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NOTICE OF APPEAL.

In Chancery of New Jersey

Between

Alice M. Hemenway, individually and as executrix of the last will and testament of John M. Hemenway, deceased,

Complainant,

-and-

Landon P. Smith, et al.,

Defendants.

On Bill, &c.

Notice of Appeal.

NOTICE IS HEREBY given that the Complainant, Alice M. Hemenway, individually and as executrix of the last Will and Testament of John M. Hemenway, deceased, appeals to the Court of Errors and Appeals in the last resort in all causes, from the final decree made by the Chancellor on the advice of Vice Chancellor Maja Leon Berry, which decree bears date June 26th, Nineteen hundred and twenty-eight.

Notice of Appeal.

Dated: September 11th, 1928.

.....
Solicitors for Complainant.

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

.....
Of counsel with Complainant.

PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

J. Harrison Montague, Eldon C. Hemenway and Martin B. Cohn, executors of the Last Will and Testament of Alice M. Hemenway, deceased, and Eldon C. Hemenway, executor of the Last Will and Testament of John F. Hemenway, deceased,

Substituted Complainants-Appellants.

-vs.-

Landon P. Smith and Julia M. Smith,

Defendants-Respondents.

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 J. Harrison Montague, Eldon C. Hemenway and Martin B. Cohn, executors of the Last Will and Testament of Alice M. Hemenway, deceased, and Eldon C. Hemenway, executor of the Last Will and Testament of John F. Hemenway, deceased, the appellants in the above entitled cause, respectfully shows that:

1. Petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of

the State of New Jersey, bearing date the twenty-sixth day of June, 1928, in a certain cause in said Court of Chancery wherein Alice M. Hemenway, individually and as executrix of the last Will and Testament of John F. Hemenway, deceased, was complainant, and J. Harrison Montague, Eldon C. Hemenway and Martin B. Cohn, executors of the last Will and Testament of Alice M. Hemenway, deceased, and Eldon C. Hemenway, executor of the last Will and Testament of John F. Hemenway, deceased, were substituted complainants, and the said Landon P. Smith and Julia M. Smith were defendants, in this respect, to wit, that the said decree adjudges that the bill of complaint filed in the above entitled cause be dismissed; that the lis pendens filed in connection therewith be discharged and nullified, and cancelled of record by the said substituted complainants or their counsel; that the defendants' costs to be taxed be paid by said substituted complaints, as such, including the sum of One hundred and thirty-five 20/100 dollars, representing the amount paid by the defendants for the court's copy of the stenographic transcript of the testimony given in said cause; and that the sum of One Thousand Dollars be allowed to the solicitors of the defendants as a counsel fee.

And your petitioners humbly appeal from the decree of the Chancellor which declares as aforesaid, upon the ground that the same is erroneous in that the Court held that the agreement between John F. Hemenway and Alice M. Hemenway and

Landon P. Smith and J. Mildred Smith, dated the twenty-ninth day of October, 1926, was not the result of fraud and deception practiced by the defendants herein; that the sale of the stock of Smith & Hemenway Co., Inc., owned by said John F. Hemenway, deceased, and Alice M. Hemenway, deceased, to the defendants was not the result of the fraud and deception of the defendants; and that appellants' testator and testatrix were not entitled to receive an undivided one-half of the proceeds of the sale of the stock of Smith & Hemenway Co. Inc. received by defendants, nor to be adjudged to be the owners of an undivided one-half interest in and to the real property formerly owned by said Smith & Hemenway Co. Inc., nor to be adjudged to be the owners of an undivided interest in and to the glazier business formerly owned by the said Smith & Hemenway Co. Inc.; and further in that said Court held that the bill of complaint and the allegations therein are without merit and that the bill should be dismissed.

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

LUM, TAMBLYN & COLYER,
Sols. for and of Counsel with Appellants.
RALPH E. LUM,
Of Counsel with Appellants.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

J. Harrison Montague, Eldon C. Hemenway and Martin B. Cohn, executors of the Last Will and Testament of Alice M. Hemenway, deceased, and Eldon C. Hemenway, executor of the Last Will and Testament of John F. Hemenway, deceased, *Substituted Complainants-Appellants.* *-vs.-* Landon P. Smith and Julia M. Smith, *Defendants-Respondents.*	*On Appeal from the Court of Chancery.* *Answer to Petition of Appeal.*

Landon P. Smith and Julia M. Smith, the above-named defendants-respondents, by way of Answer to the Petition of Appeal of J. Harrison Montague and others, the above named substituted complainants-appellants, say:

1. These defendants-respondents, not admitting the truth of all or any of the matters in the said Petition of Appeal contained, for Answer thereto, nevertheless admit that a final decree was made in the Court of Chancery of New Jersey in the above-entitled cause for the purposes in

such Petition mentioned as therein set forth, but as to the substance and form of said decree, these defendants-respondents beg leave to refer hereto when the same shall be produced.

2. These defendants-respondents are advised and believe that the said decree is agreeable to equity, and pray that the same may be affirmed with costs to be taxed in favor of these defendants-respondents.

BURNETT, MURRAY & TRELEAGE,
Solicitors for and of Counsel with
Defendants-Respondents.

BILL OF COMPLAINT.

Filed June 3, 1926.

IN CHANCERY OF NEW JERSEY.

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

The complainant, Alice M. Hemenway, of the Borough of Manhattan, in the City, County and State of New York, individually and as executrix of the last will and testament of John F. Hemenway, deceased, respectfully shows:

1. That on January 1, 1926, John F. Hemenway departed this life in the Borough of Manhattan, in the City, County and State of New York, leaving his last will and testament in writing which was duly admitted to probate by the Surrogate of the County of New York on or about January 15, 1926, and that letters testamentary thereon were duly issued to the complainant, who is the widow of the said John F. Hemenway, deceased, and the executrix in said will named; that the complainant thereupon duly qualified, and ever since has been and now is acting as such executrix.

2. That prior to the filing of this bill of complaint in this Honorable Court, the complainant, as such executrix as aforesaid, did file in the office of the Register of the Prerogative Court of the State of New Jersey a properly exemplified copy of the letters testamentary issued to her as aforesaid by the Surrogate of the County of New York.

3. That at all times hereinafter mentioned, and on October 29, 1925, complainant's testator was the owner of 212 shares of Class B common capital stock and 499 shares of Class B preferred stock of Smith & Hemenway Co. Inc., a corporation duly organized and doing business under and by virtue of the laws of the State of New York.

4. That the authorized capital stock of said company was $500,000, divided into shares of the par value of $100 each.

5. That prior to October 29, 1925, and at all times mentioned herein, the complainant individually was the owner of 1238 shares of Class B common stock and 1 share of Class B preferred stock in said Smith & Hemenway Co. Inc.

6. That at all times hereinafter mentioned prior to October 29, 1925, Landon P. Smith and Julia A. Smith, who are husband and wife, and the defendants hereto, together were the owners of 1450 shares of the common capital stock and 500 shares of preferred stock in said Smith & Hemenway Co. Inc., so that the combined stockholdings of said defendants were equal to the combined stockholdings of the complainant and complainant's testator; that at all times the stockholdings in said corporation have been held by the parties hereto in the same ratio for a long period of years, and that for upwards of more than thirty years complainant and her testator had been the owners of substantially a one-half interest in said corporation, and the defendants of the remaining one-half, the said stockholdings being equally di-

vided and being the entire voting stock, and the complainant, Alice M. Hemenway, and her testator, John F. Hemenway, and the defendants hereto being all the directors of said corporation.

7. During all the times hereinafter mentioned the defendant, Landon P. Smith, was president of the said corporation; that throughout the year 1925 the said company was solvent, and had a net worth of more than $400,000, consisting of a manufacturing plant, machinery, equipment, working assets, trade assets, accounts receivable and cash and was engaged in a profitable business in the manufacture of tools of various kinds; that in or about the month of April, 1925, or prior thereto, the defendants, Landon P. Smith and Julia M. Smith, his wife, entered into a conspiracy with each other to defraud the complainant and her testator and to secure to the said defendants the assets and good will of the said Smith & Hemenway Co. Inc. without paying to the complainant and her said testator the fair value of their interest therein as represented by their stockholdings above specified.

8. That in the furtherance of said scheme, said defendant, Landon P. Smith, fraudulently represented to complainant and the said John F. Hemenway, deceased, that an undivided one-half interest in said corporation was worth not to exceed the sum of $100,000, and requested complainant's testator and this complainant to sell their stockholdings above described to the said defendants for the said sum of $100,000; that at the said time

the said defendant, Landon P. Smith, well knew that the said company had a surplus value over and above the par value of all of its stock then outstanding, and that said sum of $100,000 which he offered was less than one-half the actual value of said stock owned by the complainant and her testator, and thereupon the said defendant fraudulently, and in furtherance of said scheme, stated that not only was the said sum of $100,000 the fair value of said stock, but that he and the defendant, Julia M. Smith, would sell to complainant and her testator their stockholdings consisting of one-half of the outstanding stock of said company for the sum of $100,000, and that he was willing to make such sale; that thereupon complainant's testator, in reliance upon said defendants' statement, caused to be prepared an agreement in writing containing the terms upon which the said defendant had agreed to sell the joint interests of the two defendants, and submitted the same to the defendants for signature; that thereupon the said defendant, Landon P. Smith, refused to execute the same and stated that he had changed his mind; that said refusal was in bad faith, and that said defendants had never intended to sell or part with their said stock interests for the sum of $100,000, and that said representation had been made solely for the purpose of defrauding complainant and complainant's testator and in furtherance of said scheme above described.

9. That in and during the months of April and May, 1925, the defendant, Landon P. Smith, repeatedly requested complainant's testator to sell

his interest in said corporation, together with the interest of complainant, for said sum of $100,000, and complainant and her testator repeatedly refused to make any such sale; that during said period of time, and all times mentioned in this complaint, the defendant, Landon P. Smith, had charge of the operating department of the said business and that complainant's testator was treasurer of the said company; that the books of the company were kept by an accountant at the factory; that said books were at all times open to the defendant, Landon P. Smith, and he was at all times entirely familiar with the finances and financial condition of the said company.

10. That in and about the month of May, 1925, the defendants hereto threatened that they would bring proceedings for the dissolution of said corporation; that said threat was for the purpose of inducing complainant and said testator to sell their said stock, and was in furtherance of the said scheme above described; that thereafter and on or about July 1st, 1925, and in furtherance of said scheme, the said defendants represented to complainant and her said husband that the business of the said corporation was in an unprofitable condition, and that in the opinion of the said Landon P. Smith the company had lost $25,000 during said year up to that time; that said statement was false and known by the said Smith to be false, and was made for the purpose of misleading and defrauding the complainant and her said husband; that at the same time said defendants

formally demanded that complainant and her testator sell their entire holdings to the said defendants for the sum of $100,000 on the following terms, to wit: $40,000 in cash, and certain property owned by the corporation in Montreal which was stated by the defendants to be of the value of $30,000 but which was actually worth less, to be deeded to complainant and complainant's testator and credited at said figure, and the remaining sum of $30,000 to be paid over a period of six years, with interest thereon at 5% per annum, and said defendants threatened and represented that unless said proposition was accepted within five days from date, to wit, on the sixth day of July, 1925, the offer would be withdrawn and the company placed in liquidation.

11. That upon the date last mentioned there was no reason for dissolution of the corporation except the desire of the defendants thereby to "freeze out" complainant and complainant's testator from their holdings in said corporation, and that said defendants represented that they would employ such a proceeding for that purpose and would wreck the company, if necessary, in order to force the complainant and her testator to sell.

12. That on the first day of July, 1925, an inventory of the assets of the corporation was being made, and the said defendant, Landon P. Smith, in furtherance of the aforesaid scheme, and for the purpose of defrauding the complainant and her husband, secretly procured said inventory to be made lower than the actual value of the

articles and assets mentioned therein; that pursuant to his secret instructions and acts, the said inventory was falsely made thereby showing the assets of the corporation at many thousands of dollars less than their true value; that said defendant never disclosed to complainant or her said testator such fact, and that said inventory was used in the negotiations herein alleged.

13. That thereafter and before said inventory was completed, complainant's testator became ill with pneumonia; that at said time he was in a very weakened physical condition, due, at least partly, to worry arising out of the said threats made against him by said defendants; that thereafter and on or about the 28th day of July, 1925, and while complainant's said husband was critically ill and in such condition that business matters could not be discussed with him, said defendants renewed their threats to liquidate the corporation, and threated that unless complainant and her said husband should sell at once on the terms above specified, the dissolution of the corporation was the only alternative, also stating at said time that said defendants would not sell their interest, and that unless an acceptance was made at once, papers would be immediately filed for the purpose of dissolving the corporation; that said defendants were notified of the condition of complainant's said husband, but nevertheless they stated that they would not withhold action until his recovery nor until he was able to discuss busi-

ness matters, and positively refused to delay action longer.

14. That complainant's husband never regained his health, but finally and in the month of Spetember, 1925, convalesced to such an extent that he was able to leave his home; that during said month of September said defendants made or caused to be made continued threats that they would wreck the company and destroy its value unless complainant and her said husband relinguished their rights upon the terms as above set forth.

15. That during all of said period of time from April, 1925 to October 29, 1925, the defendants and their attorney repeatedly stated and represented to complainant and her said husband that the statutes of the State of New York would permit a dissolution of the said corporation at the instance of the defendants, on the sole ground of equal ownership, even though such a proceeding for dissolution was against the interests of the corporation, and would destroy its assets and value, and notwithstanding the fact that the statute was being used for the purpose of compelling a sale or loss by complainant and her said husband, and further stated and represented that the courts of the State of New York would permit such a statute to be used for said purpose, and that complainant and her said husband both believed said representations and relied thereon.

16. That thereafter and on or about the 28th day of September, 1925, and in furtherance of said

scheme, the said defendants filed a petition in the Supreme Court of the State of New York for the dissolution of the aforesaid corporation; that in and by said petition, the said defendants falsely stated that it was unsafe for the corporation to continue business, and that the defendant, Landon P. Smith, had no adequate information as to the finances and business condition of the company, and further stated that complainant's testator antagonized customers and their employees whenever he came in contact with them, and many other like allegations; that said representations were false and known by the said defendant, Landon P. Smith, to be false, and were made for the purpose of using the Supreme Court of the State of New York and the provisions of the General Corporation Law of that state for the purpose of defrauding this complainant and her testator out of their interests in said corporation; that upon the filing of said petition, the defendants procured a reference to a Referee, according to the practice of said court, and the matter was referred to one Charles L. Hoffman, and hearing thereon was set down for the 25th day of November, 1925.

17. That no copy of said petition filed as aforesaid was served on complainant or her testator, nor on their attorneys although a request therefor was made on the attorneys for the defendants; that the first notice of such proceeding coming to the attention of complainant, or her said husband was a news item appearing in the New York Times of September 29, 1925; that there-

after the said defendant, Landon P. Smith, represented to complainant and her testator that said proceeding had been brought for the purpose of wrecking the company, if necessary, and that if the same were allowed to go to a final order or decree, the said company would be worthless, and the defendants would lose their interest therein and the said defendants, Landon P. Smith, further stated and represented that "he had been broke twice in his life, and that he would wreck the concern through the said proceeding, if necessary."

18. That complainant and her said testator believed that the said defendants intended to carry into execution their said threats, and also believed the representations then and theretofore made by the defendants and requested by their attorney, and believed that said corporation would be destroyed in said proceedings and that the courts and statutes of the State of New York above referred to might be used in furtherance of said scheme to defraud complainant and her said testator; that on September 29, 1925, and prior to the time that complainant's testator learned of said proceedings in the New York Supreme Court, he visited the plant of the defendant corporation at Irvington, in the County of Essex, in this state, and because of his then ill health and weakened condition, lost consciousness while at the said plant; that thereafter and during the next succeeding several weeks he was seriously ill, and for some days unable to consider business matters; that all of this was known to the said de-

fendants, yet nevertheless the said defendant, Landon P. Smith, stated that he would not postpone said proceeding, and that either the complainant and her said husband must sell or the proceeding so instituted as aforesaid would be carried to its conclusion; that at said time the available resources of complainant and her said testator with which they could have purchased the interest of the defendants was limited to $125,000; that the physical condition of complainant's husband was such that it was known to both complainant and the defendants that continued worry would bring about his death; that said fact was relied on by said defendants to assist them in their said scheme as was the fact that complainant's testator was in such condition physically that he could not attend to the details of financing more than the sum of $125,000.

19. That during the entire year of 1925, the said Landon P. Smith, as operating head of said company, was in contact with the customers and competitors thereof, and had full knowledge of the general conditions which would affect the value of the assets of the company, which knowledge was not possessed by either complainant or her testator; that with said knowledge, and between the month of April, 1925 and the 30th day of October next ensuing, the said defendant, Landon P. Smith, in furtherance of his scheme to defraud complainant and her testator, entered into secret negotiations with various companies and persons for the purpose of selling all or a part

of the assets of said corporation, which negotiations he concealed from the defendant and her testator, and the information obtained by said Smith as aforesaid was withheld and secreted from complainant and her said husband in order that said information would not interfere with the progress and consummation of the said scheme to defraud as aforesaid.

20. That in and during the said negotiations the said Landon P. Smith discovered that the Crescent Tool Company, a New York corporation, of Jamestown, New York, was in the market for the purchase of a manufacturing business such as that carried on by the said Smith & Hemenway Co. Inc., and would pay a fair price therefor; that at that time said Smith knew or believed that said Crescent Tool Company was a prosperous corporation and was able to purchase such a business as it desired, and was financially able to pay for the same at any time; that during said period and on or about the 19th or 20th day of October, 1925, the said Smith procured the general sales manager and superintendent of said Crescent Tool Company to inspect the plant of the said Smith & Hemenway Co. Inc., at Irvington aforesaid.

21. That thereafter and on or about the 30th day of October, 1925, complainant and her testator and the defendants hereto, entered into a contract or agremeent in writing, a copy of which is hereunto annexed and made a part hereof and marked Schedule A. and that said agreement was delivered to the attorneys for the defendants on or

about the 31st day of October, 1926; that up to the said delivery, the said defendants had not, nor had either of them, discussed with the complainant or her testator the said negotiation, or the purpose of the visit of the representatives of the said Crescent Tool Company.

22. That the complainant and her testator were induced by all the said acts, concealments and representations of the defendants above set forth to execute the said agreement; that the same was not executed as the result of their own free will and desire, but solely in the belief that their refusal to execute the same would result in the impairment of health and possible death of complainant's husband, and the loss to them or all or most of their interest in the said company; that the acts and representations on the part of the defendants above set forth were fraudulent and oppressive, and that the sum of money to be paid to complainant and her husband under the aforesaid agreement was only equal to less than one-half of the actual value of their interest in the said company as hereinafter alleged.

23. That in and by the terms of the aforesaid agreement it was agreed that the proceedings looking toward the dissolution of the corporation hereinabove mentioned would be discontinued; that said proceedings were brought in bad faith and were not for the best interests of the corporation, but were brought for the sole purpose of using the Supreme Court and the statutes of the State of New York to defraud the complainant and

her testator out of all or a portion of their interest in the said corporation, and that complainant and her testator were coerced thereby to execute the aforesaid agreement.

24. That thereafter and immediately after the delivery of said agreement, with full knowledge on the part of the said defendant, Landon P. Smith, that he had withheld from the complainant and her testator all information with respect to his negotiations with said Crescent Tool Company, the said Landon P. Smith immediately again entered into negotiations with said company for the sale of a portion of the business of the said Smith & Hemenway Co. Inc.; that thereafter and on or about November 2, 1925, two days after delivery of the said agreement entered into by complainant and her testator, a representative of the defendants proceeded to Jamestown, New York, for the purpose of continuing negotiations, and thereafter and on or about November 5, 1925, negotiations were begun direct with said Crescent Tool Company for the sale of all of the stock of the Smith & Hemenway Co. Inc., reserving from the assets of said company, however, for the benefit of the defendants, the most profitable part of the business of said company.

25. That thereafter and on November 9, 1925, there became due to complainant and her testator the sum of $45,000 under the terms of the agreement hereto annexed; that prior to said time only

the sum of $5,000 had been paid to them; that when said further sum became due, defendants did not make payment thereof to complainant and her testator, but delayed the payment on various pretxts for many days and until said defendants were assured that the Crescent Tool Company would purchase the said business, subject only to adjustment of details; that after receiving satisfactory information to this effect, the defendants finally paid the said sum of $45,000; that thereafter and on or about December 18, 1925, a tentative agreement for the sale of the stock of Smith & Hemenway Co. Inc. to the said Crescent Tool Company was reached, and that thereafter and before the conclusion of the sale under the annexed agreement and final delivery of stock thereunder, and while the same was held in escrow, complainant's testator heard rumors of the said impending sale; that complainant's testator informed the said defendant Landon P. Smith, on or about December 21, 1925, of his knowledge of said negotiations, and then and there the said Landon P. Smith stated and represented to complainant and her said testator that he had no negotiations of any kind whatsoever with the Crescent Tool Company for the sale of any part of the assets of Smith & Hemenway Co. Inc.; that said statement at that time by the said defendant was false and known to him to be false, and was made in furtherance of said scheme, and complainant and her testator relied thereon; that thereafter and on or about the 21st day of January, 1926, the defend-

ants entered into an agreement in writing with the said Crescent Tool Company for the sale to that company of the capital stock formerly held by the defendants and the shares acquired from complainant and complainant's testator.

26. That in and by said agreement between the said corporation and pursuant thereto, and as part consideration for the transfer of said stock, the said Crescent Tool Company paid to the said defendants the sum of $270,000, and in addition thereto and prior to the delivery of said stock, the said Smith & Hemenway Co. Inc. conveyed to the defendants hereto by deed of conveyance, the lands and buildings comprising the factory of said Smith & Hemenway Co. Inc., which said lands and buildings were of the actual value of $150,000 and were subject to mortgages of about $30,000; that said premises were at the time and by said agreement leased to the said Crescent Tool Company by Smith & Hemenway Co .Inc. for a period of three years at an annual rental of $15,000 per year; that said corporation further assigned and delivered to the said defendants the sum of upwards of more than $90,000 accounts receivable and current assets of said corporation.

27. That the said deed of conveyance from the said Smith & Hemenway Co. Inc., to the defendants herein was dated January 19, 1926, and recorded in the Register's office of the County of Essex on the 30th day of April, 1926, and the

lands and premises were therein described as follows:

All those certain tracts and parcels of land and premises, hereinafter particularly described, situate, lying and being in the Town of Irvington, in the County of Essex and State of New Jersey.

First Tract.

BEGINNING in the Easterly line of Coit Street at a point therein distant seven hundred feet Southerly from the Southerly line of Nye Avenue, formerly Cottage Street, thence running Southerly along the line of Coit Street one hundred feet; thence Easterly at right angles to Coit Street two hundred feet, thence Northerly one hundred feet and thence Westerly at right angles to Coit Street two hundred feet to the Easterly line of Coit Street and place of BEGINNING. Together with the boiler and engine contained in the building upon the said premises.

Second Tract.

BEGINNING on the East side of Coit Street at a point distant six hundred seventy-five feet Southerly from the Southerly side of Nye Avenue, formerly Cottage Street, thence running Southerly and along the East side of Coit Street, twenty-five feet to the land described in Tract First above; thence Easterly and along the Northerly line of said First Tract two hundred feet; thence Northerly twenty-five feet; thence Westerly two hundred feet to Coit Street and place of BEGIN-

NING. Subject to all restrictions contained in deeds of record as to the use of said premises or the location of buildings thereon. Recites M45-539 and X69-208.

Third Tract.

BEGINNING in the Easterly line of Coit Street at a point therein distant Southerly five hundred and fifty feet from the Southerly line of Nye Avenue, formerly Cottage Street, thence in an Easterly direction at right angles with Coit Street two hundred feet; thence in a Southerly direction parallel with Coit Street one hundred and twenty-five feet; thence in a Westerly direction at right angles to Coit Street two hundred feet to said Easterly line of Coit Street, and thence along the same in a Northerly direction one hundred and twenty-five feet to the place of BEGINNING. Recites H52-411 and R70-228, Subject to restrictions, if any, now thereon.

Fourth Tract.

BEGINNING in the Westerly line of Coit Street at a point therein distant four hundred feet Southwesterly from the Southerly line of Nye Avenue, formerly Cottage Street, thence running along the line of Coit Street, South thirty-three degrees and thirty minutes West one hundred and fifty feet to land described in Third Tract above; thence South fifty-six degrees and thirty minutes East and parallel with Nye Avenue two hundred feet to the Westerly line of Woolsey Street, thence

along said Westerly line of Woolsey Street, North thirty-three degrees and thirty minutes East One hundred and fifty feet; thence North fifty-six degrees and thirty minutes West and parallel with Nye Avenue two hundred feet to said Easterly line of Coit Street and place of BEGINNING. Recites W31-136-138, Z40-532-533 and G63-73-74. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, isuses and profits thereof including boiler and piping for heat, sprinklers and electrical wiring, but excluding and reserving to the party of the first part all machinery, shafting, belting and piping for power and manufacturing.

28. That in addition to the assets of the said Smith & Hemenway Co. Inc. conveyed and transferred to the defendants as aforesaid, the said Smith & Hemenway Co. Inc. also assigned to the said defendants a portion of its business known as the "Glass cutter or glazier business;" that such portion of the business of the company was the most profitable part thereof, and over a period of years has earned upwards of over $40,000 profit a year; that the fair value thereof is in excess of the sum of $300,000 and that the asking price of the said defendants therefor is the sum of upwards of $700,000; that said transfer was made subject to total current liabilities of $102,782.13.

29. That complainant and her testator as stockholders in the said Smith & Hemenway Co. Inc. were and had been entitled to all the knowledge and information resulting in said sale, which was withheld by the said defendants and the said transactions above referred to were carried on without any knowledge or information thereof on the part of the complainant or her testator; that during all the said transactions, complainant's testator was in very poor health, and the continued threats and controversies arising during the months of September, October, November and December, 1925, and the constant worry occasioned to said testator in attempts by the defendants to secure further advantages against complainant and her testator, contributed to a continued weakening of his condition, so that he died on the first day of January, 1926; that during all of said period the said defendants knew of the said condition of complainant's testator, and used the same continually in pressing for the conclusion of their scheme and in gaining even further advantages for themselves.

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

I. That Landon P. Smith and Julia M. Smith, who are the defendants to this suit, may answer this bill of complaint, without oath, and each statement therein made.

II. That the sale and agreement executed by and between the complainant and her testator and

the defendants, bearing date the 29th day of October, 1925, may be decreed to be void for fraud and be rescinded.

III. That the complainant, individually and as executrix as aforesaid, may be adjudged to be entitled to receive an undivided one-half of the proceeds of the sale of the stock of Smith & Hemenway Co. Inc. received by the defendants in the transaction alleged in the foregoing complaint.

IV. That the complainant, individually and as executrix as aforesaid, may be adjudged to be the owners of an undivided one-half interest in and to the real property formerly owned by said Smith & Hemenway Co. Inc. and hereinabove particularly described.

V. That the complainant, individually and as executrix as aforesaid, may be adjudged to be the owners of an undivided interest in and to the glazier or glass cutter business formerly owned by the said Smith & Hemenway Co. Inc.

VI. That the defendants hereto may be decreed to account to complainant, individually and as executrix as aforesaid, for all moneys and things of value received by them arising out of the matters alleged in the foregoing complaint, and that the account between the said defendants, and the complainant, individually and as executrix as aforesaid, may be stated, and that there be credited to the said defendants on such accounting the moneys and property heretofore

paid by the defendants under the terms of the agreement hereunto annexed marked Schedule A.

VII. That the complainant, individually and as executrix, may have such further and other relief as may be just and agreeable to equity and good conscience.

VIII. That a writ of subpoena may issue, commanding said defendants to answer this bill of complaint and to abide by such decree as this court may make in the premises.
(Signed)

LUM, TAMBLYN & COLYER,
Solicitors for and of counsel with Complainant.

SCHEDULE A.

THIS AGREEMENT made and entered into this 29th day of October, 1925, by and between

JOHN F. HEMENWAY and ALICE M. HEMENWAY, of the City of New York, State of New York, parties of the first part, and

LANDON P. SMITH and J. MILDRED SMITH, of the City of Newark, State of New Jersey, parties of the second part.

RECITALS.

John F. Hemenway is the owner of 212 shares of Class B. common and 499 shares of Class B preferred stock of Smith & Hemenway Co. Inc., a New York corporation, and Alice M. Hemenway is the owner of 1238 shares of Class B common and one share of Class B preferred stock of Smith & Hemenway Co. Inc.

It is the intention of the parties of the second part, on certain terms and conditions hereinafter set forth, to acquire all of the shares of Class B common stock, namely 1450 shares, owned by the parties of the first part, and Class B preferred stock, namely 500 shares, owned by the parties of the first part.

NOW, THEREFORE, in consideration of the sum of one dollar, by each of the parties to the other in hand paid, the receipt whereof is hereby mutually acknowledged, and in further considera-

tion of the premises hereby contained, it is agreed between the parties hereto as follows:

The parties of the first part hereby sell and the parties of the second part hereby purchase from the parties of the first part 1450 shares of Class B common stock of Smith & Hemenway Co. Inc. and 500 shares of Class B preferred stock of Smith & Hemenway Co. Inc. for the sum of One hundred and twenty-five thousand ($125,000) Dollars, and the parties of the second part hereby agree to pay therefor or follows:

Five thousand ($5,000) Dollars upon the signing and the mutual exchange of this agreement.

Forty-five thousand ($45,000) Dollars ten days from the date hereof, without interest.

Twenty-five thousand ($25,000) Dollars on or before December 31st, 1925, without interest.

Twenty thousand ($20,000) Dollars in quarterly installments of Twenty-five hundred ($2500) Dollars each, beginning April 1st, 1926, with interest from January 1st, 1926, at the rate of six (6%) per cent per annum, interest to be paid semi-annaully July 1st and January 1st of each year.

Thirty thousand ($30,000) Dollars by the corporation, on or before November 21st, 1925, deeding and conveying to the parties of the first part or their nominee, all of the corporations' right, title and interest in and to the Real estate with the improvements thereon belonging to the Corporation located in the city of Montreal, Province

of Quebec, Canada, free and clear from any and all incumbrances. liens or claims but subject to any and all existing leases thereon, the rent under and such lease to be apportioned as of the date of the delivery of the deed. The said deed to contain a covenant against grantor's acts and also a covenant for further assurance and to be in proper form for record.

The parties of the first part, upon the signing of this agreement, will deliver to their attorney, Martin B. Cohn, all of the shares of stock herein referred to as sold by them to the parties of the second part, endorsed in blank, together with their resignations as officers and directors of the Smith & Hemenway Co. Inc.

It is agreed by the parties of the first part that upon the payment by the parties of the second part of the first payment of $5000., the second payment of $45,000 and the delivery of the deed of the said real estate in the City of Montreal, all as above provided for, that said Martin B. Cohn shall and is hereby authorized to deliver the said resignations and the shares of stock above set forth, endorsed to the parties of the second part, and receive in exchange therefor nine certain promisory notes made by the parties of the second part to the order of the parties of the first part or their nominee bearing even date with the delivery of said resignations the first of said notes shall be for the sum of Twenty-five thousand ($25,000) Dollars payable December 31st, 1925,

without interest, and the balance of said notes for the sum of Twenty-five hundred ($2,500) Dollars each, the first of which shall be payable April 1st, 1926, and the other quarterly thereafter, each of such eight last mentioned notes to bear interest at six (6%) per cent per annum to be computed from January 1st, 1926; such interest to be payable on all of the unpaid notes semi-annually on July 1st and January 1st of each year. Upon default in the payment of any one of said notes, or the interest of any of said notes or the interest of any of said notes, when due, all of the remaining unpaid notes shall forthwith become due and payable at the option of the parties of the first part.

Simultaneously with the delivery of the above mentioned nine notes to the said Martin B. Cohn, there shall also be delivered to the said Martin B. Cohn all of the shares of stock hereby sold, which shares shall have been transferred to the names of the parties of the second part and endorsed by them in blank, which said shares shall be retained by the said Martin B. Cohn in escrow for the purposes (1) To secure the payment of the Twenty-five thousand dollar note due on December 31, 1925, and (2) to secure the payment of the Twenty thousand Dollars to be paid in eight installments as above provided; the said Martin B. Cohn to hold the stock until the above last mentioned notes are paid with interest, and thereupon deliver to D. Frederick Burnett, attorney for the

parties of the second part, for their use. In the event, however, of default in the payment of any of said notes or interest, the said Martin B. Cohn is hereby authorized to offer said shares of stock for sale at public or private sale, upon five days' notice to the parties of the second part or to D. Frederick Burnett, their attorney, and from the proceeds of this sale the parties of the first part shall be entitled to receive the amount of the unpaid balance of said notes with interest together with the expense of sale, any excess over the above said amount to be turned over to the parties of the second part; in the event of a sale as herein provided the parties of the first part may bid for and purchase said shares of stock in their names or otherwise.

Whereever this agreement refers to interest on any note or amount due it shall refer only to such note or notes or amounts as shall according to the terms hereof bear interest.

It is further understood and agreed that the parties of the second part, at any time, may anticipate the payment of the purchase price or any part thereof.

It is specifically understood and agreed as a condition of this purchase and sale that until the entire purchase price is paid in full with interest, as herein provided, the capital structure or charter of the corporation shall in no way be altered, changed or modified without the written consent of the parties of the first part.

It is further agreed by the parties of the second

part and as a condition for the sale by the parties of the first part of their stock, that, until final payment has been made as hereinabove provided, the capital assets of the company shall not be depleted excepting as may result from the ordinary course of business.

The parties of the second part specifically agree that they will procure the cancellation of any endorsement of John F. Hemenway, one of the praties of the first part to or on any note or notes or other negotiable instruments made by the company upon which said John F. Hemenway is individually an endorser, and the parties of the second part further agree to hold the said John F. Hemenway harmless from any and all liability on or because of any such endorsement.

Until the resignations of the parties of the first part as directors and officers shall be effective, as hereinabove provided, the salary of the parties of the first part shall be continued at the same rate as immediately prior hereto.

Mutual general releases are to be executed by the parties hereto, to be held in escrow by the respective attorneys and to be exchanged upon the final payment herein provided.

The parties of the first part hereby covenant that they will no nothing to injure, prejudice, embarrass or hinder the Smith & Hemenway Co. Inc. or the parties of the second part, in the transaction of its business, and further agree that they will not solicit its customers or entice away from its employ any of its present or future employees,

and further agree not to employ, directly or indirectly, any of its past, present or future employees.

Upon the exchange of this agreement the proceedings now pending in the Supreme Court, New York County, for the dissolution of said corporation, shall be forthwith withdrawn and discontinued.

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

(signed)

L. P. Smith (L. S.)

D. FREDERICK BURNETT.

Julia M. Smith (L. S.)

John F. Hemenway (L. S.)

M. B. COHN.

Alice M. Hemenway (L. S.)

We, the undersigned, respective attorneys for the parties hereto, having read the above agreement, hereby agree to the terms thereof insofar as they apply to the undersigned.

(Signed)

D. FREDERICK BURNETT.
MARTIN B. COHN.

ANSWER.

IN CHANCERY OF NEW JERSEY.

Between Alice M. Hemenway, individually and as executrix of the last will and testament of John M. Hemenway, *Complainant,* *-and-* Landon P. Smith and Julia M. Smith, *Defendants,*	*On Bill, &c.* *Answer*

By way of answer to the bill filed in the above entitled cause the defendants say:

1. That neither of them have any knowledge of or information sufficient to enable them to form a belief as to the truth of the allegations of Paragraph #1 and require complainant to make proper proof thereof, except that they admit that said John F. Hemenway is now dead.

2. That neither of them have any knowledge of or information sufficient to enable them to form a belief as to the truth of the allegation in Paragraph #2, and require complainant to make proper proof thereof.

3. That they and each of them admit of the truth of all of the allegations of Paragraph #3.

4. That they and each of them deny that the

authorized capital stock of said company was five hundred thousand ($500,000) dollars and say that it was six hundred thousand ($600,000) dollars.

5. That they and each of them admit the truth of the allegations of Paragraph #5.

6. That they and each of thme deny that the defendants together owned one thousand four hundred fifty (1450) shares of the common stock and five hundred (500) shares of the preferred stock of Smith & Hemenway Co. Inc., and say that in fact said Landon P. Smith in his individual right owned four hundred ninety-nine (499) shares of "Class A, Preferred" and two hundred twelve (212) shares of "Class A, Common" stock, and that said Julia M. Smith in her individual right owned one (1) share of "Class A, Preferred" and one thouand two hundred thirty-eight (1238) shares of "Class A. Common" stock of said company; that they and each of them admit that for a long period immediately prior to the death of John F. Hemenway, that is to say, since 1898, the combined stock holdings of these defendants were equivalent to those stock holdings of these defendants were equivalent to those of complainant and John F. Hemenway combined, and that such combined holdings of these defendants constituted, since 1913, substantially a one-half interest in said corporation, and they and each of them say further that such combined holdings of these defendants, together with the combined holding of complainant and John F. Hemenway, with the exception of forty (40) shares, constituted all

of the outstanding voting stock of said corporation, and that complainant, John F. Hemenway and these defendants constituted the entire board of directors.

7. That they and each of them admit that said Landon P. Smith has always been president of said corporation, and that during the year 1925 the corporation was solvent; that they and each of them deny that the net worth of the company was as large an amount as four hundred thousand ($400,000) dollars, and say on the contrary it was at the most worth two hundred fifty thousand ($250,000) dollars; and they and each of them say that in fact the book value of the business did not represent the true value thereof as John F. Hemenway had consistently refused and failed to prepare and keep accurate and complete figures and records in respect thereto and which it was his duty to prepare and keep; that the actual profits, if any, of said company had rapidly been decreasing in amount for a considerable period of time; that the company's assets composed; among other things, of real estate, manufacturing plant, equipment, machinery, raw material, finished and partly finished merchandise, dies, stock, shares of other corporations, good will, trade marks, trade names, accounts and notes receivable, and other items usually present in a going manufacturing business; that they and each of them deny that they or either of them conspired with each other or with any other person or persons in any manner or by any means whatsoever, to defraud com-

plainant or John F. Hemenway of the fair value thereof; and that they and each of them say that on the contrary Landon P. Smith purchased the interest of complainant and John F. Hemenway in and to said corporation at what all parties to the transaction considered a fair price, and that complainant and John F. Hemenway had the same and possibly a better opportunity than either of these defendants to judge as to the fair value of the interests so sold by complainant and John F. Hemenway to Landon P. Smith.

8. That they and each of them deny the truth of each and all of the allegations of Paragraph #8 and say that if the matters therein stated refer to a conversation between Landon P. Smith and John F. Hemenway in the month of April, 1925, the true facts were: Landon P. Smith, as he had previously done in January, 1925, stated to John F. Hemenway that he was unwilling longer to be associated in the business with John F. Hemenway because of the latter's inattention to the business and his lack of cooperation with Landon P. Smith in the conduct of the same and so informed said Hemenway; said Hemenway thereupon verbally offered to sell the interest of himself and complainant in said business for the sum of one hundred thousand ($100,000) dollars, and to take as part payment, to the extent of thirty thousand ($30,000) dollars thereof, certain real estate in the City of Montreal, Canada, owned by said corporation, and to the extent of thirteen hundred ninety ($1390) dollars thereof, to take the stock

and note of National Hardware Company owned by Smith & Hemenway Co., Inc.; this offer was then and there verbally accepted by said Smith; no suggestions were then made by either said Smith or Hemenway that neither of these defendants shuold sell their interests; said Hemenway and Smith then caused a written contract to be drawn embodying therein such verbal offer and acceptance; the same was then sent to complainant and said John F. Hemenway for execution, and, without any explanation whatever they changed it into a contract whereby these defendants were to sell their interests in said company instead of to buy the interest of complainant and said Hemenway; that these defendants refused to agree to such contract as so changed and negotiations between Smith and Hemenway terinmated.

9. That, except as admitted in the foregoing paragraphs, they and each of them deny the truth of all of the allegations of Paragraph #9 relating to the offers and requests therein mentioned; that they and each of them say that Landon P. Smith had charge of the Operating and Manufacturing Department and supervision over rather than charge of the Sales Department, and that John F. Hemenway was treasurer and that the books and financial data of the company were kept by an accountant under the direct supervision and direction of said Hemenway; that they and each of them admit that the Customer's Ledger was at all times open to said Smith but say that the ledgers and other books showing disbursements and other

important data pertaining to the company's financial condition were kept in the exclusive possession of Hemenway, and that said Smith did not have access thereto; and that such books as were open to said Smith were so incomplete and inaccurate as to be worse than useless; they and each of them deny that said Smith was familiar with the financial condition of the company and say that on the contrary for the greater part of the time he was in total ignorance in regard to the same, and that at all times his knowledge thereof was confined to such memoranda as said Hemenway saw fit to furnish to said Smith.

10. That they and each of them deny that they or either of them threatened that they would bring proceedings for the dissolution of the company for the purpose of inducing complainant and John F. Hemenway to sell their stock and they and each of them deny that there was any such scheme as is referred to in the bill; that they and each of them say, however, that at the conference referred to in Paragraph #8 hereof, Landon P. Smith informed John F. Hemenway that because of the latter's inattention to and lack of performance of his duties as treasurer and financial manager of the company and his failure to cooperate with said Smith in the conduct of the business, and because of the fact that said Hemenway was constantly irrating and antagonizing the company's customers and because of the resulting continued depletion of the company's surplus, said Smith

would not longer continue to be associated in the business with said Hemenway and that he proposed to have the business liquidated by means of a receiver if necessary; and that the result of this conversation was the offer and acceptance referred to in Paragraph #8 hereof; that they and each of them deny that they or either of them on or about July 1st, 1925 stated or represented for any purpose whatever, to complainant or said Hemenway, that the business of the corporation was in an unprofitable condition or that in the opinion of said Smith the company had lost twenty-five thousand ($25,000) dollars during the first half of the year 1925; they and each of them admit, however, the admissions set forth in Paragraph #8 hereof, and they say further that at that time Smith was shown figures concerning the company's affairs by said Hemenway and that Smith thereupon remarked that if such figures were correct, the company, in his opinion, would lose twenty-five thousand ($25,000) dollars during the first half of the year 1925; these defendants and each of them, however say that such statement was, as was known to complainant and John P. Smith, merely the opinion of said Smith as to the probable result of future operations, assuming that the figures so furnished to Landon P. Smith were correct; they and each of them deny the truth of all of the other allegations contained in Paragraph #10 except that they admit that in their behalf and with their knowledge and consent, their duly authorized attorney wrote a letter dated

July 1st, 1925, to the attorney for complainant and John F. Hemenway in response to the letter of the last mentioned attorney dated June 23rd, 1925, a copy of which letters (except addresses and signatures) is hereunto annexed and made a part hereof and designated as "Schedules A" and "B".

11. That they and each of them deny that they threatened dissolution proceedings in order to "Freeze out" complainant or John F. Hemenway, and that they or either of them threatened to wreck the company in order to force the complainant or John F. Hemenway to sell their interests, and that they and each of them deny further that there was no legitimate reason for dissolution of the company; and they and each of them say that because of the facts set forth in Paragraph #10 hereof and because of the future prospects of the company, its position in the trade and its financial condition were daily growing worse, and because Landon P. Smith had lost all confidence in John F. Hemenway, and because he believed that the latter felt much the same toward said Landon P. Smith, and because the resulting friction, disagreement and conflict of policy coupled with equality of control had created a situation in which the company could not long successfully complete with well managed competitors in a highly competitive market; and that as a consequence it was necessary that the friction, conflict and dissention be eliminated by the retirement from the

business of either Landon P. Smith or John F. Hemenway on terms agreeable to both, or that the business be liquidated or disposed on the best terms posisble.

12. They and each of them deny that on the first day of July, 1925 or at any other time they caused or procurred, openly or secretly, for any purpose whatever, an inventory to be made lower than the actual value of the articles and assets mentioned therein; they and each of them deny further that any inventory or extension thereof was falsely made to show the assets as less than their true value, and on the contrary they and each of them say, that neither of these defendants had anything to do with the fixing of values shown on any inventory or extension thereof, directly or indirectly, and if there were any inaccuracies in any inventory or extension thereof they were due wholly to the fault and neglect of John F. Hemenway, and the imperfect and incomplete records kept by him, and he was or should have been fully aware of the same, if any; that neither of these defendants know to what extent, if any, or for what purpose, if any, complainant or John F. Hemenway used an inventory or extension thereof in the negotiations referred to; nor have they sufficient information to enable them to form a belief in respect thereto; these defendants say further that there was an inventory on the books as of December 31st, 1924, made under the direction of said John F. Hemenway and that an ex-

tension thereof from January 1st, 1925 to July 1st, 1925 was made at the direction of said Hemenway by the company's employees under him, and these defendants and each of them say that they had nothing to do therewith, except that Landon P. Smith furnished an estimate of obsolescence in respect to raw material, work in progress and stock on hand, and that such estimate was made in good faith and was as nearly accurate as possible, and was approved by John F. Hemenway.

13. That neither of these defendants know when John F. Hemenway became ill, nor the cause, extent or duration or effect of his illness, nor have they sufficient information to enable them to form a belief in respect thereto, and leave complainant to make due proof thereof; that they and each of them deny the truth of all of the remaining allegations of Paragraph #13; that they and each of them admit, however, that inasmuch as the matter had been pending since the early part of the year 1925 without visible progress in any direction they caused their duly authorized attorney to write to the duly authorized attorney of complainant and John F. Hemenway a letter of which "Schedule C" hereof is a true copy (the address and signature being omitted), the same being made a part hereof.

14. That neither of these defendants have any knowledge as to whether or not, if at all, John F. Hemenway regained his health, nor when, nor to

what extent he convalesced, nor have they sufficient information to enable thme to form a belief in respect thereto and leave complainant to make proper proof thereof; that they and each of them deny that at any time they or either of them threatened to wreck the company or destroy its value unless complainant and John F. Hemenway relinguished their rights, but they admit that they informed complainant and John F. Hemenway that in the absence of an agreement these defendants would bring a proceeding in the State of New York under the statute of that State to effect a dissolution of the company.

15. That these defendants admit that at various times bewteen April and October 29, 1925 that their attorney stated to the attorney of complainant and John F. Hemenway that in his opinion the company could, under the New York Corporation Law, be dissolved on the ground of equality of ownership, management and control, coupled with irreconcilable conflict between those in control, and the consequent serious injury to the company as a whole and those financially interested therein; that they and each of them deny that they or their attorney made any such statement to complainant or John F. Hemenway and they each of them also deny that either of them or their attorney made any statement or representation to complainant or John F. Hemenway as to whether or not the courts of New York would permit such statute to be used for the purpose of com-

pelling a sale or loss by complainant or John F. Hemenway or to be used against the best interests of the company; they and each of them say further that they had no intention of so using said statute, causing a loss to complainant or John F. Hemenway or injury to the company, but on the contrary they and each of them believed that the dissolution of the company under said statute would operate to save all those interested therein from a loss which was certain to result from a continuance of the company under the then existing conditions.

