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**Notice of Appeal.**

(Filed January 24, 1927.)

10

**In Chancery of New Jersey**

Between

MIKE KOHOOT and ANNA KOHOOT,  
his wife,

Complainants,

and

FRANK GURBISZ and LENA GURBISZ,  
his wife,

Defendants.

On Bill, &c.

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The defendants hereby appeal from the whole and every part of the final decree made in this Court by the Chancellor, on the advice of the Honorable John Griffin, Vice-Chancellor, in the above stated cause, as declares that the complainants have an equitable lien on the property, lands and premises of the defendants, and more particularly described in the bill of complaint and final decree herein, to the amount of one thousand five hundred dollars (\$1,500), with interest thereon from the 15th day of September, 1925, until the same is full paid and discharged, and as orders, adjudges and decrees that complainants have such equitable lien aforesaid, and that a writ of *feri facias* issue to a Special Master of this Court commanding him to make sale of so much

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*Petition of Appeal.*

of said premises as is necessary to raise the afore-  
said sum of one thousand five hundred dollars  
(\$1,500), together with costs for the purpose of  
making payment of the amount of such equitable  
lien to the Court of Errors and Appeals in the last  
10 resort in all causes.

Dated January 20th, 1927.

BRENNER & KRESCH,  
Solicitors and of Counsel with Defendants.

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

ALFRED BRENNER,  
Of Counsel with Defendants.

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**Petition of Appeal .**

(Filed February 2, 1927.)

IN CHANCERY OF NEW JERSEY.

30	Between MIKE KOHOOT and ANNA KOHOOT, Complainants-Appellees, and FRANK GURBISZ and LENA GURBISZ, Defendants-Appellants.	}	On Bill.
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To the honorable, the Court of Errors and Appeals  
in the last resort in all causes:

The petition of Frank Gurbisz and Lena Gur-  
bisz, the appellants in the above stated cause, re-  
spectfully show:

40 1. That your petitioners find themselves ag-

*Petition of Appeal.*

grieved by a final decree made in the Court of  
Chancery by his Honor Edwin Robert Walker,  
Chancellor of the State of New Jersey, upon the  
advice of the Honorable John Griffin, Vice-Chan-  
cellor, bearing date the 3rd day of January, 1927,  
wherein the said Mike Kohoot and Anna Kohoot 10  
were complainants, and the said Frank Gurbisz  
and Lena Gurbisz were defendants, in this respect,  
to wit: that the said decree adjudges that Mike  
Kohoot and Anna Kohoot have an equitable lien  
on the following described lands and premises of  
the defendants, Frank Gurbisz and Lena Gurbisz,  
his wife.

ALL that certain tract or parcel of land  
and premises hereinafter particularly de- 20  
scribed, situate, lying and being in the City  
of Bayonne, in the County of Hudson, and  
State of New Jersey. Beginning at a point  
in the northerly line of West 18th Street, dis-  
tant one hundred and seventy-five (175)  
feet, westerly from the intersection of the  
said northerly line of West 18th Street, with  
the westerly line of Avenue C and from  
thence running (1) northerly parallel with  
Avenue C one hundred (100) feet to a point; 30  
thence (2) westerly and parallel with West  
18th Street twenty-five (25) feet to a point;  
thence (3) southerly and again parallel with  
said Avenue C one hundred (100) feet to the  
northerly line of West 18th Street; thence  
(4) easterly and along the said northerly  
line of West 18th Street twenty-five (25) feet  
to the point or place of beginning being the  
same premises conveyed to the defendants  
by Jacob Berman and others, by deed dated 40  
January 20th, 1924, and recorded January

Petition of Appeal.

10 23, 1924, in the office of the Register of Hudson County, in Liber 1530, page 483, together with all and singular the tenements, hereditaments, appurtenances, reversions, rents, issues and profits thereof, and all the estate, right, title, interest, use, property, possession, claim and demand of the defendants of, in, to and without the same;

20 to the amount of \$1,500, with interest thereon from the 15th day of September, 1925, until the same is fully satisfied and discharged; and further adjudges that a writ of *feri facias* issue to James J. Murphy, one of the Special Masters of the Court of Chancery, commanding him that he cause to be made of the premises aforesaid, by selling so much thereof as may be necessary for the purpose, the said sum of \$1,500, with lawful interest as aforesaid, together with the costs of the complainants to be taxed, with lawful interest thereon from the date of this decree, and that the surplus money arising from such sale, if any there be, be brought into this Court subject to the further order of the Court.

30 2. And your petitioners humbly appeal from that part of the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous for that under the evidence the complainants were not entitled to an equitable lien upon the lands and premises of the defendants, and by reason thereof the decree of the Court should have gone in favor of the defendants and the bill of complaint filed in said cause dismissed.

40 3. Your petitioners, therefore, pray that the said decree of the said Chancellor may be in the

Answer to Petition of Appeal.

particulars aforesaid reversed, set aside and for nothing holden.

And that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

Dated January 28th, 1927.

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BANNER & KRESCH,  
Solicitors of Appellants.

ALFRED BANNER,  
Of Counsel with Appellants.

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

ALFRED BANNER,  
Of Counsel with Appellants.

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Answer to Petition of Appeal.

(Filed March 22, 1927.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between  
MIKE KOHOOT and ANNA KOHOOT,  
his wife,  
Complainants-Appellees,  
and  
FRANK GURBISZ and LENA GURBISZ,  
his wife,  
Defendants-Appellants.

On Bill.

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The above named complainants-appellees, Mike Kohoot and Anna Kohoot, his wife, in answer to the petition of appeal of the above named appellants, say:

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*Bill of Complaint.*

1. These complainants-appellees are advised and believe that the said degree is agreeable to equity, and they pray that the same may be affirmed with costs to be adjudged to these complainants-appellees.

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RICHARD DOHERTY,  
Solicitor for and of Counsel  
with Complainants-Appellees.

**Bill of Complaint.**

(Filed September 28, 1925)

IN CHANCERY OF NEW JERSEY.

To the Honorable EDWIN ROBERT WALKER,  
Chancellor of the State of New Jersey.

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The bill of complaint of Mike Kohoot and Anna Kohoot, his wife, both residing at Bayonne, in the County of Hudson, and State of New Jersey, respectfully shows:

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1. August 19, 1925, the complainants were the owners and proprietors of a certain confectionery and stationery store located at No. 30 East 21st Street, in the City of Bayonne, which was then equipped with a large and valuable stock of merchandise of the value of \$1,500, was the subject of a good-will of great value, and in the operation of which the complainants held, from the owner of said building, a lease of the premises which was to run until January 1, 1926, and which lease was likewise of great value.

2. On said date, the defendants Frank Gurbisz and Lena Gurbisz, his wife, were the owners, as tenants by the entirety of:

40

All that certain tract or parcel of land and prem-

*Bill of Complaint.*

ises hereinafter particularly described, situate, lying, and being in the City of Bayonne, in the County of Hudson, and State of New Jersey. Beginning at a point in the northerly line of West 18th Street, distant one hundred and seventy-five (175) feet, westerly from the intersection of the said northerly line of West 18th Street, with the westerly line of Avenue C and from thence running (1) northerly parallel with Avenue C one hundred (100) feet to a point; thence (2) westerly and parallel with West 18th Street twenty-five (25) feet to a point; thence (3) southerly and again parallel with said Avenue C one hundred (100) feet to the northerly line of West 18th Street; thence (4) easterly and along the said northerly line of West 18th Street twenty-five (25) feet to the point or place of beginning, being the same premises conveyed to the defendants by Jacob Berman and others, by deed dated January 20, 1924, and recorded January 23, 1924, in the office of the Register of Hudson County, in Liber 1530, page 483.

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3. On said date, the complainants and the defendants, entered into an agreement in writing, a copy of which is annexed hereto, whereby the complainants agree to sell and transfer to the defendants, the said candy and stationery store with the said lease, and the security for the rent deposited thereon in exchange for the conveyance to them of the said real estate owned by the defendants, subject to the mortgage thereon and in further consideration of the sum of \$1,900 in cash, to be paid by the complainants, all of which more fully appears by reference to said agreement.

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4. In accordance with the terms of said agree-

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*Bill of Complaint.*

ment, the defendants entered at once into possession of said confectionery and stationery business, and have until the present time possessed and controlled the same, and have during such period sold the greater part of the said stock and merchandise at a cost much less than its true market value; have failed to replenish the said stock and have, by disregard of ordinary business methods, annihilated the good will of the business so that the said stock, now remaining on the premises, is of no substantial value and the good-will of the business entirely dissipated.

5. By the said agreement it was provided that in the event of the defendants' title to the house and premises being defective, the defendants agreed to keep the store and pay therefor \$1500. A survey made of the premises at the instance of the complainants, discloses that the title to the property is defective by reason of the land being substantially encroached upon by the building erected on the west, and that by reason of said encroachment the defendants are unable to place the complainants in possession of the tract agreed to be conveyed.

6. Upon the arrival of the time stipulated for the passing of the title, the complainants refused to take the property so encroached upon, and demanded of the defendants the purchase price of the said business according to the terms of the contract. The defendants refused and still refuse to pay the complainants the amount so agreed, and insist that the complainants take title to the premises, affected as they are by said encroachment.

*Bill of Complaint.*

7. The defendants are without financial means whereby they might respond to a judgment at law obtained against them, outside of the equity which they have in the real estate above described, and which is slender security for any judgment so obtained. The said defendants at the time set for the passing of the title, and upon the refusal of the complainants to take the property so encroached upon, openly threatened that they would transfer the land and premises to some third person, sell out the remaining stock in the store and invoke insolvency proceedings whereby the complainants would be wholly deprived of their business and the value thereof.

8. The complainants are without adequate remedy at law or elsewhere than in this court.

The complainants respectfully pray first, that they may be decreed to have an equitable vendees' lien upon the lands and premises above described; that the same may be ordered to be sold for the purpose of satisfying the same; that the defendants may be enjoined from conveying, encumbering, or otherwise disposing of the same during the pendency of this suit; that a receiver may be appointed to collect the rents, issues and profits thereof during the pendency of this suit, and apply the same to the satisfaction of said lien; that the defendants may be required to make answer without oath to this bill of complaint; and that process of subpoena may issue according to the practice of the court, and such other relief as may be equitable and just.

RICHARD DOHERTY,  
Solicitor and of Counsel  
with Complainants.

**Answer.**

(Filed February 10, 1926.)

IN CHANCERY OF NEW JERSEY.

10	MIKE KOHOOT and ANNA KOHOOT, Complainants,  <i>v.</i> FRANK GURBISZ and LENA GURBISZ, Defendants.	}	On Bill, etc.
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20 Defendants residing in the City of Bayonne, County of Hudson and State of New Jersey, answering the bill of complaint of the complainants say that,

1. They deny Paragraph 1.
2. They admit Paragraph 2.
3. They admit Paragraph 3.
4. They deny Paragraph 4.
5. They deny Paragraph 5.
6. They deny Paragraph 6.
- 30 7. They deny Paragraph 7.
8. They deny Paragraph 8.
9. These defendants further answering say that no encroachment exists of any building on adjoining premises on the property agreed to be sold by the defendants to the complainants, nor does any building on the property agreed to be sold by the defendants to the complainants encroach

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*Answer.*

upon adjoining property, but that such contention was made for the purpose of avoiding the performance of the contract made by the complainants, the said defendants being at all times ready, willing and able to make conveyance of the property agreed to be sold, and are still ready, willing and able to make conveyance thereof and hereby tenders performance of said contract.

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10. These defendants further answering say that in view of the claim made by the complainants that an encroachment existed, and being desirous of performing the contract made by them, the said defendants, that the said defendants agreed with the complainants that if they would accept title to the premises agreed to be sold that for the purpose of inducing the said complainants to accept such title, a deduction would be made in the purchase price agreed upon and the said complainants thereupon agreed that on the making of such deduction that they, the said complainants, would accept title to said premises; that a time was fixed for the passing of title under such supplemental agreement, but at the time so fixed the complainants insisted upon better terms than had previously been agreed upon and the defendants being unwilling to grant such better terms, tendered performance of the contract as originally made, or in the alternative performance of the contract as supplemented, but the said complainants refused to accept title and still do refuse to accept the same although the defendants have been and still are ready, willing and able to carry out said agreement in its original form or as supplemented.

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11. These defendants further answering say

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*Notice of Motion.*

that the complainants are not without adequate remedy in the courts of law, but on the contrary that they have such adequate remedy and that this Court is, therefore, without jurisdiction to determine this controversy.

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BRENNER & KRESCH,  
Solicitors of Defendants.

**Notice of Motion Addressed to Bill of Complaint.**

An application having been heretofore made for a dismissal of the bill of complaint on the ground that the complainants have an adequate remedy in the courts of law, and upon the further ground that the Court of Chancery is without jurisdiction over the subject matter of this controversy, as set forth in the bill of complaint, and such motion having been dismissed with right reserved to the defendants to renew such motion upon the hearing of this cause, such motion will be renewed at said hearing.

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BRENNER & KRESCH,  
Solicitors of Defendants.

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**Replication.**

(Filed February 11, 1926)

IN CHANCERY OF NEW JERSEY.

Between		
MIKE KOHOOT and ANNA KOHOOT,	Complainants,	} On Bill, etc.
	and	
FRANK GURBISZ and LENA GURBISZ,	Defendants.	

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The complainants join issue on the answer of the defendants.

RICHARD DOHERTY,  
Solicitor of Complainants.

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**Minutes of Final Hearing.**  
IN CHANCERY OF NEW JERSEY.

10	Between MIKE KOHOOT and ANNA KOHOOT, Complainants, and FRANK GURBISZ and LENA GURBISZ, Defendants.	}	On Bill, etc.
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APPEARANCES:

For the Complainants, Mr. RICHARD  
DOHERTY.

20 For the Defendants, Messrs. LAZARUS,  
BRENNER & VICKERS.

Before—Hon. JOHN GRIFFIN, Vice-Chancellor.

Chancery Chambers, Jersey City, N. J.,

October 6, 1926.

The Vice-Chancellor: You may proceed; I have read the pleadings.

30 THE CASE FOR THE COMPLAINANTS.

Mr. Doherty: I offer in evidence the contract.

(Admitted, without objection, and marked Exhibit C, 1.)

RALPH B. SANBORN, Esq., sworn.

*Direct examination by Mr. Doherty:*

Q. Mr. Sanborn, you are a member of the Bar, practicing in Bayonne, are you not? A. Yes.

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*Ralph B. Sanborn, direct.*

Q. Did you have any relation to the drawing of this contract that has been marked in evidence, C, 1? A. Yes, sir.

Q. You drew it? A. I drew it; yes, sir.

Q. And the parties were present at that time?

A. They were present in my office at that time, except the two women, who signed later; a few minutes after it was signed in my office I went to the store in question and had it signed there.

Q. And the contract remained in your possession? A. Yes.

Q. From whom were you interested, professionally? A. Why, I was interested in both parties—that is, I was to draw the bill of sale for the store, and search the property for the Kahoots.

Q. So, in searching the property, you were acting in the interest of Kahoot? A. Kahoot; yes, sir.

Q. You made a search? A. Yes, sir.

Q. Was Judge Brenner interested in any of these parties? A. Yes, sir; he became interested after I found there was a *lis pendens* against the property, and I believe when the question of the encroachment came up.

Q. What *lis pendens* did you find against the property? A. It seems that a woman by the name of Rosenblum owned the property at one time, and a judgment had been obtained against certain Rosenblums, and there was a question as to whether this Rosenblum against whom the judgment was entered was the Rosenblum who owned the property; but that matter had been taken care of by Judge Brenner, and the *lis pendens* removed from the property.

Q. You did find a record of a judgment against a man named Rosenblum? A. Yes.

Q. And it was followed up by a *lis pendens*, did you say? A. Yes, sir.

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Ralph B. Sanborn, direct.

The Vice-Chancellor: Well, that was all removed?

Mr. Vickers: In this Court; yes, sir.

Mr. Doherty: Well, this is only a narrative to explain the course of the relationship.

10 Q. Was there any other question that arose in connection with the passage of this title, except that *lis pendens*? A. There was a question as to an encroachment.

Q. The contract before you warrants that there was no encroachment? A. Yes, sir.

Q. You, of course, were aware of that at the time you were pursuing your search? A. Yes, sir.

20 Q. How did you ascertain that there was an encroachment? A. Why, I went to the Mechanics Trust Company of New Jersey, whom I knew held the first mortgage, and inquired if they had a survey, and they told me they had one, and I looked at the survey and found that there was an encroachment according to the survey.

Q. Would you recognize the survey if you saw it? A. I think I would.

30 (The witness is shown a paper by examining counsel.)

Mr. Vickers: His recognition does not prove the survey.

Mr. Doherty: We have sent for the surveyor; he will be here.

The Witness: Yes, that is the survey.

(The survey is marked for identification R, D, 1.)

40 Mr. Vickers: We won't put Judge Doherty to the necessity of bringing the surveyor here; we will admit that that survey

Ralph B. Sanborn, direct.

was in the possession of the Mechanics Trust Company, and, as far as we know, it is correct; and we have admitted that the survey showed an encroachment.

The Witness: I have already 'phoned for the surveyor to come here; if you can stop him, it will save trouble.

The Vice-Chancellor: Then it can be marked in evidence.

(The survey was thereupon offered in evidence, admitted, and marked Exhibit C, 2.)

Q. Now, on the discovery of the encroachment, what course did you take? A. I notified both parties.

Q. Judge Brenner, I understand, was not then interested? 20

Mr. Vickers: That is objected to, as leading.

Mr. Doherty: I withdraw it.

Q. Was Judge Brenner, at the time you notified the parties, to your knowledge representing anyone? A. I am not sure; I am not sure whether he was interested before or afterward, because the question of *lis pendens* was there, and there were two questions. 30

Q. Well, now, after your notification what did the parties do—that is, in respect to what you disclosed? A. Well, as far as I know, Gurbisz told me he didn't want the property.

