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New Jersey State Library

## Bill of Complaint.

Filed March 9, 1917.

# In Chancery of New Jersey.

*To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:*

The complainants, August H. Riviere, of the City of Summit, New Jersey, and A. H. Riviere Company, a corporation of the State of New Jersey, respectfully show that:

1. On the 3rd day of October, 1905, there was incorporated by the complainant, August H. Riviere, and Amzi Berla, together with their respective wives, a company known as the Berla-Riviere Company, for the purpose of carrying on the business of plumbing and dealing in plumbing supplies and fixtures. The authorized capital stock of the said company was $25,000, of which $1,000 was issued and divided equally between the two parties in interest, one share each being held by their respective wives.

2. Said company continued business until the month of March, 1916, when it was dissolved by mutual consent of the incorporators.

3. Prior to the dissolution of the said company negotiations had been pending between the complainant, August H. Riviere, and the said Amzi Berla, looking toward a purchase by the one and sale by the other of his interest in the said Berla-Riviere Company.

4. Ever since the incorporation of the said Berla-Riviere Company it had been the custom of the said company each winter to employ an auditor, and take an account of stock, and have a statement prepared showing the assets and liabilities of the company. Pursuant to this custom an inventory or stock taking was had in the month of December, 1915, and one George R. Scherff, an auditor, was employed to state the account on behalf of the company, and did so state the account under date of December 31st, 1915, which account included, among other things, an item for merchandise representing the inventory value of the stock on hand amounting to $14,783.04. A copy of said account and report of the said auditor is hereto annexed and made a part hereof, and marked Exhibit 1.

5. Following the making of said report by the said auditor in December of 1915, the said negotiations looking toward a purchase or sale by the one party in interest to the other, began, with the result that the complainant, August H. Riviere, agreed to purchase the interest of the said Amzi Berla for the sum of $17,000, the basis of said negotiations having been the report of the said auditor hereinabove referred to as Exhibit 1.

6. In order to consummate said agreement which had been entered into between them, it was agreed between the said Berla and the said Riviere that the said Berla should transfer his shares of stock, including that of his wife, to the said Riviere, which he did, and that the said Berla-Riviere Company should be dissolved, the said Riviere receiving in exchange for the

entire capital stock issued and outstanding which he then owned and turned in to the company, all of the assets of the company, all of the creditors having been previously paid, and there being no debts or liabilities except a first mortgage indebtedness on the property. This arrangement was in fact carried out, with the result that the said company was dissolved and all of the assets, subject to the said first mortgage indebtedness, were transferred to the complainant August H. Riviere.

7. As part and parcel of the arrangement the said Riviere thereupon caused to be incorporated the complainant, A. H. Riviere Company, under the laws of the State of New Jersey, on the 17th day of April, 1916, with an authorized capital of $25,000, which company was incorporated for the purpose of conducting the plumbing business and dealing in plumbing fixtures and supplies in general, and particularly to carry on the previous business which had been carried on by the said Berla-Riviere Company. A copy of the certificate of incorporation of said A. H. Riviere Company is hereto annexed and marked Exhibit 2.

8. In further carrying out of the said arrangement which had been entered into between the said Berla and the said Riviere, the said A. H. Riviere Company purchased from the said August H. Riviere all of the assets of the Berla-Riviere Company, as hereinabove set forth, and gave the said August H. Riviere in exchange therefor stock to the amount of $5,000, and its certain promissory notes, payable to the order of August H. Riviere, aggregating $12,000. Each of said notes was dated the 26th

day of April, 1916, and payable at the Summit Trust Company, Summit, New Jersey, in the following amounts and on the following named dates: The first for $5,000, payable March 1st, 1917; the second for $3,000, payable March 1st, 1918; the third for $3,000, payable March 1st, 1919; the fourth for $3,000, payable September 1st, 1919; with interest at the rate of 5% per annum on each of said notes, payable semi-annually. In addition, each of said notes was secured by a mortgage dated April 26, 1916, executed by the said A. H. Riviere Company to the said August H. Riviere, upon the real estate then owned by said company, which real estate had formerly belonged to the Berla-Riviere Company and had been transferred to the A. H. Riviere Company pursuant to the arrangement hereinabove set forth. Said mortgage was executed to the said August H. Riviere as mortgagee, and was recorded on the 1st day of May, 1916, in the Register's Office of Union County in Book 388 of Mortgages, page 421.

9. In further carrying out of the said agreement which had been entered into between the said Berla and the said Riviere, and immediately following the execution of the said notes and the said mortgage by the A. H. Riviere Company to the said August H. Riviere, the said August H. Riviere endorsed each of said notes in blank, and delivered them to the said Amzi Berla, and assigned to him the said mortgage which had been given to secure the said notes, which said assignment was recorded on the 1st day of May, 1916, in the office of the Register of Union County, in Book 59 of Assignments, page 179. In addition thereto the said August H. Riviere, together with his wife, executed to

the said Berla a mortgage on certain real estate in the City of Summit, which the said August H. Riviere owned personally and upon which he lived; which said mortgage was dated April 26th, 1916, and recorded on the 1st day of May, 1916, in the office of the Register of Union County, in Book 388 of Mortgages, page 424. In addition to the transfer of said notes and mortgages, the said August H. Riviere paid to the said Amzi Berla the sum of $5,000 in cash.

10. Following the consummation of the said arrangement as hereinabove set forth, the said A. H. Riviere Company proceeded to carry on the plumbing business which had theretofore been carried on by the said Berla-Riviere Company. In December of 1916 the said A. H. Riviere Company proceeded to take an account of stock and to employ the said George P. Scherff as auditor to state the assets and liabilities of the said company, and then was discovered for the first time that the amount of merchandise which had been received from the Berla-Riviere Company, which had been inventoried at $14,783.04, was not of the value at which it had been inventoried in December of 1915, at which value it had been stated in the report of the auditor, and at which value it had been taken as the basis of negotiations between the said Riviere and the said Berla, which negotiations had resulted in the purchase of the interest of the said Berla in the said Berla-Riviere Company, as hereinabove set forth.

11. Upon discovering this discrepancy the complainants proceeded to check up the said inventory which had been taken in December of 1915. The said inventory had been taken by

the said August H. Riviere, with the assistance of a clerk in the store, as had been the custom ever since the incorporation of the said Berla-Riviere Company, and carefully written up in a book at the time it was taken, which book was examined by the said Amzi Berla, and which inventory, as thus taken, was satisfactory to him. The values set opposite the respective articles as set forth in this book were by the said Riviere transcribed upon an adding machine, and a machine list made for the purpose of arriving at the total value of the inventory thus taken, which total as stated by the said adding machine amounted to $14,783.04, and the total thus stated by the adding machine was included by the said auditor in his statement of the assets and liabilities of the said Berla-Riviere Company, which statement was the basis of the negotiations which thereafter ensued between the said Berla and the said Riviere, as hereinabove set forth. The original of the said book of inventory, and the original of said adding machine list are in the possession of these complainants, ready to be produced.

12. The great discrepancy between the value of the inventory, as taken in 1916, and that as shown by the total of the machine list from the inventory taken in 1915 (very little of the original stock having been used, and an accurate account having been kept of new materials which had been purchased), so aroused the suspicions of the complainants that they had the same figures on the machine list, representing the inventory of 1915, again added on the adding machine of the Summit Trust Company, with the result that the total of the machine list as given by the Summit Trust Company was

$4,783.04, or a difference of $10,000. To further verify the total as given by the adding machine of the Summit Trust Company the same figures were added by the complainant August H. Riviere, who verified the figures as given by the said adding machine of the Summit Trust Company, namely, $4,783.04.

13. This was the first knowledge or intimation that the complainants had had that the total of the inventory of 1915 had been inaccurately stated. Nor had this fact been known to the said Amzi Berla, until the discovery thereof by these complainants, and their acquainting him with the fact. Both the said Amzi Berla and the said August H. Riviere at the time of their negotiations had absolutely relied on the accuracy of the total as given by the said adding machine, and as included in the report of the said auditor. The amount of the settlement of $17,000 between them was based on the said figures, and the statement of the value of the merchandise at $10,000 in excess of the value, as shown by the inventory, was a material mistake of fact, not known to either the said Berla or the said Riviere, the said figures of $14,783.04 having been taken by them in reliance upon the accuracy of the said adding machine.

14. The said note for $5,000, dated April 26th, 1916, became due, according to its terms, on March 1st, 1917, and was presented for payment by the said Berla at the Summit Trust Company, where it was payable; the said Berla not having endorsed or assigned or parted with the said note, nor having sold or assigned the said mortgage securing the same. Thereupon the said complainant, August H. Riviere, notified

the said Berla that he would not pay said note because of the mutual mistake growing out of the inaccurate stating of the value of the merchandise which had occurred at the time of their negotiations, but the said Berla, while neither admitting nor denying that the said mistake had occurred, insisted upon the payment of the money due under the said note. And these complainants show that the said Berla has placed the said note in the hands of his counsel for collection, and threatens to bring suit thereon unless the same is paid on or before March 8th, 1917.

15. The said mortgages which had been given to secure the said note and the other notes, by their terms provide that if default shall be made in the payment of any note when due, all of the notes shall immediately become due and payable, and the entire principal of the mortgages shall become due and payable at the option of the holder thereof, within ten days after the first default. And these complainants show that the said Amzi Berla will proceed to exercise his option to foreclose the said mortgages and declare the principal of all the notes due, and that the ten days following the due date of said note will expire on the 10th day of March, 1917.

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

1. That Amzi Berla, who is the defendant in this suit, may answer this Bill of Complaint, without oath, and each statement therein made.

2. That the mistake in stating the total of the inventory of the merchandise, as taken in

December of 1915, at $14,783.04, be corrected to state the true total amount of said inventory at $4,783.04, and that the said complainants be allowed a credit of $5,000 on account of the money agreed to be paid to the said defendant, and that the said defendant may, by decree of this Honorable Court, be required to deliver up for cancellation the said note for $5,000 bearing date the 26th day of April, 1916, and payable on the 1st day of March, 1917.

3. That the said defendant, Amzi Berla, his servants, attorneys and agents, be enjoined and restrained from instituting or prosecuting any suit or suits at law or in equity upon the said note dated April 26, 1916, and payable March 1st, 1917, for $5,000, and that he and they be enjoined and restrained from bringing or prosecuting any suit or suits at law or in equity to foreclose the said mortgages.

4. That the said defendant, Amzi Berla, his servants, agents and attorneys, be enjoined and restrained from declaring the principal due under the said notes dated April 26th, 1916, and payable, respectively, March 1st, 1918, for $3,000; March 1st, 1919, for $3,000; and September 1st, 1919, for $3,000; and from instituting any suit or suits, at law or in equity, to foreclose the said mortgage given by the said A. H. Riviere Comapny to August H. Riviere, dated April 26th, 1916, and recorded May 1st, 1916, in Book 388 of Mortgages for Union County, page 421, and assigned by said August H. Riviere to the said defendant by assignment dated April 26th, 1916, recorded May 1st, 1916, in Book 59 of Assignments for Union County, page 179; and that the said defendant, Amzi Berla,

transferring, assigning or negotiating said notes, or any or either of them, and from

his servants, agents and attorneys, be enjoined and restrained from instituting any suit or suits at law or in equity to foreclose the said mortgage given to him by the said August H. Riviere and wife, dated April 26th, 1916, and recorded on May 1st, 1916, in Book 388 of Mort-
10 gages for Union County, page 424.

5. That the said complainants may have such other and further relief as the nature of the case may require and as shall be agreeable to equity and good conscience.

6. That a writ of subpoena may issue, commanding the said Amzi Berla, to answer this Bill of Complaint, and to abide by said decree as this Court may make in the premises.

20 McCARTER & ENGLISH,
*Solicitors for and of*
*Counsel with Complainants.*

## Answer.

Filed June 12, 1917.

30 The answer of Amzi Berla.

This defendant, answering the Bill of Complaint says that:

1. He admits the statements contained in paragraph one of the Bill of Complaint.

2. He admits the statements contained in paragraph two of the Bill of Complaint, except that the actual dissolution of the said corporation, Berla-Riviere Co. did not take place until
40 April, 1916.

*Answer.*

3. He admits the statements contained in paragraph three of the Bill of Complaint.

4. Except as admitted by the statements contained in this paragraph, he denies the truth of the statements contained in paragraph four of the Bill of Complaint; an auditor was employed by the said Berla-Riviere Co. only for the purpose of going over the books of the said company; that the taking of stock was always done by the complainant August H. Riviere himself, and the employees of the company, other than the said auditor; that in recent years and particularly in the years 1914 and 1915 this defendant never had anything whatever to do with the taking of the stock of the said Berla-Riviere Co.; that the inventory and taking of stock of the Berla-Riviere Co. in December, 1915, was made and taken solely by the said complainant, August H. Riviere, and in December, 1915, the said George R. Scherff, the auditor referred to in paragraph four of the said Bill of Complaint was employed by the said Berla-Riviere Co. only for the purpose of going over the books of the said company, and was not employed for the purpose of making or assisting in making an inventory of the stock and in fact did not make, or assist in making an inventory of the stock of the said Berla-Riviere Co.; this defendant has no knowledge, information or belief as to whether or not the exhibit marked Exhibit 1 annexed to the Bill of Complaint is a true copy of the said account and report of the said auditor.

5. Except as admitted by the statements contained in this paragraph, this defendant denies each and every statement contained in paragraph five of the Bill of Complaint; that no negotia-

tions such as is stated in the said paragraph, for the purchase and sale by the one party of his interest to the other, were commenced prior to February 2nd, 1916; that the negotiations were commenced after the said last mentioned date; that the negotiations which were had by and between the complainant August H. Riviere and the defendant, resulted in an agreement by complainant, August H. Riviere, to purchase the interest of the defendant for the sum of Seventeen thousand dollars; the defendant denies that the said report of the said auditor was the basis of the said negotiations and the said report had nothing whatsoever to do with any of the said negotiations or with the said agreement to purchase and sell, made by and between the complainant, August H. Riviere, and the defendant.

6. He admits the statements contained in paragraph six of the Bill of Complaint.

7. He has no sufficient information, knowledge or belief as to whether or not the facts contained in paragraph seven of the Bill of Complaint are true, except that the defendant admits that the A. H. Riviere Company was organized as a corporation under the laws of the State of New Jersey.

8. He admits that the statements contained in paragraph eight of the Bill of Complaint are true, except that the note payable September 1st, 1919, is in the sum of One thousand dollars and not Three thousand dollars as is therein stated, and except that he does not know and has no sufficient knowledge, information or belief, and did not know and did not have sufficient knowledge, information or belief as to whether or not the consideration given to the complainant, A. H.

Riviere Co. for the said note was as is set forth in paragraph eight of the Bill of Complaint, but he took it for granted that the said notes were *bona fide* notes of the said corporation, made, executed and delivered by it, for good and valuable consideration and that they were made and delivered by the said complainant, A. H. Riviere Company to the said complainant, August H. Riviere, for an indebtedness due from the said corporation to the said August H. Riviere in the sum of the said notes.

9. He admits the truth of the statements contained in paragraph nine of the Bill of Complaint.

10. He denies that the value of the merchandise of the Berla-Riviere Company as inventoried in December, 1915, was taken as the basis of negotiations or had any part in the negotiations between the complainant, August H. Riviere, and the defendant, that had resulted in the purchase of the interest of the said Berla by the complainant, August H. Riviere, in the said Berla-Riviere Company; that the defendant has no knowledge, information or belief as to the truth of the other statements contained in paragraph ten of the Bill of Complaint.

11. He has no knowledge, information or belief as to the statement contained in the first sentence of paragraph eleven of the Bill of Complaint; the defendant admits that the said inventory had been taken by the said August H. Riviere, with the assistance of a clerk in the store, as had been the custom ever since the incorporation of the said Berla-Riviere Company; that the defendant denies that the book containing the said inventory was examined by the de-

fendant, and denies that he at any time approved of, or stated that the said inventory was satisfactory to him; that the defendant denies that the value of the merchandise of the Berla-Riviere Company as inventoried in December, 1915, or that the said statement mentioned in paragraph eleven of the Bill of Complaint was taken as the basis of, or had anything to do with the negotiations or had any part in the negotiations between the complainant, August H. Riviere, and the defendant concerning the sale by the defendant to the said complainant, of his interest in the said Berla-Riviere Company; the defendant has no knowledge, information or belief as to the other statements contained in paragraph eleven of the Bill of Complaint.

12. The defendant has no knowledge, information or belief as to the truth of the statements contained in paragraph twelve of the Bill of Complaint.

13. The defendant denies the statements contained in the first sentence of paragraph thirteen of the Bill of Complaint; defendant admits the statement contained in the second sentence of paragraph thirteen of the Bill of Complaint, and further states that defendant does not yet know whether or not the total of the inventory of 1915 had been inaccurately stated; that the defendant at no time prior to the time the note became due, which was payable March 1st, 1917, and not until March 2nd, 1917, did the defendant have any knowledge or information of the fact that the complainant, August H. Riviere, claimed that the inventory of $14,783.04 for merchandise was incorrect, and defendant does not now and did not know and did not have, and has

not any knowledge or information as to what the true inventory was; the defendant denies that both he and the said complainant, August H. Riviere, or that either of them, at any time during their negotiations had in any wise relied upon the accuracy of the said total as given by the said adding machine, or as included in the report of the said auditor; that the defendant did not at any time rely upon the accuracy of the said inventory or care about its accuracy; that in fact the property of the said Berla-Riviere Company known as the Maple street property was inventoried at the value of Twenty-two thousand, three hundred and ninety dollars and forty-eight cents, whereas the same, in fact, was at the time of the said inventory worth at least Twenty-eight thousand dollars; that the good-will of the said Berla-Riviere Company was worth several thousand dollars and that no value of the good-will of the said Berla-Riviere Company was stated in the said statement of the said auditor; that the defendant does not know whether the said adding machine was accurate or not, and does not know whether the said error, if any, was due to any inaccuracy of the said adding machine, or any mistake or carelessness made by the complainant, August H. Riviere; that the amount of the settlement of seventeen thousand dollars between complainant, August H. Riviere, and the defendant was in no wise based on the said figures, nor was it in any wise based on the statement of the value of the merchandise at ten thousand dollars in excess of its value, as shown by the inventory, as claimed by the complainant, August H. Riviere; that the defendant denies that there was a material mistake of fact not known to either the said defendant or the

said complainant, August H. Riviere; that the defendant denies that there was any mutual mistake of fact; the defendant did not in any way rely upon the said figures of $14,783.04, nor did the defendant at any time accept the said figures relying on the accuracy of the said adding machine; that the defendant did not rely upon the accuracy of the total as given by the said adding machine nor upon the said total as included in the report of the said auditor; defendant denies that the value of the merchandise of the said Berla-Riviere Company was $4,783.04 and defendant believes that the real value of the merchandise of the said company was much greater.

14. Defendant admits the statements contained in the first sentence of paragraph fourteen of the Bill of Complaint; that the defendant does not know the real reason why complainant, A. H. Riviere Company and August H. Riviere or either of them did not pay the said note, whether because of the mistake claimed by August H. Riviere to have been made, or because of the fact that the said complainants did not have the money with which to pay the same, as there were no funds on deposit at the Summit Trust Company where the said note was payable, to meet the said note; the defendant admits that he had placed the said note in the hands of his counsel for collection.

15. The defendant admits the truth of the facts stated in paragraph fifteen of the Bill of Complaint.

SECOND DEFENSE.

1. The first defense is hereby made a part of this defense.

*Answer.*

2. After the discovery of the said alleged mistake as claimed by the complainants, and thereafter, the complainants continued to carry on the business formerly conducted by the Berla-Riviere Company and continued to sell the goods and merchandise which had been sold by the Berla-Riviere Company to the said complainant, August H. Riviere, and by the said August H. Riviere, sold to the A. H. Riviere Company; that neither the said complainant, August H. Riviere, nor the said complainant, A. H. Riviere Company upon discovery of the said alleged mistake offered to restore the defendant to his original position as of the time that the defendant sold his interest to the said August H. Riviere, nor did they or either of them offer to restore him to his said position as nearly as possible under the said circumstances; and that the complainants still continue to conduct the said business and sell the said goods and merchandise; that by reason of the foregoing facts the said complainants ratified, confirmed and adopted the said sale between the defendant and complainant August H. Riviere, in all respects and in all its terms.

THIRD DEFENSE.

1. The second defense is hereby made a part of this defense.

2. On December 28th, 1916, the defendant purchased from his brother, Robert Berla, his, Robert Berla's interest in the business known as "Berla Bros." and as consideration for his interest in said business agreed to pay him the sum of $12,000.00, payable as follows: $4,000.00 on March 1st, 1917; $3,000.00 on March 1st,

*Answer.*

1918; $3,000.00 on March 1st, 1919, and $2,000.00 on September 1st, 1919, that the said payments fall due the same dates respectively as the notes mentioned in the Bill of Complaint and the said purchase was made by this deponent relying upon the validity of the said notes, and deponent expected to pay for the purchase of the said interest in Berla Brothers with the moneys realized from the said notes; that if this deponent had been immediately informed in December, 1916, of the said alleged mistake this deponent would not have entered into the purchase of the said interest in Berla Brothers above mentioned.

FOURTH DEFENSE.

1. The first defense is hereby made a part of this defense.

2. Neither of the complainants has, at any time, ever offered to restore the defendant to his original position as of the time of the sale by defendant to complainant, August H. Riviere, of his interest in the Berla-Riviere Company or as nearly as the same can be done under the present circumstances; nor has either of the complainants offered to restore the consideration or any part thereof which the defendant gave to the said August H. Riviere for the said notes now held by the defendant.

FIFTH DEFENSE.

1. The first defense is hereby made a part of this defense.

2. The said note for $5,000 bearing date the 26th day of April, 1916, payable March 1st, 1917, has been paid and the defendant has delivered

the said note to the complainant, A. H. Riviere Company.

SIXTH DEFENSE.

1. The first defense is hereby made a part of this defense.

2. There was no mutual mistake of fact.

SEVENTH DEFENSE.

1. The first defense is hereby made a part of this defense.

2. The mistake, if any mistake was made as alleged in the bill of complaint was due to the negligence and carelessness of the complainant, August H. Riviere, and was a mistake made by him alone.

EIGHTH DEFENSE.

1. The first defense is hereby made a part of this defense.

2. The defendant denies that there was any mistake made.

NINTH DEFENSE.

1. The first defense is hereby made a part of this defense.

2. The merchandise of the Berla-Riviere Company was of the value of $14,783.04 in December, 1915, when the inventory thereof was taken.

TENTH DEFENSE.

1. The first defense is hereby made a part of this defense.

*Answer.*

2. The business and assets of the Berla-Riviere Company at the time of the sale by the defendant to the complainant, August H. Riviere, of the defendant's interest therein in April, 1916, was of the value of more than $35,000.00.

ELEVENTH DEFENSE.

1. The first defense is hereby made a part of this defense.

2. It is impossible to restore the defendant to his position as of the time that he sold his interest in the Berla-Riviere Company to the complainant, August H. Riviere.

TWELFTH DEFENSE.

1. The first defense is hereby made a part of this defense.

2. The said defendant and the said complainant, August H. Riviere, were stockholders in the Berla-Riviere Company; that no special confidence appears to have been placed by one in the other; the special confidence, if any placed by one in the other being the confidence placed by the defendant in the complainant, August H. Riviere; each had equal means of information concerning the business and assets of the said Berla-Riviere Company, and the complainant, August H. Riviere, had the better means of information concerning the same, because he took the inventory of December, 1915; that the complainant, August H. Riviere, did not, in consummating the said sale with the defendant rely upon the representations of anyone and that he relied therein solely upon the information

which he, himself, had gathered, if he at all relied upon the said inventory.

WILLIAM HARRIS,
*Solicitor for and of Counsel with Defendant.*

## Replication.

Filed July 5, 1917.

The complainants join issue on the answer of the defendant.

McCARTER & ENGLISH,
*Solicitors of Complainants.*

IN CHANCERY OF NEW JERSEY.

October 8, 1917.

*Between*

AUGUST H. RIVIERE, *et al.*,
*Complainants,*

*and*

AMZI BERLA,
*Defendant.*

Transcript of shorthand notes of testimony taken in the above entitled cause at Chancery Chambers, Newark, N. J., on October 8, 1917, before Hon. MERRITT LANE, Vice-Chancellor.

Appearances:

Mr. Conover English, for the complainant.

Mr. William Harris, for the defendant.

*Mr. English.* I offer in evidence certificate of incorporation of A. H. Riviere Company, which is one of the complainants, certified copy from the Secretary of State, copy attached to the bill.

(Marked Exhibit C. 1.)

AUGUST H. RIVIERE, sworn.

*Direct examination* by Mr. English.

Q You live in Summit? A I do.

Q And you are in the plumbing and plumbing supply business? A Plumbing business, yes.

Q And are you connected with the A. H. Riviere Company? A Yes.

Q As what? A President.

Q You are president of it? A Yes.

Q And you practically own that company, don't you? A Yes, practically.

Q Previous to the incorporation of the A. H. Riviere Company, which, according to the certificate, was in April of 1916, had you had any connection with the Berla-Riviere Company? A I did.

Q And what? A I was half owner.

Q And who was the other half owner? A Why, Mr. Berla and his wife.

Q Mr. Berla, the defendant here? A Yes.

Q And that company had conducted what business? A Plumbing and heating business.

Q At Summit? A Summit, New Jersey.

Q And that business continued by the Berla-Riviere Company until the end of March, 1916, didn't it? A Yes.

*Mr. Harris.* I don't want to make very many objections, but I do object to the form of the questions of Mr. English; they are leading; they are taken from the affidavit filed instead of getting information from the witness.

*The Court.* Has there been any harm done by these questions to the witness?

*Mr. Harris.* Not so far.

*The Court.* Then let them proceed until there is some harm. Prefer to have them leading, prefer to get down to the real issue.

Q Now, you and Mr. Berla had some negotiations looking toward the purchase or sale by one or the other of his interests in the Berla-Riviere Company, didn't you? A Yes.

Q And about when did these negotiations begin? A They began at the beginning of 1916.

Q Early part of 1916? A Yes.

Q Previous to that what had been the custom of the Berla-Riviere Company with reference to taking the inventory of stock? A It was customary for my help to aid me in taking an inventory of the stock, and after the stock was taken it was put into a book and added up, and other years we didn't have an adding machine, we had to add it with pencil or pen and ink; of course, when Mr. Berla come up he would naturally go over this book, but this particular year, why, it ran a good deal more any other year.

Q You are a little ahead of the story? Did you have anybody or did Mr. Berla get anybody to state the account of the assets and the liabilities of the concern? A Yes, Mr. Berla always did procure the auditor.

Q Who was that? A Mr. Scherff at that time.

Q Did you bring with you the auditing accounts of various years previous to the dissolution of the company? A Yes, I did.

Q Who was the person who took this inventory of the stock, I am speaking now of the Berla-Riviere Company? A It was mostly myself.

Q I mean did Mr. Berla do it or did you do it? A I took the inventory of the stock, but Mr. Berla after that took a walk around different places to see if the stock looked anything like what was marked up to see if he could detect this error he thought was in there.

Q About what time of the year would you take this inventory? A Ordinarily would have to have it finished about January 1st.

Q So you would wait, I suppose, until the last of December? A Generally take the last week in December.

Q Did you take an inventory as of the close of business, 1915? A I did, sir.

Q And you personally, with the assistance of your clerk wrote up, went around the store and wrote up the stock? A Yes.

Q I show you a book here, which is a blank book of 1915, is that the blank book which you used for that purpose? A Yes, that is the book.

Q And that states what the various pipes and screws and other things there were in the store, is that it? A Yes, that is the idea.

Q Constituting all the physical property as far as the stock on hand is concerned? A Yes.

Q And that has opposite to it the valuations that you put down? A Yes.

Q How did you arrive at those figures, valuations? A Get the valuation of it, I would go through our bills and see the list of goods that were bought, and some of the things the prices had raised on and Mr. Berla said it would be well to take the higher prices so as to get at the true value of it.

Q You are familiar with those bills? A Yes.

Q Who was the active person in the conduct of the business? A I was of the business itself, with the exception of the books; Mr. Berla generally looked after that.

Q You were the man who ran the operating end of the company, so to speak? A Yes.

*Mr. English.* I will offer in evidence this book or inventory which Mr. Riviere refers to.

Q Before I close that offer let me ask you one more question. Did Mr. Berla ever look that book over? A Yes.

Q When? A He looked it over two or three times at the time he came up there.

Q I mean did he ever look it over before you closed your final deal with him? A Oh, yes, positively.

*Cross examination* by Mr. Harris.

Q Is this book now as it was at that time, any pages been torn out of this book? A Positively not, no.

Q You are positive? A Positive.

Q And in whose handwriting is this book? A Some is mine and some is our girl, the bookkeeper.

Q And when was this book written up? A Written up in the last week of 1915.

Q 1915? A Yes.

(Marked Exhibit C. 2.)

*Further direct examination.*

Q Now, did you total up the various figures that you set down in that inventory? A Yes, I added them up on the adding machine.

Q Where did the adding machine come from? A Why, the Burroughs people left a machine there to see if I could not be induced to buy it.

Q Left it on trial? A Left it on trial.

Q So you tried it out, so to speak, on these figures, is that it? A Yes.

Q I show you here a long machine list totaling $14,783.04; is that the identical machine

list that you produced from that adding machine with this book inventory? A Yes, positively.

Q Now, you have spoken of the auditor, Mr. Scherff, who used to come in and audit the books of the company.

Q Where would he get the material from, the data from, which he used in making up his audit? A He would get it from our books, and in getting at this stock he would take this book here and took this slip here and check off each figure with that book and then sign his name at the end of that book here.

Q When you say book you mean inventory book C. 2? A Yes.

Q Did Mr. Scherff handle this particular book in making up his account? A Yes.

Q He had this machine list? A Yes.

Q Did Mr. Berla ever see this machine list? A Yes.

Q Before you closed your negotiation with him? A Yes, positively.

*Mr. English.* I offer in evidence the machine list.

*Cross examination* by Mr. Harris.

Q When was this machine list made?

*The Court.* He has already said when it was made.

Q I mean what part of the month, he hasn't stated that? A In the latter part of December, 1915.

Q That is when this statement was made? A Yes.

*The Court.* When was the contract of sale?

*August H. Riviere, direct.*

*Mr. English.* In April.

*The Court.* April, 1916?

*Mr. English.* Yes, sir.

Marked Exhibit C. 3.

*Further direct examination.*

Q Now, you have spoken of the auditor's account. I show you herewith a statement signed by George P. Scherff, stating that it is the trading account or profit and loss account for the year ending December 31, 1915, of the Berla-Riviere Company; is that the original account that Mr. Scherff stated for you? A Yes.

Q And that came to the attention of Mr. Berla before you closed your negotiations? A Yes; Mr. Berla had one and I got one.

Q That was executed in duplicate, made out in duplicate? A Yes.

Q This is your duplicate? A Yes, that is my duplicate.

*Mr. English.* Mr. Harris, you can check that up with your duplicate and see if that is right. I offer it in evidence.

*The Court.* Let it be marked, subject to correction.

Marked Exhibit C. 4.

Q Now, I notice that this auditor's account C. 4, consists practically of two sheets, one is designed to show the liabilities and the other the assets; is that the general theory of it? A Yes.

Q And in the statement of assets I see here this entry, "Merchandise, $14,783.04.". A Yes.

Q What does that merchandise refer to? A That refers to all the merchandise on hand which is taken from that book.

Q The same merchandise written up in your book C. 2? A Yes.

Q Do those figures correspond with the total of the machine list? A Yes.

Q The same thing? A Yes.

Q Now, when was it, how soon after the 1st of January, 1916, did any negotiations ensue between you and Mr. Berla looking toward the closing out of one-half interest of one or the other? A It was immediately on Mr. Berla receiving his notice, the first visit he made me after receiving this copy.

Q Of this statement? A Yes; he came up to the office.

Q And do you remember when that was, what time of year it was? A Why, it was in January.

Q And who was there at the time he came up to the office? A Why, at that time our girl was there in the early part of it, but went home when we got talking personal, she got up and went on home, so we then continued our conversation, just Mr. Berla and I.

Q So that was just between you two? A Yes.

Q Was anything said at that time with reference to either one or the other of you selling out to the other? A Yes; Mr. Berla was the one that started that.

Q How did that suggestion come about? A Came about through my asking to see if I couldn't get more than $30 a week.

Q You had been drawing $30 a week from the company? A Yes; I told him on account of the expense, and the business was growing up, it was taking a good deal of my personal money, and I couldn't get along on that, and I

didn't want to draw on my personal account. He then came back and said, "I am not going to let my money pile up; I have got to get my money out." I said, "I have got to make more money, I can surely make more money somewhere else if I have to." He said, "If that is the way you are acting kind of funny. It has got to a point where we have to buy or sell."

Q That was between you and Mr. Berla alone? A Yes.

Q Did you go over any figures at that time or anything? A He started talking on prices of the thing, but I said he would have to get Mr. Scherff to verify those figures in that statement.

Q Referring to this Exhibit C 4? A Yes.

Q Was the matter closed then by arranging when Mr. Scherff would be there? A He tried to tell me then to consider the thing over; being late in the evening he wanted me to walk to the train; I said I didn't want to. He said, "You better consider this thing over; I am going to give you until Monday morning to think this matter over and Monday evening I will bring Mr. Scherff up here and we will go into this matter here."

Q Mr. Berla didn't live in Summit, he came up on the train? A He came up from Newark.

