agreeing to pay you a commission before the sale was effected? A That is what they did.

20

*Re-cross examination by Mr. Myers.*

Q Didn't you tell me yesterday that the contract for your commission, paying you 2½%, was signed after Kelly and McLaughlin and Densky and Chinich signed the other agreement; didn't you tell me that yesterday in my office? A No, I did not.

Q Were you in my office yesterday? A Yes.

Q You were there with Mr. Cohn? A Yes.

30 Q Your partner? A Yes.

Q And Kelly and McLaughlin? A Yes.

Q When did you receive a subpoena to testify in this case, if you received one? A Yesterday afternoon.

Q Before you came to my office? A Yes.

Q Did you tell me that you had received a subpoena from the other side? A You didn't ask me.

Q Did you tell me you had been subpoenaed? A No.

Q Why didn't you tell me? A You didn't ask me.

40 Q Didn't you understand that you were to be a witness for us today in this case, if necessary? A Positively I understand it.

Q You expected that I would call you as a witness some time during the trial of the case, didn't you? A Yes.

Q (*By the Court.*) Were you subpoenaed by Mr. Myers? A No, by Mr. Lesser.

*Max Stern, re-cross.*

*Mr. Myers.* I didn't subpoena him, because he promised to come here.

Q Mr. Stern, haven't you been to a lawyer with that contract? A No, sir.

Q Do you know whether or not your partner, Mr. Cohn, was there? A Mr. Cohn had this in his possession until yesterday. 10

Q You have had other sales, haven't you? A Yes, certainly.

Q You have had other agreements for commission made to you? A Yes.

Q And from your knowledge and experience don't you know that you can collect a commission on this sale, whether or not this is a sale or not?

Objected to.

*Court.* It is entirely immaterial. 20

Q (*By Mr. Lesser.*) Would it make any difference who called you in the case, as to what you would say in this case?

Objected to. Objection sustained.

Q Mr. Stern, you remember my saying to you yesterday afternoon that it might be possible that Densky and Chinich did not understand what the word "ordinance" was, and you said there was nothing said about ordinance, it was a law that they spoke about? A You told me that. 30

Q (*By the Court.*) Did that conversation occur between you and Mr. Myers yesterday in his office? A Mr. Myers told me what he said now and I just corrected him; well, Mr. Kelly and Mr. McLaughlin said it is right.

Q What? A That Mr. Kelly and Mr. McLaughlin said it is just right the way I said, because they talked about it.

Q Didn't you say to me yesterday when I explained to you the difference, or rather the similarity between the law and the ordinance, that they used the word "law", the word "ordinance" wasn't used? A No, I said only "trouble". 40

DEFENDANTS REST.

*Mr. Myers.* I will call Mr. Cohn, the partner.

*Isaac A. Cohn, direct.*

ISAAC A. COHN, sworn in rebuttal for complainants.

*Direct examination by Mr. Myers.*

Q You are a partner of Mr. Stern? A Yes.

Q Have you received a subpoena to testify from the defendants in this case? A I didn't get no subpoena at all.

10 Q You were in my office yesterday with Mr. Stern? A Yes.

Q Mr. Kelly and Mr. McLaughlin were there? A Yes.

Q And we talked over this case A Yes.

Q Tell us, first, were you present on the afternoon of the twenty-third of October, when the agreement was signed for the purchase of this property? A Yes.

Q Was anything said before the agreement was signed, as to whether a four-story house could be built there? A Not before.

20 *Mr. Lesser.* This is not rebuttal.

*Court.* Do you object to it?

*Mr. Lesser.* Yes.

*Court.* I will overrule it.

Q Was anything said before or after the agreement was signed? A It wasn't said anything before, but as I overhear, I think it was said something after.

Q What was said and who said it? A I cannot remember who said it, but not anything said before.

30 Q Somebody said something about a four-story house, didn't they? A Yes.

Q Who said it? A I cannot remember who said it, Mr. Chinich or Mr. Densky.

Q Can you remember what was said? A I will tell you the story from the beginning.

40 Q Go ahead. A I took up Mr. Chinich and Mr. Densky to the place and took the car down to South Orange avenue depot, and they went out to see how long it will take from that place to the lot from the car, so we rode down, all three of us. I think Mr. Densky paid the carfare and he walked up, and I think it took us either fifteen or twenty minutes, I cannot say exactly, because I didn't keep track of it, and then I know that the lot belongs to South Orange Township, not to Newark, because I am acquainted there, and I can tell where Newark is, that is, Vailsburgh, and where South Orange is.

*Isaac A. Cohn, direct.*

Q Did you point out the fact to them that it was in South Orange? A Yes.

Q While you were walking up there? A No, while we was on the lot.

Q Was your partner with you at the time? A No, because I was more intimate with the deal than my partner was, and I showed him all about it, and they seen it, I think they were there two times themselves, but I think I was there twice with them, and then they made an appointment, they made up their mind to buy, and they wanted to buy the corner, and we went up to Mr. Kelly's office and made the appointment, and then we went up to Mr. Herr's; Mr. Kelly and Mr. McLaughlin signed it, and Mr. Chinich and Mr. Densky; I cannot remember who signed it first. 10

*Examination by the Court.*

Q Then was anything said, you were asked, either before or after they signed, about this four-story building? A I cannot tell you. 20

Q You said something was said before they signed? A After I heard they were going to find out if they could build, but I told them in November, the same as Mr. Kelly told me, that the restrictions is going off and they can build anything they want on the lot.

Q You told them in November; October the paper was signed? A The restrictions had to come off in the month before. 30

Q When did you tell them that? A I told them on the lot.

Q Before the papers were signed? A No, that was up in the office; excuse me.

Q In your office? A In Mr. Kelly's office and Mr. McLaughlin's.

Q That was before you went to Herr? A Yes.

Q What did you say about the restriction coming off? A Mr. Kelly said that the restriction is coming off, and there is no restriction on the lot, they can build anything they want. 40

Q And they were coming off in about a month? A Yes, I think in November; Mr. Kelly can tell you that just exactly.

Q Come back to Judge Herr's office; was anything said as to which it was; after the signing of the papers what was said? A I cannot recollect, but they said that Mr. Chinich

*Isaac A. Cohn, cross.*

and Mr. Densky said he is going to find out if he can build four story; it doesn't pay him to build three-story houses.

Q What was said about the papers and check? A That wasn't said, anything at all; not that I know of.

10 Q Were you sitting there all the time or with them? A I was in the office.

Q Were these people there? A Yes.

Q Do you want to correct the statement that nothing was said about the check and contract? You started to say something when I interrupted you. A I don't think I heard it; I will not tell a story, because I don't think I went in the other room anyway; I couldn't tell, your Honor, but afterwards I overheard, when they had it signed.

20 Q What did you hear when they had it signed? A Mr. Chinich and Densky wanted to find out if they could build a four-story apartment, because it doesn't pay—

Q Anything said about what was going to happen if they found out they couldn't build? A Not that I know of.

Q Did you have an agreement, you and your partner, with Kelly and McLaughlin about your commission? A Yes.

Q In writing? A Yes, sir.

Q When did you get it from them? A The same day when they signed the agreement.

Q Before or after they signed? A I think it was after.

30 Q Where was it written and given to you? A In the same office, Judge Herr's office.

Q Did you ever get your commission paid you? A Not yet.

Q Did you ever demand it? A Of Mr. Kelly?

Q Yes, or Mr. McLaughlin? A No, sir.

Q Why not? A Well, I waited and I didn't ask him for it.

Q Did you know that this trouble was coming on between them? A I did know it that there is going to be trouble.

*Cross examination by Mr. Lesser.*

40 Q You say the first time you went down to South Orange avenue with these people to the South Orange depot; when you passed the Newark line you said you pointed out the South Orange Township line to them? A I told the gentlemen that that is South Orange; it is not in the South Orange Township, it is not Newark; they know it.

*Michael A. Fitzsimmons, direct.*

Q Did you say it is South Orange Village? A I called it a town.

Q You didn't know it was a village either? A I called it a town.

Q (*By the Court.*) Did you know that it was a village? A I did not. 10

Q But you said, "this is South Orange"? A Yes.

Q And that is all you said about it? A That is all I could say.

*Mr. Myers.* I had expected that Mr. Lesser would have Mr. Schwarze, the building inspector, here; he asked me for his name, and I wrote it to him. If you think that whatever Mr. Schwarze might have said to them at that time is of importance, I would like to have it on the record.

*Court.* I would like to hear it. 20

MICHAEL A. FITZSIMMONS, recalled in rebuttal for complainants.

*Direct examination by Mr. Myers.*

Q You are the Village Clerk of the Village of South Orange? A Yes.

Q And have been so for seventeen years? A Yes.

Q And you are at the present time? A Yes.

Q Have you with you the book of ordinances of the Village of South Orange? A Yes. 30

Q Have you made an examination of that book for the purpose of ascertaining whether or not there is any restriction in the Village of South Orange against the erection of a four-story apartment house? A Yes.

*Mr. Lesser.* I ask that the answer be stricken out.

*Court.* The objection will be overruled.

Q You have examined it? A Yes.

Q Is there any such ordinance restricting it? 40

*Mr. Lesser.* I object to that, and may I make a general objection against each question along this line?

*Court.* No, object to each one, and state the reason for it.

*Michael A. Fitzsimmons, direct.*

*Mr. Lesser.* I object to this on the ground that it is immaterial and incompetent, and ask that the exception be allowed.

*Court.* Same ruling; it is not necessary to take an exception in this Court.

10 A I find that there is a restriction as to the character of the construction of buildings. We have a fire limit ordinance in the Village of South Orange, which provides that in certain sections buildings must be constructed of non-combustible or inflammable material within certain limits, and then the ordinance provides that any building housing more than two families wherever erected in the Village of South Orange must be built in accordance with the ordinance which provides for the construction of buildings within the fire limits; so the buildings outside of the fire limits may be constructed in accordance  
20 with that particular fire limit ordinance.

Q Can you turn to the ordinance? A Yes, sir; page 482 of the Book of General Ordinances of the Village of South Orange. "An ordinance to provide that all houses to be erected in the Village of South Orange to be used for housing more than two families shall be constructed in accordance with the provisions of the ordinance entitled, 'An ordinance to establish fire limits in the Village of South Orange', passed December 21, 1914."

30 Q Is that the only ordinance on that subject? A That is the ordinance which I referred to that provides as to the size of the building.

Q And the height? A Yes.

Q Will you turn to the fire limit ordinance? Was that ordinance in effect on the twenty-third of October, 1917? A Yes, this ordinance was passed February 21, 1914.

Q And was in effect at that time and is still in effect? A Yes.

Q Is that the only ordinance of the Village of South Orange which restricts or relates to the height of buildings? A Yes.

40 Q And is there any ordinance that prohibits or restrains the erection of any building in the Village of South Orange that is four or more stories in height? A No, there isn't any ordinance that limits the height; it simply requires that the character of construction—

Q That relates to character of construction? A Yes.

*Michael A. Fitzsimmons, direct.*

*Mr. Lesser.* I object to that and ask that the answer be stricken out, as incompetent, immaterial and irrelevant.

*Court.* Objection overruled.

Q The other ordinance relates to the material and character of construction? A Yes.

10

NO CROSS EXAMINATION.

*Court.* Then subject to the taking of Mr. Schwarze's testimony in the morning, you are through, Mr. Myers?

*Mr. Myers.* Yes, I will submit it.

It is admitted by counsel for the respective parties that a tender was made to Judge Herr of a deed in conformity with the terms of the contract, Judge Herr representing the defendants, at the time stated in the bill and called for in the contract in question.

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*Carl T. Schwarze, direct.*

IN CHANCERY OF NEW JERSEY.

*Between*

WILLIAM A. KELLY, *et al.*,

*Complainants,*

*and*

BARNET CHINICH, *et al.*,

*Defendants.*

BEFORE:

VICE-CHANCELLOR FOSTER.

