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**BILL OF COMPLAINT.**

Filed May 29, 1927.

**In Chancery of New Jersey**

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey. 10

Complainants, Mayer Hartman and Minnie Hartman, residing in the City of Newark, in the County of Essex and State of New Jersey, respectfully show that:

1. On the 10th day of February, 1926, Mayer Hartman and Minnie Hartman, his wife, entered into a contract with the Church Construction Co., a New Jersey Corporation, a true copy of which is hereunto attached and made a part hereof as if herein set forth in full, whereby they agreed to convey to the defendant Church Construction Co. for the sum of Eighteen Thousand (\$18,000) Dollars, by Deed of Warranty, on or before the 10th day of March, 1926, all that certain tract or parcel of lands and premises hereinafter particularly described, situate, lying and being in the City of Newark, in the County of Essex and State of New Jersey, 20

BEGINNING at the southwest corner of North Seventh street and Third avenue; thence running southerly along the westerly side of North Seventh street one hundred feet; thence westerly at right angles to North Seventh street one hundred thirty feet; thence northerly parallel with North Seventh street one hundred feet to the southerly line of Third avenue; thence easterly along the same one hundred thirty feet to the place of BEGINNING. 30 40

*Bill of Complaint.*

2. Five Hundred Dollars of the consideration for said lands as mentioned in paragraph one hereof was duly paid by the defendant Church Construction Co. to complainants herein on the execution and delivery of said contract.

10 3. The property mentioned aforesaid consists of vacant ground.

4. Complainants have been ready, willing and able to convey the lands and premises contracted to be conveyed in accordance with the terms of said contract and have repeatedly informed the defendant herein, and the said defendant Church Construction Co. has refused and still refuses to consummate the said contract in accordance with its terms although able so to do and has 20 refused to pay the purchase price in accordance with the terms of said contract, and has refused to execute and deliver the purchase money mortgage.

5. On the 19th day of May, 1926, the complainants served a notice on the defendant Church Construction Co., a copy of which notice is hereto attached, made part hereof and expressly referred to.

30 6. The said defendant Church Construction Co., paid no attention to said notice and did not appear at the appointed time and place to take the title, and pay the balance of the purchase price, and execute and deliver the purchase money bond and mortgage.

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

40 1. That the said Church Construction Co., who is the defendant in this suit, may answer

*Bill of Complaint.*

this bill of complaint and each statement therein made, without oath.

2. That the said Church Construction Co., may be decreed specifically to perform the said agreement entered into by said Church Construction Co., with complainants. 10

3. The complainants tender themselves ready and willing and offer specifically to perform the said agreement on their part.

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

KOEHLER & AUGENBLICK,  
Solicitors for and of Counsel with  
the Complainants. 20

Newark, N. J., May 19, 1926.

To Church Construction Co.;

Sirs:

YOU ARE HEREBY NOTIFIED that the time called for closing in the contract between Mayer Hartman and Minnie Hartman, his wife, and the Church Construction Co., was March 10, 1926. Since that day we have always been ready and able to convey the premises to you in accordance with the terms of the contract and have tendered the deed for the same. We have made numerous appointments with your attorney, Mr. David M. Litwin, each of which appointments was kept by us and broken by you. 30

We desire to notify you herewith that we will appear at the office of Koehler & Augenblick, 14 40

*Bill of Complaint—Agreement.*

Mechanic St., Newark, New Jersey, at the hour of two o'clock in the afternoon on May 21st, 1926, and again tender you the deed in accordance with the terms of the contract and we will then and there be prepared to close said title.

10 This notice is given in order to make May 21st, 1926, as of the essence of said contract and unless you appear at the appointed time and place, we will take such other steps in this matter as we may be advised.

MAYER HARTMAN  
MINNIE HARTMAN

20 THIS AGREEMENT made this tenth day of February, Nineteen Hundred and Twenty-six, between Mayer Hartman and Minnie Hartman, his wife, of the City of Newark, County of Essex and State of New Jersey, hereinafter referred to as the vendors, and the Church Construction Co., a New Jersey Corporation having its principal office in the City of Newark, County of Essex and State of New Jersey, hereinafter referred to as the vendee, WITNESSETH:

30 The vendors agree to sell and convey and the vendee agrees to purchase, premises located at the southwest corner of Third avenue and North Seventh street, Newark, New Jersey, fronting one hundred feet on North Seventh street and one hundred and thirty feet on Third avenue, opposite sides being equal, the plot being a perfect rectangle, at the agreed price of Eighteen Thousand (\$18,000.00) Dollars.

Purchase price payable in manner following:

40 Five Hundred Dollars by way of deposit, receipt whereof is hereby acknowledged.

*Bill of Complaint—Agreement.*

Twenty-five Hundred Dollars in cash at the time of settlement.

Fifteen Thousand Dollars by the vendee making, executing and delivering to the vendors, a mortgage for Fifteen Thousand Dollars, due in six months from the date thereof, or sooner at option of vendee, with interest at six per cent. 10 payable when due, or paid the amount of the mortgage as specified, being more or less by reason of the fact that apportionment of 1926 taxes on the basis of 1926 as to that plot, shall be deducted from the mortgage.

Conveyance to be made subject to the lien of three mortgages aggregating less than the sum of Fifteen Thousand Dollars, which will be paid and satisfied when the vendee pays and satisfies the Fifteen Thousand Dollar mortgage above specified, and protective clauses to be incorporated in the bond and mortgage above-mentioned. 20

Purchase money bond and mortgage to be drawn by vendors' attorney at vendee's expense, to be simultaneously recorded with the deed for the premises and recording fees of deed and mortgage and revenue stamp expense on bond to be likewise borne by vendee.

Title to be conveyed by Deed of Warranty, free 30 and clear of all encumbrances, and to the effect of restrictions to the effect that no building or buildings shall be erected upon the same that shall have a flat roof covering more than two-thirds of the roof area, excepting, however, should the building of an apartment house containing eight or more families be permitted, then this restriction shall not apply; the restrictions herein referred to being the same as are contained in a deed recorded in Book Y 69 of Deeds for Essex County, on pages 249-251. 40

*Bill of Complaint—Agreement.*

The vendors covenant, warrant and represent that permits have been granted for the erection of a building to contain four stores and two flats on the corner and a four family house on the remainder of the plot relative to which the vendors further covenant, warrant and represent he has plans which plans and permits shall be turned over to the vendee without any further costs to it.

Title to the premises to be conveyed, it is understood, is not dependent in part or whole upon Martin Act, Tax Title or adverse possession.

Title to be closed at the office of Koehler & Augenblick, 14 Mechanic street, Newark, New Jersey, on March 10, 1926, at two o'clock P. M., of that day, at which time and place the deed, bond, mortgage and balance of cash shall be paid, delivered and exchanged.

It is further agreed and understood that the parties of the first part will allow to the party of the second part at the time of settlement, an amount not to exceed Two Hundred and Fifty (\$250.00) Dollars, which amount when fixed, shall be equal to one-half of the cost if any, expended in court proceedings to obtain a permit to build stores on the entire Third avenue frontage; total amount of costs incurred in that direction to be fixed by certification of David M. Litwin who is to conduct said proceedings; court proceedings not to be begun before ordinary effort is made at the City Hall to procure permit without resorting to proceedings; if at the time of settlement the certification of David M. Litwin will not then be available this clause in the contract shall stand continued and there shall be a deposit of Two Hundred and Fifty (\$250.00) Dollars made in escrow by the vendor.

*Bill of Complaint—Agreement.*

The vendors further agree that there will be no default in any of the terms of the present prior mortgages upon said premises at the time of settlement so that the same can be foreclosed, and further that the vendors will prevent any default from occurring in any of the terms of said mortgages during the period of said Fifteen Thousand (\$15,000) Dollar mortgage, and in the event of default being made in any of said mortgages during the aforesaid period, then and in that event the vendee, its successors or assigns, shall have the right to advance any and all amounts to prevent any of said mortgages from being foreclosed and the amounts so advanced shall be deducted from the principal sum due upon the Fifteen Thousand (\$15,000) Dollar mortgage.

The parties of the first part further agree to pay for any assessments that may be levied against said premises for any public work that may be performed up to the date hereof, such as paving, curbing, flagging, sewers, etc., regardless of whether the assessment for said work shall become a lien against said premises before or after said date of settlement, and in the event that said assessment shall become a lien after the date of settlement, then and in that event, the parties of the first part, will at the time of settlement, deposit with one, David M. Litwin, an amount which shall be approximated to pay such assessment upon the same becoming a lien, and if the amount deposited shall be insufficient to pay the amount of such assessment, when levied, then the said parties of the first part shall immediately thereafter, pay any deficiency to said Litwin, and in the event that there shall be a surplus remaining from such deposit, said Lit-

Bill of Complaint—Agreement.

win shall return the same immediately thereafter, to the said parties of the first part.

If at the time for the delivery of the deed, the premises or any part thereof shall be or shall have been affected by an assessment or assessments, which are or may become payable in annual installments of which the first installment is then due or has been paid, then for the purposes of this contract all the unpaid installments of any such assessment, including those which are to become due and payable after the delivery of the deed, shall be deemed to be due and payable and to be liens upon the premises affected thereby and shall be paid and discharged by the seller thereof, upon the delivery of the deed.

It is further agreed and understood that there are no encroachments from any structures or buildings on adjoining premises on to the premises herein agreed to be conveyed.

The vendors further reserve the right to remove the material on the premises at any time on or before the date fixed for settlement herein.

This agreement shall bind the respective parties hereto and their respective heirs, executors, administrators, successors and assigns.

IN WITNESS WHEREOF, the vendors have hereunto set their hands and seals, and the vendee has caused these presents to be signed by its officers thereunto duly authorized and its corporate seal to be hereto affixed the day and year first above written.

MAYER HARTMAN, (L. s.)  
MINNIE HARTMAN (L. s.)

Signed, Sealed and Delivered in the presence of

FRANK V. WILKINSON.

Bill of Complaint—Agreement.

CHURCH CONSTRUCTION CO.,

By JULIUS CHURCH,  
President.

Attest:

By JOSEPH CHURCH,  
Secretary.

10

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

BE IT REMEMBERED that on this day of February, in the year of our Lord One Thousand Nine Hundred and Twenty-six, before me, the subscriber personally appeared Mayer Hartman and Minnie Hartman, his wife, who, I am satisfied, are the grantors mentioned in the within Instrument to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

And the said Minnie Hartman, wife as aforesaid, being by me privately examined, separate and apart from her said husband, further acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, FREELY, without any fear, threats or compulsion of her said husband.

FRANK V. WILKINSON,  
Notary Public of New Jersey.

*Bill of Complaint—Agreement.*

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

10 BE IT REMEMBERED that on this 11th day of February, in the year of our Lord One Thousand Nine Hundred and Twenty-six, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Joseph Church, who, being by me duly sworn, on his oath says that he is the secretary of the Church Construction Co., the grantor named in the within instrument; that Julius Church is the President of said corporation; that deponent well knows the corporate seal of said corporation; and the seal affixed to said Instrument is such corporate seal and was there-  
20 to affixed, and said Instrument signed and delivered by said President, as and for his voluntary act and deed and as and for the voluntary act and deed of said corporation, in presence of deponent, who thereupon subscribed his name thereto as witness.

JOSEPH CHURCH.

Sworn and subscribed before me, at Newark, N. J., the date aforesaid.

30 HARRY H. KOEHLER,  
A Master in Chancery of New Jersey.

**ANSWER AND COUNTER-CLAIM.**

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i> MAYER HARTMAN and MINNIE HARTMAN, <i>Complainants,</i> <i>and</i> CHURCH CONSTRUCTION Co., a corporation, <i>Defendant.</i></p>	}	<p><i>On Bill, etc.</i> 10 <i>Answer and Counter-Claim.</i></p>
---	---	---

The defendant, Church Construction Co., a corporation of the State of New Jersey, with its principal office in the City of Newark, in the County of Essex and State of New Jersey, answering the bill of complaint, say that: 20

1. Paragraphs 1, 2 and 3 are admitted.

2. As to paragraph 4, the defendant denies that the complainants have been ready, willing and able to convey the lands and premises mentioned therein in accordance with the terms of said contract, and deny further that the complainants have repeatedly informed the defendant herein, but admits the remainder of the allegations in said paragraph and charges that it was not legally bound to perform said agreement at that time or at any time since, in that the complainants were not ready, willing and able to perform the terms of their said agreement. 30

3. Paragraph 5 is admitted but the statements set forth in said notice are denied.

*Answer and Counter-claim.*

4. Paragraph 6 is admitted, but defendant charges that it was not legally bound to perform said agreement at that time or at any time since, in that the complainants were not ready, willing and able to perform the terms of their said agreement.

10 5. Further answering the bill of complaint, defendant says that at the time fixed for the consummation of said agreement, it was ready, willing and able to take title to said premises in accordance with the terms thereof, but complainants have at all times been unable to convey said premises in accordance with the terms of said agreement in the respects hereinafter mentioned.

20 6. Further answering the bill of complaint, defendant says that the agreement as recited in the bill of complaint contains the following provision: "conveyance to be made subject to the lien of three mortgages aggregating less than the sum of Fifteen Thousand Dollars, which will be paid and satisfied when the vendee pays and satisfies the Fifteen Thousand Dollar mortgage above satisfied, and protective clauses to be incorporated in the bond and mortgage above mentioned." Defendant says that said premises  
30 were not subject to the lien of three mortgages aggregating less than the sum of Fifteen Thousand Dollars, contrary to the provision of said agreement.

40 7. Further answering the bill of complaint, the defendant says that on February 24, 1926, condemnation proceedings were instituted by the Board of Education of the Vocational Schools in the County of Essex to take and condemn said premises agreed to be conveyed by the com-

*Answer and Counter-claim.*

plainants herein to the defendant, and that on February 24, 1926, a *Lis Pendens* was filed in the office of the Register of Essex County in said matter giving notice that application by petition to his Honor, William S. Gummere, Chief Justice of the New Jersey Supreme Court had been filed with the Clerk of the County of Essex, and that proceedings were pending before him at that time for the appointment of three commissioners to fix the compensation to be paid for said lands to be conveyed as aforesaid, and that said proceedings were pending on March 10, 1926, the time fixed in said agreement for the consummation thereof. 10

8. Further answering the bill of complaint defendant says that said complainants were not seized of a marketable title to said premises on March 10, 1926, the date fixed in the said agreement for the consummation thereof, and that title to an undivided one-half interest on that date was vested in Herman Star. 20

9. Further answering the bill of complaint, defendant says that said complainants were not seized of a marketable title to said premises on March 10, 1926, the date fixed in the said agreement for the consummation thereof, in that the deed purporting to be made by Paul H. Brangs and Alida G. Brangs, wife of the said Paul H. Brangs to Mayer Hartman and Herman Star, dated February 13, 1924, and recorded in the Essex County Register's Office in Book Y-69 of Deeds for said County, on page 249, was signed by C. Clifford Brangs, attorney-in-fact for Paul H. Brangs, and said deed is not sufficient in law to convey the title of said Paul H. Brangs and Alida G. Brangs, his wife. 30 40

*Answer and Counter-claim.*

By way of counter-claim against the complainants Mayer Hartman and Minnie Hartman his wife, the defendant Church Construction Co., says:

10 1. On February 10, 1926, said complainants and defendant entered into, signed, executed and delivered a certain memorandum or agreement, a copy of which is annexed to the bill of complaint herein, and which copy is hereby made part hereof, wherein and whereby, in consideration of the Eighteen (\$18,000.00) Thousand Dollars to be paid as in said agreement recited, the complainants agreed to bargain, sell and convey premises in the City of Newark, in the County of Essex and State of New Jersey, and as more particularly mentioned and described in said agreement, 20 reference being thereunto had. Upon the signing and execution of said agreement defendant paid to complainants the sum of Five Hundred (\$500.00) Dollars on account of the purchase price of said premises.

30 2. At the time fixed for the consummation of said agreement, the defendant was ready, willing and able to perform its said agreement in accordance with the terms thereof, but complainants have at all times been unable to convey said premises in accordance with the terms of said agreement in the respects hereinafter mentioned.

40 3. Said agreement, among other things, contained the following provision: "conveyance to be made subject to the lien of three mortgages aggregating less than the sum of Fifteen Thousand Dollars, which will be paid and satisfied when the vendee pays and satisfies the Fifteen Thousand Dollar mortgage above satisfied, and protective clauses to be incorporated in the bond

*Answer and Counter-claim.*

and mortgage above mentioned." Defendant says that said premises were not subject to the lien of three mortgages aggregating less than the sum of Fifteen Thousand Dollars, contrary to the provision of said agreement.

4. On February 24, 1926, condemnation proceedings were instituted by the Board of Education of the Vocational Schools in the County of Essex to take and condemn said premises agreed to be conveyed by the complainants herein to the defendant, and that on February 24, 1926, a *Lis Pendens* was filed in the office of the Register of Essex County in said matter giving notice that application by petition to his Honor, William S. Gummere, Chief Justice of the New Jersey Supreme Court, had been filed with the Clerk of the County of Essex, and that proceedings were pending before him at that time for the appointment of three commissioners to fix the compensation to be paid for said lands to be conveyed as aforesaid, and that said proceedings were pending on March 10, 1926, the time fixed in said agreement for the consummation thereof. 10 20

5. The complainants were not seized of a marketable title to said premises on March 10, 1926, the date fixed in the said agreement for the consummation thereof, and title to an undivided one-half interest on that date was vested in Herman Star. 30

6. Complainants were not seized of a marketable title to said premises on March 10, 1926, the date fixed in the said agreement for the consummation thereof, in that the deed purporting to be made by Paul H. Brangs and Alida G. Brangs, wife of the said Paul H. Brangs to Mayer Hartman and Herman Star, dated February 13, 1924, 40

*Answer and Counter-claim.*

and recorded in the Essex County Register's Office in Book Y-69 of Deeds for said County, on page 249, was signed by C. Clifford Brangs, attorney-in-fact for Paul H. Brangs, and said deed is not sufficient in law to convey the title of said Paul H. Brangs and Alida G. Brangs, his wife.

10 7. Defendant has caused an examination to be made of the title to said premises, and also a survey thereof for the purpose of consummating said agreement.

The defendant Church Construction Co. therefore prays:

1. That said complainants Mayer Hartman and Minnie Hartman, his wife, may answer this counter-claim and each statement therein made.

20 2. That said complainants may be decreed to pay to defendant the amount paid on account of the purchase price, to wit, the sum of Five Hundred (\$500.00) Dollars, together with its search fees and costs of survey reasonably incurred in examining the title to said premises and conveying the same.

30 3. That the amount so paid on the purchase price, and search and survey fees be decreed and be impressed as a lien against the premises described in the bill of complaint.

4. That the bill of complaint be dismissed with the defendan'ts reasonable costs and charges in its behalf wrongfully sustained.

5. That the defendant may have such other relief as may be equitable.

40 DAVID M. LITWIN,  
Solicitor for and of Counsel with Defendant.

**REPLICATION.**

IN CHANCERY OF NEW JERSEY.

*Between*

MAYER HARTMAN and MINNIE  
HARTMAN,

*Complainants,*

*and*

CHURCH CONSTRUCTION Co., a  
corporation,

*Defendant.*

*On Bill, etc.*

*Replication  
of Mayer  
Hartman and  
Minnie Hart-  
man.*

10

The replication of Mayer Hartman and Minnie Hartman, of the City of Newark, in the County of Essex and State of New Jersey, to the answer filed by the Church Construction Co., a corporation, to the bill of complaint.

20

Mayer Hartman and Minnie Hartman, replying to the answer, says:

1. They deny the second paragraph of the answer.

2. They deny the fourth paragraph.

30

3. They deny the fifth paragraph.

4. With respect to the sixth paragraph, complainants say that they complied with all the terms, covenants and agreements contained in the agreement of sale.

5. With respect to the seventh paragraph, complainants say that at the time agreed upon by the parties for the taking of the title, the con-

40

*Replication.*

demnation proceedings instituted by the County of Essex were at an end.

- 6. They deny the eighth paragraph.
- 7. They deny the ninth paragraph.

10 Answering the counter-claim, complainants say:

1. Complainants admit that an agreement was entered into between the complainants and the defendant, but denies that the agreement attached to the answer is the agreement entered into by the parties.

2. They deny the second paragraph.

20 3. With respect to the third paragraph, complainants say that they complied with all the terms, covenants and conditions contained in the agreement of sale.

4. In answer to the fourth paragraph, complainants say that at the time agreed upon for the taking of the title, the condemnation proceedings instituted by the County of Essex were at an end.

5. They deny the fifth paragraph.

30 6. They deny the sixth paragraph.

KOEHLER & AUGENBLICK,  
Solicitors for Complainants.

**ORDER OF REFERENCE.**

Filed October 13, 1926.

IN CHANCERY OF NEW JERSEY.

*Between*

MAYER HARTMAN and MINNIE  
HARTMAN,

*Complainants,*

*and*

CHURCH CONSTRUCTION Co., a  
corporation,

*Defendant.*

*On Bill, &c.  
Order of  
Reference.*

10

This matter being opened to the Court by Koehler & Augenblick, solicitors of the complainants, and it appearing that David M. Litwin, the solicitor of Church Construction Co., the answering defendant, consents hereto,

20

It Is, on this 13th day of October, 1926, ORDERED, that the above-entitled cause be, and it hereby is referred to Hon. Alonzo Church, one of the Vice-Chancellors of this Court, to hear the same for the Chancellor, and to report to him and advise what order or decree should be made herein.

30

E. R. WALKER,

*C.*

*Order of Reference.*

We consent to the making and entry of the foregoing order.

KOEHLER & AUGENBLICK,  
Solicitors for Complainants.

DAVID M. LITWIN,  
Solicitor for Defendant,  
Church Construction Co.

10

A true copy.

THOMAS BARBER,  
Clerk.

20

30

40

*Opening.*

**TESTIMONY.**

IN CHANCERY OF NEW JERSEY.

April 6, 1927.

*Between*

MAYER HARTMAN and MINNIE  
HARTMAN,

*Complainants,*

*and*

CHURCH CONSTRUCTION Co., a  
corporation,

*Defendant.*

10

20

Transcript of shorthand notes of testimony taken in the above-entitled cause before his Honor Alonzo Church, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of Messrs. Koehler & Augenblick (by Mr. Freedman) for complainants, and David M. Litwin and George Astley, Esqs., for defendant.

Mr. Litwin: I just want to put on record several dates according to the records.

30

The Court: All right. I don't suppose there is any objection to that.

Mr. Litwin: A petition was filed in the matter of the application of the Board of Education of Vocational Schools from the County of Essex with the appointment of three commissioners to fix the compensation to be paid for certain lands of Mayer Hartman and Herman Starr, situated in the City of Newark, County of Essex, State of New Jersey, to be taken and condemned for pub-

40

*Opening.*

lic use. The petition is addressed to the Honorable William S. Gummere, Chief Justice of the New Jersey Supreme Court, and paragraph 2 provides that the Board of Education of Vocational Schools in the County of Essex has determined to acquire land in the City of Newark,  
 10 County of Essex, State of New Jersey, describing it, and that the description is the premises involved in this suit.

Mr. Astley: What is the date?

Mr. Litwin: Paragraph 4 makes Mayer Hartman and Minnie Hartman, his wife; Herman Starr and Ida Starr, his wife, said Hartman and Starr being the owners of record; the Roseville Land & Improvement Company, mortgagee mentioned in Mortgage E-24-491; Paul H. Brangs,  
 20 mortgagee named in Mortgage L-450, page 453; and the Church Construction Company claim to be named as purchaser of said land and premises in a contract not of record.

The petition was verified, was filed in the Essex County Clerk's office on February 24, 1926. In the same matter, Chief Justice Gummere made an order, dated February the 24th, 1926, ordering that March 13, 1926, be fixed as the time and in  
 30 Chambers, Court House, as the place for the hearing of said petition, and that the order was filed in the clerk's office on February 24, 1926.

Also produced an affidavit of service upon all the parties named in the petition, which was filed in the clerk's office on March 13, 1926; an order of continuance, made on March 13, 1926, adjourning the matter to March 27, 1926; and the stipulation of the discontinuance, signed on March 27, 1926, by Arthur T. Vanderbilt—signed by  
 40 Arthur T. Vanderbilt, attorney for the petitioner;

*Harry Augenblick, direct.*

Board of Education of the Vocational Schools in the County of Essex, New Jersey, Koehler & Augenblick, attorneys for the owners of record; Mayer Hartman and Herman Starr, and that the place for the signature for the attorney for the Church Construction Company, claimed under a  
 10 contract not of record, is stricken out and that the Church Construction Company is not a party to that discontinuance, and that was filed in the clerk's office on April 1, 1926.

The Court: Well, how about your lis pendens?

Mr. Litwin: We have certified copies of that.

Mr. Augenblick: We have certified copies.

The Court: Yes.

Mr. Augenblick: I offer the contract in evidence. There is no question about that.  
 20

(Contract marked Exhibit C. 1.)

Mr. Augenblick: The testimony that was put on record is consented to.

The Court: Do you want to put in the lis pendens?

Mr. Augenblick: I guess the other side will put that in.

HARRY AUGENBLICK, sworn for the complainant.  
 30

*Direct examination by Mr. Freedman.*

Q Mr. Augenblick, you are a counselor at law of this State? A I am.

Q And a member of the firm of Koehler & Augenblick? A I am.

Q Did you represent Mr. Hartman in connection with the sale of this property? A I did.  
 40

*Harry Augenblick, direct.*

Q And, by the terms of the contract, title was closed on March the 4th? A March the 10th.

Q Or March the 10th, rather. Did you have any conversation with the Church Construction Company, or their agent or representative, with reference to closing the title on that date? A  
10 Prior to March the 10th, I had a conversation with Mr. Litwin, who represented the Church Construction Company.

Q Oh, what was that? A Mr. Litwin informed me that Mr. Church was negotiating with the city for the purchase of this property, that a lis pendens had been filed and that the deal had been—had to be adjourned for two weeks from the time stated in the contract.

Q I see. And before that, on March 10th, did you have in your possession—  
20

Mr. Litwin: 10th of what?

Q On the 10th of March did you have in your possession any papers or instruments to convey this title? A Yes, sir; we had the record title. The record title was in Mayer Hartman and Herman Starr, but we have always had a deed for the half interest in Herman Starr and Mayer  
30 Hartman. That deed was recorded—that deed was an unrecorded deed, but it was acknowledged in New York City on the 10th of August, 1925, and we have always had that deed in our possession and Mr. Litwin knew about it all the time. The deed was never recorded.

Mr. Freedman: I see. Any objection to that?

Mr. Litwin: May I see it?

40 (Paper handed to Mr. Litwin.)

*Harry Augenblick, direct.*

Mr. Litwin: If the Court please, I make objection to the submitting of this deed upon the ground that, according to the certificate of acknowledgment, it is taken in the City of Yonkers, State of New York, County of Westchester, and is taken, subscribed before me, a notary public, and signed Malcolm J. Klein, notary public. It does not designate him, whether he is a notary public of New York or New Jersey or Pennsylvania.  
10

The Court: Well, does it—(interrupted).

Mr. Freedman: The certificate says that he was a notary public in aforesaid county with a commission duly examined and authorized of that State.

The Court: I don't think there is anything in that. I will admit it.  
20

(Paper marked Exhibit C. 2.)

Q Did you have in your possession at that time any other documents? A Yes; there was—at the time that the transaction was closed with Mr. Starr, there was a bond and mortgage given back from Mayer Hartman to Mr. Starr and we have the executed bond and mortgage. They were never recorded because the deed was not recorded and all the papers were to be recorded at the time that the contract was to be closed with the Church Construction Company.  
30

Q I see. A As to the deed, and the deed and bond and mortgage.

Q In other words, you have an unrecorded mortgage and bond from Mayer Hartman and his wife back again to Herman Starr? A Yes.

Mr. Freedman: Any objection to this?

40

*Harry Augenblick, direct.*

I offer in evidence the bond and mortgage from Mayer Hartman and his wife to Herman Starr.

(Papers marked Exhibits C. 3 and C. 4.)

10 Q Now, did you have any other papers in your possession on that day, to transfer title to the Church Construction Company? A Yes, sir. We had a deed from Mayer Hartman to the Church Construction Company, and also a bond and mortgage, in accordance with the terms of the contract. This is the deed and this is the bond and mortgage.

The Court: Any objection to that?

20 Mr. Freedman: Any objection to this? I offer in evidence a deed made by Mayer Hartman and Minnie Hartman, his wife, to the Church Construction Company, bearing date March 27, 1926, conveying the premises mentioned in the contract, subject to the lien of three mortgages, aggregating less than the sum of \$15,000, and with other recitals.

(Paper marked Exhibit C. 5.)

30 Mr. Freedman: I also offer in evidence a bond and mortgage unexecuted, purporting to run from the Church Construction Company to Mayer Hartman, covering the premises described in the contract.

(Papers marked Exhibits C. 6 and C. 7.)

Q This bond and mortgage was prepared at your direction in your office? A Yes.

Q And it was for what purpose? A To be executed by the vendee.

Q I see. As part of the purchase money?

40 A As part of the purchase money.

*Harry Augenblick, direct.*

Q And then you arranged for title to be closed on April the 5th; is that right? A It was adjourned until March the 26th and at that time when—at ten o'clock in the morning and I called up Mr. Litwin and he told me that Church was not here, and we again adjourned it until 10 April the 5th at ten o'clock in the morning. Again I called up Mr. Litwin. He said, "Mr. Church is not here." He said, "I can't do anything about it. He is purchasing the property, not myself." We then adjourned it until May the 17th, at two o'clock in the afternoon.

Q Yes. A And again I was in touch with Mr. Litwin and again he told me that Mr. Church did not show up.

