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Notice of Appeal.

NOTICE OF APPEAL.

Filed December 3, 1919.

The complainant hereby appeals from the whole and every part of the final decree made in this court, in the above stated cause, which denies the relief complainant prays for and dismisses the bill and grants costs and counsel fees to defendant, to the Court of Errors and Appeals in the last resort in all causes. 10

Dated December 2, 1919.

WIGHT, WIGHT & GOLENBOCK,
Solicitors for Complainant.

MERRITT LANE,
Of Counsel.

I conceive there is good cause for appeal in the above stated cause. 20

MERRITT LANE,
Of Counsel with Complainant.

Service duly acknowledged.

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Petition of Appeal.

PETITION OF APPEAL.

Filed December 20, 1919.

*To the Honorable, the Court of Errors and Appeals,
in the Last Resort in All Causes.*

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The humble petition of the McClung Drug Company, a corporation, the appellant in the above stated cause, respectfully shows that your petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 2nd day of December, 1919, in a cause wherein McClung Drug Company was complainant and City Realty and Investment Company and Philip Borak and Isidore Greenspan were defendants, in this respect, to wit: that the said decree orders and adjudges that the bill of complaint filed by complainant be dismissed, with costs to defendants, and that a counsel fee of one hundred dollars be allowed to Thomas Brown, Esquire, counsel for the defendants, said counsel fee to be taxed as part of the costs, and that the said Court declines to grant the relief prayed for by the complainant in its original and amended bill of complaint, to wit, that the said defendants be directed and decreed to specifically perform the contract of purchase set up in the pleadings of complainant.

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And your petitioner humbly appeals from the whole and every part of said decree upon the ground that the same is erroneous for that the said Chancellor should not have dismissed the bill of complaint with costs and should not have included in the costs the counsel fee of one hundred dollars to defendants' counsel, and should not have held that the contract of complainant was too uncertain for the Court to decree specific performance, but should have held that the contract of complainant was sufficiently certain to decree specific performance, or should have held that the subsequent acts of defendants were such as to make the contract sufficiently certain for the Court to decree specific performance, and should have granted the prayer of complainant for specific performance and directed the performance thereof as prayed for in complainant's pleadings, and should have allowed complainant costs and counsel fee.

Bill of Complaint.

Your petitioner therefore prays that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioner may have such relief in the premises as to this honorable Court shall seem meet.

WIGHT, WIGHT & GOLENBOCK,
Solicitors of Complainant-Appellant.

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MERRITT LANE,
Of Counsel with Appellant.

Service duly acknowledged.

Formal answers of respondents.

BILL OF COMPLAINT.

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Filed June 16, 1919.

The complainant, McClung Drug Co., a corporation of the State of New Jersey, duly organized and existing under the laws of said State, with its principal place of business in the City of Perth Amboy, in the County of Middlesex, respectfully shows that:

1. On July 7, 1915, one Fred W. McClung and the City Realty & Investment Co., defendant, entered into a written contract, a true copy of which is marked Exhibit "A" and is hereto attached and made a part hereof. The premises referred to in said contract are described as follows:

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All that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Perth Amboy, in the County of Middlesex and State of New Jersey, and being lot No. 33 on the plan of lots of the estate of Ezekiel M. Patterson, known as "Smith Street Property," as laid out by C. C. Hommann, civil engineer, and more particularly described as follows: Being on the northerly side of Smith street, and containing twenty-five (25) feet in front on the north side of said Smith street and extending northerly of that width one hundred and thirty-three and five-tenths (133.5) feet in depth.

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Bill of Complaint.

Bounded on the north by lot No. 76; on the east by lot No. 32; on the south by Smith street and on the west by lot No. 34.

2. Said contract was for the tenancy of the store on the ground floor of the said premises hereinbefore described, as well as the use of the cellar underneath the said store.

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3. That thereafter, and in or about October, 1915, the said Fred W. McClung duly assigned the aforementioned contract made between himself and the said City Realty & Investment Co., defendant, to the complainant, and the said assignment of the said contract was made to the complainant with the knowledge and consent of the said defendant.

4. That one of the paragraphs of said contract reads as follows:

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“And it is further understood and agreed between the parties hereto, that should the party of the first part decide to place this property on the market for sale, then the said party of the second part shall be given thirty (30) days’ notice in writing of such intention with the privilege of purchasing same within said thirty (30) days.”

5. That said complainant has been in possession of said floor and cellar underneath, in the said described premises, ever since October, 1915, and is still in possession of said premises.

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6. That on May 5, 1919, the defendant sent, through the United States post-office, at Perth Amboy, New Jersey, a notice, addressed to the complainant, a copy of which notice is marked Exhibit “B” and is hereto attached and made a part hereof, and which notice the complainant received on May 6, 1919; that the said offer referred to was for the sum of \$34,000.

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7. That thereafter and on or about the 2nd of June, 1919, and before the termination of thirty days from the date of said notice heretofore referred to, complainant notified the City Realty & Investment Co., the defendant, that it desired to purchase said premises, and that it would pay the said defendant the sum of thirty-four thousand dollars (\$34,000), the price which defendant had placed on said premises.

8. That the said defendant refused to accept the said offer of purchase of the complainant, and still refuses to accept the same.

Bill of Complaint.

9. That, upon information and belief, the said defendant had entered into a written agreement with one other than the complainant for the sale of said premises described herein prior to the said service of the notice herein referred to and marked Exhibit "B."

10. This complainant has always held itself able, ready and willing to perform and carry out the provisions and terms of the said contract, and is now ready, able and willing to do so; it tenders itself ready, able and willing to abide by the directions of this honorable Court in every respect. 10

Complainant is without adequate remedy in the courts of law, and, therefore, prays:

1. That the City Realty & Investment Co., a corporation, the defendant in this suit, may answer this bill of complaint without oath and each statement herein made. 20

2. That a writ of subpoena may issue commanding the defendant to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

3. That the City Realty & Investment Co., a corporation, be directed to convey the premises described in paragraph 1 of this bill in accordance with the provisions of the agreement as herein stated, and that the aforesaid defendant shall, in all respects, fully and faithfully perform the terms of the aforesaid contract as shall be agreeable to equity and good conscience. 30

4. That the complainant shall have such further and other relief as shall be equitable and just.

WIGHT, WIGHT & GOLENBOCK,
Solicitors for and of Counsel with Complainant.

*Bill of Complaint—Exhibit A.***EXHIBIT "A."**

THIS INDENTURE, Made the seventh day of July, in the year one thousand nine hundred and fifteen (1915) between CITY REALTY & INVESTMENT Co., a corporation of the State of New Jersey, party of the first part and FRED W. McCLUNG of the City of Perth Amboy, County of Middlesex and State of New Jersey, party of the second part.

WITNESSETH, That the said party of the first part has and does hereby let and rent to the said party of the second part, and party of the second part has and does hereby hire and take from the party of the first part, the store on first or ground floor of the building known as No. 198 Smith street, in Perth Amboy, New Jersey, to be occupied as a General Drug Store, also the use of the cellar, for the term of six (6) years from the first day of August in the year one thousand nine hundred and fifteen (1915) to the first day of August, in the year one thousand nine hundred and twenty-one (1921) at which time this lease shall terminate, at the rent or sum of five thousand nine hundred and forty (\$5,940) dollars to be paid as follows: Seventy-five (\$75) dollars on the first day of each and every month for the first three (3) years, eighty-five (\$85) dollars on the first day of each and every month for the following two (2) years, and one hundred (\$100) dollars on the first day of each and every month for the following or sixth year.

And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises, and to remove all persons therefrom.

And the said party of the second part does covenant to pay to the said party of the first part, the said rents as heretofore specified.

And that the expiration of the said term, the said party of the second part will quit and surrender the premises hereby demised, in as good state and condition as reasonable use and wear thereof will permit, damage by the elements excepted.

And it is understood and agreed between the parties hereto, that the party of the second part shall make all necessary repairs during said term to the inside of the premises hereby leased at his own expense, and also pay all water charges to the City of Perth Amboy in addition to the rent hereby agreed, and

Bill of Complaint—Exhibit A.

that the party of the second part will keep the sidewalks in front of said premises, clear of obstructions and clean in compliance with the ordinances of the City of Perth Amboy at his own expense.

And that the said party of the second part will not let or under-let said premises or any part thereof or carry on any business that shall be deemed a nuisance on said premises, or assign this lease to any person or persons, or a corporation, without the written consent of the party of the first part, or make any changes or alterations to the building or said premises hereby leased without first obtaining such written consent from the said party of the first part.

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And it is further understood and agreed that the party of the second part hereto shall deposit with the party of the first part the sum equal to three months' rent as security for the payment of rents on the signing of this lease; the same to remain with the party of the first part until expiration of this lease.

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And it is further agreed by and between the parties hereto, that the said party of the first part shall furnish coal for heating purposes to the said building, and the said party of the second part agreed to take care of the coal and boiler and to supply heat for the building so it shall be comfortable at all times.

And it is further understood and agreed that the said party of the first part reserves the right to go into the cellar (or its representatives) at any time for the inspection of boiler, meters, coal, etc.

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And it is agreed by the parties hereto that in case of damage or loss by fire to the said premises hereby leased, shall not in any way invalidate this lease. Should the repairs take more than sixty (60) days, the lessee shall pay only for the first sixty (60) days and again pay rent after premises are put into tenantable condition by the party of the first part.

And it is further understood and agreed between the parties hereto that should the party of the first part decide to place this property on the market for sale, then the said party of the second part shall be given thirty (30) days' notice in writing of such intention with the privilege of purchasing same within said thirty (30) days.

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And the said party of the first part covenants that the said party of the second part on paying the said yearly rents and performing the covenants aforesaid, shall and may peaceable

Bill of Complaint—Exhibit B.

and quietly have, hold and enjoy the said demised premises for the term aforesaid.

IN WITNESS WHEREOF, the party of the first part has caused these presents to be signed by its president and attested by its secretary and the said party of the second part has hereunto
 10 set his hand and seal the day and year first above mentioned.

CITY REALTY & INVESTMENT CO.,

By Charles M. Peterson, President.

Attest:

By K. W. McComas, Secretary.

Fred W. McClung, (Seal).

20 City Realty &
 1915
 Investment Co.

EXHIBIT "B."

CITY REALTY AND INVESTMENT COMPANY
 196 Smith Street

30 Perth Amboy, N. J.

May 5, 1919.

McClung Drug Co.,
 198 Smith St.,

Dear Sirs:

If you care to buy the Jefferson Bldg., 198 Smith St., kindly advise at once, as we have an offer.

Yours very truly,

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(Signed) EARL LAKE,
 Secy.

*Amended Bill of Complaint.***AMENDED BILL OF COMPLAINT.**

Filed June 27th, 1919.

To his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey.

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Complainant, McClung Drug Co., a corporation of the State of New Jersey, duly organized and existing under the laws of said State, with its principal place of business in the City of Perth Amboy, in the County of Middlesex, respectfully shows that:

1. On July 7, 1915, one Fred W. McClung and the City Realty & Investment Co., a defendant, entered into a written contract, a true copy of which is marked Exhibit "A" and is hereto attached and made a part hereof. The premises referred to in said contract are described as follows:

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All that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Perth Amboy, in the County of Middlesex and State of New Jersey, and being lot No. 33 on the plan of lots of the estate of Ezekiel M. Patterson, known as "Smith Street Property," as laid out by C. C. Hommann, civil engineer, and more particularly described as follows: Being on the northerly side of Smith street, and containing twenty-five (25) feet in front on the north side of said Smith street and extending northerly of that width one hundred and thirty-three and five-tenths (133.5) feet in depth.

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Bounded on the north by lot No. 76; on the east by lot No. 32; on the south by Smith street, and on the west by lot No. 34.

2. Said contract was for the tenancy of the store on the ground floor of the said premises hereinbefore described, as well as the use of the cellar underneath the said store.

3. That thereafter, and in or about October, 1915, the said Fred W. McClung duly signed the aforementioned contract made between himself and the said City Realty & Investment Co., defendant, to the complainant, and the said assignment of the said contract was made to the complainant with the knowledge and consent of the said defendant, that after the making of the said assignment and from on or about October, 1915, down

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Amended Bill of Complaint.

to the present time the said City Realty & Investment Co. has, with knowledge of said assignment, accepted rent from the said complainant and has recognized the said complainant as entitled to all of the rights of the lessee mentioned in said lease.

10 4. That one of the paragraphs of said contract reads as follows:

“And it is further understood and agreed between the parties hereto, that should the party of the first part decide to place this property on the market for sale, then the said party of the second part shall be given thirty (30) days’ notice in writing of such intention, with the privilege of purchasing same within said thirty (30) days.”

20 5. That said complainant has been in possession of said floor and cellar underneath, in the said described premises, ever since October, 1915, and is still in possession of said premises. That in reliance upon the said privilege of purchase referred to in said contract said complainant has expended large sums of money in and about permanent improvements of said premises.

30 6. That on May 5, 1919 the defendant sent, through the United States Postoffice, at Perth Amboy, New Jersey, a notice, addressed to the complainant, a copy of which notice is marked Exhibit “B” and is hereto attached and made a part hereof, and which notice the complainant received on May 6, 1919; that the said offer referred to was for the sum of \$34,000.

7. That thereafter and on or about the 2nd day of June, and before the termination of thirty days from the date of said notice heretofore referred to, complainant notified the City Realty & Investment Co., the defendant, that it desired to purchase said premises, and that it would pay the said defendant the sum of thirty-four thousand dollars (\$34,000), the price which defendant had placed on said premises.

40 8. That the said defendant refused to accept the said offer of purchase of the complainant, and still refuses to accept the same.

9. That complainant has been informed that on or about the 2nd day of May, 1919, the said defendant, City Realty & Investment Co., entered into a certain contract of sale under

Amended Bill of Complaint.

the terms of which it agreed to convey the said lands and premises hereinbefore described to Philip Borak and Isidor Greenspan for the express consideration of \$34,000, payable as follows:

\$500 on the signing of the agreement.

\$12,000, mortgage held by Perth Amboy Trust Co.

\$4,000, mortgage held by Mary Priester.

\$9,500 cash on day of passing title.

\$8,000, 3 mos. note, secured by a mortgage to be reduced every three months by a payment of at least \$500 and interest.

That title was to pass on or before the 1st of July, 1919; that there is contained in said contract of purchase the following clause:

“It being understood and agreed that the said premises are to be conveyed subject to the rights of the tenants and it being represented that their rights do not exceed the term of three years.”

That said Philip Borak and Isidor Greenspan knew that the said contract between the said City Realty & Investment Co. and complainant contained the clause giving the complainant privilege of purchasing said premises as hereinbefore set forth; that the facts of which they had knowledge were sufficient to put them upon inquiry which would have developed exactly the rights of complainant.

That complainant, besides having expended large sums of money in and about permanent improvements upon said premises in reliance upon said contract giving the privilege of purchase as hereinbefore set forth has also established, in reliance upon the terms of said contract, a business in said premises; that the good will of said business is of extensive value; that if complainant be obliged to remove from said premises there will be damage done to his business and good will, the amount of which it will be impossible even to estimate; that the conduct of said complainant has been induced, to the knowledge of the said City Realty & Investment Co., by the existence in said contract of lease of the privilege of purchase and the said Philip Borak and Isidor Greenspan had full and complete knowledge of all of the facts; that to permit the said City Realty & Investment Co. to transfer the said title to said Philip Borak and Isidor Greenspan would be to permit them to perpetrate a fraud upon the complainant.

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Amended Bill of Complaint.

That complainant has always held itself able, ready and willing to carry out the provisions of the terms of said privilege of purchase and has offered to the said City Realty & Investment Co. and to the said Philip Borak and Isidor Greenspan to carry out and perform the terms of said privilege of purchase, but the
 10 said City Realty & Investment Co. and Philip Borak and Isidor Greenspan have absolutely refused to comply with the request of complainant, and the said Philip Borak and Isidor Greenspan now threaten to transfer title to said premises to others.

Complainant now tenders itself ready, able and willing to carry out the terms of said privilege of purchase, to wit, to accept the said terms and pay therefore the sum of \$34,000, in which said purchase price is included the mortgages now liens upon said premises, one held by Perth Amboy Trust Company and one held by said Mary Priester.

20 Complainant is without adequate remedy in the courts of law, and, therefore prays:

1. That the City Realty & Investment Co., a corporation, and the said Philip Borak and Isidor Greenspan, defendants in this suit, may answer this amended bill of complaint, without oath, and each statement herein made.

2. That a writ of subpoena may issue commanding the defendants to answer this amended bill and to abide by such decree as this court may make in the premises.

30 3. That the City Realty & Investment Co., a corporation, and the said Philip Borak and Isidor Greenspan, or one or all of them, be directed to convey the premises described in paragraph 1 of this amended bill in accordance with the provisions of the agreement as herein stated, and that the aforesaid defendants shall, in all respects fully and faithfully perform the terms of the aforesaid contract as shall be agreeable to equity and good conscience.

40 4. That the said defendants and their agents and attorneys may be enjoined and restrained from disposing, encumbering or otherwise dealing with the said premises pending further determination of this case.

5. That the complainant shall have such further and other relief as shall be equitable and just.

WIGHT, WIGHT & GOLENBOCK,
Solicitors for and of Counsel with Complainant.

Amended Bill of Complaint—Exhibit A.

There is attached to the amended bill a copy of the contract printed as Exhibit A annexed to the original bill.

EXHIBIT "A."

THIS INDENTURE, Made the seventh day of July, in the year one thousand nine hundred and fifteen (1915) between CITY REALTY & INVESTMENT Co., a corporation of the State of New Jersey, party of the first part, and FRED W. McCLUNG of the City of Perth Amboy, County of Middlesex and State of New Jersey, party of the second part.

WITNESSETH, That the said party of the first part has and does hereby let and rent to the said party of the second part, and party of the second part has and does hereby hire and take from the party of the first part, the store on first or ground floor of the building known as No. 198 Smith street, in Perth Amboy, New Jersey, to be occupied as a General Drug Store, also the use of the cellar for the term of six (6) years from the first day of August, in the year one thousand nine hundred and fifteen (1915) to the first day of August, in the year one thousand nine hundred and twenty-one (1921) at which time this lease shall terminate, at the rent of sum of five thousand nine hundred and forty (\$5,940) dollars to be paid as follows: Seventy-five (\$75) dollars on the first day of each and every month for the first three (3) years, eighty-five (\$85) dollars on the first day of each and every month for the following two (2) years, and one hundred (\$100) dollars on the first day of each and every month for the following or sixth year.

And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises, and to remove all persons therefrom.

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*Amendment to Amended Bill.***AMENDMENT TO AMENDED BILL.**

Filed August 14, 1919.

Amend the amended bill of complaint by inserting a paragraph numbered 7½:

- 10 “7½. That in or about the 5th day of May, 1919, the defendant, City Realty & Investment Company, by writing, signed by its authorized agent, fixed a price of \$34,000. upon said lands and premises, which said price was the reasonable market value of said lands and premises and which said price said defendant as aforesaid, by writing as aforesaid agreed to take for said lands and premises; that on or about the said date the said defendant notified said complainant, by writing, signed by its authorized agents of the fixing of the said price of \$34,000. upon said lands and premises, and of its willingness to accept the
- 20 same from the said complainant and notified the said complainant if it desired to exercise the said option it must do so at once; that thereupon the said complainant did notify said defendant, City Realty & Investment Company, that it agreed upon the said price and that it would pay the said defendant the said sum of \$34,000., that thereupon defendant, City Realty & Investment Co., agreed in writing to sell and complainant agreed to purchase said lands and premises for the price of \$34,000.”

Amend the prayer by inserting a paragraph numbered 11½:

- 30 “11½. That the said defendant, City Realty & Investment Company, may specifically set forth the contract between it and complainant referred to in the bill of complaint; that it may specifically set forth whether it did, in fact, fix the sum of \$34,000. as the price upon said lands and premises which it would accept.”

Further amend the amended bill of complaint by inserting in paragraph 9 a new section after the second section of said paragraph 9 as follows:

- 40 “That the making of the permanent improvements upon said lands and premises as aforesaid were in part performance of the contract of purchase between complainant and defendant, City Realty & Investment Company; that prior to the making of said improvements said City Realty & Investment Company knew that said complainant was about to make the same as part performance of said contract of purchase and relying thereon, and at the time the said improvements were made said City Realty

Answer of Isidore Greenspan and Philip Borak.

& Investment Company knew that said improvements were being made as part performance of said contract of purchase and in reliance thereon; that the making of said permanent improvements were considered by complainant and by the said City Realty & Investment Company as part performance of said contract of purchase; that during the time that the said good will of such business was established and money expended by complainant in promoting the said good will, such good will was established and such moneys expended in reliance upon said contract of purchase, and at the time said good will was being established said moneys were being expended said City Realty & Investment Company knew that the complainant was acting in reliance upon said contract of purchase."

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WIGHT, WIGHT & GOLENBOCK,
Solicitors of Complainant.

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MERRITT LANE,
Of Counsel.

ANSWER OF ISIDORE GREENSPAN AND PHILIP BORAK.

Filed Aug. 30, 1919.

These defendants answering the bill of complaint, say that:

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1. They admit paragraphs 1 and 2.
2. They deny paragraph 3.
3. They admit paragraph 4.
4. They deny paragraph 5.
5. They admit paragraph 6 so far as the same pertains to the mailing of a notice marked Exhibit "B," and the remainder of said paragraph is denied by them.
6. They deny paragraph 7 and 7½.

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7. Answering paragraph 8, these defendants say that the complainant never offered to purchase said premises for any price whatsoever, and never offered to pay any price for said premises, but on the contrary refused to purchase said premises.

Answer of Isidore Greenspan and Philip Borak.

8. These defendants admit paragraph 9 of the bill of complaint so far as the same refers to the contract for the sale of said premises, but deny that they knew of any contract or agreement that existed between the City Realty & Investment Co. and the complainant relating to the privilege of purchasing said premises by the complainant, and the only knowledge these defendants had concerning the purchase of said premises, was that the complainant never desired to purchase said premises.

9. Defendants deny paragraph 9 of the complaint.

Defendants further answering say that:

1. Said defendants nor either of them ever entered into an agreement to sell said premises to the complainant nor placed a price thereon, and that when the premises were offered for sale by the defendant, the City Realty & Investment Co., to the complainant that the said complainant refused to purchase said premises at any price.

2. These defendants deny that any enforceable contract was ever entered into between the complainant and the defendants or any of them for the purchase or sale of said premises, and further answering say that the agreement or contract referred to in the bill of complaint is not a writing or memorandum of writing sufficient to satisfy the act entitled "An act for prevention of frauds and perjuries," Compiled Statutes, page 2612, sec. 5, wherein and whereby the defendants agreed or contracted to sell the lands and premises described in the bill of complaint or any interest in or concerning them.

THOMAS BROWN,

Solicitor of Defendants, Isidor Greenspan and Philip Borak.

Answer of City Realty & Investment Company.

ANSWER OF CITY REALTY & INVESTMENT COMPANY.

Filed June 25, 1919.

The said defendant answering admits paragraphs 1, 2, 3, 4, 5, 6, and 9 of said bill of complaint.

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The said defendant denies paragraph 7 of said bill and answering says that it had never placed any price on said premises to the complainant, and further denies that the complainant made any offer to the said defendant for the said premises, or ever evinced any desire to purchase said premises.

The said defendant further answering says that it is not now the owner of the said premises having conveyed the same.

This defendant submits to this honorable Court that all and every of the the matters in said complainant's bill mentioned and complained of and with respect to which the said complainant is not entitled to any relief in this court; and this defendant reserves the right to move to dismiss the bill for want of equity.

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LEO GOLDBERGER,
Solicitor for Defendant.

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Offer of Documentary Evidence.

Case was regularly referred to the Honorable John H. Backes, Vice-Chancellor, and came on for final hearing before him.

Testimony taken in the above entitled cause at the State House, Trenton, N. J., on Wednesday, the 3rd day of September, 1919, at 10:30 A. M., before Hon. John H. Backes, Vice-Chancellor.

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Appearances:

Mr. Merritt Lane and Mr. Henry K. Golenbock for complainant.
Mr. Thomas Brown for defendant.

Mr. Lane. I offer in evidence the original lease made on the 7th day of July, 1915, containing the option to purchase which I will read:

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"It is further understood and agreed between the parties hereto that should the party of the first part decide to place this property on the market for sale, then the said party of the second part shall be given thirty (30) days' notice in writing of such intention with the privilege of purchasing same within said thirty (30) days."

Mr. Brown. It is consented to without further proof.

Said lease is marked Exhibit C. 1.

Mr. Lane. I offer in evidence a letter dated May 5, 1919, to the McClung Drug Company, No. 198 Smith street.

Said letter is marked Exhibit C. 2.

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Mr. Lane. I also offer in evidence if counsel will consent to an except from the contract made between the City Realty & Investment Company, a corporation, and Philip Borak and Isadore Greenspan, under which this property was to be conveyed by the City Realty & Investment Company to Borak and Greenspan for \$34,000, the original contract is annexed to the bill of complaint and admitted in the pleadings. I will offer the original.

Said contract is marked Exhibit C. 3.

40

Chester Morton Darling, direct.

Mr. Lane. The letter of May 5th is as follows:

“City Realty and Investment Company,
196 Smith Street,
Perth Amboy, N. J.

May 5, 1919.

McClung Drug Co.,
198 Smith St.,

10

Dear Sirs:

If you care to buy the Jefferson Bldg., 198 Smith St.,
kindly advise, at once, as we have an offer.

Yours very truly, (signed) Earl Lake, Secy.”

CHESTER MORTON DARLING, a witness produced on behalf
of the complainant, being duly sworn, testified as follows:

Direct examination by Mr. Lane.

20

Q Where do you live? A Perth Amboy.

Q What is your business? A The drug business.

Q You are connected with what concern? A The McClung
Drug Company.

Q How long have you been connected with that concern? A
Well, the opening—a week following the opening in 1915.

Q At the time this lease was made? A Yes, sir.

Q Have you any official position with that company? A
President and Treasurer.

Q How long have you been president and treasurer. A A
year ago last June or July.

30

Q And before that time what was your official position? A
Secretary.

Q From the beginning? A No, from probably a year and
a half previous to that time.

Q After the McClung Drug Company went into possession
of these premises were any improvements put on them by Mc-
Clung Drug Company? A We improved the place materially.

The Court. Strike that out.

40

Q Did you? A Yes.

Q In what respect? A We put up permanent fixtures, that
is in the rear part of the store, do you mean previous to
opening?

Chester Morton Darling, direct.

Q Up to the present time? A The front was changed at quite an expense.

Q How much of an expense? A I would say \$400.

Q What else? A And the fixtures were made especially for the store, built especially, they had Dayton & Smith, the architects, make the plans for the fixtures to make up absolutely as nice a store as possibly could be made.

Q These fixtures made especially for that store, how much would they cost? A I think it was eighteen or twenty-one hundred dollars at that time.

Q I show you a bill of the Willmarth Show Case Company, and I ask you if that is the bill you paid for the installation of the fixtures? A Yes.

Mr. Lane. I offer the bill in evidence.

20 Said bill is marked Exhibit C. 4.

Q Could those fixtures be removed and used elsewhere? A They could be removed, I suppose, but it would be quite a very great expense, they would have to be cut down and removed.

Q What would the fixtures be worth removed from that store?

Mr. Brown. That is objected to.

Q What kind of fixtures were they, describe them? A Mahogany fixtures.

30 Q Just describe in a detailed way what the fixtures consisted of? A Show cases, wall cases, fixtures for the rear, wall fixtures including lights for the building, fixtures in the basement and bottle racks and a great many fixtures in the rear were built especially for the store, to fit in.

By the Court.

Q Shelving? A No fixtures as high as the ceiling to fit in there.

Q A cupboard? A Not a cupboard.

40 Q Well, what? A I suppose it is really shelving.

Q How are they fastened to the building? A Screwed to the building, I believe, I am not positive whether some of them are screwed or nailed; I know some are nailed, others may be screwed.

Chester Morton Darling, direct.

By the Court.

Q All fastened? A One isn't fastened.

Q What is it? A The cupboard below and the rack for fluid extracts and patent medicines.

Q Describe the lights. A There are three lights, two in the front part of the store and one in the rear, then there are the window lights eight window lights with magnifying shades and one in the alcove leading into the store. 10

Q What kind of lights? A Electric lights.

By the Court.

Q Electric fixtures? A Yes, sir; one is a gas fixture in the rear.

Q What do you mean by "window lights"? A In the window of the store, also a drug sign outside which is electric light also. 20

By the Court.

Q How are they kept up, with the meter externally or internally? A Internally, I presume.

Q From these electric lights are there any wires which come so that they can be seen on the exterior of the wall? A No, outside of in the back room.

Q You can't see the wires? A No, it is underneath the ceiling.

By the Court. 30

Q Who did the wiring? A We paid for the wiring.

Q How long have you been in the drug business? A About 15 years.

Q What experience have you had in buying fixtures? A My experience in buying fixtures has not been great, I haven't bought many fixtures, I was with Mr. McClung on one occasion when he looked over fixtures.

Q Do you know anything about the value of fixtures such as these if taken out and put in another place? A If these fixtures were to be removed— 40

Mr. Brown. That is objected to.

Q Do you know or not? A I really couldn't say. The tile floor—

Chester Morton Darling, direct.

Q We are talking about these fixtures only, do you know anything about the difference in value of the fixtures in that store as it is now and the value they would have if removed from the store? A I can't say.

10 *The Court.* I don't think it has any bearing any way.

Q What other improvements were made?

The Court.

Q What about the tile floor? A The tile floor is laid right up against the show cases.

Q Who put the tile floor in? A We had the tile floor put in.

Q What does the tile floor consist of? A The front part of the store and the alcove in the front part of the store is all tile.

Q Put in by you? A By the company.

20 Q What other tile is there, if any? A No other tile.

By the Court.

Q What is the floor space of the tile? A Half the store, about 35 or 40 feet.

Q By what? A By 15 or 18 feet wide.

Q What did that cost? A \$87, I believe.

Q Were there any other improvements put in by you? A I can't recall any just now, outside of—

30 Q To refresh your recollection was there any radiators put in? A The radiators I don't believe we had anything to do with, I think they were bought there.

Q Mr. Darling, are you sure that you are right that the cost of the tile was \$87? A Yes, that is right.

Q What is the significance of this bill of September 24th, 1915, of a multiplication by two? A That was a discount if paid in ten days, I believe.

40 Q At the time any of these fixtures were installed or any talk of installing permanent fixtures was there anything said in any conversation between you and any of the officers of the City Investment Company with respect to the option to purchase?

The Court. Will you let me know what the store was before they purchased it.

Q What was the store used for and what was its condition prior to the McClung Drug Company going into possession? A

Chester Morton Darling, direct.

I believe a real estate office and a tile company had space in there.

Q What with respect to the interior furnishing? A It was very bad.

By the Court. Can you describe it for me, that is what he is asking you, was this drug store room all one room? 10

A I believe it was.

Q And two people occupied it? A Yes.

Q Had it been used for a drug store before? A No, sir.

