

New Jersey Court of Errors and Appeals

PERTH AMBOY DRY DOCK COM-
PANY,

Plaintiff-Respondent,

vs.

HARDEN L. CRAWFORD and JAMES
W. DECKER, partners trading
as H. L. Crawford & Co.,
Defendants-Appellants.

*On Appeal
from
Supreme
Court.*

BRIEF FOR APPELLANTS.

Statement.

This is an appeal from a judgment of the Supreme Court entered upon a verdict found after a trial in the Middlesex Circuit, before his Honor Judge Daly and a jury. The trial consumed six days, and resulted in a verdict for the plaintiff for \$19,400.

The complaint was in seven counts, the seventh of which, and all questions arising therefrom, may be eliminated as it was, at the close of the case, abandoned (Case, 669, l. 14). The first count alleged that the plaintiff and defendants entered into two certain contracts, partly written and partly oral, for the scrapping at the plaintiff's plant at Perth Amboy of two steamships, the "Black Arrow" and "Philippines." The written parts of those contracts are alleged to be Exhibit 1 (Case, 13) and Exhibit 2 (Case, 15). Inasmuch as these two writings differ only in the name of the steamer and the amount quoted, the Court may properly limit its consideration to but one of them. An examination of Exhibit 1 shows it to be a letter on the letterhead

of the plaintiff addressed to the defendants in which the plaintiff says:

“As per your request, we quote you Sixteen Thousand Five Hundred Fifty Four Dollars (\$16,554) for the use of our plant, for scrapping the SS. ‘Philippines,’ as noted below: * * *”

The letter then went on to say that the plaintiff was to berth the ship, taking two ships at one time; to furnish gas and oxygen for cutting, also the use of hose and burning outfits required by Mr. Bernard (Bernard became the defendants’ superintendent on the job). The letter specified certain materials and tools to be furnished by the plaintiff and also provided:

“5. We to furnish general supervision of work under Mr. Bernard.

* * * * *

7. You to pay roll costs, of all labor used in scrapping, including assistant foreman, time keeper and day and night watchman, in actual charge of this work only. Also labor in removing material from yard.

* * * * *

9. Bills for labor to be rendered weekly. Bill for use of plant to be rendered monthly and to be proportioned to work done. All bills to be paid within thirty days.”

This letter was dated December 19, 1923, and below the signature by the plaintiff the following words appear: “Accepted December 20, 1923, H. L. Crawford.” The first count of the complaint further alleged that the written parts of the contracts in question were Exhibits 1 and 2, and went on to allege that in and by the contract, the defendants agreed (Case, 2):

“to complete the scrapping of the vessels so that they would be out of plaintiff’s plant within a period of three months from the time they were brought there. It was mutu-

ally understood and agreed that the superstructures of the vessels were to be cut up in what are known as 'charging box sizes,' that is to say, pieces 22" wide x 5' 6" long; that the boilers and engines were not to be cut up, but otherwise removed; that the piping, electrical fixtures, conduits and engine room auxiliaries were to be taken apart by hand and removed without being cut up; and that the remaining parts of the vessels were to be cut in what are known as 'shipping sizes,' that is to say, pieces not smaller than 20' long x 5' 6" wide."

In this count, the plaintiff went on to allege that it had fully performed, but that the defendants committed the following breaches of contract: They kept the vessels in the plaintiff's plant after April first, three months after their arrival, when, in accordance with the contract, they should have been removed, until August seventh; the defendants cut up into the small sizes known as "charging box sizes" a greater part of the vessels than their contract gave them the right to do, and this cost the plaintiff large sums for gas and air over and above the amount of gas and air that would have been required had the vessels been cut up in accordance with the contract as alleged. The defendants are alleged not to have paid \$2,000 due for labor under the contract. Under this count the plaintiff claimed (1) damages for loss of use of the plant; (2) cost for extra gas and air; (3) cost of unpaid labor.

The second count alleged that the contracts were wholly written, that is to say, that Exhibits 1 and 2 constituted the entire contract, and that under such contracts it was the defendants' duty to complete the scrapping of the vessel within a reasonable time, which reasonable time expired April first. The remaining allegations of this

count and the demands were the same as in the first count.

The third count alleged that the contracts were partly written and partly oral, just as in the first count, and, under these contracts, it was the defendants' duty to complete the scrapping within a reasonable time, which the defendants did not do. The remaining allegations and the demands were the same as in the first count.

The fourth, fifth and sixth counts were for a totally different cause of action. They alleged on the different theories that, in the course of the scrapping, by the negligence of the defendants, the SS. "Philippines" was damaged and was in danger of sinking. On these counts, the plaintiff demanded the cost of salvaging the "Philippines."

To this complaint, the defendants interposed an answer. The first defense was a general denial. The second defense set up non-performance by the plaintiff of things by it to be performed under the contracts, Exhibit 1 and Exhibit 2, the particulars of which are given at Case, 18. The third defense alleged that the plaintiff broke the contracts, Exhibits 1 and 2 by failing and refusing to continue with the prosecution of the work and notifying the defendants that the plaintiff would no longer so continue. Annexed to the answer was a counter-claim, alleging the making the contracts, Exhibits 1 and 2, the breach by the plaintiff of its obligations thereunder (the same breaches as were set up as a defense in the answer), and claiming large damages, that is to say, increased cost to the defendants of the scrapping of the steamers over and above the sums which the defendants would have to pay under the contracts, Exhibits 1 and 2, claiming in all \$150,000.

The plaintiff, replying to the answer, alleged certain proceedings between the parties in the Court of Chancery, growing out of the same contracts, and an adjudication by that Court in favor of the plaintiff. This adjudication will be more particularly referred to below. By way of defense to the counter-claim, the plaintiff, in the first place, alleged that the writings, Exhibits 1 and 2, did not constitute the whole of the contracts, but that the contracts contained additional oral terms as set forth in paragraph 1 of the first count of the complaint, and alleges that the plaintiff fully performed all of its obligations under the contracts as so constituted. By way of second defense, the Chancery decree above mentioned was pleaded in bar.

By way of rejoinder to the Chancery decree, the defendants, after denying its existence, alleged (Case, 30):

“The issues in the said suit in Chancery were different from the issues in this action. The Court of Chancery was without jurisdiction to pass upon the questions at issue in this action. The suit in Chancery was heard and decided upon evidence not legal or admissible in this action.”

The trial lasted six days, in the course of which numerous objections were made and exceptions noted by the defendants. The defendants' counter-claim was wholly ruled out by the Trial Judge, and the trial resulted in a verdict in favor of the plaintiff for \$19,400. On this judgment was entered, this appeal was duly taken, and eighty-nine grounds of appeal specified. There are by no means, however, eighty-nine different points presented. The grounds of appeal may be grouped, and there are really only seven different questions now before this Court. These questions are:

1. The most important question involved is an application of the doctrine of *res adjudicata*, that is, what effect should be given in this case to a decree of the Court of Chancery in a suit between the same parties? This question is raised by many of the Trial Judge's rulings on evidence and by exceptions to his charge and refusals to charge.

2. Another important question involves the application of the Parol Evidence Rule in the admissibility of statements by the defendants or their agents extrinsic to the written contracts, Exhibit 1 and Exhibit 2. This is raised both by the Trial Judge's rulings on evidence and by exceptions to his charge and refusals to charge.

3. The insufficiency of the evidence to establish that the vessels could have been completely scrapped within three months. This is raised both by the Trial Judge's rulings on evidence and by his charge and refusals to charge.

4. The admission of testimony by the plaintiff's experts on the question of a reasonable charge for the continued occupancy by the defendants' vessels and scrap of the plaintiff's wharves, piers and upland, briefly referred to as wharfage. This is raised by the Court's rulings on evidence.

5. The Trial Judge's leaving it to the jury to find more than nominal damages for wharfage. This is raised by the Judge's charge and refusals to charge.

6. The ruling of the Trial Judge that the plaintiff was entitled to go to the jury on its right to recover on nine different items of alleged labor. Here there are really nine separate points, all presenting, however, substantially the

same question. All this is raised on the Judge's charge and refusals to charge.

7. The Judge's rulings in his charge as to the defendants' liability to pay for the salvaging of the SS. "Philippines."

GROUND OF APPEAL RELIED ON.

I. Those raising the question of *res adjudicata*.

1. The Court admitted in evidence a certified copy of the Chancery record, Exhibit P. 1 (Case, 56).

2. The Trial Court ruled that any oral agreement which was made as to time of the completion of the contracts in suit, even though made at the time of the written contract, was admissible in evidence (Case, 92).

3. The Court admitted the following question to the witness, Meurer, "What will you say as to the time the vessels would be scrapped and the time they remained at the yard of the Perth Amboy Dry Dock Company" (Case, 95).

4. The Court admitted the following question to the witness, Meurer, "What was said?" (Case, 92).

10. The Court admitted the following question to the witness, Preacher, "Did he at that time state to you and Mr. Meurer the time within which the vessels would be scrapped and out of the Perth Amboy yard if they were brought there for scrapping?" (Case, 184).

36. The Court overruled the following question to the witness, Nicol: "Now, does this book, this last book, show the amount of expenditure in

preparing the plant where those ships are being scrapped for scrapping?" (Case, 497).

37. The Court overruled the following offer of proof on the part of the defendants: "Mr. McCarter: Now, if your Honor please, in order that the full effect of your Honor's ruling may be plain on the record, and in order that in your Honor's own words, I may have an exception sufficiently broad enough to embody that, I wish to say that I offer to prove that the plaintiff refused to permit any part of either vessel below the superstructure to be cut up into charging box sizes. That in order to produce a marketable article, to scrap the ships in the ordinary course of trade done for the market it was necessary to cut them up into charging box sizes; that as a result of such refusal of the plaintiff, the defendants were themselves forced to complete the scrapping of the ships, which caused the scrapping of the ships to be much more expensive to the defendants than the contract prices payable by the defendants to the plaintiff, and I offer to prove what that expense amounts to" (Case, 500).

47. The Court refused, although requested by the defendants' counsel, to charge the jury as follows: "The plaintiff is not entitled to recover anything under its claim for berthing the two vessels in question" (Case, 673).

64. The Court refused, although requested by the defendants' counsel, to charge the jury as follows: "In deciding what is a reasonable time in which both ships should be completely scrapped, you must bear in mind that the contracts between the parties put no limit except that of reasonableness upon the sizes of the pieces into which the vessels were to be cut, and that the defendants had the right to require as

much of the ships to be cut into charging box sizes as the ordinary course of trade done for the market required" (Case, 669).

65. The Court refused, although requested by the defendants' counsel, to charge the jury as follows: "The contracts between the parties do not require the boilers to be removed intact, instead of being cut up, and you must bear this in mind in deciding what is a reasonable time in which the ships should be completely scrapped" (Case, 673).

72. The Court, at the request of counsel for the plaintiff, charged the jury as follows: "Every matter of law, or of fact, which was litigated and determined in the Chancery suit between the parties to this action was there finally and forever settled, for all purposes, and cannot be litigated or disputed by either party in this action" (Case, 670).

73. The Court, at the request of counsel for the plaintiff, charged the jury as follows: "In the Chancery suit, it was determined that Bernard was the defendants' agent and that they were bound by his actions. That determination is binding upon the Court and jury in this action" (Case, 670).

74. The Court, at the request of counsel for the plaintiff, charged the jury as follows: "In the Chancery suit, it was finally and for all purposes determined that the work of scrapping the ships was stopped because of the fault and wrongful conduct of defendants and that by reason thereof, the presence of the ships on plaintiff's premises became wrongful, injurious to plaintiff's business, and a nuisance from which plaintiff was entitled to be relieved. That determination is binding upon this Court and jury" (Case, 670).

75. The Court, at the request of counsel for the plaintiff, charged the jury as follows: "In the Chancery suit, it was finally and for all purposes determined that the work of scrapping the ships was not stopped by any wrongful act or conduct of the plaintiff and that determination is binding upon this Court and jury" (Case, 670).

76. The Court, at the request of counsel for the plaintiff, charged the jury as follows: "Because of the findings and determinations in favor of the plaintiff in the Chancery suit, you must find that at the time of bringing the Chancery suit, to wit, July 2, 1924, defendants' ships were wrongfully and unlawfully upon plaintiff's premises because of the wrongful and unlawful conduct of defendants, and you must determine defendants' damages therefor" (Case, 671).

82. The Court, at the request of counsel for the plaintiff, charged the jury as follows: "By reason of the findings and determinations of the Court of Chancery there can be no recovery by defendants on their counter-claim" (Case, 673).

83. The Court, at the request of counsel for the plaintiff, charged the jury as follows: "By reason of the findings and determinations of the Court of Chancery, the alleged breaches of the contracts by plaintiff are disproved and they constitute no defense to plaintiff's action in this Court" (Case, 673).

84. The Court charged the jury as follows: "As I have already charged you, whatever that Court of Chancery held, as a matter of law, or as a matter of finding of fact, is conclusive upon us in the determination of this case" (Case, 675).