Q. Gurbisz? A. Or not Gurbisz, but Kahoot. And Gurbisz, I believe, went to Judge Brenner.

Q. Were there any conferences between the parties, that you know of, after Judge Brenner was interested? A. So far as I know, I don't believe there was—not in my presence; they might have 40

Ralph B. Sanborn, direct.

come at one time, one party, and another party at another time; but there was no conference together, so far as I know.

10 Q. What did you learn as to the identity of the man who was the defendant in the *lis pendens* proceedings?

Mr. Vickers: How is that material?

The Vice-Chancellor: Why go into that?

Mr. Doherty: Because at the time when this title was to go through that was the outstanding block on the title; and it was months and months after that that was cleared up.

The Vice-Chancellor: All right.

20 Q. Did you ever find out whether that *lis pendens* affected this property?

Mr. Vickers: We admit it did.

Mr. Doherty: You admit it?

Mr. Vickers: Certainly; we went into this Court and had it removed.

30 Q. What further connection did you have with the matter, Mr. Sanborn? A. I was present a few times at Judge Brenner's office. We tried to come to some sort of a settlement; I believe you were taken in as attorney for the Kahoots.

Q. Do you know when it was that you and I conferred with Judge Brenner? A. I don't remember the date, no. We were in Judge Brenner's office, I know, one evening, all together.

Q. Would the fact that I have a memorandum of "January 5th"—

Mr. Brenner: 7th.

40 Q. "January 7th" of last year—would it be about that time? A. I believe it was.

Ralph B. Sanborn, direct.

Mr. Brenner: This year.

The Witness: Yes, this year—last January.

Q. Were all parties present then? A. I believe they were.

10 Q. Do you remember any propositions that were made by Judge Brenner as to how this matter might be adjusted? A. Why, I believe there was some sort of agreement drawn, but that was taken care of, I believe, by you and Judge Brenner.

Q. An agreement drawn that night, or previously? A. I am not certain; I couldn't say; but there was some sort of a proposition that we tried to arrive at on settlement.

Q. But it was ineffectual? A. It was ineffectual.

20 Q. Do you remember the terms of any of those proposals? A. I do not remember the terms; it was a question of what reduction the house was to be bought at on account of the encroachment, in case the deal went through.

Q. Was there any proposal made by Judge Brenner as to how much this contract should be abated because of this encroachment? A. Well, there was a question there; but the exact amount, I believe—

30 Mr. Vickers: We will agree that it was \$650.

The Witness: \$650; something like that.

Q. That offer was made by the other side, was it? A. Yes.

The Vice-Chancellor: As I see it, there is an encroachment of half an inch in the rear, and five-eighths of an inch in front?

40 Mr. Doherty: Yes, sir; and the parties

*Ralph B. Sanborn, cross.*

10 themselves regarded it as being so substantial that they offered \$650 on account of it—that it was not an inconsequential encroachment; but we are not dealing with the materiality or extent of it, because in the contract there was a warranty; it is only a matter of literal compliance.

Q. Did you have any other active connection with this case? A. I do not believe so, no; that was the last time that I was interested, at all. I simply was there with you to see that it went through.

*Cross examination by Mr. Vickers:*

20 Q. Mr. Sanborn, you have said that at the time of the signing of this contract for exchange of property, C-1, the men were present, and that you afterwards went to the store and obtained the signatures of the women; is that right? A. Yes, sir.

Q. When Mrs. Gurbisz signed this agreement, C-1, had you read it to her, or had you explained it to her? A. Well, I went over the whole matter with her from the beginning, and I probably explained it to her.

30 Q. Probably explained it to her? A. Yes, sir—right from the beginning; that is, I went right from the beginning; I told her it was a contract that she was to sign, and, well, I explained the matter right from the beginning to her.

Q. Won't you tell us, as near as you remember, what you said to Mrs. Gurbisz?

40 Mr. Doherty: If the object of this testimony is to lay the foundation for claiming that the Gurbiszes were at a disadvantage

*Ralph B. Sanborn, cross.*

in signing this contract because of imperfect understanding of its terms, I object to it, because the contract, by the answer, is admitted, and we have been brought in here without knowledge of any such defense.

The Vice-Chancellor: The answer admits the contract, but does not set up anything such as you are now asking about. 10

Mr. Vickers: The testimony is directed to the witness' recollection of the entire situation, and is not directed to questioning the validity of the contract. It is quite true that we have admitted the making of the contract in our answer.

Mr. Doherty: Well, I object to any parol contemporaneous evidence, except for a definite purpose. 20

The Vice-Chancellor: I think I will sustain the objection. I don't know that the witness has testified to anything beyond the making of the contract.

Mr. Vickers: Yes, he spoke regarding the manner of its execution, and I want to see what his memory is on that subject, so as to test his memory with respect to his other testimony. 30

The Vice-Chancellor: I will sustain the objection.

Q. At the time of signing this contract did you make any inquiry, either of Mr. or Mrs. Gurbisz, as to whether this property had been surveyed? A. Yes.

Q. And at that time did not Mrs. Gurbisz tell you yes, there was a survey with the Mechanics Trust Company, which bank had made a loan, 40

*Ralph B. Sanborn, cross.*

but that she had never seen the survey—is that right? A. No, it is not.

Q. What is not right about it? A. She told me, when I questioned her as to the encroachment—as to any encroachment—

10 Q. Just a minute; I did not ask you about any encroachment, I asked you whether you made inquiry at the time of the execution of these papers, whether the property had been surveyed? A. No, I did not.

Mr. Doherty: The question is, what did Mrs. Gurbisz tell you?

The Vice-Chancellor: He has answered the question.

20 Q. Didn't you answer that question a moment ago, that you had asked Mrs. Gurbisz about it—about the survey, at the time of the execution of the paper? A. No, I did not, as I recall it.

Q. You say it is not the fact that, at that time you did make inquiry, and Mrs. Gurbisz did tell you there was a survey, and that it was in the Mechanics Trust Company? A. No, sir.

30 Q. From whom did you learn it was in the Mechanics Trust Company? A. The Mechanics Trust Company.

Q. How did you learn that the Mechanics Trust Company had anything to do with it? A. Because they had the first mortgage on the property.

Q. When you discovered, or when it was discovered, that the survey showed an encroachment, didn't you have a conference with all the parties to this agreement, C-1? A. Yes; I wrote them, and they came to see me.

40 Q. And at that conference was not the question of the encroachment discussed, and the question

*Ralph B. Sanborn, cross.*

as to whether or not they were willing to have an abatement of the purchase price, in view of the encroachment? A. I don't believe there was at that time.

10 Q. Well, in any conference between you and the parties to this agreement, C-1, was there such a discussion, and was a willingness expressed on behalf of Mr. and Mrs. Kahoot to accept a sum of money in view of the encroachment—an abatement of the price? A. There was in Judge Brenner's office, but before that time I do not think there was.

20 Q. Well, is not this the situation, Mr. Sanborn: that you telephoned to Judge Brenner and told him that the parties had met in your office, and that they had agreed to accept \$650 as an abatement of the purchase price—is not that so? A. I do not recall that; possibly there was in the conversation between Judge Brenner and I, but just what the conversation was I do not recall, because I had nothing to do with the matter, it was between Judge Brenner and Judge Doherty. I might have got in touch with them to help the thing along, but I do not remember.

30 Q. Well, before Judge Doherty was in this case, is it not a fact that you had a conversation with Judge Brenner, and with him, over the telephone, discussed the terms upon which these parties were supposed to have agreed upon the abatement—is that right? A. I do not recall it.

Q. Is it a fact that a new date had been agreed upon when title should be passed? A. Yes.

Q. Do you recall whether October 13th was that date? A. I do not recall the date.

40 Q. Do you recall that it was after the filing of the bill in this cause that the date was fixed for

Ralph B. Sanborn, cross.

passing the title? A. If that was the time that we were all present in Judge Brenner's office to close the matter, why, it was that day.

10 Q. That day has been agreed upon as January 7th; I am now asking you whether there was not, prior to that time, a day fixed for the passing of the title? A. I do not recall it.

The Vice-Chancellor: Prior to what time?  
Mr. Vickers: January 7th.

20 Q. And was not that date October 13th, and weren't you there in the office at that time, and all of the parties in Judge Brenner's office on the day fixed, October 12th, to pass title, at a time when Judge Doherty was not there—is not that right? A. I do not recall.

Q. Do you recall having told Judge Brenner that you were not yet ready to pass title—that is, on October 13th, assuming that to be the day—and that you had not yet run down your search, and the matter was then, by mutual consent, adjourned to a later day? A. That is possible; it is possible that at some day he possibly called me up, but I couldn't recall the date.

30 Q. And is it not a fact that after that date (if that date was October 13th) that it was then that you found the *lis pendens*—when you ran down the search you found the *lis pendens*—is not that true? A. It is possible.

Q. Of course it is possibly true, but is it not true; is not that the fact? A. I think he did call me up, now, and try to set a date, and I told him that I had the question of the *lis pendens* out; I recall that.

40 Q. And after you discovered the *lis pendens*, didn't you arrange with Judge Brenner that he

Ralph B. Sanborn, cross.

should go into this Court and remove the *lis pendens*? A. Yes, sir.

Q. Didn't you and he have a discussion as to whether or not the *lis pendens* actually affected this property? A. Yes, sir.

10 Q. Now, wasn't all that prior to January 7th, when you and Judge Doherty and Judge Brenner and the parties met in Judge Brenner's office—is not that so? A. Yes, sir.

Q. The fact is that, on January 7th, this Court had adjudicated the question of the *lis pendens*, is not that right? A. If that is true.

Q. Well, is it not so? You were there to pass title. A. I remember being in court, yes, sir.

20 Q. Well, don't you remember whether that was before January 7th? A. Yes, sir, it was.

Q. It was, certainly. A. Yes, sir.

By the Vice-Chancellor:

Q. By the way, at that time did you know of the existence of this encroachment—at the time the *lis pendens* was removed? A. I couldn't say.

By Mr. Vickers:

30 Q. Perhaps I can refresh your memory on that: is it not the fact that you knew of the existence of the encroachment before a day was fixed, on October 13th, as the day for the passing of the title—is not that right—the encroachment was then known? A. I don't remember about that.

Q. Perhaps I can help you: the bill in this cause was filed September, 1925—at that time the encroachment was known, is not that right?

The Vice-Chancellor: September 29th,  
1925.

Ralph B. Sanborn, cross.

Q. September 29th, 1925, the bill in this cause was filed in this Court; at that time of course the encroachment was known, because it is pleaded; you know that, don't you? A. Yes, sir.

10 Q. The encroachment was discovered by you, wasn't it, from the survey? A. Yes, sir.

Q. Now, then, between the time of the filing of the bill and the time that Judge Doherty and the parties met in Judge Brenner's office to pass title, didn't you ask for, or didn't you and Judge Brenner agree on an adjournment of the date of passing title? A. Yes, sir.

Q. Now, will you say that that was not October 13th? A. The time to pass the title?

20 Q. Yes, between the 7th of January and the day of the filing of this bill? A. It is possible that it was; I have no memorandum to show that, but it is possible. We did set a day to pass the title.

Q. All right, but that was before the day that you met with Judge Doherty and the parties at Judge Brenner's office, is not that so? A. Yes.

30 Q. Yes, sure; and at the time this bill was filed in this cause you knew nothing about the *lis pendens*, did you? A. I couldn't say; I don't remember the date the bill was filed; I had nothing to do with the bill.

40 Mr. Doherty: First there was the discovery of the encroachment; then a gesture was made to fix up the title on the basis of that encroachment being on the property. The first discovery was the encroachment; and an effort was made to take the title with the encroachment and an abatement of the price. A contract was drawn incorporating the terms of the adjustment. Mr. Sanborn thereafter continued his search and it was

Ralph B. Sanborn, cross.

after that contract was drafted that the *lis pendens* was discovered, bringing up another anxiety in the matter; and then an effort was made to have that *lis pendens* eliminated from the record, and that was accomplished by January 7th; and it was 10 when Judge Brenner saw that everything was all ironed out that we arranged the conference at his office; is not that right?

Mr. Vickers: That is right.

Q. Now, when was the question of the \$650, abatement price, first brought up? A. I don't know.

20 Q. Well, it was brought up at that conference in the office, wasn't that right? A. Well, it was brought up before we came to the agreement to pass title in Judge Brenner's office.

Q. Certainly; the \$650 was spoken of as compensation for the encroachment, is not that right? A. Yes, sir.

Q. At that time that was the sole thing that was to be compensated for, is not that right? A. Yes, sir.

30 Q. At the time the \$650 was agreed upon, or referred to by the parties mutually, there was then no question of any *lis pendens*, is not that right, as far as you or the parties knew? A. Yes, sir.

Q. All right; now we have got that fixed. Can you recall ever having seen a copy of what was purported to be the understanding between the parties which was drawn up by Judge Brenner, and prior to the 7th of January? A. I believe I saw it, but I did not read it.

40 Q. Well, your client brought it to you, is not that so? A. I saw it; I couldn't say that, because that

Ralph B. Sanborn, cross.

was when Judge Doherty was handling the matter with Judge Brenner. I saw that paper, but I don't know whether it was in Judge Brenner's office, or whether my client did bring it to me.

10 Q. Well, let us get down to January 7th: On that day, you and the parties were there in Judge Brenner's office some time before Judge Doherty arrived; is not that right? A. Yes, sir.

Q. At that time the question as to whether or not the understanding of the parties was incorporated in this written paper drawn by Judge Brenner was discussed, was it not? A. I believe it was.

20 Q. A memorandum was made by Judge Brenner as to the settlement situation of this sales agreement, or exchange agreement, on the basis of the \$650 compromise—a draft of written agreement; is not that so? A. There was some sort of a memorandum.

Q. Let me show you a paper writing, and ask you whether that was not made up and gone over between you and Judge Brenner and all of the parties before Judge Doherty arrived on this evening at Judge Brenner's office, on January 7th? A. I don't remember this, at all; it is possible it was made up, but I don't remember it, at all.

30 Q. You don't remember it? A. No. We were all waiting for Judge Doherty at the time.

Q. He was late? A. He was very late. We waited a long time.

Q. He was very late, and the parties were about to conclude this thing when Judge Doherty arrived; is not that right? A. No, sir; they would do nothing until Judge Doherty arrived; he was the attorney to settle the business.

40 Q. I show you a draft of what purports to be the understanding between these parties as to this set-

Ralph B. Sanborn, cross.

tlement and abatement, and ask you whether you recognize that as the paper to which you referred, drawn by Judge Brenner? A. As I said before, I don't believe I ever read this agreement, although I spoke to Judge Brenner over the telephone about the agreement; he wanted to draw it; he was going to present it to Judge Doherty, or something like that. Judge Doherty was going to pass on it. 10

Q. All right; and that was after the filing of the bill in this cause, and before January 7th; is not that right? A. Yes, sir.

Q. And from time to time, after the bill was filed in this Court in this cause, and up to and including January 7th, you still participated in this matter, representing the complainants—the parties who are now complainants here—is not that right—in this real estate transaction? A. Before the bill was filed. 20

Q. No, after the bill was filed? A. No, sir; I was not their attorney.

Q. Well, you were acting for them; you discovered the *lis pendens*, and you negotiated with Judge Brenner, didn't you? A. Well, I was only doing that in connection with the settlement through Judge Doherty; but Judge Doherty was their attorney. 30

Q. All right; but so far as the defendants in this case are concerned, and as far as Judge Brenner was concerned, you negotiated on behalf of the complainants in this case, is not that so? A. Well, if you want to call it so.

Q. Well, you are an attorney-at-law, you know? A. They came to see me and wanted to fix the business up, and I said, "You will have to go to Judge Doherty," and they told me to get in touch with Judge Doherty. 40

*Ralph B. Sanborn, cross.*

Q. And you did, and you got in touch with Judge Brenner, didn't you—that is true? A. Yes, sir.

10 Q. Now, have you given in your testimony, on direct and cross, all of the matters that were in dispute between these parties as to this contract of exchange? A. I don't believe I—oh, yes, I did; it was the encroachment, and the question of the *lis pendens*, and the question of the settlement of the amount.

Q. Is it not a fact that, in addition to what you have told here, that the question of security for rent was also an open question? A. Yes, that question was open.

20 Q. And is it not the fact that it was agreed between the parties and between you and Judge Brenner that the supplemental verbal agreement between these parties as to the abatement should be carried through, and then the parties themselves, between themselves, settle the question of the \$120 security for rent; is not that true? A. I don't remember whether that question came up in connection with the \$650, or whether that was to be additional to the \$650; I am not sure as to that; but that was a sort of a minor detail; that was not the real question; that is why I did not mention it.

30

Mr. Vickers: To facilitate the Court's determination, we will admit, on behalf of the defendants, that, in addition to the \$650, it was our obligation, under this agreement, to give them \$120 security for rent on the store, which was purchased for \$1,500.

40 Q. That question of the rent was, in fact, eliminated in the computation of the settlement drawn up in Judge Brenner's office, when you and he and

*Ralph B. Sanborn, cross.*

the parties were there, before Judge Doherty arrived—is not that so? A. That question was brought up, but I am not sure—

Q. (Interrupting.) But it was eliminated from this settlement draft made by Judge Brenner at that time; is not that so? A. I don't remember that, but it is possible; I remember that that question did come up, but I do not recall it at the present time.

10

*By the Vice-Chancellor:*

Q. What was eliminated—the \$120? A. The \$120; I am not sure whether that was the settlement price, \$650, or whether that \$120 was to be additional, or whether that \$650 covered everything.