Q At the time these fixtures were installed or any of them was there any discussion or talk with any member of the City Realty & Investment Company with respect to the option to purchase? A It was always the idea of the—

Q Answer the question, please. (Stenographer repeats the question.) A Yes, there was. 20

Q With whom and at what time? A Well, Mr. McClung and I both had talked with Hans Neilson who was then one of the officers of the City Realty & Investment Company and if I am not mistaken Mr. Lake and I think Mr. Peterson, but I am not positive, and Mr. McComas.

Q What was said at any conversation you had with Mr. Neilson with respect to the option to purchase?

Mr. Brown. That is objected to.

The Court. I will not allow it now. 30

Q Who was Mr. Neilson? A A real estate man in Amboy, I am not positive whether he was one of the officers of the City Realty & Investment Company or not.

Q Did you pay your rent to him? A We have paid it to Mr. Neilson, Mr. Lake and Mr. McComas and I believe Mr. Peterson.

By the Court.

Q Whom did you deal with in making the lease? A Mr. McClung was there at the time; I wasn't there at the time the lease was made out. 40

Q You don't know? A I don't know, except Mr. Hans Neilson, he wrote up the lease, I believe.

Mr. Brown. I move to strike that out.

Chester Morton Darling, direct.

Q What conversation, if any, did you have with Mr. Lake?

Mr. Brown. That is objected to.

The Court. Do you think you can connect this up later, do you know you can?

Mr. Lane. Yes, sir; I know I can connect it up.

10 *Mr. Brown.* I have no objection then.

Q What conversation did you have with Mr. Lake who was the secretary and treasurer of the City Realty & Investment Company? A Mr. Lake and I and Mr. McClung and Mr. Lake have had conversations.

Q Don't try to tell us anything unless you were all there together. A We have been there together and Lake has told us we should have the building, he said it should be our home to establish a business there and a great many times, I can't tell
20 the particular dates, we spoke about buying the building some day.

Q I will draw your attention particularly to one occasion in which you had a conversation with Lake in which the fact that you were putting in permanent improvements was discussed in connection with your option to purchase. A I can't recall that particular date.

Q I didn't ask you for the date; I am asking you about the two events if there was any such connection; I am asking you to connect those two occasions. A I really don't recall just
30 now.

Q Was there any conversation with respect to putting in a soda water fountain? A Yes.

Q When was that?

Mr. Brown. That is objected to; it wasn't put in.

Objection overruled.

A If I am not mistaken about two years ago this past April we were going to try and sub-let part of the store to a man and he was to put in a twenty-four foot soda fountain and before doing
40 so Mr. McClung consulted the City Realty & Investment Company in regard to it and they said they had no objection.

By Mr. Brown.

Q Were you there at the time? A Yes, sir, I was there.

Chester Morton Darling, direct.

Q Go on. A They said they had no objection to a soda fountain being put in the store provided we cut down the option from thirty days to ten.

By the Court.

Q What option? A The option in our lease.

Q The purchase option? A The purchase option.

10

Q At that conversation was there any discussion of the improvements which had already been put on the property? A I don't just recall that.

Q When was it that you first learned that there had been a sale of this property or a contract to purchase by the City Investment & Realty Company with Greenspan and Borak? A May 1st, I believe.

Q Where were you when you learned that? A I was in the rear part of the store.

20

Q How did you learn it? A I looked outside and saw Mr. Greenspan and Mr. Borak out there and I have been friendly with Mr. Borak for a few years and he said "get the devil out of there—" I said in a kidding, in a joking sort of a way "get the devil out of there," and he said "come out here a minute" he called me out and he said "Mr. Greenspan and I have just bought this building." I said "it's darn funny, we have an option in our lease to purchase the building on thirty days' notice" and with that they both came in through the store, they came in the back and went out the front.

Q Was there any other conversation with respect to that option to purchase at that time? A Not at that time, either one or two nights following Mr. Borak and I went home together and the subject was brought up again.

30

Q What was said? A I said I was very much peeved about the way the thing had been done and he at that time told me what they had paid for the building.

Q What was it? A He told me they had paid \$34,000 for the building and told me if I was really so sore about it I could have his interest, he would sell me his interest and at that time we left and went home.

40

Q Was there any conversation with either Borak or Greenspan and yourself in which they referred to the knowledge that they had with respect to this option? A I am not positive about that.

Chester Morton Darling, direct.

Q Did you have a conversation with Mr. Lake with respect to it? A Yes, Mr. McKeown and Mr. Lake and I.

Q When? A On June 2nd Mr. Lake came in the store for the purpose of collecting the water rent which had never been paid since the store was opened, we made out a check and also gave him the rent and Mr. McKeown asked him, he said "you
10 are a representative of the City Realty & Investment Company and the McClung Drug Company are ready to buy the building at the price it was sold to Greenspan and Borak for \$34,000." First he wouldn't answer and then he said no, they would not, the building had been sold.

Q Was there anything further said in this conversation in which the option was referred to? A Yes, I said what about our thirty day option? He said, I thought you were going to take advantage of it before this.

Q Anything else said about it? A I said, "Lake, you know
20 thirty days is thirty days," and I believe that is all the conversation there was about the option.

Q Have you established a good will of this property?

Mr. Brown. That is objected to as calling for a conclusion.

The Court. Objection sustained.

Q Is there any other place in the immediate vicinity to which the McClung Drug Company can go? A No.

Q What is the character of your business at this place? A
30 Retail drug business.

By the Court.

Q Tell me how it has grown from the time you started? A Our business has grown from \$18,000 the first year to about thirty-five or thirty-six at the present time.

Q Constantly increased from the beginning until now? A Constantly increasing, yes, sir.

Q How near a locality could you get to move to.

40 *Mr. Brown.* Objected to.

The Court. Objection overruled.

A I don't know of any locality that we could locate.

Q Within what distance of this place, there must be some place. A I can't recall a location within three or four blocks anywhere.

Chester Morton Darling, cross.

Q Where does your trade flow from? A We have trade from out in the outer sections of Perth Amboy.

By the Court.

Q Where does your drug trade come from? A Locally.

Q Any other drug stores in the town near you? A Yes, one on the next block, the next corner. 10

Q Is the bulk of your trade a local trade? A Yes, sir.

Q Within what territory? A Seven or eight or ten blocks, I presume.

Q Who is the leading druggist, who has the leading drug store in Perth Amboy? A Well, there is a druggist by the name of Cutler who claims to be the leading druggist and the United Drug Company and Barnecole, the United may do a little bigger business.

By the Court.

20

Q The United Cigar Stores? A Yes, sir, they also have a drug store.

Q Can you say from your experience in the retail drug business whether a change of locality would be likely to have an effect upon your good will or business?

Mr. Brown. That is objected to.

The Court. It is perfectly obvious I think; I will take notice of that.

Q Did you some time ago have an offer for your business? A Yes, sir. 30

Q How long ago was it? A About two years ago.

Q At that time did you have much of a stock of drugs? A At that time we didn't have the stock we have today.

Q What was the offer?

Mr. Brown. That is objected to as immaterial.

The Court. Objection sustained.

Cross examination by Mr. Brown.

40

Q This building you occupy is what number? A 198 Smith street.

Q It is right in the middle of the block, isn't it about in the middle? A Somewheres near the center.

Chester Morton Darling, cross.

Q That is between Madison avenue on the east and Maple street on the west? A Yes.

Q The building is 25 feet in width? A I think it is or 30.

Q Do you know whether or not it is 25 or 30? A I am not positive.

10 Q It has the usual walls of a building three stories high, a brick building? A I presume so.

Q There is a stairway leading upstairs? A Yes.

Q From the street? A Yes.

Q And the stairway is about five feet wide, isn't it? A The stairway.

Q The stairway. A I don't think the stairway is five feet, it may be.

Q And then there is a wall between the stairway and your
20 store, that is the stairway is built off from your store? A There is a wall, of course, in the front part of the store, half way down.

Q What you occupy is the distance between that stairway and the opposite wall? A Yes.

Q And the building itself is a square building 3 stories high?
A I wouldn't say it is square.

Q The building is about 40 feet deep, is it not? A No, sir.

Q How deep is it? A I guess it is 70 any way.

By the Court.

30 Q One room on the first floor? A Yes.

Q Mr. McClung was the gentleman who first owned the business, was he not? A He started the business.

Q And he it was who made the lease which was offered in evidence? A I think Hans Neilson made the lease.

Q He executed it for himself? A I believe so.

Q You were working for Mr. McClung at that time, were you not? A When I went with the firm I went in as—

Q Mr. McClung went in there at the time the lease was made?
A Yes.

40 Q Were you working for McClung when he first took possession of the place? A A few days afterwards I went in there.

Q What do you mean? A Five or six days afterwards.

Q When was it you went to work for him? A It must have been October 1st, five or six days after the opening, I think.

Chester Morton Darling, cross.

Q The lease was made in July, wasn't it? A I don't know when the lease was made.

Q And you went to work for him as a clerk in October, 1915?
A I invested some money in there at that time.

Q Answer the question. A Yes.

Q When the lease was made you were not present? A No, 10
sir.

Q You don't know anything that was said between the parties who entered into the lease about the repair of the place, the change of the windows, the change of the place or anything of that kind? A I wasn't there to hear it.

Q You didn't hear any conversation, did you, about how the windows were changed, the tile put down or what arrangements were made, did you? A I don't know that.

Q You don't know who it was that changed the windows, did you? A I know it was McClung's idea to change the windows. 20

Q You don't know who it was that changed the windows? A The man who done the work?

Q No, whether it was McClung that did it and paid for it or the owners of the building or what arrangement was made about the— A I believe McClung paid part—

Q I want what you know? A I know he paid for the alteration to the front part of the store.

Q How do you know? A I have seen the bills.

Q Where are they? A We have not been able to locate them. 30

Q You were served with notice to produce all your check books and books of account and everything you had? A The lawyers didn't tell us to bring all the books.

Q You know demand was made for all your books? A I didn't know that there was.

Q Did your lawyer tell you to bring all your books? A No.

Q Who is your lawyer? A Mr. Golenbock.

Q Did he tell you there was a demand served upon him to produce a statement of the standing of your trade from the time you were in business up to the present time? A I don't think so. 40

Q Why do you say you don't think so, don't you know? A If he said so, I don't recall it.

Q Did he say anything to you about it? A Then I will say "no."

Chester Morton Darling, cross.

Q He did not? A I don't know that he did.

Q You have made such a statement and made an inventory from year to year, have you not? A Yes, we have.

Q Before McClung took possession of this place in 1915, the ground floor was occupied by real estate and other offices? A Yes.

Q And it had a glass front throughout the entire front, a show window front? A Two show windows, I believe.

Q And your knowledge of what the building was was from your observation in passing the building, wasn't it? A Yes.

Q So that when you went to work for Mr. McClung the changes to the building had all been affected and the payments for the repairs had all been made before you got there? A No, I don't think it had.

Q Did you say you went to work there four or five days after the opening? A I had been in the store before the opening several times.

Q But you were not there when Mr. Lake or any other person was there? A Not when Mr. Lake was there.

Q So that as far as Mr. Lake or any of the defendants in this case is concerned you heard no conversation or heard no agreement or saw no agreement between them and Mr. McClung previous to the time you went to work for McClung in October, 1915? A I don't recall any.

Q So when McClung moved into the place there was no change in the walls in the building, no structural changes? A Really, I forget about the walls, whether there was any change or not.

Q Don't you know there has been no change in the walls and they are the same as when the building was built? A No, I am not positive about it.

Q What Mr. McClung did or what you saw there in the tile line was in the vestibule as you entered, Mr. McClung's name was placed in tile in the doorway?

Q About 3 feet wide? A About 3 or 4 feet.

Q In the center of the front of the building? A Yes.

Q And then the tile that was placed extends between the show cases on each side, does it not? A Yes, sir.

Q The show cases are placed to the left and right situated there as you walk in? A Yes, sir.

Chester Morton Darling, cross.

Q And they are movable show cases, are they not? A They are movable, I suppose; they are cemented in with the tile.

Q Aren't they glass show cases? A They are, yes.

Q There is a space for you to walk around the show cases on each side? A Yes.

Q And then again between the space that you walk on and the wall you have shelves for placing your bottles? A Wall fixtures, yes, sir. 10

Q The tile space then is about 7 or 8 feet wide, isn't it? A It must be more than 7 or 8 at the narrowest part, I think.

Q Your show cases occupy how big a space, two feet? A About two feet.

Q With the drawers? A Yes.

Q The walking space on each side is two feet, is it not? A I should think it is about two feet.

Q The walking space is how big, three feet? A About two feet. 20

Q And that exists on each side? A Yes.

Q Then the counters themselves are about four feet? A What do you mean?

Q The wall cases are about one foot, the wall cases are about 15 or 18 inches deep? A About 15 or 18 inches deep.

Q Aren't the drawers over 2 feet deep? A They are not.

Q Would you say the depth of the show cases or the width of them is more than the width of the desk before the Vice-Chancellor? A No. 30

Q How deep is it? A I should say two feet.

Q So that the distance then between the outer side of the show case is the width of the tile? A Yes, sir.

Q Now, you have a show case, have you not, that runs parallel with the street?

By the Court.

Q You have a space of 11 feet occupied by show cases, wall cases and space between show cases and wall cases, what is the width of the store? A I guess it is 20 feet in the front. 40

Q The show cases extend from the front window how far back? A Well, from the front windows where the tile commences outside to the end of the partition I should think was 35 feet, of course that is not all tile all the way back there, back of the counter isn't tile.

Chester Morton Darling, cross.

Q There is another show case runs parallel with the street?

A Yes.

Q Then your partition comes back of that? A Yes.

Q You have a show case about 20 feet from the front door?

A 25 or 30 feet.

10 Q How many show cases have you from the front window on each side? A Three show cases on each side.

Q How long are the cases? A Six-foot cases.

Q Then you have a glass case in the rear? A Yes, sir.

Q And the tile is in between this space as formed by the show cases? A Yes.

Q Then back of the parallel show case as I will call it the one parallel with the street, you have a partition and shelves, too? A Yes.

20 Q And in the rear of that is your apothecary? A Yes.

Q All these fixtures and glass show cases and the wall cases are all movable, are they not? A Anything is movable, I presume.

Q They can be readily taken out? A They can't be readily or easily taken out, they are set in the tile.

Q They are just built up? A They are cemented to the marble at the base of the cases.

30 Q And that is the only place of contact is it not with the cases, the tile running up against it is that the only connection? A I believe so.

Q And the wall cases and shelving can be taken down? A Everything can be taken down.

Q Those fixtures that were placed in there were ordinary business fixtures, were they not? A Not the ordinary, they were made special for the store.

Q If you went into any square store 25 feet long anywhere on that street the same sort of fixtures could be used? A No, I wouldn't say they could.

40 Q You didn't order the fixtures? A We certainly did.

Q You did? A I didn't, no.

Q You don't know anything about the fixtures only what Mr. McClung told you? A I was there with Howard Smith when the fixtures were ordered.

Q Where? A In the Elks' Club in Perth Amboy.

Chester Morton Darling, cross.

Q Ordered from whom? A McClung and Smith and I were at the Elks at the time, McClung told Smith to go ahead and have the fixtures made.

Q Smith is the architect? A Yes.

Q You were not present when Mr. McClung bought these fixtures in New York or wherever they were purchased? A 10 They were purchased from Detroit.

Q You were not there? A No, sir.

Q I suppose Smith made a diagram of the floor space and gave it to Mr. McClung? A Blueprints were made.

Q But as to whether the fixtures were ordered as to the ordering of the fixtures or how they were made you know nothing of your own knowledge? A No.

By the Court.

Q Blueprints were made? A Yes. 20

Q Of what? A Show cases and wall fixtures.

Q You say that Mr. Lake was in to collect the water rent in June, June 2nd? A Yes, sir.

Q And that at that time you and he had a conversation about the option? A Yes.

Q Who was it? A Mr. McKeown and he and I.

Q Who is Mr. McKeown? A The secretary of the McClung Drug store.

Q When did Mr. McClung leave the place; was he in the corporation? A Yes, sir. 30

Q Is he still a member? A Yes.

Q When did the change take place from McClung to the McClung Drug Company? A I don't know when it changed.

Q Was there any written assignment of the lease from one to the other? A I don't think there was any written assignment that I know of.

Q When you were speaking to Mr. Lake in June Mr. Lake told you he answered you, did he not, that he thought you would take advantage of your option before that time? A Yes. 40

Q The reason he said that was because he had spoken to you or Mr. McClung about purchasing the place from time to time? A He had.

Q How many times did Mr. Lake offer to sell the place to the McClung Drug Company? A I don't know.

Chester Morton Darling, cross.

Q Two or three times? A I don't know, it might have been four.

Q When was the offer made to buy the place or to sell you the place? A Well, I couldn't say.

Q Was it last June or July or March or April or six months ago, or when? A It might be about a year and a half ago or—

10 Q Do you remember most every time Mr. Lake came in there he offered to sell the place to you, didn't he? A No.

Q Would you say every three or four months? A No, I wouldn't say every three or four months.

Q How often a year would it be? A He might have said it once or a couple of times.

Q What was your answer to him every time he wanted you to buy the place? A We didn't turn the offer down.

Q What was your answer to him? A I can't recall what the answer was.

20 Q Why can't you recall? A I didn't always do the talking to Lake.

Q Who did? A Sometimes Mr. McClung.

Q When you did the talking, what did you say? A As near as I can recall I might have said later on or something like that.

Q Did you ever tell him you didn't have the money? A No, I don't think I ever told him that.

Q The fact is you didn't have the money? A It didn't make any difference, you could get it.

30 Q The fact is you didn't have the money? A Possibly not.

Q Didn't you tell Mr. Lake time and time again that you would like to buy the place, but you couldn't, you didn't have the money? A I never told him anything of the kind.

Q And the McClung Drug Company didn't. Didn't you place a value upon your fixtures of your company over your signature as treasurer of the company and Mr. McKeown as secretary in the month of August, 1919, about the 15th day of August, for the sum of \$2,000? A Yes, sir; we did that.

40 Q Didn't you say the merchandise you had on hand was \$9,000? A I told him that, yes.

Q And your fixtures \$2,000? A That is what I told them.

Q And the accounts receivable \$400? A Yes.

Q And cash in the bank \$50? A Something to that effect, cash in register, we always had that in the register.

Q And cash in bank \$1,866? A I don't remember.

Chester Morton Darling, cross.

Q About that? A I don't think it was all in the bank.

Q Whom did you tell that to? A The representative of Bradstreet.

Q You had about that much money? A We had that much money.

Q Those were all your assets amounting to \$13,316, is that right and \$9,000 was merchandise? A He asked for a rough estimate. 10

Q Is that the estimate you gave him? A Yes, sir.

Q Did you say that your total liabilities were \$850? A I believe so.

Q Your bank account is never so big that you can't tell how much you have in bank?

The Court. Why waste time on that?

Q Now you said that your business increased from \$18,000 the first year to \$35,000 to \$36,000? A Yes. 20

Q Were those gross sales or net sales? A Gross sales.

Q Have they increased or decreased between October, 1918, and June, July and August of this year? A Well, I can't tell you just exactly.

Q Didn't you give a statement in October, give a statement of your company that your assets were \$22,210, your liabilities \$1,600, net worth \$20,610, that was in October, 1918, and didn't you in August, 1919, give your assets \$13,316 and your net worth \$12,466, a decrease of \$8,000? A We may have had a decrease. 30

Q Isn't that the fact that your company is worth eight or ten thousand less now than it was a year ago? A We have declared dividends in the meantime.

Q Isn't your company worth that much less? A It may be.

Q Isn't it the fact, don't you know it? A I don't know this is the estimate I gave Mr. Lempke, it was done very quickly and he said it didn't need to be very accurate.

Q Was your statement accurate in 1918? A More accurate than this was because I took two or three days then. 40

Q What time do you take your inventory each year? A In January.

Q Once a year? A Yes.

Chester Morton Darling, cross.

Q You do know there has been a substantial depreciation in the value of your business from 1918 to 1919? A There has been no depreciation.

Q There is \$8,000 difference? A No.

Q What dividends did you declare? A Quarterly dividends.

10 Q What did that amount to? A In the last year and three or four months it probably amounted to five or six thousand dollars.

Q Between how many? A Between three of us.

Q Who are the stockholders of the company? A Well, there is really four, McClung, McKeown, Myer and myself.

Q Who has the majority of the stock? A I have.

Q How long before was it that you declared a dividend, before the last one? A Every three months for the last year, probably three months or six months I don't know exactly.

20 Q Does that dividend include your wages? A No, sir.

Q Your gross sales were about \$35,000 a year in the maximum? A About that, they are now.

Q What is the profit of those sales?

Mr. Lane. That is objected to.

The Court. Objection sustained.

Q Since the McClung Drug Company has occupied those premises they have not made any changes of any kind whatsoever to the building? A We have done some repairs around the toilets, we have not changed the building at all.

30 Q You have not made any repairs, have you? A I don't recall any repairs outside the toilets.

Q Under your lease you were to make all interior repairs, weren't you?

The Court. That is not material.

Q You have never offered to buy this building, have you? A Not until recently.

Q When did you make the offer? A On the second of June.

40 Q Who to? A Mr. Lake.

Q How did you make the offer? A Mr. McKeown made the offer.

Q Did you offer any money? A \$34,000.

Q Where was the money at? A It doesn't make any difference.

Chester Morton Darling, cross.

The Court. Answer the question.

Q Where was the money? A I could get the money.

Q You didn't have it then? A I didn't have it that minute, no, it wasn't necessary.

Q Why didn't you buy the building before, when it was offered to you? A I don't know why we didn't; it wasn't absolutely necessary that we buy it at that time. 10

Q Well, there was over thirty days elapsed between the time it was previously offered and the last time? A We didn't receive any written notice.

Q You never answered the written notice that was sent to you? A No, sir.

Q You never made any attempt to tender any money to Mr. Lake, did you, or the company, the City Land & Investment Company? A Only on the 2nd of June. 20

Q Why did you wait so long to change your mind? A We had thirty days in which to—

Q You say you knew on the first of May it was going to be sold? A Then we would have thirty days' notice in writing.

Q Why did you wait so long when you received the notice, why didn't you answer right away? A We had thirty days to act.

Q You waited until that was up? A It wasn't up.

Q Within a few days? A Yes.

Q Then you didn't go to the company about it? A No. 30

Q Mr. Lake happened to be in the store and you spoke to him? A Yes.

Q You didn't make any offer as to what you would pay? A We told him we would give \$34,000, the same as offered by the other people.

Q Did you tell him when you were ready to pay it? A No.

Q You didn't know then when you could pay it, did you? A I knew I could get the money.

Q When? A Inside of thirty days.

Q Thirty days from when? A From the time we received the option, received the notice. 40

Q You didn't try to get it, did you? A I didn't have to try because I knew I could get it.

Q Where could you get \$34,000? A I didn't say I would have to have absolutely \$34,000 cash.

Chester Morton Darling, cross.

Q What were you going to get? A I was going to find out first.

By the Court.

Q Where did you expect to get the \$34,000 from? A Part of it from my father-in-law and part from my two sisters.

10

Q Cash? A Yes.

Q You expected to pay \$34,000 cash? A We didn't expect to, but if absolutely necessary I could have got it.

Q What did you expect to pay? A I didn't know the same terms perhaps that somebody else had bought it at.

Q You didn't know what the terms would be? A No, sir.

Q And you were the president of the company? A Yes.

Q And the secretary was with you when you were talking? A Yes, sir.

20

Q You said something about getting it within thirty days; was that thirty days from the time you were talking to Mr. Lake?

A Either thirty days from then or thirty days from the 5th.

Q You had not made any attempt to get it from the 5th to that time? A I didn't have to.

Q Then it must have been thirty days from the time you made up your mind to get it, is that right? A I can't say that.

Q Why can't you say it? A I am not positive, I knew I could get the money.

30

Q But you would have to have some time to get it? A Not a great deal of time.

Q Where do your sisters live? A Jersey City.

Q Are they in business? A No, sir.

Q Are they married? A No.

Q And not in business? A No.

Q Have they an income? A Yes.

Q Have they got money? A Yes.

Q But not \$34,000, have they? A Not in cash; they have it in real estate.

40

Q Who is your father-in-law? A Mr. Myer.

Q What is his business? A Liquor business, saloon, hotel and cafe.

Q Where? A Keasbey.

Q That is in the clay banks outside of Perth Amboy? A Yes.

Chester Morton Darling, cross.

Q He hasn't got \$34,000, has he? A Not in cash, no.

Q So that what you intended to do after making the offer on the 2nd of June was to try to get the money thereafter?

A I knew I could get it because I had been promised the money.

Q By whom? A By my sisters and my father-in-law.

Q You say you didn't attempt to get the money? A I didn't go to get the money itself; I was told I could have it if I wanted it.

Q The whole \$34,000? A If necessary, yes.

By the Court.

Q When did you first plan to buy the building; when did you first conceive the notion of buying the building? A After we received this notice.

Q How soon after that? A We knew the building had been sold.

Q How soon after the 6th of May? A Well, we were going to have a talk with Lake or somebody before the thirty days were up.

Q Answer my question. A Probably about the first of June.

Q Did you understand my question? A The date you mean?

Q When did you conceive the notion of buying the building, when did you conclude to buy the building? A During the thirty days.

Q When during the thirty days? A We had thought of it all the time during the thirty days.

Q You didn't determine to buy it? A I had gone so far as to find out I could get the money.

Q When did you determine to buy the building? A The day Lake was in the store, the 2nd of June.

Q Not until then? A Well, during the thirty days I don't know whether it was just that day or not.

Q Isn't it a fact that you never expected to buy the building and that your thought about buying it or trying to buy it was prompted by a conversation you had with some one? A No, sir.

Q The McClung Drug Company hasn't \$34,000 to buy this building? A No, sir.

Q And when you made up your mind to buy the building on the 2nd of June you thought you were going to get the same

Chester Morton Darling, cross.

terms, did you, that was given to the other purchasers? A I didn't know what the terms might be.

Q But how many days after the second day of June did you think it would take before you could actually buy the building?

A We had to act before the 5th or 6th.

10 Q And what were you going to do within that time? A If we were to buy the building I suppose there would be a deposit made.

Q In regard to the windows in front of the store, the show windows were remodeled, were they not? A Yes.

Q And the glass that was in there on the window, the glass that was in the show windows before it was remodelled was as large as the glass that is in there now? A The glass itself was larger, I believe, some of them.

20 Q So that all that was done was to refit the glass and put new frame work in? A Well, we remodelled the building, any way.

Q You don't know whether the company, the defendant in this cause, and Mr. McClung, who originally entered into this lease, had agreed outside of this lease to pay for that jointly—the remodelling of those windows? A I think they went fifty-fifty on the front, I believe.

Q That was before the lease was entered into at all and not a part of it that they agreed outside of the lease to do that? A I couldn't say about that.

30 Q And wasn't the share that was paid by the defendant the City Investment Company the sum of \$200 besides material they had there—window glass? A I don't know.

Q And didn't that expense go to the laying of the tile as well as the remodelling of the windows? A The McClung Drug Company paid for the tile, I know.

Q During all the time that you occupied the place the McClung Drug Company or Mr. McClung to your knowledge, they never sought to buy the place? A They talked of it several times.

40 Q They never endeavored to buy it? A I think Mr. McClung did.

Q Didn't several agents sent by Mr. Lake come to you? A I don't know.

Q Do you know Mr. Litman? A Yes.

Q He is the man that sold it to Borak & Greenspan? A I believe so.

Chester Morton Darling, cross.

Q Didn't he before going to Borak & Greenspan come to you as president of the company in your store and ask you to buy it several times? A Not to me.

Q You know he offered it to your company for sale— A I know he offered it to the McClung Drug Company.

Q And they refused to buy it? A Because they had already heard of the other contract. 10

Q Before that? A Not to me, no.

Q Or any officer of your company? A Not that I know of.

By the Court.

Q Did McClung occupy the premises as a drug store before the corporation occupied it? A Yes, sir.

Q For how long a time? A The store opened September 25, and I think it was incorporated the first of November or something like that. 20

Q Were you with McClung before the corporation took possession? A Yes.

Q Is it not a fact that you as the managing officer of the McClung Drug Company furnished a statement of the worth of your company including merchandise on hand, fixtures, accounts receivable and cash on hand in the year 1916, your net worth was \$10,074; January, 1917, \$7,751; 1918, \$20,610, and August, 1919, \$12,466? A I didn't give all those statements.

Q Who gave them? A The firm gave the first, second and third there. 30

Q How did you put the worth of your company from year to year?

By the Court.

Q Do these depreciations spell losses? A No, sir.

Q What does the depreciation indicate? A I think perhaps the stock might have been cut down some because the more times you turn stock over a year the more money you make, the money taken out in dividends might have been invested in something else. 40

Q You never had as much stock as you have now? A I don't think so.

Q And even with that large stock you have on hand now your net worth is not as much as in other years.

Chester Morton Darling, cross.

The Court. I cannot see how you are going to improve your case by showing losses or the net worth of the business.

Q You have your books of account, have you not? A Yes, sir.

10 Q And you can produce them here in court? A Yes.

Q You would not have any trouble doing that? A I don't suppose I would.

The Court.

Q Did you bring your books? A No, sir.

Q Why? A We weren't told to bring them.

The Court. Why didn't you bring the books.

20 *Mr. Golenbock.* My understanding of the notice was this to show how the statement was made up and I asked Mr. Darling—

The Court. What is the notice?

30 *Mr. Lane.* Notice to produce "all of your bank deposit books, check books and the stubs of checks issued by your company, vouchers of checks which have been drawn upon your account, balance sheets showing amounts on deposit in all of the banks with which you are doing business, all of your books of accounts, particularly such books of accounts from which your company made a statement to obtain credit over the signature of Chester M. Darling, as president, and John W. McKeon, as secretary, dated on or about the 15th day of August, 1919, and all other letters, books, papers and writings whatsoever, in anywise relating to the matters in question in this cause."

40 *Mr. Golenbock.* We thought that was for the purpose of showing the statement as made up, I asked him if he made a statement and Mr. Darling said he did and I asked him what from and he said he guessed at it and I didn't say anything to him about it.

Q Mr. Darling, were your gross receipts greater last year or this year? A From what time?

Chester Morton Darling, re-direct.

Q I mean during the year 1918 up until June, were your receipts greater, that is for the fiscal year of 1918? A Yes, greater.

Q How much greater than this year? A That is 1918 than 1919?

Q Yes. A Well, our business is running a little bit ahead of last year, so far this year of 1919. 10

Q How do you know it? A I know it from month to month how much business we do whether we go ahead of the year previous.

Q What year did you drop back? A I don't know what year we dropped back, I don't think we have dropped back any year.

Q You are not sure of it? A I don't recall ever dropping back, always have been going ahead. 20

Q What is the difference between your advances this year as compared with last year? A Well, the advances are not quite so big as they have been, but there has been an increase.

Q Increase as compared with what?

By the Court.

Q The percentage of increase this year is not as large as the percentage of increase over the previous year; that is what he means, I suppose? A Yes.

Re-direct examination by Mr. Lane. 30

Q Mr. Darling, the drawings and specifications that have been referred to in respect to these fixtures, I show you a bill and ask you whether that is the bill that paid the architect for drawing these specifications? A Yes, sir.

Mr. Lane. I offer it in evidence.

Said receipt is marked Exhibit C. 5.

Q Mr. Darling, during the course of or since 1915, have you ever given up the idea of ultimately purchasing this building? A No, sir. 40

Q And have there been discussions between the officers of the company with respect to the purchase of the building? A A great many times.