Q The following Monday evening did he appear with Mr. Scherff? A Yes, he did.

Q Where did you meet him? A Met in our office.

Q In Summit? A Yes.

Q Who was there? A Just Mr. Scherff; our girl went home and left Mr. Scherff and Mr. Berla and myself there.

Q Do you remember the date of that? A No, I can't say exactly; it was in the latter part of January or around the first of February.

Q Now, when you men got together then was the question of the discussion of the sale of his interests renewed? A Why, no; he took the matter up with Mr. Scherff and talked it over, never mentioned anything about sale between us, dissolving, or anything, went all over this statement and all, and this question of dissolving had never come up at all, and he then complimented me on the good business I had and that I had done first rate in the past year, and after a while, why, he said, "Well, I guess there is nothing else for me to do, I can go on down with Mr. Scherff on the next train." I then turned around and said, "There is something about the other end I would like to finish up between ourselves, if Mr. Scherff wouldn't mind going home alone," or something to that effect, so as to separate them.

Q And did Mr. Scherff withdraw himself? A Mr. Scherff went home alone, went out, at least went on down home, I suppose, and left Mr. Berla there with me, and Mr. Berla said, "I thought you had got all over this; I thought you would forget all about that."

Q Referring to what? A Referring to the sale of the business. Finally he got down and referred to the company; he took half of the inventory as showed him and said, "I will take the stock just as it is for half of it."

Q Before you got that far, when Mr. Scherff was still there was any discussion had about the state of the account with particular reference to this inventory? A Yes; he went all over that. Mr. Berla went all through this thing and

said about the merchandise, he said, "That merchandise ain't there"; he said, "Gus has gone over that thing; he has taken that whole thing;" he said, "I have gone through his prices, the prices are not right; it evidently must be there," he said.

Q By referring to Gus whom did he mean? A He referred to myself.

Q Did he go over this book, Exhibit C 2? A Yes, he went over it, I believe.

Q Did he go over the machine list? A Yes, checked it up.

Q Did he check up the figures on the list with the figures in the book? A Yes.

Q Did anybody add up the total of the machine list? A No, sir, not until later on.

Q I mean at that time the machine list was taken as accurate and figures on the book were checked up to see if it was there, is that right? A Yes, even asked Mr. Scherff if he had checked it up.

Q What did Scherff say? A He said, "Yes, proved correct;" there was one item there of two figures where he had added them together. I called his attention to it as soon as Mr. Scherff had gone.

Q Before you began to discuss the sale of the property what was the object of this going over the books with Mr. Berla? A Getting this auditor's report made up?

Q Yes. A We always had that made up, showing a report on the business to see how it stood.

Q To see how the business was getting along? A Yes.

Q That you say was early in February, 1917? What did you do after that with reference to

continuing these negotiations? Did you continue alone or did you get somebody to help you? A Yes; I immediately had to go out to try in some way to try and see how I could handle it, so got Mr. Williams to help me.

Q Corra N. Williams? A Yes.

Q At that February meeting did you and Mr. Berla agree on final figures? A At that time he said he would take half of the statement.

*The Court.* Half of the surplus, you mean.

Q And what was that? A Would take half of the statement of the business, he said.

Q What did that amount to? A That amounted to $17,000.

Q You mean the half amounted to $17,000? A The half, which made $17,000, half of thirty-four.

Q Did you accept that figure then or expect to negotiate further with him either alone or through Mr. Williams? A I had no money at that time. I said, "I can't think of that." I said, "Why don't you buy me out? I would be willing to take less money than that. I would take $15,000." I said, "I can't raise any money." I said, "I can't get any money, I haven't a cent in the world." He said, "It don't make any difference, you will have to get it somewhere." I said, "The only chance I have got, somebody had promised me $4,000; a man had promised to help me out with $4,000." Of course, I didn't get it.

Q Did he accept your offer to sell out for fifteen? A No, he wouldn't do that; he said, "I can't run this business; you are the one that

has got everything here, good will and everything; the customers don't know me." He said, "All I will have to do is to throw this in bankruptcy if you don't accept it."

Q Was any change made in the figures which are set up in this auditor's report, C 4? A No, sir.

Q Was there any suggestion that the figures were inaccurate? A No, sir.

Q They were the basis of the negotiations, were they? A Yes.

*The Court.* It is an irrebuttable conclusion almost, there is no question in my mind but these figures must have had something to do with making up what prices should be paid, it is inconceivable that they should not.

Q You said you consulted Mr. Williams. Did he at your request, as far as you know, conduct any further negotiations with Mr. Berla? A Yes, he did.

Q In your presence or not? A No, sir.

Q Not in your presence? A No, sir.

Q You finally did, either directly or through Mr. Williams, agree on that figure, didn't you, by which you were going to purchase from Mr. Berla? A Yes.

Q What was that figure? A $17,000.

Q What arrangement did you make about financing the transaction? A I had to go to the bank and see if the bank would help me out.

Q What bank was that? A I went to the Summit Bank.

Q Who is the president of that bank? A Mr. Haas.

Q Did you have any conversation with Mr. Berla in the presence of Mr. Haas? A Yes, we made an appointment with Mr. Berla to meet Mr. Haas at the bank. One appointment Mr. Berla did not keep, I believe it was on account that his wife was sick, but he finally did come by appointment.

Q Was Mr. Haas there? A Yes.

Q You there? A Yes, Mr. Haas and I.

Q What was said at that time, if anything, with reference to this purchase and sale and the inventory or statement as made up by the auditor? A Why, the question came up about how the money was to be paid from the stock, that was brought up; then Mr. Berla said, then he said, "I don't know, I don't think we had any such stock, it looks exorbitant, but it is evidently there, and there is the figures, and I have gone over the books, and Riviere says he has gone over that stock himself, he ought to know," and then the question came up how we should pay, and one thing and another, which Mr. Haas arranged by accepting a note.

Q What, if anything, did Mr. Berla say about the value of that stock there enabling you to pay? A He said when the thing was bought, $17,000, it was out of reason to expect me to pay, I didn't have a dollar in the world, he said, "He can take that stock and reduce it $9,000, he doesn't need any such stock."

Q Referring to that merchandise? A Yes. He said, "Take this $9,000, he has only got to get $6,000 to get this $17,000."

Q What arrangement for payment was finally made? A Finally I was to give $5,000 then, and $5,000 the following March.

Q That would be March, 1917? A 1916 I had to give.

Q You put down $5,000 in March, 1916? A Yes.

Q And you were to give $5,000 in March, 1917, this last March? A Yes.

Q That was represented by note? A Yes.

Q Then what other? A Then I was to give $3,000 a year after that, 1918, $3,000 on March 1, 1919, and then $1,000 in September, I think.

Q September, 1919? A Yes.

Q And to secure those notes were any mortgages given? A Yes, he took a mortgage on property there.

Q Property of the company? A Yes; and I happened to have a home which I had $2,000 equity, which I purchased through a building and loan; he took a mortgage on that.

*Mr. English.* Have you got those mortgages here?

*Mr. Harris.* Yes.

*Mr. English.* Have you got the notes? In order to put the transaction through it was necessary—this is all admitted by the answer—

*The Court.* Mr. English, don't waste time on admitted facts.

*Mr. English.* In order to put the transaction through it was necessary to dissolve the Berla-Riviere Company, put all the property in one person's hands, then incorporate the new company and issue stock for all that, and that was done through Mr. Williams acting as attorney for both parties.

*Mr. Harris.* We do not admit it was necessary to do that.

*Mr. English.* It was done.

*The Court.* I don't care whether it was necessary or not necessary; it was done.

*Mr. Harris.* We admit as to the fact of the forming of the corporation and giving those mortgages back.

*Mr. English.* You admit the Berla-Riviere Company was dissolved?

*Mr. Harris.* Yes.

*Mr. English.* And the Berla-Riviere Company got the same physical property?

*Mr. Harris.* We can't admit that.

Q When the Berla-Riviere Company was dissolved and the complainant's company came into existence what physical property did it get? A Did I get, the A. H. Riviere Company?

Q What property did your A. H. Riviere Company get?

*The Court.* Did it get all the property that belonged before that to the former Company?

A It did, your Honor.

Q All the real estate and all personal property? A All the personal property, yes.

Q Just took over that same property? A Yes.

Q When you came to give these notes you secured them, you say, by a mortgage on the company property; that mortgage was made by the A. H. Riviere Company, was it not? A Yes.

Q To you and by you to Mr. Berla, is that the situation? A Yes.

Mortgage from A. H. Riviere, dated April 26, 1916, recorded in the Register's office of Union County in Book 388 of mortgages, page 421, on May 1, 1916, being given to secure $12,000, and also an assignment of this same mortgage from August H. Riviere to Amzi Berla, defendant, dated April 16, recorded May 1st in Assignments of Mortgages of Union County, Book 59, page 179, offered in evidence and marked Exhibits C. 7 and C. 8.

Q $12,000, that was balance over the $5,000 which you paid down? A Yes, I paid $5,000 down.

Q You said you also mortgaged your house. I show you mortgage from August H. Riviere and wife to Amzi Berla, dated April 26, 1916; that is the mortgage? A Yes.

*Mr. English.* That was recorded May 1, 1916, in Book 388 of Mortgages for Union County, page 424. I offer that in evidence.

Marked Exhibit C. 9.

Q Both of these mortgages were given as collateral security for those notes, $12,000 notes, were they not? A Yes.

Q Then when these various negotiations were completed and transfers made it left you and the A. H. Riviere Company in possession of the physical property of the old company, then you went and did business, I suppose? A Yes.

Q When it came around to the close of the business of 1916 what, if anything, did you do about making an inventory at the end of 1916? A I took my inventory as usual.

Q The same inventory that had always been made? A After I got it all made up I went over—didn't have this adding machine then—I went over to a concern to ask them to allow me to use their machine to add my figures up; I added it up on that machine, that is, their man helped me.

Q What concern is that? A Commonwealth Water & Light Company; I used their machine; after I came back the figures were lower so much than the year before that I said to myself immediately there is something wrong here; then I took my figures and added up these new figures, 1916, and after I found out my total I then went through the stock and compared it to see if I was surely right, if I hadn't made a mistake; when I was sure of that then I took my both stock books, both invoice books to compare the stock to see how near it would come.

Q Compared one year with the other? A Yes; when I see the stock hadn't changed much and material had gone up I should have shown more than this statement here which is the end of 1915.

Q You mean the amount of stock you carried was about the same at the end of one year as the other? A Yes; if anything I should have more than $14,000 of stock; I then and there thought something was wrong; then I went ahead and took this list of figures which are produced here.

Q This machine list that had been made originally in 1915? A Yes; then I simply added up, taking these figures, adding them up, got all my totals together and added them and found out I was $10,000 wrong.

Q How much did the total come out when you added them? A Actually came out less than $10,000.

Q $4,783.04? A Yes. As soon as I found that out I went over to the Summit Trust Company and explained it to Mr. Haas, who was president, what I had found.

Q Did you have it added up on one of their machines? A Yes.

Q The Summit Trust Company machine added up the same figures? A Yes.

Q How did they come out? A They came out $10,000 less, which I have got there.

Q Here is the second machine list; is that the Summit Trust Company figures? A Yes.

Q And that totals $4,783.04? A Yes.

Offered in evidence and marked Exhibit C. 10.

Q And you verified it yourself? A Yes.

Q When you discovered that thing then I imagine you consulted Mr. Williams as counsel, didn't you? A Yes, I went to Mr. Williams.

Q And that must have been early in 1917? A Yes.

Q On Mr. Williams' advice what did you do then, if anything? A He told me not to do anything right away until this note came due.

Q Which was to become due when? A March 1st.

Q 1917? A Yes, sir.

Q Did you have any interview with Mr. Berla prior to the time when the note became due? A No, sir, I never seen Mr. Berla.

Q Did Mr. Williams, at your request, as far as you know? A Why, I don't think so.

Q Did he see him after the note became due? A No, if he did it was not—not for me, at least, might have; he may in a personal way; I never asked him to go, or he didn't, to my knowledge.

Q I don't believe you understand what I am talking about. I want to know after the time you discovered this discrepancy if Mr. Williams acting for you, so far as you know, had any negotiations with Mr. Berla? A After I found that out, yes. I believe he did see Mr. Berla after.

Q You consulted him about it; left it in his hands, didn't you? A Yes, I left it entirely with him.

Q You were not present when he talked with Mr. Berla? A No, positively not.

*Cross examination* by Mr. Harris.

Q How long had you that adding machine in your place of business prior to the time when you used it to get out your reports? A Roughly speaking I should say about six weeks; might say six weeks or two months.

Q And when did you first have a talk with Mr. Williams to represent you in the transaction of the disposition of the business by Mr. Berla to you, if any? A Why, after Mr. Berla made the proposition for me to buy or sell.

Q And you said that he made the proposition to you to buy or sell? A Mr. Berla brought the subject up. I said we will have to buy or sell.

Q Who first suggested the buying or selling? A Mr. Berla.

Q About when was that? A That was around the end of 1915; it was after we got our

inventory, possibly around January 1, 1916, as soon as our inventory came up, so that he knew his report.

Q Who employed Mr. Scherff, you or Mr. Berla? A Mr. Berla always; the last time it was me notified him to come.

Q You employed him the last time, didn't you? A Either myself or Mr. Berla; sometimes Mr. Berla would say to the girl, "When you are ready for Scherff drop him a line and he will come up."

Q When you formed the business how was it originally formed, did you put any capital in the business? A As originally formed?

Q Yes. A No, but I didn't draw any wages.

Q Originally in the opening of the business who put the capital in to open it? A Mr. Berla put $1,000 in and drew it out a year after.

Q Then the business grew on that $1,000 capital until you had the assets that you had at the time Mr. Berla went out of the business, is that correct? A Well, there were notes negotiated, it wasn't only that $1,000, it was notes negotiated.

Q Notes negotiated on your credit or Mr. Berla's credit? A Possibly the first note was on Mr. Berla's credit and the balance of those was handled by the firm itself.

Q Who endorsed those notes? A Mr. Berla endorsed some of them and so did I.

Q What was the arrangement made about drawing salary the first year of the business?

*Mr. English.* I can't see any materiality of this early history of the thing.

*The Court.* What is the materiality of it?

*Mr. Harris.* Our contention is that this report did not form the basis of the sale by Mr. Berla of his interest; that the basis of the business was the profit made by the company, the fact that it had taken the good will of the business. The figures in the report was another matter. Our contention is that the report had nothing to do with the sale and purchase.

*The Court.* Do you expect me to believe that?

*Mr. Harris.* I think you will.

*The Court.* You can't make me believe that, no matter how much testimony you take, where two men are negotiating, that amount of assets on hand does not play some figure in the amount that is offered; you are asking me to believe an impossibility.

Q What was the arrangement the first year? A I had an offer to be in business with someone else; Mr. Berla sent for me; I had an offer for a third of a business and two per cent. of everything, as manager; he sent for me to come and see him; when I came there he got at me to induce me to go in there with him; he says, "We will be on a fifty-fifty basis;" the fifty-fifty basis I was to get a salary, my wife and myself both were there, my wife acted as bookkeeper at that time; she has since died, and I took care of the business, done everything there was to take care of, horse and janitor and everything else, for $15 a week, and I naturally thought it was salary I was getting, but at the end of possibly two or three years an auditor who we had there said to me,

"Mr. Riviere, I shouldn't do this, I don't suppose it is just right, but do you realize in a short while Mr. Berla will get this whole business and you won't have anything?" I said, "No, sir, I don't," but the whole first year, my mother had died when I went in there, through her will I had $540, I didn't draw any salary out of the Berla-Riviere Company until I had used up that $540; then I got the $15 a week, and continued on that $15 a week until after my wife died and I went boarding; I then got $25 a week. I spoke about that. The auditor said, "You will soon be out of business unless you do something about it." Then I went to Mr. Berla, I said, "Mr. Berla, according to this here I don't get any salary at all, that is all charged up to my account." He said, "You can keep drawing on that account." I said, "No, I don't want to do that, if that is the case you might as well have this business, I might as well get right out now, I won't have a cent," he said. "Then, whatever money you have drawn I will have that taken off," which was then in the neighborhood of $1,500. My wife died; I had no money to bury her. He said, "You get your undertaker, I will get you check for it;" that was out of the Berla-Riviere Company; it was charged up against me just like the $15 I had drawn per week; he then said at that time, "I will sign that over." He got Fred Kingston, who was our auditor, to sign that over; and then he put me on salary at $25 a week, and he himself was to get $12.50; that continued then until up to about a year before, two years before we dissolved, I think, and I said to him then all of the dues and different things I belong to in a town like that and one

thing and another it was costing me so much money that I really could not stand it. He said, "Well, what do you suppose that amounts to;" I said, it cost about $5 a week. He then told me to take $30 a week instead of what I was taking, $30 a week until the end of the year, so I tried to have it raised to $35.

Q And outside of that $25 drawing account you shared equally in the profits, is that correct? A Yes.

Q And I show you this statement of February 2, 1916. Looking at that statement will you tell me what profit was made in the year 1915, the year preceding the giving of that statement? A $12,196.46.

Q (*By Mr. English*). That is according to the statement? A Yes.

Q Was that the amount of profit made of that business during the year 1915? A Yes.

Q And of that sum how much was Mr. Berla to receive? A Out of that sum?

Q Yes; how much was he entitled to? A He would have been entitled to half.

Q So that at that time, at the time the company was dissolved Mr. Berla was entitled to one-half of the profits or something over $6,000, is that correct? A Yes, if that had been correct.

Q If what had been correct? A If that merchandise inventory had been correct and had not been a mistake on the adding machine.

Q Yes, but in estimating this profit of $12,000 did the mistake on the adding machine have anything to do with it? A Positively, because it was not $12,000 profit, it would have been $10,000 less.

Q What kind of a business did you do in 1915? What was the nature of the business, was it contracting business? A Why, general line of business.

Q Was it contracting with the city or contracting with individuals? A Alteration work; it was alteration work mostly.

Q Alteration work? A Yes, mostly.

Q And your margin of profit on such kind of contracts was greater than your contract on city work that you had for the year previous, is that correct? A Yes, mostly.

Q In the year 1915 you have down on the inventory, "By contract jobs," $32,782.04, is that correct? A Yes.

Q That was the amount of work you actually did in the year 1915, is that correct? A Yes, we did that.

Q You estimated there was about $2,062.50 of the amount uncompleted contract? A Yes.

Q So that would make the total $30,719.54 for the work, is that correct? A That is right.

Q Now, you have down here material used, $5,165.71? A Yes.

Q Is that the correct amount of material that was used? A Yes.

Q So that that would leave you a gross profit from the business $25,553.83? A Yes, gross profit.

Q Now, your overhead charge for 1915 with reference to the contract you have here, "Interest on bank balance, $42.04, interest on discount $175.99, making a total of $218.03; that was the amount of interest your company paid to the bank during the year 1915 in connection with these contracts, is that correct? A No,

no interest and discount; that wouldn't mean interest we had paid to the bank.

Q What would that mean? A That would mean—that was the interest paid to us for the amount of money carried in the bank, that is what the bank paid to us; this interest and discount was money we got on the discounted bills.

Q That was part of the profit of the business during that year, is that correct; in other words, the bank upon your balance—

*The Court.* Don't go into that interminably. I can see by reading this paper what it means without being told about it.

Q Then, according to this statement here, you had in the year 1915, you made a profit of $12,196.46? A No. I made profit of $2,196.46.

Q Will you turn to that statement and give us all the carrying charges of the business for the year 1915?

*The Court.* I overrule that. He can tell us any carrying charges there may be other than in this statement. I can read the statement as well as he can.

Q Were there any other carrying charges for the business of 1915 other than those contained in the statement? A No, sir.

Q And this page of the statement, are there any corrections or errors in this page two of the statement of 1915? A There is an error in that statement of $10,000.

Q What errors are there on page two of the statement of 1915, on page one, according to your figures, I want it on this page, not that page?

*Mr. English.* He turns to the page.

Q Then I will follow it on page one, page starting, "trading account, or the profit and loss account for the year ending December 31, 1915," and beginning at "contracting job, $32,-782.04," in reference to that page? A You have got a mistake right here, in this here (indicating).

Q What is the mistake as to any figures on that page? A Mistakes are in that figure and this figure, both those figures. (Indicating).

Q That is in the total, is that correct? A Yes.

Q But as to the substance of the rest of page two it is correct, is that correct? A Yes, all these figures.

Q All the figures on page two excepting the two totals, $12,196.46 and $12,670.48, are correct, is that so? A Yes.

Q That you are positive of? A I think so. I haven't had time to go over it.

Q Or do you say the figures $12,196.46 and $12,670.48 are incorrect? A They are incorrect on account of the merchandise going in on this page here, they are not wrong here (indicating), but they are wrong on this here (indicating); here is where your mistake comes in, on this merchandise, that is the whole thing, the other figures I am not saying they are wrong.

Q Are you sure that the contract, that the total amount received by the Berla-Riviere Company for the year 1915 by contracting job was $32,782.54? A Yes.

Q And that the total material used for those jobs—

*The Court.* I overrule it; he has said that the statement is correct except in that

one particular; now, reiteration does not make it any stronger than what it is, it is wasting time.

Q Now, when did you retain Corra Williams to represent you in reference to the sale by Berla of the assets to you? A I answered that question in the beginning, but to answer it again, right after the first time that he spoke to me.

Q Was that in March, February or January, 1916? A It was just previous to the day that he brought up Mr. Scherff into our office. Mr. Williams didn't take the case, just simply knew it through me going to the bank, that is all.

Q About when was that; can't you fix the date? A Not the exact date; no, it was early part of 1916, in January, 1916.

Q Did you at any time authorize Mr. Williams on your behalf to give Mr. Berla a written offer to purchase or sell? A He was to see Mr. Berla and see about arranging for the sale, to look after my interests in the sale; on those visits I never was with him.

Q At the time you asked Mr. Berla for $35 a week did he make any statement at that time to the effect that the business had to be closed up if you received $35? A No; he made the assertion that he was not getting any money out of that business; he wanted to draw some money out of that business; he was not going to allow his money to pile up; that he was going to draw his money out of it; it was just coming to an issue; then he started to say I hadn't used him right; I hadn't introduced him to the customers. I told him if he had been up there more he would have been introduced more. Whenever he came up afternoons he always

devoted his whole time right in the office on the books.

Q The inventory was taken by you, is that correct? A Yes.

Q Did Mr. Scherff help you in the inventory? A Not in the inventory, with the exception of handing him the book, taking the total of that.

Q And did Mr. Berla at any time verify every item of the inventory? A Yes; he took that slip and went through that book and checked off each item.

Q Did he go through the stock? A He walked through the place; a man being in business as long as he was he wouldn't have to count every little thing, he could guess whether it was near it or not; he had keys for the place, he could have them to this day; he could have went through the whole stock and all.

Q How long did Mr. Berla have that book in his possession, that inventory book? A Only during the time he was in our office.

Q That was about how long a period? A Oh, he would generally stay there about two hours, might have had that book about an hour or so.

Q And did Mr. Berla ever make a statement to you that he would take one-half of the inventory price for his share of the business? A He said, "I don't want this business, I will take half of what it is worth," he said.

Q He said, "What it is worth," is that correct? A Yes, "What it amounted to."

Q He never said anything about the inventory valuation of the business, did he? A Yes; that is what he was going by, the inventory value.

Q Did he state he would take half of the inventory value? A He might not have said "inventory;" he said he would take "half what it amounts to."

Q Did he ever say anything about the good will of the business; what that was worth? A He said, "I haven't got any good will of this business." He said, "If I sold out to you I would be through with it; I can't devote my time here."

Q Didn't he tell you just before you went to the bank with Mr. Berla that the good will of the business was worth a lot of money and that you would be worth in one year $40,000, or two years? A No, sir.

Q He never stated that? A No; because, as a matter of fact the name would not have been changed so quick if that had been the case.

Q (*By the Court.*) If he did say that his expectations did not come true, did they? A A No, sir.

Q Did Mr. Berla ever ask more than $17,000 for his interest in the business? A No, sir.

Q That you are positive of? A Yes, as near as I remember he did not ask over $17,000, because he was after taking some money out of the business; really he had $18,000; of course, that is not part of the sale; $17,000 is what he asked for it.

Q That is all he asked for at any time? A That is what I recall, after he had drawn money out of it; during this agreement he drew a thousand dollars out.

Q Are you sure it was a thousand dollars? A Yes, he drew it out in order to balance up $900 account of mine that was drawn up there

and he declared a dividend after these negotiations there to clean it up.

Q (*By Mr. English.*) You drew $900 and had it charged against your account? A Yes.

Q (*By Mr. English*). He drew a dividend to balance it? A Yes, after he had settled on the $17,000, not before.

Q (*By the Court.*) At the time this contract was made, the final contract, did the concern owe Mr. Berla any more than it owed you? A No, sir, at the time, yes.

Q (*By the Court.*) When the negotiations were consummated, then did it? A Well, when they were first started, when this thing first came up to settle on the $17,000 I then had drawn on my personal account for share of the business, $940.

Q (*By the Court.*) And after Mr. Berla drew a thousand dollars to make up for that? A Yes, $940 was paid on bills payable against the concern, money owing the concern, so after the $17,000 was decided on and all in January Mr. Berla said, "Now, I am going to draw a thousand dollars out of this, I need this money," and he drew $1,000 to balance my account, but the $17,000 was based on this statement before this $1,000 was drawn out.

Q (*By the Court.*) The answer to my question was that you were even; you could have said that three minutes ago. A Perfectly clear, I didn't quite understand you.

Q Who are the stockholders of the A. H. Riviere Company at the present time? A Miss Spencer, Mrs. Riviere and myself.

Q Who is Miss Spencer? A A girl that works in my office, bookkeeper.

Q Has she any interest in the business? A Has a share.

Q Has she any real interest? A No; just to incorporate.

Q (*By the Court.*) The incorporation member? A Yes.

Q The new company did not use, in any manner use the name of the Berla-Riviere Company? A No, sir, they did not. The only way that appeared was the successor to the Berla-Riviere Company, that is the only way Berla-Riviere would appear in any way, shape or form.

Q After learning of the alleged mistake regarding the value of the merchandise did you continue to do business as you did before. A Yes.

Q And you have been doing business ever since? A Yes.

Q And did you at any time offer Mr. Berla by his returning his money he had received from the business, put it back in the business like he had been required to at the time of the dissolution, take him back in the business?

Objected to.

*The Court.* I will permit it.

A No, he was never asked to come back in the business.

Q Did you ever offer to let him back in the business by him giving back the money he had received? A No, sir.

Q And can you give me the time when you discovered, the date that you discovered that the error had been made in computing the amount of merchandise? A Why, it was around between about January 15, I should say, and about February 15 of 1917, when I discovered it.

Q And prior to March 3, 1917, had you learned that Mr. Berla had bought out his brother's interest in the partnership of Berla Brothers? A I had heard so, yes.

Q When did you first get that information? A I could not recall just when I got the information.

Q How long prior to March 3, 1917? A Why, I knew it before then, possibly three or four months ahead of that, I judge.

Q Didn't you receive some time the first of January, 1917, a notice from Amzi Berla to the effect that the Berla Brothers, that he had purchased his brother's interest in the firm of Berla Brothers? A I don't ever remember any such circular coming in.

Q But you do remember learning the fact—

*The Court.* I overrule that. He said he does.

Q What became of the adding machine that was used in making the alleged mistake? A The Burroughs people took it back.

Q You don't know where that is at the present time.

*The Court.* What difference does it make?

Q What was wrong with the machine, do you know? A I don't know; I am not an expert in that; all I know it made that mistake; don't know anything about machines.

Q I understand you had used the adding machine about six weeks; had you discovered any mistakes made on that machine during these six weeks? A No, but I never used it on any long stretch of figures.

Q Do you know whether it was the fault of the operator or the fault of the adding machine that the mistake was made? A No, sir, that would be impossible for me to say.

Q (*By the Court.*) You were not the operator? A I operated it.

Q You had complete charge of all the affairs of the business at that time? A Only as a partner in it.

Q Mr. Berla did not take any active management of the business or did not have any actual management of the business so far as the office was concerned? A I took care of all; however, Mr. Berla used to come up every week or so and go all through the books; go over what I had done and all.

Q But at no time during the negotiations between you and Mr. Berla was the question of the valuation of the inventory referred to, is that correct? A What is that?

Q Was the auditor's report ever referred to by either you or Mr. Berla in any of the negotiations between you and Mr. Berla as a basis to arrive at the figures that you agreed to give Mr. Berla? A Oh, yes, positively; that is the statement that he went by.

Q How do you know he went by that? A Because his own figures will show on that statement there; Mr. Berla knows his figures, he will find pencil mark on that now that he put on there.

Q Did he ever tell you that he relied on that statement to arrive at the amount of value? A Yes, but he said he always doubted the merchandise, but he said after going over it, he said, "I don't think that merchandise is

here, but it evidently must be here, I have gone over it."

Q But he never informed you how he arrived at the figure $17,000, did he?

*The Court.* How did he arrive at the figure $17,000? What is your story as to how he arrived at that figure?

*Mr. Harris.* Our story is—let Mr. Berla tell it—our story is this gentleman wanted to buy this gentleman out; he arrived at the figure $18,000.

*The Court.* How did he arrive at it?

*Mr. Harris.* He figured the business was worth $40,000.

*The Court.* Of course, he figured the business was worth $40,000, but what element went in to make him think the business was worth $40,000?

*Mr. Harris.* The element of profit.

*The Court.* Is that all, just the mere fact that he had $12,000?

*Mr. Harris.* He figured that the business was worth somewhere in that neighborhood.

*The Court.* He must have used some figures to make up his mind that it was worth somewhere in that neighborhood; now, what figures did he use? Why don't you frankly say he did use the figures? You remember you are in a court of equity; you remember the business of this court is to search the conscience of the defendant; now, let him be frank.

*Mr. Harris.* He will be frank when he gets on the stand.

*The Court.* I am asking you; I don't want any supposing. He used these figures, he either used these figures or did not use them.

*Mr. Harris.* Mr. Berla informed me how he arrived at the figure $17,000. This gentleman wanted to buy of Mr. Berla; Mr. Berla went over the figures; over the profits; he finally said he wanted $18,000. This gentleman came back and said, "I will offer $15,000." Mr. Berla said, "I will take $17,000, because I am not in position to come up to Summit and run this business;" the report between Mr. Berla and Mr. Riviere was never mentioned.

Q You have real estate now $22,390.48, what does that real estate refer to? A It refers to the real estate 25 and 27 Maple street.

Q What is the income of that real estate per year? A The statement shows, I guess, don't it? I can't figure out these figures, the auditor, Mr. Scherff, can give you that later on, he can tell better than I can.

Q Did you ever receive an offer for the purchase of that real estate? A No, sir, not to my knowledge, not to the firm itself, unless it came through Mr. Berla.

Q Did you ever offer the real estate for sale? A No.

Q Did you ever make statement to somebody that the real estate was worth $28,000? A No, sir.

Q Is there any way you can ascertain how much income the real estate brought in each month or each year? A I suppose I could.

Q Well, can you by any papers in court? A No, not in there.

*Re-direct examination* by Mr. English.

Q You paid taxes on that real estate? A Yes.

Q I show you the tax bill of 1916, is that the tax bill on that real estate you are talking about? A Yes.

Q What is it assessed at?

*Mr. Harris.* I object.

*The Court.* Admitted.

A $11,300.

Q That is what you pay taxes on? A Yes, sir.

Offered in evidence and marked Exhibit C. 11.

Q I suppose you as a law abiding citizen paid income tax on your company for the year 1915? A Yes.

Q Who signed the statement submitted to the federal authorities? A Mr. Berla did, I had to sign it also.

Q You as treasurer? A Yes.

Q Did you keep copy of that? A Yes.

Q Was that statement sworn to, do you know? A Yes.

Q By both you and Mr. Berla? A Yes.

Q I show you here a paper which seems to be copy of income tax return of 1915, is that copy, that is just copy, of course, the signatures would not be on it, what is the merchandise or stock on hand at the close of the year stated to be?

*Mr. Harris.* I object.

*The Court.* Why?

*Mr. Harris.* Improper evidence.

*The Court.* Why?

*Mr. Harris.* It is secondary evidence and the witness has testified it is not signed.

Q (*By Mr. Harris.*) In whose handwriting is this report? A Mr. Scherff, the auditor.

Q (*By Mr. Harris.*) And that was signed by you? A Not this one wasn't; the one that had to be sent away.

Q (*By Mr. Harris.*) The original? A Yes.

Q (*By Mr. Harris.*) Was the original signed by Mr. Berla? A Yes.

Q (*By Mr. Harris.*) Did you see Mr. Berla's signature on the original? A Yes.

Q What was the stock on hand paid to the government? A $14,783.03.

Q That is the same figure that the machine list gave your inventory? A Yes.

*The Court.* There certainly must have been a mistake somewhere.

Q You paid tax to the government? A Yes, I paid.

Q You paid the tax on that valuation? A The A. H. Riviere Company did.

Q Here is check to the order of Charles D. Duffy, collector, that is the tax levied on that? A Yes.

*Mr. English.* I offer in evidence copy of the statement and also check which paid the bill on that valuation.

Marked Exhibits C. 12 and C. 13.

*The Court.* What is the net profit?

*Mr. Harris.* $12,968.07.

Q And this was made up by Mr. Scherff following his statement of the account? A Yes.

Q That was accepted by both of you as an accurate statement, I suppose? A Yes.

J. FRANKLIN HAAS, sworn.

*Direct examination* by Mr. English.

