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Bill of Complaint.

BILL OF COMPLAINT.

Filed February 13, 1925.

In Chancery of New Jersey

To his Honor Edwin Robert Walker, Chancellor 10
of the State of New Jersey:

Samuel Gross and Passie Gross, who reside in
the City of Newark, in the County of Essex and
State of New Jersey, respectfully show:

1. That on the 25th day of September, 1924,
they entered into a written contract with the
Gottfried Krueger Brewing Co., a New Jersey
corporation, by the terms whereof complainants
agreed to buy and said corporation agreed to
sell to them, all those certain lands and prem- 20
ises situate, lying and being in the City of New-
ark, in the County of Essex and State of New
Jersey, together with the buildings thereon and
certain items of personal property contained
therein, more particularly described as follows:

Plot 1—Situate on the Easterly side of
Beacon Street beginning at a point 171.46
feet southerly from the corner of the south-
east corner of Beacon Street and South 30
Orange Avenue, having a frontage of ap-
proximately 180 feet on Beacon Street and
extending through to Rankin Street, with a
frontage of approximately 180 feet on Ran-
kin Street.

Plot 2—Situate on the easterly side of
Beacon Street, beginning 141.46 feet south-
erly from the said southeasterly corner of
Beacon Street and South Orange Avenue,
having a frontage of approximately 30 feet 40

Bill of Complaint.

on Beacon Street and a depth of approximately 100 feet.

10 Plot 3—Situates on the easterly side of Beacon Street, beginning at a point 351 feet southerly from the said southeasterly corner of Beacon Street and South Orange Avenue, having a frontage of approximately 30 feet on Beacon Street and a depth of 97.60 feet on the southerly side and 97.92 feet on the northerly side respectively.

20 2. Complainants agreed to pay to the said Gottfried Krueger Brewing Co. the sum of Seventy Thousand Dollars (\$70,000) for said premises, and on said 25th day of September, 1924, paid to the said corporation the sum of Twenty-five Hundred Dollars (\$2,500) on account of the purchase price of said premises, all of which more fully and at length appears by reference to the said agreement, a copy of which is hereto annexed, marked "Exhibit A" and made a part hereof.

30 3. Said agreement provides, among other things, that a more detailed agreement was to be executed between the parties at some future date and that said agreement, so to be executed, should contain an agreement that "The said premises are to be conveyed by bargain and sale deed and said deed shall contain a covenant that no part of said premises shall be used as a brewery or for the manufacture or sale of wine, beer or spirituous liquors or malt beverages known as 'near beer,' said covenant to run with the land."

40 4. That on or about the 26th day of September, 1924, William Yeskel and Samuel Yeskel, partners trading as "Yeskel Supply Co.," by

Bill of Complaint.

their duly authorized agent, one Mr. Alfred Popik, of the City of Newark, N. J., opened negotiations with complainants for the sale to them by complainants of the property which they had agreed to purchase from the said Gottfried Krueger Brewing Co., on September 25, 1924, as hereinbefore stated.

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5. That as a result of said negotiations, complainants, on October 2, 1924, entered into an agreement with the said William Yeskel and Samuel Yeskel, partners trading as "Yeskel Supply Co.," by the terms whereof complainants agreed to sell and said William Yeskel and Samuel Yeskel, partners trading as "Yeskel Supply Co.," agreed to buy the above-described premises for the sum of Eighty-five Thousand Dollars (\$85,000), all of which will more fully appear by reference to the written agreement between the parties, a true copy whereof is hereto annexed and made a part hereto, marked "Exhibit B."

20

6. That by the terms of said agreement of October 2, 1924, between complainants and the said William Yeskel and Samuel Yeskel, partners trading as "Yeskel Supply Co.," it was agreed among other things, that complainants were to deliver title to said premises in the same way as agreement held by complainants on the above-mentioned property, which agreement is marked "Exhibit A" hereof.

30

7. That prior to the execution of said agreement between complainants and said defendants, William Yeskel, partner and agent of Samuel Yeskel, and the person who carried on all of the negotiations with complainants, in conse-

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10 quence whereof said agreement of October 2,
1924, marked "Exhibit B" hereof, was concluded
between the parties, was shown the agreement
between complainants and the said Gottfried
Krueger Brewing Co. annexed hereto and
marked "Exhibit A," so that prior to the mak-
ing of the agreement marked "Exhibit B" an-
nexed hereto, said William Yeskel was thor-
oughly familiar and conversant with all and
singular the terms of the agreement marked
"Exhibit A" annexed hereto, and particularly
was the said William Yeskel, partner and agent
of Samuel Yeskel, familiar with the fact that
said agreement, marked "Exhibit A" hereto,
provided that the deed to be given by the said
Gottfried Krueger Brewing Co. to complainants
20 was to contain a covenant that no part of said
premises shall be used as a brewery or for the
manufacture or sale of wine, beer or spirituous
liquors or malt beverages known as "near beer,"
said covenant to run with the land.

30 8. After the making of the agreement marked
"Exhibit B" hereto, said defendants, William
Yeskel and Samuel Yeskel, partners trading as
the "Yeskel Supply Co.," requested that com-
plainants enter into a more formal and detailed
agreement with them, than that of October 2,
1924, marked "Exhibit B" hereof, and requested
complainants to meet them at the offices of the
defendants' attorney, Philip J. Schotland, Esq.,
of Newark, N. J., on the 3rd day of October,
1924, which complainants did.

40 9. On said day defendants, accompanied by
Alfred Popik, Esq., the broker who negotiated
all of the agreements herein referred to, pre-
sented themselves at the office of the defendants'

Bill of Complaint.

attorney, Philip J. Schotland, Esq., and there took up the matter of the drawing of a supplemental agreement to that designated as "Exhibit B" herein, with one Helen Jedell, a clerk employed in the office of the defendants' attorney; that thereupon the defendants exhibited to said Helen Jedell the original of the agreement between complainants and defendants, marked "Exhibit B" hereof, and also exhibited to the said Helen Jedell a copy of the agreement marked "Exhibit A" hereof; that thereafter, in pursuance of the agreement had between complainants and defendants, complainants met defendants at the office of the defendants' attorney, and complainants' attorney then and there exhibited to said Helen Jedell, complainants' copy of the agreement marked "Exhibit A" hereto, so that said Helen Jedell, who represented the defendants in the making of the final agreement between the parties hereto, was thoroughly conversant with all the terms of the agreements marked "Exhibits A" and "B" respectively, and annexed hereto.

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10. That thereupon it was agreed between complainants and defendants, that the said Helen Jedell, legal representative of the defendants, was to draw an agreement between complainants and defendants supplemental to that of October 2, 1924, marked "Exhibit B" hereto, which said agreement was to be predicated upon the agreements marked "Exhibits A" and "B" respectively and to contain all of the provisions contained in said agreement, together with such other provisions as might be further agreed upon between the parties.

40
11. That in pursuance of said understanding the said Helen Jedell proceeded to and did draw

Bill of Complaint.

a supplemental agreement between complainants and defendants, to that of October 2, 1924, marked "Exhibit B," and did deliver said agreement to complainants' attorney, a copy of which agreement is hereto annexed and marked "Exhibit C" and made a part hereof.

- 10 12. That said Helen Jedell, acting on behalf of the defendants as their legal representative in the making of said agreements, either through an oversight or by deliberate omission, failed to make mention in said agreement marked "Exhibit C" that the conveyance by complainants to defendants of said premises was to be made according to the agreement marked "Exhibit A"; and particularly did she by mistake or through wilful omission, fail to make mention in
20 said agreement marked "Exhibit C" that the deed of conveyance to be given by complainants to the defendants under the terms of said agreement marked "Exhibit C," was to contain a covenant contained in the agreement marked "Exhibit A," to wit:

30 "That said deed shall contain a covenant that no part of said premises shall be used as a brewery or for the manufacture or sale of wine, beer or spirituous liquors, or malt beverages known as 'near beer,' said covenant to run with the land."

although she as well as complainants and defendants well knew that this provision should have been contained in said agreement.

13. That through mistake and oversight on the part of complainants they failed to notice this omission until the date set for the passing of said title as will more fully hereinafter appear.

Bill of Complaint.

14. Defendants at all times understood and agreed that the agreement marked "Exhibit C" was to be drawn so as to include the terms of agreements marked "Exhibits A" and "B" respectively; that the conveyance of the title to be made by complainants to defendants was to be made subject to the restrictions and conditions imposed upon the complainants by the terms of the agreement marked "Exhibit A" and that it would be impossible for the complainants to make a conveyance to the defendants free of the restrictions imposed upon the complainants by the terms of the agreement marked "Exhibit A," all of which was well known to the said Helen Jedell, legal representative of the defendant and also to the defendants. 10

15. That by the delivery of said agreement marked "Exhibit C," by the said Helen Jedell to the complainants she represented that said agreement marked "Exhibit C" was drawn in accordance with and in conformity to the provisions contained in agreements marked "Exhibits A" and "B" respectively and complainants, by their attorney, relying upon this representation accepted said agreement marked "Exhibit C" in this belief. 20

16. Said representation so made by the said Helen Jedell, legal representative, was in fact false and fraudulent in as much as she well knew that said agreement marked "Exhibit C" was not drawn in conformity with the terms and conditions of the agreements marked "Exhibits A" and "B" respectively in that said first named agreement failed to contain a provision that the deed to be given by the complainants to the defendants thereunder was to contain a covenant against the use of the premises in question as a 30 40

Bill of Complaint.

brewery or for the manufacture or sale of wine, beer or spirituous liquors, or malt beverages known as "near beer," said covenant to run with the land, as provided for by agreement marked "Exhibit A" hereof.

10 17. That defendants are not in any way connected with the brewing or liquor business; did not intend to use said premises in connection with the manufacture or sale of intoxicating liquors or beverages of any sort; that said defendants are engaged in the wholesale paper bag and twine business and represented at all times that they desired said premises for use as a storage warehouse, in connection with their business.

20 18. That on the 5th day of January, 1925, the day set for the passing of title from complainants to defendants, the representatives of the Gottfried Krueger Brewing Co., these complainants and their attorney, were present at the office of Philip J. Schotland, Esq., prepared to deliver a deed to the defendants for said premises in accordance with their true understanding; that the defendants failed to appear and the said Helen Jedell, their legal representative, stated that she was unable to account for the absence
30 of the defendants; that thereupon without examining the deed which complainants had prepared to deliver to the defendants, the said Helen Jedell would not accept said deed because it contained a covenant against the use of said premises as a brewery or for the manufacture or sale of wine, beer or spirituous liquors or malt beverages known as "near beer" said covenant to run with the land.

40 19. That thereupon complainants examined said agreement marked "Exhibit C" and were

Bill of Complaint.

aware for the first time that provisions for the insertion of this covenant in the deed had been omitted by the defendants' legal representative in the preparation of said agreement; that the fact that said agreements marked "Exhibits A" and "B" respectively made mention of or referred to such a covenant be inserted in the deed, was called to the attention of the said Helen Jedell; and complainants also called to her attention the fact that provisions for said covenant to be inserted in the deed, had been omitted from said agreement marked "Exhibit C," through error and mistake on their part and through mistake or wilful omission on the part of the defendants, and their legal representative who prepared it, but she, speaking on behalf of the defendants, wrongfully and fraudulently insisted that she would not recognize the validity of complainants' contention and refused to consider said covenant as being included in the agreement between complainants and defendants, and wrongfully and fraudulently refused to consent to the insertion of said provision for said covenant in the agreement marked "Exhibit C," all of which was done by her on behalf of and by the authority of the defendants.

20. That at no time was it ever mentioned or agreed upon by and between the respective parties hereto, that the agreement marked "Exhibit C" was to omit making mention of the fact that the deed to be given by complainants to the defendants was not to contain a covenant against the use of the premises, or any part thereof for the manufacture or sale of wine, beer or spirituous liquors, or malt beverages known as "near beer," said covenant to run with the land.

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Bill of Complaint.

21. That prior to the execution of the agreement marked "Exhibits B" and "C" respectively, the defendants and also their legal representative knew that the deed which complainants were to receive from the Gottfried Krueger Brewing Co. would contain a covenant against the use of the premises in question, or any part thereof as a brewery or for the manufacture or sale of wine, beer or spirituous liquors, or malt beverages known as "near beer," said covenant to run with the land.

22. Prior to and on the 31st day of January, 1925, complainants served a notice upon the defendants demanding that they consent to the insertion in said agreement marked "Exhibit C" of a clause providing for the insertion in the deed to be delivered by the complainants to the defendants under the terms of said agreement of a covenant against the use of said premises for the manufacture or sale of wine, beer or spirituous liquors or malt beverages known as "near beer" said covenant to run with the land, and advising the defendants that complainants would be present at the office of the defendants' attorney, Philip J. Schotland, Esq., on Wednesday, February 4, 1925, at ten o'clock in the forenoon for the purpose of receiving their answer as to whether or not they would consent to the insertion of said provision in said agreement marked "Exhibit C."

23. Said notice further informed the defendants that on said day and hour, and at said place, complainants would tender to them a deed for said premises in accordance with the true agreement for the sale of said property, made between the parties hereto.

Bill of Complaint.

24. On said day and at said hour complainants together with the representatives of the Gottfried Krueger Brewing Co. were present at the office of the said Philip J. Schotland, Esq., prepared to pass title to the defendants according to the true agreement between them. The defendant, William Yeskel, and the said Helen Jedell were also present; said Helen Jedell, legal representative of the defendants informed complainants that the defendants would not consent to the reformation of said agreement in the particulars aforestated, and refused to accept a deed from the complainants to the defendants to said premises, drawn in accordance with the true agreement between the parties, without assigning any reason for her so doing; that thereafter she asked to be shown the deed and upon it being delivered to her, she submitted it to the inspection of Mr. Philip J. Schotland, who thereupon stated that the defendants would not accept the deed because of the restrictive covenant contained therein against the use of the premises as a brewery and also because the complainants did not have title to the premises at the time but stated that the defendants would accept a conveyance of said title direct from the Gottfried Krueger Brewing Co. according to the terms of the agreement between the said Gottfried Krueger Brewing Co. and complainants, marked "Exhibit A" but complainants refused to consent to this offer.

25. That it was at all times understood and agreed between the parties hereto that the agreement marked "Exhibit C" was to contain all of the provisions of the agreement marked "Exhibit B" and that the property in question was to be delivered by the complainants to the de-

Bill of Complaint.

defendants in the same way and according to the agreement marked "Exhibit A."

26. That defendants at all times knew that complainants did not have actual legal title to the premises in question but that they had an agree-
10 ment to purchase the same and that at the time fixed for the consummation of this transaction, the said Gottfried Krueger Brewing Co. would deliver a deed for said premises to complainants and complainants in turn would deliver a deed to the defendants, all of which complainants and the said Gottfried Krueger Brewing Co. were ready, willing and able to do both on the 5th day of January, 1925, and again on the 4th day of February, 1925.

27. That subsequently to the meeting of Jan-
20 uary 5, 1925, the defendants offered to take title from the complainants to said premises providing complainants would forego fifteen thousand dollars (\$15,000) of the purchase price; that subsequently defendants modified their offer and agreed to take title from the complainants if they would forego twelve thousand five hundred dollars (\$12,500) of the purchase price, and again offered to take title from the complainants if
30 they would forego ten thousand dollars (\$10,000) of the purchase price, all of which complainants refused to do.

28. That on or about the 2nd day of February, 1925, complainants, in reply to notice served upon the defendants, a copy of which is hereto annexed and marked "Exhibit D," received the following communication, to wit:

Bill of Complaint.

Newark, N. J. February 2, 1925.

Mr. Samuel Gross,
c/o Messrs. Silberman & Grosman,
776 Broad Street,
Newark, N. J.

Dear Sir:—

Replying to yours of the 29th. ult., would 10
say, that there was no oversight on any-
body's part, as stated in your letter, and
the formal agreement that was made, con-
tained everything that was agreed upon, and
nothing was done, or intended to be inserted,
restricting the use of the premises for the
manufacture of Wines, Beer or Spirituous
Liquors, or Malt Beverages, known as "Near
Beer."

Very truly,
Yeskel Supply Co. 20
Per H. J.

28. Complainants and the said Gottfried
Krueger Brewing Co. have at all times been and
are now ready to convey title to said premises to
the defendants according to the true agreement
between the respective parties hereto.

Complainants are without adequate remedy in
the courts of law and therefore pray: 30

1. That William Yeskel and Samuel Yes-
kel, partners trading as "Yeskel Supply
Co." the defendants herein, may answer this
bill of complaint and each allegation herein
made.

2. That the written contract dated Octo-
ber 22, 1924, between the defendants as
parties of the second part, and complainant
and Passie Gross, his wife, party of the
first part, referred to as "Exhibit C" herein, 40

Bill of Complaint.

may be reformed and corrected so as to include in it the following provision:

10 “That the deed to be given by the complainant and Passie Gross, his wife, to the defendants, shall contain a covenant that no part of said premises shall be used as a brewery or for the manufacture or sale of wine, beer or spirituous liquors or malt beverages known as ‘near beer,’ said covenant to run with the land.”

3. That upon the reformation of said agreement in accordance with complainants’ prayer, a decree be made directing the defendants to specifically perform said contract as reformed.

20 4. That a writ of subpoena do issue directing the defendants to answer this bill of complaint.

30 5. That the defendants be decreed to specifically perform the contract made between them and complainants on October 22, 1924, notwithstanding the restrictive covenant in the deed tendered by complainants to defendants, against the use of said premises as a brewery or for the manufacture or sale of wine, beer or spirituous liquors or malt beverages known as “near beer,” said covenant to run with the land.

6. That complainants may have such such further and other relief as may be agreeable to equity and good conscience.

SILBERMAN & GROSMAN,
Solicitors for and of Counsel
with Complainants.

40 Subpoena served on defendants personally,
February 17, 1925.

Answer.

ANSWER.

Filed February 21, 1925.

The defendants, William Yeskel and Samuel Yeskel, partners trading as "Yeskel Supply Co.," of the City of Newark, County of Essex and State of New Jersey, answering the bill of complaint, say: 10

1. They have no knowledge as to the allegations contained in paragraph 1 of the bill of complaint, but believe same to be true.

2. They have no knowledge as to the allegations contained in paragraph 2 of the bill of complaint, but believe same to be true.

3. They have no knowledge as to the allegations contained in paragraph 3 of the bill of complaint, except the information imparted to them by the complainants at the time when these defendants were negotiating to consummate their agreement with the complainants. 20

4. They deny the allegations in paragraph 4 of the bill of complaint.

5. They admit the allegations contained in paragraph 5 of the bill of complaint, except the allegations that Alfred Popik was the agent of the defendants, as to which allegations they say that in truth and in fact, Alfred Popik was the agent of the complainants. 30

6. They admit the allegations set forth in paragraph 6 of the bill of complaint.

7. They deny the allegations set forth in paragraph 7 of the bill of complaint, and say that in truth and in fact, complainants refused to show defendants, or either of them, their agree- 40

Answer.

ment with the Gottfried Krueger Brewing Co., and only explained the terms of the mortgage and cash payments required, and what personal property was to go with the real estate.

10 8. They deny the allegations set forth in paragraph 8 of the bill of complaint, and say that in truth and in fact, Exhibit "B" referred to in the bill of complaint was agreed upon as a temporary receipt, and was to be followed by a formal agreement, setting forth all of the terms which agreement it was agreed between the parties should be approved by counsel for the defendants.

20 9. They deny all of the allegations in paragraph 9 of the bill of complaint, except that they admit that all of the parties met at the office of Philip J. Schotland, and that Miss Helen Jedell, in his behalf, represented the defendants in the arranging for and drawing of the formal agreement for the purchase of the premises, described in the bill of complaint, by these defendants from the complainants. They further deny that the agreement between the complainants and the Gottfried Krueger Brewing Co. was exhibited to said Helen Jedell, in their presence, or as far as they know, at any time.

30 10. They deny all of the allegations contained in paragraph 10 of the said bill of complaint, and say that in truth and in fact, all of the terms were carefully gone over at the time referred to in said bill of complaint, at the office of Philip J. Schotland, and reported to said Helen Jedell, who was to draw, and did draw the formal agreement embodying the terms agreed, which agreement was to be drawn, and was in fact drawn in the presence of the parties, and

40

Answer.

was not a supplemental agreement, but was a formal agreement, covering all of the terms agreed upon between the complainants and the defendants, and taking the place of the previous oral and written arrangements.

11. They deny all of the allegations contained in paragraph 11 of said bill of complaint, except that they admit, after the agreement was drawn, it was to be delivered to complainants' attorney for reading, and consideration by him, before complainants executed same, and say that this was done. All of the said arrangements were made in the presence of complainants, and complainants' attorney. 10

12. They deny all of the allegations in paragraph 12 of the bill of complaint, and say that in truth and in fact, the covenant referred to in said paragraph was never mentioned, and was not known either to defendants, or to said Helen Jedell, and never agreed upon as a term to be inserted in the agreement between complainants and defendants. They further deny that they had any knowledge of said covenant until complainants, and their attorney, met Miss Jedell, for the purpose of consummating the agreement entered into between the parties, at which time Miss Jedell noticed said covenant in the proposed deed, and objected to same, and so informed these defendants who ratified her action in objecting to the insertion of said covenant, which they had never agreed upon and never had knowledge of. 20 30

13. They deny all of the allegations in paragraph 13 of the bill of complaint, but say that in truth and in fact, after the agreement was drawn by the said Helen Jedell representing Philip J. Schotland, that said agreement was submitted 40

Answer.

to complainants' attorney, and held there for several days, and one or two changes made therein, at the suggestion of complainants' attorney, and then resigned by the defendants, after said changes had been made. Said covenant, claimed by complainants to have been omitted through
10 an oversight, was never mentioned, or agreed upon, or made known to said Helen Jedell, or to these defendants, at the time when the negotiations were being consummated and said agreement was being drawn.

14. They deny the allegations set forth in paragraph 14 of the bill of complaint, and say that the true facts are set forth in answer to previous paragraph of said bill of complaint.

20 15. They deny the allegations set forth in paragraph 15 of the bill of complaint.

16. They deny all of the allegations set forth in paragraph 16 of the bill of complaint, and say that the true facts are set forth above in answer to previous allegations in the said bill of complaint.

