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BILL OF COMPLAINT.

Filed December 6, 1921.

In Chancery of New Jersey

To the Hon. Edwin R. Walker, Chancellor of the State of New Jersey:

Complainants, Charles Scherman and Samuel Feigelson, both residing in the Township of Metuchen, County of Middlesex, says:

1. That on the twenty-second day of October, 1921, they, the complainants entered into negotiations with Abraham Miller of Metuchen, New Jersey, for the purchase of the good will, lease and stock of merchandise in a confectionery and cigar shop owned by Abraham Miller at No. 399 Main street, Metuchen, New Jersey. That the purchase price therefor, was fixed between them in the sum of $8,000.00.

2. That in the employ of Abraham Miller and managing the business for him, was one Jack Stern, who was assisted at irregular intervals by his wife, May Stern, both of Metuchen.

3. That the complainants, as part of the negotiations towards the purchase of the business of Miller and realizing the danger of competition on the part of Miller's manager, entered into an agreement with Jack Stern and his wife, May Stern, hereinafter designated as defendants, whereby they, the defendants, agreed not to enter into a business similar to the one to be purchased by the complainants nor to be employed as servants, agents or attorneys, directly or indirectly in such competing business, a true copy of which agreement, is hereto annexed, made a part hereof and marked Exhibit A.

That the purchase and sale of the business by the complainants from Miller was entirely conditioned upon the

restrictive covenant, hereinabove set forth, whereby the Sterns would not compete nor assist in competition with the complainants, and that the complainants were unwilling to enter into the purchase of the business from Miller until satisfactory arrangements were made with Jack Stern and May Stern, his wife, as set out in Exhibit "A."

That when these arrangements were satisfactorily made between the complainants and the defendants, the complainants then entered into the purchase of the business above referred to, and took title to same, by a bill of sale dated the twenty-sixth day of October, 1921, which bill of sale also contains a covenant against engaging in a similar business on the part of Abraham Miller, a true copy of which bill of sale is hereto annexed, made a part hereof and marked Exhibit "B."

That from the twenty-sixth day of October, 1921, and until the twenty-sixth day of November, 1921, defendant Jack Stern was an employee of the complainants in the capacity of salesman, and residing on the premises.

Notwithstanding the covenants, promises and undertakings made by the defendants, as set out in Exhibit "A", the defendant, Jack Stern, did on or about the twenty-seventh day of November, 1921, open a confectionery, cigar and stationery business in the Post Office Building, in the Town of Metuchen, New Jersey, at a point not more than 200 feet from the business conducted by the complainants, where, together with his wife, May Stern, he engaged in the business aforesaid.

Since the aforesaid twenty-seventh day of November, 1921, the business of complainants has shown a marked falling off in receipts to the extent of about forty per cent. of their daily income, and by reason whereof, they have been seriously injured in their business, and are likely to suffer irreparable loss, damage and injury.

All of which actings, doings and pretenses of the said defendants are contrary to equity and good conscience,

and tend to the manifest wrong, injury and oppression of the complainants.

In consideration whereof, and for as much as the complainants are without adequate remedy at law, and can only obtain adequate relief in this Honorable Court.

To the end, therefor, that the said defendants may to the best and utmost of their knowledge, remembrance and information, full, true and perfect answer make to all and singular, the matters aforesaid, without oath, and more specially, that they may be restrained, by the order and injunction of this Honorable Court, from continuing to conduct a cigar, confectionery and stationery business in Metuchen, New Jersey, and in accord with the covenant made by them and that the complainants may have such further or other relief in the premises as the nature of the case may require.

May it please your Honor, the premises considered, to grant unto the complainants the State's writ of injunction issuing out of and under seal of this Honorable Court, to be directed to the said Jack Stern and May Stern, the defendants, restraining them from continuing to conduct the business they now conduct in Metuchen, New Jersey, and compelling them to strict compliances with the covenants and agreements entered into between them and the complainants and marked Exhibit "A," and also that the State's writ of subponea issued out of and under the seal of this Honorable Court directed to the said defendants, commanding them by a certain day and under a certain penalty therein expressed, to be and appear before your Honor in this Honorable Court, and then and there to answer all and singular the matters presented in the within bill of complaint, and to stand, to abide by, and perform such orders and decrees therein, as to your Honor shall seem meet, and as shall be agreeable to equity and good conscience.

And the complainants will ever pray, and etc.

BLATT & LESSER,
Solicitors for Complainants.

Exhibit "A" attached to Bill of Complaint..

WE, the undersigned, JACK STEIN, and MAY STEIN. his wife, in consideration of one dollar to us paid by CHARLES SCHERMAN and SAMUEL FEIGELSON, covenant and agree that we will not open in the City of Metuchen, State of New Jersey, a similar business A. Miller has in the premises known as #399 Main Street, in the City of Metuchen, State of New Jersey, and sold to the above SCHERMAN and FEIGELSON. We also covenant and agree not to be engaged in, nor in any manner, whatsoever become interested, directly or indirectly, in any business similar to the one hereby sold to SCHERMAN & FEIGLESON, in the City of Metuchen, State of New Jersey, and also agree not to be employed in this city in such a business. This obligation remains in force after the above mentioned store will be sold to other persons.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the 22nd day of October, in the year 1921.

(Signed)

J. E. STERN, (L. S.)
MAY STERN. (L. S.)

Signed and delivered in the presence of

(Signed) A. H. JAFFE.

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } *ss.*

On this 27th day of October, in the year 1921, before me personally came AARON H. JAFFE & MORRIS DEUTSCH, subscribing witnesses to the annexed document, with whom I am personally acquainted, and who being by me duly sworn said that they reside in the City of New York, that they were acquainted with Jack Stern and May Stern, and knew them to be the persons described in, and

who executed the said document and that they saw them execute and deliver to them the said AARON H. JAFFE & MORRIS DEUTSCH that they executed and delivered the same and that they, the said AARON H. JAFFE & MORRIS DEUTSCH thereupon subscribed their names as witnesses thereto.

(Signed)

AARON H. JAFFE,
MORRIS DEUTSCH.

(Signed)

DAVID SCHIFF,
(NOTARY SEAL) *Notary Public,*
N. Y. Co. #76.
New York Register #2116.

Exhibit "B" attached to Bill of Complaint.

KNOW ALL MEN BY THESE PRESENTS, That I,

ABRAHAM MILLER, residing in the Township of Metuchen, County of Middlesex, State of New Jersey, Party of the First Part, for and in consideration of the sum of EIGHT THOUSAND DOLLARS ($8,000.00), lawful money of the United States, to me in hand paid, at or before the ensealing and delivery of these presents by

CHARLES SCHERMAN & SAMUEL FEIGELSON, of the same place; Parties of the Second Part, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do I grant and convey unto the said party of the second part, their executors, administrators and assigns, my good will, title, and interest I have in and to my stationery, candy toys, sporting goods, and the Agency of the United Cigar Store Company, attached to the store located in the premises known as #399 Main Street, in the Township of Metuchen, County of Middlesex, State of New Jersey, including the entire stock (ex-

cept goods belonging to the United Cigar Store Co.) all the fixtures in the store contained, all the show cases and wall cases and all other articles, in the said store located without any exception, also my newspaper route to the said business attached, free and clear from any incumbrances and debts. Also have transferred, set over, and assigned to the parties of the second part, my lease I have on the store and the one I am about to get.

TO HAVE AND TO HOLD the same unto the said parties of the second part, their executors, administrators and assigns forever. And I do for myself, my heirs, executors and administrators, covenant and agree, to and with the said parties of the second part, to warrant and defend the sale of the aforesaid store, goods and lease hereby sold unto the said parties of the second part, their executors, administrators and assigns, against all and every person and persons whomsoever.

AND I DO FURTHER COVENANT AND AGREE, to and with the said parties of the second part, that I will not reestablish, re-open, be engaged in, nor in any manner whatsoever become interested, directly or indirectly, in any business similar to the one hereby sold as aforesaid, within the Township of Metuchen for a term of eight years from the dates of these present.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the 26th day of October in the year One Thousand Nine Hundred and Twenty-One.

(Signed) A. MILLER.

Sealed and delivered in the presence
of

(Signed) AARON H. JAFFE.

Bill of Complaint—Exhibit B.

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } *ss.*

On this 27th day of October, in the year 1921, before me personally came AARON H. JAFFE & MORRIS DEUTSCH, subscribing witnesses to the annexed document, with whom I am personally acquainted, and who being by me duly sworn said that they reside in the City of New York, that they were acquainted with ABRAHAM MILLER, and knew him to the the person described in, and who executed the said bill of sale and that they saw him execute and deliver to them, the said AARON H. JAFFE & MORRIS DEUTSCH, that he executed and delivered the same and that they, the said AARON H. JAFFE & MORRIS DEUTSCH thereupon subscribed their names as witnesses thereto.

(Signed)

AARON H. JAFFE,
MORRIS DEUTSCH.

(Signed)

DAVID SCHIFF,
(NOTARY SEAL) *Notary Public,*
N. G. Co. #76,
New York Register #2116.

Affidavit attached to Bill of Complaint.

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

SAMUEL FEIGELSON, of full age, being duly sworn upon his oath according to law, deposes and says:

I am partner of Charles Sherman, both of us residing in the Township of Metuchen, New Jersey. We together are complainants in the above cause:

1. That on or about the 9th day of October, 1921, through the agency of the New York Business Exchange, I went to the Township of Metuchen, in the County of Middlesex, New Jersey, with a view to the purchase of a stationery, tobacco, confectionery and sporting goods supply store, owned by one Abraham Miller, at 399 Main street, Metuchen, New Jersey.

2. We saw Mr. Miller and discussed with him the terms of purchase. We found that the place of business was being conducted and managed by one Jack Stern, an employee of Mr. Miller's, and with the assistance of his wife, May Stern, took care of the business and resided in the premises on the floor above the store.

At that time I told Mr. Miller that if we purchased the place of business it would only be on the conditions that he and his employees enter into an agreement with us that for a period of eight years they would not enter into a similar or competing business in the Township of Metuchen, either directly or indirectly, or as employees of others.

3. After discussing the various other terms we went back to New York City, where we were then residing.

4. On the 22nd day of October, 1921, my partner and I, together with Aaron H. Jaffe, and Morris Deutsch, and Sam. R. Jaffe, son of Aaron Jaffe, went to Metuchen to see Mr. Miller and to give a deposit upon the place of business. Before giving deposit, I asked Mr. Miller

whether he had arranged with Mr. and Mrs. Stern to sign the agreement restricting them from entering into business in accordance with my suggestion on my previous visit. Mr. Miller assured us that that would be done, and on that same day, and before we paid a deposit, Mr. Aaron H. Jaffe drew up the agreement marked "Exhibit A," a copy of which is attached to the bill of complaint, and this agreement was signed in the presence of all of the parties above mentioned by Jack Stern and his wife, May Stern, and witnessed by Aaron H. Jaffe.

The matter was fully discussed by the parties in interest with Mr. and Mrs. Stern, and they readily consented to the signing of the instrument aforesaid.

5. After same was signed, my partner and I paid a deposit of $1,000.00 by check to the order of Abraham Miller on account of the purchase price of $8,000.00. My partner and I then remained in the business in the Township of Metuchen until the 26th day of October, 1921, when Mr. Jaffe and his son and Mr. Deutsch again came to Metuchen to consummate the deal, at which time the bill of sale was drawn by Mr. Jaffe and delivered to my partner and me, and we thereupon paid the balance of $7,000.00, $6,000.00 by check and $1,000.00 by our note, payable to the order of Abraham Miller.

6. We retained the services of Jack Stern for a period from the 26th day of October, 1921, until the 26th day of November, 1921, in order to familiarize ourselves with the business.

7. On or about the 27th day of November, 1921, the defendants, Jack Stern and May Stern, his wife, opened up a store in the Post Office Building and four doors away from our place of business, where they sell cigars, stationery, tobaccos, confectionery and newspapers, and other articles, all of which are sold in direct competition with the business conducted by us, and which place of business they are still conducting.

Affidavit of Samuel Feigelson.

8. That together the defendants, by reason of their entering into the business above stated, have cut materially into the daily receipts of our business, to wit, where our receipts averaged $100.00 per day prior to the defendants engaging in the similar business, our receipts now average about $60.00 per day, with no cause for the diminution other than that of the competition of the defendants.

9. If the defendants are permitted to continue in their business in competition with us, our receipts and income will not be sufficient to meet the bills of our business and necessary drawings towards living expenses on the part of my partner and myself. My partner is married, while I support my parents.

10. We have paid the sum of $8,000.00 for the business on the basis of its $100.00 daily income, and our business for the purpose of sale today has already diminished on the income basis of valuation by a sum of about $3,000.00.

11. I state further that the defendant, Jack Stern, has for a period of nine months prior to our purchase been employed in the business which we are now conducting, and that during that time he has made the acquaintance of practically all the purchasers of the community. That by reason of his friendship and acquaintance with them he is in a position to further impair our business so that we are in danger of losing the moneys invested.

SAMUEL FEIGELSON.

Sworn to and subscribed before me
at Newark this 5th day of December, 1921.

PHILIP LOWITS,
Attorney-at-Law of New Jersey.

Affidavit of Aaron H. Jaffe.

Affidavit attached to Bill of Complaint.

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

I, AARON H. JAFFE, residing in the City of New York, being duly sworn upon my oath according to law, depose and say:

1. I was the inducing agent for the sale and purchase of a store situate at 399 Main street, in the Township of Metuchen, New Jersey, owned by Abraham Miller and sold to Charles Sherman and Sam. Feigelson.

2. That on the 22nd day of October, 1921, I drew up an agreement between Jack Stern and May Stern, his wife, and the aforesaid Scherman & Feigelson, a true copy of which agreement is annexed to the bill of complaint in the above-stated cause, and I subscribed my name thereto as witness in the presence of Jack Stern and May, his wife.