Q You are the gentleman mentioned in this case as the president of the Summit Trust Company? A Yes.

Q And you are that now? A Yes.

Q You know Mr. Berla, I assume? A Yes.

Q You know Mr. Riviere? A Yes.

Q Did those gentlemen come to you in March of 1916 with reference to the sale of Mr. Berla's interest in the financing of the purchase by Mr. Riviere? A They came to me, but I think it was in February.

Q Well, whenever it was? A Yes, they came to me.

Q Did you have a conversation with Mr. Berla? A Yes, with both of them, at that time they were all present.

Q At the time they came was this auditor's statement, Exhibit 4, produced, or a copy of it? A I don't remember that it was produced, but I am perfectly familiar with the report, copy of it.

Q So you were acquainted with it? A I am acquainted with it.

Q Was this brought up in the discussion between you gentlemen, referred to, the items of it referred to in any way? A Only a copy of the inventory.

Q The inventory was discussed, that is what I want to know, what was said at the time Mr. Berla and Mr. Riviere were there with reference to this inventory? A It came up with the question regarding Mr. Riviere's ability to pay, make the payments, Mr. Berla wanted him to pay $5,000 cash the 1st of March and $5,000 on the 1st of September.

Q 1st of September following? A 1st of September following, and he claimed he was perfectly able to do that.

Q Who claimed that? A Berla claimed that. Mr. Riviere said he did not see his way clear to meet that; Mr. Berla told him he had a large inventory worth very much more than was required in the business and all he had to do was to liquidate that.

Q In discussing that inventory did they name what the value of it was, was the figure named? A I don't remember that the exact figure was named, it was simply a question that it was larger than really necessary for the business and he could easily liquidate it, make payment of $5,000 in September.

Q Was anything said by Mr. Berla to indicate his source of knowledge of the size of the inventory? A No.

Q He just stated the fact was that it was large? A Yes.

Q Was the statement exhibited at the time you had this conference, was it there in the room on the desk? A I can't remember that.

Q You do not remember that? A No.

Q Now, was anything said about reducing this stock? You made some mention of that a moment ago, Mr. Riviere reducing this large stock; what was said about that? A Mr. Berla

claimed it was larger than was necessary for the business, that he should liquidate it and enable him to make payment of $5,000 on the following September.

Q It appears from what Mr. Riviere said the terms do not require him to make payment the following September? A That was question of negotiation. Then I asked Mr. Riviere as near as I can remember at the time if his stock was any larger than usual; he said no, I asked him if it was any larger than necessary for the proper conduct of the business; he said no, he could not reduce it, he required that amount of stock he had on hand for the proper conduct of the business. My effort was merely to get these two gentlemen together, that was all, to get a settlement.

Q When you are talking about this "stock" you are referring to this merchandise? A Yes.

Q Did they finally agree on terms in your presence or was that arranged some other time? A Yes.

Q Was it stated by Mr. Riviere $5,000 down and $5,000 in a year? A Said to be $5,000 cash and $5,000 in one year, and $3,000 two following years, as Mr. Riviere stated correctly.

Q (*By Mr. Harris.*) Anything said at that meeting about the profits of the business for the year 1915 having been $12,000? A I don't remember that there was.

Q (*By Mr. Harris.*) You don't remember? A No.

GEORGE P. SCHERFF, sworn.

*Direct examination* by Mr. English.

Q What is your business? A Accountant.

Q Are you an auditor too? A Yes.

Q Are you the gentleman that has been referred to as the auditor who prepared this statement of the account of the Berla-Riviere Company? A Yes.

Q For how many years had you been doing that for that company? A At least five years.

Q How did you come in the matter originally? A Mr. Berla sent for me through a friend of his who works for the Whitehead & Hoag Company.

Q You got in through Mr. Berla? A Yes.

Q For five years past you stated the account of the company? A Yes.

Q What data would you get to state the account from? A Why, take the balances of the account after closing them, each individual account, and then taking what information they have with reference to the inventory and merchandise and stock and property on hand.

Q Did you go up to the office at Summit to go over the books for that purpose? A Yes.

Q Did you make up the statement in evidence, C. 4, dated February 2, 1916, for the year 1915? A Yes.

Q This paper bears your signature, does it? A Yes.

Q And in connection with that did you see and examine this book inventory Exhibit C. 2? A I did.

Q Did you also see and examine the machine list which Mr. Riviere says he made and which is marked Exhibit C. 3? A I did.

Q Did you check over the individual items on that machine list as they are stated in this book? A Yes, entered on the slip.

Q Did you total it up? A No, sir, I did not.

Q Where did you get the total from? A Took the machine total as being correct.

Q That total says— A $14,783.04.

Q (*By the Court.*) Isn't it apparent from looking at those figures to the eye of anybody that is at all expert that those figures can not be correct? A Might possibly be so. These are the machine totals and we took it for granted they were correct.

Q (*By the Court.*) It never occurred to you at all? A No, it never occurred to me as being incorrect.

Q You prepared this statement then so far as the merchandise figures you set up are concerned from the total of this machine list? A Yes.

Q And you got the other figures from the books of the company? A Yes.

Q Just explain what they call page two of this, which is the page headed, "Trading account, or profit and loss account," how is that made up? A By taking the total contracts and jobs which is represented on the printed side of the merchandise account and deducting the amount of unfinished contracts on hand.

Q You took the total amount of their outstanding contracts to be performed, is that it? A Yes.

Q That aggregated that amount you have stated? A Yes.

Q Then you deducted what you paid or what had been the work that had been done? A What material had been used.

Q That is material statement, is it? A Yes, material statement.

Q And then you set up there gross profit? A Gross profit on job.

Q That had nothing to do with the net profit, did it? A No, sir.

*The Court.* It has a great deal to do with the net profit.

Q I suppose before he gets through it does. Is there anything there to show the net profit? A Yes, the net profit, the amount here is, represented profit carried to surplus account of 1915, $12,196.46.

Q What role did the merchandise inventory play in arriving at that net profit you stated? A Very important.

Q What was that? A Because if this material used had been correct the amount stated there should have been $15,165.71.

Q What have you got with that? A $5,165.71.

Q In other words, the thing is $10,000 out of gear? A $10,000 out of gear.

Q (*By the Court.*) How did you get your figure as to material used? Did you take the inventory of the year before and then the inventory of this particular year and subtract the two and the difference between the two was material used? A With the purchases.

Q (*By the Court.*) With the additional purchases during the year? A With the additional purchases during the year.

Q So the fundamental basis of the error was as you have testified $14,783? A Yes.

Q That they are $10,000 out of gear as I expressed it? A Yes.

Q (*By the Court.*) They simply used $10,000 more that you don't account for in profit and loss account? A Yes.

Q Then your profit and loss account is $10,000 out of the way, is it? A Yes.

Q Now, I just want to get you down to a conversation I understand you participated in between Mr. Berla and Mr. Riviere at the office of the company, you were present one evening? A Yes.

Q This Monday night Mr. Riviere spoke about? A I don't recall the evening, but it was sometime shortly after the date of this report which is dated February 2, 1916.

Q You and Mr. Berla and Mr. Riviere were all there, is that correct? A Yes.

Q Were any negotiations done between Mr. Berla and Mr. Riviere in your presence with reference to selling out one to the other? A Only to arrive at the equity they had in the business at that particular time as shown by the statement December 31, 1915.

Q They were discussing a sale, were they? A Yes, they were.

Q And what was said with reference to arriving at the equity of the business, as you express it? A Both Mr. Riviere and Mr. Berla were anxious to arrive at the equity in the business and both of the gentlemen took the assets and liability sheet and added the amounts, making calculation of their own and arriving at the figures as between $33,000 and $34,000 as being the equity.

Q You say they took the liability sheet, you mean the first page of your report? A The second page of my report.

Q And that is the page that sets out the value of the inventory? A Yes.

Q (*By the Court.*) They arrived at $34,000 or $35,000 was the net worth of the business? A Yes.

Q Taking the paper which you prepared and which set up the merchandise fourteen thousand and odd dollars, that is right? A Yes.

Q Now, was anything said by either of them with reference to that valuation of the inventory as set up? A Yes.

Q What did either of them say and who said it? A Mr. Berla looked at the inventory book and thought that the amount was a little larger than usual, and Mr. Riviere also thought that it was a little larger, but both gentlemen rather came to the conclusion that inasmuch as the inventory book had stated the facts and inasmuch as Mr. Berla himself had handled the book and looked over the book and seemed to be satisfied that the extensions carried out here were perfectly satisfactory, they came to the conclusion that inasmuch as the books and these figures had been checked up they seemed to arrive at the conclusion that the machine total stated on this slip was correct.

Q Did they have the inventory book there, C. 2? A Yes, both gentlemen had the book.

Q And had that machine list? A They had the machine list.

Q They had your statement? A They had my statement, and Mr. Berla asked me if I added the machine list; I told him no, I had checked each item appearing on this list against the amount shown in the book, and Mr. Riviere knew that I had checked it because in the statement in this machine list somewhere, I don't

recall just the place, there were two items made out on this machine list which were a little different from the items in this book, but he made up the difference in the next total.

Q You checked that over, did you? A I checked that over, and Mr. Riviere made mention of that fact to Mr. Berla that I had checked, because of that little difference.

Q Did anybody add up the machine list that night? A No, sir.

Q Any suggestion by either of them that it ought to be added up? A No, they seemed to take it for granted the machine total was correct.

Q It seems you got up income tax—

*The Court.* You are wasting time. You got that in once; why get it in twice? It is cumulative. I will overrule it.

Q You were in the habit of preparing all their financial statements, weren't you, including their income tax statements? A Yes.

Q Did you have any other conversation except that one night when these two gentlemen were both present about this matter? A Not about this matter, except later on when the question of the difference came up, $10,000, sometime in March, 1916, when Mr. Riviere sent for me.

Q Was Mr. Berla there? A No, Mr. Berla was not there.

*Cross examination* by Mr. Harris.

Q Didn't the Berla-Riviere Company keep a merchandise book? A No, they kept merchandise account in their ledger.

Q What did the merchandise account in the ledger show? A It showed the purchasers and

the amount charged out on contracts as the material was used.

Q So that that purchasing book will show the amount of material used out on each job and if that was added all together that will show the total amount of merchandise you have during the year, is that correct? A No, that was taken care of in a separate book which is known as charge book, by which they charge each individual customer with the amount of merchandise they used and at the end of the month these items were totaled and then carried to the debit side of the merchandise account, rather to the credit side of the merchandise account.

Q And wasn't that figure $5,165.71 an item taken from that purchasing account? A It was as it appeared on the books at that time.

Q So that at the time when you went over that book this $5,163.71 was taken from that merchandise book rather than arrived at from taking the inventory of the year preceding and the inventory at this time as making the difference, isn't that correct? A Inasmuch as this amount here had a bearing on this account if this account had been correct this amount would show $15,000.

Q Was this amount of $14,783.04, did that appear anywhere on the merchandise book? A Surely.

Q Whereabouts? A The amount of inventory at the balance of the year.

Q You as an auditor, didn't you go over each account and check it up as merchandise used on each contract and add that up and show how much merchandise was used during the year? A No, did not.

Q You did not? A No, did not.

Q Were you ever requested by Mr. Berla to tell him each year how much material was actually used by the business? A No, sir.

Q Is this the book you refer to as the book showing the amount of merchandise used on each job? A No, that was amount of inventory at the close of business, December 31, 1915.

Q What kind of book was used to show the merchandise used on each job December 31, 1915? A It was kind of long book that had two columns, ordinary ruled book.

Q And the figure $5,165,71, how was that arrived at? A By using this amount here, deducting this amount from the total of the purchases and sales and then deducting this amount from the amount of merchandise used during the year, that naturally gives this amount as $5,165. Now, then, if this amount had been correct—

*The Court.* That may be intelligible, but it won't be to the Court of Appeals, "this amount." What amount?

A This amount $14,783, if that had been correct $15,000 would have shown here instead of $5,165.

Q Was anything ever said about the good will of the business at the time Mr. Berla and Mr. Riviere were negotiating for the sale or purchase of the business? A Nothing whatever

Q That was not mentioned? A Not mentioned.

RECESS.

J. FRANKLIN HAAS, recalled.

*Re-direct examination* by Mr. English.

Q Your bank, the Summit Trust Company, financed Mr. Riviere on this purchase of Mr. Berla's interest, did you not? A We in connection with the First National Bank; we took the mortgage.

Q Did the statement of the auditor given have any bearing with you on that transaction? A Objected.

*The Court.* How is that material. I exclude it.

CORRA N. WILLIAMS, sworn.

*Direct examination* by Mr. English.

Q You are a member of the bar, are you not? A Yes.

Q And have been how many years? A Thirty-four years.

Q And your office is here in Newark? A Yes.

Q You live in Summit? A Yes.

Q Are you connected with any financial institutions in Summit? A Yes, connected with the First National Bank, director of the First National Bank and also president of the bank. I am attorney for the Summit Trust Company; I am also city solicitor.

Q You know Mr. Riviere, of course? A Yes.

Q And Mr. Berla? A I have known both of them a good many years.

Q When did Mr. Riviere first come to you in connection with this matter now in court? A I think it was some time in February, 1916.

Q And in June, as I gather from what he says, he came to you to continue the negotiations he had started with Mr. Berla, did he not? A Yes.

Q You had conversation with Mr. Berla after that? A Yes. Mr. Riviere told me, in consequence of what Mr. Riviere told me, I called up Mr. Berla on the telephone.

Q Mr. Berla is here in Newark? A He had an office here in Washington street, and I asked him if he wouldn't come up to my office. I had the case of the Berla-Riviere Company. Mr. Riviere wanted me to look after the thing for him.

Q He did come, did he? A He came, I said, if you have a lawyer you better bring him along; he said he didn't want any lawyer; so he came up there and I told him that Mr. Riviere was willing to sell out his interest for $15,000 and Mr. Riviere thought $17,000 was too much for his share, and I asked him if he wouldn't buy out Mr. Riviere; he said no, he wouldn't buy out Mr. Riviere, because Mr. Riviere had the run of the business and knew all the customers, and he wanted to sell out; and I said I thought $17,000 was too much, or that Mr. Riviere thought so, and he said, "Why, it isn't too much, it is just half of what the inventory showed," he had a statement there.

Q Did he have this auditor's statement or copy of it? A He had copy of that statement, that is my recollection about it; he said, "He has got $14,500 of the merchandise on hand, he has got bills receivable for $9,000," and he says, "You will remember that the equity in that real estate is $10,000," he says, "that makes $34,000, around that sum," and he says,

"They don't owe much money, and I am not charging him anything for good will," and then the question came up, I told Mr. Riviere there was no use talking about Mr. Berla buying him out, he wouldn't do it; then the question came up as to cash payment. Mr. Riviere wanted money; he wanted his $5,000 cash payment and he wanted $5,000 paid very soon after.

Q You mean Mr. Berla did? A I mean Mr. Berla—I think in two or three months. I said, "He can't do it."

Q Who did you say that to? A "Mr. Riviere can't do it."

Q You said that to Berla? A Yes.

Q Where, in your office? A In my office. He said, "Why, what he wants to do is to reduce his merchandise on hand; he has got $14,000 worth there, and he ought to reduce it $5,000 at least right away, and he will have cash on hand; he will get cash out of that to pay cash for the second payment." I went ahead and prepared the paper; it was rather a complicated transaction and took quite some time.

Q In the operation you wound up the old company? A There was not much cash on hand and I thought the best way to do was to dissolve the old company and let Mr. Riviere buy the assets and turn them over to the new company and take in exchange notes and mortgages.

Q (*By the Court.*) How is that done? Did you take over the stock that Berla had in the old company? A Unanimous consent, took over the entire stock, we took over all the real estate and the entire stock and bills receivable.

Q How was the capital stock of the old company divided? A Why, Mr. Berla turned over his stock to Mr. Riviere.

Q Before that they had each the same? A Each had the same amount, and then Mr. Riviere sold the whole business to the new company and took the exchange.

Q The new company got the same physical property over? A Yes, exactly; that is my recollection of it.

Q The terms were finally arranged as already appears; then I assume you dropped out of the matter until this mistake was discovered? A Yes, after the transaction was closed there was nothing more done until Mr. Riviere called my attention to an error.

Q Did you have more than one conversation with Mr. Berla before the matter was closed? A Oh, I had a lot of talk with him, but mainly on the question of terms of payment, and I had to get the proceedings into shape to dissolve the old corporation and organize the new one. Mr. Berla signed a lot of papers; he signed consent to dissolve the old corporation, and it was done by unanimous consent; the new corporation was formed and the name of the new corporation was put on the sign, plate glass, at once, I think, or within a few days.

Q Now, come down to the point when you first learned, that you were acquainted by Mr. Riviere with the fact there was a mistake, how did that come up? A Mr. Riviere called me in his office one morning. I think it was a couple of months before the $5,000 note came due, and he showed me this exhibit here, machine list; he said, "There is a $10,000 error in that." I said, "I am surprised to see that,"

and then he asked me to take the matter up with Mr. Berla.

Q Was that before the note became due? A Yes; he asked me what he should do about the note and I said, "Well, if that note is in the hands of a third party, an innocent holder, you will have to pay it when it comes due." I said, "I think you had better wait and see whether Mr. Berla has transferred that note; if he has not transferred it, why, you better not pay it."

Q So on your advice he did not pay it? A Yes.

Q After that did you see Mr. Berla? A Yes.

Q What conversation took place between you? A I saw him at his office and told him there had been an error made in the statement, that the inventory of merchandise was $10,000 too high, that the adding machine had made an error of $10,000, and he said he didn't believe it, and I said, "If I show you, if I demonstrate to you to an absolute certainty that that error has been made, will you believe it?" He said, "I don't wan't to know anything about it." He said, "I believe the stock was there." I said, "I will show you the list of figures and show you the mistake in addition." He said he did not want to see it.

Q Did he see it; did he look at it? A No, he did not look at it; he wouldn't.

Q He did not recede from his position in that the stock was there? A He said he did not believe that that error was made, that he thought the thing was correct.

Q The next thing that followed was the filing of the bill? A Yes; I spoke to him about the settlement of the matter, but he would not consider any settlement; I told him I thought

it was a mutual mistake and ought to be adjusted; he said he did not see it that way.

Q Do you know who the income tax return was sworn to before? A My remembrance is that it was sworn to before me, that Mr. Berla brought it in, asked me to take the affidavit; my recollection is that I filed it afterwards.

Q For the company? A Yes.

*Cross examination* by Mr. Harris.

Q You took Mr. Berla's affidavit in Newark, did you, in his office? A I think I did.

Q And you took it up in the Kinney building and filed it, is that correct? A Not at that time; it was later.

*The Court.* What difference does it make?

Q Did you ever show the report to Mr. Riviere with Mr. Berla's signature on? A I can't say whether I did or not; I didn't file it the day he swore to it; I put it in my pocket; my recollection is that he came in around five o'clock and swore to it and that I filed it the next day or the day after.

Q Do you remember when you showed that report to Mr.—

*The Court.* Overruled. Is there any doubt Mr. Berla signed that?

*Mr. Harris.* No, there isn't any doubt; a question of veracity of some of the statements of the witnesses for the complainant.

*The Court.* As I look at this case there is no question of veracity between Mr. Berla and Mr. Riviere or anybody else.

Q Did you ever give Mr. Berla a written offer on behalf of your client to sell the business? A No, I did not.

Q You are sure about that? A I don't recall it.

Q I show you this paper and ask you if that bears your signature? A That is my signature.

Marked 1 for identification.

*The Court.* Are you going to offer it in evidence?

*Mr. Harris.* Yes.

*The Court.* Offer it then.

Offered in evidence and marked Exhibit D. 1.

Q Will you read that letter?

*The Court.* What is the question you are going to ask after he reads it?

*Mr. Harris.* I am going to ask him now that inasmuch as his memory would be refreshed if—

*The Court.* If he didn't make the original offer?

*Mr. Harris.* No, that if some of the statements that he said Mr. Berla made to him were not made.

*The Court.* That is far fetched. There is nothing in that letter inconsistent with what Mr. Williams testified to, except he did not make a written offer to sell Riviere's share to Berla.

*Mr. Harris.* That alone?

*The Court.* That alone shows that the witness is mistaken with respect to one thing, that is all.

*Mr. Harris.* He might be mistaken as to the other.

*The Court.* Every human being may be mistaken; he is doing the best he can.

Q I am trying to correct his memory. Will you read that, Mr. Williams, please? How long before this letter was sent were you retained by Mr. Riviere, do you recall, about? A No, I do not; I guess somewhere a few days before probably.

Q And prior to the making of that letter had you had any conversation with Mr. Berla at all? A I think I had; I think this was after we had the conversation that this letter was written; yes, I think so.

Q And did Mr. Berla ever tell you that he waived any compensation for his share of the good will in the business? A He said he was not charging him anything for the good will, that the statement he had there showed that the business was worth $34,000, he was not charging him anything for the good will, and he said that the merchandise on hand was worth a couple of thousand dollars more than it showed because the cost price of the merchandise was a long time prior to the actual taking of the inventory and the cost of material had gone up very materially since that time, and he was giving him the advantage of $2,000 there he thought.

Q And did Mr. Berla at any time ever tell you that $17,000 he offered to sell out for was by reason of its being half of the value of the business? A Yes, it was half of the statement that he had there; he figured up those three items and that showed $34,000 and he said

the indebtedness of the business was only nominal.

Q Did he tell you or Mr. Riviere in your presence that he would sell out his interest for half? A I don't think Mr. Riviere was ever present when any converastion took place at all between Mr. Riviere and myself, between Mr. Berla and myself.

Q And did Mr. Berla have the statement before him at the time you had the conversation with him? A I think he did, I think he had it with him, that is my recollection about it; I may be wrong.

Q Did Mr. Berla ever—did you and Mr. Berla ever discuss the fact that in all probability the business would be worth $40,000 that year? A No, I don't recall it.

Q And do you remember Mr. Berla made a statement to you that he was selling a half interest in the $40,000 business for $17,000? A I remember he said he was making $12,000 a year and I said I thought that was a big profit.

Q (*By the Court.*) On a capital of a thousand dollars? A Yes.

Q That was the capital invested ten years before?

*The Court.* I don't care when it was invested; the capital invested was $1,000 and that was all.

A I did discuss the question how much money he put in, but I didn't know whether that was pertinent or not.

Q And you do not recall whether the statement was made about the $40,000? A I don't recall it; I have entirely forgotten that letter.

*Mr. English.* We rest.

AMZI BERLA, sworn.

*Direct examination* by Mr. Harris.

Q You are the defendant in this action? A Yes.

Q And what is your business? A Plumbing.

Q How long have you been in the plumbing business? A I have been in the plumbing business, my folks and myself, about fifty years.

Q In the city of Newark? A Yes, city of Newark, part of the time in Texas. I was in Texas eight years.

Q And the rest of the time in the city of Newark? A Yes.

Q You were in partnership with August H. Riviere in a business known as the Berla-Riviere Company? A Yes.

Q That was a corporation, wasn't it? A Yes.

Q And you each owned half the shares? A Yes.

Q And do you recall when you went in business with Mr. Riviere? A In the fall of 1905.

Q Will you give a history of that business from then until the present time?

*Mr. English.* Is that material?

*The Court.* I will let him give it; I don't think it is material.

A Why, Mr. Riviere had been employed by Berla Brothers in Newark, of which I was one of the firm, and sometime before, well, it may be July of 1905, sometime late in the year of 1904 we had a strike or lockout, I forget just what it was, and Mr. Riviere could not work for us at that time; he had been working for

Berla Brothers. I had an investment in another concern and I got about a thousand dollars out of that business and I saw Mr. Riviere and told him that "I am going to start a plumbing business," what he thought of it and whether he would like to go in the thing; I told him Summit would be a good place and he said at once, "All right," that he would go and look it over, and we went up, and we finally, I don't know whether we did the first time, but soon after we hired a building up there and made a plumbing shop of it, turned it into a plumbing shop; it took nearly a thousand dollars to fix it up; then I came to our Newark bank and borrowed two thousand dollars more, which was all paid off, that is, the two thousand dollars was all paid off I think in three or four years, it was paid off piece meal. We then made, well, the agreement was that Mr. Riviere was to get half of the profits and I was to get half of the profits, and the understanding was and there was no other understanding, that Mr. Riviere was to get his wages and everything else out of profits; there was said that he was to get wages for his work. The thing went along for, I don't know, perhaps five years, I don't remember just how long it went along, might be five years, when there was an accumulation of about five or six thousand dollars charged against Mr. Riviere, and Mr. Riviere never said to me a word about that five or six thousand dollars, he always understood that that five or six thousand dollars was charged against him and would be deducted sometime from the profits of the concern for his share of the profits, and we bought a property. Then after the first lease had expired we bought the property and we had—we bought the prop-

erty for about $9,500 and Mr. Larnett let us have $10,000 on the property; we told him we were going to build up about $4,000 worth.

*The Court.* Mr. Harris, this may be very interesting, but what in the world has it to do with this case? I can not conceive what possible effect it will have in the defense of the action. The question is whether or not there was a mutual mistake made at the time this sale was made, not what led up to the sale.

Q How much did the real estate cost you? A The real estate cost, if I remember right, about $18,000 all together.

Q And what income did the real estate bring in, do you recall? A With what rents we charged to the Berla-Riviere, I think about $2,700 or $2,800.

Q You made mention of some $5,700 that Mr. Riviere owed the company? A Yes, I think Mr. Scherff could get from those reports what it was charged, what it was Mr. Scherff charged this for.

Q That was charged for one of the years you were in business with Mr. Riviere? A Yes.

Q Will you tell what took place at or about the time when you sold out your interests to Mr. Riviere? A Well, the first time I saw this report after Mr. Riviere—after I came up, generally went up there on Fridays, and I suppose that was one of the days I saw this report; we had been talking over the matter and I told Riviere he was carrying too much stock and he explained it by saying that in former years, instead of decreasing the stock as in former years, starting in September and until the 1st of Jan-

uary until stock was taken, keep decreasing it all the time, this year he increased it on account of the high price of materials and he hoped to protect, and therefore the stock would be a great deal more; and he also told me at that time and told me several times during the year that the profits would show much more than that year because we were not doing any contract work, it was all day's work, jobbing and alterations and things like that, which were much more profitable, and therefore the profits would show much greater this year than they ever did before; he did not tell me that once, he told me that a great many times.

Q And who kept the books? A Miss Spencer.

Q And did you have anything at all to do with the taking of the inventory in the year 1915? A No, sir.

Q And when was the first time the question of disposing of your interest in the business came up? A I believe it was the first time I saw that statement, after the statement was signed, the first time I went up; there was an account there of about $900 that was charged against Mr. Riviere, and I asked Miss Spencer what that meant, and, if I remember right, Mr. Riviere spoke up and said that was what he had overdrawn in his account. "Well," I said, "If you have drawn that much out then let me draw that much out and we will even the account that way," and that roiled him and he said he wouldn't stand for anything like that any more, that one of us would have to get out of that business. I saw right away that we would never patch up that thing any more, and he must have

had some thought beforehand that I would not just jump out that way, and I just imagined—

*Mr. English.* I object to what he imagined.

*The Court.* I was just about to object myself. Tell us what happened, not what you thought.

Q What took place? A He said, "All right," if one of us have got to get out I will take $18,000.

Q (*By the Court.*) How did you fix the figure $18,000? That is the only thing I am interested in? A I don't know; it went just as quickly as I tell you; it was out without any further consideration, and I said, "I will take $18,000," and he said, "I will take $17,000." I said, "All right, I won't stand on that, I will take $17,000." I left him with the idea that that was what I was going to have.

Q (*By the Court.*) You two business men can not make me believe, I am afraid, that you did not have in your mind some element which went to make up that figure $18,000; you did not just grab it out of the air? A Well, if I had any other idea of the figures, I really don't know that I did, that is all; it went as quickly as that.

Q (*By the Court.*) Why did you say $18,000 instead of $19,000 or $20,000? A I really don't know why.

Q (*By the Court.*) It is rather remarkable coincidence, isn't it, that this $17,000 is about one-half of the inventory? A I don't know; he made the offer of $17,000; I never said $17,000.

Q (*By the Court.*) I suppose this inventory value had nothing to do with your making up

this figure of $18,000? A I couldn't tell you yes or no on that, I really don't know; I will say that, that I did not have it in mind at that time, the thing was so quickly over, that I didn't have any amount; I don't know what got him to say $18,000, but it went just as I told you, as quickly as I tell you.

Q (*By the Court.*) I suppose the figure of $12,000 of profit the year before didn't have any influence in making up your mind? A I thought that was his influence, that was in my mind, that was what influenced him, because never before had he said anything about it; this whole thing came like as if I was struck by a stone.

Q (*By the Court.*) If the inventory had showed $10,000 loss and the profits showed $2,000 instead of twelve do you mean to say you would have made the offer of $17,000? A I don't know what I would have done, I really couldn't tell you what I would have done at that time.

*The Court.* I know what you would have done.

Q Did you ever make any offer to accept $17,000 for your share of the business? A No, sir.

Q Who made that suggestion of $17,000? A Mr. Riviere said so, and Mr. Riviere is mistaken when he says that it was a question of raising his salary from $25 to $30; that was done long before, and when he did it he never asked me at the time, he went ahead and did it and told me he had done it after he had done it for some time; this had nothing to do with this case whatever; the $25 or $30 was a matter long ahead of that time.

Q And did you ever at any time offer to take half of whatever the inventory showed? A There never was such a thing.

Q Did you ever mention the question of value of good will to any person in connection with this business? A In an offhand way when I as talking with Mr. Haas; Mr. Haas thought that $17,000 was a lot of money to make for a man that did not do anything in the business, and I explained to him that I did things in that business; I started the business, and when the business was first started I was up there a great deal, and when we rebuilt I lived in Summit one summer on account of it, and I lived in Summit the next summer on account of the business, and I told him when a man goes in business, into a corporation, he expects to get his share out of it; and the same with Mr. Williams, I told Mr. Williams that about the time Mr. Riviere had this thing paid off that he would probably be worth $40,000; Mr. Williams, he forgot it, but I am pretty sure I told it to him, not once, several times. The only question of my going to Mr. Williams' office was not to fix up matters, in connection with the payments, nor to fix up matters with the contract; I went there for the sake of signing papers and having explained what had to be done, one time; a whole lot was done and it had to be done again, because it was not right. Mr. Williams said it was the sole matter because there was complication of affairs because of the Seven Sisters Law, he didn't want to get the bank or anybody else in trouble, and I went there a great many times.

Q (*By the Court.*) When you said to Mr. Williams, if you did, that when this thing was

paid off the business was worth $40,000, you had in mind the fact there was $14,000 inventory there and the company had made $12,000 the year before, hadn't you? A Well, I probably had that in mind; I won't say I didn't have it.

*The Court.* Of course, you did.

A It was not discussed, your Honor, that thing was not discussed at all; the fact that Riviere had a running business and, as I told Mr. Williams at the time, I said, "Mr. Williams, Riviere never would have brought this up if it was not that he thinks he is making a profit here, now that he don't need me any more"; I told that to Mr. Williams at the time; I explained to Mr. Williams my situation; I told Mr. Williams I had explicit confidence in him, I wouldn't even take another lawyer against him.

Q (*By the Court.*) Let me ask you this question. Did you know, as a matter of fact, that the inventory was wrong? A Did I know?

Q (*By the Court.*) Yes. A No, sir.

Q (*By the Court.*) Did you know as a matter of fact that the statement of profit and loss, $12,000, was incorrect? A No, sir.

Q Did you ever make an inventory of the stock yourself at the time these things were pending? A No, sir, the only thing that I know about that is when Mr. Scherff was there one day we all looked over the thing in a general way and I asked Mr. Scherff whether the thing was right, because I then took the explanation Mr. Riviere made that everything was going up so and he had been buying that many goods, that the stock went up that way; I never considered the thing at all directly.

Q And was the offer of $17,000 that Mr. Riviere suggested, was that made at the same time on the same evening or the same day that Mr. Riviere and you decided that you could not get along together? A It was made the first time that I went up to Summit after the statement was rendered.

Q That was at the time you said you wanted to withdraw $940? A I don't know whether it is $940, it was about $900; I believe if Mr. Riviere had money then and there there would not have been a question about it, he would have handed me over $17,000.

*The Court.* Of course he would.

Q You say you never made an inventory of the merchandise itself? A No, sir.

Q And did you ever check up each item in this book Exhibit 2, merchandise book?

*The Court.* Is it contended that he did? My recollection is that the testimony of Mr. Riviere is to the effect that Mr. Berla had nothing to do with that book except he saw it.

*Mr. English.* He saw it and walked through the store and went over the figures.

*The Court.* Go ahead then.

Q Did you? A No, sir.

Q And did you check up and see if the prices of the material there set forth was correct prices? A No, sir; what I had to do with it was what I told Mr. Scherff; we were relying on Mr. Scherff; I was relying on Mr. Scherff.

Q And did you make arrangements some time in March, 1907, or some time in Decem-

ber, 1916, to purchase your brother's interest in the interest of Berla Brothers being conducted?

*Mr. English.* I object as immaterial.

A Yes.

Q How did you come to purchase, what were the reasons that led to your offering to purchase your brother's interest in the Berla Brothers business?

*The Court.* How is that material?

(Question withdrawn.)

Q (*By the Court.*) Did you depend upon the deal you had with Mr. Riviere in order to finance yourself in the purchase of the interest in your brother's concern? A I did.

*Examined* by the Court.

Q To what extent? A In what way?

