New Jersey Court of Errors and Appeals.

Between CHRISTIAN FEIGENSPAN, a Cor., Complainant, Appellee. and JOSEPH NEZOLEK, Defendant, Appellant.	On Appeal from Decree in Chancery.

BRIEF ON BEHALF OF THE APPELLANT.

I.

This case is brought up on appeal from a decree of the Court of Chancery, entered on the tenth day of July, nineteen hundred and six. The Bill prayed for the specific performance of a certain alleged contract, dated April 16, 1905, on the part of the defendant, and set forth that the defendant, Nezolek, signed a mortgage which covered certain lands and premises in the City of Elizabeth, and a contract under which the defendant agreed to purchase certain malt and brewed liquors from the complainant during a period of five years. At the time of the execution of the mortgage there were also executed a bond to accompany the same, a chattel mortgage, payable one day after its execution, and a promisory note, payable one day after date. All these documents were dated the same day and were made for the same amount, viz.: $4,800.00.

The defendant denies that he executed the contract referred to in the Bill, or that if he did execute it, it was without his knowledge, against his will and through mistake.

All the papers referred to with the exception of the disputed contract were witnessed by Louis A. Graff, an attorney-at-law, who took the acknowledgment to each paper that was required to be acknowledged. The alleged contract was witnessed by Abraham H. Cornish, also an attorney-at-law.

At the hearing before the Vice-Chancellor, Mr. Graff swore that he accompanied Mr. Nezolek to the office of Mr. Cornish, who was acting for the Fidelity Trust Company, which was employed to attend to the transaction for the Feigenspan Company. Graff says that he examined all the papers that were to be signed by Mr. Nezolek; explained their contents to Nezolek, and advised him not to sign the contract as it would bind him to sell the beers, &c., of the Feigenspan Company for a period of five years. (Case, page 50.) He says he advised Nezlek not to sign the contract, and that he did not sign it. Mr. Nezolek, Mr. Graff and the other witnesses for the appellant all sat in one room and at one table, which was in the middle of the floor. (Case, page 57.)

Nezolek signed each paper handed to him by Mr. Graff at this table; and after signing and acknowledging them, they were handed over to Mr. Cornish. (Case, page 58.)

The disputed contract was on the same table with the other papers, but was laid to one side by Mr. Graff. Nezolek was in the presence of Mr. Graff during the whole time and they all went out together; and the paper was not signed during that period. (Case, page 59-60.)

Mr. Schwitzgable, a witness on the part of the appellant, testified that he was present in Mr. Cornish's office on the day when the papers were signed by Nezolek, and says Nezolek signed all the papers but one; that Graff looked over that paper and said, "Joe, don't sign this. Joe, don't sign it, it is binding for five years for selling beer," and threw it one side. (Case, page 38.) This

witness said further, "Joe did not sign it, not in my presence. We did not see him sign it. We were there all the time." They all went out together. (Case, page 38.)

The conversation between Mr. Graff and Mr. Nezolek was had in the English language. (Case, page 45.)

Louisa Schwitzgable, the wife of Frederick Schwitzgable, also swore that she was present on the day when Nezolek signed the mortgage and other papers, and that there was one paper which Nezolek did not sign; that Graff told him not to sign it and threw it aside. (Case, page 45.) On cross-examination she said the conversation between Nezolek and Graff was in the English language; that Graff first read the paper over to himself and then advised Nezolek not to sign it, that it would bind him for five years to sell beer. (Case, pages 45-46.)

Mr. Nezolek, the appellant, was sworn and testified that he did sign the paper, but did not know what it was. That it was a week afterwards when he signed it at Feigenspan's Brewery in Newark, and says that he first found out that he had made an agreement to sell Feigenspan's beer, at the time that Mr. Ploeser, the brewery agent, called at his place. This was several weeks after the making of the bond, mortgage, the alleged agreement, and other papers. At that time he told Mr. Ploeser that he did not think that he ever signed a contract to sell for five years, and that he knew as long as he owned the money he must sell his brewery's beer. (Case, page 63.)

Mary Nezolek, the wife of the appellant, swears that she was present in Cornish's office on August 16, 1905, with her husband, and that her husband did not sign the alleged contract, and that he was advised by Mr. Graff not to sign it. That she understood Mr. Graff when he told her husband not to sign it, and that the paper was put away on the table where the other papers were.

The only testimony in contradiction of the foregoing was that of Mr. Cornish. His testimony, however, was of a guarded character. He says he saw Nezolek sign the paper on August 16th at his office in Elizabeth

(case, page 30), and that Nezolek and his wife, Schwitzgable and his wife and Louis Graff, the attorney, were present with them. (Case, page 31.)

He represented the Fidelity Trust Company, which was guaranteeing the mortgage, and in that way represented the Brewery Company. (Case, page 31.)

Mr. Cornish does not remember any instructions by Mr. Graff to his client not to sign the alleged agreement. He does remember, however, that there was something said by Graff to Nezolek, and as he understood the conversation, it was that the agreement was all right for Nezolek to sign. Upon being asked why it was that all the other papers were witnessed by Mr. Graff and the alleged agreement by himself, he said he could not remember.

The testimony of Mr. Cornish, unsupported, as it is, cannot outweigh the testimony of all the other witnesses, who swore positively that Mr. Graff advised Nezolek not to sign the contract. There does not seem to have been any conversation between Graff and his client as to any other paper presented for execution.

Cornish acknowledges that there was some talk about the contract, which corroborates the testimony of all the witnesses for the appellant.

On the oral argument before the Vice-Chancellor, counsel for the appellant suggested, that as there were a number of documents lying on the table in Cornish's office to be signed, viz.: a real estate mortgage and bond, a chattel mortgage, which had to be signed in several places, a note and a second mortgage to Schwitzgabel, that it was possible that the alleged contract, which was lying on the table, might have been executed through mistake; or it may be that it was executed on the occasion when Nezolek went to the office of the Brewery Company, some time after the 16th of August.

In the presence of such a preponderance of evidence as was produced for the defendant below, which was in no way impeached, and was to some extent corroborated by Mr. Cornish and Mr. Ploeser, we respectfully insist that the judgment of the Court of Chancery should have been

in favor of the appellant; all the testimony shows that the contract set up in the bill was not "intentionally" executed by the defendant.

II.

If the court should disregard the testimony and be of the opinion that the contract set out in the bill was in fact signed, knowingly and intentionally, yet such contract cannot be enforced in a court of equity, for the following reasons:

In the first place it is uncertain and indefinite, for the different papers signed by the appellant were all connected with the same transaction, and formed but one contract. The real estate mortgage was made by the appellant to the appellee, for four thousand eight hundred dollars ($4,800.00), payable one year after its date (case, page 102); the chattel mortgage was executed for the same sum, and was made payable one day after date (case, page 14); a promisory note for the same amount was made payable one day after date (case, page 15). Under the terms of the chattel mortgage the appellant had a right to pay off his obligation at any time after the day when the mortgage and note were executed; the Brewery Company had a right to demand payment on the mortgage at any time. It also provides that if the appellant allowed any judgment to be entered up against him, or if he should offer for sale any other goods than those manufactured by the mortgagee, or if the mortgagee should at any time deem the indebtedness or security unsafe or at any risk, the sum of money for which the mortgage was made should become instantly due and payable, without demand theerfor, and, in that event, the mortgagee might enter the saloon and sell the mortgaged goods and chattels, the mortgagor being responsible for the deficiency. It will thus be seen that the Brewery Company provided the remedy which it might resort to in case the mortgagor did not live up to the conditions of his agreement.

Meyer vs. Metzger 52 *Atl.* 274.

The alleged agreement provides that the appellant shall sell the Company's beer for a period of five years, but there was no such stipulation in the chattel mortgage. The chattel mortgage provided that the appellant should sell the manufactured products of the appellee, but certainly not for a period beyond the time when he discharged his debt. We, therefore, insist that there was uncertainty and doubt as to the terms and conditions of the contract, and in using the word contract we refer to all the papers executed on the sixteenth of August, 1905, by the appellant And again the five year agreement did not specify what prices should be paid for the beers sold by the appellant nor how much beer he should take, and did not make it obligatory for him to take any.

Speaking on this question, in a recent case, the late V. C. Gray said: "That specific performance of a contract which was uncertain and undefined in its terms, so that this court could not be assured of what the parties intended and agreed to do, would not be enforced." The uncertainty referred to by the Vice-Chancellor consisted in the fact that the defendant had agreed to give one or more mortgages as part payment for certain lands which he agreed to purchase, but did not provide for what amount they should be made, to whom they were to become due, or whether they were to run concurrently or not.

Moore vs. Galupo, 20 *Dick. Ch.* 199.

In another case the court refused to enforce a contract by decree for specific performance for the reason that the defendant had agreed in the alternative to take down or remove a certain building which he purchased from the complainant within a certain time, and declared that a decree for specific performance must be clear.

Armour vs. Connolly 49 *Atl.* 1118.

See also

McKibben ~~McAdams~~ *vs. Brown* 1 McC. 17, *S. C. 2nd* McC. 498.

Brown vs. Brown 6 *Stew Eq.* 651.
Madison Assn. vs. Britain 46 *Atl.* 655.
Meyers vs. Metzger, 52 *Atl.* 274.

Pomroy on Contracts lays down the rule as follows: "If the terms of a contract are contradicting and conflicting with each other in their effect, and when there are two different agreements between the parties concerning the same subject matter, the necessary result is an uncertainty which prevents a court of equity from decreeing specific performance. The doctrine that where an agreement is uncertain a specific performance will be refused, is applied by the courts, it would seem, with more vigor against assignees and representatives of the original contracting parties than against the parties themselves." *Pomroy on Contracts, Sec.* 160 (*2nd Ed*).

III.

The appellant also insist that there was a want of mutuality in the agreement before the Court. Allowing that the disputed contract was actually executed by the appellant the want of mutuality will render it void. All the agreements and conditions were in favor of the appellee. It might have refused to supply the appellant with its manufactured products, but appellant had no right that could be enforced in his behalf. This want of mutuality was fatal to the case of the complainant below. In the language of Mr. Pomroy's book: "If from the nature or form of the contract itself, from the relation of the parties, from the personal incapacity of one of them, or from any other cause, the agreement devolves no obligation at all upon one of the parties, or if it cannot be specifically enforced against him, then and for that reason he is not, in general, entitled to the remedy of a specific performance against his adversary party."

Pomroy on Contracts, Sec. 163.
Duvall vs. Meyers 2nd Md. Ch. 345.

Green vs. Richards 8 *C-E Gr.* 32 *and* 35.
Palmer vs. Gould (*N. Y.*) 39 *N. E. R.* 378.
Duff vs. Hopkins 33 *Fed. Rep.* 599.

In the case of *Duvall vs. Meyer, supra,* it was held that "a party not bound by the agreement itself, has no right to call upon the court to enforce performance against the other contracting party by expressing his willingness in his bill to perform his part of the agreement."

See Ballman vs. Porter 100 *Mass.* 337.
Sullings vs. Sullings 9 *Allen,* 334.

As a general rule specific performance will not be decreed in any case where mutuality of obligation and remedy does not exist.

TenEyck vs. Manning 7 *Dick. Ch.* 47.
Van Doran vs. Robinson 1 *C. E. Gr.* 256.
Hopper vs. Hopper 1 *C. E. Gr.* 147.

Mutuality in the equitable relief is so essential that the converse of the proposition above stated is well established, and it is a familiar doctrine that if the right to the specific performance exists at all, it must be mutual; the remedy must be alike attainable by both parties to the agreement.

TenEycke vs. Manning, Supra.
Am. and Eng. Ency. Law, vol. 26, *p.* 28 (*2nd Ed.*)
Pomroy on Contracts, 222, *and notes.*

Agreements for the purchase of land stand on a somewhat different footing. In that case a purchaser's obligation in a contract to purchase land may be enforced because the purchaser may in equity compel the vendor to sell.

Pomroy. Sec. 155.

The mutuality must exist *ab initio.*

Carskaddon vs. Kennedy 40 *N. J. Eq.* 239.
Pomroy, p. 233.

IV.

The court will not decree specific performance when it needs the supervision of the court to see that the decree is carried into effect, as for instance the supervision of work to be done covering a long period of time.

Wharton vs. Stoutenburg 8 *Stew.* 267.

The case of *Meyers vs. Steel Machine Co.*, 57 *Alt. Rep.* 1080 (in which the opinion was written by Vice-Chancellor), Gray), was unlike the contract under consideration, or those above cited. In that case the contract was certain and positive, showing that the defendant was obliged to manufacture for the complainants, exclusively, a certain machine, and deliver to them its whole output. It was not a common ordinary contract for the sale of chattels, which could be supplied by a hundred other dealers or manufacturers on demand. Professor Pomroy, speaking of this subject, says that "It is well settled that where chattels have some special peculiar value. . . . . which could be placed upon them, in accordance with strict legal rules, an interest which has happily been termed *pretium affectonis,* much as an heir loom; and where the chattels are individually not of a common class, but are unique of their kind, and cannot be readily reproduced, so that others of a similar nature and equal value could not be procured by means of damages assessed according to legal rules, such as a painting or other works of art; and where chattels are of unusual beauty, variety and distinction, contracts concerning them will be specifically enforced in equity and a delivery of them decreed, although they might be recovered in the common law action of detinue and replevin. The reasons of this

rule are the utter inadequacy of mere pecuniary compensation, and the incompleteness of the relief afforded by the legal actions, in which the defendant might easily evade an actual delivery of the article itself.

Pomroy on Contracts, 1[illegible].

Where the complaining party can go into the market and purchase goods of like character to those which the defendant agreed to sell him (which the complainant in the case of *Meyers vs. Stell Machine Co. ibid* could not do), a specific performance will be decreed, and not otherwise.

Eq. Gas Light Co. vs. Baltimore Coal Co., 82 *Md.* 285.
Adams vs. Messenger, 147 *Mass.* 125.
McGaw vs. Remington, 12 *Pa. St.* 16.

And even if the chattels be of special value, if that value can be readily ascertained, the remedy will be by an action at law.

Pomroy 1[illegible].
Joslin vs. Stokes, 28 *N. J. Eq.* 21.

V.

The complainant below had a remedy at law, which precluded it from seeking equitable relief. Appellee insists now as it did below that it was not compelled to resort to the remedy at law, although in its bill of complaint it alleged that it had no remedy at law, and that the appellant cannot set up that as a defence, because in his answer he did not claim the benefit of such a defence. As counsel for the defense below argued, before the Vice-Chancellor, the defendant produced a preponderance of evidence, on the trial of the cause,—five witnesses to one—to show that there was no agree-

ment made, such as the appellees set up. He had a right to assume, under the circumstances, that his witnesses were telling the truth. The defence was a complete repudiation of the contract, and any other defence would have been unwarranted; to have set up the defence that a remedy at law, upon the contract, existed, would have been, in effect, an acknowledgment that a contract had been made. The Vice-Chancellor believed the evidence of one witness, and rejected that of five witnesses. Under such circumstances the court will not say that it was inequitable for the appellant to set up a deefnce that a remedy at law existed in favor of the appellee. Equitable rules are not inflexible in the presence of such facts. It is true that in the case of *Morris Canal and Banking Co. vs. Jersey City,* 1 Beas 259, and *Holmes vs. Jersey City,* 1 *Beas* 210, the court held that when the defence is that a remdy at law exists, it should be set up in the answer, but these cases were decided on other points. In the *Morris Canal and Banking Co. vs. Jersey City,* the Chancellor said that an irreparable damage would result to the complainant, and the Court of Errors reversed the Chancellor without regard to the fact that the answer had not alleged a remedy at law. In the case of *Holmes vs. Jersey City,* the Court decided the case on its merits. The Chancellor said: "I find in it no recognized ground of equitable relief. There is no averment of irreparable injury, and the case made by the bill shows that in the nautre of things, the injury cannot be irreparable."

The case of *Ratholz vs. Schwartz,* 42 *N. J. Eq.* 477, was not decided on this ground. In that case it appeared that the deefndant had purchased a store and stock of goods and chattels; that he had sold some of the goods in the course of business, but refused to execute a chattel mortgage and a confession of judgment, which had been agreed upon before he took possession of the store and goods. The defendant had been put in possession of thousands of dollars' worth of goods. The complainant had executed his part of the contract, and it only remained for the defendant to carry out his portion

of it; the result was that complainant was left without an adequate remedy at law. The Court held that this was so, and used this language at p. 482: "But looking at the case as if the objection had been taken in time, it is manifest that the usual remedy of law, viz.: a suit to recover the balance of the unpaid purchase money, or its equivalent damages, for not executing the securities stipulated for, would not be an adequate remedy, for the reason that the defendant had no property outside of the goods sold, and during the pendency of the suit, the complainant would be destitute of any control over or lien upon the stock of goods and chattels and defendant might, before judgment, move them beyond the jurisdiction of the court."

We submit it would be stripping the court of its equitable character to deny it the right to exercise its peculiar powers, because a defendant was precluded from making a technical defence in his pleadings.

We have made a personal examination of the pleadings in the case of *Sperry & Hutchinson vs. Vine*, 57 *Atl.* 1022, and found that the defence did not set up in the answer that the complainants had a remedy at law, and yet the court relegated the complainant to its legal remedy. There is not and cannot be a strict rule in such matters, and it stands to reason that each individual case must be decided upon its merits, and according to equitable rules and principles.

VI.

The case of Sperry & Hutchinson vs. Vine, supra, decided in the Court of Errors and Appeals, is a case in all respects similar to the case before the court. In that case it appeared that the complainants had agreed to sell to defendants a number of trading stamps, to be supplied at a discount for cash trade to all persons who might call for them; to pay complainants for all stamps so disposed of, and not to use any other coupons, trading stamps or similar devise during the existence of the contract. The contract also provided that: "No dry goods, shoes, or

gents' furnishing store within two blocks either way should have S. & H. stamps without the consent of the defendants. The defendants gave out during the continuance of the contract, other trading stamps in lieu of the complainants' trading stamps. Thereupon the complainants filed their bill praying for an injunction against the defendants, to restrain them from giving out, for free distribution, or otherwise, the red star trading stamps, or any other coupons similar to the green trading stamps of the complainant. The defendants set up by way of defence that trading stamps had been sold to dry goods dealers within the prohibited distance of the defendants' store, and that complainants had violated the contract. The Vice-Chancellor, it appeared, had denied the injunction on this ground, but the Court of Errors said: "Whether this construction be correct need not be decided. The question whether it is equitable to enforce specific performance against the defendants involves considerations aside from the question whether there has been a breach of the contract of the complainants for which an action would lie. The jurisdiction to decree specific performance is based upon the inability of the courts of law to give adequate relief. *Brown vs. Brown,* 33, *N. J. Eq.,* 650-654; *Blake vs. Flately* 44 *N. J. Eq.* 228, 10 *Atl,* 158 6 *Am. St. Rep.* 886; *Rothhotz vs. Schwartz* 46 *N. J. Eq.* 447, 18, *Atl.* 312, 19, *Am. St. Rep.* 409). The rule is well stated by Vice-Chancellor Pitney in the last cited case. *In the present case the injury to the complainant is the loss of a market for its stamps, and consequently loss of profits. There can be no difficulty in ascertaining how many of the complainants' green stamps would have been required if their place had not been supplied by their competitors' red star stamps, and the complainants' profits thereon must be a matter of calculation. Assuming that the complainant has a right, his remedy at law is complete,"* and the court denied the *prayer for injunction.*

As the origin of the remedy of specific performance was due to the inadequacy of common law, under the doctrine of which a judgment for damages was, as a rule, the only redress for civil wrongs, so the inadequacy of

the legal remedy is still the controlling requisite for specific performance; where, therefore, a party applying for the specific performance of a contract is shown to have an adequate remedy at law, equitable interposition of the nature under discussion will, as a rule, be denied.

Am. and Eng. Ency. L. Vol. 26, p. 27.

VII.

After the original decision of the Court below, in favor of the defendant, a ~~rearrangement~~ reargument of the case was had, and it was urged that the alleged contract was negative in its character, and a number of English cases were cited, to overturn the rule laid down by this court, in the case of *Sperry & Hutchinson vs. Vine, supra.* A reference to the English cases, will show, however, that they were of the class of which *Meyers et als., vs. Stell Machine Co. supra,* is an example. In the case of *Lamley vs. Wagner* 1 *De. G. M. & G.* 604, it appeared that the defendant possesed peculiar characteristics as a singer. She contracted to sing at the complaint's theatre, but afterwards went to a rival house. The court could not compel the defendant to sing for the complainant, but did enjoin her from singing elsewhere on the ground that otherwise irreparable injury would result to the complainant. To have allowed defendant to sing at the rival theatre would have attracted the public to her new place of performance to the injury of the complainant. This is the same familiar rule applied to a chattel unique in its character and possessing a peculiar value, a rule which would not apply to ordinary chattels that might be purchased in the open market.

In the case of *Ralfe vs. Ralfe* 15 *Sim.* 87 (cited by the complainant below), the facts showed that three persons had been in business as tailors and had dissolved the partnership. One of the three continued the business, paying to each of the others one thousand pounds for his interest. One of the retiring parties covenanted not to

carry on, practice or engage in business as a tailor, alone or with others, within twenty miles of the complainant's place of business. The other retiring partner agreed to work for the complainant upon a certain percentage of the profits of the business. The court properly granted an injunction against the defendant (one of the retiring partners) who became a foreman in a rival business within the prohibited distance.

Catt vs. Tourle 4 *Chan. Div. E. L. R.* 654 was a case where a covenant or agreement accompanied the sale of lands to a land company. The covenant provided that the lands conveyed should be subject to the exclusive right of the complainants to sell any ale, beer or porter which might be consumed in any house or other building to be opened thereon (p. 657 original Ed.) A person who purchased the land sold beer, other than that brewed by the complainants. The Court said: "If an equity is attached to the property of the owner, no one purchasing with notice of the equity can stand in a different situation form the party from whom he purchased," and at p. 660 "what we have to deal with here is the general abstract question—whether a person purchasing with notice of such a covenant as this is bound by it, and upon that I can only say that I entirely agree with the conclusions at which the learned chancellor has arrived." A remark made by Sir G. M. Gifford, L. J., at p. 660, as follows: "One thing at least is certain: that if the plaintiff cannot sustain a bill in this court, he is without remedy altogether," is significant.

Locker vs. Dennis L. R. 7 *Ch. Div.* 227 was also, as the Vice-Chancellor states in his opinion, a covenant going with the land.

The Vice-Chancellor cites the case of *Metropolitan Electric Supply Co. vs. Ginder L. R. Chan. Div.* (1901) *Vol.* 2, *p.* 799.

In this case the Electric Lighting Order Confirmation (No. 5) Act. 52 and 53 Vic. c CLXXXI s. 46 provided that every owner of a premises requiring a supply of electricity might serve a notice upon the Electric Light Company, and "enter into a written contract with the

undertakers (if required by them so to do) to continue to receive and pay for a supply of energy for a period of at least two years," etc., etc., p. 803. The Court said, on p. 806, "The language here is that the consumer agrees to take the whole of the Electric Energy required for his premises from A. The company was bound to supply under the statute if asked. The consumer asks. The result is that he thereupon had a right as against the plaintiff to be supplied. The only question for bargain then was the price, which was fixed at 4 1-2¢, and while the court granted an injunction against the defendant, it did so under peculiar circumstances, and upon preceedsings which had been shaped and moulded by the act of Parliament.

Manhattan Manufacturing Co. vs. Stockyard Co., 8 *C. E. Gr.* 161, was a case where, as Chancellor Zabriski said, irreparable damage would result to the complainants. The complainant had agreed to take all the blood of the animals slaughtered in an abbatoir, together with the animal matter left in the rendering tanks. The defendant refused to carry out his contract, and the Court said that: "The value of the blood was no measure of the injury, and it was barely possible to compute the damages which the injury might occasion." In other words the withholding of the blood and fat agreed to be delivered might have driven the complainant out of his business, and the Chancellor took this view of the case.

In Western Union Telegraph Co. vs. Rogers, 15 *Stew. Eq.,* 311, it was impossible, from the nature of the business, to adopt any method by which the damage of the complainant would be measured in an action at law, and the Court said that it was not like the breach of an agreement to deliver grain or other articles of sale the value of which could be easily ascertained.

On the argument below the complainants also cited the case of *Thornton vs. Sherritt,* 8 *Thornton* 529. That was a jury case, in which it appeared that the defendant had agreed to purchase beer from the plaintiff for a period of twelve years. Damages were found in favor of the plaintiff, and the Court refused to set aside the

verdict. The case before the Court is one in which relief by injunction is sought, not damages.

The case of Taylor Iron and Steel Company vs. Nichols 61 *Atl. Rep.* 946, cited by the learned Vice-Chancellor, cannot be said to have any bearing on the case now before the Court. In that case valuable trade secrets had been confided to the defendant, and an injunction was granted to prevent a rival company from securing the services of the defendant, contrary to his contract with the complainants, and to restrain him from conveying to said rival company information as to the methods and formulas used by the complainants in making steel.

VIII.

We claim that there is no equity in the case of the appellee, that it has suffered no injury, and can suffer no injury in the future. The appellant paid the Brewery Company the whole amount he borrowed with interest. The appellee accepted the amount, and has no claim against the appellant. In this respect the case resembles the case of *O'Brien vs. Paterson Brewing and Malting Company* 61 *Atl.* 437. In that case the facts showed that O'Brien gave a note and chattel mortgage to the defendant for the sum of two thousand nine hundred and two dollars and sixty-five cents on a certain saloon. The business was not a paying one at the time the defendant took hold of it, and the understanding was that the defendant was to take his beer from the complainant.

In the course of the opinion the Court said: "Surely any understanding between the parties that complainant was to buy defendant's beer and build up a trade upon it was conditioned upon the beer being grateful to the taste, and in that sense marketable. I say that the defendant was entirely right in ceasing to buy beer of the defendant, but he should have offered to purchase the fixtures at a fair valuation, *and the defendant should have been satisfied to accept such an offer, for it was all the interest he had in the premises.* This, he swears, he

offered to do (p. 440). . . .,I see no reason to doubt his statement that he attempted to make a success of selling defendants' beer and failed. *But granting that his conduct in that respect was not in good faith, the case still stands as one where the quasi obliger is entitled to come into equity to be relieved from the penalty upon making the defendant whole for such damages as he had suffered by the complainant's default,* and the question arises at once; what damages has he suffered?" Clearly only such *prospective profits* as it would have realized from the beer sold, *and it seems to me hardly necessary to cite authority for the proposition that prospective profits cannot be considered for that purpose* (p. 441). The Court also stated that the complainant, in offering to pay the defendant what the fixtures in the saloon were worth performed all the equity required of him.

The appellant claims that the case under consideration is similar in every respect ~~in~~ to the case of *Sperry & Hutchison vs. Vane* supra ~~ibid~~, and that the law, as applied in that case and in the case of *O'Brien vs. Paterson Malting and Brewing Co.* supra ~~ibid~~, should govern the determination in this case.

ALFRED A. STEIN,
Attorney for Appellant.
JAMES C. CONNOLLY,
Of Counsel with Appellant.

New Jersey
Court of Errors and Appeals.

BETWEEN

CHRISTIAN FEIGENSPAN,
a Corporation,
Appellee,

AND

JOSEPH NIZOLEK,
Appellant.

ON APPEAL FROM CHANCERY.

BRIEF FOR COMPLAINANT AND APPELLEE.

STATEMENT OF FACTS.

The Bill in this case alleges, and the proof shows, that on or about the sixteenth day of August, 1905, one Joseph Nizolek, of the City of Elizabeth, was about to purchase from one Frederick Schwitzgable certain premises in Elizabeth and also a saloon business then and there carried on, and in order to enable him to pay the price agreed upon for the purchase, and to obtain a working capital, Nizolek applied to the complainant for a loan of $4,800.

That the complainant is a brewer, doing business in the City of Newark, and it was agreed that if the money should be loaned by the complainant in order to enable the defendant to purchase the premises and the business, that he would agree to buy the ale, lager beer, etc., of the complainant for a period of five years. This agreement is found on page three of the printed book, and reads as follows:

"Know all men by these presents, that I, Joseph Nizolek, of the City of Elizabeth, County of Union, and State of New Jersey, in consideration of the sum of one dollar and other valuable considerations, do hereby agree to purchase from Christian Feigenspan, a corporation, all Ales, Lager Beer and Porter, as sold in my saloon at number Seventy-three Florida street, in the City of Elizabeth, New Jersey, for the period of five years.

And I further agree that I will not sell or offer for sale any Ale, Lager Beer or Porter in my saloon at number Seventy-three Florida street, in the City of Elizabeth, New Jersey, except that manufactured by the said Christian Feigenspan for the same period as above mentioned, and it is further understood that this agreement is to bind the successor or successors of the said party of the first part in the purchase of the property or said saloon business; and the said party of the first part agrees not to dispose of said saloon business unless his purchaser shall sign the above stipulation relative to the sale of the Beers, Ales and Porter of the said party of the second part exclusively.

In Witness Whereof, I have hereto set my hand and seal this sixteenth of August, nineteen hundred and five.

JOSEPH NIZOLEK, (L. S.)

Signed, sealed and delivered
in the presence of

ABRAM H. CORNISH."

The testimony further shows that at the time of the execution of the agreement, the complainant took as security therefore, a bond and mortgage of the defendant upon the real estate, which mortgage was to run for one year, with interest. It further appears that Nizolek purchased the saloon from Schwitzgabel, using the money loaned by the complainant, and is now conducting the business under a license issued to him by the authorities of the City of Elizabeth; that Nizolek, after taking possession of the business, commenced to purchase ale, and lager beer at a certain price; this continued for a short time, and on the seventh day of September, 1905, Nizolek ceased to purchase goods from the complainant, and is now purchasing ales, lager beer, &c., from other persons than the complainant, and that the complainant is ready and willing to supply and sell to the defendant, its ale, porter and beer at the price set forth. The charge is that Nizolek has broken his agreement with the complainant, and that the complainant is irreparably damaged; that it has suffered great loss, and that Nizolek sells large quantities of beer, &c., every day, and that the complainant is deprived of the sale to it of said beer, &c., and is thereby deprived of the real consideration and inducement for the loan of said sum of money.

