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*Notice of Appeal.*

**NOTICE OF APPEAL.**

Filed November 9, 1925.

**New Jersey Supreme Court**

MODERN HOMES REALTY COM- PANY, a corporation,  <i>vs.</i>  AARON LANG, <i>et als.</i> ,	}	<i>Plaintiff,</i>  <i>Defendants.</i>	<i>Action at Law.</i>  <i>Notice of Appeal.</i>	10
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To: HUDSPETH & DEMAREST, Esqs., Attorneys for  
Plaintiff:

20

TAKE NOTICE, that the defendants, Aaron Lang  
and Simon Lang, appeal to the Court of Errors  
and Appeals of the State of New Jersey, from  
the whole of the judgment entered in this cause.

STEIN, STEIN & HANNOCH,  
Attorneys of Appellants.

(Service duly acknowledged.)

30

40

*Grounds of Appeal.*

**GROUNDS OF APPEAL.**

Duly filed December 24, 1925.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

10

MODERN HOMES REALTY COM-  
PANY, a corporation,

*Plaintiff,*

*vs.*

AARON LANG and SIMON LANG,  
*Defendants.*

*Action at  
Law.*

*Grounds of  
Appeal.*

20 To HUDSPETH & DEMAREST, Esqs., Attorneys of  
Plaintiff:

TAKE NOTICE, that the defendants appeal from the whole of the judgment entered in the above cause to the Court of Errors and Appeals on the following grounds:

1. The Court refused to non-suit the plaintiff.

30 2. The Court refused to direct a verdict in favor of the defendant.

3. The Court directed a verdict in favor of the plaintiff.

4. The Court sustained the objection to the following question addressed by the defendant to the witness, Merlis:

“Q Did you have any talk with the tenant about permitting him to remain in the property after you took title?”

40

*Grounds of Appeal.*

5. The Court refused to permit the defendant to prove by the testimony of witnesses that the tenant Blum was ready to move out of the premises on March 1st, and had made arrangements to move elsewhere, unless the defendant established that such fact was called to the attention of the plaintiff and the plaintiff so understood it. 10

6. The Court, after the case had been closed, and upon the plaintiff's motion, struck out all testimony which had been submitted respecting the agreement made between the tenant, Blum, and the plaintiff, with reference to permitting the tenant Blum to remain in possession of the said premises after March 1st, the day fixed for passing of title.

STEIN, STEIN & HANNOCH, 20  
Attorneys of Defendants-Appellants.

(Duly served.)

30

40

*Summons.*

**SUMMONS.**

Filed April 20, 1922.

The State of New Jersey to Aaron  
Lang, Lillie Lang and Simon Lang:

(L. s.) You are summoned to answer the  
10 annexed complaint of Modern Homes  
Realty Company, a corporation or-  
ganized under the laws of the State of New  
Jersey, in an action at law in the Supreme  
Court. And take notice that unless you file your  
answer to said complaint with the Clerk of the  
Supreme Court at Trenton within twenty days  
after service upon you of this writ and the an-  
nexed complaint, the plaintiff may proceed in the  
suit and judgment may be entered against you.

20 WITNESS, WILLIAM S. GUMMERE, Chief Justice  
of the Supreme Court, at Trenton, this 12th day  
of April, 1922.

ENOCH L. JOHNSON,  
Clerk.

HUDSPETH & DEMAREST,  
Attorneys.

30

40



*Complaint.*

and delivery thereof paid to the said defendants the sum of one thousand (\$1,000) dollars on account of the purchase price of the said premises.

10 3. On the first day of March, 1922, the date mentioned for passing title to said premises, and the delivery of the deed for the same, by the defendants to the plaintiff, plaintiff was ready and willing on its part to pay the balance of cash and to execute and deliver all the necessary papers called for by said contract and in all respects to perform the same.

20 4. On said first day of March, 1922, the said defendants were unable to deliver possession of the said premises to the said plaintiff, and permitted to remain in said premises certain tenants, wherefore they were unable to convey said premises by deed of warranty, free from all encumbrances except as stated in said contract.

30 5. Defendants have, since the first day of March, 1922, failed to execute and deliver the property to said premises and convey and deliver to the plaintiff the title thereof, and have refused to deliver to the plaintiff the said sum of one thousand (\$1,000) dollars paid by it on account of the purchase price of said premises.

6. Plaintiff therefore elects to rescind said contract and demands from the said defendants the sum of one thousand (\$1,000) dollars, together with interest and costs.

HUDSPETH & DEMAREST,  
Attorneys for Plaintiff.

(Attached is Exhibit P. 1.)

*Demand for Bill of Particulars.*

**DEMAND FOR BILL OF PARTICULARS.**

Served April 4, 1922.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

MODERN HOMES REALTY COM-  
PANY, a corporation,

*Plaintiff,*

*vs.*

AARON LANG, *et als.*,

*Defendants.*

10

*Action at  
Law.*

*Demand for  
Bill of Par-  
ticulars.*

To Messrs. Hudspeth & Demarest, attorneys of  
plaintiff, or whom it may concern:

20

Please take notice that we do require you to  
give us a bill of particulars with respect to the  
complaint filed by you in the above matter as  
follows:

1. In what respects were the defendants un-  
able to deliver possession to the plaintiff of the  
premises referred to in the complaint?

2. Specify the tenants that the defendant per-  
mitted to remain in possession of said premises  
in violation of the contract referred to in the  
complaint.

30

3. In what respects were the defendants un-  
able to convey said premises by deed of war-  
ranty free from all encumbrances except as  
stated in said contract?

Yours respectfully,

STEIN, STEIN & HANNOCH,  
Attorneys of Defendants.

40

*Bill of Particulars.*

**BILL OF PARTICULARS.**

Served April 10, 1922.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

10

MODERN HOMES REALTY COM-  
PANY, a corporation,

*Plaintiff,*

*vs.*

AARON LANG, *et als.*,

*Defendants.*

*Action  
at Law.*

*Bill of  
Particulars.*

20

To Messrs. Stein, Stein & Hannoch, attorneys of  
defendants, or whom it may concern:

Please take notice that in compliance with the  
demand for a bill of particulars to be furnished  
by the plaintiff to the defendant, heretofore  
served, plaintiff replies as follows:

30

1. The defendant was unable to deliver pos-  
session of the premises described in the com-  
plaint to the plaintiff by reason of the fact that  
one, Isaac Blum, was, on the day fixed in the  
contract for passing title to said premises, and  
still is a tenant in possession of the store on the  
corner of the building at the southwest corner  
of Bloomfield avenue and Boyd street.

2. That the tenant in possession of said prem-  
ises in violation of the terms of said contract  
was the said Isaac Blum, hereinabove mentioned.

40

3. That the defendant was unable to deliver  
complete possession of said premises on the day

*Answer.*

set for the conveyance of said title by reason of the occupancy by said Isaac Blum of said portion of said premises.

Respectfully yours,

HUDSPETH & DEMAREST,  
Attorneys of Plaintiff.

10

**ANSWER.**

Filed May 4, 1922.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

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MODERN HOMES REALTY COM-  
PANY, a corporation,

*Plaintiff,*

*vs.*

AARON LANG, *et als.*,

*Defendants.*

---

20

*Action  
at Law.*

*Answer.*

The answer of Aaron Lang, Lillie Lang and Simon Lang to the plaintiff's complaint. 30

1. The first paragraph of the complaint is admitted. The defendants refer to the written contract between the parties for all the details thereof.

2. The second paragraph of the complaint is admitted.

3. The third paragraph of the complaint is denied.

40

*Answer.*

4. The fourth paragraph of the complaint is denied.

5. The fifth paragraph of the complaint is denied except that defendants admit an unwillingness to pay to the plaintiff the sum of \$1,000 paid by it on account of the purchase price.

10 6. The defendants deny that the plaintiff is entitled to receive from the defendants the sum of \$1,000 together with interest and costs, or any other sum.

#### FIRST SEPARATE DEFENSE.

1. The defendants were on March 1, 1922, ready, able and willing to carry out with the plaintiff all the terms of the contract required to be performed by them.

20 2. The plaintiff was not ready, able or willing to carry out the terms of said contract on March 1, 1922, or at any other time, but wholly defaulted in the performance of the same.

#### SECOND SEPARATE DEFENSE.

30 1. On or about January 10, 1922, the plaintiff entered into an agreement with the defendants that in consideration of an allowance of \$200 to be made by the defendants to the plaintiff from the purchase price of said property, at the time of passing of title, that plaintiff would accept title to said property on February 1, 1922, subject to the lease for the corner store of said property held by Isaac Blum, referred to in the contract of sale.

40 2. Defendants were on February 1, 1922, ready, able and willing to carry out said contract of sale as modified by the aforesaid agreement.

*Answer.*

3. Plaintiff was not ready, able or willing to carry out said contract so modified by the aforesaid agreement, either on February 1, 1922, or at any other time, but wholly defaulted in the performance of same.

THIRD SEPARATE DEFENSE.

10

1. On or about January 25, 1922, plaintiff informed defendants that it had entered into an agreement with one Isaac Blum, the tenant in possession of the corner store in said premises, for permitting said tenant to continue in possession of said store at an increased rental, and that it waived the provisions of said agreement with respect to the giving of notice by the defendants to the said Blum to terminate his said tenancy.

2. Defendants were on March 1, 1922, ready, able and willing to carry out said contract as modified by said waiver.

20

3. Plaintiff was not ready, able or willing to carry out said contract as modified by said waiver, either on March 1, 1922, or at any other time, but wholly defaulted in the performance of the same.

FOURTH SEPARATE DEFENSE.

30

1. Plaintiff wholly defaulted and refused to carry out the terms of said contract of sale at the time and place fixed in said contract for the performance by it of the same.

STEIN, STEIN & HANNOCH,  
Attorneys of Defendants.

40

*Reply.*

**REPLY.**

Filed May 11, 1925.

NEW JERSEY SUPREME COURT.

10	MODERN HOMES REALTY COM- PANY,  <i>vs.</i>  AARON LANG, <i>et als.</i> ,	<i>Plaintiff,</i>   <i>Defendants.</i>	} <i>Action</i> <i>at Law.</i>  <i>Reply.</i>
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Plaintiff denies every allegation in the answer.

20	HUDSPETH & DEMAREST, Attorneys for Plaintiff.
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*Offer of Documentary Evidence.*

## NEW JERSEY SUPREME COURT.

## ESSEX CIRCUIT.

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MODERN HOMES REALTY COM-  
PANY, a corporation,

*vs.*


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AARON LANG and SIMON LANG.

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*Action at* 10  
*Law.*

Monday, October 26, 1925.

