10

INDEX.

Complaint.

In Chancery of New Jersey

To His Honor, EDWIN ROBERT WALKER, *Chancellor of the State of New Jersey.*

Complainants show unto your Honor your orators, Uszer Sukman and Abraham Sukman, trading as American Upholstery & Slip Cover Co., of the City of Jersey City, County of Hudson, and State of New Jersey, that

1. On or about the sixth day of April, 1926, and prior thereto, Charles Ihle, was the owner of certain premises situated in the City of Jersey City, Hudson County, New Jersey, described by street number as 40 Milton Avenue, Jersey City, New Jersey.

2. That on or about the said sixth day of April, 1926, the said Charles Ihle, defendant, and American Upholstery & Slip Cover Co., complainant, entered into an agreement, whereby the said Charles Ihle, landlord, agreed to let and the said American Upholstery & Slip Cover Co. agreed to hire the premises No. 40 Milton Avenue, for the term of two (2) years, from May 1, 1926, at a rental of one hundred twenty-five ($125.00) dollars per month, with the privilege to renew the same for a further term of two years, for the same rental of one hundred twenty-five ($125.00) dollars per month.

3. That on the said sixth day of April, 1926, after the consummation of said agreement to let and hire the said premises hereinabove described, the said complainant paid to the defendant the

sum of twenty ($20.00) dollars to be applied on account of the first month's rent. At the time of the payment of the said twenty ($20.00) dollars, it was agreed that a formal lease be drawn according to the terms agreed upon, which are more fully set forth in the receipt executed by the defendant, and delivered to the complainants (a copy of which is hereto attached and made part hereof).

4. That thereafter on or about the eighth day of April, 1926, said defendant delivered to the American Upholstery & Slip Cover Co. a formal lease prepared by him, a copy of which is hereto attached and made part hereof, for execution, but which the said complainants refused to sign, the terms and conditions of said agreement not being as agreed upon, as is more fully set forth in the receipt heretofore referred to.

5. That thereafter on or about the sixteenth day of April, 1926, the complainants delivered to the defendant, a formal lease, drawn and executed by them according to the terms of agreement of the parties as evidenced by the receipt heretofore referred to (a copy of which lease is hereto attached and made part hereof).

6. Defendant Charles Ihle, instead of complying with the terms and conditions of his agreement in executing the lease, declined so to do, and has wholly repudiated the said agreement, and has averred that he has received an offer of rental in excess of that agreed upon between the parties, and has threatened to execute a lease for the same premises with party making larger offer, in violation of terms of his agreement, made with the complainants and the intervention of this Court is

necessary to the protection of the said complainants to the end that the said defendant, his agents, attorneys, servants, or assignees, may not execute a lease for the said premises hereinbefore described or deliver possession of said premises to any other person than the complainants to the detriment of the complainants American Upholstery & Slip Cover Co.

7. Complainants have always been ready to comply and carry out the terms of the agreement of letting and now tender themselves ready, able and willing to carry out the terms of letting as set forth in the receipt heretofore referred to in all its terms on their side to be performed.

COMPLAINANTS HAVE NOT AN ADEQUATE REMEDY AT LAW AND THEREFORE PRAY:

1. That Charles Ihle, defendant, may answer the premises and each statement herein set forth.

2. That the defendant may be decreed in every respect to specifically perform the terms of his said agreement on his part agreed to be done and performed.

3. That said defendant, his attorneys, agents, servants or assignees may be enjoined and restrained from executing any agreement of letting, subletting or undertaking or negotiating any agreement of letting, subletting or underletting the said premises above described, and which under and by the terms they agreed to let to the complainants and that he may be perpetually restrained and enjoined from delivering the possession of the above mentioned premises to any other person than the complainants.

4. That a writ of subpoena may issue commanding said defendant to answer the bill of com-

plaint and to abide by such decree as this Court may make in the premises.

And your complainants will ever pray, etc.

DAVID H. STEMER,
Solicitor and of Counsel with Complainants.

State of New Jersey, }
County of Hudson, } ss.:

USZER SUKMAN, being duly sworn, according to law upon his oath, deposes and says:

That he is a member of the firm of the American Upholstery & Slip Cover Co.

That on or about the sixth day of April, 1926, and prior thereto Charles Ihle was the owner of certain premises situated in the City of Jersey City, County of Hudson, New Jersey, described by street number as 40 Milton Avenue, Jersey City, New Jersey.

That on or about the said sixth day of April, 1926, the said Charles Ihle, defendant, and American Upholstery & Slip Cover Co., complainant, entered into an agreement, whereby the said Charles Ihle, landlord, agreed to let and the said American Upholstery & Slip Cover Co. agreed to hire the premises No. 40 Milton Avenue, for the term of two (2) years, from May 1, 1926, at a rental of one hundred twenty-five ($125.00) dollars per month, with the privilege to renew the same for a further term of two years, for the same rental of one hundred twenty-five ($125.00) dollars per month.

That on the said sixth day of April, 1926, after the consummation of said agreement to let and hire the said premises hereinabove described, the said complainant paid to the defendant the sum of twenty ($20.00) dollars to be applied on account

of the first month's rent. At the time of the payment of the said twenty ($20.00) dollars, it was agreed that a formal lease be drawn according to premises agreed upon, which are more fully set forth in the receipt executed by the defendant, and delivered to the complainants, a copy of which is hereto attached and made part hereof.

That thereafter on or about the eighth day of April, 1926, said defendant delivered to the American Upholstery & Slip Cover Co. a formal lease prepared by him, a copy of which is hereto attached and made part hereof, for execution, but which the said complainants refused to sign, the terms and conditions of said agreement not being as agreed upon, as is more fully set forth in the receipt heretofore referred to.

That thereafter on or about the sixteenth day of April, 1926, the complainants delivered to the defendant a formal lease, drawn and executed by them according to the terms of agreement of the parties as evidenced by the receipt heretofore referred to, a copy of which lease is hereto attached and made part hereof.

Defendant Charles Ihle instead of complying with the terms and conditions of his agreement in executing the lease, declined so to do, and has wholly repudiated the said agreement, and has averred that he has received an offer of rental in excess of that agreed upon between the parties, and has threatened to execute a lease for the same premises with a party making a larger offer, in violation of terms of his agreement, made with the complainants and the intervention of this Court is necessary to the protection of the said complainants to the end that the said defendant, his agents, attorneys, servants, or assignees, may

not execute a lease for the said premises hereinbefore described or deliver possession of said premises to any other person than the complainants to the detriment of the complainants American Upholstery & Slip Cover Co.

Complainants have always been ready to comply and carry out the terms of the agreement of letting and now tender themselves ready, able and willing to carry out the terms of letting as set forth in the receipt heretofore referred to in all its terms on their side to be performed.

USZER SUKMAN.

Sworn to and subscribed before me this 21st day of April, 1926.

IRVING SOLOMON,
Notary Public,
New Jersey.

April 6, 1926.

Received of American Upholstery & Slip Cover Co. Twenty 00/100.....Dollars for Rent of as a deposit for rent of factory 40 Milton Ave.—not private office; leased to be made for two years at $125.00 per month with two privilege to renew for two more years at $125.00 rental. From May 1, 1926 to May 1, 1928.

CHARLES IHLE.

THIS AGREEMENT BETWEEN Charles Ihle, of the City of Jersey City, in the County of Hudson, State of New Jersey, and the American Upholstering and Slip Cover Company, of the City of Jersey

City, in the County of Hudson and State of New Jersey, As Tenant WITNESSETH:—That the said Landlord has let unto the said Tenant and the said Tenant has hired from the said Landlord all that Two story and basement, frame building in premises #40 Milton Avenue, in the City of Jersey City, County of Hudson and State of New Jersey for the term of Two (2) years, commencing on the first day of May, 1926. The party of the second part have the option to renew this lease for two additional years at the same rental; to be used and occupied for a storehouse and displaying furniture upon the conditions and covenants following:

FIRST.—That the Tenant shall pay the rent annual of Fifteen Hundred ($1500) Dollars in equal monthly instalments of $125.00 on the first day of each and every month, in advance.

SECOND.—That the Tenant shall take good care of the premises and shall at their own cost and expense make all repairs to the interior of the within demised premises and at the end or other expiration of the term, shall deliver up the demised premises in good order or condition, damages by the elements excepted.

THIRD.—That the tenant shall promptly execute and comply with all statutes, ordinances, rules, orders, regulations and requirements of the Federal, State and City Government and of any and all their Departments and Bureaus applicable to said premises, for the correction, prevention, and abatement of nuisances, violations or other grievances, in, upon or connected with said premises during said term; and shall also promptly comply with and execute all rules, orders, and regulations

of the Board of Fire Underwriters for the prevention of fires, at their own cost and expense.

FOURTH.—That in case the Tenant shall fail or neglect to comply with the aforesaid statutes, ordinances, rules, orders, regulations and requirements or any of them, or in case the tenant shall fail or neglect to make any necessary repairs, then the Landlord or Agents may enter said premises and make said repairs and comply with any and all of the said statutes, ordinances, rules, orders, regulations or requirements, at the cost and expense of the Tenant and in case of the Tenant's failure to pay therefor, the said cost and expense shall be added to the next month's rent and be due and payable as such, or the Landlord may deduct the same from the balance of any sum remaining in the Landlord's hands. This provision is in addition to the right of the Landlord to terminate this lease by reason of any default on the part of the Tenant.

FIFTH.—That the Tenant shall not assign this agreement, or underlet or underlease the premises, or any part thereof, or occupy, or permit or suffer the same to be occupied for any business or purpose deemed disreputable or extra-hazardous on account of fire, under penalty of damages and forfeiture.

SIXTH.—That no alterations, additions or improvements shall be made in or to the premises without the consent of the Landlord in writing, under penalty of damages and forfeiture, and all additions and improvements made by the Tenant shall belong to the Landlord.

SEVENTH.—That the Tenant shall, in case of fire, give immediate notice thereof to the Landlord who shall thereupon cause the damage to be repaired forthwith; but if the premises be so damaged that the Landlord shall decide to rebuild, the term shall cease and the accrued rent be paid up to the time of the fire.

EIGHTH.—That said Tenant agree that the said Landlord and Agents, and other representatives, shall have the right to enter into and upon said premises, or any part thereof, at all reasonable hours for the purpose of examining the same, or making such repairs or alterations therein as may be necessary for the safety and preservation thereof.

NINTH.—The Tenant also agree to permit the Landlord or his Agents to show the premises to persons wishing to hire or purchase the same; and the Tenant further agree that on and after the first day of February next preceding the expiration of the term hereby granted, the Landlord or his Agents shall have the right to place notices on the front of said premises, or any part thereof, offering the premises "To Let" or "For Sale," and the Tenant hereby agrees to permit the same to remain thereon without hindrance or molestation.