Q Well, how, to what extent? A Well, I made the notes come due the same as these notes came due from the A. H. Riviere Company.

Q How much was the amount you were to pay your brother? A $12,000.

Q And the amount you received from Riviere was $17,000? A Yes.

*Mr. Harris.* Balance of $12,000.

Q Did you pay the first $5,000 over to your brother that was paid by Riviere? A No, sir.

Q What did you do with that? A I used that in my business.

Q How do you fix the figure $12,000 for the interest of your brother that you paid out? A That was the agreement.

Q How did you happen to fix that? A I showed him by the figures I would sell out to him for $12,000 or he sell out to me, and he elected to sell out to me.

Q And did you use any figures in arriving at that figure, $12,000? A At that time?

Q Yes, or at any other time? A I believe I did.

Q How did you figure, have you got those figures here? A No, I have not.

Q What was the whole business worth, do you know? A Well, the share would come to about that much money, or mine would out of the business, you see.

*The Court.* Yes, I think I see.

A I bought—Riviere and I settled some time in April, I believe it was of the same year that I bought my brother's interest in December.

Q Did you have the agreement with your brother to buy out his interest before you had the agreement with Riviere for him to buy out your interest? A No.

Q It was after that then? A Yes.

Q And it was then you went to your brother and wanted to buy out his interest in his business? A Yes.

Q After you had arranged on the figures with Riviere or agreed upon figures, rather, with Riviere, the Berla-Riviere Company was closed? A As far as I was concerned, excepting the payment of the notes in April, some day in April.

Q 1916? A 1916; and in December, in the latter part of December, 1916, I bought my brother's interest in Berla Brothers.

*Further direct examination.*

Q It was after you had your agreement then, with Riviere that you wanted to buy out your brother's interest? A Yes.

Q December, 1916? A I had already had $12,000 worth of notes from some time in April, which would become due in March, and the payment to my brother was made in March when I got the payment from that first note, then I paid my brother.

Q In April, 1916, you sold out your interest to Mr. Riviere, is that correct? A Yes, I think it was April.

*The Court.* March or April.

Q And at that time you received $5,000 in cash and $12,000 in notes? A Yes.

Q And that $5,000 you received in cash you put in the business here in Newark? A Yes.

Q Then in December, seven months later, you made arrangements to buy your brother's interest out in Berla Brothers for $12,000? A Yes, the latter part of December, 1916.

Q And the first payment to be paid to your brother was $4,000 to become due in March, 1917, is that correct? A Yes.

Q And in March, 1917, you also had due to you a $5,000 note given by Riviere to you as part of the purchase price? A Yes.

Q And when the court ordered Riviere to pay the $5,000 note did you use any part of that $5,000 to pay your brother $4,000 that was due him? A I gave him $4,000.

Q And the remaining $7,000 or the remaining $8,000 due your brother, when did you agree to pay him that? A Why, on the 1st of

March, next year, and the 1st of March, the following year.

Q Do you recall at this time how much you were to repay your brother the 1st of March, 1918? A I am under the impression it was $5,000, but I won't be certain about that.

Q There was agreements draw providing for those payments, wasn't there? A Yes; I won't be certain about those.

*Mr. Harris.* I offer those.

*The Court.* I would like to know what materiality it has.

*Mr. English.* I don't think it is material; I would like to preserve whatever objection to materiality.

*Mr. Harris.* I offer deed and contract.

Marked Exhibit D. 2 and Exhibit D. 3.

Q Did you ever have any conversation with Mr. Riviere wherein you stated that you would take a chance with the inventory, half of the assets, an amount equal to half of the assets, for your share of the business? A No.

Q How long did that conversation take place, the total length of it wherein the offer by Mr. Riviere to purchase your interest for $17,000 was made? A No longer than it takes me to tell it here, that is about all there was to it.

Q And at the time you dissolved partnership with your brother in December, 1916, did you send Mr. Riviere a notice of that dissolution? A Yes.

Q How did it happen that you sent him a notice?

*The Court.* How am I interested in that? I overrule the question.

*Amzi Berla, cross.*

Q When was the first time you heard that mistake had been made, if any? A The first week in March, it must have been a day or two after the first of March when the note came due.

Q And had Mr. Riviere or any one for him made any offer to you that upon your returning the moneys and notes that you had received from Mr. Riviere they would give you back your interest in the business? A It was not put that way. Mr. Williams came in and he among other things said that Mr. Riviere was willing to settle the matter for $2,500.

Q Did you have any talk with Mr. Riviere since the 1st of March, 1917? A No.

Q And did you have any conversation in this matter with any one representing Mr. Riviere excepting Mr. Williams that day? A No.

Q And did Mr. Williams at any time offer upon your returning to Mr. Riviere the cash you had received and the note to give you back your interest in the business? A No.

*Cross examination* by Mr. English.

Q Mr. Williams, when he talked to you, offered to split the difference of the amount of the mistake, didn't he? A He may have said, I don't remember; it appears to my mind it was a matter of twenty-five—he may have put it that way.

Q He thought it was a mutual mistake and each bear half of the loss and call it off and not have to go to court, wasn't that the proposition? A Well, I was a little roiled about it; I won't say whether that was just the proposition, I won't say they were the exact words.

Q (*By the Court.*) I am rather interested as to why you were roiled, why were you roiled? A I was roiled to think that after this time they had discovered a mistake, and against me.

Q (*By the Court.*) What were you roiled at? A Because it was against me, Riviere had got the better of it all the way through. I was put out of the business when the property was paying well, and that was the only reason I was put out, that was on my mind.

Q (*By the Court.*) When the mistake was discovered you were not put out of a very paying proposition? A No, sir, I didn't think until today but what that business was paying $12,500; I don't understand yet how the bookkeeping is on it.

Q You say that Mr. Williams or Mr. Riviere did not offer to restore back the situation, you didn't ask him to, did you? A No.

Q You did not tender back your notes, did you, and say, "Give me back the business"? A No.

Q Did not offer to hand back that $5,000 you had?

Objected to.

*The Court.* Admitted. In the case of mutual mistake the obligation is mutual.

Q You did not make any effort to create the situation which existed before you had made this deal at all, did you? You did not try to put him back where he had been before, did you? A At that time?

Q Yes. A No.

Q You never suggested that you would put it back? A I don't know whether I would or not.

Q You don't care to do that, do you? A Well, I don't know. I didn't want to get out of the business; I was put out of the business.

Q (*By the Court.*) Do you want to go back into this business? A I never thought of that; I don't know whether I do or not; I never thought of that.

Q You say you have been relying on Mr. Scherff; he is the man that made up this account, is he? A Yes.

Q And, of course, you studied that over, did you? A Studied it over?

Q Yes. A Yes, looked it over.

Q That is what you got it for? A Yes.

Q You noticed in that statement profit and loss of twelve thousand and odd? A What?

Q The statement carried over to profit and loss $12,500, you noticed that? A Yes.

Q And you noticed the inventory at fourteen thousand dollars? A Yes.

Q And you assumed that they were correct because they come through Mr. Scherff, employed to get them right? A Well, I assumed more that part, I assumed more on account of Mr. Riviere; Mr. Riviere's contention was, and he told it to everybody that has been a witness here, that, as I explained before, that the price was higher for material and they had been buying more, we had been buying all through September, October, November and December, I should say, because in the latter part of the year he always would let his stock run down; and we all thought that looked plausible on account of the higher prices and everything, but I never thought, I never gave it a thought that the stock would be less under

those conditions than they were in the year before.

Q In other words, you assumed that that statement was correct, didn't you? A Yes.

Q And before you closed that matter with Mr. Riviere you had had opportunity to study that statement and to size up the value of the property as it appeared on that statement? A At times, yes.

Q And the $17,000 which you put in as your half of the value of the property you figured out from the general value of the property that was set up on that statement? A Why, yes; of course, there wasn't much time elapsed between the time of seeing the statement and the time of making this.

Q As an experienced business man, you have been in business many years? A Yes.

Q You have been in the habit of studying statements? A I don't know as I have been in the habit of studying statements. I am not much of a mathematician.

Q You can divide thirty-four by thirty-two without any trouble? A Yes.

Q You are in the habit of making a quick deal and putting a thing through and going on with the next deal? A I have made them that way, yes.

Q (*By the Court.*) Suppose you had known that the inventory was only $4,000 and the profits only $2,000, how much would you have asked for your share of the business? In other words, suppose you had known of the mistake, how much would you have asked? A I really don't know; I don't know how it would have come to you.

Q (*By the Court.*) Wouldn't it come to you about the same way as the $17,000 came to you? A It wasn't $17,000; it was $18,000.

Q (*By the Court.*) Well, $18,000? A I don't know.

Q (*By the Court.*) Frankly you would not have asked, if that inventory was $10,000 out and the profits some $10,000 out, you would not have asked $17,000 or $18,000 for your share, would you? A I don't know; I don't think the thing would come about if that was the case; I think I would still be a member of that company; I don't think it ever would come to that point. I believe I still would be an officer in that company and stockholder.

Q You are injecting a situation that is not in the Court's question. Can't you answer the question? A I can't answer it any better, the question he is putting to me, than by answering it that way.

Q That is the best you can do, eh? A Yes; I am trying to answer you in a fair way; I never asked a thing of Mr. Riviere for nothing; I gave him things for nothing, but I never asked anything for nothing from him, and you would feel the same as I do; you would have felt a little roiled at the time the same as I did.

Q (*By Mr. Harris.*) How much money did you draw out of the business a week during the year 1915? A $12.50 a week.

*Mr. English.* What has that got to do with it?

Q Was that charged against your dividend? A No, that was by mutual agreement between Mr. Riviere and I at the time we charged off that five or six thousand dollars that Mr.

Riviere said was only $1,500, but it was five or six thousand dollars; at that time we agreed to make—I suggested this myself at that time; I said, "Riviere, the thing is going along all right and I think I ought to get something out of this now; we will charge this thing off." I told Mr. Scherff to charge it off.

Q So then to sort of square up on that you began to take out $12.50 a week after that? A Yes, I had a thousand dollars in, not a year, I did several years. I think the books will show seven or eight years or five or six years anyhow that I didn't draw anything but one thousand dollars in.

Q (*By Mr. Harris.*) Admitting this statement was correct and showed either $12,000 or $2,000 profit, that was profit above the drawing profit that you and Mr. Riviere each took each week? A That was included in the expenses to Mr. Riviere and what I took in salary.

Q What was the business of Berla Brothers? A Plumbing.

Q Where, here in Newark? A Yes.

Q That was a bigger business than the Berla-Riviere business, wasn't it? A No, no bigger.

Q No bigger? A No.

Q Just as big? A I don't know as it was as big; it was an old concern.

*The Court.* Now, we are going off on a tangent.

The application to dismiss the bill may be considered as having been renewed.

*Mr. English.* I intended to put in evidence those notes; he has not got them here.

*Exhibits.*

*The Court.* Let them be produced and marked.

*Mr. Harris.* We agree to the fact that we have those notes and the notes were set forth in your complaint.

IN CHANCERY OF NEW JERSEY.

A. H. Riviere, *et al.*,
*vs.*
Amzi Berla.

*Abstract of Exhibits Printed by Agreement.*

C. 1—Certificate of incorporation of A. H. Riviere Company, dated April 17, 1916; authorized the transaction of a general plumbing, steamfitting and sheet metal work business. Authorized capital, $25,000.

C. 2—Inventory of merchandise and stock on hand of Berla-Riviere Company, made by A. H. Riviere in December, 1915.

C. 3—Machine list of inventory, made by A. H. Riviere, totaling $14,783.04.

C. 5 and C. 6—Notes referred to in paragraph 8 of the Bill of Complaint.

C. 7—Mortgage of A. H. Riviere Company to A. H. Riviere, on said company's property, dated April 26, 1916, recorded Book 338 of Mortgages for Union County, page 421.

C. 8—Assignment of last mentioned mortgage by A. H. Riviere to Amzi Berla.

*Exhibit C. 4.*

C. 9—Mortgage A. H. Riviere to Amzi Berla, on dwelling house, dated April 26, 1916, recorded Book 338 of Mortgages for Union County, page 424.

C. 10—Machine list of inventory made by Summit Trust Company, totaling $4,783.04.

C. 11—Tax bill for the year 1916, levied by the City of Summit on real estate of A. H. Riviere—assessed valuation $11,300.

C. 12—Income tax return for the year 1915, filed with the United States Government by A. H. Riviere Company, signed by both A. H. Riviere and Amzi Berla, as officers of said company, setting forth value of merchandise on hand as $14,783.04

C. 13—Check in payment of income tax assessed.

D. 1—Letter written by Mr. Williams.

D. 2—Deed between Amzi Berla and his brother.

EXHIBIT C. 4.

195 Brighton Avenue,
Arlington, N. J.,
February 2, 1916.

Messrs. Berla-Riviere Co.,
25 Maple Street,
Summit, N. J.

Gentlemen:—

According to instructions, I have closed the books of the Berla-Riviere Co., under date of December 31, 1915, and have prepared from same, Trading on Profit and Loss Account and

*Exhibit C. 4.*

Balance Sheet, both of which find hereto attached.

I herewith declare, that the Profit and Loss Account, is a correct showing of your operations during 1915, and that the Balance Sheet is a correct statement of the position of your assets and liabilities as of December 31, 1915, as shown on your books of accounts.

Very truly yours,

GEO. P. SCHERFF.

## TRADING ACCOUNT

OR

## PROFIT AND LOSS ACCOUNT

For Year Ending December 31, 1915.

| | | |
|---|---|---|
| By Contracts and Jobs | | $32,782.04 |
| Deduct amount of Unfinished Contracts | | 2,062.50 |
| | | $30,719.54*d* |
| Material used | | 5,165.71 |
| Gross Profit on Contracts and Jobs | | $25,553.83*d* |
| Interest on Bank Balances | $ 42.04 | |
| Interest and Discounts | 175.99 | |
| | | 218.03 |
| | | $25,771.86*d* |

Costs.

| | | |
|---|---|---|
| To Labor | $8,126.75 | |
| " Freight and Cartage | 207.32 | |
| " Stable Expenses | 266.79 | |
| " Automobile Expenses | 299.17 | |
| | | 8,900.03 |
| | | $16,871.83*d* |

*Exhibit C. 4.*

EXPENSES.

| | | | |
|---|---|---|---|
| To | General Expenses | $ 618.78 | |
| " | Telephones | 119.26 | |
| " | Light | 66.61 | |
| " | Rents and Salaries | 3,502.50 | |
| | | | 4,307.15 |
| | | | 12,564.68*d* |

DEPRECIATIONS

| | | | |
|---|---|---|---|
| To | Automobiles | 100.00 | |
| " | Tools, Fixtures, Machines, etc. | 139.54 | |
| " | Horse, Wagon & Harness | 72.70 | |
| " | Sundry Accounts | 55.98 | |
| | | | 368.22 |
| | Profit carried to Surplus Account (1915) | | $12,196.46*d* |
| | Profit carried to Real Estate Surplus Account for year 1915 | | 474.02 |
| | Total Profit for year 1915 | | $12,670.48*d* |

BALANCES SHEET

AS OF

December 31, 1915.

ASSETS.

| | |
|---|---|
| Cash on hand in Bank | $ 1,740.50 |
| Real Estate | 22,390.48 |
| Stocks and Bonds | 25.00 |
| Accounts Receivable | 9,066.86 |
| Merchandise | 14,783.04 |
| Merchandise on Consignment | 191.22 |
| Automobile and Garage | 300.00 |

*Exhibit D. 3.*

| | | |
|---|---|---|
| Horse, Wagon and Harness, | 420.00 | |
| Tools, Fixtures and Furniture | 990.00 | |
| Bills Receivable | 600.00 | |
| | | $50,507.10*d* |

LIABILITIES.

| | | |
|---|---|---|
| Capital | $25,000.00 | |
| Less Treasury Stock | 24,000.00 | $1,000.00 |
| Mortgages on Real Estate. | | 13,500.00 |
| Contract Liability | | 2,062.50 |
| Accounts Payable | | 190.29 |
| Accounts Payable (Consignments) | | 191.22 |
| Discounts | | 600.00 |
| Real Estate Surplus | | 9,793.75 |
| Surplus Account | | 23,169.34 |
| | | $50,507.10*d* |

EXHIBIT D. 3.

THIS AGREEMENT, made this twenty-eighth day of December, Nineteen hundred and sixteen, between AMZI BERLA, of the City of Newark, County of Essex and State of New Jersey, party of the first part, and ROBERT BERLA, of the same place, party of the second part,

WITNESSETH, that whereas, on or about November 1st, 1896, the parties hereto, became partners in the plumbing and heating contracting business, trading as such partners as Berla Bros., and

WHEREAS, said partnership has this day been dissolved by mutual consent, and

WHEREAS, the party of the second part has agreed to sell his interest in the said partnership

*Exhibit D. 3.*

to the said party of the first part, for the sum of Twelve thousand ($12,000) dollars, payable as follows: Four thousand dollars ($4,000) on March 1st, 1917, Five thousand dollars ($5,000) on March 1st, 1918, and Three thousand dollars ($3,000) on March 1st, 1919.

Now this Agreement Witnesseth; That the said parties hereto for and in consideration of One dollar and other good and valuable consideration to them, each to the other in hand paid, do hereby mutually covenant, promise and agree as follows:

1: The party of the second part does hereby bargain, sell, convey, transfer and assign unto the party of the first part, his heirs, executors, administrators and assigns all and every his part, share and interest of, in and to the said partnership (commonly known and designated as Berla Bros.) heretofore existing between the parties hereto, and all the right, title and interest of the party of the second part, of in and to any and all of the goods, wares and merchandise, chattels, deposits in the bank, book accounts and debts (due to the said partnership) choses in action, leases, contracts, insurance, conditional bills of sale, good will, assets and effects of the said last mentioned partnership, and all the right, title and interest, claim and demand whatsoever of the party of the second part, of in and to the capital, assets, moneys and effects of the said partnership and every and any part thereof, and any and all right of accounting of the party of the second part, with respect thereto, and all the profits, gains and proceeds of the said last mentioned partnership, and all the right, title and interest of the party of the second part, of in and to property situate in the City of New-

*Exhibit D. 3.*

ark, New Jersey, commonly known and designated as No. 9 Scott Street, No. 217 Washington street and No. 221 Washington street, (with respect to the said real estate, all as is more particularly set forth and in accordance with deeds of conveyance executed and delivered simultaneously with the execution and delivery of this agreement.)

To Have and to Hold, receive and enjoy the same unto the said party of the second part, his heirs, executors, administrators and assigns and for his and their own proper use and benefit according to the several natures and qualities of the said property hereby bargained, sold, conveyed, transferred and assigned unto the said party of the first part, his heirs, executors, administrators and assigns.

2: That the said partnership heretofore existing between the parties hereto be and the same is hereby dissolved as of this date.

3: The said party of the first part hereby assumes all contracts and obligations of the said partnership, appearing on the books of the said partnership, and the said party of the second part, promises, covenants and agrees that he has not incurred any debts or obligations for or on behalf of the said partnership, other than such as appears on the books of the said partnership.

4: The said party of the first part agrees to relieve and acquit the said party of the second part, of and from all liabilities and obligations of the said partnership appearing upon the books of the said partnership, and agrees to indemnify and save harmless the said party of the second

part of and from all said liabilities and obligations.

5: The said party of the second part does hereby make, constitute and appoint the said party of the first part, his heirs, executors, administrators and assigns and agents, his attorney irrevocable in his own name or in the name of the said partnership to ask, demand, sue for, recover and receive from any person or persons whatsoever, any debts, sum or sums of money, goods, chattels and effects whatsoever due and owing or belonging to the said partnership, for the sole use and benefit of the said party of the first part, and upon receipt of the same or any part thereof to give, sign and execute proper and sufficient releases, acquittances and discharges for the same and also to settle the accounts and debts in any way relating to the said partnership with all and every person or persons whatsoever.

6: The said party of the first part shall have the sole and exclusive right to trade and do business under the name of Berla Bros. or Berla Brothers, and if the party of the first part shall desire to form a corporation or assist in the formation of a corporation to bear the corporate name of Berla Bros. or Berla Brothers, party of the first part shall have the right to do so, and the said corporation shall have the right to bear the corporate name of Berla Bros. or Berla Brothers, to the exclusion of the use of the name of Berla Bros. or Berla Brothers by the party of the second part, as hereinafter set forth; and the party of the second part agrees that he will not trade as, or do business, either directly or indirectly, under the name of Berla Bros. or

*Exhibit D. 3.*

Berla Brothers either alone or in partnership with any person or persons whatsoever and will not hold any interest, either as stockholder, director or as agent or officer, or employee of any corporation, now existing or hereafter to be formed of which the corporate name shall be Berla Bros. or Berla Brothers.

7: The said party of the first part for himself, his heirs, executors and administrators does hereby covenant, promise and agree to and with the said party of the second party, his heirs, executors and administrators, in consideration of all the foregoing and in consideration of the release of the party of the first part by the party of the second part hereinafter mentioned, to pay the said party of the second part the sum of Twelve thousand dollars ($12,000) in manner following, that is to say: Four thousand dollars ($4,000) on March 1st, 1917, Five thousand dollars ($5,000) on March 1st, 1918, and Three thousand dollars ($3,000) on March 1st, 1919, which three payments are evidenced by three promissory notes, payable on the said respective dates, and in the said respective sums, made by the party of the first part to the order of the party of the second part.

8: And it is further mutually understood and agreed by and between the parties hereto, that they hereby release each other, and their heirs, executors, administrators and assigns, and the said partnership from all sums of money, accounts, proceedings, claims and demands whatsoever by reason of, and in respect to any cause, matter or thing whatsoever with respect to the partnership heretofore existing between them as aforesaid, from the beginning of the world to the day of the date of these presents.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

AMZI BERLA,
ROBERT BERLA.

Signed, sealed and delivered
in presence of

William Harris.

## Conclusions.

Filed November 16, 1917.

Messrs. McCarter & English for complainants.
Mr. William Harris for defendant.

Lane, *V. C.*

The complainant and defendant were holders each of one-half of the capital stock of the corporation known as the Berla-Riviere Company. In March, 1916, the corporation was dissolved by mutual consent. The negotiations, leading to the dissolution commenced in December, 1915, and culminated on the 26th day of April, 1916, by a sale from the complainant to the defendant of his stock in the concern for the sum of $17,000. The A. H. Riviere Company, one of the complainants, was incorporated on the 17th day of April, 1916, and took over the business of the Berla-Riviere Company and has been continuing business since. $5,000 of the consideration has been paid; the balance is represented by $12,000 in notes made by the A. H. Riviere Company to August H. Riviere and by him endorsed to the

defendant Amzi Berla. These notes are secured by a mortgage given by the A. H. Riviere Company. The negotiation proceeded upon the assumption that a report made by an auditor as to the assets of the concern and the profit during the year 1915 was correct. There is no question but that this report was incorrect in two particulars, with respect to merchandise on hand as as to the profit for the year 1915. The inventory was made by the complainant, A. H. Riviere. He personally compiled his figures on an adding machine and in so doing made a mistake of $10,000. Instead of there being on hand merchandise to the extent of $14,783.04 there was really on hand, according to his inventory, but $4,783.04. The figures of Riviere were taken as correct by the auditor with the result that the profit shown for the year 1915 was $12,670.49, whereas, in fact, if the inventory were correct, there was but a profit of $2,670.48.

I have found as a fact that in the negotiations both sides labored under a mutual mistake. If there was any negligence it was the negligence of the complainant, Riviere, for he took the inventory and compiled the figures. There is not sufficient evidence for me to find that the defendant Berla knew of the existence of the mistake. The testimony is to the effect that he was surprised at the amount of the inventory and drew the attention of Riviere to that fact and that Riviere said that the explanation was that they had been stocking up. I would have no hesitancy, if the contract had not been executed, in setting it aside on the ground of mutual mistake, or, if executed, and the parties could be put in *status quo,* in directing a restoration of the *status quo ante.* The difficulty is that the contract has been

executed. There is not sufficient evidence for me to hold that, if this mutual mistake had not been made and the real condition of the company disclosed, Berla would have sold his interest for $5,000 less than he did. Rather than take $12,000 he might have considered it advisable to retain his stock. Even if his real purpose was to sell his interest for an amount representing one-half of the value of the assets of the concern, if the inventory had disclosed only the existence of merchandise worth $4,783.04, he might have insisted upon a new inventory by an impartial person and it might have appeared that the merchandise was worth considerably more than $4,783.04. To now deprive the defendant of the $5,000 that the complainant seeks to deprive him of would be to make a contract between the parties which one of the parties may never have had in contemplation. This the Court, under well settled principles, cannot do.

I reach this conclusion with regret. The defendant is unquestionably unconscionably enriched at the expense of the complainant, but to what extent it is impossible for me to determine. I have examined the cases cited by counsel for the complainant and find that in each of them there is some feature distinguishing it from the case at bar.

The result is that the bill of complaint will have to be dismissed, but without cost.

## Decree.

Filed November 14, 1917.

This cause coming on to be heard, before the Chancellor, upon bill, motion to strike out, answer, replication and proofs, in the presence of William Harris, solicitor for and of counsel with the defendant, and Jacob Siff, associate solicitor for the defendant, and McCarter & English, of counsel with the complainant, and the pleadings and proofs, arguments and briefs of counsel having been heard, read and considered, and the Chancellor being of the opinion that the complainant is not entitled to relief, it is thereupon upon this twenty-sixth day of October, 1917, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey,

ORDERED, ADJUDGED AND DECREED, that the bill of complaint, filed in the above entitled cause be and the same is hereby dismissed, but without costs.

E. R. WALKER,
*C.*

Respectfully advised,

MERRITT LANE,
*V. C.*

A true copy.

ROBERT H. MCADAMS,
*Clerk.*

New Jersey State Library

## Notice of Appeal.

Filed November 15, 1917.

Complainants hereby appeal from the final decree made in this Court in the above stated cause, dismissing the bill of complaint and dissolving the injunction, and from the whole and every part thereof to the Court of Errors and Appeals in the last resrt in all causes.

McCARTER & ENGLISH,
*Solicitors of Complainants.*

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

CONOVER ENGLISH,
*Of Counsel with Complainants.*

## Petition of Appeal.

Filed December 13, 1917.

# New Jersey Court of Errors and Appeals

| | |
|---|---|
| *Between*<br>AUGUST H. RIVIERE, *et al.*,<br>*Complainants-Appellants,*<br>*and*<br>AMZI BERLA,<br>*Defendant-Respondent.* | *On Bill, &c.*<br>*Petition of Appeal.* |

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

The petition of August H. Riviere and August H. Riviere Company, the appellants in the above stated cause, respectfully shows:

That your petitioners find themselves aggrieved by the final decree made in the Court of Chancery by the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the twenty-sixth day of October, 1917, wherein the said August H. Riviere and August H. Riviere Company were complainants, and the said Amzi Berla was defendant, in this respect, to wit, that the said decree adjudges that the bill of complaint filed in the above stated cause be dismissed. And your petitioners humbly appeal from the said decree, and from the whole and every part thereof, upon the ground that the same is erroneous, for that said decree should not have dismissed the said bill of complaint, but should have adjudged that

the complainants were entitled to the relief as prayed.

Your petitioners, therefore, pray that the said decree of the Chancellor may be set aside, reversed and for nothing holden, and that your petitioners may have such relief in the premises as to this Honorable Court may seem meet.

McCARTER & ENGLISH,
*Solicitors of Appellants.*

CONOVER ENGLISH,
*Of Counsel with Appellants.*

## Answer to Petition of Appeal.

Filed January 14, 1918.

The answer of the above named respondent to the Petition of Appeal of the above named appellant:

This respondent, not acknowledging all or any of the matters which in the said Petition of Appeal are contained to be true, for answer thereto, nevertheless, says and admits, that a decree was, on the 26th day of October last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes, that the said decree is agreeable to equity, and he prays that the same may be affirmed, with costs to be adjudged to this respondent.

WILLIAM HARRIS,
*Solicitor for and of Counsel with the Defendant.*

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

# New Jersey Court of Errors and Appeals

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| *Between*<br>AUGUST H. RIVIERE, *et al.*,<br>*Complainants-Appellants,*<br>*and*<br>AMZI BERLA,<br>*Defendant-Respondent.* | *On Bill, etc.*<br>*On Appeal from Chancery.* |

## Brief for Complainants-Appellants.

Upon the filing of the bill of complaint, and after argument, the Vice-Chancellor granted a preliminary injunction as prayed.

After final hearing he dismissed the bill of complaint.

Upon the taking of the appeal he granted a stay pending appeal in the same form as the preliminary injunction.

The opinion (p. 108, &c.) briefly sums up the facts.

Complainants' equity arises out of the fact that the defendant is unconscionably enriched to the extent of $5,000 at the expense of the complainants, owing to a mutual mistake of fact. The Vice-Chancellor found that this mistake of fact existed (p. 109, l. 25). He concluded, however, that he was powerless to grant the complainant relief, although he reached this conclusion with regret (p. 110, l. 24).

The complainant, Riviere, and defendant had formerly been each half owner of an incorporated plumbing business, known as the Berla-Riviere Co. After some negotiation the defendant agreed to sell out to Riviere. Prior

to the negotiations an inventory of the merchandise belonging to the company had been made by Riviere for the year 1915 in the usual course of business. He had written the various items with their values in a book, and had added up the various items on an adding machine. The total as stated by the adding machine was $14,783.04 (p. 28, l. 37). It later developed that this figure was $10,000 out of the way, that the actual value of the merchandise, as inventoried, was $4,783.04. This mistake was not known to either party at the time of the negotiations, and was not discovered until several months after the negotiations had been concluded.

It had been the custom of the Berla-Riviere Co. to have an auditor go over its books and prepare a statement each year; and this practice was again pursued for the year 1915, the auditor taking the value of the merchandise as stated by the adding machine at $14,783.04 in preparing his statement. This caused him to set up on his statement an apparent profit of $12,670.48.

In their negotiations the two parties sought to arrive at the value of the company's assets in order that the one could sell to the other at a price representing one-half of that value.

In endeavoring to reach this conclusion each was influenced by the erroneous statement of the merchandise account; and the value of the property at which they finally arrived was the value as shown by the statement of assets and liabilities set forth by the auditor. Taking the equity in the real estate of $9,793.75 (p. 103, l. 19), the supposed value of the merchandise at $14,783, and certain other assets, as shown in the auditor's statement (p. 102), the value of

the property appeared to be roughly $34,000, which they agreed upon as the basis for the purchase and sale of the defendant's one-half interest.

The matter was consumated by the dissolution of the Berla-Riviere Co., and the forming of the complainant corporation, all the stock of which is now owned by the complainant, Riviere, and which took over all the physical assets of the old company. Complainant paid the defendant $5,000 in cash, and gave him notes, secured by two mortgages, one on the company's property and one on his own house, all of which notes were dated April 26, 1916, and were payable as follows, $5,000, March 1, 1917; $3,000, March 1, 1918; $3,000, March 1, 1919; $1,000, September 1, 1919.

By the terms of the mortgages the failure to pay any one note, when due, precipitated the due date of all the outstanding notes and entitled the defendant to foreclose the mortgages.

By the order granting the preliminary injunction complainant was ordered to pay the note due March 1, 1917, which had then become due. He paid that note and the assignment, payment and collection of the others was enjoined.

There is no consideration for $5,000 of the notes still outstanding. Because of the operation of the injunctions, they are still in the hands of the defendant, and have not been transferred to any third party.

There was no written contract between the parties. The negotiations were verbal and were finally consumated by the dissolution of the old company, the payment of the $5,000, and the

giving of the notes. There is, therefore, no written contract to be either reformed or cancelled.

A restoration of the *status quo ante* is impossible because of the fact that the old company, of which the defendant was a stockholder, has been dissolved, and the shares of stock which he sold to the complainant cannot be restored to him.

Nor did Berla want a restoration.

Following the discovery of the mistake, negotiations ensued between the defendant and Corra N. Williams, Esq., representing Riviere, but nothing was said by either with reference to a restoration of the *status quo ante*. Berla very evidently did not want any restoration, even if such had been possible.

Berla told Williams he did not believe any mistake was made (p. 75, ll. 18-40). He made no suggestion or demand for a restoration. He so admitted. Berla testified (p. 94, l. 20, &c.):

> "Q You say that Mr. Williams or Mr. Riviere did not offer to restore back the situation, you didn't ask him to, did you? A No.
>
> Q You did not tender back your notes, did you, and say, 'Give me back the business?' A No.
>
> Q Did not offer to hand back that $5,000 you had?
>
> Objected to.
>
> *The Court.* Admitted. In the case of mutual mistake the obligation is mutual.
>
> Q You did not make any effort to create the situation which existed before you had made this deal at all, did you? You did not try to put him back where he had been before, did you? A At that time?
>
> Q Yes. A No."

The prayer of the bill is broad. It prays (paragraph 2, p. 8, l. 39) that the mistake in stating the total of the inventory at $14,783.04 be corrected to state the true total at $4,783.04, and that the complainants be allowed a credit of $5,000 on account of the money agreed to be paid to the defendant, and that the defendant be required to cancel notes to the amount of $5,000; further that the defendant be enjoined from precipitating the due date of the notes and the foreclosure of the mortgages securing them, and from instituting suits, at law or in equity, on the notes, and "from transferring, assigning or negotiating the said notes, or any or either of them." There is also a prayer for general relief (paragraph 5, p. 10, l. 12).

