

New Jersey Court of Errors and Appeals.

SALINA A. CHARLTON,

Appellant,

AND

COLUMBIA REAL ESTATE

COMPANY,

Appellee.

IN ERROR.

BRIEF OF

E. A. HIGBEE and A. B. ENDICOTT,

Solicitors of Appellant.

The bill in this cause was filed to compel specific performance of a contract claimed to exist between the complainant, Selina A. Charlton, and the defendant, the Columbia Real Estate Company.

The claim on the part of the complainant is that the defendant agreed with the complainant to lease to her a certain lot of land in Atlantic City, described in complainant's bill for the rentals and under the conditions set forth in said bill, that the complainant, in consideration of this agreement, paid to the defendant the sum of One Hundred dollars, and complied with all the terms of the contract. The defendant's answer admits that negotiations

were had between the complainant and the defendant looking toward the leasing to the said complainant of the premises described in her Bill of Complaint, and that defendant caused to be prepared a lease in duplicate for said premises. (Page 7-11.)

Defendant also admits that on the seventh day of May, nineteen hundred and one, when said negotiations were commenced between the complainant and the defendant, looking toward the making of the lease for said premises, complainant handed to the defendant One Hundred dollars, but avers that thereafter the complainant neglected and refused to complete said negotiations, and neglected and refused to pay the rent moneys agreed to be paid for said premises. (See Defendant's Answer.)

The defendant further admits that the terms of the first negotiations concerning said lease were so far changed in relation to the rental money (which at that time he avers was to be paid in cash), that the defendant consented to accept notes, if secured by a satisfactory endorser. (See Defendant's Answer.)

In other words, the answer of the defendant admits that it had agreed to lease the premises described in the complainant's bill and upon the terms therein specified, but assigned as the reason for its refusal to carry out said contract that the complainant neglected and refused to comply with her part of the agreement by paying the balance of said rental on the first day of July, nineteen hundred and one. Defendant admits it consented to accept promisory notes for the rent if secured by a satisfactory endorser, but avers that no satisfactory endorser was secured on the notes.

The issue, therefore, as formed by the pleadings is whether or not the complainant complied with her part of the agreement.

The Vice Chancellor, in his opinion, fails to disclose his finding of facts upon the questions at issue, except so far as to state, "That she has since tendered or offered the first year's rental." (Page 82.)

No other reference is made to his finding of facts in relation to the issue formed by the pleadings. He dismisses the complainant's bill on the sole ground that the contract was within the Statute of Frauds, and that the lease—which was prepared by the defendant's attorney, under its instruction, and signed by the

complainant and admitted to contain the terms sought to be enforced by the complainant—could not be enforced, because it was not signed by the defendant company. This, we think, is error, because the defendant had admitted in its answer that such an agreement was concluded and such a lease prepared; the allegation of the defendant being that the complainant had failed to perform her part of the agreement.

It was also admitted at the trial that the lease offered in evidence, and marked Exhibit C (1.), which contained the terms sought to be enforced, was prepared by the attorney for the defendant company, at its dictation, and signed by the complainant, and is the lease referred to in the pleadings. (Admission, page 13; Exhibit, page 87.)

The complainant testifies that this lease was submitted to her by the attorney of the defendant (page 26), and that the lease was gone over by her and Mr. Bergman, President of the Company (page 27), who had the authority to lease (Admission, page 12), and the terms therein agreed upon, except the first year's payment, for which he was to take notes, and that thereupon the complainant immediately signed the lease and sent it out for defendant to sign and return. (Pages 27, 31, 33.) This is nowhere contradicted by the defense.

The contention of the appellant, therefore, is that the defendant, having admitted in its answer that the lease sought to be enforced, was prepared by the defendant, and contains the terms which the complainant seeks to enforce, and defendant having simply denied complainant performance of the agreement; and defendant having failed to plead the Statute of Frauds, a decree for specific performance should have been made for the complainant, unless the Vice Chancellor found as a fact that the complainant had not complied with her terms of the agreement. And to sustain this proposition we submit the following cases:

Van Duyne v. Veerland, 3d Stockton 370.

Van Duyne v. Veerland, 1st Beasley 150.

Ashmore v. Evans, 3d Stockton 150.

Petrick v. Ashcroft, 5th C. E. Green 197.

Dean v. Dean, 1st Stockton 425.

Story Sec. 753-855 and 757.

The evidence, however, fully proves that the complainant complied with her part of the agreement. She testifies to that fact and it is undisputed by the testimony of the defendants.

If the above proposition of law be denied we still say that we are entitled to have specifically performed the agreement that was signed by the Columbia Real Estate Company, as set out on pages 19 and 20 of printed book, and such as had been admitted by the defendant in its answer.

This we offered to accept in open Court at the trial of the issue, if the Court found that we were not entitled to have specifically performed the terms embodied in the written lease. (Exhibit C, 1.) In support of this claim we cite the following cases :

1. Wallace v. Brown, 2d Stockton 312.

2. Ryno v. Darby, 5th C. E. Green 231.

Where, in cases within the Statute of Frauds, negotiations have been conducted in writing, if there has been a final agreement between the parties, the terms of which are evidenced in a manner to satisfy the Statute, the agreement will be binding, although the parties have declared that the writing is to serve only as evidence for a formal agreement, to be prepared and signed.

As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by writing, signed by the party to be charged, or his lawfully authorized agent, there exists all the essentials which the Court requires to make a legal binding contract.

The fact that the details of the agreement are controverted by the parties will not deter the Court from ascertaining what the terms of it really were and give effect to the agreement.

Wharton v. Stroutenburgh, 8th Stewart, page 266.

SUMMARY.

Exhibit C (1), which is a lease drawn by the defendant company and signed by the complainant and now acknowledged as containing the agreement entered into between the parties, except as the same was modified by the accepting of notes for the first year's rent, is found on page 87 of printed book

This is the lease referred to in the defendant's answer, which it admits contained the agreement between the parties, but the terms of which it denies the complainant complied with. The lease calls for the rent of Twelve Hundred dollars per annum, to be paid as follows :

First year, nineteen hundred and one, Twelve Hundred dollars upon the signing of this lease. For each succeeding year after nineteen hundred and one, the sum of Twelve Hundred dollars on the first day of July of each and every year.

Complainant testifies, on pages 27, 33, 36, that Bergman agreed to accept notes for the first year's rental ; that immediately after that agreement was reached she signed the lease. (Page 33.)

The notes agreed upon were given to the defendant company's attorney about the twentieth of May (pages 27, 31), and were endorsed by O. H. Guttridge, a man of large means, and owning valuable real estate in Atlantic City (page 27, 28) ; that Mr. Newton, one of the company, and also Mr. Bergman, stated that the notes were perfectly good, but that Mr. Bergman had a *personal* feeling against Mr. Guttridge (page 28, 29) ; that complainant had plans drawn for buildings in May or June. (Page 31.)

No notice was given to the complainant that the notes were not acceptable (page 33) ; that the first week in June, while complainant was ill, Mr. Bergman called to see complainant and asked how much she would take and withdraw from the lease and give up the property (page 34) ; that nothing was said in relation to the notes, and it run along until about the middle of June, when, Frank Herron testifies, at the solicitation of the complainant, he went to Mr. Bourgeois' office to see if the lease had been signed by the defendant company, he having previously delivered the leases after they were signed by the complainant, together with the two notes to Mr. Bourgeois ; and when he called the second time Mr. Bourgeois gave him back the notes and the lease, stating that Mr. Bergman would not accept the notes, not but that they were good, but that some years ago in a transaction with Mr. Guttridge he refused to accept Bergman's notes, and for that reason he would not now accept his. (Page 40, 41.)

The complainant further testifies that matters thus run along

until the last week in June, when Mr. Bergman sent his man to know what she was going to do in regard to the property, that she stated the lease called for full payment on July 1st, and as Mr. Bourgeois did not accept the notes she would give him the cash for the rent on the first day of July, and on that day she took the amount, Eleven Hundred dollars in One Hundred dollar bills, to Mr. Bourgeois' office and made the tender, having previously paid One Hundred dollars, as shown by Exhibit C (3), (page 91); that Mr. Bourgeois refused, saying he could not accept the money, and that she must go to Mr. Bergman.

Whereupon she went to the Columbia Cafe and sent for Mr. Bergman, and was told that he was not in town, and would not be until Wednesday, July 3d. On that day she again called and Mr. Bergman came into the Cafe and she made him a tender of Eleven One Hundred dollar bills, and demanded her lease. He replied that it was too late. (Page 34, 45.)

Many of the statements of the complainant are corroborated by the testimony of Frank Herron. (Pages 38, 43.)

James Calloway testifies that Mr. Bergman admitted to him that he had agreed to lease the property to the complainant. (Pages 44, 46.)

Mr. Bourgeois, attorney for the defendant, testifies that the lease marked Ex. C (1.) was drawn by him, and submitted to and signed by the complainant, that he afterward received the lease signed by her, together with the notes testified to by the complainant and that the lease and notes were allowed to remain in his office for some time, and after Mr. Bergman came down from Philadelphia, he stated that he would not accept the notes, that then he returned the notes and lease to the complainant just how, he does not now remember. (Page 51-53.)

Mr. Bergman, who had the authority to lease the premises testifies that there was an agreement finally culminated between the company and the complainant for leasing the premises in question, and that the conclusions reached were embodied in the agreement which he prepared, and marked Ex. C (2.), (Page 90.) See his testimony (Page 53.)

That he agreed to accept notes (Page 55), but that when there

was talk of spending Fifteen or Twenty Thousand dollars for improvements and he found that the complainant did not have Eleven Hundred dollars to pay the rent, he saw plainly that there would be no improvements and the whole thing would be a fizzle, and he was then careful as to what arrangements he would make. (Page 55-56.)

That he did not return the One Hundred dollars, until some four or five days after the Fifteenth Day of June: that he directed Mr. Bourgeois to draw the lease marked Ex. C (1), that it embodied the terms that he had directed Mr. Bourgeois to insert; and that he saw it in Mr. Bourgeois' Office and read it and he also saw it and went over it with Mrs. Charlton.

That he never tendered to the Complainant the lease signed by the Columbia Real Estate Company, or demanded the amount due under the terms. (Page 60-61.)

That the reason he wanted to get clear of the lease was because he did not think Mrs. Charlton had the money, (Page 61-62;) and that the agreement of May 7th, Ex. C (2,) did not contain all of the details that were to be embodied in the lease, but that the lease marked Ex. C (1) contained those details, (Page 64-67.)

Such in brief is the testimony in this case, the facts are practically undenied by the defendant, but are admitted both in their answer and by their witnesses on the stand. Their sole claim is that the notes were not satisfactory and that the complainant did not tender to the defendant the balance of the first year's rent, to-wit, Eleven Hundred dollars, on or before the Fifteenth Day of June. And that the Fifteenth Day of June was the day that the lease was to bear date, in accordance with the provisions of Ex. C (2,) (Page 90.) This agreement it will be observed did not state when the rent was to be paid.

The lease however drawn by the defendant company, submitted and signed by the complainant, is admitted as containing the full details of the agreement.

We therefore contend:—First, that the complainant is entitled to a decree in accordance with the provisions of Ex. C (1), (Page 37.)

Second:—That if the Court concludes that we are not entitled

to a decree as above asked, then we are entitled to a decree for the defendant to lease to the complainant the premises in question, in accordance with the terms of Ex. C (2.); and that the Court has the right to determine and ascertain what the terms of this agreement really were, and in so doing may take into consideration the pleadings and all the facts that will aid that attempt.

The learned Vice Chancellor says that a decree for specific performance should not be allowed for an additional reason. Because it appears in a letter of the Complainant's Solicitor offered in evidence for the complainant that before this suit was brought, he was notified that the defendant company, had rented the premises in dispute to other parties; that there is other proof containing like suggestions, (Page 83.)

In reply to this we say that there is no evidence of any kind whatever to the effect that the premises in question had been leased to other parties.

It is true that the Solicitor for the complainant stated to the defendant in a letter marked Ex. C (4.), (Page 91,) that he was informed that the reason why they would not allow complainant to take possession was because they had rented the property to other parties for a greatly increased rental.

This does not make it evidence, the mere statement in a letter that he was informed that such was the fact.

It is true that he had been so informed and complainant attempted to show by James Calloway, (Page 44,) that he had a customer who had offered a much larger rental than the complainant had agreed to pay, but the testimony was overruled and nowhere in the evidence is there anything to show that the premises were actually rented, and as a matter of fact they were not.

There was only an attempt to rent to other parties, who refused to take it because of the arrangement with the complainant.

Respectfully submitted,

ALLEN B. ENDICOTT,

E. A. HIGBEE,

Solicitor and of Counsel with Complainant.

In Chancery of New Jersey.

Between	}	On Bill for Specific	10
SALINA A. CHARLTON,		Performance	
Appellant,		Brief	
and		Columbia Real Estate Company	
COLUMBIA REAL ESTATE Co.,	}	G. A. BOURGEOIS,	
Respondent.		Solicitor.	

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Prior to May 7, 1901, certain negotiations were had between above parties looking to the leasing of certain space on premises of Respondent. On May 7, 1901 these negotiations were reduced to the form of writing signed by respondent Company, agreeing to make a lease to date from June 15, 1901 which agreement did not contain the complete material terms of the proposed lease, to wit, the description of the premise; the nature of the security for the rent to be given &c. After May 7, 1901 it was verbally 30 agreed that appellant might give satisfactory endorsed note for first years' rent. And at same time it was agreed verbally between appellant and H. J. Bergman that respondent Company should purchase the buildings which appellant proposed to erect on said premises at a price fixed by arbitration. The appellant failed to pay the money

to be paid for the rental for the year 1901, to wit, Eleven Hundred Dollars, and failed to tender a satisfactory endorsed note, either on or before June 15, and on June 17, 1901 respondent Company leased the premises to another party.

Appellant filed her bill to compel respondent Company to enter into a ten year lease with her at a rental of \$1200 per year for premises described in complainants bill entirely variant from the description in the agreement of May 7, which was the only writing signed by respondent Company, and to purchase the building at end of term, which appellant should erect, which provision was not contained in
 10 and to locate an unlocated entrance at a place she describes, and to accept an endorsed note for \$1,100 as security for the rent mentioned in said agreement.

The court dismissed her bill of complaint, hence this appeal.

The decree should be affirmed for the following reasons:

FIRST.

20 The bill alleges that before the commencement of the suit, respondent Company had leased the premises to other parties. The answer specifically avers the same fact. **That which is admitted by the pleadings need not be proven.**

These other parties were not made defendants, therefore specific performance will not be decreed.

Johnson vs. Hubbell, 2 Stock 332.

SECOND.

30 The writings of May 7, 1901, show on their face that all the terms have not been settled between the parties, and this fact is expressly sworn to by appellant on p. 24, l. 10—p. 26, l. 10.

She states that the lease was to be prepared and submitted to her. Therefore the court will not decree specific performance.

Brown vs. Brown, 6 Stew. 650.

THIRD.

Complainant seeks not to enforce the agreement of May 7, 1901, but an entirely different one, p. 30, l. 7, which is in parol, to compel respondent Company to execute a lease containing a provision compelling respondent to purchase certain buildings, not described but proposed to be erected by her, at the expiration of ten years at a price fixed by arbitrators, p. 25, l. 2. This alleged verbal agreement is attempted to be enforced because of part performance, the testimony shows that \$100 was paid, but that no improvements were made on the land and no possession thereof was delivered to appellant. Under such circumstances the court will not decree specific performance.

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Lippincott vs. Bridgewater, 10 Dick. 208.

FOURTH.