TENTH.—That if the said premises, or any part thereof, shall become vacant during the said term, or should the Tenant be evicted by summary proceedings or otherwise, the Landlord or his representatives may re-enter the same, either by force or otherwise, without being liable to prosecution therefor; and re-let the said premises as the Agent of the said Tenant and receive the rent thereof; applying the same, first to the payment of such

expenses as he may be put to in re-entering and then to the payment of the rent due by these presents; the balance (if any) to be paid over to the Tenant who shall remain liable for any deficiency.

ELEVENTH.—That in case of any damage or injury occurring to the glass in the demised premises or damage and injury to the said premises of any kind whatsoever, said damage or injury being caused by the carelessness, negligence, or improper conduct on the part of the said Tenant Agents or Employees, then the said Tenant shall cause the said damage or injury to be repaired as speedily as possible at their own cost and expense.

TWELFTH.—That the Tenant shall neither encumber, nor obstruct the sidewalk in front of, entrance to or halls and stairs of said building, nor allow the same to be obstructed or encumbered in any manner.

THIRTEENTH.—The Tenant shall neither place, nor cause, nor allow to be placed, any sign or signs of any kind whatsoever at, in or about the entrance to said building nor any other part of same, except in or at such place or places as may be indicated by the said Landlord and consented to by him in writing. And in case the Landlord or his representatives shall deem it necessary to remove any such sign or signs in order to paint the building or make any other repairs, alterations or improvements in or upon said building or any part thereof, they shall have the right to do so, providing they cause the same to be removed and replaced at his expense, whenever the said repairs, alterations or improvements shall have been completed.

FOURTEENTH.—It is expressly agreed and understood by and between the parties to this agreement,

that the Landlord shall not be liable for any damage or injury by water, which may be sustained by the said Tenant or other person or for any other damage or injury resulting from the carelessness, negligence, or improper conduct on the part of any other Tenant or Agents, or Employees, or by reason of the breakage, leakage, or obstruction of the water or soil pipes, or other leakage in or about the said building.

FIFTEENTH.—That if default be made in any of the covenants herein contained, then it shall be lawful for the said Landlord to re-enter the said premises, and the same to have again, re-possess and enjoy.

SIXTEENTH.—That this instrument shall not be a lien against said premises in respect to any mortgages that hereafter may be placed against said premises, which mortgages are not to exceed in the aggregate the sum of up to $16,000.00 Sixteen Thousand Dollars, and that the recording of such mortgage or mortgages shall have preference and precedence and be superior and prior in lien of this lease, irrespective of the date of recording and the Tenant agree to execute any such instrument without cost, which may be deemed necessary or desirable to further effect the subordination of this lease to any such mortgage or mortgages, and a refusal to execute such instruments shall entitle the Landlord, his successors, assigns and legal representatives to the option of cancelling this lease without incurring any expense or damage, and the term hereby granted is expressly limited accordingly.

SEVENTEENTH.—The Tenant has this day deposited with the Landlord the sum of ($1000.00)

One Thousand Dollars as security for the full and faithful performance by the Tenant of all of the terms and conditions upon the Tenants' part to be performed, which said sum shall be returned to the Tenant after the time fixed as the expiration of the term herein, provided the Tenant has fully and faithfully carried out all of the terms, covenants and conditions on his part to be performed.

EIGHTEENTH.—That the security deposited under this lease shall not be mortgaged, assigned or encumbered by the Tenant without the written consent of the Landlord.

NINETEENTH.—It is expressly understood and agreed that if for any reason it shall be impossible to obtain fire insurance on the buildings and improvements on the demised premises in an amount, and in the form, and in fire insurance companies acceptable to the Landlord, the latter may, if so elect, at any time thereafter terminate this lease and the term thereof, on giving to the Tenant three days' notice in writing of intention so to do and upon the giving of such notice, this lease and the term thereof shall terminate and come to an end.

TWENTIETH.—It is expressly understood and agreed that in case the demised premises shall be deserted or vacated, or if default be made in the payment of the rent or any part thereof as herein specified, or if, without the consent of the Landlord, the Tenant shall sell, assign, or mortgage this lease or if default be made in the performance of any of the covenants and agreements in this lease contained on the part of the Tenant to be kept and performed, or if the Tenant shall fail

to comply with any of the statutes, ordinances, rules, orders, regulations and requirements of the Federal, State and City County Government or of any and all their Departments and Bureaus applicable to said premises, or hereafter established as herein provided, or if the Tenant shall file a petition in bankruptcy or be adjudicated a bankrupt or make an assignment for the benefit of creditors to take advantage of any insolvency act, the Landlord may, if he so elect, at any time thereafter terminate this lease and the term thereof, upon giving to the Tenant five days' notice in writing of his intention so to do, and upon the giving of such notice this lease and the term thereof shall terminate, expire and come to an end on the date fixed in such notice as if said date were the date originally fixed in this lease for the termination or expiration thereof.

All notices required to be given to the Tenant may be given by mail addressed to the Tenant at the demised premises.

TWENTY-FIRST.—The Tenant shall pay the regular annual rent or charge, and all meter charges, which is or may be assessed or imposed upon the demised premises for Water, when due during the term, and if not so paid, the same shall be added to the month's rent next accruing.

TWENTY-SECOND.—The failure of the Landlord to insist upon strict performance of any of the covenants or conditions of this lease or to exercise any option herein conferred in any one or more instances, shall not be construed as a waiver or relinquishment for the future of any such covenants, conditions or options, but the same shall be and remain in full force and effect.

TWENTY-THIRD.—There was no broker who negotiated the within lease.

TWENTY-FOURTH.—The private office now being occupied by Charles Ihle is not included in this lease and is to be used by said Charles Ihle or his representatives exclusively.

TWENTY-FIFTH.—The tenant will advise the owner of their intention to either vacate or enter into a new agreement, three months prior to the expiration of this lease.

TWENTY-SIXTH.—At the expiration of this lease the party of the second part agree to repaint the entire inside of building.

TWENTY-SEVEN.—It is further agreed that in case the demised premises are sold during the term of this lease the said party of the second part (Tenant) will surrender and cancel this lease upon three months notice in writing and without any compensation therefor.

And the said Landlord does covenant that the said Tenant on paying the said yearly rent, and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

And it is further understood and agreed, that the covenants and agreements herein contained are binding on the parties hereto and their legal representatives.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals this eighth day

of April one thousand nine hundred and twenty-six.

SEALED AND DELIVERED IN THE PRESENCE OF

.....(L.S.)

.....(L.S.)

.....

THIS AGREEMENT, MADE the 16th day of April in the year of our Lord, One Thousand Nine Hundred and Twenty-six, BETWEEN Charles Ihle of the City of Jersey City, in the County of Hudson and State of New Jersey party of the first part.

AND Uszer Sukman and Abraham Sukman, trading as American Upholstery & Slip Cover Co. of the City of Jersey City, in the County of Hudson, and State of New Jersey, party of the second part.

WITNESSETH, That the said party of the first part, has hereby let, and rented to the said party of the second part, and the said party of the second part, has hereby hired and taken from the said party of the first part:

ALL that two story and basement frame building known by street No. 40 Milton Avenue, Jersey City, County of Hudson, and State of New Jersey, except the private office now being occupied by Charles Ihle, which is not included in this lease, and same to be used by the said Charles Ihle or his representatives exclusively, for the term of two years, to commence on the first day of May A. D., 1926, at the yearly rent of fifteen hundred ($1500.00) dollars, payable in monthly installments

of one hundred twenty-five ($125.00) dollars on the first day of each and every month and in advance.

The party of the second part shall have the option to renew this lease for two additional years, upon the same terms and conditions prescribed in this agreement.

The premises are to be used as a storehouse, warehouse and for the purpose of displaying any and all kinds of furniture.

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 covenants to pay to the said party of the first part, the said rent as herein specified, to wit: One hundred twenty-five ($125.00) dollars on the first day of each and every month in advance.

And at the expiration of the said term, or the termination of this lease, the said party of the second part will quit and surrender the premises hereby demised, in as good a state and condition as reasonable use thereof will permit, damage by the elements excepted.

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

In Witness Whereof, the said parties hereto

have hereunto set their hands and seals the day and year first above written.

AMERICAN UPH. & SLIP COVER CO. (LS),
By USZER SUKMAN (LS).
ABRAHAM SUKMAN (LS).

Signed, sealed and delivered
in the presence of
DAVID H. STEMER.

State of New Jersey,
County of Hudson, } SS.:

BE IT REMEMBERED, that on this 16th day of April, in the year of our Lord One Thousand Nine Hundred and Twenty-six before me, the subscriber, a Master in Chancery of New Jersey personally appeared Uszer Sukman and Abraham Sukman, who, I am satisfied are the lessees in the within Indenture of Lease named; and I having first made known to them the contents thereof, they did acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

DAVID H. STEMER,
Master in Chancery of New Jersey.

April 6, 1926.

Received of American Upholstering & Slip Cover Co.
Twenty 00/100 .....Dollars for
Rent of as a deposit for rent of factory 40 Milton Ave. not private office lease to be made for two years at 125.00 per month with two privileges to renew for two more years at 125.00 rental.
From May 1st, 1926 to May 1, 1928.

CHAS. IHLE.

Affidavit of Charles Ihle.

IN CHANCERY OF NEW JERSEY.

Between

USZER SUKMAN and ABRAHAM SUKMAN, trading as AMERICAN UPHOLSTERY & SLIP COVER CO., Complainants,

and

CHARLES IHLE, Defendant.

On Bill, &c. Affidavit.

State of New Jersey, County of Hudson, } ss.:

CHARLES IHLE, of full age, being duly sworn upon his oath, doth depose and say: That he is the above named defendant and that he is the party who signed the receipt for $20 as deposit for rent for a certain factory at No. 40 Milton Avenue, Jersey City, as set forth in the bill of complaint herein. That prior and subsequent to the time of giving of said receipt, this deponent and the complainants herein discussed the question as to the painting of the interior of said premises to be rented. That this deponent at said times when these negotiations were had, agreed to spend the sum of $50 for said painting work, as this was the price the complainants said they could have the work done for by their painter, and that the estimates received by this deponent from the painter sent by the complainants, amounted to the sum of $175, and that this deponent took up the question

as to the cost of said painting with the complainants and suggested that each pay half. That said complainants said that if the deponent could not do the painting without any cost to them, that they would say good-bye to the building and rent another place, which they had under consideration at that time. This deponent informed said complainants that he must know the conditions under which they would enter into the possession of said building and enter into a lease at once, for if they did not care to take the building, he would have to rent it to some other party. That at the time of the negotiations it was also agreed among other things, that the tenants should pay for the water consumed upon said premises, in addition to the yearly rental, also that said complainants do all the necessary inside repairs to the building, and that said lease should contain a condition that said tenants would not assign said lease, nor sublet said premises or any part thereof. That it was finally agreed that this deponent prepare a lease and submit it to the complainants. This deponent prepared a lease, a copy of which is annexed to the bill of complaint and handed the same to the complainants on the 8th day of April, 1926. That said complainants informed this deponent that they would examine the lease and advise him as to the same. That on the 9th day of April, 1926, this deponent called upon the complainants and they refused to sign the lease, informing this deponent that they had another place in view which they would rent. Deponent thereupon offered to return to them the deposit of $20 which they refused to take. On the 10th day of April, 1926, deponent again called at their place of business and asked them whether or not they intended to sign the