85. The Court charged the jury as follows: "That Court of Chancery found, among other

things, as I have already charged you in the requests to charge, that Bernard was not only the supervisor of the defendants in the prosecution of the work of scrapping the vessels, but he was also their agent and representative in the preliminaries which led up to the making of the contract, and as the Vice-Chancellor stated in his opinion, when he spoke to the plaintiffs, or the plaintiff's representative, it was with just the same effect as though Mr. Crawford himself has spoken" (Case, 675).

86. The Court charged the jury as follows: "If you find that a reasonable time in which this work was to be done was such or such a date prior to July second, when, the Vice-Chancellor says, those vessels had no right to any longer continue there, if it is any time prior to July second, then the plaintiff is entitled to compensation for the damages and loss that he suffered, as I will explain it to you, for the time that those vessels were kept there beyond what was a reasonable time in which the defendants should have completed the job of scrapping those vessels" (Case, 678).

87. The Court charged the jury as follows: "But if you find that they should have completed their task, from the standpoint of what was reasonable time, on a date before July second, then you are to consider what was a reasonable charge, or what was the reasonable value of the use of the wharf, of the piers, upland, and wharfage space which they continued to use after a reasonable time" (Case, 678).

89. The Court charged the jury as follows: "As to July 2, 1924, that I have mentioned, that was the date on which the Chancery proceedings started, and, of course, the decree held that that

proceedings was justified, but if you find at all that there was unreasonableness on the part of the defendant in the time it took in keeping the vessels there, then from the time you find unreasonableness began, until the time the vessels were removed, the plaintiff would be entitled to compensation" (Case, 682).

II. Those involving the question of parol evidence.

In addition to grounds of appeal numbered 2, 3, 4, 5, 10, 64, 65, copied under Point I above, we have here:

6. The Court admitted in evidence the letter dated March 3, 1924, Exhibit P. 5 (Case, 108).

7. The Court admitted in evidence the letter dated March 6, 1924, Exhibit P. 6 (Case, 108).

24. The Court admitted the following question to the witness, Goggin: "At the time that you were employed did Mr. Morny say anything to you as to how long the job would last?" (Case, 301).

26. The Court permitted the following question to the witness, Snedeker: "During that conference, did Mr. Crawford say anything as to the time these vessels would be at the plant?" (Case, 370).

27. The Court permitted the following question to the witness, Snedeker: "What did he say?" (Case, 371).

28. The Court permitted the following question to the witness, Snedeker: "In what way—why did it influence you?" (Case, 371).

31. The Court permitted the following question to the witness, Snedeker: "Mr. Snedeker,

when the offer was taken down by Mr. Meurer to Mr. Crawford, before the question of the compensation insurance arose, did Mr. Meurer tell you whether or not there had been any representations made to him as to the time the vessels were to remain in the plant?" (Case, 394).

78. The Court, at the request of counsel for the plaintiff, charged the jury as follows: "In determining what was a reasonable time for scrapping the ships you are to consider all the evidence bearing upon that subject including any and all representations and admissions of the defendants and their agents as to the time the ships would be on plaintiff's premises" (Case, 671).

III. Insufficiency of evidence that the vessels could have been completely scrapped within three months.

In addition to grounds 64, 65, 78, 86 and 87 hereinabove quoted, we have:

68. The Court refused, although requested by the defendants' counsel, to charge the jury as follows: "It is established by the evidence that it would have been impossible for the 'Philippines' and 'Black Arrow' to have been completely scrapped at the plaintiff's plant within the period of three months" (Case, 688).

69. The Court refused, although requested by the defendants' counsel, to charge the jury as follows: "The plaintiff has failed to establish by the preponderance of the evidence that the two ships 'Black Arrow' and 'Philippines' could with reasonable diligence, have been completely scrapped at the plaintiff's plant within a period of three months" (Case, 688).

77. The Court, at the request of counsel for the plaintiff, charged the jury as follows: "In ascertaining the damages of plaintiff arising out of the unlawful presence of defendants' ships upon its premises, you must determine two things. First, what was a reasonable time for the scrapping of the ships and when that reasonable time terminated. Second, what sum constitutes reasonable compensation for the wharfage made necessary because of the presence of the ships upon plaintiff's premises after the expiration of the reasonable time until the date of their removal" (Case, 671).

IV. The admission of the testimony by the plaintiff's experts as to a reasonable charge for wharfage.

15. The Court admitted the following question to the witness, Dendel: "Assuming that the 'Black Arrow' was 409½ feet long, 52.8 feet wide, 28 feet deep and 8,000 tons dead weight, 602 gross tons, 3,657 tons net, and that she lay alongside the pier which I have indicated on that map by the words 'BA,' and which you saw a few days ago, and that the busiest time of the Perth Amboy Dry Dock Company is from April until November, what in your judgment is a fair and reasonable price for the wharfage of that vessel from April first to August, 1924?" (Case, 238).

16. The Court admitted the following question to the witness, Dendel: "Now, I will put to you exactly the same question that I put to you in the respect of the 'Black Arrow' that I will ask you to assume that the 'Philippines' was 500 feet long, 62 feet wide, had a depth of 34½ feet, net tonnage 7,305, gross tonnage 11,440, and dead weight tonnage of 13,000" (Case, 239).

17. The Court overruled the following question to the witness, Dendel: "Of course, I concede that; but isn't it a fact that the person—or, that I could find, as a matter of fact, a person whose idea of a fair and reasonable charge would be vastly less, at Perth Amboy, or along Staten Island Sound, than I could in the North River opposite New York City?" (Case, 248).

18. The Court admitted the following question to the witness, Dendel: "Were the ship repair and dry dock yards in New York harbor, and we include in that Perth Amboy and Staten Island Sound, in a position where one could charge more for a repair job than the other could, in say the last three or four years?" (Case, 250).

19. The Court denied the motions of the defendants' counsel to strike out the answers of the witness, Dendel, to the effect that \$125 a day was a reasonable charge for wharfage for the SS. "Philippines" and the same amount was a reasonable amount for the wharfage for the SS. "Black Arrow" (Case, 251).

20. The Court admitted the following question to the witness, Bonnett: "You never saw them. Now, tell us the truth, please, that the 'Black Arrow' was a vessel 409½ feet long, 52.8 feet wide, 28 feet deep, with a dead weight tonnage of 8,000 tons, gross tonnage of 6,022 tons, net tonnage of 3,657; and the 'Philippines' was a vessel 500 feet long, 62 feet wide, 34 feet deep, dead weight tonnage of 13,000 tons, gross weight tonnage of 11,440, net tonnage 7,305; and that those two vessels lay from April until August, 1924, at the places I have indicated on that map—namely, those that I have marked 'BA' and 'P'—and that the busiest time of the Perth Amboy

Dry Dock Company for its ordinary work is from the first of April until November—and basing your answer on what you know, what you have charged yourself for the wharfage of vessels under conditions which I have mentioned, and what you know is charged generally throughout New York harbor for these same conditions, for wharfage for those same conditions, what would be a reasonable and a fair charge for the wharfage or berthage of the 'Philippines' and the 'Black Arrow' at the two piers of the Perth Amboy Dry Dock Company that I have indicated to you for the period from April 1 to August" (Case, 264).

V. On the question of the Trial Judge's leaving it to the jury to find more than nominal damages for wharfage.

66. The Court refused, although requested by the defendants' counsel, to charge the jury as follows: "There is no competent evidence on which you can award the plaintiff more than nominal damages on the claim for use of piers, upland and wharfage space" (Case, 687).

VI. On the ruling of the Trial Judge that the plaintiff was entitled to go to the jury on its right to recover on eleven different items of labor alleged to have been performed.

48. The Court refused, although requested by the defendants' counsel, to charge the jury as follows: "There is no evidence that the defendants have neglected and refused to pay the plaintiff any moneys expended by and due to the plaintiff for labor in and about the scrapping of the vessels in question" (Case, 685).

49. The Court refused, although requested by the defendants' counsel, to charge the jury as follows: "The plaintiff is not entitled to recover any damages under its claim for unpaid labor in and about the scrapping of the vessels in question" (Case, 685).

50. The Court refused, although requested by the defendants' counsel, to charge the jury as follows: "The plaintiff is not entitled to recover any part of the moneys demanded by it and described on Exhibit P. 15 as 'deductions for labor in handling tanks'" (Case, 685).

51. The Court refused, although requested by the defendants' counsel, to charge the jury as follows: "The plaintiff is not entitled to recover any part of the moneys demanded by it and described on Exhibit P. 15 as 'labor lost on account of lack of manifold'" (Case, 685).

52. The Court refused, although requested by the defendants' counsel, to charge the jury as follows: "The plaintiff is not entitled to recover any part of the moneys demanded by it and described on Exhibit P. 15 as 'labor lost on account of lack of air'" (Case, 685).

53. The Court refused, although requested by the defendants' counsel, to charge the jury as follows: "The plaintiff is not entitled to recover any part of the moneys demanded by it and described on Exhibit P. 15 as 'miscellaneous labor ordered by Bernard'" (Case, 685).

54. The Court refused, although requested by the defendants' counsel, to charge the jury as follows: "The plaintiff is not entitled to recover any part of the moneys demanded by it and described on Exhibit P. 15 as 'labor lost on account of crane off track'" (Case, 686).

55. The Court refused, although requested by the defendants' counsel, to charge the jury as follows: "The plaintiff is not entitled to recover any part of the moneys demanded by it and described on Exhibit P. 15 as 'labor making wrenches'" (Case, 686).

56. The Court refused, although requested by the defendants' counsel, to charge the jury as follows: "The plaintiff is not entitled to recover any part of the moneys demanded by it and described on Exhibit P. 15 as 'labor on steam line'" (Case, 686).

57. The Court refused, although requested by the defendants' counsel, to charge the jury as follows: "The plaintiff is not entitled to recover any part of the moneys demanded by it and described on Exhibit P. 15 as 'use of steam 19½ hours, \$117'" (Case, 686).

58. The Court refused, although requested by the defendants' counsel, to charge the jury as follows: "The plaintiff is not entitled to recover any part of the moneys demanded by it and described on Exhibit P. 15 as 'use of air pump'" (Case, 686).

59. The Court refused, although requested by the defendants' counsel, to charge the jury as follows: "The plaintiff, in support of its claim for the various items enumerated on Exhibit P. 15, has the burden of establishing, and before it is entitled to recover any part of any of such items, must establish, by the preponderance of the evidence, that the labor claimed was actually performed, and that it was such labor as, under the contracts in suit, would entitle the plaintiff to require the defendants to reimburse the plaintiff therefor" (Case, 686).

67. The Court refused, although requested by the defendants' counsel, to charge the jury as follows: "The plaintiff has not established by the preponderance of the evidence that the labor claimed to have been performed and for which the plaintiff is asking reimbursement was in fact performed or was such labor as under the contracts in suit would entitle the plaintiff to require the defendants to reimburse the plaintiff therefor" (Case 688).

80. The Court, at the request of counsel for the plaintiff, charged the jury as follows: "By the terms of the contracts, defendants were required to reimburse the plaintiff for expenditures made by it for labor used in scrapping the ships. Defendants are also bound to pay the plaintiff a reasonable price for those things, such as steam, the use of pumps, and other things and implements, if any, which it was not required by the contracts to furnish, but which it did furnish and which defendants ordered or accepted. If you find that defendants have not reimbursed plaintiff for expenditures made by it for labor properly used in scrapping the ships, or that defendant has not paid plaintiff a reasonable price for steam, the use of pumps and other things ordered by defendants or accepted and used by them in scrapping said ships, then you should include in your verdict a proper amount to reimburse plaintiff for labor so paid for by it and not repaid by defendants, and also a proper amount for the reasonable price of the steam and other things including the use of implements, if any, which defendants, ordered or accepted and used in connection with the scrapping of the ships" (Case, 672).

81. The Court, at the request of counsel for the plaintiff, charged the jury as follows: "Plain-

tiff was not required by the contracts to furnish manifolds. The deductions made by defendants from plaintiff's bills for labor for handling tanks, for labor used because of lack of manifolds and for labor used in repairing tools were improper, and plaintiff is entitled to recover the amount of these deductions. Plaintiff is also entitled to recover for the use of its pumps in pumping out the vessels, and for the steam supplied for their operations. That is true, with the exception so far as the removal of the tanks and labor that under the written contract it was clearly their duty to furnish, such tanks as were used and known to the defendants, were used by the plaintiff as part of the plant which the plaintiff rented to the defendant, or which uses it let the defendant have" (Case, 672).