Q Yes. A And he couldn't do anything about it. 20

Q Now, between those dates, did you have any conversations or write any letters to Mr. Litwin? A Yes.

Q With reference to this? A I think, on March the 22nd.

Mr. Freedman: Have you the letter?

Mr. Litwin: I looked through my file and I haven't it. May I see the letter? I haven't this letter. 30

Mr. Freedman: I have given notice to produce it.

I offer a copy.

The Witness: On March 22nd, I wrote a letter to Mr. David Litwin, in which I said, "A telephone call was received at this office to the effect that the Board of Education was no longer interested in the property at the corner of Third and Seventh 40

*Harry Augenblick, direct.*

avenue, so I assumed this title would close as per agreement. Please let me hear from you as soon as possible."

Mr. Freedman: I offer in evidence this letter.

10 (Letter marked Exhibit C. 8.)

Q Now, between March the 10th and the last conversation that you had in May with Mr. Litwin, was this talk about the condemnation suit that the Board of Education of Essex County had commenced and that was delaying the closing of title, as I understand it? A No; there was never any—there was never any talk outside of that one conversation that I had with Mr. Litwin, immediately after the lis pendens was filed, about  
20 the rights of the Board of Education in the property. All that Mr. Litwin would tell me, when the time came for closing, was that Mr. Church didn't show up.

Q I see. And he adjourned the closing with you to various dates? A Until May the 17th, was the last adjournment date, when he again told me that Church didn't show up, and I served him with a notice, making time the essence of the contract.

30

Mr. Freedman: Now, I want to offer in evidence the certified copy of the lis pendens in this matter.

The Court: All right.

Mr. Freedman: And also a discontinuance, discharging the lis pendens.

(Papers marked Exhibits C. 9 and C. 10.)

Mr. Freedman: I want to call your Honor's attention to the fact that this lis pendens purports to be certified copy of the  
40

*Harry Augenblick, direct.*

stipulation to be signed by David M. Litwin, an attorney of the Church Construction Company, claiming under a contract not of record.

Mr. Litwin: And the original produced here?

Mr. Freedman: I don't know. There might have been two. 10

The Court: This is a certified copy.

Mr. Litwin: We read into evidence, your Honor please, the original which did not have my signature.

Mr. Freedman: There might have been two original copies.

Mr. Litwin: That is what I pointed out, when I was reading.

The Court: How can a certified copy have the signature, if the original did not? I can't understand that. 20

Mr. Freedman: This was made in the Register's office.

I now call for a notice dated May 17, 1926, given to the Church Construction Company by Mayer Hartman and Minnie Hartman.

Mr. Litwin: I haven't got May 17th, but I have May 19th, if that is what you mean. 30

The Witness: May 19th.

Q Now, after the 17th, did you do anything in connection with this matter? A Yes. And, after the adjourned day, when Mr. Church didn't show up to take title, I served Mr. Litwin with a—no, I think we served Mr. Church. We served Mr. Church with a copy—with a notice making time of the essence and that is the original of that notice. 40

*Harry Augenblick, direct.*

Mr. Freedman: Any objection? I suppose it is in evidence now. I ask it be marked.

(Paper marked Exhibit C. 11.)

The Witness: And in that notice I said: "You are hereby—" (interrupted).

10 Mr. Litwin: I object, your Honor please, the notice speaks for itself.

The Court: Yes. You don't have to read it.

The Witness: Very well.

The Court: What happened after that?

20 The Witness: After that the time fixed in the notice for the taking of the title, Church paid no attention to it; neither did Mr. Litwin. They did not appear at all these closings. The title was to close in our office, in accordance with the terms of the contract. They did not appear to take the title and we filed a bill for specific performance.

Q Now, at all of these dates that you have mentioned that the title was to be closed, you were in your office with these papers ready to deliver title, in accordance with the contract? A At each date, yes, sir.

30 Q And you were there for that—you waited for that purpose? A Yes, sir.

Q Nobody appeared, A No.

Mr. Litwin: I will admit that we were not there on May the 21st.

The Court: Well, is that all you want?

Mr. Freedman: I also want Mr. Augenblick's testimony as to these other dates, on March 10th—

40

*Harry Augenblick, cross.*

Mr. Litwin: I also admit that we were not there at any time.

Mr. Freedman: All right. I guess that is all right now from Mr. Augenblick.

The Court: Now, do you want to cross examine?

10

*Cross examination by Mr. Astley.*

Q Mr. Augenblick, this contract was to be closed on March 10, 1926, and you testified it was adjourned from that day until March 26, 1926, wasn't that? A Yes.

Q With whom was that arrangement made? A Mr. Litwin.

Q Did he agree to an adjournment? A Yes, sir.

20

Q Was there any written adjournment? A No; there was no writing of any of these adjournments. It was all by telephone.

Q And did Mr. Litwin agree to these adjournments of April 5th and 17th? A Yes, sir.

Q And you stated that, after May 10th, there was an arrangement whereby two weeks was made for an adjournment, an understanding with Mr. Litwin; is that true? A March 26th—whatever—whether that was two weeks or not—that is the first date in my diary.

30

Q And the deed from Mr. Starr was never recorded, was it? A No; the acknowledgment was taken in New York by a notary public, I think, in 1925, with the certificate of the notary attached to it.

Q These different negotiations, were they had with you and Mr. Litwin directly, or with your office and Mr. Litwin? A No; myself and Mr. Litwin.

40

*Harry Augenblick, cross.*

Q Mr. Koehler didn't make the arrangement?  
A No.

Q In any of these adjournments, from March 10th on, did Mr. Litwin raise any question as to a defective title, a *lis pendens*? A No, no.

Q Condemnation? A Never in my conversation. 10

Q Or no record title? A Never in my conversation. He knew that Mr. Starr had a half interest in it, because I told him we had a deed from Mr. Starr and we will record all the papers on the day we will close with the Church Construction Company.

Q On your direct examination did you not say that Mr. Litwin made some—or spoke to you about the *lis pendens* being of record against this property and that was the reason for not carrying out the transaction? A After the *lis pendens* was filed, I think it was the 22nd or 21st of February, he called me up and he said he was making negotiations with the City, for the City to purchase the property, and that the deal should be postponed for two weeks and we set the date down for March the 26th and he was in communication and in negotiations with the City of Newark for the purchase of this property. 20 30

Q And the letter, marked Exhibit C. 8, you state there that you sent this letter to Mr.— A Litwin.

Q And you dictated the letter, did you? A Well, I don't know whether I did or Mr. Koehler. One of the two did that.

Q The exhibit shows that it was Mr. Koehler's letter.

The Court: Well, what difference does it make? 40

*Julius Church, direct.*

The Witness: Yes. Well, he is my partner.

Mr. Astley: That is all.

The Court: That is all.

Well, I suppose that is your case?

Mr. Freedman: Just one thing more. Well, I suppose that would be properly rebuttal. 10

Mr. Litwin: Mr. Church.

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JULIUS CHURCH, sworn for the defendant.

*Direct examination by Mr. Litwin.*

Q Mr. Church, where do you live? A I live now 800 South 13th street. 20

Q Newark? A Yes, sir.

Q What is your business? A Building business.

Q Are you connected with the Church Construction Company? A Yes, sir.

Q What is the office that you have with that company? A President.

Q Did you have any negotiations with Mr. Hartman relative to the purchase of property on Third avenue? A Yes; not in the first beginning. 30

Q Who came to you first? A An agent.

Mr. Freedman: I object to that.

The Court: Wait a minute. Is the contract in evidence?

Mr. Freedman: Yes, sir.

The Court: Let us see the contract. The contract is signed by the Church Construction Company. Well, go on. 40

*Discussion.*

Q Who came to you first, Mr. Church, about the purchase of this property?

Mr. Freedman: I object to that, your Honor please. I see no materiality in that.

10 The Court: I will sustain the objection. It wouldn't make any difference what preceded the contract. The contract was signed.

Mr. Litwin: Yes. The Court please, we desire to show in this case that by the facts preliminary to the signing of this contract time was of the essence and I refer to your Honor the case of *Agens v. Koch*, 74 Equity, 528. May I have that volume here? It is the leading case of the State.

20 The Court: I haven't got any book here, but you mean to say that because this contract calls for settlement on the 17th of May, or whatever it was—

Mr. Litwin: March 10th.

The Court: —March 10th, and it was not closed, then, because a *lis pendens* was filed by the County of Essex, that therefore you are released from this contract. Is that the idea?

30 Mr. Litwin: That is our contention, sir.

The Court: Well, I shall not sustain that contention. It was no fault of these people at all; they could not convey because the condemning power had stepped in and stopped them.

Mr. Astley: If the Court please, that is only one of our several defenses.

40 The Court: Well, then, you have stated that and I say that I do not think that is any defense.

*Discussion.*

Now, I think you can go on with your other defenses.

Mr. Litwin: If the Court please, if I may indulge the Court a moment, the question of *lis pendens* is a novel point in this State, and, in fact, is practically a novel point in the entire country, and, with the Court's permission, I would like to refer you to the only two cases in the country that are directly in point upon this question.

The first case is that of *Miller v. Calvin Philips & Co.* The Supreme Court of Washington decided in 1906, decided in that case by the Chief Justice of the Court and in which four judges of the Court concur. I assume there were five judges sitting. "Defendant agreed to convey to plaintiff certain described real estate, free and clear of all encumbrances, and that if the title was not good and could not be made good within thirty days of the date of the delivery of the abstract, it should be optional with the purchaser whether the title should be passed subject to any defect that might be found or that the earnest money should be refunded. After the abstract was furnished, plaintiff discovered that a railroad corporation had begun proceedings to condemn a right of way through the property and had filed a *lis pendens*, held that such proceedings constituted a defect in the title warranting plaintiff in refusing the same and recovering the earnest money."

The Court says: "It seems to us too plain for extended discussion under the allegation of the complaint, the respondent was

*Discussion.*

unable to obtain that for which he contracted, and that it would be inequitable to compel him to pay for anything else."

10 The Court: Well, that is on an entirely different theory. This man agreed to sell a certain tract of land, and then a condemning power came along and took away part of the land and the Court said, of course, he cannot be compelled to take it because he didn't get all he bargained for. This case is entirely different.

Mr. Litwin: If the Court—

20 The Court: Here is a man that says, "I will sell you this property," and then a lis pendens was filed, and, of course, he can't do anything. Then the lis pendens was lifted and the property was there for him to take.

Mr. Litwin: If the Court will just bear for me a moment: That is not the fact in this case. At the time set for closing, there was a lis pendens as of record. There was commenced no actual condemnation as yet, when the contract was rescinded in this Washington case.

30 The Court says further: "No matter what the technical definition of 'incumbrance' may be, the language of the contract is plain and specific. It is agreed, that if the title to said premises is not good, or cannot be made good within thirty days of the date of delivery of the abstract, it shall be optional with the purchaser whether the title passed subject to any defect that may be found or the earnest money shall be refunded."

40 The Court says: Can it be said with any degree of reason that after the com-

*Discussion.*

mencement of condemnation proceedings, and the filing of the lis pendens by the railroad company, a good title without defect could have been given by appellant? It may be that a conveyance any time before the condemnation proceedings culminated vesting the title in the railroad company, would convey to the grantee the right to receive the damages allowed for the taking; but the value of the damages for the taking would not be subject of the contract—was not what the respondent expected to buy or the appellant intended to sell. Under such contract it has been universally decided that the grantee is entitled to a marketable title—to an indubitable title—he cannot be compelled to buy a lawsuit or a title that will involve him in litigation, but that he has a right to a title which will enable him to hold possession of his land in peace and security."

The Court: Oh, no. All that, Mr. Litwin—that is perfectly good law, unquestionably, in the State of Washington and possibly in the State of New Jersey, but it does not apply to this case. That is the only trouble.

Mr. Litwin: You have not permitted me to go into that theory of it. I will get to it as rapidly as I can. 30

The Court: Do you say that you were going to say that time was of the essence of this contract?

Mr. Litwin: Yes, sir.

The Court: And because they did not convey on the 17th of March, or whatever day it was, and on that day there was a lis pendens filed by the county, and I say that, 40

*Discussion.*

assuming that time was of the essence of the contract, they cannot be compelled or considered to be at fault because they didn't do something which they couldn't possibly do.

10 That is my theory. Now, I am not saying that time was not of the essence of the contract, but I say it cannot be charged against them because they were utterly unable to carry out their contract, through no fault of their own, and, as the testimony now stands, as soon as the lis pendens was lifted they offered their property to you and you did not take it. That is the situation.

20 Mr. Litwin: Now, if the Court please, let us get away, for a moment, from the condemnation proceedings and assume this fact, that we made our contract on February the 10th, closing on March the 10th. John Jones, an absolute stranger to Hartman or to the Church Construction Company, files a lis pendens upon this property, setting forth that he has a claim against the title; or that he has a contract for the purchase of the property, suing for specific performance, or, in the first instance, to remove the cloud on the title, to have his title declared good as to the property. Now, Hartman, the complainant, had nothing to do with the filing of that lis pendens. We have a contract that makes the closing date on March the 10th as of the essence. Subsequently, on April 30 1st, John Jones comes in with Hartman and they agree to discontinue their case. Now, Hartman had nothing to do with the filing of the lis pendens, and will your Honor say in that case that although Hartman was the 40

*Discussion.*

victim of circumstances, that we are not excused from our bargain?

The Court: I will say in this case that the filing of the lis pendens by an authority that has the right to condemn, cannot be charged against this complainant here as a failure to carry out a contract of which time may or may not be the essence. I am assuming that time is of the essence. 10

Mr. Litwin: Yes.

The Court: Now, that is the way I am going to rule, and don't let us waste any more time about it.

Of course, if you disapprove of my ruling, you can appeal, but you say you have other defenses. Now, if this title is not any good, that is another matter. 20

Mr. Litwin: We have a right to urge even this defense as strongly and vehemently as we can.

The Court: You have already urged this defense strongly and vehemently and I have already decided it and I don't see any reason for wasting your time and mine.

Mr. Litwin: Except at times, courts are human and they may err. 30

The Court: Sometimes.

Mr. Litwin: They are always human and they may err in an ordinary, common experience.

The Court: Yes, they often do.

Mr. Litwin: Now, may I just ask again your Honor's indulgence just for one minute to refer to a short citation from a California case which is identically on all fours with 40

*Discussion.*

this case. The Los Angeles Flood Control District—*Hunt v. Inner Harbor Land Company*, 214 Pacific 998—the Los Angeles Flood Control Districts of California have the right of condemnation similar to the school system here in Essex.

10 A vendor entered into a contract with the vendee to sell certain property. In the interim, between the date of the contract and the day fixed for the consummation, there was a lis pendens filed by the Los Angeles Flood Control District to condemn the property in question. The Court says: "This covenant calls for a good title to the land unencumbered and free from defects. The pendency of the condemnation action is an encumbrance upon the title. (*Bloch v. Citizens Trust*, 207 Pacific, 510.)"

20 The Court comes to this conclusion: "Therefore, if by reason of a subsequently commenced condemnation suit, the vendor at the time when he should execute the deed, is not able to give that title to the land he covenants to grant, his vendee may rescind the executory contract and sue for the return of any purchase money which may have been paid by him before the condemnation suit was instituted."

30 Appellant claims that the commencement of the condemnation action excused it from performing its contract to convey an unencumbered title to the land. Even so appellant is not entitled to retain moneys which it accepted as the consideration for that good and unencumbered title that it expressly obligated itself to convey. Affirmed."

40

*Discussion.*

And where they hold that the lis pendens was an encumbrance and there cannot be a case more squarely than the case we are trying right here on every phase of the case.

The Court: Is that all that you want to say?

10 Mr. Astley: If the Court please, may I just make a suggestion, that the Court has ruled that whether in this contract essence is of the time or not, the fact that it is a month or so after the time, that is, than that it be executed, the lis pendens was entered under this case in New Jersey Chancery where a building is to be erected upon the property and the complainant knew that was the purpose, and, as in this case, it was in the contract, and in the contract in this case 20 it provides with the giving of the deed or the title, they would also give a building permit and the plans for the building, they had the cellar erected, we were going right on with the erection of the building. Now, under that case, it describes time was of the essence. The point I am getting at is this, that, if that be so, and in this contract time being of the essence, where it is a period of time 30 beyond the point in which the contract is to be closed, that would be reasonable that we would be held. Now, here is a month or so gone by, with time of the essence. Under the ruling of that case, I think that we should be in a position to accept or reject on that particular day.

The Court: Well, I have made my ruling. You may be right, but I can't see why these men should be penalized because the governmental authorities have stopped them from 40

*Discussion.*

doing what they were perfectly ready to do. I may be all wrong about it, but that is my opinion. Now, that is assuming that time is of the essence of the contract, but there isn't anything in the contract that says that.

10 Mr. Astley: I think, in order to have a record, we ought to go into that question to prove that time is of the essence.

The Court: Well, but don't you know that the contract speaks for itself and you cannot vary the terms of a written contract by parol evidence?

Mr. Astley: We are not going to vary the terms of it. We are going to show—

20 The Court: You are going to read something into it that is not in it now.

Mr. Astley: In this particular case it was not shown that— We are not going to try to read anything into the contract. We are simply going to show the knowledge of the parties making the contract at the time— Their knowledge is all. We are not asking to put anything in it that would make a condition or term beyond the contract or in addition to the contract.

30 The Court: What do you want?

Mr. Astley: Here is the point. As I said a moment ago, these people knew the object for which we were buying this property. That is confirmed in the contract. There is a clause stating that they would within the date give us the permit for the building which is going on there, knowing that we are going to build at once. Vice-Chancellor Emery says that where the vendor has knowledge of the fact that we are going to build that that

40

*Discussion.*

would read in that time was of the essence on the day of closing and that in this particular case, why, he wouldn't let it go beyond four days. And that was our purpose of this line of testimony.

The Court: Well, I can't see that it has any bearing on the case, because I think the contract speaks for itself. There is not anything in the contract which says time is of the essence. Now, if you can construe from the terms of the contract itself that this contract means that time is of the essence, that is one thing, but what you are trying to do is to introduce evidence to show that they thought that time was of the essence. 10

Mr. Astley: Our object is to show the reason for which we are buying the property. That does not increase the terms of the contract, in order to come within this case of Vice-Chancellor Emery's. 20

The Court: I can't see it.

Mr. Astley: There is a term in the contract whereby they agreed to convey to us, or assign and transfer to us the permit for the building and their plans.

The Court: Well—

Mr. Astley: And which substantiate exactly what we want to show, the fact that we intend to proceed at once with the building of the building on the property. 30

The Court: Where does it say that they agree to convey or assign?

Mr. Litwin: On page two, the third paragraph from the bottom.

The Court: Well, this thing just simply says that "The vendors covenant, warrant 40

*Discussion.*

and represent that permits have been granted for the erection of a building to contain four stores and two flats on the corner and a four-family house on the remainder of the plot relative to which the vendors further covenant, warrant and represent he has plans, which plans and permits shall be turned over to the vendee, without any further cost to it." 10

It does not say that this vendee is going to build any house on it. He might or might not. He might start immediately and he might start three months from now, but the meaning of that, in my mind, is "here, I want to not only buy your property, but I want the chance to erect these flats, according to these plans, if I want to." I am going to stick to my ruling, gentlemen. 20

Mr. Litwin: May I make an offer, your Honor please, for the record?

The Court: Surely.

Mr. Litwin: The Court please, we offer to prove that, before and at the time of the making of this contract, the purchase of this property, that there were conversations had between Mr. Church, the witness now on the stand, representing the Church Construction Company, and Mr. Mayer Hartman, the vendor mentioned in the agreement, that the Church Construction Company was purchasing this property for the express purpose of placing a building on it that Hartman was told by Mr. Julius Church that he was at that time just completing a building— Any objection? 30

Mr. Augenblick: I have objection to the record that he is trying to pile up. 40

*Julius Church, direct.*

Let him ask the question and we will object to it and the Court will rule on it, because, otherwise, the record will be clogged up and we won't know what it is all about.

The Court: All right. Ask him the question.

Mr. Augenblick: The Court has ruled that he wouldn't allow any of this evidence in. 10

The Court: Yes; that is what I have ruled.

Mr. Litwin: Then, I am going to ask the same line of questions and have a continuous ruling by the Court?

The Court: All right, you can do that, if that is satisfactory to you.

Q Mr. Church— 20

Mr. Litwin: I think there was a pending question.

The Court: When he first came to your office about this property, that was the question, something like that?

Q Did Mr. Newman and Mr. Horowitz come to you for the purpose of negotiating the purchase of this property by you? 30

Mr. Augenblick: I object.

The Court: I will sustain the objection because it is a leading question.

Q Who came to you for the purpose of negotiating the purchase of this property?

Mr. Augenblick: I object on the ground that it is immaterial. The contract is a subsequent act of the parties than the final act. 40

*Julius Church, direct.*

The Court: I will sustain the objection.

Q Did you have any conversation with the party who came to you to purchase the property?

10 Mr. Augenblick: I object for the same reason in my previous objection.

The Court: Objection sustained.

Q Did you tell the person who started the negotiations for the property the purpose for which you were buying it?

20 Mr. Augenblick: I object. And, your Honor, at this time, I want to state that I am going to object to any questions relative to the transactions of the Church Construction Company and Mayer Hartman prior to the entering of this contract.

The Court: Objection sustained.

Mr. Litwin: If that is the objection, may I renew my offer, instead of having continuous objections and rulings by the Court?

The Court: It seems to me, you have enough objections on record now to take it up.

30 Mr. Litwin: Well, we will have some more, if that is my adversary's idea. He wants the rulings continuously by the Court. I will continue to ask my questions, in order to bring out what I think is necessary to prove in this case.

The Court: I cannot stop you from that.

Mr. Litwin: No, sir.

40 Q After you had entered into negotiations for the purchase of this property, did you meet Mr.

*Julius Church, direct.*

Mayer Hartman, the complainant in this case? A Yes, sir.

Q Where? A In Mr. Litwin's office.

Q At the time you met Mr. Hartman in my office— A Yes.

Q —did you have any conversation with him, and, in that conversation did you tell him the purpose for which you were buying this property? 10

Mr. Augenblick: I object to it; leading question.

The Court: Yes.

Mr. Augenblick: And move it be stricken out.

The Court: I will sustain the objection.

Q Did you have any conversation with Mr. Hartman at my office— A Yes, sir. 20

Q —relative— What was the answer? A Yes, sir.

Q State the conversation.

Mr. Augenblick: Just a minute. Let him first state the time, what conversation he had.

The Court: Yes.

Q When was that conversation had? A That was before we made the agreement. 30

Mr. Augenblick: Then I object to any conversation between Mr. Hartman and Mr. Church.

The Court: I will sustain the objection.

Q When you say that it was before you made the agreement, was it before that time or was it 40

*Julius Church, direct.*

simultaneously with the preparation of the agreement offered in evidence and marked C. 1?

Mr. Augenblick: I object. The witness has answered when he had the conversation and the answer should stand.

10 The Court: I will sustain the objection.

Q In that conversation did you tell Mr. Hartman the purpose—

Mr. Augenblick: I object.

Q —for which you were buying this property?

Mr. Augenblick: I object.

20 Mr. Litwin: Let me finish the question, please.

A Yes, sir.

Mr. Augenblick: I move the answer be stricken out.

The Court: That is perfectly immaterial.

Mr. Augenblick: It is a leading question, in the first place: "Did you ask Mr. Hartman, and so forth?"

30 The Court: Yes. It is a leading question. I will strike it out.

Q Did your conversation with Mr. Hartman have anything to do with telling them the purpose for which you were buying this property?

Mr. Augenblick: I object to the question.

40 The Court: I will sustain the objection.

*Julius Church, direct.*

Mr. Augenblick: For the same reason?

The Court: Yes.

Q What was your conversation with Mr. Hartman?

Mr. Augenblick: I object. 10

The Court: I will sustain the objection.

Q After the contract was signed, did you have any conversation with Mr. Hartman relative to the purchase of this property? A Yes, sir.

Q What was that conversation?

Mr. Freedman: I object to that. There is no time fixed.

The Court: He said, after the signing of 20 the contract.

Mr. Freedman: It might have been last week, your Honor.

The Court: Well, if it was after the signing of the contract, why, then the contract speaks for itself, for that would surely be varying the terms of the contract by parol evidence.

Mr. Litwin: And your Honor sustains 30 that objection?

The Court: Yes.

Q What was the time of that conversation? When did you have that conversation with Mr. Hartman? A At the same time when we were to make the agreement down there.

Q No. You stated before you had a conversation after the contract was made.

Mr. Augenblick: He answered it. 40

*Julius Church, direct.*

Q When was that conversation? A Well, I don't recollect it.

Q Well, was the conversation before March the tenth, 1926? A Yes, sir.

Q What was that conversation?

10

Mr. Augenblick: I object.

The Court: Sustain the objection.

Mr. Astley: I think, as a matter of record, it might be stated, we understand the Court to allow no evidence in before or after the execution of the contract relative to any conversation with this man and this man was an officer of the defendant and the complainant.

20

The Court: Well, that is about my—

Mr. Augenblick: I don't think it ought to be as broad as that. I don't think it can be as broad as that, Vice-Chancellor. There may be some conversation.

Mr. Litwin: We have not gone into the question of what the conversation was.

The Court: I think you ought to ask the questions and I will rule on them.

30

Q Did you, at any time, tell Mr. Hartman the purpose for which you were buying this property?

Mr. Augenblick: I object to the question.

The Court: Objection sustained.

Q Was this improved property or unimproved property?

40

Mr. Freedman: I object to that.

*Julius Church, direct.*

The Court: Well, I don't know that that is objectionable. What difference does it make?

Q Was it improved or unimproved property?

Mr. Augenblick: I object to it.

10

The Court: I will sustain the objection.

Mr. Litwin: If the Court please, I again renew my offer to adduce evidence—to what this witness would testify to if the Court had not overruled the objection and had not ruled as it has.

The Court: I won't permit that. You cannot fix up your record like that. You can ask any questions you want to and I will rule on each question, but I am not going to allow on the record any sweeping statement of what you think you might be able to prove.

20

Q I read to you, Mr. Church, the provision from the contract made between you and Mr. Hartman, and marked C. 1. "The vendors covenant, warrant and represent that permits have been granted for the erection of a building to contain four stores and two flats on the corner and a four-family house on the remainder of the plot relative to which the vendors further covenant, warrant and represent he has plans which plans and permits shall be turned over to the vendee without any further costs to it." Now, was that clause— What was your intention in having that clause put into the contract?

30

Mr. Augenblick: I object to the question.

The Court: Objection sustained.

40

*Julius Church, direct.*

Mr. Augenblick: The intent has nothing to do with it.

The Court: The Court will consider the contract.

10 Q Did you tell Mr. Hartman why you wanted the plans and the permit for this property?

Mr. Augenblick: I object. It is immaterial.

The Court: I will allow the question. Answer yes or no.

A Yes, sir.

Q What did you tell him?

20 Mr. Augenblick: I object.

The Court: I will sustain the objection.

Q Was it important to you to have the plans and specifications and permit for the erection of the buildings, as described in this contract, upon this land?

Mr. Augenblick: I object to the question.

30 The Court: I will sustain the objection. It is leading.

Q Of what importance was the receiving by you of the plans and permits for the erection of the buildings, as provided for in contract C. 1?

Mr. Augenblick: I object to it.

The Court: I will sustain the objection.

40 Q Did you tell Mr. Hartman at any time, either before the contract was made or after the

*Joseph Church, direct.*

contract was entered into, why you wanted the plans and the permits?

Mr. Augenblick: I object to it on the ground that the conversation before the contract—(interrupted).

The Court: Well, he can say, yes or no. 10

A Yes, sir.

Q What was that conversation?

Mr. Augenblick: I object to it.

The Court: I will sustain the objection.

Mr. Litwin: That is all.

The Court: That is all, sir.

Mr. Litwin: Mr. Joseph Church. 20

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JOSEPH CHURCH, sworn for the defendant.

*Direct examination by Mr. Litwin.*

Mr. Litwin: May I have put on the record, if the Court please, that my purpose in asking these questions was to show the intention of the vendors in purchasing this property—the vendees—the purpose for which it was to be used, and that I am producing this evidence in accordance with the case of *Agens v. Koch*, reported in 74 Equity, page 528? 30

The Court: That is a matter of argument on your appeal.

I told you, a few minutes ago, you ought not endeavor to make a record for yourself.

Mr. Litwin: I also desire to show that time was of the essence of this contract. 40

*Joseph Church, direct.*

The Court: The contract speaks for itself.

Mr. Litwin: But, that is outside of the contract and which was made so pursuant to negotiations between the parties.

10 The Court: Has Mr. Church been sworn? I won't allow all that on the record. You will have to ask your questions, if you want to continue to pursue this.

Q Mr. Joseph Church. A Yes, sir.

Q Where do you live? A 680 Clinton avenue, Newark.

Q And are you an officer of the Church Construction Company? A Secretary.

20 Q And are you the gentleman that signed Exhibit C. 1 as secretary of the Church Construction Company (handing witness paper)? A Yes, sir.

Q Were you present when the contract, C. 1, was drawn between Mayer Hartman and Minnie Hartman, his wife, and the Church Construction Company? A Yes, sir.

Q Where was that contract drawn? A Mr. Litwin's office.

Q Who was present? A Mr. Litwin—

30 Mr. Augenblick: Just a minute. I object to this line of questions on the ground that they are immaterial. There is no fraud that is set up. There is no rescission. There is nothing pleaded in the bill to that effect. What difference does it make who was present? The contract was signed and executed and delivered.

40 The Court: You have already forced Mr. Litwin into asking question by question because you objected to his putting a general statement on the record.

*Joseph Church, direct.*

Mr. Augenblick: He asked the question and I objected to the question.