The prayers of the Bill are:

1. That Nizolek be decreed to perform and fulfill in all things his said agreement.

2. That he may be enjoined from selling, in his saloon, for said period of five years, any ale, lager beer, &c., except that brewed and manufactured and sold to him by the complainant, and that he may be enjoined, during said period, from purchasing any ale, lager beer, &c. from any person other than the complainant.

3. Prayer for General Relief.

The Bill is supported by the affidavit of Christian W. Stengel, the President of the complainant company, and also by that of Joseph Ploeser, an agent of the complainant for the County of Union.

Upon the filing of the Bill, which was on November 27, 1905, with affidavits annexed, an Order to Show Cause, returnable on December fifth was made, with an ad interim restraining clause. On that day the defendant filed an answer with several affidavits annexed, in which he sets forth that he admits the loan of the money, to wit, the sum of $4,800, but denies that he ever signed the agreement above set forth, but positively declined to sign it, and that if his signature was annexed to the agreement, it was obtained by fraud and made upon some subsequent occasion. He declares that he declined to sell the complainant's beer because he could sell the beer of other brewers to greater advantage and with better profit.

The answer also sets forth that at the time of the execution of the agreement, the defendant executed a chattel mortgage to the complainant, with a note payable on demand. It will be seen that the chattel mortgage annexed to the answer contains a stipulation, on the defendant's part, that he will not sell any beer, &c., except that manufactured by the complainant.

It also appears that subsequently the defendant, or someone for him, paid the sum of $4,800 with interest, in payment of the promissory note secured by the chattel mortgage, and that the complainant accepted such payment and delivered up said chattel mortgage and note and released the real estate from the lien of the mortgage upon it.

The fact of payment was then set up by the defendant in an amendment to his answer and by a cross bill praying that the contract, which was the original agreement that Nizolek should sell the products of the complainant, for a term of five years, might be declared no longer binding upon him. We find then that the com-

plainant, by a Replication, admits the payment of the $4,800 on the 26th day of December, 1906, after the filing of the defendant's original answer and after the granting of the order to show cause, but denies the allegation that the amount of the mortgage was ever tendered to the complainant prior to that time.

FIRST.

The defendant executed the Agreement in good faith.

Let us first discuss the question as to whether or not the defendant executed in good faith the agreement upon which specific performance is now sought.

It appears that Schwitzgabel, being the owner of the premises which were mortgaged to the complainant, conducted a beer saloon and was a customer of the complainant and was indebted to the complainant in the sum of $1,300, for a balance on current account, to secure which the complainant held, as usual in such cases, a chattel mortgage. Nizolek became desirous of purchasing the property, but did not have enough money or a ready capital to complete the purchase and he put himself in communication with the Brewing Company. He met the Messrs. Stengel, one the President of the corporation, and the other a sub-officer, and a Mr. Southerland, who was at that time general bookkeeper of the corporation, and who had charge of the making of loans to customers. The proof shows that the defendant spoke English with some difficulty and apparently understood little of it. Schwitzgabel, however, who understood English, accompanied the defendant, Nizolek, to the Brewing Company's office, where the amount of the loan was fixed at the sum of $4,800, and *it was then and there agreed and distinctly understood that this loan was made to the defendant upon the condition that the defendant would purchase the beer, etc., of the complainant and no one else, for a period of five years.*

Mr. A. H. Cornish, a counselor at law, was employed by the Fidelity Trust Company, having his office in Elizabeth, and he was ordered by the complainant to examine the title, and on the 16th day of August, 1905, the parties met at the office of Mr. Cornish in Elizabeth. Cornish was apparently representing the Fidelity Trust Company and also the complainant. A Mr. Louis Graaf appeared for the defendant. Schwitzgable and his wife were present, and after some telephoning, a messenger from the Brewing Company arrived with a draft for $4,800, a chattel mortgage, a promissory note and the contract upon which this action is founded, and a letter, which reads as follows:

"Fidelity Trust Co.,
"Elizabeth, N. J.

"Gentlemen:

"Enclosed please find our check for $4,800.00, which is to be loaned to Joseph Nizolek, at 6 per cent., to be secured by first mortgage on property No. 73 Florida Street, Elizabeth, N. J. We are to receive as collateral security a chattel mortgage for the same amount, also note, form of which we enclose. In addition to this, Nizolek is to enter into an agreement by which he agrees to use our Lager Beer, Ales and Porter exclusively for a period of five years, and to further agree that he will not dispose of his business unless his successor is accepted by us as a customer and will enter into the same agreement. He is to sign a power of attorney on the license, and insurance is to be taken out to protect our loan.

"The costs of search and drawing papers in this matter is to be paid by the mortgagor.

"If the report is free from all liens you may close the transaction as above.

"Kindly inform Joseph Nizolek that he must pay $5.00 per week from now on, on account of license.

"Please withhold the sum of $1,300 on account of

the indebtedness due us from Mr. Schwitzgabel, which account we shall adjust with him later.

"Yours truly,

"CHRISTIAN FEIGENSPAN,

"A Corporation,

"Per N. Sutherland."

It must be remembered that the parties now are assembled to carry out the agreement which had heretofore been contemplated by the parties, to wit, that, in consideration of the loan of $4,800, Nizolek should execute a contract to sell the beer, etc., of the complainant for a term of five years. There seems to be no controversy that this matter was thoroughly explained by Schwitzgabel to Nizolek at the meeting at the Brewing Company's office, when the Messrs. Stengel and Mr. Southerland were present. The executing of the chattel mortgage and the bond and real estate mortgage was not talked over at the time when the contract was originally discussed. Now what happened? A deed was executed from Schwitzgabel and wife to Nizolek. Then a bond and mortgage from Nizolek and his wife to the Brewing Company and a bond and second real estate mortgage from the defendant and wife to Schwitzgabel. Then the chattel mortgage and promissory note were executed by the defendant Nizolek, and these papers were witnessed in the presence of, and properly acknowledged before, Mr. Graaf, the defendant's counsel.

What happened at the time of the execution of the agreement to sell the products of the complainant is in dispute. It seems that an agreement had been drawn and was laid upon the office table with the other papers; that the date had been left blank and that Mr. Graaf had filled it in. Mr. Graaf testifies that at that time he examined the contract and advised the defendant not to sign it, and that the defendant then and there refused to sign it, and did not sign it.

This evidence is corroborated by the testimony of Mr. and Mrs. Schwitzgabel and the defendant and his wife. Now, whether Mr. Graaf and the Schwitzgabels had left the room before the execution of this paper or not, is doubtful, but the circumstances which no doubt led the learned Vice Chancellor to come to his conclusion in the matter, indicate most strongly that the story told by Mr. Cornish is true.

It must be remembered that the letter written by the corporation and signed by Mr. Southerland, which was sent to the office of Mr. Cornish on the 16th of August, 1905, gave to Mr. Cornish implicit instructions as to his acts. It told him that Nizolek was to enter into an agreement to sell the lager beer, etc., of the complainant for a term of five years, and the agreement drawn by the corporation is enclosed with the letter. Mr. Cornish, apparently a tried officer of the company, swears he saw the defendant sign it, and that he witnessed it at the time, and that he sent it promptly with the other papers to his own company, where it was sent to the complainant.

It also appears that Mr. Cornish paid the money in accordance with his instructions in the letter, and it is incredible to believe that Mr. Cornish would have disobeyed the order of the complainant and have paid the money unless he had obtained from Mr. Nizolek his voluntary signature to the agreement.

It must be remembered that the defendant admits that his signature to the document is genuine, but insists that if he did sign it, it must have been a few days later, on a visit to the office of the complainant. This statement is undoubtedly untrue, as the testimony of Mr. Cornish is to the contrary.

It also must be taken into consideration that Mr. Cornish swears that Mr. Graaf advised his client, at the time of the signing of the other papers, to execute the contract to purchase beer, etc., from the complainant.

But if this testimony is conflicting, the probabilities are so strong in favor of the complainant that there should be no doubt left in the mind of this Court as to what happened. Keep fully in mind that the execution of this paper was talked over at the brewery at the inception of these proceedings. It appears that the one great lever brought to bear upon the complainant corporation for the loan of the money, was, that Nizolek should sell the products of the complainant for a period of five years. This was the inducement which caused the complainant to open its purse strings and assist Nizolek in his venture. Therefore, Nizolek knew at the time when the agreement was handed to him to be executed at the office of Mr. Cornish, that he was expected and had agreed to sign a paper to this effect. And it is significant upon this point that by the affidavit annexed to the answer and made by Mr. Nizolek and which affidavit was offered in evidence, he, Nizolek, admits that Mr. Graaf explained to him the agreement, and that he then and there refused to sign the agreement; that it was beyond the understanding he had with the company. The affidavit discloses without doubt, that Graaf read the agreement to Nizolek and explained to him its contents and its purport.

We therefore respectfully insist that the agreement was executed by Nizolek with his full knowledge of its contents without any mistake or fraud, and that there is no defense to the agreement shown, on this account.

SECOND.

The payment of the money loaned not a bar to a specific performance of the contract.

It was contended at the trial below, and no doubt will be urged before this Tribunal, that a Court of Chancery has no jurisdiction in this case, for the reason that the subsequent payment of the money loaned, after the bill filed was a bar to the specific performance of the contract. In other words, that the

complainant, by reason of having accepted the sum loaned, is estopped from further prosecuting his claim in a Court of Equity. We are inclined to think that the Vice Chancellor was right in not following the ruling in the case of Cutting vs. Dana, reported in 10 C. E. Gr. 265, where it was held that, having experimented and been beaten on the merits, defendant ought not to be permitted to raise the question of jurisdiction as he did. It will be noticed, however, that the question of jurisdiction of the Court of Equity, was not raised in the pleadings which would in any way suggest that a Court of Equity was not the proper tribunal to have a case of this character adjudicated. If the complainant's action even after the setting up of the defense of payment should have been at law, this question should have been raised in some way by the amended answer or the cross bill, but the true defence interposed was only that the defendant had been induced by fraud to execute the covenant in question.

The consideration of the contract.

Before we discuss the problem as to the legality of a contract of this kind and the right to enforce the same, we desire to call the Court's attention to the fact of its consideration.

Nizolek desired a loan; the Brewing Company agreed to give it to him for the consideration that Nizolek would sell the product of the Brewing Company for the term of five years. It can be safely said that no loan would have been made by the Brewing Company had it not been for the promise in writing, under seal, of Nizolek to this agreement. If the defendant's position be correct, then one day after the agreement is executed, and the money loaned, before the real estate mortgage is due, the defendant can come in and pay the loan and avoid the agreement. It is true that the note which was given, and for which the chattel mortgage was given to secure, was a note on demand, but the additional security for the loan, to

wit, the bond and real estate mortgage, was for a period of one year, so that we have this state of facts:

That an agreement is entered into to sell the complainant's beer, etc., for five years, to secure a loan to be made under the agreement, a real estate mortgage is given to run one year; a note on demand is given and a chattel mortgage with a stipulation that during the life of the chattel mortgage, the defendant should sell no other beer except that of the complainant, yet after the execution of all these instruments, the defendant comes in and pays off the debt and now claims that by such payment he is relieved of any liability under the agreement which this Court is asked to enforce. It will be seen that at the time of the payment of the sum of $4,800 and the cancellation of the real estate mortgage the mortgage having become due (the mortgage was to run for one year), hence the complainant could not refuse to accept the money, the corporation did nothing in this case to show any intention, on its part, to terminate the agreement.

Why should not this covenant be enforced? That there was originally a valid consideration for the contract cannot be for a moment disputed. The complainant did not ask to have the money paid. There was nothing in the covenant in question providing for the contingency of a voluntary payment any time he saw fit to do so. Would it not be far more equitable to say that a man should live up to his contract? It was undoubtedly the intention at the time of the execution of the contract, that Nizolek should purchase the products of the complainant for a period of five years. Nothing has been done on the part of the complainant to vitiate his part of the agreement. He has sold the defendant beer, and it is to be presumed that the beer was marketable, because it does not appear that there was any complaint made by any one of its quality or price. It is willing and desirous to continue the

sale of the beer to the defendant, and yet it is apparent, from the testimony, that the defendant has got into the hands of a rival brewing company who are now backing Nizolek and who, no doubt, raised the money to pay off the loan to declare the contract at an end.

Suppose the Brewing Company had laid out a large sum of money in erecting a plant for the purpose of supplying Nizolek with beer for a period of five years, and after its completion and the money spent, Nizolek should back out of his bargain by paying the money loaned, would not the Court of Equity specifically uphold the contract originally made? We claim, therefore, that the payment of the consideration price did not abrogate the contract, and that it is still enforceable in a Court of Equity.

THIRD.

A Court of Equity will enforce the written contract by enjoining the breach of a negative covenant therein.

The question which was discussed in the Court below, at great length, was, whether a Court of Equity was the proper tribunal to enforce a negative covenant of the kind set forth in the agreement, or, whether an action should be brought at law for the damages arising for a breach thereof. On page 128 of the Vice Chancellor's opinion he uses the following language: "The policy of the law is that business men should keep their contracts and not turn the contractee over to an uncertain remedy at an action at law for damages of non-performance. It is, in my judgment, one of the most important functions of courts of equity to prevent injuries which result in damages in all instances where it is practicable to do so, and the tendency is toward extending the protecting power of the court to cases not formerly thought to be sufficient to invoke its action. For myself, I think this tendency is wholesome."

It is earnestly contended that a Court of Equity is the proper tribunal to enforce a negative covenant, and in the first place we understand a negative cove-

nant to be one in which the covenantor obliges himself not to do or perform some act. The covenant alleged to have been broken is that the defendant will not sell or offer for sale any ale, etc., at his saloon in Elizabeth except that manufactured by the complainant for a period of five years, and that the agreement is to bind the successor or successors of the defendant in the purchase of the property or saloon business, and that he will not dispose of the saloon until his purchaser shall sign the above stipulation relative to the sale of beers, etc. It will be seen that this is a negative covenant. By the express terms of this contract there is no agreement that the complainant will sell beer to the defendant, but we take it that a liberal construction of this contract would be that it was understood that so long as the agreement ran, the complainant would be compelled to sell beer for that period to the defendant. In Pom. Eq. Jur. Sec. 1341, we find the following rule:

"An injunction restraining the breach of a contract is a negative specific enforcement of that contract. The jurisdiction of equity to grant such injunction is substantially coincident with its jurisdiction to compel a specific performance. Both are governed by the same doctrines and rules. It may be stated, as a general proposition, that, whenever the contract is one of a class which will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practical mode of enforcement which its terms permit." In going to the books upon this subject, we find that Courts of Equity will also exercise a sound, legal discretion in view of all the terms and conditions of a contract, as well as the facts and circumstances in determining whether it will specifically enforce such a contract or not.

In the case of the South Chicago City Railway Company vs. The Calumet Electric Street Railway, 171, Ill., we find it held, that the granting of an injunction

restraining the breach of a contract is a negative specific performance of a contract. But the subject before us is not a new one, and we find that the English cases are harmonious upon this subject, and in one of the leading cases, to wit, the case of Catt v. Tourle (1869) reported in 38 L. J. Ch. 401, the syllabus reads as follows:

"On the occasion of a conveyance by the plaintiff (who was a brewer) of land to trustees in fee of a building society, of which the defendant (also a brewer) was a member, the trustees (the purchasers) covenanted with the plaintiff, that "he, his heirs and assigns, should have the exclusive right of supplying all ale, beer and porter which might be consumed in every house or other building which might be erected on the said piece of land, and which should be opened or used as an inn, public house or beer shop." The defendant with notice of the covenant, opened a public house on the land, and supplied it with ale, etc., of his own brewing. The plaintiff then filed a bill against the defendant alone for an injunction to restrain the breach of the covenant. The defendant demurred. Held, that the covenant was not invalid, on the ground either of uncertainty, want of mutuality or as being in restraint of trade; and the demurrer was overruled with costs."

In his opinion, the Vice Chancellor uses the following language:

"The books abound with cases in which covenants are entered into with brewers by the lessees of public houses that they will consume no other beer upon the premises than the beer supplied by those brewers. In none of those cases is there ever a covenant on the part of the brewer to supply beer; nor has it, in any of those cases, been ever held that the want of a corresponding covenant on the part of the lessor or owner of the house to supply the beer vitiates the covenant by the occupier that he will exclusively use certain

beer to be consumed upon the property. Therefore, upon the ground of mutuality, viz., that there is no covenant on the part of the plaintiff that he shall supply the beer, there seems to me to be no objection whatever to this covenant." This case was taken up on appeal and reported in L. R. 1869, 4 Ch. Ap. 653. Lord Justice Selwin said that "Every court of justice has had occasion to consider these brewer's covenants, and must be taken to be cognizant of the distinction between what are called free public houses and brewer's public houses which are subject to this very covenant. We should be introducing very great uncertainty and confusion into a very large and important trade if we were now to suggest any doubt as to the validity of a covenant so extremely common as this is."

So it has been repeatedly held in the United States that where the covenant is for the performance of some specific act by the grantor, requiring the expenditure of money, that its performance may be enforced by a mandatory injunction irrespective of whether the proceeding is between the original party or not.

Wittendon Mfg. Co. v. Staples, 164 Mass. 327.
Burbank v. Pillsbury, 48 N. H. 475.
Stuyvesant v. New York, 11 Paige (N. Y.) 414.

In England, however, while the courts of equity will also enforce such a covenant as between the original parties, still they will not do so when the proceeding is not between the original parties.

We also turn the Court's attention to the case of Lumley v. Wagner, 1 DeG., M. and G. 604.

Looker vs. Dennis, L. R. 7 Ch. Div. 227.
Donnell vs. Bennett, L. R. 22 Ch. Div. 835.
Metropolitan Electric Supply Co. vs. Ginder, L. R. Ch. Div. Vol. 2, page 799.

We are aware of the general rule that where an obligation to perform rests upon one of the parties

only, equity will enforce the contract with great caution.

Van Doren v. Robinson, 1st C. E. Gr. 256.

But the principal does not apply where the contract, by its terms, gives to one party a right to the performance, which it does not give to the other.

Green v. Richards, 8 C. E. Gr. 32, 536.

Laning v. Cole, 3 Gr. Ch, 229.

And we also are conversant with the doctrine that unilateral or optional contracts are not favored in equity, and want of mutuality of obligation and remedy is a bar to specific performance.

But as was said in the case of Pinner v. Sharp, 8 C. E. Gr. 274-281, this doctrine has been confined to cases where there is no other consideration and an optional agreement to convey or renew a lease, without any covenant or obligation to purchase or accept and without any mutuality of remedy be enforced in equity if made upon proper consideration, or if it forms part of a lease or other contract between the parties and may be the true consideration for it.

So in referring to this last case we find that where the provisions of a unilateral contract are unusual and favorable to the complainant, but unfavorable to the defendant, both as to conditions and price, and the circumstances attending its preparation and execution are fitted to engender distrust, the complainant will be left to his action at law.

In the case of Woodruff v. Woodruff, 17 Stew. 349, the following rule is stated:

"The general rule, that equity will not specifically enforce the performance of a contract where, from its terms, a right does not arise in favor of each party against the other, and where either party is not entitled to the equitable remedy of specific execution of such obligation against the other contracting party, is subject to the modification, that if the quality originally lacking be subsequently supplied, the enforce-

ment of the contract may be made possible. Such quality may be supplied by filing a bill for specific performance by the party not bound."

See also the opinion of Chief Justice Beasley in the case of Richards vs. Green, 8 C. E. Gr. 536.

Carskaddon v. Kennedy, 13 Stew. Eq. 259.

So in the case of Miller v. Cameron, 18 Stew. 95, a unilateral contract for the purchase of lands was enforced by the vendor. In that case the complainant not being bound to show that he is not only willing to perform all the stipulations on his part, but that he has tendered himself ready to perform them before the filing of his bill. It will be seen from an inspection of the record on page five of the printed book that the complainant tenders himself willing and ready to supply to Nizolek all the ales, porter and lager beer that he may require or need in his business, upon the agreed price as set forth, and has repeatedly offered to sell Nizolek all that he may require thereof for his business at the price and upon the terms agreed upon.

The general principal is well laid down in Fry on Specific Performance, page 948, which is as follows:

"But the principal does not apply where the contract, by its terms, gives to one party a right to the performance which it does not give to the other, as where a lease contains a covenant on the part of the lessor for a renewal of the lease at the expiration of the term. It is now settled that such covenant may be enforced against the lessor, though there is no reciprocal obligation on the part of the lessee to accept the renewal."

See Chesterman v. Mann, 9 Hare. 206.

Allen v. Hilton, 1 Fonb. Eq. 425.

Fry on Specific Performance, Sec. 291-292, 733.

The remedy at Law is inadequate.

Though in general the Court of Chancery will not entertain a bill for the specific performance of contracts for chattels relating to merchandise, but will leave the party to his remedy at law, yet, notwith-

standing this general distinction between personal contracts for goods and contracts for lands, in some cases equity will enforce the contracts for personal property.

Cutting v. Dana, 10 C. E. Gr. 265.

Where the complainant has not a clear, complete and adequate remedy at law, or where some other question of equity jurisdiction is mixed up in the transaction, equity will interfere to decree specific performance of a contract for the sale of a chattel.

Story, Eq. Jur. 710.

In the case of Shreve v. Black, 3 H. W. Gr. 177, the question as to whether or not a redress of law could only be obtained by a continued series of suits, and whether an injunction should lie was discussed. This case also took into consideration the pecuniary responsibility of the defendant.

So in the case of the Manhattan Mfg. Co. v. Stockyard Co., 8 C. E. Gr. 161, Chancellor Zabriskie comments upon the question of whether a remedy at law in the case now before him was adequate, and holds that it was not possible to compute the damages in that case in any other way than by a continued series of suits, and held that an injunction was proper.

Kerr on Injunctions, 200.

Joyce on Injunctions, 75, 503-554.

2nd Joyce on Injunctions, 852-1035.

Shimmer v. Morris Canal and Banking Co., 12 C. E. Gr. 364.

Pomeroy Eq. Sec. 243.

In the case of Mausert v. Feigenspan, 2 Robb. 671, on appeal from V. C. Emery's decree which granted an injunction restraining the breach of the covenant relating to the sale, on the premises, of goods other than those supplied by the defendant, the Court of Errors and Appeals unanimously affirmed the decision of the learned Vice Chancellor.

The Vice Chancellor on page 672 in his opinion says: "In the present case, I think it was clearly intended by the parties that the covenant related to the premises. The agreement recites that the object of defendant in taking the option and lease was to open the premises for one of its customers for the sale of his goods, and that the complainant desired to establish himself in the premises as a customer of defendant for the purpose of opening a saloon and selling the goods of defendant. The covenant which is to be inserted in the lease of the premises is, that complainant is to use and sell exclusively the goods manufactured by defendant, except those imported outside of the United States. Taking the whole agreement, its covenants clearly relates to the exclusive use and sale on the leased premises of defendant's goods for the term of the lease (five years) and is to that extent a covenant restricting the use of the lands leased and is in equity attached to the lands of the lessor."

Reference is made to the case of Manchester Brewery Co. vs. Coombs, 2 Ch. Div. 608-612 (1901), which held that a covenant by the lessee to buy beer of the lessors and their successors in business was held to be a covenant running with the land.

We also refer to the case of Myers v. Steel Machine Co., 67 N. J. Eq. 1 Robb. 300. It was there held that "When a contract requires the defendant to do for the complainants, exclusively, some act calling for the exercise of skill or artistic capacity, equity will enforce the negative side of the agreement and will restrain the defendant from giving his services to any other than the complainants for whom he agreed to work, but it will not make a mandatory decree to compel the defendant to exercise his skill in specifically performing the contract."

In the case of Taylor Iron and Steel Co. v. Nichols, 61 Atl. Rep. 946, Vice Chancellor Bergen, in his opinion, referred to the case of Lumley v. Wagner, Supra.

See Errinton v. Aynesley, 2 Bro. Ch. Cas. 343.
Montague v. Flockton, 16 Eng. Eq. 189.

In the case of Whitwood Chemical Company v. Hardman, 2 Ch. Div. 1891, 416, the Vice Chancellor, commenting upon the Lumley-Wagner case, allowed the injunction restraining defendant from giving less than his whole time to one with whom he had contracted so to do. The contract then considered contained no negative covenant. On appeal from his decree on review, it was sustained, the Court saying: "I cannot read the decision of Mallins, V. C., without seeing that he was under the impression that Lord St. Leonards in Lumley v. Wagner would have granted the injunction even if a negative clause had not been in the contract. This was a mistake. Lord St. Leonards was very clear and explicit on that subject. He said distinctly he would not have done it in the absence of that clause." In Taylor Steel Company case an injunction issued.

We therefore respectfully insist that the injury is a continuing one, and that if the remedy be at law, a series of suits would have to be instituted for a period of five years. That it would be most difficult to prove the continued character of this injury.

We therefore submit that the decree of the Court of Chancery should be affirmed.

Respectfully submitted.

JOHNSON & BEASLEY,

Solicitors and of Counsel with Complainant and Appellee.

New Jersey Court of Errors and Appeals.

BETWEEN—	
CHRISTIAN FEIGENSPAN, A CORPORATION, *Complainant.*	*On Appeal From Chancery.*
AND	
JOSEPH NIZOLEK, *Defendant.*	

On Petition of the Defendant, Joseph Nezolek.

In Chancery of New Jersey.

To the HON. WILLIAM J. MAGIE,
Chancellor of the State of New Jersey.

I. Humbly complaining showeth unto your Honor, your orator, CHRISTIAN FEIGENSPAN, a corporation, duly incorporated under and by virtue of the laws of the State of New Jersey, with its principal office in the City of Newark, in the County of Essex, and State of New Jersey; that on or about the sixteenth day of August, 1905, one JOSEPH NIZOLEK, of the City of Elizabeth, in the

County of Union, and State of New Jersey, was about to purchase from one, FREDERICK SCHWITZGABEL, a certain premises in the City of Elizabeth, known as Number Seventy-three Florida Street, and also the saloon business then being carried on upon the said premises, and in order to enable him to pay the price agreed upon for the purchase of said premises and saloon business, and to obtain a working capital for said business the said JOSEPH NIZOLEK applied to your orator and asked your orator to loan him the sum of Four thousand eight hundred dollars ($4,800) in cash.

2. And your orator further shows that your orator was then and now is and for a number of years last past, has been engaged in the business of brewing and manufacturing and of selling at wholesale, ales, lager beer, porter and malt liquors generally; that your orator stated to the said JOSEPH NIZOLEK, that your orator did not make a business of loaning money for investment, and that if your orator loaned to him this amount of money, while your orator would require security for the payment of the same, and also the payment of interest thereof, the real reason, inducement and consideration of the loan would be that your orator would thereby secure him as a customer for the purchase of their products, namely, ale, beer, porter and malt liquors generally, and the said JOSEPH NIZOLEK stated to your orator that if your orator would loan him this amount of money and thereby enable him to purchase said business and said premises and to carry on and conduct the same, he, the said JOSEPH NIZOLEK would agree to buy and sell upon said premises, for the period of five years, only ale, larger beer and porter manufactured and brewed by your orator and sold to him by your orator, and would not sell or offer for sale in the saloon upon the said premises for said period of five years, any ale, lager beer or porter except that manufactured by your orator, CHRISTIAN FEIGENSPAN.

3. And your orator further shows that thereupon and in consequence of said agreement of said JOSEPH NIZOLEK with your orator, and on the said sixteenth day of August, Nineteen hundred and five, your orator loaned

and paid to the said JOSEPH NIZOLEK, the sum of Four thousand eight hundred dollars ($4,800), and the said JOSEPH NIZOLEK executed and delivered to your orator a mortgage upon the said premises, number Seventy-three Florida Street, in the said City of Elizabeth, bearing date the day and year last aforesaid, conditioned for the payment of the sum of Four thousand eight hundred dollars ($4,800) in one year from the date thereof, with interest at the rate of six per cent. per annum, and also at the same time executed and delivered to your orator, under his hand and seal, a certain agreement, in writing, in words following, that is to say:

"Know all men by these presents, that I, JOSEPH NIZOLEK, of the City of Elizabeth, County of Union and State of New Jersey, in consideration of the sum of One Dollar, and other valuable considerations, do hereby agree to purchase from CHRISTIAN FEIGENSPAN, a corporation, all ales, lager beer and porter, as sold in my saloon at No. 73 Florida Street, in the City of Elizabeth, New Jersey, for the period of five years.

"And I further agree that I will not sell or offer for sale any ale, lager beer or porter, in my saloon at Number Seventy-three Florida Street, in the City of Elizabeth, New Jersey, except that manufactured by the said CHRISTIAN FEIGENSPAN, for the same period as mentioned above, and it is further understood that this agreement is to bind the successor or successors of the said party of the first part in the purchase of said property for said saloon business; and the said party of the first part agrees not to dispose of said saloon business, unless his purchaser shall sign the above stipulation relative to the sale of the beers, ales and porter of the said party of the second part exclusively.

"IN WITNESS WHEREOF, I have hereunto set my hand and seal, this sixteenth day of August, 1905.

Signed, sealed and delivered in the presence of } JOSEPH NIZOLEK." [SEAL]
ABRAM H. CORNISH.

To which said agreement, now here in the possession of your orator, ready to be produced, your orator begs leave to refer if it be necessary so to do.

4. And your orator further shows that the said JOSEPH NIZOLEK, purchased the said premises and saloon business from the said FREDERICK SCHWITZGABEL, using therefor the money borrowed from your orator as aforesaid, and took possession of the same and since that time has been and now is conducting and carrying on the saloon business in said city under a license fully issued to him by the proper authorities of the City of Elizabeth.

5. And your orator further shows that immediately after taking possession and commencing to carry on said business, the said JOSEPH NIZOLEK commenced to purchase all of his ales, lager beer and porter from your orator, agreeing with your orator to pay it the sum of Eight dollars ($8) per barrel for beer, and Seven dollars ($7) per barrel for ale. And your orator agreed to allow him a certain cash discount at the rate of Two dollars ($2) per barrel for beer, and One dollar and twenty-five cents ($1.25) per barrel for ale on cash payments, making the net figures Six dollars ($6) per barrel for beer, and Five dollars and seventy-five cents $(5.75) per barrel for ale.