16. That they and each of them deny that they or either of them had any "scheme" and they deny the truth of all of the allegations of Paragraph #16 as to the contents of the petition filed in the State of New York, and for a statement of the contents of said petition they refer for greater certainty to the petition itself; they and each of them deny that the allegations contained in said petition were false and say on the contrary that they were true; that they and each of them deny that said petition was filed for the purpose of defrauding complainant or John F. Hemenway in the manner alleged in the bill or in any other manner, and say that the reasons for filing the petition were those hereinbefore set forth; they and each of them admit that they caused the matter of said petition to be referred, and the matter set down for hearing as alleged in the bill.

17. That neither of them have any knowledge as to whether or not a copy of said petition was

served on complainant or John F. Hemenway or how or when they learned thereof, nor have either of these defendants sufficient information to enable them to form a belief in respect thereto, and leave complainant to make due proof thereof; that they and each of them deny that they or either of them ever said that proceedings would be brought for the purpose of wrecking the company and that if the proceedings went to a decree the company would be worthless, and that complainant or John F. Memenway or any of them would lose their interests therein, and that Landon P. Smith would wreck the company through said proceeding, and they and each of them deny making any of said statements or statements of similar import to anyone whomsoever.

18. That neither of them have any knowledge of nor responsibility for nor concern with, what complainant or John F. Hemenway believed or did not believe, nor have they sufficient information to enable them to form a belief in respect thereto; that they and each of them deny that they or either of them or their attorney made any misrepresentations to complainant or John F. Hemenway or their attorney, and that they and each of them also deny that they or either of them used or intended to use said proceedings in the State of New York in the furtherance of any scheme to defraud complainant or John F. Hemenway, and they say in fact that there was no such scheme and no intention or desire to defraud complainant or

John F. Hemenway of anything; that they admit that the prosecution to completion of said proceeding would, under the statute of New York, have resulted in the sale of the assets of the company as a whole or in parcels, the payment of its obligations from the proceeds and the distribution of the balance of the proceeds among all of the stockholders of the company, and in all probability its final dissolution, all as contemplated by said statute of the State of New York to which reference for greater certainty is hereby made; that they have no knowledge of the visit of John F. Hemenway to the company's plant nor of the alleged physical condition of John F. Hemenway or whether or not he was ill, nor for how long, nor when, nor to what extent, nor as to the resources or lack of them of the complainant and John F. Hemenway, nor have either of these defendants sufficient information to enable them to form a belief in respect hereto and leave the complainant to make due proof thereof; that they and each of them deny that at the time when the contract complained of was negotiated or entered into, John F. Hemenway was ill to such an extent that he was unable to transact business; that they and each of them also deny that John F. Hemenway was worried over the attitude of these defendants and that worry caused or contributed to his death, and that either of these defendants relied in any way or for any purpose on such alleged fact; they and each of them deny further that it caused John F. Hemenway or complainant to enter into the con-

tract complained of, and these defendants say that they knew nothing of the financial resources of the complainant or John F. Hemenway or their limitations in that regard, and they and each of them also deny that they had any "scheme" to carry out or consumate.

19. That they admit that Landon P. Smith as head of the Production Department knew the details of that Department, and that as supervisory head of the Sales Department he was, to some extent, in contact with the company's customers and competitors; that they and each of them deny that he had knowledge of its financial condition, except such alleged meagre information as was vouchsafed to him by John F. Hemenway or the employees under the supervision of John F. Hemenway, and they say that consequently Landon P. Smith had less knowledge in respect to those matters than did John F. Hemenway who had at all times accurate and detailed information in respect thereto; that they and each of them deny that between the months of April and October, 1925, Landon P. Smith entered into secret negotiations for the purpose of selling all or part of the company's assets and that he concealed any such negotiations for any purpose and that he withheld any information from complainant or John F. Hemenway to which they or either of them were entitled, and that they had any intention or desire to defraud complainant or John F. Hemenway or anyone else.

20. That they and each of them deny that while the negotiations which lead up to the said purchase of the stock of complainant and John F. Hemenway were pending either of these defendants or their attorney had any knowledge whatever that Crescent Tool Co. or anyone else was in the market for the purchase of a manufacturing business such as that carried on by said Smith & Hemenway Co., Inc., and that Crescent Tool Co. would pay a fair or other price therefor, and that they or either of them had any knowledge or information in respect to the financial standing, ability or resources of Crescent Tool Co.; that they admit that some employees of Crescent Tool Co. went through the plant of Smith & Hemenway Co. Inc. but say that the date on which they did so was October 29th, 1925.

21. That they admit that a formal written document referred to in Paragraph #21 (except for certain errors in said copy) of the bill was delivered on or about the 29th day of October, 1925, and for the contents thereof refer to the original thereof, and admit that up to that date they had not discussed wih complainant or John F. Hemenway any negotiations with Crescent Tool Co.; they say further that complainant and John F. Hemenway, by their duly authorized attorney who was a competent, able and upright member of the Bar of the State of New York, made to the duly authorized attorney of the defendants a written offer

dated October 12, 1925, wherein and whereby they offered to sell to these defendants their stock in said corporation for the sum of one hundred twenty-five thousand ($125,000) dollars on and under terms substantially the same as those employed in the formal document referred to in Paragraph #21 of the bill; and that these defendants caused their duly authorized attorney on their behalf to accept such written offer, which acceptance was in the form of a latter dated October 13, 1925, addressed and mailed to the said attorney of complainant and John F. Hemenway who made said offer, and which letter of acceptance was duly received by him; that they say further that then and by virtue of said offer and acceptance the rights and liabilities of complainant, John F. Hemenway and these defendants in respect to said Smith & Hemenway Co. Inc. and its stock became fixed, copies of which letters (except addresses and signatures) are designated as "Schedules D and E" hereof; that subsequent thereto and for the first time these defendants and their attorney learned that Crescent Tool Co. was in the market for the purchase of a manufacturing business and that by reason of he fact that as hereinbefore set forth, complainant and John F. Hemenway had irrevocably bound themselves to sell to Landon P. Smith all of their stockholdings in said Smith & Hemenway Co. Inc. neither complainant nor John F. Hemenway were in fact any longer interested therein, nor in what disposition was made of the corporation, its assets or its capital stock, and

hence neither of these defendants was in anywise called upon or obligated to disclose to complainant or John F. Hemenway any information as to the Crescent Tool Co., its plans, wishes or intentions, or as to any dealings that either of these defendants might have with that corporation.

22. That they and each of them deny that they or either of them made any misrepresentation or concealed from complainant or John F. Hemenway or their attorney, any information to which they were entitled, and that they did any act which from any standpoint was reprehensible or illegal, and that they deny that complainant or John F. Hemenway were induced by such alleged acts or any alleged misrepresentations or concealments to enter into the contract referred to in Paragraph #22 or the contract preliminary thereto mentioned in Paragraph #21 hereof; that they and each of them deny that said contracts or either of them were entered into by complainant or John F. Hemenway otherwise than as the result of their own free will and desire; that they and each of them deny that complainant or John F. Hemenway entered into such contracts or either of them in the belief that their refusal so to do would result in the impairment of the health and possibly the death of John F. Hemenway and the loss to them of all or most of their interest in said company; and these defendants further say that if complainant or John F. Hemenway did in fact have such belief that neither of these defendants

was responsible therefor or had any knowledge thereof; that they and each of them deny that acts or representations which they did or made were fraudulent or oppressive and that the price paid to complainant and John F. Hemenway for their interests in the company was less than one-half of the actual value thereof; that these defendants say on the contrary to the allegations contained in Paragraph #22 of the bill, that from the month of April, 1925, at least, and possibly before that time, complainant and John F. Hemenway were by their own attorney, who was also attorney of said company, represented and advised and throughout in their dealings with these defendants in respect to Smith & Hemenway Co. Inc., and their stockholdings therein, and the dissolution proceedings brought in the Supreme Court of New York; that said attorney on behalf of complainant and John F. Hemenway, over his own signature and on his own terms, made the offer to sell which was accepted as hereinbefore set forth, and that he prepared the final and formal draft of said contract and that complainant and John F. Hemenway signed the same at his request; that in his presence on January 19, 1926, complainant executed, in behalf of herself and the Estate of John F. Hemenway, in favor of these defendants, a general release prepared by him in attempted performance of the clause of the said formal and final contract which called for the exchange of releases; that complainant and John F. Hemenway, particu-

larly the latter, had more complete and accurate information as to the company's assets, their value, its financial condition and prospects, and the value of the capital stock than had either of these defendants; that all the many and diverse circumstances and factors considered, the actual value of the stock of Smith & Hemenway Co. Inc. was highly problematical and a matter of individual opinion and judgment; that complainant and John F. Hemenway and their attorney on the one hand and these defendants and their attorney on the other hand each formed their own individual judgment as to the value to them of their respective stockholdings, and that on such basis, with full knowledge or ample opportunity therefor as to all the material facts on the part of the complainant and John F. Hemenway, the parties thereto voluntarily entered into and executed the contracts aforesaid, and that if complainant or John F. Hemenway entered into either of them on any other basis it was not due to any acts of either of these defendants or their attorney or to the knowledge of them or any of them; and these defendants charge that the complainant now institutes this proceeding in an unwarranted attempt to realize a portion of the profit which she believes these defendants realized and to no part of which, if any, complainant individually or as executrix of John F. Hemenway is entitled.

23. That they admit that by the terms of said final and formal contract the said dissolution pro-

ceedings were to be discontinued and they refer to said contract for greater certainty as to the terms and conditions on and under which such discontinuance was to be effected; that they and each of them deny that said dissolution proceeding was brought in bad faith and that it was not for the best interests of the company, and that it was brought for the purpose of using the Supreme Court of New York to defraud complainant or John F. Hemenway of their interests in said corporation or of any other property whatsoever, and that either of them were coerced thereby; that these defendants say that on the contrary that said proceedings were brought in good faith and because of the existing conditions hereinbefore recited and that unless either the interests of the Smith faction or those of the Hemenway faction were sold and their connection with the company severed, dissolution of the corporation was the only means of saving the company from serious loss if not eventual insolvency, and these defendants say further that the statute referred to was designed to cover just such a situation and that by its terms and by the practice of the courts in which such proceeding was brought, the interests of all parties would have been conserved and impartially protected.

24. That they admit that about the time of the delivery of the said final or formal contract, but after the making of the said preliminary contract on which the same was based as hereinbefore set

forth, Landon P. Smith learned of the fact that Crescent Tool Co. was in the market for a manufacturing plant and thereafter entered into negotiaions with it, looking to the possible sale of a portion of the assets of the said Smith & Hemenway Co. Inc., and they admit that on the 18th day of November, 1925, a representative of these defendants went to Jamestown, New York, for the purpose of opening negotiations and that on that date negotiations were for the first time begun directly with authorized representatives of Crescent Tool Co. for the sale to them of the stock of Smith & Hemenway Co. and that from sale there was reserved the Sales Agency Contract with New England Novelty Company which operated what is known as the "Glass Cutter Business' and that while these defendants believed said "Glass Cutter Business" to be profitable they cannot say as to how it compares in that respect with the remaining portion of the business of Smith & Hemenway Co. Inc.; and as hereinbefore set forth in detail, they and each of them deny that they or either of them withheld or failed to disclose to complainant or John F. Hemenway any information to which they or either of them were entitled.

25. That they admit that the payment of forty-five housand ($45,000) dollars was not made when due and that the payment was not in fact made until November 23, 1925; they say, however, that such delay was due solely to difficulties in making conveyance of the Montreal property in compli-

ance with the laws of Canada and to the delay of the Bank through which Landon P. Smith was financing said purchase in attending to the details incident thereto, and that such delay was not due in any degree whatever to the negotiations with Crescent Tool Co.; they say further that Landon P. Smith, previous to learning that Crescent Tool Co. was in the market had made arrangements for financing the purchase of the stockholdings of complainant and John F. Hemenway, and that such financial arrangements were carried through as originally planned except that Landon P. Smith encountered an unexpected delay in receiving the proceeds of such arrangement; that they and each of them deny that the payment of such sum was dependent upon the outcome of the negotiations with Crescent Tool Co. and they and each of them deny that either of these defendants purposely delayed such payment and that he brought about such delay until he was assured that Crescent Tool Co. would purchase said business; that they admit that an agreement for the sale of the stock of Smith & Hemenway Co. Inc. to Crescent Tool Co. was made, but say that the same was entered into on the 19th day of January, 1926, and not on the date alleged in Paragraph #25 of the bill; they say that they believe that complainant or John F. Hemenway, or both, heard rumors of the contemplated sale to Crescent Tool Co. and they admit that prior to the final and complete performance of the contract annexed to the bill complainant or John F. Hemenway asked Landon P. Smith in re-

spect thereto and they admit that Landon P. Smith answered such inquiry which was made on or about the 18th day of December, 1925, by saying that a sale to Crescent Tool Co. was not yet made, and they say that the reason for such statement was that inasmuch as the contract annexed to the bill had theretofore been entered into, such inquiry was impertinent and without right on the part of the complainant or John F. Hemenway, and that as a consequence Landon P. Smith was entitled to answer such inquiry in such manner as he saw fit regardless of the facts, and these defendants and each of them deny, as they have hereinbefore done in detail, that there was any scheme, and they deny further that said denial to said inquiry was in furtherance of any scheme to defraud complainant or John F. Hemenway of any property or rights whatsoever; they deny further that complainant or John F. Hemenway to any extent whatever relied or had any right to rely on said denial to said inquiry in respect to any phase of the contract annexed to the bill; they admit that they entered into a written contract with Crescent Tool for the sale of the stock of Smith & Hemenway Co. Inc., which these defendants owned and also that which they acquired from complainants and John F. Hemenway, there being reserved from the assets of the corporation the said Sales Agency Contract relating to the "Glass Cutter Business," but they say that said written contract with Crescent Tool Co. was en-

tered into on the 19th day of January, 1926, instead of January 21, 1926, as is alleged in the bill.

26. That they admit the allegations contained in Paragraph #26 of the bill, except that said conveyance was subsequent and not prior to the transfer of the stock, and except further that they and each of them deny that the said lands and buildings conveyed to them were of as great a value as one hundred fifty thousand ($150,000) dollars; and they and each of them deny that the accounts receivable and the current assets assigned to them were of as great a value as ninety thousand ($90,000) dollars.

27. That they admit the truth of the allegations contained in Paragraph #27 of the bill.

28. That they and each of them deny the truth of all of the allegations of Paragraph #28, except that as hereinbefore admitted that they admit that the Sales Agency Contract relating to the "Glass Cutter Business" was assigned to these defendants; that they and each of them deny that said business ever earned in one year profits as large as forty thousand ($40,000) dollars, and that it ever had a value as great as three hundred thousand ($300,000) dollars and that there was ever any asking price therefor; they say that the liabilities referred to of one hundred two thousand seven hundred eighty-two dollars and thirteen cents ($102,782.13) represented in part liabilities of Smith & Hemenway Co. Inc.

29. That they and each of them deny the truth of all of the allegations contained in Paragraph 29 of the bill, and here repeat so far as the same are responsive to or explanatory of said allegations, the appropriate portions of this answer hereinbefore set forth; that they have no knowledge of the causes of the death of John F. Hemenway, nor sufficient information to enable them to form a belief in respect thereto, and in addition to what is hereinbefore set forth these defendants and each of them deny that they defrauded or attempted or schemed to defraud or to take any improper advantage of complainant or John F. Hemenway whatsoever, and they assert that the aforesaid informal contract and the formal final contract based thereon, a copy of which latter contract is annexed to the bill, were negotiated and entered into by complainant and John F. Hemenway freely, openly and voluntarily, and that throughout they had and relied upon competent legal advice and representation, in conjunction with their own knowledge and judgment to the exclusion of all reliance whatsoever by them on these defendants or either of them; and these defendants further assert that the contract annexed to the bill and the aforesaid preliminary contract upon which the same was based were and are legally effective and binding and not subject to be rescinded, annulled or modified, and they assert further that the proceeds received by these defendants from the resale of the stock acquired from complainant and John F. Hemenway and

also the land and buildings conveyed to these defendants or one of them, and also the so-called "Glass Glazier" or "Glass Cutter Business" and all other monies or things of value, if any, received by these defendants or either of them from said corporation or from the capital stock thereof, or from complainant or John F. Hemenway, legally and equitably, belong in their entirety to these defendants or one of them, and that they are under no legal or equitable duty to account therefor to complainant in any capacity whatever, and they say that complainant is not entitled to any relief as prayed for in said bill or otherwise as against these defendants, and these defendants pray that said bill be dismissed with costs.

FIRST SEPARATE DEFENCE.

By way of additional and separate defense to said bill, these defendants say that the contract annexed to the bill provided that mutual general releases should be exchanged by the parties thereto, that pursuant to said contract these defendants delivered to complainant and John F. Hemenway or their aforesaid attorney such a general release duly executed by them in favor of complainant and John F. Hemenway, which release was duly accepted; that in return and in intended attempted fulfillment of said obligation of the complainant and said John F. Hemenway, complainant executed and delivered a general release of which a true copy is hereto annexed and made a part hereof and designated as "Schedule F," which was

duly accepted by these defendants with the request that the complainant execute and deliver to these defendants a new release of the same purport in the body of which should be inserted the name of the complainant as executrix of John F. Hemenway, deceased, instead of the name of John F. Hemenway, but they say that to date complainant has failed to deliver such release; that under and by virtue of the terms of said contract annexed to the bill, and by virtue of the said release so executed and delivered by complainant to these defendants, these defendants were and are wholly released and discharged of and from all obligations to complainant in both of said capacities, save only from those obligations excepted or reserved by the stipulation referred to in "Schedule F" hereof, and that complainant is thereby precluded from maintaining this proceeding.

SECOND SEPARATE DEFENSE.

By way of additional separate defense these defendants say that by reason of the delay of John F. Hemenway and by complainant in both of her said capacities, after the alleged discovery of the matters alleged in the bill, in asserting the claims now asserted by her in the bill, John F. Hemenway and complainant in both of her said capacities were guilty of such laches as to cause to be forfeited such rights, if any, as they or she might otherwise have had, and these defendants say further that when the contract, a copy of which is annexed to the bill, was executed, these defend-

ants informed complainant and John F. Hemenway and their said attorney that these defendants intended to attempt to sell the Smith & Hemenway Co. Inc. and they say further that John F. Hemenway and complaint learned in fact of said negotiations and contract with Crescent Tool Co. practically as soon as they were had and entered into and that they desired to hold these defendants to their contract with them unless the negotiations with Crescent Tool Co. resulted profitably to these defendants, in which event they intended to attempt without right to repudiate their contract with these defendants and thus speculate on the situation and the result at the expense of these defendants, and that by reason thereof, John F. Hemenway and complainant in both of her said capacities forfeited such rights, if any, as they or she might otherwise have had.

NORBURY C. MURRAY,
Solicitor for and of Counsel with
Defendants.

Answer.
"Schedule A."

"SCHEDULE A."

June 23rd, 1925.

This is to acknowledge receipt of your communication of the 18th. I have been out of town since the 19th and just returned. On that date, however, I had an interview with Mr. Hemenway in connection with the proposed sale of his interest in Smith & Hemenway, or the purchase of Mr. Smith's interest therein. He informs me that they are about to take their semi-annual inventory, which will be completed this week, and it occurs to me that both parties will be better informed as to the actual value of their interests after such inventory has been taken. In the meantime, however, I suggest that you give me your client's views with regard to the terms upon which the purchase or sale would be made after the price has been determined.

Answer.
"Schedule B."

"SCHEDULE B."

July 1, 1925.

I duly received yours of the 23rd ult. and because of Mr. Smith's dates conflicting with mine, we have not been able to have a conference until today. He tells me that while it is true that inventory is about to be taken, nevertheless, it will be approximately three weeks or more before all the extensions are made and final computation of the inventory had. He tells me that his preliminary estimates will show a loss of $25,000. That statement, however, is not to be taken as a representation or warranty or condition. It is simply Mr. Smith's belief. Your client has equal access to and knowledge of the facts. His guess is as good as ours. We are willing to stand by our figures hereinafter mentioned, but only for the time hereinafter mentioned.

Mr. Smith says that the trend has been toward the cheaper and less profitable line of tools. He does not appear to me nearly so keen to purchase the business for himself as he was a month ago. His proposition, therefore, to be accepted, must be accepted without further delay. Otherwise it is understood that it automatically lapses. If affairs continue on their present trend much longer, he will not buy on any conditions. I must therefore ask that I hear from you definitively by Monday, July 6th, on the following proposition:

Answer.
"Schedule B."

Mr. and Mrs. Hemenway to sell their entire holdings of stock to Mr. Smith for $100,000, payable as follows: $40,000 cash; $30,000 by conveyance forthwith to your nominee of the Montreal property; and the balance of $30,000 in six annual installments of $5,000 each, the first payable in one year with interest at 5%; the second in two years with interest at 5%, and so on. All the capital stock thus acquired and Mr. and Mrs. Smith's present holdings, to be deposited in escrow, endorsed in blank as collateral security for the payment of the proferred installments. Mutual general releases to be exchanged. Mr. and Mrs. Hemenway to covenant that they will do nothing to injure, prejudice, embarrass, or hinder the corporation or Mr. Smith in the prosecution of its business, nor to solicit its customers, and further not to entice away from its employ any of its present or future employees, and further not to employ, directly or indirectly, any of its past, present or future employees.

May I have your definitive answer one way or the other not later than Monday, the 6th?

I expect to go on my own vacation shortly and desire to have the matter either settled or else the liquidation proceedings legally instituted and well under way before I go.

Answer.
"Schedule C."

"SCHEDULE C."

July 28, 1925.

I duly received yours of the 2nd and of the 9th, and have been awaiting to hear that had returned from vacation as I hesitate very much to bother you on vacation. However, the month is passing by and on Friday I leave for my vacation and will be gone during the month of August, and this matter must receive attention and have action. I am sending the original of this letter to your camp and a copy to your office, in the event that perchance you have already returned from vacation.

It appears from your letters that the inventory is complete, and I take it that by now all the extensions have been made. I have not seen Mr. Smith recently, but presume that in the absence of word to the contrary that the proposition which I set forth in my letter to you of July 1st can still be worked out. Mr. Smith has no intention of selling, and is entirely unwilling, in view of his comparative youth as compared with Mr. Hemenway, to consider any proposition relating to selling. He is willing to buy on the terms stated in my letter of July 1st, but that is all. If Mr. Hemenway desires to accept this proposition, well and good. If not, I take it that there is no use of negotiating further, and that our only recourse will be to institute proceedings for dissolution.

As I have but a few days in the office before my own vacation, I have taken the matter up with my

partner, Mr. Murray, to whom henceforth all correspondence should be addressed for his attent. Personally I hope that the matter can be settled amicably, but Mr. Smith is insistent on dissolving the company, and the only possible alternative that I can see is a purchase by him of the Hemenway interests.

I am genuinely sorry to bother you with this matter while on your vacation, but it seems to me that all you will have to do will be to answer yes or no. If "yes" Mr. Murray will at once arrange for the purchase. If "no" he will draw the papers in the proceedings for dissolution.

Answer.
"Schadule D."

"SCHEDULE D."

October 12th, 1925.

This is to acknowledge receipt of your communication of the 6th with respect to the interview had by you with Mrs. Hemenway and her nephew and we appreciate your frankness in transmitting to us the details of this interview.

I desire respectfully to call your attention to the inconsistency contained in the third paragraph of your letter in reference to the sale of Mr. Smith's stock, in which you state "that Mr. Smith has been and would be at all times open to an offer for the sale of his holding but that no offer had ever been made to me." Your attention is directed to my communication of the 2nd of July and of the 9th of July, and in particular to your reply of July 28th. However, it would seem to me that discussion on these points is immaterial at this time in view of the situation that has been created by the filing of the petition for dissolution. You and I both realize that the prosecution of this proceeding will entail a sacrifice and an expense which will not enure to the benefit of either one of the parties, and should be avoided if at all possible.

Mr. Hemenway feels, as we do, that there is no occasion for a dissolution of the company and no sound foundation therefor, especially in view of the fact that his health is improving and that business conditions generally are considerably on the

mend and the prospects for a profitable continuation are almost assured.

While you seem to have some objection, and so indicate in your letter, to make an offer to buy or sell at a certain figure in that you thought this was making a double offer and giving us the advantage of deciding which one to accept, we have no such hesitation, in order to save the situation, and we are authorized to make you the following offer for the purchase of the Smith interests, or to sell the Hemenway interests upon the same terms and conditions:

The purchase or sale price to be $125,000, payable as follows: $5,000 upon signing the contract; $45,000 ten days after the signing of the contract, without interest; $30,000, the agreed value for the Montreal property, to be taken over by the party selling his shares of stock, free from all encumbrances, subject to a lease, however, rent on said property to start to the seller from November 1st, 1925; the amount of $30,000 to be credited on account of the purchase price; $25,00 cash on or before December 31, 1925, without interest; $20,000 to be paid $2,500 each three months beginning April 1, 1926, with interest from January 1, 1926, at the rate of 6% per annum, interest to be paid semi-annually July 1 and January 1 of each year. Total $125,000.

The stock, after it is transferred on the books of the company, will be endorsed in blank and deposited in such amount as you and I will agree upon as being necessary so that the selling parties

will be fully protected, in escrow, with any bank or trust company, as collateral security for the deferred payment of $20,000.

An agreement is to be made by the purchaser with the seller that until the final payment has been made as hereinabove provided the capital assets of the company shall not be depleted excepting as may result from the ordinary course of business, and such other safeguards as contained in your letter of July 1st.

Will you kindly give this matter your immediate attention and let us hear from you promptly.

"SCHEDULE E."

October 13, 1926.

Confirming telephone conversation, this is to verify that I, in behalf of Mr. Landon P. Smith and Mrs. J. Mildred Smith, being thereunto duly authorized, accept your offer in behalf of Mr. and Mrs. John F. Hemenway to sell the Hemenway interests at the price and upon the terms and conditions as set forth in your offer of October 12th.

As mentioned over 'phone, if you will draft the agreement of sale and send it to us, we will cause it to be duly executed by clients and the first installments of $5,000 paid forthwith.

Answer.
"Schedule F."

"SCHEDULE F."

TO ALL TO WHOM THESE PRESENTS SHALL COME OR MAY CONCERN:

GREETING: KNOW YE, That we, John F. Hemenway and Alice M. Hemenway, for the sole consideration of the sum of One Dollar and other valuable considerations, lawful money of the United States of America to us in hand paid by Landon P. Smith and J. Mildred Smith, the recepit whereof is hereby acknowledged, have remised, released, and forever discharged and by these presents do for ourselves and our respective heirs, executors and administrators, remise, release and forever discharge the said Landon P. Smith and J. Mildred Smith and their respective heirs, executors and administrators, of and from all, and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckoning bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents executions, claims and demands whatsoever, in law or in equity, which against them or either of them, we or either of them, we or either of us ever had, now have or which our respective heirs, executors or administrators, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents. Excepting from the operation hereof, however, the matters still to be performed contained in stipulation between Cohn

and Burnett, representing the respective parties hereto, dated December 9th, 1925.

IN WITNESS WHEREOF, we have hereunto set our hands and seals the 19th day of January in the year one thousand nine hundred and twenty-six.

ESTATE OF JOHN F. HEMENWAY.
Alice M. Hemenway (L. S.)
Executrix.
Alice M. Hemenway (L. S.)

Sealed and delivered in
the presence of
M. B. Cohn.

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

On the 19th day of January in the year one thousand nine hundred and twenty-six before me personally came ALICE M. HEMENWAY, individually and as Executrix of John F. Hemenway, deceased, to me known, and known to me to be the individual described in, and who executed the foregoing instrument, and she duly acknowledged to me that she executed the same.

ALICE T. ROOK,
Commissioner of Deeds,
New York City.
Kings Co. Clerk's No. 186, Reg. No. 6078.
N. Y. Co. Clerk's No. 248, Reg. No. 26103.
Commission expires Oct. 21, 1926.

REPLICATION.

IN CHANCERY OF NEW JERSEY.

Between Alice M. Hemenway, individually and as executrix, etc., *Complt.,* *-and-* Landon P. Smith, et al., *Defts.*	*On Bill, &c.* *Replication*

The replication of Alice M. Hemenway, individually and as executrix of the last will and testament of John F. Hemenway, deceased, to the answer of Landon P. Smith and Julia M. Smith, the defendants in the above entitled cause.

The complainant joins issue on the answer of the said defendants.

(Signed) LUM, TAMBLYN & COLYER,
Solrs. for and of Counsel with Complainant.

We consent to the filing of the within replication as in time.

(Signed) BURNETT & MURRAY,
Solrs. for Defts.

ORDER OF REFERENCE.

IN CHANCERY OF NEW JERSEY.

Between Alice M. Hemenway, individually and as executrix, etc., *Complt.,* *-and-* Landon P. Smith, et al., *Defts.*	*On Bill, &c.* *Order of Reference*

The solicitors for the defendants consenting hereto;

It is on this 8th day of December, 1926, on motion of Lum, Tamblyn & Colyer, of counsel with the complainant, ORDERED that the above stated cause be referred to Honorable M. L. Berry, one of the Vice-Chancellors, to hear the same for the Chancellor and to report thereon to him and advise what order or decree should be made therein.

L. R. WALKER,
C.

We consent to the entry of the above order.

BURNETT & MURRAY,
Solrs. for Defts.

A True Copy.
Thomas Barber,
Clerk.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

Between

Alice M. Hemenway, individually and as executrix of the last will and testament of John F. Hemenway, deceased,

Complainant,

-and-

Landon P. Smith and Julia M. Smith,

Defendants,

Transcript of shorthand notes of testimony and proceedings in the above entitled cause before Hon. Maja Leon Berry, Vice Chancellor, at the Chancery Chambers, Newark, New Jersey, on Monday, June 20, 1927, at 10 A. M.

Appearances:

For Complainant: Lum, Tamblyn & Colyer, by Ralph E. Lum, Esq., and George W. Alger, Esq., and W. R. Pratt, Esq. (of the N. Y. Bar).

For Defendants: Burnett & Murray, by Norbury C. Murray, Esq.

Mr. Murray:—I would like to know who the parties to this proceeding are. This proceeding was started by Mrs. Hemenway, as execu-

trix and individually. He died in January, 1926. Then this proceeding was started by Mrs. Hemenway as his executrix and also in her individual capacity. Since then Mrs. Hemenway has died. I would like to know who the parties are here to this proceeding.

Mr. Alger:—We expected to amend the record as far as necessary. After the date which was set for trial the last time, Mrs. Hemenway was taken very suddenly ill, and died within a couple of days. Mr. Elden C. Hemenway has been appointed executor of the last will and testament of John F. Hemenway. He was alternate executor of the will. Mrs. Hemenway alone qualified, and has since died, and he has since qualified, and at this time we offer in evidence the exemplified record of the proceedings and the appointment of the executor of the estate of John F. Hemenway.

(Marked Exhibit C-1.)

Mr. Lum:—We suggest on the record the amendment of the bill and the appointment of Elden C. Hemenway as executor of the Estate of John F. Hemenway, and J. Harrison Montague, Elden C. Hemenway and Martin B. Cohn have been appointed executors of the will of Mrs. Alice M. Hemenway, and we offer in evidence an exemplified copy of the probate proceedings.

(Marked Exhibit C-2.)

Mr. Murray agreed with me that we may use certified copies of the proceedings in New

York, touching the dissolution of the corporation, instead of exemplified, subject to his right to examine and check the record.

Martin B. Cohn, sworn for complainants:

Direct Examination by Mr. Alger:

Q. Mr. Cohn, where do you reside? A. New York City.

Q. And you are an attorney and counsellor at law of the New York Bar? A. I am.

Q. And one of the executors of the last will and testament of Alice M. Hemenway? A. I am.

Q. Are you acquainted with Landon P. Smith, one of the defendants in this case? A. I am.

Q. And with Mrs. Smith? A. Yes.

Q. That is Julia Mildred Smith? A. Yes.

Q. How long a time have you been acquainted with them? A. For twenty years or more.

Q. Were you at one time attorney for Smith & Hemenway, Inc.? A. Yes.

Q. And in what state was that company incorporated? A. New York.

Q. Were you the attorney who incorporated the company? A. Yes, sir.

Q. Do you know offhand what was the capital stock of the company? A. I don't recall. There was originally a smaller capitalization and it was subsequently increased, to the best of my recollection.

Q. In 1925 do you recall the amount? A. Not accurately.

Q. Mr. Cohn, were you familiar with stockholdings of the company as they existed on April 7, 1925. A. Yes.

Q. And Mr. John F. Hemenway was the owner of 212 shares of Class B Common and 499 shares of Class B Preferred Stock of the company of the par value of $100 per share? A. Yes, sir.

Q. And Alice M. Hemenway was the owner of 1238 shares of Class B Common and one share of Class B Preferred Stock of the company? A. Correct.

Q. And those shares were also of the par value of $100? A. Yes.

Q. Mr. Landon P. Smith owned 212 shares of Class A Common and 499 shares of Class A. Preferred Stock of the company? A. Yes.

Q. And his wife, Julia Mildred Smith, owned 1238 shares of Class A Common and one share of Class A Preferred stock; is that right? A. Yes.

Q. All of the par value of $100? A. Yes.

Q. Was there any preference of Class A stock over Class B, or was this so designated simply for convenience? A. I believe that the preference was as to dividends, and as such in case of dissolution.

Q. Sometime in April, 1925, did you have some talk with Mr. and Mrs. Smith relative to the stock holdings of these parties? A. I will have to refresh my memory.

Mr. Murray:—Before the witness refreshes his memory, I would like to know what he is refreshing it from.

Witness:—Daily entries in my office.

Cross Examination by Mr. Murray:

Q. In what? A. Daily entries in my office.

Q. In what form are they? A. Typewritten.

Q. I notice that they are loose leaf entries. A. I just took them out of a file.

Q. You have a regular file; did you do that with all matters that you handled in your office? A. Yes.

Q. When were those made? A. They were made at the time.

Q. Either the same day or the following day? A. Yes.

Q. May I look at them? A. Certainly.

Q. Are these original sheets or have they been copied? A. No, those are original sheets.

Q. Do I understand that each day you have typewritten on this idential sheet the matters which took place on that day, or possibly the day before? A. No. They are dictated—all the entries are dictated and transcribed into the particular subject matter of the case.

Q. These are the result, then, of the stenographer's taking of the notes which you dictated? A. Yes, and I check them up each day.

Q. You checked them up after you received them? A. After I received them from the stenographer.

Q. How long after do you usually receive them from the stenographer? A. The following day. They are dictated one day and I receive them the next day.

Q. When do you check them up? A. During the course of the following day.

Q. Do these contain a record of all of the transactions which you had with Mr. and Mrs. Hemenway or Mr. and Mrs. Smith, or with any matter relating to this case? A. They contain all the records in this particular matter.

Q. That is what I mean. A. Yes.

Q. You don't put down just certain portions and omit other portions which you think may not be material? A. I may simply dictate sufficient to give me the entire picture.

Court:—Proceed.

Further Direct Examination by Mr. Alger:

Q. Are there some other matters in these entries referring to the Hemenways, which have no connection with this matter, also? A. Yes, sir.

Mr. Murray:—On this same sheet?

Witness:—Yes.

Mr. Murray:—You didn't keep a separate page for each case taken, you simply run them down in chronological order, all matters which you handled?

Witness:—The matters in connection with the Hemenway-Smith & Hemenway would have one sheet; Hemenways individually would have a sheet and they would be all mixed. What is the question, Mr. Alger?

Q. Do you recall having a conference with Mr. and Mrs. Hemenway on either the sixth or seventh of April, 1925? A. Yes.

Q. On which date was that, Mr. Cohn? A. I think it was the sixth; I am not sure.

Court:—If you can tell by referring to your record, do so.

Witness:—(After examining record) April 6th.

Q. And did you have another conference with Mr. or Mrs. Hemenway on the seventh of April? A. Yes, sir.

Q. And after that second conference did you prepare or cause to be prepared a paper writing? A. Yes, sir.

Mr. Alger:—I offer in evidence a paper endorsed "John F. Hemenway and ano. With Landon P. Smith and ano. Orig. Agreement"; no date is given on the outside.

(Marked Exhibit C-3 for identification.)

Q. I show you Exhibit C-3 for identification and ask you if that is the paper which you prepared, or one copy of it? A. It is.

Q. How many copies of that paper did you prepare? A. Probably five.

Q. Subsequently did you see Mr. and Mrs. Hemenway and Mr. and Mrs. Smith in connection with that paper? A. Yes.

Q. And at the same time? A. Yes, sir.

Q. And where did you see them? A. At the office of Mr. Isherwood.

Q. Do you know what Mr. Isherwood's first name is? A. Mr. Howard Isherwood.

Q. Just go on and state briefly the conversation had between the Smiths, the Hemenways and Mr.

Isherwood and yourself at that time. A. I didn't fix the date.

Q. What date was it? A. It was on the seventh. Excuse me; I am mistaken as to that. The interview at Mr. Isherwood's office was on the 13th.

Q. Morning or afternoon? A. That was in the morning.

Q. Will you go on and tell me what was said and what transpired? A. A conference was had with reference to an agreement that Mr. Isherwood prepared, by which Mr. Smith agreed to purchase the stock from the Hemenways, and at this conference I presented a counter—the agreement which has just been submitted, which reversed the situation and made the Hemenways the purchasers of the stock. Mr. Smith made a statement that he would refuse to sell.

Q. That he would refuse to sell? A. Yes.

Q. Mrs. Smith say anything? A. I don't recall that Mrs. Smith said anything.

Q. What else was said? A. And Mrs. Hemenway called attention to a conference that had been held at the Robert Treat Hotel, at which she complained about the unfairness of the agreement, and Mr. Smith made the statement that he would sell and Mr. Smith declined to—

Q. What did Mr. Smith say to that? A. He said that he would refuse to sell; he changed his mind. I subsequently spoke to Mr. Isherwood in connection with the matter, and Mr. Isherwood said that he would confer with his clients further and let me know.

Q. Did Mr. Smith deny the statement of Mrs. Hemenway that he had agreed to sell? A. He did not.

Q. Is that all you recall of that conversation? A. There were a great many generalities spoken of in connection with the affairs of the company. I tried just to have the matter straightened out. I couldn't see any good reason for any controversy. They had been in business so many years together—

Mr. Murray:—I object to that.

Court:—How long had they been in business together, to your knowledge?

Witness:—Over twenty years. I think I first had dealings with the company in some tax matters in 1892—I think—I am not sure as to that; maybe it is 1902; it is a good many years —a lifetime.

Q. Did Mrs. Hemenway or Mr. Hemenway refer to the book value of the company and a half interest? A. That was a natural subject, which was brought up repeatedly.

Q. What did they say about it? A. Mrs. Hemenway criticised the offer and the insignificant amount, and I made various efforts to have the amount increased, but without any success at that time.

Q. The Smiths were offering to buy at that time and refused to sell at $100,000? A. That is correct.

Q. And they so stated in Mr. Isherwood's office? A. Yes.

Mr. Alger:—I offer Exhibit C-3 for identification in evidence.

Mr. Murray:—This was never signed, was it?

Witness:—No, sir.

(Marked Exhibit C-3.)

Q. In the interim between this conference at the Robert Treat Hotel on April 7th, to which Mrs. Hemenway referred, and the conference at Mr. Isherwood's office, at which the Smiths were present, do you know whether Mr. Hemenway had called to New York City his nephews from Buffalo and Chicago? A. I do.

Q. Had he called them to New York? A. Yes.

Q. And there had been some conference between them before this contract, Exhibit C-3, was drawn by you? A. Yes.

Q. Did you have any further negotiations with Mr. Isherwood? A. None.

Q. Subsequent to this conference on the thirteenth of April did you see Mr. Smith up to May 28th? A. I don't recall; no, sir.

Q. On May 28 did you receive a communication from Messrs. Burnett, Sorg, Murray & Duncan, signed by D. Frederick Burnett? A. Yes, sir.

Q. You have the original letter of that date with you? A. Yes, sir.

Mr. Alger:—I offer it in evidence.

(Marked Exhibit C-4.)

Q. Did you reply to that letter, Mr. Cohn? A. I did.

Q. And did you have a duplicate carbon copy made in your office? A. Yes.

Mr. Alger:—I offer in evidence carbon copy

of letter from Mr. Cohn to Burnett, Sorg, Murray & Duncan.

(Marked Exhibit C-5.)

Q. Mr. Cohn, will you please state the dates of the various matters in order? I would like to have each one marked and offered as an exhibit. A. I have here a letter dated June 15, 1925, from Burnett, Sorg, Murray & Duncan, signed by D. Frederick Burnett, to Martin Cohn.

Mr. Alger:—I offer that in evidence.

(Marked Exhibit C-6.)

A. (Continuing) Next, a carbon copy of letter dated June 23, 1925, from me to Burnett, Sorg, Murray & Duncan.

Mr. Alger:—I offer that in evidence.

(Marked Exhibit C-7.)

A. (Continuing) Next, a letter from Mr. Burnett to me, dated June 18, 1925.

Mr. Alger:—I offer that in evidence.

(Marked Exhibit C-8.)

A. (Continuing) Next, a letter dated July 2, 1925, from Mr. Burnett to me.

Mr. Alger:—I offer that in evidence.

(Marked Exhibit C-9.)

A. (Continuing) Next, a letter dated July 2, 1925, being a carbon copy, from me to Mr. Burnett.

Mr. Alger:—I offer that carbon copy of letter in evidence.

(Marked Exhibit C-10.)

A. (Continuing) Next, a carbon copy of letter from me to John F. Hemenway, dated July 2, 1925.

Mr. Alger:—I offer that in evidence.

(Marked Exhibit C-11.)

A. (Continuing) Next, a carbon copy of letter dated July 9th, 1925, from myself to Mr. Burnett.

Mr. Alger:—I offer that in evidence.

(Marked Exhibit C-12.)

A. (Continuing) Next, original letter from Mr. Burnett to me, dated July 28, 1925.

Mr. Alger:—I offer that in evidence.

(Marked Exhibit C-13.)

A. (Continuing) Next, a carbon copy of my reply, dated August 4, 1925, addressed to Burnett, Sorg, Murray & Duncan, attention of Mr. Norbury C. Murray.

Mr. Alger:—I offer that in evidence.

(Marked Exhibit C-14.)

A. (Continuing) Next, a carbon copy of a letter written by myself to Mrs. J. F. Hemenway, dated August 4, 1925.

Mr. Alger:—I offer that in evidence.

(Marked Exhibit C-15.)

A. (Continuing) Next, original letter from Burnett, Sorg, Murray & Duncan, signed by Mr. Murray, addressed to Alexander, Cohn & Sondheim, attention Mr. Cohn, dated August 5, 1925.

Mr. Alger:—I offer that in evidence.

(Marked Exhibit C-16.)

A. (Continuing) Next, a carbon copy of letter dated August 7th, 1925, from myself to Mrs. John F. Hemenway.

Mr. Alger:—I offer that in evidence.

(Marked Exhibit C-17.)

A. (Continuing) Next, a carbon copy of letter dated August 7, 1925, from myself to Burnett, Sorg, Murray & Duncan, attention of Mr. Murray.

Mr. Alger:—I offer that in evidence.

(Marked Exhibit C-18.)

A. (Continuing) Next, original letter from Burnett, Sorg, Murray & Duncan, signed by Mr. Murray, to Alexander, Cohn & Sondheim, attention of Martin B. Cohn, dated August 10, 1925.

Mr. Alger:—I offer that letter in evidence.

(Marked Exhibit C-19.)

A. (Continuing) Next, carbon copy of letter dated October 1, 1925, from myself to O'Brien, Malevinsky & Driscoll.

Mr. Alger:—I offer that in evidence.

(Marked Exhibit C-20.)

A. (Continuing) Next, original letter dated October 6, 1925, from D. Frederick Burnett to myself.

Mr. Alger:—I offer that in evidence.

(Marked Exhibit C-21.)

A. (Continuing) Next, original letter dated October 6, 1925, from O'Brien, Malevinsky & Driscoll to Alexander, Cohn & Sondheim, attention Mr. Cohn.

Mr. Alger:—I offer that in evidence.

(Marked Exhibit C-22.)

A. (Continuing) Next, a carbon copy of letter dated October 12, 1925, written by myself to Burnett, Sorg, Murray & Duncan, attention of Mr. Burnett.

Mr. Alger:—I offer that in evidence.

(Marked Exhibit C-23.)

A. (Continuing) Next, original letter, dated October 13, 1925, from D. Frederick Burnett to myself.

Mr. Alger:—I offer that in evidence.

(Marked Exhibit C-24.)

A. (Continuing) Next, a carbon copy of letter dated October 14, 1925, written by myself to Mr. Burnett.

Mr. Alger:—I offer that in evidence.

(Marked Exhibit C-25.)

A. (Continuing) Next, original letter, dated October 17, 1925, from D. Frederick Burnett to myself.

Mr. Alger:—I offer that letter in evidence.

(Marked Exhibit C-26.)

A. (Continuing) Next, original letter, written in longhand, dated October 20, 1925, from John F. Hemenway to M. B. Cohn.

Mr. Alger:—I offer that in evidence.

(Marked Exhibit C-27.)

A. (Continuing) Next, a carbon copy of letter, dated October 21, 1925, written by myself to Mr. John F. Hemenway.

Mr. Alger:—I offer that letter in evidence.

(Marked Exhibit C-28.)

A. (Continuing) Next, an original letter, dated October 22, 1925, from D. Frederick Burnett to Martin B. Cohn.

Mr. Alger:—I offer that in evidence.

(Marked Exhibit C-29.)

A. (Continuing) Next, original letter, dated Octo-

ber 23, 1925, from D. Frederick Burnett to Martin B. Cohn.

Mr. Alger: I offer that in evidence.

(Marked Exhibit C-30.)

A. (Continuing) Next, a carbon copy of my letter to Mr. Burnett, dated October 27, 1925.

Mr. Alger:—I offer that in evidence.

(Marked Exhibit C-31.)

A. (Continuing) Next, original letter, dated October 29, 1925, from D. Frederick Burnett to Martin B. Cohn.

Mr. Alger:—I offer that letter in evidence.

(Marked Exhibit C-32.)

A. (Continuing) Next, carbon copy of letter, dated October 30, 1925, from myself to Mr. Burnett.

Mr. Alger: I offer that in evidence.

(Marked Exhibit C-33.)

A. (Continuing) Next, carbon copy of letter, dated October 31, 1925, from myself to Mr. Burnett.

Mr. Alger:—I offer that in evidence.