Before Hon. Nelson Y. Dungan, *J.*, and a jury.

For the plaintiff appear Hudspeth & Demarest (by Elmer W. Demarest).

For the defendant appear Stein, Stein & Hano- 20  
noch (by Herbert J. Hanocho).

(A jury is called and sworn.)

Mr. Demarest opens in behalf of plaintiff.

Mr. Hanocho opens in behalf of defendant.

Mr. Demarest: I offer in evidence the con-  
tract for the sale of property dated November  
25, 1921, whereby the defendants agreed to sell  
the property in question to the plaintiff. 30

(Marked Exhibit P. 1.)

Mr. Demarest: I next offer the lease between  
the Langs and Blum, which has been produced  
by the other side, upon notice, and is admitted  
without proof.

(Marked Exhibit P. 2.)

The Court: I gather from the opening that  
there is but one question in this case, and why  
cannot the proofs be limited to that? 40

*Samuel Merlis, direct.*

Mr. Demarest: Mr. Hannoch and I have agreed, without proof, that it is admitted that Blum, the tenant, was in possession of the property on the day named in the contract for passing title.

The Court: That was March 1, 1922?

10 Mr. Hannoch: Yes.

SAMUEL MERLIS, sworn in behalf of plaintiff.

*Direct examination by Mr. Demarest.*

Q Where do you live? A Elizabeth, New Jersey.

Q Were you the president of the Modern Homes Realty Company in 1921? A Yes, sir.

Q And in March, 1922? A Yes, sir.

20 Q On the 1st day of March, 1922, did the Modern Homes Realty Company have the necessary funds to take this title, the money? A Yes, sir.

Q And was the company ready to take title at that time? A Yes, sir.

Q Why didn't you accept the deed? A We couldn't do our remodelling while the tenants was in, he tell me it was dangerous to let that man in—  
30

Objected to.

Q Why didn't you take it? A Because we couldn't go ahead with alterations, the tenant was in there and wouldn't go in.

Q Did you go to the office of Stein, Stein & Hannoch, 31 Clinton street, Newark, New Jersey? A Yes, sir.

Q Who did you see there? A I think I saw Mr. Stein there.  
40

*Samuel Merlis, cross.*

Q What did you say to him? A I asked him whether the corner store man will be out, able to get out so we will be able to take it.

Q Mr. Stein was the lawyer? A Yes, sir.

Q And was Mr. Lang, or either of them, there at the same time? A I think that gentleman was there (pointing to Simon Lang). 10

Q What did he say about it? A He didn't say anything. He says, "If you don't want it, you don't have to take it."

Q Is that the reason you didn't take the title? A That is the reason we didn't take it.

Q Was a thousand dollars paid to the Langs at the time you signed that contract? A Yes, sir.

Q Did you ever get it back? A No, sir.

Q Did you ask to give it back? A Yes, sir. 20

Q And what did the Langs say when you asked for it? A Wouldn't give it to us back.

*Cross examination by Mr. Hannoeh.*

Q What funds did you have necessary to take title to this property? A We had cash money.

Q Where? A In the Elizabeth National Bank.

Q You had \$9,000 there in cash? A No; 30 we had about \$6,000 and we could easily get the other money.

Q Where? A In Elizabeth.

Q In the bank? A We had plenty of property there. We could raise it on mortgages.

Q I am asking whether you had the difference between the six and nine thousand dollars in the bank? A I had arranged to get it.

Q Where had you arranged to get it? A Right in Elizabeth. 40

*Samuel Merlis, cross.*

Q From whom? A From P. H. Gilhooly, he give me all the money when I needed it.

Q Judge Gilhooly? A Yes, sir.

Q And you spoke to Judge Gilhooly in 1922?

A Yes, sir.

10 Q Don't you know that Judge Gilhooly died in 1918? A Mr. Gilhooly was represented by Mr. Bender, his partner, that is the man who I did business with.

Q You were going to borrow the money from him on a mortgage? A I arranged with Mr. Bender in Judge Gilhooly's office and whenever I wanted money I could get it.

Q He wouldn't give it to you unless you gave him some security? A Yes, sir.

Q You had other property? A Yes, sir.

20 Q Had he made a search for you? A Who?

Q Mr. Bender, had he made a search for the purpose of granting you this mortgage loan? A No, he didn't.

Q Had you had any agreement in writing to borrow the money? A No.

Q On what other property, were you to borrow this money? A I have plenty of property in Elizabeth to borrow money whenever I needed it.

30 Q On what particular property were you going to borrow this money? A I offered him quite a few of them. I didn't need the money because I couldn't get the title right.

Q You didn't arrange to get the money because you knew that this tenant was going to be in the property? A I had arranged to get the money providing I can get the title clear, according to my agreement.

40 Q When did you find out that you couldn't get the title clear? A On March first, when I was supposed to get the deed.

*Samuel Merlis, cross.*

Q That is the first time you knew the tenant— A I knew it before, but I thought maybe he move out.

Q If the tenant had moved out on March first then you were going to make your arrangements? A Then we would give him the money right there.

Q You were going down to Bender's office and get the money? A Yes, I certainly would get it. 10

Q Had you spoken to Mr. Bender about this, that you would need this money? A I spoke to him that time.

Q When? A After I made that contract.

Q After you made the contract? A Yes, sir.

Q Was he going to take a first or second or third mortgage on your property? A It wasn't necessary to take a third or second mortgage. 20

Q When you came in to our office on March first, you spoke to Mr. Stein? A I spoke to a couple of gentlemen. I think it was Mr. Stein.

Q Was this Mr. Lang there? A I think he was there.

Q How long did you stay in the office? A Five or ten minutes. 30

Q What did you ask? A I asked him if it was arranged that the tenant was going to move out, so I could get the title.

Q You wanted to take title to the property with the tenant out? A Yes, sir.

Q And you wouldn't take it without that? A No, sir.

Q Did you have anybody else with you? A Yes, Horwitz.

Q He was your lawyer? A Yes, sir. 40

*Samuel Merlis, re-direct.*

Q Had you had any search made on this property? A No, sir.

Q Had you been to see this tenant yourself? Do you know what the tenant's name was that was in that property? A Blum.

Q Had you been to see him?

10

Objected to as not cross examination.

The Court: That question may be answered yes or no.

A Yes, sir.

Q Did you have any talk with that tenant about permitting him to remain in the property after you took title?

Objected to.

20

Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Who was it that said to you, "If you don't want the property, don't take it?" A One of the two gentlemen, either Mr. Lang or Mr. Stein, either of the two.

30

*Re-direct examination* by Mr. Demarest.

Q Did you a short time after this buy another piece of real estate? A Yes, sir.

Q How much did you pay for it?

Objected to.

A \$75,000.

Objection sustained.

40

PLAINTIFF RESTS.

*Motion for a Non-suit.*

Mr. Hannoeh:

I move for a non-suit on two grounds:

*First*, that the plaintiff has not established that he was able to perform; and

*Second*, that the plaintiff has stated that its reason for not taking title was the fact that the tenant was in possession of the property on March first, and that it would not have taken title, unless the tenant was out of possession. 10

An examination of the agreement discloses that it contains the following clause:

“This conveyance is also to be made subject to the rights of various tenants as monthly tenants. It is understood, however, that at the present time the corner store in said premises is subject to a lease held by one Blum which said lease will expire on August 1st, 1922, and that the party of the first part will give notice to the said tenant to terminate his tenancy contemporaneously with the passing of title.” 20

The agreement contains no clause obligating the defendants to deliver title with the tenant out of possession. Their obligation was merely to serve notice to quit. 30

(Further argument.)

The Court: I will hold the motion for non-suit until the close of the defendant's case.

*Isaac Blum, direct.*

ISAAC BLUM, sworn in behalf of the defendant.

*Direct examination* by Mr. Hannoeh.

Q Where do you live? A I used to live 138 Johnson avenue; now I live in a little different place.

10 Q You were in business at the Springfield avenue store owned by the Langs, at 259 Springfield avenue? A Yes, sir.

Q And you were in possession of that property under this lease, Exhibit P. 2? (Showing witness paper.) This is a lease which you made with Mr. Lang? A Yes.

Q That is from August 1, 1921, to August 1, 1922? A Yes.

20 Q Did you learn that Mr. Lang had sold the property? A Yes.

Q Do you know Mr. Merlis? A Yes, sir.

Q Which one do you know? A The three of them.

Q Where did you first see them? A The first time he came, that man, the old man, he came to the window to me, and he came inside and he told me he bought the property and I told him—

30 Mr. Demarest: I object. He is apparently going to give a conversation with an officer of the corporation without showing authority.

*By the Court.*

Q Who do you mean by the "old man?" A Yes, sir.

Q Samuel Merlis? A Yes, sir.

Objected to.

Objection overruled.

40

*Isaac Blum, direct.*

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q What did he say to you? A He said, "I bought that property," and then I asked him, "Why you want the property, do you want the property for yourself, or do you want a tenant for the store?" 10

Mr. Demarest: I object. Perhaps what is testified to so far, is proper, but when we come to a new contract made by this man with a corporation, I would like to renew my objection on the ground that he is an officer of the corporation, or he is an independent outsider, and he would have no authority unless that authority would be given by the Board of Directors by appropriate action, and that must be shown before the witness can testify. 20

The Court: Your objection and exception will be assumed to go to all the conversations.

Objection noted as ground of appeal.

A I said, "You want the store for yourself, do you want the store so I can't stand here?" He tell me, "All right, you can stay there; come to the office and we will make a new lease, a five year lease." 30

Q Who was in the store when that took place, who was in your store? A The old man and the young fellow, his son.

Q Did you talk about the length of the lease, how long it was going to be? A The new lease for five years. 40

*Isaac Blum, direct.*

Q How much rent?

Mr. Demarest: I object to that on the ground that no verbal arrangement could be made as to a lease for that term under the statute of frauds.

10 The Court: I will hear what the conversation was.

Q Did you discuss the rent? A Yes. \$110.

Q When they left the store what were you to do? A I saw Aaron Lang and I ask him, "Mr. Lang—"

Q You can't tell what you told Mr. Lang unless Mr. Merlis was there. You went to see Mr. Lang? A I went to see Mr. Lang and I said, "You sell that property?" And I told  
20 Mr. Lang—

Q You can't tell us that. What did you do respecting Mr. Merlis? A I came over there to his office—of course, I don't know myself how to make out the lease; I go to my friend—

Q Who told you to go to Merlis' office? A He told me to go to the office, 196 or 169 Market street.

Q Did you go down to his office? A Yes, sir.

30 Q Who went down with you? A Barney Levy.

Q Who is Barney Levy? A A friend of mine.