The Court: He asked who was present at the time the contract was prepared, was that it, or signed?

Mr. Augenblick: Yes. How is that material? 10

Mr. Litwin: Yes, your Honor.

The Court: Is that it?

Mr. Litwin: Yes; prepared and signed.

The Court: I don't see any harm in that. I will allow it.

Q Who was present? A Mr. Litwin, Mr. Julius Church, myself, Mr. Samuel Newman, Mr. Horowitz, Mr. Hartman and, I think, Mr. Koehler, or Kohler, whichever it is. 20

Q Who did Mr. Koehler represent? A Mr. Hartman.

Q Now, previous to the drawing of the contract, C. 1, was there any conversation had between yourself, your father, Mr. Julius Church, and Mr. Hartman? A Yes, sir.

Q Did that conversation have anything to do with the purchase of this property? A Yes, sir. 30

Mr. Augenblick: I object to the question on the ground it is leading.

The Court: Yes. I will sustain the objection on that ground.

Q What was the purport of the conversation?

Mr. Augenblick: I object to the question.

The Court: I will sustain the objection. 40

*Joseph Church, direct.*

Q Was anything said by anybody— A Yes, sir.

Q —relating to the purpose for which this property was being purchased by the Church Construction Company?

10 Mr. Augenblick: I object to the question. That is leading and immaterial.

The Court: I will sustain the objection. It is clearly leading.

Mr. Litwin: If the Court please, I know it is getting monotonous, asking questions and having the rulings, but where a question is asked—(interrupted).

20 The Court: You see, you have got plenty on the record. You have asked if there were conversations before and if there were conversations after and you have got enough now to carry it up to the Court of Appeals very comfortably, I should think, and I don't see why you call this man and ask practically the same questions that you asked his father. If I am wrong as to the father, excluding the father's testimony, why, I am just as wrong excluding his. You have got enough for your appeal.

30 Mr. Astley: The statement I made a few minutes ago, I think, really, should go on the record and eliminate all this questioning.

The Court: I told counsel that I do not intend to permit a record to be made except by question and answer and I also tell counsel that I think they have got plenty on the record to carry it up.

40 Your ideas and Mr. Litwin's involve what he wanted to let in by these questions. It is

*Joseph Church, direct.*

plain to be seen what is wanted—and I have ruled them out.

Now, if I am mistaken, why, the Court of Appeals will just simply reverse me and send it back and I will have to listen to these questions and answers.

10 Mr. Astley: The ground of the objection on which your Honor ruled was not as to the materiality, but upon the ground that it was leading.

The Court: Some of them I said were leading and some were not.

Mr. Litwin: May I point this out to the Court, that where I asked the question "Where was that conversation?" And the objection was made, "That is leading—"

20 The Court: No; that is not a leading question.

Mr. Litwin: But the objection, your Honor ruled upon it.

The Court: No. You said, "Did you have any conversations relative to what you wanted the land for?" That was one question. Of course that is a leading question, because the answer could only be "Yes."

30 Mr. Litwin: It could be "No," too.

The Court: Well—

Q Were there any conversations had, after the contract was signed, between either yourself, your father or—and Mr. Hartman? A Yes, sir.

Q What was that conversation? A We were speaking about—

Mr. Freedman: Did this conversation relate to anything that is covered by the con- 40

*David M. Litwin, direct.*

tract? I object. I ask leave to strike out the answer, after it is in, because, from this question, it is impossible to say what the witness is going to answer. It is an omnibus question. It does not limit itself to any particular phase of the case.

10

Q Were there any conversations had between your father, yourself and Mr. Hartman? A Yes, sir.

Q Relative to the property in question? A Yes, sir.

Q What was that conversation?

The Court: Well, when was it, first? When was the conversation?

20

Q When was the conversation? A Immediately after the signing of the agreement.

Q What was that conversation?

Mr. Freedman: Now, at this time, I ask leave to move to strike out the answer, should it be—(interrupted).

The Court: No. I won't allow it to be answered, their conversations after the signing of the contract. It is the same question that he asked the father and the same ruling.

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(Discussion.)

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DAVID M. LITWIN, sworn for the defendant.

*Direct examination by Mr. Astley.*

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Mr. Astley: I offer in evidence tax search made by the City of Newark of the premises,

*David M. Litwin, direct.*

bearing date February 15, 1926, and being an official tax search.

Mr. Augenblick: I want to know for what purpose these papers are offered.

The Court: What purpose is that offered for?

Mr. Astley: I will connect it up in just a moment, your Honor please.

Mr. Augenblick: We will wait until you connect it up. I don't see the materiality.

The Court: I don't either.

Mr. Litwin: I desire to show under our contract the provision that none of these mortgages were in default. The mortgage produced in court today, marked Exhibit C. 4, and which I have seen for the first time, provides that the mortgage shall become due and payable if there is a default in taxes for sixty days. Now, the 1925 taxes became due, the first half on June 1st, and there has been a default there, and then there is a second default from December 1st to February 1st, so they could not convey property subject to mortgages which were not in default at the time of closing.

Mr. Augenblick: I object to the proof that is going to be offered on this score, because it is not pleaded and I am taken by surprise. All the mortgagees were present and they were ready to carry out the terms of these mortgages in accordance with their terms. We have the mortgagee here in court now.

The Court: Well, I will allow the tax bills to be marked in evidence. Then I will see what I think about that.

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*David M. Litwin, direct.*

Mr. Augenblick: This testimony is going to be now with respect to the building permit?

The Court: Yes.

10 Mr. Augenblick: Naturally, I say it was not pleaded in their answer. If there is anything that I must answer, of course, I will be given the opportunity—

The Court: Certainly, we will. We will adjourn the case until another day, if you insist upon it.

Mr. Augenblick: I may not, if there is nothing in his testimony.

The Court: If it was not pleaded, you can claim surprise.

20 Mr. Astley: We contend they were not ready and able to carry out the terms of the contract. This is one of the terms.

The Court: All right. Now, let us find out about that.

30 Q Mr. Litwin, Mr. Augenblick testified that this contract, as shown on the face of it, is to be consummated on the 10th of March, 1926, and he said that he had a conversation with you whereby the closing date was extended two weeks. Did you have any such conversation with Mr. Augenblick? A I did not.

40 Q And he further testifies that—that is, the two weeks expired on March the 26th, 1926—that he also had conversations with you extending the time for closing from March 26th to April the 5th, 1926, and from April the 5th to May the 17th, '26. Did you have any conversation or did you do anything or say anything with Mr. Augenblick extending the time for the closing

*David M. Litwin, direct.*

of this contract? A Not with regard to extending the time of the contract.

Q Did you have any conversation, as a representative of the defendants in this case, with anybody, extending the time of this contract? A I did not.

10 Q Did you sign any papers extending the time of this contract or of your client—

The Court: We understand that. There were several days set down for settlement and Mr. Church was not present on those days. Mr. Litwin has already admitted that on the record.

20 Q And was the contract in question drawn in your office? A It was.

Q Did you draw it? A I did.

Q Who was present at the time? A Mr. Julius Church, Mr.—(interrupted).

The Court: Are you going all over that again? That is all in the record.

30 Q What was your answer? A —Mr. Joseph Church, Mr. Newman and Mr. Horowitz, the brokers; Mr. Mayer Hartman and Harry H. Koehler and myself.

Q And did you draw the contract? A I completed the drawing of it.

Q Was there any conversation between the complainant and the officers of the defendant—(interrupted).

Mr. Augenblick: I object to the question.

Mr. Astley: I haven't asked it yet.

The Court: I think—

*David M. Litwin, direct.*

Mr. Augenblick: I am going to object to any conversation had between complainant and defendant at the time the contract was drawn.

The Court: Just let him ask it and object, and then I will sustain it. Go on.

10 (Question read as follows: "Was there any conversation between the complainant and the officers of the defendant—") relative to the purposes and objects of the terms of the contract?

A There was.

Q What were these conversations?

Mr. Augenblick: I object to the question.

20 The Court: Sustained.

Q I show you a paper and ask you if you received this paper, being a letter from the State of New Jersey to the Board of Tenement House Supervision. A I did.

Q And what are the contents of that letter?

Mr. Augenblick: I object.

The Court: Oh, no, you can't do that.

30 Mr. Astley: I offer it in evidence.

Mr. Augenblick: I object to the paper going in evidence.

The Court: I will allow it.

(Paper marked Exhibit D. 1.)

The Court: What is the date of it?

Mr. Astley: I am going into that.

Mr. Augenblick: The date of this letter is April 20, 1926, and it is a letter signed by A. R. Swain, secretary to the Board of Tene-

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*David M. Litwin, direct.*

ment House Supervision, and I object to the paper going in evidence.

The Court: I have already allowed it in evidence. What does it say? Read it.

Mr. Augenblick: It says: "April 20, 1926. Mr. Mayer Hartman, 842 South Orange avenue, Newark, New Jersey. The records 10 in this office indicate that plans for the construction of a tenement house at the above address were approved by this Board on April 7, 1925.

An inspection made on April 19, 1926, indicates that no work has been done above the foundation walls of the said building.

You are hereby notified that the certificate of approval issued for the construction of this building is hereby cancelled and is null 20 and void.

No construction work must be done on this building until plans have been approved by this Board.

Very truly yours,

C. Ray Swain, Secretary."

Now, this letter is dated April 20, 1926. The lis pendens was removed—the County 30 Counsel had decided, on March 22nd, to remove the lis pendens in accordance with my letter. The Church Construction Company did not go ahead with this building, as he should have gone ahead, and they revoked the permit, or, at least, they threatened to remove it and it never was renewed again.

The Court: What they want, according to that letter, is a renewal, however.

40

*David M. Litwin, cross.*

Mr. Astley: They want a new application made as originally.

The Court: Perhaps so.

Q From whom did you receive this letter, Exhibit D. 1? A Mr. Mayer Hartman.

10 Q When did you receive it? A A day or two after April 20, 1926.

Q Was a deed of this property ever tendered you by the complainant, that is, you as representative of the defendant? A There was not.

Mr. Astley: Cross examine.

*Cross examination by Mr. Augenblick*

20 Q Mr. Litwin, do you mean to say that you and I did not agree on these various dates for the adjournment of the taking of this title? A I do.

Q Didn't I have conversations with you over the telephone almost every time that these adjournments were had, and you told me that it is not your fault, Mr. Church doesn't come in?

30 Mr. Astley: I object to the question. He said "almost every time."

Mr. Augenblick: All the time. I will change it.

The Witness: May I ask you to split your question? I will be able to answer it.

The Court: Mr. Litwin has admitted that Mr. Church was not there on these various occasions. I do not see any use of pursuing it any further.

40 Mr. Astley: Very well.

*David M. Litwin, cross.*

The Court: That doesn't mean that Mr. Litwin agreed to anything. He simply said his client was not there.

Q You knew that the time called for—the place called for taking of this title was in my office? A I did. 10

Q And that was the place where the deed was to be tendered? A Yes, sir.

Q And you, in fact, knew all the time that I had the deed from Mayer Hartman and Minnie Hartman? A I did not.

Q Didn't I tell you that I have not the unrecorded deed from Starr to Hartman? A You did not.

Q Didn't you know about it? A I did not.

Q Did you ever tell me that that was an objection to the taking of the title? A I did. 20

Mr. Augenblick: That is all.

The Court: That is all.

Well, now, it seems to me that we have to decide—these two points that you raised are points of law. The first is about this permit, whether or not that would break the contract; and the second is about these taxes. 30

The agreement, Mr. Litwin says, provides that it should be mortgages in the neighborhood of fifteen thousand dollars and that they shan't be in a position so they can be called. Is that the idea?

Mr. Freedman: I might say, your Honor, the contract covers the question of default and provides in case there is a mortgage in default that, in that event, the vendee shall have the privilege to pay off that prior mort- 40

*David M. Litwin, cross.*

gage and make a purchase money mortgage loan accordingly, so that, even if this mortgage were in default, it would not be an objection to the title.

The Court: Well, that is a matter of argument.

10

Mr. Freedman: Yes, sir.

The Court: And I will take the papers and try to come to some conclusion about it.

Mr. Augenblick: I was going to ask Mr. Litwin whether, as representative of the defendant, he has ever seen a mortgage that was to be executed—or an unrecorded mortgage given to Starr.

The Court: Why, no, I don't suppose he did.

20

Mr. Augenblick: Was he ever told about it, I would like to know?

The Court: Did you know anything about it?

Mr. Litwin: I did not, sir.

The Court: Do you claim surprise about this permit business?

30

Mr. Augenblick: Of course, I claim surprise about the permit business, but I say, now, it has no effect whatsoever on this case.

The Court: Well, you think it has not?

Mr. Augenblick: No, I don't think it has. I don't think that you will think it has, either.

The Court: All right, now, I will take the papers.

40

Mr. Astley: There is one other thing in our counter-claim we are entitled to. We are entitled to certain fees. I would like to prove those.

*David M. Litwin, cross.*

The Court: Well, you state what they are on the record.

Mr. Astley: Will you state those?

Mr. Litwin: We made a sixty year accounting search, made all the attendant official searches and also had a survey made of the property. My charge to the Church Construction Company including my disbursements was two hundred and fifty dollars.

10

Mr. Freedman: May I ask that these searches be put in evidence?

The Court: Yes.

Mr. Augenblick: I will object to the unreasonable charge of two hundred and fifty dollars for search fees.

The Court: I will decide that. The first thing is to decide whether they get anything.

20

(Bundle of papers marked Exhibit D. 2.)

Mr. Augenblick: I want to place the mortgage on the witness stand to show he did not take any advantage of the default in these taxes. He is here and he never took any advantage of the default in the taxes.

Mr. Astley: We object to the testimony. The point is here, the contract says there is to be none. The fact they say they wouldn't or they would take care of it is optional with them. I object to this testimony.

30

The Court: I will sustain the objection.

(Adjourned to April 28th, 1927.)

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*Julius Church, direct.*

SECOND DAY.

April 28, 1927.

10 Transcript of shorthand notes of testimony taken in the above-entitled cause before his Honor, Alonzo Church, Vice-Chancellor, at the place and in the presence of counsel as before.

Mr. Augenblick: As I understand it, the purpose of taking testimony this morning is to permit the defendant to introduce testimony that time might have been the essence of this contract.

The Court: That is right.

20 Mr. Augenblick: And also to give me the opportunity to rebut the testimony that they introduced with respect to the permit and the taxes.

Mr. Astley: Do I understand we are going into all the facts of the case?

The Court: I will take all the testimony that is offered.

Mr. Astley: I presume it is up to us to proceed then, if that is the idea?

30 Mr. Augenblick: Yes.

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JULIUS CHURCH, resumed.

*Direct examination by Mr. Astley.*

40 Q Mr. Church, are you an officer of the defendant, the Church Construction Company? A Yes, sir.

*Julius Church, direct.*

Q What officer are you of that company? A President.

Q And did you sign the contract in question with the complainant, Mayer Hartman and Minnie Hartman? A Yes, sir.

Mr. Astley: I believe that contract was marked as an exhibit. 10

Mr. Augenblick: It was. I have it right here.

Q Referring to Exhibit C. 1, showing you Exhibit C. 1, I ask you if that is your signature (indicating)? A Yes, sir.

Q And at the time this contract— Pardon me, strike it out. That is your signature as president of the Church Construction Company? A Yes, 20 sir.

Q And, at the time of the signing of this contract, where was it signed? A In Mr. Litwin's office.

Q And who was present, at the time of the signing of the contract? A That was Mr. Hart.

Mr. Augenblick: Who?

Mr. Astley: Mr. Hart.

Mr. Augenblick: Hart? 30

The Witness: Is that his name, Hart, the man who bought—

Mr. Astley: Hartman.

The Witness: Hartman. I thought his name was Hart. And my son, Joseph, and two agents, Newman and Horowitz.

Q And the contract, you say, was signed in Mr. Litwin's office? A Yes, sir. 40

*Julius Church, direct.*

Q And did you, at the time just prior to the signing of the contract, have any conversation with Mr. Hartman relative to the terms of the contract? A Yes, sir.

Q What was that conversation?

10 Mr. Augenblick: Just a minute. If he is going to relate a conversation now, it must be only with respect to time and nothing else.

The Court: Well, I will receive it for what it is worth.

Mr. Astley: What do you mean, time?

Mr. Augenblick: Relative to the time fixed for the performance of the contract. That is the only testimony.

20 The Court: No. Let him say what the conversation was and whatever of it is material I will take into consideration.

Mr. Augenblick: Oh.

Q Just tell us what the conversation was. A The conversation was before we went in to sign that agreement in the foyer room, in the entrance room, and I asked Mr. Hart—

30 Q Hartman. A (Continuing.) —Hartman if we could be able to sell it right away and I would buy it, but if we couldn't start right away on it, I wouldn't bother with it.

Q Did you tell him or did you not tell him why you wanted it right away? Yes or no. A Yes; I told him.

40 Q What did you tell him? A I told him I am not putting up such houses, small ones, and I am making plans for big operations in East Orange, Harrison street, for three big apartment houses and I couldn't spare more than about six

*Julius Church, direct.*

or seven weeks until I get my plans done to build up these houses there from the lot I buy from him, and he said he got for me some plans and even they start to dig out the cellar and "you can start working right away on it."

Q Did he or did he not at that time offer to assign the permit to you and make such a permit a term of the contract? Say yes or no. A Yes. 10

Q What did he say with regard to that?

Mr. Freedman: I object to that. That is in evidence, your Honor please, the contract.

The Court: No. It is the conversation about the company, apparently.

Q What did he say as to that? A He said he got the permit and everything is ready to go ahead, before he will assure me who the contract is, he wants to give the contract for the cellar so it will go quick, he says. 20

Q Was there anything said relative— A No.

Q —to the building on the property? A No.

Q And then, after your conversation with Mr. Hartman relative to desiring to build upon the property at once and he assigning the premises to you, what did you then do? A We went into the office and we signed the agreement. 30

Q Did you sign the agreement then? A Yes.

Q What kind of property was this that the agreement related to? A That was—the lot was 100 by 130, and it was supposed to go on there four-family houses on the Seventh street side and stores and apartments on the corner of Seventh street and Third avenue.

Q Had anything been done on the property, prior to the signing of the contract, in relation to construction work? A Yes, sir; on the four- 40

*Julius Church, direct.*

family house the cellar was dug up and about two feet of foundation was laid from cement blocks.

Q And was it or was it not your intention to proceed to erect upon that foundation? A Yes, sir.

10 Q Did you so inform Mr. Hartman to that effect? A Do I what?

Q Did you so inform Mr. Hartman to that effect, before signing the contract? A Yes, sir.

Q That it was your intention to proceed to erect the building on those foundations? A Yes, sir.

Q Now, I want to show you certain plans. Just look at those (showing witness papers). A Yes.

20 Q Look at these (handing map to witness). A Yes; that is one.

Q Look at that (handing another map to witness). A Yes; that is the plan.

Q Look at that. A Yes; that is the plans; one is four-family house and one is on the corner for the stores on the property.

30 Q Just a moment. You looked at these plans. Now, tell us what they are. A On the side of Seventh street that is a four-family house and on the corner that is four stores. I think it is four; I don't remember exactly, and flats above.

Q And these other plans for those buildings? A Yes, sir.

Q And were they given to you? A Yes, sir.

Q By whom? A By Mr. Hartman, or whatever his name is.

Q Mr. Hartman, the complainant? A Yes, sir.

40 Mr. Astley: You want to see these plans?

*Julius Church, direct.*

Q And when, in relation to the date of the contract, did you get these plans from Mr. Hartman? A We get them when we signed the agreement.

Q When you signed the agreement? A Yes, sir.

10

Mr. Astley: I would like to offer these plans in evidence.

The Court: All right.

Mr. Augenblick: No objection.

The Court: They will be received. You better mark them all as one exhibit.

(Plans marked Exhibit D. 1, April 28, 1927.)

20

Q Now, Mr. Church, this contract, according to its terms, was to be closed, the title was to be closed on March—(interrupted).

The Court: No. The contract speaks for itself.

30 Q How long would it take you, Mr. Church, to construct the buildings that you contemplated, under the terms and plans that were to be given to you under the contract? A About seven to eight weeks.

Q And if the contract had been carried out and the title closed, as specified in the contract, on what date would you have had the building finished? A On the 1st of May.

Q And when is the renting season for stores and buildings of this character? A About the 1st of May.

40

*Julius Church, cross.*

Q You testified before, did you not, that you had other operations after the 1st of May? A Yes, sir.

Mr. Astley: Cross examine.

10 *Cross examination by Mr. Augenblick.*

Q You say you were in a great hurry to build these buildings. Is that correct? A Yes, sir.

Q You signed this contract on February the 10th and it was to close on March the 10th; is that correct? A Yes, sir.

Q When did you first learn of that lis pendens that was filed by the State—by the Board of Education?

20

Mr. Astley: The Board of Freeholders.

Q The Board of Freeholders. A About two weeks later they sent the bill.

Q The lis pendens was filed on the 24th of February? A Yes.

Q How long after that did you find out about this lis pendens? A I find it out before.

Q Before? A After I signed the agreement.

30 Q From whom? A I came over to my lawyer, Mr. Litwin, and I asked him to hurry with that search, and he told me that the man was down there and he says I couldn't build anything on it, because they were going to put up a school there.

Q Mr. Litwin told you? A Yes, sir.

Q Before the 24th of February? A Yes, sir.

Q You are sure about that? A Yes, sir.

40 Q Did you ask him who told him that the Freeholders were to take that over? A Yes, sir.

*Julius Church, cross.*

Q Who told him? A He told him, a man, he said, by the name of Anderson came around and told him. He left the card with him to give it to me.

Q Before the 24th? A Yes, sir.

Q About how long before the 24th did you have this conversation with Litwin? A Well, I don't exactly remember how long it was, but I used to go there every while and say he shall hurry with the search, I was in a hurry to put that up. 10

Q You say it was about two weeks after you signed the contract that you learned that? A About that time.

Q Did you enter into any contract, in the meantime, with other people to build this building? A To build this building? 20

Q Yes. A Well, I bought materials, I bought bricks.

Q For this building? A Yes, sir.

Q When did you buy bricks and other materials for this building? A The day after I signed the agreement.

Q You are sure about that? A Yes, sir.

Q Isn't it a fact, Mr. Church, that you never even contemplated building this building, and that you were to seek other plans for this building? A No, sir. 30

Q Didn't you provide in your contract that you were to build all stores on Third avenue and that you were going to go and get another permit? A It is—(interrupted).

Q And you reserved yourself the privilege to do so? A It is in the addition to this building.

Q Do you know that court proceedings were necessary to obtain the permit for the three 40

*Julius Church, cross.*

stores on Third avenue? You knew that? A I didn't know that.

Q Didn't you? A (No answer.)

Q You didn't know that? A No.

Q You knew Mr. Hartman had been in court for over a year? A I didn't know it.

10 Q With this permit? A I didn't know it.

Q Why did you provide in the contract that you were to obtain the privilege, that you were to have the privilege to go into court and get a permit for three additional stores? A Well, I thought he will have stores there in the corner and I would like to have the others on the rest of the lot to put up stores.

20 Q Why did you say in the contract and why did you reserve yourself the right to go into court to do so, if you say you knew nothing about court? A I don't think I quite understand.

Q Why did you sign the contract that you would go to court to do so and exacted an allowance of \$250 from the vendor to give you the privilege and to pay your expenses of doing so?

30 Mr. Litwin: If the Court please, the contract doesn't say so, if I may read to the Court that particular portion of the contract.

The Court: Well, you let your opponent direct the cross examination.

Q Why did you do that, Mr. Church?

Mr. Litwin: May I have the question read again, Mr. Stenographer?

40 (Question read as follows: "Why did you sign the contract that you would go to

*Julius Church, cross.*

court to do so and exacted an allowance of \$250 from the vendor to give you the privilege and to pay your expenses of doing so?")

Mr. Litwin: Is that in the contract?

Mr. Augenblick? A Yes.

Mr. Litwin: The Court please, I think the witness has answered the question. He said there were additional stores outside of these plans erected. 10

The Court: Well, this is cross examination. Proceed. If it was in the contract, let us find out why it was put in.

Q Will you answer that, Mr. Church? A Well, I don't recollect that. I don't know what to answer on that. 20

Q Why did you sign a contract in which you reserved yourself the privilege to go to court and provided also in the contract that the contract was to continue and stand as it did without the passing of title until you obtained a permit for these additional stores, if you were in such a hurry to build? 20

30 Mr. Astley: I object to the question as not being plain. I do not think I could answer that myself. 30

The Court: Let him try to answer it.

Mr. Litwin: I make the further objection that Mr. Augenblick is not quoting the contract. The contract does not say he shall continue in force.

The Court: Read the contract.

Mr. Augenblick: "It is further agreed and understood that the parties of the first part shall allow to the party of the second 40

*Julius Church, cross.*

part at the time of settlement an amount not to exceed \$250, which amount, when fixed, shall be equal to one-half of the cost, if any, expended in court proceedings to obtain a permit to build stores on the entire Third avenue frontage; total amount of costs incurred in that direction to be fixed by certification of David M. Litwin, who is to conduct said proceedings; court proceedings not to be begun before ordinary effort is made at the City Hall to procure permit without resorting to proceedings; if at the time of settlement the certification of David M. Litwin shall not be available this clause in the contract shall stand continued and there shall be a deposit of \$250 made in escrow by the vendor."

20

The Court: Why did you put that clause in the contract?

The Witness: Well, I thought to build some stores in the addition property that is left on Third avenue.

The Court: If you thought you were going to build stores, why didn't you go ahead and build them? Why did you think you had to go to court to get the right to build stores?

30

The Witness: Why, I didn't know if you have to go to court with that or not, but I was had a conversation about it.

Q Now, Mr. Church, you testified that this contract was drawn in Mr. Litwin's office and that you were present and that Mr. Hartman was present and two brokers were present and Mr. Litwin was present; is that correct? A I didn't say that. I say that we signed it, but I didn't talk anything about—(interrupted).

40

*Julius Church, cross.*

Q I didn't ask you that. I am only asking you who was present. A I am telling you who was present.

Q Who was present? A Me and the two agents and my son and Mr. Litwin.

Q Was Mr. Koehler, my partner, present? A By the signing, yes. 10

Q You didn't say so at first, though, did you? A No.

Q And you just said, a moment ago, that there was no conversation had in the presence of all these people with respect to your hurry to build, was there? A No.

Q No. That conversation was had in a back room between you and Mr. Hartman? A Yes, sir. 20

Q Why was there such a secret about that conversation?

Mr. Litwin: I object.

The Court: I will allow it.

Q Why was there such a secret about that conversation? A I don't know about any secret.

Q Why did you have it in a back room? Why didn't you have it in the presence of your lawyer and insert it in the contract? A If you will allow me to tell you— 30

Q I will allow you. A When I came in to sign agreements with the lawyer, I am always making my talking outside. When we come to the lawyer, we are ready to sign it. It ain't got nothing to do with the lawyer, what he did with it.

Q Why did you say, a few moments ago, when you thought I was going to ask you about a conversation— 40

40

*Julius Church, cross.*

The Court: Wait a minute; wait a minute. Don't ask him anything like that. He can't tell you what you thought.

Q Why didn't you have that conversation with respect to your hurry to build this building, or these buildings, in the presence of your lawyer and Mr. Hartman's lawyer? 10

Mr. Astley: I object to the question.

The Court: I will allow it.

Q Will you answer that, please, Mr. Church?

A I answered that any time I am making a sale, selling or buying, that I am not bothering the lawyer about my business, only when we come to sign agreements. 20

Q That is the best answer you can give? A That is the best answer I can give.

Q You thought it was a very good thing for you to take this title on the 10th of March, didn't you? Wasn't that important, having clear title on the 10th of March? A Yes.

Q Why didn't you tell your lawyer to provide that you would get the title on that date? A I told him he should do that. That is all I know.

Q And your lawyer neglected to do so? A I don't know whether—I don't know if he neglected to do so. 30

Q When did you tell him to do so, in the presence of all these people? A I don't know if it was in their presence or before or after.

Q Or after what? A Or after we signed the agreement. I don't remember exactly when it was.

Q The lis pendens was filed by the Board of Freeholders on the 24th of February. After 40

*Julius Church, cross.*

that you were having negotiations with the city with respect to the city taking this property over from you—hadn't you?

Mr. Astley: You mean the city or county?

Mr. Augenblick: The county, after the 24th. 10

The Witness: I didn't have nothing to do with the county—just a man asked me about it and I was—I went over and told him I bought it and if he wants it he can have it.

Q For how much? A Well, we didn't say about the price. I told him I paid eighteen thousand for it and I would like to get a few dollars' profit out of it.

Q Didn't you make a demand upon the county for \$30,000 for this property? A No; I did not. 20

Q Who did you have your conversations with?

Mr. Astley: I—

Q The representative of the Board of Freeholders? A Mr. Anderson.

Q Mr. Anderson? A Yes.

Q Was there any price ever stated between you and Anderson? A No; we didn't state no price. 30

Q Did you ask him for a price? A No; he said the first thing we have to know, if the State will buy it.

Q Well, the Board of Freeholders had already filed their lis pendens. That— A That was before they filed it.

Q This conversation you are referring to now was before? A Before, yes.

Q And at that time there was no price stated by you to Mr. Anderson? A No. 40

*Julius Church, cross.*

Q After the lis pendens was filed was there a price stated by you to Mr. Anderson?

10 Mr. Astley: Just a moment. If the Court please, I would like to object to this question as not proper cross examination. I only went into the conversation this gentleman had prior to the signing of the contract. Now, they are cross examining him on an entirely different matter.

The Court: I will allow it.

Q After the lis pendens was filed, Mr. Church, was there any discussion between you and Mr. Anderson with respect to price? A No.

