INDEX.

PAGE

Complaint 1
Notice of Motion to Dismiss 33
Order 34
Answer of Defendant, Lowy Laboratory, Inc. 35
Replication 39
Stipulation to Take Testimony 53
Opinion of Vice Chancellor Backes 111
Interlocutory Decree 116
Notice of Appeal (Filed Oct. 14, 1922) 120
Petition of Appeal (Filed Nov. 3, 1922) 121
Answer to Petition of Appeal (Filed Nov. 10, 1922) 124
Final Decree (Filed Dec. 10, 1922) 125
Notice of Appeal (Filed Dec. 21, 1922) 128
Petition of Appeal 130
Answer to Petition of Appeal (Filed Jan. 25, 1923) 131

TESTIMONY.

For Complainant:

Examination before Trial:

Richard E. Kohn:

Direct 40
Cross 49

Examination at Trial:

Otto Lowy:

Direct 55, 103
Cross 61
Re-Direct 66

FOR DEFENDANT:

PAGE

FRANCIS A. STANTON:
Direct 68
Cross 88
Re-Direct 92
Re-Cross 93
JAMES R. STANTON:
Direct 94
JOHN SCHUEMANN, JR.:
Direct 95
Cross 98
EDWARD STANTON:
Direct 99
Cross 102

FOR COMPLAINANT IN REBUTTAL:

CAMILLA LOWY:
Direct 108
Cross 110

EXHIBITS.

Exhibit 1.—Agreement between William V. McMenimen and Doctor Otto Lowy, dated September 3rd, 1919; made part of the Complaint and printed at 8

Exhibit 2.—Assignment by Otto Lowy to Lowy Laboratories, Inc., dated February 18, 1920; made part of the Complaint and printed at 17

Exhibit 3.—Affidavit of Lowy Laboratory, Inc., dated February 18, 1920; made part of the Complaint and printed at 20

Exhibit 4.—Memorandum of Agreement between Lowy, Squibb and the Inventor, dated July 1, 1921; made part of the Complaint and printed at 21

Complaint

(Filed November 12, 1921.)

IN CHANCERY OF NEW JERSEY.

To His Honor Edwin Robert Walker,
Chancellor of

The State of New Jersey:—

Humbly complaining shows unto your Honor, your orator Otto Lowy, of the City of Newark, County of Essex and State of New Jersey.

1. Complainant as the result of experimental and research work, produced a new and useful process for permanently liquifying powdered arsenical compounds, and on May 3, 1919, complainant filed an application describing his product and process for preparing same in the United States Patent Office; and on October 4, 1919, he filed a continuing application in the said patent office.

2. On September 3, 1919, William V. McMenimen, of the Borough of Manhattan, in the City of New York, and state of New York, desired to purchase all the right, title and interest of the complainant in and to said invention and the patent application therefor, and desired to have the sole and exclusive right to commercialize said permanently liquid arsenical compounds.

3. Complainant and the said McMenimen after some negotiations entered into an agreement in writing duly executed by complainant and the said McMenimen relating to the sale of the

said invention by the said complainant to the said McMenimen, a copy of which said agreement in writing is hereto annexed, marked Ex. 1 and made a part hereof, and to which complainant begs leave to refer.

4. Complainant agreed to sell to said McMenimen and to transfer and assign his whole and entire right, title and interest in and to the said invention and the patent application therefor, and in and to all improvements upon said invention, and of any and all applications in the United States, or other countries, which may result from said invention or improvements, including the issues of any and all patents which may be applied for; and agreed to make the assignment to a corporation to be designated by the said McMenimen and to be thereafter organized for the manufacture and sale of the said arsenical compounds; upon two conditions: first, that the corporation should assume and carry out the obligations entered into by the said McMenimen and the complainant, and second, that the corporation should have sufficient financial ability for the purpose.

5. The said McMenimen agreed to pay to complainant the sum of $4,000.00 upon execution of the aforesaid agreement in writing, which amount has been paid; and also agreed that there should be paid to the complainant within a certain period and upon certain conditions, as provided in Par. 7 of the said agreement in writing, to which reference is made, the additional sum of $11,000.00, part of which has been paid in money and the balance adjusted by issue of stock of Lowy Laboratory, Inc. to complainant.

6. The said McMenimen also agreed to pay to

the complainant an annual royalty of ten per cent of the gross sales of the product to be made in accordance with said invention in the United States for all sales not exceeding 100,000 ampules, and on sales of over 100,000 ampules, there should be a decrease of two percent for 100,000 until a minimum of two per cent on the amount of gross sales should be reached.

7. It was also agreed by the said McMenimen to pay to the complainant two per cent on the gross sales of the corporation to be organized, derived from preparations other than said arsenical compound, and other than the sale of preparations on which the corporation should be required to pay a patent or established trade name royalty.

8. It was further agreed by the said McMenimen that the complainant should have a right to inspect all the books of the corporation at all convenient hours, and to have access to and to make true copies therefrom, and that the royalties aforesaid should be paid in quarterly installments.

9. It was also agreed by the said McMenimen that the corporation thereafter to be formed would not contract to sell to any firm, persons or corporation, for the purpose of lessening the amount of gross sales on which the royality to be paid to the complainant is based.

10. It was also agreed by the said McMenimen that all sales, transfers, license and assignments thereafter to be made of the patents aforesaid in the United States or foreign countries, should be made subject to the royalties aforesaid.

11. It was further agreed by and between the

parties to the said agreement in writing, that the contract should continue in force for the period of thirty years in the United States, and in foreign countries for the duration of the patents procured in each country.

12. The complainant assented to the various agreements aforesaid made by the said McMenimen.

13. On February 18, 1920, complainant executed and delivered to Lowy Laboratory, Inc., a corporation which had been organized by the said McMenimen and others, under and by virtue of the Laws of the State of New Jersey, a deed of assignment of all his right, title and interest in and to the application for Letters Patent as aforesaid, and all Letters Patent and extensions thereof which have been or may be granted on said applications; a copy of which said deed of assigment is hereto annexed and made a part hereof, and to which complainant begs leave to refer, and is marked Ex. 2.

14. On February 18, 1920, Lowy Laboratory, Inc., the said corporation, executed and delivered to complainant an agreement in writing whereby it agreed to carry out and perform the terms and conditions, covenants and agreements set forth in the said agreement in writing made between complainant and said William V. McMenimen, dated September 3, 1919; a copy of which said undertaking by the said corporation is hereto annexed, marked Ex. 3, and complainant begs leave to refer to the same.

15. Complainant alleges that the said corporation is in arrears with the payment of royalties, and that he has been unable to obtain from the said corporation any statement of the sales

made and any payment of royalties since about January 6, 1921.

16. Shortly prior to July 1921, complainant was requested by the said corporation through certain of its officers and agents, to interest himself in making a contract between the said corporation and a certain other corporation known as E. R. Squibb & Sons; it being represented to complainant that Squibb & Sons desired to acquire the sole and exclusive right to make, use and sell the said inventions in the United States.

17. It was the subject matter of conversation between complainant and certain of the officers and agents of the said Lowy Laboratory, Inc. that the proposed contract with E. R. Squibb & Sons might have some effect upon the royalty to be paid to complainant, and complainant was led to believe by what was said to him, that if he should consent to the proposed contract to be made with E. R. Squibb & Sons, the royalty to be paid to him should be adjusted upon an equitable basis.

18. On July 1, 1921, a contract in writing was entered into between Lowy Laboratory, Inc., a corporation as aforesaid, and E. R. Squibb & Sons, a corporation as aforesaid, and complainants, a copy of which contract in writing, marked Ex. 4, is hereto annexed, and complainant begs leave to refer to the same.

19. In and by said last mentioned contract in writing the said Lowy Laboratory, Inc. did grant to E. R. Squibb & Sons the sole and exclusive license to make, use and sell the aforesaid inventions and improvements and the products thereof in the United States, and to sell the products when manufactured by Squibb in the

United States in foreign countries, provided such sale does not operate to invalidate the foreign patents of Lowy Laboratory, Inc. for the said invention.

20. In and by the said contract in writing last mentioned, the said E. R. Squibb & Sons agreed to pay to Lowy Laboratory, Inc. the following royalties:—

(a) For the plain arsphenamine solution, a royalty of forty-five cents for each gram of arsphenamine contained in the solution sold by Squibb calculated according to analysis.

(b) A royalty of $1.00 per gram for each gram of silver arsphenamine contained in solution sold by Squibb calculated according to analysis.

(c) A royalty for each gram of any other arsenobenzol derivative which may be made into solution by the processes covered by said Letters Patent, or which embodies the inventions thereof, and sold by Squibb at a rate to be hereafter agreed upon, but which shall bear substantially the same ratio to the net profit from the sale of said solution as in the cases of the solutions referred to in paragraphs a and b.

21. It was further agreed in the said last mentioned contract that the royalty should be paid quarterly within twenty days after the first day of January, April, July and October of each year.

22. It is recited in the said last mentioned agreement that the complainant admits full knowledge of the terms and provisions of the same, and consents and agrees to the same; and complainant alleges that he entered into said agreement relying upon the representation and promises and understandings as aforesaid with the

officers and agents of Lowy Laboratory, Inc.

23. Complainant alleges that since the execution of said contract with E. R. Squibb & Sons, Lowy Laboratory, Inc. has refused to pay any royalties to complainant, and has refused to give him any account of sales, and has refused to account with him and has refused to permit him to examine its books and its officers have stated to complainant that he has no contract with Lowy Laboratory, Inc., and that he abandoned said contract by consenting to the contract made with E. R. Squibb & Sons as aforesaid.

Complainant is without adequate remedy in the courts of law, and therefore, prays:—

1. That this honorable Court may determine any questions of difference between the parties relating to the construction of the said agreement in writing made by and between complainant and William V. McMenimen, and assumed by said Lowy Laboratory, Inc., and any question relating to the construction of the agreement made by complainant in consenting to the exclusive license given by Lowy Laboratory, Inc. to E. R. Squibb & Sons on July 1, 1921.

2. That this court may declare the rights of complainant and Lowy Laboratory, Inc. in the said several agreements in writing, that is, in the agreement in writing made by and between complainant and William V. McMenimen and assumed by Lowy Laboratory, Inc., and the agreement in writing of the Lowy Laboratory, Inc. with E. R. Squibb & Sons made on July 1, 1921, and assented to by complainant.

3. That said Lowy Laboratory, Inc. may be required by the decree of this honorable Court to account for all sales of the products of said

inventions made by it since it undertook to carry out the agreement aforesaid made between complainant and William V. McMenimen.

4. That the said Lowy Laboratory, Inc. may be required by the decree of this honorable Court to pay to complainant such amount as may be determined by this Court to be due to Complainant and payable to him as and for a royalty upon said patented invention.

5. That a writ of subpoena may issue commanding William V. McMenimen, Lowy Laboratory, Inc.,, a corporation, defendants, to answer this bill of complaint and abide by such decree as this Court may make in the premises.

FRANK E. BRADNER,
Solicitor for and of counsel
with Complainant.

Exhibit 1.

AGREEMENT entered into this third day of September, 1919, by and between William V. McMenimen, 140 Cedar Street, Borough of Manhattan, New York, New York, party of the first part, and Doctor Otto Lowy, 190 Clinton Avenue, Newark, County of Essex, State of New Jersey, party of the second part, hereinafter called the "Doctor".

WHEREAS, the Doctor has spent much time and money in experimental and research work and now claims to have produced a new and useful process for permanently liquifying powdered arsenical compounds, such as arsphenamine and the like, and believes he has perfected a product comprising such arsenical compositions in a per-

manent liquid state suitable for commercial use, and

WHEREAS, the said Doctor has, on or about the third day of May 1919, filed an application, describing said product and the process of preparing same, in the United States Patent Office, requesting the issuance of Letters Patent thereon, said application bearing Serial number 294,-465, and

WHEREAS, the party of the first part is desirous and anxious to purchase all right, title and interest in and to said invention and the patent application therefor, and of having the sole and exclusive right to commercialize said permanently liquid arsenical compounds,

NOW, THIS AGREEMENT WITNESSETH, that in consideration of the sum of Four Thousand Dollars ($4,000.) paid to the Doctor upon the execution of this agreement, the receipt whereof is hereby acknowledged, and the further payment hereinafter mentioned,

FIRST, That the Doctor will sell, transfer and assign the whole and entire right, title and interest in and to the aforesaid invention and the patent application therefor, together with the whole and entire right, title and interest in and to all improvements upon said invention and of any and all applications in the United States or other countries, which may result from said invention or improvements thereon, including the issue of any and all patents which may be applied for, issued or granted, for the invention or improvements aforesaid, in the United States or elsewhere, said assignment shall be made by the Doctor to a corporation, designated by the party of the first part, to be hereafter

organized for the manufacture and sale, etc., of said arsenical compound upon their assuming and carrying out the obligations herein contained; said corporation shall have sufficient financial strength for said purpose.

SECOND. That immediately upon the signing of this agreement the Doctor will prepare for distribution to the medical profession one thousand (1,000) ampules, properly boxes, with hoses, filter and needle attached, as per sample submitted.

THIRD. That the Doctor will keep a detailed cost sheet of labor and materials used in preparing said one thousand (1,000) ampules and furnish a copy of the same to the party of the first part; and further that the Doctor will prepare a list of suitable physicians, surgeons, institutes and laboratories to whom these thousand ampules may be sent and submit said list to the party of the first part, who shall designate to whom they shall be sent.

FOURTH. That the party of the first part will forward and distribute said one thousand (1,000) ampules, or as much thereof as he deems advisable, with instructions as to use, as prepared by the Doctor.

FIFTH. That the party of the first part will, after the distribution of said samples, endeavor to ascertain from the medical profession, the merits of said invention and product and convince himself of the validity of the patent and its commercial features.

SIXTH. That upon the signing of this agreement, the Doctor will permit disclosure of the process to the patent attorney or attorneys of the party of the first part, and will furnish to

said attorney or attorneys a true and correct copy of the application filed in the United States Patent Office, as well as a full and perfect description of the said invention and the method of working same, so as to enable to be made proper researches, examinations of the art and opinions of the validity of the patent, etc., as well as the study of the manufacture in this and other countries.

SEVENTH. That after the delivery of said one thousand samples to the party of the first part, he shall have a period of sixteen (16) weeks in which to make such examinations; and that upon the party of the first part deciding, on or before said sixteen weeks, to exercise the option herein contained, then upon paying the additional sum of Eleven Thousand Dollars ($11,000.00) to the Doctor, the Doctor will then execute the necessary assignments, transfers, etc., in accordance with the terms of this agreement; It is understood and agreed that time shall be of the essence of this option.

EIGHTH. That the party of the first part will then organize a corporation of sufficient financial strength for the proper manufacture, sale, improvement and development of the aforesaid inventions, to whom said assignment shall be made as hereinbefore mentioned.

NINTH. That there shall be paid to the Doctor an annual royalty of ten per cent (10%) of the gross sales in the United States for all sales not exceeding one hundred thousand (100,000) ampules, and that on sales of over one hundred thousand (100,000) ampules, said royalty shall decrease two per cent (2%) per one hundred thousand (100,000) ampules until a minimum

of two per cent (2%) on the amount of gross sales is reached, to wit:

Sales of

1 to 100,000 ampules	10%
100,001 to 200,000 ampules	8%
200,001 to 300,000 ampules	6%
300,001 to 400,000 ampules	4%
400,001 ampules and over	2%

that on all sales outside of the United States the Doctor shall be paid an annual royalty of five per cent (5%) of the gross sales for all sales not exceding one hundred thousand (100,000) ampules, and that on sales of over one hundred thousand (100,000) ampules said royalty shall decrease one per cent (1%) per one hundred thousand (100,000) ampules, until a minimum of one per cent (1%) of the amount of gross sales is reached, to wit:

Sales of

1 to 100,000 ampules	5%
100,001 to 200,000 ampules	4%
200,001 to 300,000 ampules	3%
300,001 to 400,000 ampules	2%
400,001 ampules and over	1%

It is agreed that where said product is manufactured or sold outside of the United States, and a royalty shall be required to be paid to any person, firm or corporation other than the Doctor by reason of infringement of other patents or protection therefrom, the percentage of royalty due the Doctor shall be calculated on the amount of the gross sales after deducting the royalties so paid.

In addition to the foregoing royalties there shall be paid to the Doctor two per cent on the

gross sales of the corporation derived from preparations other than that said arsenical compound hereinbefore referred to, and other than the sale of preparations on which the said corporation is required to pay a patent or established trade name royalty.

TENTH. That the Doctor shall have the right to inspect all the books of such manufacturing corporation at all convenient hours, to have access to and to make true copies therefrom, and the aforesaid royalties shall be paid in quarterly instalments.

ELEVENTH. That upon the payment of said Eleven thousand dollars ($11,000.00) as hereinbefore mentioned, the Doctor will write up and deliver to the party of the first part a complete and full recital of all experiments performed, researches made, steps taken and results ascertained in his experiments relating to this product.

TWELFTH. That the Doctor shall have the right to supervise the preparation of the product in the United States or nominate one so to do, and that a fair value for such services shall be paid to the Doctor or his nominee.

THIRTEENTH. That the Doctor shall have the right to designate suitable trade names and must do so within a reasonable time.

FOURTEENTH. That all advertisements shall be ethical and any objection thereto on the part of the Doctor must be voiced within a reasonable time.

FIFTEENTH. That said corporation hereafter to be formed will not contract to sell to any firm, persons or corporation for the purpose of lessening the amount of the gross sales on which

the royalty aforementioned to be paid to the Doctor is based, and that it will use its best endeavors and utmost exertions to introduce said product to trade and patronage and in general to commercialize the same,

SIXTEENTH. That all sales, transfers, licenses and assignments shall be made of the patents in this or foreign countries subject to the royalties herein contained, and all reversionary rights other than those provided and prescribed for by statutes and laws of this and foreign countries are to be the property of the Doctor.

SEVENTEENTH. That the Doctor will at any and all times do every act and thing which may be necessary for the purpose of obtaining patents, registrations, copyrights, etc., in this and foreign countries, and will assist and aid to his utmost in prosecuting and defending such applications, registrations, patents, trade mark, etc.

EIGHTEENTH. That the party of the first part obligates himself to the procurement where possible of all patents, copyrights, registrations of trade names and marks and labels, by said corporation to be hereafter formed, when and where deemed expedient and necessary.

NINETEENTH. That the Doctor shall be privileged and permitted to use the laboratories of the party of the first part for experimental and research purposes and that any improvements or inventions, developments, etc., relating to arsenical compounds discovered or produced by the Doctor or by the Doctor and his assistants, shall become the property of the party of the first part and the Doctor agrees to make the proper assignments thereof.

TWENTIETH. That any inventions relating to

other than arsenical compounds perfected by the Doctor or by the Doctor and his assistants shall be first offered to the party of the first part at the minimum price asked by him of other concerns manufacturing or selling along similar lines.

TWENTY-FIRST. That during the manufacture of this product the Doctor will keep the process of preparing the same secret until permitted otherwise to do by the party of the first part.

TWENTY-SECOND. That the Doctor will use every endeavor to further improve the process and product, increase, if possible, its medicinal properties, lessen all possible dangers and endeavor to make the manufacture more economical and in general develop the process to the highest degree of perfection, provided, however, that said obligation shall be no more than a moral obligation.

TWENTY-THIRD. That the life of this agreement shall be for a period of thirty years in the United States, and in foreign countries for the duration of the patents procured in each country, time to run from date of patent protection in each country respectively.

TWENTY-FOURTH. That the use of the word "ampule" herein shall be deemed to mean an ampule sufficient in size to properly contain the necessary amount of the product to comply with all health regulations.

TWENTY-FIFTH. That the mention in this agreement of either of said parties, by name or otherwise, shall be deemed to include his executors, administrators and assigns, unless otherwise inconsistent with the terms and provisions hereof.

TWENTY-SIXTH. Said corporation, when or-

ganized, and upon assignment to it of said patent or rights therein, shall deliver to the Doctor an agreement binding itself to carry out the provisions of this contract, and a further clause agreeing that it will at all times conduct the affairs of the corporation for the purpose of carrying out its obligations and conserving its assets.

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

Signed, sealed and delivered in the presence of

WM. V. MCMENIMEN, (L.S.)
OTTO LOWY, M. D. (L.S.)

RICHARD E. KOHN,
Master in Chancery of New Jersey.

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

On this third day of September A.D. 1919, before me personally came William V. McMenimen, to me known and known to me to be one of the individuals described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

RICHARD E. KOHN,
A Master in Chancery of New Jersey.

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

On this third day of September A.D. 1919, before me personally came Doctor Otto Lowy, to me known and known to me to be one of the

individuals described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

RICHARD E. KOHN,
A Master in Chancery of New Jersey.

Exhibit 2.

ASSIGNMENT

WHEREAS, I, OTTO LOWY, a citizen of the United States, and a resident of the City of Newark, County of Essex, State of New Jersey, have invented an improvement in Arsenical Preparations and Methods of producing the same, for which I filed an application for Letters Patent of the United States of America based thereon in the United States Patent Office, on the fourth day of October 1919, Serial Number 328,485, which application is a continuation in part of a previously filed application entitled "Processes for Liquidifying Arsenical Compounds," filed May 3, 1919, Serial Number 294,465; and

WHEREAS, the LOWY LABORATORY, INC., a corporation existing under and by virtue of the laws of the State of New Jersey, and having an office for the transaction of business at 95 River Street, Hoboken, New Jersey, is desirous of acquiring the entire right, title and interest in and to the said inventions in and throughout the United States of America, its territories and dependencies, and all countries foreign thereto, and in and to said applications for Letters Patent, and in and to any and all Letters Patent of the United States of America and of countries foreign thereto, which have been or may be

granted on said inventions or any of them, or on any part thereof, or on said applications for letters Patent or either of them;

NOW, THEREFORE, for One Dollar ($1.00) by each of the parties hereto to the other in hand paid, and for other good and valuable considerations, the receipt whereof is hereby acknowledged, I, the said Otto Lowy, have agreed to sell, assign and transfer, and do hereby sell, assign and transfer unto the said Lowy Laboratory, Inc., the entire right, title and interest in and throughout the United States of America, its territories and dependencies, and all countries foreign thereto, in and to said inventions, said applications for Letters Patent, and any and all Letters Patent and extensions thereof, of the United States of America and of countries foreign thereto, which have been or may be granted on said applications or either of them, or on any divisional, continuing, renewal, reissue or other application or applications based in whole or in part on said inventions or any of them, or any part thereof, or on said applications for Letters Patent or either of them:

TO BE HELD AND ENJOYED BY THE SAID LOWY LABORATORY, INC., its successors in business and assigns, to the full ends of the terms for which said Letters Patent or any of them have been or may be granted, as fully and entirely as the same would have been held and enjoyed by me had no sale and assignment of said interests been made; and I authorize and request the Commissioner of Patents of the United States of America to issue any and all Letters Patent of the United States which may be granted upon the said applications referred to above,

or any of them, or upon said inventions or any of them or any part thereof, to said Lowy Laboratory, Inc., and I hereby agree for myself for my heirs, executors and administrators, to execute without further consideration any further lawful documents, and any further assurances, and any reissue, renewal, divisional, or other application for Letters Patent of the United States of America and of countries foreign thereto that may be deemed necessary by said Lowy Laboratory, Inc., fully to secure to said Lowy Laboratory, Inc. its interest as aforesaid in and to said inventions or any of them or any part thereof, and in and to said applications for Letters Patent of the United States and of countries foreign thereto or any of them, and in and to said several Letters Patent of the United States and of countries foreign thereto, or any of them.

AND I do hereby covenant for myself and for my legal representatives, and agree with said Lowy Laboratory, Inc., its successors in business and assigns, that I have granted no license to make, use or sell the said inventions or any of them or any part thereof; that prior to the execution of this deed my right, title and interest in the said inventions have not been encumbered, that I then had good right and title to sell and assign the same, and I have not executed and will not execute any instrument in conflict herewith.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal this 18th day of February, 1920.

(seal) OTTO LOWY.

Complaint.

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

On this 18th day of February 1920, before me appeared the above named Otto Lowy, personally known to me and known by me to be the one who executed the foregoing instrument, and he acknowledged the same to be his free act and deed before me.

RUTH E. LUNDGRIST,
Notary Public of N. J.
(seal)

Exhibit 3.

In consideration of the execution of the foregoing assigment by Otto Lowy, said Lowy Laboratory, Inc. and William V. McMenimen do agree to and with the said Otto Lowy that the said Lowy Laboratory, Inc. will carry out and perform the terms and conditions, covenants and agreements set forth in a certain agreement made between the said Otto Lowy and William V. McMenimen dated September 3, 1919, a copy of which agreement is hereunto annexed and made a part thereof.

IN WITNESS WHEREOF, the Lowy Laboratory, Inc., has caused these presents to be signed by its President, attested by its Treasurer, and its corporate seal to be hereunto affixed, and the said William V. McMenimen has hereunto set his hand and seal, on this eighteenth day of February, nineteen hundred and twenty.

Signed, sealed and delivered }
in the presence of }

LOWY LABORATORY, INC.
WM. V. MCMENMEN.

FRANCIS L. STANTON, (L.S.) Treasurer.

President (L.S.)
WM. V. MCMENIMEN.

Exhibit 4.

MEMORANDUM OF AGREEMENT

Memorandum of agreement made and entered into this first day of July, 1921, between Lowy Laboratory, Inc., a corporation organized and existing under the laws of the State of New Jersey, and having a place of business at Newark, New Jersey, hereinafter referred to as "Lowy" E. R. Squibb & Sons, a corporation organized and existing under the laws of the State of New York and having a place of business at 80 Beekman Street, New York City, hereinafter referred to as "Squibb" and Dr. Otto Lowy, of Newark, New Jersey, hereinafter referred to as the "INVENTOR," witnesseth:

WHEREAS, Lowy represents and guarantees that it is the owner of certain inventions as set forth in certain patent applications of the United States, enumerated in Schedule "A" attached hereto, and

WHEREAS, Squibb is desirous of acquiring the sole and exclusive right to make, use and sell the said inventions in the United States.

NOW THEREFORE, in consideration of the premises, the terms and conditions hereof and for other good and valuable considerations, receipt of which is hereby acknowledged, the parties hereto have agreed and by these presents do agree as follows, to wit:

1. Lowy hereby grants to Squibb the sole and exclusive license to make, use and sell the aforesaid inventions and improvements and improvements and the products thereof in the United States, and to sell the products when manufactured by Squibb in the United States

in foreign countries, provided such sale does not operate to invalidate the foreign patents of Lowy for the said inventions.

2. Lowy further agrees to instruct Squibb fully in all details of its development of its said arsphenamine solutions such as heretofore have been marketed by Lowy, and Lowy represents and warrants that the processes of manufacture of such solutions have been developed to the point of being reliable commercial processes, yielding in the case of the plain arsphenamine solution a uniform product of definite arsenical content and otherwise satisfying the requirements of the United States Hygienic Laboratory, and that the cost of said process in the case of plain arsphenamine to Lowy at the present time does not exceed five cents (5¢) per ampule of six decigrams or under in lots of one thousand ampules. The process referred to in the next preceding sentence includes only the preparation of the solution from the salt, its stabilization and its treatment up to the point at which it is ready to be sealed in the ampules.