Newark, New Jersey, May 22, 1918.

APPEARANCES:

20 Charles M. Myers, Esq., Solicitor for Complainants.

Louis B. Lesser, Esq., and David H. Yonteff, Esq., Solicitors  
for Defendant.

*Mr. Myers.* I want to say that the agreement which has been heretofore admitted and marked C-1 is again offered by complainants as the agreement on which the action is based.

*Mr. Lesser.* I now take objection and ask that the objection be entered to same as it comes within the Statute of Frauds.

30 *The Court.* Objection overruled; and the exhibit is retained.

CARL T. SCHWARZE, called as a witness on behalf of the complainants, having been first duly sworn, testified as follows:

*Direct examination by Mr. Myers.*

40 Q Mr. Schwarze, what is your business? A I am Professor of Civil Engineering at Cooper Institute, New York, and also Consulting Engineer.

Q During the year 1917 did you hold any public position?  
A Yes.

Q What was that? A Building Inspector of the Village of South Orange.

*Carl T. Schwarze, direct.*

Q You were then and are now living in South Orange? A I was then and am now.

Q You remember the occasion some time in the month of October, 1917, when you were visited by two gentlemen, and inquiry was made concerning the erection of a building in your village? A I do.

Q Do you see those two gentlemen in the court room? A Yes, sir. There they are (pointing to the two defendants).

Q Will you just tell the Court what happened when they came to see you? Tell it in your own way. A These gentlemen came in—

*Mr. Lesser.* I object to that, and ask to have the exact conversation. Perhaps the questions and answers will bring it out—

*The Court.* He is asking him to tell us what these gentlemen told him when they came in.

*Mr. Lesser.* May I object again generally on the ground that it is incompetent, irrelevant and immaterial.

*The Court.* Objection overruled. Answer the question.

A These two gentlemen came in and said that they would like to put up a four-story or a five-story tenement house on Stanley Road. I told them that this was a little new to me. In fact, it was the first thing of the kind since I was Building Inspector, the first thing of this kind that ever came under my jurisdiction, but that I would find out from competent authority downstairs in the Village Hall as to whether this building could be built. I thought that probably they might have to build the first floor of fireproof. When I went downstairs and saw the Village Clerk and the former building inspector, and they told me—

*The Court.* You cannot tell us what they told you.

Q As a result of what they told you, what did you tell these people? A As a result of my conversation with them, I came up and told them they can build the building any way in which they wished, with the exception that they would have to conform with the ordinances of the village requiring all tenement houses to be built according to the requirements of buildings in the fireproof limits, the outside walls would have to be built of brick, stone or other incombustible material—otherwise there was no limit to the height.

*Carl T. Schwarze, cross.*

Q Did you tell them that if they undertook to build a four-story or more in height that probably the Board of Trustees would have a meeting and probably stop them in the middle or get an injunction? A It did not occur to me.

Q Did you say that to either of them or not? A No.

10 Q Was there anything said when you came back with reference to what you had previously said as to the possibility that the first floor would not have to be fire-proof? A I told them that the first floor would have to be fire-proof, that they would have to comply with the requirements of the Tenement House Law.

*The Court.* That was pertaining to material and construction, and not as to the height?

*The Witness.* No, sir.

20 *The Court.* Did you tell them in substance that they could or could not erect a four or more story building?

A I told them they could build a four-story building or more.

Q Do you remember what you said to them with reference to the height, how high they could build? A I said there would be really no limit.

*Cross examination by Mr. Lesser.*

30 Q Mr. Schwarze, did you say to the defendants Chinich and Densky that they can walk through the whole village, and they wouldn't find a building like that? A I didn't tell them that—

Q You merely said it was a novel thing since you were Inspector? A Since I was Inspector; yes, sir.

Q Did you say anything about a four-story building in the whole village? A No.

Q As a matter of fact is there such a building?

*Mr. Myers.* Objection.

*The Court.* I will allow it.

40 Q Is there, or was there at the time? A Not that I know of.

Q You know the village pretty well? A Fairly well.

Q Didn't you say to them, you take a walk through the village and see? A I did not.

*Carl T. Schwarze, cross.*

Q In line with the suggestion that it was a novel proposition to you, didn't you say such a thing? A I said, it did not occur since I was building inspector.

Q What did you say as to the Board of Trustees? A A I didn't say anything, I couldn't—

*The Court.* What is your best recollection? Did you 10  
or did you not, to the best of your recollection?

*The Witness.* I did not say anything about the Board  
of Trustees.

Q Didn't you say, "You are taking a chance of investing  
so much money on a proposition like this?" A I did not.

Q Did they tell you they were going to invest a certain  
amount of money? A They did.

Q How much? A I forget the amount.

Q About \$95,000 in the building? A Probably, something 20  
like that.

Q And \$10,000 or \$9,000 in the land? A I do not remem-  
ber exactly.

Q Didn't you say, "Boys, you are taking a chance on so  
much money"? A They asked me whether it would pay, and  
I said I did not know.

Q Permit me to ask you this question: Didn't you say,  
"Chinich and Densky, even if you started to build such a build-  
ing, the Board of Trustees can hold a meeting and stop you  
in the middle of the work?" A No.

Q And again, "You are taking a chance in investing so 30  
much money"? A No.

*The Court.* Have you any interest in this controversy?

*The Witness.* I have not.

*The Court.* Are you the building inspector now?

*The Witness.* I resigned the 1st of February, 1918.

Q How long have you known Messrs. Kelly and McLaughin?  
Either or both? A I met Kelly last night and McLaughlin  
this morning.

Q And you have never known them before? A Never 40  
known them before.

Q How long had you been a building inspector of the Village  
of South Orange when this case came up? A I became a build-  
ing inspector the first of June, 1914.

*Carl T. Schwarze, cross.*

*The Court.* And they came to you some time in October or November, 1917?

*The Witness.* Yes, sir.

Q And at that time you didn't know of anybody having the right to build—you couldn't say definitely—a four-story apartment? A The matter hadn't come up in my jurisdiction, so I did not know.

Q If the first story would have to be built of concrete, it would be more expensive construction than the brick apartment building, as it is ordinarily known? A I don't quite understand the question.

Q Would the cost of constructing the ground floor of fireproof be greater than the cost of constructing it with the materials of the other three floors? A Yes, sir.

Q How much greater? A Well, it depended largely upon the materials, but I should say probably about fifty to seventy-five per cent. more; that's just the ground floor.

Q Wouldn't it be necessary to use steel beams or iron girders in the fireproofing? A No. They could build it of reinforced concrete.

Q But the cost of the bottom floor throughout would be from fifty to seventy-five per cent. more than if they did not build it fireproof? A I should say so; yes, sir.

Q Didn't Messrs. Chinich and Densky say anything to you about building a fireproof building? A They said they wished to build—the building to be of frame floors and partitions, but I told them they would have to build outside floors of brick, stone or other incombustible material.

Q They told you they were going to put up a brick apartment in the first place? A Yes, sir.

Q No frame? A Not that I remember.

Q Do you remember, Mr. Schwarze, opening a book with some red covers, a red covered book with reference to the questions that these men put to you? A I do not remember opening it; I had such a book which is the fire underwriters' book.

Q And do you remember upon reading something from that book, you then said to these gentlemen, "You cannot build such a building?" A No, sir.

*The Court.* You say you do not remember, or did not say it?

*Carl T. Schwarze, re-direct.*

*The Witness.* I do not remember it, nor did I say it.

Q Are you positive that you did not say it, Mr. Schwarze; throughout the whole conversation you did not tell these people, "You cannot do it"? A I did not say that.

*The Court.* Or did you say anything in substance to that effect? They could not build a four-story building? 10

*The Witness.* No.

*Mr. Myers.* That's all.

*Re-direct examination by Mr. Myers.*

Q Mr. Schwarze, I show you a book (doing so) that is endorsed, marked on the outside, "Building Code of the Village of South Orange, New Jersey"? Is that the building code that was in operation last November, the printed book?

*Mr. Lesser.* I object to it, if the Court please, on the ground that the same is irrelevant, incompetent and immaterial, and not brought to the attention of the defendants. 20

*The Court.* Your last objection is of no moment. Offer the original, and I will admit it. Here is a paper, a little pamphlet, I don't know by what authority. Prove the authority and I will have some basis upon which to admit it.

Q Mr. Schwarze, I ask you whether or not the so-called building code was based on the ordinances of the Village of South Orange? 30

*Mr. Lesser.* Objected to.

*The Court.* That's not the proper proof. Are you through with this gentleman?

*Mr. Myers.* Yes. The complainants rest.

*Mr. Lesser.* I would like to request the privilege of filing a memorandum by way of argument and citation.

*The Court.* Serve your memorandum on Mr. Myers within three days, and let me have your reply within three days afterwards. 40

*Mr. Lesser.* On the facts and the law?

*The Court.* Give me the facts and the law both.

*Exhibit C. 1.*

EXHIBIT C. 1.

THIS AGREEMENT, Made the Twenty-third day of October in the year of our Lord One Thousand Nine Hundred and Seventeen.

10 BETWEEN WILLIAM A. KELLY and MICHAEL F. McLOUGHLIN, of the City of Newark in the County of Essex and State of New Jersey party of the First Part;

AND BARNET CHINICH and JOSEPH DENSKY, of the City of Newark in the County of Essex and State of New Jersey, party of the Second Part;

20 WITNESSETH, That the said party of the first part, for and in consideration of the sum of NINE THOUSAND DOLLARS, to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenant and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that they the said party of the first part, will well and sufficiently convey to the said party of the second part, their heirs and assigns, by Deed of Warranty free from all encumbrances on or before the Fifteenth day of January next ensuing the date hereof, all that lot , tract , or parcel , of land and premises, hereinafter particularly described, situate, lying and being in the Village of South Orange in the County of Essex and the State of New Jersey.

30 BEGINNING on the westerly line of Holland Avenue at a point distant One Hundred feet and Fifty-two hundredths of a foot northerly from the northerly line of South Orange Avenue; thence running along the westerly line of Holland Avenue north Twenty-one degrees, fifteen minutes east One Hundred and fifty-two one hundredths of a foot; thence north sixty-eight degrees forty-five minutes west two hundred and eighteen feet and thirty-six one hundredths of a foot; thence south eighteen degrees nine minutes west twenty-nine feet and twelve one hundredths of a foot; thence south thirteen degrees nine minutes west seventy-one feet and twenty-three one hundredths of a foot; thence south 40 three degrees forty-seven minutes west twenty-four feet and sixty-five one hundredths of a foot; thence south seventy-five degrees, thirteen minutes east two hundred feet and fifty-five one hundredths of a foot to the place of BEGINNING.

*Exhibit C. 1.*

AND the said BARNET CHINICH and JOSEPH DENSKY, for themselves, their heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that they the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the said sum of NINE THOUSAND DOLLARS, as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say: Three Hundred Dollars upon the signing of this Agreement, the receipt whereof is hereby acknowledged, Five Hundred Dollars on December second, Nineteen Hundred and Seventeen, and the balance on or before January fifteenth, Nineteen Hundred and Eighteen.

10

And the said party of the second part, for themselves, their heirs, executors, administrators and assigns, do hereby covenant and agree with the said parties of the first part, their heirs, executors, administrators and assigns, as follows:—That the main westerly front foundation wall of any building or buildings, or any part thereof, or any appurtenances thereto, to be erected on the premises above described, shall be in a straight line with the main westerly front foundation wall of the building now on the premises of Helen D. Kelly, adjoining the above premises on the north. And the said party of the second part, for themselves, their heirs, executors, administrators or assigns, do hereby further covenant and agree with the said party of the first part, their heirs, executors, administrators and assigns, that no building or buildings or any part thereof, or any appurtenances thereto, to be erected on said premises, shall be nearer than eight feet from the northerly line of said premises above described and adjoining the premises of said Kelly on the north of said above described premises. Said covenants and restrictions shall be considered real covenants and shall attach to and run with the land and shall bind the said party of the second part, their heirs, executors, administrators and assigns.