88. The Court charged the jury as follows: "Then there is another item charged by the plaintiff and that is that when they presented their payrolls to the defendants, that the defendants struck out some of the items which the plaintiff paid. You will remember that under the terms of the contract, the plaintiff was to furnish the man power, which man power was to be under the supervision of Mr. Bernard, and they were to present their payrolls weekly to the defendant, and the defendant was to reimburse them for such payrolls. It is claimed that when they presented these payrolls that the defendants struck out some of the money which they had paid, and improperly struck that out, and if you find that is so, according to the terms of this contract, that they had no right to do that, of course, the plaintiff is entitled to be reimbursed for that" (Case, 680).

VII. On the Judge's rulings as to the defendants' liability to pay for the salvaging of the SS. "Philippines."

60. The Court, although requested by the defendants' counsel, refused to charge the jury as follows: "The plaintiff is not entitled to recover any part of the amount claimed by it under the fourth count" (Case, 687).

61. The Court refused, although requested by the defendants' counsel, to charge the jury as follows: "The plaintiff is not entitled to recover any part of the amount claimed by it under the fifth count" (Case, 687).

62. The Court refused, although requested by the defendants' counsel, to charge the jury as follows: "The plaintiff is not entitled to recover any part of the amount claimed by it under the sixth count" (Case, 687).

70. The Court refused, although requested by the defendants' counsel, to charge the jury as follows: "You cannot find the defendants liable to pay for the sum claimed for salvaging the 'Philippines' unless you find there was some negligence by persons who were employees of the defendants" (Case, 669, 688).

71. The Court refused, although requested by the defendants' counsel, to charge the jury as follows: "If you believe that the fall of the pipe which broke the sea-cock that caused the flooding of the 'Philippines' was due to the breaking of a rope rather than to the dropping the pipe, as testified to by the plaintiff's witnesses, then you must find the defendants not liable to pay the sum claimed for salvaging that ship" (Case, 669, 688).

I.

The question of res adjudicata.

A history of the litigation is desirable. On June 30, 1924, the present plaintiff filed its bill against the present defendants in the Court of Chancery, setting up the making of the contracts in question, the arrival of the Steamships "Philippines" and "Black Arrow" at the plaintiff's plant, the progress of the work, the arising of disputes as to the respective rights and duties of the parties, the practical cessation of the work of scrapping, by reason of the deadlock between the parties. The bill alleged that the continuance of the vessels in the plaintiff's yard was causing irreparable damage, and prayed for a mandatory injunction requiring the defendants forthwith to remove the vessels. The case came on for final hearing July 14, 1924, and lasted several days, at the conclusion of which Vice-Chancellor Backes announced his decision. His opinion is printed at Case, page 792-798. He concluded by saying (Case, 798):

"The complainant has the right to have them removed and it is the duty of the defendants to see that they are taken away. It may be that after both sides have considered the view I have expressed they can arrive at some amicable arrangement. The only thing for me to do now is to fix the time within which the boats are to be removed. Counsel may appear before me at ten o'clock tomorrow morning at Trenton unless they can agree upon the time."

Counsel did appear the next morning at Trenton, and stated that the ships would be promptly removed, whereupon the Vice-Chancellor stated that if they were so removed he would make no decree. The vessels were actually removed on July thirty-first and August second respectively.

Counsel for the defendants, in acquiescing in the Vice-Chancellor's expressed opinion, without requiring a decree, was undoubtedly influenced by two considerations: First, in view of the time of year, no application could be made to the Court of Errors and Appeals for a stay under the decree which the Vice-Chancellor announced he would advise; secondly, the deadlock having arisen, a further continuation of the ships' presence at the plaintiff's yard served only to increase the loss of both parties, without any corresponding benefit. As a practical matter, at that time it was to the advantage of the defendants, as well as the plaintiff, that the vessels be removed and the scrapping continued elsewhere. The question of liability for the loss and the amount of damages could be settled in an action at law. Furthermore, whatever conclusive effect might be urged by the plaintiff to the Chancery decree in such action at law, if no decree were entered there would be no basis for any conclusive effect. His mere opinion, not followed by a decree, could have no such effect. The ships were removed on the dates above stated without there being any decree. This action at law was then started, and the answer and counter-claim filed, whereupon the plaintiff successfully moved Vice-Chancellor Backes to enter a decree on December 30, 1924, as of July 17, 1924, by which decree it was (Case, 799):

“ORDERED, ADJUDGED AND DECREED that the defendants forthwith and as speedily as possible remove the said vessels ‘Philippines’ and ‘Black Arrow’ referred to in the bill of complaint from the complainant's plant, at Perth Amboy, New Jersey.

And counsel for the defendants having announced in open Court that the defendants would remove the said vessels from the complainant's plant as speedily as possible,

It is, thereupon, ORDERED, ADJUDGED AND DECREED that the issuance of the mandatory injunction prayed for in the bill of complaint be suspended and withheld."

The decree went on to allow a counsel fee and costs, and contained no other provision whatsoever. From this decree an appeal was promptly taken and argued on the merits before this Court, which filed an opinion for affirmance, 130 *Atlantic* 519, which is printed as a supplement to this brief. An examination of the opinion shows that the affirmance was solely on the ground the appellants were not aggrieved as, at the time the decree was actually signed, they had already done that which the decree directed them to do. This conclusion was reached by this Court notwithstanding that, on the argument of the appeal, counsel for the present and then appellants urged that the plaintiff would seek to give some conclusive effect to the Chancery decree in the then pending action at law, and was adhered to, notwithstanding a petition for a rehearing.

At the trial of the action at law, the plaintiff did insist that the Chancery decree had a most conclusive effect, and the Trial Judge so ruled. The Trial Judge's many rulings giving conclusive effect to the Chancery decree, are noted on pages 7 to 12 *supra*. The full force and effect of them is seen from an examination of one or two. At the opening of the trial, a certified copy of the Chancery record was offered in evidence and, over objection, admitted, the Court saying (Case, 84):

"The Court: I will admit this record in that so far as it contains any finding, or the determination of any question applicable to this case, that it is conclusive on us in the determination of this case. The record is admitted to that extent."

Again, counsel for the defendant, in seeking to put in evidence to prove the counter-claim, made the following offer of proof, which was overruled (Case, 499):

“Mr. McCarter: Now, if your Honor please, in order that the full effect of your Honor’s ruling may be plain on the record, and in order that, in your Honor’s own words, I may have an exception sufficiently broad enough to embody that, I wish to say that I offer to prove that the plaintiff refused to permit any part of either vessel below the superstructure to be cut up into charging box sizes. That in order to produce a marketable article, to scrap the ships in the ordinary course of trade done for the market, it was necessary to cut them up into charging box sizes; that as a result of such refusal of the plaintiff, the defendants were themselves forced to complete the scrapping of the ships, which caused the scrapping of the ships to be much more expensive to the defendants than the contract prices payable by the defendants to the plaintiff, and I offer to prove what that expense amounted to. Now, will your Honor permit me to introduce such evidence?”

Mr. Haight: I object to the offer of such evidence on the ground—

The Court: The objection is sustained. You may have an exception.”

In his charge, the Trial Judge charged the plaintiff’s thirteenth request (Case, 673):

“By reason of the finding and determinations of the Court of Chancery there can be no recovery by defendants on their counter-claim.”

He charged the jury also as follows (Case, 675):

“Much discussion has been properly had in the trial of this case, between the Court and attorneys, as to the effect of a previous proceeding which was held in the Court of

Chancery, and as I have already charged you, whatever that Court of Chancery held, as a matter of law, or as a matter of finding of fact, is conclusive upon us in the determination of this case."

By these typical rulings, and by the other rulings grouped under Point I, pages *supra*, all of which are relied on, the Trial Judge gave to the Chancery decree, not only a greater effect than that decree was entitled to receive, but a greater effect than the Vice-Chancellor who advised the decree in his opinion indicated it was entitled to. He said (Case, 794):

"The contract failed to fix the time of the use of the docks and the method of scraping. As to these two items, which have become very important in the case, the contract must be read in the light of what the law says, that the Dry Dock Company and the defendant agreed—understood that the work was to be done within a reasonable time in the ordinary course of trade done for the market.

Reading the contract there is no limitation except reasonableness. Now that is the legal view but it is not controlling in this case.

The bill alleges that there were two contemporaneously made contracts, written contract and a verbal contract, which I think is an impossible situation where the parties have reduced that which they have agreed to to writing. There cannot be a written and verbal contemporaneous contract where the written contract of and in itself is a complete contract. So much of the allegations of the bill as charge a contemporaneous verbal contract I shall read and regard as allegations of representations preceding and accompanying the making of the written agreement in determining the cause.

When two parties enter into written agreement the law says they are bound by their written agreement, but equity says you are

not bound by your written agreement if the agreement was procured by false representations, made to induce the contract; or, where the representations are not false but are thereafter violated; in other words, fraudulent conduct in the execution of the contract. I feel I do not express myself as precisely as I want to on that point but it is this, that if one makes representations to inducing another to enter into a contract and then in its performance repudiates the representations, the repudiation is a fraud and equity will intervene."

We do not dispute the general doctrine of *res adjudicata*, but for several reasons that doctrine is not applicable to the case at bar. The Vice-Chancellor conceded that the written contracts constituted the entire contract between the parties, and that at law the rights of the parties would have to be governed by a proper interpretation of them, independently of any extrinsic oral declarations. He said, however, that in deciding the right to the equitable relief prayed for before him, he could consider not only the contracts but the oral declarations which an examination of his opinion shows were promissory in their nature, that is, were statements of what the defendants would thereafter do. Such declarations obviously are not admissible in an action at law by either party against the other on the contracts in question. If this needs any demonstration, see the cases cited under Point II of this brief, where the Parol Evidence Rule is considered.

SUB-POINT 1.

The doctrine of *res adjudicata* should not have been applied in this case because evidence in the suit in Chancery was different from that admissible in the lawsuit.

The rule that the doctrine of *res adjudicata* will not be applied when the evidence in the two suits is different, is stated clearly in 1 *Wharton on Evidence*, Sec. 758, as follows:

“Every judgment by a court having jurisdiction is conclusive, between the parties and privies, as to such facts in issue, upon which the judgment is on its face conditioned, as were actually decided by the court, unless it should appear that evidence was admitted (or the converse) in the suit where the judgment was entered, which evidence would have been excluded in the suit in which the judgment was offered, or unless from some other reason the proofs in the two suits are necessarily different.”

The rule stated by the above author is supported by the following cases:

Sopwith v. Sopwith, 2 Sw. & Tr. 160; 164 English Reprints, 954; Petition for restitution of conjugal rights. The wife answered admitting the fact of withdrawal, but justified it on the ground of certain alleged acts of adultery by the husband, and prayed a judicial separation on the same facts. To this the petitioner replied, in addition to a general denial, that previously the wife had filed in the same court a petition for judicial separation, alleging the same acts set up in the present justification, a denial thereof, and judgment in his favor. A motion was then made to strike out the plea of estoppel by judgment. The estoppel was held good. The Judge Ordi-

nary, at the end of his opinion of the case at bar, said:

“The principle however upon which my judgment proceeds, may not be applicable in all cases, in consequence of the different rules of evidence that prevail in different suits; *e. g.* in the suit instituted by the husband for divorce on account of adultery, the wife may plead cruelty, desertion, or such wilful misconduct as has conduced to the adultery, so as to bring her case within the latter part of the 31st section of the 20 and 21 Vict. c. 85; but she cannot be heard as a witness in support of such an allegation. In an independent suit by her for judicial separation on the ground of cruelty or desertion, or for dissolution of marriage on the ground of adultery coupled with cruelty or desertion, she may give evidence in support of her case; and inasmuch as the same identical issue in these two cases would be triable on different principles as to the admissibility of evidence, the doctrine of estoppel could not be justly applied.”

The situation considered by the Judge Ordinary in the portion of the opinion quoted above arose in the case of *Stoate v. Stoate*, 2 Sw. & Tr. 223; 164 Eng. Reprints, 980: Petition for dissolution of marriage by husband on ground of wife's adultery. Previously the wife had obtained a decree of judicial separation on a verdict of the jury finding that husband had deserted wife and treated her with cruelty. The wife's answer in this proceeding set up the desertion and cruelty found in the former proceeding. The former decree was offered in evidence.

“The Judge Ordinary refused to admit it, on the ground that it would be indirectly making use of evidence which was directly inadmissible in the present suit.”

It appears that in the previous suit the wife was examined as a witness to prove the desertion and cruelty and was not admissible as such in the present suit.

Likewise, in the case of *Bancroft v. Bancroft*, 3 Sw. & Tr. 398; 164 English Reprints, 1407: Suit for dissolution of marriage on ground of wife's adultery. There was a cross-suit by wife for judicial separation on ground of cruelty, in which the husband had charged his wife with the same acts of adultery as those charged in his petition for dissolution. The issues raised in the wife's suit were tried before a jury and a finding that Mr. Bancroft was guilty of cruelty and that Mrs. Bancroft was not guilty of adultery. In the dissolution suit, on behalf of Mrs. Bancroft, leave was asked to plead the verdict of the jury. This was denied. The Court said, in part:

“It seems to me that the law, by making the evidence of the parties admissible in one suit and not in the other, has virtually declared that in cases of this kind the issue as to the wife's adultery may be twice tried, the same issue being triable on different principles in the two suits; by one species of evidence in the one, and by another in the other.”