20

*By Mr. Vickers:*

Q. Well, that was no question of controversy, either when you and the parties were there without Judge Doherty, or when Judge Doherty arrived—it was not part of the controversy as to where the \$120 figured, was it? A. Well, there was no controversy there, I should say, at all, because before Judge Doherty arrived—

Q. No, after Judge Doherty arrived? A. After Judge Doherty arrived there was other questions came up.

30

Q. But that did not come up; is not that so? A. I can not say that, I don't remember.

Q. What do you mean, you couldn't say? A. That question did come up, but I don't know whether that amount there was included in that amount—the \$120—or whether it was not.

Q. Is it not a fact that after Judge Doherty arrived at Judge Brenner's office on this 7th day of

40

*Ralph B. Sanborn, cross.*

January, the day said to have been fixed for the passing of the title, the sole question of controversy was whether the \$650 was to come out of the cash, the thousand dollars cash that was to be paid, or whether it was to be deducted from  
10 the \$900 third mortgage which was to be given at the time of the passing of the title; is not that a fact? A. I don't remember that, at all.

Q. Well, what was the controversy, then; why didn't it go through, so far as learned counsel was concerned? A. Well, as I stated, I did not appear there as counsel for the parties, at all; I simply was there—well, interested perhaps in getting my fees, more than anything else.

Q. Well, if you were there for the purpose of  
20 getting your fees, you were vitally interested in whether this thing was closed, or not, weren't you? A. Yes.

Q. All right; then tell us why it was not closed, if you have any recollection? A. I couldn't say.

Q. Now, I call your attention to the third paragraph of the second page of this draft of memorandum which has been referred to as made by Judge Brenner, and I ask you to look at that paragraph and say whether that was not the sole question of controversy arising out of the construction  
30 of that paragraph—as to where the \$650 was to come in? A. I don't believe I read this paper, at all.

Q. Well, you can look at it now, can't you, Mr. Sanborn? A. Yes, I can.

Q. And you were there during this time, and I am now asking you whether that does not refresh your memory as to the sole question of controversy? A. (After examining the paper.) I  
40 couldn't say.

*Ralph B. Sanborn, cross.*

Q. I show you a carbon copy of a letter which it is admitted was produced by Judge Doherty—

Mr. Doherty: Yes.

Q. —produced here by Judge Doherty—a carbon copy of a letter written by him to Judge Brenner—and ask you whether you recall the subject-matter contained in that letter being brought up on January 7th, when this was to be settled? A. Yes, the question of the \$120 was discussed that evening.  
10

Q. Arising out of that letter, is not that so? A. I couldn't say.

Q. Well, don't you know that Judge Doherty's attention was called to his own letter at that time—is not that so? A. Yes.  
20

Q. And reference is here made to Mike Kahoot having been shown the settlement agreement drawn up—don't you know that that referred to this paper which I have shown you here, and which is said to have been drawn up by Judge Brenner—is not that right? A. Well, you see my office is not connected with Judge Doherty, at all. I did not see this paper; I never saw this paper before.

Q. Before when? A. Before now.  
30

Q. Didn't you see the original, which was referred to on January 7th, the time of the supposed closing of this title? A. Did I see the original? A. Oh, no.

Q. You did not see the carbon copy, because that was Judge Doherty's; didn't you see the original; didn't Judge Brenner refer to it at that time? I will withdraw the question. Irrespective of whether you saw that letter, either the carbon copy or the original, you have said, have you not, that  
40

*Ralph B. Sanborn, cross.*

the subject-matter of that letter, to wit, this agreement, was discussed at that time, is not that so?

A Yes, sir.

10 Q. All right; I call your attention to the date of that letter, October 13th, and ask you whether that refreshes your memory as having been sent on the day that the title was to have been passed according to a verbal agreement, and whether you did not know that at the time of your talks with Judge Brenner for an adjournment of the day? A. That is right; yes, sir.

Mr. Vickers: I ask that the typewritten copy of the so-called memorandum be marked for identification.

20 (The same is marked G. T. V. 1 for identification.)

Mr. Vickers: I also ask that the carbon copy of the letter of Judge Doherty to Judge Brenner be marked for identification.

(The same is marked G. T. V. 2 for identification.)

30 Q. Now then, Mr. Sanborn, calling your attention to the second paragraph of Judge Doherty's letter to Judge Brenner, I ask you whether that does not refresh your memory as to an understanding that the \$120 was in addition to the \$650? A. I wouldn't like to say because I am not sure.

Q. And, on October 13th, did you, or did you not, know that Mike Kahoot, the complainant in this suit, was satisfied with the substance of the terms, and that Judge Doherty interposed no objection, except that he did not waive the \$120, and there was coming to him \$89.38—is not that the fact? A. I don't know.

40 Q. What? A. I don't know.

*Mike Kahoot, direct.*

*Redirect examination by Mr. Doherty:*

Q. The contract in respect to the store that was to be sold contains a provision that a bill of sale be given immediately—do you know whether that provision of the contract was carried out? 10

Mr. Vickers: We will admit it was.

Mr. Doherty: And that your people went right into possession?

Mr. Vickers: We will admit it.

Q. Are you able to recall that, after the conference of October 13th and the drafting of the settlement agreement, Kahoot came to your office with that agreement after having seen me about it—do you recall that? A. No, I cannot recall that. 20

Q. When, after that agreement was prepared, you discovered the *lis pendens*, in what way did you communicate that to the parties? A. I believe I got in touch with Judge Brenner.

MIKE KOHOOT, sworn.

*Direct examination by Judge Doherty:*

Q. You are Mike Kahoot, the complainant in this cause? A. Yes, sir. 30

Q. Along with your wife, Anna Kahoot—is that Mrs. Kahoot's name? A. Yes.

Q. Now, on the 19th of August, last year, you owned a stationery store, did you? A. Yes, sir.

Q. Where? A. 30 East 21st Street, Bayonne.

Q. What else did you sell in the store besides stationery? A. I sold everything.

Q. Did you sell tobacco? A. Tobacco, cigarettes, candy, gloves and ice cream—everything.

Q. A general store? A. Yes, sir. 40

Q. And how long did you run that store?

*Mike Kohoot, direct.*

Mr. Vickers: I do not see how this is material, your Honor. It is admitted that the price was \$1,500; it is admitted that we got a bill of sale and went into possession. We do not claim that there should be an abatement in the price of the store.

10

Mr. Doherty: Well, we are seeking here for an adjudication of foreclosure of a lien, and something must be done in order to define the amount; now, is it admitted that the lien exists, and that it should be to the extent of \$1,500, then we can dispense with this testimony.

Mr. Vickers: The contract so provided. The contract provides that if we failed in the property, the defendant, nevertheless, shall pay \$1,500.

20

The Vice-Chancellor: Is that in the contract?

Mr. Doherty: Yes, sir.

The Vice-Chancellor: Well, what more do you want?

Q. Who was your lawyer at first, when you contracted to buy this property—who was your lawyer? A. Counsellor Sanborn.

30

Q. And he gave you some information about this property of Gurbisz's—he told you something about it?

Mr. Vickers: We are not bound by what Mr. Sanborn told him.

Q. I am not asking for the details—did he? A. Yes, sir; he gave me the information when he started to search the property.

40

*Mike Kohoot, direct.*

Q. And then you would not take the property, after you got that information? A. No, sir.

Q. Now, after October 13th were you at Judge Brennan's office with the Gurbiszes? A. October 13th—I think I was.

Q. And was there talk about settling up this encroachment? A. Yes. 10

Q. And a paper was drawn?

Mr. Vickers: Of course that is objected to, on the ground that it presupposes the drawing of a paper subsequent to October 13th.

The Vice-Chancellor: No, I think he is referring to October 13th.

Mr. Vickers: Well, he says, "Was there a conference" and "Was there then a paper drawn?" I think that precludes the paper having been drawn before that— 20

Mr. Doherty: I will straighten it out.

Q. When you were at Judge Brenner's office to fix up about the encroachment, did you see a paper that was drawn up for you people to sign? A. Yes, I seen a paper.

Q. Did you get a copy of that paper? A. No.

Q. You did not? A. No. 30

Q. Didn't you get a copy of it, and bring it to my office? A. Yes, I did, but I gave it back.

Q. You gave it back—you did not keep the copy, but you had it? A. Yes, sir.

Q. You had a copy in your hand, and you brought it to me? A. Yes.

Q. And you showed it to me? A. Yes.

Q. And while you were still in my office I wrote a letter to Judge Brenner—do you remember that? A. Yes, sir. 40

Mike Kohoot, direct.

Q. Now, what did you do with the paper that you showed me? A. What do you mean?

Q. With that contract, with that paper that you brought up to my office—where did you go afterwards? A. Afterwards I go home and I gave it back to Mrs. Gurbisz. 10

Q. Did you tell Mrs. Gurbisz anything why you were giving it to her? A. Yes; there was something wrong about \$120 on that property, and I told her she should fix it up, and then I am going to sign that paper.

Q. Well, did you sign it? A. No.

Q. Why didn't you? A. Because when I seen that contract, and Mr. Sanborn was going to search that house again, he found a judgment on that for \$3,500, and then, when I found this judgment then I refused to sign it, and I didn't like the house. 20

Q. Did Mr. Sanborn say "judgment," or did he say another thing—"lis pendens"?

Mr. Vickers: We will admit it was a *lis pendens*. There was a judgment, but not against our parties.

Q. And then you would not sign the contract, after you got the word from Mr. Sanborn? A. No, sir. 30

The Vice-Chancellor: Do I understand that in the absence of a *lis pendens*, he was willing to take the title on the basis of the settlement?

Mr. Doherty: Yes.

The Vice-Chancellor: Well, why did he change after the *lis pendens* was removed?

Mr. Doherty: I will ask him. 40

Mike Kohoot, direct.

Q. You were down in Judge Brenner's office one evening with Mr. Sanborn and myself, were you? A. Yes.

Q. And you went there to see if you could fix it up and take this property? A. Yes.

Q. Now, you didn't take the property that night, did you? A. No. 10

Q. Why didn't you? A. Because Mr. Gurbisz, he wanted all cash, and we had settled it up between ourselves to give the \$650 off from the cash, and afterwards she changed her mind; she says, "We settle it up and take that \$650 from the third mortgage of \$900."

Mr. Vickers: Could we find out who said this? 20

By the Vice-Chancellor:

Q. Who said this to you? A. They was talking about that in Judge Brenner's office.

Q. Who were "they"? A. There was Mrs. Gurbisz, and there was Mr. Sanborn, Judge Doherty and Judge Brenner.

By Mr. Doherty:

Q. Well, did Judge Brenner speak, too? A. Yes, he did speak. 30

Q. What did Judge Brenner say about how that \$650 should be paid? A. About that \$650?

Q. Yes—don't guess now—do you remember? A. I don't remember.

Q. You, at that time, were living in the Gurbisz house, were you? A. Yes.

Q. You were a tenant when you made the contract with them? A. Yes. 40

Mike Kohoot, direct.

Q. And are you still living there? A. No.

Q. How did you get out?

Mr. Vickers: How is that material?

10 A. Judge Brenner sent me a letter from the Court I should move out.

Mr. Doherty: I want to show they were dispossessed.

The Vice-Chancellor: Suppose they were?

Mr. Doherty: That he was even removed from the possession of the property he had at that time.

The Vice-Chancellor: Oh, the relation of landlord and tenant existed?

20 Mr. Vickers: We will admit that he was dispossessed for non-payment of rent, if they will admit that he did not pay the rent.

The Vice-Chancellor (to Mr. Doherty): Do you accept that admission?

Mr. Doherty: No.

Q. Do you know whether or not the Gurbiszses still own your store?

Mr. Vickers: Objected to. We will admit that they sold it for \$280.

30 Mr. Doherty: Will you let us have the date?

Mr. Vickers: July 7th. \$280 was the price.

Mr. Doherty: And it is admitted that, upon rescission at the present time, they could not restore the business and the store?

Mr. Vickers: Yes, we will admit that.

The Vice-Chancellor: Was that July 7th of this year?

40 Mr. Vickers: Yes.

Mike Kohoot, cross.

Cross examination by Mr. Vickers:

Q. Do you speak the same language that Mr. and Mrs. Gurbisz speak? A. Yes.

Q. And when you and they conferred, did you talk English, or talk in Yiddish, or Polish, or what language? A. We talked Polish. 10

Q. And you and they—that is to say, you and the Gurbiszses had a number of talks after it was found out that there was an encroachment of the property next door on the property in which you then lived, and which you were going to buy—is that right? A. Yes.

Q. Now, that paper that you took to Judge Doherty on October 13th you received from Mrs. Gurbisz, didn't you? A. Yes. 20

Q. She had signed it, told you to take it to your lawyer, and if it was satisfactory, that you should sign it and give it back to her—is that right? A. Yes, sir.

Q. That is true, is it not? A. Yes, sir.

Q. Were you in the Chancery Court when the case of the *lis pendens* came up before Vice-Chancellor Bentley? A. Was I in the Chancery Court? 30

Q. Yes. A. No.

Q. You were in Judge Doherty's office while he dictated the letter on October 13th to Judge Brenner, is that right? A. Yes.

Q. And had you then told Judge Doherty, before he dictated this letter, that you were satisfied with the terms of that agreement which Mrs. Gurbisz gave you, except that you wanted to be sure that you were going to get the \$120 back? A. \$120 security, you mean?

Q. Yes. A. No. 40

*Mike Kohoot, cross.*

Q. Well, when you had this agreement in Judge Doherty's office what were you dissatisfied with about it? A. I don't understand that question.

10 Q. What didn't you like about it—wasn't it all right? A. I didn't like it because they did not put in the contract that I was supposed to get the \$120.

Q. That is what I say, exactly—that is the only thing that is wrong with it, is not that right? A. That is right.

Q. And you heard Judge Doherty dictate a letter to Judge Brenner to make sure that you would get the \$120, is not that right? A. I didn't hear it; I didn't see it.

20 Q. You just told Judge Doherty that you were there when he dictated the letter—is that true, or is it not true? A. He wrote some letters, but I don't know what it was.

Q. When he wrote the letter did he hand you back the agreement? A. Yes.

Q. What did he say to you when he handed you the agreement? A. He says, "Go on home now, and tell this gentleman he should search the house, and then, when he finishes the search we are going to make the title."

30 Q. "Going to make the title"—right; and didn't you, then, afterwards, have a talk with Judge Brenner about the \$120? A. No.

Q. Sure about that? A. Yes.

Q. Didn't you have a talk with Judge Brenner, and didn't he tell you that that was perfectly all right, that his clients (that is, the Gurbiszes) had to pay you that \$120 in addition to the \$650—is not that so? A. No.

40 Q. Do you remember being in Judge Brenner's office and he saying to you that, because the title

*Mike Kohoot, cross.*

was going to be passed so soon, and that you and the Gurbiszes had agreed upon the terms of the settlement, it was not now worth while to sign the written contract—do you remember that? A. No, I don't remember.

Q. You don't remember it? A. I don't remember it. 10

Q. Well, you say that no such thing was said by Judge Brenner, do you? A. I don't remember.

Q. Well, I am asking you whether you will say that it did not happen? A. I don't know.

The Vice-Chancellor: I guess that is the best you can get.

Q. Now then, you and your wife and Mr. and Mrs. Gurbisz and Mr. Sanborn were at Judge Brenner's office on January 7th? A. Yes. 20

Q. Before Judge Doherty arrived there—is that right? A. Yes.

Q. And at that time didn't you tell Mr. and Mrs. Gurbisz, and didn't you tell Judge Brenner, to go ahead and make up the settlement according to the agreement which you and the Gurbiszes had made together and as he had drawn it up in this paper—didn't you tell him that before Judge Doherty arrived? A. No. 30

Q. And didn't Judge Brenner write down the figures while you were there, and didn't you see them, and didn't he put them on this piece of paper which I show you now? A. I don't remember.

Mr. Vickers: I ask that it be marked for identification.

(The paper was thereupon marked G. F. V. 3 for identification.)

Q. Didn't Judge Brenner tell you that he would 40

Mike Kohoot, cross.

figure this matter out, according to the agreement which you and the Gurbiszes had made, and then you and the Gurbiszes could settle the \$120 between you—is not that so? A. I don't remember.

10 Q. You don't remember. After Judge Doherty arrived at Judge Brenner's office on January 7th, then some question arose as to how much cash you were to pay to Gurbisz, is not that right; after Judge Doherty got down there, then it was a question as to how much cash you had to pay to Gurbisz—is not that right? A. Yes, I remember when she was offering me \$650, so I was supposed to pay her \$350 more.

20 Q. \$350 more—let us see if we get this straight; first you were to ket \$1,500 for the store—is that right? A. No.

Q. Well, is it not so, now—or weren't you to get \$1,500 for the store?

The Vice-Chancellor: Well, \$1,500 is the agreed value of the store.

Mr. Vickers: Yes, sir.

30 Mr. Doherty: Judge Brenner and I have been discussing this, and we are not in accord as to the proposals made at that meeting—

Mr. Vickers: Do you mean you were discussing it while I have been examining this witness?

Mr. Doherty: I have, I must admit; we have been discussing together.

Mr. Vickers: Well, I wish you had let me know it before, because I want to know where I am, I want to be vigilant. Make your statement—what is it?

40 Mr. Doherty: It is just agreed that, as an

Mike Kohoot, cross.

upshot of this conference down there, three proposals were made—1, to go through with the original contract; 2, to go through with the settlement of October 13th—the proposed settlement of October 13th—

Mr. Brenner: Not “the proposed settlement”—the settlement. 10

Mr. Doherty: Well, to go through with the settlement of October 13th by reducing the price \$650 and paying the balance in cash; 3, returning the stationery store and keeping the property. One is execution; another, rescission; the other, compromise.

The Vice-Chancellor.: Well, what happened?

Mr. Doherty: All three were rejected. 20

The Vice-Chancellor: Who rejected them?