3. I state further that this was signed after a conference wherein all the parties, including the vendor, the complainants, both defendants, my son, Samuel H. Jaffe, and one Mr. Morris Deutsch and myself, were all present, and that subsequent to the signing of "Exhibit A" Sherman and Feigelson paid by check to Mr. Abraham Miller the sum of $1,000.00 as deposit on the purchase price of $8,000.00, and that until such agreement was made Scherman & Feigelson refused to make purchase, and that same was consummated distinctly upon agreement marked "Exhibit A," as a condition.

4. I state further that subsequently, on the 26th of October, 1921, Mr. Deutsch, my son, and I again came to Metuchen, where the complainants had already taken up their residences at the home of Mr. Miller, and where they were already conducting the business, and that when we got to the place of business I drew up a bill of sale, a true copy of which is annexed to the bill of complaint

and marked "Exhibit A," and I saw Abraham Miller sign said bill of sale, and I subscribed thereto as witness.

5. The purchase price was $8,000.00; $1,000.00 was paid on the 22nd day as aforesaid, $6,000.00 on the 26th day of October by check and $1,000.00 by note of the purchasers, made to the order of the vendor.

6. I state further that I was instrumental in bringing about both the sale of the business and the agreement signed by Jacob Stern and his wife, May Stern, and marked "Exhibit A."

7. That together the bill of sale and the restrictive agreement of the Sterns makes one complete transaction.

8. I state further that my actions as agent in this matter was on behalf of the New York Business Exchange, a brokerage concern of which my son and Mr. Deutsch are partners.

AARON H. JAFFE.

Sworn and subscribed before me
at Newark this 5th day of Decemcer, 1921.

PHILIP LOWITS,
Attorney-at-Law of New Jersey.

RULE TO SHOW CAUSE AND ORDER.

Filed December 6, 1921.

Upon application of Blatt & Lesser, solicitors of complainants, and upon reading and filing bill and corroborating affidavits exhibited in above cause, it is hereupon on this sixth day of December, 1921,

ORDERED, that the defendants, Jack Stern and May Stern, show cause before the Chancellor on the 13th day of December, 1921, at Chancery Chambers, Prudential Building, Newark, New Jersey, at the hour of ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an order shall not issue out of this Honorable Court restraining the defendants, and each of them, from engaging in the confectionery, tobacco, stationery and newspaper and sporting goods business in the Township of Metuchen, County of Middlesex and State of New Jersey, according to the prayer in the bill exhibited in the above cause.

And it is further ORDERED, that from the time of service upon them of the order, and until the further order of this Court, defendants, Jack Stern and May Stern, his wife, and each of them, are hereby restrained from selling, disposing of, mortgaging, or in any way aliening, encumbering or affecting the business which they now conduct in the Post Office Building in Metuchen, New Jersey, except in the ordinary cause of the business.

And it is further ORDERED, that a true but uncertified copy of the bill and affidavits and of this order be served upon each of the defendants at least four days prior to the day fixed herein for the hearing thereon. Complainants may present additional affidavits on the hearing, provided copies of the same are served on each of the

defendants at least two days before the return day of this rule.

E. R. WALKER,
C.

Respectfully advised,

JOHN E FOSTER,
V.-C.

Additional Affidavits for Complainant.

Filed December 13, 1921.

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

I, CHARLES SCHERMAN, residing at Metuchen, New Jersey, of full age, being duly sworn upon my oath according to law, depose and say:

I am a partner of Samuel Feigelson. My partner and I together are complainants in the above-stated cause:

1. That on or about the 9th day of October, 1921, Mr. Morris Deutsch, of the New York Business Exchange, referred me and my partner to Mr. Abraham Miller, of 399 Main street, Metuchen, New Jersey, with a view to our purchasing the business conducted by Mr. Miller at the above address.

2. We went to Metuchen, New Jersey, and saw Mr. Miller, and discussed with him the matter of purchase of his tobacco, confectionery, stationery and sporting goods supply business. We found that the business was being managed by one Mr. Jack Stern, and that Mr. Stern was assisted in running the business by his wife, May Stern, both of whom resided together at the same address in an apartment immediately above the store.

3. We at that time told Mr Miller that if we bought the place of business at all, that he would have to enter into an agreement not to engage in a similar or competing line of business in any capacity in the Township of Metuchen, New Jersey, and that his employee, Mr. Jack Stern, and his wife would have to engage in a similar covenant, or that otherwise we, Scherman & Feigelson, would not agree to the purchase of the aforesaid business.

4. Mr. Jack Stern suggested to his employer that he would like to buy the store, and asked for a day off in order to try to raise the money. Mr. Miller allowed him the time, and Stern left the place of business with me and my partner. We went to New York together from Metuchen, and Mr. Feigelson, Mr. Scherman and myself discussed the situation on the train.

I told Mr. Stern at that time that if he was able to buy the business we would not interfere with the purchase, but that if he could not raise the money to let Mr. Miller know, and Mr. Miller could take up negotations with us again; but under no condition would we buy the store unless he, Stern, and his wife, May Stern, entered into such a restrictive covenant as hereinbefore set forth.

About a week later, after hearing from Mr. Miller, my partner and I again went to Metuchen and spoke with Jack Stern. We asked what the situation now was, and he said: "I can't raise the money, you can buy the business." We then said: "What about your agreement not to enter into a competing business?" and he, Jack Stern, said: "My wife and I both will do that, but I want you to retain my services for one month on the same conditions as I am staying with Mr. Miller," (*i. e.,* at a salary of $25.00 per week, rent free, and electric light free.) I told him that such arrangements would be satisfactory, but that I desired to sleep in his premises during the first month.

5. Mr. Jack Stern told me further that he was arranging to buy a similar business in Hightstown, New Jersey, and it would take him a month to get in shape. Mr. Miller was present during this conversation. I then made arrangements with Mr. Miller that we would be at his place of business on the 22nd day of October, 1921. My partner and I then left Metuchen for New York.

6. We got in touch with the New York Business Exchange, and through them made arrangements to be at Mr. Miller's place of business in Metuchen, New Jersey, on the 22nd day of October, 1921, in order to put through the deal.

7. On the 22nd day of October, Mr. Aaron H. Jaffe, his son, Samuel Jaffe, Mr. Deutsch, my partner, and I went to Metuchen in order to put through the deal. When we got there, we found Mr. Miller, the owner, and Mr. Stern in the store. I asked whether Mr. Stern and his wife were ready to sign an agreement not to engage in similar or competing business. He said he was satisfied; Mr. Jaffe then drew up the paper marked "Exhibit A," a true copy of which is attached to bill of complaint, and Mr. Jack Stern and his wife signed the paper; after which my partner and I paid to Mr. Abraham Miller $1,000.00 on account of the purchase price of $8,000.00, and agreed to pay the sum of $6,000.00 by check or cash on the 26th of October, 1921, and $1,000.00 by note of my partner and me for four months, payable to the order of Abraham Miller on the same day.

8. My partner and I remained in the business and took possession of same on the 22nd day of October, 1921. I slept in the flat of the Stern's and my partner stayed with Mr. Miller.

9. On the 26th day of October, 1921, all of the parties before mentioned were present at the store in Metuchen, where the bill of sale, a true copy of which is marked "Exhibit B" and attached to the bill of complaint, was

drawn up by Mr. Aaron H. Jaffe, signed by Mr. Miller, and delivered to us, and my partner and I paid the sum of $6,000.00 by check to Mr. Miller and delivered the note called for in our agreement.

10 He retained the services of Mr. Stern from the 26th day of October, 1921, until the 26th day of November, 1921, as our employee, he to be in the business with us, and we paid him $25.00 per week, and permitted him to use the flat above rent free and electric light free.

11. In the latter part of November, 1921, Jack Stern, in the presence of Mr. Samuel Jaffe, and another person who was introduced to me as a Mr. Lissen said to me at the store: "Charlie, you come across with some money or I will open a store in this town, and in six months' time your store will be worth $1,000.00." I said to him: "Why, you and your wife have agreed not to do that," to which he responded: "Never mind my agreement."

12. About November 27th or 28th defendant, Jack Stern, and May Stern, his wife, opened up a store in the Post Office Building, four doors away from our place of business, where they sell cigars, tobacco, confectionery, stationery, sporting goods, newspapers, and other articles, all of which are sold in direct competition with the business conducted by us, and which place of business they are still conducting.

13. That together the defendants, by reason of their entering into the business above stated, have cut materially into the daily receipts of our business, to wit, where our receipts averaged $100.00 per day prior to the defendants engaging in the similar business, our receipts now average about $60.00 per day, with no cause for the diminution other than that of the competition of the defendants.

14. If the defendants are permitted to continue in their business in competition with us, our receipts and income will not be sufficient to meet the bills of our business

and necessary drawings towards living expenses on the part of my partner and myself. My partner is married, while I support my parents.

15. We have paid the sum of $8,000.00 for the business on the basis of its $100.00 daily income, and our business for the purpose of sale today has already diminished on the income basis of valuation by a sum of about $3,000.00.

16. I state further that the defendant, Jack Stern, has for a period of nine months prior to our purchase been employed in the business which we are now conducting, and that during that time he has made the acquaintance of practically all the purchasers of the community. That by reason of his frendship and acquaintance with them he is in a position to further impair our business so that we are in danger of losing the moneys invested.

CHARLES SHERMAN.

Sworn and subscribed to before me
at Newark this 7th day of December, 1921.

MORRIS D. ROSENTHAL,
An Attorney-at-Law of New Jersey.

Affidavit of Morris Deutsch.

Affidavit.

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

I, MORRIS DEUTSCH, residing in Plainfield, New Jersey, of full age, being duly sworn according to law, upon my oath depose and say:

1. I am a partner of the New York Business Exchange, a brokerage house in New York City that deals in the sale and exchange of stores, business and real estate.

Our firm proposed to Charles Scherman and Samuel Feigelson the purchase of a tobacco, confectionery, stationery and sporting goods business owned by one Abraham Miller, situate at 399 Main street, Metuchen, New Jersey.

At our direction the aforesaid Scherman & Feigelson went to inspect the place of business some time in October, 1921.

2. Mr. Scherman reported back to me that he would entertain the purchase of the business only on the condition that Jack Stern, an employee of Abraham Miller, owner of the business, and May Stern, wife of Jack Stern, hereinafter designated the defendants, would enter into an agreement with the prospective purchasers not to engage either as owners or employees directly or indirectly in a similar or competing business in the Township of Metuchen, New Jersey.

3. On the 22nd day of October, 1921, Mr. Samuel Jaffe, one of my business associates, and Mr. Aaron Jaffe, his father, also engaged with us in the business, and I went to Metuchen with Charles Scherman and Samuel Feigelson for the purpose of making the contemplated deal. We came to the place of business at 399 Main street, Metuchen, New Jersey, where we found Mr. Miller, owner of the place of business, and Mr. and Mrs. Stern. Mr. Feigelson asked Mr. Miller whether or not

Mr. Jack Stern and May Stern, his wife, were ready to sign an agreement not to enter into similar or competing business, and referred to an earlier conversation between Mr. Scherman and Mr. Feigelson and Mr. Miller, looking to that end. Mr. Miller said that arrangements had been made to that effect.

4. Mr. Scherman and Mr. Feigelson both insisted that they would not buy the place of business for any price unless such agreement would be signed by the defendants, Mr. and Mrs. Stern, in advance of any payments by them, Scherman and Feigelson. Mr. Jack Stern was present at the time of this conversation and his wife, May Stern, was upstairs in the rooms which they then occupied above the store.

5. Mr. Aaron H. Jaffe then drew up the paper marked "Exhibit A" in the bill of complaint. The paper was then exhibited to defendants, Mr. Jack Stern and May Stern, his wife. They read it and then each of them signed it, and it was witnessed by Mr. Jaffe.

6. After this was done Scherman & Feigelson agreed to pay $8,000.00 for the place of business situate at 399 Main street, Metuchen, New Jersey, and did, on that same day, pay the sum of $1,000.00 by check as deposit; the balance was to be paid on the 26th day of October, 1921; $6,000.00 by check or cash, and $1,000.00 by a four months' note made by the purchasers to the order of the vendor.

7. On the 26th day of October, 1921, all of the parties again appeared at the place of business, including the Jaffes and myself; Mr. Miller signed the bill of sale, which is marked "Exhibit B" and attached to the bill of complaint, which Mr. A. H. Jaffe drew and witnessed, and Scherman & Feigelson turned over to Mr. Miller check for $6,000.00, and the note hereinbefore referred to.

8. I state further that after the deposit moneys were paid on the 22nd day of October, Scherman & Feigelson remained in the business and Scherman lived in the rooms with the Sterns.

9. I state further that I have no further interest in the matter in controversy between the complainants and the defendants, and I make this affidavit voluntarily.

MORRIS DEUTSCH.

Sworn and subscribed to before me at Newark this 7th day of December, 1921.

MORRIS D. ROSENTHAL,
An Attorney-at-Law of N. J.

Additional Affidavit for Complainant.

Filed December 13, 1921.

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

I, ABRAHAM MILLER, residing in Metuchen, New Jersey, of full age, being duly sworn according to law, upon my oath depose and say:

1. I was the owner in October, 1921, of store at 399 Main street, Metuchen, New Jersey, which, on the 26th day of October, 1921, was purchased by Charles Scherman and Samuel Feigelson, for the price of $8,000.00; $1,000.00 was paid to me on the 22nd day of October, 1921, as a deposit, $6,000.00 was paid by check on the 26th day of October, and a note for $1,000.00 that was turned over to me on the aforesaid 26th day of October, 1921, signed by Charles Scherman and Samuel Feigelson.

2. I had in my employ, one Jack Stern, as clerk and salesman, and he was at irregular intervals assisted by his wife, May Stern. They resided together in rooms above the store in the same building. I paid Jack Stern $25.00 per week as wages, and provided him with the rooms rent free and paid his electric light bills.

3. Prior to the purchase by Scherman & Feigelson of my business there was a discussion between the purchasers and myself as to Stern and his wife signing an agreement not to engage in the same or competing line of business in the Township of Metuchen, New Jersey, Scherman & Feigelson were unwilling to buy unless Jack Stern and May, his wife, signed paper hereinafter referred to as "Exhibit A."