Q What was the general sentiment with respect to the purchase of the building?

John W. McKeown, direct.

Mr. Brown. Objected to.

Mr. Lane. Question withdrawn.

10. Q What was the discussion between the officers of the company during this time with respect to the purchase of the building? A Mr. McKeown and I had talked about it quite a number of times in the last year or more, ever since he had come into the firm in regard to purchasing the building.

Q What was the discussion, what did you say? A Well, we talked about getting the money on two or three occasions, I even went so far one time as to talk to my two sisters about it and they said I could get the money from them.

20. Q Did you ever receive from the City Realty Company or any one else prior to this notice of May 5th any definite request that you should purchase the building for any particular sum? A No, sir.

Re-cross examination by Mr. Brown.

Q The building was offered for sale to you time and again, wasn't it?

The Court. That has been gone into.

By the Court.

Q Could you run a drug store such as you have without putting these fixtures in that you have put in? A No, sir.

30. JOHN W. McKEOWN, a witness produced on behalf of the complainant, being duly sworn, testified as follows:

Direct examination by Mr. Lane.

Q Where do you live? A Perth Amboy.

Q What is your business? A A registered druggist.

Q Connected with what concern? A McClung Drug Company, Incorporated.

40. Q How long have you been connected with it? A Since May 10th, 1918.

Q In what capacity? A Well, since August 5, 1918, I have been part owner, before that I was merely there relieving Mr. McClung of his duties on account of illness.

Q What office did you hold in that concern in May, 1919? A I was acting in the capacity of registered druggist.

John W. McKeown, direct.

Q Are you an officer now? A Secretary of the company.

Q How long have you been secretary? A Since August 5, 1918.

Q Did you have any conversation with Mr. Lake of the City Realty & Investment Company on the 1st of May, 1919? A Why, I don't recall any conversation I had with Mr. Lake.

Q Did you receive this or were you shown this letter of May 5th, 1919, before it was received? A Yes.

Q Where? A I was called in Mr. Lake's coal office, 367 New Brunswick avenue.

Q What date? A May 5th, I think.

Q The date of the letter? A The date of the letter, and he read it to me out of his hands and I refused to accept it.

Q What was said? A Why, there was nothing definite said other than that we understood that they had entered into negotiations.

Q What was said? A I told Lake I think that we knew that he had sold the building, and we had it from Mr. Philip Borak, I understood that he purchased the building which was prior to the time we received our notice.

Q What did Mr. Lake say? A I don't recall what he did say; I don't imagine he said anything; I walked out of the office directly; I was on my way home to supper; I was in a hurry.

Q When was it you saw Lake next? A The next time I was talking with him was the time he came in to collect the water rent.

Q June 2nd? A Yes.

Q What occurred? A He brings the bill which had never been paid and there was some little controversy about the collection of it, we claimed we didn't have to pay that rent and he said that if we called up Mr. McComas we could find out definitely what arrangements had been made about the water rent. Without any further controversy we drew him a check for the rent of the store and the water rent, this is the first time I came out personally and offered to buy the building at \$34,000, acting in the capacity of our option, that was the 26th day I believe, we still had four days in which to complete our arrangements at which time we only had to put a deposit down on it.

Q What was said between you and Lake with respect—what did you say to him and he to you? A That he couldn't receive the offer, the building had been sold, we asked him about our

John W. McKeown, direct.

thirty-day option and he didn't answer; if he did, I don't remember.

Q Did you ever have any conversation with either Greenspan or Borak? A Mr. Jacob Greenspan came to the store a few days after our action was started—

10 Q This pending suit? A Yes, sir, and had a conversation with me relative to the suit.

Q What was said?

Mr. Brown. That is objected to as not material to this issue; he is not one of the parties.

Q Was Mr. Isadore there? I don't want any conversation with Jacob unless it was in the presence of Isadore. A Mr. Jacob Greenspan went into the store and asked me whether I was busy and then he called Mr. Isadore Greenspan from the
20 car.

Q What was said? A Jacob and Isadore both done the talking while they were in there, Jacob Greenspan—

Q What was said? A That they had not—not stating whom—they had not gone into this thing blindly, they had gone over the contract with the McClung Company, the contract the McClung Company had with the City Investment Company and had come to the conclusion that we had no rights in it, that it belonged to McClung and not to the company; they had been given advice that we had no rights or privileges under that lease
30 whatever.

Q What else was said? A This Isadore Greenspan said if you think you have a chance to win this suit, go ahead with it. And they tried to discourage it.

Q Did you have any conversation prior to May 5, 1919? Did you ever have any conversation with Lake with respect to any improvements in the store? A I didn't personally; no, sir.

Q Were you ever present when any conversation took place? A Not with Mr. Lake.

40 Q With whom, if anybody? A There was conversations with the secretary of the company, at that time Mr. McComas, with reference to fixing the cellar door and the toilet and the electric light fixtures and several things in the interior.

Q When? A About thirty days, within the time that the sale was made within the corporation.

John W. McKeown, direct.

Q What time? A It was within the corporation itself, the building was offered for sale before that.

Q Can you fix it without reference to that? A I couldn't say positively what the date was, several times it was taken up and each time the rent was due the thing was taken up.

Q Do you remember any specific conversation with—

10

The Court. Is that material?

Q I will ask this question: Was there a conversation in which the option to purchase was mentioned? A Not prior to that time.

Q Prior to what time? A To the time we received notice.

By the Court.

Q Prior to the time that Mr. Lake read the notice to you, is that what you mean? A Not with me personally.

20

Q Did you receive prior to May 5th, 1919, any offer from the City Investment Company to sell? A No.

Q Are you familiar with the improvements or any of the improvements put on this property by the company? A Yes.

Q What improvements are you familiar with? A Well, of course, as I say, the tile floor has been laid—

Mr. Brown. That is objected to.

Q I don't want anything except what you know personally.

By the Court.

30

Q Were you acquainted with this store prior to the time that you were connected with it? A I have known the store since it has been opened; in fact, before Mr. McClung opened the store he came to the place where I was located in New York to get his ideas to open his store and I went over the plans of the fixtures and everything.

Q Tell us what you know about the improvements made by the McClung Drug Company? A The architect drew the plans and the fixtures were built according to specifications.

40

Mr. Brown. That is objected to because he knows it.

The Court. He says he knows it.

Q Go on. A The plans were drawn and the fixtures built according to specifications, not regular stock fixtures, like you

John W. McKeown, direct.

ordinarily buy to fit up a drug store; they are built to fit in the store, and could be used in no other location; the walls have been interior decorated and the tile floor laid and the alterations in the front was made with the idea of improving the window space; that was all the improvements that I have a record of; at any rate that I had any dealings with.

10

Q Could that drug business in another location be conducted without such fixtures as these? A No, sir.

Q What do you mean by stock fixtures? A Ordinarily there are—

The Court. I know what he means; the difference is these are fixtures made to order in contra distinction to stock fixtures.

Q Do you know anything about whether the business of the McClung Drug Company has increased or not? A Yes.

20

Q For how many years are you familiar with the business enough to know that? A Of course I have only been active in it for the past year, and in that time I know it has increased materially. In the year 1917 we did \$25,000 of business and in the year 1918 we did \$35,000, an increase of \$10,000.

Q What is the comparison between the months of this year and the same months of last year? A They have increased each month.

By the Court.

30

Q Over the corresponding months of last year? A Yes, sir.

Q Is there any location in the immediate vicinity to which you could go if you wanted to? A No, sir.

Q Within how great a distance could you go? A There is no location on Smith street that is desirable or suitable for a drug store.

Q What would the effect be if you went on the side street?

The Court. I know what it would be.

40

Q With whom, Mr. McKeown, have you conducted your business with the City Realty & Investment Company since you have been there in May, 1918, with what officer? A In reference to the collection of the rent?

Q Yes, or anything else. A Well, the check for the rent was drawn the first of the month, sometimes one of the officers

John W. McKeown, direct.

of the firm collected it and sometimes it was mailed to them; if it lay three or four days before being collected, it was always given to Mr. Neilson to mail to Mr. McComas, who was secretary.

Q He was secretary until when? A A few days before May 1st, I understand. 10

Q I show you a notice dated May 2, 1919, or a letter, and ask you whether you received that? A Yes; this was handed to us when Mr. Lake came into collect the rents for the first time.

Q And this is the receipt attached to it? A That is the first receipt we ever received; yes.

Mr. Lane. I offer them in evidence.

Said receipt is marked Exhibit C. 6, and the letter is marked Exhibit C. 6A.

Mr. Lane. I will read the letter: "May 2nd, 1919. McClung Drug Co., 198 Smith street, city.. Dear Sirs: The undersigned have been elected secretary and treasurer of the City Realty & Investment Company. All rents, when due, are payable at my office, 367 New Brunswick ave. Please make checks payable to the City Realty & Investment Company. Very truly yours, Earl Lake, Secretary, Treasurer. 20

Q Mr. McKeown, did you know at the time of the incorporation of the McClung Drug Company, at the time it was incorporated? A Yes. 30

Q When was it incorporated? A It was incorporated about November 1, 1915, but I am not positive of the date; it was very shortly after the opening of the store; very shortly.

Q Have you the records of the company? A Yes, sir; they are in the headquarters, at 198 Smith street.

Q You haven't them here? A No, sir.

Q Do you know the purpose for which that company was incorporated? A Yes.

Q What? A To conduct a retail drug business. 40

Q What happened to the business theretofore conducted by McClung? A He was the originator and promoter and he immediately incorporated after opening; he was elected president and treasurer and the agent, and appointed agent to act in that capacity for the company.

John W. McKeown, cross.

Q Since that time, has the corporation been conducting a drug business? A Yes.

Q And been paying the rent? A Yes, sir; always paid the rent.

10 Q And was stock issued to McClung for his interest in the business? A Yes; stock certificates written out at the time of the incorporation.

Q Were the checks used to pay the rent, the checks of the McClung Drug Company? A Yes, sir.

Q Did I understand you to say that is the first written receipt you never received? A Yes, for rent.

By the Court.

Q How does the business hold itself out to the public—what signs are on the store? A McClung Drug Company.

20 Q How long has that been so? A Since the day of the opening.

By the Court.

Q The day of the opening of the drug store? A Yes.

Q Before there was a corporation? A Yes, sir.

Q Besides that on the door, there are the names of the officers? A Yes.

Q What names? A Mr. Chester M. Darling, President, and Mr. John W. McKeown, Secretary; originally it was Mr. McClung and Mr. Darling.

30 Q Does it represent an actual investment? A Yes, sir; at all times.

Cross examination by Mr. Brown.

Q The business markings on the exterior of the store to public view are the same now as when the store was first occupied? A Yes, sir.

Q In the tile that was placed when the store was first occupied by Mr. McClung, the same wording is there—McClung Drug Store? A I understand; yes.

40 Q From 1915 up to May, 1918, where were you employed? A In 1915 I was acting in the capacity of manager for Riker-Hegeman, New York City.

Q What were your hours or duties? A As I pleased providing I conducted the store to suit the corporation; which I did at all times.

John W. McKeown, cross.

Q Were you there during the day? A Yes.

Q How long? A From eight to six.

Q How long did that continue, that employment? A 1916, I believe.

Q Where did you go then? A I entered the employ of the Schulte Cigar Stores and opened a store in the Terminal Building, Newark, which I conducted until December of the following year; I left their employ and went with Mr. John D. Foster as his manager and worked there up until the time I came down to help Mr. McClung out, in May, 1919. 10

Q So that anything that happened before you came to the McClung store any knowledge that you got was what Mr. McClung told you? A Yes.

Q You don't know who it was that placed the tile there or who paid for it until you were told? A I knew things; I was very personally acquainted with Mr. McClung. 20

Q Is that the way you knew? A Yes.

Q About the condition of the business up to the time you were employed, your knowledge of it was obtained by what Mr. McClung told you? A Yes; I always visited his store at least once a week.

Q And what he told you is the knowledge you are testifying from? A Yes; because two or three occasions he tried to interest me financially, and I had the option to see the books.

Q How many stockholders are there in the company? A 30
Four at the present time.

Q Who holds the stock? A Chester M. Darling has the majority; Mr. Meyer and myself and Mr. McClung, who holds preferred stock only.

Q How much money have you invested in that? A About \$1,500 invested.

Q And how much has McClung in there? A McClung's investment there is—

Q Actual money; I don't mean stock. A About \$520 or \$530. 40

Q What is Darling's interest? A He has the balance, except Mr. Meyer, who has \$2,000 invested.

Q How much is Darling's? A The balance.

Q How much is that? A Well, I should judge it is about \$6,000.

John W. McKeown, cross.

By the Court.

Q The stock issued is \$10,000? A Yes, sir.

Q Was money paid in for all that stock? A Yes, sir; at par value; the stock is \$10 a share.

10 Q How many clerks have been employed in that store from the time it was opened until the present time? A I couldn't enumerate all those.

Q The number, not their names. A There was as high as five or six at times.

Q When? A Shortly after the opening.

Q I mean the regular force. A At the present time there are four.

Q Who? A Myself, Mr. Darling, Mr. Curry and the man we have to do janitor work.

20 Q Mr. Curry is the man who sweeps around? A Yes.

The Court. Try this case.

Q There have been no improvements made in the place since you have been there? A No, sir.

Q Except what is required by the lease? A No, sir.

Q You say that you didn't hear any offer made to sell this place to Mr. Darling or any officer of the company? A No, sir.

Q Didn't you say you knew it was for sale? A I never knew it was for sale up until the time the notice was received.

30 *By the Court.*

Q Do you mean when the notice was read to you by Mr. Lake? A Yes, sir.

Q You were a member of the company at that time for about a year? A Yes, sir.

Q You never made any offer to buy it during that time? A No; we didn't.

40 Q I am speaking about you; you have been in Mr. Lake's store or place of business, have you not, before the day you got this notice? A I think I was in there to order some coal once.

Q Both times you were there, once when you got the notice and when you were there paying for coal—was that in the month of March the time you paid for the coal? A I don't recall that.

Q When was it? A It was about March; I bought some coal for a poor family.

John W. McKeown, cross.

Q Was this young lady who is sitting here, Miss Keefe; was she there? A No, sir.

Q Was she there either time? A Only when I received the notice.

Q Did Mr. Lake on either of those occasions or any time he came to collect the rent request you to buy or the company to buy the place? A No, sir. 10

Q And you never said anything to him about buying the place? A No, sir.

Q Why did you refuse to take the notice when he gave it to you? A We wanted to receive it in an official way.

Q What way? A Being received through the mail.

Q So if he didn't send the notice for a month afterwards you would not recognize it, would you? A Positively not; non-delivery.

Q You knew what the notice was about, did you not? A He read it to me out of his hands, sir. 20

Q What was your reply to the notice?

By the Court.

Q Why did you want it through the mail? A So we would necessarily have it received in the headquarters of the business; not given to me in the street.

Q What did you answer when he read the notice to you? A I think I told Mr. Lake that I understood the building had been sold. 30

Q What did Mr. Lake say to you? A I can't recall he said anything; I walked directly out of the office; I was in a hurry to go to my supper.

Q Didn't Mr. Lake read the notice to you, and didn't you answer, "Why, I couldn't think of buying that place; we have no money," and then didn't Mr. Lake say to you, "You take this notice, anyway," and then didn't you answer, "What's the use of taking that notice; we have learned you have already sold the place." Wasn't that the conversation? A No; that is positively not correct. 40

Q From the time that Mr.—then you did receive a notice a day or two after that? A It came in the mail; yes.

Q The next day? A I couldn't say; the postmark will show.

Q You saw Mr. Lake the next time in the store on June 2nd, wasn't it? A Yes.

John W. McKeown, cross.

Q Now, between the time that you were in Mr. Lake's place on business and the time you saw Mr. Lake in your store, between the 5th of May and the 2nd of June, wasn't it? A Yes.

Q You passed Mr. Lake's office every day, did you not, during that time? A I believe I rode back and forth; yes.

10 Q How many times a day did you pass his place of business? A At least four times.

Q Did you ever go in to see Mr. Lake and tell him your company was ready and willing to buy that place? A No, sir.

Q Why didn't you? A The simple reason we were formulating our plans, and when ready if he hadn't come to us we were going to go to him. The thing had been talked over by Mr. Darling and the rest of the firm and we had decided we were going to buy the building.

20 Q When? A Just as soon as we put a deposit down on the business, 30 days after date.

Q How did you know you could put a deposit down 30 days after date? A I didn't positively know, but we were making the offer of \$34,000 for the building.

Q How did you know you were going to put a deposit down and get it 30 days after date? A I don't know; we were making arrangements.

Q Did you make arrangements? A Yes; we had a check drawn.

Q How much? A \$500 when he came into the store.

30 Q What was your arrangement about paying the rest of it in 30 days? A Yes, sir; we could pay it in 30 days.

Q Notwithstanding your passing Mr. Lake's place of business every day, you waited until he came to your store? A Yes, sir.

Q And even then you didn't offer him the check of \$500? A No, sir; we made the offer of \$34,000.

Q Did you pull out a check and offer it to Mr. Lake? A No, sir.

Q So, at no time did you make an offer to him of the check? A We did make an offer.

40 Q What do you mean? A We offered \$34,000 to buy the building.

Q By word of mouth? A Yes.

Q What did you say to him? A When we came out with the check for the water rent and the store rent we said, "Mr. Lake, you, as an official representative of the City Realty & In-

John W. McKeown, cross.

vestment Company, the McClung Drug Company now make an offer of \$34,000 for this building."

Q Who said that? A I did.

Q Did you have any money in your hand at the time? A No, sir, outside of the checks, we handed them to him.

Q You didn't have any deposit check? A No, sir. 10

Q Nothing at all? A No, sir.

Q How did you expect your offer would be accepted? A We had the check already drawn.

Q Why didn't you show it to him? A Not necessarily.

Q Weren't you trying to buy the building? A I don't know for what reason.

Q Why didn't you make some substantial offer; why didn't you tender the deposit or why didn't you speak about terms? A Because Mr. Lake said he couldn't accept; the building had already been sold. 20

Q He didn't say that until you had spoken to him, did he; until you had made the offer? A No, he didn't say that until—

By the Court.

Q What answer did he make? A The building had been sold.

Q Did Mr. Darling ever tell you or any officers of the company that an offer had been received or that the building was for sale? A No, sir.

Q You know Mr. Litman, do you not? A Yes. 30

Q How many times did you see him around your place? A He was in our place trying to sell us the building after the arrangements had been made.

Q Not before that? A He was trying to sell it for \$40,000.

By the Court.

Q After what arrangements? A After the sale had been made to Borak & Greenspan.

Q Didn't he come to you before he sold it to them? A Never for the City Investment Company. 40

Q Who did he come for? A Borak & Greenspan.

Q You have never made any offer from that time to this other than you have testified to to buy the building, have you? A A No, sir.

Bernard Litman, direct.

Re-direct examination by Mr. Lane.

Q Is there any reason that you have not produced your books and papers here that have been called for? A We weren't notified by our lawyer.

10 Q There isn't any reason why you object to any examination of them? A Positively not; no, sir.

RECESS UNTIL 2 o'CLOCK.

AFTER RECESS.

BERNARD LITMAN, a witness produced on behalf of the complainant, being duly sworn, testified as follows:

20 *Direct examination by Mr. Lane.*

Q Where do you live? A Perth Amboy.

Q What is your business? A Real estate broker.

Q How long have you been a real estate broker? A Several years.

Q Well, how many about? A Since 1907.

Q In Perth Amboy? A No.

Q How long have you been in Perth Amboy? A Going and coming since 1917.

30 Q Are you familiar with this property? A Quite well, sir.

Q How long have you been familiar with it? A Of recent dates, do you refer to?

Q Yes. A Well, since I am in the real estate business in Amboy; every piece of property is quite familiar to me.

Q Have you acted as real estate broker for the sale of property in the immediate vicinity of this property? A Yes, sir.

Q What, in your opinion, was a fair and reasonable price on this property on the first of May, 1919? A 1919?

40 Q Yes. A May I ask you again, so I understand clearly what you refer to?

Q I refer to the property known as 198 Smith street, Perth Amboy, in which the McClung drug store is located, and I am asking you the value as of the first of May, 1919; the reasonable value.

Earl Lake, direct.

Mr. Brown. That is objected to. I don't see how it is material in this case. I object to it as irrelevant and immaterial.

The Court. I will hear it, and overrule the objection.

A The maximum at that time in May, 1919, was \$34,000, and the minimum was \$32,000.

10

Cross examination by Mr. Brown.

Q What other property did you have in that neighborhood that sold for \$34,000 at that time? A The only one that was sold, the only sale that occurred at that time was this one building for the time being.

Q Mr. Litman, you were the agent who negotiated the sale of this property to Greenspan and others? A Yes, sir.

Q Before the sale of the property to Greenspan and Borak, were you acting as agent for Lake or the City Land & Investment Company? A I have, sir.

20

Q For how long? A Quite some time, sir.

Q How long will that be? A May be a couple of months or so.

Q Did you endeavor to sell the property through the City? A I did.

Q What offer did you make to the McClung Drug Company?

Mr. Lane. That is objected to on the ground that it is not proper cross examination.

30

EARL LAKE, a witness produced on behalf of the complainant, being duly sworn according to law, testified as follows:

Direct examination by Mr. Lane.

Q Mr. Lake, where do you live? A Perth Amboy.

Q What is your business? A Wholesale and retail coal and wood.

Q What is your connection with the City Realty & Investment Company? A At the present time, secretary and treasurer.

40

Q How long have you been secretary and treasurer? A Since about the middle of April.

Q 1919? A Yes; 1919.

Earl Lake, direct.

Q Before that time, were you interested in the concern? A Yes.

Q In what capacity? A Stockholder and one of the directors.

Q Were you interested in the concern in 1915? A Yes, sir.

10 Q As a stockholder? A Yes, sir; as a stockholder.

Q Are you a member of the Board of Directors? A I am; yes, sir.

Q And had you been a member of the Board of Directors since 1915? A Yes.

Q Who are the other members of the board of directors? A At the present time, do you mean?

Q Since you have been in, since April, 1919? A Charles M. Peterson, Marie M. Peterson and myself are the directors.

20 Q Did I understand you to say you had been a member of the board of directors since 1915? A Yes.

Q Who was Hans Neilson in connection with this company? A Vice-president and also a member of the Board of Directors.

Q In 1915 at the time this lease was negotiated? A Yes.

Q And since? A Yes.

Q Up to what time? A To the middle of April.

Q Has he had any connection with the company since the middle of April?

By the Court.

30 Q You three are the stockholders, you, Peterson and his wife? A And one older.

Q Who is the other stockholder? A James H. Bryan, of Baltimore.

Q They are the only stockholders? A Yes.

Q Was the stockholdings practically the same in 1915? A At that time there was five.

Q Mr. Neilson? A Yes.

40 Q There has been a change, one has dropped out? A Also Mr. McComes; he was the former secretary.

By the Court.

Q Who did they sell their stock to? A Mr. Peterson and myself.

Q In April of this year? A Yes, sir.

Earl Lake, direct.

Q Before April of this year Mr. Neilson had charge of the company's property, did he not? A No; Mr. McComas collected the rents and conducted the business.

Q Did Mr. Neilson transact any business for the company? A Such as selling property for us, he did; but he didn't collect the rents.

10

Q Who negotiated the sale of this property to Borak and Greenspan? A Mr. Litman.

Q Who acted for your side of it? A He brought the buyer to us.

By the Court.

Q Who acted for the company with Litman? A Myself and Mr. Peterson, the president.

Q Prior to the sale of this property to Borak and Greenspan there had been a sale of the property in the company, hadn't there? A No, sir.

20

Q There hadn't been any transfer of the title? A No, sir.

Q Had the value of the property been fixed prior to April, 1919, by resolution of the company or by resolution of the Board of Directors? A We had had several offers on the building.

The Court. Answer that question.

A We had originally fixed a value of \$32,000 on it.

Q Was that done by resolution of the company? A By the directors; yes.

30

Q When was that? A I don't recollect the exact day, but along the first of April, I should say.

By the Court.

Q 1919? A 1919.

Q What was the occasion of the fixing of that value by resolution? A Because we had had several offers for it; several brokers wanted to sell it for us.

Q Did the resolution contain anything more than a mere—

40

Mr. Lane. I call for the production of the resolution.

Mr. Brown. This is the first notice we have had and I haven't got it.

Q Repeat, if you can, the resolution.

Earl Lake, direct.

Mr. Brown. That is objected to. I think we ought to have the resolution in.

10 Q After the passage of that resolution and prior to May 5, 1919, are there any other resolutions or actions of the Board of Directors that appear upon the minutes of the board with respect to the sale of this property? A No, sir.

Q Was there any action of the Board of Directors that doesn't appear upon the minutes of the board in relation to this property and its sale? A No, sir.

Q Where did you get your authority to execute the contract with Borak and Greenspan? A I didn't execute the contract; Mr. Peterson and I, as officers of the company, executed the contract; also the Board of Directors.

20 Q Where did they get their authority from? A Why, Mr. Peterson and I are the president, secretary and treasurer, and also a majority of the Board of Directors.

By the Court.

Q Did you obtain your authority by a formal resolution? A No, sir; no formal resolution.

Q Where did you get your authority to send to the McClung Drug Company the letter dated May 5, 1919, Exhibit C. 2? A At the meeting of the Board of Directors, composed of Mr. Peterson and myself, he thought that was necessary, according to the terms of the lease, to give them that notice, thirty days' notice.

30 *By the Court.*

Q You did that by formal resolution? A Not a formal resolution; no, sir.

Q Well as a matter of fact, your corporation is a close corporation? A Yes, sir.

Q And most of your business transactions are transacted without formal resolutions? A Yes, sir.

Q And that has been the practice and custom ever since your organization? A No; I won't say that.

40 Q Since you have been connected with it? A Since I have been secretary and treasurer.

Q And it was also your practice after 1915—do you know from your knowledge of the records of your company whether there was any formal resolution at the time of making the lease

Earl Lake, direct.

on July 7, 1915, to McClung? A At that time there was a formal resolution, I am not quite sure, about the lease.

Q When was it that your company got into the practice of transacting its business without a formal resolution of the Board of Directors? A Well, since April, 1919.

Q Why did you consider it necessary to send to the McClung Drug Company the letter of May 5th, 1919, after you had sold the property to Greenspan and Borak? A To comply with the terms of the lease.

10

By the Court.

Q How did you expect to comply with it? A The property was sold subject to the lease.

Q And subject to the right of purchase? A That option was in there.

Q Did you have any conversation with Mr. Borak or Mr. Greenspan, or either of them, with respect to that option to purchase before that contract was entered into? A No; I don't recollect; we had the lease there when the other contract was signed; their counsel did.

20

Q Who was their counsel? A Mr. Goldberger.

Q Was there any discussion at that time as to whether the McClung Drug Company were likely to take up that option or not? A No discussion at all.

Q Was there any discussion at that time as to what the meaning of that option was? A No, sir.

30

By the Court.

Q Why did you think it was necessary to give this notice after you had sold the property to Greenspan and Borak? A Because the case called for it.

Q It was a perfectly futile act, wasn't it? A I didn't think so; there is an option there, with the right to convey or to buy.

Q At what price? A No mention was made of price.

Q You say you were ready to make a conveyance to them at any time, at what price? A We would probably have wanted a little more from them than we would from the other people.

40

Q Explain to me, if you can, why you gave that notice after you sold to Greenspan? A It was compulsory under the terms of the lease, it was sold subject to the terms of the lease, not only of the length of the lease, but to all other terms.

Earl Lake, direct.

Q Of what office did you think the notice was? A To give them an opportunity to come to us and make us an offer to buy the building.

Q After you had sold it? A We only entered into a contract to sell.

10 Q Didn't you think that was a sale? Suppose they had come to you, what would you have done? A Sold it to them.

Q At what price? A Probably we would have fixed a higher price.

Q Why? A Maybe the same price; probably higher.

Q Why? A We might not considered their bond and mortgage as good.

20 Q How did you expect to get out of the contract if you had sold the second time? A Their contract called for the building being sold subject to the terms of the lease and the rights of the tenants.

Q And the rights of the tenants as purchasers? A No; rights of the tenants.

Q The rights of the McClung Company as purchasers? A I don't quite understand; if they bought the building they were their own landlord.

Q Did you sell subject to the rights of the McClung Company as optionees? A To all the terms of the lease regarding water rents and all the terms.

30 Q In your contract with Greenspan and Borak, is this provision, "It is understood and agreed that the same premises are to be conveyed subject to the rights of the tenant and it being represented that said rights do not exceed the term of three years." In view of that representation, or apparent representation, that the terms of the tenants do not exceed three years, why do you say they bought subject to the rights of the tenants to purchase? A Their tenancy expires in three years; the term of the lease has yet three years to run.

40 Q The insertion of that clause was not to represent it was the only right? A No; it was not.

Q And it was so understood by the parties? A Yes; it only applied to the terms of the lease.

Q Since this notice was given, May 5, 1919, have you had any talk with Greenspan and Borak with the respect of the exercise

Earl Lake, direct.

by the tenants of their option to purchase, or its option to purchase? A I talked to them about it; yes.

Q How many times? A I couldn't say, several times.

Q Do you recollect any of the conversation? A Only in a general way.

Q What was the conversation in a general way? A In a general way that I had heard nothing from the McClung Drug Company and they didn't want to buy it evidently. 10

Q With whom did you have that? A Isadore Greenspan.

Q Any other of the conversation that you recollect? A With Greenspan and Borak?

Q Yes. A I don't recollect, no, most every time I would meet them there would be something said about it, nothing only in a general way that I had heard nothing from McClung, Darling and McKeown.

Q After the filing of this bill of complaint did you have any conversation with Greenspan and Borak? A Yes, we had several conversations. 20

Q Did Greenspan and Borak ever indicate to you that they would or would not transfer the property to McClung? A I understood that they would.

Q How did you understand that? A From their conversation.

Q What did they say? A They were willing to turn it over to McClung.

By the Court. 30

Q For how much? A Nothing said about price; I suppose they expected a profit; that was their business.

Q Now, is there any reason why you should not have accepted from the McClung Drug Company the sum of \$34,000 in cash? A It has never been offered to me.

Q I didn't ask you that, is there any reason why—

(Stenographer repeats the question.)

A There is no reason why I wouldn't if it had been offered to me before we signed the contract with the other people. 40

By the Court.

Q Is there any reason why you didn't take it after you signed the contract? A Never been offered to me.

Jean A. Hommell, direct.

Q Answer the question.

(Stenographer repeats the question.)

A It was never offered to us.

Q As soon as it was offered would there be any reason— A
10 There would be a reason if we didn't sell it, if we wanted more
money.

Cross examination by Mr. Brown.

Q This City Land & Investment Company is a real estate
company? A Yes, sir.

JEAN A. HOMMELL, a witness produced on behalf of the
complainant, being duly sworn according to law, testified as
follows:

20 *Direct examination by Mr. Lane.*

Q Mr. Hommell, where do you live? A Perth Amboy.

Q What is your business? A Pharmacy.

Q Are you in business in Perth Amboy? A I am asso-
ciated with Mr. Buckley, I am not the owner of the business.

Q Where, with relation of this store at Smith street? A
About four blocks away.

Q How long have you been in the drug business? A Twenty-
five years.

