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**Bill of Complaint.**

(Filed May 22, 1945.)

**In Chancery of New Jersey**

*To his Honor, Luther A. Campbell, Chancellor of  
the State of New Jersey:* 10

Complainant, Industrial Electronics Corporation, a New Jersey corporation with its principal place of business at 80 Bank Street, in the City of Newark, County of Essex and State of New Jersey, says that:

1. Complainant is a sales company engaged in the sale and distribution of industrial lamps and lights. 20
2. In connection with its said business, complainant employs a staff of salesmen and district sales managers located throughout the country.
3. The foundation of complainant's business is the good will of the salesmen and their customers, the lists of salesmen and customers, the lists of leads obtained by and contacted by salesmen, and the method of dealing with the respective salesmen and customers. 30
4. On April 1, 1943 complainant employed the defendant, Howard D. Harper, residing at No. 333 Beech Spring Road, South Orange, New Jersey, as its sales manager. His duties as sales manager required him to "manage the sales and distribution of the articles or products dealt in or handled by the Company, and of the salesmen, district managers, divisional sales managers and sales representatives; the Sales Manager shall 40

*Bill of Complaint.*

have the power to employ and discharge salesmen under regular salesmen contracts printed and provided by the Company, and under such terms and conditions as the Company may set forth from time to time. All such agreements shall be subject to the approval of the Company.”

10

5. Since said date of April 1, 1943, Howard D. Harper has been acting as sales manager of the complainant under the supervision and control of the President acting for the Board of Directors of complainant.

20

6. By reason of his employment as sales manager, defendant obtained possession of the following: salesmen's correspondence, copies of replies from the salesmen to the sales manager, copies of letters from the home office to salesmen, copies of monthly statements to salesmen, copies of weekly payroll sheets, customers' correspondence, copies of correspondence between the home office and customers, inter-office correspondence, sales literature and miscellaneous material.

30

7. Defendant, Howard D. Harper, removed the greater portion of the above material from the files and premises of the complainant to his own home and has failed to return the said material to the files of the complainant, though the complainant, through its president, has repeatedly requested him to do so.

40

8. On May 4, 1945 complainant, through its president, Maxwell M. Bilofsky, caused to be delivered to the defendant, Howard D. Harper, a demand for the return of the said material. A copy of the said demand is hereto annexed, made part hereof and marked Schedule "A".

*Bill of Complaint.*

9. On Saturday, May 5, 1945, defendant promised to return the said material referred to in Schedule "A".

10. Complainant, through its president, on the basis of the defendant's promise to return the material, agreed to consider a new employment contract and conferences were held with the defendant in connection therewith until on Monday, May 14, 1945 he refused to return the aforesaid material. 10

11. Complainant charges that the said material is vital to it in the continued operation of its business, that the disappearance of the material would cause it irreparable harm and that the monetary damage would be impossible of calculation. 20

12. Complainant charges that the defendant, Howard D. Harper, has stated he intends to go into business for himself and the said material, which is the property of the complainant, would be diverted to his own use to the detriment and at the expense of complainant and in violation of the trust reposed in him as sales manager of complainant. 30

Complainant has no adequate remedy in the courts of law, and therefore prays:

1. That Howard D. Harper, who is the defendant herein, may answer this bill of complaint and each and every allegation therein contained.

2. That a decree may be made and entered that the defendant, Howard D. Harper occupied a confidential relationship with the complainant and 40

*Bill of Complaint.*

was under the duty and obligation not to remove from the files and premises of the complainant the following: salesmen's correspondence, copies of replies from the salesmen to the sales manager, copies of letters from the home office to salesmen, copies of monthly statements to salesmen,  
10 copies of weekly payroll sheets, customers' correspondence, copies of correspondence between the home office and customer, inter-office correspondence, sales literature and miscellaneous material.

3. That a decree may be made and entered enjoining the defendant, Howard D. Harper, from divulging the business secrets and copying the material hereinabove referred to and directing  
20 the return to complainant of all papers and documents taken by the said defendant from the premises of the complainant and directing the delivery to complainant of all notes and memoranda thereof transcribed by the defendant, Howard D. Harper.

4. That a decree may be made and entered directing the defendant, Howard D. Harper, to make discovery under oath as to all of the documents or other material of the complainant which  
30 came into his possession during the course of his employment as sales manager of complainant, and account for the present whereabouts of said documents and material.

5. That the final relief prayed for may be granted *pendente lite* in order to preserve the subject matter of this suit.

6. That complainant may have such other and  
40 further relief in the premises as the nature of the case may require.

*Affidavit of Maxwell M. Bilofsky.*

7. That a writ of subpoena may issue, directed to the defendant, Howard D. Harper, to answer this bill of complaint and to abide by such decree as this court may make in the premises.

FURST & FURST,  
Furst & Furst,  
Solicitors for Complainant. 10

GEORGE FURST,  
George Furst,  
Of Counsel.

**Affidavit of Maxwell M. Bilofsky.**

STATE OF NEW JERSEY, }  
COUNTY OF ESSEX. } ss.: 20

MAXWELL M. BILOFSKY, being duly sworn, according to law, upon his oath deposes and says:

1. I am President of Industrial Electronics Corporation, the complainant named in the foregoing bill of complaint; I have read the said bill of complaint and the facts therein alleged are true of my own knowledge except that the statement contained in Paragraph 12 of said bill of complaint, that the defendant intends to go into business for himself, was made to another salesman of complainant and I believe that the said allegation is true. 30

2. Complainant is a sales company engaged in the sale and distribution of industrial lamps and lights.

3. In connection with its said business, complainant employs a staff of salesmen and district sales managers located throughout the country. 40

*Affidavit of Maxwell M. Bilofsky.*

4. The foundation of complainant's business is the good will of the salesmen and their customers, the lists of salesmen and customers, the lists of leads obtained by and contacted by salesmen, and the method of dealing with the respective salesmen and customers.

10

5. On April, 1943 complainant employed the defendant, Howard D. Harper, residing at No. 333 Beach Spring Road, South Orange, New Jersey, as its sales manager. His duties as sales manager required him to "manage the sales and distribution of the articles or products dealt in or handled by the Company, and of the salesmen, district managers, divisional sales managers and sales representatives; the Sales Manager shall have the power to employ and discharge salesmen. Under regular salesmen contracts printed and provided by the Company, and under such terms and conditions as the Company may set forth from time to time. All such agreements shall be subject to the approval of the Company."

20

6. Since said date of April 1, 1943, Howard D. Harper has been acting as sales manager of the complainant under the supervision and control of my acting for the Board of Directors of complainant.

30

7. By reason of his employment as sales manager, defendant obtained possession of the following:—salesmen's correspondence, copies of replies from the salesmen to the sales manager, copies of letters from the home office to salesmen, copies of monthly statements to salesmen, copies of weekly payroll sheets, customers' correspondence, copies of correspondence between the home office and customers, inter-office correspondence, sales literature and miscellaneous material.

40

*Affidavit of Maxwell M. Bilofsky.*

8. Defendant, Howard D. Harper, removed the greater portion of the above material from the files and premises of the complainant to his own home and has failed to return the said material to the files of the complainant, though the complainant, through me, has repeatedly requested him to do so. 10

9. On May 4, 1945 complainant, through me, caused to be delivered to the defendant, Howard D. Harper a demand for the return of the said material. A copy of the said demand is hereto annexed, made part hereof and marked Schedule "A".

10. On Saturday, May 5, 1945 defendant promised to return the said material referred to in Schedule "A". 20

11. Complainant, through me, on the basis of the defendant's promise to return the material, agreed to consider a new employment contract and conferences were held with the defendant in connection therewith until on Monday, May 14, 1945 he refused to return the aforesaid material.

12. Complainant charges that the said material is vital to it in the continued operation of its business, that the disappearance of the material would cause it irreparable harm and that the monetary damage would be impossible of calculation. 30

13. Complainant charges that the defendant, Howard D. Harper, has stated he intends to go into business for himself and the said material, which is the property of the complainant, would be diverted to his own use to the detriment and at the expense of complainant and in violation 40

*Schedule "A"*.

of the trust reposed in him as sales manager of complainant.

MAXWELL M. BILOFSKY.

Sworn and subscribed to before me }  
this 21st day of May, 1945. }

10

LOUIS KRAEMER,  
A Master in Chancery of New Jersey.

**Schedule "A."**

H. D. Harper                      M. M. Bilofsky                      5-4-45

Dear Mr. Harper:

20

You have taken to your home and have in your possession material which is vital and important to this Company consisting of:

Salesmens' correspondence  
Copies of replies to the salesmen from you  
Copies of letters from this office to salesmen  
Copies of monthly statements to salesmen  
Copies of weekly payroll sheets  
Customers' correspondence  
30 Copies of correspondence to customers  
Inter-Office correspondence  
Literature, etc.

I have requested you in the past to return this material to the files of the Company where they properly belong. I must insist that you return the material tomorrow and advise me that you have done so.

40

INDUSTRIAL ELECTRONICS CORPORATION.  
M. M. Bilofsky, President

**Order to Show Cause and Preliminary  
Restraint.**

(Filed May 22, 1945.)

IN CHANCERY OF NEW JERSEY.

Between

INDUSTRIAL ELECTRONICS CORPO-  
RATION, a New Jersey corpora-  
tion,

Complainant,

*and*

HOWARD D. HARPER,  
Defendant.

10

On Bill, etc.  
Order to Show  
Cause and  
Preliminary  
Restraint.

20

This matter being opened to the Court by Furst & Furst, solicitors for complainant, and this Court having read and considered the bill of complaint filed herein and the affidavit annexed thereto, and it appearing to the Court from the affidavit annexed to the bill of complaint that immediate, substantial and irreparable injury will probably be suffered by complainant unless the relief herein contained is granted, it is, on this 22nd day of May, 1945, on motion of Furst & Furst, solicitors aforesaid,

30

ORDERED: That until the further order of this Court the defendant, Howard D. Harper, be and he is hereby enjoined and restrained from divulging the business secrets of complainant and from copying, removing, destroying or in any way disposing of the salesmen's correspondence, copies of replies from the salesmen to the sales manager, copies of letters from the home office to salesmen, copies of monthly statements to salesmen, copies

40

*Order to Show Cause and Preliminary Restraint.*

of weekly payroll sheets, customers' correspondence, copies of correspondence between the home office and customers, inter-office correspondence, sales literature and miscellaneous material; and it is further

10 ORDERED: That the defendant, Howard D. Harper, show cause before the Chancellor at the Chancery Chambers, 1060 Broad Street, Newark, New Jersey, on Tuesday, May 29, 1945, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard,

(1) why the restraint herein contained, and all the provisions of this order should not be continued until final hearing,

20 (2) why the complainant should not be granted the final relief prayed for *pendente lite* in order to preserve the subject matter of this suit,

(3) why such other and further relief should not be afforded complainant as may be just and proper in the premises; and it is further

ORDERED: That a copy of this Order and the Bill of Complaint and the affidavit filed herein, be served upon the defendant within 3 days from the date hereof; and it is further

30 ORDERED: That the defendant serve any answering affidavit which he intends to use on the return day of this order, upon the solicitors for the complainant, on or before May 25, 1945; and it is further

ORDERED: That this Order may be dissolved, enlarged or modified upon two days' notice given by either party to the other.

Respectfully advised,

40 ALFRED A. STEIN,  
V.-C.

LUTHER A. CAMPBELL,  
C.

**Subpoena.**

NEW JERSEY, TO WIT: THE STATE OF NEW JERSEY to  
 HOWARD D. HARPER, 333 Beach  
 (Seal) Spring Road, South Orange,  
 New Jersey—GREETING:

WHEREAS a bill of complaint has lately been exhibited against you in our Court of Chancery by INDUSTRIAL ELECTRONICS CORPORATION, to be relieved touching the matters therein contained: 10

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, within twenty days after service upon you of this Writ, and in default thereof such order or decree will be made against you as the court shall think equitable and just. 20

WITNESS, his honor, LUTHER A. CAMPBELL, our Chancellor, at Trenton, the 23rd day of May, in the year of our Lord one thousand nine hundred and forty-five.

J. GRANT SCOTT,  
 Clerk.

FURST & FURST,  
 Solicitors.

30

SERVICE of a copy of the within subpoena is hereby acknowledged on behalf of the defendant this 28th day of May, 1945.

WILBUR J. BERNARD,  
 Wilbur J. Bernard,  
 Solicitor for Defendant.

40

**Order Continuing Order to Show Cause and  
Preliminary Restraint.**

(Filed May 29, 1945.)

IN CHANCERY OF NEW JERSEY.

10

Between

INDUSTRIAL ELECTRONICS CORPO-  
RATION, a New Jersey corpora-  
tion,

Complainant,

*and*

HOWARD D. HARPER,  
Defendant.

On Bill, &c.  
Order  
Continuing  
Order to Show  
Cause and  
Preliminary  
Restraint.