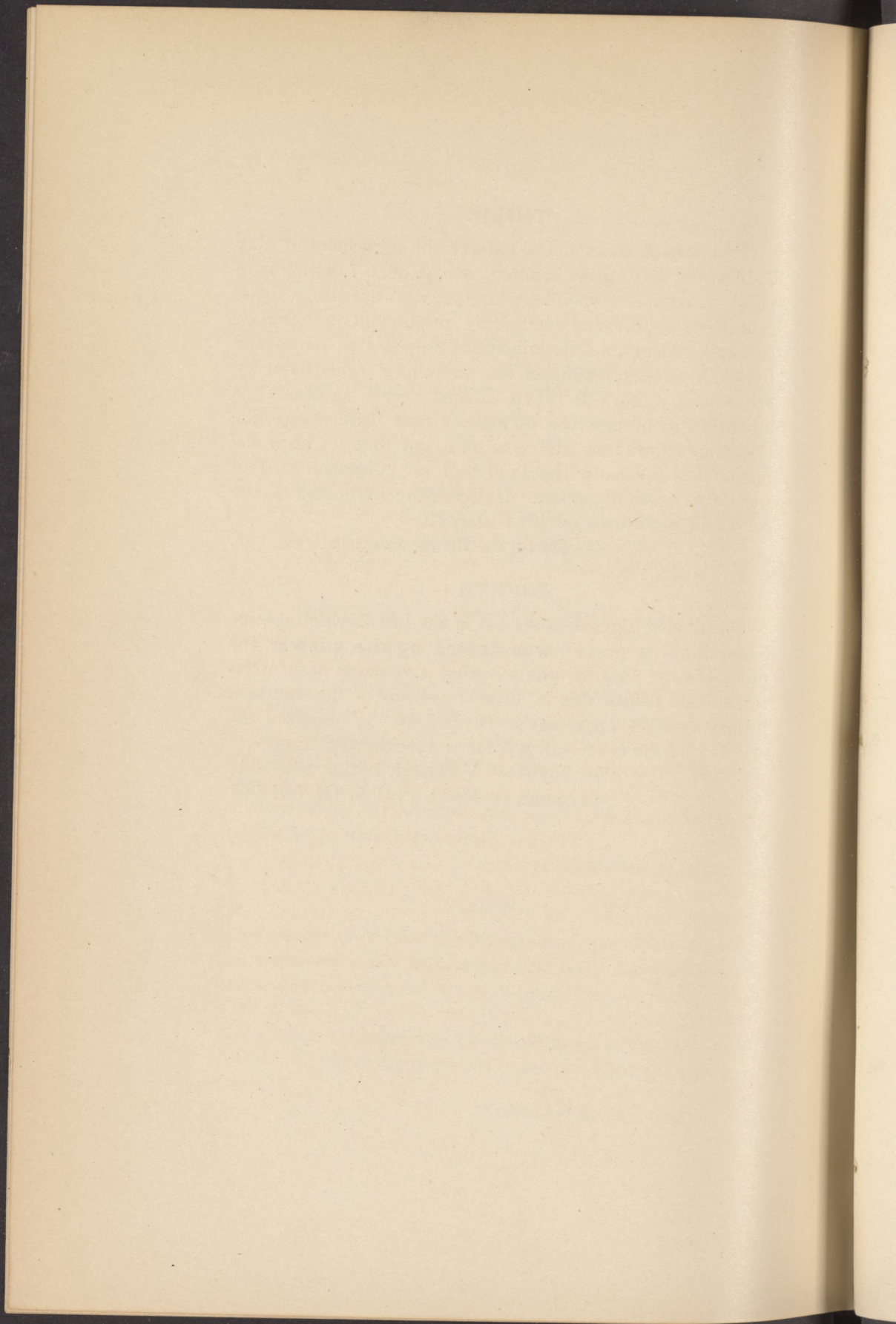
The alleged agreement set out in the bill of which specific performance is prayed, **was denied by the answer**, the proof showed that it was a verbal agreement only. The respondent insists this is invalid because of the statute of frauds, therefor appellant is entitled to the benefit of the statute and the court will not decree specific performance.

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Vanduyne vs. Vreeland, 1 Beas. 142-150.

Wakeman vs. Dodd, 12 C. E. Gr. 564-565.

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IN CHANCERY OF NEW JERSEY.

Between

Salina A. Charlton,
Complainant,
and

Columbia Real Estate Company,
Defendants.

} Bill

To his Honor William J. Magie, Chancellor of the State of New Jersey, complaining showeth unto your Honor, you oratrix Salina A. Charlton, of Atlantic City, 10 County of Atlantic and State of New Jersey, that on or about the seventh day of May, nineteen hundred and one, she entered into an agreement with the Columbia Real Estate Company, a corporation under the laws of the State of New Jersey, whereby said Company agreed to lease to your oratrix a certain lot of land in Atlantic City, in the County of Atlantic and State of New Jersey, bounded and described as follows:

Beginning at a point distant five hundred and seventy-two feet southerly of Pacific avenue, one hundred feet 20 westerly from Missouri avenue, and extends thence (1) southerly parallel with Missouri avenue sixty-two feet; (2) easterly at right angles to Missouri avenue ten feet; (3) southerly parallel with Missouri avenue fifty-one feet; (4) easterly at right angles to Missouri avenue eighty feet; (5) northerly parallel with Missouri avenue one

hundred and thirteen feet; (6) westerly at right angles to Missouri avenue ninety feet to the place of beginning, together with the privilege of the free and unobstructed use of a fifteen feet entrance way, where the same is now located, with the privilege of the party of the second part having the exclusive use of the doors across said entrance way for the purpose of protecting the premises above described, for a period of ten (10) years from June 15th, 1901, at the annual rental of twelve hundred
10 dollars.

2. Your oratrix further saith, that it was expressly understood and agreed, that at the expiration of said lease the said Columbia Real Estate Company should purchase from your oratrix all improvements erected thereon by her, at a price to be fixed by three arbitrators; and that the buildings and improvements erected on said premises in the meantime, should stand as security for the rent due or to become due during said term.

3. Your oratrix further shows, that she paid to H. J. Bergman, the manager of the Columbia Real Estate Company, one hundred dollars on account of said rent on the seventh day of May, nineteen hundred and one, and received his receipt for the same, which is now in her possession and ready to be produced when and where this honorable Court shall direct.
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4. And your oratrix further shows, that under said agreement she had the privilege of paying said rent in cash or of furnishing security for the payment of the same at her pleasure; that in conformity with said agree-
30 ment, she did on the twenty-first day of May, nineteen hundred and one, deliver to George A. Bourgeois, Esq., attorney and agent of the said Columbia Real Estate Company two certain promissory notes made by her and endorsed by Oliver H. Guttridge, a citizen of Atlantic

City and a man of large wealth and good financial standing in the community, one of which was for five hundred dollars, payable in two months from the date thereof, and the other being for six hundred dollars payable in three months from the date thereof, that at the same time she delivered to him the agreement and lease which he had prepared under the direction of said company, and which she had signed, and that the said notes were retained by said attorney of said company until the first day of June when the same were returned to her with the statement that while the security was sufficient, Mr. Bergman, agent and manager of said company, and to whom she had paid one hundred dollars on account of said rent, had some personal feeling against the endorser on said notes, and therefore refused to accept him as surety for the payment of said notes which represented the balance of rent due the first year. 10

5. And your oratrix further shows, that the refusal of said Bergman to accept said notes for the payment of said rent and his refusal to deliver possession of the premises to your oratrix, was due to the fact that he had found another applicant for said premises, who had offered to pay him the sum of three thousand dollars per annum for the purpose of erecting thereon what is known as "The Old Mill" and that the said Bergman about that time, came to your oratrix and asked her to name a price which she would be willing to accept and discharge said Columbia Real Estate Company from its agreement with her; that your oratrix refused to name any sum and assured said Bergman that she desired possession of the said property for the purpose of erecting buildings thereon in which she could establish Turkish Baths. 20 30

6. Your oratrix further shows, that after said Bergman refused to accept said notes on the first day of July, nineteen hundred and one, she went to the office of George A. Bourgeois, Esq., who had been acting as the attorney and agent of the said Columbia Real Estate Company in this as well as other transactions, and tendered to him eleven one hundred dollar bills in legal tender and demanded possession of the property; that said Bourgeois told your oratrix that he was not authorized to receive the money, but told her to take the
10 lease which he then delivered to her and go see H. J. Bergman, the manager of said company; that said Bergman could not be found until the third day of July, when she saw him in the Columbia Hotel Cafe and in the presence of Mr. Heron, one of the proprietors of said Cafe she tendered to the said Bergman the said eleven one hundred dollar bills and exhibited to him the lease which she had signed on May twenty-first, nineteen hundred and one, and which had been in the possession of George A.
20 Bourgeois, Esq., attorney for the said company, from that date until the first day of July, as above set forth and demanded of said Bergman, the possession of said property, which he refused.

7. And your oratrix further shows, that she then sought the aid of counsel, and that on the tenth day of the same month, her attorney, Allen B. Endicott, caused a notice of which the following is a true copy, to be sent to the said H. J. Bergman, agent and manager, of the Columbia Real Estate Company, which letter is in
30 the words and figures following:

"Atlantic City, July 10th, 1901.

Columbia Real Estate Company,
Atlantic City, New Jersey.

Dear Sirs:

Mrs. Selina A. Charlton has retained me to enforce the performance of an agreement between your company and her, whereby your company rented to her certain lands in Atlantic City near Missouri avenue for \$1200.00 per annum for a term of ten years.

I learn through Mrs. Charlton that on the seventh day of May, your Company received one hundred (\$100 dollars on account of this rent and that you have since refused to accept the balance of the rent due and have refused to allow her to take possession of the property, because you have since rented it to other parties for a greatly increased rental. 10

On behalf of Mrs. Charlton I now demand the possession of the property and desire thus to advise you, if you refuse to put her in possession forthwith, that she will immediately institute proceedings for specific performances of her contract as well as for damages suffered by her because of the refusal of your company to carry out its agreement with her. 20

The balance of \$1100 rent which you refused on July 2nd is still subject to your order and will be paid whenever you are willing to accept it.

Yours respectfully,

SELINA A. CHARLTON,

by Allen B. Endicott, her Attorney,

and that the said Columbia Real Estate Company still refuses to execute the said lease or allow your oratrix to enter into possession of said premises. 30

8. And your oratrix further shows, that she is now ready and willing to pay said company said sum of twelve

hundred dollars, and that the action of the said Columbia
Read Estate Company is in violation of its agreement and
contrary to the equity and good conscience, and for as
much as your oratrix is without remedy save in this
Court, where matters of this nature are cognizable and
relievable, to the end that the said Company may, with-
out oath, answer the premises and be by the decree of
this honorable Court directed to specifically perform said
agreement and execute said lease which it had prepared
10 and which is already signed by your oratrix and deliver
possession of said property to your oratrix, and that your
oratrix may have such other and further relief as the
nature of the case may require and as shall be agreeable
to equity and good conscience.

May it please your Honor, the premises considered,
to grant unto your oratrix the State's writ of subpoena,
issuing out of and under the seal of this honorable Court
directed to the said Columbia Real Estate Company
commanding it to appear on such a day as may be named
20 in said subpoena, then and there to answer the premises,
and your oratrix as in duty bound will ever pray, &c.

ALLEN B. ENDICOTT,
Solr. and of Co. with Compl

IN CHANCERY OF NEW JERSEY.

Between:
Salina A. Charlton,
 Complainant,
 vs.
Columbia Real Estate Co.,
 Defendant.

} On Bill &c.
} Answer.

The answer of the Columbia Real Estate Company to the bill of complaint of Salina A. Charlton, Complainant.

This defendant answering the bill of complaint in the above stated cause says that it denies each and every of the allegations in said bill except those hereinafter specifically admitted: 10

The defendant says that certain negotiations were had between complainant and defendant looking towards the leasing to said complainant of the premises described in the bill of complaint, and that defendant caused to prepare a lease in duplicate for said premises, but avers that said lease was never executed on the part of the defendant nor delivered upon the part of the complainant: 20

Defendant admits that on the Seventh day of May, Nineteen hundred and one, when said negotiations were commenced between the complainant and defendant looking towards the leasing of said premises, complainant handed to defendant the sum of one hundred dollars, and avers that when complainant was unable to carry into effect the agreement for leasing said premises, defendant tendered said complaint the sum of one hundred dollars on or about the second day of July, Nineteen hundred and one, and then and

there declared all negotiations concerning said premises, off.

Defendant admits that George A. Bourgeois was attorney for the Columbia Real Estate Company but denies that he was agent for said Company and denies that Mr. Bergman, agent and manager of said Company had some personal feeling against the endorser of said notes and for that reason refused to accept said endorser as surety for the payment of said notes, but avers the fact to be that at the time of the first negotiations concerning said lease the rental money was
10 agreed to be paid in cash, and afterwards and before the day when said payment was to have been made, defendant was solicited by complainant to accept notes for a part of said rental moneys, and defendant consented to accept notes if secured by a satisfactory endorser, but avers that no satisfactory endorser was ever secured on these notes: and this the defendant denies that the reason said notes were not satisfactory was because defendant had found another tenant, known as the Old Mill, and denies that the Old Mill was or is a tenant of the Columbia Real Estate Company.

20 Defendant denies that complainant tendered to George A. Bourgeois on the first day of July, Nineteen Hundred and One, the sum of eleven hundred dollars (\$1,100.00) in legal tender and that at said date the said George A. Bourgeois handed to complainant the copy of the lease but avers the fact to be that pursuant to the original agreement the lease was to be executed and the money paid on or before the first day of July, Nineteen hundred and one.

30 That the said complainant neglected and refused to pay the balance of said rental money on said first day of July, nineteen hundred and one, and immediately thereafter, to wit, on or about the Second day of July, nineteen hundred and one, and before the tender of the eleven hundred dollars paid on the nineteenth day of May, nineteen hundred and one, and notified complainant or defendant's intention not to further consider the matter of leasing:

Defendant further says that after the First day of July, nineteen hundred and one, this defendant leased said premises described in complainant's bill to other parties who are now tenants of defendant and actually in the possession of said premises.

GEORGE A. BOURGEOIS,
Sol. of Defendant.

IN CHANCERY OF NEW JERSEY.

Between:

Salina A. Charlton,
Complainant,
and
Columbia Real Estate Co.,
Defendant.

} On Bill &c.

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} Amended Answer.

The answer of the Columbia Real Estate Company to the bill of complaint of Salina A. Charlton, Complainant.

This defendant answering the bill of complaint in the above stated cause says that it denies each and every of the allegations in said bill except those hereinafter specifically admitted:

The defendant says that certain negotiations were had 20 between complainant and defendant looking towards the leasing to said complainant of the premises described in the bill of complaint, and that defendant caused to prepare a lease in duplicate for said premises, but avers that said lease was never delivered on the part of the defendant, nor the rental moneys therein specified by the complainant:— Nor security tendered.

Defendant admits that on the seventh day of May, nineteen hundred and one, when said negotiations were commenced between the complainant and defendant looking towards the making of a lease for said premises, complainant handed to defendant one hundred dollars and avers that thereafter Complainant neglected and refused to complete said negotiations and neglected and refused to enter into said lease and neglected and refused to pay the rental moneys agreed to be paid for said premises, and avers that when
10 Complainant was unable and neglected and refused to carry into effect the agreement for leasing said premises, defendant tendered said Complainant the sum of One Hundred Dollars, on or about the nineteenth day of June, nineteen hundred and one, and then and there declared all negotiations concerning said premises to be at an end.