Mr. Doherty: I did, because of the second proposition, to reduce the price \$650 and making the balance of cash through an additional burden on this title, because the original contract had provided for a mortgage.

30 Mr. Vickers: Now, it seems to me we are right at the crux of this case. If that is the situation, I think we can submit this to the Court on the question of the construction of the third paragraph of the agreement drawn by Judge Brenner, which, under the evidence now arising out of the complainant's case, was acceded to by Judge Doherty, except for the \$120 and the item of his fees.

Mr. Doherty: And the *lis pendens*.

Mr. Vickers: No, the *lis pendens* was not up at that time.

Mr. Doherty: It was later. 40

Mike Kohoot, cross.

Mr. Vickers: I know, but that was removed and does not figure in this case. Now, that is the situation; and, with counsel's consent, I would like to submit the paragraph to the Court and, if the Court says—

10 Mr. Doherty (interrupting): I haven't seen this.

Mr. Vickers: You passed on it.

20 Mr. Doherty: Yes, that appeared to have been a satisfactory arrangement at that time, and would have been the basis of the settlement, except for the *lis pendens*. Then, in January, the same terms were proposed, and they were not accepted at that time because of the financial character of them. The original contract provided for the \$1,000 mortgage, or for the payment of the \$1,000; the proposal of January 7th (and, indeed, the proposal of October 13th) called for the payment of \$1,350. In October, according to what the complainant told me, he was satisfied with that part if the deal could have been carried through, but it was blocked by the *lis pendens* in January; and he was not satisfied with it.

30 Mr. Vickers: Well, I want to ask if we can settle one important point? I think this case is before the Court on all points of fact and law if counsel will admit that, subsequent to the writing of this letter of his on October 13th, we went ahead and had the *lis pendens* removed? It seems to me, that settles the whole situation. Acting on that, we had the *lis pendens* removed.

40 Mr. Doherty: I know; but are you removed from all duty to give us title?

Mike Kohoot, cross.

Mr. Vickers: No; we say now it clearly appears in the complainant's case, out of the mouth of the complainant himself, by the letter of Judge Doherty, that there was an oral agreement, which was reduced to a written memorandum which was satisfactory to this complainant, subject to an understanding that there was no waiver of the security for rent. Now, then, afterwards the *lis pendens* question came up, and we removed that; so that there was nothing to prevent them from, or justify them in refusing to carry through the terms of their settlement agreement, on which we acted, and had the *lis pendens* removed. It seems to me, that sums up the questions of fact and presents the questions of law to your Honor.

Mr. Doherty: Our bill was pending here in this Court for the establishment of the lien before any of these gestures were undertaken. They were gestures that had as their object the closure of this difficulty, and they simply failed, that is all; the parties never got together; so we are reverted back to our original situation.

The Vice-Chancellor: Well, have you closed your case?

Mr. Vickers: No; if we do not agree that that is the situation, we will have to go on. I have no further questions for this witness.

By Mr. Doherty:

Q. Were you ever present in Judge Brenner's

Mary Senyk, direct.

office with Mrs. Senyk before she came to me? A. No.

Q. Don't you remember—

Mr. Vickers: He says "no."

The Witness: No.

10

MARY SENYK, sworn.

*Direct examination by Mr. Doherty:*

Q. You know the Kahoots, and you know the Gurbiszes? A. Yes, I know them.

Q. You live in Bayonne? A. Yes.

Q. You are in the real estate business? A. Yes.

20

Q. And you had something to do with this contract? A. Yes, I represented the two parties at the sale.

Q. You were the broker that brought them together? A. Yes.

Q. Now, in September, before September 29th, were you ever present at any occasion when both parties were together talking about this encroachment? A. Never.

Q. You were not? A. Never.

30

Q. Well, did the parties ever talk to you, or did you ever talk to Gurbisz about the encroachment? A. No.

Q. You did not? A. No.

Q. Did you ever talk to Judge Brenner about the encroachment? A. No, I didn't know Judge Brenner until after the contract was made. Mrs. Gurbisz gave Judge Brenner the case afterwards, and I didn't ask him anything before.

40

Q. Well, did Mr. Gurbisz ever say to you that unless Kahoot took this property with the encumbrance on, that he would sell the real estate and

Mary Senyk, direct.

sell the store and go into bankruptcy? A. Well, that was when he made the settlement; I think, before the last settlement, the 13th.

Q. Before the 13th of October? A. I was at Judge Brenner's office a couple of times trying to make a settlement.

10

Q. Well, did Gurbisz say that? A. No, Judge Brenner—"either you take the house the way we settle it, or you take the store back. Maybe she might sell out the store, and her husband be bankrupt and you not get anything."

Q. And you told that to me before this case was started, didn't you?

Mr. Vickers: I object to that.

The Vice-Chancellor: I sustain the objection.

20

Mr. Doherty: We make an allegation of this situation in the bill.

The Vice-Chancellor: I sustain the objection as to what she told you. The allegations in the bill are sufficient.

Q. Do you know the date when Judge Brenner told you that? A. I couldn't remember the date. I think, on the 13th.

Q. What—of October? A. Yes, October 13th, when we made the settlement.

30

Q. You don't know how we got it in the bill on September 29th? A. I couldn't remember what date, because I was there a couple of times. I tried to bring the two parties and settle it up.

Q. You were down at the meeting in Judge Brenner's office on the night of January 7th? A. Yes, I was there.

Q. And you heard these different proposals made? A. Yes.

40

*Mary Senyk, cross.*

Q. And you, yourself, were talking down there about it? A. Yes, we were talking.

Q. And you know the transaction did not go through at that time because they wanted more cash than they wanted under the original agreement? A. Yes; the contract says it should be a  
10 third mortgage, \$900, and when we came to the settlement Judge Brenner wanted to wipe off the third mortgage and pay all cash.

Q. That is why they could not agree?

Mr. Vickers: I object; that calls for a conclusion on the part of the witness.

The Vice-Chancellor: All right; strike out the past question.

20 *Cross examination by Mr. Vickers:*

Q. Mrs. Senyk, at that time, on January 7th, when you were down at the office of Judge Brenner, and before Judge Doherty arrived, did you see Judge Brenner figuring up on a paper? A. No.

Q. Didn't see him? A. No.

Q. Did he say anything about how much would be due? A. Well, he did say something about how much would be due; he did say, but I couldn't  
30 remember how much.

Q. You could not? A. No.

Q. Was there anything said at that time about the \$120 for security for rent? A. At that time I didn't hear anything about security.

Q. But you knew about it before? A. Well, when we made the contract—

Q. Wait a minute, please, lady—the contract does not say anything about it, so do not tell us  
40 what it is supposed to say. You knew that Mr.

*Mary Senyk, cross.*

and Mrs. Kahoot expected to get the \$120 security for rent, and also the \$650 on account of the encroachment—you knew that, didn't you? A. Yes.

Q. That was talked over by all the parties, and was satisfactory, so far as you could tell from their conversation, is that right? A. Well, when  
10 he made—

Q. (Interrupting.) Cannot you answer that; it was satisfactory; they were agreed to it? A. We didn't talk anything about security when we made that agreement for \$650; I didn't hear anything about "security."

Q. Yes, lady, but, afterwards, when Judge Doherty wrote the letter, then the question of the \$120 for security for rent was talked about, is not that so? A. Well, the letter I didn't see, because  
20 the letter I did not read, at all; I didn't see any letter.

Q. Well, after October 13th was the question of \$120 for security for rent talked about? A. Well, I don't know about that.

Q. Well, if you don't know about it, all right. You don't read English, do you? A. Not English, no.

Q. Then you don't know actually what was in the contract? A. No—in the contract, I know, because Mr. Sanborn read it to me; he explained  
30 it to the parties.

Q. Where were you? A. I was in the deal.

Q. Well, where were you? A. I was in Sanborn's house when they made the contract, and I was in Mr. Kahoot's store when both women signed the contract.

Q. In Kahoot's store? A. Yes.

Q. And you say that at that time Mr. Sanborn explained— A. To them.  
40

*Alfred Brenner, direct.*

Q. Wait a minute; you are too quick; you say, at that time, Mr. Sanborn explained that the Kahoots were to get \$120 for security for rent—is that right? A. Yes.

10 Q. And you say that he then told them that that was in the contract—is that right? A. That is what he explained to them.

THE COMPLAINANTS REST.

THE CASE FOR THE DEFENDANTS.

ALFRED BRENNER, Esq., sworn.

*Direct examination by Mr. Vickers:*

20 Q. Judge Brenner, you are a practicing attorney and counsellor-at-law of this State? A. I am.

Q. And you are the person who has been referred to here as having acted for Mr. Frank Gurbisz and Lena Gurbisz, his wife, in regard to this contract for an exchange of property? A. Yes, sir.

Q. From whom did you first learn, if you did learn, that the contract, C-1, was the subject of modification discussion between the parties to it? A. From Mrs. Gurbisz.

30 Q. After having been informed by Mrs. Gurbisz, did you have any conversation with Mr. Sanborn on the subject? A. I did.

Q. While Mr. Sanborn was representing either both of the parties or the Kahoots? A. When he was representing the Kahoots.

Q. At that time you had been retained to represent Mr. and Mrs. Gurbisz—is that correct? A. That is correct.

40 Q. What, if anything, was said in that conversation respecting a modification agreement, or

*Alfred Brenner, direct.*

agreement arrived at between the parties to this contract, concerning the alleged encroachment?

Mr. Doherty: I object to that as hearsay.

The Vice-Chancellor: What is your objection?

10 Mr. Doherty: My objection is that this testimony is remote, as to what conversation there was between the respective attorneys and these parties, in the light of the fact that the parties themselves eventually got together and discussed the matter.

The Vice-Chancellor: I will overrule the objection.

A. The conversation was over the telephone with Mr. Sanborn at a time when Mrs. Gurbisz was in the office. I told Mr. Sanborn that Mrs. Gurbisz had reported to me that there was a conference in his office the previous night between the Gurbiszes and the Kahoots, in which they had arrived at a settlement, the settlement being that the purchase price of the property was to be reduced to the extent of \$650, with the further understanding that the balance of the purchase price was to be paid in cash at the time of closing title, instead of a mortgage being accepted for a part of that balance. Mr. Sanborn, at that time, told me that there had been such a conference, and that that agreement had been made. I told him then that I would reduce that to writing and would submit it to him, or to Mr. Kahoot, for signature.

30 Q. What was said by Mr. Sanborn to you respecting your reducing it to writing? A. He said it was all right for me to do so.

40 Q. I show you a paper marked G. T. V. 1 for identification, and ask you whether that is the

*Alfred Brenner, direct.*

paper which you thereafter drew? A. I drew that paper right after the telephone conversation, and delivered two copies of it to Mrs. Gurbisz.

10 Q. I show you a carbon copy of a letter addressed to you by Judge Doherty, marked G. T. V. 2 for identification, and ask you whether you received the original of that? A. The original was received and has since been mislaid.

Mr. Vickers: I offer that letter in evidence.

20 Mr. Doherty: I object to the relevancy of it; it establishes nothing more than my expression that a party to a purported contract assented to it. It is incompetent, in view of the contract not having been signed by the parties themselves.

The Vice-Chancellor: Your theory is that there was no contract entered into because it was a verbal contract, not reduced to writing?

30 Mr. Doherty: Well, I do not regard this transaction at all as related to a new contract; it was an ancillary negotiation for the settlement of the controversy under a subsisting contract, which negotiation never became effectual.

The Vice-Chancellor: Well, I will overrule the objection; I will let it in for whatever it is worth.

(Admitted and marked Exhibit D-1.)

40 Q. Judge Brenner, the agreement which is referred to in that letter of Judge Doherty's, is that the agreement which is before you, marked G. T. V. 1 for identification?

Mr. Doherty: I object to that, as calling

*Alfred Brenner, direct.*

for a conclusion. He doesn't know what the agreement was before me.

Mr. Vickers: I will withdraw the question.

10 Q. Was there any other agreement drawn by you in the matter of a compromise or adjustment of this controversy between the Kahoots and the Gurbiszes? A. No, sir.

Q. Prior to the receipt by you of the letter of October 13th, 1925, had you had any conference or arrangement with Mr. Sanborn for the passing of title in this matter other than the date fixed in the contract, C-2? A. No; the date fixed was for October 13th, but this letter came to me subsequent to that date.

20 Q. Although it is dated on that date it came to you subsequently; now, I ask you whether you had any arrangement for the passing of title on a day other than that expressed in the agreement of exchange, C-1, and before January 7th, 1926? A. Yes, sir.

30 Q. And what was that date? A. The time was indefinite; there was an arrangement made for the passing of title, but it was to be subject to a subsequent fixing by Mr. Sanborn and myself. That conference took place on October 13th.

Q. Now, on October 13th did the parties come to your place, and were you—

The Vice-Chancellor: One moment—the contract provides for passing title on September 15th.

Mr. Vickers: That is right.

The Vice-Chancellor: Well, there was something said about "October 13th"?

40 Mr. Vickers: This was subsequent to the filing of the bill, your Honor; when the title

*Alfred Brenner, direct.*

was not passed on September 15th, then on the 29th of September this bill was filed. These negotiations followed the filing of the bill.

The Vice-Chancellor: I see. Proceed.

10 Q. Now, on October 13th did the parties come to your place, and were you prepared to pass the title? A. I was prepared, yes, sir—but my answer to the previous part of that, as to whether the parties were in my office, is no, they were not all there.

*By Mr. Doherty:*

20 Q. Was this on the 13th, Judge? A. On the 13th of October.

*By Mr. Vickers:*

Q. Well, who was there? A. Mrs. Gurbisz was there; and I had an arrangement to call Mr. Gurbisz from the store at the time that the rest of the parties came.

Q. Who do you mean by "the rest of the parties"? A. Mr. and Mrs. Kahoot, and Mr. Sanborn.

30 Q. Did Mr. Sanborn come there? A. He did not until about eight o'clock.

Q. And what was said by him with respect to passing the title at that time? A. I had called Mr. Sanborn's office in the afternoon to remind him of the fact that the title was to be closed that night at 7:30; he was not there. When Mr. Sanborn did not get there, shortly after 7:30 I called his home, and he said he would be right down. He came in about eight o'clock, and at that time told me that he had not notified his people to be there because  
40 he had not then completed his search, saying that

*Alfred Brenner, direct.*

he had been very busy, and, if my recollection serves me correctly, he had some illness in his family at that time—I think there were two of his children that were ill—and he asked for a further continuance of the passing of title so that he could run down his search. 10

Q. On behalf of your clients, did you assent or dissent to the matter? A. I assented to it, and, instead of fixing a definite date for closing, said that he and I could agree on a date subsequently, as soon as his search was completed.

Q. At that time, Judge Brenner, had this agreement been drawn by you, and had it been turned over by you to Mrs. Gurbisz? A. It had been turned over by me to Mrs. Gurbisz several days before that. 20

Q. And I notice that in the draft the month of "October" is written out—does that refresh your memory as to whether it was drafted during the month of October, or was it drafted prior thereto? A. It was drafted in the month of October, because it was subsequent to the filing of the bill, which was not filed until September 29th.

Q. How soon after this 13th of October (if it was after the 13th of October) were you first informed as to the *lis pendens*? A. Oh, I presume it was a matter of a week or so. 30

Q. And with whom did you confer respecting that? A. With Mr. Sanborn.

Q. What arrangements did you and Mr. Sanborn make regarding that *lis pendens*? A. At first I seriously questioned the *lis pendens* affecting the interests of the Gurbiszes in this property, and Mr. Sanborn was inclined to agree with me that it did not affect it; we subsequently agreed, however, to avoid all question, that I should go into the Court 40

Alfred Brenner, direct.

of Chancery and make an application for its removal, which I did.

Q. Before Vice-Chancellor Bentley? A. Before Vice-Chancellor Bentley, to whom the matter had been referred.

10 Q. And was that done prior to January 7th, 1926? A. Yes; shortly prior, because my recollection now is that Vice-Chancellor Bentley, so as to expedite the matter, set it down during the holiday week.

By the Vice-Chancellor:

Q. That is, between Christmas and New Year's? A. Between Christmas and New Year's. He intended that the Court should take a vacation during that time, but simply put the matter on so that this title could be passed. That was the reason for it.

20

By Mr. Vickers:

Q. Prior to January 7th, 1926, had you any conversation with Mr. Kahoot, one of the complainants in this case, respecting the agreement, the draft of which is before you and marked for identification? A. I did.

30

Q. Now, how long prior to January 7th, and at what time with relation to the decision by Vice-Chancellor Bentley? A. It was only a few days after October 13th, and was the result of a conversation which I had with Mrs. Gurbisz when she reported to me about this \$120 item.

Q. Was it before or after you received the letter from Judge Doherty which referred to the \$120 matter? A. It was after.

Q. After that? A. Yes.

40

Q. But Mrs. Gurbisz, independent of the letter, reported to you about the \$120? A. Yes, sir.

Alfred Brenner, direct.

Q. What was your conversation with Mr. Kahoot about the \$120? A. Mr. Kahoot told me that I had left out of the agreement the \$120 security for rent. I told him that I had already received a letter from Judge Doherty calling my attention to that, and I had telephoned to Judge Doherty's office saying that it was left out by mistake. I further said to him—I asked him whether the contract was all right outside of that, and he said "Yes," and I said, "Well, it won't be necessary to sign it as long as we have all agreed on the terms of it, and I have a letter from Judge Doherty in which he has said it was agreeable to him."

10

Q. What did Mr. Kahoot say, if anything, when you made that remark? A. He said, "All right," and he asked me when we were going to pass title, and I said I was waiting for Mr. Sanborn, and, as soon as the search was through, which I thought would be within a few days, we would pass title.

20

Q. That was before the *lis pendens* had been discovered, as far as you know? A. Yes; I don't know whether it was before it was discovered, but it was before he made mention to me of it.