Sopwith v. Sopwith, and *Stoate v. Stoate*, above cited, were referred to by Beasley, *C. J.*, delivering the opinion of this Court in the case of *Putnam v. Clark*, 34 N. J. Eq. 532 (1881). In that case, Putnam brought a suit in Chancery against Clark to recover a bond and mortgage which had been assigned, as Putnam alleged, by forgery. By reason of the joinder on their own applications of the executors of T. P.'s testimony was made incompetent and she lost the suit. She then sued C, in detinue for the bond and mort-

gage, and C filed a bill to enjoin the prosecution of that suit, setting up the decree in the first Chancery suit. P pleaded that her testimony would establish the fraud and would be admissible in the action in detinue. It was held, nevertheless, that the prior decree in Chancery was a bar. Beasley, *C. J.*, said on page 542:

“Nor do I perceive the pertinency of the decisions cited from the court for divorce. The first of these was *Stoate v. Stoate*, 2 Sw. & Tr. 223, which merely maintained that when a judgment has been obtained on evidence that would not be admitted on the trial of the same issue in another form, the former judgment is inadmissible on the second trial, the ground being that it would be indirectly making use of evidence which was directly inadmissible in the latter trial. The other case, of *Sopwith v. Sopwith*, 2 Sw. & Tr. 160, is the application of the same principle under variant circumstances. It is not apparent how it can be reasonably contended that such adjudications can apply to a case where the evidence in the first suit is entirely admissible in the second suit on the identical issue.

With respect to the decisions to which the attention of the court has been called relative to the doctrine that a party is not concluded by the election of a forum in which to bring his suit, it is sufficient to say, that the existence of such doctrine is not denied, and that it is not the fact that the appellant in the first instance sought relief in the court of chancery that debars her from her action at law, but the circumstance having that preventive consequence is that, with knowledge that she could add to the force of her case her own testimony in a court of law, she elected to take the judgment of the chancellor on the issue, supported by evidence that did not prove to be sufficiently convincing.”

In the case at bar the appellants herein have in neither case selected the forum, and, therefore, there can be no application of the doctrine of election. A very obvious application of this doctrine can be supposed. Suppose a husband was trustee to pay income to his wife during her life or until she should commit an act which is also a matrimonial offense and ground for divorce, and suppose a suit was commenced by the wife to enforce that trust, to which the husband answered setting up that the wife had committed the act which could terminate the trust, and suppose that act were established to the satisfaction of the Court by the evidence of the husband, and the admissions of the wife, uncorroborated, and a decree entered. Can it be thought that such a decree could be used as *res adjudicata* in an action for divorce thereafter brought by the husband? If it could, he would get his divorce without the necessary corroboration.

SUB-POINT 2.

The Chancery decree is not conclusive because the questions involved in this action came only collaterally in question and were only incidentally cognizable by the Court of Chancery.

The leading case on the doctrine of *res adjudicata* is the famous *Duchess of Kingston's Case*, 20 Howell's State Trials, 352. In that case it was adjudged that a matter or question is not *res adjudicata* if in the earlier proceeding it arose "collaterally" or if it was "incidentally cognizable." The following cases show what is meant by the quoted words:

Cavanaugh v. Buehler, 14 Atl. (Pa.) 391. It appears that two lots were conveyed under sep-

arate agreements and a suit was brought upon one of the agreements to recover payments provided therein. In that suit a deed for both lots, the delivery of which was contested, was introduced in order to prove payment, and the issue of payment was found in favor of the defendant. Plaintiff later brought another suit on the other agreement and the defendant insisted that the former adjudication established the delivery of the deed. The Court held that the former judgment was not *res adjudicata* as to the delivery of the deed, saying, page 393:

“The question of the delivery of the deed was not in issue in that case within the meaning of the rule, although the fact was controverted at the trial. The deed was offered merely as evidence to establish the particular matter which was in issue. The delivery of the deed was incidental only to the real issue. In applying the principle of *res adjudicata* the inquiry is not always, perhaps, as to the identity of the cause of action, but as to the identity of the matter in issue; and the matter in issue is not what comes collaterally or incidentally in controversy under the evidence, but what is essentially and directly in issue in the cause. *King v. Chase*, 15 N. H. 15; *Wells, Res Adj.* 167; *Duchess of Kingston's Case*, 20 How. St. Tr. 538. The delivery of the deed was *prima facie* evidence of the payment of the purchase money, and it was for this purpose the delivery was sought to be established. But mere evidential facts are not usually held conclusive; they must be such as are within the substance of the issue; all others are merely collateral. ‘Neither the judgment of a concurrent nor exclusive jurisdiction is evidence of any matter which came collaterally in question, though within the jurisdiction; nor of any matter to be inferred by agreement from the judgment.’ *Duchess of Kingston's Case, supra; Hibshman v. Dulleban*, 4 Watts, 183.”

In the matter of *Eliza Dutcher*, 4 N. W. (Minn.) 685, a proceeding was brought to remove an administratrix on a separate ground that she had become "unsuitable or incapable of discharging her trust." It was contended that the administratrix had wrongfully recognized the claim of one George to hold assets of the estate as a surviving partner of the decedent. The question thus arose in the case whether George was a partner of the decedent, and it was held that the decision of this question was collateral, the Court saying, page 690:

"The precise point which was there presented for adjudication, and the only one which the court had any jurisdiction to try and determine, was that of the personal fitness or unfitness of the respondent to continue longer to act as the administratrix of the estate of her deceased husband. By the judgment therein this matter became *res adjudicata*, and could not again be questioned by the respondent, except in the way of the review on appeal. She was not, however, concluded by it from litigating anew any collateral question or disputed fact considered or passed upon in that proceeding incidentally only, because of its bearing as evidence upon the vital point in controversy, and such was clearly the character of the question which was there raised and contested as to the existence of the partnership between George and the decedent. A finding upon that fact or question was only pertinent to characterize the conduct of the respondent in recognizing the validity of George's claim to the hotel property as a surviving partner of the intestate, for the purpose of aiding in the determination of the main question whether, under the circumstances, she was a suitable person to perform the duties and discharge the trust of an administratrix faithfully and advantageously to the estate. In this incidental way, and to this end, the probate court

rightly took cognizance of the question and passed upon it, and in this indirect way alone was it proper for the court to consider it, for probate courts have no jurisdiction to try and determine partnership rights in any action or proceeding brought for that direct purpose."

The following cases illustrate what matters are "incidentally cognizable." In *Hibshman v. Dulleban*, 4 Watts (Pa.) 183, the question is stated by Chief Justice Gibson as follows:

"The defendants having pleaded a release to the plaintiff's declaration for a legacy, and the plaintiff having replied *per fraudem* the defendants rejoin that the release was exhibited by them in the orphans' court as a decisive bar to exceptions taken by the plaintiff to their administration account; and the question raised by demurrer is, whether the validity of the release passed in *rem judicatam*."

After repeating the rule in the *Duchess of Kingston's Case*, the Court said:

"Now, did the question of fraud come before the orphans' court directly or incidentally? Not directly, certainly; for that court had jurisdiction of it but incidentally, and not to entertain an action whose immediate object should be to ascertain the fact."

This case was followed by Vice-Chancellor Stevens in the case of *Mullaney v. Mullaney*, 65 N. J. Eq. 384, and the decree advised by him was affirmed on his opinion. In this case a suit was brought to set aside a release for fraud. It was objected that this question was *res judicata* by reason of the fact that Mrs. Mullaney had applied for letters of administration, which application was resisted on the ground that she was not in fact his widow. After the hearing was closed, upon application, the case was reopened for the purpose of putting in the release to show

that Mrs. Mullaney had no further interest in the estate. The counsel for the widow, upon request, was permitted to put in evidence to show that the release was obtained by fraud, and after putting in evidence on both sides the court decided that there was no fraud and the prayer of the petitioner asking for administration was denied. Vice-Chancellor decided first that the Orphans' Court had no jurisdiction to determine the question whether the release had been obtained by fraud. However, he then goes on to decide that if cognizable at all, it was only incidentally cognizable (p. 388):

"If I had come to the conclusion that the court had jurisdiction to determine the question of fraud, I should still have thought that its determination would not have been conclusive. * * * It seems to me that the question resolved by the orphans' court, if cognizable at all, was only incidentally cognizable, and only to be inferred by argument from the order actually made. The statute says the administration shall 'be committed to the widow or next of kin of the intestate.' Under ordinary circumstances it is usually confided to the widow. * * * The question whether Mrs. Mullaney was or was not Michael Mullaney's wife, would, under ordinary circumstances, have gone to the very heart of the controversy. An issue could have been framed upon it; but the question of release or no release could never have become an issue in the proper sense of that term. If her allegation was, 'I am widow,' and this was proved, then the allegation by way of confession and avoidance would be, not 'you have executed a release,' but 'you, though widow, are without interest,' and so not entitled to your statutory right. Want of interest would be the issue, and of this the release would be evidence. It would have been quite beyond the power of the orphans'

court to have decreed that the release should be avoided for fraud. The judgment in the case at bar was only 'that the application of Pauline E. Mullaney for her appointment as administratrix be and the same is denied, and her petition be dismissed, with costs.'

It seems to me clear, therefore, that the question of fraud or no fraud, had the court been competent to try it, would have been collateral."

Another illustration of questions incidentally cognizable is found in *Johnston v. Jones*, 23 N. J. Eq. 216 (Zabriskie, C. 1872), where the question arose as to the legality of a corporate election. The Chancellor said at page 225:

"One objection strongly urged by the defendants is to the jurisdiction of the court, which, it is contended, has no power to inquire into or determine the legality of an election of the directors of a corporation. They contend that this is exclusively within the jurisdiction of the courts of law by the appropriate remedies of *quo warranto* or *mandamus*, or by the proceeding authorized by statute.

It is clear that a court of equity has no jurisdiction to remove an officer of a corporation from an office of which he has possession, or to declare the forfeiture of such office. Its decree will not, like the judgment of a court of law, operate *in rem*, and remove or oust anyone from an office which he in fact holds. When the object is simply to determine the regularity of an election, or to declare an office to which anyone has been duly elected, forfeited, a court of law is the proper and only competent tribunal. So it is the only proper tribunal to recover the possession of lands, or authoritatively to settle and declare the title in real or possessory actions. Yet when the object is to protect lands from waste or destruction, to compel the specific performance of a contract, or to exercise any other power over

them vested in a court of equity, it may inquire and determine as to the title. Here, the allegations that Jones and Carpenter obtained the positions they claim by breach of trust, fraud, and breach of agreement, gives this court jurisdiction of the matter for the purpose of restraining the breach of trust and any acts of such breach that may work irreparable injury, and for the purpose of compelling them specifically to perform their contract. This could be done, even if the election held in such breach of trust had been conducted according to law, and would not be set aside by courts of law.

If the question of the legality of an election, or whether a certain person holds such an office, arises incidentally in the course of a suit of which equity has jurisdiction, that court will inquire and decide it, as it would any other question of law or fact that arises in the cause. But the decision is only for the purpose of the suit; it does not settle the right to the office, or vacate it if the party is in actual possession."

To the same effect, *Kean v. The Union Water Co.*, 62 N. J. Eq. 813 (E. & A.), pp. 818, 819.

Likewise in *National Docks Railway Co. v. Penn. R. R. Co.*, 54 N. J. Eq. 10, the Court said that it would incidentally determine a question as to the method of user in conflicting easements which it said was a legal question inasmuch as the question arose incidentally to equitable relief.

In the case at bar the question whether or not Bernard was the defendants' agent; whether the defendants under the contracts had the right to have the ships cut into charging box sizes as contended by them, or into shipping sizes as contended by the plaintiff, and whether there was any time limit within which the work must be completed, and all of the other questions relied on by the defendants in support of their coun-

ter-claim, and in defense to the plaintiff's action on the contract, arose only collaterally in the Chancery suit and were only incidentally cognizable therein.

SUB-POINT 3.

The issues in the two suits were different.

The issue in the Chancery suit is whether, under all the facts and circumstances, including the equities of the case, the plaintiff was entitled to have the ships removed. That is the relief for which the plaintiff prayed in that suit. The decree itself purported to adjudge nothing but that the ships should be removed, and that the defendants should pay costs. In the case at bar the issues which have been accurately framed in the pleadings are substantially different. The issues are, in brief, which of the two parties has committed a breach of the contracts in suit, the proper constructions of those contracts, and the amount of damages to be recovered. Here is a vast difference in issues.

SUB-POINT 4.

To conclude the Supreme Court on the points in controversy in this action is beyond the jurisdiction of Chancery in the prior suit.