The Vice-Chancellor felt that he was helpless to afford relief. He found as a fact that a mutual mistake had been made. He said he would have had no hesitancy in setting it aside if it had not been executed and a restoration of the *status quo ante* had been possible (p. 109, l. 35). He held also that to now deprive the defendant of the $5,000 which the complainant sought to deprive him of "would be to make a contract between the parties which one of the parties may never have had in contemplation" (p. 110, l. 20).

In reaching his conclusion the Vice-Chancellor seems to have misapprehended the facts. He seems to have thought that the contract was to purchase and sell at a valuation of $17,000.

## I.

**The real contract was to purchase and sell on the basis of the value of the property.**

The parties arrived at a figure of $34,000 because they figured that that was the value of the property, basing their conclusion on the auditor's report which contained the erroneous valuation of merchandise at $14,783.04. The figure $34,000 is but an incident.

The fact is that the real contract was to purchase and sell on the basis of the real value of the property.

There is no doubt that both sides were misled by the erroneous statement of the value of the inventory, as the Vice-Chancellor found, and each thought that the merchandise to the amount of upwards of $14,000 was there.

In the process of the negotiations, especially those dealing with the making of payments by Mr. Riviere, Berla made statements showing his reliance on those figures. He stated that Riviere could reduce a large part of this merchandise to cash, and so make payment. Mr. Riviere testified (p. 35, l. 28):

> "Q What, if anything, did Mr. Berla say about the value of the stock there enabling you to pay? A He said when the thing was bought, $17,000, it was out of reason to expect me to pay, I didn't have a dollar in the world, he said, 'He can take that stock and reduce it $9,000, he doesn't need any such stock.'
>
> Q Referring to that merchandise? A Yes. He said, 'Take this $9,000, he has only got to get $6,000 to get this $17,000.' "

Mr. Haas, president of the Summit Trust Co., bears Mr. Riviere out in this. He said, with

reference to the proposed payment of $5,000 cash by Riviere (p. 61, l. 15):

> "Mr. Riviere said he did not see his way clear to meet that; Mr. Berla told him he had a large inventory worth very much more than was required in the business and all he had to do was to liquidate that."

Mr. Corra N. Williams, who attended to the legal details of the situation, in testifying to a conversation with Mr. Berla in his office, said (p. 73, l. 20):

> "He (Berla) said, 'Why, what he wants to do is to reduce his merchandise on hand; he has got $14,000 worth there, and he ought to reduce it $5,000 at least right away, and he will have cash on hand; he will get cash out of that to pay cash for the second payment.'"

Mr. Berla did not deny any of these statements attributed to him.

Mr. Berla, through his counsel, claimed that basis of the business was the profit made by the company in addition to the value of the good will, and that the auditor's report had nothing to do with it (p. 43, l. 10).

To this the Vice-Chancellor said, "Do you expect me to believe that?" (P. 43, l. 14.)

> *The Court.* "You can't make me believe that, no matter how much testimony you take, where two men are negotiating, that amount of assets on hand does not play some figure in the amount that is offered; you are asking me to believe an impossibility." (P. 43, l. 16, &c.)

Mr. Riviere testified that the auditor's report was the basis of the negotiations at which they arrived at the value of the property, and from which the figure of $17,000, which he was to pay for Berla's share (p. 52, l. 30; p. 55, l. 28), was deduced.

Mr. Williams in his negotiations with Berla, acting on behalf of Riviere, testified (p. 72, l. 21):

> "I told him that Mr. Riviere was willing to sell out his interest for $15,000 and Mr. Riviere thought $17,000 was too much for his share, and I asked him if he wouldn't buy out Mr. Riviere; he said, no, he wouldn't buy out Mr. Riviere, because Mr. Riviere had the run of the business and knew all the customers, and he wanted to sell out; and I said I thought $17,000 was too much, or that Mr. Riviere thought so, and he said, 'Why, it isn't too much, it is just half of what the inventory showed,' he had a statement there.
>
> Q Did he have this auditor's statement or copy of it? A He had copy of that statement, that is my recollection about it; he said, 'He has got $14,500 of the merchandise on hand, he has got bills receivable for $9,000,' and he says, 'You will remember that the equity in that real estate is $10,000,' he says, 'that makes $34,000, around that sum,' and he says, 'They don't owe much money, and I am not charging him anything for good will.' "

And see his cross examination (p. 78, l. 25).

Counsel's contention that the good will figured in the matter was not borne out by the evidence.

Mr. Scherff, the auditor, who was present during some of the negotiations, said that nothing whatever was said about the good will (p. 70, l. 34).

Mr. Corra N. Williams said that Mr. Berla had expressly stated that he was not charging anything for good will (p. 73, l. 1), and Berla, himself, when on the stand, did not say a word about good will, but did admit, in answer to the Court's question, that in fixing his valuation on

the property he had in mind the fact that the inventory was upwards of $14,000 for merchandise (p. 87, ll. 1-10). He did not then know that the inventory was incorrect or that the supposed profit of $12,000 was incorrect (p. 87, ll. 20-30).

The agreement was not to sell on the basis of the specific valuation of $34,000, but was to sell on the basis of the actual valuation of the property, one-half of which they fixed at $17,000 and the figures in the inventory greatly influenced the parties in arriving at their conclusion as to what the value of the company's property was.

This appears clearly from the cross examination of Mr. Riviere, where he was asked about the negotiations between him and Berla (p. 50, l. 30):

> "Q And did Mr. Berla ever make a statement to you that he would take one-half of the inventory price for his share of the business? A He said, 'I don't want this business, I will take half of what it is worth,' he said.
>
> Q He said, 'What it is worth,' is that correct? A Yes, 'What it amounted to.'
>
> Q He never said anything about the inventory valuation of the business, did he? A Yes; that is what he was going by, the inventory value.
>
> Q Did he state he would take half of the inventory value? A He might not have said 'inventory;' he said he would take 'half what it amounts to.' "

Mr. Berla did not deny this.

This also appears from the testimony of the auditor, Mr. Scherff, who was present during the negotiations between Berla and Riviere. He said (p. 66, l. 20):

> "Q Were any negotiations done between Mr. Berla and Mr. Riviere in your presence

with reference to selling out one to the other? A Only to arrive at the equity they had in the business at that particular time as shown by the statement December 31, 1915.

Q They were discussing a sale, were they? A Yes, they were.

Q And what was said with reference to arriving at the equity of the business, as you express it? A Both Mr. Riviere and Mr. Berla were anxious to arrive at the equity in the business and both of the gentlemen took the assets and liability sheet and added the amounts, making calculation of their own and arriving at the figures as between $33,000 and $34,000 as being the equity."

The situation, therefore, comes down to this. Berla wanted to sell, and Riviere wanted to buy. Berla had one-half interest in the property. He was willing to sell for the value of this one-half interest. Both were anxious to ascertain what the value of the property was for the purpose of fixing the value of Berla's one-half interest. In ascertaining the value they were naturally much influenced by the auditor's report. But the important thing to remember is that the agreement to sell was not so much at a given figure, as it was for half the value of the property, and that the figure of $17,000 which was arrived at was what both parties supposed represented this one-half value.

The result is that having closed the bargain on the supposed basis of $34,000 for the value of the property, the defendant has obtained notes from the complainant for $5,000 more than his half share in the company. While the matter has been executed so far as the delivery of the notes is concerned, payment has not yet been made on the note due March 1, 1918, because of

the filing of the bill prior to its maturity, and because of the court's injunction; and the notes falling due in 1919, of course, are not yet due, according to their terms.

If these notes due in 1919 should be transferred to the hands of a bona fide purchaser for value, Riviere would be powerless to resist their payment.

## II.

### Complainants are entitled to relief.

We, of course, recognize the well settled principles of equity jurisprudence that the ordinary relief granted in cases of mutual mistake is classed under the heads of either reformation or cancellation.

If reformation is sought, the reformation is of the written instrument which has erroneously set forth the agreement of the parties. Here there is no written instrument to reform, unless it be the inventory total.

If cancellation is sought, it is usually on the basis of a restoration of the *status quo ante.*

But in cases of fraud or mistake there is nothing to prevent a court of equity from granting equitable relief as incident to its right to decree a cancellation.

It may be well to keep in mind that the fundamental concept of mistake is found in the mental condition of the person mistaken.

Thus 2 Pomeroy Eq. Jur. sec. 854, says:

> "The belief may be either that a certain matter or thing exists at the present time, which really does not exist; or that a certain matter or thing existed at some past time, which did not really exist. All possible forms of mistakes of fact are em-

> braced within this description; and all particular errors which fall under any of these conditions are mistakes of fact which furnish an occasion for equitable relief."

In *Cummins* v. *Bulgin,* 37 N. J. Eq. 476, Vice-Chancellor Van Fleet defined mistake as follows (p. 477):

> "A mistake in a legal sense may be defined as the doing of an act under an erroneous conviction which act, but for such conviction, would not have been done."

The jurisdiction of equity to grant injunctive relief, and also to order the surrender of the instrument, in cases where unmatured negotiable paper is involved, is well recognized.

**The defendant should be enjoined from assigning or enforcing payment of the notes for the unearned excess of $5,000, and should be required to cancel this excess.**

Thus Pomeroy vol. 4, sec. 1377, says:

> "The jurisdiction of equity to grant the remedy of cancellation exists and will always be exercised when it is necessary to protect or maintain equitable primary estates, interests, or rights; where, however, the estate, interest, or right is legal, the jurisdiction always exists but its exercise depends upon the adequacy of the legal remedies,—a party being left to his affirmative or defensive remedy at law, where full and complete justice can thereby be done. The occasions giving rise to the exercise of this jurisdiction are mistake, fraud, and other instances where enforcing instruments or agreements would be inequitable or unjust. A doubt was formerly entertained as to whether a court of equity ought to exercise its jurisdiction to order instruments absolutely void at law, and not merely voidable, to be delivered up and cancelled, since the

> legal remedy of the party was adequate and complete, and no case was presented for equitable interference; but it is now well settled that jurisdiction will be exercised in such cases, except where the invalidity of the instrument is apparent on its face. The particular instances in which this remedy is most often given are instruments concerning land, and negotiable paper before maturity, the legal remedies in these cases being, as a general rule, inadequate."

And in volume 6, the same author, in dealing with the same subject, says, sec. 685:

> "The remedy at law is usually inadequate, and the jurisdiction of equity exercised as a matter of course, (1) where the invalid instrument creates a cloud on title to land. (2) Where the instrument is negotiable and not yet mature, 'because in such cases if the present unlawful holder, although the legal defense to an action by him would be perfect, should transfer the security to a bona fide purchaser, such legal defense would be cut off.' In this case, it is usual to enjoin the transfer of the instrument, as well as to order its surrender."

And see also volume 1, sec. 311, by the same author.

In the development of equity jurisprudence in this State, our courts have consistently manifested a tendency to rectify inequitable results flowing from mistakes of all kinds.

Contrary to the rule in some jurisdictions in the United States, the courts of New Jersey follow the broad rules applied by the English Court of Chancery.

In *Eggers* v. *Anderson,* 63 N. J. Eq. 264, this court, in an opinion by Mr. Justice Dixon, quoted from Pomeroy, when he said (p. 271):

> "The only question therefore presented to an English court is not whether the equitable

jurisdiction exists, but whether it should be exercised;"

and then said (p. 271):

"Undoubtedly the American courts have not generally upheld so broad a jurisdiction, being influenced probably, and sometimes controlled, by enactments similar to the United States Judiciary acts of 1789, which declared that 'suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law.' But New Jersey is distinguished from her sister states by her adherence to the standards of the mother country respecting both rights and remedies in equity, and I know of no constitutional or statutory provision or judicial decision in this state which can be regarded as withholding or withdrawng from our court of chancery any jurisdiction possessed by its English prototype."

In *Swedesboro Loan & Bldg. Association* v. *Gans,* 65 N. J. Eq. 132, Vice-Chancellor Reed had before him a case where, through a mistake, a mortgage was cancelled without consideration. He discussed the English cases and the earlier cases in this State. He said, with reference to the English cases (p. 134):

"The result of the English cases is summed up by Mr. Kerr in the remark 'that if a man through misapprehension or mistake of the law parts with or gives up private rights to property, or assumes obligations upon grounds upon which he would not have acted but for such misapprehension, a court of equity may grant relief. If under the general consideration of the case it is satisfied that the party benefited by the mistake cannot in conscience retain the benefit or advantage so acquired.' Kerr Fr. This statement of the equitable rule was cited with apparent approval by Chancellor

> Runyon in Macknet *v.* Macknet, 2 Stew. Eq. 54, 59, and in Martin *v.* New York, Susquehanna and Western Railroad Co., 9 Stew. Eq. 109, 112."

With reference to the tendency of our own courts he said (p. 137):

> "Our later cases display a desire to discover some ground to rectify an inequitable result flowing from mistakes of all kinds. Chilver *v.* Weston, 12 C. E. Gr. 435; Macknet *v.* Macknet, *supra;* Martin *v.* New York, Susquehanna and Western Railroad Co., *supra;* Young *v.* Hill, 4 Stew. Eq. 429."

See also

*Freichnect* v. *Meyer,* 39 N. J. Eq. 551 (E. & A.) at page 560.

*Headley* v. *Leavitt,* 65 N. J. Eq. 748 (E. & A.) at page 755.

*Schoenfeld* v. *Winter,* 76 N. J. Eq. 511, p. 512.

*Strauss* v. *Norris,* 77 N. J. Eq. 33, p. 34; 78 N. J. Eq. 212.

*Kuntz* v. *Tonnele,* 80 N. J. Eq. 373, p. 382.

There is no suggestion in the answer that the complainants had an adequate remedy at law, but even if there were, the cases above cited show that the Court of Chancery would assume jurisdiction notwithstanding.

Certainly Riviere assumed obligations (the notes) upon grounds upon which he would not have acted, but for the errors in the inventory total.

Should not this inequitable result be rectified?

Can Berla, in conscience, retain his extra $5,000?

In *Metler's Admrs.* v. *Metler,* 18 N. J. Eq. 270, affirmed 19 N. J. Eq. 457, the complainant sought a perpetual injunction against proceedings at law on a note, and to have the note delivered up

and cancelled. The note was without consideration and could not be recovered on at law. Nevertheless the Chancellor said (p. 273):

> "In such case the jurisdiction of courts of equity to order the security to be given up to be cancelled, is now well established. There has been some diversity of opinion and decision on this point, and more in cases when the instrument asked to be cancelled is at law void upon its face; but even then the weight of authority is in favor of it. In cases where the instrument is on its face valid, and especially if negotiable, the jurisdiction of the court is founded upon principle adopted among other cases in bills *quia timet,* and is now settled by authority. 1 Story's Eq. Jur., § 699, 702; Minshaw *v.* Jordan, 3 Bro. Ch. Cas. 17; Newman *v.* Milner, 2 Ves. 483; Bromley *v.* Holland, 7 Ves. 3; Jervis *v.* White, *Ibid.* 413; Jackman *v.* Mitchell, 13 Ves. 581; Wynne *v.* Callander, 1 Russ. 293; Peirsoll *v.* Elliott, 6 Peters 95; Hamilton *v.* Cummings, 1 John. C. R. 520."

He also granted the injunction.

In *City of Paterson* v. *Baker,* 51 N. J .Eq. 49, the suit was to compel the defendant to surrender two bonds for cancellation. The bonds had been adjudicated to be invalid. Vice-Chancellor Van Fleet said (p. 59):

> "That a court of equity has power to compel the surrender of a worthless or invalid bond, or other instrument, which is negotiable and unmatured, and consequently in a condition to be used to the prejudice of the person who executed it, is a doctrine too familiar to need the citation of authorities in its support. The bonds in question are unmatured and negotiable, and hence in a condition to be used, at any time during the next four years, to impose an obligation on the complainant which it ought not in justice to bear."

*O'Brien* v. *Paterson, &c., Malting Co.*, 69 N. J. Eq. 117, was a case where Vice-Chancellor Pitney enjoined any action upon a note, and also decreed the delivery up of the note to be cancelled, the note having been given upon the understanding that it would never be collected upon. In his opinion he cites many cases which are pertinent to this suit. At page 128 he says:

> "The real question for consideration in this case is whether under the circumstances it is equitable that the defendant should recover upon the note and that is always the question in cases like this."

That language applies with full force to the situation at bar.

The power of this Court to enjoin is amply illustrated by *Gallagher* v. *L. & B. Eagle Brewing Co.*, 86 N. J. Eq. 188 (E. & A.), where the court enjoined execution under a judgment at law upon a so-called brewery note, which accompanied a chattel mortgage on saloon property and fixtures. The note was for $12,000, and was given upon a representation that it was merely for the purpose of bookkeeping and would never have to be paid if the plaintiff continued to sell the products of the defendant company. The opinion of the court continues (p. 190):

> "The bill goes on to state that for sixteen years complainant continued to run the saloon and to sell the defendant's beer, &c., exclusively (the note being kept alive by renewals about every six years), and in every respect performed his part of the arrangement until compelled to vacate by the expiration of his tenancy as above; that he then returned the furnishings and fixtures to defendant, and demanded his note back, but that, instead, the defendant brought suit thereon in the circuit court, an answer setting up the above facts was struck out by the court, and judgment entered over it

for the amount of the note and interest, on the ground that the facts constituted no defense at law.

The bill, which is duly supported by affidavit, prays a reformation of the note to express the contract between the parties, an injunction against proceeding on the judgment, a discovery, and vacation of the judgment and delivery and cancellation of the note.

We are of opinion that this bill, the statements of which for present purposes must be taken as true, makes out a complete case for equitable relief. It is very similar to the case of O'Brien *v.* Paterson Brewing and Malting Co., 69 N. J. Eq. 117, in which Vice-Chancellor Pitney awarded an injunction and decreed the delivery of the note for cancellation. Whether the complainant may maintain a defense at law on these facts seems immaterial in view of the decisions. In Metler *v.* Metler's Administrator, 19 N. J. Eq. 457, a similar case, it was held that even though the defense was good at law, the complainants were entitled as against the payee to an injunction against enforcement of the note at law, and to a decree that it be delivered up. In Headley *v.* Leavitt, 65 N. J. Eq. 748, it was held that if the defense to the note be not good at law, the defendant at law may after judgment and without appeal of the judgment at law invoke the aid of a court of equity.

We see nothing in the ground of laches, or in any other ground assigned. The order sustaining the bill will be affirmed, with costs."

It may be said that in all these cases, the entire obligation was cancelled. But the courts go further than that, and in a proper case order an abatement of the original obligation.

A case in the Court of Appeals of New York, which seems to uphold the complainant's conten-

tion here absolutely is *Paine* v. *Upton,* 87 N. Y. 327. There the parties negotiated for the sale of a farm, represented to contain 222 acres more or less. The negotiations began on the basis of $150 per acre, and it was finally agreed to sell for the lump sum of $31,687.

The payment was made by the assumption of a mortgage on the premises, and the payment of the purchase price in installments, to secure which the plaintiff executed his bond and mortgage. About nine months after the transaction had been closed, the plaintiff discovered that the property contained only 206 acres. Upon suit brought the court ordered that the sum of $1,953.93 be deducted from the face of the bond and mortgage, the court having found that the deficiency in the quantity of the land was the result of a mutual mistake. The figure $1,-953.93 was arrived at by taking the average price per acre on the basis of $31,687 for 222 acres, and multiplying the average price per acre thus obtained, by the number of acres lacking. The question raised by the Court of Appeals was (p. 335), "whether the acceptance of the deed and the giving of the bond and mortgage, barred the antecedent right of the plaintiff to have the mistake corrected."

In the course of the opinion Chief Judge Andrews said (p. 331):

> "The precise question presented is, whether, upon the facts found, the plaintiff is entitled to an abatement from the bond and mortgage given for the purchase-money, proportionate to the deficiency of acreage, in the farm.
>
> It is to be observed, that the facts affirmatively show a mutual mistake of the parties, in respect to the quantity of land, which commenced with the commencement of the negotiation for the sale of the farm, and

> pervaded the whole dealing from that time, until the transaction was consummated, by the giving of the deed, and the execution of the mortgage. This mistake, moreover, was as to an essential and material element of the contract."

He quoted from *Hill* v. *Buckley,* 17 Vesey 394, as the leading case, and said, quoting from Sir William Grant (p. 332):

> "When a misrepresentation is made as to quantity, though innocently, I apprehend the right of the purchaser to be to have what the vendor can give with an abatement out of the purchase money for so much as the quantity falls short of the representation."

Applying this law, the New York Court said (p. 332):

> "The right of a purchaser, under such a contract, to have a corresponding abatement of the purchase money, exists as well after the execution of the deed, as before, where the mistake was not known, when the deed was executed. This relief has been frequently granted. (Shovel *v.* Bogan, 2 Eq. Cas. Abr. 688; Quesnel *v.* Woodlier, 2 Hen. & Mumf. 173, note; Couse *v.* Boyles, 3 Gr. Ch. 212; Darling *v.* Osborne, 51 Vt. 148.) The court, in granting such relief, does not make a new contract for the parties, but simply conforms the nominal agreement to the real one. The vendor cannot, in justice, be permitted to defeat the vendee's right to a reformation of the contract, or to an abatement from the purchase-money by the plea, that if he had known of the deficiency, he might, nevertheless, exacted the same price. When the quantity is an essential element of the contract, the presumption is, as stated by Sir. Wm. Grant, that the price was fixed by both parties with reference to it."

This language of the court is most apt as applied to the contention of Berla that if he had

known what is now known, he might not have made the bargain to sell on one-half of the value of the property (p. 97, l. 10, &c.); and also to the conclusion of the Vice-Chancellor that to grant relief would be making a new contract for the parties.

The learned Court of Appeals concluded its discussion of the law as follows (p. 336):

> "It is doubtless true that the annulling or reforming of executed transactions, is an exercise of supreme judicial power. The power should be exercised with great caution, and when invoked on the ground of mistake, a plain case should be made, before it is exerted. But these are considerations which address themselves to the chancellor, in the exercise of the jurisdiction; they ought not to prevent the interference of equity when the proper occasion for interference arises. The granting or refusing of equitable relief on the ground of mistake may depend, to some extent, on the fact whether the contract is executory or executed. The court might very well refuse the specific performance of a contract for the sale of land, in respect to which a mistake is alleged, and leave the party to his remedy at law, when it would not interfere, if the contract had been executed. But it cannot, we think, be maintained upon principle, that where a mistake is admitted, or proved, the fact that the title has passed, and the purchase-money has been paid or secured, precludes the court, on the mistake being discovered, from granting relief. The consummation of the transaction in ignorance of the mistake, without laches on the part of the party injured, gives to the other party no immunity, from making recompense, nor does it deprive the court of the power to remedy the injustice.

The objections raised by the Vice-Chancellor (p. 110, ll. 1-22) might with equal force have

been made in this Paine case. For instance, how could the court know that the parties would have bought and sold if they had known that the farm contained only 206 as opposed to 222 acres? Such a query in that case is quite as forceful as that raised here, that the Court cannot say whether the parties would have bought and sold if they had known that the value of the assets was twenty-four thousand and odd dollars, instead of thirty-four thousand and odd dollars. Yet the New York Court of Appeals seems to have found no difficulty in awarding relief once the mutual mistake was established.

*Paine* v. *Upton* was followed and approved on an almost similar set of facts in *Gallup* v. *Bernd,* 132 N. Y. 370, p. 375.

It was again followed and approved in *Mills* v. *Kampfee* (N. Y.), 94 N. E. 1072. The facts were almost the same, except in the Mills case the parties had negotiated for a lump sum and not on the basis of so much per acre as had been the situation in the Paine case. The question of the quantity to be sold was held vital in the Mills case as in the Paine case, and the court ordered, as in the Paine case, that there be an abatement of the price paid.

The doctrine of *Paine* v. *Upton,* 87 N. Y. 327 was followed, approved and applied by our Court of Chancery in *Strauss* v. *Norris,* 78 N. J. Eq. 488. In that case the complainant agreed in consideration of $37,500.00, to convey a piece of real estate "containing 82 acres more or less." After the deed had been delivered and the consideration paid, it was discovered that the property contained considerable less than 82 acres and the complainant thereupon filed his bill (p. 490), "to compel a restitution of a pro-

portionate part of the purchase price paid by him because of the deficiency in acreage."

Vice-Chancellor Howell granted relief as prayed upon the principle laid down in *Paine* v. *Upton, supra,* and *Couse* v. *Boyles,* 4 N. J. Eq. 212 (which is also cited in the Paine case). He recited the facts in the Paine case as (p. 492) "a fair epitome of the facts in the case at bar." He found further that the representations were not fraudulent, but were the result of an innocent mistake. He then said, (p. 492):

> "It must be kept in mind that this suit is not a suit for the rescission or cancellation of the contract on the ground of misrepresentation, but is brought to recover back a portion of the purchase-money paid by the vendee upon the ground that he over-paid the vendor by reason of her misrepresentation of a then present fact. There appears to be no express authority in this state for such a proceeding. There are, however, many cases in which this court and the Court of Errors and Appeals, in foreclosure suits, have ordered an abatement to be made in the amount secured by purchase-money mortgages which were the result of conveyances of land as to which the mortgagee misrepresented the number of acres in the tract conveyed and covered by the mortgage. These cases, to a large number of which reference will be made, are analogus in principle to the case at bar."

He then cited and discussed the following cases:

*Couse* v. *Boyles,* 4 N. J. Eq. 212.

*Weart* v. *Rose,* 16 N. J. Eq. 290.

*White* v. *Stretch,* 22 N. J. Eq. 76.

*Melick* v. *Dayton,* 34 N. J. Eq. 245.

*Frenche* v. *The Chancellor,* 51 N. J. Eq. 624.

*Kuhnen* v. *Parker,* 56 N. J. Eq. 286.

*McMichael* v. *Webster,* 57 N. J. Eq. 296.
*Van Blarcom* v. *Hopkins,* 63 N. J. Eq. 466.

After this digest of the cases he said, p. 494:

> "In Capstick *v.* Crane (1903), 66 N. J. Eq. (21 Dick.) 341, the rule in the cases of Couse *v.* Boyles, Dayton *v.* Melick and Van Blarcom *v.* Hopkins was again announced and affirmed by the Court of Errors and Appeals. I take it that while some of the judges have stated that relief would be granted in case of mistake, and others have stated that it would be granted in case of gross mistake, there is substantially no difference between the two expressions. The mistake must be sufficient to induce the Court to believe if the truth had been known at the time, the parties would not have contracted; in view of this idea, mistake and gross mistake are interchangeable."

He then discussed the question of estoppel by reason of the acceptance of the deed in payment of the purchase money and concluded that the complainant was entitled to relief.

This opinion shows the tendency of the Court to extend its jurisdiction to grant relief in cases of mistake, by way of abatement of the unearned purchase price. While the case was one neither strictly of recission or cancellation, the Court decreed a restitution of the proportionate part of the unearned purchase price. There is no suggestion that the Court felt itself making a new contract for the parties in thus decreeing.

The same principle applies here. Instead of quantity of land, we have value of assets. The great question between Riviere and Berla was, what was the value of the property? When that was ascertained, it was simply a matter of Riviere paying Berla one-half of it, and fixing the terms of payment.

In *Paget* v. *Marshall,* Eng. L. R. 1885, Ch. Div. 28, 255, the parties had agreed to lease a certain premises. Through a mistake the lease included the first floor. Vice-Chancellor Bacon gave the defendant the option to either have the entire lease cancelled or to have it rectified by omitting therefrom all mention of the first floor. The defendant elected the second alternative. The alternate form of relief granted by the court indicates the desire of the courts to afford relief in cases of this character.

A helpful case on both the law and the facts is the Massachusetts case of *Gould* v. *Emerson,* 35 N. E. 1065. The facts there, as stated in the opinion of Judge Allen, were as follows:

> "There was a plain mistake in the giving of the note for $10,000 to the defendant. It should have been for only $5,000. There was no fraud, but it was a case of mutual mistake as to the manner of carrying out what had been settled and agreed on. Upon dissolving the partnership between the plaintiff and the defendant, the plaintiff was to take the goods on hand, and pay the defendant for his interest therein. The value of the goods was fixed at $16,000, and the plaintiff gave to the defendant his note for $8,000, and this has been paid. There was no mistake as to this. But the plaintiff had withdrawn from the funds of the firm $10,000 more than the defendant had, and to make this right between the parties the plaintiff would have to restore the $10,000 to the firm, or pay the defendant for his share thereof, which would be $5,000. Instead of doing this, by sheer inadvertence or ignorance of what is plain when you come to look at it carefully, the plaintiff gave his note for $10,000 to the defendant. This gave to the defendant the whole of a sum which belonged to the firm, and which he was entitled to only one-half of. The mistake,

> though gross, was mutual and innocent; and the plaintiff, at any time, upon discovering it, might have had a bill in equity for relief against it. Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 290, 219, 320; Canedy *v.* Marcy, 13 Gray 373; Wilcox *v.* Lucas, 121 Mass. 21; Goode *v.* Riley, 153 Mass. 585, 28 N. E. 228; Beauchamp *v.* Wynn, L. R. 6 H. L. 223; Daniell *v.* Sinclair, 6 App. Cas. 181, 190, 191; Paget *v.* Marshall, 28 Ch. Div. 255. And, though the contract has been executed, a court of equity may grant relief, and decree repayment of money so paid by mistake. Tarbell *v.* Bowman, 103 Mass. 341; Wilson *v.* Randall, 67 N. Y. 338; Paine *v.* Upton, 87 N. Y. 327."

The court then discussed the defenses of the statute of limitation, and laches, and said (p. 1066):

> "Upon the facts already referred to, the relief to which the plaintiff would be entitled would be to have his original note of $10,000, upon which he has paid $6,000, surrendered and cancelled, and to have the overpayment of $1,000 refunded; and also to have the interest refunded which he has paid in excess of the interest due on the $5,000 which he justly owed. The $10,000 note should be treated as valid for $5,000, and all payments of principal or interest in excess of what would have been due if the note had been for $5,000 should be refunded. These overpayments amounted, as we understand from the decree, to $1,000 upon the principal and $1,800 upon the interest."

The court made a slight correction in the decree because it had ordered the repayment of interest upon overpayments of interest, and as thus amended the decree of the lower court was affirmed.

See also *Reggio* v. *Warren,* 93 N. E. 805, a well considered case dealing with the relief

which the Court will award in mistakes, both of fact and of law, citing (p. 807) the New Jersey cases of *Freichnect* v. *Meyer,* 39 N. J. Eq. 551, and *Swedesboro Loan & Building Association* v. *Gans,* 65 N. J. Eq. 132.

A pertinent case is the case of *Commissioners of Delta Co.* v. *Commissioners of Gunnison Co.,* 23 Pac. 476 (Col. Sup. Court). There the new county of Delta was carved out of territory formerly embraced within the County of Gunnison. The statute provided for an apportionment of the indebtedness between the two counties, and error was made. The case came up on demurrer. The Court held that when two boards of county commissioners, acting conjointly, undertook to determine the exact indebtedness to be apportioned between their respective counties, and in good faith believed they had arrived at the correct amount, but by mutual mistake had reached a grossly excessive figure, and the county profiting by the mistake refuses to correct the same, equity may interfere on request of the county injured.

In *Barrow* v. *Barrow,* 18 Beavan's Reports, 529, which was the defendant's chief reliance below, the Court intimates that while it would not grant the particular relief there prayed, its arm was not shortened that it could not do equity as between the parties, for it says:

> "Whether the Court would resist the execution of a contract, entered into under such circumstances, in a suit for specific performance, I forbear to inquire."

That case was one where a marriage settlement was involved. The plaintiff sought as relief to have the Court rectify the settlement made on her marriage to the defendant, so as to make it include the sum of 10,000£, to the in-

terest of which she was entitled for her life, and had power to dispose of the principal by her will, and further, if she failed in that respect, to have the Court decree the payment of the interest on this fund to her. The Court denied the first relief prayed on the ground that the question of the 10,000£ was never present to the minds of the parties, but expressly affirmed the power of the Court to give relief under a proper state of facts.

The court below allowed one-half the interest on the fund, but on appeal to the Lord Justices this order was reversed and the plaintiff was allowed the entire income on the fund.

The salient fact which stands out in this case at bar is, that the parties intended to buy and sell on the basis of the true value of the property; that Berla was willing to sell out for one-half of this value, and that they both took the inventory as fixing this value. The real contract was that Berla would sell and Riviere would buy for a price which was one-half the value of the property. The agreement as made did not represent their true intentions for it was based on a value which did not exist. The true value was the real basis of the negotiation, and of the contract. By mutual mistake, induced by the erroneous inventory, they fixed the value too high. The inventory was not an end in itself; it was only a means to an end. What they really based their negotiations on was the value. The erroneous inventory misled them into fixing the value. Because of the error in the inventory, the agreement as made did not meet their real intention. Their real intention was to buy and sell on the basis of the real value.

The force of this argument will be further enhanced if the Court will examine the defendant's answer, and then compare it with the defendant's proofs at the hearing. The defendant, at the hearing, completely abandoned the case as laid in his answer.

Brief reference may therefore be made to the various defenses set up by the answer.

As to the third defense (p. 17), the proof was that the complainant had no knowledge of the mistake until the latter part of January or the first part of February.

As to the fifth defense (p. 18, l. 35), the note of $5,000 payable March 1st, 1917, was paid under the order of the Court, after the application for preliminary injunction had been argued.

As to the sixth, seventh, eighth, ninth, tenth and twelfth defenses (pp. 19-20), each of these is resolved against the defendant by the finding of fact that there was a mutual mistake.

The second (p. 16, l. 39), fourth (p. 18, l. 20) and eleventh (p. 20) defenses all revolve around the question of a restoration of the *status quo*.