lease and they again refused and deponent again tendered them the return of $20 deposit. On the 12th day of April, 1926, deponent again called at the place of business of said complainants at the corner of Central Avenue and Charles Street and inquired of them as to the signing of the lease and they again refused to do so and further stated that unless they could get into possession of said building without expense to themselves, they would not consider the proposition. The item of expense under discussion being the painting of the interior of said building. At that time deponent stated to complainants that deponent must have an answer as to the signing of the lease, because deponent could not lose any more rent and must try to lease out the building, and if there was any adjustments to be made, deponent would be glad to negotiate, but the said Uszer Sukman at that time stated to deponent, "You have my answer, so do as you wish, as I am through." Deponent thereupon said to him that it seemed to him that he was stringing him along and did not really wish the building. Deponent then asked the said Uszer Sukman whether the deal was off, and he said "Yes." On April 15th, 1926, said Uszer Sukman called on deponent and said that they had changed their minds and would take the building. Deponent then informed him that he had another party who was negotiating for a lease and that the lease was already prepared. On the 16th day of April, 1926, said complainants submitted a lease, a copy of which is annexed to the bill of complaint, but the same was not executed as stated by the complainants in their affidavit. Deponent refused to sign this lease, as it was not in accordance with agree-

ment between the parties. That this deponent on the 17th day of April, 1926, about 9:30 in the morning, called at the store of the complainants and stated that he would sign the lease submitted by this deponent, but would not sign the lease as submitted by the complainants, unless certain clauses were inserted in the same, and that the said Abraham Sukman, at that time informed the deponent that he would not sign any lease other than the one which complainants had submitted and would not consent to the insertion of any other clauses. That this deponent again tendered to the complainants the return of the deposit of $20 and that the complainants refused the same. That this deponent thereupon executed a lease on said 17th day of April, 1926, with Remy Millring Co., Inc., a copy of which is hereto annexed.

Deponent denies that he refused to enter into a lease with the complainants, because he had a better offer from somebody else, but refused to sign the lease because the complainants refused to agree to the conditions which were agreed upon prior to the giving of the receipt for $20, and only negotiated with another party after the complainants had definitely informed this deponent that they would not enter into a lease and did not care to take over the building.

Deponent denies that the complainants were at all times ready and willing to carry out the terms of the letting as agreed between the complainants and this deponent, and that the complainants never tendered to this deponent any moneys to cover the first month's rent, until after this depo-

nent had entered into the lease with the Remy Millring Co., Inc.

CHARLES IHLE.

Sworn and subscribed to before me this 26th day of April, 1926.

ALVINA STEVENS,
Notary Public of New Jersey.

Affidavit of Charles A. Ihle.

IN CHANCERY OF NEW JERSEY.

Between

USZER SUKMAN and ABRAHAM SUKMAN, trading as AMERICAN UPHOLSTERY & SLIP COVER CO., Complainants,

and

CHARLES IHLE, Defendant.

On Bill, &c. Affidavit.

State of New Jersey, County of Hudson, } ss.:

CHARLES A. IHLE, of full age, being duly sworn upon his oath, doth depose and say that he is the son of the above named defendant. That on Friday, the 16th day of April, 1926, at about 7 o'clock in the evening, this deponent accompanied his father to the place of business of the complainants herein and was present when his father asked the complainants to sign a lease and that the complainants at that time refused to sign the lease and

said they were through with the building and that said complainants also refused to accept the $20 which the defendant herein offered to return to them.

CHARLES A. IHLE.

Sworn and subscribed to before me this 26th day of April, 1926.

ALVINA STEVENS,
Notary Public of N. J.

Affidavit of Max A. Sturm.

IN CHANCERY OF NEW JERSEY.

Between USZER SUKMAN and ABRAHAM SUKMAN, trading as AMERICAN UPHOLSTERY & SLIP COVER CO., Complainants, and CHARLES IHLE, Defendant.	On Bill, &c. Affidavit.

State of New Jersey, County of Hudson, } ss.:

MAX A. STURM, of full age, being duly sworn upon his oath, doth depose and say that he is a Counsellor-at-Law of the State of New Jersey and that he was present when the defendant in the above entitled matter called at the place of business of the complainants at Central Avenue and Charles Street, Jersey City, on Thursday morning, April 15th, 1926. That the defendant at that time

requested the complainants to enter into a lease for the premises described in the Bill of Complaint herein, but the complainants refused to do so, unless the interior of said building was painted. The defendant at that time said he was willing to allow the $50 as agreed at the time of the paying of the $20 deposit, but would not pay the $175 which was the amount of estimate given him by the painter sent by the complainants. That said complainants refused to pay anything towards the painting of the interior of the said building. That the defendant thereupon offered to pay one-half of the expense of the painting, but the complainants again refused and said that they would not take the building if they had to expend any money on the same, and further stated they had some other place in view at that time. That the defendant tendered to return the $20 deposit to the complainants, stating that if the complainants did not care to take the building, they should take their $20, but said complainants refused to accept the money.

Deponent further says that on Saturday morning, April 17th, 1926, at about 9:30, he again called at the place of business of the complainants with the defendant herein, and was present when the defendant again requested the complainants to enter into a lease. That only one of the complainants was present at that time and he informed the defendant in the presence of this deponent, that he would not sign the lease as submitted by the defendant, and would only sign the lease as submitted by the complainants. That the defendant refused to sign that lease, but said if they would add certain clauses to the lease as to repairs, payment for water and other conditions which had been discussed between themselves, he woud be willing

to sign a lease. That the complainant thereupon informed the defendant that he would not sign any other lease but the lease submitted by the complainants and would not agree to any other conditions except as stated therein.

Deponent further states on said 17th day of April, 1926, about 11 o'clock, the said defendant executed and delivered a lease covering said building, to the Remy Millring Co., Inc., which lease was executed by the defendant in the office of this deponent.

MAX A. STURM.

Sworn and subscribed to before me,
this 26th day of April, 1926.

ALVINA STEVENS,
Notary Public of N. J.

THIS AGREEMENT, BETWEEN Charles Ihle, of the City of Jersey City, County of Hudson and State of New Jersey, and Remy-Millring Co., Inc., a New Jersey Corporation, of the City of Union City, County of Hudson and State of New Jersey.

As Tenant WITNESSETH:—That the said Landlord has let unto the said Tenant and the said Tenant has hired from the said Landlord, all that certain two story and basement frame building being about 25 x 100, making a total of about 6000 sq. ft. in the entire; and being known as 40 Milton Avenue, Jersey City, N. J., for the term two years from the 1st day of May, 1926, to be used and occupied for decorating china, glass, art novelties upon the conditions and covenants following:

FIRST.—That the Tenant shall pay the annual rent of Eighteen Hundred ($1800) Dollars, payable

in monthly instalments of One Hundred and Fifty ($150.00) Dollars on the first day of each and every month.

SECOND.—That the Tenant shall take good care of the premises and shall at his own cost and expense make all repairs to the interior of the demised premises, and at the end or other expiration of the term, shall deliver up the demised premises in good order or condition, damages by the elements excepted.

THIRD.—That the Tenant shall promptly execute and comply with all statutes, ordinances, rules, orders, regulations and requirements of the Federal, State and City Government and of any and all their Departments and Bureaus applicable to said premises, for the correction, prevention, and abatement of nuisances, violations or other grievances, in, upon or connected with said premises during said term; and shall also promptly comply with and execute all rules, orders and regulations of the Board of Fire Underwriters for the prevention of fires, at his own cost and expense.

FOURTH.—That in case the Tenant shall fail or neglect to comply with the aforesaid statutes, ordinances, rules, orders, regulations and requirements or any of them, or in case the tenant shall fail or neglect to make any necessary repairs, then the Landlord or his Agents may enter said premises and make said repairs and comply with any and all of the said statutes, ordinances, rules, orders, regulations or requirements, at the cost and expense of the Tenant and in case of the Tenant's failure to pay therefor, the said cost and expense shall be added to the next month's rent and be

due and payable as such, or the Landlord may deduct the same from the balance of any sum remaining in the Landlord's hands. This provision is in addition to the right of the Landlord to terminate this lease by reason of any default on the part of the Tenant.

FIFTH.—That the Tenant shall not assign this agreement, or underlet or underlease the premises, or any part thereof, or occupy, or permit or suffer the same to be occupied for any business or purpose deemed disreputable or extra-hazardous on account of fire, under penalty of damages and forfeiture.

SIXTH.—That no alterations, additions or improvements shall be made in or to the premises without the consent of the Landlord in writing, under penalty of damages and forfeiture, and all additions and improvements made by the Tenant shall belong to the Landlord.

SEVENTH.—That the Tenant shall, in case of fire, give immediate notice thereof to the Landlord who shall thereupon cause the damage to be repaired forthwith; but if the premises be so damaged that the Landlord shall decide to rebuild, the term shall cease and the accrued rent be paid up to the time of the fire.

EIGHTH.—That said Tenant agrees that the said Landlord and Agents, and other representatives, shall have the right to enter into and upon said premises, or any part thereof, at all reasonable hours for the purpose of examining the same, or making such repairs or alteratons therein as may be necessary for the safety and preservation thereof.

Agreement Annexed to Foregoing Affidavit.

NINTH.—The Tenant also agrees to permit the Landlord or his Agents to show the premises to persons wishing to hire or purchase the same; and the Tenant further agrees that on and after February 1st, next preceding the expiration of the term hereby granted, the Landlord or his Agents shall have the right to place notices on the front of said premises, or any part thereof, offering the premises "To Let" or "For Sale," and the Tenant hereby agree to permit the same to remain thereon without hindrance or molestation.

TENTH.—That if the said premises, or any part thereof, shall become vacant during the said term, or should the Tenant be evicted by summary proceedings or otherwise, the Landlord or his representatives may re-enter the same, either by force or otherwise, without being liable to prosecution therefor; and re-let the said premises as the Agent of the said Tenant and receive the rent thereof; applying the same, first to the payment of such expenses as he may be put to in re-entering and then to the payment of the rent due by these presents; the balance (if any) to be paid over to the Tenant who shall remain liable for any deficiency.

ELEVENTH.—That in case of any damage or injury occurring to the glass in the demised premises or damage and injury to the said premises of any kind whatsoever, said damage or injury being caused by the carelessness, negligence, or improper conduct on the part of the said Tenant his Agents or Employees, then the said Tenant shall cause the said damage or injury to be repaired as speedily as possible at his own cost and expense.

TWELFTH.—That the Tenant shall neither encumber, nor obstruct the sidewalk in front of, en-

trance to or halls and stairs of said building, nor allow the same to be obstructed or encumbered in any manner.