3. Squibb agrees to promptly provide full facilities for the manufacture of the arsphenamine solution licensed hereby and its extensive sale, to actively press the sale of said product with the medical profession advocating its use, and to use every effort to increase its sale to the greatest possible extent. As to the silver arsphenamine solution, Squibb agrees to use its best efforts to develop the product and if found to be satisfactory, to thereafter promote its sale as its merits may warrant. Squibb agrees to pay Lowy the following royalties (except as hereinafter provided):

(a) For the plain arsphenamine solution, a royalty of forty-five cents (45¢) for each gram of arsphenamine contained in the solution sold by Squibb calculated according to analysis.

(b) A royalty of one dollar ($1.00) per gram for each gram of silver arsphenamine contained in solutions sold by Squibb calculated according to analysis.

(c) A royalty for each gram of any other arsenobenzol derivative, which may be made into solutions by the processes covered by said letters patent, or which embodies the inventions thereof, and sold by Squibb, at a rate to be hereafter agreed upon, but which shall bear substantially the same ratio to the net profit from the sale of said solution as in the cases of the solutions referred to in paragraphs (a) and (b) above.

Said royalties due under this agreement are to be payable quarterly within twenty (20) days after the first days of January, April, July and October of each year throughout the continuance of this agreement. It is however, expressly provided that

1. If the lowest net price of arsphenamine sold by competitors of Squibb to distributors (excluding hospitals and the United States Public Health Service) in ampules containing six decigrams, shall fall below one dollar in lots of fifty ampules, the royalty payable by Squibb shall be reduced in direct proportion to the fall of price of arsphenamine below said price of one dollar; for example, if the said price of arsphenamine in ampules of six decigrams should fall to fifty cents (50¢) per ampule, the royalty payable by Squibb would be twelve

and one-half cents (12½¢) per ampule containing six decigrams of arsphenamine in solution.

11. In the event that Squibb should sell or furnish the plain arsphenamine solution licensed hereby, to hospitals or the United States Public Health Service at a special price below the average market price of arsphenamine sold by competitors to individual physicians in lots of 100 doses, no royalty shall be payable on such solution so sold or furnished.

3. Squibb shall be entitled to a royalty credit for any sales reported and upon which royalties have been paid, whenever such sales are not paid for because of breakage, defect, age or any other cause beyond the control of Squibb.

4. Resale of any of the solutions licensed hereby by Squibb shall not entitle Lowy to the payment of any further royalty.

5. In the event that the dose called for by the medical profession shall be increased above six (6) decigrams in the case of arsphenamine or two and one-half (2½) decigrams in the case of silver arsphenamine, the royalty payable shall in no event exceed twenty-five cents (25¢) per dose.

Squibb agrees to keep a set of books or records covering its operations under this license, which books or records and the plant where the solutions are made shall be open to inspection by Lowy or its representatives at all reasonable times, to an extent sufficient to determine the nature and extent of the operations of Squibb under this license.

4. Lowy grants to Squibb the exclusive right for a period of two years from the date hereof and the non-exclusive right thereafter during

the continuance of this agreement, to negotiate sales of or licenses under the patents or applications of Schedule "B," or any other patents in countries foreign to the United States which may be granted for the inventions disclosed in the applications of Schedule "A" at a sales price or royalty rate satisfactory to Lowy. It is agreed that out of the proceeds of such sales or licenses Squibb shall first be reimbursed the amount of its necessary expenses in negotiating such sales or licenses, and that the remainder shall be divided between Squibb and Lowy in the proportion of forty per cent (40%) to Squibb and sixty per cent (60%) to Lowy and that such shares shall be payable forthwith upon receipt thereof by either party. The assignees or licenses under the foreign patents of Schedule "B" shall be entitled to a non-exclusive license, without royalty, in the countries covered by their respective assigments or licenses, under any foreign letters patent that Squibb may obtain or control, for improvements upon the Lowy inventions during the term of this agreement.

5. Lowy guarantees Squibb against the claim of any persons claiming ownership of or title to the inventions, applications or patents under which this license is granted and agrees that it will defend Squibb against any such claims and will reimburse Squibb for any damages or expenses arising in connection therewith up to the amount theretofore paid by Squibb to Lowy for royalties under this agreement, Lowy agrees to bring such suits for infringement as it deems necessary, and, if such suits are not brought, Squibb shall have the right to bring suit in its own name against infringers. In the event of

suits for infringement being brought by Squibb, Lowy agrees to contribute ten per cent (10%) of the expense of such litigation, up to an amount correspounding to the royalty theretofore paid by Squibb to Lowy under this agreement. The recovery in any such suits shall be divided between Squibb and Lowy in the proportion they have contributed to the expense thereof. The expense of soliciting the United States applications for patents of Lowy and for soliciting and maintaining in force the foreign patents of Lowy shall be borne by Lowy.

6. It is further mutually understood and agreed that if Squibb should at any time or for any reason, except for cause beyond its control, cease the exploitation of the product to be made under said patents or the manufacture of arsphenamine solutions under this license, or in the event of any other breach of this agreement, which breach is continued in for sixty (60) days after notice, or has not been made within sixty (60) days after notice, this license shall be terminable by giving sixty (60) days notice in writing thereof; otherwise, this agreement shall continue in force for the life of the principal patent (corresponding to application, serial number 328,485), and after the expiration of said principal patent, Squibb shall have a non-exclusive license without royalty, under all of the letters patent issued upon any of the applications of Schedule "A." In the event that any patent or patents covered by this agreement or any claim or claims thereof is or are held invalid by a court of last resort or by final decision of a lower court of competent jurisdiction from which no appeal is taken, to an

extent sufficient to materially impair the exclusive rights granted thereby, then Squibb shall have the right, at its option, to terminate this agreement or to continue at the same rate of royalty, or a royalty to be agreed upon.

7. Squibb agrees that it will label the products made under this agreement to indicate that they are manufactured under the Lowy patents, or in some similar manner at the discretion of Squibb, the name Lowy being mentioned, and shall comply with the provisions of the United States statutes respecting patent marking.

8. Inasmuch as Squibb will be unable to enter the market immediately, it is mutually agreed that Lowy may continue to sell the products licensed hereby for a period of thirty (30) days after the signing of this agreement, or until Squibb is ready to enter the market, whereupon Squibb shall take over such of said Lowy products, the packages in which they are sold, and accessories sold with them, including arsphenamine on hand in original sealed containers which has not been made into solution as shall remain in Lowy's hands, at their cost to Lowy or at the market price, whichever is lower. Lowy shall not after the signing of this agreement manufacture the products licensed hereby in excess of its requirements of the next thirty (30) days succeeding the date hereof, nor shall Lowy solicit any new orders for the solutions licensed hereby.

9. Lowy agrees to give Squibb full information regarding any and all United States applications and patents covered by this agreement and regarding any corresponding foreign applications and patents, and to permit the duly authorized

attorneys of Squibb to advise and assist Lowy's duly authorized attorneys in the prosecution of such applications with a view to obtaining the broadest and best possible patent protection for the inventions covered thereby. This agreement shall not be binding upon Squibb until Squibb shall have had an opportunity of making a thorough investigation of the Lowy patent applications and of the Lowy process of manufacture and shall have notified Lowy in writing that it is satisfied therewith.

10. Each of the parties hereto undertakes to execute and deliver all necessary papers to carry out any of the provisions of this agreement. All notices shall be given by registered mail addressed to the last known post addresses of the parties.

11. It is further mutually agreed and understood that this agreement shall be binding upon and enure to the benefit of the successors in business of the parties hereto.

12. The Inventor hereby admits full knowledge of the terms and provisions of the foregoing agreement and consents and agrees to the same.

The Inventor hereby binds himself to assist to the best of his ability in carrying out the provisions of this agreement, to render such technical and other assistance as he is able and to commit no act calculated to nullify this agreement or to injure the interests of the parties thereunder.

The Inventor further agrees to assign to Lowy all inventions and letters patent based thereon for improvements upon the inventions of Schedule "A".

IN TESTIMONY WHEREOF the parties hereto have hereunto set their hands and seals and caused these presents to be executed by their duly authorized officers the day and year first above written.

LOWY LABORATORY, INCORPORATED,
By EDWARD R. STANTON,
President.

ATTEST:
JAMES R. W. STANTON,
Secretary.

E. R. SQUIBB & SONS,
By MORTON WINKLE,
Vice President.

WITNESS,
FRANK E. BARROWS.

STATE OF NEW YORK, }
County of New York. } ss.:

On this first day of July 1921, before me came Edward R. Stanton, to me known, who, being by me duly sworn, did depose and say that he resides in ; that he is the President of Lowy Laboratory, Inc., the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order.

ROBERT A. CANAAN,
Notary Public.

STATE OF NEW YORK, }
County of New York. } ss.:

On this 1st day of July 1921, before me came Theodore Weicker, to me known, who, being by me duly sworn, did depose and say that he resides in Stamford, Connecticut; that he is the Vice President of E. R. Squibb & Sons, the corporation described in, and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order.

ROBERT A. CANAAN,
Notary Public.

STATE OF
COUNTY OF } ss.:

On this first day of July 1921, before me personally came Otto Lowy, to me known and known to me to be the person described in and who executed the foregoing instrument and he acknowledged to me that he executed the same for the purposes therein mentioned.

ROBERT A. CANAAN,
Notary Public.

SCHEDULE "A"

SERIAL NO.	FILING DATE	TITLE
328,485	Oct. 4, 1919	Arsenical preparations and Methods of Producing the Same.

365,369	Mar. 12, 1920	Means and Method of Packing Administering Medical Arsenical Preparations.
432,081	Dec. 20, 1920	Arsenical Solutions and Methods of Preparing same.

An application in course of preparation specifically directed to Silver Arsphenamine Solution.

An application in course of preparation for Process of Preparing Arsphenamine Solution from Wet Stage.

All other applications which may be now or hereafter during the term of this agreement owned or controlled by Lowy Laboratory, for improvements on the inventions of the foregoing.

SCHEDULE B.

Argentine application	#21018/20	filed	May 20, 1920.
Australian "	#15636/20	"	May 14, 1920.
Austrian "	# 2676	"	June 1, 1920.
Belgian "	# 196	"	May 18, 1920.
Brazilian "	#16998	"	June 10, 1920.
Chilean patent	# 4410	dated	May 2, 1921.
Chinese application	.....	.....	
Czecho Slovakian appln.	# 3037/20	filed	April 21, 1920.
Cuban patent	# 4064	dated	Feb. 25, 1921.
Danish application	# 1177/20	filed	April 29, 1920.
French "	#126968	"	May 14, 1920.
German "	#50448	"	May 11, 1920.
British "	#10031/20	"	April 9, 1920.
Dutch "	#14578	"	April 19, 1920.
Indian "	# 5560/20	"	April 23, 1920.
Italian "	#38731	"	May 19, 1920.
Japanese "	#56451	"	April 26, 1920.
New Zealand patent	#43560/20	dated	Oct. 4, 1919.
Norwegian application	#20123	filed	May 8, 1920.
Peruvian "	.....	"	June 7, 1920.
Roumanian "	#40127	"	July 19, 1920.
Phillipine Islands appln.	.....	.....	
Spanish patent	#73288	dated	Aug. 21, 1920.
Swedish application	# 1956/20	filed	May 7, 1920.
Swiss "	# 5672	"	May 18, 1920.
Union of So. Africa appln.	# 410/20	"	April 29, 1920.
Russian application	.....	.....	
Portugese "	#11400	filed	April 29, 1920.
Porto Rican "	.....	.....	

Notice of Motion to Dismiss.
(Filed November 29, 1921.)

IN CHANCERY OF NEW JERSEY.

Between OTTO LOWY, *Complainant,* *and* WILLIAM V. MCMENIMEN and LOWY LABORATORY, INC., *Defendants.*	On Bill, &c.

TAKE NOTICE, That we will move before his Honor, Edwin R. Walker, Chancellor of the State of New Jersey, at Chancery Chambers, to be held in the City of Jersey City, on December 12, 1921, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, to strike out the whole or portions of said Bill for the following reasons, to wit:

1. The facts as alleged are insufficient to constitute and do not state a cause of action.
2. Complainant has adequate remedy at law.
3. The Court is without jurisdiction.
4. For the want of Equity.
5. The Complainant is not entitled to the relief prayed for.
6. The prayer for relief is vague, indefinite and uncertain.

GAEDE & GAEDE,
Solicitors for Defendant,
Lowy Laboratory, Inc.

To: FRANK E. BRADNER,
Solicitor for Complainant.

Order.

(Filed December 27, 1921.)

IN CHANCERY OF NEW JERSEY.

Between OTTO LOWY, *Complainant,* *and* WILLIAM V. MCMENIMEN and LOWY LARORATORY, INC., *Defendants.*	On Bill, &c.

Motion to dismiss the Bill of Complaint in the above cause having been given by the Defendants therein named, and the hearing of same having been continued to December 27, 1921, and the Court on said last mentioned date having heard the respective solicitors for the Complainant and Defendants thereon;

IT IS on this 27th day of December, 1921, ordered that said motions do stand over until the final hearing of said cause, with leave to said Defendants to make and renew said motions at the time of such final hearing;

And it is further ordered that the Defendants have until January 20th, 1922, to answer said Bill of Complaint.

E. R. WALKER,
C.

Respectfully Advised,
EUGENE STEVENSON,
V. C.

Answer of Defendant Lowy Laboratory, Inc.

(Filed January 7, 1922.)

IN CHANCERY OF NEW JERSEY.

Between OTTO LOWY, *Complainant,* *and* WILLIAM V. MCMENIMEN and LOWY LABORATORY, INC., a corporation, *Defendants.*	On Bill, &c.

The answer of the defendant Lowy Laboratory, Inc., a corporation.

This defendant, answering the bill of complaint, says that:

1. Paragraphs 1 to 14, inclusive, are admitted, but for further particularity reference is made to the several documents described in said paragraphs, copies whereof are attached to the bill of complaint.

2. Paragraph 15 is denied, except as herein expressly admitted.

This defendant on its books has credited complainant with the sum of $3,419.58 in royalties, as of July 1, 1921, based upon the provisions of said contract of September 3, 1919.

Under said contract this defendant is under no obligation to furnish complainant with statements of the sales made, although at the complainant's request it has prepared and submitted such statements to him as late as the end of September, 1921.

At all times the books of this defendant have been and now are open to the complainant's inspection, and at all times he has had and now has access to the same and full opportunity to make copies thereof.

From June, 1920, until October, 1921, the complainant was in constant attendance at the laboratory of this defendant, and was during all of that period thoroughly conversant with the details of this defendant's business and with its books, and knew and approved the amount of royalties from time to time accruing to the credit of his account in said books and the method of computing the same.

3. Paragraph 16 is denied. It was at the complainant's suggestion and due to his urgent and persistent efforts that this defendant was induced to and did enter into the negotiations with E. R. Squibb and Sons which resulted in the agreement of July 1, 1921. During all of the period of time occupied by such negotiations complainant was a stockholder in and a director of this defendant corporation, and such negotiations were carried on by the complainant not only on his own behalf and for his own interest, but also in behalf of and in the interest of this defendant.

4. It is admitted, as alleged in paragraph 17, that prior to the making of the Squibb contract, it was the subject matter of conversation between complainant and certain of the officers and agents of this defendant that the proposed contract would affect the royalty to be paid to complainant.

It is also admitted that, prior to making said Squibb contract, it was agreed between com-

plainant and this defendant that the royalty to be paid to complainant thereafter would be adjusted upon an equitable basis.

All of the other allegations of paragraph 17 are denied.

Prior to the making of the agreement of July 1, 1921, with E. R. Squibb & Sons, the said agreement of September 3, 1919, was rescinded by mutual consent of complainant and this defendant, in consideration of the execution of said Squibb contract, and it was mutually agreed that after the execution of the Squibb contract a new agreement would be made between complainant and this defendant by which this defendant would promise to pay to complainant such amount or proportion of the moneys to be received by it from E. R. Squibb & Sons, as might thereafter be agreed upon and upon such terms and conditions as might thereafter be agreed upon.

5. Paragraphs 18 to 21 are admitted, with reference for greater certainty to said agreement with E. R. Squibb & Sons, of July 1, 1921.

6. Paragraph 22 is admitted, except that it is denied that this defendant made any representations, promises or agreements except as hereinabove set forth.

7. Paragraph 23 is denied.

This defendant has endeavored to agree with complainant upon a schedule of royalty payments to be made to him out of moneys to be paid to this defendant by E. R. Squibb & Sons, and has endeavored to adjust such royalty payments upon an equitable basis, and has always been ready and willing to do so, but complainant has refused to do so and has demanded an

unjust, inequitable, unfair and excessive share of such moneys, which this defendant has refused to agree to pay.

8. On September 15, 1921, one Abram L. Konweiser of the City of Newark, Essex County, New Jersey, declared an interference against complainant in the United States Patent Office, which involves the patents scheduled in said agreement of July 1, 1921. Said interference is numbered 46390, and this defendant has been made a party thereto.

This defendant ought not to be required to pay to complainant any royalties or sums of money whatsoever until the validity of said patent is determined in said proceedings.

9. This defendant, pursuant to motion heretofore made and order laying the same over for final hearing, insists that the bill of complaint should be dismissed for the reasons urged upon said motion, which are set forth in the notice of said motion filed herein, and for other reasons.

LOWY LABORATORY, INC.,
By EDW. R. STANTON,
President.

Attest:
JAMES R. W. STANTON,
Secretary.

STATE OF NEW JERSEY, County of Hudson. } ss.:

The answer of the defendant Lowy Laboratory, Inc., was taken this 11th day of January, 1922, before me, under the common seal of said corporation, as by their seal thereto affixed appears.

DOUGAL HERR,
Master in Chancery of New Jersey.

Replication.

(Filed January 21, 1922.)

IN CHANCERY OF NEW JERSEY.

Between

OTTO LOWY,
Complainant,
and

WILLIAM V. MCMENIMEN and LOWY LABORATORY, INC., a corporation,
Defendants.

On Bill &c.

Complainant joins issue with Lowy Laboratory, Inc., upon the answer filed by it in the above stated cause.

FRANK E. BRADNER,
Solicitor of Complainant.

Examination before Trial.

(Filed April 21, 1922.)

IN CHANCERY OF NEW JERSEY.

Between

OTTO LOWY,

Complainant,

and

WILLIAM V. MCMENIMEN, et als.,

Defendants.

For the Complainant: MR. FRANK E. BRADNER, 31 Clinton Street, Newark, N. J.

For the Defendant, Lowy Laboratory, Inc., MESSRS. GAEDE & GAEDE, Hoboken, N. J., (MR. DOUGAL HERR).

RICHARD E. KOHN, a witness on behalf of the Complainant, being first duly sworn in my presence, was examined, pursuant to the attached stipulation of counsel, and testified as follows.

DIRECT EXAMINATION BY MR. BRADNER:

Q. Mr. Kohn, where do you live? A. In Newark.

Q. And what is your occupation? A. Lawyer.

Q. Are you related to Doctor Lowy? A. I am his brother-in-law.

Q. Have you acted in the capacity of legal adviser to him in this matter of his contract with Lowy Laboratory, Incorporated? A. I did.

Q. When did you commence to act in that

capacity for him? A. From the very beginning until almost the present time.

Q. I show you——

MR. HERR: Don't you think that's pretty indefinite?

MR. BRADNER: You can make it more definite if you wish.

THE WITNESS: From the time of the original contract with Mr. McMenimen.

Q. Did you participate in the making of the original contract in any way? A. I did.

Q. Was that in conversations with anybody? A. Conversations with Doctor Lowy, Mr. McMenimen and Mr. Frank Stanton.

Q. Do you mean when they were present together? A. When they were present together and at times with Doctor Lowy alone.

Q. Confining yourself to Mr. McMenimen's presence, do you recall any conversation in which there was any discussion as to the amount per ampoul of this arsenical compound was to be paid to Doctor Lowy?

MR. HERR: I object to the question on the ground that any conversations prior to the contract are immaterial and irrelevant; also on the ground that the conversation was not in the presence of the defendant, Lowy Laboratories, or any representative; also on the ground that the terms of the contract speak for themselves, and that any prior conversations were integrated in the contract.

Q. Just answer yes or no? A. Yes.

Q. And where was that? A. At my office.

Q. And when? A. That was prior to the making of the contract; I think it was in 1918.

Q. And when you use the word "making," what do you mean precisely by that? A. The execution of the agreement between Doctor Lowy and Mr. McMenimen.

Q. Who was present at that conversation? A. Doctor Lowy, Mr. McMenimen, Mr. Stanton and myself.

Q. Which Mr. Stanton? A. Mr. Frank Stanton.

Q. What was said about the price per ampoul?

MR. HERR: Same objection.

A. Doctor Lowy wanted 25 cents per ampoul.

Q. Yes? A. And it appeared that the ampoul itself would sell for from two to three dollars, and a compromise of ten per cent. on the gross sales was arrived at.

MR. HERR: I move that that be stricken out.

Q. Confine yourself to what was said, not to what your inference might have been. A. Doctor Lowy said that he would take ten per cent. of the sales price.

Q. And at that time, was any estimate made of the sales price?

MR. HERR: Same objection.

A. There was an estimate made.

Q. And who made it up? A. It was made by Mr. Stanton, Mr. McMenimen and Doctor Lowy.

Q. And what was the amount of the selling price estimated upon at that time?

MR. HERR: I object to that on the same ground; also, on the ground that it doesn't

appear that such estimate was not in writing, and also on the ground we do not know who made the estimate, how it was made, or what the processes were which were used in arriving at the figures.

A. I think about $2.50.

MR. HERR: I object to the answer on the ground—as not responsive.

Q. Were there any figures made on papers or was this mere talk?

MR. HERR: Same objection.

A. I don't recall whether the figures were made on paper or not.

Q. What was Mr. McMenimen's business? Did you know at that time? A. He was in the dock construction company and in some cement company, I believe.

Q. What was Mr. Stanton's business? A. Mr. Stanton was an attorney.

Q. You said a moment ago that this was in 1918, and the contract was dated September 3, 1919. A. That is the contract I referred to.

Q. And was the conversation in 1918 before this contract was made? A. Before that contract was made.

Q. What part of 1918? A. I think it was the fourth——

Q. (Interrupting.) This contract is dated September 3, 1919. I want to direct your attention to that. A. I don't know whether the conversation was held in the fall of 1918, but I think it was held in the fall prior to the making of the original contract for McMenimen and Lowy.

Q. It was before the contract was signed? A. It was before the contract was signed.

Q. It was while negotiations were going on? A. That was in the negotiations.

Q. Were you present when the contract was signed? A. I don't recall whether I was or not.

Q. I show you a document which purports to be a contract between Doctor Otto Lowy and William McMenimen, and ask you if you were the subscribing witness on it? A. Yes, I was present.

MR. HERR: Is that the original contract?

MR. BRADNER: I think so; yes.

THE WITNESS: That is my signature.

Q. It appears that there you were attesting witness to Mr. McMenimen's signature? A. Yes, I was there when they both signed.

Q. What place was it signed? A. In my office; the cover was drawn in my office, too, I notice.

Q. Who prepared the contract? A. The contract was submitted to us by Mr. Stanton.

Q. Which Mr. Stanton? A. Mr. Frank Stanton.

Q. You don't know who actually prepared it? A. No, I don't.

Q. After that contract was made, Mr. Kohn, did you participate any further in these matters? A. Not until 1921.

Q. And in what respect did you participate then? A. First, in respect to the giving Doctor Lowy commissions being due him earlier in the year, and second, that, at Doctor Lowy's solicitation, for the purpose of obtaining a settlement

of his disagreement with the Lowy Laboratory.

Q. What was that disagreement? A. Doctor Lowy had assigned—had given his consent to an assignment, or rather a consent on the part of Squibb's to manufacture arsphenimine, and his royalties, whatever royalties were due him, had not been paid, and he wanted it to be definitely ascertained as to what royalties he was to receive.

MR. HERR: May I interrupt? Is that your—— I'd like to get this clear. Do you mean to say that was your dealings between yourself and Doctor Lowy?

Q. Well, following that, did you go with Doctor Lowy to Hoboken and have any conversation with any one representing the Lowy Laboratory? A. The Monday before the fourth of July, I went, with Doctor Lowy, to Mr. Stanton's home at Hoboken. The Squibb contract had not yet been signed. There was no discussion at that time of the amount of commissions that Doctor Lowy has—what proportion of the 25 cents which the Lowy Laboratory was to receive from Squibb was to be paid to Doctor Lowy, but——

Q. (Interrupting.) What was said at that time? A. At that time, Mr. Stanton was in a greatly weakened condition and was very anxious, as a matter of fact, to close the contract with Squibb, and there was nothing said as to what proportion would be received. There were no financial negotiations that morning. I went there first for the purpose of trying to smooth over——

MR. HERR: I object to the purpose.

Q. Who were present? A. Doctor Lowy,

Frank Stanton and myself, and Elizabeth Stanton at times came and went from the room.

Q. Who is Elizabeth Stanton? A. Frank Stanton's wife.

Q. On that occasion, was anything said about the percentage that the Doctor wanted or ought to have? A. There was nothing said on that occasion; no. Doctor Lowy and Mr. Stanton smoothed over a quarrel which they had, I think, the previous night—the night before.

Q. Were you present on the occasion of the quarrel? A. No, I was not.

Q. Then, how do you know there was a quarrel? A. From the conversation that took place in the home at Hoboken.

Q. Were you present at any other meeting with reference to the Squibb contract? A. Late in July, Frank Stanton and Doctor Lowy and James Stanton were at my office and it was finally agreed between us——

Q. That's a conclusion. Say just what was said? A. Doctor Lowy said he would be willing to take thirty per cent. as a flat commission, thirty per cent. of the 25 cents which Lowy Laboratory would receive from Squibb and Frank Stanton said that this was fair, and that he would induce—use his endeavor to get the directors to accept it.

Q. What did James Stanton have to say? A. No, James Stanton had nothing to say.

Q. You speak of a commission. What do you mean by that? A. Thirty per cent. flat of the 25 cents royalty, rather, which Squibb's was paying the Lowy Laboratory.

Q. Do you recall any subsequent meeting in that same month? A. In that same month? It

was the 28th day of July, that was the day I went to your office.

MR. HERR: Where?

THE WITNESS: I am just fixing the day.

MR. HERR: You say you met at your office?

THE WITNESS: I met Frank Stanton and Doctor Lowy at the home of Doctor Lowy.

MR. HERR: On July 28th?

THE WITNESS: Yes. Frank Stanton said the directors would not agree to pay Doctor Lowy thirty per cent. Doctor Lowy was angry and Mr. Stanton said to him that he (Doctor Lowy) had no contract at all, as a matter of fact.

Q. And then what occurred? A. Mr. Stanton left Doctor Lowy and myself.

Q. You said something about going to my office. What did you mean by that? A. After Mr. Stanton had made that statement, Doctor Lowy and I came to your office that very day.

Q. Do you recall any subsequent meeting at which Doctor Lowy and Mr. Stanton were present? A. I recall a subsequent meeting without Doctor Lowy.

Q. With Mr. Stanton? A. With Mr. Stanton.

Q. Which Mr. Stanton? A. Mr. Frank Stanton.

Q. And where was that? A. Shortly after this conversation at Doctor Lowy's house, Mr. Stanton came to my office, and I tried, on Doctor Lowy's behalf, to come to some agreement. Mr. Frank Stanton said that the Lowy Laboratory wanted its money back first, and after that if there was any gravy, Doctor Lowy could have it.

