# INDEX

## PLEADINGS, ETC.



## TESTIMONY



## EXHIBITS



Opinion 61

(Filed Jan. 7, 1926)

## BILL OF COMPLAINT

IN CHANCERY OF NEW JERSEY

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

The complainants, Abraham A. Cohen and Annie Cohen, his wife, of the City of Paterson, in the County of Passaic, and State of New Jersey, respectfully show that:

1. On June 18th, 1925, the defendant, Benjamin Cohn, an unmarried man, was seized in fee simple of all that certain lot, tract or parcel of lands and premises, situate, lying and being in the City of Paterson aforesaid, and described as follows:

> Beginning at a point on the northerly side of Market Street, formerly Congress Street, at a distance of one hundred and one feet and one half inch from the corner of Prospect Street and running thence (1) easterly along the line of Market Street twenty-six feet and seven inches and thence (2) northerly at a right angle with Market Street one hundred and twelve feet and six inches; thence (3) westerly, parallel with Market Street, twenty-six feet and seven inches, and thence (4) southerly, one hundred and twelve feet, and six inches to the place of beginning.
>
> Being known as No. 95 Market Street, Paterson, New Jersey.

2. On the date last mentioned, complainants entered into a certain agreement, in writing, with the said defendant, whereby the defendant agreed to convey the said lands and premises by deed of warranty, on or before January 2nd, 1926, to the

said complainants, in consideration of the payment by them of the sum of Forty-five thousand dollars ($45,000.00) and the said complainants agreed to pay to defendant, the said purchase price of Forty-five thousand dollars ($45,000.00) by the payment of Two thousand dollars ($2,000.00) at the execution of said agreement, and the balance of the purchase price to be paid upon the delivery of said deed in the following manner: Fourteen thousand dollars ($14,000.00) in cash; by the execution by the said complainants to the defendant, of an assignment of a bond and mortgage, a first lien upon premises known as No. 174 Jackson Street, Passaic, New Jersey, for the sum of Five thousand dollars ($5,000.00), and by the execution by the said complainants of an assignment of a bond and mortgage for Four thousand dollars ($4,000.00) to the defendant, which mortgage is a lien on premises known as Nos. 61 to 63 Jackson Street, Paterson, New Jersey; the said complainants agreed also to execute a collateral bond in favor of the defendant, conditioned for the payment of the sum of Nine thousand dollars ($9,000.00) the total of the above two mortgages; by a purchase money bond and mortgage for Twenty thousand dollars ($20,000.00) to run for a period of one year, with interest at six per cent per annum, payable semi-annually, executed by the complainants to the defendant. The said deed to be delivered and received at No. 95 Market Street, Paterson, New Jersey, between the hours of eleven in the forenoon and three, in the afternoon, on the said 2nd day of January, 1926. The said agreement, having been first duly acknowledged, was on the 20th day of July, 1925, recorded in the Register's Office of Passaic County, in Book D-32 of Deeds for said County, on page 283. A true copy of said written agreement is hereto annexed and made part hereof.



3. The said complainants paid to defendant, the said sum of Two thousand dollars ($2,000.00) at the time of the execution and delivery of said agreement.

4. On the said 2nd day of January, 1926, at the hour of eleven o'clock in the forenoon and again at the hour of twelve-thirty in the afternoon and again at the hour of three o'clock in the afternoon, complainants duly attended at No. 95 Market St., Paterson, New Jersey, with the assignments duly executed of the mortgages above referred to and collateral bond accompanying the same, and also with a purchase money bond and mortgage in the sum of Twenty thousand dollars ($20,000.00) executed by complainants to defendant, to run for one year with interest at six per cent per annum as above referred to and also with the sum of Fourteen thousand dollars ($14,000.00) for the purpose of paying the defendant the consideration mentioned in said contract and obtain the delivery of said deed; but the said Benjamin Cohn did not appear at said times and place.

5. Complainants have always been ready and willing and now tender themselves ready and willing to perform their part of the said agreement, and, on being tendered a deed to the said premises are ready and willing to pay the purchase price for said property, according to the terms of said agreement.

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

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

2. That the said Benjamin Cohn may be compelled by the decree of this court specifically to perform the said agreement with complainants, and to deliver to complainants a deed for the said property as in and by said agreement provided, upon payment of the consideration therein set forth.

3. That the said Benjamin Cohn be restrained from transferring the title to or selling the said premises to any one except these complainants.

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

Edward F. Merrey,
Solicitor for and of Counsel
with Complainants.

This Agreement

Made the Eighteenth day of June, in the year of our Lord One Thousand Nine Hundred and twenty-five.

Between Benjamin Cohn, of the City of Paterson, in the County of Passaic, and State of New Jersey, party of the First Part;

And Abraham A. Cohen and Annie Cohen, his wife, of the City of Paterson, in the County of Passaic, and State of New Jersey, party of the Second Part:

Witnesseth, That the said party of the first part, for and in consideration of the sum of Forty-five thousand ($45,000.) dollars to be paid and satisfied as hereinafter mentioned, and also in consi-



deration 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 he, 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 encumbrance on or before the Second day of January, 1926, next ensuing the date hereof, all the lot, tract, or parcel, of land and premises, hereinafter particularly described, situate, lying and being in the City of Paterson, in the County of Passaic, and State of New Jersey.

Beginning at a point on the northerly side of Market Street, formerly Congress Street, at a distance of one hundred and one feet and one half inch from the corner of Prospect Street and running thence (1) easterly along the line of Market Street, twenty-six feet and seven inches and thence (2) northerly at a right angle with Market Street one hundred and twelve feet and six inches; thence (3) westerly, parallel with Market Street, twenty-six feet and seven inches, and thence (4) southerly, one hundred and twelve feet, and six inches to the place of beginning. Being known as No. 95 Market Street, Paterson, New Jersey.

It is understood by and between the parties to these presents, that the party of the first part agrees to sell and convey the said land and premises, subject to a written lease, extending for a period of three years, commencing December 1st, 1925, which lessee is now in possession of the store floor and is used exclusively for millinery business.

The rental of the said store is as follows: Twenty-four hundred dollars ($2400.) per annum, pay-

able $200. each and every first day of the month, for a period of two years, commencing December 1st, 1925, and the sum of Twenty-seven hundred ($2700.) dollars per annum, to be paid in the same manner, at the rate of Two hundred Twenty-five ($225.) per month, for the third and last year.

It is clearly understood and agreed upon, by and between the seller and purchasers, that the above mentioned lease can not be assigned, transferred or sublet, without the written consent of the present owner or his assigns.

And the said Abraham Cohen and Annie, his wife, do for themselves, their heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, his 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 Forty-five thousand dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say: The sum of Two Thousand Dollars, upon signing this agreement, the receipt whereof is hereby acknowledged. Upon delivery of the warranty deed, the following payments will be made by the parties of the second part to the party of the first part: The parties of the second part will assign to the party of the first part a bond and mortgage, which they now hold, and which is a first lien upon premises known as No. 174 Jackson Street, Passaic, New Jersey, and which mortgage becomes due and payable about eighteen months from the date of this agreement. Also a bond and mortgage for Four thousand dollars, now held by the



parties of the second part and which bond and mortgage is a lien on premises known as Nos. 61-63 Jackson Street, Paterson, New Jersey, maturing three years from date of this contract, to be assigned to the party of the first part, together with a bond executed by the parties of the second part, conditional for the payment of the said sum of Nine thousand dollars ($9000.) the total of the above two mortgages, and Fourteen thousand dollars by cash, and a purchase money bond and mortgage for a period of one year, together with 6% per annum interest, payable semi-annually which bond and mortgage will be executed and delivered when warranty deed to the above premises is given by the party of the first making a total of Forty-five thousand ($45,000.) dollars, the purchase for the foregoing land and premises, as aforesaid. All interest, taxes, water taxes, insurance and rents will be apportioned as of day of taking title.

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 2nd day of January next ensuing the date hereof, ad from thence take the rents, issues and profits to them and their use.

And it is further Agreed, by the parties hereto, that the said Deed of Warranty shall be delivered and received at 95 Market Street, Paterson, New Jersey between the hours of eleven in the forenoon and three o'clock in the afternoon on the said second day of January next ensuing the date hereof.

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

heirs, executors and administrators; and they hereby agree to pay upon failure to perform the same, the sum of Five hundred dollars which they hereby fix and settle as liquidated damages therefor.

In Witness Whereof, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

Benjamin Cohn
Abraham A. Cohen
Annie Cohen

Signed, Sealed and Delivered
in the presence of
Anthony Dell Vennery.

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

Be it Remembered, That on this Eighteenth day of June, in the year of our Lord, One Thousand Nine Hundred and twenty-five, before me, the subscriber personally appeared Benjamin Cohn, who I am satisfied, is the Grantor in the within Agreement named; and I, having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed:

Anthony Dell Vennery,
Notary Public of N. J.

Received in the Register's Office of the County of Passaic, N. J., on the 20th day of July A. D. 1925 at 8:00 o'clock in the forenoon and recorded in Book D-32 of Deeds for said County, on page 283 &c.

John R. Morris,
Register



(Filed February 3, 1926)
IN CHANCERY OF NEW JERSEY

Between
Abraham A. Cohen and Annie Cohen,
Complainants,
and
Benjamin Cohn,
Defendant.
} On Bill, Etc.

**ANSWER**

Defendant, Benjamin Cohn, answering the bill of complaint, says that:

1. Paragraph 1 is admitted.
2. Defendant admits only so much of paragraph 2 as alleges that on June 18th, 1925, defendant and complainants signed an instrument in writing, a copy of which is annexed to complainants' bill.

The facts are that at that time, defendant's step-daughter, Gusie Lasky, and Irving R. Lasky, her husband, occupied the store room in the premises described in complainants' bill, under a lease theretofore executed by defendant as lessor and by said Gusie and Irving R. Lasky, as lessees, the term whereof runs to December 1, 1928. Before that time said Gusie had often expressed hope to defendant that if he should convey said premises in his lifetime, he would sell same to her and her said husband, and that if he continued to own the same, he would continue to lease said store room to them as long as they desired to occupy it. On said June 18, 1925, defendant was unhappily

estranged from his said step-daughter, notwithstanding the affection he bore her and notwithstanding also that he deplored said estrangement. Defendant was then unwilling to do anything which might cause said estrangement to become permanent. All of the facts stated in this paragraph, complainants well knew. As well on said June 18, 1925, as theretofore, complainants and defendant mutually agreed that said instrument in writing so signed by them on said date would have no legal life or any force or effect unless and until said Gusie Lasky should give her assent thereto. It was further agreed that complainants should undertake to obtain such assent from her, and in or about the month of Sept., 1925, complainants did undertake to obtain her assent to said instrument; but she then refused and has ever since refused to assent thereto. By virtue of the above stated facts, said instrument in writing is and always has been inoperative and of no obligatory effect either upon complainants or defendant.

3. Paragraph 3 is admitted; but defendant says that on numerous occasions subsequent to the month of September, 1925, defendant has offered to repay said sum to complainants, and that they have wrongfully refused to accept same.

4. Paragraph 4 is admitted.

M. Metz Cohn,
Solicitor for and of Counsel
with Defendant.



IN CHANCERY OF NEW JERSEY

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|---|---|
| Between,<br>Abraham A. Cohen and Annie Cohen,<br>Complainants,<br>and<br>Benjamin Cohn,<br>Defendant. | On Bill, &c. |

**REPLY**

The complainants, by way of reply to the Answer filed in this cause, say:

(1) They deny the allegations contained in paragraph 2.

Edward F. Merrey,
Solicitor of Complainants.

IN CHANCERY OF NEW JERSEY

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|---|---|
| Between<br>Abraham A. Cohen and Annie Cohen,<br>Complainants,<br>and<br>Benjamin Cohn,<br>Defendant. | On Bill, &c. |

## ORDER OF REFERENCE

This matter being opened to the Court by Edward F. Merrey, Solicitor of the complainant, and upon consent of M. Metz Cohn, Solicitor of defendant,

It is, on this 2nd day of March, Nineteen hundred and twenty-six Ordered, that the above cause be referred to the Honorable V. M. Lewis, one of the Vice-Chancellors, of this Court, to hear the same for the Chancellor, and report thereon to him, and, advise what order or decree should be made thereon.

E. R. Walker, C.

I do hereby consent to the making of the above order.

Edward F. Merrey,
Solicitor of Complainant.
M. Metz Cohn,
Solicitor of Defendant.

A True Copy,
Thomas Barber,
Clerk.



IN CHANCERY OF NEW JERSEY

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|---|---|
| Between<br>Abraham A. Cohen and Annie Cohen,<br>Complainants,<br>and<br>Benjamin Cohn,<br>Defendant. | On Bill, &c. |

## TESTIMONY

Paterson, N. J., June 17th, 1926.

Before:
Hon. Vivian M. Lewis, Vice Chancellor.

Appearances:
Edward F. Merrey, Esq.,
Solicitor for the Complainants;
Morris Metz Cohn, Esq., and
Hon. Wood McKee,
Solicitors for the Defendant.