(Marked Exhibit C-34.)

A. (Continuing) Next, original letter, dated November 2, 1925, from D. Frederick Burnett to me.

Mr. Alger:—I offer that in evidence.

(Marked Exhibit C-35.)

Q. Mr. Cohn, during this exchange of correspondence, C-6 to C-35, inclusive, where was Mr. Hemenway? A. I think Mr. Hemenway was sick, because I was in the habit of sending copies, both of the letters received from Mr. Burnett as well as my replies, to his home.

Q. Do you know whether for a time from early in July until the first of August, that Mr. Hemenway could not be seen at all? A. There was a time, yes, sir; I don't recall the exact date.

Q. Do you recall an occasion when a proceeding was commenced in New York City to dissolve the Smith & Hemenway Company? A. Yes, sir.

Q. When was that, Mr. Cohn? A. September 30. It must have been filed on the twenty-ninth, or possibly the twenty-eighth. I think it was the twenty-eighth—twenty-eighth, yes.

Q. Was any copy of the petition or any papers in the proceeding served on you? A. No, sir.

Q. Do you know whether or not any were served on either Mr. or Mrs. Hemenway?

Mr. Murray:—I object.

A. There were not.

Court:—So far as he knows.

Q. So far as you know? A. No, there were not.

Q. Did you see an item in the New York Times of September 29, 1925, relative to this proceeding? A. I did.

Q. I show you copy of The New York Times, dated September 29, 1925, page 44, and ask you if you saw that copy of The Times at the time it was published? A. I did.

Mr. Murray:—I object to it.

Court:—I assume the only purpose it can have is to show that this was the first notice that he had. I understood that from your opening.

Mr. Alger:—Yes.

Court:—The contents of the article is not admissible.

Mr. Murray:—It is already on the record and it is not necessary to offer it in evidence.

Court:—You cannot prove any more than that is the first notice that this man had.

Mr. Alger:—The notice also had a direct bearing on the subsequent transfer of property. It had a direct bearing on his condition of health.

Court:—I don't see how you can hold the defendant for what appears in the New York Times or any other paper, unless they inserted it.

Q. Did you see Mr. Hemenway subsequent to the appearance of the article in the New York Times? A. Yes.

Q. And when did you next see Mr. Hemenway or Mrs. Hemenway? A. On September 30 I went to their home.

Q. Was Mr. Hemenway confined to his bed at that time?

Mr. Murray:—I object as leading.

Q. Where was Mr. Hemenway when you saw him? A. He was confined to his bed.

Q. Did you have a conference with Mr. and Mrs. Hemenway? A. Yes, sir.

Q. And did you have further conferences with him during the next few days? A. On October 2.

Q. Are you able to state the condition of Mr. Hemenway's health at that time? Just describe his appearance. A. He was in a weakened condition

and he wasn't in very good health; very much worried.

Q. Was he still confined to his bed? A. No, I think he was sitting up the last time—October second, I think he was sitting up.

Q. At that time did Mr. Hemenway again call in his nephews from Buffalo and Chicago, if you know? A. On October second there was an appointment made with Mrs. Hemenway for a conference with one of her nephews the following week, which was held on October 9th.

Q. And at that time did you have a conversation with her and one or more of Mr. Hemenway's nephews? A. I had a conference with Mr. and Mrs. Hemenway and two of the nephews.

Q. Where was that conference?

Mr. Murray:—Who were the nephews?

Witness:—That I haven't a record of here; I think—I am sure, that Charles Hemenway was one, but I don't recall whether Elden or the other brother.

Q. Was Thomas H. here from Buffalo at that time? A. Thomas, yes, that is right.

Mr. Murray:—Not Charles?

Witness:—No. I don't think it was Charlie; I think it was Thomas and Elden.

Q. Following those conferences did you communicate with Mr. Burnett? A. Yes, I dictated a letter to Mr. Burnett on October 12th.

Q. And you had further conferences up to November 2, which is already in evidence, as Exhibit C-6 to C-35? A. I believe so, yes, sir.

Q. Following that talk, or that letter to Mr. Burnett, was the contract dated October 29, 1925, between John F. Hemenway and Alice M. Hemenway, the first parties, and Landon P. Smith and J. Mildred Smith, of the City of Newark, second parties, was that contract prepared and signed? A. Yes.

Q. When was that delivered to Mr. Burnett? A. I think October 31 it was mailed.

Q. Where was the contract signed by Mr. Hemenway? A. New York.

Q. And what place in New York? A. At his home.

Q. Was he confined to his house at that time? A. He wasn't well.

Mr. Murray:—I object as leading.

A. He was at his home.

Q. What was the condition of his health at that time? A. He was very—he was not in very good condition.

Q. Was he able to come to your office? A. I cannot say; he didn't want to come down.

Mr. Alger:—I offer the contract in evidence. I understand the signatures are admitted.

(Marked Exhibit C-36.)

Q. And that was on the thirty-first of October? A. Yes.

Court:—Is this the final contract?

Mr. Alger:—Yes.

Q. During this period up to November first, that is, from April 13 to November first, had you been together with the Smiths and Hemenways at one

time, except in Mr. Isherwood's office? A. I think Mr. Smith called at my office in the interim, but there was no conference with all the parties.

Q. Was that in connection with some matter for the company? A. Yes, sir; it had nothing to do with this.

Q. So that you had no personal conference with him regarding this matter? A. No.

Mr. Murray:—Objected to.

Q. That was up to November 2nd? A. Yes.

Q. When was the next meeting between the Smiths and the Hemenways at which you were present? A. November 4th.

Q. Were both the Smiths and Hemenways there? A. Yes, sir.

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

Q. Will you go on and tell the Court what took place there? A. There was a meeting of the stockholders and directors, and the minutes were all signed and the originals delivered to Mr. Burnett.

Q. It was simply a meeting of the company for the purpose of transacting business of the company? A. Carrying out some of the matters contained in the agreement. I note here that there was a resolution passed authorizing the sale of the Montreal property. My entry reads, "Meeting of stockholders held at this office. Minutes prepared authorizing sale of Montreal property to Smith. Deed to be issued to Hemenway. All minutes signed, stockholders and directors, original of which were given to Mr. Burnett.

Q. You don't have those minutes in your possession? A. No, I can explain that entry with reference to the deed to Smith, I think. I think there was some other company had the record title, and the transfer had to be made first from that company to the Smith & Hemenway Company, and then from the Smith & Hemenway Company to Mr. Hemenway. That is to the best of my recollection. There was quite some discussion at that meeting.

Q. Was there any discussion between Mrs. Hemenway and the Smiths about the sale and why it was being made? A. Yes, sir.

Q. Just tell the Court briefly what was said about that. A. Mrs. Hemenway was very forceful in her criticism of the entire transaction, but having signed the agreement, I told her she had to go through with it, and I think she asked Mr. Smith one or two questions with reference to the sale of some of the property, and Mr. Smith said there wasn't any truth to that—something to that effect.

Q. With reference to what? A. With reference to the sale of part of the property of the Smith & Hemenway Company.

Q. Was that on November 4 or December 9?

Mr. Murray:—Counsel is constantly leading.

Court:—That question is permissible. He said it was on November 4th.

A. I think it was at both times, to the best of my recollection.

Court:—I don't think it makes any difference whether it was once or twice, providing it was said.

You were asked, Mr. Cohn, to detail the conversation and the negotiation which took place at that time, and you may detail them as fully as your recollection will permit.

Witness:—I am giving it to the best of my recollection.

Q. Was there anything else you think of at that time, November 4th? A. I cannot recall; I know that there was a great deal of conversation.

Q. Was there a meeting at your office again on December 9th, 1925? A. Yes, that was the final meeting.

Mr. Murray:—I object; counsel is now fixing the date for him.

Witness:—I will fix it.

Q. Will you fix the date?

Court:—It cannot do any harm.

Mr. Alger:—Mr. Burnett was there.

A. December 9th.

Q. Who was present at your office on that occasion? A. Mr. and Mrs. Smith, Mr. Burnett, Mr. and Mrs. Hemenway and myself.

Q. And will you go on and detail to the Court what transpired at your office on that day? A. That was a conference that lasted from eleven-forty-five to five-thirty without any interruption. The entire matter was closed at that meeting; stipulations were dictated as to some of the matters that couldn't be complied with at that particular time. New stock certificates were issued and I received them in escrow, 500 shares of Preferred Class B and 1450 shares of Class B Common. I also re-

ceived notes aggregating $45,000, note for $25,000, due December 31, 1925, which I delivered to Mr. Hemenway, and the balance of the notes as required under the contract. I also receive the resignations of Mr. Hemenway and Mrs. Hemenway as officers and directors. I received check for salary due to December 8th and a dividend check for $116, plus $90 interest on the $45,000 note from the due date up to the date of payment. I think that is all.

Q. Will you go on and detail the conversation had between Mrs. Hemenway and Mr. Smith? A. Practically the same thing.

Q. Just detail it, Mr. Cohn, what was said; what did she say and what did he say? A. There was always a feeling—

Mr. Murray:—I object to that.

Q. Don't tell us what the feeling was; tell us what was said. A. Your Honor, Mrs. Hemenway was a very exciteable person and she made some very serious statement reflecting on Mr. Smith's attitude.

Court:—What were they?

Witness:—And that it was—

Court:—I cannot imagine this, Mr. Cohn; you will have to tell me, or I won't know.

Witness:—She referred to the entire transaction as being one that was distasteful to her, and forced upon them, and she also accused Mr. Smith of underhanded motives. She also asked him a question, which I testified to before, as to whether—she put it this way: "I heard you have sold out part of the plant to

the Crescent people," and Mr. Smith denied that.

Q. Have you told us all that you can recall of that conversation? A. That is all I have in mind.

Q. Will you refresh your recollection, and I will ask you if Mrs. Hemenway said to Mr. Smith in words or in substance—

Mr. Murray:—I object; counsel is deliberately leading the witness.

A. I can recall other parts of the conversation.

Court:—Tell us all you recall.

Witness:—I can recall a statement made by Mrs. Hemenway to Mr. Smith, or to all of us, that if it were not for Mr. Hemenway's health, he would never sell. I remember something like that occurring at the time that these actions had ruined his health.

Mr. Murray:—She would never sell?

Witness:—Yes, that these actions had ruined Mr. Hemenway's health.

Q. To refresh your recollection: Didn't Mrs. Hemenway inquire—

Mr. Murray: I object to that.

Court:—Wait until he asks the question. After the question is put, I will consider your objection, but I don't know what it is.

Q. To refresh your recollection: What specific inquiry did Mrs. Hemenway make with reference to any negotiations of the Crescent Tool Company?

Mr. Murray:—I object to that; he told the witness what he wanted him to say.

Court:—The objection is overruled.

A. I thought I testified to that, that she asked Mr. Smith whether he had had any negotiations with the Crescent Tool, and he denied it.

Q. To refresh your recollection: What was said about the condition of Mr. Hemenway's health with reference to this dissolution proceeding?

Mr. Murray:—I object to that for the same reason—leading, incompetent, irrelevant and immaterial.

Court:—Objection overruled.

A. That it had affected him a great deal. I recall telling Mr. Burnett that the only reason that we would go through with it was on account of Mr. Hemenway's health. That was the inducing thing that compelled us to sign the agreement.

Q. Did you present to Mr. Hemenway for his signature a general release under the terms of this agreement? A. I mailed it to him, yes, sir.

Q. Did he sign that? A. He did not.

Q. When did Mr. Hemenway die? A. January 1, 1926.

Q. And at the time of his death are you able to tell us whether the proceedings in the dissolution action were still in effect in New York City? A. I have no knowledge as to that.

Q. Had any of the papers in that proceeding ever been served on Mr. or Mrs. Hemenway or yourself? A. I cannot speak for Mr. or Mrs. Hemenway, excepting on information; there were none served on me or our office.

Q. Did you ever receive from anyone a copy of those proceedings? A. No, sir.

Q. To refresh your recollection, do you recall that the matter was first referred to a referee for a hearing on November 25, 1925? A. I think so.

Q. Were you informed that a further order was taken adjourning the matter to January 25, 1926, which order was filed in New York County Clerk's Office November 24? A. I don't recall that; I think the agreement provided for a discontinuance of the proceedings.

Q. Had they been discontinued so far as you know at that time? A. We never received any papers or were never served. Even though papers were requested by our office, we were never favored with any.

Court:—Let me ask a question at this time. It may be a little out of order in your line of proof, but I notice that this agreement provides that as a condition of the purchase and sale "that until the entire purchase price is paid in full with interest, as herein provided, the capital structure or charter of the corporation shall in no way be altered, changed or modified without the written consent of the parties of the first part."

"It is further agreed by the parties of the second part and as a condition for the sale by the parties of the first part of their stock that, until final payment has been made as hereinabove provided, the capital assets of the company shall not be depleted excepting as may result from the ordinary course of business."

Under the terms of the agreement, as I under-

stand it, the payments of the purchase price would not have been completed until sometime later this year or probably the first of next year.

Do I understand that the capital assets of the company have been disposed of?

Mr. Alger:—Yes, the payment of the notes were anticipated, as I understand, subsequently, after Mr. Hemenway's death.

Cross Examination by Mr. Murray:

Q. How long have you been a member of the New York Bar? A. Since 1893.

Q. How long were you the attorney of the Smith & Hemenway Company? A. I should say about twenty years, Mr. Murray.

Q. And how long were you personal attorney of Mr. and Mrs. Hemenway? A. About the same period of time.

Q. And you never were the personal attorney of Mr. Smith, were you? A. No, sir.

Q. Who had charge of the financial end of the company? A. Mr. Hemenway.

Q. And Mr. Smith of the practical end? A. The selling end.

Q. When you met at Isherwood's office what was said regarding an agreement, either oral or written, that Mr. Hemenway had previously made with Mr. Smith, to sell to Mr. Smith, Mr. and Mrs. Hemenway's interest in the company? A. Reference was made to some conversation which was had at the hotel; I never saw any written instrument, or never heard of any written instrument.

Q. What was said with reference to the agreement, oral agreement or written agreement, by Mr. Hemenway and Mr. Smith, for the sale of the Hemenways' interest to Smith, which had been entered into verbally or by written agreement prior to the meeting at the Robert Treat Hotel? A. I don't recall.

Q. Was anything said? A. I don't think so.

Q. Reference was made to this conference and the statement that Mr. Smith would sell on the same terms as he was willing to buy, and then the agreement was presented; when did they say that Mr. Smith had so expressed himself? A. At the conference at the Hotel.

Q. Are you quite certain that it was not at a conference between Mr. Smith and Mr. Hemenway prior to that? A. I don't recall reference to the hotel conference.

Q. Are you sure that nothing else was said—that nothing was said about an oral agreement? A. I didn't hear it, Mr. Murray.

Q. On direct examination you said that the agreement which you drew was the reverse of something else. What was that something else? A. That was an agreement prepared by Mr. Isherwood, and which Mr. and Mrs. Hemenway consulted me about in my office in New York, I think the day that they received it.

Q. And that agreement concerning which they consulted you, provided for a sale by the Hemenways to the Smiths or one of the Smiths, at $100,000, did it not? A. To the best of my recollection it did.

Q. And the agreement that you drew simply reversed that proposition? A. Quite correct, excepting that in the Isherwood agreement it required the Hemenways to return the Montreal property, and in the agreement which I submitted, we took the Montreal property as part payment.

Q. At that conference at Mr. Isherwood's office, Mrs. Hemenway did most of the talking for the Hemenways, did she not; she did more talking than Mr. Hemenway? A. Yes.

Q. Isn't it a fact that Mr. Hemenway at that conference expressed himself as reluctant to buy that business on account of his age or on account of his unfamiliarity with manufacturing methods, or for some other reason? A. No, sir.

Q. Are you sure that he didn't show any reluctance at that conference? A. I am positive, and Mr. Hemenway was at all times able to secure somebody.

Mr. Murray:—I object to that.

Q. (Last question repeated). A. I don't recall any such statement.

Q. Are you sure there wasn't such a statement, or remarks along that line? A. I am quite positive. My hearing is fairly good; I didn't hear it.

Q. Didn't Mrs. Hemenway urge Mr. Hemenway at that conference to buy; whereas, Mr. Hemenway expressed himself as desirous of selling rather than buying? A. No, sir, not at any conference at which I was present.

Q. Did I understand you to say that at that conference, Mr. or Mrs. Hemenway stated at the hotel conference Mr. Smith had agreed to sell to the Hem-

enways? A. He said that he would buy or sell.

Q. At the Isherwood conference did they say whether at the hotel conference any decision had been arrived at? A. Not that I recall.

Q. I understand you to say that something was said about the book values at that Isherwood conference. A. That was always part and parcel of the various conferences.

Mr. Murray:—I ask that that be stricken out.

Q. (Last question repeated). A. I can only repeat that that was always part of the conversation, that the values were in question.

Q. Who referred to them? A. Mrs. Hemenway.

Q. Did Mr. Hemenway refer to it? A. He might have; I don't recall.

Q. You are not sure of that? A. I cannot recall.

Q. Did Mr. Smith? A. Yes, I think Mr. Smith spoke of them in answer to a statement made by one of the parties.

Q. What did he say? A. He said that the values were not as great as the books showed—one of the reflections.

Q. What did Hemenway say about them in reply, or Mrs. Hemenway? A. Mrs. Hemenway, as I recall it, claimed that the property was worth more than the book value.

Q. What did Mr. Hemenway say? A. Mr. Hemenway didn't have much to say at any of these conferences.

Q. Mrs. Hemenway did most of the talking? A. Yes.

Q. Did most of the objecting? A. Mr. Hemenway would occasionally shake his head in approval or make some statement, but he never—

Q. What did Mr. Hemenway say in answer to Mr. Smith's statement that the assets were not worth anything like they appeared to be on the books? A. I don't recall.

Q. Did he say anything? A. I don't think he did.

Q. He didn't dispute it, then? A. I don't know whether he had a chance to.

Q. You don't know what? A. I don't know whether he had a chance to; I think Mrs. Hemenway did most of the talking.

Q. There was nothing to prevent him speaking up and stating his views as to how the book values compared with the actual value, was there? A. Mr. Hemenway was a very meak individual in my experience; he was of a very retiring nature and very seldom asserted himself; I don't think he was in the best of health at that time, either.

Q. He was the financial manager of this concern? A. Yes.

Q. If anybody knew what it was worth, he did? A. He always told me it was worth what the books showed.

Mr. Murray:—I object to that and ask that it be stricken out.

Court:—Answer the question. The question is, that he should know if anybody did.

Witness:—Certainly.

Q. Up to July first—about July first, was it, that Mr. Hemenway was taken ill with pneumonia? A. I don't recall the dates, Mr. Murray.

Q. About that time? A. I thought it was a little later.

Q. Up to that time his health was good, wasn't it? A. Only fair.

Q. What do you mean; what was the matter with him, so far as you could see; what outward evidence? A. None, excepting his movements were always kind of slow in walking.

Q. He attended the business up to the time he was taken ill with pneumonia? A. Yes, as far as I saw.

Q. Up to that time he consulted on matters in reference to the company's affairs? A. Occasionally.

Q. At the time that he appeared at the Isherwood conference he was quite active, was he not, physically? A. I think so.

Q. And mentally? A. Yes.

Q. For several years, or during three or four years prior to 1925, he consulted you occasionally with reference to income tax matters relating to the corporation? A. Yes.

Q. Mr. Smith never did, did he? A. I don't recall; he might have.

Q. You would recall it if he had? A. He might have, I don't say that he didn't.

Q. But what stands out in your recollection distinctly is— A. Most of the time Mr. Hemenway did.

Q. And he consulted you from time to time, did he not, about how to handle the finances of the company? A. I don't know; in what respect?

Q. The reorganization. A. Yes, the corporate matters.

Q. And when they declared a stock dividend? A. Yes.

Q. Now, as a matter of fact, practically every time any one consulted you on behalf of the company in reference to capital set-up or financial affairs of the company, it was Mr. Hemenway, wasn't it? A. Yes; I think one time Mr. Smith was in with Mr. Hemenway in connection with some reorganization of the company—or the capital structure.

Q. In answer to the letter of May 28, which Mr. Burnett wrote you, you replied as follows, did you not:

> "We acknowledge the receipt of your communication of the 28th ult. As our Mr. Cohn expects to be in Newark on Thursday, June 4th, he will take this occasion to call on you relative to the above entitled matter. If this arrangement is not satisfactory to you kindly communicate with us."

Then you received a reply, did you not, of June 15:

> "This is to remind you of our telephone conversation during the heated term by which you requested postponement of our proceedings for dissolution of Smith & Hemenway Inc. until

the following week, in the hope of cooler weather.

"That week has now passed and on turning over my diary this morning I am reminded that a new week is beginning.

"As client is desirous of having this matter carried over with dispatch, may I not ask you to ring me up and arrange the conference early this week.

Very truly yours,

D. Frederick Burnett."

Then there was a letter on June 18 from him to you:

"Please let me have your offer of sale along lines we discussed on Monday, without further delay. Client is getting restive and insists on action.

Very truly yours,

D. Frederick Burnett."

You apparently had a conference with Mr. Burnett a day or two prior to June 18, did you not? A. I imagine so; I know I had one or two conferences with Mr. Burnett.

Q. Do you remember this conference? A. I recall a conference.

Q. Did you have that in your memoranda of your office records which you referred to a while ago? A. Will you give me an approximate date?

Q. About June 16 or 15; June 15 I think it was. A. June 15.

Q. What was the gist of that conversation? A.

I recall that conference very distinctly, Mr. Murray.

Q. Will you relate it? A. Because it was—I came over to see Mr. Burnett with an effort to try to get this thing straightened out for the people to continue.

Q. Continuance of what? A. Continue to run the company as it was. Mr. Burnett, in the course of the conversation, told me of a method that he had used in connection with another case, which I thought was very unique and could be made applicable to the situation here, and that method, as he explained, was that each of the parties would in a sealed envelope indicate the upset price at which they would purchase the other person's interest, and that the attorneys were to open that, and whoever paid the most, whoever exceeded the figure of the other, was to be the purchaser. I think I referred to that in the subsequent letter to your office, in which I suggested that we adopt that plan, and we would be perfectly willing to agree to a sale or purchase on a plan of that kind.

Q. And what price was discussed? A. The price was indefinite at that time.

Q. Wasn't $100,000 discussed as the price at that time? A. Mr. Burnett said that $100,000 was their price, but that his client might be induced to pay a little bit more. I told Mr. Burnett at that time that we wouldn't consider to sell at $100,000, and then this other plan was suggested.

Q. Nothing definite was arrived at at that time? A. No, sir, not at that conference, except that I

was to take the matter up with the Hemenways; I recall that.

Q. On June 23 you wrote as follows:

"This is to acknowledge receipt of your communication of the 18th. I have been out of town since the 19th and just returned. On that date, however, I had an interview with Mr. Hemenway in connection with the proposed sale of his interest in Smith & Hemenway, or the purchase of Mr. Smith's interest therein. He informs me that they are about to take their semi-annual inventory, which will be completed this week, and it occurs to me that both parties will be better informed as to the actual value of their interests after such inventory has been taken. In the meantime, however, I suggest that you give me your client's views with regard to the terms upon which the purchase or sale would be made after the price has been determined."

A. That is right.

Q. Then you received the letter of July first from Mr. Burnett, which I believe has already been read, but for the sake of sequence, I will read it again:

"I duly received yours of the 23rd ult. and because of Mr. Smith's dates conflicting with mine, we have not been able to have a conference until today. He tells me that while it is true that inventory is about to be taken, nevertheless, it will be approximately three weeks or more before all the extensions are made and

final computation of the inventory had. He tells me that his preliminary estimates will show a loss of $25,000. That statement, however, is not to be taken as a representation or warranty or condition. It is simply Mr. Smith's belief. Your client has equal access to and knowledge of the facts. His guess is as good as ours. We are willing to stand by our figures hereinafter mentioned, but only for the time hereinafter mentioned.

Mr. Smith says that the trend has been toward the cheaper and less profitable line of tools. He does not appear to me nearly so keen to purchase the business for himself as he was a month ago. His proposition, therefore, to be accepted, must be accepted without further delay. Otherwise it is understood that it automatically lapses. If affairs continue on their present trend much longer, he will not buy on any conditions. I must therefore ask that I hear from you definitely by Monday, July 6th, on the following proposition:

Mr. and Mrs. Hemenway to sell their entire holdings of stock to Mr. Smith for $100,000, payable as follows: $40,000 cash; $30,000 by conveyance forthwith to your nominee of the Montreal property; and the balance of $30,000 in six annual installments of $5000 each, the first payable in one year with interest at 5%; the second in two years with interest at 5%, and so on. All the capital stock thus acquired and Mr. and Mrs. Smith's present holdings, to be

deposited in escrow, endorsed in blank as collateral security for the payment of the proferred installments. Mutual general releases to be exchanged. Mr. and Mrs. Hemenway to covenant that they will do nothing to injure, prejudice, embarrass, or hinder the corporation or Mr. Smith in the prosecution of its business, nor to solicit its customers, and further not to entice away from its employ any of its present or future employees, and further not to employ, directly or indirectly any of its past, present or future employees.

May I have your definite answer one way or the other not later than Monday, the 6th?

I expect to go on my vacation shortly and desire to have the matter either settled or else the liquidation proceedings legally instituted and well under way before I go.

Very truly yours,

D. Frederick Burnett."

You replied to that July second, as follows:

"Your letter of the 1st was received by me this morning and I am under the impression that you have misinterpreted my communication of the 23rd of June. It was not my intention to indicate in any way that Mr. and Mrs. Hemenway were willing to sell their interest, but rather I wanted to get your suggestion as to a plan of payment, no matter who the purchaser was, and that we would follow some plan similar to the one which you used in another case as to

which one would pay the most for the other's interest.

Your letter coming on the day when I leave for my vacation makes it impossible for me to have a conference with my client in time for an answer on July 6th, as indicated in your communication. I intend to return to New York on the 8th for a few days interruption of vacation on account of other business matters and have sent a copy of your letter to Mr. Hemenway, asking him to call at my office on one of these days to take the matter of your communication up with me. Personally, I see no reason why this haste and why the entire matter should not go over until after the inventory has been completed. The impression I gained in my last interview with Mr. Hemenway would indicate 'that the length of time before all the extensions are made and final computation of the inventory' was somewhat exaggerated by Mr. Smith.

I shall write you further on the subject after my conference with clients."

Then you wrote on July 9th:

"I endeavored to get into communication with you by phone today, but was informed that you were out of town. I desired to confer with you with reference to conference had with Mr. and Mrs. Hemenway. I understand that the inventory has been completed and that within a very short period of time the extensions will be made so that both parties can intelligently

negotiate in connection with the purchase or sale of their respective interests. I would suggest that a plan similar to the one that you showed me which was used by you in settling another matter be adopted in this case. That an agreement be entered into between the parties fixing the percentage to be paid in cash, terms as to the balance, and such other matters as we might deem necessary to be incorporated in said agreement.

In the event that the Hemenways sell, they are willing to take in addition to the cash provided for in the agreement, the Montreal property at a valuation of $27,500. This is carried on the books at $25,000.

I am leaving for my camp tonight to be absent for a few weeks. Any communication addressed to me, % Green Mountain Camp, Brandon, Vermont, will however, receive my attention.

I am sorry that I was not able to talk personally with you today."

A. Yes; I didn't want to do it.

Court:—I think it is quite apparent that this case will consume the two days allotted to it, if not more, and if it takes any more than two days, it will not be completed until sometime next fall. Necessarily, I will have to read the testimony and the exhibits all at that time, so that it is a waste of time for me to listen to them now.

Q. Mr. Cohn, you said that on October 2 Mr. Hemenway was not in good health, and that you saw him sitting up at home? A. I did.

Court:—He made two calls within two days of each other; the first time, Mr. Hemenway was in bed, and the second time, he was sitting up.

Q. Are you aware of the fact, Mr. Cohn, that Mrs. Hemenway was at the factory on October first? A. No, sir.

Q. With Elden Hemenway? A. I heard that they had been there but I wasn't aware of their going there.

Q. You found out afterwards that they had been there? A. Yes.

Q. And that was the time referred to in Mr. Burnett's letter to you of October 6th or thereabouts? A. I cannot answer that without seeing the letter. I have a memorandum here that I received a letter from Mr. Burnett.

Q. On the eighth of October? A. Yes, I recall this.

Q. There was nothing wrong with Mrs. Hemenway's health then, was there? A. Not that I know.

Q. There wasn't anything wrong with her health, so far as you knew, throughout any of these proceedings, throughout 1925, was there? A. Not that I know of.

Q. You made the offer which was accepted and which formed the basis of the contract carried out and marked Exhibit C-36, did you not? A. Yes, sir, that is my letter, dated October 12, 1925.

Q. And you received first a telephone acceptance of that letter by Mr. Burnett the next day, did you not? A. I received a telephone communication from Mr. Burnett that he had received my letter, and that he was going to send for Mr. Smith the next day, October 13.

Q. Did he not also say that he accepted your proposition? A. I don't recall that.

Q. You are not sure of that? A. No.

Q. You did receive the letter, however, of October 13, the following day? A. Yes. May I see the letter? (Witness shown letter.) Yes.

Q. You didn't say anything at any time, in reference to these letters, did you, that the Hemenways were being forced into this? A. Not in the letters; I told Mr. Burnett that I induced Mr. and Mrs. Hemenway to agree to this on account of Mr. Hemenway's anxiety and his ill health.

Q. You said on your direct examination that the only reason that they were going through with the contract was they were forced into it. I am asking you now— A. On account of Mr. Hemenway's health.

Q. I am asking you now whether you told Mr. Burnett or anybody else at or about the time you made this offer of October 12 and received the acceptance of October 13, whether you told them anything at all about that at any time? A. Nothing except what is contained in the letter.

Q. You first consulted with Mr. and Mrs. Hemenway before you sent that letter of October 12 con-

taining their offer to sell? A. Yes, sir, several times.

Q. And they had had a family conference; you had been in consultation at the family conference? A. No, I was never present at the family conference.

Q. The family conference to which you referred on your direct examination was a few days prior to that, wasn't it? A. I had a conference with Mr. and Mrs. Hemenway and two of the nephews.

Q. When? A. What date are we at, Mr. Murray?

Mr. Lum:—October 12.

Witness:—That was on the ninth of October, with Mr. and Mrs. Hemenway and the two nephews.

Q. And the family conference you speak of, whether you attended that or not, was when with reference to that? A. I don't think I testified as to any family conference. I was asked the question whether I knew there was a family conference; I think I said I did, but I wasn't present.

Q. When was that family conference? A. That I don't recall; it was told to me afterwards; I think the night before or something like that.

Q. Was it before or after your letter of October 12? A. I should say before.

Q. You followed up your letter of October 12 and the acceptance of the thirteenth by a draft of a contract, did you not? A. Yes, sir.

Q. And you drew that, did you not? A. Is this the one that was signed, Mr. Murray?

Mr. Murray:—No, that was not signed; that was one that was returned later.

Witness:—I don't recall; this is my back, and I imagine it was drawn.

Q. Won't you look at it and say whether it is a contract which you drew? A. It is.

Q. Subsequent to that, the final contract, which was carried through, was drawn by you? A. Yes.

Q. After the one I just showed you had been objected to in parts by Mr. Burnett? A. Yes. This contract is an entirely different matter, Mr. Murray. That refers to a purchase of the stock by the Hemenways of the Smiths.

Q. I show you another contract. Did you prepare that?

Mr. Murray:—I would like to have marked for identification, a draft of a contract, bearing date the blank day of October, 1925, between John F. Hemenway and Alice M. Hemenway to Landon P. Smith and J. Mildred Smith.

(Marked Exhibit D-1 for identification.)

Q. That was never executed? A. Or no copy of it; apparently not.

Q. About October 29 or 31 you received the payment on account, of $5000, did you not? A. Yes.

Q. At that time you didn't say anything to Mr. Burnett as to any objections being made to the contract or going through with the contract because of duress or force or because of Mr. Hemenway's health, did you? A. No, sir.

Q. You had consulted with Mr. and Mrs. Hem-

enway, or both, between October 29 and October 12, hadn't you? A. Yes, sir.

Q. When you met on November 4th, at your office, the purpose of the meeting was to take the action necessary to convey the Montreal property in accordance with Canadian laws? A. What date was that?

Q. November 4th. A. Yes.

Q. At that meeting the Hemenways and the Smiths shook hands, did they not, with each other? A. I don't recall; I think I was probably busy talking to—

Q. They were talking pleasantly to each other? A. They spoke to one another.

Q. They talked pleasantly and conversed while this matter was being ironed out, didn't they? A. After the set-to between Mrs. Hemenway and Mr. Smith I think everything went along all right.

Q. Are you sure that the set-to, as you call it, took place on November 4th, or December 9th? A. I think it was on every occasion that they ever got together.

Q. On November 4th what was the occasion of the set-to? A. Probably in relation to the contract.

Q. Not "probably"; what was it? A. I know reference was made to various things and criticism of Mr. Smith forcing this situation upon the Hemenways, and also questions were asked relative to some sale of part of the property.

Q. What criticism did Mr. Hemenway have to make, if any? A. None that I recall.

Q. Mrs. Hemenway, once again, did all the talking? A. Yes.

Q. And she was, as you said before, highly excited? A. She was of an excitable nature, yes.

Q. She was a very nervous woman and of very nervous temperament, wasn't she?

A. She was nervous, but she had her wits about her.

Q. All the time, wasn't she? A. Nervous.

Q. That was her temperament? A. Temperamentally so.

Q. She was rather given to hysteria? A. Not at all; she was very despondent, I will put it that way.

Q. What did she say about the Crescent Tool Company deal? A. She simply asked Mr. Smith the question; I didn't pay much attention to it, but I heard that, and his reply.

Q. What were you doing at the time that question was asked? A. In the office, probably attending to some of the papers.

Q. Your attention was given to getting out the papers for this corporate meeting? A. I was probably listening to Mr. Burnett—listening to the general conversation.

Q. At the same time? A. As we all do.

Q. How do you fix—how do you make certain that this remark about the Crescent Tool Company and this set-to, as you call it, took place on November 4 instead of December 9? I understood you to say on your direct examination, that it took place

on December 9th. A. I think I said afterwards that it took place at both interviews.

Q. The same thing? A. I think so. I know that Mrs. Hemenway had that in her mind, and every time she met Mr. Smith she put the question to him.

Q. Did you make any record in your notes there of that set-to? A. No, but I spoke to my partner about it at the time. I didn't make any record here because it wasn't of any importance to me.

Q. And you didn't make any record of it on December 9th? A. No, sir.

Q. You are not very sure, are you, whether that took place on both—whether there was a dispute on both occasions or only on the last occasion? A. I think it took place on both, Mr. Murray, I am not positive. I know it took place on one, and there wasn't any question about that.

Q. You wouldn't swear that it took place on November 4th? A. I think it did; that is my recollection.

Q. What did Mr. Smith say exactly when he was asked the question by Mrs. Hemenway as to the proposed sale to the Crescent Tool Company? A. I think the statement as I recall was that that is not a fact.

Q. Did he say "Not yet"? A. No, sir, he did not; that I will swear to.

Q. The company was named, was it? A. Yes, sir. And Mrs. Hemenway asked him.

Q. You say she referred to negotiations— A. Mrs. Hemenway asked the question.

Q. —Already under way with the Crescent Tool Company? A. I think the question was asked, "Are you negotiating a sale or have you sold part?"

Q. And you on your direct examination said that Mrs. Hemenway said something about—something was said at that November 4th conference about Sam Swisshelm from the Crescent Tool Company having been at the plant? A. No, sir.

Q. Was there anything said about that? A. No.

Q. Was there anything said about how much—how far the negotiations had proceeded with the Crescent Tool Company? A. No, it was simply a question and answer. I never heard that name Swisshelm.

Q. The question simply was had he sold it, and he answered "No"? Had he sold it to the Crescent Tool Company, or part of it, and the answer was No; is that correct? A. He said, "I have not."

Q. The dissolution proceedings was set for sometime in November. A. Yes.

Q. There was no reason why you could not have asked the New York Court for an adjournment of that, if Mr. Hemenway's health was not such as to enable him to engage in defending it, was there? A. Up to that time we were not in the matter; we hadn't received any of the papers, although I requested them from O'Brien & Melevinsky's office; I wrote them and asked them that papers be served on us.

Q. Hadn't papers been served? A. No, sir, never received them.

New Jersey State Library

Q. There was no reason, then, why you could not have appeared in the New York court at that date, November 9th, fixed for the hearing, and objected to the proceedings going on then, on any ground you saw fit? A. I think there was an adjournment had. I may be mistaken, Mr. Murray. Are you sure it was November 9th?

Q. No, I will say not November 9th; November 25th. A. Then there was no adjournment had.

Q. You never asked for any? A. No, sir.

Q. You never asked for an adjournment of the November 5th hearing until after the preliminary contract by your letter of the twelfth and your letter of the thirteenth had been entered into? A. I recall, but I am not sure, that I spoke to Mr. Burnett about an extension of the time. I believe that Mr. Burnett said that we ought to be ready at that time to dispose of the matter, and let it go at that.

Q. You didn't tell Burnett, did you, or Smith or anybody that the only reason that the Hemenways were consummating this contract was because of the dissolution proceedings having been brought? A. I did speak to Mr. Burnett.

Mr. Murray:—I object to that.

Witness:—You asked Mr. Smith or Burnett. I cannot answer that Yes. I would couple the two together.

Q. Did you tell Mr. Burnett that the reason why Hemenway was carrying through and consummating the contract was because of the fact that dissolution proceedings had been brought? Yes or No. A. That was the inducing thing.

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Mr. Murray:—I object to that. Answer the question Yes or No.

Witness:—I can tell you what I told Mr. Burnett, that Mr.—

Mr. Murray:—I object to that.

Q (Last question repeated). A. Not entirely. I will say No as to the direct question, but it was coupled with another statement.

Q. Did you tell Smith or Mrs. Smith that the reason why the Hemenways were consummating that contract was because the dissolution had been started? A. No, I never told Mr. or Mrs. Smith; I never had any conversation with them.

Q. Mr. Hemenway, you said, was in ill health beginning July 1st or thereabouts? A. A little later than that. There is a reference here to my minutes.

Q. Isn't it a fact that the reason he sold out was because he wasn't physically able to carry out the business of manufacturing if Smith got out? A. I should say "No" to that.

Q. He was how old? A. I should say about sixty-five or sixty-six at that time.

Q. On December 9th Mrs. Hemenway you say again asked the question about the Crescent Tool Company? A. Yes.

Q. Just what was the question she asked at that time? A. I think she prefaced by saying that "I heard that you have sold out part of the plant to the Crescent Tool Company." Mr. Smith said, "I did not; you are mistaken."

Q. She asked precisely the same question then on that occasion that she had asked on the previous occasion, November 4th, and got the same answer? A. Exactly the same answer.

Q. Was there any set-to at that time between— A. They always went at each other.

Q. Mrs. Hemenway and Mr. Smith? A. Yes.

10 Q. You mean they showed an antagonism toward each other? A. Since that interview at Isherwood's office every time they got together they were always at dagger's point.

Q. And Mr. Hemenway was passive again? A. Always.

Q. And had nothing to say about that—about any objection to going through with the sale? A. No objection to going through with the sale.

Q. When you made the remark to Burnett that 20 the only reason they were going through with the sale was because of his health, did Mr. Hemenway say anything to that? A. No, Mr. Hemenway wasn't present when I told Mr. Burnett that. I told to Mr. Burnett over the phone and also in the office, that I had induced him to sign because Mr. Hemenway's health was being affected by this trouble.

Q. When did you tell him that over the phone? A. I don't recall; sometime prior to the signing of 30 the contract, or prior to that letter, or it may be contained in the letter, for all I know.

Q. You say it was prior to the letter of October 12th? A. No, probably during that time. I may have had a telephone call prior to the writing of

that letter; it might have been the day before; I don't recall, but I do remember telling Mr. Burnett that.

Q. Was it between the making of the tentative draft of October blank, not executed, and the final draft, that you told Burnett that? A. It might have been before that. If that is the tentative draft of the sale of the Hemenway stock, it might have been before that.

Q. At that December 9th conference Mr. Hemenway took the lead in the debate, did he not, with Burnett, as to whether Hemenway should get dividends on the stock from the date of the contract, and as to whether interest should be allowed on the $45,000 which had been paid on November 21st, and in reference to the allowance to Hemenway of all his salary up to December 9th, the day of closing? A. No, sir, I think not; I think I did it.

Q. Isn't it a fact, Mr. Cohn, that Mr. Hemenway took the reins out of your hands and conducted his own debate with Burnett at that conference? A. I don't recall it, Mr. Murray; I don't think so; he isn't that kind of a man.

Q. Was it Mrs. Hemenway that conducted it? A. No, I think that feature of it was entirely up to me.

Q. What took so long to close that matter? You said it took from eleven-forty-five to five-thirty; there were any number of instruments which had to be drawn. You said you had a stipulation signed on December 9th, at that meeting, didn't you? A. I think so; I think there was a stipulation signed.

Q. Will you look at that paper? A. This is it.

Q. Will you look that over and see if that does not refresh your recollection as to what the debate was about, and who took the active part in it? A. The question that you asked me in reference to the salary, and so forth, are not contained in that stipulation. These particular things Mr. Hemenway had something to say about.

Mr. Murray:—I ask to have this paper before the witness marked for identification.

(Marked Exhibit D-2 for identification.)

Q. What did Mr. Hemenway have something to say about, that is referred to in this memorandum, this stipulation, D-2? A. In connection with the Montreal property; I think he had something to say about this electric commission order, which he brought up, and I furthered the cause, but without very much success.

Q. And Mr. Hemenway stated his reasons as to why it should be paid by the purchaser? A. By the seller.

Q. I am speaking now of the electric— A. I mean by the seller of the property; this has reference to the Montreal property, and it was a charge against the property.

Q. What did Mr. Hemenway have to say about why that should be paid by the Smiths rather than by him, Hemenway, as the purchaser? A. No, it was to be paid by the Smith & Hemenway Company, who owned the property, because it was a charge against the property existing at the time that the contract was made for the sale.

Q. Did he say so? A. No, I said that.

Q. What did Mr. Hemenway say about that? A. He thought they ought to pay it.

Q. He had quite a tift with Burnett about it? A. We stipulated here to refer the matter to someone up in Canada for adjustment.

Q. What was said at that conference about whether the notes which were to be given in payment of part of the purchase price, should be negotiable or non-negotiable in form? A. I think something might have been said about that.

Q. Did Mr. Hemenway take considerable part in that debate? A. There wasn't much of a debate, Mr. Murray.

Q. What took all this time from eleven-forty-five to five-thirty, if there wasn't any lengthy debate about anything? A. Mr. Burnett can tell you we didn't waste very much time; we were interrupted considerably with conversations from some of the parties present, and then we had to have this instrument drawn up and another instrument drawn up. The stock were to be transferred and notes prepared, quite a few of them.

Q. Did Mrs. Hemenway take any part in that argument about these matters? A. Not about the Montreal property.

Q. Or about the notes or about the salary of Mr. Hemenway? A. She may have.

Q. She wanted Hemenway's salary paid right up to date, didn't she, December 9th? A. I think that we did also, as attorneys.

Q. She wanted to charge Smith interest, did

she not, on the $45,000 part of the purchase price for the period from November 4th to November 21st, when it was paid, did she not? A. I think I arranged that with Mr.—

Q. Did she say she wanted interest? A. Is that the second payment under the contract which you have reference to?

Q. Yes. A. That wasn't paid on time, and we got the interest by arrangement with Mr. Burnett. I arranged that over the phone; I don't think she had anything to do with that.

Q. Wasn't there quite a discussion as to whether interest—by Hemenway—should be allowed him by Smith for the period of the delay on the $45,000? A. I think I made the request, Mr. Murray, of Mr. Burnett that we get interest on that. The note provided no interest up to the time of the due date, and they were a week or ten days behind, and I requested interest on that note, and Mr. Burnett agreed that that was a reasonable demand, and we were paid the interest.

Q. Was there a discussion in which Hemenway or Mrs. Hemenway participated as to the holding of the note and stock which they were delivering in your hands in escrow; did they have anything to say about that? A. I don't recall; that is all part of the agreement. It was all thrashed out in advance and there was nothing further said at that time. The stock was left in escrow and the resignations.

Q. Did you ask Burnett or Smith or Mrs. Smith to cancel this contract? A. I did not.

Q. Or to modify it as to the price to be paid? A. No, sir.

Q. Who was present when Hemenway signed the final contract which was consummated? A. I think I was the only person; it was signed up at their house by Mr. and Mrs. Hemenway; that is all that were present.

Q. Was Hemenway ill on November 4th and December 9th? A. He was not in good health; everybody could notice that.

Q. But not such poor health that you considered it improper for him to sign or consummate the agreement, did you? A. The agreement had already been signed.

Court:—His question is, did you think his condition such that he ought not to have signed it?

Witness:—Oh, no; he was mentally sound and able to carry through any agreement he had made under my instructions.

Redirect Examination by Mr. Alger:

Q. That was just a few days before his death, the December 9th matter? A. He died on January 1st. He was very careful of himself; that is all.

Q. Counsel asked you about Mrs. Hemenway having so much to say. What relationship did Mrs. Hemenway bear to the company and with relation to holding its money outside of stock holdings? A. I don't recall; she was a large stockholder of the company.

Q. You didn't have charge of the books which

showed whether she financed the company? A. No.

Q. Counsel asked you about Mr. Hemenway, whether he appeared along in this interval—I ask you to describe his condition with reference to whether he was worried, or appeared worried after April 7th and prior to his illness, with pneumonia? A. I should say that he was worried.

Q. Did Mr. Hemenway ever express to you as to whether he desired to sell or not? Answer Yes or No.

Mr. Murray:—I object to that as not binding on us, and incompetent and immaterial. It is privileged, beside.

Court:—How are you going to bind the other side?

Mr. Alger:—Counsel asked him what was the reason that he sold.

Mr. Murray:—No, I didn't ask that.

Court:—Your question is proper within limits. The witness will realize the limits. He may answer that question Yes or No, but that is just as far as he can go.

Q. (Last question repeated).

Mr. Murray:—I object to that further on the ground that it is a privileged communication between counsel and client.

Court:—What right have you to object?

Mr. Murray:—I grant you that I am pretty dubious whether that is a privilege which is personal to the client, but inasmuch as the client is dead and cannot exert that privilege himself, I think it is the duty of the Court to exert it for him.

Court:—If it were a privilege the violation of which would injure the client, I would suspect counsel for complainant would have objected long ago and wouldn't have asked the question. The answer to that question can do nobody any harm or anybody any good, except to indicate that there was some conversation about the affair before it was closed. I will permit the question to be answered Yes or No.