6. And your orator further shows that the said JOSEPH NIZOLEK continued this only for a very short time, about three and one-half weeks; that shortly afterwards and on or about the Seventh day of September, 1905, the said JOSEPH NIZOLEK ceased purchasing any ales, lager beer or porter whatsoever from your orator, and absolutely refused to purchase or take any more of said goods from your orator, notwithstanding his said agreement with your orator, and commenced to purchase all his ales, porter and lager beer from other brewers and manufacturers, and your orator shows and expressly charges and insists that since the Seventh day of September, 1905, the said JOSEPH NIZOLEK has not purchased any ales, lager beer or porter from your orator, but has absolutely refused so to do, and since that date has purchased and now is purchasing all of his said ales, lager

beer and porter from other persons or corporations in violation of his said greement with your orator.

7. And your orator shows that the said mortgage still remains unpaid, and that the whole amount of money secured thereby is still unpaid and owing to your orator, although by the terms of the said mortgage it is not payable to your orator until the sixteenth day of August, 1906.

8. And your orator further shows that your orator has always been willing and now is willing and ready to supply and sell to the said JOSEPH NIZOLEK all the ales, porter and lager beer that he may require or need in his said business, at the agreed price as above set forth, and has repeatedly, since the refusal by the said NIZOLEK to take and purchase ales, lager beer and porter from your orator, offered to sell him all that he may require thereof for his business at the price and upon the terms agreed upon as above set forth and to allow him the agreed discount for cash as above set forth.

9. And your orator further shows that the said JOSEPH NIZOLEK has deliberately violated and broken the said agreement with your orator, and that your orator is greatly and irreparably damaged thereby and suffers great loss and injury by reason of the failure and refusal of the said JOSEPH NIZOLEK to keep and perform his part of the said agreement; that the said JOSEPH NIZOLEK sells large quantities of lager beer, ales and porter every day and week in his said saloon, and that by reason of his failure, and refusal to keep his said agreement with your orator, your orator is deprived of the sale to him, said NIZOLEK, of this amount of your orator's manufactured products, and loses the profits that your orator would otherwise receive and make therefrom, and that your orator is thereby deprived of the real consideration and inducement for the loaning to the said JOSEPH NIZOLEK, of the sum of Four thousand eight hundred dollars ($4,800).

IN TENDER CONSIDERATION WHEREOF, and for as much as your orator is without remedy under and by virtue of the strict rules of the Common Law, and can

only have adequate relief in this Honorable Court where matters of this nature are particularly cognizable and relievable.

To the end therefore that the said Joseph Nizolek, the defendant herein, may without oath, full, true and perfect answer make to all and singular the premises, and that he may be decreed to perform and fulfill in all things his said agreement with your orator, and that he may be restrained and enjoined from selling in his said saloon, number Seventy-three Florida Street, for said period of five years, any ale, lager beer or porter except that brewed and manufactured and sold to him by your orator, and that he may be restrained and enjoined during said period of five years from purchasing any ale, lager beer or porter from any person or corporation whatsoever than your orator, for the purpose of selling the same in the said saloon, Number Seventy-three Florida Street, in said City of Elizabeth; and that your orator may have such other and further relief as the nature of the case may require, and as shall be agreeable to equity and good conscience.

May it please your Honor, the premises considered, to grant to your orator not only the States Writ of Injunction issuing out of and under the seal of this Honorable Court, to be directed to the said defendant, Joseph Nizolek, his agents, servants, employees and attorneys, restraining them and each of them from selling or offering for sale in said saloon, Number Seventy-three Florida Street, in said City of Elizabeth, during the period of said agreement, namely, the period of five years from the date thereof, any ales, lager beer or porter other than that brewed and manufactured and sold to him by your orator, and from purchasing from any other person or corporation than your orator, any ales, lager beer or porter for the purpose of selling the same in the said saloon during the period of said agreement, namely, five years from the date thereof, but also the States Writ of Subpoena issuing out of and under the seal of this Honorable Court to be directed to the said Joseph Nizolek, commanding him by a certain day, and under a certain penalty therein

to be expressed, to be and appear before your Honor in this Honorable Court, and then and there to answer all and singular the said premises and to stand to, abide by and perform such order and decree therein as to your Honor shall seem meet and shall be agreeable to equity and good conscience.

And you orator as in duty bound will ever pray, etc.

JOHNSON, BOGGS & MERSFELDER,
Solicitors for and of Counsel with Complainant.

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

CHRISTIAN W. STENGEL, being duly sworn on his oath says, that he is the President of the CHRISTIAN FEIGENSPAN, a corporation, duly incorporated under the laws of the State of New Jersey; that he has read the bill of complaint attached hereto, and that the matters and things therein set forth are true to the best of his knowledge and belief;

That the said Corporation has its principal office and brewery in the City of Newark, New Jersey, that its principal business is the brewing and selling of ales, lager beer, porter and malt liquors generally; that NEWTON SOUTHERLAND is the general bookkeeper of said corporation and has especial charge of the matter of loans to customers, and that JOSEPH PLOESER is the selling agent and collector for said corporation for Union County, New Jersey; that the said corporation does not loan or advance money as an investment of funds for the sake of the interest earned, but does often advance and loan money to customers or prospective customers to aid them in their business, the purpose, consideration and inducement for such loans being to secure customers for its manufactures for ales, lager beer and porters; that he was consulted about the loan to said JOSEPH NIZOLEK, and approved of the same provided NIZOLEK would execute

the agreement set forth in the Bill of Complaint, that the inducement and consideration for said loan to said NIZOLEK was the agreement executed by said NIZOLEK to purchase all his lager beer, ales and porter for five years from CHRISTIAN FEIGENSPAN, deponent believing it wise to make this loan of the money of the Company, if thereby said JOSEPH NIZOLEK could be secured as a customer of the company for five years

Sworn and subscribed to before me, this 16th day of November, 1905. } C. STENGEL.

ANTHONY G. KROEHL, JR.,
Notary Public, N. J.

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

JOSEPH PLOESER, of full age, being duly sworn on his oath says, that he is the agent and collector of CHRISTIAN FEIGENSPAN, for the County of Union; that JOSEPH NIZOLEK, of the City of Elizabeth, first applied to deponent for a loan from CHRISTIAN FEIGENSPAN to enable him to purchase from FREDERICK SCHWITZGABEL the saloon and premises No. 73 Florida Street, Elizabeth; and deponent referred him to the main office of CHRISTIAN FEIGENSPAN at Newark, New Jersey.

That said premises and saloon were purchased from said SCHWITZGABEL by NIZOLEK on or about August sixteenth, 1905; and said NIZOLEK then took possession of said premises and saloon, and since that time has been and now is conducting and carrying on the saloon business upon said premises; that until September seventh, 1905, he regularly purchased all the ale, lager beer and porter sold and offered for sale on said premises, from CHRISTIAN FEIGENSPAN, buying the same through deponent, at and for the price named in the Bill of Complaint, attached hereto, namely Eight dollars per barrel for beer, and Seven dollars per barrel for ale, and was regularly

allowed upon all his purchases a cash discount, at the rate of Two dollars per barrel for beer, and One dollar and twenty-five cents per barrel for ale, making the net cost per barrel for beer, Six dollars, and for ale, Five dollars and seventy-five cents, and that deponent as agent for CHRISTIAN FEIGENSPAN agreed with NIZOLEK to sell him ale and lager beer at these prices, at the time the agreement set forth in said bill was executed.

That about the Seventh day of September, A. D., 1905, NIZOLEK stopped buying ale and lager from CHRISTIAN FEIGENSPAN, and commenced to buy all his lager beer and ale from some other brewery, and since September 7, 1905, said NIZOLEK has not purchased any lager beer or ale whatever from CHRISTIAN FEIGENSPAN, but has repeatedly refused to deponent to purchase any lager beer or ale from said CHRISTIAN FEIGENSPAN; that since September 7, deponent has repeatedly seen said NIZOLEK, at his said saloon and has offered to sell him all the lager beer and ale he might need or require at the several prices above named, and to allow him the discounts above stated, but said NIZOLEK has always and uniformly refused to purchase from him or from said CHRISTIAN FEIGENSPAN, and stated to deponent, that he would not purchase any more ale or lager beer from CHRISTIAN FEIGENSPAN, notwithstanding his said agreement with them, as he could get his lager beer and ale from an Elizabeth brewer at lower prices; and deponent says that said NIZOLEK now is and has been since said September 7, 1905, selling and offering for sale each and every day, large quantities of lager beer and ale upon said premises, No. 73 Florida Street, Elizabeth, not manufactured or brewed by CHRISTIAN FEIGENSPAN, and is daily violating his said agreement with CHRISTIAN FEIGENSPAN. And deponent says that said JOSEPH NIZOLEK is a large customer and that his trade is very valuable; that he sells about thirty half barrels of lager beer and about six half barrels of ale per week, in his said saloon, No. 73 Florida Street, Elizabeth. And deponent says that he has read the Bill of Complaint hereto annexed, and that the matters and things therein set forth, in so far as they are of

his knowledge, are true.

JOSEPH PLOESER.

Sworn and subscribed to before me, this
23rd day of November, A. D., 1905.

ABE J. DAVID,
Master in Chancery of New Jersey.

IN CHANCERY OF NEW JERSEY.

BETWEEN

CHRISTIAN FEIGENSPAN,
A CORPORATION,
Complainant.

AND

JOSEPH NIZOLEK,
Defendant.

On Bill, Etc.
Answer.

The ANSWER *of* JOSEPH NIZOLEK, to the bill of complaint of CHRISTIAN FEIGENSPAN, a corporation, complainant:

1. This defendant admits that on the sixteenth day of August, Nineteen hundred and five, he purchased the premises No. 73 Florida Street, in the City of Elizabeth, N. J., and that in order to enable him to purchase the said premises and the saloon business conducted therein he borrowed from the complainant the sum of Forty-eight hundred ($4,800) dollars.

2. Defendant admits that he was asked by the complainant if he would sell their beer if they loaned him the money and give security for the same, and also pay itnerest to complainant on the amount of money loaned, to all of which this defendant agreed; but this defendant DENIES that he was told that the inducement and real consideration of the loan would be an agreement from defendant to sell the beer, ale, porter and malt liquors of the complainant for a period of five years, and defendant further denies that he agreed to sell the aforesaid products of said brewery in consideration of their making said loan for a period of five years, or that he agreed not to sell or offer for sale in the said saloon for a period of five years, the manufactured product of any other brewery.

3. This defendant admits that on the sixteenth day of August, Nineteen hundred and five, the complainant loaned to him the sum of Forty-eight hundred dollars, and that he executed and delivered to the complainant a bond and a mortgage covering the premises at No. 73 Florida Street, Elizabeth, N. J., bearing date the day and year last aforesaid, conditioned for the payment of the money herein mentioned in one year from the date of said instruments, with interest at the rate of six per cent. per annum, but defendant DENIES that he at the same time delivered and signed any such agreement as is set forth in the bill of complaint in this cause, and says that he did not sign said agreement on that day, and that he refused to sign the same when it was handed to him at the office of the Fidelity Title and Trust Company, in its office in Elizabeth, N. J., because he says it was not a part of his understanding or agreement with the complainant; that he cannot read or write English, and that he therefore had Louis A. Graff, an attorney of this State, read all the papers that were handed him for his signature on the said Sixteenth day of August, 1905, and that when the contents of the aforesaid agreement were read and explained to him that he immediately refused to sign the same; that he did not sign the same at any subsequent date unless his signature was obtained by fraud and mis-

representation because he cannot read the English language, and that said agreement was positively not a part of his understanding with said brewery.

And this defendant for a further answer says that he did on the same day, viz.: Sixteenth day of August, 1905, sign and execute a chattel mortgage to said complainant for the sum of Forty-eight hundred dollars, a certified copy of which is annexed to this his answer and made a part thereof, and to which this defendant refers this Honorable Court for greater certainty and which is recorded in Book 58 of Chattel Mortgages for Union County, on page 561, and the affidavit to which was not sworn to at the time the mortgage was recorded, and which mortgage was subsequently recorded with said affidavit sworn to and which appears by record in book 59 of Chattel Mortgages on page 74 of said county aforesaid, which books containing the record of said chattel mortgage this defendant is ready to produce in this court; that the only agreements and security which he agreed to give for the loan of said money are the two mortgages just referred to and the bond accompanying the real estate mortgage, and that these documents were executed on the sixteenth day of August, 1905, and no other, and that the transaction between him and said corporation complainant was closed on that day on the understanding as represented by and in said documents.

4. It is true that the defendant used the Forty-eight hundred dollars he received from complainant together with monies of his own wherewith to purchase the said saloon and premises, and that he took possession thereof and is still in possession of said saloon and business and of said property.

5. It is true also that after he took possession of said premises and business that he purchased from the said complainant, ales, lager beer and porter.

6. This defendant further answering says that he admits that he continued to sell the products of said complainant until about the Seventh day of September, 1905, when he discontinued his purchases from them and purchased his beers, ales and porters from other brewers;

and that he has not purchased any beers, ales or porters from the complainants since that time, and that he discontinued his purchasing beers and ales and porters from said complainant because he found it to his advantage so to do, and that it was more advantageous for him to purchase from other brewers, and that it was more satisfactory to his customers and that the change of beers and ales and porters would net him larger gains and earnings if he purchased from a brewery other than that of the complainant; that he considered it no violation of any agreement that he had made with the brewery who is the complainant in this cause so long as he would re-pay to them the amount of money he had borrowed from them, and he therefore on the same day that he discontinued the use of said beers, ales and porters of complainant, or within a reasonable time thereafter, offered and tendered the amount of the money due to said complainants and that he received no reply from them, and that they refused to accept the amount due to them from this defendant. Defendant further answering says that he is ready and willing to pay to the complainants what is due to them together with interest thereon as agreed between them, and he hereby and at this time requests that the defendant be ordered by this Honorable Court to receive the amount that this Honorable Court may find is justly due and owing to the said complainant.

7. It is admitted that the mortgages are still unpaid and that the whole amount represented by said mortgages is still due to the complainant.

8. It is also true that complainant has since the day when defendant discontinued the sale of its beers, ales, and porters, offered its products for sale to this defendant at the same prices he had paid for the same theretofore.

9. Defendant DENIES that he has violated and broken the agreement set forth in the bill of complaint and that he never entered into any such agreement, and that the agreement set forth in the bill of complaint was not a part of his arrangement with the complainant, and that the first time he heard of any such agreement was when it was handed to him for his signature on August

16th, 1905, at the office of the Fidelity Trust Company.

And this defendant humbly prays that he be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

ALFRED A. STEIN,
Solicitor of Defendant.

J. A. KIERNAN,
Of Counsel with Defendant.

JOSEPH NIZOLEK,
TO
CHRISTIAN FEIGENSPAN,
A CORPORATION.

Know all men by these presents, That I, JOSEPH NIZOLEK, of the City of Elizabeth, Union County, New Jersey, party of the first part, hereinafter called mortgagor, being justly indebted unto CHRISTIAN FEIGENSPAN, a corporation, with its principal office in the City of Newark, Essex County, New Jersey, party of the second part, hereinafter called mortgagee, in the sum of Forty-eight hundred dollars, which with interest the mortgagor promises and agrees to pay to the mortgagee, one day after date.

Now in consideration of One dollar to the mortgagor paid by the mortgagee, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and for securing the said debt with interest, and for the performance of the covenants herein mentioned, does hereby grant, bargain and sell, unto the said mortgagee, its successors and assigns, all the following goods, chattels and fixtures particularly mentioned in the schedule hereto annexed and now in, about and upon the premises known as No. 73 Florida Street, in the City of Elizabeth aforesaid, Union County, New Jersey, and all other goods, chattels, stock in trade and fixtures now in, about or upon the aforesaid premises belonging or

appertaining to the saloon, restaurant or hotel business therein carried on, as well as those hereafter placed therein or thereon, in lieu thereof or added thereto, excepting, however, any household goods and furniture in the use and possession of the family, to have and to hold the said goods, chattels, and fixtures above granted, bargained and sold or intended so to be, unto the mortgagee, its successors and assigns forever.

The mortgagor for himself, his heirs, executors, and administrators, the said goods, chattels and fixtures above granted, bargained and sold, unto the mortgagee, its successors and assigns against the mortgagor and against all and every person or persons whomsoever shall and will warrant and forever defend, upon condition that if the mortgagor shall pay unto the said mortgagee, its successors and assigns Forty-eight hundred dollars within one day from the date hereof, with interest as evidenced by a certain promissory note bearing even date herewith, whereby the mortgagor promises to pay the said mortgagee within one day after date the said sum with interest at six per cent. for value received in words and figures as follows:

ELIZABETH, N. J., August 16, 1905.

One day after date I promise to pay to the order of CHRISTIAN FEIGENSPAN, a corporation, Forty-eight hundred dollars at the principal office, of said CHRISTIAN FEIGENSPAN, Newark, New Jersey, with interest from date.

Value received, $4,800.00.

JOSEPH NIZOLEK,

And upon the further condition that the said mortgagor will not sell or offer for sale any Ale, Porter, Lager Beer, Birch Beer or Bottled goods in said Saloon, Restaurant or Hotel, except that brewed, manufactured and sold by the mortgagee, and further that said mortgagor will allow all discounts he may be entitled to on purchases from the mortgagee to remain in its hands and be credited, on the amount due the said mortgagee for

goods sold and delivered to said mortgagor shall be added to the amount due on said note, and this mortgage stands as security therefor, and upon the further condition that said mortgagor shall keep all of the covenants on his part herein contained then these presents shall be void.

And it is agreed that the mortgagor will keep the goods, chattels and fixtures herein set forth insured against loss and damage by fire by insurers and in an amount approved by and assign the policy and certificate thereof to the mortgagee and in default thereof, said mortgagee may effect such insurance and the premiums paid therefor shall be an additional lien on said mortgaged goods, chattels and fixtures, and secured by these presents and payable on demand with legal interest.

And said mortgagor for himself, his heirs, executors, administrators and assigns, covenants and agrees to and with the mortgagee, its successors and assigns, that in case default shall be made in the payment of the said sum above mentioned or any part thereof, or in case the said goods, chattels and fixtures or any of them be removed or attempted to be removed at any time before the day of payment herein provided for, from the place where the same now are or in case said goods, chattels and fixtures or any part thereof, shall be seized or levied upon under distress or process (which shall be deemed *ipso facto* a demand of payment by the mortgagee) or permit or suffer any judgment to be entered up against said mortgagor *or if said mortgagor shall sell, or offer for sale any ale, porter, lager beer, birch beer, or bottled goods in said premises except that manufactured and sold by the said mortgagee or if said mortgagor fails or refuses to allow all discounts* he may be entitled to on purchases from said mortgagee to remain in its hands and to be credited on the amount due on said note, or if the said mortgagor fails or refuses to allow or permit the said mortgagee to add to the said note the amount which may be due to said mortgagee, for goods sold and delivered by it, during the existence of this mortgage to said mortgagor and not paid for by him or if said mortgagor fails or refuses to keep and perform all the covenants herein

contained, or if said mortgagee shall at any time deem the above mentioned indebtedness or the security herein provided therefor unsafe or at any risk then the said sum of money herein mentioned shall become instantly due and payable without any demand for payment thereof, being made, and *then it shall and may be lawful for and the mortgagor hereby authorizes and empowers the mortgagee, its successors and assigns with the aid and assistance of any person or pesrons to enter the saloon, dwelling house, store and other premises of the mortgagor and such other place or places whatsoever in which the said goods, chattels and fixtures or any of them are or may be placed and take exclusive possession thereof, and either to sell them at public or private sale either in bulk or parcels upon the premises mentioned or such other place, as it may designate or to take and carry away the said goods, chattels and fixtures, and to sell and dispose of the same at such other place as the mortgagee may designate at public or private sale, either in bulk or in parcels for the best price that can be obtained, and out of the money arising therefrom to retain and pay the said sums above mentioned with interest and all charges touching the same, and the keeping and sales thereof, rendering the overplus (if any) unto the mortgagee, his executors, administrators or assigns; and the mortgagor hereby stipulates* to be bound by the result of such sales, and if from any cause said property shall fail to satisfy the said sums of money due as aforesaid together with interest, costs and charges, the mortgagor for himself, his heirs, executors, administrator, covenants and agrees to pay the deficiency.

And it is agreed that such sale by the mortgagee as is hereby provided for, or any breach of the covenants herein contained shall forever foreclose the equity of redemption of the mortgagor in said goods, chattels and fixtures, and shall vest in the purchaser an absolute indefeasible title thereto, and the said mortgagor hereby covenants at all times to warrant and defend such title and to execute papers as may be necessary to perfect the same whenever requested so to do, and in case of default

in the payment of said sums above mentioned or a breach of any covenants herein contained the mortgagor will surrender or cause to be surrendered to said mortgagee or any person or persons whom it may designate the proper writing purporting to be the municipal license granted for the aforesaid premises waiving and releasing all right, title, interest and claim for the mortgagor in and to said license and the renewals thereof in favor of said mortgagee and its assigns or the persons designated by the mortgagee, and he does hereby request the court, council or board authorized to transfer said license to transfer the same on application of the mortgagee.

And until default in the payment of any said sums of money or breach of any of the covenants or agreements herein contained the mortgagor to remain in possession of the aforesaid goods, chattels and fixtures.

In Witness Whereof, the mortgagor has hereunto set his hand and seal this Sixteenth day of August, One thousand nine hundred and five.

Joseph Nizolek, [L. S.]

Signed, sealed and delivered in the presence of

Louis A. Graff.

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

Newton Southerland, being duly sworn on his oath, says that he is the agent of the mortgagee in the aforegoing mortgage named, that the true consideration of the said mortgage is as follows, viz.: The sum of Forty-eight hundred dollars, for money loaned by the said mortgagee to the said mortgagor at his request on the Sixteenth day of August, 1905. The deponent further says that there is due on said mortgage the sum of Forty-eight hundred dollars, besides lawful interest thereon from the Sixteenth day of August, 1905.

Sworn and subscribed to this
Sixteenth day of August, 1905.

SCHEDULE.

The following is the schedule referred to in the foregoing mortgage: One sideboard, one bar and back-bar, one four-tap pressure outfit with cooler and all connections, one stove, four round tables, sixteen chairs, one safe, one clock, gas fixtures, all window shades, all screens, one cash register, one pair summer doors, stock of wines, liquors and cigars, and all goods and chattels now in said premises used in carrying on the saloon business.

Witness.

STATE OF NEW JERSEY, }
COUNTY OF UNION. } *ss.*

NIZOLEK, being duly sworn on his oath, says that he is the owner and in possession of the goods, chattels and fixtures mentioned in the above chattel mortgage, and he has exclusive right and lawful authority to mortgage the same; that each and every part and article of said property is now free and clear of and from any and all mortgages and other liens of whatever nature and description except —. That there are no judgments against deponent the money mentioned in and intended to be secured by the foregoing mortgage.

JOSEPH NIZOLEK,

Sworn to before me this Sixteenth day of August, 1905.

L. A. GRAFF,
M. C. C. of N. J.

STATE OF NEW JERSEY, }
COUNTY OF UNION. } *ss.*

Be it remembered that on the Sixteenth day of August, One thousand nine hundred and five, before me, the subscriber, a Master in Chancery of N. J., personally appeared JOSEPH NIZOLEK, who I am satisfied is the mortgagor in the within mortgage named and who executed the same, and I having first made known to him the contents thereof he did thereupon acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

L. A. GRAFF,
M. C. C. of N. J.

Rec. Aug. 17, 1905, at 9.14 A. M. No. 693.

STATE OF NEW JERSEY, }
COUNTY OF UNION. } *ss.*

JOSEPH NIZOLEK, of full age, being duly sworn on his oath, deposes and says, that he is the defendant in the above stated cause; and that he cannot read or write the English language; and that the bill of complaint and the affidavits thereto attached of CHRISTIAN W. STENGEL, NEWTON SOUTHERLAND and JOSEPH PLOESER, were read to him; and deponent says that it is true that he borrowed from CHRISTIAN FEIGENSPAN, a corporation, the sum of Forty-eight hundred dollars, wherewith to purchase the premises at 73 Florida Street, in the City of Elizabeth, New Jersey, together with the saloon or business therein at that time conducted by FREDERICK SCHWITZGABEL; and that he agreed to give to the CHRISTIAN FEIGENSPAN BREWERY COMPANY for the loan of the said sum of money, a bond and mortgage covering said premises and to execute a chattel mortgage as a further security for the loan of said money, covering the saloon or business;

which chattel mortgage was to be based upon a note due and payable one day after date; and the mortgage covering the real estate was to be payable in one year from its date, together with six per cent. interest; and this deponent further says that at the time he purchased said premises the FEIGENSPAN BREWERY was selling its beer and manufactured products to the then proprietor and owner of the premises, FREDERICK SCHWITZGABEL; and that it was in that way that he chanced to go with MR. SCHWITZGABEL to the office of the said brewery to make application for the aforesaid loan of Forty-eight hundred dollars; and that he did agree to continue to sell the beers, ales and porters manufactured by CHRISTIAN FEIGENSPAN, a corporation, as long as he shall remain indebted to them in the sum of Forty-eight hundred dollars and there was positively no agreement as to the time between him and the aforesaid brewery, within which he shall continue to sell their manufactured products, except as aforesaid, and as expressed in the chattel mortgage, which he executed to said brewery on the Sixteenth day of August, Nineteen hundred and five.

And this deponent further says that on the Sixteenth day of August, Nineteen hundred and five, deponent and his wife, FREDERICK SCHWITZGABEL and his wife, LOUIS A. GRAFF, an attorney at law of this State, and ALBERT BENDER, were all in the office of the Fidelity Trust Company, in the Union County Trust Company's building, at Elizabeth, New Jersey, where they had gathered for the purpose of closing the title, which was to be passed from SCHWITZGABEL to this deponent for the premises at No. 73 Florida Street, Elizabeth, aforesaid; and for the transfer of said saloon business conducted therein; that said LOUIS A. GRAFF was there representing this deponent and that ALBERT BENDER was present in the interest of the Insurance Company, which he represents; that ARBAM H. CORNISH was present, acting for the Fidelity Trust Company; that the various papers which were to be signed were handed to MR. GRAFF for his inspection as attorney of this deponent; and that this deponent executed a bond and mortgage, together with his wife to

CHRISTIAN FEIGENSPAN, as set forth in the bill of complaint and also the chattel mortgage herein referred to, but which is not set forth in said bill of complaint; that a paper was handed him for his signature; and which had been previously read by GRAFF, and which MR. GRAFF explained to him to be an agreement, which if signed would oblige him to sell the beers, ales and manufactured products of CHRISTIAN FEIGENSPAN, a corporation, for a specified period of five years, regardless of whether he was then indebted or obligated to said corporation, and whether he repaid said loan of Forty-eight hundred dollars within five years or not; this deponent then and there refused to sign any such agreement because it was beyond the understanding he had had with the company; and this deponent further says that he did not sign any such agreement as set forth in the bill of complaint in this cause, and that while deponent and the other persons herein mentioned were still in the office of the Fidelity Trust Company, ABRAM H. CORNISH went to the telephone and called up the office of the CHRISTIAN FEIGENSPAN BREWERY, in order to receive further instructions because of the refusal of this deponent to sign said agreement; and that subsequently, when said CORNISH returned from the telephone, the transaction was closed without said agreement having been signed and without the signature of this deponent to any document affecting the sales of beer, except the chattel mortgage herein referred to; this deponent further says that FREDERICK SCHWITZGABEL and LOUIS SCHWITZGABEL received the purchase price or consideration money for said premises and for said business from ABRAM H. CORNISH, and then and there; that Messrs. GRAFF, BENDER, SCHWITZGABEL, this deponent, MRS. SCHWITZGABEL and this deponent's wife, then left said office; this deponent further says that he absolutely refused to sign such an agreement and that the transaction was closed without any such agreement having been signed by him.

This deponent further says that it was because of his inability to read and write the English language, that he took the precaution to have LOUIS GRAFF read all papers

took the precaution to have LOUIS A. GRAFF read all papers to which his signature was requested; and that it was not the understanding or agreement between deponent and CHRISTIAN FEIGENSPAN, a corporation, brewers, that he should execute an agreement to sell their beers, ales, etc., for a period of five years, in consideration of their advancing to him the sum of Forty-eight hundred dollars, as represented by the mortgage on his real estate and the aforesaid chattel mortgage on his business; and this deponent further says that the full consideration or purchase price of said business and property was the sum of Sixty-eight hundred dollars, and that he is prepared and ready and willing to pay off his aforesaid obligation to the said CHRISTIAN FEIGENSPAN, together with the interest for one year, and has been willing so to do since the Seventh day of September, Nineteen hundred and five, and that he has made that fact known to JOSEPH PLOESER, the agent of the aforesaid brewery, at divers times, when the said PLOESER called upon him at his place of business; and this deponent denies that he agreed with NEWTON SOUTHERLAND, to execute an agreement to sell the manufactured products of CHRISTIAN FEIGENSPAN, for a period of five years or any other fixed period. And deponent further says that he discontinued purchasing beer from the FEIGENSPAN BREWERY because his customers were a somewhat different class of persons than those of SCHWITZGABEL'S, and that they asked for other beer, and he had to change to retain his custom and further because he could purchase the beer they wanted for less money per barrel than he was paying FEIGENSPAN.

Deponent further says that said agreement was not signed on Sixteenth day of August, Nineteen hundred and five, and that he did not sign any such agreement subsequent to that date, and that it is not signed by him unless his signature was obtained since August Sixteenth, Nineteen hundred and five, by misrepresentation and fraud, since he cannot read the English language.

JOSEPH NIZOLEK.

Sworn and subscribed to before
me this 9th day of December, 1905.

EDWARD W. DOYLE,
Notary Public of New Jersey.

STATE OF NEW JERSEY
COUNTY OF UNION. } *ss.*

MARY NIZOLEK, of full age, being duly sworn on her oath, deposes and says: that she is the wife of JOSEPH NIZOLEK; and that she was present at the office of the Fidelity Title and Trust Company, in Elizabeth, when her husband finally closed the sale of the property on Florida Street with FREDERICK SCHWITZGABEL; that she does not understand English very well and that she did not know all that was said at the time, but she recalls that her husband objected to the signing of a certain paper that was produced and that he said that that was not his agreement; she asked him afterwards what the paper was that he objected to signing and she then learned what its terms were from him; deponent further says that MR. GRAFF was her husband's attorney and that he read all the papers to him and explained what they meant at that time; further deponent says that her husband cannot read or write the English language and that she positively knows that the paper her husband objected to signing was not signed at the time that the sale of the property and the business was closed and that the whole transaction was closed and that she and her husband, the SCHWITZGABEL'S, MR. GRAFF and MR. BENDER left the Fidelity Trust Co.'s office without her husband signing the objectionable paper.