Q Whom did you meet at Merlis' office? A These men (indicating).

Q The three of them? A Yes, sir.

Q Who is Mr. Resnik, do you know? A I don't know the name.

40 Q The three of them were there? A Yes, sir.

*Isaac Blum, direct.*

Q What was done in the office? A In the office they came with an agreement, with a five year lease for \$110 a month.

Q Was there a paper drawn up? A Yes, sir, a big paper.

Q What was said about the paper? A There was something wrong, it ain't put in it what I want, and he said we have to get up a new paper. 10

Q Was there any paper signed that afternoon? A No, he don't give me to sign.

Q Did you come back again? A Yes, sir.

Q A few days later? A A week.

Q Who came back with you? A Mr. Barney Levy.

Q Who was there when you came back? A All the three.

Q What did you do with it? A That day he say he couldn't sign a lease because first he wants to take title. 20

Q Did you see them any more after that? A No.

Q Did you tell Mr. Lang what you had done? A I told Mr. Lang—

Q Just yes or no. A Sure, I told Mr. Lang.

Q Can you fix the time when you had these talks, when it was, the date? A The date I don't remember. 30

Q What month? A I have to have thirty days' notice, and it was before I got the notice.

Q Were these talks that you had with them before Christmas or after Christmas? A I don't remember.

Q Did you afterwards receive a notice from Mr. Lang? A Yes, sir.

Q (Showing witness paper.) Is this the paper that you received? 40

*Isaac Blum, direct.*

Mr. Demarest: I object to that notice as being insufficient as a defense.

The Court: The question may be asked.

Plaintiff's counsel prays an exception to this ruling of the Court.

10 Exception noted as ground of appeal.

Q Is this the notice you received? Is this your signature on the bottom of it? A Yes, sir.

Mr. Hannoeh: I desire to offer this notice in evidence.

20 Mr. Demarest: I object on the ground that it is admitted by the opening of the defense that the notice was not served on the day stated in the notice by the acknowledgment, namely, on the thirty-first day of January, but some time later, as Mr. Hannoeh has stated in his opening, and he stated then that there was an agreement between them.

*By the Court.*

30 Q When did you get this notice? A I don't remember what month he gave me the notice.

Mr. Hannoeh: There is an acknowledgment of service on it.

The Court: It may be marked for identification.

(Marked Exhibit D. 1 for identification.)

*By Mr. Hannoeh.*

40 Q On the first of March were you ready to move out of your store? A Of course.

*Isaac Blum, direct.*

Q Had you made any arrangements for another store with Mr. Lang? A Yes, sir.

Q Whereabouts? A Way up Springfield avenue.

Mr. Demarest: I object to this line of testimony.

10

The Court: Objection sustained.

Mr. Hannoeh: I offer by the testimony of this witness to show that he was ready to move out of the premises on the first of March and had made arrangements to move elsewhere.

The Court: I overrule the offer unless you propose to show further that that was called to the attention of the plaintiff and the plaintiff understood it.

20

Mr. Hannoeh: The testimony in the case will be that no such conversation as plaintiff alleges took place with Mr. Lang and Mr. Stein. I cannot promise therefore to show that we called this to plaintiff's attention.

The Court: The objection will be sustained.

Defendant's counsel prays an exception to this ruling of the Court.

30

Exception noted as ground of appeal.

Mr. Demarest: Before cross examining, I move to strike out the entire testimony of this witness on the ground that the only defense pleaded here and the only one that could prevail against the plaintiff, would be a new contract of waiver by the tenant. I think the testimony should be stricken out right here.

40

*Isaac Blum, cross.*

The Court: I decline to strike it out. I will reserve decision on the motion until the end of the case.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

10

*Cross examination by Mr. Demarest.*

Q You say that Mr. Merlis and his son and his son-in-law, Mr. Resnik, came to your office the first time you had a talk about this lease? A Not Mr. Resnik.

Q Mr. Merlis and his son came there and they told you that the Modern Homes Building Company had bought the property? A Yes, sir.

20

Q Did they say that they wanted to raze the building and make some alterations? A They told me they will do it.

Q And did they tell you that those alterations could not be made while you were in the property, but that you would have to move out while they were being made? A No, sir.

Q They didn't say that? A No.

30

Q Did you tell them that you were a tenant of the store and that you didn't intend to get out? A I told them I will stay there if they want because I am a monthly tenant, because I won't go out—

Q What did you tell them? A I told them, "When you want that store, I go out." He tell me he will give me a new lease for five years—I don't know—because he made arrangements for a five-year lease.

40

*Isaac Blum, cross.*

*By the Court.*

Q When did you say this conversation took place, when was this? A In what month?

Q Yes. A That is three years ago—I don't know—I don't remember.

Q So that what finally was understood between you and Mr. Merlis and his son at the end of the first conversation, the first time they came to see you, was the understanding at the finish of your conversation that you were to get a new lease for five years at \$110 a month? A Yes, sir. 10

Q And that you were to stay in the store while the alterations were being made, or were to go out while the alterations were being made?

A He don't make no alterations at all. He said, "You will stay like this, \$110." 20

Q The same, without alterations? A Without alterations.

Q Don't you remember Mr. Merlis telling you that they wouldn't take any chances of making alterations in the store while the tenant was there? A He didn't say that to me at all.

Q What kind of a business did you run there? A Shoe.

Q When did you first see Mr. Merlis after the first conversation? A The next when he tell me to come up to his office, he tell me to come over in Market street. 30

Q You went over to see him in Elizabeth? A No, Market street.

Q Market street, Newark? A Yes.

Q When was that? A Three years ago.

Q How long was that after the first conversation you had? A A week later.

Q Can you state what month it was in? A I don't remember what month. 40

*Isaac Blum, cross.*

Q Between the first conversation that you had with Mr. Merlis and the second conversation did you say anything to Mr. Lang about what you talked with Mr. Merlis? A I told Mr. Lang that I made a five-year lease with Mr. Merlis.

10 Q After the first conversation you had, and before the second, is that right? A I am not sure about it.

Q When you saw Mr. Merlis the second time who was there in the office? A All the three.

Q What did you say then? A I told them is the lease made out? He said, "Only you have to wait for the title and then sign the lease, then you sign it," and I went there with my friend Barney Levy; they told me that they make ready  
20 to sign it.

Q Was the written lease discussed the second time you saw him, or the first time that you saw him? When was it that you and he agreed that there should be a paper drawn? A The first time, and at the second time he tell me he couldn't sign it, only have to take title first.

Q When you saw him the first time, the paper was prepared? A Yes, sir.

30 Q Why wasn't it signed? A He tell me he couldn't give me sign the lease, he has to take title first.

Q Did you ever see him after that? A No, sir.

Q There was no new lease ever signed? You never signed a lease with him for the property? A No, sir.

Q You didn't make any agreement by word of mouth for an extension of the lease, did you? A Of course, he told me he couldn't give it to  
40

*Isaac Blum, cross.*

me to sign it, "Give me title first," and then after I didn't bother no more with him.

Q So when you got through with your talk with Mr. Merlis and his son, and, on the last occasion, with Mr. Resnik, you were exactly in the same position as when you started, you had no new lease? A No.

10

Q Were you still in the store on March 1, 1922? A I am still there.

Q Have continued in that store; is that right? You stayed there all the time, you had the store then and have it now? A I stayed there all the time.

Q Do you remember when this paper was signed by you, "Isaac Blum" this notice that Mr. Hannoeh showed you? A When I was there and told him he gave me the notice and I put it in my pocket.

20

Q Do you remember when you signed this paper? A I don't remember what date that was. It is three years ago.

Q Was it after the thirty-first day of January? A I don't remember.

Q Who served this paper on you, who brought it to you? A I was by Mr. Lang and he give it to me, that notice.

30

Q Where did that happen? Where were you when he gave you the paper? A I was by him in the office.

Q In his office? A Yes.

Q Do you remember him saying to you at that time something to this effect, that he had served you with a notice any time and that he was serving you after the time that he should have served you, and do you remember agreeing then that this service should be as though it had

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*Isaac Blum, cross.*

been made on the thirty-first of January? A  
I don't know that, no.

Q Do you remember any agreement between  
you and Mr. Lang that that notice which was not  
served in time was considered as having been  
served in time? A He tell me that time, he  
10 say he will give me the notice a month before, a  
month's notice.

Q Please repeat that. A He gave me that  
notice before the thirty days. Whether it was  
in January or February, I don't remember what  
date that was. He says he will give me thirty  
days' notice.

Q Are you right about that? You say he  
gave you more than thirty days' notice? A  
Not more than thirty days; only thirty days.  
20 He says the notice is for thirty days, so he give  
it to me for thirty days' notice.

Q It says: "Service of a true copy herein  
is hereby acknowledged this 31st day of Janu-  
ary, 1922, Isaac Blum." Was that before or  
after the 31st day of January that he served  
you with this paper? A I think he served me  
before. I don't know what day.

Q Did you agree that if the notice was not in  
time it should be considered as having been  
30 served in time?

Objected to.

The Court: The question may be an-  
swered.

Q Did you tell Mr. Lang that if the notice  
had not been served at the time it should have  
been— A Mr. Lang? I didn't tell him.

40 Q You didn't tell him? A No.

*Isaac Blum, cross.*

Q Wait until you hear what I am going to ask you. Did you tell Mr. Lang or Mr. Stein or anybody before Mr. Lang that if they hadn't given you sufficient notice to make you get out of the property on the first of March that you consider this notice as being a good notice?

Objected to.

10

Objection overruled.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A I couldn't explain you what that is. He give me that notice. I don't remember what day he give me the notice, whether before or after. He give me thirty days' notice.

Q Do you remember what was said when he did serve this notice? A Mr. Lang tell me, he say, "I got for you a store and I make it \$75, if you want to go out, I will give you the store for \$75." I said, "That man gave me a five-year lease and then I will stay there."

20

Q Did Mr. Lang pay you \$200 that is mentioned in this notice? A He don't pay me.

Q He never paid you? A No.

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Mr. Demarest: I think there has been no defense made out by the testimony of this witness.

The Court: The testimony may remain.

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*Simon Lang, direct.*

SIMON LANG, sworn in behalf of defendant.

*Direct examination* by Mr. Hannoeh.

Q You are one of the plaintiffs in this case?

A Yes, sir.

10 Q The other Mr. Lang, Aaron Lang, is your brother? A Yes, sir.

Q And he is confined to his home with serious illness? A Yes, sir.

Mr. Hannoeh: I would like to have it noted on the record that Mr. Stein died last November.

20 Mr. Demarest: At the same time, will you admit that Mr. Horwitz, who would have been produced here and who was a member of the bar, has also died. He was secretary of this corporation.