THIRTEENTH.—The Tenant shall neither place, nor cause, nor allow to be placed, any sign or signs of any kind whatsoever at, in or about the entrance to said building nor any other part of same, except in or at such place or places as may be indicated by the said Landlord and consented to by him in writing. And in case the Landlord or his representatives shall deem it necessary to remove any such sign or signs in order to paint the building or make any other repairs, alterations or improvements in or upon said building or any part thereof, they shall have the right to do so, providing they cause the same to be removed and replaced at his expense, whenever the said repairs, alterations or improvements shall have been completed.

FOURTEENTH.—It is expressly agreed and understood by and between the parties to this agreement, that the Landlord shall not be liable for any damage or injury by water, which may be sustained by the said Tenant or other person or for any other damage or injury resulting from the carelessness, negligence, or improper conduct on the part of any other Tenant or Agents, or Employees, or by reason of the breakage, leakage, or obstruction of the water or soil pipes, or other leakage in or about the said building.

FIFTEENTH.—That if default be made in any of the covenants herein contained, then it shall be lawful for the said Landord to re-enter the said premises, and the same to have again re-possess and enjoy.

Agreement Annexed to Foregoing Affidavit.

SIXTEENTH.—That this instrument shall not be a lien against said premises in respect to any mortgages that hereafter may be placed against said premises, whch mortgages are not to exceed in the aggregate the sum of Thirteen Thousand ($13,000.00) Dollars, and that the recording of such mortgage or mortgages shall have preference and precedence and be superior and prior in lien of this lease, irrespective of the date of recording and the Tenant agree to execute any such instrument without cost, which may be deemed necessary or desirable to further effect the subordination of this lease to any such mortgage or mortgages, and a refusal to execute such instruments shall entitle the Landlord assigns and legal representatives to the option of cancelling this lease without incurring any expense or damage, and the term hereby granted is expressly limited accordingly.

SEVENTEENTH.—The Tenant has this day deposited with the Landlord the sum of

Dollars

as security for the full and faithful performance by the Tenant of all of the terms and conditions upon the Tenant's part to be performed, which said sum shall be returned to the Tenant after the time fixed as the expiration of the term herein, provided the Tenant has fully and faithfully carried out all of the terms, covenants and conditions on part to be performed.

EIGHTEENTH.—That the security deposited under this lease shall not be mortgaged, assigned or encumbered by the Tenant without the written consent of the Landlord.

NINETEENTH.—It is expressly understood and agreed that if for any reason it shall be impos-

sible to obtain fire insurance on the buildings and improvements on the demised premises in an amount, and in the form, and in fire insurance companies acceptable to the Landlord, the latter may, if so elect, at any time thereafter terminate this lease and the term thereof, on giving to the Tenant three days' notice in writing of intention so to do and upon the giving of such notice, this lease and the term thereof shall terminate and come to an end.

TWENTIETH.—It is expressly understood and agreed that in case the demised premises shall be deserted or vacated, or if default be made in the payment of the rent or any part thereof as herein specified, or if, without the consent of the Landlord, the Tenant shall sell, assign, or mortgage this lease or if default be made in the performance of any of the covenants and agreements in this lease contained on the part of Tenant to be kept and performed, or if the Tenant shall fail to comply with any of the statutes, ordinances, rules, orders, regulations and requirements of the Federal, State and City Government or of any and all their Departments and Bureaus applicable to said premises, or hereafter established as herein provided, or if the Tenant shall file a petition in bankruptcy or be adjudicated a bankrupt or make an assignment for the benefit of creditors to take advantage of any insolvency act, the Landlord may, if he so elect, at any time thereafter terminate this lease and the term thereof, upon giving to the Tenant five days' notice in writing of his intention so to do, and upon the giving of such notice, this lease and the term thereof shall terminate, expire and come to an end on the date fixed in such notice

as if said date were the date originally fixed in this lease for the termination or expiration thereof.

All notices required to be given to the Tenant may be given by mail addressed to the Tenant at the demised premises.

TWENTY-FIRST.—Then Tenant shall pay the regular annual rent or charge, and all meter charges, which is or may be assessed or imposed upon the demised premises for Water, when due during the term, and if not so paid, the same shall be added to the month's rent next accruing.

TWENTY-SECOND.—The failure of the Landlord to insist upon strict performance of any of the covenants or conditions of this lease or to exercise any option herein conferred in any one or more instances, shall not be construed as a waiver or relinquishment for the future of any such covenants, conditions or options, but the same shall be and remain in full force and effect.

It is acknowledged by both the parties hereto that J. I. Kislak, Inc., are the brokers who negotiated the within lease and that they have earned a commission of One Hundred ($100.00) Dollars, which commission the landlord hereto, hereby agrees to pay. It is further acknowledged by both the parties hereto that in the event that the option hereinafter mentioned is exercised by the Tenant herein, then and in that event, J. I. Kislak, Inc., shall receive 5% of the purchase price.

It is hereby understood and agreed that the Tenant has the privilege of purchasing the above property for the sum of Sixteen Thousand ($16,000.00) Dollars, for a period of two years from the date of this lease, provided however, that should

the Landlord of the property have an offer for the purchase after the first year of this option has expired at the option price, the Landlord shall notify the Tenant of this fact and the Tenant shall have the first privilege to purchase, it being however understood that such privilege shall be exercised within thirty days.

It is hereby understood that the boiler and all heating apparatus are in good working condition at the time of the tenant taking possession of the premises.

The private office now occupied by Charles Ihle is not included in this lease and is to be used by Charles Ihle or his representatives exclusively.

And the said Landlord does covenant that the said Tenant on paying the said yearly rent, and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

And it is further understood and agreed, that the covenants and agreements herein contained are binding on the parties hereto and their legal representatives.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals this 17th day of April, one thousand nine hundred and twenty-six.

REMY-MILLRING CO. INC.
(Seal)
(Signed) M. REMY, Pres.
" CHARLES IHLE, (L.S.)

SEALED AND DELIVERED IN THE PRESENCE OF
REMY-MILLRING CO. INC.,

DAVIS C. REMY,
Sec.

Affidavit of Charles Ihle.

State of New Jersey,
County of Hudson, } ss.:

BE IT REMEMBERED, That on this 17th day of April, in the year of our Lord One Thousand Nine Hundred and twenty-six, before me the subscriber, a notary public of New Jersey, personally appeared Charles Ihle who, I am satisfied, is the landlord mentioned in the within lease, to whom I first made known the contents therof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

ALVINA STEVENS,
Notary Public of New Jersey.

Affidavit of Charles Ihle.

IN CHANCERY OF NEW JERSEY.

Between USZER SUKMAN and ABRAHAM SUKMAN, trading as AMERICAN UPHOLSTERY & SLIP COVER CO., Complainants, and CHARLES IHLE, Defendant.	On Bill, &c. Answering Affidavit.

State of New Jersey,
County of Hudson, } ss.:

CHARLES IHLE, of full age, being duly sworn upon his oath, doth depose and say: That he has read the affidavit of Uszer Sukman and Abraham

Sukman, the complainants therein. That it is true as set forth in this deponent's previous affidavit, that the complainants refused to sign any other lease except the one submitted by them.

Deponent further says that this deponent originally asked $150.00 rent per month for the premises in question and after a lengthy discussion, it was finally agreed to rent the place at $125.00 per month. That the question of the painting arose and the defendant agreed to pay $50.00 towards the painting of the place.

That prior to the time of the giving of the receipt, this deponent informed the complainants that he would give them a lease similar to the one which he had given to the previous tenant, which was a Gilsey form of lease. This deponent denies that he said he would prepare a lease in such a form that the complainants would refuse to sign the same. This deponent further says it is not true that the complainants asked him to go to Mr. Stemer's office on April 10th, nor did they make this request until the 19th day of April. He denies that the complainant Uszer Sukman delivered to him a copy of the receipt. He denies that the complainants at any time tendered him a certified check for $105.00. He admits that he tendered the complainants the $20.00 and asked for the return of the receipt. This deponent offered to return the deposit because the complainants said they did not wish to rent the building and that this deponent could rent it to some one else. This deponent denies that said complainants ordered four carloads of furniture in anticipation of obtaining possession of the premises of the deponent, but states that said complainants have another storeroom and a

storage place in the City of Jersey City where they can store the goods which they claim is enroute to them. This deponent denies that his attorney attempted to put the said Uszer Sukman through a third degree, and denies that the said Uszer Sukman threatened to throw his attorney out of his place of business. That on the two occasions when this deponent and his attorney called at the place of business of the complainants, their stay was not of a longer duration than five or ten minutes. That on the 17th day of April, 1926, said Uszer Sukman was not present, but this deponent and his attorney had their talk with the brother, Abraham Sukman. That this deponent did not enter into the lease with the Remy-Millring Co., Inc., until after the complainants had finally informed him that they would not take the premises.

CHARLES IHLE.

Sworn and subscribed to before me this 1st day of May, A. D. 1926.

JOSEPH A. RANKER,
Master in Chancery of N. J.

Affidavit of Max A. Sturm.

IN CHANCERY OF NEW JERSEY.

Between

USZER SUKMAN and ABRAHAM SUKMAN, trading as AMERICAN UPHOLSTERY & SLIP COVER CO.,
Complainants,

and

CHARLES IHLE,
Defendant.

On Bill, &c. Answering Affidavit.

State of New Jersey, }
County of Hudson, } ss.:

MAX A. STURM, of full age, being duly sworn upon his oath, doth depose and say: That he has read the affidavit of Abraham Sukman filed in the above entitled matter and that it is not true that Mr. Uszer Sukman threatened to throw this deponent out of his place of business. That said Uszer Sukman was only present on the 16th day of April, 1926, and was not present on the morning of April 17th, 1926, and his statement in his affidavit that he was present at that time is absolutely untrue. That this deponent did not attempt to put either of the complainants through a third degree, as stated in their respective affidavits. That this deponent went there with the defendant for the purpose of having a lease executed to cover premises #40 Milton Avenue, Jersey City, N. J. That the complainants herein on the 16th day of April, 1926,

in answer to a question by the defendant, admitted they had other places under consideration for which they were negotiating a lease, and that this deponent asked the complainants where the places were located and said complainants informed this deponent that it was none of his business. That this deponent asked the complainants why they would not adjust the differences as to the terms of the lease, so as to finally dispose of the matter and said complainants informed this deponent that they would not sign any other lease except the one submitted by the complainants. That said complainants showed the defendant a copy of the receipt, in the presence of this deponent, but did not give the defendant nor this deponent a copy of said receipt as stated in their affidavits.

MAX A. STURM.

Sworn and subscribed to before me
this 1st day of May, A. D. 1926.

JOSEPH A. RANKER,
Master in Chancery of N. J.

Affidavit of Abraham Sukman.

IN CHANCERY OF NEW JERSEY.

Between USZER SUKMAN and ABRAHAM SUKMAN, trading as AMERICAN UPHOLSTERY & SLIP COVER CO., Complainants, and CHARLES IHLE, Defendant.	On Bill &c. Affidavit.