In our dual system of jurisprudence, courts of law adjudge the legal rights of the parties, and the Court of Chancery adjudges their equities. An adjudication of legal rights is not conclusive of the equities of the parties and *vice versa*. In *Staats v. Bergen*, 17 N. J. Eq. 297 (1865) it was distinctly held that a judgment rendered against a plaintiff in a strict legal proceeding

was no bar to a suit in equity on the same subject matter where the complainant presents equitable grounds of relief which could not be considered or decided by the law court.

Logan v. Flattau, 73 N. J. Eq. 222 (Bergen, V. C., 1907). The parties to this suit had entered into a contract for the sale of land, and the purchaser had previously filed a bill for the specific performance thereof and general relief. The bill disclosed the inability of the vendor to remove existing encumbrances and his consequent inability to perform, so that it was, upon demurrer, dismissed. The purchaser then rescinded the contract, commenced an action at law to recover back his deposit, whereupon the vendor sought to enjoin the purchaser from proceeding with the action at law, on the ground that the subject matter of the action at law had been under the consideration of Chancery, and the same issues had been determined against the purchaser. The Vice-Chancellor held, however, that the Court of Chancery in the first suit was without jurisdiction to pass upon the matter involved in the action at law, the Chancery decree was not conclusive, and the action at law could not be enjoined. A very important and instructive case is *Commercial Union Assurance Company v. New Jersey Rubber Company*, 64 N. J. Eq. 338 (C. E. A. 1901). It appears in that case that an insurance company entered into an agreement by which it was to issue a policy of insurance upon the defendant's plant and the defendant was to procure other concurrent insurance so that under the policy the insurance company should be liable for a proportionate part only upon any loss. The insurance company issued its policy and the defendant failed to procure the concurrent insurance. After the

occurrence of the fire the insurance company tendered to the defendant the proportionate part of the loss for which it would have been liable under its agreement, at the same time cancelling its policy and returning the unearned premium. An action at law was brought by the insured on the policy and a proceeding in equity was instituted to enjoin the lawsuit and for equitable relief. The Vice-Chancellor permitted the action at law to proceed to judgment which was, that by the cancellation of its policy, the insurance company had recognized its validity. This judgment was affirmed by the Court of Appeals. The insurance company then returned to the Court of Chancery by supplemental bill. A demurrer was interposed to the supplemental bill and Vice-Chancellor Emery sustained the demurrer holding that the adjudication at law settled the matter conclusively between the parties. On appeal the decision of the Vice-Chancellor was reversed.

Garrison, *J.*, for the Court of Errors and Appeals, said at page 342:

“Keeping this distinction in mind, it is evident that the contract submitted by the complainant to the court of equity, and that upon which the defendant sued at law, were totally different affairs. Indeed, under the law of the case, their only point of similarity was that neither of them had any legal existence. The contract submitted to the chancellor was the one that would have resulted if the defendant had not made default; that upon which the defendant sued was the one that had resulted from that default. The former was sought to be validated as a contract in equity by the fact that the party who had been wronged had done equity, which very circumstance, maugre its purpose, was, by force of immemorial law, a waiver of all defences strictly legal. For

reasons presently to be stated, the court of equity might, with marked propriety, have held that the doctrine of *res judicata* would not suffer impairment by a decision that, where a matter *in pais* had acquired a fixed import at law, but might have an opposite significance in equity, a judgment that accorded to such matter its strictly legal consequences would not control the effect to be given to it by a court of equity. * * *

If the broad claim be made that the court of law had established that the policy of insurance was for all purposes the only contract between the parties, or that its judgment so conclusively embodied all the rights of the parties that none could be elsewhere established or otherwise enforced, the answer is that such a power did not reside in the court of law. * * * It may be well to add, in the interest of clarity, that these views are based upon the idea that the remedy of the complainant is not by a reformation of its policy of insurance, but by the enforcement of its contract as binding upon the defendant, under the maxim that equity regards that as done that ought to have been done, and that the jurisdiction thus invoked does not rest upon mistake in its technical acceptance, but rather upon fraud in equity as distinguished from legal fraud. Upon this equitable fiction of fraud, and not upon actual fraud or a strained definition of mutual mistake, the jurisdiction of the court of equity may apparently be rested, unless, upon final hearing, a different state of the proofs compels a different result."

We submit that the distinction made by Garrison, *J.*, between the contract involved in the lawsuit above and the contract submitted to the court of equity obtains in the case at bar. Backes, *V.-C.*, did not construe or interpret the contract between the plaintiff and defendants standing alone, but took the contract in connection with certain matters *in pais*, and looking

at these together he decided that in equity (at the same time disclaiming that the same effect would hold at law) the situation was one in which it would constitute a fraud to have the ships of the defendants remain longer on the premises of the plaintiff. The equitable relief actually granted by the decree in Chancery, while necessarily determined that in the eyes of the Chancellor the ships were wrongfully at the docks, does not, except by inference from the decree, purport to settle, as between the parties, their rights under the contracts in an action thereon in a court of law. The fraud of which Backes, *V.-C.*, speaks in his opinion is a fraud in equity as distinguished from legal fraud, which fraud in equity is an equitable fiction. (See the opinion of Garrison, *J.*, just above quoted.) Among the decisions in the leading *Duchess of Kingston's case*, *supra*, is that a judgment is not conclusive in any matter to be inferred by argument therefrom.

So, in the case at bar, it was clearly erroneous for the Trial Judge to give to the Chancery decree the conclusive effect which he did as to points which are only inferable from the Chancery decree.

A somewhat analogous situation is found in the inconclusiveness as to title to real estate of the decree of a Surrogate, the Orphans' or Prerogative Court granting or refusing probate of a will. It is well known, notwithstanding litigation in Probate Courts resulting in an adjudication one way or another, the same matter is open for litigation in the courts of law. Of course, now by statute, a certain *prima facie* effect has been given to the Surrogate's decree.

Den v. Ayres, 13 N. J. L. 153, 155 (Supreme, 1832);

Allair v. Allair, 37 N. J. L. 312, 318 (Supreme, 1875);

Wilkinson v. Trustees, 38 N. J. Eq. 514 (C. E. A. 1884).

The case last mentioned was a bill to construe a codicil and to procure the execution of its trusts. The codicil had been admitted to probate by the Surrogate, and purported to devise lands. This Court held that the validity of the codicil, notwithstanding the probate, might be attacked in the Chancery suit.

But, the most pertinent and controlling authority that the Trial Judge was in error in giving such effect as he did to the Chancery decree is the opinion of this Court on appeal from that decree. This opinion is printed as an appendix to this brief. The Chancery decree, ordering the ships to be moved, was made after the ships actually had been moved. This Court, on appeal therefrom, held that the appellants, the present defendants, were not aggrieved by a decree which directed them to do something which they had already done at the time the decree was actually signed. That decision was made by this Court, notwithstanding that it was argued to this Court by the appellants that some effect would be sought to be given by the plaintiff in the then undetermined action at law.

In *Andrews v. Stelle*, 22 N. J. Eq. 478 (C. E. A. 1871), Andrews, the appellant, was the maker of a bond and mortgage, and after he had sold the property was made a defendant to a fore-

closure bill. The defense of usury was set up. Andrews appealed from the decree, and it was urged that, having no interest in the mortgaged premises, he was not aggrieved by the decree. This Court, however, ruled that he was aggrieved because if the decree of the Chancellor were not reversed Andrews would be precluded in any future litigation on the bond from setting up the defense of usury.

In the appeal from the Chancery decree between the parties to this suit, this Court, in ruling that the then and present appellants were not aggrieved by the Chancery decree, necessarily held that the Chancery decree would not be conclusive against the appellants in the action at law. The ships having been moved before the Chancery decree, it was quite obvious that the only purpose of the appeal therefrom was to dispose of that decree as being in any way conclusive of the defendants' rights in the action at law. This Court, by its opinion, holding that the defendants were not aggrieved by the Chancery decree, has in the most effectual way adjudged that the Chancery decree can have no effect against the defendants' position in the action at law. The Trial Judge should have obeyed that mandate of this Court, and is in error in not so doing. We say that this Court must reverse the judgment.

II.

The Trial Court's errors in the application of the parol evidence rule.

On pages 12 and 13, *supra*, are listed various rulings of the trial court erroneous on this ground. It is obvious that the two written contracts, Exhibits 1 and 2, constituted the entire

contract. Look at one of them (Case, 13). It certainly purports to be complete. In considerable detail it sets forth the respective duties of each of the parties. There is not a single blank to be filled in. Notwithstanding those contracts, the Trial Court made the rulings enumerated above (pp. ~~127-13~~). The Trial Court's position is summed up by his language (Case, 95):

“The Court: I am holding that any oral agreement that was made as to time, even though made at the time of the written contract, is admissible, both on the ground of what was a reasonable time, and also on the ground, if there was such an oral agreement, that it was supplying that which was a necessary part of an effective and sane contract. You may take an exception.”

So, over objection by counsel for the defendants, the Court permitted the witness Meurer to say (Case, 96):

“Mr. Bernard told both Mr. Preacher and myself that the vessels would have to be scrapped within three months in order to make any money on the proposition, so it had to be within three months.”

The Court also, over defendants' objection, admitted in evidence Exhibit P. 5, plaintiff's letter of March 3rd, in which the oral statements of Mr. Bernard were quoted as follows (Case, 805):

“Mr. Bernard at that time informed us that he intended scrapping the ships in the following manner:

The entire super-structure to be cut up into charging box sizes and the rest of the hull cut up into large size plates for shipment to China and the engines and boilers were going to be lifted out without being entirely dismantled for shipment to Germany. Mr. Bernard informed the writers that you had a representative in Germany

trying to dispose of the engines and boilers of these ships."

The Court admitted similar declarations by Mr. Bernard to be testified to by the witnesses Preacher (Case, 184), Peterson (Case, 272), O'Hagan (Case, 317), Patten (Case, 323), Williams and Peterson (Case, 273), Campbell (Case, 296) and O'Hagan (Case, 317). The agency of both Bernard and Williams to bind the defendants by declarations was disputed, but for purposes of the Parol Evidence Rule, their agency may be assumed. Finally, the witness Snedeker was permitted to testify (Case, 15) that Crawford, one of the defendants, said the job would be completed within three months. The Trial Judge (Case, 95), as we have seen, admitted all this evidence on two grounds: (1) "that it was supplying that which was a necessary part of an effective and sane contract"; and (2) as evidence of what was a reasonable time for the completion of the scrapping. Neither of these grounds is tenable. The first ground is clearly untenable, in view of the conclusive effect given by the Trial Judge to the Chancery decree. We have endeavored to show that this application was erroneous, but the Trial Judge must be consistent—what is sauce for the goose is sauce for the gander. Vice-Chancellor Backes, in his opinion (Case, 794) ruled that Exhibits 1 and 2 constituted the entire contract, that there could not be a contract partly written and partly oral in this case. He said:

"The contract failed to fix the time of the use of the docks and the method of scrapping. As to these two items, which have become very important in the case, the contract must be read in the light of what the law says, that the Dry Dock Company and the defendant agreed—understood that the work was to be done within a reasonable

time in the ordinary course of trade done for the market. Reading the contract there is no limitation except reasonableness. Now that is the legal view but it is not controlling in this case.

The bill alleges that there were two contemporaneously made contracts, written contract and a verbal contract, which I think is an impossible situation where the parties have reduced that which they have agreed to to writing. There cannot be a written and verbal contemporaneous contract where the written contract of and in itself is a complete contract. So much of the allegations of the bill as charge a contemporaneous verbal contract I shall read and regard as allegations of representations preceding and accompanying the making of the written agreement in determining the cause."

If the Trial Court was right (which, of course, we contend it was not) in giving the conclusive effect it did to the Chancery decree, then it should have given like conclusive effect to the Vice-Chancellor's ruling that the contracts were in themselves complete and not capable of being supplemented or added to by extrinsic statements of the parties. This position was in fact conceded to be correct by counsel for the plaintiff (Case, 82, l. 35).

Independently of the conclusive effect of the Chancery decree, the written contracts themselves are complete and do not admit of supplementing by extrinsic statements of the parties. Look at the contracts themselves (Case, 13). Not a single blank is left in them. They purport to express completely the several rights and duties of the parties. That the contract itself, upon an inspection thereof, is the test of its own completeness, has been the undoubted law ever since the leading case of *Naumberg v. Young*, 44 N. J. L. 331, which case has always been cited with ap-

proval and followed by this Court. For example, see *Shinn v. Black*, 97 N. J. L. 219 (1921). In the contracts before the Court, no time for completion was expressly stated. It is well settled, however, that in such a case the law implies a reasonable time as fully and completely as if the words "reasonable time" were set out in the written contract. In *Lean v. Leeds*, 92 N. J. Eq. 455 (Leaming, V.-C.), the Court said at page 456:

"The only element ordinarily embodied in such contracts which is absent in this is the element of time for final payment and final delivery of the deed, but that element is not essential, so far as the express terms of the written contract is concerned, because in its absence a reasonable time will be implied."

