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Petition of Appeal.

(Filed, December 20, 1926; Served, December  
21, 1926.)

10

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

DANIEL A. HOHMANN and KATH-  
ARINE K. HOHMANN,  
*Complainants-Appellants,*

vs.

WILBUR S. CORKRAN,  
*Defendant-Respondent.*

On Appeal  
from the  
Court of  
Chancery.

20

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

The petition of Daniel A. Hohmann and Katha-  
rine K. Hohmann, of the township of Millburn,  
Essex County, New Jersey, appellants in the  
above-stated cause, respectfully shows that your  
petitioners find themselves aggrieved by a final  
decree made in the Court of Chancery by his  
Honor, Edwin Robert Walker, Chancellor of New  
Jersey, upon the advice of the Honorable Maja L.  
Berry, Vice-Chancellor, bearing date the 16th day  
of November, in the year nineteen hundred twenty-  
six, in a cause therein then depending, wherein  
your petitioners were complainants and Wilbur  
S. Corkran was defendant, in these respects, to

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*Petition of Appeal.*

wit: that said final decree orders, finds and ad-  
 judges that your petitioners are not entitled to  
 discovery as prayed for in their bill of complaint  
 in said cause; that said final decree adjudges that  
 said bill of complaint be dismissed; that said final  
 10 decree orders and adjudges that complainants pay  
 to defendant or his solicitors the costs of said  
 cause therein and a counsel fee of \$100, and  
 awards to defendant and his solicitors counsel fee  
 and costs accordingly; that said final decree pur-  
 ports to grant and in effect grants a motion on  
 the part or in behalf of the defendant-respondent  
 therein for a dismissal of said bill, whereas said  
 motion ought to have been denied; that said Court  
 20 of Chancery wrongfully received and considered  
 upon said motion affidavits upon subjects extrane-  
 ous thereto and said decree was made upon an as-  
 sumption of facts, wrongfully found, which were  
 inapplicable to a motion to dismiss such bill; be-  
 cause said Court of Chancery, in lieu of making  
 said final decree, should have made an order deny-  
 ing said motion of defendant-respondent and  
 ought to have retained said bill of complaint,  
 heard the same upon the merits and adjudged  
 30 same upon the merits in favor of the complain-  
 ants, according to the prayer thereof; and because  
 said final decree is erroneous, contrary to the law  
 and the facts, contrary to the equities disclosed  
 by said bill of complaint and in these and other  
 respects wrongful and oppressive: And your pe-  
 titioners humbly appeal from the whole of said  
 final decree and from each and every part thereof  
 upon the ground that the same is erroneous, for  
 that it orders, finds and adjudges that your peti-  
 40 tioners are not entitled to discovery as prayed

*Petition of Appeal.*

for in their said bill; for that it adjudges that  
 said bill be dismissed; for that it orders and ad-  
 judges that petitioners pay to defendant-respond-  
 ent or his solicitors the said costs and counsel fee,  
 and wrongfully awards the same accordingly; for  
 that it purports to grant and in effect grants de- 10  
 fendant-respondent's said motion for a dismissal  
 of said bill; for that said Court of Chancery  
 wrongfully received and considered upon said mo-  
 tion affidavits upon subjects extraneous thereto  
 and same was made upon an assumption of facts,  
 wrongfully found, which were inapplicable to such  
 motion; for that said Court of Chancery failed  
 to deny said motion of defendant-respondent,  
 failed to retain said bill of complaint, denied to 20  
 your petitioners the equal protection of the laws,  
 denied them due process of law and took and ad-  
 judged the taking from them of their property  
 without due process of law and for that the said  
 final decree was for these and other reasons in-  
 equitable, contrary to the law and the facts and  
 oppressive to and confiscatory of the rights of  
 your petitioners in the premises disclosed by said  
 bill.

Your petitioners therefore humbly pray that 30  
 said final decree of the Chancellor may be, in the  
 particulars aforesaid and because thereof, re-  
 versed, set aside and for nothing holden: And that  
 your petitioners may have such relief in the prem-  
 ises as to this honorable Court shall seem meet.

JOHN WINANS,  
 Solicitor of and of Counsel with Appellants.



*Bill of Complaint.*

4. At or about the time of the making and delivery of said contract, plans and specifications for the proposed dwelling house and semi-detached garage, therein and in said contract referred to, were prepared and agreed upon by the parties hereto and incorporated by internal reference into said contract; which plans and specifications prescribe and describe the dimensions, materials and character of the buildings intended to be erected pursuant thereto; duplicate originals of which plans and specifications are now in the possession of complainants and ready to be produced and proved as your Honor may direct.

5. At the time of the execution and delivery of said contract and throughout the construction work thereunder, which ensued, it was the intention of the parties hereto that said dwelling house and garage should be erected upon the land and premises of complainant Katharine K. Hohmann, hereinbefore described, for the joint and common use, occupation and enjoyment of the complainants.

6. At and before the time of the execution of said contract, and at all times thereafter, defendant was and is a building contractor of extensive experience in the erection and construction of dwelling houses and garages of the same and similar dimensions, materials, construction and types and was and is familiar with the quantities and kinds of materials and labor necessary and appropriate to be used and employed in the erection and construction thereof and with the costs and expenses thereof and of each item and part thereof.

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7. At and shortly before the making of said contract, defendant appraised the cost of the construction of said dwelling house and semi-detached garage, so to be constructed thereunder, and of the materials and labor to be used and employed therein, and each item thereof, in the sum of \$14,000 and thereupon, at the same times, stated and represented to complainants and each of them that said dwelling house and garage could and would be erected and constructed and fully completed, according to said contract, plans and specifications, for said sum of \$14,000.

8. After the execution and delivery of said contract and the preparation and mutual acceptance of said plans and specifications and until a date shortly prior to June 12, 1925, defendant, in pretended and ostensible compliance with the provisions thereof, erected upon said premises a dwelling house and garage of the same general character as described and provided for therein, and purchased or otherwise procured and installed therein certain building materials and hired and caused to be used and employed in and upon the construction work thereof certain labor, the amounts, kinds, qualities and values of which materials and labor are and at all said times have been well known to defendant, but of which complainants have no knowledge.

9. From time to time during the course of construction of said buildings, defendant stated and represented to complainants that he had expended and paid out large sums of money for their account, aggregating \$21,438.68, in the purchase of

Bill of Complaint.

materials, employment of labor and payment of expenses, necessarily procured, employed, expended and incurred in the erection and construction of said dwelling house and garage.

10 10. That at the times when defendant made such statements and representations aforesaid, complainants and each of them believed the same.

20 11. During the course of construction of said dwelling house and garage complainants, believing and relying upon the statements and representations of defendant, made as aforesaid, that he had expended moneys and incurred debts aggregating said sum of \$21,438.68, paid to defendant, at his request and upon his demand, the several sums of money hereinafter mentioned, aggregating \$21,438.68, on the several dates as hereinafter stated:

|      |         |          |                       |
|------|---------|----------|-----------------------|
| 1924 |         |          |                       |
| Nov. | 8.....  | \$400.00 | Jan. 26..... \$500.00 |
|      | 22..... | 500.00   | 31..... 200.00        |
|      | 28..... | 500.00   | Feb. 1..... 300.00    |
| Dec. | 5.....  | 500.00   | 10..... 1,996.67      |
|      | 13..... | 300.00   | 21..... 2,200.00      |
| 30   | 13..... | 200.00   | Mar. 2..... 600.00    |
|      | 20..... | 500.00   | 7..... 1,100.00       |
|      | 24..... | 500.00   | 14..... 300.00        |
| 1925 |         |          |                       |
| Jan. | 5.....  | 300.00   | 21..... 1,000.00      |
|      | 5.....  | 200.00   | 28..... 300.00        |
|      | 10..... | 3,000.00 | Apr. 9..... 1,000.00  |
|      | 17..... | 500.00   | Jun. 11..... 100.00   |
|      |         |          | 12..... 4,442.01      |
| 40   |         |          | <hr/> \$21,438.68     |

Bill of Complaint.

12. Defendant did not at any time or times expend moneys or incur debts to the amount or extent of \$21,438.68, for the purchase of materials, employment of labor and payment of expenses or otherwise pay out money or incur debts in relation to said building and construction work, in excess of the sum of \$14,000. 10

13. The said dwelling house and semi-detached garage, so as aforesaid erected by defendant, in seeming compliance with said contract, plans and specifications, did not cost \$21,438.68; but in fact cost a much smaller sum of money, to wit: about the sum of \$14,000.

20 14. Said dwelling house and semi-detached garage, as constructed by defendant, are not and were not at any of the times herein mentioned well or reasonably worth said sum of \$21,438.68; but in fact were and are worth, exclusive of the land upon which the same are erected, a much smaller sum of money, to wit: about the sum of \$14,000.

30 15. At all times herein mentioned complainants and each of them were are are wholly unfamiliar with building construction or with the nature, quantities or kinds of materials or the kind or extent of labor necessary or proper for the construction of buildings, including said dwelling house and garage, or with the cost of construction thereof or of the labor or materials necessary or proper to be employed therein.

40 16. Between June 13, 1925, and November 13, 1925, both dates inclusive, complainants and each

*Bill of Complaint.*

of them duly demanded of defendant that he pay over to them or either of them the sum of \$7,438.68, and each item and part thereof, the same being the excess of moneys paid to defendant by complainants, over and above the actual cost of said construction work as aforesaid, and each item and part of said moneys, together with lawful interest during the period while defendant withheld said moneys from complainants; but defendant thereupon refused and has always since refused to pay over said moneys or any part thereof to complainants or either of them or to any person for their benefit or account.

17. Complainants have recently commenced an action in the Supreme Court of the State of New Jersey, which Court has ample jurisdiction in relation to said action, for the recovery of said sum of \$7,438.68, and each item thereof, and the interest thereon as aforesaid; upon 5 separate and distinct causes of action or grounds, to wit: (1) for money had and received; (2) for obtaining money under false pretenses; (3) for breach of said building contract; (4) for conversion of the moneys aforesaid belonging to complainants, and the building materials, or some portions thereof, purchased with portions of said moneys; and (5) for negligence in the destruction, loss and damaging of portions of said buildings and of materials used or intended for use therein or otherwise purchased with moneys supplied by these complainants; in which action defendant has answered denying all liability on his part in the premises therein set forth; that said action has been noticed for trial at the Essex County Circuit of the

*Bill of Complaint.*

said Court and is now pending and undetermined therein; but that the remedy afforded or which may be afforded to complainants therein is wholly inadequate, for the reason that complainants have been and are unable to procure an examination of defendant, upon his oath, before the trial of said action concerning the several matters in relation to which discovery is herein prayed for.

18. Complainants and each of them have frequently, since the making of said building contract, during the course of the construction work ostensibly performed thereunder, and prior to the commencement of this suit, applied to the defendant in a friendly manner and requested him to disclose and make known to them the persons to whom and the purposes for which their said moneys and each item and part thereof were expended and to state, disclose and make known to them the kinds, quantities and costs of the labor and materials used in the construction of said dwelling house and semi-detached garage; the amounts, kinds and costs of materials purchased by defendant for the account or at the expense of complainants for use in said buildings or either of them; the amounts, kinds and costs of materials actually used therein or devoted to the construction thereof; the amounts, kinds and costs of all surplus materials, purchased with complainants' money or purchased by defendant for their account and at their expense, and how all such surplus materials were disposed of; the amounts, kinds and costs of all materials purchased with the money of or at the expense of or for the account of complainants which were wasted, damaged or de-

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10 stroyed during the progress of said work; the  
 kinds, duration and expense of all labor used or  
 employed in the construction of said dwelling  
 house and garage and each part thereof and of the  
 various works required to be performed by said  
 contract, plans and specifications or either of  
 20 them, what portions of such labor were employed  
 in constructing damaged or defective work or  
 portions of said building or buildings, or in tear-  
 ing out, removing or destroying defective work  
 therein or in replacing such defective work with  
 new work of construction; as to the causes of such  
 destruction, demolition, tearing out or injury to  
 materials or to parts of the work then or lately  
 30 under construction; that he make full statement,  
 disclosure and discovery as to where, when and  
 from whom all materials used in said construc-  
 tion work, procured for use therein or otherwise  
 purchased or procured with the moneys of com-  
 plainants or any part thereof or with moneys paid  
 to defendant by complainants or either of them  
 on account of said building construction or any  
 part or parts thereof were purchased or how oth-  
 erwise procured; and as to when, where and to  
 40 whom all of the moneys, aggregating \$21,438.68,  
 supplied to defendant by complainants or either  
 of them, were expended or paid out and for what  
 purposes and that he, the said defendant, make  
 and deliver to complainants a full and itemized  
 statement of account, disclosing and showing in  
 full each and every item of materials, designating  
 the same by their respective quantities, qualities,  
 natures and kinds, which were purchased or pro-  
 cured for use in said buildings or either of them,  
 the time when and the persons or corporations

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from whom the same were acquired, the costs and  
 reasonable values thereof and the amounts of  
 money paid by defendant or the obligations as-  
 sumed by him on account of the purchasing or ac-  
 quiring thereof and the times when the persons  
 or corporations to whom, and the dates when, 10  
 each of said payments was made and each of said  
 obligations incurred and also the kind, quantities  
 and durations of all labor and each item of labor  
 upon said building work and the particular parts  
 of said construction upon which each item of said  
 labor was employed; the costs and reasonable  
 values of all said labor, the persons to whom, the  
 times when and the amounts of money paid for  
 labor; and the particular items, including dates, 20  
 amounts, purposes and places where incurred and  
 where paid, of all expenses for which defendant  
 paid money, incurred debts or claims so to have  
 done in relation to the erection of said buildings  
 or either of them or the performance of any of  
 the work provided for in said contract, plans or  
 specifications or either of them.