State of New Jersey, }
County of Hudson, } ss.:

ABRAHAM SUKMAN, of full age, being duly sworn, according to law, upon his oath, deposes and says: That he is one of the complainants in the above entitled cause; that he was present on nearly every occasion that Mr. Ihle, the defendant in this suit, visited the place of business of the complainants. That at all times during these visits either he or Mr. Uszer Sukman said that they would not take possession of the premises in question. That he on all of these visits and at all times heard Mr. Ihle make statements offering the return of the deposit and asking for the return of the receipt he executed on the payment of $20.00, on account of rent.

That he was present on the day Mr. Ihle, the defendant, and his attorney, Mr. Sturm, were at his place of business and that no time during the course of conversation did either he or Mr. Uszer Sukman say that they did not want possession of the premises.

Affidavit of Uszer Sukman.

That he did hear Mr. Uszer Sukman threaten Mr. Sturm that if he did not leave his place of business he would throw him out of his place of business.

ABRAHAM SUKMAN.

Sworn and subscribed to before me this 30th day of April, 1926.

BERNARD A. GANNON,
Attorney at Law
of New Jersey.

Affidavit of Uszer Sukman.

IN CHANCERY OF NEW JERSEY.

Between

USZER SUKMAN and ABRAHAM SUKMAN, trading as AMERICAN UPHOLSTERY & SLIP COVER CO.,
Complainants,

and

CHARLES IHLE,
Defendant.

On Bill &c. Affidavit.

State of New Jersey, County of Hudson, } ss.:

USZER SUKMAN, of full age, being duly sworn, according to law, upon his oath, deposes and says: That he is one of the above named complainants in the above entitled cause. He denies that he ever made any representation to have the painting work of the premises in question done for any

specified sum; he denies he ever said that unless the defendant would do the necessary painting of the premises in question, the defendant could rent the place to another. He denies that the deponent informed him that he must know the conditions, and they were to enter into the possession of said building and into a lease at once, and that if the complainants did not care to take the building, he would rent it to some other place; he denies that at the time of the negotiations it was agreed that the complainants should pay for the water consumed on said premises in addition to the yearly rental and that the complainants do all the necessary inside repairs to the building, and that the said lease should contain a condition that the said tenants would not sign said lease nor sublet said premises or any part thereof. He denies that he said that unless they could go into possession of said building without expense to themselves they would not consider the proposition. He denies that he ever made any of the statements as attempted to be shown by the affidavit of the defendant. "You have my answer, so do as you wish, as I am through"; he denies that there was any attempt on the part of the complainants stringing the defendant along, and that they would not take possession of the premises. He denies that he ever said that the deal was off; he denies that he ever made any statements, that he would not sign any lease, other than the one submitted and would not consent to the insertion of any other clauses.

Deponent further says that on or about the 6th day of April, 1926, at the time of the negotiations were had for the letting of these premises, the defendant refused to accept the sum of $110.00 per month as a rental of the premises in question and

after a lengthy discussion about the painting of the place, which the defendant promised to do, especially the second floor of the premises and the outside of the building, the complainants agreed to pay the rental of $125.00 per month beginning May 1st, 1926, for the term of two years with an option for two more years from the date of expiration and for the same rental. After agreeing as above stated the complainants gave to the defendant the sum of $20.00 and in return the defendant gave the complainants a receipt, a copy of which is attached to the bill filed in this cause. After executing the receipt, the defendant said that a lease, in the ordinary form would be prepared by him, agreeing to the terms of said receipt, without any qualifications.

Thereafter, on or about the 8th day of April, 1926, the defendant and complainants met at the premises, in question, and in the presence of a painting contractor. He submitted an estimate that the cost of painting would amount to $175.00. This amount the defendant said was too much and would not pay. Mr. Uszer Sukman said, but you promised to pay it. The question of the lease then came up and the defendant said that he would prepare a lease but that it would be in such form that the complainants would have to refuse to sign same. (Reference to the lease substantiates same, copy of which is attached to bill filed in this cause.)

Defendant then on or about the 9th day of April, 1926, delivered lease prepared by him to complainants. Deponent said that he would take same to his lawyer for approval.

On the same day lease was delivered, he took same to his lawyer, for approval, and was advised

not to sign, the lease containing numerous clauses and conditions never agreed upon or anticipated between the parties. At about 11 o'clock of the same day, and in my presence, David H. Stemer, my lawyer, at whose office I was, and whose advice I sought on this lease, called Mr. Ihle, the defendant, on the phone. Mr. Ihle was not at his office and word was left for him to call Mr. Stemer.

On or about the 10th day of April, 1926, I met the defendant and asked him to go to my lawyer's office to straighten the matter out which the defendant refused to do.

After the defendant had refused to go to Mr. Stemer's office the complainants had prepared a lease according to agreement of the parties and delivered same for approval to the defendant. On or about the 15th day of April. At the same time the deponent delivered a copy of the receipt. This lease the defendant refused to sign, saying that he did not have to sign same and that the place would be rented to another for a higher rental.

On or about the 16th day of April, 1926, the deponent delivered to defendant, at his place of business, executed lease (a copy of which is attached to bill filed in this cause) together with certified check for $105.00 balance of rent due for the first month.

Between the times of delivery of the lease by the defendant on or about April 8th, and date of delivery of the lease by complainants, the defendant called at the complainants' place of business, 371 Central Avenue, Jersey City, daily, trying to get back receipt and offering return of $20.00, but at all times the complainants refused to accept same,

and said that they would go into possession on May 1st, 1926, as agreed.

In anticipation of obtaining possession, showing the good faith of the complainants, there is now enroute, four (4) carloads of furniture to be stored at said premises.

Deponent further says that on or about the 17th day of April, 1926, the defendant called at his place of business together with another party. He has learned since then that this other party was Max A. Stern, lawyer for the defendant. On this particular visit, Mr. Stern was attempting to put the deponent through a third degree, asking him numerous questions about the lease and receipt, and finally after refusing to be bothered by him any longer, he told him that unless he would leave his place of business, and stop bothering him, he would throw him out of his place of business.

USZER SUKMAN.

Sworn and subscribed to before me this 30th day of April, 1926.

BERNARD A. GANNON,
Attorney at Law of New Jersey.

Order Dismissing Rule to Show Cause.

IN CHANCERY OF NEW JERSEY.

Between USZER SUKMAN and ABRAHAM SUKMAN, trading as AMERICAN UPHOLSTERY & SLIP COVER CO., Complainants, and CHARLES IHLE, Defendant.	On Bill, &c.

This matter coming on to be heard in the presence of David H. Stemer, Esq., solicitor of the complainants, and Max A. Sturm, Esq., solicitor of the defendant, upon an order entered herein on the twenty-first day of April, 1926, that the defendant show cause why the said defendant, his agents, assignees, servants and attorneys shall not be enjoined and restrained from executing any agreement of letting, sub-letting or underletting the premises as described in the bill of complaint herein; and upon reading the affidavits of the complainants and the affidavits of the defendant in answer thereto, and counsel having been heard, from all of which it appears, that the complainants are not entitled to the relief sought by them in said rule.

It is, thereupon, on this 12th day of July, 1926, on motion of Max A. Sturm, solicitor for defendant, ORDERED that said rule to show cause be dis-

missed and that the restraint contained therein be dissolved, with costs to be taxed.

E. R. WALKER,
C.

Respectfully advised.

JOHN BENTLEY,
V. C.

COURT OF CHANCERY OF NEW JERSEY

JOHN BENTLEY
Vice Chancellor

Jersey City, N. J., May 17, 1926.

David H. Stemer, Esq.,
15 Exchange Place, Jersey City.

Max A. Sturm, Esq.,
1132 Summit Ave., Jersey City.

Gentlemen:

In Zukman *v.* Ihle, I have come to the determination that no preliminary injunction ought to issue, for a number of reasons but primarily for the one in the recent case of Tansey *v.* Suckoneck (130 Atl. 528). I followed that recently in the case of Venino *v.* Naegele (131 Atl. 895), and I see nothing to differentiate that from the one at bar. It is not a recent ruling that a memorandum relating to an interest in land, not complete in itself, will not be specifically enforced. In this case many important details of a lease have not been touched upon, and the consequence is that any lease that would be

drawn would be forced by the court upon the parties and would not be their agreement at all.

Yours very truly,

JB:ARB JOHN BENTLEY.

COURT OF CHANCERY OF NEW JERSEY

JOHN BENTLEY
Vice Chancellor

Jersey City, N. J., May 19, 1926.

David H. Stemer, Esq.,
15 Exchange Place, Jersey City.

Max A. Sturm, Esq.,
1132 Summit Ave., Jersey City.

Gentlemen:

In considering my letter of the 17th inst. expressing my decision of the motion in Zukman *v.* Ihle, I find that I have fallen into a most egregious error, and that the decision will have to be the exact reverse of that heretofore expressed. The first section of the Statute of Frauds converts into leases at will all leases not put in writing and signed, "except, nevertheless, all leases not exceeding the term of three years from the making thereof". Of course, the lease under consideration was only for a two-year term. The effect of such a lease, namely, one that is not reduced to writing but for a term not exceeding three years, was dealt with by Chief Justice Beasley in Birckhead *v.* Cummins (33 N. J. Law, 44), and the Supreme Court decided that a lease similar to the one involved herein is valid for all purposes from the time the contract is entered into and without entry by the tenant or anything else done under it by either of the parties.

This was followed in Albey *v.* Weingart (71 N. J. Law, 92).

Not only is it decided in the Birckhead case that the first section of the act is complete in itself but no advantage can be given to the defendant by reason of anything said in the second section of the statute. That provides that after a lease, estate, or interest comes into being it shall not be assigned, granted or surrendered unless in writing. I erroneously confused the second section and thought that it had to do with the creation of leases. This, of course, is not so, the purpose of the legislature being to prevent frauds and perjuries for the purpose of unlawfully securing possession of premises of value from a tenant in possession thereof which might be quite as attractive to schemers where it was beyond the power of the owner of the fee to make a demise.

Yours very truly,

JB:ARB JOHN BENTLEY.

Opinion.

IN CHANCERY OF NEW JERSEY.

Between

USZER SUKMAN and ABRAHAM SUKMAN, trading as AMERICAN UPHOLSTERY & SLIP COVER CO., Complainants,

and

CHARLES IHLE, Defendant.

On Bill, &c.

June 22, 1926.

DAVID H. STEMER, Solicitor for Complainants.

MAX A. STURM, Solicitor, JULIUS LICHTENSTEIN, of Counsel, of the Defendant.

OPINION.

BENTLEY, V-C.:

On bill for specific performance of a lease and to enjoin interference by the lessor of the lessees' enjoyment of the land.

On April 6, 1926, the complainants and the defendant conferred about the renting by the former of certain of the latter's premises, and, as a result of their negotiations, the following receipt was prepared and signed by the defendant:

April 6th, 1926.

Received of American Upholstery & Slip Co. Twenty 00/100 Dollars for Rent of as

a deposit for rent of factory 40 Milton Ave.—not private office; lease to be made for two years at $125.00 per month with the privilege to renew for two more years at $125.00 rental. From May 1, 1926, to May 1, 1928.

CHARLES IHLE.