20

This matter being opened to the Court by Furst & Furst, solicitors for complainant, and upon the endorsed consent of Wilbur J. Bernard, solicitor for defendant, and Furst & Furst, solicitors for complainant aforesaid;

30 IT IS, on this 29th day of May, 1945, ORDERED, that the order to show cause entered herein on May 22, 1945, returnable May 29, 1945, be and the same is hereby in all respects continued to Tuesday, June 12, 1945, at ten o'clock in the forenoon, at the Chancery Chambers, 1060 Broad Street, Newark, New Jersey;

40 And it is further ordered that the defendant serve any answering affidavit which he intends to use on the continued return day upon the solicitors for the complainant on or before June 7, 1945;

*Order Continuing Order to Show Cause  
and Preliminary Restraint.*

And it is further ordered that the complainant have leave to serve reply affidavits thereto within three days thereafter;

And it is further ordered that this order may be dissolved, enlarged or modified upon two days' notice given by either party to the other. 10

Respectfully advised,

ALFRED A. STEIN,  
V.-C.

We hereby consent to the entry of the foregoing order.

WILBUR J. BERNARD,  
Solicitor for Defendant. 20

FURST & FURST,  
Solicitors for Complainant.

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**Notice of Motion.**

(Filed June 12, 1945.)

IN CHANCERY OF NEW JERSEY.

10	Between INDUSTRIAL ELECTRONICS CORPORATION, a New Jersey corporation, <p style="text-align: center;">Complainant,</p> <p style="text-align: center;"><i>and</i></p> HOWARD D. HARPER, <p style="text-align: center;">Defendant.</p>	On Bill, etc. Notice of Motion.
20		

*To the Complainant Industrial Electronics Corporation:*

TAKE NOTICE that on the 12th day of June, 1945, at the hour of ten o'clock in the forenoon or as soon thereafter as counsel can be heard thereon at the Chancery Chambers in the City of Newark, I will apply to the Chancellor for an order striking the bill of complaint filed by you in the above entitled cause for the following reasons:

- (1) The bill of complaint discloses no cause of action which entitles complainant to relief in a court of equity.
  - (2) The bill of complaint sets forth no facts to entitle complainant to the relief asked.
  - (3) The relief asked for by complainant is not
- 40 justified from the facts set forth in the bill of complaint.

*Answer.*

(4) The rights of complainant as set forth in the bill of complaint are doubtful and uncertain.

(5) Complainant has an adequate remedy at law.

(6) The complainant shows no irreparable wrongs or threatened irreparable wrongs by defendant to entitle it to the extraordinary of injunction. 10

WILBUR J. BERNARD,  
Solicitor of Defendant.

**Answer.**

(Filed June 12, 1945.)

20

## IN CHANCERY OF NEW JERSEY.

Between

INDUSTRIAL ELECTRONICS CORPORATION, a New Jersey corporation,

Complainant,

*and*

HOWARD D. HARPER,  
Defendant.

On Bill, etc.

Answer.

30

Defendant, answering the bill of complaint herein, says that:

1. Paragraph 1 is admitted.

40

*Answer.*

2. He admits the complainant is a selling organization, but it does not employ either a staff of salesmen and district sales managers throughout the country. It does business by contracting with agents giving them a license; they work strictly on commission and receive a drawing account  
10 against commissions. They are not in the employ of the complainant.

3. Paragraph 3 is admitted.

4. Paragraph 4 is admitted. Defendant adds that his contract of employment was for five years from April 5, 1943 to March 31, 1948. His compensation under said contract had been amended, and at the time this suit was filed, was 5% of  
20 gross sales, with a drawing account against sales of \$250.00 a week.

5. He admits that he had been sales-manager of complainant from April 1, 1943 to the filing of the bill herein. But he further says that since the filing of the bill, he has been discharged by complainant. He received a telegram, dated May 24, 1945, addressed to him at Cleveland, Ohio, and also a letter, dated May 22, 1945, addressed to him at his home No. 333 Beach Spring Road, South Orange, New Jersey, from the Industrial Electronics Corporation, by M. M. Bilofsky, President, both of which read as follows:  
30

“In view of your obstinate refusal to return the property of this Company, and other conduct on your part detrimental to the interests of this Company, take notice that your services as Sales Manager are hereby terminated as of this date.”

40

*Answer.*

At the time the above telegram was sent to defendant, he was in Buffalo on complainant's business, interviewing prime licensees (referred to as district sales managers in the bill) and interviewing, hiring and instructing new men who were to be contracted as sub-licensees (referred to as salesmen in the complaint). Defendant had with him four folders containing correspondence with the prime licensees whom he was to interview. He still has these folders; he had no opportunity to return them to complainant; because, while he was travelling on the business of complainant, this suit was commenced and he was summarily and unjustifiably dismissed. 10

6. Defendant admits he has certain material in his possession; but says that they involve no business secrets and that they are useless and worthless to him. He herein lists all material which he has in his possession: (a) *Price list of articles sold by complainant.* This list is mailed to all salesmen and to all customers and is not, nor could it be, of any value to defendant or anyone else except to licensees of complainant. (b) *Copy of fuse parts inventory.* This list was given to all licensees for the purpose of sale to the trade. It is simply a list of the fuse parts which were in stock and which the company was anxious to sell. It is, and can be, of no use to defendant or to anyone; it contains no business secrets. (c) *Blue Print showing specifications for florescent drop cord lamp.* This print was distributed to all salesmen to show customers in aid of sales. The blue print shows an ordinary commercial florescent lamp, with a drop cord which is sold generally by the lamp industry. This blue print is not, nor could it be, of any use to defendant; there is no secret about it; it is not unique; and it contains no spe- 20  
30  
40

*Answer.*

cial information. (d) *Four licensee folders.* Defendant had these with him at Buffalo during his last trip while in the employ of the complainant—as mentioned in Paragraph 5 of this answer—and they are entitled as follows:

- 10           Downing  
               E. H. Philippe  
               F. C. Anderson  
               Duane Downing.

20           The names on these folders are of men who have contracts to sell the merchandise of complainant. Defendant used—or was to use but for the fact that his trip was cut by his dismissal—these folders in his conferences with the various licensees to promote sales for the complainant. These folders—and their contents—are and could be of no value to defendant, and he would not have had them in his possession but for the facts that this suit was commenced and that he was dismissed, giving him no opportunity to return the same. They contain no information that would be of any value to defendant or to anyone else other than to complainant. (e) *Folder marked R. A. MacDougall.* Defendant had this folder in his home for some time.

30           The subject was a licensee of complainant who had quit. Defendant took the folder with him on one of his business trips in 1944 with the hope of interviewing and of getting this man back in complainant's employ. However, he has not been in the employ of complainant for over a year; and thus the folder is of no use or value. Defendant just did not bother to return it to the office. It contains no secret information or any information that could be used by anyone. This file is of no value whatsoever. (f) *One Order Pad of Magno*

40           *Tronic Silver Point Starters.* This pad is a usual

*Answer.*

pad used for salesmen to take orders. It has no value to defendant; nor does it contain any special or secret information that could be used to the detriment of complainant. (g) *One 1945 Spring Sales Contest Bulletin*. This bulletin was used to promote and increase sales. It was originated by defendant and has now no special or secret value. 10  
 It simply shows the results of a contest and the bonuses given as prizes. It has no secret, peculiar, or unique value. As a matter of fact it has no value now to anyone. (h) *Loose Leaf Sales Note Book*: This book contains matter used by defendant in the field in conferences with prime licensees and in instructions to new sub-licensees. Defendant had this note book with him at Buffalo on his last trip for complainant. It is now of no value to defendant; and he would not have it in his possession but for the facts that this suit was commenced and he was dismissed, and thus had no opportunity to return it. It contains no information that would be of any value to him or to anyone other than to complainant. (i) *Stationery of Complainant*: This stationery was used by defendant in his work for complainant. It is of absolutely no value to him. (j) *Franchise and sub-licensee agreements*. These are form agreements which new sub-licensees signed when they became associated with complainant. These forms are obviously of no use to defendant. Defendant admits that he also has in his possession his copies of monthly statements to salesmen and copies of weekly payroll sheets of licensees. But these are only copies of original records and statements in the possession of complainant. These statements are the property of defendant. The monthly statements to salesmen are furnished to each salesmen and a copy to defendant. From these and from the 40

*Answer.*

weekly payroll sheets which too are statements furnished to the salesmen showing weekly sales and earnings, defendant figures his weekly earnings—which were, as stated 5% of gross sales. Defendant contends that these statements were furnished to him as his property by the complainant.

10 They have no value to him or to anyone else other than a record of his earned income.

7. Defendant denies paragraph 7 except as explained in Paragraph 6 of his answer. He has never wilfully removed any material from the files of the complainant to his own home. He has taken files and other material preparatory to making trips or has taken them home to study, and he has always returned them. The only material he has in his possession is that above described.

20

8. Defendant admits that on May 4, 1945 he did receive the letter marked Schedule "A" and annexed to the complaint.

9. Defendant admits he did have some odds and ends of correspondence which he did return to their proper files; but he denies that he promised to return material referred to in Schedule "A"; as a matter of fact he did not have this material, except as he has already returned or which he has in his possession, as set forth above.

30

10. Defendant denies that complainant, on the basis of the defendant's promise to return the "material," agreed to consider a new employment contract and conferences were held with the defendant in connection therewith until on Monday, May 14, 1945 when he refused to return the aforesaid "material." As a matter of fact defendant's existing contract still has three years to run and he was and is perfectly satisfied with it. While sales manager of complainant the weekly

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*Answer.*

sales had jumped from approximately \$1,000.00 a week to approximately \$10,000.00 a week. After the sales had increased, mainly through the efforts of defendant, complainant became dissatisfied and attempted to get defendant to enter into a new contract which was less profitable to him than his existing one. Complainant gave defendant the proposed new contract, which, after a study of same, he refused to sign and which he returned to complainant. He then informed complainant that he would continue under the existing contract. This attempt to force defendant to sign a new contract—notwithstanding the fact that he had a contract with which he was satisfied and which had three years to run—fomented the subsequent actions of complainant, to wit, the bringing of this suit and the unwarranted dismissal of defendant. Defendant charges that complainant seeks an injunction over a paltry few pieces of worthless paper to overshadow its own wrong in dismissing defendant summarily and unjustifiably. 10 20

11. Defendant denies that he has any “material” vital to complainant in its continued operation of the business or that he has anything in his possession, the absence or disappearance of which would cause irreparable harm and loss of a sum of money that would be impossible to calculate. Defendant has no material of the complainant, except as hereinbefore set forth, and he specifically and categorically denies that the material which he has are vital or necessary to the continued operation of complainant’s business or that their absence or disappearance would cause any irreparable harm or loss of any money whatsoever. 30

12. Defendant denies complainant’s charge that he said he intended to go into business for 40

*Answer.*

himself. Since being summarily dismissed by complainant, defendant has, up to now, made no plans whatsoever. Defendant admits he may have said that he would like to go into business for himself. But this idea defendant has always—like most men—had. He denies specifically that he has formed any intention—or done any act whatsoever in carrying out such an intention—of going into business. He further specifically denies that he has any “material” of complainant—even if he did go into business, the intention of which he has denied—which could be diverted to his use to the detriment of the complainant or at the expense of complainant or which would be in violation of the trust reposed in him while sales manager of complainant.

13. Defendant further states that during his employment with the complainant, he worked hard, faithful, and diligent; that he developed a competent and efficient sales force for complainant; and that he personally knows every man connected with complainant’s sale force and he knows their ability and capability by reason of his constant and successful work with them to increase sales; that he was summarily and unjustifiably dismissed although his contract has approximately three years to run; that he has no lists of complainant’s customers or sales licensee; nor has he copied any data from complainant’s records; and finally—and he reiterates—that he has no material of the complainant except as herein set forth and that which he has is of no value and of no interest to defendant or to anyone else.

WILBUR J. BERNARD,  
Solicitor of Defendant.

**Affidavit of Howard D. Harper.**

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

HOWARD D. HARPER, being duly sworn, according to law, upon his oath, deposes and says:

1. I am the defendant named in the bill filed in this cause; and I have read the attached answer and the matters and things therein contained are true. 10

2. Complainant, Industrial Electronics Corporation, a New Jersey corporation, is a sales company engaged in the sale and distribution of industrial lamps and lights. In connection with its business, it employs a staff of licensees and prime licensees, called respectively in the bill of complaint salesmen and district salesmanagers, throughout the country or most of it. 20

3. I was employed by the complainant on April 1, 1943 as its sales manager; my duties, among others, required me to "manage the sales and distribution of the articles or products dealt in or handled by the complainant, and of the salesmen, district managers, divisional sales managers and sales representatives; the sales manager shall have the power to employ and discharge salesmen under regular salesmen contracts printed and provided by the Company, and under such terms and conditions as the Company may set forth from time to time. All such agreements shall be subject to the approval of the Company." My contract of employment was for five years from April 5, 1943 to March 31, 1948. My compensation under said contract, as subsequently amended, 30  
40

*Affidavit of Howard D. Harper.*

was 5% of gross sales, with a drawing account against sales of \$250.00 a week.