30 Q In Perth Amboy? A No, sir.

Q How long in Perth Amboy? A Four years.

Q Have you known the location of the McClung Drug Com-
pany? A Yes.

Q Are you familiar generally with that store? A Yes, I
have been in there many times.

Q Have you any knowledge as to whether they have a good
will or not? A Yes, I have.

Q How have you derived that knowledge? A Well, I de-
rived the knowledge in this way, I know they had a very good
40 business and I think doing a good business is considered a good
will.

Q How do you know they do a good business? A I have
been there on several occasions and seen people go in and out.

Q Are you in your own mind able to place an estimate on
the value of their good will? A I think so.

Jean A. Hommell, cross.

Q What are your sources of information upon which you base an estimate? A Well, in my practice of pharmacy and the length of time I have been in business.

Q What knowledge of this particular business have you to permit you to put a value on it? A Well, only on the occasions I have been in there in seeing the amount of business they have done and so on. 10

Q What is your estimate as to the value of the good will?

Mr. Brown. That is objected to.

The Court. Objection sustained.

Q What would you say with respect to the effect upon the good will upon the McClung Drug Company if they were forced to another location?

Mr. Brown. Objected to. 20

The Court. Objection sustained.

Q What would you say as to the effect of a removal upon their good will, a removal of the McClung Drug Company to any location within a reasonable distance of the one they are now in?

Mr. Brown. I object to that.

The Court. Objection sustained.

Q Do you know whether there is or is not any location within a reasonable distance of the McClung Drug Company to which it could remove? 30

Mr. Brown. Objected to.

The Court. Objection overruled.

A There is not.

Cross examination by Mr. Brown.

Q You have been working as a clerk, have you not, since you have been in Amboy? A Yes, sir. 40

Q Under a salary? A Yes.

Q And Mr. Buckley's place, that you are working at, is on New Brunswick avenue, one of the side streets, is it not? A Yes, sir.

Stephen Roskowski, direct.

STEPHEN ROSKOWSKI, a witness produced on behalf of the complainant, being duly sworn, testified as follows:

Direct examination by Mr. Lane.

Q Where do you live? A Perth Amboy.

10 Q What is your business? A Druggist.

Q How long have you been in the business? A Seven years for myself.

Q Where in relation to 198 Smith street? A I should judge about ten blocks.

Q Do you know the business conducted by the McClung Drug Company at 198 Smith street? A Yes, sir; I do.

Q How well do you know it? A Going down there almost every second day.

Q To the store itself? A To the store itself.

20 Q Do you know whether or not they have a good will? A I should say they had.

Q How do you know? A I know Mr. McClung and Mr. Darling, they are good business men and they are doing a good business.

Q How do you know they are doing a good business? A I can see it when I go in there.

Q Have you tried to estimate in your own mind the value of their good will? A Yes, sir.

30 *Mr. Lane.* I think, your Honor, you have overruled this question.

The Court. Yes, and it would not be proper to attempt to introduce it by another witness.

Mr. Lane. I will withdraw this witness.

40 *Mr. Lane.* I rest my case with this exception, I desire to reserve the right to show, and I cannot do it today because of the impossibility of having Mr. McClung, who is ill, and not in Perth Amboy, exactly how this lease became the property of the McClung Drug Company. It is quite apparent how it became the property, but there is not actually any proof that at the time the company was incorporated it took over this lease as part of the—

The Court. Where are your records?

Mr. Lane. They have been telephoned for but are not here yet.

Earl Lake, direct.

The Court. Were any other witnesses present at the time?

Mr. Lane. No other witnesses who are here.

The Court. Are there any in the State?

Mr. Lane. My associate, Mr. Golenbock, has stepped out and I don't know. 10

The Court. Is Mr. McClung seriously ill?

Mr. Lane. He has been affected mentally.

The Court. Then I wouldn't receive his testimony I suppose.

Mr. Brown, do you regard this option as a personal option running to McClung or to the land?

Mr. Brown. I must confess that an option of this kind runs to the land.

The Court. Then isn't there proof plenary of assignment? 20

Mr. Brown. Unless there is in the lease that it should not be assigned without consent.

Mr. Lane. I wish to reserve the right to offer this resolution of the City Investment Company.

EARL LAKE, being recalled on behalf of the defendants, testified as follows:

Direct examination by Mr. Brown. 30

Q You have always been an officer, have you not, of the City Realty Company? A I have always been a director.

Q And do you know what arrangements were made with Mr. McClung or the lessee in the lease that was made which has been offered in evidence in regard to improvements if there were any? A At the time that Mr. McClung arranged to take the building we allowed him three months' rent for our share of fixing the front, that would be \$225 that he was to make all inside repairs, improvements and pay a certain percentage of the water rent. 40

Q That was the terms of the lease? A That was the terms of the lease, yes.

Q Was the arrangement about changing the front, was that made before the lease was entered into? A Yes, sir.

Q And was it carried out before them? A Yes.

Earl Lake, direct.

Q Outside of the improvements you have mentioned about changing the front and the making of interior repairs as required by the lease, has there been any repairs or structural changes made or improvements by the complainants in this case since they have occupied this building or their assignor?

10

A Nothing whatever.

Q Has the building been changed at all in any respect? A No, sir.

Q The company defendant is a real estate company, is it not? A Yes.

Q And been buying and selling real estate in Perth Amboy? A Yes.

Q Very frequently? A Yes.

Q For how many years? A Since our incorporation.

20 Q Did the company own other property in the vicinity of the McClung property? A Yes.

Q Was it similar in situation and description? A Very similar.

Q What property have you in mind? A 176 Smith street.

Q Where is that? A It is near the corner of Madison avenue.

Q What have you to say about Madison avenue being a busy corner? A A very good corner.

Q Is that property better than the McClung property? A Very much better.

30 Q Is it the same size lot? A Yes.

Q What is the size? A About 125 by 25.

Q Do you know the thickness of the wall? A I don't know, but there must be at least eighteen inches.

Q What have you to say about the buildings near Madison avenue? A About the same.

Q A three-story building? A Yes.

Q What have you to say about the store at Madison avenue being empty or otherwise? A That has been empty for at least two months now.

40 Q Have you been buying and selling real estate as a business in Perth Amboy for years past? A For six or seven years.

Q On Smith street? A On Smith street.

Q Are you acquainted with the values of property on Smith street? A I am, yes.

Earl Lake, direct.

Q Can you tell what the value of the property, the McClung property, the property you sold, what the market value was at the time you sold it? A The McClung property?

Q Yes. A \$34,000.

Q What have you to say as to the value at the present time?

Mr. Lane. That is objected to as immaterial and irrelevant. 10

The Court. Objection overruled.

A At the present time, property has advanced considerable, I should think it is worth around \$45,000 today.

Q This property near Madison avenue which was sold, how often has that been sold since May 15th?

The Court. Let us not get into that. Here is a bargain made to sell a property where the amount is not fixed. 20

Q Are you acquainted with the fixtures in the McClung property? A I am, yes.

Q What have you to say as to the fixtures being special or otherwise? A They are very nice fixtures, but nothing out of the ordinary.

Q Has there any improvement been made in the fixtures or property since the day McClung took possession? A No permanent fixtures; those fixtures of course belong to them, not the building.

Q Have any new fixtures been put in? A None since they started. 30

Q Are those fixtures annexed to the floor? A No, sir.

Q Are they movable fixtures? A I consider them movable fixtures; I consider them their property; not attached to the building.

Q Is there anything extraordinary— A No, sir.

Q What have you to say about the lighting fixtures, are they the usual lighting fixtures? A The usual lighting fixtures; yes, sir.

Q Have you ever, or your company ever, offered to sell this property to Mr. McClung or the McClung Drug Company? A Yes. 40

Q How many times? A Several times; I don't remember how many.

Earl Lake, direct.

Q How often? A I should say, since the first of the year, at least three times.

Q Did you speak to Mr. Darling about it? A Yes, sir, and Mr. McKeown, also.

10 Q What was the answer each time? A They had no money to buy the building with.

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

Q Was he your agent for the sale of this property? A Yes, sir.

Q Do you remember Mr. McKeown coming to your place of business in the month of March, 1919? A Yes.

Q What was his purpose? A To pay a coal bill at that time.

Q Who was there? A My bookkeeper, Miss Keefe.

Q And you? A Yes.

20 Q Did you have any conversation about this building at that time? A We did; yes.

Q What was the conversation? A I told them they ought to buy the building; they said they had no money to buy the building with.

Q When did you next speak to Mr. McKeown about this building? A The time I handed him the notice. We made out the notice and watched for him to come by, and when he came by I called him over; I handed him the notice and I said, here is something I want you to read; you have an opportunity to buy that building, if you want to buy it.

30 Q What did he say? A The same as before; he threw the notice back in the window, and he said, why, that is a joke, he said, and walked away.

Q What did you do with the notice? A I promptly mailed it.

Q Were you at the store, the McClung drug store, on the second day of June? A Yes.

40 Q What was the purpose of your visit there? A The purpose of my visit there was to collect the store rent, and also to collect a bill for water rent, which had not been paid since McClung signed the lease, and at that time the only conversation we had—

Q Who was there then? A Mr. Darling spoke to me first and Mr. McKeown come in afterwards; the only conversation was in regard to the water rent.

Q What was the conversation? A Mr. McKeown said he couldn't find out anywhere in the lease where it called on them

Earl Lake, direct.

to pay the water rent; I told him it was there nevertheless, and I also said Mr. McComas had told me that he had spoken about the water rent before and they gave me a check for the water rents. No mention was made about buying the building.

Q Did Mr. McKeown or Mr. Darling, either one of them, say at that time especially Mr. McKeown, that he—did he say that the McClung Drug Company offered or would pay you \$34,000 for the building? A There was no such conversation while I was there at all; nothing was said at all whatever about buying the building.

10

Q Did the McClung Drug Company or any of its officers since the day you sent the letter to them, up to the present time make any offer? A No, sir.

Q To buy the building? A No, sir; no offer whatsoever.

Q Did you say at that time that you thought they would take advantage of their option before this; did you say that to them at the store? A No; because nothing was said about the purchase of the building.

20

Q Did you ever receive an answer to the letter that you sent to the McClung Drug Company? A No, sir; we never did.

Q How many times a day do you see Mr. Darling on an average, and Mr. McKeown? A Mr. McKeown passes the office three or four times a day on his way to lunch; he lives right by the office.

Q Who was present in the office the day you gave the notice to Mr. McKeown or tendered the notice to him? A My bookkeeper, Mrs. Keefe.

30

Q What have you to say from your observation about the business of the McClung Drug Company whether it has increased or decreased during the past three years. A They seem to be doing a nice business; I don't think they have grown very much.

Q When was the first that you knew that the McClung Drug Company desired to enforce their option? A When Mr. Green-span called me up and said they had received a notice that they had started suit; that was the first that we knew it.

40

Q Do you know what day that was?

The Court. The bill was filed June 16.

Q Have you had any conversation with Darling or McKeown since that time? A Not since the suit was started; no sir.

Earl Lake, cross.

Q And previous to that time, did they ever offer to buy the place from you? A They never made any offer; I was in every Saturday night at some time.

10 Q You say the agreement you executed to Greenspan and Borak, that at the time it was drawn there was an exception placed therein in regard to the tenants' rights, you remember testifying? A Yes, sir.

Q Was there any conversation at that time when you entered into the contract with Borak and Greenspan about the right of the McClung Drug Company to purchase? A I don't recollect anything definitely; I know the terms of the lease were mentioned.

Q Didn't Borak and Greenspan insist upon having placed in the contract the full extent of the tenants' right and didn't their attorneys so insist? A Yes.

20 Q And wasn't thereupon the clause inserted that the tenants' right was not to exceed three years? A That was the main point, the length of the lease.

Q At that time there was nothing said about the option to buy? A No, sir.

Q Did you ever promise or agree with the McClung Drug Company to do anything in regard to that building, and they thereupon made any improvements to that building? A No, sir.

Q Relying upon that promise? A No, sir.

30 Q Did they ever inform you either directly or indirectly that they made any improvements to the building on account of that option to purchase? A No, sir.

Q Did they ever bring it to your notice? A No, sir.

Q Did they ever say to you they were making improvements to the building, or did make them on account of that option? A No, sir.

Q Did they ever bring such a notice or write to the company to that effect? A No, sir.

Cross examination by Mr. Lane.

40 Q What did you say to McClung or to the officers of the McClung drug store at the time you offered this building to them? A I told them that they ought to have the building; they were there and they ought to have a good stand.

Q Why did you think they ought to have the building? A They were the best persons to buy.

Earl Lake, cross.

Q Why? A They were friends of mine.

Q Only for that reason? A Yes; I wanted to see them get along.

Q Why were they the logical persons to have this building?

A They were already there.

Q What difference did that make? A It was a good place for them to start. 10

Q A good place for them to keep for their business purposes? A Yes; I thought so.

Q You thought, did you not, that the building would be of greater value to them in a business way than to anybody else, is that right? A I don't know; it might be more valuable in some other line of business.

Q Did you ever fix a price on it? A The prices are not stationary in Perth Amboy. 20

Q Did you ever fix a price to them? A Yes; \$32,000.

Q When did you fix a price to them of \$32,000? A By Mr. Lipman, in April, 1919.

Q When did you ever give them a price of which you have personal knowledge? A No price was fixed definitely, because they said they had no money to buy at any price.

Q So that at no time from 1915 down to April, 1919, was any price mentioned? A Well, the price of \$32,000 was mentioned.

Q That was by Mr. Lipman; I mean aside from the Lipman episode. A I don't recollect what price; I had several offers on the building. 30

Q Didn't Mr. McClung and didn't the other officers of the company on each occasion you spoke to them express a desire to buy the building? A No, sir.

Q Did they say that they would buy it if they had the money, or words to that effect? A No; they simply said they had no money to buy with.

Q And that is all they said? A Yes, sir; that is all they said.

Q They never said, either McClung or any one else, that they anticipated sometime buying the building? A No; never. 40

Q Were you present at the time this lease was signed? A Yes.

Q You knew that option to purchase was in there? A Yes.

Q At whose instance did that option to purchase get in that lease? A I think, Mr. McClung's.

Earl Lake, cross.

Q What did he say at the time he asked that that should go in; why did he want it there? A He thought he might be in a position to buy at the end of the lease.

Q At the end of the lease? A Yes.

10 Q At the time that option to purchase was put there he expressed a desire or anticipation of buying the property at the end of the lease? A Yes, sir.

By the Court.

Q A hope? A Yes.

Q Did he say why he wanted to buy the property at the end of the lease? A No, sir.

Q Well, it was tying up your property, wasn't it? A Only for thirty days; yes.

20 Q When was it that either McClung or any officer of the McClung Drug Company indicated that they had changed their minds in respect to that? A I didn't know they had until they started suit.

Q When was it that they departed from their original intention or hope that they would buy the property at the end of the lease? A Mr. McClung ceased to be an active partner in the business.

30 Q Was there any particular time that they indicated to you that they didn't care whether that option was in there or not, notwithstanding that they insisted it was in there? A I don't believe they knew it was there.

Q McClung is still connected with the company? A Not for about eighteen months.

Q Is McClung ill, to your knowledge? A He has been physically unable to do business for at least two years; he has not been physically able to do it for two years, I don't believe.

By the Court.

Q What is the matter with him? A Mental trouble.

40 Q In March, 1919, at the time when McKeown came to your office, you then told him that he ought to have the building, is that right? A Yes, sir.

Q Why did you think he ought to have the building then? A Because he had not been in there long, and we had recently had an offer or two on it; I thought they ought to have it. I also

Earl Lake, cross.

at the same time said if they didn't want to buy it we would be glad to lease them the whole building.

Q You were endeavoring at that time to induce McClung Company to purchase the lease? A Or change the lease.

Q What argument did you use to McKeown at that time to convince him that he ought to take this property? A Never entered into very much discussion, because it was always something they had no time to talk about or they had no money to buy with; it seemed to be of no interest to them at all, because they had three years yet to run—their lease. 10

Q Did you yourself just say to him you ought to have this building without saying why? A No; I said we would like to sell them the building or to change the lease and lease the whole building to them.

Q Did you give him any reason as to why he, of all the other people in Perth Amboy, ought to have this building? A No; I don't recollect that I did. 20

Q There was a reason in your own mind, wasn't there? A Yes.

Q What was it? A The reason that they were already tenants and they had built up some trade.

Q And it would hurt them to get out?

The Court. That is apparent.

Q Did McKeown say in March, 1919, merely that they had no money to buy it; is that all he said? A That they had no money to buy. 30

Q Is that all? A They wasn't able to buy.

Q Is that all? A That's all; practically all; it probably wasn't so abrupt as that; they had no money to buy, and wasn't in a position to buy.

Q They didn't say they didn't want it, did they? A That is the same words, only different language.

Q Did they say they didn't want it under any circumstances? A They said they couldn't buy; they had no money to buy with. 40

Q At the time you handed him the notice in the building, when you say McKeown said it was a joke, didn't McKeown say you had already sold it and he knew it? A I told him we had entered into a contract, but I said you have a chance yet to buy.

Earl Lake, cross.

Q What else did you say? A He threw the notice back and I mailed it to him.

Q What else did you say to him when you first gave him notice or read the notice to him— A He read the notice himself, I handed it to him.

10 Q When he read it didn't he immediately say to you you have already sold this property, or words to that effect? A Well, he was—

Q Answer the question.

(Stenographer repeats the question.)

A Yes, sir; he said that.

Q And he said that was a joke; wasn't that the occasion in which he said that was a joke? A I don't understand the question.

20 Q Well, when he read the notice, didn't he turn around and say to you "That's a joke, you have already sold the property," or words to that effect? A He did, yes.

Q And then you said to him what? A I told him they had an opportunity to buy yet.

Q Is that all you told him, you have an opportunity to buy? A This complies with the terms of the lease.

Q Did you say you had a party to buy for \$34,000? A Nothing was said about a price; nothing is stated in the option about any price.

30 Q You merely said you have an opportunity to buy yet? A Yes.

Q Then what did he say? A He threw the notice back and walked out.

Q Did you say anything to that? A No, sir.

Q I suppose if he had offered you at that time \$34,000 in cash you would have taken it, would you? A I might have.

Q Carry your mind back to that day if you can and tell me whether you would or not? A Certainly we would.

40 Q You would have taken the \$34,000 secured as the contract with Greenspan and Borak was secured? A No, sir.

Q You wouldn't have done it that way? A No, sir.

Q Now, as I understand your testimony, on June 2nd, 1919, at the time you went to McClung's office not one single word during all the time you were in that store was used with refer-

Earl Lake, cross.

ence to the option or the purchase of the property? A Nothing was said whatsoever.

Q And all of the conversation was confined to the payment of the water rent and the payment of the rent, particularly the payment of the water rent? A Yes, sir.

Q You talked to Darling first? A Yes. 10

Q And McKeown was brought into the conversation purely to talk about the water rent. A I think he handed me the check; I think he made the check out and handed it to me.

Q And from the time that you handed him the notice on May 5th down to the time of the filing of the bill on June 16, not one single word ever passed between you, McKeown or Darling with respect to the purchase of this property? A No, sir, they never made us any offer at all.

Q I didn't ask you whether they made you any offer, were there any discussions between you three or one or the other of you? A No, sir. 20

Q Or any talk in which the option was referred to or the purchase was referred to? A No, sir.

Q You met them quite frequently? A He passed by my office every day.

Q And you talked to them quite frequently? A Yes, sir.

Q And never mentioned the purchase? A No.

Q Nor the option? A No, sir.

Q Never said anything about your not having treated them fairly? A No, sir. 30

Q Did Greenspan and Borak tell you prior to the filing of the bill of a conversation one of them had with Darling and McKeown with respect to this option and purchase? A Mr. Greenspan I think.

Q What? A He told me about looking the store over and Mr. Darling came out and wanted to know what they were doing there and he told them they had just bought the building.

Q What else did Greenspan say about that conversation? A I don't know, I don't know just the details at all. 40

Q Well, now, Greenspan didn't call you up—what did he do? A When he got the notice of the filing of the suit—

Q I am talking about a time prior to that. A I don't recollect.

Earl Lake, cross.

Q He called you up about some talk he had with Darling and McKeown with respect to the purchase of the building, didn't he? A Oh, yes; he did.

Q When was that? A Why, several days after the contract was signed.

10 Q How many days after the contract was signed? A I don't recollect.

Q Four, five or six? A I should say about a week.

Q That would make it about the 8th of May; what did he say in that conversation to you? A As I recollect I think he asked if we had notified them about—whether we had notified them in regard to the option I told him I had.

Q What else? A That's what I told them we had; we had written them a letter. Nothing else at all, nothing else to it. I told them we had written them giving them a chance to buy.

20 Q He told you something about some conversation, didn't he, that he had had with McKeown or Darling? A Only just the interview; I never mentioned meeting Greenspan and Borak in the back yard.

Q What I want to know, what I want to get at is what he told you about the meeting in the back yard and everything he told you, what did he tell you took place in the back yard—

A Mr. Greenspan and Borak were looking over the building and Darling asked them what they were doing there and they told him they had signed a contract to buy the building; that is all there was to it as far as I know.

30 Q What did Darling and McKeown say to them when they told him they had bought the building? A I don't know.

Q Did Greenspan tell you over the telephone, did he say that he happened to be in the back yard of this building? A No, I said he called me up about the letter, the contract.

Q Wasn't this a part of one conversation? A No, two different times.

Q Confining your attention to the time in which he told you what took place in the back yard, tell us about that. A

40 That was when I met him on the street.

Q Accidentally? A Yes.

Q And nothing was said about their intending to exercise the option? A Nothing at all.

Q Did Greenspan tell you why he wanted to be certain whether that notice had been given? A I suppose he wanted

Grace D. Keefe, direct.

to know whether they were going to get the building or whether the McClung Drug Company was going to get it.

Q Did he say so? A No, but he implied that.

Re-direct examination by Mr. Brown.

Q Mr. Lake, before you could set the price to sell the property for any price you would have to consult the directors of the company? A Yes. 10

Q You testified on your direct examination for the complainant today that you and Mr. Peterson held a directors' meeting; what do you mean by that? A We held a meeting to talk over the affairs of the company.

Q Is it not a fact that you and Mr. Peterson, without holding any meeting—

The Court. We can see what was done. 20

Q You didn't send out any call for a meeting? A No, sir.

Q You and Mr. Peterson individually discussed this contract? A Yes, sir.

GRACE D. KEEFE, a witness produced on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. Brown.

Q You are the bookkeeper for the Lake Coal Company? A I am. 30

Q How long have you worked in that capacity? A I have been there since the last week in January, 1919, now.

Q At Perth Amboy? A Yes.

Q Do you work daily in the office? A Yes.

Q Were you in the office in the month of March when McKeown came in to pay a coal bill? A I was.

Q Was there any conversation between Mr. McKeown and Mr. Lake about the property? A Yes.

Q What? A Mr. Lake suggested that he buy the property or asked him if he wanted to buy it. 40

Q What did he say? A He sort of put it off and gave the impression he wasn't ready.

Q What did he say, never mind the impression. A He said he didn't have the money or they weren't financially able to buy it, that's it.

Isidore Greenspan, direct.

Q Were you in the office on the 5th day of May? A Yes.

Q When Mr. Keown came there? A I was.

Q What happened there? A Well, I had written this letter dictated by Mr. Lake and he saw him coming down the street and suggested he would give him the letter instead of mailing it. He picked it up and hailed Mr. McKeown across the street and said, "Here is a letter I want you to read," and Mr. McKeown took it and read it through. He was at the door. I was sitting at the desk in the back. I can't say exactly what was said, only I do remember when Mr. McKeown threw the letter in through the door, as a final remark saying the building is sold any way, the impression to me was that even if he wanted to buy it it is sold any way.

Q What part of the conversation did you hear? A I heard Mr. Lake call him across the street and say here is a letter I want you to read, and they were at the door.

Q How far is the door from your desk? A I was sitting behind the counter.

Q How far is the door from the desk? A Well, straight through it would be probably six feet, but it's around a rail.

Q What did Mr. McKeown say when the letter was handed to him? A I don't know what he said, I didn't hear him.

By the Court.

Q Have you told all you heard? A All I heard, I don't know.

Mr. Lane. No cross examination.

ISIDORE GREENSPAN, a witness produced on behalf of the defendants, being duly sworn according to law, testified as follows:

Direct examination by Mr. Brown.

Q You are in the wholesale and retail grocery business in Perth Amboy? A Yes.

Q And you are one of the defendants in this case? A Yes, sir.

Q Did you have occasion to call at the premises known as the McClung Drug Company's store about the 5th day of May?

A Yes, sir; after we signed up the contract I went over to

Isidore Greenspan, direct.

see the building. I went around the back; I had seen the front of the building, but not the back.

Q Up to that time had you ever seen the lease or known the contents of the lease that was held by the McClung Drug Company? A No, sir; I didn't.

Q Were you not there at that time, did you have any conversation with Mr. Darling when you went to the store? A We were in the back yard looking at the building and Mr. Darling came out and said "what are you doing here," and Mr. Borak informed him we had just signed the contract to buy the building. He said, "is that so?" "Yes," and we asked him what he thought of the building; is it in good shape, and different things, and Mr. Borak asked him if we could walk through the store to get out to the front so we wouldn't have to walk around on the street to get out. He said, "sure you can go through if you want to." That was the first time we were in the building.

Q Was that the only conversation? A Yes.

Q Did Mr. Darling say at that time, kidding you, that they had an option on the place? A Sir?

Q Did Mr. Darling say at that time, after you had mentioned about buying the place, did Mr. Darling say to you, kidding, that they had an option on the place?

The Court. That is not the testimony.

Q Did he say to you in any part of the conversation that they had an option on the place or words to that effect? A No, I didn't hear any remark of that kind; there was very little conversation.

Q Did he say this to you, "Get out of here, get the devil out of there, we have an option to purchase?" A I don't know if he said that; he might have said "get out of here" or "what are you doing there?" I think he said to Mr. Borak; he is very intimate with him, "what are you doing here, Phil?" or something to that effect. After we told him we bought it he got a little red in the face, he got a little sore.

Q How do you know? A He got red in the face, I didn't have much to say.

Q When did you first find out that they had an option, the McClung Drug Company in their lease to purchase the place? A I was home for supper and Mr. Lipman called me up and

Isidore Greenspan, cross.

he said, "Do you know the McClung Drug Company are going to put a lis pendens on the building you are going to take title to on Monday morning?" That was about June 8th or 9th, I don't remember which. I said I didn't know anything about it.

Q When did you take title? A We took title, I think it was on June 11th, I don't know exactly the date.

Q Was it June or July? A We took title in June.

Q Did you take title the same day mentioned in the agreement? A No, a little ahead of time; at the time we made the agreement we wanted to make as long an arrangement as possible, because at the time we didn't know just when we would have the money; we wanted as long as possible; as soon as we got the money we notified Mr. Lake we were ready to take title.

Q At the time the agreement was entered into—I mean the contract to purchase—was there anything mentioned about the option at that time? A No, sir; there was no mention of option made.

By the Court.

Q Didn't you see the lease? A No, sir; I wanted to see the lease, and Mr. Peterson's lawyer was away at the time, and he couldn't get the lease, so he told me the lease was about two years; when I came to the lawyer's office I said put in—he said the lease has two years; he said we will make it two years and one month; he wouldn't take a chance; then I said then make it three years; that was to be safe.

Q What is the lis pendens? A There was a lis pendens to it or something like it to take title.

Cross examination by Mr. Lane.

Q Mr. Greenspan, were you represented by a lawyer? A It was a mutual lawyer; Mr. Peterson's lawyer was away and our lawyer is Mr. Brown, and Mr. Peterson didn't care to have Mr. Brown, and we were anxious to get the building, and we went to Mr. Goldberger, who was the lawyer at that time.

Q He was present at the time this contract was signed? A Yes.

Q And the lease was not there? A No.

Q There was no discussion as to the terms of the lease except the time? A Except the time.

Isidore Greenspan, cross.

Q You didn't know anything about the claim on the part of the McClung Drug Company that it had an option to purchase at all until this lis pendens was filed? A Yes.

Q You didn't inquire from Mr. Lake as to whether the notice of May 5th had been sent? A No, sir.

Q You didn't know at the time you entered into the contract that any notice was going to be given to the McClung Company? A I didn't know anything about a notice; no, sir. 10

Q Did you call up Mr. Lake and tell him about this conversation you had in the rear of the store on June 8th? A I didn't speak to him about any conversation.

Q May 8th? A No, sir.

Q And you never told Lake up to this minute about any conversation which you and Borak had, and Darling had, in the rear of the store? A We didn't see McKeown at all.

Q Well, with Mr. Darling? A I didn't tell Lake about any conversation with Mr. Darling. 20

Q At no time? A Except that Saturday night before the lis pendens, that is the only time when I first found out that there was an option, and that is the time that I spoke to him about it.

Q You have already testified that Mr. Darling got red in the face when you told him that you had purchased the property? A Yes; he was the tenant there.

Q Did he do anything else; express any opinion about it? A No, sir; but I figured the reason; I say he got red in the face; he felt, I suppose, that he would rather have Lake and Peterson as the landlords than he would have us; that was my idea of it; that was my opinion. 30

By the Court.

Q On May 8 did you inform Darling that you had bought the property? A After we had signed the contract; the same day.

Q The same day you signed the contract? A To purchase the property; we had seen the front of the building.

Q That is the day you went there? A That is May 1st. 40

Q That is May 1st? A That is May 1st; that is the day I went there.

Philip Borak, direct.

Re-direct examination by Mr. Brown.

Q When you telephoned to Lake on that Saturday night, was there any conversation at that time about the notice being sent?

A I didn't know anything about the notice.

Q Answer the question; was there any conversation at that time about a notice? A No, sir.

Q Did you have a conversation with Lake about that time whether or not he sent the notice? A When he came to the lawyer's office I did.

Q That was the same day? A That was Saturday night, he came to Mr. Goldberger's office.

By the Court.

Q Did you ask him whether he sent a notice? A At that time he asked me, "I said do you know McClung Drug Company have filed a lis pendens." I said, "Have they got an option to purchase the property," and he said, "Yes, there is an option in the lease, but I gave them notice."

Q Why did you ask them if you didn't know? A I asked the reason for the lis pendens, and they said they had the option.

PHILIP BORAK, a witness produced on behalf of the defendants, being duly sworn according to law, testified as follows:

Direct examination by Mr. Brown.

Q You are one of the defendants in this case? A Yes, sir.

Q Were you with Mr. Isidore Greenspan at the place of business of the McClung Drug Company on May 2nd? A Yes, sir.

Q What was the conversation, if any, between you and Darling that day, and Greenspan? A We walked in the rear of the yard to look around, and Mr. Darling came out of the rear, and said, "What the devil are you doing around here," and I finally told him we bought the building and signed a contract to purchase the building; he looked at me and Mr. Greenspan and didn't know what in the world to say, and we looked around a little while. I said, "Can I go through the inside of it," and he said, "Sure," and we walked through the building, and that is all there was to it.

Q Did you meet Mr. Darling after that from time to time walking along the street? A Yes, lots of times; yes.

Philip Borak, cross.

Q Did you have any conversation with him about the premises? A Nothing much concerning the property.

Q What was it you had? A Just met him one day in the Elks while eating there and told him he was very foolish to go and start a rumpus like this unless he was positive he would win the case; he told me he was assured by his lawyer that he would.