In *Atlantic Pebble Co. v. Lehigh Valley R. R.*, 89 N. J. L. 336, (C. E. A.) White, J., for this Court said at page 339:

"In the absence of a provision defining the time for complete performance, the presumption is that such performance was to be within a reasonable time. What that is depends upon the circumstances of each case."

See also *Hayden v. Hoadley*, 111 Atl. 343 (Vermont).

For the theory that extrinsic declarations of the parties may be admitted as evidence of what is a reasonable time some support can be found in decisions of some states. Other states, however, exclude declarations of the parties, although admitting evidence of the surrounding circumstances and acts of the parties. We do not find that this Court has unmistakably ruled on the question. Such decisions as there are in this State, however, are inconsistent with the admission of such declarations and lean strongly toward their exclusion. Moreover, on principle

the admission of such declarations is very dangerous and will amount to a substantial over-throwing of the admittedly salutary Parol Evidence Rule.

A well considered discussion denying the admissibility of the parol evidence to show what is a reasonable time is found in *Stone v. Harmon*, 19 N. W. (Minn.) 88, at page 90:

“It is argued, however, with some show of plausibility, that the object of the evidence in question was not to vary or supplement the writing, but to show by the conversation of the parties what they understood or agreed to be a reasonable time, to be considered as a collateral fact or matter with other circumstances in ascertaining the intention of the parties in reference to the time of acceptance. It was so ruled at *nisi prius* in *Cocker v. Franklin, etc. Co.*, 3 Summ. 530, and in *Barringer v. Sneed*, 3 Stew. (Ala.) 202; and evidence of such character seems to be classed by the court with other collateral facts, properly admissible, in *Ely v. Adams*, 19 Johns. 313; but the question is not much discussed or considered in any of these cases. The same rule was also adopted in *Coates v. Sangston*, 5 Md. 131, and such evidence received and treated as in the nature of an admission by one of the parties of what he considered a reasonable time. But as to this point see *Cook v. Finch*, *supra*, 411. Following these cases, it is laid down in some of the text-books that when a contract is to be performed in a reasonable time, as construed upon its face, ‘parol evidence of the conversation of the parties is admissible to determine their intention in respect to the time of performance.’ 2 Story, Cont. (5th Ed.) §§13, 25. The question is casually referred to, but not considered, in *Roberts v. Mazeppa Mill Co.*, 30 Minn. 416; S. C. 15 N. W. Rep. 680. On the contrary, the general tenor of the decisions upon the question of the reception of parol

proof to explain or supplement contracts, is adverse to the doctrine contended for, and we believe it unsound.

There is no foundation for the claim that the evidence does not in reality tend to change the written contract. Its object is to influence the construction of the writing by parol evidence of the language and conversation of the parties during the negotiations, so that its terms, which are presumed to be the sum of the negotiations, and the best evidence of what is intended, in so far as they are expressed or implied by language, are still subject to be limited or enlarged by language previously used. It must be presumed that, whatever may have been the opinions or expectations of the parties, and whatever statements may have been used by either party in reference to the subject, the defendant, being fully advised, finally shaped his offer so as to express his intentions and conclusions in the form and by the language adopted by him, subject to be construed in connection with the attending facts and circumstances, as in the case of other written instruments. If such evidence is admissible, the determination of a case might be largely influenced by evidence deduced from loose and conflicting statements, in defiance of the proper legal construction of a written contract. See *Stange v. Wilson*, 17 Mich. 341; *Simpson v. Henderson*, 1 Moody & M. 300; *Warren v. Wheeler*, 8 Metc. 99, 100; *La Forge v. Richert*, 5 Wend. 187. We think it would prove in practice a very unsafe rule to allow parol evidence in such cases on any of the grounds suggested, and that its practical effect and influence would be substantially the same as if offered directly to vary or supplement the writing, and hence likely to work serious injustice in any particular case. So much of the evidence, therefore, as embraced the conversation of the parties in relation to the time within which plaintiff might accept defendant's offer was improperly received."

Benjamin on Sales, Sec. 1023, note:

“What is a reasonable time is determined by proof of circumstances, but not by proof of an oral agreement fixing the time.”

The note then cites the following case of *Stange v. Wilson*, 17 Mich. 342, at page 348:

“And to prove, when a reasonable time is agreed upon, that at the same time it was understood what time would be reasonable, is equivalent to proving they agreed on that time either absolutely or conditionally, but it is no proof whatever of the only important point, which is whether the time was really reasonable.”

Turning to this State, we have the decision of this Court in *Atlantic Pebble Co. v. L. V. R. R. Co.*, 89 N. J. L. 336, above referred to, in which case *White, J.*, for the Court said at page 339:

“In the absence of a provision defining the time for complete performance, the presumption is that such performance was to be within a reasonable time. What that is depends upon the circumstances of each case. Both parties are presumed to have had in mind, as an unexpressed term of the contract they entered into, a period for complete performance, which, in view of the existing conditions, and viewed in the light of their own actions, it is reasonable to suppose they had in contemplation. Not having seen fit to reduce it to definite, expressed form, the circumstances surrounding the transaction, taken in connection with its character or nature, and the actions of the parties themselves, will determine this unexpressed and otherwise undefined term of the contract. One of the parties to such a contract cannot, therefore, escape its obligations on the ground that he expected it would be performed within a shorter time than that which, under the circumstances, was a reasonable time for its performance. What was a reasonable time in the circumstances

of this case was clearly a jury question. There was ample evidence arising not only from the character of the merchandise but from the actions of the parties themselves with reference to the two previous cargoes, to indicate that a longer period than two months was reasonable for the completion of the sales of the third cargo. The non-suit cannot, therefore, be sustained on the ground that the minds of the parties did not meet as to the time of performance."

Note that it is evidence of the actions of the parties themselves, which is admissible. It is not said that the declarations of the parties may be put in evidence. A case almost directly in point is *Schwartzman v. Creveling*, 85 N. J. Eq. 402 (Backes, V.-C.). That was a suit for the specific performance of a contract to sell land which was described in the written instrument as "the store property owned by me, No. 224 South Broad street, Trenton, N. J." Backes, V.-C., found no difficulty in fixing the dimensions of the store lot in the light of admissible extrinsic evidence. The complainant claimed more land. In denying this, the Vice-Chancellor said, at page 404:

"The complainant does not deny the general application of the rule, but contends that it should not be here adopted because at the time of the agreement the defendant represented to him that she was selling all of the land to which she had title, from Broad street to Conover's alley, and that that was what he understood he was buying. * * * The testimony was admitted at the trial, under objections, but, upon examination, I am persuaded that it is incompetent. Evidence of declarations of the defendant's intention as to what she meant to sell, cannot be entertained without violating a fundamental principle of the law of evidence. 'It is sometimes said that this sort of evidence is admitted only when there is a latent ambiguity. The use of the expression "latent

ambiguity" in this connection, has given rise to some confusion in the cases. The office of such testimony is that of interpretation merely, to ascertain the sense in which words have been used by the testator. Where, in a deed, will or written contract, general words of indefinite signification are used, and there is nothing on the face of the instrument to qualify them, or limit and apply them to a particular subject-matter, evidence of extrinsic circumstances—matters of fact *as distinguished from mere* declarations of intention—is admissible for the purpose of ascertaining in what sense such indefinite language was used. The effect of such evidence is not to vary the language employed, but merely to explain the sense in which the writer understood it.' *Griscom v. Evans*, 40 N. J. Law 402. In that case Mr. Justice Depue reviews the cases in this state, and supports the text by numerous authorities."

Of course, the sharp distinction drawn between evidence of surrounding circumstances and the acts of the parties and extrinsic statements of intention or declarations of the parties runs all through the Law of Evidence applicable to written instruments.

See for example:

Lee v. Savidge, 14 N. J. Eq. 124;

Griscom v. Evans, 40 N. J. L. 402.

On principle, it is clear that the statements should be excluded. The exclusive doctrine of our law of evidence by which evidence, though relevant, is excluded, is a concomitant of the jury system. The excluded evidence is deemed to be too dangerous to be handled with fairness, safety, or justice by the lay-tribunal. It is peculiarly so with respect to the evidence under discussion. To admit declarations of the parties

that the work was to be done within three months on the theory that the jury are going to regard that merely as evidence of a reasonable time and not as an added term of the contract is absurd. Juries will always take such evidence as fixing the contract time for performance, and will disregard any other evidence tending to fix as a reasonable time any time other than that stated in the declarations of the parties. So they did in the case at bar. The declarations admitted and objected to fixed the time for the completion of the scrapping as three months. The plaintiff's own witness, Gilbert, said that the vessels could not have been scrapped within three months (Case, 126). The defendants' witness, Williams, said that the vessels could have been scrapped in less than eight months to one year (Case, 466), and the witness Mason said that the smaller of the two ships could have been scrapped within fifteen months, and that he could not say within what time the larger vessel, the "Philippines" could have been scrapped (Case, 539). All of these witnesses, Gilbert, Williams and Mason, are men of experience qualified as experts to give an opinion as to the reasonable time. All of the parties, both plaintiff and defendant, were admittedly without prior experience in the scrapping of ships, and yet the estimates by the experienced men were wholly disregarded and the declarations of the defendants and their agents were by the jury given a conclusive effect, and so it will always be. To admit such declarations will, therefore, as a matter of principle, abolish the Parol Evidence Rule in this connection.

A particularly erroneous ruling is that presented by the thirty-first ground of appeal wherein the Court permitted the following question to the witness Snedeker (Case, 393):

“Q Mr. Snedeker, when the offer was taken down by Mr. Meurer to Mr. Crawford, before the question of the compensation insurance arose, did Mr. Meurer tell you whether or not there had been any representations made to him as to the time the vessels were to remain in the plant?”

Here not only were extrinsic declarations admitted but the declaration was proved by hearsay. It is impossible to sustain this ruling.

III.

Insufficiency of evidence as to the reasonable time within which the vessels could be scrapped.

This point is predicated upon the soundness of Point II. The various rulings of the Court which present this point are quoted on pages 13 and 14, above, two of which, for example, are the 77th and 78th grounds of appeal, namely, the Court's charging the jury, at the request of counsel for the plaintiff, as follows:

“77. In ascertaining the damages of plaintiff arising out of the unlawful presence of defendants' ships upon its premises, you must determine two things. First, what was a reasonable time for the scrapping of the ships and when that reasonable time terminated. Second, what sum constitutes reasonable compensation for the wharfage made necessary because of the presence of the ships upon the plaintiff's premises after the expiration of the reasonable time until the date of their removal.”

“78. In determining what was a reasonable time for scrapping the ships you are to consider all the evidence bearing upon that

subject including any and all representations and admissions of the defendants and their agents as to the time the ships would be on plaintiff's premises."

Since the declarations of the parties extrinsic to the contract were improperly admitted, the Court should have charged the jury on the question of reasonable time as if that evidence were not in the case. With that inadmissible evidence out, the only evidence in the case was the following: The plaintiff's witness Gilbert said (Case, 126) that the ships could not have been scrapped within three months; the defendants' witness Williams (Case, 466) said that if the ships were cut up in accordance with the defendants' contention they could have been scrapped within one year, and if in accordance with the plaintiff's contention, within eight months; and the defendants' witness Mason testified (Case, 539) that in his opinion, with the facilities at the plaintiff's plant, the "Black Arrow" could have been completely scrapped in twelve to fifteen months, and the "Philippines" in a longer time. Inasmuch as the ships arrived at the plaintiff's plant approximately January 1st, the shortest reasonable time did not expire until August 1st, when they were removed. There is absolutely nothing in the case, except the inadmissible declarations, to contradict the testimony just referred to. There was, therefore, nothing on which the jury could find that there had been any unreasonable delay. Under the contracts the ships had a right to remain a reasonable time at the plaintiff's plant, and there was no legal basis for a verdict finding that such time had been exceeded.

We wish particularly to emphasize the Trial Judge's action with respect to the defendants'

nineteenth and twentieth requests to charge. They read as follows (Case, 687):

“19. In deciding what is a reasonable time in which both ships should be completely scrapped, you must bear in mind that the contracts between the parties put no limit except that of reasonableness upon the sizes of the pieces into which the vessels were to be cut, and that the defendants had the right to require as much of the ships to be cut into charging box sizes as the ordinary course of trade done for the market required.”

“20. The contracts between the parties do not require the boilers to be removed intact, instead of being cut up, and you must bear this in mind in deciding what is a reasonable time in which the ships should be completely scrapped.”