Q. Did he tell you how much the Lowy Laboratory wanted first? A. I think $160,000.

Q. I call your attention to another conference with Stanton, if there was one?

MR. HERR: I object to the question on the ground that it is leading.

A. Mr. Stanton and Doctor Lowy were at my offices late in August, or, I think, early in September, and Mr. Stanton offered Doctor Lowy twenty per cent. of the 25 cent royalty. Doctor Lowy, at that time, wanted forty per cent., and it was finally agreed that Doctor Lowy——

MR. HERR: (Interrupting.) I object.

A. (Continuing.) I'll change that. Doctor Lowy finally said that he would take twenty per cent. of the first 500,000—of the royalty received on the first 500,000 ampouls and twenty-five per cent. of the royalty to be received on the sale of the ampouls in excess of that number. Frank Stanton said that he thought that would be satisfactory, and he would submit it to the directors.

Q. Where did that conversation take place? A. That was in my office.

Q. Do you recall any other conversation at any other time at any other place? A. Shortly after I came to the office of the Lowy Laboratory.

Q. Where was that? A. On Plain Street, in Newark, and there was present at the office, when I arrived there, Doctor Lowy, Mr. Frank Stanton, Mr. James Stanton, Mr. Edwin Stanton—I think that's the father of Mr. Stanton—and Mr. Roser. Mr. Roser said that the company would not agree to pay Doctor Lowy on the twenty and twenty-five per cent. basis. I

said that we would be perfectly willing to negotiate. Mr. Roser said that he might advise the company to pay from between ten to fifteen per cent. on the sale of the first 500,000 ampouls. I said that I would not begin any discussion unless we used twenty per cent. to begin the discussion. Mr. Roser said he would not do this, and I left.

CROSS EXAMINATION BY MR. HERR:

Q. Do you remember a meeting on or about October 14th between you, Doctor Lowy and Mr. Frank Stanton, at which it was proposed that the Doctor should receive twenty-five per cent. on the first 500,000 ampouls, and twenty per cent. thereafter? A. Only twenty of the twenty-five——

Q. Only twenty of the twenty-five per cent. on the first 500,000 ampouls to be actually paid to the Doctor? A. I remember a discussion along those lines; there was no agreement arrived at. There were compromise propositions along those lines.

Q. Do you remember the occasion? A. I don't remember the particular occasion. I remember there were discussions along those lines.

Q. Do you remember whether that was the same occasion that you testified to in your direct examination, when you said that Mr. Stanton offered some such terms and that, at that time, Doctor Lowy wanted forty per cent.? A. It may have been.

Q. You don't remember definitely? A. I don't remember; I remember discussions along those lines.

Q. Now, was it not agreed, on that occasion

or at about from October 14th—— A. (Interrupting.) That wasn't October 14th, that was in September.

Q. Well, was it at any of these conferences in September or October agreed that a meeting of the directors should be called to consider the various propositions that had been proposed and try to come to some conclusion on them? A. Mr. Stanton said that he would submit it to the directors.

Q. And then, that was agreeable to you and the Doctor? A. Perfectly.

Q. And you waited for such a meeting to be called? A. We didn't wait for the meeting to be called. We waited for a reply from Mr. Stanton.

Q. Did you get such a reply? A. The reply I got was that I came up to the Lowy Laboratory and had a conversation with Mr. Roser. I went in reply to a telephone call from Doctor Lowy.

Q. That wasn't the occasion of a directors' meeting, was it? A. I don't know.

Q. I call your attention to a letter to you under date of October 21, 1921. Do you remember receiving that letter?

MR. BRADNER: I haven't any of Mr. Kohn's letters at all.

A. I think I did.

MR. BRADNER: I haven't seen the original.

Q. Having seen that letter, doesn't that refresh your mind that there was a meeting just prior to the writing of that letter? A. That we were to be parties to it? No, sir.

Q. That within a few days prior to that you had arranged those conferences? A. Yes, that

was the conference of twenty or twenty-five I told you.

Q. Can't you say definitely it was in October? A. No. There was so many conversations during that time and we were so far apart that I couldn't get any action out of Frank Stanton. I think the occasion for this was that I tried to get some action out of Frank Stanton, and I couldn't.

MR. HERR: I offer this for identification.

(Paper marked Exhibit D-1 for identification.)

Q. Having received this letter, did you attend a special directors' meeting on Tuesday afternoon, the 11th? A. No, I didn't. I attended a conference. I had no occasion to know it was a meeting. There were five gentlemen seated whose names I mentioned. What they were doing I don't know.

Q. Who were there when you got there? A. Mr. Frank Stanton, Mr. James Stanton, Mr. Edwin Stanton, Doctor Lowy and Mr. Roser.

Q. They were all directors? A. I don't know. I don't know the names of the officers of the company.

Q. Did Doctor Lowy at that time make any proposition? A. Doctor Lowy was silent.

Q. Didn't you come in response to a telephone call on that occasion? A. I did.

Q. Do you remember what time you got there? A. I think I got there at half past two.

Q. Didn't Doctor Lowy on that occasion insist upon his last proposition, the proposition previously made by him? A. Doctor Lowy left the talking entirely to me.

Q. Didn't you insist, then? A. I insisted that the discussion start with the basis of at least twenty per cent. on the first 500,000.

Q. And what else did you say? A. That is all I said. Mr. Roser said that he would start on ten and perhaps fifteen. I said, "We might waive on the point on the second 500,000, but we would not go into discussion unless they were offering us twenty per cent."

Q. What did you say if they didn't at least concede the twenty per cent.? A. That I would not discuss the matter further.

Q. Didn't you say you would take measures to enforce the Doctor's rights? A. Yes, I left there in that frame of mind, exactly.

Q. Didn't Mr. Edward Stanton after that, say that if that was a threat, there was no use of further discussion? A. I don't recall that.

Q. Do you remember his characterizing that as a threat? A. I don't remember.

Q. Well, the result of it was there was no discussion beyond that? A. No.

Q. That's the last thing you had to do with it? A. That's the last talk I had on this matter.

Q. As I understand your testimony, up and until after the Squibb's contract was signed and executed, there was no discussion as to the amount of money, or the amount of royalty which the Doctor should have under the new arrangement? A. Discussion in which I participated?

Q. Yes. A. There wasn't.

(Signing of the above testimony was waived by counsel.)

Stipulation to take Testimony.

IN CHANCERY OF NEW JERSEY.

Between
OTTO LOWY,
Complainant,
and
WILLIAM V. MCMENIMEN, et als.,
Defendants.

On Bill, &c.

It is hereby stipulated and agreed by and between the solicitors of the respective parties in the above stated cause to take the testimony *de bene esse* of Richard E. Kohn, who resides at Newark, N. J., and is about to go out of the State to be gone for several months, and is alleged by the complainant to be a material witness in his behalf; and it is further agreed that the said witness shall be sworn before his Honor, John H. Backes, Vice-Chancellor, to whom the above stated cause has been referred, and that his testimony shall be taken stenographically by Mr. C. Edwin Hyer, official stenographer of said Vice-Chancellor and that such testimony shall be taken before said stenographer on Friday, April 21st, 1922, at four o'clock in the afternoon, in the Chancery Chambers, Prudential Building, in the City of Newark.

FRANK E. BRADNER,
Solicitor of Complainant.
DOUGAL HERR,
Of Counsel with Defendant,
Lowy Laboratories, Inc.

Testimony at Final Hearing.

(May 29, 1922.)

IN CHANCERY OF NEW JERSEY.

Between

OTTO LOWY,

Complainant,

and

WILLIAM V. MCMENIMEN and LOWY LABORATORY, Incorporated,

Defendants.

Transcript of shorthand notes of testimony taken in the above entitled cause before his Honor, John H. Backes, Vice-Chancellor, at the Chancery Chambers, in the City of Newark, New Jersey, in the presence of Mr. Frank E. Bradner, for complainant and Messrs. Gaede & Gaede and Messrs. Hopkins & Herr, for defendants.

MR. HERR: There was a motion made to dismiss the bill of complaint which was carried over by Vice Chancellor Stevenson until final hearing, and I presume that this is the proper time to renew that motion.

THE COURT: You may renew it without argument.

MR. HERR: It will be considered that I have renewed the motion?

THE COURT: I will reserve it until the final argument.

OTTO LOWY, complainant, sworn in his own behalf.

DIRECT EXAMINATION BY MR. BRADNER:

Q. Where do you live? A. 190 Clinton Avenue, Newark.

Q. After the Lowy Laboratory was organized did they commence to do any business? A. They did.

Q. How do you know? A. I was at the laboratory when they were manufacturing; I also received royalties from them up to about January 6, 1921.

Q. What were you doing at the laboratory? A. I was in a sort of secretarial and research position; I was answering letters, inquiries, to physicians, supervised the manufacture of the solution, test the solution, test after the chemist, make tests on animals to see if the solution was not poisonous, go to Washington on numerous occasions for the purpose of straightening out little disputes between the Hygienic Laboratory and the laboratory; went to medical meetings and conventions for the purpose of showing the men the advantages of the solution; went to other institutions, such as the Mayo Clinic in Rochester, Minnesota, and a few others.

Q. What compensation did you receive for that? A. None.

Q. Do you know what sales have been made by the company? A. I do not.

Q. Have you examined the books? A. I have not.

Q. On the former payment of royalties to you

were the payments accompanied with statements? A. They were not.

Q. With whom did you converse and receive any payment? A. Mr. Frank Stanton and Mr. Schueman; they told me how much my royalties amounted to and gave me a check.

Q. Do you know at what price the preparation was selling? A. At that time Mr. Schueman told me——

By The Court:

Q. When? A. ——about January 6, 1921, when they gave me the royalties, they told me the average selling price per ampoul was $2.26.

Q. Who was Mr. Schueman? A. Mr. Schueman was the book-keeper.

Q. And who is Mr. Stanton? A. Mr. Frank Stanton was the managing director and treasurer of the Lowy Laboratory, Incorporated.

Q. Have you since January made any request for a statement? A. I have.

Q. When did you make them? A. I have asked for money and statements on innumerable occasions, but sometime in September, 1921, I wrote a letter to the Lowy Laboratory asking them for an accounting and for the moneys due to me as of October 1, 1921.

Q. I called for a letter produced by the defendant. Is that your letter? A. Yes.

Letter marked Exhibit C-1.

Q. What reply did you receive to that letter? A. None.

Q. Doctor, do you know how much this preparation costs to manufacture? A. Approximately.

Q. What does it cost? A. $1.15 per dose.

BY THE COURT:

Q. What is it used for? A. Used in the treatment of syphilis.

Q. What do you include in that figure? A. The cost of material and labor.

Q. And out of the average selling price of $2.26, what was the overhead expense? A. The only way in which I could determine the overhead was by the fact that the Lowy Laboratory was spending approximately $75,000 a year and they were selling about thirty or forty thousand ampouls, therefore, I should figure their overhead would have to be at least seventy-five cents per ampoul—pardon me—I made a mistake—thirty-five thousand—no, I think it was $70,000 a year they were spending; I figured their overhead out to be at least seventy-five cents per ampoul, if they sold at least 100,000 ampouls, which would make the cost of the preparation, if they sold 100,000 ampouls about $1.90.

Q. Have you any way of knowing just exactly what the overhead was?

THE COURT: How am I interested?

MR. BRADNER: I wanted to know about what the gross profit was on these sales.

A. The only way I know about the overhead is by knowing approximately how much it costs them a year to run the business, from their capital, that is, how much they have to spend in addition to their income.

Q. When the contract was made and they commenced to manufacture was there any selling price fixed? A. There was.

Q. What was that? A. The retail selling price,

$3.50 per ampoul for a large dose and $3.25 for the small dose.

Q. What is the large dose? A. Six-tenths of a gram of the drug, and the small dose containing four-tenths of a gram of the drug.

Q. And, at that selling price was it estimated then what the actual cost was, how much profit there would be in that selling price? A. Well, I don't know whether they had estimated that, but it depended entirely upon the number of sales they made. If they sold 100,000 ampouls at an average selling price of $2.26, then their profit was the difference between $1.90.

Q. I don't think you get me. Was any selling price fixed? A. The selling price was fixed at the time when the Lowy Laboratory started to manufacture. The selling price was arrived at after a conference between Mr. Frank Stanton, Mr. McMenimen and Mr. McDonald; I do not remember whether I was present or not, but I sent them a statement what I thought the actual cost of manufacture was, because I had to manufacture 1,000 ampouls and give them a statement of what they cost me to manufacture them.

Q. You manufactured 1,000 as a sample? A. Yes.

Q. And you told them what it cost to manufacture those? A. Yes.

Q. About what did it cost? A. About $1.15.

Q. In addition the cost would depend upon the number of sales and your overhead expenses—— A. And royalties.

Q. ——in the upkeep of your establishment? A. Yes.

Q. Can you give us approximately what propor-

tion of the profits your ten per cent. of the gross sales amounted to? Do you understand my question? A. No, I do not.

Q. Can you figure out what proportion of the profits on the sale of this preparation—— A. Yes.

Q. ——your ten per cent. of the gross sales would amount to? A. Yes.

MR. HERR: I object to that; that would be a conclusion clearly.

THE COURT: Go ahead.

A. It costs $1.80 or $1.90 to manufacture, plus the seventy-five cents overhead, which may be ten cents out either way, but this is my figure; they were selling it for $2.26; the difference between $1.90 and $2.26, which was thirty six cents, I was entitled to twenty-two and six-tenths per cent. of that. Therefore, my proportion on it would be as twenty-two and six tenths per cent. is to thirty-six cents.

Q. Now doctor, under the Squibb contract, explain this provision in the contract of Squibb, "shall pay for the plain arsphenimine a royalty of forty-five cents for each gram contained in the solution"? A. The arsphenimine is put into the solution and marked according to the number of gram or grams in the solution. The maximum therapeutic dose is six-tenths of a gram. The forty-five cents is based upon one gram, or one and four-tenths maximum doses, or on two and a half minimum doses—that is, the four-tenths decigrams; so that each decigram, for each tenth of a gram that the Squibb would sell would be four and a half cents, and on six decigrams

would be approximately twenty-seven cents, so that they would receive approximately twenty-seven cents per therapeutic dose of the maximum dose.

Q. Was Lowy Laboratory to go to any expense at all under the Squibb contract? A. Not to my knowledge.

Q. Now, I find in the Squibb contract a provision relating to sales or licenses in foreign countries; do you recall that? A. Squibb contract?

Q. Yes A. Yes.

Q. That Squibb was first to reimburse the amount of his necessary expense in negotiating such sale and licenses, and that the remainder shall be divided between Squibb and Lowy in the proportion of forty per cent. to Squibb and sixty per cent. to Lowy; do you recall that? A. Yes.

Q. Does that refer to the profit on these sales? A. It refers to the licenses which they may issue to foreign manufacturers.

Q. But it says sales also? A. I don't know about the sales; I understood that this was a question of licenses.

MR. HERR: I think the contract speaks for itself on all these matters and should be put in evidence.

THE COURT: Well, it is all admitted.

Q. What does that forty and sixty per cent. mean?

MR. HERR: I object, on the ground that the contract speaks for itself.

THE COURT: We better have it.

A. I understood the forty per cent. was to be the profit to Squibb and the sixty per cent. was

what the Lowy Laboratory was to receive, and out of that pay all the expenses that Squibb incurred in negotiating the foreign sales.

CROSS EXAMINATION BY MR. HERR:

Q. You say, doctor, that you were working in the laboratory and going down to Washington and among the medical societies without compensation? A. Yes.

Q. You were, however, paid your expenses? A. Not all of them; they still owe me $55.

Q. All except $55. you have received? A. Yes.

Q. And you got $15,000 under the first general contract? A. I did not; I only got $11,000 and a note of $4,000, which I converted into stock.

Q. You are a stockholder in this company? A. I am.

Q. Also a director? A. No, sir.

Q. You were? A. I was.

Q. Up until what time? A. Until last November meeting, when I was re-elected, and I informed the company under present conditions I was unable to serve.

Q. When was the annual meeting? A. I don't know whether it was in January or February of this year.

Q. 1922? A. Yes.

Q. Now, you have given us the prices which you say it cost this company to make the product, overhead, but you also say that you never examined the books; how did you determine the cost of this article, what it cost the company to make it; was that simply on a basis of what it had cost you to make the samples? A. No, sir.

Q. Well, if you did not look at the books how

did you know what it cost the company? A. Some time in December, 1921, Mr. Schueman and I went over the cost of every article that entered into the manufacture of the preparation, and that was the amount which Mr. Schueman told me it would cost; it was approximately $1.15.

Q. Where was it that you went over these figure? A. Lowy Laboratory—I did not go over the figures with Mr. Schueman; I told Mr. Schueman what we had used and Mr. Schueman computed it.

Q. Now, it is a fact, isn't it, that the overhead cost, whatever it may be, would not be substantially greater on the manufacture of 500,000 ampouls than it would be on the manufacture of 100,000? A. That would depend entirely on the business methods used, I presume.

Q. Wasn't the laboratory equipped to turn out a great many more ampouls than it was turning out? A. It was in a way.

Q. Well, what do you mean? A. Well, sometimes we had more help there than we had use for.

Q. I understood you to say the laboratory was, at the time you computed these costs, selling between thirty thousand and forty thousand ampouls? A. A year, yes.

Q. Now, if it had been selling ten times that number the overhead cost would not have been appreciably more? A. Again, I am telling you it would have depended entirely upon the business conduct.

Q. Assuming that? A. Well, then the overhead would have been considerably decreased.

THE COURT: He wants to know whether

you had the facilities for doing greater work?

THE WITNESS: We had facilities for doing about 100,000 ampouls there.

Q. And all you needed for doing more, making up more than that, was some extra help? A. And more room.

BY THE COURT:

Q. And machinery? A. We needed more machinery, too; that was not expensive; that would not have made much difference.

Q. You were engaged, were you not, doing experimental and research work at the laboratory? A. How do you mean that term, engaged by the Lowy Laboratory?

THE COURT: No, occupied.

A. I was doing research work at the Lowy Laboratory and doing the other work which I have mentioned.

Q. You had some assistants in that work? A. I had no assistants; there were men there who were under my jurisdiction; I could ask them to do things for me, but they were all employed by the Lowy Laboratory and not by me.

Q. Have you any idea of the cost of that work? A. Only what Mr. Stanton has told me; I believe he paid one man $2500 a year—I don't know whether it was $2500 or $3000.

BY THE COURT:

Q. A chemist? A. A chemist; there were two other chemists there, but this one chemist was detailed to assist me. Research work was done for the purpose of eliminating some things which Mr. Stanton thought was a fault with the preparation

and at the same time for the purpose of getting new arsenical preparations, to prepare new arsenical preparations which we thought might be superior to the old arsphenimine.

Q. In the tenth paragraph of the McMenimen contract it is provided that the doctor shall have the right to inspect all of the books of the said manufacturing corporation at all convenient hours, to have access to and make true copies therefrom, and the aforesaid royalties shall be paid in quarterly instalments. You always had access to the books? A. I always had access to them, but Mr. Frank Stanton told me to leave Mr. Schueman alone.

Q. At that particular time Mr. Schueman was very busy? A. I don't know whether he was busy or not, but Mr. Frank Stanton told me to leave him alone.

Q. That is the only occasion on which that happened? A. And assuming I had looked at those books, I am not a bookkeeper.

Q. Yes or no? A. That he told me not to bother him?

Q. Yes. A. Yes.

Q. You were there at the laboratory frequently? A. I was there daily from March, 1920, until the middle of June, 1921, excepting when I was off on one of the trips for the Lowy Laboratory; I was there sometimes from five o'clock in the morning until eleven at night.

Q. When you asked for a statement by that letter which has been put in evidence, didn't Mr. Frank Stanton tell you orally that you had always had access to the books and still had access to them and might go and look at them? A. He did not.

Q. And didn't you go over a statement with Mr. Frank Stanton the day before you sent over that letter? A. No. May I explain?

Q. Go ahead. A. I went over a statement with Mr. Frank Stanton, on which we attempted to arrive at a settlement, where he showed me what I would receive under the McMenimen contract if the Lowy people were manufacturing and selling at $1 per ampoul and what I would receive under a certain proportion under the Squibb contract, but never under the sales made by the Lowy Laboratory.

Q. Well, did you raise the question at that time as to how much royalty was due you? A. Yes, sir; I asked about it and he said, "John Schueman is preparing it for you".

Q. Didn't he actually show it to you? A. No, sir ; he did not.

Q. In connection with this interference suit of Conwiser, as instituted at Washington, you authorized the Lowy Laboratory, Incorporated, did you not, to pay for the necessary legal—to pay for the necessary defense of that suit?

MR. BRADNER: I object. That is not cross examination and is not any part of our case at all.

THE COURT: Overruled.

A. I did not, didn't authorize them to pay anything.

Q. Didn't the Lowy Laboratory, Incorporated, retain counsel at your request? A. No, sir; they did not, if I may answer this——

THE COURT: You have answered it.

Q. Are you defending it yourself? A. No, sir.

Q. Do you know that the Lowy Laboratory, Incorporated, is defending it? A. I don't know; I assume they are.

Q. Haven't you been over to see counsel in New York and—— A. Yes.

Q. ——haven't you gone over the papers with counsel in New York relating to the defense of that proceeding? A. Yes.

Q. Then you know that counsel has been engaged to defend the proceeding? A. He has been, I assume.

Q. Who first took up the question with E. R. Squibb & Son about the contract? A. I did.

Q. Wasn't it your idea in the beginning or didn't you urge that such a contract be made? A. I did.

RE-DIRECT EXAMINATION BY MR. BRADNER:

Q. Why? A. Because the Lowy Laboratory was practically bankrupt and had to do something else in order to get on their feet, and I didn't want them to lose their money.

EXAMINED BY THE COURT:

Q. What was their capitalization? A. Originally it was supposed to be $108,000.

Q. What is your authorized capital and how much is outstanding? A. I don't know.

Q. You have four thousand? A. No, I have more; there was a reorganization.

Q. I mean at the time you entered into the Squibb contract. A. At that time I had $12,000 of their stock.

Q. As against how much? A. I don't know;

I think something like $250,000; I am not sure.

Q. A small amount? A. A small amount, yes.

RE-DIRECT EXAMINATION BY MR. BRADNER:

Q. Does this company manufacture anything else? A. It does, or it did; I don't know whether they do now.

Q. During the time they were making this arsphenimine solution they were manufacturing what other articles? A. They manufactured another article, a venereal prophylactic, which was my invention, and then they manufactured little ampouls of mercury and other products which were put into little doses.

Q. Doctor, under your contract you received a percentage of the gross sales of the other articles? A. I was to receive two per cent. under the gross sales of the other articles, but there was no understanding, no agreement; according to my original contract I was to turn over or offer to the Lowy Laboratory all other inventions which I might offer for sale to them first, and I had made a number of other inventions, which I assigned to the Lowy Laboratory. The only other which they manufactured was this venereal prophylactic; the royalties I was to receive was left open, except it was understood it was to be more than two per cent.

Q. Well, the contract calls for two per cent.? A. On other things, but it does not on my own patents which I assigned to them; I am willing to waive it, however, and take two per cent. on it.

Q. You have not been paid anything? A. I don't know whether they gave me anything; they

gave me $3000 and told me that was the amount I was to receive; I don't know what it was for.

COMPLAINANT RESTS.

FRANCIS A. STANTON, sworn in behalf of defendant.

DIRECT EXAMINATION BY MR. HERR:

Q. Where do you live? A. Hoboken.

Q. You are an officer of this defendant company? A. I am treasurer of the company.

Q. And also a director? A. And a director.

Q. And a stockholder, of course? A. Yes.

Q. When did you first meet Dr. Lowy? A. Well, I knew Dr. Lowy personally as far back as 1914 or 1915.

Q. When did you first meet him with respect to the matter of this arsphenimine compound? A. Early in March, 1919.

Q. Where? A. At my house in Hoboken.

Q. Did he come over to see you? A. He came over to see me and at that time he outlined the nature of his invention, not specifically, but broadly, as to what it covered and what the nature of the compound was. Subsequently he came to my office in New York City and then outlined it in detail for the purpose of having an application filed.

Q. Then a couple of weeks after that, did you, at his request, visit him in Newark, at his home? A. In order to prepare the application I was obliged to come out to Newark on more than one occasion to go over the process of manufacture

and the results which were accomplished and examine the doses that had been made up.

Q. He disclosed the process to you, did he, prior to your filing papers and the application? A. Yes.

Q. Did you make an application in the patent office for him? A. I filed an application in the patent office; first, of course, I instituted a search and then I filed the application early in May, 1919, I think it was May 3rd.

Q. Was that application granted? A. That application is the same application as is in the patent office at the present time, but later, on the history of the application, it became necessary to file what we call a continuing application, to more specifically outline the invention as it was contained in the original, so there was a subsequent application filed which takes the date of the first application, although there are two applications that amount to one in the patent office.

Q. Has any patent been issued on that yet? A. No, sir.

Q. That is prevented at the present time by the institution of an interference suit? A. There has been a suit instituted against Dr. Lowy, which of course, stops the application.

Q. Are you a patent lawyer? A. Well, I was until I got mixed up with the Lowy Laboratory.

Q. With an office in New York? A. Yes.

Q. A member of the bar of the State of New York? A. Yes.

Q. Have you made a specialty of patent matters? A. Yes; my first education was along mechanical engineering; I took a degree in that

and afterwards studied law and specialized exclusively in patents.

Q. What is the effect of the institution of an interference suit at this time against the assignee of the application with respect to subsequent royalty payments to the assignor?

MR. BRADNER: That is a question of law.

Q. Tell us what is the general nature of one of these interference suits? A. An interference is a declaration by the patent office that there are two or more applications for the same identical invention. Then the examiner is obliged to take testimony to determine which of the applicants is the true inventor. The question that arises is solely a question of title to the invention. From an adverse finding by the examiner an appeal can be taken to a board in the patent office known as the Board of Examiners in Chief, and findings of that board are submitted to the Commissioner of Patents for approval or disapproval, and the patent is then issued to whomsoever the Examiner and Board have confirmed as the true inventor. The question that arises on an interference is solely one of title. The question whether it is a good invention or valid invention or prior rights in existence, does not come up in an interference. That comes up in the ordinary examination of an examiner.

Q. Does any appeal lie from the Commissioner of Patents on that determination? A. Not to my knowledge, nor have I ever heard of one being taken from the award of the Commissioner of Patents. My understanding is that the Commissioner is authorized to issue patents for what he

believes to be good inventions, to whom he believes to be the first, true and sole inventor.

Q. In an interference suit, is any question of royalties or their payment ever considered? A. An interference is a secret procedure in the patent office. The question of royalties could not come up. There is only one question for determination. Nobody knows of these applications except the applicants themselves, because they are not made public.

By The Court:

Q. Well, is an infringement suit based upon a patent, the title of which is certified by the Commissioner? A. Yes, an infringement suit would be based upon the validity of the patent itself; by that I mean whether there is a true invention; that is one of the defenses to an infringement.

Q. I asked you are all infringement suits based upon prior patents? A. There has to be a patent in existence, yes.

Q. Of course the converse of that is not true, the defendant may not have a title? A. The defendant may not have a title, no. It is also true in an infringement suit——

Q. Then a man who has no patent, is really the inventor, can proceed against one who has a title for the invention? A. By showing that he had dedicated to the public, either by letter, use or publication and thus killing the other man's monopoly.