Q Was there any offer made at that time to sell your interest to him? A No, sir. 10

Q Did you ever offer to sell your interest to him? A No, sir.

Q Did you ever have a conversation with Mr. Lake in regard to the option? A No, sir.

Q When did you first learn there was an option on the place? A Mr. Greenspan told me a day or two afterwards.

By the Court.

Q After what? A After he found there was a lis pendens on it. 20

Q Do you remember what day that was? A I couldn't tell you what day.

Q When did you first find out there was an option in existence? A Mr. Greenspan told me he was up to Goldberger's office.

Q You were not there? A No, sir.

Q You say you told Darling the day you were down there that you had bought the place? A Yes.

Q Did he say anything to you that day about an option? A Not that I can remember. 30

Q Why can't you remember? A I don't believe he told me so.

Q Why have you any doubts about it? A Because we never paid no attention to it.

Q How often did Darling meet you from that day until the lis pendens was filed? A He met me quite often.

Q How often is that? A Almost every day.

Q Did he ever say anything to you about the interest of the McClung Drug Company there? A No, sir; never spoke to me about it. 40

Cross examination by Mr. Lane.

Q Mr. Borak, you know Mr. Golenbock? A I do.

Q You are certain you didn't get information with respect to this option until two days after Mr. Greenspan knew that a lis pendens was going to be filed? A Yes.

Bernard Litman, direct.

Q Do you remember Mr. Golenbock telephoning to you some days before you took title to this property with respect to putting a lis pendens on the property? A No.

Q Don't you remember any conversation with Mr. Golenbock regarding a lis pendens; that he was going to file a bill and put a lis pendens on record? A Yes, he did say about the same time Mr. Greenspan told me.

Q Before or after? A It must have been the same day.

Q Greenspan didn't tell you until after the lis pendens had been put there? A About that time.

Q What did Mr. Golenbock tell you on the telephone? A That he was going to put a lis pendens on it.

Q That they were going to put a lis pendens on it? A Yes.

Q You didn't know at the time he was talking to you about any option to purchase? A No, sir.

Q And he didn't tell you? A No.

Q And the lease wasn't there at the time you signed this contract on May 2nd? A I never looked at any papers.

Q (Stenographer repeats the question.) A I didn't see it.

Q You don't know whether it was there or not, then? A No, sir.

By the Court.

Q Did you ask what right the McClung Company had there? A No.

Q You knew they were tenants? A Yes.

Q Did you ask whether they had a lease? A Yes.

Q Did you ask to see the lease? A No.

Q Why? A Because Mr. Greenspan was taking charge of it.

BERNARD LITMAN, recalled on behalf of the defendants, testifies as follows:

Direct examination by Mr. Brown.

Q Mr. Litman, as agent of the City Land & Investment Company, did you call at the McClung Drug Company premises for the purpose of selling the property? A I did, sir.

Q When was that? A The early part of April.

Q Whom did you have the conversation with? A I seen them individually, Charles Darling and McKeown, at the same time; both of them together.

Bernard Litman, direct.

Q What was their answer to you; what did you say to them?

A I submitted them as a broker, what the property was, and told them the good side of it, and the reason why—

By the Court.

Q What did you say to them? A I said to them, "Gentlemen, I wish you would buy the building," and the reasons what I give them, several reasons, I told them I understand they had been there and established their business, and while they have established their business it is a practical way to purchase the business they are in, and in the event the building is sold you would lose your home; I requested them to buy the building, and they asked me why do I want them to buy the building for; I told them the reason; I said one reason I want to tell, I am offering this building because I am making a commission in selling the building, and the second thing is you are the practical, logical buyers; if ever I sell to some one else you would lose your home.

Q What did you say to them? A I asked them to buy the building, and they requested the price, and I told them \$34,000.

Q What did they say? A At the moment they said, "All right; come and see it again; we will see; we will think."

Q Did you go there? A I did.

Q How many times? A Very many times.

Q More than once? A Yes; more than once.

Q How many times in your estimation—three or four times?

A Probably four and five times; maybe a half dozen times.

Q Did you offer to sell to them on each occasion? A I did.

Q What did they answer you? A The first time they said, "We will see."

Q And the second time? A "We will see."

Q And then, again, what did they say finally? A Darling said, "I have overlooked that opportunity; I could have bought it for \$32,000," when I offered it to him for \$34,000.

Q Was that the final answer? A The final answer was, I got tired of going; I wouldn't never go any more to ask them for it.

Q What is the property worth now? A More than at that time; maybe four or five or six thousand dollars more; at that time the maximum was \$34,000.

Bernard Litman, cross.

Cross examination by Mr. Lane.

Q Did you have authority from the City Realty & Investment Company to offer this property for \$34,000? A Not in writing.

Q Did you have authority? A Yes.

10 Q From whom? A The City Realty & Investment Company.

Q What individuals of that company? A Both of them—Charles C. M. Peterson and Earl Lake.

Q Did you tell the City Realty & Investment Company that you would make the offer of the property to the McClung Drug Company at that price? A I did not.

Q Did they know it to your knowledge? A I don't know.

Q Did you tell them after you had made the offer? A I did.

20 Q Did they object to your having made the offer to the McClung Drug Company at that price? A Not that I remember.

Q Did you have authority to offer it at \$32,000? A I did before it was bought in by the company.

Q What do you mean? A They had a meeting one evening at 5 o'clock; I had very many buyers, and I spoke to the members of the company, and said call in the evening and submit your buyers, and also the price you can obtain for it, and we will let you know the next morning; so I submitted a buyer, a Perth Amboy gentlemen, for \$32,000.

30 Q Was that the meeting at which the price of \$32,000 was fixed? A That was the meeting, I understand.

Q Did they, after they had that meeting, inform you that the price had been fixed at \$32,000? A No, sir; they told me it had gone up to \$34,000.

Q Prior to that, you had it for \$32,000? A Yes, sir.

Q Didn't you for the first time offer that property to Darling or McKeown after the sale to Borak and Greenspan, and did you not then ask for \$38,000? A After they purchased the building?

Q Yes. A I don't remember the price I asked for it.

By the Court.

40 Q Was that the first time you spoke to them? A No, sir; I spoke to them all along for the previous owners.

Mr. Lane. The record discloses the lis pendens was filed on the 16th day of June, 1919.

Henry K. Golenbock, direct—cross.

HENRY K. GOLENBOCK, a witness produced on behalf of the complainants, being duly sworn, testified as follows:

Direct examination by Mr. Lane.

Q Are you a member of the bar of this State? A Yes.

Q And representing the McClung Drug Company? A Yes.

10

Q Prior to the *lis pendens* in this case did you have a conversation with Mr. Borak over the telephone? A Yes, sir.

Q When was it? A I can't fix the date, except as to the time of taking title.

Q Can you fix the date? A Only as to the number of days, not as to the date; it was the third or fourth day prior to taking title.

Q What was the conversation? A I told him I represented the McClung Drug Company, and that they had an option to buy, which was in the lease which they had with the City Investment Company, and that I intended to file a *lis pendens* and start suit for specific performance; I asked them what are they going to do about it; he said they hadn't taken title to it, and they would consider it.

20

Q Is that all? A Yes.

Cross examination by Mr. Brown.

Q How long after that conversation was it that you filed the *lis pendens*? A I can't tell.

Q Why can't you? A Well—

30

Q As near as you could tell? A Possibly three or four days; I had to get a description of the property.

Q It didn't take you three or four days to get that? A I can't say; the bill had to be filed and sent to Trenton, and a subpoena had to be sent to the sheriff, and then the *lis pendens* had to be filed.

Q You filed them both the same day? A Yes; but we had to make sure the bill was filed with the clerk of the Court of Chancery.

Q Did you send the bill down by messenger? A No, sir; by mail.

40

Q You knew, of course, about this long before you filed the *lis pendens* about the McClung option? A I knew about it the day before, but I was not retained.

Charles M. Peterson, direct—cross.

Q Isn't it a fact that you were the person who urged Mr. Darling to bring this suit, and that you guaranteed him you could get the— A I never guaranteed a client in my life.

Q Didn't you urge him to do this? A No, sir; he was the one that spoke first about it; I didn't know anything about the transaction, whether they had a lease or not.

Q You don't know what date it was that you called up Borak? A I can't tell as to date.

Q As near as you can tell, what date was it? A I remember that I had a drink with him on the day it was closed, and that conversation was several days before.

By the Court.

Q That was in June? A Yes; after we took title I was down stairs and they invited me to have a drink with them; I accepted the invitation, and they said they had just taken title, and the conversation was prior to that day.

CHARLES M. PETERSON, a witness produced on behalf of the defendants, being duly sworn according to law, testified as follows:

Direct examination by Mr. Brown.

Q You are an officer of the City Land & Investment Company? A Yes, sir; president.

Q You signed as president the contract of sale to Greenspan and Borak? A Yes.

Q In the office of Mr. Goldberger? A Yes.

Q Were you there at the time Mr. Greenspan was there, and Mr. Lake? A Yes.

Q Was the lease between the McClung Drug Company and Fred W. McClung and your company present at the time the contract was made or signed by Isadore Greenspan? A No, sir.

Cross examination by Mr. Lane.

Q Any discussion with respect to the lease at that time? A Not any more than the question was asked about the time of the lease; how long it was to run.

Q Was the option to purchase referred to? A The tenants' rights was put in; yes.

Charles M. Peterson, cross.

By the Court.

Q What? A The tenants' rights.

Q What rights does the tenant have? A What is in the lease.

Q Was the fact that the tenant had the right to purchase referred to? A No, sir. 10

Q Wasn't talked about at all? A No, sir.

Q You knew that the contract contained a provision representing that the tenants' rights were confined to a term of three years, didn't you? A That is covered in the lease?

Q Yes. A Yes.

Q Three years then to run, you knew that, didn't you? A Yes.

Q You knew also that the tenant had a right to purchase, didn't you? A Yes. 20

By the Court.

Q Didn't you disclose that to these buyers? A No, sir.

Q Why? A I don't know just why; the point was overlooked, I guess.

Q You didn't want to deceive them? A No, sir.

Q You made no reference to it at all? A No, sir.

Q How did this clause, with respect to the tenants' rights, become to be inserted in this contract? A Mr. Goldberger put it in.

Q How did he come to put it in; was there any talk about it? 30

A Only Mr. Greenspan brought up the question of how long the lease was to run.

By the Court.

Q Why did you put it in; so as to protect you? A Yes.

Q Why didn't you put in also to protect you that there was an option to buy? A That is a point that was overlooked.

Continued until September 11th, 1919, at Newark, N. J.

Earl Lake, direct.

In Chancery of New Jersey

Between

10	McCLUNG DRUG COMPANY, and CITY REALTY & INVESTMENT COMPANY,	}	<i>Complainant,</i> <i>Defendant.</i>	<i>On Bill, &c.</i> <i>Testimony.</i>
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Testimony taken in the above-entitled cause at the Chancery Chambers, Newark, N. J., on Thursday, September 11, 1919, at eleven A. M.

20 Before HON. JOHN H. BACKES, Vice-Chancellor.

Appearances as heretofore noted.

Mr. Lane. I call for the production of the resolution of the City Realty & Investment Company, referred to as fixing the price of \$32,000.00, merely to identify it.

Mr. Brown. I haven't any resolution. I understand Mr. Lake was subpoenaed to produce the minutes of the corporation. He has them in court.

30 EARL LAKE, being recalled on behalf of the complainant, testifies as follows:

Direct examination by Mr. Lane.

Q Mr. Lake, have you produced the resolution of the minute of it? A I have the minute book here.

Q Will you refer to the resolution you referred to in your testimony in Trenton relative to fixing the price on this property? A I want to explain that this resolution was not in the minute book, but I had it placed there by the secretary. This was a meeting of April 4, 1919. The members present were Peterson, Lake, Neilson, McComas, Bryan's proxy being voted by McComas.

40 Q Let me see the minute? A (Witness hands counsel the book.)

Earl Lake, cross.

Mr. Lane. I offer that minute.

Mr. Brown. I would like to examine the witness.

The Court. You may.

By Mr. Brown.

Q Mr. Lake, when was this entry made in your minute books? 10
A Yesterday.

Q Of a meeting that took place when? A April 14.

Q Who made the entry yesterday? A Mr. McComas, who was formerly the secretary.

Q He is not an officer or a member of the company now? A No.

Q In which way did he refresh his memory to—from what did he make the entry? A From memory.

Q Mr. Lake, were you present when the resolution was passed? 20
A I was.

Q Was it a written resolution or a motion? A It was a motion.

Q And does that entry in the book there state the motion as it was put that day? A It does, to my recollection; yes, sir.

Q Will you read into the record the resolution?

Mr. Lane. I offer the minute.

(Said minute is marked Exhibit C. 7.)

Q Read it? A “April 14, 1919, present, Peterson, Lake, Neilson and McComas, Bryan’s proxy being voted by McComas. Moved and seconded that Jefferson Building be placed on the market for \$32,000.00. General discussion. Adjourned. K. W. McComas, Secretary.” 30

Q Does the Jefferson Building comprise 198 Smith street?
A Yes.

Q You have been subpoenaed to produce the correspondence with respect to the sale of this building between your company or any of its officers and Greenspan and Borak or any of their representatives. Have you any such correspondence? A No.

Q There was none? A There was none. 40

Cross examination by Mr. Brown.

Q Mr. Lake, for what purpose was the resolution passed? A The resolution was passed to give a broker a price.

Q What broker? A Mr. Bernard Litman.

Chester Morton Darling, direct.

CHESTER MORTON DARLING, being recalled on behalf of the complainant, testifies as follows:

Direct examination by Mr. Lane.

10 Q Mr. Darling, were you present at the time of the original incorporation of the McClung Drug Company? A Yes, sir.

Q Were you present at the time the business theretofore conducted by McClung was taken over by that company? A Yes.

Q When was that meeting held? A I think it was about October, 1915; October, '15.

Q Who was present? A Meyer, Stremlow, Smink and myself. There might have been one or two other boys there.

Q Were they the incorporators of the company? A Yes.

20 Q Are there any minutes of that meeting? A There are no minutes of the meeting; no, sir.

Q Are there any minutes of the Board of Directors or the stockholders of the McClung Drug Company? A No, sir.

Q What took place at that meeting with respect to the taking over of the business of McClung?

Mr. Brown. That is objected to. I understood the purpose of this hearing was to have the minutes of this corporation—

30 *The Court.* No; one purpose was to establish what was established by the minute just read, and the other one to show the assignment from McClung to the McClung Company.

Mr. Brown. I object to it as hearsay testimony.

The Court. The objection is overruled.

A Those present were McClung, Stremlow, Smink and myself, and McClung said that as long as the McClung Drug Company had been formed, that he would turn over the lease to the McClung Drug Company, and they were to pay all bills, rent and all bills.

40 Q How about the business as a whole? A He turned over the business to the McClung Drug Company as a whole.

Q Since that date has the McClung Drug Company operated that business and paid all the rent? A Yes, sir.

Q And as I understand it there was nothing, and never has been anything, in writing? A No, sir.

Chester Morton Darling, cross.

Q Was there at that time or shortly thereafter, stock issued to McClung? A Yes.

Q What did he turn it over for? What did he get for it? A Why, he paid for the stock.

Q Was the formation of the McClung Drug Company under consideration and anticipated before McClung got this lease? A Yes, sir. 10

Q For how long before McClung got the lease? A I couldn't say just how long before.

By the Court.

Q Was McClung running a drug store at this place at the time the corporation was formed? A He opened up the store.

Q Before the corporation was formed? A Yes, sir.

Q And running it? A The papers were drawn at about the time— 20

Q Who bought the stock? A McClung, Smink and myself.

Q I mean the drug store stock and the fixtures? A Well, they were partly paid for by McClung—

Q Who bought them? A They were ordered by McClung.

Q Who bought the stock, the drugs? A He ordered the drugs.

Q That was before the corporation was formed? A Yes, that was before the corporation was formed.

Q What did he do with the stock and fixtures? A It was turned over to the McClung Drug Company. 30

Q What for? A They got stock for it.

Q How much? A I can't recall the number of shares.

Q Turned over with the lease? A Yes.

Cross examination by Mr. Brown.

Q You have all this in writing, have you not, about the stock that was turned over? A No, sir.

Q Do you mean to say you didn't issue stock? A Yes, sir; we did. 40

Q You got that in writing? A I have the stock certificates here.

Q The McClung Drug Company paid for part of the stock put in that store, is that so? Stock of drugs? A The McClung Drug Company paid for some of the stock.

Chester Morton Darling, cross.

Q At the time the papers was drawn, you say, the corporation was then in contemplation? A The bills were not at that time paid.

Q McClung didn't give anything for his stock? A I don't quite understand the question.

10 Q Did McClung give anything for his stock? A Any money?

Q Yes. A He paid for it, I suppose, by purchasing goods.

Q Do you know whether he did or did not? A If I am not mistaken he bought from the company—

Q Answer the question? A I can't recall.

Q When this company was incorporated you had the certificate drawn? A Yes.

Q You had a meeting? A Yes, sir.

20 Q And you had a minute book? A We didn't have a minute book at the time.

Q When did you get the minute book? A About a year and a half ago.

Q Where is it? A Here.

Q Nothing written in it? A No, sir; not a thing.

Q You had no by-laws? A There are rules that Stremlow got up. I don't know that you would call them by-laws.

Q Where are they? A They are here. Everything is here.

30 Q When were those rules formulated? A I don't know whether they were formulated that day. Some of the things were typewritten when Stremlow brought them to the store.

Q By what rule do you operate in the corporation? A Stremlow got the papers.

Q The officers have certain powers? A Yes, sir.

Q Do you have directors' and stockholders' meetings? A Informal meetings.

Q Well, the directors cannot undertake any project of any moment, or the officers cannot, without the directors passing on it, can they? A I suppose they could.

40 Q According to the rules of your corporation what have you to say? A Well, I don't think it reads that way. I am not familiar enough with the papers.

Q What do the by-laws say? A I don't know.

Q Who has charge of the corporation—the directors? A Yes.

Q Who are they? A McKeown, Meyer and myself.

Chester Morton Darling, cross.

Q When did you hold your last directors' meeting? A We have not had a regular directors' meeting in, perhaps, a couple of months; that is, McKeown and I talk over things informally, but not what you call a regular meeting.

Q You never had a regular meeting in two months. That brings it back to May? A I can't say.

10

Q Was it before then or afterwards? A Since.

Q When? A I should say it was probably the middle of May.

Q You didn't have any minutes of that meeting, did you? A No, sir.

Q Didn't pass any resolutions at that meeting? A No; no resolutions passed. We spoke in regard to the purchase of the building.

Q When was that? A That was some time during the middle of May.

20

Q What time in May? A I say about the middle.

By the Court.

Q Was any corporate action taken by the McClung Company with reference to the purchase of this land? A We spoke about that, and even made out checks.

Q Answer the question? A Yes, there was.

Q You say you made out a check? A Yes, sir.

Q You say you made out a check? A Yes, sir.

Q Where is that check? A We haven't the check; I don't know whether it has been destroyed. Mr. McKeown could tell you that.

30

Q What bank was it drawn on? A The Raritan Trust Company.

Q You have the stubs here? A Yes, but it wasn't on the stub.

Q You have your check book here? A Yes.

Q It was made out when? A I couldn't tell you just when. Mr. McKeown could perhaps tell the date better than I.

Q When do you think it was made out? A I think somewhere around the 26th or 27th of May; around June 1st or 2nd.

40

Q Was the talk that you had about the purchase of this property because you had heard that Greenspan and Borak had sold it for \$40,000? A No, I wouldn't say so.

Q Isn't that the reason? A No, sir.

Chester Morton Darling, cross.

Q You did hear that, that they had sold it for \$40,000? A I don't know that we did hear that.

Q How much did you hear they sold it for? A I don't recall the price. I heard they had sold it.

10 Q Just before you filed the *lis pendens* didn't you hear they had sold this property for \$40,000? A I am not positive about the price.

Q Who was your lawyer at the time? A Mr. Golenbock.

Q Do you know Pete Clauson, in Judge Hommann's office? A No.

Q What was the price, as near as you can remember? A I can't say.

Q You know it was more than thirty-four? A I think it was.

20 Q How much more? A I couldn't say whether it was thirty-six or thirty-eight.

Q It was very much more? A That I don't know. I am not positive.

Q How many days after that was it that you caused the *lis pendens* to be filed? A I don't know.

Q Two or three days? A I couldn't say whether it was before or after.

Q You started your suit after you had heard that, didn't you? A I don't know whether it was before or after, no, sir.

30 Q But it was on account of hearing that that you filed the *lis pendens*? A No, sir.

Q Wasn't that the subject of the talk you had with Meyer and the other gentlemen? A We spoke about the purchase of the building.

Q The price, how it had gone up in price? A No. We spoke about this notice we received.

Q Wasn't the reason you made up your mind to buy the building because it had gone up in price? A No, we received that notice of the company.

40 Q Why didn't you act before that? A We didn't have to act before our time was up.

Q And you expected you were going to make your own price on it? A No.

Q How much did you expect to pay? A I couldn't say; certainly no more than we had to.

Chester Morton Darling, direct.

Q But you couldn't tell what you were going to pay? A We thought we were going to pay the same as somebody else had to.

By the Court.

Q What corporate action did the McClung Drug Company take after you got this notice? A Mr. McKeown and I talked about the thing, and we spoke about, as I have said in the previous testimony, about offering the City Realty and Investment Company the same amount of money offered by Greenspan and Borak, the amount I was told by Mr. Greenspan.

10

Q Well, you had a third member of the Board of Directors? Mr. Meyer? A Yes.

Q Did you have any talk with him? A Yes, sir, on several occasions.

Q Who? A Mr. McClung, Mr. McKeown and myself.

Q All three together? A Yes, several times, and we—

20

Q What conclusion did you arrive at when you were together?

A We would buy the building before our time was up.

Q For how much? A For \$34,000.00, the same price—

Q That the three of you agreed to? A Yes.

Q How much was this check for? A \$500.00.

Q Why that? A We thought that would bind the bargain until thirty days or until or until the time we bought.

Mr. Brown. I will call Mr. Darling as my own witness now.

Direct examination by Mr. Brown.

30

Q Produce your books? A (Witness produces books.)

Q Will you please point out in your book the check that was used for the purchase of this property, the \$500.00 check? A Well, the check isn't here in this book, but there was one issued about the second of June.

By the Court.

Q What was done with it? A I don't know whether it was in the store today or—

40

Q What was done after it was issued? A We had it right at the store at the time Mr. Lake came around.

Q Did you show it to Lake? A No, because he absolutely refused—

Q You didn't? A No.

Chester Morton Darling, direct.

Q You took it from that book? A Yes.

Q Show where it came from? A Either the front or the back of the book.

Q Why didn't you draw the check in its order? A We thought perhaps we might be turned down on the thing.

10 Q What did you do with the check? Didn't you write the stub? A No, sir.

Q What did you do with the check itself? A I can't say whether it is in the store today or where it is, but all the papers—

Q They are all here? A Yes, sir.

Q And paper writings of every kind? A Yes, sir.

Q Can you find that check? A No, sir.

Q Did you look for it? A I have.

20 Q You don't know what became of the \$500.00 check? A I am not positive; I think it was destroyed.

Q You didn't stop payment on that check, did you? A No, sir.

Q Where are the minutes of your incorporation? A All the papers are right there.

Q Didn't you have a minute book, printed stock certificates? A Yes.

Q Didn't you have a minute book with the name of the company across the top of it? A No, sir.

Q Your stock book does? A Yes, sir.

30 Q And your stock transfer book contains the name of the company? A Yes.

Q Will you say you have not any other minute book than this one? A We never had any until a year and a half ago.

Q Are those the by-laws of your company? A I guess they are.

Q Look at them? A I guess these are the by-laws, all right.

Mr. Brown. I offer them in evidence.

Said by-laws are marked Exhibit D. 1.

40 Q Have you not any paper writings at all of your incorporation? A No, sir, only what you have right there.

Q Where is your stock book? A In the rear there.

Q When you had that stock book issued didn't you have a minute book also? A No, sir; I don't think there was ever any minute book.

Chester Morton Darling, direct.

Q Didn't you report or keep a record in any place or write on any papers the proceedings of your meetings? A No, sir.

Q The first or any of your meetings? A No, sir; the only minute ever reported was the minute we sent to the State once a year, or report, that's all.

Q You don't mean a meeting? A A minute.

Q Have you got a copy of the reports you made to the State every year?

10

Mr. Lane. Objected to.

The Court. Objection sustained.

Q Has your corporation made a report to the internal revenue department from time to time?

The Court. What is the purpose?

Mr. Brown. To show the income from this business during the past three or four years, how it has developed or not developed. There is a claim made that there is an appreciable good will in the business.

20

The Court. Proceed.

Q Have you income tax reports? A We have a sort of data there in regard to that report.

Q Didn't you keep a copy of the reports? A I think we have one.

Q Didn't you tell me that you had copies of the reports? A I don't know that I did.

30

Q When were these copies made up? A Last night, by going through our books. One year I know we have a copy for.

Q Didn't you have your reports made up from year to year? A Yes, sir.

Q You had an accountant to make them up, did you not? A One year we did.

Q And besides the year the accountant made them up didn't you keep a copy that was furnished you by the department? A I think we have one copy.

Q What did you do with the other copies? A All the papers we have are right here.

40

Q Will you get the other copies, please?

The Court. I don't see the relevancy of it, whether they had a good will or not.

Mr. Brown. Then I won't press this examination.

Leo Goldberger, direct.

LEO GOLDBERGER, a witness produced on behalf of the defendant, being duly sworn, testifies as follows:

Direct examination by Mr. Brown.

Q You are a counselor-at-law in this State? A Yes, sir.

Q With offices in Perth Amboy? A Yes.

Q And city attorney of Perth Amboy? A Yes.

Q You know the defendants in this case, the company and Borak and Greenspan? A I know all the parties.

Q It was through your office that the agreement by the City Investment Company and Borak and Greenspan, was made? A Yes.

Q At the time that the agreement was prepared who was present? A Mr. Lake, Mr. Peterson, Mr. Greenspan. I won't be sure about Mr. Borak.

Q Who was it that gave you the terms and information by which to make up the agreement? A The parties that were there.

Q Did you have any writing of any kind in the form of a lease or deed? A I can't recall. If I saw the contract I might refresh my memory.

Q I show you Exhibit C.3. A No, I had no deed there. I recall now that I examined the title to that property prior to the purchase by the defendant, the City Realty. I had an abstract at the time, and that is where I got the dimensions from.

Q Did you have at that time, or anyone there, a lease form or agreement made in the year 1915 between the City Realty and Investment Company and Frederick W. McClung? A No lease at all.

Q In making up the agreement between the Investment Company and Borak and Greenspan, which is marked C.3, what conversation was there about the interest of McClung Drug Company or Frederick W. McClung? A Why, I asked for the written lease. They said they did not have it, and then the question arose as to how long the tenants had a right to possession. I think Mr. Lake or Mr. Peterson was in doubt as to the time, and we agreed that the term was not longer than three years and it would be satisfactory to the buyers. I had no doubt in my mind as to what Mr. Lake or Mr. Peterson said. I didn't doubt their word at all.

Leo Goldberger, direct.

By the Court.

Q Was the lease before you? A No.

Q That is, the lease of this property from the City Realty and Investment Company to McClung? Was that before you?

A No, sir. I never saw it at that time.

Q Was there anything said at that meeting about the option? 10

A No, sir, there wasn't any talk about it at all. If it had been there might have been a different proposition.

Q Were you present when Mr. Borak telephoned to Mr. Lake about the notice of *lis pendens*? A It was in my office, yes.

Q When was that? A On Saturday I believe.

Q What Saturday? A The Saturday preceding the filing of the *lis pendens*.

Q How do you know when the *lis pendens* was filed? A Well, I was making an abstract of the title, and we were arranging to take title, and we naturally had to keep track of that. 20

Q What occasioned the conversation over the telephone between Mr. Greenspan and Mr. Lake? A I understood there was going to be a *lis pendens* filed and wanted to know the cause and reason for it. I called up Mr. Borak, and, I think, Mr. Greenspan, to come to my office, and told them what I had heard. And then, I believe, I called up Mr. Lake, and asked him to come to my office.

Q Go on. Then what? A I told them what I had heard.

Q What? A About the prospective *lis pendens*.

Q Tell us what you told him. A That Mr. Darling and Mr. McClung claimed there was an option to buy, and asked them whether they wouldn't bring down the lease, and after a while they brought it down and got hold of Mr. Peterson, and he came to the office and we discussed the proposition. 30

By the Court.

Q That was the Saturday before the *lis pendens*? A Yes, sir.

Q What was said about it there, between Greenspan and Lake, as to the option being in the agreement? A Well, there was a general conversation. I don't remember any particular detail, except I look at—the lease was produced and I simply give them my opinion as to what I thought of the lease. 40

Bernard Litman, direct.

Cross examination by Mr. Lane.

Q Did Mr. Lake at that time say he had given a notice to the McClung Drug Company? A Probably he did; I couldn't say.

10 Q Are you sure that that was the first time you had seen that lease or knew of the option to purchase? A Absolutely. If I had seen the lease I wouldn't have drawn the contract as I did.

Q Date back your mind to that conference of which you have spoken didn't you ask either Peterson or Lake for a copy of that lease? A I certainly did.

Q And didn't he say, or one of them, that the lease was at their office, and that they would send it down to you? A No, sir.

20 Q What did they say? A They said they didn't have it handy, and told me what it was, and Mr. Peterson's or Mr. Lake's word is as good as their bond in Perth Amboy.

Q You are sure that a few days after this contract was signed the City Realty & Investment Company didn't send a copy of this lease to you? A Absolutely certain.

Mr. Brown. We have no value as of the second day of June. We have it on the fifth. I think the value is material in this case.

The Court. How?

30 *Mr. Brown.* If no price was set and the theory is a fair price was paid, I should think it would be material to show that a fair price of the property on that day was what the testimony—

The Court. Is it part of your contention that the contract implies a reasonable price?

Mr. Lane. I shall so contend.

BERNARD LITMAN, being recalled on behalf of the defendants, testifies as follows:

40 *Direct examination by Mr. Brown.*

Q What, in your opinion, was the reasonable value of the property known as the Jefferson Building, 198 Smith street, on the second day of June, 1919? A Well, within the neighborhood of \$40,000.00.

Conclusions of Vice-Chancellor.

Q What do you mean "within the neighborhood of" that? A Well, in my mind \$40,000.00 doesn't exactly mean forty. Maybe above a thousand and maybe within a thousand less. That's the way we figure.

Both sides rest.

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CONCLUSIONS.

Submitted October 17, 1919.

Decided October 28, 1919.

For the complainant Messrs. Wight, Wight & Golenbock, (Mr. Merritt Lane of counsel.)

For the defendant Mr. Thomas Brown.

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BACKES, V. C.

This bill is for the specific performance of an option contained in a lease to purchase land. The struggle for the property is due, chiefly, to its recent increase in value. The City Realty and Investment Co. leased to the McClung Drug Company's assignor the ground floor of No. 198 Smith street, Perth Amboy, to be occupied as a general drug store, for the term of six years from the first day of August, 1915, and stipulated "That should the party of the first part decide to place this property on the market for sale, then the said party of the second part shall be given thirty (30) days' notice in writing of such intention with the privilege of purchasing same within said thirty days." The Realty Company decided to sell and to that end its board of directors formally resolved "That Jefferson Building be placed on the market for \$32,000." Thereafter a real estate agent retained by it tried to negotiate a sale with the drug company but it was not ready to buy. The drug company had no knowledge of the resolution.