30 17. They admit that they are not in anyway connected with the brewery or liquor business, and did not intend to use said premises in connection with the manufacture or sale of intoxicating liquor or beverages of any sort, but that they are engaged in the wholesale burlap bag business, and intended at the time of the purchase to possibly use said premises for their business; but they deny all of the other allegations in paragraph 17 of the bill of complaint, and say that in truth and in fact, they also expected to have the benefit of the bargain and
40 relied upon a resale of said premises at a much

Answer.

higher price than they agreed to pay for the same, in the event that at any time in the future the laws were amended to permit the manufacture and sale of beer, and also they desired to keep their title free for the sale of the said premises to any brewer, who might desire same for the manufacture of near beer, if by such sale, they could make a sufficient profit. 10

18. Answering the allegations contained in paragraph 18 of the bill of complaint, these defendants say that on the 5th of January, 1925, the day set for the passing of title, they were delayed in appearing at the office of Philip J. Schotland, because of trouble they had with their automobile in getting to said office, and when they appeared to consummate said agreement, they were informed by their attorney, that the deal could not be consummated because the deed exhibited to their representative, contained a restrictive covenant, contrary to the terms of the agreement; they deny all of the other allegations in said paragraph of the bill of complaint. 20

19. They deny all the allegations in paragraph 19 of the bill of complaint, except that in truth and in fact, said Helen Jedell did not wrongfully, or fraudulently, refuse to consent to the insertion of said covenant in said agreement, or deed, but in accordance with the actual terms of the agreement, as agreed upon, refused to consent to any change in it, by inserting such a new term which would wrongfully affect the value of the said lands and premises. 30

20. They deny all of the allegations in paragraph 20 of the bill of complaint, and say that there never was any mention made to them, these 40

Answer.

defendants, of any restrictive covenant against said premises.

21. They deny all of the allegations set forth in paragraph 21 of the said bill of complaint.

10 22. They admit the allegations set forth in paragraph 22 of the bill of complaint.

23. They admit the allegations set forth in paragraph 23 of the bill of complaint.

20 24. They admit that they refused to accept the deed as set forth in paragraph 24, which contained the restrictive covenant, upon advice of their attorney, and they say that what actually took place on said February 4, 1925, at ten o'clock in the forenoon was, that their attorney, Philip J. Schotland, refused to accept the deed because of the restrictive covenant contained therein against the use of the premises, as a brewery, which was contrary to the terms of the agreement entered into with the complainants; and further, that the complainants did not have title to said premises. And these defendants further answering say, that their attorney, without consulting them, did state that he would advise the acceptance of a deed with the reduction in price,
30 to compensate for the restrictive covenant, and did mention that the reduction should be the difference between the price complainants were selling said premises for to these defendants, and the price agreed upon to be paid to the Gottfried Krueger Brewing Co.

25. They deny the allegations set forth in paragraph 25 of the bill of complaint.

40 26. They deny the allegations contained in paragraph 26 of said bill of complaint, and say

Answer.

that in truth and in fact, the Gottfried Krueger Brewing Co. were ready to deliver the deed to complainants, provided the complainants would pay the Gottfried Krueger Brewing Co. the consideration required by the terms of the agreement between the Gottfried Krueger Brewing Co. and the complainants, but the complainants refused to pay said consideration, and never placed themselves in a position where they were able to deliver a deed to these defendants. 10

27. Answering paragraph 27 of the bill of complaint, these defendants admit that negotiations were going on between complainants and defendants, through the complainants' broker, for the purpose of effecting a sale of said premises to these defendants, and subject to the restrictive covenant and that various prices were mentioned as compensation to these defendants for said restrictive covenant, but that the negotiations failed, and the parties did not agree upon any specific sum. 20

28. They admit the allegations set forth in paragraph 28 of the bill of complaint, but deny the allegations set forth in paragraph 28 in the bill of complaint, which is duplicated and should be 29. 30

PHILIP J. SCHOTLAND,
Solicitor and Counsel with Defendants.

Order of Reference.

REPLICATION.

Filed April 20, 1925.

Complainants join issue on the answer of the defendants.

10 SILBERMAN & GROSMAN,
Solicitors for and of Counsel
with Complainants.

ORDER OF REFERENCE.

Filed April 20, 1925.

20 This matter being opened to the Court by
Robert D. Grosman of the firm of Silberman &
Grosman, solicitors for and of counsel with com-
plainants, and it appearing that Philip J. Schot-
land, Esq., solicitor for the defendants, has con-
sented hereto:

30 It is, on this 20th day of April, 1925, on motion
of Robert D. Grosman, of the firm of Silberman
& Grosman, solicitors for complainants, ORDERED
that the above-entitled cause be referred to Hon-
orable J. H. Backes, one of the Vice-Chancellors
of this Court, to hear the same for the Chan-
cellor and to report thereon to him and to ad-
vise what order or decree should be made therein.

E. R. WALKER,
C.

I hereby consent to the entry of the foregoing
order.

PHILIP J. SCHOTLAND,
Solicitor of Defendants.

A true copy.

40 THOMAS BARBER,
Clerk.

Designation.

DESIGNATION.

Filed April 21, 1925.

This matter being opened to the Court by Robert D. Grosman, of the firm of Silberman & Grosman, solicitors of the complainants, and it appearing that Philip J. Schotland, Esq., solicitor of the defendants, has consented hereto: 10

It is, on this 21st day of April, 1925, ORDERED that the 23rd day of June, 1925, at the hour of ten o'clock in the forenoon, at the Chancery Chambers, in the City of Newark, be designated as the time and place for the hearing of the above-entitled cause.

JOHN H. BACKES,
V.-C.

Consented to. 20

PHILIP J. SCHOTLAND,
Solicitor of Defendants.

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Notice of Hearing.

NOTICE OF HEARING.

Filed June 17, 1925.

To Philip J. Schotland, Esq., solicitor of the
defendants:

10 TAKE NOTICE of the hearing of this cause be-
fore the Honorable John H. Backes, the Vice-
Chancellor of this Court to whom the said cause
has been referred, on the 23rd day of June, 1925,
at the hour of ten o'clock in the forenoon, at
the Chancery Chambers, in the City of Newark,
the time and place designated by the order of
the said Vice-Chancellor made on the 21st day
of April, 1925.

20 SILBERMAN & GROSMAN,
Solicitors of Complainants.

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J. Frederic Wherry, direct.

IN CHANCERY OF NEW JERSEY.

June 23, 1925.

Between

SAMUEL GROSS,

Complainant,

and

WILLIAM YESKEL, *et als.,*

Defendants.

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Transcript of shorthand notes of testimony taken in the above-entitled matter before his Honor John H. Backes, Vice-Chancellor, at the Chancery Chambers, in the City of Newark, New Jersey, in the presence of Robert D. Grosman for complainant and Philip J. Schotland for defendant.

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J. FREDERIC WHERRY, sworn in behalf of complainant.

Direct examination by Mr. Grosman.

Q You are a counselor-at-law of this State?

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A Yes, sir.

Q You were attorney of the Gottfried Krueger Brewing Company? A Yes, sir; I represent the Gottfried Krueger Brewing Company.

Q I show you this writing and ask you whether you recognize that as having been given by your client to Mr. Gross? A Yes, sir; that was prepared in our office and given to Mr. Gross—preliminary contract—that is a memo-

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J. Frederic Wherry, direct.

randum of a contract to be executed in the future.

Mr. Schotland: It is not a contract to which we are a party or binding on us.

Mr. Grosman: We will connect it up.

10

Q Now, subsequent to the making of this writing was there an agreement entered into between the brewery and Mr. Gross? A There was; yes, sir.

Q Is that the agreement (handing witness paper)? A This is the agreement that was signed by the Gottfried Krueger Brewing Company and delivered to Mr. Gross through Mr. Silberman, his attorney.

20

Q Can you tell us whether since that time Mr. Gross has accepted title to the property? A Title has passed since this to Mr. Gross.

Mr. Grosman: I would like to have the papers marked.

(Paper marked Exhibit C. 1.)

(Paper marked Exhibit C. 2.)

30

Q I show you certified copy of a deed from the Gottfried Krueger—(interrupted).

The Court: Put the deed in evidence. It is acknowledged.

Mr. Grosman: I offer these documents in evidence.

(Paper marked Exhibit C. 3.)

40

Q Now, were you present in the office of Mr. Philip J. Schotland on the 5th day of January, 1925? A I was.

J. Frederic Wherry, direct.

Q Will you tell us who else was present? A As I recollect it, Miss Helen Jedell was there, representing Mr. William Yeskel; Mr. Silberman was there, representing Mr. Samuel Gross; I was there, representing the Gottfried Krueger Brewing Company; Mr. Yeskel, of the Brewing Company, and Mr. Hahn, of the Brewing Company, was there on that day—were there on that day. 10

Q Was the complainant there, Mr. Gross? A Mr. Gross was there; I so stated.

Q Was the subject of the passing of this title from Gross to Mr. Yeskel discussed? A It was; yes, sir. I had gone over there representing the Brewing Company on the suggestion that title was to be closed at the office of Mr. Schotland on that morning. I got there about ten-thirty. 20

Q Were you ready to convey title—or rather your clients—were they prepared to convey title to Mr. Gross? A I had the deed from the Gottfried Krueger Brewing Company duly executed to Samuel Gross with me and the discharge of the United States Brewing Company mortgage which was against the property.

Q Do you know whether Mr. Gross was prepared to convey the title which you were about to convey to him to Mr. Yeskel? A I understood that that was to be done in that transaction. It was a triangular transaction. 30

Q Did you hear any discussion between Mr. Silberman, who represented Mr. Gross, and Miss Jedell, concerning the passing of that title from Mr. Gross to Yeskel? A Miss Jedell said at that time that they had just received a letter from the Secretary of State, in the morning's mail, to the effect that the United States Brew- 40

J. Frederic Wherry, direct.

ing Company, through which this title was reached, or come to the Gottfried Krueger Brewing Company, had been dissolved in 1922, and that the deed—that Mr. Schotland thought the deed made by the trustees in dissolution after the actual dissolution of the company—his off-
10 hand opinion was, that that deed was not effective to convey the property, and for that reason they would not want to take title at that time. He also, upon looking at the deed, inspecting the deed from the Gottfried Krueger Brewing Company to Samuel Gross, said, “Where did these restrictions come from?” referring to the restrictive covenants in the deed against the use by Gross of the property for brewery purposes or manufacturing of spirituous or malt
20 liquors or near beer, and to that, as I recollect it, I replied that they had been taken from the agreement between the Gottfried Krueger Brewing Company and Mr. Gross—it was in accordance with the terms of that agreement.

Q Did you hear any conversation between—
(interrupted).

Mr. Schotland: Let the witness finish his answer.

30 The Witness: And she then said that she understood that there were to be no restrictions against the property at that time.

Q Did you hear any conversation between Miss Jedell and Mr. Silberman concerning the subject of this covenant against the use of the premises as a brewery, and so forth? A Yes, sir; there was a discussion between Mr. Silberman and Miss Jedell in respect to the knowledge
40 that Miss Jedell had of the terms of the memo-

J. Frederic Wherry, direct.

randum of agreement between Mr. Gross and the Gottfried Krueger Brewing Company, dated September 25, 1924.

Q Can you tell us, please, the substance of that conversation? A The substance was that Mr. Silberman claimed that Miss Jedell and Mr. Yeskel, her client—or Mr. Schotland's client—both knew of the existence of this agreement and had agreed to take the property in accordance with the terms of that agreement. 10

Q And what did she say to that, if anything? A Miss Jedell, as I recollect it, said that she did not so understand.

Q Did she say whether or not she had seen the agreement?

The Court: September 25th agreement?

Mr. Grosman : Yes, sir; the agreement of September 25th, marked Exhibit C. 1. 20

A I do not recollect that. I have a complete memorandum made on the date of that interview. If I may refer to that I may be able to refresh my mind on that point. I dictated it on that day. I do not see here any memorandum that I made saying that Miss Jedell had said that she had seen that agreement, so I cannot recall whether she did or did not. I do not recall that on that occasion. 30

Q Was either one of the Yeskels present during that meeting? A No. Mr. Yeskel, as I recollect it, was not there. Miss Jedell said she had called him up at five minutes to nine and asked him to be down at the office at ten o'clock, and he had not appeared when we left the office at half-past eleven or twenty minutes to twelve.

Q Now, were you present in Mr. Schotland's office again on February 4, 1925? A I was. 40

J. Frederic Wherry, direct.

Q Will you please give who was there on that occasion? A Mr. Schotland was there part of the time; Miss Jedell was there; Mr. Silberman, Mr. Yeskel—Mr. William Yeskel—Mr. Gross and I.

10 Q And what was the purpose of that meeting? A The purpose of that meeting was to make this triangular transfer from the Gottfried Krueger Brewing Company to Samuel Gross and from Gross to Yeskel, or the Yeskel concern.

Q And were your clients prepared on that day to transfer title to Gross? A Yes, sir.

Q And do you know whether any offer was made by Gross to transfer the title to Yeskel in your presence? A Yes, sir; there was.

20 Q What was the result of that interview? A The result of that offer was that Mr. Schotland refused the tender of the deed because, as I recollect it, Mr. Gross was not then the owner of the title which he was tendering to transfer, and there was some discussion in relation to that. I said he would be the owner of the title as soon as Mr. Yeskel paid the consideration over to him and he in turn paid it over to the Gottfried Krueger Brewing Company and received his deed. I had then, at the same time, 30 the discharge of the mortgage which was held by the United States Brewing Company on the property. And he also refused the tender of the deed because of these restrictive covenants which were not in accordance with the original agreement between Mr. Yeskel and Mr. Gross.

Q Was Mr. Popik present on these occasions?

A Mr. Popik was present on that occasion.

40 Q Was he present on the first occasion of January fifth? A I will have to refresh my

J. Frederic Wherry, direct.

memory about that. Yes, he was present on January fifth.

Q Was there any proposition made by you—to you by Mr. Schotland or by Miss Jedell to take this property direct from you for the original consideration paid by Mr. Gross?

Mr. Schotland: I object.

10

A There was; yes, sir.

Q Will you tell us what was said on that subject and by whom it was said?

The Court: Was Yeskel there?

The Witness: No; he was not a lawyer.

The Court: Was he there?

The Witness: He was on the occasion of February twenty-fourth—or fourth.

20

The Court: That is when you are speaking about now?

The Witness: Yes, sir.

Q Was he present in the room with you? A Mr. Yeskel was outside of the room most of the time of that conversation on February fourth. I do not know whether he was present at that moment or not. He was out in the next room and in the hall most of the time, but he did come in once or twice. I couldn't tell whether he was present at that moment or not. I have my doubts.

30

Q Will you tell us what the substance of that proposition was? A Well, I did not take it very seriously at the time, but as I recollect it he asked us if we would make—(interrupted).

The Court: Who asked?

40

J. Frederic Wherry, direct.

The Witness: Mr. Schotland asked me whether I would have the brewery convey directly to his client for the purchase price that we had—our client—my client had agreed to sell to Mr. Gross for.

10 The Court: Clear or subject to the restrictions, or wasn't that mentioned?

The Witness: I think it was mentioned. I said, "Of course, I cannot convey it because we are under contract to convey it to Samuel Gross," and I said, "You won't take it anyway with the restrictions on it." He says, "Well, if you got rid of the agreement to Gross would you convey to Yeskel without the restrictions?" I said, "That would be up to the Brewing Company. If they were willing to do it I would do it," 20 but I did not think they would. Whether there was anything said about conveying it with the restrictions—I think there was something said about conveying it with the restrictions. I said I thought if Mr. Gross released us we would be willing to convey it directly with the restrictions.

30 Adjourned until ten o'clock tomorrow morning, June 24, 1925.

J. Frederic Wherry, direct.

SECOND DAY.

June 24, 1925.

Continuation of hearing pursuant to adjournment in the presence of the parties as before.

10

J. FREDERIC WHERRY, recalled for further

Direct examination by Mr. Grosman.

Q Mr. Wherry, what was the wind-up of that conference in the office of Mr. Schotland on January 5, 1925?

The Court: You mean what was the result?

20

Mr. Grosman: Yes, sir.

A The conference was adjourned. The whole conference—transaction was adjourned to January eighth, the following Thursday.

Q By consent of all parties concerned? A By the consent of the parties.

Q Now, you have refreshed your mind from certain notes, and I ask you whether those notes purport to cover the entire subject of the conference both as relates to Mr. Gross's end of it and also as relates to the Gottfried Krueger Brewing Company end? A No. Those notes were made primarily so that I would have the facts in mind, with Mr. Hahn and Mr. Bethel representing the Gottfried Krueger Company, to refresh our memories in case we needed it later, but it was primarily made for the purpose of showing the tender to Mr. Gross of the Gottfried Krueger Brewing Company deed and

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40

J. Frederic Wherry, cross.

the transactions between the brewery and Mr. Gross.

Q You did not attempt to cover in those notes Mr. Gross's end of this transaction? A No, sir; I did not.

10 *Cross examination by Mr. Schotland.*

Q Mr. Wherry, do you recall on the first occasion when you were at my office with the endeavor to pass title to this property that when the question arose over the restrictions there was an adjournment taken for the purpose of giving Mr. Gross an opportunity to get the Brewing Company to release the restrictions?

A I remember that at that time Mr. Silberman asked me to step out into the hall. I did so.
20 And he asked me then in that connection whether I could get the directors of the Brewing Company to remove those restrictions. I told him that I thought it would be probably hopeless to do it, but suggested that we go to the brewery and see Mr. William C. Krueger, the vice-president, which we did.

Q And there was then, to your knowledge, an effort made by Gross and or through his counsel to get the brewery to release?
30

The Court: We have what the witness said. I can form my own conclusion.

Q Now, on the other occasion when you were at my office, that was February 4, 1925? A Yes, sir.

Q On that occasion, at the suggestion of either you or I, we dictated to one of my stenographers a memorandum of what took place, did we not? A You did.
40

J. Frederic Wherry, cross.

Q Have you a copy of that memorandum? A Yes, sir.

The Court: That is the one you referred to yesterday?

The Witness: No, sir. The memorandum I referred to yesterday was the memorandum made by me of the meeting of January 5th. He refers to the later meeting on February 4th. I have a copy. 10

Q Now, by looking at it, refresh your recollection, will you, and state clearly on what grounds I rejected the supposed tender at that time? A You rejected the deed tendered by Mr. Silberman on two grounds: first, that it doesn't conform with the terms of the contract between Samuel Gross and the Yeskel Supply Company in that the said contract does not provide for the restrictive covenants above recited. 20

The Court: This is what date?

The Witness: February 4, 1925.

The Court: Your other notes were of February fifth?

The Witness: January fifth. Second, on the ground that Samuel Gross is not the owner of said property and has no title other than the right to procure title if he complies with the terms of his agreement with the brewing company. 30

Q Now, Mr. Wherry, it is a fact, isn't it, that at that time Samuel Gross had not taken title to the brewery property? A He had not taken title. I was there for the purpose of passing title. 40

J. Frederic Wherry, re-direct.

Q When did he actually take title? A Some time—(interrupted).

Q Is the deed here?

Mr. Grosman: Yes, certified copy is in evidence.

10 The Court: Does that give the exact date?

The Witness: No; that don't give the date of the transfer. The deed had been executed and ready for delivery at this time.

Q Earlier? A Yes, sir.

Q It is dated back in January? A I could give you the exact date by referring to my lawyer's diary, but I do not remember.

20 Q The certified copy of the deed shows that it was recorded on June 4, 1925.

The Court: Counsel says that title was passed the day before.

Mr. Schotland: Counsel says title was passed June third. That is this very month. That is all, Mr. Wherry.

30 *Re-direct examination* by Mr. Grosman.

Q The adjournment of the passing of title from the brewery company to Gross, was that adjournment taken with your consent?

Mr. Schotland: I object. It is immaterial.

40 Q Was that adjournment made with the consent of you and your client? A Yes, sir. My client was not there.

Alfred Popik, direct.

The Court: On February fourth, or January, it was continued from time to time?

The Witness: Yes, sir, from time to time.

Q You understood that the title would be transferred to Gross and by Gross to Yeskel? 10

The Court: Yes, it is all in.

ALFRED POPIK, sworn in behalf of complainant.

Direct examination by Mr. Grosman.

Q Mr. Popik, what is your business? A 20
Real estate operator.

Q And how long have you been in the real estate business? A Twenty-five years.

Q Do you know Samuel and William Yeskel, the defendants in this case? A Yes, sir.

Q Do you know Samuel Gross, the complainant? A Yes, sir.

Q And you were the broker in this transaction? A Yes, sir, between Gross and Yeskel. 30

Q Between both Gross—you were the broker in the transaction between Gross and the brewing company whereby he bought the property in question? A Yes, sir.

Q And you were also the broker between Gross and Yeskel? A Yes, sir.

Q In this transaction? A Yes, sir.

Q I show you the memorandum between Samuel Gross and the brewery marked Exhibit C. 1 and ask you if you have ever seen this in- 40

Alfred Popik, direct.

strument before? A Yes, sir; I saw that before. I delivered that to Mr. Gross myself.

Q And I show you writing dated October 2, 1924, purporting to be an agreement between the Yeskel Supply Company and Samuel Gross and ask you whether you have seen this paper before?

10 A Yes, sir.

Q Did you see the party sign the instrument?

A Yes, sir.

Q Was the paper drawn up in your presence?

A Yes, sir.

Q And is that your name on there? A Yes, sir.

Mr. Grosman: I wish to offer this in evidence.

20 Mr. Schotland: I object. The bill recites and shows that annexed is a copy of that agreement as well as of the formal agreement, provided that the terms of that agreement be entered into between the parties, and it annexes a copy of the formal agreement. Now, the formal agreement takes the place of that—that is merged, and that is incompetent as evidence to show the agreement at all.

30 The Court: It is competent, but what it shows is another thing. I think I will let it in. I have got to have it before me.

(Paper marked Exhibit C. 4.)

Q Mr. Popik, what date was the writing marked Exhibit C. 4 signed by Mr. William Yeskel? A October 2, 1924.

40 Q At that time did you have in your possession a copy of the memorandum agreement marked Exhibit C. 1? A Yes, sir.

Alfred Popik, direct.

Q Did you show your copy of Exhibit C. 1 to Mr. William Yeskel before Exhibit C. 4 was signed?

Mr. Schotland: I object. It is coming down to the crux of what he wants to prove. Whether he will be able to establish anything with it or not is a legal proposition I expect to argue later, but in the meantime I object to getting in the crux under leading questions. 10

The Court: The form of the question is objectionable. You may answer.

Q Did you? A I have shown the agreement, yes, sir.

Q Did Mr. Yeskel read—(interrupted) 20

Mr. Schotland: If your Honor please—(interrupted)

Mr. Grosman: May I finish my question?