20 Q Then you never made an offer to anyone representing the Board of Freeholders as to how much you wanted for this property? A No.

Q Why didn't the Board of Freeholders purchase the property from you before they filed the lis pendens?

The Court: No.

Mr. Astley: I will object.

30 The Court: I will sustain the objection. He doesn't know why, of course.

Q Did the Board of Freeholders tell you what they would pay for the property? A They didn't tell what they would pay, but he told me what he could get it for before I got it.

Q Did Mr. Anderson tell you how much the county would pay for the property? A Yes, before I got the agreement signed.

40 Q Did he tell you how much he would pay you for the property? A Yes—not me—but he said that is what he could buy it for, for ten

*Julius Church, cross.*

thousand. He said he was talking to Mr. Hartman about it and he offered him \$10,000 for it.

Q Did he make you an offer for the property? A No.

Q You made no offer to him? A Well, he was not authorized to buy it off me, and I didn't make an offer. 10

Q He was not authorized to buy it? A No. He just wanted to find out if he could get it and what he could get it for.

Q Now, Mr. Church, at the time that contract was signed, you say that the plans were delivered to you and the permits for the two buildings were also delivered to you? A That is, one permit was delivered and the other one is supposed to give it to me, and I don't know, I never received it. 20

Q Is this the one permit that was given to you? A Yes.

Q And, you say, the other permit was not given to you? A No. He supposed to give it to me. He said he will send it to me, but never send it.

Q Was it ever given to your lawyer? A No.

Q But there were two valid and subsisting permits in effect at that time? 30

Mr. Litwin: "At that time"? At what time?

Mr. Augenblick: At the time the contract was signed.

Mr. Litwin: I object as a conclusion of law.

The Court: Yes; I will sustain the objection.

Anything further, Mr. Augenblick? 40

*Julius Church, cross.*

Q You say, Mr. Church, that the conversation that you had with Mr. Hartman with respect to your rush to build these two buildings was had in Mr. Litwin's office with Mr. Hartman privately?

A Yes.

Q At that time were the contracts drawn?

10 A I don't recollect; I don't know.

Q You don't recollect? A No.

Q Do you know where the contracts were drawn? A No, I don't know where they were drawn.

Q At that time did you tell him you were in a hurry for these buildings?

Mr. Litwin: Tell who?

Mr. Augenblick: Mr. Hartman.

20

A That was before we draw the contract.

Q That was before you drew the contract? A Yes.

Q And that was in Mr. Litwin's office? A Yes, sir.

Q And where were the other people at the time? A The two agents was present.

Q Where was Mr. Koehler? A Mr. Koehler was not in there.

30 Q Where was he? A Up to his office. They was waiting for him.

The Court: If he was not there, how does he know where he was?

Q Wasn't he in the room with Mr. Litwin? A Well, I don't know.

Q You don't know. As a matter of fact, the original contract was drawn in Mr. Koehler's office, wasn't it, Mr. Church? A I don't know.

40

*Joseph Church, direct.*

Q I show you the contract and I ask you to look at the first two pages and at the third page and tell us which part of that contract was drawn in Mr. Koehler's office and which part of it, which part of the contract was drawn in Mr. Litwin's office? A I couldn't tell you that.

Q You couldn't tell? A I never paid any attention to the contract, when the lawyer was there. 10

Mr. Astley: Showing him Exhibit C. 1.

Mr. Augenblick: Yes.

Q Do you recall whether the portion providing the—the covenant in the contract providing for the permit was drawn in Mr. Koehler's office or in Mr. Litwin's office? A I don't know. I don't remember that. Any time I am drawing a contract, I leave it to my lawyer and I don't pay any attention to who is drawing it. 20

Mr. Augenblick: All right, that is all, Mr. Church.

The Court: That is all, Mr. Church.

JOSEPH CHURCH, resumed.

30

*Direct examination by Mr. Astley.*

Q Mr. Church, are you an officer of the Church Construction Company? A Yes, sir.

Q What office do you hold? A Secretary.

Q What is that? A Secretary.

Q And were you present at the time a contract—C. 1—was executed? A Yes, sir. 40

*Joseph Church, direct.*

Q Where was it executed? A Mr. Litwin's office.

Q Who was present at the time? A Mr. Koehler, Mr. Litwin, Mr. Newman, Mr. Horowitz, Mr. Church, myself and Mr. Hartman.

10 Q And were you present at the time— Strike it out. The witness just prior to you is your father? A Yes.

Q Were you present at the time your father had a conversation with the complainant, Mr. Hartman? A Yes, sir.

Q Relative to the terms of the contract? A Yes, sir.

Q And before the contract was signed? A Yes, sir.

20 Q Will you tell the Court just what that conversation related to?

Mr. Augenblick: And where was it?

The Court: Now, wait a minute. One at a time. What does it relate to, what does this conversation relate to?

The Witness: It related to the getting of the title to this land so we could start immediately.

30 The Court: And where was the conversation held?

The Witness: In Mr. Litwin's waiting room.

The Court: And who was present when it was held?

The Witness: Mr. Newman, Mr. Horowitz, brokers, Mr. Hartman, Mr. Church, my father and myself.

40 The Court: Well, now, what was said at that time?

*Joseph Church, direct.*

The Witness: We asked Mr. Hartman and the brokers at the time if the loan was available immediately and they told us it was, the loans were O. K. and permits granted and the excavation work for one house was already completed, and the work was ready to go ahead with, and that was the understanding, that we were to get that land immediately or as soon as our title was searched. 10

The Court: Now, who told you that?

The Witness: Mr. Hartman.

The Court: All right.

Q And did you or did you not or did your father, in your presence, tell Mr. Hartman the purpose for which you desired to acquire this land? A Yes, sir. 20

Q What did he say? A He told us that everything was O. K., that we could go ahead, that the permits was granted.

Q What did you or your father say relative to the construction? A We had a little spare time while our plans were being completed, for a bigger operation we were undertaking, and we wanted to get hold of some small proposition that we could fill in this time with and he told us this was available immediately, and that was the understanding, that we were to get it. 30

Q What did you tell him that you were going to do on the property? A We were going to build the same thing that he had his plans O. K.'d for.

Q And was anything said about the permit that Mr. Hartman held? A He says everything was O. K. and that we could go right ahead, that he had already started one cellar. 40

*Joseph Church, direct.*

Q And can you explain to us the term in the contract relative to a possible future application to the Court—

Mr. Augenblick: I object to that, Vice-Chancellor—

10 The Court: Yes; I will sustain the objection.

Mn. Augenblick: That calls for a conclusion of law.

Mr. Astley: The point is here—I understand, then, in cross examination it cannot be gone into?

The Court: Well, you can ask him what conversation was had relative to that clause, but you cannot—(interrupted).

20 Q Was there any conversation had, at that time, or up to the signing of the contract, relative to the clause in the contract specifying a few—(interrupted).

The Court: About the Court proceedings.

Q About the Court proceedings? A Yes.

30 The Court: What was said.

Q Tell us what it was. A We understood he had a permit for the corner.

The Court: No, no. The conversation, not what you understood. What did he say and what did you say?

The Witness: Well, he told us the permits were granted for the corner and we asked him about getting the permits for the balance

40

*Joseph Church, direct.*

of it and he says, "Well," he said, "you shouldn't have any trouble about that place going up," and in case we should have trouble we wanted to protect ourselves, in case we went to court, so he says, "All right. We will allow you that certain amount of money to help pay towards the expense of court proceedings." 10

Q Did that relate to the land that the buildings would not cover provided for in the plans?

A Yes, sir.

Q What court proceedings did they mean?

Mr. Freedman: I object.

The Court: No.

20 Q Do you know what court proceedings they meant?

The Court: No. I will sustain the objection.

Q Was anything said between the parties at that time as to what the court proceedings might be?

30 Mr. Freedman: I object.

The Court: Well, that is all right. (To Witness:) Was there?

The Witness: Yes, sir.

The Court: What did they say?

The Witness: There might have been some restrictions on the balance of the land.

40 Q Did they say what kind of restriction? A Probably against stores.

40

*Joseph Church, cross.*

Q And, after this conversation had taken place, what was done relative to the contract?

A I didn't get that question.

Q And after this conversation had taken place that you just related, what was done relative to the contract? A We were waiting for  
10 Mr. Koehler to come so the contract could be signed.

Q Did Mr. Koehler come? A Yes, sir.

Q Was the contract prepared? A Yes, sir.

Q And was it signed? A Yes.

Q And that is the contract marked Exhibit C. 1 in this cause? A (No answer.)

Mr. Astley: Cross examine.

20 *Cross examination by Mr. Augenblick.*

Q Was there any conversation had by you or your father, in the presence of Mr. Litwin and Mr. Koehler? A No, sir.

Q And with respect to your rush to start these buildings? A No, sir.

Q Why?

30 The Court: No, no. There was not. That is sufficient.

Q There was not. Why didn't you ask your attorney to incorporate such a provision?

Mr. Astley: I object.

The Court: I will sustain the objection.

40 Mr. Augenblick: I think that is very material, Vice-Chancellor. They are maintaining that time, by the circumstances, was the essence of this contract. If that is a fact, why didn't they—(interrupted).

*Joseph Church, cross.*

The Court: Well, all right. I will allow it.

The Witness: Will you ask that question again, please?

Q Why didn't you ask your attorney to incorporate such a provision in the contract? A  
10 We didn't think it was necessary. We had Mr. Hartman's words for it, and his plans and his permits. All that was necessary to go ahead.

Q You had signed a good many of these contracts before this, hadn't you? A Yes, sir.

Q You know what "time of the essence" means, don't you? A Yes, sir.

Q You knew it at that time, didn't you? A  
20 Well, I didn't give it a thought whether it was necessary.

Q Why didn't you ask your lawyer to put a provision in this contract in which time was to be of the essence? A Well, I didn't think it was necessary. We took Mr. Hartman's word. He showed us his plans and terms, that everything was ready to go ahead.

Q He did not misrepresent anything in his plans and permit, did he? A No, sir.

Q He had his permit, didn't he? A Yes,  
30 sir.

Q And he had his plans? A Yes, sir.

Q You were in a great rush to start this on the 10th of March, on the day of the closing of the title? A Yes, sir.

Q Why didn't you tell your lawyer to make sure that you can start on the 10th of March?

Mr. Astley: I object.

The Court: I will allow it.

*Joseph Church, cross.*

A I didn't think it was necessary to tell him.

Q You knew, on the 22nd of March, that the city was withdrawing their proceedings with respect to condemnation, didn't you? A Yes, sir.

Q Why didn't you start then, ten days later?

A They had withdrawn their proceedings?

10 Q Yes. A I didn't know it.

Q You were notified on the 22nd of March that the Board of Education was no longer interested in the property? A We had already—  
(interrupted).

Mr. Astley: I object. If the Court please, there is no evidence showing he was notified.

The Court: Ask him when he was notified.  
20

Q When were you first notified that the Board of Education had no more intention to acquire this property? A I don't remember ever being notified. I have not received anything, unless the president of the company received anything, I hadn't received anything.

Q Who was the president of the company? A My father.  
30

Q You mean to say you did not know that the city had withdrawn their intention of condemning this property? A Not at that time, no, sir.

Q When did you know? A Some time later.

Q Well, about when? A Oh, probably a month or two later.

Q Probably a month or two later. Had you been going into Mr. Litwin's office to ask him what is happening to this property? A No.

40 Q Why? A I was working on other work.

*Joseph Church, cross.*

Q Well, you were in a great hurry to build this—to complete this job, weren't you? A Well, I had other things to do myself.

Q Who was attending to this matter? A Mr. Church, my father.

Q Your father. Had your father been going into Mr. Litwin's office to find out what was happening to this? 10

Mr. Astley: I object.

The Court: Wait a minute. I will sustain the objection.

Q Do you know whether—

Mr. Astley: What?  
20

Q If your father had been negotiating with Mr. Litwin?

Mr. Astley: I object.

The Court: I will sustain the objection. You should have asked the father.

Q Where were you working at the time, Mr. Church?  
30

Mr. Astley: What time?

Mr. Augenblick: At the time that this contract was signed. (To witness:) Where was your job?

The Witness: I was just completing a theater on Clinton avenue.

Q Whereabouts? A Seventeenth street and Clinton avenue.  
40

*Joseph Church, cross.*

Q What do you mean, you were just completing? How far from completion were you?

A Just putting in the final touches.

Q Just the final touches? A Adjusting—

Q When did you complete it finally?

10 Mr. Astley: I object to the question, immaterial.

The Court: I will allow it.

Q When did you finally complete it? A Oh, I think I got that property wrong. It was another property that I was working on at that time.

Q Another property? A Yes, sir.

Q What other property? A A little synagogue we were building.

20 Q A little synagogue, where? A On 13th street and Avon avenue.

Q And how far away was that from completion at the time this contract was signed? A That was completed.

Q That was completed? A Yes, sir.

Q Then you were not working on any other job? A I was just working there completing, putting on the final touches, adjusting doors and—(interrupted).

30 Q When was that synagogue completed?

Mr. Astley: If the Court please, I don't see what materiality the synagogue is.

The Court: What Mr. Augenblick is apparently driving at, as I see it, is this: He wants to find out whether this man did have those seven weeks on his hands without anything else to do; isn't that it?

Mr. Augenblick: Exactly.

40

*Joseph Church, cross.*

Q When was that building completed? A Just about the time we signed this contract.

Q Just about the time you signed this contract; is that the synagogue on the corner of 13th avenue and Avon avenue— A Thirteenth street.

Q —(Continuing.) Thirteenth street and Avon avenue? Isn't it a fact that that building was only completed this last Christmas? A Oh, no. It was completed long before that.

Q How long before? A This last Christmas?

Q Yes. The 25th of December, 1926.

Mr. Astley: 1926 or 1927?

The Witness: It was completed right around that time, right after that time. 20

Q On the 25th of December, 1926? A Later than that.

Q It was completed in 1927? A 1926. I mean, earlier than 1926.

Q When? A Around in February and March, around that time.

Q You are sure about that? A Yes.

Q When was the synagogue opened? A Well, it was opened— I don't exactly remember the dates that time. 30

Q Isn't it a fact that you were working on that synagogue on October and November, 1926?

A No, sir.

Q You are positive about that? A Yes, sir.

Mr. Augenblick: That is all.

The Court: That is all, sir.

Mr. Litwin: Just one moment, please.

40

*William Fiverson, direct.*

*Re-direct examination by Mr. Astley.*

Q Were you working on that theater, finishing up a theater, about the time this contract was signed?

10 The Court: Now that is a leading question.

Q Were you or were you not working on a theater?

The Court: No, that won't do. What were you working on?

20 Q What were you working on besides a synagogue, if anything? A I was getting some preliminary work ready on Harrison street.

Mr. Astley: That is all.

The Court: That is all, sir.

Well?

Mr. Litwin: Mr. Fiverson.

30 WILLIAM FIVERSON, sworn for the defendant.

*Direct examination by Mr. Litwin.*

Q Mr. Fiverson, are you connected with the Building Department of the City of Newark?  
A Yes, sir.

Q What is your connection with that department? A I am a structural engineer in the department.

40

*William Fiverson, direct.*

Q And have you charge of the records of that department? A I have not charge of them; I have access to them.

Q You have access to them. You brought the records of the department to court here? A Yes, sir.

10 Q Will you refer to your records and tell us when the permit was granted by the Building Department for the erection of a four-family house on Seventh street? A That permit was approved on March the 25th, 1925, and it was issued on April the 1st of that same year.

Q 1925? A Yes.

Q To whom was that permit issued? A To Mayer Hartman.

20 Q Do your records disclose whether the building was ever put up, under the terms of that permit? A It was—my records show that it was never completed. It had been started.

Q Do you know, of your own knowledge, for how long a permit is valid? A Yes.

Q How long? A A permit is issued for one year and—(interrupted).

Q And after the lapse of one year, what happens to it, if nothing else is done? A It may be renewed, if the owner wishes to do so.

30 Q Was this renewed? A I have no record of it being renewed.

Q Now, will you refer to your records and tell us when the permit was issued by your department for the erection of the stores on the Third avenue side of the premises? A That permit was issued on January the 9th, 1926.

Q Do your records disclose whether the building was erected upon the premises in accordance with that permit? A My records show that the work had not been started.

40

*William Fiverson, direct.*

Q And does the same apply to the duration of the permit of a building, under your building code? A Yes, sir.

Q Now, were there ever any applications made for a renewal of that permit? A I have no record of it.

10 Q If it had been made, you would have a record of it? A Yes, sir.

Q The permit for the stores on the Third avenue frontage, was it necessary to have any court proceedings in order to have that granted to Mr. Hartman? A Yes, sir.

Q What was the nature of those proceedings? A It is— Shall I go into detail of this matter?

20 The Court: I don't see how this gentleman is competent to say what—

Mr. Litwin: From his records, the nature of the proceedings and all that.

Q Have you a copy of a writ of mandamus issued in the case of Hartman against the City of Newark directing the building inspectors to issue the permits for the Third avenue stores? A Yes.

30 Q Have you that here? A Yes; copy of it.

Q Is that the copy that was served upon your department? A Yes; on the Law Department.

Mr. Litwin: I offer it in evidence.

Mr. Augenblick: I have no objection to it, but I can't see the materiality of it.

The Court: Without passing on the materiality of it, I will let it in.

(Paper marked Exhibit D. 2, April 28, 1927.)

40

*William Fiverson, direct.*

The Court: It appears, there were two permits, as I understand it.

Mr. Augenblick: Yes, sir.

The Court: One was turned over at the time of the closing of the contract.

Mr. Augenblick: No; there were—that is their testimony. 10

The Court: Yes, which one do they say was turned over?

Mr. Augenblick: For the stores and the four-family houses.

The Court: Third avenue?

Mr. Litwin: Third avenue.

Mr. Augenblick: Third avenue.

The Court: Yes.

Mr. Augenblick: And the other permit? 20

The Court: The other permit was granted when?

Mr. Litwin: April, 1925.

Mr. Freedman: The one that was not turned over, as I understand the testimony, was granted on January, 1926; the one that was turned over to them, according to their testimony, was the one that was granted in April, 1925. 30

Mr. Litwin: Just the opposite.

The Court: How could they turn over at the time of signing the contract a permit that had not been granted? The contract was signed when?

Mr. Augenblick: February 10th.

The Court: This permit was not issued until March 25th.

Mr. Litwin: That was the year before, your Honor, for the four-family house and 40

*William Fiverson, cross.*

the one turned over to us is dated January 11th and is for the Third avenue stores.

The Court: All right.

Mr. Astley: Turning over that permit means nothing until title passes.

10 The Court: We won't argue. I am just trying to get the dates straight.

Q Can you tell us from your knowledge as to the one—the building zone of the City of Newark that this property is located in? A Yes.

Q What zone is it? A It is in a residential district.

20 The Court: Well, that is enough of that. Then we can infer what will have to be done. Is that all?

Q And you said, I believe, that the permit for Third avenue had never been renewed. A I have no record of its being renewed.

The Court: Is that all?

Mr. Litwin: That is all.

*Cross examination by Mr. Augenblick.*

30 Q Now, Mr. Fiverson, on the 10th day of February, 1926, were there two valid, legal and subsisting permits for the two buildings, one on Third avenue and one on—(interrupted).

The Court: You cannot have valid, legal— All you can say is "Were there two permits?"

40 Mr. Augenblick: Very well. We will strike out the words "valid" and "legal."

*Frank J. Leiser, direct.*

Q Were there two permits, one for Third avenue and one for Seventh street? A What was that date, please?

Q February 10, 1926. A Yes; there were two permits.

Q Yes. One of these permits would expire on April the 1, 1926? A That is correct, unless the work had been started. 10

Q The other one will expire in December, 1927? A Yes, sir.

Q Is that correct? A Yes, sir.

Q Yes. On April the first, 1926, if Mr. Mayer Hartman had come in there to renew the North Sixth street permit, it would have been renewed, would it not? A No, sir.

Mr. Litwin: I object.

The Court: I will sustain the objection. Is that all? 20

Mr. Augenblick: No other questions.

Mr. Litwin: Mr. Leiser.

FRANK J. LEISER, sworn for the defendant.

*Direct examination by Mr. Litwin.*

30 Q Mr. Leiser, are you connected with the Tenement House Board? A I am.

Q And have you the records here relating to the plans filed for a tenement house on 404-406 North Seventh street, Newark? A Yes, sir.

Q To whom was that permit—by whom were those plans filed? A They were filed by Nathan Siegel for a man named Mayer Hartman.

40 Q Were those plans approved by your department? A They were. 40

*Frank J. Leiser, direct.*

Q When? A They were filed on the 2nd of April, 1925, and approved on the 7th of April, 1925.

Q And was that approval given to Mr. Hartman at the time— A Why—

Q —or to the architect? A —the architect  
10 called for them.

Q Do your records disclose whether any building was ever erected upon these lands in accordance with the approved plans? A There were periodical inspections made by the inspector and they never got any further than the excavation.

Q I show you Exhibit D. 1, dated April 20, 1926, and ask you, upon referring to your records, whether that letter was issued—was sent  
20 by your department? A I have a carbon copy of it here, showing that that had been mailed to the owner.

Q Why was it mailed to the owner? A Because—

Mr. Augenblick: I object to the copy until we see the letter.

The Court: I will sustain the objection.

Mr. Astley: It is in evidence now.

Mr. Augenblick: Oh, yes, that is already  
30 in evidence.

The Court: That is in evidence?

Mr. Augenblick: Yes; we admit that that was mailed.

Mr. Astley: And received?

Mr. Augenblick: And received.

Q What is the duration of the approval given by your department? A One year, providing  
40 the work is—

*Frank J. Leiser, cross.*

Q What is that, sir? A One year, unless the work is under way.

Q Was an application ever made to your department to renew this permit or to grant a new permit?

Mr. Freedman: I object to that as immaterial. 10

The Court: I will allow it.

The Witness: Answer?

The Court: Yes.

The Witness: Our records show no request for renewal.

Mr. Litwin: That is all.

*Cross examination by Mr. Augenblick.* 20

Q On February the 10th, 1926, the approval of your department stood on both of these buildings, did it not, inspector? A I only have one building.

Q The other one is not a tenement house, is it?

The Court: No.

The Witness: Evidently not. 30

Q The approval of your department stood on the North Seventh street house? A On what date?

The Court: February 10th.

Q February the 10th, 1926? A Yes.

Q And it stood up until the 7th of April, 1926? A Until— 40

*Lathrop Anderson, direct.*

Q Is that right? A —one year of the approval date, yes, sir.

Mr. Augenblick: Yes, that is all.

The Court: That is all.

Mr. Litwin: That is all.

10

That is our case, your Honor please.

The Court: The Court will take a recess of five minutes.

Mr. Augenblick: Mr. Anderson.

LATHROP ANDERSON, sworn in rebuttal.

*Direct examination by Mr. Augenblick.*

20

Q Mr. Anderson, were you asked by the Board of Freeholders of the County of Essex to assist them in acquiring this property on the corner of Seventh street and Third avenue? A No; the Board of Education and Essex County Vocational Schools, but the Freeholders had to furnish the money.

Q Yes. You learned at some time that Mr. Church had bought this property from Mr. Hartman, had you not? A Mr. Hartman told me that he had sold it to Mr. Church.

30

Q To Mr. Church. Did you see Mr. Church after that? A Mr. Church came to my office.

Q Yes. That was some time after the 10th of February, wasn't it?

Mr. Astley: I object to the leading question.

The Court: Yes; that is a leading question. When did he come?

40

*Lathrop Anderson, direct.*

Q About when did he come to your office? Can you recall, Mr. Anderson? A No; I don't recollect the day.

Q Well, you say he came and he told you he had bought the property from Mr. Hartman?

Mr. Astley: I object as leading.

10

The Court: No. He has already said so.

A Yes; that is what I said.

Q Did you send for him? A Well, I don't know that I sent for him but Mr. Hartman told me that he had sold it and I asked him to whom he had sold it and he said to a man by the name of Church and I asked where I could find Church. I couldn't find him in the telephone book, and I think Mr. Hartman said his lawyer was Koehler, somebody by the name of Koehler.

20

Q Koehler. A I went to see Mr. Koehler and he told me that the man who had charge of Mr. Church's affairs was a man by the name of Litwin, I think he was at 800 Broad street. I went to see Mr. Litwin and he said that Mr. Church had bought this property. I asked where I could find Mr. Church. I couldn't seem to get hold of Mr. Church. And finally Mr. Church came to my office. Now, I can't tell you just what date, but it was along about the first of the year sometime.

30

Q Was any other conversation had between you and Mr. Church at that time when he came to your office? A In regard to the piece of property?

Mr. Litwin: If the Court please, I think this is entirely immaterial and irrelevant to the issue.

40

*Lathrop Anderson, direct.*

The Court: Well, I don't know whether it is or not. We have not heard it yet. I will allow it.

10 Mr. Litwin: I object to any conversations had by Mr. Church and Mr. Anderson as to the date of the agreement. Mr. Augenblick brought it out on cross examination and went out of the scope of the direct examination and he is bound by whatever Mr. Church has said. He became his witness.

The Court: I will allow it.

Q Was any conversation had between you and Mr. Church? A In regard to this property?

20 Q In regard to this piece of property. A Sure. That is what he came to see me for. I told him I wanted to buy this property.

Q Did he tell you—

Mr. Litwin: I object.

The Court: I will allow it.

Q How much did he ask you for it? A \$30,000.

30 Q Was there any further negotiations between you and Mr. Church after that conversation? A Not at all.

Mr. Augenblick: That is all.

The Court: Wait a minute, Mr. Anderson.

The Witness: I beg your pardon.

The Court: Not through yet.

*Lathrop Anderson, cross.*

*Cross examination by Mr. Litwin.*

Q Mr. Anderson, can you recall as to whether that conversation was before the lis pendens was filed by the county? A You mean, the condemnation proceedings?

Q Yes. A Yes, that was before, because I told the Board of Education that the price was ridiculous, and, if they wanted it, they better condemn. 10

Q And prior to the Church Construction Company purchasing the property, did you negotiate with Mr. Hartman for the purchase of this property? A Yes, sir; I tried to get the property from Mr. Hartman.

Q For how long a period, prior to the time that you met Mr. Church, had you been negotiating? A Oh, I should say, a month, probably. 20

Q Was it prior to February 10th? A I should imagine so, but I cannot say without my records.

Q It was at least a month before you had met Mr. Church? A Oh, yes, at least that.

Q And Mr. Hartman knew that the county wanted to buy the property? 30

The Court: Now, wait a minute. Mr. Anderson is in no position to say that.

Q Did he tell you anything about the county, Mr. Hartman—or did you tell him? A I don't recollect that I told him who my purchaser was. I told him I wanted that corner. I had already gotten options on Roseville avenue property and some on 7th street and he might have heard that; 40

*Harry H. Koehler, direct.*

I don't know. I can't say that I told him who I wanted it for.

Mr. Litwin: That is all.

10 HARRY H. KOEHLER, sworn in rebuttal.

*Direct examination by Mr. Augenblick.*

Q Mr. Koehler, you are an attorney of this State? A Yes, sir.

Q I show you Exhibit C. 1, and I ask you who drew that exhibit? A Partly by my stenographer and partly by Mr. Litwin.

20 Q Will you point out to the Court which part of the contract was drawn in your office? A The first two pages. The balance in Mr. Litwin's.

The Court: How do you know the balance was drawn at his office?

The Witness: I can tell the typewriting; I can tell the paper and I have a recollection of the facts.

30 The Court: Well, did you see it drawn in his office?

The Witness: Yes, sir.

Q You were there when the last two pages were drawn in Mr. Litwin's office? A The last three.

Q The last three? A I was.

40 Q Yes. While this contract was being prepared by you, were you in communication with Mr. Litwin with respect to it throughout? A I was in communication with his office and there

*Harry H. Koehler, direct.*

was some delay, I believe, either on my part or on his part. We didn't get together, and later I went to his office with the agreement as I originally had it completed. Then, later, it was changed in Mr. Litwin's office, following conversations had between the parties direct.

Q Was the provision contained in the contract with respect to giving them the privilege of coming into court and getting additional stores inserted at your suggestion or at Mr. Litwin's suggestion? A Mr. Litwin's. 10

Q Did you originally ask for that provision? A Absolutely no.

Q Was any conversation had between you and Mr. Litwin, at any time, with respect to time being of the essence of this contract? A Never.

Q Did you ever attempt to exact a clause like that? A No. 20

Q Did they ever attempt to exact a clause like that? A No.

Q Was there any conversation had at all between any of the parties in your presence that there was a great rush to start this building on the 10th of March, 1926? A Never heard of such a conversation.

Q Who inserted the provision in the contract which reads that, "The vendors covenant, warrant and represent that permits have been granted for the erection of a building to contain four stores and two flats on the corner and a four-family house on the remainder of the plot relative to which the vendors further covenant, warrant and represent he had plans, which plans and permits shall be turned over to the vendee without any further costs to it." Who inserted that provision in the contract? A I personally inserted that, with the exception of the last few 30 40

*Harry H. Koehler, direct.*

words. The last few words were inserted in Mr. Litwin's office.

Q "Without any further cost to it"? A Yes.

Q At that time, were there permits and plans for the erection of these two buildings? A I believe there were.

10

The Court: You have already proved that.

The Witness: That is right.

Mr. Augenblick: We have already proved that.

Q I show you Exhibit C. 8 and ask you at what time you were informed by the office of Arthur Vanderbilt that the lis pendens was to be discharged and that there were no more interests in the property? A On the date of this letter.

20

Q March the 22nd? A Yes.

Q Did you immediately communicate with Mr. Litwin? A With Mr. Litwin and Mr. Hartman both.