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30

Taxes for 1917, to be apportioned up to the day of settlement.

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

40

*Exhibit C. 1.*

AND IT IS FURTHER AGREED, by the parties hereto, that the said Deed Warranty shall be delivered and received at the office of Chas. F. Herr, No. 772 Broad Street, Newark, N. J. between the hours of ten in the fore-noon and three o'clock in the afternoon on the said Fifteenth day of January next ensuing the date hereof.

10

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

WILLIAM A. KELLY, (L. S.)  
MICHAEL F. McLAUGHLIN. (L. S.)

Signed, Sealed and Delivered  
in the presence of

20

CHAS. F. HERR.

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

30

BE IT REMEMBERED, That on this \_\_\_\_\_ day of October in the year of our Lord, One Thousand Nine Hundred and Seventeen before me, the subscriber personally appear WILLIAM A. KELLY and who, I am satisfied, are the Grantors in the within Agreement named; and I, having first made known to them the contents thereof, they did acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed:

CHAS. F. HERR,  
M. C. C. of N. J.

40

*Opinion of Vice-Chancellor.*

AGREEMENT

—FOR THE—

SALE OF PROPERTY

Between,

WILLIAM A. KELLY and MICHAEL F. McLOUGHLIN,

—and—

BARNET CHINICH and JOSEPH DENSKY,

Dated, October 23rd 1917.

10

**Opinion.**

Filed

Mr. Charles M. Myers, for complainants.

Messrs. Blatt & Lesser, and Mr. David H. Yonteff, for defendants.

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FOSTER, V. C.

The bill in this cause is filed to compel the specific performance of a contract for the purchase of real estate in the Village of South Orange. It is entirely a fact case, and the question to be determined is whether the parties ever entered into the contract in question.

It appears that sometime prior to October 23rd, 1917, complainants, through Stern & Cohn, real estate agents, had offered to sell the premises in question to defendants and that defendants visited the property with Mr. Cohn and learned from him that the lands were located in South Orange.

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On October 23rd, 1917, the parties and the agents met at the office of Charles F. Herr, counsel for defendants, and had drafts of the contract of sale prepared. When the description of the property was read, one of the defendants raised the question whether there were any building restrictions in force in the Village of South Orange that would prevent defendants from building a four-story apartment house on the lands. They were to pay \$9,000 for the land and had told complainants they intended to build thereon an apartment house that would cost about \$90,000. When the question about the building restrictions was raised one or both complainants assured defendants

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*Opinion of Vice-Chancellor.*

that there were no restrictions in the village that would interfere with the height of their building and it is at this point that the controversy between the parties arises.

10 According to complainants' version, defendants were satisfied with the assurances that complainants gave them that there were no restrictions in the village to interfere with the height of their contemplated building; and the suggestion was made that the parties sign the copies of the contract and the check for \$300 to cover the first payment called for by the contract, and that the copies of the contract and the check should be left with Mr. Herr for a day or two in order that defendants could call on the proper authority in South Orange and learn that there were no laws or ordinances limiting the height of buildings that could be erected in the village; that this was accordingly done, and a few days later when Mr. McLaughlin the other complainant, called at Mr. Herr's office and asked for 20 complainants' copy of the contract and the check, he was informed by Mr. Herr's clerk that the matter was all ended, and was refused the check but was given one copy of the contract from which the signatures of the defendants had been torn. The other copy of the contract which all the parties had signed was never returned to complainants, and so far as the record discloses, it is still in the possession of defendants with the signatures of all the parties thereon intact. Complainants in due time demanded the performance of the contract which defendants refused and then this action was brought.

30 Defendants' version of what happened when the copies of the contract and the check were signed differs very materially from that of complainants.

40 They state that when they raised the question of the building restriction they were unwilling to sign the contract until all doubts on the subject were removed but that they were induced to sign the papers when Judge Herr remarked, "What's the use of losing time, \* \* \* you can sign and leave your check for the first payment with me and I will hold the papers till you tell me to turn them over." That Densky, one of the defendants, still hesitated and finally he said to Judge Herr, "All right, you are my lawyer, and if you keep it till we find out, we will do as you say," and that Judge Herr then said to defendants, "You are to be the sole judges as to whether the papers will be delivered"; and defendants claim it was upon this assurance that they signed the papers and check.

*Opinion of Vice-Chancellor.*

While Judge Herr corroborates defendants regarding the above particulars, his memory about many other details of the transactions is very poor, and he pleads that he is a very busy man, as the reason for his failure to recall other details of the transaction. Complainants deny that any such statements were made by defendants or Judge Herr in their hearing.

Defendants further claim that the papers were not to be delivered until they were satisfied that there would be no trouble in erecting the building. This complainants also deny.

A day or two later defendants called on Mr. Schwarze, the inspector of buildings for the Village of South Orange, and informed him of their proposed building plans and asked if there were any restriction that would interfere with the height of their building; they say Mr. Schwarze told them, "You can't build such a building in South Orange"; that there was not a four-story building in the village; that even if he were to grant them a permit, the trustees of the village could hold a meeting and stop the construction of the building, and he told them when he learned of the estimated cost that they were taking a big chance.

Defendants on leaving Schwarze walked through the village as he had suggested and did not see a four-story building. They then returned to Newark and went to Judge Herr's office and told him they were satisfied they would have trouble in South Orange, and asked for the return of the check, which was given them, and their signatures were torn from the copies of the contract. They did not communicate with complainants or tell them the result of their investigations.

Mr. Schwarze was called as a witness by complainants and he positively contradicts the defendants in every essential particular. He testifies that defendants called on him and informed him of their building project and inquired about restrictions limiting its height; that he took the trouble to look up the matter and made inquiries of other officials and assured them that there was nothing to prevent them from erecting their contemplated building; that there were no restrictions affecting the height and that they could build it as high as they pleased, provided they conformed with the requirements of the building ordinance relating to the character of the materials used in the building. He denies telling defendants the

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*Opinion of Vice-Chancellor.*

trustees might or could interfere with or stop their building operations.

10 Mr. Schwarze was an exceptionally competent, disinterested witness; he did not know any of the parties; had met defendants only when they called on him in October, 1917, and had never met either of complainants until the day before the hearing. He impressed me as telling the truth and as being wholly uninformed and indifferent about what any other witness had stated at the hearing.

20 There is another significant circumstance in connection with what occurred in Judge Herr's office when the papers were signed. Stern & Cohn, the real estate agents, were present, and their version of the matter agrees with complainants'. Stern understood, however, that the papers were not to be delivered until defendants learned that there was no restriction against the height of their contemplated building; while Cohn understood the papers and check were to be delivered as soon as defendants learned there was no regulation of the village that would prevent the erection of a four-story building.

30 Cohn was the active man in affecting the sale of the property and he states that after the check and contracts were signed, complainants took him into one of Judge Herr's rooms and gave him a written agreement to pay the agents a commission of two and one-half per cent. for effecting the sale. Stern thinks this agreement was given them just before the contract was signed, while Cohn is positive it was given afterwards.

If Cohn's version is correct, it may have been that while he and complainants were in one room and Judge Herr and defendants in another room, some of the remarks it is claimed Judge Herr and defendants made to each other about the papers were actually exchanged, but there is nothing in the proofs to show that such remarks were ever brought to complainants' attention.

40 In view of all the circumstances, the improbability of complainants, without consideration, tying up property worth \$9,000 for months under what, according to defendants' statements, amounted to a mere option to purchase or not as defendants saw fit, and in view of the fact that complainants must have considered the contract closed when they gave the agents a written agreement to pay them a commission for having effected

*Opinion of Vice-Chancellor.*

the sale, and particularly in view of defendants' deliberate false testimony about the result of their interview with the inspector of buildings, coupled with the fact that defendants have made no effort to show that there is any law or ordinance that would prevent or interfere with the building they claim they intended to erect, I have reached the conclusion that complainants' version of the matter is the correct and truthful one, and that defendants have merely used the question of a building restriction as a subterfuge, to escape the performance of the contract, possibly because they could not obtain the building loan they desired, or possibly because they realized, as Mr. Schwarze told them, they were taking a big chance in erecting such an expensive apartment house in South Orange. Whatever their reason, I am satisfied defendants have not told the truth and have not acted in good faith towards complainants; they permitted complainants to become liable for the payment of the agents' commission; they held complainants' property for several days under contract, after they had decided not to buy it, and never informed complainants that they had decided not to purchase the property.

If they held it under any such condition as they claim, they do not explain why they did not have this condition written in the contract, together with the other conditions written therein.

The proofs convince me that defendants have deliberately testified falsely about the transaction, and that complainants have told nothing but the truth, and a decree will be advised in accordance with the prayer of the bill.

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*Final Decree.*

**Final Decree.**

Filed

IN CHANCERY OF NEW JERSEY.

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*Between*

WILLIAM A. KELLY, *et al.*,

*Complainants,*

*On Bill, &c.*

*and*

*Final Decree.*

BARNET CHINICH, *et al.*,

*Defendants.*

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This cause coming on to be heard before the Chancellor upon the bill, answer, replications and proofs, in the presence of Charles M. Myers, solicitor for and of counsel with complainants, and Blatt & Lesser and David H. Yonteff, solicitors for and of counsel with defendants, and the pleadings and proofs having been read and the arguments of counsel heard and considered, and it satisfactorily appearing to the Court that by virtue of an agreement in writing dated October 23, 1917, duly made and executed between the complainants, Barnet Chinich and Joseph Densky, that the said Barnet Chinich and Joseph Densky agreed to purchase of the said complainants a certain tract of land in said bill mentioned and described as follows, to-wit:

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All that lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the Village of South Orange, in the County of Essex and State of New Jersey.

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BEGINNING on the westerly line of Holland avenue at a point distant one hundred feet and fifty-two-hundredths of a foot northerly from the northerly line of South Orange avenue; thence running along the westerly line of Holland avenue north twenty-one degrees, fifteen minutes east one hundred and fifty-two one-hundredths of a foot; thence north sixty-eight degrees forty-five minutes west two hundred and eighteen feet and thirty-six one-hundredths of a foot; thence south eighteen degrees nine minutes west twenty-nine feet and twelve one-hundredths of a foot; thence south thirteen degrees nine minutes west seventy-one feet and twenty-three one-hundredths of a

*Final Decree.*

foot; thence south three degrees forty-seven minutes west twenty-four feet and sixty-five one hundredths of a foot; thence south seventy-five degrees, thirteen minutes east two hundred feet and fifty-five one-hundredths of a foot to the place of BEGINNING.

and to pay complainants therefor the sum of nine thousand dollars in the following manner: \$300 upon the signing of said agreement, \$500 on December 2, 1917, and the balance on January 15, 1918, when the said complainants were to execute and deliver to the defendants, their heirs and assigns, a good and sufficient deed for the premises and also possession of the said premises; and it appearing that the said complainants have always been and still are ready and willing, in all things, to comply with the stipulations of the said articles of agreement on their part and have prayed the order or decree of this Court directing the defendants to accept said conveyance of the land and premises in said contract of sale, and to comply with and fulfill the said contract of sale by the payment of the amounts by said defendants in said contract agreed to be paid; and the Court being of the opinion that the complainants are entitled to the specific performance of said agreement as in and by said bill the same is prayed.

It is on this eighth day of July, 1918, on motion of Charles M. Myers, solicitor for the complainants, ORDERED, ADJUDGED and DECREED, that the said articles of agreement be in all things specifically performed by the said defendants and that the said defendants do within twenty days from the date of this decree pay to the said complainants the sum of nine thousand dollars upon the making, execution, acknowledgment and delivery in due form of law by the complainants of a good and sufficient deed for the said premises so sold.

