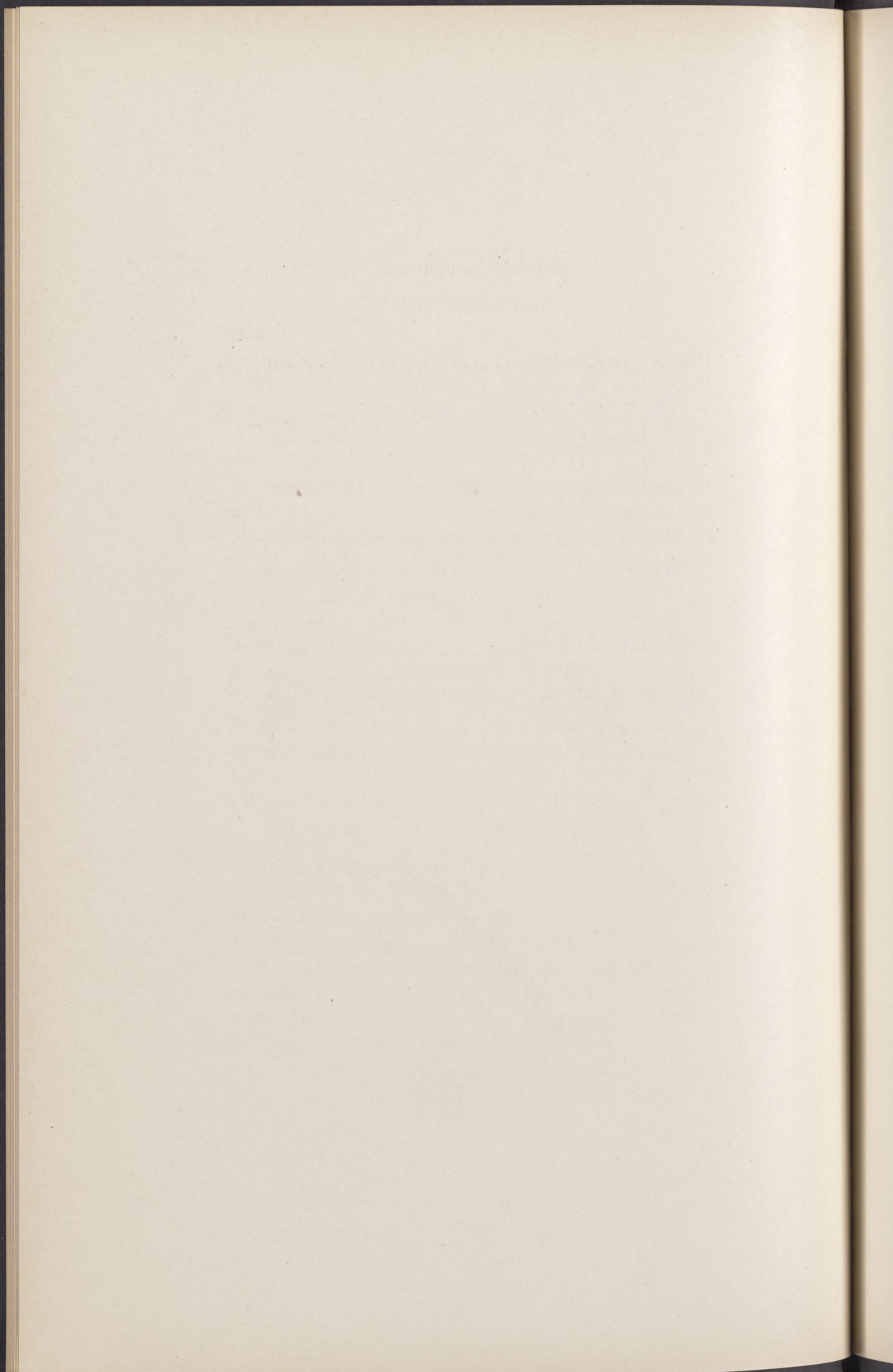


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Bill of Complaint.

(Filed July 5, 1929.)

In Chancery of New Jersey

10

To his Honor, EDWIN ROBERT WALKER, Chancellor
of the State of New Jersey:

Complainants Alfred Brenner and Samuel E. Kresch, partners as Brenner and Kresch, residing in the City of Bayonne, County of Hudson and State of New Jersey, respectfully show:

1. Defendants James J. Lowery and Anna Lowery were and are the owners of property known as 104 West 57th Street, in the City of Bayonne, County of Hudson and State of New Jersey, which property is further known as lot 54 in block 17 on the "Official Assessment Map of the City of Bayonne" and is further described as lot #54 in Block #75 on a Map entitled "Map 2 of a portion of the Estate of James Currie, situated in the Third Ward, City of Bayonne, New Jersey."

20

2. James D. Calabrese and Rosina Calabrese were and are the owners of property known as #102 West 57th Street in the City of Bayonne, County of Hudson aforesaid, also known as lot 53 in block 17 on the "Official Assessment Map of the City of Bayonne" which is also designated and described as lot #53 in Block #75 on a Map entitled, "Map #2 of a portion of the Estate of James Currie, situated in the Third Ward, City of Bayonne, N. J."

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40

Bill of Complaint.

10 3. The properties belonging to said James J. Lowery and Anna Lowery and James D. Calabrese and Rosina Calabrese described as aforesaid were desired by the Board of Education of the City of Bayonne for the purpose of erecting thereon a school building or buildings and offers were made by said Board of Education to said James J. Lowery and Anna Lowery and to said James D. Calabrese and Rosina Calabrese, the amount of said offers being far less than the value of their respective properties.

20 4. Upon and after the submission by the Board of Education of the offer to purchase said respective properties complainants, members of the Bar of this State and admitted to practice in this Honorable Court, were engaged in writing by said James J. and Anna Lowery and by said James D. Calabrese and Rosina Calabrese to represent them and each of them in the negotiations for the purchase and sale of their respective properties, and in any proceedings that might be instituted for the acquisition of certain properties in any condemnation proceedings. Thereafter condemnation proceedings were instituted under the provisions of an Act of the Legislature usually referred to as the "School Act." Commissioners were appointed by 30 a Judge of the Hudson County Circuit Court, who, after examination of the respective parties and hearing testimony, including the testimony of experts, fixed the value of the property belonging to said James J. and Anna Lowery at the sum of \$14,800 and the value of property belonging to James D. and Rosina Calabrese at the sum of \$19,500. The determination of said Commissioners in condemnation was reduced to writing and filed as 40 provided in the order of the Circuit Court Judge thereafter made.