A. I will answer it Yes.

Q. Just state to the Court what statement you did make to Mr. Burnett as to Mr. Hemenway's reasons for consummating the deal, which I understood counsel didn't permit you to give that answer. State what you did say to him. A. I told Mr. Burnett that on account of the worries over this dissolution proceeding affecting Mr. Hemenway's health, that I had succeeded in inducing him to sell and go through with it, rather than to fight it out.

Q. This interest about which counsel asked you a number of questions, that was interest on a payment in which the Smiths were in default? A. Yes, sir; that is to the best of my recollection. I think the agreement provided for the payment of a note without interest on a certain date. As I recall it, it is a $45,000 note. I haven't got the agreement here.

Court:—You said the note wasn't paid on its due date, but that after that you required them to pay interest?

Witness:—Yes.

Q. Counsel asked you with reference to this con-

versation between Mrs. Hemenway and Mr. Smith about the Crescent deal. In his question to you he left out the word "negotiations." Did you note that in making your answer? A. What is that?

Q. As I understood you, you testified just after Mrs. Hemenway asked Mr. Smith if there had been some negotiations with the Crescent Tool Company, afterwards counsel on cross examination asked you, as I recall, in substance, if Mrs. Hemenway asked Mr. Smith if there had been a sale of all or part of the Smith & Hemenway Company to the Crescent. He left out the word "negotiations." Did you note that when the question was asked you? A. I did not.

Q. Do you now desire to change your testimony? A. I don't think it is material.

Mr. Murray:—I object as leading.

Court: — I think the matter is sufficiently plain in my mind; I believe it is on the record. There is no jury here, and while counsel may leave out a word, that doesn't always deceive the Court. I don't think there was any attempt to deceive the Court when Mr. Murray asked the question. I understood the testimony originally to be that Mrs. Hemenway asked Mr. Smith, on at least one, or possibly two occasions, whether he had sold or was going to sell this property to the Crescent Company. Mr. Murray confined his question on cross examination to whether or not he had sold. I have no way of knowing why Mr. Murray confined his question, but the answer didn't go any further than the question.

Mr. Alger:—I withdraw the question.

Recross Examination by Mr. Murray:

Q. Now, to get this cleared up, on November fourth what question did Mrs. Hemenway ask of Mr. Smith relative to the sale or negotiation for sale or intended sale of part or all of the Smith & Hemenway Company assets, if you know? A. She asked the question or put the question to Mr. Smith, "Are you negotiating to sell part of the plant to the Crescent Tool?" That is to the best of my recollection, and Mr. Smith said, "You are mistaken," or something to that kind.

Q. And the same question and the same answer was made on the occasion of the conference of December 9th. A. Mr. Murray, it was an obscession in Mrs. Hemenway's mind from that time on.

Q. What? A. The fact that she thought that Mr. Smith had been negotiating with the Crescent people while these negotiations were going on with us. It was a constant obscession in her mind, and every time she met Mr. Smith the thing cropped out, on two occasions while I was present.

Q. Did she ask the same question on December 9th as she asked on November 4th? A. Practically in the same form, Mr. Murray.

Q. Will you swear positively that the question was not this: "Have you sold all or part of the Smith & Hemenway assets to the Crescent Tool Company?" A. No, I don't think she said "Have you sold."

Q. Are you positive in which form the question

was asked on either of those occasions? A. To the best of my recollection it was "Are you negotiating with the Crescent people."

Q. But you won't swear to it? A. I will swear at one of the meetings to that statement.

Dr. Josephine Kenyon, sworn for complainant:

Direct Examination by Mr. Alger:

Q. Dr. Kenyon, where do you reside? A. New York City.

Q. And you are or were a relative of John F. Hemenway in his lifetime? A. I was.

Q. What relationship did you bear to him? A. Niece.

Q. Your father was his brother? A. Yes.

Q. Did you know Mr. Landon P. Smith or Mrs. Smith? A. I met them years ago; I haven't met them for many years.

Q. During the past fifteen or twenty years you have lived in New York City? A. Yes.

Q. How about Mr. and Mrs. Hemenway; did they live there? A. Yes.

Q. Are you a graduate of some approved medical college? A. I am.

Q. And what college? A. Johns Hopkins.

Q. And how long have you been practising medicine? A. I graduated in 1904.

Q. And then you practised on the hospital staff for some years? A. Yes.

Q. How many years? A. One year at Johns Hopkins and seven at the Babies Hospital.

Q. At what place? A. New York.

Q. Then you were out of practise for several years? A. Two or three years.

Q. And then you resumed? A. Yes.

Q. And practised how long since? A. Until the present time.

Q. And your practise has been a general practise, with some specializing? A. Children up to about nineteen hundred and fourteen, and general since.

Q. Did you see Mr. Hemenway often in the year 1925? A. I did.

Q. How about Mrs. Hemenway? A. Yes, I did.

Q. And did you see Mr. Hemenway early in July, 1925? A. Yes.

Q. About what time in July, if you know, Doctor? A. About the second week, the eleventh.

Q. Where did you see him on that occasion? A. At his home.

Q. Will you go on and tell the Court and describe his condition at that time? A. He was extremely ill. I spent the better part of the night there.

Q. What ailment was he suffering with? A. It was later diagnosed as pneumonia. It was not quite definite that night. He had high fever, delirious at intervals, quite restless, heart bad, kept in bed. I stayed until they could get a nurse.

Q. And thereafter did you see Mr. Hemenway during his illness with pneumonia? A. I did.

Q. Some other doctor was called in also? A. Yes.

Q. Who was that? A. Dr. Shattock.

Q. Did you see Mr. Hemenway during his illness with pneumonia? A. I did.

Q. How long a time was he confined to the house, if you know? A. approximately a month.

Q. And will you describe his condition when he began his long convalescent period; that is, after a month? A. He never really recovered; we were very greatly worried about him; he was never himself to me afterwards.

Q. Did you make some particular examination of him following that partial recovery, to determine his condition? A. Not at that time.

Q. I say following that. A. Yes.

Q. You were away part of August on a vacation or something? A. Yes.

Q. And after you returned did you examine Mr. Hemenway as to his general condition—his heart condition? A. I did.

Q. And about when was that examination made? A. Early in October; October second.

Q. Just go on and tell the Court what Mr. Hemenway's condition was at that time. A. He came into my office. He had been to have an X-ray of his heart because of the diagnosis of dilated heart. He came in and sat in my office. I did not believe his heart could be as dilated as he said. It was examined again and found that it was. He was short of breath. He was very pasty white and very worried about himself, and rather unsteady. He did not wish to be guarded—have someone with him all the time. He asked me if I thought he should; I said I did.

Q. Describe the condition of his heart. A. There was actual dilation by examination and as later proved by the X-ray. I did not see the X-ray which at that time had just been taken; I saw it later.

Q. By dilation, what do you mean? A. A weakening of the heart muscle.

Q. And also an enlargement of the heart? A. Yes.

Q. The beat was abnormal? A. It was abnormal, far apart.

Q. Was that condition an acute or chronic condition, that is, one from which he could recover or one from which he would not? A. One from which he could live, but probably not regain complete recovery, I should say.

Q. Doctor, what would be the effect of excitement or worry of any kind on Mr. Hemenway? A. Sudden death, of course, we were afraid of.

Q. Can you describe any more fully what would be the effect of this heart condition with reference to his life in general, his habits? A. He would have to change very materially his habits. That heart muscle practically does not regain its control. It means going very quietly and avoid stairs; taking of a very minimum amount of exercise, increasing it gradually each day.

Q. Do you know when Mr. Hemenway died? A. January 1, 1926.

Q. Do you know of what ailment he died? A. The diagnosis was cardiatic condition.

Q. Just a few more questions. What was the condition of Mrs. Hemenway's health in 1925? A. She had diabetes for about ten years.

Q. Just describe her condition, whether that disease was progressive, what her general condition was and temperament was. A. It was progressive; she ran a very high blood sugar, back in 1924 it was 200 as again a normal of 90 to 120. That was her blood sugar in connection with her diabetes.

Q. What was the condition of her heart? A. She never had a very good heart, but she had no definite cardiac disease.

Q. She simply had a high blood pressure? A. Not especially high; she had a high blood sugar in the urine and the other signs of diabetes.

Q. When did she die? A. She died early in May of this year.

Q. Of what did she die? A. In the end, pneumonia, but it was complicated by her diabetes condition; she had a double pneumonia—heart failure; she died suddenly.

RECESS.

Cross Examination by Mr. Murray:

Q. Doctor, did I understand you to say that in the fall of 1925 Mr. Hemenway was suffering from dilation of the heart? A. Yes.

Q. And an enlargement of the heart? A. Yes.

Q. And that any excitement would be likely to cause sudden death? A. It was one of the things feared.

Q. His condition was such that any excitement would cause his death? A. Yes.

Q. Likely to cause sudden death? A. It might.

Q. And what effect on him or his heart would a strain, a long continued strain have had on his heart? A. A mental or physical strain?

Q. A mental strain. A. I think both would have a disastrous effect.

Q. Either mental or physical? A. Yes.

Q. Would you say that either one, either mental or physical strain, would be sufficient to cause his sudden death? A. Probably depleting more gradually; might not actually be the cause of death. A prolonged strain would not be the cause of death.

Q. Was he in a condition to attend at the factory and at his office for eight hours a day in the fall of 1925? A. After October 2nd I should say probably not, a full office day.

Q. And prior to October 2nd? A. Before that he had been very much better. This was comparatively sudden, this dilation of the heart.

Q. When did that occur? A. It was discovered sometime in October.

Q. So far as your examination showed, how long had that condition been continuing? A. I have no way of knowing.

Q. Had you seen him prior to the time that he was first taken with pneumonia? A. Not professionally.

Q. Had you seen him shortly before that in any way? A. Oh, yes.

Q. Had he shown any symptoms prior to the

time he was taken with pneumonia? A. He had not been well.

Q. Did he show any signs of dilation of the heart or enlargement of the heart? A. He had been examined at fairly regular intervals, because of some fear of his heart.

Q. By you? A. Not by me.

Q. So far as you could see, prior to the time he was taken with pneumonia, there was no evidence of dilation or enlargement of the heart? A. I don't think you could tell that by looking at a person.

Q. Nothing to cause you as a physician to expect that condition? A. We knew he was not well.

Q. Was there anything from his appearance immediately prior to the time he was taken with pneumonia, to cause you as a physician to suspect the presence of dilation or enlargement of the heart? A. No, I don't think so.

Q. Would you say that that condition of the heart was the result of pneumonia? A. We considered it was.

Q. He was up in New Hampshire, was he not, in August or September? A. I don't know; I have no way of knowing.

Q. And he was down in Atlantic City, was he not, in October or September, 1925? A. I don't remember; I don't know.

Q. Was he under your care after October first? A. He was not under my professional care.

Q. Or in your care in any way? A. Not professionally at all.

Q. Did you see him very often? A. Yes.

Q. After October first? A. Yes.

Q. How often? A. I should say once a week at least.

Q. Don't you know whether he was down at Atlantic City or not? A. I don't remember at all.

Q. Do you remember whether he was out of the office and away from the factory in Irvington between October first and November 4th? A. I would not know. There would be no way in which I would know that.

Q. Would you say that his condition was such that he would have been able to manage an office—a manufacturing business? A. That is very hard to say—mentally, he was quite all right; I saw no deterioration mentally.

Q. Physically? A. Physically, he was slower; walked more slowly, more carefully.

Q. If he had been subjected to a continuous strain over a period of weeks or months, he would have been liable to die, would he not? A. Not the continuous strain; the sudden strain is the thing that one worried about for him.

Q. You mean sudden shock? A. Sudden from exertion, over anxiety.

Q. What about continued irritation; mental irritation? A. In what respect?

Q. What effect would irritations regarding important matters, if continued for a period of weeks or months continuously, have on his life or death, or the possibility of his death? A. I don't think I feel qualified to answer that, because it hasn't any direct bearing on his cardiac condition. It might not affect his cardiac condition.

Q. And it might? A. It might have influenced his general health, yes.

Q. As I understand you, Doctor, the effect which you say that this enlargement or dilation of the heart would have, was to render him liable to sudden death if he were subjected to a sudden shock or sudden strain of some kind? A. I think so.

Q. Did he actually have pneumonia, to your knowledge, or did you only surmise that? A. I did not examine him myself during the July time.

Q. You don't know, then, whether he had pneumonia or not? A. I cannot swear to it.

Q. Did you examine him yourself as to this dilation of the heart? A. I did.

Q. Could that have been caused by the injection of pneumonia serum, or serum injected for the cure of pneumonia? A. May I answer that in my judgment? There is no other way to answer it.

Court:—Yes.

Witness:—I should say No.

Court:—Didn't you say you examined him when he was first taken ill?

Witness:—In October, for his heart.

Q. Then you know nothing as to your personal knowledge, whether he had pneumonia or not? A. I consulted with the physicians who were in attendance, but I did not examine him.

Mr. Murray:—I ask that all the testimony of the witness regarding Mr. Hemenway having pneumonia be stricken out; it now appears that it is based on hearsay.

Court:—I will not strike it out, but I will

let it stand for what it is worth. It appears that the information she had came from other physicians.

Q. As to Mrs. Hemenway, she had had diabetes for ten years? A. Approximately.

Q. And that is a rather slowly progressive disease, is it not? A. Yes.

Q. As a matter of fact she had had it for over twenty years? A. My memory would have been about ten; I don't know; I don't remember.

Redirect Examination by Mr. Alger:

Q. On the night that Mr. Hemenway became ill on July 11th, I think you testified—just tell the Court what you did with reference to him. A. I was called to his house by the telephone, that he was acutely ill, and I met the physicians who were then in charge and they told me of his condition.

Mr. Murray:—I object to that.

Court:—Don't tell me what they said.

Q. What did you observe that night? A. He was breathing very badly; he was sitting propped up in bed; he was extremely white, quite restless; had difficulty in getting his breath; he was a little blue, and I stayed the better part of that night, as I testified, helping them nursing him really until they could get a capable nurse.

Q. Did he run a temperature? A. Yes.

Q. Did you take his temperature that night? A. It was taken that night.

Q. In your presence? A. I think so.

Q. Just describe to the Court what are the

symptoms of pneumonia. A. Shortness of breath, difficulty in breathing when you are lying flat, and necessitating being propped up, blueness, sometimes cough, temperature.

Q. Delirium sometimes? A. At the onset often.

Q. Mr. Hemenway was also delirious? A. At intervals.

Q. What you mean to say is, that you made no diagnosis yourself? A. I did not examine him with a stethoscope is what I mean.

Q. What you observed were the common symptoms of pneumonia? A. Yes, they were.

Q. Doctor, did you see Mr. Hemenway about the time of the dissolution proceedings of Smith & Hemenway, Inc. That is when Mr. Hemenway saw an article in the New York Times. A. I saw him the time he fainted; that was just the day the article appeared.

Q. Will you describe to the Court where you saw him on that day, and what day it was, if you remember? A. It was the twenty-ninth of September.

Q. And where did you see him? A. In his home.

Q. Just describe to the Court his condition on that day. A. He was lying in bed; he was extremely weak and very much worried about himself.

Q. And did he discuss with you anything about his business affairs? A. Yes, he mentioned them.

Q. And how long a time was he confined to his bed that time, if you know? A. Not very long; a few days I think that time.

Q. Was he happy or unhappy about his business affairs? A. He was very unhappy.

Recross Examination by Mr. Murray:

Q. You said he was worrying about himself? A. Yes.

Q. What do you mean by that? A. I mean he was very much afraid he wasn't going to live, I think, from the way he talked to me.

Q. Are you a beneficiary under the will of either Mr. or Mrs. Hemenway? A. I am.

Elden Carlisle Hemenway, sworn for complainant:

Direct Examination by Mr. Alger:

Q. Mr. Hemenway, where do you live? A. New York.

Q. Are you a nephew of John F. Hemenway, deceased? A. I am.

Q. And one of the executors of his will? A. I am.

Q. You have a direct financial interest in the outcome of this lawsuit? A. Yes.

Q. That is, you are one of the residuary legatees? A. Yes.

Q. You lived in New York many years? A. About seven.

Q. And in that time were you accustomed to see the Hemenways often? A. Quite often.

Q. And coming right down to the time of this

transaction, about September 29, 1925, did you see Mr. and Mrs. Hemenway? A. I am not sure of that exact date, but I was seeing them almost every day then.

Q. And did you see them on the day that an announcement was made of the dissolution proceedings of the Smith & Hemenway Company? A. I saw them the day that they saw that article in the paper; whether it was the same day that it came out or the next day, I don't know.

Q. Where did you see them on that occasion? A. At their home.

Q. And what was Mr. Hemenway's condition at that time? Just describe his condition. A. He struck me as not being at all well. He was certainly very much worried.

Q. Where was he? A. At his apartment.

Q. Where at the apartment? A. I think he was in the living-room, lying down most of the time, but he could get around, move around.

Q. And following that conference with Mr. and Mrs. Hemenway, on that occasion, did you see Mr. Landon Smith, one of the defendants in this case? A. Yes.

Q. And when was that? A. I think it was October 1st.

Q. And who was present at that interview? A. Mrs. J. F. Hemenway, Mr. Smith and myself.

Q. Where did that take place? A. At Mr. Smith's office.

Q. At Irvington, New Jersey? A. At the factory.

Q. What time of the day did you see him? A. Mrs. Hemenway and I reached his office about eleven o'clock, perhaps a little later, in the morning, near noon.

Q. How long did you talk with them at the office? A. Perhaps an hour.

Q. Just go ahead and tell the Court as briefly as you can what was said between you three on that occasion. A. As I recall it, Mrs. Hemenway first asked Mr. Smith why that article had come out; why he had put the article in the paper, or something of that kind.

Q. Did she say what article? A. She referred —I think she had a clipping, I don't know what; she had a clipping, I think it was the article that appeared in the paper a few days previous to that, relative to the dissolution proceedings being brought.

Q. What did Mr. Smith say? A. I don't recall any explanation as to why it was put in, except I believe he said that he did not put it in.

Q. Just go ahead; what else was said in that connection? A. She asked him why he persisted in trying to force an issue at that time, especially in view of the fact that he had promised Mr. Hemenway that he would not do anything about dissolving the corporation, or forcing an issue of any kind until after the first of the year.

Q. What did Mr. Smith say to that? A. My recollection is that he said it was in the hands of his lawyers and he preferred not to discuss it very thoroughly at that time.

Q. Go on and tell the Court what else was said and what transpired later during the day. A. We sat and talked in his office for, I should say, about an hour, as near as I can remember, and I said to Mr. Smith that it seemed to me a shame that two partners, or two men who had been associated in business for upwards of thirty years, would force the dissolution of the business, which obviously would lose each one of them a great deal of money, and Mr. Smith agreed with me that if those proceedings went through, that neither he nor Mr. Hemenway would get very much out of it; that the courts and lawyers and the various incidentals connected with such procedure would certainly take most of the profits, and I added that I thought it was a shame, and that there ought to be some other way out, and my recollection is that he said that he had made up his mind to go ahead with that; that he would go ahead with the proceedings, if it did wreck the business, and I think he made—I am sure he made the comment to the effect that he had been—I have forgotten the words—but I remember he said he had been bankrupt twice in his life and could be so again.

Q. After that did you and Mrs. Hemenway go with him to the office of Mr. Burnett, who was acting as Mr. Smith's attorney? A. We did.

Q. And did you see Mr. Burnett? A. Yes.

Q. What talk did you have there in that office between the four of you? A. Mrs. Hemenway repeated to a certain extent why the need—to Mr. Burnett—about the article in the paper, asking him

why the proceedings had been brought, especially without notice to her or Mr. Hemenway, and he answered that there had been a notification, and he then produced from his file the carbon of a letter —I do not know the date, but it was previously to that time, in which he stated that there would be such proceedings brought in case Mr. Hemenway did not accept Mr. Smith's proposition to buy him out, and Mr. Burnett added that Mrs. Hemenway's Jew lawyer evidently thought that they were bluffing; that they were not bluffing at all. Mrs. Hemenway added that he may be a Jew, but he is a gentleman.

Q. She told Mr. Burnett that? A. Yes.

Q. And then you left Mr. Burnett's office? A. We had a little more conversation there. I tried to form some sort of a basis of adjustment to prevent the company from going to the point of dissolution.

Q. What did you say and what was said in substance? A. I have forgotten. My only point was that I explained both to Mr. Smith and Mr. Burnett that my presence there was in place of Mr. Hemenway, who was too ill to come. The idea was that Mr. Burnett thought I would go back and discuss it with Mr. Hemenway and try to arrive at some other—or some basis of settlement other than the dissolution proceedings, and Mr. Burnett told me—I remember that—I would have to take it up very quickly with him, as proceedings would go on —he gave me the date; I think it was about ten days after that, but I would have to take up further anything along that line.

Q. That is, any proposition you had would have to come within ten days? A. Within the time limited by the time that he had to keep the dissolution proceedings.

Q. Was there anything else that you think of at that conference at Mr. Smith's office? A. At Mr. Smith's office Mrs. Hemenway brought up the fact of Mr. Hemenway being ill and rather criticised Mr. Smith for forcing the issue at this time, and reminded him that he knew that he was ill, and recalled the fact that Mr. Hemenway had fainted at the factory just a few days previous to that—previous to our interview, and Mr. Smith said he was very sorry about it, and that he had been much worried and spent practically all one night walking between his home and Summit, New Jersey, worrying over the situation.

Q. He walked all night worrying about Mr. Hemenway's physical condition? A. That is as I understood it.

Q. And anything else that you recall at that conference? A. I tried to get from Mr. Smith some basis to form negotiations, but he didn't say anything along that line, but said we would have to take that up with his lawyer, as I remember.

Q. To refresh your recollection, was anything said on the subject of Mr. Smith's selling out? A. I have forgotten what was said, but I know I had it in mind to—

Q. Not what you had in mind; what was said at that time, if you recall?

Mr. Murray:—He said he didn't know.

A. I am quite sure I asked Mr. Smith if he would put any kind of a price on his half to sell to the Hemenways.

Q. That was at the first meeting which you had with him? A. Yes.

Q. Do you have any recollection of what Mr. Smith said about that or anyone else? A. It was made after—

Mr. Murray—I object.

Q. Say what was said in substance.

Court: — Did he say he would sell or wouldn't?

Witness:—He said he would not sell. I am trying to think exactly the words.

Court: — You don't have to tell the exact words.

Q. Did you go back to New York after that conference with Mrs. Hemenway? A. Yes.

Q. And subsequent to that time did your brother Thomas Hemenway come to New York City? A. Yes, he came down in a very few days after that.

Q. Did you and Thomas Hemenway have some conference with Mrs. Hemenway and Mr. Hemenway? Yes or no. A. Yes.

Q. Do you know about when that was? A. It was the evening of October 5th or 6th, as I remember.

Q. And following that conference did you and your brother Thomas see Mr. Smith in Newark or in Irvington? A. Yes.

Q. What date was that that you saw him? A. I think it was the seventh of October.

Q. Just go on and tell the Court very briefly what was said between you three on that occasion. A. We asked Mr. Smith if he would sell, and we asked him if he would put a price on it, any kind of a price, and he refused.

Q. Just go on and detail that conversation. A. There was a good deal of conversation that did not have much—it was reminiscing, and so forth, that did not have a bearing on the matter, as I see it now, but we both tried for at least an hour and a half to get Mr. Smith to say that he would sell or put any kind of a price on at which he would sell, but we were not successful.

Q. What did Mr. Smith say about that? A. His final comment, as I remember, that closed that conversation was that he was not in a position to put the price on.

Q. Have you told us all that you recall of that conversation? A. I don't remember anything else at that conversation.

Q. Anything said about the result of the dissolution proceedings, if they went on? A. Yes, Mr. Smith admitted that—

Q. Just what did he say? A. I cannot recall the words.

Q. Not the identical words, but the substance. A. The substance was that if the dissolution proceedings went on, the assets of the business would be practically dissipated and neither he nor Mr. Hemenway would get anything nearly what it was worth.

Q. Anything said on the subject of Mr. Hemenway's then physical condition. A. Yes.

Q. Tell the Court what was said on that subject. A. We explained that our presence there in place of Mr. Hemenway was due to the fact that he was too ill to come; that he was confined to his home at least, and was not in a position to go on with any negotiations at that time.

Q. Did you communicate with Mr. Hemenway the conversation that you had with Mr. Smith? A. Yes.

Q. And when did you do that? A. That evening; we went straight to the apartment from seeing Mr. Smith.

Court:—Was there anything said at that conference between you and Mr. Smith about who was to run the business if Smith sold to Hemenway?

Witness:—There were accurate plans as to what that was to be.

Court:—Were they disclosed to Mr. Smith?

Witness:—I do not remember if they were disclosed to him; it was carefully worked out. That was the reason for the family conferences. My brother had been with the company for a number of years.

Court:—I just wanted to know whether you had discussed that question with Mr. Smith or not. Evidently, you didn't.

Witness:—If we didn't do so, it was because we didn't feel that it was—

Q. Your brother Charles was with the Smith & Hemenway Company at that time? A. Yes.

Q. And had been for how many years? A. I don't recollect; about twelve years, I suppose; probably more.

Q. And your brother Thomas had had some experience in the manufacturing line? A. Yes.

Q. In what particular line? A. He was in the foundry business at that time, manufacturing metal specialties.

Cross Examination by Mr. Murray:

Q. You were never connected with the company? A. No.

Q. At the time you met Mr. Smith at his office on October first, you came out there at whose solicitation? A. Mr. and Mrs. Hemenway's

Q. Not Mr. Smith's? A. No.

Q. Did you or Mrs. Hemenway not ask several questions of Mr. Smith? A. I don't remember many questions asked of Mr. Smith, except why the proceedings were brought without warning.

Q. He told you that he had nothing to do with the article which appeared in the newspaper? A. I understood from him something to that effect, that he personally had not had anything to do with it.

Q. Didn't he tell you that he hadn't had anything to do with it personally and that it had been published without his knowledge and consent or authorization; didn't he tell you that? A. I un-

derstood from him that he did not have anything to do with publishing the article.

Q. Didn't Mr. Smith tell you several times that inasmuch as he had a lawyer handling the matter for him, that he did not wish to discuss the matter with you or Mrs. Hemenway? A. He did, and he made an appointment with Mr. Burnett.

Q. Didn't he in fact refuse to have anything to say as to what ought to be done or what could be done with reference to the dissolution proceedings; didn't he refuse to have anything to say except in the presence of his lawyer? A. He refused to talk about withdrawing the dissolution proceedings, except in the presence of his lawyer.

Q. Didn't he refuse to discuss the case in any way except in his lawyer's presence? A. We went to lunch with Mr. Smith and we were with him about four hours before we saw Mr. Burnett, and there was more or less discussion of the situation.

Q. What part of the situation; their past troubles? A. A little bit; not a great deal.

Q. Mr. Smith told you, Mrs. Hemenway, didn't he, that he and Mr. Hemenway had had disagreements for years? A. That was acknowledged.

Q. Twenty years? A. I don't know the time.

Q. It was actually acknowledged that there had been trouble and Mr. Smith told you, did he not, that he was sick and disgusted with the business —being connected with the business in connection with Mr. Hemenway; didn't he say that? A. Something to that effect.

Q. And didn't he say he wouldn't stand it any longer? A. Yes.

Q. And didn't he say that Mr. Hemenway hadn't attended to his job? A. I don't remember his saying that to me, or to us, at that interview.

Q. Didn't he say that Mr. Hemenway had demoralized the employees of the organization? A. Not to us.

Q. Something to that effect? A. I don't remember that that was discussed.

10 Q. Didn't he say that he had antagonized the customers of the concern? A. Not in that conference. I don't remember Mr. Smith ever saying that.

Q. What conference did he say that? A. Not with me.

Q. Why that remark? A. Because it was talked about on the outside a good deal and appeared in the paper.

Q. You mean the dissension? A. No, the fact that Mr. Hemenway antagonized customers ap-

20 peared in the paper and that was talked about a good deal between Mr. and Mrs. Hemenway and myself.

Q. You mean this article that you referred to? A. That was in the paper; that is what hurt him.

Q. Did Mr. Smith complain to you and Mrs. Hemenway at that talk about the fact that Mr. Hemenway had not properly attended to the financing of the concern and the payment of notes at the bank? A. I don't remember that we got into that

30 sort of a conversation at all.

Q. Did he tell you specifically that he was sick and tired of being in the business any longer in association with Mr. Hemenway? A. He said substantially that he was sick and tired and would

ruin the business if necessary rather than stay in.

Q. Are you certain that it was not you that said, or Mrs. Hemenway that said, that the dissolution would ruin the business? A. I asked Mr. Smith if he agreed with me that the dissolution would wipe out most of the assets, and he said no doubt it would. He represented something to the effect that the courts in such proceedings did usually wipe out most of the money involved.

Q. Did he say that, or did he say that they were expensive? A. He said more to the effect, something to my recollection, that it would practically wipe out the assets that he and Mr. Hemenway would get.

Q. Did he say how that would be accomplished, how it would wipe out the assets of the Smith & Hemenway Company by a dissolution? A. My recollection is that he said that the business would be turned over to a receiver and operated by an appointee of the Court, and sold at auction, and the assets would be sold at auction; something to that effect. I am not clear enough to repeat it exactly.

Q. What led up to this remark that you say Mr. Smith made about having been bankrupt twice and did not care if he was bankrupt again? A. That followed my conversation with him relative to the fact that they would both lose the bulk of their savings of a lifetime, if they wrecked the business by the dissolution proceedings. That remark followed that conversation.

Q. What I am trying to get at is, were the words "wrecked the business" your words or his? A. I am not sure that those were the words or the

exact words, but they were certainly words to that effect.

Q. Might damage the business? A. No, it was worse than that.

Q. How long were you together with Mr. Smith before you came to Mr. Burnett's office? A. We were there before lunch; we arrived at noon, what time I am not sure; we then went to lunch with Mr. Smith at his Club, and then went to Mr. Burnett's office, and arrived at Mr. Burnett's office, I think, about four o'clock.

Q. You went to lunch at what time? A. About two; we sat in the Club quite a while.

Q. When you came to Mr. Burnett's office, what reason did Mr. Smith give you or Mrs. Hemenway for wanting to go to Burnett's office? A. I have forgotten the words; the reason was that —

Q. What was stated; what did Mr. Smith say to you or Mrs. Hemenway for the reason in going to Mr. Burnett's office? A. To have Burnett discuss with him any proposition to withhold the dissolution proceedings.

Q. Wasn't it because Mr. Smith wouldn't discuss anything at all with you? A. He wouldn't discuss the proposition of withholding those proceedings.

Q. When you came to Mr. Burnett's office, didn't Mr. Smith say in the presence of all to you that the reason that you had come down there was because you and Mrs. Hemenway wanted to ask some questions, and he did not wish to discuss them except in the presence of his lawyer? Wasn't that what Mr. Smith said? A. I have forgotten what Mr.

Smith said, but I think something to that effect was said.

Q. Then what happened? A. Mrs. Hemenway asked Mr. Burnett why that proceeding was brought without notice of any kind, especially in view of the fact that Mr. Smith had promised not to do anything of that kind until after the first of the year, and asked Mr. Burnett why it was done without warning, and Mr. Burnett then said that he had written a letter to that effect very plainly, and he produced a carbon copy from his files, and I was familiar with the letter, and told Mrs. Hemenway that he was correct in that stand.

Q. That he had notified them long before that he was going to start proceedings? A. Yes, and he read the letter—the carbon copy.

Q. Did you ask or Mrs. Hemenway ask Mr. Burnett anything about the procedure incident to a dissolution proceeding in New York? A. I think I asked him what would be done, in trying to get at the results of what would happen.

Q. Did he say what the result would be? A. My recollection is that we arrived at the same result, that the greater part of the assets would be lost if that proceeding was forced.

Q. You mean that you arrived at that or that Burnett arrived at that, or did both or you arrive at it in words, or was that a conclusion of your own? A. I am quite sure it was a conclusion of everyone.

Q. Did you say anything to Mr. Burnett, or in his presence, as to the willingness of the Hemen-

ways to make an offer of purchase? A. I have forgotten what was said in that respect. I think I made it plain to Mr. Burnett that I wanted to act as a mediary between Mr. Smith and Mr. Hemenway to try to prevent a dissolution proceeding.

Q. Did you say or Mrs. Hemenway say that the Hemenways were ready to make an offer to buy this business? A. I don't remember that anything was said to that effect at that time.

Q. You did not make any offer? A. No, I was not authorized to.

Q. And you didn't say definitely that you would make an offer to buy? A. No, not that I remember.

Q. And neither you nor Mrs. Hemenway claimed that you or they ever had made an offer to buy the Smith interest; is that right? A. I don't remember that we discussed that.

Q. And didn't Mr. Burnett tell you that no offer had ever been received from them—from the Hemenways to buy out Smith? A. He may have.

Q. Didn't he? A. I don't know; I don't remember.

Court:—There was no use of making any offer, was there, if Smith wouldn't sell?

Mr. Murray:—That is a question.

Court:—That had been his attitude.

Mr. Murray:—A man cannot sell until he gets an offer.

Court: — There is no use making an offer when he forestalls you by saying he won't sell. The testimony is from Mr. Cohn, that he repeatedly asked Mr. Smith to put a price on his

holding and he wouldn't do it, and he repeatedly said that he would not sell.

Mr. Murray:—Mr. Cohn's testimony, as I recall, is, that what he asked Smith there was to put an offer, which was a double offer, at which he would either buy or sell, giving Hemenway the option. That he refused to do.

Court:—The record will show. My recollection is that he refused to consider any offer at all.

Thomas S. Hemenway, sworn for complainant:

Direct Examination by Mr. Alger:

Q. Mr. Hemenway, where do you live? A. East Aurora, a suburb of Buffalo.

Q. You are a nephew of John F. Hemenway? A. Yes.

Q. And beneficiary under the will of Mrs. Hemenway? A. Yes.

Q. As a residuary legatee you are interested in the outcome of this litigation? A. I am.

Q. Are you acquainted with Landon Smith? A. Yes.

Q. You knew Mr. Hemenway quite well during his lifetime? A. Yes.

Q. And when did you first meet Landon Smith? A. It was probably about 1899; I came here one summer and was office boy in their office, or assistant office boy.

Q. You worked for Smith & Hemenway at one time? A. Yes.

Q. As assistant office boy? A. Yes.

Q. And subsequent to that time were you engaged in the manufacturing business at some time or other? A. Yes.

Q. What were you doing in 1925? A. In 1925 I was president of my own company in Buffalo, operating a foundry and machine shop.

Q. Do you recall an occasion when you came to New York in 1925 to see Mr. Hemenway? A. I came down here early in April—it was about Easter time—to see Mr. Hemenway, my uncle.

Q. Did you have some conversation with him at that time on the subject of his purchasing the Smith & Hemenway Company? A. I did. That was the object of my visit.

Q. And subsequent to that time did you come to New York again in the fall? A. I did.

Q. And did you have some further talk with him at that time? A. I did.

Q. And on the same subject? A. Yes.

Q. Following that talk did you see Mr. Landon Smith? A. The last talk, yes.

Q. And about what time did you see him and where? A. It was about the seventh of October, I saw him at his office in Newark, where I went with my brother, Elden Hemenway.

Q. That was the first conversation you had with Mr. Smith? A. The first in many years.

Q. Just go on and tell the Court what talk you had, what you said or did, and where you went and all about it, as briefly as you can. A. We had no

appointment with Mr. Smith, and we arrived at his office—he was busy with some people, and we were kept waiting some time, and as soon as he was able to see us, he did so. We started to converse in his office, but knowing the object of our visit, Mr. Smith said he preferred we would not talk there as it was about lunch time; at that time we went with Mr. Smith at the Elks' Club for lunch, where we spent the greater part of the afternoon.

Q. Tell briefly what was said by you and by your brother Elden and by Mr. Smith. A. I said to Mr. Smith that I personally had been through a situation somewhat similar to the one he was in with my uncle, and that I had come down hoping that we talking as man to man over the whole deal, could arrive at some conclusion by which the best adjustment would be made without loss and the best arrangement made for the carrying on of the business, through the dropping of this dissolution proceeding. I told Mr. Smith that from my point of view the carrying on of these proceedings, the appointment of a receiver, the necessary influence upon the trade of that receivership and the expenses involved, and all would no doubt result in a very serious loss to both Mr. Smith and Mr. Hemenway, and Mr. Smith thoroughly agreed with me in that attitude.

Q. That is what he said? A. He did.

Q. Go ahead. A. I asked him if there wasn't some way that a basis of adjustment or sale could be brought about, and I endeavored through a very long conversation to get from Mr. Smith an idea of the basis upon which he would sell his interest

in the business. I was unable to get any definite basis upon which to work.

Q. What did he say? A. Mr. Smith said finally that he wasn't interested in selling and didn't want to discuss that phase of it.

Q. What did you say about it? A. I told him that from that point of view it didn't look as if there was any way in which we could get together; that the offer that he had made previously, from what study I had made of the affairs of the company, didn't seem to be reasonable and fair, and Uncle never thought so. Mr. Hemenway never wished to sell the business.

Mr. Murray:—I object.

Q. Not what Mr. Hemenway did. You can tell anything you told Mr. Smith. Go on. A. As I recall, I told Mr. Smith that Mr. Hemenway had said to me that he did not wish to sell the business —his interest in the business. He was interested in buying Mr. Smith's interest, if that could be arranged.

Q. What did Mr. Smith say about that? A. Mr. Smith didn't seem to be interested in that phase of it. It was very difficult for me to get Mr. Smith to come down to anything concrete basis of working. In fact, after the entire afternoon we had arrived at no definite basis.

Q. Have you told all you recollect of that conversation? A. There was a great deal of it, in which Mr. Smith told about all the things that had taken place in the office in the past, but I remember specifically that I told him during the conversation

that I thought that too many of the things that had gone on had developed from past conditions, and that I wasn't a bit interested in the past condition. We had a very critical condition before us at that time, and that was what I was here to discuss.

Q. Just describe your uncle as he was, as a man. What was his temperament and his manner in relationship to other people, as you observed? A. Well, uncle's manner was—he was always very reserved—

Mr. Murray:—I ask the Court to fix the time.

Court:—He said "always." I presume that means a continuing characteristic.

Mr. Murray:—I think he said he hadn't seen him for a good many years.

Mr. Alger:—He hadn't seen Mr. Smith for a good many years.

Q. Is there anything else you think of in this conversation? A. I think I have covered it. There was a great deal—it took a long time, but we talked the same thing over a great deal.

Q. Was anything said on the subject of Mr. Hemenway's then condition of health? A. Yes, it was. Mr. Smith—we spoke of his condition of health. He was not present, he was unable to be present, and that was the reason I was there, and that was the reason my brother was there.

Q. What did you say to Mr. Smith on that subject? A. I said Mr. Hemenway was in no condition at that time to go into the thing; he wasn't able to stand the strain of it, and that is why we

boys, who were his nephews, were interested in working with him and for him all we could.

Q. That is the last talk you had with Mr. Smith on the subject? A. Yes.

Q. You didn't go up to the lawyer's office on that occasion? A. No, I never saw Mr. Burnett before today.

Cross Examination by Mr. Murray:

Q. Mr. Smith persistently refused to discuss what he would do or would not do with reference to dissolution proceeding or discontinuance, except in the presence of his lawyer? A. I never saw Mr. Smith with his lawyer.

Q. (Last question repeated). A. He refused to commit himself in any way at that time.

Q. And that is what you mean when you say that you could not get him down to a definite basis with reference to selling his stock? A. Whether it was put upon the basis of refusal to discuss it without his lawyer or merely a refusal to discuss it at all, I cannot state clearly that phase of it.

Q. Didn't he say time and again that the matter was in the hands of his lawyer and that he wouldn't discuss the matter—any phase of the matter— A. He said it was in the hands of his lawyer. I said, "Mr. Smith, the lawyers cannot talk it over; it is you and Mr. Hemenway who will have to decide the basis of adjustment; the lawyers can work it out afterward.

Q. You didn't make any offer on behalf of the Hemenways at that time? A. No, I endeavored to

find out if Mr. Smith would give us the basis under which we could place an offer with him.

Q. And he refused to discuss it in the absence of his lawyer? A. He refused to place any figure on it.

Q. He didn't say that he wouldn't sell at any price, did he? Yes or No. A. I don't recall that he made that statement.

Q. What reason did he give for your brother and Mrs. Hemenway going to Mr. Smith's lawyer's office? A. I don't recall that that was discussed when I was there. I wasn't present at the other meeting.

Q. Was Mrs. Hemenway at this meeting? A. She was not there when I was there.

Q. The conference which you have talked about was on that date? A. As I recall it, it was the seventh of October; it was on a Wednesday.

Q. How long is it since you have been connected with the Smith & Hemenway Company in any capacity? A. 1903.

Q. How long was it prior to 1925 that you had been in the Smith & Hemenway Company's plant and factory? A. I don't think I had ever been in their factory before that.

Q. And what did you make in your factory? A. In my own factory or former experience do you mean?

Q. I mean in your foundry and machine shop. A. We make various types of non-ferrous castings and various machine operations, or some of them.

Q. Primarily a foundry, isn't it? A. Foundry is the major portion of my business.

Q. Do you know whether Smith & Hemenway Company had a foundry or not? A. I don't think they did.

Q. In 1925 how long had you been operating your foundry and machine shop? A. I started that business in 1916.

Q. Still operating it? A. Yes.

Q. What did you refer to when you made the remark that you had been through a similar situation? A. I meant that I had been associated on practically the same basis with another man in my business.

Q. Just what was said by your brother or Mr. Smith that made you refer to this so-called similar situation? A. The fact that two men represented each half an interest in the business and one of them desired to separate and buy out the other interest, and I was faced with exactly that situation as existed here with Mr. Smith in the business here.

Q. Mr. Smith told you, didn't he, that he was disgusted with the way the business was being run? A. Yes.

Q. And he told you that he had been for years, didn't he? A. Mr. Smith told me a great deal along those lines.

Q. He did? A. Yes.

Q. And he told you that things were going from bad to worse, and had been for years, or substantially that? A. Mr. Smith told me a great deal along—

Q. Didn't he? A. Yes; oh my, yes.

Q. And didn't he express considerable dissatis-

faction with the way Mr. Hemenway had done his part in the business? A. He did, and then went back over twenty years of it, during which the business had grown.

Q. And he said that that had been fighting and quarrelling all the time? A. That is true.

Q. And didn't he tell you that he (Mr. Smith) was a sick man and couldn't stand it any longer? Or something to that effect? A. I don't remember his saying that he was sick. I think he had been at that time.

Q. Smith? A. Yes. Or prior to that; something or other was said about it anyway.

Q. He told you he couldn't stand the strain any longer of being associated with Hemenway in the business, didn't he? A. I think he said something to that effect.

Q. Didn't he tell you that the matter had been gone over; that Mr. Hemenway had in the spring of 1925, on his own motion and own violation, agreed to sell out to Smith? A. I don't remember that he did.

Q. Wasn't it discussed between you and Mr. Smith at your conference with him, that in the spring, in April, 1925, Hemenway had agreed to sell his interest, and Mrs. Hemenway's interest, to Smith for $100,000? A. I don't remember that he did.

Q. Nothing was said about that at all by Smith? A. I don't remember.

Q. You wouldn't say whether it was or not?

Witness:—May I answer that—I would like to answer it fully.

Mr. Murray:—Yes.

Witness:—When you mentioned the fact that Mr. Hemenway had made an offer to sell out, a few minutes ago in this room, was the first time I ever recall having heard that statement made.

Q. You stated to Mr. Smith that the proceedings would result in serious loss or damage to the company, did you not? A. Yes.

Q. Those were your words? A. Yes, and he thoroughly agreed with me and emphasized it.

Q. Did he agree on that or did he agree with you that they might be expensive? A. No, he agreed with me that it might wreck the business.

Q. Did he say why? A. Yes.

Q. What did he say? A. Loss of trade, loss of prestige, sale under forced sale, unless either he or Mr. Hemenway would buy it in—we discussed that phase of it—would probably bring a very small return to them; loss of credit.

Re Direct Examination by Mr. Alger:

Q. What did Mr. Smith say in connection with dissolution proceedings, if anything, as bearing on his future conduct; that is, when you discussed the question of loss by continuance of the dissolution proceedings; what did Mr. Smith say about that? A. He agreed that unless something could be done to avert it, that it would be a serious loss, and agreed with me that if something could be done, it might be averted without committing himself.

Q. Was any suggestion made outside of a sale

by Mr. Hemenway and Mrs. Hemenway to him? A. None.

Court:—By consent Mr. Isherwood is called out of order on behalf of the defendants.

Howard Isherwood, sworn for defendants:

Direct Examination by Mr. Murray:

Q. You are an attorney and counsellor at law of New Jersey? A. Yes.

Q. And have been practising how long? A. Seventeen years.

Q. And have been a former surrogate of Essex County? A. Yes.

Q. Do you remember having been called in to a conference between Mr. Smith and Mr. and Mrs. Hemenway in the spring of 1925? A. Yes.

Q. By whom were you called? A. I was called by Mr. Smith.

Q. And where did you go? A. I went up to his home, somewhere off of Clinton Avenue, I forget the name of the street.

Q. Whom did you find there? A. I met Mr. Smith and Mr. Hemenway and I also saw Mrs. Smith in there, she was in the house, but she didn't have anything to do with the matter at the time.

Q. What part of the house was this conference held in? A. Some place upstairs in the house.

Q. Will you state as briefly as you can what happened and what was said by you, by Mr. Smith and by Mr. Hemenway at that conference?

Mr. Alger:—Could we have the time fixed of this conference?

Witness:—It was in the afternoon.

Q. The date? A. Sometime around the early part of April, 1925. The conference there took place for several hours.

Q. What time did you get there? A. In the afternoon around two or two-thirty, and I didn't leave there—I know I didn't get home for dinner, and I had to stay for dinner down town.

Q. About what time did you leave the Smiths' house? A. It was about six o'clock, I think, or around that time.

Q. State what occurred. A. I cannot state the exact conversation; I know that there had been some words between the two of them. Mr. Smith at that time was suffering with some boils or abscess on the back of his neck, and when I went in I just sat down and listened to the argument between Mr. Smith and Mr. Hemenway,—I had never met Mr. Hemenway up to this time,—and Mr. Smith told him that he was a sick man and had to get out of the business.

Q. Who was sick? A. Mr. Smith was a sick man, and he had to get out of the business. He said that he was run down, that he had been worried about the business, that the business had been running from bad to worse, and that he had—Mr. Hemenway had not taken care of the business; that he had charge of the manufacturing end of it and the sales end of it.

Q. Who? A. Mr. Smith, and that he had to

get out, his health was to him a great deal more than the Smith & Hemenway business.