Sworn and subscribed to before
me this 9th day of December, 1905.

MARY NIZOLEK.

EDWARD W. DOYLE,
Notary Public of New Jersey.

24 G

In Chancery of New Jersey

BETWEEN CHRISTIAN FEIGENSPAN, A CORPORATION, *Complainant.* AND JOSEPH NIZOLEK, *Defendant.*	*Amendment to Answer.*

And this defendant, by way of cross-bill, and in addition to his answer heretofore filed in this cause, exhibited against the complainant, says, that prior to the filing of the bill in this cause he offered to pay the amount due to the complainant, on the bond and mortgage referred to in said bill of complaint, and was anxious and willing at all times thereafter to pay the same, but was unable to make arrangements with the complainant in order to do so, and the defendant says that the sum of Forty-eight hundred dollars due said complainant on the bond and mortgage mentioned and referred to in the complainant's bill of complaint, was also secured by a chattel mortgage, referred to in the answer heretofore filed in this cause, and a promissory note, both payable one day after date, and that all of said papers and documents were part and parcel of one transaction, and that the conditions and agreements therein contained, ceased and became void upon tender and payment of the money secured thereby. And the defendant further says that on the Twenty-sixth day of December, Nineteen hundred and five, and since the commencement of this cause, he has satisfied said bond and mortgage and said chattel mortgage, and the promissory note accompanying the same, by paying to the said complainant, the sum of Forty-eight hundred dollars due thereon, and interest from the Sixteenth day of August, Nineteen hundred and five, to the Sixteenth day of August, Nineteen hundred and six, amounting to Two hundred and eighty-eight dollars, and that the complainant did, on the said Twenty-sixth day of December, Nineteen hundred and five, make and execute

24 B

a discharge and release of the said mortgage, mentioned in the complainant's said bill of complaint, and that the payment of the said sum of Forty-eight hundred dollars, and the payment of the sum of two hundred and eighty-eight dollars, as interest thereon, was in full satisfaction of any claim which the complainant had against the defendant, and that the defendant was thereby released from the duty or obligation of purchasing ales, porter and lager beer, to be sold in his saloon and premises from the said complainant.

This defendant, therefore, prays that the said complainant may answer, but not under oath, the matters and things set up in this cross bill, and that the alleged contract, between the complaint and the defendant be declared to have no binding force or effect upon the defendant, and that the defendant be relieved from any contract, express or implied, made or claimed to have been made between him and the complainant, and from the terms, obligations and conditions set forth in bond and mortgage referred to in the bill of complaint, and from the chattel mortgage and the said promissory note referred and set forth in the defendant's said answer, and that the Court may grant such other relief as the nature of the case may require.

ALFRED A. STEIN,
Solicitor for Defendant.

JAMES C. CONNOLLY,
Of Counsel with Defendant.

State of New Jersey,
County of Union } **ss.**

JOSEPH NIZOLEK, the above named defendant, being duly sworn on his oath, deposes and says, that the matters and things set forth in the above cross-bill are true, so far as relates to his own acts, and so far as they relate to the acts of others he believes them to be true.

JOSEPH NIZOLEK.

Sworn and subscribed to before
me, this 6th day of January, 1906.

MARTIN P. O'CONNOR,
Commissioner of Deeds of N. J.

IN CHANCERY OF NEW JERSEY.

BETWEEN CHRISTIAN FEIGENSPAN, A CORPORATION, *Complainant.* AND JOSEPH NIZOLEK, *Defendant.*	*On Bill, Etc. Replication and Answer to Cross-Bill.*

The complainant joins issue on so much of the defendant's answer as is not in the nature of a cross-bill, and as to that part of said answer which is in the nature of a cross-bill, it says:

1. That it denies that the said defendant, JOSEPH NIZOLEK, at any time prior to the filing of the Bill of Complaint in this cause, offered to pay the amount due to the complainant on the bond and mortgage referred to in said Bill of Complaint, but that he was unable to make arrangements with the complainant in order to do so; and this complainant says and evers the truth to be, that the defendant never, at any time before the filing of the Bill of Complaint in this cause, tendered to the complainant the amount due upon the said bond and mortgage, or the said sum of Four thousand eight hundred dollars ($4,800), or any sum of money whatsoever, and never offered to pay to the complainant the amount due on said bond and mortgage, either the sum of Four thousand eight hundred dollars ($4,800), or any other sum of money whatsoever, and never approached the complainant for any purpose, either to pay to the complainant any money or for any other purpose, and never attempted to make arrangements with the complainant to pay to com-

plainant the said sum of Four thousand eight hundred dollars ($4,800) or any other sum of money whatsoever on said bond and mortgage.

2. And the complainant admits that the payment of the sum of Four thousand eight hundred dollars ($4,800) due the complainant on the bond and mortgage mentioned and referred to in the Bill of Complaint, was also secured by a chattel mortgage and by a promissory note, both payable one day after date and both referred to in the answer of the said defendant.

3. And the complainant says and evers the truth to be, that the agreement mentioned and at length set forth in said Bill of Complaint, and the bond and mortgage mentioned in said bill, and said chattel mortgage and promissory note were all executed by said defendant, JOSEPH NIZOLEK, on the same day and at one time, and were part and parcel of one transaction to this extent and no other, namely, that the complainant agree with the said defendant, JOSEPH NIZOLEK, that said complainant would loan said defendant Four thousand eight hundred dollars ($4,800) for one year, upon his bond and promissory note, secured by a mortgage upon the real estate described therein, and by a chattel mortgage upon certain goods and chattels of said defendant, particularly described in the schedule annexed to said chatel mortgage, upon condition, and if, said defendant, JOSEPH NIZOLEK, would on his part, and as a further inducement for said loan, agree to purchase from this complainant, for the period of five years from and after the making of said loan, all ales, lager beer and porter sold in his saloon, at Number Seventy-three Florida Street, in the City of Elizabeth, New Jersey, being the premises particularly described in said real estate mortgage, and would not, during said period of five years, sell or offer for sale in or upon said premises, during said period of five years, any ales, lager beer or porter, except that manufactured by the complainant, and said agreement, bond and mortgage, chattel mortgage and promissory note, were made and executed by said defendant, JOSEPH NIZOLEK, to carry out and complete his said agreement

with the complainant, and that in consequence thereof, and of said agreement by said defendant, the complainant loaned to said defendant, the sum of Four thousand eight hundred dollars ($4,800).

4. And the complainant admits that since the commencement of this suit, and on the Twenty-sixth day of December, Nineteen hundred and five, the defendant paid to the complainant the full amount due and owing to the complainant on the said bond and mortgage, and on said promissory note and chatel mortgage, and that complainant has executed a discharge and release of the said real estate mortgage, and that no money is now due and owing from the said defendant to the said complainant on said loan, although the whole amount of said loan of Four thousand eight hundred dollars ($4,800) with interest was justly due and owing when this suit was commenced and the Bill of Complaint filed.

5. And the complainant denies that said defendant, JOSEPH NIZOLEK, by reason of his indebtedness to said complainant, or for any other reason whatsoever, is released from his duty or obligation of purchasing ales, lager beer and porter, to be sold in his saloon and premises, from this complainant; but says and avers, that the agreement at length set up in the Bill of Complaint, and executed by said defendant, JOSEPH NIZOLEK, and delivered to the complainant, is still in full force and effect and binding upon said defendant, notwithstanding the payment by the defendant of his indebtedness to the complainant, and that the said defendant should not be relieved by this Court from the promises and conditions and effect of the said contract and agreement.

6. And the complainant expressly avers and maintains that notwithstanding the payment by the said defendant to the complainant on the Twenty-eighth day of December, Nineteen hundred and five, and since the commencement of the said suit, of the amount of said loan made by the complainant to said defendant with interest as set forth in said Cross Bill, the said agreement made and executed and delivered by the said defendant to the complainant is still binding and obligatory upon said de-

fendant for the remainder of the period of five years mentioned therein, and that this defendant is entitled in equity to have said agreement kept and performed in all respects by said defendant, and to have the aid of this Honorable Court in the premises, and the relief prayed for in the Bill of Complaint, notwithstanding the payment of said loan by the defendant to complainant as set forth in said Cross Bill.

JOHNSTON, BOGGS & MERSFELDER,
Solicitors for and of Counsel with Complainant.

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

JOSEPH PLOESER, being duly sworn on his oath, according to law, doth depose and say, that since JOSEPH NIZOLEK stopped purchasing lager beer, ale and porter from CHRISTIAN FEIGENSPAN, as set out in the deponent's affidavit attached to the Bill of Complaint, deponent has several times seen said NIZOLEK, relative to his refusal to purchase from CHRISTIAN FEIGENSPAN, and that at the first of such interviews, deponent said to said NIZOLEK, "Why do you refuse to buy our beer and ale?" and NIZOLEK said: "Well, I have made a change," and deponent said to NIZOLEKS "You had no right to break your contract; you had a contract for five years to buy our goods," and NIZOLEK said: "That doesn't make any difference, the contract has nothing to do with it; as soon as I pay the money I can do as I please."

And deponent further says that at that time the said NIZOLEK certainly understood that he had made and signed a contract with FEIGENSPAN, to buy only their ale, lager beer and porter for five years.

JOSEPH PLOESER.

Sworn and subscribed to before me
this 16th day of December, A. D., 1905.

JOSEPH HARSBURY CALLAHAN,
Attorney at Law of New Jersey.

BETWEEN

CHRISTIAN FEIGENSPAN,
A CORPORATION,
Complainant.

AND

JOSEPH NIZOLEK,
Defendant.

Transcript of shorthand notes of testimony taken in the above entitled cause, at Chancery Chambers, Newark, N. J., on May 31, 1906, before Hon. Henry C. Pitney, Vice-Chancellor.

Appearances:

MR. HERBERT BOGGS for the complainant.
MR. JAMES C. CONNOLLY for the defendant.

To Mr. Connolly

THE COURT: Do you admit the execution of this paper?

MR. CONNOLLY: No, sir. Of course we will show that all the papers, the chattel mortgage, the mortgage, the note—

THE COURT: The question is whether you contest the execution of the instrument outside of the chattel mortgage?

MR. CONNOLLY: We do, sir.

ABRAM H. CORNISH, sworn.

Direct Examination by MR. BOGGS.

MR. CONNOLLY: It may shorten up our proceedings somewhat if the counsel on the other side will admit the execution of all the papers referred to in the evidence and papers before the court.

THE COURT: Well, but you are the fellows to admit. The complainant alleges and you deny.

MR. CONNOLLY: He does not allege in his bill that there was any chattel mortgage.

MR. BOGGS: I admit in my answer to the cross bill there was. I admit that; there is no question about that.

MR. CONNOLLY: Then I understand it is admitted in evidence.

MR. BOGGS: I don't know about its being admitted in evidence, but I admit the execution.

Q. You are a counselor at law of the Supreme Court of the State of New Jersey?

A. Yes, sir.

Q. And you reside in Elizabeth, New Jersey?

A. Yes.

Q. And you are connected with the Fidelity Trust Company?

A. Yes, sir.

Q. What is your position?

A. Assistant title officer.

Q. And you have charge of their branch office in Elizabeth?

A. Yes, sir.

Q. I show you a paper purporting to be signed by JOSEPH NIZOLEK and dated August 16, 1905. Is that your signature attached to it as subscribing witness?

A. Yes, sir.

Q. You signed that as subscribing witness?

A. Yes, sir.

Q. Did you see MR. NIZOLEK sign the paper?

A. I did; yes, sir.

Q. On that day?

A. Yes, sir.

Q. Where was the paper signed?

A. In my office in Elizabeth.

Q. And MR. NIZOLEK, is he present now; do you know? Do you recognize him?

A. I think that is MR. NIZOLEK in the back of the room there.

Cross Examination by MR. CONNOLLY.

Q. What time of the day was it?

A. I think at the time this was signed it was late in the afternoon.

Q. And how long had the parties been in your office?

A. Some time.

THE COURT: Who were there?

Q. Who were there?

A. NIZOLEK, his wife, and MR. SCHWITZGABEL and his wife, and LOUIS GRAFF, an attorney who represented them.

Q. (BY THE COURT) They were conveying property to NIZOLEK?

A. Yes, sir.

Q. (BY THE COURT) They were there, the two husbands and two wives and a lawyer by the name of what?

A. GRAFF.

Q. (BY THE COURT) GRAFF was with them?

A. Yes, sir.

Q. (BY THE COURT) And you represented the brewing company?

A. I represented the Fidelity Company, and we were guaranteeing the mortgage, the title to the property rather; I didn't represent the brewery except in that way.

Q. When MR. GRAFF came there with NIZOLEK and the others, did he have in his possession certain papers prepared to be signed to the brewery?

A. Yes.

Q. And did you examine those papers?

A. Yes.

Q. And you said they were not properly drawn?

A. That is right.

Q. Then you drew up the papers that were necessary?

A. I drew up certain papers.

Q. Will you please mention the papers you drew up?

A. Bond and mortgage was all we drew up.

Q. At your office in Elizabeth.

A. That is right.

Q. Which bond and mortgage, the real estate bond and mortgage?

THE COURT: Given by NIZOLEK and wife to the trust company?

A. To the brewery, to FEIGENSPAN; the bond and mortgage which GRAFF brought with him was full of interlineations and errors, and I wouldn't accept it, and drew one for him; he offered to redraw it, but I thought it would take so much time that I had it drawn myself.

Q. Who drew the deeds from SCHWITZGABEL to NIZOLEK?

A. GRAFF.

Q. That you didn't change?

A. That we didn't change.

Q. They had it present there, did they?

A. They had it with them.

Q. Who drew the bond and mortgage from SCHWITZGABEL or from NIZOLEK to SCHWITZGABEL, the second bond and mortgage.

A. I think GRAFF drew that. I don't recall.

Q. You didn't redraft that?

A. I didn't concern myself about that because I didn't represent them.

Q. Now who drew the chattel mortgage?

A. The chattel mortgage, I think, was drawn by the brewery people.

Q. Was it in your possession?

A. When?

Q. That day?

A. It was in my possession that day.

Q. (By The Court) Who brought it there?

A. I think it came with the check in a letter from Feigenspan late in the afternoon.

Q. (By The Court) You had a check sent to you with papers which the Brewery Company required to be signed before the check was delivered?

A. Yes, sir.

Q. (By The Court) And the was nobody there really representing the brewery company except yourself by their trusting you with this check to be delivered when certain papers were right?

A. Yes, sir.

Q. (By The Court) Now I will ask you who drew this contract which has just been shown to you which you witnessed?

A. I think that was drawn by the brewing company and sent with the check and other papers.

Q. Now I show you a chattel mortgage and ask you—

The Court: Just got that from the complainant, didn't you?

Q. I got that from the complainant now. I show you a chattel mortgage which has just been handed to me by the counsel for the complainant. Do you recognize that as the chattel mortgage which was executed on the 16th of August last year?

A. I think it is; yes.

Q. Now I show you a note payable one day after date for $4,800 which has just been handed me by counsel for the complainant. Do you recognize that as the note?

A. I think it is.

Q. Which was passed over that day to you?

A. I think it is.

Q. I also show you bond and mortgage which covers the real estate, made for the same amount. Do you recognize those papers as the bond and mortgage which were executed by Nizolek on that day?

A. Yes; I think those are the papers.

Q. The chattel mortgage just handed you also provided for the payment of $4,800 in one year from the date thereof.

THE COURT: It shows for itself.

Q. (BY THE COURT) You have now seen, had shown you pretty near all the papers that were executed that day except the bond and mortgage.

A. Second mortgage.

Q. (BY THE COURT) First mortgage or second mortgage?

A. Second mortgage; this is first mortgage; second mortgage to SCHWITZGABEL.

Q. (BY THE COURT) And the deed from SCHWITZGABEL?

A. Yes, sir.

Q. (BY THE COURT) But all the papers that came from the brewing company to you you have seen now, haven't you—that is, all the papers?

A. I think there was in addition a power of attorney to transfer the license, or something of that sort.

Q. There were also submitted on that date for your inspection the deed for the property?

A. Yes.

THE COURT: He has sworn to that.

Q. And all the papers concerning the transaction were on the table, were they?

A. Well, I think that the deed and the bond and mortgage and I think the second bond and mortgage were executed before the other papers were sent to us.

Q. (BY MR. BOGGS) The real estate bond and mortgage?

A. The real estate bond and mortgage, and the second real estate bond and mortgage were executed before the other papers came; we didn't have the check, it was bfore we got it.

Q. (BY THE COURT) That is to say, the parties came there all ready to execute this thing, these papers,

and those dealing with the real estate and between the two that purchased, vendor and vendee, were ready and had been executed, and you had drawn the substituted mortgage, the corrected mortgage, and they had all been executed?

A. Yes, I think so.

Q. (By The Court) Then you were waiting for the brewing company for these papers?

A. Yes, sir; the check.

Q. (By The Court) How long were you waiting for that?

A. I can't recall; it was some time.

Q. (By The Court) Was there anybody there representing the brewing company except you?

A. No.

Q. (By The Court) Did you 'phone to the brewing company.

A. I telephoned for them.

Q. (By The Court) You were all ready to go on?

A. Yes, sir.

Q. (By The Court) How did these checks and other things come down there?

A. I think a boy brought them in an envelope.

Q. (By The Court) Mere messenger boy?

A. Yes; I presume it was somebody from the brewery; I don't think it was an ordinary messenger.

Q. (By The Court) Not a business man connected with it?

A. No; it was a boy.

Q. How often did you call the brewery up?

A. I don't think I called the brewery up but once.

Q. Do you remember whether you paid over the money, the consideration money to Schwitzgabel?

A. I paid Mr. Schwitzgabel part of it, I think, on that day, and there was an adjustment to be made between himself and the brewery and some money was held until after settlement.

Q. Did you call up the brewery in connection with that?

A. I don't recall having done so.

Q. Was the power of attorney, the transfer of license signed?

A. I think so.

Q. In your office?

A. I think so.

Q. Who recorded the papers?

A. We did.

Q. GRAFF, the attorney representing MR. NIZOLEK, signed or witnessed all the papers that were passed, didn't he, and took acknowledgements to you?

A. I think he witnessed all of the real estate papers and the chattel mortgage.

Q. Everything but this agreement you spoke of?

A. So far as I recollect.

THE COURT: It will show for itself. Just let me look at it; that is the way to do business—just let me look at it. This is the real estate mortgage.

Re-direct Examination by MR. BOGGS.

Q. Is that the letter that accompanied the check?

A. Yes; that is the letter.

Q. (BY THE COURT) That letter came with the company's check, and the other papers you mentioned?

A. Yes, sir.

Q. (BY THE COURT) Brought by a small boy or boy?

A. Yes, sir.

MR. BOGGS: I offer the agreement in evidence.

THE COURT: Any objection?

MR. CONNOLLY: No. I want all the papers admitted if it can be done.

THE COURT: You can put them in; I have looked at them.

Marked Exhibit C. 1.

MR. BOGGS: And the letter I offer in evidenve.

Marked Exhibit C. 2.

THE COURT: These papers are both admitted in evidence.

MR. BOGGS: I think I rest, your honor.

MR. CONNELLY: Now, your honor, I see that there is no evidence going to any other point than that with reference to the execution of the contract. I have four or five witnesses here who will all swear—

THE COURT: Never mind what they will swear to. Put them on and let them swear.

MR. CONNOLLY: I want to say this in justice to MR. CORNISH, that I don't think that he would knowingly and wilfully have this paper executed, but that it was executed there against the consent of the defendant in this case, and afterward was found there among the mass of papers that was taken out, and as he was present and saw everything that transpired he signed it as a witness, and it may be that he didn't think they insisted so much as they afterwards said they did, it may be that he didn't pay as much attention to that part of the case as he ought to have, but at any rate the witnesses will all swear that that paper was not executed by NIZOLEK on that occasion, or, if it was, that it was not with his understanding that he was signing it.

FREDERICK D. SCHWITZGABEL, sworn.

Direct Examination by MR. CONNOLLY.

Q. Where do you reside?
A. I reside in Elizabeth, on Elizabeth Avenue
Q. And how long have you lived in that city?
A. I have lived in the city of Elizabeth since 1874.
Q. What has been your business?
A. Machinist and hotel proprietor.

Q. Were you the proprietor of 73 Florida Street, Elizabeth, on August 16th, last year?

A. I was.

Q. And did you on that day sell and dispose of the place to NIZOLEK, the defendant?

A. We did.

Q. Were you present in MR. CORNISH'S office when the papers were signed.

A. I was.

Q. Who else were present at the time?

A. My wife and MR. NIZOLEK and MRS. NIZOLEK and MR. GRAFF and ALBERT BENDER.

Q. How about—was MR. CORNISH present also?

A. MR. CORNISH? Oh, yes.

Q. Were the papers submitted to MR. NIZOLEK by MR. CORNISH to be signed?

A. They were.

Q. And did NIZOLEK sign all the papers that were presented to him?

A. All with the exception of one.

Q. Now will you please tell us just what one that was and how it happened that he didn't sign it, and what was said, pro and con.

A. The last paper that was to be signed, MR. GRAFF got hold of the paper, looked it over, and then he says: "Joe, don't sign this," and he threw it one side like that (indicating); he opened it and said: "Joe, don't sign that; it is binding for five years for selling beer."

Q. Well, what did Joe say?

A. Joe didn't sign it, not in my presence; we didn't see him sign it; we were there all the time.

Q. You were there until he went out?

A. Yes, all went out together.

Q. And if he had signed it you would have seen him sign it?

A. We certainly could.

Q. Now, what did JOE say when GRAFF made that remark; did he say anything to GRAFF?

A. Well, I don't know; I couldn't understand what he says then.

Q. (By The Court) You are a German?

A. Yes, sir.

Q. (By The Court) And understand German?

A. I do, yes; chiefly Polish.

Q. (By The Court) Could you understand him?

A. He spoke very broken, sir.

Q. (By The Court) German and Polish are different?

A. Oh, yes.

Q. (By The Court) You couldn't understand his natural language?

A. I could not; no, sir.

Q. Now, was there anything said by Mr. Cornish when Mr. Graff made that remark about not signing?

A. After we got ready to go away Mr. Cornish, which he will say himself, he says: "He will be pretty well tied up."

Q. What was it drew that remark forth?

A. I presume the paper.

Q. No; was there anything said by anybody?

A. Mr. Graff hesitated not to let him sign that paper.

Q. And then Cornish made the remark that you attribute to him just now?

A. Yes, sir.

Q. (By The Court) Immediately after Mr. Graff said to Nizolek: "Don't sign that paper?"

A. Your honor, when we got ready to go out.

Q. (By The Court) I know, but how long after that remark was made, after Graff told Joe Nizolek?

A. Not to sign that paper?

Q. (By The Court) Not to sign the paper, was it that Mr. Cornish said: "Pretty well tied up?"

A. Immediately.

Q. (By The Court) Immediately?

A. Yes. I guess Mr. Cornish could bear me out in that.

Q. (By The Cohrt) Never mind what anybody else will swear to or say. You just stick to what you understand to be the truth. I won't have any talk of that

kind to any witness, what another man swears to or what another man will swear to; I don't allow that in my court.

Q. Now were you or not called to the telephone while you were there that day, and, if so, by whom?

A. MR. CORNISH was at the 'phone and speaking to somebody in the office who I presume was MR. SUTHERLAND, and then I went to the 'phone and I spoke to MR. SUTHERLAND regarding the money that I owed, told him I would be over there the next day and settle up, that I wanted him to throw off a certain amount of money, and he says he couldn't do that; I would have to come over there next day; so I went over next day.

Q. (BY THE COURT) Over where?

A. Over to the brewery in Newark.

Q. Now did CORNISH pay you the consideration money for the property that day?

A. He gave me part, he gave me some money that day, at least he gave it to my wife, and he held the other back until I got another check from the brewing company, and then I go out to MR. CORNISH and MR. CORNISH had the check of his own drew up and kept the one of the FEIGENSPAN BREWING COMPANY, took off what I owed.

Q. How much did you owe the brewery?

A. That I don't—something like eleven hundred dollars—I don't remember that quite.

MR. BOGGS: Is that material?

Q. (BY THE COURT) One moment. When was it that MR. CORNISH was at the 'phone talking with the brewery?

A. Why, in the afternoon.

Q. (BY THE COURT) Before this?

A. He telephoned for some papers, I believe, yes.

Q. (BY THE COURT) You were there when a boy came in and brought him some papers?

A. I didn't see the boy; no, sir; he was in the next room; the boy came in the next room.

Q. (By The Court) But you know he did come?

A. A boy came, yes; somebody came.

Q. (By The Court) And it was after Mr. Cornish had been 'phoning to Newark?

A. Yes, sir.

Q. (By The Court) Mr. Cornish didn't 'phone to Newark at the time that Graff wouldn't let Nizolek sign this paper?

A. I think he did after that; yes.

Q. (By The Court) Before you left?

A. Before I left.

Q. (By The Court) Was that before or after he said that Joe was pretty well tied up?

A. They were the last words that was said.

Q. (By The Court) Last words, and he had been just 'phoning to Newark?

A. Not after Mr. Graff refused; wouldn't allow Mr. Nizolek to sign the papers.

Q. (By The Court) He didn't 'phone after that?

A. I don't remember; no, sir.

Q. (By The Court) How many time did he 'phone to Newark?

A. Twice.

Q. (By The Court) Did he 'phone to Newark after the papers come from Newark by the boy?

A. I guess not.

Q. (By The Court) Did not?

A. No, sir.

The Court: That is what I wanted to know. Go on.

Q. When was it then that you had your conversation over the wire with the brewery?

The Court: Long before that; long before these papers, before the boy came with the papers.

Q. I want to know in relation to the time the papers came?

A. Directly after the papers came when MR. CORNISH wanted to withhold the check.

Q. (BY THE COURT) Oh, then was the time, eh?

A. Yes, sir.

Q. Wanted to withhold check?

A. Yes, sir.

Q. Well, what did you say to him?

A. I told him over the 'phone—

Q. No, no. What did you say to MR. CORNISH then when he wanted to withhold the check?

A. I had to accept it.

Q. And when was it that you telephoned to Newark, was it before that or after that?

A. Telephoned to Newark?

Q. Yes?

A. Right after the checks came, then I found MR. CORNISH was to withhold the check; then I wanted to find out exactly what I owed the FEIGENSPAN BREWING COMPANY.

Cross Examination by MR. BOGGS.

Q. Had MR. GRAFF told NIZOLEK not to sign this agreement, I think you said?

A. Yes.

Q. Did he speak English?

A. Yes, sir.

Q. At that time or shortly afterwards did MR. GRAFF have any conversation with NIZOLEK in NIZOLEK'S own language?

A. He couldn't talk it.

Q. GRAFF couldn't talk Polish?

A. No, sir.

Q. Then the only conversation that he had with NIZOLEK, so far as you know, was in English?

A. Yes.

Q. Was MR. CORNISH waiting for the money, the check from FEIGENSPAN'S to close this matter up?

A. Couldn't proceed unless he had it.

Q. And the check came with this boy?

A. I don't know who brought it; I couldn't say; it came in the back room.

Q. Then you immediately proceeded to settle up?

A. Yes; we didn't leave the room; we were all together.

Q. Did you all go away together?

A. Yes; we all left together.

Q. You spoke of ALBERT BENDER being there. Who was he, do you know?

A. He was representing some insurance company, I presume.

Q. Was he there all the time or only part of the time?

A. He was there part of the time.

Q. Was he sent for by MR. CORNISH, do you know?

A. No; he came up there with us.

Q. Oh, he came there with you?

A. Yes, sir.

Q. And went away before the rest of you?

A. He went away to look out for some insurance paper; MR. CORNISH spoke about some insurance papers and he went away and attended to some insurance policies.

Q. Did he come back?

A. I think he did.

Q. Now where was it MR. CORNISH went to the telephone?

A. In his office.

Q. Well, there are two offices, aren't there?

A. Where we were sitting right alongside of him, the same as the 'phone would be right here by this inkstand.

Q. You were all in MR. CORNISH'S inner office?

A. Yes, sir.

Q. And none of this transaction took place in the outer office, of the signing of the papers, all in the inner office?

A. No; it all took place in the inner office; there was nobody in the other office only a typewriter.

THE COURT: Do you want to put these papers in?

MR. CONNOLLY: Yes, I think I better do that.

THE COURT: Defendant offers in evidence papers produced by the complainant. First a note, promissory note dated August 16, 1905, signed by JOSEPH NIZOLEK; second, a real estate mortgage of the same date executed by JOSEPH NIZOLEK and wife to the brewing company, recorded on the 17th of August, 215 mortgages. Third, a chattel mortgage of the same date executed by NIZOLEK to the brewing company; and, fourth, a bond executed by NIZOLEK and his wife to the brewing company, on the same date.

MR. BOGGS: Before they go in I object to their admission on the ground that they are irrelevant. I cannot see that they have any bearing on the case. I don't see the object for which they are offered.

THE COURT: I overrule your objection. I am quite astonished that you would make the objection, as they are decidedly in your favor.

Marked Exhibit D. 1, D. 2, D. 3 and D. 4.

LOUISE SCHWITZGABEL, sworn.

Direct Examination by MR. CONNOLLY.

Q. You are the wife of the last witness?

A. Yes, sir.

Q. And you were present in MR. CORNISH'S office, in Elizabeth, on the day when the papers before you were signed?

A. Yes, sir; I was present, yes.

Q. Do you know who else was present?

A. Well, there was MR. NIZOLEK and the wife and myself and MR. SCHWITZGABEL, MR. GRAFF, and then BENDER.

Q. (By The Court) Mr. Cornish was there?

A. Mr. Cornish, yes, at his desk.

Q. Do you know whether there was any paper that Mr. Nizolek didn't sign?

The Court: Was he asked to sign a paper that he did not sign?

A. Yes, sir; there was one paper; some agreement about five years, you know, to sign; he didn't sign it; Graff told him not to sign it.

Q. Who told him not to sign it?

A. Graff told him, read it and throwed it aside.

Q. Did you see him sign that paper?

A. No, I did not.

Q. Where were you all the time until Mr. Nizolek left the place?

A. I was there all the time.

Cross Examination by Mr. Boggs.