19. At all times since the making of said con-  
 tract, and notwithstanding the reasonable requests 30  
 so made to defendant by complainants, as set forth  
 in the last preceding paragraph of this bill of  
 complaint, defendant has always refused and  
 neglected to make any statement or disclosure  
 to complainants or either of them or to any per-  
 son for their use or benefit, concerning the dispo-  
 sition of said moneys, the natures of the several  
 materials and labor aforesaid or as to any of the  
 matters or things concerning which complainants 40  
 demanded such information, as set forth in said

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last preceding paragraph; and at all said times defendant has wholly refused and neglected to make, furnish or exhibit to complainants or either of them any statement of account, truly setting forth the disposition of said moneys, so furnished to him by complainants, in the respects as in said last preceding paragraph set forth; but has in all respects wholly failed and refused to make any accounting, disclosure or discovery in relation to the several matters therein set forth, as requested by complainants; except that he has from time to time supplied to complainants alleged and pretended monthly statements of account, not showing the several matters aforesaid, as requested by complainants; which said alleged and pretended monthly statements of account, so made up by defendant and delivered to complainants, are now in the possession of these complainants, ready to be produced and proved as your honor may direct.

20. Your complainants have not now and have never had any knowledge or information as to the disposition of their moneys or with respect to said alleged materials, labor and other expenses, as heretofore demanded by them as aforesaid, except the incomplete and misleading information contained in said pretended statements of account, and are wholly in ignorance as to the facts in that regard.

21. Defendant has in his possession and is able to furnish to complainants information regarding all of the matter so required of him and demanded by complainants as aforesaid; complainants have not this information and cannot safely proceed to

*Bill of Complaint.*

trial in their said action at law, without such discovery and disclosure by defendant and without a true, full and detailed statement of account, made up by him or under his direction and verified by his oath in relation to the matters aforesaid; all of the information so sought by complainants is necessary and material evidence in their said action at law, without which they cannot safely proceed to trial therein.

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

1. That Wilbur S. Corkran, who is the defendant in this suit, may answer this bill of complaint, under oath, and each statement therein made;

2. That the defendant, Wilbur S. Corkran, may be required to make discovery under oath, according to law and the practice of this honorable Court, in relation to the premises in this bill set forth, and particularly to disclose the kinds, quantities and costs of the labor and materials used in the construction of said dwelling house and garage, as to the amounts, kinds and costs of materials purchased for that purpose, of materials actually used therein, of all surplus materials and how the latter were disposed of, and of all materials wasted, damaged or destroyed during the progress of construction work upon said buildings; as to the labor employed in performing or installing work which was afterwards torn out and in replacing work torn out and destroyed, and as to the causes of such destruction, demolition, tearing out or injury to materials or parts of the work under construc-

*Bill of Complaint.*

tion; as to where, when and from whom all such materials were purchased; when, where and to whom all the money aggregating \$21,438.68, supplied to defendant by complainants or either of them was expended or paid out and for what purposes, as more particularly set forth above;

10

3. That defendant Wilbur S. Corkran, may be required to make a just and true account of all said moneys, showing particularly the dates, places, persons or corporations to whom and for what purposes all payments were made by him for the account of complainants or either of them, his disposition of said money so paid or supplied to him by complainants with the items, reasonable values and costs of each item of work, labor or materials appearing upon such account;

20

4. That said defendant may be required to produce his books of account and all bills, vouchers, accounts and writing touching or concerning the premises or in any way relating to said construction work or to the receipt, handling or disposition of said money of the complainants; and

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

JOHN WINANS,  
Solicitor of and of Counsel with Complainants.

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**Affidavit of Complainants.**

(Filed, September 3, 1926.)

State of New Jersey, }  
County of Essex, } ss.:

Daniel A. Hohmann and Katharine K. Hohmann, the above named complainants, being each severally duly sworn according to law, each on his or her separate corporate oath saith—that each of the said deponents has read the foregoing bill, knows the contents thereof and that he and she each believe that the contents thereof are true.

10

DANIEL A. HOHMANN,  
KATHARINE K. HOHMANN.

20

Subscribed and sworn to this  
24th day of August, 1926, before me.

LELA KNEEN,  
Notary Public for N. J.

**Exhibit A Annexed to Bill.**

30

(Filed, September 3, 1926.)

THIS AGREEMENT made the first day of November in the year nineteen hundred and twenty-four by and between Wilbur S. Corkran hereinafter called the Contractor, and D. A. Hohmann hereinafter called the Owner, WITNESSETH, that whereas the Owner intends to erect a residence on Coniston Place, Short Hills, N. J.

40

*Exhibit A Annexed to Bill.*

NOW, THEREFORE, the Contractor and the Owner, for the considerations hereinafter named, agree as follows:

10 ARTICLE 1. THE WORK TO BE DONE AND THE DOCUMENTS FORMING THE CONTRACT.

The Contractor agrees to provide all the labor and materials and to do all things necessary for the proper construction and completion of the work shown and described on Drawings bearing the title—and numbered—and in Specifications bearing the same title, the pages of which are numbered—  
 20 The said Drawings and Specifications and the General Conditions of the Contract consisting of Articles numbered one to — together with this Agreement, constitute the Contract; the Drawings, Specifications and General Conditions being as fully a party thereof and hereof as if hereto attached or herein repeated. If anything in the said General Conditions is inconsistent with this Agreement, the Agreement shall govern.

The said documents have been prepared by — therein and hereinafter called the Architect.

30 ARTICLE 2. CHANGES IN THE WORK.

The Owner, may from time to time, by written instructions or drawings issued to the Contractor, make changes in the above-named Drawings and Specifications, issue additional instructions, require additional work or direct the omission of work previously ordered, and the provisions of this contract shall apply to all such changes, modifications and additions with the same effect as if  
 40

*Exhibit A Annexed to Bill.*

they were embodied in the original Drawings and Specifications. Since the cost of all such changes is to merge in the final cost of the work, Articles 24 and 25 of the General Conditions of the Contract are annulled, unless elsewhere especially made applicable. 10

ARTICLE 3. THE CONTRACTOR'S DUTIES AND STATUS.

The Contractor recognizes the relations of trust and confidence established between him and the Owner by this Agreement. He covenants with the Owner to furnish his best skill and judgment and to co-operate in forwarding the interests of the Owner. He agrees to furnish efficient  
 20 business administration and superintendence and to use every effort to keep upon the work at all times an adequate supply of workmen and materials, and to secure its execution in the best and soundest way and in the most expeditious and economical manner consistent with the interests of the Owner.

ARTICLE 4. FEE FOR SERVICES.

In consideration of the performance of the contract, the Owner agrees to pay the Contractor, in current funds, as compensation for his services hereunder Fourteen hundred dollars and no cents (\$1400.00) which shall be paid as follows: Four hundred dollars (\$400.00) upon signing, Three hundred dollars (\$300.) on the first of each month thereafter, except that One hundred dollars (\$100.) shall be held until completion of contract. 30  
 40

*Exhibit A Annexed to Bill.*

## ARTICLE 5. COSTS TO BE REIMBURSED.

10 The Owner agrees to reimburse the Contractor in current funds all costs necessarily incurred for the proper prosecution of the work and paid directly by the Contractor, such costs to include the following items, and to be at rates not higher than the standard paid in the locality of work except with prior consent of the Owner:

(a) All labor directly on the Contractor's pay roll.

20 (b) Salaries of Contractor's Employees stationed at the field office, in whatever capacity employed. Employees engaged, at shops or on the road, in expediting the production or transportation of material, shall be considered as stationed at the field office and their salaries paid for such part of their time as is employed on this work. Prorated time of time keeper and clerk at fifty cents (\$0.50) an hour.

30 (c) The proportion of transportation, traveling and hotel expenses of the Contractor or of his officers or employees incurred in discharge of duties connected with this work. Operation of truck and driver at One Dollar and fifty cents (\$1.50) when used.

(d) All expenses incurred for transportation to and from the work of the force required for its prosecution.

40 (e) Permit fees, royalties, damages for infringement of patents, and costs of defending suits

*Exhibit A Annexed to Bill.*

therefor and for deposits lost for causes other than the Contractor's negligence.

(f) Losses and expenses, not compensated by insurance and otherwise, sustained by the Contractor in connection with the work, provided they have resulted from causes other than the fault or neglect of the Contractor. Such losses include settlements made with the written consent and approval of the Owner. No such losses and expenses shall be included in the cost of the work for the purpose of determining the Contractor's fee, but, if, after a loss from fire, flood or similar cause not due to the fault or neglect of the Contractor, he be put in charge of reconstruction, he shall be paid for his services a fee proportionate to that named in Article 4 hereof. 10 20

(g) Minor expenses, such as telegrams, telephone service, expressage, and similar petty cash items.

(h) Cost of hand tools, not owned by the workmen, canvas and tarpaulins, consumed in the prosecution of the work, and depreciation on such tools, canvas and tarpaulins used but not consumed and which shall remain the property of the Contractor. 30

## ARTICLE 6. COSTS NOT TO BE REIMBURSED.

Reimbursement of expenses to the Contractor shall not include any of the following:

(a) Salary of the Contractor, if an individual, 40 or salary of any member of the Contractor, if a

*Exhibit A Annexed to Bill.*

firm, or salary of any officer of the Contractor, if a corporation.

10 (b) Salary of any person employed, during the execution of the work, in the main office or in any regularly established branch office of the Contractor, other than clerk and time keeper.

(c) Overhead or general expenses of any kind, except as these may be expressly included in Article 5.

(d) Interest on capital employed either in plant or in expenditures on the work, except as may be expressly included in Article 5.

20 ARTICLE 7. COSTS TO BE PAID THROUGH CONTRACTOR BY THE OWNER.

In addition to items of cost noted in Article 5 for which the Owner reimburses the Contractor, the Owner shall pay all costs as follows: (through Contractor)

30 (a) Materials, supplies, equipment and transportation required for the proper execution of the work, which shall include all temporary structures and their maintenance; all such costs to be at rates not higher than the standard paid in the locality of the work except with prior consent of the Owner.

(b) The amounts of all separate contracts.

40 (c) Premiums on all bonds and insurance policies called for under Articles 19, 20, 21 and 22 of the General Conditions of the Contract.

*Exhibit A Annexed to Bill.*

(d) Rentals of all construction plant or parts thereof, whether rented from the Contractor or others, in accordance with rental agreements approved by the Architect. Transportation of said construction plant, cost of loading and unloading, cost of installation, dismantling and removal thereof and minor repairs and replacements during its use on the work—all in accordance with the terms of the said rental agreements. 10

ARTICLE 8. DISCOUNTS, REBATES, REFUNDS.

All discounts, rebates and refunds, and all returns from sale of surplus materials, equipment, etc., shall accrue to the Owner, and the Contractor shall make provisions so that they can be secured. 20

ARTICLE 9. CONTRACTOR'S FINANCIAL RESPONSIBILITY.

Any cost due to the negligence of the Contractor or anyone directly employed by him, either for the making good of defective work, disposal of material wrongfully supplied, making good of damage to property, or excess costs for material or labor, or otherwise, shall be borne by the Contractor, and the Owner may withhold money due the Contractor to cover any such cost already paid by him as part of the cost of the work. 30

This article supersedes the provisions of Articles 13, 14 and 16 of the General Conditions of the Contract so far as they are inconsistent herewith.

*Exhibit A Annexed to Bill.*

## ARTICLE 10. SEPARATE CONTRACTS.

10 All portions of the work that the Contractor's organization has not been accustomed to perform or that the Owner may direct, shall be executed under separate contracts let by the Contractor direct. In such cases either the Contractor shall ask for bids from contractors approved by the Architect and shall deliver such bids to him, or the Architect shall procure such bids himself and in either case the Contractor shall determine, with the advise of the Owner or Architect as needed and subject to the approval of the Owner, the award and amount of the accepted bid. The Contractor shall contract for such work direct with such approved bidders in accordance with the terms of this agreement and the General Conditions of the Contract, which Conditions shall, for the purpose of such contracts, stand as printed or written and not be subject to the modifications set forth herein.

20 The Contractor, being fully responsible for the general management of the building operations, shall have full directing authority over the execution of the separate contracts.

30 The separate Contractors shall not only cooperate with each other, as provided in Article 41 of the General Conditions of the Contract, but they shall conform to all directions of the Contractor in regard to the progress of the work.

## ARTICLE 11. TITLE TO THE WORK.

40 The title of all work completed and in course of construction and of all materials on account of

*Exhibit A Annexed to Bill.*

which any payment has been made, and materials to be paid for under Article 7, shall be in the Owner.

## ARTICLE 12. ACCOUNTING, INSPECTION, AUDIT.

10 The Contractor shall check all material and labor entering into the work and shall keep such full and detailed accounts as may be necessary to proper financial management under this Agreement and the system shall be such as is satisfactory to an auditor appointed by the Owner. The Owner, the auditor and their timekeepers and clerks shall be afforded access to the work and to all the Contractor's books, records, correspondence, instructions, drawings, receipts, vouchers, memoranda, etc., relating to this contract, and the Contractor shall preserve all such records for a period of two years after the final payment hereunder.

## ARTICLE 13. APPLICATIONS FOR PAYMENT.

30 The Contractor shall, between the fifteenth and thirtieth of each month, deliver to the Owner a statement, sworn to if required, showing in detail and as completely as possible all moneys paid out by him on account of the cost of the work during the previous month for which he is to be reimbursed under Article 5 hereof, with original pay rolls for labor, checked and approved by a person satisfactory to the Owner, and all receipted bills.

40 He shall as necessary submit to the Owner a complete statement of all moneys properly due for materials or on account of separate contracts, or on account of his fee, or otherwise, which are to

*Exhibit A Annexed to Bill.*

be paid direct by the Owner under Article 7 hereof.

The provisions of this Article supersede those of Article 26 of the General Conditions of the Contract.

- 10 The Owners shall keep a balance in their account on the Contractor's books sufficient to meet current needs.

## ARTICLE 14. CERTIFICATES OF PAYMENT.

The Owner may check the Contractor's statements of moneys due, called for in Article 13, and shall promptly pay to the Contractor for all such as he approves.

- 20 The provisions of this Article supersede the first paragraph of Article 27 of the General Conditions of the Contract.

## ARTICLE 15. DISBURSEMENTS.

Should the Contractor neglect or refuse to pay, within five days after it falls due, any bill legitimately incurred by him hereunder (and for which he is to be reimbursed under Article 5) the Owner, after giving the Contractor twenty-four hours' written notice of his intention so to do, shall have the right to pay such bill directly, in which event such payment shall not, for the purpose either of reimbursement or of calculating the Contractor's fee, be included in the cost of the work.