Q Did Mr. Yeskel, at the time you say you showed him your copy of Exhibit C. 1 read the paper? A He read it over with me—in my presence.

Mr. Schotland: I objected before. 30

The Court: I overrule the objection

Q Did he read that paper? A He did.

Q Did you discuss any of the terms of the memorandum receipt marked Exhibit C. 1 with Mr. Yeskel?

The Court: C. 1 is the preliminary agreement between the brewing company and Gross? 40

Alfred Popik, direct.

Mr. Grosman: Yes, sir.

Q Did you discuss with Mr. Yeskel before the signing of Exhibit C. 4 any of the terms of Exhibit C. 1?

Mr. Schotland: I object.

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The Court: Objection overruled.

A Yes, sir. Mr. Yeskel asked me if the property could be used for his purposes—for his line of business. I told him, "It is out of the zoning limits"; that there had been many manufacturing businesses down there, and the neighborhood is much more clear for his line of business. He took me in back and showed me how much room he would need—he was very crowded for space to file away his merchandise and I told him it would just make the place—there is plenty of room in there for that purpose. He thought probably the city would have some objection to his business. I said not to my knowledge.

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The Court: Is this important? Is this what you want?

Mr. Grosman: It is not.

30

The Court: Then stop your witness. I do not know what you are seeking.

Q Did you discuss with Mr. Yeskel before the signing of the receipt—(interrupted)

The Court: What was done—what was said?

Q —Exhibit C. 4, the restriction against the use of these premises as a brewery? A Yes, sir.

40

Alfred Popik, direct.

Q What did you say to him and what did he say to you? A It can be used for any purpose outside of a brewery.

Q How did that conversation come up between you and Yeskel? A Because that is the conditions the brewery had in the contract, and when we read it that clause was right there. 10

Q Can you tell us how it is that the copy of the agreement marked Exhibit C. 4 contains the following words, "The property is to be delivered the same way as the agreement held by said Samuel Gross on the above mentioned property," in original type while the balance of the agreement is apparently in carbon? A When I made out the agreement—practically receipt, not agreement—when I made out the receipt Mr. Yeskel, before he accepted and signed, wanted me to insert that the property shall be conveyed to him the same as Mr. Gross's agreement calls for. 20

Q And who typed those words in the paper? A Mr. Yeskel's typewriter.

Q In your presence? A Yes, sir.

Q And in the presence of Mr. Yeskel? A Yes, sir.

Q And then what did you do with that paper? A I took that paper over to Mr. Gross and had him sign it and delivered the check to him for a thousand dollars. 30

Q Do you remember going down to Mr. Schotland's office shortly after the agreement marked Exhibit C. 4 was signed by Yeskel and by Gross? A Yes, sir.

Q Whom did you go there with? A I went there with Mr. Yeskel the following day.

Q Whom did you see there? A We met Miss Jedell there. 40

Alfred Popik, direct.

Q Did any conversation take place between you three concerning the sale of this property by Gross to Yeskel? A Mr. Yeskel had told Miss Jedell that he purchased the property from Mr. Gross and he showed her the receipt that I gave him and after she read it she said—(interrupted)

10 Q What receipt do you refer to? A This receipt here (indicating).

Q (Witness indicates receipt Exhibit C. 4.) Yes; go ahead. A And she said she would like to know what is in the agreement.

Q What agreement? A That Mr. Gross had with the brewery.

Q You refer to—(interrupted) A This agreement here (indicating).

20 Q (Witness refers to Exhibit C. 1.) A Yes. I had a copy of that agreement in my pocket and I pulled it out and handed it to Miss Jedell to look at.

Q Didn't she read it? A She read it.

Q Did she make any comment on the agreement? A She just remarked that she knew Mr. Hahn who signed it.

30 Q Now, what happened after that? A Then Mr. Silberman and Mr. Gross came in and they started to draw the agreement for the sale.

Q You refer to the formal agreement? A Formal agreement.

Q Is this the agreement that you refer to? A This is not the agreement that I refer to.

Q Is this the agreement you refer to? A I am not sure whether this is it.

Q Will you look at it, please? A This is the agreement, yes, sir.

Alfred Popik, direct.

Mr. Grosman: I offer this agreement in evidence.

(Paper marked Exhibit C. 5.)

Q Now, when Mr. Silberman and Mr. Gross came into the office what conversation took place between them and Miss Jedell and Mr. William Yeskel? A They started to talk about the terms of the agreement to be drawn. Miss Jedell wanted to draw the agreement and Mr. Silberman agreed to Miss Jedell drawing the agreement, but she objected to Mr. Gross's agreement because in his agreement it was a bargain and sale deed and she wanted a warranty deed for her client. 10

Q What agreement do you refer to? A That first preliminary agreement, Exhibit C. 1. 20

The Court: Who was to draw the agreement, Miss Jedell?

The Witness: Miss Jedell.

The Court: And that was a formal agreement, the last formal agreement?

The Witness: Last formal agreement, yes, sir.

The Court: I understood you to say it was the preliminary agreement that she was then drawing. The last formal agreement. 30

The Witness: Last formal agreement.

The Court: The preliminary agreement had been drawn by you?

The Witness: By the Krueger Brewery and by Mr. Wherry.

The Court: No, the preliminary agreement between Gross and Yeskel?

The Witness: Yes, sir. 40

Alfred Popik, direct.

The Court: By you?

The Witness: Yes, sir, by me, in the form of receipts, when I made the deposit.

10 Q Did you see Mr. Silberman deliver to Miss Jedell a copy of the preliminary agreement between Gross and the brewery marked Exhibit C. 1? A Miss Jedell asked for the agreement and Mr. Silberman kind of hesitated in handing it to her. Then Miss Jedell remarked she knew all that was in it, he needn't be afraid to hand it to her.

The Court: Speak louder and more distinctly.

20 The Witness: Miss Jedell asked Mr. Silberman to show her the agreement from the brewing company to Mr. Gross so that she may be able to draw her agreement between Gross and Yeskel, and Mr. Silberman kind of hesitated in handing her the agreement. Then Miss Jedell made the remark that she knew the contents—she is aware of what is in the contract—he need not be afraid to show it to her.

30 Q Did he give it to her? A He did. Then he handed her his agreement that he held between—the preliminary agreement between the brewery and Mr. Gross.

Q You refer to Exhibit C. 1? A Yes, sir.

Q What did Miss Jedell do, if anything, with that agreement? A She called in the stenographer and started to draw up the agreement between Mr. Gross and Mr. Yeskel.

40 Q That is the formal agreement we have here? A Yes, sir.

Alfred Popik, direct.

Q In doing that did she refer to the agreement marked C. 1? A She did, in several points. She remarked something about some stuff that was to be removed by the brewery and they got into a kind of an argument and she remarked to Mr. Yeskel that he cannot get any more than what Mr. Gross bought from the brewery—can't get any more. 10

The Court: Who remarked?

The Witness: Mr. Silberman remarked to Mr. Gross.

Q Mr. Silberman made that remark? A Yes, sir.

Q To whom? A Miss Jedell made the remark to Mr. Yeskel. 20

The Court: What?

The Witness: That Mr. Gross cannot deliver any more than what he has got in his agreement. They were supposed to remove some stuff there from the brewery and they didn't understand, just some of the hardware and piping, and Mr. Yeskel didn't understand it. Then Miss Jedell answered him that he can't give him any more than what he bought himself. 30

Q Now, did you at any time during the negotiations between Gross and Yeskel ask Mr. Yeskel what he intended to use these premises for?

A I did.

Q What did he say? A For his business—for the burlap and rag business.

Q Now was that the end of that conference in Mr. Schotland's office? A To my knowledge that was the end of it. 40

Alfred Popik, direct.

10 Q When next did you meet the parties to this suit in Mr. Schotland's office? A On the day the agreement was signed, the formal agreement, I was there. There was a search made on the property before the agreement was signed and Mr. Silberman objected to giving a warranty deed to his client until he finds out if the property is clear, and I think they adjourned the signing of the agreement for two weeks or three weeks—I am not sure—until the search is completed, and when the search was completed I was there when they signed the—that was when the search was brought in—I wasn't there when the signatures were attached to the contract.

Q Were you in Mr. Schotland's office on January 5, 1925? A Yes, sir.

20 Q Do you remember anything being said about a restrictive covenant being omitted from the last agreement marked Exhibit C. 4—C. 5? A I heard some argument about that.

Q What did you hear?

The Court: Was the agreement signed on January fifth or when?

30 The Witness: It was signed before January fifth, your Honor, but I was not there when the agreement—(interrupted)

The Court: When was it signed, Mr. Grosman—when was the formal agreement signed?

Mr. Schotland: October twenty-eighth by the complainant, October twenty-second, by the defendant.

The Court: And when was this meeting that Miss Jedell was about to write the agreement, the formal agreement?

40 Mr. Grosman: October third.

Alfred Popik, cross.

Q What did you hear said at the meeting of January fifth concerning the restrictive covenants? A I heard Miss Jedell make a remark to Mr. Wherry, the lawyer, that she did not think that the deed—that the people who executed the deed had a right to execute a deed as the corporation was dissolved. Mr. Wherry answered her, he said that “You need not worry, everything is all right,” and while they were arguing inside about the deed Mr. Silberman came out in the hallway and told Mr. Gross about it, that Miss Jedell refuses to accept the title on account of a restriction in the deed that was not in the agreement. 10

Q Now, did you hear any conversation between Mr. Silberman and Miss Jedell concerning the covenants in question? A On the fifth of January? 20

Q Yes. A Yes, sir, Mr. Silberman said—
(interrupted)

The Court: He said to you?

The Witness: Right in there. I was there in the office when they were talking. Mr. Silberman said to Miss Jedell that she had the contract before her and she drew the contract and she knew what was in it. 30

Q What did she say to that? A She said she didn't care about the agreement Mr. Gross had, the last agreement counts.

Cross examination by Mr. Schotland.

Q Popik, how much commission are you getting on this sale? A My regular commission—broker's commission—\$4,000. 40

Alfred Popik, cross.

Q I show you a paper dated October 2, 1924, is this the original receipt you drew up, or had the stenographer write out in Mr. Yeskel's office at your dictation? A Yes, sir.

The Court: Between Gross and Yeskel?

10 Mr. Schotland: Between Gross and Yeskel, yes, sir.

Q Comparing this with Exhibit C. 4, the copy of the same paper that we offered in evidence, they differ. You notice that the handwriting does not appear on this original, does it? A No, sir.

Q Whose handwriting is this in ink? A Mine.

20 Q Yours? A I wrote that.

Q And why didn't you write it on the original? A It wasn't necessary because Mr. Gross had accepted it and Mr. Yeskel had told me to put that in. There was a boiler to be removed from Mr. Gross and it was not typewritten so I inserted it and Mr. Yeskel agreed to it and signed it right here (indicating).

30 Q Mr. Yeskel signed that place indicated on this paper "Agreed and accepted by," which place is in the same space as on the original I am showing you, didn't he? A Yes, sir.

Mr. Schotland: I offer the original for identification.

The Court: What is the trouble?

(Mr. Schotland handing papers to the Court.)

40 (Paper marked Exhibit D. 1 for identification.)

Alfred Popik, cross.

Q I show you Exhibit C. 1 which appears to be the original of the memorandum agreement between the Gottfried Krueger Brewing Company and Samuel Gross. Do you say you had that in your possession at Miss Jedell's—Mr. Yeskel's office when you dictated receipt C. 4? A I had a copy of it, I think I said.

10

Q Where is the copy that you had of it? A I think I got it here with me (producing paper).

Q When was this copy that you show me made? A The same day that this agreement was delivered, October second.

Q And you have that with you? A Yes, sir.

Q You showed that to Mr. Yeskel? A I showed that to Mr. Yeskel.

Q You showed him how much Mr. Gross was paying for this property? A Yes, sir.

20

Q And you were selling it to him for \$15,000 advance? A Yes, sir.

Q As a matter of fact, you offered this property to Mr. Yeskel before you sold it to Mr. Gross, didn't you? A For a hundred thousand dollars.

Q Will you answer my question, please? A I did.

Q You offered it to Mr. Yeskel some time before you sold it to Mr. Gross, didn't you? A Personally, I had not. I had written to Mr. Yeskel a letter that I had a factory for sale which was suitable for his business.

30

Q Did you describe this place? A I did not describe it at all. I simply notified him I had a place to sell at the time. Then Mr. Yeskel telephoned me on the telephone to come up after Mr. Gross had purchased it.

Q You showed him he was paying \$15,000 on the agreement? A He offered me that.

40

Alfred Popik, cross.

Q You showed him that? You say you are positive of that? A Positively.

Q Now, as a matter of fact, do you know why you took three weeks between the date of that receipt C. 4 and the actual dictation and drawing of the formal agreement between Mr. Gross and Mr. Yeskel? A I do.

Q Why? A Mr. Silberman refused to give the warranty deed to Mr. Gross before he will search the title of the property and survey it.

Q So they did not enter into any actual agreement between Mr. Gross and Mr. Yeskel until after Mr. Silberman finished his search and secured a survey of the property? A That was the agreement—the agreements were drawn and they were not signed until the search would be completed.

Q Were the agreements drawn or did they wait without drawing the agreements at all? A The agreements, I believe, were drawn—they were ordered drawn.

Q I show you Exhibit C. 5, which is dated the twenty-second of October. You say that that agreement was drawn before the twenty-second of October? A The agreement was drawn the time we were down there at the office.

The Court: October second or twenty-second, did you say?

Mr. Schotland: October twenty-second.

The Court: That is three weeks afterwards?

The Witness: After.

The Court: After the time it was postponed, counsel wants to know—I understood you to say that the agreement was drawn

Alfred Popik, cross.

at the time it was suggested that they continue.

The Witness: To make a search. At that time they agreed to draw the agreement.

The Court: The agreement was not drawn at that time?

The Witness: That I don't know. I 10
wasn't there. That was an agreement between the lawyers.

Q Now, who gave the terms to be put into the agreement to Miss Jedell? A Mr. Grosman gave the terms.

Q Which Mr. Grosman? A Mr. Silberman, the lawyer.

Q He gave the terms? A He gave the terms. 20

Q Now, as a matter of fact, at the time when Miss Jedell was dictating or ready to dictate the agreement C. 5 the question came up as to certain personal property which the brewery desired to take out, didn't it? A Yes, sir.

Q And Miss Jedell asked to be shown the agreement between the brewery and Mr. Gross, didn't she? A Yes, sir.

Q And didn't Mr. Silberman fold over the agreement between Mr. Gross and the brewery to just show her that part where the clause appeared regarding the personal property? A He handed her the agreement. 30

Q Yes or no to my question. A No.

Q Didn't he say, "I don't want you to see the whole agreement?" A That was at the beginning, before he took the agreement out of his pocket and showed it to her.

The Court: He did say that, did he? 40

Alfred Popik, cross.

The Witness: I beg pardon?

The Court: He did say, "I don't want you to see the agreement," didn't he?

The Witness: No; he didn't say so.

The Court: Why did you a moment ago say that he did?

10 The Witness: When he showed the agreement I said—

The Court: Ask your question over again.

Q Isn't it a fact that Miss Jedell asked to see the agreement between Gross and the brewery so as to get the exact clause referring to what personal property the brewing company was going to take out and that Mr. Grosman said, "I don't want you to see the agreement.
20 I will show you that clause"?

Mr. Grosman: I object unless the time is fixed.

The Court: The time is fixed. He did not?

Q He didn't? A No.

Q He never said, "I don't want you to see the agreement"? A Why, Miss Jedell saw the
30 agreement before.

Q Will you answer my question? A He never said he don't want her to see the agreement.

The Court: Why did you start to say that was before?

The Witness: He hesitated when they first came in in the morning—Mr. Silberman hesitated showing Miss Jedell the agree-
40 ment.

Alfred Popik, cross.

The Court: She asked for the agreement?

The Witness: I showed her my copy.

The Court: She asked for the agreement?

The Witness: Yes, sir.

The Court: What did he say? 10

The Witness: He kind of hesitated. He didn't answer her.

The Court: What did he say?

The Witness: He didn't answer her. He kind of hesitated giving it to her. Miss Jedell did not give him a chance to answer. She says, "I know what is in it. You can show it to me. I know what is in it, all right." Then Mr. Silberman took out the agreement and handed it to Miss Jedell. 20

Q Now, as a matter of fact, didn't Mr. Silberman take the agreement, fold it over to just the point where the clause in question appeared so as to let Miss Jedell copy that clause? A No, sir.

The Court: Which clause?

Mr. Schotland: The clause referring to the personal property that the brewing company was going to take out, not to be included in the sale. 30

Q Didn't he? A No, sir.

Q Didn't Miss Jedell say to Mr. Silberman, "If you are afraid of the price, I know the price that Gross paid, so you needn't be afraid of letting me see the agreement." A That was when we first entered. 40

Alfred Popik, cross.

Q Isn't that the remark Miss Jedell made?

A Miss Jedell made that remark.

Q And then didn't Mr. Silberman say, "Well, if you know that, you can look at the agreement now if you want to," didn't he? A I do not remember him saying that, but I know he handed her the agreement.

10 Q And then didn't Miss Jedell hand him, Mr. Silberman, back the agreement and say, "I don't want to read it"? A I didn't hear her say that.

Q You didn't hear her say that? A No.

Q Of course, you were there and Mr. Silberman was there while the agreement was being dictated, weren't you? A Yes, sir.

Q While Miss Jedell was dictating it to the stenographer? A Yes, sir.

20 Q But you were not there when the agreement was signed? A No.

Q When you met at my office for the purpose of trying to pass title, on January fifth, was it? A Yes, sir.

Q Did you stay inside in the room with Miss Jedell and hear the conversations that took place? A Part of it.

30 Q What part did you stay inside and hear? A About Mr. Wherry explaining the deed being all right, that there is no defect in the deed on account of the trustees or the corporation being dissolved.

Q Did you hear anything else? A Nothing else.

Q All the rest you heard was what Mr. Silberman told you out in the hall outside? A He walked out—(interrupted).

40 Q At that time? A Yes, sir.

Alfred Popik, re-direct.

Q And that part of it about Miss Jedell objecting to the fact that the proposed deed contained a restriction which the agreement did not call for and she would not take for that reason, Mr. Silberman told you out in the hall? A He did.

Q Yes. You were not inside when the conversation about that took place? A On that day I was not. 10

Q Now, were you inside on that day when the passing of title was adjourned for the purpose of having Mr. Gross procure a release of that restriction from the brewing company? A I was there.

Q It was postponed for that purpose, was it not? A I think it was.

Q And you also promised to assist in getting a release of that restriction so that title could pass, did you not? A I did. 20

Q You then expressed a view that you might pay the brewing company some more money in order to get them to release the restriction, didn't you? A I did.

Q And did you try to carry that out and get that restriction released? A Mr. Wherry and myself and Mr. Silberman went up that day—the same day—to the brewery. 30

Q Answer my question, did you try? A We did.

Q And you did not succeed? A We did not.

Re-direct examination by Mr. Grosman.

Q Did you ever speak to Miss Jedell personally about the restrictive covenants in question?

A Before or after the agreements?

Q After the agreement? A I did. 40

Samuel Gross, direct.

Q When? A When Mr. Yeskel refused to take title I came down there a couple of weeks later—(interrupted).

Q Did you speak to Miss Jedell? A I did.

10 Q What was said? A I told her, I think, Mr. Yeskel knew that he can't start no brewery there; he didn't buy it for that purpose, and she said, "We don't care; we got the agreement here and we are going to go by our agreement."

SAMUEL GROSS, sworn in behalf of complainant.

Direct examination by Mr. Grosman.

20 Q You are the complainant in this case, Mr. Gross? A Yes, sir.

Q And you agreed to buy the premises in question from the Gottfried Krueger Brewing Company according to the terms of Exhibit C. 1? A Yes, sir.

Q And do you recall signing the paper marked Exhibit C. 4, which I show you? A Yes, sir.

30 Q That is your signature? A Yes, sir.

Q You agreed to convey the property you purchased from the brewery to William and Samuel Yeskel? A Yes, sir.

Q Now, did you know at the time you signed Exhibit C. 4 the restriction on the property against the use of the premises for a brewery, and so forth? A Yes, sir.

Q Mr. Grosman was your counsel in the matter? A Yes, sir.

40 Q And you were present in the office of Mr. Schotland on October 3, 1925? A Yes, sir.

Samuel Gross, direct.

Q Who else was there? A Mr. Silberman and myself, Mr. William Yeskel and Mr. Samuel Yeskel, Mr. Popik and Miss Jedell.

Q And was there any conversation between Mr. Silberman and Miss Jedell in the presence of all the persons whom you have mentioned concerning the contents of the agreement marked C. 1? A Well, the conversation was only to draw up the agreement. The terms were agreed upon previous. 10

Q Did you see the agreement marked Exhibit C. 1 shown by Mr. Silberman to Miss Jedell? A Yes, sir.

Q Did Miss Jedell have it in her hands? A Yes, sir.

Q Did she read it?

The Court: Do not lead him. What happened? 20

Q What happened there? A When I came in with Mr. Silberman in Mr. Schotland's office Miss Jedell asked Mr. Silberman for the agreement. Mr. Silberman kind of hesitated to show her.

Q What agreement do you refer to? A The agreement between me and the Krueger Company. 30

Q C 1? A She says, "I want to know what I am getting, but I must tell you I have seen already—Mr. Popik has shown me a copy. You don't need to be afraid to give it to me." So Mr. Silberman gave the agreement to Miss Jedell.

Q Were you present in Mr. Schotland's office again on the fifth of January? A Yes, sir.

Q When title was supposed to pass; and were you prepared to accept title from the Gott- 40

Samuel Gross, direct.

fried Krueger Brewing Company and pass it on to the Yeskels on that day? A Well, I was prepared at that time.

10 Q Did you hear any conversation concerning the restrictive covenants in the deed which you proposed to give to Yeskel? A When I came and Mr. Silberman was there Mr. Silberman started to look over the papers, the deed from the brewery, seeing a lawyer was there from the brewery—Krueger Brewing Company—and they were arguing about the deed wasn't right—not signed right. Some corporation was dissolved. I didn't pay much attention. I left it to my attorney.

20 Q That was January fifth? A January fifth. And after that he says, "Come out," and I walked out with Mr. Popik.

The Court: What?

The Witness: I walked out in the hallway with Mr. Popik. Mr. Silberman come out and told me "Mr. Gross"—(interrupted).