Q Both. And you told them that—

Mr. Astley: Wait a moment.

Q What did you tell them? A The letter explains what I told them.

30

Q Did they ever tell you that it is too late, that they intended to build on March the 10th and it is ten days later now?

Mr. Astley: I object as leading.

The Court: No. That is all right.

Mr. Astley: Oh, this is his own witness, if the Court please. "Did they ever tell you this?"

40

*Harry H. Koehler, cross.*

The Court: I guess that is so. What did they tell you?

Q What did they tell you? A I was never told they had any rush on this title—

The Court: Did they tell you anything about it? 10

The Witness: Up to the time that I finished handling this matter and Mr. Augenblick came in, I had conversations with Mr. Litwin from time to time continuing this matter on, with never any expression on his part as to time being of the essence.

The Court: All right.

Mr. Augenblick: That is all, Mr. Koehler.

The Court: Do you want to cross examine? 20

*Cross examination by Mr. Litwin.*

Q Mr. Koehler, at the time that you got to my office— A Yes.

Q —Mr. Hartman and Mr. Church and his son were already there, weren't they? A They were all—we were all at your office together. Whether they were there before I got there I am not sure now. They were all there at the time. 30

Q They may have been there at the time you got there? A Possibly.

Q Have you got the original third page that was prepared by you? A I haven't that particular page with me and I imagine they were probably destroyed.

Q There was a third page? A Undoubtedly.

Q Prepared by you? A Yes.

Q Because your second page ends with the word "own" and stops there. Wasn't the clause 40

*Harry H. Koehler, cross.*

about a two-hundred-and-fifty-dollar allowance in your original third sheet? A No.

Q Outside of that, aren't all of the other clauses in the agreement the usual stock clauses, if I may call them that?

10 The Court: No. Don't ask him that.

Q Who suggested the remainder of the clauses in the agreement? A They were incorporated subject to our mutual supervision.

Q Both of us handled the case of drawing the agreement? A Right.

Q More so than our clients? A Correct.

Q Now, after this agreement was drawn, did you turn over this matter to Mr. Augenblick in your office? A I did.

20 Q How soon afterwards? A Around the 22nd of March, somewhere along there.

Q Twenty-second of March? A About that time.

Q On March the 10th Mr. Augenblick had nothing to do with it, did he? A Knew of the transaction.

30 Q Knew of the transaction, but he had nothing to do with the details of it? A He was conversant with the transaction, probably did not actually handle it entirely.

Q Outside of being conversant with the transaction, did he have anything directly to do with the transaction? A Insofar as I brought it to his attention, he did.

40 Q But do you know he did anything directly in this matter, prior to your turning it over to him, on March the 22nd? A It is hard for me to precisely recollect.

*Harry H. Koehler, cross.*

Q All right. Now, you said, before, that you have—you and I adjourned the matter from time to time after March the 10th? A Yes.

Q Positive of that? A Yes.

Q Mr. Augenblick didn't, did he? A Mr. Augenblick may have.

Q Well, he did? A Either one of us, possibly both.

Q Each time there was an adjournment you would call me and then Mr. Augenblick would call me? A I have not said that, Mr. Litwin.

Q Well, is that possible? A I doubt that.

Q Do you recall my communicating with you at the very end of February and telling you that there was a lis pendens filed and that we didn't think Mr. Church could use the property?

Mr. Augenblick: I object to the question. He doesn't mean "at the end of February." I will withdraw the object—I thought—my mistake, Vice-Chancellor.

A We had numerous conversations on the score of the lis pendens, and both you and myself were in touch with Vanderbilt from time to time to find out whether they were going through or were going to relinquish. We were in touch with Vanderbilt possibly every few days on that.

Q Then, according to your theory, you—

Mr. Augenblick: Never mind about the theory.

The Court: No.

Q According to your understanding as to what happened—

*Harry H. Koehler, cross.*

The Court: No. What we want to know is what happened.

Q Were you and your client acquiescent in the extension of time from March the 10th until the later date? A Temporarily, that is the arrangement you and I made. 10

Q And after that temporary arrangement was up, what was the arrangement between us? A I wrote you about closing title.

Q When? A You have one letter March 22nd from us, besides telephoning.

Q But, as a matter of fact, the lis pendens was not discharged until April the 1st. A That is possible. We had advance information from Mr. Vanderbilt to that effect.

20 Mr. Augenblick: File date, 22nd of March.

Q So that your letter dated March 22nd was prior to the actual discharge of the lis pendens? A If the dates shown there are correct, yes.

Q Now, after March 22nd, was your client and yourself acquiescent in having this matter adjourned? A We wanted you to close.

Q Was there any acquiescence on your part to these adjournments? A We requested a closing, and, after that particular date, I think 30 Mr. Augenblick handled it exclusively.

Mr. Litwin: That is all.

The Court: That is all, sir.

Mr. Augenblick: Is that all?

The Court: Is that the end, now?

Mr. Augenblick: Mr. Hartman.

40

*Mayer Hartman, direct.*

MAYER HARTMAN, recalled in rebuttal, sworn.

*Direct examination by Mr. Augenblick.*

Q Mr. Hartman, did you have a conversation with Mr. Church, before this contract was signed, with respect to this property? A Well, we were 10 talking about the price.

Q You were talking about the price. Were you talking anything about the great rush to acquire title?

Mr. Astley: I object as leading.

The Court: Well, I will allow it. What else did you talk about besides the price?

The Witness: Didn't talk anything else.

The Court: Nothing else excepting price? 20

The Witness: About the price, and he asked me whether I have permits granted. He didn't ask me for the plans.

The Court: Nothing else was said?

The Witness: I cannot recollect what else.

Q A little louder. A Only about he asked me about the plans and I told him any time he wants I can give him the plans. 30

Q Did he tell you that he wanted to start any building on March the 10th? A No.

Mr. Astley: I object as leading.

The Court: No. I will sustain the objection. He says all he talked about was the price and the plans.

Q Anything else? A He told me he is going to change the plans, make a different building. I said, "I got the plans," any time I can turn 40

*Mayer Hartman, direct.*

them over to him, but he didn't ask for the plans until we made the contract.

Q Until you made the contract? A And that was later I sent over the contract.

10 Q You heard the testimony of Mr. Church and of his son, in which they testified that they had a conversation with you and Mr. Litwin in the waiting room before the contract was signed.

Mr. Astley: If the Court please, I don't think—

The Court: Wait a minute, wait a minute.

Q (Continuing.) —And that they told you they must have the title on March the 10th?

20 Mr. Astley: I object, if the Court please. The Court. I will allow it. Did you hear that testimony in court?

Q Did you hear that testimony in court this morning? A I heard them say.

Q Did you have such a conversation with him? A No, sir.

30 Q Did he ask you—did he tell you anything like that? A He told me he was going to change the plans and make a big building. I don't know.

Q Did he say he must have that property on March the 10th?

Mr. Astley: I object as leading.

The Court: I will—

A I don't remember.

40 Q Don't shake your head. He didn't say anything like that?

*Mayer Hartman, direct.*

Mr. Astley: The witness didn't say that. He said he "don't remember."

Q What did he say? Did he say anything like that? Don't shake your head; answer. A He said he wants to change the plans for a different building. 10

Q Did he say that he must have that building on March the 10th, that property on March the 10th? A He didn't say it.

Q When did you turn over the permit to him? A A few days later.

Mr. Astley: If the Court please, there is no evidence the permits were turned over. There was one permit.

Mr. Augenblick: I will get to that. 20

The Court: How many permits did you turn over?

Q How many permits did you turn over? A I turned them over—

The Court: How many? How many?

Q How many? A Two.

The Court: When did you turn them over? 30

The Witness: A few days after the contract was signed, he come to me and he got it.

Q And you gave him the permits for the Third avenue building and the permit for the— A Yes; I didn't have no use for it.

Q (Continuing.) —And the permit for the Seventh street building? A Yes, sir. 40

*Mayer Hartman, direct.*

Q I show you a tax receipt for the year 1925 and ask you whether you paid your taxes on the date specified in this receipt? A Yes, sir.

Q And is that your tax bill for the property on Third avenue and Seventh street? A Yes, sir.

10

Mr. Astley: I object. The paper speaks for itself. He can give it to the witness and ask what it is.

The Court: That is all right. I will allow it.

Do you want to offer it?

Mr. Augenblick: I want to offer this receipted tax bill.

20

(Paper marked Exhibit C. 4, April 28, 1927.)

Q After the 10th of March, 1926, did you have any conversation with Mr. Church, or with Mr. Litwin, with respect to the closing of this title?

A I had a conversation with—

30

Q A little louder so we can hear you. A I had a conversation with them in Mr. Litwin's office. I was several times asking him why they don't settle and why don't they keep the appointments.

Q What appointments? A He made several appointments in his office.

Q Who made appointments? A Well, you lawyers made the appointments and I called up your office and you told me you made an appointment and I was waiting there.

Mr. Astley: I object.

40

Q Did you see Mr. Litwin at any of these times? A I have seen Mr. Litwin in his office.

*Mayer Hartman, direct.*

Q How many times? A I have seen him several times, asking him to find out.

Q What did he tell you? A He told me to wait and he will arrange it.

Q He will arrange it and did he say anything about Mr. Church? A He said to me he made an appointment with Mr. Church and Mr. Church didn't show up. "It is not my fault."

10

Q He said, "It is not my fault; I made an arrangement with Mr. Church"? A Yes.

Q How many times did he tell you that? A Several times, a few weeks after that.

Q Did he ever tell you that Mr. Church did not want to take the property because he couldn't get it on March the 10th?

Mr. Astley: I object, leading.

20

The Court: I will sustain the objection.

A He didn't say anything there.

Q Did Mr. Church ever tell you why he didn't want to take this property? A Mr. Church told me to wait, the same thing. He had some conversations with Anderson, because I referred Anderson to them.

Q Did Mr. Church tell you how much money he was trying to get from the city for this property? A No.

30

Q Or from the county? A He didn't told me that.

Q Did you know he was dealing with the county? A Mr. Anderson told me that.

Q But Mr. Church never told you anything about selling the property to the county? A He just told me that he is communicating with them and I should wait because I was—I wanted to know whether it was going to be settled or not.

40

*Mayer Hartman, cross.*

Q And he told you to wait? A Yes, sir.

The Court: Cross examine.

*Cross examination by Mr. Litwin.*

10 Q Do you remember you and Mr. Church and his son and Mr. Newman and Mr. Horowitz were in my waiting room on the day you drew the agreement. Is that right? A Yes.

Q And you and Mr. Church had a conversation about this property. That is right, isn't it? A Not at that time.

Q Well, what did you do at that time? A I was in your room waiting for—(interrupted).

20 The Court: You must speak louder.

The Witness: I was waiting in your office, in your room, altogether. The contract was prepared and you changed some things in it.

Q Before you got into my room, you were waiting in my waiting room, weren't you, before Mr. Koehler got there? A I come with Koehler together.

Q You came directly with Koehler, is that the first time you met Mr. Church? A Mr. Church?

30 Q Yes. A I met him before.

Q Where? A On the street.

Q When? A I don't remember when.

Q When was the first time you met Mr. Church about this particular property? A I don't remember when it was. A few days before, because—

40 Q A few days before you got to my office; is that right? And at that time did you discuss with him the details of this property? A (Witness nods no.)

*Mayer Hartman, cross.*

Q I can't hear you shake your head. A No; I didn't discuss it with you. I didn't know what to discuss.

Q What did you say to Mr. Church and what did he say to you at the—

Mr. Litwin: I didn't know you were a good mimic, Mr. Augenblick. 10

The Court: Mr. Augenblick, you should not do that; you must not do that. I won't permit it.

Now, ask the question.

(Question read as follows: "What did you say to Mr. Church and what did he say to you at the—")

Q (Continuing.) —at the time that you met him on the street, a few days before you left my office? A Just seeing the first time we were—I asked him whether he straightened out with the agent, that is all. 20

Q Is that all? A That is all.

Q Nothing was said about price? A He said it is too much I asked for it.

Q What else was said? A That is all.

Q He said the price was too much; that was all? A (Witness nods yes.) Yes, sir. 30

Q Nothing further was said about this property at that time? A Nothing said—nothing else.

Q All right. Now, when was the next time you met Mr. Church? A In your room.

Q What did you—what did Mr. Church say at that time about this property? A He didn't—I didn't talk to him.

Q Who did all the talking? A The lawyers, you and Koehler. 40

*Mayer Hartman, cross.*

Q Mr. Koehler and I? A Yes, sir.

Q Did all the talking? A Everything.

Q We arranged the price? A No; you asked how much was arranged.

Q Who arranged the deposit? A You arranged the deposit.

10 Q What else was said? A I don't remember what you were talking about—all those things.

Q Nothing else was said? A No.

Q Outside of the price and deposit? A I don't remember. You said a lot of things there until you straightened out.

Q Well, of all the things that I said, what did I say? A I can't say what is said.

20 Q Don't you remember? A The whole conversation you had with Koehler and whatever Koehler asked me I answered it.

Q What did Mr. Koehler ask you and what did you answer? A He asked me about whether the deposit was all right.

Q And that was all? A I don't know.

30 Q Don't you remember? A I remember, if you tell me what you were talking with Koehler. I can't remember everything. You were talking with Koehler, because I left it with him, because we haven't got nothing to talk about. It was arranged.

Q It was arranged. What was arranged? A He should make the contract and we should sign it.

Q And what was arranged in the contract? A I sell the property to Mr. Church for \$18,000.

Q Yes. Is that all? A That is all I arranged. The agent—

The Court: Take your hand away from your mouth so we can hear you.

*Mayer Hartman, cross.*

Q You are sure nothing else was arranged with the agent? A I don't know.

Q Well, who made the arrangement about the plans and the permits? A I had the plans and permits.

10 Q Who made the arrangement about the plans and the permits? A There was no arrangement made.

Q No arrangement was made. Well, then, can you tell us why the clause was put in the agreement, referring to C. 1, that the plans and the permits were to go with this property? A That was the condition.

20 Q Who made that condition? A We agreed on this condition. I—before we did anything I told the agent I got a plan and permit granted.

Q How did you come to tell him that? A Well, he asked me, he asked me how much I want for the property. I had to tell him.

Q What kind of property was this? A A lot.

Q Vacant land? A Vacant land.

30 Q Did you say anything to Mr. Church about the plans and the permits? A I said "I have plans." He didn't ask me for them. "As long as you have plans, that is all I want."

Q Then, you did say something to him about plans; is that right? A I said, "I have plans." I had plans from the beginning, the first thing the agent come to me and—(interrupted).

Q Won't you answer my question? When did you tell him about the plans? A I don't remember the time I told him.

40 Q Was there anything else said at that time about this land? A I don't—he don't care for these plans and "As long as you have permits, I

*Mayer Hartman, cross.*

am going to change, anyway. It is a big proposition for that."

Q Was anything else said about this land and an agreement, at the time mention was made of the plans? A No.

Q Sure of that, now? A I don't know what  
10 you are asking me.

The Court: He said "No."

Q All right. Now, do you remember coming to my office in the last part of February, 1925—1926, last year? A I come to your office, after you made an agree—a date with Koehler, I come to your office asking why you didn't show up because you had to come to Koehler.

Q When was that date? A Well, it was  
20 after—after March, I think it was.

Q Wasn't that date made for May the 21st? A I was a lot of times in your office, before.

Q But, the date that Mr. Church did not show up was May the 21st? A No.

Q When this paper, signed by you and your wife, was served on the company, referring to C. 11, isn't that the date you are referring to? A What is this?

Q A notice to appear at Mr. Koehler's office  
30 on the 21st of May, 1926. You signed it? A I don't know what it is. Notice to appear to Mr. Koehler?

Q Yes. Don't you know anything about it? A I was there a lot of times at Mr. Koehler's. I don't know anything about this.

Q Do you remember coming to my office and bringing with you the letter from the Tenement House Board, marked D. 1? Do you remember bringing that to my office? A I remember I  
40 received the notice and I come to Koehler.

*Mayer Hartman, cross.*

Q No. Do you remember bringing that to my office? A I don't remember.

Q Will you say that you did not bring it to my office? A No. Either I brought it to you at his request or sent—I couldn't say exactly I brought it to you. I was in the place.

Q You remember being at my office shortly  
10 after April 20, 1926, and bringing me the letter from the Tenement House Board, addressed to Mr. Mayer Hartman of South Orange avenue? A I brought this letter to Koehler.

Q You are positive of that? A Yes.

Q And don't you remember on that date when you brought the letter to my office— A What date?

Q Shortly after April 20th, that I said, "Why  
20 bother me with these letters? We don't want the property and you know it"? A You never told me anything.

Q Never told you that. Do you remember being in my office around March the 1st, 1926, before the date set for closing? Do you remember that?

Mr. Astley: Answer. Don't shake your head.

A No.

Q When were you at my office? A I never did was in your office before.

Q Weren't you ever in my office? A I was, after, on this transaction, because—

Q And, after that agreement was made, weren't you at my office? A I don't have no business to go to your office.

Q Then you were never there? A I was at  
40 the time of the agreement.

*Mayer Hartman, cross.*

Q And that is all? A And then I was a lot of times after that, transactions you had, you made appointments.

Q With whom? A You made appointments. I had only been notified from my lawyer.

10 Q Oh, your lawyer told you I made appointments? A Appointments. Then I come to you to find out and you told me Church don't show up.

Q Didn't I tell you Church bought this property to put up a building and he didn't want the property unless he could have it on March the 10th? A You never said it.

Q I never said it? A I know it.

20 Q Is it possible that I may have said it to you?

The Court: Well, he said you never did.

Q When did you hand Mr. Church the plans and the permits? A Either you sent for them or Mr. Church sent for them, but I don't handle it myself. The agent come and took it from me.

Q Didn't you hand Mr. Church the plans and the permits, at the time the agreement was made in my office? A No. I had the plans home.

30 Q And Mr. Church bought this property without even looking at your plans? A He only asked me I got the permits.

Q Don't you remember that I referred to the plan of a four-family house when the question of restrictions came up as to the type of a roof that was to be put on the property? A That was the plan, but that was not—and I had the plans home and they come and took it from me.

40 Q Didn't Mr. Church point out to me the said elevation of the Seventh street house and show

*Mayer Hartman, cross.*

me what was meant by the restriction as to the type of the roof? A I don't remember anything like that.

Q You don't remember. You said, before, that Mr. Church wanted to put up a big building there? A Yes, sir.

Q That is right, isn't it? Well, then—

Mr. Astley: Don't shake your head. Answer.

A Yes.

Q Well, then, why did you give him the plans and the permits for the two small buildings? A He asked for it.

Q Did he say why? A I don't know. He come and asked for the plans. According to the understanding, I had to turn it over to him.

Q At the time he signed the contract and you signed the contract, you knew that he was going to build on the property, didn't you? A I didn't know his contract.

Q You didn't know it? That is all. A (No answer.)

Mr. Augenblick: That is all.

The Court: That is all.

Now, is that the end?

If you will have the testimony written out and send me briefs, I will decide it.

How long do you want after the testimony is written out?

Mr. Augenblick: I only want a week.

The Court: Well, how about you, Mr. Litwin?

Mr. Litwin: It will take a week to reply.

*Mayer Hartman, cross.*

The Court: Well, I want you to exchange briefs and then either one can send in a reply brief. I will give you two weeks after you get the testimony.

Mr. Augenblick: After the testimony is written up?

10

The Court: Yes. Then my associate and I will consider the case.

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*Exhibit C. 1.*

**Exhibit C. 1.**

THIS AGREEMENT made this tenth day of February, Nineteen Hundred and Twenty six, between Mayer Hartman and Minnie Hartman, his wife, of the City of Newark, County of Essex and State of New Jersey, hereinafter referred to as the Vendors, and the Church Construction Co., a New Jersey Corporation having its principal office in the City of Newark, County of Essex and State of New Jersey, hereinafter referred to as the Vendee, WITNESSETH:

10

The vendors agree to sell and convey and the vendee agrees to purchase, premises located at the southwest corner of Third Avenue and North Seventh Street, Newark, New Jersey, fronting one hundred feet on North Seventh Street and one hundred and thirty feet on Third Avenue, opposite sides being equal, the plot being a perfect rectangle, at the agreed price of Eighteen Thousand (\$18000.00) Dollars.

20

Purchase price payable in manner following: Five Hundred Dollars by way of deposit, receipt whereof is hereby acknowledged.

Twenty five Hundred Dollars in cash at the time of settlement.

Fifteen Thousand Dollars by the vendee making, executing and delivering to the vendors, a mortgage for Fifteen Thousand Dollars, due in six months from the date thereof or sooner at option of vendee, with interest at six percent payable when due, or paid the amount of the mortgage as specified, being more or less by reason of the fact that apportionment of 1926 taxes on the basis of 1926 as to that plot, shall be deducted from the mortgage.

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*Exhibit C. 1.*

Conveyance to be made subject to the lien of three mortgages aggregating less than the sum of Fifteen Thousand Dollars, which will be paid and satisfied when the vendee pays and satisfies the Fifteen Thousand Dollar mortgage above specified, and protective clauses to be incorporated in the bond and mortgage above mentioned. 10

Purchase money bond and mortgage to be drawn by vendors' attorney at vendee's expense, to be simultaneously recorded with the deed for the premises and recording fees of deed and mortgage and revenue stamp expense on bond to be likewise borne by vendee.

Title to be conveyed by Deed of Warranty, free and clear of all encumbrances, and to the effect of restrictions to the effect that no building or buildings shall be erected upon the same that shall have a flat roof covering more than two-thirds of the roof area, excepting, however, should the building of an apartment house containing eight or more families be permitted, then this restriction shall not apply; the restrictions herein referred to being the same as are contained in a deed recorded in Book Y 69 of Deeds for Essex County, on pages 249-251. 20

The vendors covenant, warrant and represent that permits have been granted for the erection of a building to contain four stores and two flats on the corner and a four family house on the remainder of the plot relative to which the vendors further covenant, warrant and represent he has plans which plans and permits shall be turned over to the vendee; without any further costs to it. 30

Title to the premises to be conveyed, it is understood, is not dependent in part or whole 40

*Exhibit C. 1.*

upon Martin Act, Tax Title or adverse possession.

Title to be closed at the office of Koehler and Augenblick, 14 Mechanic Street, Newark, New Jersey, on March 10, 1926, at two o'clock p. m. of that day, at which time and place the deed, bond, mortgage and balance of cash shall be paid, delivered and exchanged. 10

It is further agreed and understood that the parties of the first part will allow to the party of the second part at the time of settlement, an amount not to exceed Two Hundred and Fifty (\$250.00) Dollars, which amount when fixed, shall be equal to one-half of the cost if any, expended in court proceedings to obtain a permit to build stores on the entire Third Avenue frontage; total amount of costs incurred in that direction to be fixed by certification of David M. Litwin who is to conduct said proceedings; court proceedings not to be begun before ordinary effort is made at the City Hall to procure permit without restoring to proceedings; if at the time of settlement the certification of David M. Litwin will not then be available this clause in the contract shall stand continued and there shall be a deposit of Two Hundred and Fifty (\$250.00) Dollars made in escrow by the vendor. 20 30

The vendors further agree that there will be no default in any of the terms of the present prior mortgages upon said premises at the time of settlement so that the same can be foreclosed, and further that the vendors will prevent any default from occurring in any of the terms of said mortgages during the period of said Fifteen Thousand (\$15,000) Dollar mortgage, and in the event of default being made in any of said mortgages during the aforesaid period, then and in 40

Exhibit C. 1.

that event the vendee, its successors or assigns, shall have the right to advance any and all amounts to prevent any of said mortgages from being foreclosed and the amounts so advanced shall be deducted from the principal sum due upon the Fifteen Thousand (\$15,000) Dollar mortgage. 10

The parties of the first part further agree to pay for any assessments that may be levied against said premises for any public work that may be performed up to the date hereof, such as paving, curbing, flagging, sewers, etc., regardless of whether the assessment for said work shall become a lien against said premises before or after said date of settlement, and in the event that said assessment shall become a lien after the date of settlement, then and in that event, 20 the parties of the first part will, at the time of settlement, deposit with one, David M. Litwin, an amount which shall be approximated to pay such assessment upon the same becoming a lien, and if the amount deposited shall be insufficient to pay the amount of such assessment, when levied, then the said parties of the first part shall immediately thereafter, pay any deficiency to said Litwin, and in the event that there shall be a surplus remaining from such deposit, said 30 Litwin shall return the same immediately thereafter, to the said parties of the first part.

If at the time for the delivery of the deed, the premises or any part thereof shall be or shall have been affected by an assessment or assessments, which are or may become payable in annual installments of which the first installment is then due or has been paid, then for the purposes of this contract all the unpaid installments of any such assessment, including those which 40

Exhibit C. 1.

are to become due and payable after the delivery of the deed, shall be deemed to be due and payable and to be liens upon the premises affected thereby and shall be paid and discharged by the seller thereof, upon the delivery of the deed.

It is further agreed and understood that there are no encroachments from any structures or buildings on adjoining premises on to the premises herein agreed to be conveyed. 10

The vendors further reserve the right to remove the material on the premises at any time on or before the date fixed for settlement herein.

This agreement shall bind the respective parties hereto and their respective heirs, executors, administrators, successors and assigns.

IN WITNESS WHEREOF, the vendors have hereunto set their hands and seals, and the vendee has caused these presents to be signed by its officers thereunto duly authorized and its corporate seal to be hereto affixed the day and year first above wirtten. 20

Mayer Hartman (L. S.)  
Minnie Hartman (L. S.)

Signed, Sealed and Delivered  
in the presence of

Frank V Wilkinson 30

CHURCH CONSTRUCTION CO.

By Joseph Church  
President. (L. S.)

Attest:

By Joseph Church  
Secretary.

Exhibit C. 1.

STATE OF NEW JERSEY }  
COUNTY OF ESSEX } ss.

10 BE IT REMEMBERED that on this 11 day of February in the year of our Lord One Thousand Nine Hundred and Twenty six, before me the subscriber, personally appeared Mayer Hartman and Minnie Hartman, his wife, who, I am satisfied, are the grantors mentioned in the within Instrument to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

20 And the said Minnie Hartman, wife as aforesaid, being by me privately examined, separate and apart from her said husband, further acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, FREELY, without any fear, threats or compulsion of her said husband

Frank V Wilkinson  
Notary Public of New Jersey

30 STATE OF NEW JERSEY }  
COUNTY OF ESSEX } ss.

40 BE IT KNOWN, That on this 11 day of February in the year of our Lord One Thousand Nine Hundred and Twenty six before me, the subscriber a Master in Chancery of New Jersey, personally appears Joseph Church who being by me duly sworn, according to law, on his oath says, that he is the secretary of Church Construction Co. a corporation formed under the laws of the State of New Jersey, the grantor named in and which executed the within instru-

Exhibit C. 1.

ment; that he knows the seal of the said corporation; that the seal now affixed to the said instrument is the common seal of the said corporation; that Julius Church is the President of the said corporation, and did, by its order, sign, seal and deliver the said instrument as the voluntary act and deed of the said corporation in the presence of said deponent, and that the said deponent, did, at the execution thereof, subscribe his name as a witness thereto. 10

Joseph Church

Sworn to and Subscribed the Day  
and Year Above Written, Before  
me

H H Koehler  
Master in Chancery of New Jersey. 20

AGREEMENT

Between  
Mayer Hartman and wife  
and  
Church Construction Co. 30

*Exhibit C. 2.*

**Exhibit C. 2.**

THIS INDENTURE, Made the twenty eighth day of July in the year of Our Lord One Thousand Nine Hundred and Twenty five.

10 BETWEEN Herman Star and Ida Star, his wife, of the City of Yonkers in the County of Westchester and State of New York of the First Part;

AND Mayer Hartman of the City of Newark in the County of Essex and State of New Jersey of the Second Part:

20 WITNESSETH, That the said party of the first part, in consideration of the sum One Dollar and Other Good and Valuable Consideration lawful money of the United States of America, to them in hand paid, by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey and confirm, unto the said party of the second part, and to his heirs and assigns forever, ALL that equal undivided one-half right title and interest in and to all tract or parcel 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

30 BEGINNING at the southwest corner of North Seventh Street and Third Avenue; thence running southerly along the westerly side of North Seventh Street one hundred feet; thence westerly at right angles to North Seventh Street one hundred thirty feet; thence northerly parallel with North Seventh Street one hundred feet to the southerly line of Third Avenue; thence easterly

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*Exhibit C. 2.*

along the same one hundred thirty feet to the Place of BEGINNING.

Being part of the same premises conveyed to Mayer Hartman and Herman Star by Paul H. Brangs and wife, by deed dated February 13, 1924 and recorded in Book Y 69 of Deeds for Essex County, on pages 249-251.

10

This conveyance is made subject to the lien of a mortgage in the sum of Six Hundred Dollars covering said premises, and also subject to the lien of a blanket mortgage whereof Seven Hundred and Eighty one Dollars and fifty cents thereof is assumed by the grantee herein and agreed to be paid.

It being understood and agreed by and between the parties that if it takes more than Seven Hundred and Fifty one Dollars and fifty cents to release the premises above described from the lien of the blanket mortgage hereinabove referred to, that then the parties between themselves, will contribute equally to the excess amount required for that purpose.