Q (Showing witness paper.) I show you Exhibit D. 1 for identification. Does that bear your signature? A Yes, sir.

Q And does it bear the signature of your brother? A Yes, sir.

Q Did you serve that on Mr. Blum? A Yes, sir.

30 Q Will you tell us the date that you served it? A Why, that was a few days after the first of February.

Q How were you able to fix the time, what is it that makes you fix that time? A The Modern Homes Realty Company arranged with us to take title to this property the first of February and we agreed to reduce the price \$200 if they would take the title on that day.

40 Objected to.

*Simon Lang, direct.*

The Court: It will be stricken out. It is stating a conclusion.

Q Did you have any conversation with the Merlises about closing title before March first? Yes or no. A Yes, sir.

Q Where did that conversation take place? A In the office of Stein, Stein & Hannoeh. 10

Q Approximately, when did it take place? A In the month of January.

Q Who was present? A Mr. Merlis and his son, and the other gentleman, Mr. Resnik.

Q Do you know who Mr. Resnik is? A Yes, sir.

Q Who is he? A He is one of the members of the Modern Homes Realty Company.

Q What was said at that conference by everybody? 20

Mr. Demarest: I object on the same ground.

The Court: I will reserve decision on this objection, although I am convinced that there is merit in it. We will consider that the objection goes to all the testimony as to the conversation with Mr. Merlis.

Plaintiff's counsel prays an exception to this ruling of the Court. 30

Exception noted as ground of appeal.

Q Tell us what that conversation was? A The conversation was that if they would take the title on February first that we would allow them \$200 off the purchase price, which we said we would; and we said we would pass title on the first, that we would live up to our contract if they would.

*Simon Lang, direct.*

Q On the first of February what happened?

A Nobody showed up.

Q Where were you? A In Stein, Stein & Hannoch's office.

Q Did you ascertain in anyway whether anybody was going to show up? Yes or no. A  
10 No, sir.

Mr. Demarest: With reference to the first of February, I understand that you do not insist on the first of February contract as a defense.

Mr. Hannoch: I will offer this testimony.

Mr. Demarest: I make the objection that the first defense is not a proper defense. It was not in writing.

20 Q After February first what did you do with respect to Blum? A We served Mr. Blum notice to vacate.

Q (Showing witness paper.) And is this the notice? A Yes, sir.

Mr. Hannoch: I desire to offer this notice in evidence.

30 Mr. Demarest: I object. It is not in compliance with the terms of the contract and not a proper defense to the action.

The Court: It will be admitted.

(Marked Exhibit D. 1.)

Q On March first what did you do? A We went down to Stein, Stein & Hannoch's office to pass title.

Q Did you execute a deed? A Yes, sir.

40 Q Where were you all of March first? A In the office of Stein, Stein & Hannoch.

*Simon Lang, cross.*

Q At any time during that day did Mr. Merlis come to the office? A No, sir.

Q Mr. Merlis in his testimony said that he was in the office on March first and that he had a talk with Mr. Stein, at which you were present, and he asked whether Blum was out of the property, and you said no, and Mr. Stein was there and you or Mr. Stein said, "If he didn't want the property he shouldn't take it." Was there any such conversation on that day? A No, Mr. Merlis was not there that day. 10

Q Did you have the deed and bond and mortgage ready? A Yes, sir.

Q I show you an instrument bearing three signatures and ask you to identify those signatures. A Yes, sir.

Q Whose are they? A My brother's and his wife and my own. 20

Mr. Hannoeh: I desire to offer proposed deed dated March 1, 1923, and the proposed bond and mortgage.

(Marked Exhibit D. 2.)

Q Were you ready on March first to convey this property in accordance with the contract?

A Yes, sir.

Q Has there ever been any tender made to you by the Modern Homes Realty Company? 30

A No, sir.

Q Has there ever been any tender made to you by the Modern Homes Realty Company of their money under this contract? A No, sir.

*Cross examination by Mr. Demarest.*

Q Were you present when the contract for the sale of the property was executed, were you 40

*Simon Lang, cross.*

there with Mr. Merlis? A You mean the agreement?

Q Yes. A Yes, sir.

Q Both there at the same time? A Yes, sir.

Q When did you next see Merlis after that?

10 A Saw him in Stein, Stein & Hannotch's office.

Q When? A Some time in January.

Q Was Mr. Blum in the property on the first of February? A Yes, sir.

Q Was he still in the property on the 1st of March, 1922? A Yes, sir.

Q And there some time afterward? A Yes, sir.

Q Did you ever dispose of Mr. Blum and offer Mr. Merlis a deed for the property with Blum out of possession?

20

Mr. Hannotch: I object to the question as immaterial.

The Court: The question may be answered.

*By the Court.*

Q Blum was always in possession of the property, wasn't he? A Yes, sir.

30

*By Mr. Demarest.*

Q You say that Mr. Blum agreed that this notice served on him some time after the 23rd day of February, 1922, would be a sufficient notice and that he would get out? A Right.

Q And you told Mr. Blum that you had provided another store for him so he would have a place to conduct his business? A Yes, sir.

40 Q Why didn't you then carry out that agreement with Mr. Blum to take another store and

*Simon Lang, cross.*

offer the Modern Homes Realty Company the title to this property without Mr. Blum as a tenant? A Mr. Blum told me that they had offered to make a lease with him, and in the month of January we had a conversation with them in regard to taking over the property at a reduced price.

10

Q Those were only conversations that you heard about, they were not in that contract, were they? A No, sir.

Q Blum didn't tell you that he and Merlis had signed a new lease in regard to this property? A No, sir.

Q Why didn't you put yourself in possession on March first if you were ready to give title to this property? A He wanted Mr. Blum to stay in there.

20

Q And you were never told that there had been an agreement actually made between Mr. Blum and the Modern Homes Realty Company to the effect that Mr. Blum was to remain there as a tenant? A An unsigned agreement.

Q You afterwards sold this property for \$10,000 more than the Modern Homes Realty Company agreed to pay for it?

Objected to.

30

Objection sustained.

Q When did you see Mr. Merlis, the first time after the contract was signed? A Some time in the month of January.

Q Did you talk about Blum then? A Yes, sir.

Q And you understood when you talked with him that he and Blum had made no new contract, they had come to no terms? A They had an unsigned contract.

40

*Simon Lang, cross.*

Q When did you see Mr. Merlis after that?

A I haven't seen him since.

Q Mr. Merlis made a demand upon you for the return of this thousand dollars, didn't he?

10 Mr. Hanooh: We admit that a demand was made.

Q Why did you refuse to pay Mr. Merlis the thousand dollars? A By advice of counsel.

Q Did you sell this property afterward? A Yes, sir.

Q When? A It was about eight months.

Q For what price?

Objected to.

20 Objection sustained.

Q Let me understand you perfectly. There was never any time from the day you signed this contract for the sale of this property up to the first day of March following the date of passing title, or at any other time later, any knowledge to the effect that a contract had been made between Mr. Blum, and the Modern Homes Realty Company, that Mr. Blum should remain  
30 in the property after the first of March? A What is that?

Q Get this right. (Question read.) A I don't get it right.

Q You knew there were negotiations on between the Modern Homes Realty Company and Mr. Blum about a new lease, you heard there were negotiations, on, didn't you? A Yes, sir.

Q You never knew at any time that those negotiations had resulted in a new contract, did you? A It isn't quite clear to me.  
40

*Samuel Merlis, direct.*

Q You never heard of that, you never heard that they had settled upon a new contract at a new bargain, did you? A No, sir.

*By Mr. Hannoch.*

Q What did you hear that they had done?  
A They had arranged to make a lease for a term of five years at a monthly rent of \$110 a month, the lease to be signed after the passing of title. 10

Q Did you have a store vacant on the first of March that you were going to put Mr. Blum in? A Yes, sir.

Q Where was it? A 638 Springfield avenue.

Q How far away from this store? A It is about fifteen blocks.

20

*By Mr. Demarest.*

Q You merely heard that they were negotiating about a new contract, didn't you, that is all you heard? A Yes, sir.

DEFENDANT RESTS.

SAMUEL MERLIS, recalled in behalf of plaintiff, in rebuttal. 30

*Direct examination by Mr. Demarest.*

Q How many times did you go in Mr. Stein's office or see Mr. Lang and his brother after the 1st of March, 1922? A Three times.

Q Did you ask for your deed? A Yes, I asked him whether Mr. Blum is going to move, so we can take the deed. 40

*Morris Merlis, direct.*

Q Where did you go when you asked that?

A In Mr. Stein's office.

Q Was Mr. Lang there every time you went in? A Either this one or his brother.

Q Every time? A Either him or his brother; I don't know exactly.

10 Q I understand that you want to correct your testimony that you gave on cross examination about the search. Had there been a search of this property made by Mr. Horwitz? A So I was told by my son.

Q Do you know whether or not there was one? A Yes, sir, by Mr. Horwitz.

Q Mr. Horwitz is dead? A Mr. Horwitz died.

Cross examination waived.

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MORRIS MERLIS, sworn in behalf of plaintiff, in rebuttal.

*Direct examination by Mr. Demarest.*

Q Where do you live? A Elizabeth.

30 Q You are an officer of the Modern Homes Realty Company? A Yes, sir.

Q And director? A Yes, sir.

Q What office did you occupy? A Secretary.

Q Were you at Mr. Stein's office on the 1st day of March, 1922? A No, sir, I wasn't.

Q Were you there at any other time around that date? A I was there prior to that date; not after that date.

40 Q Were you there at any time when there was anything said by Mr. Stein or Mr. Lang with

*Defendants' Motion for Direction of a Verdict.*

regard to passing this title? Did either one of them say anything to you about passing title?

A There was something said in January about passing the title.

Q I mean later? A No.

Q Were you over in Mr. Stein's office after the date when you were to get your deed? A 10  
Mr. Horwitz and my father went all the time.

Q You were not there? A No, I was not there.

Cross examination waived.

PLAINTIFF RESTS.

DEFENDANT RESTS.

Mr. Hannoeh: I move for the direction of a 20  
verdict in favor of the defendant in this case,  
and urge the same grounds as stated in my mo-  
tion for non-suit.

It also now appears that the notice provided  
for by the agreement was given, and that there-  
fore, the defendants had performed the obliga-  
tion placed upon them, namely the giving of a no-  
tice to quit. They were not required to have 30  
the tenant actually vacate the premises.

It furthermore appears that the plaintiff had  
made arrangements with the tenant whereby the  
tenant was to remain in possession after March  
first, and the defendant had knowledge of that  
fact and relied upon it. The plaintiff is there-  
fore estopped to urge the tenant's presence in  
the property on March first as a ground for re-  
fusing to take title.