The Vice-Chancellor: It must have been discovered before the 13th, because Judge Doherty mentions it in his letter.

30

Mr. Vickers: No, your Honor; it is only the \$120.

The Vice-Chancellor: No, but you asked him if evidence of the *lis pendens* was discovered before or after October 13th.

The Witness: I am talking about the *lis pendens* that I had dismissed before Vice-Chancellor Bentley.

40

The Vice-Chancellor: Well, is not that

Alfred Brenner, direct.

the same *lis pendens* that Judge Doherty refers to in this letter?

The Witness: Judge Doherty does not refer to any *lis pendens* in that letter.

10 The Vice-Chancellor: Yes, it is right at the foot of it.

The Witness: Oh, he refers to his *lis pendens* in this case. He had already filed the bill for this vendee's lien, and he asked me to make a deduction of his fees at the time of closing title.

The Vice-Chancellor: Oh, that refers to the *lis pendens* in this case?

The Witness: In this case.

20 Q. What took place on January 7th at your office when these parties appeared there? A. I made the arrangement with Mr. Sanborn, right after Vice-Chancellor Bentley had signed the order dismissing the *lis pendens*, fixing January 7th as the date for closing title, at about seven o'clock in the evening. Mr. and Mrs. Gurbisz were present; Mr. and Mrs. Kahoot were present; I believe Mrs. Senyk was; and Mr. Sanborn was present, all arriving at the time that had previously been fixed.  
30 We then sat down—Mr. Sanborn and I—and figured out the allowances that were to be made, which included the item of \$650, previously agreed upon, as the reduction from the contract price, and the insurance that was to be allowed. All of those figures were arrived at definitely before Judge Doherty appeared.

40 Q. I show you a paper marked G. T. V. 3 for identification, and ask you whether that is in your handwriting, and whether that is the paper you have been referring to? A. That is in my hand-

Alfred Brenner, direct.

writing, and is the paper I referred to, and was referred to by both Mr. Sanborn and myself.

Q. Previous to January 7th, concerning which you are testifying, did you and Mr. Kahoot have any conversation regarding the \$120 and how it should be taken care of at the time of settlement? 10

A. Only at the time that Mr. Kahoot came to the office and told me that I had left it out of the contract; and I said that that could be taken care of at the time of passing title, that it had simply been left out of the agreement through an oversight.

Q. And at the time of making up these figures was the \$120 included in the deductions and allowances, or what, if anything, had been said regarding the way in which it should be taken care of? 20  
A. It is not included in the calculation; I cannot recall the reason why; it was a minor detail concerning this whole transaction, and I haven't any clear recollection of it.

Q. Were the figures given in this calculation made known by anybody to the parties interested—that is to say, Mr. and Mrs. Kahoot and Mr. and Mrs. Gurbisz? A. They were there while it was being figured.

Q. Well, in their presence? A. In their presence. 30

Q. And discussed? A. And discussed.

Q. Was any of the information contained in here, respecting the insurance, etc., obtained from the parties themselves? A. Yes; the insurance policies were delivered to me by Mrs. Gurbisz right at that time, and Mr. Sanborn and I sat down and figured out what the allowance on the insurance should be. On the first mortgage, held by the Mechanics Trust Company, Mrs. Gurbisz 40

*Alfred Brenner, direct.*

10 produced a receipt showing the last time that interest had been paid; and also produced a receipt from the second mortgagee, Fenchal, showing the balance due on that mortgage and the time when the last interest was to be paid. That second mortgage of Fenchal's was an installment mortgage, payable monthly.

Mr. Vickers: I offer this statement in evidence.

(The same is admitted without objection, and marked Exhibit D-3.)

Mr. Vickers: And I offer in evidence the draft of the contract which has been referred to as drawn by Judge Brenner.

20 (The same is admitted without objection, and marked Exhibit D-4.)

*By the Vice-Chancellor:*

30 Q. What is this last item—what does that represent? A. "Rent, second floor, paid to January 8th; first floor occupied by Gurbisz"—that shows that there was no allowance of rent because from the second floor the Kahoots would collect the rent the next day; and inasmuch as the other floor was occupied by Gurbisz, there would be no deduction for rent.

*By Mr. Vickers:*

40 Q. After Judge Doherty arrived on January 7th, at your office at the time the parties were there, what, if anything was said or done respecting this settlement? A. I showed Judge Doherty the settlement statement, and he said something to the effect that it would not take us very long to get through. Then Mr. Kahoot told Judge Doherty that he wanted to see him, wanted to talk to him, and he

*Alfred Brenner, cross.*

went out of the room, and they then went into an adjoining room—I don't know, of course, what they said in that adjoining room—but it was reported to me when Judge Doherty returned.

Q. And when Judge Doherty returned, what objection, if any, was made to the settlement as drafted by you? A. He said that Kahoot did not have sufficient cash, and wanted the Gurbiszes to go through with the proposition to accept a third mortgage for the balance of the purchase price, deducting the \$650 from the \$1,000 that was to be paid under the original contract at the time of passing title; and I told them then that these people certainly could not consent to the reduction of \$650 and then take practically the entire purchase price by way of mortgage rather than cash; and that the agreement as drawn and accepted by them provided that it was all to be paid in cash at the time of closing title. 10 20

Q. And in that latter statement did you refer to the paragraph which appears as Paragraph 3 on page 2 of the written agreement, among others? A. That is the paragraph.

Mr. Vickers: It being in evidence, I submit the paragraph to your Honor (handing the paper to the Court for its inspection). 30

Q. And on that rock of difference of opinion the deal was temporarily wrecked? A. Yes, sir.

*Cross examination by Mr. Doherty:*

Q. Judge, when were you called in to this matter originally—can you place the date? A. It was before the bill was filed by you; the exact date I could not possibly give. 40

Alfred Brenner, cross.

Q. Do you know whether it was before the time stipulated for passing the title? A. Yes, it was.

Q. It was? A. Yes.

Q. Was it prior to September 15th? A. Yes, sir.

10 Q. You were aware that the matter was being held up because of the discovery of an encroachment? A. I was aware that there was a claimed encroachment. I did not know of the existence of the encroachment at that time.

Q. Well, that was brought to your attention as the reason for you being consulted, is that so? A. That is correct.

20 Q. Now, you say that on an early date in October Mrs. Gurbisz was in your office and you called up Sanborn on the 'phone? A. With reference to what, Judge?

Q. Well, I am only going by your testimony. I am referring to the day on which you drew this contract of settlement. A. Yes; that is correct.

Q. Can you tell us how early in October that was? A. No, I cannot.

30 Q. Now, Sanborn said the parties had been around to his place the night before and had come to some sort of an understanding? A. No, he said that they had arrived at an agreement.

Q. "Arrived at an agreement"—he did not say that he drew it up, did he? A. No, it was verbal, as far as he was concerned.

Q. He did not explain why it was not drawn up and signed—he left that to you? A. He did not say he "left it to me," he simply said they had made an agreement, and told me the terms of it.

40 Q. Well, did he mention anything to you about whether the agreement had been signed the night before? A. I mentioned it to him; I knew that

Alfred Brenner, cross.

there had been no signed agreement, and I then suggested that the terms of the settlement be reduced to writing.

Q. So the suggestion emanated from you? A. That is correct.

10 Q. The day after Kahoot had been in Mr. Sanborn's office? A. That is correct.

Q. And did you draw up the agreement, right there on the spot, while your client was with you? A. Right after the call I drew it up, and delivered two copies to her.

Q. Did she sign any copy? A. My recollection is that she did.

20 Q. Well, have you got any of those drafts that you prepared? A. No, sir, I only have the draft that was in my file.

Q. Do you think that the draft that was submitted to me was signed by the Gurbiszes? A. Not by the Gurbiszes.

Q. Well, by anybody? A. I think by Mrs. Gurbisz; I won't say positively.

Q. Well, you do not profess to have seen them sign it, do you? A. I think I saw Mrs. Gurbisz sign it; I won't say positively.

30 Q. You are not sure; but at that time you dreamed nothing about the *Rosenblum lis pendens*, did you? A. No, sir.

Mr. Vickers: Well, how would it be material whether he "dreamed" about it, or not?

40 Q. You drew that settlement agreement in contemplation of facilitating the matter on the basis of a reduction of the price? A. I drew it believing that that would obviate all objection, because the only question that had been raised, as far as I was concerned, was the encroachment concerning

Alfred Brenner, cross.

which Mr. Sanborn and I had previously conferred.

Q. And it was after that that the matter of this *lis pendens* was brought to your attention? A. That is correct.

10 Q. You then abandoned all expectation that the title would be passed under this settlement agreement, after you heard of the *lis pendens*, didn't you? A. No, I did not.

Q. Well, you regarded that *lis pendens* as being of sufficient significance for you to resort to the Court here to have it lifted? A. I did not.

Q. Well, didn't you take any measures in that matter? A. Yes, after the insistence of Mr. Sanborn, who thought there might be a question that 20 that affected this title.

Q. Well, you respected their objections to the extent of coming down here and having that *lis pendens* wiped out? A. I did so simply for the purpose of eliminating any question of its being an unmarketable title.

By the Vice-Chancellor:

Q. Why do you say the *lis pendens* did not affect this property? A. Israel Rosenblum had been 30 the owner of this piece of property. He, through an intermediary, conveyed the property to his wife. Subsequent to the conveyance to Mrs. Rosenblum a judgment had been entered in the Supreme Court; that was some time after the conveyance had been made. Title was then passed—

Mr. Vickers: A judgment against whom?

A. Judgment against Israel Rosenblum was entered after the conveyance to Mrs. Rosenblum. 40 The Gurbiszes became the owners of the property,

Alfred Brenner, cross.

and after they became the owners of the property a suit was started in the Court of Chancery for the purpose of setting aside the title from Mr. Rosenblum to Mrs. Rosenblum; but the Gurbiszes had never been made a party to that suit, although 10 they were the owners of record of the property. I therefore disagreed with Mr. Sanborn for two reasons—No. 1 because the judgment was not a lien at the time that Mrs. Rosenblum had taken title; and, secondly, that the Gurbiszes, never having been made parties to that suit, that it certainly could not affect their rights in the property.

By Mr. Doherty:

Q. The proceeding against Rosenblum was in the nature of a creditor's bill, alleging that there 20 was fraud in the conveyance of this particular property? A. That is correct—this property, with other property.

Q. And the *lis pendens* described this property as being affected by the prayer of the bill? A. Yes, sir—but filed subsequent to the deed to Gurbisz; in other words, when Gurbisz took title this *lis pendens* was not on record, nor was there any judgment on record which affected the interests 30 of Mrs. Rosenblum in this property, the judgment being entered against Israel Rosenblum after Mrs. Rosenblum had taken title.

Q. But you still regarded that *lis pendens* as being a very pointed form of notice that this property was practically under ban? A. Well, I certainly did not, inasmuch—

Q. (Interrupting.) Now, in your activities to get this *lis pendens* eliminated you understood that the parties would abide by the terms that had 40 been arrived at at Mr. Sanborn's office? A. Yes;

Alfred Brenner, cross.

it was so understood by both Mr. Sanborn and myself.

Q. All during that period, Judge, did you have any information of the fact that Kahoot had never signed the contract that you drew? A. I knew he had never signed the contract.

Q. And you knew that he had never signed the contract, notwithstanding your impression as to the great desirability that the contract should be signed? A. There was no "great desirability; after both you and he had said that the terms of the contract were satisfactory, I accepted your letter as a confirmation of all of those terms that had been previously agreed upon in Mr. Sanborn's office.

Q. But Mr. Sanborn had told you originally that he knew the parties were in agreement? A. That is exactly true.

Q. Now, did you discard what Mr. Sanborn said and place implicit confidence in my assurance? A. I certainly did impose implicit confidence in your assurance; I never had any reason to doubt that you would go back on your word; I didn't believe you would go back on your word.

Q. Did you abandon all expectation of having a signed contract between these parties as soon as you heard from me? A. Yes, sir.

Q. You did? When you drew that contract you anticipated that that settlement would be carried out with reasonable speed, didn't you? A. Yes; I was ready to carry it out on October 13th.

Q. You did not figure upon dallying along until January, to get the *lis pendens* out of the way? A. There was no thought of the *lis pendens* at that time; it was only to get rid of the encroachment.

Q. So that the discovery of the *lis pendens* was

Alfred Brenner, cross.

the entire disappointment in the contract, was it?

A. No, sir; it was not.

Q. Just on what date was the *lis pendens* eliminated, can you tell us? A. No, I cannot; I know that the hearing was had before Vice-Chancellor Bentley right before January 1st.

Q. And you arranged the occasion for passing the title? A. I arranged it right after that, between Mr. Sanborn and myself. Mr. Sanborn was in court, as matter of fact.

Q. But you and Mr. Sanborn were still assuming that the parties were complaisant as to the terms that were arrived at in Mr. Sanborn's office in October, were you? A. Both Mr. Sanborn and I evidently assumed that.

Q. You hadn't heard anything first-hand from Kahoot about that, though? A. I had never heard anything from him after the day that he told me that the terms of the contract were satisfactory with the exception of the \$120, which I had left out by mistake, and told him at that time that because the title would be closed within a few days, or evidently within a few days, that it was not necessary to sign the contract.

Q. So, as the time of the conference in January came on, you met, and Mr. Sanborn and you undertook to get up a settlement agreement? A. We did, in the presence of the parties.

Q. And before that was ventured, did you ask whether the October arrangement still went? A. No, there was nothing said about it.

Q. It was still assumed that it was all right? A. Yes, sir; and our figures were on that basis, when Mr. Sanborn and I figured it out, because you will notice that I took off on the purchase price immediately the \$650.

*Alfred Brenner, cross.*

Q. Well, was I expected, while you and Mr. Sanborn were there? A. Yes, sir.

Q. Then you knew that Mr. Sanborn's views of the matter might be subject to some little modification when I arrived? A. No, sir.

10 Q. You did not? A. I did not.

Q. Well, what was I supposed to be there for—what did you expect me to do when I got down there?

Mr. Vickers: Well, that is objected to, on the ground that nobody can tell what the Judge was likely to do.

Mr. Doherty: I am trying to ascertain what was the Judge's understanding of what he thought was the extent of the authority of Mr. Sanborn.

20

The Vice-Chancellor: I will let him answer it, but I do not see that it is material.

Mr. Doherty: I will change it.

Q. Did you consider that Mr. Sanborn had complete representation of the Kahoots? A. Well, I couldn't say whether I "assumed" that, or not; I can tell you the fact as to the reason why we did not wait for you in making the calculation, if you want that.

30

Q. I do not. Now, this settlement agreement contains nothing at all in favor of the Kahoots excepting the allowance of fifteen hundred dollars?

Mr. Vickers: Objected to, on the ground that it assumes that the paper the Judge refers to and shows the witness is a settlement agreement; it is not so contended, nor does it, itself, represent a settlement.

40

Q. What do you call that (referring to the paper

*Alfred Brenner, cross.*

now shown the witness)? A. "A settlement statement."

Q. All right; the only thing favorable to the Kahoots in that is the allowance of \$1,500 for their store? A. Oh, no; there is the deduction of \$650, and the deduction for the mortgage and interest to date. 10

Q. From what date is the interest deducted on the mortgage? A. On the Mechanics mortgage the last interest payment was October 1st; the interest is computed and deducted from the amount to be paid by the Kahoots from October 1st to January 7th.

Q. Now, just why was October 1st selected? A. Because October 1st, the receipt shows, was the last payment of interest, and we were allowing the Kahoots, on the next interest that they would have to pay, what had not been paid from October 1st to January 7th. The interest was payable every six months. 20

Q. Those figures were all prescribed by yourself, were they? A. They were what?

Q. They were all settled and determined by you, weren't they? A. Oh, no; they were not; they were settled by Mr. Sanborn and me.

Q. To what extent did Mr. Sanborn have any complicity in the matter? 30

The Vice-Chancellor: What difference does it make, Judge? It is a proper settlement statement.

Mr. Doherty: Well, I wanted to get that for another thing.

Q. At this time the Gurbiszes were in possession of the real estate, were they? A. Yes, sir. 40

*Alfred Brenner, cross.*

Q. They were also in possession of the store?

A. Yes, sir.

Q. They had both? A. Yes, sir.

Q. When I arrived I told you that Kahoot said that you were demanding too much cash from him? A. No; you told me, after your conference  
10 in the other room, that Kahoot did not have enough money to settle on that basis—on the basis of all-cash balance.

Q. Yes—that the demand for cash was beyond his financial power at that time? A. Yes.

Q. And I requested you to relax the terms as to the amount of cash required? A. Yes, sir.

Q. But you were adamant? A. I don't think I was, because I said to you—

20 Q. (Interrupting.) You would not let anything off? A. No, I did not assume that position.

Q. Well, you refused to allow the transaction to proceed otherwise than upon the payment of this amount of cash that you were determined he should pay? A. No, I gave you an alternative proposition; I said if you wanted the benefit of the mortgage we would then go back to the original agreement, "we would eliminate this and go  
30 back to the original agreement, and then we would take the mortgage," but, inasmuch as you were getting \$650 allowance on the encroachment, that it did not amount to anything.

Mr. Doherty : Well, I object to that characterization.

The Witness: I said that to you, in the presence of the Kahoots; I said, "I don't think they acted in good faith when they raised the question of that encroachment, and, inasmuch as we had given them \$650  
40 (which was far beyond the value of the en-

*Alfred Brenner, cross.*

croachment) that they could not now ask that we relax on our agreement and take a mortgage for the balance of the purchase price; but if you wanted to go back to the old position we would then take the mortgage."  
10

Q. Well, your propositions were those three that have been read into the record? A. That was my proposition then, and had been my previous proposition; because, when I first took this matter up with Mr. Sanborn, after getting into the case, which was only a short time—

Mr. Doherty: Please do not talk too much.