4. On the 22nd day of October, 1921, prior to the time that Scherman & Feigelson paid me the deposit moneys, Mr. Aaron H. Jaffe drew up the paper which has this day been exhibited to me and marked "Exhibit A" in the bill of complaint, containing an agreement on the part of Jack Stern and May Stern not to engage in any business similar to the one sold by me to Scherman & Feigelson.

5 Mr. Jack Stern told me that he had signed the paper that we had wanted him to sign.

6. Then Scherman & Feigelson paid me the deposit on the $8,000.00 price by check of $1,000.00. Subsequently the deal was consummated on the 26th day of October, 1921, in the manner aforesaid.

7. From the 26th day of October and for about a month thereafter Jack Stern remained in the employ of Scherman & Feigelson in the place of business which they had bought from me.

ABRAHAM MILLER.

Sworn to and subscribed before me
at Newark this 8th day of December, 1921.

MORRIS D. ROSENTHAL,
An Attorney-at-Law of New Jersey.

ANSWERING AFFIDAVITS FOR DEFENDANTS.

Filed December 22, 1921.

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

Jacob E. Stern, being duly sworn, on his oath deposes and says:

1. That he is the defendant designated "Jack Stern" in the above-entitled cause; that the same is a misnomer, his name being Jacob E. Stern.

2. That a copy of the bill of complaint in said cause together with a copy of an order advised therein and hereto annexed were served upon this deponent, on the sixth day of December, 1921, at about four o'clock in the afternoon of that day.

3. That deponent is at present a resident of the Borough of Metuchen, in the County of Middlesex and State of New Jersey, formerly a resident of the City of New York, in the State of New York.

4. That prior to March 18th, 1921, deponent was engaged in business in the said City of New York, and that on or about that date Abraham Miller, named in said bill of complaint induced deponent to leave New York and go to Metuchen and deponent thereupon engaged with the said Miller to work for him as clerk in his store located at #399 Main street, in the Borough of Metuchen, at a stated salary of $25.00 per week, together with the use of the apartment over the store free of rent, with the electric lighting and water additional and incidental to the use of the apartment.

5. That deponent had been employed in New York, as a clerk by the Quality Corset Company, located at #132 Spring street, at a salary of $30.00 per week, and lived with his family in an apartment at #1985 Amsterdam avenue and paid therefor a rental of $35.00 per month.

6. That deponent had no personal interest whatever in the business conducted by the said Miller in the said store nor in the stock therein; said Miller was the sole proprietor of the business and sole owner of the stock in the store at Metuchen.

7. That deponent was never at any time a manager of Miller's store or business at Metuchen, and never at any time acted as manager or performed the duties of manager.

8. That deponent was told by said Miller before he went to Metuchen as an inducement to go, that after a time deponent might be given an interest in the Metuchen business and might also eventually buy and own it.

9. That early in the month of October, 1921, the said Miller entered into negotiations with the complainants for the sale to them of his Metuchen business and stock in his store, which negotiations resulted in a sale and transfer of the store, stock and fixtures by the said Miller to the complainants.

10. That pending the negotiations for the sale and transfer of the said business, store and stock by the said Miller to the complainants, deponent was requested by both Miller and the complainants to enter into an agreement with covenant not to engage in or in any manner whatsoever become interested, directly or indirectly, in any business similar to the business conducted by Miller and that he would not be employed in any such business in the Borough of Metuchen; that deponent consented to enter into such an agreement and covenant upon the express promise and stipulation that in consideration of such agreement and covenant on his part, the complainants should pay to deponent the sum of three hundred dollars immediately upon the consummation of the sale and transfer of the store, stock and business by said Miller to the complainants.

11. That the complainants on several occasions during the negotiations referred to their promise to pay deponent the $300 in consideration of his agreement and covenant with them and also assured deponent that it would be paid to him upon the consummation of the sale by Miller to them; the complainants further promised and agreed that if deponent desired to enter into business outside of Metuchen, they the said complainants would advance him for that purpose the sum of $1,000, as a loan or would procure for him a loan of $1,000 in addition to the $300 to be paid by them.

12. That deponent to and in consequence of the said undertakings, promises and agreements of said complainants, deponent signed the said agreement, and at deponent's request, deponent's wife, the defendant, May Stern, also signed the agreement mentioned in the bill of complaint, a copy of which is annexed to the bill of complaint and marked Exhibit "A."

13. That deponent's wife, the defendant, May Stern, was never employed by the said Miller in his said store and business at Metuchen in any capacity whatever and was never paid any money or given anything of value by Miller for any work or service performed or bestowed by her in and about said store and business; that any work or service performed or bestowed by her therein was entirely voluntary and gratuitous on her part and intended by her to assist deponent in his work therein.

14. That because of deponent's knowledge of, and his experience in the business and his acquaintance with the trade and the people of the Borough and in order to afford the complainants an opportunity to familiarize themselves with the business, the complainants desired and requested deponent to remain in the store and work for them as clerk, which deponent consented to do, and did for about one month at the same salary of $25.00 per week, occupying the apartment over the store rent free as before.

15. That at the time of the employment of this deponent by the complainants, they told deponent that they might want him to work for them more than one month, perhaps until after Christmas, but before the expiration of one month, namely, on Saturday, November 19th, 1921, the complainants discharged deponent and on the following Wednesday, November 23rd, 1921, deponent vacated the apartment over the store and with his family, a wife and two children, moved to his present abode, #87 Centre street, in the Borough of Metuchen, for which deponent pays a rental of $35.00 per month, monthly, in advance; that employment of the deponent by the complainants was separate and distinct and entirely unconnected with their former promise, stipulation and agreement to compensate and pay deponent the $300 as the consideration for his agreement and covenant with them made and entered into on October 22, 1921.

16. That *it not* true that deponent told Charles Scherman that deponent was arranging to buy a store and business in Hightstown, New Jersey, similar to Miller's in Metuchen, and that it would take him a month to get it into shape; deponent had no idea or intention of buying such a store or any store in Hightstown at that time or at any time; that at the time of the sale and transfer by Miller of the said store, stock and business to the complainants, and up to the time of his discharge by the complainants from their employ deponent had no money with which to engage in any business whatever, and from the time of his discharge by them and up to the 25th day of November, 1921, deponent was without employment and had no income from any business or from any source whatever.

17. That the complainants have never, nor has either of them at any time paid to this deponent the sum of $300 which they promised and agreed to pay him as and for the consideration and inducement for his signing the aforesaid agreement and covenant not to engage in busi-

ness in Metuchen or any sum or sums of money whatever on account thereof, nor have they or either of them tendered to deponent the said sum of $300 or any part thereof, or given or tendered deponent anything of value in lien thereof; on the contrary, the complainants have refused to pay or give deponent any money whatever.

That defendant, May Stern, has no material interest in the store, stock or business now being conducted by deponent in Metuchen.

18. That neither this deponent nor his wife, the defendant, May Stern, is in any way related to or connected with the said Abraham Miller by marriage or otherwise as deponent is informed and believes.

JACOB E. STERN.

Sworn and subscribed before me this
13th day of December, in the year 1921.

ALFRED D. HYDE,
(SEAL) *Notary Public.*

ORDER GRANTING INJUNCTION.

Filed December 19, 1921.

Application having been made for an order restraining the defendants from the acts hereinafter mentioned, and The matter coming on to be heard on the 13th day of December, 1921, at Chancery Chambers, Prudential Building, Newark, New Jersey; Louis B. Lesser appearing for the complainants, and Silas T. Grimstead appearing for the defendants, whereupon, and upon reading the affidavits submitted on behalf of the complainants and defendants, and upon hearing argument of solicitors of the parties, it is, on this nineteenth day of December, 1921,

ORDERED, that until the further order of this Court, Jack Stern and May Stern, the defendants, and each of them, are hereby restrained from engaging, directly, or indirectly, either as principal, agent, or employee, in the selling of stationery, candy, toys, sporting goods, tobaccos, cigars and cigarettes, at the Post Office Building in Metuchen, in this state.

E. R. WALKER,
C.

Respectfully advised,

JAMES F. FIELDER,
V.-C.

Notice of Appeal.

NOTICE OF APPEAL.

Filed December 20, 1921.

The defendants hereby appeal from the interlocutory order or decree made in this court in the above-stated cause, on the 19th day of December, in the year nineteen hundred and twenty-one, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated, December 19, 1921.

SILAS D. GRIMSTEAD,
Solicitor of and of Counsel with Defendants.

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

SILAS D. GRIMSTEAD,
Of Counsel with Defendants.

PETITION OF APPEAL.

Filed January 3, 1922.

NEW JERSEY COURT OF ERRORS AND APPEALS IN THE LAST RESORT IN ALL CAUSES.

CHARLES SCHERMAN and SAMUEL FEIGELSON, *Complainants,* *vs.* JACK STERN and MAY STERN, *Defendants.*	*On Bill, &c.* *Petition of Appeal.*

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

The humble petition of Jacob E. Stern and May Stern, the appellants in the above-stated cause, respectfully show that your petitioners find themselves aggrieved by an interlocutory order or decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of New Jersey, bearing date the 19th day of December, in the year 1921, wherein the said Charles Scherman and Samuel Feigelson were complainants and the said Jacob E. Stern (therein designated Jack Stern), were defendants, in this respect, that the said interlocutory order or decree, orders in the words following, namely; "That "until the further order of this Court, (Chancery) Jack "Stern and May Stern, the defendants, and each of them, "are hereby restrained from engaging, directly or in-"directly, either as principal, agent, or employee, in the "selling of stationery, candy, toys, sporting goods, to-"bacco, cigars and cigarettes, at the Post Office Building "in Metuchen in this State."

Substitution of Solicitors.

And your petitioners humbly appeal from the said interlocutory order or decree of the Chancellor and from the whole and every part thereof upon the ground that the same is erroneous, for that the said defendants, the appellants, were then and there and now are lawfully entitled to engage in the selling of stationery, candy, toys, sporting goods, tobacco, cigars and cigarettes, at the Post Office Building in Metuchen, in this State, without the restraint, let, molestation or hindrance of any person or persons whatever.

Your petitioners therefore pray, that the said interlocutory order or decree of the said Chancellor may be reversed, set aside and for nothing holden, and that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet and your petitioners will ever pray, &c.

SILAS D. GRIMSTEAD,
Solicitor and of Counsel with Appellants.

Endorsed:

"Filed Jan. 3, 1922.

THOMAS F. MARTIN,
Clerk."

Service acknowledged by solicitors of complainants on January 6, 1922.

SUBSTITUTION OF SOLICITORS.

Filed January 3, 1922.

Consent is hereby given to the substitution of Stein, Stein & Hannoch, as solicitors for and of counsel with the defendant.

SILAS D. GRIMSTEAD.

Notice of Motion for Stay Pending Appeal.

NOTICE OF MOTION FOR STAY PENDING APPEAL.

Filed January 3, 1922.

To Messrs. Blatt & Lesser,
Solicitors of complainants in above-stated cause:

TAKE NOTICE that on Tuesday, the 3rd day of January, in the year 1922, at the hour of ten o'clock in the forenoon, or as soon thereafter on that day as counsel can be heard, motion will be made before the Chancellor at the Chancery Chambers, in the Prudential Building, No. 579 Broad street, City of Newark, New Jersey, for an order staying proceedings in said above-stated cause, pending the appeal taken by the defendants therein from an interlocutory order or decree made therein against them on the 19th day of December in the year 1921, in this Court to the Court of Errors and Appeals in the last resort in all causes.

Dated: December 29, 1921.

Respectfully yours,

SILAS D. GRIMSTEAD,
Solicitor of Defendants.

Proof of service on solicitors of complainant on December 29, 1921.

ORDER GRANTING STAY.

Filed January 3, 1922.

It appearing to the Court that the defendants herein have taken an appeal from the order of this Court heretofore entered herein on December 16, 1921, and application now being made to the Court for a stay of the operation of said order pending said appeal, and the Court having considered the matter and being of the opinion that said application should be granted,

It is, on this 3rd day of January, 1922, on motion of Stein, Stein & Hannoch, solicitors and of counsel with the defendant, ORDERED, that the operation and effect of the order of this Court herein entered on December 16, 1921, be and the same is hereby stayed until the opening of the March, 1922, Term of the New Jersey Court of Errors and Appeals, or until the further order of this Court in the premises.

E. R. WALKER,
C.

Respectfully advised,

JAMES F. FIELDER,
V.-C.

AMENDED PETITION OF APPEAL.

Served January 16, 1922.

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

The humble petition of Jack Stern and May Stern, the appellants in the above-stated cause, respectfully shows:

1. That your petitioners find themselves aggrieved by an order made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, dated the 19th day of December, 1921, in a cause wherein Charles Scherman and Samuel Feigelson are complainants and your petitioners are defendants, which said order provides that until the further order of the said Court of Chancery, the said defendants, Jack Stern and May Stern, and each of them be enjoined and are restrained from engaging, directly or indirectly, either as principal, agent or employee, in the selling of stationery, candy, toys, sporting goods, tobaccos, cigars and cigarettes, at the Post Office Building, in Metuchen, in the State of New Jersey.

2. Your petitioners humbly appeal from the whole of said order upon the ground that the same is erroneous;

For that there was no evidence before the Court from which the Court could justifiably and properly find that the said defendants were not entitled to engage directly or indirectly either as principal, agent, or employee in the selling of stationery, candy, toys, sporting goods, tobaccos, cigars and cigarettes; and

For that the said defendants were then and there, and now are, lawfully entitled to engage in the selling of stationery, candy, toys, sporting goods, tobaccos, cigars and cigarettes; and

For that the instrument executed by the said defendants on October 22, 1921, and attached to the bill of com-

plaint and marked "Exhibit A," which instrument was the basis of the relief claimed by the complainants and granted by the said Court of Chancery was null, void and inoperative, in that it was not based or founded upon any valuable consideration, and was wholly lacking in consideration, and in that any consideration which might have been the basis of said agreement had wholly failed, and in that the said instrument was a contract in restraint of trade and against public policy and was, therefore, null and void; and

For that, there was no evidence that the complainants were irreparably injured by any acts of the defendants, or would be irreparably injured if the defendants were permitted to carry on their business as they had theretofore carried on; or would be irreparably injured if the defendants were permitted to carry on their business as they had theretofore carried it on, pending the final hearing of the cause; and

For that there were disputed questions of law involved herein, about which there was doubt and which had not been settled by the courts of law of this State; and

For that the said order amounted to giving complainants the full measure of relief to which they might be entitled on final hearing.