4. Since April 1, 1943 I have been sales manager of the complainant corporation to the filing of the bill herein. But, since the filing of the bill,  
 10 I have been discharged by complainant. I received a telegram dated May 24, 1945, addressed to me at Cleveland, Ohio, and also a letter, dated May 22, 1945, addressed to me at my home Number 333 Beach Spring Road, South Orange, New Jersey, from the Industrial Electronics Corporation, by M. M. Bilofsky, both of which read as follows:

20 “In view of your obstinate refusal to return the property of this Company, and other conduct on your part detrimental to the interests of this Company, take notice that your services as Sales Manager are hereby terminated as of this date.”

At the time the above telegram was sent to me, I was at Buffalo, New York on complainant's business, interviewing prime licensees (referred to as district sales managers in the bill) and interviewing, hiring and instructing new men, who were to be contracted as sub-licensees (referred to as salesmen in the complainant). I had with me  
 30 four folders containing correspondence with the prime licensees whom I was to interview. I still have these folders; I had no opportunity to return them to the complainant; because, while I was travelling on the business of complainant, this suit was commenced and I was summarily and unjustifiably dismissed.

5. I admit I have certain material in my possession; but I say that they involve no business  
 40

*Affidavit of Howard D. Harper.*

secret; and that they are useless and worthless to me. I herein list all things of the complainant which I have in my possession: (a) *Price list of articles sold by complainant*: this list is mailed to all salesmen and to all customers, and it is not, nor could it be, of any value to me or anyone else except a sales employee of the complainant. (b) *Copy of fuse parts inventory*. This list was given to all licensees for the purpose of sale to the trade. It is simply a list of the fuse parts which were in stock and which the company was anxious to sell. It is, and can be, of no use to me or to anyone; it contains no business secret. (c) *Blue Print showing specifications for florescent drop cord lamp*: this print was distributed to all salesmen to show customers in aid of sales. The blue print shows an ordinary commercial florescent lamp, with a drop cord which is sold generally by the lamp industry. This blue print is not, nor could it be, of any use to me; there is no secret about it; it is not unique; and it contains no special information. (d) *Four Licensee folders*: I had these folders with me at Buffalo during my last trip while in the employ of the complainant—as mentioned in paragraph 4 of this affidavit. These folders are entitled as follows:

Downing  
 E. H. Philippe  
 F. C. Anderson  
 Duane Downing.

The names on these folders are of men who have contracts to sell the merchandise of complainant. I used—or was to use, but for the fact that my trip was cut by my dismissal—these folders in my conferences with the various licensees to promote sales for the complainant. These folders—

*Affidavit of Howard D. Harper.*

and their contents—are, and could be, of no value to me; and I would not have them in my possession but for the facts that this suit was commenced and I was dismissed, and thus had no opportunity to return them. They contain no information that would be of any value to me or to anyone other than to complainant. (e) *Folder marked R. A. MacDougall*. I have had this folder at my home for some time. The subject was a licensee of complainant who had quit. I took the folder with me on one of my business trips in 1944 with the hope of interviewing and of getting this man back in complainant's employ. However, he has not been in complainant's employ for over a year; and thus the folder is of no use or value. I just did not bother to return it. It contains no secret information or any information that could be used by any one. This file is of no value whatsoever. (f) *One Order Pad of Magno Tronic Silver Point Starters*: this pad is a usual pad used for salesmen to take orders. It has no value to defendant; nor does it contain any special or secret information that could be used to the detriment of complainant. (g) *One 1945 Spring Sales Contest Bulletin*: this bulletin was used to promote and increase sales. It was originated by me and has now no special or secret value; it is simply the results of a contest and the bonuses given as prizes. As a matter of fact, it has no value now to any one. (h) *Loose Leaf Note Book*: this book contains matter used by me in the field in conference with prime licensees and in instructing new sub-licensees. I had this note book with me at Buffalo on my last trip for complainant. It is now of no value to me; and I would not have it in my possession but for the facts that this suit was commenced and I was dis-

*Affidavit of Howard D. Harper.*

missed, and thus had no opportunity to return it. It contains no information that would be of any value to me or to any one other than to complainant. (i) *Stationery of Complainant*: This stationery I used in my work with complainant. It is of absolutely no value to me. (j) *Franchise and sub-licensee agreements*: these are agreements which new sub-licensees signed when they become associated with complainant. These forms are obviously of no use to me. 10

6. I admit that I also have in my possession my copies of monthly statements to salesmen and copies of weekly payroll sheets of licensees. But these are only copies of original records and statements in the possession of complainant. These statements are my property. The monthly statements to salesmen are furnished each salesman and a copy to me. From these, and from the weekly payroll sheets, which too are statements furnished to the salesmen showing weekly sales and earnings, I figure my weekly earnings—which were, as stated, 5% of gross sales. I contend that these statements were furnished to me as my property by the complainant. They have no value to me or to any one else, other than a record of my earned income. 20 30

7. I deny that I removed any material from the files and premises of the complainant to my own home and that I failed to return any material to the files of the complainant, except as explained in Paragraph 5 of this affidavit. I have never wilfully removed any material from the files of the complainant to my own home. I have taken files and other material preparatory to making trips for the complainant or I have taken them 40

*Affidavit of Howard D. Harper.*

home for study; but I have always returned them. The only material I have in my possession is that above set forth.

8. I admit that on May 4, 1945 I did receive the letter marked Schedule "A" and annexed to the  
10 complaint.

9. I admit that I did have some odds and ends of correspondence which I did return to their proper files; but I deny that I promised to return material referred to in Schedule "A"; as a matter of fact I do not have this material, except as I have already returned or which I have in my possession as set forth above.

20 10. I deny that complainant, on the basis of my promise to return the "material", agreed to consider a new employment contract and that conferences were held with me in connection therewith until Monday, May 14, 1945, when I refused to return the said material. As a matter of fact, my existing contract still had three years to run, and I was, and am, perfectly satisfied with it. While sales-manager of complainant, the weekly sales had jumped from approximately \$1,000.00 a  
30 week to approximately \$10,000.00 a week. After this increase in sales, mainly through my efforts, complainant became dissatisfied and attempted to get me to enter into a new contract, which was less profitable to me than my existing one. Complainant gave me the proposed new contract, which, after a study of same, I refused to sign and returned it to complainant. I informed complainant that I would continue under the existing contract. This attempt to force me to sign a new contract—  
40 notwithstanding the fact that I had a contract with which I was satisfied and which had three

*Affidavit of Howard D. Harper.*

years to run—fomented the subsequent actions of complainant, to wit, the bringing of this suit and the unwarranted dismissal of me. I charge that complainant seeks an injunction over a paltry few pieces of worthless paper to overshadow its own wrong in dismissing me summarily and unjustifiably.

10

11. I deny that I have any “material” vital to complainant in its continued operation of the business or that I have anything in my possession, the absence or disappearance of which would cause irreparable harm and loss of a sum of money that would be impossible to calculate. I have no material of the complainant, except as hereinbefore set forth, and I specifically and categorically deny that the things which I have are vital or necessary to the continued operation of complainant’s business or that their absence or disappearance would cause any irreparable harm or loss of any money whatsoever.

20

12. I deny complainant’s charge that I said I intended to go into business for myself. Since being summarily dismissed by complainant, I have, up to now, made no plans whatsoever. I concede that I may have said that I would like to go into business for myself. But this idea I have—like most men—always had. I deny specifically that I have formed any intention—or done any act whatsoever in carrying out such an intention—of going into business. I further specifically deny that I have any “material” of complainant—even if I did go into business, the intention of which I deny—which could be diverted to my use to the detriment of complainant or at the expense of complainant or of which would be in violation of any

30

40

*Affidavit of Howard D. Harper.*

trust reposed in me while sales-manager of complainant.

10 13. I further state that during my employment with complainant I worked hard, faithful, and diligent; that I developed a competent and efficient sales force for complainant and that I personally know every man connected with complainant's sales force and I know his ability and capability by reason of my constant and successful work to increase sales; that I was summarily and unjustifiably dismissed although my contract has approximately three years to run; that I have no list of complainant's customers or sales licensees; nor have I copied any data from complainant's records; and that, finally—and I reiterate—I have  
20 no material of the complainant, except as herein set forth, and that which I have is of no value and of no interest to me or to any one else.

HOWARD D. HARPER.  
Howard D. Harper.

Sworn and subscribed to before me }  
this 6th day of June, 1945. }

30 JOSEPH M. DEGNAN,  
Joseph M. Degnan,  
A Master in Chancery of New Jersey.

**Reply Affidavit of Maxwell M. Bilofsky to  
Answering Affidavit of Howard D. Harper.**

(Filed June 12, 1945.)

IN CHANCERY OF NEW JERSEY.

148-465.

10

<p>Between</p> <p>INDUSTRIAL ELECTRONICS CORPORATION, a New Jersey corporation,</p> <p style="text-align: center;">Complainant,</p> <p style="text-align: center;"><i>and</i></p> <p style="text-align: center;">HOWARD D. HARPER,</p> <p style="text-align: center;">Defendant.</p>	}
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On Bill, etc.  
 Reply Affidavit  
 of Maxwell M.  
 Bilofsky to  
 Answering  
 Affidavit of  
 Howard D.  
 Harper.

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

MAXWELL M. BILOFSKY, of full age, being duly sworn, according to law, upon his oath deposes and says:

1. I have read the answering affidavit of Howard D. Harper sworn to under date of June 6, 1945. 30

2. I deny that the contract of employment dated April 1, 1943 has been amended. No agreement was ever entered into to amend the contract, but deponent temporarily allowed the defendant 5% of gross sales, subject to cancellation and bad debts, to assist the defendant over the organization period of the sales force. 40

*Reply Affidavit of Maxwell M. Bilofsky to  
Answering Affidavit of Howard D. Harper.*

3. I deny that the defendant was discharged since the filing of the bill of complaint. He was discharged on May 22, 1945.

10 4. I had and still have no knowledge that the defendant was in Buffalo on May 22, 1945, and if he was in Buffalo or anywhere outside the immediate vicinity of our office in Newark, it was in direct violation of my express orders to him not to leave Newark until the dispute relative to the return of the correspondence and other data had been disposed of.

20 5. I deny that the defendant, as stated in paragraph 5 of his affidavit, has listed all of the items of the complainant which he has in his possession, and I refer to the affidavit of William B. McGuirk verified June 7, 1945, that the original letters addressed to the sales department by customers and dealers and turned over to Mr. Harper by Mr. McGuirk since January 1, 1945 have never been returned to the files of the company. I also refer to the affidavit of Morris Edward Starrett verified June 7, 1945 that he spoke to  
30 Mr. Harper less than three weeks ago and requested the defendant to turn over to him a list of the customers in the New Jersey area prepared by one of the sales agents of the company.

40 6. Signed applications by prospective licensees, which were received by Mr. Harper are extremely valuable and absolutely essential to the future operations of the business of this company. All of the other documentary material, which has disappeared from the files of the company, are also extremely valuable and necessary to the company in the future operations of its business.

*Reply Affidavit of Maxwell M. Bilofsky to  
Answering Affidavit of Howard D. Harper.*

7. All of the items referred to in paragraph 5 of the defendant's answer are useful to the company. I call particular attention to item "E", the folder marked R. A. MacDougall. R. A. MacDougall is presently indebted to the company for overdrawals approximating \$1,000.00 and the folder containing the history of his transaction with this company is therefore necessary. Other salesmen have overdrawn, in some instances sums approximating \$3,000.00, with the consent of the defendant, Harper, and the correspondence between the salesmen and the company through all of its officers and employees is necessary in showing the relationship and the respective duties of the parties.

8. It is a rule of my office that no employee may take the stationery of the company off the premises, except inter-office memo pads. I have just learned that the defendant has used the letterhead of the company to order merchandise thus ostensibly pledging the credit of this company. He did present an order to Dale Luggage House at No. 719—5th Avenue, New York City, using the name of the company, and said Dale Luggage House first attempted to collect the bill from this company.

9. The forms of franchise and licensee agreements of this company are unique and were prepared by New York counsel specially retained for that purpose, together with tax consultants. The fees of the New York counsel and tax consultants, for their services in preparing these unique license agreements and in obtaining the approval of the forms by the Treasury Department, agree-

*Reply Affidavit of Maxwell M. Bilofsky to  
Answering Affidavit of Howard D. Harper.*

gated a considerable sum of money, and any competitor obtaining these blank forms would be saved that sum.

- 10     10. The monthly statements to salesmen and copies of weekly payroll sheets of licensees were furnished to defendant solely for his use in the performance of his duties as sales manager under the supervision of deponent as president, and at all times were and still are the property of the complainant. They are extremely confidential because they set forth the basis of compensation to the licensees and their inspection by defendant as sales manager was necessary for him in ascertaining which licensees were overdrawn and which  
20     were producing. Complete files of all correspondence with the licensees, including these statements, are necessary in evaluating the services and good will of the licensees.

- 30     These same statements are extremely valuable to competitors of the complainant in that it would disclose the amount of sales in the respective districts and would be especially valuable to certain manufacturers who are allegedly infringing upon patents which are controlled or licensed by the complainant. The defendant is personally acquainted with the pendency of certain of these  
infringement suits.