ANTHONY DELL VENNERY, a witness produced on behalf of the Complainants, being first duly sworn according to law, testified as follows:

Direct Examination by Mr. Merrey:

Q. I show you this paper and ask you if that is your signature? A. Yes, sir.

Q. Were you present, and did you see Benjamin Cohn, Abraham A. Cohen and Annie Cohen sign that paper? A. Yes, sir.

Q. And that is your signature—you signed there? A. Yes, sir.

Q. And at that time you were a Notary Public of the State of New Jersey? A. Yes, sir.

Q. And you put your signature and seal on there at the time? A. Yes, sir.

Q. You know Mr. Abraham A. Cohen? A. Yes, sir.

Q. And Annie Cohen? A. Yes, sir.

Q. And Mr. Benjamin Cohn? A. Yes, sir.

Q. And they all signed at that time? A. Yes, sir.

Q. And who were all there at the time? A. Him and his wife and Benjamin Cohn.

The Court—There is no dispute about that. Why don't you offer it in evidence?

Contract offered and received in evidence and the same is marked Exhibit C-1, on behalf of the Complainants.

Mr. Merrey—That is all.

(No Cross Examination.)

It is admitted on the record that Mr. Cohn instructed counsel for the complainants that he did not intend to go through with the deal, and that that information was given about four days before the expiration of the time limited in the contract.

It is further admitted that on the second day of January, 1926, the complainant appeared at the place mentioned in the contract, that is, 95 Market Street, Paterson, New Jersey, at eleven o'clock in the forenoon, ready and willing to go on with the terms of the contract.



Mr. McKee—We only know that from hearsay.

Mr. Merrey—And at 12:30 and 3 o'clock, and at that time with the necessary cash, and with the mortgages referred to in the contract, and with the collateral bond as required, and that the defendant did not appear, and nobody representing him was at the place specified, which was his office, 95 Market street.

The Court—That is the case?

Mr. Merrey—Yes, sir.

Complainants Rest.

BENJAMIN COHN, the defendant in the above entitled cause, being first duly sworn according to law, testified as follows:

Direct Examination by Mr. McKee:

Q. Mr. Cohn, where do you live? A. 95 Market street.

Q. And you are the owner of the property, 95 Market street, is it? A. Yes, sir.

Q. And have been the owner of that how long? A. Since 1902.

Q. Conducting what business there? A. Millinery—ladies' hats.

Q. Up until what time? A. Up until 1919, I guess.

Q. And what became of the business at that time? A. I sold it to a man by the name of Rosenberg, I believe.

Q. Who occupies the property now? A. My daughter.

Q. For how long? A. Since 1924.

Q. In what line of business? A. Same business; ladies' hats.

Q. Mrs. Cohn, your wife, is she alive? A. She is dead.

Q. When did she die? A. January 9th, 1925.

Q. Now, after her death—I withdraw that. How many children have you, Mr. Cohn? A. Five sons and three daughters.

Q. After the death of your wife, did you have any trouble with your children? A. I have.

Q. What about? A. They came and dictated to me what to do about my business, &c. I said: "You have no right to do that; you didn't make the money."

Q. What was the outcome? A. They kept on so much that I said I will dispose of all my property and turn the money over to charitable purposes and leave Paterson.

Q. Before the death of your wife, was there ever a promise made to your daughter to buy the property? A. My wife and myself said she should have the first opportunity to buy the property.

Q. On June 1st, 1925, were you on speaking terms with your daughter? A. No, sir; none of them.

Q. How long have you known Mr. Abraham A. Cohen, the complainant in this suit? A. Over twenty years.

Q. What is his line of business? A. Dry goods.

Q. Where is his place of business? A. 97 Market street; right next door to me.



Q. How long has he been there? A. Seven or eight years or more.

Q. Been very friendly with him? A. Very friendly.

Q. Member of the same synagogue? A. Not the synagogue; two lodges.

Q. Did he talk to you about the trouble with your children in June, 1925? A. Yes, sir; almost every day.

Q. Do you know whether he talked to your children about your trouble? A. That I couldn't say.

Q. Did he ever tell you that he had talked to your children? A. He did.

Q. What did he say about them? A. Express sympathy; about raising up children and getting along and when they grow up they don't want to recognize you but control their own affairs.

Q. How long was that before the signing of this contract in June, 1925? A. It began in the month of March, until the signing of the contract.

Q. When was the first suggestion made about your selling this piece of property to him, by him? A. During the month of May, 1925.

Q. Who made the suggestion? A. Mr. Cohen. He said: "Now, Mr. Cohn, if you intend to dispose of your property, give me a chance; I am interested in this property right next door to mine", and I said: "All right", and he said: "How much do you want for it," and I said: "Forty-five thousand dollars," and I said: "My daughter offered me forty-two thousand dollars for it two or three years ago." He said forty-five thousand dollars was too high, and I said my daughter had offered me forty-two thousand dollars for it two or three

years ago, and why is that too high? and he said he would give me forty thousand dollars and I said I am a one price man, and then he would come in every day or two and offer five hundred more, and then he finally said: "All right, I will give you forty-five thousand dollars," and I said: "Remember, I am selling that property under the consideration that if the children don't become reconciled, and if they do, you are to get five hundred dollars for your trouble," and he said: "I will have to talk that over with my wife," and I said:"All right, take all the time you want," and I said: "Don't go around the city talking, because it may make more trouble with my children," and I went to my son-in-law in New York City, and I draw the contract there, and I brought it back, and I drew the contract in duplicates, and I said: "There is the contract; take it to your attorney and look it over careful and if you agree upon the terms that I made you can execute it," and they kept the contract for four days and then he said: "I am ready to execute it," and I said I didn't want to go to any lawyer in Paterson, because they all know me, and he said he knew a Notary Public on Cross street, and there was Mr. Cohn and his wife and son, and he didn't even read it; he just put his name to it and he gave me his check.

Q. Was anything said about the terms of the contract? A. I said: "Tell to your attorney the terms of the contract," and, of course, I thought Mr. Cohen was a man of his word.

By the Court:

Q. Why did you take the two thousand dollars in cash if you had these terms? A. I didn't want this cash.



Q. You took it? A. He gave me the check.

Q. What did you do with the two thousand dollars? A. I got it.

Q. Put it in the bank? A. Sure.

By Mr. McKee:

Q. Why did you put the date for the delivery of the deed on the second day of January, nineteen hundred and twenty-six? A. For the purpose to give my children sufficient time to realize their action, and we might have a chance to reconcile and become friends again.

Mr. Merrey—I want to make an objection. I want it noted that the evidence is irrelevant and that such verbal agreement is no defense to this suit.

The Court—I don't know of any such case myself, except The Paterson Brewing & Malting Company case, carried out in my Oak Ridge case.

Mr. Merrey—I don't suppose it is necessary for me to keep objecting all the time.

The Court—A general objection is entered.

Q. Did you become reconciled with the children? A. I did.

Q. When was that? A. Before the Hebrew New Years, and it is the custom to come up and be reconciled before the New Years, and my children did that and I forgave them.

Q. What happened then? A. Between New Years and Day of Atonement—

Q. When was that? A. Every morning Mr.

Cohen used to come up to my place to pray; we got a chapel there.

Q. Did you see him there? A. Every day.

Q. And did you have a conversation with him about this contract? A. I did.

Q. What did you say to him? A. I said: "Mr. Cohen, you got a chance to make your five hundred dollars now," and he said: "What about?" and I said the children are reconciled now, and I said: "Well, our agreement or contract is null and void, and you can have the five hundred dollars, and your two thousand dollars and your interest," and he said: "Never mind; let it stand; the children might get mad again; you can never tell," and he said: "Let it stand; the contract runs until January 2nd, 1926."

Q. Did you have any other conversation with him after that? A. Several times.

Q. What was his reply then? A. "Oh, that is all right; let it stand; I don't expect to get your property as long as you are all right with your children."

Q. Along about December, 1925, did you have a conversation with him then? A. I did.

Q. Where was that? A. At my office, 95 Market street.

Q. What was the conversation then? A. About returning the contract. The contract wasn't on record then until my children began to find out about it and making a holler, and then he went and put it on record.

Q. What did he say in December about carrying it out? A. A conversation took place from the beginning of September, until the seventeenth, and I used to meet him every day, and I made



that offer several times, and he kept saying the same thing, and I didn't care to approach him any more.

Q. When did you next hear about the enforcing of the contract? A. I think it was during the month of December, I received a letter from Mr. Merrey—I received a letter that there was a contract entered into between you and Mr. Cohen to sell the property, and he was ready to take possession, and I didn't answer it.

Q. Did you see Mr. Abraham Cohen then? A. I did.

Q. What did you say to him? A. I said: "Mr. Cohen, I got a letter from your lawyer," and he said: "What about?" and I said: "About closing the contract," and he said: "Never mind that," and I said: "You know you are not going to get the property," and he said it was all right.

Q. When did you next hear about it? A. I was in Atlantic City, in New Years, and I came back on the second about twelve o'clock, and my daughter told me that Mr. Merrey and several men were there, and I had my dinner and looked through my correspondence and went away again, and when I came back again he said they were there again, and then on February 10th, I think it was, Mr. Fred Barnes came with the subpoena, and he came up and I said: "What is this?" and he said: "What is what?" and I said: "You brought me in the court," and he said: "I didn't," and I said: "Who?" and he said "my lawyer," and I said: "What is this going around the bush; what is it?" and he said: "I want the property." He said he wanted the property and he was going to get it. I said: "Mr. Cohen, you claim to be a

religious man; why don't you go to the rabbi," and I said: "I will send you a subpoena to come to the rabbi," and I went to the rabbi, and he said to send a writing to come in and have the matter threshed out, and I went down to the big synagogue in Godwin street, and it was for a date at the rabbi's residence in Fair street, and I came down there around seven o'clock, and it was a bitter, cold night, and Mr. Cohen came in about five minutes later, and we went in, and I said: "We have a grievance and we want to explain it," and I explained my case, and Mr. Cohen stated his case, and he said: "Before I give my decision, will you be bound by my decision?" and I said: "I will," and he said: "I will have to see my wife about it," and he said: "Mr. Cohen, I see you are a little nervous about it, and then he said for him to pick a man and for me to pick a man, and I will be the umpire, and he said: "Are you satisfied?" and I said: "I am," and he said: "Are you, Mr. Cohen?" and he said he would think about it, and that was the last I heard of it.

Q. Did you tell the rabbi that before you signed the contract you had explained to him that if you had a reconciliation with your children the contract was to be null and void? A. I did.

Q. Did Mr. Cohen admit in the presence of the rabbi that that was so? A. He didn't deny it.

Q. Now, after that time—after this meeting at the rabbi's, did you have any further conversation with Mr. Abraham Cohen about the property? A. I sent him a letter and explained him the action —the way he conducted himself during the whole transaction.



Q. Did you receive any further communication from him about the settling of the dispute between you? A. I did.

Q. When was that? A. That was in—

Q. I withdraw that. I will ask you to look at this. A. That was handed to me by my son-in-law, Mr. Laskey, Mr. Irving Laskey.

Q. You don't know where it came from? A. I do not.

Q. And when did you get this, do you recollect? A. On the morning the date on January 26th.

Q. January 26th, 1926? A. Yes, sir.

Q. And did Mr. Abraham Cohen ever say to you that he would settle, provided you paid him damages? A. Never said to me a word about it.

Q. Not after that time? A. No, sir.

Q. Never spoke to you after you spoke to him in the rabbi's? A. I never spoke to him about it after he brought me in the court, because it was in court and what was the reason of talking to him.

Mr. McKee—That is all.

Cross Examination by Mr. Merrey:

Q. You say, Mr. Cohn, that you went to New York and prepared this contract? A. I did.

Q. Why didn't you write in that contract the condition that you say had been agreed to, that Mrs. Laskey's consent was to be given to it? A. Why didn't I?

Q. Yes. A. Because, I am no lawyer, and if I had known Mr. Cohen I would have brought it out proper.

Q. You drew the contract? A. Yes, sir.

Q. And you have been a justice of the peace for many years? A. Yes, sir.

Q. And you prepare legal papers? A. Well, a few, but I am not a lawyer.

Q. You have drawn contracts? A. May be I did.

Q. How long were you a justice of the peace? A. Five years.

Q. You say you didn't know Mr. Dell Vennery? A. May be I did.

Q. He was a justice of the peace right down there in your neighborhood? A. Yes, sir.

Q. And you suggested that he be brought in? A. No, sir; he is a friend of his.

Q. Didn't you say any justice of the peace would do? A. I said I didn't want to go to any attorney in this town, because I knew them all and there might be trouble with my children, and he said he knew this man in Cross Street and I said: "All right."