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On May 2nd, 1919, the realty company sold the property to the defendants, Greenspan and Borak, for \$34,000., and three days later it sent a letter to the drug company saying: "If you care to buy the Jefferson Building, No. 198 Smith street, kindly advise us at once as we have an offer." Within thirty days the drug company verbally notified the realty company that it exercised

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Conclusions of Vice-Chancellor.

its option and would give \$34,000., which was ignored, and the property was conveyed to Greenspan and Borak. They had knowledge of the lease but not of the option. They are, however, chargeable with notice of all the lease contains; and further, as the drug company was in possession, reasonable inquiry would have brought forth the information. *Hoy v. Bramhall*, 19 N. J., Eq. 563; *Vredenburg v. Burnet*, 31 N. J. Eq. 229.

The question for decision is, Is the option a complete contract and enforceable in view of the statute of frauds? It seems to me the answer must be in the negative as there was no price stipulated and no method provided for its ascertainment.

It is familiar law that equity will not specifically enforce a contract for the sale of lands unless it is conclusive and certain as to parties, the subject matter, the price and the terms. Some of the cases in this State are *McKibbin v. Brown*, 14 N. J. Eq. 13; *Welsh v. Bayaud*, 21 N. J. Eq. 186; *Domestic Telegraph Co. v. Metropolitan Telephone Co.*, 39 N. J. Eq. 160; *Woodruff v. Woodruff*, 44 N. J. Eq. 349; *Schenck v. Spring Lake Beach Improvement Co.*, 47 N. J. Eq. 44. It is not necessary that the price be specified in figures or words at length. It is sufficient if a standard is established by which the price may be determined with certainty; as, for instance, the "fair value" or "market value," (*VanDoren v. Robinson*, 16 N. J. Eq. 256) or at a price offered by another upon a certain event, and accepted, (*Race v. Groves*, 43 N. J. Eq. 284; *Hayes v. O'Brien*, 149 Ill. 403) or the appraisal of arbitrators (*Woodruff v. Woodruff*, *supra*.) Complainant's counsel rely, for authority, altogether upon the remark of Vice Chancellor Bird in *Race v. Groves*, and the opinion of the Supreme Court of Illinois in *Hayes v. O'Brien*. I think the options in those cases are easily distinguishable in principle in that each of them defined the price to be the amount of a future accepted offer from another. No provision of that kind is contained in the complainant's option. All the drug company got by it was the exclusive privilege, for thirty days, of buying if the realty company decided to sell. It is not implied that the realty company was to fix a price at which it would sell to the drug company, for it is common practice to put property on the market awaiting proposals. Nor can it be read into the option that upon the realty company's determination to sell, and a price being fixed, it was to be unalterable and final; nor that the price was to be the accepted offer of another; nor that it

Conclusions of Vice-Chancellor.

was to be the reasonable value, as the complainant's counsel contend. Any of these factors of definiteness, properly stipulated upon the contingency of an offer of sale, would have supplied the required certainty, according to the authorities. A simple illustration of the incompleteness of the contract is, that the option would be spent by the giving of a notice that the property was for sale, without more, and the lapse of thirty days.

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It is not the privilege of the Court to piece out the option into a complete contract by seizing upon the resolution to sell for \$32,000., or the selling price to Greenspan and Borak of \$34,000., as the sum for which the realty company were, or ought, to sell to the complainant. That would be a juridical interpolation of an essential of the contract upon which the minds of the parties had not met, at least not at the time the option was granted; and it is of that period that it must speak. In *Fogg v. Price*, 145 Mass. 513, the Supreme Court of Massachusetts had before it an option substantially like the one in this suit. I quote at length from the opinion of Judge Holmes for the better expression of my views. He says:

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"The covenant is, 'If the premises are for sale at any time, the lessee shall have the refusal of them.' This is simply an agreement to give the lessee the first chance to make a contract—an agreement to sell if the parties can agree, but not otherwise. It neither fixes the price nor provides any way in which it can be fixed. Suppose that the premises had been advertised for sale, and that the tenant had brought his bill at once, it is plain that the court could not have named any sum at which the lessor should be compelled to sell. Considered therefore in the light of a contract to sell, as it is treated by the bill, it does not satisfy the statute of frauds, and, apart from the statute, it is not such a contract as equity can specifically enforce. *Pray v. Clark*, 113 Mass. 283. *Grace v. Denison*, 114 Mass. 16. *Gelston v. Sigmund*, 27 Md. 334. *Abeel v. Radcliff*, 13 Johns, 297. *Bromley v. Jeffries*, 2 Vern. 415.

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It may be that the contract does mean that the lessor will deal with the lessee on the same terms as with anyone else, or at least will not discriminate against him; that the lessor has now fixed his price by a sale; and that, as the purchaser had notice of the contract, the defendants have removed the difficulties in the way of specific performance by their own conduct. It might be that the remedy would do substantial justice as against the lessor,

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Final Decree.

but in order to do it, a term would have to be added which is not in the contract. The contract certainly does not contemplate a sale to somebody else as a mode of ascertaining the price at which the lessor will sell to the lessee. *Bromley v. Jeffries, ubi supra.* The statute of frauds remains unsatisfied notwithstanding what has happened. It is not the event, but the nature of the contract, which is to be considered, and that must be determined by looking at it as it stood at the time it was made. See *Stapilton v. Stapilton*, 1 atk. 2, 10; *Walton v. Coulson*, 1 McLean, 120; *Moore v. Fitz Randolph* 6 Leigh, 175, 186."

The bill will be dismissed with costs.

FINAL DECREE.

Filed December 2, 1919.

This cause coming on to be heard in the presence of Thomas Brown of counsel with the defendants, and Merritt Lane of counsel with the complainant, and the Court after having read the pleadings in this cause, and considered the proofs and arguments of counsel for the parties respectively, and it appearing that the agreement referred to in the bill of complaint is too uncertain for the Court to decree specific performance thereof, and does not comply with the statute of frauds;

It is on this 2nd day of December, A. D. nineteen hundred and nineteen, ORDERED and DECREED that the bill of complaint be dismissed with costs to the defendants and that a counsel fee of one hundred dollars be allowed to Thomas Brown, counsel for the defendants which counsel fee shall be taxed as part of the costs herein.

E. R. WALKER,
C.

Respectfully advised,

JOHN H. BACKES,
V. C.

New Jersey Court of Errors and Appeals

Between

McCLUNG DRUG COMPANY,
Complainant-Appellant,

and

CITY REALTY & INVESTMENT COMPANY,
et als.,

Defendants-Respondents.

On Bill.

*On Appeal
from Chancery.*

BACKES, V. C.

BRIEF FOR APPELLANT.

Statement of the Case.

The bill (p. 9) was filed to compel specific performance of a contract of option to purchase real estate. On July 7th, 1915, one Fred W. McClung and the City Realty and Investment Company, defendant, entered into a contract of lease by which the City Realty and Investment Company leased to McClung the premises described in the bill for the term of six years. The lease (p. 6) contained the following provision: "And it is further understood and agreed between the parties hereto, that should the party of the first part decide to place this property on the market for sale, then the said party of the second part shall be given thirty (30) days' notice in writing of such intention with the privilege of purchasing same within said thirty (30) days." Fred W. McClung obtained the lease and contract for the complainant, McClung Drug Co., which immediately, upon execution, went into possession, has paid the rent, and been recognized by defendant, City Realty and Investment Co., as the tenant and entitled to exercise the rights of McClung under the contract. The corporation issued its stock to McClung for the lease and contract rights (p. 95).

On May 5th, 1919, the City Realty & Investment Co. sent to complainant a notice reading as follows (p. 19): "Dear Sirs: If you care to buy the Jefferson Bldg., 198 Smith St., kindly advise, at once, as we have an offer." On May 2nd, 1919, the City Realty & Investment Co. had entered into a contract of sale with the defendants, Borak and Greenspan, under the terms

of which it agreed to sell the premises in question to them for an aggregate price of \$34,000. The agreement of sale contains a provision that the premises to be conveyed are to be conveyed subject to the rights of the tenant, it being stated as represented that its rights did not exceed the term of three years (p. 11).

At the time of the receipt of this notice of May 5, 1919, complainant's officers had knowledge of the prior contract of sale made between the City Realty and Investment Company and Borak and Greenspan (pp. 25, 83). Prior to the expiration of the thirty day period complainant's officers had made up their minds to exercise the option and purchase the property. On June 2, 1919, complainant's officers notified the representative of the City Realty & Investment Co. that complainant desired to purchase for the sum of \$34,000 and offered a check for a deposit (pp. 26, 33, 37, 39, 45, 54, 55, 97). The officer of the City Realty and Investment Co. stated that he could not receive the deposit as the property had been sold to Borak and Greenspan (p. 26). This notwithstanding that Lake, secretary of City Realty and Investment Co. testified that he thought it obligatory on the part of that company to, after having made the contract with Borak and Greenspan, send the notice of May 5, giving complainant notice to exercise the option if it desired (p. 61). Within a very few days thereafter the bill was filed.

Defendant, City Realty & Investment Co., in April, 1919, by resolution, had fixed a price of \$32,000 on this property (pp. 93, 59, 88, 73). No written notice in pursuance of the option agreement was given to complainant. Subsequently, defendant, City Realty & Investment Company, ascertained that it could get from Borak and Greenspan a price of \$34,000 and thereupon the contract with Borak and Greenspan was made. Almost immediately after it was made defendant, City Realty & Investment Co., gave notice to complainant that complainant must, if it desired to exercise its option, do so at once and it was in pursuance of this notice that on June 2, 1919, complainant exercised the option.

The defense mainly relied upon was that the option of purchase did not satisfy the statute of frauds. Section 5, 2 Comp. Stat. of New Jersey, p. 2612. The learned Vice-Chancellor (conclusions, p. 105) found that complainant had notified defendant, City Realty and Investment Company, of the exercise of its option and that it would give \$34,000 for the property and that defendant, City Realty and Investment Company ig-

nored this action. He further found that Greenspan and Borak did not have actual notice of all that the lease contained but that as the Drug Company was in possession reasonable inquiry would have brought forth the information. In holding that Greenspan and Borak did not have actual notice of what the lease contained we insist the Vice-Chancellor erred. Lake, one of the witnesses for defendant, City Realty and Investment Company, secretary of that concern, swears that they had knowledge of the option; that Greenspan knew that the notice had been sent and was anxious that it should be sent (pp. 61, 62, 63, 79). Darling and McKeown testify to conversations with Greenspan and Borak almost immediately after the contract of sale, and long prior to June 2nd, in which conversations the option to purchase was referred to (pp. 25, 46). Greenspan and Borak admit that these conversations took place but deny that the option to purchase was mentioned (pp. 81, 84). This would be highly improbable. Greenspan says that, when the purchase by Greenspan and Borak was referred to, Darling got red in the face but said nothing with respect to the option (pp. 81, 83). The testimony of Mr. Golenbock is to the effect that prior to Greenspan and Borak taking title by deed he had a telephone conversation in which he informed them that he was going to file a *lis pendens* (p. 89). Long before the time fixed in the contract for the passing of title Borak and Greenspan took title. It is quite apparent that they did so because they thought that by taking the legal title the rights of complainant would be prejudiced. We urge that there is no doubt but that all parties concerned had full and complete knowledge of the existence of this option in the lease, and that they rested upon the assumption that complainant would not be able to exercise it. Not only did they have full and complete knowledge of the existence of the option, but they had a concrete understanding as to the interpretation of the language. All concerned agree, it seems to us, that this option gave to complainant the privilege of purchasing the property at such price as should be fixed upon it by the City Realty and Investment Company or such price as it could get from another.

We urge that there is no doubt whatever but that when the price of \$32,000 was fixed upon this property, by resolution, if complainant had sought to exercise its option a complete contract would have been formed which would be enforceable. Not knowing of the fixation of the price complainant could not, and was under no necessity to act. We urge that the act of

defendant, City Realty and Investment Company, in contracting with Borak and Greenspan for a price of \$34,000 followed by the letter of May 5th, 1919, to complainant was in essence the fixation of a new price of \$34,000 upon the property which price complainant, under its option to purchase, was privileged to accept, and that it did accept the price on June 2, 1919, and a complete contract was formed. It is immaterial that this acceptance was not in writing. The statute of frauds merely requires the writing to be signed by the person to be bound thereby. Citation of cases is unnecessary to the effect that the filing of the bill in the court of Chancery supplies any lack of mutuality which might theretofore have existed.

If it can be said that the option to purchase as contained in the lease was uncertain in its meaning the subsequent acts of the parties have reduced it to certainty.

The Vice-Chancellor intimated in his opinion (p. 105) that the struggle for the property is due chiefly to its recent increase in value. This so far as complainant is concerned, we insist, is not the fact. Complainant has been in possession of the property since the making of the lease in 1915 and has built up a prosperous drug business and a valuable good will. It is conceded that there is no other location to which it may remove that will not irreparably damage its good will (pp. 26, 27, 65). Lake, secretary of the City Realty and Investment Company, (p. 76) testifies: "Q Did you give him any reason as to why he, of all the other people in Perth Amboy, (that is McKeown of McClung Drug Company) ought to have this building? A No, I don't recollect that I did. Q There was a reason in your own mind, wasn't there? A Yes. Q What was it? A The reason that they were already tenants and had built up some trade. Q And it would hurt them to get out? The Court. That is apparent." Litman, agent for the City Realty and Investment Company, testifies, page 87: "Q What did you say to them? (that is the officers of the McClung Drug Company)? A I said to them 'Gentlemen, I wish you would buy the building,' and the reasons what I give them, several reasons, I told them I understand they had been there and established their business, and while they have established their business it is a practical way to purchase the business they are in, and in the event the building is sold you would lose your home; I requested them to buy the building, and told them the reason; I said one reason I want to tell, I am offering this building because I am making a commission in selling the

building, and the second thing is you are the practical, logical buyers; if I ever sell to some one else you would lose your home."

It is insisted that in this case complainant is not interested in the increased value of the property. It is interested in retaining its good will which it has built up in reliance upon the option of purchase and which will be destroyed if it is forced to vacate. Complainant has an equity arising other than from the mere fact that it has a contract for the purchase of real estate which has been held sufficient to warrant the intervention of a court of equity in specific performance. It has a further and higher equity arising from the fact that if it is deprived of the benefit of this option of purchase it will be irreparably damaged in its good will and business.

The learned Vice-Chancellor dismissed the bill upon the ground that the option to purchase was not certain as to price and therefore unenforcible and in reaching his conclusion he confined himself to a consideration of the option as written in the lease. We urge he erred both in holding that the option as written was so uncertain as to prevent the court granting relief and in holding that he was confined to a consideration of the option as written. We think he should have considered all of the circumstances and all of the acts of the parties up to the time of the hearing, and that considering such facts and circumstances if the option to purchase as written were uncertain its terms were reduced to certainty before the hearing.

ARGUMENT.

I.

Options to purchase contained in leases are favored in the law and will be specifically enforced if possible.

II.

The oral exercise of the option was sufficient.

In *Houghwout v. Boisaubin*, 18 N. J. E. 315 suit was brought to compel specific performance of a portion of a written agreement quoted in full in the option by which complainant was given the option to purchase certain lands. Complainant accepted the offer but not in writing. Specific performance was

resisted upon this ground. The court said (p. 318): "If the proposal be clear and definite, and one to which a simple assent is a complete answer, such assent may be given either by writing, by acts, or by words. The statute of frauds requires the writing to be signed only by the person to be charged." Citing cases. The court examined the proofs and came to the conclusion that there had been an acceptance and required specific performance.

In *Hawralty v. Warren*, 18 N. J. E. 124 the Chancellor held that an optional agreement signed only by one party would be specifically enforced.

In *Green v. Richards*, 23 N. J. E. 32 the Chancellor held that a writing endorsed on a lease, signed only by the lessor, agreeing to sell was enforceable. It does not appear in the case that there was, prior to the filing of the bill, an acceptance of the offer by the defendant in writing.

In *Reynolds v. O'Neill*, 26 N. J. E. 223 the agreement, which was in the form of a receipt, was signed only by defendant. It appears from the facts in that case that all that the complainant did prior to the filing of the bill was to demand a deed. Not until after the bill was filed did he tender the balance of the purchase money.

In *Howland v. Bradley*, 38 N. J. E. 288 the Court of Errors and Appeals affirmed the decision of Vice-Chancellor Bird holding that a contract, signed only by the vendor, to convey lands was enforceable.

In *Dynan v. McCulloch*, 46 N. J. E. 11 (affirmed on opinion below, 46 N. J. E. 608), the agreement signed by the vendor consisted of a receipt. The Chancellor said (p. 16): "To the defendant's objection, that the contract cannot be enforced because it is unilateral, it is only necessary to say, that by filing his bill the complainant put himself under the obligation of the contract, so that he may now be compelled to perform it. *Richards vs. Green*, 8 C. E. Gr. 536; *Reynolds vs. O'Neill*, 11 C. E. Gr. 223; *Carskaddon vs. Kennedy*, 13 Stew. 259; *Woodruff vs. Woodruff*, 17 Stew. 349." It is significant also in that case that the time was limited to five days from the date of the receipt. It was held that time was not of the essence of the contract.

In *Carskaddon v. Kennedy*, 40 N. J. E. 259 the Court of Errors and Appeals, at p. 277, said:

"The first ground (that is, the contract was not completely made being signed by defendant only) is not tenable. The signature of the complainant was not legally necessary. Browne on Stat. of Frauds, secs. 365, 366. The filing of the bill made the contract and the right to specific performance mutual. *Richards vs. Green*, 8 C. E. Gr. 536."

In *Krah v. Wassmer*, 75 N. J. E. 109 the contract was evidenced only by a receipt. Vice-Chancellor Howell said (p. 112):

"Even if the case stood upon this so-called unilateral contract it ceased to be unilateral the very moment the vendee filed his bill for the specific performance of the contract."

Potts v. Whitehead, 20 N. J. E. 55; 23 N. J. E. 512, is not contrary to the above cases. In that case the Chancellor and the Court of Errors and Appeals held that no contract had, in fact been made. The case is not authority that an offer in writing must be accepted in writing. The statute of frauds provides, sec. 5, 2 C. S. of N. J. 2612 "that no action shall be brought * * * upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them;—unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged there." It is uniformly held that signing by the other party is immaterial. See cases cited, p. 2613, under note "Real property and estates and interests therein."

As bearing upon this subject and also upon the right of the court to look upon documents other than those passing between the parties to the contract (thereafter considered) etc. an important case is that of *Carlton v. Columbia Real Estate Co.*, in the Court of Errors and Appeals, 67 N. J. E. 629. In that case it appeared that the written memorandum was signed only by the Columbia Real Estate Company and was defective in that it did not set forth the entire agreement. Complainant offered to produce in evidence a duplicate of a paper sent by defendant's agent to her for signature which duplicate bore the signature of defendant but which papers had never been exchanged so as to be of any force and effect. The Vice-Chancellor excluded the paper saying (p. 631): "An undelivered though signed contract, remaining in the possession of the

parties bound by it, has no legal efficacy. It is only when the party obligated has passed it over to the other party that it becomes of any binding effect. The paper marked Exhibit C 1 is in no way obligatory upon Mrs. Charlton, because it remained in her possession. The paper here produced on call by the attorney for the defendant is no obligation whatever upon the Columbia Real Estate Company, because it remained in the hands of the attorney for the Columbia Real Estate Company. The mere execution gave it no force or effect; it is its delivery that gives it force." The Court of Errors and Appeals reversed. It said (p. 632): "It is clear, as the Vice-Chancellor held, that the duplicate signed by the defendant's president could not become a lease until it was delivered, but it was none the less a memorandum in writing, signed by the defendant, showing the details of the proposed lease, as they had been agreed upon between the parties pursuant to the memorandum of May 7th, 1901." After quoting the statute the Court of Errors and Appeals said: "The signing by the complainant is immaterial; only the party to be charged therewith need sign." Citing cases.

III.

The option to purchase contained in the lease is certain.

It provides: "Should the party of the first part decide to place this property on the market for sale, then the said party of the second part shall be given thirty (30) days notice in writing of such intention with the privilege of purchasing same within said thirty (30) days."

In *Race v. Groves*, 43 N. J. E. 284 there was a provision in a lease that if Grove should have an offer to purchase the lot he should give Race first refusal at the price named. Vice-Chancellor Bird said: "There is but little if any doubt as to the right of Race against Grove." He dismissed the bill, however, upon other grounds. The case was affirmed in the Court of Errors and Appeals "for the reasons given by the Vice-Chancellor."

The learned Vice-Chancellor in the case at bar rested his conclusion upon *Fogg v. Price*, 145 Mass. 513, 14 N. E. 741. That case is not in accord with more recent decisions in other jurisdictions nor is it in accord with *Race v. Groves*. The

Illinois Supreme Court had the matter under consideration in *Hayes v. O'Brien*, 26 N. E. 601, on rehearing 37 N. E. 73. The Illinois Court was dealing with a contract in which the lessor reserved the right of selling the land but with a provision that no such sale should be made without first giving the lessee privilege of purchasing upon such terms and at the same price per acre as any other purchaser or purchasers might have offered therefore. The Court, in its opinion, 26 N. E. 601, held that this contract was too indefinite and rested its conclusion upon *Fogg v. Price*. It recognized that the language of *Race v. Groves* was to the contrary but intimated that what was said in that case was not authority because the case was not decided upon that issue. The case was reargued, and in its second opinion, 37 N. E. 73 it relied upon the case of *Race v. Groves*, and distinguished *Fogg v. Price*, as well as other cases relied upon by the defendant below. The court said, referring to the case of *Homfray v. Fothergill*, L. R. 1 Equity 576,

“The case of *Homfray v. Fothergill*, L. R. 1 Eq. 576, is an instructive case on this point. The agreement there was that no partner should sell his shares without first offering them or it to the other partners, collectively, after notice. If they refused to buy, the shares were to be offered to the partners desirous of collectively purchasing. If no two desired to purchase jointly, then to the partners individually, after which he might sell them to a stranger. The only limitation as to the price upon the sale to strangers was in the condition providing that he or she should sell the same, fairly, for 500 pounds per share, at least, more than the price at which he or she offered the same to his or her partners, collectively or individually. One of the partners offered his shares to the remaining partners. One of the three refused to join with the other two, so there could be no collective purchase. A bill was filed by the two who were willing to purchase, and the court held that the offer to the partners inured to the benefit of the two who were willing to purchase, and decreed specific performance accordingly. There, it is apparent, the price was in the discretion of the seller, subject only to the limitation that he would not sell to a stranger for less than 500 pounds per share more than he had offered to sell them for to his partners, collectively or individually. By the contract the price was to be fixed by the offer of the seller, and thereupon the right of the remaining partners to purchase became complete.”

Just as in the case *sub judice*, the defendant, City Realty and Investment Co. having decided to place the property on

the market at a price, complainant was entitled to accept the offer and having accepted there was a complete contract.

The Court in the Illinois case further said:

"In the construction of contracts, the intention of the parties—to be ascertained from the words employed, the connection in which they are used, and the subject matter in reference to which the parties are contracting—must control; and courts are powerless to interpolate terms and conditions into the contract, to which the minds of the parties have not given assent. Courts will, however, look to the entire instrument, and, if possible, give such construction that each clause will have some effect, and perform some office, and for this purpose will, as far as practicable, view the contract from the position of the parties at the time it was made, in order to understand their language, in the sense in which it was used. And such construction will be adopted, if it can consistently and reasonably be done, as will render the whole contract operative." It further said: "We know of no principle of equity that is violated by such a contract, nor are we referred to any case holding that a contract of this character may not be enforced in equity. *The contract is that the lessee shall have a right to purchase at a price satisfactory to the lessor; and when fairly entered into, upon a valuable consideration*, if the terms upon which the sale is to be made are fixed in the contract, or the parties have, by the contract, provided the means for their ascertainment, no reason is perceived why a court of equity may not compel its performance."

The Massachusetts Court in *Fogg v. Price* held that a contract which fixed no price but gave a refusal was too indefinite to be specifically enforced. As indicated it is opposed to and disapproved in *Hayes v. O'Brien* and is opposed to *Race v. Groves* and I think is opposed to the reasoning of cases in the jurisdiction of Massachusetts among others *Silver v. Graves*, 1911, 95 N. E. 948, at p. 949.

The Vice-Chancellor distinguished the options considered by the court in *Race v. Groves* and *Hayes v. O'Brien* from the option in the case at bar. It is insisted that they cannot be distinguished. The question is one of interpretation of language. What did the parties mean by the language in the option, "place this property on the market for sale"?

It is a cardinal rule in the construction of contracts that they will be construed if possible so as to be enforceable, 13 Corpus Juris, title "Contracts" 539, sec. 506, 509, 510, 511.

It is a well recognized method of placing property on the market for sale to place it at a price. The language may reasonably be construed as to require the lessor when he placed the property upon the market for sale to fix a price. There is no doubt but that if this construction be put upon the language then upon the property being put on the market at a price the lessee would be privileged under the option to purchase the property at the price fixed. If this be the construction to be put upon the language then the case is clearly within the reasoning of *Race v. Graves* and *Hayes v. O'Brien*. Applying the rule that contracts are to be construed, if possible, so as to be enforceable and the further rule that options to purchase contained in leases are favored, inasmuch as the language contained in the option is susceptible of the construction which we have put upon it, it is insisted that, aside now entirely from the light which may be cast upon the construction by the circumstances and the subsequent acts of the parties, the court ought to have construed it as aforesaid.

IV.

The Court erred in refusing to consider the circumstances and the subsequent acts of the parties as bearing upon the construction to be put upon the option to purchase.

If the circumstances and the subsequent acts of the parties are considered there is a complete and certain contract enforceable in equity.

After the making of the lease, which gave the option to the lessee to, within thirty days after notice that the lessor had decided "to place this property on the market for sale," purchase the same, the lessor by resolution of April 14th, 1919 (p. 93), directed the property to be placed on the market for \$32,000. No notice was given to the lessee in accordance with the option and agreement. On May 1, 1919, the lessor entered into a contract in writing with Borak and Greenspan by which it agreed to sell the property to Borak and Greenspan for \$34,000. By this act, the lessor irrevocably, in writing, fixed the price which it would receive for the property. On May 5th, 1919, the lessor in pursuance of the terms of the option gave written notice to the lessee "If you care to buy the Jefferson Building, 198 Smith street, kindly advise at once as we have an offer" (p. 8). This notice was given in pursuance of the

option agreement and because the lessor assumed that it was under a duty to give it (p. 61). It had irrevocably fixed the price it would receive for the property. The notice referred to the offer which it had received and this offer must, of course, have been the offer evidenced by the contract between the lessor and Borak and Greenspan. The testimony of Lake (pp. 62, 63, 64) indicates that there was no reason why the lessor should not have accepted the same offer from the lessee as it had accepted from Borak and Greenspan. Taken in connection with the option to purchase, the fixation of a price by the resolution of April 14th, the irrevocable fixation of a price by the contract with Borak and Greenspan in writing, the letter of May 5th, amounted to an offer to the lessee to purchase at the price fixed by the contract between the lessor and Borak and Greenspan. On June 2nd, 1919, this offer on the part of the lessor was accepted as found by the Vice-Chancellor and the option exercised.

The Vice-Chancellor refused to consider in determining this case any matter subsequent to the lease itself.

It is well settled that a contract which is uncertain when made may, after its execution, be rendered certain by a practical construction or otherwise, 13 Corpus Juris, "Contracts" p. 268, sec. 59, subtitle "Effect of Subsequent Acts."

In *Charlton v. Columbia Real Estate Co.*, Court of Errors and Appeals, 67 N. J. E. 629 the court held in a case where the original written memorandum did not contain the entire agreement that the proof might be supplemented by a duplicate of a paper sent by defendant's agent to her for signature, which duplicate bore the signature of the defendant but which paper had never been delivered so as to be of any legal force or effect. The court said (p. 632):

"It is clear, as the vice-chancellor held, that the duplicate signed by the defendant's president could not become a lease until it was delivered, but it was none the less a memorandum in writing, signed by the defendant, showing the details of the proposed lease, as they had been agreed upon between the parties pursuant to the memorandum of May 7th, 1901." And further: "Nor is it necessary that all the terms of the contract be agreed to at one time, nor written down at one time, nor on one piece of paper. If all the papers, taken together, contain the whole bargain, they form such a memorandum as will satisfy the statute." Citing cases. "Nor does it signify to whom the memorandum is addressed; it may

be to a third person, and yet be a good writing to satisfy the statute of frauds. Form it not important." Citing cases.

"The reason for this is clear. The memorandum is only necessary to evidence the contract, not to constitute it. As Chief Justice Tindal says, in *Laythoarp vs. Bryant*, *supra*, (2 Bing. N. C. 744) 'the contract is made before any signature thereof by the parties.'"

"The memorandum or note is only to evidence what the contract was. To prevent perjury as to such contracts, the statute declares that evidence of what the contract was must be contained in some memorandum or note in writing, signed by the party to be charged therewith. When the memorandum exists, and is legally given in testimony, it becomes evidence of the contract claimed to have been made. The memorandum is not the contract, but only evidence of the contract."

And further:

"The question here is simply this: Will the court, in a suit for specific performance of an oral agreement to make a lease, admit in evidence all the paper writings signed by the parties to the negotiation, even though some of the papers be signed but undelivered instruments, in order to see, when all the papers are taken together, whether they contain the completed terms for a lease as agreed, so that a decree may be made? We think this question must be answered in the affirmative."

The court distinguished *Brown v. Brown*, 33 N. J. E. 650 in an opinion which amounted practically to its overruling.

The application of the Charlton case to the case at bar is clear. It seems to us that the option to purchase contained in the lease must be construed as giving complainant the right to purchase when defendant chose to put the property upon the market at the price at which complainant was willing to take for it. The price which the complainant was willing to take is evidenced by a writing, to wit, the contract between it and the third persons, Borak and Greenspan. This contract may be looked at. *Charlton v. Columbia Real Estate Company*, 67 N. J. E. 633. Subsequent to the making of this contract by which complainant had determined the amount which it was to receive, complainant was advised in writing by defendant to exercise its option. Under the cases previously referred to it is clear that the exercise of the option need not be in writing.

In *Scott v. Shiner*, 27 N. J. E. 185 in a specific performance case the court in order to determine the details of an agreement referred to an instrument executed between the defendant and a third person. The court said (p. 187):

"The instruments of writing by which the refusal to purchase the land was given first to Marwood and then to the complainant, together constituted a binding obligation on the defendant to sell and convey the property in question in fee simple to the complainant for the price therein specified, if the offer was duly accepted within the time therein limited."

Enforcement of options to purchase contained in leases is favored in equity. They are assumed to be made for good consideration. *Hawralty v. Warren*, 18 N. J. E. 124, at p. 127; *McCormick v. Stephany*, 61 N. J. E. 208. In the latter case the court said (p. 218): "Such an agreement to convey is not a mere unaccepted proffer based upon no consideration, as is a letter offering to sell, nor is it a naked promise to sell at a price within a limited time. It is a completed purchase of a right to have a conveyance if the purchaser shall choose to buy upon the terms named." The contention in the Stephany case was that Mrs. McCormick had forfeited her rights because she made a demand for more than she was entitled to under the contract. It appeared that she had demanded more than the contract provided for and that she made no other demand. The court on page 219 treated the filing of the bill as a demand.