- 40     I deny that these statements were furnished to defendant as his property. They were furnished to him on the same basis that copies of letters pertaining to credit risks are delivered to our credit manager for his inspection and returned by him to the files of this company after he has performed his duties as credit manager.

*Reply Affidavit of Maxwell M. Bilofsky to  
Answering Affidavit of Howard D. Harper.*

11. The defendant has received each and every month since his employ a statement prepared by a certified public accountant retained by the company for that purpose, setting forth the figures upon which his commissions and expenses are computed. The copies prepared by the certified public accountant and submitted each month are his property and the complainant has never requested the return of said copies from the defendant, nor do they form any part of the subject matter of the within suit. 10

12. The defendant promised to return the material referred to in my letter dated May 4, 1945. Thereafter he refused to return any correspondence or other material to the files of this company. The disappearance of these letters has made it impossible for other employees of the complainant company to reply to correspondence thus received, and in some instances the failure to reply to the correspondence from licensees has resulted in the return of merchandise at a loss to the complainant. Letters have been received from customers and turned over to the defendant complaining about merchandise because of incorrect sizes among other reasons, and since the letters disappeared after they were delivered to Mr. Harper, the customers received no reply and the complaints were not taken care of. This resulted in the cancellation of orders by the complainant's customers and the loss of their business thereafter. In turn, the licensee, who was deprived of the good will of the customer, became disgruntled thus reducing the efficiency and morale of the sales force. 20  
30  
40

*Reply Affidavit of Maxwell M. Bilofsky to  
Answering Affidavit of Howard D. Harper.*

10 I deny the allegations in paragraph 10 of de-  
fendant's affidavit. Prior to April of 1944 the  
sales of this company mounted above \$16,000.00  
and at that time no attempt or effort was made  
by the complainant to negotiate a new contract  
with the defendant. The material, which is the  
subject matter of this suit, is so vital to the com-  
plainant that I was willing to discuss within the  
past few weeks the negotiations of a new contract,  
conditioned upon the return of all of the material  
which we demanded be returned by the defendant,  
and it was impressed upon the defendant during  
our negotiations that he would receive no more  
copies of the statements or letters from sales-  
men and customers. From that date, I took care  
20 of all such correspondence and payroll.

After he received the notice of May 4, 1945,  
defendant promised to return the material the  
following day, since he had them at his home, and  
suggested that a new contract be drawn. A new  
contract was drawn. Because of his failure to  
return the material, nothing came of these nego-  
tiations.

MAXWELL M. BILOFSKY.

Maxwell M. Bilofsky.

30 Sworn and subscribed to before me }  
this 11th day of June, 1945. }

IDA GOLDBLATT,  
A Notary Public of New Jersey.

**Supplemental Reply Affidavit of  
Maxwell M. Bilofsky.**

IN CHANCERY OF NEW JERSEY.

148-465.

Between

INDUSTRIAL ELECTRONICS CORPO-  
RATION, a New Jersey corpora-  
tion,

Complainant,

*and*

HOWARD D. HARPER,  
Defendant.

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On Bill, etc.  
Supplemental  
Reply Affidavit  
of Maxwell M.  
Bilofsky.

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

MAXWELL M. BILOFSKY, of full age, being duly sworn, according to law, upon his oath deposes and says:

1. This morning, on June 11, 1945, I received an interoffice communication dated June 9, 1945 from L. A. Burr, a licensee operating in the Chicago area, a photostat of which is hereto annexed. 30

2. I have made and caused to be made a diligent search of all of the correspondence in the company's office but the letter referred to by Mr. Burr, which he mailed to the company and the defendant, as its sales manager, is nowhere to be found. 40

*Supplement Reply Affidavit of  
Maxwell M. Bilofsky.*

3. Extremely valuable reports of this nature, which are the property of the company, are part of the many items which were received by the defendant, removed by him from the premises and not returned to the company files.

10

MAXWELL M. BILOFSKY.  
Maxwell M. Bilofsky.

Sworn and subscribed to before me }  
this 11th day of June, 1945. }

IDA GOLDBLATT,  
A Notary Public of New Jersey.

20

INTER-OFFICE CORRESPONDENCE

OF THE

INDUSTRIAL ELECTRONICS CORPORATION

Memo to	From	Date
Mr Bilofsky	L A Burr	6/9/45

30

You will receive a request within the next few days from Mr Moeser V. P. in charge of operations Chgo Plant of Doehler Die Casting Co Division of Doehler-Jarvis Corp to call at their executive offices in New York to arrange for a contract covering our F 5-4 B Silver Point starters for their plants in Pottstown, Pa. Toledo, Ohio, Batavia, N Y, Brooklyn N Y and their offices in New York City.

40

The writer sat in at a meeting yesterday in their Chgo plant where those in attendance were Mr Miller, Chgo Maintenance Supt., Mr Moeser V P charge of operations Chgo plant and an engineer from New York.

*Supplement Reply Affidavit of  
Maxwell M. Bilofsky.*

The question came up by the engineer from New York (name has slipped my mind) about the price of starters as being purchased by the Chgo plant.

In plain words, why was Chgo paying more than other plants who were buying other starters. 10

Mr Miller and Mr Moeser argued our case without the writer opening his mouth, in fact I learned a few things just listening to two outsiders sell our starters to their executive office boss from New York, in fact they did such a good job that the engineer from New York then asked "If they are as good as you say, why hasn't New York Office been advised so that the information can be passed along to our other plants?"

That question of course stopped me as you will find in Mr Harper's file a letter that I wrote to him sometime ago to have our men call on these various plants, but I heard nothing from him on this subject. 20

Chgo plant has about 5,500-40 Watt tubes, and where they have bought only 325 or 348 starters, they are replacing all of their old starters as they burn out with our starters.

Mr Miller openly admitted yesterday that our starter gave him better performance by far than any starter he had ever used and you can quote him. 30

Chgo plant has been buying on a guarantee price of 95¢ at first and then 72¢.

Mr Moeser asked me about a better price for their plants and I told him, I thought the best price that you (Mr. Bilfsky) would quote them would be 72¢ less 25% with a 90 day guarantee for defective workmanship and that is the way Chgo is going to buy in the future. 40

*Affidavit of William B. McGuirk.*

These people are the largest (before and will still be after the war) die casting company in the United States and it might be advisable for you to see them personally in New York when you get Moeser's letter as I am working on Mr Miller to put some of our tubes in his plant.

10 *Stick to the price of 72¢ less 25% discount*

Regards

L A Burr

**Affidavit of William B. McGuirk.**

IN CHANCERY OF NEW JERSEY.

148-465.

20

Between

INDUSTRIAL ELECTRONICS CORPORATION, a New Jersey corporation,  
Complainant,

and

30

HOWARD D. HARPER,  
Defendant.

On Bill, etc.  
Affidavit.

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

WILLIAM B. MCGUIRK, of full age, being duly sworn, according to law, upon his oath deposes and says:

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*Affidavit of William B. McGuirk.*

1. I am the general office manager of complainant company, and have been in its employ since January 1, 1944.

2. I know Mr. Howard D. Harper, who was employed as the general sales manager of the complainant. I received all of the mail and opened and distributed the same. Mail addressed to the sales department was turned over by me to Mr. Harper. I have searched the files of the company and I am unable to find the original letters, which I turned over to him since the first of the year. These letters were written to the company by customers and by salesmen. 10

3. Mr. Harper stated to me that if I would cooperate with him, we could make more money outside of the business conducted by the complainant company. 20

4. Although Mr. Harper was the sales manager, he did not tend to his duties regularly. He was not in the office on many days. Letters remained unanswered. We received frequent telephone calls for Mr. Harper for information in connection with sales, and because of Mr. Harper's absence these telephone calls were not taken care of in the usual course of business. I can definitely state that Mr. Harper was not interested in promoting the sales of the company. This is due, of course, to the fact that he was not in the office regularly and was very negligent in taking care of his telephone calls and answering letters, many of which related to orders and information in connection with our products. 30

5. Mr. Harper opened offices in various cities in his own name. He did not use the name of the complainant company, although he was under an 40

*Affidavit of William B. McGuirk.*

agreement to do so. As one indication, I exhibit a bill of the landlord of the Chicago office.

WILLIAM B. MCGUIRK.

10 Sworn and subscribed to before me }  
this 7th day of June, 1945. }

IDA GOLDBLATT,  
A Notary Public of New Jersey.

INVOICE

Telephone Harrison 7490

20 CHICAGO OFFICE SERVICE AGENCY  
8th Floor  
20 East Jackson Boulevard

Date April 1, 1945

Name HOWARD HARPER

.....		
Bal. from Prev. Invoice.....	\$	.....
Rent for April.....	\$	12.50
Postage .....	\$	.....
Local Phone Calls.....	\$	.....
30 Long Distant Toll.....	\$	.....
Misc. Charges	Ext.....	\$ 1.50
Total Amount Due.....	\$	14.00

Itemized Toll Charges

.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....

**Affidavit of Morris Edward Starrett.**

IN CHANCERY OF NEW JERSEY.

148-465.

<p>Between</p> <p>INDUSTRIAL ELECTRONICS CORPORATION, a New Jersey corporation,</p> <p style="text-align: center;">Complainant,</p> <p style="text-align: center;"><i>and</i></p> <p style="text-align: center;">HOWARD D. HARPER,</p> <p style="text-align: center;">Defendant.</p>	}	<p>10</p> <p>On Bill, etc. Affidavit.</p>
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STATE OF NEW JERSEY, }  
COUNTY OF ESSEX. } ss.:

MORRIS EDWARD STARRETT, of full age, being duly sworn, according to law, upon his oath deposes and says:

1. I am the metropolitan area (New York and New Jersey) manager of Industrial Electronics Corporation, and have been such for over two and one-half years. 30

2. I sell the products of the complainant company in this area.

3. I know Mr. Howard D. Harper, and have known him for over six years. Mr. Harper was formerly in the employ of the complainant.

4. On several occasions and particularly about a month ago Mr. Harper advised me that he was 40

*Affidavit of Morris Edward Starrett.*

going into business for himself. Mr. Lee Sim-  
mons, a sales agent for the complainant company,  
talked to me about three weeks ago and informed  
me that he gave Mr. Harper a list of the accounts  
in the New Jersey area for the purpose of turning  
10 the list and he refused to turn it over to me and  
I never received the list.

5. Mr. Harper also advised me at the same time  
that he had some dispute with the complainant  
company and that he has in his home records  
which belonged to the complainant company,  
which he contended belonged to him, and which  
he refused to return to complainant company.

20

MORRIS E. STARRETT.  
Morris Edward Starrett.

Sworn and subscribed to before me }  
this 7th day of June, 1945. }

IDA GOLDBLATT,  
A Notary Public of New Jersey.

30

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**Affidavit of Louis Scheff.**

IN CHANCERY OF NEW JERSEY.

148-465.

Between INDUSTRIAL ELECTRONICS CORPO- RATION, a New Jersey corpora- tion, <p style="text-align: center;">Complainant,</p> <p style="text-align: center;"><i>and</i></p> HOWARD D. HARPER, <p style="text-align: center;">Defendant.</p>	}	10  On Bill, etc. Affidavit.
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STATE OF NEW JERSEY, COUNTY OF ESSEX.	}	ss.:
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LOUIS SCHEFF, being duly sworn, deposes and says:

1. That he is a certified public accountant engaged by Industrial Electronics Corporation.
2. That one, John Nehrbass, a franchise agent for said Industrial Electronics Corporation, was discharged by said company on or about September 15, 1944.
3. That thereafter, about October 15, 1944 an action for goods sold and delivered was instituted by General Electric Company in Milwaukee, Wisconsin, against Industrial Electronics Corporation and John Nehrbass arising out of merchan-

*Affidavit of Louis Scheff.*

dise purchased by John Nehrbass for his own account.

10 4. That attorney J. J. Silber of Milwaukee, Wisconsin, was retained to defend said action and on or about November 13, 1944 he requested various letters and correspondence between Industrial Electronics Corporation and John Nehrbass.

5. Your deponent requested the licensee file on John Nehrbass, which should normally be closed and in the office of the company, from H. D. Harper, the general sales manager, and was told by Harper that it was not in the office but in his possession, but would be available in a few days.

20 6. That thereafter said file was made available and subsequently thereafter the file again was missing from the filing case it should have rested in. At the same time an agreement between one, Earl Ewing, a licensee, and John Nehrbass was required in the General Electric Company litigation, and the Ewing file was missing from the filing cabinet. It was subsequently produced by Harper and later on it was missing again and it is still missing.

30

LOUIS SCHEFF.  
Louis Scheff.

Sworn and subscribed to before me }  
this 11th day of June, 1945. }

IDA GOLDBLATT,  
A Notary Public of New Jersey.

40

**Affidavit of Cornelius J. Kennedy.**

IN CHANCERY OF NEW JERSEY.

148-465.

Between

INDUSTRIAL ELECTRONICS CORPORATION, a New Jersey corporation,

Complainant,

*and*

HOWARD D. HARPER,  
Defendant.