Q. He could not proceed against a man having a patent for an invention, he the plaintiff, being emeritus simply? A. Except against the infringement suit, as a defense.

Q. Now after your patent application was filed for the doctor, did you ever have any talk with him about the future of the business? A. Yes: the doctor came over to me and told me that he had come to the conclusion that his invention was a much bigger field than he had anticipated, that he was afraid that there were other people endeavoring to steal it, or started to, and that overtures had been made to him by different manufacturers and requested if it was possible, to interest capital, so that they could start to work and he would be more able to get better protection. I spoke to several gentlemen and finally I interested Mr. McMenimen, with the result that in September the McMenimen contract was drawn up.

Q. You had conferences with Mr. McMenimen? A. To interest him in the product, and prior to the drafting of the agreement between Dr. Lowy and Mr. McMenimen.

Q. Who prepared that agreement? A. Mr. Kohn. The original draft was prepared by Mr. Kohn and sent over to my office, and I redrafted it, the nomenclature.

Q. Who was Mr. Kohn? A. Mr. Kohn is Dr. Lowy's personal attorney and his brother-in-law.

By The Court:

Q. How were you interested, professionally? A. Professionally.

Q. Prior to the making of that McMenimen agreement, in your conference with Mr. McMenimen and Mr. Kohn and Dr. Lowy, was anything said about royalties? A. Oh, yes, the question of royalties was discussed. I cannot say whether Mr. McMenimen and Dr. Lowy ever discussed or

disputed the form of royalties that were put in the contract, because I personally was not interested at that time.

Q. Well, in devising that schedule of royalties contained in that agreement, was the probable cost of the material and overhead calculated? A. Oh, yes, undoubtedly.

Q. And what relation does that calculation bear to the amount that it was found to cost? A. Well, Mr. Herr, by the drafting of that agreement and the proposed organization of the laboratory there was not any question but every man considered the introduction of this product, because of its unquestioned newness, nothing had ever been heard of like it, but that it would command a tremendous sale, that the profession was waiting for it, and that it overcame a very severe obstacle in the treatment of the disease; it was in my mind, and I presume in all the rest, that the sale would automatically be tremendous and the royalties were considered to be paid out of the profits that would be earned.

Q. My question is did that schedule of royalties which the McMenimen contract contained, was that worked out on the basis of the probable cost of manufacture? A. I think so. I did not work that out myself, but I believe it was. I may say, Mr. Herr, that the sliding schedule of ten to two per cent. was a thoroughly standard schedule on an agreement of that kind. If your Honor will allow me to digress, it was adopted by the Committee on Patents in Congress that a ten to two per cent. was the maximum and minimum of royalties for the Commissioner to recommend, but it is not in existence now.

Q. Now, after the McMenimen contract was entered into, at was assigned to this corporation, was it not, this defendant corporation? A. Yes, the corporation was organized subsequently, in October, 1919, and then the contract was assigned to it.

Q. Who named this company?

THE COURT: What difference does it make?

Q. And at the same time an assignment was made directly to the company from Dr. Lowy? A. Yes.

THE COURT: That is all admitted.

MR. BRADNER: That is all admitted in the pleadings.

Q. Now, then, did the company proceed to manufacture? A. The company proceeded—it could not manufacture right off; it was discovered that the improvement as it was developed was not defective in any major point, but defective in a lot of minor details, such as apparatus and packing and containers and all the different little things to it; it was not a commercial proposition right offhand and up until March, 1920, the company spent most of the time in improving its manufacture and improving the product.

BY THE COURT:

Q. The product or the facilities? A. Improving the product. There was considerable difficulty in the glass containers. It was so strongly alkaline it used to eat the silicates out of the glass, and thousands of dollars and time was spent in developing and finally procuring a glass which would withstand the action of this alkaline

product. When it was sent down to Washington and the Hygienic Laboratory would make the tests and find these defects, they held up our license and would not allow us to manufacture, so it was not until March 2, 1920, it was first offered to the public.

Q. Now, then, on account of the delay was there a reorganization of the company—when did you first become connected with the company? A. I had a block of the stock on the organization of the company. I was permitted to subscribe for it. Along about May the managing director, that was Mr. McMenimen, the majority stockholder, and Mr. McDonald, who was the chief factotum, they began to get disgusted at the delay in getting it on a marketable basis, and they had invested sufficient money to wonder when they were going to get it back. Considerable friction occurred between the board of directors and on the first of May I went out and told the doctor what was developing and I told him I still had faith in the product, and if he still had I would buy the interests and go ahead myself, and the result was I got about 100 per cent. of the stock from my other directors. I went to the doctor and told him my situation and we started to get some capital to take over my holdings, and I told the doctor I had sufficient funds to conduct it the way it had been conducted up until the end of that year and if it was not a success up to that time it would be all lost. I raised and put into it up to the end of 1921 in excess of $176,000.

Q. You mean your own? A. My own, my father's, my brother's and my friends'.

Q. Well, then you continued operations from

that time on? A. We continued operations from that time on until in December we were commencing to be broke——

By The Court:

Q. December, when? A. December, 1920. We owed the doctor a little money; we computed his royalties; he went over the books with me personally; I had a statement prepared that I showed him; I had a check drawn to his account for royalties, $3000; this was in December. There was a check drawn to him for the amount of his note, which was $4000. That brought our payments right up to date. He knew that the check for $4000 could not be paid, we did not have the money, so he re-endoresd it back to the company and took $4000 of capital stock. I immediately went out and sold one thousand dollars of his capital stock, for which he got a thousand dollars, and we didn't have a thousand dollars in the treasury at that time and then the check for $3000 was re-endorsed.

Q. When was that? A. The last of December, 1920, and I interested a Mr. Roser and we started off again. Business in 1921 was worse than in 1920; collections were impossible; we came up to the months of March and April and we had nothing in front of us except a lot of debts. At that time we were in debt close to 40 to 50,000. The doctor came to me in May, 1921, and said he had been down to see Dr. Anderson of Squibb's and they were interested in it and they were anxious to get hold of the product, and because of their reputation and believing they could make more sales. I wrote to Dr. Anderson, telling him that Dr. Lowy had spoken

to me about it and requesting that if he had any proposition he should lay it before me—Dr. Lowy saw Dr. Anderson on several occasions, so he wrote to me—Dr. Anderson wrote back to me asking me to meet him at the Boston convention in June. I had Dr. Lowy introduce me to him. Dr. Anderson went back to New York and said he was going to take it up with the directors of the Squibbs and he was going to set a date, and, if my memory serves me right, June 6, 1921, for a meeting of the directors of Squibbs and myself. Prior to my going over to meet the gentlemen from Squibbs, Mr. Roser, and my brother, who were both directors, and myself, had a conversation with the doctor at his house. Mr. Roser said, "If we entered into a contract with Squibbs what happens to the doctor's contract he has with the company?" The doctor said, "That will be ended, because we will have a new agreement", and I said to Mr. Roser "It has to be ended, because we cannot work under it". We discussed it pro and con, with the conclusion we were to draw up a new contract, but the first thing to do was to get the Squibb contract. Dr. Lowy then, on the 15th came down and asked me to come down and see Mr. Kohn. I did. I went over the situation with Kohn and we discussed Lowy's contract again and Kohn said it was ended on June 15th. I went down with Dr. Lowy to Mr. Kohn's office and on the doctor's invitation that Mr. Kohn might be able to help me in figuring out what terms we would ask of the Squibb people, we discussed it pro and con. The question of the doctor's contract with the Lowy laboratory came up. Kohn said that it was

ended. The doctor admitted it would be ended, and I was of the same opinion. The principal thing that we were discussing was how to get Squibb to enter into a contract with us. That was the question of vital importance. If we did not succeed in that it would not make any difference what contract we had. I then went over on the next day, the 16th, and met the president and vice-president and attorneys and all the rest of the Squibb outfit, and started negotiations. That ran from June 16th until July 1st or 2nd, every day and mostly every night. During every one of these days I telephoned the doctor, or he telephoned me, or I saw him and outlined what was taking place, what their propositions were and how they proposed to operate. Time and again we referred to the fact that when the Squibb contract was consummated, if it was consummated, we would have to draw up a new agreement, but always it was put off, because we could not tell—we never even tried to determine what he would be entitled to, because we didn't know what he would get. On July 2nd—July 1st, a Friday night, the contract was finally drafted. It was about five o'clock in the afternoon when it was drafted and I telephoned to Dr. Lowy and to my father, who was in the corporation, to arrange to meet me somewhere in Hoboken, so as to execute the instrument. We met at my father's house. I had one copy, which was to be executed by us, and there were two copies left in Squibb's hands to be executed by them and we were to exchange them the next day. I met Dr. Lowy at my father's house. There were present my father, my brother, the doctor and myself. The doctor read the contract and found

two or three more discrepancies. He called them to my attention and made notations on them in ink and afterwards they were confirmed by Squibb and the doctor signed the contract, saying, as he signed it, to me—I think my father and brother heard him—"Just as soon as your health is better we will get together and draw up an agreement between the laboratory and myself." We then went down to a Notary Public in Hoboken, in the doctor's car; the notary took the doctor's acknowledgement, and when he left me he said, "Just as soon as your health is better we will endeavor to get together and work out a new agreement, because the old McMenimen contract is now ended for keeps——" those were his words. I went home and went to bed. I was sick and all in. Two or three days later while still confined to my house, the doctor and Mrs. Lowy came there. He said, "I have been thinking over this Squibb contract and I have come to the conclusion I ought to have fifty per cent. of all the laboratory gets from Squibb, with a mimimum guaranty of $6000 a year." I told him I thought he was crazy. I told him that I feared he had worked too hard and that he ought to take a rest. It was outlandish and my directors would not think of it; my stockholders would be worked an injustice. He went out of the house and he was mad. The next day he called me on the telephone and he said he thought over what he told me the night before, and he was very apologetic, and he never intended to make such a proposition and if we could get together we could spell out something. I said all right, and accepted his apologies, and two hours after-

wards he and Mr. Kohn came into my house. I was still confined. Kohn came in to say he could more aptly express the doctor's apologies to me than the doctor could, and just as soon as I could get well we ought to come out to his office and we would try to work out a contract. I said all right. A week or so later—this was in July—I went to Kohn's office and we worked over all the figures; we tried to reconcile the McMenimen contract with the Squibb contract as a basis of drafting a new one. We could not get anywhere near it. Kohn suggested thirty per cent. of what was received from Squibb until the capitalization of the company was intact; that is, we had received as much money as we had put in, then fifty per cent. I told him I thought it was ridiculous and my directors would not consider it. Dr. Lowy came in in the meanwhile and said if I would get all the figures we would have Schueman figure them out and arrive at a mesne dosage and mesne amount of sales, we might agree upon the figures. I told him I could not make an agreement, that no matter what we agreed upon or thought was fair, it would be up to my directors, and I suggested that I be permitted to call a director's meeting which he and Kohn could attend. Kohn and the doctor and I had several talks over the situation. A directors' meeting having been called for the latter part of July at Hoboken, a notice was sent the doctor and a notice to Kohn; the directors met and waited an hour or an hour and a half for the doctor and asked me if he was coming, and I told them that I had telephoned him the day before and he would be there, then

I telephoned his office and they told me that he was away and sorry he could not be there, so the directors adjourned without considering the proposition and the next day the doctor apologized again for not being at the directors' meeting. He was a director of the corporation at the time. At different times up until September we discussed the proposition. His demands ran anywhere from thirty per cent. to fifty per cent. with guarantees of $6000 and $3000 and so forth. The laboratory was broke, every penny that was taken in was spent for threatening obligations. We were threatened with court action by five creditors at once. Squibb had not started to manufacture and did not start up until October. In September—on September 26th, the date of the letter regarding the accounting, the day before that the doctor was in my office; he went over the books with me as to the accounting. Schueman had prepared a statement for me and I showed it to the doctor and explained it to him. I told him it was ridiculous to argue about it, because we had no money with which to pay any royalties whatever. The next day I got that letter and I called up Kohn and asked him why he sent it. He told me to disregard it. I said, "He is not entitled to an accounting and you know it and he has got the statement and everything we had." I met the doctor a couple of days after and asked why he sent it. He told me he had been advised to send that letter, because it might be an omission on his part for any royalties due from that time to the time of the Squibb contract. The Squibb contract was signed in July and they had not started to operate and

did not start it until the middle of October. After that we had several other conversations between Kohn and Dr. Lowy, Mr. Roser and myself, and finally one day at Mr. Kohn's office the doctor made a proposition—this was early in October—of twenty-five per cent. on the first 500,000 doses and twenty per cent. thereafter, only twenty per cent. of the twenty-five per cent. to be paid until the capitalization of the company was intact. I had said all along that I did not think I could get my directors to consent to anything more than twenty per cent. I was sure of it. I knew what their figures were and I doubted if I could get it to twenty. After he made the proposition of twenty-five and twenty I said, "All right, I will take it back to my directors; we will call a special meeting and you and Kohn come down and we will thrash the matter out." A directors' meeting was called, this time in Newark, so as to suit the doctor's and Mr. Kohn's convenience for two or three o'clock in the afternoon. The doctor arrived. Mr. Kohn was not there and action was delayed until he telephoned Mr. Kohn and Mr. Kohn came down and my father was acting president and he said, "Now, doctor, what is it? We are here to discuss this royalties basis with you. What do you want?" The doctor said, "I have made my proposition of twenty-five and twenty per cent. and that is the lowest; if I do not get that I will have to take other actions." That did not meet with favor of the other directors and finally my father said, "Am I to take that as a threat?" He said, "No, I don't mean that, but if I don't get twenty-five and twenty I will protect my own interests." My father told

him what we had done, the money we had spent, and if he was going to stand on the twenty-five and twenty and never giving us a chance to go over how he came to this set of figures we might just as well quit and go home, and he quit and went home, and the next was the action in this court.

Q. Did you have any conversation with Dr. Lowy about the payment of the counsel fees and expenses in the expense of the interference proceeding? A. Yes, when Conweiser filed his application we got a notice of the interference subsequently from the Commissioner of Patents. The doctor got a notice individually, I presume—he did, because he came to me and told me he had asked me what he was to do; I said, "I think the best thing that can be done is to permit Mr. Houget to defend it, he has made all our searches and has direct charge of the application; all the tests and franchises in connection with the patent and it would be foolish to retain other counsel and go through the expense of educating them in this industry," and he said, "Well, will you take care of that matter?" and I notified Houget to defend the interference; I notified him also, at the same time to keep his charges separate on the interference from his charges on the laboratory. The doctor and I went to Mr. Houget's office to gether and Mr. Houget and Mr. Evans, the doctor and I went all over the interference situation. Houget and Evans came to Newark to the laboratory. I made an appointment for them, for the doctor, and then they went away with the doctor and went all over his priority claim, as to when he conceived and

when he invented, and so forth. He told me he had been over to Houget's office since.

Q. There was no agreement made with Houget as to how much he was to charge for that work? A. No, it is not customary on an interference because you cannot tell what it will run into, how much testimony, or where it is going to be taken.

Q. Has Mr. Houget been paid anything at all in that interference matter yet? A. We owe Houget at the present time considerable money and now and then we send him a check for a thousand or fifteen hundred dollars on account. We have hesitated to ask for a bill.

Q. You mean some of that may have been applied to the interference matter? A. I don't know how he is crediting what we pay him.

Q. Now, did Dr. Lowy have access to the books of the Lowy Laboratory? A. Mr. Schueman and I are in the same office in the laboratory, he having entire charge of the books. The doctor's desk was in the same place for a time, right next to Mr. Schueman's and subsequently not fifteen feet away; the books were there and open at all times and hundreds of times to my personal knowledge has he asked how were we getting along, how much money did we owe, and we would go over the whole financial situation; he was just as much interested as I was and took as much interest in it, as to how much money we received and expended, as I took.

Q. In considering the matter of the schedule—the new schedule of payment to be made, did the doctor, in following the Squibb agreement, did he say anything at all to you at any time as

to the effect that he would rather have any particular percentage from Squibb than a larger percentage from the company? A. Yes, at the time I spoke, before I went over to Squibb, and that was early in June, the doctor and my brother and I were at lunch in his house and we were discussing what he was going to get in the ending of his contract and he made a remark flippantly that he would rather have five cents from Squibb than from the Lowy Laboratory, because of the larger sales they would make, and then he had his doubts as to a larger percentage from the laboratory.

Q. You did a good deal of advertising in the company? A. We advertised in every leading medical magazine in the United States and some in Canada; we circularized constantly; by that I mean some seven and some ten to twelve pieces of literature to thousands of doctors.

Q. That was all high class literature? A. It was high class literature and very difficult to write.

Q. What name did you trade under? A. Lowy Laboratory, Incorporated, Solution Arsphenimine Lowy.

Q. Did you ever draw any salary or other remuneration for your work in this company? A. There was a salary voted to me, but I never drew it, because there was not sufficient cash.

Q. Did anybody else get paid, I mean outside of the employees? A. Outside of the employees, no.

Q. You devoted all your time to the company? A. Exclusively.

Q. The advertising that you have told us

about constituted a large part of the cost of the overhead, didn't it? A. Oh, yes, it ran into—well, I would hesitate to guess without referring to the books, but I would say five or six thousand dollars a month, sometimes less.

Q. Would the overhead cost of producing this product in 500,000 ampoul lots be much greater than in 100,000 as the company manufactured? A. The only additional cost in the manufacture of 500,000 over a hundred thousand would be with the exception of a slight increase, the cost of the additional work and material that went into the product for us to distribute, as we were operating throughout the United States we had to maintain sales offices in Memphis, Boston, in Cleveland and Dallas, Texas—there is one other, but I have forgotten where it was; we had to keep a certain number of men out constantly calling on new physicians to bring it to their attention; we had to continue advertising and circularizing. This overhead cost us just as much to start off with from the ground floor, without selling a hundred doses a month, as it would to have sold hundreds of thousands.

Q. Have you tried to reconcile the two schedules, that contained in the McMenimen contract and that contained in the Squibb agreement? A. Yes, on many occasions.

Q. And what did you find; did you find that they were reconcilable—— A. I don't know.

Q. ——or are they not? A. The McMenimen contract was based on our manufacturing and selling and after we had made sufficient money to pay our overhead there was enough leeway of profit in our sales to pay the doctor ten per

cent., but on the income from Squibb at the present time, it is stationary and a certain amount comes in for a certain number of doses. The doctor's sliding scale contract will on some sales show where he is receiving much more money than we do, we could not pay it, we have not got the money even to this day; in other cases it shows where he is receiving on different prices, larger sums than he would under the McMenimen contract.

Q. Now, taking the schedule used in the McMenimen contract and applying it to the Squibb agreement, using definite figures as to prices and amounts sold, arbitrary figures, were you able to determine between what percentages the amount payable to the doctor would come, the outside figures? A. I don't understand.

Q. There were certain variables in the equation? A. Yes; one of the variables is the price at which Squibb sells. That does not vary under our contract.

Q. It varies on applying the McMenimen schedule to the Squibb agreement? A. Yes.

Q. The second variable is the quantity of the product going in to make up a dose? A. That is right.

Q. Because the Squibb contract is based on the gram? A. That is right.

Q. And the ampoul has to bear a variable relation to the gram? A. Yes.

Q. The third is the quantity which Squibb may sell, that is the third; the fourth variable is the amount of sales which the company would have made under the McMenimen contract if it had not entered into the Squibb agreement? A. That would not be a variable; that would

be in the nature of a guess.

Q. Well, it is a variable, isn't it? A. Yes.

Q. And the fifth is the cost of overhead that would have been obtained under the McMenimen contract? A. Yes.

Q. Well, now if you eliminate the cost of the overhead under the old contract and if you take a constant instead of a variable to express the variation between the dosage and the gram and a constant to express the price for which Squibb will sell and a constant for the sake of figures to indicate the amount of sales Squibb will name, then if you apply all of those constants in place of variables you come to outside figures, a maximum and a minimum between which figures the doctor would be entitled to a sum of money on the basis to reach a relative ratable; is it possible to do that? A. I cannot.

RECESS.

CROSS EXAMINATION BY MR. BRADNER:

Q. Mr. Stanton, has the Board of Directors of your corporation ever taken any action upon a proposed new contract with Dr. Lowy? A. No further than having met twice to talk it over with the doctor in an endeavor to reach a solution.

Q. Then the Board of Directors has not had any meeting to reach any conclusion as to what ought to be paid the doctor and broach any proposition? A. No, sir; I might say the board of directors have never met since the signing of the Squibb contract except for the purpose of receiving the doctor.

Q. Did Conweiser work for the company? A. Conweiser was originally an employee of the

doctor's and the doctor had the power to designate who his assistant would be and he designated Conweiser.

Q. Did he work for the company? A. Yes.

Q. When did he begin to work? A. He was working prior to my taking over the company, and one of the first things I did was to discharge him.

Q. When did you discharge him? A. June, 1920.

Q. When did these interference proceedings commence? A. Oh, about—the declaration of the interference was in the fall or early winter of 1920.

Q. 1920? A. Yes.

Q. That is after he had been discharged? A. Yes.

Q. Now, since the declaration of the interference has Conweiser applied for what is known as a division? A. I would not know what he did with his application; I don't know.

Q. Have you heard of it? A. No, sir.

Q. What does division mean, in that relation? A. Well, it could be used in several senses—what do you mean, the division of accounts or——

Q. The division of withdrawing his claim of priority and only claiming priority as to some subsequent matters? A. I know nothing as to that.

Q. Haven't heard about it? A. No, sir.

Q. Do your books show any account giving the items of the cost in the manufacture of this product? A. We had tabulated cost sheets that we made up from time to time; they would not appear in our books; they would appear in the memorandum to that effect.

Q. Did you bring those with you today? A. I did not.

Q. Do you know what the product cost? A. To manufacture?

Q. Yes. A. Yes.

Q. How much? A. $1.19, that is including package; one dollar and one half cents for the ampoul and seventeen and a half cents for the packing.

Q. Did that include the salesman's commission? A. That was the cost of manufacture.

Q. Just the mere cost of manufacture? A. Yes.

Q. Did that include the overhead expense? A. No, sir; only the proportionate part to make it up.

Q. And what proportionate part was in that dollar and nineteen cents? A. Well, whatever time would be charged to labor; it would not cover any item of selling expense or overhead expense for maintaining an agency or advertising.

By The Court:

Q. Maintaining your factory? A. Rent would be included, gas and electricity.

Q. That was all included in the dollar and nineteen cents? A. Yes.

Q. And you put it out at what? A. $3.50 less trade discount for the large dose, and $3.25 for the small.

Q. What were those discounts? A. They would vary according to the orders. The net price received was $2.85.

Q. And did you give Dr. Lowy credit on the basis of $2.85? A. We did.

Q. Why didn't you give it to him on the basis

of $3.50? A. That was never the way it was contemplated to pay him—well, he always accepted the other basis of payment as being the way.

Q. Now, I ask you why you did not base it on the basis of gross sale of $3.50? A. That is the net amount received on the gross sale.

Q. Out of that $3.50 you simply paid the trade discount? A. No, we might sell fifty doses for $3.50, but we did not receive $3.50 for it; it might be subject to a fifteen per cent. discount, or thirty per cent.

Q. Then you did give him credit for the percentage you actually received? A. For every dollar we took in we gave him credit.

Q. You stated that after the company was organized there was some work done in improving the product; is that right? A. Yes.

Q. And under this contract I call your attention to paragraph 17, "Obligate myself to assist for the purpose of obtaining the patent and registrations and copyright and assist in prosecuting and defending such applications." Do you recall if he has done so? A. Will you repeat that.

Q. He has assisted wherever it was necessary for the purpose of obtaining patents? A. Yes.

Q. And registrations and copyrights? A. Yes.

Q. And he has assisted in prosecuting and defending such applications? A. Yes, so far.

Q. Well, was there any contract with him that obligates him to pay any part of the expenses of such prosecution? A. I can answer as a member of the bar.

Q. Do you know of anything in the contract

which so obligates him? A. In the assignment, not in the contract.

Q. You base your view upon the breach of something in the assignment as an obligation on his part to protect you? A. I base it on the fact that he warranted, as the sole inventor in his application, that he was the first, sole and true inventor, in his petition for his application, and he then assigned to us the entire right and interest therein—not his entire right, but the entire right and interest.

Q. Do you mean to say that the doctor has expressly agreed to pay some portion of the expense of this litigation in the patent office? A. Not some portion; the entire amount.

Q. He made that agreement with you? A. I would not say it was an agreement; it was understood he was to pay it, and he asked me to retain counsel for him to defend it.

Q. And you paid the counsel? A. Well, as I explained, we paid the counsel in bulk sum and some of it is to that effect and some to others.

RE-DIRECT EXAMINATION BY MR. HERR:

Q. These sheets, cost sheets that you speak of, did the doctor have access to those at all times also? A. At all times.

BY THE COURT:

Q. The contract you have with Squibb is a permanent one? A. We expect it to be if the sales increase. The sales for the last report we came to in March, up to six thousand odd doses, and for the month of March.

Q. Was that high? A. That was better than we ever did.

RE-CROSS EXAMINATION BY MR. BRADNER:

Q. Did you participate in making up the amount of royalties to be paid by Squibb; did you take part in it? A. Why, I—the conferences started early in the latter part of June and ran right up to July; I was present at every one; sometimes alone.

Q. Well, how was that amount of forty-five cents per gram, how was that made up? A. Mr. Weikert of Squibb's said in the first instance, "Do you wish to dictate the selling price or do you wish to dictate the royalties, which do you want to control?" I took it up with the doctor over the telephone and he said the royalties. We then came to an agreement of twenty-five cents per ampoul. When it came to reducing that to writing in the contract, twenty-five cents would not be fair, at least with the four decigram and six decigram, so we hit upon forty-five cents, because there would be more six decigrams sold than four, and the mesne way the sales were running averaged twenty-five cents a dose.

Q. Then you had the option of dictating the selling price? A. I had the option of dictating the selling price and submitted it to the doctor.

Q. Where was that? A. In Newark.

Q. Whereabouts? A. At the laboratory.

Q. Who was there? A. The doctor and I.

Q. Anybody else? A. There may have been; I do not recall.

Q. In the Squibb contract there is a provision that on foreign sales and licenses Squibb shall be reimbursed to the amount of his necessary expense in negotiating such sales and licenses and

the remainder shall be divided between Squibb and Lowy in proportion of forty per cent. to Squibb and sixty per cent. to Lowy; did you participate in the making of that provision in the contract? A. I did.

Q. Will you explain how you arrived at that percentage, forty and sixty? A. More a question of bargaining than anything else.

Q. I do not understand what you say—you did bargain about it, then? A. For upwards of two weeks.

Q. And finally agreed upon those proportions? A. Yes.

JAMES R. STANTON, sworn in behalf of defendant.

DIRECT EXAMINATION BY MR. HERR:

Q. You are secretary of this defendant company? A. I am.

Q. And a stockholder? A. Yes.

Q. Did you meet or talk with Dr. Lowy prior to entering into the Squibb agreement? A. We talked of it around the laboratory a considerable number of times and on one occasion I had lunch with my brother and Mr. Roser at Dr. Lowy's house, at which time we discussed it at great length.

Q. On that occasion was the schedule of royalties discussed? A. The question of fixing the royalties for Dr. Lowy was brought up and he said at that time we would put it over until after the Squibb contract was signed, at which time a new contract could be entered into, because

the old contract would not—could not be workable.