While there was no time limited in the option to purchase in the Stephany case, nevertheless it was held a reasonable time would be assumed.

The option in the Stephany case provided that the lessee should have the option of purchase "in case the said party of the first part should find a purchaser for the said premises." The landlord had made a contract of sale with a third party. The court held that this was finding a purchaser within the meaning of the contract. In view of the contention of defendant (not supported, I insist, by the proofs) that the complainant in this case had indicated upon several occasions its non-desire to purchase the property, it is interesting to note that in the Stephany case just such a contention was made and overruled. See pp. 214, 215, 216.

Bateman v. Phillips, 15 East, 272, 104 English Reprint, 847, referred to by the Court of Errors and Appeals in *Charlton v. Columbia Real Estate Co.*, 67 N. J. E. 633, was a suit based

upon a promise to pay the debt of another. The written evidence consisted only of a letter written by the defendant to plaintiff's attorney. The letter read: "Sir: The bearer, David Williams, has a sum of money to receive from a client of mine some day next week, and I trust you will give him indulgence till that day, when I undertake to see you paid." It was contended that the writing did not satisfy the statute of frauds because it did not express the name of the creditor nor the amount of the debt. It was addressed to an attorney. It was contended that parole evidence was not admissible to show either of these facts. Lord Ellenborough, *J. C.*, held that the writing was sufficient. The fourth section of the statute of frauds in that case involved is the same as that with respect to real estate. 104 English Reprint 847.

In *Moss v. Atkinson*, 44 Cal. 3 it was held that a letter written to a third person signed by defendant in which the agreement was referred to was sufficient to satisfy the statute. The court said, quoting Lord Hardwicke in *Welford v. Beazley*, 1 Atk. 503:

"The meaning of the statute is to reduce contracts to a certainty, in order to avoid perjury on the one hand and fraud on the other, and therefore, where an agreement has been reduced to a certainty, and the substance of the statute has been complied with in the material parts, the form has never been insisted upon."

In *Moore v. Mountcastle*, 61 Mo. 424, referred to by the Court of Errors and Appeals in *Charlton v. Columbia Real Estate Co.*, the court said:

"Professor Greenleaf on his treatise on the law of evidence, vol. 1, sec. 268, says: 'It is sufficient if the contract can be plainly made out in all its terms from any writings of the party, or even from the correspondence.' In the case of *Welford vs. Beazley* (3 Atk. 503) Lord Hardwicke said: 'There have been cases where a letter written to a man's own agent and setting forth the terms of an agreement as concluded by him, has been deemed a signing within the statute and agreeable to the provisions of it.'"

In *Singleton v. Hill*, 91 Wis. 51, 64 N. W. 588 referred to by the Court of Errors and Appeals in *Charlton v. Columbia Real Estate Company*, the court said:

"It is not necessary that the memorandum should be formal, or in one writing, or paper, or made directly between the parties to the contract."

In 20 Cyc. 253, title "Statute of Frauds," it is said:

"The memorandum need not formally recite its purpose as a note of the agreement; any memorandum however informal is adequate if it states the agreement with sufficient clearness. *For example, the memorandum may be contained in a record of a corporate vote.*" Citing cases.

In *Lamkin v. Baldwin*, 43 Atl. 593 the court said:

"The vote of the directors of a corporation in writing, and the signature of the recording officer in attestation of the minutes a sufficient signature by the party to be charged. It is found that the vote of the directors of the _____ Co. was passed at a meeting at which all of them were present. It therefore became the duty of the clerk of the board to record it and at the proper time verify the record by his signature. The law presumes, in the absence of evidence, to the contrary, that all this was done."

From the above authorities it is clear we urge that in considering this question the court may take into consideration not only the lease containing the option and the letter passing from the defendant to the complainant but also any other writings, whenever made, including the contract of sale made between defendant Realty Company and Greenspan and Borak. It is also clear we urge from the cases above referred to that the oral exercise of the option by complainant was sufficient.

In *Lee v. Cherry*, 4 Am. St. Rep. 800 cited by the Court of Errors and Appeals in *Charlton v. Columbia Real Estate Company*, the court held that letters to third persons may be used as memorandum satisfying the statute and that oral acceptance of written offer is sufficient.

With respect to the construction of this contract it is submitted that not only the written contract but the acts of the parties may be considered and that there are certain general rules applicable. The contract *may* be so construed as to be definite and perfect. In 13 Corpus Juris, p. 546, sec. 517, it is said:

"Where the parties to a contract have given it a practical construction by their conduct, as by acts in partial performance, such construction is entitled to great if not controlling weight in determining its proper interpretation."

The New Jersey cases are *Edmunds v. Miller* 61 N. J. L. 677; *Camden v. Lippincott*, 45 N. J. L. 405; *Church v. Florence Iron Works*, 45 N. J. L. 129; *Van Dyke v. Anderson*, 83 N. J.

E. 568; *United Box Board v. McEwan*, 76 Atl. 550; *Conover v. Wardell*, 20 N. J. E. 266, affirmed 22 N. J. E. 492.

In *Van Dyke v. Anderson*, 83 N. J. E. 568, the instrument construed was one in writing and it was necessary to construe it having regard to the parol evidence rule which is no more elastic than the statute of frauds. Backes, V. C., said:

“Whenever a dispute arises as to the meaning of a contract, that construction which the parties themselves have placed on it, as between themselves, is the one to be adopted by the courts.”

In *Johnson & Miller v. Buck*, 35 N. J. L. 338 referred to by the Court of Errors and Appeals in *Charlton v. Columbia Real Estate Company*, Depue, J., said, speaking for the Supreme Court (p. 344):

“It is not essential that the whole bargain be contained in one memorandum. It will be sufficient to satisfy the statute if its terms can be gathered from two or more detached papers, if the signed memorandum contains such reference to the other papers as to make the latter part of the former. The connection between the signed and the unsigned papers cannot be made by parol evidence that they were actually intended by the parties to be read together, or of facts and circumstances from which such intention may be inferred. The connection between them must appear by internal evidence derived from the signed memorandum. Parol testimony will be received only for the purpose of interpretation or explanation, where technical terms are employed, or to identify papers which, by a reference in the signed memorandum, are made parts of it.”

The importance of this case is not in its holding that there must be internal evidence connecting the unsigned with the signed memorandum. In the case at bar the memorandum was signed. It is in the fact that the court intimated that parol evidence would be received for the purpose of interpretation or explanation.

In *Camden, etc. v. Lippincott*, 45 N. J. L. 405 the court said:

“If the words of a grant be ambiguous (within the statute of frauds) the court will call in aid the acts done under it as a clue to the intention of the parties.”

In *Edmunds v. Miller*, 61 N. J. L. 677 the Court of Errors and Appeals headnote is:

“The terms of an agreement of partnership, unilateral in form, respecting the profits of the renting and sale of real property, construed in the light of the subsequent

acts of the parties, and a claim of a right of recovery by one partner against the other for certain interest for the use of money invested in the joint enterprise, denied."

In *Corpus Juris*, title "Contracts" p. 539, sec. 506, it is said:

"Where a particular word or words, or the contract as a whole is susceptible of two meanings, one of which will uphold the contract or render it valid and the other of which will destroy it or render it invalid, the former will be adopted so as to uphold the contract. So a contract should be construed in favor of mutuality and of certainty."

Section 509:

"The main object of the contract, or the purpose which the parties sought to accomplish, is to be considered in ascertaining their intention, and particular parts of the contract must be so construed as to harmonize with such purpose, if possible."

Section 510:

"No matter how clear the ordinary significance of the words, it has been held that they must not be given a meaning which when applied to the subject matter of the contract will render performance impossible."

Section 511:

"The words of a contract will be given a reasonable construction, where that is possible, rather than an unreasonable one."

In 36 Cyc. title "Specific Performance," p. 595, it is said:

"Although the description is insufficient in itself, it is competent to show that the particular land sued for was pointed out and designated and the plaintiff put in possession. *The parties thus give a construction to their contract by the manner in which they executed it.*"

In *Swann, Law of Vendor and Purchaser*, England, 1912, it is said (with reference to a contract of sale of real estate):

"The ordinary rules of contract prevail. A contract may be partly verbal, and partly in writing, or wholly one or the other, the statute only referring to the requisites for establishing legality. So we get the not infrequent position of one who has alone signed a sufficient memorandum being bound, while the other party who may take advantage of it is not bound, although he may have accepted verbally or by contact. We also have instances where parties have agreed verbally and then one of them has signed a letter or other document with sufficient particularity to constitute a memorandum. The memorandum, of course, need not be in any particular form."

Browne on Parol Evidence, sec. 54, p. 190, says:

“The conversation and acts of the parties to a contract, at and about the time of the making of the contract, as well as subsequent to the making of the contract, are admissible in evidence to show what sense the parties attached to any term or phrase used in the contract, which is itself susceptible of more than one interpretation, or which, would in the light of the evidence explanatory of the subject matter, the relation of the parties and the circumstances, may reasonably be susceptible of more than one interpretation.” Citing numerous cases.

The option of purchase reads as follows: “Should the party of the first part decide to place this property on the market for sale, then said party of the second part shall be given thirty days notice in writing of such intention with the privilege of purchasing the same within said thirty days.” If this contract can be construed so that the words “place this property on the market for sale” include within it the fixation of a price by the Realty Company it is enforceable. To determine the meaning of this contract other papers signed by the Realty Company may be considered as well as subsequent acts of the parties.

By resolution of the board of directors the defendant Realty Company did place the property on the market *at a price*. This resolution of the board of directors may be considered under the authorities. It was an act following and in execution of the contract. It indicated a practical construction put upon the contract by the defendant Realty Company against which construction defendant Realty Company cannot complain whatever the rights of complainant may be.

Subsequent to this it entered into a contract to sell the property to Borak and Greenspan for \$34,000 and thereby irrevocably fixed the price which it was to receive. Subsequent to this it caused the letter in evidence to be written to the complainant referring to the option and to the offer and requesting the notification at once if complainant desired to exercise its privilege. We urge it is quite clear that from these written documents and the course of conduct of defendant Realty Company that it construed the contract in such a way as to give the complainant the right to have the property at the price which the defendant Realty Company was willing to accept, namely, \$34,000. If the contract be construed in such a way as to give complainant the right to purchase the property at the best price that defendant Realty Company could obtain when it placed the property upon the market, then under the

cases, including *Race v. Groves*, the contract is enforceable. It is only in case the court should construe this contract in such a way as to make the price at which the property was to be bought the subject of negotiation between complainant and defendant, that doubt arises as to its enforceability. Not only are the acts of the parties and the subsequent writings contrary to such a construction but the rules applicable to construction of contracts heretofore referred to, that is, that they should be so construed as to uphold the contract and render it valid rather than to destroy it or to render it invalid and in such a way as that the main object of the contract should be accomplished, and that they should not be construed as to make performance impossible and that there should be a reasonable construction, are against such a construction.

Cases in which offers without consideration were involved are without point, as the cases in this state uniformly hold that valuable consideration and equity will enforce it, if possible. such an option as we are now dealing with is based upon a (*McCormick v. Stephany*, 61 N. J. E. 208). In *McCormick v. Stephany* the Vice-Chancellor said:

"On the contrary, Mr. Stephany's own letters written to Mr. Haines' counsel, after this conversation, indicate that he had Mrs. McCormick's right to purchase in memory as an existing right which he feared when he dealt with Haines, but relied on her supposed poverty to prevent her assertion of it."

So in the case at bar. The defendant Realty Company knew of the existence of this option to purchase; it feared it when it made the contract with Greenspan and Borak. It relied upon the assumed inability of complainant to take advantage of it. Relying upon this assumed inability it wrote the letter which made certain the practical construction of the contract and which gave in connection with the other letters, it is insisted, the right to complainant to have this property for the sum of \$34,000.

The Stephany case is authority for the proposition that a demand for more than the contract provides does not forfeit the right under such a contract of option so that it cannot be contended in this case that if the acceptance by the complainant was uncertain in that the manner in which payment of purchase price was to be made, etc. complainant forfeited its rights.

Indeed, in this case, it would seem that inasmuch as defendant Realty Company had agreed to convey the property to Green-

span and Borak before writing the letter and notifying complainant, complainant might have filed its bill without making formal offer or a formal acceptance.

V.

If the contract is silent as to price, then a reasonable price is to be assumed and the contract is enforceable.

The evidence showed that the price of \$34,000 is reasonable.

It is established law that where no price is fixed with respect to the sale of personality, the law implies an understanding that it be paid for at what it is reasonably worth. Benjamin on Sales, notes by Charles L. Corbin, revised edition, p. 102, chapter 5; 35 Cyc. title "Sales" p. 101, subtitle "Price, expenses and transportation" subtitle "Price," subsection a. In *Silver v. Graves* (Massachusetts) 95 N. E. 948, the court said: "The only element left undetermined in this contract is that of price. But this is not infrequently found to be indefinite in contracts of sale and for work and labor. It is not necessary that the subject matter of such a contract should possess a price in the market or be commonly bartered in trade. It is enough if there is a reasonable value, which can be ascertained by the practical methods of trial. The difficulty of fixing the compensation is no greater than occurs in many cases." In 39 Cyc. 1187 under the title "Vendor and Purchaser" subtitle "Price" it is said: "If the offer is intended merely as one for a reasonable price, and not for a specific price, the price need not be fixed in the offer, since the law will in such case imply a reasonable price." In *Johnson v. Staley*, Appellate Court of Indiana, 1904, 70 N. E. 541 the court said, in an action at law: "The agreement fixed no time within which the sale of said real estate should be made by Hammer. The law implies, therefore, a reasonable time. It is not claimed that the undertaking on appellant's part was repudiated because of a failure to sell within a reasonable time. The contract fixes no price at which the land should be sold. The price and terms to be fixed by appellant would therefore also be required to be reasonable." In *Collins v. Vandever* (Iowa), Vol. 1, Cole's Edition (p. 573) the court had under consideration an oral agreement made with Collins that Collins might build a house upon a certain part of a tract owned by Kelly, and that Kelly would convey the land to him at the same rate as he, Kelly,

got for the rest. No precise description of the property was agreed upon, but it was stipulated that it should consist of one acre. Specific performance was sought. The court held that the building of the house took the contract out of the statute of frauds and then said: "First. It is said that the contract is indefinite and uncertain, both as to the property and the terms of payment. The contract is natural in its original progress. Collins is permitted to build a house on a certain piece of land, and is to have one acre of ground to be surveyed and laid out thereafter. It was laid out and reduced to certainty by metes and bounds. If it had never been laid out otherwise, he would have been entitled to one acre on which his house stood. The form of this acre would then depend upon circumstances, but unless some circumstances dictated a different course, it would lie in a square, including the house. Thus it was sufficiently certain, as soon as the house was built. And if this were not so, still *id certum est quod reddi potest*; and the vendor did render it certain, by the survey. Second. *If the price had been left uncertain, this would not vitiate the contract, for then it would mean a reasonable consideration; it would rest upon a quantum meruit, and either party could enforce it without difficulty.*"

The holding of these cases, and the statement in Cyc, we think, is consistent with reason. There is no reason that we can think of why there should be a distinction as to necessity for certainty between a contract to sell personalty and a contract to sell realty. It is unquestioned law that in a contract to sell personally where no price is agreed upon a reasonable price is presumed. I can find no cases holding that the same presumption is not to be indulged in with respect to realty.

If the contract calls for the payment of a reasonable price, then it is enforceable. *Myers v. Metzger*, Grey, V. C., 61 N. J. E. 522. There are other cases unnecessary to cite.

If the option contained in the lease must be considered as calling for the payment by the lessee of a reasonable price that reasonable or actual price is shown by the acts of the parties to have been reduced to a certainty, to wit, the sum of \$34,000 for that is the price at which complainant was willing to sell the property to Borak and Greenspan. Furthermore, the expert testimony indicates that the reasonable price of this property at the time notice was given, and that is the time to be considered, was between thirty-two and thirty-four thousand dollars.

VI.

Consideration of cases cited by defendant in the court below.

The principle of law that a contract must be certain before it can be enforced is almost too well settled to need any citation of authorities. It found its last expression, so far as I can find, in the Court of Errors and Appeals in *Neptune Fisheries Co. v. Cape May Real Estate Co.*, 105 Atl. 212. In *McKibbin v. Brown*, 14 N. J. E. 13, the contract specifically provided that one of its terms should be the subject of arrangement between the parties. In this case there is no such provision. If there was such a provision there has been a subsequent arrangement, reducing whatever was uncertain to a certainty. So in *Van Doren v. Robinson*, 16 N. J. E. 257 the price was one which was to be agreed upon by the parties. The court said that where the contract provided that the price should be ascertained by the parties it could not be enforced, although it would be enforced if the agreement was that a fair price should be paid. There is no such provision in the contract under discussion in this case, and if there had been, the price has been ascertained and fixed by the act of the parties. In *Welsh v. Bayaud*, 21 N. J. E. 186 there was no contract in writing. The receipt did not describe the land nor mention the price. In *Woodruff v. Woodruff*, 44 N. J. E. 349 a method of fixing the price was provided. The land was to be valued by valuers. The court held that this might not be done although it said that if the agreement provided that the price should be fair, specific performance might be had. In this case there is no such provision for ascertaining the price. We have no hesitancy in saying that we think that the law ought to be extended so that the court would in such instances as *Woodruff v. Woodruff* compel the appointment of valuers.

I have already considered the case of *Fogg v. Price*, 145 Mass. 514. In that case the covenant was if the premises are for sale at any time the lessor shall have the refusal of them. The court construed the covenant as an agreement to give the lessee the first chance to make a contract—agreement to sell if the parties can agree but not otherwise. It may be that this covenant can be construed in this way. The covenant in the case at bar is different. It is "should the party of the first part decide to place this property on the market for sale." Now, while, as the Vice-Chancellor says, it may be common practice to put property on the market for sale without

fixing a price it is equally common practice to put property on the market for sale at a price. In the Fogg case there was no statement with respect to placing the property on the market for sale. The language was merely if the property was for sale. Placing property on the market for sale implies more than a mere condition of mind which is implied by the covenant in the Fogg case. In the Fogg case there were no subsequent acts of the parties construing the contract. The lessor had, in fact, entered into a contract with a third party by which he agreed to sell the property at a price and it was contended that by entering into this agreement the lessor had fixed the price at which he would sell to the lessee. But there was nothing to show that the contract between the lessor and the third party was referable in any way to the option to purchase. There was no fixation of the price referable to the option. The situation in the case at bar is different. On April 14th, 1919, the lessor put the property on the market for sale and fixed the price. In view of the existence of the written option by which the lessee was given the option to purchase if the property was placed on the market the act of the lessor in placing the property on the market at a price indicates that what was intended by the language used was the fixation by the complainant of a price at the time it put the property on the market. There was no such condition in the Fogg case. Subsequent to the placing of the property upon the market at a price the lessor entered into the contract with Borak and Greenspan by which it irrevocably fixed the price it was to receive. It then wrote the letter of May 5th which by its terms referred to the offer, and which the testimony shows was sent because of the existence of the option. The sending of this letter amounted to an invitation to the lessee to exercise the option at the price fixed by the offer. There was no such letter and no such condition in the Fogg case. The Massachusetts court said that the statute of frauds remained unsatisfied notwithstanding what had happened. That might have been true in the Fogg case because of the absence of any conditions similar to those present in the case at bar. The court went further to say that it is not the event but the nature of the contract, which is to be considered and that must be determined by looking at it as it stood at the time it was made. If the Massachusetts court meant that acts of the parties subsequent to the making of the contract could not be considered as bearing upon the interpretation of the contract or as reducing to certainty that

which by the terms of the contract was uncertain, and this seems to be the construction put upon it by the Vice-Chancellor and adopted by him, it is opposed to the great weight of authority. Notwithstanding the absence of the conditions present in the case at bar, in the Fogg case the Massachusetts court said it might be that the remedy would do substantial justice as against the lessor. Wherever a case is found in which the court intimates that it is obliged to refrain from doing substantial justice that case ought not to be followed further than absolutely necessary. The Illinois court refused to follow it in *Hayes v. O'Brien*, 37 N. E. 73.

Conclusion.

The learned Vice-Chancellor at p. 107 says: "A simple illustration of the incompleteness of the contract is, that the option would be spent by the giving of a notice that the property was for sale, without more, and the lapse of thirty days." The difficulty is that the statement is not in accord with the facts. No such notice was given. The Court further said: "It is not the privilege of the Court to piece out the option into a complete contract by seizing upon the resolution to sell for \$32,000, or the selling price to Greenspan and Borak of \$34,000, as the sum for which the realty company were, or ought, to sell to the complainant. That would be a juridical interpolation of an essential of the contract upon which the minds of the parties had not met, at least not at the time the option was granted; and it is of that period that it must speak * * *". If the passing of the resolution fixing the price and the fixation of the selling price to Greenspan and Borak were not properly referable to the option, then the Vice-Chancellor is right. Suppose that after this option was made the lessor had in writing stated "We understand the option which we have signed means that we will sell to the lessee at the price which we by resolution shall hereafter fix, or at the price which we can obtain from a third party or at the price at which we may enter into a contract with another," we do not think that it will be contended that this statement on the part of the lessor could not be used for the purpose of interpreting the meaning of the option to purchase. It would seem that the Vice-Chancellor might have thought that it could not. The whole question is whether the resolution and the fixation of the price and the contract between Greenspan and Borak can be made referable to the option. If they can,

then there is a practicable construction put upon the option by the parties, or at least by the party, to be bound thereby which is binding upon it. That they are referable to the option to purchase is indicated by the form of the resolution fixing the price. The lessor had knowledge of this option to purchase which gave the lessee the right to purchase, if the lessor decided to place the property on the market for sale. In the light of that knowledge it adopts the resolution by which it decides to put the property on the market for sale at a price, naming it. It then enters into the contract in writing for sale at a price. It then in writing notifies the lessee to exercise the option if it desires.

There is nothing in the testimony that indicates that the City Realty and Investment Company should not be willing to accept from complainant \$34,000 for this property. There is no evidence that the manner in which the \$34,000 of Greenspan and Borak was to be paid had any influence in its making the contract. A court will not construe a contract if it can avoid it so that it will be unenforceable. If the contract could be construed so as to give the lessor the right to insist upon a specific method of payment, the lessor by its own fraudulent act might, in any case, render the contract unenforceable because it might very readily contract to sell and take a personal bond for a portion of the purchase price and because the lessee could not give that same personal bond with the same security the lessor might avoid the contract. Such a situation was never contemplated by the parties. I think it may generally be said that payment in money is the highest kind of payment. If there is any reason why the party considers something else better than money, then it ought to be left to the party so asserting to set up the facts from which the Court can conclude that his position is well taken. We have the proof that the price of \$34,000 was fixed. As repudiating any idea that the lessor construed the contract to give it a right to insist upon any specific security there is the letter written after the contract with the two outsiders was made inviting complainant to purchase. This letter would not have been sent, if the lessor did not consider that the lessee had the right to purchase or if the lessor considered that under no circumstances could the lessee purchase, and it must have so considered, if it intended to insist upon the identical security that it was to obtain by virtue of its contract with the outsiders. The proof of the officers of the City Realty and Investment Company is to the effect that they would have accepted the offer of complainant had they not made the contract with Greenspan and Borak. They did not suggest any reason why they would be

induced to decline \$34,000 from complainant. In consideration of cases for specific performance the Court is interested in the equities of the parties. In this case there is an equity other than that the subject matter of the contract is real estate. Complainant has built up a large drug business. It has a valuable good will. It is a conceded fact that to remove would do injury to complainant incapable of being estimated at law. The witnesses for the defendant Realty Company, including its expert, testify that they considered that complainant was the logical purchaser; that this place was its home, and that it was entitled to it. There could be no stronger case calling for the intervention of the Court in specific performance.

By the payment of \$34,000 by complainant to defendant City Realty and Investment Company, the City Realty and Investment Company will get precisely what it wants for this property. Complainant will get precisely what it bargained for. We urge that it would be a hard case indeed where the Court would feel itself obligated to, where the price of the property a seller desires to get is fixed in writing and that price is accepted by the purchaser, decline to decree specific performance upon the ground that there is some uncertainty in the contract. There can be no uncertainty in a situation where the amount that a seller agrees to get is fixed and the purchaser agrees to accept it.

Borak and Greenspan have no rights. Aside from their constructive knowledge of this option, I insist that the proofs indicate clearly that they had actual knowledge. And aside from this, if they had no knowledge they have not been injured. It is true that they may be deprived of a profit which they hoped to make upon this purchase. But they have not changed their position. There is no proof that they will be injured to any extent other than being deprived of the benefit of their bargain. The mere deprivation of the benefit of a bargain is not one of those things which will move a court of equity to action or to refrain from action.

It is respectfully submitted that the decree of the Chancellor should be reversed, with directions to enter decree for complainant for relief prayed.

Respectfully submitted,

MERRITT LANE,
Of Counsel with Appellant.

WIGHT, WIGHT & GOLENBOCK,
Solicitors for Appellant.

New Jersey Court of Errors and Appeals

McCLUNG DRUG COMPANY, a corporation,
Complainant-Appellant,

and

CITY REALTY AND INVESTMENT COMPANY,
PHILIP BORAK and ISIDORE GREENSPAN,
Defendants-Respondents.

On Bill, &c.

*On Appeal from
Chancery.*

BACKES, V. C.

BRIEF FOR RESPONDENTS, ISIDORE GREENSPAN AND PHILIP BORAK.

Statement of the Case.

This cause is brought up on appeal from a decree of the Court of Chancery, dismissing (p. 1) a bill for the specific performance of an option to purchase real estate, which option was included in a lease.

The lease (p. 6) was made by the defendant, the City Realty and Investment Company, to one Frederick McClung on the 7th day of July, 1915. There is no written assignment of the lease to the complainants in this cause (p. 33). McClung was in possession of the premises from the date of the lease until the complainant company was organized, in October, 1915 (p. 94). Upon the incorporation of the complainant, it took possession of the premises, and it has been paying the rent to the defendants since that time.

The lease rents the story on the first or ground floor of the building known as #198 Smith street, Perth Amboy, N. J., to be occupied as a general drug store; also the use of the cellar for the term of six years from the first day of August, 1915; it also contains the provisions that the party of the second part (McClung) shall make all necessary repairs at his expense (p. 6), and the provision:

“Said party of the second part will not or under-let said premises or any part thereof, or carry on any business that shall be deemed a nuisance on said premises, or assign this lease to any person or persons, or a corporation, without the written consent of the party of the first part, or make any changes or alterations to the building or said premises hereby leased, without first obtaining such written consent from the said party of the first part.”

The complainants never obtained this written consent (pp. 33-94).

A provision in the lease upon which this suit was brought (p. 7) is as follows:

“And it is further understood and agreed between the parties hereto that should the party of the first part decide to place this property on the market for sale, then the said party of the second part shall be given thirty (30) days’ notice in writing of such intention with the privilege of purchasing same within said thirty (30) days.”

There were no repairs made or money expended by the complainant on the premises that would warrant the intervention of this court for its protection. The premises are located in the middle of a block and consist of a twenty-five foot city lot occupied by a three-story building, the ground floor of which is a store about seventeen feet in width, which is occupied by the complainants as a drug store (p. 28). The fixtures were ordinary removable store fixtures, and could be used in most any drug store (pp. 32, 33, 44, 69). The business was ordinary and not very profitable (pp. 36 to 41).

Allowance was made by the owners for all improvements made to the premises (p. 67).

The complainant refused to purchase the property in dispute, although often offered to it (pp. 24, 33, 34, 69, 70). It did not have the money to purchase (pp. 34 to 39).

On May 2d, 1919 (p. 11), the defendant realty company entered into a written contract for the sale of the premises to the other defendants for \$34,000, and on May 5th, 1919, the defendant realty company offered a notice (p. 70) to the secretary of the complainant, which was refused and thereupon mailed to him. The notice is marked Exhibit B, and is as follows:

“If you care to buy the Jefferson Building, 198 Smith street, kindly advise at once, as we have an offer.”

The complainant did not answer this notice (p. 71), although the officers of complainant could have conveniently done so. On June 2d, 1919, the secretary of the defendant realty company was in the store of the complainant and nothing was said to him about buying the premises (p. 71). The secretary for complainant denies this, and says he offered to buy for thirty-four thousand dollars, and says as to the answer (p. 46), “he didn’t answer; if he did, I don’t remember.” The complainant waited for almost thirty days after receiving written notice of the build-

ing for sale, and even then made no tender (pp. 54-55) but expected to pay a small deposit and pay the remainder on terms which were never spoken of between the parties (pp. 99-100). The fact was, the complainant was financially unable to purchase (pp. 34 to 39), since which time the property has increased in value to forty thousand dollars (p. 105) from thirty-two thousand dollars (p. 87), hence this suit.

Defendant realty company, on April 14th, 1919, placed the property with a broker for thirty-two thousand dollars (p. 93), (a resolution to this effect was entered in the minutes at the trial of this cause in September, 1919,) and the broker offered it to the complainant, and it was refused, and when offered again for thirty-four thousand dollars, was refused (p. 87).

It is contended by the defendants that the optional agreement contained in the lease made to Frederick McClung was too uncertain and indefinite for a court of equity to decree specific performance thereof, and is not a writing or memorandum in writing sufficient to satisfy the statute of frauds and perjuries.

By way of answer to the defense in the court below, the complainant unsuccessfully attempted to argue that the optional contract was made definite and complete by the subsequent conduct of the defendants. The same reasons are relied upon by the appellant before this Court.

The Vice-Chancellor found, and it was a fact (p. 105), that the defendant realty company did, in the month of April, 1919, decide to sell the property in dispute for thirty-two thousand dollars. This was an oral arrangement and was not placed in writing until a person, McComas, who was not connected with the defendant company, made a written entry in the minutes of the defendant realty company in the month of September, 1919 (p. 93). This information was not conveyed to the complainant, but to a real estate agent, and upon the real estate agent approaching the complainant it refused to purchase. The only other price that was mentioned for the property was the sum of thirty-four thousand dollars, which was the price agreed upon between the defendant realty company and Greenspan and Borak on a contract made May 2d, 1919 (p. 105). The information regarding the price last mentioned was not conveyed directly to the complainant. Three days after the property was sold to Greenspan and Borak the defendant realty company wrote to the complainant, "If you care to buy the Jefferson Building, 198 Smith street, kindly advise us at once, as we have an offer." The

complainant even then made no substantial attempt to purchase the property (pp. 54-55); therefore, there never was a definite contract for the sale of the premises between the complainant and the defendants, either expressed or implied, as argued by the complainant, as the parties never agreed upon a price or terms, and this Court is urged by complainant to piece out the option so as to make a new contract which amounts to a legal invention in the law of specific performance.

I.

Optional agreements to purchase are not favored in equity, and for a stronger reason equity does not favor uncertain optional agreements.

If an optional contract is founded on a good consideration and is certain, definite and free from objections in other respects, equity will enforce the contract, but, on the other hand, equity will not favor an optional contract.