Q. You say the complainant first talked to you about the sale? A. Yes.

Q. You sold other property that you owned, didn't you? A. I did, July, 1924.

Q. Did you say to Mr. Cohen that you intended to dispose of all your property? A. That I intend to do today.

Q. And this piece of property you intended to dispose of? A. This I wanted for my daughter.

By the Court:

Q. If you were so fond of carrying out the agreement with your children— A. I was so sore.



Q. What do you mean by "sore"? A. I was angry.

Q. Why weren't you anxious to carry it out? A. Simply I tell you I was angry, and I was in an angry mood, and Mr. Cohen came in and put some more fire to it and I said "all right; I will sell it upon condition."

By Mr. Merrey:

Q. You say you got a letter from Mr. Cohen's lawyer about going on with the contract? A. I think I did.

Q. And you didn't answer it? A. I didn't.

Q. And you asked for an adjournment because you were going to Atlantic City? A. No, sir; I didn't know I was going to Atlantic City.

Q. Did the lawyer, in speaking to you say: "Mr. Cohn, if you want an adjournment you must write a consent on the agreement"? A. I don't know what was said.

Q. And didn't you then say: "I don't intend to go on with the contract; I had a quarrel with my children and it is settled and done; I don't intend to go on with it, and you can have your damages"? A. That is right; I said it.

Mr. Merrey—That is all.

By Mr. McKee:

Q. Did you have inserted in here the five hundred dollars damages in case you did not go on with the contract? A. Yes, sir.

Q. Why was that put in?

Mr. Merrey—I object to that.

The Court—Objection sustained.

Q. Did you talk about that and that amount arrived at? A. Yes, sir.

Q. Was there any reason given for having it in? A. In case I didn't comply with the agreement he was to make five hundred dollars.

Q. And that is the reason why you said to him on New Years, "You made five hundred dollars"? A. Yes; between the day of atonement and New Years.

Mr. McKee—That is all.

By Mr. Merrey:

Q. Mr. Cohn, you knew that Mr. Cohen had negotiated to renew his lease where he was? A. No, sir.

Q. You didn't know that? A. No, sir; he delayed it.

Q. You didn't know anything about his lease? A. He said he delayed it, but I didn't speak anything to his landlord about it.

Mr. Merrey—That is all.

DAVID COHN, a witness produced on behalf of the defendant, being first duly sworn according to law, testified as follows:

Direct Examination by Mr. McKee:

Q. Mr. Cohn, you are a practicing attorney of the State of New Jersey? A. I am.

Q. And an officer of this court? A. I am.

Q. And the son of Benjamin Cohn, the defendant in this case? A. Yes, sir.



Q. Your mother died when? A. January 19th, 1925.

Q. After the death of your mother, you sons had a little dispute with your father? A. We did.

Q. And you didn't speak to him and he didn't speak to you? A. We did to such an extent that I was the only one living home, and I moved out.

By the Court:

Q. Where did you go? A. I went to live with my married sister.

Q. What was the quarrel about? A. Because he went around with another woman and mother was very ill at the time.

Q. Was your mother living then? A. No; there was no trouble before mother died, but we heard this was going on at the time mother was very sick.

Q. You have only the one sister? A. A sister and a half-sister.

Q. And the half sister is the one who is to get the property? A. Yes, sir.

By Mr. McKee:

Q. This kept up until about how long? A. Until about a week before New Years.

Q. What happened then? A. I heard the rumors were false, and I was the first to apologize, I fixed things up between my father and my brothers.

Q. Did you know anything then about this contract with Mr. Abraham Cohen? A. I did not.

Q. During the time that you had the misunderstanding—during the time that you and your

father were mad, did you have any talk with Mr. Abraham Cohen? A. No, sir.

Q. When did you first know about this contract? A. I was informed by a barber on our block that my father had sold the property, and I said: "Yes; that is new," and I asked my father if that was so, and he said I didn't need to bother, and I saw Mr. Cohen, we went every morning to the synagogue for a year after my mother died, and I said my father was not satisfied to go on with the contract, that he would return the five hundred dollars, and I asked him—

Mr. Merrey—I object to this.
The Court—I will admit it.

(Witness continuing) Mr. Cohen told me that if my father could prove to him that my father and children were reconciled he would turn back the contract, and he should get five hundred dollars, and on top of that he said: "You know, man to man, five hundred dollars is not enough for my trouble," and I said: "I am not here to discuss it," and he said: "I will not discuss it with you; I will discuss it with your father."

Q. Did you see him after that? A. Several times during the month of October.

Q. Did you ever have a conversation with him in which he said what the terms of the contract were? A. He said he had a contract with my father that he would not ask for the contract unless the children were not reconciled.

Mr. McKee—That is all.

(No Cross Examination.)



MORRIS METZ COHN, a witness produced on behalf of the defendant, being first duly sworn according to law, testified as follows:

Direct Examination by Mr. McKee;

Q. Mr. Cohn, you are a member of the bar?

The Court—Yes; we will admit that.

Q. And you are a son of Mr. Benjamin Cohn, the defendant in this case? A. I am the oldest son.

By the Court:

Q. Did you have a quarrel with your father? A. A very bitter one; yes, sir.

Q. About what—selling the property? A. No; about rumors of going out with another woman, shortly after mother's death, and I didn't think it was fair.

Q. Did you speak to him about selling the property? A. I didn't know about it until later.

Q. What did you say; speak about selling it too low? A. I said: "Why didn't you consult us?" and he said: "I made arrangements that if we could become reconciled, it was to come back again."

By Mr. McKee:

Q. When did you become reconciled with your father?

By the Court:

Q. On the Jewish holiday? A. On the Jewish holiday.

By Mr. McKee:

Q. When did you learn about this contract with Abraham Cohen? A. Shortly after the reconciliation.

Q. Did you ever speak to him about this contract? A. I spoke to him about it the day I heard about it.

Q. What did he say? A. He said: "You need not worry; you will get it back the day you and your father become reconciled; you and the rest of the children".

Mr. McKee—That is all.
(No Cross Examination.)

WILLIAM WHITTENSTEIN, a witness produced on behalf of the defendant, being first duly sworn according to law, testified as follows:

Direct Examination by Mr. McKee:

Q. You are the Rabbi of which Synagogue? A. Yes, sir.

Q. Which one? A. On Godwin street.

Q. And have been Rabbi there for how long? A. Six years.

Q. Do you know Mr. Benjamin Cohn, the defendant in this case? A. Yes, sir.

Q. And also Mr. Abraham Cohn, the complainant? A. Yes, sir.

Q. Did you have these gentlemen before you, regarding this contract of sale for the property? A. Yes, sir.

Q. And when was that? A. That was in January, on Thursday evening.



Q. January of this year? A. Yes, sir.

Q. Now, at that time did Mr. Benjamin Cohn explain his side of the case to you, in the presence of Mr. Abraham Cohen? A. Yes, sir.

By the Court:

Q. What did they tell you; give us the conversation? A. They showed me the contract with Mr. Abraham Cohen at the time he sold; at the time he was very angry and he had a privilege for himself at the time he was reconciled with his children he should get it back and he offered the five hundred dollars and the other party claimed that five hundred dollars was too little to cover his damages, and that was the explanation given to me by both parties.

Q. What did Mr. Abraham Cohen say about this agreement? A. He didn't deny it, but he said five hundred dollars was too little to cover his expenses.

Q. Did they make any agreement in your presence? A. They didn't. I said if they would abide by my decision, I would do it, and Mr. Abraham Cohen said he would converse with his wife and would let me know.

By Mr. McKee:

Q. Now, at the time Benjamin Cohn told you in the presence of Abraham Cohen that the time he signed this contract of sale that he reserved the right to declare that null and void, provided he became reconciled with his children, and the contract was no good, did Abraham Cohen deny that?

Mr. Merrey—I object to that.

The Court—He said Benjamin Cohn told him that if he was reconciled the contract was to go back.

Q. When Mr. Benjamin Cohn told you that the agreement was that he reserved to himself that if he became reconciled with his children, that then the agreement of the sale of property would not be carried out? A. Yes, sir.

Q. That was told to you in the presence of Mr. Abraham Cohen? A. Yes, sir.

Q. And did he deny it? A. He didn't deny it.

Q. The only thing he objected to was he thought five hundred dollars wasn't enough? A. Yes, sir.

Q. And he wanted a thousand? A. He explained to me that even a thousand dollars wasn't enough.

Mr. McKee—That is all.

Cross Examination by Mr. Merrey:

Q. Now, Mr. Whittenstein, when these gentlemen came before you they told you the story? A. Yes, sir.

Q. Did they give you the written contract? A. Yes, sir.

Q. Then who started to tell the story? A. The complainant usually starts it.

Q. And he told the whole story? A. Yes, sir.

Q. And he told it at quite some length? A. Yes, sir.

Q. There was no lawyer there representing him? A. No, sir.



Q. Just the three of you? A. Yes.

Q. Then after Mr. Cohn told the story, he said he would pay? A. Yes, sir.

Q. And then there was a dispute over what he should pay? A. Yes.

Q. You didn't ask Abraham Cohen if there was an outside agreement, did you? A. Well, during the conversation, I understood, the way Mr. Abraham Cohen explained it, the case was arguing the amount of damages done to Mr. Abraham Cohen.

Q. That is what you understood from Mr. Abraham Cohen? A. Yes.

Q. You didn't understand, and he didn't discuss, whether there were reservations made or not? A. No.

Q. You didn't ask him whether there were reservations made or not? A. I didn't ask him.

Q. So between you and he there was no attempt made to find out whether there was any such reservation? A. No, sir.

Q. Mr. Benjamin Cohn stated that and then you went on and discussed how much he was to pay for damages? A. Yes, sir.

Q. You never found out whether Mr. Abraham Cohen affirmed or denied what he said, did you? A. No, sir.

Mr. Merrey—That is all.

HERMAN LASKEY, a witness produced on behalf of the defendant, being first duly sworn according to law, testified as follows:

Direct Examination by Mr. McKee:

Q. Mr. Laskey, you are a son-in-law of Mr. Benjamin Cohn, the defendant in this case? A. Yes, sir.

Q. And you are in the millinery business with your wife? A. Yes, sir.

Q. In this building? A. Yes, sir.

The Court—In this building in dispute?
The Witness—Yes, sir.

Q. And have been in there how long? A. Since September 1st, 1924.

Q. Prior to the death of Mrs. Cohn, did you and your wife have any agreement as to who was to have the first opportunity to get this property? A. I was first at 103, and while I was there my father and mother-in-law always told me that when I moved in this building that building was to be sold to me and I spent over three thousand dollars in it.

By the Court:

Q. Did you ever have any conversation with Mr. Benjamin Cohn about having an option with your wife? A. I did.

Q. What was it; your wife was his daughter? A. His step daughter; his wife's daughter.

Q. When did you know the property had been sold? A. A month after that. My brother-in-law, Mr. David Cohn, told me he heard it in the barber shop.



Q. Did you think it was sold at too low a figure? A. No, sir; figures didn't bother me then.

By Mr. McKee:

Q. Did you have any talk with Mr. Abraham Cohen? A. After I heard it from my brother-in-law I went into Mr. Abraham Cohen's store, and I said: "Mr. Cohen, is that true that you have bought the property after I had spent so much money in the building," and he said: "You go and speak to your father-in-law and everything will come out all right."

Q. Did you see your father-in-law after that? A. After what?

Q. After you had seen Abraham Cohen? A. After I left his store I went to him and I said: "Papa, what have you done; you have sold this property after you said you would sell it to me," and he said: "I had trouble with the children," and he said it was agreed that if the children were reconciled to me "I will pay five hundred dollars, and there is a clause in the contract, and everything will be all right," and I went down and saw Mr. Abraham Cohen, and I told him what my father-in-law said, and he said: "All right," and that is all I said to him.

By Mr. McKee:

Q. During the time that there was a misunderstanding between the children and your father-inlaw, did Mr. Abraham Cohen visit your place quite often? A. Yes; after that he came in and

inspected the store quite frequently, and we had a couple of drinks together and talked politics.

Q. Did you know that he was intending to come in the building? A. No; he even told my father-in-law about fixing the back.

Q. Did he ever say anything about buying the property? A. He said: "If you are reconciled, I don't want the property; I just want the first chance on the property".

Mr. McKee—That is all.

Cross Examination by Mr. Merrey:

Q. You have a lease on the premises for three years? A. I have no lease on this building.

Q. It says here that it is under a lease for three years from December 1st, 1924? A. I don't know anything about it; I have no lease.

Q. Nothing was said about that? A. Absolutely nothing.

Q. And you never heard of it since? A. No, sir.

Q. You tried to get an assignment of this contract from Mr. Cohen? A. No, sir; I tried to get it back.

Q. You didn't threaten his life, did you? A. No, sir; I didn't have a gun with me; no, sir.

Q. Did you tell him you would kill him if he persisted in going on with this contract? A. No, sir.

Q. Did you make arrangements to meet him in one of the Cohn boys office and settle the matter? A. No, sir; the Cohn boys were doing their own trying; not me.



Q. And you never made any threats to Mr. Cohen as to what you would do to him? A. No, sir.

Q. Didn't threaten to kill him? A. No, sir.

Mr. Merrey—That is all.