- 30

## ARTICLE 16. TERMINATION OF CONTRACT.

(The provisions of this Article supersede all of Article 37 of the General Conditions of the Contract except the first sentence.)

- 40

*Exhibit A Annexed to Bill.*

If the Owner should terminate the contract under the first sentence of Article 37 of the General Conditions of the Contract, he shall reimburse the Contractor for the balance of all payments made by him under Article 5, plus a fee computed upon the cost of the work to date at the rate of percentage named in Article 4 hereof, or if the Contractor's fee be stated as a fixed sum, the Owner shall pay the Contractor such an amount as will increase the payments on account of his fee to a sum which bears the same ratio to the said fixed sum as the cost of the work at the time of termination bears to a reasonable estimated cost of the work completed, and the Owner shall also pay to the Contractor fair compensation, either by purchase or rental, at the election of the Owner, for any equipment retained. In case of such termination of the contract the Owner shall further assume and become liable for all obligations, commitments and unliquidated claims that the Contractor may have theretofore, in good faith, undertaken or incurred in connection with said work and the Contractor shall, as a condition of receiving the payments mentioned in this Article, execute and deliver all such papers and take all such steps, including the legal assignment of his contractual rights and benefits of the Contractor under such obligations or commitments.

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The Contractor and the owner for themselves, their successors, executors, administrators and assigns hereby agree to the full performance of the covenants herein contained.

IN WITNESS WHEREOF they have executed this agreement the day and year first above written.

40

WILBUR S. CORKRAN.

KATHERINE K. HOHMANN.

Subpoena ad Respondendum.

(Issued September 17, 1926; Served September 18, 1926.)

New Jersey, to wit, The State of New Jersey to Wilbur S. Corkran: GREETING

10

Whereas a bill of complaint has lately been exhibited against you in our Court of Chancery by Daniel A. Hohmann and Katharine K. Hohmann, to be relieved touching the matters therein contained.

20

Therefore, we command you, if you intend to make a defense, that you file an answer to said bill in the office of the Clerk of our said Court at Trenton, on or before the expiration of twenty days from and after the twenty-seventh day of September, 1926, and in default thereof such order or decree will be made against you as the Court shall think equitable and just.

30

Witness, his Honor, Edwin Robert Walker, Chancellor of our said State, at Trenton, the seventeenth day of September, in the year of our Lord one thousand nine hundred and twenty-six.

THOMAS BARBER, Clerk.

JOHN WINANS, Solicitor.

40

Notice of Motion to Dismiss Bill.

(Served, September 29, 1926.)

IN CHANCERY OF NEW JERSEY.

Between DANIEL A. HOHMANN and KATHARINE K. HOHMANN, Complainants, and WILBUR S. CORKRAN, Defendant. On Bill, etc. Notice of Motion to Strike Out. 10

To JOHN WINANS, Esq., Solicitor for Complainants: 20

PLEASE TAKE NOTICE that on Tuesday, October fifth, Nineteen Hundred and Twenty-six, at eleven A. M., or as soon thereafter as counsel can be heard, at Chancery Chambers, Newark, New Jersey, we shall move before the Honorable Maja Leon Berry, one of the Vice-Chancellors of this court, to strike out the bill of complaint in the above entitled cause on the grounds that: 30

- 1. It does not set up an equitable cause of action.
2. There is an adequate remedy at law.

3. The Supreme Court of the State of New Jersey has already granted said adequate remedy to complainants by an order of his Honor William S. Gummere, Chief Justice of the New Jersey Supreme Court, in a cause now depending in said court, wherein the complainants herein are plain- 40

*Moving Affidavit.*

tiffs and the defendant herein is defendant, based on the identical facts alleged in this cause.

And take further notice that on the argument of said motion the attached affidavit will be presented to said Court.

10 Dated, September 29, 1926.

STEWART & HARTSHORNE,  
Solicitors for Defendant.

*Moving Affidavit.*

(Served, September 29, 1926.)

20 State of New Jersey, }  
County of Essex, } ss.:

Richard Hartshorne, being duly sworn on his oath, deposes and says:

30 I am a member of the firm of Stewart & Hartshorne, solicitors for defendant, Wilbur S. Corkran, in the above entitled cause, and attorneys for defendant, Wilbur S. Corkran, in the case of Daniel A. Hohmann and Katharine K. Hohmann against Wilbur S. Corkran, now depending, at issue and noticed for trial in the New Jersey Supreme Court, said cause being based upon the exact state of facts set forth in the bill of complaint in the above entitled cause.

40 Complainants, through their counsel and present solicitor, John Winans, Esquire, applied to the said Chief Justice of the New Jersey Supreme Court for an order for the examination of defendant before trial, and on July 17, 1926, the Honorable Chief Justice of the New Jersey Supreme

*Exhibit Annexed to Moving Affidavit.*

Court granted an order for such examination of defendant before trial, a copy of which said order is attached hereto and made a part hereof.

RICHARD HARTSHORNE.

10 Subscribed and sworn to before me  
this 29th day of September, 1926.

HARRY P. DAY,  
A Master in Chancery  
of New Jersey.

*Exhibit Annexed to Moving Affidavit.*

(Served, September 29, 1926.)

NEW JERSEY SUPREME COURT,  
ESSEX COUNTY.

DANIEL A. HOHMANN and, in the  
alternative, KATHARINE K.  
HOHMANN,

*Plaintiffs,*

vs.

WILBUR S. CORKRAN,  
*Defendant.*

Action  
at Law. 30  
Rule for  
Inspection  
of Building  
and for  
Examination  
Before Trial.

40 Plaintiffs having moved, pursuant to Chapter  
93, Laws of 1924, for an examination of defend-

*Exhibit Annexed to Moving Affidavit.*

ant before trial, and defendant having made a cross motion for leave to inspect the dwelling house described in the pleadings herein, and plaintiffs consenting thereto, and such motions coming on to be heard pursuant to the respective notices thereof before the Chief Justice at the Court House in Newark on June 26, 1926, in the presence of John Winans, Esquire, counsel for the plaintiffs, and Richard Hartshorne, Esquire, counsel for the defendant, and the Court having considered the affidavits and arguments of counsel of the respective parties, it is thereupon, on motion of John Winans, attorney of the plaintiffs,

20 ORDERED that the defendant, Wilbur S. Corkran, have leave to inspect the dwelling house referred to in the pleadings in this cause, situate on Coniston Road, at Short Hills, in the Township of Millburn, Essex County, New Jersey, in company with such building and building-material experts as he may elect to take with him for the purpose, without committing any waste or other damage in and upon said building; such examination to take place between the hours of 1 o'clock and 5 o'clock in the afternoon on such day or 30 days as are fixed by the Commissioner, and it is further

40 ORDERED that the defendant, Wilbur S. Corkran, submit to examination upon his oath before trial, pursuant to the provisions of the statute above mentioned and of Sections 145 and 146 of "An Act to regulate the Practice of Courts of Law (Revisions of 1903)"; such examination to take place before John A. Bernhard, Esquire, one

*Exhibit Annexed to Moving Affidavit.*

of the Supreme Court Commissioners of this State, at his office, Prudential Building, Newark, New Jersey, commencing on such day as is fixed by the Commissioner at 2 o'clock in the afternoon, or as soon thereafter as counsel can be heard, and continuing thereafter on such days and at such 10 times as the same shall be adjourned to by said Master; that defendant have notice thereof, as provided by law and the practice of this court, and that said examination be confined to the 50 specific items or issues specified in the further bill of particulars of the plaintiffs and designated in the latter by the numbered paragraphs designated respectively from (1) to (50) inclusive; the examination as to said 50th paragraph to be confined to the items specified therein, to wit, oak 20 flooring, crushed stone, shingles, flag screws, front door and grass seed.

Let this rule be entered on the minutes.

Dated, July 17th, 1926.

WM. S. GUMMERE,  
Chief Justice.

30 Rule dated and actually entered this 21st day of July, 1926.

Opposing Affidavit.

(Verified and Filed, October 5, 1926.)

IN CHANCERY OF NEW JERSEY.

61/617.

10

DANIEL A. HOHMANN and KATHARINE K. HOHMANN,  
*Complainants,*

vs.

WILBUR S. CORKRAN,  
*Defendant.*

On Bill for  
Discovery.  
Affidavit.

20

State of New Jersey, }  
County of Union. } ss.:

John Winans, being duly sworn according to law, on his oath says:

1. I am solicitor of the complainants in the above entitled cause, which is upon a bill for discovery, but not praying any relief.

30

2. Defendant has given notice of motion to strike out the bill of complaint in this cause, upon three grounds, specified in his notice of motion:

(1) That it does not set up an equitable cause of action;

(2) That there is an adequate remedy at law; and

40

(3) That the New Jersey Supreme Court "has already granted said adequate remedy

Opposing Affidavit.

to complainants" in an action now pending in that court, based on the identical facts alleged in complainants' bill.

3. The only action now pending in any court of law between the parties to this suit is an action at law brought in the New Jersey Supreme Court by the above-named complainants, as plaintiffs therein, against said Wilbur S. Corkran, as defendant therein, upon a summons issued out of said Supreme Court on November 14, 1925, and soon thereafter served with a copy of the complaint therein, upon said defendant. 10

4. Said action at law grew out of the same facts alleged in paragraphs 1 to 16, both inclusive, of complainants' bill in this cause, to which reference is hereby made, and is based on five counts, as follows: 20

(First Count) for money had and received; alleging payments by complainants-plaintiffs to defendant in the sum of \$21,438.68, receipt of which moneys defendant has not at any time denied in said action at law or in this cause; against which credits are conceded to defendant in the sum of \$14,000; leaving \$7,438.68 due; 30

(Second Count) for money obtained by defendant from complainants-plaintiffs by false representations, the sum involved being the same balance of \$7,438.68, exacted by defendant over and above actual sums to which he was entitled; 40

*Opposing Affidavit.*

(Third Count) for breach of a contract for building; wherein plaintiffs therein demand judgment for the same sum of \$7,438.68;

10 (Fourth Count) for conversion by defendant of the identical sum of \$7,438.68, belonging to complainants-plaintiffs and paid to defendant by them in connection with said building contract; and

(Fifth Count) for negligence in the construction work performed by defendant under said contract, including waste and destruction of building materials.

20 5. Defendant, in his answer in the action at law, admits the receipt of all moneys which complainants, as plaintiffs therein, allege that they have paid to him, to wit: \$21,438.68, but claims to have expended or otherwise appropriated for complainants' account, all of the moneys so received by him.

30 6. Replication to that answer was filed, and the action at law is now at issue and pending and undetermined in the Supreme Court of this State, with venue in the County of Essex. Pending that action, complainants, as plaintiffs therein, gave due notice of motion to the attorneys of the defendant for an order in said cause, in said court of law, requiring the defendant to submit to an examination before trial

40 "as to kinds, quantities and costs of the labor and materials used in the construction of

*Opposing Affidavit.*

plaintiffs' house, mentioned in the complaint herein; as to the amounts, kinds and costs of materials purchased for that purpose, of materials actually used therein, of all surplus materials and how the latter were disposed of, and of all materials wasted, damaged or destroyed during the progress of said work; 10 as to the labor employed in performing or installing work which was afterwards torn out and in replacing work torn out and destroyed and as to the causes of such destruction, demolition, tearing out or injury to materials, or to parts of the work under construction; as to where, when and from whom 20 all such materials were purchased; when, where and to whom all the money, aggregating \$21,438.68, supplied to defendant by plaintiffs or either of them, as alleged in the complaint, was expended or paid out and for what purposes."

7. This motion came on before the Chief Justice at Newark, and was granted by him in its entirety, by an oral decision; but by some means unknown to me, over my vigorous protest and against my strenuous objection, an order was entered in said court and suit at the instance of the attorneys of the defendant therein, being the solicitors for the same defendant in this cause, which, instead of granting an examination before trial as to the disposition made by defendant of the moneys supplied to him by the plaintiffs and the use and application made by him of building materials purchased therewith, as specified in the notice of motion, from which the above quotation is taken, 40

*Opposing Affidavit.*

10 directed the defendant to submit to an examination before trial and limited such examination, with a few inconsequential exceptions, to subjects concerning which such examination had not been prayed for by plaintiffs and upon which they had asked for, and desired, no information whatever; a copy of which order, improperly reciting that it is made upon my motion, whereas such is not the case, is annexed to the moving affidavit made in this cause by Richard Hartshorne on September 29, 1926, to which reference is hereby made.

20 8. Said order obtained by defendant's attorneys confines the examination supposed to take place thereunder, but which has not been held, which will not be held at the instance of the complainants herein and in which they will not voluntarily participate, to certain specified matters, all of them within the knowledge of the complainants and concerning which they need no discovery or other information; as specified in said order, as follows:

30 "the 50 specific items or issues, specified in the further bill of particulars of the plaintiffs and designated in the latter by the numbered paragraphs designated respectively from (1) to (50) inclusive; the examination as to said 50th paragraph to be confined to the items specified therein, to wit, oak flooring, crushed stone, shingles, lag screws, front door and grass seed."