And it is further ORDERED, ADJUDGED AND DECREED, that the defendants do pay to the complainants the costs of this suit to be taxed and a counsel fee of fifty dollars.

E. R. WALKER,

C. 40

Respectfully advised.

JOHN E. FOSTER,  
V. C.

*Notice of Appeal.*

**Notice of Appeal.**

Filed

10 The defendants hereby appeal from the whole and every part  
of the final decree made in this Court in the above stated  
cause on the 9th day of July, nineteen hundred and eighteen,  
to the Court of Errors and Appeals in the last resort in all  
causes.

BLATT & LESSER,  
*Solicitors of Defendants.*

WM. E. HAMPSON,  
*Of Counsel.*

20 Dated July 18/18.

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

BLATT & LESSER,  
*Solicitors of Defendants.*

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*Petition of Appeal.*

**Petition of Appeal.**

Filed

# New Jersey Court of Errors and Appeals

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*Between*

WILLIAM A. KELLY, *et al.*,  
Complainants-Respondents,

and

BARNET CHINICH, *et al.*,  
Defendants-Appellants.

*On Appeal from  
Chancery.*

*Petition of  
Appeal.*

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

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The petition of Barnet Chinich and Joseph Densky, defendants in the above stated cause, respectfully shows:

That your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 8th day of July, 1918, in a cause pending in the Court of Chancery wherein these appellants are defendants and William A. Kelly and Michael McLaughlin are complainants in this respect, to-wit, that the said decree orders and decrees that on October 23rd, 1917, a contract for the purchase of a certain piece of property owned by the complainants, in the Village of South Orange, County of Essex and State of New Jersey, more particularly described in the complainants' bill of complaint and in the aforesaid final decree was made and actually consummated by the parties to this suit; that the said decree orders and decrees that the defendants specifically perform such agreement aforesaid; and your petitioners appeal from the whole decree on the ground that the same is erroneous for that, the Court of Chancery should have decreed that no contract was actually made and consummated between the parties hereto.

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Your petitioners therefore pray that the said decree may be reversed and set aside as to that part which decrees that there

*Answer to Petition of Appeal.*

was a valid legal contract entered into between the parties hereto on October 23rd, 1917, or any other date for the purchase of the aforesaid property in the Village of South Orange, County of Essex and State of New Jersey, and also that part which decrees that the defendants specifically perform such aforesaid contract.

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And that the petitioners may have such further relief in the premises as shall be equitable and just.

BLATT & LESSER,  
*Solicitors of Defendants.*

NATHAN ERLICH,  
*Of Counsel.*

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**Answer to Petition of Appeal.**

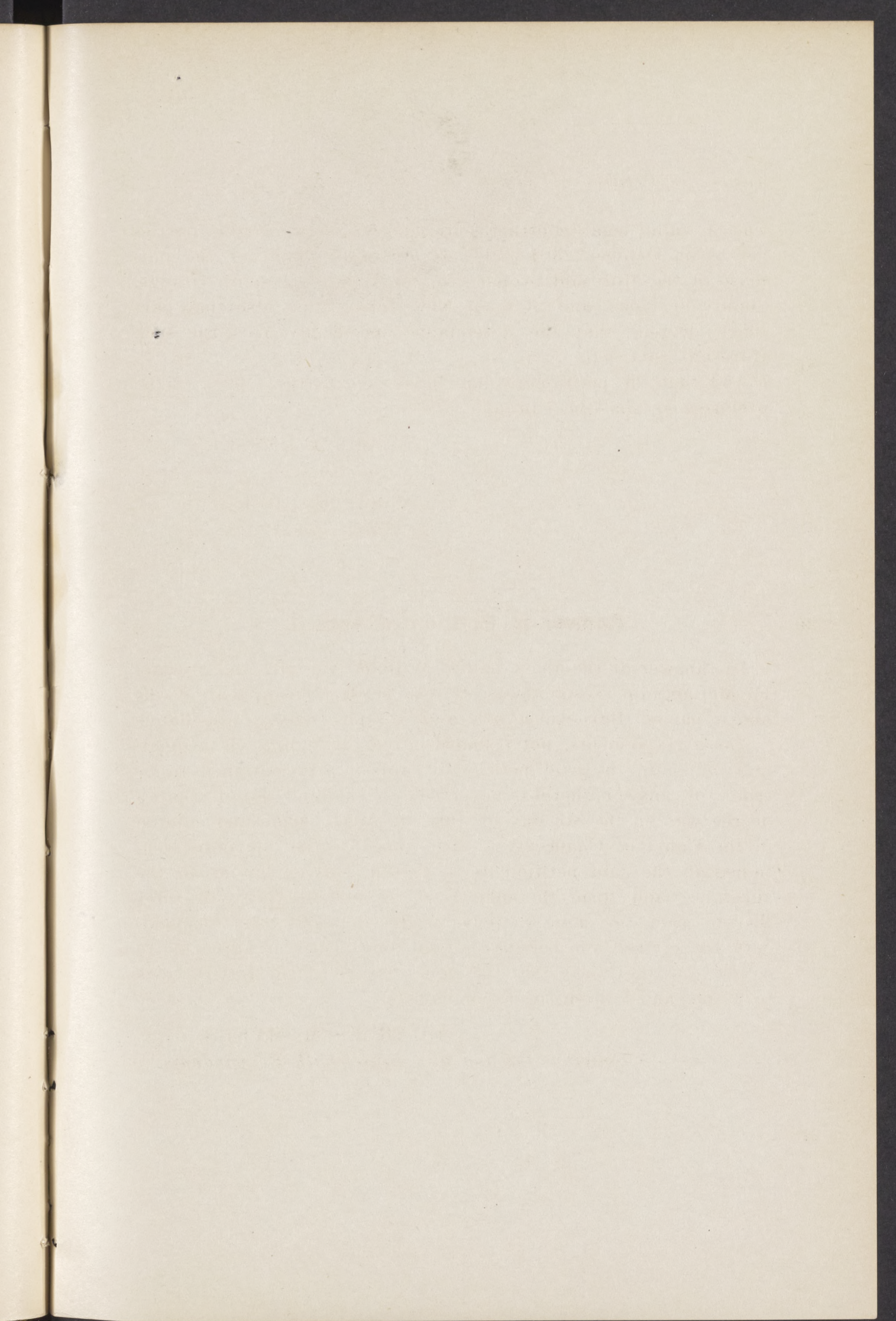
The answer of the above named William A. Kelly and Michael F. McLaughlin, respondents, to the petition of appeal of the above named Barnet Chinich and Joseph Densky, appellants.

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These respondents, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, say and admit, that a decree was on the 8th day of July, last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced. And these respondents are advised and believe that the said decree is agreeable to equity, and they pray that the same may be affirmed, with costs to be adjudged to these respondents.

CHARLES M. MYERS,  
*Solicitor for and of Counsel with Respondents.*

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# New Jersey Court of Errors and Appeals

*Between*

WILLIAM A. KELLY, *et al.*,

*Complainants-Respondents,*

*and*

BARNET CHINICH, *et al.*,

*Defendants-Appellants.*

*On Bill, &c.*

*On Appeal  
from Chancery.*

## BRIEF FOR COMPLAINANTS-RESPONDENTS.

This appeal is from a decree advised by Vice-Chancellor Foster for the specific performance of a contract for the purchase of lands made by the appellants.

### Facts.

As the learned Vice-Chancellor stated at the beginning of his opinion, this is "entirely a fact case, and the question to be determined is whether the parties ever entered into the contract" (Case, page 49).

We contend that once the exact situation is ascertained the law will not be difficult to apply.

As a result of negotiations between the vendors and vendees, in which the price and all the terms of sale had been agreed upon, they met by appointment in the office of Mr. Charles F. Herr, a counsellor at law of this State, representing the vendees, who drew the contract embodying the agreement and understanding of the parties to this suit.

Some slight changes were to be made in the contract during lunch hour, and they went out, arranging to come back at two o'clock and sign the contracts as corrected and pay the deposit. When they returned and while the description of the property was being read to them one of the vendees stated that "he had heard when he had been out to dinner, that there was a law in South Orange preventing you from putting up a four-story building, and if that was so, they didn't want to buy this property." (Case, page 5, lines 42-45).

Both complainants assured the defendants to the contrary, but they still appeared to have some doubt on this point, and, to

use the words of one of the complainants, "Mr. Herr stated that it would be well for the contract to be signed by all parties, and then if there was a law forbidding the building or prohibiting the building of any such four-story apartment, that the thing wouldn't go through." (Case, page 10, lines 37-41).

Mr. Herr himself says (Case, page 15, line 21): "You sign this contract and avoid the necessity of coming back here again, and ascertain whether you can build the house that you desire." The defendant, Chinich, testified to about the same thing (Case, page 20, lines 13-15 and lines 30-40). Defendant, Densky testified (Case, page 27, line 2): "Mr. Chinich said maybe there is some different rule; maybe we have some trouble if we build a four-story apartment." (line 30): "We cannot sign the agreement today; we cannot sign it because we don't know the rules of South Orange; we want to build in South Orange \* \* \* there may be some different rules."

It was not a question whether they would have had trouble in erecting the building, but whether there was a law, an ordinance or a rule of the Village of South Orange, which would prevent the erection of a four-story building.

This is shown by the testimony of Chinich, on page 20, line 14, where he said to his partner, "Mr. Densky, we will not sign the agreement, because I am afraid there is a different law there." and that he said to Judge Herr, "We will not sign the agreement before we find out if we can build a four-story apartment without any trouble," evidently meaning without any trouble *with the law*.

He also stated (Case, page 20, line 23) that they asked an architect "if he knows the rules about the Village of South Orange," and, on page 21, line 11, in an interview with the building inspector, the defendant Chinich said, "It is (is it) the law here you cannot build four-story"? and on cross examination (page 22, line 12) he testified that he went to South Orange for the purpose of finding out if there was any law against a four-story building.

This testimony taken from the mouths of the defendants and their own attorney conclusively establishes one fact, and that is, that the only question which arose between the parties was as to whether or not a four-story building could *lawfully* be erected in South Orange.

The defendants doubting the truth of the complainants' representation that there was no law to prevent it, and desiring to

have some time within which to ascertain the truth by means of their own inquiry, adopted the suggestion of their own lawyer to sign the agreement, to draw a check in payment of the deposit and to leave all the papers executed as they were by both complainants and defendants in the hands of their lawyer.

There was not then any delivery to Mr. Herr in escrow, nor was he an agent for either or both parties. His duty was simply to hold the agreements and check, pending an investigation by the defendants of the law, ordinances and rules of South Orange, and as soon as his clients had ascertained if the representation of the complainants that there was no such law, was true, he was to hand over one of the executed agreements and the signed check to the sellers. He says (Case, page 15, line 24): "That was agreed upon, and the contracts were signed and left with me. Chinich and Densky were to find out whether such a building could be put up, and if they came back and let me know that such a building could not be put up, the contract was not to be delivered or no contract at all made; the agreement was to be at an end."

What Mr. Herr evidently intended to convey was that if they let him know that the building could not be erected because of a law preventing it (this is the evidence of all the witnesses, including the vendees), the contract was not to be enforceable.

It will be noted that Mr. Herr puts the condition upon which the instrument was to be enforced as one made to depend entirely upon whether or not his clients informed him of a fact, whereas the testimony of the vendees was that they were to find out if a *law or rule* prevented the building.

From the subsequent testimony there was no doubt but that Chinich and Densky came back and misinformed their attorney, and upon such misinformation he tore part of the signatures and seals from the contract, and later delivered one of the contracts so mutilated to the complainants.