Defendant admits that George A. Bourgeois was attorney for the Columbia Real Estate Company but denies that he was agent for said Company and denies that Mr. Bergman, agent and manager of said Company had some personal feeling
20 against the endorser of said notes and for that reason refused to accept said endorser as surety for the payment of said notes, but avers the fact to be that at the time of the first negotiations concerning said lease the rental money was agreed to be paid in cash, and afterwards and before the day when said payment was to have been made, defendant was solicited by complainant to accept notes for a part of said rental moneys, and defendant consented to accept notes if secured by a satisfactory endorser, but avers that no endorser satisfactory to this defendant was ever secured on
30 said notes: and this the defendant denies that the reason said notes were not satisfactory was because defendant had found another tenant, known as the Old Mill, and denies that the Old Mill at any time was or now is a tenant of the Columbia Real Estate Company:

Defendant denies that complaint tendered to George A. Bourgeois on the first day of July, nineteen hundred and one, the sum of eleven hundred dollars (\$1,100.00) in legal tender and that at said date the said George A. Bourgeois handed to complainant the copy of the lease but avers the fact to be that pursuant to the original agreement the lease was to be executed and the money paid on or before the fifteenth day of June, nineteen hundred and one, and before the tender of the Eleven Hundred Dollars aforesaid, defendant tendered to complainant the One Hundred Dollars paid on the eleventh day of May, nineteen hundred and one, and notified complainant of defendant's intention not to further consider the matter of leasing: 10

Defendant further says that after the seventeenth day of June, nineteen hundred and one this defendant leased said premises described in complainant's bill to other parties who are now tenants of defendant and actually in possession of said premises.

G. A. BOURGEOIS,
Sol. of Defendant. 20

IN CHANCERY OF NEW JERSEY.

Between:

Salina A. Charlton,

Complainant,

and

Columbia Real Estate Co.,

Defendant.

} On Bill

} Replication.

And the complainant joins issue in the answer of the defendant.

ALLEN B. ENDICOTT,
Solr. and of Counsel with Compl. 30

IN CHANCERY OF NEW JERSEY.

Between:
Salina A. Charlton,
 Complainant,
 and
Columbia Real Estate Co.,
 Defendant. } On Bill &c.

Camden, N. J., March 31, 1902.

Transcript of testimony, &c., taken at the hearing in
10 the above cause before his Honor Martin P. Grey, one
of the Vice Chancellors of this State, at the Chancery
Chambers in the City of Camden.

Mr. Allen B. Endicott and Mr. E. A. Higbee for com-
plainant.

Mr. G. A. Bourgeois, for defendant.

MR. HIGBEE: There are certain facts which counsel
for the other side are willing to admit.

Counsel for defendant company is willing to admit, as
I understand it, that H. J. Bergman is general manager
20 of the Columbia Real Estate Company, the defendant,
and had authority to lease the premises set up in the com-
plainant's bill.

MR. BOURGEOIS:—I am willing to admit that he had
such authority without formal proof.

MR. HIGBEE: Counsel for defendant admits that a certain lease endorsed "Lease Columbia Real Estate Company to Salina A. Charlton, dated _____, 1901, and signed S. A. Charlton, was prepared by George A. Bourgeois, attorney for the defendant company, at the dictates of the defendant company, and we ask that it be marked for identification.

Defendant's counsel also admits that the paper here produced is the paper which was handed by Mr. Bourgeois to Mrs. Charlton, referred to in the pleadings. 10

(Marked Exhibit C 1.)

Counsel for defendant also admits agreement dated the 7th day of May (no year) signed by the Columbia Real Estate Company by H. J. Bergman, agent; S. A. Charlton; witnessed by Ida J. Atkinson.

Counsel for defendant admits that the date when the agreement dated the 7th of May was made, was in the year 1901.

(Marked Exhibit C 2.)

20

Receipt dated May 7, 1901, as follows, is admitted by the defendant to have been executed without further proof: "Received Atlantic City, May 7, 1901, of Mrs. S. A. Charlton, one hundred dol. on acc. of agreement for lease to be made to Mrs. Charlton, for which details are to be settled &c. (Signed) H. J. Bergman, Agent."

(Marked Exhibit C 3.)

Defendant's counsel also admits that the company received a letter dated July 10, 1901, on the letter head of

Allen B. Endicott, counselor-at-law, Atlantic City, addressed "Columbia Real Estate Company, Atlantic City, N. J., "Dear Sirs:" and ends "Yours truly, Salina A. Charlton, by Allen B. Endicott, her attorney."

(Marked Exhibit C 4.)

Counsel for complainant offered in evidence the above named exhibit.

MR. BOURGEOIS: I object to the admission of exhibit C 1 for identification, being the lease on the ground
10 that it is irrelevant to the matter in issue.

THE VICE CHANCELLOR: That is the lease executed by Mrs. Charlton.

MR. BOURGEOIS: Yes.

THE VICE CHANCELLOR: But not executed by the Columbia Real Estate Company?

MR. BOURGEOIS: Yes.

THE VICE CHANCELLOR: The execution of the paper as it appears on its face you do not dispute, but you deny its relevancy to the issues here presented.

20 MR. BOURGEOIS: Exactly.

THE VICE CHANCELLOR: At this stage I do not know enough about the case to know whether it is relevant or not. I will take the objection and let the matter remain to be disposed of after I have more acquaintance with the facts.

SALINA A. CHARLTON, Sworn for Complainant.

DIRECT EXAMINATION.

BY MR. HIGBEE:

Q. You are the complainant in this case?

A. I am.

Q. Did you have any conversation with H. J. Bergman in relation to leasing the premises set out in the bill of complaint?

A. I did.

Columbia Real Estate Company, the defendant, admits 10
having received this communication, dated 5-6-1901, addressed "Columbia Real Estate Company, Gentlemen," signed "Yours truly, S. A. Charlton," which communication is offered in evidence and admitted and marked

Exhibit C 5.

Q. When was that.

A. You mean the first?

Q. Yes.

A. I think that was in March.

Q. What year?

A. Last year, 1901. 20

Q. Did you afterwards have a subsequent conversation with him?

A. We had quite a number of conversations about it.

Q. When, if at any time were any details arranged in relation to leasing the premises?

A. The first proposition they made to me in regard to taking the premises was that they would build me baths, and I was to pay a rental, and then after they went into details enough to know that it would be an expenditure of more money than they wanted to pay out. 30

MR. BOURGEOIS: I object to this conversation, that took place before they finally came to their agreement. We do not want to try that.

Q. Just relate what the details were when you agreed, if at any time, when you agreed to lease the premises?

A. That led up to it.

Q. (By the Vice Chancellor): When was the agreement made?

A. The date of that letter, that was the main proposition.

Q. (Further Direct): Letter dated 5-6-1901, Atlantic City, N. J., addressed Columbia Real Estate Company, signed S. A. Charlton" marked Exhibit C 5, shown witness, and she is asked is that the letter you wrote to the Columbia Real Estate Company?

A. It is.

Q. The letter in question is as follows, being Exhibit C 5:

"Atlantic City, N. J., 5-6-1901.

Columbia Real Estate Company, Gentlemen: Reply-
ing to your letter of May 4th would state, I will pay you,"
what significance has that \$1200 alteration?

A. The \$1000 I offered that, and they wanted \$1500 and we afterward settled on \$1200.

Q. The letter was sent with that \$1200?

A. No, with \$1000 and afterward we came to an agreement to pay \$1200.

Q. Then as originally sent it was \$1000?

A. Yes, sir.

Q. "I will pay you twelve hundred dollars for rental
per year for ten years' lease, for all that building in the
rear of the stores on the Boardwalk, and extending from
Clumbia Place to the Columbia Cafe, with 14 feet en-

trance thereto from the Boardwalk. But providing that at the expiration of this lease, the Columbia Real Estate Co. will purchase the improvements placed upon said premises by me during said term at a price to be fixed by arbitrators, one selected by me, one selected by said company, and they two to select a third, whose valuation shall be final. I am, your truly,

S. A. CHARLTON."

MR. BOURGEOIS: I want to object to the admission of that: maybe I am a little bit late. That was not accepted and it is not relevant to the issue at all. 10

THE VICE CHANCELLOR: Is there any reason why the original negotiations between the parties, which terminated, as alleged by the complainant, in a definite written agreement, should be here proven by parol testimony.

MR. HIGBEE: One reason, we wish to show that there were negotiations pending between these parties for leasing the premises, and of course we will follow that up by showing that this lease partially embodied these negotiations, which were accepted. But they deny, as you have already seen, that that lease was executed by them, and it may be necessary to bring out this whole transaction to show what the agreement really was. No lease having been signed by the Columbia Real Estate Company themselves, it may be a question for the Court to determine what the real agreement was. 20

THE VICE CHANCELLOR: The objection is that you are endeavoring to prove an agreement by the parol negotiations which preceded it. 30

MR. BOURGEOIS: I base my objection upon the fact that this agreement was finally concluded in writing on the seventh day of May; whatever may have preceded that cannot alter that agreement. It is irrelevant.

THE VICE CHANCELLOR: Where is the evidence of the conclusion of the agreement on the 7th or May?

MR. BOURGEOIS: The paper there, one of the exhibits.

JUDGE ENDICOTT: Another reason is this agreement
10 not having been signed by them it may be a question whether we sufficiently establish that as an argument to hold them, but we can build up a case on these papers I think sufficient for a decree, therefore I think we want them in evidence.

THE VICE CHANCELLOR: Exhibit C. 2 is signed by both parties, its execution is not disputed. It has been admitted here, and being the conclusion of the transaction, the resulting contract, the antecedent negotiations are not admissible if there is no ambiguity on the face of the contract.
20 The agreement Exhibit C 2 appears to be a written contract between the parties. It seems to me that its terms are so clear that no ambiguity appears which would justify the admission of testimony of the preceding negotiations.

JUDGE ENDICOTT: We have no desire to urge it if your Honor is inclined to that view.

THE VICE CHANCELLOR: The only possible ambiguity is the statement in the agreement that the parties will make a lease. An agreement that they will make a lease, if it expresses all the terms of the lease, would leave the

lease itself to be but a formal execution of the undertaking and no ambiguity would be shown. Where there is no ambiguity the written agreement must stand without parol contemporaneous explanation. The cases in this State hold that even if a whole term which was within the negotiations be omitted from the written contract, it cannot be put in by parol proof where the written agreement is itself on its face, apparently final and conclusive and makes any reference to the uncontained term. The written agreement excludes all the precedings bargaining unless in cases of mistake or fraud in a suit of equity to reform it. In *Naumberg vs. Young* 15 Vr. 331 the Supreme Court declared that oral testimony as to previous negotiations cannot be admitted either to contradict the written contract or to supply terms with respect to which the writing is silent. The Court of Appeals approved of this ruling in *Van Horn vs. Van Horn* 4 Dick. 328. It seems to me therefore that the antecedent negotiations which resulted in the contract Exhibit No. 2, cannot be received to vary that contract. 10

MR. HIGBEE: Our contention is that it does not contain all the terms of the agreement, it is merely an agreement that we will make a lease, and that has been admitted. 20

THE VICE CHANCELLOR: The defendants admission merely saved you the trouble of proving the signatures.

The receipt previously referred to of May 7, 1901, made to Mrs. Charlton by the Columbia Real Estate Company, for \$100 being Exhibit C 3, is in the words and figures as follows:

'Received, Atlantic City, May 7th, 1901, of Mrs. S. A. Charlton, one hundred dol. on acc. of agreement for lease to be made to Mrs. Charlton, for which detail are to be settled on. 30

COLUMBIA REAL ESTATE CO.,
by H. J. Bergman, Agent."

The agreement dated May 7th, without date of year, but admitted to have been made in 1901, signed by the Columbia Real Estate Co., by H. J. Bergman, agent, S. A. Charlton and witnessed by Ida J. Atkinson, the execution of which has been admitted without further proof, and which is exhibit C 2 in the words and figures, as follows:

10 "Agreement made this seventh day of May between Columbia Real Estate Co., of the first part and Mrs. Charlton, of Atlantic City, of the second part, Witnesseth, that the party of the first part will make a lease for ten years of a certain building on their grounds in rear or stores to contain about eighty feet in width by about one hundred feet in depth, with a fourteen feet entrance from Boardwalk to consideration to be a rental of twelve hundred dol. per annum, payable yearly in advance, lease to date from June 15th, 1901. The party of the first part to be put to no expense whatever in this matter and security to be given for the rent.

20 COLUMBIA REAL ESTATE CO.,
by H. G. Bergman, Agent.
Witnessed by S. A. Charlton."
Ida J. Jackson.

Letter dated July 10, 1901, addressed Columbia Real Estate Co., signed Salina A. Charlton, by Allen B. Endicott, her attorney, which is Exhibit C 4, is as follows:

30 "Allen B. Endicott,
Counsellor-at-Law, Atlantic City, N. J.,
Union National Bank Building.
Rooms 1, 2 and 3.

July 10, 1901.

Columbia Real Estate Company,
Atlantic City, New Jersey.

Dear Sirs:

Mrs. Salina A. Charlton has retained me to enforce the performance of an agreement between your company and her, whereby your company rented to her certain lands in Atlantic City, near Missouri avenue for \$1200 per annum for a term of ten years.

I learn through Mrs. Charlton that on the seventh day of May, your company received one hundred (\$100) dollars on account of this rent and that you have since refused to accept the balance of the rent due and have refused to allow her to take possession of the property, because you have since rented it to other parties for a greatly increased rental. 10

On behalf of Mrs. Charlton, I now demand the possession of the property and desire thus to advise you if you refuse to put her in possession forthwith that she will immediately institute proceedings for specific performance of her contract. As well as for damages suffered by her because of the refusal of your company to carry out its agreement with her. The balance of \$1100 rent which you refused on July 2nd is still subject to your order and will be paid whenever you are willing to accept it. 20

Yours respectfully,

SALINA A. CHARLTON,
by Allen B. Endicott, her Attorney." 30

THE VICE CHANCELLOR: Now we are discussing the question whether testimony shall be taken touching the negotiations preceding the agreement of May 7, 1901. What term do you say was opened between these parties and agreed to by parol, not contained in the agreement of May 7? 30

A. Yes, sir, at Green's hotel, not in Atlantic City but in Green's hotel.

Q. And then you paid \$100?

A. Yes, sir.

(Recess until 2 o'clock.)

THE VICE CHANCELLOR: Upon considering the matter I am disposed to admit the exhibit without finally passing upon the objection, in order that the complainant may present all the proof which she may be advised will exhibit her full case. This case will probably turn largely upon matters of law, and I prefer to allow the complainant to make the fullest possible proof that may be submitted to the Court in support of the complainant's bill. 10

Q. (Further Direct.) You said in response to the question asked you by the Court that the receipt and agreement were signed at Green's hotel, Philadelphia. Will you please state how you came to be at Green's hotel?

(Objected to.)

THE VICE CHANCELLOR: Admitted for the same reasons stated above. I think the complainant should be permitted a full case, and see what can be exhibited as to her right to relief. 20

A. By appointment with Mr. Bergman.

Q. Is Mr. Bergman an officer of the Columbia Real Estate Company?

A. He represents himself to be their agent, manager.

Q. You spoke about one Mr. Newton?

A. He is one of the company.

Q. One of the managers of the Real Estate Company?

A. Yes, sir.

Q. Has he any connection with Green's Hotel?

A. He is proprietor there.

Q. Now at the signing of the agreement C 2, was it the understanding that that embodied the full terms?

(Objected to as leading.)

THE VICE CHANCELLOR: That is a question that is objectionable first as leading, and then in the next place asking as to what the understanding was.

10 Q. Did that embody the full terms of the agreement?

A. No, sir.

Q. Was any other agreement or lease to be made?

A. Yes, sir; a lease was to be made and submitted to me.

MR. BOURGEOIS: That is all in writing.

THE VICE CHANCELLOR: I will admit it.

Q. Will you please state the terms that were to be embodied in the lease that was to be made?

(Objected to as tending to vary a written contract.)

Admitted.