Mr. Vickers: I think he is entitled to give the answer. 20

Mr. Doherty: I think I have the right to ask a question to which the witness may respond.

Q. You, of course, at the time when you were pressing these terms of settlement, knew the position of dominance that your client occupied in having both the property and the business?

Mr. Vickers: Objected to. 30

The Vice-Chancellor: What difference does that make? I do not see anything to it. Is not the only question here whether or not this agreement, not being in writing, is unenforcible?

Mr. Vickers: Is that remark directed to both counsel, your Honor?

The Vice-Chancellor: Yes.

Mr. Vickers: Well, I think we had better settle that question, then; if that is going  
40

Alfred Brenner, cross.

to settle his case, we might as well argue it now.

Mr. Doherty: Well, suppose you let me proceed.

10 Mr. Vickers: Well, no; the Court addressed a question to us; suppose we let the Court do some of this "conducting."

The Vice-Chancellor: The serious question here is whether or not this agreement was valid, or was it within the statute of frauds.

Mr. Vickers: I take it that a modification by parol of an agreement in writing is permissible.

20 The Vice-Chancellor (to Mr. Doherty): Well, you may go ahead.

Q. You say that the action that you took in respect to getting this *lis pendens* eliminated was merely in deference to the view that Mr. Sanborn had of the effect of that *lis pendens*? A. Yes, sir.

30 Q. It was not influenced by the offer to make this composition agreement, was it? A. Well, at the time that this "composition," as you call it, was made there was no question of a *lis pendens*.

Q. There was no conduct at all on your part, or on the part of your clients, influenced by the proffer on the composition, was there?

Mr. Vickers: With respect to the *lis pendens*, or what?

Q. With respect to anything—there was no change of position, at all, as the result of that? A. I do not quite understand that question, Judge.

40 Q. I want to find out to what extent you or your clients went to any expense, or change of position

Alfred Brenner, cross.

as a result of the offers made in October to settle this case?

10 Mr. Vickers: That is objected to, on the ground that he eliminates conduct by the witness on behalf of the defendants, and the defendants themselves, as a result of the agreement. This is only a proffer of agreement. He eliminates any question of conduct or attitude as the result of any agreement that is alleged to have been consummated.

The Vice-Chancellor: I will overrule the objection.

20 A. Well, I went to none, because I was not interested in the matter, except to settle it for my clients; but they suffered a loss of \$650 from the purchase price, and the loss of the benefit of a defense which they would have had had the Ka-hoots held to their original position.

30 Q. What defense? A. When Mrs. Gurbisz came to me she reported to me that that provision of the contract relative to encroachments had never been mentioned to her, saying, at that time, that when Mr. Sanborn asked her whether a survey had been made, that she told him that a survey was in the Bank, that the Mechanics Trust Company had loaned money and had a survey, that she at that time knew nothing of encroachments, and that there were no encroachments mentioned. After I came into the case I told that to Mr. Sanborn, and said to him that I did not care to raise a defense, and suggested to him that, inasmuch as this deal had just then been made (only a week or so having passed between the making of it and the time that these people came to me) that we 40 could put them all back in the same position—we

*Alfred Brenner, cross.*

deliver back the store in the same condition it was, and they should cancel the contract.

Q. Were you present here when Col. Vickers started to cross examine Mr. Sanborn today? A. Yes, sir.

10 Q. And you heard the Colonel inquire concerning the circumstances of this contract being signed?

A. Yes, sir.

Q. Did you consider that he came down here with the idea that that defense had been foregone?

Mr. Vickers: That is objected to, as to what Mr. Sanborn's idea was in the situation; I do not know how that binds this defendant.

20 The Vice-Chancellor: I think I will sustain the objection.

Q. Aren't you aware, Judge, that that defense still survived in full vigor until the Vice-Chancellor stopped it today? A. No, sir; I never believed that the defense existed in its full vigor because of the fact (and I presume that the Colonel was unaware of it) that in the answer I admitted the contract, because I did not want to raise any question that another member of the Bar would have a contract executed which he did not read or explain.

30 Q. Well, was it to conciliate the Kahoots, or to conciliate Mr. Sanborn, that you admitted the contract? A. I admitted the contract because, to me, it did not make any difference; the matter having been supplemented by this other contract, it certainly did not become necessary to raise that defense.

40 Q. Well, outside of that, was any alteration

*Alfred Brenner, cross.*

stated as a result of the offer to settle the case?

A. I do not recollect any at the present moment.

Q. In this settlement statement there is no charge made for the rental of the place against Kahoot, is there? A. Kahoot was not an occupant of these premises.

10

Q. Was not Kahoot a tenant of the Gurbisz property? A. No, sir.

Q. He was not? A. No, sir—wait a minute, I may be incorrect about that.

The Vice-Chancellor: Oh, yes, he was ejected.

A. He was not a tenant in that property.

Q. I show you a summons in a case issued by Alfred Brenner, Esquire, Judge of the District Court—is not that a summons that was issued by you against Kahoots to throw them out of the property?

20

Mr. Vickers: Well, I object on the ground that the witness, although he was Judge of the Court at that time, is not here as an expert witness, and the instrument speaks for itself and does not require the interpretation of the witness for this Court.

30

The Vice-Chancellor: It may be shown him, and offered in evidence.

Mr. Vickers: I do not object to it being shown to the witness. I object to the question; the question is, "What is this thing"?

Q. Will you look at that, Judge, and say whether you are willing to modify your previous testimony that Kahoot was not a tenant of Gurbisz in the property that was agreed to be bought?

40

Mr. Vickers: I object to that, on the ground that the question contains an unwar-

Alfred Brenner, cross.

ranted assumption of fact, that the paper refers to the same time as January 7th, 1926.

The Vice-Chancellor: Well, I will let it go in.

10 A. If you will observe this summons, Judge, you will see that it refers to property No. 30 East Twenty-first Street, and the agreement you have there was for 69 West 18th Street. The Gurbiszes were not tenants in this property.

Q. This is the Eighteenth Street property? A. Yes, sir.

Q. Where was the stationery store located? A. At 30 East Twenty-first Street.

20 Q. So, what they were dispossessing them out of were the rooms that he occupied in the rear of his own store that he had turned over to them?

Mr. Vickers: I object to that, on the ground that it is not proper cross examination, and is not the best evidence of what the proceedings in a court of record were.

The Vice-Chancellor: I do not see any point in the whole thing, anyway.

Mr. Doherty: It certainly touches the attitude of the witness.

30 The Vice-Chancellor: I will let you go ahead with it, but I do not see it.

Q. Did you, Judge, after the failure of the negotiations in your office on January 7th, advise that the Gurbiszes should proceed to dispossess Kahoot from the part of the store premises that he continued then to occupy? A. I did not.

40 Q. You didn't know anything about it, then, did you? A. I knew about it, yes, but refused to advise them, by virtue that I was Judge of the District Court at that time, and did not think it proper

Alfred Brenner, cross.

that I should advise them, and told them to seek other counsel.

Q. Well, you did officiate at the dispossess proceedings, as the Judge, didn't you? A. Yes, and it was uncontested. If the matter had come before me as a contested matter I would have asked one of the other Judges of the District Court to sit for me; but the requirement of the statute peculiar to Landlord and Tenant cases is that the suit must be started in the District Court of the particular city where the property is located; so the statute required them to bring it in the Court over which I was presiding—

Q. Oh, I am not criticising you? A. Well, I want to get myself straight on the record—and I advised these people that I would not hear a contested case that related to my own clients. I have not any fear about what the Court might believe about it, but I have fear about what the outside public might believe about it at some future time.

Q. Did you represent the Gurbiszes when they were selling the stationery store to the third party? A. Yes, sir.

Q. You drew the bill of sale? A. Yes, sir.

Q. And that included the lease? A. Yes, sir.

Q. Of course you were fully conscious that that property represented the consideration paid on this contract to convey the real estate? A. Yes, sir.

Q. And that it put the Gurbiszes beyond the possibility of restoring the *status quo ante*? A. Yes, sir. We had offered to return that store many times, and there had been a refusal. It was either a case of Mrs. Gurbisz losing it entirely, or of selling it out. It was not a paying proposition—it has been a losing proposition from the moment she got into it.

Alfred Brenner, redirect.

Redirect examination by Mr. Vickers:

Q. Judge, you acted for Mr. and Mrs. Gurbisz in the matter of proceedings in this Court to vacate the *lis pendens*? A. I did.

10 Q. And you did not do that as an eelymosynary act as a lawyer—you expected to be paid for it? A. I expect to be paid for it; I have not, as yet.

By Mr. Doherty:

Q. Can you tell us when you filed the answer in this proceeding? A. Oh, not until after January 7th; the answer had been held off by agreement and then not filed at all because of the settlement.

20 By Mr. Vickers:

Q. An agreement with whom, Judge Brenner? A. With Judge Doherty.

By Mr. Doherty:

Q. Were you aware, in giving your previous testimony, that you had not filed this answer until February 11th, 1926? A. Yes, sir.

30 Q. And that up to that time it was wide open to you to put in any defense you cared to put in? A. Yes, sir.

Q. And at the time you filed it you were fully mindful and reminiscent of what had transpired in your office on the 7th of January, 1926? A. Yes, sir; and I recite in there what did happen.

Q. In here? A. Yes; it is part of my answer that there had been a supplemental agreement that was refused to be carried out.

The Defendants Rest.

40

BOTH SIDES CLOSE.

Case Held for Briefs.

Exhibit C 1

AGREEMENT, made this 19th day of August, nineteen hundred and twenty-five between Frank Gurbisz and Lena, his wife, party of the first part, and Mike Kohoot and Annie, his wife, party of the second part:

WITNESSETH, as follows: The party of the first part, in consideration of One Dollar, paid by the party of the second part, the receipt of which by the party of the first part is hereby acknowledged, and also in consideration of the conveyance by the party of the second part of the real property hereinafter mentioned, hereby agree to grant and convey to the party of the second part, at a valuation for the purpose of this contract of Eighty-one hundred Dollars, ALL that certain tract of land with building thereon erected known as No. 69 West 18th St., Bayonne, N. J. plot 25 feet front and rear by 100 feet in depth.

AND the party of the second part, in consideration of One Dollar paid by the party of the first part, the receipt of which by the party of the second part is hereby acknowledged, and also in consideration of the conveyance by the party of the first part of the real property hereinbefore mentioned, agrees to grant and convey to the party of the first part, at a valuation for the purposes of this contract of Fifteen hundred Dollars, ALL that certain candy and stationery store with contents and fixtures not belonging to landlord on ground floor at 30 E. 21st St., with lease thereon at \$60 per month to run to January 1st, 1926, with security for rent of \$120, to be returned to second party, bill of sale to be given immediately.

Said premises which are to be conveyed by the party of the first part are to be conveyed subject to the following incumbrances:

bank mortgage .....	\$ 3500.
second mortgage payable \$25 monthly besides interest for about 1 1-2 years to run....	1200.
	<hr/>
	\$ 4700.

*Exhibits*

Said premises which are to be conveyed by the party of the second part are to be conveyed subject to the following incumbrances:

no encumbrances

The difference between the values of the respective premises, over and above incumbrances shall be deemed for the purposes of this contract to be Nineteen hundred Dollars in favor of the party of the first part, and the said party of the second part agree to pay the same as follows:

Cash when title passes.....\$1,000.

By giving a third mortgage for 2 yrs.  
int. payable every 6 months on 69 W. 18th St.,  
Bayonne, N. J..... 900.

First party warrants that the rent of upstairs floor of 69 West 18th St. is \$33. per month.

First party warrants that there are no encroachments against his property nor does his property encroach on any other property.

Each of the parties to these presents hereby agrees to convey the property above described, as sold by that party, free from all incumbrances, except as above specified, and to execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered to the other party, or to the assigns of the other party (the deed to be drawn in each case at the cost of the vendor), a proper warranty deed containing full covenants, duly executed and acknowledged to convey and assure to the grantees an absolute fee of said premises.

In the event first party's title to house and premises is defective, then first party agrees to keep the store and pay therefor \$1500. cash.

Said deeds shall be delivered and exchanged on or before the 15th day of September at 7 o'clock P. M., at the office of R. B. SANBORN, No. 33 West 37th St., in the City of Bayonne, N. J.

*Exhibits*

Each of the parties hereto assumes the risk of loss or damages by fire prior to the completion of this contract on the premises owned by them respectively. The rents of the said premises, insurance premiums and interest on mortgage, if any, shall be adjusted, apportioned and allowed up to the day of taking title.

If there be water meters on the premises, the respective sellers shall furnish readings to dates not more than thirty days prior to the time herein set for closing title and the unfixed meter charges for the intervening time shall be apportioned on the basis of such readings.

All personal property appurtenant to or used in the operation of said premises is represented to be owned by the respective sellers and is included in this exchange.

This contract covers all right, title and interest of the respective sellers, of, in and to any lands lying in the bed of any street, road or avenue, opened or proposed, in front of or adjoining the premises to be conveyed to the centre line thereof, or all right, title, and interest of the respective sellers in and to any awards made or to be made in lieu thereof, and the sellers will execute and deliver to the purchasers, on closing of title or thereafter, on demand, all proper instruments for the conveyance of such title and the assignment and collection of such awards.

AND IT IS UNDERSTOOD, that the stipulations aforesaid are to apply and bind the heirs, executors, administrators and assigns of the respective parties.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

WITNESS

FRANK GURBISZ (Seal)  
 LENA GURBISZ (Seal)  
 MIKE KOHOOT (Seal)  
 ANNIE KOHOOT (Seal)

RALPH B. SANBORN

*Exhibits.*

the premises above described, free and clear of and from all encumbrances to the date thereof except as above mentioned will be delivered at the offices of DEMBE & DEMBE, 473 Broadway, on or before June 10, 1924.

IN WITNESS WHEREOF the parties hereto have set their hands and seals.

10

- D. FENCHEL (SEAL)
- ANNIE FENCHEL (SEAL)
- B. ROSENBLUM (SEAL)
- ESTHER ROSENBLUM (SEAL)
- FRANK GURBISZ (SEAL)
- MIHALINA GURBISZ (Seal)

Signed, sealed and delivered  
in the presence of

20

MORRIS SOFFERMAN  
Notary Public of N. J.

30

40

40

30

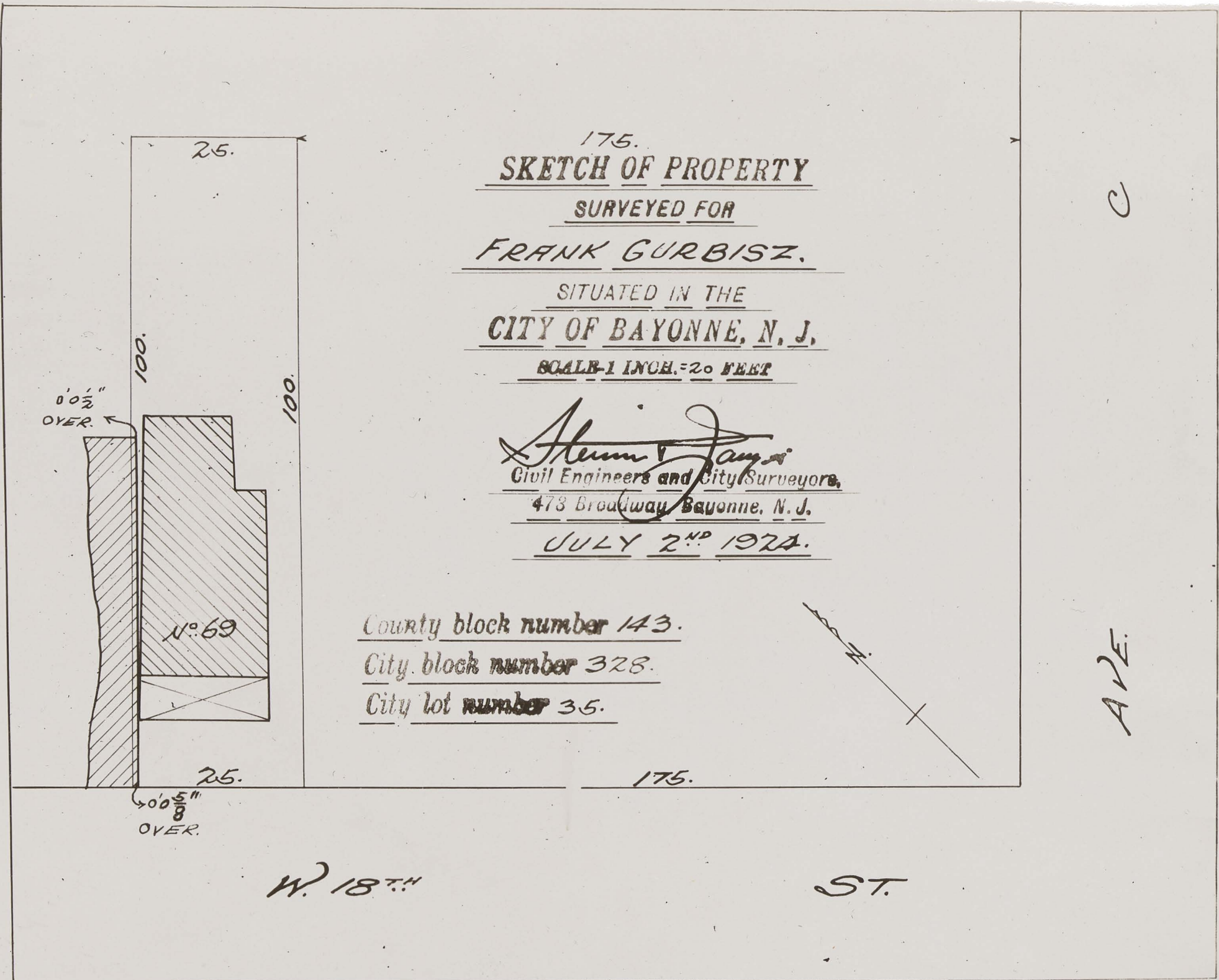
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Exhibits.