Q. Did he say what part Hemenway had in the business? A. He said Mr. Hemenway had taken care of the financial end of it, and it seems some notes had gone back on them, he hadn't been able to do some refinancing of the company. He couldn't go into the banks and get sufficient money, and they were not in very good shape at that time, and Mr. Smith said, "I cannot go on the road, take care of the manufacturing end of it and also take care of the financial end of it," and he said, "It is worrying me to death and I am going to get out," and Mr. Hemenway said that he thought that he was a little upset because he was ill and wasn't feeling well.

Q. Who said that? A. Mr. Hemenway said to Mr. Smith, and that if he had a rest he might get around again and things could go on just the same, and Mr. Smith then said something about Mr. Hemenway not being over to the business any more than once or twice a week. He said, "When I am out of town and away and taking care of things, you are not here to take care of stuff, and I simply come back here and you take up with me the financing proposition, and I am not able to go on with it," and he said, "I am ready to either buy or sell and I will let you fix the price.

Q. Who said that to him? A. Mr. Smith said that to Mr. Hemenway, and Mr. Smith then went out of the room and said, "I will leave you two men here to talk," and I talked with Mr. Hemenway, and I had a conversation there for pretty nearly an

hour with Mr. Hemenway, and he said something to me about my urging Mr. Smith to stay in the business. He asked me if I represented Mr. Smith. I said I had never represented Mr. Smith up until the time I went in the house, and I just came up there for the purpose of discussing the matter, and I didn't know what it was when I was coming up there. I had come from my office. He asked me what I knew about Mr. Smith. I said I had only met him in the Rotary Club where I had met him, and I had only met him at the meetings, and never represented him, and I said, "Why don't you go on with the business? I can see that Mr. Smith is a sick man; I can see that he was a well man at one time when he was in the Rotary Club, but he has gotten ill, and he don't act right to me." And he said, "Well, the trouble with the thing is I cannot go on with it, I don't know anything about the manufacturing end of the game."

Q. Hemenway said that? A. This was a conversation I had with Mr. Hemenway when Smith was out of the room. And I said, "From the man's attitude it is apparent he is not going to stay in the business, and it is simply going to wreck the concern if you are going to pull apart from each other," and he said, "What happens if you have a receivership?" I said, "A receivership, in my estimation, never turns out very satisfactorily to anybody, and I said it simply means that this whole concern of yours will be put on the market unless you are able to reorganize. It will be a lot of expense; it will be sold and you and Mr. Smith will be bidding against each other; the concern itself

will lose prestige, and these red devil tools are known all over, and I think it is a shame to wreck a concern of this kind." He said, "I don't know what figure to offer him." I said, "Well, you are the financial man, you ought to know more about it than anybody else," and finally he came back to me and said, "Suppose we offer him $100,000?" I said, "You might as well offer him $10,000 for all I know, because I don't know anything about your finances of the concern, but whatever you think is fair, offer him, and see what Mr. Smith has to say about it." We argued about that.

Q. When you say "offer," you mean what offer, to buy or sell? A. He wanted to offer Smith $100,000 for his share, and he said, "I wish you would try to prevail upon Mr. Smith to stay in the concern; I don't want him to get out." And he said, "I am a pretty old man." I said, "Mr. Smith must be older than you are." He said, "He isn't, not by a long shot." He said, "I am older than Mr. Smith," and he told me his age, pretty nearly seventy years of age at that time he was, and he said, "You do all you can to get him to stay in the concern. I will offer him, and if he has got to get out, I will offer him $100,000." So after we had talked for a while Mr. Smith came—we called him in.

Q. At whose suggestion did Smith go out of the room? A. His own. He said he thought we would be able to talk better if he was out of the room.

Q. Who first brought up the idea of separating Smith and Hemenway? A. Mr. Smith said he

couldn't stay in it any longer; he said he was a sick man.

Q. I mean separating at your conference and going out of the room; who first brought up that idea? A. Mr. Smith. Then Mr. Smith came back into the room and we talked more about the factory and they got into arguments about different parts of the financial end of it and what they were going to do, and finally Mr. Hemenway said, "Well, I simply cannot go on with the business; I don't know how to run the manufacturing end, and I will get out, and I will sell out for $100,000," and he said, "You go ahead and prepare some papers." It was a New York corporation, and I am not exactly versed in a New York proposition, so I had a friend of mine prepare some of the preliminary papers.

Q. What did Smith say when that offer was made to him? A. Smith said he would accept it.

Q. Was anything said about how that $100,000 was to be paid and when? A. There was a lot of detail about that; it took into consideration the Montreal property and some shares of another concern, and he was to get that $100,000 at certain stipulated times. I haven't those papers here. I turned a lot of those papers back to Mr. Smith after I got out of the affair, and I haven't any of those papers in my file at the present time.

Q. Did Hemenway at that time say anything as to how his health was? A. No, he didn't say anything to me about his health. He didn't say that he wasn't in good health. He didn't mention his health as a matter of fact, to my recollection.

Q. Was there anything about his appearance which would lead you to believe that he was in bad health? A. No, he looked like a pretty well preserved man.

Q. What was the next thing that happened within your knowledge? A. Three or four days after that Mr. Hemenway came into my office alone.

Q. Who asked him to come? A. No one, as I know of; he walked into the office and I happened to be there; Mr. Smith was not there at the time.

Q. What was said? A. He asked me whether Mr. Smith had been in touch with me since, and I said I had not seen Mr. Smith since the time Mr. Smith had called me and asked me if I was preparing the papers, and I said that I was working on the papers at that time when he called me, and then Mr. Hemenway then said to me in the conference at the office, "Won't you please do everything you can to get Mr. Smith to stay into the concern? I don't want him to get out." And he said, "You do all you can for my family." I said, "I will do all I can, but from Mr. Smith's attitude up there at the house, it is quite apparent that he is not going to stay in this concern, and it looks to me if you don't go through with the proposition, it will perhaps be a receivership, if you are both going to fight each other."

Q. When Mr. Hemenway was alone at your office did he say why he did not want to buy out Mr. Smith's interest? A. He said he thought that if he could—he wanted to know from me whether I thought if he didn't buy out Mr. Smith would stay

in. I said, " I don't know; from his attitude shown at that conference, it is apparent he is not going to stay in." I said, "That is the only way that I can judge it."

Q. That was at that conference. Did he say anything about his inability or ability to run the business, if he got out? A. He said he knew the financial end of it, but he didn't know anything about the manufacturing or sales end, as that had been left exclusively to Mr. Smith.

Q. Did he say whether he thought he could run the business if he took it over? A. He said he couldn't because he knew nothing about it; he said he would have to depend on other people, and he said that he had been depending on Mr. Smith and had been taking over— the only kick Mr. Smith had with him was that he wasn't there taking care of the business.

Q. Did Mr. Hemenway have any complaint to make about Mr. Smith, the way Mr. Smith handled the business? A. He didn't make any complaint to my recollection.

Q. How long was that conference after the time when you first met both of them at the house there? A. Not over two or three days.

Q. What was the next that took place in reference to this matter? A. Mr. Cohn, who I found out was the man who was on the stand this morning, called me up and said he represented Mr. and Mrs. Hemenway, and they made an appointment, and I didn't know it until they had come to my office that there had been a meeting in the Robert Treat Hotel

with Mr. and Mrs. Hemenway and Mr. Smith. I didn't know that they had been there.

Q. Did Mr. Cohn say what the conference was for? A. He said he wanted to discuss the sale.

Q. And he made an appointment? A. Yes, and they came over to my office. That was the time that he testified to this morning.

Q. Who were there? A. Mr. and Mrs. Hemenway, Mr. Smith, and Mr. Cohn and myself.

Q. What happened then? A. Mr. Cohn handed to me a contract, and in a cover similar to the one he had here this morning, and I looked at it; I said I was very much surprised, "You have got this wrong"; I said, "I understand that Mr. Smith is selling it."

Q. Mr. Smith is selling out or buying out? A. Getting out.

(Last answer read to the witness on the request of counsel.)

Court:—What did you mean?

Witness:—I mean the arrangement was that he was to pay the $100,000—Mr. Hemenway had offered him $100,000. He made the offer of $100,000 at his house, and he had this contract. I don't recall what the substance of that contract is at the present time.

Court:—You mean Hemenway had made an offer to Smith?

Witness:—He had made an offer of $100,000 for his interest.

Court:—To buy out Smith?

Witness:—Yes, to buy out Smith.

Q. You say that the contract which Mr. Cohn presented was the reverse? A. I don't recall what the contents of that was.

Q. You said you were surprised. A. I asked them about—I was quite surprised at the time, yes.

Q. Why? A. I cannot tell until I see the contract; I would like to look at it. (After examining contract). That was the contract that was produced, I believe; I don't recall fully that proposition at that time.

Q. Produced by whom? A. Mr. Cohn, at my office.

Mr. Murray:—I have shown the witness a contract bearing the blank day of April, 1925, between John F. Hemenway and Alice M. Hemenway and Landon P. Smith and J. Mildred Smith, being Exhibit C-3.

Q. That provided for the purchase by Hemenway of Smith's interest, half of the common stock held by the Smiths, and in exchange for the preferred stock substantially, does it not? A. Yes.

Q. So that under that contract C-3 it was the Smiths common stock which was to be sold to the Hemenways? A. Yes, which was different than what happened up at the house.

Q. How was it then? A. Mr. Smith said that he was going to get out, and Mr. Hemenway had made the offer of $100,000.

Q. What do you mean; you mean Hemenway made an offer to sell his share for $100,000, or buy Smith's for $100,000? A. He had made his offer

to sell his share—now, wait a minute; I have got that wrong.

Court:—You have testified both ways. I am interested in knowing which is right.

Q. How did this agreement C-3 compare with the verbal agreement which had been arrived at at Smith's home, to which you testified? A. At the Smiths' home Mr. Smith had said that he would not stay in the corporation, and Mr. Hemenway had said, when I had that talk with him, that he would make an offer of $100,000, and he made that offer when they came together again, the two of them, in the home, after Mr. Smith returned, and Mr. Hemenway then came to the office and asked me to prevail upon Mr. Smith to stay in the corporation so they could both stay together, and then when this agreement was flashed here by Mr. Cohn which I didn't know anything about, the idea was that Mr. Hemenway was to sell out and Mr. Smith —Mr. Hemenway was to purchase.

Q. At that conference did you prepare any resignation or resolutions of the corporation to carry into effect what was agreed upon originally at the meeting at Smith's home? A. I did, yes, sir. I didn't prepare them; they were prepared by some friend of mine in New York.

Q. Did you look them over at the time? A. I did at the time, but I haven't looked them over since.

Q. What do they show? Use them to refresh your recollection. What preparation did you make for the carrying into effect of the verbal agreement made at Smith's home? A. I took the matter up

with Mr. Hemenway and we went over to see this gentleman in New York, and these papers were prepared over there. The minute books, stock book and different books that Mr. Hemenway had in his possession were taken over there, to this man's office, and were prepared accordingly.

Q. At the conference when Mr. Cohn was present at your office, what took place after the draft of contract C-3 was produced by Mr. Cohn; or what did you do when Mr. Cohn produced that draft of contract? A. I don't recall just offhand what I said; I know Mrs. Hemenway said she would not sell her interest for $100,000.

Q. She would not? A. She would not; and Mr. Hemenway at that time had very little to say at all.

Q. Did he express any desire at that time as to whether he was in accord with the Hemenways views? A. I don't recall that he did. Mrs. Hemenway did most of the talking. The only thing—one thing I do recall was that he tried to persuade Mr. Smith to remain with him.

Q. At that conference was there anything said as to Mr. Hemenway's ability to run the business if he bought Smith out and Smith got out of the company? A. Yes, he said at that time—he said—

Q. Who said? A. Mr. Hemenway said, "You know, Mr. Smith" — he didn't address him "Mr. Smith" — "Landon, that I don't know the manufacturing end and I have got to depend on other help in that concern, and you know all about the sales end of it and fixing the prices and buying of materials, the raw materials, and you know that I

don't know that," and Mr. Smith said something to the effect, "Well, why don't you come over to the concern; why don't you come over to the concern more often than you have been doing, instead of twice a week, and take care of matters?"

Q. Was there anything said at that conference as to book values? A. Not that I can recall.

Q. Do you think you would recall it if there had been? A. Yes, I think I would. The only figure that was practically talked about was this $100,000 —the only figure. I don't know whether that was the right book value or the wrong one. The interest they referred to was the interest of Mr. and Mrs. Smith; that was worth $100,000. Mr. Hemenway had placed that himself, but when they got together Mrs. Hemenway wouldn't consider it. All she said that I can recall was that it was worth more than that. Nothing was said about figures.

Q. Nothing was said about how much more? A. I don't know, and I have never heard it.

Q. Did Mr. Hemenway at that conference dispute the fact that he had previously offered his stock to—his and his wife's stock to Smith for $100,000? A. Yes, he said that.

Q. Yes what? A. He had offered it; Mr. Hemenway had personally offered it to Mr. Smith.

Q. Did Mr. Hemenway comment on that fact at that conference at which Cohn was present in your office? A. I asked him about it.

Q. What did he say? A. I asked him if he hadn't done that; he said yes; he admitted that he had offered it up at Mr. Hemenway's house.

Q. What excuse, if any, did he give for not living up to his agreement? A. That his wife wouldn't sign to convey her stock.

Q. Was there any conversation between Mr. and Mrs. Hemenway at that conference as to what they ought to do about their stock, as to buying or selling? A. Not that I know of, except that she would not sell to Mr. Smith for $100,000. Mr. Hemenway said that he couldn't get her to sign off, and she was a very substantial stockholder.

Q. Did he say anything at that conference about what his condition of health was? Mr. Hemenway, I mean. A. No, Apparently all right; he didn't look as if he was ill.

Q. Did his wife say anything? A. No, nothing. The only thing said about anybody's health was Mr. Smith's health.

Q. How was the matter left? A. When they went out of the office—they had quite an argument there about it; Mr. Smith said that Mr. Hemenway had agreed at his house to sell to him, and he had gone ahead with the idea that he was going to purchase this for $100,000, and Mrs. Hemenway said, "Well, I won't sell." Mr. Hemenway said that he wouldn't sell; Mrs. Hemenway said that she wouldn't sell, and things got pretty warm there for a while, and they got up and walked out.

Q. That is the last you ever saw either Mrs. Hemenway or Mr. Cohn again? A. That is the last time I ever saw them.

Cross Examination by Mr. Alger:

Q. Mr. Isherwood, all through this first conference between Mr. Smith and Mr. Hemenway, Mr. Hemenway tried to smooth down Mr. Smith and tried to stop any argument? A. Yes.

Q. And there wasn't any time in which he engaged in the argument as far as disputing Mr. Smith? A. Yes, on different things; one time, when he said he wasn't there at all, and Mr. Hemenway wasn't attending to the business, then he would come back at him.

Q. Mr. Hemenway did say that he attended to the business, didn't he? A. He said that he thought he had attended to it as much as it needed, by going over a couple of times a week.

Q. He said he had to run the New York office, had to go in three or four times a week there, and come over to the plant two times, didn't he; did he say that? A. No, I don't recall that he did. The argument seemed to be that he hadn't appeared at the Irvington plant.

Q. Wasn't there another statement made, that there was a New York office of this company that Mr. Hemenway ran? A. Yes, I believe there was.

Q. And Mr. Hemenway said that it was necessary to put in his time over there, too, didn't he? A. Yes. And I think Mr. Smith said—

Q. I didn't ask you what Mr. Smith said. Please answer my questions. And Mr. Hemenway said that for over twenty-five years, that he and his wife had raked and scraped and pledged everything that could

to keep that company going; didn't he say that? A. No.

Q. Didn't he say that in words, or in substance? A. No; I thought he was—

Q. Not what you thought; didn't he say that he had gone out, he and his wife, on one occasion she had pledged everything she had to keep this company going? A. No, sir.

Q. She didn't say anything about that? A. I never heard that before. He did say that he wanted his partner Smith to wait a few days until he felt better, and go on and get along as they had for the last thirty years. He said he thought after he became well he would have a different attitude.

Q. He wanted Smith to stay in; he didn't want to be bought out at such a small figure? A. Yes.

Q. He didn't want either one of them to lose the fruits of their many years' labor? A. Yes.

Q. And all the way through Mr. Hemenway had charged that he wanted to be fair to his partner Smith, didn't he? A. Yes.

Q. And all the way through Mr. Smith said that he would not stay in; that they had come to a time where they had to split up? A. Yes.

Q. Mrs. Hemenway was a woman of fine appearance, wasn't she? A. Very nice.

Q. A woman of high character and keen intellect, isn't that right? A. A very fine woman I had heard.

Q. You know she gave the appearance that she was a woman of high type and high class? A. Very shrewd woman.

Q. And she said that $100,000 was wholly inadequate to buy out a half interest in that business? A. No, she said she wouldn't sell out for $100,000.

Q. You said she said it was worth more, didn't you? A. She wanted more money if she wanted to sell out.

Q. Didn't you testify that she said that? A. I might have said it. I will withdraw that.

Q. She said she didn't want to sell out for $100,000 any way; you are quite sure about that? A. Yes.

Q. You didn't say, if I recall, what the Smiths said when this Exhibit C-3 was presented, whereby the Smiths were to sell out for $100,000. What did the Smiths say to that? A. Both Smiths were not there, to my recollection. Mr. Smith was the only one there.

Q. What did Mr. Landon Smith say when Exhibit C-3 was presented for his signature? A. He wouldn't sell. He said that he had agreed—that Mr. Hemenway had agreed to sell to him for $100,000, and that he wanted to know from Mr. Hemenway— addressing Mr. Hemenway, why he wouldn't carry out his agreement as he made it up at his house.

Q. Didn't Mrs. Hemenway say that at the Robert Treat Hotel on April 7th, and after this talk at the house, that Smith said that $100,000 was a fair proposition and he would sell at that figure, and they were taking him up on it? A. No, I don't recall that.

Q. Will you swear that that didn't take place? A. I will swear that I don't recall it.

Q. Didn't Mr. Smith say that he had changed his mind? A. As to what?

Q. As to selling out for $100,000? A. Mr. Smith said that was to pay—

Q. No, I ask you if Mr. Smith said that he had changed his mind? A. I don't recall Mr. Smith saying he had changed his mind.

Q. Were you in the room with Mr. Cohn and the other folks at that particular time and all the time? A. Excepting in answering the telephone calls once in a while, when I couldn't quite get all the conversation, when I answered the telephone in my own office.

Q. Did you keep any office record of this conversation up at the Smith house? A. No, I did not, except the fact that I spent so much time up there.

Q. You didn't keep any record of when that occurred? A. Just of the time; my bill has been paid, and that is my only record.

Q. You didn't look up your record to see what date that was? A. No.

Q. Whether before or after April 7th? A. The one I can place is, you say something about the Robert Treat conference; I know I was up to Mr. Smith's house with Mr. Hemenway and then Mr. Hemenway was in the office, and then when Mr. Cohn and Mr. and Mrs. Hemenway and Mr. Smith came in, and I know there had been some kind of a conference at the Robert Treat.

Q. There was a mention made that there had been such a conference? A. Yes. I didn't know it until they got to my office.

Q. (Last question repeated). A. Yes.

Q. So that there isn't any question about that in your mind? A. No.

Q. That the Smiths and Hemenways did confer at the Robert Treat Hotel? A. That is what they talked about at my place.

Q. All of the time that Smith and Hemenway were along, Mr. Smith was telling Hemenway what he would do, and Mr. Hemenway was begging him to come along, is that right? A. Where, up to the house?

Q. Yes. Mr. Hemenway was a kind of a retired fellow who didn't speak up for his own rights; isn't that about the size of it? A. He wouldn't be stepped on by anybody.

Q. He did deny that he neglected the financial end, didn't he? A. He did deny it.

Q. And then he said that when they had trouble about the notes it was because Landon P. Smith wouldn't sign the note, didn't he, wouldn't endorse it personally along with the Hemenways? A. No, I don't recall that.

Q. Do you recall at any time any mention of the fact that the only financial trouble they had was when Landon P. Smith said "I will no longer endorse the company's notes personally?" A. I don't recall that at all.

Q. Did Mr. Smith or any one else tell you in the conference at his house, that during the first

six months of 1925 the company had more than doubled its operating profits over the preceding year? A. No, I hadn't heard that.

Q. Mr. Smith said they were losing money, didn't he? A. Yes, he said things were going from bad to worse.

Q. He didn't tell you that from five to ten thousand some twenty years ago, the company had been built up to some $600,000; he didn't tell you that? A. No.

Q. Did Mr. Hemenway mention it? A. No.

Q. Who was the New York lawyer that drew these papers? A. William Huck, Jr.

Q. You hadn't thought of this matter from April, 1925, until the preparation for this trial, had you, Mr. Isherwood? A. No, I hadn't, and I haven't since.

Q. And you hadn't discussed it with any one during that time? A. Oh, yes, I have.

Q. Until the preparation— A. Until the preparation of this suit.

Q. That is what I mean; until the preparation of this trial? A. Yes.

Q. So that substantially two years elapsed in which you didn't think about it at all? A. Yes.

Q. You made no notes of what took place? A. No, I made no memorandum of it.

Redirect Examination by Mr. Murray:

Q. Whom did you discuss it with in preparation for this trial? A. You.

Q. And did you tell me what happened? A. I did, to the best of my recollection.

Q. And did you have any prompting from me? A. No; I didn't recall until I had quite a time looking up my file; it was an old file, it was downstairs, and I had quite a time finding it, to look over my papers, to see what I had, and then I found that all the papers had been turned over to Mr. Hemenway in 1925, I believe.

Q. How does what you told on the stand today compare with what you told me when I asked you what the circumstances were? A. The same, after I had looked over the papers.

Q. You said that Mr. Hemenway stated that he wanted to be fair to Smith. What did Mr. Smith reply to that, if anything? A. He wanted to be fair to him.

Q. But he was insisting on either him getting out, or upon he and Mr. Hemenway severing the connection with the company? A. Yes.

Q. Was there anything said or any description given as to what happened at the Robert Treat Hotel conference? A. No, I only drew from the conversation that there was a conference; I don't recall what was said there at that time.

Court:—This agreement, C-3, has been referred to as an agreement which provided for Smiths selling to Hemenway for $100,000. It does not provide any such thing; as I read it, it simply is an exchange of stock. I don't know what the result might be in dollars and cents, but that is all this contemplates.

Adjourned to tomorrow morning, at 10 A. M.

Glover Way for complainant, direct.

IN CHANCERY OF NEW JERSEY.

Between

Alice M. Hemenway, individually and as executrix of the last Will and Testament of John F. Hemenway, deceased,

Complainant,

-and-

Landon P. Smith and Julia M. Smith,

Defendants.

Continuation of testimony in the above entitled cause before Hon. Maja Leon Berry, Vice Chancellor, at the Chancery Chambers, Newark, New Jersey, on Tuesday, June 21, 1927, at 10 A. M.

Appearances:

Counsel as before stated.

Glover Way, sworn for complainant.

Direct Examination by Mr. Alger:

Q. Mr. Way, where do you live? A. 32 Hawthorne Avenue, East Orange.

Q. Are you acquainted with Mr. Landon Smith? A. Yes, sir.

Q. And were you acquainted with Mr. John F. Hemenway in his lifetime? A. About eighteen or twenty years.

Q. And some time or other were you employed by the Smith & Hemenway Company? A. For about seven months.

Q. And what year were you employed by them? A. From about the first of October, 1919, to about the last of April, 1920.

Q. In what capacity were you employed? A. I was supposed to be general manager; that was a nominal position; I was really factory superintendent.

Q. Did you as factory superintendent operate the plant for the seven months you were there? A. I did.

Q. Prior to that time just detail very briefly what experience you had had in that line of work. A. I had about twelve years in charge of construction and factory work; I had about six months with the Wagner Electric Company at St. Louis.

Q. You had twelve years of factory production work? A. Not all factory; part of it was out-

side construction on plumbing, steam heating and electrical work.

Q. You had some service in the United States Navy? A. Three years and four months.

Q. And in what particular grade and line? A. I was lieutenant J. G. under Commander B. B. McCormick, 3rd Naval District, in ordinance.

Q. Did you do something in connection with the New York Central Terminal in New York City? A. I designed and laid out the third rail, laid cross-overs for them, inclines and cross-overs for the electrical work.

Q. That is at the New York Central Terminal, New York City? A. That involved trigonometry and knowledge of steel.

Q. Was Mr. Smith at the plant when you first went there? A. Yes.

Q. How long a time was he there after you went there? A. He was several times, once for several months.

Q. And that was because of illness? A. Because of his illness.

Q. What was the matter with him at that time? A. I don't know what was the matter with him; he complained that he was sick, and Mr. Hemenway urged him to take a vacation; he felt he needed it.

Q. During that period of seven months when he was away more or less, was Mr. Hemenway at the plant? A. Mr. Hemenway came over to the plant almost every day.

Q. And did he operate a New York office also? A. Yes.

Q. And are you familiar with whether Mr. Hemenway continued that office subsequent to 1920, that is, the New York office? A. After I left—I think so.

Q. Just briefly tell about your work there in that seven months; what results were accomplished, so the Court will see just what happened.

Witness:—May I tell this in my own way?

Mr. Alger:—Yes.

A. Mr. Hemenway figured that there would be a big financial depression in 1920, and he got me in there to get our unfilled orders out before the crash came, and I made very little headway while Mr. Smith was in the factory. When he went away on his vacation, with the help of some intelligent foreman, we increased the output about fifty per cent.

Q. And did you increase your personnel or your overhead? A. No, no increase in personnel, except one man.

Q. So you had fifty per cent increase of production with substantially no increase in overhead? A. Approximately.

Q. Who ran the finances of the company at that time? A. That was a matter between Mr. Smith and Mr. Hemenway. Mr. Hemenway ran it while Mr. Smith was away.

Q. The financial end? A. He ran the financial end.

Q. Did he also take some part in the general management of the company? A. Oh, yes.

Q. And when Mr. Smith came back, just tell

the Court what happened. A. Mr. Smith was very cordial until he explained that Mr. Hemenway wanted his resignation as general manager of the factory. He said that he thought that the factory output could be increased considerably if he would resign, and the increase would be sufficient to make up for his loss of salary.

Q. Mr. Hemenway wanted him to still draw his salary, but to let go of the production end? A. No, he wanted him to vacate his salary; that is what caused the trouble.

Q. That is, wanted him to do without his salary? A. Yes.

Q. And resign also? A. Yes, and take his profits. He felt the profits would be enough additional to pay him for his loss of salary.

Q. Go on and describe the relationship of Mr. Smith to the factory employees as you saw them, and the trade in general, so far as you saw? A. So far as the trade in general, I don't know anything about it, but I know that his influence upon the factory was that of trouble. Every time he would go through the factory, it would take about a week for the trouble to simmer down.

Q. What was Mr. Hemenway's attitude and manner toward the superintendents? A. Very friendly.

Q. Did you ever know of any controversy between Mr. Hemenway and anyone in the factory outside of Mr. Smith? A. Never; never knew of any trouble of any kind.

Q. Did you know of any employees in the factory in positions of responsibility with whom Mr.

Smith didn't have any controversy? A. I don't quite get that.

Q. I will put it this way: Did Mr. Smith have any controversy with any of the employees? A. He was having it all the time.

Q. Just go on and state to the Court the occasion of your resigning from the company. A. After Mr. Smith came home he told me of his conversation with Mr. Hemenway, in which Mr. Hemenway wanted him to resign from the active management. He said, "I am going to hold my job in this factory."

Q. Who said that? A. Mr. Smith said that, and the next day when I turned up at the factory, when I gave my orders to two of my foremen, they refused to take them, and I asked for an explanation, and the boys were both friendly to me, and they said, "We have orders from Mr. Smith not to take any orders from you whatever." They said, "We understand that he has gone through the factory to the heads of the departments." Then I had an interview with Mr. Smith and he said that I could do as I pleased. "Well," I said, "it will please me, under these conditions to resign." He said, "You don't need to resign; we are going on just the same as usual, and I will give you orders, and you transmit them to the factory." I said, "In other words, I am a figure." He said, "You can figure it any way you want."

Q. What did you say and then what did he say? A. I said, "You can accept my verbal resig-

nation now, and I will write out a written one," and he turned on his heel and went upstairs.

Q. Is that all you recall of that conversation? A. That is all of that particular conversation. I called up Mr. Hemenway and he asked me to come in to New York and see him.

Mr. Murray:—I object.

Q. Never mind Mr. Hemenway. To refresh your recollection, was anything said by you to Mr. Smith on the subject of the orders to the foremen not to obey you? A. He denied that he had given any such orders to the foremen.

Q. Go on and tell what was said on that subject. A. I saw him again, and I said, "These fellows have reiterated what they said about not taking orders from you," and he said——

Court:—From you, or me?

Witness:—They were not to take orders from me, from myself, and he denied that he had given any such orders. It was an impossible situation. I couldn't continue with any service to either Mr. Smith or Mr. Hemenway under those conditions.

Q. And you therefore resigned? A. Therefore I resigned.

Q. Describe Mr. Hemenway's general characteristics, in reference to whether he was a quarrelsome man or man who was friendly generally? A. He was a man friendly; he was the soul of honor, and every promise he ever gave a man, he kept, if it was humanly possible.

Glover Way for complainant, cross.

Cross Examination by Mr. Murray.

Q. Mr. Way, are you any relation of either Mr. or Mrs. Hemenway? A. By marriage, sir.

Q. And you have been quite active in preparing this case? A. Not at all.

Q. Haven't you been going around to a number of the former employees of the concern? A. One.

Q. How many more? A. That is the only one.

Q. And did you try to locate any more? A. No, sir.

Q. Just what did the Smith & Hemenway Company make? At the time you were there? A. They made a very large variety of pliers.

Q. Nippers, pinchers, hand tools of various kinds? A. Yes.

Q. There were over a thousand varieties? A. I don't know how many; I wouldn't say.

Q. There were several hundred of them? A. A thousand would be a very great exaggeration.

Q. How many would you say? A. I wouldn't say.

Q. It is on record, you were the general manager, were you not? A. That is very true.

Q. And you were the factory superintendent, weren't you? A. Yes.

Q. You cannot say how many varieties or types of tools they made? A. I cannot— a great many. It is on record on their books; you can ascertain that.

Q. Just what manufacturing experience had you had before you came to the Hemenway fac-

tory? A. I had six months with a mechanical electric manufacturing company in St. Louis.

Q. What were they manufacturing? A. They were manufacturing transformers, motors, dynamos.

Q. Electric work? A. Yes.

Q. You were there as what, an electrical engineer? A. I was there testing in the test room.

Q. Electrical tester? A. Yes, and I also worked in the shops.

Q. Where they produced what, the coils and armatures? A. Coils, armatures, transformers; that was their principal stock; motors, dynamos, transformers.

Q. They did no drop forging there? A. No.

Q. Did you ever work anywhere where they did drop forging? A. Yes, I worked at the Liemans & Holske Company.

Q. When was that? A. That was approximately about 1894 to 1897.

Q. How old were you then? A. I was born in 1874; you can figure it out yourself.

Q. About twenty-two or twenty-three years? A. I was born in 1874.

Q. You were there in 1894? A. About 1894 to about 1897, I worked in all departments, taking a student-apprentice course.

Q. Do you want to say that you with the experience which you have described in producing these tools, stepped into the plant and in seven months got out more production and got out production more efficiently that Mr. Smith did when he was there? A. To get out production in a

plant you have to pull it. It is like a chain, you cannot push it. For the time that Mr. Smith was there, I was only permitted to study conditions, which I did, and I found out what the trouble was, but while Mr. Smith was there, I was not permitted to make any changes.

Q. I ask you, do you say that you with your experience which you had at that time in that line of business, came there and in seven months increased the production over what Mr. Smith with his experience had been enabled to do? A. That was not the only experience I have had.. I had about twelve years in charge of construction and factory work.

Q. What kind? A. Electrical and mechanical.

Q. What kind of mechanical? A. Plumbing and steam heating.

Q. That was assembling; that wasn't manufacturing? A. No,that was designing and looking after construction on outside work.

Q. Building factory buildings? A. Building factory buildings?

Q. Yes. A. Yes, I have had experience in that.

Q. As a matter of fact, you are a construction and electrical engineer? A. I made a specialty of production work in the factory; that is what I was doing in the Navy—production and inspection. That has been my specialty.

Q. Did you ever have any experience in hardening and tempering steel? A. Yes, I did; I had it in my technical school.

Q. When was that? A. That was a branch of the Washington University in St. Louis.

Q. That was a part of the curriculum? A. Yes, part of the curriculum, a very important part.

Q. Ever have any experience in case hardening? A. No.

Q. You said that when Mr. Hemenway wanted Smith to resign and give up his salary, that that is what caused the trouble, and later on you said that they got along without any trouble. Just what did you mean? A. I didn't say that Mr. Smith and Mr. Hemenway got along without any trouble. I don't know whether they did or not. I said that Mr. Smith and I got along without any trouble.

Q. You don't know how Mr. Hemenway and Mr. Smith got along? A. No, I do not.

Q. Isn't it a fact that it was known through the factory, or throughout the employees that you came in contact with, that there was continual dissension between Smith and Hemenway? A. None whatever between Mr. Hemenway and any of the factory.

Q. I didn't ask you that. Between Smith and Hemenway, wasn't it common knowledge among the employees that you came in contact with, that there was dissension between Smith and Hemenway? A. I never heard of it.

Q. You wouldn't say that it didn't exist? A. If I never heard of it, I cannot say anything about it.

Q. You were hired, were you not, when Mr. Smith was away? A. Not at all; my first job for Smith & Hemenway was to make a survey of a plant over in Pennsylvania, at the time I was employed by the Government. I got leave from my Commander to go over there and look over the Government plant, and to see if it was acceptable to them.

Q. When you were hired as general manager and factory superintendent, Mr. Smith was away? A. Not at all ;Mr. Smith employed me himself.

Q. How long was Mr. Smith there after you were employed in this capacity? A. I don't remember that, but I remember that during the time I was in the factory he was away several months.

Q. Isn't it a fact that when Mr. Smith came back and found out how you had been making pliers, that he criticised it, and that you took offense and resigned? A. No, not at all.

Q. When you said that you increased the output fifty per cent without any increase in personnel, you mean with the same personnel that was there? A. With the exception of the addition of one man.

Q. That was the only change? A. That was the only change, that I know of.

Q. When did you go into the Irvington plant? A. That was about October, 1919.

Q. Were you in the Irvington plant the whole time you were there? A. No, because I had a contract for a year and I resigned on the thirtieth of April, if I remember right.

Q. All the time you were there, you spent in the Irvington plant? A. Certainly.

Redirect Examination by Mr. Alger:

Q. What relationship did you have to the Hemenways? A. My aunt on my father's side married Mr. Oliver Harrison, and Mr. Oliver Harrison was an uncle of Mrs. Hemenway.

Q. Although I cannot exactly figure out your relationship to the Hemenways on short notice, you had kept up your acquaintanceship and association with the Hemenways prior to their death, hadn't you? A. Certainly.

Q. Quite intimate with them? A. I wouldn't say that; quite friendly. If you call "intimate" making a call maybe once or twice a month, yes.

Q. And they called on you? A. Yes, once.

Karl Peterson, sworn for complainant.

Direct Examination by Mr. Alger:

Q. Where do you live? A. Jamestown, New York.

Q. Are you the president of the Crescent Tool Company? A. I am.

Q. And that is a New York corporation? A. New York corporation.

Q. Having its principal office or place of business at Jamestown, New York? A. Yes.

Q. Subsequent to November 5, 1925, did you purchase the entire outstanding stock of the Smith & Hemenway Company, Inc.? A. We did.

Q. You still possess that stock? A. Yes.

Q. And you operate the Smith & Hemenway plant in Irvington? A. Yes.

Q. In connection with that purchase did you talk with someone by the name of Smith? Just yes or no. A. Yes.

Q. And that was Mr. D. G. Smith, a brother of the defendant L. P. Smith? A. Yes.

Q. And when and where did you talk to him? A. November 5, 1925, in Jamestown.

Q. Following that talk and at some time was a copy of the inventory of Smith & Hemenway Company, Inc., furnished to you? A. Not at that time.

Q. I say later on? A. Later on, yes.

Q. And on what date? A. November 14.

Q. That is nine days later? A. Yes.

New Jersey State Library

Q. And by whom was that furnished? A. It was mailed to us.

Q. Do you know who mailed it or who signed the latter? A. If I recall correctly, I think it was signed by Mr. L. P. Smith.

Q. It wasn't signed by Mr. Hemenway? A. No, sir.

Q. Your agreement with Mr. Smith for the purchase of this stock was reduced to writing, was it? A. There was a tentative agreement made at one time.

Q. That tentative agreement was never signed? A. No, sir.

Q. Just simply was a verbal understanding? A. Yes.

Q. I show you a paper purporting to be a typewritten memorandum of agreement dated the eighteenth day of November, 1925, and ask you if that is one copy of the memorandum which was made at that time? A. I believe it is.

Q. And later on a formal contract was entered into? A. Yes, sir.

Q. I show you a paper marked "Memorandum of agreement—Landon P. Smith, J. M. Smith and Dew G. Smith, Smith & Hemenway Company, Inc., and Crescent Tool Company," dated January 19, 1926, and ask you if that is the original formal agreement entered into between you and the persons named? A. That is one copy of it, yes, sir.

Mr. Alger:—I offer both the memorandum and formal agreement in evidence.

Mr. Murray:—I don't see the purpose of the informal memorandum which preceded it,

unless if it is being admitted as to the history of the case.

Mr. Alger:—That is all. I don't want it to appear that there wasn't anything we were not placing before the Court in the entire chain.

Court:—It wouldn't be material as part of the contract.

Mr. Murray:—I would like to have the privilege of comparing these papers.

(Marked Exhibit C-37 and C-38.)

(By consent, copies of these exhibits are marked in lieu of the originals.)

(Marked Exhibit C-37 and C-38.)

Q. At the same time was a lease of the factory plant and buildings which under Exhibit C-38 was reserved to Mr. Smith, or reserved out of the contract—was a lease of that property made with the Crescent Tool Company? A. Yes, sir.

Q. And that was dated January 19, 1926? A. The same date.

Q. And is the paper now shown you the original lease which was signed and delivered to you at that time? A. It is one of the copies.

(Offered in evidence and marked Exhibit C-39.)

Q. I show you two sheets, one marked "Total Inventories," June 30, 1925, and one marked "Smith & Hemenway Co. Inc., Assets, June 30th, 1925," and ask you from whom you received those? A. I cannot tell definitely just when they were received, if they were received with the inventory or later.

Q. But from whom did you receive them? A. If they come by mail, the same as the inventory; otherwise, I received them from Mr. Smith.

Q. But in any event they came from Mr. Smith, one way or the other? A. Yes.

(Offered in evidence and marked Exhibits C-40 and C-41.)

Q. This Exhibit C-40 and this Exhibit C-41 were furnished before you entered into the contract? A. Yes.

Q. In the spring of 1925 had you had some negotiations, directly or indirectly, for extending your line of pliers, that is, with the Utica Drop and Forge Company? A. Indirectly.

Q. And one of your factory men had visited the Utica plant in that connection? A. At some time, yes.

Q. How many large manufacturers of pliers were there in the industry in 1925? A. I cannot say.

Q. Were there four who were known as the "Big Four"? A. They were sometimer referred to as the Big Four.

Q. And the Utica plant was one of those referred to as one of the Big Four? A. I presume so, yes; there was never anything definite about the Big Four.

Q. That is, they were not accused of being a plier trust? A. No, sir, I never heard of it.

Q. The Smith & Hemenway Company was another of the Big Four? A. I really don't know.

Q. They were one of the large manufacturers in the industry? A. Yes.

Q. How long had you known Mr. Landon Smith and his brother Dew G. Smith? A. A number of years; they were customers of ours.

Q. During the spring and summer of 1925 you were in the market looking for a plier business which you could combine with your business, is that right, Mr. Peterson? A. I wouldn't put it just that way, no.

Q. Were you in a receptive mood, so that you would purchase at that time? A.. We were willing to consider a proposition, yes.

Q. That was true in the spring and summer of 1925? A. Yes.

Cross Examination by Mr. Murray:

Q. Do you know how Mr. Dew G. Smith came to come to your plant in Jamestown on November 5? A. I do not.

Q. All you know is that he appeared? A. Yes.

Q. What did he say?

Mr. Lum:—I object. It is a self-serving declaration.

Court:—You cannot bind the complainant by anything that Mr. Smith said. The objection is sustained.

Mr. Murray:—I make that offer for the purpose of showing that it was the result of an accidental call by two employees of the Crescent Tool Company at the Smith & Hemenway factory; the purpose of that being to show that there was no thought in Smith's mind of selling to the Crescent Tool Company

prior to November 4. I understand the offer is overruled?

Court:—Yes.

Mr. Murray:—May I have an exception?

Q. Prior to the appearance of Mr. D. G. Smith at your office on November 5th, so far as you know, did D. G. Smith or Mrs. Smith know that you were in the market—your concern was in the market for a plier plant? A. Not as far as I know.

Q. Had you endeavored to keep your talks with the Utica plant secret? A. It really never got anywhere so far as any deal with the Utica plant.

Q. Just how far did it go? A. The sales manager reported that he had heard a rumor that the Utica plant was for sale, and he mentioned that to me, and I said that the best way to find if there is anything to the rumor would be to make a call on them, and he did.

Q. Did he make a call? A. He did make a call on them.

Q. Who was the sales manager? A. C. R. Swisshelm.

Q. What happened then? A. He came back and reported as I recall it, that there was not any prospect of making any deal.

Q. There were no negotiations? A. No negotiations, not with any of the officials; that it, I was not in contact with any of the officials.

Q. Were you in contact with anybody after that? A. No.

Q. At the Utica plant? A. No.

Q. When you took over the Smith & Hemenway plant, what did you do with the machinery, most of it?

Mr. Lum:—I object to it as not cross examination. I don't see the purpose of it.

Mr. Murray:—What is the purpose of putting in the balance sheet?

Court:—I will admit it; I don't know what it is worth.

Q. You scrapped a large part of this machinery, didn't you? A. We did.

Q. In the Smith & Hemenway plant? A. Yes.

Q. Do you know about what part of it, in dollars, that you did scrap? A. I cannot state.

Q. Was there a few dollars or a thousand? A. A considerable amount.

Q. Did you buy it on the basis of this inventory, or on what basis did you buy it? A. No, sir, we didn't on the basis of any inventory.

Q. What basis did you buy on? A. A compromise price.

Q. I take it you didn't think that the plant was worth what the inventory, or rather the balance sheet showed; is that right? A. No.

Q. You didn't pay much attention to it? A. No, only as to the material that was there.

Q. You mean—— A. That was shown in the inventory.

Court:—I suppose you bought for the lowest price and they sold for the highest price they could get?

Witness:—Yes.

Court:—It was a matter of bargain between you?

Witness:—Yes.

Q. And they jacked up the price as high as they could, and you put them down as low as you could? A. I don't know about jacking up.

Redirect Examination by Mr. Alger:

Q. On the items that were cut from the inventory was there an item of $30,000 which Mr. Smith had charged up twice, once in the journal and once in the finished goods? A. I wouldn't put it that way.

Q. It was shown twice? A. It was in the inventory twice and I objected to it.

Q. You only wanted to figure it once? A. That helped me to reduce it.

Q. And after taking that out the amount that you were apart was how much in round figures; how much difference was there between the amount they asked on their figures or inventory and the amount that you were willing to pay; what was the difference between you? A. At the final?

Q. Yes, the final? A. There was a difference of twenty-eight thousand and some hundred dollars.

Q. What was done with that difference? A. We split the difference.

Q. As a matter of fact, you paid a thousand dollars more than half, or almost a thousand dollars more than half? A. No, not a thousand dol-

lars, but it made odd figures; we made it an even figure.

Q. The total figure was $269,000 and something; you said you would give an even $270,000 for the portion of the business that you bought? A. Yes.

Q. The machinery that you junked consisted principally of one item of $11,000? A. No.

Q. How much more did you junk? A. Some of the machinery that was put in the corner but still on the inventory.

Q. You figured that $11,000 off in the machinery that you were junking when you came to make your deal? A. It was deducted from the inventory. It was previous to making a deal.

Q. How many other items of machinery were deducted from the inventory prior to coming to a deal? A. The boiler was on the inventory.

Q. How much? A. I don't recall the figure, but it seems it was nine thousand dollars and something.

Q. What else? A. If you want exact figures, I can look them up. $9077.

Q. What else did you deduct in the way of machinery? A. Experimental machinery.

Q. How much? A. $1500.

Q. What else? A. It has already been referred to—oil engine, $11,200.

Q. What else? A. Then what has already been referred to, the small tools, $30,000.

Q. What percentage of the machinery inven-

toried did you allow for the machinery? A. My net figure come to $68,991.64.

Q. That is what you allowed or took off? A. That was my figure.

Q. Just what you thought the stuff was worth —the machinery? A. Yes.

Q. They had an item here on this balance sheet of machinery and equipment of $219,711, didn't they? A. Yes.

Examination by the Court:

Q. What is the total amount now that you deducted? A. On these that I have enumerated here $51,777.

Q. Was that deducted from the total inventory value as presented to you?

Mr. Alger:—That is the gross cost of the machinery carried on the books. Then there was a reservation of depreciation of substantially $100,000, that will show on the balance sheet.

Q. You deducted what? A. $51,777.

Q. Then in your compromise you added $14,000? A. May I explain how we arrived at the price of machinery and equipment?

Q. Yes. A. Mr. Smith figured the net price of that was $90,220.21; that is approximately forty-one per cent of the $219,711 as the appraisal figure. Deducting for small tools, oil engine, boiler and experimental machinery, $51,777, we took forty-one per cent of that and deducted it from the $90,220.21, which makes $21,238.57. I believe that is correct. The figures are not plain whether

it is thirty-eight or eighty-eight. Which would make a net of $68,991.64 for machinery and equipment.

Further Cross Examination by Mr. Murray:

Q. Out of the price which you paid for this $270,000, Smith was required to pay outstanding debts, was he not, of $132,782.13? A. He was required to pay the indebtedness that is covered by the contract.

Q. There was something said about reserves for depreciation. There wasn't any cash reserved for that, was there? A. No, not to my knowledge.

Q. Just a bookkeeping entry? A. Not to my knowledge.

Q. You would know if there was $100,000 and odd in cash there, wouldn't you? A. I didn't get that cash.

Redirect Examination by Mr. Alger:

Q. You didn't get the accounts receivable or the cash or the plant? A. No.

Q. You also didn't get the glass cutter business? A. No.

Q. There were some other things which are shown in the contract which you didn't get? A. That is right.

Hans Ditmar Frederick, sworn for complainant:

Direct Examination by Mr. Alger:

Q. Mr. Frederick, where do you live? A. Irvington, New Jersey.

Q. Were you employed by the Smith & Hemenway, Inc., at some time or other? A. Yes.

Q. For how many years? A. Seventeen years.

Q. And were you know as F. Federson at that plant? A. Yes.

Q. And on their books? A. Yes.

Q. And so signed your name? A. Yes.

Q. What line of work did you do for the Smith & Hemenway Company? A. Accounting.

Q. And you were the accountant during all of that period? A. Yes.

Q. And also acted as auditor? A. Yes.

Q. Did you know Mr. John F. Hemenway in his lifetime? A. I did.

Q. And for how many years? A. Seventeen years practically.

Q. Who had charge of the bookkeeping system and the audit making up statements of the Smith & Hemenway Company? A. I had charge of that.