40 9. A further bill of particulars was made and served in said action at law and contains 50 para-

*Opposing Affidavit.*

graphs, designated by numerals from 1 to 50, each enclosed within parentheses; these items, with a few inconsequential exceptions, charging misappropriation by defendant of some shingles, front door, grass seed, crushed stone, lag screws, etc., all relate to the negligence attributed to defendant in Count Five of said complaint; but do not relate to the main question of his embezzling \$7,438.68 of complainants' money, nor his obtaining the same moneys by means of false representations that he had expended same upon their premises. This is better illustrated by reference to the 50 paragraphs in question, which charge neglect on defendant's part, as follows:

- |  |  |    |
|--|--|----|
|  | (1) Defective plaster;   | 20 |
|  | (3) Defective tiling;  |    |
|  | (4) Improper setting of door;                                  |    |
|  | (5) Defective flashing on roof;                                |    |
|  | (6) Shutters omitted;  |    |
|  | (7) Leaks and other defects in foundations;                    |    |
|  | (8) Rain water leaders deficient;                              |    |
|  | (9) Improper drains;   |    |
|  | (10) Defective ice-box;  |    |
|  | (11) Negligence in locating ice-box and space for same;        | 30 |
|  | (12) Oak flooring ruined and unskillfully laid;                |    |
|  | (13) Valves omitted;   |    |
|  | (14) Pipes in lavatory unprotected;                            |    |
|  | (15) Lavatory faucets unmatched, defective, air valve omitted; |    |
|  | (16) Sewing machine shelf improperly supported;                | 40 |
|  | (17) Main stairway steps injured by exposure to weather;       |    |

*Opposing Affidavit.*

- 10 (18) Ice-box drain misplaced;  
 (19) Gas range improperly placed several times;  
 (20) Stone coping omitted;  
 (21) Defective electric wiring and fixtures;  
 (22) Defective and deficient painting;  
 (23) Hardware injured by exposure to weather and insufficiently painted;  
 (24) Interior painting insufficient and improperly applied;  
 (25) Doors improperly set and warping;  
 (26) Insufficient stone on driveway;  
 (27), (28) Entrance to garage improperly constructed; not sufficient clearance;  
 20 (29) Cold storage closet improperly placed and badly constructed;  
 (30) Defective window glass putty;  
 (31) Window glass of poor quality; scratched and defaced;  
 (32) Outside doors improperly adjusted leaving apertures admitting rain and snow;  
 (34) Ashes, plaster, &c., used in grading yard;  
 30 (36) Trees injured, killed and destroyed;  
 (37) Insufficient excavation;  
 (38) Hinges misplaced;  
 (39) Misplacing deliveries of materials requiring unnecessary cartage;  
 (40) Screens defective and improperly set;  
 (41) Negligence and wrongful acts in finishing interior woodwork;  
 (42) Rough plaster walls in bathroom;  
 40 (43) Premises defaced and not properly cleaned;

*Opposing Affidavit.*

- (45) Waste of materials in constructing batten doors;  
 (46) Shutters omitted;  
 (47) Floors left unfinished;  
 (48) Outside door and electric fixture misplaced interfering with refrigerator; 10  
 (49) Failure to inspect work and superintend men, increasing expense;  
 (50) Conversion of several items of building materials, having no reference to defendant's conversion of plaintiffs' money.

None of these items refers to the matters concerning which plaintiffs are in urgent need of discovery. 20

10. This bill of particulars contained numerous other specifications of breaches of contract and wrongful acts on defendant's part, and if the order for examination had permitted all of the subjects covered by the bill of particulars to be inquired into, or even those relating to embezzlement and false pretenses, it would have been sufficient and plaintiffs would have proceeded to examine defendant under oath regarding his alleged peculations. 30

11. This suit is brought to obtain discovery in aid of the pending action at law; the circumstances of embezzlement, obtaining money by false pretenses and breach of contract by defendant, being the particular matters concerning which discovery is sought. The facts alleged in the bill of complaint are similar to those set forth in the 40

*Opposing Affidavit.*

complaint in the action at law and both grow out of the same building contract between the parties to this suit, dated November 1, 1924, by which defendant undertook to build a house on premises of the complainants on the cost-plus plan, he to receive \$1,400 as a builder's fee, stated to be 10% of the prospective cost of the building, as stated by defendant, \$14,000; nevertheless, by statements that he had expended larger sums, he procured from plaintiffs and admits in his answer that he took and received from them \$21,438.68.

12. The bill of complaint further alleges the pendency of the suit at law (paragraph 17), that they have frequently requested defendant to give them information as to his alleged expenditures for their account (paragraph 18), that he has refused to make such disclosure to them (paragraph 19), that the complainants have no knowledge as to how their money was expended (paragraph 20), and that defendant has in his possession information, largely written and detailed, by means of which he could furnish to complainants the discovery which is necessary in support of their pending action at law; and that all of the information concerning the discovery as prayed for is necessary and material evidence in said action (paragraph 21).

It is respectfully submitted that complainants' bill presents a proper case for the granting of discovery and that the objections urged by defendant do not appear on the face of the bill and that,

*Decision.*

while they may be proper subjects for answer, are not available on a motion to strike out the bill.

JOHN WINANS.

Subscribed and sworn to this  
5th day of October, 1926, before me. 10

ALEX. R. DE SEVO,  
Attorney at Law  
of New Jersey.

*Decision.*

(Filed, November 1, 1926.)

IN CHANCERY OF NEW JERSEY 20

|                            |               |    |
|----------------------------|---------------|----|
| Between                    | On Bill, etc. |    |
| DANIEL A. HOHMANN, et al., | On Motion to  |    |
| <i>Complainants,</i>       | Strike out    |    |
|                            | Bill of       |    |
| and                        | Complaint.    |    |
| WILBUR S. CORKRAN,         | Conclusions.  | 30 |
| <i>Defendant.</i>          | 61/617.       |    |

STEWART & HARTSHORNE, for the motion.  
JOHN WINANS, contra.

BERRY, V. C.  
This is a bill for discovery in aid of a suit at law now pending in the New Jersey Supreme 40

*Decision.*

10 Court between the complainant, as plaintiff, against the defendant. Under the provisions of Chapter 93, P. L., 1924, page 183 (2 Cum. Supp. to Compiled Statutes, page 2805, Section 144), the plaintiff has three times applied to the Chief Justice for an order for the examination of the defendant before trial. Such an order was granted with respect to certain particulars and denied as to others. Thereupon this bill was filed, and while it is in form the usual bill for strict discovery, it seeks, in effect, a review of the action of the Chief Justice. It would appear that under the act above referred to there is a complete remedy at law, and it is elementary that under such circumstances this Court will not act. I do not mean, however, to suggest that this Court has in any way been deprived of its ancient jurisdiction of discovery in aid of actions at law where application is made to this Court in the first instance. That jurisdiction still exists in a proper case. SHOTWELL vs. SMITH, 20 N. J. Eq., 79; VINELAND vs. MARETTI, 93 N. J. Eq., 513; 1 POMEROY'S EQUITY JURISPRUDENCE, Sec. 193, page 269. But where the law court is fully empowered to compel complete discovery before trial and the plaintiff in the suit in that court has sought such discovery in the method prescribed by law, and has not obtained as extensive relief as he believes he is entitled to, he is not privileged to review that Court's findings here. The power of the law court under the act referred to is discretionary, but none the less adequate, and that the Chief Justice, in the exercise of the discretion vested in him by that act, refused the relief sought, is no ground for the intervention of

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*Decision.*

this Court. Bills of discovery in aid of suits at law are entertained only where the application is made to this Court in the first instance, or where such aid is necessary and the law court is not competent to grant full and adequate relief.

*Powers vs. Butler*, 4 N. J. Eq., 465;  
*Howell vs. Ashmore*, 9 N. J. Eq., 82;  
*Little vs. Cooper*, 10 N. J. Eq., 273;  
*U. N. J. R. R. vs. Hoppock*, 28 N. J. Eq., 261;  
*Hannon vs. Maxwell*, 31 N. J. Eq., 318;  
*Billingham vs. Palmer*, 54 N. J. Eq., 315;  
*State vs. Elizabethtown Water Company*, 83 N. J. Eq., 216.

I will advise an order dismissing the bill, with costs.

10

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## Decree Dismissing Bill.

(Filed, November 16, 1926.)

IN CHANCERY OF NEW JERSEY.

|    |   |   |  |
|----|---|---|--|
| 10 | Between<br>DANIEL A. HOHMANN, et al.,<br><i>Complainants,</i><br><br>and<br><br>WILBUR S. CORKRAN,<br><i>Defendant.</i> | } | On Bill, &c.<br><br>Decree Dis-<br>missing Bill. |
|----|---|---|--|

20 Application having been duly made to this Court by defendant to dismiss Bill for lack of equity, on due notice to Solicitor for Complainants, and the Court having heard the arguments of Counsel for Complainants and Counsel for Defendant, and due cause therefor appearing.

30 It is on this sixteenth day of November, Nineteen Hundred and Twenty-six on motion of Stewart & Hartshorne, Solicitors for and of Counsel with Defendant, Wilbur S. Corkran ORDERED that the bill in the above entitled cause be and it hereby is dismissed, with costs, together with counsel fee of One Hundred Dollars to be paid Solicitors for Defendants.

Respectfully advised:

MAJA LEON BERRY,  
 V.-C.

E. R. WALKER,  
 C.

40

## Notice of Appeal.

(Filed, December 20, 1926: Served, December 21, 1926.)

IN CHANCERY OF NEW JERSEY.

|    |  |   |   |    |
|----|--|---|---|----|
| 10 | DANIEL A. HOHMANN and KATH-<br>ARINE K. HOHMANN,<br><i>Complainants,</i><br><br>vs.<br><br>WILBUR S. CORKRAN,<br><i>Defendant.</i> | } | On Bill for<br>Discovery, &c.<br><br>Notice of<br>Appeal. | 10 |
|----|--|---|---|----|

20 The complainants and each of them hereby appeal from a certain final decree, dated November 16, 1926, made in the above-stated cause by the Chancellor upon the advice of Mr. Vice-Chancellor Berry and filed in the office of the Clerk in Chancery on November 18, 1926, which dismisses or purports to dismiss their bill of complaint in the said cause, and from the whole and every part of said final decree, to the Court of Errors and Appeals in the last resort in all cases.

Dated this 9th day of December, 1926.

To STEWART & HARTSHORNE, Esqs.,  
 Solicitors of Defendant.

JOHN WINANS,  
 Solicitor of and of Counsel  
 with Complainants.

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

Dated this 9th day of December, 1926.

JOHN WINANS,  
 of Counsel with Complainants.

40

New Jersey Court of Errors and Appeals

10

DANIEL A. HOHMANN and KATHARINE K.  
HOHMANN,  
*Complainants-Appellants,*

vs.

WILBUR S. CORKRAN,  
*Defendant-Respondent.*

20

**BRIEF OF APPELLANTS.**

This is an appeal by complainants, husband and wife, from a final decree made and filed in the Court of Chancery on November 16, 1926 (State of Case, p. 46), dismissing their bill for discovery.

The bill of complaint (pp. 5-16), which was dismissed on motion of defendant-respondent, on the sole ground of lack of equity appearing on its face (p. 46), alleges the making and execution in duplicate of a building contract (par. 3), dated November 1, 1924 (p. 5, line 30; p. 17, line 32), a copy of which is annexed to the bill (Exhibit A, at pp. 17-27), by complainant-appellant Daniel A. Hohmann, in behalf of himself and his wife, complainant-appellant Katharine K. Hohmann (par. 2), as owners, and defendant-respondent, as builder, providing for the erection, on the "cost-

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plus" plan (vide Exhibit A, p. 19, lines 30, *et seq.*), of a dwelling house and semi-detached garage (p. 6, lines 1-10, lines 20-27) on a plot of land at Short Hills, in this state (p. 17, line 40), owned by the complainant-wife (par. 1), for the joint and common use, occupation and enjoyment of complainants-appellants (pars. 2, 5); and the coincidental agreement upon, by all parties to the bill, and incorporation thereof into, the agreement between them of plans and specifications for the proposed construction work (par. 4).

The contract, Exhibit A Annexed to Complainants' Bill (pp. 17-27), provided that the owners should pay to the builder (defendant-respondent) for due performance of by him of all his obligations thereunder (Articles 1, 2, 3, at pp. 18, 19; Arts. 8, 9, at p. 23; Arts. 12, 13, at p. 25) a "Fee for Services" (p. 19, line 29), otherwise referred to as "builder's fee," of \$1,400 (Art. 4, at p. 19); should reimburse the builder (Art. 5, at pp. 20, 21) for all costs necessarily incurred by him for labor (subdiv. a, at p. 20), salaries of his employes at the job (subdiv. b, at p. 20), transportation (subdivs. c, d, at p. 20), fees for permits, &c. (subdiv. e, at pp. 20, 21), certain specified losses not compensated by insurance (subdiv. f, at p. 21), specified expenses for telegrams, &c. (subdiv. g, at p. 21) and cost or depreciation of certain tools and equipment (subdiv. h, at p. 21); and should pay *through the builder* (Art. 7, at pp. 22, 23) all cost for materials, equipment and transportation required in the work (subdiv. a, at p. 22), amounts of sub-contracts (subdiv. b, at p. 22), premiums on bonds and insurance policies (subdiv. c, at p. 22) and rentals, transportation charges, &c., for hired equipment (subdiv. d, at p. 23). It is a contract of the type

known as "cost-plus," which makes the builder the agent and fiduciary of the owners in the purchase and procuring of materials and other necessities of the work and in the handling, safeguarding and disposition of their moneys; as defendant-respondent expressly recognized himself to be in Article 3 of the contract (p. 19, lines 12-14).

The bill set forth further that defendant-respondent was a building contractor of extensive experience and well-versed in building costs (par. 6, at p. 6); that he appraised the cost of the proposed buildings and represented same to complainants-appellants as \$14,000 (par. 7) and during the course of construction represented and stated to them that he had expended \$21,438.68 (par. 9); that complainants-appellants were wholly ignorant of building construction and the costs thereof (par. 15) and paid to defendant-respondent the moneys demanded by him, aggregating \$21,438.68 between November 8, 1924, and June 12, 1925 (par. 11), and at all times believed and relied upon his statements aforesaid (pars. 10, 11); but that defendant-respondent did not pay out moneys or contract debts to the amount of \$21,438.68 (par. 12) nor more than \$14,000 (*ib.*); that said buildings did not cost \$21,438.68 nor more than \$14,000 (par. 13) and were not worth \$21,438.68 nor more than \$14,000 (par. 14); that between the time of the making of said contract and a time just prior to June 12, 1925, defendant-respondent, in ostensible compliance with said contract, erected a house and garage on said land, with materials and labor procured or provided by him, the amounts, kinds, qualities and values whereof are well known to him, but wholly unknown to complainants-appellants (par. 8).