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TOGETHER with all and singular, the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, AND ALSO, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of said party of the first part, of, in, or to the above described premises and every part and parcel thereof, with the appurtenances, TO HAVE AND TO HOLD, all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs, and assigns forever, to the only proper use, benefit and be-

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*Exhibit C. 3.*

**Exhibit C. 3.**

THIS MORTGAGE, made the twenty eighth day of July, One Thousand, Nine Hundred and Twenty five,

10 BETWEEN Mayer Hartman and Minnie Hartman, his wife, of the City of Newark in the County of Essex and State of New Jersey of the First Part, hereinafter known as the Mortgagor,

AND Herman Star, of the City of Yonkers in the County of Westchester and State of New York of the Second Part, hereinafter known as the Mortgagee,

20 WITNESSETH, that the said mortgagor, for and in consideration of the sum of Twenty Five Hundred and Fifty Nine Dollars and Twenty Cents lawful money of the United States of America, to them in hand well and truly paid by the mortgagee at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said mortgagor therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, enfeoff, convey and confirm to the said mortgagee and to his heirs, executors, administrators and assigns, ALL that tract or parcel 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,

30 BEGINNING at the southwest corner of North Seventh Street and Third Avenue; thence running southerly along the westerly side of North Seventh Street one hundred feet; thence westerly at right angles to North Seventh Street one hundred thirty feet; thence northerly parallel  
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*Exhibit C. 3.*

with North Seventh Street one hundred feet to the southerly line of Third Avenue; thence easterly along the same one hundred thirty feet to the Place of BEGINNING.

Being the same premises conveyed to Herman Star and Mayer Hartman by Paul H. Brangs and wife, by deed dated February 13, 1924 and recorded in Book Y 69 of Deeds for Essex County, on pages 249-251; the equal undivided one-half right title and interest of Mayer Hartman being conveyed by Mayer Hartman to Herman Star by deed of even date herewith and simultaneously herewith recorded; this mortgage being given to secure a portion of the purchase money of said conveyance. 10

TOGETHER with all and singular the 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 mortgagor of, in and to the same, and of, in and to every part and parcel thereof, 20

TO HAVE AND TO HOLD all and singular the above described tract or lot of land and premises with the appurtenances, unto the said mortgagee, his heirs, executors, administrators and assigns, to the only proper use, benefit and behoof of the said mortgagee, his heirs, executors, administrators and assigns forever. Provided always, and it is agreed by and between the parties to these presents that if the said mortgagor, their heirs, executors, administrators and assigns do and shall well and truly pay, or cause to be paid, to the said mortgagee, his heirs, executors, administrators and assigns the sum of Twenty Five Hundred and Fifty Nine Dollars and Twenty Cents (\$2,559.20) with lawful interest for the 30  
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*Exhibit C. 3.*

10 same from the twenty eighth day of July 1925, at the rate of six per cent. per annum, payable semi-annually, according to the conditions of a certain bond, bearing even date herewith, in the penal sum of Fifty One Hundred and Eighteen Dollars and Forty Cents made by said Mayer Hartman without any deduction or defalcation for taxes, assessments, or any other imposition whatsoever, thence and from thenceforth these presents and said obligation shall cease and be void, anything herein and therein contained to the contrary in anywise notwithstanding.

20 AND THE SAID MORTGAGORS, for themselves, their heirs, executors, administrators and assigns, do covenant and grant to and with the said mortgagee, his heirs, executors, administrators and assigns that they shall not nor will claim or demand or be entitled to receive any credit or credits on the interest payable hereon, or on the moneys to secure payment of which this mortgage is made, for so much of the taxes assessed against said lands as is equal to the tax rate applied to the amount due on this mortgage or any part thereof.

30 AND THE MORTGAGOR hereby warrants and defends the title to the said lands and premises. The mortgagor shall and will keep the buildings erected and to be erected upon the lands above conveyed insured against loss or damage by fire by insurers, through such broker or brokers selected and in an amount approved by the mortgagee, his heirs, executors, administrators and assigns, and assign the policy or policies and certificate or certificates thereof to the mortgagee, his heirs, executors, administrators and assigns, as collateral security for the payment of the principal and interest aforesaid; and it is

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*Exhibit C. 3.*

agreed that if the mortgagor, their heirs, executors, administrators and assigns, shall neglect to pay all or any tax, assessment or other municipal or governmental rate, charge, imposition, or any installment or installments of monthly Building Loan dues and interest, or any sums payable under any lien superior hereto, or any premium for insurance, as aforesaid, on any day whereon the same shall become due and payable, after the period of default aforesaid, then it shall be lawful for the mortgagee, his heirs, executors, administrators and assigns, to pay such charges, and the sum or sums so paid shall be a lien on the said mortgaged premises added to the amount secured hereby, with interest at six per cent. per annum, and, in the event of such payment, at the option of the mortgagee, his heirs, executors, administrators or assigns, the principal sum secured hereunder shall become due and payable, and agrees that if default be made in the payment of any installment of principal or of the said interest, or any part thereof, on any day whereon the same is made payable as hereinbefore expressed, and should the same remain unpaid and in arrears for the space of thirty days, or if default be made in the payment of any of said taxes, water rents or other municipal or governmental rate, charge, imposition or any money payable under the terms of any mortgage lien paramount hereto, on any day whereon the same shall become due and payable, and should the same remain unpaid and in arrears for the space of sixty days, or in the event that any building shall be demolished or removed from the mortgaged premises (or if the removal or demolition thereof is threatened) without the consent in writing of the mortgagee or holder of this

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*Exhibit C. 3.*

mortgage, or in the event that the owner of the  
 mortgaged premises shall fail, within ten days  
 after written request therefor, to furnish a state-  
 ment of the amount due and owing for principal  
 and interest hereunder, or evidence of the pay-  
 10 ment of taxes, water rents, interest and princi-  
 pal of prior mortgages or any carrying charges,  
 or in the event that default shall be made in any  
 of the terms, covenants and conditions herein con-  
 tained, or contained in any mortgage constituting  
 a lien upon the mortgaged premises prior and su-  
 perior to the lien hereof, or should any action be  
 commenced to foreclose any such prior mortgage,  
 or should the owner of the mortgaged premises  
 fail, for a period of thirty days, to begin com-  
 20 pliance with any requirements, recommendation  
 or recommendations of any of the Departments  
 or authority of the State of New Jersey, or the  
 municipality where such mortgaged premises are  
 situate, such municipality or State Department  
 or authority having jurisdiction over the mort-  
 gaged premises, or in the event of the adjudica-  
 tion in bankruptcy or insolvency of the mort-  
 gagor or the owner of the mortgaged premises,  
 then and from thenceforth, that is to say, after  
 the lapse or expiration of either of the said  
 30 periods, as the case may be, the aforesaid prin-  
 cipal sum of money, with all arrearages of in-  
 terest thereon, and any other charges paid by  
 the holder of this mortgage, shall, at the option  
 of the mortgagee and assigns, become and be  
 due and payable immediately thereafter, although  
 the period first above limited for the payment  
 thereof may not then have expired, anything  
 hereinbefore contained to the contrary thereof in  
 anywise notwithstanding.

*Exhibit C. 3.*

AND agrees that the said mortgagee, his heirs,  
 executors, administrators or assigns shall and  
 may, from time to time, and at all times after  
 default shall be made in the performance of the  
 proviso or condition herein contained, peaceably  
 and quietly enter into, have, hold, use, occupy,  
 10 possess and enjoy all and singular the above  
 granted and bargained premises, with the appur-  
 tenances, without the let, suit, trouble, hindrance  
 or denial of the said mortgagor, their heirs, ex-  
 ecutors, administrators or assigns, or of any  
 other person or persons whatsoever.

AND agrees that if default shall be made, as  
 aforesaid, the mortgagee, his heirs, executors,  
 administrators and assigns, shall have the right  
 forthwith, after any such default, to enter upon  
 and take possession of the said mortgaged prem-  
 20 ises, and to let the said premises, and receive the  
 rents, issues and profits thereof, and to apply  
 the same, after payment of all necessary charges  
 and expenses, on account of the amount hereby  
 secured, and said rents and profits are, in the  
 event of any such default, hereby assigned to the  
 mortgagee, his heirs, executors, administrators  
 and assigns and the mortgagee, his heirs, execu-  
 tors, administrators and assigns shall also be at  
 liberty immediately after any such default, upon  
 30 proceedings being commenced for the foreclosure  
 of this mortgage, to apply for the appointment of  
 a receiver of the rents and profits of the said  
 premises, and be entitled to the appointment of  
 such receiver as a matter of right, as security  
 for the amounts due the mortgagee, his heirs,  
 executors, administrators and assigns without  
 consideration of the value of the mortgaged  
 premises or solvency of any person or persons  
 liable for the payment of such amounts.

Exhibit C. 3.

IN WITNESS WHEREOF, the mortgagors have hereunto set their hands and seals the day and year first above written.

Mayer Hartman  
Minnie Hartman

10 Signed, sealed and delivered  
in the presence of

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

BE IT REMEMBERED, that on this 12th day of August, in the year of our Lord One Thousand, Nine Hundred and Twenty five before me A  
20 Notary Public of New Jersey personally appeared Mayer Hartman and Minnie Hartman, his wife, who, I am satisfied, are the Mortgagors mentioned in the within Mortgage, and to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed: And the said Minnie Hartman, wife  
30 as aforesaid, being by me privately examined, separate and apart from her husband, acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, FREELY, without any fear, threats or compulsion of her said husband.

Ethel Botwinick  
Notary Public of New Jersey

Exhibit C. 4.

MORTGAGE

Mayer Hartman and wife,  
to  
Herman Star

Dated July 28, 1925.

10

Exhibit C. 4.

KNOW ALL MEN BY THESE PRESENTS, That I, Mayer Hartman, of the City of Newark in the County of Essex and State of New Jersey, am held and firmly bound unto Herman Star, of the City of Yonkers in the County of Westchester and State of New York in the penal sum of  
20 Fifty-One Hundred and Eighteen Dollars and Forty Cents lawful money of the United States of America, to be paid to the said obligee, his heirs, executors, administrators or assigns, for which payment well and truly to be made I bind myself, my heirs, executors, administrators or assigns firmly by these presents. Sealed with the Obligor's seal and dated the twenty-eight day of July One Thousand, Nine Hundred and Twenty-Five.

THE CONDITION OF THE ABOVE OBLIGATION IS  
30 SUCH, that if the above bounden obligor, his heirs, executors, administrators or assigns, shall well and truly pay, or cause to be paid unto the above named obligee, his heirs, executors, administrators or assigns, the just and full sum of Twenty-Five Hundred and Fifty-Nine Dollars and Twenty Cents on the twenty-eighth day of July which will be in the year One Thousand, Nine Hundred and Twenty-Six, and the interest thereon, to be computed from July 28th, 1925  
40

Exhibit C. 4.

at and after the rate of six per cent. per annum, and to be paid semi-annually, without any fraud or other delay, then the above obligation to be void, otherwise to remain in full force and virtue.

AND IT IS HEREBY EXPRESSLY AGREED that should any default be made in the performance of any of the terms, covenants and conditions contained in the Mortgage accompanying this Bond (the said terms, covenants and conditions, and all matters and things contained in said Mortgage being hereby made a part hereof as though particularly incorporated herein), or should any of the events or contingencies occur by reason of which the time for the payment of the said Mortgage matures as set forth therein, or should any default be made in the payment of the said interest or any part thereof, on any day whereon the same is made payable as above expressed, or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in the Mortgage accompanying this Bond, and become due and payable, and should the said interest remain unpaid and in arrear for the space of thirty days, or said tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien, or any or either of them remain unpaid and in arrear for the space of sixty days, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of money, or so much thereof as may then remain unpaid, with all arrearage of interest thereon, shall at the option of the said obligee, or the legal representatives of the said obligee, become and be due and payable immediately thereafter,

40

Exhibit C. 4.

although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

The principal secured by this Bond, or any part thereof not less than Five Hundred Dollars, may be paid at any time before maturity, to the holder of the Mortgage accompanying this Bond.

AND IT IS FURTHER EXPRESSLY AGREED that the said obligor shall not be entitled to and will not claim any credit on the interest payable on the Mortgage securing this Bond for taxes which may be levied upon the mortgaged premises, or for any part of said taxes.

IN WITNESS WHEREOF, the obligor has hereunto set his hand and seal the day and year first above written.

Mayer Hartman.

Signed, Sealed and Delivered in the presence of

10

20

30

40

Exhibit C. 4.

BOND

Mayer Hartman

to

Herman Star

10

Dated ..... July 28th, 1925.  
 Amount ..... \$2559.20  
 Date ..... July 28th, 1925  
 Due ..... July 28th, 1926  
 Interest payable ..... Semi-annually

Exhibit C. 4.

April 28, 1927.

20

1925

Please Bring This Bill with you

ARREARS OF TAXES

Upon Real Estate For 1925

Office of the Comptroller

City Hall Newark, N. J.  
 Office Hours, 8 A. M. to 4 P. M.  
 7568

30

11 Taxing Dist., Page 622 No. 7  
 Mr. M. Hartman & H. Star.  
 Premises No. 404-410 No. 7th St.  
 The original amount of your tax is ... \$158.76  
 Interest ..... 10.19

Total ..... \$168.95

John Howe, Comptroller.

Paid, May 20, 1926, John Howe, Director of Revenue and Finance.

40

Exhibit C. 5.

Exhibit C. 5.

THIS INDENTURE, made the twenty-seventh day of March, in the year of our Lord One Thousand Nine Hundred and Twenty-Six.

BETWEEN Mayer Hartman and Minnie Hartman, his wife, of the City of Newark in the County of Essex and State of New Jersey, of the first part,

AND Church Construction Co., a New Jersey Corporation having its principal office in the City of Newark, 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 and other good and valuable consideration, 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 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 give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part, its successors and assigns, forever

ALL that tract or parcel 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.

BEGINNING at the southwest corner of North Seventh Street and Third Avenue; thence running southerly along the westerly side of North Seventh Street one hundred feet; thence westerly at right angles to North Seventh Street one hundred thirty feet; thence northerly par-

*Exhibit C. 5.*

allel with North Seventh Street one hundred feet to the southerly line of Third Avenue; thence easterly along the same one hundred thirty feet to the Place of BEGINNING.

Being part of the same premises conveyed to Mayer Hartman and Herman Star by Paul H. Brangs and wife, by deed dated February 13, 1924 and recorded in Book Y 69 of Deeds for Essex County, on pages 249-251; the said Herman Star having conveyed his equal undivided one-half right title and interest in and to the above property to Mayer Hartman by deed dated July 28th, 1925 and simultaneously herewith recorded.

This conveyance is made subject to the lien of three mortgages aggregating less than the sum of Fifteen Thousand Dollars; it is expressly understood and agreed that the lien of open prior mortgages now a lien against the above described premises shall not be deemed a breach of the warranty herein, but therein the party of the first part agrees to pay and satisfy said mortgage liens when the purchase money mortgage given in conjunction with this deed is paid and satisfied by the party of the second part.

Conveyance is made subject to the effect of restrictions to the effect that no building or buildings shall be erected upon the above described premises that shall have a flat roof covering more than two-thirds of the roof area, excepting, however, should the building of an apartment house containing eight or more families be permitted, then this restriction shall not apply; the restrictions herein referred to being the same as are contained in a deed recorded in Book Y 69 of Deeds for Essex County, on pages 249-251.

40

*Exhibit C. 5.*

TOGETHER with all and singular the houses, buildings, trees, ways, waters, profits, privileges, and advantages, with the appurtenances to the same belonging or in any wise 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.

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, its successors and assigns, to the only proper use, benefit and behoof of the said party of the second part, its successors and assigns forever: and the said party of the first part do for themselves, their heirs, executors and administrators, covenant and agree to and with the said party of the second part, its successors and assigns, that he, the said Mayer Hartman is the true, lawful and right owner 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, except as aforesaid.

AND ALSO that the said party of the first part now has good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid;

40

Exhibit C. 5.

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 party of the second part, its successors 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 encumbrance whatsoever, except as aforesaid.

10

IN WITNESS WHEREOF, the said party of the first part have hereunto set their hands and seals the day and year first above written.

Mayer Hartman (L. s.)  
Minnie Hartman (L. s.)

Signed, Sealed and Delivered  
in the Presence of  
Ethel Botwinick.

20

STATE OF NEW JERSEY, }  
COUNTY OF ESSEX, } ss:

BE IT REMEMBERED, That on this twenty-seventh day of March in the year of our Lord One Thousand Nine Hundred and Twenty-Six before me, the subscriber, a Notary Public of New Jersey personally appeared Mayer Hartman and Minnie Hartman, his wife, who, I am satisfied, are the grantors mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that, they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

30

And the said Minnie Hartman, wife as aforesaid, being by me privately examined, separate

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Exhibit C. 6.

and apart from her said husband, further acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, Freely, without any fear, threats or compulsion of her said husband.

Ethel Botwinick,  
Notary Public of N. J. 10

DEED.

Mayer Hartman and wife

to

Church Construction Co.

Dated ..... May 27th, 1926. 20

Exhibit C. 6.

KNOW ALL MEN BY THESE PRESENTS, That the Church Construction Co., a New Jersey Corporation having its principal office in the City of Newark, County of Essex and State of New Jersey, is held and firmly bound unto Mayer Hartman, of the City of Newark, County of Essex and State of New Jersey, in the sum

30

lawful money of the United States of America to be paid to the said obligee, his heirs, executors, administrators or assigns: To which payment well and truly to be made, it binds itself, its successors and assigns firmly by these presents. Sealed with its seal and dated the day of One Thousand Nine Hundred and Twenty six.

40

Exhibit C. 6.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the above bounden obligor, its successors or assigns shall well and truly pay or cause to be paid, unto the above named obligee, his executors, administrators or assigns, the just and full sum of

10 the                    day of                    which will be in the year One Thousand Nine Hundred and Twenty six and the interest thereon, to be computed from at the rate of six per cent. per annum, and to be paid when due, without any fraud or other delay, then the above obligation to be void, otherwise to remain in full force and virtue.

It is hereby understood and agreed that the obligor may at any time prior to the expiration of the time limited herein, pay the principal sum of this bond together with interest thereon to the date of prepayment.

AND IT IS HEREBY EXPRESSLY AGREED, That should any default be made in the payment of the said interest or prior mortgage interest or of any part thereof, on any day whereon the same is made payable, as above expressed, or should any tax, assessment, water rent, or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in the mortgage accompanying this bond, and become due and payable, and should the said interest or prior mortgage interest remain unpaid and in arrear for the space of thirty days, or said tax, assessment, water rent, or other municipal or governmental rate, charge, imposition or lien, or any or either of them remain unpaid and in arrear for the space of sixty days then and from thenceforth, that is to say, after the

40

Exhibit C. 6.

lapse or expiration of either of the said periods as the case may be, the aforesaid principal sum of with all arrearage of interest thereon, shall, at the option of the said obligee or his legal representatives, become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

10

IN WITNESS WHEREOF, the obligor has caused these presents to be signed by its officers thereunto duly authorized and its corporate seal to be hereto affixed the day and year first above written.

CHURCH CONSTRUCTION CO. 20

By ..... president

Signed, Sealed and Delivered in the presence of

Attest:

By..... Secretary 30

BOND.

Church Construction Co. to Mayer Hartman

Dated, 1926

Due, six months from the date hereof Interest Payable, when due Interest Rate, six percent 40

Exhibit C. 7.

Exhibit C. 7.

THIS INDENTURE, made the day of \_\_\_\_\_ in the year of Our Lord One Thousand Nine Hundred and Twenty six

10 BETWEEN Church Construction Co., a New Jersey Corporation having its principal office in the City of Newark in the County of Essex and State of New Jersey of the First Part:

AND Mayer Hartman of the City of Newark in the County of Essex and State of New Jersey of the Second Part:

20 WHEREAS, the said mortgagor is justly indebted to the said party of the second part, in the sum of lawful money of the United States of America, secured to be paid by its certain bond or obligation, bearing even date with these presents, in the penal sum of

lawful money as aforesaid, conditioned for the payment of the said first mentioned sum of

lawful money as aforesaid, to the said party of the second part, his executors, administrators, or assigns, on the \_\_\_\_\_ day of \_\_\_\_\_

30 which will be in the year One Thousand Nine Hundred and Twenty six and interest thereon, to be computed from the \_\_\_\_\_ day of \_\_\_\_\_ One Thousand Nine Hundred and Twenty six at and after the rate of six per cent. per annum, and to be paid when due.

40 AND IT IS THEREBY EXPRESSLY AGREED, that should any default be made in the payment of the said interest or prior mortgage interest or of any part thereof, on any day whereon the same is made payable, as above expressed, or

Exhibit C. 7.

should any tax, assessment, water rent, or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in this mortgage, and become due and payable, and should the said interest or prior mortgage interest remain unpaid and in arrear for the space of thirty days, or said tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien, or any or either of them remain unpaid and in arrear for the space of sixty days then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods as the case may be, the aforesaid principal sum of

with all arrearage of interest thereon, shall, at the option of the said party of the second part, or his legal representatives, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, anything therein before contained to the contrary thereof in anywise notwithstanding; as by the said bond or obligation, and the condition thereof, reference being thereunto had, may more fully appear.

30 It is hereby understood and agreed that the mortgagor herein, may at any time prior to the expiration of the time limited herein, pay the principal sum of this mortgage together with interest thereon to the date of prepayment.

40 Now, THIS INDENTURE WITNESSETH. That the said party of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation with interest thereon according to the true intent and meaning thereof, and also for and in con-

*Exhibit C. 7.*

sideration of the sum of one dollar, to it in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents  
 10 does grant, bargain, sell, alien, release, convey and confirm, unto the said party of the second part, and to his heirs and assigns forever, ALL that tract or parcel 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

BEGINNING at the southwest corner of North Seventh Street and Third Avenue; thence running southerly along the westerly side of North  
 20 Seventh Street one hundred feet; thence westerly at right angles to North Seventh Street one hundred thirty feet; thence northerly parallel with North Seventh Street one hundred feet to the southerly line of Third Avenue; thence easterly along the same one hundred thirty feet to the Place of BEGINNING.

Being the same premises conveyed to the party of the first part by the party of the second part and wife, by deed of even date herewith and  
 30 simultaneously herewith recorded; this mortgage being given to secure a portion of the purchase money of said conveyance.

It being understood and agreed that at the time the within mortgage is paid and satisfied, the party of the second part will procure a release from the lien of all prior mortgages a lien against the premises, permitting the mortgagee herein to use the mortgagor's moneys for such  
 40 purposes.

*Exhibit C. 7.*

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; AND ALSO all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in  
 10 law as in equity, of the said party of the first part, of, in and to the same and every part and parcel thereof, with the appurtenances. To HAVE AND TO HOLD, the above granted and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their own proper use, benefit and behoof, forever.

PROVIDED ALWAYS, and these presents are upon this express condition, that if the said party of  
 20 the first part, its successors or assigns shall well and truly pay unto the said party of the second part, his executors, administrators or assigns, the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon, at the time and times, and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then these presents, and the estate hereby granted,  
 30 shall cease, determine and be void. AND THE SAID party of the first part, for itself, its successors and assigns does covenant and agree to pay unto the said party of the second part his executors, administrators or assigns, the said sum of money and interest, as mentioned above and expressed in the conditions of the said bond.

AND IT IS ALSO AGREED, by and between the parties to these presents, that the said party of the first part shall and will keep the buildings  
 40 erected, and to be erected, upon the lands above

Exhibit C. 7.

conveyed, insured against loss or damage by fire, by insurers, and in an amount approved by the said party of the second part, his executors, administrators or assigns, and assign the policy and certificates thereof to the said party of the second part; and in default thereof, it shall be

10 lawful for the said party of the second part to effect such insurance, and the premium and premiums paid for effecting the same shall be a lien, on the said mortgaged premises, added to the amount of the said bond or obligation, and secured by these presents, payable on demand, with interest at the rate of six per cent. per annum, from the time of payment of such premium or premiums.

20 AND the said party of the first part, its successors and assigns does covenant and grant to and with the said party of the second part, his heirs and assigns, that the said party of the first part, its successors and assigns, shall not nor will claim or demand or be entitled to receive any credit or credits on the interest payable hereon or on the moneys to secure payment of which this mortgage is made for so much of the taxes assessed against said lands as is equal to the tax rate applied to the amount due on this mortgage or any part thereof.

30 IN WITNESS WHEREOF, the said party of the first part has caused these presents to be signed by its officers thereunto duly authorized and its corporate seal to be hereto affixed the day and year first above written.

CHURCH CONSTRUCTION CO.

By.....  
President

Exhibit C. 7.

Signed, Sealed and Delivered  
in the presence of

Attest:

By.....  
Secretary

10

STATE OF NEW JERSEY }  
COUNTY OF ESSEX } ss.

BE IT REMEMBERED that on this day of May, in the year of our Lord One Thousand Nine Hundred and Twenty six, before me, the subscriber, personally appeared

who, being by me duly sworn on his oath, says that he is the of the Church Construction Co. the grantor named in the within instrument; that is the President of said corporation; that deponent well knows the corporate seal of said corporation; and the seal affixed to said Instrument is such corporate seal and was thereto affixed, and said Instrument signed and delivered by said

20

President, as and for his voluntary act and deed and as and for the voluntary act and deed of said corporation, in presence of deponent, who thereupon subscribed his name thereto as witness.

30

Sworn and subscribed before me,  
at Newark, N. J. the date aforesaid

MORTGAGE.

Church Construction Co.  
to  
Mayer Hartman  
Dated, May, 1926.

Exhibit C. 8.

Exhibit C. 8.

March 22nd, 1926

David Litwin, Esq.,  
800 Broad Street,  
Newark, N. J.

10

Dear Sir:

A telephone call was received at this office to the effect that the Board of Education was no longer interested in the property at the corner of Third Avenue and Seventh Avenue, so I assume this title will close as per agreement.

Please let me hear from you, as soon as possible.

Very truly yours,

20

Dict. H. H. Koehler  
C J

30

40

Exhibit C. 9.

Exhibit C. 9.

4952

In the matter of the Application of the Board of Education of the Vocational Schools in the County of Essex for the appointment of three commissioners to fix the compensation to be paid for certain lands of Mayer Hartman and Herman Star, situate in the City of Newark, County of Essex and State of New Jersey, to be taken and condemned for public use.

10

On Petition.  
Notice of Lis  
Pendens.

20

TAKE NOTICE that application by petition to his Honor William S. Gummere, Chief Justice of the New Jersey Supreme Court, has been filed with the Clerk of the County of Essex and that proceedings thereon are pending before him for the appointment of three commissioners to fix the compensation to be paid for said lands owned by said persons as described and named below, situate in the City of Newark, in the County of Essex and State of New Jersey, to be taken and condemned for public use for the erection of a building or buildings for a county vocational school.

30

The owners of and persons interested in these lands and their known residences, are as follows:

Mayer Hartman, owner, residing at 842 South Orange Avenue, Newark, N. J.;

Minnie Hartman, having a prospective dower right, residing at 842 South Orange Avenue,  
Newark, N. J.;

40

Exhibit C. 9.

Herman Star, owner, residing at 222 Ashburton Avenue, Yonkers, N. Y.;

Ida Star, having a prospective dower right, residing at 222 Ashburton Avenue, Yonkers, N. Y.;

10 The Roseville Land Improvement Co., mortgagee, a corporation with principal office at 81 North Sixth Street, Newark, N. J.;

Paul H. Brangs, mortgagee, residing at 335 Roseville Avenue, Newark, N. J.;

Church Construction Company, reputed purchaser under a contract not of record, a corporation with principal office at 794 Clinton Avenue, Newark, N. J.;

and a description of the lands so to be taken and condemned is as follows:

20 "ALL that certain tract or parcel of land and premises, situate, lying and being in the City of Newark, Essex County, New Jersey, more particularly described as follows:

30 "BEGINNING at the southwest corner of North Seventh Street and Third Avenue, thence running southerly along the westerly side of North Seventh Street one hundred feet; thence running westerly at right angles to North Seventh Street one hundred thirty feet; thence northerly parallel with North Seventh Street one hundred feet to the southerly line of Third Avenue; thence easterly along the same one hundred thirty feet to the place of Beginning."

Dated February 24, 1926.

Arthur T. Vanderbilt  
Attorney of Petitioner.

Received in the Office February 24th A. D. 1926  
at 2:11 P. M.

Exhibit C. 9.

Office of  
REGISTER OF DEEDS AND MORTGAGES  
Essex County, New Jersey

STATE OF NEW JERSEY }  
COUNTY OF ESSEX } ss. 10

I, HOWARD S. DODD, Register of Deeds and Mortgages of the County of Essex, State of New Jersey, do hereby certify that the foregoing is a true and correct copy of the record of a certain Lis Pendens in the matter of the Application of the Board of Education of the Vocational Schools in the County of Essex for the appointment of three commissioners to fix the compensation to be paid for certain lands of Mayer Hartman and Herman Star, situate in the City of Newark, County of Essex and State of New Jersey, to be taken and condemned for public use and also of the certificate of acknowledgment thereto annexed, as the same may be found recorded in my office in book I of Lis Pendens for said County on pages 41-42 20

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this (SEAL) 4th day of April A. D. 1927 30

Howard S. Dodd  
Register of Deeds and Mortgages.

Exhibit C. 9.

Compared by 43 & 17

Office of  
REGISTER OF DEEDS AND  
MORTGAGES

10 Essex County, New Jersey  
Certified Copy of  
Lis Pendens

In the matter of the Application of the Board of Education of the Vocational Schools in the County of Essex for the appointment of three commissioners to fix the compensation to be paid for certain lands of Mayor Hartman and Herman Star, situate in the City of Newark, County of Essex and State of New Jersey, to be taken and condemned for public use.  
20

Recorded February 24 A. D. 1926 In Book I of Lis Pendens Pages 41-42

30

40

Exhibit C. 10.

Exhibit C. 10.

In the matter of the Application of the Board of Education of the Vocational Schools in the County of Essex for the Appointment of three commissioners to fix the compensation to be paid for certain lands of Mayer Hartman and Herman Star, situate in the City of Newark, County of Essex and State of New Jersey, to be taken and condemned for public use.