20 A. Well the agreement was according to my first letter, that I was to put the improvements on the premises leased and the Columbia Real Estate Company was to buy it from me at the expiration of ten years.

Q. (By the Vice Chancellor) It is that agreement which you seek now to have enforced?

A. Yes, sir.

Q. You want to have them compelled to make a lease to you, wherein they recognize the obligation upon their part to pay for the improvements which you have put upon the premises at the end of the term upon arbitration valuation?

A. Yes, I want the Co. sign the lease that they have submitted to me to sign. I want them to sign it.

Q. This is the agreement?

A. Yes, sir.

Q. (Further Direct) Was any arrangement made other 10
than that expressed in the agreement as to the security?

A. Well Mr. Bergman and I talked the security over, asking him what he wanted in the line of security; I asked him if the contractor's name would do, and he said it would do.

Q. Will you please explain in detail that the security was to include?

(Objected to.)

A. As I understand he wanted security for each year,
\$1,200— 20

THE VICE CHANCELLOR: That does not vary the agreement, but supports it.

A. Mr. Bergman came to my house—

THE VICE CHANCELLOR: One moment, I do not see that the proof contradicts or varies the agreement.

MR. BOURGEOIS: There is a question what is meant by security. That speaks for a ten years' lease with security. Now she says the security to be given for a year. It is a matter for the Court to determine whether the security is to be given for one year or ten years. 30

A. They never asked me for ten years.

THE VICE CHANCELLOR: I will admit it.

Q. Now tell us the arrangement, that was made in relation to security.

A. Mr. Bergman came to my house, Mr. Bergman drew the lease—

Q. I have reference at the time of the making of this agreement.

A. No, it was to be a lease for \$1,200, I paid him
10 \$100, and the lease was to be made and submitted to me. Mr. Bergman said this merely was to show the company that I had taken the property. This agreement was to show the company that I had taken the property from him, and I signed this waiting for the—

Q. That is Exhibit C 2?

A. And I signed it waiting for the lease.

Q. Now Mrs. Charlton, was the lease afterwards submitted to you?

A. Yes, sir.

20 Q. By whom?

A. It was sent to me by Mr. Bourgeois, their attorney.

Q. And that is the lease, Exhibit C 1?

A. Yes, sir.

Q. Is that the lease that was sent you by Mr. Bourgeois?

A. Yes, sir.

Q. Was that sent to you or did you personally apply and receive it?

A. No, it was sent to me.

30 Q. Can you remember how you received it, whether by mail or messenger?

A. I think it came by mail.

Q. What did you do after you received it?

A. Mr. Bergman called at my cottage, and we went over the lease together. I said, Mr. Bergman, this is not according to our agreement, you want all cash. He said I am not particular for cash, if you give me security. I said how good security do you want. He said I want a real estate owner, and I said would two notes with a real estate owner's name be sufficient. He said that it would, and I immediately gave him two notes, one for a month and three months, and with O. H. Guttridge, the contractor on the notes. I sent them to Mr. Bourgeois' office with the lease signed by me. 10

Q. How did you send them?

A. By Mr. Herron.

Q. Who is O. H. Guttridge?

A. He is an extensive contractor in Atlantic City.

Q. Do you know his financial responsibility?

A. I know he endorsed my note for \$3,000 and they were cashed immediately at the bank. 20

Q. Is he a man owning real estate or not?

MR. BOURGEOIS: That is not the way to prove that; if they want to prove that he owned real estate the best evidence is the record of it.

THE VICE CHANCELLOR: That may be so, but I think when the question is entirely collateral, and not the main issue, it may be proved this way.

A. He was always counted a first-class security as I understood it.

Q. Is he a man of property?

A. He is. 30

Q. Of small or considerable?

A. Considerable property.

Q. Was any objection ever made to you as to Mr. Guttridge being insufficient security, I mean by the directors of this company or by Mr. Bourgeois?

A. No, sir.

Q. Was anything ever said to you in relation to it, either one way or the other by them?

A. No.

10 Q. Did you talk to Mr. Newton, one of the company in relation to it?

A. Yes, sir.

Q. What did he say?

MR. BOURGEOIS: Objected to, there is no evidence of any authority to bind the company. A statement made by a member of the company cannot bind the company.

20 THE VICE CHANCELLOR: The statement made by the lady is that the negotiations were opened by Mr. Bergman and Mr. Newton, who represented the company, and were carried on subsequently by Mr. Bergman; and the statement now is that further conferences were had with Mr. Newton who opened negotiations with the lady. If Newton had authority to make the bargain which was verified afterwards by a writing submitted by Mr. Bergman, representing the company, why may not he still be supposed to have continued to act for it.

MR. BOURGEOIS: There is no testimony that Mr. Newton ever acted with any authority of the company.

30 THE VICE CHANCELLOR: I think the testimony shows that these parties, representing the company, opened negotiations with this lady. Their action was ratified by

Mr. Bergman's agreement, exhibit C 2; that was the direct result of the conference between Mr. Newton and Mr. Bergman representing the company, and this lady. Mr. Newton entered upon the negotiations, and undoubtedly took part in them representing the defendant as one of the parties at the conference. It ought not to be assumed that having acted for the defendant he lost the power to do so, unless testimony shows that he lost it. Question admitted.

Q. Just answer the question what Mr. Newton said.

A. I went to Mr. Newton and I said it is too bad, I 10
said that this trouble had come on, because I expected to be ready to open up on the first of July. Mr. Newton said, Mrs. Charlton, I wish you would state to me just how the thing is, I don't understand it clearly. I said, Mr. Newton, I tendered Mr. Guttridge's notes for \$500 and \$600, two and three months, and Mr. Bergman would not accept it, saying that the notes were perfectly good, but he had a personal feeling against Mr. Guttridge. Mr. Newton said of course the notes were good, I would have cashed them for the company myself, I 20
would have cashed the notes, but he said he understood Mr. Bergman to say that the security you offered was your own notes. I said no, he called for security of an outside party and I had Mr. Guttridge on the notes.

Q. (By the Vice Chancellor): I understand the security which you offered was Mr. Guttridge for \$1,100

Q. Which with the \$100 you paid in cash would have been a full payment, had it been accepted, of one year's rent?

A. Yes, sir.

Q. (Further Direct): And that was the first year's 30
rent?

A. Yes, sir.

Q. When was the first year's rent to be paid according to your original agreement?

(Objected to.)

Q. I will reform that, according to your agreement?

(Objected to. The writing speaks for itself; it says to be paid in advance.

THE VICE CHANCELLOR: As I understand the complainant's contention, they insist that they are entitled to enforce an agreement, other than the agreement
10 of the 7th of May.

MR. HIGBEE: Yes, sir.

THE VICE CHANCELLOR: Exhibit C 2.

MR. HIGBEE: Yes, sir.

THE VICE CHANCELLOR: That agreement you allege is in part by parol and in part by the agreement Exhibit C 2, and you are now proposing to prove this agreement partly in parol?

MR. HIGBEE: That is it.

THE VICE CHANCELLOR: I will admit the ques-
20 tion.

A. There was no date fixed for it, the day I paid the \$100 there was no day fixed, because I was to build, I wanted them to wait the commencing of the lease; while

I was building, but I would not be there until the first of July, and we talked it over, and made it the 10th of June next, when I gave up the ten years, the 15th of June, made it a better renting time, and they wanted me to give them the lease from that time, before I got it built and occupied, and that was why it was fixed the 15th of June, but there was no time stated when the other was to be paid. The lease was to commence the 15th of June.

Q. Was there subsequently any agreement entered 10 into between you and the defendant company as to when the first \$1,200 was to be paid for the first year's rent?

A. None whatever. When the lease was presented, that was the first I had any idea of it, and then we talked that over, and it was finally settled that he was to accept the two notes as security of the two payments.

Q. You mean when the lease, which has been shown you and marked Exhibit C 1, you say it was talked over at that time with whom?

A. Mr. Bergman.

Q. And did you then agree when the money was to 20 be paid?

A. He was to accept the two notes in payment. No, there was no set time then, but he was to accept the two notes, and as I commenced building before the 15th of June, I sent them up about the 20th of May in order to secure him, so that I commenced building; if I waited until the 15th I would not get the building in time for the summer season.

Q. (By the Vice Chancellor): Did you in fact build or 30 expend any money in and about the building?

A. Yes, I had my plans all drawn.

Q. Did you in fact get possession of the property and build on it?

A. No, they never gave me possession.

Q. Nor did you build any building?

A. No.

Q. (Further Direct): Whose name was on these notes which you spoke of as having tendered Mr. Bourgeois?

A. O. H. Guttridge.

Q. Who else, yours?

A. Yes, sir, they were my notes.

10 Q. Were those notes in conformity with the arrangement which you had with Mr. Bergman on the day you said you went over the lease?

(Objected to as leading.)

VICE CHANCELLOR: I think it is leading.

Q. When were the notes to be paid, when were they due?

A. The first of July and the first of August, one for \$500 and one for \$600.

Q. Which was due on the first of July?

A. That I could not tell you.

20 Q. When were the notes dated?

A. I could not tell you, but I know they came due on the first of July and the first of August, but I could not tell you the date of them.

Q. Did you and Mr. Bergman agree upon the terms set out in the lease that you went over that day, which is marked Exhibit C 1, with the exception of the payment of the first year's rent?

MR. BOURGEOIS: Objected to as leading, if there was an agreement, let us know what it is.

30 THE VICE CHANCELLOR: Yes, let the lady state what it was. Ask her what it was.

A. The lease we went over together as he made it out, and it was all satisfactory to me except the first year's payment, and when he told me that he would take the notes as a payment, I immediately signed the lease and sent it out for them to sign and return to me.

Q. (By the Vice Chancellor): Did they ever sign it?

A. They never signed this one.

Q. Exhibit C 1 was not signed by them?

A. Yes, sir.

Q. And that is your complaint is it not?

10

A. Yes, sir.

Q. (Further Direct): After that you had signed the lease and sent it up to Mr. Bourgeois' office with the two notes, what next was done in relation to this transaction, if anything?

A. They didn't notify me at all about the notes, and my architect was down there drawing the plans. I had just come out of the hospital, I was ill at the time, not badly, of course he had to come to my room. The day I went to the hospital I sent the papers to Mr. Bour- 20
geois.

Q. What day was that?

A. That was the 21st of May.

Q. 1901?

A. Yes, and was brought in an ambulance home on the 20th of May, which was Thursday evening. On a Saturday Mr. Herron called at the house, I asked him to go to Mr. Bourgeois' office and see if the Columbia Real Estate Company had signed the lease, as my architect was there and I wanted to go on with the building; 30
Mr. Herron came back and reported—

(Objected to.)

Q. (By the Vice Chancellor): You can't tell that. What did you do in consequence of what he said?

A. In consequence then I had to wait until I got out of bed, got around.

Q. (Further Direct.): Did you ever have any conversation with Mr. Bergman; did he ever call at your house?

A. Mr. Bergman, the first week in June, while I was ill in bed, he called Saturday and asked to see me. I was not feeling very well, and I didn't see him. It was
10 about 2 o'clock. In the evening he called again. Mr. Herron was down stairs and I told the nurse to allow both gentlemen to come up, and Mr. Bergman asked me how much money I would take and withdraw, if the would
20 give me the \$100; how much money I wanted to withdraw from the lease and give up the property. I told him I didn't want any money, that I would not give up the property, I wanted the property and wanted to build.

Q. (By the Vice Chancellor): The lease had not been executed by the Columbia Real Estate Company but had
20 been signed by you?

A. Yes, sir.

Q. (Further Direct.): When was this?

A. The first week in June. I could not tell you the exact date, the first Saturday.

Q. What next was done, either on your part or the Columbia Real Estate Company after that?

A. Then it ran along until the last week in June. I had been moved down to the Charlton Hotel and Mr. Bergman sent his man to me, I think Friday in the last
30 week in June, to know what I was going to do in regard to the property. I said the lease called for full payment on the first of July, and as Mr. Bergman did not accept the notes, I would give him the cash for the rent on the first of July; and the first of July I took the amount,

\$1,100 in \$100 bills to Mr. Bourgeois' office. Mr. Bourgeois held the lease at that time. Mr. Bourgeois told me he could not accept the money, but he handed me the lease and told me to take it and go to Mr. Bergman and tender him the money, and ask him to sign the lease.

Q. You say this is the first of July?

A. Yes, sir; I went down to the Columbia Cafe sent for Mr. Bergman. He was not in town, would not be down until Wednesday. Wednesday, July 3, I sent for Mr. Bergman, he came into the cafe. I said here is your money and the lease, I want it signed, and also I tender you the money, I laid the money on the table, eleven \$100 bills. He said it was too late. I said who said so. He said I. I said the lease calls for the payment on the first of July. He would not accept it, and I said I have tendered you the money in cash and you would not accept it, and he said no, he would not accept it. 10

Q. You say you demanded the lease to be accepted by him at that time?

A. Yes, sir. 20

Q. When you called at Mr. Bourgeois' office and tendered him the eleven \$100 bills, did he say why he could not accept it?

A. He did not.

Q. Was anything said in relation to the security that he had been heretofore offered?

A. Nothing.

Q. Did he make any complaint that you had not complied with your terms of the agreement?

A. No. 30

Q. The lease which he returned to you at that time, is that the lease which is now marked exhibit C 1?

A. Yes, sir; that is the one.

Q. Did he make any objection to the terms of that lease?

A. None at all, never opened the lease, just handed it to me

Q. The signature which is upon that lease, is that your signature?

A. It is.

Q. You stated that you and Mr. Bergman went over the lease by paragraphs, I understood you to say?

A. Yes.

Q. When was that?

10 A. That was the Monday or Tuesday evening before I went to the hospital.

Q. About what time was that?

A. That was the 21st, I think, or 22d.

Q. Did Mr. Bergman make any objection to the terms of the lease so far as the Columbia Real Estate Company was concerned or otherwise?

20 A. I called his attention to the security for each year, he said fifteen days of that time there was no security given, and I told him I could give him any security he wanted for the fifteen days. You see my time being up on the 15th of June and the money to be paid on the first of July, left 15 days without any rent, and the company wanted each year for me to give that security, for each year's rent on the 15th of June.

Q. You discussed the paragraph that was therein stated?

A. Yes, sir.

Q. Did you agree that was correct or otherwise?

A. I agreed to it.

30 MR. HIGBEE: At this time we offer that lease in evidence.

MR. BOURGEOIS: Objected to.

Admitted. Exhibit C 1 is admitted in evidence for complainant.

CROSS EXAMINATION.

BY MR. BOURGEOIS:

Q. When you came to my office and tendered the money to me I said I had no authority to accept a tender for the Columbia Real Estate Company and that you would have to go to Mr. Bergman?

A. You told me you could not accept it and to take it to Mr. Bergman.

Q. About the notes, did I understand you to say that when Mr. Bergman was at your house that you asked ⁰¹ him about accepting the notes instead of the cash?

A. Yes, sir.

Q. At that time do you say you told him that Mr. Guttridge would be your endorser?

A. No, I asked him if he would take the contractor's name on the note.

Q. He said yes?

A. Yes.

Q. I understood you to say that you went and got the notes and handed them to him? 20

A. Handed them to him?

Q. Yes.

A. No, I didn't say that, I said I sent the notes and the lease to your office with Mr. Herron to you, the day I went to the hospital.

Q. After you sent the notes to my office, did you ever make any inquiry of me as to what was done with the notes before I sent them back to you?

A. I was in the hospital.

Q. And did not? 30

A. And did not.

Q. You have stated a conversation you had with Mr.

Newton regarding Mr. Guttridge's financial standing; did Mr. Newton not tell you at that time that he did not consider Mr. Guttridge financially responsible, because he had just purchased from Mr. Guttridge a piece of property at a sacrifice, and that Mr. Guttridge in the selling of that property said to him, that he had to sell it because he had to have the money?