10

On Bill, etc.  
Affidavit.

20

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

CORNELIUS J. KENNEDY, of full age, being duly sworn, according to law, upon his oath deposes and says:

1. I am General Field Sales Manager of the complainant and have been associated with it since September 1942.

30

2. My duties require me to contact all of the licensees located throughout the country and to interview prospective licensees to work under the prime licensees.

3. I returned to Newark from my last field trip on May 28, 1945. On Tuesday, May 29, 1945 I wanted to review applications of certain licensees as to their past histories, preparatory to contacting them on my next field trip for the purpose of possible expansion of their territory as requested by them.

40

*Affidavit of Cornelius J. Kennedy.*

I requested the office manager to permit me to examine the applications and I was with him when he discovered that he could not find many of them in the company files where they belonged.

10 4. Since April 1, 1943 I have mailed from the field to the company, attention of Mr. Harper, approximately 25 signed applications by prospective licensees, many of which I now discover are not in the company's files.

20 5. In September 1944 Harper transferred the telephone listing of a discharged Milwaukee licensee into his own name instead of that of the prime licensee in that area. Mr. Bilofsky wrote to me that Harper had no right to do so and directing him to transfer the listing to the prime licensee.

I met Harper at his hotel room in Milwaukee and he told me that he had quit and suggested that I quit also. I told him that I would act for myself without any suggestions from him.

30 6. Several licensees complained to me that Harper's letters were demoralizing them and I suggested to Mr. Bilofsky that he take over the correspondence with these particular licensees. In other instances the licensees complained that Harper was not answering their letters.

CORNELIUS J. KENNEDY.

Sworn and subscribed to before me }  
this 11th day of June, 1945. }

IDA GOLDBLATT,  
A Notary Public of New Jersey.

**Affidavit of William T. Mullally.**

IN CHANCERY OF NEW JERSEY.

148-465.

<p>Between</p> <p>INDUSTRIAL ELECTRONICS CORPORATION, a New Jersey corporation,</p> <p style="text-align: center;">Complainant,</p> <p style="text-align: center;"><i>and</i></p> <p style="text-align: center;">HOWARD D. HARPER,</p> <p style="text-align: center;">Defendant.</p>	}	<p>10</p> <p>On Bill, etc. Affidavit.</p>
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STATE OF NEW JERSEY, }  
COUNTY OF ESSEX. } ss.:

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WILLIAM T. MULLALLY, of full age, being duly sworn, according to law, upon his oath deposes and says:

1. I am engaged in the general advertising business, and my office is located at No. 247 Park Avenue, New York City. 30

2. I have been in charge of the advertising program of the complainant company since its inception.

3. I know Howard D. Harper, the defendant herein, and have known him since April 1943. I have had intimate contact with him by reason of the fact that Mr. Harper, who was the sales manager, was instructed by Mr. Bilofsky, the Presi- 40

*Affidavit of William T. Mullally.*

dent of the complainant company, to cooperate with me in the advertising program. On a great number of occasions over this period of time, I spoke with Mr. Harper for the purpose of getting such cooperation. He failed to cooperate. In fact, on some occasions he refused to assist me in order to help develop the sales of the complainant company.

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4. On many occasions I talked to Mr. Harper about his lack of cooperation and advised him that he was not cooperating and was hurting the development of a competent and adequate sales force.

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5. I can definitely state from my close contact with Mr. Harper that he did everything within his power to obstruct the development of a good sales force.

WILLIAM T. MULLALLY.  
William T. Mullally.

Sworn and subscribed to before me }  
this 8th day of June, 1945. }

30 CATHERINE E. MANNING,  
A Notary Public of New Jersey.  
(Catherine E. Manning)

40

**Affidavit of Frank Ruse.**

I, FRANK RUSE, of St. Paul Apartments, Baltimore, Md. make the following affidavit:

Mr. Harper told me that he was going into business and would get plenty of merchandise to sell. That he contemplated going into business and did everything in his power to break down the morale, both of myself and my men. My men instructed me and I in turn instructed the office not to have Mr. Harper send them any mail to my men as the mail that he did send to them was very antagonistic and hard for my men to stay on the job. He never gave me any help although he has promised to do so many times. 10

While working in Essex, Hudson and Union Counties, before my going to Baltimore, I made frequent trips, often times daily trips, to the office at 80 Bank Street and have very seldom seen Mr. Harper in the office. 20

FRANK RUSE.

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

Sworn to before a Notary Public this 9th day of June, 1945.

WILLIAM B. MCGUIRK 30  
FRANK RUSE

**Affidavit of D. C. Downing.**

June 8, 1945

Mr. M. M. Bilofsky  
 Industrial Electronics Corp.  
 Newark, New Jersey.

Dear Mr. Bilofsky:

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Approximately ninety days ago, Mr. Howard D. Harper, who at the time was employed by Industrial Electronics Corp. as General Sales Manager, was riding in my car toward Springfield, Ohio. During our conversation, I mentioned the fact that I had never been to California. He asked me if I'd like to go there. I replied that I would. He then made the remark that "I have been thinking of going into business for myself in California and I'm sure I could take most of the men in the

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company along with me. I'm tired of working for someone else and I know that if we can get together that we should make enough money in the next few years to be able to retire."

These may not be the exact words but the conversation was definitely disturbing to me at the time because I naturally felt that the General Sales Manager of an organization should not make such remarks to a man who he had only six months back sold the idea of making his present job last

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a lifetime.  
 With best personal regards I remain,

Sincerely yours,

D. C. Downing

STATE OF OHIO, }  
 CUYAHOGA COUNTY. } ss.:

Sworn to before me a Notary Public this 8th day of June, 1945.

40

W. R. WALKER,  
 Notary Public.

My commission expires 1/3/1946.

**Opinion.**

## IN CHANCERY OF NEW JERSEY.

Between INDUSTRIAL ELECTRONICS CORPO- RATION; a New Jersey corpora- tion,  <div style="text-align: right;">Complainant,</div> <div style="text-align: center;"><i>and</i></div> <div style="text-align: right;">HOWARD D. HARPER,          Defendant.</div>	}	On Bill.           10 Docket 148. page 465. Opinion.
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(Decided September 4, 1945.)

Appearances:

MESSRS. FURST &amp; FURST, for complainant.

MR. WILBUR J. BERNARD, for defendant.

The defendant, employed as sales manager by complainant, obtained possession of certain letters, documents, etc., valuable to complainant in its business which he refuses to return. *Held*, equity has jurisdiction to enforce the restitution or delivery of such letters and documents which have a peculiar artificial value, and for which, therefore, adequate compensation cannot be obtained at law.

STEIN, V.-C.

This is a motion to strike complainant's bill and is also the return day of an order to show cause why the defendant should not be enjoined from divulging the business secrets of complainant and

*Opinion.*

from copying, removing, destroying or in any way disposing of the salesmen's correspondence, copies of replies from salesmen to the sales manager, copies of letters from the home office to salesmen, copies of monthly statements to salesmen, copies of weekly payroll sheets and customers' correspondence generally.

10 The bill charges that these letters and documents are vital to the continued operation of its business; that it is engaged in the sale and distribution of industrial lamps and lights and that the foundation of its business is the good will of its salesmen and their customers; that the withholding by defendant of these letters and documents will cause it irreparable harm and monetary damage, impossible of calculation. The bill  
20 prays discovery and that it be decreed that the defendant deliver up possession of the letters and documents taken by him from the files of complainant during the course of his employment as its sales manager.

30 Complainant employed a staff of salesmen and district managers, located throughout the country. The bill alleges that the defendant was its sales manager, and as such, managed the sales and distribution of the products of the Company, managed the salesmen, district managers and divisional sales managers, and possessed the power to employ and discharge salesmen, subject to the approval of the Company; that the greater  
40 portion of the letters and documents removed by the defendant were by him taken to his home where he still retains the same after demand upon him to return them, and that the defendant has threatened to go into the same business as that of complainant.

*Opinion.*

The motion to strike is denied. The suit is one in the nature of equitable replevin and discovery.

“This court has jurisdiction to enforce the restitution or delivery of a specific chattel, which has a peculiar artificial value, and for which, therefore, adequate compensation cannot be obtained at law; and that, too, whether possession has been got by the wrong-doer through a trust or not.” *Pattison v. Skillman*, 34 N. J. Eq. 344. “\* \* \* The doctrine applicable to the delivery up of title deeds also ‘applies to other instruments and securities, such as bonds, negotiable instruments and other evidences of property, which are improperly withheld from the persons who have an equitable or legal interest in them.’” *Schrafft v. Wolters*, 61 N. J. Eq. 467, 48 A. 782.

The jurisdiction of the Court in matters such as are presented in the instant case is supported by a wealth of authority. *Burr v. Bloomsburg*, 101 N. J. Eq. 615, 138 A. 876; *Redmond v. New Jersey Historical Society*, 132 N. J. Eq. 464, 28 A. 2d, 189; *Ipswich Mills v. Dillon*, 157 N. E. 604, 53 A. L. R. 792; *Union Switch & Signal Co. v. Sperry*, 169 Fed. Reporter 926.

On the return of the order to show cause, the answer of the defendant and the defendant’s affidavit annexed thereto admits that he had “some odds and ends of correspondence” which he returned to their proper files, but he also says that he has “four folders containing correspondence with the prime licensees whom I was to interview \* \* \*”, and “I admit I have certain material in my possession; but I say that they involve no business secret; and that they are useless and

*Opinion.*

worthless to me. \* \* \*” He says he has four licensee folders, the contents of which “\* \* \* are, and could be, of no value to me \* \* \*” and are of no value to “\* \* \* to any one other than to complainant. \* \* \* I have had this folder at my home for some time. \* \* \*” He admits the possession

10 of monthly statements to salesmen and of weekly payroll sheets of licensees which he says are copies of original records and statements and claims them as his property. And while he denies the complainant’s charge that he intended to go into business for himself, he says that he concedes that “I may have said that I would like to go into business for myself. But this idea I have—like most men—always had. \* \* \*”

20 Certainly the defendant who is no longer employed by complainant cannot be harmed by the injunction pending final hearing, and on this application the Court must consider what injury the defendant might suffer from an injunction, assuming that he shall prevail at final hearing and what injury might be done complainant if the injunction be denied and yet complainant should finally win. So considering the matter, and in order to maintain the *status quo*, I shall advise an

30 order enjoining the defendant until the further order of the Court from divulging the business secrets of complainant and from copying, removing, destroying or in any way disposing of the salesmen’s correspondence, copies of replies from the salesmen to the sales manager, copies of letters from the home office to the salesmen, copies of monthly statements to salesmen, copies of weekly payroll sheets, customers’ correspondence, copies of correspondence between the home office and customers, inter-office correspondence

40 and sales literature.

Present an order.

**Order Denying Motion to Strike Bill of  
Complaint and Continuing Injunction.**

(Filed June 26, 1945.)

IN CHANCERY OF NEW JERSEY.

148-465.

Between

INDUSTRIAL ELECTRONICS CORPO-  
RATION, a New Jersey corpora-  
tion,

Complainant,

*and*

HOWARD D. HARPER,  
Defendant.

On Bill, etc.  
Order Denying  
Motion to Strike  
Bill of  
Complaint and  
Continuing  
Injunction.

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This matter being opened to the Court upon the return of a notice of motion for an order striking the bill of complaint filed herein, and upon the continued return date of an order to show cause dated May 22, 1945, directed to the defendant why the *interim restraint* heretofore granted against the said defendant should not be continued until the further order of the Court, and the Court having considered the bill of complaint and the affidavit filed herein on behalf of complainant, and the answer and affidavit on the part of the defendant, and having heard and considered the arguments of Wilbur J. Bernard, solicitor for the defendant, Howard D. Harper, and of Furst & Furst, solicitors for the complainant, Industrial Electronics Corporation;

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*Order Denying Motion to Strike Bill of  
Complaint and Continuing Injunction.*

IT IS, on this 26th day of June, 1945, on motion of Furst & Furst, solicitors aforesaid,

ORDERED: That the motion to strike the bill of complaint be and the same is hereby denied; and it is further

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ORDERED: That until the further order of this Court the defendant, Howard D. Harper, be and he is hereby enjoined and restrained from divulging the business secrets of complainant and from copying, removing, destroying or in any way disposing of the salesmen's correspondence, copies of replies from the salesmen to the sales manager, copies of letters from the home office to salesmen, copies of monthly statements to salesmen, copies of weekly payroll sheets, customers' correspondence, copies of correspondence between the home office and customers, inter-office correspondence, sales literature and miscellaneous material.

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Respectfully advised,

ALFRED A. STEIN,  
V.-C.

LUTHER A. CAMPBELL,  
C.

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The foregoing is hereby approved as to form.

WILBUR J. BERNARD,  
Wilbur J. Bernard,  
Solicitor for Defendant.

**Notice of Appeal.**

(Filed July 20, 1945.)

IN CHANCERY OF NEW JERSEY.

148-465.