Bill of Complaint.

5. On December 6, 1928, resolutions were adopted by the Board of Education of the City of Bayonne, determining that the fair values of the property belonging as aforesaid to James J. and Anna Lowery and James D. and Rosina Calabrese were respectively of the amount fixed by the Commissioners aforesaid; that the same should be purchased at the prices so fixed and that the Board of School Estimate of the City of Bayonne should be thus informed and requested to approve the purchase thereof and procure an appropriation to be made by the City of Bayonne for such purchase. 10

6. Under the written retainer made by the said James J. and Anna Lowery complainants were to receive as compensation for their services any amount paid for said property in excess of the sum of \$10,000, and under the written retainer of the said James D. and Rosina Calabrese said complainants were to receive any excess paid for the said property over and above the sum of \$15,000 up to an amount of \$17,000 and one-half of any amount over and above the sum of \$17,000, so that if there was paid to said James J. and Anna Lowery the sum of \$14,800 determined by said Commissioners as the value of the property of said James J. and Anna Lowery subsequently approved as aforesaid by said Board of Education, complainants would have received from said James J. and Anna Lowery the sum of \$4,800 and if there had been paid to said James D. and Rosina Calabrese the sum of \$19,500 as fixed by said Commissioners, approved as aforesaid by the Board of Education, complainants would have received from said James D. and Rosina Calabrese the sum of \$3,250. 20 30 40

Bill of Complaint.

7. Notwithstanding the resolutions adopted as
aforesaid on January 3rd, 1929, the Board of Edu-
cation although prohibited by the School Manual
from reconsidering the resolution previously
adopted determining the values of the respective
10 properties, adopted a resolution referring to the
resolution of December 6th, 1928, reciting that the
attorney for said Board had instituted condemna-
tion proceedings improperly and that same should
have been instituted under the "General Condem-
nation Act" instead of under the "School Act" and
in said Resolution the attorney for said Board was
authorized and directed to institute proceedings
to set aside the condemnation proceedings thereto-
fore instituted.

20 8. Thereafter application was made to the Su-
preme Court for a writ of certiorari to review the
resolution of the Board of Education and particu-
larly the resolution of January 3rd, 1929, but upon
hearing thereof it was held that such application
for certiorari was prematurely brought and per-
mission was granted to review such application
in the event that said Board of Education should
thereafter institute further proceedings in con-
demnation.

30 9. Application was thereafter made on behalf
of said Board of Education before the Judge of
the Hudson County Circuit Court to rescind the
order previously made for condemnation of said
lands under the "School Act," which application
was granted.

40 10. No further proceedings were instituted by
the Board of Education to condemn said lands and
no further application could therefore be made
for a writ of certiorari.

Bill of Complaint.

11. Said Board of Education well knew that complainants were representing said James J. and Anna Lowery and said James D. and Rosina Calabrese, but notwithstanding such knowledge without informing complainants the said James J. and Anna Lowery and said James D. and Rosina Calabrese, without knowledge of the complainants, commenced negotiations for the purchase and sale of the properties aforesaid neither of said parties informing complainants of such negotiations.

10

12. Complainants by virtue of the agreements made with them and their services in behalf of said James J. and Anna Lowery and James D. and Rosina Calabrese hold a lien for such services upon the lands hereinbefore described and the proceeds of the sale thereof enforceable only by order or decree of this Honorable Court. Said Board of Education and said James J. and Anna Lowery and James D. and Rosina Calabrese having knowledge of that fact, but wilfully and fraudulently intending to deprive complainants of their right to be compensated for services performed, privately negotiated for the purchase and sale of said lands and agreements were entered into for the purchase of the property belonging to the said James J. and Anna Lowery for the sum of \$10,000 and the property of the said James D. and Rosina Calabrese in the sum of \$14,000 which said amounts were far in excess of the amounts offered to said respective parties prior to the institution of proceedings to acquire the same and such amounts were realized solely through the efforts of the complainants.

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30

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

40

Bill of Complaint.

1. That the Board of Education of the City of Bayonne, James J. Lowery, Anna Lowery, James D. Calabrese and Rosina Calabrese who are hereby made defendants in this action answer this bill of complaint and each allegation thereof without
10 oath.

2. That an injunction or injunctive order be issued restraining and enjoining the Board of Education of the City of Bayonne from purchasing, and the said defendants James J. Lowery, Anna Lowery, James D. Calabrese and Rosina Calabrese from making a conveyance of the premises hereinbefore described.

3. That it be determined by order or decree of
20 this Honorable Court the value of the services performed by the complainants and that the amount so fixed be declared a lien against the properties hereinbefore described.

4. That a writ of subpoena issue out of and under the seal of this Honorable Court commanding the defendants to answer this bill of complaint and to stand to and abide by such order or decree as shall be made in the premises.

30 5. That such other or further relief may be granted as to this Court may seem equitable and just.

GEORGE T. VICKERS,
Solicitor and of Counsel
with Complainant.

Notice of Motion to Strike Out Bill.

(Filed July 29, 1929.)

IN CHANCERY OF NEW JERSEY.

Between

10

ALFRED BRENNER and SAMUEL E.
KRESCH, partners as BRENNER
AND KRESCH,

Complainants,

and

JAMES J. LOWERY and ANNA LOW-
ERY; JAMES D. CALABRESE and
ROSINA CALABRESE; and BOARD OF
EDUCATION OF THE CITY OF
BAYONNE,

20

Defendants.