Q. I show you a paper which purports to be a balance sheet of the Smith & Hemenway Company, Inc., dated June 30, 1925, and ask you if that was prepared by you, and if that represents a true and correct statement of the condition of that company at that time? A. Yes, I prepared this statement.

Mr. Alger:—I withdraw the last part of my question.

Q. In preparing that inventory and balance sheet was Mr. Hemenway at the plant, or was that done during his illness? A. This was prepared during his illness, as far as I recall.

Q. Was Mr. Smith at the plant during that time? A. Yes.

Q. That was after June 30, 1925? A. Yes.

Q. And did you have some talk with Mr. Landon Smith about the figures which were made as to the finished goods on hand, on the inventory? A. Yes.

Q. Just go on and tell the Court briefly what that talk was? A. The subject was the appraising of the inventory, particularly to mark off items that were not moving fast, obsolete items and so on.

Q. Tell the Court what was the talk between you and Mr. Smith. A. I don't know that there was any particular talk; it was a matter of procedure every year when we took an inventory, to go to fix prices and see if they were in order.

Q. Mr. Federson, did you figure the inventory at forty per cent less than cost of manufacture on the finished tools in this inventory? A. Forty per cent less than the cost of manufacture?

Q. Yes, cost of production. A. No, we didn't have any figured at that price that I know of.

Q. After you had made certain deductions, did you refuse to make some additional deductions on the balance sheet, at Mr. Smith's request? A. No.

Q. You are quite sure about that? A. Oh, yes.

Q. And after you had finished, did Mr. Smith make some further deductions? A. Not to my knowledge.

Q. Amounting to $9,527.61; will you examine the sheet and see? A. That wouldn't appear here anyway.

Q. Doesn't it appear on that last sheet? A. Oh, yes, I see; they made a separate item of it.

Q. You made the separate item, didn't you? A. I suppose so; I must have.

Q. Didn't you state to Mr. and Mrs. Hemenway that Mr. Smith had asked you to make the inventory smaller, and you refused it, and then he had made the inventory $9,527.61 more? A. No.

Q. You are quite sure about that? A. The only remark I made was that the inventory was down low.

Q. On the occasion that you talked with Mrs. Hemenway, in my presence, you stated to her that you were reluctant to be a witness in this case, and would not testify unless you had to; is that right? A. Yes; that is, you wanted me to testify on sentimental grounds, as to likes and dislikes; that is what I objected to. I didn't object to testifying in my capacity of an accountant.

Q. That is the way you recall it? A. That is the way I have it, yes.

Q. And do you recall that I had a list of questions made up as to the subject on which we wanted you to testify? A. Yes.

Q. Mr. Federson, didn't you state in my presence to Mrs. Hemenway that Mr. Smith did ask you to cut that inventory, and you refused to do so? A. No-

Q. I show you an additional paper and ask you if that is in your handwriting? A. Yes, that is in my handwriting.

Q. You delivered that memorandum to Mr. Hemenway at the time you delivered the copy of the inventory which you hold in your hand, didn't you? A. Possibly, yes.

Mr. Alger:—I would like to have both marked in evidence.

Mr. Murray:—I object to that unless it is connected with Mr. Smith in some way. I object further as not binding on Mr. Smith.

Court:—I don't know what it is, unless it has some connection with his report.

Mr. Murray:—Impeaching your own witness.

Mr. Alger:—It is cross-examining a hostile witness.

(Balance sheet marked Exhibit C-42.)

(Paper in witness's handwriting marked Exhibit C-43.)

Q. On the last page of Exhibit C-42, the inventory, you show a net profit for the period of six months ending June 30, 1925, of $17,660.32; is that right? A. Yes.

Q. Less inventory adjustments of $9527.61? A. Yes, that is right.

Q. Leaving a net profit of $8132.71? A. Yes.

Q. Who did make these inventory adjustments, you of Mr. Smith? A. We did it together.

Q. You assisted in making this? A. Yes, I had charge of that.

Q. But you show adjustments as a profit on your statement? A. Yes, a loss or deduction from profit.

Q. As a net profit for the period? A. Yes.

Q. I show you a comparative balance sheet Deceber 31, 1924 and 1925, consisting of two sheets, and ask you if you made that? A. Yes, I believe I did.

Q. Was that a true and correct statement from the books of the company? A. Yes, I should say so.

Mr. Alger:—I offer that in evidence.

(Marked Exhibit C-44.)

Q. During the making of Exhibit C-42, the balance sheet for the first six months, was the inventory of the plant taken? A. Yes.

Q. And Mr. Smith went through that very carefully with you, didn't he? A. I wouldn't say that. The only thing that Mr. Smith had to do with was to fix prices on certain articles, obsolete and slow-moving items; that is a customary thing in inventory time.

Q. Do you recall any other inventory, for instance for the preceding years, that showed a charging off of that kind? A. Oh, yes. We always took them the same way, low and conservative.

Q. Where was the check book of the company kept? A. At Irvington, at headquarters.

Q. In what office? A. We only had one office in Irvington.

Q. Did Mr. Smith have access to that office? A. Yes.

Q. And where were the bank deposits kept? A. We had several depositories; two in New Jersey and one in New York City.

Q. And who signed the checks? A. Mr. Hemenway mostly.

Q. Did Mr. Smith have authority to sign checks? A. Yes.

Q. He signed checks also, then? A. Yes.

Q. Who made the deposits at the bank ordinarily? A. The cashier.

Q. And did you keep a record of those deposits in the office? A. Yes.

Q. Were they kept under lock and key or were they so that Mr. Smith could see them if he desired? A. They were in the safe. No particular reason for locking them up.

Q. That is, Mr. Smith had access to them, did he? A. Yes.

Q. And did your books show the balances that the company had on deposit in various banks? A. Yes, sure.

Q. Did you keep any record of the obligations and borrowings of the company? A. Yes.

Q. And it is a fact, isn't it, that over the eighteen years you were there, that Mr. and Mrs. Hem-

enway made many personal loans to the company; isn't that true? A. Only one that I recollect.

Q. You recollect only one in that period of time? A. Yes.

Q. Do you recall that Mr. Hemenway kept a ledger himself of his own cash accounts, money loaned? A. No.

Q. You don't recall ever seeing such a book? A. No.

Q. Do you remember also that Mr. Hemenway kept a diary each year and wrote down every day's business transactions? A. No, I didn't know that.

Q. You would know his handwriting if you saw it? A. Oh, yes.

Q. I show you this book and ask you to examine the various pages and determine if that is in Mr. Hemenway's handwriting? A. Yes, that is in his handwriting.

Mr. Alger:—I offer that in evidence.

(Marked Exhibit C-45.)

Q. Did Mr. Smith have access to the records of the company as to the amounts borrowed and owed at various banks? A. Yes.

Q. As a matter of fact, Mr. Smith and Mr. Hemenway were personally endorsers on the notes upon which the company borrowed; is that right? A. Yes.

Q. You remember one occasion, about the year 1925, when Mr. Smith refused to endorse personally himself? A. No.

Q. You don't remember that? A. No.

Q. How about it in 1924 or any other year? A. No, not at all that I know of.

Q. You observed Mr. Hemenway in his relationship to the employees at the plant? A. Yes.

Q. Just describe to the Court his relationship with these employees.

Court:—Was it pleasant, cordial or what?

Witness:—Ordinary business attitude; I presume. Nothing unusual about it.

Court:—No unusual friction?

Witness:—No.

Q. Did Mr. Hemenway spend some time at the plant? A. Yes, sir.

Q. And what work did he do in connection with the company? A. He was looking after the financial end of it.

Q. Was he there as often as was necessary in taking care of that end of the business? A. Most of his time he was in the New York office and he would come over to the factory.

Q. The company had an office in New York? A. Only for salesmen's purposes.

Q. Do you know what proportion of the business in volume of sales the glass cutter business bore to the whole? Just in round figures or round percentages. A. About twenty or twenty-five per cent, I should say.

Q. And in the year 1925, so far as you are able to say, Mr. Frederick, approximately how much money did that represent, what volume of business? A. $200,000, something like that.

Q. But the company manufactured glass cutters? A. Some of them, yes.

Q. The great bulk of them they bought from another concern? A. Yes.

Q. Under a long term contract? A. Yes.

Q. What was the ratio of gross profit on the glass cutters that were sold by the company? A. That varied.

Q. Just give us approximately what it was? A. On some numbers they were sold at a loss and on others there was a large margin, fifty per cent or seventy-five per cent margin.

Q. That is, in some numbers you made seventy-five per cent profit? A. Gross profit.

Q. And some numbers fifty per cent profit. How large a percentage of the business was carried on at a loss, the glass cutter business? A. That I cannot say.

Q. Was it large or small? A. Not a very large amount.

Q. On the books of the company were the plant and buildings or land and buildings carried at a cost and then depreciation charged off on the other side? A. Yes.

Q. And the same on the machinery and equipment? A. Yes.

Q. Are you able to say approximately what was the net profit on the glass cutter business in 1925? A. It was all merged in one account there; there was no segration of it.

Q. Are you able to say what the ratio of selling

cost for the glass cutters was? A. It would be about the same as the average shown by the profit and loss statement.

Q. That would be about how much; ten or fifteen per cent? A. No, it is more than that; it is about thirty, I think,—thirty-three and one-third.

Q. Thirty-three and one-third for expense for selling alone? A. That is selling and general expense.

Q. The glass cutter business is still being carried on by Mr. Smith? A. I presume so.

Q. To get back to this thirty-three and one-third per cent, none of the general overhead was necessary for the glass cutter business, except the selling end and the stock on hand? A. Yes, the same percentage would apply to glass cutters as to any other article; it has to go through the same routine.

Q. You didn't manufacture? A. No; that doesn't enter into the selling and general overhead, the manufacture.

Q. I guess you don't understand me. Did you carry the manufacturing cost and selling cost together? A. Oh, no; separate entirely.

Q. Then the selling cost alone was thirty-three and one-third per cent? A. Selling and general administrative.

Cross Examination by Mr. Murray:

Q. Mr. Hemenway had supervision, did he not, of the bookkeeping in the accounting and financing department? A. Yes.

Q. You were directly under him; you were his righthand man? A. Yes.

Q. You said that Mr. Smith told you that he himself wrote down about nine thousand dollars worth of obsolete items that you refer to as items either finished or partly finished, that had been lying on the shelves for a long time and had been unsalable? A. Yes.

Q. And such as hacksaws which had been there for a long time? A. That is it.

Q. And parts of pliers and half of a plier on which there was no name, and all that sort of thing? A. Yes.

Q. And still that had been there since the War? A. Yes, items of that nature, obsolete or unsalable.

Q. That had been customary procedure each year to gradually write it down as a loss? A. Yes.

Q. And that was known to Mr. Hemenway, wasn't it, that system? A. Oh, yes.

Q. The inventory had been—or a part of the inventory had been carried at a fixed price since 1916? A. Yes.

Q. So that if the market went up or down, the discrepancy between the book price and the market price would fluctuate? A. Yes.

Q. That had been done since 1916 continuously? A. Yes.

Q. And Mr. Hemenway knew that? A. Yes.

Q. During your connection with the company were not Mr. Smith and Mr. Hemenway at logger-

heads most of the time? A. I wouldn't say that.

Q. There was a good deal of friction and dissension between them, wasn't there? A. Some, I presume.

Q. I am not asking you to fix the blame; wasn't there a good deal of dissension and trouble between them? A. I cannot answer that question, because in my presence there wasn't any; there might have been a lot, for all I know.

Q. You heara good deal of rumors around the factory? A. No, I wouldn't say that there were many; some, perhaps.

Q. Weren't there a good many times one would give an order and another would countermand it? A. No, I don't think so, unless they did it before the order went into effect.

Q. After it had been given, I mean? A. No, not to my knowledge.

Q. In January, 1925, the company had about $1500 or $1600 of cash, didn't it? A. Very likely; I don't recall.

Q. December 31, 1924, $1651.88? A. Yes.

Q. That is correct? A. Yes.

Q. At that time the bills which the company owed and had matured as early as the preceding October remained unpaid? A. That I really cannot tell you.

Q. Put it generally, then; in December, January, March and April the company was behind on its bills, wasn't it; it was pressed for money, wasn't it? A. We were at times pressed for money.

Q. You were then? A. I would want to see the figures before I could say.

Q. Take a look at it. A. December, 1925 or 1924?

Q. December, 1924. A. December, 1924, I should not say that they were particularly pressed for funds.

Q. They were not paying their bills when they were due, were they? A. That I cannot tell you; as far as I recollect, we used to take all the discount we could get.

Q. If you had the money? A. Whether we had it or not.

Q. You mean you took discounts arbitrarily after the discount period had expired? A. No, within the discount period. The quick assets were three to one at that period. I wouldn't say that was a very serious condition.

Q. I call your attention to the fact that you had accounts receivable of $75,548? A. Yes.

Q. And you had accounts payable; where are your accounts payable? A. On the other sheet, over the page.

Q. Of $61,000, didn't you? Now, your pay-roll was about $4500 a week, wasn't it? A. Yes.

Q. So December 31 you had about three days' pay-roll in cash, is that right? A. Yes.

Q. And you had $75,000 accounts receivable as against $61,000 accounts payable, didn't you? A. Yes.

Q. And that meant if the collections got slow at any time, the company would be up against it

for money to continue? A. They were always certain of funds flowing in.

Q. You depended, in other words, on the continuous and rather steady influx of funds from accounts receivable in order to meet your pay-roll? A. Yes.

Q. And if for any reason that inflow would stop or seriously diminish, what would happen? A. We would resort to our bank credit and take other steps to cut the expenditures.

Q. On December 31, 1924, you had notes payable of $50,500, didn't you; you were borrowed up to the hilt then, were you not? A. No, I wouldn't say; I cannot recall the line of credit we had.

Q. Isn't it a fact that the American National Bank was constantly dissatisfied over the fact that there was no balance to speak of as compared with the loans which you had at the bank? A. All banks are that way.

Q. But not with all accounts? A. Most accounts, I should say, banks want as large a balance as possible.

Q. Didn't you have trouble with your New York Bank for the same reason; wasn't the New York Bank complaining? A. Oh, yes.

Q. And wasn't the Irvington National Bank complaining? A. I don't know about the Irvington National Bank.

Q. The Irvington Bank, whatever the name is? A. Yes.

Q. And the American was? Two out of the three banks were complaining? A. Yes.

Q. Do you want to say that, now, in the light of that, that the company could have gone and borrowed some more money from those banks in addition to the $50,000 which they already owed? A. Yes, sure.

Q. On the personal endorsement, however, on Hemenway or Smith? A. Not necessarily. They had a ratio, as you see for yourself, three to one; that is a very satisfactory ratio; very few firms have that. No reason why a bank should not treat them fairly.

Q. You wouldn't call it a very satisfactory ratio, when you have $50,000 of notes? A. Those notes were not collectible.

Q. $50,000 worth of notes, accounts payable of $61,000, and pay-roll of $4500, and $1600 cash in the bank? A. Yes, that is right.

Q. In addition to the $4500, there was expense of the salesmen on the road? A. Yes.

Q. How many were there? A. Fifteen or so.

Q. And what did their expenses average a week? And salaries? A. That I cannot say, but of course the sales went on at the same time.

Q. Isn't it a fact that the salesmen's salaries and commission checks were delayed very frequently because of lack of funds with which to pay them on time? A. Yes, occasionally.

Q. And isn't it a fact that sometimes the salesmen would obliged to stay over in a town or a city waiting for their funds, when they ought to go on about their business to some other town? A. I don't know about that.

Q. You wouldn't say that that wasn't so? A. It might be possible; they ought to have sufficient funds with them.

Q. Do you know whether the banks or any of them required the personal endorsements of the Hemenways and the Smiths? A. Evidently, yes.

Q. As a condition to loaning the concern money? A. Yes.

Q. In other words, the company itself cannot stand on its own legs financially in getting bank loans? A. They should have been able to.

Q. But they were not? A. A bank wants all the security they can get.

Q. Did Mr. Smith ever refuse to endorse a note? A. Not to my knowledge.

Q. They both endorsed them continually personally, didn't they? A. Yes.

Q. At the time that Mr. or Mrs. Hemenway made the company a loan, Mr. or Mrs. Smith likewise made the company a loan in the same amount, didn't they? A. Yes.

Q. On some of your statements appears items —"Loans from Executives"? A. Yes.

Q. Some of those items represent salaries due to the executives which had been unpaid and when they then converted into loans on the books? A. Yes.

Q. And the reason the salaries weren't paid, was because the money wasn't forthcoming with which to pay it? A. Yes.

Q. That was no uncommon thing? A. No, it happened occasionally.

Q. Do you want to say Mr. Smith and Mr. Hemenway didn't have within your knowledge, trouble and quarrals over this condition of the finances of the company? A. I don't know about any personal quarrels.

Q. Didn't you often hear them in Hemenway's private office; didn't you often hear the sound of quarrelling coming over the transom? A. No.

Q. You did sometimes, didn't you? A. No; you cannot hear.

Q. You shut your ears? A. No, you simply couldn't hear; I tried to hear.

Q. What was there that you wanted to hear; what aroused your curiosity? A. Nothing in particular.

Q. Now, Mr. Frederic, isn't this the fact that Mr. Smith and Mr. Hemenway were quarrelling a great deal, and you—if you will pardon the expression—were between the Devil and the Deep Sea; you didn't want to offend either of them; isn't that about the fact? A. No, I wouldn't put it that way; they were not cordial, but I wouldn't go to the extreme of saying that they were always at loggerheads.

Q. There was a time when they didn't speak for a long period of time; wasn't there? A. I don't know about that.

Redirect Examination by Mr. Alger:

Q. The salaries of Mr. Hemenway and Mr. Smith were paid to them during each year, however, at some time or other? A. Yes.

Q. And if they were a little short for funds, they didn't draw their money? A. That is it.

Q. This glass cutter business has been a substantial business as to volume for a period of how many years? A. I don't know how many years. It was as long as I was there.

Q. And did they have as substantial a volume for the years preceding 1925 as in that year? A. Yes.

Q. About the same, then, for the period of a few years back of 1925? A. It varied, but not very much.

Q. Did it vary very much? A. Not very much.

Q. How many years would you say that would cover, that it ran along about the same as to volume? A. It grew, of course, over the pre-war periods on account of increase in prices. It is pretty hard to draw any comparison.

Q. What was the trade name of that glass cutter? A. Red Devil and others.

Q. And the glass cutter business of the Smith & Hemenway Company was the largest glass cutter business in the country, do you know? A. Yes.

Q. Do you know whether the requirement of the personal endorsement of Mr. Smith and Mr. Hemenway was because this was a small closely owned corporation; do you know whether that is customary in banking circles? A. It is a common thing. I don't know why they demanded it or why it was done.

Recross Examination by Mr. Murray:

Q. Was the increase in the glass cutter business which you speak of—do you refer to the increase in the number of different kinds of glass cutters or to an increase in the volume of sales? A. Volume of sales.

Q. Wasn't that brought about by the increase in the different number of types of glass cutters? A. To some extent, yes.

Q. Did you make any glass cutters in Irvington? A. Yes.

Q. Did you buy any outside of this one factory? A. No.

Q. This glass cutter business on the books was thrown in as a part of the manufacturing operations of pliers, pinchers and so on? A. Yes.

Q. Then the figures what you have given us as to the gross profits are largely surmised, aren't they? A. No, approximately correct; the thirty per cent gross profit, you can verify it from the profit and loss statements.

Q. That thirty-three one one-third per cent was designed to cover selling expenses, part of the advertising? A. Yes.

Q. Part of the executives? A. Yes.

Q. Part of the rent and general overhead? A. Yes.

Q. Whether it did cover in fact its proper proportion, you don't know? A. Any article that you sell, whether you manufacture it or buy it outside goes through the same process.

Q. It requires an overhead, doesn't it? A. That is overhead, the general expenses, the administration expense.

Q. When you are using the facilities and organization of a manufacturing plant in doing a sales business under a sales agency contract, the overhead of the factory must be apportioned between the manufacturing operations and the sales agency operations? A. It hasn't anything to do with the sales operations, only the manufacture.

Q. The glass cutter business? A. You see if you manufacture one article, you buy another. That manufactured article may have labor, material and manufacturing overhead; on the others, when you buy outside, you have the cost price. These two articles go on your shelves at cost of both; then begins the selling and administrative and general overhead, and it is the same for both articles; there is no distinction; you have to sell and pay your salesmen a commission; you have to pay rent and insurance on these articles; you have to send out bills, do your billing and your shipping, and you have to collect your money; that is, roughly speaking, the elements of the general and selling overhead.

Q. As a matter of fact, some of these accounts receivable on this statement were very low, weren't they, along back to 1918 or 1919? A. No, we write them off within a reasonable time, if there is any question about it.

Q. What do you call reasonable time? A. About four months.

Q. You mean you wrote off an account that wasn't paid; you wrote that off in four months? A. Yes.

Q. Wrote it off as a loss? A. Unless there are unusual features connected with it; but at the end of four months we have done everything we could to force collection.

Q. Did you have any foreign accounts that you hadn't been able to collect? A. They are unusual.

Q. They run back to 1918 or 1919? A. Yes; we set up a reserve and profit for the loss.

Q. How much did they amount to, the accounts? Will you show me where you wrote off your depreciation for accounts receivable? A. It doesn't appear on the statement; it would be subtracted from the gross amount.

Q. You would as an accountant set up a reserve for depreciation without showing them on your statement? A. Yes.

Q. You show your depreciation for buildings and machinery on that statement, why don't you show your depreciation for reserves for accounts receivable? A. That is an ordinary thing, to subtract it from the accounts receivable, the same as on your inventory, you don't show the concealed reserve there.

Examination by the Court:

Q. At the time this statement was made up in December, or subsequently, up to the day of sale by Hemenway to Smith, had there been any diffi-

culty in obtaining loans from the bank as needed, so far as you know? A. Not to my knowledge, no. The only thing was that the banks insisted on having the account cleaned up from time to time.

Q. Had you ever presented any notes for discount to the bank and had been turned down? A. I cannot answer that, because that was handled by Mr. Smith and Mr. Hemenway personally.

Q. So far as you know? A. None.

Further Recross Examination by Mr. Murray:

Q. You were evidently in need of working capital in the spring of 1925, were you not? A. I really don't know; there were times when——

Q. I show you a letter which you wrote to Mr. Smith, and I ask you whether that is your signature? A. Well, I don't see anything here about being hard pressed; I merely suggested additional working capital to take care of discount.

Q. You say, "In order to take care of all obligations on a discount basis and retire all notes at the banks and discount all future transactions, at the same time keeping stock of merchandise in proper shape to take care of all orders immediately on receipt, it will be necessary to provide an additional working capital of $100,000." A. Yes, because that is pursuing an entirely different policy.

Q. It is a proper policy for a concern to discount its bills? A. Not necessarily; you have a certain limit of credit; some give you thirty days, some sixty, some ninety days. It is perfectly fair

to take your thirty, sixty or ninety days, as the case may be.

Q. If you get two per cent for discounting a bill, it is just so much money saved? A. Yes.

Q. And if you have a turnover twelve times a year, it is twenty-four per cent on your—— A. It is policy to take advantage of discounts.

Court:—Did you say you did take advantage of discounts?

Witness:—As much as we could.

Court:—You had to let some of them go?

Witness:—But as a general rule, we discounted all bills that had discount to them, and we let the others, that were note bills, take the limit of the terms, whatever they might be—thirty, sixty or ninety days.

Q. And over the limit? A. Yes, once in a while.

Dr. Carl H. Ill, sworn for defendants.

Direct Examination by Mr. Murray:

Q. Doctor, you are a physician in Newark? A. Yes, sir.

Q. Practicing how long? A. Nine years.

Q. And do you know Mr. Landon P. Smith? A. Yes.

Q. And did you see him in the spring of 1925? A. Yes.

Q. Just state what you observed as to his con-

dition and what you did? A. At that time, my father, Dr. Charles Ill, who is now abroad, operated upon Mr. Smith for a very severe carbuncle on the back of his neck; he had been taking care of it, but I know from his history, and I was at the operation and helped him perform this operation at St. Barnabas Hospital, on April 17—he was in the hospital from April 17 until April 23, when he was considerably better and was discharged, but came to the office for a long period afterwards—how long, I didn't look up my records——

Q. What did he come to the office after the operation for? After the discharge from the hospital? A. These things require dressings for a long while; they remain open and drain for long periods of time.

Q. Before a patient is operated on, they are very painful, are they not? A. Yes, very painful.

Q. Very distressing? A. Yes.

Q. Did they have any general effect on a person's health? A. They can have, yes.

Q. Did it in Mr. Smith's case, do you know? A. I didn't see Mr. Smith before his operation, so I cannot tell you that stage of it, but I know we wouldn't operate on those things, unless they are in pretty bad shape, in the type of operation that was done upon Mr. Smith.

Q. Would you consider it a serious operation? A. Yes, they are considered quite serious operations.

Q. Where was this trouble? A. In the back of his neck.

Mr. Alger:—What is your name?

Witness:—Ill.

Charles F. Hemenway, sworn for complainant.

Direct Examination by Mr. Alger:

Q. Mr. Hemenway, you live in Chicago? A. Yes, in Evanston, a suburb of Chicago.

Q. And have an office in Chicago? A. Yes.

Q. You were a nephew of Mr. Hemenway? A. Yes, I was.

Q. Are you financially interested in the outcome of this case? A. I am.

Q. And did you work for the Smith & Hemenway Company? A. From about the fall of 1912 to March 15, 1926.

Q. And what did you do during that period? A. I was salesman practically the entire time, except during the War years.

Q. And then you were in the service? A. In the Navy.

Q. Did you ever do any work at the plant? A. No, only during the interim, calls coming in, general sales meetings.

Q. What territory did you sell? A. In Canada two or three years; New York State, out to Indiana; after the War period I was in Chicago until the end, covering nearby states.

Q. The states surrounding Illinois? A. And Michigan, Wisconsin, Illinois.

Q. In the petition for dissolution of the Smith & Hemenway Company, it was stated in substance that Mr. Hemenway antagonized customers whenever he came in contact with them. In your experience of fifteen years, do you know of any instance where Mr. Hemenway had any controversy with any customer or antagonized any customer? A. He came in very little contact with the party. I know of no specific instance where he did antagonize.

Q. What was his manner of approach or manner in talking with customers, those that he did see? A. Always courteous, reserved, as he was.

Q. He was a quiet sort of fellow, anyway? A. Yes.

Q. Reserved? A. Yes.

Q. Do you know of any contention between Mr. Hemenway and the employees of the Company? A. No.

Q. Did you know of any contention between Mr. Hemenway and Mr. Smith by reason of your —that is, did you ever observe anything yourself prior to the spring of 1925? A. Very minor at times, perhaps, as between partners.

Q. Just minor disagreements in the business? A. Yes.

Q. Did you come to New York in the spring of 1925? A. In April, sometime, in the early April, as I remember it.

Q. At whose request? A. Mr. Hemenway.

Q. You had a talk with him at that time? A. Yes.

Q. In the event Mr. Hemenway had taken over control of the company by purchase or an exchange of stock, were you willing to continue with the company? A. I was; that was the general plan.

Cross Examination by Mr. Murray:

Q. How old were you in 1912? A. Twenty-two.

Q. And you have been on the road ever since? A. Practically, except those years of the War, with headquarters in Chicago since the War.

Q. You never had any practical manufacturing experience? A. Not I.

Q. Whether you called them minor or major disagreements, the fact remains there were numerous disagreements that you heard of between Smith and Hemenway? A. From hearsay or personally?

Q. Yes. A. There were minor ones at times, as between partners.

Q. Were your commission and salary checks and expense checks ever delayed? A. No expense checks that I know of.

Q. Salary checks were delayed? A. Perhaps at times.

Q. Quite often? A. Not often; at times during a period of fourteen or fifteen years.

Q. They were during the last three or four

years; that happened quite frequently? A. I wouldn't say over three or four years ago.

Q. Not at all during that period? A. At times, I say.

Redirect Examination by Mr. Alger:

Q. The tool industry suffered the same depression for 1920 that business in general did? A. Very radically so.

Frank P. Tenney, sworn for complainant:

Direct Examination by Mr. Alger:

Q. Mr. Tenney, you live in Cleveland, Ohio? A. Yes, Cleveland.

Q. And were you at one time employed by Smith & Hemenway? A. For twenty-five years and eight months.

Q. That is, you were with them substantially from the time they started in business? A. About two years after they started.

Q. You knew Mr. Smith very well, of course? A. Yes.

Q. And Mr. Hemenway very well? A. Yes.

Q. During more recent years, and particularly in 1925, where did Mr. Hemenway maintain his office? A. In New York.

Q. That was a company office? A. Yes.

Q. When you came in from the road did you

see Mr. Hemenway at different times? A. Usually.

Q. And also see Mr. Smith? A. Yes.

Q. And his brother, D. G. Smith? A. Yes.

Q. What position did Mr. D. G. Smith have with the company? A. Since War he was sales manager.

A. Mr. George Yakey.

Q. Mr. Yakey is now dead? A. Yes.

Q. He died since this case was started? A. I think last July.

Q. And what territory did you travel during that period of twenty-five years? A. I was in the Middle West, principally the wholesale jobbing trade; I pretty nearly covered everything between Cleveland and Kansas City, Omaha and Duluth, down St. Louis and Louisville, Cincinnati.

Q. That is substantially the entire middle western territory? A. Yes.

Q. What did you observe about Mr. Hemenway in connection with his contact with the employees of the company and the trade? A. The employees in the company were always very friendly toward Mr. Hemenway; they always held him in very high esteem; he was retiring; he didn't put himself forward at all, but they could always figure that he was on friendly terms with them at all times.

Q. Do you know of his antagonizing their employees or customers, so that by reason thereof the morale of the employees has been seriously injured and the company has lost valuable custom-

ers? A. Mr. Hemenway didn't know, I don't believe, four or five customers on my territory; I don't believe he had met that many.

Q. He didn't interfere with your customers in any way? A. In no way at all, and I never heard him spoken of in any way by any of them; they didn't know him.

Q. And until the question was brought up in these dissolution proceedings did you ever know of any claim by anyone that he broke down the morale of the employees? A. Never.

Cross Examination by Mr. Murray:

Q. Your commission checks or salary checks or expense checks were delayed occasionally, weren't they? A. I don't think in the twenty-five years that I was with Smith & Hemenway, it was over three days that my salary check, which was a straight salary including expenses, was delayed more than three days, and that not over ten times.

Q. And what about the expense check? A. I didn't have any; it was all in one check each month.

Q. You are now connected with what company? A. I am with the Utica Drop Forging Company, in Chicago.

Q. With Mr. Charlie Hemenway? A. Yes.

Q. He was the means of your coming there? A. I wouldn't say that.

Q. He helped get your contract for you with the Utica Drop Forging Company? A. He was

with me at the time we went up there; we went up there together.

Q. He told you about the opening there, didn't he? A. No, he didn't.

Q. You are quite friendly with Charles Hemenway? A. Yes.

Q. And you are a friend of his and would like to help him out in this case? A. Not necessarily. I was trying to do the best for myself in this case that I could.

Q. Do you remember trying to get an advance of salary from Mr. Hemenway? A. I don't remember I ever went to Mr. Hemenway about an advance in salary in my life. I always took that up with Mr. Smith. Up to the tme Mr. D. G. Smith came with us, Mr. Smith had all to do with the salesmen.

Q. Did Mr. Smith keep his agreements with you on salary that he made? A. Yes, my agreements were all in contract form, and there was nothing to do after they were signed.

Mr. Alger:—I would like to have marked and offer in evidence copy of petition in the matter of the voluntary dissolution of the Smith & Hemenway Company, Inc., in the Supreme Court of the State of New York, including an order of Judge Wasservogel, an order granted September 26, 1925, on the petition, the petition being made by Landon P. Smith and Julia Mildred Smith, under oath; notice to the Attorney-General of the State of New York, dated September 14, 1925, and

an amended petition and amended order made by Mr. Justice Ford November 19, 1925, in that proceeding. I would like to have them marked.

Mr. Lum:—Subject to our examination and right to a verification and correction.

(Petition, and Order granted September 26, 1925, marked Exhibit C-46.)

(Notice marked Exhibit C-47.)

(Amended Petition and Order marked Exhibit C-48.)

Mr. Alger:—I would like to say on the record at this time, there was also an inventory attached to the original petition, involving many pages of items, which we haven't copied, and may be put in by either side, if it is agreeable to Mr. Murray, at any time. They have copies. We tried to get copies from the Clerk in New York for some months, without success, and had to send up and make these copies ourselves.

Mr. Lum:—We rest.

MOTION FOR DISMISSAL.

Mr. Murray:—I would like to make a motion to dismiss the bill, and excluding from consideration our witnesses submitted out of order. I submit that the testimony introduced at the present time on the part of the complainant taken as a whole does not show as a matter of law or equity, any right to relief in this court. I will not take the time to sum up the evidence, and I will make the motion, and if it is denied, I can have the record fixed for appeal.

Court:—I would like to ask you, Mr. Lum, how you tie up the negotiations with the Crescent Company and the sale to that company by Smith with the prior transactions between Smith & Hemenway.

Mr. Lum:—That is part of our case. I will say to Your Honor, that, in my view, is merely by way of inducement; I think it follows. It is a matter which we may argue. This man had that plan in view, either with that particular concern, or with some other. The gist of our case, in a word, is, that this man used an unlawful method of accomplishing his result. These proceedings which have just been marked in evidence, the petition, and so forth, in New York, we argue is an improper and unjustified and unlawful use of that process under the law of New York, and when we come to it, we will desire to argue that this is

all controlled by the New York law. The contract was made in New York; it is a New York corporation; resort was had to New York statutes, and the decisions of New York clearly bar and ban the use of this procedure for any such purpose as was made use of here. We say that we have so far proved that this man knowing that Mr. Hemenway was ill, and seriously ill, while he was the president of this corporation and owning one-half of the stock, refused to sell on terms which he insisted upon the right to buy upon, and that he threatened that unless a sale by this sick man of his stock by a wholly inadequate consideration was made to him, he would resort to legal methods to wreck the concern. It was, we say, an illegal method that he resorted to under the circumstances, using that method for this purpose. We say, in addition, that he had in contemplation, getting this for a very low figure, intending to dispose of it at a very high figure, and that he did do that.

Court:—Your contention, then, as I understand it, is, that irrespective of whether he had any immediate prospect and purchaser for the plant, the method by which he acquired the holdings of Mr. and Mrs. Hemenway was in effect a fraud?

Mr. Lum:—It was. That is our view and our situation, and would be the same if he still held the stock today. We say that the other aggravates and merely goes to the aggrava-

tion of the fraud, and we think it is a fair inference that he had in mind carrying out this very scheme, in contemplation. The fact that these proceedings were filed on September 18, and that there is an order continuing the advertisement; these were not served on the parties interested, and never served, according to the testimony, upon Mr. Cohn, simply the threat made to this sick man, we will use this legal method to destroy your property if you don't permit us to take it from you for an inadequate consideration—and on November 24—they didn't go ahead with the advertisement; it is clear proof of an improper method of doing an improper thing. They had the order to show cause which was made by Mr. Justice Wasservogel on September 26th, and on the twenty-fifth of November not advertised, but continued until the twenty-fifth of January, 1926, while they carrying the contract along until it was consummated, and we say it is an unauthorized and illegal thing.

Court:—What was the date of the contract of sale of stock; was that September 29 or October 29?

Mr. Lum:—October 29, and delivered November 1, four days before the negotiations with the Crescent.

Mr. Murray:—This was not a New York contract.

Court:—The motion is denied.

Mr. Murray:—I offer in evidence release

executed by Alice M. Hemenway, individually and as executrix of the Estate of John F. Hemenway, in favor of Landon P. Smith, J. Mildred Smith, defendants, dated January 19, 1926.

(Marked Exhibit D-6.)

Mr. Lum:—It is stipulated that the law of New York is as shown by Article IX of the General Corporation Act of New York, and the decisions considering and referring to the statute will by agreement be argued as law rather than proved as fact in this suit, and so much of the statute as needs to be referred to and the supplements.

Mr. Murray:—I stipulate that the corporation law as set forth in McGowan's Consolidated Laws of New York Annotated, Book 22, Edition of 1917, that that represents the statute law of New York as governing the dissolution proceedings started by the defendants in New York, and existing at the date of the dissolution proceedings in question.

Court:—All the contents of that volume apply to this particular matter?

Mr. Murray:—We haven't had time to pick out the particular section.

Mr. Lum:—I suggested that we agree on the sections that either of us will apply. We both have New York counsel in association.

Mr. Murray:—And to be considered as matters of law to be argued rather than facts to be proved.

F. Guy Moore, sworn for defendants.

Direct Examination by Mr. Murray:

Q. In the fall of 1925 you were in the employ of what company? A. Crescent Tool Company.

Q. In what capacity? A. General superintendent.

Q. Of the factory? A. The entire factory.

Q. Did you come to Newark in the fall of 1925? A. Yes, sir.

Q. In company with whom? A. Mr. Swisshelm.

Q. He is what of your company? A. Our sales manager, and was at that time.

Q. What did you come to Newark for and on what date? A. On a friendly visit, on October 29, 1925.

Q. And did you have any other errand in view in Newark? A. Yes, I came to see a machine down on Broad Street.

Q. Belonging to whom, or in whose charge? A. Semple Scott.

Q. How did that machine interest you? A. It was a machine for putting the edge on pliers, and we came to see it.

Q. With the idea of buying it? A. Yes; we made him an offer for one, but he did not accept our offer, and we didn't buy it.

Q. Then did you come to see Mr. Semple on that day? A. Yes.

Q. And from there where did you go? A. Went out to the Smith & Hemenway plant.

Q. So far as you know, or rather what caused you to go out there? A. Just a friendly visit; Mr. Smith had been down to see us, and he said, "Come up and see us some time," and as long as we were in town, we went out to see their plant.

Q. Did you know that the Smith & Hemenway plant or any of its stock was for sale at that time? A. No, sir.

Q. Did you know that the Smith & Hemenway plant or any of its stock was for sale at that time? A. No, sir.

Q. Did you go there for the purpose of trying to buy it? A. No, sir.

Q. Or interest yourself in it in any way? A. No, sir.

Q. You say Mr. Smith had visited you? A. Yes.

Q. You mean you personally, or your plant? A. Our plant.

Q. When? A. Oh, I don't know just when it was; sometime before that; a year or two before that.

Q. What did he visit that for? A. I don't remember now; I didn't see him; I met him at that time; that was Mr. D. G. Smith. I just met him at that time, and I don't know what his purpose was at our plant.

Q. Did you ever visit any other plants on a friendly visit? A. Yes, on the day before we came here we visited the Peck Stow Wilcox plant at Southington.

Q. What did you visit that for? A. A friendly

visit, since we were coming East we stopped off there. We often visit plants that way.

Q. To exchange information as to your production methods? A. Yes.

Q. Whom did you see when you got to the Smith & Hemenway plant? A. As I remember it now, I saw Mr. D. G. Smith first; later, Mr. L. P. Smith.

Q. Did you talk with him in the office? A. Yes.

Q. Was there any conversation at all about the Smith & Hemenway plant or stock being for sale? A. No, sir.

Q. In the office was there any talk between you as to the Crescent Tool Company desiring to buy the Smith & Hemenway plant or its stock? A. Not in my presence.

Q. How long were you in the office? A. As I remember, we got there a little while before lunch time; we went out to lunch together, the two Mr. Smiths and Mr. Swisshelm and I had lunch together.

Q. Where? A. I think the Elks Club, one of the clubs out in Irvington. I think it was the Elks Club; I am not sure, though.

Q. At lunch was there anything said about the buying by the—about the Crescent Tool Company wanting to buy the Smith & Hemenway Company and its stock? A. No, sir, not to me; I didn't hear anything of that sort.

Q. You were present all the time? A. We sat at one table, so if there had been anything said, I would have heard it.

Q. Was anything said about the Crescent Tool Company being in the market for any purpose? A. I don't remember hearing anything of that kind; we were not in the market, you might say.

Q. Was anything said about the Crescent Company having tried to buy, or having negotiated to buy an interest in or the entire Utica Drop Forging plant the previous spring? A. I don't remember anything said while we were there.

Q. Was there anything said at that time—when did you leave Newark? A. I left the Smith plant along in the afternoon, and I have cousins that live here in Newark and I went down and spent the evening and spent the night with them, and the next morning I had business in Jersey City to see another machine there; I went over to Jersey City and saw that machine.

Q. Where was that? A. I forget the name of the plant. Wicks Machinery House—I don't know what street it is on now.

Q. Did you see either of the Smiths again before you went back to Jamestown? A. No, sir.

Q. Did you see the Smiths after you parted with them, after having had lunch? A. No; we went back to the plant after we had our lunch.

Q. What did you do then? A. Mr. Smith called—I don't remember now whether I met Mr. LaRue before that or after lunch.

Q. Who is Mr. LaRue? A. He was their manager, or factory manager or superintendent; I don't know what his title was at that time; and after lunch Mr. LaRue took me down through the

plant, or part way through, and then turned me over to Mr. Whalen, who was assistant in the plant, and Mr. Swisshelm and I went through the plant, and then came back to the office.

Q. What did you go through the plant for? A. That is what we were there for, to see the methods and see the plant.

Q. To see whether they were using any better methods than you had? A. That was the idea.

Q. On the twenty-ninth or thirtieth was there anything said in your hearing by Mr. Landon P. Smith or Mr. D. G. Smith, or you or Mr. Swisshelm, either as to the Crescent Company purchasing the Smith & Hemenway Company plant or stock, or as to the sale of that plant or stock? A. No, sir.

Q. Nothing was said at all? A. No, sir.

Q. At any time on that visit or during that visit was anything said as to whether the Crescent Company was in the market for a plant of that kind? A. I don't remember of anything being said.

Q. Or that it had been negotiating or trying to negotiate for the purchase of the Utica Drop Forging Company? A. I don't remember, now, of anything being said; if it was, it was in an offhand way; I don't remember it at all.

Q. You stayed over night at your relative's or your sister's or friend's? A. Cousin's.

Q. Then you went to Jersey City? A. Yes.

Q. Then you went where? A. Came back to

Newark that night and stayed with my cousin the second night.

Q. Did you see anybody connected with the Smith & Hemenway plant then? A. No.

Q. Then where did you go? A. The next day I went to New York and went home that night. I beg your pardon. The next day we went over on Long Island, to see another cousin of mine. I went with the cousin here over to Long Island to see another cousin there, and then came back and took the train back that night for home.

Q. After you left Smith & Hemenway's plant on your first day in Newark, did you see any of the Smiths again—either of the Smiths again? A. Not in Newark or New York.

Q. Or anywhere? A. No, sir, not on that visit.

Q. Was there anything said between you and Mr. LaRue, between any of your party, either you or Mr. Swisshelm and Mr. LaRue and Mr. Whalen, or anybody connected with the Smith & Hemenway plant, as to whether the Crescent Tool Company was in the market for the Smith & Hemenway Company's plant? A. No, sir.

Q. Or that the Smith & Hemenway Company's plant or its stock was for sale? A. No, sir.

Q. What date did you go back to Jamestown? A. That would figure out about the thirty-first; twenty-ninth here, thirtieth I went over to Long Island, and left here the night of the thirtieth, and

got home the morning of the thirty-first of October.

Q. Did you see D. G. Smith in Jamestown? A. After that, yes.

Q. When was it you saw him? A. I don't know the exact date; it was about a week later, I would say offhand, maybe longer than that; no longer than a week or ten days, something like that.

Q. Where did you see him? A. At our plant and office.

Q. Did he say what he came to see you for? A. I don't know as he did. He said he had been or was giong up to Canada. I remember he made the remark, he said, "I got some orders in Canada when I was there."

Q. Did he say what he had come for? A. No.

Q. To visit you? A. When he was here, he said, "I am going out to the West and I am going to stop off and see you", that was when we were here, and I said, "That is fine."

Q. Did he say what for? A. He was going out on business in the West, but he was just going to stop off and see us, just to see us; he hadn't been there for several years, and he was going to stop off and see us.

Q. Did you introduce Mr. D. G. Smith to Mr. Peterson, the president of the Crescent Tool Company? A. Oh, no, he knew him long before I ever did.

Q. Do you remember whether he met him or

not on that visit? A. Oh, yes; I think when I first saw him he was in Mr. Peterson's office, and I walked in there and saw him.

Cross Examination by Mr. Alger:

Q. You heard in the preceding spring that the Drop Forge plant might be on the market, didn't you? A. I didn't get your question. Which plant on the market?

Q. The Drop Forge and Tool Company? A. No, I hadn't in the spring.

Q. You didn't know about Mr. Swisshelm coming down there to look at that plant, did you? A. Sometime afterwards I understood that he had stopped in there to see him.

Q. That was the spring that he went down, wasn't it? A. I don't know.

Q. Or along about February and March? A. I have no idea when he went.

Q. Did you see Mr. Smith at Atlantic City? A. No, sir.

Q. Weren't you down to Atlantic City from the sixteenth of October on to the convention? A. No, sir.

Q. Did you hear any rumors that the Smiths were buying out the Hemenways? A. No, sir.

Q. Nobody said anything to you about the fact that there was a change in the personnel of that corporation? A. The only thing I had heard——

Q. Just did you hear anything along that line?

A. That the Smiths were buying out the Hemenways?

Q. Yes. A. I heard it, yes.

Q. You heard rumors about that? A. Yes.

Q. Was that before you came to look at the Irvington plant? A. I didn't hear rumors that they were buying them out before I came to the Irvington plant, no.

Q. When did you first hear it? A. I don't know. I saw it in one of the papers, I believe, that there was internal friction in the Smith & Hemenway plant.

Q. What paper was that? A. I think the Iron Age, but I wouldn't swear to that.

Q. Was that prior to October 27? A. Yes.

Q. That was an account of this application to a referee in dissolution in New York City? A. I don't remember anything about that; I don't remember what it was.

Q. You did look that plant over pretty carefully while you were there? A. No, I didn't look over the plant, but their methods.

Q. Did you see the machinery? A. Yes.

Q. You had to see the plant in order to observe the methods? A. Yes, more or less.

Q. Where did Mr. Swisshelm go when you went down to see your cousin? A. He went back to Jamestown on the night train.

Q. Did Mr. D. G. Smith stay all night in Jamestown with Mr. Swishelm before he came up to the

plant? A. In Jamestown?