The bill alleges further, that after payment and before bringing suit complainants-appellants demanded of defendant-respondent that he re-pay to them the excess of \$7,438.68 exacted and received by him, and that he refused to do so and has not paid any part thereof (par. 16); that they have frequently before bringing suit and since paying the moneys in question, aggregating \$21,438.68, demanded of defendant-respondent an accounting thereof and a statement of the kinds, quantities and costs of the material, labor and other items of expense entering into the construction of the buildings (par. 18) and that he has always refused to render such accounting or to comply with any of said requests (par. 19); that they have not and never had any knowledge of the disposition by defendant-respondent of their moneys and of materials purchased by him therewith (par. 20); but that he has full and complete knowledge thereof (par. 21); and that complainants-appellants as plaintiffs therein, have commenced an action in the New Jersey Supreme Court against defendant-respondent, as defendant therein, for the recovery of the same sum of \$7,438.68, so withheld by him, upon several counts, namely: money had and received, obtaining money under false representations, breach of the same building contract, conversion, and negligence in handling and disposing of their funds and property thereunder (par. 17); that said action at law is pending and undetermined and that they cannot safely go to trial therein without discovery upon oath by defendant-respondent in the respects aforesaid (*ib.*); and that complainants-respondents are without adequate remedy at law (p. 15, lines 14-16).

The bill prays for discovery under oath as to defendant-respondent's disposition of complainants-appellants' said moneys and materials or other goods purchased therewith, answer under oath, an accounting of said moneys and other property, inspection of defendant-respondent's books and accounts in the respects aforesaid, and process of *subpoena ad resp.*, but asks no relief (pp. 15-16). It is a pure bill of discovery and is sworn to as such (p. 17).

No answer or answer in the nature of a plea was interposed; and the material allegations of the bill which are well pleaded, must therefore be taken as true for all purposes of defendant-respondent's motion to dismiss the bill (pp. 29, 30).

It does not appear that the bill is multifarious or lacks equity upon its face, nor that it contains any impertinent or scandalous matter. The motion was addressed, and was decided, solely on the ground of want of equity. Consideration of alleged facts not appearing on the face of the bill was objected to by the complainants, and their denial, in the opposing affidavit, of these extraneous matters was coupled with an express objection to the consideration thereof (*vide* affidavit, at p. 42, lines 34, *et seq.*). The notice of motion for dismissal, sets forth 3 grounds, as follows:

"1. It does not set up an equitable cause of action.

"2. There is an adequate remedy at law.

"3. The Supreme Court of the State of New Jersey has already granted said adequate remedy to complainants by an order of his Honor William S. Gummere, Chief Justice

of the New Jersey Supreme Court, in a cause now depending in said court, wherein the complainants herein are plaintiffs and the defendant herein is defendant, based on the identical facts alleged in this cause" (pp. 29, 30).

10 The first ground, want of equity, and the second, that "there is an adequate remedy at law," must appear, if at all, on the face of the bill; but the third ground, amounting to a defense of *res adjudicata* or former recovery, and depending upon supposed facts, wholly *dehors* the record, is available only by answer or answer in the nature of a plea (Chancery Rules, 67, 68) and not by motion under Chancery Rule 75.

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## I.

The bill of complaint in the court below had merit and should not have been dismissed.

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Complainants-appellants' allegations, briefly summarized above and fully amplified in the bill (pp. 5-16), which, for all purposes of the motion, being in the nature of a demurrer (Chancery Rule 67), must be taken as true, presented a complete case for the equitable remedy prayed for, i. e., discovery upon oath, accounting and inspection. There was no prayer for relief.

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Included in the bill are allegations that defendant-respondent received from complainants-appellants, under the terms of the building contract, sums aggregating \$21,438.68, of which he expended moneys not exceeding \$14,000, and that in receiving and handling their moneys, he acted as

their agent and fiduciary. In this connection defendant-respondent, builder or contractor, covenanted as follows:

"ARTICLE 3. THE CONTRACTOR'S DUTIES AND STATUS. The Contractor recognizes the relations of trust and confidence established between him and the Owner by this Agreement. He covenants with the Owner to furnish his best skill and judgment and to co-operate in forwarding the interests of the Owner. He agrees to furnish efficient business administration and superintendence and to use every effort to keep upon the work at all times an adequate supply of workmen and materials, and to secure its execution in the best and soundest way and in the most expeditious and economical manner consistent with the interests of the Owner" (p. 19, lines 13-27).

The pendency of an action at law by these complainants-appellants against defendant-respondent, for the recovery of the same moneys alleged to have been misappropriated by him, is set forth at length in the bill (par. 17); and it is alleged therein that complainants-appellants have demanded of him, but unsuccessfully, a correct statement of his disbursements, as their fiduciary, of their funds in his hands (par. 18); that he has refused to make such discovery (par. 19); that complainants-appellants have no knowledge as to his disposition of their moneys and materials, except some unsworn summaries, which are incomplete, misleading and wholly without detail (par. 20); and that defendant-respondent has personal

knowledge and documentary evidence in his possession of the amounts and particulars of the disbursement and disposition of their moneys and materials.

Bispham, in his Principles of Equity, Ch. XIII, secs. 557, *et seq.*, discoursing upon the subject of "Discovery," says:

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"557. While the common-law rule prevailed, and while the inconvenience consequent thereon existed, a different rule grew up in courts of equity. It was part of the machinery of the Court of Chancery that a *discovery* could be compelled; in other words, the defendant in a bill in equity was obliged to answer under oath the allegations in the bill. The production of documents could also be enforced, and an opportunity for their inspection afforded. The right to discovery was in fact one of the peculiar advantages of a complainant in equity, and was always enjoyed by him in every case in which he was entitled to come into chancery, either for the purpose of asserting an equitable title, or setting up an equitable right, or applying an equitable remedy.

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"The jurisdiction of the High Court of Chancery being based upon matters of 'conscience,' an appeal to the defendant's conscience was one of the earliest and most natural modes of equitable relief.

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"But this right went still further. Many cases existed in which the plaintiff had a legal title or a legal right, or was pursuing a legal remedy, but wherein no redress could be actually obtained, simply because the plaintiff's

evidence either rested in the breast of the defendant, or consisted, in whole or in part, of documents in the defendant's possession. Hence, there was a failure of justice at common law, and hence there arose the equitable remedy of bills for discovery, which was made use of simply for the purpose of assisting or supplementing the plaintiff's remedy at common law.

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"Bills in equity, therefore, came to be filed not only for the purpose of discovery *and* relief, but also for the purpose of *discovery alone*; and bills of the latter description were made use of as a distinct equitable remedy, entirely outside and independent of any equitable right or title to relief.

"Bills of discovery, therefore, in their technical sense, are bills which are filed for the purpose of assisting one of the parties to a common-law action; and which, seeking no independent relief themselves, aim solely at arming the complainant with the necessary and proper means for asserting or defending his right or title at law (Kearney vs. Jeffries, 48 Miss., 357).

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"558. It has been already observed that the necessity for this equitable remedy has, in modern times, been very much diminished by statutory enactments, whereby the same results are attained in common-law trials; and hence, this particular equitable remedy no longer deserves to occupy so important a place as it formerly did in equitable jurisprudence. Nevertheless, it is proper that it should be (at least) briefly considered, partly because it has been decided in England, and in some

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of the States of the Union, that the chancery method of redress has not been ousted by the amendments to the common law (*Lovell vs. Galloway*, 17 Beav., 1; *Senior vs. Pritchard*, 16 Id., 473; *British Empire Shipping Co. vs. Somes*, 3 K. & J., 433; *Shotwell vs. Smith*, 20 N. J. Eq., 79); and partly because in equity certain rules in regard to this peculiar remedy have been laid down, which are still considered applicable in common-law suits" (Bispham's Principles of Equity, secs. 557, 558).

This ancient jurisdiction of the Court of Chancery has been in nowise limited or abridged by the decisions of our courts. Chancellor Zabriskie, in *Shotwell's Adm'x vs. Smith*, 20 N. J. Eq., 79, says:

20 "Courts of equity will always compel discovery in aid of prosecuting or defending suits at law, and to make such discovery of use on the trial at law, will restrain the suit from proceeding until the discovery is had. And this ancient and well settled jurisdiction is not taken away by the fact that courts of law have been clothed with powers to compel discovery in such cases by the oath of the complainant."

30 It was held by Stevens, V.-C., in *Schrafft vs. Wolters*, 61 N. J. Eq., 467, "that a bill of administrator for discovery and relief was not demurrable on the ground that complainant had an adequate remedy at law"; and the learned Vice-Chancellor, in this relation, says:

40 "And it is particularly applicable to the case of agents and others who, like the trust

company, in a certain sense stand in a fiduciary relation to the plaintiff. *Wood vs. Rowcliffe*, 2 Phil. Ch., 382. The cause in hand is not unlike *Goodale vs. Goodale*, 16 Sim., 316. The demurrer should be overruled" (*Schrafft vs. Wolters, supra*).

Also, in *Howell vs. Ashmore*, 9 N. J. Eq., 82, Chancellor Williamson held (syllabus), as follows: 10

"In the case of a bill for mere discovery, if it appears reasonable that the complainant should be entitled to the disclosure, and no principles of law, or equity, are violated in enforcing it, the court will not be as nice in the application of technical rules as where an injunction, or relief, is asked for. 20

"So in a bill for discovery only, it is not necessary to aver that the discovery is absolutely necessary, or indispensable, to the defense. It will be sufficient to state and show that it is material evidence."

The case of *Little vs. Cooper*, 10 N. J. Eq., 273, cited by the honorable Vice-Chancellor in support of his decree (p. 45, line 13), does not sustain respondent's position. That was on motion to dissolve injunction, on a bill for both discovery and injunction. The discovery having been afforded by the sworn answer, no basis for continuance of the injunction remained. In the opinion in that case, by Williamson, C., it is held: 30

"All bills in the court are, in their nature, bills of discovery. Some are bills for discovery purely. When the subject matter is one which is properly cognizable at law only, 40

and adequate relief can be given there, as where damages are to be ascertained or titles to land tried, and in cases of mere trespass, a Court of Chancery frequently takes jurisdiction, in order that a discovery may be had on the oath of a party, or to compel the production of papers and documents. The end for which the jurisdiction of the court was invoked having been attained, the party seeks his redress in the proper tribunal at law.

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“Where a suit has been commenced at law, the defendant may be entitled to a discovery from his adversary, and may resort to this court to obtain it. But if he seeks to change the forum of litigation, and prays for relief as well as discovery, the subject-matter must be one which appropriately belongs to equity jurisdiction.”

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In the case lastly cited (*Little vs. Cooper*), discovery was allowed and the question considered was only as to whether the *relief* prayed for, in junction, should be continued.

In *United N. J. R. & C. Co. vs. Hoppock*, 28 N. J. Eq., 261, the bill was for discovery and relief, the latter being for recovery of damages for breach of covenant and for specific enforcement, and it was held that there was an adequate remedy at law, so far as the demand for damages was concerned; that, as for specific performance, the bill would not lie, because of a defect of parties; and that “the bill is defective, as one for discovery, in that it fails to allege that an action at law is pending or contemplated”;—an objection to which the bill in the instant case clearly is not subject. This was one of the decisions relied upon as justifying dismissal of complainants-appellants’ bill

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(p. 45, lines 14, 15), yet the propriety of a bill for discovery in such cases as that now at bar is at least expressly recognized in the opinion of this honorable court, per Reed, J., in which is said:

“Nor can the bill be supported as a pure bill for discovery. The office of such a bill is to compel a discovery of facts resting in the knowledge of the defendant, in order to maintain a right in a court of common law. 2 *Story Eq.*, sec. 1483). It is an elementary principle that courts of equity will not compel a disclosure from a defendant, unless it not only appears that such disclosure is needed to properly prosecute or defend an action at law, but also that it is to be used in such an action.

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“It is a general rule that every bill of discovery is sought in aid of some judicial proceeding commenced, or at least contemplated. *Story Eq. Pl.*, sec. 560. In *Cardale vs. Watkins*, 5 Madd., 18, Vice-Chancellor Leach said: ‘The purpose for which discovery is given is the aid of some proceeding pending or intended, and not to satisfy curiosity, and if such purpose be not stated in the bill, a demurrer will lie.’ There is no such purpose alleged in this bill, and in this respect it is bad.”

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Vice-Chancellor Backes, in *State vs. Elizabethtown Water Co.*, 83 N. J. Eq., 216, recognized bills of discovery as a proper branch of the equity jurisdiction, but advised dismissal of the petition, because it appeared that discovery was not sought in aid of any pending or contemplated action at law.

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In *Freite vs. Rudiger*, 89 N. J. Eq., 91, the bill was for strict discovery in aid of an action at law and decree was for the complainant; but, "the parties having gone to hearing, and having stated on the record that they desired the whole controversy decided, the court, in its discretion" retained jurisdiction and decided the issues involved in the main controversy at law, i. e., a question of liability upon a promissory note. The equity of the bill, as one for discovery, was not questioned and discovery was had.

In *Steitz vs. Old Dominion Copper M. & C. Co.*, 89 N. J. Eq., 265, the bill sought discovery, rescission, appointment of a receiver and accounting of mesne profits. Defendant's motion to dismiss the bill was denied by Lewis, V.-C., holding, as to the discovery prayed for,

"Obviously the defendant must have within its knowledge, possession or control, some of the facts of which discovery is sought, as specified in the complainant's bill. The fact that it may not have knowledge or possession of all the information of which discovery is sought by complainant in his bill is, of course, no ground for dismissal of the bill."

A bill of strict discovery is in effect not unlike a bill to perpetuate testimony, over which jurisdiction in a court of equity is undoubted; and they rest on very similar grounds, to wit: the making available of testimony in aid of present or contemplated litigation.

Much difficulty and most of the misunderstanding which surrounds the equitable remedy of discovery has grown out of the refusal of many courts of equity to grant relief of a purely com-

mon-law nature, in conjunction with a prayer for discovery. Indeed, the mere joinder of such diverse prayers renders the bill objectionable. Nor can such a bill be sustained upon the doctrine, obsolete at least in its relation to the subject of discovery, that when the equitable cognizance once attaches, jurisdiction will be retained for purposes of all appropriate relief in the controversy. Many bills have been dismissed or failed of their purpose, because of such misjoinders. Bispham says in this connection:

"The true rule would seem to be that laid down by a learned writer in modern times" (Mr. Justice Redfield in his edition of *Story's Equity Jurispr.*, 74a, 74c; and see also *Pearce vs. Creswick*, 2 Hare, 285) "viz: that where the bill is filed purely in aid of a legal right and for the purpose of obtaining evidence to be used in a trial at law, the jurisdiction will not extend to afford relief; but that where the bill is based upon any breach of trust or duty and an appeal to the defendant's conscience consequently becomes necessary, the general jurisdiction will attach" (*Bispham's Principles of Eq.*, sec. 565).