By Mr. McKee:

Q. Did you ever see this paper before? A. I did.

Q. When? A. This paper was given to me on January 26th.

Q. By whom? A. Mr. Slotnick.

Q. What did you do with it? A. I gave it to my father-in-law on the same evening.

Mr. McKee—That is all. I would like to have this paper marked for identification.

Paper marked D-1 for Identification, as of this date.

GERTRUDE LASKEY, a witness produced on behalf of the defendant, being first duly sworn according to law, testified as follows:

Direct Examination by Mr. McKee:

Q. You are a step-daughter of Mr. Benjamin Cohn? A. Yes, sir.

Q. And in the millinery busines with your husband in the building in dispute? A. Yes, sir.

Q. And you had an agreement with your father and mother to buy this building? A. Yes; with my mother and father.

Q. You had a quarrel with him? A. No; I didn't have any quarrel; the rest of them did.

The Court—What about?

The Witness—Different things people said.

Q. A misunderstanding and feeling that existed between the step-father and the children was long before the property was sold or contract signed, wasn't it? A. Yes; of course.

Q. Now, Mr. Cohen is in business, Mr. Abraham Cohen is in business right next door to you? A. Yes.

Q. Did he ever come in and have a talk with you about what your father and he said and did? A. Not to me.

Q. There was a reconciliation between your father and the children? A. Yes, sir; just before the New Year.

Q. And the old friendship was renewed? A. Yes, sir; everything was all right.

Q. What was said at the time about this contract having been made? A. What was said while mother was living?

Q. No; what was said by your step-father? A. My father said that he had agreed with Mr. Cohen that after the children was reconciled that he would lose five hundred dollars, and he would get the contract back.

Q. After you heard about that, did you hear anything from Mr. Abraham Cohen? A. No, sir; I never spoke to him, because he pretended to be our best friend.



Mr. McKee—That is all.

(No Cross Examination.)

LOUIS SLOTNICK, a witness produced on behalf of the defendant, being first duly sworn according to law, testified as follows:

Direct Examination by Mr. McKee:

Q. What is your name? A. Louis Slotnick.

Q. Where do you live? A. 406 Market street.

Q. Do you know Mr. Benjamin Cohn, the defendant in this case? A. Yes, sir.

Q. And also Mr. Abraham Cohen, the complainant? A. Yes, sir.

Q. How long have you known them? A. About ten or fifteen years.

Q. And friends of both? A. Yes, sir.

Q. Did you have a talk with Mr. Abraham Cohen in January, 1925? A. 1926.

Q. And where was that conversation? A. 1922—that is right; that was Friday night. It was Friday night he came up to my place.

The Court—In what year?

The Witness—1926.

Q. This year? A. Yes, sir.

By the Court:

Q. Who came up, Abraham? A. Abraham Cohen.

Q. What did he say to you? A. I was surprised to see him in my place.

Q. Just tell what he said to you. A. He said: "You just heard that I bought the property from Mr. Cohn," and I said: "Yes; I just heard it," and I said: "You shouldn't buy from Mr. Cohn, because we are your friends, because you know as well as I know, Mrs. Cohn, when she was living, promised the property to her daughter."
By Mr. McKee:

Q. What did he say to that? A. He said: "I spent some money now and time and everything, and I got to get something for my trouble."

Q. Yes. A. I said: "Well, you want me to come together so you get your expenses that you had," and he said: "Yes," and I went up the next day, on the morning, to his place, and he told me he would let me know; he would send me how much he has got expenses.

Q. Did he send you any memorandum of that? A. Yes.

Q. When? A. Nineteen—

Q. No; how long after you went to his place and he said he would send it to you? A. About four days.

Q. Who brought it to you? A. His son, Danny Cohen.

Q. Did you see the paper he sent up to you? A. Certainly.

Q. Look at that; is that the paper? A. Yes; and I handed that ever to Mr. Laskey.

Q. How soon after you received it did you turn it over to Mr. Laskey? A. The same day.

Q. The same day? A. The same day.

Q. When you were talking to him about the fact that the property ought to belong to the children, did he say anything to you about what was his understanding with Mr. Benjamin Cohn?



Mr. Merrey—I object to that question on the ground that it is leading.

The Court—Yes; very leading, and also incompetent. He is a friendly witness; you don't have to lead him.

Mr. McKee—Oh, no.

Q. Was anything said by Mr. Benjamin Cohn about any reservation, or by Mr. Abraham Cohen, at the time you had the talk with him, about any reservation being made by Mr. Benjamin Cohn, when he signed the contract? A. He told me he was ready at any time to give the property back to Mr. Cohn.

Q. And this was a list of the prices that he wanted for doing it? A. Yes, sir.

Mr. McKee—That is all.

Cross Examination by Mr. Merrey:

Q. Did he tell you at this time that Laskey had threatened to kill him? A. I didn't know that.

Q. Did he tell you that Laskey had threatened to kill him? A. He said he was anxious to get the thing closed up.

Q. Did he tell you that Laskey had threatened to kill him? A. No, sir; de didn't tell me that.

Mr. Merrey—That is all.

DANIEL COHEN, a witness produced on behalf of the defendant, being first duly sworn according to law, testified as follows:

Direct Examination by Mr. McKee:

The Court—You are a son of the complainant here?

The Witness—Yes, sir.

Q. Is that your writing? A. No, sir.
Q. Did you deliver that to Mr. Slotnick?

Mr. Merrey—I object to it on the ground that it isn't pertinent to the issue.

A. I will say that Mr. Abraham Cohen authorized that.

Letter is offered and received in evidence and the same is marked Exhibit D-1, as of this date.

"On the following conditions I would give up my contract for the property:

First and above all with the written consent of Mr. Benjamin Cohn.

Second that all the lawyer's expenses which were incurred by me must be paid by you.

Third that the deposit which I have given to Mr. Benjamin Cohn must be returned to me with interest.

Fourth that the sixty-five (65) dollars per month increase in rent, which I have to pay on account of the actions of Mr. Laskey and Sam Cohn must be paid by you for the remaining period of the lease.



And don't you think that the trouble which I had until now is worth $2000.00 to me?"

Mr. McKee—That is all.

(No Cross Examination.)

Defendant Rests.

ABRAHAM COHEN, the complainant in the above entitled cause, being first duly sworn according to law, testified as follows:

Direct Examination by Mr. Merrey:

Q. Mr. Cohen, you are one of the complainants in this case? A. Yes, sir.

Q. And did you buy this property from Mr. Benjamin Cohn? A. Yes, sir.

Q. Will you tell us briefly how you came to make this purchase? A. I used to visit frequently Mr. Cohn, because he felt so lonely, and so one day I goes up to his place to ask him some question about matters of my own, he said that you have heard that I am down and out with my children, and I said I have heard something like that, and he said: "I am going to sell all my property," and he said: "I haven't my will quite ready yet," and he showed me a book of wills there, and he said: "I am going to take care of my money."

The Court—We don't care anything about that.

(Witness continuing) And I said: "If you have anything for me I will buy it from you," and he

said: "How about this property," and I said: "I have heard Mr. Laskey has a lease for ten years, and I don't want any place with a lease for ten years," and then he opens the book and he showed me that Mr. Laskey has no lease whatever, and I said then all right, and then he said: "Well, I can't sell it unless I give Mr. Lasky three years lease." He said: "They are not my children, and I don't care anything about it," and he said even one of his own children—one of his own sons threatened to kill him. So afterwards, Mr. Cohn, I asked him the price, and he said it was forty-five thousand dollars, and he said if you have twenty-five thousand and twenty thousand for one year mortgage—only one year, because I want to get rid of all my money and get out of here.

The Court—You agreed to do that, didn't you?

The Witness—Yes, sir; not right away, but I will go home and talk over with my wife.

Q. After you talked it over with your wife? A. Then he told me I should go to Mr. Cohn and see everything and do just as he says.

Q. Did he say anything then about the contract not to be good if he had a reconciliation with his children? A. There was nothing said whatsoever when he told me—I said: "How about the contract?" and he said: "I will have it made, and when it is ready I will let you know."

Q. He prepared the contract, didn't he? A. Himself.

Q. And you signed it before this justice of the



peace? A. And he told me in the morning: "I am ready with the papers," and I said: "When will take place the signing up?" and he said: "About two o'clock," and I said: "How much deposit?" and he said: "About two thousand dollars."

Q. You did all that? A. Yes, sir.

Q. Was there anything said about this contract—there being a reservation that if he became reconciled to his children he should pay five hundred dollars? A. There was never said a word, and I don't think he ever said to me a word about it; I don't think he thought about it.

Mr. McKee—I object to that and ask that it be stricken out.

The Court—Strike out: "I don't think he thought about it."

Q. You made some sort of offer of settlement? A. Some months later, after his sons and daughter found out that I bought the place, Mr. Laskey came to my place and he came in and said: "Did you buy this place from my father-in-law?" and I said: "Go ask your father-in-law," and he said: "I am asking you," and I said: "What are you going to do if I did?" and he said: "Why didn't you tell me about it?" and I said: "I should tell you when I buy a property?" and he got so mad, and his children got so mad because Mr. Benjamin Cohn didn't tell him he was going to sell that place.

Q. Did you ever say to Laskey, or to Mr. David Cohn, or Mr. Metz Cohn, that you had agreed if

the children should become reconciled you would give the property back? A. I never did.

Q. Did you go before the rabbi? A. I did.

Q. Mr. Whittenstein? A. I did.

Q. Did Mr. Cohn lay his case before him? A. He laid his; yes, sir.

Q. Did he say to the rabbi that it was to be given back? A. He didn't, and the rabbi himself said he didn't.

Q. And you didn't deny what was said? A. I didn't, because there was nothing said; the only thing that Mr. Cohn did say was "I am sorry I sold my place, and therefore I would give to Mr. Cohen five hundred dollars," and he said: "Mr. Cohen is entitled to damages."

Q. And then there was talk about the damages? A. By whom?

Q. By you and Cohn?

By the Court:

Q. What did you speak to Cohn about damages? A. I never spoke to Cohn about damages anything, except only once Mr. David Cohn came in my store and said: "Mr. Cohen, I have five hundred dollars in my pocket, and you can have it right away," and I said: "David, I can't do anything until I see your father", and I went up to see him and I told him what Dave said and he said Dave had no authority to say anything and don't pay any attention to what he says.

Q. Did you ever have any conversation with Mr. Laskey? A. We were very good friends until one morning Mr. Laskey comes in about half past seven, it must have been, probably, and I was sitting in the back, and he came in, and I was sitting in the back reading the paper, and he said: "Mr. Cohen, after February first you wouldn't live much longer; I may be hung, but you wouldn't live after February first much longer." Then he ran out and I went down to Chief Tracey, and I said: "What is the use to go to law; he is my neighbor," and I went down to Mr. Laskey's, no, Mrs. Slotnick, and I went down and I told Mr. Slotnick the whole story, and they said they are sorry; you can't blame them; Mr. Cohen sold the place; now they are living there, &c. &c.



Q. Did any of the other boys say that Laskey was angry enough to do what he said? A. On Saturday morning Mr. Slotnick comes in my place and sits down by the stove and we talk a little while, and then he said: "Mr. Laskey has to pay sixty-five dollars a month, and he said you would have to pay in three years time too he said the three thousand dollars—

The Court—That has nothing to do with it.

Mr. Merrey—That is all.

Cross Examination by Mr. McKee:

Q. What addition did your landlord put on your property? A. I didn't measure it.

Q. Some addition, wasn't it? A. Yes, sir.

Q. And that gave you additional space? A. Yes, sir.

Q. And that increased your rent? A. I told my landlord two years ago to build on an addition.

Q. Wasn't it because of the addition in space that you paid the additional rent? A. No; the

addition was thirty-five dollars, and being Mr. Laskey heard that I had Mr. Cohn's place, and he called him up and said: "Why do you give Mr. Cohen there for three hundred dollars a month; I will pay your four hundred."

Q. And that is the reason why? A. Yes.

Q. How did you know that? A. Don't you think I have the Book of Knowledge?

Q. Did Mr. Laskey telephone your landlord that he would pay four hundred dollars; is that it?

Mr. Merrey—I object to the question; it is not cross examination.

The Court—No; it is not cross examination.

Q. You were great friends of Mr. Benjamin Cohn? A. Always was up to to-day yet.

Q. Always went up to his place to pray? A. Yes, sir; with him and his children also; all except Mrs. Laskey.

Q. The fact that you didn't talk to her was after you signed the contract with Mr. Benjamin Cohn? A. No; before that.

Q. He told you his trouble about the children? A. Who did?

Q. Mr. Benjamin Cohn. A. What is the difference?

Q. Did he? A. We used to talk like man to man.

Q. Did you and he talk about his children? A. I have told you that before, didn't I?



The Court—No; you didn't.

A. All right, then; yes; he did.

Q. And you talked with the children about their troubles between them and their father? A. No, sir; not once.

Q. Didn't you ever come in Laskey's store with Mr. Benjamin Cohn—I mean, and say what Mr. Benjamin Cohn had said about them? A. I would not do that.