30 Q Do not tell us what he told you out in the hall. Now, did you sign a deed on the fifth of January, 1925, from yourself and Passie Gross, your wife, to William Yeskel and Samuel Yeskel? A Yes, sir.

Q Did you sign this deed? A Yes, sir.

Q And your wife signed it? A Yes, sir.

Q And you had this with you on the fifth of January? A Yes, sir.

Q Were you prepared to deliver this to the Yeskels? A Yes, sir.

40 Q Now, did you at any time hear any discussion between Mr. Silberman and Miss Jedell

Samuel Gross, direct.

or the Yeskels concerning the leaving out of the final agreement of the restrictive covenant in question?

The Court: On January fifth?

Mr. Grosman: At any time.

10

Q Do you understand my question? A No, I do not.

Q This covenant against the use of the premises as a brewery—you say you knew about the covenant? A Yes, sir; I did.

Q Now, did you ever agree to leave that out of the deed or out of the agreement?

The Court: Wait. You say, "Whether he agreed." Let him give me the facts. 20

Q Was there any conversation ever had between Mr. Silberman and Miss Jedell or between you and the Yeskels whereby you agreed to leave this covenant out of the papers? A No, sir.

Q Since that time you have taken title to the property?

The Court: That is in the case. He took title in June. 30

Q And you still own the property? A Yes, sir.

Q And are you satisfied to convey it to Yeskel? A Yes, sir.

Mr. Grosman: I offer the deed in evidence.

(Paper marked Exhibit C. 6.) 40

Samuel Gross, cross.

Cross examination by Mr. Schotland.

Q Mr. Gross, when and where did you first meet Yeskel in connection with the negotiations for the sale of this brewery property to him?

A In your office.

10 Q And when? A October second, or October third, pardon me.

Q October third; and at that time you and your attorney, Mr. Silberman and Miss Jedell and Mr. Popik were together? A Yes, sir.

Q And you started to agree upon terms to put into a regular contract, didn't you? A I didn't agree to anything. I handed the contract over, that is all I did.

20 Q Whom did you hand the contract over to? A Pardon me, Mr. Silberman handed the contract over, not me, to Miss Jedell.

Q Didn't you start there to talk the terms as to what to put into the agreement between you and Yeskel? A The only terms that were talked between me and Mr. Yeskel was I should take a second mortgage for \$15,000 until March first; that is all.

30 Q Did you talk over how much more deposit you would take off? A The same, \$15,000 more.

Q Oh, you did talk over that, did you? A That is all.

Q Did you? A Yes, sir.

Q Did you talk over what kind of a deed Yeskel wanted from you? A Well, this was talked over between Miss Jedell and Mr. Silberman.

40 Q Who was giving Miss Jedell the terms to put into the contract? A Nobody gave her any terms.

Samuel Gross, cross.

The Court: Who gave her instructions?

The Witness: She took it from the agreement.

Q From what agreement? A Between me and the Gottfried Krueger Brewing Company.

Q Is that so? And Mr. Silberman did not give her instructions, did he? A No, sir. 10

Q You didn't tell her what you were agreeing to sell and on what terms? A The agreement speaks for itself.

The Court: Answer, did you?

The Witness: No.

Q You have been in court before, haven't you? 20

Mr. Grosman: I object.

Q Did you talk over making the arrangement that in case you were unable to give title because the Krueger Brewing Company do not give you title, and through no neglect on your part, what would happen then as to the agreement between you and Mr. Yeskel?

The Court: What is that? 30

Mr. Schotland: I will reframe the question.

Q Did you talk over putting the following clause into the agreement between you and Yeskels: "In the event the party of the first part are unable to convey because the Krueger Brewing Company refuses to convey to them, through no neglect or fault on the part of the party of the first part herein, then and in that event the 40

Samuel Gross, cross.

deposit is to be returned and this agreement is to be null and void." Did you talk over putting that term in that agreement between you and Yeskel for your protection? A I did not.

Q Who did? A My lawyer did.

10 Q In your presence? A I was there when he talked it over.

Q Did you talk over putting this term in the agreement between you and Yeskel: "It is expressly understood that the party of the first part has agreed to take this conveyance subject to the survey of C. T. Lemmesena made October 23, 1924, a copy of which is attached to this agreement." Did you talk over putting that in? A I did not.

Q Who did? A My attorney did.

20 Q Do you know whether or not there is any such clause in the agreement or either agreement from the Krueger Brewing Company to you?

Mr. Grosman: I object.

The Court: Objection overruled. The question is whether he knows.

The Witness: Clause of what?

30 Q Clause that you are supposed to accept the title according to the survey made by Mr. Lemmesena October 23, 1924? A I heard the conversation between my lawyer and Miss Jedell.

Q That was one of the new terms agreed upon at my office, is that right? A Yes, sir.

40 Q Now, in the agreement between the Krueger Brewing Company and you I notice this clause: "The making of this contract shall be noted on the insurance policies, and any money received on account of loss under such policies as adjusted by the parties hereto with the insurance

Samuel Gross, cross.

company or companies shall be received by the party of the first part and credited to the party of the second part upon the purchase price of said premises." Did you put any such clause into the agreement of sale between you and Mr. Yeskel? A I did not.

Q Did you talk over any such clause? 10
A No, sir.

The Court: Who did?

The Witness: My attorney did.

Q Did you hear him talk over that clause?
A I heard it.

Q And I call your attention to the clause in the agreement between you and Yeskel, "The risk of loss or damage to said premises by fire or otherwise until the delivery of said deed is assumed by the party of the first part." 20

The Court: Who?

Mr. Schotland: Mr. Gross.

Q Did you talk over putting a different style of clause in that agreement between you and Yeskel than the ones that you had in the agreement between you and the brewery? A I did not. 30

Q Did you hear it mentioned at all? A No; I did not. I did not hear it mentioned. Of course, I may was out. I wasn't there all the time when they were talking.

Q I see. You relied entirely on your attorney? A Yes, sir.

Q Now where did you sign the contract with Yeskel? A I think I signed it in the office. I do not remember in Mr. Silberman's office or in your office. 40

Samuel Gross, cross.

Q I show you a copy—(interrupted)

The Court: Try to think, will you? Try to think where you signed it.

The Witness: You see at that time Mr. Silberman wasn't there, they had some trouble, and I went with Mr. Grosman there.

10

The Court: Where did you sign it? Do you recall now?

The Witness: I cannot recall.

Q You know that Mr. Silberman took your and your wife's acknowledgment to the contract, don't you? A Yes, sir.

Q Now, does that refresh your recollection as to where you signed it? A That was—I think I signed it in Mr. Silberman's office.

20

Q In Mr. Silberman's office. And do you remember that at that time when the agreement was dictated an arrangement was made that the agreements were to be sent over to Mr. Silberman's office, that he was to look them over and if O. K. get your signature? A Well, the agreement was drawn in your office.

The Court: Answer. Do you remember that arrangement?

30

The Witness: Yes, sir.

Q Mr. Silberman and you left before the stenographer finished writing out the agreement, didn't you? A Yes, sir.

Q And then the agreement was to be sent to you and you were to look it over. Now, do you remember that the agreement was drawn the day that it is dated, the twenty-second of October?

40

A Oh, I don't know when it was drawn.

Samuel Gross, cross.

Q Well, you know you signed it nearly a week after it was drawn, don't you? A Well, I signed it in Mr. Silberman's office. I wouldn't remember the day when I signed it. I wouldn't say that.

Q What day were you there when instructions were being given to Miss Jedell? A October 10
fifth.

Q Are you sure that Mr. Silberman handed Miss Jedell the agreement between you and the brewery? A I was there present.

The Court: Answer the question.

The Witness: Yes, sir.

Q I show you a paper. Isn't that the paper which gives the description of the property which 20
Mr. Silberman handed to Miss Jedell?

The Court: Isn't this the paper?

Q This paper I am showing you; isn't that the one that Mr. Silberman handed to Miss Jedell at the time when you were all in my office? A
No.

Q That you saw handed? A No, sir. 30

Mr. Schotland: I ask that that be marked for identification.

(Paper marked Exhibit D. 2 for identification.)

Q Can you explain, Mr. Gross, why it is that the description in the agreement between you and Yeskel is in a different form than the description contained in the agreement between the brewing company and yourself? 40

Samuel Gross, cross.

Mr. Grosman: I object. That does not appear. No evidence of that.

Mr. Schotland: Both agreements are in evidence and an inspection shows it.

The Court: Ask him whether he knows. You asked him to explain it.

10

Q Mr. Gross, do you know that the agreement for the sale of this property between the brewery and yourself contains a description in different form than the one contained in the agreement between you and Mr. Yeskel? A No, I do not. I did not know that.

The Court: In what respect do they differ—substantially?

20

Mr. Schotland: Well, the effect is the same, but it is in an entirely different way.

Q And do you know that the description which is contained in the agreement between you and Yeskel is in exactly the same form as the description contained in Exhibit D. 2 for identification, the paper that I just showed you? A No, I don't know.

30 Q Did you see Mr. Silberman hand Miss Jedell the paper Exhibit D. 2 for identification at all—this paper (indicating)? A No.

Q Do you know how that paper got in our possession at all? A I do not, no.

40

Paul Silberman, direct.

PAUL SILBERMAN, sworn for complainant.

Direct examination by Mr. Grossman.

Q Mr. Silberman, you are one of the solicitors of this court? A I am.

Q And you were the attorney of Mr. Gross, the complainant in this case? A I was. 10

Q And you handled the entire transaction? A I did.

Q I show you Exhibit marked C. 1 and ask you whether you have seen that before? A I did.

Q When was it delivered to you and by whom? A By Mr. Gross on October 3, 1924.

Q I show you Exhibit marked C. 4 and ask you whether you have ever seen that before? A I did. 20

Q Was that paper delivered to you? A Yes, sir.

Q When and by whom? A October 3, 1924, by Mr. Gross.

Q Did you have a conference over at Mr. Schotland's office with Miss Jedell? A I did.

Q Who were present? A Miss Jedell was there, Mr. Popik, Mr. William and Samuel Yeskel, Mr. Gross and myself. 30

Q On October third? A On October third—and Mr. Schotland would come into the room occasionally.

Q Will you tell us what happened on that occasion? A Why, when I got there Mr. Yeskel was there waiting, and Miss Jedell spoke about drawing up an agreement for the sale of the brewery, and during the conversation Miss Jedell said there wouldn't be any complications being the parties had already entered into an agree- 40

Paul Silberman, direct.

10 ment. Question arose about a warranty deed. I told Miss Jedell that I couldn't permit Mr. Gross to enter into an agreement to convey the premises by warranty deed because he was getting only a bargain and sale deed, and we agreed to postpone the signing of the agreement until we would have an opportunity to search the premises and have them surveyed. All the terms were agreed between Mr. Gross and Mr. Yeskel.

The Court: What?

The Witness: All the terms were agreed between Mr. Gross and Mr. Yeskel.

The Court: When?

20 The Witness: On October second, according to their writing—to their agreement of October second. Miss Jedell called in her stenographer and in order to prepare the agreement she wanted to know what Mr. Gross was buying and she asked me for my agreement between Mr. Gross and the brewery and I hesitated because I didn't know whether Mr. Yeskel knew about what Mr. Gross was paying, and Miss Jedell told me, she says, "Now, you don't have to hesitate, 30 Mr. Silberman, I know all about the contents of the agreement between Mr. Gross and the brewery, and Mr. Yeskel knows. Mr. Popik showed me a copy." She says, "I don't care whether Mr. Gross paid a nickel for it." With that I gave her the agreement between Mr. Gross and the brewery.

Q Is that the agreement you refer to (indicating)? A That is the agreement.

40 Q C, 1? A C. 1.

Paul Silberman, direct.

Q What did she do with that agreement, if anything? A From that agreement she dictated to the stenographer. There was at one time a conversation whether it wouldn't be advisable for Mr. Gross to assign to Mr. Yeskel this agreement, and the only reason we didn't—the only reason we thought it wouldn't be advisable because this agreement contained a clause that Mr. Gross must execute and deliver to the brewery a bond and mortgage for \$45,000, and that we thought that the brewery wouldn't take Mr. Yeskel on the bond instead of Mr. Gross; and the further reason that Mr. Yeskel was not prepared to pay to Mr. Gross the difference in the purchase price, the \$15,000. 10

Q That was spoken of? A Yes, sir.

The Court: I mean these reasons were discussed. 20

The Witness: Yes, sir; and we then agreed to enter into this agreement which provides that Mr. Yeskel was to give Mr. Gross a second mortgage for \$15,000 to be payable I think March or April first—I do not remember. With that I left and we all left, and Miss Jedell—(interrupted)

The Court: What happened next? 30

The Witness: It took about two or three weeks for us to get the search of the property and have the property surveyed. Miss Jedell agreed that they were to pay the surveyor. When we got the search through, on October twenty-second, I think, Miss Jedell sent over the agreements to my office and I read the agreements and I sent them back for some correction; then I got them back a day or two later—(interrupted) 40

Paul Silberman, direct.

The Court: With the corrections?

10 The Witness: With the corrections. I did not look at it for that clause—for the restrictive clause. I relied upon Miss Jedell. I knew I was dealing with an honorable office and I was under a great mental strain at that time—my mother-in-law was very ill and I spent a number of nights—and she died two days later—she died October thirtieth. The acknowledgment I took on October twenty-eight, I believe. I went up to Mr. Gross' house and I had Mrs. Gross sign the agreement, and I did not know about this covenant, about it being left out, until the day of passing title on January fifth when Miss Jedell called my attention that the deed from the brewery to Mr. Gross and from Mr. Gross to Yeskel contained that covenant and that it was not contained in the agreement of Mr. Yeskel with Mr. Gross. I told her that she knew about the covenant, that she had the agreement from Mr. Gross—from the brewery to Mr. Gross and—first she said that she did not, but then when I refreshed her memory why when she dictated to her stenographer and that she took that description for the agreement between Mr. Gross and Yeskel from the agreement from the brewery to Gross she said, "Well, I remember now having the agreement, but I did not look for that clause," and I—of course, Mr. Yeskel was not there—I said—I asked Miss Jedell why Mr. Yeskel was not there and she said she didn't know, that she had spoken to him at quarter-to-ten over the 'phone and that she was expecting him yet. We waited until half-past eleven and left and

20

30

40

Paul Silberman, direct.

we adjourned it for January eighth. I then went back and asked Miss Jedell, I said, "Miss Jedell, tell me, is Mr. Yeskel trying to crawl out of this deal?" So that I should know just what to do. I said, "You know how I feel as far as Mr. Gross is concerned. I overlooked it and I will probably go up to the brewery and try to get them to remove that covenant," and she said, "Well, I don't know," she said, "It looked very much like it," meaning that it looked very much like Mr. Yeskel was trying to crawl out of the deal. 10

The Court: She said that on January fifth?

The Witness: January fifth? On January eighth I called up Miss Jedell, asked her whether we should get together. She said no, that she didn't hear anything from Mr. Yeskel, and she asked me, "Well, can you get the brewery to remove the covenant?" and I said, "No." I said, "I don't think they will stand for it." And we did not meet until February fourth. By arrangement we went there to make a tender. 20

The Court: Went where?

The Witness: To Mr. Schotland's office. Mr. Schotland was there and Miss Jedell was there and Mr. Yeskel was there and Mr. Schotland said that he refused to accept the deed on the two grounds, first, that the deed contained a restrictive covenant and second because Mr. Gross had not got title to the premises, and with that we left. 30

Q Did you serve a notice on William and Samuel Yeskel that you would be present at Mr. 40

Paul Silberman, cross.

Schotland's office on the fourth of February for the purpose you have mentioned? A Well, I had served—(interrupted)

Q Is this the original of the notice? A Yes, sir.

10 Q Did you and Miss Jedell at any time discuss omitting from the final agreement drawn between Gross and Yeskel the clause covering the use of the premises as a brewery? A Whether we—(interrupted).

The Court: Did you ever discuss with her the restrictive covenant and the omission of it from the agreement?

The Witness: Yes, sir; several times, after that.

The Court: After what?

20 The Witness: After January fifth. I met Mr. Schotland and Miss Jedell on Broad street in front of my building and we discussed the omission of the covenant, and I said to Mr. Schotland—I said, "Miss Jedell knew about it, and Mr. Yeskel agreed—temporary agreement between him and Gross, October second, to buy the premises as Mr. Gross will receive title to it," and
30 Mr. Schotland said, "Well, that may be so, but the last agreement controls."

Q Did you, before the signing of the final agreement marked Exhibit C. 5, ever discuss with Miss Jedell or anybody else the proposition of omitting this restrictive covenant out of the final agreement? A I did not.

Cross examination by Mr. Schotland.

40 Mr. Grosman: I offer the notice.
(Paper marked Exhibit C. 7.)

Paul Silberman, cross.

Q Did you ever mention or discuss the question of these restrictive covenants with Miss Jedell at all? A I did not—not before October—not before October third.

The Court: Not before the formal agreement was signed?

10

The Witness: No.

Q The only time you ever talked with Miss Jedell about the restrictive covenants was after January fifth when she objected to the deed? A Yes, sir.

The Court: After you discovered the error?

The Witness: After we discovered the error.

20

Q Now, as a matter of fact, Mr. Silberman, when you were in my office discussing with Miss Jedell on October third the terms of the agreement there was no agreement dictated or drawn that day, was there? A Yes, sir.

Q Now, wasn't the drawing of an agreement postponed until after you would finish your search? A The signing of the agreement. It was dictated by Miss Jedell.

30

The Court: There was some dictation?

The Witness: Yes, sir; some dictation.

The Court: You don't know whether it was wholly dictated?

The Witness: Well, the price was dictated.

The Court: You don't know whether the whole agreement was dictated?

40

Paul Silberman, cross.

The Witness: No.

Q Wasn't the whole agreement dictated in detail in your presence in my office on the twenty-second of October? A No, sir.

Q The day the agreement is dated? A No, sir.

10 Q It was not? A No, sir; it was sent to me by Miss Jedell from your office.

The Court: You were not at the office of Mr. Schotland on the twenty-second?

The Witness: I do not think so.

The Court: How would the information be communicated to Mr. Schotland's office that you would give a warranty deed after you searched the title and made the survey?

20 The Witness: On October third we—Miss Jedell dictated the agreement and the drawing—or the signing of the agreement was left until such time as we will be able to ascertain whether the title ought to pass. When I got my search I went over to Miss Jedell's office—whether it was October twenty-second or October twenty-first I do not remember, and we went over the title. I gave her the notes and left the notes of the search with Miss Jedell. I think the survey wasn't ready yet, but the surveyor said everything was clear. I think I left the note there and she finished the agreement—she told the girl to insert a certain restriction that appeared on the search with reference to some well—an old, abandoned well.

30

The Court: With reference to what?

40 The Witness: A restriction with reference to a well. And she dictated to the girl.

Paul Silberman, cross.

The Court: Was that in the other agreement?

The Witness: No. She had a bargain and sale deed—we did—no, the brewery—she dictated to the girl that this conveyance should be made subject to L. 13; and then she sent over the agreement to my office. 10

The Court: After you had left?

The Witness: After I had left; and I sent them back.

Q Just a moment. Then the dictation did take place in your presence on October twenty-second? A Yes, sir.

The Court: Some part of it?

The Witness: Part of it. 20

Q The completion of the dictation of the agreement? A Yes, sir.

Q That is your recollection? A Yes, sir.

Q And you say it was Miss Jedell suggested that the conveyance be made subject to the recital in Deed L. 13? A No.

Q You made that because you discovered that in your search? A Yes, I went over it with Miss Jedell, the search. 30

Q And then after the agreements were delivered to you you went over this agreement D. 5 and you wrote a letter pointing out your criticism of it? A Yes, sir.

Q And this is the letter that you wrote? A Yes, sir.

Mr. Schotland: I ask that it be marked. (Paper marked Exhibit D. 3.) 40

Paul Silberman, cross.

Q And after you wrote this letter you got in communication with Miss Jedell and some of your suggestions in this letter were complied with and others you waived, is that so? A No, sir.

10 The Court: Were they all incorporated in the agreement?

The Witness: Practically.

Q For instance, was this clause, "The deed was to be delivered and received in the office of the Krueger Brewing Company's attorney." Was that incorporated in the agreement? A No. I spoke to Miss Jedell about it.

20 The Court: You waived that?

The Witness: I waived that upon Miss Jedell—(interrupted).

The Court: That is what Mr. Schotland asked you, whether some were not inserted and others you did not insist on?

The Witness: Yes, sir.

Q Then, after that the agreement was signed by your client? A Yes, sir.

30 Q And I show you the copy you delivered to my office with the acknowledgment filled out by you? A Yes, sir.

Q This is the agreement you had your client execute? A I didn't deliver.

Q You had it delivered? A I had it delivered.

Q And the acknowledgment you took is the twenty-eighth of October? A Yes, sir.

40 Q Is that the day when your client actually signed it? A Yes, sir.

Paul Silberman, cross.

Mr. Schotland: I offer it in evidence.
(Paper marked Exhibit D. 4.)

Q Now, Mr. Silberman, do you remember at the time when Miss Jedell was ready to dictate the agreement she wanted particulars about—
(interrupted).

10

The Court: October third?

Mr. Schotland: Yes. Well, if your Honor please, the evidence varies as to whether that took place.

The Court: Are you referring to October third? I am trying to follow you.

Q I am referring to the occasion when Miss Jedell dictated the agreement—when they got as close as that.

20

The Court: October third and later on, probably twenty-first or twenty-second. My query was whether you were referring to October third.

Mr. Schotland: Our theory is—(interrupted).

The Court: I am asking you whether you are referring to October third.

30

Mr. Schotland: I am referring to the occasion—this witness differs as to the date. We claim that it was the twenty-second, the same as the other witnesses for the complainant.

Q Mr. Silberman, might you not be mistaken as to whether there was any beginning of the dictation of the agreement at all on October third? A No, sir.

40

Paul Silberman, cross.

Q You are positive of that? A Absolutely.

Q All right. Well, then, on the occasion, whether it was October third or twenty-second, when Miss Jedell was getting ready to dictate the agreement, you are the one who explained the terms to be embodied in the agreement to her, weren't you, representing Mr. Gross? A
10 Yes, sir.

Q And did you give her the temporary agreement between the brewery and Mr. Gross? A
Yes, sir.

Q Or did you prepare and give her a separate sheet containing the description copied on that temporary agreement? A No, sir; I did not.

Q Did you leave it with her? A She had
20 it there and she dictated to the girl.