84

Exhibit C-2.  
(See photograph opposite.)



*Exhibits.*

**Exhibit D-1.**

October 13, 1925.

Hon. Alfred Brenner,  
579 Avenue C,  
Bayonne, N. J.

10

Dear Judge Brenner:

Mike Kohoot has shown me the settlement agreement drawn up between himself and Frank Gurbisz. Of course he is satisfied with the substance of the terms, and I interpose no objections.

My attention is drawn however, to the fact that the lease which is to be assigned, is secured by a deposit of \$120 and that the original contract calls for this to be returned to Mr. Kohoot, but the settlement agreement is silent on that point. I mention it in order that there may be no question as to this being waived.

20

There is due to me \$89.38 of which I have heretofore notified your office, and which amount is assented to by Mr. Kohoot. I would be thankful if you would see that this is held out as part of the process of securing the discontinuance of the Chancery action and the cancellation of the *lis pendens*.

30

Yours very truly,

(Sg.) RICHARD DOHERTY.

RD/AJ

40

Exhibits.

Exhibit D-3.

	Contract Price .....	\$8100.00
	Allowance for encroachment as agreed	650.00
		<hr/>
10	Balance purchase price .....	\$7450.00
	Insurance:	
	Eagle 305102—Exp 4/10/26 \$23.13.....	1.93
	Superior 39318 “ 8/ 8/26 56.25.....	10.92
		<hr/>
		7462.85
	1st mortgage Mechanics .....	\$3500.00
	Int. Oct 1 to Jan 7 .....	56.58
	2nd Mortgage Fenchel .....	850.00
	Int. Dec. 20 to Jan 7 .....	2.56
20	Rent 2nd floor paid to Jan 8/26	
	“ 1st “ occupied by Gurbicz	
	(No Allowance)	
		<hr/>
		4409.14
		<hr/>
		\$3053.71
	Allowance for store .....	1500.00
		<hr/>
		\$1553.71

30

Exhibit D-4.

THIS AGREEMENT, made this            day of October, 1925, by and between FRANK GURBISZ and LENA GURBISZ, his wife, of the City of Bayonne, County of Hudson and State of New Jersey, parties of the first part, and MIKE KOHOOT and ANNA KOHOOT, his wife, of the same place, parties of the second part,

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Whereas, the parties of the first part did on the 19th day of August, 1925, enter into an agreement

Exhibits.

to sell and convey to the parties of the second part premises known as 69 West 18th Street, in the City of Bayonne, County of Hudson, aforesaid, and

10

Whereas, the parties of the second part agreed, in exchange therefor, to sell and convey to the parties of the first part a certain store located at 30 East 21st Street, in the City of Bayonne, aforesaid, together with the lease thereon, and

20

Whereas, the said parties of the second part in said contract agreed to pay the balance of the purchase price for the property of the parties of the first part by payment of \$1,000. at the time of passing title and by executing and delivering as security for the balance of purchase price a mortgage in the sum of \$900 which was to be subsequent to the mortgages then a lien and encumbrance against said property, and

30

Whereas, it was claimed that an encroachment existed against said property of the parties of the first part and that there were other objections to the taking of title thereto as the result of the claim, the parties of the second part refused to accept title, and

40

Whereas the parties of the second part have instituted an action in the Court of Chancery of the State of New Jersey for the purpose of establishing a vendee's lien, and

Whereas, since the institution of said action, the parties to this agreement have stipulated and agreed to adjust their differences, the parties of the second part agreeing to accept the title to said premises and the parties of the first part agreeing to deliver title thereof to the parties of the second part, and the parties of the first part agreeing to

*Exhibits.*

accept title to the store agreed to be sold by the parties of the second,

10 Now, THEREFORE, the parties hereto hereby agree that in consideration of the settlement aforesaid, the price for the said property, 69 West 18th Street, aforesaid, shall be lowered by the sum of \$650, which amount shall be deducted from the balance of the purchase price to be paid, with the understanding however, that the balance of the purchase price shall be paid in cash at the time of closing title, and

20 It is Further Agreed, by the parties of the second part that in consideration of such reduction and the consummation of said agreement, they will accept title to said premises subject to the encroachment existing thereon, and will waive any and all objections heretofore raised concerning the validity of the title to said premises.

It is Further Agreed that title shall be passed and all papers delivered at the offices of Lazarus, Brenner and Vickers, Times Building, Bayonne, N. J., on Tuesday, October, 13, 1925, at 7:30 P. M.

30 IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and affixed their seals the day and year first above written.

Signed, Sealed and Delivered  
in presence of

40 ..... (L.S.)  
..... (L.S.)  
..... (L.S.)  
..... (L.S.)

**Opinion by Griffin, V. C.**

The bill in this cause is filed to obtain a decree impressing a lien upon the lands in question for the sum of fifteen hundred dollars, which the defendants agreed to pay the complainants as the purchase price of their store in case the contract of sale fell through by reason of defect of title, etc. The defendants were the owners of the premises, and the complainants were the lessees of a store in the premises in which they carried on a candy, stationery and cigar business. By the terms of the contract the defendants bought this store for the sum of fifteen hundred dollars, which sum was to be credited on account of the purchase price of the lands, and, as above stated, if the sale fell through from defect of title, the defendants were bound to pay the fifteen hundred dollars; and, immediately upon the signing of the contract, were put in possession and continued therein down to a recent date, when they sold the store for \$280. There is a clause in the contract covenanting against encroachments on the lands of the defendants, as well as encroachments by the defendants on the lands of their neighbors. The adjoining building encroaches on the defendants' lands one-half of an inch in the rear and five-eighths of an inch in front. When this situation was discovered, the parties met (on October 17th, I think) and entered into a stipulation whereby the defendants were to reduce the purchase price \$650 by reason of the encroachment; and the previous contract, which was in writing, was modified so that, instead of giving to the complainants \$1,000 in cash and \$900 by third mortgage and the assumption of two prior mortgages, the complainants were to pay the whole balance in cash, which

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*Opinion by Griffin, V. C.*

amounted to \$1,250, being \$250 more in cash than the original agreement required the payment of; and the complainants were to take the title subject to the existing encroachments.

10 Various conferences were held, and an agree-  
ment was prepared in writing by Judge Brenner,  
which was agreed to by the parties, and had the  
O. K. of Judge Doherty, representing the com-  
plainants; but the same was not signed by any of  
the parties. There was one matter that, by mis-  
take, was left out of this agreement, viz.: that the  
defendants were also to pay to the complainants  
\$120, being the deposit which the complainants  
made with the defendants to secure the payment of  
20 the rent under the lease. This was also agreed  
to by the parties. Judge Brenner says that the  
contract was not signed because they expected to  
pass the title within a few days. At this time the  
search had not been completed. Mr. Sanborn was  
making the search and found a *lis pendens* on file,  
which troubled him, and Judge Brenner says it  
did not affect the property because, at the time it  
was filed, the defendants were the owners of the  
property and were not mentioned in the *lis pen-*  
30 *dens*, and were not parties to the suit; however, to  
satisfy Sanborn, he obtained an order from Vice-  
Chancellor Bentley, in Christmas week, discharg-  
ing the *lis pendens*; and on January 7th they met  
at Judge Brenner's office to pass the title.

The complainants, from the time the oral agree-  
ment was entered into on October 17th, down to  
January 7th, 1926, never gave notice of any kind  
that they would not take the title. They met that  
night at Judge Brenner's office. They waited for  
40 Judge Doherty to come in, and when he came there  
he said that they were "all ready," or words to that

*Opinion by Griffin, V. C.*

effect; when the defendants called Judge Doherty  
out of the room, and Judge Doherty returned say-  
ing that his clients would not carry out the terms  
of the oral agreement. I think the reason given  
was that his clients did not have sufficient funds to  
10 pay the increased cash. There the matter dropped.  
(I might add that, prior to October 17th, 1925, the  
complainants had filed their bill, as above stated,  
and this compromise agreement, or settlement  
agreement, was made thereafter, and, having  
fallen through, in January, 1926, the defendants  
answered, setting up this supplemental agreement,  
which I take from the testimony to be clearly  
proven. To this answer the complainants filed a  
20 general replication, which operates as a denial of  
every allegation of new matter set up in avoidance  
or bar. *Lovat v. Demarest*, 5 N. J. Eq. 113; *Wilkin-*  
*son v. Bauerle*, 41 N. J. Eq. 635 (646); *Kocher &*  
*Triers Chan.*, Sec. 366; *Kocher's Ch. Pr.* p. 315;  
*Freichnecht v. Meyer*, 39 N. J. Eq. 551 (554): See  
also Rule 74, Ct. Chan.

The defendants offered in evidence the unsigned  
supplemental agreement, which was objected to.  
Col. Vickers claims that it is not within the stat-  
ute of frauds, because it is not an independent  
30 agreement, but is a modification of the written  
agreement.

The defendants went into possession under the  
original contract, and not under the contract as  
amended; so that there could be no part perform-  
ance of the supplemental contract to take it out  
of the statute.

It seems quite clear that, in view of the clause  
of the contract that there were no encroachments,  
when, in fact, there were, the contract is rendered  
unenforcible by the defendants against the com-  
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*Opinion by Griffin, V. C.*

plainants. *Wyatt v. Bergen*, 98 N. J. Eq. 502 (507);  
aff'd *id.* 738; *Herring v. Esposito*, 94 N. J. Eq. 348.

The case, therefore, turns on whether this sub-  
sequent agreement, modifying the terms of the  
signed contract as to payment, and accepting sub-  
ject to encroachments, is valid and not opposed to  
the statute of frauds.

Under Section 9 of the statute, the consideration  
need not be set forth or expressed in writing, but  
may be proved by any other legal evidence. 2  
Comp. St., p. 2616, Sec. 9. *Nibert v. Baghurst*, 47  
N. J. Eq. 208; *Cavanna v. Brooks*, 97 N. J. Eq. 334.  
Thus, if the question of consideration alone was  
involved, the agreement would not violate the  
statute of frauds. But this consideration was to be  
paid for the changing of the signed contract, so  
that the defendants might convey the property sub-  
ject to these encroachments, which means that the  
complainants might not receive the fee in the lands  
encroached upon; and it might be that the en-  
croaching owner has acquired title by adverse pos-  
session. Thus, the original contract is modified by  
cutting down the quantity of land to be conveyed.  
This, I think, brings the amendatory contract and  
agreement within the statute of frauds, under Sec-  
tion 5 of the statute, which provides that "any con-  
tract for sale of lands, tenements or hereditaments,  
or any interest in or concerning them," shall be  
void unless in writing signed by the party to be  
charged therewith, etc. I consider that the agree-  
ment as to this encroachment touches an interest  
in lands, or concerning lands.

I will advise a decree for the complainants.

The foregoing memorandum, being merely for  
the enlightenment of counsel in ascertaining the  
views of the Court, is not to be published, printed

*Final Decree.*

nor filed; if an appeal is taken, however, counsel  
will notify me in writing of that fact and have the  
testimony transcribed and forwarded to me,  
whereupon I will prepare and file a formal opin-  
ion.

December 17, 1926.

N. B.:

[The above opinion was rendered in the form  
of a letter addressed to the solicitors of the respec-  
tive parties. Although it was the request of the  
late Vice-Chancellor Griffin that this opinion  
should not be printed, published or filed, because  
he desired to render a formal opinion in the event  
that an appeal would be taken, nevertheless, an  
appeal was taken, but before the late Vice-Chan-  
cellor rendered his formal opinion, he died.]

**Final Decree.**

(Filed January 3, 1927.)

IN CHANCERY OF NEW JERSEY.

Between

MIKE KOHOOT and ANNA KOHOOT,  
his wife,  
Complainants,

and

FRANK GURBISZ and LENA GURBISZ,  
his wife,  
Defendants.

On Bill, etc.

This cause having been commenced by the filing  
of the bill herein, whereupon process was duly  
served by the defendants who answered to said

*Final Decree.*

bill, and upon replication thereto by the complainants the cause was referred to Hon. John Griffin to hear the same for the Chancellor and report thereon to him, and advise what order or decree should be made herein; and the same coming on  
10 to be heard in the presence of Richard Doherty, solicitor for the complainants, and Lazarus, Brenner & Vickers, solicitors of the defendants, and the proofs of the respective parties having been heard, it is on this 3rd day of January, 1927,

ORDERED, ADJUDGED AND DECREED that the above named complainants, Mike Kahoot and Anna Kahoot, his wife, have an equitable lien on the following described lands and premises of the above-named defendants, Frank Gurbisz and Lena Gurbisz, his wife:  
20

ALL that certain tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Bayonne, in the County of Hudson, and State of New Jersey. Beginning at a point in the northerly line of West 18th Street, distant one hundred and seventy-five (175) feet, westerly from the intersection of the said northerly line of West 18th Street, with the westerly line of Avenue C and from thence running (1) northerly parallel with Avenue C one hundred (100) feet to a point; thence (2) westerly and parallel with West 18th Street twenty-five (25) feet to a point; thence (3) southerly and again parallel with said Avenue C one hundred (100) feet to the northerly line of West 18th Street; thence (4) easterly and along the said northerly line of West 18th Street twenty-five (25) feet to the point or place of beginning be-  
30  
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*Final Decree.*

ing the same premises conveyed to the defendants by Jacob Berman and others, by deed dated January 20th, 1924 and recorded January 23, 1924, in the office of the Register of Hudson County, in Liber 1530, page 483, together with all and singular the tenements, hereditaments, appurtenances, reversions, rents, issues and profits thereof, and all the estate, right, title, interest, use, property, possession, claim and demand of the defendants of, in, to and without the same;  
10

to the amount of \$1,500 with interest thereon from the 15th day of September, 1925, until the same is fully satisfied and discharged; it is further

ORDERED, ADJUDGED AND DECREED that a writ of *fieri facias* issue to James J. Murphy, one of the special masters of this court, commanding him that he cause to be made of the premises aforesaid, by selling so much thereof as may be necessary for the purpose, the said sum of \$1,500 with lawful interest as aforesaid, together with the costs of the complainants to be taxed, with lawful interest thereon from the date of this decree, and that the surplus money arising from such sale, if any there be, be brought into this court subject to the further order of the court; it is further  
20  
30

ORDERED AND DECREED that the complainants recover the costs of this suit to be taxed, which shall include a counsel fee of one hundred dollars which is hereby allowed to Richard Doherty, solicitor of the complainants.

E. R. WALKER,  
C.

Respectfully advised.

JOHN GRIFFIN,  
V. C.

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New Jersey Court of Errors and Appeals

Between

MIKE KOHOOT and ANNA KOHOOT,  
his wife,  
Complainants-Appellees,

and

FRANK GURBISZ and LENA  
GURBISZ, his wife,  
Defendants-Appellants.

On Bill.  
Appeal from  
Final Decree  
in Chancery.

**BRIEF OF FRANK GURBISZ AND LENA  
GURBISZ, DEFENDANTS-APPELLANTS.**

**Statement of Facts.**

On August 19th, 1925, Mike Kohoot and Anna Kohoot, his wife, hereafter referred to as complainants, were the owners and proprietors under a lease of a certain confectionary and stationery store located at 30 East 21st Street, in the City of Bayonne (p. 35, line 33).

At that time, Frank Gurbisz and Lena Gurbisz, his wife, hereafter referred to as defendants, were the owners of a certain tract or parcel of land, as tenants by the entirety, which premises are commonly known as No. 69 West 18th Street, in the said City of Bayonne, and on the date hereinbefore set forth, the complainants and defendants entered into a written agreement whereby the complainants agreed to sell their confectionary store, together with the stock in trade and good-will of said business, for the sum of \$1,500 (p. 36, line 3),

in exchange for the property belonging to the defendants, at a price set for the latter property, to wit: \$8,100, subject to the terms set forth in the agreement of exchange (pp. 81, 82, 83).

Pursuant to the terms of the within agreement the defendants entered at once into possession of the confectionery and stationery business, conducting the business in the usual business-like manner.

Before the time set for the passing of title, the complainants produced a survey which showed an encroachment of an adjoining building, which encroached upon the lands of the defendants  $1/2$  inch in the rear and  $5/8$ ths inch in the front (p. 19, lines 37-39). Pursuant to the terms of the written agreement of exchange, it was provided that "in the event first parties title (Frank Gurbisz and Lena, his wife) to house and premises is defective, then first party agrees to keep the store and pay therefor \$1,500 in cash."

Thereupon, the complainants filed their bill in chancery to impress a lien upon the lands of the defendants for the sum of \$1,500, and prior to the time that the defendants filed their answer, negotiations were pending whereby the parties considered a reduction in the purchase price of premises owned by these defendants in the sum of \$650, which amount the complainants were to receive as credit, thereby reducing the purchase price from \$8,100 to the sum of \$7,450 (p. 86, lines 7-9). A written memorandum conforming to the understanding of the parties with regard to the reduction of the purchase price was drawn, but not signed (p. 53, lines 31-34).

The complainants refused to accept the title with the encroachments thereon, although the defendants agreed to reduce the purchase price in the sum of \$650, in accordance with the modified

agreement, whereupon the defendants then filed their answer to the bill of complaint and the matter was thereafter referred to the late Vice-Chancellor John Griffin, who respectfully advised, and the Chancellor decreed that the complainants have an equitable lien on the lands and premises owned by these defendants to the amount of \$1,500, with interest from the 15th day of September, 1925 (p. 95, lines 17-19), from which decree the defendants finding themselves aggrieved appeal to this Honorable Court to reverse the decree of said Chancellor, so that the same may be set aside and for nothing holden.