Q. Were there any other occasions on which that matter was discussed prior to the Squibb contract? A. In my father's house, at the time the contract was signed. Dr. Lowy, at the time, after signing the contract, said that this ended the McMenimen contract.

Cross examination waived.

JOHN SCHUEMANN, JR., sworn in behalf of defendant.

DIRECT EXAMINATION BY MR. HERR:

Q. Mr. Schuemann, you are the bookkeeper of this defendant company, Lowy Laboratory, Inc? A. I am.

Q. Have you, in conjunction with Mr. Frank Stanton, attempted to reconcile the schedule of royalties contained in the McMenimen contract with the schedule of payments in the Squibb contract? A. I have several times, and for the last two weeks continually.

Q. Have you been able to find any basis upon which to reconcile them? A. We found it impossible to come to any sort of a basis.

Q. Why is it impossible? A. On account of the different variables; that is, the number of ampouls that might be sold, the price it might be sold at and the size of the dose.

Q. Did you make up the figures in the form of a tabulation to show at what different amounts sold and different selling prices would have been the profit to the company under the McMeni-

men contract and the proportion which ought to be paid to the doctor if the basis contained in the McMenimen contract was applied to the Squibb contracts? A. I did.

Q. Is this the schedule? A. Yes.

Q. Well, now, by referring to that, supposing a sale of 100,000 ampouls at a price of $3.50 by Squibb, can you tell how much money would be payable to this defendant corporation? A. $25,000.

Q. Suppose under the McMenimen contract this and sold them at $3.50, what would have been company had manufactured 100,000 ampouls and the amount payable to the complainant?

MR. BRADNER: They never sold at that price, if your Honor please. I object to it.

THE COURT: Overruled. Go on.

A. Ten per cent., or $35,000.

Q. Now, then, the complainant, as I understand it, on the basis of 100,000 ampouls at $3.50 would get $10,000 more than this company would get from Squibb if he got it out of the amount of gross sales taken in by Squibb? A. Right.

Q. Take it on a basis of a million ampouls sold on this basis of the old contract, the amount on his schedule with the McMenimen contract would have been how much? A. $140,000.

Q. On that basis you would receive from Squibb how much money? A. $250,000.

Q. So that you would have only $110,000 left? A. $110,000.

Q. Now, you have prepared this schedule in order to show different selling prices from a

$3.50 schedule down to a dollar? A. Yes.

Q. Different quantities in ampouls from 50,000 to 5,000,000? A. Yes.

Q. Did you also make out a schedule showing up to quantities of a million ampouls what percentage would go to the complainant if the McMenimen contract schedule were applied to the amount received by this company under the Squibb contract? A. I don't follow that question—I think I know what you mean. I have made up another schedule showing the percentage that the doctor would receive of the profits to the laboratory as for certain figures, that is, the sale of 100,000 up to a million.

Q. Will you produce that schedule?

MR. BRADNER: And at different prices?

THE WITNESS: No, figured at the present price of $3.50 or an average of $2.85.

Q. You find from that that upon a basis of 100,000 ampouls sold the doctor would be—the profit to the laboratory would be $166,000, of which, under the old schedule, the doctor would get ten per cent.? A. Yes.

Q. So that the percentage on that figure would now be about seventeen per cent? A. Seventeen and one tenth per cent.

Q. And that becomes reduced as you go up in quantity? A. Yes.

Q. When you get up to a million it is down to? A. Four and four-tenths per cent.

Q. And, of course, above, it would be less than that? A. Yes.

Q. Now, that represents, without taking into consideration these various variables basing it

on the one price of $3.50 what the doctor would receive in percentage of the company, under the Squibb contract, if you applied the minimum scale to that profit? A. Yes. I am figuring that you are meaning the sales would be on the same proportion as this profit.

Q. Was Dr. Lowy in the laboratory frequently when you were there? A. Yes, quite often.

Q. Did he ever ask you to see the books and cost sheets? A. Every time I was in the office, and I dare say he would come and ask me as to the receipts and sales how we were standing financially.

Q. And did you tell him? A. Yes.

Q. At all times? A. Yes.

CROSS EXAMINATION BY MR. BRADNER:

Q. How did you figure the seventeen per cent.? A. From the cost sheets that we had made up; the cost per ampoul was $1.19, the manufacturing costs; we had to sell 8000 doses a month or more to cover the balance of the overhead expense before we would show a profit, and figure it on a basis of 100,000 per year the selling value of which was $2.85 per ampoul, showed a return to the laboratory in selling value of $285,000. The manufacturing cost was $119,000, and, leaving a gross profit to the laboratory of $166,000. Dr. Lowy's royalties figured on that basis at ten per cent., he was entitled to ten per cent. of $285,000 or $28,500, which showed seventeen and one-tenth per cent. of the gross profit to the laboratory's of $166,000.

Q. Of course, that descends with the descending schedule of his percentages? A. Yes.

Q. In the $2.85 have you figured in any particular amount for the expense thereof, the material and labor? A. No, sir.

Q. You have only averaged that? A. This is the actual cost of manufacturing and at the time of this cost of $2.85, we made up a set of cost figures in which it showed it would be necessary to sell between seventy-five hundred and eight thousand a month to carry the balance of overhead, so that to make any money the sales of the laboratory would have to run close to 100,000 or more.

Q. As a matter of fact, has the company made any profit at all? A. No, sir.

Q. Then, in order to make any profit you had to sell 100,000 a year? A. Yes.

Q. And if you didn't sell the 100,000 the doctor would make all there was in it? A. Yes.

Q. Have you sold 100,000? A. In any one year?

Q. Yes. A. No, sir.

Q. Well, any two years. A. Well, I have not been with the concern, that is, in the manufacture, that long.

EDWARD STANTON, sworn in behalf of defendant.

DIRECT EXAMINATION BY MR. HERR:

Q. What is your business? A. At present I am United States Commissioner at Hoboken.

Q. Are you president of this Lowy Laboratory Inc.? A. Yes.

Q. You signed this agreement as president? A. I did, yes.

Q. At the time of the signing of that agreement was Dr. Lowy present? A. He was.

Q. Did he say anything with regard to the McMenimen contract at that time? A. He said that ended the McMenimen contract, that ended it.

Q. Did you have any talk with him prior to that time respecting the McMenimen contract or the schedule of royalties under it and what would happen to it after the Squibb contract was made? A. The only conversation I had was when my son Frank was very sick I went to his house and I met Dr. Lowy there and my son Jimmie and I think Mrs. Lowy, the doctor's wife, was present, and Frank was in no condition to talk, he was very bad, and he had an appointment with Mr. Weikert, who was the president or vice president of the Squibb corporation—Frank was in no shape to keep the appointment and Dr. Lowy and my son Jimmie kept the appointment and Dr. Lowy said then and there we must get rid of this contract, we must sign up, he said, "I am poor at bargaining"; "Well," I said, "doctor if you argue as much with Mr. Weikert as you have argued here you are a great bargainer."

Q. Well, was anything said at that time about the McMenimen contract? A. Well, at that time the appointment there ended. Now, after they came back, the next time I met the doctor was at a meeting of the board of directors of the Lowy Corporation—in fact, the board met twice to meet the doctor and discuss his royalties, or percentage, or whatever he was entitled to under the new contract. He disappointed the board on

two occasions. The last time we met in Newark. The full board of directors was there and the doctor was there and talked for a few moments, and I said, "Now, doctor, we have called this board in order to hear your proposition; are you in shape or ready to make it?" he said, "I am." "Well," I said, "now be reasonable, doctor." He said, "My proposition is that I want twenty-five per cent., and I want twenty per cent.," as I understood him, of the foreign rights. "Why," I said, "doctor, how did you come to that conclusion?" He said, "Now, that is my proposition." I said, "Now, doctor, let's be reasonable. Do you realize the amount of money that has been expended to advertise Dr. Lowy and his solution throughout the United States? Do you realize the amount of money that is owing to the bank; did you ever figure the amount of money that has been expended to carry this article that you have invented, as you have called it, solution of arsphenimine; haven't you any consideration at all for the services that have been rendered, the amount of money that has been expended; can't you be reasonable; won't you be reasonable?" He said, "That is my proposition." "Well," I said, "Doctor, it is unfair." He said, "Well, if I cannot get that from the board of directors or from this body or from you," as he said, I didn't just exactly catch the word, but with reference to the board, "I will seek redress elsewhere"; and I said, "Doctor, do I understand that is a threat?" "No," he said. He then, in the meantime, called his counsel up, Mr. Kohn. Mr. Kohn came there and he introduced us. Of course, that is the first

time I met him, and he said—well, I don't know if you call him Louis or what his first name was; he said, "I made my proposition to them," and Mr. Kohn said, "What did they say?" "Well, they don't seem to accept"; and they didn't say any more. He tied his shoes and he said, "Good-bye, gentlemen"; and that was the last.

Q. When you signed up the Squibb contract as president of this company did you understand the McMenimen contract to be at an end? A. Yes, it ceased, abrogated entirely.

CROSS EXAMINATION BY MR. BRADNER:

Q. Where was that last meeting held? A. Newark.

Q. When was it? A. I think it was in July, though I am not positive of the date, although I think so; I would not say the date.

Q. Did the board of directors ever act on any proposition that the doctor had made? A. No, finally they discussed it, but the doctor's request and proposition was so outrageous,—that the income from the Squibb royalties would not be able to meet the demands of the doctor's suggestion.

Q. Well, did the board of directors ever meet and adopt any resolutions or motions to make any proposition to the doctor? A. They never adopted any resolution to my knowledge, but they discussed it and said "Well, now——

Q. No, I don't ask what was said. Did you ever have any formal meeting on the subject? A. Oh, yes; we had two or three meetings.

Q. Did you have any formal meeting and take into consideration what the company was will-

ing to pay the doctor? A. There was nothing ever final on that.

Q. You have never made him any proposition, have you? A. Well, I think my son Frank and him have talked so often on it—in fact, it is so much out of my line of business I was perfectly contented to abide by those familiar with the conditions.

Q. Mr. Schuemann has been in your employ all the time? A. Why, he has been the clerk there, and reliable and responsible.

Q. He was just as capable at any time to make up his schedule of percentage as he is today? A. I think he is a very competent clerk and a very honest one.

Q. Have you ever asked him before this suit was brought to figure up what the doctor's proportionate share was? A. Me, individually?

Q. Yes. A. No.

Q. Have the officers of the company? A. They may, but I didn't know.

Defendant rests.

OTTO LOWY, complainant, recalled in his own behalf.

DIRECT EXAMINATION BY MR. BRADNER:

Q. Dr. Lowy, when did you have your first conversation with Mr. Stanton in relation to the proposed license to Squibb? A. When I first suggested that the Lowy Laboratory people license or sell to Squibb? That was some time in May, 1921, either April or May; I do not remember the exact date.

Q. Who acted for Squibb in the negotiation for that company? A. A Mr. Weikert.

Q. Did they have a meeting at your house? A. No, not with Mr. Weikert of Squibb's; I had a meeting with the gentlemen that have been mentioned.

Q. In relation to the Squibb contract? A. Yes.

Q. Before it was executed did you have a meeting at your house? A. Yes.

Q. Who was there? A. Frank Stanton, James Stanton, Mr. Roser and myself. It was not a formal meeting of the Board of Directors; it was simply an informal affair when we discussed on what terms the Lowy Laboratory should sell or license to Squibb.

Q. Was any suggestion made by Mr. Roser? A. Yes.

Q. What did he say? A. After we had discussed the various ways, Mr. Roser said, "Now, this arrangement with Squibb will disarrange Dr. Lowy's contract; what are you going to do about that?" I said that I was perfectly willing to permit a readjustment of the contract to fit the new conditions, but I did not say that I was willing to give up my original contract until I had another contract from the Lowy Laboratory, as was testified.

Q. After that meeting did you have a further talk with Frank Stanton? A. Oh, yes; any number of talks with Frank Stanton.

Q. When was that? A. This conversation took place, I believe, on a Wednesday. On Thursday night there was another meeting at Mr. Frank Stanton's home, at which were present the

gentlemen Mr. Edward Stanton has described. Ed. Stanton, James Stanton and myself and Mrs. Lowy. At that time we were discussing the question what should be done with the Squibb matter. Mr. Frank Stanton was sick and I suggested at that time that Mr. Kohn and Mr. James Stanton go over to see Mr. Weikert, and I said, furthermore, it would be a good idea if Mr. Kohn went over there to take care of my interests. Mr. Frank Stanton then replied to that that that would be a very poor thing, that there would be too many lawyers in it, and that we ought to get rid of this contract, but, he said he had talked the matter over with Mr. Houget, who was his patent attorney, and they decided he would take care of my interests. That being the case, I said no more. On Saturday following I again called at Mr. Stanton's home with Mrs. Lowy and then I told Mr. Frank Stanton what I thought I ought to get.

Q. What did you say? A. I told him I thought I ought to get a fifty-fifty split. Mr. Frank Stanton was very indignant and I became excited; I said things I ought not to have said. I then went down to a proposition of thirty-three and one-third per cent. Mr. Stanton could not see it and I became some more excited. The following day I telephoned, apologizing for my excitement, and then the following Monday—this was Sunday—on Monday morning Mr. Richard Kohn and I went to Mr. Stanton's home with Mr. Kohn and Frank Stanton, and decided that Mr. Kohn and Mr. Stanton would talk the matter over and arrange a new agreement. That was all before the Squibb contract was signed. I was

in communication with Mr. Stanton daily, as he has said, and on Friday—I suppose it was the first, but the Friday before the fourth of July, I received a telephone call at five o'clock in the afternoon, to come to Hoboken to sign the Squibb contract. I went over and found Frank, James and Edward Stanton, and they showed me this document, and I said, "Is it necessary for me to read it?" They said, "No, the only thing pertaining to you is in the last three paragraphs, you can glance over them," and I glanced over them and said, "There is nothing inimical to me," and I signed it, and I said, "I want to show you one or two things" which I thought were wrong, and he said I will have that corrected; and I went to the notary to have the contract executed. At that time I did not tell that this was the end of the McMenimen contract. I mean I could not give up what I had. There was nothing in the Squibb contract which was inimical to me; they never paid me any money; I merely signed the contract to save the Lowy people, because Mr. Stanton had said Squibb would not sign it unless you sign.

Q. Did you have another meeting after the contract was signed? A. Oh, yes, any number. On one occasion James Stanton and Frank and Mr. Kohn and myself, after a long consultation, agreed I ought to accept thirty per cent. as a compromise; and Frank Stanton said, "I will have to take it up with my directors." Nothing more was heard for four or five days and then Frank Stanton said he would like to have me come up to the house and discuss the matter, and then he said, "My board of directors would not take the thirty per cent.

and anyway you have no contract; by signing the Squibb contract you abrogated the original contract and you simply have nothing at all; you are through; you are on the short end of the stick and you will have to take what we are willing to give you." I said, "I cannot very well believe that"; I said, "If there is anything over we can adjust it"; and he said, "No, at any rate you have breached your contract and we have breached our contract and there is no contract"; and I said, "No, we are honest people, we can adjust this"; and we then sent for Mr. Kohn and he told him something and that very same day I engaged Mr. Bradner, and after that we had other meetings at each of which I agreed to take a little less, but they made no effer except at the last meeting, and Mr. Roser then thought ten or fifteen per cent., ought to be satisfactory.

Q. At the last meeting was anything said about your original contract? A. Yes; at all the meetings there was something said about my original contract. I always said unless I got a new contract from them I would stand on the original contract.

Q. Is that the time Edward Stanton asked you if that was a threat? A. Yes.

Q. Did you make any proposition at that meeting? A. Why, yes; I made a proposition to accept twenty-five per cent. up to 500,000, with the understanding only twenty per cent. was to be paid until other obligations were to be paid off, and then that remaining five per cent. was to accumulate, and if they sold above 500,000 ampouls I would be willing to take twenty per cent. Now, in money that would mean this, when I was

entitled to approximately $28,000 on a sale of 120,000 ampouls that I was willing to accept instead of $28,000, twenty-five per cent. of $25,000, about $6250. I was willing to sacrifice a whole lot to prevent the Lowy Laboratory from going into bankruptcy.

Q. Doctor, did you participate in making the Squibb contract? A. I did not. I was present at one meeting with Mr. Weikert.

Q. Do you know how that forty and sixty proportion was arranged? A. I suppose Mr. Stanton and Mr. Weikert thought that that was a fair proportion.

Q. That is the proportion of the net receipts? A. That would mean the profits.

Cross examination waived.

CAMILLA LOWY, sworn in behalf of complainant, in rebuttal.

DIRECT EXAMINATION BY MR. BRADNER:

Q. You are the wife of Dr. Lowy? A. Yes.

Q. Mrs. Lowy, were you present at any conversations between Dr. Lowy and Mr. Stanton with relation to the Squibb contract? A. I was present at three of the meetings; two at Mr. Stanton's home, and I was present at our home when he said he had not any contract, because I sent Sonny by automobile for my brother, Mr. Kohn, to come up, after Mr. Stanton said that Dr. Lowy was through.

Q. That was at your home? A. That was at my home; and then I was present at two at Mr. Stanton's home.

Q. What occurred at the first one of those? A. We came there and Mr. Stanton had been quite ill and had a long day of it, and they were supposed to go over the case, but Mr. Stanton was really very sick and they thought that Jimmie Stanton ought to go over——

Q. Over where? A. To see Mr. Weikert; there was to be a meeting, and Jimmie Stanton said he could not go because he hadn't any authority; they wouldn't do much with him; and then Dr. Lowy said that he thought he could fix them up, and I know that they sent to the drugstore for something for Mr. Stanton; and then they suggested Mr. Stanton's father going over, and Dr. Lowy said, "I think I ought to ask my brother to go along to take care of my interests," and Mr. Stanton said it was not necessary because he and Mr. Houget had talked the matter over and they were going to take care of Mr. Lowy's interests. That was the first one.

Q. Now the next one? A. The next one that was Thursday, and on Saturday night we went over again and Mr. Stanton had still been sick and Dr. Lowy told him he wanted fifty and then thirty-three and a third, and they had quite a heated argument, and all I could think of was to get Dr. Lowy home, because there was not anyone else there and there was quite an argument, and I didn't like to hear it.

Q. Was any proposition made by them to him? A. No, just simply that they would not hear of what he had to say; he used the word his playfellows would not stand for it.

Q. At the meeting at your house you say Mr. Roser was there? A. Why, that was upstairs—I wasn't in the room when that happened; this

was in the lower hall and all I remember is when Mr. Stanton said that the doctor's contract was no good, he had shown it to half a dozen lawyers and he said he had breached his contract and they breached theirs, because it was of no value, and Dr. Lowy said he would stand for his own until he got another.

CROSS EXAMINATION BY MR. HERR:

Q. That occasion you last spoke of was at Mr. Stanton's house at Hoboken? A. Do you mean when he said the contract was breached?

Q. Yes. A. No, that was at our house when I sent for my brother.

Q. When was that? A. That was after the Squibb contract had been signed. There had been several negotiations and the doctor had met Mr. Stanton several times, but that was the time they were up to our house.

Q. You were not present on any occasion before the Squibb contract was signed, when this matter was spoken of? A. Yes; that Saturday at Mr. Stanton's home when we went there, because Dr. Lowy went over it to make him understand what he wanted.

Q. How did you happen to go there? A. Because I have always been interested; in fact, the first time Mrs. Stanton said, "Let's go out of the room, they don't want us," and I said, "I am not, because I am very much interested"; and I wouldn't listen to it because it meant everything to us.

MR. BRADNER: I offer to read the deposition of Mr. Kohn that was taken.

Adjourned until June 6, 1922.

Opinion of Vice Chancellor Backes.

(Filed July 18, 1922.)

Submitted June 14, 1922. Decided July 11, 1922.

IN CHANCERY OF NEW JERSEY.

Between

OTTO LOWY,
Complainant,
and

WILLIAM V. MCMENIMEN, et als.,
Defendants.

ON FINAL HEARING.

For Complainant, MR. FRANK E. BRADNER.
For Defendant, MESSRS. HENRY J. GAEDE and DOUGAL HERR.

BACKES, V. C.

This bill is in effect a suit for the specific performance of a contract. Dr. Lowy, the complainant, invented a process for permanently liquifying powdered arsenical compounds used in the treatment of syphilis, for which he obtained Letters Patent. He sold his invention to one McMenimen, who, in turn, assigned it to the Lowy Laboratory, Inc., a corporation which he formed for the purpose of making and marketing the compounds. Dr. Lowy received a cash consideration and some of the capital stock, and was to receive an annual royalty of the gross sales in the United States on the following sliding scale:

For all sales of

1 to 100,000 ampules, 6/10 grain arsphenimine 10%
100,001 to 200,000 ampules, 6/10 grain arsphenimine 8%
200,001 to 300,000 ampules, 6/10 grain arsphenimine 6%
300,001 to 400,000 ampules, 6/10 grain arsphenimine 4%
400,001 to 500,000 ampules, 6/10 grain arsphenimine 2%

The royalty on sales outside of the United States was also on a scaling rate, but it plays no part in this suit. The company assumed the contract, paid the Doctor royalties from time to time up until January, 1921, but the output never reached the maximum of the first division of one hundred thousand ampules annually. The business was not profitable and in July, 1921, the company was about to go on the financial rocks. Failure was imminent and bankruptcy was staring it in the face, when Dr. Lowy, co-operating with his associates, interested E. R. Squibb & Sons, a wholesale drug supply house, and negotiations resulted in a contract granting to Squibb & Sons the sole and exclusive license to make, use and sell the products of Dr. Lowy's invention, for which Squibb & Sons agreed to pay the company "for the plain arsphenimine solution a royalty of forty-five cents for each gram of arsphenimine contained in the solution sold by Squibb calculated according to analysis." There was also a provision for an adjustment of the royalties in the event that competitors of Squibb & Sons should undersell them, the formula of which is set out in the contract. Dr. Lowy was personally a party to the agreement. It was

the understanding beforehand that his right to royalties under his contract was to remain unimpaired, but a new rate had to be fixed, and it was agreed that if he consented to the Squibb & Sons contract his royalty would be adjusted upon "an equitable basis." The bill so charges and it is admitted by the answer. The parties have not been able to agree. The principal defense is an attack upon the jurisdiction of the Court, the contentions being that the bill is one for an accounting and cognizable at law, citing *Daab v. N. Y. C. & H. R. R. Co.,* 70 N. J. Eq., 489; *Olds v. Regan,* 32 Atl. Rep., 827, and that the court is powerless to fix the rate of the royalty, and that the remedy is at law for a breach of the contract. The suit is manifestly for more than an accounting—the accounting is incidental to the main relief for enforcement. At the hearing the defendant's officers professed anxiety to settle on a royalty basis, and to test their sincerity I suggested that they withdraw their jurisdictional objections and allow the court, unhampered, to adjust their differences, which they promptly rejected, in the hope, no doubt, of driving the complainant into the law courts for damages, and ridding themselves of the contract. The remedy at law is entirely inadequate. Damages could not be even approximately measured. The fruits of Dr. Lowy's invention depend upon the successful marketing of the product. What that will be is problematical. *Feigenspan v. Nizolek,* 71 N. J. Eq., 382; *Peoples' Brewing Co. v. Levin,* 81 Atl. Rep., 1114, aff'd 78 N. J. Eq., 583. It is Dr. Lowy's privilege to have his contract specifically enforced, and as the parties themselves have established a standard by which the

royalty may be determined with certainty—"equitable basis"—it is within the power of equity to grant him relief. "It is not necessary that the price be specified in figures or words at length. It is sufficient if a standard is established by which the price may be determined with certainty; as, for instance, the 'fair value' or 'market value' (*VamDoren v. Robinson,* 16 N. J. Eq., 256), or at a price offered by another upon a certain event, and accepted, (*Race v. Groves,* 43 N. J. Eq., 284; *Hayes v. O'Brien,* 149 Ill., 403), or the appraisal of arbitrators (*Woodruff v. Woodruff,* 44 N. J. Eq., 349)." *McClung Drug Co. v. City Realty & Invest. Co.,* 91 N. J. Eq., 216; aff'd 92 N. J. Eq., 237. I can perceive no distinction in standards between "fair value" or "market value" and "an equitable basis," as used and understood by the parties. It is said that the royalty contracts of Dr. Lowy and Squibb and Sons are so inharmonious as not to admit of an adjustment on an equitable basis. That is more apparent than real. The adjustment is simply one of proportional abatement, and simple of computation thus: by taking as the basis for the calculation Lowy Laboratory's net profit per gram of arsphenimine earned under its own manufacture and that derived from the Squibb & Sons contract and apportioning the latter to the Lowy Company and Dr. Lowy on the basis of the division of profit prevailing during the existence of their contract. I am making the calculation upon the first division of output of one hundred thousand ampules. The uncontradicted testimony is that the Lowy Laboratory's gross selling price per ampule of six-tenths grain of arsphenimine was $2.26. Of this Dr. Lowy was entitled, under his contract, to 22.6 cents.

The cost of production and marketing was $1.90, leaving a net profit of 36 cents, divided thus, 22.6 to Dr. Lowy and 13.4 to Lowy Laboratory, Inc.,—approximately ⅔ and ⅓. The royalty from Squibb & Sons to the Lowy Laboratory is 45 cents per gram, or 27 cents for $^{6}/_{10}$ of a gram. The rate per gram of profit to the Lowy Laboratory under its own output was 60 cents. Its income from Squibb & Sons at 45 cents per gram means simply a drop of 25 per cent. which should be proportionately borne. Thus, calculated on the basis of a gram at 45 cents, Dr. Lowy's yield will be $28^{25}/_{100}$ and the Lowy Laboratory's $16^{75}/_{100}$. But Dr. Lowy is willing to make concessions and offers to accept, as counsel says in his brief, as an equitable division, 60 per cent. for the Lowy Laboratory and 40 per cent. to him of the proceeds of the royalties coming from Squibb & Sons. It will be so decreed and an accounting ordered.

For present purposes the foregoing will suffice. If in the future sales reach beyond 100,000 ampules, or 100,000 units of $^{6}/_{10}$ gram of Arsphenimine, then the sliding scale above set out will be a factor to be taken into the reckoning, but not until the division of the royalty from Squibb & Sons, calculated on the equity basis, touch the 60 to 40 ratio accepted by the complainant.

The bill can also be sustained on this theory. If the arrangement to adjust the royalty on an equitable basis be not an enforceable contract, then the original contract between the two may be enforced. That contract retains its legal vitality save as to the percentage of royalty. If the Squibb & Sons contract should terminate and

Lowy Laboratory, Inc., should resume manufacturing, it would be restored to its full vigor. On an accounting, therefore, to which the complainant is entitled, at all events, he would be allowed his royalty, modified, however, consistently with the new situation he helped to bring about. This, clearly, would not be less than the complainant agreed to take.

Interlocutory Decree.

(Filed October 6, 1922.)

IN CHANCERY OF NEW JERSEY.

Between

OTTO LOWY,
Complainant,

and

WILLIAM V. MCMENIMEN and LOWY LABORATORY, INC., a corporation,
Defendants.

On Bill, &c.