Between

INDUSTRIAL ELECTRONICS CORPORATION, a New Jersey corporation,

Complainant,

*and*HOWARD D. HARPER,  
Defendant.

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On Bill, etc.  
Notice of  
Appeal.

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The defendant hereby appeals from the interlocutory order made by Vice-Chancellor Stein in the above entitled cause on June 26, 1945, and from every part thereof, to the Court of Errors and Appeals in the Last Resort in all Causes.

WILBUR J. BERNARD,  
Wilbur J. Bernard,  
Solicitor for and of Counsel with  
Defendant. 30

Dated: July 1945.

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

WILBUR J. BERNARD,  
Wilbur J. Bernard,  
Of Counsel with Defendant. 40

**Petition of Appeal.**

(Filed August 9, 1945.)

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

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Between

INDUSTRIAL ELECTRONICS CORPO-  
RATION, a New Jersey corpora-  
tion,

Complainant-Appellee,

*and*HOWARD D. HARPER,  
Defendant-Appellant.

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On Appeal from  
the Court of  
Chancery.  
Petition of  
Appeal.*To the Honorable the Court of Errors and  
Appeals in the last resort in all causes:*

The petition of Howard D. Harper, the appel-  
lant in the above entitled cause, respectfully  
shows that:

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1. Petitioner finds himself aggrieved by an in-  
terlocutory order made in the Court of Chancery  
by his Honor Luther A. Campbell, Chancellor of  
the State of New Jersey, bearing date June 26,  
1945, in a certain cause in said Court of Chan-  
cery wherein the said Industrial Electronics Cor-  
poration, a New Jersey corporation, was com-  
plainant and the said Howard D. Harper was de-  
fendant in this respect, to wit, that the said order  
adjudges that the defendant, Howard D. Harper,  
be and he is hereby enjoined and restrained from  
divulging the business secrets of complainant and

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*Petition of Appeal.*

from copying, removing, destroying or in any way disposing of the salesmen's correspondence, copies of replies from the salesmen to the sales manager, copies of letters from the home office to salesmen, copies of monthly statements to salesmen, copies of weekly payroll sheets, customers' correspondence, copies of correspondence between the home office and customers, inter-office correspondence, sales literature and miscellaneous material; and also that the said order denied defendant's motion to strike the bill of complaint filed by complainant in this cause. 10

And petitioner appeals from the order of the Chancellor which orders as aforesaid, upon the grounds that the same is erroneous in that

(1) There are no facts set forth in the bill and affidavit annexed to the bill on which to base either the *ad interim* restraint or the interlocutory order of June 26, 1945. 20

(2) There are no facts set forth in the reply affidavits filed by the complainant on which to base the interlocutory order of injunction of June 26, 1945; and that the court erred in considering the matters set up in the reply affidavits because they violate Rule 214 of the Rules of the Court of Chancery of the State of New Jersey. 30

(3) The bill of complaint discloses no cause of action which entitled complainant to relief in a court of equity.

(4) Complainant has an adequate remedy at law.

(5) The complainant shows no irreparable wrongs or threatened irreparable wrongs by de- 40



## New Jersey Court of Errors and Appeals

Between

INDUSTRIAL ELECTRONICS CORPORATION, a New Jersey corporation,  
Complainant-Appellee,

and

HOWARD D. HARPER,  
Defendant-Appellant.

On Bill, etc.  
On Appeal from  
the Court of  
Chancery.

### BRIEF OF DEFENDANT-APPELLANT.

#### Statement.

This is an appeal from an order of the Court of Chancery of New Jersey, dated June 26, 1945, denying defendant-appellant's (hereafter called the defendant) motion to strike the bill of complainant-appellee (hereafter called the complainant) for want of equity and for continuing an injunction *pendente lite*.

#### Facts.

The bill of complaint and its supporting affidavit states that complainant, a corporation, engaged in the sale and distribution of industrial lamps and lights, employs a staff of salesmen throughout the country; that the foundation of its business is the good will of the salesmen and their customers, the lists of salesmen and customers, the leads and the methods of dealing with salesmen and customers; that defendant was employed as Sales Manager and, as such, had ob-

tained possession of letters and correspondence, literature and miscellaneous material and had failed to return them though its president had repeatedly requested him to do so. (But it fails to describe or identify one piece of paper it seeks returned.) It further states that its president, agreed, on agreement of the return of the papers, to consider a new employment contract. It charges that the material is vital to the continued operation of its business; that the disappearance of the material would cause it irreparable harm and that the monetary damage would be impossible of calculation; that defendant had stated he intended to go into business for himself and would divert the property to his own use.

On these facts complainant seeks the following relief: (a) that a decree may be made stating that defendant occupies a confidential relationship with complainant and was under the duty and obligation not to remove the papers from the files; (b) that he be enjoined from divulging the business secrets and from copying the papers and directing their return and directing the delivery to complainant of all notes and memoranda thereof transcribed by him; and (c) that he make discovery of all papers he has in his possession belonging to complainant.

The verified bill, however, fails to identify a single piece of paper or correspondence; it simply makes the bland statement that defendant has papers and correspondence; it fails to charge that defendant has done any wrong, or threatened any wrong, other than he had stated he intended to go into business for himself. Complainant then concludes that the material would be diverted to defendant's own use to the detriment and at the expense of complainant and in violation of the trust reposed in him as sales manager. It does

not charge that defendant threatened to use the material; it simply concludes that, if defendant went into business, he would use the material. The court is left in the dark as to what the material is, its importance, and its vitalness. Complainant simply concludes that its absence would cause irreparable harm.

It is contended from the nature of complainant's business—sale and distribution of industrial lamps and lights—that defendant had the legal right, at the termination of his employment with complainant, to go into business for himself and that he could use any knowledge or information he acquired while in the employ of complainant, even to the soliciting of its customers. (See *Avalene Exterminating Co. v. Elges, et als.*, 137 N. J. E. 1 and Point 2 of this brief). And this right to go into business and compete against complainant is fortified by the fact that complainant discharged defendant although his contract still had approximately three years to run (S. of C., p. 23, l. 47).

Although complainant claims irreparable injury, still it fails to identify or describe, as to subject or salesman or customer, a single paper, form or letter or anything else that defendant is supposed to have in his possession. Defendant, on the other hand, in his answer, frankly admits and makes discovery of everything in his possession at the time of his discharge, which, he claims, was subsequent to the commencement of this suit and the signing of the *ad interim restraint*, but which complainant claims was on the same day. The items of material—which defendant listed but which complainant does not or could not—are set forth and explained fully in his answer (S. of C., p. 17, l. 19 on; pp. 18, 19 and 20, ll. 1 to 11). But these can hardly, from their nature, be considered the subject of an injunction or of an order

of restoration; and this particularly so because they were needed—except the file on R. A. MacDougall and this one was valueless and worthless—by defendant in the pursuit of complainant's business and this suit was started and the *ad interim* injunction signed before, as defendant claims, he was discharged; or, at least, as complainant claims, contemporaneously with it.

Defendant, in his answer, admits that he was so employed as sales manager on a contract which would expire on March 31, 1948; that up to May 14, 1945, 8 days before the bill herein was filed and the *ad interim* injunction signed, complainant was negotiating a new contract with him (and this notwithstanding that his existing contract still had approximately three years to run); and that within the said eight days after defendant's refusal to sign a new contract, the bill in this cause was filed. It seems strange that complainant was trying to negotiate a new contract—although the old one had approximately three years to go—with a many-sided wrong-doer. A corporation, the size of complainant, doing a gross yearly business of more than half a million dollars, would hardly on May 14, 1945 be negotiating to have its sales manager sign a new contract, when on May 22, 1945, it filed a bill and secured an *ad interim* restraint on facts which it knew long prior to May 14, 1945. It sounds preposterous and taxes credulity.

Defendant, in his answer, further states that at the time of his dismissal—which was the date this suit was instituted—he was in Buffalo, New York, and had with him four folders containing correspondence with prime licensees (called district sales managers in the bill of complaint and in the opinion of the learned Vice-Chancellor) for the purposes of interviewing and instructing these

men. He had no opportunity to return these folders because, while travelling on the business of complainant, this suit was commenced and an *ad interim* restraint signed, before he was notified of his summary and unjustifiable dismissal.

Defendant further, in his answer, sets forth all of complainant's material in his possession at the time of his discharge. It consisted of the usual gear which a sales manager, in the pursuit of his employer's business, would normally have with him. Listed, they read as follows:

- (a) Price list of articles sold by complainant.
- (b) Copy of fuse parts inventory.
- (c) Blue Print showing specification for fluorescent drop cord lamp.
- (d) Four licensee folders.
- (e) Folder marked R. A. MacDougall.
- (f) One Order pad of Magno Tronic Silver Point Starters.
- (g) One 1945 Spring Sales Contest Bulletin.
- (g) Loose Leaf Sales Note Book.
- (h) Loose Leaf Sales Note Book.
- (i) Stationery of Complainant.
- (j) Franchise and sub-licensee agreements.

All of this material, as already said, would normally be in the possession of a sales manager in the pursuit of his duties. They are his tools. They are hardly material for an injunction; and, under the circumstances of this case, could not be.

Defendant denies that he ever wilfully removed any material from the files of complainant to his home. He had taken files and other material prepa-

ratory to making trips or for study and had always returned them. Defendant admitted that he had some odds and ends of correspondence when he received complainant's letter of May 4, 1945; but he had returned them.

Defendant denies that he has any material vital to complainant in its continued operation or the absence of which would cause irreparable harm and loss of a sum of money that would be impossible to calculate.

Defendant denies the charge that he said he intended to go into business for himself. He frankly admits he might have said that he would like to go into business for himself. But this idea, he said, he always had. And he denied specifically that he had formed any intent or done any act whatsoever in carrying out such an intention of going into business. But it is unimportant whether defendant's statement was an intention or a wish; he had that right, after the termination of his employment with complainant. (See *Abalene Exterminating Co. v. Elges, et al.*, 137 N. J. E. 1 and Point 2 of this brief.)

Complainant filed reply affidavits consuming twenty-two pages of the state of case (S. of C., pp. 31 through 52). They are all made by employees of complainant. They attempt to show that defendant had many faults. But, it is significant that nowhere in these twenty-two pages does complainant describe or identify one scrap of paper—other than those which defendant sets forth as a bill of discovery in his answer. Before discussing the facts in these affidavits, defendant believes they are not admissible, being in violation of Chancery Rule 214, which reads as follows:

When a motion is made to dissolve an injunction upon the answer, the defendant shall rely on his answer and on the affidavits an-

nexed thereto, in reply to the case made by the bill and its accompanying affidavits; and no affidavits, except those annexed to the bill, shall be read on such motion on behalf of the complainant, except in reply to new matter set up in the answer, when the defendant shall in any manner rely on such new matter for a dissolution of the injunction; affidavits for complainant in reply to new matter may be ex parte, or upon such notice, as may be ordered.

And this refusal of the court to permit reply affidavits on the motion to dissolve an injunction applies with greater force to a motion to strike a bill for injunction for failure to make out a cause of action. The bill stays or goes on the case it and its accompanying affidavit make out.

But, even if this court should consider these reply affidavits, they fall far short of shoring up the basic weaknesses of the verified bill. The nearest complainant comes—and the word “nearest” is used advisedly—is in the supplemental affidavit (and incidentally it is his third affidavit filed in the cause) of Maxwell M. Bilofsky, president and leading light of complainant corporation. He recites in this third affidavit (S. of C., p. 37) that on June 11, 1945 (twenty days after this suit was commenced) he received an interoffice communication, dated June 9, 1945, from L. A. Burr, a licensee, operating in the Chicago area, which stated, after reciting a conference he had with engineers at a Chicago plant, that “you will find in Mr. Harper’s file a letter that I wrote some time ago.” Mr. Bilofsky, in his affidavit, stated he made and caused to be made a diligent search but the letter could not be found. It is as consistent to say that the letter was misplaced or wrongly filed as it is to say that defendant has it. And furthermore this letter was received twenty days after defendant was discharged.

“Sometime ago” in the mind of an energetic salesman could mean less than twenty days; and it is reasonable to believe that the letter was received after defendant’s discharge as before it. There is no proof that defendant has this letter or that he ever saw it.

The other reply affidavits make multiple charges, many of them totally immaterial to this issue—charges which, if true, might be set up as defenses to a suit by defendant against complainant for breach of contract. But where these affidavits try to show that defendant has material vital to the continuance of its business or the absence of which would cause it irreparable loss, complainant again fails dismally in describing or identifying a single item of paper. Here are some of the charges in these reply affidavits:

William B. McGuirk, general office manager, says: “Mail addressed to the sales department was turned over by me to Mr. Harper. I have searched the files of the company and am unable to find the original letters which I turned over to him since the first of the year. These letters were written to the company by customers and by salesmen.” Yet, the general sales manager fails to describe or identify any missing letters. He makes a bald statement that letters are missing; he does not say that the defendant has them; he leaves this to conjecture. It seems peculiar that a general office manager cannot identify at least a few of the important things he looked for in his files and could not find.