The Court: Please.

The Witness: I did not, sir.

The Court: On October third, when you say you handed to her the temporary agreement, did you leave it with her?

The Witness: When I left? No, sir.

The Court: You took it away with you?

30 The Witness: Gave it to me back.

Q I show you Exhibit D. 2 for identification; do you recognize that? A No, sir.

The Court: It is on your typewriter?

The Witness: No, sir.

The Court: Look at the agreement and then look at that, and see whether you can tell whether it was written at the same
40 time.

Paul Silberman, cross.

Mr. Grosman: What agreement do you refer to?

The Court: The temporary agreement.

The Witness: Why, we didn't draw that. It was drawn by the brewing company.

The Court: Look at it and see if it is in the same type. 10

Mr. Schotland: It is not the same type as my typewriter.

The Court: No; same type as the brewery?

Mr. Schotland: No.

The Witness: It is not my typewriter.

Q It is not? A No, sir.

Q Can't you refresh your recollection as to how this sheet containing this description, which is the exact description of Exhibit C. 1, came to be in existence? A I cannot recollect. 20

Q Well, do you know anything about it? A No, sir.

The Court: Don't know how it came into existence?

The Witness: No, sir.

Q At the time when Miss Jedell was dictating the agreement, did you take this temporary agreement C. 1 and fold it over to the clause containing the list of chattels that the brewery were to take out to let her see what was to be excluded, and show her only that? A No, sir. 30

Q And after you did show her that and she copied off the list, didn't she say to you, "If you are afraid of the price, we know how much Gross paid for it, and you need not be afraid of it? A No, sir. She said that before. 40

William Yeskel, direct.

Q And didn't you say to her, "Well, if you know that, you can look at the whole agreement"? A No, sir.

Q And didn't she say, "I don't care to look at it now"? A No, sir; she did not.

10 Mr. Grosman: I offer in evidence the letter.

(Letter marked Exhibit C. 8.)

COMPLAINANT RESTS.

WILLIAM YESKEL, sworn in behalf of defendant.

20 *Direct examination* by Mr. Schotland.

Q Mr. Yeskel, last fall you and your father, Samuel Yeskel, were partners trading as the Yeskel Company? A Yes, sir.

Q And did you negotiate through Mr. Popik, a broker, to purchase the old Trefz Brewery property on Rankin and Beacon streets, in this city? A Yes, sir.

30 Q I show you Exhibit D. 1 for identification, on your letterhead. Who dictated that? A Mr. Popik, I guess.

Q Popik.

Mr. Schotland: Now, I offer this in evidence.

(Paper marked in evidence by striking out the words "for identification.")

40 Q Mr. Yeskel, on a carbon of D. 1, which has been marked C. 4, there appears in addition to

William Yeskel, direct.

the typewriting which is on D. 1 handwriting which says, "Further agrees Mr. Gross can have one boiler if he removes same himself from new boiler room." Was that writing put in before this paper left your possession, or hadn't it? A That was after.

Q Did you know at the time when you put up the deposit and entered into this preliminary agreement on October second that there were restrictions to be put on the property that it could never be used for brewery purposes or for near beer? A I did not. 10

Q Did Mr. Popik tell you that there were? A No, sir.

Q Did Mr. Popik show you a temporary agreement between the Gottfried Krueger Brewing Company and Mr. Gross? A No. 20

Q Did you know anything about what was in the agreement between the Gottfried Krueger Brewing Company and Mr. Gross? A No.

Q Now, when did you first come to my office and meet Mr. Gross and his attorney, Mr. Silberman, regarding the drawing of an agreement—a formal agreement for the purchase of this property? A I believe it was the following day.

Q The following day, on October third? A Yes, sir. 30

Q Was there an agreement drawn that day? A Yes, sir.

Q That next day the agreement was drawn? A We were discussing about the agreement.

Q And what happened? A Well, I believe we requested to get a guarantee from Mr. Gross on the deed.

Q You mean a warranty deed? A Yes, sir; and there was a question come up, counsel wanted 40

William Yeskel, direct.

us to take the same agreement—the same way Mr. Gross bought from the brewery—so we refused to accept this way unless he will give us a special guaranty by Mr. Gross on our deed.

10 The Court: He was giving a bargain and sale and you wanted a warranty, is that what you mean?

The Witness: Yes, sir.

Q Now, what was said? What was the result then? A Mr. Silberman was going to arrange to give a warranty deed for it and then—
(interrupted)

20 Q Who did the talking about that, to arrange for that purpose for you? A Well, Miss Jedell asked me whether I would take it the same way that they got it from the brewery. Well, it says there is no warranty to be at all, so we finally come to the conclusion we couldn't take it; we wanted the personal guaranty from Mr. Gross.

Q Now, who did the talking for you in those negotiations and making of the arrangements? A Miss Jedell spoke.

30 Q And who gave her the terms? Who told her what to put into the contract; what you and Gross had agreed upon?

The Court: Who told her what to put in the formal contract that you were to sign?

The Witness: I told her what—I told her what we were buying.

Q You told her what you were buying? A Yes, sir.

40 Q And on behalf of Mr. Gross who told her? A Mr. Silberman.

William Yeskel, direct.

Q Now, at that time was Mr. Gross's contract between himself and the brewery shown to Miss Jedell? A No.

Q Was any part of it shown to her in your presence? A It was. It was part of it shown.

Q Just tell us the circumstances how it was shown to her? A Miss Jedell wanted the original agreement from the brewery. They refused to give it to her. Finally it was folded up to show certain clauses in the agreement so as to prepare for the property that was supposed to be taken out from the brewery. 10

The Court: I do not get it.

Mr. Schotland: He says it was finally folded up so as to show certain clauses of the property that was to be taken out by the brewery. 20

Q And what was done with the agreement after those clauses were shown to Miss Jedell?

A Mr. Silberman took it.

Q Now, do you know how Miss Jedell got the description of the property? A Yes, sir.

Q How? A Gave her a certain paper showing the items—things that were supposed to be taken out. 30

Q I mean the description, the metes and bounds, and number of feet? A Yes, sir, piping and vats, and so forth.

Q Where was that? A At your office.

Q Who showed her that about the piping and vats that you are talking about now? A I believe Mr. Silberman.

Q Is that what you are referring to as part of the agreement you showed her after folding it over? A No; this showed the whole thing. 40

William Yeskel, direct.

This was shown to me, too, what things were to be taken out from the brewery, itemizing each lot separately, and so forth.

Q Now, did you see any description? I mean the beginning point and the number of feet that the land runs—how many feet in each direction?

10

The Court: Did you see a paper description of it?

The Witness: No; I was told it was supposed to be 240 feet on Beacon.

Q Did you see the paper description at that time? A I do not remember seeing it.

20

Q Now, were there any restrictions against using the property for brewery purposes mentioned at that time? A Not to me.

Q In your presence? Did you hear any? A No.

Q When was the first time that you ever learned that the brewery in selling to Gross were going to put restrictions against the use of that property for brewery purposes in the future? A When I came to take title to the building that was called to my attention.

30

Q And who called it to your attention? A Miss Jedell did.

Q Was that the first time you ever heard of it? A That was the first time I ever heard of it.

Q When was that? A After the first of the year.

Q And you refused to take title for that reason? A Yes, sir.

40

Q Now, how much deposit have you paid?
A \$2,500.

William Yeskel, cross.

Q And you have paid the search fees for searching the title to get ready to take it? A I paid it to you.

Cross examination by Mr. Grosman.

Q Mr. Yeskel, what is your business? A I deal in bags and burlap. 10

Q You are still in partnership with your father under the name of Yeskel & Sons? A No.

Q Do you own any real estate in the City of Newark? A I do.

Q How many real estate transactions have you been in—how many times have you bought and sold property? A I sold a property this year. 20

Q How many times, one, two, ten, or how many? A This year I sold one.

Q Well, during all the time you have been dealing in real estate how many times have you entered into agreements for the sale or purchase of property? A In the last seven or eight years I sold about, oh, about five or six pieces of property.

Q What kind of property? A Well, one was the apartment house, I sold this year; and the last five or six years I sold one one-family house and several three-family houses, and I think one six-family house. 30

Q Now, is this your signature on Exhibit C. 4? A Yes, sir.

Q You signed that? A I did.

Q Was this exhibit drawn up in your presence? A It was.

Q Who drew it up? A Some girl working for me drew it up. 40

William Yeskel, cross.

Q You were present while Mr. Popik dictated to the girl? A I believe I was.

Q And did you read it over after it was prepared? A I did.

10 Q Now, do you remember that when this writing Exhibit C. 4 was first drawn up it did not contain the following clause, "The property is to be delivered the same way as agreement held by said Samuel Gross on the above mentioned property." That was not in it when it was first drawn? A It was not in it.

Q Do you remember asking Mr. Popik to insert those words in this writing after it had been drawn by you?

The Court: You mean on the copy?

20 Mr. Grosman: On the copy and on the original.

The Witness: Didn't. We only drew up original and copy, that is all to it; never seen it, no, sir.

Q Can you explain how it is, that the words which I have just read to you are in original type while the balance of Exhibit C. 4 is in carbon copy? A This I cannot recollect.

30

The Court: What do you mean?

Mr. Grosman: I mean these words are in original type while the balance appears to be a carbon copy. The original contains the exact words which I have referred to.

Q You do not know how that difference in type happens to be? A No; I do not recollect.

40 Q Did you ask Mr. Popik to put those words in after the agreement was drawn up? A I do not remember, not this thing.

William Yeskel, cross.

Q Will you say that you did not ask Mr. Popik to do that? A I didn't ask him anything.

Q Did you see that wording in the paper before you signed it? A When I signed it I seen whatever was there.

Q You are satisfied that everything contained in this paper was in before you signed? A I am not, for there is handwriting there in ink which I never seen before, when I signed it. 10

Q Is that O. K. on the margin of this writing? A It is not my O. K., no.

Q You didn't see Mr. Popik put that in? A I did not. You can see for yourself—(interrupted)

Q Just answer my questions, please. Well, is it a fact that you agreed that Mr. Gross could have one boiler if he removed the same himself from the new boiler room? A That was agreed. 20

Q That was agreed. You do not quarrel with that part of it? A No; not about the boiler part of it.

Q Now, you gave Mr. Popik a thousand dollars, a deposit on it? A I did.

Q You knew that Gross had just purchased this property from the brewery, did you not? A So he told me. 30

Q And you knew that he had not taken title to it at that time? A Right.

Q You agreed to give an additional deposit on it upon the signing of the agreement, is that right? A I did.

Q The amount of the deposit was to be agreed upon between you and Gross? A Right.

Q Is that right? A Yes, sir.

Q Now, the purchase price agreed upon for this property was \$85,000, is that correct? A I don't know. 40

William Yeskel, cross.

Q Mortgage of \$45,000 to be taken by the brewery? A Yes, sir.

Q Is that correct? A Yes, sir.

Q And the balance to be paid in cash?

The Court: You got it all there.

10

Mr. Grosman: He questions some part of this agreement.

The Court: He doesn't question that part with reference to the boilers, does he?

Mr. Grosman: No, but he says it wasn't in there.

The Court: Anything else?

Mr. Grosman: Yes, sir.

20 Q The \$45,000 mortgage is correct? A Yes, sir.

Q And the statement that the property is to be delivered the same way as agreement held by said Mr. Samuel Gross on the above mentioned property, that is correct? A Yes, sir.

Q Now, that was your agreement at the time you signed Exhibit C. 4? A Yes, sir.

Q And you say that Mr. Popik did not show you the writing marked Exhibit C. 1? A No, sir.

30

The Court: What is that?

Mr. Grosman: Original memorandum.

Q You did not see that? A I did not.

Q You never saw it? A I never saw it.

Q Until today? A Until today.

Q Did you see a copy of this Exhibit C. 1 before you signed the writing marked Exhibit C. 4?

A No; I didn't see anything at all at my office.

40

Mr. Popik—all he did there was talked to me per-

William Yeskel, cross.

sonally about getting certain stuff out from the brewery, and that was agreed upon, and the final thing was supposed to be drawn by Mr. Schotland's office the following day. That was the reason I gave him the check and deposit—that is why he took it—(interrupted)

Q Didn't you understand when you put your signature on paper C. 4 that you were binding yourself to take this property according to the terms set out in this paper? A According to what he said to me, yes, sir. 10

Q According to the terms set out in this paper, didn't you understand that? A The terms he said to me, yes, sir, we agreed to.

Q And the terms set out in the paper marked C. 4, are they the terms which he stated to you at that time? A Well, he said he thought certain material was to be taken out from the brewery, that is all he said to me, and this is what we agreed upon and the final thing I told him to meet to Mr. Schotland's and we will draw the agreement. 20

Q Didn't he tell you of the various terms set out in the agreement marked Exhibit C. 4? A What he told me was certain property was to be taken out from the building.

Q Will you answer my question, please. Did Mr. Popik tell you before you signed the paper marked Exhibit C. 4 of the various terms contained in this paper? A Yes, sir; that is what he told me, that I am buying the brewery and the Krueger people will take certain material out from the brewery, and we were supposed to sign an agreement at my lawyer's office; he took this money from me in order to show good faith to Mr. Gross that we got money to buy the building—got money to buy the building, and all the 30 40

William Yeskel, cross.

arrangements to be made in my lawyer's office for regular agreement.

Q Now, do you mean to say that you gave Mr. Popik a check for a thousand dollars and agreed to buy this property for \$85,000 and all that he told you was the items that the brewery was going to take off the premises? A That is right.

Q That is all he told you? A Sure.

Q And you gave him a check for a thousand dollars? A I did.

Q And agreed to buy this piece of property for \$85,000? A Yes, sir.

Q You say that the first time you heard of this restrictive covenant against the use of the premises as a brewery was on the fifth of January? A I don't recollect it was the fifth; when I come to take title to the building.

Q When was that? A Well, I don't recollect the date when we agreed to take the title.

The Court: After New Year's?

The Witness: Yes, sir.

Q That is the first time you heard of it? A That is right.

Q This restrictive covenant? A Yes, sir.

Q Now, as a matter of fact, didn't you know that you were not there on that date? A I was there.

Q Were there? A Absolutely.

Q What time were you there? A Oh, I must have been around eleven or twelve o'clock in the morning.

Q Who was there? A Why, they told me—
(interrupted)

William Yeskel, cross.

Q Besides yourself? A They told me that they had already left.

Q You were there around eleven o'clock? A Between eleven and twelve o'clock; somewhere on that time. Before—I was there in the morning.

10

The Court: You were there before noon?

The Witness: Yes, sir, before noon I was there.

Q Did you ever tell your lawyer that you could not appear at his office on the 5th of January, 1925, because you had auto trouble? A That was on the 2nd, I believe when I rode down I had some trouble with my car—that time was later. That must have been the day I was supposed to take a title. I was a little delayed.

20

Q You say you got there about eleven o'clock? A Well, somewhere around that time, maybe eleven or twelve o'clock—somewhere around that time.

Q Now, did you see the copy of the writing marked Exhibit C. 1, which I show you, at that time? A The time I come over there?

Q Yes. A I do not remember seeing anything at that time. We were simply discussing about the place not having some—well, having certain provisions not to be used for a brewery, and so forth.

30

Q I am speaking now of the 5th of January when you say you came there to take this title—you first found out about this restriction? A I don't know whether it was the 5th or the 2nd.

Q Well, whenever it was, did you see a copy of this agreement? A I didn't see a copy.

40

William Yeskel, cross.

Q Who told you about the restrictive covenants? A Miss Jedell told me.

Q Did she read from anything or did she just tell you? A No; she just told me that this is the way I can get, but I wouldn't take it.

10 Q You wouldn't take it that way? A I wouldn't take it.

Q Why not? A Well, I didn't buy it this way.

Q You agreed to take the way Gross was taking it from the brewery, did you not? A He never told me that I couldn't use it—(interrupted).

Mr. Grosman: I move that the answer be stricken out.

20 The Court: The question ought to be stricken out, because you were asking about something in writing.

Q You are not in the brewery business, are you? A I am not.

Q Were you ever in the brewery business? A No, sir.

Q Do you know anything about the brewery business? A Well, I do business with them.

30 Q Were you prepared on the 5th day of January, 1925, to take title to this property from Gross? A Yes, sir.

Q Did you have the money? A Yes, sir.

Q And you would have take title except for this restriction? A Right.

Q Did you have the money with you in Schotland's office? A I had money with me. I can prove it by the Broad & Market National Bank.

Helen Jedell, direct.

HELEN JEDELL, sworn in behalf of defendant.

Direct examination by Mr. Schotland.

Q Miss Jedell, you are the managing clerk in my office? A I am.

Q And do you know the complainant and defendant in this case? A I do. 10

Q Do you remember when they first came to my office regarding the purchase and sale of the old Trefz brewery on Rankin and Beacon streets? A Yes, sir; October 3rd.

Q What happened? What took place at that time? A I was instructed by Mr. Yeskel to get ready to draw an agreement as he was about to purchase the brewery on Beacon and Rankin streets and I asked Mr. Silberman the price and the terms under which we were to purchase, and Mr. Silberman started to give me the terms, and so forth. When I said to him, "By warranty deed?" he says, "No; we cannot give you a warranty deed, because we are getting a bargain and sale deed." I said, "I cannot let Mr. Yeskel purchase this property or any property unless he gets a warranty deed from Mr. Gross." So Mr. Silberman said, "Well, we did not make a search yet—we are making a search now. If we had the search finished I could tell you if there is anything wrong on the title. If there is nothing wrong I will be willing that Mr. Gross should give a warranty deed." So we agreed to adjourn the matter for a few days because Mr. Silberman thought his search would be completed, and it was adjourned from time to time until October 22nd. 20 30

Q Is that all that happened that day? A That is all that happened that day—one more 40

Helen Jedell, direct.

thing happened. I agreed that they should get a survey, and if they would get it from Mr. Lemmesena, I said, if we agreed to take this we would pay for that survey. If we did not agree to purchase we would pay half of the survey.

10 Q And when did you get together? A Then we got together on October 22nd.

Q Now, tell everything that happened on that day. A Mr. Silberman repeated the terms, because I hadn't kept any memorandum, and he repeated the price and the terms and the conditions. When it came to me starting to get them down I asked for a description and I was told that he had a piece of paper among his records, because he didn't want me to see the agreement, and he handed me a description.

20 Q Just a moment.

The Court: Go on with the story.

30 The Witness: Then Mr. Silberman said to me, "Now, there are certain things in the brewery which we agreed that we would leave, in our agreement with the brewery, and I want the exact named things stipulated in this agreement." I said, "Well, let me see what it is that you want to be put in this agreement." So he had a little consultation with Mr. Gross, and he said "Mr. Gross does not want me to show the agreement, but I will read it to you." I said, "What is your objection to your showing it to me?" So he took the paper, folded it over, and I dictated right down to the girl for her to take the memorandum word for word as it was in that paragraph. He then asked for the agreement back, so I gave it back to him. I said, "If it is because you do

40

Helen Jedell, direct.

not want me to know the price, I know the price that Mr. Gross is paying." He says, "Well, as long as you know the price you can see the agreement." I said, "No, I don't want to see it. I don't care anything about it," and I returned his agreement. Then, after the entire agreement was dictated Mr. Silberman said to me, "I have another appointment. Your girl can write it out and after she is through writing it out you can send it over to me and if it is satisfactory to me, then I will get the acknowledgment and we can pass the balance of the money." After that I had Mr. Yeskel wait, and after the agreement was drawn Mr. Yeskel signed that agreement. Then I sent it over to Mr. Silberman, and either the next day or a few days later—I do not just recall that—I received a letter—Mr. Schotland received a letter setting forth such things as were to be changed in that. I changed those things with the exception of the place to passing title, and I sent for Mr. Yeskel to reiterate these new terms, because he had signed the other agreement, and then I sent it back to Mr. Silberman, and he returned it to me executed after the twenty-eighth of October.

Q Now, Miss Jedell, I show you Exhibit D. 2 for identification. What is that? A That is a description of the premises that I put in the agreement. I dictated it—

Q From whom did you get it? A From Mr. Silberman.

Q Now up to and including October twenty-second when you drew the formal agreement be-

Helen Jedell, direct.

tween the complainant and defendant did you know—had you seen the original agreement between the Krueger Brewing Company and Gross? A No.

10 The Court: Either the one that Mr. Silberman had or the one that Mr. Popik had?

The Witness: No, sir.

Q Was that clause you spoke about, itemizing the things that the brewing company were to take out, the only part of the agreement that you ever saw? A The only part I ever saw.

20 Q Now, when either Mr. Yeskel or Mr. Silberman mentioned the terms to you that were to be put into the formal agreement between the parties, Exhibit C. 5, was there any mention made of any restrictions of any nature? A No, sir.

The Court: The restriction as to the brewing.

Q Restriction as to the use to which the building should be put? A No, sir.

30 Q Was there any mention made by any one as to asking you to insert a restriction of this nature?

The Court: That the building was not to be used for brewing purposes?

The Witness: No, sir.

Q Was there any mention made of it? A No, sir.

40 Q When did you first hear of it? A On the fifth of January.

Helen Jedell, direct.

Q How did you learn of it? A When I asked to inspect the deed in order to see what our client was getting I noticed in the deed from the Krueger Brewing Company to Gross that restriction and I asked Mr. Silberman to show me his deed, and he showed it to me and I saw it in there. That was the first I knew about it. 10

Q Was Mr. Yeskel there?

The Court: What did you say then?

The Witness: Well, just about that time —(interrupted)

The Court: What did you say then?

The Witness: I will tell you. Just about that time Mr. Yeskel had called me up on the wire and told me he was delayed and I told him over the wire what I found and Mr. Yeskel said, "I won't take it any other way than my agreement calls for," and I repeated that conversation to Mr. Silberman, that Mr. Yeskel just told me that I can't take this title unless it conforms with the agreement, and this restriction is not in our agreement and therefore I cannot take the title. 20

The Court: Did you intentionally omit that covenant in the agreement? 30

The Witness: No, sir.

The Court: That is the implication from what counsel says and I just wanted to know whether you intentionally omitted it.

The Witness: No, sir.

The Court: Did you have any reason for it?

The Witness: No. 40

Helen Jedell, cross.

Cross examination by Mr. Grosman.

Q Miss Jedell, how long have you been in Mr. Schotland's employ handling his office affairs? A I guess it is about twenty-five years.

Q And during that time you have handled a great many titles? A I certainly have.

10 Q You are pretty thoroughly familiar with real estate law? A I think so.

Q Now, do you remember being shown this writing marked Exhibit C. 4? A I never saw that.