In the proofs submitted on the return of the order to show cause, a great deal of extraneous matter was included, and, in fact, my mind became so confused that I have been obliged to read the bill and affidavits to secure a clear view of the situation. There is no question in my mind that the defendant agreed to demise the premises mentioned in the receipt to the complainant for a period of two years, with an option to renew for a like term. It also appears very probable that the change of mind has been occasioned by an ability to lease the premises to another for a larger rent. The difficulty with which I am faced, however, is the failure to complete the terms of the contract. Without reference to the Statute of Frauds and Perjuries, it is the invariable rule that specific performance will not be decreed unless the contract is complete, certain and definite (Pom. Eq. Jurisp., 4th Ed., Sec. 2186). As recently as Tansey *v.* Suckoneck (130 Atl., 528), the Court of Errors and Appeals has reiterated this rule and declared that wherever it is apparent from the terms of the contract that it was preliminary and not final, and that features left unsettled are to be settled by further negotiations, specific performance will be denied. That this is the rule, counsel for complainants does not deny, but maintains that there is a complete lease to be spelled out of the terms

of the above receipt, and that it is not a memorandum by which the defendant evidenced his willingness to enter into a lease. It is impossible for me to agree with this argument.

Reliance is placed by the complainants upon the pronouncement of the Court of Errors and Appeals, in Wharton *v.* Stoutenburgh (35 N. J. Eq., 266). There is quoted in their opinion the following language of Lord Westbury in Chinnock *v.* Marchioness of Ely (4 DeG. J. & S., 645):

> I entirely accept the doctrine that if there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the Statute of Frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement. * * * But, if to a proposal or offer an assent be given, subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation.

In the Wharton case, letters had passed between the parties for the leasing of land, and later there was a meeting at which all the terms of the lease were agreed upon and incorporated in a formal instrument, which, however, was never signed. A copy of this document was forwarded to the defendant and its receipt acknowledged by him, and he went into possession of the demised premises and retained them for a considerable period of time until a decline in prices of the iron he was taking from the complainant's land caused him to attempt a repudiation of the lease by setting up the Statute of Frauds. Of course it was determined

that the part performance took the transaction out of the statute. The rationale of that opinion, so far as germane to the case at bar, is that, whether or not there has been a complete meeting of the minds depends upon all the facts and circumstances entering into the case. The distinguishing feature between the case in hand and the one at bar is, that in the former the preliminary negotiations were followed by a final lease and agreement, while in the latter no such complete understanding was ever reached. The informality of the receipt copied above is of no moment, and the complainants would be entitled to the assistance of this court if it was complete in all its details.

In these days it is very unusual for the owner of a more or less valuable piece of real estate devoted to business purposes to simply say to a prospective tenant, "I will lease you these premises for two years at a rental of $125" as is frequently done in ordinary dwelling houses. The lease proper is always, or nearly always, accompanied in the same instrument by a formidable list of covenants, some binding upon the lessor but most of them upon the lessee. For example, in this very case each of the parties prepared and submitted to the other forms of formal leases, differing utterly in their respective covenants. The one submitted by the defendant contained no less than twenty-two printed covenants, besides an acknowledgment of the broker's commission, and three covenants in typewriting. Any attempt to comply with the prayer of the bill would not result in compelling the defendant to abide by his bargain because he never completed one. It would

be a demise by the Court of his land for a considerable term upon conditions imposed by the Court. This would be intolerable. Applying the reasoning of Wharton *v.* Stoutenburgh (*supra*), the very preparation and submission of these leases brings the case within the opinion in Tansey *v.* Suckoneck (*supra*). It is clear from the incompleteness of the document upon which the complainants rely, the failure to stipulate any of the usual terms and conditions to be found in leases of such properties and the subsequent action of the complainants themselves, that there was in contemplation on April 6th further requirements to be decided upon by the parties and, therefore, that there was no such complete, certain, and definite understanding between the parties, either written or oral, as it is the policy of this Court to compel the parties to perform.

The order to show cause should be discharged.

Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

Between USZER SUKMAN and ABRAHAM SUKMAN, trading as AMERICAN UPHOLSTERY & SLIP COVER CO., Complainants, and CHARLES IHLE, Defendant.	On Bill, etc.

The complainants, Uszer Sukman and Abraham

Sukman, trading as American Upholstery & Slip Cover Co., hereby appeal from the order, made by the Chancellor on the advice of Honorable JOHN BENTLEY, Vice Chancellor, in the above entitled cause, on the 12th day of July, 1926, and from the whole and every part thereof, to the Court of Errors and Appeals, in the last resort, in all causes.

Dated July 14th, 1926.

DAVID H. STEMER,
Solicitor for and of Counsel
with the Complainants.

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

MAX A. STURM,
Of Counsel with the Complainants.

Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

USZER SUKMAN and ABRAHAM SUKMAN, trading as AMERICAN UPHOLSTERY & SLIP COVER CO.,
Complainants-Appellants,

and

CHARLES IHLE,
Defendant-Appellee.

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

The petition of Uszer Sukman and Abraham

Sukman, trading as American Upholstery & Slip Cover Co., the appellants in the above entitled cause, respectfully show:

1. Petitioners find themselves aggrieved by an order made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Honorable John Bentley, Vice Chancellor, bearing date July 12th, 1926, in a certain cause in said Court of Chancery, wherein Uszer Sukman and Abraham Sukman, trading as American Upholstery & Slip Cover Co., were complainants and Charles Ihle, was defendant, in this respect, to wit:

> "It is thereupon on this 12th day of July, 1926, ORDERED that the said Rule to Show Cause, be dismissed and that the restraint contained therein be dissolved with costs to be taxed."

2. Petitioner appeals from the order aforesaid upon the ground that the same is erroneous in that:

a. The contract in question is complete, certain and definite.

b. That a lease for two years with a two-year option does not come within the purview of Section 1, of "An Act for the prevention of Fraud and Perjuries," (2 Compiled Statutes, p. 2610).

c. That the facts in this cause constitute a lease and not an agreement to make a lease.

d. There is no evidence before the Court to justify the order made in this cause.

e. That the complainants were entitled to an order as prayed for on the rule to show cause, and evidence before the Court.

Petitioner therefore prays that the said order of said Chancellor advised by Honorable John Bentley, Vice Chancellor, made, may be wholly reversed and set aside and for nothing holden, and that petitioner may have such further relief as to this Court may seem proper.

DAVID H. STEMER,
Solicitor and of Counsel with
Complainants-Appellants.

Answer to Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

USZER SUKMAN and ABRAHAM SUKMAN, trading as AMERICAN UPHOLSTERY & SLIP COVER CO.,
Complainants-Appellants,

v.

CHARLES IHLE,
Defendant-Respondent.

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

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained, to be true, for answer thereto, never-

theless, says and admits, that an order was on the twelfth day of July, 1926, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes, that the said order is agreeable to equity, and he prays that the same may be affirmed, with costs to be adjudged to this respondent.

MAX A. STURM,
Solicitor and of Counsel with
Defendant-Respondent.

New Jersey Court of Errors and Appeals

Between

USZER SUKMAN and ABRAHAM SUKMAN, trading as AMERICAN UPHOLSTERY AND SLIP COVER COMPANY,
Complainants-Appellants,

and

CHARLES IHLE,
Defendant-Appellee.

} On Bill, etc.

BRIEF FOR COMPLAINANTS-APPELLANTS.

This is an appeal from an order dismissing rule to show cause obtained by the above named complainants, on or about the 21st day of April, 1926, why the above named defendant in this suit should not be enjoined and restrained from executing any agreement of letting, etc., of premises in question, and also why the said defendant should not be enjoined and restrained from delivery of said premises to any other person than the complainants.

Statements of Facts.

On or about the 6th day of April, 1926, the defendant agreed with the complainants to lease his premises located at 40 Milton Avenue, Jersey City, N. J., for the term of two years with an option of two years at the monthly rental of one hundred twenty-five dollars ($125.00) per month,

beginning May 1st, 1926, and ending May 1st, 1928. After agreeing upon the above terms, the complainants gave to the defendant the sum of $20.00 on account, of payment for the first month's rent and the defendant gave him a receipt, which reads as follows:

"April 6, 1926.

Received of American Upholstery and Slip Cover Co. twenty 00/100.....dollars for Rent of as a deposit for rent of factory 40 Milton Avenue, not private office; *lease to be made,* for Two years at $125.00 per month, with two privilege For two more years at $125.00 rental from May 1st, 1926, to May 1st, 1928."

That on or about the 8th day of April, 1926, defendant submitted unexecuted lease to complainants (State of Case, pp. 6-15), for execution, which the complainants refused to do, the terms of said lease being radically different from those originally agreed upon on the making of said lease on April 6th, 1926.

That on or about the 16th day of April, 1926, complainants delivered lease executed by them (State of Case, pp. 15-17), drawn in accordance with agreement made between them and defendant on said April 6th, 1926, and as further evidenced by the receipt hereinabove set forth.

The defendant refused without reason to sign the latter lease submitted by complainants. Suit was then instituted compelling the said defendant to specifically perform his agreement of April 6th, 1926. Upon the filing of the verified bill, the complainants obtained an order to show cause for temporary restraint which said order to show cause was dismissed on the 12th day of July, 1926. The appeal in this case is taken from said order dismissing the rule to show cause.

POINT ONE.

The agreement is by its terms so definite and certain that it can be enforced as a final agreement and therefore amounts to a final agreement binding the defendant.

It is an elementary doctrine of the courts of equity that they will not specifically enforce any contract unless it be complete and certain. It should also be remarked before proceeding with the discussion, that when a contract has been partly performed by the complainant, and the defendant has received and enjoys the benefit thereof, and the complainant would be virtually remediless unless the contract was performed, the Court, from the plainest consideration of equity and common justice, does not regard with favor any objections raised by the defendant, merely on the ground of incompleteness or uncertainty of the agreement. *Muller* v. *Brautigan,* 84 N. J. Equity, 574.

In Pomeroy's Specific Performance of Contracts, Third Edition, 1926, on page 211:

Essential Matters of the Agreement.

What are the essential matters of the agreement which must appear on the face of the memorandum in order that it may comply with the requirements of the statute? They are:

1—The parties.

2—The subject-matter.

3—The promises upon both sides.

4—The price, and under the original and ordinary language of the statutory provisions

5—The consideration.