(Further argument.)

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*Plaintiff's Motion for Direction of a Verdict.*

Mr. Demarest: I make a motion to direct a verdict for the plaintiff. There has no legal defense been proven.

(Argument.)

10 The Court: On the motion you made to strike out testimony, all the evidence regarding a new contract between Merlis and Blum will be stricken out.

Mr. Demarest: That having been done, then I move for the direction of a verdict on the ground that no legal defense has been established. They would have no right to retain this money anyway. There is no forfeit in this contract and their action would be one of damages.

20 The Court: (After argument.) I do not know that the principle has ever been established in New Jersey that because both parties move for the direction of a verdict, that, therefore, it becomes a question of law to decide. If both sides agree to that, I will so consider it.

Mr. Hannoeh: Do I understand that your Honor has stricken out all the testimony respecting the agreement with the tenant?

30 The Court: Yes. I intended to strike out all the testimony as to the contract made between Blum and Merlis with reference to a new lease, by whoever it was given, whether by Mr. Lang or by Mr. Blum.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(After argument.)

The Court: It is now conceded that it is a question of law that the Court should decide.

*Conclusions of Judge.*

That being the fact, there seems to be no question under the testimony that the defendants' representatives were ready, able and willing to convey this property, unless they were prevented from doing so by reason of the presence in the property of the tenant Blum. I have here, and it is in evidence, the deed from the Langs to the Modern Homes & Realty Company which is dated on the first day of March, the date when, according to the contract of sale, title was to be passed. Mr. Leo Stein, who is now dead, took the acknowledgment as of that date and there is no reason why I should say, from my knowledge of Mr. Stein, a man of high character and standing at the bar, that he would falsify the date of this acknowledgment. So I think it is established in the case that the deed was executed, ready for delivery, and that is all, according to the pleadings in the case, the defendants were obliged to do, unless they were obliged to have the tenant, Blum, out of the property. The contract of sale, which I suppose, the Court must construe, where there is any doubt about it says this: "This conveyance is also to be made subject to the rights of various tenants as monthly tenants. It is understood, however, that at the present time the corner store in said premises is subject to a lease held by one Blum, which lease will expire on August 1, 1922, and that the party of the first part will give notice to the said tenant to terminate his tenancy contemporaneously with the passing of title." Ordinarily the tenancy could not have been terminated by any notice prior to the expiration of the lease. Ordinarily, of course, any notice which might be given would be insufficient to obtain possession, for his lease did not expire until the first of August. But this

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*Conclusions of Judge.*

lease with Blum contains this provision: "This lease is made upon this express condition and limitation, that in case the party of the first part should enter into an agreement for the sale of said property, then, upon the giving of a thirty days' notice in writing to the party of the second part of the execution of such agreement and of the election of the party of the first part to terminate this lease by reason thereof, this lease shall thereupon, at the expiration of said thirty days' period, come to an end, anything hereinbefore to the contrary notwithstanding, and the party of the second part shall thereupon, at the expiration of said thirty days' period quit and surrender possession of said premises, and the party of the first part, their heirs and assigns, may thereupon re-enter said premises."

There is another paragraph which reads as follows: "It is further agreed, that providing that the party of the second part hereto has promptly surrendered possession of said premises at the expiration of said 30-day period, the party of the first part shall immediately upon such surrender pay to the party of the second part the sum of five hundred dollars (\$500), provided the said notice requires the party of the second part to surrender said premises during the first six months' period of this lease, the sum of two hundred dollars (\$200) provided said notice requires said party of the second part to surrender said premises during the succeeding three months' period, or the sum of one hundred dollars (\$100) if said notice requires the party of the second part to surrender possession during the last three months' period of this lease and before the expiration of the one year term hereinbefore set forth."

40

*Conclusions of Judge.*

A notice was served, but it was not until after the first of February. The tenant, however, acknowledged service of that notice as of the thirty-first day of January, which was not within thirty days of the first day of March, as called for by the lease; so that the notice was ineffective to get possession of the premises on the first day of March. The tenant did not remove from the premises. The result of that is, even though the defendants were ready, able and willing, so far as the lease is concerned, to deliver possession on that day, they were not able to deliver possession, so far as the tenant was concerned, nor had they given the notice required by the lease, to the tenant, to obtain possession that day. So the whole matter must be decided as conditions were on the first day of March. That being true, the defendants were not ready, able and willing to transfer the property on the first day of March, free and clear of encumbrances, because they had failed to give the notice which they had agreed to give under the terms of the lease, which would have been effective, under the terms of the lease with Blum, to have terminated this lease.

Therefore, there will be a verdict in favor of the plaintiff and against the defendant for \$1,000, with interest from the 1st day of March, 1922, to this 26th day of October, 1925, at six per cent., amounting altogether to \$1,215.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

*Exhibit P. 1.*

**EXHIBIT P. 1.**

ARTICLES OF AGREEMENT, made the Twenty-fifth day of November in the year of Our Lord One Thousand Nine Hundred and Twenty-one, BETWEEN AARON LANG and LILLIE LANG, his wife, and SIMON LANG (widower) of the City of Newark in the County of Essex and State of New Jersey, party of the first part; AND MODERN HOMES REALTY COMPANY, a New Jersey corporation, having its principal office located in the City of Newark in the County of Essex and State of New Jersey, party of the second part;

WITNESSETH, That the said party of the first part, for and in consideration of the sum of FIFTY THOUSAND DOLLARS (\$50,000), to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that they, the said party of the first part, will well and sufficiently convey to the said party of the second part, its successors and assigns, by Deed of warranty free from all encumbrance, except as hereinafter set forth, on the first day of March, 1922 next ensuing the date hereof, all those lots, tracts, or parcel, of land and premises, hereinafter particularly described situate, lying and being in the City of Newark in the County of Essex and State of New Jersey, known and designated as #269-271-273 Springfield Avenue and 7 & 9 Boyd Street, being the two tracts of land described in a certain deed from Ann Satz (widow) to the party of the first part, which deed is dated April 16, 1907, and recorded in the Essex County Reg-

*Exhibit P. 1.*

ister's office in book S. 41 of deeds for said county on pages 355 &c.

Said conveyance is to be made subject to a mortgage of \$16,500. bearing interest at the rate of five and a half per cent (5½%) held by the Howard Savings Institution.

This conveyance is also to be made subject to the rights of various tenants as monthly tenants. It is understood, however, that at the present time the corner store in said premises is subject to a lease held by one Blum, which lease will expire on August 1, 1922, and that the party of the first part will give notice to the said tenant to terminate his tenancy contemporaneously with the passing of title. 10

Rents of premises, insurance premiums, taxes, water rents and interest on mortgage encumbrances shall be equitably apportioned between said parties at the time of passing of title. 20

Morris A. Merlis is hereby recognized as the broker who effected this sale, and the party of the first part agrees to pay him a commission of two and a half per cent (2½%) on the total sale price as soon as title to the same passes to the party of the second part. If for any reason without wilfull default on the part of the party of the first part said title should not pass, the party of the first part shall not be liable for any commission whatsoever to the said Merlis. 30

AND the said party of the second part, for itself, its successors and assigns doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that it, the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the said sum of FIFTY THOU- 40

*Exhibit P. 1.*

SAND DOLLARS (\$50,000) as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

- \$ 1000.00 In cash on the execution and delivery of this agreement, the receipt whereof is hereby acknowledged.
- 10    16500.00 By accepting said conveyance subject to the mortgage held by the Howard Savings Institution as above stated, which mortgage the said party of the second part agrees to assume as part of the consideration money aforesaid.
- 20    23500.00 To be secured by a purchase money bond of said party of the second part and mortgage embracing said premises, bearing even date with the deed hereinbefore mentioned, payable in ten years from the date thereof as follows, \$1500. each year for nine years consecutively, and the balance at the end of ten years from the date of said mortgage, said bond and mortgage to bear interest at the rate of six per cent per annum, payable semi-annually. Said bond and mortgage shall contain a clause providing that the entire principal sum thereof shall become due and payable in case of default for a period of thirty days in the payment of any instalment of interest or instalment of principal. Said bond and mortgage shall also contain a sixty days tax default clause, and a fire insurance clause to the extent of \$25,000. on said premises.
- 30

*Exhibit P. 1.*

Said bond and mortgage shall be prepared by the attorneys of the party of the first part, and the cost thereof, together with the revenue stamps and cost of recording thereof, shall be paid by the party of the second part.

9000.00 in cash upon the passing of title and delivery of deed. 10

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\$50,000.

AND IT IS FURTHER AGREED, by the parties to these presents, that the said party of the second part, its successors and assigns, may enter into and upon the said land and premises on the first day of March, 1921 next ensuing the date hereof, and from thence take the rents, issues and profits to its and their use. 20

AND IT IS FURTHER AGREED, by the parties hereto, that the said Deed and purchase money bond and mortgage shall be delivered and received at the office of Stein, Stein & Hannoeh, #31 Clinton St., Newark, N. J., between the hours of 10 in the forenoon and four o'clock in the afternoon on the said first day of March, 1921, next ensuing the date hereof.

If on a survey of said premises it should appear that there are any encroachments the party of the second part may withdraw from this contract, obtain a refund of his deposit moneys, and both parties shall thereupon be discharged from further liability under this contract, and in that event the party of the first part shall pay to the party of the second part the cost of such survey. It is understood, however, that a survey of said premises shall be obtained within twenty days from the date hereof, and in order for the party of the second part to take advan- 40

*Exhibit P. 1.*

tage of the provisions of this paragraph it shall, within five days after obtaining said survey, give written notice of its election to terminate this contract and to obtain the repayment of its deposit moneys.

10 AND for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators; successors and assigns.

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

AARON LANG,  
LILLIE LANG,  
SIMON LANG.

20 MODERN HOMES REALTY COMPANY,  
By SAMUEL MERLIS, President.

Attest MORRIS A. MERLIS, Secretary.

Signed, Sealed and Delivered  
in the presence of

(SEAL) LEO STEIN.

30 (Duly acknowledged.)

*Exhibit P. 2.*

**EXHIBIT P. 2.**

LEASE.