Your petitioners therefore pray that the said order of said Chancellor may be reversed, set aside, and for nothing holden, and that your petitioners may have such other and further relief as may be proper.

STEIN, STEIN & HANNOCH,
Solicitors and of Counsel with Appellant.

HERBERT J. HANNOCH,
Of Counsel.

ANSWER TO PETITION OF APPEAL.

The answer of Charles Scherman & Samuel Feigelson, respondents, to the petition of the above-named appellants.

The respondents, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereunto, nevertheless say that an order was made out of the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date the 19th day of December, 1921, in the above-stated cause, as set forth in said petition; but as to the substance and form thereof these respondents pray to refer thereto when the same shall be produced, and these respondents are advised and believe that the said order is agreeable to equity, and pray that the same may be affirmed with costs to be adjudged to these respondents.

BLATT & LESSER,
Solicitors for Respondents.

LOUIS B. LESSER,
Of Counsel with Respondents.

Order.

ORDER.

Filed March 9, 1922.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

CHARLES SCHERMAN and SAMUEL FEIGELSON,
Complainants-Respondents,

and

JACK STERN and MAY STERN,
Defendants-Appellants.

On Bill, &c.

On Application to Suppress Answering Affidavit of Appellants Filed in the Court of Chancery.

Order.

This matter coming on to be heard before the Court, in the presence of Blatt & Lesser, solicitors for and of counsel with the complainants-respondents, and Stein, Stein & Hannoch, solicitors for and of counsel with the defendants-appellants, upon the application of the respondents for an order suppressing the answering affidavit of the defendant verified December 13, 1921, and filed in the office of the Clerk in Chancery in the above-entitled cause on December 22, 1921, and the Court having considered the matter and being of the opinion that its decision on said application be reserved in accordance with the terms of the order;

Now, therefore, it is on this 9th day of March, 1922, ORDERED that the consideration of said motion be and the same is hereby reserved.

It is further ORDERED that the parties be and they are each given leave to argue said motion at the time of the hearing of the argument on the appeal herein, and

It is further ORDERED that the complainants be and they are hereby given leave to file reply affidavits to said an-

swering affidavits and that said reply affidavits be included in and considered part of the state of the case on appeal herein.

By the Court,

E. R. WALKER,

C.

Affidavits Filed Pursuant to Leave Granted in Court of Appeals, Order of March 9, 1922.

Rebutting Affidavit.

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

SAMUEL FEIGELSON, being duly sworn upon his oath according to law, deposes and says:

I am one of the complainants in the above case and respondent on appeal to the Court of Errors and Appeals of New Jersey.

My attention has been directed by my solicitor and counsel, Louis B. Lesser, to an affidavit filed in the Court of Chancery on the 22nd day of December, 1921, and which affidavit appears as part of the record on appeal in the printed state of the case on page 23. In response to same I say that:

1. I have very carefully read all of the allegations contained in affidavit of Jack Stern above referred to. I say that never, on any occasion, did I make any promise to pay Jack Stern the sum of $300.00, or any other sum of money, as an inducement to his signing, or the signing by his wife, of their covenant not to engage in a competitive business. Charles Scherman (my partner) and I did insist to Mr. Miller and Mr. Jaffe, the agent, that we would not buy Mr. Miller's business unless Stern and his wife signed such an agreement. This, too, I person-

ally told Mr. Stern, and whatever his arrangements were with Mr. Miller, the owner of the business and our vendor, I had nothing to do with same.

2. I have very carefully read the rebutting affidavit signed by my partner, Charles Scherman, and I reiterate such facts, allegations and statements as are by him made and contained in that affidavit, in so far as my personal conduct, promises, doings and sayings are concerned.

SAM. FEIGELSON.

Sworn and subscribed to before me
this 13th day of March, 1922.

PHILIP LOWITS,
An Attorney-at-Law of New Jersey.

Rebutting Affidavit.

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

CHARLES SCHERMAN, being duly sworn upon his oath according to law, deposes and says:

I am one of the complainants in the above case and respondent on appeal to the Court of Errors and Appeals of New Jersey.

My attention has been directed by my solicitor and counsel, Louis B. Lesser, to an affidavit filed in the Court of Chancery on the 22nd day of December, 1921, and which affidavit appears as part of the record on appeal in the printed state of the case on page 23. In response to same I say that:

1. I have no knowledge of the facts alleged in paragraph four of said affidavit.

2. Nor have I any knowledge of the facts alleged in paragraph five of said affidavit.

3. I believe that paragraph six is true.

Rebutting Affidavit of Charles Scherman.

4. As to paragraph seven, I understand that Jack Stern, or Jacob E. Stern, the defendant-appellant, was the manager of Miller's store.

5. I have no knowledge of facts alleged in paragraph eight of Stern's affidavit.

6. Paragraph nine is true.

10 7. As to paragraph ten of this affidavit, I distinctly deny that either I or my partner, Samuel Feigelson, ever offered to pay to the defendant, Stern, any money or moneys or made him any promise of gain or reward as set out in paragraph ten of this affidavit, excepting only that I actually gave to him the $1.00 mentioned in the covenant, which he and his wife signed, not to engage in a similar or competing business, and upon which this suit is based.

I believe that Miller, former owner of the store, and
20 who sold to us, did promise Stern to assist him, if he, Stern, should go into business in another town.

I state further, that pursuant to Stern's arrangement with Miller, he, Stern, advertised in the Metuchen Recorder, a newspaper of Metuchen, that he was going to engage in business in Hightstown, N. J.

I say further that Stern was employed in my business with me and my partner for one month after we purchased the place of my business and until about the 27th
30 day of November, that at the end of the first week, when I paid him his first week's salary, I asked him whether he had received any money from Miller, to which he responded that he had.

Other than the aforesaid, I do not know whether Miller paid him or not, but it was no concern of mine, inasmuch as I had made him no promise of compensation.

I further repeat that we should not have purchased the store and paid the sum of $8,000.00 unless Mr. Miller procured the signature to the covenant upon which this suit
40 is based, and it was a distinct condition precedent to our

entering into an agreement with Miller, as appears from the fact that the covenant of Stern was entered into on the 22nd day of October, 1921, and the bill of sale was entered into on the 26th day of October, 1921, we being unwilling to take a bill of sale from Miller until the Stern matter had been settled.

8. As to paragraph eleven of the Stern affidavit, I deny that on any occasion I promised to pay Stern $300.00 in consideration of his agreement and covenant with me and my partner, and I deny further that I undertook to pay him the sum of $300.00 upon the consummation of the sale by Miller to me and my partner, nor did I undertake to pay it to him upon any occasion.

9. I admit that I promised the defendant, Stern, to procure for him a loan of $1,000.00 upon the business which he looked over for the purpose of purchase in the City of New York, and that I procured Aaron H. Jaffe, who was one of the brokers in the deal wherein I purchased from Miller, to show Stern the aforesaid store in New York. Stern, Mr. Miller, my vendor, and Mr. Aaron H. Jaffe together looked at one store on 189th street and another store somewhere on Avenue "A," and Mr. Jaffe stood ready to advance $1,000.00 by note or chattel mortgage to assist Stern in buying either of the places. In order that Stern might have an opportunity to examine these stores for purchase, without loss of pay, although he was then in our employ, my partner and I made no deduction from his salary, for his day off.

10. I deny that Stern and his wife entered into the covenant marked Exhibit "A" because of any promise on my part or on the part of my partner, as set forth in paragraph twelve, but state that this promise on my part to procure for him a loan of $1,000.00 occurred subsequent to my taking over and conducting the business. That we took over and conducted the business on the 26th day of October, 1921, it was not until a week later that I

referred Mr. Stern to Mr. Jaffe for the purpose of considering the purchase of a store in New York.

11. I admit that the defendant, May Stern, was not employed by Mr. Miller in his store in business in Metuchen, nor that she received compensation for services performed, but I repeat that she did perform services and work about the store and assist in selling, and that she had become familiar with the customers and trade, and that I made it a condition to Miller that both Stern and his wife signed the covenant not to engage in a competing or similar business in Metuchen before I would consider purchasing the business from him.

12. As to paragraph fourteen, I admit that because of Stern's knowledge of, and experience with, the business, and his acquaintanceship with the people of the Borough of Metuchen, and in order to afford me and my partner an opportunity to familiarize ourselves with the business, we requested Stern to remain in our store and work for us as clerk, which Stern did, and that we paid him the sum of $25.00 per week, and permitted him to occupy the apartment above the store rent free.

13. As to paragraph fifteen of defendant Stern's affidavit, it has no important bearing on the case, excepting that it repeats an alleged promise on the part of me and my partner, to pay Stern the sum of $300.00, and this I distinctly deny.

14. As to paragraph sixteen of Stern's affidavit, it has already been sufficiently met in our original affidavits, and also in this one, excepting that I must note that according to defendant Stern's own affidavit, he was in the employ of me and my partner until the 19th day of November, 1921, the fact being that he was in our employ until Saturday, the 26th day of November, 1921, and his competing store in the Town of Metuchen, according to his affidavit, he opened on the 25th day of November, 1921, and that he was preparing the premises of his competing business

during the time that he was still in our employ. That he was making arrangements with his new landlord and the dealers from whom he bought his stock of merchandise and all the other necessary arrangements in the opening of a new business during the time that he was in our employ. That there was no time during which the defendant Stern was idle and without occupation, but that he planned to violate his covenant almost immediately after he signed same.

15. As to paragraph seventeen of defendant's affidavit, I admit that neither I nor my partner have ever paid Stern the $300.00, but again deny that we ever made such promise. I also admit that we never made any tender of any such payment and again deny that there was any obligation on our part to make such tender, inasmuch as we never made a promise to pay, and did not owe the defendants any moneys.

I have no knowledge as to whether the defendant, Jack Stern, or his wife, May Stern, is in any way related to or connected with Abraham Miller by marriage or otherwise.

CHARLES SCHERMAN.

Sworn and subscribed to before me
this 11th day of March, 1922.

ALFRED D. HYDE,
Notary Public.

(SEAL)

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

CHARLES SCHERMAN and SAMUEL FEIGELSON,
Complainants-Respondents,

and

JACK STERN and MAY STERN,
Defendants-Appellants.

On Bill.

BRIEF FOR COMPLAINANTS-RESPONDENTS.

Facts.

Charles Scherman and Samuel Feigelson, partners, hereinafter designated as respondents, on the 26th day of October, 1921, purchased from one Abraham Miller a confectionery, stationery, newspaper route, and sporting goods business in the Borough of Metuchen, County of Middlesex, State of New Jersey, and paid for same the sum of $8,000.

Metuchen is a borough with a population of 3,500 to 4,000.

In the employ of Abraham Miller was one Jacob Stern, who acted in the capacity of salesman or manager, and who was frequently assisted by his wife, May Stern, although she received no compensation from Miller for services rendered in the store. Jacob Stern and May Stern are the appellants, and are hereinafter so designated.

On the 22nd day of October, 1921, four days before respondents took bill of sale for the business of Miller, they came to him with a view to purchasing same, and informed Miller that they would buy only upon the condition that the appellants enter into a covenant not to engage in the same or in a competing line of business in Metuchen, New

Jersey. They also informed Jack Stern of this condition precedent to their purchasing. Stern consented to making such an agreement or covenant, and did, on the 22nd day of October, 1921, as did also May Stern, his wife, sign and seal the covenant which appears as Exhibit "A," attached to the bill of complaint, and is set out in full on page 4 of the printed State of the Case (top of page to line 30), and which covenant is duly witnessed by A. H. Jaffe, the broker in the transaction.

After this covenant was signed by appellants, the respondents paid to Miller the sum of $1,000 as deposit on the purchase, and, subsequently, on the 26th, took title to the business and paid the balance of purchase price, *i. e.,* $7,000.

Stern remained in the employ of the respondents from the 26th day of October, 1921, until the 26th day of November, 1921. On the 27th day of November, 1921, Jack Stern and his wife, May Stern, opened a competing business in the Post Office Building in Metuchen, four doors away from respondents' business, which they conducted in violation of their covenant, and which they still conduct. Bill was filed in the Court of Chancery to restrain the appellants, and an order for a temporary injunction was signed by the Chancellor, which order is before this Court.

Argument.

Before taking up the question of law involved, we wish to argue the matter of suppression of the affidavit which appears on page 23 of the printed State of the Case.

This Court will remember that on the opening day of the term, counsel argued that the answering affidavit of Jack Stern (*vide,* S. C., p. 23) should be suppressed inasmuch as it was filed on the 22nd day of December, 1921, while the order granting injunction was filed on December 19, 1921.

And for the further reason that the facts presented by the affidavit were not presented to the Vice-Chancellor, who heard the arguments.

And for the further reason that counsel for the appellants with counsel for respondents called upon the learned Vice-Chancellor to discuss with him the propriety of submitting this affidavit to this Honorable Court for review. Vice-Chancellor Fielder stated that he thought it improper to submit to the reviewing Court allegations of fact which were not presented to him, nor considered by him in arriving at his determination of the issue.

We then made motion to this Court on the opening day for suppression of the affidavit. This Court gave us leave to argue the question in our brief, and also to file rebutting affidavits, so that in the event this Court decided to consider affidavit a part of the case, we should have had an opportunity to rebut. We have filed rebutting affidavits, but respectfully insist that although our affidavits fully deny the material allegations which might have adversely affected our claim in the lower court, if such allegations had been there presented, we feel that this Court should not consider the affidavit in question as part of the record.