Q You never saw that? A No, sir.

Q Did you ever see the writing marked Exhibit C. 1? A I did.

Q When was that shown to you? A October 3rd.

20 Q Before the final agreement in this case was drawn? A That is right.

Q Did you read it over? A I did.

Q Did you observe the clause in this writing to this effect that this writing is to be delivered the same way as the agreement held by Samuel Gross on the above mentioned property? A I did.

30 Q Did you make any effort to get that agreement to find out precisely what that clause meant? A I asked what the clause meant.

Q Who showed you the paper marked Exhibit C. 4 on the third of October? A Yeskel.

Q And was he alone with you at the time he showed you this paper? A He was not.

Q Was Popik with him? A He was.

Q Isn't it a fact that Yeskel and Popik came to your office together on that morning? A Yes, sir.

40 Q And did you make any comment to Yeskel as to about this clause referring to his taking

Helen Jedell, cross.

this property the way Gross was getting it from the brewery? A Yes, sir.

Q What did you say to him? A I asked Mr. Yeskel what that meant. Mr. Yeskel told me there was certain things that the brewery was to have the privilege of taking out and that is what he meant by having that in.

10

Q Well, did you explain to him what that clause really meant? A No.

Q You didn't think that was necessary? A No.

Q Was Popik present during this conversation? A Yes, sir.

Q Did he show you a copy of the agreement between Gross and the brewery? A He did not.

Q Did he explain to you what the agreement between Gross and the brewery contained? A He did not.

20

Q Did you ask him? A No.

Q Didn't you think that you ought to have known that in view of the provision of his writing marked C. 1? A No.

Q Didn't interest you? A No; I got my explanation as to that.

Q Now, when Mr. Silberman came in later in that day did you ask him for a copy of the agreement between Gross and the brewery? A Not at that time.

30

Q Not on the third of October? A No, sir.

Q Did you make any comments to Mr. Silberman as to the clause in the paper marked C. 1 requiring Yeskel to take the property from Gross the way Gross got it from the brewery? A Mr. Silberman?

Q Yes. A No.

40

Helen Jedell, cross.

The Court: Did you say to Mr. Silberman that you did not see the agreement between the brewing company and Mr. Gross that Mr. Popik had shown you his?

The Witness: No, sir.

10 Q What time of the day on January fifth did you speak to William Yeskel over the 'phone?
A Several times, in the morning.

Q When was the first time? A About five minutes after nine.

Q And did you ask him to come down to the office at that time? A Told him to be there at ten o'clock.

Q Did he say he would be? A He said he would be there.

20 Q When did you speak to him again? A Shortly after ten o'clock, when he called up to say he had some automobile trouble and he would be delayed, but I should proceed for he would be down in time to pay over the money.

Q Is that the time you told him about the restrictive covenant? A No.

Q Did you tell him about it at that time? A No.

30 Q When did you tell him about it? A About twenty minutes later, when he called up again and told me he was still having trouble.

Q Was Mr. Silberman present? A He was in the office.

Q The telephoning you did was from the room where Mr. Silberman was in? A May not have been. May have come in the outside room. I had a whole room full of people.

40 Q No memorandum whatever was given to you by Mr. Silberman on October third? A No, sir.

Helen Jedell, cross.

Q Do you remember meeting Mr. Silberman while you were in the company of Mr. Schotland on the street one day after you had refused this title to go through? A Remember meeting you.

Q Meeting Mr. Silberman? A Yes, sir.

Q Do you remember Mr. Silberman calling your attention to the fact that that provision concerning the restrictive covenant should have been in that agreement because Yeskel had agreed to take it the way Gross was to receive? A Had a conversation with Mr. Schotland. 10

Q Didn't you hear it? A I heard it.

Q What was the substance of that conversation? 20

The Court: We have already had it. Your man said that the contract would stand.

DEFENDANT RESTS.

30

40

*Exhibit C. 1.***Exhibit C. 1.**

RECEIVED of Samuel Gross Twenty-five
 Hundred (\$2500.00) Dollars to be applied as a
 first payment upon an agreement to be here-
 after prepared providing for the sale to the said
 10 Samuel Gross, for Seventy Thousand (\$70,000.00)
 Dollars, of premises in the City of Newark,
 Essex County, New Jersey, having a frontage
 of approximately 240 feet on Beacon Street and
 180 feet on Rankin Street, formerly known as
 Trefz Brewery, consisting of three plots, as
 follows:—

Plot 1:—Situates on the easterly side of
 Beacon Street beginning at a point 171.46
 feet southerly from the corner of the south-
 east corner of Beacon Street and South
 20 Orange Avenue, having a frontage of ap-
 proximately 180 feet on Beacon Street and
 extending through to Rankin Street, with a
 frontage of approximately 180 feet on Ran-
 kin Street.

Plot 2:—Situates on the Easterly side of
 Beacon Street, beginning 141.46 feet south-
 erly from the said southeasterly corner of
 Beacon Street and South Orange Avenue,
 30 having a frontage of approximately 30 feet
 on Beacon Street and a depth of approxi-
 mately 100 feet.

Plot 3:—Situates on the easterly side of
 Beacon Street, beginning at a point 351
 feet southerly from the said southeasterly
 corner of Beacon Street and South Orange
 Avenue, having a frontage of approximately
 30 feet on Beacon Street and a depth of
 97.60 feet on the southerly side and 97.92
 40 feet on the northerly side respectively.

Exhibit C. 1.

Said agreement shall provide that said premises are to be conveyed by bargain and sale deed and said deed shall contain a covenant that no part of said premises shall be used as a brewery or for the manufacture or sale of wine, beer or spirituous liquors or malt beverages known as "near beer," said covenant to run with the land. 10

Said agreement shall also provide for the payment of \$22,500.00 in cash upon the passing of the title and the balance of said \$70,000.00 by a purchase money mortgage given to secure a bond conditioned for the payment of \$45,000.00, in five years from the date thereof with interest at 6% payable semi-annually, said bond and mortgage to be reduced by an installment payment of \$5,000.00 within three years from the date of said mortgage, and a further installment of \$5,000.00 within four years from the date of said mortgage. 20

Said bond and mortgage shall also contain the usual thirty days interest installment default and tax default clauses, and shall provide for insurance in the sum of \$45,000.00 with the usual mortgage provisions relating thereto.

The agreement shall further provide that the title shall be transferred on or before January 1, 1925. The vendors shall have the right to remove the following personal property and fixtures now existing on said premises:— 30

Oak Pressure Vats, 4 at 440 bbls. and 5 at 555 bbls.;

Vapor pipes of the Beer kettles;

Mash tubs and the cooker;

All remaining Beer Coolers, sections in cellars;

3 cold Water Tanks on roofs;

All office furniture including safes; 40

Exhibit C. 2.

All furniture in large Hall over office;

All loose Hardward fittings and tools.

Dated—Newark, N. J., Sept. 25, 1924.

G. KRUEGER BREWING

WILLIAM F. HAHN, Supt.

10

Exhibit C. 2.

ARTICLES OF AGREEMENT, made the nineteenth day of January in the year of Our Lord One Thousand Nine Hundrad and Twenty-Five,

BETWEEN

GOTTFRIED KRUEGER BREWING COMPANY, a corporation of the State of New Jersey, having its principal office in the City of Newark, in the County of Essex and State of New Jersey of the First Part;

20

AND

SAMUEL GROSS

of the City of Newark in the County of Essex and State of New Jersey of the Second Part;

WITNESSETH That the said party of the first part, for and in consideration of the sum of

SEVENTY THOUSAND (\$70,000.00) DOLLARS lawful money to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that it the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed of Bargain and Sale, free from all encumbrance on or before the first day of May next ensuing the date hereof, all those lots, tracts, or parcels, of land

30

40

Exhibit C. 2.

and premises, hereinafter particularly described, situate, lying and being in the City of Newark in the County of Essex and State of New Jersey.

Three (3) tracts set out by metes and bounds. Description same as set forth in paragraph one of the bill of complaint.

AND the said Samuel Gross for himself, his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, its successors and assigns, that he the said party of the second part, will pay and satisfy or cause to be paid and satisfied, unto the said party of the first part the said sum of Seventy Thousand (\$70,000.00) Dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

\$ 2,500. Two Thousand Five Hundred Dollars heretofore paid on account of contract to purchase said premises, dated Sept. 25, 1924.

1,000. One Thousand Dollars paid on the execution of this agreement;

21,500. Twenty-One Thousand Five Hundred Dollars in cash upon the passing of the title;

45,000. Forty-Five Thousand Dollars by a purchase money mortgage given to secure a bond conditioned for the payment of \$45,000. in five years from the

date thereof with interest at 6% payable semi-annually, said bond and mortgage to be reduced by an installment payment of \$5,000. within three years from the date of said mortgage, and a further installment of \$5,000. within four years from the date of said mortgage.

10

20

30

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Exhibit C. 2.

Said bond and mortgage shall also contain the usual thirty days interest, installment, and tax default clauses, and shall provide for insurance in the sum of \$45,000. with the usual mortgagee provisions relating thereto.

10 It is hereby agreed by and between the parties hereto that said premises are to be conveyed subject to a covenant that no part of said premises shall be used as a brewery or for the manufacture of wine, beer or spirituous liquors or malt beverages known as "near beer," said covenant to run with the land.

The party of the first part shall have the right to remove the following personal property and fixtures now on said premises:—

20 Oak Pressure Vats, 4 at 440 bbls. and 5 at 555 bbls.;

Vapor pipes of the Beer kettles;

Mash tubs and the cooker;

All remaining Beer Coolers; sections in cellars;
3 cold Water Tanks on roofs;

All office furniture including safes;

All furniture in large Hall over office;

All loose Hardward fittings and tools.

30 All other personal property and fixtures are included in the sale.

Taxes, insurance rents and water rents are to be apportioned as of January 1st, 1925.

40 The making of this contract shall be noted on the insurance policies and any money received on account of loss under such policies as adjusted by the parties hereto with the insurance company or companies, shall be received by the party of the first part and credited to the party of the second part upon the purchase price of said premises.

Exhibit C. 2.

AND IT IS FURTHER AGREED, by the parties to these presents, that the said party of the second part, his heirs and assigns, may enter into and upon the said land and premises on the first day of May next ensuing the date hereof, and from thence take the rents, issues and profits to his and their use.

10

AND IT IS FURTHER AGREED, by the parties hereto, that the said Deed Bargain & Sale shall be delivered and received at the office of Pitney, Hardin & Skinner, 701 Prudential Building, Newark, New Jersey, between the hours of ten in the forenoon and four o'clock in the afternoon on the said first day of May next ensuing the date hereof

AND for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators;

20

IN WITNESS WHEREOF, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

GOTTFRIED KRUEGER
BREWING COMPANY,

By Wm. C. Krueger, Vice Pres.

Signed, Sealed and Delivered
in the presence of

30

Attest:

Hugo Boepple, Jr.
Secty.

(SEAL)

Acknowledged January 23, 1925, by Hugo Boepple, Jr. on behalf of Gottfried Krueger Brewing Company.

40

*Exhibit C. 3.***Exhibit C. 3.****BARGAIN AND SALE DEED.**

Gottfried Krueger Brewing Co.
 (A N. J. Corporation),

Grantor

10

To

Samuel Gross,

Grantee.

Dated: January 2, 1925.

Conveys premises described in bill of complaint.

Contains the following covenant:

20 The party of the second part for himself, his heirs, executors and administrators hereby covenants and agrees to and with the party of the first part, its successors and assigns, that no part of the premises hereby conveyed shall be used as a brewery or for the manufacture of wine, beer or spirituous liquors or malt beverages known as "near beer." This covenant shall run with the land.

Acknowledged Feb. 2, 1925.

Recorded June 4, 1925.

30

40

*Exhibit C. 4.***Exhibit C. 4.**

Oct. 2, 1924

Received from the Yeskel Supply Company the sum of \$1,000.00 as part deposit payment on property purchased by Samuel Gross, formerly owned by the Trefz Brewing Company, and also known as the Trefz Brewery Co. about 240 feet on Beacon Street, and 180 feet on Rankin Street running through. 10

An additional deposit to be given upon signing of agreement. The amount of the deposit is to be agreed upon by both parties.

The conditions of the sale are as follows:

The purchase price is to be \$85,000.00.

A mortgage of \$45,000.00 is to be taken by the Brewery, and the balance is to be paid in cash on date of agreement calling for delivery of deeds. The property is to be delivered the same way as agreement held by said Samuel Gross on the above mentioned property. further agreed Mr. Gross can have one Boyler if he removes same himself from New Boyler room
Very truly yours,
Alfred Popik O. K. 20

Agreed and accepted by:

Wm Yeskel.

Samuel Gross

WY/G

O. K.

Exhibit C. 5.

Exhibit C. 5.

ARTICLES OF AGREEMENT,

Made the Twenty-second day of October in the
year of our Lord One Thousand Nine Hun-
dred and twenty-four

10 Between

SAMUEL GROSS AND PESSIE GROSS,
HIS WIFE,

of the City of Newark in the County of Essex
and State of New Jersey party of the first part:

And

WILLIAM YESKEL AND SAMUEL YES-
KEL, PARTNERS TRADING AS
"YESKEL SUPPLY CO."

20 of the City of Newark in the County of Essex
and State of New Jersey party of the second
part;

WITNESSETH, That the said party of the first
part, for and in consideration of the sum of

EIGHTY-FIVE THOUSAND DOLLARS

30 to be paid and satisfied as hereinafter mentioned,
and also in consideration of the covenants and
agreements hereinafter mentioned, made and en-
tered into by the said party of the second part,
doth agree to and with the said party of the
second part, that they the said party of the first
part, will well and sufficiently convey to the said
party of the second part, their heirs and assigns,
by Deed of warranty free from all encumbrances,
except as hereinafter stated, on or before the
Second day of January, 1925, * * * all those
lots, tracts, or parcels, of land and premises,
hereinafter particularly described situate, lying
and being in the City of Newark in the County
40 of Essex and State of N. J., the said premises

Exhibit C. 5.

being known and designated as The Trefz Brewery, having a frontage of approximately 240 feet on Beacon Street; 180 feet on Rankin Street and consisting of three plots as follows:

Plot 1:—Situates on the Easterly side of Beacon Street beginning at a point 171.46 feet southerly from the corner of the southeast corner of Beacon Street and South Orange Avenue, having a frontage of approximately 180 feet on Beacon Street and extending through to Rankin Street, with a frontage of approximately 180 feet on Rankin Street. 10

Plot 2:—Situates on the Easterly side of Beacon Street, beginning 141.46 feet southerly from the said Southeasterly corner of Beacon Street and South Orange Avenue, having a frontage of approximately 30 feet on Beacon Street and a depth of approximately 100 feet. 20

Plot 3:—Situates on the Easterly side of Beacon Street beginning at a point 351 feet southerly from the said Southeasterly corner of Beacon Street and South Orange Avenue, having a frontage of approximately 30 feet on Beacon Street and a depth of 97.60 feet on the southerly side and 97.92 feet on the Northerly side respectively. 30

Together with the buildings now on the said premises, and the contents of all of the buildings, except the Oak pressure vats, 4 at 440 barrels, and 5 at 555 barrels; vapor pipes of the beer kettles; mash tubs and the cooker; all remaining beer cooler sections in cellars; three cold water tanks on roofs; all office furniture, including safes; all furniture in large hall over office; all loose hardware fittings and tools, which Krueger Brewing Co. have a right to remove. 40

Exhibit C. 5.

It is expressly understood that party of the first part has the privilege of also removing one three-section boiler in the new boiler room.

This conveyance is made subject to recital in L. 13-409 of Deeds.

AND the said

10 WILLIAM YESKEL AND SAMUEL YESKEL, PARTNERS TRADING AS
"YESKEL SUPPLY CO."

for themselves, their heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that they the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the said
20 sum of

EIGHTY-FIVE THOUSAND DOLLARS

as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

On Execution of this agreement
for which this is also a receipt\$2,500.00

30 \$45,000., by accepting this conveyance subject to a mortgage which is to be a first lien on the said premises, conditioned for the principal to be paid in five years from its date, with interest at the rate of six per cent per annum, payable semi-annually, in instalments as follows:—

\$5,000., at the end of the third year from the date of said mortgage; \$5,000., at the end of the fourth year from the date of said mortgage; and the balance at the end of the fifty year from the date of said mortgage, which mortgage contains usual 30 day int. instalment and tax de-
40

Exhibit C. 5.

fault and provides for \$45,000. worth of Insurance.

\$22,500., in cash, when title passes and deed is delivered.

The balance, by executing and delivering to party of the first part their bond in double said amount, together with a purchase money mortgage which shall be a second lien on the said premises, conditioned for the principal to be paid on March 1, 1925, with interest at the rate of six per cent per annum, payable March 1, 1925. Said bond and mortgage shall also contain the usual thirty day interest instalment default, and tax clauses, and shall provide for insurance in the sum of the purchase money mortgage, with the usual mortgagee provisions relating thereto. 10

It is expressly understood that party of the first part has agreed to take this conveyance subject to the survey of C. F. Lemassena, made October 23, 1924, a copy of which is attached to this agreement. 20

In the event party of the first part are unable to convey because the Krueger Brewing Co. refuse to convey to them, through no neglect, or fault, on the part of the party of first part herein, then and in that event, the deposit is to be returned, and this agreement is to be null and void. 30

* * * * *

AND IT IS FURTHER AGREED, by the parties to these presents, that the said party of the second part, their heirs and assigns, may enter into and upon the said land and premises on the said day of settlement next ensuing the date hereof, and from thence take the rents, issues and profits to them and their use.

Exhibit C. 5.

AND IT IS FURTHER AGREED, by the parties hereto, that the said Deed shall be delivered and received at the office of Philip J. Schotland, 9 Clinton St., Newark, N. J., between the hours of ten in the forenoon and four o'clock in the afternoon on the said day of settlement next
 10 ensuing the date hereof.

The rents of said premises, insurance premiums, water rents, taxes and interest on Mortgage, if any, shall be adjusted, apportioned and allowed as of the day of delivery of said deed.

Gas and electric fixtures and chandeliers, carpets, linoleum, mats, and matting in halls, ash cans and heating apparatus, if any, are included in this sale.

The risk of loss or damage to said premises by fire or otherwise until the delivery of said
 20 deed is assumed by the party of the first part.

* * * * *

It is expressly understood that the premises hereby to be conveyed are not derived from adverse possession, nor tax sale, nor is to be what is commonly known as "A Martin Act Title."

* * * * *

AND for the performance of all and singular the covenants and agreements aforesaid, the
 30 said parties do bind themselves and their respective heirs, executors and administrators; and they hereby agree to pay, upon failure to perform the same, the sum of

which they hereby fix and settle as liquidated damages therefor.

Exhibit C. 6.

IN WITNESS WHEREOF, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

Signed, Sealed and Delivered

in the presence of

Helen Jedell.

(L. s.) 10

(L. s.)

Wm Yeskel & Saml Yeskel (L. s.)

Partners Trading as Supply Co. (L. s.)

Exhibit C. 6.

THIS INDENTURE, Made the Fifth day of January, in the year of our Lord One Thousand Nine Hundred and Twenty-Five. 20

BETWEEN

SAMUEL GROSS and PASSIE GROSS, his wife,

of the City of Newark, in the County of Essex, and State of New Jersey, party of the first part;

AND

WILLIAM YESKEL and SAMUEL YESKEL, partners trading as "YESKEL SUPPLY CO." 30

of the City of Newark, in the County of Essex, and State of New Jersey, party of the second part:

WITNESSETH, That the said party of the first part, for and in consideration of One Dollar (\$1.00) and other good and valuable considerations lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before 40

Exhibit C. 6.

the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part being therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do
 10 give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part, and to their heirs and assigns, forever, ALL those certain tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the City of Newark, in the County of Essex, and State of New Jersey,

Three (3) tracts set out by metes and bounds. Description same as set forth in paragraph one of the bill of complaint.

20 This conveyance is made subject to recital in deed recorded in the Essex County Register's Office in Book L 13 page 409 of deeds for Essex County, and also subject to a mortgage of Forty-Five Thousand Dollars (\$45,000) now a lien on the herein described premises which mortgage the party of the second part assumes and agrees to pay.

30 And the said party of the second part, William Yeskel and Samuel Yeskel, partners trading as "Yeskel Supply Co.", for themselves, their heirs, executors, administrators and assigns, do jointly and severally covenant with the party of the first part, their heirs, executors and administrators, that neither the said party of the second part, nor their heirs, executors, administrators or assigns, shall or will at any time thereafter, use or permit said premises or any part thereof, to be used as a brewery or for the manufacture
 40 of wine, beer or spirituous liquors or malt bever-

Exhibit C. 6.

ages known as "near beer," this covenant to run with the land.

TOGETHER with all and singular the houses, buildings, trees, ways, waters, profits, privileges, and advantages, with the appurtenances to the same belonging or in anywise appertaining.

ALSO, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof. 10

TO HAVE AND TO HOLD, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, their heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, their heirs and assigns forever:

AND the said Samuel Gross and Passie Gross, his wife, do for themselves, their heirs, executors, and administrators covenant and agree to and with the said party of the second part, their heirs and assigns, that they the said parties of the first part, are the true, lawful and right owners of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever: 20 30

AND ALSO that the said party of the first part now have good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid: 40

Exhibit C. 7.

AND ALSO, that they, the said parties of the first part will WARRANT, secure, and forever defend the said land and premises unto the said

10 heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrances whatsoever, except as hereinbefore mentioned.

IN WITNESS WHEREOF, the said party of the first part have hereunto set their hands and seals the day and year first above written.

SAMUEL GROSS (L. s.)

PASSIE GROSS (L. s.)

20 Signed, Sealed and Delivered
in the presence of

Paul R. Silberman

Truly acknowledged by Saml & Passie Gross.

Exhibit C. 7.

Newark, N. J., January 29th, 1925.

30 TO WILLIAM YESKEL and SAMUEL YES-
KEL,
PARTNERS TRADING AS "YESKEL
SUPPLY CO."
110 LILLIE STREET,
NEWARK, NEW JERSEY.

Gentlemen:

40 I call your attention to the fact that through an oversight on the part of my attorney, Mr. Paul R. Silberman and through an oversight or

Exhibit C. 7.

willful omission on the part of your legal representative, Miss Helen Jedell, the agreement made between you, Pessie Gross and myself, dated October 22nd, 1924, for the sale by us to you of the Trefz Brewery lands and buildings, on Beacon Street, Newark, New Jersey, omits the following clause contained in our agreement of October 2nd, 1924; to wit: 10

“The property is to be delivered the same way as agreement held by said Samuel Gross on the above mentioned property.”