THIS INDENTURE made this Thirty-first day of July, in the year One Thousand Nine Hundred and Twenty-one BETWEEN AARON LANG and SIMON LANG of City of Newark in the County of Essex and State of New Jersey of the First Part AND ISAAC BLUM of the City of Newark in the County of Essex and State of New Jersey, of the Second Part, 10

WITNESSETH, that the said Party of the First Part do hereby demise and lease unto the said Party of Second Part, the store on the ground floor of premises known and designated as #269 Springfield Avenue, Newark, New Jersey, being at the southwest corner of Springfield Avenue and Boyd Street, with the appurtenances and the sole and uninterrupted use and occupation thereof (except as hereinafter mentioned) for the term of one year from the First day of August 1921, to the first day of August 1922, for the yearly rent of SEVEN HUNDRED AND EIGHTY (\$780) dollars payable in equal monthly instalments of sixty five dollars each on the first day of each and every month during said term in advance. 20 30

AND the said Party of the Second Part does hereby agree to pay to the said Party of the First Part, their heirs, assigns, agents or attorneys, the said yearly rent of SEVEN HUNDRED AND EIGHTY (\$780) dollars at the time and in the manner aforesaid.

AND the said Party of the Second part does hereby promise and agree that he will not Re-Let or Under-Let the whole or any part of said premises, nor assign this lease, nor use or per- 40

*Exhibit P. 2.*

mit any part thereof to be used for any other purpose than a shoe store, without the written consent of the said Party of the First Part, their heirs, assigns, agents or attorneys, under the penalty of forfeiture and damages; that the said Party of the First Part, their heirs, assigns,  
10 agents or attorneys may enter into and upon said premises at reasonable hours in the daytime to examine the same, or to make such repairs or alterations therein as shall be necessary for the preservation thereof; and to exhibit them at any time during the last three months of the said Term from Ten o'clock in the morning to Five o'clock in the afternoon (Sundays excepted) to any person or persons; and put up notices "To Let" or "For Sale," on the outside wall there-  
of. If the said premises shall become vacant, or  
20 be deserted during said term, the said Party of the Second Part, does hereby authorize the said Party of the First Part, their heirs, assigns, agents or attorneys, to re-enter the same at their option, and Re-Let them and receive and apply the rent so received to the payment of the rent due by these presents.

AND the said Party of the Second Part does further agree to keep the premises in as good  
30 repair as the same shall be at the commencement of said term (wear and tear arising from a reasonable use of the same and damages by the elements excepted); and at the expiration of said term to yield up the peaceable possession thereof to the said Party of the First Part, their heirs, assigns, agents or attorneys.

This lease is made upon this express condition and limitation, that in case the party of the first part should enter into an agreement for the  
40 sale of said property, then, upon the giving of a

*Exhibit P. 2.*

thirty days notice in writing to the party of the second part of the execution of such agreement and of the election of the party of the first part to terminate this lease by reason thereof, this lease shall thereupon, at the expiration of said thirty days period, come to an end, anything hereinbefore to the contrary notwithstanding, and the party of the second shall thereupon, at the expiration of said 30-days period quit and surrender possession of said premises, and the party of the first part, their heirs and assigns may thereupon re-enter said premises. 10

It is further agreed, that providing that the party of the second part hereto has promptly surrendered possession of said premises at the expiration of said 30-day period, the party of the first part shall immediately upon such surrender pay to the party of the second part the sum of five hundred dollars (\$500), provided the said notice requires the party of the second part to surrender said premises during the first six months period of this lease, the sum of Two hundred dollars (\$200) provided said notice requires said party of the second part to surrender said premises during the succeeding three months period, or the sum of One hundred dollars (\$100) if said notice requires the party of the second part to surrender possession during the last three months period of this lease and before the expiration of the one year term hereinbefore set forth. 20 30

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

A. and S. LANG (L. S.)  
 by Aaron Lang (L. S.)  
 ISAAC BLUM (L. S.) 40

*Exhibit D. 1.*

Sealed and Delivered  
in the Presence of  
Ada Blum.

**EXHIBIT D. 1.**

10 To Isaac Blum,  
269 Springfield Ave.,  
Newark, N. J.

Please take notice, that we, the undersigned,  
your landlords, having entered into an agree-  
ment for the sale of the property mentioned be-  
low, do hereby give you notice, pursuant to the  
terms of your lease dated July 31, 1921, to quit  
the premises rented by you of us and now held  
and occupied by you, being the premises known  
20 as the store on the ground floor of premises  
known and designated as #269 Springfield Ave-  
nue, Newark, New Jersey, being at the southwest  
corner of Springfield Avenue and Boyd Street, on  
the first day of March, 1922, and to deliver pos-  
session thereof to us on that day.

We hereby agree that upon your surrendering  
possession of said premises in accordance with  
the terms of this notice, that we will pay you the  
30 sum of Two hundred dollars (\$200) as provided  
for by said lease.

Dated, January 31, 1922.

AARON LANG  
SIMON LANG

Landlord's service of a true copy of the within  
notice is hereby acknowledged, this 31st day of  
Jan 1922.

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ISAAC BLUM

*Exhibit D. 2.*

**EXHIBIT D. 2.**

A. Proposed deed dated and acknowledged March 1, 1922, duly executed by Aaron Lang, Lillie Lang and Simon Lang in favor of plaintiff for property in question.

B. Proposed bond and mortgage, dated 10 March 1, 1922, to be executed by plaintiff in favor of Aaron Lang and Simon Lang as provided for in agreement P. 1.

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CHAPTER II

The first part of the book is devoted to a description of the various forms of life which are found in the sea. It is a very interesting and instructive work, and one which should be read by every student of natural history.

## New Jersey Court of Errors and Appeals

MODERN HOMES REALTY COM- PANY, a corporation, <i>Plaintiff-Respondent,</i>  <i>vs.</i>  AARON LANG and SIMON LANG, <i>Defendants-Appellants.</i>	}	<i>Action at Law.  On Appeal from Supreme Court.</i>
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### BRIEF FOR APPELLANT.

#### Statement of Issue.

The plaintiff sues the defendants to recover a deposit of \$1,000, paid on account of the purchase price for certain real estate in Newark, New Jersey. Judge Dungan, before whom the case was tried, in the Essex Circuit, directed a verdict for the plaintiff. From the judgment entered thereon, this appeal has been taken.

#### Statement of Facts.

On November 25, 1921, the defendants being the owners of property commonly known as Nos. 269-73 Springfield avenue and 7-9 Boyd street, Newark, New Jersey, agreed in writing (P. 1) to sell the said premises to the plaintiff for the sum of \$50,000. A deposit of \$1,000 was paid at the time of the execution of the agreement. Title was to be conveyed on March 1, 1922, subject to certain mortgages, and the rights of certain tenants. Inasmuch as the plaintiff based its right to recover its deposit upon the defendants' failure to perform their obligation respecting one of the tenants, Mr. Blum, the clause

contained in the contract respecting thereto is set forth in detail (Case, p. 47, l. 10):—

“This conveyance is also to be made subject to the rights of various tenants as monthly tenants. It is understood, however, that at the present time the corner store in said premises is subject to a lease held by one Blum, which lease will expire on August 1, 1922, and that the party of the first part will give notice to the said tenant to terminate his tenancy contemporaneously with the passing of title.”

The tenant, Blum, mentioned in the clause, was in possession of the corner store on said premises, under a lease (P. 2) expiring August 1, 1922, at a monthly rental of \$65 per month, which lease contained this clause (Case, p. 52, l. 36):

“This lease is made upon this express condition and limitation, that in case the party of the first part should enter into an agreement for the sale of said property, then, upon the giving of a thirty days notice in writing to the party of the second part of the execution of such agreement and of the election of the party of the first part to terminate this lease by reason thereof, this lease shall thereupon, at the expiration of said thirty days period, come to an end, anything hereinbefore to the contrary notwithstanding, and the party of the second part shall thereupon, at the expiration of said 30-days period quit and surrender possession of said premises, and the party of the first part, their heirs and assigns may thereupon re-enter said premises.”

The lease contained a further clause obligating the landlord to pay the tenant various sums of money (dependent upon when the tenant was required to vacate) *after* the tenant had vacated (C., p. 53, l. 15).

*It will be noted that the clause in the agreement of sale merely obligated the defendant to give notice to the tenant to vacate, and not to have the tenant out of possession.*

The undenied and undisputed testimony discloses that after the agreement was signed by the Modern Realty Company, its president, Samuel Merlis, called upon the tenant Blum. He advised him that his Company had agreed to purchase the property and was to take title on March 1, 1922. He then asked Blum whether he desired to remain in possession of the property, after his Company had acquired title. Blum answered in the affirmative and after negotiations, the parties agreed upon a five-year lease, at a monthly rental of \$110.00 (C., p. 22, l. 12), an increase of \$45.00 over the old rent.

Pursuant to the appointment, Blum in company with a friend called at the plaintiff's office (C., p. 22, l. 28). A lease was presented for his execution (C., p. 23, l. 6), which lease upon examination required alterations and Blum and his friend left the office to call again after the lease had been re-drafted. A few days later they called again. The lease was approved, but Merlis told Blum that the lease would be signed when the plaintiff's Company took title to the property (C., p. 23, l. 20).

*The facts of these negotiations and the result thereof was made known to the defendants (C., p. 23, l. 28), who thereupon gave no notice to vacate, as required by the agreement.*

Some time after the agreement of sale was signed, the plaintiff requested the defendants to pass title on February 1st, and to this the defendant consented, agreeing to give plaintiff a reduc-

tion of \$200 in the purchase price if title was closed at the earlier date.

On February 1st, the plaintiff did not appear to pass title.

Up to this time, defendants had not given any notice to vacate to Blum.

Being unable to obtain any satisfactory reason why title was not closed on February 1st, defendants called upon Blum a few days after February 1st, and asked him whether he was willing to accept service of a notice, and to antedate the acknowledgment thereof, so as to comply with the terms of the lease. Blum agreed to this. Lang advised Blum that they had a vacant store, a short distance away, and offered it to Blum for immediate possession, in the event that he would be required to vacate by the new buyer. To this Blum assented, a notice to vacate was served upon him, and he admitted service thereof as of January 31, 1922 (Exhibit D. 1). *Blum testified that on March 1st he was ready to vacate* (C., p. 24, l. 39).

As has been stated, there was no denial of any of these facts by the plaintiff.

The only testimony that was in dispute was the testimony as to what transpired on March 1, 1922, the date fixed for the passing of title.

The plaintiff testified that on that date, it was able to close title, and its president called at the office of Stein, Stein & Hannotch, attorneys for defendants, prepared to close. There he met Mr. Leo Stein, since deceased, and Mr. Simon Lang. Plaintiff testified that he (the plaintiff) asked, "whether the corner store man would be able to get out so he would be able to take" (C., p. 15, l. 1), to which he received the reply, "If you

don't want it, you don't have to take it" (C., p. 15, l. 12). On cross examination, he was asked (C., p. 17, l. 31):

"Q What did you ask? A I asked him if it was arranged that the tenant was going to move out, so I could get the title.

Q You wanted to take title to the property with the tenant out? A Yes, sir.