In our opinion, the situation shows that the only contingency upon which the agreements were not to be enforced was if the vendees discovered that the complainants' representations were false. If there be any doubt about this, reference to the examination of Mr. Herr by Vice-Chancellor Foster (Case, page 17, line 24) elicited a statement that "If they came back and told me they could not put up the building, the contract was to be at an end." However, immediately following this statement he said, "If they could put up the building, then the papers were to be delivered."

When Mr. Herr stated (Case, page 16, line 3), "That they were to be the sole judges as to whether this contract was to be delivered or not," there is no doubt but that, and everyone understood, that he meant that they were to be sole judges as to whether or not there was a law, ordinance or rule in South Orange that would prevent the erection of such a building, because that is the only question which was open, and, of course, they had to decide it truthfully. This was the view of Vice-Chancellor Foster, and no other construction can be put upon that part of the testimony in the case.

What occurred between the time when the contracts were executed and the check signed and left with Mr. Herr, and the time when the defendants returned to Mr. Herr's office and asked to have their agreements back, no one knows but themselves. But what happened can well be surmised. It does not require much argument to show that they had probably decided in the interim that they did not want to undertake, for financial reasons, the erection of such an expensive building. Instead of "squealing" they decided to furnish their lawyer with an untruthful excuse, which would enable them to get back the check and the contracts. In the light of what happened, namely, that the contracts were not torn up or destroyed, it is in our opinion safe to presume that the defendants did not even convince their lawyer that, to quote his own words, "There was to be no agreement and the papers were to be destroyed."

Inasmuch as the building inspector, who was an absolutely disinterested and impartial witness, testified that he did not make the statements attributed by the appellants to him, but that, on the contrary, he told them there would be no limit to the height of the building (Case, page 42, line 23), their credibility is necessarily impugned, and they should not be believed with reference to any testimony that they present for the purpose of evading the obligations of their contract.

What more could have been done on the day when all of the parties met at the office of Mr. Herr to conclude the contract than was done. The minds of the parties met in every detail.

When the question arose as to whether or not there was a law prohibiting the erection of a four-story building, the vendees asked for time to investigate it, and it must have been the clear understanding of all of the parties that if there was no such law that the agreement was to be enforceable. The vendees could not by a false statement vary the law or the agreement

between the parties. If it be true, as concluded by Mr. Herr, that the vendees were to be the sole judges, and no limitation was placed upon the extent of their "judicial powers," or the time during which they were to make up their minds, then it will be seen that a transaction was entered into in which the vendors had absolutely nothing to say, and in which the vendees would have the situation resolve itself in an option in their favor without any limit of time as to its exercise and absolutely under their own control. The result of this would be to bind the complainants and never the defendants.

In the light of the extraordinary claim made by the defendants on this score, it is interesting to note that as soon as the agreements were signed the real estate agents, Cohen & Stern, asked for and obtained from the complainants a written agreement to pay the commission due upon the sale. No conclusion can be drawn from this circumstance other than that the agents who were waiting and watching the transaction had at last found the parties agreed in all details and they entitled to receive the fruit of their efforts to bring them together. Had there been doubt at this point, the complainants would certainly have refused to bind themselves to pay the commissions.

The appellants lay stress on the fact that delivery was never accomplished in this case. As we view it, delivery was made by the parties in Mr. Herr's office. The latter signed his name underneath the words "signed, sealed and delivered in the presence of" and *prima facie* a delivery was accomplished.

The contracts having been so concluded, the parties simply allowed the papers to remain in Mr. Herr's hands until a fact could be ascertained.

The defendants could not by falsifying the situation and misstating the information disclosed to them by the officers of the village rescind the contract executed in a manner in which the contract in question was concluded.

If they had acted in good faith they would have called the attention of the complainants to the situation as they claim it was disclosed to them, and would have given the complainants an opportunity to prove that the representations made to them at the time of the execution of the contract were in fact true. Their failure so to do indicated clearly that they used the question of the height of the building as a subterfuge to escape the performance of the contract.

Under the circumstances, there was nothing unusual in the fact that Mr. Herr retained possession of the executed agreements and the signed check pending the ascertainment by the defendants of the law regulating the height of the building in South Orange.

That statement coming to them with the authority of the building inspector from whom they sought the information would have been conclusive on Mr. Herr if it had been truthfully reported to him. In view of all the circumstances, it seems to us that he should not have relied on the statement of the vendees, but should have, before tearing off the signature and returning the check, have either reported the situation to the complainants or learned it from the authorities of the Village of South Orange.

In the case of *Dietz v. Farish*, cited by the appellants, there was no delivery inasmuch as the parties agreed to make delivery and a payment upon approval of defendant's counsel, which approval was never given. The plaintiff unlawfully obtained one of the contracts by removing it from the desk of defendants' counsel, and the Court properly held that such removal did not consummate the delivery, and that in fact there was no valid delivery.

An attempt is made by the appellants, on page 12 of their brief, to show a connection between the facts in the case at bar and those in *Dietz v. Farish*. This similarity is sought to be established by the statement that Mr. McLaughlin, in the absence of Mr. Herr, managed to obtain from Mr. Herr's clerk a copy of the contract, and they therefore urged that the complainant "never obtained a valid delivery; \* \* \* but that their possession of the paper was and is wrongful."

An examination of the evidence, however, discloses that nothing of this kind occurred. In fact, Mr. McLaughlin stated that Mr. Herr's clerk produced to him both copies of the agreement, and that he took one and handed back the other (Case, pages 11-12). There is absolutely no evidence that this taking was unlawful or wrongful or in any way against the wishes of either Mr. Herr or his clerk.

We do not contend that the delivery by Mr. Herr's clerk was the delivery contemplated under the facts of this case or the law applicable thereto, but we do insist that there was a valid delivery on the day the papers were signed of a contract whose terms were certain, and which had been concluded between the

parties, subject only to the truthful report by the defendants of their investigation as to the law in South Orange.

We desire to call attention to the discussion as to the delivery of an instrument so completely set forth in *Terhune v. Oldis*, 44 N. J. Eq., page 146, in which the Court, citing various cases, summed up the definition of a "delivery" with a quotation from Sheppard's Touchstone, where it was said that "a delivery may be by words without acts or by acts without words, or by both acts and words."

We rely upon all that the learned Vice-Chancellor said in our case, and we lay particular stress upon that portion of the opinion wherein he reaches the conclusion that the defendants used the question of a building restriction as a subterfuge, to escape the performance of the contract, and that he is satisfied that the "defendants have not told the truth and have not acted in good faith."

The learned Vice-Chancellor had an opportunity not only to hear the testimony of the defendants, but to observe their demeanor and their actions. They were as much in evidence as were their spoken words, and having arrived at the conclusion that the complainants were entitled to a decree for specific performance, it is submitted it should not be disturbed.

Respectfully submitted,

CHARLES M. MYERS,

*Solicitor for and of Counsel with Complainants-Respondents.*

MILTON M. UNGER,

*On Brief.*



## New Jersey Court of Errors and Appeals

*Between*

WILLIAM A. KELLY, *et al.*,

*Complainants-Respondents,*

*and*

BARNET CHINICH, *et al.*,

*Defendants-Appellants.*

*On Bill, &c.*

*On Appeal from  
Chancery.*

### BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS.

#### Preliminary Statement.

This is an appeal by the defendants Barnet Chinich and Joseph Densky from the whole and every part of a final decree in Chancery, advised by Vice-Chancellor Foster in favor of the complainants William A. Kelly and Michael F. McLaughlin.

#### Statement of Facts.

Some time prior to October 23, 1917, the complainants, through Stern & Cohen, real estate agents, offered to sell the land in question to the defendants for Nine Thousand (\$9,000.00) Dollars, on which land defendants were to erect a four-story apartment house to cost about Ninety Thousand (\$90,000.00) Dollars.

On October 23, 1917, the complainants, together with their agents, Stern & Cohen, and their counsel, Mr. Conway, met the defendants at the office of the defendants' counsel, Charles F. Herr, and had drafts of a contract of sale prepared. When the description was read, the defendants expressed their fear that there might be some trouble so far as the authorities of the Village of South Orange were concerned in erecting the proposed four-story apartment house, and refused to conclude the bargain until they should go to the authorities at South Orange and investigate the matter, to which the complainants agreed. The defendants' counsel, Mr. Herr, insisted that since all the parties were present, it would save time if they all signed the contract forms, which, however, he would not deliver to the complainants until the defendants notified him of the favorable

results of their investigation and their decision to conclude the deal. The defendants at first refused to do this, but after Mr. Herr's assurance that the papers would be safe in his hands as their attorney, they acquiesced. The defendants also left with Mr. Herr a check for Three Hundred (\$300.00) Dollars for the initial payment.

The defendants, a day or two later, went to South Orange and made the investigation in question, the result of which, being unsatisfactory to them, they went to the office of Mr. Herr and told him they would have trouble in South Orange and that they did not want to purchase; and asked for the return of the check, which was done, and their signatures were torn from the contract forms.

A few days later Mr. McLaughlin, one of the complainants, 'phoned Mr. Herr and was told that the defendants did not wish to conclude the deal. Some time later, the same complainant called at Mr. Herr's office, but Mr. Herr, being out at the time, he, the complainant, took from Mr. Herr's clerk one of the contract forms with the signatures of the defendants torn off (Exhibit C. 1). Upon this mutilated paper complainants brought this suit for specific performance.

### **Specification of Error.**

The learned Vice-Chancellor erred in decreeing specific performance.

### **Points.**

(1) No contract was ever consummated between the parties; the complainants' offer was never accepted by the defendants.

(2) There was no delivery of the paper upon which this suit was instituted.

(3) The paper (Exhibit C. 1) is not a sufficient memorandum signed by the parties to be charged as required by the Statute of Frauds and its admittance in the evidence was error.

**ARGUMENT.****POINT ONE.**

No contract was ever consummated between the parties; the complainants' offer was never accepted by the defendants.

On the morning of October 23, 1917, complainants, together with their agents, Stern & Cohn, and their counsel, Mr. Conway, met at the office of Mr. Herr, counsel for the defendants, for the purpose of entering into a contract for the sale and purchase of the complainants' land. Drafts of the contract were prepared. When the description of the property was read by Mr. Conway, in which it appeared that the property was located in the Village of South Orange, Mr. Chinich said, "We will not sign the agreement before we find out if we can build a four-story apartment without trouble" (p. 20). Mr. McLaughlin then told the defendants that he had positive information from the authorities in South Orange that there was no law preventing the building of a four-story apartment house in South Orange (p. 10, l. 25). The defendants were not satisfied with Mr. McLaughlin's assurance that they would have no trouble (p. 10, l. 36). Mr. Kelly himself testified that they refused to go on with the deal until they "satisfied themselves that there was no such law to prevent them from putting up the contemplated building" (p. 8, l. 26; also p. 27, l. 30).

Up to this point it is certainly clear that the negotiations between the parties had not progressed to the point of contract. The complainants' offer was still unaccepted by the defendants, although the terms of the offer were perfectly satisfactory to them.

At this juncture the defendants' counsel, as a matter of convenience and to save time and the trouble of having the parties all meet again, suggested that the defendants sign the papers together with the check for \$300.00 for the first payment and that he, Mr. Herr, would hold them for the defendants until they should investigate the question as to whether they would have any trouble in erecting the contemplated building; and if they should be satisfied that they would have no trouble, and authorize him to deliver the papers to the complainants, he would do so (p. 15, l. 20; p. 16, l. 18). It was only upon this assurance that the signatures of the defendants would not be binding upon them, but that the signing was merely as a matter of practical convenience to all, that they did sign (p. 20, l. 26;

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Mr. Herr testified (p. 17, l. 22): "Chinich and Densky were to come back and tell me whether they could put up such a building. If they came back and told me that they could not put up the building, that the contract was to be at an end, there was to be no agreement and the papers were to be destroyed. If they could put up building then the papers were to be delivered" (p. 17, l. 30).

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That this arrangement was communicated to complainants and consented to by them is made clear by testimony of the complainants themselves.