Q. Did you? A. It would be too much to mix in family affairs.

Q. Did you? A. No; I didn't.

Q. When you spoke to him about purchasing the property, it was after he had told you about the trouble with his children? A. No, sir.

Q. Did you speak to him about buying this property because he told you about the trouble with his children? A. In this manner—

Q. That was after he told you about the trouble with his children? A. Yes.

Q. He told you that he was having trouble with his children and he was going to sell all his property? A. Yes, sir.

Q. And you said you would buy it? A. Yes, sir.

Q. Nothing was said about any reconciliation for the benefit of his children? A. No.

Q. The children wasn't mentioned about it at all? A. Not to me; no, sir.

Q. And it was just a straight contract? A. Yes, sir.

Q. He never mentioned anything about the children being mentioned in the contract at all, did he? A. Yes; if he hadn't thought about the

children he wouldn't have put in a three year lease to Mr. Laskey.

Q. Wasn't that spoke about before the paper was made up? A. No, sir; he said: "I will make out a paper."

Q. And nothing was said about any reservation before the drawing of the papers? A. I didn't speak to Mr. Cohn much about it at all.

Q. Was anything said about the reservation for his children? A. I didn't speak anything about a reservation.

Q. You didn't admit that there was any reservation to Mr. David Cohn? A. No, sir.

Q. And you didn't admit that there was any reservation to Mr. David Cohen? A. No, sir.

Q. And you said you didn't say anything to the rabbi; that nothing was ever said before the rabbi that if the children were reconciled— A. I said he said when he was in before the rabbi he said he was sorry.

The Court—We will take what the rabbi said.

Q. In September, did Mr. Cohn ever come and tell you that he had become reconciled with his children, and that he contract was no good? A. Now could it be no good?

Q. In September, did Mr. Cohn ever come and tell you that he had become reconciled with his children, and that the contract was no good? A. No, sir.

Q. At any time, from the time you signed the contract, up until January 2nd, 1926, did he ever come to you and tell you that they had become reconciled, and that you were entitled to the five hundred dollars, and your two thosuand dollars deposit back, with interest? A. He didn't tell me anything until after January 2nd.



Q. What was the reason the date of closing was extended until January 2nd, 1926, when the contract was made in June? A. I asked him the same question, and he said: "I don't want to have anything to do, because my children should have nothing to say about it; for twelve months the children should be in mourning, and after the twelve months the children are through with it."

Q. Then the children were spoken about at that time? A. That he is through with them.

Q. He didn't say that the length of time was put in there to give them an opportunity to be reconciled with him? A. No, sir; he said that they shouldn't have a word to say to him about his business.

Q. He said the reason that was extended was because at that time they would be out of mourning? A. Yes, sir.

Mr. McKee—That is all.

Testimony Closed.

(Filed May 23, 1927)

IN CHANCERY OF NEW JERSEY

| | |
|---|---|
| Between<br>Abraham A. Cohen and Annie Cohen,<br>Complainants,<br>and<br>Benjamin Cohn,<br>Defendant. | On Bill, etc. |

**DECREE**

This cause coming on to be heard in the presence of Edward F. Merrey, solicitor of the complainants, and M. Metz Cohn, solicitor of the defendant, and the court having examined the pleadings and having taken proofs orally and in open court and heard and considered the arguments of counsel thereon; and it appearing that the complainants, Abraham A. Cohen and Annie Cohen, entered into an agreement in writing, with the defendant, Benjamin Cohn, on June 18th, 1925, for the purchase of certain lands lying in the City of Paterson, County of Passaic and State of New Jersey, and known as No. 95 Market Street, and particularly described as follows:

Beginning at a point on the northerly side of Market Street, formerly Congress Street, at a distance of one hundred and one feet and one half inch from the corner of Prospect Street and running thence, (1)



easterly along the line of Market Street twenty six feet and seven inches; and thence (2) northerly, at a right angle with Market Street one hundred and twelve feet and six inches; thence (3) westerly, parallel with Market Street, twenty six feet and seven inches; and thence (4) southerly, one hundred and twelve feet and six inches to the place of beginning. Being known as No. 95 Market Street Paterson, New Jersey; wherein and whereby said defendant agreed to convey said lands and premises; and in pursuance, the complainants paid to the defendant, the sum of Two thousand dollars ($2000.) as a deposit; and it further appearing that the contract is recorded in the office of the Register of Deeds for Passaic County in Book D-32, of deeds, page 283.

And the court being of the opinion that the complainants are not entitled to specific performance of the aforesaid agreement as prayed for by them in their bill of complaint filed herein:

It is on this 18th day of May, 1927, Ordered, Adjudged and Decreed, that the bill of the complainants be dismissed; that the Two thousand dollars ($2000.) paid as deposit be returned to the complainants by the defendants and it is further Ordered, that no counsel fees be allowed; and further, that the contract herein referred to and entered into between Abraham Cohen and Annie Cohen, complainants, with Benjamin Cohn, defendant, dated June 18, 1925, and recorded in the Register's office of Passaic County on July 20th, 1925, in Book D-32 of deeds for said county on page 283, be cancelled and of no effect. That a

certified copy of this order be filed with the Register of Deeds of said County.

E. R. Walker,
C.

Respectfully advised,
Vivian M. Lewis,
V. C.

A True Copy,
Thomas Barber,
Clerk.



IN CHANCERY OF NEW JERSEY

| | |
|---|---|
| Between<br>Abraham A. Cohen and Annie Cohen,<br>Complainants,<br>and<br>Benjamin Cohn,<br>Defendant. | On Bill, etc. |

## AMENDED NOTICE OF APPEAL

The complainants, Abraham A. Cohen and Annie Cohen, hereby appeal from the final decree made in the above entitled cause on May 18th, 1927, by Edwin Robert Walker, Chancellor, upon the advice of Vivian M. Lewis, Vice-Chancellor, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in all Causes.

Edward F. Merrey,
Solicitor for and of Counsel
with the Complainants.

Dated: June 8th, 1927.

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

Edward F. Merrey,
Of Counsel with the Complainants.

Service of a copy of the within amended notice of appeal is hereby acknowledged this 8th day of June, 1927.

M. Metz Cohn,
Solicitor of Defendant.

NEW JERSEY COURT OF ERRORS AND APPEALS

| | |
|---|---|
| Abraham A. Cohen and Annie Cohen, Complainants-Appellants, vs. Benjamin Cohn, Defendant-Appellee. | On Appeal from the Court of Chancery |

**PETITION OF APPEAL**

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

The petition of Abraham A. Cohen and Annie Cohen, the appellants in the above entitled cause, respectfully shows that:

1. 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 18th day of May, 1927, in a certain cause in said Court of Chancery wherein the said Abraham A. Cohen and Annie Cohen were complainants and the said Benjamin Cohn was defendant, in this respect, to wit, that the said decree adjudges that the bill of the complainants be dismissed; that the Two thousand dollars ($2,000) paid as deposit be returned to the complainants by the defendant and it is further Ordered, that no counsel fees be allowed; and further, that the contract herein referred to and entered into between Abraham Cohen and Annie Cohen, complainants, with Benjamin Cohn, defendant, dated June 18, 1925, and recorded in the Register's office of Passaic County on July 20th,



1925, in Book D-32 of deeds for said county on page 283, be cancelled and of no effect.

And petitioners appeal from the decree of the Chanceller which decrees as aforesaid upon the ground that the same is erroneous for the reasons that:

1. The court below ordered the bill of complaint to be dismissed, whereas it should have ordered the defendant to specifically perform the contract set up in the bill of complaint.

2. The said court failed to order the defendant to specifically perform the contract set out in the bill of complaint.

3. There was no legal evidence to support said decree.

4. The court below held that the written contract referred to in th ecomplaint could be changed by a prior parol agreement.

5. The court below held that the contract was not to become effective in the event that defendant became reconciled to his children whereas, there was no legal evidence to support such finding.

6. The court held that the contract set up in the bill of complaint never had any legal life, because, as the court held, there had been established by parol that such contract was not to be effective in the event the defendant became reconciled to his children.

Petitioner therefore prays that the said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden, and that petitioner may have such other relief in the premises as to this court shall seem proper.

Edward F. Merrey,
Solicitor for and of Counsel with Appellants.

Service of a copy of the within Petition of Appeal is hereby acknowledged this 31st day of May, 1927.

M. Metz Cohn,
Solicitor of Defendant-Appellee.



NEW JERSEY COURT OF ERRORS AND APPEALS

Abraham A. Cohen and Annie Cohen,
Complainants-Appellants,
vs.
Benjamin Cohn,
Defendant-Appellee.

On Appeal from the Court of Chancery

**ORDER**

The respondent having failed to file an answer to the petition of appeal within thirty days after the service of a copy of the said petition, and the making of a deposit as required by the rules of this Court,

It is on this 15 day of September, 1927, on motion of Edward F. Merrey, of Counsel with the Appellants,

Ordered that the said appeal be heard and that the appellant may bring on the same for hearing in accordance with the rules of this Court.

(Filed Sept. 28, 1923.)

## OPINION

Lewis, V. C.

The Bill in this suit was filed for the purpose of compelling the defendant, Benjamin Cohen, to convey a piece of property to the complainant, Abraham Cohen, known as 95 Market Street, Paterson, New Jersey, under and by virtue of a contract of sale made and executed on June 18, 1925. Under the agreement the deed was to be delivered on or before January 2, 1926, upon the complainant complying with certain conditions set forth in said agreement, and which agreement was duly recorded in the Register's Office of Passaic County on July 20, 1925. The defendant admits the execution of said contract as set forth in the Bill of Complaint, but claims that said contract was signed after a verbal agreement with complainant to the effect that if the children of defendant, and the defendant, became reconciled before the date for the delivery of the deed, then said agreement was to be null and void, and the complainant was to be entitled to damages of Five Hundred Dollars ($500.00), together with the return of Two Thousand Dollars ($2,000.00) deposited at the time of execution.

Under this agreement Two Thousand Dollars ($2,000.00) was paid upon the execution of the agreement, which is now in the possession of defendant; Fourteen Thousand Dollars ($14,000.00) was to be paid in cash upon the delivery of the deed; Nine Thousand Dollars ($9,000.00) was to be paid by the assignment to the defendant of two mortgages,

owned by complainant, and a purchase money mortgage of Twenty Thousand Dollars ($20,000.00), for a period of one year, was to be executed to the defendant by the complainant upon delivery of title to them, the time fixed for the completion of the contract was January 2, 1926.

It appears by the testimony that some time prior to June 18, 1925, the defendant, who, at that time was a widower, his wife having died some prior thereto, and at that time had three sons and two daughters, became embroiled with his children regarding a rumor, that he, the defendant, was going around with another woman, which was resented by the children, and the remonstrances of the children became so insistent that the defendant and his children became unfriendly towards each other, to such an extent that there was no conversation between them. This feeling of animosity was told and explained to the complainant, Abraham Cohen, by the defendant, before anything was said about the purchase of the property in question by the complainant from the defendant. This is admitted by the complainant, Abraham Cohen, and it was only after the complainant knew of the trouble between the defendant and his children, and after frequent visits by the complainant to the defendant, that anything was said about selling the property. The complainant went to the defendant's store every day for the purpose of prayer. Complainant sympathized with him and visited him, his store being next door, until finally the complainant spoke to the defendant about buying the property. The complainant denies that the defendant agreed to sell him the property for Forty-Five Thousand Dollars ($45,000.00) with the understanding that in case the defendant and his



children should become reconciled, in that event the contract for sale was to be null and void.

The complainant produced no witnesses in substantiation of his denial that an agreement accompanied the signing of the contract that it was not to be effective if the defendant made up with his children before the date for the delivery of the deed.

The evidence satisfies me that no deed was to be given in case the defendant did become reconciled with his children before the date set for the delivery of the deed; and I allowed parol testimony to be put in evidence to establish that fact.

There is no doubt that parol evidence is admissible to show the existence of some contingency or condition affecting the operation and effect of a written contract.

22 Corpus Juris, 1148, Section 1540.

O'Brien vs. Paterson Brewing & Malting Company, 69 N. J. E., page 131.

Oak Ridge Company vs. John Toole, 82 N. J. E., page 541.

I shall advise a decree in accordance with these views.