Q. Yes. A. I cannot say; I don't know anything about it.

Q. The fact is all you know about it is that you saw the plant here? A. That is about all I know.

Redirect Examination by Mr. Murray:

Q. Did your visit on the twenty-ninth have anything to do—did the fact that you had seen or heard rumors of these dissolution proceedings or friction or dissension between the Smiths and the Hemenways, have anything to do with your visit to the plant on October 29th? A. No, sir.

Recross Examination by Mr. Alger:

Q. Did Mr. Peterson ask you to stop off there, or Mr. Swisshelm? Mr. Swisshelm did, didn't he? A. Off where?

Q. Off at the Irving plant. A. When we were going through he was in my company with me.

Q. He asked you to come along, didn't he? A. I don't know as he asked me to come along; he said we would go over.

Q. Are you over Mr. Swisshelm or under him? A. I am under Mr. Peterson, each of us; we have our own departments.

Q. Mr. Moore, have you any interest in this controversy at all? A. No, sir.

Clarence R. Swisshelm, sworn for defendants:

Direct Examination by Mr. Murray:

Q. Mr. Swisshelm, in 1925, you were what of the Crescent Tool Company? A. Sales manager.

Q. Did you come to Newark on October 29, 1925? A. October 29, 1925, I was in Newark, yes.

Q. And whom did you come with? A. I came with our Mr. Moore.

Q. And what was your purpose of coming to Newark? A. The primary purpose was to see the plier edging machine made by—I will get the name exact (after examining paper) Semple S. Scott, of 1149 Broad Street.

Q. You wanted to see the machine for what purpose? A. To be used in the manufacture of our tools, and Mr. Moore had been corresponding with him for about two or three years, and he invited Mr. Moore to come down and see the machine which he had in his residence at 1149 Broad Street, and we came for that purpose, with the object, of course, of buying it, if it fitted our needs.

Q. What time did you arrive in Newark? A. We had an appointment with Mr. Scott for ten o'clock of Thursday, October 29, and I know I commented to Mr. Scott that we happened to get there exactly on the minute at his place at 1149 Broad Street.

Q. You examined the machine there, did you? A. We did.

Q. Where did you go then? A. We went di-

rect from there to the Smith & Hemenway plant at Irvington.

Q. How did you come to go to the Smith & Hemenway plant? A. To give you the real idea, I should start the first of the trip, if it is satisfactory with you.

Q. Go ahead. A. The companies giving the background in the tool business are all very friendly; we interchanged ideas; our competitors come to our plant, we go to theirs; always have. When Mr. Moore was coming down here to see this machine, Mr. Peterson suggested that I may go along, as Mr. Moore didn't know the Smiths, nor didn't know any of the Peck Stow & Wilcox plant officials at Irvington, New Jersey; we left Jamestown on Tuesday night, October 29, 1925, and went direct to Southington, Connecticut; spent that afternoon with the officials of the Peck, Stow & Wilcox plant, going over their plant.

Q. With the object of buying it? A. No, looking over the methods. I went over some of their sales department records. Wednesday night we went from Southington to New York and stayed at the McAlpin Hotel, that was October 28th. On the morning of the twenty-ninth, we came over here to Scott's, then went to the Smith & Hemenway plant. I met Mr. D. G. Smith and introduced Mr. Moore to them; and from then we visited in the office and went to lunch with them, and I am not altogether sure of the Club; it was one of the Clubs, I believe it was the Elks Club, at Irvington, but that is not clear. Then after that we re-

turned to the plant and went through the shop just the same as we went through the Peck, Stow & Wilcox plant.

Q. When did you return to Jamestown? A. I returned to Jamestown on the night of October 29th, taking the Erie from Jersey City.

Q. And arrived in Jamestown when? A. Friday morning, the thirtieth.

10 Q. At any time on your visit, or rather when you came to Newark did you know that the stock of the Smith & Hemenway Company or the plant of the Smith & Hemenway Company was for sale? A. No, sir.

Q. Had you heard any rumor to that effect? A. Not about selling or that it could be purchased.

Q. Did you go for the purpose of looking over the plant with a view to your company's purchasing it? A. No, sir.

20 Q. At any time on your visit to Newark, which you have described, did either Mr. L. P. Smith or Mr. D. G. Smith say anything to you which would—or in your presence, which led you to believe that the Smith & Hemenway Company or its stock was for sale? A. No, sir.

Q. Was there anything said to your knowledge, in your presence, on that visit, that the Crescent Tool Company was in the market for a plant such as the Smith & Hemenway Company's? A. The

30 only comment applying anywhere near to it was while we were at lunch; I was talking to Mr. D. G. Smith while Mr. Moore was talking direct to Mr. L. P., and in the conversation I mentioned casu-

ally, before that—I don't know as I said the date —I had tried to make some kind of a deal with the Utica plant towards purchasing it. Mr. D. G. Smith said, "Why didn't you?" and I said, "We couldn't come to terms, and the matter was dropped.

Q. Nothing more was said? A. Not another word was said; he didn't even ask me what the terms were.

Q. And that was the nearest approach to the fact that the Crescent Tool Company was in the market for a plant, made during your entire visit there? A. That was the only thing touching at all on the subject.

Q. By anybody? A. By anyone, in my hearing; by myself or anyone in my hearing.

Q. Did Whalen or LaRue give you any idea or say anything which would lead you to believe that the stock of the Hemenway Company or the plant itself was for sale? A. No, sir.

Q. By anybody? A. No, sir.

Cross Examination by Mr. Alger:

Q. You had heard about this article which appeared in the paper before this visit to Irvington, hadn't you? A. The first I heard of——

Q. Yes or No, had you? A. Yes, sir.

Q. And you had that in your mind when you came down and looked over the plant? A. Not when the trip was planned.

Q. I didn't ask you about when it was planned;

about the time when you looked over the plant. A. No.

Q. So you didn't look it over with the idea of having information in case Mr. Peterson should be interested in buying that plant? A. No, sir.

Q. You knew Mr. D. G. Smith quite well? A. Yes.

Q. And saw him frequently in the trade during the summer of 1925? A. Undoubtedly.

Q. And during the spring of 1925? A. I don't remember the dates, but I did as a rule.

Q. You saw him about the time that you came back from Utica, didn't you? A. I cannot say definitely.

Q. You saw him within a short time after you came back from Utica? A. I cannot fix any date.

Q. Within how many months would you say it was that you—or how many months elapsed before you saw D. C. after you came back from Utica? A. It couldn't have been over six months, because I saw him on an average of twice a year; that would be as close as I could fix it.

Q. You saw him in October, at the Atlantic City Convention, about October 16th, didn't you? A. I should judge so; I have seen him every year that I recall.

Q. You saw him six months back of that, along about March or April? A. Probably.

Q. That was shortly after you had been to Utica? A. I was in Utica twice.

Q. You were in Utica January or February first, were you not? A. Yes.

Q. And then the latter part of March, the second time? A. No, I was there in December and January.

Q. And February? A. Approximately; roughly, December, 1924 and January, 1925, or February; I haven't attempted to fix it, and wouldn't want to fix it closer than thirty days.

Q. You did come down and see what was the prospect of buying the Utica business for Crescent? A. Yes.

Q. And that was the specific purpose you had that time? A. Yes.

Q. Did D. G. Smith telegraph you that he was coming in November? A. Not to my knowledge.

Q. Didn't you get a telegram when he was going to arrive in Jamestown? A. Not to my knowledge; I don't recall it.

Q. Do you know what day he got there? A. To the best of my knowledge—yes, he was there Wednesday night, November 4th.

Q. Didn't he get there on the second? A. No.

Q. Didn't he have a conference with you on the third? A. No.

Q. Didn't you on the fourth make an appointment with Mr. Peterson to see him the next morning? A. No, sir.

Q. Sure about that? A. It was on the fifth.

Q. And Mr. Peterson didn't see him until the sixth? A. He saw him on the fifth. I took Mr. Smith in with me; it was the first Mr. Peterson knew of it.

Q. You were the one that took Smith in to in-

troduce this subject of purchase and sale? A. Yes.

Q. D. G., he came down to your house on the fourth, didn't he? A. On the night of the fourth.

Q. And you discussed the proposition of how you would broach this matter to Mr. Peterson, didn't you? A. Nothing more than—

Q. Just Yes or No, if you either did or didn't.

Mr. Murray:—What is the question?

Q. (Repeated) And you discussed the proposition of how you would broach this matter to Mr. Peterson, didn't you?

Mr. Murray:—I object to that question. There was no testimony that there was any discussion between these two as to any proposition of purchase and sale.

The Court:—The objection is overruled.

Q. You did discuss it? A. Yes.

Q. You did talk with several other people in the party about the Crescent being interested in the purchase of the Utica, didn't you? A. Possibly; there was no secret in it.

Q. That is what I am getting at. A. After the negotiations fell through, there was no secret on either side to the best of my knowledge.

Q. You discussed it with different boys you met on the road, frequently? A. Yes.

Q. It was well known among the men in the trade that the Crescent had tried to buy Utica? A. Possibly.

Q. You have heard it discussed quite a number of times? A. No, I cannot say that.

Q. And when you got down to the Atlantic City Convention, you met D. G., didn't you? A. Probably.

Q. And went around together? A. I expect so.

Q. Spent a social evening together? A. Undoubtedly.

Q. D. G. told you that L. P. was buying out the Hemenways, didn't he? A. No, sir.

Q. Didn't he mentioned it to you? A. No.

Q. And didn't L. P. say anything to you about Hemenway getting out? A. No, sir.

Q. Not a single word about it? A. No.

Q. So that up to the time that you came to Irvington, there was no talk that Mr. Hemenway was getting out? A. No, sir, not to my knowledge.

Q. And for all you know, there might be a receiver in charge when you got there? A. I don't know.

Q. You knew this dissolution proceding had been brought? A. I had heard it.

Q. But that never suggested to your mind that might be a chance for Crescent to buy the Irvington plant? A. Never gave it a thought.

Q. But when you heard about the Utica plant, that did suggest itself to your mind? A. It came in a different way.

Q. There was some difficulty up there about fiances at Utica, wasn't there? A. By rumor; that is all that I have.

Q. And by rumor there was some dissension down here at Irvington? A. But not financial.

Q. It was your understanding that there was no difficulty about finances here in Irvington at that time? A. I had heard nothing either way, for or against.

Q. You did recommend the purchase of this plant to Mr. Peterson, didn't you? A. No, sir, I let Mr. Peterson judge for himself.

Q. But did you advise with him on the advisability of buying the plant? A. I don't believe Mr. Peterson ever asked me.

Q. Did you discuss with him the possibilities which might arise from a combination of the Crescent business and Hemenway & Smith business? A. After Mr. Smith was in Jamestown?

Q. During these negotiations between November 5, 1925, and January, 1926, you had many conferences with Mr. Peterson on that subject, didn't you? A. Yes.

Q. You examined the accounts to whom the Smith & Hemenway Company sold, didn't you, to determine the value of the business for your company? A. Not to the best of my knowledge.

Q. Didn't you examine the list of their customers? A. The list of customers, but not the individual accounts.

Q. I don't mean the purchases, but I mean their trade. A. Yes, their customers list, I did.

Q. That trade included some of the larger jobbers all over the United States? A. Yes, sir.

Q. And those jobbers were all known to you? A. Yes.

Q. And didn't you advise with Mr. Peterson as to whether that would be a desirable connection for this company or not? A. Well, in the series of conferences that we had, it would be hard to say just definitely what we did and didn't. I don't recall definitely that he asked my advice on it. I looked them over.

Q. You discussed them with him, didn't you? A. Yes, but I don't know that I made any recommendation.

Q. But you didn't tell him, of course, what you knew about the customers and whether the accounts would be desirable accounts to obtain or not? A. I doubt if I went into it very much, because Mr. Peterson knows as much about that as I do.

Q. He is as well acquainted with the sales end as you are? A. In the form of the customers, he is, yes.

Q. You didn't know Mr. Hemenway very well? A. Never met him but once, that I recall, a number of years ago.

Q. Mr. Swisshelm, were you paid a commission on this transaction? A. I was not.

Redirect Examination by Mr. Murray:

Q. Have you any interest in this controversy at all? A. None whatever.

Q. When was this convention in Atlantic City that you mentioned? A. It is usually about the

third week in October; I cannot fix the date, but it comes about that time.

Q. And you said that you saw D. G. Smith down there? A. Undoubtedly did.

Q. Did you see any others down there? A. What do you mean by "others"?

Q. Other men in the sales department of similar concerns? A. Practically all the tool industry have representatives there.

Q. Did you see Mr. Hemenway and his wife there? A. No; if he was there, I didn't recognize him.

Q. Did you see any more of D. G. Smith at that convention than you did any other men and representatives of various concerns? A. No, I don't believe I did.

Q. Prior to November 4th, 1925, did you discuss with D. G. Smith, or anybody from the Smith & Hemenway plant or company, as to the desirability of your company purchasing that company or its stock, prior to November 5, 1925? A. No, sir.

Recross Examination by Mr. Alger:

Q. The Automobile Equipment Association also had a convention in New Hampshire or Canada in the summer of 1925, isn't that true? A. 1926 they met in Canada, I believe. They met in Dicksville Notch probably 1925.

Q. That would be in New Hampshire? A. Yes.

Q. You saw D. G. at that convention? A. I don't recall.

Q. You wouldn't swear that you didn't see him? A. No, sir, I wouldn't.

Q. As sales manager of his company he attended those conventions regularly, didn't he? A. He did.

Q. And as sales manager of your company, you attended them? A. I did.

Redirect Examination by Mr. Murray:

Q. The sales managers of all of these companies made a regular practice of attending conventions? A. Yes.

Q. You mixed together socially and in a business way in these conventions? A. Yes.

Q. And that is the way you saw D. G. Smith at the convention in October, 1925? A. Yes.

D. Frederick Burnett, sworn for defendants.

Direct Examination by Mr. Murray:

Q. You are a counsellor at law of this State? A. Yes.

Q. Of how many years' standing, about? A. I was admitted in 1904.

Q. And in this matter in controversy, you represented the defendants, the Smiths? A. Yes.

Q. You had a conference with Mr. Cohn, who represented the Hemenways, about June 15th, did you not? A. Sometime in the middle of June, 1925.

Q. Where was this conference? A. At my office.

Q. Was there anyone there beside you and Mr. Cohn? A. No, just the two of us.

Q. Will you tell us what took place and what was said at that conference? A. Mr. Cohn had come in response to my letter that I had written. Mr. Cohn said that he thought that we ought to get together and not have a dissolution, and said he thought that I ought to fix a price at which we would either sell or buy, and I told him that that would not do at all, because by fixing an alternative, buy or sell, proposition, I was in reality making them a double offer, and they could take whichever offer was best for their sake, and I wouldn't make any double offer.

Q. You mean by that, that that gave them the first option? A. He wanted me to make that kind

of an offer, which I refused to make, and I in turn asked him to make me an offer.

Q. What was his reply? A. Mr. Cohn was negotiating and did not make any offer.

Q. So that neither of you made an offer? A. No, neither of us made an offer to the other; we discussed the matter; we negotiated; we were dealing at arms length, but neither made an offer to the other. We resolved to take it up with our respective clients.

Q. And was that all that was said substantially? A. Yes. There was one other thing which was spoken of to Mr. Cohn, what he referred to in his testimony yesterday. He asked me what suggestion I had to make about the situation, as to how to close it, where they were divided and at swords points, and I suggested what I had done in a previous matter; I got out the papers to show him, which in short consisted of the attorneys on each side being authorized, with a certain maximum, by their clients, and conducted as between themselves a private auction sale, first having deposited certified checks, each party with the other, to guarantee their bid, and depositing the stock in escrow. I had done that once before with a concern under a similar situation. Mr. Cohn at that time said it was entirely too complicated. Later on, he changed his view about that, and suggested it.

Q. Was anything more said at that conference of importance? A. No. The upshot of it was that he was to see Mr. Hemenway and talk the

situation over with him and let me know whether Mr. Hemenway would make an offer on the proposition.

Q. Was there anything said between you and Mr. Cohn as to any disagreements—as to whether there were any disagreements or dissensions between Smith and Hemenway? A. The matter was mentioned, but not discussed. We each agreed to waive it, and we both thought we wouldn't go into the merits of any controversy to determine whose fault it was.

Q. When did you next see Mr. Cohn? I withdraw that question. When did you first see Mrs. Hemenway after that June fifteenth conference with Mr. Cohn? A. The day that she came with Elden Hemenway and Mr. Smith to my office, approximately the first of October.

Q. Up to the first of October had you ever seen Mrs. Hemenway? A. No.

Q. Or Mr. Hemenway? A. No.

Q. Or either or any of their nephews? A. No.

Q. Up to that time all your talks and correspondence had been exclusively with Mr. Cohn? A. And Mr. Smith.

Q. I mean from the other side? A. Yes.

Q. On October first who was there and where was it? A. It was at my office; Mr. Smith, Mrs. Hemenway and Elden Hemenway and myself, of course, four of us.

Q. How did they come to come to your office? A. Mr. Smith telephoned me about noon of that day, saying that Mrs. Hemenway and her nephew

were at his plant and desired to ask him certain questions, but that he wouldn't answer those questions unless in my presence, and asking for an appointment.

Q. And pursuant to that appointment, they came to your office what time? A. I couldn't see them; I had previous appointments; they got there just about four o'clock; they were there about one hour.

Q. Tell me just what took place at that conference when they arrived. A. Mr. Smith introduced me to Mrs. Hemenway and to Elden Hemenway, and whereupon I said that they may now proceed to ask him the questions, and Mrs. Hemenway asked why it was that she had received no notice of the proceedings which had been started in the New York Supreme Court, and Mr. Smith asked me to answer that question, whereupon I told her that I couldn't explain that to her, because she was represented by an attorney, and that I had given her attorney many notices of that, and I got out the correspondence—the carbons of my correspondence, beginning with my first letter to Mr. Cohn, and read over the carbons of my letters to Mr. Cohn, showing these very things; whereupon Mr. Hemenway, Jr., the nephew, said that he knew that that was so.

Q. That was one question. What other questions were asked either of you or Mr. Smith? A. Thereafter they asked me all the questions, instead of asking Mr. Smith.

Q. What were they? A. I cannot remember

whether the question was asked of me by Mrs. Hemenway or whether it was asked of my by Elden.

Q. Either of them? A. But the next question she asked was whether it was true that I had said that under no circumstances would we sell; that the only offer we would make would be to buy; and they called my attention that in one of my letters to Mr. Cohn, that I had used language to that effect; and I looked up the letter and saw what they had referred to. I had first forgotten it entirely, and having my correspondence out there, I looked it up, and then explained to them that what I meant by that was simply that Mr. Cohn had persistently been endeavoring to fix a figure in the alternative at which I would either buy or sell, and that I was not willing to consider it and give them such a double figure, but that I was open and always had been open to a proposition of sale, and would like to have the proposition—when I say "sale", I mean sale by us.

Mr. Alger:—What was that?

A. (Continuing) I had always been open to a proposition, if they make an offer, to buy our interest, but that no offer had been made, and the impression that they had gained was simply because I was writing to Cohn in the light of our conversation and telling him that I would not make a double offer to him, and then they asked me questions about procedure, that is, to say what would happen. I told him I felt embarrassed about their asking me questions of that kind, that

they really ought to be asked of their own attorney; that I did not know accurately myself what the procedure in New York would be, but if it was something like the New Jersey procedure, that the directors would become trustees in liquidation, unless they couldn't agree, in which event they would have to have a receiver, and that they would then sell out the materials—all the different assets of the concern, and at that sale anybody could bid. Mr. Elden Hemenway approached the question from a practical standpoint and said, "Wouldn't that wreck the business to have it sold that way?" And I said that I didn't see that at all, because I thought there was a great confusion in his mind between a receiver in dissolution proceedings and a receiver in bankruptcy proceedings, that people in general associated the two receivers; and there was a damage which would be done to the business, if a receiver was appointed and the property was sold, because people would get the impression, which would have to be lived down later on, that the concern was in financial difficulties; and that the notices had not been sent out. I am not sure, but I think the date of the hearing in New York was November 25, and that the last day for publishing notices and sending the notices to all the creditors of the concern and stockholders, I think was three weeks preceding that.

Q. Preceding November 25? A. Yes, and that I was just as anxious to avoid that as they

were. I think that that covers the conversation with Mr. Elden Hemenway.

Q. How was the matter left at the end of the conference? A. Mrs. Hemenway said that she was very glad to learn that this thing could be stopped. There was another thing spoken about; she felt very badly that the thing had gotten into the newspapers, and called my attention to some article in the New York Times; she did not exhibit it to me, but told me that there had been an article in the newspaper, the New York Times, which reflected on Mr. Hemenway, and she felt badly about that, but when they left, we shook hands and she said that she was going to talk it over with Mr. Hemenway and see whether we could get together on a proposition. I told them to see their lawyer at the earliest possible moment.

Q. The next you heard from anybody from the other side was who and in what form? A. I went away to the Adirondacks over Columbus Day. I think the day I got home from the Adirondacks, I got a letter from Mr. Cohn in which he acknowledged my letter. I wrote him in between after that, the next day, I was about then, I wrote him a letter outlining substantially what I have just told you now.

Q. The letter which you have last referred to, in which you say you outlined at that conference, is the letter of October 6th, is it not? A. It is written quite a few days after, because I had trouble with my eyes, and I was home. Yes, that

is the letter I wrote after the conference on October first.

Q. You reiterated there that you had not refused to sell, but you had refused to give a double offer? A. Whatever is there is in the letter.

Q. You said that something was said about wrecking the company, at that October first conference. Who used those words? A. Mr. Elden Hemenway was very much afraid that this proceeding would wreck the company.

Q. Who used those words, he or you? A. He. He raised the question; he was afraid that it would.

Q. Did you have anything to do with the article appearing in the New York Times? A. Oh, no. I have never seen the article.

Q. Do you know how it did come to get in there? A. No, I haven't the slightest idea.

Q. When did you next see, or rather you accepted the offer made by Mr. Cohn, and then you recieved a draft of a contract, did you not, from Mr. Cohn, a purported attempt to reduce to formal form the correspondence contract? A. Let me see the correspondence.

Mr. Murray:—I would like to put in this entire batch of correspondence, subject to the agreement of the counsel.

Court:—I ask that this batch of correspondence between the defendants and complainants attorneys——

Mr. Lum:—Is that in any part a duplicate what is already in?

Mr. Murray:—Some of it is a duplicate.

Court:—You may offer this as a whole and then extract from it whatever appears to be duplicates of what is already in evidence.

Mr. Murray:—I should say that in addition to the correspondence between attorneys, are also some letters to a Canada lawyer regarding the transfer of the Montreal property. That can be extracted, if desired.

Witness:—The letter I referred to as being received after my return from the Adirondacks was a letter from Mr. Cohn to me of October 12, which I got on the thirteenth, and on the afternoon of the thirteenth I telephoned Mr. Cohn that I had accepted the offer, and wrote him a letter on the thirteenth, which is in this exhibit, confirming the telephone conversation accepting the offer, and asked him to draft the agreement of sale and send it to me, and thereafter he did send me a draft of the agreement.

Q. Will you examine Exhibit D-1 and see if that is the draft to which you refer? A. Yes, I initialed it.

Q. And the handwriting on the top of the front page is whose handwriting? A. My secretary's.

Q. Placed there by your direction? A. Yes.

Q. When? A. At the time that I was closing up my files, after I had completed the case, to

identify what this thing was as distinguished from the finished contract; I dictated that.

Q. You referred to that in a subsequent letter, did you not? A. I wrote to Mr. Cohn disagreeing with this draft of contract.

Q. Then following that you received what subsequently became the final draft and contract? A. Yes. In between there were some telephone conversations with Mr. Cohn, where we thrashed out further details of my letter.

Q. The criticism of this contract and the final draft and the result of these telephone conversations was incorporated by Mr. Cohn in the final draft which he drew? A. Yes.

Q. And he drew Exhibit D-3, did he not? A. This was sent to me by him.

Q. Does the October 6th letter correctly set forth what took place at the conference at your office at which Mr. Smith and Mrs. Hemenway and Elden Hemenway attended? A. Substantially it sets forth everything; it wasn't written immediately after they left, because I had to leave myself to go to New York that afternoon, and didn't get back to the office until that day, October 6th, and then I wrote Mr. Cohn, because I was embarrassed to have his clients come to my office.

Q. At that conference on October first what was said, if anything, about the state of Mr. Hemenway's health? A. I inquired about it; they told me that Mr. Hemenway was very much improved but was not able to come out, and that young Mr. Hemenway had come in his place.

Q. Did they say what was the matter with him or what had been the matter with him? A. I had learned during the summer vacation that he had had pneumonia.

Q. At any time did they tell you or say anything which gave you the impression that he was in such a condition that he was likely to die suddenly? A. Oh, no; nothing was said of that kind.

Q. Was there anything said about his having dilation or enlargement of the heart? A. Oh, no, nothing.

Q. What did you understand his condition to be up to the time, we will say, October 13th, up to the time the matter was closed on December 9th? A. Of couse, I didn't know anything about his health at all, with the exception that during the month of August while I was on vacation, I learned from a carbon copy of a letter which was written to our office by Cohn, that he had had an attack of pneumonia, and I knew on October first that he had recovered. A month later I met Mr. Hemenway for the first time and then I knew with my own eyes.

Q. After October first when did you next see either Mr. or Mrs. Hemenway or Elden or any of the nephews? A. I never saw Mr. Elden Hemenway again until here in the court room the other day. I never saw any of the other nephews besides Elden Hemenway.

Q. At any time? A. At any time. I saw Mrs.

Hemenway again; the second time I ever saw her was over at Mr. Cohn's office on Wednesday, it was November 4th.

Q. And who was there? A. Mr. and Mrs. Hemenway, Mr. and Mrs. Smith, Mr. Cohn and myself.

Q. And had you seen Mr. Cohn since you had seen Elden and Mrs. Hemenway at your office? A. No, I hadn't seen him since he was at my office sometime in June.

Q. What was the purpose of the meeting on November 4th at Mr. Cohn's office? A. To hold, first, stockholders and directors meetings of the Smith & Hemenway Company, for the purpose of passing proper resolutions incident to the transfer of the Montreal property, which required resolutions entirely different from our New Jersey resolutions or New York resolutions, because the title in the Province of Quebec passes under French laws, and the conveyance is made by a notary, somewhat in analogy to a power of attorney here, and required some highly specialized resolutions.

Q. Where was that November fourth conference? A. That was held at Mr. Cohn's office. That was the company office, too.

Q. The resolution for what company? A. The Smith & Hemenway Company.

Q. At that meeting were Mr. and Mrs. Hemenway and Mr. and Mrs. Smith together all the time you were there with Mr. Cohn? A. Yes.

Q. In the same room? A. Yes, we were all together, in Mr. Cohn's office.

Q. Were there any acrimonious discoursed between the Smiths and the Hemenways? A. There were none, whether acrimonious or not, there were no disagreements that day.

Q. Was there any appearance of courtesy or friendship between them? A. I thought the meeting was very cordial that day.

Q. Were there any objections made by anybody about going through with the contract? A. No, we were there to carry out the contract.

Q. At that time was there anything said as to what Mr. Smith was going to do or intended to do with the company if he got it? A. No.

Q. Or its stock? A. No.

Q. Did you hear Mr. Cohn the other day testify that, first, that he thought there was some discussion about selling the company took place on November 4th and then on December 9th; did you hear him say that? A. Yes, I heard him say that.

Q. I take it, then, that you disagree with him so far as the November fourth meeting? A. He was correct as to the next meeting, December 9th, but mistaken about the November fourth meeting.

Q. At that time what did Mr. Hemenway's physical condition appear to be, so far as you saw it from observation? A. All right, perfect; he was a man who would give me the impression of not robust, or anything of that kind, but on the other hand, not feeble. He was not a large man;

he was rather thin, drawn. I would call him wirey; he looked in perfect health.

Q. Did he take any part in the proceedings which took place there? A. Yes, Mr. Hemenway knew considerable about the French Law, and these people had had some property transactions in this Montreal property and on several occasions he indicated what is required of the—what the proper way to do it was.

Q. For the purpose of helping you and Mr. Cohn get the matter prepared? A. Yes, in drafting jointly the resolutions.

Q. When did you next see Mr. or Mrs. Hemenway or Mr. Cohn? A. At the meeting of December 9th, at Mr. Cohn's office.

Q. What was the purpose of that meeting? A. That was to close up all the other details, other than the Montreal property, pursuant to the contract of October 29th.

Q. At that meeting was there any discussion, acrimonious or otherwise; and if so, what was it, and who participated? A. There was discussion for several hours.

Q. How long? A. I got there quarter past twelve.

Q. And got away when? A. About half past five.

Q. What was the difficulty; what took so long? A. There was an awful lot of work to do in closing that contract.

Q. What did that consist of? A. There were the shares of stock, which were to be signed by

Mr. and Mrs. Hemenway, and these certificates were not all in one certificate, they were scattered, different certificates. We took each one of those certificates—I daresay there were ten or twelve of them had to be signed up by Mr. and Mrs. Hemenway, as the case might be, and then they were transferred on the books of the corporation and entered in the transfer book and posted in the ledger, and new certificates issued and signed by the officers. Then there was the question about the promissory notes.

Q. What was that question? A. I raised that—given by the Smiths to the Hemenways as part of the purchase price, pursuant to the contract. The contract so provided. The contract, however, didn't say anything as to whether these notes were to be negotiable or not. My memory is that there were eight or nine notes, and I told Mr. Hemenway and Mrs. Hemenway, or rather addressing Mr. Cohn, that as to these notes——I had them all signed by the Smiths—Landon Smith and by his wife, pursuant to the contract, but that before I delivered those notes I wanted to have a clause written on, somewhat to this effect: "These notes are given pursuant to a contract dated so and so," describing it.

Q. Why did you want that? A. So as to make them non-negotiable.

Q. Why did you want them non-negotiable? A. That is what I explained to Mr. Cohn.

Q. What did you explain to him? A. I told

Mr. Cohn that we were trying either to organize the company or else to sell it, and that if we succeeded in selling the company, we would want to be in a position where I could take up these notes at any time, and therefore I did not want negotiable notes extending over a period of years, floating around in the hands of bona fide purchasers; that I would never he able to take up these notes otherwise, and the contract itself did contain a clause to the effect that we could accelerate the payment of the notes, and therefore I suggested that we should have a clause to that effect put in th notes. So there was considerable discussion about that. Mr. Hemenway in that took a leading discussion.

Q. What did he have to say? A. I think he misunderstood it, he wanted that clause in. I said, "You do not want a clause like that in." He said yes he did. He did not understand it, so later on Mr. Cohn took him aside and explained it to him.

Q. You said you wanted it in? A. No, I said, I either wanted that in, a clause of that kind in, or else that they should be put in ascrow. That was was my alternative suggestion, to put them in escrow so that we could take them up if we wanted to.

Q. Were they all to be treated alike, all the notes, as you finally agreed? A. The final outcome of it was that we agreed that the note number one, the one which matured the earliest, was not to be escrowed, because Mr. Hemenway said that he wanted to discount that note and utilize

the proceeds right away, he needed the money, and as that only had a short term to run, that was excepted from the agreement.

Q. How long did that have to run? A. My memory is only to January first, but I am not sure, but I do know it was the earliest maturity.

Court:—January sometimes?

Witness:—Yes. I remember distinctly it was number one in the series.

Q. Did you enter into the stipulation marked D-2 for identification, at that time? A. Yes. This is the stipulation of things which after that long discussion we either had decided or else were unable to decide, and determined after, as everything that remained to be done is practically set forth in the stipulation.

Mr. Murray:—I would like to have Exhibit D-1 for identification and Exhibit D-2 for identification offered in evidence.

(Marked Exhibits D-1 and D-2.)

Q. What other matters were discussed at that meeting, if any? A. Everything which is in this stipulation was discussed. I will have to look it over, if you want to know. (After examining paper.) The question as to whether a bill should be paid of Reed, my memory is that that was for insurance. The question about one Ligman, I think he was the man who had charge of the Montreal building, like an agent, to collect rents. Some question about his fee. And then there was a big question we had a long argument about, about this

notice from the Electric Commission of the City of Montreal, which required the owner of the premises within sixty day to put certain electric wiring in, and the question was on whom the incident of that burden should fall, whether upon the vendor or the purchaser.

Q. The cost of the electric installation required by the City of Montreal? A. Yes, and that was agreed to be arbitrated. We thought it depended upon the local law, rather than upon the New York and New Jersey law, and therefore we agreed to arbitrate it.

Q. Who took part in that discussion? A. That was solely between Mr. Cohn and myself.

Q. What was the next matter discussed? A. I am not saying that this is the order. This is the order they were set down here. The question about giving a covenant for further assurance on the contract in reference to the Montreal property; some question was raised by the notary as to whether the authorization was in proper form, and I suggested that we would give a covenant for further assurance.

Q. What else was discussed? A. Of course, we had to fix up the matter pursuant to the contract that the certificates of stock with the formal notes were held in escrow.

Q. Did you have an escrow agreement? A. Yes, this is the escrow agreement, an informal stipulation.

Q. That was drawn where? A. In Mr. Cohn's

office. The question of the receipt of rents on the Montreal property, about the apportionment of them, the question about the assignment of the rents on the Montreal property, and then I remember another thing which we discussed—I am sure it was that day—the salary of Mr. Hemenway and the matter of the accrued dividends on the preferred stock.

Q. Belonging to whom? A. Which belonged to both Mr. and Mrs. Hemenway.

Q. What was the question involved? A. The question was whether the purchaser of the stock got the right to the dividends from October 29th on or only from the date of the delivery, which was December 9th.

Q. And who participated in that discussion? A. All of them.

Q. Mr. Hemenway? A. Yes, indeed; Mrs. Hemenway.

Q. Mr. Smith have anything to say about it? A. He let me do the talking in his behalf.

Q. Mrs. Smith have anything to say about it? A. No.

Q. What did Mr. Hemenway have to say? A. You mean about the salaries and dividends?

Q. Yes. A. I cannot pick out any isolated thing; there was nothing that impressed me strongly. He was arguing a question of self-interest, and I was trying to put up the opposite side, that the dividends belonged to the purchaser from October 29th on.

Q. And Mr. Hemenway claimed the contrary? A. Yes.

Q. And what did Mrs. Hemenway say? Did she have anything to say about it? A. She was right in it every time that he was.

Q. Did Mr. Cohn take part in that debate on those questions, too? A. Yes, but that wasn't long; we had to talk about it.

Q. Was there any personal argument of a personal character between the Smiths and the Hemenways while you were there? A. No; all the argument was as to the detail of the closing of this contract.

Q. You were there all the time they were there? A. Yes.

Q. Mr. Cohn said yesterday something to the effect that at sometime he had told you by telephone, or by word of mouth, that the Hemenways would not go through with this contract, or that the contract would not have been made, unless—, if it had not been for the state of Mr. Hemenway's health. Do you remember what Mr. Cohn testified to about that? A. Yes, I heard him say that yesterday.

Q. Was there any such thing said? A. I do not remember any such statement ever being made by him.

Q. Would you remember it if it had been made? A. I might or might not, because whatever was said at all by him must have been after the contract was made, because there was nothing said at the time I telephoned to him.

Q. You mean when? A. When I telephoned to him—what was the date, October 13th?—when I telephoned to him then, nothing was said, and everything else was in reference to the terms of the contract.

Q. At any time was there anything told you by anybody as to the fact that Mr.—if it was a fact, that Mr. Hemenway was likely to die suddenly from strain or exertion or shock? A. Was anything said about his being likely to die?

Q. Yes. A. No.

Q. Did you have any such idea? A. No, I was very much shocked when I did learn of his death.

Q. At that meeting on December 9th or at the meeting on December 4th, was there any reluctance shown on the part of Mr. or Mrs. Hemenway or Mr. Cohn to carry through and consummate the contract? A. December 4th?

Q. November 4th or December 9th. A. No, never.

Q. On December 9th just what was said by you or by Mrs. Hemenway or Mr. Hemenway or Mr. Smith regarding a sale of the property of the Smith & Hemenway Company or the stock of it to the Crescent Tool Company or anybody else? A. As to Crescent Tool Company nothing was said about any sale to them. As to anybody else, I have already told you, a few moments ago, that I told them we had it in mnd either to reorganize the company or, if Mr. Smith could get an offer, we might sell it, and therefore I wanted to have

them there. I told you all that in reference to the promissory notes.

Q. That was November 4th meeting? A. The only question with reference to Crescent Tool Company was a remark made by Mrs. Hemenway when we entered the room.

Q. When? A. On December 9th, as we came into the room to take our seats, she said, "I hear you have told your plant to the Crescent Tool Company."

Q. Speaking to whom? A. The three of us, when we came in. She didn't single anybody out.

Q. Was there any reply made by anyone? A. Yes, Mr. Smith replied.

Q. What did he say? A. He said, "No, not yet."

Q. Anything more said? A. No.

Q. On that subject, I mean? A. No.

Q. Subsequent to that you received the release marked Exhibit D-6? A. Yes, that was a long time afterwards, though. That is the release which was given.

Adjourned to September 13th, 1927, at 10 A. M.

IN CHANCERY OF NEW JERSEY.

Between

Alice M. Hemenway, individually and as executrix of the last Will and Testament of John F. Hemenway, deceased,

Complainant,

-and-

Landon P. Smith and Julia M. Smith,

Defendants.

Continuation of testimony in the above entitled matter before Hon. Maja Leon Berry, Vice Chancellor, at the Chancery Chambers, Newark, New Jersey, on Monday, September 13, 1927, at 10 A. M.

Appearances:

For Complainant: Lum, Tamblyn & Colyer, by Ralph E. Lum, Esq., and George W. Alger, Esq., and W. R. Pratt, Esq., (of the New York Bar).

For Defendants: Burnett & Murray, by Norbury C. Murray, Esq.

D. Frederick Burnett, recalled for

Further Cross Examination by Mr. Murray:

Q. When did you first hear that the Crescent Tool Company was interested in the Smith & Hemenway Company or in its stock? A. At that second meeting in Mr. Cohn's office.

Q. And that second meeting at Mr. Cohn's office was the meeting which was attended by Mr. and Mrs. Smith and Mr. and Mrs. Hemenway and Mr. Cohn and yourself? A. Yes.

Q. Do you remember when that second meeting was? A. I think the ninth of December.

Q. You first learned of the Crescent Tool Company on December 9, at that meeting? A. Yes, the first time I ever heard of it.

Q. In what connection did you hear of it then and how? A. As we entered the room Mrs. Hemenway said, "I hear you sold your plant to the Crescent Tool Company," and I turned and looked at Mr. Smith, because I hadn't heard anything about it, and he said, "No, not yet."

Q. Up to that time you had not heard of the Crescent Tool Company from anyone? A. No, never heard the name before.

Q. Up to that time had you heard that Mr. Smith was trying to sell it to anyone in particular? A. No, he wasn't making an effort to sell to anybody.

Q. Do you know whether he had any other plans? A. Yes, he did.

Q. For the company than that? A. He did.

Q. What were they? A. He was going——

Mr. Lum:—I object unless the basis of his knowledge is shown.

The Court:—How do you know it?

The Witness:—Smith told me.

Mr. Lum:—I object. Was Hemenway present?

The Witness:—No.

Mr. Lum:—I object.

Mr. Murray:—I think that is admissible on the ground that the complainants are challenging the good faith of the defendant Smith in buying this property, in buying this stock from the Hemenways, and they are claiming that it was bought by Smith knowing at the time that the Crescent Tool Company was interested, or would be interested. This line of testimony will show that Mr. Smith was at that time, up to December 9th, planning to reorganize the company and take in a different board of directors and take in some of his employees, and so on, which is entirely inconsistent with the idea of selling out to the Crescent Tool Company. That is the line of testimony that I desire to bring out by that question. I realize that it is not binding upon Hemenway, but on the other hand, it negatives the idea of any bad faith and shows what happened at that time as part of the *res gestae*, and for the purpose of negativing the idea of bad faith which complainants have sought to inject into this case.

Mr. Lum:—Mr. Smith's statement at best would be hearsay and a self-serving declaration.

The Court:—Any statement which he may have made prior to this transaction indicating a different intention, it seems to me would be pertinent. I want to ask one question. When did Mr. Smith tell you of his other plans?

The Witness:—After the contract was signed.

The Court:—I will sustain the objection.

Mr. Murray:—That was just before this conference, which has just been referred to. The Contract was signed on October 29th. Then there was a meeting on November 4th at that office to carry out the contract for resignations, and so on, and then that was succeeded by this meeting just referred to of December 9th. These plans which the witness just said were stated to the witness about October 29th, which was—the difference between October 29th and December 9th—was when he first heard of the Crescent Tool Company, so these plans were formulated at the time the contract was made, and before this time, that the Crescent Tool Company first came up.

The Court:—There might be some purpose in his making the statement on December 9th, after the contract had been made—some purpose affecting this suit. There could have been none at that time.

Mr. Murray:—Doesn't that go to the

weight rather than the admissibility of the evidence? If your Honor got that idea from the testimony it would affect its weight, but not its admissibility.

The Court:—I will sustain the objection.

Mr. Murray:—I offer a letter from Mr. Cohn to the attorneys who were attorneys of record in the dissolution proceedings, dated October 1st, 1925.

(The following letter was marked Exhibit D-9):

"Law Offices of
ALEXANDER, COHN & SONDHEIM
51 Chambers Street, New York
Telephone Connection
Martin B. Cohn Harry J. Sondheim
Herbert A. Cone

October 1st, 1925.

O'Brien, Malevinsky & Driscoll,
152 West 42nd Street,
City.

Dear Sirs:

In re Smith & Hemenway.

We are attorneys for John F. Hemenway and Alice M. Hemenway, two of the stockholders of the above company. We note that you, on behalf of Landon P. Smith and Julia M. Smith, have commenced proceedings in the Supreme Court, New York County, for the dissolution of said corporation under Section 172 of the General Corporation Law, and that

in accordance with the order of the Hon. Justice Wasservogel, Charles F. Hoffman was appointed Referee to hear the order to show cause on November 25th, the return day mentioned in the order. Will you kindly favor us with a complete copy of the order, petition and schedules. At the same time will you be kind enough to let us know who in your office has charge of this matter, in the event that we desire to communicate by telephone.

Thanking you in advance, we are,

Very truly yours,

ALEXANDER, COHN & SONDHEIM.

By: M. B. Cohn.

(MBC)—R."

Cross Examination by Mr. Pratt:

Q. Who in that firm of O'Brien, Malevinsky & Driscoll, had charge of this proceeding to dissolve Smith & Hemenway Company? A. I don't know of my own knowledge. Mr. Murray handled that phase of the matter.

Q. Did they communicate with you about furnishing Mr. Cohn a copy of the petition and your moving papers? A. All that correspondence was between their firm and Mr. Murray who handled that phase of it.

Q. You know that they didn't furnish any copy of these papers at any time? A. I don't know that. I wrote them that they should if they paid for it.

Q. Is it the practice in New Jersey to require payment of a fee for service of copies of process and petitions and proceedings? A. No.

Q. But you felt that in this case where the Hemenways were actually parties defendant that they should pay for a copy of the papers to be served on them? A. Simply because the papers were very voluminous and they would have had to pay $200 for outside stenographic services. I said if they had any extra copies they should let them have them, or let them see their office copy.

Q. You knew that under the New York statute it was necessary to serve these papers upon Mr. Hemenway and upon Mrs. Hemenway, didn't you? A. I can't say that I did, because I didn't examine the New York statute except the jurisdictional ground, that was all.

Q. You didn't assume that a corporation could be dissolved without some notice to the interested parties, did you? A. No, I didn't, but I had nothing to do with that phase of the matter. That was handled by the New York correspondents.

Q. You say you first heard of the Crescent Tool Company matter on the 9th of December? A. Yes.

Q. The next preceding visit which you made to Mr. Cohn's office was on November 4th? A. Yes.

Q. And on that occasion you came in almost two hours after the agreed hour of appointment, didn't you? A. No, I did not. I came in precisely at the time.

Q. You weren't late on November 4th? A. No, I was not.

Q. Were you late on December 9th? A. I was not. I was precisely on time, quarter past twelve. I will tell you how I fix it, if you like.

Q. You are quite certain that you came in on time and before the other parties arrived? A. Absolutely on the minute I was there.

Q. When you arrived were the Smiths already there? A. They were there.

Q. So that it is possible that Mrs. Hemenway might have asked Mr. Smith about this question of the tool deal before you came in? A. No, because the Smiths were waiting in the anteroom for me and the Hemenways were in Mr. Cohn's private room.

Q. You are quite sure that they didn't converse with each other before you arrived there? A. I can't tell you anything about that, of course.

Q. When you came into this case, Mr. Burnett, you didn't have any knowledge that Mr. Smith's health was so bad that he was going to leave the business? A. He spoke about his health.

Q. Did he tell you, as he told Mr. Isherwood, that his health was such that he wanted to get out of the business? A. No, he didn't say he wanted to get out of the business, he said——

Q. I didn't ask you what he said; please answer my questions. There was never at any time anything said to you about Mr. Smith's selling out? A. About his selling out?

Q. Yes. A. Yes.

Q. And when was that? A. At the time that he first came to me.

Q. You didn't mention that in your first letter, however, did you? A. No.

Q. You said that if there was any, before instituting proceedings, if our clients had any alternative proposition to sell, that was other than dissolution, you wanted them to submit it, is that right? A. Yes.

Q. When you wrote this letter of July 28th, 1925, you were clear in your mind that you were in a receptive mood to receive a proposition, weren't you? A. Yes.

Q. And you so told the Hemenways on October first, that you were ready to sell at any time? A. If I got an offer.

Q. If you got an offer? A. Which was satisfactory, of course.

Q. In your letter of July 28th, your Exhibit C-13, just what did you mean when you said, "Mr. Smith has no intention of selling, and is entirely unwilling, in view of his comparative youth as compared with Mr. Hemenway, to consider any proposition relating to selling. He is willing to buy on the terms stated in my letter of July 1st, but that is all. If Mr. Hemenway desires to accept this proposition, well and good. If not, I take it that there is no use of negotiating further, and that our only recourse will be to institute proceedings for dissolution. As I have but a few days

in the office before my own vacation, I have taken the matter up with my partner, Mr. Murray, to whom henceforth all correspondence should be addressed for his attention. Personally I hope that the matter can be settled amicably, but Mr. Smith is insistent on dissolving the company, and the only possible alternative that I can see is a purchase by him of the Hemenway interests." Just what did you mean by that? A. I don't think that letter of mine is very well expressed. It was written immediately as I left on vacation and rather—

Q. I didn't ask you that, I asked you what did you mean to convey by that letter? A. I was writing that letter in view of the previous conversations I had had with Mr. Cohn at my office and on the telephone, and I meant to negative the idea of making it a double proposition, that I wasn't making any proposition of purchase coupled with a proposition of selling.