A. No, Mr. Newton did not say anything of the kind.

Q. Did I understand you to say that you opened the
10 negotiations with Mr. Newton in regard to this?

A. The negotiations were opened by Mr. Newton and Mr. Bergman at my house with regard to baths.

Q. When?

A. Sometime in March.

Q. The two of them together?

A. Yes, sir.

Q. What day was it that you tendered Mr. Bergman
the balance of the rental money.

A. You mean the money or the notes?

20 Q. The money, not the notes.

A. It was the third of July, Wednesday.

Q. That is all.

FRANK HERON, Sworn for Complainant.

DIRECT EXAMINATION.

30 BY MR. HIGBEE—

Q. Where do you reside?

A. Atlantic City.

Q. What is your business?

- A. In the hotel business.
- Q. Are you lessee of the Columbia Real Estate Company?
- A. Yes, sir.
- Q. You know the complainant Salina A. Charlton?
- A. Yes, sir.
- Q. You know Mr. Bergman the gentleman present?
- A. Yes, sir.
- Q. Did you ever have any transaction or any connection with the transactions between Salina A. Charlton and the Columbia Real Estate Company, in relation to the leasing of certain premises in Atlantic City? 10
- A. No, sir.
- Q. Witness being shown exhibit C 1, being lease executed by Mrs. Charlton only, and he is asked: Did you ever see that lease before?
- A. Yes, sir.
- Q. When?
- A. About the last of May or first of June, 1901.
- Q. How did it come to your hands? 20
- A. Mrs. Charlton asked me to take this lease and two notes which she had made, and which were endorsed by Mr. O. H. Guttridge, one for \$500 and the other for \$600 up to Mr. Bourgeois' office.
- Q. Did you do it?
- A. Yes, sir; I did so.
- Q. Whom did you see at Mr. Bourgeois' office?
- A. I saw Mr. Bourgeois himself.
- Q. Did you deliver him the lease and notes? 30
- A. Yes, sir.
- Q. Did any conversation pass between you and him in relation to it?
- A. Not that I can recall.
- Q. Did you leave them there?
- A. Yes, sir.

Q. Were you ever there after that in relation to them?

A. Yes, sir.

Q. When?

A. As near as I can recall about a week or ten days later.

Q. How did you come to go there at that time?

A. At Mrs. Charlton's solicitation.

Q. Whom did you see there?

A. Mr. Bourgeois.

Q. What was done there between you and Mr. Bour-
10 geois?

A. Mr. Bourgeois gave me back the notes and I think the lease with it, stating that Mr. Bergman could not accept the notes. I asked him, Mr. Bourgeois, for what reason, or if the notes were not good; he said Mr. Bergman had objected to them on the ground that some years ago he had some business with Mr. Guttridge and Mr. Guttridge refused to accept his note, and he in return refused to accept Mr. Guttridge's note or Mr. Guttridge's endorsement.

Q. Did he say whether or not Mr. Guttridge's endorse-
20 ment was good?

A. I don't think Mr. Bourgeois expressed himself, he quoted Mr. Bergman.

Q. Are you sure as to whether or not he returned you the lease at that time?

A. No I am not quite positive about that.

Q. Do you remember what you did with the notes, if anything?

A. Yes, I gave the notes to Mrs. Charlton.

Q. Were you ever present when Mr. Bergman and
30 Mrs. Charlton had any conversation in relation to the matter of leasing the premises set out in the bill?

A. Yes, sir, I was present on several occasions.

Q. When were you first present?

A. I was present in March when the negotiations were first spoken of.

Q. When next?

A. I could not tell the date, but at various times after that.

Q. Were you present at Mrs. Charlton's home when Mr. Bergman was there?

A. Yes, sir.

Q. In her room?

A. Yes, sir. 10

Q. Her bed room?

A. Yes, sir.

Q. Was Mrs. Charlton sick at this time?

A. Yes, sir.

Q. What conversation, if any, passed between Mrs. Charlton and Mr. Bergman at this time in your presence?

A. I could not recall the conversation.

Q. Was anything said in relation to her surrendering the lease? 20

A. I really could not say definitely what was said, I remember being present at the time, but I don't recollect what the conversation was.

Q. Were you ever present when Mr. Bergman and Mrs. Charlton went over the lease?

A. I think they went over the lease that day, I am quite sure they did.

Q. (By the Vice Chancellor): When you say the lease, you mean the proposed lease, this Exhibit C 1?

A. Yes, sir. 30

Q. Which was not executed by the Columbia Company?

A. Yes, sir.

Q. (Further Direct): Do you remember anything that was said in relation to it at that time?

A. I could not say as to that time positively, but I remember Mr. Bergman and Mrs. Charlton talking this matter of payments over at different occasions, and I remember Mr. Bergman saying, I don't say now it was on that day that Mr. Bergman made this remark, but it was during some of this conversation, I heard Mr. Bergman say, if Mrs. Charlton gave him good security that
10 would answer as well as payment in cash; and that conversation might have occurred at that time, am not prepared to say positively as to that.

Q. Do you remember at any time you delivered the lease to Mr. Bergman, or after the 7th of May, any conversation ever passing between Mrs. Charlton and Mr. Bergman in relation to Mrs. Charlton enforcing her lease or giving up her lease or anything of that kind?

A. No, sir.

Q. Were you present after Mrs. Charlton came out of
20 the hospital when Mr. Bergman was present, in her sick room?

A. Yes, sir.

Q. Did you ever hear Mr. Bergman say anything in relation to trying to buy out Mrs. Charlton?

A. Yes, I think Mr. Bergman said that he would—I thing the remark that Mr. Bergman made—he wanted to know what Mrs. Charlton would take to surrender the lease.

Q. And what reply, if any, did Mrs. Charlton make?

A. She stated that she wanted the property.

30 Q. Do you remember about the date of this?

A. I could not say positively as to that.

Q. Now at the time you delivered the notes and leases to Mr. Bourgeois, did Mr. Bourgeois make any objections to the lease?

A. Not that I recall.

Q. Were you present at the cafe of the Columbia Company on the third day of July last?

A. Yes, sir.

Q. When Mrs. Charlton and Mr. Bergman were there?

A. Yes, sir.

Q. What took place?

A. Mrs. Charlton tendered Mr. Bergman eleven \$100 bills and asked him to sign the lease.

Q. What did Mr. Bergman say?

10

A. He said the negotiations were all off and he could not sign the lease.

Q. Did he state why the negotiations were off?

A. I don't think so.

MR. HIGBEE: Cross examine.

MR. BOURGEOIS: No questions.

Q. (Further Direct.) One moment, did you see Mrs. Charlton tender him the lease that day and ask him to sign it?

A. Yes, sir.

20

Q. Is that the lease which was marked exhibit C 1?

A. Yes, sir.

Q. Did Mr. Bergman at that time make any objection to the terms of the lease?

A. No.

Q. That is all.

JAMES CALLOWAY, sworn for the complaint.

DIRECT EXAMINATION.

BY MR. HIGBEE—

Q. Where do you reside?

A. Atlantic City.

Q. What is your business

A. Real Estate.

Q. Do you know Mrs. Charlton, the complainant?

A. I do.

10 Q. Do you know Mr. Bergman, the defendant?

A. I do.

Q. Are you familiar with the premises set forth in the lease marked Exhibit C 1?

A. I did.

Q. Did you ever have conversation or communication with Mr. Bergman in relation to renting the premises therein described along in May or June of last year?

(Objected to as irrelevant.)

20 MR. HIGBEE: We wish to say that the defendant acknowledged to this man that Mrs. Charlton had a lease for these premises, or was to have a lease, had leased them and were not in a position to lease them to his client; and furthermore we wish to show that the reason for their failing to carry out this agreement is because a customer offered two or three times as much money.

THE VICE CHANCELLOR: I will allow you to put the first question and the second one I will reserve.

MR. BOURGEOIS: We are willing to admit that the first proposition took place; I don't know whether it did or not, but I am willing to admit that it did.

A. It did.

Q. About what time of the year was it, do you remember the exact date or about the time?

A. The last week in May.

Q. What was said between you and Mr. Bergman in relation to it?

MR. BOURGEOIS: I understand that this is limited to what?

MR. HIGBEE: The leasing of the premises.

THE VICE CHANCELLOR: From whom?

MR. HIGBEE: From the Columbia Real Estate Company.

THE VICE CHANCELLOR: To whom?

MR. HIGBEE: To some customer of Mr. Calloway.

(Objected to.)

THE VICE CHANCELLOR: I do not think that has any relation at all, unless it has some relation to some acknowledgement that there had been a leasing by the Columbia Real Estate Company to Mrs. Charlton. 20

MR. HIGBEE: That is what I want.

THE VICE CHANCELLOR: Was anything said between this gentleman on the stand and Mr. Bergman, with relation to any lease made of the premises in question by the Columbia Real Estate Company to the complainant in question.

MR. HIGBEE: I will put that question.

A. Mr. Bergman didn't speak of it in the terms of a lease, he said it was an option, that Mrs. Charlton had an option on it.

10 Q. Did he say anything in reference to whether he was at liberty to lease to your party by reason of that or not?

A. He said he was, he could lease to us by the first of June, and on the thirty-first of May, which was Saturday, he came Saturday night, and said that he could not lease it to us until after the 15th of June, as the date had been changed, and that my party would have to wait until the 15th of June. He showed me a paper where the date had been changed from the first of June to the 15th of

20 June.

Q. Did he state to you any of the terms of the agreement with Mrs. Charlton?

A. None.

Q. That is all.

NOT CROSS EXAMINED.

HENRY J. BERGMAN, sworn for Complainant.

DIRECT EXAMINATION.

BY MR. HIGBEE—

Q. You are one of the officers of the Columbia Real Estate Company?

A. Yes, sir.

Q. You are the Mr. Bergman who had negotiations with Mrs. Charlton, the complainant, are you not?

A. I am.

Q. Look at Exhibit C 1.

10

A. (Witness did so.)

Q. Did you ever see that before?

A. I think I have.

Q. When

A. About the latter part of June.

Q. And where?

A. Or the latter part of May or the early part of June,
I mean to say.

Q. Where?

A. At Mr. Bourgeois' office.

20

Q. Did you ever see it elsewhere?

A. I think not.

Q. You know whether or not there was a duplicate prepared of that?

A. Yes, sir.

Q. Who has the duplicate?

A. I have it.

Q. Where is it now?

A. Mr. Bourgeois has it.

MR. HIGBEE: We ask for the production of the duplicate. 30

MR. BOURGEOISE: Here it is. (Producing it.)

Q. Paper produced by Mr. Bourgeois, being handed to counsel for complainant, he shows it to the witness and asks: Who is Orro G. Leonard, who has signed his name as President?

(Objected to as irrelevant.)

THE VICE CHANCELLOR: What significance has this?

MR. HIGBEE: We want to show that this lease in duplicate was executed by the Columbia Real Estate Company.

THE VICE CHANCELLOR: What difference does that make?

MR. HIGBEE: If the lease which was produced to us, having been prepared by their attorney, and which we signed, and also the duplicate, which they acknowledged to be a duplicate, is signed by the defendant himself, it certainly goes to show, it seems to me that those were the terms agreed upon by the parties.

THE VICE CHANCELLOR: An undelivered though
20 signed contract remaining in the possession of the parties bound by it, has no legal efficacy. It is only when the party obligated has passed it over to the other party that it becomes of any binding effect. The paper marked Exhibit C 1, is in no way obligatory upon Mrs. Charlton because it remained in her possession. The paper here produced on call by the attorney for defendant, is no obligation whatever upon the Columbia Real Estate Company, because it remained in the hands of the attorney for the Columbia

Real Estate Company. The mere execution gave it no force or effect; it is its delivery that gives it force.

MR. HIGBEE: That is true, but the pleadings admit that a lease was prepared by the Columbia Real Estate Company. We have shown that the lease marked Exhibit C 1, is the lease that was prepared by the Columbia Real Estate Company, and we have now shown that there was a duplicate of the lease. We wish to show that this is a duplicate of the lease.

THE VICE CHANCELLOR: There is no denial of 10
the fact. It has been admitted that the lease produced
and marked Exhibit C 1, was prepared by the attorney
of the Columbia Real Estate Company. There is no
dispute about it, you are here because it was not de-
livered.

MR. HIGBEE: We are here to try to make them de-
liver it, but our purpose is to show the terms of the
lease which was not delivered.

THE VICE CHANCELLOR: There is no question
about the terms of that lease. 20

MR. HIGBEE: It cannot make any difference except
for this reason; I thought I would bolster up our case to
meet that. Suppose the Columbia Real Estate Com-
pany, not having seen the lease in evidence, they might
claim they didn't know the contents of that lease.

THE VICE CHANCELLOR: It is not so claimed.

MR. HIGBEE: It is not yet. It is admitted that it

was prepared by their attorney, but as to whether the attorney prepared it on the line they desired is not admitted.

THE VICE CHANCELLOR: Then your testimony would be admissible in rebuttal. I am free to say that I am quite unwilling to take from the custody of an attorney a paper executed but not delivered by his client, and put it in evidence, or to be considered as evidence forceful and binding upon his client. If you undertake to
10 prove delivery, that is another matter. Your present offer is to put it in evidence without proof at all that it was ever delivered.

MR. HIGBEE: Our object is to prove that this company was cognizant of the contents of that lease.

THE VICE CHANCELLOR: It is not denied that the defendant company knew the contents of the paper, but that does not make it admissible as a forceful contract.

MR. HIGBEE: That is all.

20 THE VICE CHANCELLOR: The defendant company has admitted that its attorney drew the proposed lease and that Mrs. Charlton signed it.

Q. That is all.

COMPLAINANT RESTS.

GEORGE A. BOURGEOIS, Sworn for Defendant.

DIRECT EXAMINATION.

Sometime during the month, I think of May, in fact the 6th of May, 1901, Mrs. Charlton came to my office and had me prepare this letter, which is marked Exhibit C 5, which I did; and I might state before that time I had done some legal work for Mrs. Charlton, also for the Columbia Real Estate Company. Later I was asked by Mr. Bergman to prepare a lease, which I did, and sent a copy of it to Mrs. Charlton, which is Exhibit C 1. 10
Sometime later, I think in May, this lease, together with two notes, was returned to my office, and I allowed it to remain in the office until Mr. Bergman came down from Philadelphia. When he came down I handed the lease and also the notes to him, and he refused, said they would not accept the notes, and immediately afterwards I sent the notes back, and I am not certain whether I sent the lease back, or whether it was delivered afterwards; but at any rate the two notes that have been spoken about here never got out of my office, and as 20
soon as Mr. Bergman saw them, he instructed me that they would not accept them, and I immediately sent them back.

Q. (By the Vice Chancellor): To Mrs. Charlton?

A. Yes.

Q. And was the lease subsequently returned?

A. I don't know whether I sent the lease back with the notes, or whether I delivered it afterwards, I have forgotten.

Q. Was the lease C 1 signed by the Columbia Real Estate Company, lessor? 30

A. No, sir, the original, the one I have among my

papers now, I didn't have at that time; it was not delivered to me until a week ago last Saturday, and this paper.

Q. Exhibit C 1?

A. Yes, sir, when I sent it to Mrs. Charlton was unsigned, and when it came back it was signed and I delivered it back to her again, because of the fact that her signature was to it.

CROSS EXAMINATION.

BY MR. HIGBEE:

10 Q. Did Mr. Bergman say why he would not accept the notes?

A. I don't remember whether he did or not, he may have said so or not, I don't recollect at this time.

Q. How did you return the notes to Mrs. Charlton?

A. I think by letter, my recollection is that immediately after Mr. Bergman came into the office I put them in an envelope and sent them down to her.