Applying the above rules to the case at bar, there can be no doubt that the receipt in question clearly shows that the minds of the parties have met, that a proposition for a contract has been made by one party and accepted by the other, that the terms of this agreement are definitely agreed upon and are final and that part of the mutual agreement is drawing a written lease embodying these terms. The complainants did execute and deliver said written lease according to terms agreed upon. There is not a single material element missing in this receipt. Delivery of possession of the premises is the next step. The construction of the contract now before the Court should be controlled by the law as laid down in *Wharton* v. *Stoutenburgh,* 35 New Jersey Equity at page 273, wherein the Court says:

> "The question as to the degree of the completeness in an agreement requisite to relief by way of specific performance has generally arisen when the negotiations have been conducted in writing, and the inquiry has been whether the writings produced comply with the requirements of the statute. In Chinnock *v.* Marchioness of Ely, 4 De C. J. & S. 645-6, Lord Westbury states, with precision, the doctrine of courts of equity. He says: 'I entirely accept the doctrine that if there has been a final agreement, and the terms of it are evidenced in a manner to satisfy the statute of frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties. As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged, or his agent lawfully authorized, there exist all the materials which

> this court requires to make a legally binding contract. But, if to a proposal or offer an assent be given, *subject to a provision as to a contract,* then the stipulation as to the contract is a term of the assent, and there is no agreement independent of this stipulation.' "

Also see *9 Cyc.,* at page 282, which reads as follows:

> "On the other hand, an agreement to make and execute a certain written agreement, the terms of which are mutually understood and agreed upon, is in all respects as valid and obligatory as the written contract itself would be if executed. If therefore it appears that the minds of the parties have met, that a proposition for a contract has been made by one party and accepted by the other, that the terms of this contract are in all respects definitely understood and agreed upon, and that a part of the mutual understanding is that a written contract embodying these terms shall be drawn and executed by the respective parties, this is an obligatory agreement." (Citing *Wharton* v. *Stoutenburgh, supra.*)

In order to test the agreement for the purpose of ascertaining the certainty and finality of its character we have no right to go beyond the verbiage of the contract under examination. Certain provisions are essential to a contract of this kind to make it comply with the requirements of the Statute of Frauds; others are essential to make it definite and certain as a binding contract. The Court in its opinion seems to intimate that the lease in question is not complete because it does not contain a formidable list of covenants, some binding upon the lessor, but most of them upon the lessee. *Are we to assume from this that a lease made by two laymen not familiar with the usual covenants that may be inserted in a lease is incomplete, and that in order that they may make a binding agree-*

ment it is necessary for them to obtain the services of competent lawyers? What is there in the letting of a warehouse that requires formal covenants to be embodied in the lease?

I submit that the contract before the Court is a complete, forceful and binding agreement.

POINT TWO.

That a lease for two years with a two-year option does not come within the purview of Section One of "An act for the prevention of Fraud and Perjury (2 Compiled Statutes" p. 2610).

A lease for two years with a two-year option is nevertheless a valid lease for two years only. The existence of the option does not render the agreement for a longer period than two years as it might not be exercised and it is entirely possible for the lease to terminate at the definite period agreed upon. Hence, it does not come within the statute above referred to, it being a lease for less than three years.

In *24 Cyclopedia of Law,* at page 961:

> "A lease for a certain term which gives the lessor or the lessee an option to continue the tenancy for an additional term *terminates with the expiration of the first term mentioned unless the option is exercised.* Citing Williams *v.* Mershom, 57 N. J. Law, page 242."

If as above stated the lease for a definite term with an option terminates at the end of the first term unless the option is exercised, then it must be concluded that a two-year lease with a two-year option does not render the agreement for a longer period than two years because, as stated above, the option may never be exercised, and such

lease does not therefore come within the purview of the first section of the Statute of Frauds, it being a lease for less than three years.

The learned Vice-Chancellor in deciding this issue (State of Case, p. 47) said:

> "The first section of the Statute of Frauds converts into leases at will all leases not put in writing and signed, 'except, nevertheless, all leases not exceeding the term of three years from the making thereof.' Of course, the lease under consideration was only for a two-year term. The effect of such a lease, namely, one that is not reduced to writing but for a term not exceeding three years, was dealt with by Chief Justice Beasley in Birckhead *v.* Cummins (33 N. J. Law, 44) and the Supreme Court decided that a lease similar to the one involved herein is valid for all purposes from the time the contract is entered into and without entry by the tenant or anything else done under it by either of the parties. This was followed in Albey *v.* Weingart (71 N. J. Law, 92).
>
> "Not only is it decided in the Birckhead case that the first section of the act is complete in itself but no advantage can be given to the defendant by reason of anything said in the second section of the statute. That provides that after a lease, estate, or interest comes into being it shall not be assigned, granted or surrendered unless in writing. I erroneously confused the second section and thought that it had to do with the creation of leases. This, of course, is not so, the purpose of the legislature being to prevent frauds and perjuries for the purpose of unlawfully securing possession of premises of value from a tenant in possession thereof which might be quite as attractive to schemers where it was beyond the power of the owner of the fee to make a demise."

On June 22nd, 1926, the Court after argument, reconsidered the issue involved herein and con-

cluded that the receipt in question is incomplete (State of Case, at p. 52). The learned Vice-Chancellor said:

> "In these days it is very unusual for the owner of a more or less valuable piece of real estate devoted to business purposes to simply say to a prospective tenant, 'I will lease you these premises for two years at a rental of $125' as is frequently done in ordinary dwelling houses. The lease proper is always, or nearly always, accompanied in the same instrument by a formidable list of covenants, some binding upon the lessor but most of them upon the lessee."

The error committed by the Vice-Chancellor in reversing his former decision lies in the fact that the Vice-Chancellor concludes that the agreement in question comes within the Statute of Frauds. The contention of the complainants is that they and the defendant entered into an oral agreement of letting and that the receipt in question in evidentiary of such oral agreement and that as an oral agreement it is binding upon the defendant.

The complainants further submit that in so far as testing this receipt for the purpose of ascertaining if it is a definite, certain, final and enforceable contract is concerned, *it is error to look beyond the language of the agreement under consideration.* For the purposes just mentioned, it was error for the Vice-Chancellor to look as he did and say:

> *"The lease proper is always, or nearly always, accompanied in the same instrument by a formidable list of covenants, etc."*

It may be further added that the opinion of the Vice-Chancellor of May 19th (State of Case, pp. 47-48), clearly shows that there are sufficient facts

before the Court to constitute a lease, and in so doing the learned Vice-Chancellor governs himself by the decision in our Court of Errors and Appeals in the case of *Birkhead* v. *Cummings,* 33 New Jersey Law, page 44.

Having once concluded that the facts in issue constitute a lease and those facts are embodied in a written memorandum, how can the Court now say that the memorandum is incomplete, even assuming that the decision of the Court is that the agreement in question comes within the Statute of Frauds?

POINT THREE.

That the facts in this cause constitute a lease and not an agreement to make a lease.

The Court may have intended to bring the issue involved herein within the rule enunciated in the case of *Cooper* v. *Aiello,* 93 N. J. Law, at page 338, etc., where the Court said:

> "We think that under the doctrine declared in Charlton *v.* Real Estate Co. (Court of Errors and Appeals), 67 N. J. Eq. 629, the plaintiff's action for a breach of the verbal agreement to make a lease and to give defendant an option of two years more is not maintainable, for the reason that the agreement to make a lease for one year and to give an option for two years more was a contract relating to and concerning an interest in lands, tenements and hereditaments, and in order to be an enforceable agreement, the statute of frauds requires that there should be some memorandum or note thereof in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized. Comp. Stat., p. 2612, Par. 5.

The main question therefore to be considered here is whether the agreement between the parties is *an agreement to make lease or a lease.* The complainants contend that the negotiations between them and the defendant resulted in a *lease,* all of the terms of letting were agreed upon. In addition thereto the complainants made a deposit of $20.00 on account of first month's rent. In *McCulloch* v. *Lake & Risley Co.,* 91 N. J. Law, at page 381, by the Court:

> "The plaintiff leased a property in Atlantic City of the defendant from July 6th to October 1st. The terms were agreed to on July 6th, and the plaintiff at once sent his check to the real estate agents for the first payment. Meantime, and before the lease was in fact executed the defendants leased to another customer at $1,200 instead of $800 for the season. The plaintiff refused to release the defendant, and brought suit for damages for breach of the contract. But two questions are raised: (1) Was the contract complete since both parties contemplated the execution of a lease? (2) What was the proper measure of damages? The first question is answered for us in the affirmative by the rule in Wharton *v.* Stoutenburgh, 35 N. J. Eq. 266, which has been followed in Trenton & Mercer County Traction Co. *v.* Trenton, 90 N. J. Laws, 378, 101 Atl. 562, the opinion in which has recently been approved by the Court of Errors and Appeals, 103 Atl. 1054."

The above decision clearly shows that the facts in this case constituted a *lease* and *not an agreement to make a lease.*

It may also be added that if a note or memorandum was necessary to satisfy the fifth section of the Statute of Frauds in this case the receipt in question (State of Case, p. 17) is in compliance with such statute entitling the complainants to the relief prayed for.

POINT FOUR.

There is no evidence before the Court to justify the order made in this cause.

The agreement as made by the parties on April 6th, 1926, is evidenced by the receipt in question. It is also in evidence that the defendant leased the same premises to some one other than the defendant for larger rent (State of Case, pp. 25-34).

The learned Vice-Chancellor in his opinion (State of Case, p. 50) says:

> "There is no question in my mind that the defendant *agreed to demise the premises* mentioned in the receipt to the complainant for a period of two years, with an option to renew for a like term. It also appears very probable that the change of mind has been occasioned by an ability to lease the premises to another for a larger rent."

Following out the reasoning of the Court as above set forth, the Court should have had no difficulty in deciding the issue in favor of the complainants. By deciding in favor of the defendant the Court has made it possible for this defendant to plead the statute of frauds in order that he may perpetrate a fraud.

POINT FIVE.

The complainants were entitled to an order as prayed for on the rule to show cause and evidence before the Court.

The Court seems to conclude that the submission of formal leases by both sides shows that the agreement of the parties is incomplete. While it is true that both parties sub-

mitted formal leases and the one submitted by the defendant contained more than twenty-five covenants, yet reference to lease executed and delivered by the complainants (State of Case, pp. 15-17) clearly shows that said lease is complete in all terms, a good and valid lease and at no variance from the agreement of the parties of April 6th, 1926, as evidenced by the receipt (State of Case, p. 17).

CONCLUSION.

The Court has by its opinion concluded that there is present a lease, and that the defendant seeks to avoid the agreement because of ability to get a higher rental, as more fully expressed in the opinion (State of Case, p. 50):

> "There is no question in my mind that the defendant agreed to demise the premises mentioned in the receipt to the complainant for a period of two years, with an option to renew for a like term. It also appears very probable that the change of mind has been occasioned by an ability to lease the premises to another for a larger rent."

then expresses a doubt whether an owner of a more or less valuable piece of real estate devoted to business purposes to simply say, "I will lease you these premises for two years at a rental of $125" as is frequently done in ordinary dwelling houses.

If the lease in the case at bar is a good lease for a dwelling house, then it is a lease cognizable for all purposes.

In conclusion it is respectfully submitted that there was a complete, certain and definite agreement between the parties, and that the order of the Chancellor advised by Honorable John Bently, Vice-Chancellor, may be wholly reversed and set aside and for nothing holden, and the appellants have such further relief as to this Court may seem proper.

DAVID H. STEMER,
Solicitor and Of Counsel
with Complainants-Appellants.