The facts appearing on the face of the bill in this case might invoke the equity jurisdiction on many grounds, other than that of discovery; e. g., (1) the trust involved in the deposit of complainants-appellants' moneys; (2) fraud and deceit by defendant-respondent in obtaining portions of these moneys; (3) the fiduciary relation existing pursuant to the contract itself; and (4) the equitable remedy of accounting. The bill itself might have been so framed as to demand, not only the

provisional remedy of discovery, but also substantial relief by accounting and a decree for the moneys found to be due; but this is no reason why relief may not be had through a judgment at law, nor why the Court of Chancery should deny to complainants-appellants the remedy which it is so peculiarly competent to give by compelling defendant to submit to an examination under oath, to produce his books and papers and to make up a statement of account.

## II.

### There is no adequate remedy at law.

An actionable cause is a right capable of being enforced by appropriate legal proceedings, denial of which constitutes reversible error; and it is in no sense a matter of favor, which connotes the un-legal procedure of cajolery and caprice. An *adequate* remedy is not one that rests in discretion, which, in extreme cases, may amount to caprice.

The common law affords relief to the extent of recovery of a money judgment; but, as contended under Point I (*supra*), this does not in anywise detract from the unquestionable power of a court of equity to search the conscience of a defaulting fiduciary and compel him to disclose his disposition of the corpus of the trust.

More or less effective procedure for the examination of opposing parties has existed in the common-law courts of this state since comparatively early times; the most recent enactment on the subject, which took effect March 8, 1924, is as follows (*italics ours*):

### Laws of 1924, Chapter 93.

An Amendment to an act entitled "An act to amend an act entitled 'An act to regulate the practice of courts of law (Revision of 1903).'"

Be it Enacted by the Senate and General Assembly of the State of New Jersey: 10

1. Section one hundred and forty-four of the act to which this is an amendment, is hereby amended to read as follows:

144. Any party to an action may by order of the court or a judge thereof or by a judge of the Court of Common Pleas in the county in which such action is pending, in the absence of a Supreme Court justice a Circuit Court judge, if the action is pending in the Supreme Court or Circuit Court, be examined as a witness at the instance of the adverse party or any one of several adverse parties after issue joined and before trial; such examination may be before the court or a judge or a Supreme Court Commissioner or Examiner Master in Chancery on four days' notice to the party to be examined, unless a shorter time is for good cause prescribed; the granting of *said order shall be discretionary*; the service of the order shall be sufficient summons and notice to the party named therein to attend before the court judge or officer named therein, and such attendance and examination may be enforced in the same manner as answers to interrogatories. 20 30

This restricted and wholly discretionary power in the courts of law has not operated to divest or 40

abridge the ancient, appropriate and peculiarly effective procedure of the equity courts upon bill of discovery.

- 10 *Bispham's Prin. Eq.*, sec. 558;  
*Shotwell's Adm'x. vs. Smith (supra)*;  
*Schrafft vs. Wolters (supra)*;  
*Little vs. Cooper (supra)*;  
*United N. J. R. & C. Co. vs. Hoppock (supra)*;  
*Redfield's Story's Eq. Jur.*, 74a, 74c;  
*Story's Eq. Pl.*, sec. 560;  
*Mayor, &c., of Boonton vs. United W. S. Co.*, 83 N. J. Eq., 536;  
*Board, &c., of Vineland vs. Maretti*, 93 N. J. Eq., 513.

- 20 In *Miller vs. U. S. Cas. Co.*, 61 N. J. Eq., 110, per Emery, V.-C., it was held that

- 30 "7. Where in a bill for discovery on a purely legal claim, complainant prayed for general relief in addition to discovery the fact that the parties failed to object to the jurisdiction, but consented thereto, in so far as the form of the pleadings could effect such consent, did not confer on a court of equity the right to grant general relief";

but nevertheless, although a purely legal right was involved, discovery was allowed.

In *Bellingham vs. Palmer*, 54 N. J. Eq., 136, it was held, by Reed, V.-C., that

- 40 "Improved methods of procedure in courts of law will not strip a court of equity of its jurisdiction in matters of account; but where

there is no trust relationship involved, and jurisdiction rests solely upon the ground of complicated accounts the present method of procedure in the law courts will be regarded, in deciding whether the accounts are so complex that such courts cannot try them."

- This case is cited by the honorable vice-chancellor, in his decision in the instant case, as justifying dismissal of complainant's bill; but it will be observed that the case cited goes to no such length; it recognizes the power of a court of equity to compel discovery in aid of an action at law, and merely decides, as a matter of fact, that there was not sufficient complexity of accounts to warrant the equitable *relief of accounting, with decree for payment* of moneys found due. 10

- 20 *Hannon vs. Maxwell*, 31 N. J. Eq., 318, is cited by the learned vice-chancellor, in dismissing the bill; but this case merely decides that sufficient reason did not exist for an injunction. This did not involve any question whatever as to the propriety of a bill for discovery, since none was involved.

- 30 The case of *Powers' Ex'rs vs. Butler's Adm'r*, 4 N. J. Eq., 465, relates to the question of courts of equity interfering in matters concerning judgments at law; no discovery was involved and the case does not even remotely concern any question involved in the instant case. It is undoubtedly true that courts of equity no longer exercise their former jurisdiction to relieve against judgments at law, the remedy by appeal from those judgments being sufficient, and that new trials at law are now granted or refused by the courts immediately concerned. 40

The right to *apply* to a common-law court for the examination of a defendant before trial is a mere *privilege*; it is not an *actual right*, because its denial is not reviewable, unless it involves abuse of discretion. What rests in favor is not an *adequate* remedy. Even if a litigant in a court of law had the unrestricted right to *compel discovery in connection with his pending suit therein*, this would not detract from the fuller and more effective procedure for the purpose in a court of equity; but he has no such *right*, as reference to the statute, quoted at length above, indicates. It is, therefore, respectfully submitted, the more or less diverse and extraneous cases cited in the honorable court below to the contrary notwithstanding, that here there is no adequate remedy at law; and, *a fortiori*, none appearing on the face of the bill, and so available upon a motion to dismiss that bill.

It would be a dangerous expedient for this State to make, nor has it not yet been done, the enforcement of a legal right a matter of favor, or dependent upon the discretion, arbitrary or otherwise, or caprice of any trial court or judge. The right to a right includes the right to enforce it.

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### III.

Facts well pleaded in a bill of complaint are traversable only by appropriate denials in an answer or an answer in the nature of a plea, and extraneous allegations in an affidavit are not available on a motion to dismiss the bill; issues of fact may not be tried on *ex parte* affidavits.

40 Defendant-respondent moved, on notice and affidavit, to dismiss the bill. For all purposes of

the motion, which was in lieu of demurrer, all facts well pleaded must be taken as true. There was no objection to the form of the bill or its averments and no motion to strike out as scandalous or impertinent. By this means alone, defendant-respondent sought to place in issue certain extraneous statements in the guise of facts, summarized in the notice of motion, as follows:

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“3. The Supreme Court of the State of New Jersey has already granted said adequate remedy to complainants by an Order of his Honor William S. Gummere, Chief Justice of the New Jersey Supreme Court, in a cause now depending in said Court, wherein the complainants herein are plaintiffs and the defendant herein is defendant, based on the identical facts alleged in this cause”;

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the application of which to the motion was denied, and consideration of which by the court in that connection opposed, by counsel for complainants-appellants, in whose opposing affidavit it is contended

“that complainants’ bill presents a proper case for the granting of discovery and that the objections urged by defendant do not appear on the fact of the bill and that, while they may be proper subjects for answer, they are not available on a motion to strike out the bill” (affidavit of John Winans, October 5, 1926, at p. 42, lines 34, *et seq.*).

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Chancery Rules 67 and 75 provide as follows:

“67. Demurrers, pleas and exceptions to answer are abolished. Any pleading may be ob-

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jected to, on motion, on the ground that it discloses no cause of action, defense or counterclaim, respectively.

10 "On the hearing of such motion, the court, in its discretion, may order the application to stand over until the hearing, and if the objection be to the bill or counterclaim, may require the same to be answered on such terms and conditions as may be ordered."

"75. All objections to pleadings must be made by motion.

20 Five days' notice of such motion must be given within the time limited for filing an answering pleading, and the notice must state the particular grounds of objection. The notice suspends, until the motion is disposed of, the running of the time to answer or reply."

#### IV.

**No remedy, adequate or otherwise, has been afforded to complainants-appellants.**

30 Counsel approaches this subject with reluctance, believing that the controverted questions of fact, interjected by defendant-respondent upon the motion to dismiss, have no true relation to that matter; and this point will be urged only in the event that the argument under Point III (*supra*) should prove unavailing.

40 The claim of defendant-respondent was that the identical remedy sought by the bill in this case had already been granted to complainants-appellants by an order of the Supreme Court, in an action pending in that court between the same parties.

This was in all respects denied by the opposing affidavit (pp. 34-43), which showed, further, that in the action at law an order, purporting to grant to them the right to examine defendant-respondent before trial upon a very restricted class of subjects (disclosure concerning which had not been asked for and was not wanted by the plaintiffs therein) had been entered at the instance of the opposing attorneys. It is needless at this point to recite the facts at length, since they are set forth in the opposing affidavit (pp. 34-43). 10

Suffice it to say that complainants-appellants have consistently wanted and applied for the right to examine defendant-respondent under oath as to what he did with the moneys, aggregating \$21,438.68, entrusted by them to him as their fiduciary, and that by various devices he has thus far avoided making any such disclosure. The right to examine defendant-respondent, accorded by the order in question (pp. 31-33), which recites, contrary to the fact, that it was made on motion of the plaintiffs' attorney (p. 32, line 17), upon several seriously restricted matters, concerning which they required, or asked for, no information, was not availed of by them, and no such examination has been held. 20

In this connection it is respectfully submitted that the application of complainants-appellants, plaintiffs in the law action, to examine defendant-respondent as to his alleged misappropriation of their funds and the building materials purchased therewith, has not been granted nor the right exercised in any manner; nor was the denial of that relief by the Chief Justice in any sense *res adjudicata*, precluding them from this right in a proper proceeding for the purpose, such as on bill of discovery. It may have been the ex- 30 40

istence of such right in the Court of Chancery that led the honorable Chief Justice, in the exercise of his undoubted discretion, to deny the examination in the lower court. However that may be, the refusal of a privilege resting in discretion is in no sense a former adjudication, and *a fortiori*, not a former recovery; nor was the denial reviewable on appeal or otherwise.

*Young vs. Board of Ed., &c.*, 4 N. J. L., 770;  
*Sentliffer vs. Jacobs*, 84 N. J. L., 128.

In the action at law complainants-appellants demanded judgment for the moneys misappropriated by defendant-respondent, and their original bill of particulars set forth these moneys at length. A further bill of particulars was demanded by counsel for defendant therein, and the order for examination related only to certain specified subparagraphs of the further bill of particulars, relating chiefly to negligence in matters of construction and expressly excepting conversion or misappropriation of their moneys or property purchased therewith, except a few inconsequential items specified at the foot of the order (p. 33, lines 19-23).

Complainants-appellants allege in their bill (p. 15, lines 14-16) that they have no adequate remedy at law; this is not denied by any answer or other pleading and is affirmatively shown to be true by the copy of order annexed to the moving affidavit (pp. 31-33) and by the opposing affidavit (pp. 34-43); since it there appears that in the Supreme Court action no right to examine defendant-respondent as to his alleged peculations was granted or enjoyed.

### CONCLUSION.

It is respectfully submitted that the final decree appealed from should be reversed, with costs to appellants in both courts.

JOHN WINANS,  
Solicitor of and of Counsel  
with Complainants-Appellants.

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Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

## New Jersey Court of Errors and Appeals

DANIEL A. HOHMANN and KATH-  
ARINE K. HOHMANN,  
*Complainants-Appellants,*

*vs.*

WILBUR S. CORKRAN,  
*Defendant-Appellee.*

*On Appeal.*

### BRIEF OF DEFENDANT-APPELLEE.

#### Facts.

1. Complainants-appellants have elected their remedy at law.
2. Complainants-appellants admit the Court of Law to have "ample jurisdiction."
3. Complainants - appellants have actually sought their remedy at law.
4. Complainants-appellants have not obtained the unlimited decision desired from Chief Justice Gummere, and thereupon have applied to the Court of Chancery for the same relief.
5. The Court of Chancery has refused to entertain what it terms as amounting to "an appeal" from the decision of the Supreme Court.

The above in sum and substance, constitutes this entire case.

To verify this statement let us refer in detail to the record:

1. Complainants-appellants have elected their remedy at law.

In the Bill of Complaint, appellee has recited the facts in dispute, which involve the construc-

tion of a house by defendant for complainants, for which complainants have already paid defendant (record p. 10, l. 8). Thereupon complainants complain of an overpayment, and sue for the recovery of such excess, and say: "Complainants have recently commenced an action in the Supreme Court of the State of New Jersey, which court has ample jurisdiction in relation to said action, for the recovery of said sum" (record p. 10, l. 20).

2. Complainants-appellants admit the Court of Law to have "ample jurisdiction."

The above quotation shows from complainants' own mouth, that the Court of Law has "ample jurisdiction" in relation to the facts of this case (record p. 10, l. 20).

3. Complainants-appellants have actually sought their remedy at law.

The affidavit of John Winans, counsel for complainants-appellants, shows that "this action at law is now at issue and pending and undetermined in the Supreme Court of this State, with venue in the County of Essex" (record p. 36, l. 28, etc.).

4. Complainants-appellants have not obtained the unlimited decision they desired, from Chief Justice Gummere, and thereupon have applied to the Court of Chancery for the same relief.