Q. Do you remember Mr. Herron calling at your office?

20 A. When he brought the notes?

Q. Yes.

A. Yes, sir.

Q. Do you remember him subsequently calling and getting the notes?

A. I don't remember, Mr. Higbee, I was doing a little business for Mr. Herron, just about that time, he came to my office frequently and I don't just remember what did take place.

30 Q. At the time you returned the notes to Mrs. Charlton, whether it be by mail or by Mr. Herron, did you make any objection to the terms of this lease?

A. I had no right to make objection, I simply drew the lease as scrivener, there was nothing concerning me.

Q. There was nothing said to Mrs. Charlton that the lease did not embody the terms?

A. Nothing whatever, I simply sent the lease back again.

HENRY J. BERGMAN, heretofore sworn, recalled for Defendant.

DIRECT EXAMINATION.

BY MR. BOURGEOIS:

Q. You are treasurer and general manager of the Columbia Real Estate Company?

A. Yes, sir.

Q. As manager you had conversation with Mrs. Charlton? 10

A. Yes, sir.

Q. It finally culminated in an agreement?

A. Yes, sir.

Q. Will you state to the Court,—I suppose we will have to go over the whole transaction.

THE VICE CHANCELLOR: You may do whatever you think necessary to sustain your defence.

Q. Will you state to the Court the transaction as it took place? 20

A. There were numerous propositions made before the final culmination of the agreement, which were not acceptable either to Mrs. Charlton, or were not accepted by the Columbia Real Estate Company which I represented; but finally at the meeting at Green's hotel, Mrs. Charlton advised me by mail that she would be there, and wanted to meet myself and Mr. Newton; the details were gone over and the conclusion reached as embodied by the agreement that I prepared myself. 30

Q. Which is exhibit C 2 here shown you?

A. Yes, sir.

Q. Did you see Mrs. Charlton after that time?

A. I did.

Q. Where?

A. I saw her at her room in the cottage.

Q. At that time did you ask her for a sum for which she would release her interest if any she had, in that contract?

10 A. Yes.

Q. State to the Court how it was, and when it was.

A. I was under the impression, without having the agreement at my hand, that the date fixed for the signing of the lease was the first day of June and at that time I had another tenant, and had partly agreed to lease the premises to another party, because Mrs. Charlton had not come up to her agreement to complete the lease by that time; but before doing so, I looked over the agreement, and I found it was the fifteenth day of June on which the agreement
20 should be consummated, and the money paid, and security given and the terms complied with. So I notified Mr. Calloway, who represented the other tenant that he had that I was not in a position at that time to enter into negotiations for the same premises, not until the 15th, until the option agreement that we had made would have expired.

Q. Was it before the 15th day of June that you asked Mrs. Charlton what you would accept?

A. Yes, sir; it was before the 15th day of June, about a
30 week before that, the 5th or 6th, or somewhere in that neighborhood.

Q. Now will you state to the court the conversation that took place between you and Mrs. Charlton with regard to accepting the Security for the first year's rent?

A. There was nothing said about it.

Q. What was said, if anything, about the notes, or accepting notes for the first year's rent?

A. Nothing said about it whatever at that time.

Q. What was the conversation you did have, you had a conversation in which she asked you to accept security?

A. Not at that time.

Q. What time was it?

A. That was in the earlier part, before the first of June.

10

Q. State what conversation.

A. We would often come down to Atlantic City, and Mrs. Charlton had invited us to take luncheon with her, and at the table these matters were talked over, and before that time, at any rate between that time, she asked me, I could not say what date it was, but it was prior to the first day of June, whether a good endorsed note for the first payment would be satisfactory to me, instead of the cash as provided for. I said to Mrs. Charlton if the note is a good one, that I could just take it to the bank and get the money for it, I have no objection; but there was no name mentioned as to whose note or who the endorser would be.

20

Q. Now what happened after that, what transpired after that; was the note sent, did she get a note for you?

A. Yes, they came to Mr. Bourgeois' office some time in May and sent the two notes there. Mr. Bourgeois showed me two notes endorsed by Oliver Guttridge, and I said these notes are not satisfactory, I could not get them discounted, I can't take them.

30

Q. Why were the notes not satisfactory?

A. Well, I had good reason to think, in fact I will give the real reason as it is. In the first place when these

negotiations were started there was talk as if there was no limit to money, spending \$15,000 to \$20,000 for improvements, and when I found when the time went on that they didn't have \$1,100 to pay for the rent, I saw it plainly coming that there would be no improvements and the whole thing was to be a fizzle, and I was very careful as to what arrangements I would make.

Q. What, if anything, led you not to be willing to accept Mr. Guttridge's note?

10 A. If conversations are admissible I will say, of course it has been said, Mr. Newton is one of our company, and I talked the matter over with him, and he said I don't think Mr. Guttridge—

(Objected to.)

THE VICE CHANCELLOR: You were not willing to take them because you did not think they were good enough?

A. That is it.

Q. Did Mrs. Charlton ever tender you the balance,
20 \$1,100 before the 15th day of June, 1901?

A. No, sir.

Q. After the 15th day of June, 1901, what if anything, did you do with the \$100 that she had paid you on account of this agreement.

A. In the first place I sent my check to Mrs. Charlton in a registered letter for \$100. Two or three days afterwards that check was returned. Then I made an effort to see Mrs. Charlton at her cottage.

Q. You mean she sent her check back to you?

30 A. Yes, sir; I got a hundred dollars in cash, \$100 note for the same note that I had sent her, out of the same bank

at least, for the purpose of returning her the money that she had deposited and calling the negotiations off, but I was not successful in seeing her, she was either out or was not well or she could not see me. So I sent my employee to her whom she did not know, to turn the money back to her that she had paid, the \$100 hand her that money.

Q. Now when was it that you sent your employee to her?

A. Right after the 15th of June.. That is I tried myself on two or three occasions to deliver that money to her, and I suppose about four or five days after the 15th of June. 10

Q. Before the third day of July?

A. Oh, yes.

Q. You have heard of the statement of Mrs. Charlton that security was to be given for each year's rent, to cover the space between the 15th of June and the first day of July; was that correct, was that security?

A. The security, as to my interpretation of any security is—

MR. HIGBEE: I object to his interpretation of it. 20

THE VICE CHANCELLOR: The witness cannot state his understanding or interpretation of the contract. He may state what was said about security because that term of the contract has much dubiety about it as to admit oral statements of the parties touching the subject, but not the construction which the parties might think the contract ought to have.

Q. What was said in regard to that security?

A. I wanted security for the ten years.

Q. And did not simply for the fifteen day's rent? 30

(Objected to.)

THE VICE CHANCELLOR: I overrule the question. You may state what was said.

Q. Was anything said at the time of assigning of the original agreement, Exhibit C 2, regarding security for rent, other than appears in the original agreement?

A. Nothing.

Q. That was all, that was of it?

A. Yes, sir.

Q. Was anything said between you and Mrs. Charlton,
10 or by you, or by Mrs. Charlton in your presence, after that time regarding security for the payment of the rent after the first year?

A. No.

Q. When Mrs. Charlton has spoken on the stand of security, do I understand that she simply referred to the endorsed note for the first year's payment?

A. Well that is not the way I understood it, I wanted security—

THE VICE CHANCELLOR: No, did she ever tender
20 you security for the rent, other than the security for the first year's rent by Mr. Guttridge's note?

A. She did not.

Q. I show you Exhibit C 3, being receipt for \$100, and ask you what details were to be agreed upon?

A. The dimensions of various angles, and which we didn't know, just without taking a survey.

Q. You mean of the premises?

A. Yes, sir, of the premises.

CROSS EXAMINATION.

BY MR. HIGBEE:

Q. Mr. Calloway stated that you had another application for the property?

A. Yes.

Q. When was that?

A. The first of June.

Q. That was after you had signed this agreement with Mrs. Charlton?

A. Yes, sir.

Q. That was after the lease had been prepared by Mr. Bourgeois, which was offered in evidence and marked Exhibit C 1? 10

A. Yes, sir.

Q. And that was after you had met Mrs. Charlton and gone over the lease with her?

A. Yes, sir.

Q. And after that you went to her and asked her what would she take to sell out?

A. Yes, sir. 20

Q. When was it that you went to her and asked her what she would take?

A. Well during the week, from the first to the sixth.

Q. Was the tenant to pay you \$4,000 a year?

MR. BOURGEOIS: Objected to. It matter not what they may have an opportunity to rent it to some other person for.

MR. HIGBEE: We wish to show that that was the reason why they failed to execute this lease.

THE VICE CHANCELLOR: I do not think it has any pertinence, because if the defendant company was bound to have leased to the complainant, the motive which induced it to refuse to perform its duty would not affect the matter.

Q. You referred to the option of Mrs. Charlton, what do you understand by an option?

A. The agreement that both Mrs. Charlton and myself, on behalf of the Columbia Real Estate Company
10 signed.

Q. You mean by the option the agreement C 2 here shown you?

A. Yes, sir.

Q. You afterwards on behalf of the Columbia Real Estate Company, caused a lease to be prepared as called for in that option, didn't you?

A. I started to have the lease prepared at once after the agreement was made.

Q. Who prepared that for you?

20 A. Mr. Bourgeois.

Q. And the lease which is offered in evidence and marked Exhibit C 1, is the lease which you had prepared?

A. It so appeared, yes.

A. And that embodied the terms as you had directed Mr. Bourgeois to draw it, didn't it?

A. I presume so, yes.

Q. And you saw that, you say, in Mr. Bourgeois' office?

A. Yes.

Q. And read it?

30 A. Yes.

Q. And you say also saw it and went over it with Mrs. Charlton?

A. Yes.

Q. When was that?

A. I don't know that I went over it with Mrs. Charlton, that may have been the case, at any rate the terms were agreed upon, there is no—

Q. Did you ever tender to Mrs. Charlton a lease embodying the terms in that lease, signed by the Columbia Real Estate Company?

A. I did not.

Q. Or by you as its agent?

A. I did not.

Q. And demand the amount due under the terms of that? 10

THE VICE CHANCELLOR: There is no question about that, they did not, they say, and were not obliged to. That is their contention.

Q. Did you ever ask any security, other than what was offered by Mrs. Charlton, that is ever ask Mrs. Charlton?

A. No, I was waiting for her to tender it.

Q. You say that you told Mrs. Charlton at one time you would take a note for the first year's rent if it was such a note as could be put in the bank. Is not the note Mrs. Charlton; endorsed by Oliver H. Guttridge, one that would be accepted by any bank in Atlantic City, or nearly every bank? 20

A. I didn't say so.

Q. Did you ever try?

A. Oh, no, sir.

Q. You know Mr. Guttridge well?

A. Yes, sir.

Q. Is he not a man of large means, large estate?

A. I didn't say so. 30

Q. Do you know what his business is?

A. Yes, sir.

Q. What is it?

A. Papering and painting.

G. Is he not a plumbing and hardware contractor and builder?

A. Well he has a store on Atlantic avenue exhibiting wall paper and painting, I didn't know that he was a contractor.

Q. Is he not a contractor and builder of large capacity?

A. He does that occasionally, but I didn't know it was his special business.

10 Q. Don't you know that he is a man worth anywhere from fifty to a hundred thousand dollars?

A. I do not.

Q. Is he not part owner in a large brick plant at Mays Landing?

A. I did not know that.

Q. Did you ever make any inquiry as to his wealth?

A. Yes.

Q. From whom?

A. I spoke to Mr. Newton and said—

20 Q. No. Did you make inquiry?

A. Yes, sir.

Q. Did you make any inquiry among the bank people in Atlantic City?

A. No.

Q. You said that one of the reasons you wanted to demand security was, or get clear of this lease was, because you didn't think Mrs. Charlton had the money; you say, I think the language was, plainly that it was going to be a fizzle?

30 A. Yes, sir.

Q. Didn't you know that Mrs. Charlton has been running a hotel in Atlantic City, for which she paid \$11,000 a year rent, at the same time?

(Objected to.)

THE VICE CHANCELLOR: He may have misjudged her, but what if he did.

MR. HIGBEE: I agree with your Honor, I don't think it has any effect.

Q. When did you return to Mrs. Charlton your check of \$100?

A. Immediately after the 15th of June.

Q. And she returned it back?

A. Yes, sir.

Q. Unused?

10

A. Yes, sir.

Q. Did you ever tender her the \$100 in cash?

A. My employe tendered it to her.

Q. How do you know that?

A. I proved it here.

Q. Do you know it of your own personal knowledge, did you see him tender it?

A. No.

Q. What is his name?

A. Lew Steinbecker.

20

Q. Is he here?

A. Yes, sir.

Q. Now you stated the details that were referred to in the receipt signed 7th of May, referred to the amount of rent, the premises, that is what you meant by the word details?

A. Yes, sir.

Q. Is that all you mean by that word?

A. That is all.

Q. Was there anything to be agreed upon as to how the rent was to be paid, or the matter of security or erection of buildings or anything of that kind, was there anything said about that? 30

A. The plans were to be submitted to us, in fact had been submitted and approved, that is the reason there was nothing said about that; they had submitted the plans and they were satisfactory, so there is nothing in the agreement about that.

Q. Then as a matter of fact, on the 7th day of May, when this receipt of \$100 was given and \$100 received, there was conversation that took place between you and Mrs. Charlton in relation to her building upon these
10 premises?

A. Undoubtedly.

Q. And in relation to the company buying at the expiration of the term?

A. Well, all the conversation that took place, and all the agreement at that time, I on the very, same day embodied them in the agreement.

Q. Just answer my question, there was a discussion at that time in relation to her building, you say?

A. Yes.

20 Q. Was there any discussion as to how you were to purchase, how the valuation of the building should be fixed at the end of the term?

A. I don't think there was at that time.

Q. When was that discussion?

A. Previous.

Q. Wasn't it discussed afterwards then?

30 A. The plans, they were submitted before hand, in fact, the plans you might say, started by us, and completed by her, were submitted, and we agreed that they would be all right, would be satisfactory, as there was nothing said about that, when the final agreement was reached it was understood that these plans were to be carried out.

Q. It was understood that these plans were to be carried out?

A. Yes, sir.

Q. So you didn't put it in the agreement of May 7th, it was already understood.

A. Yes, sir.

Q. Is that the idea?

A. Yes, sir.

Q. (By the Vice Chancellor): And that understanding was not in the writing, it was not in the agreement of 10 May 7th?

A. It was not in that agreement.

Q. (Further Cross): But you had that inserted in the lease, you told Mr. Bourgeois to insert it in the lease?

A. The lease will speak for itself.

THE VICE CHANCELLOR: What lease?

MR. HIGBEE: The lease marked Exhibit C 1.

THE VICE CHANCELLOR: The unexecuted lease signed by Mrs. Charlton but not executed by the company?

20

MR. HIGBEE: That is it.

Q. Then when you speak of the details in the receipt of May 7th, you mean other than the details of the mere matter of the size of a lot, description of the lot, do you not?

A. I understand that I had every other detail covered in the agreement.

Q. You understood at the time of giving the receipt that you had every other thing covered in the agreement, is that it?

30

- A. Yes, sir.
- Q. Then the agreement had been executed before the receipt of \$100 was executed, is that it?
- A. At the same time.
- Q. They are simultaneous?
- A. Yes, sir.
- Q. One and the same transaction?
- A. Yes, sir.
- Q. It was the understanding that you were to give
10 Mrs. Charlton a lease of course?
- A. Yes, sir, and prepared to give it.
- Q. (By the Vice Chancellor): I understood you to say that you had before the execution of this memorandum agreement of May 7th, Exhibit C 2, a conversation with Mrs. Charlton relative to her improvement of the premises, and to the taking by the company of those improvements at an arbitration valuation at the end of the term?
- A. Yes, sir.
- Q. That was by parol, a word of mouth agreement?
20 A. Yes.
- Q. No writing had ever been drawn which mentioned that understanding?
- A. No writing.
- Q. You say there was no details of the description of the premises which was as yet unsettled, but was to be settled?
- A. Yes, sir.
- Q. Was anything said other than expressed in the agreement, as to the nature of the security to be given for the
30 rent?
- A. Nothing.
- Q. Then those three matters remained unexpressed on the face of the agreement, except that one in reference to the security?
- A. Yes, sir.