This cause coming on to be heard before the Court upon the Bill and Answer of Lowy Laboratory, Inc., and Replication thereto, and the proofs, in the presence of Frank E. Bradner, of counsel with the complainant, and Dougal Herr and Henry J. Gaede, of counsel with the answering defendant; and the pleadings, proofs, etc., having been read and the arguments of respective counsel having been heard and considered, and

it appearing to the Court that the complainant is entitled to the relief prayed in his bill of complaint:

It is thereupon on this 4th day of September, 1922, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the Chancellor doth by virtue of the power and authority of this court, hereby order, adjudge and decree that the complainant is entitled to receive from defendant Lowy Laboratory, Inc., an annual royalty of a percentage of the gross sales of a certain arsenical solution, as provided in the contract in writing made by and between the complainant and William V. McMenimen, and bearing date September 3, 1919, and assigned to and assumed by said Lowy Laboratory, Inc.

And it is further ordered, adjudged and decreed that the said contract is in full force and effect except as modified by a subsequent contract made by and between Lowy Laboratory, Inc., and E. R. Squibb & Sons and the complainant, and bearing date July 1, 1921; and it is further ordered, adjudged and decreed that the complainant is entitled to an accounting from Lowy Laboratory, Inc., of all sales made pursuant to the first above mentioned contract up to October 1, 1921.

And it is further ordered, adjudged and decreed that the complainant is entitled to receive from Lowy Laboratory, Inc., 40% of all royalties payable to and received by said Lowy Laboratory, Inc., from E. R. Squibb & Sons pursuant to a certain contract in writing made by and between said defendant Lowy Laboratory, Inc., and E. R. Squibb & Sons, complainant, and bearing

date July 1, 1921, which provides for the payment of royalty by E. R. Squibb & Sons upon the sale of the said certain arsenical solutions; and it is further ordered, adjudged and decreed that the complainant is entitled to an accounting from said Lowy Laboratory, Inc., for all moneys received from the said E. R. Squibb & Sons since October 1, 1921.

And it is further ordered, adjudged and decreed, that it be referred to Charles R. Myers, Esq., one of the Special Masters of this Court, to take and state an account between the said complainant and the said defendant Lowy Laboratory, Inc., of the sales made by said Lowy Laboratory, Inc., of the arsenical compound referred to in the contract in writing made by and between the complainant and William V. McMenimen, and assumed by the said defendant, and bearing date September 3, 1919, and to ascertain the amount of royalty due to the said complainant pursuant to the terms of said contract as of October 1, 1921; and to report the amount so found to be due; and also, to take and state an account between the said complainant and the said defendant Lowy Laboratory, Inc., of the royalties payable to and received by the said Lowy Laboratory, Inc., from E. R. Squibb & Sons, pursuant to the contract in writing made by and between the said Lowy Laboratory, Inc., and the complainant, and bearing date July 1, 1921, since October 1, 1921, charging the defendant Lowy Laboratory, Inc., and giving credit to the complainant 40% of the amount of royalties received by said Lowy Laboratory, Inc., from said E. R. Squibb & Sons; and to ascertain and report the amount found to be due to the complainant.

Interlocutory Decree.

And it is further ordered that in the taking of said accounts said Special Master shall be at liberty to examine the parties under oath, and such other witnesses as may be produced; and for the better clearing of which accounts the parties are to produce all books and all accounts kept by them, or either of them, relating to the matters aforesaid; checks, vouchers and such other documents as the Special Master shall direct.

And it is further ordered and decreed that either party may apply to the Court for further directions to the said Master in the taking and stating of such account, if the same shall become necessary; and all further equity is reserved until the coming in of said Master's report.

Respectfully advised,

JOHN H. BACKES,
V. C.

E. R. WALKER,
C.

A True Copy,
JESSE R. SALMON,
Clerk.

Notice of Appeal.

(Filed October 14, 1922.)

IN CHANCERY OF NEW JERSEY.

Between OTTO LOWY, *Complainant-Respondent,* *and* WILLIAM V. MCMENIMEN, *Defendant,* and LOWY LABORATORY, INC., a corporation, *Defendant-Appellant.*	On Bill, &c.

The defendant, Lowy Laboratory, Inc., hereby appeals from the decree made and filed in this Court in the above stated cause on October 4th, 1922, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

GAEDE & GAEDE,
HOPKINS & HERR,
Solicitors of and of counsel with Lowy Laboratory, Inc., Defendant.

Dated, October 14th, 1922.

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

DOUGAL HERR,
Of counsel with Lowy Laboratory, Inc., defendant.

A True Copy,
JESSE R. SALMON,
Clerk.

Petition of Appeal.

(Filed November 3, 1922.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between OTTO LOWY, *Complainant-Respondent,* *and* WILLIAM V. MCMENIMEN, *Defendant,* and LOWY LABORATORY, INC., a corporation, *Defendant-Appellant.*	On Bill, &c. On appeal from Court of Chancery.

To the Honorable, the Court of Errors and Appeals, in the last resort in all causes:

The petition of Lowy Laboratory, Inc; a corporation, the appellant in the above stated cause, respectfully shows that your petitioner finds itself aggrieved by a certain decree or order, termed an "Interlocutory Decree" made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the fourth day of September, in the year Nineteen Hundred and Twenty-two, in a cause wherein your petitioner was one of the defendants and Otto Lowy was complainant, in these respects, to wit:

1. That the said order or decree adjudges and decrees (by necessary implication) that the bill of complaint should not be dismissed upon your petitioner's motion, duly and regularly made, that

said bill is not defective upon any of the grounds urged upon said motion, to wit:—

1- The facts as alleged are insufficient to constitute and do not state a cause of action.

2- Complainant has adequate remedy at law.

3- For the want of equity.

4- That the Court is without jurisdiction.

5- That complainant is not entitled to the relief prayed.

6- That the prayer was vague, indefinite and uncertain.

2. That the said order or decree adjudges and decrees that the complainant is entitled to receive from your petitioner an annual royalty of a percentage of the gross sales of a certain arsenical solution, as provided in a certain contract in writing made by and between the complainant and the defendant William V. McMenimen, bearing date September 3, 1917, and assigned to and assumed by your petitioner.

3. That the said order or decree adjudges and decrees that said contract is in full force and effect except as modified by a subsequent contract made by and between your petitioner and E. R. Squibb and Sons and the complainant, and bearing date July 1, 1921.

4. That the said order or decree adjudges and decrees that the complainant is entitled to an accounting from your petitioner of all sales made pursuant to the first above mentioned contract up to October 1, 1921.

5. That the said order or decree adjudges and decrees that the complainant is entitled to receive from your petitioner forty per centum (40%) of all royalties payable to and received by your petitioner from E. R. Squibb and Sons,

pursuant to the contract secondly above mentioned, and that the complainant is entitled to an accounting from your petitioner for all moneys received from the said E. R. Squibb and Sons since October 1, 1921.

And your petitioner humbly appeals from the parts of said order or decree above mentioned upon the ground that the same is erroneous, for that your petitioner is entitled to a decree dismissing the said bill of complaint, upon the grounds urged below, and because the complainant is not entitled to be paid 40% of all royalties payable to and received by your petitioner from E. R. Squibb and Sons pursuant to the contract secondly above mentioned, or to any accounting or other relief in equity.

Your petitioner therefore prays that the said order or decree of the said Chancellor may be, in all particulars, reversed, set aside and for nothing holden, and that your petitioner may have such further relief in the premises as to this honorable Court shall seem meet.

GAEDE & GAEDE,
HOPKINS & HERR,
Solicitors of and of counsel with appellant.

Answer to Petition of Appeal.

(Filed November 10, 1922.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between OTTO LOWY, *Complainant-Respondent,* *and* WILLIAM V. MCMENIMEN and LOWY LABORATORY, INC., a corporation, *Defendants-Appellants.*	On Appeal From the Court of Chancery.

The answer of the above named respondent to the petition of appeal of Lowy Laboratory, Inc., a corporation.

This respondent not acknowledging all or any of the matters which in the said petition of appeal are contained, to be true, for answer thereto nevertheless says and admits that a decree was made in the above stated cause on October 4, 1922, not September 4, 1922, as alleged in the petition; and entered in the Court of Chancery as is stated in said petition, but as to the substance and form thereof this respondent prays to refer thereto when the same shall be produced.

And this respondent is advised and believes that the said decree is agreeable to equity, and he prays that the same may be affirmed with costs to be adjudged to this respondent.

FRANK E. BRADNER,
Solicitor of Respondent.

Final Decree.

(Filed December 19, 1922.)

IN CHANCERY OF NEW JERSEY.

Between OTTO LOWY, *Complainant,* *and* WILLIAM V. MCMENIMEN, et al., *Defendants.*	On Bill &c.

This cause having been heard and an interlocutory decree having been made on September 4, 1922, wherein and whereby it was decreed that the complainant is entitled to receive from the defendant Lowy Laboratory, Inc., an annual royalty of a percentage of the gross sales of a certain arsenical solution, as provided in a certain contract in writing made by and between the complainant and William V. McMenimen, and bearing date September 3, 1919, and assigned to and assumed by said Lowy Laboratory, Inc., and wherein and whereby it was further decreed that the said contract of September 5, 1919, is in full force and effect except as modified by a subsequent contract made by and between Low Laboratory, Inc. and E. R. Squibb & Sons and the complainant, and bearing date July 1, 1921; and it was further decreed that the complainant is entitled to receive from Lowy Laboratory, Inc., 40% of all royalties payable to and received by said Lowy Laboratory from

E. R. Squibb & Sons pursuant to said last mentioned contract; and it was further ordered and decreed that it be referred to Charles M. Myers, Esq., one of the Special Masters of this court, to take and state an account between the said complainant and the said defendant Lowy Laboratory, Inc., of the sales made by said Lowy Laboratory, Inc., of the arsenical compound referred to in the contract in writing made by and between the complainant and William M. McMenimen as aforesaid; and to ascertain the amount of royalty due to the said complainant pursuant to the terms of said contract as of October 1, 1921, and to report the amount so found to be due; and also to take and state an account between the said complainant and the said defendant, of the royalties payable to and received by the said Lowy Laboratory, Inc., from E. R. Squibb & Sons pursuant to the contract in writing made between them as aforesaid, since October 1, 1921, and to ascertain and report the amount found to be due to complainant; and it appearing that the said Special Master has filed a report in which he finds that the royalty due to the complainant on October 1, 1921, pursuant to the contract of September 3, 1919, is the sum of $3,595.51; and that the amount due to the complainant since October 1, 1921, from the royalties payable to and received by the said Lowy Laboratory, Inc., from E. R. Squibb & Sons, is the sum of $2,946.89; and the said report of said Master having been duly confirmed: IT IS thereupon, on this 19th day of December, 1922, on motion of Frank E. Bradner, of counsel with the complainant, in the presence of Gaede & Gaede, and Dougal Herr, of counsel with the

defendant Lowy Laboratory, Inc., by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chancellor doth by virtue of the power and authority of this court, hereby order, adjudge and decree that the said defendant Lowy Laboratory, Inc., shall forthwith pay to the said complainant the sum of $3,595.51, the amount of royalties found to be due to the said complainant on October 1, 1921, together with interest thereon from October 1, 1921; and that the said defendant Lowy Laboratory, Inc., shall also forthwith pay to the said complainant the sum of $2,946.89, the amount of the royalties collected and received by said Lowy Laboratory, Inc., from E. R. Squibb & Sons, up to October 1, 1922, together with interest thereon from October 1, 1922; and it is further ordered, adjudged and decreed that the complainant do recover from the said defendant Lowy Laboratory, Inc., his costs of this suit to be taxed, including therein the sum of $74.50, the cost of the testimony; and also including therein a counsel fee of $1,000.00 allowed to Frank E. Bradner, of counsel with the complainant.

And it is further ordered, adjudged and decreed that the complainant may have execution to recover the debts and costs aforesaid, according to the practice of this court.

And it is further ordered, adjudged and decreed, that either party may apply to this court for further relief as occasion may arise.

E. R. WALKER,
C.

Respectfully advised.
JOHN H. BACKES,
V .C.

Notice of Appeal.

(Filed December 21, 1922.)

IN CHANCERY OF NEW JERSEY.

Between

OTTO LOWY,
Complainant-Respondent,

and

WILLIAM V. MCMENIMEN,
Defendant,

and LOWY LABORATORY, INC., a corporation,
Defendant-Appellant.

The defendant, Lowy Laboratory, Inc., hereby appeals from the final decree made and filed in this Court in the above stated cause on December 19th, 1922, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

GAEDE & GAEDE,
HOPKINS & HERR,
Solicitors of and of counsel with Lowy Laboratory, Inc., Defendant.

Dated, December 19th, 1922.

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

DOUGAL HERR,
Of counsel with Lowy Laboratory, Inc., Defendant.

Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between OTTO LOWY, *Complainant-Respondent,* *and* WILLIAM V. MCMENIMEN, *Defendant,* and LOWY LABORATORY, INC., a corporation, *Defendant-Appellant.*	On Bill, &c. On Appeal from Court of Chancery.

To the Honorable, the Court of Errors and Appeals, in the last resort in all causes:

The petition of Lowy Laboratory, Inc., a corporation, the appellant in the above stated cause, respectfully shows that your petitioner finds itself aggrieved by a certain final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the nineteenth day of December in the year Nineteen Hundred and Twenty-two, in a cause wherein your petitioner was one of the defendants and Otto Lowy was complainant, in these respects, to wit:—

That the said decree adjudges and decrees that this appellant pay to the respondent, Otto Lowy, certain sums of money, including One Thousand Dollars, counsel fees.

And your petitioner humbly appeals from the whole of said decree above mentioned upon the

ground that the same is erroneous for that your petitioner is entitled to a decree dismissing the said bill of complaint upon the grounds urged below and upon the grounds urged in the petition of appeal filed by this appellant on November 3rd, 1922, upon the appeal from the interlocutory decree in this cause and also upon the ground that an interference proceeding is pending in the Patent Office involving the validity of the title to the patents in question, as appears from the evidence taken in this cause, and also upon the ground that your petitioner is entitled to set off against any monies found to be due the respondent, the amount necessarily expended and which must in future be expended by your petitioner in and about the defence of said patents in said interference proceedings.

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

GAEDE & GAEDE,
HOPKINS & HERR,
Solicitors of and of counsel with Appellant.

Answer to Petition of Appeal.

(Filed January 25, 1923.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between OTTO LOWY, *Complainant-Respondent,* *and* WILLIAM V. MCMENIMEN and LOWY LABORATORY, INC., a corporation, *Defendants-Appellants.*	On Appeal from the Court of Chancery.

The answer of the above named respondent to the petition of appeal of Lowy Laboratory, Inc., a corporation.

This respondent not acknowledging all or any of the matters which in the said petition of appeal are contained, to be true, for answer thereto nevertheless says and admits that a decree was made in the above stated cause on December 19, 1922, as alleged in the petition, and entered in the Court of Chancery, as is stated in said petition, but as to the substance and form thereof this respondent prays to refer thereto when the same shall be produced.

And this respondent is advised and believes tha the said decree is agreeable to equity, and he prays that the same may be affirmed, with costs to be adjudged to this respondent.

FRANK E. BRADNER,
Solicitor of Respondent.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

OTTO LOWY,
Complainant-Respondent,

and

WILLIAM V. MCMENIMEN,
Defendant,

and

LOWY LABORATORY, INC.,
Defendant-Appellant.

On Appeal from Court of Chancery.

BRIEF FOR RESPONDENT.

Abstract of the Case.

Complainant-respondent sold to Lowy Laboratory, Inc., in September, 1919, a certain invention (arsenical solution), and has assigned to said defendant the invention and the applications for patent and patents that may be granted. The price to be paid by the defendant was part cash and a percentage of the gross sales of the solution for a term of 30 years.

Complainant has received some cash and some shares of stock of the corporation in settlement of the cash payment, and the percentage of sales has been paid to January, 1921. In July, 1921, the defendant gave an exclusive license to E. R. Squibb & Sons to make, use and sell the solution in the United States, and agreed to accept from Squibb a royalty of approximately 27 cents for each ampule of the solution sold by Squibb. The Squibb contract took effect October 1, 1921. The defendant made sales up to that date.

Prior to the making of the Squibb contract, the complainant and certain officers of the defendant had conversations relating to the effect of the proposed Squibb contract on the complainant's contract with defendant, and complainant was induced to believe that if he would assent to the making of the Squibb contract, his percentage of gross sales would be changed so that he would receive a portion of the 27 cents royalty, to be adjusted on an equitable basis.

The defendant could not have given the license to Squibb without complainant's consent. Complainant relying upon the understanding aforesaid, assented to the making of the Squibb contract.

After the Squibb contract had been made, the defendant refused to make any more payments to the complainant. The defendant now contends that the legal effect of the license to Squibb was to discharge the defendant from any liability under the original contract of sale. The defendant also contends that it only agreed to make an agreement relating to the share of the royalty to be paid to complainant, and that the complainant must bring an action at law for breach of that agreement.

The original contract of sale provides in paragraph 10 thereof (State of Case, p. 13), that the doctor (meaning the complainant), shall have the right to inspect all the books of such manufacturing corporation at all convenient hours, to have access to and to make true copies therefrom, and the aforesaid royalties shall be paid in quarterly installments.

In September, 1921, the complainant asked defendant for an accounting and for the moneys due to him as of October 1, 1921. This was his testimony (p. 56, l. 30). He made that demand by letter, and the letter was marked in evidence, but has not been printed with the state of the case.

No reply was made to the doctor's demand; he was therefore, forced to take action.

SPECIFICATION OF POINTS.

1. Complainant did not have an adequate remedy at law.

2. The Court of Chancery had jurisdiction to determine the right of the complainant and defendant under the contract of September 3, 1919, and the Squibb contract, and to make a declaration of those rights.

3. Defendant is not entitled to retain the moneys found to be due to complainant by reason of the interference proceedings instituted by one Konwiser, claiming to be the original inventor of the arsenical solution.

BRIEF OF ARGUMENT.

1. The parties to the contract of sale contemplated that an account should be kept of all sales made, and the contract expressly provides that Dr. Lowy shall have the right to inspect the books. This account was to be kept not only for the benefit of the corporation, but for the benefit of Dr. Lowy. He had an interest in the proceeds of sale; *the corporation had the legal title to the proceeds of sale, and Dr. Lowy had an equitable estate therein.* A *quasi fiduciary* relationship existed between the parties, and this would be sufficient to justify a court of equity in entertaining the suit for an accounting. In an action at law, Dr. Lowy would be obliged under the Practice Act of 1912, to allege truthfully the amount of sales that had been made. He could not do this without either taking items from the books himself, or by having a statement from the Company. And even if he could have made an allegation of the amount of gross sales on which to base the calculation of his percentage at the trial, he would have been obliged to prove each sale of each ampule, and as the Master's Report shows in this case that up to October 1, 1921, the doctor had earned as 10% of the gross sales $3,595.51, which means $35,955.10 of gross sales, and that means about 16,000 ampules. Therefore, the com-

plainant in an action at law would have to prove probably 16,000 items of sale and the price realized at the sale.

Under the contract, his royalties are payable quarterly, which means that he would have to bring an action every three months. This would necessitate a multiplicity of suits, and would also require a reference to take and state an account. Therefore, equity would assume jurisdiction upon the ground of complication of account.

But there is another reason why the court of equity should take jurisdiction. In any action at law that might be brought, at some stage of the proceedings the question would arise as to the effect of the Squibb contract, *and that would raise the question as to the effect of the conversations and agreements between the parties prior to the execution of the Squibb contract which induced the complainant to assent to the license to Squibb.*

The conduct of the officers of the defendant prior to the execution of the license to Squibb, constitutes an equitable estoppel. While it is true that equitable estoppels are recognized and may be enforced by courts of law, they are more properly enforceable in a court of equity.

It is said by *V.-C.* Pitney, in *Ruckelschaus* v. *Oehme,* 48 Eq. 436, at p. 443, in speaking of equitable estoppels: "Originially they were available only in equity, and they are now enforced at law only in cases where such enforcement is in accordance with the procedure in that court, and will work complete justice to all parties." The case cited was affirmed in *Borcherling* v. *Ruckelschaus,* 49 Eq. 340. It would seem therefore, that complainant did not have an adequate remedy at law.

2. Having the right cognizable in equity, *that is the right to have the equitable estoppel enforced against the defendant,* the complainant, under Section 7 of the Chancery Act 1915, could ask the Court of Chancery to determine any question of construction of the contract of sale and of the license to Squibb, and to declare the rights of the persons interested.

The complainant's specific prayer for relief is (p. 7), that the Court may determine any questions of difference between the parties relating to the construction of the two agreements, and may declare the rights of complainant and the Lowy Laboratory, Inc., in the said several agreements in writing. This procedure is sustained by the following cases: *In re Ungaro,* 88 Eq. 25; *Snyder* v. *Taylor,* 88 Eq. 513.

The complainant alleges in paragraph 17 of his bill of complaint (p. 5) as follows: "It was the subject matter of conversation between complainant and certain of the officers and agents of the said Lowy Laboratory, Inc., that the proposed contract with E. R. Squibb & Sons might have some effect upon the royalty to be paid to complainant, and complainant was led to believe by what was said to him that if he should consent to the proposed contract to be made with E. R. Squibb & Sons, the royalty to be paid to him should be adjusted upon an equitable basis."

In the answer of the defendant (paragraph 4, p. 36) the defendant says: "It is admitted as alleged in paragraph 17 that prior to the making of the Squibb contract, it was the subject matter of conversation between complainant and certain of the officers and agents of this defendant, that the proposed contract would affect the royalty to be paid to complainant. It is also admitted, that prior to making said Squibb contract it was agreed between complainant and this defendant that the royalty to be paid to complainant thereafter would be adjusted upon an equitable basis."

The complainant being in court to enforce the equitable estoppel, and the defendant admitting the facts constituting the estoppel, the Court then proceeded to determine the rights and to declare the rights of the parties. The only question that was submitted to the Court for determination was in effect this: *What is the fair value of the complainant's equitable interest in the royalty to be paid by Squibb to the defendant?*

The parties having agreed either expressly or impliedly by reason of their conduct that the fair value of the complainant's equitable estate should be ascertained upon an equitable basis; apart from the statute the Court of Chancery has power to determine that fair value. The cases supporting this proposition are stated by the Vice-Chancellor in his opinion.

Equitable merely means true, fair, just; basis is used figuratively and means fundamental principle. Therefore, what the Court had to do *was to ascertain an equitable, that is a fair principle, upon which the value of the complainant's interest in the royalties to be received from Squibb should be determined.* The suggestion was made by the complainant, that the parties having agreed upon a percentage of gross sales in the sale contract, that percentage must have borne some reasonable relation to the anticipated profit to be made on the sales, and that such percentage was undoubtedly agreed upon after due consideration and negotiation.

It appeared from the testimony of Dr. Lowy that the gross selling price per ampule of 6/10 gram of arsphenamine was 2.26. Of this, Dr. Lowy was entitled under his contract to .22 6/10. The cost of production and marketing was 1.90, leaving a net profit of 36 cents, divided thus .22 6/10 to Dr. Lowy and .13 4/10 to Lowy Laboratory, Inc. (See testimony of Dr. Lowy, p. 56, l. 40 and pp. 57, 58 and 59.) This testimony was uncontradicted. Mr. Stanton testified that the mere cost of manufacture was $1.19 per ampule, and that did not include the overhead expense, nor the salesmen's commissions and that the net price received was $2.85. *It did not appear from his testimony what proportion of any profit the doctor would be entitled to receive.* The purpose of the inquiry was to ascertain what proportion of the profit either actually made or anticipated, the 10% of the gross sales would be.

Mr. Schuemann testified (p. 98), that the cost per ampule was $1.19, that is the manufacturing cost, and that

it would be necessary to sell 8,000 doses a month, or more, to cover the balance over the overhead expense before they would show a profit and figure it on a basis of 100,000 per year. He calculates that Dr. Lowy's royalties figured on the basis of manufacturing cost of $119,000, and leaving a gross profit to the laboratory of $166,000, would be 10% of $285,000, which showed 17 1/10% of the gross profit. On p. 99, he admits, however, *that as a matter of fact the Company has not made any profit at all.* His testimony is, that the cost to manufacture was $1.19 per ampule, and the overhead and other expenses $1.66 per ampule, making a total of $2.85. The product being sold for $2.85, there was no profit whatever. Dr. Lowy would receive .285 cents and Company nothing.

In his anxiety to have the differences between him and the Company settled, Dr. Lowy offered to accept 40% of the Squibb royalty, instead of two-thirds. This is less than he would strictly be entitled to upon the principle of determination adopted by the Court. His percentage will be the same, it cannot be increased or decreased. *The defendant may possibly receive at times less than 27 cents from Squibb, but Dr. Lowy's share of that will be 40%.*

It is true that when the proportion on the sliding scale adopted in the original contract reaches 40%, there may have to be a readjustment on the same principle, and the decree provides for that in accordance with the opinion of the Vice-Chancellor, by giving the parties leave to apply to the Court for relief as occasion may arise (p. 127).

3. The "interference" proceedings do not constitute any defense, and do not give the defendant the right to retain the moneys due to complainant.

Konwiser was an employee of the defendant; he was discharged by the defendant and shortly thereafter, started proceedings in the Patent Office at Washington, claiming to be the inventor of the arsenical solution, instead of Dr. Lowy. Before the defendant took an assignment of this

invention, the complainant was required by his contract (paragraphs 2, 3 and 4, p. 10) to prepare for distribution to the medical profession 1,000 ampules with proper boxes, &c., and to keep a detailed cost sheet of labor and materials used in preparing said 1,000 ampules, and should furnish a copy of the same to McMenimen, the original party to the contract, and also, give him a list of physicians and surgeons, &c. McMenimen thereupon in paragraph 5, agreed to ascertain from the medical profession the merits of the invention and protect and *convince himself of the validity of the patent and its commercial features.* In paragraph 6 of the contract, the doctor agreed to disclose the process to the patent attorney or attorneys of the purchaser, and to furnish the attorneys a true and correct copy of the application filed in the U. S. Patent Office.

Paragraph 7, p. 11, provides: that after the delivery of said 1,000 samples, *the purchaser shall have a period of sixteen weeks in which to make such examinations as to the validity of the patent, &c.* It will thus be perceived that before this assignment was made to Lowy Laboratory, Inc., the purchaser had ample opportunity to ascertain not only whether the invention was patentable, but also whether the doctor was the inventor. Undoubtedly, if he had found that the invention was not patentable, or that the doctor was not the original inventor, he would immediately have rescinded the contract.

Konwiser's interference suit has the earmarks of an attempt to get revenge for being discharged, and also, to get money; but apart from that, his interference suit does not relieve the defendant from paying the royalties agreed upon.

As has been stated, Dr. Lowy has an equitable estate in the royalties by agreement. "Having actually received profits from the sales of the patented machine, which profits the defendant does not show have been or are in any way liable to be affected by the validity of the patent,

its invalidity is immaterial. The invalidity of the patent does not render the sales illegal so as to taint with illegality the obligation of the defendant to account." These statements are taken from the opinion of Mr. Justice Curtis, in the case of *Kinsman* v. *Parkhurst,* in the U. S. Supreme Court, 18 How. 289-295; Law Ed. Book 15, 385.

By the interlocutory decree in this case, a reference was made to a special master to take and state an account. At the time of taking depositions before the special master, the following stipulation was made: "It is stipulated and agreed that the amount of moneys due to Dr. Lowy under the McMenimen contract, is $2,847.46 up to July 1, 1921. *This is the balance due after making all deductions.* It is further stipulated and agreed that there is owing from Lowy Laboratory, Inc., to Dr. Lowy the sum of $748.05 for royalties from July 1, 1921, on the McMenimen contract, making a total due to Dr. Lowy on this date from Lowy Laboratory, Inc., on the old contract, dated September 3, 1919, of $3,595.51." The foregoing is copied from the stipulation incorporated in the depositions taken before the special master and filed by him. Those depositions are not in the printed case, and the Master's Report is not in the printed case, but reference is made to the actual files.