The affidavit of John Winans, counsel for complainants-appellants, recites that complainants have not only sought, but obtained, the right to their discovery from defendant: "Pending that action complainants, as plaintiffs therein, gave due notice of motion, to attorney of defendant, for an Order in said cause in said court of law

requiring defendant to *submit to an examination before trial* (record p. 36, l. 31).

Complainants' affidavit continues "This motion came on before the Chief Justice in Newark and was granted by him in its entirety in an oral decision; *but by some means unknown to me* over my vigorous protest and against my strenuous objection an Order was entered in said court"—which "limited further examination" (record p. 37, l. 27). That Chief Justice Gummere was influenced to change his decision by "some means unknown to" complainants' counsel is not only an untrue but a scandalous allegation, which practically amounts to charging that someone or some thing had some secret influence over the Chief Justice. Had this affidavit ever been served on defendant's counsel or had they ever had knowledge of it, before it was placed on the record, it would have been promptly objected to as impugning the sanctity of our Courts. It was never seen, never heard of by defendant's counsel, until such counsel went through the original Chancery files at Trenton, in December 29, 1926, in regard to the appeal to this Court. In fact, the record (record p. 34) shows no service.

Of this situation Vice-Chancellor Berry was immediately advised in person, but it was then decided that nothing in the end would be gained by moving to expunge it from the records. Nor, it may be added, is this the only time that appellants' counsel has filed his own affidavit without serving it on his adversaries. This again occurred in this case before this Court on the motion to dismiss this appeal.

Of course, complainants-appellants' counsel is in error in stating that Chief Justice Gummere's

oral decision granted their motion "in its entirety." This error is clear from what occurred at a subsequent one of the almost innumerable applications of complainants' counsel to the Chief Justice in this matter. We are far from desiring to state to this Court what occurred before the Supreme Court since same, strictly speaking, is *dehors* the record. On the other hand, when now faced with an affidavit which was never served, so that it could be answered, in which affidavit appear statements contrary to the fact, it would seem only fair, both to this Court and to the Chief Justice, to state what Chief Justice Gummere actually did and said, particularly since the affidavit practically charges the Chief Justice with being subject to improper influence. On the occasion in question, on October 30, 1926, the Chief Justice, referring to complainants' motion for examination before trial and the fact that a form of order had been submitted by complainants' counsel covering more than the Chief Justice had orally agreed to grant, said "I don't like to have counsel add things"; and a few minutes later, while complainants' counsel was still arguing, the Chief Justice said to him "You may submit a rule providing you won't put in it something which I haven't ordered." Should there be the slightest doubt in the minds of the Court as to these facts, we would respectfully suggest that they be referred to Chief Justice Gummere for his certification.

Regardless of this unpleasant situation, complainants-appellants admit that they pursued their discovery remedy at law and that they were granted discovery at law. Not only that, but as shown by the opinion of Vice-Chancellor Berry (record p. 44, l. 9), "The plaintiff has *three times*

applied to the Chief Justice for an order for the examination of the defendant before trial, such an order was granted with respect to certain particulars and denied as to others."

Of course, on these three applications, the reasons for the granting of discovery at all, and for the granting of discovery as to some matters, and not as to others, were argued at length before the Chief Justice. These reasons are, strictly speaking, immaterial. Since it is the fact of the *existence* of the adequate legal remedy and the fact of, not merely the *election*, but of the *seeking* of such legal remedy by complainants-appellants, with which this Court is now concerned. It is consequently immaterial whether on these three separate hearings of this matter, before Chief Justice Gummere, he limited discovery for the reason that complainants had already had a two-day audit of defendant's accounts at defendant's place of business with complainants' own auditor, or for the reason that complainants had failed to give defendant particulars required by the statute, or for no reason at all. The question is not one of error in the thrice-repeated decisions of the Chief Justice, but of competency of the court of law, and of the prior seeking of the legal remedy.

5. The Court of Chancery has refused to entertain an appeal from the decision of Chief Justice Gummere.

The Court of Chancery has adverted to the complainants-appellants' application on three separate occasions to the Chief Justice for an order for the examination of defendant before trial, and his granting that order to a certain extent saying: "Thereupon this bill was filed, and while it is in form the usual bill for strict dis-

covery, it seeks in effect, a review of the action of the Chief Justice.”

*This application to the Chief Justice was for the identical relief for which the bill in Chancery prays. (Compare record p. 36, l. 40, with p. 15, l. 27.)*

The Vice-Chancellor fully agrees with complainants-appellants’ contention that the statutory remedy at law has not absolutely deprived the Court of Chancery of the power to grant a bill for discovery, saying “That jurisdiction still exists in a proper case.” Vice-Chancellor Berry adds “But where the law court is fully empowered to compel complete discovery before trial and the plaintiff in the suit in that Court has sought that discovery in the method pursued at law and has not obtained as extensive a relief as he believes he is entitled to, he is not privileged to review *that Court’s findings here.*” Consequently complainants-appellants’ bill was dismissed, and rightfully so, as the following rules of law and precedents will clearly establish:

#### LAW.

**I. This Court has settled the rule that after the jurisdiction of the Courts of Law has attached, and adequate relief exists at law, Chancery will decline to entertain jurisdiction.**

This is the rule established by the case of *Sweeney v. Williams*, Court of Errors, 36 N. J. Equity 627, as alluded to subsequently.

Defendant does not dispute for one moment the fact that Chancery may still entertain a bill for discovery. In fact the opinion of the Court of Chancery in this case states such to be the

rule: “I do not mean, however, to suggest that this Court has in any way been deprived of its ancient right of jurisdiction of discovery where applications are made to this Court in the first instance—that jurisdiction still exists in a proper case.” Opinion of Vice-Chancellor Berry (record p. 44, l. 20).

Therefore, the main argument of complainants-appellants under Point I of their brief and the citation of cases thereunder, becomes immaterial. The point is—will Chancery so interfere, (1) where the law court is competent to grant discovery, and not only so, but (2) the legal discovery remedy has in fact been sought and granted. This case is not merely to be determined by the *adequacy* of the legal remedy, but in the second place, by the *election* of the legal remedy, and in the third place, by the *seeking and granting* of that remedy after election.

We will confine our attention in this point of our brief, to the question of the adequacy of the legal remedy and its election, leaving the question of the seeking and granting of such remedy to subsequent consideration.

Complainants-appellants place great reliance on Bispham’s Principles of Equity. But immediately preceding the sections quoted by appellants, that author shows that the basis for equitable discovery is in fact the ancient inadequacy of the legal remedy, a situation now changed, and continues to show that the adequacy of the legal remedy is a crucial consideration in the willingness of equity to grant discovery:

Bispham, section 556:

“In a common law action the plaintiff was obliged to make out his case by calling third

parties as witnesses, by compelling the production of such documents material to the issue, as were in the custody or under the control of third parties, and by producing himself, such documents as were in his own possession, and whose execution could be properly proved. No means, however, existed by which the opposite party could be compelled to testify as to the matters in dispute, or by which the production of documents in his possession could be enforced. In modern times this rule, has in England, and in nearly all of the United States, been altered by statute, and a party to a common law action can now put his adversary upon the witness stand without being concluded by his testimony, and without being subject to the rule which forbids leading questions—in other words, he can call and cross examine the opposite party; and he can compel the production of books and papers at a reasonable period before the trial of the cause.”

Thereupon Bispham continues, as quoted by complainants, section 557:

“*While* the common-law rule prevailed, and *while* the inconvenience consequent thereon existed, a different rule grew up in courts of equity. It was part of the machinery of the Court of Chancery that a discovery could be compelled.”

Hence, there was originally a failure of remedy at the common law and the equitable remedy of bills for discovery existed *while* the common law failure prevailed.

Bispham, section 559:

“*Nor will such a bill (discovery) be entertained in order to aid discovery, in a court which can by its own methods of procedure obtain the same result.*”

Again in Story’s Eq. Pl. section 555, we find the rule as to the effect of the adequacy of a

legal remedy on the right to discovery, stated as follows:

“In the next place in cases of a purely civil nature, Courts of Equity will not sustain a suit for discovery, in aid of a suit pending in another court or jurisdiction, *if that Court can compel the discovery required, and in such a case the remedy elsewhere is complete and the interference of a court of equity is unnecessary and vexatious.*”

Then in Story’s Eq. Jurisprudence, 14th Edition, paragraph 1943, the learned author says:

“In the next place, Courts of Equity will not entertain bills for discovery, to assist a suit in another court, *if the latter is of itself competent to grant such relief* and in such a case the proper exercise of the jurisdiction should be left to the functionaries of the Court where the suit is depending.”

In a long note thereto, the author cites numerous decisions including *Gelston v. Hoyt*, 1 John Chancery 547, where Chancellor Kent said:

“If a bill seeks discovery in aid of the jurisdiction of a court of law, it ought to appear that such aid is required. *If a Court of Law can compel the discovery*, a Court of Equity will not interfere.— It is not denied in this case, but that every fact material to the defense at law, can be proved by the ordinary means of law without resort to the aid of this Court.— Such trials at law are not to be delayed for discoveries required when the necessity of such delay and discovery is not made to appear. This would be perverting and abusing the powers of this Court.— Such trials at law are not to be delayed for discoveries required when the necessity for such delay and discovery is not made to appear. *This would be perverting and abusing the powers of this Court.*”

In Corpus Juris the rule is succinctly laid down as follows:

“Like other equitable remedies bills for discovery will not lie where legal remedies are adequate.” (18 C. J. paragraph 4, p. 1058.)

Again in Pomeroy's Eq. Jurisprudence, Vol. 1, section 83, this learned author, in referring to discovery as one of the auxiliary jurisdictions of equity, and adverting to the effect, not upon the *jurisdiction* of the Court of Chancery, but upon its *willingness to exert* the jurisdiction, due to the increase of the legal remedy says:

“These instances (discovery) of auxiliary jurisdiction have wholly disappeared from the English system under the late re-organization of the courts and the procedure, and have almost entirely disappeared from the equity as administered in the United States. In England, in the States of this Country generally, and in the United States Courts parties are permitted in their own behalf and are required to testify in behalf of their adversaries in all actions and proceedings of a civil nature, so that every ground or reason for a bill of discovery has been removed by the far more efficient means of an oral examination conducted by counsel in open court.— In other states which keep up the two jurisdictions of law and equity, administered by the same tribunal, discovery as an auxiliary to trials at law is no longer necessary; and is, I believe, practically obsolete, even where not formally abrogated. In the few states which still retain a separate court of chancery, this jurisdiction may be *nominally* preserved.”

This it is believed is a fair statement of the situation as to discovery in equity as it now exists, not only in the United States generally, but in this state. In the United States generally, it is practically abolished. In this state, equity has retained its *nominal* jurisdiction to grant dis-

covery. But an examination of the cases in this state, including particularly those cited by appellants, will show, that while this nominal jurisdiction *exists*, this jurisdiction will not be *exerted*, except in extraordinary cases where adequate legal remedy is not obtainable. Let us therefore take up the New Jersey cases.

First it should be borne in mind that all those cases where discovery is granted, not as auxiliary to a case at law, but in the ordinary exercise of equitable jurisdiction, are beside the point. Of course, equity, exercising its original jurisdiction to grant a discovery, will continue to do so, if a law court has not already assumed jurisdiction and placed itself in a prior position to grant relief.

What we here consider, is the question whether equity will exert its existing jurisdiction to grant this relief *if the court of law has assumed jurisdiction*. Further we must bear in mind in the consideration of the New Jersey cases, that since the discovery which the courts of law have been able to grant is of statutory origin, it has been a continually increasing one. Therefore, under the earlier statutes, the discovery which a court of law could grant was sometimes inadequate and inefficient, when compared with the present remedy at law. A comparison of the present statutes will show that in every respect, at least insofar as it effects the present case, full discovery both by oral testimony and the production of books and documents, can now be obtained before trial as well in the court of law as by discovery in equity. In fact, from the standpoint of a practicing attorney, the opportunity of examining the defendant in person before trial, is infinitely to be preferred to obtaining his answer under oath, which he can prepare and file

at his leisure under the bill of discovery filed in this case.

Furthermore, originally the statutory common law discovery was not as efficient as that in chancery, since the original statutes would not permit the Court to hold the party refusing to give the discovery in contempt, which could be done in chancery. That is not the case today. The Practice Act permits holding a party in contempt for failure to obey the order of the common law court, under an examination before trial. (P. L. 1924, p. 183 and C. S. 1910, p. 4097, sec. 140.)

Bearing this in mind, let us consider the cases cited by appellants.

In the very earliest case, to wit, *Howell v. Ashmore*, 9 N. J. Eq. 82, Chancellor Williamson says, page 90:

“The principle is correctly laid down in Story’s Eq. Jurisprudence, paragraph 1495, in Cooper Eq. Pleadings, Chapter 3, page 199 and in Mitford’s Pleadings 52, that in the case of suits merely civil in a court of ordinary jurisdiction, *if that court can itself compel the discovery required*, a court of equity will not interfere.”

Then the Court proceeds to exhibit the inadequacy of the then statute as compared with the present statute as follows:

“But is the Supreme Court, where this suit is pending, to assist which this bill has been filed, competent to grant the same relief which this Court is able to afford the plaintiff in this proceeding? That Court can compel no discovery by any proceeding in the nature of a bill of discovery. It can compel the defendant to *answer as a witness on the trial of the cause*, if called upon the plaintiffs. But the disclosure he may make then may be of no avail to the plaintiff.

The plaintiff has a right to the discovery before the trial, to aid him in preparing to meet the very case the defendant may make by the disclosure—*it (the statute) does not afford the adequate relief*, for it does not meet the wants of the party—*it is a question addressed to the sound discretion of the Court*—I do not think that this statute ought to deprive plaintiff of his right to file his bill in this Court to aid him in the prosecution of his suit at law. I do not think that he should be compelled to resort to the alternative of making the defendant a general witness in the suit, or be deprived of having the benefit of a disclosure before the trial, so that he may prepare himself to meet the facts which may be presented by the disclosure which he seeks.”