The theory of a reviewing Court is to consider the facts presented to the lower Court, and the law as applied to those facts. Inasmuch as there is no dispute about the presentation of these facts, for we assume that the Vice-Chancellor's statement to the effect that they were not presented to him is conclusive; and inasmuch as the record itself shows that the affidavit was filed two days after the entry of the order, this Court would be considering evidence not presented to the "jury," and might consider the "verdict" erroneous upon those very facts which were never presented to the "jury" or considered by "it."

It must not be thought that counsel objects to this Court's consideration of all the facts in the case. The

serious objection that counsel makes is that by reason of the non-presentation of this affidavit to the Court below, and the failure to apprise us of the contents of that affidavit, and by reason of the belated filing of this affidavit, this Court is put in a position where it might do us a serious injustice because we had never had an opportunity to meet the allegations of the affidavit in question, and a righteous judgment of a Court might be reversed by reason of the wrongful act of the solicitor, and a careless solicitor profit by his neglect.

At this juncture it is only fair to state that counsel now appearing for the appellants in the matter, must be entirely absolved from any wrong therein, they having been substituted after the order appealed from was entered, and after first petition of appeal was served, and we sincerely feel that they, too, are solicitous for the rights of all the parties concerned.

We therefore again urge, not only as a matter of technical right, but as a matter of pure right, that the affidavit on page 23 of the printed State of the Case be suppressed, and that, consequently, the possible defense of "no consideration" fail, and this we urge despite the fact that we have fully rebutted the material facts in that affidavit.

LAW.

Richardson v. *Peacock;* 26 N. J. E., p. 40, 28 N. J. E., p. 151, and finally decided in Court of Errors and Appeals and reported in 33 N. J. E. 597.

Defendant was engaged in the poultry business in Philadelphia. He bought poultry in the Counties of Salem, Cumberland, Camden and Gloucester in New Jersey, and in South street, for certain persons in New York and Washington, to whom he sent it at a commission of ten per cent. He also bought for his own account, and sent to commission merchants of New York and Washington

for sale, and paid his consignors a commission of five per cent.

He sold this business with the good will to the complainant, on the fourteenth of November, 1863, for $2,000,00, and did covenant *that he would not at any time* send or ship any poultry coming from said counties to South street or either New York and Washington.

Justice Dixon, speaking for the Court of Errors, says:

> "The case is not one of a mere implied contract, growing out of a sale, of the good will of a business. Such a sale, without more, while it does not prevent the vendor from carrying on a similar business, and, perhaps, dealing with the old customers, will prevent his soliciting the old customers by any means other than the general advertisement of his business. Labouchere *v.* Lawson, L. R. (13 Eq. Cac.) 322; Legott *v.* Barrett, L. R. (15 Ch. Div.) 306."

The Court, through Justice Dixon, apparently did not feel that the failure to mention a time limit was of any importance in the case, and felt that the covenant, as provided, should be specifically enforced.

Mandeville v. *Harman*, 42 N. J. E., p. 185.

The complainant, a physician, took into his employ the defendant, another physician, on the twenty-second day of April, 1885, for a period of three months, which contract of employment was extended until the twenty-second day of April, 1886. On that day, further written agreement was made and endorsed on the original agreement between the parties, by which defendant's term of service was increased until October, 1886, his compensation increased, and the last clause read:

> "In consideration of this contract made with him by the said Mandeville, the said Harman hereby covenants and agrees not to engage in the practice of medicine in the City of Newark at any time hereafter."

The opinion in the case, written by Vice-Chancellor Van Fleet, makes extended research into the law involved and denies the application for an injunction on the theory that no right or interest existed in the practice of the profession of medicine, which would pass to his personal representative, and therefore, it was unreasonable to make a restriction so broad that it would cover such contingency. The case of

Hitchcock v. *Coker,* 6 Ad. & El. 438

is discussed by the learned Chancellor. This, too, was a case involving the practice of a profession, to wit, chemist and druggist. The case was tried by the Court of King's Bench. The first Trial Court gave judgment for the defendant, holding the agreement unreasonable on the theory that it was larger than would give necessary protection to the complainant. The case was taken up by writ of error to the Exchequer Chamber, and there the judgment of the King's Bench was reversed.

> "Reversal was put distinctly on the ground that a restriction so extensive in point of time was necessary for the protection of the promisee or covenantee, in the enjoyment of the good will of his trade, and should therefore be held to be reasonable."

Chief Justice Tindal in delivering the opinion of the court, said:

> "The good will of the trade is a subject of value and price. It may be sold, bequeathed, or become assets in the hands of the personal representative of a trader. And if the restriction as to time is to be held to be illegal if extended beyond the period of the party by himself carrying on the trade, the value of such good will, considered in those various points of view, is altogether destroyed. If, therefore, it is not unreasonable, as undoubtedly it is not, to prevent a servant from entering into the same trade in the same town in which his master lives, so long as the master carries on the trade there, we cannot think it unreasonable that the restraint should be carried further, and should be allowed to continue, if the master sells the trade, or bequeaths it, or it becomes the

property of his personal representative." 6 Ad. & El. 453.

This doctrine has been adhered to in subsequent cases, and is now the established law of Great Britain. *Pemberton* v. *Vaughan,* 10 Q. B. 87; *Elves* v. *Crofts,* 10 C. B. 241; *Atkyns* v. *Kinnier,* 4 Exch. 782.

The reason for the decision of the Chancellor appears most cogently on page 193, last paragraph, where the Chancellor says:

> "Professional skill, experience, and reputation are things which cannot be bought or sold. They constitute part of the individuality of the particular person, and die with him, etc."

However sound the doctrine applied in the above case may be (differing as it does from the English case) it is the law of the state. But it concerns itself only with professional skill, technical ability, and the like, which can die with the person. In the case at bar, it cannot be contended fairly that these questions are involved, and it is a fair inference that were the case of *Mandeville* v. *Harman,* concerned with the sale of an ordinary business, the failure to limit the time would be considered reasonable. This is borne out by the following case of

Finger v. *Hahn,* 42 N. J. E. 606.

There the complainant, Finger, purchased the butcher business of the defendant, Hahn, and Hahn entered into a covenant in these words:

> "Does hereby covenant to and with the party of second part that he will not carry on the retail butcher business on his own account or operate any butcher business, except a wholesale butcher business, within the corporate limits of the City of Newark."

The opinion does not give any time limit, but speaks of a "period" not yet expired. Thereafter, Hahn went into the grocery business. This, proving unsuccessful, he offered it for sale. One, Horst, offered to buy, if he could establish a butcher business in connection therewith. Hahn

sold to Horst, and the butcher business was established with the grocery business, and then Horst employed Hahn to assist in the butcher business as well as the grocery. Finger brought suit to restrain Hahn from "operating in the butcher business."

Vice-Chancellor Bird, for the Court, says:

> "In common sense or reason, the object of every such covenant is to get rid of the competition which endangers the business of the purchasing party; to remove beyond reach the influence of the vendor's popularity, business integrity, knowledge or skill, and to make it impossible for personal influences and business acquaintance, exerting themselves to the prejudice of such purchaser. Without these considerations such contracts are quite meaningless. But not one of the influences is there which will not be felt or brought to bear, to a greater or less extent, if the vendor engage in business even as a clerk. This reasoning is established beyond controversy in this very case; for persons who have been employed by Hahn before he sold to Finger continued to buy meats of Finger until a short time after Horst purchased the grocery business of Hahn and opened in connection therewith the butcher business, when they left Finger and made their purchases of Horst. So many did this, that it certainly was very damaging to Finger."

The Court granted the injunction, and cites among other cases the case of *Richardson* v. *Peacock, supra.*

The Finger case is especially applicable to the case at bar.

Sternberg v. *O'Brien,* 48 N. J. E. 370.

There Vice-Chancellor Van Fleet refuses to invoke injunctive aid of the Court because the employee sought to be restrained was only in the complainant's employ about five weeks. He had no knowledge of the business, and his relation to the business was such that he could not in any way do substantial injury. Therefore, there was no oc-

casion for special relief of a court of equity. The covenant in that case is substantially as follows:

> "He will not engage in, or be concerned or interested in the installment clothing business in the City of Newark, N. J., on his own account, or as agent or employee of any other person or persons, in any capacity."

Vice-Chancellor Van Fleet says:

> "It thus appears that the defendant's promise is that he will not take employment in a particular business in any capacity. When, therefore, the whole of the restrictive clause is read, it is made entirely plain that the restraint which the defendant put upon himself is not general, but partial, and that the only thing which he has prevented himself from doing, after he ceases to be an employee of the complainant, is engaging in, or being concerned or interested in the installment clothing business. He cannot serve or assist a rival of the complainant in the prosecution of that particular business in any capacity, in either of the two cities named, but the interdiction is confined to that particular business. As to any other business or employment he is unbound and free. Anything outside of the installment clothing business he is just as much at liberty to do for a rival of the complainant as though he had not made the contract in question."

In the light of the Vice-Chancellor's reasoning in this case, the covenant in the case at bar comes clearly within the category of reasonable covenants and is partial in its limitations.

Trenton Potteries Co. v. *Oliphant,* 58 N. J. E. 507.

In this case defendants agree to refrain from engaging in the business of manufacturing pottery ware

> "within any state of the United States of America, or within the District of Columbia, excepting the state of Nevada and and territory of Arizona for a period of 50 years."

Magie, *C. J.,* holds that the public policy of this state permits the enforcement of such covenant, and the decree

of the Court of Chancery denying relief prayed is reversed in so far as it affects such persons or corporations as signed and violated the covenant. The Court there holds the fifty-year limitation reasonable, and it must be remembered that in this case the defendants showed an agreement existing among pottery manufacturers for price-fixing and price maintenance, and it was further shown that the Trenton Potterties Co. bought out a majority of the manufacturers who entered into such an agreement, and it was in the consummation of this purchase of competitors' business that the covenant against competition was entered into.

On the score of price-fixing, the Court held that the proper remedy was to declare null such a price-fixing scheme, but that even this wrongful situation did not affect the "reasonableness" in enforcing of the covenant, nor did it give broader protection than was necessary to preserve the good-will of the business purchased. There is no substantial difference between a fifty-year limitation with all the possibilities of shifting and changing conditions within that period and the time limitations in the case at bar. As to the area limitation, the Potteries case covered the whole of the United States with a few unimportant exceptions, and though it was considered broader than might be necessary for the protection of the business, it was still given full effect in so far as the state of New Jersey at least was concerned, while in the case at bar, the covenant is confined to Metuchen. In each case, the exigencies of the specific business are considered by the contracting parties, and agreed upon as reasonable between them, and then signed in solemn form.

As the covenant was enforced in the Potteries case, so should it be enforced in the case at bar.

Artistic Porcelain Co. v. *Boch,* 76 N. J. E. 533.

The complainant was a manufacturer of black and brown door knobs, shutter knobs and wheels, and the complainant sold to the defendant right, title and interest in the goods, chattels, stock, chemicals, materials and per-

sonal property then in the plant of the American Porcelain Works, for which the defendant agreed to pay a certain price. Then follows a restriction wherein the defendant agrees that he will abstain from the manufacture or sale, directly or indirectly, of porcelain or of any imitation thereof, except tile, until January 1, 1910, and this agreement was subsequently extended until January 1, 1915.

The Court, through Chancellor Walker, then Vice-Chancellor, there concludes as follows:

> "My judgment is that the covenant in question which is certainly founded upon adequate consideration is not one in illegal restraint of trade, but is valid and enforceable."

and cites with special emphasis from the decision of Vice-Chancellor Green in *Ellerman* v. *Chicago Junction Railroad Co.*, 49 Equity 217, at p. 253. Quoting from *Diamond Match Company* v. *Roeber*, 106 N. Y. 473:

> "To the extent that the contract prevents the vendor from carrying on the particular trade it deprives the community of any benefit it might have from his entering into competition. But the business is open to all others and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privileges."

The above case also cites with approval the case of *Fleckenstein Bros. Co.* v. *Fleckenstein*, 76 N. J. L., p. 613, where the following covenant was enforced within the limits of Jersey City, N. J.:

> "I do hereby guarantee and agree to and with said company that I will not directly or indirectly engage in, promote or give my name to any business of the same kind or character as that now carried on by said company within five hundred miles from the city of Jersey City, N. J., at any time within the period of twenty years from the date hereof. Signed, George Fleckenstein. Witness, Henry Niederlitz."

The Court here held that the contract was a divisible one as to area and went on the presumption that the parties must be presumed to have intended to make a vaild and enforceable contract. The time limitation of twenty years was not considered by the Court in its opinion and apparently was not stressed by either of the parties to the suit. The conclusion of Chief Justice Gummere in the Fleckenstein case is that public policy is best subserved by the administration of *justice* when a construction finding the contract a reasonable one is adopted by the Court.

Pen Carbon Manifold Co. v. *Tomney,* 90 N. J. E. 233.

The Court modifies an injunction against the disclosure of secrets concerning machinery and processes in so far as it is necessary in safeguarding the business of complainant, and refers to the Trenton Potteries case as authority.

Palumbo v. *Piccioni,* 103 Atl., p. 815.

Also follows the Trenton Potteries case which seems to be the leading case in New Jersey upon the subject. There an injunction was granted even though the purchaser for whose benefit the covenant was made had resold his business on the theory that it preserved the good-will of the business, and that such agreements were not necessarily in restraint of trade.

Althen v. *Vreeland,* Chancery Decision, 36 Atl. Rep. 479.

The covenant in this case was

> "that I will not at any time engage in or conduct the business of manufacturing or selling crackers, cakes or biscuits, as principal, agent or servant within 1,000 miles of Newark, New Jersey, without the written consent of said Althen."

The proofs showed to the satisfaction of Vice-Chancellor Emery that the business of the complainant did not extend further than one hundred miles. From this he concluded that it was wider in scope than was necessary to adequately protect the business sold. The important point that counsel wishes to make in this case is that the Vice-Chancellor does not even reflect upon the failure to limit as to time, nor does he advert to that fact as being unreasonable anywhere in his opinion. The Court granted an injunction in this case against the defendants to prevent them from soliciting the trade of the complainant or from unfair competition on the general theory that the defendant sold the good-will of the business, and regardless of the existence of a covenant, the vendee could be restrained from soliciting his old customers even where he would have the right to establish a competing business.