Q. You say there was some one paper that Mr. Graff told Nizolek not to sign?

A. Just one paper; yes.

Q. Do you know what the paper was or what it was about?

A. Well, he read it to Nizolek and told him it was for five years to bind him to sell the beer, and not to sign it for five years, and he throwed it aside.

Q. Did he read the paper to Nizolek?

A. Graff read it; yes.

Q. In what language?

A. In English language. Well, Graff read it to himself and then he told Nizolek not to sign it, and threw it aside.

Q. Did Graff read it to Nizolek; Graff read it aloud?

A. Well, I can't remember that; I know he read it and told him not to sign it.

Q. How do you know what the paper was?

THE COURT: It was paper binding MR. NIZOLEK to buy beer from the brewing company for five years.

A. He read it.

Q. So you explained.

A. He said: "Don't sign this paper; it will bind you for five years to sell the beer; don't sign it," that is what I heard.

Q. How long was that before you left the office?

A. That was while I was sitting there, told him not to sign the paper?

Q. (BY THE COURT) He wants to get at how long that was before you all left the office?

A. I don't know; might have left maybe half hour or hour after that; I can't remember.

Q. How long were you in the office altogether, do you remember?

A. I couldn't say; it was quite some while.

Q. Hour or two, wasn't it?

A. Well, it might have been somewhere around that.

Q. Might have been two hours?

A. I couldn't say exactly, but I know it was quite a while.

Q. Well, first there was some papers signed, were there not, and then they were waiting for the check, for the money from FEIGENSPAN?

A. Yes, sir.

Q. (BY THE COURT. You recollect that there was a break in the work?

A. Well, there was in the—

Q. (BY THE COURT) A rest?

A. Yes, sir; and then they rung up the 'phone.

Q. (BY THE COURT) Then some papers came from Newark?

A. Yes, sir.

Q. (BY THE COURT) Then you had another signing?

A. Yes, there were some to be signed.

Q. Well, was this second paper, this paper that MR. NIZOLEK refused to sign, was that handed to MR. GRAFF by MR. CORNISH after the papers came from Newark, or before?

A. Well, there was some papers come, and now there was a paper read, and then he told him not to sign it, so he didn't sign that paper.

Q. But that was paper that was read that he told him not to sign, was that after the papers came from Newark or before the papers came from Newark?

A. That I can't remember; I can't remember that.

Q. You can't remember that?

A. I know there was about the license; they telephoned over there, and he didn't sign that; I can remember that well. He didn't sign that; I can remember that, that was when he telephoned over to Newark; at MR. CORNISH'S desk there was a little 'phone.

Q. You say ther was a paper about the license he didn't sign?

A. That he didn't want to sign some agreement about paying it off, he didn't sign that, and at the last there was another paper that he didn't sign for the five years binding him to sell the beer.

Q. Didn't he sign a paper in regard to the license?

A. No.

Q. You are sure of that?

A. No; didn't sign anything of that.

Q. Did he refuse to sign the paper about the license?

A. Yes; he refused; they wanted him to pay off by the week; he says: "SCHWITZGABEL'S license is in full and I don't see why I want to take it by the week to pay it up."

Q. Pay five dollars a week, were they?

A. Yes, sir.

Q. You say he didn't sign that paper?

A. Didn't sign that.

Q. (BY MR. CONNOLLY) Don't misunderstand—that is on the license?

A. Yes, that is on the license paper I am talking.

THE COURT: She said something about paying five dollars a week; he wouldn't sign paper to make him pay five dollars a week.

A. And then he didn't sign the paper what binds him to buy the beer for five years, so I remember two papers he refused.

Q. Two papers that he refused to sign?

A. Yes, sir; while I was there present.

Q. Then after he refused to sign the two papers, what happened then, if you recollect? Was the money paid over before that or was the money paid over after that to your husband?

A. I can't recollect that, but they telephoned something about a check to Newark.

Q. (BY THE COURT) CORNISH paid some money to your husband that day, didn't he; he paid some money?

A. Yes; he paid some money.

Q. Do you remember whether that money was paid over before MR. NIZOLEK refused to sign these two papers, or after?

A. I can't remember whether it was before or after, but I know there was some settlement between them.

Q. And I understand you it was some little time after MR. NIZOLEK refused to sign these papers that you all went out of the office together?

THE COURT: Some time she said.

Q. Some time.

Q. (BY MR. CONNOLLY) How much was paid that day to you on account.

A. I don't exactly remember; there was something paid there.

Q. (BY MR. CONNOLLY) You don't remember how much?

A. I can't remember the amount.

LOUIS A. GRAFF, sworn.

Direct Examination by MR. CONNOLLY.

Q. You have been practicing law in this State how long?

A. Since 1884.

Q. At the City of Elizabeth?

A. Yes, sir.

Q. And were you present in CORNISH'S office on the 16th of August, 1906, as the attorney for MR. NIZOLEK and MR. SCHWITZGABEL?

A. I was.

Q. Were any papers that were signed there signed in your presence?

A. Yes.

Q. Now will you please tell us whether all the papers submitted to NIZOLEK were signed by him?

A. There was a chatel mortgage, real estate mortgage, two real estate mortgages, one to SCHWITZGABEL and one to the FEIGENSPAN COMPANY, bonds, that is all.

Q. How about the note?

A. Yes, there was a note.

Q. Was there any other paper submitted that was not signed?

A. There was.

Q. What paper was it?

A. That was an agreement whereby NIZOLEK was to bind himself to sell the products of the FEIGENSPAN COMPANY for the term of five years.

Q. Did you read that?

A. I did.

Q. After you read that did you or not explain it to the—I show you the agreement which was submitted on that occasion and ask you if you recognize it as the paper?

A. Yes.

Q. Now did you read that on that occasion and explain its contents to the defendant?

A. I did.

Q. (BY THE COURT) You are sure he understood it?

A. Well, I made it as plain as I could.

Q. What did you say to him?

A. I said: "That this is an agreement; don't sign it; five years."

Q. Did he say anything in reply that you remember?

THE COURT: Well, didn't you tell him it was an agreement to buy the beer?

A. To buy the beer from the company, yes.

Q. (BY THE COURT) Yes, for five years?

A. Yes, sir.

Q. What did he say in reply, if anything?

A. I think he said: "No sign," something like that, in broken English.

Q. Was the paper signed in your presence that day?

A. No, sir; it was not.

Q. That is, you didn't see him sign it?

A. I didn't see him sign it.

Q. And if it was signed it was against your advice?

A. It was against my advice.

Q. Were you there all the time until NIZOLEK went away?

A. I was.

Q. Now how did the table appear with all the papers that were to be signed, how did the table appear; was it littered up with all these documents?

A. Yes; the documents were brought in to me and laid on the table.

Q. On the table.

A. Yes.

Q. And you witnessed all the papers that you directed him to sign?

A. Yes; and took the acknowledgement.

Q. (BY THE COURT) You knew that this paper was sent from Newark to Elizabeth to MR. CORNISH to be executed, these papers, didn't you?

A. Well, no; I didn't know that; had no personal knowledge of that; but they were there, the papers were there.

Examined by THE COURT.

Q. Didn't you know a messenger came there?

A. No, sir; I didn't see him.

Q. Didn't you know there was delay in finishing the thing because the agent didn't come from Newark?

A. There was delay.

Q. Didn't you have any chattel mortgage ready to be signed before it came from Newark?

A. I had no chattel mortgage; I had no chattel mortgage.

Q. You know a chattel mortgage was to be signed?

A. Yes; I knew that, was told that.

Q. And you knew it had not been prepared?

A. That I didn't know.

Q. You prepared the other papers, didn't you?

A. No.

Q. Very well. Now then you knew they were waiting for something from Newark?

A. Yes, sir.

Q. Didn't you know that somebody came there, a messenger from Newark, with a package?

A. Well, I don't know; I have no personal knowledge of that, but somebody came in the outer office while we were in the inner office, shortly after.

Q. And you learned from MR. CORNISH that papers had come from Newark?

A. Yes, sir.

Q. And he presented them there for signature?

A. Yes, sir.

Q. Now did MR. CORNISH hear you tell MR. NIZOLEK not to sign that paper?

A. I wouldn't be positive as to that.

Q. Well, the papers were all on the table?

A. They were all there, yes.

Q. And MR. NIZOLEK was signing a lot?

A. Yes, sir.

Q. Signed the chattel mortgage?

A. Yes, sir.

Q. And he signed the promissory note in your presence?

A. Yes, sir.

Q. And he signed the chatel mortgage in two or three places, didn't he?

A. Yes, sir.

Q. I find here the chatel mortgage is signed, the body of it, then it is signed at the end?

A. Yes, sir.

Q. And then it is signed again in an affidavit?

A. Three times; yes, sir.

Q. Those were all signed after they came from Newark?

A. They were signed after they were given to me at the table; yes, sir.

Q. After the messenger came from Newark?

A. Well, after—your honor, I can't tell whether a messenger came from Newark or not; but I know MR. CORNISH—

Q. They were signed at the time the note was signed?

A. Yes, sir.

Q. And they were signed after there had been a wait for something to come from Newark?

A. Yes, that is true.

Q. Did MR. CORNISH say anything then when you directed your client not to sign that paper?

A. My recollection is as to that that MR. CORNISH then went to the 'phone again.

Q. Well, did you hear what he said?

A. No.

Q. Now, there was no hugger mugger about anything there, was there?

A. No, I don't say there was.

Q. You were watching your client all the time?

A. Why, certainly.

Q. And there was no appearance of any trick played by MR. CORNISH, was there? You didn't suspect anything of the kind?

A. I didn't suspect anything; no.

Q. Did he say anything about directions in this letter; did he?

A. No.

Q. Didn't say anything about the directions?

A. Not to me.

Q. Well, just look at that signature to the contract here now in question; see whether you think it is your client's signature?

A. I certainly do.

Q. How do you suppose that got there?

A. Well, I don't know; he may have went there subsequent to the signing of these and signed it up there.

Q. Eh?

A. I say he may have gone to MR. CORNISH'S office subsequently and signed that; I won't vouch for that. I will say that that signature appears genuine.

Q. Well, the transaction was considered as closed there that day, except the settlement to the former owner and brewery company, wasn't it?

A. Yes, sir.

Q. The papers were delivered, you put a lot of them on record, didn't you?

A. Yes. No, MR. CORNISH put them on record.

Q. All right; MR. CORNISH took the papers, but you acknowledged, you witnessed all the papers except the one in dispute?

A. All except that; that is all.

Cross Examination by MR. BOGGS.

Q. You drew the deed from SCHWITZGABEL to NIZOLEK?

A. Yes, sir.

Q. And that was already executed when you came to the office, wasn't it?

A. No, no; I think MR. CORNISH found some objection to it.

Q. To the deed I am speaking of now, not the mortgage.

A. I mean the deed; I think there was some slight error in the description, if I am not mistaken, and MR. CORNISH had the deed re-drawn in the office.

Q. You think the deed was re-drawn?

A. I think so.

Q. (By The Court) the mortgage?

A. No, the deed; I didn't draw the mortgage.

Q. Didn't you have a mortgage drawn when you came there?

A. From Nizolek to Schwitzgabel, second mortgage.

Q. No, but first mortgage to the brewing company, didn't you have?

A. No.

Q. You didn't have the mortgage?

A. No; I had the deed.

Q. Didn't you have the mortgage to the brewing company prepared, bond and mortgage?

A. I don't think I did.

Q. Hadn't you spoken to Mr. Cornish about that before, and you had agreed that he should draw the bond and mortgage?

The Court: That is, who should have the profit, if you may call it that, of preparing the papers?

A. I don't recollect any such conversation.

Q. Are you sure about that?

A. I know that; about the deed I am sure.

Q. You heard Mr. Cornish's testimony.

The Court: Never mind. I don't allow that at all in my court, nothing of that kind. I told you in the first place, you can't refer one witness to what another swears to.

Q. You think then that you did not draw the bond and mortgage?

A. That is my recollection, that I did not.

Q. Now, the deed and the bonds and mortgages were prepared and executed, were they not?

A. Yes, sir.

Q. And then there was a wait for some time?

A. Yes.

Q. And didn't MR. CORNISH tell you that he was waiting for the money, that he hadn't received the money or check yet from FEIGENSPAN?

A. I know he mentioned FEIGENSPANS; I don't remember whether he mentioned the check or not, because he had a conversation with FEIGENSPAN from the office.

Q. Didn't he say anything to account for the delay in closing the matter up?

A. Yes, I think he did.

Q. And didn't he say it was on account of the check not having arrived?

A. Yes; it was something about the money.

Q. (BY THE COURT) Didn't he 'phone to Newark?

A. Yes, sir; I didn't know what he 'phoned for, but he did 'phone to Newark.

Q. Then the check came, he had a check there, you saw the check?

A. Yes; I saw the check.

Q. The check came and some papers with it, didn't it?

A. Yes; the papers were brought out.

Q. And wasn't it then that the chatel mortgage and note and the agreement were first referred to, after the check came and after you had executed the other papers?

A. No; I don't think so.

Q. Had the agreement and the chatel mortgage been referred to in any way before the check came?

A. The chatel mortgage and this agreement with other papers were handed to me at one time.

Q. All the papers?

A. All, and I took the acknowledgment, and this one I read, this agreement, and threw it one side, and told him not to sign it.

Q. Well, were the bond and mortgage, the real estate bond and mortgage and the chattel mortgage and this agreement all handed to you at the same time?

A. Yes.

THE COURT: What is that?

Q. Well, the real estate bond and mortgage and the chattel mortgage and this agreement all handed to you at the same time?

A. Yes, sir.

Q. And that must have been then when you first came in, wasn't it?

A. No. When we first came there I had a deed drawn; there was some error in the description; MR. CORNISH read it and had it re-drawn.

Q. And then the bond and mortgage, as I understand you, were drawn, the real estate bond and mortgage, in the office, re-drawn or drawn in the office, the real estate bond and mortgage?

A. No; I won't say anything about that, because the real estate bond and mortgage is on the blank of the FEIGENSPAN BREWING COMPANY and FIDELITY TRUST COMPANY, so I didn't draw that.

Q. I say that was drawn in the office after you got there?

A. I didn't see it drawn.

Q. You didn't see that?

A. No.

Q. Then I understand you that the chatel mortgage and the note were executed before the check came?

A. I don't say that.

Q. (BY THE COURT) That is what he is asking you.

A. I say that when the note, the chattel mortgage, the real estate mortgage and the bond were all executed at one time.

Q. Well, were they all executed before or after the check came?

A. It was after MR. CORNISH had telephoned.

Q. You remember when the check had come?

A. I remember when it came in; I don't remember who brought the check.

Q. You remember seeing the check?

A. Yes.

Q. He didn't have the check before that?

A. Didn't show it to me.

Q. And he stated he was waiting for the check?

THE COURT: Didn't you undrestand from him now that you were waiting there because he hadn't got the check from Newark?

A. Something about money matters with the FEIGENSPAN BREWING COMPANY; that is what I said before.

Q. (BY THE COURT) You knew the check was coming from the FEIGENSPAN BREWING COMPANY, didn't you?

A. Yes, sir; that is what I was informed.

Q. And then I understand you now, that after the check came, am I right in that, that after the check came, or you understood that the check had come, the papers were all executed?

A. Yes, sir.

Q. They were executed?

A. Yes.

Q. And none of them before?

A. None before.

Q. The papers that were executed were all executed at once?

A. Yes, sir; one sitting.

Q. Where did MR. NIZOLEK sit to sign them, at the inner office or outer office?

A. We were all in the inner office, second office, second room.

Q. There is a big desk there, isn't there, double desk?

A. My recollection is that there is a table about that size (indicating).

Q. (BY THE COURT) Table in the middle of the room?

A. Yes, sir.

Q. (BY THE COURT) NIZOLEK sat at that table and signed these papers?

A. Yes, sir.

Q. And as he signed them you executed them, took his acknowledgment?

A. Yes, sir.

Q. And then after taking the acknowledgment you signed them?

A. Yes, sir.

Q. And handed them over to MR. CORNISH?

A. Yes, sir.

Q. And you say the agreement was there with the other papers?

A. Yes; I laid that one side.

Q. You laid that one side after you had told him not to sign it?

A. Yes.

Q. You laid that one side?

A. Yes.

Q. So that the agreement was not there with the papers as you were signing them?

A. Certainly the paper was there; I laid it one side on the table; it was on the same table.

Q. It was on the same table, but not in front of him?

A. Well, the table isn't so large; yes, it was right near him.

Q. And as he signed the different papers did you hand them to him to sign?

A. TO NIZOLĘK?

Q. TO NIZOLĘK.

A. Yes.

Q. And then took them up and looked them over?

A. Yes, sir.

Q. (BY THE COURT) That is to say that he signed every paper that you witnessed?

A. Yes, sir.

Q. (BY THE COURT) He signed every paper you witnessed in your immediate presence while you were looking at him?

A. Yes, sir.

Q. (BY THE COURT) You handed him one after the other?

A. Yes; that is true.
Q. And the agreement?

THE COURT: He didn't hand him.

A. That I didn't hand him.
Q. That you had laid to one side?
A. Yes, sir.
Q. How long after these papers were signed do you think it was before you left the office?
A. Oh, not—about twenty minutes, a half hour.
Q. What were you doing in the office all that time after the papers were executed?
A. We were talking, MR. NIZOLEK and MR. SCHWITZGABEL were talking about the second mortgage, and then we went away, left.
Q. And immediately after the papers were signed did MR. CORNISH pay over the money coming to MR. SCHWITZGABEL that was paid?
A. He gave him check; he gave him check for some amount, and MR. SCHWITZGABEL said he would go to FEIGENSPAN next day and make a settlement; then MR. CORNISH said he would give him the balance after the settlement was made.
Q. Then you were simply talking among yourselves after that?
A. Yes, sir.
Q. The transaction was through as far as you were concerned?
A. As far as I was concerned, yes, sir.
Q. And you are positive, are you not, that MR. NIZOLEK did not sign that agreement?

THE COURT: In his presence.

A. In my presence.
Q. In the office that day?
A. I don't say that. I say in my presence.
Q. Let me ask you this question then. All the time that MR. NIZOLEK and you were there, until you

all went out together, MR. NIZOLEK was in the room there where you could see him, wasn't he?

A. Yes; sat at the table where the papers were executed.

Q. And if he had signed any such paper—

THE COURT: Hardly worth while to put that question to him. You can put it, but I must object on my own account.

MR. BOGGS: I will withdraw that.

THE COURT: What the witness swears to, he didn't see him sign it.

MR. BOGGS: Didn't see him sign it.

JOSEPH NIZOLEK, sworn.

Direct Examination by MR. CONNOLLY.

(Interpreter sworn and witness examined through interpreter).

Q. Where do you live?

A. I live now?

Q. Yes.

A. 73 Florida Street, Elizabeth.

Q. How long have you lived there?

A. Since August.

Q. Were you at MR. CORNISH'S office on Broad Street, Elizabeth, on the 16th of last August, when these papers before you were signed?

A. Yes, sir.

Q. Do you remember who you had with you as your attorney?

A. MR. GRAFF.

Q. And was there any paper submitted to MR. GRAFF which you did not sign?

A. There was a paper that was given to me by MR. GRAFF that I should not sign it.

Q. (Paper shown witness). I ask you whether you remember signing that paper on the 16th of August, 1905?

THE COURT: Or any other time.

Q. I didn't want to put the question that way.

THE COURT: All right. You have the right to put it your own way.

Q. Because he did sign. (question read).

A. I did sign the paper, but I didn't know what it was.

Q. I ask you if you remember signing that paper?

THE COURT: Look at it.

A. This is my signature.

Q. He says he did sign a paper but he doesn't know what it was. When was it you signed that paper? Was it that day or subsequently?

A. When I signed it was about a week later, week or week and a half after I left CORNISH'S office and I signed paper where I didn't understand what it was.

Q. And that was signed where?

A. FEIGENSPAN BREWERY in Newark.

Q. Now was that the paper that you signed when you came over to the brewery in Newark?

MR. BOGGS: He can't read.

Q. From the appearance of it?

A. I don't know sure if that is the paper, but I am sure that this is my signature; they read the paper before me but I didn't understand what it was.

Q. But on the 16th day of August of last year when MR. GRAFF told you not to sign the paper did you refuse to sign it then?

A. Yes; I understand that I should not sign that paper.

Q. (BY THE COURT) He asked him whether he refused. The question was whether he refused to sign it?

A. No, I refused not to sign it.

Q. Was it your understanding with the brewery people that you were to sell their beer for five years? Does your honor allow that?

THE COURT: No objection has been made to it.

MR. BOGGS: I think I object to it. The only thing I was considering was I had set up in my bill that there was such an agreement, and I don't know whether I can object to it, on that account.

Question withdrawn.

Q. Did you have any agreement with the brewery when they loaned the money to you, or any time prior to the 16th of August, that you were to sell their beer for five years?

A. I understand that they lends the money, of course I have got to sell their beer, but I didn't know for how long; I thought whenever I pays up the money so I will be free of the brewery that I could do whatever I please then.

Q. Who was with you when you had an agreement such as you speak of with the brewery people, who was with you?

THE COURT: Who was present with you when you made any bargain that you did make with the brewery company?

A. MR. SCHWITZGABEL was with me in the brewery.

Q. And how many times were you over to the brewery before you went to MR. CORNISH?

A. Twice I was before I went to CORNISH'S office, twice I was at the brewery.

Q. And you had conversations with the brewery officials, in what language was the conversation carried on?

A. In the English language.

Q. When was it that you first learned that the brewery claimed that you had entered into an agreement to sell their beer for five years?

A. I found out; it was the time when I took beer of the Peter Breidt Brewery Company, so MR. PLOESER, the collector, come up to see me, why did I took the beer in the Peter Breidt Brewing Company. Of course I told him that the people kind of refuse to take the FEIGENSPAN beer, that I can sell better the Peter Breidt's, so MR. PLOESER commenced to jump and told me if I do it he will make me trouble, and furthermore MR. PLOESER told me I sign agreement he has got to sell for five years beer of FEIGENSPANS; and then I told him I didn't know that and I don't think I ever sign contract to sell five years, only I knows as long as I owe that money I has to sell that beer.

Q. Is MR. PLOESER in court?

A. He is.

Q. Who was present when this conversation took place with PLOESER?

A. Nobody; but my wife was upstairs and she heard hollering so much; so she come down to see what was going on.

Q. Were the SCHWITZGABELS still living in the house at that time?

A. Yes; they both been upstairs and they come down too; they ask what is the trouble going on downstairs.

Q. Was there anything said then about paying off the amount due to the FEIGENSPAN people?

A. I told MR. PLOESER that he should not holler at me, that I will try and get the money and pay him off.

Cross Examination by MR. BOGGS.

Q. Do you remember the paper that you refused to sign on the 16th day of August in MR. CORNISH'S office; do you remember what it looked like, the general appearance of it?

A. About that size (indicating); it was some kind of paper about that size (indicating).

THE COURT: It was not the paper that is now shown you.

Q. I was going to ask him if he thinks it is the paper now shown him?

MR. CONNOLLY: He can't read it.

Q. From the appearance, I mean.

THE COURT: The answer is it was a paper about that size, just about three-quarters of the size of the paper that bears his signature and is now in question. That is what is shown by the interpreter.

Q. Ask him to look at that paper and if he thinks it was not—

THE COURT: Just ask him whether that was the paper. Put it in the other way. You want to put your questions as simple as possible, because I am in doubt as to whether the questions are put as put to the interpreter, and whether the answers were given. Just ask him whether that was the paper shown him on the 16th of August and that he refused to sign.

He shakes his head and says no, it isn't the paper.

Q. You say about a week or ten days afterwards you signed a paper at the brewery in Newark?

THE COURT: Signed this paper at the brewery.
MR. CONNNOLLY: No.
MR. BOGGS: He said a paper.

Q. A paper at the brewery in Newark?
A. Yes, sir.
Q. Who was present; who did you see in the brew-

ery at Newark when you signed that paper there?

A. SUTHERLAND.

Q. Is he here in court?

A. He is here.

Q. Did you see anybody else at the brewery at the time besides MR. SUTHERLAND?

A. Saw a good many bookkeepers was busy writing at desks.

Q. Didn't talk to anybody else?

A. No; nobody talked to me and I didn't neither to nobody.

Q. Was anybody with you when you went there?

A. By myself I went there.

Q. What did you go there for?

A. MR. PLOESER, the collector was at my place to collect for the beer, so he told me I should go to the office that they wanted me there.

Q. How long before you went to the office was it that MR. PLOESER told you that?

A. I think about the second or third day when MR. PLOESER told me, so I went to Newark.

Q. About two or three days after?

A. About two or three days after, yes.

Q. Do you remember what papers you did sign that day at MR. CORNISH'S office?

A. I remember that I signed some papers MR. GRAFF handed to me to sign.

Q. Did MR. GRAFF explain them to you when you signed them ?

A. Something I understood, but not all.

Q. Bond and mortgage on the real estate, did you understand that?

A. Yes; I understand that; that there was a mortgage on the house.

Q. And chattel mortgage on your goods?

A. All I understand was supposed to be on the house; the mortgage.

Q. (To the interpreter) Was that all he said, are you sure? Is that the full answer?

THE INTERPRETER: Yes, sir.

Q. And you are quite sure, are you, that the paper that you refused to sign when MR. GRAFF told you not to sign it, that you didn't afterwards sign it that day before you left the office?

THE COURT: He has sworn to that.

A. I am sure I didn't sign that paper.

THE COURT: I will state what I understand, gather from the interpreter, is this witness's evidence as to the paper. He says that a paper was shown him, and that he was told by MR. GRAFF not to sign it, and that he did not sign it. He further says that the paper which bears his signature was not that paper, as he thinks, but that later on he did sign a paper at FEIGENSPAN'S brewery office, but he doesn't say this is the paper, but he says the paper his name is signed, he did sign the paper that is now in question.

MR. CONNOLLY: He doesn't say he signed this.

THE COURT: He says this is his signature.

MR. CONNOLLY: That is right.

THE COURT: But he says this paper now shown, the famous agreement which is drawn in question here, that the signature is his signature, but he don't recognize it as having been shown to him on the 16th of August; it was a smaller paper, as he explained it to the interpreter and as the interpreter showed by manifestation, it was about three-quarters the size of this paper. The interpreter had it folded as I fold that now. I say three-quarters, about two-thirds the size of that paper. I repeat; he says the signature to the paper here in question is his signature, but he don't know when he signed it, but he did sign a paper at FEIGENSPAN'S office

a week or ten days afterwards. I believe I have got it right now, haven't I?

MR. CONNOLLY: Yes; I think that is right.

MR. BOGGS: That is right.

THE COURT: That is the substance of his evidence.

Q. When MR. PLOESER came to see you to ask you why you didn't take their beer, you testified to, PLOESER told you that you had made a contract for five years—is that right?

A. Yes, sir.

Q. And didn't you say this in answer to MR. PLOESER: "That doesn't make any difference; the contract has nothing to do with it; as soon as I pay the money I can do as I please?" Ask him if he didn't say that in answer to MR. PLOESER?

THE COURT: When PLOESER came to him and asked him why he didn't buy their beer, didn't he answer the way it is there?

A. I didn't know that I signed a contract until MR. PLOESER told me that.

Q. (BY THE COURT) He asked him whether he didn't answer just as those words are. That is the question. Ask him whether he didn't answer to MR. PLOESER in the language there.

THE COURT: You have a right to put the affidavit in, but the affidavits, you understand, on both sides, gentlemen, don't go in at all and are not considered by me, unless one or the other puts them in.

MR. BOGGS: But we have to call their attention to it first?

THE COURT: No; that is different, between witness and the party. (NIZOLEK'S wife). Are you willing to admit she will swear her husband did not sign it?

MR. BOGGS: Yes, if MR. CONNOLLY will admit she don't understand English.

THE COURT: It is admitted that this witness will swear that she was present at the time all these papers were signed and did not see her husband sign the paper now in question, the contract.

MR. CONNOLLY: Of course I would want all the other evidence to go in, that MR. GRAFF instructed him not to sign it.

THE COURT: Yes.

MR. BOGGS: I can hardly agree to that, because she hardly understood any English, and he spoke in English; I think that ought to appear, that she does not understand much English.

THE COURT: That is the ground I am asking counsel to admit something on, that she doesn't understand any English hardly.

MARY NIZOLEK, sworn.

Direct Examination by MR. CONNOLLY.

Q. Do you understand English?

A. I understand little bit; I don't understand all.

Q. Were you present in the office of MR. CORNISH on the 16th of August last year?

THE COURT: You need not put that question, because the proof is she was there already; the Court is satisfied of that.

Q. Did you see your husband sign the papers that were handed to him?

A. They signed paper on the house and to MR. SCHWITZGABEL on $500; something like that.

Q. Who managed the business for you, what attorney?

A. MR. GRAFF.

Q. Did he show them one paper that they must not sign?

A. He did.

Q. Did you understand him?

A. Mr. Graff told them that this was a contract to sell for five years beer of Feigenspans.

Q. And what did your husband do in consequence?

A. My husband said he wouldn't sign that paper.

Q. Did he sign it?

A. No; he did not.

Q. Did you understand Mr. Graff when he spoke to your husband about that?

A. I did.

Q. What was done with the paper that Mr. Graff told Mr. Nizolek he must not sign?

A. Simply put it away.

Q. On the table where the other papers were?

The Court: The gesture she made was that he shoved it one side on the table.

Mr. Boggs: That is too leading.

Q. I asked if that was on the table on which the other papers were lying?

A. I don't remember that.

Q. Now, do you remember the date, the time that Mr. Ploeser called down to the saloon when you came downstairs on account of the noise that he created?

The Court: What is that?

Q. I am asking if she remembers the occasion when she came downstairs when Mr. Ploeser was in the saloon making a noise?

A. Yes; I remember that day.

Q. And was there any other person beside Mr. Ploeser, yourself and your husband present?

A. Nobody I seen.

Q. What did Mr. Ploeser say?

A. Why doesn't he take their beer?

Q. And what did your husband say?

A. The people brought back the beer; that they couldn't sell it.

Q. What did MR. PLOESER say in reply to that.

A. Well, MR. PLOESER said that isn't true, and it was such heavy argument that I don't know much about it.

Q. Was it true that people had brought back beer that you sold to them?

MR. BOGGS: I object.