While the complainant made no offer to restore the *status quo*, it is quite apparent that the defendant would not have accepted such a situation, if it had in fact been made.

We respectfully submit that both on principle and authority (*Paine* v. *Upton, Couse* v. *Boyles, and Strauss* v. *Norris*) the complainants are entitled to relief, and that the Court has ample power to grant it.

Respectfully submitted,

McCARTER & ENGLISH,
*Solicitors of Complainants.*

CONOVER ENGLISH,
*Of Counsel.*

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

# New Jersey Court of Errors and Appeals

*Between*

AUGUST H. RIVIERE, *et al.*,
*Complainants-Appellants,*

*and*

AMZI BERLA,
*Defendant-Respondent.*

*On Bill, Etc.*

## Brief in Reply to Defendant's Brief.

Under the agreement between counsel by which this case was to be submitted for argument on briefs, the complainants have the right to file a reply brief to the defendant's brief.

The defendant devotes pages 5 to 17 of his brief in an effort to overcome the first point which we make (pages 6 to 11 of complainant's brief) that the real contract was to purchase and sell on the basis of the value of the property.

In attacking this proposition, defendant says that it is not borne out by the bill, the affidavits annexed to the complaint, nor the testimony of the witnesses. (Defendant's brief, page 5.)

Each of these contentions is unfounded.

First, the bill.

An examination of the bill shows that there runs all through it the idea that the basis of the negotiations was the value of the property.

Thus, paragraph 5 of the bill (page 2) says that following the making of the auditor's report, negotiations ensued with the result that Riviere (page 2, line 28)

> "agreed to purchase the interest of the said Amzi Berla for the sum of $17,000, the basis

of said negotiations, having been the report of the auditor."

Again, paragraph 10 of the bill speaks of the erroneous inventory valuation of $14,783.04, and says (page 5, line 30)

"at which value it had been stated in the report of the auditor, and at *which value it had been taken as the basis of negotiations* between said Riviere and said Berla, which negotiations had resulted in the purchase of the interest of the said Berla."

And again, in paragraph 13 of the bill (page 7) it is said (page 7, line 23)

"the amount of the settlement of $17,000 between them *was based* on the said figures (referring to the auditor's report) and the statement of the value of the merchandise at $10,000 in excess of the value as shown by the inventory."

The point now contended for, therefore, was clearly set up in the bill.

Second, the affidavits annexed to the bill.

Defendant caused these affidavits to be printed and applied to the court for permission to use them on his argument, evidently because he thinks they help his case.

But they do not help his case.

These affidavits show it was the value of the property which was the basis of the negotiations, and that the figure of about $34,000 was arrived at because the parties figured that that was about the value of the property.

Thus, in Mr. Riviere's affidavit, as appears on page 7 of defendant's brief, he states how, after they had gone over the figures, Mr. Berla said

"That the way it figured out, the value of the property was about $34,000 after de-

ducting the indebtedness, and that he would sell out his interest for $17,000."

This means nothing if it does not mean that Mr. Berla was making his offer on the basis of what he thought was one-half the value of the property.

Defendant in his brief says (page 8) with reference to the value of the property:

> "The reference to the value as being *about $34,000* is immaterial; Berla offered and agreed to take a specific sum of $17,000 for his share of the business."

Reference to *"about $34,000"* made by Mr. Berla is highly material, and the offer of $17,000 was made by him because he thought it was one-half the value of the business and for no other reason.

Defendant quotes from the affidavit of Mr. Williams (defendant's brief, page 8). He has begun his quotation in the middle of a paragraph. He does not quote the earlier sentences of the paragraph. Prior to the statement quoted in defendant's brief, Mr. Williams said in his affidavit (affidavits, page 8, line 19):

> *"The basis of the negotiations which were directed toward arriving at a figure* at which one or the other would sell his interest, was the statement of the auditor," etc.

Immediately following the portion of Mr. Williams' affidavit quoted in defendant's brief, he said this (affidavit, page 9, line 9):

> "The total net value of the assets of the Berla-Riviere Co. as the two parties figured them, was upwards of $33,000, of which $14,783.04 was represented by merchandise as shown by the inventory."

Here, again, the affidavits, as well as the bill, show the real contract was to purchase and sell on the basis of the value of the property.

Defendant has not seen fit to quote from the affidavit of Mr. Scherff, the auditor. Mr. Scherff, in his affidavit (affidavits, page 12, line 12) said, describing the conference between Riviere and Berla:

> "On that occasion discussion was had in an effort to *arrive at the value of the assets* after deducting the debts, or in other words, the equity in the property belonging to the Berla-Riviere Company, and it was agreed that the value was between $33,000 and $34,000. In arriving at this total, both took into consideration the amount of the inventory as stated on the machine list and as also stated in my report and account, namely, $14,783.04."

Nothing could be plainer than Mr. Scherff's language that the effort was to arrive at the value of the assets in order to reach the basis for negotiations.

Third, as to the witnesses.

The pertinent testimony of the witnesses on this point has already been quoted in our main brief (pages 6 to 11). Particularly significant is the testimony of Mr. Riviere, quoting what was said to him by Mr. Berla, that Berla said (page 50, line 34):

> "I don't want this business. I will take one-half of what it is worth"

and again (page 51, line 4)

> "He said he would take one-half of what it amounts to."

Defendant now contends in his brief (top of page 6) that this testimony is so indefinite in

character and meaning that it does not sustain our contention; but the important thing about this testimony is that it was given by the complainant at the trial, and that defendant subsequently took the stand and in no manner denied it. Having had his opportunity to deny it, if he had not originally spoken as Riviere testified; or to explain it, if he thought it was not definite or clear, he cannot now be heard to argue that it is indefinite and without meaning.

Again, Mr. Williams, in his testimony (page 72, line 34) said, describing his conference with Mr. Berla:

> "He had copy of that statement, that is my recollection about it; he said, 'He has got $14,000 of the merchandise on hand, he has got bills receivable for $9,000' and he says, 'You will remember that the equity in that real estate is $10,000' he says, 'that makes $34,000, around that sum,' " etc.

Mr. Berla did not deny this statement of Mr. Williams.

The letter of February 16, 1916, from Mr. Williams to Mr. Berla (defendant's brief, page 9) was merely a statement of the proposition which Mr. Riviere was willing to to make for either purchase or sale following the determination by him and Berla of what they thought was the value of the property.

That the contract was to purchase and sell on the basis of the value of the property was pressed upon the Vice-Chancellor, and he fully grasped it. He differed with us as to the legal effect of the fact. He said in his opinion (page 110, line 10):

> "Even if his real purpose was to sell his interest for an amount representing one-half

of the value of the assets of the concern,'' etc.

Plaintiff's contention, therefore, that this point which we urge in our brief (pages 6 to 11) is some new thought, is entirely unfounded. It has been theory of the case from the beginning.

The fact being established that the real basis of negotiations was the value of the property, defendant contends that we are without remedy because he says that our application is for neither a cancellation nor a reformation (defendant's brief, p. 18, etc.), and he claims that we are unable to state the equitable power invoked (defendant's brief, page 33).

The second paragraph of the prayer of the bill prays that the inventory be corrected, that the purchase price be abated $5,000, and that the $5,000 note given on account of the purchase price and payable March 1, 1917, be delivered up for cancellation (p. 8, l. 39, etc.).

On the return of the rule to show cause, the Vice-Chancellor ordered that this particular $5,000 note be paid, inasmuch as it was then due, and more than $5,000 of notes remained unpaid. That particular note, therefore, was paid under the order of the Court, and the defendant was enjoined from suing upon or assigning the remaining notes. The practical result is the same under the prayer of the bill, the effect of which is that $5,000 of the notes given on account of the purchase price be delivered up for cancellation.

If this prayer is not specific enough, paragraph 5 of the prayer contains a general prayer for relief (page 10, line 11).

Chancery Rule 60 provides that relief, other than that prayed for, may be given without a

prayer for general relief, to the same extent as if general or other relief had been prayed for. Much more, therefore, can such relief be given if there is a prayer for general relief.

In *Hilton* v. *Hilton,* decided at June term, 1918, this Court said:

> "The fact that the bill does not contain any prayer for the protection of the good will, or prayer for general relief does not shut us off from the inquiry. The bill was filed in 1917. By the new chancery rules, P. L. 1915, 194, rule 47, relief other than that prayed for may be given without a prayer for general relief."

The defendant has shown no good reason why the principle applied by Vice-Chancellor Howell in *Strauss* v. *Norris,* 78 N. J. Equity 488, and by New York Court of Appeals in *Paine* v. *Upton,* 87 N. Y. 327, should not be applied here. (These cases are fully discussed in our main brief, at bottom of page 18 to bottom of page 24.)

Indeed, the fact that the contract was to purchase and sell on the basis of the value of the property seems to make the application of the principle of those two cases to this inevitable.

If the equitable doctrine of abatement, as a part of the larger equitable doctrine of cancellation be applied here, as we contend it should, there was no occasion for a restoration of the *statu quo* as contended in defendant's point 1, in his brief at pages 40 to 41.

If, as suggested in defendant's point 2, in his brief at page 41, the value of the property of the Berla-Riviere Company has not been sufficiently ascertained, there is nothing to prevent a further

inquiry into that fact, either by the Vice-Chancellor or through a reference to a Master. It would be a simple matter to ascertain the value as of the date of the closing of the transaction between Berla and Riviere, because there is a complete record of all of the items of property belonging to the company and evidence could be produced with respect to the value of each of these items as of that date.

Defendant, in his brief, says that the auditor entered no credit for the good will of the business (defendant's brief, page 4). The good will did not figure in the negotiations. It was waived by Mr. Berla (testimony of Mr. Williams, page 73, lines 1 to 2). Mr. Berla made no claim to the good will in his testimony.

If the matter of good will becomes pertinent, its value can be ascertained the same as that of any of the other assets.

The other points raised by the defendant in his brief (pages 43 to 48) are already answered in our main brief.

Respectfully submitted,

McCARTER & ENGLISH,
*Solicitors of ~~Defendant~~ complainant.*

CONOVER ENGLISH,
*Of Counsel.*

# New Jersey Court of Errors and Appeals

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|---|---|
| Between<br>AUGUST H. RIVIERE, et al.,<br>*Complainants,*<br>and<br>AMZI BERLA,<br>*Defendant.* | *On Bill, Etc.*<br>*Brief of*<br>*Defendant.* |

In this case the complainant has filed a bill for relief on the ground of an alleged mutual mistake. The defendant has filed an answer in this matter embodying twelve defenses, which are fully set forth in the state of the case on pages ten to twenty-one.

The facts are as follows:

In October, 1905, complainant, Riviere, and defendant, Berla, became interested together in a plumbing business at Summit, New Jersey. Each owned one-half of the outstanding stock of the Berla-Riviere Company, a corporation, through which they conducted said business. The enterprise was financed by Mr. Berla, who put up one thousand dollars as a cash capital for the concern to start business, and endorsed notes of the company; Mr. Riviere's contribution to the enterprise was his time. Mr. Riviere was the active man in the business, and in active charge thereof; Mr. Berla took no active part in the business, his time being taken up with his other affairs, in another plumbing concern (Berla Bros.) at Newark, N. J.

Mr. Riviere yearly took stock and had an accountant go over the books. Mr. Berla never took any stock, nor did he assist in taking inventory. In December, 1915, Mr. Riviere took stock as usual. The items of stock and their cost as taken from bills (the dates of the bills do not appear) were entered by Riviere in a blank book. The cost of each item was then transcribed by Riviere to a long slip on an adding machine, and the total of these items, according to the adding machine slip, was $14,-783.04. The accountant was soon after called in to go over the books and make up a statement of the business for the year 1915, which he accordingly did. He did not add up the figures on the adding machine, but assumed the total to be correct and entered the sum of $14,783.04 in his statement as the value of the company's stock. According to the values stated in this statement, the net assets of the company were between $33,000 and $34,000, and the company made a profit of $12,000 in the year 1915. According to the books of the company, Riviere had overdrawn his account by nine hundred dollars and Berla suggested to Riviere that he (Berla) be allowed to draw nine hundred dollars out of the business to square their accounts. This perfectly fair request (and the fact is not denied by Riviere) seemingly angered Riviere, who used same as a pretext for getting Berla out of an apparently very prosperous business. Riviere insisted that their relations must be severed. See Berla's testimony, page 83, lines 23-38; Riviere's testimony, page 30, lines 2-11; page 31, lines 1-32; page 41, lines 33-36; page 49, lines 30-35; Berla's testimony, page 85, lines 10-17; page 87, lines 10-20. Berla also becoming angered by what he considered Riviere's ingratitude in desiring to oust him (Berla) from an apparently very prosperous business when

he (Riviere) no longer needed Berla's help, offered, on the spur of the moment, to sell his stock for $18,000; Riviere offered to take $17,000, and Berla in return offered to take the same amount (see page 84, lines 10-22), and Riviere made an effort to get Berla to reduce his figure by (Riviere) offering to take $15,000 for his interest, but Berla refused to do so. Finally, an agreement was reached that Riviere should buy out Berla for $17,000. (One of complainant's points is that the defendant offered to take one-half of the value of the business, and complainant, Riviere, accepted that offer, but there is absolutely nothing in that point, as will be later shown.) The agreement was consummated and executed, and Berla received $5,000 in cash and $12,000 in notes for his stock. The Berla-Riviere Company was dissolved and the business taken over by complainant, August H. Riviere Company, which continued the business.

About a year later Riviere took inventory of the stock of August H. Riviere Company. It amounted to about $7,000 (see page 5 of Riviere's affidavit annexed to the complaint). The stock in 1916 was about the same as in 1915, and the discrepancy of about $8,000 between the inventory of 1916 and 1915 led Riviere to the discovery that the items on the machine slip of 1915 totaled $4,783.04 and not $14,783.04, an error of $10,000.

Riviere waited several months after the discovery of the error, continuing business in the meantime, and then, through his attorney, advised Berla of the error in the machine list and requested a deduction of $2,500 on notes held by Berla, part of the consideration of $17,000. This Berla refused to allow.

No tender of any sort to restore defendant to his statu quo, or to so restore him as far as possible,

was made by complainants; in fact, they admit and contend it was impossible to do so.

It will be noted that the auditor did not attempt to make a statement of the fair market value of the company's assets as of the time he made the statement—he merely took figures as they were given to him, as they were carried on the books. He entered no credit for good will of the business, nor did he purport to state the true value of the realty, or stock. In making up his inventory Riviere did not re-price the goods at the increased value from the time they were bought to the time of taking inventory; the market price was going up owing to war conditions; he valued them according to the bills, so that the statement of the accountant could not purport to state the true value of the goods as of the time the statement was rendered.

Paragraph thirteen of the bill of complaint expressly negatives the fact that Berla had any knowledge of the error in the adding machine slip. Defendant was entirely ignorant of the error until it was called to his attention by Riviere a year after the agreement was executed. In fact, any thought on the part of Berla that the stock might be inventoried too high was lulled by Riviere himself, who explained that the stock of goods of the Berla-Riviere Company was worth more than the year before, because he (Riviere) had stocked up before inventory instead of reducing stock, as in previous years, and also the cost of material had advanced owing to war conditions. See Berla's testimony, page 82, line 30; page 83, line 17; page 95, line 22; page 96, line 2.

The relief sought is the correction of the error in the *inventory* and that complainants be allowed a credit of five thousand dollars on the moneys agreed to be paid the defendant, and the cancellation of

one of the notes for five thousand dollars due March 1st, 1917, and that defendant be enjoined from starting suit on the notes totaling $12,000 or the mortgages accompanying them.

## COMPLAINANTS' POINT I.

**Complainants' point I is that "The real contract was to purchase and sell on the basis of the value of the property."**

Complainants now contend that the agreement between Riviere and Berla arose as follows: Berla offered to take one-half of the true value of the physical assets as the price for his interest in the business, and that Riviere accepted that offer, and that the agreement did not arise by Berla offering to take $17,000 for his interest in the business and Riviere accepting that offer. The difference is in the language of the two offers.

The existence of such an offer in such language as complainants now seek to make out as having been the fact is borne out neither by the bill of complaint in this case, the affidavits thereto annexed of complainant, Riviere, and his witnesses, nor the testimony and probabilities as to how the matter happened.

It is not very definite from complainants' brief and from testimony of complainant quoted on this point therein just what complainant claims the language of the offer to have been: Was it one-half of the actual value of the property, or was it one-half of the actual value of the property exclusive of good will, or was it one-half of the cost of the property as shown by the inventory?

Complainant Riviere, in the testimony quoted in his brief, page 90, alleged the offer to have been that defendant would take half what "it (the business)

was worth," then complainant states defendant offered to take half what "it amounted to," and then adds that defendant was "going by the inventory value." Now just what does complainant mean by this testimony (assuming it worthy of credence that that was the exact language of the offer)? Does complainant mean to state that defendant offered to take one-half the actual value of the business, or does complainant mean to state defendant offered to take one-half of the cost as shown by the auditor's statement? If the former, does complainant mean to state defendant offered to take one-half the value of the business with or without the good will? If the former, what was one-half of the actual value of the business? (There is absolutely no evidence in the case on the point, and the inventory taken several months prior to the agreement wouldn't be a guide in view of the rapid upward trend of the market at that time due to war conditions.) When was such offer made? There is nothing to indicate whether it was such offer, or a subsequent offer which was accepted by complainant. Complainants' Point I is based solely on this testimony of complainant, and that testimony is so indefinite in its character and meaning that it does not justify the point, and the point is without merit.

Furthermore, it is clear there never was any such language used such as is now claimed by complainant. There never was any offer by defendant to take one-half of the value of the business, or one-half of the cost of the assets; the offer by Berla was to take $17,000 for his interest in the business. The bill of complaint, on this point, which complainant considers the most vital fact of all his case, does not so much as even suggest, much less state, that defendant offered or agreed to take one-half of the

value of the assets, or one-half of the inventoried cost of the assets; the bill of complaint states that complainant agreed to purchase defendant's interest for $17,000. Is it possible that even in the bill of complaint, when it was the most vital fact of complainants' case, complainant would have omitted to state the agreement as he now contends it to have been—an agreement to purchase and sell at one-half the actual value of the business—if that were the true fact? Isn't it stated in the bill of complaint to have been a purchase and sale for $17,000, because that was the way the agreement was made?

The sworn statements and affidavits of complainant and his witnesses, annexed to the bill of complaint, are clearer still as to how the agreement was reached and what language was used. On pages 3 and 4 of his affidavit Riviere states in detail the language used in making the ocntract; that testimony is as follows:

> "After we had gone over the figures in this matter Mr. Berla said, 'Either one of us will have to buy or sell, and make me an offer.' I told him that I was not then prepared to make an offer, and he *said* that the way it figured out the value of the property was about $34,000, after deducting the indebtedness, and that he would sell out his interest for $17,000. I stated that I would have to consider the matter, and see if I could raise the money. As a counter-proposition I offered to sell out to him for $15,000, but he was not willing to buy.
>
> I reported this conference to Mr. Williams, my attorney, and requested him to interview Mr. Berla, and see if he could persuade him to buy me out for $15,000, or to further continue

> the negotiations, which Mr. Williams did, although not in my presence. Mr. Williams finally reported that Berla would not buy me out, and that the best *figure* at which he would sell was $17,000, and it was agreed to buy him out at that *figure,* and thereafter, on Mr. Williams' advice, Mr. Berla assigned his stock to me."

There isn't the slightest suggestion in this testimony that Berla offered or agreed to take one-half of whatever the business was worth or cost for his interest. On the contrary, it shows the language of the offer to have been to take $17,000 (even though based on the erroneous assumption that the value of the property as shown by inventory was $34,000). The reference to the value of the property as being *about* $34,000 is immaterial; Berla offered and agreed to take a specific sum, $17,000, for his share of the business, and not one-half of the value of the business, and he never made any other agreement.

The affidavit of Corra N. Williams, an able member of the New Jersey bar and a bank president, and very apt to be most exact in his statements and who actually closed the agreement and transaction for Riviere, discloses the details and the language used in making the agreement; that testimony is as follows (page 2, line 11, of affidavit of Corra N. Williams verifying and attached to bill of complaint):

> "In view of this, Mr. Riviere offered to sell his interest to Mr. Berla for $15,000. Mr. Berla refused this offer, but *said* that he would sell his interest to Mr. Riviere for $17,000, and after further negotiations Mr. Riviere accepted

*that offer,* being moved thereto largely, among other things, because the supposed value of the merchandise was $14,783.04."

This testimony as to the language of the contract by Riviere's own attorney, contained in an affidavit annexed to the bill of complaint, contradicts Riviere's version quoted in the brief and is exactly in line with Riviere's first version contained in Riviere's affidavit above set forth. There is not the slightest suggestion in the affidavit of Mr. Williams, Riviere's attorney, that Berla agreed to take one-half of the value of the business or one-half of anything else, for his interest in the business; on the contrary, it shows that Berla agreed to take the specified sum of $17,000, and made no other agreement. That Riviere was *moved* to accept that offer largely because he thought the assets worth $34,000 is immaterial; that is collateral, and doesn't prove Riviere's contention that Berla offered and agreed *in language* to accept one-half of the value of the business (whatever it might be) for his share of the business.

The only written evidence in the case on the point is squarely against the complainants' contention and squarely in favor of the defendant. It is a letter marked Exhibit D-1, from Mr. Williams, Riviere's attorney, to Berla, and reads as follows:

"February 16th, 1916.

Amzi Berla, Esq.,
Newark, N. J.

Dear Sir:

Mr. Riviere, of the Berla-Riviere Company, in which you and he are joint owners, authorizes me to make the following proposition to purchase your half interest therein upon the following terms:

Five thousand dollars in cash, $2,000 on September 17th and $1,500 each six months thereafter until the final payment on March 20th, 1920, of $1,000, *making in all $17,000.* The instalment payments will be evidenced by the notes of Berla-Riviere Company, the corporation, and by the individual endorsement of Mr. Riviere, and will be secured by a mortgage upon the property of the Berla-Riviere Company on Maple street, subject to prior encumbrances of $15,000, and also by a mortgage upon Mr. Riviere's dwelling house. These notes to bear interest at five per cent. and the interest to be adjusted semi-annually.

If you do not wish to accept this proposition Mr. Riviere offers his half interest in the corporation to you for the sum of $15,000, $5,000 in cash and the balance in like amounts, and upon the same terms as his offer to you; the notes to be the notes of Berla-Riviere Company, endorsed by you and secured by a mortgage upon the property of the Berla-Riviere Company on Maple street, Summit, subject to mortgages aggregating $15,000.

Yours very truly,

C. N. WILLIAMS."

The conduct of Mr. Riviere and of his attorney, Mr. Williams, after the discovery of this error and prior to the institution of the suit, is significant. Neither Mr. Riviere nor Mr. Williams, in taking the matter up with Mr. Berla at that time, claimed that the agreement was as is now contended for. Neither Mr. Riviere nor Mr. Williams demanded back from Mr. Berla the sum of $5,000 or an allowance of $5,000, but the only thing that they did ask was that, in view of the error, Mr. Riviere should be allowed *$2,500.* What caused Mr. Riviere or Mr. Williams to ask for an allowance of only

$2,500? Why wasn't an allowance of $5,000 insisted upon, if the *agreement* was such as Riviere now contends it was? Is it because Riviere believed that deducting the error of $10,000 the stock was actually worth $5,000 more than it had been inventoried for, and if so, how did Riviere arrive at those figures, as being the actual value of the stock in addition to the actual cost of the stock shown by the inventory? Or was there some other unmentioned reason for Riviere insisting on being allowed $2,500 instead of $5,000, and if so, what was that reason? Certainly the conduct of Riviere and of Mr. Williams, his attorney, is not consistent with their claim of the existence of an agreement such as is now sought to be established.

It will be noted that what I have pointed to in opposition to complainants' contention is taken from the mouth of plaintiff himself, and also from the mouth of his own attorney. It will also be noted that what I have, up to this point, said in opposition to complainants' contention is testimony and incontrovertible proof of the exact language of the offer and acceptance, which was put into black and white by complainants and their attorney, either in the institution of this suit or prior to the institution of this suit, and *before the defendant filed his defense.* Is it not obvious that the new version now contended for is purposely framed, in view of the obstacles presented to complainants' case by the defenses set forth in the answer?

To turn to defendant's evidence of the language of the offer and acceptance, we find:

1. The letter above quoted, which is absolutely clear and distinct as to what the proposition was; and

2. We have the definite, clear, unmistakable testimony of the defendant, Berla, as to the language of

the offer; the testimony of Mr. Berla is not indefinite and vague nor meaningless as that of Riviere; the testimony of Berla is positive and definite, and understandable.

Both the letter and the testimony of Mr. Berla prove very definitely that the proposition of Mr. Berla was to sell for a specific sum, to wit, $17,000, and not for one-half of the value of the business.

Mr. Berla's version of the matter is given very clearly and very distinctly at the following portions of the state of the case: Page 83, line 23, to page 85, line 17; page 85, line 28 to line 37; page 86, line 1 to line 3; page 87, line 10 to line 20; page 92, line 22 to line 26; page 97, line 9 to line 18; and that testimony is as follows:

Page 83:

> "Q. And when was the first time the question of disposing of your interest in the business came up? A. I believe it was the first time I saw that statement, after the statement was signed, the first time I went up; there was an account there of about $900 that was charged against Mr. Riviere, and I asked Miss Spencer what that meant, and, if I remember right, Mr. Riviere spoke up and said that was what he had overdrawn in his account. 'Well,' I said, 'if you have drawn that much out, then let me draw that much out, and we will even the account that way,' and that riled him, and he said he wouldn't stand for anything like that any more, that one of us would have to get out of that business. I saw right away that we would never patch up that thing any more, and he must have had some thought beforehand that I would not just jump out that way, and I just imagined——

Mr. English: I object to what he imagined.

The Court: I was just about to object myself. Tell us what happened, not what you thought.

Q. That took place? A. He said, 'All right,' if one of us have got to get out, I will take $18,000.

Q. (By the Court.) How did you fix the figure $18,000? That is the only thing I am interested in? A. I don't know; it went just as quickly as I tell you; it was out without any further consideration, and I said, 'I will take $18,000,' and he said, 'I will take $17,000.' I said 'all right, I won't stand on that, I will take $17,000.' I left him with the idea that that was what I was going to have.

Q. (By the Court.) You two business men can not make me believe, I am afraid, that you did not have in your mind some element which went to make up that figure $18,000; you did not just grab it out of the air? A. Well, if I had any other idea of the figures, I really don't know that I did, that is all; it went as quickly as that.

Q. (By the Court.) Why did you say $18,000 instead of $19,000 or $20,000? A. I really don't know why.

Q. (By the Court.) It is a rather remarkable coincidence, isn't it, that this $17,000 is about one-half of the inventory? A. I don't know; he made the offer of $17,000; I never said $17,000.

Q. (By the Court.) I suppose this inventory value had nothing to do with your making

up the figure of $18,000? A. I couldn't tell you yes or no on that, I really don't know; I will say that, that I did not have it in mind at that time; the thing was so quickly over that I didn't have any amount; I don't know what got him to say $18,000, but it went, just as I told you, as quickly as I tell you.

Q. (By the Court.) I suppose the figure of $12,000 of profit the year before didn't have any influence in making up your mind? A. I thought that was his influence; that was in my mind, that was what influenced him, because never before had he said anything about it; this whole thing came like as if I was struck by a stone."

Page 85:

"Q. Did you ever make any offer to accept $17,000 for your share of the business? A. No, sir.

Q. Who made that suggestion of $17,000? A. Mr. Riviere said so."

Page 86:

"Q. And did you ever at any time offer to take half of whatever the inventory showed? A. There never was such a thing."

Page 87:

"A. It was not discussed, your Honor; that thing was not discussed at all; the fact that Riviere had a running business and, as I told Mr. Williams at the time, I said, 'Mr. Williams, Riviere never would have brought this up if it was not that he thinks he is making a profit

here, now that he don't need me any more.' I told that to Mr. Williams at the time; I explained to Mr. Williams my situation; I told Mr. Williams I had explicit confidence in him, I wouldn't even take another lawyer against him."

Page 92:

"Q. Did you ever have any conversation with Mr. Riviere wherein you stated that you would take a chance with the inventory, half of the assets, an amount equal to half of the assets for your share of the business? A. No."

Page 97:

"Q. (By the Court.) Frankly, you would not have asked, if that inventory was $10,000 out and the profits some $10,000 out, you would not have asked $17,000 or $18,000 for your share, would you? A. I don't know; I don't think the thing would come about if that was the case; I think I would still be a member of that company; I don't think it ever would come to that point. I believe I still would be an officer in that company and stockholder."

There is another silent, incontrovertible fact in this case, which is against the complainants' proposition that Berla agreed to take one-half of the inventoried value, or one-half of anything else for his share of the business, and that is the fact that $17,000 is not one-half, mathematically figured, of the equity of the business, but is more than the figures show. This silent fact weighs more in favor of the defendant and against the complainant. It has caused the complainant to speak in approximations.

There is another silent, significant factor which is against the complainant and in favor of the defendant, and that is the probabilities of the matter. Isn't it more likely that a business proposition would be put in the terms stated by Riviere in his affidavit and by Corra N. Williams in his affidavit and by Corra N. Williams in his letter and by Berla rather than in the terms now contended for?

On the whole, I believe that it is beyond controversy, in view of Riviere's statement in his affidavit annexed to the bill of complaint, in view of the statement of Corra N. Williams, contained in his affidavit annexed to the bill of complaint, in view of the language of the bill of complaint itself, in view of the language of the letter of Corra N. Williams to the defendant, marked Exhibit D-1; in view of the conduct of Riviere and Corra N. Williams after the discovery of the error and prior to the institution of this suit, and in view of the testimony of the defendant and of the probabilities of the case, that the defendant offered and agreed to accept a specific sum of $17,000 for his interest in the business, and that the contract was not to purchase and sell for one-half of the value of the property.

The court below, who has had an opportunity of considering the testimony and of judging the witnesses in person, has found that the sale was for the specified sum of $17,000, and there is no reason shown to disturb that finding of fact. That finding of fact is entirely supported by the evidence in the case, and should not be disturbed.

In the next place, assuming for the sake of argument that the agreement was as contended by the complainant, we are met by a difficulty regarding the value of one-half of the value of the business.

The value of the goods was more than $4,783.04.

That total is arrived at by taking the cost of the goods from the bills, but between the time of the purchase of the goods as represented by said bills and the sale by Berla to Riviere quite some time had elapsed and the goods had increased greatly in value in the meantime.

The inventory of 1916 showed the stock to be worth about $7,000, and the stock in 1915 was about the same as that shown by the inventory of 1916. Page 5, Riviere's affidavit annexed to complaint. The stock in 1915 was worth at least $7,000, about $2,500 more than shown by the inventory. It was probably worth more than that, else why did Riviere ask for a credit of only $2,500 instead of $5,000 upon discovering the error? There is not even a suggestion he ever asked for more.

Just what the true value of the stock was cannot be ascertained; no proof thereof has been produced.

The value of the good will has not been fixed.

The true value of the realty has not been proven.

In view of this situation, and taking it for granted for the moment for the sake of argument (although not conceded) that Berla agreed to take one-half of the value of the property, how much did one-half of the value of the property amount to?

## COMPLAINANTS' POINT II.

**Complainants' Point II is that "Complainants are entitled to relief."**

This presents two questions:

1. What relief is complainant entitled to? Has this Court the power to grant complainant that relief?

THERE ARE ONLY TWO FORMS OF AFFIRMATIVE RELIEF WITHIN THE

POWER OF A COURT OF EQUITY WHERE A MUTUAL MISTAKE HAS BEEN MADE: 1. REFORMATION. 2. CANCELLATION. NEITHER OF SAID FORMS OF RELIEF IS SOUGHT IN THIS CASE, NOR IS THIS A PROPER CASE FOR SUCH RELIEF. THE RELIEF SOUGHT BY COMPLAINANTS IN THIS CASE IS ALTERATION OF CONTRACT, RELIEF WHICH A COURT OF EQUITY HAS NOT THE POWER TO GIVE.

The law, while not what might be termed an exact mathematical science, is nevertheless a fairly exact science, following certain defined rules. The law of equity is not strictly a law of conscience, for if it were, as an old-time English jurist expressed it, "the law would vary with the conscience of each Judge," and the law would be unstable. The law of equity has been made stable by certain well-defined rules and principles. The several heads of equitable jurisprudence are well defined and clearly established, and the various heads of equitable jurisprudence constitute the various powers of the Court of Equity.

Under what head of equitable jurisprudence does the relief sought by the complainants come? What relief may a Court of Equity give where there has been a mutual mistake? It is not sufficient for the purpose of the determination of this case to say that the Court of Equity has power to grant relief where there has been a mutual mistake; we concede, for the purpose of this argument, that a Court of Equity has the power to grant relief in certain cases where there has been a mutual mistake. The question is *what relief can* the Court give? In referring to the various heads of equitable jurisprudence there are only two powers granted which

a Court of Equity can exercise when a mutual mistake in a contract has been proven. One is reformation; one is cancellation. These are the only two forms of affirmative relief within the power of the Court of Equity where there has been a mutual mistake.

Pomeroy on Equity, Jurisprudence, 3rd Edition, 2nd Volume, Paragraph 870, is authority for the following, and, in fact, the following is a quotation from the said volume:

"Affirmative remedies on occasion of mistake are (1) Cancellation and (2) Reformation.