The most recent case in the state is that of

Wyder v. *Milhomme,* 115 Atl. Rep. 380.

There the defendant agreed for a period of ten years not to enter into such business as conducted by the Silk Finishing Co. of America, or to be engaged by any firm, corporation or business engaged in a similar business in the United States of America, and that he further agrees that he would not knowingly assist, aid or advise, in any way whatsoever, any corporation or person engaged in a similar business, or might desire to become interested in or to engage in the same or similar kind of business. The Court of Errors there affirms the Chancery Court in denying an injunction for two reasons.

1. That it forbids the defendant from engaging in a business for which he is fitted by training and experience, anywhere in a territory many times larger than the actual or reasonably accepted field of operations of the covenantee.

2. To the same extent deprives the public of his usefulness in the capacity in question.

The Milhomme case is clearly one of an extreme covenant unduly oppressive and likely to affect public policy in that a highly techincal business is prevented from freely expanding because of the expert who is prevented from engaging in same, or from assisting others to engage in same in the whole of the United States.

It is clearly inapplicable to the facts in the case at bar, but being the most recent decision, we deemed it proper to direct this Court's attention thereto.

It does, however, reaffirm the doctrines in the cases of *Fleckenstein Bros. Co.* v. *Fleckenstein,* and in the *Trenton Potteries Co.* v. *Oliphant,* holding only that under its special facts the Milhomme case does not come within the rules laid down in those cases.

ARGUMENT ON LAW.

POINT I.

The agreement on the part of the appellants to refrain from engaging in competitive business was based on a good, valid and legal consideration.

The covenant itself recites: "In consideration of one dollar to us paid by Charles Scherman and Samuel Feigelson, etc." The rebutting affidavit of Charles Scherman (filed by permission of the Court, S. C., p. 40, l. 15), specifically alleges the actual paying of that one dollar.

The signatures of Jacob E. Stern and May Stern are followed by their seals, and the seals import consideration.

The general rule of law is "there is sufficient consideration for a promise if there is any benefit to the promisor or any loss or detriment to the promisee." It is not necessary that a benefit should accrue to the one making the promise. It is sufficient that something valuable flow from the person to whom it is made, or that he suffers

some prejudice or inconvenience, and that the promise is the inducement to the transaction.

13 Corpus Juris, p. 316;
Root Construction Co. v. *West Jersey,* 85 L. 645;
Burgesser v. *Wendell,* 73 L. 286;
Conover v. *Stillwell,* 34 L. 54.

"The purchase of property at the instance of a promisor is valuable consideration."
Berry v. *Graddy,* 1 Metcalf (Ky.) 553.

It were an act of supererogation to cite the mass of authority all holding for the proposition as above outlined.

As to the facts in this particular case, Stern's affidavit, which this Court will consider in the event that our motion to suppress same is denied, alleges a promise on the part of respondent to pay him $300.00. There is nothing in the covenant that bears out this proposition, and the rebutting affidavits (S. C., pp. 38-43) filed in this court by special permission of this Court, categorically deny the allegations of Stern. There can be no doubt, but that the respondents never made such a promise to Stern, and there is not the slightest vestige of evidence to support appellant's claim outside of his mere statement to that effect. The bill for relief was filed upon the covenant, and the breach of the covenant known as "Exhibit A," and although it was open to the appellants to set up the defense of "no consideration," there should be evidence on their part more cogent than that offered to raise even a doubt in favor of the appellants.

POINT II.

The agreement or covenant made by the appellants with the respondents is a valid, enforcible one.

The covenant provides that the Sterns "will not open in the City of Metuchen" a business similar to that sold by Miller to the respondents. It further provides that "we (the Sterns) agree not to be engaged in, nor in any manner whatsoever, become interested, directly or in-

directly, in any similar business to the one hereby sold to Scherman and Feigelson in the City of Metuchen, New Jersey, and also agree not to be employed in such a business."

The Court will note that this agreement is limited in *area* to Metuchen, New Jersey, a borough having a population of from 3,500 to 4,000. There is no limitation in *time.*

> "Agreement by the vendor of a business, trade or profession, or by employees, etc., without limitation as to time, not to carry on the business within a certain town, village, city or country, even though it be a large city, *is valid.*"
>
> 13 Corpus Juris, p. 470;
>
> *Carl* v. *Snyder,* 26 Atl. 977;
>
> *Finger* v. *Hahn,* 42 N. J. E. 606, 8 Atl. 654.

In *Carl* v. *Snyder,* 26 Atl. 977, a bill was filed to restrain the breach of an agreement which provided that the defendant should not engage in the "galvanized, iron cornice, etc., business in the City of Trenton," which contract arose out of the sale of a business by the defendant to the complainant. The relief prayed for was resisted on the ground that the contract was unlawful, because unreasonable, since it was indefinite as to time.

The injunction was granted. The Court, Vice-Chancellor Bird, said:

> "The purchaser of such good will may fairly be supposed to purchase, not only for his immediate use or benefit, but for the use of his personal representatives, in the same sense that he purchases personal property or real estate. I can see no good, just reason for his not being able in the law to make such an investment which shall pass to his assigns, executors, or administrators. *It cannot be said, when it is limited to a particular district, that this interferes in any manner with sound public policy.*"

In *Hoagland* v. *Segur,* 38 N. J. L. 230, it was held that an agreement not to engage in the banking business in a certain New Jersey town was valid. The essence of this state's policy in cases of this nature seems to be that

the restrictions to be valid, must be reasonable in consideration of all the special facts of the particular case to which they are applied, and of course, time, area, and extent of the restriction, and that it give no more protection than is necessary to insure the good will of the purchase, all enter into the determination of the reasonableness of same.

The question of reasonableness of the restrictive covenant would not enter into the cases, were it not for the fact that ordinarily, in cases of this nature, public policy is involved; that is, the public may be injuriously affected by the restraint upon competition.

It is not out of solicitude for the violating covenantor that the courts impose a rule of reasonableness, and on that point it is pertinent to refer to the English case of *Nordenfeldt* v. *Maxim & Co.*

> "It seems almost absurd to talk of public policy in connection with such a case. It is a public scandal when the law is forced to uphold a dishonest act, and the public suffers no injury in being deprived of the privilege of dealing with a man who is carrying on his business in violation of his solemn engagement not to do so."

This quotation is cited with approval in the case of *Fleckenstein* v. *Fleckenstein,* 76 N. J. L., p. 617, in the opinion of Chief Justice Gummere.

Now, let us examine how seriously the public is affected by the strict enforcement of the covenant in the case at bar. Stern is variously described as manager, salesman and clerk, in a confectionery, stationery, cigar, tobacco, and periodical business. His wife, May Stern, is also a party to the covenant, because of the commonly known subterfuge of a man's conducting a business in his wife's name, also because she assisted her husband while the husband was in the employ of Miller. They both covenant not to engage in a competing business with the respondents in the Borough of Metuchen. The business has no peculiar characteristics which prevent any person from

engaging in same in the Borough of Metuchen. There is no great personal skill required which seriously limits the number of people who may engage in it in Metuchen. It is not an unusual trade or occupation of such nature that if one man be kept from engaging therein, the Borough of Metuchen would suffer to any appreciable degree. Indeed, the affidavit of Stern, offered to this Court by opposing counsel on our motion for the filing of a bond (but we do not know whether same has been filed with this Court in that it has not been printed in the record or brief) sets forth that another person has recently opened such a business on the main street in Metuchen.

In short, the skill of the appellants is not that of the artist, the poet, the painter, the craftsman, the expert in industry, the highly specialized mechanic; so that a restriction upon them is not necessarily, nor even likely, to be a detriment to the Borough of Metuchen, or to the state, whose benefit this honorable Court would jealously guard.

Even were the Court to consider tenderly the rights of the offending covenantors, an examination into the facts would show that they suffer practically nothing by the strict enforcement of the covenant. They are deprived from engaging in particular lines of business (all cognate lines and together making one business) in the Borough of Metuchen. As has been previously said, the Borough of Metuchen has a population of from 3,500 to 4,000. The whole of New Jersey, the United States of America, and the rest of the world are open to the appellants for these lines of business, and the whole of the world including Metuchen is open to the appellants for any other line of business. In fact, Jack Stern seriously contemplated entering into the same line of business in Hightstown, N. J., and sought to enter into the same line of business in New York City, and even went to New York City to look at two stores for the purpose of purchase. (See S. C., p. 41, par. 9.)

When they signed the covenant, the appellants did not consider its terms as a special hardship upon them, for if they had, they would have required limitations other than those prescribed, and such as would relieve them of any hardship entailed in the covenant. It must be presumed that *as between the parties* they agreed upon the reasonableness of the covenant as to its limitations. They must have specially agreed as to the limitation with respect to time, because in a separate sentence, the covenant reads "this obligation remains in force after the above-mentioned store will be sold to other persons." They should not now be heard when they complain of the limitations as against them and the Court should give scant consideration to that phase of the case.

POINT III.

The limitations in the covenant are not greater than are required to protect the purchasers in the enjoyment of all the benefits of their purchase.

We respectfully urge:

FIRST: That the doctrine involved in the above point should not be applied at all, unless it is perfectly clear that the limitations are too broad.

SECOND: That the doctrine should not be invoked unless the enforcement of the covenant is distinctly violative of public policy.

On the first point, the competition of the Sterns was particularly and specially detrimental to the business purchased by the respondents. In the small Borough of Metuchen where, the Sterns admit, they had a large acquaintance and where Jack Stern had been employed in the business for nine months in such capacity that he came into friendly contact with the whole of the purchasing population, and in a borough where the population does not readily shift, vary or change, the personal influence of the Sterns can fairly be presumed to be a permanent one.

The respondents were buying the business which included stock and good will. They must safeguard against detrimental influences while they engage in the business. They must plan for the future growth of their business, and good will. They must provide for the possibility of an advantageous re-sale of the business. The greatest possible deterrent to the existing business, to its potential growth and re-sale value was the possibility of the competition of the appellants. The respondents came to Metuchen from New York City without a clear knowledge of the borough's limitations.

Can it then fairly be argued that in view of the circumstances existing about the purchase, that the failure to limit the *time* in the Sterns' covenant was broader than was necessary to protect adequately the business of the respondents, especially when the Sterns, by their ready assent to signing the covenant inferentially admit the necessity of just such provisions as the covenant contains?

The appellants, or at least Jack Stern began to engage in a competing business on the twenty-fifth day of November, 1921 (S. C., p. 26, l. 30 to end of par). Admittedly, the respondents purchased the business of Miller on the twenty-sixth day of October, 1921. The twenty-fifth day of November is the date given by Stern in his affidavit as the date when he opened the competing store. It is our contention that he must have commenced to engage in a competing business although not actually selling goods, a considerable time prior to November 25, 1921, because the time spent in arranging for a lease or letting, for the purchase of stock, fixtures, agreements with news and periodical dealers, and all other arrangements incidental and necessary to the opening of a new business, was engaging in a competing business.

Jack Stern remained in the employ of the respondents from the time of their purchase (October 26, 1921), until he actually went into his own store, a period of about a month. The inescapable conclusion is, therefore, that almost coincident with the signing of his covenant, he

began to lay plans for violating same, a clearly unconscionable act, regardless of the reasonableness or enforcibility of the "covenant." He had made a solemn engagement, and proceeded immediately to violate it. He now appears before this Court inveighing against a time limitation, or rather against no time limitation, presumably on the theory that with a "reasonable" limitation as to time, the covenant might be enforcible against him. His plea, like his conduct, is unconscionable. It comes with bad grace from a man who, within a month after making same, violates his solemn covenant.

There is no similarity between his plea and that of the purchaser of real estate, subject to a restrictive building covenant, who, by reason of the change in the character of the neighborhood, and the futility of continuing a merely oppressive restriction upon the usefulness of land, prays the Court to relieve him of the oppressive and no longer reasonable burden.

On the second point, we again urge that public policy is not in any way violated by the enforcement of the covenant under consideration, and if the foregoing be true, then it follows that the covenant is like all agreements under seal, wherein, because of their peculiar nature, specific performance of such contracts is enforced by a court of equity. And even if it were to create a hardship upon some of the parties, they would not be relieved from performance for that reason alone. To avoid the contract, the party desiring avoidance must show fraud, duress, or such unfair advantage as would be tantamount to fraud. It is obvious in the case at bar, that no such elements enter.

POINT IV.

The respondents have no adequate remedy at law.

We wish to direct the attention of the Court that this point is not made in the amended petition of appeal as it appears on pages 34 and 35 of the State of the Case, and although we feel we should not be expected to argue the matter, we submit the following in response to the appellants' brief.

It is true that the respondents in the various affidavits which they filed have set out a forty per cent. diminution of business. They also set out a daily loss of income, which is true, that is, a difference between the daily gross income and net profit as taken in from the date of their purchase up to the time of the appellants' entry into the competing business, and the daily gross income and net profits since the appellants' entry into the competing business, and these matters were presented to this Court on motion of counsel for the respondents in an application for a bond with sufficient sureties to cover the diminutions and losses.

Nevertheless, it cannot fairly be argued that by reason thereof, the respondents have an adequate remedy at law, because these figures are not the true measure of damages, even in an action at law, and these figures do not make an allowance for the good-will of the business which has suffered, and for the future expansion of the business, which was contemplated by the purchasers when they bought same, and which expansion has been seriously impaired by the appellants' competition.

And a continuance in business by the appellants means not only the present diminution and loss, both in daily income and profit, and in the present good-will value of the business, but a continuing impairment of the expansion of the business. This is especially true of a borough the size of Metuchen.

A court of equity with its broad powers of relief can meet all phases of the situation and grant an adequate

remedy. To expect full relief in a court of law requires a straining of the imagination or the powers of the law courts

To recapitulate, the decree appealed from should be affirmed:

FIRST: Because there was good, valid and legal consideration therefor.