In the brief of counsel for the appellant, it is suggested that the defendant should be allowed to retain the moneys due to Dr. Lowy by way of equitable set-off to some possible damages that it may have to pay by reason of the Konwiser interference proceedings.

Set-off is a creature of the statute. Unliquidated damages cannot be the subject of set-off.

Godkin v. *Bailey,* 74 N. J. L. 655;
Trotter v. *Heckcher,* 40 N. J. Eq. 612, at p. 657.

The defendant ought to act with reasonable promptness and either affirm the sale or seek to rescind it, if it has any fear of the result in the interference suit. A half dozen people might start interference proceedings, and

if the defendant could hold up the royalties, Dr. Lowy would not receive any compensation whatever. The defendant did not counter-claim any loss by reason of the Konwiser suit, but merely set up the fact in its answer (p. 38), that it ought not to be required to pay until the validity of the patent is determined.

The damages which might by any possibility be recoverable by the defendant in an action for breach of warranty of the title, are so remote and sepculative that it seems to me to be quite unjust to give the defendant the right to withhold payment, that is to stay proceedings in execution of the decree until the interference proceedings have been determined, and if determined against the patent, until the defendant has brought an action at law and recovered a judgment against the complainant.

It should be observed that the interlocutory decree in effect disposes of this defense, and that in the appeal taken from the interlocutory decree no reference is made to the contention of the defendant that proceedings should be stayed by reason of the interference suit. In the appeal taken from the final decree (p. 130), the appellant does allege as a ground of appeal that an interference proceeding is pending in the patent office involving the validity of the title to the patents in question, and that the appellant is entitled to set-off against any moneys found to be due to the respondent, the amount necessarily expended and which must in future be expended in and about the defense of said patents.

There is no proof in the case that Dr. Lowy agreed to bear any part of the expense. Mr. Stanton assumed that he would, but Mr. Stanton testifies (p. 92, l. 20): "I would not say it was an agreement; it was understood he was to pay it, and he asked me to retain counsel for him to defend it." The complainant testified (p. 65, l. 25) that he did not authorize the laboratory to pay for necessary legal defense, or any defense to the interference suit, and that he did not authorize them to pay anything, and that he did

not authorize them to retain counsel. At p. 66, he testified, that he is not defending it himself and he did not know whether Lowy Laboratory was or not, but he assumed they were, and that he had been to see counsel and had gone over the papers with counsel.

It is respectfully submitted that the claim of defendant to retain the money should not be sustained.

Conclusion.

It is unfortunate that the defendant is unwilling to assent to so fair a valuation of the complainant's interest in the royalty payable by Squibb. All this litigation could have been saved by mere effort in good faith to make adjustment. The attitude of the defendant throughout has been evincive of an intention to deprive the complainant of any share of the royalty whatever.

I respectfully submit that the decree should be affirmed in all respects, and that the complainant should have leave to issue execution forthwith.

FRANK E. BRADNER,
Of Counsel with Complainant-Respondent.

New Jersey Court of Errors and Appeals.

Between: OTTO LOWY, *Complainant-Respondent,* *and* WILLIAM V. MCMENIMEN, *Defendant,* and LOWY LABORATORY, INC., a Corporation, *Defendant-Appellant.*	On Bill. Heard below before Backes, V. C.

BRIEF OF APPELLANT.

State of the Case.

The bill, apparently, was framed to come under Section 7 of the Chancery Act of 1915. Its first two prayers for relief are based upon that Section of the Act. The Act cannot apply for the rights of the parties, although partly dependent upon the construction to be given written instruments, are partly dependent upon conduct.

Its third prayer is for an accounting. Its fourth prayer is for a decree that complainant pay "such amount as may be determined by this Court to be due to Complainant and payable to him as and for a royalty upon said patented invention."

The bill was treated by the Vice Chancellor as, in effect, a bill for specific performance (p. 111).

In substance and effect what the Court below did was to make a contract for the parties.

The rights of complainant, if any, grew out of a contract made September 3rd, 1919 (Ex. 1, p. 8), which contract was subsequently abrogated by act of the parties, the understanding being that they would come together and make a new contract.

The condition of the parties, after the abrogation of the old contract, was changed. Thereafter the parties attempted to come together and make a new contract and they failed. The Court below has now assumed to make for them that contract which they were unable to make for themselves, and the contention of the appellant is that the case is within

McKibbin v. Brown, 14 N. J. E., 13;
Domestic Telegraph Co. v. Metropolitan Telephone Co., 39 N. J. E., 160;
Woodruff v. Woodruff, 44 N. J. E., 349;
Schenck v. Spring Lake Beach Improvement Co., 47 N. J. E., 44;
Fogg v. Price, 145 Mass., 513;
Haskins v. Ryan, 71 N. J. E., 575, 577; affirmed 75 N. J. E., 623;
Lane v. Calvary Church, 59 N. J. E., 413; L. R. A., 1917, D. p. 1079.

Lowy had invented certain improvements in arsenical preparations for which an application for letters patent had been filed. He made a contract with McMenimen on September 3rd, 1919 (Ex. 1, p. 8), reciting a consideration paid to him of four thousand dollars ($4,000). By that contract he agreed to assign all of his rights to a corporation to be designated by McMenimen; that he would immediately prepare for distribution one thousand (1,000) ampules, as per sample submitted, keeping a detailed cost sheet; that

after the delivery of the one thousand ampules then, if McMenimen should pay to Lowy an additional Eleven thousand dollars ($11,000), the assignments and transfers would be executed. McMenimen agreed to organize the corporation. Lowy was to be paid a royalty, according to the ninth paragraph of the contract, as follows:

"Ninth. That there shall be paid to the Doctor an annual royalty of ten per cent. (10%) of the gross sales in the United States for all sales not exceeding one hundred thousand (100,000) ampules, and that on sales of over one hundred thousand (100,000) ampules, said royalty shall decrease two per cent. (2%) per one hundred thousand (100,000) ampules until a minimum of two per cent. (2%) on the amount of gross sales is reached, to wit:

"Sales of

1 to 100,000 ampules	10%
100,001 to 200,000 ampules	8%
200,001 to 300,000 ampules	6%
300,001 to 400,000 ampules	4%
400,001 ampules and over	2%

that on all sales outside of the United States the Doctor shall be paid an annual royalty of five per cent. (5%) of the gross sales for all sales not exceeding one hundred thousand (100,000) ampules, and that on sales of over one hundred thousand (100,000) ampules said royalty shall decrease one per cent (1%) per one hundred thousand (100,000) ampules, until a minimum of one per cent. (1%) of the amount of gross sales is reached, to wit:

"Sales of

1 to 100,000 ampules	5%
100,001 to 200,000 ampules	4%
200,001 to 300,000 ampules	3%
300,001 to 400,000 ampules	2%
400,001 ampules and over	1%

"It is agreed that where said product is manufactured or sold outside of the United States, and a royalty shall be required to be paid to any person, firm or corporation other than the Doctor by reason of infringement of other patents or protection therefrom, the percentage of royalty due the Doctor shall be calculated on the amount of gross sales after deducting the royalties so paid.

"In addition to the foregoing royalties there shall be paid to the Doctor two per cent. on the gross sales of the corporation derived from preparations other than that said arsenical compound hereinbefore referred to, and other than the sale of preparations on which the said corporation is required to pay a patent or established trade name royalty."

The contract then gave the right to Lowy to inspect the books of the company and provided that, upon the payment of eleven thousand dollars ($11,000), Lowy would write up and deliver to McMenimen a complete and full recital of all experiments performed, researches made, steps taken and results ascertained in his experiments relating to the product in the United States and that a fair value for such services should be paid to Lowy or his nominee.

By Section 24 of the contract it is provided:

"That the use of the word 'ampule' herein shall be deemed to mean an ampule sufficient in size to properly contain the necessary amount of the product to comply with all health regulations."

The life of the contract of September 3rd, 1919, between McMenimen and complainant was fixed at thirty years in the United States and in foreign countries for the duration of the patents procured in each country (par. 23, p. 15).

The four thousand dollars ($4,000) was paid

as well as the eleven thousand dollars ($11,000), apparently seven thousand dollars ($7,000) in cash and four thousand dollars ($4,000) in stock. This acceptance of stocks was entirely voluntary (p. 61). Lowy Laboratory, Inc., was incorporated and complainant, Lowy, on the 18th of February, 1920, made an assignment of all his rights in the pending patent application to Lowy Laboratory, Inc., (p. 17). Lowy Laboratory, Inc., assumed the obligations of McMenimen under the contract of September 3rd, 1919. Business was commenced. Large sums of money were spent. Up to the end of 1921 Francis A. Stanton had raised and put into the business one hundred and seventy-six thousand dollars ($176,000) (p. 75, l. 35). The improvement was defective. It was not a commercial proposition and it had to be improved (p. 74). The company went in debt close to forty or fifty thousand dollars (p. 76). At this juncture complainant brought to the attention of Francis A. Stanton, who was the acting genius of the company in a financial way, the fact that he, complainant, had been to see a Dr. Anderson, connected with E. R. Squibb & Sons, a drug concern in New York, and stated to Stanton that they were interested and were anxious to get hold of the product (p. 76). Complainant saw Dr. Anderson on several occasions, and there finally was a meeting of the parties interested (p. 77) which resulted in the making of the contract of July 1st, 1921, between Lowy Laboratory, Inc., and E. R. Squibb & Sons and complainant (Ex. 4, p. 21). Complainant swears that he was the one who first took up the question with E. R. Squibb & Sons with respect to this contract, and that he urged that such a contract be made (p. 66).

This Squibb contract of July 1st, 1921 (Ex.

4, p. 21) provided inter alia as follows: Lowy Laboratory granted to Squibb the sole and exclusive license to make, use and sell the inventions and improvements referred to in Schedule A, which were improvements made by complainant, and covered by his contract of September 3rd, 1919, and to sell the products when manufactured by Squibb in the United States and in foreign countries. Lowy Laboratory, Inc., agreed to instruct Squibb fully in the details of its arsphenamine solutions, such as theretofore had been marketed by Lowy Laboratory, Inc., and Lowy Laboratory, Inc., warranted that the processes of manufacture of such solution had been developed to the point of being reliable commercial processes, that the solution satisfied the requirements of the United States Hygenic Laboratory, and that the cost of the processes in the case of plain arsphenamine to the Lowy Laboratory, Inc., did not exceed five cents (5¢) per ampule of six decigrams or under in lots of one thousand ampules. Squibb agreed to promptly provide full facilities for the manufacture of the arsphenamine solution, and its extensive sale, to actively press the sale of the product with the medical profession, advocating its use, and to increase the sale to the greatest posssible extent as to the silver arsphenamine solution. Squibb agreed to use its best efforts to develop the product and, if found to be satisfactory, to thereafter promote its sale as its merits might warrant. Squibb agreed to pay Lowy Laboratory, Inc., royalties as follows:

> "(a) For the plain arsphenamine solution, a royalty of forty-five cents (45¢) for each gram of arsphenamine contained in the solution sold by Squibb calculated according to analysis.
>
> "(b) A royalty of one dollar ($1.00) per

gram for each gram of silver arsphenamine contained in solutions sold by Squibb calculated according to analysis.

"(c) A royalty of each gram of any other arsenobenzol derivative, which may be made into solutions by the processes covered by said letters patent, or which embodies the inventions thereof, and sold by Squibb, at a rate to be hereafter agreed upon, but which shall bear substantially the same ratio to the net profit from the sale of said solution as in the cases of the solutions referred to in paragraphs (a) and (b) above."

There then followed five provisions with respect to royalties—if the lowest net price of arsphenamine sold by competitors of Squibb to distributors

"* * * in ampules containing six decigrams, shall fall below one dollar in lots of fifty ampules, the royalty payable by Squibb shall be reduced in direct proportion to the fall of price of arsphenamine below said price of one dollar * * *—" in the event that Squibb shall sell or furnish the plain arsphenamine solution licensed by the contract to hospitals or the United States Health Service "at a special price below the average market price of arsphenamine sold by competitors to individual physicians in lots of 100 doses, no royalty shall be payable on such solution so sold or furnished." "Squibb shall be entitled to a royalty credit for any sales reported and upon which royalties have been paid, whenever such sales are not paid for because of breakage, defect, age or any other cause beyond the control of Squibb." "Resale of any of the solutions licensel hereby by Squibb shall not entitle Lowy to the payment of any further royalty." "In the event that the dose called for by the medical profession shall be increased above six (6) decigrams in the case of arsphenamine or two and one-half (2½) decigrams in the case of silver arsphena-

mine, the royalty payable shall in no event exceed twenty-five cents (25¢) per dose."

The contract further granted to Squibb the exclusive right for a period of two years and the non-exclusive right thereafter, during the continuance of the agreement, to negotiate sales of or licenses under the patents or applications mentioned in Schedule "B." It was agreed that out of the proceeds of such sales or licenses Squibb should first be reimbursed the amount of its necessary expenses in negotiating such sales or licenses, and that the remainder should be divided between Squibb and Lowy Laboratory, Inc., in the proportion of forty per cent. to Squibb and sixty per cent. to Lowy Laboratory, Inc.

Lowy Laboratory, Inc., guaranteed Squibb against the claim of any persons claiming ownership of or title to the inventions, applications or patents under which the license was granted, and agreed to defend Squibb against any such claim, and to reimburse Squibb for any damages or expenses arising in connection therewith up to the amount theretofore paid by Squibb to Lowy Laboratory, Inc., for royalties under the agreement. In other words, during the life of the agreement, Lowy Laboratory, Inc., is always under the obligation to guarantee Squibb against interference with its patent rights and to reimburse Squibb for monies paid out because of interference to the extent of whatever amount might have been paid during the life of the agreement by Squibb to Lowy Laboratory, Inc., for royalties. Lowy Laboratory, Inc., also agreed to contribute ten per cent. of the expenses of any litigation, up to the amount of the royalty theretofore paid by Squibb to Lowy Laboratory, Inc., which litigation might be brought to pre-

vent infringement, and it was provided that the recovery in any such suits should be divided between Squibb and Lowy Laboratory, Inc., in the proportion that they contributed to the expense thereof.

The expense of soliciting the United States applications for patents of Lowy Laboratory, Inc., and for soliciting and maintaining in force the foreign patents of Lowy Laboratory, Inc., should be borne by Lowy Laboratory, Inc.

The agreement was to continue in force for the life of the principal patent corresponding to application serial number 328,485, unless sooner terminated by reason of breach by Squibb as provided in section 6 of the agreement.

Under the provisions of the original contract between McMenimen and complainant it was provided, by the fifteenth clause, that the corporation to be formed, which was the Lowy Laboratory, Inc., would not contract to sell to any firm, persons or corporation for the purpose of lessening the amount of the gross sales on which the royalty mentioned in the said agreement was based.

Complainant was a party to the agreement between the Lowy Laboratory, Inc., and Squibb, and signed it, and the 12th paragraph of the agreement contains this language:

> "The inventor (the complainant) hereby admits full knowledge of the terms and provisions of the foregoing agreement and consents and agrees to the same."

> "The inventor hereby binds himself to assist to the best of his ability in carrying out the provisions of this agreement, to render such technical and other assistance as he is able and to commit no act calculated to nullify this agreement or to injure the interests of the parties thereunder."

> "The inventor further agrees to assign to

Lowy all inventions and letters patent based thereon for improvements upon the inventions of Schedule 'A'."

Subsequent to the making of this agreement between Squibb and Lowy Laboratory, Inc., complainant met with Francis A. Stanton and with other members of the Board of Directors in an attempt to arrive at an agreement to take the place of the agreement between McMenimen and complainant made September 3rd, 1919. With respect to these attempts to agree Francis A. Stanton, testifying for defendant said that during the time the Squibb contract was under consideration:

"Time and again we referred to the fact that when the Squibb contract was consummated, if it was consummated, we would have to draw up a new agreement, but always it was put off, because we could not tell—we never even tried to determine what he would be entitled to, because we didn't know what he would get."

The day after the drafting of the contract Stanton saw complainant, and in the presence of the father of Stanton, complainant said:

"Just as soon as your health is better we will get together and draw up an agreement between the Laboratory and myself."

And again upon the same night:

"Just as soon as your health is better we will endeavor to get together and work out a new agreement, because the old McMenimen contract is now ended for keeps."

Two or three days later complainant came to Stanton and said:

"I have been thinking over this Squibb contract and I have come to the conclusion

> I ought to have fifty per cent. of all the Labratory gets from Squibb, with a minimum guarantee of $6,000 a year."

He was told that he was crazy; that the directors would not think of it; that the stockholders would be worked an injustice. He went away and came back the next day very apologetic (p. 79).

They met a week later and worked over the figures (p. 80):

> "We tried to reconcile the McMenimen contract with the Squibb contract as a basis of drafting a new one. We could not get anywhere near it. Kohn (who represented complainant) suggested thirty per cent. of what was received from Squibb until the capitalization of the company was intact; that is, we had received as much money as we had put in, then fifty per cent. I told him I thought it was ridiculous and my directors would not consider it. Dr. Lowy came in in the meanwhile and said if I would get all the figures we would have Schueman figure them out and arrive at a mesne dosage and mesne amount of sales, we might agree upon the figures. I told him I could not make an agreement, that no matter what we agreed upon or thought was fair, it would be up to my directors, and I suggested that I be permitted to call a directors' meeting which he and Kohn could attend."

A directors' meeting was called in the latter part of July, to which complainant was invited, but did not attend. The matter was discussed upon several occasions with him (p. 81), and his demands ran anywhere from thirty to fifty per cent. with guarantees of $6,000 and $3,000, etc. The Laboratory was broke, every penny that was taken in was spent for threatening obligations. They were threatened with court action by five creditors at once.

Squibb was not operating under its contract and did not commence to operate until the middle of October (p. 82). Early in October (p. 82), the Doctor made a proposition

> "of twenty-five per cent. on the first 500,000 doses and twenty per cent. thereafter, only twenty per cent. of the twenty-five per cent. to be paid until the capitalization of the company was intact. I had said all along that I did not think I could get my directors to consent to anything more than twenty per cent. I was sure of it. I knew what their figures were and I doubted if I could get it to twenty."

A directors' meeting was called to pass upon this proposition, and at that meeting complainant said:

> "I have made my proposition of twenty-five and twenty per cent. and that is the lowest; if I do not get that I will have to take other actions."

Edward Stanton told complainant at page 83:

> "What we had done, the money we had spent, and if he was going to stand on the twenty-five and twenty and never giving us a chance to go over how he came to this set of figures we might just as well quit and go home, and he quit and went home; and the next was the action in this Court."

Francis A. Stanton is corroborated by James R. Stanton (p. 94), Edward Stanton (p. 99).

Complainant (p. 104) denies that he stated that he would waive his rights under the contract of September 3rd, 1919, between himself and McMenimen, before the Squibb contract was entered into, testifying:

> "I said that I was perfectly willing to permit a readjustment of the contract to fit the new conditions, but I did not say that I was

willing to give up my original contract until I had another contract from the Lowy Laboratory, as was testified."

On pages 105, 106 and 107 he tells about the negotiations and his story is, in substance, no different from that of Francis Stanton heretofore referred to, except that he denies that at the time of the signing of the Squibb contract he said that that was the end of the McMenimen contract.

Francis A. Stanton is further corroborated with respect to the negotiations after the signing of the Squibb contract by complainant's witness Kohn (p. 48).

From the testimony of Francis A. Stanton (p. 87) and John Schuemann, Jr., (p. 95) as well as from an inspection of the contract of September 3rd, 1919, and of the Squibb contract, it appears clear that there is no way of reconciling them, that is to say, there is no way by which it can be determined with any approximate certainty, using as a basis the rate of recompense to the complainant prescribed by the contract of September 3rd, 1919, how much he should get out of the royalty paid to Lowy Laboratory, Inc., by Squibb.

A striking illustration of this is the fact that the Vice Chancellor comes to the conclusion (pp. 111, 115 of the Record), that upon the basis which *he* thinks should be applied complainant would be entitled out of the royalty to the Lowy Laboratories, Inc., of forty-five cents per gram to 28 25/100 cents and the Lowy Laboratory, Inc., to 16 75/100 cents. The Vice Chancellor says:

> "But Dr. Lowy is willing to make concessions, and offers to accept, as counsel says in his brief, as an equitable division, 60 per cent for the Lowy Laboratory and 40 per cent to him of the proceeds of the royalties coming from Squibb & Sons."

The Vice Chancellor came to the conclusion that the parties themselves had agreed that what complainant was entitled to out of the return from the Squibb contract was to be determined upon an "equitable basis." He holds, therefore, that he has the right to determine what is an equitable basis. He then reaches a conclusion, based upon a calculation of percentages (p. 114) and by this means he reaches a result which complainant himself concedes to be inequitable, because, as the Vice Chancellor says, complainant agrees to a totally different division as an "equitable division" and this division is adopted by the Vice Chancellor as an equitable division without giving any reasons therefor except that the complainant is willing to accept it.

This concession of complainant was put in the form of an interlocutory decree (p. 116) followed by a final decree (p. 125).

The bill also prayed for an accounting from defendant for royalties due under the contract of September 3rd, 1919, prior to the time that the Squibb contract went into effect. The evidence showed that such an accounting was wholly unnecessary. Complainant had full access to the books of defendant (p. 64). A statement was made up for him showing the amount due under this contract (pp. 65, 98). There was never any question as to the amount due, and hence no necessity for an accounting. Nevertheless, the Court directed an accounting and made a decree that defendant, Lowy Laboratory, Inc., pay to complainant the sum of $3,595.51, the amount found due for royalty under the McMenimen contract to October 1st, 1921.

The objection other than jurisdictional, that defendant raised to making this payment at this time was that an interference had been filed in

the Patent Office in Washington against the issuance of the patent applied for, which patent was the subject matter of the contract of September 3rd, 1919, and for which patent complainant had received the $15,000 therein provided to be paid to him, and for the use of which defendant was to pay to complainant the royalties prescribed by the agreement. The effect of that interference suit (p. 69) is to stop the application (p. 70). If the application is denied and if the patent is granted to the person filing the interference, then an infringement suit will lie against the Lowy Laboratory, Inc.

Francis A. Stanton testifies (p. 63) that upon the filing of the interference suit he had a conversation with complainant and counsel was retained and Stanton says (pp. 83, 84) that the payment of counsel in defending this interference suit is a matter for complainant. Likewise it is clear that if the application is granted to the person who filed the interference suit and an infringement suit is brought, defendant may be compelled to pay royalties to another. Complainant admits his knowledge of the interference suit (p. 65) but denies that he authorized Lowy Laboratory, Inc., to defend it for him. He is a respondent in that suit, the application being in his name.

Under the assignment from complainant to defendant (Ex. 2, p. 17) complainant covenanted that he had good right and title to sell and assign the said inventions. The defendant's position is that pending the determination of this interference suit it should not in equity, at least without security, be obliged to pay to complainant the amount due for royalties.

The Court, by its decree, further provided that there should be paid by defendant to complainant $2,946.89 for royalties accrued since October,

1921, upon the basis prescribed by the Court in its interlocutory decree (p. 116).

Under the Squibb contract, from the proceeds of which these royalties are ordered, and to which contract complainant was a party, defendant (Clause 5, p. 25) guaranteed Squibb against the claim of any person claiming ownership of or title to said invention and agreed to defend Squibb against any claims and to reimburse Squibb for any damages up to the amount theretofore paid by Squibb to defendant for royalties; it also agreed to indemnify Squibb to a certain extent as to the expenses of litigation.

Under this contract, in view of the interference suit, it may be necessary for defendant to return to Squibb all of the royalties which it has received, and it may be necessary for it to expend certain sums of money to reimburse Squibb for expenses.

Lowy is and was a stockholder of defendant and was a director. He is the person who first suggested the Squibb contract. He induced the making of the Squibb contract. He is a party to it. The interference suit is against the patent which formed the basis of complainant's right. Defendant should not in equity, at least without security, be compelled now to pay to complainant a portion of the royalties which it may receive from Squibb when, under the terms of the contract between Squibb and defendant, it may be necessary for defendant to return to Squibb the royalties which it may have received.

The Vice Chancellor made an interlocutory decree October 6th, 1922 (p. 116) determining the equitable rights of the parties in the proceeds of the Squibb contract and the right of complainant to an accounting. From that interlocutory decree an appeal was taken.

Subsequent to the interlocutory decree and in pursuance thereof there was an accounting which resulted in the final decree of December 19th, 1922 (p. 125) and from the final decree an appeal was taken.

Both appeals are now before this Court for argument.

ARGUMENT.

I.

Upon the making of the Squibb contract the rights of complainant under the contract of September 3rd, 1919 between McMenimen and complainant ceased.

The contract of September 3rd, 1919 (p. 8) contemplated the manufacture and sale by the Lowy Laboratory, Inc., of the preparations, the employment of complainant in and about the manufacturing and the active assistance of complainant in improving the solution, etc. For the right to use the inventions *and* the right to complainant's services it was provided that complainant should be paid fifteen thousand dollars ($15,000) and a certain royalty based upon gross sales upon a sliding scale.

When the Squibb contract of July 1st, 1921, was made, conditions had entirely changed.

The business had not been successful. One hundred and seventy-six thousand dollars ($176,000) had been invested (p. 75). Complainant says that defendant was bankrupt (p. 66).

Under these conditions complainant took up with Squibb the taking over of the invention and

urged the making of the contract of July 1st, 1921, between Lowy Laboratory, Inc., and Squibb, to which contract he was a party.

That contract contemplated that Lowy Laboratory, Inc., should go out of the manufacturing and selling business. It assumed obligations to Squibb, however, as follows: it guaranteed it against the claim of any persons claiming ownership of or title to the inventions, agreeing to save Squibb harmless to the extent of royalties paid under the contract; it agreed to contribute certain moneys toward the expense of litigation; it warranted (par. 2) that the processes of manufacture had been perfected to the point of being reliable commercial processes and that the cost of the process did not exceed five cents per ampule of six decigrams or under in lots of one thousand ampules so far as the preparation of the solution, etc., was concerned.

In consideration Squibb agreed to pay to Lowy Laboratory, Inc., certain royalties upon a varying basis (p. 23)—

(a) for the plain arsphenamine solution, a royalty of forty-five (45) cents for each gram of arsphenamine contained in the solution sold by Squibb calculated according to analysis.

(b) A royalty of one dollar ($1.00) per gram for each gram of silver arsphenamine contained in solution sold by Squibb calculated according to analysis.

(c) A royalty for each gram of any other arsenobenzol derivative, which may be made into solutions by the processes covered by said letters patent, or which embodies the inventions thereof, and sold by Squibb, at a rate to be thereafter agreed upon, but which shall bear substantially the same ratio to the net profit from the sale of said solution as in the cases of the solutions referred to in paragraphs (a) and (b).

And then there follow sub-clauses 1, 2, 3, 4 and 5, which provide for a variation of the royalties in certain events, and for certain credits with respect to the royalties.

There is also provided in clause 4 of the contract (p. 24) royalties with respect to the use of the inventions mentioned in Schedule "B."