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“Q Who were to be satisfied that the law permitted the building of a four-story apartment building in South Orange? A I suppose the parties to the contract and their counsel, Judge Herr.

“Q Chinich & Densky? A Yes.”

Up to this point there certainly was no acceptance by the defendants of the complainants' offer, for it was definitely understood that their acceptance would come when and if they were satisfied with the results of the proposed investigation. With the complainants' offer still open and unaccepted, the parties all left Mr. Herr's office to await the defendants' investigation in South Orange and their decision to accept or reject.

A day or two later the defendants called on Carl F. Schwarze, then building inspector of South Orange, and inquired of him as to whether there were any restrictions against the erection of a four-story apartment house in the Village of South Orange. At p. 41, l. 27, Schwarze testified: “I told them this was a little new to me. In fact it was the first thing of this kind since I was building inspector.” Both the defendants testified that Schwarze told them there was not a four-story apartment house in the village and they could walk through the village and see for themselves and if they were to start to build, the trustees of the village would meet and order the building stopped (p. 21, also p. 28).

The defendants then spent about an hour and a half in walking through the village, but saw no four-story building (p. 28, l. 35).

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The testimony plainly and conclusively shows that the satisfaction of the defendants with the state of the law in South Orange, was the pivot upon which their acceptance of the complainants' offer and the conclusion of the contract was to turn; and that they never communicated such satisfaction to the complainants is admitted by the complainant McLaughlin on pp. 13 and 14.

Of course there is no duty on the part of the offeree to communicate to the offerer his rejection of the offer. However, Mr. McLaughlin upon inquiring, was promptly and unequivocally informed of the defendants' rejection. He was asked (p. 11, l. 13):

“Q When did you come back or communicate with Mr. Herr? A I think the next day or day after I called him up on the 'phone and asked him about that, and I think he told me it was off and that they could not build.”

It is a well established maxim of equity jurisprudence that specific performance will not be decreed if it be reasonably doubtful whether the contract was finally concluded. *Brewer v. Wilson*, 17 N. J. Equity, 180. The burden of this proof, of course, rests upon the complainant. This burden was not sustained by the complainants' proofs in this case. The evidence taken as a whole shows that during the negotiations at Mr. Herr's office on October 23, 1917, the draft of the proposed contract was read to the defendants for their approval; that upon the reading of the description defendants discovered for the first time that the property was situated in the Village of South Orange; that this discovery created in the minds of the defendants a bona-fide doubt as to whether they could build their proposed apartment house on the premises; that despite the assurances of the complainants, that they could, they refused to consummate the deal and execute the contract until they investigate; that an investigation was actually made; that the investigation, instead of removing the doubt, confirmed it, and that the defendants never communicated to the complainants their satisfaction with the matter, nor in any other way accepted the complainants' offer.

“Preliminary negotiations which open the way toward a contract are not to be confused with the contract itself.” Vide, 7 American and English Encyc. of Law, 139, and cases in note 1, especially *Dietz v. Farish*, 53 How. Pr. (N. Y. Supr. Ct.), 217. Confirm 79 N. Y., 520.

“A specific performance will not be decreed unless the existence and terms of the contract be clearly proved. It must be shown that a contract has been concluded. If it be reasonably doubtful whether the contract was finally closed, equity will not interfere by decreeing a specific performance.” *Ridgeway v. Wharton*, 6 H. L. Cas., 238; *Brewer v. Wilson*, 2 C. E. Gr., 182; *Potts v. Brown*, 33 N. J. Eq., 650, at p. 657.

The mere fact that a signature has been affixed to a contract form does not amount to conclusive evidence of contractual intent. At best it only raises a presumption of such intent which may be rebutted by evidence to the contrary, synchronous with the act of signing which is admitted as part of the *res gestae*. Now the evidence is clear and uncontradicted that the defendants were unwilling to sign for the purpose of executing a contract and that they continued in their refusal to sign for such purchase, but that they did sign only for a special purpose stated by their counsel, to wit, the convenience of counsel and the parties, so that they need not return again in the event that the defendant should, at a later date, decide to enter into the contract.

Something more is necessary to the constitution of a contract than the mere signing of the names of the parties to a written or printed formula. The procreating fact is the intention of parties, the absence of which no form or ceremony can supply. *Vol. II Kent's Com.*, 477; *Addison on Contracts*, chapter 26, section 2; *Chitty on Contracts*, volume 1, 20.

*Deitz v Farish*, 53 How. Pr. (N. Y. Supr. Ct.), 217, is a case which we consider directly in point and we respectfully ask the Court's indulgence of our stating the facts and decision in this brief.

In this case the plaintiff and defendant being in treaty for the purchase of a house, met at defendants' office for the purpose of continuing negotiations. Plaintiff brought with him a printed form of contract in duplicate, with the description of the premises filled in. Plaintiff signed both of the contracts and handed them to defendant for signature, who signed both. At this stage of the business it was decided by the defendant to proceed no further in it until he had advised with his counsel (in the case at Bar defendants refused to proceed even before signing). At the time it was agreed between the parties to make the delivery of the contract and a payment of the first installment required by it dependent upon the approval of defendant's counsel. Defendant took both duplicates into his possession, and both parties proceeded to the office of the defendant's counsel. The latter not being in, both duplicates, together with the check for the amount of the first installment, were left by defendant for his counsel, with instructions, in case of approval, to deliver one of the duplicates and the check to plaintiff. The contract was never approved, nor were any of the papers handed by said counsel, or with his knowledge or consent, to the plaintiff. Before leaving the office of defendant's counsel,

plaintiff succeeded in obtaining one of the papers by removing it from a desk where it was lying and putting it in his pocket, took it away with him.

Held: "The intent is the governing and controlling element in the determination of the question whether a contract has or has not been concluded in a given case. Established forms and ceremonies furnish useful indications of intention; but in themselves, and in the absence of mutual and concurring intention, meeting in the same sense to the same point, and embracing the same subject-matter, they are inoperative. This is a rule of universal jurisprudence, and applies to all classes of contracts.

"Although the mere consent of the parties will suffice for the perfection of consensual contracts, yet if the parties, in agreeing upon a sale or any other bargain, agree also that there shall be some other formal act, intending that the bargain shall not be deemed complete until this act is performed, the parties, although they may have agreed upon the terms, may recede before the act is complete.

"In the case of a contract under seal, or a deed the parties are at liberty to recede at any time up to the time of its actual delivery as a living obligation."

The case of *Brewer v. Wilson*, 17 N. J. Equity, 180, is another case in point with the case at bar and we quote from the opinion of Chancellor Green so much as pertains to the question of proof of a contract.

"The bill is filed to enforce the specific performance of a contract for the sale of real estate. The contract rests in *parol*. The complainant alleges, that on the day of the contract, and in part performance thereof, he surrendered the occupation of the premises to the purchaser, and put him in the full possession and enjoyment thereof. The defendant, by his answer, denies the making of the contract and the delivery of possession of the premises, as set out in the complainant's bill. The burden of proving both issues is upon the complainant.

"The material terms of the contract, so far as the negotiation proceeded, are not disputed. The contract was for the purchase of a stable, for which the defendant was to pay \$1,075. The deed was to be made in a few days thereafter, and the purchase money was to be paid on the delivery of the deed by the defendant's check therefor, payable in sixty days. Thus far the parties agree. But the defendant alleges that the contract was not closed. That during the negotiation he had objected that the location of the premises was hazardous, the building being peculiarly exposed to danger from fire, and that the defendant was at liberty, before the delivery of the deed, to satisfy himself upon that point, and that if his investi-

gation did not prove satisfactory, he was under no obligation to take the title. That his investigation proved unsatisfactory, and upon that ground the defendant declined to accept the title. The material question presented by the issue between the parties is, whether the contract was, or was not, finally closed. No one was present at the close of the negotiation but the parties themselves. The proof of the contract rests upon their testimony alone. They are in direct conflict upon the point in issue. There is nothing in the testimony of the parties which can be regarded as decisive of the question. The complainant relies upon the partial occupancy of the premises by the defendant, and his statement to his hired man that he had bought the stable, as corroborative proof of the allegations of the bill, sufficient to overcome the defendant's answer. It may be admitted that this additional evidence is sufficient to obviate the technical objection that something more than the testimony of a single witness is necessary to overcome the allegations of the answer, and that it does incline the scale in favor of the complainant's statement. But it is not absolutely inconsistent with the defendant's view of the case, and cannot, therefore, be regarded as conclusive of the question, whether the contract was, or was not, finally closed.

A specific performance will not be decreed, unless the existence and the terms of the contract be clearly proved. It must be shown that a contract has been concluded. If it be reasonably doubtful whether the contract was finally concluded, equity will not interfere by decreeing a specific performance, but will leave the parties to their remedy at law. *Huddleston v. Briscoe*, 11 Vesey, 591; *Stratford v. Bosworth*, 2 Ves. & B., 341; *Fry on Spec. Perf.*, §164."

The learned Vice-Chancellor in his opinion (pp. 52 and 53) states, "that since the complainants permitted the property to be tied up and made themselves liable for the payment of commission to their agents, they must have considered the contract closed." But we respectfully submit that this is entirely of no moment. What the complainants thought in the matter is of no probative value in the issue of whether a contract was or was not entered into. Not what the offerer thought, but what the offeree did, is the decisive question. The books abound in cases where the offerer thought he had a contract, but upon trial was unable to prove that the offeree actually and unequivocally accepted the offer.

We quote from the opinion in *Dietz v. Farish*, 79 N. Y., 520:

"In this case the evidence is that there was to be no contract until delivery and that there was to be no delivery until the papers were approved. It is said that the

plaintiffs supposed that the contract was binding and that counsel was consulted only as to the payment of \$2,000.00. If this was so, it would not aid the plaintiff; both parties must consent to make a binding contract. Although the parties agreed orally upon the terms of sale, the defendant certainly never intended to consummate the contract until he was satisfied as to the title; and as the contract was never consummated by delivery, there is no authority for holding him bound against his intention."

As a matter of fact the complainants' land in this case was no more tied up than in any other case where the offer is held out with the view to a possible future acceptance. Both parties were at all times in *locus penitentiae*. The property of the complainants was in no sense tied up for even a moment, for the complainants were at all times at liberty to revoke their offer and themselves call the deal off. That they did hold their property open for the acceptance by the defendant was a matter of their own free choice done in the hope that the defendants might decide to purchase. The complainants, as business men, knew that sales of \$9,000.00 plots of land in South Orange are not made every day, therefore, they undoubtedly felt that, although the defendants were unwilling to conclude the deal on October 23rd, it was worth their while to hold their offer open to the defendants for an additional period of time on the chance that the defendants, who had already agreed on the terms of the purchase, might later determine to go ahead and conclude the purchase. This was sufficient inducement to have made it worth while for the complainants, as reasonable business men, to hold their offer open although the defendants might not eventually purchase.

The Court also speaks of the failure of the defendants to have a condition (pertaining to the agreed investigation) incorporated in the contract as proof that a binding contract must have been concluded. That the defendants did not incorporate such a condition certainly does not prove that they are telling an untruth about the investigation being agreed to by both sides, for the complainants themselves frankly admit that the defendants were to make such an investigation. In other words, it is perfectly plain by the testimony itself, without resorting to inference, that the matter was not to be considered finally closed until the investigation in South Orange was made. A condition in the contract, however, would have been to the advantage of the *complainants* for then they could have insisted upon immediate delivery of a contract. That the complainants

were unable to induce the defendants to consummate a contract containing such condition and to obtain immediate delivery, clearly proves that the defendants wanted no contract at all, not even a conditional contract.

### POINT TWO.

There was no delivery of the paper upon which this suit was instituted.

It is an elementary proposition of law that an instrument cannot be delivered in escrow to the agent or attorney of the grantor, because the possession of the grantor's agent or attorney is the grantor's possession and revocable by him.