Q And wouldn't take it without that? A No, sir."

Simon Lang, one of the defendants, testified that on March 1st, a deed was executed by the defendants, and was ready for delivery. The bond and mortgage, provided for in the agreement, was prepared and ready for execution by the plaintiff. The original instruments were offered in evidence (Exhibit D. 2). Lang stated that he waited at the office of Stein, Stein & Hanoeh, in whose office title was to pass, according to the agreement, the entire day, and no one appeared on behalf of the plaintiff. He never heard from the plaintiff until demand was made for the return of the deposit.

At the close of the plaintiff's case, a motion to non-suit was made for the reasons (C., p. 19):

(a) That the plaintiff had not established that it was able to perform;

(b) That plaintiff's reason for refusing to take title was not sufficient; it insisted that defendant have the tenant Blum out of possession, whereas all that the agreement provided for was the giving of a notice to vacate.

This motion was denied, and its denial is one of the grounds of appeal.

Throughout the submission of defendants' case, plaintiff objected to the introduction of testimony respecting the proposed new lease

to Blum, on the ground that no such lease could be established, except by instrument in writing (C., p. 22, l. 2). The Court, however, permitted the testimony and reserved the question of striking it out until the end of the case (C., p. 26, l. 2).

No rebuttal testimony was offered on behalf of the plaintiff to deny any of the testimony submitted by the defendant.

The case was then closed and each side rested.

The defendant then moved for a directed verdict in their favor.

The defendants' reasons for non-suit was repeated, and in addition thereto, it was urged that the defendants had given the notice required by the contract; that the tenant in possession, who was the only possible one who could urge any defect in the service thereof, had waived such defect by antedating his acknowledgment of service thereof. Defendants further urged that plaintiff had made arrangements with tenant to remain in possession and that defendant had known of this, and that therefore plaintiff was estopped to urge this as a ground for refusing to take title.

The plaintiff then renewed his motion to strike out all the testimony relating to the new lease, and the Court granted its motion (Case, p. 42).

This was excepted to, and is another ground of appeal urged herein.

The plaintiff then moved for a directed verdict in its favor.

Then, a most peculiar thing occurred that does not appear in the record at all. The Court proceeded to direct a verdict for the *defendants*. It

pointed out that the contract simply required the giving of a notice to quit. It did not obligate the defendants to have the tenant Blum out of possession at the time title was passed. The Court pointed out that although the notice had actually been given in February, nevertheless, the defendants by obtaining the tenant's acknowledgment of service as of January 31, 1922, had in effect given a notice as of that date. The Court then noticed (neither party had raised the question) that January 31st was 29 and not 30 days prior to March 1st, as required by the lease, and that therefore a thirty-day notice required by the lease had not been given. The Court then instructed the stenographer to strike out its conclusions and re-dictated them directing a verdict for the plaintiff (Case, p. 43).

This direction of the verdict was also duly excepted to, and is urged as a ground of appeal.

The Trial Court declined to permit certain cross examination and certain direct testimony of the defendants. The Court's refusal is urged as additional grounds of appeal. This will be discussed in greater detail hereafter.

#### POINT ONE.

The Court erred in sustaining the objection to the following questions addressed by the defendant to the plaintiff's witness Merlis (C., p. 18, l. 16).

“Did you have any talk with that tenant about permitting him to remain in the property after you took title?”

Merlis was the president of the plaintiff company and its only witness.

Under direct examination, he had testified (C., p. 15, ll. 1-15) that his reason for refusing to

take title was because Blum was in possession of the corner store. On cross examination, he repeated this (C., p. 16, ll. 30 to 35). He was then asked if he had called to see Blum, and he answered in the affirmative (C., p. 18, l. 15). He was then asked the question above quoted and the Court refused to permit an answer. An exception was duly taken.

This witness having in his direct testimony given as a reason for refusal to take title, the fact that Blum was in possession of the corner store, it was clearly competent and proper for the defendant, on cross examination, to show that this was a situation of his own making, and that Blum was in possession pursuant to permission obtained from Merlis. In that way, doubt could be cast upon the genuineness of the reason for the plaintiff's refusal to take title.

In *Ferber v. Cona*, 89 N. J. L. 135, Sup. Ct. 1916, Justice Minturn stated that it was competent and proper to show that a party to a contract had prevented its performance, and the exclusion of such testimony was reversible error.

We submit that the Court's action in this regard was error.

#### POINT TWO.

**Plaintiff's ability to take title was not established and defendants' motion to non-suit and direct a verdict on that ground should have been granted.**

The agreement required a payment of \$9,000 on the passing of title (C., p. 49, l. 10). Plaintiff testified that it had \$6,000 of this sum on deposit (C., p. 15, l. 30). The balance it did not have in hand, but it had arranged to borrow it on mort-

gages (C., p. 15, l. 35). This was not sufficient, we submit. It should have had the funds on hand on March 1st.

The Court, in *North American Oil Co. v. Forsythe*, 48 Pa. 291, said:

“There is a distinction between a willingness to pay and a readiness; and the latter may be tested by the tendering of money or an offer to pay it.”

A reading of the testimony will show the plaintiff's uncertainty as to just how or from whom the funds were to be obtained.

At 13 C. J., p. 667, par. 756, it is said:

“The tenderer must do and offer everything that is necessary on his part to complete the transaction, and must fully make known his purpose without ambiguity. The tender must be made in good faith and must be definite and certain in character. *A mere readiness to perform is not a tender.*”

Plaintiff testified that when he arrived at Mr. Stein's office on March 1st, he was ready to close if Blum was out of possession. He should have had the funds ready *at that time*. Not having the funds on hand, he cannot be said to have been ready to perform.

It must also be borne in mind in this connection that Mr. Lang testified he was in Mr. Stein's office the entire day of March 1st, and that Merlis did not appear at all.

### POINT THREE.

**The Court erred in striking out the testimony as to the new lease made by the plaintiff with Blum.**

The question to be determined was whether the defendants were legally justified in assuming

that plaintiff had abandoned or waived the provision of the contract requiring the giving of the notice to Blum.

Prof. Page in his work on Contracts, page 4662, par. 2652, Vol. 5, states:

“In many cases, the Courts succeed in avoiding the fact of breach of conditions in accordance with the terms of the contract, by holding that the party who has broken such condition is excused from performance, or that the breach of such condition has been waived.”

At page 4675 it is stated:

“A party may have a right to which he is originally entitled, and which he may assert, but by his words or acts he may have induced the adversary party so to act in reliance thereon, that the adversary party will be prejudiced seriously if such an original right can be asserted. Accordingly the original right is lost and the loss of such right is called ‘waiver.’”

And on page 4679, paragraph 2660, it is stated that:

“Conduct on the part of the party for whose benefit the condition is inserted, which induces the adversary party to believe that such condition will not be insisted upon, or that this performance will be unavailing while there is still time for the adversary party to perform, is ordinarily said to amount to a waiver of such condition.”

The undisputed testimony showed that an agreement had been made with Blum for a new lease and defendants knew of this. In that situation, the law, as outlined above, applied. The issues should then have been submitted to the jury to determine whether there was a waiver, or, there being no denial of the testimony, the Court could have concluded that there was a waiver.

The Court in *Williams v. U. S. Bank*, 7 L. Ed. 360, 2 (Pet.) U. S. 96, at p. 102, states:

“If a party to a contract who is entitled to the benefit of a condition, upon performance of which his responsibility is to arise, dispense with or by any act of his own prevents the performance, the opposite party is excused from a strict compliance with the conditions.

#### POINT FOUR.

The Court erred in overruling the defences of modification of the contract.

Proof of the parol modification was relevant and competent. *Nisel v. Swinley*, 76 N. J. L. 289, and cases therein cited. It was a question for the jury as to whether the new agreement had been made, and under the authorities the new agreement would have constituted a good defense to the action. The Statute of Frauds does not apply in such a case. A more recent case is *Halpern v. Shurkin*, 3 N. J. Adv. Rep. 1164, in which V.-C. Backes reviews the cases and shows clearly that the defense of parol modification of the contract is not barred by the statute. The testimony should not have been stricken out.

#### POINT FIVE.

If the tenant was ready to vacate on March 1, the plaintiff could not make the objection that notice had not been given.

The testimony relating to the notice was given by Isaac Blum (C., p. 20). At the foot of page 24 he was asked:

“Q On the first of March were you ready to move out of the store? A Of course.”

Further questioning was objected to after the question had been answered, but there was enough to show that the tenant had accepted the notice as sufficient and was ready to move.

The Court, however, struck the testimony of Blum out. The defendants were deprived of having that undisputed testimony considered. Clearly this was error.

Defendants' offered (C. 25) to show that Blum was ready to move on March first. The Court refused to consider this testimony unless defendants' agreed to show that plaintiff knew of this fact. Defendants' testimony was to the effect that plaintiff never appeared at the day fixed for closing, and hence defendant could not agree to this limitation. Clearly, defendants were entitled to offer this testimony, and its exclusion was error.

For the foregoing reasons it is respectfully submitted that the judgment should be reversed and a *venire de novo* issued.

STEIN, STEIN & HANNOCH,  
Of Counsel with Appellants.

## New Jersey Court of Errors and Appeals

MODERN HOMES REALTY COMPANY,

a corporation,

*Plaintiff-Respondent,*

vs.

AARON LANG and SIMON LANG,

*Defendants-Appellants,*

Action at  
Law.  
On Appeal  
from Su-  
preme  
Court.

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### **RESPONDENT'S BRIEF.**

#### **State of Facts.**

This action was brought in the Supreme Court, Essex Circuit, to recover \$1,000.00 paid as a deposit by the plaintiff to the defendants on account of a contract for the sale of lands by reason of the defendants' failure to perform.

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On November 25, 1921, the parties entered into a written contract (p. 46) whereby the defendants agreed to sell for \$50,000.00 to the plaintiff, certain lands in the City of Newark. The contract contained the following provision, "*this conveyance is also to be made subject to the rights of various tenants as monthly tenants. It is understood, however, that at the present*

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*time the corner store in said premises is subject to a lease held by one Blum, which lease will expire on August 1, 1922, and that the party of the first part will give notice to the said tenant to terminate his tenancy contemporaneously with the passing of title."*

10 Title was to pass March 1, 1921. Samuel Merlis, president of the plaintiff, testifies it was willing and able to perform its contract and take title March 1, 1921.

On March 1, 1921, the tenant, Blum, was, and still is, in possession of the store. For this reason the plaintiff refused to take title and now sues for the return of its deposit of \$1,000.00.

The defendants' answer denies the allegations of the complaint and sets up as separate defenses:

20 (a) That the defendants were ready to perform March 1, 1922 but that the plaintiff defaulted.