APPEAL PRINTING CO., 22 THAMES ST., NEW YORK CITY
[5705]

Order to Show Cause, Injunction.

IN CHANCERY OF NEW JERSEY

Between

USZER SUKMAN and ABRAHAM SUKMAN, trading as AMERICAN UPHOLSTERY & SLIP COVER CO.,

Complainant,

and

CHARLES IHLE,

Defendant.

} On Bill, etc.

This matter being opened to the Court by David H. Stemer, solicitor and of counsel with the complainants, and upon reading and filing the bill of complaint and the affidavit thereto annexed, and the Court being satisfied of the sufficiency of the claim made in this cause, it is on this 21st day of April, 1926,

ORDERED, that the defendant Charles Ihle show cause before the Chancellor at the Chancery Chambers in the City of Jersey City, on Monday, April 26th, next, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, why the said defendant, his agents, assignees, servants and attorneys shall not be enjoined and restrained from executing any agreement of letting, subletting or underletting or negotiating any agreement of letting, subletting or underletting of the premises in question, and also why the said defendant should not be enjoined and restrained from delivering possession of said mentioned premises to any other person than the complainants; and it is

FURTHER ORDERED that in the meantime and until the final hearing on this rule to show cause, the defendant, his agents, assignees, servants and attorneys be and are hereby enjoined and restrained from entering into any agreement of letting, subletting or underletting or negotiating any agreement of letting, subletting, or underletting the premises in question and from delivering possession of the premises in question to any other person than the complainants until the further order of this Court; and it is

FURTHER ORDERED, that a true copy of this order certified by the solicitor of complainant, be served upon the defendant Charles Ihle at his usual place of abode upon any member of the family over the age of fourteen (14) years, or by leaving same at his principal place of business, on the date hereof.

Respectfully advised,

JOHN BENTLEY,
V. C.

E. R. WALKER,
C.

New Jersey Court of Errors and Appeals

Between USZER SUKMAN and ABRAHAM SUKMAN, trading as AMERICAN UPHOLSTERY AND SLIP COVER COMPANY, Complainants-Appellants, and CHARLES IHLE, Defendant-Appellee.	On Bill, &c.

BRIEF FOR DEFENDANT-APPELLEE.

Statement.

On or about April 6th, 1926, the complainants and defendant were negotiating for the leasing of certain premises of the defendant located at 40 Milton Avenue, Jersey City, New Jersey. As a result of such negotiations, the complainants paid the sum of $20.00, and the defendant gave them a receipt, a copy of which follows:

"April 6, 1926.

Received of American Upholstery and Slip Cover Co. twenty 00/100 ..... dollars for Rent of as a deposit for rent of factory 40 Milton Avenue, not private office; lease to be made, for Two years at $125.00 per month, with the privilege for two more years at $125.00 rental from May 1st, 1926, to May 1st, 1928."

On the eighth day of April, 1926, the defendant submitted a form of lease to complainants (State

of Case, pp. 6-15), which the complainants refused to sign, because the terms and conditions contained therein were not as agreed upon (State of Case, p. 2, Par. 4, also p. 5, lines 10-20). The complainants did nothing in the matter, although the defendant called at the complainants' place of business on numerous occasions from said 8th day of April, 1926, until the 17th day of April, 1926, except that on the 16th day of April, 1926, they submitted a form of lease (State of Case, pp. 15-17). This lease defendant refused to sign because it did not contain some of the covenants and conditions agreed upon to be embodied in the formal lease to be drawn as set forth in said receipt. That another item left unsettled at the time of the payment of the $20.00, was the painting of the interior of the factory building (State of Case, pp. 18-19; also p. 24 and p. 42).

The complainants having refused to execute a lease, the defendant leased said premises to the Remy-Millring Co., Inc., on the 17th day of April, 1926 (see State of Case, pp. 25-34).

Complainants did not submit an executed lease to the defendant until the 19th day of April, 1926 (see State of Case, pp. 15-17).

The bill of complaint and the order to show cause and rule staying further proceedings were not served upon the defendant until the 21st day of April, 1926, four (4) days after the defendant had given possession of said premises to the Remy-Millring Co., Inc.

After several hearings before the Hon. JOHN BENTLEY, Vice-Chancellor, the order to show cause for temporary restraint was dismissed on the 12th day of July, 1926, upon the ground that the agreement upon which the complainants rely, was not complete and that there was no completed, certain and definite understanding between the parties.

POINT ONE.

The receipt or agreement is not complete in itself, and, therefore, will not be specifically enforced. It is not a lease in itself, but at best an agreement to make a lease.

That the complainants themselves did not consider the receipt the final agreement, and that there was in contemplation on April 6th, 1926, further requirements to be decided upon by the parties, is borne out by complainants' own actions in submitting formal leases.

In the case of *Tansey* v. *Suckoneck*, 130 Atl., p. 528, the Court holds:

> "In actions for specific performance, based on a writing relied on as a contract, *where it is apparent from the writing that it is not intended as the final and complete agreement of the parties*, but that there are outstanding features of the bargain to be settled by further treaty and to be embodied in a completed contract, equity will refuse its aid."

In its opinion in this case the Court cites from the language found in *Brown* v. *Brown*, 33 N. J. Eq., 650, at page 655:

> "The bargain must have been completely determined between the parties, and its terms definitely ascertained. *So long as negotiations are pending over matters relating to the contract, and which the parties regard as material to it, and until they are settled and their minds meet upon them, it is not a contract, although as to some matters they may be agreed.*"

To the same effect are:

> *Bettcher* v. *Knapp*, 94 N. J. Eq., 433;
> *Schneider* v. *Crawford*, 131 Atl., p. 687;
> *Venino* v. *Naegele, et ux.*, 131 Atl., 895.

Also see 35 Corpus Juris, *Landlord and Tenant*, page 1197, par. 511:

> "INTENTION OF PARTIES: In determining whether an instrument is a present demise or merely an agreement to lease, the controlling consideration is the intention of the parties, to be collected from the whole instrument. * * * While the intention should be determined primarily from the writing itself, where the writing is ambiguous or doubtful, consideration may be given to the surrounding circumstances or to a construction given the instrument by the parties;"

Citing *Clark* v. *Mylkes*, 95 Vt., 460, 115 Atl., 492; in which case the landlord had prepared a lease and presented it to the tenant, and the tenant refused to sign or accept it, not because he already had a lease, but because it was not according to the agreement, the instrument was construed as an agreement for a lease, and not a lease.

Also 35 Corpus Juris, *Landlord and Tenant*, page 1144, par. 395:

> "NEGOTIATIONS LOOKING TO FORMAL LEASE: Mere negotiations are not of themselves a sufficient basis for a binding lease. Where a written or oral agreement contains all the terms necessary for a binding contract, the mere fact that a more formal lease is contemplated does not affect the binding force of such agreement as a lease; but if it is the intention of the parties that the agreement is not to be binding as a lease until a formal lease is executed, such intention will be given effect, and the mere fact that a payment is made by the contemplated lessee when the preliminary agreement is made does not affect the foregoing rule. Moreover, the fact that a formal lease was intended is strong evidence that the oral agreement was not intended to be binding."

> "Whenever, therefore, the transaction has

not passed beyond the condition of negotiation or treaty, there can be no specific performance. A contract must be actually concluded, for otherwise there are no rights upon which the equitable remedy can operate." (Sec. 58. Pomeroy Spec. Perf.)

"And, if it is doubtful from all the evidence in the case, whether a contract was concluded or not, equity will not grant its specific relief." (Sec. 58, *supra.*)

"The relief of specific performance is discretionary, and when the testimony is substantially in balance, or weighs about evenly, or when it leaves the court in doubt, the undoubted rule is that specific performance will be denied, and the parties will be left to their remedy at law." *Rabinowitz, et al.* v. *Rooney, et al.*, 128 Atl., p. 882.

POINT TWO.

The undisputed fact is that defendant, after signing the receipt, actually executed and delivered a lease to a third party of the premises in question.

The rule that the lease first in time prevails, even if the first lease is not recorded, does not apply in this case, since the memorandum is not a lease, but merely an agreement to make a lease. Hence, there is but one lease in existence, namely, the lease made subsequent to the signing of the receipt; and the court will not compel a person to do that which he cannot do, namely, execute a second lease to the complainants, when there is already a lease in existence.

In *Flattau* v. *Logan, et al.*, 72 N. J. Eq., 338; 65 Atl., 715, the Court holds:

"It has been repeatedly held by this Court that it will not decree the specific performance

by a vendor of a contract for the sale of land where the vendor is not the owner of the land which he has agreed to convey. The inability of the Court to enforce such a decree is alone a sufficient ground for its refusal to act in such cases." *Welsh* v. *Bayaud,* 21 N. J. Eq., 186; *Peeler* v. *Levy,* 26 N. J. Eq., 330; *Ten Eyck* v. *Manning,* 52 N. J. Eq., 47, 27 Atl., 900; *Hopper* v. *Hopper,* 16 N. J. Eq., 147, 149.

"It is frequently said, in cases of this class, that inasmuch as the vendee cannot enforce specific performance against his vendor who is without title, such a vendor will not be permitted to enforce the contract against his vendee. Contracts of this class are, therefore, frequently regarded as without that mutuality of obligation and remedy which should exist to entitle them to be specifically enforced at the instance of either party."

See also:

Public Service Corp. of N. J. v. *Hackensack Meadows Co.,* 72 N. J. Eq., 285, 64 Atl., 976;

Friedlander v. *Lehr, et al.,* 129 Atl., p. 241.

CONCLUSION.

Complainants contend that the receipt is a lease and not an agreement to enter into a lease.

If this contention is correct, then complainants have stated themselves out of court, since if it is a lease, there can be no relief by specific performance—their remedy would be complete by an action at law.

The injury, if any, sustained by complainants can be adequately redressed by pecuniary damages. Nowhere in their pleadings do complainants allege that they have suffered or will suffer irreparable injury, if they fail to obtain possession

of the premises agreed to be leased to them. They do not allege that any special benefits will be theirs by reason of the possession of said premises, nor that they cannot lease some other suitable place for storage or warehouse purposes. In fact they have another warehouse as stated by defendant (State of Case, p. 35, last line). And this is not denied by the complainants.

There is no doubt that equity will protect legal rights in real estate, where the right though formally denied is yet clear on facts which are not denied, and the injury is irreparable. But that is not the situation in this case.

Irreparable injury is defined as:

> "The injury shall be a material one, and of such a nature as cannot be adequately redressed by pecuniary damages."
>
> *Hodge* v. *Giese,* 43 N. J. Eq., 350.

Complainants have not suffered such injury.

In conclusion it is respectfully submitted that there was no such complete, certain and definite understanding between the parties, either written or oral, as can be specifically enforced by this Court, and that the order of the Chancellor, advised by Honorable John Bentley, Vice-Chancellor, be affirmed, with costs to be adjudged to this respondent.

MAX A. STURM,
Solicitor and of Counsel,
with Defendant-Appellee.

APPEAL PRINTING CO., 22 THAMES ST., NEW YORK CITY