THE VICE CHANCELLOR: Now I understand, gentlemen for the complainant, you claim the right to enforce the agreement whereby this lady was to be protected for improvements she put upon the premises, by specific agreement, that at the end of her term, she should be compensated for them, made by her and at her expense, by as arbitration valuation, in substance as you allege in your bill; that is the agreement you allege?

JUDGE ENDICOTT: That is part of it.

THE VICE CHANCELLOR: That element is by parol. 10

JUDGE ENDICOTT: Yes.

THE VICE CHANCELLOR: You do not stand upon the enforcement of the agreement expressed by C 2, but by the agreement expressed in C 2 with the added parol undertaking entered into by the company, that they were to compensate her for improvements at the end of the term?

JUDGE ENDICOTT: We do stand on both agreements, as far as that goes.

THE VICE CHANCELLOR: But in addition to that you claim a parol element which you claim the right to set up and have enforced here? 20

JUDGE ENDICOTT: Yes, and we claim that as to the arbitration that is a matter of writing under date of May 6, 1901, which they accepted.

THE VICE CHANCELLOR: I want you now to show me any place where there is any written agreement signed by the defendant company, or anybody else authorized to

act for it, whereby they agreed that the lady may make improvements to the premises, and that they will pay for the improvements at the end of the term upon arbitration value.

JUDGE ENDICOTT: I was going to say that in the lease and agreement, C 1, and the duplicate which was signed but not delivered.

THE VICE CHANCELLOR: You do not claim for that any force of effect, as having bound them, without any
10 delivery do you?

JUDGE ENDICOTT: We claim that they assented to these terms.

THE VICE CHANCELLOR: You are seeking then, to get for this lady a decree that the defendant shall make and deliver to her a lease obligating the defendant company at the end of the term to pay for the improvements which she may put on the premises at arbitration value,—to that extent you are seeking then to enforce parol contract?

JUDGE ENDICOTT: That is true.

20 THE VICE CHANCELLOR: And that you say you are entitled to it on the ground of part performance?

JUDGE ENDICOTT: Yes we paid \$100 and had plans made and incurred expenses.

THE VICE CHANCELLOR: I wanted the exact status upon which the complainant bases the case. Any further examination of this witness?

Q. (By Judge Endicott): The letter of Mrs. Charlton to under date of May 6, refers to a letter which you had written under date of May 4; have you a copy of that letter?

A. I have not.

RE-DIRECT.

Q. Did Mrs. Charlton ever expend any money upon the premises in suit.

THE VICE CHANCELLOR: She said she did not, herself, all she did was to pay the architect for plans. 10

LEWIS STEINBECKER, Sworn for Defendant.

DIRECT EXAMINATION.

BY MR. BOURGEOIS:

Q. You reside where?

A. Atlantic City.

Q. And you are acquainted with Mr. Bergman?

A. Yes, sir.

Q. And also with Mrs. Charlton in this suit?

A. Slightly.

Q. You know her by sight? 20

A. Yes, sir.

Q. You know who she is.

A. Yes, sir.

Q. Did you call on Mrs. Charlton some time after the 15th of June last year?

A. Yes.

Q. For what purpose?

A. To return her \$100 to her.

Q. What did you do?

A. Well. I went there two or three times, finally I got an audience with Mrs. Charlton and I told her I have \$100 I would like to return to you from Mr. Bergman; that Mr. Bergman had sent to you, claiming that you had not come up with your agreement with the company; she refused to take the money claiming that—

10 JUDGE ENDICOTT: Objected to.

Q. What did she say?

A. Saying she thought she could get more out of it. She went on in that strain right along, would not take the money under any consideration, that she was advised that she didn't have to take it, and that she could get more out of it by not taking the money.

Q. When was this?

A. It was on Friday I believe, the 21st day of June.

Q. 1901?

20 A. Yes, sir.

CROSS EXAMINATION.

BY MR. HIGBEE:

Q. Didn't Mrs. Charlton tell you that she would have the money ready for him on the first day of July?

A. No, sir.

Q. Didn't say anything about it?

A. No, sir.

Q. Where did you see her?

A. In a room at the hotel Charlton.

MR. BOURGEOIS: Did I testify that I had no authority to accept tender of the money?

THE VICE CHANCELLOR: I think you did.

DEFENDANT RESTS.

SALINA A. CHARLTON, recalled in rebuttal.

DIRECT EXAMINATION.

BY MR. HIGBEE:

Q. You know the witness who has just been on the stand?

A. I do. 10

Q. Did he call upon you on the day which he said he did?

A. Which day was that?

Q. The 21st of June.

A. Yes, sir.

Q. Did he see you in a bed room at the hotel Charlton?

A. He did the last Friday in June.

Q. Did he tender you \$100?

A. No, sir.

Q. What, if anything, was said in reference to this transaction? 20

A. He sent up his name and I didn't know who it was, and they told me a messenger from Mr. Bergman; I said allow him to come up, and he came up and he said Mr. Bergman wanted to know what you are going to do about the place. I said to tell Mr. Bergman on the first of July the lease calls for the payment of the money, and I will tender him the cash as he refused to take the security.

CROSS EXAMINATION.

BY MR. BOURGEOIS:

Q. Didn't he offer you \$100 at all?

A. No, sir; I didn't see it at all, he never spoke of them.

Q. Did you say that you would not accept the return of the \$100?

A. He never offered it.

Q. Did you tell him you would not accept the return of the \$100?

10 A. Nothing was said about it.

Q. On your part or his?

A. No.

Q. You received Mr. Bergman's check sometime about the 15th of June?

A. I didn't receive it.

Q. Who received it for you?

A. No person received it, it came to the house and I sent it back.

20 Q. It came to the house and after you saw what it was you would not accept it?

A. No.

Q. You received it but didn't accept it?

A. I didn't accept it, that is right.

Q. That is all.

COMPLAINANT RESTS.

CASE CLOSED.

IN CHANCERY OF NEW JERSEY.

Between
Salina A. Charlton,
Complainant,
and
Columbia Real Estate Com-
pany
Defendants.

} On Bill, Answer,
and Proofs.
Opinion.
Replication

The bill in this case is filed to compel the specific performance of an agreement alleged by the complainant to have been made by the defendant Company, for the lease under special terms, of a lot of land situate in Atlantic City. 10

The complainant alleges that by a contract made between herself and the defendant Company, the latter agreed to lease to the complainant the lot of land in question with the privilege of a fifteen foot entrance way to the demised premises, and the use of the doors across the entrance way, for the period of ten years, from June 15, 1901, at the annual rental of Twelve hundred dollars. That it was expressly agreed that at the expiration of the lease, the defendant Company should purchase all improvements erected on the premises by the complainant, at a price to be fixed by three arbitrators, and that in the meantime said buildings and improvements should stand as security for the rent to become due during the term. That she paid one hundred dollars to the defendant Company on account of the rent, for which the defendant gave her a receipt. That she had 20

the privilege of paying the rent in cash or of furnishing security for the same, at her pleasure. That in conformity with the agreement, she delivered to the attorney of the defendant Company, two promissory notes, one for \$500 payable in two months from date, and one for \$6,000 payable in three months from date, both endorsed by a citizen of Atlantic City of large wealth and good financial standing, and that at the same time she delivered to him an agreement and lease which had been prepared under the directions of the defendant Company, which agreement was executed by her. The promissory notes and the agreement executed by her, were, she alleges, retained from the 21st of May, 1901, until the first of June, when they were returned to her, the Company having refused to accept the suretyship of the endorser. The refusal of this security and to deliver possession, the complainant alleges was due to the fact that the defendant Company had found another applicant for the premises at a higher rental.

The complainant further avers that she subsequently tendered to the attorney of the defendant Company, eleven hundred dollars, the balance of the rent for the first year, and demanded possession of the property, and that the attorney declined to receive the money, telling her he had no authority, and sent her to the agent of the defendant company, and that on the third day of July, 1901, she tendered the \$1,100 to the agent of the defendant company, and demanded possession of the property which he refused. She alleges that she then caused a notice to be served on the defendant company on July 10, 1901, demanding possession stating that she would sue for specific performance if it was refused to her, and notifying the defendant company that the \$1,100 rent would be paid whenever they were willing to accept it, which offer was again refused.

The complaint tenders herself ready to pay the rent reserved by the agreement, and prays that the defendant may

be decreed to specifically perform the agreement set forth in the bill, and execute the lease which the defendant Company had prepared and which is already signed by the complainant, and to deliver possession of the property to the complainant, and for further relief.

The Columbia Real Estate Company is the sole defendant. It files its answer denying all the allegations in the bill, except those specifically in the answer admitted. The defendant Company admits that negotiations were opened between the parties, looking towards the leasing of the property in question, and that a duplicate copy of a proposed lease was prepared, but avers that it was never executed by the defendant Company, nor delivered. The defendant admits that when the negotiations for a lease were begun the complainant paid \$100, which the defendant says it tendered back to the complainant on the second day of July, 1901, when it appeared she was unable to carry into effect the agreement for leasing, and that all negotiations between the parties were then and there declared to be off. The defendant avers that at the time of the first negotiations, the rental money was agreed to be paid in cash; that complainant asked the defendant to accept notes which the defendant consented to do if secured by a satisfactory endorser, which the defendant insists was not furnished. The defendant denies the tender of \$1100, on July 1, 1901, and avers that the complainant neglected and refused to pay the balance of the rental money, and further avers that the defendant Company, before the alleged tender handed back to the complainant the \$100, which had been paid and notified complainant of defendant's intention to proceed no further in the matter of leasing. The defendant further says that it has leased the premises to other parties who are now tenants of defendant, actually in the possession of the premises.

Issue was joined on these pleadings and the cause came to final hearing.

MR. A. B. ENDICOTT for complainant.

MR. G. A. BOURGEOIS for defendant.

GREY, V. C.

The bill seeks the specific performance of an alleged agreement for the leasing for ten years of a lot of land situate in Atlantic City, admittedly owned by the defendant, the Columbia Real Estate Company. The agreement is not alleged in the bill to have been in writing. The defence is, First, that no agreement between the parties touching the alleged leasing was ever finally concluded; it is admitted that negotiations were opened and that they had made some progress towards an agreement, but it is denied that any concluded contract was made between the parties. Secondly, The defendant insists as the claimed agreement is for a lease for a ten year term, that it must have been evidenced by a writing signed by the lessor or by his lawfully authorized agent, and that no such writing has been shown, etc., nor any equitable excuse for its non-production.

The statute of frauds in its first section prescribes the effect which shall be given to leases of land for a longer period than three years, when they are not put in writing, signed by the parties so making or creating the same or their agents thereunto lawfully authorized by writing. The phrasing of this clause of the statute is in the words of the following:

“That all leases, estates, interests of freehold or term of years, or any uncertain interests of, in, to, or out of any messuages, lands, tenements, made or created, or hereafter to be made or created, by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of

leases or estates at will only, and shall not either in law or equity, be deemed or taken to have any other or greater force or effect any consideration for making any such parol leases or estates notwithstanding except nevertheless all leases not exceeding the term of three years form the makethereof." (Genl. Stat. p. 1602 No. 1.)

The bill of complaint does not allege that the contract whereby the defendant Company "agreed to lease," was in writing. The frame of the bill shows that the agreement that a lease should be given, and the lease itself, were in the contemplation of the parties several and distinct transactions. The proofs also show that there were negotiations between the parties, preliminary to an intended leasing. These preliminaries are to an imperfect extent, evidenced by writings. The following are copies of these preliminary writings. 10

Exhibit C 2. "Agreement made this Seventh day of May between Columbia Real Estate Co., of the first part and Mrs. Charlton, of Atlantic City, of the second part, Witnesseth, that the party of the first part will make a lease for ten years for a certain building on their ground in rear of stores to contain about eighty feet in width by about one hundred feet in depth with a fourteen foot entrance from Boardwalk, the consideration to be a rental of twelve hundred dollars per annum payable yearly in advance, lease to date from June 15th, 1901. The party of the first part to be put to no expense whatever in this matter, and security to be given for the rent. 20

COLUMBIA REAL ESTATE CO.,

by H. G. BERGMAN, Agt. 30

S. A. CHARLTON."

Witnessed by IDA J. ATKINSON.

Exhibit C. 3. "Received Atlantic City, May 7th, 1901, of Mrs. S. A. Charlton, one hundred dol. on acc. of agreement for lease to be made to Mrs. Charlton, for which details are to be settled on.

COLUMBIA REAL ESTATE CO.,

By H. G. BERGMAN, Agt."

These papers were signed and passed at the same time from the defendant company's agent to the complainant. As they relate to the same transaction, they must be deemed
10 to be parts of one instrument. Exhibit C. 2 is a mem. of an agreement for a lease. Exhibit C. 3 is a receipt for \$100 on account of that agreement.

The effect of these two writings shows on the fact of them that the parties in their negotiations had not by these writings yet arrived to any contract the terms of which had been definitely agreed upon between them. The receipt in express words recognizes this, in the phrase, referring to the lease "for which details are to be settled on." The proof shows that when these mem. of May 7th were signed,
20 the details of the lease had not yet been finally "settled on." and were not expressed in those agreements. Plans for buildings to be erected by the lessee had been submitted and approved, but certain dimensions and angles of the premises which might call for a survey, had not yet been ascertained, and a method of compensating the proposed lessee for her expenditures in improvements, by paying her a price to be fixed by an arbitrator, was yet under discussion, as details of the proposed lease which were yet to be settled. None of these incidents of the proposed lease were set out
30 in the written mem. of May 7th.

The two mem. of May 7th, are the only writings signed by or for the defendant company. These instruments themselves, as well as the evidence of the negotiations of the parties as to details to be settled, show, that

when they were created, no concluded contract had yet been made. No other written papers of any kind was ever "signed by the parties making or creating the same, or by their agents thereunto lawfully authorized in writing," &c.

A comparison of the contract of lease which the bill seeks to have decreed to be made, with these two writings, also shows that the complainant is not asking for the making of a lease, the terms of which are set forth in these two writings, but for quite a different instrument. The bill of complaint prays that the defendant company may be decreed specifically to perform the agreement therein set forth. The agreement for a lease set forth in the bill, contains a number of terms, dealing with matters of substance, which are not in any way referred to in the previous written memoranda. 10

The bill of complaint demands a lease which shall convey "the use of the doors across the entrance way," and which shall oblige the defendant company to "purchase all improvements erected on the premises by the complainant at a price to be fixed by three arbitrators, and that in the meantime the said buildings and improvements should stand as security for the rent to become due during the term." That the complainant should have "the privilege of paying the rent in cash, or of furnishing security for the same at her pleasure." 20

None of these incidents, imposing obligations upon the defendant company of great importance (some of which are essentially part of the lease) are included within the two writings signed by the defendant company's agent, and above recited. Nowhere either in pleadings, evidence or argument, is it intimated, that the complainant would in this cause, accept a decree for the making of a lease which did not contain these incidents, on the contrary it is insisted that the decree shall be for a lease on these terms. We must therefore look elsewhere than to the writings signed by 30

the defendant company to find the terms of the lease which the complainant insists the defendant is bound to make.