*Wier v. Batdorf*, 24 Neb., 86.

*Day v. Lacasse*, 85 Me., 242.

*Confederation L. Ass'n v. O'Donnell*, 10 Can. Sup. Ct. Rep., 92.

*Buck v. Knowlton*, 21 Can. Sup. Ct. Rept., 371.

*Shelinsky v. Foster*, 87 Atl. (Conn.), 35.

In New Jersey it was decided as early as *State Bank at Elizabeth v. Chetwood*, 8 N. J. L., 1, that "A party to an instrument can never hold it as escrow."

Mr. Herr's possession of the papers being the possession of the defendants, it follows from this doctrine of the New Jersey case that no escrow existed.

The testimony is that Mr. Herr was the attorney for the defendants Chinich & Densky (the complainants Kelly & McLaughlin being represented by Mr. Conway) and that the papers were left with Mr. Herr with the express understanding that he was to hold them as attorney and agent for the defendants.

Mr. Chinich testified (p. 20, l. 37), "Then I said, Judge, we will not sign the agreement with the check to anybody just except to your—in your hands because you are our lawyer."

Mr. Densky testified (p. 27, l. 43), "Well, alright, Judge, we can sign on that condition, if you give me a few days and on another condition if you keep the agreement with the check by you, you are our lawyer."

The evidence clearly shows that no delivery was made on the 23rd day of October, but that if a delivery were to be made at all, it would be at some later date. But the defendants at no subsequent time authorized their agent, Mr. Herr, to make such

a delivery; on the contrary, they returned to his office shortly after their investigation in South Orange and strictly forbade Mr. Herr to make such delivery; and in fact made delivery impossible by taking back their check for the first payment and removing their signatures from the draft of the contract.

Before Mr. McLaughlin called in person at the office of Mr. Herr, he communicated with him by telephone, and was then promptly told that the defendants would not make delivery (p. 11, l. 13). However, Mr. McLaughlin, notwithstanding Mr. Herr's statement, that he would not deliver the papers, called at Mr. Herr's office, and in the absence of Mr. Herr, managed to obtain from Mr. Herr's clerk a copy of the contract form, admitted as Exhibit C. 1, and upon which this suit was instituted.

It is, therefore, clear that the defendants never surrendered control of the papers, and the complainants never obtained a valid delivery of any papers as a living contract; but that their possession of the paper was and is wrongful.

The complainants acquired no legal advantage by this wrongful possession obtained from Mr. Herr's clerk. *Dietz v. Farish*, 79 N. Y., 520.

### POINT THREE.

The paper, Exhibit C. 1, is not a sufficient memorandum signed by the parties to be charged as required by the statute of frauds and its admittance into evidence was error.

To satisfy the Statute of Frauds, the memorandum signed by the party to be charged, must have been delivered. Without a valid legal delivery the memorandum is inadmissible, hence the Court erred in admitting Exhibit C. 1 (p. 40, l. 31) as evidence of a contract.

*Vide Brown v. Brown*, 33 N. J. E., 650.

*Brown on Stat. of Frauds*, §354, and cases in note 3.

We respectfully submit that the decree of the learned Vice-Chancellor be reversed.

BLATT & LESSER,  
*Attorneys of Defendants-Appellants.*

PHILIP J. SCHOTLAND,  
*Of Counsel.*

DAVID H. YONTEFF,  
*On Brief.*

# New Jersey Court of Errors and Appeals

*Between*

WILLIAM A. KELLY, *et al.*,  
*Complainants-Respondents,*

*and*

BARNET CHINICH, *et al.*,  
*Defendants-Appellants.*

*On Bill, &c.,*

*On Appeal from  
Chancery.*

## BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS.

### Preliminary Statement.

This is an appeal by the defendants Barnet Chinich and Joseph Densky from the whole and every part of a final decree in Chancery, advised by Vice-Chancellor Foster in favor of the complainants William A. Kelly and Michael F. McLaughlin.

### Statement of Facts.

Some time prior to October 23, 1917, the complainants, through Stern & Cohen, real estate agents, offered to sell the land in question to the defendants for Nine Thousand (\$9,000.00) Dollars, on which land defendants were to erect a four-story apartment house to cost about Ninety Thousand (\$90,000.00) Dollars.

On October 23, 1917, the complainants, together with their agents, Stern & Cohen, and their counsel, Mr. Conway, met the defendants at the office of the defendants' counsel, Charles F. Herr, and had drafts of a contract of sale prepared. When the description was read, the defendants expressed their fear that there might be some trouble so far as the authorities of the Village of South Orange were concerned in erecting the proposed four-story apartment house, and refused to conclude the bargain until they should go to the authorities at South Orange and investigate the matter, to which the complainants agreed. The defendants' counsel, Mr. Herr, insisted that since all the parties were present, it would save time if they all signed the contract forms, which, however, he would not deliver to the complainants until the defendants notified him of the favorable results of their investigation and their decision to conclude the

deal. The defendants at first refused to do this, but after Mr. Herr's assurance that the papers would be safe in his hands as their attorney, they acquiesced. The defendants also left with Mr. Herr a check for Three Hundred (\$300.00) Dollars for the initial payment.

The defendants, a day or two later, went to South Orange and made the investigation in question, the result of which, being unsatisfactory to them, they went to the office of Mr. Herr and told him they would have trouble in South Orange and that they did not want to purchase; and asked for the return of the check, which was done, and their signatures were torn from the contract forms.

A few days later Mr. McLaughlin, one of the complainants, 'phoned Mr. Herr and was told that the defendants did not wish to conclude the deal. Some time later, the same complainant called at Mr. Herr's office, but Mr. Herr, being out at the time, he, the complainant, took from Mr. Herr's clerk one of the contract forms with the signatures of the defendants torn off (Exhibit C. 1). Upon this mutilated paper complainants brought this suit for specific performance.

### **Specification of Error.**

The learned Vice-Chancellor erred in decreeing specific performance.

### **Points.**

(1) No contract was ever consummated between the parties; the complainants' offer was never accepted by the defendants.

(2) There was no delivery of the paper upon which this suit was instituted.

(3) The paper (Exhibit C. 1) is not a sufficient memorandum signed by the parties to be charged as required by the Statute of Frauds and its admittance in the evidence was error.

## ARGUMENT.

### POINT ONE.

**No contract was ever consummated between the parties; the complainants' offer was never accepted by the defendants.**

On the morning of October 23, 1917, complainants, together with their agents, Stern & Cohn, and their counsel, Mr. Conway, met at the office of Mr. Herr, counsel for the defendants, for the purpose of entering into a contract for the sale and purchase of the complainants' land. Drafts of the contract were prepared. When the description of the property was read by Mr. Conway, in which it appeared that the property was located in the Village of South Orange, Mr. Chinich said, "We will not sign the agreement before we find out if we can build a four story apartment without trouble" (p. 20). Mr. McLaughlin then told the defendants that he had positive information from the authorities in South Orange that there was no law preventing the building of a four story apartment house in South Orange (p. 10, l. 25). The defendants were not satisfied with Mr. McLaughlin's assurance that they would have no trouble (p. 10, l. 36). Mr. Kelly himself testified that they refused to go on with the deal until they "satisfied themselves that there was no such law to prevent them from putting up the contemplated building" (p. 8, l. 26; also p. 27, l. 30).

Up to this point it is certainly clear that the negotiations between the parties had not progressed to the point of contract. The complainants' offer was still unaccepted by the defendants, although the terms of the offer were perfectly satisfactory to them.

At this juncture the defendants' counsel, as a matter of convenience and to save time and the trouble of having the parties all meet again, suggested that the defendants sign the papers together with the check for \$300.00 for the first payment and that he, Mr. Herr, would hold them for the defendants until they should investigate the question as to whether they would have any trouble in erecting the contemplated building; and if they should be satisfied that they would have no trouble, and authorize him to deliver the papers to the complainants, he would do so (p. 15, l. 20; p. 16, l. 18). It was only upon this assurance that the signatures of the defendants would not be binding upon them, but that the signing was merely as a matter of practical convenience to all, that they did sign (p. 20, l. 26;

p. 27, l. 42). This signing cannot, in any sense, be regarded as evidence of an *animus contrahendi* and certainly was not a step further in the execution of the contract; it was simply an indifferent and ineffectual writing of names upon a paper which might or might not, at some later time, be given contractual being. No delivery of the papers was intended nor made at this time. The papers were left in the hands of Mr. Herr, who was acting as attorney and agent for the defendants with the express understanding that there would be no delivery unless the defendants, after the proposed investigation, were satisfied that they would have no trouble with their building in South Orange and until they authorized Mr. Herr to deliver the papers to the complainants.

Mr. Herr testified (p. 17, l. 22): "Chinich and Densky were to come back and tell me whether they could put up such a building. If they came back and told me that they could not put up the building, that the contract was to be at an end, there was to be no agreement and the papers were to be destroyed. If they could put up building then the papers were to be delivered" (p. 17, l. 30).

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That this arrangement was communicated to complainants and consented to by them is made clear by testimony of the complainants themselves.

"Q (By the Court.) What was said about it; give us the language, or what did you or Mr. McLaughlin say in reply?" A (Kelly.) "I think it was Judge Herr said that if the papers were signed he would want permission to hold them for a couple of days until Mr. Densky or Mr. Chinich *satisfy themselves* that there was no such law to prevent them from putting up this contemplated building."

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“Q Chinich & Densky? A Yes.”

Up to this point there certainly was no acceptance by the defendants of the complainants' offer, for it was definitely understood that their acceptance would come when and if they were satisfied with the results of the proposed investigation. With the complainants' offer still open and unaccepted, the parties all left Mr. Herr's office to await the defendants' investigation in South Orange and their decision to accept or reject.

A day or two later the defendants called on Carl F. Schwarze, then building inspector of South Orange, and inquired of him as to whether there were any restrictions against the erection of a four-story apartment house in the village of South Orange. At p. 41, l. 27, Schwarze testified: “I told them this was a little new to me. In fact it was the first thing of this kind since I was building inspector.” Both the defendants testified that Schwarze told them there was not a four-story apartment house in the village and they could walk through the village and see for themselves and if they were to start to build, the trustees of the village would meet and order the building stopped (p. 21, also p. 28).

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“Q When did you come back or communicate with Mr. Herr? A I think the next day or day after I called him up on the 'phone and asked him about that, and I think he told me it was off and that they could not build.”

It is a well established maxim of equity jurisprudence that specific performance will not be decreed if it be reasonably doubtful whether the contract was finally concluded. *Brewer v. Wilson*, 17 N. J. Equity, 180. The burden of this proof, of course, rests upon the complainant. This burden was not sustained by the complainants' proofs in this case. The evidence taken as a whole shows that during the negotiations at Mr. Herr's office on October 23, 1917, the draft of the proposed contract was read to the defendants for their approval; that upon the reading of the description defendants discovered for the first time that the property was situated in the village of South Orange; that this discovery created in the minds of the defendants a bona-fide doubt as to whether they could build their proposed apartment house on the premises; that despite the assurances of the complainants, that they could, they refused to consummate the deal and execute the contract until they investigate; that an investigation was actually made; that the investigation, instead of removing the doubt, confirmed it, and that the defendants never communicated to the complainants their satisfaction with the matter, nor in any other way accepted the complainants' offer.

“Preliminary negotiations which open the way toward a contract are not to be confused with the contract itself.” Vide, 7 American and English Encyc. of Law, 139, and cases in note 1, especially *Dietz v. Farish*, 53 How. Pr. (N. Y. Supr. Ct.), 217. Confirm 79 N. Y., 520.

“A specific performance will not be decreed unless the existence and terms of the contract be clearly proved. It must be shown that a contract has been concluded. If it be reasonably doubtful whether the contract was finally closed, equity will not interfere by decreeing a specific performance.” *Ridgeway v. Wharton*, 6 H. L. Cas., 238; *Brewer v. Wilson*, 2 C. E. Gr., 182; *Potts v. Brown*, 33 N. J. Eq., 650, at p. 657.