The twentieth request was refused entirely, but the Court read the nineteenth and then said: “I charge that; subject to what I may say upon that subject in my general charge” (Case, 669, l. 26). In his general charge (Case, 676, 677) the Court said:

“This being absent in the written contract, the law says that then the time in which the work was to be consummated or completed was what was reasonable for the prosecution of work of that kind, ‘in the ordinary course of trade done for the market.’ And in determining that you are to consider all of the evidence in this case that touches upon that question, as to what was reasonable time, including such evidence as you believe represents the truth as to anything that was said by the parties themselves as to the time in which the work was to be done. * * * But where there is a lack of writing to show what that meeting of the mind was, then you do not take it from the mere say-so of one interested party or the other interested party; but you are to apply your own common sense and clean

reasoning power, from all the facts of the case, to determine what was a reasonable time. The contention of the plaintiff is that the time was three months, or approximately three months. The contention of the defendant is that there was no time mentioned, and it was to be determined from the practical standpoint as to the time that was reasonably necessary to properly do this work in the ordinary way. Now, in determining what was a reasonable time, we are not helped much by the contract itself, so far as it details just what this work meant. It simply says the scrapping of a vessel, but it is lacking in any detail as to just how that vessel was to be scrapped. You have heard the testimony that when it came to cutting this vessel up in charging box sizes, which I will refer to as the smaller size, and cutting it up in shipping sizes, which I will refer to as the larger sizes, that it meant a great detail of difference in the time necessary to accomplish the task. From the standpoint of reason, what was a reasonable way of scrapping this vessel, as it was understood and agreed to by the plaintiffs, and as you will determine from what would be reasonable, from all the evidence in the case, in the ordinary prosecution of this work, in the ordinary way, in the ordinary market for that kind of work?"

Even assuming the extrinsic declarations of the parties were properly admitted, nevertheless, the twentieth request should have been charged and there should have been no qualification on the nineteenth. To qualify the latter gave an undue importance to the extrinsic statements with respect to three months. The defendants were entitled to have the jury unequivocally instructed as to the sizes of the pieces into which the defendants had a right to have the vessels cut. This had an important bearing as to the time to be consumed in the scrapping. It nat-

urally would take longer to cut charging box sixes than shipping sizes. The jury, after listening to the nineteenth request with the qualification that it was subject to the general charge, and then after listening to the portions of the general charge just above quoted, could and possibly did believe that the extrinsic statements with respect to three months might control the right of the defendants to require as much of the ships to be cut into charging box sizes as the ordinary course of trade done for the market required. The nineteenth request should have been charged specifically, as requested, without qualification.

As to the twentieth request, it is obvious that it would take more time completely to scrap the ships if the boilers were to be cut up than if they were to be removed intact. The point that they were to be removed intact was made by the plaintiff, and appears in Exhibit P. 5 (Case, 805). An examination of the contracts, Exhibits 1 and 2, shows that they do not require the boilers to be removed intact. The defendants, therefore, had the right to have the boilers, as well as the rest of the ships, scrapped. We can find no excuse for the failure to charge the twentieth request, and feel that the Court's refusal to charge it is clearly erroneous.

IV.

The admission of the testimony by the plaintiff's experts as to a reasonable charge for wharfage.

Under this heading are grouped six different rulings by the Trial Judge, quoted on pages 14 to 16, *supra*. Two alleged experts, Messrs. Dendel and Bonnett, were produced.

The plaintiff's shipyard is situated at Perth Amboy on Staten Island Sound. Mr. Dendel testified that he had been in the ship repair business for thirty-one years with Tietjen & Lang Co., at its plant at Hoboken, New Jersey, on the Hudson River (Case, 226). He said:

"We repair all the various kinds of vessels that are really afloat and that come up and down the North River, from canal boats up to the largest steamships that are afloat today."

He had seen the plant of the plaintiff many times, but his experience as to reasonable charges for wharfage was limited to the plant where he had been employed (Case, 230). When he was asked to give his opinion, counsel for the defendants claimed he was not qualified, saying (Case, 228):

"This witness has qualified by experience in the Hudson River, and he shows no basis for his opinion as to the wharfage down here on Arthur Kill. You might just as well have the manager of the Waldorf-Astoria testify to room rent in the Perth Amboy Hotel."

It is true, he said (Case, 228), that there was no difference in wharfage charges between the plant of the Perth Amboy Dry Dock Company and any other part of New York Harbor, but his special cross examination brought out the following facts: At the Tietjen & Lang plant work could be done on steamships of the largest size, and that such steamships could not be worked on or berthed at the plaintiff's plant (Case, 231). He admitted, after much fencing, that the land under water at the Tietjen & Lang plant was very much more valuable than that at the plaintiff's plant (Case, 235), but he said that, notwithstanding that difference in value, the charge for storing the vessels should be the same in one yard as

the other, and he justified this extraordinary statement as follows (Case, 237):

“A Because every yard has a certain right to a profit on the job, and when you berth a vessel in any repair yard, especially on such piers as we have mentioned before in Perth Amboy, which are the principal piers of a company, you are depriving them entirely from the profits which they are entitled to.

Q You mean by the use of those piers?

A Meaning by that they cannot use the piers which they should use when they have a vessel at their yard that they are doing contract work on.

Q Now, then, you say that the price of wharfage in the Perth Amboy Dry Dock would be just the same as the price of wharfage in the Tietjen & Lang Dry Dock because the Perth Amboy company could make just as much profit by the use of those piers as the Tietjen & Lang could by the corresponding piers in its dry dock or plant. Is that what you mean to say? A I meant that, yes.”

He admitted that the investment represented by the plaintiff's yard was far less than that represented by a yard on the Hudson River (Case, 244), but testified (Case, 249) as follows:

“Q Your testimony is based on the assumption that the Perth Amboy yard could make the same profit from the use of the space and piers occupied by these two vessels, as your yard could have made, had your yard had such piers at its place? A I do.

Q And it is not based at all on the reasonable value of the space occupied by those vessels? A It is not.”

It appears, therefore, that the witness' testimony was not directed to establish the reasonable value of the space occupied by the defendants' vessels, but it was a guess at the profits lost by the plaintiff by reason of such occupancy.

Assume for the moment that such is the right measure of damages; nevertheless, there isn't a word of testimony in the record that the plaintiff lost any profits, made any profits during the time in question, or would have made any had the defendants' ships not been there. Not only is there no such testimony, but this very witness Dendel testified as follows (Case, 245):

“Q The shipyard business has not been profitable in recent years? A It has not.

Q Is that true of all shipyards in and about New York harbor, so far as you know?

A As far as I know of.

Q They have not made a profit? A They have not.

Q And the effort has been to do almost any work, just to keep the overhead down and the force together and the yard occupied? A That is so.”

So this witness himself, by his own testimony, makes his opinion inadmissible.

The witness Bonnett likewise had experience only in shipyards in Brooklyn and on the Hudson River in New York Harbor. He admitted the value of the plaintiff's plant and the consequent interest on the investment was far less than that of the plants with which he was connected (Case, 256-257). He had the same theory as to loss of profits as did the witness Dendel, and yet he testified (Case, 259):

“A I don't think there has been any profit, so you can't talk about this.

Q There hasn't been any profits in any of these yards? A No.

Q So far as you know? Why hasn't there been any profits? A Business conditions have been such that they simply don't make any.”

Whether an expert witness has entitled himself, by reason of his qualifications, experience,

and by the similarity of the facts used by him as a basis of comparison, to give his opinion in evidence, is a preliminary question to be decided by the Trial Court. Both of these witnesses were undoubtedly experienced shipyard men in New York Harbor proper, but the Trial Judge should have found that their efforts to assimilate conditions in Perth Amboy with those with which they were familiar were not sufficient to entitle them to give their opinions. It follows, therefore, that their opinion evidence should have been excluded, and that the motion to strike out their testimony should have been granted.

V.

The Trial Judge should have charged the defendants' request that there was no competent evidence on which the jury could award the plaintiff more than nominal damages for the claim for use of piers, upland and wharfage space.

This was the defendants' twenty-first request to charge (Case, 687). That such request should have been charged follows directly from what we have said about the testimony of Messrs. Dendel and Bonnett. That was the only testimony on this subject. As we have seen, that testimony was based on the theory that the unreasonable occupancy of the space interfered with the profits of the plaintiff's business to the tune of \$125.00 per day per ship. There is no evidence in the case that the plaintiff's business made any profits during the period in question, and, on the other hand, there is the testimony of both Messrs. Dendel and Bonnett that none of the shipyards in the Port of New York was at that time making any profits at all. The witnesses expressly disclaimed the basing of these figures on the rea-

sonable value of the space occupied. The evidence being that no profits were made, there could be no loss of profits. The testimony of the experts, being predicated upon loss of profits, was, therefore, wholly inapplicable to the actual situation, leaving no evidence whatsoever as to the reasonable value of the space occupied. It follows, therefore, that the request that no more than nominal damages should be allowed should have been charged.

VI.

The Trial Judge erred in ruling that the plaintiff was entitled to go to the jury on its right to recover nine different items of labor alleged to have been performed.

The grounds of appeal which present this point are printed on pages 16 to 20, *supra*.

The contracts in question provided (Case, 16):

“7. You to pay roll costs, of all labor used in scrapping, including assistant foremen, timekeeper and day and night watchman, in actual charge of this work only. Also labor in removing material from yard.

8. You to pay for services rendered by outside contractor for railroad.

9. Bills for labor to be rendered weekly. Bill for use of plant to be rendered monthly, and to be proportioned to work done. All bills to be paid within thirty days.”

With two exceptions to be hereafter noted the only evidence in support of this part of the plaintiff's claim is that given by the office manager, Mr. Olsen. He testified that he supervised the making and sending out of bills to the defendants (Case, 339). The labor bills, in accordance with the contracts, were rendered weekly. They were itemized in great detail and

were only partly paid. The items to which exception was taken by the defendants were noted on the bills as rendered (Case, 342-343). The bills, with the objected-to items so noted thereon, were returned by the defendants to the plaintiff. Mr. Olsen and counsel for the plaintiff insisted on calling these objected-to items as deductions from the plaintiff's bills. Obviously, the only significance of the notations on the plaintiff's bills was to make it plain that the defendants were objecting to the noted items and evidencing the fact that the money tendered in payment was tendered in payment only of the unobjectionable items on the plaintiff's bills. All of the bills were admitted in evidence (P. 11 and P. 12). There were thirty-four bills in all with respect to the "Black Arrow" and thirty-three with respect to the "Philippines." For convenience, the witness Olsen had prepared a paper listing the items objected to by the defendants on the bills rendered with respect to the "Black Arrow" and a similar document with respect to the bills rendered in connection with the "Philippines." These two summaries were offered in evidence and were admitted on the following understanding (Case 346):

"Mr. Carey: I offer these in evidence.

Mr. McCarter: Now, I don't suppose that is really evidence, but I don't object to its being used for the convenience of the jury.

The Court: For the convenience of the jury and the attorneys, yes."

The groups of bills were Exhibits P. 11 and P. 12. They were not printed, pursuant to a stipulation which was printed in lieu thereof (Case, 809), which stipulation provided in part:

"2. Exhibit P. 11, if printed, would show, among other things, bills rendered by the plaintiff to the defendants for labor claimed

by the plaintiff to have been performed in and about the contract for the scrapping of the SS. 'Black Arrow,' and for other sums claimed by the plaintiff to be due from the defendants to it under the said contract.

3. All of the items listed in Exhibit P. 13 are taken from and appear on the aforesaid bills included in P. 11."

Exhibit P. 13 (Case, 810) is simply a selection of items appearing on Exhibit P. 11 (and bills for the "Black Arrow"), which the defendants by notation on the original bills signified their objection to, and made it plain that they did not pay. Exhibit P. 14 (Case, 813) is the same document with respect to the SS. "Philippines." Exhibit P. 15 (Case, 816) is a summary of the above-mentioned summaries, which was likewise admitted by consent for a limited purpose (Case 349):

"Mr. McCarter: I have no objection to that paper being used in the same way as the last two exhibits for our assistance.

Mr. Carey: I ask to have it marked on that understanding."

By this exhibit, the plaintiff classified and summarized the items appearing in Exhibits P. 14 and P. 15, into nine separate items, totaling in all, as to both vessels, \$813.31. As to each of the nine separate items, the defendants requested the Trial Judge to charge the plaintiff was not entitled to recover anything (Grounds of Appeal 50 to 58 inclusive).

Mr. Olsen testified that the several sums of money listed in Exhibit P. 15 were actually paid by the plaintiff. He did not claim or purport to know and, indeed, as office manager he could not very well not have, whether or not the labor claimed to have been performed had actually been performed. The plaintiff took the position,

however, in which it was supported by the Trial Judge, that the burden was on the defendants to justify their "deductions" from the plaintiff's bills. How erroneous is this position! Suppose the defendants had paid nothing and the plaintiff was suing for the cost of all of the labor performed under the contracts, can it be suggested that a *prima facie* case would have been made out by showing that bills had been rendered and that they would have been returned objected to *in toto*? No one can contend that in such a situation the burden would be on the defendants to prove that the work had not been performed nor was such work as under the contracts they were required to pay for. How is the situation altered by the fact that only part of the labor is unpaid and being sued for? The plaintiff should have produced evidence by witnesses having knowledge of the facts that the labor claimed to have been performed was, in fact, performed. It is true that in answer to questions from the Court, Mr. Olsen testified that the bills were made up from payrolls, which payrolls, in turn, were made up by Messrs. Patten and Ackerman. The payrolls were not produced, nor were Messrs. Patten and Ackerman, both of whom testified in the cause, asked to swear to the correctness of the payrolls. To permit the jury to find in favor of the plaintiff on each of these nine separate items is to permit them to base their verdict on the rankest hearsay and without any competent evidence. As to each of the nine items, the Trial Judge was specifically requested to charge that the plaintiff was not required to recover such item (Grounds of Appeal 50 to 58 inclusive). Each of these nine judicial rulings is plainly erroneous.