This clause should have been inserted in our agreement of October 22nd, 1924, and said agreement should have contained the following specific provision, contained in the agreement of September 25th, 1924, between the Godfried-Krueger Brewing Co. and myself, with which both you and your legal representative were acquainted, to wit: 20

“The deed shall contain a covenant that no part of said premises shall be used as a brewery or for the manufacture or sale of wine, beer, or spirituous liquors or malt beverages known as ‘near beer,’ said covenant to run with the land.”

Both you and your attorney were familiar with the terms of the agreement of September 25th, 1924, between the Godfried-Krueger Brewing Co. and myself; both of you were aware that said agreement contained the above mentioned provision and that this clause should have been contained in my agreement with you of October 22nd, 1924. 30

I therefore call upon you to permit the insertion of the abovementioned provisions or the former of them, if you so prefer, in the agreement of October 22nd, 1924, between Pessie Gross, you and myself. 40

Exhibit C. 7.

I shall expect you to inform me of your decision with reference to this request not later than Wednesday, February 4, 1925. I shall be at the office of your attorney, Philip J. Schotland, Esq. at ten o'clock on that day for the purpose of receiving your answer.

10 I further wish to inform you that on Wednesday, February 4th, 1925, at the hour of ten o'clock in the forenoon, I shall be present at the office your attorney, Mr. Philip J. Schotland, Union Building, Newark, New Jersey, for the purpose of making you a tender of the deed to the premises which you agreed to purchase from me under date of October 22nd, 1924.

20 The deed which I propose to tender you will be drawn in accordance with the true agreement for the sale of said property made between us and will contain the covenant abovementioned, namely:

“No part of said premises shall be used as a brewery or for the manufacture of wine, beer, or spirituous liquors or malt beverages known as “near beer,” said covenant to run with the land.”

Please be present at that time.

Very truly yours,

30 Samuel Gross.

Exhibit C. 8.—D. 1.

Exhibit C. 8.

PHILIP J. SCHOTLAND
Counsellor at Law
9 CLINTON ST., NEWARK, N. J.

February 2, 1925

Mr. Samuel Gross,
c/o Messrs. Silberman & Grosman,
776 Broad Street,
Newark, N. J.

10

Dear Sir:—

Replying to yours of the 29th. ult., would say, that there was no oversight on anybody's part, as stated in your letter, and the formal agreement that was made, contained everything that was agreed upon, and nothing was done, or intended to be inserted, restricting the use of the premises for the manufacture of Wines, Beer or Spirituous Liquors, or Malt Beverages, known as "Near Beer."

20

Very truly,
Yeskel Supply Co.
Per H J.

30

Exhibit D. 1.

Is the same as Exhibit C. 4, except that C. 4 contains the following notation in ink in the margin:

Gross can have one boiler if he removes same himself from new boiler room. O. K. A. P.

40

*Exhibit D. 3.***Exhibit D. 3.**

Law Offices
SILBERMAN & GROSMAN

776 Broad Street

Newark, N. J.,

10

October
23rd,
1924

PHILIP J. SCHOTLAND, ESQ.
UNION BUILDING,
NEWARK, N. J.

Dear Sir:

With reference to agreement between Gross and Yeskel Supply Co., I wish to suggest the following corrections:

20

Date of passing title: January 2nd, 1925.

The contents of excepted clause shall read: "The Krueger Brewing Co. shall have the right to remove the following personal property and fixtures now existing on said premises:

Oak Pressure Vats, 4 and 440 bbls. at 5 at 555 bbls.

30

Vapor pipes of the Beer Kettles

Mash tubs and the cooker

All remaining Beer Coolers, sections in cellars

3 cold Water Tanks on roofs

All office furniture including safes

All furniture in large Hall over office

All loose Hardware fittings and tools.

The privilege also of removing one three-section boiler in the new boiler room, is in the party of the first part.

40

The \$45,000.—first mortgage shall contain the usual thirty day interest, installment default and tax default clauses, and shall provide for insur-

Exhibit D. 3.

ance in the sum of \$45,000.—with the usual provisions relating thereto.

The second bond and mortgage shall be drawn by the attorneys for the party of the first part at the cost and expense of the party of the second part.

The deed shall be delivered and received in the office of the Krueger Brewing Company's attorneys. 10

Violation clause shall be stricken out.

The clause referring to injury to building shall be stricken out.

Upon receipt of a corrected agreement, I will submit same to my client.

Very truly yours,

SILBERMAN & GROSMAN,

By Paul R. Silberman 20

PRS:W

30

40

*Stipulation.***Stipulation.**

It is stipulated between Counsel for the respective parties hereto that Exhibits A, B, C and D annexed to the bill of complaint filed in this cause be omitted for the following reasons:

10 Exhibit A is a copy of Exhibit C. 1 in the cause;

Exhibit B is the same as Exhibit C. 4 in the cause;

Exhibit C is the same as Exhibit C. 5 in the cause;

Exhibit D is the same as Exhibit C. 7 in the cause.

The remaining exhibits have been abridged by consent.

20

SILBERMAN & GROSMAN,
Solicitors of Complainants.

PHILIP J. SCHOTLAND,
Solicitor of Defendants.

30

40

Opinion.

OPINION.

Filed October 10, 1925.

On final hearing.

For complainants, Silberman & Grosman.

10

For defendants, Philip J. Schotland.

BACKES, *V.-C.*

The complainant Gross bought the old Trefz Brewery from the Krueger Company and in his agreement of sale with and his deed from the Krueger Company covenanted not to use the property for a brewery. Before he got his deed he sold the property to the defendant and in a memorandum agreement between them it was stipulated that "the property is to be delivered the same way as the agreement held by said Samuel Gross." The following day a formal agreement of sale was entered into in which the stipulation was omitted.

20

Complainant prays that the agreement of sale be reformed to include the covenant, and as reformed that it be specifically enforced. Contracts for the sale of land will not be reformed in respect of matters required by the statute of frauds to be in writing, and then enforced. *Wirtz v. Guthrie*, 81 N. J. Eq. 271; *Vogt v. Mullin*, 82 N. J. Eq. 452; *Schwartzman v. Creveling*, 85 N. J. Eq. 402. Complainant later waived this prayer for performance and now asks reformation to protect him against a possible suit for a breach of the contract as written. While equity refuses to reform such a contract for the purpose of prosecution, either at law or in equity, it will reform to defeat an inequitable suit for a breach. Suit is not threatened and the plea is premature.

30

40

Opinion.

The proofs do not show that the defendant agreed to take title to the property, subject to the restrictive covenant, nor that the stipulation in the memorandum agreement that the property was to be delivered in the same way as Gross was to receive it, means that the defendant was to take title subject to the covenant. The Krueger Company had reserved the right to remove some appliances, and it would appear that the stipulation, as its language indicates, embodied the understanding of the parties, that the defendant was to take the property minus the articles, as the complainant had agreed to do with the Krueger Company. The defendant also testified that he did not know of the covenant until the day fixed for the passing of title, although the complainant's real estate agent, who negotiated the sale, testified that he had shown him the Krueger Company contract before the memorandum agreement was signed, and also that he had shown it to the scrivener of the agreement of sale before it was drafted. Both deny seeing it. Had she known of the covenant it would not have been notice to the defendant, nor evidence that he had agreed to the covenant. The scrivener, an efficient clerk in the office of the defendant's attorney, prepared the agreement of sale, as she says, in ignorance of the stipulation or of the covenant. It was sent, signed, to the attorney of the complainant, who, after criticism and correction, returned it executed by his client without, as he says, noticing the omission. To warrant a reformation of a contract on the ground of mutual mistake the proof must be clear and convincing that a mistake had been made and that it was mutual. *Green v. Stone*, 54 N. J. Eq. 387; *Birch v. Baker*, 81 N. J. Eq. 264.

Notice.

If the stipulation had been incorporated in the agreement of sale the defendant would not, upon the case as made, have been compelled to accept the title subject to a burden of which he had no notice.

The bill will be dismissed.

10

NOTICE.

To Silberman & Grosman, Esqs., solicitors for Samuel Gross and Passie Gross, complainants:

SIRS:

PLEASE TAKE NOTICE, that on Tuesday, October 27, 1925, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, I shall present the form of final decree to the Honorable John H. Backes, Vice-Chancellor, before whom the above-entitled cause was tried, for signature by him; a true copy of which is hereto annexed. Dated October 15, 1925.

20

Respectfully yours,

PHILIP J. SCHOTLAND,
Solicitor and Counsel with Defendants.

30

40

Final Decree.

FINAL DECREE.

Filed October 27, 1925.

This matter coming on to be heard in the presence of Silberman & Grosman, Esqs., solicitors of the complainants, and Philip J. Schotland, Esq., solicitor of the defendants, and the Court having heard and considered the testimony and arguments of the said solicitors, and being of opinion that the complainants are not entitled to the relief prayed for, and that the bill of complaint should be dismissed:

It is, on this 27th day of October, 1925, ORDERED, ADJUDGED and DECREED, that the complainants said bill of complaint be and the same is hereby dismissed.

And it is further ORDERED, ADJUDGED and DECREED, that the complainants, Samuel Gross and Passie Gross pay to the defendants, William Yeskel and Samuel Yeskel, partners trading as "Yeskel Supply Co.," the costs of this suit to be taxed, including a counsel fee of \$220 to be taxed as part of the taxed costs, which is hereby allowed to said defendants and that execution issue therefor, according to the practice of this Court, against the goods and chattels, lands, hereditaments and real estate of the said Samuel Gross and Passie Gross, complainants.

E. R. WALKER,

C.

Respectfully advised,

JOHN H. BACKES,
V.-C.

*Notice of Appeal.***NOTICE OF APPEAL.**

Filed November , 1925.

Complainants, Samuel Gross and Passie Gross,
 hereby appeal from the final decree made in the
 above-entitled cause on the 27th day of October,
 1925, and from the whole and every part there- 10
 of, to the Court of Errors and Appeals in the
 LAST RESORT in all causes.

Dated November 10, 1925.

SILBERMAN & GROSMAN,
 Solicitors for and of Counsel
 with Complainants.

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

ROBERT D. GROSMAN,
 Of Counsel with Complainants.

Service of a copy of the within notice is hereby
 acknowledged this 10th day of November, 1925.

P. J. SCHOTLAND,
 Solicitor of Defendant. 30

*Petition of Appeal.***PETITION OF APPEAL.**

Filed November 13, 1925.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

10	SAMUEL GROSS and PASSIE GROSS, <i>Complainants-Appellants,</i> <i>vs.</i> WILLIAM YESKEL and SAMUEL YESKEL, partners trading as YESKEL SUPPLY Co., <i>Defendants-Appellees.</i>	} <i>On Appeal</i> } <i>from the</i> } <i>Court of</i> } <i>Chancery.</i> } <i>Petition</i> } <i>of Appeal.</i>
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20 *To the Honorable the Court of Errors and Appeals in the last resort in all causes:*

The petition of Samuel Gross and Passie Gross, the appellants in the above-entitled cause, respectfully shows that:

30 Petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date October 27, 1925, in a certain cause in said Court of Chancery wherein the said Samuel and Passie Gross were complainants and the said William Yeskel and Samuel Yeskel, partners trading as "Yeskel Supply Co." were defendants, in this respect, to wit; that the said decree adjudges that your petitioners are not entitled to the relief prayed for in the bill of complaint filed by them in said suit, and doth decree that your petitioners' said bill of complaint be and is thereby

40 dismissed.

Petition of Appeal.

And your petitioners humbly appeal from said decree and from the whole and every part thereof, on the ground that the same is erroneous and that the Chancellor should have found and adjudged the several allegations of your petitioners' bill of complaint to have been proved and should have ordered, adjudged and decreed that the contract entered into between your petitioners and the respondents, dated the 22nd day of October, 1924, and marked as "Exhibit C. 5" in the cause, fails to truly express the intention and agreement of the parties thereto and should be reformed and corrected so as to include therein the following provisions:

"That the deed to be given by complainants-appellants to the defendants-respondents, shall contain a covenant that no part of said premises shall be used as a brewery or for the manufacture or sale of wine, beer or spirituous liquors or malt beverages known as 'Near Beer' said covenant to run with the land."

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

Dated November 12, 1925.

SILBERMAN & GROSMAN,
Solicitors for and of Counsel
with Appellants.

ROBERT D. GROSMAN,
Of Counsel.

Service acknowledged November 12, 1925.

PHILIP J. SCHOTLAND,
Solicitor of Respondents.

Answer to Petition of Appeal.

ANSWER TO PETITION OF APPEAL.

Filed November , 1925.

10 The answer of William Yeskel and Samuel Yeskel, partners trading as "Yeskel Supply Co.," the above named appellees to the petition of appeal of Samuel Gross and Passie Gross, the above-named appellants:

20 These appellees, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admit that a decree was on the 27th day of October, 1925, made and entered in the Court of Chancery of New Jersey, in the above-entitled cause, for the purposes in said petition mentioned, and as therein set forth, but as to the substance and form of said decree, these appellees beg leave to refer thereto when the same shall be produced.

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

30 PHILIP J. SCHOTLAND,
Solicitor for and of Counsel
with Appellees.

Service of a copy of the within answer to petition of appeal is hereby acknowledged this 13th day of November, 1925.

SILBERMAN & GROSMAN,
Solicitors for and of Counsel
with Complainants-Appellants.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

SAMUEL GROSS and PASSIE GROSS,
Complainants-Appellants,

vs.

WILLIAM YESKEL and SAMUEL
YESKEL, partners trading as
"Yeskel Supply Co.,"
Defendants-Appellees.

On Bill, etc.

*On Appeal
from Decree
in Chancery.*

BRIEF ON BEHALF OF DEFENDANTS- APPELLEES.

Facts.

The complainants brought suit to reform the contract Exhibit C. 5, appearing on pages 110-115 of the state of the case, and to compel the defendants to specifically perform said agreement as reformed. After the close of the case, on final hearing, the complainants, having become aware of the fact that equity will not reform a contract, and then decree specific performance on it as reformed, abandoned their prayer for specific performance and asked for reformation only. The reformation that complainants ask is, that a clause be inserted in said contract, C. 5, reading as follows:

"That said deed shall contain a covenant that no part of said premises shall be used as a brewery or for the manufacture or sale of wine, beer or spirituous liquors or malt beverages, known as 'near beer,' said covenant to run with the land."

See page 6 of the state of the case.

The learned Vice-Chancellor, after hearing all of the evidence in the case, determined that

there was no mutual mistake of fact in the making of the agreement Exhibit C. 5, that neither the defendants, nor their attorney, knew of the alleged covenant, and that to warrant a reformation of a contract on the ground of mutual mistake, the proof must be clear and convincing that a mistake had been made, and that it was mutual, citing *Green v. Stone*, 54 N. J. Eq. 387, and *Birch v. Baker*, 81 N. J. Eq. 264, and therefore ordered the bill dismissed and a decree was accordingly entered, from which decree the complainants have appealed (see opinion of Vice-Chancellor Backes, pp. 125-127 of the State of the Case).

ARGUMENT.

Until a mistake has been established by such force of proof as leaves no rational doubt of the fact, no change in the writing sought to be reformed is entitled to be called a correction.

Rowley v. Flannelly, 30 N. J. Eq. 612.

The reformation of a deed for mistake will not be granted where the evidence of the mistake is strongly contradicted.

Green v. Stone, 54 N. J. Eq. 387, 34 Atl. 1099, in which case Judge Depue wrote the opinion for the Court of Errors and Appeals, in which all the cases are collected and reviewed, carefully considered, and the rule laid down by Vice-Chancellor Van Fleet in *Rowley v. Flannelly*, *supra*, is cited with approval, and Judge Depue himself says:

“To justify the reformation of a deed executed, delivered, accepted and acted upon, on the ground that it did not correctly express the agreement made by the parties, the proof must be *clear and convincing*, and

upon testimony that is *unexceptional*, both with regard to the agreement actually made by the parties, and the *mutuality of the mistake* through which a different agreement was put in the deed.

“The mistake which is equitable ground for reformation of a written contract must be *clearly shown to have been a mutual mistake*, and the mistake must be established by such force of proof *as leaves no rational doubt of the fact of mistake.*”

Birch v. Baker, 81 N. J. Eq. 264, 86 Atl. 932 (opinion by Vice-Chancellor Emery).

To the same effect are *Goerke v. Diskon*, 75 Atl. 780; *Giammares v. Alemania Fire Insurance Co.*, 108 Atl. 237, and *First National Bank v. Fessler*, 84 N. J. Eq. 166.

There are no decisions in this State in any way modifying or weakening this rule.

In the case at bar, the only evidence introduced on the part of the complainants that there was a mutual mistake in the agreement C. 5 is Exhibit C. 4, appearing on page 109 of the state of the case, which contains the clause:

“The property is to be delivered the same way as agreement held by Samuel Gross on the above-mentioned property,”

and the complainants seek to draw the inference from that clause that the defendants agreed to purchase the property in question by deed containing the restrictive covenant; also the testimony of Alfred Popik, the broker in the case, who was interested in the result, for the purpose of collecting the commission, who testified on page 41, lines 1-2, that he told the defendants the property can be used for any purpose, out-

side of a brewery, and that he showed the preliminary agreement between the Gottfried Krueger Brewing Co. and the complainant, which appears as Exhibit C. 1, on pages 102-104 of the state of the case, to the defendant. This testimony is flatly and squarely contradicted by the defendants, and the defendant William Yeskel, with whom the negotiations were carried on, who, according to the testimony of Alfred Popik, is the one that insisted that the clause above quoted from Exhibit C. 4, be inserted in Exhibit C. 4, testified that all he knew about that part was, that Mr. Popik told him certain property was to be taken out from the building, and that he told Mr. Popik to meet him at Mr. Schotland's office to draw the agreement (see p. 89 of the State of the Case, ll. 20-30).

The receipt C. 4 on its face shows that it is not a binding agreement, but only a preliminary receipt, for it contains this clause: "An additional deposit to be given upon signing of agreement. The amount of the deposit is to be agreed upon by both parties." It, in itself, is, therefore, not a binding agreement.

Tansey v. Suckoneck, 130 Atl. 528;

Schneider v. Crawford, 131 Atl. 687;

Venino v. Naegele, 131 Atl. 895;

Thompson v. Kilheffer, 125 Atl. 11;

Kurtz v. Busch, et al., 128 Atl. 552;

Kuskin, et al., v. Guttman, et al., 130 Atl. 829.

In *Tansey v. Suckoneck, supra*, Judge Parker, speaking for the Court of Errors and Appeals, says:

"The basis for decision in the present case is that the paper is, on its face, preliminary, and not final, and by its very language indicates that other features left un-

settled are to be settled by further negotiations,"

and held such an agreement unenforceable.

In *Thompson v. Kilheffer, supra*, Judge Kalisch, speaking for the Court of Errors and Appeals, held that the execution of a receipt with the understanding to enter into a formal contract later, does not constitute a contract.

It is, therefore, clear that in and of itself, Exhibit C. 4 does not constitute a contract, nor is it an enforceable agreement. It can only be used for the purpose of showing what the parties had agreed upon, and as demonstrated above, the only testimony to show that they included a reference to the covenant against the use of the premises is the testimony of the broker, whose manner on the stand, and whose changes of testimony did not inspire the learned Vice-Chancellor with very much confidence, and his testimony is flatly contradicted by the defendant and by the subsequent acts of the parties.

When the parties came together at Mr. Schotland's office, both on October 3rd and on October 22nd or 23rd, 1924, no one mentioned the covenant in question to the scrivener drawing the agreement, and asked that it be embodied in the agreement; in fact, it was not even mentioned. See testimony of Samuel Gross, complainant, who testified that he did not do any of the talking, that he did not state or make any of the terms to go into the contract, but that he relied entirely on his attorney, Mr. Silberman, who did all the talking for him (see pp. 62-63 of the State of the Case).

The testimony of Paul Silberman, who was the complainants' attorney and carried on the negotiations at the office of the defendants' attorney when the terms were agreed upon, to be em-

bodied in the formal agreement C. 5, appears on page 73 of the State of the Case, and is as follows (lines 1-20):

“Q Did you ever mention or discuss the question of these restrictive covenants with Miss Jedell at all? A I did not—not before October—not before October third.

The Court: Not before the formal agreement was signed?

The Witness: No.

Q The only time you ever talked with Miss Jedell about the restrictive covenants was after January fifth, when she objected to the deed? A Yes, sir.

The Court: After you discovered the error?

The Witness: After we discovered the error.”

The testimony of the defendant is, that he never heard of the covenant until informed of it by Miss Jedell the day that he was prepared to take title, and the testimony of Miss Jedell, on the bottom of page 96 and top of page 97 of the State of the Case, is as follows:

“Q Was there any mention made of it?

A No, sir.

Q When did you first hear of it? A On the fifth of January.

Q How did you learn of it? A When I asked to inspect the deed in order to see what our client was getting I noticed in the deed from the Krueger Brewing Company to Gross that restriction and I asked Mr. Silberman to show me his deed, and he showed it to me and I saw it in there. That was the first I knew about it.”

It is therefore clear that when the negotiations were going on, no one mentioned the restrictive covenant, and neither the defendants, nor their attorney, or the scrivener, knew anything about any restrictive covenant. It, there-

fore, could not have been, and was not, a mistake, not to insert the restrictive covenant in Exhibit C. 5. Furthermore, after C. 5 was drawn and signed by the defendants, it was sent to the office of the plaintiffs' attorney, who evidently went over it very carefully and very minutely, for he wrote Exhibit D. 3, which is addressed to the attorney for the defendants, on October 23, 1924, and which takes up a full page and a half in the State of the Case, pages 122-123, in which he suggested very minute corrections. These were gone over, some of them were agreed upon, and inserted in the contract, C. 5, and others were waived, and the agreement C. 5 was then signed by the complainants, five days later, that is, on October 28, 1924. See testimony of Paul Silberman, page 76 of the State of the Case, wherein he testifies to these facts. This further demonstrates that there was no fraud, no mutual mistake, and no oversight in the drafting, drawing and executing of Exhibit C. 5, the contract between the parties, in the form in which it was actually drawn, signed and delivered.