Thus the earliest case cited by appellants instead of holding for appellants, lays down the rules (1) that *a court of equity will not grant discovery where an adequate remedy exists* and (2) that *the question of whether the remedy is adequate is one of sound discretion for the Court*.

In the case at bar it is obvious that the present statutes do (1) afford an adequate remedy and (2) the Court of Chancery has already exerted its sound discretion in so determining and dismissing the bill. Not only does the earliest case uphold the very rule urged by Bispham, but the latest case cited by appellants, in which the question as to the right to discovery in aid of a suit at law was raised is to the same effect.

Except for *Freule v. Rudinger*, 89 N. J. Eq. 91, where no question as to the right to discovery was raised, the latest case cited by appellants on the right to discovery in aid of the court of law is that of *Bellingham v. Palmer*, 54 N. J.

Eq. 136. In that case Vice-Chancellor Reed on page 140 says:

"It seems to me that the question is whether a court of law can now adequately deal with the account. The question is **simply adequacy of the remedy** and that should be decided by the present processes of legal investigation; as already remarked these processes have become radically changed. So changed in fact, that the remarks of Judge Finch in his opinion in the case of *Marvin v. Brooks*, 94 Equity, N. Y. 71-80, are almost as pertinent here as in the State of New York, speaking of the jurisdiction of a court of equity in matters of account resting upon their complexity *and also for discovery*. He observed: 'The necessity for a resort to equity is now very slight, if it can be said to exist at all, since a court of law can send to a referee a long account too complicated for the handling of a jury, and furnishes by examination of the adverse witness before trial, and the production and deposit of books and papers, almost as complete a means of discovery as can be furnished by a court of equity'. \* \* \* There are still many cases in which a court of equity and a master can afford a fuller measure of relief than can a court of law dealing with a referee, but there are also cases of which courts of equity would once have assumed jurisdiction, which I think should now be remitted to the legal tribunals. In my judgment the present account is not one for equitable cognizance. \* \* \* Now in determining whether a court of law can adequately deal with an account, I do not perceive why the present and not the past method of legal procedure should not be regarded. \* \* \* As was observed in *Exec. of Powers v. Administrator of Butler*, 3 Gr. Chancery 465, 'upon examination of numerous authorities it will be seen that as the courts of law have extended their jurisdiction over these subjects, the courts of equity have withdrawn their juris-

diction from it.' This remark was reiterated in the case of *Hannon v. Maxwell*, 4 Stewart Eq. 318 decided by the Court of Appeals."

This, the latest case cited by appellants on the point, therefore, shows, first, that the nominal jurisdiction of chancery remains, but second, that the Court of Chancery will exercise its jurisdiction only where the remedy is inadequate and third, that, as the adequacy of the legal remedy increases, the exercise of the jurisdiction by the court of equity will decrease.

In the case of *Hannon v. Maxwell*, 31 N. J. Eq. 318-329 this Court says:

"As courts of law have extended their jurisdiction over this subject (of bills for new trial) courts of equity have in this instance withdrawn theirs, in accordance with the principle that where courts of law can furnish an adequate remedy, equity will not interfere."

This jurisdiction to grant a new trial is but an exercise of an auxiliary jurisdiction of the court of equity, as is the jurisdiction to grant discovery in aid of trials of law. The reason of the rule, as laid down by the Court of Errors, therefore, applies exactly to the situation of the bill for discovery filed in this case.

The Court of Errors has again reiterated this same rule in the case of *Sweeney v. Williams*, 36 N. J. Eq. 627. In this case the Court discusses the entire subject of the effect of the growth of the common law remedy by statute, and its effect upon the exercise of equitable jurisdiction. This Court there says:

"When courts of law have of their own motion extended their jurisdiction over cases, theretofore solely cognizable in equity, the *jurisdiction* of the latter court has been in no respect abridged, although when the juris-

diction at law has become well established, the equity jurisdiction has been in some cases declined" (citing cases). "When by statute a right to administer relief, previously administered only by courts of equity is extended to courts of law, the jurisdiction of the courts of equity is undisturbed unless prohibitory or restrictive words are used in the statute—therefore, the jurisdictions are concurrent. This was the view expressed by Chancellor Green in *Frick v. Black*, 2 C. E. Green and by Chancellor Zabriskie in *Shotwell v. Smith*, 5 C. E. Green 79—citing cases—*But if there exists a concurrent jurisdiction in courts of law and courts of equity, the latter will decline to entertain jurisdiction after the jurisdiction of the courts of law has attached, unless the relief that the applying party is entitled to ask cannot be fully obtained in the court of law.* Citing Story's Eq. Jurisprudence, section 599, *Smith v. Smith*, administrator, 3 Stewart 564; *Salter v. Williamson*, 1 Green Chancery 480; *Van Mater v. Sickler*, 1 Stockton 483; *Clark v. Johnson*, 2 Stock. 287."

To paraphrase the rule there laid down by this very Court, and apply it to this case, we find (1) that the jurisdiction of the courts of law and of equity, as to discovery, is concurrent; (2) that the jurisdiction of the courts of law has attached; (3) that the relief that the appellant is entitled to ask, not only can be fully obtained at law, but (4) has been obtained at law. Therefore, as the Court of Errors says in *Sweeney v. Williams*, the courts of equity "will decline to entertain jurisdiction."

Of course, the fact that the appellant has not obtained the relief he *thought* he was entitled to is beside the point. In the court of law the Chief Justice gave him the full discovery to which the Court decreed him entitled. It was competent to give him more, but appellants' own

actions disentitled them to more, as seen above. It is not a question of the relief which they obtained, but of the relief which the *Court was competent to give*.

In any event appellants have themselves admitted in their own bill of complaint, as seen above, that the court of law had "ample jurisdiction." They cannot complain of the exercise of this "ample jurisdiction" by the court of law, in a court of equity. The sustaining of such a contention would *convert the Court of Chancery into another appellate court, sitting in judgment upon the decisions of the courts of law*.

Such are the general principles dispositive of this case, laid down by the courts of this state, all of which cases, with the exception of that of *Sweeney v. Williams*, have been cited by appellant in his own brief. The remaining authorities cited by appellants may be quickly disposed of. Appellants initiate their citation of New Jersey authorities with the case of *Shotwell v. Smith*, 20 Equity 79, upon which they greatly rely. But the Chancellor in holding in this case that discovery will be granted says:

"The power given to courts of law is not so complete and ample as the power to compel discovery in chancery. At law the plaintiff cannot be compelled actually to answer. The only penalty is that the Court may stop his proceeding in the suit." In other words, this case recognizes as a criterion the adequacy of legal remedy. It holds the remedy there inadequate, because of the inability under the statute, then in existence, to hold for contempt. This right now exists in the Court of Law in this respect, exactly as in the Court of Chancery.

Appellants cite *Little v. Cooper*, 10 N. J. Eq. 73. But in this case, too, the Chancellor says:

“When a bill seeks discovery in aid of a court of law, it must appear that the *aid is necessary* and the discovery material to the defense and *that it is not in the power of the party to prove them by witnesses.*”

The following cases have no bearing on the case at bar, since they are cases not determining the right of equity in its jurisdiction to grant discovery in aid of a suit at law, but cases where the right of equity was considered as ancillary to its own right to grant substantive relief. This is a very different question depending upon the application of very different principles.

Such are the cases of:

- Schrafft v. Wolters*, 61 N. J. 467;
- United N. J. R. & C. Co. v. Hoppock*, 28 N. J. Eq. 261;
- State v. Elizabethtown Water Co.*, 82 N. J. Eq. 216;
- States v. Old Dominion Copper M. & C. Co.*, 89 N. J. Eq. 265;
- Mayor, &c. of Boonton v. W. S. Co.*, 83 N. J. Eq. 536;
- Board of Vineland v. Maretti*, 93 Eq. 513;
- Miller v. U. S. Cas. Co.*, 61 Eq. 110.

We will, therefore, discuss such cases no further. We would further add that the quotation from Bispham's Principles of Equity, section 565 on page 15 of appellants' brief is similarly inapplicable, since same refers not to the propriety of the granting of discovery by equity in aid of courts of law, but to a situation where equity has already granted the discovery, and the question is as to equity's right to thereafter

grant substantive relief, an utterly different question.

In short then, *if an adequate remedy exists at law, the court of equity will not exert its auxiliary remedy of discovery. It appears on the face of complainants' bill, and totally without regard to defendant-respondent's affidavit, that the adequate remedy at law does exist. Hence the action of the Court of Chancery was proper.*

Furthermore this is not merely a case of where an adequate remedy at law exists, but where complainants-appellants have elected such remedy, have sought such remedy, and have been granted relief. Let us consider the effect of these additional facts:

## POINT II.

When an adequate remedy exists at law and complainant has not merely elected such remedy but has sought such remedy and been granted relief thereunder, every equitable maxim prevents the intervention by equity, to override the decision of the courts of law.

Complainants-appellants, prior to filing their bill in equity, started their suit at law. Complainants-appellants admit in their bill in equity that the court of law has “ample jurisdiction” (record p. 10, l. 20). Complainants-appellants admit that they have actually sought and been granted discovery at law (record p. 36, l. 31, p. 37, l. 27).

(1) Equity will not take jurisdiction where there is an adequate remedy at law. Such is axiomatic.

(2) The court of equity does not entertain appeals from the courts of law.

(3) When two concurrent remedies exist, when one is elected and relief obtained thereunder, it would be vexatious to permit the other remedy to be pursued and in another court. Yet, that is exactly what complainants-appellants are seeking to do here.

As the opinion of the Court of Chancery shows "they three times applied to the Chief Justice for an order for the examination of defendant before trial. Such an order was granted with respect to certain particulars and denied as to others." With this complainants-appellants were dissatisfied, and, continuing the quotation from the Court of Chancery's opinion, "Thereupon this bill was filed and while it is in form, the usual bill for strict discovery, seeks in effect a review of the action of the Chief Justice."

In view of the above axiomatic principles, the Court of Chancery is clearly right when it says, "It would appear that under the act above referred to (Practice Act) there is a complete remedy at law, and it is elementary that under such circumstances this Court will not act—but where the law court is fully empowered to compel complete discovery before trial *and the plaintiff in the suit in that court has sought such discovery in the method prescribed by law and has not obtained as extensive relief as he believes he is entitled to, he is not privileged to review that court's findings here.*"

### POINT III.

Appellants' technical objection to the use of respondent's affidavit in the court below is beside the point. Respondent's motion should have been granted by the court below, regardless of such affidavit.

Appellants' bill of complaint admits "Complainants have recently commenced an action in the Supreme Court of the State of New Jersey, which court has ample jurisdiction in relation to said action (record p. 10, l. 19). Complainants cannot safely proceed to trial in their said action at law without such discovery," the which they then pray as the full relief asked in their bill of complaint (record p. 14, l. 40).

Respondent's notice of motion sets up as one ground that "there is an adequate remedy at law" (record p. 29, l. 32). This Court will take judicial notice of the Practice Act, with its amendments, which provide for free and full examination before trial, and for the discovery of documents.

As pointed out at length in Point I of this brief, where, as in this case, the jurisdiction of a court of law has attached, and an adequate remedy exists, it would be vexatious for the Court of Chancery to assume jurisdiction, even though such Chancery jurisdiction still nominally exists.

This point as to the adequate remedy at law is raised on defendant-respondent's motion, *without the use of the affidavit in any way whatsoever.* This objection to appellants' bill appears directly *on the face of the bill* itself. Under such circumstances appellants' bill was rightly dismissed.

**POINT IV.**

Appellants' technical objection to respondent's affidavit is not well taken because appellants have waived such objection by themselves submitting an affidavit, and otherwise.

Appellants in answer to defendant's affidavit, filed an opposing affidavit, which the record shows was executed on the day of the hearing before the Vice-Chancellor, and was filed that same day (record p. 34). The record further shows that such opposing affidavit was never served (record p. 34) and as appears earlier in the brief, such is indeed the fact.

By the use of this affidavit, by appearing before the Court on the argument, when defendant's affidavit was used, and by their failure to enter any objection to the use of defendant's affidavit, except in their own affidavit, appellants have clearly waived their purely technical objection.

In fact, appellants' opposing affidavit should not be considered by this Court, not only because of the objectionable statement therein as above set forth, but because the record shows it was never served as required by the rules of this Court (Chancery rule 90). If not to be considered by this Court, appellants' appearance before the Court without other objection as to the use of defendant's affidavit, is alone sufficient to waive his objection to such use.

Regardless of this, the highest court in the State of New Jersey will not do a useless thing. It will not, therefore, send back this cause to the Court of Chancery, merely because an objection was raised by motion rather than by answer in the nature of a plea, and thus force the

Court of Chancery to again enter its decision on the merits, dismissing the bill for the second time.

Regardless of this, this Court will give no consideration to appellants' technical objection to the use of defendant's affidavit, since, as seen above in Point III, the Court of Chancery was correct in dismissing appellants' bill, without any regard to defendant's affidavit whatever.

**SUMMARY.**

(1) Appellants admit that the jurisdiction of the New Jersey Supreme Court has first attached.

(2) Appellants admit that they have submitted themselves to such jurisdiction.

(3) Appellants admit that the Supreme Court has "ample jurisdiction."

(4) Appellants therefore admit, particularly in view of the statutes of this state, of which this Court will take judicial notice, that there is an adequate remedy at law.

(5) Such being the case, according to the repeated decisions of the Court of Errors and Appeals, the bill was rightly dismissed.

(6) In the second place, not only as stated by the Court of Chancery in its opinion is "The law court fully empowered to compel complete discovery before trial" but, "the plaintiff in the suit in that court has *sought* such discovery."

Hence, appellants have not only elected, but sought and been granted, their remedy in the court of law. Therefore, "He is not privileged to review that Court's findings here," as stated by the Court of Chancery.

In fact, as stated by the Court of Chancery, "The plaintiff has three times applied to the Chief Justice." Therefore, appellants are here asking a court of equity to sit as an appellate court over the thrice-repeated decisions of the Chief Justice of the Supreme Court.

It is respectfully submitted that the decree of the Court of Chancery should be affirmed with costs.

STEWART & HARTSHORNE,  
Solicitors for and of Counsel  
with Defendant-Respondent.