To Alfred Brenner and Samuel E. Kresch, part-
ners as Brenner and Kresch, the complainants
in the above entitled cause, and George T.
Vickers, their solicitor:

Please take notice that on Monday the 29th day
of July, 1929, at the hour of ten o'clock in the
forenoon, daylight saving time, or as soon there-
after as counsel can be heard, at the Chancery
Chambers in the City of Jersey City, I shall apply
to the Chancellor for an order striking out and dis-
missing the bill of complaint filed by you in the
above entitled cause, and for a further order can-
celling and setting aside the Lis Pendens filed by
you in said cause. The grounds of my motion are
as follows:

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40

Notice of Motion to Strike Out Bill.

10 1. The said bill of complaint discloses no cause of action against the Board of Education of the City of Bayonne, and sets up no equitable grounds for an injunction or injunctive order restraining and enjoining the said Board of Education of the City of Bayonne from purchasing from the defendants James J. Lowery and Anna Lowery and James D. Calabrese and Rosina Calabrese the premises described in said bill, and because the said bill does not set out any equitable grounds for relief.

20 2. Because the Court of Chancery has no power or authority to make an order creating a lien in favor of the complainants for the amount the said complainants allege to be due them in their said bill of complaint by the said James J. Lowery and Anna Lowery and James D. Calabrese and Rosina Calabrese against or upon the land mentioned and described in said bill of complaint, and which the said Board of Education of the City of Bayonne has agreed to purchase.

30 3. Because the complainants in and by their bill of complaint allege only a claim for money against the said James J. Lowery and Anna Lowery and James D. Calabrese and Rosina Calabrese, which can only be sued for in a Court of Law.

4. The complainants' remedy is at law and not in equity against the said James J. Lowery and Anna Lowery and James D. Calabrese and Rosina Calabrese.

40 5. Because the complainants seek to enforce their claim for damages by reason of the non-performance of an alleged agreement made between the complainants and the said James J. Lowery

Notice of Motion to Strike Out Bill.

and Anna Lowery and James D. Calabrese and Rosina Calabrese in a Court of Equity instead of a Court of Law.

6. Even though the Board of Education of the City of Bayonne knew and had notice of the agreement made between the complainants and the said defendants James J. Lowery and Anna Lowery and James D. Calabrese and Rosina Calabrese such notice does not deprive the said Board of Education of the City of Bayonne from entering into agreements with the said James J. Lowery and Anna Lowery and James D. Calabrese and Rosina Calabrese for the purchase from them of said lands.

10

7. Because the Circuit Court of the County of Hudson had no jurisdiction over the condemnation of said lands mentioned in the bill of complaint and therefore dismissed the proceedings for the condemnation of said lands.

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Respectfully yours,

JAMES BENNY,
City Attorney,
Solicitor of the Board of
Education of the City of Bayonne.

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Notice of Motion to Strike Out Bill.
IN CHANCERY OF NEW JERSEY.

	Between	
10		ALFRED BRENNER and SAMUEL E. KRESCH, partners as BRENNER AND KRESCH,
		<i>Complainants,</i>
	and	
20		JAMES J. LOWERY and ANNA LOW- ERY; JAMES D. CALABRESE and ROSINA CALABRESE; and BOARD OF EDUCATION OF THE CITY OF BAYONNE,
		<i>Defendants.</i>

To Alfred Brenner and Samuel E. Kresch, partners as Brenner and Kresch, the complainants in the above entitled cause, and George T. Vickers, their solicitor:

30 Please take notice that on Monday, the 29th day of July, 1929, at the hour of ten o'clock in the forenoon, daylight saving time, or as soon thereafter as counsel can be heard at the Chancery Chambers in the City of Jersey City, we shall apply to the Chancellor for an order striking out and dismissing the bill of complaint in the above entitled cause, and for an order cancelling and setting aside the Lis Pendens filed by you in said cause so far as the same affects the defendants James D. Calabrese and Rosina Calabrese on the following grounds:

40 1. The said bill of complaint discloses no equitable ground for an injunction or an injunctive

Notice of Motion to Strike Out Bill.

order restraining and enjoining the Board of Education of the City of Bayonne from purchasing from the defendants James D. Calabrese and Rosina Calabrese the premises described in said bill of complaint.

2. Because the Court of Chancery has no power or authority to make an order creating a lien in favor of the complainants for the amount they allege to be due them in their said bill of complaint by the said James D. Calabrese and Rosina Calabrese against or upon the lands mentioned and described in said bill of complaint, and which the said Board of Education of the City of Bayonne has agreed to purchase from the defendants James D. Calabrese and Rosina Calabrese.

10

3. Because the complainants in and by their said bill of complaint allege only a claim for damages against the said James D. Calabrese and Rosina Calabrese for money which can only be sued for in a Court of Law.

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4. The complainants' remedy is at law and not in equity against the said defendants James D. Calabrese and Rosina Calabrese.

5. Because the complainants seek to enforce their claim for damages by reason of the non-performance of an alleged agreement made between the complainants and the said James D. Calabrese and Rosina Calabrese in a Court of equity instead of a Court of law.

30

6. Because the Circuit Court of the County of Hudson has no jurisdiction over the condemnation of said lands mentioned in the bill of complaint

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Order to Strike Out Bill.

and therefore dismissed the proceedings for the condemnation of said lands.

BENNY & CRUDEN,
Solicitors for the Defendants
James D. Calabrese and
Rosina Calabrese.

10

Order to Strike Out Bill.

(Filed August 21, 1929.)

IN CHANCERY OF NEW JERSEY.

Between

ALFRED BRENNER and SAMUEL E.
KRESCH, partners as BRENNER
AND KRESCH,

Complainants,

and

JAMES J. LOWERY, *et ux, et als.,*
Defendants.

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This matter coming on to be heard in the presence of George T. Vickers, solicitor of the complainants, and of James Benny, solicitor of the defendant the Board of Education of the City of Bayonne, and the Court having heard the arguments of the said solicitors and being of the opinion that the bill of complaint filed herein discloses no cause of action particularly against the Board of Education of the City of Bayonne, in that the matter stated therein will not sustain complainants' claim for equitable relief and that the complainants have an adequate remedy at law;

And it appearing that due notice of the said de-

Order to Strike Out Bill.

fendant's motion to dismiss the said bill of complaint for the cause aforesaid has been given to the said complainants, it is thereupon on this 21st day of August, 1929, ORDERED, ADJUDGED and DECREED that the complainants' said bill of complaint be and the same is hereby dismissed, so far as the Board of Education of the City of Bayonne is concerned, with costs. 10

E. R. WALKER,
C.

Respectfully advised.