Edward Starret, manager of metropolitan area (New York and New Jersey), says that a sales agent told him he gave to Mr. Harper a list of accounts in the New Jersey area to be turned over to him. He did not turn the list over. First, the

statement is hearsay; second, even if true, a list of customers in the New Jersey area is hardly secret information either to the company or to the sales manager. The defendant, by reason of his position as sales manager, would know who are complainant's customers in the home area; and, even further, upon inquiry, he could ascertain from whom any person or corporation bought electric lights and lamps. Even if it could be averred and properly verified that complainant has the list mentioned, it could not be the subject of a bill to enjoin or restore.

Cornelius J. Kennedy, General Field Sales Manager, says that on May 29, 1945 he wanted to review applications of certain licensees (salesmen) as to their past histories, preparatory to contacting them on his next field trip for the purpose of possible expansion of their territory. He requested the office manager to permit him to examine the applications and they could not find many of them in the company files where they belonged. Further he says that from April 1, 1943 he mailed from the field to the company, attention of Mr. Harper, approximately twenty-five signed applications by prospective licensees, many of which he now discovers are not in the company's files. The statement does not say that the defendant has the missing applications; it leaves that to conjecture. The General Field Sales Manager certainly must have known what applications he was looking for but could not find; yet he failed to describe or identify a single missing application. Furthermore, what irreparable harm could come from the loss of an employee's application. He can make out another application.

The reply affidavits also attempt to show many other things: that defendant intended to go into business for himself; that he had gone into busi-

ness for himself and opened up a number of offices; that he failed to cooperate; that he was inefficient, harmful and even disloyal. All these charges were thrown in, no doubt, to justify its summary dismissal of defendant. As a matter of fact the gist of complainant's affidavits seems to be an attempt to justify its dismissal of defendant rather than an attempt to prove a vital or irreparable loss. Whether or not the affidavits justify the dismissal is not a question to be decided in this suit; it might be a good defense in a suit by defendant against complainant for breach of contract; it should be set up when called upon in such a suit, but not in this suit.

The event, admitted by complainant, which condemns all its statements into the abyss of falsity is the one where we find complainant, eight days before this suit is started and long after knowledge of these claimed acts of wrong, inefficiency, perfidy, disloyalty, and even dishonesty, attempting to negotiate a new contract of employment with defendant. No employer would negotiate a new or amended contract with a scoundrel such as the affidavits attempt to characterise the defendant. Not only does complainant fail to make out a cause of action in its verified bill, but he also tinges his entire cause with bad faith.

## LAW.

### POINT ONE.

**The bill of complaint discloses no cause of action which entitled complainant to relief in a court of equity.**

The verified bill discloses no cause of action; for nowhere does it describe or identify a paper, a file or other property which it claims the de-

fendant has. No particular paper, letter, file of a customer or a salesman, or of any subject of sale is set forth. It fails to show how the material, which it cannot identify, is vital to its existence or the absence of which would cause irreparable loss or harm to it, except that it intimates that defendant would or could use these undescribed, unidentified and unascertained papers to his own advantage in his business, which, it claims, he intended to start, but which, so far as the bill charges, is still in the thinking or dream stage. There is no charge that defendant is actually in the process of starting a competing business nor that he threatened to use the unspecified material, even if he did compete; and there is no charge that he copied or threatened to copy these unidentified papers.

The conclusion which complainant attempts to reach is that defendant would use information and knowledge which he acquired in complainant's employ for his own advantage in his own business, after he was discharged from complainant's employ. Having been sales manager of complainant's corporation practically since its inception and having seen and been instrumental in the growth of the business from \$1,000.00 a week to \$10,000.00, and in the development of complainant's sales force, defendant knows who the customers and the salesmen are. Furthermore complainant has the right, after his discharge as an employee of the complainant, to start his own business or to be employed by a competing concern and to solicit the customers of his former employer. (See *Abalene Exterminating Co. v. Elges, et als.*, 137 N. J. E. 1 and cases listed under Point two of this brief.)

The irreparable loss which complainant concludes it will suffer is the customers it might lose

if defendant goes into business for himself or is employed by a competitor. There are two things wrong with this conclusion. The first is that there are no business secrets as to the identify of complainant's customers that would preclude defendant from soliciting them after his discharge by complainant. The second is that facts and not the conclusions or opinions of the pleader must be stated in the bill of complaint. *Cooper v. Cooper*, 5 N. J. E. 498; *Capner v. Flemington Mining Co.*, 3 N. J. E. 467; 32 C. J. 322. The bill of complaint must allege facts from which the court can see that the alleged injurious acts sought to be enjoined will in all probability be committed by defendant. *Penna Rd. Co. v. National Docks*, 52 N. J. E. 55; *German Evangelical Lutheran Church v. Marship*, 10 N. J. E. 57; *Kean v. Colt*, 5 N. J. E. 365, 32 C. J. 327. A bill will not be sufficient where it appears therefrom only by inference and not by averment that the acts complained of are being committed or threatened. (32 C. J. 540).

## POINT TWO.

**A jobber of merchandise—whose customers are members of a readily ascertained class—cannot enjoin a former employee from engaging in competition with, or from selling to, customers of said jobber, unless so prohibited by valid contract.**

The gravamen of the bill is that defendant should be enjoined from using or divulging any information or secrets he learned while in complainant's employ as sales manager for the sale of industrial lamps and lights. Assuming that defendant intends to engage in competition with complainant in the sale of industrial lamps and

lights and that he intends to contact complainant's customers whose names he knows by reason of his employment, still complainant would not be entitled to relief.

In *Newark Cleaning & Dyeing Works v. Gross, et al.*, 97 N. J. E. 406, the court, by V.-C. Backes, decided that where an employee, after six years acting as solicitor for complainant, whose business was cleaning and dyeing and whose customers were trade people—jobbers in the cleaning and dyeing business—left and went in a like business and solicited his employer's customers, the employer was not entitled to enjoin him. The court said:

“The fact that he knows they deal with the complainant, while others know only that someone does their work, is not a trade secret, sacred to his former employer, not to be invaded now that he has launched in business for himself. If it were, there would be fewer merchants. The open door to these customers earned by his tact and contact with them, is the defendant's not his employer's gain of which he ought not to be deprived simply because he secured them as patrons of the complainant.”

And in *Lewitter v. Adler*, 101 N. J. E. 74—decided by the same Vice-Chancellor—complainant was engaged in window cleaning business and had employed defendant for six years as a window cleaner when he was discharged; he then set up in business for himself and went among his employer's customers and secured the trade of some, and was trying for more. His former employer asked that he be enjoined. It was charged “that he has been unlawfully using the information so acquired by him in the course of his employment for his own personal profit, and has been soliciting and canvassing the complainant's customers on

the said route for the purpose of procuring for himself that work given by said customers to complainant and has been taking unto himself money of said customers through the knowledge gained by him in the confidential employment as aforesaid, thereby causing complainant irreparable damage." The injunction was refused. The court said:

"It is impossible from this state of affairs to spell out any confidence broken by the defendant in entering into competition with his former employer for the trade he helped to build up, and the knowledge he got while building. Such knowledge is not of trade secrets. \* \* \* There is no covenant that he should stifle his knowledge and refrain from competing and none is implied."

These cases should not be confused with, and are distinguishable from, those where the prayer asks to enjoin the breach of a covenant not to compete. *Stone v. Grasselli Chemical Co.*, 65 N. J. E. 756; *Fleckenstein Brothers Company v. Fleckenstein*, 66 N. J. E. 252; *Taylor v. Nichols*, 73 N. J. E. 684; *Golden Cruller & Doughnut Co. v. Manasher*, 85 N. J. E. 537; *Ideal Laundry Co. v. Gugtiemone*, 107 N. J. E. 108; *Davey Tree Expert Co. v. Ahlers*, 124 N. J. E. 175; *Abalene Exterminating Company, Inc. v. Oser*, 125 N. J. E. 329; *Automobile Club of New Jersey v. Zubrin*, 127 N. J. E. 202; *Vandermay v. Schoone-Johgen*, 128 N. J. E. 336. Furthermore, most of these cases dealt with actual trade secrets and secret processes; in *Stone v. Grasselli Chemical Co.* it was the secret process of manufacturing delipators; in *Maas & Waldstein Company v. Walker* it was secret formulae; in *Taylor v. Nichols* it was a secret process of steel making.

In *Abalene Exterminating Company, Inc. v. Oser*, *supra*, there was in the contract of employ-

ment a restrictive covenant against employee from engaging in any similar business in the State of New Jersey. The employee, with his brother, engaged in a competitive business and solicited the former employer's customers; then he sold to his brother. His employer sought to restrain the brother from serving its former customers. The court, by V. C. Buchanan, said that the employer was entitled to relief whether or not there was a covenant, and criticized *Lewiller v. Adler, supra*. But in the recent case of *Abalene Exterminating Co. v. Elges, et al.*, 137 N. J. E., 1, which, it will be noted, has the same complainant, the court, through V. C. Jayne, reversed the finding of V. C. Buchanan that the employer was entitled to relief whether or not there was a covenant.

In *Haut v. Rossbach*, 138 N. J. E. 77, affirmed in 128 N. J. E. 478, the complainants, for many years, were engaged in the lunch box business; they prepared sandwiches and other foods for factory workmen. They had salesmen distribute boxes by automobile. Defendants were two salesmen who quit their employment and went into a competing business for themselves. They offer their lunches at some of the factories complainants serve. Complainants prayed to enjoin them from selling to any of their customers on any of the routes or stops heretofore served by complainants. The injunction was refused. The court said:

“The general rule is well established that unless prohibited by a valid contract, a former employe may properly sell to customers of his late employer, in competition with him.

“The general rule, and not the exception applies, where the former employer is a manufacturer or wholesaler dealing with jobbers or retail merchants. \* \* \* Likewise, where

the complainant sells to members of a readily ascertained class, even though some of the class do not buy like service or articles from anybody.”

All industries and businesses are users of lamps and lights. The class of its users are readily ascertainable and easily discoverable. Its articles of sale are sold generally in the open market. There are no secrets concerning who uses lamps and lights. Therefore, any information which defendant may have concerning complainant's customers is not in the nature of a trade secret.

### POINT THREE.

**Court of Equity will not direct the return of personal property undescribed and unidentified; nor will it direct the return of personal property described and identified unless it has some imaginary value put upon a thing by the fancy of the owner in his affection for it or for the person from whom he obtained it.**

The learned Vice-Chancellor seemed to confuse this case with those of equitable replevin. The cases he cites deal with defined articles of personal property upon which an imaginary value is placed by the fancy of the owner in his affection for it or for the person from whom he obtained it.

In *Pattison v. Skillman*, 34 N. J. E. 344, the complainant sought the return from defendant of papers, documents and testimony which proved his heirship to a foreign estate. The court held it had jurisdiction to enforce the restitution or delivery of a specific chattel which has a peculiar artificial value and for which, therefore, adequate compensation cannot be obtained at law.

In *Burr v. Bloomburg*, 101 N. J. E. 615, equity took jurisdiction to enforce the restitution of a ring which was an heirloom. The court in this case cited the two earliest cases: *Fells v. Read*, (1796), 3 Ves. 70, dealing with a remarkable tobacco vase; and *Pusey v. Pusey*, (1884), 1 Vern. 273, dealing with a horn given to the Pusey family by Danish King Canute.

The burden of proving such special value is on the one who asserts it; it cannot be presumed or concluded. *Burr v. Bloomsburg*, *supra*.

Complainant could hardly meet the burden of proof when it fails even to describe or identify the things it wants returned. Furthermore, nowhere in the verified bill does complainant make so ambitious a claim. Rather does he base his irreparable loss on the fact that defendant might go into business and use his knowledge of complainant's customers to solicit and sell them. Complainant cannot enjoin defendant from doing this. (See Point two of this brief.)

#### POINT FOUR.

**An interlocutory injunction should not issue unless complainant's right is free from doubt or reasonable dispute.**

Complainant's interlocutory order enjoins and restrains defendant from divulging the business secrets of complainant and from copying, removing, destroying or in any way disposing of complainant's papers. But there is no allegation in the bill that defendant divulged or threatened to divulge the business secrets of complainant or that he copied or threatened to copy any papers. The only allegation in the bill that defendant misused,

or threatened to misuse, any alleged secret information is that he stated he intends to go into business for himself and that "the said material, which is the property of the complainant, would be diverted to his own use to detriment and at the expense of complainant and in violation of the trust reposed in him as sales manager of complainant." Defendant, after discharge, has the legal right to go into business for himself and to solicit complainant's customers. *Salomon v. Hertz*, 40 N. J. E. 400; *Newark Cleaning and Dye Works, Inc. v. Gross*, 97 N. J. E. 406; *Mass & Waldstein Co. v. Walker*, 100 N. J. E. 224; *Lewitter v. Adler*, 101 N. J. E. 74; and others. Furthermore, the charge that defendant stated he intended to go into business is not verified in the bill and its attached affidavit by anyone who heard him make that statement. And no injunction should issue unless the bill is properly verified. Rule 210 of the Court of Chancery reads:

"Where injunction or other extraordinary relief is prayed, and the facts which are relied upon are not within the knowledge of the complainant, such facts shall be verified by the oath or affirmation of some person who has knowledge of the facts, unless under the peculiar circumstances of the case the court shall dispense with such additional verification."