SECOND: Because the covenant as written is not violative of the public policy of the state, in that it is reasonable in its limitations in view of all the circumstances surrounding this particular case, and not broader in scope than is necessary to protect adequately the rights of the respondents.

THIRD: That the public policy of the state is not involved, and a contract of this type is enforceable in equity in the absence of fraud, duress or oppression.

FOURTH: That the respondents have no adequate remedy at law.

FIFTH: That there were no doubts as to the material facts in the case, such as would avoid the issuance of a temporary injunction, and postpone the issue to final hearing.

Respectfully submitted,

BLATT & LESSER,
Solicitors of Complainants-Respondents.

LOUIS B. LESSER,
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New Jersey Court of Errors and Appeals

Between
CHARLES SCHERMAN and SAMUEL FEIGELSON,
Complainants-Respondents,
and
JACK STERN and MAY STERN,
Defendants-Appellants.

BRIEF OF DEFENDANTS-APPELLANTS.

Statement of Issues.

This is an appeal from an order entered in the Court of Chancery granting a preliminary injunction in favor of the complainants, restraining the defendants from engaging directly or indirectly either as principal, agent or employee in the selling of stationery, candy, toys, sporting goods, tobaccos, cigars and cigarettes at the Post Office Building, Metuchen, New Jersey. The complainants' right to relief is based upon a certain agreement marked Exhibit "A" and attached to the bill of complaint (S. C., p. 4).

In brief, the facts surrounding the execution of this agreement are as follows:

Prior to March 18th, 1921, defendant Jack Stern was employed as a clerk by the Quality Corset Company at New York at a salary of thirty dollars a week. In March, 1921, he was hired by one Abraham Miller to work as a *clerk* in Miller's cigar, stationery and candy store at 399 Main street, Metuchen, New Jersey, at a salary of twenty-five dollars a week, together with the use of an apartment over the store free of rent, and with free use of electric light and water in connection with the occupation of said apartment. From March, 1921, until Oc-

tober, 1921, Stern continued in Miller's employ. Occasionally his wife, the defendant May Stern, assisted in doing odds and ends of work at the store, but she was never employed by Miller, the owner, nor was she paid any salary for any work that was performed by her.

In October, 1921, Miller entered into negotiations with the complainants through a certain brokerage agency known as the New York Business Exchange, relating to a proposed sale of Miller's business to the complainants. The purchase price was eight thousand dollars.

Complainants desired that as part of this agreement of purchase, Miller and his employee, the defendant Stern, and the latter's wife, enter into a contract agreeing not to engage in a competing business. The exact nature of the conversation relating to the proposed contract is discussed in greater detail hereafter.

As the result of these negotiations, the defendants on October 22nd, 1921, executed the agreement marked Exhibit "A" attached to the bill. The sale of the store by Miller to complainants was completed on October 26th, 1921, at which time the bill of sale and the contract under the terms of which Miller agreed to refrain from engaging in a competing business was executed. (Exhibit "B" attached to the bill, S. C., p. 5.)

On November 27th, 1921, the defendant Jack Stern opened a store in Metuchen and engaged in a line of business which competes with that of complainants.

Thereafter and on December 6th, 1921, the bill of complaint was filed. Upon the return of an order to show cause, a preliminary injunction was advised by the Vice-Chancellor on December 19th, 1921.

It is from the order granting the preliminary injunction that this appeal is taken.

Argument.

One of the reasons for reversal set forth in the amended petition of appeal, is that the agreement which constituted the basis of complainants' right to relief was not based or founded upon any valuable consideration and was wholly lacking in consideration, and that any consideration which might have been the basis of the agreement, had wholly failed.

The appellants' present solicitors were substituted in the case in place of Silas Grimstead, Esq., *after* the order granting the preliminary injunction had been entered and based their amended petition of appeal upon the record as they found it in the office of the Clerk in Chancery, the former solicitor not having retained office copies of his pleadings. The State of the Case as printed, is in accordance with the file in the Clerk of Chancery's office.

When the state of the case was served upon the respondents' solicitors, appellants' solicitors were advised that the answering affidavit of the defendant set forth on pages 23 to 27 inclusive of the state of the case had never been served, nor had they been read to the Vice-Chancellor at the time of the argument, and objection was then made to the inclusion of portions of such affidavit as part of the state of the case. The matter was then taken up with the Vice-Chancellor who advised the order, who stated that at his request the former solicitor for the defendants had not read the affidavit at the argument, but had stated its contents. In such statement, however, no reference had been made to the facts set forth in paragraphs 10, 11, 12 and 17 of the answering affidavit to the effect that as part of the negotiations which resulted in the execution by defendants of Exhibit "A" the sum of three hundred dollars had been promised to the defendant Jack Stern by the complainants. The Vice-Chancellor further stated that the only mention which he recalled had been made of the three hundred dollar item was to the effect that Miller, the

vendor, and not complainants, had promised to pay said sum to the defendants.

A motion was then made to the Court at the opening of the present term asking that the affidavit be suppressed. Decision on this motion was reserved and leave granted to argue the motion to suppress in the briefs on the main issue. Leave was also given to the complainants-appellees to file reply affidavits to the answering affidavits (which they were seeking to suppress), and the entire matter also argued in the briefs on the theory that the motion to suppress might be denied. (See order of this Court dated March 9, 1922, contained in the supplement to the State of the Case, p. 37.)

Reply affidavits have been filed pursuant to this order and are also contained in the supplement to the State of the Case (p. 38).

The motion to suppress the defendant's answering affidavit should be denied and the affidavit regarded as part of the record.

The affidavit in question was verified on December 13, 1921, the return day of the order to show cause, and it is not in any way intimated that the affidavit was not executed at that time.

Mr. Grimsted, the former solicitor, for whom we have been substituted, offered to read the affidavit at the argument, but to save time, the Court requested a statement of its contents, which was made. There is a dispute as to just how much of the contents of the affidavit were stated. The Vice-Chancellor and Mr. Lesser state that only portions of the affidavit were made known to the Court. Mr. Grimsted and our client, who was present in court, advise us that all the contents were stated.

Unfortunately Mr. Grimsted did not have the Court mark the affidavits filed at the time of the argument, and he did not mail the affidavit to the clerk at Trenton till a few days later when notice of appeal was given.

We urge that when an affidavit is submitted to a Court, and the Court instead of reading it, or permitting a reading thereof, requests a statement of its contents, the rights of the parties are to be determined by the actual contents of the affidavit and not by the statement of contents made by counsel.

Were the rule otherwise than above set forth, serious damage might be done and no relief therefrom awarded.

For instance: Assume that a bill was filed to declare a corporation insolvent, and the Court, instead of reading the bill and the supporting proofs presented, requested the solicitor for a statement of its contents; assume further that the solicitor stated facts which, if established, would constitute proof sufficient to justify the granting of the relief, and acting on the solicitor's statement, the Court awarded relief; assume further, however, that an actual examination of the pleadings disclosed that the alleged facts stated by the solicitor were not established in proper form, let us say by hearsay, for example, or were omitted from the bill entirely.

Under such circumstances could the Court's decree be sustained simply because the Court relied upon counsel's statement? Manifestly not. The decree would have to be vacated. Counsel might perhaps be punished for misleading the Court, but the decree would nevertheless have to fall.

To state another case: Assume in an application for alimony in a divorce case, counsel stated to the Court that his affidavits established that the defendant was possessed of a substantial income, and on the basis of such statement, an order was entered directing the payment of the alimony requested; assume the affidavits when read, did not establish the receipt of the income alleged. Would the order stand? Clearly, it would not.

Of course, the above situations are the reverse of the present case, but the same rule applies in the one as it must in the other.

If we must vacate orders *awarding* relief on the basis or erroneous statements of the contents of affidavits, so must we also vacate orders *refusing* relief, where relief would be justified were the affidavits themselves actually read.

The safest and best rule to be adopted is that the affidavits themselves must control; not statements of their contents. This is but another way of restating the ancient doctrine, that the writing itself is the best evidence.

Assuming that the affidavit is to be considered as part of the record we allege on the part of the appellant:

1. That the agreement on which complainant's right to relief is based is invalid, because the consideration on which it is founded has failed; and

2. That the agreement is a contract in partial restraint of trade and is objectionable to public policy because it goes beyond what was reasonably required for the protection and enjoyment of the business in whose interest it was made.

The agreement upon which complainant's right to relief is based is invalid because the consideration on which it is founded has failed.

Defendant states (p. 24, ll. 25 to 40) that in order to induce him to sign the agreement in question complainants promised to pay him three hundred dollars. This was never paid (p. 25, ll. 1 to 15). They also promised to procure for him a loan of a thousand dollars to assist him in engaging in business outside of Metuchen. This was never done (p. 25, ll. 1 to 15). These promises were the inducing causes which resulted in his signing the agreement which is the basis of the relief (p. 25, ll. 15 to 21).

Complainants deny all these allegations (p. l.).

If defendant's statement is true, the defendant was justified upon complainants' failure to perform, to regard the agreement as terminated, and this he did by opening his present store. Complainants having promised him moneys

which were not paid, defendant was not required to perform the terms of the contract on his part.

At law, a partial failure of consideration is not a complete defense, but is ground for an abatement of damage.

U. & G. Rubber Co. v. *Conard,* 80 N. J. L. 286 (Appeals 1910).

In equity, there may be a rescission in cases of this character if the party seeking to rescind places the opposite party in *status quo,* as far as he is able so to do.

Doughten v. *Camden B. & L. Assn.,* 41 N. J. Eq. 556 (Appeals 1886).

In the present case, defendant had received nothing from complainants and hence had nothing to restore to them in order to place them in *status quo.*

This rule is much stronger when the party asking the Court for relief is himself guilty of a breach of the contract on his own part. He does not come into equity with clean hands, and hence equity will not aid him.

In the present case we can go still further and argue that the consideration not having been advanced at all, the contract was a *nudum pactum* and therefore incapable of being enforced by either party.

We, therefore, submit that the agreement should not be enforced by this Court, there being no consideration to support it.

I.

A contract in partial restraint of trade is not objectionable to public policy unless it goes further than is reasonably required for the protection and enjoyment of the business in whose interest it is made, or unless the restraint is so great as to interfere with the interest of the public.

The foregoing, we submit is the rule of law by which the validity of the restrictive convenant involved in these proceedings is to be determined.

The latest adjudication of our courts on that subject is found in the recent decision of this court in the case of *Wyder* v. *Milhomme,* 115 Atl., 381, decided at the November, 1921, term.

That case was a suit at law to recover certain liquidated damages sustained by the complainant as the result of the defendant's breach of a covenant which he had entered into when he had sold his business to complainant. The covenant provided that the defendant would not for a period of ten years enter into a similar business; that during said period he would not become connected in any manner with any firm engaged in such business in the United States; that he would not disclose any information concerning said business to any person, and that during said period, he would not advise or assist any firm engaged in or about to become engaged in such business. The Court stated that the New Jersey cases laid down the principles of law to be applied to cases such as the one before it to the effect that a contract in partial restraint of trade is not objectionable to public policy unless it goes further than is reasonably required for the protection and enjoyment of the business in whose interest it is made, or unless the restraint is so great as to interfere with the interests of the public.

The Court found that the clause in question was broader than was reasonably necessary to protect the

purchaser and his business, and also deprived the public of the defendant's usefulness in his particular line of work.

The clause was held to be invalid.

In reaching its conclusion, the Court reiterated the doctrine which has long existed in this State (although all of the cases hereafter referred to were not expressly cited by the Court in its opinion). The following are additional authorities in support of the foregoing doctrine:

Richardson v. *Peacock,* 26 N. J. E., 40 (Chancery 1875, Runyon, *C.*), 28 N. J. E., 151 (Chancery 1877, Runyon, *C.*), 33 N. J. E., 597 (Appeals 1881, Dixon *J.*);

Mandeville v. *Harman,* 42 N. J. E., 185 (Chancery 1886, Van Fleet, *V. C.*);

Finger v. *Hahn,* 42 N. J. E., 606 (Chancery 1887, Van Fleet, *V. C.*); affirmed without opinion in 44 N. J. E., 604 (Appeals 1888);

Sternberg v. *O'Brien,* 48 N. J. E., 370 (Chancery 1891, Van Fleet, *V. C.*);

Elerman v. *Chicago Junction Rly Co.,* 49 N. J. E., 217 (Chancery 1891, Green, *V. C.*);

Carll v. *Snyder,* 26 Atl., 977 (Not contained in N. J. Reports); (Chancery 1893, Bird, *V. C.*);

Althen v. *Vreeland,* 36 Atl., 479 (Chancery 1897, Emery, *V. C.*);

Trenton Potteries Co. v. *Oliphant,* 58 N. J. E., 507;

Taylor Iron & Steel Co. v. *Nichols,* 73 N. J. E., 684 (Appeals 1907, Swayze, *J.*);

American Ice Co. v. *Lynch,* 74 N. J. E., 298 (Chancery 1908, Leaming, *V. C.*);

Artistic Porcelain Co. v. *Boch,* 76 N. J. E., 533 (Chancery 1909, Walker, *V. C.*);

Fleckenstein v. *Fleckenstein,* 76 N. J. L., 613 (Appeals 1908, Gummere, *C. J.*);

Penn Carbon, &c. Co. v. *Tomney,* 90 N. J. E., 233 (Appeals 1918, Swayze, *J.*);

Cosmos Dyeing, &c. Co. v. *Calderini,* 91 N. J. E., 379 (Chancery 1920, Lewis, *V. C.*);

Reference will be made to only such of the foregoing cases as have peculiar application to the case at bar.

Measured by the rules laid down by the foregoing cases, the question before the Court is whether the covenant executed by the defendants was reasonably required for the protection and enjoyment of the business sold and was not so great as to interfere with the interests of the public.

We submit that the clause is broader than was reasonably required for the protection and enjoyment of the business.