JOHN J. FALLON,
V. C.

Order to Strike Out Bill. 20

(Filed August 21, 1929.)

IN CHANCERY OF NEW JERSEY.

Between

ALFRED BRENNER and SAMUEL E.
KRESCH, partners as BRENNER
AND KRESCH,

Complainants,

and

JAMES D. CALABRESE, *et ux, et als.,*
Defendants.

30

This matter coming on to be heard in the presence of George T. Vickers, solicitor of the complainants, and of James Benny, solicitor of the defendant the Board of Education of the City of Bayonne, and of Benny and Cruden, solicitors of the defendants James D. Calabrese and Rosina 40

Memorandum.

10 Calabrese, and the Court having heard the arguments of the said solicitors and being of the opinion that the bill of complaint filed herein discloses no cause of action in that the matter stated therein will not sustain complainants' claim for equitable relief and that the complainants have an adequate remedy at law;

And it appearing that due notice of the said defendants' motion to dismiss the said bill of complaint for the cause aforesaid has been given to the said complainants, it is thereupon on this 21st day of August, 1929, ORDERED, ADJUDGED, and DECREED that the complainants' said bill of complaint be and the same is hereby dismissed with costs.

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E. R. WALKER,
C.

Respectfully advised,

JOHN J. FALLON,
V. C.

Memorandum.

(Filed August 21, 1929.)

30

I will advise an order striking out the Bill as to all defendants:

1. Want of Equity (all of the matters stated in the bill taken together, if true, will not sustain complainants' claim for equitable relief).

2. Complainants have an adequate remedy at law against defendants Lowery & Calabrese.

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FALLON,
V. C.

Amended Notice of Appeal.

(Filed September 12, 1929.)

IN CHANCERY OF NEW JERSEY.

ALFRED BRENNER and SAMUEL E.
KRESCH, partners as BRENNER
AND KRESCH,

*Complainants,**v.*

JAMES J. LOWERY, ANNA LOWERY,
JAMES D. CALABRESE, ROSINA
CALABRESE and the BOARD OF
EDUCATION OF THE CITY OF BAY-
ONNE,

Defendants.

10

On Bill.

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The complainants Alfred Brenner and Samuel E. Kresch, partners as Brenner and Kresch, hereby appeal from the orders made by the Chancellor on the advice of Vice-Chancellor John J. Fallon in the above entitled cause striking out the bill of complaint filed by the complainants in the above entitled cause and from the whole and every part thereof to the Court of Errors and Appeals in the last resort in all causes.

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Dated September 7th, 1929.

GEORGE T. VICKERS,
Solicitor for and of Counsel
with complainants, Alfred
Brenner and Samuel E.
Kresch, partners as Bren-
ner and Kresch.

40

Petition of Appeal.

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

GEORGE T. VICKERS,
Solicitor for and of Counsel
with complainants, Alfred
Brenner and Samuel E.
Kresch, partners as Bren-
ner and Kresch.

10

Petition of Appeal.

(Filed September 8, 1929.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

20

ALFRED BRENNER and SAMUEL E.
KRESCH, partners as BRENNER
AND KRESCH,

*Complainants-Appellants,**v.*

JAMES D. CALABRESE and ROSINA
CALABRESE and the BOARD OF
EDUCATION,

Defendants-Appellees.

30

On Appeal
from the
Court of
Chancery.

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

The petition of Alfred Brenner and Samuel E. Kresch, partners as Brenner and Kresch, the appellants in the above entitled cause, respectfully show that:

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1. Petitioners find themselves aggrieved by

Petition of Appeal.

final orders advised in the Court of Chancery by the Honorable John J. Fallon, Vice Chancellor, and made by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date August 21st, 1929, in a certain cause in said Court of Chancery wherein the said Alfred Brenner and Samuel E. Kresch, partners as Brenner and Kresch, were complainants and the said James D. Calabrese and Rosina Calabrese and the Board of Education of the City of Bayonne were defendants in this respect, to wit:

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That said orders adjudge that the complainants' bill of complaint be dismissed in so far as the Board of Education of the City of Bayonne and James D. Calabrese and Rosina Calabrese were concerned with costs.

20

2. And your petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that the allegations of the bill of complaint set forth a cause of action for equitable relief and should, therefore, have been stricken out.

Petitioners, therefore, pray that the said order of the said Chancellor may be wholly reserved, set aside and for nothing holden, and that petitioners may have such other relief in the premises as to this Court shall seem proper.

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GEORGE T. VICKERS,
Solicitor for and of Counsel
with Appellants.

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Answer of the Board of Education.

(Filed September 21, 1929.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10

ALFRED BRENNER and SAMUEL E.
KRESCH, partners as BRENNER
AND KRESCH,
Complainants-Appellants,

v.

JAMES D. CALABRESE and ROSINA
CALABRESE, and BOARD OF EDUCA-
TION OF THE CITY OF BAYONNE,
Defendants-Appellees.

20

THE ANSWER OF THE BOARD OF EDUCATION OF THE
CITY OF BAYONNE, ONE OF THE APPELLEES ABOVE
NAMED, TO THE PETITION OF APPEAL OF THE ABOVE
NAMED APPELLANT.

30

This appellee, not admitting the truth of all or
any of the matters in the petition of appeal con-
tained, for answer thereto, nevertheless, admits
that an order was on the 21st day of August, 1929,
made and entered in the Court of Chancery of New
Jersey in the above entitled cause for the purposes
in said petition mentioned and as therein set forth,
but as to the substance and form of the said order
this appellee begs leave to refer thereto when the
same shall be produced.

This appellee is advised and believes that the
said order is agreeable to equity and it prays that

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Answer of James D. and Rosina Calabrese.

the same may be affirmed with costs in favor of this appellee.

JAMES BENNY,
Solicitor for and of Counsel
with Appellee, Board of
Education of the City of Bayonne. 10

Answer of James D. Calabrese and Rosina Calabrese.