Thus, complainant's rights are not free of doubt or reasonable dispute. Therefore, complainant is not entitled to the relief sought. *Brunetto v. Montclair*, 87 N. J. E. 150; *Allman v. United Brotherhood of Carpenters*, 78 N. J. E. 150; *Kitty Kelly Shoe Corp. v. United Retail Employees*, 126 N. J. E. 318.

And lastly, from the nature of complainant's business—the sale and distribution of lights and

lamps—no sales information can be a business secret for the class of users of its articles of sale can be easily ascertainable. *Haut v. Rossbach*, 128 N. J. E. 77; and other cases.

WILBUR J. BERNARD,  
Solicitor for and of Counsel  
with Defendant-Appellant.

To be argued orally by WILBUR J. BERNARD.

BRIEF OF COMPLAINANT RESPONDENT

lamps—no sales information can be a business  
 secret for the class of users of its articles of sale  
 can be easily ascertainable. *Went v. Woodcock*  
 138 N. J. 12, 13; and other cases.

In the interests of our own best interests we  
 do not desire to have our name associated with  
 the name of the defendant.

To be argued orally by **WALTER J. BERNARD**  
 Counsel for and of Counsel  
 with Defendant Applicant.

It is respectfully requested that the court  
 grant the relief requested in the foregoing  
 prayer of this petition.

WALTER J. BERNARD  
 Attorney at Law  
 100 South Street  
 Newark, N. J.

237 OCT T. 1945

**New Jersey Court of Errors and Appeals**

Between:

INDUSTRIAL ELECTRONICS CORPORATION, a New Jersey corporation,  
Complainant-Respondent,

*and*

HOWARD D. HARPER,  
Defendant-Appellant.

On Bill, Etc.

On Appeal from  
the Court of  
Chancery.

**BRIEF OF COMPLAINANT-RESPONDENT.**

(Italics and underlining ours, unless otherwise noted.)

**Statement.**

This is a suit by complainant-respondent to recover from defendant-appellant (who was its former sales manager) letters, papers and other documentary material, which are the property of respondent and which the appellant removed from its files. The suit is one in the nature of equitable replevin and discovery.

This is NOT a suit to enjoin an employee from competing with his former employer or from soliciting its customers.

Appellant appeals from the order of the Court of Chancery which denied his motion to strike the bill of complaint for want of equity (S. of C., p. 57).

To preserve the documentary material, pending final determination of this suit, the Court of

Chancery issued a temporary restraint against appellant so that he may not destroy, or copy the documentary material or divulge its contents (S. of C., p. 57).

Appellant also appeals from this restraint.

Appellant is not enjoined from going into business for himself or being employed by a competitor or from competing with complainant or from soliciting its customers.

### **Issues.**

The appeal raises only two issues:

- I. Whether a Court of Equity has jurisdiction of an action by an employer to compel an employee to surrender and turn over to his employer papers, records and correspondence which he removed from the files of the employer.**
- II. Whether, pending final hearing, a Court of Equity may restrain the former employee from destroying, copying or removing the said papers and divulging their contents.**

### **ARGUMENT.**

#### **I.**

**A Court of Equity has jurisdiction of an action by an employer to compel an employee to surrender and turn over to his employer papers, records and correspondence which he removed from the files of the employer.**

The bill of complaint, briefly summarized, alleges that appellant had been employed by respondent as its sales manager and that by reason of his employment he had received:

“salesmen’s correspondence, copies of replies from the salesmen to the sales manager, copies of letters from the home office to salesmen, copies of monthly statements to salesmen, copies of weekly payroll sheets, customers’ correspondence, copies of correspondence between the home office and customers, inter-office correspondence, sales literature and miscellaneous material”

all of which was the property of respondent, and that he had removed the greater portion of this material from the files and premises of the respondent to his own home; that on May 4, 1945 respondent served a written notice upon appellant to return the papers and records enumerated and identified in said demand (Exhibit A of Bill of Complaint, S. of C., p. 8); that appellant had failed and refused to return the material; that the material is vital to respondent and its disappearance would cause it irreparable harm and that the monetary damage would be impossible of calculation. (S. of C., p. 1)

The bill of complaint then prays that appellant be adjudged to occupy a confidential relationship and that he is under a duty and obligation not to remove the correspondence and other material from the files and premises of respondent; that he be enjoined from divulging the business secrets contained in said material and from copying same, and be directed to return the material to respondent; and that he make discovery under oath as to the whereabouts of all documents and material of respondent which came into his possession.

Appellant has misconceived the nature of the suit and the relief sought. Respondent does not seek to enjoin appellant as a former employee from engaging in competition with it or from sell-

ing to customers of respondent. The bill of complaint alleges that the appellant has come into possession of various documents and material of respondent, while acting as its sales manager and seeks only the return of the documents from the appellant and discovery as to all documents of respondent which came into his possession.

*Nowhere in its bill of complaint does respondent charge that appellant has not the right to engage in his own business or to compete with it or to solicit its customers, and nowhere does it pray for any such relief.*

The bill of complaint does charge, however, that an employee has no right to walk off with the correspondence, records and files of his employer and that he should be directed to return them.

The bill is one in the nature of equitable replevin and discovery from an employee who as salesmanager occupied a confidential relationship.

*It is the settled law that an employer is entitled to have his employee turn over to his employer papers, records, correspondence and other material, which the employee removed from the files of the employer. Cases on the point have been collected at 93 American Law Reports, Page 1323.*

In *Union Switch & Signal Co. v. Sperry*, 169 Fed. Reporter 926 (C. C. S. D. N. Y.), the defendant was employed as manager of the New York office of the complainant. By reason of his being in charge of the New York office, he had access to the records, confidential and otherwise, of the company, "copies of reports, letters, diagrams, blue prints, and photographs relating to the complainant's business the defendant kept in a so-called personal file." Without the knowledge or consent of the complainant, the defendant walked

off with this file, and the bill of complaint asked the return of the material. The Court stated:

“Some of the articles involved in this proceeding were photographs and blue prints made public by the complainant, and upon hearing were not urged to be included in the decree. Aside from those articles, I am satisfied, from an examination of the exhibits and the evidence that they are the property of the complainant, and that the defendant’s possession thereof is unjust and unlawful. It is unnecessary in this case to discuss the distinction between carrying away and making use of mental information and carrying away and making use of documents. The facts in this case only apply to the latter, which is a plain violation of the complainant’s rights. In *Keene v. Wheatley et al.*, 14 Fed. Cas. 181 (Case No. 7,644), Judge Cadawalader uses this language:

‘In the administration of equitable jurisprudence, improper disclosures of the knowledge of primary results of mental development, whether the contents of literary compositions, or oral disclosures, or secrets of inventions, or improper disclosures of knowledge, acquired in professional relations, or in those of service or agency, are prevented and redressed on principles of general applicability.’

“I regard this as sound law, and it well applies to the facts in the case at bar. The complainant may have decree that the defendant deliver to the complainant such of the exhibits, including originals and copies, as were not of a public nature, and that the defendant and his clerks, attorneys, servants, agents, and workmen, be restrained from further use, in any manner, of said exhibits, with costs.”

In *Evitt v. Price* (1827), 1 Sim. 483, 57 Eng. Reprint 659, a firm of attorneys employed defendant as an accountant. The court granted an in-

junction restraining the disclosure of secrets which came to the defendant's knowledge in the course of confidential employment, and directed the defendant to turn over the books and papers and not to make copies thereof.

Equitable replevin has been invoked in this jurisdiction with respect to return of a portrait and ring having artificial value and to securities. See *Burr v. Bloomsburg* (Ch.), 101 N. J. Eq. 615; *Redmond v. N. J. Historical Society* (E. & A.), 132 N. J. Eq. 464; *Schrafft v. Wolters* (Ch.), 61 N. J. Eq. 467.

As the Court points out in *Burr v. Bloomsburg*, *supra* (p. 623):

“But while the equitable principles here involved are usually treated under the head of ‘specific performance’ in works on equity jurisprudence, the jurisdiction of this court is not confined to that head; ‘it is freely exercised to enforce the surrender of chattels in specie which have been tortiously obtained or are wrongfully detained.’ (Citing *Pom. Spec. Perf.* 3d ed.)”

In *Ipswich Mills v. Dillon* (Sup. Mass.), 157 N. E. 604, 53 A. L. R. 792, complainant brought a suit in equity against its former accountants, a partnership, for the return of papers of which it claimed ownership. The court found the accountants were independent contractors “engaged in their own occupation,” and were not employees and were therefore entitled to retain their own work sheets, copies of tax reports and correspondence but were required to return papers which “originated in the plaintiff’s office or in the office of its selling agents, or of someone associated with them.”

The rationale of the opinion emphasizes that correspondence and other documents written or

received by an employee on behalf of his employer and in connection with the employer's business are the property of the employer.

## II.

**A Court of Equity, pending final hearing, may restrain an employee from destroying, copying or removing papers of his employer which are in his possession and from divulging their contents.**

**(A) A Court of Equity may grant such relief *pendente lite* as is necessary for the preservation of the subject matter of the controversy and for the maintenance of the *status quo*.**

The Court below set forth its reasons for granting a restraint pending final hearing, as follows:

“Certainly the defendant who is no longer employed by complainant cannot be harmed by the injunction pending final hearing, and on this application the Court must consider what injury the defendant might suffer from an injunction, assuming that he shall prevail at final hearing and what injury might be done complainant if the injunction be denied and yet complainant should finally win. So considering the matter, and in order to maintain the *status quo*, I shall advise an order enjoining the defendant until the further order of the Court \* \* \*” (S. of C., p. 56).

This Court, in *Christiansen v. Local 680 etc.* (E. & A., 1939), 127 N. J. Eq. 215, 219, has very aptly stated the applicable principles as follows:

“\* \* \* we deem it to have been the duty of the Chancellor to award such relief as was requisite for the preservation of the subject

matter of the controversy pending the determination of the right on final hearing \* \* \* \* \* And it goes without saying that justice is not served if the subject matter of the litigation is destroyed or substantially impaired during the pendency of the suit, and thus the Court loses the faculty of fully vindicating such right and of remedying such wrong as may be revealed on final hearing. Doubt of the validity of the complainants' asserted cause of action is therefore not an adequate reason for refusing to maintain the subject of litigation *in statu quo* pending a definitive settlement of the right on final hearing. Unless such be the rule, the final hearing, and the appeal in the event of an adverse decree, would be vain forms."

To the same effect is *Peters v. Public Service Corp.* (Ch. 1942), 132 N. J. Eq. 500, 511, in which the Court stated:

"The purpose of ad interim restraint is to enable the Court to fully deliberate and investigate the case in order that the injunction maintains the status quo so that the parties are in substantially the same plight when the final decree is entered as they were when the litigation began."

Assuming *arguendo*, that the Court below had denied any restraint and prior to final hearing the appellant destroyed the material in his possession, and that at final hearing the Court determined respondent was entitled to relief, the decision would be academic and meaningless because the subject matter of the suit would have been destroyed and the Court would be unable to grant adequate relief to respondent.

As Vice Chancellor Stein pointed out, the appellant cannot be harmed by the injunction pending final hearing. He is not enjoined from going into

business for himself or from competing with respondent or from being employed by a competitor of respondent or from soliciting the customers of the respondent.

The granting of the restraint pending final hearing was a proper exercise of discretion since it was an absolute necessity to preserve the documents and other material, which form the subject matter of this suit.

**(B) The reply affidavits submitted by respondent were properly received by the Court below.**

Defendant-appellant contends that the reply affidavits, which were served upon him could not be considered by the Court because they were not annexed to the bill of complaint.

Chancery Rule 214, upon which appellant relies, is not applicable, because the Court by order, dated May 29, 1945, authorized the service and use of reply affidavits on the argument. (S. of C., p. 12). Furthermore, it is well settled that the rules of the Court are for its own guidance and may be modified as the Court of Chancery thinks is advisable in each particular case.

Moreover, appellant's argument ignores completely the fact that the order, dated May 29, 1945, was consented to by the appellant. This consent order authorized appellant to serve answering affidavits and authorized respondent to serve reply affidavits thereto. (S. of C., p. 12).

Thus appellant is objecting to the use of affidavits served on him pursuant to an order of the Court of Chancery to which he consented.

The admissions of the appellant alone, contained in his answer and affidavit, that he had possession of some odds and ends of correspondence

and that he had retained possession of various files and other documents, are sufficient to warrant the restraint pending final hearing in order to preserve the subject matter of the suit.

### Conclusion.

**We respectfully submit that the order of the Court of Chancery, dated June 26, 1945, is correct in all respects and should be affirmed and the appeal therefrom should be dismissed.**

FURST & FURST,  
Solicitors for Complainant-  
Respondent.

GEORGE FURST,  
Of Counsel.

To be argued orally by GEORGE FURST.