The clause is as follows:

> "We, the undersigned, Jack Stern and May Stern, his wife, in consideration of one dollar to us paid by
>
> "Charles Scherman and Samuel Feigelson, covenant and agree that we will not open in the City of Metuchen, State of New Jersey, a similar business A. Miller has in the premises known as #399 Main street, in the City of Metuchen, State of New Jersey, and sold to the above Scherman and Feigelson. We also covenant and agree not to be engaged in, nor in any manner whatosever become interested, directly or indirectly, in any business similar to the one hereby sold to Scherman & Feigelson, in the City of Metuchen, State of New Jersey, and also agree not to be employed in this city in such a business. This obligation remains in force after the above mentioned store will be sold to other persons."

It will be noted from the foregoing:

a. That the clause is unlimited as to time;

b. That the covenant continues in effect even though the purchaser should himself again sell the business to other parties.

We submit that this clause is, under our adjudications too broad, unreasonable, and, therefore, invalid.

In *Mandeville* v. *Harman* (*supra*) the parties were physicians. Mandeville had employed Harman to act as his assistant, the contract of employment providing that Harman would not "engage in the practise of medicine or surgery in the City of Newark at any time hereafter." He ceased his connection with the complainant and began to practise medicine on his own behalf, and proceedings were brought to restrain him. Vice-Chancellor Van Fleet said that *prima facie* contracts in restraint of trade were invalid, and that *the burden of establishing their validity was on the party seeking to enforce it.* On page 189 of the opinion he says:

> "The rule is, not that a limited restriction *is* good, but that it *may* be good. It is valid when the restraint is reasonable, and the restraint is reasonable when it imposes no shackle upon the one party, which is not beneficial to the other. * * * The test is to consider whether the restraint is such only as to afford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either. It can only be oppressive, and if oppressive, it is in the eye of the law unreasonable and void on the ground of public policy as being injurious to the interests of the public."

The Court further discusses the matter and shows that the clause prohibits the defendant from practising medicine forever in the City of Newark. If such injunction is granted, the defendant would be restrained even though complainant should die and cease practising medicine. Under such circumstances the complainant would not receive any benefit; he would need none, and the only purpose of the injunction would be to causelessly oppress the defendant.

The contract was held to be invalid.

In *Carll* v. *Snyder* (*supra*), the complainant had purchased a galvanized iron business from the defendant, who agreed not to engage in a competing business in Trenton. No time limit was mentioned in the contract. The Court states that the affidavits filed, the details of which do not appear in the opinion, satisfied him that the enforcement of the restriction was necessary to protect the complainant in its business. The Court stated further that the mere fact that no time limit was mentioned did not in and of itself make the contract invalid. The Court cites in support of its conclusion other cases in which it states a restrictive covenant was enforced even though no time limit was therein contained. The New Jersey case, however, of *Richardson* v. *Peacock* (*supra*), which he cites, does not support the statement because in that case a time limit of two years was contained in the contract.

In *Althen* v. *Vreeland* (*supra*) the defendant agreed not to engage in the cracker and biscuit business within a thousand miles from Newark. No time limit was mentioned in that contract. On final hearing, after considering the facts the Court was satisfied that the restrictions were broader than were reasonably necessary for the protection of the complainant, and the preliminary injunction which had been granted was vacated and a permanent injunction refused. The Court, however, did restrain the defendant from personally soliciting former customers on the theory that the purchaser of the defendant's business had acquired its good will, which included the right to do business with the former customers, which right should not be interfered with.

In *Taylor Iron & Steel Co.* v. *Nichols* (*supra*) the covenant was unlimited both as to time and place, and under the facts that case was held to be invalid as being unreasonable.

In *Fleckenstein Brothers Co.* v. *Fleckenstein (supra)* the defendant agreed not to engage in business within five

hundred miles of Jersey City for a period of twenty years. The Court found on final hearing that such a clause was not necessary for the reasonable protection of a business purchased, and refused to enforce it in its entirety. He restrained the defendant from engaging in business within a territory in which the business had been carried on at the time of the sale.

In *Cosmos Dyeing, &c., Co.* v. *Calderini (supra),* the defendant had sold his business to the complainant and entered into a covenant "not to engage in the piece dyeing and finishing business in the States of New Jersey or New York for a period of five years from August 1st, 1919." It was alleged that the defendant had become the general manager of the Atlas Chemical Company, in violation of the terms of the covenant. The defendant alleged that he was an employee of that company and had invested $11,000 for the benefit of his son who was learning the business. It appeared that the moneys invested were checks of the defendant's old company, and that although he claimed to be receiving a salary, no salary had as a matter of fact been paid to him until the hearing on the motion for the preliminary injunction. It also appeared that the defendant was enticing salesmen away from complainant and was making other attempts to injure the complainant's good will.

Upon the argument for the preliminary injunction the defendant agreed to withdraw all moneys invested by him in the business, and the question before the court was whether he could continue to act as an employee. On behalf of the defendant it was urged that when the restrictive covenant had originally been drawn complainant had requested that there be inserted a clause restraining defendant from acting as an employee for any other competing concern, but that the defendant had refused to enter into such a covenant.

The Court stated on page 381:

> "There is no doubt that this court should go as far as possible to restrain a fraudulent act by a vendor in violation of his covenant; but the restraint must be reasonable and the words of the contract carefully construed. Moreover, the rule in New Jersey is plainly established that when complainant's right is uncertain as a matter of law, a preliminary injunction will be denied. The true intent and meaning of the contract here is a question of law, particularly when the covenant is one which may be in restraint of trade."

The Court then modified the preliminary injunction which had theretofore been entered and refused to grant the injunction in the form requested by complainant.

The facts as set forth in the pleadings do not disclose that the clause was reasonably necessary for the protection of the business purchased.

In order to ascertain what protection was deemed necessary by the parties we must consider their negotiations, *bearing in mind that the defendants in this case are not the persons who sold the business, but merely employees of the vendor.*

Feigelson, one of the complainants, in his affidavit states (S. C., p. 8, ll. 26-32) that he stated that he and his partner would not be interested in the purchase unless Miller and his employee would agree not to enter into a competing business for a period of *eight years.*

Aaron Jaffe, one of the brokers, who was present at the conversation, does not repeat the details of the conversation. He merely states that there was a conversation concerning the execution of the agreement on behalf of Stern (S. C., p. 11, ll. 22-32). Presumably the conversation was to the same effect as stated by Feigelson.

Feigelson's and Jaffe's affidavits were the only ones attached to the bill. On the return of the order to show cause additional affidavits were submitted.

The other complainant, Scherman, states (S. C., p. 15, ll. 1-12) that he and his partner stated that if the business were sold Miller, the vendor,

> "would have to enter into an agreement not to engage in a similar or competing line of business in any capacity"

in Metuchen, New Jersey, and that the defendant Stern

> "would have to engage in a *similar* covenant."

Nothing is said as to the length of time during which the covenant should run. Consequently we are again relegated to Feigelson's affidavit that a covenant for eight years was desired.

Deutsch, another broker, says (S. C., p. 20, ll. 1-10) that he was present when the agreement was signed, and that he heard Feigelson ask if the defendants were ready to sign the agreement not to enter into a similar business, which agreement had been "referred to in an earlier conversation." Undoubtedly he was referring to the conversation which related to the eight-year agreement.

Miller, the vendor of the business, refers to the conversation with the purchasers, but he says nothing as to the length of time. His statement that the purchasers were unwilling to buy unless the defendants sign Exhibit "A" is manifestly incorrect, because Exhibit "A" was not drafted until some time later.

From the foregoing we think it is reasonable to conclude that the purchasers themselves did not think that a perpetual restraint was necessary to aid them in their purchase. At most an eight-year restraint was all that they thought was required.

If an eight-year restriction on the part of the vendor was all that was needed to protect the purchaser, why was it necessary to impose a restriction unlimited in time against a mere employee and his wife?

The purchasers were apparently satisfied that all the protection they needed as against their immediate vendor was a clause restricting him from entering into a com-

peting business for a period of eight years. Miller was the owner of the store. We assume he had operated it for a long time. At any rate, he was the owner before the defendant Stern moved from New York to enter his employ. If eight years was all that was needed to protect the business against him, can it be said that an unlimited restriction against an eight-months employee and his wife was also necessary?

The omission of an eight-year term was not the result of any error or mistake.

The fact that the parties discussed an eight-year term, inserted an eight-year term in the bill of sale executed by Miller, the vendor, but omitted such clause in the defendants' agreement, might cause one to ask was there not an error made?

We submit there was no error.

The clause in the agreement to the effect that "This obligation remains in force after the above-mentioned store will be sold to other parties" clearly establishes that the parties desired a restrictive clause that would run with the business, irrespective of whether the business was owned by complainants, and would continue in effect even after complainants had sold the same.

The most convincing argument, however, that there was no error is the failure of complainants to allege any such error in the bill or affidavits and their failure to ask for any reformation.

Defendants were not persons possessing such peculiar ability or knowledge that a perpetual restraint against them was reasonably necessary.

Complainants allege that the defendant, Jack Stern, was *manager* of Miller's store (S. C., p. 8, l. 22). This is denied, however, by the affidavit of Miller himself, which affidavit was submitted by the complainants (S. C., p. 21, ll. 35 and 36), to the effect that the defendant was a *clerk* and *salesman*. Defendant himself alleges that he began to work for Miller in March, 1921, seven months prior to

the sale in question. His salary was twenty-five dollars a week and free rent and electricity for some rooms over the store. It is true that defendant states in his affidavit that he had experience in the business and was acquainted with the trade and people of Metuchen (S. C., p. 25, ll. 31-35), but does that make him possess any extraordinary ability? The business, being the ordinary candy, cigar and stationery business which one sees everywhere, is not a business which requires unusual ability to operate.

Defendant, May Stern, certainly possesses an extraordinary ability. Miller in his affidavit says (S. C., p. 21, l. 35), that she assisted her husband at "irregular intervals." Defendant's affidavit is to the same effect. Does that indicate that a perpetual restraint against her is necessary as a means of protection to the purchaser and his business?

The affidavits do not establish that the business sold had acquired such a good will in Metuchen that it was reasonably necessary that the defendants be perpetually restrained from engaging in business in that municipality.

It should be borne in mind that the businesses of the parties are comparatively small businesses, and are not of such a nature that only one of them can be said to reasonably fulfill the needs and requirements of the city. If those stores were department stores, for instance, it might be argued that only one could be supported by the entire Town of Metuchen. But there is nothing in the affidavits to indicate the number of businesses of this character in Metuchen or to show that it was reasonably necessary to complainants that another store be enjoined. We feel that the case is not one where in view of the rapid growth of cities of this character in our State, it is reasonably necessary to complainants' business that this defendant be perpetually restrained from engaging in a similar business in that city.

We, therefore, respectfully submit that the case as it stood before the Vice-Chancellor was not one in which it

was established that the enforcement of the covenant in question was necessary to afford reasonable protection to the complainants.

II.

The complainants have an adequate remedy at law.

We submit that under ordinary conditions, complainants in cases of this character have no adequate remedy at law due to the difficulty of establishing their damages.

In this case, however, the complainants, according to their affidavits, can clearly establish what damages they have suffered as the result of defendants' acts.

In the bill of complaint (S. C., p. 2, ll. 32-38) it is alleged that since the commencement of business by the defendant the complainants' business has diminished by forty per cent. This allegation is supported by the affidavit of complainant, Feigelson (S. C., p. 10, ll. 1-12), in which it is stated that the receipts have fallen from one hundred dollars a day to sixty dollars a day, and that the value of the business has diminished by three thousand dollars, all as the result of defendants' competition.

This is further corroborated by the affidavit of the complainant Scherman (S. C., p. 17, ll. 30-38) to the same effect as Feigelson's affidavit.

We, therefore, submit that the complainants have an adequate remedy at law.

III.

The case was not so clear and free from doubt, nor was the likelihood of irreparable injury so imminent as to warrant the Court in granting a preliminary injunction.

The more recent cases are the cases of

Aldrich v. *Union Bag & Paper Co.*, 81 N. J. E. 244;

Schlemm v. *Whittel*, 86 N. J. E. 415;

Brunetto v. *The Town of Montclair,* 87 N. J. E. 338;

Cosmos Dyeing, &c., Co. v. *Calderini,* 91 N. J. E. 378.

All of the foregoing cases are based upon the old case of *Citizens' Coach Co.* v. *Camden Horse Railway Co.,* 29 N. J. E., p. 299.

The rules laid down in those cases are so well settled that we have not deemed it necessary to repeat them at length herein.

The doubts appearing in the pleadings are:

1. The question of the payment of the consideration; and

2. The question of the reasonableness of the restrictive covenant.

A preliminary injunction should not be entered where, in order to justify its entry, all doubts must be resolved in favor of the complainant, prior to final hearing; nor should such injunction be entered where the effect is to give complainants the full measure of relief which they could obtain on final hearing.

The rule above stated is well settled and is supported by the cases of

Howland v. *Andrus,* 81 N. J. E. 175 (Appeals, 1912, Trenchard, *J.*);

Aldrich v. *Union Bag & Paper Co.* (*supra*);

Cosmos Dyeing, &c., Co. v. *Calderini* (*supra*).

At the expense of repetition, reference is again made to the Cosmos Dyeing, &c., Co. case above set forth. The Court's attention is called to allegations of fraud in that case.

The Court states:

> "I am not willing on this preliminary injunction to say that the covenant prevents the defendant from working at the Atlas Co. * * * It is well settled that a preliminary injunction will not issue

> unless the injury sought to be prevented is really irreparable. There is grave doubt in my mind whether, under our cases, the temporary restraint in the form desired by complainant is proper, for it resolves, prior to final hearing, all doubts in favor of it, and gives such relief as it would be entitled to by a final decree."

When, in spite of the allegations of fraud contained in that case, we find that the preliminary injunction was vacated, is it not reasonable to argue that in the present case, weaker by far than in that case, the preliminary injunction should not have been granted?

We, therefore, respectfully submit that the order and decree of the Court of Chancery should be reversed.

STEIN, STEIN & HANNOCH,
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HERBERT J. HANNOCH,
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