(b) That by the terms of a new parol contract abating \$200.00 from the purchase price, plaintiff agreed to accept title February 1, subject to the leasehold of Blum and that the plaintiff defaulted in performing this new contract.

30 (c) That on January 25, plaintiff informed defendants that Blum would continue in possession under an agreement with it and waive the provision of the contract calling for notice to terminate Blum's tenancy.

Upon the trial there was produced by the defendant and offered in evidence (p. 51) the lease between the defendants and Blum dated July 31, 1921 for the term of one year which contains the following paragraphs:

40 *"This lease is made upon this express condition and limitation, that in case the party of the first part should enter into an agreement for*

the sale of said property, then, upon the giving of a thirty days' notice in writing to the party of the second part of the execution of such agreement and of the election of the party of the first part to terminate this lease by reason thereof, this lease shall thereupon, at the expiration of said thirty days' period, come to an end, anything thereinbefore to the contrary notwithstanding, and the party of the second shall thereupon, at the expiration of said 30 days period, quit and surrender possession of said premises, and the party of the first part, their heirs and assigns may thereupon re-enter said premises. 10

"It is further agreed, that providing that the party of the second part hereto has promptly surrendered possession of said premises at the expiration of said 30-day period, the party of the first part shall immediately upon such surrender, pay to the party of the second part the sum of five hundred dollars (\$500), provided the said notice requires the party of the second part to surrender said premises during the first six months period of this lease, the sum of Two hundred dollars (\$200), provided said notice requires said party of the second part to surrender said premises during the succeeding three months period, or the sum of One hundred dollars (\$100) if said notice requires the party of the second part to surrender possession during the last three months period of this lease and before the expiration of the one year term hereinbefore set forth." 20 30

The plaintiff denies the testimony offered by the defendant under their separate defenses. Defendants' proof thereunder does not support them. The testimony of the defendant, Simon Lang and the tenant, Blum, who is produced as a witness for the defendants, is that the notice to the tenant, Blum, to terminate the tenancy was served less than 30 days before March 1st 40

and that Blum was in possession of the premises on the latter date. At page 32 the defendant, Simon Lang, upon direct examination, testifies as follows:

“Q. Will you tell us the date that you served it? A. Why, that was a few days after the first of February” (p. 32, l. 28).

10 Again the same witness testifies:

“Q. After February first, what did you do with respect to Blum? A. We served Mr. Blum notice to vacate.

“Q. (Showing witness paper.) And is this the notice? A. Yes, sir” p. 34, l. 20).

On cross-examination of the same witness:

20 “Q. You say that Mr. Blum agreed that this notice was served on him some time after the 23rd day of February 1922, would be sufficient notice and that he would get out? A. Right” (p. 36, l. 32).

The notice to terminate (p. 54) is dated January 31, 1922. It is signed by the owners. At the bottom appears the following endorsement: “Landlord’s service of a true copy of the within notice is hereby acknowledged this 31st day of January 1922. Isaac Blum.”

30 Blum, the tenant, as the defendants’ witness, identifies the notice and admits its service but does not state when it was served. He was a witness of low mentality. At pages 30 and 31 the witness testifies he received a notice which the defendant told him was a thirty days’ notice. He testifies he did not receive the \$200.00 rebate for the surrender provided in the lease.

40 Although it does not appear by the testimony taken by the stenographer in the printed case, it will undoubtedly be admitted by counsel, that counsel for defendants in his opening and during the course of the trial stated that the notice

to the tenant was served some time in February, and dated as of January 31, and that the landlord and tenant verbally agreed that the notice should be considered as having been served within time. This was the purpose of the tenant's acknowledgement of service produced in court. The fact is admitted in defendants' brief (p. 4, l. 10), and is stated in the court's Conclusions (p. 45).

10

It should be noted that February contained 28 days and that even had the notice to terminate the tenancy March 1st, been served January 31, it would have been less than a thirty days' notice. That, this was the situation before the court plainly appears from the conclusion of Judge Dungan on page 45.

"A notice was served, but it was not until after the first of February. The tenant, however, acknowledged service of that notice as of the thirty-first day of January, which was not within thirty days of the first day of March, as called for by the lease; so that the notice was ineffective to get possession of the premises on the first day of March."

20

The plaintiff is a corporation. The defendants attempted to prove their defenses by conversations with Samuel Merlis, Morris Merlis, his son, and Louis Resnick, over the objection of the plaintiff that the authority of the witnesses to act for the corporation must first be shown. The objection was overruled, although it was "assumed to go to all conversations" (p. 21). The objection was renewed at page 33 and decision thereon reserved.

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At the conclusion of the testimony both plaintiff and defendant moved for a direction of verdict. On motion of plaintiff all testimony as to conversations between Merlis and Blum respecting a new lease between the buyer and Blum

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were stricken out. Counsel for plaintiff then moved a direction of verdict. First on the ground that the notice to vacate given by the defendants to the tenant was not a thirty day notice, did not comply with the provisions of the lease, nor with the contract for the sale of property between the plaintiff and defendant, and, secondly, because the defendant and the tenant  
 10 could not by an agreement to which the plaintiff was not a party, waive the thirty day notice inasmuch as the tenant continued in possession of the property. Upon this situation the court's conclusions (found on pages 43 and 45) were passed upon undisputed evidence, mostly offered on part of the defendant and admitted without contradiction and resulted in a direction of verdict in favor of the plaintiff.

20 The plaintiff's contention should also be observed (p. 42, l. 14) that as the contract for the sale of the property contained no forfeiture clauses the defendants would have no right to retain the deposit and that their action should be one for damages. The record does not show that this ground, although urged, was directly determined.

30 Plaintiff further contended the new contract alleged by defendant must be in writing; the case however was decided entirely upon the notice to the tenant.

### **Argument.**

The case will be discussed in the same order as in the brief of the appellant.

**POINT I.**

**The court ruled properly on the question propounded to the witness on cross-examination.**

It should be observed that the plaintiff is a corporation of which the witness was president but this office did not carry with it the right, unless the witness's authority be proven, to make a new contract. Until otherwise proven this authority is assumed to be in the directors only. It is argued by the defendant that the question was admissible because the witness had testified that the corporation refused to take title because Blum was in occupation of the store. There is a vast difference between a witness testifying what he *did for* a corporation and showing that he *modified a contract* of the corporation without first proving authority. It is a well established rule in this state that an agent, and even a president, of the corporation cannot bind it without authority. *Demarest vs. Spiral Riveted Tube Company* 71 N. J. L. 14. During the past year the Court of Appeals upon a motion for re-argument in the suit of *McAnarney vs. Lembeck*, where the stockholders of a corporation in process of dissolution have ratified a contract which the directors had not ratified, the court held that the act was not one authorized by the corporation. This opinion is, of course, not reported but will undoubtedly be recalled by the court. We submit that until it was shown that the witness had the right to modify the corporation's contract the question was properly overruled. We admit the soundness of *Ferber vs. Cona* cited by the appellant but it is not in point.

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**POINT II.**

**The president of the corporation testified to the plaintiff's ability to reform the contract. There was no testimony to the contrary.**

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The president of the corporation testified that on the date fixed for passing title he, as plaintiff's representative, appeared at the place designated in the contract and was able and willing to perform. Defendants' counsel unsuccessfully sought to weaken this testimony by cross-examination. No testimony contradicting that of the witness was offered by the defendant.

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Time was not of the essence of the contract between the parties in this case. The witness testifies the plaintiff was financially ready to perform. Had it not been ready until within a reasonable time thereafter it would not have excused the defendants nor authorized them to retain the deposit, the return of which, the defendants admit, was demanded.

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**POINT III.**

**There was no error in striking out testimony with regard to the alleged new lease between the plaintiff and Blum.**

The testimony in the case shows that no new lease was ever made. There is testimony of conversations and negotiations but it is admitted that no new lease or contract was consummated. The defendant, Lang, testifies (p. 39):

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“Q. You never heard of that, you never heard that they had settled upon a new contract at a new bargain, did you? A. No, sir.

“Q. You merely heard that they were negotiating about a new contract, didn't you, that is all you heard? A. Yes, sir.”

The defendants were not justified in assuming that the plaintiff and Blum would consummate a  
**HOMES** **A-2—** **\*\*** **10**

new contract merely because they were negotiating. The defendants were not justified in failing to give the notice to terminate upon a mere assumption which later proved to be a false assumption.

#### **POINT IV.**

**20**

**The court properly overruled the defenses of modification of the contract.**

Counsel for the appellant do not appear to appreciate the ground of the objection. It first appears at page 21 and is based upon lack of authority from the corporation. The objection was again urged at page 33 line 21. It was again urged on the motion to direct a verdict, page 42, in the argument which is not printed. We reiterate the argument under Point I. **30**

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**POINT V.**

**The notice to terminate the tenancy given by the defendant to Blum was not the notice contemplated in the contract for sale.**

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The contract does not expressly provide that Blum should be out of possession on March 1st, yet that undoubtedly was the intention of the parties. The notice to be given by the landlord to the tenant, and contemplated by the parties, must either have been one that would require Blum to be out of possession and permit the defendants to deliver possession to the plaintiff, or

20 it must have been a notice that would permit the plaintiff to recover possession from Blum by appropriate action. This obligation the defendant did not discharge. The defendant, Lang, testifies he had arranged to provide another store for Blum which was acceptable to the latter. Blum testifies he was ready to move out; but this is not in compliance with the contract between the parties to the action. It is admitted that Blum did not vacate and at the time of the trial was still in

30 possession of the store. Blum's tenancy could not have been terminated except for the provision in his lease with the defendant which provided for a thirty day notice. If the provision of the contract for the sale of the property did not mean that title was to be delivered to the plaintiff free from the occupation of the store by Blum, it did mean that the notice to be given was one in accordance with the terms of the lease and

40 sufficient for the plaintiff to dispossess Blum.

The contract does not pass, by its terms, to the purchaser the right to bring and eject the tenant and it is an open question under the circumstances whether the defendant, if Blum had not vacated March 1st, would not have been compelled to bring the suit and possibly postpone the passing of title until such time as Blum was ejected. At any rate the notice given was not sufficient basis for an action by the plaintiff to dispossess Blum. Neither could Blum and the defendants make a contract which would substitute that existing between the plaintiff and defendants. Although Blum acknowledged service of the notice as of January 31st, he might not willingly have vacated the premises after title was passed and his waiver was insufficient because the most he did was to accept service as of time of less than a thirty day notice.

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For the foregoing reasons it is submitted that the judgment should be affirmed.

HUDSPETH & DEMAREST,  
Attorneys for Respondent.

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