The mere fact that a signature has been affixed to a contract form does not amount to conclusive evidence of contractual intent. At best it only raises a presumption of such intent which may be rebutted by evidence to the contrary, synchronous

with the act of signing which is admitted as part of the *res gestae*. Now the evidence is clear and uncontradicted that the defendants were unwilling to sign for the purpose of executing a contract and that they continued in their refusal to sign for such purchase, but that they did sign only for a special purpose stated by their counsel, to-wit, the convenience of counsel and the parties, so that they need not return again in the event that the defendant should, at a later date, decide to enter into the contract.

Something more is necessary to the constitution of a contract than the mere signing of the names of the parties to a written or printed formula. The procreating fact is the intention of the parties, the absence of which no form or ceremony can supply. *Vol. II Kent's Com.*, 477; *Addison on Contracts*, chapter 26, section 2; *Chitty on Contracts*, volume 1, 20.

*Deitz v. Farish*, 53 How. Pr. (N. Y. Supr. Ct.), 217, is a case which we consider directly in point and we respectfully ask the Court's indulgence of our stating the facts and decision in this brief.

In this case the plaintiff and defendant being in treaty for the purchase of a house, met at defendants' office for the purpose of continuing negotiations. Plaintiff brought with him a printed form of contract in duplicate, with the description of the premises filled in. Plaintiff signed both of the contracts and handed them to defendant for signature, who signed both. At this stage of the business it was decided by the defendant to proceed no further in it until he had advised with his counsel (in the case at Bar defendants refused to proceed even before signing). At the time it was agreed between the parties to make the delivery of the contract and a payment of the first installment required by it dependent upon the approval of defendants counsel. Defendant took both duplicates into his possession, and both parties proceeded to the office of the defendant's counsel. The latter not being in, both duplicates, together with the check for the amount of the first installment, were left by defendant for his counsel, with instructions, in case of approval, to deliver one of the duplicates and the check to plaintiff. The contract was never approved, nor were any of the papers handed by said counsel, or with his knowledge or consent, to the plaintiff. Before leaving the office of defendant's counsel, plaintiff succeeded in obtaining one of the papers by removing it from a desk where it was lying and putting it in his pocket, took it away with him.

Held: "The intent is the governing and controlling element in the determination of the question whether a contract has or has not been concluded in a given case. Established forms and ceremonies furnish useful indications of intention; but in themselves, and in the absence of mutual and concurring intention, meeting in the same sense to the same point, and embracing the same subject-matter, they are inoperative. This is a rule of universal jurisprudence, and applies to all classes of contracts.

"Although the mere consent of the parties will suffice for the perfection of consensual contracts, yet if the parties, in agreeing upon a sale or any other bargain, agree also that there shall be some other formal act, intending that the bargain shall not be deemed complete until this act is performed, the parties, although they may have agreed upon the terms, may recede before the act is complete.

"In the case of a contract under seal, or a deed the parties are at liberty to recede at any time up to the time of its actual delivery as a living obligation."

The case of *Brewer v. Wilson*, 17 N. J. Equity, 180, is another case in point with the case at bar and we quote from the opinion of Chancellor Green so much as pertains to the question of proof of a contract.

"The bill is filed to enforce the specific performance of a contract for the sale of real estate. The contract rests in *parol*. The complainant alleges, that on the day of the contract, and in part performance thereof, he surrendered the occupation of the premises to the purchaser, and put him in the full possession and enjoyment thereof. The defendant, by his answer, denies the making of the contract and the delivery of possession of the premises, as set out in the complainant's bill. The burden of proving both issues is upon the complainant.

"The material terms of the contract, so far as the negotiation proceeded, are not disputed. The contract was for the purchase of a stable, for which the defendant was to pay \$1,075. The deed was to be made in a few days thereafter, and the purchase money was to be paid on the delivery of the deed by the defendant's check therefor, payable in sixty days. Thus far the parties agree. But the defendant alleges that the contract was not closed. That during the negotiation he had objected that the location of the premises was hazardous, the building being peculiarly exposed to danger from fire, and that the defendant was at liberty, before the delivery of the deed, to satisfy himself upon that point, and that if his investigation did not prove satisfactory, he was under no obligation to take the title. That his investigation proved unsatisfactory, and upon that ground the defendant de-

clined to accept the title. The material question presented by the issue between the parties is, whether the contract was, or was not, finally closed. No one was present at the close of the negotiation but the parties themselves. The proof of the contract rests upon their testimony alone. They are in direct conflict upon the point in issue. There is nothing in the testimony of the parties which can be regarded as decisive of the question. The complainant relies upon the partial occupancy of the premises by the defendant, and his statement to his hired man that he had bought the stable, as corroborative proof of the allegations of the bill, sufficient to overcome the defendant's answer. It may be admitted that this additional evidence is sufficient to obviate the technical objection that something more than the testimony of a single witness is necessary to overcome the allegations of the answer, and that it does incline the scale in favor of the complainant's statement. But it is not absolutely inconsistent with the defendant's view of the case, and cannot, therefore, be regarded as conclusive of the question, whether the contract was, or was not, finally closed.

A specific performance will not be decreed, unless the existence and the terms of the contract be clearly proved. It must be shown that a contract has been concluded. If it be reasonably doubtful whether the contract was finally concluded, equity will not interfere by decreeing a specific performance, but will leave the parties to their remedy at law. *Huddleston v. Briscoe*, 11 Vesey, 591; *Stratford v. Bosworth*, 2 Ves. & B., 341; *Fry on Spec. Perf.*, § 164."

The learned Vice-Chancellor in his opinion (pp. 52 and 53) states, "that since the complainants permitted the property to be tied up and made themselves liable for the payment of commission to their agents, they must have considered the contract closed." But we respectfully submit that this is entirely of no moment. What the complainants thought in the matter is of no probative value in the issue of whether a contract was or was not entered into. Not what the offerer thought, but what the offeree did, is the decisive question. The books abound in cases where the offerer thought he had a contract, but upon trial was unable to prove that the offeree actually and unequivocally accepted the offer.

We quote from the opinion in *Dietz v. Farish*, 79 N. Y., 520:

"In this case the evidence is that there was to be no contract until delivery and that there was to be no delivery until the papers were approved. It is said that the plaintiffs supposed that the contract was binding and that counsel was consulted only as to the payment of \$2,000.00. If this was so, it would not aid the plaintiff; both parties

must consent to make a binding contract. Although the parties agreed orally upon the terms of sale, the defendant certainly never intended to consummate the contract until he was satisfied as to the title; and as the contract was never consummated by delivery, there is no authority for holding him bound against his intention."

As a matter of fact the complainants' land in this case was no more tied up than in any other case where the offer is held out with the view to a possible future acceptance. Both parties were at all times in *locus penitentiae*. The property of the complainants was in no sense tied up for even a moment, for the complainants were at all times at liberty to revoke their offer and themselves call the deal off. That they did hold their property open for the acceptance by the defendant was a matter of their own free choice done in the hope that the defendants might decide to purchase. The complainants, as business men, knew that sales of \$9,000.00 plots of land in South Orange are not made every day, therefore, they undoubtedly felt that, although the defendants were unwilling to conclude the deal on October 23rd, it was worth their while to hold their offer open to the defendants for an additional period of time on the chance that the defendants, who had already agreed on the terms of the purchase, might later determine to go ahead and conclude the purchase. This was sufficient inducement to have made it worth while for the complainants, as reasonable business men, to hold their offer open although the defendants might not eventually purchase.

The Court also speaks of the failure of the defendants to have a condition (pertaining to the agreed investigation) incorporated in the contract as proof that a binding contract must have been concluded. That the defendants did not incorporate such a condition certainly does not prove that they are telling an untruth about the investigation being agreed to by both sides, for the complainants themselves frankly admit that the defendants were to make such an investigation. In other words it is perfectly plain by the testimony itself, without resorting to inference, that the matter was not to be considered finally closed until the investigation in South Orange was made. A condition in the contract, however, would have been to the advantage of the *complainants* for then they could have insisted upon immediate delivery of a contract. That the complainants were unable to induce the defendants to consummate a contract containing such condition and to obtain immediate delivery,

clearly proves that the defendants wanted no contract at all, not even a conditional contract.

## POINT TWO.

**There was no delivery of the paper upon which this suit was instituted.**

It is an elementary proposition of law that an instrument cannot be delivered in escrow to the agent or attorney of the grantor, because the possession of the grantor's agent or attorney is the grantor's possession and revocable by him.

*Wier v. Batdorf*, 24 Neb., 86.

*Day v. Lacasse*, 85 Me., 242.

*Confederation L. Ass'n v. O'Donnell*, 10 Can. Sup. Ct. Rep., 92.

*Buck v. Knowlton*, 21 Can. Sup. Ct. Rept., 371.

*Shelinsky v. Foster*, 87 Atl. (Conn.), 35.

In New Jersey it was decided as early as *State Bank at Elizabeth v. Chetwood*, 8 N. J. L., 1, that "A party to an instrument can never hold it as escrow."

Mr. Herr's possession of the papers being the possession of the defendants, it follows from this doctrine of the New Jersey case that no escrow existed.

The testimony is that Mr. Herr was the attorney for the defendants Chinich & Densky (the complainants Kelly & McLaughlin being represented by Mr. Conway) and that the papers were left with Mr. Herr with the express understanding that he was to hold them as attorney and agent for the defendants.

Mr. Chinich testified (p. 20, l. 37), "Then I said, Judge, we will not sign the agreement with the check to anybody just except to your—in your hands because you are our lawyer."

Mr. Densky testified (p. 27, l. 43), "Well, alright, Judge, we can sign on that condition, if you give me a few days and on another condition, if you keep the agreement with the check by you, you are our lawyer."

The evidence clearly shows that no delivery was made on the 23rd day of October, but that if a delivery were to be made at all, it would be at some later date. But the defendants at no subsequent time authorized their agent, Mr. Herr, to make such a delivery; on the contrary, they returned to his office shortly after their investigation in South Orange and strictly forbade

Mr. Herr to make such delivery; and in fact made delivery impossible by taking back their check for the first payment and removing their signatures from the draft of the contract.

Before Mr. McLaughlin called in person at the office of Mr. Herr, he communicated with him by telephone, and was then promptly told that the defendants would not make delivery (p. 11, l. 13). However, Mr. McLaughlin, notwithstanding Mr. Herr's statement, that he would not deliver the papers, called at Mr. Herr's office, and in the absence of Mr. Herr, managed to obtain from Mr. Herr's clerk a copy of the contract form, admitted as Exhibit C. 1, and upon which this suit was instituted.

It is, therefore, clear that the defendants never surrendered control of the papers, and the complainants never obtained a valid delivery of any papers as a living contract; but that their possession of the paper was and is wrongful.

The complainants acquired no legal advantage by this wrongful possession obtained from Mr. Herr's clerk. *Dietz v. Farish*, 79 N. Y., 520.

### POINT THREE.

**The paper, Exhibit C. 1, is not a sufficient memorandum signed by the parties to be charged as required by the statute of frauds and its admittance into evidence was error.**

To satisfy the Statute of Frauds, the memorandum signed by the party to be charged, must have been delivered. Without a valid legal delivery the memorandum is inadmissible, hence the Court erred in admitting Exhibit C. 1 (p. 40, l. 31) as evidence of a contract.

*Vide Brown v. Brown*, 33 N. J. E., 650.

*Brown on Stat. of Frauds*, §354, and cases in note 3.

We respectfully submit that the decree of the learned Vice-Chancellor be reversed.

BLATT & LESSER,  
*Counsel of Defendants-Appellants.*

DAVID H. YONTEFF,  
*On Brief.*

W. B. E. & Co.

Southey