A. Yes.

Q. Do you know whether there was anything said on that occasion about the five year contract?

A. I didn't hear that.

Cross Examination by MR. BOGGS.

Q. At the time that papers were signed in MR. CORNISH'S office did you hear MR. GRAFF tell MR. NIZOLEK not to sign this paper?

A. Yes; I did hear that.

Q. He spoke in English?

A. In English.

Q. What did MR. GRAFF say?

A. Don't sign that paper.

Q. That was all he said?

A. Yes, sir.

Q. Then when did you first learn what the paper was about, from anything that MR. GRAFF said, or from what your husband told you afterwards?

A. I knowed just the very first time when MR. GRAFF spoke about it.

Q. Did MR. GRAFF say what the paper was, explain?

A. He did.

Q. What did he say?

A. That the contract was to take beer for five years.

Q. Did you make an affidavit, swear to a paper in this cause?

MR. CONNOLLY: Isn't that evidence in this case that she did?

THE COURT: No, sir; it is not evidence. She is not defendant here. It isn't evidence; it can only be used to contradict her, and the best way is to show it.

MR. BOGGS: There is no question she made that affidavit.

MR. CONNOLLY: There is no doubt she took the affidavit, and I say it is in the case, part of the record in case.

THE COURT: It isn't in the case unless it is put in, sir. It can only be put in—I want to repeat, not one of these affidavits are in evidence, won't be looked at by me, won't be read or recollected unless they are put in. The affidavit of MRS. NIZOLEK is competent evidence if it is put in by MR. BOGGS, and you can't put it in, but he can, as an admission. This paper can be used by him to contradict this witness. Her attention must be called to it. He is now asking her whether she swore to it. I suggest that he need not go through that formality. Probably you will admit that she swore to it.

MR. CONNOLLY: I will.

THE COURT: Look at it and see if we cannot shorten it.

MR. CONNOLLY: I will admit that, sir.

THE COURT: It is an affidavit, affixed to the original answer. Now I want to get rid, if I can, of the labor of having interpreter interpret all that affidavit to the witness. The better way is for you to hand it to him and let him interpret it to her from the beginning to the end, and then put it in evidence against her.

MR. CONNOLLY: I will admit that affidavit was made by her.

THE COURT: And you admit it may be used if MR. BOGGS, the counsel, wishes to contradict her, without going through the formality of having it all interpreted to her?

MR. CONNOLLY: Yes.

THE COURT: That is all right then.

MR. CONNOLLY: There was another person present on the 16th of August, 1905, in MR. CORNISH'S office, MR. BENDER, and MR. STEIN day before yesterday served a subpoena upon him, but he is not here, so I will have to close my case without him.

THE COURT: Defendant rests, as I understand. Go on, MR. BOGGS.

NEWTON SUTHERLAND, sworn.

Direct Examination by MR. BOGGS.

Q. You live in the City of Newark?

A. I do.

Q. And you are in the employ of CHRISTIAN FEIGENSPAN, the complainant in this case?

A. Yes, sir.

Q. What is your particular—

A. I have charge of the loans and mortgages, and general bookkeeper in the department.

Q. And also general bookkeeper?

THE COURT: Bookkeeper in that department he says.

Q. Did you have any telephone conversation with MR. CORNISH on the 16th of August in relation to this NIZOLEK loan matter?

A. I did.

Q. Do you remember about what time it was?

A. Why, it was in the afternoon, I should judge in the neighborhood of four o'clock or thereabouts.

Q. Did you call MR. CORNISH up or he called you up?

A. He called me.

Q. In reference to what?

A. He called up and stated that these parties in this case were at his office waiting to close the transaction, that he had not received the check, and I told him that I had sent it by special mesenger.

MR. CONNNOLLY: I object to any statement made over the telephone.

THE COURT: Well, there is evidence put in by you that telephone messages were sent, and I think it is perfectly proper for MR. BOGGS to show just what stage the matter was at when that telephone message went—if you don't mean to draw any inference from it—that is another matter.

MR. CONNOLLY: All I object to is the conversation.

THE COURT: The subject matter of the conversation, the letter of instructions is already in, and very properly in, without your objection. I should let it in even if you had objected, and certainly it is competent for the complainant to show that that letter of instructions was not modifled, and that I think on this issue whether this paper was signed at all that day by MR. NIZOLEK intelligently, which is the issue here, he has a right to fortify MR. CORNISH and show the whole circumstances. I wouldn't rule it out any how. You have got your objection. Have you completed your answer?

A. Yes, sir.

Q. (BY THE COURT) That is the substance of what you said to him. Did you say anything more?

A. No; there was nothing more asked me.

Q. Was anything else said over the telephone at that time in regard to any other matter?

A. No.

Q. Connected with this loan?

A. There was not.

Q. (By The Court) Was there a subsequent phoning by Mr. Cornish to you after that afternoon?

A. I don't recall any conversation, any telephone message, except that one with Mr. Cornish that afternoon, the only one I recall.

Q. Now had you in fact sent the check when you received this message from Mr. Cornish?

A. Yes, I think the boy had probably gone fifteen minutes or so, something like that.

Q. And was there anything sent by you with the check?

The Court: Was this letter of instructions that accompanied the papers, was that prepared by you?

A. Yes, it was.

Q. That was sent with the check?

A. Yes.

Q. And was there anything else sent with the check besides that?

A. Why, I sent the agreement and the chattel mortgage and a note and a power of attorney on the license, I think I stated in that letter.

Q. (By The Court) This contract which I show you now which is here in question is the contract which you sent, which went with the papers?

A. Yes, that is.

Q. (By The Court) You prepared that, I suppose, or had it prepared?

A. The typewriter prepared it at my dictation.

Q. (By The Court) That is the contract referred to in this letter of instructions?

A. Yes, sir.

Q. (By The Court) I will ask you this. When did you first see that contract here in question now, what is called the five year contract, which is dated the 16th of August, which you sent to be executed, when did you first see it after it was executed?

A. Why, to the best of my recollection this was returned to our office by the Fidelity Trust Company of Elizabeth, with the note and the power of attorney, and I think the bond and the chatel mortgage.

Q. (By The Court) Was it executed when it came to your office?

A. It was.

Q. (By The Court) And signed by Mr. Cornish as witness?

A. Yes, sir.

Q. (By The Court) Been changed at all since, to your knowledge?

A. Not to my knowledge, and placed in the file.

Q. Now was there any other paper sent by you that day besides those you have mentioned, to Mr. Cornish?

A. I don't recall any other except such papers as are enumerated in that letter.

Q. Any agreement in regard to paying five dollars a week?

A. There is no agreement, I stated in my letter.

The Court: He said he enclosed this five year agreement, agreement to pay five dollars a week on license, one of the witnesses said there was such a paper they refused to sign.

A. No; there was no agreement in connection with that at all; I simply called Mr. Cornish's attention to it, mentioned it to him.

Q. But there was no agreement to sign?

A. No agreement.

Q. (By The Court) No prepared agreement?

A. No prepared agreement.

Q. Did Mr. Nizolek come to the office in Newark of the brewery some days after the 16th day of August and see you?

A. I never saw Mr. Nizolek at our office after this matter was closed.

Q. (By The Court) Feel sure of that, eh?

A. I am positive of it.

Q. Did he sign any paper at your office?

A. He did not.

Q. (By The Court) Not in your presene or with your knowledge?

A. Not in my presence or to my knowledge.

Q. Before the agreement was signed, before these papers were signed on the 16th of August, did you have any conversation with Mr. Nizolek relative to the making of this loan?

A. I did.

Q. I think he stated he came twice to the office. Was that the first or second time, do you know?

A. Second.

Q. (By The Court) How many times did he come to the office?

A. I saw him at the office twice before these papers were executed.

Q. And did you converse with him both times?

A. I didn't have any conversation with him at the first time.

Q. Who was with him the first time, do you know?

A. Mr. Schwitzgabel was there the first time with him.

Q. Anybody else?

A. The man he bought out; the man he bought out.

Q. Anybody else that you remember?

A. No.

Q. Now the second time you saw him?

A. I did.

Q. And talked with him?

A. I did.

Q. Who was with him then?

A. Mr. Schwitzgabel was there.

Q. (By The Court) Both times?

A. Both times.

Q. Now, at that time, that interview, was there any conversation in regard to and agreement to sell your beer and ale?

A. There was.

Q. What was the conversation; in what language?

A. English.

Q. Please state what was said about the agreement to sell your beer?

A. I told him we would make the loan $4,800 to him, upon the condition that an agreement was made to use our beer and ale and no other for five years.

Q. Are you sure that the term five years was mentioned?

A. I am certain, positive of it.

Q. And what did he say, if anything, in answer to that?

A. He expressed himself that he was satisfied.

Q. (By The Court) Was the other gentleman taking your beer that he bought out?

A. He was.

Q. (By The Court) Was he taking it exclusively, as far as you knew?

A. I don't think he did.

Q. (By The Court) He was buying of you freely?

A. Yes; he was buying of us freely; yes, buying weekly, every week.

Q. You had no loan to the other man, this Schwitzgabel?

A. Yes; there was an account owing there; not as large though.

Q. (By The Court) Didn't have mortgage on it?

A. Had chattel mortgage, chattel mortgage on the fixtures.

Q. Then did you see Mr. Nizolek again after that?

A. I did not.

Q. (By The Court) Then the whole thing was turned over to your counsel and you required the guarantee of the trust company?

A. Turned over—the Fidelity Trust Company were notified to make a search and the matter would be closed there, and I notified Schwitzgabel to take his deeds there.

Cross Examination by Mr. Connolly.

Q. Was it on the first or second occasion when you told him he would have to take beer from you during a period of five years?

A. On the second occasion.

Q. Now, the first time that he called there he wanted to know upon what conditions he could buy the saloon and premises, didn't he, and he said he had a thousand dollars to put into it?

THE COURT: You are putting too much in one question. The witness may have to divide it in his answer.

Q. All right, sir; I will divide that and put it in another form. How much money did he say he had to put in the business the first time he came to your place?

A. He came to our place the first time with MR. SCHWITZGABEL and MR. SCHWITZGABEL said that this man wanted a loan of fifty-three hundred dollars. MR. STENGLE informed him he wouldn't loan $5,300 on that property; he says: "If you can get along with less I will consider it."

Q. Did he say he had a thousand dollars to put into the business?

A. He did not; not that I recall.

Q. Did you tell him to go and get $2,000 and pay it on the consideration, and you would furnish the balance?

A. I didn't tell him that.

Q. Don't you know he came a second time and told you he had $1,500 and SCHWITZGABEL would take a second mortgage for $500?

A. He came a second time; the time that I closed this matter with him, and said that he had made some arrangement with MR. SCHWITZGABEL, I believe, to take a second mortgage for $500, and then the figure $4,800 was arrived at, and then we considered it, and decided to advance that amount.

Q. Did you decide to do it that day?

A. Well, the decision was given to him that day.

Q. To loan the money. Now then was that the day that you say he promised to take the beer for a period of five years?

A. That is the day I told him the conditions, which he accepted.

Q. And you say MR. SEHWITZGABEL was present at the time?

A. He was there.

Q. You had a chattel mortgage on the place at that time, hadn't you?

THE COURT: He said he had a chattel mortgage.

A. Chattel mortgage from SCHWITZGABEL to the amount of ten hundred or eleven hundred dollars, thereabouts.

Q. And you had in addition a bill against him for $1,100 or $1,200, didn't you?

A. No.

THE COURT: I didn't get the question.

Q. Beer bill against him for eleven or twelve hundred.

THE COURT: I think in your letter here you speak about thirteen.

A. With interest; I think the leter called for the Fidelity Trust Company to withhold about thirteen hundred. There was some interest on this which I afterwards compromised with MR. SCHWITZGABEL.

THE COURT: I suppose the counsel's question which you said you didn't have an account—

A. He asked me if in addition to that there was a beer bill of some eleven or twelve hundred dollars; I told him there was not, in addition to that.

Q. Out of the consideration money that was paid

to SCHWITZGABEL you deducted the amount mentioned in your letter?

A. I believe that amount was withheld.

Q. And now on either of those occasions when NIZOLEK was at your place in Newark did you tell him that in addition to selling the beer for five years you would have to make a mortgage, a chattel mortgage and note payable, the note in one day and the chattel mortgage in one year and the real estate mortgage in one year; did you tell him that?

A. I don't think I told this man he would have to sign a note payable one day after date, but I did tell him he would have to secure us by the real estate and collateral chattel mortgage.

Q. Did you tell him that it was to be for one year?

A. I don't think I did.

THE COURT: The chattel mortgage is one day after date; it is real estate mortgage that is one year after date.

Q. Now then did you tell him also that he would be required to pay six per cent on the real estate mortgage and that he would have to pay off the chattel mortgage by allowing discounts on the beer; did you tell him that?

A. I told him the rate of interest would be six per cent.

Q. (BY THE COURT) You didn't go into the particular terms of the chattel mortgage which you required?

A. I did not; I didn't go over that chattel mortgage to him at all.

Q. (BY THE COURT) You have those blanks?

A. Those are our regular forms, regular form of chattel mortgage.

Q. (BY THE COURT) The same kind of one MR. SCHWITZGABEL had?

A. I think not; I think that that form has been revised; I think that is the later form that we have had made; MR. SCHWITZGABEL'S is dated back some years.

THE COURT: Does that make any difference? In this case he signed that; signed all the papers. The only question in the case is whether he signed this one paper that day and knew what he was signing. That is the only question there is in the case; and this evidence is given to show that he ought to have expected to have to sign this contract.

MR. CONNOLLY: Of course I want to show—

THE COURT: That is the only point of view in which it is competent.

MR. CONNOLLY: The answer to the cross bill filed states that all the different documents signed on that day were a part of one transaction.

THE COURT: They were.

MR. CONNOLLY: And the affidavit filed by MR. BOGGS, the affidavit of MR. CORHISH is to the effect that all the papers constituted one transaction.

THE COURT: Undoubtedly.

MR. CONNOLLY: Now then if that be so—

THE COURT: But the question is what the transaction was. You deny that you signed one of the papers.

MR. CONNOLLY: Yes.

THE COURT: Then presented to your client. He admits it is his signature; he says he didn't sign it that day; if he did sign it when he knew it it was at a later day. Now it is perfectly competent for MR. BOGGS to prove that he ought to have known that he would be called upon to sign a contract for five years, and that detracts from the probability, as MR. BOGGS would argue, I have no doubt, that he would refuse to sign it, and didn't know what he was about, or was led into anything unawares. That is the only point I can see in it. I don't think the chattel mortgage would amount to anything.

MR. CONNOLLY: The chattel mortgage was

signed at the same time, and provided that it was payable in one day after date, and yet it also provided—

THE COURT: You ought not to complain of that now.

MR. BOGGS: No; I am sorry for that; it also provides he might foreclose it at any time if he thought the security was not of sufficient value, if he, on reconsideration of the matter, should come to the conclusion that the chattels were not of sufficient value, he might go on and foreclose. Now, I want to know whether he brought all these different phrases on the contract—

THE COURT: He said he did not, and it don't seem to me it makes any difference whether it did or not, because these papers were all scrutinized by MR. GRAFF and MR. GRAFF advised his client to sign that paper, three times his name appears there, his signature; but I shall not shut you off, except to say that it is a little tedious, that is all.

Q. Now, you say that he didn't call there some time after the matter was closed up in CORNISH'S office?

A. He didn't call there some time after that matter was closed and see me; I didn't see him at any time after that at our office.

Q. (BY THE COURT) Did you hear of him being there?

A. I didn't hear of him being there.

Q. Do you know whether he was there and saw anybody else?

A. I said I didn't hear of him being there.

Q. (BY THE COURT) Have you heard of it since at any time?

A. I have not.

Q. (BY THE COURT) Have you any reason to believe he might have been there?

A. I have not.

Q. (BY THE COURT) You are the man he would see if he came?

A. Very likely.

Q. (By The Court) You are the chattel mortgage man?

A. I am.

John A. Stengle.

Direct Examination by Mr. Boggs.

Q. You live in the City of Newark and are in the employ of Christian Feigenspan, the complainant?

A. Yes, sir.

Q. And what is your particular department?

A. I am cashier.

Q. In the office?

A. Yes, sir.

Q. In Newark?

A. Yes.

Q. Now do you remember any time Mr. Nizolek coming to the office with Mr. Schwitzgabel in regard to this loan, effecting this loan?

A. I do.

Q. You remember when it was, about?

A. Why, it was about the second day of August, last year.

Q. Whom did he see?

A. He saw Mr. Sutherland.

Q. Did you hear any of the conversation between Mr. Sutherland and Mr. Nizolek in regard to this matter?

A. I did.

Q. How did you happen to hear that?

A. Why, I come out there with the intention of finding out whether Mr. Nizolek would agree to the conditions that we would impose upon him after granting the loan.

Q. Well, now, did you hear any conversation in reference to this agreement?

A. I did.

Q. (By The Court) This five year agreement?

A. I did.

Q. Just state what you heard?

A. I heard MR. SUTHERLAND state to MR. NIZOLEK that we would grant this loan of $4,800, provided he would sign an agreement to sell our product exclusively for the term of five years, and MR. NIZOLEK agreed to those conditions.

Q. What did he say?

A. He shook his head; he said it would be satisfactory—didn't say it would be satisfactory, but—

Q. (BY THE COURT) Nodded his head?

A. Yes, sir.

Q. Now there was evidence here that the first time they came they saw MR. STENGLE; is that you?

A. No.

Q. Who is that? Who would that be?

A. That is the president of the corporation.

Q. He is now in Europe or on his way to Europe.

THE COURT: What is his name?

A. C. W. STENGLE.

Q. (BY THE COURT) Any relation to you?

A. Yes, sir.

Q. (BY THE COURT) Did you ever see him there after the agreement was signed, MR. STENGLE—ever see MR. NIZOLEK?

A. No, sir; not that I can recall.

Q. Since the commencement of this suit have you seen MR. NIZOLEK there?

A. No, sir; no, I haven't see MR. NIZOLEK at the office since last August.

Q. Did you see this agreement? How long ago did you first see that agreement?

THE COURT: Did you see it when it was prepared, before it was signed?

A. No, sir; I didn't see it before it was signed.

Q. When did you first see it then?

A. When I saw it at our office after the papers were all returned from the Fidelity Trust Company.

Q. Did you examine it then; look at it?

A. Why, not particularly; I saw it was signed by MR. NIZOLEK.

Q. (BY THE COURT) Saw that it was regularly executed?

A. Yes, sir.

Q. Did you notice whether the signature of ABRAM H. CORNISH was there or not?

A. That signature was there.

Q. (BY THE COURT) Not been changed since it come to your office?

A. No, sir.

Q. Who has the custody of such papers as those?

A. Why, MR. SUTHERLAND.

Cross Examination by MR. CONNOLLY.

Q. Do you know whether it was the first or second time that NIZOLEK was at your office to secure the loan that you were present?

A. It was the second time.

Q. And don't you remember the first time then?

A. No.

Q. You only know that there was an agreement concluded by which he was to be advanced $4,800 on that property at Elizabeth?

A. Yes, sir.

Q. And were the conditions upon which he has to get that loan fully entered into, fully spoken of?

A. They were.

Q. And was he told he would have to execute all these different instruments?

A. Why, he was told he would have to secure us by real estate, chattel mortgage, and an agreement and a note. I think the note was—I don't know whether the note was mentioned or not.

Q. Was MR. SCHWITZGABEL with him?

A. Yes, sir.

Q. You don't remember, you say, that MR. NIZOLEK called at your office a week or some days after the trans-

action at Elizabeth, do you?

A. Why, I was told that he was there; I had no business with him.

Q. (By The Court) You heard he was there after the transaction was closed up?

A. No; this was previous to the time that—or on his first call; you refer to his first call at the office, don't you?

Q. No; I am talking now about after the transaction was closed up at Elizabeth. Do you remember a call by him; I said a week or some days after?

A. No; I do not.

Q. (By The Court) In the previous answer you were referring to the first call at the time he came there?

A. Yes, sir.

Q. Did anybody tell you that he had been there?

A. No, sir.

Joseph Ploeser, sworn.

Direct Examination by Mr. Boggs.

Q. You reside in the City of Elizabeth?

A. Yes, sir.

Q. And you are in the employ of Christian Feigenspan, the complainant?

A. Yes, sir.

Q. And what is your particular employment?

A. I am the agent and collector for Union County.

Q. You know Mr. Nizolek?

A. Yes, sir.

Q. And Mr. Schwitzgabel?

A. Yes, sir.

Q. Did they speak to you about this sale of the property from Mr. Schwitzgabel to Mr. Nizolek?

A. Yes, sir.

Q. (By The Court) Before it went through?

A. Yes, sir; they came first to me.

Q. What was their object in speaking to you about it?

MR. CONNOLLY: Who were "they"?

Q. NIZOLEK and SCHWITZGABEL, about anything with regard to the getting of this loan from FEIGENSPAN?

A. MR. SCHWITZGABEL introduced MR. NIZOLEK to me first, and he told me that MR. NIZOLEK was satisfied.

Q. (BY MR. CONNOLLY) Was MR. NIZOLEK present?

A. Yes, sure; he introduced him to me; that is what I said, that is the first time I got acquainted with him, and he said that MR. NIZOLEK was satisfied to buy his business and property, and that he would have a loan from somebody, and that he himself, MR. SCHWITZGABEL, introduced us because the beer had been at the place so long a time and he thought it was satisfactory to him, and I made an appointment, we went to the office.

Q. Here in Newark?

A. To Newark, yes, sir.

Q. (BY THE COURT) Did you go with him?

A. Yes; made the appointment with him at the office; I don't know whether I came on the same train; at least we went to the office, I know that, and I introduced this MR. NIZOLEK to MR. STENGLE, our president of the corporation; he happened to come downstairs and I introduced him right at the foot of the stairs.

Q. Now, what was said?

A. And I introduced MR. NIZOLEK to MR. STENGLE and stated the fact to MR. STENGLE that MR. NIZOLEK wanted a loan of $5,300, and MR. STENGLE asked me several questions, and he considered the matter right there at the foot of the stairs; he says: "No; that is too much money; if MR. NIZOLEK can get a little more money by himself I am satisfied to make it about $4,800"; that is all I know.

Q. Was anything more said that day about the terms of the loan?

A. No; not that day; no, not that I know of.

Q. (BY THE COURT) That is as far as it got that day?

A. That is as far as it got; yes, sir.

Q. Did you come with them a second time?

A. No sir; I did not.

Q. Now, some time after this transaction was concluded and MR. NIZOLEK took possession of the property, for some time he took the beer from FEIGENSPAN?

A. Yes, sir.

Q. Then he stopped taking the beer?

A. After the expiration of about three weeks, to my knowledge.

Q. Did you go to see him about it?

A. Yes, sir.

Q. And about when was this, do you remember?

THE COURT: He says about three weeks.

A. He took the goods about three weeks and then he quit.

Q. (BY THE COURT) You went very soon after that?

A. Yes, sir; following day when I got notice of it, that must have been on Friday; he stopped on Thursday. He give the order to the driver to bring so much goods, and on Friday morning the driver got there he refused to take it; consequently the driver telephoned to the office, and it reached me.

Objected to.

THE COURT: It is quite proper, even if it is hearsay, to say how soon it was after he stopped he went to see him; that is all, nothing more.

Q. Just state what took place when you went there to see him, the conversation betwen you and NIZOLEK in regard to the refusal to take FEIGENSPAN'S beer?

A. Well, I went there, I asked him what was the matter, why he didn't live up to his contract, and take somebody else's beer. His wife happened to be there also, and he says: "I give it up"; I says: "You have no

right to break your contract, you know you signed a contract for five years; you put yourself in trouble, that is all." He says: "Well, it don't make any difference; when I pay up I buy where I please."

Q. (By The Court) What did he say about the contract for five years; did he deny?

A. He didn't exactly deny it and he didn't acknowledge it, so I told him: "You break your contract and you get in trouble." He says: "It makes no difference; when I pay up I can buy where I please"; that is the very words he said.

No cross examination.

Abram H. Cornish, recalled.

Q. (By The Court) You have been thinking of this, I suppose, as you sat here in the court room, Mr. Cornish?

A. Yes, sir.

Q. (By The Court) Give me your recollection now as to the particulars, if you can recollect anything of the execution of this contract in question.

A. Well, I have no very distinct recollection of how he signed it. I know that the papers were, as they came in that the letter was handed to Graff with the request to explain them to his client.

Examined by The Court.

Q. Did you show the letter to Graff?

A. I don't know whether I showed that to him or not; I don't recollect.

Q. What do you recollect that Graff said to his clients about it?

A. I don't recollect any conversation distinctly; I think that Graff told him that in regard to the agreement that it was all right to sign it.

Q. Well, how come you to witness it, and not Graff, and he witness the other papers, and you not?

A. I don't remember.

Q. What did you do with the papers after that?

A. I kept the papers until I sent all except those that have been recorded to the brewery in a day or two, and as soon as the others had come back from recording I sent them along too.

Q. You mean you sent them to the brewery or to the insurance office here; the Title Guarantee Company?

A. No; I sent the papers that were not recorded; I sent them direct to the FEIGENSPAN people.

Q. And you are not able to explain at this time how you happened to sign that paper as a witness and not the other.

A. No; I don't recollect. I have a great many of these transactions to close, and it is hard to carry the details in my mind, especially as far back as that.

Q. You have been ~~speaking~~ sitting here and heard the evidence—have you any doubt the papers were signed there in your presence?

A. No; I haven't; I wouldn't have paid the money if the papers hadn't been executed.

Q. (BY MR. CONNOLLY) Didn't pay the money that day, did you?

A. Paid part of it that day. The transaction was closed as far as NIZOLEK was concerned.

Q. They were dated that day in this very contract, the date is written in your very handwriting?

A. I think that handwriting is GRAFF'S of the date; I think the date is written in GRAFF'S handwriting.

Q. It is different from the other. It was blank when you got it, I suppose?

A. I think so.

Q. You haven't got the deed here; deed of real estate?

A. I have the deed; I found it among the other papers.

Q. Deed of real estate?

A. Yes, sir.

Q. The filing is not in your handwriting?

A. Of the date? No, sir.

Q. You think it is MR. GRAFF'S?

A. I think so.

Direct Examination by Mr. Boggs.

Q. Have you any doubt, Mr. Cornish, about that you signed your name as witness on that same day to the paper?

A. Oh, I signed it at that time.

No cross examination.

The Court: I want to call Mr. Stengle of my own motion.

John A. Stengle, recalled.

Examined by The Court.

Q. Just tell us whether that date of this contract in question was filled in before it was sent by you to Elizabeth?

Mr. Connolly: I don't think that he saw it before it was sent.

Q. I want to see if it is his handwriting then?
A. No.
Q. If you know this handwriting?
A. No; I don't know this handwriting.
Q. It isn't yours?
A. No, sir.

The Court: I want to ask Mr. Sutherland of my own motion.

Newton Sutherland, recalled.

Examined by The Court.

Q. Do you recollect whether the date was put in that paper before it was sent or not; blank left there for it, wasn't it?

A. Yes, sir; there was blank; that isn't my handwriting.

Q. That isn't your handwriting?

A. No.

Q. Do you know it?

A. I don't know the handwriting?

MR. BOGGS: That is all I have.

THE COURT: If Mr. Graff wants to come and look at that and see what he thinks about it, I have no objection.

LOUIS A. GRAFF, recalled.

Examined by MR. CONNOLLY.

Q. You have seen the words "the sixteenth"—

THE COURT: Just see if you know in whose handwriting the word "sixteenth" is.

MR. CONNOLLY: Take the witness stand.

Q. Is the word "sixteenth" at the foot of the contract in your handwriting?

A. It is.

Q. How did you come to put it there?

A. Well, after I put it in there before, and after I read it, then I reconsidered it and then told him not to sign.

RECESS.

FREDERICK D. SCHWITZGABEL, recalled.

Direct Examination by MR. CONNOLLY.

Q. You accompanied MR. NIZOLEK to the brewery company's place in Newark on both occasions before the final transactions were carried out at Elizabeth, leading up to the sale, etc.?

A. Yes, sir.

Q. Now, on those visits, were there anything said by MR. SUTHERLAND or MR. STENGLE as to the length of time, anything said by MR. SUTHERLAND as to the length of time that NIZOLEK must sell beer there in order to sesure the loan?

A. Why, yes; MR. SUTHERLAND said to MR. NIZOLEK in my presence: "Understand, when we loan you this money you will have to take this beer; nothing but our beer," and he says: "You all understand that?" and MR. NIZOLEK says "Yes."

Q. Was there anything about the length of time he must take it?

A. No period of time, no.

Q. No period of time was stated?

A. No.

Q. Was there anything said on either occasion when you went there about the length of time that he must sell?

A. That is the only time there was anything said, because the first time we was there they didn't come to any agreement on the price; they wouldn't loan the money.

Cross Examination by MR. BOGGS.

Q. Was MR. STENGLE there the second time?

A. MR. STENGLE was close by; he was in his office, but I don't think he was interested.

Q. And how far were you from MR. NIZOLEK and MR. SUTHERLAND?

A. We were right together.

Q. Well, was this at the conference?

A. It was in the gangway, in the pathway going between the two offices.

Q. MR. SUTHERLAND was at his desk?

A. He was outside of his desk.

Q. He was outside in the gangway talking to you?

A. Yes; between the two offices.

Q. That was the second time?

A. Second time; yes, sir.

Q. The only two times you were at the office with MR. NIZOLEK, isn't it?

A. That is all.

Q. The first time you saw MR. CHRISTIAN STENGLE, the president?

A. I saw MR. CHRISTIAN STENGLE before that; I saw MR. PLOESER; spoke to MR. PLOESER.

Q. MR. PLOESER went with you the first time?

A. He didn't go with us; he happened to miss the train; he came on the next train afterwards.

Q. He met you there?

A. Yes.

Q. Introduced MR. NIZOLEK to MR. STENGLE, as he said?

A. Yes.

JOSEPH NIZOLEK, recalled.

Direct Examination by MR. CONNOLLY.

Q. When you went to the brewery office in Newark with MR. SCHWITZGABEL was there any time fixed, any time set during which you were to purchase the FEIGENSPAN COMPANY'S beers.