# New Jersey Court of Errors and Appeals

| | |
|---|---|
| Between<br>Abraham A. Cohen and Annie Cohen,<br>Complainants-Appellants,<br>vs.<br>Benjamin Cohn,<br>Defendant-Appellee. | On Appeal from Chancery |

***Brief of Edward F. Merrey, for Appellants.***

## *I.*
## *STATEMENT OF THE CASE*

The complainants appeal from a final decree of the Court of Chancery, advised by Vice-Chancellor Lewis, dismissing a bill of complaint filed by the appellants to compel the defendant to convey to the complainants, a piece of property, known as Number 95 Market Street, Paterson, New Jersey, in accordance with the terms of a written contract, entered into between them, a copy of which is found on pages 4 to 8 of the State of the Case, and which was annexed to the bill of complaint. The agreement is the ordinary form of agreement for the sale of real estate. The defendant, a widower, was to convey to the complainants on or before January 2, 1926, Number 95 Market Street, Paterson, New Jersey, for the sum of Forty Five Thousand Dollars, ($45,000). Two Thousand Dollars, ($2,000) was paid upon the execution of the agreement; Fourteen Thousand Dollars, ($14,000) was to be paid in cash upon the delivery of the deed; Nine Thousand

Dollars ($9,000) by the assignment of certain mortgages owned by the complainant, and a purchase money mortgage of Twenty Thousand Dollars, ($20,000) was to be executed by the purchasers. The only answer set up in the court below was that the complainants and defendant mutually agreed that the contract, in writing, so signed by them was to have no legal life, or any force or effect until a certain Gussie Laskey should give her assent thereto, and that the said Gussie Laskey had refused to give her assent to the instrument. This defense was abandoned on the trial and no evidence of any kind was offered to sustain it.

The defendant, on the hearing before the Vice-Chancellor offered testimony which was received over the objection of complainants (Case, page 19) in an attempt to prove that there was a parol agreement changing the terms of the written agreement. The defendant claimed that at the time the written contract was executed, he was having trouble with his children and that in the event that he became reconciled with them he was not to convey the property to complainant, but should pay Five Hundred Dollars, ($500.00) to complainant, the amount stipulated in the contract as liquidated damages for failure to perform. Complainant objected to the offer of all evidence along this line, on the ground that there was an attempt to vary a written contract by parol. The Vice-Chancellor admitted this evidence, over objection, and held, in his opinion, that the evidence so offered satisfied him, that no deed was to be given in case the defendant would become reconciled with his children, and that parol



evidence was admissible to show the existence of some contingency or condition affecting the operation and effect of a written contract. A decree was entered dismissing the bill of complaint and directing the defendant to return the Two Thousand Dollars, ($2,000) to complainants.

## *II.*
## *SPECIFICATION.*

We claim the decree advised by the Vice-Chancellor is erroneous; (1) in that it ordered the bill of complaint to be dismissed, whereas, it should have ordered the defendant to specifically perform the contract set up in the bill of complaint; (2) in that there was no legal evidence to support the decree; (3) in that the court held that the contract referred to in the complaint could be changed by a contemporaneous parol agreement; (4) in that the court held that tthe contract was not to become effective in the event that the defendant became reconciled to his children, whereas, there was no legal evidence to support such finding; (5) in that even if the evidence offered by defendant was properly admitted, it was insufficient to prove the parol agreement.

## *III.*
## *ARGUMENT*

The court below erred in dismissing the bill of complaint, instead of ordering the defendant to specifically perform his contract, because:

*1. The only evidence offered by defense was to the effect that the parties had entered into a contemporaneous parol agreement varying the terms of the written contract. This evidence should not have been admitted and if this evidence was stricken out there was no defense.*

*2. The Court held that the written agreement between the parties could be varied by a contemporaneous parol agreement.*

The contract entered into between the parties is found as part of the bill of complaint on pages 4 to 8 of the State of the Case. The complainants proved the execution of the contract. It was offered and admitted in evidence. It was admitted that the defendant refused to carry out the contract, and that the complainant was ready and willing to go on with it, and tendered exact performance at the time specified in the contract. On this, the complainant rested. (Testimony, pages 13, 14, 15.) Defendant then offered himself as a witness and testified in substance that his wife had died about six months before the execution of the contract; that he had five sons and three daughters who attempted to dictate to him what to do about his business. He said that he threatened them that he would dispose of all his property and turn over the money to charitable purposes. The complainant, Abraham A. Cohen, was a neighbor of the defendant, having a retail dry goods business at 97 Market Street. (Since Annie Cohen, the wife of Abraham A. Cohen took no part in the negotiations, we use the term "complainant" in this brief, as referring to Abraham



A. Cohen alone.) The parties had known each other for seven or eight years and were friendly. The defendant claims that in his talks with the complainant, who apparently had learned of the intention of the defendant to dispose of his property, the complainant asked for a chance to buy the property in question and the defendant agreed and fixed the price of Forty-Five Thousand Dollars, ($45,000). The complainant held off for some time and finally came to the defendant's terms. The defendant went to a son-in-law in New York and prepared the contract. He gave the complainant no opportunity whatever to change a word of the contract, but claims that he told the complainant that he might look it over. The defendant said he would not go to any Paterson lawyer to have the contract executed, and a Notary Public nearby was called in and witnessed the contract. The Two Thousand Dollars, ($2,000) which was to be paid on the execution of the contract was then paid by the complainant to defendant in the form of a check and the defendant still has the money. The defendant claims that when he originally handed the contract to complainant for examination he said to him, "Remember, I am selling that property under the consideration that if the children don't become reconciled, and if they do, you are to get Five Hundred Dollars, ($500.00) for your trouble." (Case, page 18, lines 8 &c.)

This story is denied by the complainant; is without corroboration, and is undoubtedly a pure concoction as we argue later, but for the present, let us treat this story as true. The defendant's position as here taken, and as maintained through-

out his testimony is entirely different from the defense set up in his answer and abandoned by him, apparently for lack of proof. In the answer, it is clearly charged that the instrument, in writing, was to be absolutely void until the happening of the condition, that is, until one Gussie Laskey should give her consent thereto. If that had been proved the paper would never have been a contract, and the complainant would not have been entitled to the Five Hundred Dollars, ($500.00), liquidated damages provided for, in case of breach. By the evidence adduced, the contract is treated as a valid executed contract, effective always as to some of its terms, but changed by parol with respect to others. It is to remain valid in that the provision for the payment of Five Hundred Dollars, ($500.00) in case the defendant refused to perform, was to remain in full force and effect, but it was to be amended, so that in case of the defendant becoming reconciled with his children, he could escape from the performance of his part of the contract by the payment of Five Hundred Dollars. He is attempting to change the contract by parol and he clearly should not be permitted so to do. On page 25, at line 21 he admits that when asked to go on with the contract, he made the following reply, "I don't intend to go on with the contract; I had a quarrel with my children and it is settled and done; I don't intend to go on with it, and you can have your damages."

On page 26, line 3, he said in answer to a question by his counsel, concerning the damage clause in the contract:



Q. "Was there any reason given for having it in? A. In case I didn't comply with the agreement, he was to make five hundred dollars.

Q. "And that is the reason why you said to him on New Years, 'You made five hundred dollars'? A. Yes; between the day of atonement and New Years."

This rule has been laid down so often, and is so well known that a reference to only the latest authorities is useful. In the case of Platt vs. Currie, decided this year by the Court of Errors and Appeals, reported in 5 Advance Reports, page 133, it was held: "It is well settled that parol testimony cannot be introduced to vary, add to or alter a written instrument which in itself is clear and free from doubt in the absence of fraud, surprise or mistake, and where a written agreement is complete, its terms cannot be varied or contradicted by parol evidence of a contemporaneous verbal understanding." The court, in that case quoted from 10 R. C. L. 1018 as follows: "Having deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking have been reduced to writing, and parol evidence is not permitted to vary or contradict the terms of such writing, or to substitute a new or different contract for it."

The present situation is right in point; the defendant was a Justice of the Peace, had drawn

numerous contracts, knew all the lawyers in Paterson, has three sons who are lawyers, and prepared the contract in question himself or with the aid of his son-in-law in New York. (See page 24.)

In the opinion of the court below we find the following: "There is no doubt that parol evidence is admissible to show the existence of some contingency or condition affecting the operation and effect of a written contract."

22 Corpus Juris, 1148, Section 1540.

O'Brien v. Paterson Brewing & Malting Company, 69 N. J. E., page 131.

Oak Ridge Company vs. John Toole, 82 N. J. E., page 541.

Taking up these citations we find by examining the first citation above, the following: "It has been frequently asserted that parol evidence is admissible to show the existence of some contingency or condition affecting the operation and effect of a written instrument; but on the other hand there are a great many cases holding that parol evidence is not admissible for such purpose. These two lines of authorities, while on their face conflicting, may be to a great extent reconciled by the reasonable assumption that the courts in making the decision one way or the other had in mind, although they may not have clearly expressed, the true distinction, which is this:

The rule excluding parol evidence has no place in any inquiry unless the court has before it some ascertained paper beyond question binding and of full effect, and hence parol evidence is admissible to show conditions relating to the delivery or taking effect of the instrument, as that it shall only become effective upon certain conditions or contingencies, for this is not an oral contradiction or variation of the written instrument, but goes to the very existence of the contract and tends to show that no valid and effective contract ever existed; but evidence is not admissible which, conceding the existence and delivery of the contract or obligation, and that it was at one time effective, seeks to nullify, modify, or change the character of the obligation itself, by showing that it is to cease to be effective or is to have an effect different from that stated therein, upon certain conditions or contingencies, for this does vary or contradict the terms of the writing."



It appears from the above that while parol evidence may be offered with respect to the delivery or taking effect of an instrument, so as to show that the instrument while executed by the parties was never actually delivered or in other words that it never became the contract of the parties, but that once it is conceded that an instrument has had existence and has been delivered, parol evidence cannot be offered to show that it is to cease to be effective upon certain conditions or contingencies. On page 1152 under note 4 D. to the text above quoted, the following appears:

"Condition subsequent not provable. Parol evidence cannot tbe admitted to prove a condition subsequent which will defeat an operative contract, but only a condition precedent giving life to what was before a dead writing. Burns, etc.,

Lumber Co., vs. Doyle, 71 Conn. 742, 43 A. 483, 71AmSR 235; Sweet vs. Stevens, 7 R. I. 375; Wallis vs. Littell, 11 C. B. N. S. 369, 103 ECL 369, 142 Reprint 840."

The defense admits that the contract in this case was delivered and that it is effective; that the defendant took $2,000.00 of the plaintiff's money and still has it and it is further conceded that the contract is so far in effect that the defendant is bound to pay damages of $500.00 under it. This being the case how can it be said that the contract was only to take effect upon the conditions mentioned; that is upon the failure of the children and the father to become reconciled by a certain day? This is the very opposite of the matter, as the contract was to remain in effect unless the condition happened. This is a condition subsequent and not a condition precedent.

The next authority cited is the case of O'Brien vs. Paterson Brewing & Malting Company, 69 Equity, page 117. In that case O'Brien executed a promissory note to defendant for $2902.65. This was in payment for certain bar fixtures which were really not worth $500.00. The defendant set up that it was agreed at the time of the execution of the note that he was not to be liable thereon. It appears it was the custom of breweries to turn over the possession of saloons to their customers upon the customer executing a promissory note for all the indebtedness against the place which had accrued under former tenants, and executing a chattel mortgage on the fixtures to the extent of such indebtedness, notwithstanding that the fixtures which were turned over to the customer making the note and mortgage were not worth anything near the amount of the note. A parol agreement was then entered into that the customer was not to be held liable on the note.



It was held that the complainant could prove by parol that he was not to be held responsible on the note.

The last authority cited is the Oak Ridge Company vs. John Toole, 82 New Jersey Equity, page 541. In that case the court said, "This case (referring to O'Brien vs. Paterson Brewing & Malting Company) it seems to me, established the rule, that if the parties to an agreement stipulated at the time that it was made, that it was to have no binding effect upon them, then notwithstanding their execution of the agreement, such contract is of no force and effect at law or in equity. The written paper in the above case was an agreement by which the defendant agreed to purchase two lots in the City of Paterson for $2,000. This price was apparently excessive and there was most convincing testimony, that, at the time it was signed it was understood that it was not to be binding at all upon the defendant. Practically everybody present at the time the agreement was signed admitted that there was such a parol agreement: The defendant was corroborated by his attorney, by the real estate agent who was present, and in great measure by the attorney of the complainant. In both these cases it was held that parol could be used to prove that a written instrument was given under an agreement that it was not to

be binding. There appears to be no case anywhere upon which parol evidence is admitted to show that there was an agreement that a written instrument was to cease to be binding upon the happening of a certain event. The text writer in Corpus Juris above very clearly shows the instances in which parol evidence may be used to show that an instrument never took effect, but it cannot be used to show that an instrument once effective, afterwards ceased to be effective. The rule laid down is an old one. In Stephen's Digest this rule is stated in article 90 as follows: "Nor may the contents of any such document be contradicted, altered, added to, or varied by oral evidence, provided that any of the following matters may be proved.

"The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property."

Nowhere in Professor Stephen's work is it indicated that oral evidence may be given of a condition subsequent to relieve an obligation.

In 22 Corpus Juris on page 1152 are very many notes and references to cases in other states, holding that while oral evidence may be admissible to show that an obligation was not to be effective until the happening of a condition precedent, that such oral evidence would not be given to show that an obligation effective, was to cease to be effective upon the happening of a condition subsequent. Our case is even stronger than those cases in which an agreement was to cease to be effective upon the happening of a



condition subsequent. The attempt here is clearly to vary the terms of a written instrument by oral evidence. The instrument in question is the contract for the sale of land. The testimony offered by defendants is to the effect not that upon the happening of a certain contingency the contract was to be void, but that upon the happening of that contingency it was to have a different effect; that is, upon the happening of such contingency the complainant was to be paid damages for the breach of the contract by defendant. No case can be cited holding that parol evidence of the character may be admitted.