In the case of *Pinner v. Sharp*, 23 Eq., at page 281, the following appears:

Optional contracts are not favored in equity, though if founded on consideration, and free from objections in other respects, are enforced.

If the courts do not favor optional agreements, for a stronger reason they should not favor uncertain optional agreements.

The optional agreement in this case is uncertain as to price, as to the description of the premises, and does not include the name of the complainant.

In all suits for specific performance, clear proof of the contracts are required. It is, therefore, more imperative to enforce the specific performance of a contract in the sale of real estate, part of which is admitted to be proven by parole evidence that the proofs of the contract should be most clear and convincing. *McEvoy v. Brooks*, 103 Atl., p. 403.

In the case of *Brown v. Brown*, 33 Eq., p. 651, the following appears:

“A specific performance will not be decreed unless the existence and terms of the contract be clearly proved. If it be reasonably doubtful whether the contract was finally closed, equity will not interfere.”

In *Brewer v. Wilson*, 17 Eq., p. 180, it is held:

“Equity will not decree the specific performance of a contract, if it be reasonably doubtful whether the contract was finally concluded. The parties will be left to their remedy at law.”

For this Court to compel the enforcement of the optional agreement in this case, the Court will have to reform or add a term to the executory optional agreement by parole evidence, and, thereafter, require the specific enforcements of the variation made by parole evidence. The Court will not reform such an executory agreement on parole evidence and specifically enforce it with the variation. *Wirtz v. Guthrie*, 81 Eq., p. 272.

II.

The terms of the option sought to be enforced by specific performance does not comply with the Statute of Frauds and Perjuries.

Under Point II of appellant's brief it is contended that the oral exercise of the option was sufficient to satisfy the Statute of Frauds.

The optional agreement in this case is not such a memorandum in writing for the sale of land as to comply with the Statute of Frauds.

The Statute of Frauds provides, Section 5, 2 C. S., p. 2612, that “no action shall be brought upon any contract for sale of lands unless the agreement upon which the action is brought, or some memorandum or note thereof, shall be in writing.”

The memorandum in this case is deficient in that there is not a sufficient description of the premises to be conveyed, the complainant's name is not mentioned in the option, and, what is more serious, the price to be paid is not agreed upon, nor is there a method of ascertaining the price provided, that would comply with the Statute of Frauds.

In the case of *Schenck v. Spring Lake Beach Improvement Co.*, 47 Eq., at p. 44, it is held:

“That a writing, to be entitled to be considered a compliance with that provision of the Statute of Frauds, which requires that a contract for the sale of land shall be in writing, must contain all the essential terms of the bar-

gain, expressed with such certainty that they may be ascertained from the writing itself, without the aid of oral evidence.

In such a case parole evidence is inadmissible to show who the vendor or the vendee is, the subject of the contract, the price to be paid or the terms of credit."

In this case, at p. 50, the following appears:

"The writing which the statute requires must, according to the rule laid down in *Johnson & Miller v. Buck*, 6 Vr. 338, 343, contain the full terms of the contract—that is, the names of the buyer and seller, the subject of the sale, the price and terms of credit, and the conditions of sale, if any there be. The parole testimony is not admissible to prove any of the essential parts of the contract. 'The policy of the statute,' says Mr. Justice Depue, in the case just cited, 'is to exclude testimony of that uncertain character with respect to transactions within its provisions. It, therefore, requires the substantive parts of the contract to appear in writing. To admit parole evidence of any of the terms of the contract with respect to which the memorandum is silent, would open the door to the very mischief the statute was intended to suppress.'"

In *Johnson & Miller v. Buck*, 35 Law, p. 338, the Statute of Frauds requires that "the memorandum must contain the full terms of the contract, that is, the names of the buyer and seller, the subject of the sale, the price and terms of credit and the conditions of sale, if any there be."

In the conclusion of the complainant's brief (p. 27) a general reference is made to the equities in the case in which it is said that the complainant has a large and valuable business that might be disturbed. This contention is not supported by the testimony; in fact, the contention is so feeble that counsel for the complainant has not made any particular reference thereto.

To move a court of equity to grant specific performance the partial performance would have to be such to constitute a fraud upon the party complaining if specific performance was not decreed; there is no such partial performance in this case.

The lease made by the defendant realty company to McClung, Exhibit A. (P. 6) requires the tenant to make all necessary repairs during the term of the lease to the inside of the premises, in addition to paying the rent. The only evidence as to repairs was that testified to by Chester Darling, who does not show any unusual amount of money that was spent for improvements (p. 28).

Page 28, Darling testified that four hundred dollars was spent in changing the front and eighty-seven dollars for changing the tile (p. 22).

On cross examination (pp. 29-31) the witness testified that he had no personal knowledge as to who paid for the improvements. This witness further testified that he did not recall any conversation had with Mr. Lake, secretary of the defendant realty company, about improvements (p. 24 of testimony), but that he did have a conversation about a soda water fountain, which was not permanent improvements. The same witness testified that the show cases were movable (pp. 27-33). Page 44, Mr. Darling testified as follows:

"By the Court.

Q Can you run a drug store, such as you have, without putting in the fixtures, such as you have put in? A No, sir."

Earl Lake, a witness produced for the defendant (p. 67), testified that at the time Fred McClung arranged to take the building, he was allowed three months' rent for fixing the front; that would be two hundred and twenty-five dollars; that the building has not been changed in any other respect since (p. 68); that the fixtures are ordinary fixtures, and are movable (p. 69).

It would appear from the testimony, therefore, that there has been no substantial improvements or change of position made by the complainant.

In order to take the option out of the Statute of Frauds there would have to be a very substantial performance on the part of the complainant to make up for the omission in writing, and that oral testimony is not admissible to change the written option or add anything to it, but for the one purpose only, that is, to show that actual fraud was committed.

National Iron Armor Company v. Bruner & Baxter, 19 Eq., p. 332;

Wirtz v. Guthrie, 81 Eq., p. 271;

Brown v. Brown, 31 Eq., p. 651.

In order to enforce the performance of a contract on the ground of part performance: (1) the parole agreement relied on must be certain and definite in its terms; (2) the acts proved in part performance must refer to, result from, or be made in pursuance of the agreement proved; (3) the agreement must have been so far executed that a refusal of full execution would operate as a fraud upon the party, and place him in a situation which does not lie in compensation.

And in the case of *Brewer v. Wilson*, 17 Equity, p. 180, it is held:

"2. Specific performance will not be decreed on the ground of part performance of the contract unless the part performance has been such as clearly to take the case out of the operation of the Statute of Frauds."

In the case of *Eyre v. Eyre*, 19 N. J. Eq., p. 102, it is held that "part performance will take a contract out of the Statute of Frauds, when it has been in part performed in such manner that a refusal would be a fraud on the other party. But for this purpose the contract itself must be clearly proved, and the acts of part performance must be referable to the contract alone."

In *Coulanger v. Churchill*, 97 Atl., p. 947, it was held as follows:

"To take an oral contract for the devise of land out of the prohibition of the act for the prevention of frauds and perjuries, it is necessary to establish by the clearest proof that the doctrine of part performance of parole contracts will apply."

Unless the improvements or performance is clearly established, and the contract was made in reference thereto, the statute will be a bar.

Phillips v. Phillips, 95 Atl., p. 621.

In *Tunison v. Bradford*, 49 Equity, p. 210, the rule of part performance is stated as follows:

"The ground of equitable relief where a person has gone into possession under an oral promise and expended money to make improvements, is to prevent a fraud being practiced."

and on page 215 of this case, this statement of the principle makes it apparent that expenditure of money to make the promise enforceable must be made the promisee on the faith of the promise with the knowledge of the promisor. In the case of *Johnson v. Hubbell*, 10 Eq., p. 332, it is held:

"If one party to a parole agreement has wholly or partially performed it on his part, so that its non-fulfillment by the other party is a fraud, the court in this case will not invade the right of innocent persons, and in all cases its aid will be refused."

Especially in the case of *Johnson v. Hubbell*, it is held that the contract must be definite and certain.

In *Vogt v. Mullin*, 82 Equity, p. 452, it is held that "entry made under a lease does not mean part performance."

In the *Vogt* case, it is true that there were two separate instruments, but that makes no difference. If possession is not taken under the option, and the part performance is not made under the option, the statute is a bar, for in the *Vogt* case it is held (p. 454) in referring to the two separate instruments, that is, the contract and lease, "even if they could be taken as one there would have to be shown not only part performance of their written terms and stipulations, but also part performance of the parole agreement."

The parole evidence that was permitted in this case was admissible, as hereinbefore stated, for one party to prove the part of performance, not to vary the terms of the written instrument.

In the case of *Wakeman v. Dodd*, 27 Equity, p. 564, it is held that "oral evidence admitted to prove the contract was illegal and could not support the decree."

The testimony in this case does not show that there was such partial performance as to relieve the complainant from the effects of the Statute of Frauds, and, in any event, the complainant has not shown such part performance or conduct as should move the discretion of this Court in its favor, much less to spell from the optional agreement a contract that would be certain and definite.

Consideration of cases as cited by the complainant under Point II of its brief:

Houghwout v. Boisaubin, 18 N. J. Eq., p. 315; this is not a case in point as the price and terms in that case were certain and in writing. Indeed, the case itself holds, "If the proposal be clear and definite, and one to which a simple assent is a complete answer, such assent may be given either by writing, by acts or by words. The Statute of Frauds requires the writing to be signed only by the person to be charged." In the case at bar, the proposal is not clear and definite; in fact, there is no proposal with any terms. The case of *Hawralty v. Warren*, 18 N. J. E., p. 124, was to the same effect, and are not on optional contracts.

The following cases cited by the complainant under Point II of its brief:

Green v. Richards, 23 N. J. E., p. 124;

Reynolds v. O'Neill, 26 N. J. E., p. 32;

Howland v. Bradley, 38 N. J. E., p. 288;

Dynan v. McCulloch, 46 N. J. E., p. 11;
Caraskaddon v. Kennedy, 40 N. J. E., p. 259;
Krah v. Wassmer, 75 N. J. E., p. 109,

are not applicable to the principal involved in the case now under consideration, as in all the cases cited by the complainant, the prices and terms were certain and definite and all of the agreements were in writing; there was nothing to be supplied by extrinsic evidence, and none of these cases were optional agreements. The case of *Potts v. Whitehead* and *Carlton v. Columbia Real Estate Co.* are cases supporting the defendants' contention.

III.

The option to purchase contained in the lease is too uncertain and indefinite to be specifically performed.

The optional part of the agreement is as follows (p. 7):

"And it is further understood and agreed between the parties hereto that should the party of the first part decide to place this property on the market for sale, then the said party of the second part shall be given thirty (30) days' notice in writing of such intention with the privilege of purchasing same within said thirty (30) days."

As stated by the Vice-Chancellor (p. 106): "It is familiar law that equity will not specifically enforce a contract for the sale of lands unless it is conclusive and certain as to parties, the subject matter, the price and the terms."

The option in this case does not contain any price or any standard by which a price may be determined, or a price that might be offered by another or upon the happening of a certain event. It does not say that the realty company was to fix the price at which it would sell to the drug company, nor that any price that might be fixed by the realty company was the binding price, nor was the price to be the reasonable value. As stated by the Vice-Chancellor (p. 107): "Any of these factors of definiteness, properly stipulated upon the contingency—would have supplied the required certainty, according to the authorities."

The authorities in the State of New Jersey and other states, notably Massachusetts and Illinois, supporting the contention of the defendants, are the following:

McKibbin v. Brown, 14 N. J. Eq., beginning at p. 13. This is a case where the defendant leased to the complainant a hotel and

furniture for a specified term for \$8,000. The lease contained a privilege of re-leasing and also an option to purchase the furniture in the hotel at a stipulated price, and the option contained this clause, "and that the times or credits to be given by the defendant to the complainant should be the subject of arrangement between the parties."

The parties failed to agree upon the times or credits to be given.

The Court held (p. 13):

"No specific performance of a contract can be decreed in equity unless the contract be actually concluded and be certain in all its parts."

And at page 17:

"If the matter still rests in treaty or if the agreement in any material particular be uncertain or undefined, equity will not interfere.

'I lay it down as a general proposition,' said Lord Rosslyn, 'to which I know no limitation, that all agreements, in order to be executed, must be certain and defined.' "

On page 18, after a general review of the option to purchase contained in the lease, the Court has this to say:

"The price to be paid for the furniture was about \$18,000. Of this sum the complainant proposed to pay \$3,000 in cash, and the residue in four equal instalments, at once, two, three and four years. The defendant, as his ultimatum, on the 7th of December, demanded \$9,000 in cash, and the balance in six, nine and twelve months, with interest. These terms, as finally proposed by the defendant, the complainant insists are unreasonable and unjust, and not according to the true intent and meaning of the agreement. He was therefore unwilling to accede to them; and the defendant refusing to offer more favorable terms, the parties, as the bill charges, have been and are unable to come to any such agreement or arrangement as provided for in the article.

The court is therefore asked to decree a specific performance of the agreements, and that the defendant, among other things, shall sell and transfer the said furniture to the complainant for the ascertained price, *for such times and credits of payment as this court shall deem reasonable and just according to said agreement.* Is such decree within the power of this court?"

The Court held that the times or credits to be given should be the subject of arrangement between the parties.

The Court was asked to enforce this arrangement, when in fact the parties themselves could not agree.

It would appear, therefore, by the McKibbin case when the price or any other essential part of the agreement is indefinite, the Court will not enforce the performance of the optional agreement.

The next reported case in the State of New Jersey is *Van Doren v. Robinson, et al.*, 16 Equity, beginning p. 257.

A Court of Equity will not decree specific performance of an optional contract where the terms are indefinite and where there is an indefiniteness as to price. The Court has enforced a decree where the option contained a provision that the price was to be "at a fair price" or "at a fair value." Those particular words seemed to have a great deal of significance in the distinguishment of the cases.

In the Van Doren case the agreement contained a provision that the price was to be "at a fair price" or "at a fair valuation." The Court contends that it can justly enforce such a contract because it is possible to ascertain the just and fair price of a piece of property, but such a provision in an option is of the very essence thereof, and the Court will not compel the parties to submit to a valuation unless they agree to it in their option.

In the case of *Cooper v. Carlisle*, 17 Equity, p. 525, it is held that a contract will not be enforced by a Court of Equity if it is uncertain both as to price and as to description of the land. By this decision it is held the price must be as definite as the description of the land.

In the option under discussion, there is absolutely no price set, and therefore under this authority the bill of complaint in this cause should be dismissed.

In the case of *Welsh v. Bayaud*, 21 Equity, p. 186, it was held:

"A receipt for \$100, part of the consideration of an alleged contract for sale of lands, which does not describe the land or mention the price to be paid, without any other memorandum in writing, is not sufficient to found a decree for specific performance. The property to be conveyed and the price to be paid, must be designated with certainty."

In the case of *Woodruff v. Woodruff*, 44 Equity, p. 349, it is held that the specific performance of a contract, which involves

the payment of a price, will not be decreed until the price shall be ascertained. It was further held:

“the contract mode of ascertaining the price must be pursued when it is specified in the contract. The limit to which the court will go in fixing a price is to ascertain it when the contract simply provides that it shall be fair.”

The following appears in the decision of this case on page 356:

“The second objection is, that the contract is incomplete, because no price is fixed for which the property shall be reconveyed. The contract provides that the complainant may purchase back his interest in the farm, at a valuation to be made by two disinterested persons, one to be selected by him and the other to be selected by the representatives of Patrick. The defendant, Louisa C. Woodruff, claims to be the sole representative of Patrick, and refuses to name a valuer upon her part, and it is insisted, in her behalf, that this court will not compel her to appoint such a person to act if he be appointed, in other words, will not complete the incomplete contract by compelling an agreement as to the price for which the reconveyance is to be made.

It is settled that the court will not decree the specific performance of a contract which involves the payment of a price, until the price shall be ascertained. The ascertainment of the price must precede a decree. *Pomeroy on Spec. Perf.* Sec. 149; *McKibbin v. Brown*, 1 *McCart.* 13; *S. C.* 2 *McCart.* 498. Where the contract specifies a mode of ascertaining the price which is essential, the contract is conditional till the ascertainment, and is absolute only when the price has been determined. If there be default in this respect the contract remains imperfect, and incapable of being enforced.” *Fry on Spec. Perf.* 163; *McKibbin v. Brown*, *supra*.

In the case of the *Domestic Telegraph Co. v. Metropolitan Telephone Co.*, 12 *Stew. Eq.*, p. 160, it is held:

Where a lease provided, “should the party of the first part (lessor) conclude to sell this property, the said second part (lessee) is to have the first chance to buy the same,” it was held that the contract was so uncertain and incomplete, in that it fixed no price and no mode of determining the price, that a Court of Equity would not grant specific performance of it.

American and English Annotated Cases, Vol. 12, p. 93;

Folsom v. Harr, 218 *Ill.*, p. 369, and other cases therein cited.

A contract is too incomplete or uncertain for specific performance if it does not fix a price or consideration or provide a way in which it could be fixed (36 Cyc., p. 596; see cases therein cited).

Counsel for the complainant in his brief refers to the case of *Race v. Groves*, 43 Equity, p. 284, as being an authority in support of the contention made by the complainant. The Groves case was not decided on the words of the option, as the parties had changed their position by partial performance. In the Groves case the language used in the option was, "the first refusal at the price named."

It is true, the Court in this case said, "there is but little, if any, doubt as to the right of Race against Groves." The Court, no doubt, had in mind that the parties had agreed upon a price, that is to say, "the price that might be offered." In the case under consideration the option does not go to this extent, as it only provides for the owner to notify the tenant of his intention to place the property on the market for sale, with the privilege of purchasing the property. It does not give him the exclusive privilege, or in fact "the first refusal," as in the Groves case, nor does it give him the right to purchase the property at "the price that might be offered" by any other purchaser, as in the Groves case; therefore, the Groves case is not a case in point. The reference made in the case of *Foggs v. Price* to the Groves case has the same application.

Another case cited by the complainant's counsel is the case of *Silver v. Graves*, 210 Mass., p. 26. This case is not in point, as there was a partial performance, and it would have been a great injustice for the Court to deny specific performance.

Cases directly in point are the case of *Foggs v. Price*, 145 Mass., p. 513, and the case of *Hayes v. O'Brien*, 26 N. E. Rep., p. 601, and again reported in 37 N. E. Rep., p. 73.

In the case of *Foggs v. Price* it is held that a conveyance in a lease "if the premises are for sale at any time, the lessee shall have the refusal of them, is not of a nature to be specifically enforced." The following is a part of the decision in this case:

"This is simply an agreement to give the lessee the first chance to make a contract—an agreement to sell—if the parties can agree, but not otherwise. It neither fixes the price, nor provides any way in which it can be fixed. Suppose that the premises had been advertised for sale, and that the tenant had brought his bill at once. It is plain that the court could not have named any sum at which the lessor should be compelled to sell. Considered, therefore,

in the light of a contract to sell, as it is treated by the bill, it does not satisfy the statute of frauds, and apart from the statute it is not such a contract as equity can specifically enforce.

Pracy v. Clark, 113 Mass., p. 283;

Grace v. Denison, 114 Mass., p. 16;

Gelston v. Sigmund, 22 Md., p. 334;

Abel v. Redcliff, 13 John., p. 297;

Bramley v. Jeffries, 2 Verm., p. 415.

It may be said the contract does mean that the lessor will deal with the lessee on the same terms as with any one else, or at least will not discriminate against him; that the lessor has now *fixed the price by a sale*; and that as the purchaser had notice of the contract, the defendants have removed the difficulties in the way of specific performance by their own conduct. It might be that the remedy would be substantial justice against the lessor, but, in order to do it, a term would have to be added which is not in the contract. The contract certainly does not contemplate a sale to somebody else as a mode of ascertaining the price at which the lessor will sell to the lessee."

In the case of *Hayes v. O'Brien*, 26 N. E. Rep., p. 601, the lease contained the following covenant:

"Said party of the first part hereby reserves the right or privilege of selling that portion of said land at any time from and after this date; but no such sale of said land shall be made by said first party without first having given said second party the privilege of purchasing said lands upon such terms and at the same price per acre as any other person or purchaser might have offered therefor."

The property was sold to O'Brien without giving notice to the complainant.

The Court denied specific performance in this case because of the uncertainty of the terms of the option. On a re-argument, Rep. in 37 N. E., p. 73, the Court did decree specific performance, and in doing so in its opinion upholds the principle set forth in the case of *Fogg against Price*, *supra*, and in the case of *Bramley v. Jeffries*, 2 Verm., p. 415.

On a re-hearing in the O'Brien case, the Court pointed out that the option provided a scheme whereby the price could be ascertained, and that the Court in its first opinion evidently did not consider the method by which the parties had agreed to ascertain the price. The option in the case of *Hayes against O'Brien*, as above cited, provides first that no sales of the lands should be made without first having given the party of the second part the privilege of purchasing the lands *upon such terms and at the*

same price per acre as any other person or purchaser might have offered therefor. The Court can readily see that this option expressly provides that the party of the first part can have the *first refusal* and that he can purchase the property at such price and upon *such terms as any other person or purchaser may offer therefor.*

A comparison of the principles discussed in the law of Fogg against Price and Hayes against O'Brien shows the error of the complainant's contention, that they are different in principle.

As cited in the conclusions of the Vice-Chancellor (p. 107):

"It is not the privilege of the court to piece out the option into a complete contract by seizing upon the resolution to sell for thirty-two thousand dollars, or the selling price to Greenspan and Borak of thirty-four thousand dollars, as the sum for which the realty company were, or ought to sell to the complainant. That would be a juridical interpolation of an essential of the contract upon which the minds of the parties had not met, at least not at the time the option was granted; and it is of that period that it must speak."

In *Pray v. Clark*, 113 Mass., p. 283, it was held that,

"An agreement in a lease to renew it at its expiration, the 'rent to be proportioned to the valuation of said premises at said time' but with no provision made for determining that valuation, is too vague to be enforced in equity."

See also *Grace v. Denison*, 114 Mass., p. 16.

In *Gelston v. Sigmund*, 27 Md., p. 334, it was held,

"An agreement by A to let B retain possession of certain property from the 1st of July, 1866, to the 1st of July, 1867, upon his giving the same rent that A 'might be able to obtain from other parties,' is not such an agreement a court of equity will enforce. It lacks certainty."

In *Bramley v. Jeffries*, 2 Verm., p. 415, the case where A on the marriage of his daughter to B covenants that B should have his land called C for 1,500 pounds less than any other would give for it, and afterward devises this estate to his grandson for life with remainders, over and dies. The Court refused to decree a specific execution of this agreement by reason of the uncertainty of it, and it not being mutual, because the estate was not sold, but the plaintiff was to have it; it was not practical to know what a purchaser would give for it.

The Statute of Frauds remains unsatisfied notwithstanding the happenings referred to by the complainant in its brief. As stated by the Vice-Chancellor (p. 108), "It is not the event, but the nature of the contract, which is to be considered, and that must be determined by looking at it as it stood at the time it was made."

In the case of *Moore v. Fitz Randolph*, 6 Leigh., p. 175, it was held,

"The rule that equity refuses specific performance for want of mutuality, applies to cases in which there is not such mutuality of remedy at the time the contract is made; not to cases in which the mutuality of remedy is taken away by a subsequent contingent event."

And again in the case of *Stapilton v. Stapilton*, 1 Atk., pp, 2, 10:

"Consider the state and situation of the parties at the time of the making of the agreement."

IV.

There was no offer of acceptance that amounts to a meeting of the minds of the parties to the option.

In order for the Court to enforce its terms by specific performance, the contract should first be determined.

In the case *sub judice* there was no offer of acceptance either in writing or by conduct of the parties. An offer of an option unless unconditionally accepted, according to its terms, is not binding and cannot be specifically enforced. (*Stengel v. Sergeant*, 74 N. J. Eq., p. 20.) An acceptance to be good must be such as to conclude an agreement or contract between the parties, and to do this it must in every respect meet and correspond with the offer, without falling nor going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand.

Moore v. Galupo, 65 Equity, p. 194.

See, however, the case of *Green v. Richards*, 23 Equity, p. 32. *Green v. Richards* is criticized in *Moore v. Galupo*, *supra*, at p. 203.

The complainant claims that it was willing to purchase for \$34,000, expecting to agree upon terms similar to the terms upon

which Greenspan and Borak purchased. The price of \$34,000 was not communicated by the defendant realty company to the complainant. The complainant was not entitled to a communication of the price by option or otherwise. The complainant in this cause is not an assignee in writing of the option.

The motive in this case was summed up by the Vice-Chancellor stating (p. 101), "the struggle for the property is due chiefly to its recent increase in value."

The McClung Drug Company was approached time and again to purchase the property, as hereinfore recited, and it refused to purchase.

Bernard Lipman, a real estate agent (p. 87), approached the McClung Drug Company three or four times to buy the property. The second time he went there Darling, the president of the company, said, "we will see."

The following is testified to by Lipman (p. 87):

"Q And then, again, what did they say finally? A Darling said, 'I have overlooked that opportunity; I could have bought it for \$32,000' when I offered it to him for \$34,000.

Q Was that the final answer? A The final answer was, I got tired of going; I wouldn't never go any more to ask them for it."

On the 2nd day of June the property had risen in price from \$32,000 to \$45,000 (pp. 69-105).

The complainant in this cause has never taken any corporate action to purchase the property and a very feeble attempt was made by any of the individuals connected with the corporation.

The president testified (p. 34):

"Q The fact is you didn't have the money? A Possibly not."

Darling, the president, testified (p. 35):

"Q Isn't that the fact that your company is worth eight or ten thousand less now than it was a year ago? A We have declared dividends in the meantime.

Q Isn't your company worth that much less? A It may be."

The same witness (p. 36) testified that he never made an offer to purchase the building until the 2nd day of June, a month after the place was sold to the defendants Borak and

Greenspan. The testimony of Darling will show the offer that was made (bottom of p. 36):

“Q Where was the money at? A It doesn't make any difference.

The Court. Answer the question.

Q Where was the money? A I could get the money.

Q You didn't have it then? A I didn't have it that minute, no; it wasn't necessary.

Q Why didn't you buy the building before, when it was offered to you? A I don't know why we didn't; it wasn't absolutely necessary that we buy it at that time.

* * * * *

Q You never answered the written notice that was sent to you (p. 37)? A No, sir.

Q You say you knew on the 1st of May it was going to be sold? A Then we would have thirty days' notice in writing.

Q Why did you wait so long when you received the notice; why didn't you answer right away? A We had thirty days to act.

Q You waited until that was up? A It wasn't up.

Q Within a few days? A Yes.

Q Then you didn't go to the company about it? A No.

Q Mr. Lake happened to be in the store and you spoke to him? A Yes.

Q You didn't make any offer as to what you would pay? A We told him we would give \$34,000, the same as offered by the other people.

Q Did you tell him when you were ready to pay it? A No.

Q You didn't know then when you could pay it, did you? A I knew I could get the money.

Q When? A Inside of thirty days.

Q Thirty days from when? A From the time we received the option—received the notice.

Q You didn't try to get it, did you? A I didn't have to try because I knew I could get it.

Q Where could you get \$34,000? A I didn't say I would have to have absolutely \$34,000 cash.

Q What were you going to get? A I was going to find out first.”

Hereafter he testified about his sisters living at Jersey City and not having \$34,000 in cash, and likewise his father-in-law, who was in the saloon business, and he not having the \$34,000 in cash.

The following testimony appears (p. 39):

"By the Court.

Q And when you made up your mind to buy the building on the 2nd of June, you thought you were going to get the same terms, did you, that was given to the other purchaser? A I didn't know what the terms might be.

Q But how many days after the 2nd day of June did you think it would take before you could actually buy the building? A We had to act before the 5th or 6th.

Q And what were you going to do within that time? A If we were to buy the building I suppose there would be a deposit made."

V.

The Court did not refuse to consider the circumstances in the subsequent acts of the parties as bearing upon the construction to be put upon the option of the purchase.

Points IV and V of the complainant's brief are considered under this point, as well as in the previous argument of this brief.

The Vice-Chancellor considered all of the circumstances referred to by the complainant (pp. 105 to 107), and after a full consideration, stated (p. 108), "The Statute of Frauds remains unsatisfied, notwithstanding what has happened, and the plaintiff so contends."

The fourth and fifth points of complainant's brief are statements of general principles in law, which have no application to the case under discussion, except as hereinbefore stated.

An attempt is also made to apply the law of personal property to that of real property in so far as the consideration of this case is concerned. This would be a novel departure in the law of this State.

The resolution fixing the price at \$32,000 was not in writing, as hereinbefore stated, and was only put in writing at the hearing of the cause, at least six months after the resolution was passed. The complainant refused to purchase at that price, and in fact it refused to purchase at the price of \$34,000. It was only after Greenspan and Borak purchased the property and the property became more valuable that the complainant undertook to compel a conveyance.

The complainant never recorded its agreement. It was held in its possession without being recorded. In none of the exhibits or papers in this case was there any writing to the effect that the entire premises were to be conveyed under any condition to the complainant by any of the defendants.

Lake and Peterson (pp. 90-91) understood the reservation in the Greenspan and Borak agreement to protect them in their option. Whether they were right or wrong about this conclusion makes little difference, for the complainant failed to perform within the optional time specified in the lease, and made no substantial attempt to do so.

In *Jeffreys v. Charlton*, 72 Equity, p. 341, it was held,

“An option agreement wherein vendee extended to vendor the option to purchase within a specified time upon specified terms, such option must be complied with by the payment or tender of payment of the amount specified within the time named, or all rights under the option will be lost.”

Greenspan and Borak were not aware of the optional agreement, as the agreement was never recorded.

Greenspan, Borak and Peterson testified that the complainant's lease was not present when the contract for sale was made with the defendant. The testimony of Mr. Lake in this connection is incorrect. The testimony of Mr. Peterson, Borak and Greenspan (see testimony of these witnesses, which is short, pp. 80 to 85 and 90 to 91) must be very convincing, for the reason stated by Greenspan; that is to say, they did not know the length of the time the lease had to run, and in order to be safe it was specified that the rights of the tenant would be that of three years (p. 11). By the terms of the McClung lease, it expires in less than two years.

As between Greenspan, Borak and the complainant, should not the complainant, for its failure to record its agreement and take such other steps as might be necessary to protect the alleged right which it had under the optional agreement, be charged against it? In any event, no substantial attempt was made to purchase the property within the time specified in the optional agreement.

In *Klausner v. Watson*, 98 Atl., p. 271, it is held that,

“Where the vendee failed to perform on the day set, and did not prior thereto record its option contract, it could not thereafter compel specific performance in suit

against the vendor, where the property was sold to a third person without notice of the contract, such person having in good faith and for valuable consideration acquired an equitable title."

If the complainant did not act when it should have acted, the Court should not assist it to perform at this time when the sole reason for the desire to purchase is that of the advance in value of the property.

If the complainant is entitled to any remedy at all, it is an action at law for damages, and even there the same defense could be well taken; that is to say, that the optional agreement is too indefinite and uncertain upon which to maintain an action and would be barred by force of the Statute of Frauds and Perjuries.

It is respectfully submitted that the decree of the Chancellor should be affirmed with costs and a counsel fee to the respondents on this appeal.

Respectfully submitted,

THOMAS BROWN,
Solicitor for and of Counsel with the Defendants,
Isidore Greenspan and Philip Borak.

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