*CANCELLATION* is appropriate when there is an *apparentiy* valid written agreement or transaction embodied in writing, while, in fact, by reason of a mistake of *both or one* of the parties: (1) either *no agreement* at all has really been made, since the minds of both parties have failed to meet on the same matters, (2) or else the agreement or transaction is different, with respect to its subject *matter* or *terms,* from that which was intended.

*REFORMATION* is appropriate, when an agreement has been made, or a transaction has been entered into or determined upon, as intended by all the parties, but in *reducing such agreement* or transaction to writing, either through mistake common to *both* parties, or through the mistake of the plaintiff accompanied by the fraudulent knowledge and procurement of the defendant, the written instrument fails to express the real agreement or transaction; in such a case *the instrument* may be corrected so that it shall truly represent the agreement or transaction *actually made* or determined upon according to the real purpose and intention of the parties."

Cancellation *wipes out* the entire contract; reformation changes the *evidence* of a contract, so that the evidence of the contract shall correspond with the terms which the parties have *orally, actually* made.

Clearly this is not a case in which *reformation* is really sought in the sense in which reformation is used as above, and as defined in paragraph 675, Volume 6 of the 3rd Edition of Pomeroy on Equitable Jurisprudence and adopted in and cited in the case of *Ordway vs. Chace,* 57 N. J. Equity 478, 42 Atl. 149. What the complainant is really seeking is *alteration* of contract. But, as stated in paragraph 675, Volume 6 of the 3rd Edition of Pomeroy on Equitable Jurisprudence, "*A Court of Equity will not make a contract for the parties,*" and in the note to that section, quoting from the *Citizens' National Bank vs. Judy,* 146 Ind. 322, 43 Northeastern, 259, Monks, Judge, "Courts of Equity do not *rectify contracts;* they may and do rectify *instruments* purporting to have been made in pursuance of the terms of contracts." This lack of power of a Court of Equity to fix terms for a contract between parties which the parties themselves have not made where there has been a mutual mistake, is expressed in the case of *Barrow vs. Barrow,* 18 Beavan's Reports, 529, in which the Court states, "A Court of Equity will *not* interfere to make a settlement conformable with what *would have been* the contract of the parties if all the facts material to be known by them had been there present in their minds." In paragraph 676 of Volume 6 of the 3rd Edition of Pomeroy on Equitable Jurisprudence it is stated that a Court of Equity has no power to *alter* or reform an agreement since that would in reality be making a contract for the parties. It is only the instrument *evidencing* the

agreement that can be reformed (that is where by mutual error the agreement in fact made is, through error, improperly reduced to writing). The case at bar is not a case of reformation; it is a case of alteration of the terms of a contract, which the Court of Equity will not and has not the power to do. If this had been a case where Berla had agreed to take twelve thousand dollars, and, through error in *reducing to writing* the terms actually agreed upon, the contract recited that Berla was to receive seventeen thousand dollars, or if, in fact, Berla had received seventeen thousand dollars, then a proper case would be presented, where this Court could exercise its power of reformation and reform the ~~agreement~~ instrument so that it would state that Berla was to receive twelve thousand dollars as he had orally agreed to accept, and if he had received the seventeen thousand dollars, he would, under those circumstances, be obliged to return five thousand dollars paid to him, above what he had orally agreed to take. If those were the facts this would be within the head of reformation, and this Court would have power to reform the written ~~agreement~~ instrument made by mutual mistake to conform to what the parties had actually orally agreed upon. But that is not the situation in this case. In this case Berla has received only what orally he has agreed to accept. The oral agreement between the parties was that Berla was to receive seventeen thousand dollars; it may be that figure was induced by a mutual error, but nevertheless the fact remains that the price fixed between the parties was seventeen thousand dollars, and Berla at no time agreed to take twelve thousand dollars; for this Court to say to Mr. Berla, "It is true that you have orally and at all times agreed to take seventeen thousand dollars, nevertheless because of a mutual mistake we are

going to oblige you to take twelve thousand dollars," is to fix a price (a term of the contract) which Berla never, either orally or in any other way, ever agreed to accept, and that price is being fixed, not by Berla but by the Court; this is clearly alteration, and differs from reformation in that in the case of reformation the Court obliges the party to take a figure, not which the Court fixed but which the party himself has orally fixed. For the Court to fix a price of twelve thousand dollars when Berla at no time agreed to take twelve thousand dollars, as is very exactly expressed in the case of *Barrow vs. Barrow,* 18 Beavan's Reports, above cited, "An interference by the Court to make an agreement conformable with what would have been the contract of the parties if all the facts material to be known by them had been there present to their minds," and this, according to said case of *Barrow vs. Barrow,* is something which the Court of Equity will not and has not the power to interfere to do.

The following is an excerpt from and resume of the case of *Barrow vs. Barrow,* 18 Beavan's Reports, 529:

Parties in this suit are a husband and wife; plaintiff being the wife.

Prior to plaintiff's marriage to the defendant, plaintiff had been married to Mr. Combes; during her marriage with Mr. Combes, Mr. Combes made a settlement upon her of ten thousand pounds, of which she was to have the interest for life, and the power to dispose of at death by will. Mr. Combes died and left all his property to the plaintiff; plaintiff subsequently married the defendant, and before their marriage there was a settlement made between the parties to this suit of the whole property left to her by Mr. Combes. In the new settlement no men-

tion was made of the ten thousand pounds which had been settled by the first settlement, both parties believing, however, that such mention was unnecessary and that the effect of the second settlement was to include in the latter settlement the property mentioned in the first settlement; plaintiff obtained a separation from the defendant and the plaintiff sought to have the second settlement corrected so as to include the fund of the first settlement; under the second settlement plaintiff was entitled to the income during her life, and if the fund of the first settlement was not included in the second settlement, the husband would be entitled to the income from the first settlement by the marital right.

> "The utmost that can be said in favor of Mrs. Barrow's case, on this point, as a result of the evidence, appears to me, to be this: That if the real effect of the first settlement as to the ten thousand pounds had been present to the minds of both parties, they would have agreed that it should have been included in the second settlement. If I am correct in this view of the evidence, I think that the conclusion is, that *this Court cannot interfere to rectify the settlement. The jurisdiction of the Court, in matters of mistake, has to be very cautiously exercised; the extent* to which it can be carried, in such a case as this, is to correct an error in carrying into effect the real contract between the parties. *I am not aware of any case,* and none has been produced to me, *where, in the absence of fraud,* such as a suppression of a fact that ought to have been communicated, *this Court has interfered to make a settlement conformable with what would have been the contract between the parties, if all the facts*

> *material to be known by them had been there present in their minds.* Whether the Court would resist the execution of a contract, entered into under such circumstances, in a suit for the specific performance of it, I forbear to inquire; but where a settlement has been executed, which carried into effect a contract framed under a mistaken apprehension of the facts, and a marriage has been actually solemnized on the faith of that contract and on that settlement, it would be to *substitute a new contract* between the parties and not to carry the real contract into effect, if I were to *alter* the settlement. On this first point, therefore, I entertain an opinion unfavorable to the case of the plaintiff."

The case in hand (the Berla case) is stronger in its facts in favor of the defendant, for in the Barrow case it was clear that the parties *would* have included the fund of ten thousand pounds in the new settlement, while in this case it is not even clear that Berla would have been satisfied to take twelve thousand dollars for his share if the mistake in question had not arisen. (See Testimony, P. 96, l. 33; p. 97, l. 18.) There might not have been any argument between the parties causing the hasty dissolution if there had been no mistake showing such a large profit apparently. (See same Testimony last referred to.) There might have been a peaceful dissolution or none at all. Berla had been drawing eight hundred dollars a year, in addition to which the business was showing a profit to Berla for his share of one thousand dollars or more above his drawing account, so that on his investment, even eliminating the error, Berla was making a percentage of about twenty per cent. or more on his money, and the good will would have been fixed at

several thousand dollars in a moment of calm; no item for good will appears in the auditor's report. In the auditor's report the value of the property on Maple street is stated to be $22,390.48; it had an income of two thousand eight hundred dollars per year, and in a moment of calm Berla would have insisted that the Maple street property be considered at a valuation of two thousand eight hundred dollars, which is nearer its fair value than that stated in the auditor's report. The stock on hand at the time of dissolution is now claimed by Riviere to have been only about four thousand dollars instead of fourteen thousand dollars. That a man of Riviere's experience, who was the active man in the business, should not be able to tell at a glance whether he had four thousand dollars' worth of stock or fourteen thousand dollars' worth of stock on hand seems incredible, and, while he might have been deceived by the appearance of the stock to the extent of a couple of thousand dollars, it is not conceivable that he could be deceived by a discrepancy to the extent of ten thousand dollars, all of which leads to the contention that if there was not fourteen thousand dollars' worth of stock on hand there certainly must have been considerably more than four thousand dollars' worth of stock, and further strength for this conclusion is drawn from two sources; one is the affidavit of Riviere himself on file in this matter in which he states that in December, 1916, the year after the dissolution, at the taking of the inventory of the new company, he had on hand about the same amount of stock as the year previous, and that the valuation of the stock on hand the year after the dissolution was about seven thousand dollars, and not four thousand dollars; secondly, Riviere told Berla, just prior to the dissolution, that they had the

largest stock that they had ever carried; that he (Riviere) instead of reducing stock for several months prior to taking of the inventory, as had been his custom in prior years, had kept on increasing his stock, and this fact, together with the increasing cost of materials (due to war conditions), accounted for a high valuation of the stock. Now, granting that there may not have been fourteen thousand dollars' worth of stock, for, as Mr. Berla himself testified on the stand, he thought the valuation of fourteen thousand dollars was a little high, but he was satisfied with Riviere's explanation, nevertheless it seems that there was considerably more than four thousand dollars' worth of stock. Mr. Berla was thrown off his guard from ascertaining the exact value of the stock by Riviere's explanation, which seemed plausible and which would seem to indicate a great deal more stock than four thousand dollars' worth, and was thereby lulled into refraining from ascertaining the true value of the stock at the time of the dissolution. A further circumstance to be considered is, that at the time of the dissolution Berla first asked for eighteen thousand dollars and then reduced the figure to seventeen thousand dollars, which was due to the anger then existing and to a natural desire to have the matter over with quickly. What Berla's initial demand might have been on a peaceful dissolution and whether or not he would have made any reduction is a matter wholly of conjecture. Another thing, as Mr. Berla testified, as he, Mr. Berla conceived, that it was Riviere's purpose to oust him from a partnership which was beginning to prove highly successful as both partners thought, though erroneously, to a degree, and as that seems to have been the reason which really prompted Riviere to get rid of Berla, the probabilities, ac-

cording to Mr. Berla's notions, were that he (Berla) would not have been called on to sell his interest in the corporation at that time at all if a mistake had not been made; that Riviere would not have wanted to get rid of Mr. Berla and that Mr. Berla would still today have a half interest in the Berla-Riviere Co. So it is not manifest that at that time, if there had been no mistake that there would have been any dissolution at all or that Berla would have taken twelve thousand dollars for his interest on a peaceful dissolution. In a moment of calm a larger valuation of the stock might have been insisted upon. So that while in the Barrow case the Court finds that it is clear that the parties *would* have included the ten thousand pounds in the new settlement, but, nevertheless, desisted from interfering to perform what was really alteration; in this case it is not even manifest that Berla *would* have been willing to take twelve thousand dollars; on the contrary, under calmer circumstances, even allowing for an error, his price might have been much larger than twelve thousand dollars, and this circumstance is even a stronger ground than in the Barrow case for refusing to *alter* a contract between Berla and Riviere.

*The Barrow case is decisive of the case at bar.*

In the case of Whittemore *vs.* Farrington, New York Reports 31, page 458, which is also authority for the proposition that Equity has no power to alter a contract, Judge Rapallo says:

> "It is beyond the power even of a Court of Equity to make contracts for parties."

The following excerpt is taken from the case of Dimon *vs.* The Providence, Warren & Bristol Railroad Co., 5 R. I. 130, 134, Ames, C. J.:

> "A Court of Equity has no power to alter or reform an agreement made between parties, since this would be in truth a power to contract for them; but merely to correct the writing executed as *evidence* of the agreement, so as to make it express what the parties *actually* agreed to."

The following excerpt is taken from the case of the Citizens' National Bank *vs.* Judy, 43 Northeastern Rep. 265:

> "It is said in 1 Whart. Cont., p. 300, pr. 207, that 'there can be no rectification however, unless it is proved that *both* parties were mistaken in the *use of the terms* to be corrected, and that both parties agreed to *the contract sought to be substituted* for them to be set aside. *In each term* of the contract *to be* thus *set up* it must be proved that the *parties concurred.* To a contract, concurrence of minds is essential and no substitution of an amended contract can be made without showing that *the parties* concurred in the *amended contract.*"
>
> "It is necessary for a plaintiff to show that there was an actual concluded contract which is inaccurately represented to be the instrument purporting to be made in pursuance of it. *Courts of Equity cannot rectify contracts.* They may and do rectify *instruments* purporting to have been made in pursuance of the terms of contracts. 2 Seton, Decrees pt. 1, pg. 1342, McKenzie *vs.* Coulson, L. R. 8 Eq. 368, Bentley *vs.* Mackay, 31 Law J. Ch. 697, 709."

I do not believe that it is necessary for me to cite any further authority to show that equity is

without power to alter a contract or fix the terms of a contract which the parties themselves have not made in fact. I believe that I have, by the matter and illustrations above set forth, fairly demonstrated that the relief which the complainant seeks in this case amounts to *alteration*, and if this is a case of alteration then, too, I believe I have fairly demonstrated the law to be that the Court has no power to grant the relief of alteration sought by the complainant. As before stated, *if* Berla had agreed to accept twelve thousand dollars, and through an error was receiving seventeen thousand dollars, to decree Berla to turn back five thousand dollars of the notes would not be alteration of the agreement, but would be reformation; it would be making Berla take what he had orally agreed to take, had he agreed to take twelve thousand dollars, but, as pointed out, what the complainant seeks in this case is to have this Court say that Berla should take twelve thousand dollars on the theory that if the mistake had not been made Berla would or might have taken twelve thousand dollars, although Berla never actually agreed to take twelve thousand dollars, and as before stated, this is clearly an attempt to have the Court fix a new contract and is *alteration*. There is even the added circumstance that complainant is really seeking alteration, even though it is not manifest from the evidence that Berla would or might have taken twelve thousand dollars.

* * * * * * * *

Nor is this a proper case in which the Court of Equity can extend equitable relief of *cancellation*. Cancellation is equivalent to rescission, and means wiping out the entire transaction and restoring the parties to the statu quo; in the first place in this

case complainant is not asking that the *entire* transaction be wiped out; in the second place, the Court cannot decree cancellation in this case, for if the complainant were seeking a rescission he ought at least restore the defendant to his statu quo as half owner of the Berla-Riviere Co., its *then* stock, property and good will. Manifestly this is impossible under the circumstances of this case. The Berla-Riviere Co. has been dissolved since about April 26, 1917, and Berla has been out of the business since about April 26, 1917; the corporation having been dissolved, is now out of existence and cannot be restored to existence, and the good will of the Berla-Riviere Co. is no more unless it can be said to have been preserved by the Riviere Company with Riviere in the business alone, without the connection of Berla's name, and without Berla's interest therein. The stock of goods admittedly has been used and sold and cannot be restored; the real estate as a general proposition has depreciated in value, from which it can be readily seen that it is impossible to restore the statu quo, and the restoration of the statu quo is a condition precedent to the equitable relief of cancellation especially in those cases where the relief is asked *on the ground of mutual mistake* (not fraud). See Pomeroy on Equitable Jurisprudence, 3rd edition, Volume 6, paragraph (about) 688. According to paragraph 1165 of that volume it has even been held that a *tender* by the complainant, before suit to restore the statu quo, is necessary. In the third place rescission or cancellation is not granted for a mutual mistake on a mere collateral matter, when the source of information is open to both parties alike. Sampel *v.* Bridgeforth, 72 Miss. 293, 16 South 876, Cited Vol. 6, Pomeroy, supra Supreme Court, Mississippi. Suit for rescission of a

contract decided in favor of defendant, Appeal, Woods, J.:

> "The complainant complains of no fraud or misrepresentations on appellee's part. Indeed, appellee made no representations whatever. He sold, and appellant purchased, the note and deed of trust of Swayze; the one wishing to get clear of it, and the other wishing to acquire it. Touching its real worth, both parties were honestly mistaken. They mistook an important fact, collateral to their transaction. They thought the note so bought and sold was secured by a first trust deed on Swayze's stock, and they were both innocently mistaken. Appellant not only did not rely on statement made by the appellee as to the trustee deed (for he made none), but he undertook to settle the value of the trust deed for himself, before he bought, by an examination of the deed records of the proper county. Unfortunately for him, his examination was imperfect, and the older trust deed of D. A. Swayze escaped his attention. He acquired exactly what he intended to get, but what he would not have purchased if he had been more fully informed. There was a mistake of fact in a collateral point, and the fact was unknown to both parties, and the sources of information were open to both alike. It is well settled that this will not afford ground for a rescission of the contract." Halls *v.* Thompson, 1 Smedes M. 443; Ayers *v.* Mitchell, 3 Smedes and M. 683, and Wise *v.* Brook, 69 Miss. 891, 16 South 836.

The case of Sample *vs.* Bridgeforth and the case at bar seem to be parallel, and if the opinion of the Court in that case be read, substituting the

word defendant for the word appellee and the word complainant for the word appellant, bearing the facts of this case in mind, the parallel becomes very apparent. In the fourth place in the case of *cancellation* there are three elements to consider, concerning a mistake:

(1) It must be concerning material fact.

(2) A mistake resulting from the complaining party's own negligence will not be relieved against; where the mistake is wholly caused by want of that care and diligence in the transaction which should be used by every person of reasonable prudence in the absence of which would be a violation of legal duty, the court of equity will not grant relief; and if both parties were negligent in this case that would not alter the situation, for in such a case neither party will be heard to complain of a result of which his own want of negligence was the approximate cause, so that if in this case the Court finds that Riviere was negligent in the operation of the machine or in not being put on inquiry by reason of the great discrepancy, or if the Court should find that both parties were negligent in not being put on inquiry for the discrepancy, then in such case Riviere will not be heard to complain of a result of which his own negligence was the approximate cause.

(3) Equity will never give any relief from a mistake if the party could, by reasonable diligence, have ascertained the real facts, nor where the means of information are open to both parties and no confidence is reposed.

What I have said concerning cancellation or rescission in this brief does not seem to me to be important, for the reason that I do not think that the complainant is seeking cancellation; he is seeking alteration. I mention it for the purpose of

showing, however, that this is not a proper case for cancellation, even if that were what complainant were seeking, because the statu quo cannot be restored and for the other reasons above mentioned.

* * * * * * * *

Defendant's argument, amongst other things to this point, is briefly, (1) that complaint is not seeking the equitable relief of reformation; (2) that complainant is seeking alteration and is seeking to have the Court fix a price which Berla would or might have accepted, or regardless of whether Berla would or might have accepted that price, to fix a price anyway and compel Berla to accept that price, even though Berla never orally or in any other manner agreed to accept that price; (3) that it is defendant's further contention that, although equity has a right to cancel a contract, this is not the relief sought, nor can that relief be given, if it were sought, because the statu quo cannot be restored, and for other reasons; (4) that as before stated, the real relief sought is alteration of contract, which is beyond the power of this Court.

This briefly summarizes defendant's argument to this point, and I now turn to answering the complainant's point II.

Complainant's attorney has not been able to state what form of equitable Jurisprudence by way of relief he seeks to invoke in this case, and when the firm of McCarter & English is unable to state what equitable power it desires invoked, it is a fairly certain sign that there is no relief in that case.

Complainant's attorney virtually admits that this is not a case within the well recognized branch of reformation or cancellation; he states he appeals to the injunctive relief of the Court, but such relief is not primary relief extended by a Court of

Equity, but is only incidental relief, that is, incidental to the exercise of some well recognized major power of a Court of Equity.

Complainants in the first part of this point, from page eleven to page fifteen inclusive of their brief, state a number of abstract propositions of law and cite a number of cases with which I have no quarrel, but which do not help us in the present situation. The sum and substance of those propositions and cases is that a Court of Equity will relieve against a mutual mistake; I grant this, but as before pointed out, reformation and cancellation are the only two kinds of relief equity gives for mutual mistakes, and that this case is not a case of reformation nor cancellation, which is the relief which Equity gives for mutual mistake.

The case of Metler's Admr. *vs.* Metler, 18 N. J. Eq. 270, 19 N. J. Eq. 457, cited by the complainant, is a case in which the Court properly decreed reformation, and, as incident thereto, cancellation. That case presents none of the elements of alteration really sought by way of relief by complainant in this case, nor did it present the obstacle of the impossibility of restoring the statu quo presented in this case. The same may be said of the cases of the City of Paterson *vs.* Baker, O'Brien *vs.* Paterson Hauling Co., Gallagher *vs.* L. & D. Eagle Brewing Co., which are cited by the complainant. In none of those cases was it sought as it is in this case to alter the terms of a contract made by the parties themselves. In those cases the Court was really decreeing the execution of the contract according to the terms *the parties themselves had agreed upon.*

Regarding the case of Payne *vs.* Upton, cited by the complainant, complainant has not stated the full facts in that case; in that case it appears that

the plaintiff went to the defendant for the purpose of purchasing a large farm; *the defendant represented* to the plaintiff that the farm contained two hundred and twenty acres or more, and defendant further stated to the plaintiff that he had asked one hundred and fifty dollars an acre for the farm, but that he was willing to sell it for thirty-three thousand dollars, that is, two hundred and twenty acres at one hundred and fifty dollars an acre. The plaintiff offered thirty thousand dollars; there were further negotiations, as a result of which the defendant agreed to sell to the plaintiff for thirty-one thousand six hundred and eighty-seven dollars. The other facts are stated in the complainant's brief. (1) The Court, in the course of its opinion, says: "It is also *very material* that the misconception under which the plaintiff labored in respect to the number of acres was induced by the untrue, although not fraudulent, *representation* of the DEFENDANTS." This circumstance, as appears from the words *"very material,"* is the very controlling fact, *the ratio decidendi,* of that decision, and it distinguishes that case from this case, for in the case between Riviere and Berla the mistake under which both parties labored *was not induced by any representation on the part of Berla;* on the contrary, the mistake under which Berla labored was induced by Riviere. Riviere was the active man in the business, he was the one who took stock and made the inventory; it was Riviere who lulled Berla; Berla said to Riviere that he, Berla, thought that fourteen thousand dollars was rather a high valuation for the merchandise on hand, to which Riviere replied that that was due to the increase in price of material, and to the fact that he, Riviere, had increased the stock before taking inventory, instead of decreasing and selling the same for several

months before taking inventory, as he had done for the several previous years. So that, whereas in the case of Paine *vs.* Upton, the "very material" circumstances which controlled the Court's decision was the fact that the defendant had made representations which were untrue, and that the defendant would not be permitted to take advantage of his own wrong or misrepresentation, in this case that "very material" circumstance is lacking, and not only is it a fact in this case, that *Berla did not lead Riviere into a mistake,* but on the contrary it was the representation and acts of Riviere which led Berla to share the common mistake. (2) The complainant says that the contention of alteration made by Berla *might* with equal force have been made in the case of Payne *vs.* Upton; as a matter of fact, however, *the point was not raised in the case of Payne vs. Upton, that the Court was without power of alteration,* and that the proper remedy, if any, should be cancellation. This point was not brought to the attention of the Court nor argued. (3) In my judgment the case of Payne *vs.* Upton is unsound, for it allows alteration and makes a new contract for the parties, based on the representations, untrue, though not false, of the defendant, leading the plaintiff into mistake. The theory on which the Court proceeds to alter the contract is that the defendant should not be permitted to get out of the contract by reason of his, the defendant's, wrong; that to permit the defendant to get out of the contract by his, the defendant's, wrong, would be to permit the defendant to take advantage of his own wrong. This is unsound, for by enforcing a cancellation or rescission, the defendant would receive no advantage, but would be placed in statu quo. (4) There is therefore no good reason for the Court in that case assuming the

power of alteration and forcing its own contract on the defendant on the ground that the defendant has made an untrue statement. The point is that while the Court has power of reformation and cancellation it has not the power of alteration. Inasmuch as the theory on which the Court proceeds in the case of Payne *vs.* Upton is unsound, and inasmuch as the Court has thereby taken unto itself a power of alteration which it does not possess, the case should be confined strictly to its peculiar facts and circumstances and cannot be extended to a case in which the plaintiff has not been misled by the defendant. The controlling circumstance for the decision in the Payne *vs.* Upton case is the defendant was misled by the complainant; in this case such controlling circumstance does not exist. (5) In that case as appears from complainant's brief, the Court speaks of reformation and cancellation as though its decree were an exercise of that relief, and the Court also says in the course of its opinion: "*The Court in granting relief does not make a new contract for the parties, but simply conforms the nominal agreement to the real one.*" In other words, in the case of Payne *vs.* Upton the Court did not purport or intend to interfere for the purpose of imposing on the defendant a contract made by the Court, but purported to enforce the contract made by the parties themselves. Whereas in the case at bar complainants seek to have this Court force upon defendant a contract defendant never made.

What has been said with reference to the case of Payne *vs.* Upton above applies equally in answer to the cases of Mills *vs.* Kampfee; Strauss *vs.* Norris and Gallop *vs.* Bernd, cited by complainant.

The following is an excerpt from the New Jersey case of Strauss *vs.* Norris, 78 N. J. Eq. 488, and

shows that the controlling fact which permits of a restitution in those cases is a *misrepresentation,* untrue, though not fraudulent on the part of the defendant; no such misrepresentation by Berla exists in this case, and that is the distinguishing fact between those cases and the case at bar, the quotation is as follows (page 492): "It must be kept in mind that this suit is not a suit for the rescission or cancellation of the contract on the ground of misrepresentation, but is brought to recover back a portion of the purchase money paid by the vendee upon the ground that he overpaid the vendor *by reason of her misrepresentation of a then present fact.*"

Paget *vs.* Marshall, cited by the complainant, shows that where the mistake is mutual the Court will grant reformation; where the mistake is not mutual or unilateral, the Court will not grant reformation, but will grant cancellation. This case of Paget *vs.* Marshall is in the defendant's favor rather than in complainant's favor, if it can be cited in favor of either party. In that case there was a mistake made principally by the plaintiff alone, and the plaintiff sought to have a contract changed to conform with the plaintiff's intention and enforced as rectified against the defendant. The Court decided that it would grant *rescission or cancellation, but would not change* the contract and enforce it against the defendant without the defendant's consent, *even though* the probabilities were that the defendant would have been willing to make a contract such as the plaintiff at first intended to propose; and in fact after the Court's decision of cancellation the defendant later agreed to take the contract as rectified, conforming to the manner in which plaintiff originally intended, but this was done only with his (defendant's) consent.

The case of Gould *vs.* Emerson, cited by complainant, is a case in which a promissory note by mutual mistake of the parties was drawn for a sum greater than the *actual debt* for which it was given. In such a case a Court of Equity will correct it so as to make it conform to the *actual agreement* between the parties in pursuance to which the note is given; in other words, the *actual obligation* from plaintiff to defendant in this (Gould) case, *flowing from their partnership relations and contract,* was the sum of five thousand dollars, that is, plaintiff was *actually indebted* to the defendant for the sum of five thousand dollars, and by mistake in payment of that five thousand dollars, paid the defendant ten thousand dollars. The five thousand dollars was due from plaintiff to defendant as the result of an agreement which they themselves had made, and the Court, in ordering the repayment of the excess of five thousand dollars, was not imposing a contract of the Court on the parties, but was enforcing the obligations made by the plaintiff and defendant themselves, whereas in the case between Riviere and Berla the complaint would have *the Court* fix the price and oblige the defendant to live up to that price, and complainant is not asking defendant to live up to the price which the *defendant* and plaintiff have fixed and agreed upon.

The case of Reggio *vs.* Warren, cited by the complainant, is one in which the Court *cancelled* an entire transaction on the ground of mistake, and did not alter the terms of a contract. Also in that case it was possible to restore the statu quo.

The case of Commissioners of Delta County *vs.* The Commissioners of Gunison County, cited by complainant, is one in which the Court of Equity made no attempt to enforce obligations other than those agreed to by operation of law, by the parties.

The relief specifically prayed for by complainant is for the reformation, not of any agreement, but of the *inventory*. This is unheard of and absolutely beyond the powers of the Court, and could of itself serve no purpose. Complainant also seeks a credit of five thousand dollars, but the bill shows no right to such a credit, shows no agreement by defendant to take twelve thousand dollars for his interest in the business. Complainant also requests cancellation of a five thousand dollar note due March 1st, 1917; this relief is merely incidental to and presupposes complainant is entitled to an allowance of five thousand dollars. Not being entitled to such an allowance, the cancellation cannot be granted. Furthermore, the note of five thousand dollars has actually been paid, and delivered to complainants.

## DEFENDANT'S POINT I.

**(a) It was the duty of the complainant (and not the defendant) to tender a return to the statu quo, and there having been no such tender made, complainants are not entitled to relief.**

**(b) It being impossible to restore the statu quo, complainants are not entitled to any relief.**

What has heretofore been said in this brief is a complete answer to plaintiff's brief.

In addition, a number of defendant's points have been made in answering complainant's points.

The balance of this brief takes up those points of defendant not already so covered.

This point (Defendant's Point I) is raised by the second, fourth and eleventh defenses of defendant's answer.

It is clear that to put this defendant in default it was necessary, before instituting suit, to have made a tender. Whether or not complainant felt

that defendant would have accepted the tender, it was complainant's duty to have made that tender, in order to put defendant in default and entitle complainant to affirmative relief, as it is the complainant who is seeking affirmative relief and as the moving party it was his duty and not Mr. Berla's duty to make a tender to restore the statu quo, and it is therefore immaterial that Mr. Berla did not suggest a return to the statu quo.

Complainant seeks to explain away the fact that he did not make a tender prior to suit. The true explanation would seem to be that the probabilities are that it did not dawn upon the complainant that it was his duty to make a tender, and a tender was therefore negligently omitted.

Complainants contend and admit in their brief filed on the appeal of this matter, that a restoration of the statu quo is impossible. This being so, the complainants are not entitled to any relief by way of cancellation, it being a necessary condition precedent to granting cancellation in case of *mistake* (not fraud), that the statu quo he restored by the complainant, and if it be impossible to restore the statu quo the relief of cancellation on the ground of mistake will not be granted. See pages thirteen and fourteen of this brief, citing Pomeroy on Equitable Jurisprudence, Third Edition, Volume six, paragraph (about) 688, and paragraph 1165.

## DEFENDANT'S POINT II.

**The value of the merchandise of the Berla-Riviere Co. was more than $4,783.04. The value of Berla's interest in the Berla-Riviere Co. was more than $12,000.**

This point is suggested by the first, ninth and tenth defenses of the answer.

It has heretofore been fully covered (see partic-

ularly page — of this brief) and requires no added discussion. P16-§ 37; P17-§ 21; P24-l 30; P26-l 24; P11-l 69.

It is clear that it is impossible to tell how much more, if anything, than the true value of his interest in the business Berla received for his interest by reason of the mistake (even laying aside for the moment the fact that Berla never agreed to accept anything less than $17,000 for his interest).

When it is considered that the realty was actually worth more than it was inventoried at, that a figure for good will was entirely omitted, and the good will was worth considerable, even deducting the ten thousand dollar error, and that the merchandise was actually worth a great deal more than $4,783.04 (this is plain from a number of circumstances already adverted to), it is clear that the amount by which defendant Berla is unconscionably enriched, if by any amount at all, must be small indeed. Figuring the fair value instead of an old book value of the realty, figuring a fair value of good will of a concern which from a start on one thousand dollars cash capital in ten years showed assets of over twenty-five thousand dollars, after deductions of salaries and drawing accounts, was a going concern showing good profits, and figuring a fair market value for the merchandise (allowing for an increase over the inventory of $4,783.04, for an obvious error of considerable size and allowing also for an increase in the value of merchandise by reason of the rise in market price since the purchase of the goods to the time of sale), does it strike one that Berla has been unconscionably enriched by any considerable sum (although of course a fair value cannot legally be arrived at)?

## DEFENDANT'S POINT III.

**Complainants by their conduct in continuing the**

**business instead of electing to avoid the transaction upon discovery of the mistake ratified, confirmed and adopted the sale between defendant and complainant, A. H. Riviere, in all respects and in all its terms as set forth in the bill of complaint.**

This point is suggested by the second defense of the answer.

The facts stated in the second defense are clearly proven by the evidence in the case. Upon discovery of the mistake it was the duty of the complainants immediately to affirm or disaffirm the transaction. By their conduct as disclosed by the second defense complainants must be held to have affirmed the transaction by their conduct. Their excuse that they desired to wait until the due date (some two or three months) to see if Berla still had the notes, is not a valid one. Just as they have tied up unmatured notes by court proceedings, in the same manner they could have tied up the note due March 1st, 1917, also by Chancery proceedings before it matured, and there was no excuse for waiting. Berla either had the note or he didn't at the time the error was discovered, and prompt Chancery proceedings would have disclosed the fact promptly.

## DEFENDANT'S POINT IV.

**The mistake was due to the negligence and carelessness of the complainant, A. H. Riviere, and was made by him alone.**

This point is suggested by the seventh defense.

Riviere was unable to swear that there was anything wrong with the adding machine. It had been used by him for six weeks and had not made any errors before. See page 54, line 30; page 55, line 10. If there had been anything wrong with the adding machine Riviere would have sued the

Adding Machine Co. The only explanation as to how the error arose is that it must have been due to careless and negligent operation of the machine by Riviere, and if the mistake was brought about by Riviere's negligence he must suffer the consequences of his own carelessness and is not entitled to relief. See also page — of this brief as to important discussion of this point.