Objected to.

MR. CONNOLLY: I am directing him to the testimony your witness gave on the witness stand here.

THE COURT: I thought he was examined on that subject before. Go on.

A. The first time we went there we didn't do anything, because I didn't have enough money.

Q. Second time or first time?

A. The first time; but the second time, then I had $1,500, and another five hundred MR. SCHWITZGABEL he going to put up on second mortgage, that would be two thousand.

Q. Get right down to the point I asked you about.

THE COURT: What was said about how long?

Q. What was said about how long you were to take the beer?

A. Well, I didn't hear nothing about it, and I didn't said, and I didn't ask it, only just long I have money I take the beer.

Q. As long as you had their money you would take the beer?

A. Yes, sir.

Q. Did they say you must sell their beer for five years?

A. No, sir; I didn't hear that.

Q. You said before, on your direct examination—

THE COURT: Never mind what he said on his direct examination.

Q. All right, sir. How long was it after the Elizabeth transaction that you called to their office at the suggestion of MR. PLOESER?

THE COURT: It doesn't appear that he called at their office at the request of MR. PLOESER.

MR. CONNOLLY: Yes, it does; that appears in the testimony; MR. PLOESER hasn't denied it.

THE COURT: I never heard that part of it. He said he was there, but I didn't understand he said he went there at the request of MR. PLOESER; I don't know whether MR. BOGGS understood it or not.

MR. BOGGS: I didn't understand that; it may be.

THE COURT: It may be that was there; my attention wasn't called to it, or I would certainly have called MR. PLOESER'S attention to it myself if MR. BOGGS omitted it. You have no right to put that question, and it assumes something that was in doubt. You can ask him how soon it was after.

MR. CONNOLLY: I withdraw the former question.

Q. How soon after you signed the papers at Elizabeth did you call at the office of the brewery in Newark?
A. MR. PLOESER—

THE COURT: Never mind. You answer that question. You have answered it once distinctly.

Q. How long after?
A. About a week; something like that.
Q. About a week?

THE COURT: That is what he swore to before; week or ten days he said.

Q. A week or ten days. Who did you see when you went there?

MR. BOGGS: He testified to that.
THE COURT: He testified he saw MR. SUTHERLAND.

A. I saw MR. SUTHERLAND.
Q. And you signed some paper, as I understand, when you went there?

THE COURT: That is a leading question. You are going right over the same ground; before a jury it wouldn't be permitted at all; it don't have any effect on my mind whatever.

Cross Examination by MR. BOGGS.

Q. What did MR. SUTHERLAND say to you about their beer? Just tell us what he said.

THE COURT: When?

Q. At the second time you were there when you saw MR. SUTHERLAND.

THE COURT: When you made the bargain for $4,800.

A. MR. SUTHERLAND, MR. SCHWITZGABEL, we was talking about, I have money of them and I have to sell the beer; that is all there was.

Q. Nothing else?

A. Nothing else.

Q. But about the beer?

A. No, sir.

Q. Didn't he say you must sell it for five years?

THE COURT: He says he didn't. What is the use of pressing him; he only makes it stronger.

A. No, he did not.

LOUISE SCHWITZGABEL, recalled.

Direct Examination by MR. CONNOLLY.

Q. Do you remember being in or around MR. NIZOLEK'S saloon when MR. PLOESER came in there one day and talked about a five year contract?

A. I do.

Q. Do you remember being in and around there?

A. I heard something in the hall.

Q. What were you doing in the hall?

A. Doing the work; mopping up the oilcloth.

Q. The hall; how near was that to the saloon?

A. Right upstairs.

Q. How near was it to the saloon?

THE COURT: She said right upstairs.

A. Right upstairs on the floor from the saloon.

Q. Were the doors open or shut downstairs?

A. They was open; upstairs was open.
Q. And who did you hear talking?
A. Mr. Ploeser.
Q. (By The Court) Ploeser?
A. Yes, sir.
Q. Do you know his voice?
A. Sure; I guess I should.
Q. And what did he say to Mr. Nizolek?

Mr. Boggs: One moment.

A. He was finding fault for changing the beer, and he thought he ought to sell their beer, but he didn't mention now anything about—well, he says: "You change the beer now and got the money from us, and why don't you stick to us, and change your beer what for?" And then he told him that the people find fault with the beer, and then he spoke about the six per cent.; I heard loud talk.

Q. Did you hear Mr. Nizolek say that he would pay him off?

Mr. Boggs: I object; it is too leading.

A. Yes; he said.
Q. That is somewhat leading, but still this witness is pretty dumb.
A. He told him he would pay him off $4,800; I heard that; it was loud enough talk.

Mr. Boggs: Do I understand she was upstairs and heard this?
A. Yes; Mr. Ploeser talk loud enough; yes.
Mr. Connolly: She was in the hallway.
The Court: In the hall upstairs, mopping.
Q. The doors, she says, was open.
The Court: Yes; she swore the doors were open and she heard what they said.
Mr. Boggs: They were in the saloon.
Mr. Connolly: They were in the saloon.

Q. Was there or not a stairs leading from the saloon up where you were?

A. Sure, there is stairs there; yes, and the voice goes up the stairs.

MR. BOGGS: I want to put in the affidavit of JOSEPH NIZOLEK, the defendant, and also the affidavit of MARY NIZOLEK.

THE COURT: By way of contradiction. They are annexed to the original answer.

MR. BOGGS: They are annexed to the original answer. I understood the bond and mortgage are all in.

THE COURT: They are all in; I have got them here.

MR. CONNOLLY: I wish to put in evidence the affidavits of MR. PLOESER.

THE COURT: His attention was not called to them on the stand, but it can be if there is anything in it.

MR. CONNOLLY: I also wish the affidavits of MR. STENGLE, CHRISTIAN STENGLE; he is not here; and MR. SUTHERLAND.

THE COURT: Have you any objection of their affidavits going in?

MR. BOGGS: No, sir; I think not.

THE COURT: They can be called to explain anything. I don't recollect what is in them. They can only be used to contradict them.

MR. BOGGS: I have no objection to their going in.

THE COURT: You have a right to put them on the stand and let them explain anything that is inconsistent with what they have sworn to here to-day, if you choose.

MR. BOGGS: I don't want to.

MR. CONNOLLY: I will withdraw the affidavit of MR. SUTHERLAND; I shall not put it in.

THE COURT: Then the affidavit of SUTHERLAND is not in?

MR. CONNOLLY: No.

THE COURT: Whose is in?

MR. CONNOLLY: MR. PLOESER'S is in. I would like to get in all affidavits attached to my cross bill and answer.

THE COURT: You can't get them in; I want that distinctly understood. The only affidavits in here are first, the affidavit on the part of the defendant NIZOLEK; that is put in as an admission, and it is annexed to the answer in this case; the next is the affidavit of MARY NIZOLEK, and that is put in by way of contradicting her. That is all put in; that is all the complainant puts in.

MR. BOGGS: Yes.

THE COURT: Then the defendant puts in affidavit of MR. PLOESER by way of contradicting him, and the complainant waives the putting of MR. PLOESER on the stand to explain that affidavit and waives the fact that his attention was not called to it when he was on the stand. Is there anything else, gentlemen?

MR. BOGGS: No.

MR. CONNOLLY: No.

THE COURT: I will hear you right away, and I will ask in the first place, so as to shorten the thing, I will ask you what relief you ask for, expect; under your cross bill in your answer you ask for the delivery up of any of these papers; you don't pray for it.

MR. CONNOLLY: They have been all delivered up to us in the sense that their counsel—

THE COURT: What else do you ask?

MR. CONNOLLY: We ask to be released from this agreement.

THE COURT: Now what do you ask for?

MR. BOGGS: I ask for the enforcement of the agreement, and that NIZOLEK be restrained from purchasing beer from any other person.

THE COURT: Has he been under injunction?

MR. BOGGS: He has up to this time.

THE COURT: I want to hear you in support of the position that the mortgage having been paid this court has no further jurisdiction over it, whether the remedy is not that you shall have your remedy at law on the agreement.

MR. BOGGS: You want to hear me on that. You don't want to hear me on the question whether the agreement was ~~sound~~ signed or not?

THE COURT: No; I don't want to hear you on any question of fact that I know of now.

EXHIBITS

COPY.

FIDELITY TRUST CO.,
ELIZABETH, N. J.

GENTLEMEN: Enclosed please find our check for $4,800.00, which is to be loaned to JOSEPH NIZOLEK, at 6%, to be secured by first mortgage on property No. 73 Florida Street, Elizabeth, N. J. We are to receive as collateral security a chattel mortgage for the same amount, also note, form of which we enclose. In addition to this NIZOLEK is to enter into an agreement by which he agrees to use our Lager Beer, Ales and Porter exclusively for a period of five years, and to further agree that he will not dispose of his business unless his successor is accepted by us as a customer and will enter into the same agreement. He is to sign a Power of Attorney on the License, and Insurance is to be taken out to protect our loan.

The costs of search and drawing papers in this matter is to be paid by the mortgagor.

If the property is free from all liens you may close the transaction as above.

Kindly inform JOSEPH NIZOLEK that he must pay $5.00 per week from now on, on account of license.

Please withold the sum $1,300 on account of the indebtedness due as from MR. SCHWITZGABEL, which account we shall adjust with him later.

Yours truly,
CHRISTIAN FEIGENSPAN,
A CORPORATION.
Per N. SOUTHERLAND.

Mortgage to be drawn for one year.

Exhibit on Part of Defendant. C2

This Indenture, made the Sixteenth day of August, in the year of Our Lord, One thousand nine hundred and five, between JOSEPH NIZOLEK and MARIA NIZOLEK, his wife, of the City of Elizabeth, in the County of Union, and State of New Jersey, and CHRISTIAN FEIGENSPAN, a Corporation, organized under the laws of the State of New Jersey, of the City of Newark, in the County of Essex, and State of New Jersey, hereinafter called the mortgagee of the second.

Whereas, the said JOSEPH NIZOLEK and MARIA NIZOLEK are justly indebted to the said party of the second part in the sum of Forty-eight hundred dollars ($4,800.00)) lawful money of the United States of America, secured to be paid by their certain bond or obligation, bearing even date with these presents, conditioned for the payment of the said first mentioned sum to the said mortgagee, its certain attorney, successors or assigns, on the Sixteenth day of August, which will be in the year One thousand nine hundred and six, and interest thereon to be computed from the Sixteenth day of August, One thousand nine hundred and five, at and after the rate of Six per cent. per annum, and to be paid semi-annually. And it is thereby expressly agreed, that the obligor therein, the said party of the first part herein, their heirs, executors, administrators and assigns, shall not nor will make or claim any deduction from or credit on the interest therein and herein agreed to be paid by reason of, on account of, or for any tax or taxes assessed

or which may be assessed on the real property described in this mortgage or any part thereof; and that should any default be made in the payment of the said interest, or any part thereof (without deduction as above agreed against) on any day whereon the same is made payable as above expressed, or should any tax, assessment, water rent or other municipal or government rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in this mortgage and become due and payable, and should the said interest, or any part thereof, remain unpaid and in arrears for the space of thirty days, or said tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien or any or either of them, or any part thereof, remain unpaid and in arrears for the space of ninety days after the first shall become due and payable, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods as the case may be, the above first mentioned principal sum with all arrearage of interest thereon, without deduction or credit as aforesaid, shall at the option of the said mortgagee, its successors or assigns, become and be due and payable immediately thereafter, although the period above limited for the papment thereof may not then have expired, anything therein contained to the contrary thereof in anywise notwithstanding; and the said mortgagee, its successors or assigns may at is or their option pay any such tax, assessments or water rent in arrears, and the amount so paid shall be added to and become part of the principal sum secured by the said bond and by this mortgage, and shall be payable on demand with interest at six per cent. per annum, as by the said bond or obligation and the condition thereof reference being thereunto had may more fully appear.

Now this Indenture witnesseth, that the said party of the first part for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation with interest thereon, according to the true intent and meaning thereof, and also for and

in consideration of the sum of One dollar to them in hand paid by the said mortgagee, at or before the ensealing and delivering of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, release, convey and confirm unto the said mortgagee and to its successors and assigns forever, all that tract or parcel of land situate, lying and being in the City of Elizabeth, in the County of Union, in the State of New Jersey. And which is more particularly laid down, designated and distinguished on a map entitled, "A map of property owned by JACOB T. MERRITT, in the City of Elizabeth, in the County of Union, and State of New Jersey" (on file in the Clerk's office of said County of Union), as lot number forty (40) on block number twelve (12) as laid down on said map, being the same premises conveyed to LOUISA SCHWITZGABEL by HANNAH A. WALTER (widow), by deed dated September 29th, A. D. 1897, and recorded in the Clerk's office of Union County in book 327 of deeds for Union Ciunty on page 271, etc. And by said LOUISA SCHWITZGABEL conveyed to said JOSEPH NIZOLEK, by deed bearing even date herewith, this mortgage beng given to secure a part of the purchase money in said deed mentioned.

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion or reversions, remainder and remainders, rents, issues and profits thereof, and also, all the estate, right, title, interest, property, possession claim and demand whatsoever as well in law as in equity of the said party of the first part, of, in and to the same and every part and parcel thereof with the appurtenances; to have and to hold the above granted and described premises with appurtenances unto the said mortgagee, its successors and assigns, to its and their own proper use, benefit and behoof forever. And the said JOSEPH NIZOLEK and MARIA NIZOLEK do covenant with the said mortgagee that they are seized of an indefeasible

estate in fee simple in said premises, and will warrant and forever defend the title thereof unto the said mortgagee, its successors and assigns against all lawful claims whatsoever; provided always, and these presents are upon this express condition, that if the said JOSEPH NIZOLEK and MARIA NIZOLEK, their heirs, executors and administrators or assigns shall well and truly pay unto the said mortgagee, its successors or assigns the said sum of money mentioned in the condition of the said bond or obligation and the interest thereon, according to the terms of said bond or obligation, then these presents and the estate hereby granted shall cease, determine and be void. And the said JOSEPH NIZOLEK and MARIA NIZOLEK, their heirs, executors and administrators do covenant and agree to pay unto the said mortgagee, its successors and assigns the said sum of money and interest as mentioned above and expressed in the conditions of said bond. And it is also agreed by and between the parties to these presents, that the said party of the first part shall and will keep the buildings erected and to be erected upon the lands above conveyed insured against loss or damage by fire by insurers and in an amount approved by the said mortgagee, its successors or assigns, and assign the policy and certificates thereof to the said mortgagee, its successors or assigns, to effect such insurance and the premium and premiums paid for effecting the same shall be a lien on said mortgaged premises added to the amount of said bond or obligation and secured by these presents payable on demand with interest at the rate of six per cent. per annum, from the time of payment of such premium or premiums.

IN WITNESS WHEREOF, the said party of the first part have hereunto set their hands.

JOSEPH NIZOLEK, [L. S.]
MARIA NIZOLEK, [L. S.]

Signed, sealed and delivered in the presence of

LOUIS A. GRAFF.

STATE OF NEW JERSEY, }
COUNTY OF UNION, } *ss.*

Be it remembered, that on this Sixteenth day of August, in the year One thousand nine hundred and five, before me, a Master in Chancery of New Jersey, personally appeared JOSEPH NIZOLEK and MARIA NIZOLEK, his wife, who, I am satisfied, are the grantors in the within Indenture named; and I having first made known to them the contents thereof, they did each acknowledge that they signed, sealed and delivered th same as their voluntary act and deed; and the said MARIA NIZOLEK being by me privately examined, separate and apart from her said husband, she did further acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, freely and without any fear, threats or compulsion of or from her said husband.

L. A. GRAFF,

Exhibit D2. *M. C. C. of N. J.*

Exhibits referred to ~~but not~~ set out in full. *in the pleadings.*

Contract set forth in bill of Complaint marked Exhibit C1.

Note set forth in chattel mortgage marked Exhibit D1.

Bond accompanying the mortgage on house and lot No. 215 Florida St., Elizabeth, marked Exhibit D3.

Chattel mortgage set forth in answer marked Exhibit D4.

IN CHANCERY OF NEW JERSEY.

BETWEEN CHRISTIAN FEIGENSPAN, A CORPORATION, *Complainant.* AND JOSEPH NIZOLEK, *Defendant.*	*On Bill for Injunction. Final Decree.*

This matter coming on to be heard on Bill and Answer and proof, in the presence of Messrs. JOHNSON, BOGGS & MERSFELDER, of Counsel with the Complainant, and of JAMES C. CONNOLLY, Esquire, of Counsel with Defendant, and the Court having heard the evidence produced on behalf of the respective parties, and the arguments of their Counsel thereon, and considered the same; and it appearing to the Court that the Agreement at length set forth in said Bill of Complaint was intelligently signed, sealed and delivered by the Defendant, JOSEPH NIZOLEK, and is his act and deed, and that the said Defendant has violated the same as set forth and charged in the Bill of Complaint, by selling and offering for sale upon his premises, Number Seventy-three (73) Florida Street, in the City of Elizabeth, New Jersey, ale, lager beer and porter not brewed and manufactured or sold to him by the Complainant and by purchasing from other persons or corporations than the Complainant, to be sold on his said premises, ales, lager beer and porter not brewed and manufactured by the Complainant, and that the Complainant has, at all times, since the execution of said Agreement, been ready and willing to supply said

Defendant with ale, lager beer and porter of its own brew and manufacture; and it further appearing to the Court that the Complainant is entitled to the relief prayed for in its said Bill of Complaint, and that the Defendant should be enjoined and restrained, during the time mentioned in said Agreement, namely, the period of five years, from the Sixteenth day of September, in the year Nineteen hundred and five, the date of said Agreement, to the Sixteenth day of September, in the year Nineteen hundred and ten, from selling, causing, permitting or suffering to be sold, in said saloon, No. 73 Florida Street, in said City of Elizabeth, any ale, lager beer or porter except that brewed and manufactured and sold to him by the Complainant, and from purchasing during said period, any ale, lager beer or porter from any person or corporation whatsoever, other than the Complainant, for the purpose of selling the same in said saloon, so long as and while the Complainant is ready and willing and continues to supply him with ale, lager beer and porter of its brew and manufacture, of the quality and at the prices and upon the terms and conditions as to credit and payment at which Complainant sold to and supplied FREDERICK SCHWITZGABEL, his immediate predecessor, in the occupation and carrying on of said saloon, but the prices not to be higher than those charged to other customers of Complainant, and that, notwithstanding, the said Defendant has, since the commencement of this cause, repaid to the Complainant in full, $4,800, loaned to him by the Complainant at the time of the execution of said Agreement;

IT IS THEREUPON, on this Tenth day of July, Nineteen hundred and six, ORDERED, ADJUDGED AND DECREED, and the Chancellor doth, by virtue of the power and authority in him vested, Order, Adjudge and Decree that the Agreement at length set forth in said Bill of Complaint, was intelligently signed, sealed and delivered by the said Defendant, JOSEPH NIZOLEK, and is his act and deed, and that the said Defendant has violated the same as charged in said Bill and that the said Defendant, JOSEPH NIZOLEK, his executors, administrators and as-

signs, be restrained and enjoined, during the term of said Agreement, and until the Sixteenth day of September, Nineten hundred and ten, from selling or offering for sale, or suffering or permitting to be sold in the said saloon, No. 73 Florida Street, in the City of Elizabeth, any ale, lager beer or porter, except that brewed, manufactured and sold to him by the Complainant, and from purchasing, until said Sixteenth day of September, Nineteen hundred and ten, from any person or corporation other than the Complainant, any ale, lager beer or porter for the purpose of selling the same, in the said saloon, No. 73 Florida Street, in said City of Elizabeth, or so long, during said period, as said Complainant shall supply or be ready and willing to supply to Defendant, ale, lager beer and porter of its own brew and manufacture and of good quality and at the prices and upon the terms and conditions as to payment and credit at which Complainant sold to and supplied FREDERICK SCHWITZGABEL, during his occupancy of said saloon, but the prices not to be higher than those charged to other customers of Complainant.

And it is further Ordered, that an Injunction do issue out of and under the seal of this Court to be directed to the said JOSEPH NIZOLEK, his clerks, agents, attorneys and employees, commanding him and them and each of them, that they do absolutely refrain and desist from selling or causing, permitting or suffering to be sold upon or in the saloon, No. 73 Florida Street, in the City of Elizabeth, any ale, lager beer or porter except that brewed and manufactured and sold to them by the Complainant, CHRISTIAN FEIGENSPAN, until the Sixteenth day of September, in the year Nineteen hundred and ten, and until said day that they and each of them do absolutely desist and refrain from purchasing any ale, lager beer or porter from any person or corporation except the Complainant, for the purpose of selling the same upon said premises.

And it is further Ordered that the Defendant pay to the Complainant, or his Solicitor, his costs of this suit to be taxed, and that the Complainant's costs upon the

application for an allowance of the prelimianry Injunction be taxed and included therein.

W. J. Magie,
Chancellor.

Respectfully advised.
H. C. Pitney, V. C.

A true copy.
Vivian Lewis,
Clerk.

IN CHANCERY OF NEW JERSEY.

Between Christian Feigenspan, a corporation, *Complainant.* and Joseph Nizolek, *Defendant.*	*On Bill, &c.*

NOTICE OF APPEAL.

The Defendant, Joseph Nizolek, hereby appeals from the final decree made in this Court, in the above named cause on the Tenth day of July, A. D., Nineteen hundred and six, and in particular from that portion of the decree which orders, adjudges and decres the alleged agreement set forth in the bill of complaint and bearing date the Sixteenth day of September, Nineteen hundred and five, to have been intelligently signed, executed and delivered by the Defendant to the Complainant, and to

have been the act of the said Defendant, and that he had violated the same as set forth in the bill of complaint.

And from that part of the decree adjudging and decreeing that the said defendant should be restrained and enjoined during the term of said alleged agreement and until the Sixteenth day of September, Nineteen hundred and ten, from selling or offering for sale, or suffering or permitting to be sold upon the premises, No. 73 Florida Street, in the City of Elizabeth, New Jersey, any ale, lager beer or porter, except that brewed, manufactured and sold by the Complainant.

And from that part of the said decree enjoining the said Defendant, his agents and servants from selling any ale, lager beer or porter on the said premises, No. 75 Florida Street, in the City of Elizabeth, New Jersey, except that manufactured by the Complainant from the time of making said decree until the Sixteenth day of September, A. D., Nineteen hundred and ten, to the Court of Errors and Appeals in the last resort in all causes.

ALFRED A. STEIN,
Solicitor of Defendant.

JAMES C. CONNOLLY,
Of Counsel.

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

JAMES C. CONNOLLY,
Of Counsel with the Defendant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

BETWEEN CHRISTIAN FEIGENSPAN, A CORPORATION, *Complainant.* AND JOSEPH NIZOLĘK, *Defendant.*	*On Appeal.*

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

The humble petition of JOSEPH NIZOLĘK, the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor, WILLIAM J. MAGIE, Chancellor of the State of New Jersey, bearing date the Tenth day of July, A. D., Nineteen hundred and six, wherein CHRISTIAN FEIGENSPAN, a corporation, was complainant and your petitioner was defendant, and your petitioner humbly appeals from that part of the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous, for that the said decree adjudges and decrees that the agreement set forth in the bill of complaint was signed, sealed and delivered by the defendant, JOSEPH NIZOLĘK, and was his act and deed, and that he had violated the same as set forth in the bill of complaint.

And further that said decree adjudges and decrees that said defendant had sold and offered for sale upon

his premises, No. 73 Florida Street, in the City of Elizabeth, New Jersey, ale, lager beer and porter not brewed by the complainant in said bill of complaint mentioned, and has purchased from other persons and corporations than the complainant.

And for that the said decree adjudges and decrees that defendant should not be allowed to sell or offer for sale any beer, ale or porter, other than that brewed by the complainant, in the premises Number 73 Florida Street, in the City of Elizabeth, New Jersey, from the date of said decree to the Sixteenth day of September, Nineteen hundred and ten.

And for that the said decree adjudged and decrees that notwithstanding the payment by the defendant of the sum of Forty-eight hundred dollars due under said agreement to the said complainant, defendant must absolutely desist and refrain from purchasing any ale, lager beer or porter to be sold upon said premises from any person or corporation except the complainant, during the period aforesaid.

And your petitioner appeals from the said decree because the agreement referred to and set out in the bill of complaint had never been signed, sealed and delivered as in said bill alleged.

And because the contract and agreements between the complainant and the defendant were not properly enforcible in the said Court of Chancery.

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

ALFRED A. STEIN,
Solicitor for Defendant.

JAMES C. CONNOLLY,
Of Counsel with the Defendant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

BETWEEN CHRISTIAN FEIGENSPAN, A CORPORATION, *Respondent.* *Complainant.* AND JOSEPH NIZOLEK, *Appellant.* *Defendant.*	*On Appeal.* *Answer.*

The answer of the above named Respondent to the petition of Appeal of the above named Appellant.

This Respondent, not acknowledging all or any of the matter which in the said Petition of Appeal, are contained to be true, for answer thereto, nevertheless says and admits, that a Final Decree was, on the Tenth day of June, Nineteen hundred and six, made and entered in the Court of Chancery of New Jersey, by his Honor, WILLIAM J. MAGIE, Chancellor, in the above cause, for the purpose mentioned in the said Petition, as is therein stated; but as to the substance and form thereof, this Respondent prays to refer thereto when the same shall be produced.

And this Respondent is advised and believes, that the said Decree is agreeable to equity, and he prays that the same may be, in all things, affirmed, with costs to be adjudged to this Respondent.

JOHNSON, BOGGS & MERSFELDER,
Solicitors for and of Counsel with Respondent.

CONTENTS

Witnesses

Pleadings, &c.

CHRISTIAN FEIGENSPAN, A CORPORATION, *vs.* JOSEPH NIZOLEK.	*Final hearing on bill, answer and proofs.*

DECIDED JULY 10, 1906.

The object of the bill is to enforce a written contract by enjoining the breach of a negative covenant therein. The contract is as follows:

Know all men by these presents, that I, Joseph Nizolek, of the city of Elizabeth, County of Union, and State of New Jersey, in consideration of the sum of one dollar and other valuable considerations, do hereby agree to purchase from Christian Feigenspan, a corporation, all Ales, Lager Beer and Porter, as sold in my saloon at number Seventy-three Florida Street, in the City of Elizabeth, New Jersey, for the period of five years.

And I further agree that I will not sell or offer for sale any Ale, Lager Beer or Porter in my saloon at number Seventy-three Florida Street, in the City of Elizabeth, New Jersey, except that manufactured by the said Christian Feigenspan for the same period as above mentioned, and it is further understood that this agreement is to bind the successor or successors of the said party of the first part in the purchase of the property or said saloon business; and the said party of the first part agrees not to dispose of said saloon business unless his purchaser shall sign the above stipulation relative to the sale of the Beers, Ales and Porter of the said party of the second part exclusively.

In Witness Whereof, I have hereto set my hand and seal this Sixteenth of August, Nineteen hundred and five.

Joseph Nizolek, [L. S.]

Signed, sealed and delivered in the presence of

Abram H. Cornish.

The allegation of the bill is that the contract was part of an arrangement by which the complainant loaned to the defendant the sum of Forty-eight hundred dollars to enable him, the defendant, to purchase the premises mentioned in the contract and took in security therefor the bond and mortgage of the defendant at one year with interest. It farther alleges that the complainant is a brewer, and was ready and willing at all times to deliver beer to the defendant, and the defendant commenced and continued to purchase beer from it for a period of about three weeks, and then declined to purchase any more from complainant but continued the business and purchased his beer from another brewer.

Upon filing the bill, November 27th, 1905, with affidavits annexed, an order to show cause, returnable on December 5th was made, without *interim* restraint. On that day the defendant filed his answer with several affidavits annexed, in which he admits the loan of the money for the purposes mentioned and that he was at that time requested to sign such an agreement as that set out in the bill, and positively declined to sign it, and that if his actual signature was annexed to the agreement it was procured by fraud and made upon some subsequent occasion; and he says that he declined to sell the complainant's beer because he could sell the beer of other brewers to a greater advantage and with better profit.

The answer further sets forth that at the same date the defendant executed a chattel mortgage to the complainant, with a note payable on demand. It sets out the chattel mortgage as an annex to the answer and it appears to contain an agreement on defendant's part to do certain things, among others that he will not sell any beer except that manufactured by the complainant.

On the filing of this answer and the affidavits annexed the complainant asked leave to file rebutting affidavits, and the hearing was for that purpose adjourned to the 19th of December.

On that day, beside the reading of the affidavits, the Vice-Chancellor, with the consent of the counsel for the defendant, compared the signature to the alleged agreement with the admitted signatures of the defendant to the bond and mortgage covering the house and lot and the chattel mortgage and promissory note, and expressed his belief upon that comparison in connection with the several affidavits, that the signature was genuine, and thereupon an order for an injunction and *interim* restraint was made.

Subsequently the defendant, or some one in his behalf, tendered to the complainant the sum of Forty-eight hundred dollars with interest in payment of the promissory note secured by the chattel mortgage, and the complainant accepted such payment and delivered up the chattel mortgage and note and released the real estate from the lien of the mortgage upon it.

The defendant then set up such payment in an amendment to his answer, and by a cross bill prayed that the contract might be declared no longer binding upon him.

The complainant by replication admits the payment of the money on the 26th of December, 1906, after the filing of the defendant's original answer and after the issuing of the order for *interim* restraint, and denies the allegation that the amount of the mortgage was ever tendered to complainant prior to that time. The cause was brought to final hearing May 31st, 1906.

Mr. Herbert Boggs for the complainant.

Mr. James C. Connolly and Mr. Alfred A. Stein for the defendant.

Pitney, *V. C.*

The only questions of fact and of law raised by the pleadings are, first, whether the agreement set out in the bill was entered into by the defendant intelligently, and, second, whether, if it were so entered into, in view of the fact that the defendant or some one in his behalf

has discharged the pecuniary obligations to the complainant incurred at the same time the contract was entered into, it is still binding on the defendant.

The question of the jurisdiction of this Court to enforce by injunction the negative covenant contained in the agreement was not raised either by the pleadings or on the order to show cause, and was raised for the first time at the hearing.

The question of fact was determined by me on the spot at the hearing in favor of the complainant for reasons stated orally, substantially as follows.