It is true that it appeared that the labor making wrenches was actually performed in making wrenches for deck bolts on the "Philippines" (Case, 365). It is also true that with respect to the item "use of steam" the witness, Gilbert, testified that he ordered it and that it was furnished for pumping out rain water which accumulated in the "Philippines" (Case, 137). The plaintiff, however, contracted the defendants, for a lump sum, should have the use of the plaintiff's plant, the contracts reading:

"We quote you * * * for the use of our plant for scrapping the SS. 'Philippines' as noted below."

The wrenches needed for the deck-bolts of the "Philippines" and for the steam for pumping out the "Philippines" were part of the plaintiff's plant, and the only compensation to which the plaintiff was entitled for the steam and the wrenches is the lump sum.

The word "plant" has been defined as follows:

Substances used in dressing a pulley belt in a manufacturing plant to keep the belt from slipping are a part of the "plant" within the Employer's Liability Act. *Riddle v. Bessemer Soil Pipe Co.*, 54 Southern 525, 526, 170 Alabama 559. Under the Alabama Employer's Liability Act, making a master liable for a defect in the ways, works, machinery and plant, a ladder used in doing the master's work is held to be part of the "plant." *Grasselli, etc. Co. v. Davis*, 52 Southern 35, 166 Alabama 471. Under the New York Employer's Liability Act, in which the same language is used, it was held that chain tongs used on a pipe machine were part of the plaintiff's "plant," the Court saying:

"The term 'plant' in its ordinary sense including whatever apparatus other than stock

in trade an employer uses to carry on his business. *McKeon v. Proctor, &c. Co.*, 135 N. Y. Supp. 291, 294."

Where an agreement indemnifying a contractor's surety provided that, in the event of the contractor's being unable to complete the contract, the contractor thereby assigned such "plant" as the contractor then owned or had upon the work to the surety, the term "plant" was sufficient to include lumber and other materials intended for use in the building in process of erection, together with horses, carts and harnesses used in connection with the work. *Wood v. United States Fidelity & Guaranty Co.*, 143 Fed. 424, 425. .

"Plant" as applied to a factory, is defined by the Century Dictionary to consist of "the fixtures, machinery, tools, apparatus, appliances, etc., necessary to carry on any trade or mechanical business or any mechanical operation or process." The Standard Dictionary defines it as "a set of machines, tools, etc., necessary to conduct a mechanical business, often including the buildings and grounds or, in case of a railroad, the rolling stock, but not including material or product; hence the permanent appliances needed for any institution, as a post office." The Imperial Dictionary defines the word to mean: "The fixtures, machinery, tools, apparatus, etc., necessary to carry on any trade or mechanical business. The locomotives, carriages, vans, trucks, etc., constitute the plant of a railway." In the Encyclopedic Dictionary, the words is defined: The tools, machinery, apparatus, and fixtures used in a particular business; that which is necessary to the conduct of any trade or mechanical business or undertaking." Webster's International Dictionary defines it: "The whole machin-

ery and apparatus employed in carrying on a trade or mechanical business; also sometimes including real estate and whatever represents investment of capital in the means of carrying on a business, but not including material worked upon or finished products; as the plant of a foundry, mill, or railroad." It will be noticed that the only definition including real estate is found in Webster's International Dictionary, and there it is qualified by the word "sometimes." That there may be instances in which courts will hold real estate to be a part of a plant cannot be doubted. The ground occupied by the factory or mill, or even that part adjoining the factory used for offices or warehouses, may be treated as a part of the plant, but a large tract of land, miles from the plant proper, to be used for the purpose of raising the raw material for use in the factory, has never been held to be a part of the plant. *Old Colony Trust Co. v. Standard Beet Sugar Co.*, 150 Fed. 677, 680.

A further objection appears to the validity of the first item, "labor handling tanks." Mr. Olsen testified (Case, 349) that the objection by the defendants to the items grouped under this head was on the ground that the charge was made for labor taking the tanks of gas and air used in the burning from the place where they were left by the trucks delivering them to the plaintiff to the vessels where they were used in the cutting operation. The contracts in question provided:

"2. We to furnish gas and oxygen for cutting, also use of hose and burning outfits required by Mr. Bernard."

The plaintiff does not furnish the gas and oxygen until it has brought the gas and oxygen to the place where it is to be used in accordance with the contract. Even assuming, therefore,

that the performance of this labor were proved, the cost of moving the tanks of gas and air from the point where they left the trucks to the steamer was no more chargeable to the defendants than the cost of moving them to the gate of the plaintiff's plant. The plaintiff's obligation to furnish the gas and air required to get the tanks containing the gas and air to their points of use. The labor in moving the gas and air from wherever the tanks were filled to the point of use is not labor used in scrapping within the terms of paragraph 7 of the contracts.

VII.

The Judge erred in his rulings as to the defendants' liability to pay for the salvaging of the SS. "Philippines."

In the course of the scrapping of the SS. "Philippines" a heavy copper pipe fell and broke a sea-cock in the bottom of the ship, which break admitted such a large quantity of sea-water that the ship was in danger of sinking and work was done by the plaintiff and moneys disbursed by it in patching the leak and pumping out the sea-water. The work done and the amount claimed therefor is admittedly reasonable, but the defendants disputed their responsibility for the accident. There is no doubt of the fact that the sea-cock was broken by a piece of heavy copper pipe falling on it. There is a conflict in the testimony as to what caused the copper pipe to fall. The plaintiff's witnesses Preacher and Peterson testified that they saw a pipe, although not the particular pipe in question, dropped, and warned Mr. Williams, an under-superintendent, to lower the pipe by rope and tackle, and Williams said that would be too slow (Case, 208, 273). This

was denied by Williams (Case, 473). Neither Preacher nor Peterson saw the accident. Connors, a witness for the plaintiff, was foreman in charge of the particular work. On direct examination he said (Case, 285) that the laborers shoved the particular piece of pipe over the top of the condenser, and that it fell and hit the sea-cock. On cross examination, he said that it did not drop directly from the cutting, and that he did not actually see the laborers do this, that he would have stopped it if he had seen it, but that he had just left the men and was going up the engine-room ladder (Case, 293). The defendants produced William Sofield, who was actually in charge of lowering the pipe. He said that they started to lower the pipe by rope, and the rope broke, so that the pipe fell (Case, 480). In the light of this conflicting testimony, the Trial Judge, in his general charge, charged the jury (Case, 679):

“If you find that that was due to the negligence of the defendants, or their agents, or their direct representatives, then, of course, the plaintiff is entitled to be reimbursed for what it cost him to float that ship again. You are to pass upon that; and when I say negligence, I mean lack of the care that an ordinary prudent person would exercise, and if it was due to lack of ordinary care of an ordinarily prudent person, that was responsible for the sinking, so-called, of that ship, and if that negligence flowed from the defendants or their agents or representatives, then the plaintiff would be entitled to be reimbursed for the cost of the salvaging of that ship.”

He was specifically requested by the defendants to charge in this connection, but refused to charge except with certain limitations (Case, 669):

“‘25. You cannot find the defendants liable to pay for the sum claimed for salvag-

ing the "Philippines" unless you find there was some negligence by persons who were employed by the defendants.' That is true. Subject to what I may say to you upon that subject in my general charge.

'26. If you believe that the fall of the pipe which broke the sea-cock that caused the flooding of the "Philippines" was due to the breaking of a rope rather than to the dropping of the pipes, as testified to by the plaintiff's witnesses, then you must find the defendants not liable to pay the sum claimed for salvaging that ship.'

That is true, if the breaking of the rope, in case it was the breaking of the rope that caused that damage, was not due to the negligence or the express direction of the defendants, or the defendants' agents or supervisor."

The Court's refusal to charge these two requests specifically, as requested, was made the basis of the 70th and 71st grounds of appeal. The Court's attention is particularly invited to the qualifications placed upon the 26th request. These qualifications were improper because there was absolutely no evidence in the case that the breaking of the rope was due to the negligence of the defendants or their employees. As we have seen, the testimony was conflicting, the plaintiff's witnesses saying that the workmen cut and dropped the pipe, the testimony on behalf of the defendants, on the other hand, was that the particular pipe was being lowered by a rope which broke. Obviously, under the authorities cited under Point VI, *supra*, the rope was part of the plant, which it was the duty of the plaintiff to furnish, and any defect in which was the plaintiff's fault, so that any damage caused by such defect is damage for which the plaintiff is responsible and the defendants are not. As there was no evidence with respect to the rope

except that of the witness Sofield, who said simply that the rope was weak, and that they had difficulty in getting good appliances, there is no evidence that the breaking of the rope was due to any want of care on the part of any person for whose acts the defendants would have been responsible.

It was error, therefore, not to charge the twenty-sixth request specifically as requested.

The judgment should be reversed.

Respectfully submitted,

G. W. C. McCARTER,
Of Counsel with Appellants.

October term, 1926.

SUPPLEMENT.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

PERTH AMBOY DRY DOCK COM-
PANY,

vs.

HARDEN L. CRAWFORD, *et al.*,
partners, &c.

Appeal from a decree of the Court of Chan-
cery.

For the appellants, George W. C. McCarter.

For the respondents, Thomas G. Haight and
William H. Carey.

PER CURIAM.

The parties to this litigation entered into con-
tracts by the terms of which the complainant
agreed that two vessels belonging to the defend-
ant should be moored at the dry dock plant of
the complainants in Perth Amboy, in order that
they might there be "scrapped." The time limit
within which, as the complainant claims, the
scrapping of these vessels was to have been com-
pleted and removed from its plant having ex-
pired and the two vessels at that time having
been only partly dismantled, the present bill was
filed by the complainant, praying a decree direct-
ing the defendants to forthwith remove their
vessels and that a mandatory injunction should
be issued against them so directing.

When the hearing was completed the Vice-
Chancellor orally expressed the view that the
complainant was entitled to the relief sought

and that it was the duty of the defendants to see that both vessels were taken away. He then added: "It may be that after both sides have considered the view I have expressed they can arrive at some amicable arrangement," and counsel for the defendants then announced, in open court, that his clients would remove their vessels from the complainant's plant as speedily as possible, and this was done by them shortly after the hearing was concluded. The pronouncement of the Vice-Chancellor was made on the 17th of July, 1924, and on the 30th of December of that year, long after the vessels had been removed by the defendants, a decree *nunc pro tunc* was advised, ordering, adjudging and decreeing "that the defendants forthwith and as speedily as possible remove the said vessels referred to in the bill of complaint from the complainant's plant at Perth Amboy." The decree further adjudged costs against the defendant and a counsel fee. From this decree the defendants have appealed.

In order to be entitled to appeal from a decree of the Court of Chancery, it must appear that the appellant has been aggrieved by it. (*Coryell, Ex., v. Holcombe*, 9 N. J. Eq., 650; *Green v. Blackwell*, 32 N. J. Eq., 768; *Beckhard v. Rudolph*, 68 N. J. Eq., 749.) And, as was stated in the case first cited, where the decree appealed from has been executed, the object of it attained, and there is nothing upon which a judgment of reversal could operate, no appeal will lie. In that case the appellant sought to bring up for review an order directing the issuing of process to bring in parties to answer for an alleged contempt. Prior to the taking of the appeal the process was issued, the appellants were brought before the court, entered their appearance according to the rule of the court, and answered

the interrogatories exhibited before the master. In this situation this court held that, if the appeal should be maintained and the order appealed from set aside, the appellants could derive no benefit from our judgment, the reason being that, as the order sought to be reviewed had been executed, a reversal thereof would be the pronouncing of a nugatory and idle judgment which the court would be without power to enforce. The doctrine expounded in this case is declared in *Green v. Blackwell, supra*, to be in uniform accordance with the practice of this court and was affirmed in this later case. From what has been said, it is apparent that the appellants are not aggrieved by so much of the decree as directs them to do something which they had already done at the time the decree was actually signed.

The propriety of that part of the decree which imposes costs and counsel fees upon the defendants has not been discussed by their counsel, and, therefore, has not received consideration from us.

The decree under review will be affirmed.

Endorsed:

“Filed Oct. 19, 1925.

THOMAS F. MARTIN,
Clerk.”