In each of the New Jersey cases a court of equity acted to relieve the complainant of an obligation, that it was inequitable to enforce. In the O'Brien case the complainant was relieved from paying an exorbitant price for some real estate. In the O'Brien case it is said that the court in giving relief was preventing a fraud.

On page 135 the Vice-Chancellor refers to the case of Chetwood vs. Brittan in which the complainant filed a bill to be relieved from his obligation upon a bond, upon the ground that at the time of the execution thereof the defendant agreed that he would not hold him responsible. The bond in that case was secured by mortgage on land. Vice-Chancellor Pitney in the O'Brien case on page 136 said that the O'Brien case was clearly distinguished from Chetwood vs. Brittan, because in the Chetwood case the land conveyed was at the time of the conveyance, worth the money agreed upon as its price. In that case it was

said that the land was inflated by the wave of speculation then prevalent, but there was not the least hint of over valuation or fraud on either side. In the O'Brien case the Vice Chancellor said there never could be any pretense that the property conveyed was worth, for any purposes, any such money as the nominal price fixed for it. He clearly held in the O'Brien case that it was inequitable to compel the complainant to carry out a bargain by which he was forced to pay an exorbitant price for the property purchased. The same situation occurred in Oak Ridge vs. Toole but in the present case there isn't the slightest suggestion of fraud, or that the agreed price was not the actual value of the property.

***3. The evidence offered by defendant even if properly admitted was insufficient to make out the defense attempted.***

In considering the evidence submitted by the defendant to prove his contention, we should first refer to the answer. This answer was filed February 3, 1926, and if there had been any such parol agreement as is contented by the defendant, it should have been set up in the answer. Nowhere in the answer is there any suggestion that the defendant was not to be compelled to execute a deed in the event that he became reconciled with his children. Surely, if there was any such agreement, it must have been known to him and would have been put in the answer. The failure to place it in the answer makes us believe that it was an afterthought entirely which was brought forward as a last hope at the trial. An



examination of the answer shows that the defense set forth therein was much stronger from a legal point of view than the one presented at the trial. The words of the answer are: (See page 10, line 8 &c.) "As well on June 18, 1925, as theretofore, complainants and defendant mutually agreed that said instrument in writing, so signed by them on said date would have no legal life, or any force or effect, unless and until said Gussie Laskey should give her assent thereto. It was further agreed that complainants should undertake to obtain such assent from her, and in or about the month of September, 1925, complainants did undertake to obtain her assent to said instrument; but she then refused and has ever since refused to assent thereto."

This solemn answer filed by the defendant gives the above as the only defense to this suit. At the trial, not one word of evidence was produced to substantiate this statement, but an entire new story was concocted of which the complainants had no notice whatever. We are justified in charging that the defense set up in the answer was a pure concoction. The defendant, finding himself unable to prove the allegations of his answer shifted and concocted a new story, about which we heard nothing until the trial. From the testimony of the defendant, it appears that he had been formerly in business at the property in question, (See page 15, line 20) and that it was at present occupied by his daughter (See page 16, line 1). This is a mis-statement as the property was occupied by a Herman Laskey, who was the husband of Gussie or Gertrude Laskey, a daughter, not of Mr. Cohn, the defendant, but of his

deceased wife. The defendant said that he had had difficulty with his children and decided to dispose of all his property and turn the money over to charitable purposes and leave Paterson (page 16, line 19), and it seems to be admitted that there was a quarrel between the defendant and his children, but this quarrel did not extend to his step-daughter, Gussie Laskey or Gertrude Laskey, as she is named in the testimony (See line 1 on page 38). The complainant and defendant were well known to each other, the complainant occupying a store at 97 Market Street, and frequently called upon the defendant. It seems that the defendant had intended to sell the property in question to his step-daughter, but she did not offer him enough money for it. (See page 17, line 30.) After quite some bargaining, the defendant agreed to sell the property to complainant for Forty-Five Thousand Dollars, and this was the price originally fixed by defendant and is beyond any question, the full value of the property. The defendant then prepared the contract with the aid of a son-in-law in New York. It was prepared in detail. If the complainant was at odds with all his children, it is strange that he would go to a son-in-law and have him prepare the contract. The defendant then said he did not want to go to any lawyer in Paterson, and a nearby Notary Public was called in to witness this contract. (See page 17-18.) The complainant was apparently given no option but to take the contract in the form it was made or leave it. He had nothing to do with suggesting the wording of the contract. It was prepared by and under the direction of the defendant. The defendant



then took Two Thousand Dollars from the complainant. Why did he do this if the contract was only to be binding providing Gussie Laskey assented to it, or in case the defendant became reconciled with his children? If this contract was to depend entirely on the question of reconciliation with the children, why was it that the defendant was to pay Five Hundred Dollars in the event that he did not execute the deed called for in the contract? Certainly, this defendant would never have agreed to have paid Five Hundred Dollars to his neighbor unless the contract was binding upon him and he was obliged to pay Five Hundred Dollars to relieve himself of an obligation. If at the time he made the contract there was a parol reservation that the execution of the deed was to depend upon the question of reconciliation with his children this defendant would never have agreed to pay the complainant Five Hundred Dollars. The witnesses produced to corroborate the defendant gave no corroboration at all. The first is David Cohn, the son of the defendant, and a lawyer. He tells about the quarrel with his father and he tells the story that on finding that his father had agreed to sell this property, he went to see the complainant and the complainant told him that he would be willing to turn back the contract, but that Five Hundred Dollars was not enough for his trouble. The attitude of the complainant seems always to have been, that he was willing to settle and not compel the execution of this contract, if the defendant would pay him proper damages.

The second witness was Morris Metz Cohn, a son of the defendant and a lawyer. He tells about the quarrel of the father and his children and he spoke to the complainant, and complainant merely assured him that he need not worry, as they would get the property back. This statement might be true, but the complainant's attitude was always such that he was willing to forego his contract if his losses were made good. This is no corroboration of the father's story at all. It will be noted that this son's name is signed to the answer as Solicitor, and that he says nothing about the assent of Gussie Laskey being required.

The third witness was William Whittenstein, a Rabbi, to whom the parties to this suit went to see if the dispute between them could be settled. According to the defendant's story, on page 21, this attempt was made after the institution of the present suit. There is no corroboration on the part of the Rabbi of the story told by the defendant, because he states that the complainant did not admit or deny anything that was said by the defendant. This Rabbi says on page 33, line 21, that he made no attempt to find out whether there were any reservation made at the time that the contract was entered into. The only question that was being submitted to him was how much damages the defendant should pay to the complainant.

The next witness is Herman Laskey, the occupant of the premises. All he says is that upon learning of the contract, he went to the complainant and complainant told him to go to his



father-in-law and everything would come out all-right. Gertrude Laskey a step-daughter of the defendant testifies about the quarrel the other children had with the defendant, but corroborates in no way about the reservations now claimed.

The last witness was Louis Slotnick, who presented a paper given him on behalf of complainant and sugesting a settlement between the parties of this cause of action. So, in the whole testimony there is absolutely no corroboration of the statement made by the defendant about the oral agreement which was supposed to have been made at the time the written contract was executed. The complainant was sworn, and denied that he had entered into any such arrangement. The court below says that this denial was not corroborated. It is hard to see how there could be any corroboration, because a bargain for the sale of the property was made by the two men alone, nobody being present. (See page 18, line 6.) One man now says that he annexed a parol condition to the contract. The other denies this. How it would be possible to corroborate this denial is hard to see.

The burden of proof to sustain this defense, if it is a defense, must certainly be upon the defendant. The evidence to establish the defense should be clear and convincing. Certainly there is no such clear and convincing evidence as was offered in O'Brien vs. Paterson Brewing and Malting Company, nor even as in Oak Ridge Co. vs. Toole, cited in the Vice-Chancellor's opinion. Besides quite different from the situation in those

cases, the contracts in this case is in all respects fair, the price paid is true value of the property, and not entirely disproportionate as in the cases cited. Here the terms were fixed by the party seeking to avoid the contract and not by the other party. The defendant will not be injured if this contract is enforced. He says he still intends to sell this property (Case, page 24, line 27). The complainant will be severely injured if this contract is not carried out, some of his damages appear in evidence offered by defendant (Case, page 42, line 20). While defendant insists that he made this contract because of ill-feeling for his children, yet the only one who could be hurt was the step-daughter, Gertrude Laskey. Defendant says he intended this property for her. (Case page 24, line 30.) But this step-daughter had not quarrel with defendant, (Case page 38, line 1), and in the contract he made a provision for her benefit, (Case page 5, line 28) (Case page 44, line 7). This gave to Laskey the benefit of a three year lease which had never been executed. (Case page 36, line 15.) He had offered the premises to her and she was only willing to pay Forty-Two Thousand Dollars, ($42,000.00) for them. (Case page 17, line 30.)

The whole story of the reservation is flatly denied by complainant. (Case page 45, line 9.)

In face of this positive denial, in view of the fact that the contract was prepared by defendant, who was familiar with such papers, and would have put any such condition in writing,



in view of the shifting from the defense set up in the answer we feel that the uncorroborated statement of defendant cannot be accepted.

If a plain, fair contract such as this can be upset by such evidence, there can be no safety in transactions of this kind.

The decree should be reversed.

Respectfully submitted,
EDWARD F. MERREY,
Of Counsel with Complainants-Appellants.

# New Jersey Court of Errors and Appeals

| | |
|---|---|
| Between<br>Abraham A. Cohen and Annie Cohen,<br>Complainants-Appellants,<br>vs.<br>Benjamin Cohn,<br>Defendant-Appellee. | On Appeal from Chancery |

**Brief of Wood McKee and Morris Metz Cohn, for Appellee:**

## I.

## STATEMENT OF THE CASE

The complainants appeal from a final decree of the Court of Chancery advised by Vice-Chancellor Lewis, dismissing a bill of complaint filed by the appellants to compel the defendant to convey to the complainants a piece of property, known as Number 95 Market Street, Paterson, New Jersey, in accordance with the terms of a written contract, entered into between them, a copy of which is found on pages 4 to 8 of the State of the Case, and which was annexed to the bill of complaint. The agreement is the ordinary form of agreement for the sale of real estate. The defendant, a widower, by said agreement dated June 18, 1925, was to convey to the complainants on or before January 2, 1926, Number 95 Market Street, Paterson, New Jersey, for the sum of Forty-five thousand dollars ($45,000). Two thou-

sand dollars, ($2,000.) was paid upon the execution of the agreement; Fourteen thousand dollars ($14,000) was to be paid in cash upon the delivery of the deed; Nine thousand dollars ($9000) by the assignment of certain mortgages of Twenty thousand dollars ($20,000) owned by the complainant, and a purchase money mortgage of Twenty thousand dollars ($20,000) was to be executed by the purchasers.

The defendant, on the hearing before the Vice-Chancellor offered testimony which proved that there was a parol agreement, not changing the terms of the written agreement, but that the same was not to take effect on the happening of a certain event. The defendant claimed that at the time the written contract was executed, he was having trouble with his children and that in the event that he became reconciled with them he was not to convey the property to complainant, but should pay Five hundred dollars ($500) to complainant, the amount stipulated in the contract as liquidated damages for failure to perform. The Vice-Chancellor admitted this evidence over objection and held in his opinion that the evidence so offered satisfied him that no deed was to be given in case the defendant would become reconciled with his children, and that parol evidence was admissible to show the existence of some contingency or condition affecting the operation and effect of a written contract. A decree was entered dismissing the bill of complaint and directing the defendant to return the Two thousand dollars ($2000) to complainant.



## COMMENT

It appears in the statement of the case that the appellants contend that the defense which appears in the written answer was abandoned at the trial; and no evidence of any kind was offered to sustain it. This is rebutted by the evidence of Benjamin Cohn on page 18, lines 7 to 11 inclusive, referring to the reconciliation with his children. The answer among other things says that the instrument in writing signed by the parties would have no legal life or any force or effect only and until the said Gussie Lasky should give her assent thereto. The said Gussie Lasky being a child of the said Benjamin Cohn and her husband being interested in the premises in question who was conducting a millinery business with his wife, the said Gussie Lasky. Both Gussie Lasky and Irving Lasky being children of the defendant appellee, the consent to be secured from the said Gussie Lasky as outlined in the answer necessarily means the consent of Gussie Lasky and Irving Lasky who conducted a business together in the premises which is the subject of this suit. The consent to be gotten of the said Gussie Lasky as outlined in the Answer refers to the reconciliation of the defendant's children with the defendant which reconciliation includes the consent of Gussie Lasky and Irving Lasky her husband. See testimony of Irving Lasky page 34, lines 10 and 11; and also lines 20 to 26 inclusive.