A significant fact in the case is, that when, on January 5, 1925, the complainant, as he now claims, learned for the first time that the restrictive covenant, limiting the use of the premises, was omitted from the contract Exhibit C. 5, he had no binding agreement with the Brewing Company, for his agreement, Exhibit C. 1, appearing on pages 102-104 of the State of the Case, is only a receipt for \$2,500, "to be applied as a first payment upon an agreement to be hereafter prepared, providing for the sale," and, therefore, was not a binding contract under the authorities quoted above, on either party, and complainant could have either insisted upon securing a contract, omitting that covenant,

which he attempted to do, as is shown by the evidence, or could have bought the property for himself, independent of the fact that the defendants did not desire to take the property subject to a restrictive covenant, limiting its use. Complainant evidently chose to buy the property with full knowledge that he was not selling it to the defendants, for he entered into a formal agreement with the Gottfried Krueger Brewing Company on the 19th of January, 1925, exactly two weeks after he knew that the defendants would not buy subject to the restrictive covenant, and in the formal agreement, agreed to take it subject to that restrictive covenant, and actually took title in June, a few days before the final hearing of this cause.

It is, therefore, clear that there was neither fraud, nor mistake, in the making, executing and delivering of the contract, Exhibit C. 5, and that the learned Vice-Chancellor who held:

“The proofs do not show that the defendant agreed to take title to the property subject to the restrictive covenant, nor that the stipulation in the memorandum agreement, that the property was to be delivered in the same way as Gross was to receive it, means that the defendant was to take title subject to the covenant”

is supported by the overwhelming weight of the evidence in the case, and the decree entered on his opinion dismissing the bill should be affirmed.

Defendants therefore respectfully submit that the decree of the Court of Chancery be affirmed and the appeal dismissed.

Respectfully submitted,

PHILIP J. SCHOTLAND,
Solicitor and Counsel
with Defendants-Appellees.

New Jersey Court of Errors and Appeals

SAMUEL GROSS and PASSIE GROSS,
Complainants-Appellants,

vs.

WILLIAM YESKEL and SAMUEL
YESKEL, partners trading as
"YESKEL SUPPLY Co.",
Defendants-Appellees.

On Bill, Etc.

*On Appeal
from Decree
in Chancery.*

BRIEF ON BEHALF OF APPELLANTS.

Statement of Facts.

This is an appeal from a final decree entered in the Court of Chancery on the 27th day of October, 1925, in the above-entitled cause, dismissing appellant's bill of complaint.

The suit as originally instituted was for reformation of a written agreement to sell land and for a decree directing specific performance of the contract as reformed.

Subsequently the appellants waived their prayer for performance and asked merely for the reformation of the agreement.

The appellants purchased from the Krueger Brewing Co. certain lands and premises known as "The Old Trefz Brewery" upon the terms and conditions set forth in Exhibit C. 1.

This agreement was later amplified by a more formal agreement between the appellants and the said Gottfried Krueger Brewing Co. which last named agreement is Exhibit C. 2 in the cause.

Both of these agreements provided that the deed to be given thereunder to the complainants should contain a covenant to the following effect:

“That no part of said premises shall be used as a brewery or for the manufacture or sale of wine, beer or spirituous liquors or malt beverages known as ‘near beer’, said covenant to run with the land.”

On the 2nd day of October, 1924, before complainants received their deed from the Krueger Company, the respondents agreed to purchase from the complainants the property in question and a memorandum agreement was drawn between the appellants and respondents which is marked “Exhibit C. 4” in the cause.

This last-named agreement provided among other things that:

“The property is to be delivered the same way as agreement held by said Samuel Gross on the above property.”

Subsequently a more formal agreement was drawn between appellants and respondents which agreement is marked “Exhibit C. 5” of the cause.

This agreement (Exhibit C. 5) failed to make any mention of the provision contained in the appellants’ contract with the Krueger Company (Exhibits C. 1 and 2) namely that the deed to be given by the appellants to the respondents should contain a covenant against the use of the premises “as a brewery or for the sale of wine, beer or spirituous liquors or malt beverages known as ‘near beer’ said covenant to run with the land.”

The final agreement between appellants and respondents (Exhibit C. 5) was prepared by the respondents’ counsel.

It was sent to appellants' counsel who inspected same and returned it for correction and finally executed by the parties to this suit.

Appellants' counsel however failed to observe that the final agreement between the parties (Exhibit C. 5) failed to make provision for the insertion in the deed to be given by the appellants to the respondents thereunder of a restrictive covenant against the use of the premises as a brewery and this fact became known to the appellants only at the time fixed for the passing of title at which time the respondents refused to accept title from the appellants because the deed tendered contained the restrictive covenant in question.

The respondents also objected to the deed tendered to them by the appellants because they insisted that at the time the appellants did not have title to the premises.

This was to have been a three-cornered transaction, that is, the Krueger Brewing Company was to convey title to the appellants and the appellants were to in turn convey title immediately to the respondents. All parties concerned were present at the time finally agreed upon for the passing of title with the exception of the respondents who were represented by counsel.

Thereupon the appellants served a written notice upon the respondents demanding that they consent to the insertion of a provision in their final agreement (Exhibit C. 5) providing for a covenant against the use of the premises as a brewery to be inserted in the deed to be given thereunder.

This the respondents refused to do.

POINT ONE.

Where an instrument is drawn and executed, which professes, or is intended to carry into execution an agreement, whether in writing or by parole, previously entered into, but which by mistake of the draftsman, whether as to fact or law, does not fulfil, or which violates the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the true agreement.

This rule was applied in *Cochran v. Burns*, 107 Atl. 476, and is approved in *Exrs. Wintermute v. Exrs. Snyder*, 3 N. J. Eq. 489-500, and is in substance approved by this Court in *Freichnecht v. Meyer*, 39 N. J. Eq. 51-60.

The thing that stands out most clearly in this case and about which there seemingly cannot be any dispute, is the original manifest intention of the parties as indicated by the memorandum agreement (Exhibit C. 4) and as set forth in the testimony of the respondents.

At S. C., p. 87, l. 28, the respondent, William Yeskel, gives this testimony:

“Q You knew that Gross had just purchased this property from the brewery, did you not? A So he told me.

Q And you knew that he had not taken title to it at that time? A Right.”

Again at S. C., p. 88, l. 20, the respondent, William Yeskel, gives this testimony:

“Q And the statement ‘that the property is to be delivered the same way as agreement held by said Samuel Gross on the above mentioned property,’ that is correct? A Yes, sir.

Q Now, that was your agreement at the time you signed Exhibit C. 4? A Yes, sir.”

The agreement (Exhibit C. 4) provides that:

“The property is to be delivered the same way as agreement held by said Samuel Gross on the above mentioned property.”

This last mentioned provision is not in the original draft of Exhibit C. 4, but was inserted at the respondents' express request. This is evidenced by the testimony of the respondent, William Yeskel (S. C., p. 86, l. 10).

Alfred Popik, the agent through whose efforts all of these agreements were made, testifies (S. C., p. 41, l. 10) with reference to this provision as follows:

“Q Can you tell us how it is that the copy of the agreement marked ‘Exhibit C. 4’ contains the following words, ‘The property is to be delivered the same way as agreement held by said Samuel Gross on the above mentioned property’ in original type while the balance of the agreement is apparently in carbon? A When I made out the agreement—practically receipt, not agreement—when I made out the receipt Mr. Yeskel, before he accepted and signed, wanted me to insert that the property shall be conveyed to him as Mr. Gross’ agreement calls for.”

Paragraph six of the bill of complaint (S. C., p. 3, l. 30) charges as follows:

“That by the terms of said agreement of October 2, 1924 (Exhibit C. 4), between complainants and the said William Yeskel and Samuel Yeskel, partners trading as ‘Yeskel Supply Co.’, it was agreed among other things, that complainants were to deliver title to said premises in the same way as agreement held by complainants on the above mentioned property, which agreement is marked ‘Exhibit A’ hereof” (Exhibit C. 1).

The respondents in their answer admit this allegation to be true.

Paragraph six of the answer (S. C., p. 15, l. 35) states:

“They admit the allegations set forth in paragraph six of the bill of complaint.”

It is therefore respectfully insisted that by the terms of the agreement (Exhibit C. 4); by the testimony of the respondent, William Yeskel, who also acted on behalf of his partner, the co-defendant in this suit, which testimony is hereinbefore detailed and by the unconditional admission contained in paragraph six of the respondents' answer to the bill of complaint, two things clearly appear, to wit:

1. That at the time the respondents executed the agreement, Exhibit C. 4, they knew that the appellants did not have title to the premises in question but merely had an agreement for the purchase thereof;
2. That title to said premises was to be delivered by the appellants to the respondents in the same way as the appellants were receiving it under the agreement between appellants and the Krueger Company (Exhibit C. 1).

It is undisputed that under the terms of the agreements between the appellants and the Krueger Company (Exhibits C. 1 and 2) they were obligated to take title to the premises subject to a restrictive covenant against the use of the premises as a brewery.

It also appears clearly that all that the appellants sought to have the respondents do is to accept title to said premises precisely the way that the appellants were receiving title from the Krueger Company.

It is our respectful insistment that it is wholly immaterial how it came about that the final agreement between the parties hereto (Exhibit C. 5) fails to make provision for the insertion of a restrictive covenant against the use of the premises as a brewery in the deed to be given thereunder. Suffice it to say that it fails to make mention of this important provision which is one of the terms of the agreement between the appellants and the Krueger Company.

The appellants were obligated to accept title to the premises subject to this restriction and the respondents agreed in the first instance (Exhibit C. 4) to take title from the appellants precisely the way they received it from their grantors.

It consequently follows that the agreement (Exhibit C. 5) should have contained a provision for this restrictive covenant to be inserted in the deed to be given thereunder and insofar as it fails to make this provision it fails to conform to the true agreement between the parties and should be reformed, in this respect, in order to effectuate the manifest intention of the parties which is clearly apparent from a reading of Exhibit C. 4.

It goes without saying that the omission of a provision for a restrictive covenant in the deed, from the agreement (Exhibit C. 5) was the result of an oversight on the part of the appellants, or rather on the part of their attorney to whom they entrusted the entire matter.

The appellants knew that they were obligated to take title to these premises subject to the restrictive covenant in question (S. C., p. 56, l. 34) and Mr. Silberman, their attorney, frankly admits (S. C., p. 70, l. 17) that he overlooked this omission from the contract (Exhibit C. 5).

In *Simpson Plumbing & Heating Co. v. Geschke*, 76 N. J. Eq. 475, decided by V.-C. Leaming, and unanimously affirmed by this Court in 78 N. J. Eq. 306, it is held at page 478:

“So far, therefore, as the complainant is concerned, the written contract contained a mistake; so far as the defendant is concerned, if he did not observe the error in the writing then the writing embodies a mistake upon his part, if the defendant did observe the error in the writing, then his failure to disclose that fact to complainant constituted such unconscientious or fraudulent conduct upon his part as to entitle the complainant to the relief of reformation; so that, so far as the defendant is concerned, it is utterly immaterial whether he failed to notice the mistake, as did complainant, or whether he discovered the mistake and failed to communicate it.”

The important question involved in all suits for the reformation of documents is whether or not the agreement as reduced to writing, carries out the manifest intention of the parties. If it fails to do so, even though they have agreed upon the language of the document, equity will decree its reformation.

In the case of *Louis Sterns Sons, Inc. v. Connelly*, 123 Atl. 153, V.-C. Leaming holds that:

“If, therefore, equitable relief of reformation customarily exercised under the circumstances heretofore indicated is properly applicable to a situation where the complainant goes so far as to seek reformation, not because the written instrument fails to set forth the correct terms of the verbal agreement, but because it fails to clearly indicate the real intent of the parties, then I would be inclined to grant the reformation prayed for by the complainants in this case.”

Reformation was granted by the Court in this case not because the written instrument failed to

set forth the correct terms of the verbal agreement, but because it failed to clearly indicate the real intent of the parties.

Appellants undoubtedly signed the contract (Exhibit C. 5) believing that they were agreeing to convey title to the premises in question subject to the same restrictions with which they received it or were going to receive it. It is inconceivable that they would voluntarily and knowingly agree to convey title to the respondents free of the covenant against the use of the premises as a brewery, subject to which the appellants were receiving the title from their grantor.

In *Sarecki v. Guarantee Co.*, 82 N. J. Eq. 489, at page 490, *V.-C.* Leaming in a somewhat similar situation holds:

“At the meeting the parties undoubtedly met with a mutual purpose to execute a contract for a building forty-four feet in depth, as previously agreed upon. Whether the contract was read at that meeting or not is of little importance, for it is inconceivable that complainants at that time voluntarily and knowingly waived four feet of the depth of the building as already agreed upon without comment or protest, and if defendant’s representatives at that time observed the change in the depth of the building, it was their plain duty, under the then existing circumstances, to call complainant’s attention to that change. Complainant undoubtedly signed the contract believing it to be for a building forty-four feet in depth as had been previously agreed upon; defendant’s representatives did the same or concealed the fact that they had observed the error. In either case the right of reformation would obtain.”

Much stress is laid by the respondents upon the fact that the agreement (Exhibit C. 5) though prepared by their counsel was sent to appellants' attorney for inspection and that he returned the agreement to respondents' attorney with certain suggested alterations which were made.

It is conceded that appellants' counsel overlooked the omission of a provision for the restrictive covenant in the agreement (Exhibit C. 5), but it is insisted that merely because this omission was overlooked, the respondents should not be permitted to take advantage of this oversight to escape from the obligation of their contract and deprive the appellants of the benefit thereof.

In *Coady v. Ciccione*, 2 N. J. Misc. R. 588, V.-C. Leaming in disposing of a case somewhat similar to the one at bar where an error was made in a written contract for the sale of land through the oversight of counsel, at page 492, second paragraph, says:

"I am convinced there must be a decree in this case for complainant, reforming this agreement by changing the word 'sixty' to the word 'thirty-six.'

"I think Luigi will thus get what he really bargained for and what at the time he thought he was getting. I think that since then he has worked himself into the belief that at that time he thought he was getting more, because his agreement reads that way."

POINT TWO.

Human actions should be construed in the light of common experience rather than in the belief that the marvelous has occurred.

The respondents well knew that it was incumbent upon them to explain their refusal to take title from the appellants precisely the way that the appellants received title from their grantor, in view of the provision of the agreement (Exhibit C. 4), to wit:

“The property is to be delivered the same way as agreement held by said Samuel Gross on the above-mentioned property.”

The respondent, William Yeskel, states in his testimony (S. C., p. 88, l. 40) that all that the agent, Popik, told him at the time that he obligated himself to purchase these premises from the appellants for the sum of eighty-five thousand dollars (\$85,000) was merely that the Krueger Company had the right to remove certain items of personal property from the premises.

At S. C., p. 90, l. 10, we find this testimony:

“Q Now, do you mean to say that you gave Mr. Popik a check for \$1,000 and agreed to buy this property for \$85,000 and all that he told you was the items that the brewery was going to take off the premises?

A That is right.

Q That is all he told you? A Sure.

Q And you gave him a check for \$1,000?

A I did.

Q And agreed to buy this piece of property for \$85,000? A Yes, sir.”

It must be remembered that the respondent, William Yeskel, was not a novice at business matters.

He was actively engaged in the burlap and paper bag business and had had considerable experience in buying and selling real estate (S. C., p. 85, l. 10).

It is respectfully submitted that it is impossible to believe that this man of business, experienced in the buying and selling of real estate, would obligate himself to purchase property for \$85,000 with the only information before him that which he says was given to him by the broker, namely, that certain items of personal property were to be removed by the Krueger Company from the premises.

It is far more consistent with the average conduct of men that the respondents before obligating themselves to purchase the premises in question, as evidenced by the agreement (Exhibit C. 4), demanded to be shown the agreement (Exhibit C. 1) and made it their business to know precisely what the appellants were purchasing from the Krueger company so that they in turn might know precisely what they were purchasing from the appellants for the no mean sum of \$85,000.

The agent, Alfred Popik, testifies (S. C., p. 39, l. 1) that before the agreement (Exhibit C. 4) was signed by the respondents he not only showed the respondent, William Yeskel, a copy of the agreement marked "Exhibit C. 1," but discussed the terms thereof with him.

It is respectfully insisted that this testimony is far more consistent with common experience than the testimony of the respondent, William Yeskel, that he assumed this important responsibility and obligated himself and his associate to pay \$85,000 without knowing what he was buying.

If the testimony of Yeskel be true he didn't know whether he was buying a one-room shack or a ten-story office building.

In *Whelen v. Osgoodby*, 62 N. J. Eq. 571 at p. 575, last paragraph, the Court comments upon a somewhat similar situation in the following fashion:

"The statement that a man, under certain circumstances, did something which we know from experience not one in a thousand would do, under the circumstances, is discredited by the inherent improbability of the statement. It is more rational to believe that the testimony is intentionally or mistakenly untrue, than it is to believe that the marvelous occurred."

In *Cozzone v. Redfield*, 129 Atl. 699 at p. 700, the Vice-Chancellor holds:

"It was a story faultlessly and frankly told, but it was not appealing. It ran counter to common experience."

Undoubtedly, the respondent, William Yeskel, made it his business to know exactly what the terms of the agreement (Exhibit C. 1) between the appellants and the Krueger Company were, before he obligated himself and his partner to purchase the premises for this large sum of money.

But even if he is able to convince your Honors that he did not know what the terms of this agreement were, nevertheless he assumed that responsibility, because he expressly requested the broker, Alfred Popik (S. C., p. 41, l. 20), to incorporate in the agreement (Exhibit C. 4) the provision "that the property shall be conveyed to him according to the agreement between the appellant and the Krueger Company" and the respondent, William Yeskel, affirms the correct-

ness of this part of his undertaking at S. C., p. 88, l. 20.

It also should be observed that the respondents are not brewers nor are they in any manner connected with the liquor industry. They are in the bag and burlap business (S. C., p. 85, l. 10).

At S. C., p. 92, l. 23, we have this testimony by the respondent, William Yeskel:

“Q You are not in the brewery business, are you? A No.

Q Were you ever in the brewery business? A No, sir.”

It is consequently difficult to understand why the covenant against the use of the premises as a brewery is so objectionable to them.

The only reasonable motive ascribable to their violent objection in this connection is that the respondents seek to use the situation merely as a subterfuge by which to escape from their contract.

They stand to suffer no loss or damage by this restrictive covenant and they should not be permitted capriciously to refuse the title because of something which can occasion them no loss.

POINT THREE.

The respondents' refusal to take title because at the time the deed was tendered to them, complainants were not the actual owners of the legal title to the premises is without merit if the appellants were able to convey at the time of the final hearing.

The respondents knew that the appellants did not have legal title to the premises in question, but only an agreement to acquire the same.

This is evidenced not only by the agreement (Exhibit C. 4), but also by the agreement (Exhibit C. 5), which makes reference thereto and provides for the return of the respondents' deposit in the event that the appellants did not receive title from the Krueger Company.

The respondent, William Yeskel, in his testimony (S. C., p. 87, l. 30) says:

“Q You knew that Gross had just purchased this property from the brewery, do you not? A So he told me.

Q And you knew that he had not taken title to it at that time? A Right.”

At the time of the final hearing the appellants had already taken title to the premises and were then in a position to convey to the respondents.

This was to have been a three-cornered transfer title. The Krueger Company was to transfer title to the appellants and the appellants were to immediately transfer title to the respondents.

It is respectfully insisted that this objection on the part of the respondents is frivolous.

They knew that had they been willing to take title to the premises it could readily have been accomplished.

In the case of *Gerba v. Metruske*, 84 N. J. Eq. 141, Chief Justice Gummere, speaking for this Court, says:

“The vendor is entitled to a decree of specific performance where time of performance is not of the essence of the contract, if he can, at the time of the decree give a clear title.”

To the same effect is the case of *Cavanna, et al. v. Brooks*, 127 Atl. 247, decided by this Court.

POINT FOUR.

Parol evidence is admissible in a suit for the reformation of a written instrument, not to alter the terms of the document but to show what the real agreement between the parties was.

The respondents during the course of the trial objected to evidence introduced for the purpose of showing what the real agreement between the parties was, claiming that the agreement (Exhibit C. 4) was merged in the agreement (Exhibit C. 5).

Professor Pomeroy, in Vol. 2 of his 4th Edition on Equity Jurisprudence, page 1754, states:

“Parol evidence may, in proper modes and within proper limits, be admitted to vary written instruments, upon the ground of mistake, fraud, surprise and accident. This exception rests upon the highest motives of policy and expediency; for otherwise an injured party would generally be without remedy. Even the statute of frauds cannot, by shutting out parol evidence, be converted into an instrument of fraud or wrong.”

POINT FIVE.

Appellants are entitled to have the agreement reformed so as to express the true agreement between the parties even though no suit on account thereof is pending because the agreement as it stands at present is not the true agreement between the parties but nevertheless constitutes a cloud upon the appellants' title.

The learned Vice-Chancellor in his opinion (S. C., p. 125, l. 40) holds:

“Suit is not threatened and the plea is premature.”

The entire controversy is now before the Court and relief should not be withheld until action is

brought on the written contract, because if the respondents do not sue, the appellants are left with a cloud on their title in the sense that while there is apparently a valid contract to sell, although probably unenforceable as written, still this cannot be established. Frequently when clouds upon title are removed, there is no immediate threat of suit. *Kesner v. Miesch*, 204 Ill. 320, 68 N. E. 405; *Dayband & Cattle Co. v. State*, 4 S. W. 865.

Summary.

It is clear that the intention of the parties was that the appellants were to convey title to the respondents precisely as they received it from the Krueger Company. This is shown by Exhibit C. 4 and by the respondents' testimony as hereinbefore detailed.

It is equally clear that the final agreement between the parties as written (Exhibit C. 5) does not accurately set forth the true agreement between the parties, because it omits mention of the restrictive covenants against the use of the premises as a brewery to be inserted in the deed to be delivered thereunder by the appellants to the respondents.

It is also manifest that while no suit is pending at the present moment against the appellants on account of the contract in question (Exhibit C. 5), nevertheless, this contract constitutes a cloud upon the appellants' title.

It is, therefore, respectfully insisted that the contract (Exhibit C. 5) should be reformed so as to include therein a provision to the effect that the deed to be given by the appellants to the respondents thereunder shall contain a re-

strictive covenant against the use of the premises as a brewery or for the manufacture or sale of wine, beer or spirituous liquors, or malt beverages known as "near beer," said covenant to run with the land, and a decree made accordingly.

Respectfully submitted,

SILBERMAN & GROSMAN,
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ROBERT D. GROSMAN,
Of Counsel.

May, 1926, Term.