On Petition.  
Stipulation  
of Discon-  
tinuance.

10

20

Petitioner having abandoned its intention of proceeding in condemnation of the lands described in the Petition for use by it for public purposes, it is on this 27th day of March, 1926, hereby stipulated and agreed between the attorneys for the Petitioner and for the owners of said land and premises therein named, that the proceedings herein be discontinued without costs to either party as against the other and the lis-pendens recorded in the office of the Register of the County of Essex against said owners of record of the land and premises therein described, may be discharged and cancelled of record.

30

40

Exhibit C. 10.

Lispendens I page 41

No. 4952

10 Arthur T. Vanderbilt,  
Attorney for Petitioner Board  
of Education of the Vocational  
Schools of the County of Essex,  
New Jersey.

David M. Litwin,  
Attorney of Church Construc-  
tion Co., claiming under a con-  
tract not of record.

20 Koehler & Augenblick,  
Attorneys for Owners of record,  
Mayer Hartman and Herman  
Star.

Received in the Office April 1st A. D. 1926 at  
3:11 P. M.

Office of  
REGISTER OF DEEDS AND MORTGAGES  
Essex County, New Jersey

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

40 I, HOWARD S. DODD, Register of Deeds and  
Mortgages of the County of Essex, State of New  
Jersey, do hereby certify that the foregoing is a  
true and correct copy of the record of a certain  
discharge of lis pendens in the matter of the ap-  
plication of the Board of Education of the Vo-  
cational Schools in the County of Essex for the  
appointment of three commissioners to fix the  
compensation to be paid for certain lands of

Exhibit C. 10.

Mayer Hartman and Herman Star, situate in the  
City of Newark, County of Essex and State of  
New Jersey, to be taken and condemned for pub-  
lic use. as the same may be found filed in my  
office with Lis Pendens No. 4952 for said County.

IN TESTIMONY WHEREOF, I have hereunto set  
my hand and official seal this 4th day of April, 10  
A. D. 1927

HOWARD S. DODD,  
Register of Deeds and Mortgages.

Compared by 43 & 17

Office of  
REGISTER OF DEEDS AND  
MORTGAGES 20

Certified Copy of

Discharge of Lis Pendens  
In the matter of the application of the  
Board of Education of the Vocational  
Schools in the County of Essex for the  
appointment of three commissioners  
to fix the compensation to be paid for  
certain lands of Mayer Hartman and  
Herman Star, situate in the City of  
Newark, County of Essex and State of  
New Jersey, to be taken and con-  
demned for public use.

30 Filed April 1st A. D. 1926  
with Lis Pendens No. 4952

*Exhibit C. 11.***Exhibit C. 11.**

Newark, N. J., May 19, 1926.

To CHURCH CONSTRUCTION Co.:

S<sup>rs</sup>:

10 YOU ARE HEREBY NOTIFIED that the time called for closing in the contract between Mayer Hartman and Minnie Hartman, his wife, and the Church Construction Co. was March 10, 1926. Since that day we have always been ready and able to convey the premises to you in accordance with the terms of the contract and have tendered the deed for the same. We have made numerous appointments with your Attorney, Mr. David M. Litwin, each of which appointments was

20 kept by us and broken by you.

We desire to notify you herewith that we will appear at the office of Koehler and Augenblick, 14 Mechanic Street, Newark, New Jersey, at the hour of two o'clock in the afternoon on May 21st, 1926 and again tender you the deed in accordance with the terms of the contract and we will then and there be prepared to close said title.

30 This notice is given in order to make May 21st, 1926 as of the essence of said contract and unless you appear at the appointed time and place, we will take such other steps in this matter as we may be advised.

Mayer Hartman  
Minnie Hartman

*Exhibit D. 1.***Exhibit D. 1.**

“April 20, 1926, Mr. Mayer Hartman, 842 So. Orange Avenue, Newark, New Jersey. The records in this office indicate that plans for the construction of a tenement house at the above address were approved by this Board on April 7, 1925. 10

An inspection made on April 19, 1926, indicates that no work has been done above the foundation walls of the said building.

You are hereby notified that the certificate of approval issued for the construction of this building is hereby cancelled and is null and void.

No construction work must be done on this building until plans have been approved by this Board.

Very truly yours, C. Ray Swain, Secretary.” 20

**OPINION OF VICE-CHANCELLOR.**  
**IN CHANCERY OF NEW JERSEY.**

10	<p><i>Between</i></p> <p>MAYER HARTMAN and MINNIE  HARTMAN,</p> <p style="text-align: right;"><i>Complainants,</i></p> <p style="text-align: center;"><i>and</i></p> <p>CHURCH CONSTRUCTION COM-  PANY, a corporation,</p> <p style="text-align: right;"><i>Defendants.</i></p>	} <i>Opinion.</i>
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20 Koehler & Augenblick, for complainants.  
David Litwin and George B. Astley, for de-  
fendant.

CHURCH, V.-C.

30 This is a bill for specific performance of a con-  
tract for the sale of lands at the corner of Third  
avenue and North Seventh street, Newark. The  
contract was dated February 10, 1926, and pro-  
vided that the title was to be closed on March  
10th. On February 24th condemnation proceed-  
ings were instituted against the property by the  
Board of Education of Essex County. On March  
27th a stipulation to discontinue was entered into  
which was recorded April 1st. The contract calls  
for a clear title and among other things that  
“vendors further agree that there will be no de-  
fault in any of the terms of the present prior  
mortgages on said premises at the time of set-  
tlement so that same can be foreclosed” and  
“vendors covenant, warrant and represent that

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*Opinion of Vice-Chancellor.*

permits have been granted for the erection of a  
building to contain four stores and two flats on  
the corner and a four family house on the re-  
mainder of a plot relative to which the vendors  
further covenant, warrant and represent he has  
plans which plans and permits shall be turned  
over to the vendee without any further cost to it.” 10  
Defendant contends that time was of the essence  
of the contract as of March 10th, 1926, and as con-  
demnation proceedings were in force against the  
property at that time, clear title could not be  
given.

The testimony of the defendant’s witnesses is  
positive in asserting that the property was de-  
sired for immediate building purposes. This is  
borne out by the fact that complainant agreed at  
the time of closing title to deliver to defendant 20  
plans and permits for the proposed new building,  
the cellar of which had been at that time partially  
excavated by the defendant.

In the case of *Agens v. Koch*, 74 New Jersey  
Equity 528, at page 535, Vice-Chancellor Emery  
said:

“It is my conclusion upon the whole evi-  
dence that in this case the time for passing  
the title fixed by the provisions of the con- 30  
tract and its extension was of the essence of  
the contract by reason of the object of the  
vendee in making the purchase for the pur-  
pose of immediate building thereon for the  
purposes of trade, which purpose of immedi-  
ate improvement was known to the vendors  
at the time of making the contract. \* \* \*  
The essentiality of time in the performance  
of contracts made under such circumstances  
should not be disregarded.”

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*Opinion of Vice-Chancellor.*

To the same effect are the cases *Gerba v. Mitruske*, 84 New Jersey Equity, 141, and *Newark v. Lindsley*, 114 Atlantic, 794.

Another fact that leads me to the conclusion that the parties meant time to be of the essence of the contract is that the title was to pass in one  
10 month from the signing of the contract, which would enable defendant to have the spring and summer months for the work of construction.

The next question then is was the title clear on March 10, 1926? There were condemnation proceedings pending against it. I have not found any New Jersey cases directly on this point.

However, in *Hunt v. Inner Harbor Land Co.*, 214 Pacific, 998, the Court held at page 999: "An  
20 executory contract to convey has the effect of vesting the equitable estate in the vendee, leaving in the vendor, the naked legal title. As the equitable owner of the land, the vendee is entitled to any award which may be made on condemnation of the property. Wherefore, appellant contends that respondent can look to the Flood Control District for compensation; that the money he thus is entitled to receive from that source will stand in lieu of the real property which appellant contracted to convey to him,  
30 and that therefore, there was no warrant for the rescission of the contract.

"The contention lacks merit. The fact that upon the execution of the contract, respondent became the equitable owner of the property, and as such would be entitled to any award which might be made on condemnation of the land, did not deprive him of the benefit of appellant's covenant to convey to him the legal title to the land, clear of all encumbrances. The equitable ownership of a vendee under an executory contract  
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*Opinion of Vice-Chancellor.*

neither satisfies nor releases his vendor's contract to convey to him the legal title free from encumbrance. The covenant refers to title to land, not to title to personal property. Therefore, if by reason of a subsequently commenced condemnation suit, the vendor at the time when  
10 he should execute the deed, is not able to give that title to the land which he covenanted to grant, his vendee may rescind the executory contract and sue for the return of any purchase money which may have been paid by him before the condemnation suit was instituted. \* \* \*

"Appellant claims that the commencement of the condemnation action excused it from performing its contract to convey an unincumbered title to the land. Even so, appellant is not  
20 entitled to retain moneys which it accepted as the consideration for that good and unincumbered title which it expressly obligated itself to convey."

And, in *Miller v. Calvin Phillips & Co.*, 87 Pacific 264, it is held at page 265: "It seems to us too plain for extended discussion that under the allegations of the complainant, the respondent was unable to obtain that for which he contracted, and that it would be inequitable to compel him to  
30 pay for anything less. No matter what the technical definition of 'incumbrance' may be, the language of the contract is plain and specific. 'It is agreed that, if the title to said premises is not good, or cannot be made good within thirty days of the date of delivery of the abstract, it shall be optional with the purchaser whether the title pass subject to any defect that may be found, or the earnest money shall be refunded.'

"Can it be said with any degree of reason that, after the commencement of the condemnation pro-  
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*Opinion of Vice-Chancellor.*

ceedings, and the filing of the Lis Pendens by the railroad company, a good title without defect could have been given by appellant? It may be that a conveyance any time before the condemnation proceedings culminated in vesting the title in the railroad company, would convey to the grantee the right to receive the damages allowed for the taking; but the value of the damages for the taking was not the subject of the contract—was not what the respondent expected to buy, or the appellant intended to sell. Under such contract it has been universally decided that the grantee is entitled to a marketable title—to an indubitable title—and that he cannot be compelled to buy a lawsuit, or a title that will involve him in litigation, but that he has a right to a title which will enable him to hold possession of his land in peace and security.”

The case of *Goldstein v. Ehrlick*, 124 Atlantic, 761, was one in which the defendant refused to take title because padlock proceedings under the Prohibition Act were pending. Vice-Chancellor Backes held that these proceedings were “a cloud upon the title sufficient to prevent the enforcement of the contract.”

Further, it is a fact that on March 10, 1926, the taxes for 1925 were a lien and not paid. Complainant admits they were not paid until May 20, 1926. This is a violation of that term in the contract which provides that “there will be no default in any of the terms of the present prior mortgages upon said premises at the time of settlement so that same can be foreclosed.” The mortgages contain the usual clauses giving the mortgagee the right to foreclose on default in payment of taxes.

*Opinion of Vice-Chancellor.*

Complainant insists that defendant knew of the existence of the condemnation proceedings and was willing to take subject thereto and try to make a profit from the Board of Education.

In the case of *Goldstein v. Ehrlick*, *supra*, it was arranged that complainant would take title upon defendant's giving an indemnity bond. Complainant claimed that defendant refused to give the bond. Defendant claimed complainant refused to take it.

Vice-Chancellor Backes said at page 762: “I need not decide this question of fact. The complainant was entitled to the property according to the terms of the contract. He was not bound to take the bond. If he, in fact, consented to take it in lieu of a good title, he had the right to change his mind.”

It seems to me that this reasoning applies to the present case. If defendant did agree to take subject to condemnation proceedings, he had the right to change his mind and stand squarely on the contract.

The complainant further insists that defendant consented to various adjournments, thereby showing that time was not of the essence of the contract as of March 10, or if it was, it was waived; and that complainant made time of the essence as of May 21st, when defendant did not appear to take title.

The solicitor for the complainants testifies that solicitor for the defendant agreed to various adjournments down to May 17th. The solicitor for the defendant specifically denies this. It is unfortunate that counsel in the case deemed it necessary to appear as witnesses and also that their testimony is so diametrically at variance.

*Opinion of Vice-Chancellor.*

But I think I can decide this question without determining which one of the learned counsel is mistaken as to the facts. It is true that the title was not closed on March 10th, but the complainant has the burden of proof in showing that the defendant acquiesced in a material change in the written contract. This he has not done. His testimony is that defendant's counsel consented to the delay. It is uncorroborated and is denied by counsel for defendant. Moreover, there is no proof that the defendant authorized or sanctioned this change.

"In *Strauss v. Rabe*, 97 N. J. Eq. (affirmed on the opinion below in 98 N. J. Eq. 700), Vice-Chancellor Bentley said (at p. 212): 'When a vendor delivers a written contract for the sale of land to an attorney, and asks the latter to represent him upon the passing of title, without further instructions, and it is known to the purchaser that the contract, by its express terms, has fixed a final, specific day, upon which the deed is to be delivered, the purchase money paid and the other matters in the contract adjusted and concluded, the charter of the agent's powers fixes them, and the purchaser cannot thereafter claim the benefit of any treaty with the agent not found within the contract, either expressly or by necessary implication, unless the act of the agent is either expressly or impliedly ratified by his principal. If it is sought by the purchaser to modify any of the terms of the contract or impose a new one in any material matter affecting the principal's right, the former must, under the cases just cited, make certain at his own peril, that the agent's authority is sufficient to permit him to perform such act.'

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*Opinion of Vice-Chancellor.*

The cases referred to by the learned Vice-Chancellor are *Cooley v. Perrine*, 41 N. J. Law 322; affirmed, 42 N. J. Law 623; *Milne v. Kleb*, 44 N. J. Eq. 378, and *Dowden v. Cryder*, 55 N. J. Law 329."

For these reasons I will advise a decree dismissing the bill and directing the return of the deposit with a reasonable allowance for search fees and counsel fee.

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**FINAL DECREE.**

IN CHANCERY OF NEW JERSEY.

10	<p><i>Between</i></p> <p>MAYER HARTMAN and MINNIE HARTMAN,</p> <p style="text-align: center;"><i>Complainants,</i></p> <p style="text-align: center;"><i>and</i></p> <p>CHURCH CONSTRUCTION COM- PANY, a corporation,</p> <p style="text-align: center;"><i>Defendant.</i></p>	<p><i>On Bill, etc.</i></p> <p><i>Final Decree.</i></p>
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20 The above-entitled cause having heretofore come on to be heard for final hearing in the presence of Harry H. Koehler, Esq., of Koehler & Augenblick, solicitors for the complainants, and David M. Litwin, solicitor for the defendant, and of George B. Astley, of counsel with said defendant, and the Court having heard the evidence adduced by the complainants and the defendant, and having considered the same,

30 It is, on this 29th day of November, 1927, on motion of David M. Litwin, solicitor for the defendant,

ORDERED, ADJUDGED and DECREED that the bill of complaint filed herein be and the same is hereby dismissed, and it is further

40 ORDERED, ADJUDGED and DECREED that the said complainants Mayer Hartman and Minnie Hartman do pay to the said defendant Church Construction Company, a corporation, the sum of Five Hundred (\$500.00) Dollars heretofore paid by the said defendant Church Construction Com-

*Final Decree.*

pany to said complainants Mayer Hartman and Minnie Hartman, as set forth in the counter-claim filed herein by the said defendant Church Construction Company, and the further sum of \$75.00 for search and survey fees, together with interest on both of said amounts from February 10, 1926, and also together with the costs of the said defendant Church Construction Company in this cause to be taxed, including a counsel fee of \$500.00 which is hereby allowed to said defendant Church Construction Company, in which taxed costs there shall be included the fees charged to the said defendant amounting to the sum of ninety-eight dollars and ten cents (\$98.10) for the Court's copy of the testimony herein, and it is further

20 ORDERED, ADJUDGED and DECREED that the said total sum of \$575.00 together with interest thereon from February 10, 1926, and also together with such counsel fees and the taxed costs be, and they are hereby impressed as a lien upon the lands and premises specifically mentioned in the counter-claim filed by the said defendant Church Construction Company against the said complainants Mayer Hartman and Minnie Hartman as of February 10, 1926, and in the event that such complainants Mayer Hartman and Minnie Hartman shall not pay to the said defendant Church Construction Company the said several sums of money within twenty days from the date hereof that then and in that event a Writ of Fieri Facias issue out of this Court directed to the Sheriff of Essex County to sell the said premises described in said counter-claim to raise and to pay and satisfy to said defendant Church Construc-

*Final Decree.*

tion Company, the said sums of money, without any further order of this Court.

E. R. WALKER,  
C.

10 Respectfully advised,  
ALONZO CHURCH,  
V.-C.

Service of a copy of the within notice is hereby acknowledged this 23rd day of November, 1927.

KOEHLER & AUGENBLICK,  
Solicitors for Complainants.

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**NOTICE OF APPEAL.**

Filed December 7, 1927.

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i></p> <p>MAYER HARTMAN and MINNIE HARTMAN, <i>Complainants,</i></p> <p><i>and</i></p> <p>CHURCH CONSTRUCTION COM- PANY, a corporation, <i>Defendant.</i></p>	}	<p>10</p> <p><i>On Bill, &amp;c.</i></p> <p><i>Notice</i></p> <p><i>of Appeal.</i></p>
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To the above-named defendant or David M. Litwin, Esq., its solicitor: 20

The complainants, Mayer Hartman and Minnie Hartman, hereby appeal from the final decree made by the Chancellor on the advice of Vice-Chancellor Church, in the above-entitled cause, on the twenty-ninth day of November, 1927, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes. 30

Dated December 2, 1927.

KOEHLER & AUGENBLICK,  
Solicitors for and of Counsel  
with Complainants.

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

KOEHLER & AUGENBLICK,  
Of Counsel with Complainants. 40

*Notice of Appeal.*

Due and legal service of the within notice of appeal is hereby acknowledged this 3rd day of December, 1927.

DAVID M. LITWIN,  
Solicitor for Defendant.

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**PETITION OF APPEAL.**

**New Jersey Court of Errors and Appeals**

MAYER HARTMAN and MINNIE HARTMAN, <i>Complainants-Appellants,</i>  <i>vs.</i> CHURCH CONSTRUCTION COM- PANY, a corporation, <i>Defendant-Respondent.</i>	} <i>On Appeal</i>	} 10
	} <i>from the</i>	
	} <i>Court of</i>	
	} <i>Chancery.</i>	
	} <i>Petition of</i>	
	} <i>Appeal.</i>	

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

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The petition of Mayer Hartman and Minnie Hartman, the appellants in the above-entitled cause respectfully shows,

1. Petitioners find themselves aggrieved by the final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of his Honor Alonzo Church, one of the Vice-Chancellors of said court, bearing date the twenty-ninth day of November, 1927, in a certain cause in said Court of Chancery wherein the said Mayer Hartman and Minnie Hartman were complainants and the said Church Construction Company was defendant, in this respect, to wit: that the said decree adjudges and decrees that the bill of complaint filed in the said cause should be dismissed and said decree further adjudges and decrees that the appellants pay to the respondent the sum of five hundred dollars theretofore paid by

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*Petition of Appeal.*

the said respondent to the appellants as a deposit on the purchase money under a certain contract of purchase and sale of certain real estate dated February 10, 1926, between the appellants as vendors and the respondent as vendee; and the said final decree further adjudges and decrees that in addition to said sum of five hundred dollars, that the appellant pay to the respondent the further sum of seventy-five dollars for search fees together with interest on said amounts from February 10, 1926, and also together with costs to be taxed including a counsel fee of \$500; and said final decree further adjudges and decrees that the said sums together with interest be impressed as a lien upon the lands and premises described in the counter-claim filed by the respondent and in the event that the appellants shall not pay to the respondent the several sums aforesaid within twenty days from the date of the said final decree, that then and in that event a writ of *feri facias* issue out of the said Court of Chancery to sell the premises described in said counter-claim to raise and pay and satisfy the said sums of money to the respondent,

And your petitioners appeal from the said final decree of the Chancellor which adjudges and decrees as aforesaid upon the ground that it is erroneous in that it appears that by said contract of purchase and sale dated February 10, 1926, appellants agreed to sell and respondent agreed to purchase certain lands and premises described with particularity in the bill of complaint in said suit; and that the respondent failed to accept a conveyance of said lands and pay the consideration therefor although on May 21, 1926, time having been made as of the essence of said contract as of that date by notice given by the ap-

*Petition of Appeal.*

pellants to the respondent, and it further appears that except for the notice aforesaid given by the appellants to the respondent time was not of the essence of said contract of purchase and sale until made so by said notice as of May 21, 1926, and that appellants were at the time of the entry and making of said final decree and at all times had been, ready, willing and able to perform the said contract by them agreed to be performed and to deliver a deed for said lands and premises in accordance with the terms of said contract, but that the respondent on the contrary was not ready and willing nor had it ever been ready and willing to perform the said contract by it agreed to be performed; and the said final decree is further erroneous in that it decrees that the appellants should pay to the respondent the sum of \$500 paid as a deposit on the purchase price in accordance with said agreement together with interest thereon and that said sum of money with interest and costs be and they are by said decree impressed as a lien upon the said lands and in the event that the appellants should fail to pay the said sum of \$500 together with counsel fees and costs and search fees, within twenty days from the date of said final decree, that then the said lands and premises should be sold to satisfy and pay to the respondent the said sums of money; for the reason that the said final decree of the said Chancellor should have ordered and decreed that the said respondent do in all things specifically perform the said contract hereinbefore referred to; and the said final decree should further have adjudged and decreed that the counter-claim of the said respondent should be dismissed; and the said final decree is further erroneous in that it allows costs, search fees and counsel fees to the

*Petition of Appeal.*

respondent since the counter-claim of the respondent should have been dismissed and the final decree should have awarded costs to the appellants.

10 Petitioners therefore pray that the said final decree of the said Chancellor may be in all things reversed, set aside and for nothing holden and that your petitioners may have such other relief in the premises as to this Court shall deem proper.

KOEHLER & AUGENBLICK,  
Solicitors for and of Counsel with Appellants.

Due and legal service of the within petition of appeal is hereby acknowledged, this 12th day of December, 1927.

20 DAVID M. LITWIN,  
Solicitor of Defendant-Respondent.

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**ANSWER TO PETITION OF APPEAL.**

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

MAYER HARTMAN and MINNIE  
HARTMAN,  
Complainants-Appellants,

vs.

CHURCH CONSTRUCTION COM-  
PANY, a corporation,  
Defendant-Respondent.

*On Appeal  
from the  
Court of  
Chancery.* 10

*Answer to  
Petition of  
Appeal.*

The answer of the above-named respondent to the petition of appeal of the above-named appellants: 20

This respondent not acknowledging all or any of the matters which in the said petition of appeal are contained, to be true, for answer thereto nevertheless, says and admits:

1. That a decree was on the 29th day of November, 1927, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. 30

And this respondent is advised and believes that the said decree is agreeable to equity and it prays that the same may be affirmed, with costs to be adjudged to this respondent.

DAVID M. LITWIN,  
GEORGE B. ASTLEY,  
Solicitors and of Counsel with  
Defendant-Respondent. 40

## New Jersey Court of Errors and Appeals

MAYER HARTMAN and MINNIE HARTMAN, <i>Complainants-Appellants,</i>	} <i>On Appeal from the Court of Chancery.</i>
<i>vs.</i>	
CHURCH CONSTRUCTION COM- PANY, <i>Defendant-Respondent.</i>	

### BRIEF OF COMPLAINANTS-APPELLANTS.

#### Facts.

This is an appeal from a decree entered on the advice of Vice-Chancellor Church, dismissing the bill of complaint which was filed to compel specific performance of a contract for the sale and purchase of real estate between the complainants as vendors and the defendant as vendee, and directing the return by the complainant to the defendant of the deposit money together with certain other expenses and counsel fees and impressing the same as a lien upon the lands which were the subject matter of the contract.

By agreement in writing dated February 10, 1926, the complainant agreed to sell and the defendant agreed to purchase a certain parcel of real estate located at the southwest corner of North 7th street and Third avenue, in the City of Newark, and five hundred dollars down money was paid upon the execution of the contract. The purchase price was eighteen thousand dollars and an additional sum of twenty-five hundred dollars was to be paid at the time of settlement, the vendor taking back a purchase money mortgage

for fifteen thousand dollars. The contract provided that title was to be closed at the office of Koehler & Augenblick in the City of Newark, on March 10, 1926. The contract was admitted in evidence marked Exhibit C. 1 and appears on pages 129 to 135 of the State of the Case.

It is not disputed that title was not closed on the day stipulated in the contract for the reason that before that time the Board of Education of the Vocational Schools of Essex County had instituted condemnation proceedings to take and condemn for public use the premises which were the subject matter of the agreement; a petition in the condemnation matter having been filed on February 24, 1926, and on that day an order of the Supreme Court was likewise filed fixing March 13, 1926, as the time for the hearing of the petition; and on February 24, 1926, a *lis pendens* giving notice of said condemnation proceedings was likewise filed. The *lis pendens* is Exhibit C. 9 and appears in the State of the Case at page 165 *et seq.* On March 27, 1926, a stipulation was entered into to discontinue the condemnation proceedings. A certified copy of the stipulation was admitted in evidence and appears as Exhibit C. 10 on page 169 *et seq.*, of the State of the Case and it will be noted that this stipulation was signed not only by Arthur T. Vanderbilt as attorney for the Board of Education of the Vocational Schools of the County of Essex and by Koehler & Augenblick as attorneys for owners of record Mayer Hartman and Herman Star, but it was also signed by David M. Litwin, attorney of Church Construction Company, claiming under a contract not of record. This stipulation is dated March 27, 1926, and was received in the Register's Office of Essex County on April 1, 1926.

On March 22, 1926, it appears by Exhibit C. 8 which is in the State of the Case at page 164, that the attorneys representing the complainants notified the attorney of the defendant that the Board of Education was no longer interested in the property and that it was assumed title would close in accordance with the agreement. All of the facts above recited are indisputable. They are in writing.

The Vice-Chancellor in deciding this case decided it upon the theory that March 10, 1926, the date originally fixed in the contract for closing was of the essence of the contract, and that although the contract did not provide that time should be of the essence, the Vice-Chancellor held that the time for performance was nevertheless of the essence of the contract and he then went on to reason that time having been of the essence on March 10, 1926, the fact that the *lis pendens* was on record made the title unmarketable and absolved the defendant from taking the property and also reasoned from that, that the taxes not having been paid, there was a lien against the property at that time and that the existing mortgage under the terms thereof might therefore have been in default.

#### POINT I.

**Time was not of the essence of the contract in this suit until made so by notice, as of May 21, 1926.**

We think that the testimony in the case not only fails to support the finding of the Vice-Chancellor in this regard, but on the contrary, the testimony is overwhelming that time was not of the essence of the contract. One of the most appealing reasons we think which shows

that time was not of the essence of the contract is the answer and counter-claim that was filed in this suit. It appears on pages 11 to 16 of the State of the Case, and in it no mention is made that time was of the essence of the contract, but several defenses were raised by the answer all of which upon the coming in of the complainant's case, were exploded, and thereupon, at the hearing, the defendant shifted to new ground and raised the defense that time was of the essence of the contract.

All of the defenses raised in the answer were abandoned at the hearing. Some of them were not even raised at the hearing. The undisputable inference to be drawn is that the defendants bought this property and then changed their minds. The defense made was not a bona fide defense. The entire defense is an afterthought; at the hearing the defendants suddenly became aware of new reasons why they should not be decreed to take the property which they had agreed to purchase and they say that time was of the essence of the contract by circumstances known to the complainant, as of March 10, 1926. The contract itself does not make time of the essence. Mr. Church, the president of the defendant company, and his son, who is likewise an officer of the defendant company, were both present when the contract was made and they are very experienced real estate operators as they testified (p. 91). This parcel of property they purchased they say, to keep them busy for a short time while they were getting ready for a big building operation and that this was a mere trifle to them and that they could not afford to waste any time on it and that therefore time was of the essence. Having this in mind, and having also in mind that their counsel who

scrutinized very carefully and made quite a lot of changes in the contract is likewise an able lawyer, is it not strange that no provision was put into the contract making time of the essence? These people deal with real estate every day in the week, and are continuously buying and selling it, and they know the meaning of a clause making time of the essence in a contract and yet they enter into an agreement without saying that time shall be of the essence, and both of the Messrs. Church say that they spoke of it to Mr. Hartman before signing the contract. If time were essential, why was that not put into the contract? This question is especially pertinent because the contract that was signed was the subject of considerable change; it goes into great detail as to almost every contingency that might arise. It is very carefully prepared and considering that Messrs. Church are large real estate operators as they testified, why did they not write into the contract a clause making time of the essence as they say they told Mr. Hartman it was? Again, if time were of the essence because of the circumstances which were made known to Mr. Hartman, why, on March 10th, and after that time, did Mr. Church try to sell this property to the County of Essex for \$30,000, whereas he had agreed to buy it for \$18,000, and why did Mr. Litwin continuously adjourn this closing until May 17, 1926? If time were of the essence, Mr. Litwin would have told Mr. Augenblick that since the complainants were not in a position to comply with the agreement on the stipulated day, the defendant did not want the property and would not take it. Instead of that, admittedly from time to time the closing was adjourned and when suit was finally brought to compel specific performance, on the day of the hearing after all other defenses had been proven

futile, they suddenly discover that time is of the essence of the contract. Every act of omission and of commission in the making of the contract and in the adjournments puts the stamp of falsehood upon this contention. It is merely an afterthought to attempt to avoid the performance of a binding contract. Mr. Church, Sr., on page 79, and Mr. Church, Jr., on page 86, both say that the father and son, Mr. Newman and Mr. Horowitz were present when Mr. Church, Sr., had the conversation with the complainant on which the defendants rely to make time essential. Why, if this testimony be true, were the brokers not produced? Their testimony would be that of disinterested witnesses free from the taint of partisanship—no explanation for the failure to produce them is offered. The only inference to be drawn is that they would not corroborate the father and son Church, but would contradict them. Moreover, we submit that the defendants' witnesses are not entitled to credence and for this reason, Mr. Church, Sr., on pages 81 and 82 of the State of the Case, says that he spoke to Mr. Anderson, who is a gentleman of very high standing and without any interest in this suit whatsoever, about the sale of the property, but they say that they did not set any price nor was there any figure offered them. Mr. Anderson on the contrary, on page 106, says that Mr. Church asked \$30,000 for the property. "*Falsus en unum, Falsus en Omnibus.*"

Mr. Augenblick testified that before the day fixed for closing in the contract (p. 24), Mr. Litwin informed him that Mr. Church was negotiating with the State for the purchase of this property and that a *lis pendens* had been filed and that the closing had to be adjourned for two weeks from the time stated in the contract

and on page 27, Mr. Augenblick further testified that on March 26th, the time for closing was adjourned by agreement between Mr. Litwin and himself, until April 5th, and that on April 5th, the time for closing was adjourned until May 17th.