(Filed September 21, 1929.)

NEW JERSEY COURT OF ERRORS AND APPEALS. 20

ALFRED BRENNER and SAMUEL E. KRESCH, partners as BRENNER AND KRESCH,
Complainants-Appellants,

v.

JAMES D. CALABRESE and ROSINA CALABRESE, and BOARD OF EDUCATION OF THE CITY OF BAYONNE,
Defendants-Appellees. 30

THE ANSWER OF JAMES D. CALABRESE AND ROSINA CALABRESE, TWO OF THE APPELLEES ABOVE NAMED, TO THE PETITION OF APPEAL OF THE ABOVE NAMED APPELLANT.

These appellees, not admitting the truth of all or any of the matters in the petition of appeal contained, for answer thereto, nevertheless, admit that an order was on the 21st day of August, 1929, 40

Answer of James D. and Rosina Calabrese.

made and entered in the Court of Chancery of New Jersey in the above entitled cause for the purposes in said petition mentioned and as therein set forth, but as to the substance and form of the said order these appellees beg leave to refer thereto when
10 the same shall be produced.

These appellees are advised and believe that the said order is agreeable to equity and they pray that the same may be affirmed with costs in favor of these appellees.

BENNY & CRUDEN,
Solicitors for and of Counsel
with Appellees, James D.
Calabrese and Rosina Calabrese.

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New Jersey Court of Errors and Appeals

ALFRED BRENNER and SAMUEL E.
KRESCH, partners as BRENNER
AND KRESCH,
Complainants-Appellants,

v.

JAMES D. CALABRESE and ROSINA
CALABRESE and the BOARD OF
EDUCATION OF THE CITY OF
BAYONNE,
Defendants-Appellees.

On Appeal.

BRIEF OF COMPLAINANTS- APPELLANTS.

Statement of Facts.

This is an appeal from orders striking out bill of complaint filed by the complainants (Case, pp. 12-14).

The bill of complaint (Case, pp. 1-6) alleges that James J. and Anna Lowery were the owners of property 104 West 57th Street and James D. and Rosina Calabrese were owners of 102 West 57th Street, both in the City of Bayonne. The Board of Education of the City of Bayonne was desirous of procuring both properties for the erection of a school. Both owners engaged the services of Brenner and Kresch as attorneys to represent them in pending negotiations for sale and to subsequently represent them in any proceedings that might be instituted for condemnation of such property.

The parties entered into written agreements with the complainants, James J. and Anna Lowery, agreeing to pay them any amount secured in excess of \$10,000, James D. and Rosina Calabrese agreeing to pay any excess over \$15,000 up to \$17,000 and 50% of net amount above \$17,000, both amounts being far in excess of what had previously been offered by the Board for the purchase of the respective properties. Being unable to agree with the Board on a price, condemnation proceedings were instituted by the Board of Education under a statute commonly designated as the "School Act." Commissioners were appointed who fixed the price of the Lowery property at \$14,800 and the Calabrese property at \$19,500. The Board subsequently adopted a resolution agreeing to pay such prices and asking the Board of School Estimate for an appropriation in such amounts. Subsequently, the Board reconsidered the former resolutions complaining that the proceedings in condemnation were invalid and should have been instituted under the "General Condemnation Act" and authorized the City Attorney to make application to the Judge of the Hudson County Circuit Court to invalidate the previous proceedings. Such application was made and granted.

A writ of certiorari was applied for and temporarily refused, the Supreme Court Judge holding that the application was prematurely made and that reapplication could be made if further negotiations were entered into for the purchase or further condemnation proceedings instituted.

Disregarding entirely the rights of the complainants and without knowledge of the complainants, agreements were entered into by both owners with the Board of Education, Lowery agreeing to make sale for \$10,000 for his parcel and Calabrese agreeing to make conveyance for \$15,000 ~~as a fee~~.

The bill prayed that the defendants Lowery and Calabrese should be restrained from making conveyance of their respective properties to the Board of Education until the fee of complainants had been fixed by the Court of Chancery, and that the Board of Education should be restrained from accepting conveyance until such fee should be paid, and further prayed for the fixing of such fees.

Upon notice of motion to strike out the bill of complaint, argument was heard and memorandum filed (Case, p. 14, lines 30-40), V. C. FALLON determining that the bill should be struck out for the following reasons:

(1) Want of equity (all of the matters stated in the bill taken together if true will not sustain complainants' claim for equitable relief).

(2) Complainants have an adequate remedy at law against defendants Lowery and Calabrese.

POINT I.

Defendants James J. and Anna Lowery are not represented, they having made a settlement.

Subsequent to the filing of the bill, James J. and Anna Lowery arrived at a satisfactory settlement with complainants, and the Board of Education has been advised of that fact. To protect such settlement, an assignment was made of all amounts that might thereafter be paid by the Board of Education for the Lowery parcel to the complainants, and such assignment has been delivered to the Secretary of the Board of Education. No notice has been given by James J. or Anna Lowery of a motion to strike out, and the present solicitors, acting for the other parties, do not presume to act for them.

POINT II.

Defendants James D. and Rosina Calabrese are not entitled to have the bill of complaint struck out as to them.

(a) As against James D. and Anna Calabrese, complainants have no adequate remedy at law.

The bill alleges and on this motion such allegation must be taken as true, that a definite contract was entered into between Mr. and Mrs. Calabrese and the complainants.

The bill also alleges and cannot on this motion be denied that for the purpose of avoiding payment to the complainants, private negotiations were entered into with the Board of Education.

If suit at law were instituted, complainants would immediately be met with the contract and contention made that the complainants could not be entitled to a recovery in view of the fact that the price obtained was not beyond that fixed as the upset price in the contract.

(b) A Court of Equity has jurisdiction to fix compensation of attorneys.

In the Court of Chancery it was held by Vice-Chancellor PRITNEY that an attorney has a lien for compensation upon property, the possession of which was secured by him for his clients.

Adams v. Schmidt, 68 N. J. E. 168.