These terms are expressed in a prepared draft of a lease which was never executed by the defendant company, but a copy of which, having been drawn in counterpart, was sent unsigned to the complainant; the duplicate being retained by the defendant company. At this stage of the negotiations differences arose between the parties as to security offered for the rent by the complainant. The prepared
10 draft was never signed and delivered by the lessor. The complainant was told that the "negotiations were all off," and that the defendant agent could not sign the lease. The \$100 which the complainant had paid was sent back to her.

The complainant offered in evidence the copy of this unsigned draft of a lease which was sent to her and it has been marked Exhibit C. 1. The complainant (proposed lessee) has signed it, but the defendant (proposed lessor) has not. A cursory examination of this draft of lease, affords additional proof that the previous written memoranda of May
20 7th, 1901, signed by the defendant company, did not express a concluded contract between the parties, and that after they had been made, there were further negotiations, or if no further negotiations, yet there were terms of the letting already agreed upon, which were not included in the written mem. though both parties recognized their essentiality as component parts of the lease. These were the "details to be settled on," which were referred to in the mem. receipt. It is on this promised but unexecuted lease, which the complainant insists by her bill of complaint
30 was agreed to be given as a lease of the premises in question.

This unexecuted paper contains all the above recited terms as to the use of doors and obliging the defendant lessor to purchase improvements at an arbitrated price, and making them meanwhile stand as security for the rent, and

giving the lessee the privilege of paying the rent in cash or of furnishing security therefor at her pleasure.

This unexecuted draft of lease has of itself no efficacy as the concluded agreement of the parties, because it was never executed by the lessor. The parties got into a dispute before that was done about the character of the security for the rent, and the proposed lease was declared off as above stated.

Nothing in all the proofs shows that there ever was a time when as to each incident of the proposed contract, OI the parties came to be of the same mind, and finally contracted each with the other that such a lease should be made.

The Court of Appeals declared in the case of *Brown vs. Brown*, 6 Stew. 650, that when specific performance is sought, the terms of the contract must have been completely determined and definitely ascertained between the parties. If it be doubtful whether the contract was finally closed, equity will not interfere.

The utmost effect that can be ascribed to the two mem. of May 7th, is that they amounted to an agreement to enter 20 upon an agreement, upon terms to be afterwards settled between the parties. On the face of the receipt of that date is an express declaration that details of the lease were yet to be settled. Lord Wensleydale in *Ridgway vs. Wharton*, 6 H. L. C. 305, declares such an agreement to be a contradiction in terms, and that it is absurd to say that one enters into an agreement until the terms of that agreement are settled.

Leaving the effect of the written mem. of May 7th which were signed by the defendant company only all the proofs 30 show that it was always in the contemplation and intent of both parties that a written lease of some sort should be executed by the complainant as well as the defendant which should contain clauses severally binding upon each of them. It was the execution of this instrument by the signature of

both parties, and its delivery, which it was intended should conclude the bargain. This appears by the fact that the draft of the proposed lease contained various terms not included in the previous written mem. but imposing serious obligations upon the parties. These were the details, which, when the mem. of May 7th was made, were yet to be settled on. This draft of lease never was executed and delivered by the lessor. There never was any complete determination and definite ascertainment of the terms of the contract.

10

A further objection by defendant is that the unexecuted draft of lease is obnoxious to the statute of frauds as a basis for a decree for specific performance such as is here prayed. This draft of lease purports to convey a ten years term in the lands: It is not in writing signed by or for the party making it (the lessor). The statute prescribes that such an agreement, even if finally concluded between the parties, but not expressed in a signed writing, shall have only the force and effect of a lease at will. This the complainant is

20 not willing to accept. She asks that she be decreed to have a lease for a ten years term, with all the tending advantages of privilege to erect improvements which the defendant company shall be obliged to pay for at an arbitrated price. The statute is a bar to any such decree.

The written mem. being ambiguous in their phrasing, considerable latitude has been allowed, introducing parol proof as to the attending negotiations of the parties, in order to ascertain what was meant by "details to be settled on." Little or no proof has been offered showing that the complainant has done anything in part performance of what she claims was a concluded contract, party in parol. She paid \$100 which has been returned to her. She has since tendered or offered the first year's rental, but this tender was based on the assumption that she had a concluded and binding contract with the defendant. In this she was mis-

30

taken as is above shown. She never entered into possession of the premises, nor made any of the contemplated improvements. She did expend some money to get plans from an architect. None of these incidents constitute such a part performance of a contract as entitled the complainant to the favorable consideration of this Court by a decree for specific performance. For all loss or inconvenience she may have suffered she may, if she has any right, be fully and adequately compensated by an action at law for damages.

There is an additional objection which this Court ought 10
to consider on this application for relief by specific performance. It appears in a letter of the complainant's solicitor offered in evidence for complainant, that before this suit was brought, he was notified that the defendant company had rented the premises in dispute to other parties. There is other proof containing like suggestion. No such other persons have been brought in as defendants in this cause. It may be that such persons are bona fide holders without notice of the alleged equity of the complainant, so that a decree in this suit against the defendant company for specific performance, may be of no avail against such other 20
parties.

If this condition should appear, this Court would refuse specific performance, even if, as against the defendant company, the complainant was shown to be entitled to it. *Johnson vs. Hubbell*, 2 Stockt, 332.

Upon the whole case the complainant's bill should be dismissed with costs.

A true copy.

E. C. STOKES, 30
Clerk.

IN CHANCERY OF NEW JERSEY.

Between
Salina A. Charlton,
Complainant,
and
Columbia Real Estate Co.,
Defendant. } On Bill, &c.,
Final Decree.

This cause coming on to be heard at the present term of
the Court of Chancery, held at the State House, in the city
10 of Trenton, in the presence of Allen B. Endicott, and E. A.
Higbee of Counsel with the complainant, and George A.
Bourgeois of Counsel with the defendant, and the pleadings
and proofs having been read and the arguments of the re-
spective counsels having been heard and considered, and the
Court having duly considered the said pleadings, proofs
and arguments, and it appearing to the Court that the com-
plainant is not entitled to the relief sought and prayed for
by her in her bill of complaint.

It is on this twenty-eighth day of April, one thousand
20 nine hundred and two, by William J. Magie Chancellor of
the State of New Jersey, ordered, adjudged and decreed
that the complainant's bill be and the same is hereby dis-
missed with costs.

W. J. MAGIE,
C.

Respectfully advised,
M. P. GREY,
V. C.

A true copy.
E. C. STOKES,
Clerk.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Salina C. Charlton, Compt. and Appellant. and Columbia Real Estate Co., Defendant and Appellee.	} On Appeal from Trial. Decree of Chancellor.
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To the Honorable, the Court of Errors and Appeals of
the last resort in all causes:

The petition of Salina A. Charlton, the Appellant, in 10
the above stated cause respectfully shows, that your pe-
titioner finds itself aggrieved by a final decree made in the
Court of Chancery by His Honor, William G. Magie,
Chancellor of the State of New Jersey, dated the eighth
day of April, nineteen hundred and two, wherein your
petitioner was complainant, and the Columbia Real Es-
tate Company, a corporation under the laws of the State
of New Jersey, Defendant, in this respect, to wit: That the
said decree adjudged that the Complainant, your pe-
titioner was not entitled to the relief sought and prayed 20
for by her bill of complaint, dismissed said bill.

Your petitioner humbly appeals from said decree of the
Chancellor and from each and every part thereof upon
the ground, that the same is erroneous, for that it de-
crees as aforesaid, whereas it should decree that the Com-
plainant's prayer be granted.

Your petitioner therefore prays, that the decree of the
said Chancellor may be in all respects reversed, set aside

and for nothing holden, and that your petitioner may have such relief in the premises as to this honorable Court shall seem meet.

ALLEN B. ENDICOTT,
Solr. for and of Counsel with Appellant.

COURT OF ERRORS AND APPEALS.

10 Salina A. Charlton,
Appellant, } On Appeal.
and }
Columbia Real Estate Co., } Answer to Petition.
Respondent. }

The answer of the above named respondent to the petition of appeal of the above named appellant.

This respondent acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless says and admits, that a decree was on the twenty-third day of May, nineteen hundred and two, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent is advised and believes that said decree
20 of, this respondent is advised and believes that said decree is agreeable to equity and prays that same may be affirmed, with costs to be adjudged to this respondent.

G. A. BOURGEOIS,
Sol'r and Counsel.

EXHIBIT C 1.

This Indenture made the day of A. D.,
Nineteen Hundred and One. (1901.) between Columbia
Real Estate Company, a corporation of the State of New
Jersey, of the first part, and Salina A. Charlton of Atlantic
City, New Jersey, of the second part. Witnesseth, that the
said party of the first part has let and by these presents
does grant, demise and to farm let unto the said party of the
second part all that certain building situate in the rear of
the stores fronting on the Boardwalk, Beginning at a point 10
distant five hundred seventy-two feet southerly of Pacific
avenue, one hundred fifty feet westerly from Missouri ave-
nue and extends thence, (1) southerly parallel with Missou-
ri avenue sixty-two feet, (2) easterly at right angles to
Missouri avenue ten feet. (3) southerly parallel with Mis-
souri avenue fifty-one feet. (4) easterly at right angles to
Missouri avenue eighty feet. (5) northerly parallel with
Missouri avenue one hundred thirteen feet. (6) westerly at
right angles to Missouri avenue ninety feet to the place of 20
beginning, together with the privilege of the free and un-
obstructed use of a fifteen foot entrance way, where the
same is now located, with the privilege of the party of the
second part having the exclusive use of the doors across
said entrance-way for the purpose of protecting the prem-
ises above described. With the appurtenances from June
15th, 1901, to June 15th, 1911.

At the rent or sum of twelve hundred (\$1,200) dollars
per annum, to be paid as follows:—For the year 1901
\$1,200, upon the signing of this lease. For each succeeding 30
year after the year 1901 the sum of twelve hundred
(\$1,200) dollars on the first day of July of each and every
year.

Provided, that if any rent shall be due and unpaid for
the space of three months or if default be made in any of the

covenants herein contained, then this lease shall cease and become void, and it shall be lawful for the said party of the first part, without notice and without any demand for said rent, to re-enter the said premises and remove all persons therefrom, or to proceed by action for the recovery of the possession thereof, or otherwise however.

And the said party of the second part does hereby covenant and agree, to and with the said party of the first part, to pay the said rent in the proportions and upon the conditions aforesaid; nor to permit any person or persons to occupy the same, or any part thereof, or use nor permit any part thereof to be used for any other purpose than a bathing establishment and letting rooms for the patrons thereof, and also at the expiration of said term, to yield up and surrender the possession thereof, with the appurtenances, in as good state and condition as the same now are, or may be put into by the said party of the first part, reasonable wear and tear and accidents happening by fire or other casualties excepted.

20 It being expressly understood and agreed that at the expiration of this lease or re-newal thereof, the party of the first part shall purchase from the party of the second part all improvements erected on said premises by the party of the second part at the price to be fixed by three arbitrators, one to be selected by the said party of the first part; one to be selected by the said party of the second part, and they two to select the third, whose decision as to the value of said improvements shall be final.

30 It being further understood and agreed that the party of the second part shall furnish security to the party of the first part for the payment of the rent for each succeeding year after the first on or about the fifteenth day of June of each year, and that the building and improvements erected on said premises by the party of the second part shall at all

times be subject to the lien for said rent for the whole of said term which said lien shall be prior to the lien of any chattel or any other incumbrance placed thereon by the party of the second part.

And the said party of the first part does covenant that the said party of the second part, on paying the said rent, and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

In Witness Whereof, the said parties have interchangeably set their hands and seals hereto the day and year first above written. 10

S. A. CHARLTON.

Signed, sealed and delivered in the presence of

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

Be it remembered that on this _____ day of May, 1901, before me, a _____ personally appeared William Heyde, who being by me duly sworn, on his oath says that he is Secretary of Columbia Real Estate Co., the grantor within named, and that Arno Leonhardt is the President; That deponent knows the common or corporate seal of said grantor and that the seal annexed to the within deed of conveyance is such common or corporate seal; That the said deed or conveyance was signed by the said President and the seal of said grantor affixed thereto in the presence of deponent: That said deed was signed, sealed and delivered as ent: That the said deed was signed, sealed and delivered as and for the voluntary act and deed of the said grantor for the uses and purposes therein expressed, pursuant to a resolution of the Board of Directors of said grantor, and at the execution thereof this deponent signed his name thereto as witness. 20 30

Sworn and subscribed the day and year aforesaid.

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

Be it remembered that on this _____ day of May, 1901, before me, a Master in Chancery of the State of New Jersey, personally appeared Salina A. Charlton, who I am satisfied is the person named in and who executed the foregoing instrument, and I having first made known to her the contents thereof she acknowledged that she signed, sealed and delivered the same as her voluntary act and deed for the purposes therein expressed.

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EXHIBIT C 2.

Agreement made this Seventh day of May between Columbia Real Estate Co., of the first part, and Mrs. Charlton, of Atlantic City, of the second part, Witnesseth, that the party of the first part will make a lease for ten years of a certain building on their grounds in rear of stores to contain about eighty feet in width by about one hundred feet in depth with a fourteen foot entrance from boardwalk, to consideration to be a rental of twelve hundred dollars per annum payable yearly in advance, lease to date from June 20 15th, 1901. The party of the first part to be put no expense whatever in this matter, and security to be given for the rent.

COLUMBIA REAL ESTATE CO.,
By H. G. BERGMAN, Agt.,
S. A. CHARLTON.

Witnesseth by
IDA J. ATKINSON.

EXHIBIT C 3.

Received Atlantic City, May 7th, 1901, of Mrs. S. A. Charlton One hundred dollars on acc. of agreement for lease to be made to Mrs. Charlton, for which details are to be settled on.

COLUMBIA REAL ESTATE CO.,
By H. J. BERGMAN, Agt.

EXHIBIT C 4.

Salina A. Charlton,
vs.
Columbia Real Estate Co. 10

ALLEN B. ENDICOTT,
Counsellor at Law.

Union National Bank Building.
Rooms 1, 2 and 3.

Atlantic City, N. J., July 10, 1901.

COLUMBIA REAL ESTATE COMPANY,
Atlantic City, New Jersey.

DEAR SIRS:

Mrs. Salina A. Charlton has retained me to enforce the performance of an agreement between your company and her, whereby your Company rented to her certain lands in Atlantic City near Missouri avenue for \$1,200.00 per annum for a term of ten years. 20

I learn through Mrs. Charlton that on the Seventh day of May, your Company received One Hundred (\$100.00) dollars on account of this rent and that you have since refused to accept the balance of the rent due and have refused to allow her to take possession of the property, because you have since rented it to other parties for a greatly increased rental. 30

On behalf of Mrs. Charlton I now demand the possession of the property and desire thus to advise you, if you refuse to put her in possession forthwith, that she will immediately institute proceedings for specific performance of her contract as well as for damages suffered by her because of the refusal of your Company to carry out its agreement with her .

The balance of \$1,100.00 rent which you refused on July 2nd, is still subject to your order and will be paid whenever
10 you are willing to accept it.

Yours respectfully,

SALINA A. CHARLTON,

By ALLEN B. ENDICOTT her Attorney.

EXHIBIT C 5.

Atlantic City, N. J., 5-6-1901.

COLUMBIA REAL ESTATE CO.,

Gentlemen.—Replying to your letter of May 4th would state, I will pay your the \$1,200.00 dollars rental per year for a ten years lease for all that building in rear of the
20 stores on the Boardwalk and extending from Columbia Place to the Columbia Cafe with a fourteen foot entrance thereto from the Boardwalk. Provided that at the expiration of this lease the Columbia Real Estate Co., will purchase the improvements placed on said premises by me during said term at a price to be fixed by arbitrators, one selected by me, one selected by the said Company, and they two to select a third, whose valuation shall be final. I am,

Yours truly,

S. A. CHARLTON.