Mr. Koehler testified on page 114, that he and Mr. Litwin had likewise arranged for the adjournment of the time for taking and delivering of title.

Mr. Augenblick testified (pp. 25, 26) that he had all the papers to transfer the complete and unencumbered title to the premises into the Church Construction Company, and also had prepared a purchase money mortgage to be executed by the Church Construction Company, and that he had these papers in his possession at all the times when the title was to close.

The testimony of Mr. Augenblick and Mr. Koehler in this regard is corroborated by that of Mr. Hartman, who testified on page 119 of the State of the Case as follows, speaking of a conversation with Mr. Church. "Mr. Church told me to wait, the same thing. He had some conversations with Anderson, because I referred Anderson to them" and further down on line 36 of the same page he testified, "He just told me he is communicating with them and I should wait because I wanted to know whether it was going to be settled or not."

The defendant's counsel admitted at the hearing (pp. 30-31) that the defendant never appeared on any of the days set for closing title and Mr. Litwin admitted that he had adjourned the closing of the title from time to time until the 17th of May, at which time upon the failure of the defendant to perform, the complainant

gave notice making time of the essence as of May 21st, and at that time admittedly the defendant did not appear to perform.

The Vice-Chancellor in his opinion on page 175, says:

“The testimony of the defendant’s witnesses is positive in asserting that the property was desired for immediate building purposes. This is borne out by the fact that complainant agreed at the time of closing title to deliver to defendant plans and permits for the proposed new building, the cellar of which had been at that time partially excavated by the defendant.”

We fail to see how the fact that the plans and permits were to be delivered can be any corroboration of the defendant’s story that time was of the essence of the contract. On the contrary, on page 44, of the State of the Case, the learned Vice-Chancellor himself disposed of this contention by saying, “It does not say that this vendee is going to build any house on it” (after quoting the clause in the contract pertinent to the delivery of plans and permits). “He might or might not. He might start immediately and he might start three months from now, but the meaning of that in my mind, is ‘here, I want to not only buy your property, but I want the chance to erect these flats according to these plans, if I want to.’” And that is all that the clause with reference to the delivery of plans and permits meant. The complainant had them and he was selling the land on which he had already commenced building by excavating the cellar, and the defendants wanted them with their purchase for whatever that might be worth to them.

Mr. Hartman testified (pp. 116-117) that Mr. Church told him he wanted to change the plans for another and larger building and the contract

corroborates Mr. Hartman in that respect. On page 131, the second paragraph on that page, provides for the making of an application and the allowance of counsel fee for the obtainance of a permit for a different type building. Moreover, Mr. Hartman’s testimony that the defendant company desired to build a larger and different building was not contradicted and the only reason why the contract represented that plans and permits had been issued was that this property was located in a residential zone and the defendants knew it and desired to build stores and therefore the question of whether or not a permit had been issued for the building of stores became of importance. They knew that the complainants had been compelled to go to court and obtain a writ of mandamus to compel the issuance of a permit for the erection of stores and that is why they wanted to know that a permit had been issued. The defendant’s witness, William Fiverson, on pages 98-99 in his testimony makes this quite clear.

We respectfully submit that the testimony amply shows that time was not of the essence of this contract originally and never was considered to be by either of the parties. Moreover Mr. Hartman contradicts the statement of the defendant’s witness and says that he had not been told that the defendant wanted this property immediately (p. 117) and this statement is borne out by the testimony of Mr. Augenblick and Mr. Koehler to the effect that the closing of title was from time to time adjourned. It is also borne out by the testimony of Mr. Litwin who admitted he adjourned the closing of title on several occasions. The Vice-Chancellor passes this point as not necessary to the decision of the case by reference to the case of

*Strauss v. Rabe*, 97 N. J. Eq. 209, affirmed in 98 N. J. Eq. 700. In that case the Court held that an attorney who is retained for the specific purpose of closing a title on a specific date, does not have authority to adjourn the closing, but on page 213 in that case, the learned Vice-Chancellor said:

“Or, if the contract did not make time of the essence, there might be a different question presented. But for the reasons mentioned, it would seem that the answer to the proposition involved in this case is that the agent was without authority to extend the time for passing the title between the parties under the circumstances described.”

so that if time were not of the essence on March 10th, Mr. Litwin had authority to adjourn the closing of title, and the rule laid down in *Strauss v. Rabe*, as quoted by the learned Vice-Chancellor in this case does not apply.

Vice-Chancellor Church in deciding this case, likewise depended upon the case of *Agens v. Koch*, 74 Equity 528, as holding that time was of the essence. With the rule laid down in that case we of course have no quarrel. All that that case decides is that time may be of the essence of the performance of a contract even though not stated in the contract where such circumstances are present and known to both of the parties as would make the time of performance essential. But that case is entirely different. There both of the parties knew that time was essential and the question was whether or not in view of the fact that there was nothing in writing in the contract the Court could consider the knowledge of the parties as making time of the essence.

We respectfully submit that where a contract does not contain the provision making time of the essence for performance, that great care

should be exercised in reading into the contract that which the parties themselves have failed to incorporate therein. The burden of proving that time was essential remains upon him who so asserts and in this case it seems to us all the testimony shows that time was not considered as essential but only became so by the notice marked Exhibit C. 11, which was given by the complainant to the defendant. If that be so it follows that on May 21, 1926, the time fixed for performance by the notice given by the complainant to the defendant, the complainant was able, ready and willing to deliver and perform the contract in accordance with its terms, and the defendant should have been decreed to perform.

#### POINT II.

Even if time were of the essence of this contract, it was waived.

We respectfully submit that even if time were of the essence of this contract which by no means are we willing to admit, before it was made so by the notice given by the complainant to the defendant on March 19, 1926, that that circumstance was waived by the conduct of the defendant.

The Vice-Chancellor in his opinion on page 179 of the State of the Case, says:

“Complainant insists that defendant knew of the existence of the condemnation proceedings and was willing to take subject thereto and try to make a profit from the Board of Education.

“In the case of *Goldstein v. Ehrlick*, *supra*, it was arranged that complainant would take title upon defendant's giving an indemnity bond. Complainant claimed that defendant

refused to give the bond. Defendant claimed complainant refused to take it.

"Vice-Chancellor Backes said at page 762: 'I need not decide this question of fact. The complainant was entitled to the property according to the terms of the contract. He was not bound to take the bond. If he, in fact, consented to take it in lieu of a good title, he had the right to change his mind.'

"It seems to me that this reasoning applies to the present case. If defendant did agree to take subject to condemnation proceedings, he had the right to change his mind and stand squarely on the contract."

Now the case of *Goldstein v. Ehrlick*, referred to by the learned Vice-Chancellor, is very readily distinguishable from the case *sub judice*. There padlock proceedings were pending for the violation of the law. It constituted, as Vice-Chancellor Backes there held, a cloud on the title sufficient to make the title unmarketable. This court of course, can take judicial notice of the fact that so-called padlock proceedings for violation of the prohibition act are the legal result of criminal conduct. Condemnation proceedings, however, are not the result of any affirmative act of the party whose property is being condemned nor are such proceedings the result of any wrong doing by the party. The tenure under which all persons hold property is that it is subject to the paramount right of the State to take it away by condemnation proceedings and just as when one takes a deed with full covenants of warranty to property which is afterwards taken by the condemning power there is no breach of warranty, so when one makes a contract to sell and in the interim the State or one of its agencies clothed with the power of eminent domain steps in and takes away the property, we submit that the moneys paid in condemnation of the property should take the

place of the property itself, but that the contract is not avoided thereby.

However that may be, and admitting for the moment that the pendency of condemnation proceedings constitutes a cloud on the title, nevertheless we say that the cloud having been removed and the parties thereafter having continued to deal with this contract as if it were in existence, the reasoning of the case of *Goldstein v. Ehrlick, supra*, does not apply because there the padlock proceedings continued to remain a cloud on the title while here the so-called cloud was removed before the time finally fixed for performance.

In the case of *Kobrin v. Drazin*, 97 N. J. Eq. 400, at page 403, Vice-Chancellor Backes said:

"While I have no question that, originally in the circumstances and by conduct of the parties, the time fixed for the transfer became and was of the essence of the contract (the properties were bought for homes—*Tilley v. Thomas*, 3 Ch. App. (L. R.) 61; *Levy v. Lindo*, 3 Mer. 81; Fry Spec. Perf. P. 1056), the plea cannot be sustained as a bar, because it appears to have been waived by subsequent negotiations and later rejection of the contract, specifically, on the ground of the existence of the liens, 25 R. C. L. 256; *Levy v. Lindo, supra.*"

We respectfully submit that even if time were of the essence of this contract before made so by the complainant, and even if there were encumbrances making it impossible to close this title on March 10th, as originally fixed by the contract, that the defendant, by its subsequent negotiations and later rejection of the contract specifically on the ground of the existence of certain defects in the title, waived that defense; the title in this case was rejected according to the

answer filed (p. 11, *et seq.*), because of certain alleged deficiencies in title and not because time was of the essence. All of these objections to the title were on the final hearing exploded.

Another thing in connection with this which we consider to be quite important is that on page 125 and on page 126, the counsel for the defendant in cross examining the complainant said, line 19— Q Shortly after April 20th that I said, "Why bother me with these letters? We don't want the property and you know it." A "You never told me anything." And then on page 126, at line 14— Q "Didn't I tell you Church bought this property to put up a building and he didn't want the property unless he could have it on March 10th?" A "You never said it."

The impression attempted to be made by these questions was that the examining counsel had made these statements to the complainant, yet counsel who was present in court and could have gone on the witness stand and testified to these conversations, didn't do so and we submit that the rule where one can deny or contradict a statement and fails to do that, the inference raised is that he doesn't contradict or deny because the statement is true, should apply with great force here; nor can it be said that Mr. Litwin did not contradict the complainant in this regard due to the fact that he being an attorney he did not desire to take the stand, because he had already testified in this cause.

### POINT III.

On May 21, 1926, the time finally fixed for performance, the complainant was ready, able and willing to perform according to the terms of the contract.

On May 19, 1926, when the defendant failed to appear to complete the contract, the complainant gave notice making time of the essence as of May 21, 1926. This is not disputed. The contract provided that the vendors covenant, warrant and represent that permits have been granted for the erection of a building, etc. We have hereinbefore adverted to what we consider the reason why this clause was inserted. It appears conclusively by the testimony of Mr. Church himself (p. 91) that these permits had been granted. The contract required that the mortgages be not in default. Then the mortgage contained a clause that if taxes were unpaid for a certain period of time the mortgage might, at the option of the mortgagee, become due and payable immediately. Taxes were paid before May 21, 1926. The complainant had instruments executed, acknowledged and ready for delivery to convey to the defendant the title to the premises in accordance with the terms of the contract. There was no obligation on the part of the complainant to keep alive the permits and if through the failure of the defendant to take title when the same was offered, in the latter part of March, when the permits were still in force, they through the lapse of time expired, we insist that the defendant ought not to be permitted to complain. Nor should this court, we submit, strain the reading of the covenant to permit or aid the defendant to escape compliance with its contract in a situation such as here where apparently the defendant

scuttles from one defense to another to evade the plain mandate of its solemn contract. In this contract we did not agree that the permits would remain in force and not be revoked, nor did we agree that the permits which we had would not expire. We warranted that permits had been granted and they had. That is all we agreed to.

In conclusion we respectfully submit that time not having been of the essence of the contract until made so by the notice as of May 21, 1926; that even if time had been of the essence of the contract as of March 10th, the testimony clearly shows that such stipulation was waived, that the complainant was ready, willing, able and anxious to perform but that the defendant had never been, but has shifted from one reason to another why they ought to escape from the contract. They pleaded many reasons in their answer but abandoned them all at the hearing and set up new ones.

We respectfully submit that the decree of the Chancellor should be reversed and that the cause should be remitted to the Court of Chancery for the entry of a decree directing the defendant to specifically perform the contract.

Respectfully submitted,  
 KOEHLER & AUGENBLICK,  
 Solicitors for and of Counsel  
 with Complainant.

# 21

## New Jersey Court of Errors and Appeals

MAYER HARTMAN and MINNIE HARTMAN, <i>Complainants-Appellants,</i>	}	<i>On Appeal          from the          Court of          Chancery.</i>
<i>vs.</i>		
CHURCH CONSTRUCTION COM- PANY, <i>Defendant-Respondent.</i>		

### BRIEF OF DEFENDANT-RESPONDENT.

#### Facts.

This is an appeal from a decree entered on advice of Vice Chancellor Church, dismissing the bill of complaint filed by the complainants-appellants for the enforcement of the terms of a certain written agreement entered into between the parties, dated February 10th, 1926, wherein the complainants agreed to convey and the defendant agreed to purchase certain vacant lands located at the southwest corner of Third avenue and North Seventh street, in the City of Newark, County of Essex and State of New Jersey, all in accordance with the terms and conditions as set forth in said contract to be performed by the parties.

#### Points in Defense of the Decree.

1. That although the contract in question does not specify that time is of the essence, nevertheless the complainants having knowledge at the time of the signing of said contract, that the defendant was purchasing the same for the erection of a building upon the property, makes time as of the essence of the contract.

2. Thus time being of the essence of the contract, and in accordance with said contract title was to be closed on the tenth day of March, Nineteen Hundred and Twenty-six, we contend that on that date the complainants could not give a clear title in accordance with the terms of the contract, because

(a) The contract provides "the vendors further agree that there will be no default in any of the terms of the present prior mortgages upon said premises at the time of settlement so that the same can be foreclosed." And it appears by the evidence that one of the prior mortgages contained a clause providing for the default of the mortgage in case of the non-payment of the taxes on the property, and the evidence further shows that the 1925 taxes for the first half of the year had not been paid at the time set for closing title and the same were in default according to the terms of a prior mortgage and the prior mortgage could be foreclosed.

(b) That on the date set for closing the title, according to the contract, there was filed in the Register's office of Essex County, a *lis pendens* showing that a condemnation proceedings had been started against the property.

3. That if the Court should decide that time was not of the essence of the original contract, it will have to be admitted that the complainants by a notice they served upon the defendant, extending the closing of said contract until the twenty-first day of May, 1926, specifically provided that time would be the essence of the contract at said extended date. That on May 21st, 1926, the complainants could not give a clear title to said property, in accordance with the terms of the contract, because

(a) Said contract provided "The vendors covenant, warrant and represent that permits have been granted for the erection of a building to contain four stores and two flats on the corner, and a four-family house on the remainder of a plot relative to which the vendors further covenant, warrant and represent he has plans which plans and permits shall be turned over to the vendee, without any further cost to it." And on the 21st day of May, 1926, one of said permits for building had been revoked both by the Building Department of the City of Newark and the Tenement House Department in the month of April, 1926, and therefore the complainants could not deliver to the defendant the said building permit which he covenanted and agreed to deliver under the terms of the agreement on the 21st day of May, 1926.

(b) For the same reason as set forth in subdivision "a" under paragraph two above.

#### POINTS OF LAW.

Where the vendor at the time of the signing of the agreement knew the purpose for which the vendee was acquiring the property, that then time would be of the essence of the contract.

The evidence of Mr. Church, Sr., president of the defendant company, testified positively that he informed the complainant the purpose for which the property was to be used prior to the signing of the agreement (see pp. 70-71 of testimony). Also the testimony of Mr. Church, Jr., also an officer of the defendant company, testified clearly and in his presence, his father told the complainant the purpose for which the defendant was to acquire the property, and that this conversation was prior to the execution of

the agreement (see p. 87 of testimony). Mr. Church, Jr., also explained that the defendant company was in the building business and desired the premises in question as soon as they could acquire the same for the purpose of erecting the buildings before May 1st, and between pending jobs (see testimony, p. 87) Mr. Church, Sr., also testified to this fact (see pp. 70-71 of testimony). The testimony of the complainant, Hartman, was very evasive on this point and he did not seem to know whether any conversation was had or not prior to the signing of the contract as to the purpose to which the property was to be put. Because of the testimony aforesaid, and because of the further fact that the complainant had agreed in his contract to deliver to the defendant at the time of closing title the plans and permits for the proposed building upon the site and the further fact that the complainant had excavated the cellar on a portion of said premises for the purpose of erecting said building. We therefore contend that because of the above testimony and because of the above facts there is no question but that the complainant knew the objects and purposes for which the defendant was going to purchase the property. In *Kokes v. Kilmorey*, 1 De G. & S. 444 (63 Eng. Rep. 1141), the purchase was for the purpose of building, and the time was extended for the purpose of perfecting title. On the failure to complete the title by the extended time, it was held that the purchaser was entitled to abandon the contract.

In *Agens v. Koch*, 74 N. J. Eq. 528 at page 535, the Court holds "it is my conclusion, upon the whole evidence, that in this case the time for passing the title fixed by the provisions of the contract and its extension was of the essence of the contract, by reason of the object of the vendee

in making the purchase for the purpose of immediate building thereon for the purposes of trade, which purpose of immediate improvement was known to the vendors at the time of making the contract." Also see:

*Gerber v. Metriska*, 80 N. J. E. 79—84 N. J. E. 141;

*City of Newark v. Lindsley*, 114 At. 794 (not officially reported).

**A lis pendens filed against the premises in question, giving notice of a condemnation proceeding pending is a defect, because of which the vendor cannot convey good title.**

At the date set for closing of title, according to the contract (Exhibit C. 1, p. 131, l. 9) namely, March 10, 1926, there was filed in the Register's office of Essex County, a *lis pendens* showing that a condemnation proceeding had been started against the premises in question (see Exhibit C. 9 at pp. 165-166) that said *lis pendens* was so filed February 24th, 1926, and that said *lis pendens* was not discharged or the condemnation suit was not discontinued until April 1st, 1926 (see Exhibit C. 10, p. 169), therefore at the time set to close title in the contract, the condemnation proceeding against the premises in question was pending and the complainant-appellant could not give title free of this litigation.

There appears from our search of the cases in the State of New Jersey that there has been no ruling upon the case of a *lis pendens* giving notice of a condemnation proceeding as applied to the above question but we find a parallel case recently decided by Vice Chancellor Backes in which one of the objections to the title was a padlock proceeding pending against the property in question because of a violation of the Na-

tional Prohibition Act by one of the tenants in the premises. *Goldstein v. Ehrlick*, 96 N. J. Eq. 52. We cite this case in answer to the statement that it would be unfair to the owner to say that he, the owner, was not responsible for the filing of *lis pendens*, and therefore could not suffer on that account. In the present case cited the owner was not responsible for the violation of a law by his tenant, but nevertheless the Court held that the injunction proceedings was a cloud on the title.

It is our contention, that in the purchase of a property we are not compelled to buy litigation and to take our chances on what a condemnation commission might pay us for the property and, therefore, the condemnation proceedings and the *lis pendens* notifying us of the same was a cloud on the title.

We have searched the records for specific cases relative to condemnation proceedings as applied to the above facts and we refer the Court to the following cases and extracts from same:

*Hunt v. Inner Harbor Land Co.*, 214 Pac. 998. California Supreme Court. Chief Justice and 6 Judges.

An action to recover moneys which plaintiff had paid to defendant as part of the agreed purchase price under a written contract of sale whereby defendant had agreed to convey, and plaintiff had agreed to purchase a certain parcel of land in Los Angeles County. Subsequent to the contract and to the payment of the moneys sought to be recovered, a condemnation action was commenced by the Los Angeles Flood Control District to condemn the land for flood control purposes. In its contract to convey, defendant covenanted to deliver to plaintiff, upon

payment of the agreed purchase price "a good and sufficient deed of grant, bargain and sale \* \* \*." This covenant calls for a good title to the land, unencumbered and free from defect. The pendency of the condemnation action is an encumbrance upon the title (*Bloch v. Citizens Trust*, 207 Pac. 510). Rescission by plaintiff, and suit.

An executory contract to convey has the effect of vesting the equitable estate in the vendee, leaving in the vendor, the naked legal title. As the equitable owner of the land, the vendee is entitled to any award which may be made on condemnation of the property. Wherefore, appellant contends that respondent can look to the Flood Control District for compensation; that the money he thus is entitled to receive from that source will stand in lieu of the real property which appellant contracted to convey to him, and that therefore, there was no warrant for the rescission of the contract.

The contention lacks merit. The fact that upon the execution of the contract, respondent became the equitable owner of the property, and as such would be entitled to any award which might be made on condemnation of the land, did not deprive him of the benefit of appellant's covenant to convey to him the legal title to the land, clear of all encumbrances. The equitable ownership of a vendee under an executory contract neither satisfies nor releases his vendor's contract to convey to him the legal title free from encumbrance. The covenant refers to title to land, not to title to personal property. Therefore, if by reason of a subsequently commenced condemnation suit, a vendor at the time when he should execute the deed, is not able to give that title to the land which he covenants to grant,

his vendee may rescind the executory contract and sue for the return of any purchase money which may have been paid by him before the condemnation suit was instituted.

Appellant claims that the commencement of the condemnation action excused it from performing its contract to convey an unincumbered title to the land. Even so, appellant is not entitled to retain moneys which it accepted as the consideration for that good and unincumbered title that it expressly obligated itself to convey. Affirmed.

*Miller v. Calvin Philips & Co.*, Supreme Court of Washington, 1906. 87 Pac. 264. Chief Justice and 4 Judges concur.

Defendant agreed to convey to plaintiff certain described real estate, free and clear of all incumbrances, and that if the title was not good, and could not be made good within thirty days of the date of the delivery of the abstract, it should be optional with the purchaser whether the title should pass subject to any defect that might be found, or that the earnest money should be refunded. After the abstract was furnished, plaintiff discovered that a railroad corporation had begun proceedings to condemn a right of way through the property and had filed a *lis pendens*. Held, that such proceedings constituted a defect in the title, warranting plaintiff in refusing the same and in recovering the earnest money.

The Court: "It seems to us too plain for extended discussion that under the allegation of the complaint, the respondent was unable to obtain that for which he contracted, and that it would be inequitable to compel him to pay for anything else. No matter what the technical definition of 'in-

cumbrance' may be, the language of the contract is plain and specific. 'It is agreed that, if the title to said premises is not good, or cannot be made good within thirty days of the date of delivery of the abstract, it shall be optional with the purchaser whether the title pass subject to any defect that may be found, or the earnest money shall be refunded.'

"Can it be said with any degree of reason that, after the commencement of the condemnation proceedings, and the filing of the *lis pendens* by the railroad company, a good title without defect could have been given by appellant? It may be that a conveyance any time before the condemnation proceedings culminated in vesting the title in the railroad company, would convey to the grantee the right to receive the damages allowed for the taking; but the value of the damages for the taking was not the subject of the contract—was not what the respondent expected to buy, or the appellant intended to sell. Under such contract it has been universally decided that the grantee is entitled to a marketable title—to an indubitable title—and that he cannot be compelled to buy a lawsuit, or a title that will involve him in litigation, but that he has a right to a title which will enable him to hold possession of his land in peace and security." Affirmed.

**A prior mortgage on the premises in question subject to call and foreclosure at the option of the holder because of default in payment of municipal taxes, is in violation of the terms of the contract.**

The complainants, in accordance with the contract under consideration, specifically agree that no default in *any* of the terms of the present prior mortgages upon said premises at the time of settlement, will exist, so that said mortgage can be foreclosed.

According to one of the prior mortgages on said premises, as introduced in evidence, there was a tax default clause, and there was also introduced in evidence a tax bill or tax search (Exhibit C. 4, p. 150), showing that the taxes on the premises in question for the year 1925 were not paid until May 20, 1926, when the first half of this tax became due June 1st, 1925, and the second half of this tax became due December 1st, 1925, and said taxes became a lien, and due and payable on the last mentioned dates, and said tax had not been paid within the period of the tax default clause provided in said mortgages (see mortgage Exhibit C. 4, p. 147 at p. 148, l. 20, also Exhibit C. 3 at l. 30, p. 143), and that at all times from the closing date provided in the contract down to May 21st, 1926 (being the date the complainant claims that he extended the time of closing title, and made said time the essence of the contract by his notice), this mortgage was in default and could be foreclosed at the option of the holders, all in express violation of the covenants, terms, conditions of the contract in question. From the exhibits above mentioned, there is no contradiction in evidence but that this mortgage contained the default clause, and that the tax bill had not been paid during the period in question, and therefore the complainants at no time were in a position to comply with that portion of the contract, and said mortgage once in default continued in default and was subject to call at any time, at the option of the holder of the mortgage.

If time was not of the essence of the contract for the reasons above stated the complainants made time of the essence of the contract in their notice extending the time to close title to May 21st, 1926.

If the Court should hold that time was not the essence of the original contract, although the complainants knew the object and purposes for which the defendant was to use the property prior to the signing of the agreement, then we contend that the Court must hold that time was of the essence of the extension period for closing title as made by the complainants, for in the written notice given by the complainants to the defendant (Exhibit C. 11, p. 172) the complainants extended the time of closing title to May 21st, 1926, and specifically stated in said notice that time was of the essence of the extended period. This being so, we still contend that the complainants were not in a position to carry out the terms of the contract even though the condemnation proceedings had been stopped, for still the mortgage above-mentioned which under the contract the defendant was to take title subject to, was in default and could be foreclosed at any time at the option of the holder; also the complainants were not in a position to deliver the building permits for the erection of buildings on said premises as they agreed to, according to the terms of said contract, and the delivery of their building permits was one of the important conditions of the agreement of purchase, and this delivery was so to be made without any further cost to the defendant, these permits were originally granted under court order, and because complainants had not proceeded under said permits they had forfeited and lost the same, and could not deliver same to defendant on May 21,

1926, and defendant to regain said building permit would have to litigate the question at great expense (Exhibit D. 1, p. 173, testimony pp. 98, 63, 97, 98, 102, 103).

**If the complainants could not deliver to the defendant the building permits as agreed in the contract then the defendant was released from carrying out the contract on its part.**

The above point applied only in the case where the Court should hold that time was not of the essence of the original contract, for the reasons above stated, and that time was only the essence of the extended period for closing title as created by the complainants in their written notice to that effect.

In the contract in question the complainants *covenant, warrant and represent* that permits had been granted for the erection of certain buildings on the premises in question and that the complainant warranted and represented that he had plans, which plans and permits were to be turned over to the defendant without any further cost to it (p. 130, l. 30).

It will be noted from the evidence of the representative of the Building Department of the City of Newark, pages 97-98 of testimony, and the evidence of the representative of the Tenement House Commission of the State of New Jersey, pages 102-103 of testimony, that one of the permits which the complainants covenant and agree to give to the defendant was revoked on April 20th, 1926, and was not effective on May 21st, 1926, and it was impossible for the complainants to live up to the terms of their agreement on the date of the extended period for closing title so made and created by them.

We further call to the Court's attention that this permit so revoked was granted after a litigation and by order of court, and as according to the law was revoked after no work was performed upon the property, in accordance with the terms of said permit, for one year, therefore, in order for the defendant to acquire renewal of this building permit it would be compelled by the Tenement Commission of the Building Department to re-litigate the question in order to compel these governing bodies to re-issue the permit, all of which would have been at the cost and expense of the defendant. For the provision in the contract relative to the complainant contributing toward legal fees and expenses for obtaining a permit related only to new buildings that might be erected on other portions of the premises in question, not covered by the building or buildings for which the permit in question was issued.

We, therefore, contend that where the complainant specifically warranted and agreed in the contract to provide us with these permits without cost to us, that they could not carry out the terms of said contract on the 21st day of May, 1926.

We, therefore, contend that at all times from the date fixed in said contract to close title up to the extended date, May 21st, 1926, determined by the complainants, and which date was made the essence of the contract by the complainants' notice, that they, the complainants, at no time were in a position to close title in accordance with the terms of the contract, for during all that period the prior mortgage was in a position for foreclosure, during a portion of that period the condemnation proceedings were pending and during a portion of that period the complainants

did not have the building permit to deliver to the defendant, in accordance with the terms of the contract in question.

And as already stated the defendant informed the complainants prior to the signing of the contract of the object and purpose for which the premises were to be used, that is, the building of stores and apartments to be finished by May 1st, 1926, which was the renting period of the year. And when the complainants were unable to convey title, in accordance with the terms of the agreement, the defendant should not have been penalized, in other words, the complainants in seeking equity in this court should at all times be in a position to do equity.

For the reasons aforesaid and for the reasons set forth in the opinion filed by the Court of Chancery in this cause, we contend that the decree of the Court of Chancery entered in this cause should be affirmed in all respects.

Yours respectfully,

DAVID M. LITWIN,  
GEORGE B. ASTLEY,  
Solicitors for and of Counsel with  
Defendant-Respondent.