#### Argument.

The defendants defended this cause upon the following grounds:

FIRST.—The defendants being desirous of performing the contract made by them, they agreed with the complainants to convey title to these premises upon their allowing the said complainants the sum of \$650 as a deduction, so that the complainants would accept the title to these premises with the slight encroachments thereon.

SECOND.—Upon the further ground that the complainants agreed with the defendants, by and with the consent of their respective counsel, to the terms and conditions set forth in the modification of the original contract, which modification is embodied in Exhibit D-4 in evidence (pp. 86, 87, 88), which provides, among other things, the final settlement of the disputes regarding title to these premises.

THIRD.—Upon the further ground that the modification as heretofore referred to is not such an agreement as is required to be signed by the person to be charged in accordance with the Statute of

Frauds, but is merely a modification as to the terms of the original contract of exchange, which does not affect the title to these premises, nor does it relate to any interest in the realty. The deduction only relates to one of the terms, that is, the purchase price, which was subsequently agreed upon by the parties hereto, and which reduction of \$650 enures to the benefit of the complainants.

#### POINT I.

**The complainants failed to comply with the modification of the terms of the original contract by refusing to accept the sum of \$650 in reduction of the purchase price on property belonging to the defendants herein, and that by reason of the complainants' failure to carry out the terms thereof, they should be denied the relief prayed for in their bill of complaint.**

There is no doubt that an encroachment existed on the property which the defendants agreed to convey to the complainants herein, and by reason of said encroachment, the defendants were willing to forego the sum of \$650, provided the complainants would accept title with the encroachments thereon.

In accordance with that understanding, the complainants and defendants agreed to close the title on January 7th, 1926 (p. 55, line 16), after Judge BRENNER, who represented the defendants, had a conversation with Mr. Sanborn, who then was interested in the complainants' behalf, and as a result of this conversation Judge BRENNER informed Mr. Sanborn that he would draw a written memorandum which would confirm the verbal understanding between the parties (p. 53, lines 32-34). Thereupon, Judge BRENNER delivered two type-

written copies of the agreement to the defendants herein, who were to secure the signatures of the complainants thereto, a copy of which agreement was, evidently, handed to Judge DOHERTY, who then was called in to represent the complainants herein, and with respect to the agreement modifying the terms of the original contract, Judge DOHERTY sent a letter, dated October 13th, 1925, to Judge BRENNER, confirming the conditions of the agreement with the exception of an omission of a clause respecting the deposit of \$120, which amount was to be returned to his clients, the defendants. In that letter, Judge DOHERTY, in part, wrote as follows:

"Of course, he, (Mike Kohoot) is satisfied with the substance of the terms, and I interpose no objections" (p. 85, lines 15-16).

After the receipt of this letter from Judge DOHERTY, Mr. Kohoot came to the office of Judge BRENNER and informed Judge BRENNER that there was an omission with respect to the security for rent in the sum of \$120, whereupon Judge BRENNER informed Mike Kohoot that his attention had already been called to that point by Judge DOHERTY (p. 59, line 11). Mike Kohoot was then satisfied with the terms of the modified agreement (p. 59, lines 1 to 20 incl.).

The reason that this supplemental modification of the terms of the original agreement was not signed was due to the fact that Judge BRENNER expected the parties to get together in order to pass title within the next few days (p. 59, lines 20-24).

In the opinion rendered by the Chancellor, and advised by Vice-Chancellor Griffin, who presided at the hearing, the Court was of the opinion that the modification regarding the reduction in price, to the extent of \$650, affected the lands and premises with respect to the title to said premises, and

that the agreement not having been signed by the person to be charged therewith, that such agreement was invalid and opposed to the Statute of Frauds.

Our contention is that after the parties had already agreed to the exchange of their respective properties that they could alter any of the terms thereof orally or by a written agreement, and that Section 5 of the Statute of Frauds and Perjuries, 2 Compiled Statutes, page 2612, does not apply because under the provisions of the contract of exchange, the defendants were immediately put in possession of the confectionary store by and with the consent of the complainants herein. The policy of the Statute is to exclude testimony of uncertain character with respect to transactions within its provision; the modifying arrangement does not affect the title to these premises because the complainants have expressed their willingness to accept title with the encroachments thereon, provided they receive credit in the sum of \$650, which the defendants have agreed to pay.

This change does not effect the realty, it merely effects the method of adjusting the compensation which one party is to pay to the other at the time the title to these premises is closed.

In the case of *Hewitt v. Lehigh & Hudson River Railroad Co.*, 57 Equity 511, the complainant brought suit to enforce the submission to arbitration; the subject matter being the price which the defendant Railroad Company should pay for two strips of land belonging to him, which were taken and used by the Railroad Company with the complainants' permission for many years before the submission, the Court said:

"I am of the opinion that the Statute of Frauds does not apply to this case for the simple reason that the title to land did not in

anywise come into the question; the only question being the amount of compensation which the defendant should pay the complainant for land which it already had in possession and which it could have compelled the complainant to convey to it on terms."

The character of the modification is such that it only reduces the equity on the part of the defendants who, naturally, confer the benefit upon the complainants. The interest in the real estate in question does not become involved by reason of the modification which the defendants relied upon, but it only goes to the question of performance in that it changes the original purchase price in the sum of \$650. The modification merely effects the right of one of the parties to receive more cash than he would have originally received under the original contract.

The defendants have on several occasions offered to put the complainants in their original position so that their rights would not be effected by the defective title to the premises owned by the defendants, but the complainants refused to accept the return of the store (p. 79, lines 36-37).

The purpose of the Statute of Frauds is to prevent the perpetration of fraud upon innocent persons who may be effected thereby, and the defendants when sued upon contracts not within the Statute of Frauds may invoke the statute as a defense, and the Court is at all times ready to assist such defendants in order that the fraud may not be perpetrated, and, in view of the statute, the Court, therefore, would dismiss the action by reason of the wording of such statute in that it states "that no action shall be brought upon any contract or sale of lands, tenements and hereditaments, or any interest or concerning them."

In the case at bar, the defendants in the performance of the supplemental agreement which

was acceptable to the complainants, have attempted to carry out the terms thereof to the satisfaction of these complainants, but due to a change of heart the said complainants refused to accept the terms thereof. The defendants at all times evidenced their intention of carrying out the terms of the supplemental agreement. A statement was prepared and displayed to the defendants and their counsel setting forth the statement of account with reference to the exchange of properties herein (p. 62, lines 34-41; p. 63, lines 1-5).

The letter sent to Judge Brenner by Judge Doherty, in behalf of the complainants, on October 13th, 1925, which letter confirms the supplemental agreement, and marked Exhibit D-1 in evidence (p. 85), together with the settlement statement marked Exhibit D-3 (p. 86), clearly indicate the acceptance on the part of the complainants of the terms of the supplemental agreement.

We contend that the complainants are not entitled to the relief granted by the Court below because they had already accepted the terms of the modified agreement. The defendants are estopped from exerting their claim because they have acquiesced in the terms of the supplemental agreement as evidenced by the testimony of Judge Brenner, who testifies in behalf of the defendants as follows (p. 60, line 19 to p. 61, line 32):

“Q. What took place on January 7th at your office when these parties appeared there? A. I made the arrangement with Mr. Sanborn, right after Vice-Chancellor Bently had signed the order dismissing the *lis pendens*, fixing January 7th as the date for closing title, at about seven o'clock in the evening. Mr. and Mrs. Gurbisz were present; Mr. and Mrs. Kohoot were present; I believe Mrs. Senyk was; and Mr. Sanborn was present, all arriving at the time that had previously been fixed. We then sat down—Mr. Sanborn and I—and fig-

ured out the allowance that were to be made, which included the item of \$650 previously agreed upon, as the reduction from the contract price, and the insurance that was to be allowed. All of those figures were arrived at definitely before Judge Doherty appeared.

“Q. I show you a paper marked G. T. V. 3 for identification, and ask you whether that is in your handwriting, and whether that is the paper you have been referring to? A. That is in my handwriting, and is the paper I referred to, and was referred to by both Mr. Sanborn and myself.

“Q. Previous to January 7th, concerning which you are testifying, did you and Mr. Kohoot have any conversation regarding the \$120 and how it should be taken care of at the time of settlement? A. Only at the time that Mr. Kohoot came to the office and told me that I had left it out of the contract; and I said that that could be taken care of at the time of passing title, that it had simply been left out of the agreement through an oversight.

“Q. And at the time of making up these figures was the \$120 included in the deductions and allowances, or what, if anything, had been said regarding the way in which it should be taken care of? A. It is not included in the calculation; I cannot recall the reason why; it was a minor detail concerning this whole transaction, and I haven't any clear recollection of it.

“Q. Were the figures given in this calculation made known by anybody to the parties interested—that is to say, Mr. and Mrs. Kohoot and Mr. and Mrs. Gurbisz? A. They were there while it was being figured.

“Q. Well, in their presence? A. In their presence.

“Q. And discussed? A. And discussed.”

In view of the testimony heretofore referred to, we contend that the complainants and defendants had entered into a supplemental agreement by

the terms of which they modified the original agreement in respect to the acceptance of title in consideration of a reduction in the purchase price in the sum of \$650, which the defendants would allow to the complainants, and that this supplemental agreement does not effect the marketability of the title, nor the interest in the premises so far as the Statute of Frauds would require.

It is our contention that the terms of payment, rather than the terms relating to title, have been altered or amended by consent of the parties and that, therefore, the complainants are bound by their agreement.

**For all these reasons we respectfully submit that the bill of complaint filed should be dismissed.**

Respectfully submitted,  
BRENNER & KRESCH,  
Solicitors of Defendants-Appellants.

ALFRED BRENNER,  
Of Counsel.

**New Jersey Court of Errors and Appeals**

Between	} On Bill.
MIKE KOHOOT and ANNA KOHOOT, his wife, Complainants-Appellees,	
and	
FRANK GURBISZ and LENA GURBISZ, his wife, Defendants-Appellants.	

**BRIEF OF MIKE KOHOOT AND ANNA KOHOOT, HIS WIFE.**

**Statement of Facts.**

The complainants, owners of a confectionery store, contracted in writing with the defendants, owners of a piece of real estate, to exchange the store and good will for the realty. The agreement (p. 82) contained this covenant by the defendants: "First party warrants that there are no encroachments against his property, nor does his property encroach on any other property." A survey disclosing that there were encroachments, the complainants refused to accept title, and found themselves within the privilege of the following further provision of the contract (Exhibit 1, p. 82). "In the event first party's title to house and premises is defective, then first party agrees to keep the store and to pay therefor \$1,500 cash." Defendants, reluctant to pay the \$1,500,

proposed an abatement of \$650 in the price, and a further modification of the original terms whereby the complainants, instead of giving a third mortgage, should pay all the balance in cash (Exhibit C-1, p. 82; Exhibit D-4, p. 88). In consequence, the complainants, in order to get title, would be required to raise \$1,250 cash instead of \$1,000 and a mortgage for \$900. The proposed agreement contained the further covenant that the complainants would, in consideration of such reduction, "accept title to the premises subject to the encroachment existing thereon, and will waive any and all objections heretofore raised concerning the validity of the title to said premises."

The latter agreement was prepared by Judge Brenner in early October, 1925, was delivered to one of the complainants, who exhibited it to his attorney, to whom he expressed his satisfaction which was communicated to the defendant's attorney. The agreement was not signed because after its preparation, Mr. Sanborn, another attorney engaged in making a search for the complainants, discovered a *lis pendens* on the property affecting it to the extent of \$3,500. Upon receiving his report, the complainant refused to sign the agreement (p. 38). The compromise which the agreement proposed, was to be effected by the passing of title October 13th, 1925. The discovery of the *lis pendens* caused the whole matter to languish until holiday week of that year, when Judge Brenner, representing the defendant, obtained from Vice Chancellor Bentley, an order dismissing the *lis pendens* (p. 58, l. 10).

Following this a conference between the parties was arranged for Judge Brenner's office for January 7th, in anticipation by defendants that title would be closed on the basis proposed by the un-

signed and expired compromise agreement, but were met by the complainants' objection to paying the whole balance in cash, and their expression of willingness to go through with the matter on the original terms modified only by an abatement of the cash payment in respect of the encroachments. The conference thus came to naught.

These negotiations all took place *pendente lite*, the bill of complaint in the present matter having been filed September 28th, 1926.

### Argument.

1. The defendants were in default by reason of the breach of their express covenant against encroachments; the rights of the complainants in the event of title being defective were likewise stipulated by defendants' agreement; and the complainants had on the real estate, an equitable vendees' lien for the liquidated amount of the consideration they had paid.

2. The proposed compromise agreement, modifying the consideration to be paid by the complainants for the real estate, and containing in addition a covenant to take title with existing encroachments and waiving objections theretofore raised concerning the validity of the title, was within the Statute of Frauds and had no force as an accord when not signed.

3. Abortive efforts by the defendants to settle the controversy, put forth after the filing of the bill, constituted no defense. By the negotiations between the parties, on which the defendants rely exclusively for their defense, the status of neither was changed, and the equities remained unimpeached.

## I.

**On the failure, or inability, of a vendor of land to perform the contract to convey, the vendee has an equitable lien on the land to the extent of the part consideration paid, and this without reference to any special equity.**

*Cleveland vs. Bergen Bldg., Etc.*, 55 Atl. 117;  
*King vs. Ruckman*, 21 N. J. Eq. 599;  
*Crawford vs. Bertholf*, 1 N. J. Eq. 458;  
*Craft vs. Latourette*, 62 N. J. Eq. 206.

In the latter case, relying on the reasoning of the leading case of *Rose vs. Watson*, 10 H. L. 672, Vice Chancellor Stevenson concluded that the equity was evolved from the principle of trust.

There was a further citation of

*Copper vs. Wells*, 1 N. J. Eq. 10;  
*Berry vs. Van Winkle*, 2 N. J. Eq. 269.

## II.

**The unsigned agreement undertaking substantially to modify the original agreement, was unavailable for the purpose of either remedy or defense.**

The cases pronouncing the inefficacy of an oral modification of a contract, required to be in writing under the Statute of Frauds are collated in the annotations to

*Nonamaker vs. Amos* (Ohio), 4 L. R. A. (N. S.), 918;

*Bonicamp vs. Starbuck* (Okla.), L. R. A. 1917 B 141;  
*Schaap vs. Wolf* (Wis.), 17 A. L. R. 7.

The entire line on the question is to the point that the statute may not be circumvented by parole modification in respect of any part of the contract whatever when the latter is entire, or in any circumstance in respect of the obligations of the parties touching an interest affecting lands.

So far as the question has been ruled upon in our own state, the holdings are in accord with the general rule.

Where a memorandum does not contain the full terms of the contract, the deficiency cannot be supplied by oral proof.

*Johnson vs. Buck*, 35 N. J. L. 338.

Where a memorandum was signed by vendee only, and vendor's name did not appear therein, no relief is available to the vendor.

*Schenck vs. Spring Lake Beach Improvement Co.*, 47 N. J. Eq. 44;

followed in

*Clement vs. Young-McShea Amusement Co.*, 70 N. J. Eq. 677;  
*Stengel vs. Sergeant*, 74 N. J. Eq. 20;  
*Brown vs. Pinninger*, 81 N. J. Eq. 229;

and all the foregoing cited in

*Davimos vs. Green*, 83 N. J. Eq. 596.

The exaction of the Statute that the contracts therein referred to should be in writing, is in disparagement of the rule that permits evidence that

a written contract has been subsequently modified by the parties.

*Scharff Construction Co. vs. Bowers*, 81 N. J. Eq. 198;

*Emerson vs. Slater*, 22 How. 28, 16 L. Ed. 360;

*Swain vs. Seamens*, 9 Mall. 254; 19 L. Ed. 554.

It may be conceded that if one party to a contract, formulated under the Statute of Frauds, encourages the other to act upon an oral modification thereof, that in equity he might be obliged to perform on his own part on the theory of estoppel, waiver, accord, or on the theory that the statute should not be used to aid the perpetration of fraud. But where the contract, as modified, remains executory, the mere tender of performance by one will not impose upon the other either legal or equitable obligations if the latter declines to act in violation of the Statute. Otherwise the circumvention of the Statute would be facilitated.

In the present case, as discerned by the Vice Chancellor, the unsigned agreement proposed a substantial variation of the original contract in three respects:

1. The consideration was to be reduced.
2. The method of payment was to be altered.
3. The vendee was to bargain to accept the property subject to encroachments and perchance a diminished quantum of land.

Several cases may be found holding that the restraints of the Statute operate only before the translation of title, and that agreements of the parties subsequent to the passing of title are not within its operation.

A distinctive case of this character is the single citation in the appellants' brief,—*Hewitt vs. Lehigh & Hudson R. R. Co.*, 57 N. J. Eq. 511. This case does not deal with the controversy in the matter *sub judice*. In the Hewitt case a railroad company desiring land for a right of way, executed in writing, with the owner, an adequate submission to arbitration. The amount of compensation was fixed by the latter and the railroad company went into possession while the owner repudiated his arbitration agreement.

It was directly held by Vice Chancellor Pitney that the Statute did not apply to the situation by reason of the railroad company having present possession and the right to maintain it through condemnation.

The controversy at that stage bore no relation to "any contract or sale of lands \* \* \* or any interest in or concerning them", but dealt entirely with the matter of compensation for lands already competently acquired.

### III.

**The unsigned compromise agreement was merely an unaccepted proposal to settle the case set out in the bill of complaint.**

Matters of defense arising after the filing of the bill, if completely destructive of the complainants' case, may be set up by answer,

*Raelble vs. Goebbel*, 6 Atl. Rep. 21,

but unless they incorporate the indispensable features of accord based upon mutual intention and

adequate consideration, or at least present a case of estoppel or waiver, they are nugatory.

Respectfully submitted,

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