Prior to about the first of August, 1905, one Frederick Schwitzgabel was the owner of a house and premises at No. 73 Florida Street, Elizabeth, N. J., and there conducted a beer saloon, and was a customer of the complainant and was indebted to it for a balance on current account, for which complainant held, as usual in such cases, a chattel mortgage.

Early in August, 1905, the defendant Nizolek negotiated with Schwitzgabel to purchase the premises and saloon and they seem to have agreed upon the price. But the defendant had not sufficient ready money or capital to complete the purchase, whereupon, naturally enough, resort was had to the complainant.

It was not the business of the complainant to loan money on bond and mortgage except in aid of the extension and maintenance of its business as a brewer.

A visit to complainant's place of business brought the defendant and Schwitzgabel in contact with the complainant's agents, Messrs Stengel, one of whom is the president of the complainant corporation, and the other a sub-officer, and with Mr. Sutherland, who is, or was at the time, the general bookkeeper of complainant and had charge of the department which made loans to customers. The defendant spoke English with difficulty, if at all, but probably, as appeared at the hearing, understood it a little better than he could speak it. He was accompanied upon his visits to complainant's office by Schwitzgabel, who did understand English. At that interview the amount complainant would loan was fixed at Four thousand eight

hundred dollars, which amount was accepted by Schwitzgabel, but the parties were given clearly and distinctly to understand that the loan would be made only upon condition that the defendant would enter into a covenant to purchase his beer of complainant and no one else, for a period of five years. The evidence was entirely satisfactory to me on that point.

Directions were then given by complainant to a Title Guarantee Company, whose representative in Elizabeth was Mr. A. H. Cornish, a counsellor-at-law, to examine the title and superintend the transaction on behalf of the complainant.

He examined the title and the parties met at his office in Elizabeth on the 16th of August, 1905, to complete the transaction. There were present Schwitzgabel and his wife, the defendant and his wife, and defendant's counsel, Mr. Louis Graaf. No one represented the complainant except Mr. Cornish. While there assembled a messenger arrived from complainant's office bringing the draft for $4,800.00, a chattel mortgage and promissory note, the contract in question and a letter of instructions in these words:

Fidelity Trust Co.,

Elizabeth, N. J.

GENTLEMEN: Enclosed please find our check for $4,800.00, which is to be loaned to Joseph Nizolek, at 6%, to be secured by first mortgage on property No. 73 Florida Street, Elizabeth, N. J. We are to receive as collateral security a chattel mortgage for the same amount, also note, form of which we enclose. In addition to this Nizolek is to enter into an agreement by which he agrees to use our Lager Beer, Ales and Porter exclusively for a period of five years, and to further agree that he will not dispose of his business unless his successor is accepted by us as a customer and will enter into the same agreement. He is to sign a power of attorney on the license, and insurance is to be taken out to protect our loan.

The costs of search and drawing papers in this matter is to be paid by the mortgagor.

If the property is free from all liens you may close the transaction as above.

Kindly inform Joseph Nizolek that he must pay $5.00 per week from now on, on account of license.

Please withold the sum of $1,300 on account of the indebtedness due us from Mr. Schwitzgabel, which account we shall adjust with him later.

Yours truly,
CHRISTIAN FEIGENSPAN,
a Corporation.
Per N. Sutherland.

The papers to be executed were as follows: a deed from Schwitzgabel and his wife to the defendant; a bond and mortgage from the defendant and his wife to the complainant; a bond and second mortgage from the defendant and his wife to Schwitzgabel; the chattel mortgage and promissory note and the contract. These, excepting the contract, were all executed by Schwitzgabel and wife and by the defendant and his wife where her signature was necessary, in the presence of and witnessed by and properly acknowledged before Mr. Graaf, the defendant's counsel.

The evidence as to the execution of the contract in question is conflicting. That it was laid upon the table with the other papers seems to be admitted. That the date had been left blank by complainant's officer who prepared it is admitted, and there seems to be no doubt that the blank was filled in by Mr. Graaf.

Mr. Cornish, whose manner on the stand was such as to command my confidence in his intention to tell the truth, swears that he saw the defendant sign it, and that he witnessed it at the time, and that he sent it promptly, with such of the other papers as did not need to be recorded, to the Title Guaranty Company, and it found its way immediately to the possession of the complainant.

The money was in substance paid at once and Mr. Cornish swears that while he does not recollect the precise details he is quite sure that he never would have parted with the money or closed the transaction unless the

contract had been then and there executed, and in this he is sustained by the letter of instructions.

The evidence of the defendant's witnesses, Mr. and Mrs. Schwitzgabel, the defendant and his wife and Mr. Graaf is to the following effect:

That in the course of the actual execution of the papers Mr. Graaf took the contract in question and explained it to the defendant and advised him not to sign it, and that the defendant then and there refused to sign it, and did not sign it, to the knowledge and belief of either of the witnesses, at that time.

The defendant himself admits his signature to the instrument to be genuine, but claims and asserts that he did not sign it at the time of the execution of the other papers, but must have signed it a few days later on a visit which he made to the complainant at its office in Newark.

This explanation, if it might be supposed to be true, does not account for the signature of Mr. Cornish as a witness, as defendant does not testify that Cornish was present at the actual execution.

But the whole story of a subsequent execution is denied in the most positive manner by the executive officers of the complainant and is completely refuted by all the circumstances as well as the evidence of Mr. Cornish and the executive officers of the complainant. Its object is manifest, namely, to show that the execution of the paper was not a part of the original transaction and hence that it had no sort of consideration in equity.

Returning to what occurred at the moment of the execution of the papers; Mr. Cornish, as before remarked, does not pretend to recollect the details with minuteness but swears that his recollection is that Mr. Graaf did advise his client, the defendant, to execute the contract.

I conclude then that there can be no reasonable doubt that the contract was executed at the time that the other papers were executed and before the payment of the money.

There is as little doubt that defendant executed it knowingly and was fully aware of the effects and consequences of the act. In his affidavit annexed to the bill,

which affidavit was put in evidence by the complainant, I find the following:

"That a paper was handed him for his signature; and which had been previously read by Graff, and which Mr. Graff explained to him to be an agreement, which if signed would oblige him to sell the beers, ales and manufactured products of Christian Feigenspan, a corporation, for a specified period of five years, regardless of whether he was then indebted or obligated to said corporation, and whether he repaid the said loan of Forty-eight hundred dollars within five years or not; this deponent then and there refused to sign any such agreement because it was beyond the understanding he had had with the company; and this deponent further says that he did not sign any such agreement as set forth in the bill of complaint in this cause, and that while deponent and the other persons herein mentioned were still in the office of the Fidelity Trust Company, Abram H. Cornish went to the telephone and called up the office of the Christian Feigenspan Brewery, in order to receive further instructions bcause of the refusal of this deponent to sign said agreement; and that subsequently, when said Cornish returned from the telephone, the transaction was closed without said agreement having been signed."

"This deponent further says that it was because of his inability to read and write the English language, that he took the precaution to have Louis Graff read all papers to which his signature was requested."

The evidence of Graff is very positive to the same effect:

"Q. Was there any other paper submitted that was not signed?

A. There was.

Q. What paper was it?

A. That was an agreement whereby Nizolek was to bind himself to sell the products of the Feigenspan Company for the term of five years.

Q. Did you read that?

A. I did.

Q. After you read that did you or not explain it to

the—I show you the agreement which was submitted on that occasion and ask you if you recognize it as the paper?

A. Yes.

Q. Now, did you read that on that occasion and explain its contents to the defendant?

A. I did."

Mrs. Schwitzgabel's evidence was to the same effect. She says:

"Q. You say there was some one paper that Mr. Graff told Nizolek not to sign?

A. Just one paper, yes.

Q. Do you know what the paper was or what it was about?

A. Well, he read it to Nizolek and told him it was for five years to bind him to sell the beer, and not to sign it for five years, and he throwed it aside.

Q. Did he read the paper to Nizolek?

A. Graff read it, yes.

* * * * * * * * *

A. He said: 'Don't sign this paper; it will bind you for five years to sell the beer; don't sign it,' that is what I heard."

And Mrs. Nizolek says:

"Q. Did he show them one paper that they must not sign?

A. He did.

Q. Did you understand him?

A. Mr. Graff told them that this was a contract to sell for five years beer of Feigenspan.

Q. And what did your husband do in consequence?

A. My husband said he wouldn't sign that paper.

Q. Did he sign it?

A. No; he did not.

Q. Did you understand Mr. Graff when he spoke to your husband about that?

A. I did.

* * * * * * * * *

Q. Then when did you first learn what the paper

was about, from anything that Mr. Graff said, or from what your husband told you afterwards?

A. I knowed just the very first time when Mr. Graff spoke about it.

Q. Did Mr. Graff say what the paper was, explain?

A. He did.

Q. What did he say?

A. That the contract was to take beer for five years."

I conclude then that the defendant fully understood the nature and effect of the agreement when he signed it.

The validity of the contract having been thus established, the question remains what remedy, if any, the complainant is entitled to thereon in this court.

By its bill the complainant asks that the defendant be restrained from purchasing his beer from any other brewer, and tenders itself ready and willing to furnish beer on the usual terms. There is no undertaking in words in the contract on complainant's part to furnish beer at any time, but I find no difficulty in protecting the defendant by a decree which shall provide that the restraint shall continue only so long as the complainant shall continue to furnish beer to defendant at reasonable rates and of good quality; and leaving to the defendant the liberty to apply to be relieved of the restraint if complainant shall fail in that behalf.

The defense set up for the first time at the hearing and after the issue raised by the answer had been inquired into and practically decided against the defendant, is that this court should not take jurisdiction of this cause, but leave complainant to his remedy at law.

If the court actually has jurisdiction, concurrent with the law courts, of such causes the general rule is that the defendant should take his objection to the jurisdiction on the ground here taken early in the action, either by demurer or setting it up specifically in his answer.

This he has not done, but defendant put himself distinctly and entirely on the ground that he had not executed the covenant in question.

In several instances, notably *Cutting vs. Dana,* 10 C. E. Gr. 265 at 273, the court has held that having so experimented and been beaten on the merits defendant ought not to be permitted to raise the question of jurisdiction as he did.

But I am not disposed to enforce that rule against the defendant in this instance.

The covenant here in question is not an uncommon one. Such covenants have been used in England for more than half a century and are in common use in this country, and the question of their enforcement in this court is an important one, and should be considered on its intrinsic merits.

I will enquire first—has the covenant a proper consideration?

It was, as we have seen, a part of the whole transaction which is similar to many others entered into between parties situate as are these here.

The defendant being desirous of entering into the business of keeping a liquor and beer saloon, and to commence that business under favorable circumstances, attempted to buy out Mr. Schwitzgabel, who was the owner of an old established house and saloon in Elizabeth, and was willing to sell it. But defendant had not the requisite capital, and appealed to the complainant to assist him, under the circumstances which I have previously stated. The complainant advanced the money, and, as a part of the transaction, exacted from the defendant the covenant in question. It is fairly inferable from all the circumstances, and in fact the evidence shows, that the amount of money advanced was large in comparison with the value of the premises; much larger than an ordinary person willing to invest on bond and mortgage would have been willing to advance. The complainant then incurred both trouble and risk in the transaction and was willing to do it for the sake of advancing its business interest. It is a well known fact that all the great successful breweries of the country are obliged to enter into such transactions in order to maintain their business. Hence it seems to me that the covenant had, in its inception, a con-

sideration, which for purposes of enforcement in a court of equity, must be considered as valuable. It is under seal and admits a consideration.

But in answer to this the defendant proves that after suit brought and after the *interim* restraint was granted he procured another brewing company to pay off the complainant in full, thereby relieving the complainant of all further risk. Apparently the complainant was obliged to accept the payment because it had taken a promissory note payable on demand.

Of course we all know that upon such payment the party advancing the money assumed, by defendant's consent, the same attitude toward him that the complainant had held. That the money was advanced by another brewing company was taken as a fact at the hearing, and so the cause developed into a contest between two brewing companies as to which should control defendant's trade.

At first I was inclined to think that this satisfaction of complainant's debt ought to be considered and given prevailing weight in determining the enforceable qualities of the covenant. But further reflection and argument of counsel lead me to the conclusion that such a result is not justified.

The question is what was the original enforceable character of this covenant, and if it was an enforceable covenant at the time it was made I am unable to perceive how that quality was lost by the voluntary payment of the debt. The covenant itself does not provide for any such contingency. It might have done so. Defendant's counsel might have exacted such a condition.

The original bond and mortgage on the land was given for one year. The accompanying chattel mortgage and promissory note, given as collateral, expressly provide that it should become due if the defendant should buy beer from any one besides the complainant.

But the defendant says that the complainant did not in express terms agree to wait upon him for the five years for the payment of the money mentioned in the covenant. The only importance of that circumstance seems to

me to be this: that if the complainant should at any time before the expiration of the five years, enforce the mortgage for any reason except the non-payment of the interest, that act would be of itself a discharge of the defendant from the obligation of his covenant. For it seems to be well settled by the authorities in cases of this character that the defendant's obligation is based upon the assumption that the complainant will continue to supply the material which he desires to sell and will forbear to collect the money which it has loaned.

I think then that nothing that has been proven by the defendant shows any defense to the action.

There was no attempt to prove that the beer furnished was of poor quality or the price an unusual one. In fact, as before observed, defendant knew what sort of beer he would get from complainant, for his predecessor in title had been selling Feigenspan's beer and the saloon was a Feigenspan saloon.

The more serious defense set up in argument by the defendant is that this is in effect a bill for the specific performance of a contract, and that the court will not enforce it but leave the complainant to his remedy at law.

The practice of enforcing negative covenants by this court is well established, and is a part of the growth of equity jurisprudence to meet and keep up with the growth and development of business methods.

The policy of the law is that business men should keep their contracts, and not turn the contractee over to the uncertain remedy of an action at law for damages for non-performance. It is in my judgment one of the most important functions of courts of equity to prevent injuries which result in damages in all instances where it is practicable to do so, and the tendency is toward extending the protecting power of the court to cases not formerly thought to be sufficient to invoke its action.

For myself I think this tendency is wholesome.

Negative covenants of the particular kind here in question have been enforced more than once.

In *Catt vs. Tourle* (1869) Vice Chancellor Stuart dealt with such a case, as reported in 38 L. J. Ch. 401.

The head note states the case thus:

"On the occasion of a conveyance by the plaintiff (who was a brewer) of land to trustees in fee of a building society, of which the defendant (also a brewer) was a member, the trustees (the purchasers) covenanted with the plaintiff, that "he, his heirs and assigns, should have the exclusive right of supplying all ale, beer and porter which might be consumed in every house or other building which might be erected on the said piece of land, and which should be opened or used as an inn, public house or beer shop." The defendant with notice of the covenant, opened a public house on the land, and supplied it with ale, etc., if his own brewing. The plaintiff then filed a bill against the defendant alone for an injunction to restrain the breach of the covenant. The defendant demurred. Held, that the covenant was not invalid, on the ground either of uncertainty, want of mutuality or as being in restraint of trade; and the demurrer was overruled with costs."

The learned Vice Chancellor used the following language:

"The next important objection to this covenant was that there is no mutuality in it. In a covenant of this kind mutuality is not necessary at all. The books abound with cases in which covenants are entered into with brewers by the lessees of public houses that they will consume no other beer upon the premises than the beer supplied by those brewers. In none of those cases is there ever a covenant on the part of the brewer to supply beer; nor has it, in any of those cases, been ever held that the want of a corresponding covenant on the part of the lessor or owner of the house to supply the beer vitiates the covenant by the occupier that he will exclusively use certain beer to be consumed upon the property. Therefore, upon the ground of mutuality, viz. that there is no covenant on the part of the plaintiff that he shall supply the beer, there seems to me to be no objection whatever to this covenant.

"The last objection was that the covenant is bad in law, because it is a covenant in restraint of trade. The

cases in which courts of law and equity have held that covenants in restraint of trade are bad, are cases in which those covenants have so extensive an operation as to cause public detriment. No such objection has ever been raised, in any of the cases in the books that I have referred to, to the covenants entered into with the owners of public houses, by lessees, to have their beer exclusively supplied by those persons. Nor could any such objection be raised in those cases; because the public are not affected to that degree which is requisite for the application of the principle making contracts clearly in restraint of trade to be bad. This covenant is a covenant between one individual and another with reference to the beer to be consumed in one particular house. Covenants of this kind are not confined to the consumption of beer; for instance, they may be covenants that all corn shall be ground at a particular mill. All those covenants are in restraint of trade; but are not such an extensive and general restraint of a public right as to be obnoxious to that principle of law which declares that covenants too general in restraint of trade are injurious to the public, and therefore to be considered bad."

An appeal was taken to the Court if Appeals, as reported in L. R. (1869), 4 Ch. Ap. 653. The question was elaborately argued and the action was sustained by both the Lord Justices.

It will be observed that in that case there was no express negative covenant.

In the course of his judgment, Lord Justice Selwin remarked: "And then with respect to this particular covenant, it seems to me that the court cannot but take judicial notice of its being extremely common. Every court of justice has had occasion to consider these brewer's covenants, and must be taken to be cognizant of the distinction between what are called free public houses and brewer's public houses which are subject to this very covenant. We should be introducing very great uncertainty and confusion into a very large and important trade if we were now to suggest any doubt as to the validity of a covenant so extremely common as this is."

Naturally in the course of the argument the great case of *Lumley vs. Wagner*, 1 DeG., M., and G., 604, was mentioned and discussed, and numerous others in the same line.

Catt vs. Tourle has never been overruled or doubted, but was followed ten years later by Fry, J. (afterwards Lord Justice Fry and author of Fry on Specific Performance) in *Looker vs. Dennis,* L. R. 7 Ch. Div. 227 (1878). That also was a suit by a firm of brewers against a publican to restrain him from purchasing the beer sold by him at his public house in violation of a covenant by which the complainant alleges he was bound. There, as in *Catt vs. Tourle*, there was no negative covenant.

There the question was raised and discussed as to what the effect would be of the complainant's failing to furnish good wholesome beer. On that subject Fry, J., said: "It is, in my opinion, a covenant conditional on a supply being made by the plaintiffs of good marketable beer. Various expressions are used in the cases which have been referred to, but I think they all really amount to the same thing. In one case the term 'good and wholesome beer' is used, in another 'good and marketable beer.' I see no objections to any if these expressions."

Another case in which *Catt vs. Tourle* was cited before Fry, J., is *Donnell vs. Bennett,* L. R. 22 Ch. Div. 835 (1883). There a manufacturer of fertilizer, the plaintiff, made a contract with one Cormack, a fish curer and smoker by which it was agreed that Cormack should sell and the plaintiff buy all the refuse fish not used by Cormack at a specified price per ton for two years, and Cormack agreed that he would not sell any such parts to any other manufacturer whatever. In breach of that agreement Cormack entered into a contract to deliver fish parts to the defendant Bennett. The suit was to restrain Cormack from selling and Bennett from buying. The question was raised whether, as that was a case which it was assumed was one which involved a continuous contract which the court would not enforce by specific performance, it would enforce the negative covenant. Mr. Justice Fry, after hearing the arguments and going over the

authorities, says: "That is the way in which the direct authorities stand in cases in which there is a negatve clause, and they appear to me to show that in cases of this description where a negative clause is found, the court has enforced it without regard to the question whether specific performance could be granted of the entire contract."

It is in exact accord with the decision of Chancellor Zabriskie in *Manhattan Manufacturing Company vs. Stockyard Company*, 8 C. E. Gr. 161.

Returning to the English cases we have the very recent one of the *Metropolitan Electric Supply Co. vs. Ginder, L. R.* (1901) Ch. Div. Vol. 2, page 799.

There the defendant, an owner of a hotel in High Holborn, London, applied to the complainant for a supply of electricity and entered into an agreement as follows:

"The consumer agrees to take the whole of the electric energy required for the premises mentioned below from the company for a period of not less than five years." Shortly afterwards defendant ordered the complainant to disconnect their apparatus and made an arrangement to get a supply of electricity from a rival company. An action was brought for an injunction and was dealt with on final hearing. It will be perceived that there was no express negative covenant. The learned judge (Buckley) after stating the case goes on to show in what cases an affirmative covenant may amount to a negative covenant and held that the effect of the covenant in that case was the same as if it were in words a negative covenant, and granted the injunction prayed by the plaintiff.

I have cited these few from many English authorities because they are specially in point in the present case.

It is worthy of remark that while in *Catt vs. Tourle* and *Looker vs. Dennis* the covenant sued on was found in a conveyance or demise of land, in the other cases which followed those that element does not appear, and none of the decisions rest in any degree upon that circumstance.

Of course the great case which has set the pace for later decisions is *Lumley vs. Wagner, supra*, decided by

Lord St. Leonards in 1852 against the argument of the most able barrister of the day, Sir Richard Bethel, afterwards Lord Westbury. Mr. Perkins' edition (Boston) of that report, printed in 1871, shows a great number of cases in which it has been followed.

Coming to our own state we have the case previously cited of the *Manhattan Manufacturing Co. vs. The Stockyard Co.* In that case there was a contract between the complainant and the predecessor in title of the defendant, by which the complainant had the exclusive right of taking all the blood of animals slaughtered in an abbatoir, and also the animal matter and ammonia from the rendering tanks. This contract was broken by the defendant. A bill was filed for an injunction and the injunction was granted. The headnote states that such injunction is not mandatory. It does not require the delivery of the blood, but restrains the defendant from permitting any other but the complainant from taking it. Chancellor Zabriskie holds the remedy at law inadequate, using this language: "For this injury there is a remedy at law, but it is not an adequate remedy. The value of the blood is no measure of the injury, and it is hardly possible to compute the damages which the injury may occasion. And redress at law could only be obtained by a continued series of suits through the twenty or forty years of the complainant's term. It is a case peculiarly proper for the preventative remedy by injunction."

He refers to *Shreve vs. Black,* 3 H. W. Gr. 177. A reference to that case and to Chancellor Green's note to *West vs. Walker,* 2 H. W. Gr. 290 will show, what is now perfectly well settled, that in considering the question of what is an adequate remedy at law the courts will take into consideration not only the question of multiplicity of suits, but also the pecuniary responsibility of the defendant.

It is all very well to say you can sue and recover your damages. But can you collect the damages after you have recovered them? And this is one of the important elements in support of the doctrine that it is better

to prevent an injury than to give damages for its infliction.

In the same direction is a case in this Court similar to *Metropolitan Electric Supply Co. vs. Ginder, supra, Western Union Telegraph Co. vs. Rogers,* 15 Stew. 311. The case is valuable on account of its citation of authorities on page 314.

Coming to the present case we have these elements bearing on the question of an adequate remedy at law.

First, the difficulty of ascertaining and proving in an action at law the amount of beer which the defendant has sold.

Second, the profit which the complainant would have made on an equal amount of beer. On this item the difficulty rests in distributing the items of cost, consisting of the interest of the costs of the plant, the wear and tear of it, the cost of administration, the actual cost of material and manufacture.

In the third place is the consideration of the multiplicity of suits necessary and proper to give the complainant proper satisfaction.

In the fourth place is the uncertainty of the pecuniary responsibility of the defendant. The proofs show, incidentally, that it is slight. All these combine to render it well nigh axiomatic that in such cases the remedy at law can, with rare exceptions, never be said to be adequate, and support the general proposition which I have previously advanced, that the policy of the law should be to prevent a man from breaking his contracts rather than to leave the injured party to his damages at law.

The subject of the effect of the necessity of the complainant bringing a series of suits at law to complete his remedy at law is dealt with by Professor Pomeroy in his Treatise on Equity, section 243, as follows:

"The multiplicity of suits to be avoided, which are generally actions at law, shows that the legal remedies are inadequate, and cannot meet the ends of justice, and therefore a court of equity interferes, and although the primary rights and interests of the parties are legal in their nature, it takes cognizance of them, and awards

some specific equitable remedy, which gives, perhaps in one proceding, more substantial relief than could be obtained in numerous actions at law. This is the true theory of the doctrine in its application to the two jurisdictions."

And in classifying the cases he states the present case under class one in section 245, as follows:

"1. Where from the nature of the wrong, and from the settled rules of the legal procedure, the same injured party, in order to obtain all the relief to which he is justly entitled, is obliged to bring a number of actions against the same wrong doer, all growing out of the one wrongful act and involving similar questions of fact and of law. To this class of cases belong cases of nuisance, waste, continued trespass and the like."

And in section 250 he says: "It follows as a necessary consequence—and this point in one of great importance to an accurate conception of the whole doctrine—that the existing legal relief to which the plaintiff who invokes the aid of equity is already entitled need not be of the same kind as that which he demands and obtains from a court of equity; on the contrary, it may be, and often is, an entirely different species of remedy."

This doctrine was applied by Chancellor Runyon in *Shimer vs. Morris Canal and Banking Co.*, 12 C. E. Gr. 365. That was a bill for the specific performance of an agreement between the complainant and the defendant as to the mutual continuous use of the waters of a creek. It charged the defendant with the violation of that contract, "prayed an injunction to restrain the defendant from continuing to violate the agreement, and that the defendant might be decreed to perform the agreement specifically."

The learned Chancellor says, (page 365): "It is clear that the complainants have not an adequate remedy at law. The injury complained of it, in its nature, a continuing one. The remedy at law must, therefore, be by successive suits, if the defendants persist in inflicting the injury. It is, therefore in this respect, wholly inadequate for the protection of the complainant's rights, and it obviously will not answer the purposes of justice."

It is true that the case just cited and most of the cases in this country in which the court has seen fit to relieve against the necessity of bringing a multitude of suits have related to interests in real estate, but the principle is the same.

The object of the contract here in question, and others like it, is to support and maintain a going business, and naturally and necessarily mere damages for detracting from a part of that business can hardly be said to be an adequate compensation for the injury.

The necessity and propriety of bringing a multitude of actions in the present case seems to me to be too plain for argument. The injury is a continuing one and liable to be such for a period of five years. To say that the complainant must not only accomplish the very difficult if not hopeless task of keeping account and preserving the proof of the amount of beer sold by the defendant for all that period, or even for one year or two years, and then sue to recover its damages seems to me to be a mockery. The continuing character of this injury seems to me to be of itself, according to well settled principles, a sufficient ground for the interference of the court.

But the defendant relies on the very recent case of *Sperry and Hutchinson Company vs. Vine,* decided by the Court of Errors and Appeals and reported in 66 N. J. Eq., (21 Dick.) 339. The opinion of the court below in that case has not been published, so far as I have been able to ascertain, but the bill was dismissed on the construction of the contract and the conduct of the complainant.

The opinion on appeal does not state how long the contract had to run (I am informed it was for one year) but the substance of the contract was that the defendant agreed to buy trading stamps of the complainant and not to use any other trading stamps and the bill was filed to restrain them from so doing. The learned judge who spoke for the court held that it was not necessary to consider the ground upon which the decree of dismissal was put in the court below, but says: "The injury to the complainant is the loss of a market for their stamps and consequent loss of profit. *There can be no difficulty in*

ascertaining how many of the complainant's green trading stamps would have been required if their place had not been supplied with their competitor's red star stamps, and the complainant's profit thereon must be a matter of calculation. Assuming that the complainant has a legal right the remedy at law is adequate."

I am not aware that the nature of the trading stamp trade, with what may be termed its true inwardness, is a matter of common knowledge. I confess my ignorance of it, and hence am not able to reason from that case to the present case. But from what little knowledge I do have of that modern retail mercantile device I should be ready to agree with the result arrived at on the ground that the device is a sort of fraud on the public, and contracts of the character there set out should not be enforced on grounds of public policy. Be that as it may, I might have been able to have measured the full force of the decision *if it had been explained in the opinion how the complainant would have had no difficulty in ascertaining how many of complainant's green stamps would have been required.*

If the contract was for one year that feature alone distinguishes it from the present case and presumably the defendants were abundantly able to respond in damages.

As the case is reported I do have difficulty in applying it to this and cannot consider it as governing it, especially in view of the more recent case of *Meyers vs. The Steel Machine Company,* 67 N. J. Eq., (1 Rob.) 300, affirmed, on the opinion below, in 68 N. J. Eq., (2 Rob.) 795. That was a contract by which the defendant agreed to sell to the complainant all of certain machines which the defendant should manufacture, provided the complainant should purchase all the defendant should make. The third headnote is this:

"When a contract requires the defendant to do for the complainants, exclusively, some act calling for the exercise of skill or artistic capacity, equity will enforce the negative side of the agreement and will restrain the defendant from giving his services to any other than the complainants for whom he agreed to work, but it will not

make a mandatory decree to compel the defendant to exercise his skill in specifically performing the contract."

The bill was filed to restrain the defendant from selling the machines to any other person. The cases wherein courts of equity will enforce negative covenants was discussed by Vice-Chancellor Grey in his opinion, page 314, and treated in a satisfactory manner, and the result is a good illustration of the present limits of the rule governing courts of equity in such cases.

In the same direction is the very recent opinion of Vice-Chancellor Bergen in *Taylor Iron and Steel Company vs. Nichols,* 61 Atl. Rep. 946.

Reference is made by defendant's counsel in his argument to what was said by me in *O'Brien vs. Paterson Brewing and Malting Company,* 61 Atl. Rep. 437, but the circumstances of that case and the present are quite different and the language used does not cover the present case.

The defendant herein, in his written argument, expressly disavows any contention that the contract is open to the criticism of being in restraint of trade.

He does make the point that the contract is not enforceable by reason of its lack of certainty. That point is covered incidentally by the several authorities which I have cited. The business of supplying malt liquors to a beer saloon is a familiar one and its course well known and the contract must be construed accordingly. The rule is well settled that in contracts of this character the brewer, by implication, agrees to supply in the ordinary course of trade beer of a good quality at reasonable prices and on the usual terms as to delivery, payment, discounts and the like. The present case presents no disagreement between the immediate parties to the suit on any of these points, but, as before remarked, it has developed into a bare contest between two rival brewers which shall supply the defendant's beer saloon. I thought, and still think, that the complainant was entitled to relief and advised accordingly.

ADDENDA.

Since preparing the foregoing my attention has been called to the case of *Mausert vs. Feigenspan,* 2 Robbins, 671. It appears by the fourth section of Vice-Chancellor Emery's opinion, found on page 675, that he there granted an injunction similar to that which I have advised in this case. And as I infer that the appeal was from all parts of the decree I think that the unanimous affirmance of that decree is not without significance.