The Squibb contract, therefore, contemplated an entirely different thing than did the McMenimen contract of September 3rd, 1919.

Performance of the Squibb contract makes impossible the performance of the McMenimen contract. One contemplates manufacturing and selling by defendant, Lowy Laboratory, Inc., and the payment to complainant of a percentage of gross sales. The other, the Squibb contract, contemplates no manufacturing or selling by defendant, Lowy Laboratory, Inc., therefore no gross sales. It contemplates payment to Lowy Laboratory, Inc., of a variable but fixed royalty.

It is impossible for the McMenimen contract to be superimposed upon the Squibb contract. If there were no evidence that complainant had stated that the making of the Squibb contract ended the McMenimen contract he would be estopped to deny but that it did. He signed the Squibb contract. He was a stockholder and director of Lowy Laboratory, Inc. It is conceded that it is impossible to work under the McMenimen contract without modification.

Stockholders of the company had invested one hundred and seventy-six thousand dollars ($176,000) and had received nothing back. The situation was quite different from what it had been in September, 1919, when the McMenimen contract was made.

It was conceded by complainant, when he agreed to take forty per cent. of the royalties

under the Squibb contract, leaving sixty per cent. for the Lowy Laboratory, Inc., instead of the amount which the Vice Chancellor held he was entitled to upon the basis of the McMenimen contract, to wit, out of forty-five cents 28 25/100 cents and for Lowy Laboratory, Inc., 16 75/100 cents, that it would be inequitable and unjust to attempt to apply to the situation existing in 1921 a situation which had existed in 1918.

Having agreed, therefore, to a change in situation which made impossible the working of the McMenimen contract, it must be considered as having been abandoned by him.

The weight of the evidence is to the effect that he stated during the negotiations for the Squibb contract that that meant the end of the McMenimen contract (Francis A. Stanton, pp. 77, 78; James R. Stanton, p. 94; Edward Stanton, p. 100). These statements are denied by complainant (p. 104) he stating, however, that what he did say was:

> "After we had discussed the various ways Mr. Roser said, 'Now, this arrangement with Squibb will disarrange Dr. Lowy's contract; what are you going to do about that?' I said that I was perfectly willing to permit a readjustment of the contract to fit the new conditions, but I did not say that I was willing to give up my original contract until I had another contract from the Lowy Laboratory, as was testified."

Whether he said it or whether he did not say it the result of the making of the Squibb contract was to make unworkable the McMenimen contract.

II.

The parties not having agreed upon a contract the court was without authority to make a contract for them.

The Court below held that the parties had agreed that the royalty would be adjusted upon "an equitable basis" and that this was a *standard* so certain as that the Court might fix the royalties within the cases of *Van Doren v. Robinson,* 16 N. J. E., 256; *Race v. Groves,* 43 N. J. E., 284; *Hayes v. O'Brien,* 149 Ill., 403; *Woodruff v. Woodruff,* 44 N. J. E., 349; *McClung Drug Co. v. City Realty & Investment Co.,* 91 N. J. E., 216, affirmed 92 N. J. E., 237 (in which latter case the court refused specific performance).

What did the term "equitable basis" mean within the contemplation of the parties? Francis A. Stanton testifies (p. 77) that complainant said, referring to the contract of September, 1919,

> "that will be ended, because we will have a new agreement." (p. 78.) * * *
>
> "Time and again we referred to the fact that when the Squibb contract was consummated, if it was consummated, we would have to draw up a new agreement, but always it was put off, because we could not tell—we never even tried to determine what he would be entitled to, because we didn't know what he would get."

And complainant said in July (p. 79):

> "Just as soon as your health is better we will get together and draw up an agreement between the laboratory and myself. * * * Just as soon as your health is better we will endeavor to get together and work out a new agreement, because the old McMenimen contract is now ended for keeps. * * *"

Later, in July, complainant demanded fifty per cent. of all that the Laboratory got from Squibb with a minimum guarantee of $6,000 a year in the same interview, coming down to 33⅓ per cent. (p. 105). He was told he was crazy; that it would work an injustice and the next day he called up and said that:

> "he thought over what he told me the night before, and he was very apologetic, and he never intended to make such a proposition and if we could get together we could spell out something."

It is significant that, according to the Vice Chancellor's calculation, complainant is entitled to more than what he himself claimed in this interview to be entitled to. Subsequently (p. 80) Stanton says that:

> "we tried to reconcile the McMenimen contract with the Squibb contract as a basis of drafting a new one. We could not get anywhere near it. Kohn suggested thirty per cent, of what was received from Squibb until the capitalization of the company was intact; that is, we had recieved as much money as we had put in, then fifty per cent."

That figure was said to be ridiculous, and it was suggested by complainant that if they got all of the figures they would have Schueman figure them out

> "and arrive at mesne dosage and mesne amount of sales, we might agree upon the figures." (p. 81.)
>
> "His (the complainant's) demands ran anywhere from thirty per cent. to fifty per cent. with guarantees of $6,000 and $3,000. and so forth."

In October complainant made a proposition of

> "twenty-five per cent. on the first 500,000 doses and twenty per cent. thereafter, only

twenty per cent. of the twenty-five per cent. to be paid until the capitalization of the company was intact."

When told that the directors would not consent to anything more than twenty per cent. complainant said:

"I have made my proposition of twenty-five and twenty per cent, and that is the lowest; if I do not get that I will have to take other actions."

Complainant testifies (p. 104) that he was perfectly willing to permit readjustment of the contract to fit the new conditions. He also admits (p. 105) that he suggested a fifty-fifty split and came down to 33⅓ per cent. and that the next day he telephoned apologizing for his excitement and he says that this was *before* the Squibb contract was signed.

He admits the negotiations testified to by Francis Stanton and says that on one occasion they agreed that he ought to accept thirty per cent as a compromise.

He admits (p. 107) that he made a proposition to accept twenty-five per cent. up to 500,000 ampules with the understanding only twenty per cent. was to be paid until other obligations were paid off, and if they sold above 500,000 ampules he would be willing to take twenty per cent. and he says (p. 107):

"Now, in money that would mean this, when I was entitled to approximately $28,000 on a sale of 120,000 ampules that I was willing to accept instead of $28,000, twenty-five per cent. of $25,000, about $6,250. I was willing to sacrifice a whole lot to prevent the Lowy Laboratory from going into bankruptcy."

The way the Vice Chancellor arrived at *his*

figures was to take the gross selling price per ampule of 6/10 of a grain of arsphenamine at $2.26; he then figured the complainant's ten per cent. of $2.26; he then took the cost of production and marketing at $1.90; he then said that this represented a net profit of thirty-six cents; that of this net profit of thirty-six cents 22.6 went to complainant and 13.4 to the Lowy Laboratory, Inc., or approximately 2/3 of the net profit to complainant and 1/3 of the net profit to Lowy Laboratory, Inc. He attempted to change a percentage on gross sales into a proportion of the net profits. He then said that the royalty from Squibb & Sons to Lowy Laboratory, Inc., was forty-five cents per gram or 27 cents for 6/10 of a gram; the income per gram to Lowy Laboratory, Inc., under its own output was 60 cents; its income from Squibb & Sons at 45 cents per gram meant simply a drop of 25 per cent. which should be proportionately borne; he then finds that, calculated on the basis of the ratio between 22.6 and 13.4, of the 45 cents royalty per gram complainant would be entitled to $28\ ^{25}/_{100}$ cents and Lowy Laboratory to $16\ ^{75}/_{100}$ cents. He thus reaches a result more favorable to complainant than complainant ever demanded.

This result, it is submitted, is neither accurate nor is it equitable, if the word "equitable" is to be understood as usually used or if it is to be understood as the parties understood it.

It is not accurate.

The gross sale price is based upon the testimony of complainant (p. 56) that they hold him "about January 6, 1921, when they gave me the royalties, they told me the average selling price per ampule was $2.26." But how long had it been $2.26, and how long would it remain $2.26? If the gross selling price was increased proportionately the net profit coming to Lowy Lab-

oratory, Inc., would increase. Complainant never would get more than ten per cent. of the gross selling price. Whatever was left of net profit would go to Lowy Laboratory, Inc. An increase in the gross selling price would not therefore proportionately benefit complainant. That the selling price of this material is not a fixed matter see subdivision 1 of clause 2 of the contract between Lowy Laboratory, Inc., and Squibb dated July 1st, 1921 (p. 23). The figure of the cost of production is based upon the testimony of complainant on page 57. He makes a calculation by which he figured the cost to produce at the rate of 100,000 ampules $1.90 per dose, but his calculation on page 57 is most indefinite. It was not based upon actual experience. He says on page 59:

> "A. It cost $1.80 or $1.90 to manufacture, plus the seventy five cents overhead, which may be ten cents out either way, but this is my figure."

On page 62 his attention is brought to the fact that the overhead would not be substantially greater on the manufacture of 500,000 ampules than it would be on the manufacture of 100,000, that is, as there was increase in production there would be decrease in cost per ampule. There is nothing certain. And see the testimony of Francis A. Stanton (p. 86). The cost of $1.90 is not certain. If it were to be decreased the Lowy Laboratory, Inc., would profit whereas complainant would not profit at all.

The Vice Chancellor says in his opinion that

> "the uncontradicted testimony is that the Lowy Laboratory's gross selling price per ampule of six-tenths grain of arsphenimine was $2.26. Of this Dr. Lowy was entitled, under his contract, to 22.6 cents. The cost

> of production and marketing was $1.90, leaving a net profit of 36 cents, divided thus: 22.6 to Dr. Lowy and 13.4 to Lowy Laboratory, Inc.,—approximately ⅔ and ⅓."

And he then figures the proportion.

This appears to be based upon the testimony of complainant (p. 59), who figures out the same proportion.

Turning to the testimony of John Schuemann (p. 95) we find that he has made a calculation based on figures which calculation he schedules. He says that the selling price, after taking off commissions, is $2.85 (p. 98); that the manufacturing cost was $119,000; that the gross profit to the Laboratory would be $166,000. Figured on that basis complainant would be entitled to ten per cent. of $285,000, or $28,500, or 17 1/10 per cent. of the gross profit.

Francis A. Stanton testifies with respect to the figures (pp. 89, 90, 91) and we submit that the Vice Chancellor is mistaken if he means to intimate that the figures testified to by complainant are correct.

It is urged, therefore, that the calculation of the Vice Chancellor is inaccurate.

But in making up a calculation and reaching an equitable result various so-called variables must be taken into consideration:

First—The price at which the articles sell.

It would vary under the McMenimen schedule and would make a difference. It may vary under the Squibb contract and may make a different difference.

Second—The quantity of the product which might go into making up a dose.

Third—The quantity which Squibb may sell and the amount of the sales which the defendant would have made under the McMenimen contract if it had not entered into the Squibb contract.

Fourth—The cost of the overhead that would have to be borne under the McMenimen contract (p. 87).

But there are still other considerations which go into making up an equitable result.

The company had not been successfully operating under the McMenimen contract. One hundred and seventy-six thousand dollars ($176,000) had been sunk in it. The only person who had gotten anything out of it was complainant; he had received fifteen thousand dollars ($15,000) and certain royalties; it was impossible to continue longer under that contract without bankruptcy. In order to save the situation the Squibb contract was entered into which changed the conditions. Under the new conditions it was equitable that the stockholders who had put in their money should get their money out before complainant received any further royalties or at least before complainant received royalties of large amount. This was recognized by complainant when he agreed to take twenty-five per cent. up to 500,000 with the understanding that only twenty per cent. was to be paid until other obligations were paid off, and then that the remaining five per cent. was to accumulate and if they sold above 500,000 ampules twenty per cent. flat (p. 107).

Another thing to be taken into consideration is that under the Squibb contract the return to the Lowy Laboratories, Inc., *might* be *reduced* but *could not* be *increased.*

It might be reduced because the net price of the article sold by competitors might fall below the figures contained in subdivision 1 of paragraph 3 of the Squibb contract (p. 23). In some instances, royalty credits were to be given (subdivision 3). Under the McMenimen contract the selling price was wholly within the control of Lowy Laboratory, Inc.

Under the Squibb contract, paragraph 5, Lowy Laboratory, Inc., assumed certain obligations of guarantee and also certain obligations with respect to standing expenses of suit.

It was intended that all of these matters should be taken into consideration by the parties in arriving at an *equitable* result. The negotiations between the parties clearly so indicated. As testified to by Francis A. Stanton and not denied, the complainant's "demands ran anywhere from thirty per cent. to fifty per cent. with guarantees of $6,000 and $3,000." He finally came down to an agreement to accept twenty-five per cent. up to 500,000 ampules with the understanding that twenty per cent. was to be paid until other obligations were paid off, and then that five per cent. was to accumulate and if they sold above 500,000 ampules twenty per cent. flat (p. 107). It is indicated by defendant's counsel in his brief in the Court below when he offered to accept as an equitable division sixty per cent. for Lowy Laboratory, Inc., and forty per cent, for complainant.

The Vice Chancellor in reaching his conclusion does not take any of these matters into consideration. All that he does is to attempt to apply the schedule of the McMenimen contract to the amount to be received under the Squibb contract, an impossible thing to do.

John Schuemann, an expert bookkeeper, testifies:

> "Q. Have you, in conjunction with Mr. Frank Stanton, attempted to reconcile the schedule of royalties contained in the McMenimen contract with the schedule of payments in the Squibb contract? A. I have several times, and for the last two weeks continually.
>
> "Q. Have you been able to find any basis

upon which to reconcile them? A. We found it impossible to come to any sort of a basis."

Having intimated that complainant is legally entitled to the amount arrived at (p. 115) the Vice Chancellor then says:

"But Dr. Lowy is willing to make concessions and offers to accept, as counsel says in his brief, as an equitable division, 60 per cent. for the Lowy Laboratory and 40 per cent. to him of the proceeds of the royalties coming from Squibb & Sons. It will be so decreed and an accounting ordered."

Why? The Vice Chancellor does not hold that the division suggested by counsel, sixty and forty, is an equitable division.

Of course, if the result reached by the Vice Chancellor that of the forty-five cents 28 25/100 should go to complainant and 16 75/100 to the Lowy Laboratory, Inc., is equitable then it might well be that he would give complainant only that which he askes for, if it was less than the equitable amount.

But in reaching the result the Vice Chancellor did not take into consideration the matters which the parties were considering. It cannot be contended that the result reached by the Vice Chancellor is equitable. It exceeds, in favor of complainant, anything that complainant has asked for. It is recognized to be inequitable by complainant.

This result of the Vice Chancellor being inequitable or having been reached without a consideration of all of the circumstances, why does the Court, without further suggestion of consideration, accept as an equitable division the amount which counsel for complainant says he will accept in his brief, sixty per cent, for the Laboratory and forty per cent. to complainant. Why

not rather accept the amount which complainant agreed to accept before the litigation started as an equitable amount, that is, twenty-five per cent, up to 500,000 ampules with the understanding that twenty per cent. was to be paid, until other obligations were paid off, and then that five per cent. was to accumulate and if they sold above 500,000 ampules twenty per cent. flat (p. 107). Why not at least accept another suggestion which was made by complainant (p. 80) to wit, thirty per cent. of what was received from Squibb until the capitalization was intact, and then fifty per cent.; or the 33⅓ per cent. suggested by complainant at the interview during which he originally asked 50 per cent.? (p. 105.)

It is submitted that this consideration indicates clearly:

First—That the equitable basis referred to by the parties is not a sufficiently certain standard, in the absence of agreement between the parties, for the Court to fix the division.

Second—That if it is a sufficient standard the Court below did not, in fact, arrive at an equitable result.

The case differs widely from cases where fair value or market value are the standards used.

In *Van Doren v. Robinson,* 16 N. J. E., 256, cited by the Vice Chancellor, the bill was dismissed. The Chancellor, in the course of considering the case, said (p. 260):

> "The agreement is that the land shall be reconveyed for a fair price, if the grantor will accept the deed and pay such price.
>
> "It is urged that the effect of the agreement is simply to give to the vendor the refusal of the property, if the parties could agree upon the price. If such be the effect of the contract, the court will not decree a specific performance. An agreement for the sale of land, at a price to be ascertained by

the parties, is too incomplete and uncertain to be carried into execution by a court of equity.

"But where the contract is that the land shall be reconveyed, not at a price to be agreed upon by the parties, but at a fair price, or at a fair valuation, the court will direct the valuation to be made by a master, and will enforce the execution of the contract.

"This class of cases has given rise to some conflict of opinion, and the line which marks the limits of the court's exercise of jurisdiction, is not clearly defined. The true principle seems to be, that whenever the price to be paid can be ascertained, in consistency with the terms of the contract, performance will be enforced. But the court will not make a contract for the parties, nor adopt a mode of ascertaining the price, not in accordance with the real spirit of the agreement."

It is one thing to fix a fair price for a piece of land and another thing to reach an *equitable basis* for an agreement where there are two agreements to be reconciled which are irreconcilable except by agreement.

The effect of the testimony in the case at bar is not that the agreement should be made upon an equitable basis by someone other than the parties. It is that the parties would agree and would use as the basis of their agreement an equitable basis. An equitable basis, under the testimony, was to be used by the parties, but the terms of the contract were to be fixed by the parties. The mode used by the Vice Chancellor in arriving at his conclusion is one not contemplated by the parties.

The cases of *Race v. Groves,* 43 N. J. E., 284; *Hayes v. O'Brien,* 149 Ill., 403 and *Woodruff v. Woodruff,* 44 N. J. E., 349, are clearly distinguishable.

In *McClung Drug Co. v. City Realty & Invest. Co.*, 91 N. J. E., 216, affirmed 92 N. J. E., 237, the Court denied relief, holding that the case was within *Fogg v. Price,* 145 Mass., 513.

"Fair value" and "market value" are words importing some degree of certainty. The term "equitable basis" is a term of great uncertainty. "Fair value" and "market value" are interchangeable and may be proven by testimony.

"Equitable basis" is something which cannot be proven by testimony.

If the words "equitable basis" are considered words of certainty then almost every contract which left out a term would be enforcible because it is fair to assume that the parties making the agreements intended, in the absence at least of evidence to the contrary, to make a fair contract and an equitable contract, and if they had omitted any one of the terms the Court would supply the omission by determining what would be proper upon an equitable basis.

And although it is conceded that equitable basis might be a term of certainty under some circumstances in others it would not be. In the case at bar the term is one of great uncertainty. The variables which have to be taken into consideration are of such a nature as that there is no way by which an equitable basis can be arrived at except by negotiation and by agreement of the parties.

III.

Under the circumstances of this case the court should have left the parties to their remedy at law.

Insofar as the action may be treated as one for specific performance the contract sought to be specifically performed as modified was so uncertain as that a court of equity had no jurisdiction to enforce it. It is only where a contract is certain in all its parts that a court of equity will enforce it.

McKibbin v. Brown, 14 N. J. E., 13; affirmed 15 N. J. E., 498;
Potts v. Whitehead, 20 N. J. E., 55;
McClung Drug Co. v. City Realty & Invest. Co., 91 N. J. E., 216; affirmed 92 N. J. E., 237;
Haskins v. Ryan, 71 N. J. E., 575, 577; affirmed 75 N. J. E., 623;
Brown v. Brown, 33 N. J. E., 650; L. R. A., 1917, D., p. 1079.

Courts of equity quite often decline to assume jurisdiction to enforce specific performance and leave the parties to their remedy at law, even if the contract is certain.

Page v. Martin, 46 N. J. E., 585;
Brisbane v. Sullivan, 86 N. J. E., 411;
Ten Eyck v. Manning, 52 N. J. E., 47;
Pyatt v. Lyons, 51 N. J. E., 308.

Courts of equity have never assumed to enforce specific performance of a contract because the remedy at law is uncertain because of the uncertainty of the contract.

If the contract is so uncertain as that it is impossible to recover under it at law, it is a for-

tiori so uncertain as to prevent a court of equity decreeing specific performance.

Insofar as the bill prays for an accounting under the McMenimen contract of September, 1919, there is nothing shown either in the pleadings or in the evidence to take the case out of the rule of *Daab v. N. Y. Central R. R.,* 70 N. J. E., 489, in which case it was held that jurisdiction of equity to decree an accounting cannot be sustained on the sole ground that the bill prays for a discovery, and where it is sought to be sustained because of the intricacy and complexity of the account, it must show that the remedy at law is in fact inadequate.

The rights of the parties under the McMenimen contract of September, 1919, are strictly legal. To justify the Court of Chancery in assuming jurisdiction something must be shown which would indicate that there is no adequate remedy at law.

In the case at bar there is no complexity of accounts. The amount due under the McMenimen contract is a certain percentage of the gross selling price. The figures are certain and are agreed upon. There was no necessity for an accounting or for discovery. The case is clearly within

Bellingham v. Palmer, 54 N. J. E., 136;
Cranford v. Watters, 61 N. J. E., 284;
DeBevoise v. H. & W. Co., 67 N. J. E., 472;
Olds v. Regan, 32 Atl., 827.

as well as those heretofore cited.

Insofar as the decree grants an accounting under the modified agreement, that is, of the amount of royalty due since October 1st, 1921, the Court acted beyond its jurisdiction. The proposed

modification of the agreement being too uncertain for specific performance there can, of course, be no accounting under its terms.

Haskins v. Ryan, 71 N. J. E., 575; affirmed 75 N. J. E., 623.

IV.

In view of the provisions of the Squibb contract and the existence of the interference suit no decree should be made at this time that moneys be paid to complainant.

The entire business of the Lowy Laboratory, Inc., and the basis for its capitalization and the subject matter of the Squibb contract is the patent rights of complainant. For these patent rights complainant has already been paid fifteen thousand dollars ($15,000) and certain royalties. By his assignment to the company (p. 19) he covenanted that he had good right and title to sell and assign the same.

By the contract made with Squibb, to which complainant was a party Lowy Iaboratory, Inc., warranted the validity of patent rights and guaranteed Squibb against the claim of any persons claiming ownership or title to the inventions to the extent of any royalties which may be paid under the terms of the Squibb contract and also agreed to share in the expense of the litigation.

Now an interference suit has been filed, another person claiming priority of invention. This is not an attack upon the patent. It is an attack upon the title to the patent. Conceding that the patent is valid the person filing the interference suit claims that it belongs to him, and not to complainant.

This suit is pending, not yet determined. Complainant is a party to it. Counsel has been retained, and Lowy Laboratory, Inc., in the defense of this patent, is incurring expense.

It may be that the patent, which is the basis of this entire controversy, belongs to someone other than complainant in which event all of the contracts will fall.

Pending determination of this controversy with respect to the title to the patents therefor equity should not decree moneys to be paid to complainant.

There is a contingency, which may, in equity, constitute an equitable set off against the demand of the complainant for immediate payment. While royalties may have been received by the Lowy Laboratory, Inc., under the Squibb contract, nevertheless these royalties may have to be refunded.

Finally.

It is respectfully submitted that the court, in order to remedy what the learned Vice Chancellor thinks is an inequitable situation, has assumed jurisdiction in a case in which it has no jurisdiction for the reasons stated in the motion to dismiss the bill which was made prior to the hearing (p. 33, and see the action of the Court reserving the motion until final argument, p. 54). The result of the decree was, of course a denial of the motion.

The bill set up nothing except the existence of a legal contract; the making of another contract inconsistent with it; the fact that the parties had agreed to adjust the matter upon an equitable basis; the failure of the parties to agree; and

then prays for an adjudication of rights apparently under Section 7 of the Chancery Act and for an accounting. Nothing is set up with respect to complexity of accounts or necessity for accounting in equity as distinguished from one at law. No fraud or over-reaching is set up or suggested. If a decree pro confesso had been taken upon the bill the Court could not grant relief for upon the face of the bill there is no equitable relief which could be granted. If the pleadings be considered as amended so as to conform to the proofs, the complainant is not aided. There is no proof of fraud or over-reaching or mistake or mis-statement, nor is there any proof of complexity of accounts or anything which would warrant the intervention of a court of equity. The case is one in which two parties having a contract, came to the conclusion that that contract could no longer be carried out according to its terms, and having come to that conclusion entered into another contract with a third party wholly inconsistent with the contract between themselves, the mutual understanding between the parties being that after the contract with the third party should have been entered into they would get together and make a new contract for themselves. They tried to make a new contract and failed. Because of the variables in the situation they could not agree upon a contract which they considered proper to be entered into by each of them. But there is no suggestion that the defendant corporation refused to enter into a new contract because of fraud. Complainant deliberately, intentionally and intelligently had waived the royalty provision of the McMenimen contract. It is out of the question to disturb the Squibb contract. There is no way by which the parties can

be put back in statu quo. However desirous the Court of Chancery may be to relieve complainant in such a situation it cannot do it where the terms are so uncertain as that in order to do it it is obliged to make a contract for the parties. When the decree of the Court provides for a division between the parties of the royalties upon the basis of sixty per cent. for defendant and forty per cent. for complainant, although the Court has held that upon the basis of a forty-five cent royalty complainant should have 28 25/100 cents and Lowy Laboratory, Inc., 16 75/100 cents, there is cogent proof of such uncertainty as to prevent the Court from imposing upon the parties a contract where the divergence between the Vice Chancellor and complainant in whose favor it is, is so great. Complainant already has had fifteen thousand dollars ($15,000) out of this patent as well as royalties from time to time. No one else has had one cent out of it. One hundred and seventy-six thousand dollars ($176,000) has been invested in the proposition with no return. Is it not fair and equitable that before these royalties go on being paid to complainant, whose title to the patent is now questioned, some provision should be made for restoring to the corporation its title? Complainant thought so, and during the negotiations offered such a proposition. Complainant is not in the position of being the injured man which the Vice Chancellor seems to think he is.

The Vice Chancellor said (p. 133):

> "At the hearing the defendant's officers professed anxiety to settle on a royalty basis, and to test their sincerity I suggested that they withdrew their jurisdictional objections and allow the Court, unhampered, to adjust their differences, which they promptly re-

jected, in the hope, no doubt, of driving the complainant into the law courts for damages, and ridding themselves of the contract."

May not rather the attitude of the officers of the company have been due to the fact that they doubted that the Court could put itself in the position of the parties to this contract, and doubted whether the Court, under the circumstances, would consider the various elements which they thought should go into the determination of the division of these royalties? May not they have been imbued with this motive rather than that attributed to them by the Court below? And if they were, were they not justified, if the Court has, in arriving at its conclusion, disregarded all equitable considerations and all those matters which would influence a business man in arriving at the terms of a contract and has attempted to arrive at a result by applying a rule of mathematics?

Under the circumstances of this case the remedy is at law, and that the damages are uncertain is no reason for equity assuming jurisdiction.

Sperry & Hutchinson v. Vine Bros., 66 N. J. E., 339.

McGann v. LaBrecque Co., 91 N. J. E., 307, at page 309, citing:

Palys v. Jewett, 32 N. J. E., 302;
Trotter v. Heckscher, 40 N. J. E., 612, 656;
Alpaugh v. Wood, 45 N. J. E., 153, 157;
Norton v. Sinkhorn, 63 N. J. E., 313;
Sparks Mfg. Co. v. Town of Newton, 57 N. J. E., 367, 393.

It is respectfully submitted that the decrees brought up by these appeals should be reversed and the record remitted to the Court of Chancery with a direction to dismiss the bill.

Respectfuly submitted,

DOUGAL HERR,
MERRITT LANE,
Of Counsel with Appellant.

GAEDE & GAEDE,
Solicitors of Appellant.