In the statement of the case the appellants contend that the defendant-appellee offered the testimony to prove there was a parol agreement chang-

ing the terms of the written agreement. This is not so, no evidence was offered to change the terms of the agreement; but on the contrary to show that the agreement was to have no life or effect, and to be inoperative if the defendant-appellee became reconciled with his children. See testimony of Benjamin Cohn, page 18, lines 7 to 11 inclusive. See testimony of David Cohn, page 28, lines 8 to 21 inclusive. See testimony of Morris Metz Cohn page 30, lines 10 to 12 inclusive. See testimony of Rabbi William Whitenstein, page 31 lines 22 and 23, also 10 to 21 inclusive and Rabbi William Whitenstein, page 32 lines 1 to 15 inclusive. See testimony of Irving Lasky, page 35, lines 10 to 20 inclusive, also lines 20 to 30 inclusive.

All the above testimony indicates the attitude of the appellee that the contract in question was to have no life or effect if the defendant-appellee became reconciled with his children. In substantiation of the appellant's attitude and admission that the contract in question was dependent upon the event if the defendant-appellee became reconciled with his children. See Exhibit "D" 1, page 42, line 20 through the rest of the page, and continued on page 43.

## II.

## SPECIFICATION

The appellant in his specification under point three contends that the court held that the contract referred to in the complaint could be changed by a contemporaneous parol agreement. **This was not so**



**held.** The court in its opinion held that no Deed was to be given in this case if the defendant appellee became reconciled with his children before the date set for the delivery of the deed; and that the delivery of the deed was dependent upon some contingency or condition affecting the operation and effect of the written contract. Under point four in the specification the appellant contends that there was no evidence to support the finding of the Vice Chancellor. This is not so. See Testimony of David Cohn, page 28, lines 10 to 22 inclusive. See testimony of Morris Metz Cohn, page 30 lines 9 to 12 inclusive. See testimony of Rabbi William Whitenstein, page 31, lines 10 to 24. See testimony of Herman (Irving) Lasky, page 35, lines 10 to 18. Under point five in specification, the appellant contends that the defendant's offer by the defendant was insufficient to prove an oral agreement. The evidence offered by the appellee was to the effect that the contract was to have no life or effect upon the happening of some contingency or event. No parol evidence was introduced for the purpose of proving a parol agreement to change or vary the written agreement.

## III.

## ARGUMENT

Under point One of the Argument, appellant contends that evidence was introduced by the defense that the parties had entered in a contemporaneous parol agreement, varying the terms of the written contract. This is not so. **Defense show that the instrument was not operative and no evidence was**

**introduced to alter the terms of the agreement; simply to limit the effect of its operation.** Under point two in the argument, appellant contends that the court held that the written agreement between the parties could be varied by a contemporaneous parol agreement. This is not so. Opinion held that the change of the contract was dependent upon the contingency.

## COMMENT

The testimony of Benjamin Cohn, page 18, shows that the appellant Abraham Cohen held the contract in question four days **offsetting the effect of the statement under Argument three "that the defendant-appellee gave the complainant-appellant no opportunity whatever to change a word of the contract he claims that he told the complainant that he might look it over."** See testimony of Benjamin Cohn, page 18, lines 22 and 23, shows that the appellant held the contract for four days. Counsel for the appellant in Argument three maintains that the defendant still holds the complainant's money. **This is too ridiculous for argument, as such sums were offered by the defendant time and time again.** See testimony of Benjamin Cohn, page 20, lines 10 to 20. This is not denied by the defendant.

Counsel in his argument contends that the contract in question was treated as a valid executed contract effective always as to some of its terms, but changed by parol in respect to others. In passing it would be advisable to say that the defendant although a Justice of the Peace, was more in a true



sense of the word, a layman, than any other person. The insertion of $500.00 damages in one clause of the contract unequivocally indicates that the parties to the contract were to be compensated for their trouble in the event the deal was not consummated. The court in its Decree adjudged that the bill of complaint be dismissed and that $2,900.00 paid as deposit be returned to the complainant by the defendant and that the contract hereto referred to and entered into between Abraham Cohen and Anna Cohen be cancelled and of no effect. The court certainly appreciated the true light of the situation and declared that there be returned only the deposit monies without a forfeiture so that the contention of counsel for the appellants that the defendant change the contract by parol is unfounded.

All the testimony of the defendant substantiated by testimony of David Cohn, page 28, line 1 to line 22 inclusive. Testimony of Morris Metz Cohn, page 30 line 9 to 12 inclusive, testimony of Rabbi William Whitenstein, page 31, line 9 to 25 inclusive, testimony of Benjamin Cohn, page 20, line 7 to 19 inclusive, further testimony of Benjamin Cohn, page 21, line 11 to 20 inclusive shows that the contract was to be effective upon the happening of some event and that in no instance **was the contract treated in parts but as a whole.** Counsel for appellant in argument contends that the contract was at one time effective and is now sought to be nullified by the defendant-appellee. This is not so. **All the evidence indicates that the contract was treated as a whole, its life dependent upon certain conditions and effects.** It is never contended as pointed out by

appellant that the contract in question had an existence. **Counsel for appellant in his argument states that the contract was delivered and that it is effective. This is a misstatement on the part of counsel, as the evidence indicates that the contract was never effective.** Counsel in his argument maintains that the contract was to remain in effect unless the condition happened; and that this was a condition subsequent and not a condition precedent. This is not so. The defendant indicates that the life of a contract was dependent upon a certain contingency or effect; and that the mere happening based upon expectancy or event makes it a condition precedent.

The testimony of Louis Slotnick, page 40, line 11, shows that the appellant Abraham Cohen treated the contract in question as one having no life or effect; and this is further evidence by Exhibit "D" 1 appearing in page 42 of the testimony. On Cross Examination of Abraham Cohen, page 49, line 21 indicates that the appellant knew that the defendant had his children in mind; and that the life of the contract depended upon the contingency or event that the appellee was to be reconciled with his children; and that we can safely say that where in the answer it is stated that the consent of Gussie Lasky was to be gotten that all the parties to the contract had in mind all of the children.



## CONCLUSION

### I.

In the case of Plummer vs. Keppler and Scanlan 26 New Jersey Equity, page 481; and which case was affirmed by the Court of Errors and Appeals in 27 New Jersey Equity, page 550, the Court in passing on the question whether or not specific performance should be allowed in this case said in its opinion on page 482 "on a bill for specific performance, the court will grant or refuse its aid according to the justice of the case." Commenting on a bill for specific performance, the court in its opinion in this case on page 482 said "that the remedy by specific performance is discretionary; the question is not, what must the court do, but what, in view of all the circumstances of the case in judgment should it do to further justice.

In the case of Ten Eyck vs. Manning, 52 New Jersey Equity, page 47. In this case, Vice Chancellor Van Fleet in his opinion on page 49, in a suit for specific performance, says that the remedy by specific performance is not a matter of strict right, but of sound judicial discretion, and will be granted or denied as the justice and right of the particular case shall seem to the court, on full consideration of rights and equities of the parties, to require.

### II.

That parol evidence is admissible to show that a writing, in the form of a contract, never became operative as a contract. In other words, a separate

agreement, constituting a condition precedent to the attaching of any obligation under the writing may be shown by parol evidence. Parol evidence is admissible to show that a written instrument has never been delivered so as to bind the parties thereto. See 10 Ruling Case Law, page 1053, Section 249 to 3.

Indeed, parol evidence is admissible to show that a written contract shall not become binding until the performance of some condition precedent, although the contract names other conditions precedent, not repugnant to the one sought to be shown, to its becoming operative and taking effect. See 10 Ruling Case Law, page 1054, Section 249.

The same author in Section 250, 10 Ruling Case Law, page 1054, says that it has become the settled rule in a majority of States that a written contract whether under seal or not, may, by parol, be proved to have been delivered to the obligee upon a parol condition that it was not to become binding until the happening of a future event, and may be avoided upon the further proof that such an event has not occurred. Smith vs. Dotterweich, 200 New York, page 299, Fulton vs. Priddy, 123 Michigan, page 298. There is no doubt that parol evidence is admissible to show the existence of some contingency or condition affecting the operation and effect of a written contract. See 22 Corpus Juris, page 1148, Section 1540.



## III.

In the case of Chetwood vs. Brittan, 4 New Jersey Equity, page 334, affirmed by the Court of Errors and Appeals, in 5 New Jersey Equity, page 628.

In this case the Chancellor writing the opinion, at page 337, said that too much latitude has already been given, I fear, for the good of society in allowing parol proof in explanation of written agreements; but no case as it appears to me has yet gone as far as I am asked to go in this case. The Court in its opinion, at page 337, said that a Deed absolute on its face may be shown to have been delivered as an escrow. This, however, does not affect the writing, but its delivery only.

The Court in this case in passing on the question whether or not parol evidence is admissible to show that at the time of the execution of the Bond in question, the obligor who executed this Bond, could show that at the time of its execution that it was agreed that the obligor should not be responsible under the terms and conditions of said Bond.

The Court in its opinion said in this case that "it will not do to be guided by those decisions where the courts of Equity on a Bill for Specific Performance have indulged defendants in parol proof in excuse for not fulfilling written contracts. Here a latitude has been given which belongs to no other case."

## COMMENT

Counsel for the appellant to aid his own case, avoided that portion of the opinion in the case of Chetwood vs. Brittan, 4 New Jersey Equity, page 334, which was adverse to the interest of his client; and cites only that portion of the opinion which can be found on page 342 in the conclusion of the opinion; but omits to state that the Chancellor says "it will not do to be guided by those decisions where courts of Equity on a bill for specific performance have indulged defendants in parol proof in excuse for not fulfilling written contracts." Here the court recognized and appreciated an exception to the rule, which exception has been allowed in cases time and time again.

## IV.

In the case of Naumberg vs. Young, 44 New Jersey Law reports, page 336, the court refers to a class of cases in which oral testimony of an agreement by parties is held to be competent, are those in which evidence is offered to show that the written agreement was made to take effect upon a condition which was not performed.

In the case of Pym vs. Campbell, 6 E. B. page 370, in an action for non-performance of an agreement to sell, the plaintiff produced a written agreement signed by the defendant. The defendant was allowed to prove by oral testimony that the agreement was drawn up with the understanding that it would be no bargain until approved by "A"; and "A" did not approve of it.



## V.

In the case of Giberson and Van Cleaf vs. First National Bank of Spring Lake, et als., Volume 5, New Jersey Advanced reports, the issue of February 26, 1927, page347, Vice Chancellor Berry in his opinion on an action to restrain the defendant bank from the prosecution of two suits at law against the complainants herein, wherein recovery is sought on certain promissory notes of which the complainants were makers and endorsers, the learned Vice Chancellor said in his opinion "It is equally true, however, that numerous cases have arisen in the courts of equity of this state in which parol evidence has been admitted respecting the rights of the parties under written instruments, including promissory notes, which would not have been admitted had the issue been framed at law." Chetwood vs. Brittan, 2 New Jersey Equity, page 438; Stoutenburg vs. Tompkins, 9 New Jersey Equity page 332; Sweet vs. Parker, 22 New Jersey Equity, page 453; Van Syckel vs. Dalrymple, 32 New Jersey Equity, page 223; affirmed, 32 New Jersey Equity, page 826; O'Brien vs. Paterson Brewing Co., supra; Oak Ridge Co. vs. Toole, 82 New Jersey Equity, page 541; Gallagher vs. Lembeck & Betz Eagle Brewing Co., supra; Massopust vs. Lembeck & Betz Eagle Brewing Co., supra.

In the same opinion Vice Chancellor Berry cited the case of Stoutenberg vs. Tompkins, 9 New Jersey Equity, page 332, affirmed by the Court of Errors and Appeals in 9 New Jersey Equity, page 348. In

the case of Van Syckle vs. Dalrymple, 32 New Jersey Equity, page 233, affirmed by the Court of Errors and Appeals page 826, in that case the court said "Oral evidence is admissible to reform a written instrument, or to subvert or overthrow it entirely, but not to vary or alter it."

**COMMENT**

In the case of Giberson vs. First National Bank of Spring Lake, Vice-Chancellor Berry cited with approval the case of Oak Ridge Co. vs. John O'Toole, 82 New Jersey Equity, page 541 decided by the learned Vice Chancellor Lewis who laid down the following rule in the Oak Ridge case "that where parties to an agreement stipulate at time it was made that it was to have no binding effect upon them although executed, such agreement was to have no force or effect at law or in equity; and that parol evidence is admissible to show for what purpose the written agreement to purchase land was executed."

In the case of O'Brien vs. Paterson Brewing and Malting Co., which was cited by Vice Chancellor Berry, 69 New Jersey Equity, page 131, the court in discussing the Rule says as follows: "As the Court will not permit the Statute of Frauds to be a instrument of Fraud, so it ought not to permit the Rule that parol evidence cannot be permitted to alter or vary a written contract to be made a in-



strument of Fraud. We submit that the decree entered in this case should be sustained.

Respectfully submitted,

WOOD McKEE,
MORRIS METZ COHN,
Solicitors for and of Counsel
with Defendant-Appellee.

INDEX.