In a later decision in this Court, the authorities in this State, as well as those of other jurisdictions, were reviewed and the rule definitely stated that where an attorney contracted with his client for payment of his services under a contingent agreement, that he was to be paid out of the fund cre-

ated by his efforts, that he secured an equitable lien upon the proceeds which would be enforced in this Court. In its decision, the Court distinguished the earlier case of *Weller v. Railway Company*, 68 N. J. E. 659, which held that the Court would not enforce a lien upon an amount recovered for personal injuries.

Wilson v. Seeber, 72 N. J. E. 523.

In *Grimm v. Franklin*, 140 Atl. 236, it was stated by Vice-Chancellor BERRY:

“It is also admitted that the charges of an attorney are always subject to scrutiny and review in this court and that this court has a right now to determine the fairness and reasonableness of the contract, the adequacy and propriety of the compensation therein provided for and the defendant joins in this request that this be done. That such is the law in this State cannot be doubted. ON THE OTHER HAND, IT MAY BE SAID THAT THIS COURT’S CONSCIENCE MAY AS EASILY BE SHOCKED BY AN ATTEMPT TO AVOID THE PAYMENT OF AN HONEST OBLIGATION AS THE PROCURING OF AN UNFAIR CONTRACT.”

Examination reveals no case in this State which says that a Court of Equity on application of either party is without jurisdiction to fix compensation of counsel, but to the contrary every case as illustrated by those cited definitely holds that the Court has such jurisdiction.

In the case at bar, the complainants are certainly entitled to the intervention of this Court in view of the fact that it bears the additional feature not necessarily found in other cases where the Court has given relief, in that there is a definite charge that the property owners wilfully, fraudulently and deliberately entered into the contract with the

Board of Education in realization of the fact that by so doing their representatives might be barred of any compensation for services performed, and, in so doing, were guilty of a fraud.

That this Court has authority to consider a case where fraud is alleged is so elementary as to need no citation of authorities.

POINT III.

The Board of Education is not entitled to a dismissal of the bill against it.

As to the Board of Education, there is contained in the bill of complaint, a definite charge of fraud. Whether or not this can be substantiated will depend entirely on the proof which the complainants would be permitted to offer on final hearing, but could not offer in defense of the motion.

Disregarding, however, the charge of fraud, the rights of the complainants as against the Board of Education will be dependent upon such rights as they may have against the property owners. If the bill of complaint is held good as against the property owners and it should be subsequently determined that the complainants have a lien on the fund created and are entitled to restrain the sale until such lien is satisfied, then, of necessity, the Board of Education could not accept title nor pay the proceeds of sale until the lien so created had been satisfied.

It is, therefore, urged that the Court erred in striking out the bill of complaint.

GEORGE T. VICKERS,
Solicitor and of Counsel with
Complainants-Appellants.

New Jersey Court of Errors and Appeals

ALFRED BRENNER and SAMUEL E.
KRESCH, partners as Brenner
and Kresch,
Complainants-Appellants,

vs.

JAMES D. CALABRESE and ROSINA
CALABRESE and the BOARD OF
EDUCATION OF THE CITY OF BA-
YONNE,
Defendants-Appellees.

On Appeal from
the Court of
Chancery.

**BRIEF ON BEHALF OF DEFENDANTS-
APPELLEES.**

History of the Case.

The Board of Education of the City of Bayonne, desiring to acquire the possession of lands belonging to James D. Calabrese and wife and James J. Lowery and wife, offered them a sum of money for the same, which offer was rejected. Thereupon, the Board of Education filed its petition in the Hudson County Circuit Court for the condemnation of said lands and a Judge of said Court appointed Commissioners to condemn the same.

After the said Commissioners had reported, to-wit: on December 6th, 1928, resolutions were adopted by the Board of Education of said City for orders setting aside the proceedings for the condemnation of said property and directing the City Attorney to apply to the Hudson County Circuit Court for orders setting aside the said proceedings.

Prior to the filing of the petition for the condemnation proceedings, the defendants James J. Lowery *et ux.* and James D. Callabrese *et ux.* engaged the complainants to represent them in the negotiations for the purchase and sale of their respective properties and in any proceedings that might be instituted for the acquisition of their properties in any condemnation proceedings.

James J. Lowery *et ux.* have settled with the complainants so that this appeal only affects the defendants, James D. Calabrese and Rosina Calabrese and the Board of Education of the City of Bayonne.

On the application, after hearing the parties, the Hudson County Circuit Court set aside the condemnation proceedings on the ground that it had no authority in the premises.

Thereupon the complainants made an application for a writ of certiorari to review the proceedings of the Board of Education in the matter of the resolution directing the City Attorney to make application for the orders setting aside the said proceedings, which writ was denied. Thereupon, the complainants filed their bill of complaint.

Notice was given by the defendant, the Board of Education of the City of Bayonne, and by the defendants, James D. Calabrese *et ux.*, of an application to the Chancellor on the 29th day of July, 1929, of a motion for an order striking out and dismissing the said bill of complaint. See notice, pp. 7 and 10.

The matter came on to be heard before Vice-Chancellor Fallon and he made an order striking out the bill as to all the defendants. See Memorandum on page 14.

The Board of Education entered into a written contract with the defendants, James D. Calabrese *et ux.*, by which said Board agreed to purchase and said James D. Calabrese *et ux.* agreed to convey said lands.

POINT I.

The condemnation proceedings were commenced under the wrong act and the Hudson County Circuit Court had no power to condemn the land.

The act is referred to in the bill of complaint (Paragraph 4, p. 2) as the "School Act". It was approved April 4th, 1889, Comp. Stat. Vol. 4, p. 4822, Sec. 284. It is entitled, "An act to authorize the condemnation of land in cities of this state whereon public school buildings may be erected and which shall be devoted for public school purposes."