If the mistake was brought about by an improper machine complainant's redress is against the Adding Machine Company.

That Riviere may be guilty of negligence in the judgment of the Court below is apparent from the Court's opinion (State of the Case, page 109, line 26 29).

## DEFENDANT'S POINT V.

**The note for $50,000.00 due March 1st, 1917, mentioned in paragraph two of the prayer for relief, has been paid and delivered to the A. H. Riviere Co.**

This point is suggested by the fifth defense.

As the said note has as a matter of fact been paid and delivered as aforesaid, before the filing of the answer, the cancellation of that $5,000 note should not be decreed and the prayer for that relief should be denied.

## DEFENDANT'S POINT VI.

**In view of the facts stated in the third defense, and which have been proven, it would be working a hardship on defendant to enter a decree against him in this case.**

This point needs no discussion other than a reference to the third defense, which discloses the fact that great financial hardship would be worked

against this defendant if a decree were to be entered against him in this matter.

## DEFENDANT'S POINT VII.

**The facts stated in the twelfth defense have been proven and constitute a complete and conclusive defense and answer to complainant's case.**

Authority for this proposition is the case of Sample *vs.* Bridegworth, cited at page — of this brief, where the complete opinion of the Court is set out. P30-L35-P32-L4

## DEFENDANT'S POINT VIII.

**There was no mistake of fact.**

The mistake under which Riviere labored as to the value of the merchandise was not a mistake of fact, but as to the value of goods, which is a matter of opinion. He knew the number of articles there were and he knew the cost of each article; the value thereof was a matter of opinion.

## DEFENDANT'S POINT IX.

**The inventory did not form the basis of negotiations between the parties.**

The negotiations were hastily precipitated and were caused by anger, and the propositions were not carefully thought out propositions, so far as Berla was concerned.

On the spur of the moment Berla offered to take $18,000 for his interest. Riviere offered to take $17,000 and Berla promptly countered and offered to sell at *Riviere's* figure of $17,000, which offer was finally accepted. Berla probably did not have the statement in mind. He was angered and willing to quit, willing to accept Riviere's challenge to

separate, and it was under those conditions and influences Berla was prompted to offer to take $17,000, get out and get out quickly, and not the influence of the statement. The offer of $17,000 was not Berla's figure; it was Riviere's figure, and Berla was willing to meet the figure and get out at the figure. While Riviere may have been influenced to make the offer of $17,000 by the statement, Berla was not influenced to make the offer of $17,000 by the statement, but by the desire to meet Riviere's challenge and figures, and because he, Berla, had to get out and couldn't continue the business, for Riviere had been the active man in business.

While the inventory may have been the basis or inducing cause of Riviere's proposition, it was not the inducing cause of Berla's proposition.

* * * * * * * *

To summarize most of defendant's contentions:

1. In answer to complainant's point I: it is clear that Berla agreed to sell his interest for the specific sum of $17,000, and not for one-half of the value of the property; that even if Berla had agreed to take one-half of the value of the property, there is no proof of the value of one-half of the value of the property.

2. In answer to complainant's Point II: (a) Equity gives relief for a mutual mistake, but the only power which a Court of Equity has where there is a mutual mistake is that of reformation or cancellation. Equity has no power to alter contracts or make contracts for parties; (b) this is not a proper case for the exercise of the equitable power of reformation; (c) this is not a proper case for the exercise of the equitable power of cancellation; (d) the power which the complainants seek to invoke is the power of alteration; (e) the

power of alteration is one which, according to the numerous cases cited by the defendant, a Court of Equity does not possess.

3. Complainants are not entitled to the equitable relief of cancellation (as a major relief) for the reason amongst others that it is impossible to restore the statu quo.

4. Even allowing for the error, the value of the merchandise was considerably more than $4,783.04, and the value of Berla's one-half interest was considerably more than $12,000, though how much more cannot be arrived at from the proof.

5. Complainants ratified, adopted and confirmed the transaction by conducting the business for months after the discovery of the error without valid excuse instead of promptly notifying Berla of the error and of their desire to disaffirm the transaction.

6. The mistake was due to the carelessness of Riviere in the operation of the adding machine.

7. The note due March 1st, 1917, which complainants pray shall be cancelled, has been paid and delivered to complainants.

8. In view of obligations in the sum of $12,000 incurred by defendant to be met by the moneys to be paid on the Riviere notes, a decree against defendant would work great financial hardship against him.

9. The facts appear to be as stated in the twelfth defense, which is a bar to relief in complainant's favor.

10. The mistake was not as to fact, but as to a matter of opinion or judgment, with respect to the value of the goods.

11. The inventory was not the basis of Berla's offer. His offer was influenced and brought about

in a moment of anger by a desire to meet Riviere's figures and get the unpleasantness over with quickly.

12. The case of Barrow *vs.* Barrow is precedent in defendant's favor and controlling and decisive of this case.

This being a case of alteration and the Court being without the power of alteration, the Court ought deny the relief sought in this matter. As repeatedly stated in numerous cases, the power of annulling or reforming executed transactions is an exercise of Supreme Judicial Power, and should be exercised with the highest caution. If that be so in cases of reformation or cancellation, where the Court has power, how much greater is it the solemn duty and obligation of a Court of equity to refrain from exercising a power which it does not possess.

Respectfully submitted,

WILLIAM HARRIS,

*Solicitor for and of Counsel with ~~Complainant.~~* Respondent

JACOB SIFF,

*Solicitor for ~~Complainant.~~* Respondent

EXHIBIT D.-1.

February 16th, 1916.

Amzi Berla, Esq.,
Newark, N. J.

Dear Sir:

Mr. Riviere, of the Berla-Riviere Company, in which you and he are joint owners, authorizes me to make the following proposition to purchase your half interest therein upon the following terms:

Five thousand dollars in cash, $2,000 on September 17th and $1,500 each six months thereafter until the final payment on March 20th, 1920, of $2,000, making in all $17,000. The instalment payments will be evidenced by the notes of Berla-Riviere Company, the corporation, and by the individual endorsement of Mr. Riviere, and will be secured by a mortgage upon the property of the Berla-Riviere Company on Maple street, subject to prior encumbrances of $15,000, and also by a mortgage upon Mr. Riviere's dwelling house. The notes to bear interest at five per cent. and the interest to be adjusted semi-annually.

If you do not wish to accept this proposition Mr. Riviere offers his half interest in the corporation to you for the sum of $15,0000, $5,000 in cash and the balance in like amounts, and upon the same terms as his offer to you; the notes to be the notes of Berla-Riviere Company, endorsed by you and secured by a mortgage upon the property of the Berla-Riviere Company on Maple street, Summit, subject to mortgages aggregating $15,000.

Yours very truly,
C. N. WILLIAMS.

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## Affidavit of August H. Riviere.

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

AUGUST H. RIVIERE, being duly sworn, upon his oath says: I am one of the complainants in the foregoing bill of complaint named. The other complainant is the A. H. Riviere Company, of which I am the president and own all the stock, except qualifying shares of directors. I have read the bill of complaint and am familiar with the contents thereof. The matters and things therein contained are true.

The Berla-Riviere Company was incorporated October 3rd, 1905, as stated in the bill, one-half of the stock issued being held by Amzi Berla and his wife, and the other half by me and my wife. This company continued business until April, 1916, when it was dissolved as stated in the bill.

Every year it was customary for the Berla-Riviere Company to have an inventory taken and to have an auditor prepare a financial statement showing the assets and liabilities of the company. In December, 1915, pursuant to that annual custom, I took an inventory of the assets of the company. I was the active man in the affairs of the company and always took the inventory. This inventory was written up by me, with the assistance of the bookkeeper, Sadie Spencer, in a book which I had for that purpose, and which is still in my possession ready to be produced. The values set forth opposite the various items which go to make up the inventory were the cost values as they had been paid by the Berla-Riviere Company.

When the inventory was prepared I transcribed the various figures on an adding machine which we had in the office. This was a new machine, which had been left on trial, and I used it for this purpose. The total amount of the figures as given on the adding machine were $14,783.04.

A machine list was made setting forth the various figures, and the total, which I have in my possession and am ready to produce. I turned this machine list over to the auditor, George P. Scherff, who used it with other data to prepare the financial report and statement of the company's assets and liabilities as of December 31st, 1915.

In February of 1916 Amzi Berla and I entered upon a series of negotiations looking toward either the purchase or sale by either the one or the other of us of the other's intesest in the Berla-Riviere Company. The basis of our negotiations was the auditor's report and statement, in which he included, among other things, the value of the merchandise at $14,783.04. In connection with these negotiations I called upon Mr. J. Franklin Haas, the president of the Summit Trust Company, and also called upon Mr. Corra N. Williams, as my attorney, to assist me in the matter. I applied to the Summit Trust Company for financial assistance in the matter, and exhibited to Mr. Haas the report and account of the auditor, which is annexed as Exhibit 1 to the bill.

A day or two thereafter, which was Monday evening following the opening of the negotiations, I met with Mr. Berla and the auditor, Mr. Scherff, at the office of the Berla-Riviere Company, Mr. Berla stating that he had asked

Mr. Scherff to come to explain to him his financial statement and report. We went over the figures, and, among other things, discussed the amount of the inventory as stated in the report. Mr. Berla said to Mr. Scherff in my presence that the amount of the inventory seemed to him high, but that he had gone over the figures in the book in which I had set forth the inventory, and that he had compared the figures with the figures on the machine list, and that they seemed to correspond, and be accurate, and he thought it must be all right, and that he was satisfied to take those figures as setting forth the amount of the merchandise. None of us added up the column of figures, but all of us assumed that the total of $14,783.04, as stated on the machine list by the adding machine, was accurate.

After we had gone over the figures in this matter Mr. Berla said, "Either one of us will have to buy or sell, and make me an offer." I told him that I was not then prepared to make an offer, and he said that the way it figured out the value of the property was about $34,000, after deducting the indebtedness, and that he would sell out his interest for $17,000. I stated that I would have to consider the matter, and see if I could raise the money. As a counter proposition I offered to sell out to him for $15,000, but he was not willing to buy.

I reported this conference to Mr. Williams, my attorney, and requested him to interview Mr. Berla, and see if he could persuade him to buy me out for $15,000, or to further continue the negotiations, which Mr. Williams did, although not in my presence.

Mr. Williams finally reported that Berla would not buy me out, and that the best figure at which

he would sell was $17,000, and it was agreed to buy him out at that figure, and thereafter, on Mr. Williams' advice, Mr. Berla assigned his stock to me; I turned the stock in to the Berla-Riviere Company in exchange for all of its assets, and thereafter caused to be incorporated the A. H. Riviere Company, and transferred to it the assets which I had received, previously belonging to the Berla-Riviere Company, all as stated in the bill of complaint.

In connection with the payment of the agreed price to Mr. Berla, I paid him $5,000 in cash, and gave him promissory notes for the various amounts and due on the various dates as mentioned in the bill of complaint.

The first of these notes, by its terms, became due March 1st, 1917, being a note for $5,000. The A. H. Riviere Company also executed its mortgage to me, which was assigned to Mr. Berla, and I, together with my wife, executed a mortgage to him on the property upon which I live, to further secure the notes, all as stated in the bill of complaint.

The A. H. Riviere Company immediately upon being incorporated, proceeded to carry on the business which had previously been carried on by the Berla-Riviere Company, which was the business of plumbing and dealing in plumbing supplies. In December of 1916 I took an inventory of the stock of the A. H. Riviere Company, and also called on Mr. George P. Scherff, the auditor, to state the account of its assets and liabilities. The inventory as thus taken by me I took to the office of the Commonwealth Water Company, of Summit, where a friend of mine is employed, and had him add up the figures on the adding machine there used, and I also

checked it up by adding the figures myself. As soon as the total of this inventory was struck, I was impressed by the difference between it and the amount of the inventory which had been taken in December, 1915. The amount of the merchandise as shown in the inventory of 1915 had not changed very much during the year. We had replaced practically all that had been sold, and roughly the same amount of merchandise should have been there in 1916 as was there in 1915. The discrepancy between the two inventories was about $8,000, and I thereupon readded the machine list of the inventory of 1915 myself, and found that it totaled $4,783.04, instead of $14,783.04, as the adding machine had stated it. I thereupon took this machine list to Mr. Haas the president of the Summit Trust Company, and told him the difference in the figures as I had added them, and as the adding machine had added them, and he offered to have the same set of figures added again on one of the adding machines used by the trust company. This was done, and the total agreed with the total which I had made it, namely, $4,783.04.

This corrected figure showed a difference of $10,000 in the amount of the merchandise which had been inventoried in 1915, and which had been included in the auditor's report, and had been the basis of the negotiations between Mr. Berla and me. I therefore at once consulted Mr. Williams about the matter, and at his suggestion waited until the first of March, 1917, when the first note became due, in order to determine whether or not the rights of any third persons had intervened. On the 1st of March, 1917, on Mr. Williams' advice, the note was not paid, and Mr. Williams, at my request, in-

terviewed Mr. Berla. I authorized Mr. Williams to settle the matter on some fair basis if he could, but he reported to me that Mr. Berla was obdurate, and insisted on payment of the full amount of the note.

Following that, and under date of March 5th, 1917, I received a letter from William Harris, a counsellor at law, having an office in Newark, a copy of which is as follows:

"Newark, N. J., Mar. 5th, 1917.

A. H. Rivier Co.,
25 Maple St.,
Summit, N. J.

Gentlemen:—

I have been retained by Amzi Berla, of this city, in reference to a $5,000 note due March 1st, 1917, and shall expect a certified check for same by March 8th, 1917, and in the event same is not received am instructed to take such legal action as shall be necessary to enforce the collection of said note.

Respectfully yours,
WILLIAM HARRIS."

The mistake in the amount of the inventory of December, 1915, as stated by the adding machine, as set forth in the account and report of the auditor, was a mutual mistake on the part of both Mr. Berla and myself. While each of us thought that the amount stated was high, each of us thought it was accurate, and neither of us re-added the figures to see whether the total was correct or not. In the negotiations which took place between us we both assumed that the amount of 14,783.04 was the correct amount of the inventory, and the amount at which he agreed to sell his interest and which

I agreed to pay for it, was based upon the auditor's report, in which this figure of $14,783.04 was a very material item.

This stock of merchandise was regarded by both of us as stock which could readily be used in the business or for which money could be obtained, and which represented a cash outlay by the Berla-Riviere Company. Had the amount of the inventory been less, the figure which I would have paid Mr. Berla would have been proportionately less, this item of $14,783.04 having been taken as a fixed item in estimating the value of the property which he was selling and I was buying.

AUGUST H. RIVIERE.

Sworn to and subscribed before me,
this 8th day of March, 1917.

DANIEL B. SMITH,
[SEAL] *Notary Public for New Jersey.*

## Affidavit of Corra N. Williams.

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

CORRA N. WILLIAMS, being duly sworn, upon his oath says: I am an attorney and counsellor at law of the State of New Jersey. I have read the bill of complaint and know the contents thereof, and the matters and things therein contained are true.

I have known the complainant, August H. Riviere, for many years, and became connected with this matter in February of 1916, when Mr. Riviere consulted me as an attorney in connec-

tion with the proposed purchase by him of the interest of Amzi Berla in the Berla-Riviere Company. That company, as stated in the bill of complaint, had to my personal knowledge, ever since its incorporation, been conducting a plumbing business and the sale of plumbing fixtures and supplies in the City of Summit. At Mr. Riviere's request I conducted the negotiations on his behalf with Mr. Berla, which resulted in the purchase by him of Mr. Berla's interest in the Berla-Riviere Company. In connection with the matter I met Mr. J. Franklin Haas, the president of the Summit Trust Company, who agreed to assist Mr. Riviere in financing the purchase by him of Mr. Berla's interest.

The basis of the negotiations which were directed toward arriving at a figure at which the one or the other would sell his interest, was the statement of the auditor, George R. Scherff, dated February 2, 1916, and annexed as Exhibit 1 to the bill of complaint. A copy of this report was in the possession of Mr. Berla, as well as in my possession, acting for Mr. Riviere. Mr. Haas, of the trust company, also had seen Riviere's copy. This report showed the inventory value of the stock on hand to be $14,783.04, which was much the largest item of assets of any of those shown in the report; the equity in the real estate being stated at $9,793.75. Besides this, the merchandise was in a sense liquid, and could be turned into cash. The presence of this large value of merchandise enhanced the value of the property to be sold, and of the respective interests of the two parties, to a much greater extent than would otherwise have been the fact. In view of this Mr. Riviere offered to sell his interest to Mr. Berla for $15,000. Mr. Berla

refused this offer, but said that he would sell his interest to Mr. Riviere for $17,000, and after further negotiations Mr. Riviere accepted that offer, being moved thereto largely, among other things, because the supposed value of the merchandise was $14,783.04. The total net value of the assets of the Berla-Riviere Company, as the two parties figured them, was upwards of $33,000, of which $14,783.04 was represented by the merchandise as shown by the inventory.

In order to carry out the arrangement which had been agreed upon between them, it was necessary to dissolve the Berla-Riviere Company, place all the assets in the possession of Mr. Riviere, and have him organize the A. H. Riviere Company, all as stated in the bill of complaint. These details were all carried out under my direction as attorney in the matter, Mr. Berla having stated to me that he did not feel the need of any independent attorney in the matter, all the expense of the matter having been borne by Mr. Riviere, and the $17,000 being net to him.

About the 1st of February, 1917, Mr. Reviere brought to my attention the discovery by him of a very great discrepancy between the actual amount of the merchandise as inventoried in December of 1916, and that set forth in the report of the auditor, Exhibit 1. He produced for me the original book of inventory which he had made and the machine list which totaled $14,783.04, and also produced a machine list setting forth the same identical figures which he said had been added up by the adding machine of the Summit Trust Company, and this totaled $4,783.04. He thereupon asked me to take the matter up with Mr. Berla in an effort to secure

some reduction from the agreed amount of settlement of $17,000, and I advised him that he had better not disturb that situation until the note became due on March 1st, 1917, when it would develop whether or not the note was still in the possession of Mr. Berla, or whether the rights or interests of third persons had intervened. Accordingly nothing further was done in the matter until March 1st, 1917, when the note was presented for payment at the Summit Trust Company, but was not paid. The day following, which was the 2nd of March, 1917, I interviewed Mr. Berla, and stated to him that there had been an error of $10,000 in stating the amount of the inventory of merchandise, as set forth in the auditor's report which had been the basis of the agreement between him and Mr. Riviere, and asked him if he was willing to make any adjustment of the matter in view of that mistake, but he declined to do so. He stated that he did not think there was any mistake and demanded payment of the note by Mr. Riviere. I know this to be the fact because the Berla-Riviere Company filed an income tax return with the Federal government, for the year ending December 31st, 1915, which return was signed by Mr. Berla, as president of that company, and which stated the amount of the stock on hand at the close of the year at $14,783.04, which was the total stated in the machine list of the inventory of the merchandise.

On March 5th, I having meanwhile consulted Mr. Riviere, I advised Mr. Berla that he would not pay the note, and thereupon he stated that he would place it in the hands of his attorney for collection, and since then I have learned from Mr. Riviere that he has been notified by William

Harris, Esq., attorney for Mr. Berla, that he will bring suit on the note if the same is not paid by March 8th, 1917.

I personally drew both the mortgages and all the papers in the matter, and am familiar with the contents thereof. It is true, as stated in the bill, that the mortgages have a clause providing that if any default is made, for ten days, in payment of any of the notes, that thereupon all of the notes shall become due, and the holder of the mortgage can declare the principal due and foreclose.

CORRA N. WILLIAMS.

Sworn to and subscribed this 7th day of March, 1917.

DANIEL B. SMITH,
[SEAL] *Notary Public for New Jersey.*

## Affidavit of George P. Scherff.

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

GEORGE P. SCHERFF, being duly sworn on his oath says: I am the George P. Scherff mentioned in the bill of complaint as the auditor who stated the account of the assets and liabilities of the Berla-Riviere Company, as of December 31st, 1915. I had stated similar accounts for this company for several years previous.

In making up the statement of the accounts I included the amount of the inventory of the merchandise. The inventory had been taken by Mr. Riviere and written up in a book, and the totals

of the various items had been added up on a long machine list. I checked over the amount set opposite each item as it appeared on the book and the machine list, but I did not add the total of the long column of figures because it having been written up by an adding machine, I assumed it was correct, as did both Mr. Berla and Mr. Riviere.

I stated the total as set forth on the machine list as the amount of the inventory in the account which I stated of the assets and liabilities of the company. Copy of this account is annexed to the bill of complaint as Exhibit 1.

I was present at the office of the Berla-Riviere Company when Mr. Berla and Mr. Riviere were discussing the question of either buying or selling the respective interest of the one or the other in the Berla-Riviere Company. On that occasion discussion was had in an effort to arrive at the value of the assets after deducting the debts, or in other words the equity in the property belonging to the Berla-Riviere Company, and it was agreed that the value was between $33,000 and $34,000. In arriving at this total, both took into consideration the amount of the inventory as stated on the machine list and as also stated in my report and account, namely, $14,783.04.

Considerable discussion was had as to the amount of the inventory, which was stated at $14,783.04. Mr. Riviere said he thought it seemed rather high, and Mr. Berla said he thought it seemed high too, but both of them had before them the book of the inventory which had been made by Mr. Riviere, each of them looked at it, and each of them said that if the machine list added up that amount it must be so. None of

us there added up the column, but everybody assumed that the total as stated by the adding machine was correct.

There is no doubt to my mind but that the negotiations which proceeded between Mr. Berla and Mr. Riviere were greatly influenced by the amount of the inventory as stated in my report, which had in turn been taken from the total of the machine list, and that they were both acting under a mistake of fact in taking it at the value of $14,783.04.

I understood that the adding machine was one which had been left there on approval. It was not listed as one of the assets of the company.

GEO. P. SCHERFF.

Sworn to and subscribed before me
this 8th day of March, 1917.

DANIEL B. SMITH,
*Notary Public for New Jersey.*

[SEAL]

## Affidavit of J. Franklin Haas.

IN CHANCERY OF NEW JERSEY.

*Between*

A. H. Riviere Company, and August H. Riviere, *Complainants,*

*and*

Amzi Berla, *Defendant.*

*On Bill, &c.*

State of New Jersey, County of Essex. } *ss.*

J, Franklin Haas, being duly sworn according to law upon his oath, says that he is the president of the Summit Trust Company, of Summit, N. J., and was such president at the times hereinafter mentioned; that August H. Riviere, the complainant above named, applied to the Summit Trust Company some time in February, 1916, for financial assistance in carrying through a purchase of the interest of Amzi Berla, the above named defendant, in the Berla-Riviere Company, a corporation which had operated in the said city of Summit and carried on business there for a period of about ten years and showed to deponent the auditor's account, Exhibit 1, of the bill; that the amount which the said Riviere was to pay for the interest of the said Berla in the said Berla-Riviere Company was about $17,000; that the Summit Trust Company was asked to advance the sum of $1,500 on a mortgage on the Berla-Riviere Company property

and the First National Bank of Summit, of which deponent is a director, was asked to discount a note of $2,500, said note to be endorsed by the said August H. Riviere and another endorser; that the terms of payment of the $17,000 to the said Berla were not definitely determined at the time the said August H. Riviere came to this deponent for financial assistance as aforesaid, and for the purpose of fixing the terms of payment this deponent was in consultation personally with the said Amzi Berla and August H. Riviere; that it was finally agreed by the said Berla that the payments should be made as follows: $5,000 in cash; $5,000 in a note of A. H. Riviere Company endorsed by August H. Riviere payable on March 1, 1917; $3,000 on a like note, payable March 1, 1918; $3,000 on a like note payable March 1, 1919, and $1,000 on a like note payable September 1, 1919; that there was a long discussion and argument between this deponent and the said Amzi Berla as to the amount of cash which was to be paid at the time of the purchase and as to the payment of the notes the said Berla urging that the note of $5,000 should be payable at the end of six months rather than at the end of one year, and as a basis of his claim he stated that the inventory showed that the said Berla-Riviere Company had on hand merchandise which had been inventoried at $14,783.04; that this was a large amount of stock to have on hand and that the said Riviere should reduce it at once by using it in the business and turning it into cash, and that the stock could be reduced at least $5,000 within six months and the said Riviere would easily be able to pay the $5,000 within the said six months; that the said Berla insisted

upon being paid six per cent. interest on the notes, but deponent urged the said Berla to accept five per cent. on the notes; that the result of such conversation was that the said Berla finally agreed to accept the notes of the said A. H. Riviere Company endorsed by the said August H. Riviere, for the amounts and payable at the times hereinabove stated, with interest at five per cent. per annum;

Deponent further says that the Summit Trust Company advanced the sum of $1,500 to the said A. H. Riviere Company in pursuance of the arrangement, and the transaction was carried through as deponent was informed and believes, and he heard nothing further about the matter until the latter part of the month of January, 1917, when he was called upon by the said August H. Riviere, who exhibited to this deponent a computation of figures by an adding machine, which deponent was informed contained the items of the inventory of merchandise on hand of the said Berla-Riviere Company on December 31, 1915; that the said computation showed that the items aggregated $14,783.04; that the said Riviere informed deponent that the adding machine in computing said items had made an error of $10,000, and this deponent offered to have the items computed upon one of the adding machines owned and in use by the Summit Trust Company; that deponent caused the same figures contained in the list shown on the computation of the adding machine used by the said Berla-Riviere Company at the time the said inventory was made and showing a total amount of $14,783.04, to be placed upon one of the adding machines of the Summit Trust Company; that the total amount of such items when

so placed upon the adding machine of the said Summit Trust Company aggregated the sum of $4,783.04, showing that an error of $10,000 had been made in the computation of the adding machine used by the said Berla-Riviere Company at the time of making the inventory aforesaid; that the computation so made on the adding machine of the Summit Trust Company, was a correct computation of the same items as shown on the list prepared on the adding machine of the said Berla-Riviere Company, and was compared item by item, so that there should be no mistake; that such list is in the possession of the said August H. Riviere and has been exhibited on this date to this deponent and he recognizes it as such list.

Deponent further says that there is no question that an error of $10,000 in addition was made by the adding machine in the possession of the said Berla-Riviere Company, and that the total of said list was carried into the statement of the assets and liabilities or inventory of the said Berla-Riviere Company made as of the 31st of December, 1915, and that it is shown in the copy thereof attached to the bill of complaint herein.

The note due March 1st, 1917, was sent to the Summit Trust Company by Mr. Berla a day or two before it was due, having come to our Trust Company for collection from one of the banks of Newark. I examined the note. It was stamped across the face "No Protest." On March 1st, 1917, the date it was due, there being no funds on deposit to meet it, it was returned by our Trust Company to the bank from which it was received. The morning the note was due, Mr. Riviere called on me at the office of the Trust

Company and stated that he did not propose to pay the note. Mr. Williams was present at the time and stated that Mr. Riviere was not paying the note upon his advice.

J. FRANKLIN HAAS.

Sworn to and subscribed before me
this 7th day of March, 1917.

DANIEL B. SMITH,
*Notary Public for New Jersey.*

]SEAL[

195 Brighton Avenue,
Arlington, N. Y.
February 2, 1916.

Messrs. Berla-Riviere Co.,
25 Maple Street,
Summit, N. J.

Gentlemen:—

According to instructions, I have closed the books of the Berla-Riviere Co., under date of December 31, 1915, and have prepared from same, Trading or Profit and Loss Account and Balance Sheet, both of which find hereto attached.

I herewith declare, that the Profit and Loss Account is a correct showing of your operations during 1915, and that the Balance Sheet is a correct statement of the position of your assets and liabilities as of December 31, 1915, as shown on your Books of Account.

Very truly yours,
GEO. P. SCHERFF.

*Balance Sheet of Berla-Riviere Co.*

## TRADING ACCOUNT
## OR
## PROFIT AND LOSS ACCOUNT.

FOR YEAR ENDING DECEMBER 31, 1915.

| | | |
|---|---|---|
| By contracts and jobs | | $32,782.04 |
| Deduct amount of unfinished contracts | | 2,062.50 |
| | | $30,719.54 |
| Material used | | 5,165.71 |
| Gross profit on contracts and jobs | | $25,553.83 |
| Interest on bank balances | $ 42.04 | |
| Interest and discounts | 175.99 | 218.03 |
| | | $25,771.86 |

### COSTS.

| | | |
|---|---|---|
| To labor | $8,126.75 | |
| " freight and cartage | 207.32 | |
| " stable expenses | 266.79 | |
| " automobile expenses | 299.17 | 8,900.03 |
| | | $16,871.83 |

### EXPENSES.

| | | |
|---|---|---|
| To general expenses | $ 618.78 | |
| " telephones | 119.26 | |
| " light | 66.61 | |
| " rents and salaries | 3,502.50 | 4,307.15 |
| | | $12,564.68 |

*Balance Sheet of Berla-Riviere Co.*

DEPRECIATIONS.

| | | |
|---|---|---|
| To automobile ..... | $100.00 | |
| " tools, fixtures, machines, etc. ..... | 139.54 | |
| " horse, wagon and harness | 72.70 | |
| " sundry accounts ..... | 55.98 | 368.22 |
| Profit carried to surplus account, 1915 ..... | | $12,196.46 |
| Profit carried to real estate surplus account for year 1915..... | | 474.02 |
| Total profit for year 1915..... | | $12,670.48 |

BALANCE SHEET.

As of December 31, 1915.

ASSETS.

| | | |
|---|---|---|
| Cash on hand and in bank.. | $ 1,740.50 | |
| Real estate ..... | 22,390.48 | |
| Stocks and bonds ..... | 25.00 | |
| Accounts receivable ..... | 9,066.86 | |
| Merchandise ..... | 14,783.04 | |
| Merchandise on consignment | 191.22 | |
| Automobile and garage.... | 300.00 | |
| Horse, wagon and harness. | 420.00 | |
| Tools, fixtures and furniture | 990.00 | |
| Bills receivable ..... | 600.00 | |
| | | $50,507.10 |

LIABILITIES.

| | | |
|---|---|---|
| Capital .....$25,000 | | |
| Less treasury stock 24,000 | | |
| | $ 1,000.00 | |
| Mortgages on real estate... | 13,500.00 | |
| Contract liability ..... | 2,062.50 | |

| | | |
|---|---|---|
| Accounts payable ..... | 190.29 | |
| Accounts payable (consignments) ..... | 191.22 | |
| Discounts ..... | 600.00 | |
| Real estate surplus ..... | 9,793.75 | |
| Surplus account ..... | 23,169.34 | |
| | | $50,507.10 |

## CERTIFICATE OF INCORPORATION

OF

## A. H. RIVIERE COMPANY.

THIS IS TO CERTIFY, that we, CHARLES RIVOT and JOHN S. BYLAND, of the City of Summit, County of Union, and State of New Jersey, and SADIE SPENCER, of the Borough of Chatham, in the County of Morris in said state, do hereby associate ourselves into a corporation by virtue of the provisions of an act of the Legislature of New Jersey, entitled, "An Act concerning corporations (Revision of 1896)," approved April 21st, 1896, and the several supplements thereto and amendments thereof, for the purposes hereinafter mentioned, and to that end we do by this our certificate set forth:

First: The name of the corporation is "A. H. RIVIERE COMPANY."

Second: The location of the principal office in this state is at number 25 Maple street in said City of Summit, in the County of Union. The name of the agent therein and in charge thereof, upon whom process against this corporation may be served, is Sadie Spencer.

Third: The objects for which the said corporation is formed are to do general plumbing, steamfitting and sheet metal work, buying, sell-

ing and exchanging real estate, mortgaging and leasing same, buying and selling patent and registered rights, and doing and performing all other things permitted by the statute in such case made and provided. The corporation shall also have power to conduct its business in all its branches, have one or more offices and to hold, purchase, mortgage and convey real and personal property outside of the State of New Jersey, and in all states and in all foreign countries.

Fourth: The total amount of capital stock is twenty-five thousand dollars ($25,000). The number of shares into which the same is divided is two hundred and fifty, and the par value of each share is one hundred dollars ($100). The amount with which the said company will commence business is one thousand dollars ($1,000), which is divided into ten shares of the par value of one hundred dollars ($100) each.

Fifth: The names and post office addresses of the incorporators and the number of shares subscribed by each, the aggregate of such subscription being the amount of capital stock with which this company will commence business, are as follows:

| *Name* | *Address.* | *Number of Shares.* |
|---|---|---|
| Charles Rivot | Summit, N. J. | 1 |
| John S. Byland | Summit, N. J. | 1 |
| Sadie Spencer | Chatham, N. J. | 8 |

Sixth: The period of existence of this corporation is unlimited.

*Certificate of Incorporation.*

In Witness Whereof we have hereunto set our hands and seals, this 17th day of April, A. D., one thousand, nine hundred and sixteen.

Charles Rivot (L. S.)
John S. Byland (L. S.)
Sadie Spencer (L. S.)

Signed, sealed and delivered
in the presence of

C. N. Williams.

(Revenue 10c stamp.)

State of New Jersey, }
County of Union. } *ss.*

Be it Remembered that on this 17th day of April, in the year One thousand, nine hundred and sixteen, before me, the subscriber, a Master in Chancery, of New Jersey, personally appeared Charles Rivot, John S. Byland and Sadie Spencer, who I am satisfied are the persons named in, and who executed the foregoing Certificate of Incorporation, and, I having first made known to them the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed.

CORRA N. WILLIAMS,
*Master in Chancery of New Jersey.*