The following is a copy of the act of April 4, 1889, or so much of it as affects this case:

"Section 1. That whenever, in the judgment of the board or body having control of the public schools in any of the cities of this State, the price, demanded by the owners of any lands or real estate which may be deemed by such board or body necessary for the use of the public schools of any such city, is exorbitant and more than the fair market value thereof, it shall and may be lawful for such board or body * * * to apply to a judge of the Circuit Court in and for the county in which such city is located, for the appointment of three commissioners to make an appraisement of the value of the lands and of the damages which the owner or owners may suffer by reason of the taking and condemnation thereof. Such application shall be made upon petition. * * * Thereupon, it shall be the duty of said judge to appoint as commissioners three suitable persons, who shall be freeholders and residents of the county within which such application is made, to make an appraisement of the value of the lands so to be condemned and of the damages which the owner or own-

ers of such lands may suffer by reason of the taking thereof.

Section 2. That such commissioners appointed by the Circuit Court * * * shall forthwith proceed to estimate and determine the fair value of the lands and real estate so to be taken and condemned, as aforesaid, and of the damages which the owner or owners thereof will suffer by reason of the taking thereof * * * and as soon as they shall have determined upon said valuation they shall make and sign a certificate thereof and file the same in the office of the City Clerk of such city or such other place as the said Judge may direct. * * *

Comp. Stat., Vol. 4, p. 4822 and p. 4823,
Secs. 284 and 285.

Said act was superseded by an act passed March 20th, 1900, P. L., 1900, p. 79, which is entitled, "An act to regulate the ascertainment and payment of compensation for property condemned or taken for public use." The following cases hold that the General Condemnation Act of 1900 supersedes all other acts authorizing the condemnation of lands:

Fishblatt vs. Atlantic City, 81 N. J. L. 67;
Lehigh Valley Railroad Company vs. Phillipsburg, 73 N. J. L. 138;
Traction Company vs. De Gray, 70 N. J. L., p. 63;
Coles vs. Telegraph Company, 67 N. J. L. 490.

The following is a copy of so much of the General Condemnation Act of 1900, P. L. 1900, page 79, as is deemed necessary for the decision of the case:

"1. Whenever the proper officers of the state or of any county or of any municipal

corporation or of any other corporation, public or private, having power to take land or other property for public use, shall have determined to acquire land or other property, pursuant to authority conferred by law, and cannot acquire such land or other property by agreement with the owner whether by reason of disagreement as to the price or the legal incapacity or absence of the owner or his inability to convey valid title, or the lack of authority of the party, determining to acquire the property, to do so by agreement or by reason of any other cause, the compensation shall be ascertained and paid in the manner directed by this act.

2. The party exercising the right of taking shall present a petition to one of the Judges of the Supreme Court for the appointment of three Commissioners to fix the compensation to be paid, which petition shall contain a particular description of the land and property required and shall set forth the names of the owners and occupant, if any there be, and the person appearing of record to have any interest in said property, and the residences of said owners, occupants and persons, if the same can be ascertained, which petition shall be verified by the oath of the engineer or agent of the petitioner. * * * ”

Section 18 of said act contains a repealer as follows:

“All acts or parts of acts, general, special, public or private, inconsistent with the provisions of this act, shall be and are hereby repealed but proceedings pending when this act takes effect shall not be affected by this repealer.”

By the terms of this act and the various decisions above cited, there can be no question but that it superseded, if it did not repeal, the act of April 4, 1889, Comp. Stat. Vol. 4, p. 4822, Section 284.

POINT II.

There are no grounds of equity set forth in the bill of complaint.

The bill does not contain any facts which authorize the Court of Chancery to grant either an injunction restraining the Board of Education from purchasing the lands or the said defendants, James D. Calabrese *et ux.* from making a conveyance thereof.

Paragraph 2 of the bill (p. 1) describes the property owned by the said defendants.

Paragraph 3 (p. 2) sets out the desire of the Board of Education to acquire said property for the purpose of erecting a school house thereon and that said Board offered to them less than its value.

Paragraph 4 (p. 2) sets out that the said defendants engaged the complainants to represent them in the negotiations for the purchase of said property and in any proceedings that might be instituted for the acquisition thereof, and that thereafter condemnation proceedings were instituted under the provisions of an act of the Legislature usually referred to as the "School Act," and that Commissioners were appointed by a Judge of the Hudson County Circuit Court, and that testimony was taken by which the value of the property, belonging to the defendants James D. Calabrese *et ux.*, was worth the sum of \$19,500, and that the determination of said Commissioners was reduced to writing and filed as provided in the order of the Circuit Court Judge made thereunder.

Paragraph 5 (p. 3) of said bill sets out that on September 6th, 1928, resolutions were adopted by the defendant the Board of Education determining that the fair values of the property belonging, as aforesaid, to the defendants James D. Cala-

brese *et ux.* and to James J. Lowrey *et ux.*, were respectively of the amounts fixed by the Commissioners aforesaid, and that the same should be purchased at the price so fixed, and that the Board of School Estimate of the City of Bayonne should be thus informed and requested to approve the purchase thereof and procure an appropriation to be made by the City of Bayonne for such purchase.

Paragraph 6 (p. 3) of the bill sets out the retainer made by the said defendants James D. Calabrese and Rosina Calabrese.

Paragraph 7 (p. 4) of the bill sets out that, notwithstanding the resolutions of the Board of Education determining the value of the property, the Board of Education adopted a resolution reciting that the Attorney for said Board had instituted condemnation proceedings improperly and that the same should have been instituted under the General Condemnation Act instead of under the School Act, and directing the said Attorney to institute proceedings to set aside the said condemnation proceedings.

Paragraph 8 (p. 4) sets forth the application made by the complainants for a writ of certiorari to review the resolution of the Board of Education and that upon the hearing thereof it was held that such application was prematurely brought and that permission was granted to renew such application in the event that said Board of Education should thereafter institute further proceedings in condemnation.

Paragraph 9 (p. 4) sets up that application was made before the Hudson County Circuit Court to rescind the orders previously made for condemnation of said lands under the School Act and that said application was granted.

Paragraph 10 (p. 4) of said bill sets up that no further proceedings were instituted by the Board of Education to condemn said lands.

Paragraph 11 (p. 5) of said bill sets up that said Board of Education well knew that the complainants were representing the said James D. Calabrese *et ux.* and that, notwithstanding such knowledge without informing complainants and without the knowledge of complainants, commenced negotiations for the purchase and sale of said property.

Paragraph 12 (p. 5) of said bill sets out that complainants, by virtue of the agreements made with them and their services in behalf of the said defendants, James D. Calabrese *et ux.*, hold a lien for such services upon the said lands.

Nowhere in said bill are any facts set forth that justify the Court of Chancery in either enjoining the Board of Education from purchasing or James D. Calabrese *et ux.* from conveying said lands to it or that the complainants are entitled to a lien on said lands for their alleged services in the premises.

POINT III.

The Board of Education of the City of Bayonne had ample power to enter into the contract of purchase.

The School Act, P. L., 1903, 2nd Special Session, p. 17, and Comp. Stat., Vol. 4, p. 4746, Sec. 76, provides as follows:

“Whenever a city board of education shall decide that it is necessary to raise money for the purchase of lands for school purposes or for erecting, enlarging, repairing or furnishing a school house or school houses, it shall prepare and deliver to each member of the Board of School Estimate of such school district a statement of the amount of money estimated to be necessary for such purpose or purposes * * *.”

Then the act defines the procedure necessary to be followed by the board of school estimate in making the appropriation.

The 5th paragraph of the bill of complaint (p. 3) sets out that the Board of School Estimate was requested to approve the purchase of said lands and procure an appropriation to be made by the City of Bayonne for such purchase.

As a matter of fact, the appropriation has since been made.

POINT IV.

The complainants-appellants have an adequate remedy at law.

No citation of authorities is necessary to establish that where there is an adequate remedy at law equity will not entertain jurisdiction.

A reading of the bill of complaint indicates that there is an adequate remedy at law in this case.

If the complainants-appellants have any cause of action against the defendants, James D. Calabrese *et ux.*, it is for damages for breach of contract. Such actions cannot be maintained in a court of equity.

The act of 1919, P. L., 1919, p. 500, is unconstitutional to the extent that it attempts to give the Court of Chancery authority to hear and determine actions for debt and for damages arising out of breach of contract, which power is solely within the jurisdiction of the law courts.

Gross vs. Penna. Mortgage, etc., Company, decided May 20, 1929, reported in No. 21 of Vol. 7 of New Jersey Advance Reports.

POINT V.

The Court of Chancery has no authority to create a lien upon lands in favor of agents employed to sell the same or for services rendered by such agents.

The complainants-appellants, by the 3rd paragraph of the prayer of their bill of complaint (p. 6), pray as follows:

“That it be determined by an order or decree of this Honorable Court the value of the services performed by the complainants, and that the amount so fixed be declared a lien against the properties hereinbefore described.”

We urge that it is beyond the power of the Court of Chancery to grant that prayer.

Finally, the orders of the Court below (pp. 12 and 13) should be affirmed for the reasons set forth in the memorandum of Vice-Chancellor Fallon (p. 14), which is as follows:

“MEMORANDUM

I will advise an order striking out the Bill as to all defendants;

(1) Want of equity (all of the matters stated in the bill taken together if true will not sustain complainant's claim for equitable relief).

(2) Complainants have an adequate remedy at law against defendants, Lowery and Calabrese.

FALLON,
V. C.”

All of which is respectfully submitted.

JAMES BENNY,
Of Counsel with the Board of Education of the City of Bayonne.

BENNY AND CRUDEN,
Of Counsel with James D. Calabrese and Rosina Calabrese.

New Jersey Court of Errors and Appeals

ALFRED BRENNER and SAMUEL E.
KRESCH, partners as BRENNER
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SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANTS-APPELLEES.

Since the printing of the brief of the defendants and on the morning of October 15th, 1929, at the opening of the Court of Errors and Appeals, the points or brief of the appellants was served on us. In said brief it is claimed that the appellants are entitled to an attorneys' lien, they being attorneys-at-law.

POINT VI.

By their own showing, the appellants are not entitled to any money from the defendants John D. Calabrese and Rosina Calabrese, his wife.

The bill alleges in substance (paragraph 6, p. 3) that under the written retainer of said James D. Calabrese and Rosina Calabrese, said appellants were to receive any excess paid for said property

over and above the sum of Fifteen thousand (\$15,000) dollars, up to an amount of Seventeen thousand (\$17,000) dollars, and one-half of any amount over Seventeen thousand (\$17,000) dollars; and by paragraph 12, page 5, they allege that an agreement was entered into by the Board of Education of Bayonne, and the said James D. Calabrese and Rosina Calabrese, for the purchase by the Board of Education of the property belonging to the said James D. Calabrese *et ux.* for the sum of *Fourteen thousand (\$14,000) dollars*, thereby showing that the complainants are not entitled to anything from the defendants James D. Calabrese and Rosina Calabrese, *because the purchase price was less than Fifteen thousand (\$15,000) dollars.*

The appellants in their bill of complaint do not allege that they did anything under their retainer. There is no allegation that they appeared in the illegal condemnation proceedings in the Hudson County Circuit Court, which proceedings were set aside by that court, for want of jurisdiction; nor do they allege that they ever appeared in the certiorari proceedings.

In fact, it is only by inference that the court can assume that the appellants did anything under their retainer.

The allegation contained in paragraph 12 (p. 5, ll. 30-40) that the sum of Fourteen thousand (\$14,000) dollars was far in excess of the amount offered to said James D. Calabrese *et ux.* prior to the institution of the proceedings to acquire the property, ought not to entitle the appellants to recover, because it does not appear by their bill what amount (paragraph 3, p. 2) was offered to the defendants James D. Calabrese and Rosina Calabrese.

This is a case where the appellants are attempting to have the Court of Chancery determine how much they are entitled to for an alleged breach of contract.

The case of *Gross vs. Penna. Mtg. etc. Company*, cited under Point Four of our brief, is decisive of this case.

The case of *Grimm vs. Franklin*, 140 Atl. page 236, cited in the brief of the appellants, is not in point. That case was a bill in Chancery to enjoin a suit by Mr. Franklin in a Court of Law for his fees.

Respectfully submitted,

JAMES BENNY,
Of Counsel with the Board of Education.

BENNY AND CRUDEN,
Of Counsel with James D. Calabrese *et ux.*