Q. You didn't say anything about any double proposition, or any proposition coupled with an offer of purchase and sale? A. All of that had been said between Mr. Cohn and myself repeatedly.

Q. Well, when you said you wouldn't consider any proposition of selling, that is what you meant, wasn't it? A. I meant the double proposition. I don't think it is well expressed, and when my attention was called to that——

Q. Wait a minute. When you came along with your letter of October 6th, following your talk

there in your office with Mrs. Hemenway and her nephew, you did say that Mr. Smith had been and would be at all times open to an offer for the sale of his holdings, but no offer of sale had been made. "I told him that we were not interested at all in selling out our holdings and had no offer to make on that behalf." Then you went over and said, following along, buy out amicably, "To which I, of course, answered in the affirmative and said that I had had such hope and had for several months delayed action hoping that such happy result could be accomplished, but that I was afraid that you and they had construed my hope of affecting an amicable settlement as a confession of weakness." Then you go on down and say, "If it is still the wish of your clients to settle this matter amicably (that is, by selling—by selling out to you) and before further damage is done to the business by publications and notices to creditors, it will be necessary that your offer be in my hands not later than Thursday, October 15th. Under no circumstances will I delay the hearing or any of the preliminaries necessary thereto." In that letter again you insisted that they should go through and sell to you, didn't you? A. No, I did not.

Q. You wish it to be understood now that you were perfectly willing to sell out? A. As shown in that letter, I think it is October 6th.

Q. But you were unwilling at any time to fix a price which you considered adequate, or anything which you had in mind. A. No, my letter of Oc

tober 6th said that I would entertain an offer to buy or sell.

Q. I think if you read that letter you will find it doesn't say that. You talked with your client alone during the summer once after this inventory was gotten out, didn't you, the inventory of June 30th? A. I don't believe that I did; I never saw the inventory.

Q. Didn't Mr. Cohn ask you for a copy of the inventory when it should be completed? A. Yes, but I never saw it. I went on vacation on or about the 30th of July.

Q. Did you ever furnish him that inventory? A. I don't know; I didn't.

Q. Did you know that after the inventory was figured that your client, Mr. Smith, and Peterson refigured it? A. No.

Q. Do you know that Mr. Smith made inventory adjustments of $9,527 which were deducted from the net profits for that period? A. Never heard that until I came to court in June.

Q. Did you know that the selling profits for the first six months of 1925 were substantially twice those of the of the preceding year? A. No, I did not.

Q. You understood that you were to lose $25,000 in that first six months? A. Yes, Mr. Smith told me that he thought that would be so. I wrote him a letter on that point.

Q. You talked with Mr. Smith before you wrote this letter saying that he would not entertain any proposition of selling out because of his compara-

tive youth as compared with Mr. Hemenway? A. Undoubtedly I talked with him.

Q. That repeated his instructions to you? A. It wasn't instructions, it was my size-up of the situation.

Q. You testified the other day that you had never discussed with Mr. Cohn the question of who was right as between these parties? A. No, we didn't go into that question at all.

Q. The only question that was ever discussed was whether the Hemenways would sell out to you at a certain price, or whether the dissolution proceedings should go on? A. Or whether we should sell to them.

Q. Just when did you ever talk to any of them about selling to them? A. At the conference with Mr. Cohn at my office.

Q. And when was that? A. About the middle of June.

Q. Mr. Cohn at that time offered to adopt your proposal and put sealed bids in envelopes, didn't he? A. No, he did not. I suggested that. I suggested buy or sell, and for this method of bidding that he described to you, but Mr. Cohn wasn't interested in that at the time. Later on he did become interested.

Q. At the last hearing you testified that at your talk in June you told him that you wouldn't make any buy or sell proposition, didn't you? You didn't say anything about being willing to accept an offer, didn't mention that in your testimony.

did you? A. Your first question is this: I told him I wouldn't make any proposition to buy or sell at a given figure for him to take his choice whether he would take that figure and either buy or sell, but I was willing to either buy or to sell.

Q. Coming down to November 4th, in the fall, when you already had the signed agreement in your possession, had it for a couple of days, hadn't Mr. Smith mentioned the fact that D. G. was in the west? A. No; I didn't know D. G. Smith and didn't know who he was until a month or two later.

Q. Did you know Mr. Smith had a brother Mr. D. G. Smith? A. I didn't learn that until sometime in December.

Q. On November 4th he didn't tell you that on that very day that you were in New York City at Mr. Cohn's office that his brother was arriving in Jamestown to open negotiations to sell to the Crescent Tool Company? A. No.

Q. Never mentioned it? A. No.

Q. Between November 4th and December 9th even though there had been a visit by the Crescent people down to the Irvington plant to look it over, figures had been submitted to them, and inventories, and all, Mr. Smith never mentioned that to you? A. He did not.

Q. When did you first learn that they had been there in November to look over the plant? A. On December 9th at Mr. Cohn's office.

Q. During this period did he talk to you about

other plans that he had for reorganizing the company? A. Yes.

Q. You say that you told Mrs. Hemenway and Elton that a receiver in dissolution proceedings would damage the business quite a little? A. Yes.

Q. You emphasized that in your letter of October 6th where you said to submit their offer before any more damage was done to the company? A. Yes.

Q. Did you ever investigate the New York statute to see whether such a proceeding was actually permissible under the facts that existed in this case? A. I was familiar with the New York statute and examined the statute myself to verify my understanding of it, that was all.

Q. But yo uhadn't examined the statute far enough to see about serving papers? A. Oh, no, not about procedure, but simply the subject of the fact of jurisdiction.

Q. When you told the Hemenways that they must get in their offer by the 15th, you knew the papers had to be served on them by October 15th. You told them you wouldn't hold up any of the formal proceedings? A. I am not aware at all that I mentioned the 15th of October to them at any time.

Q. Do you remember writing them, "The hearings start October 15th, and prior thereto it is necessary to serve a copy of the order to show cause upon all creditors and stockholders of the corporation"? A. Yes.

Q. Also to publish the order? A. Yes.

Q. "If it is still the wish of your clients to settle this matter amicably and before damage is done it will be necessary that your offer be in my hands not later than Thursday, October 15th"? A. I forget it.

Q. You didn't know that these papers had to be served? A. No.

Q. Up to that time you were only willing to deliver them on condition that we pay for a copy of them? A. I didn't have anything to do with that.

Q. You say that Mr. Hemenway was a rather thin, drawn appearing fellow. He didn't look as robust as Mr. Smith was? A. He wasn't as big a man as Mr. Smith, no.

Q. You drew this answer, I take it, for Mr. Smith? A. No, I did not.

Redirect Examination by Mr. Murray:

Q. When you didn't furnish the Hemenways with a copy of these New York proceedings, do I understand the only reason was the expense to the Smiths on account of the great volume of these papers, the length of them? A. I directed the New York correspondent to let them have their office copy so they could make a copy. Mr. Smith had been charged, I think, $190 or $200 for preparing these voluminous copies. They had outside stenographers and I didn't want them to go ahead and hire the stenographer and pay him for another copy. If they wanted to do that they

could do that, or look at the New York lawyer's copy.

Q. Was there any delay in having the hearing on that New York proceeding fixed? A. That I don't know of my own knowledge. I understand from what——

Mr. Lum:—I object.

Q. Did Mr. Cohn or any of the Hemenways ask that that be delayed? A. I think young Mr. Elton Hemenway asked if they couldn't be delayed, and I answered no.

Q. How do you fix the hour so closely of the appointments on November 4th and November 9th? A. Because I am at law school every Wednesday in New York City and I fixed it at quarter past twelve, and making the trip twice in fifteen minutes.

Q. You finish at twelve o'clock? A. Yes, I finish at twelve o'clock.

Q. You had how far to go? A. Underground I can not tell you how far. From Ninth Street down to the City Hall Park.

Q. When did Mr. Smith tell you that there would be a loss of $25,000 in 1925? When was it that he told you that? A. I don't remember that time, but whatever is mentioned in my letter is the time, shortly before that.

Q. Did he tell it to you as a statement of fact or as an idea? A. He said he thought, and I so wrote that.

Q. Part of the letter of October 6th so read. I wish you would read the third paragraph for the

benefit of the Court so we can see just what you did say. "Mr. Hemenway asked me if it was true that I had said that Mr. Smith would not consider any offer for sale of his holdings. I told him that was not true at all; that Mr. Smith had been and would be at all times open to an offer for the sale of his holdings, but that no offer had ever been made to me; that I had made to you an offer to purchase Mr. Hemenway's holdings but that this offer lapsed because of non-acceptance; that no counter-figures had ever been submitted by you to me; that you had asked me to make my offer to buy in the shape of an offer to buy or sell at a certain figure, but that I had absolutely refused to make any such proposition stating that to do so was really making a double offer and giving you the advantage of deciding on which one to accept; that I had told you that we were not interested at all in selling out our holdings and had no offer to make on that behalf; that the only offer we had to make was one for the purchase of Mr. Hemenway's interests; that I thought this statement was the basis, or the color for the impression that they had evidently gained as manifested by their question." That letter was a letter to Mr. Cohn, the attorney of the Hemenways? A. Yes.

Q. And on the 12th of October you received the letter from Mr. Cohn offering to sell the Hemenway's interest? A. I didn't get it, I was away on the 12th, Columbus Day, but I got it the next day.

Q. Between October 6th and the time you got

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that letter to sell, did you receive any offer from Mr. Cohn or the Hemenways for the purchase by them of the Smith holdings? A. No, there was no communication between the 6th and 13th.

Q. In answer to this letter then the next thing you heard from anybody was this offer by them to sell out to the Smiths? A. This letter of October 12th.

Q. What were the plans of reorganization which Mr. Smith talked to you about? A. Taking employes into the concern and putting them on the board of directors and giving them stock in it.

Q. Was there any other person suggested or talked about by Mr. Smith for the board of directors?

Mr. Lum:—I object to this line of examination. I think it is subject to the same objection made before.

Mr. Murray:—They asked about it themselves on cross.

The Court:—What bearing has that on it?

Mr. Murray:—To give the names of the other persons and corroborate it by them simply on the question of good faith on this purchase, as I said before.

The Court:—This was the directors' meeting when?

Mr. Murray:—December 9th. This was the meeting at which they were closing up that contract between Smith and Hemenway.

The Court:—Were the Hemenways there?

Mr. Murray:—The Hemenways were there

when the Crescent Tool Company was first mentioned. That was when Burnett first heard about the Crescent Tool Company. Before that the plans of reorganization, about October 29th when the contract was signed, was when this conversation took place regarding the reorganization I am speaking of, showing at that time Smith was proceeding to reorganize his plant with the idea of running it himself, which is entirely opposed with the idea of selling it to the Crescent Tool Company, which is what the complainants are trying to show. This absolutely negatives that proposition.

The Court:—When was that? When were those plans talked over between you and Mr. Smith?

The Witness:—I can't name the date. I was in error in answering the Court's question. You asked me a moment ago when he first talked about his plans. I said when the contract was signed. He really began to talk about those plans after our letter of acceptance of the offer was made.

Q. That was made October 12th or 13th? A. Yes, or thereabout. Sometime after he commenced to talk as to what he was going to do.

Q. Between what dates? A. After the contract had been made, which then consisted of a letter of offer, a letter of acceptance, and thereafter he talked about that from time to time.

Mr. Lum:—I ask to have that voluntary statement struck out.

Q. Was it between October 13th and November 4th?

The Court:—What difference does it make if it was after the agreement had been reached?

Q. Was there anyone else talked about by Mr. Smith for the board of directors?

The Court:—I will sustain the objection to that question because it is clear that this conversation was after the arrangement had been arrived at between the parties.

Mr. Murray:—Smith buys the Hemenways' interest. He gets it and he has it on his hands. Now, what will he do with it? What was his next move? He starts in to make plans to reorganize and get the employes in and get outside interests on the board of directors for business purposes and financial reasons, and so on. My contention is that that shows positively, if you assume it is true and believe that he was planning to run the business himself and not to sell it, as complainants claim.

The Court:—I am very hazy about this case which was partially tried last June. I think there is something in what you say. The contract which I refer to, that was the contract for the sale to the Crescent Tool Company.

Mr. Murray:—No. Here was the situation: On October 12th the attorney, Mr. Cohn, the

attorney of the Hemenways, wrote a letter to Mr. Burnett as the attorney of the Smiths, that the Hemenways would sell out. That was immediately accepted on the 13th.

The Court:—When did the Crescent Tool Company come into existence?

Mr. Murray:—The final contract was made on January 19th, 1926.

Mr. Lum:—Mr. Smith's brother went up to the Crescent Tool Company on the 4th of November. Immediately this was signed, instantly, and, of course, what would he talk about?

The Court:—I will receive it. I was under the impression that their contract was dated the 29th of October.

Mr. Murray:—The Crescent Tool Company did not come along until January.

The Court:—I will admit the question and I will overrule the objection.

Q. (Question repeated as follows: Was there anyone else talked about by Mr. Smith for the Board of Directors?) A. Yes.

Q. Who?

Mr. Pratt:—May we have the time and place of that?

The Witness:—I can't tell you the time, except it was after October 13th, after he had bought it. Then he commenced to ask me what to do with it? Do you want the names?

Q. Yes. A. Mr. Charles Niebling, who was

then the president of the American National Bank of this city, and myself. He said he wanted both of us on his board of directors. The other man he talked about was—he didn't mention any other names, but he said he had several employes up there at the plant that he would like to put on and give them a share in the profits and put them on the board of directors.

Q. Did you ever talk to Niebling about that?

Mr. Lum:—I object.

Mr. Murray:—I withdraw it.

Q. On the 6th of October, after these proceedings in New York County had been started, you served notice on Mr. Cohn in writing that the Hemenways must either make an offer to you by the 15th to sell, or you would go on with the proceedings, and on the 12th or 13th you received that offer which you accepted over the telephone. That was reduced to a permanent contract dated October 29th and actually delivered into your hands by mail from New York City to Newark on the first of November, isn't that so? A. I think that one thing you said is wrong, I am not sure. I think he said that the offer was made to me over the telephone.

Q. Yes. A. No, it was not. Pardon me. It was made by Mr. Cohn's letter dated Columbus Day, October 12th.

The Court:—You said it was accepted over the telephone.

The Witness:—Then when I got that letter

I sent for Mr. Smith and talked it over with him and then accepted that over the telephone and then confirmed the acceptance by letter of October 13th, the same day.

Q. You limited the time from October 6th to October 15th for the Hemenways either to offer to sell out or for the proceedings to go on, that is so, is it? A. Yes. You are refreshing my memory. I forgot that I had named October 15th.

Q. And they mailed you their offer three days before the time expired, October 12th? A. They must have, I got the letter.

Q. And you replied over the 'phone on the 13th you would accept it? A. Yes.

Q. And the formal contract was dated October 29th and finally signed and delivered to you November 6th? A. I have forgotten the date on which I actually got it.

Recross Examination by Mr. Pratt:

Q. Over what period of time did your talks with Cohn about this subject cover? When did your talks with Cohn start on this subject? A. The whole subject?

Q. Yes. A. You will have to let me see the date of my first letter. May 28th, 1925, that was, wasn't it?

Abraham Edward Fuller, a witness produced on behalf of the defendants, being duly sworn according to law, on his oath testified as follows:

Direct Examination by Mr. Murray:

Q. What is your business? A. Salesman.

Q. And were you connected with the Smith and Hemenway Company? A. I was.

Q. Over what period? A. I began with them in 1914.

Q. And you terminated your connection with them? A. 1920, and went back again in 1923.

Q. And stayed how long? A. Up to the time that they sold to the Crescent Tool Company, and I am with the Crescent Tool Company at this time.

Q. In what capacity were you connected with the Smith and Hemenway Company during these two periods? A. As salesman in the Metropolitan district in New York City.

Q. Were you employed on a salary basis or salary and commission, or how? A. Up to 1920 on salary. From 1923 until they sold out to the Crescent Tool Company, on commission.

Q. With an allowance for expense account? A. When on salary my expenses were paid.

Q. What was your experience we will say during the period of 1923-1924-1925 with regard to the promptness or lack of promptness with which your salary was paid? A. A drawing account that I got weekly, and then at the end of the month I made a statement showing what was shipped and

whether I had earned my drawing account or less. It was then understood that I was to get my check between the 10th or the 15th of the month following shipments.

Q. Did you get it? A. Not regularly, no, sir.

Q. How long overdue were your checks as a rule? A. They varied; sometimes it went over ten days past the 15th, perhaps 45 and 50 days.

Q. How would the checks be dated with reference to the date when you received them? A. They would be pre-dated. They would be dated approximately three four days after when I should have received them.

Q. But you wouldn't receive them until long afterwards? A. That is it.

Q. Did you ever talk to Mr. Hemenway about that? A. Occasionally I asked him if he wouldn't when he went back to the factory ask to have the check released as I had had certain needs for it at certain times.

Q. What was his attitude on these occasions? A. He would never commit himself. He said he would see about it when he got there, but I don't believe it helped in bringing the checks any sooner.

Q. It didn't seem to have any appreciable effect? A. No, sir.

Q. What can you say in the same regard with reference to the period from 1918 to 1920? A. I had no commissions coming to me then; it was a salary and I got that weekly.

Q. You got that without any trouble? A. Yes.

Q. During the second period of your employ-

ment with the company do you know whether the company was up-to-date on filling its orders? Did it fill them promptly or slow or what was the situation? A. They were exceptionally slow.

Q. Can you give us any idea what you mean by exceptionally slow in point of time? A. I can tell it to you in my own way.

Q. I wish you would. A. I would take an order on the first of the month for perhaps 12 items, and the factory would ship maybe five and back-order the other seven items. Sometimes the customers would get the seven items in a month, other times he would get part of the seven and there would be a third section, and the order to be shipped would take from 30 to 60 days to complete.

Q. On what date were they supposed to be shipped? A. Anywheres from three days to a week after the receipt of the order at the factory.

Q. Did you have any complaints from your customers because of that condition of affairs? A. Yes, indeed.

Q. Were the complaints the exception or the rule? A. I would say they were the rule.

Q. What effect did that have, if any, on your ability to sell the company's goods? A. It made me have to use as much diplomacy as I could command because I would have to give various excuses and have to watch what I said in order to keep in the good graces of the customer and keep retaining his goog will. It was a case more of satisfying the customer on his last shipments than it was of selling the goods themselves.

Q. You would go to him to sell a new bill of goods and find he didn't have the previous order filled? A. That was quite regular, yes.

Q. Do you know Mr. Tenney? A. Yes.

Q. He was one of the salesmen of the company. He testified here last June. A. Yes.

Q. Did you ever hear him say whether or not he had trouble with delayed checks and expense accounts and so on?

Mr. Pratt:—I object.

Mr. Murray:—He testified that he never had any trouble.

The Court:—I will receive it.

Q. Did you ever hear Mr. Tenney talk or say anything about whether his checks were on time? A. I never did because I saw him very very rarely, sometimes an entire year.

Cross Examination by Mr. Pratt:

Q. Who had charge of manufacturing and shipping these goods out to the customers? A. As I understand it the factory superintendent had charge of the manufacturing of the goods.

Q. And who was directly over the factory superintendent and the operation of the mill? A. Mr. Smith.

Q. Mr. Smith also was over the shipping room, wasn't he? A. Mr. Smith was at the Irvington plant, the head of the plant.

Q. Wasn't that where the goods were shipped from? A. Some were.

Q. So that delays in shipment were at least

in part traceable to the plant and to Mr. Smith? A. I can't tell you. I can't answer that for I don't know what the causes were.

Q. You know that Mr. Hemenway was the financial man and was supposed to know nothing about the operation of the business except the finances, didn't you? A. I knew Mr. Hemenway was treasurer of the firm.

Q. Who was your immediate superior as a salesman? A. Mr. D. G. Smith.

Q. That is the Mr. Smith, the defendant L. P. Smith's brother was your boss? A. Yes.

Q. And you turned in your statements to him? A. What statements?

Q. Statements of commissions earned? A. No, I never turned them in. They would send them it. I mailed my orders.

Q. You would send them orders and they made up the statements? A. Yes.

Q. Who would mail you your check? A. Someone at the factory.

Q. Was it Mr. D. G. Smith? A. I don't think so.

Q. You don't know who it was? A. No, I think the accounting department sent my check.

Q. Mr. Hemenway was regularly in the New York office? A. Yes.

Q. You knew he spent most of his days there? A. Yes.

Q. Until about 7 o'clock at night many days? A. I never came back evenings so I don't know how long he stayed there. He stayed there the full

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business day. I left the office at about 9 or 9:30 and never came back until the next morning, except an occasional call.

Redirect Examination by Mr. Murray:

Q. What time did Mr. Hemenway arrive in the New York office? A. If I was in the office about 9:30 he would probably come in. Then sometimes I would meet him on the way out, quarter of ten.

Q. Who signed the checks that you got? A. In the majority of cases I believe it was Mr. Hemenway.

Recross Examination by Mr. Pratt:

Q. Was Mr. Smith's signature countersigned on them? A. I believe the only time was when Mr. Hemenway wasn't in town.

Q. Didn't Mr. Smith countersign checks? A. I don't recall.

Ernest B. Odgers, produced as a witness on behalf of the defendants, being duly sworn according to law, on his oath testified as follows:

Direct Examination by Mr. Murray:

Q. You were connected with the Smith and Hemenway Company as a salesman at one time? A. Yes.

Q. In what period? A. 1907, I think.

Q. To when? A. Until the present time, with the exception of about seven or eight months.

Q. When was that seven months? A. Last year.

Q. Up to 1926? A. Yes.

Q. Where was your territory? A. The middle west.

Q. On what basis were you employed, salary, commission or what? A. On a drawing account and commission.

Q. What have you to say as to the promptness or lack of promptness with which your checks for your expenses and commission checks and salary checks were received? A. Checks weren't on time as a rule.

The Court:—Just how important is this?

Mr. Murray:—Counsel for complainants stated at the close of their case that the bringing of these dissolution proceedings in New York by Smith was an abuse of process in that it wasn't brought in good faith, it was brought without reason. Whether there is anything in that as a matter of law or not we

proposes to show conditions obtaining all through that business. We propose to show that they were financially embarrassed, they held up salary and commission checks, they would delay paying their bills and they had an overstock of some things and an under stock of others; and the whole thing was run in sixes and sevens, and that was a just reason for Mr. Smith to take the action he did, and the reason for taking the New York proceedings.

The Court:—You put several salesmen on the stand who said they received their checks uniformly late. How many more witnesses to the same effect have you?

Mr. Murray:—I am going to have one other witness besides this man to the same effect, and then I propose to put on a man who had charge of sending them out and show why—

The Court:—If he shows they didn't have the money to send them out, that is more important to me.

Q. In the course of your dealings with your customers did you have any complaints as to dislike of Mr. Hemenway? A. Not personally; in his method of collection they took exception to his letters that he wrote to the trade.

Q. What do you mean? A. He had rather an abrupt way of going after the customers if they were late with their payments a little.

The Court:—Isn't that chronic with debtors?

Q. What was the effect on your ability to do business with them? A. In some cases it made it rather hard.

Q. What have you to say about slow shipments, if any—— A. The shipments were particularly—in 1924 were very slow.

Q. Did you ever talk to Mr. Tenney with regard to the salary check business? A. He has complained to me several different times about his checks. Once at Atlantic City, I remember.

Cross Examination by Mr. Pratt:

Q. Mr. Hemenway, when the company was hard up for ready money, when orders weren't filled by the factory and customers dissatisfied, he did try to get in his money for what they already shipped so he could pay you fellows off? A. I presume he did.

Q. Mr. Hemenway was always a man who was courteous and reasonably spoken, wasn't he? A. I think so.

Q. You had a strong personal friendship for him, didn't you? A. Why, yes.

Emory B. Hatch, produced as a witness in behalf of the defendants, being duly sworn according to law, on his oath testified as follows:

Direct Examination by Mr. Murray:

Q. You are connected with the Smith and Hemenway Company as a salesman and have been for what period? A. From March, 1922.

Q. You had this same trouble about delay in checks? A. To a great extent.

Q. Did you ever have to lay over on the road and wait for checks? A. No, I think not, because I wasn't entirely dependent on those checks.

Q. If you hadn't you would have had to? A. They weren't on time.

Q. Did you have any trouble with delayed shipments with your customers on the goods you sold? A. Very much.

Q. Was that an exception or a chronic condition? A. I would say chronic.

Q. Did customers complain? A. Yes.

Q. Any of them quit—cease doing business with you? A. Yes.

Q. Before you came with the Smith and Hemenway Company where were you employed? A. I was a buyer.

Q. Did you have any knowledge or hear anything regarding the friction between Smith and Hemenway? A. I don't know that it was between Mr. Smith and Mr. Hemenway, but they knew there was friction at the plant.

Q. How did you come to know that? A. I

think it was quite general among all the trade. I know it was when I had my territory.

Q. You were a buyer for a concern where? A. Philadelphia.

Q. And that was one of the biggest concerns in the country? A. Largest in the east.

Q. There was trouble and friction in the plant somewhere and that was a matter of common knowledge? A. Yes.

Q. In the business, I mean? A. Yes.

Q. Did you come in contact with Mr. Hemenway personally? A. Very little.

Cross Examination by Mr. Pratt:

Q. Mr. Hatch, your business was with D. G. Smith, the defendant's brother? A. To a great extent.

Q. You sent in your orders to him and what process these orders followed through the factory either in manufacturing or payment to you you don't know? A. They weren't sent to me personally.

Q. You know that Mr. Hemenway did try to get in his money for his goods right along and sometimes people kicked about it because he tried to get the money in, is n't that so? A. I presume he tried to get his money.

Q. That is what they kicked about, his insisting upon prompt payment? A. I don't know as it was so much prompt payment as the attitude in trying to get it.

Q. Did you ever see any of his letters? A. No.

Q. Did you ever bring them to his attention? A. No, not to his personally.

Q. Mr. Hemenway was a fellow who was pleasant to people that he met? A. As far as I know.

Q. Wasn't he pleasant to you? A. Yes.

Q. Did you ever try to sit in any business conferences about the Smith and Hemenway Company affairs? A. I was to have a conference with him at one time after a sales meeting.

Q. Did you have it? A. No.

Q. Why not? A. He didn't stay for it.

Q. Did you ever have any conference with him before or afterwards? A. I had tried to. I never was in a conference with Mr. Hemenway personally.

Q. You couldn't get him in conference? A. No.

Joseph Scharfenberger, produced as a witness on behalf of the defendants, being duly sworn according to law, on his oath testified as follows:

Direct Examination by Mr. Murray:

Q. Mr. Scharfenberger, you are employed now by whom? A. Langdon P. Smith, Incorporated.

Q. That is the defendant here, Langdon P. Smith? A. Yes.

Q. You were connected with the Smith and Hemenway Company up until 1925 and 1926 in what capacity? A. Purchasing agent and taking care of accounts payable.

Q. And you were connected with the company how long? A. Ten years.

Q. We will say 1923, 1924, 1925, who had charge of sending out the checks in payment of the bills both for merchandise and salesmen? A. I did.

Q. What was your system? Who sent the checks to start with? A. Mr. Hemenway, and when he wasn't there, Mr. Smith.

Q. Who signed most of them? A. I should say it was about equally divided.

Q. Who prepared the checks and O. K.'d them for signature? A. I did.

Q. Was it the practice of the company to pay its salesmen on time when they should be paid and to pay the merchandise creditors when they should be paid, or what was the condition? A. They weren't paid on time.

Q. You are referring to what, the salesmen? A. Both salesmen and bills.

Q. Why were they not paid on time? A. Due to lack of funds.

Q. What was the company's financial condition at that time with regard to cash? A. The cash was very little.

Q. Where did you bank ? A. Three different banks, Irvington, Newark, New York.

Q. Just state how you handled these bank accounts and the checks. A. The deposits would be made up for the day and deposited in the Irvington National Bank at Irvington, and from that bank we would transfer to the other banks to keep a little balance there.

Q. What was the purpose of this transfer? A. We paid out all bills from one bank in New York, and therefore we had to take care of such checks as were drawn against that bank by making a transfer.

Q. You had notes owing out of three banks? A. Yes.

Q. Why didn't you make a deposit in the bank which you were going to draw against in the first instance? A. The Irvington National was very handy to put the money in instead of mailing it.

Q. How long would the money stay there? A. Possibly 24 hours.

Q. In other words, you put it in and took it right out again? A. Yes.

Q. Why was that? A. I would have to draw some checks to satisfy some people from the New

York bank, and in that case I made that deposit. If that deposit was made I would have to draw against it to cover against what I drew out of the New York bank.

Q. Did the New York bank or the American bank or Irvington bank ever complain of that method of doing business? A. Yes.

Q. What was the nature of their complaints? A. The complaint was that we never kept a balance sufficient for the loans that we had in the bank.

Q. Do you know what your loans were on an average at that time? A. It averaged from 15 to 20 or $25,000 in each bank.

Q. About how much cash did you have on hand daily? A. $800 to $1,000 in each bank.

Q. And your accounts payable ran up to how much as a usual thing on the average,—approximately a monthly average? A. I should say about $40,000 accounts payable.

Q. In other words, you were juggling $40,000 worth of accounts payable with $1,000 cash?

The Court:—Mr. Murray, do you think it is altogether fair for you to characterize what he says? He can state the facts and I will place my own construction on them.

Q. Were you required to reduce these notes at the bank? A. Yes, sir.

Q. Did you ever draw checks against funds that were not there in the banks at the time? A. Yes.

Q. How did you meet them or expect to meet

them? A. Didn't let them go out until I could meet them.

Q. You would draw the check and then hold it until you got enough money in the bank to meet it? A. Yes.

Q. And was that a common occurrence or exceptional? A. Yes, sir, a common occurrence.

Q. Did you discount your bills? A. Some of them.

Q. What portion of them? A. About $50,000.

Q. Did the merchandise creditors that you owed money to make any complaint to you about not being paid? A. Yes.

Q. What did you do when they complained? A. We would have to make them some excuse, hold them off for a while to see if we could get some money in from accounts receivable.

Q. Who was your direct superior? Did you go to anybody and talk to anyone about this condition of affairs? A. Yes, I went to—I talked to Mr. Hemenway about it, about the accounts payable.

Q. How many times? A. I should say half a dozen times.

Q. And what answer would you get? He said he will be able to take care of it.

Q. Did you ask him to get the company on a different financial basis or adopt a different system so you wouldn't have to use these methods? Did you ever ask him to do that or suggest that he do it? A. No, I did not.

Q. Do you know whether anybody did or not? A. I don't know.

Q. Do you know when Mr. Hemenway went to Europe? A. Yes.

Q. That was in 1923, the summer, wasn't it? A. Yes.

Q. Do you know what provision, if any, was made for the handling of the finances while he was gone? A. None that I know of.

Q. Do you know whether or not he did make any or didn't make any?

The Court:—He said none that he knows of.

Q. Did you need any money for the company while he was gone? A. Yes.

Q. How did you get it? Where did you get it? A. I was dependent on accounts receivable coming in.

Q. Do you know whether anybody borrowed money personally for the company or not? A. Yes.

Q. Who did? A. Mr. Smith.

Q. Do you know whether the notes that the company gave to the various banks were endorsed by anyone or not? A. Yes, they were endorsed.

Q. By whom? A. By both Mr. Smith and Mr. Hemenway.

Q. And when Mr. Smith used to go away what would be done about notes which would mature while he was gone? A. Mr. Hemenway would endorse it and leave it with the bank for Mr. Smith's endorsement upon his return.

Cross Examination by Mr. Pratt:

Q. Were you under Mr. Federson or over him? A. Under him.

Q. The last six months from January 1st, 1925, to June 30th, 1925, you did take discount on your bills of $3797, nearly $4,000, didn't you? A. I don't recall the amount.

Q. Did you do some work on this inventory, Exhibit C-42? A. No, I don't believe I did; Mr. Federson did that.

Q. You didn't have anything to do with making up the semi-annual statement of the company? A. No.

Q. But you do know that your loans at that time had been reduced under 1924, didn't you? A. No, I didn't know that they had been reduced.

Q. And know that your interest rate in 1925 was considerably lower than 1924? A. I can't say.

Q. Against these $45,000 loans you have indicated the company owed at the close of business 30th of June, 1925, they had finished merchandise of $93,000 and accounts receivable of $89,449, didn't they? A. I don't know that; I can verify that.

Q. Something better than four to one. You don't know about that? A. I didn't have anything to do with the accounts receivable.

The Court:—Isn't there some substance to what you testified to that the company was short of money at times?

The Witness:—Yes.

Q. And couldn't pay its bills on time? A. Yes.

Q. And that was due to the fact that bills due it were not paid? A. Yes, sir.

Perry J. Shaffer, sworn for defendants.

Direct Examination by Mr. Murray:

Q. Whom are you employed by now? A. Bound Brook Oilless Bearing Company, Bound Brook, New Jersey.

Q. You were with the Smith & Hemenway Company from 1916 to 1917? A. From 1916 to 1920.

Q. And in what capacity? A. Started as tool designer and tool maker, and from that to foreman of machine room, and then general foreman.

Q. When you were general foreman, who were your superiors? A. Mr. Paul Ketcher was the superintendent.

Q. Who else was there? A. Mr. Way.

Q. What was his job? A. That I could never understand what his job was.

Q. While you were connected with the Smith & Hemenway Company, did you know of any friction between Mr. Smith and Mr. Hemenway? A. I had heard of it, and it was common talk.

Q. Common talk where? A. Common talk among the foremen of the plants in the various departments and through the office.

Q. How long did that condition continue; for

what period? A. For the entire period I was there.

Q. Was it discussed among the foremen? A. Yes.

Q. What were the conditions in the factory that you observed in 1920? A. What conditions have you reference to?

Q. About the way the factory was run, the way the production was gotten out, and so on, management? A. The management was very poor; the quality of work turned out was also poor. The equipment for turning out the production was worse.

Court:—What was your position?

Witness:—General foreman.

Court:—Of the plant?

Witness:—Of the plant.

Q. What was wrong with the equipment? A. It was obsolete, old and out of date.

Q. And that had the effect of what; doing poor work or slowing up production? A. It had the effect of both.

Q. Seriously or to a minor degree? A. Quite seriously, I would say.

Q. During the time you were there, up to 1920, was the company well up with its orders, or was it behind with its orders? A. Far behind.

Q. That was due to what, you say; the men and the equipment both? A. Men and equipment.

Q. Anything else? When you say "men," whom do you include? A. I include the labor; labor conditions particularly at that time.

Q. What about the management? A. The management was—Mr. Ketcher, he was new on the job.

Q. How long had he been there? A. He came there in 1920.

Q. What month, do you remember? A. I don't remember; I cannot say.

Q. He was a new man in the factory. Who else was there at the head of the factory department who had had experience? A. Mr. Way was supposed to be.

Q. Did Mr. Way ever give you any help? A. None at all.

Q. Did you ask him to? A. Yes.

Q. Why didn't he give you some? A. He didn't understand the conditions.

Q. How did the quantity of production and quality of production compare with before and after Way was there? A. The quality practically diminished; the quantity came up a little bit.

Q. During Way's regime the quantity came up somewhat and the quality diminished? A. The production came up periodically; it would be one month up and the next month way up.

Q. When you say "way up," what do you mean in terms of per cent? A. Ten or fifteen per cent.

Q. What was wrong with the quality? A. Seconds.

Q. What were you making there? A. Pliers, nail pullers, glass cutters and linemen's tools.

Q. How many different kinds of articles did

you make there altogether? A. I would say over a hundred.

Q. What was wrong with the quality; in what respect was the quality deficient? A. We were not able to hold the position to turn out work simultaneously, one after another, correctly.

Q. What was incorrect about it? A. The machines were obsolete; they wouldn't hold the position; the cutters would shift.

Q. That would have what effect on the article you were producing? A. The joints on pliers were supposed to be closed; by the machine getting out of alignment, there would be open joints, causing a second.

Q. You produced an article you sold for a second, instead of a first-class article, you mean? A. Yes.

Q. What was the proportion of firsts and seconds? A. Offhand, I would say maybe fifty fifty.

Q. About as many seconds as you produced firsts? A. Yes.

Q. Under normal conditions, what is a proper proportion? A. Handling that quality of tools, I would say from fifteen to twenty per cent.

Q. How long have you been in the tool business altogether? A. Since 1909.

Q. These were finely tempered articles, case hardened? A. Yes, and some were tool steel.

Q. What condition were your case hardening furnaces in? A. Very poor condition.

Q. What was the condition? A. The fire brick would not stand up, due to inferior quality of

brick, and subject to weather conditions in the back; too close to the outside wall of the plant, hot and cold exposures.

Q. What effect did that have on the articles which you were case hardening? A. Uneven temperature.

Q. That would have what effect on the article itself? A. Uneven cutting qualities of the pliers.

Q. One would cut and another one wouldn't cut, you mean? A. Yes.

Q. Or they would cut to different degrees of efficiency? A. Yes.

Q. Was there harmony between you and Way and Ketcher during the time you three were together? A. I would say no.

Q. What was the trouble? A. The principal trouble was the way he tried to tell us what to do, and he didn't know himself.

Q. Did you have any trouble with Ketcher? A. Yes, the ordinary trouble running any plant.

Q. Nothing out of the way with him? A. No, not particularly.

Q. Can you give any instances in which Mr. Way didn't know his job, didn't know his business? A. In the erection of a certain countershaft, recall at present, in the polishing room, we had to put it up and take it down two or three times to get it so we could operate it the following Monday morning. We worked all day Sunday; we put it up according to blue prints he made out, and they were wrong.

Q. Did you make any report to Mr. Smith about this condition? A. I think I did.

Q. I show you a number of papers dated May 14, 1920, addressed to Mr. L. P. Smith; whose handwriting is that? A. Mine.

Q. When did you make them? A. The date given on those papers.

Q. Will you look over that and refresh your memory as to the things and conditions in that plant at that time? (Witness handed papers.) State some of the things that went wrong there and conditions which existed there, refreshing your recollection from them. A. Do you want me to read my report?

Q. No, just give some typical instances of what you consider typical instances of conditions at the factory. A. We had an oil furnace which was installed in the rear of the plant to do away with using the Public Service current. We had a pulley on the generator. The oil engine was to operate the generator, for furnishing the current for the plant. We purchased a large pulley, Ideal pulley, to take up the slack on the belt. We had to cut that off and there were all kinds of stunts being put forward to take that off and file it, and it was impossible—impractical, and the entire plant spent most of the time out there watching him. Mr. Ketcher took it up then and it took him about two hours to do the job.

Q. Under whose directions were those attempts being made to do that work? A. Mr. Way's.

Q. Do you know whether Mr. Way understood hardening and tempering tools of that kind? A. From my experience, no.

Q. What makes you think not? A. Because he never bothered with that end of it.

Q. Did you ever ask him? A. Yes, I think I have.

Q. Are you sure?

Mr. Lum:—I object to this; Mr. Way is not a party to this suit.

Court:—How are you going to charge Hemenway with Way's dereliction? If Way didn't know his business, wasn't it as much Smith's business to displace him as it was Hemenway's?

Mr. Murray:—I will show one thing, that it was due to Mr. Hemenway that we didn't have the proper kind of equipment, and show that Mr. Way was hired for construction work, which he did not know something about, and while Mr. Smith was away Mr. Hemenway puts him on to superintend this factory, which he knows nothing about.

Mr. Lum:—This is in 1920, and it cannot be any justification for an illegal abuse of process in 1925, five years later; but it seems to me we are going so far afield, we will never finish.

Court:—The objection is sustained. You are taking up a lot of time with useless testimony, in my opinion.

Cross Examination by Mr. Pratt:

Q. You had trouble with superintendents down there, this fellow Ketcher? A. No more trouble with him than we had in any way.

Q. You had quite a little trouble? A. We didn't have quite a little trouble.

Q. Did you have any trouble with him? A. A little.

Q. Where did you write these letters to Mr. Landon P. Smith; where was he when you wrote them? A. I think I made out reports from day to day while he was away and handed them to him when he got back.

Q. Did Mr. Smith ask you to keep tabs on things? A. He did not.

Q. You took it upon yourself to keep an eye on things and make a report to him when he got back? A. Absolutely.

Q. You always told Mr. Way that you were a good friend of his, didn't you? Did you act friendly toward him or not? A. I did.

Q. Did you ever tell him that Mr. Smith promised you to advance you and had broken his word with you time after time? A. Not that I remember.

Q. You wouldn't swear that you didn't tell him that? A. No.

Q. You did tell a good many people that Smith never kept his word with you? A. I don't think I have.

Q. To how many have you told that? A. That I cannot say.

Redirect Examination by Mr. Murray:

Q. You left in 1920? A. Yes, sir.

Q. Just state how you came to leave. A. The old superintendent came back.

Q. What is his name? A. Yakey, and he had a grievance against me, and he was the one was the means of me getting out of there.

Q. He discharged you? A. He discharged me.

Q. Smith have anything to do with it? A. Not to my recollection, which afterwards I found out was right.

Carl Dege, sworn for defendants.

Direct Examination by Mr. Murray:

Q. Where are you employed now? A. Newark Modern Laundry.

Q. You were employed by the Smith & Hemenway Company as a chauffeur? A. Yes.

Q. When? A. 1918 to the day they sold out.

Q. You used to drive a car for whom? A. For Smith & Hemenway Company.

Q. Do you know how often Mr. Hemenway used to come out to the plant and when he used to come? A. Yes.

Q. How do you know that? A. I used to go to meet him at the Tube and bring him out.

Q. He used to come from New York? A. Yes.

Q. You met him at the Tubes? A. Yes.

Q. And was that the case all the time that you were there with the company, except when Mr. Hemenway was away? A. Yes.

Q. How many times, taking, say, 1923, 1924 and 1925, how often was Mr. Hemenway out there? A. On an average of three times a week; I would say three or four times a week.

Q. And what time of the day would he come out? A. I would get a call to meet him from two to half past one, and he would arrive half past three or four o'clock, get up to the plant around five and leave around six, half past five or six.

No Cross Examination.

Julia Mildred Smith, one of the defendants, sworn.

Direct Examination by Mr. Murray:

Q. You are the wife of Landon P. Smith? A. Yes.

Q. You are one of the defendants in this suit? A. I am.

Q. Mrs. Smith, do you remember in the early part of 1925, when a conference took place at your home between your husband and Mr. Hemenway and Mr. Isherwood? A. I remember very well.

Q. You didn't hear the talk which went on? A. I was not in the room, no.

Q. State what Mr. Smith's physical condition was at that time, and what it had been for two or three years prior to that time, so far as you observed it. A. Yes, Mr. Smith was in very bad health; he had high blood pressure; he was extremely nervous; he was very much worried over his business; he had a very severe carbuncle and was operated on by Dr. Charles Ill and taken to the hospital; he remained one week; it was a very serious operation and was caused by worry—

Mr. Lum:—I ask that that be stricken out, unless the lady can qualify.

The Court:—Strike it out.

Q. The operation was after this conference at your home, wasn't it? A. Mr. Smith had the carbuncle at the time of the conference.

Q. And the operation was afterwards? A. Yes.

Q. You say that he was worried; was there any evidence of that, that you could observe yourself? A. Absolutely.

Q. What was that evidence? A. He was very much upset over his business affairs.

Mr. Lum:—I ask that that be stricken out.

Q. Just what did you see? A. You mean in the conference?

Q. No, as to Mr. Smith's condition; you observed him at home; what was his condition which made you think he was worried? A. He was very nervous and irritable at times; he came home very tired at night and was worried constantly for several years.

Q. What about his sleeping and appetite? A. He slept very poorly and had several attacks of gastritis, stomach trouble.

Q. How long had that condition been going on at the time of this conference; how long before this conference? A. About five or six years.

Q. Was it growing better or worse? A. Growing worse.

Q. Did you attend the conference which took place at Mr. Isherwood's office, at which Mr. and Mrs. Hemenway were present and Mr. Cohn and Mr. Isherwood and your husband? A. I did not.

Q. There were some conferences in the fall of 1925; did you attend either of those? A. I never attended any of them.

Q. Any conferences? A. None at all.

Q. Were you at Mr. Cohn's office at the time they settled or tried to settle this purchase mat-

ter? A. I was at Mr. Cohn's in New York twice, the first week in Noember, passibly the third or fourth of November, and I was in Mr. Cohn's office again on December 8th or 9th.

Q. At the first conference at Mr. Cohn's office, Mr. Hemenway, Mrs. Hemenway, Mr. Cohn and Mr. Burnett were there, and you and Mr. Smith? A. We were all there.

Q. What was the attitude toward you and Mr. Smith shown by Mr. and Mrs. Hemenway? A. Very friendly.

Q. Was there any sign at all of dissatisfaction with the deal? A. None whatever.

Q. What makes you say they were very friendly? A. Mrs. Hemenway greeted me and called me by my first name, and was friendly and shook hands. Mrs. Hemenway has been a friend of my family for over twenty-five years—my mother's, and was always friendly.

Q. While the lawyers were attending to the legal end of the business, or business end, was there any conversation between you and Mrs. Hemenway or Mr. Hemenway? A. Never very much, no; we were very friendly; we didn't enter in it very much.

Q. Nothing of importance? A. No.

Q. Was there any discussion at that time in which Mr. or Mrs. Hemenway took part? A. At the first meeting?

Q. Yes. A. Not so much the first meeting.

Q. Was there any; did they take any part at all, Mr. or Mrs. Hemenway, in what went on?

A. They were always talking, of course. Mrs. Hemenway was always right at Mr. Hemenway's side.

Q. She was at that time? A. Yes.

Q. Did they discuss or engage in any debate or any discussion with either of the lawyers there? A. I don't remember any.

Q. At the second conference, was there anything said at that time about Mr. Smith going to sell the business or having sold the business, or the Crescent Tool Company, or anything along that line at that conference, by any one? A. Yes.

Q. At the first conference? A. Yes, at the first conference it was said.

Q. What was said, and by whom? A. When we tneered the room,—Mr. Smith and I came in with Mr. Burnett, and the first thing Mrs. Hemenway said—she looked at Mr. Smith and she said, "I heard you have sold to the Crescent Tool Company," and Mr. Smith said, "No, not yet."

Q. Was there anything more said? A. No.

Q. How do you fix that as being the first conference? A. I only went to two of them. I was only in the office twice, in Mr. Cohn's office, and the last time I remember very distinctly there was a great deal of discussion.

Q. You remember the last time? A. The last meeting on the ninth of December,—eighth or ninth of December.

Q. What was the subject of discussion at the last meeting? A. Mr. Hemenway was very much upset and very much irritated about things and

argued a great deal also and kept us there several hours; we had no lunch that day; we didn't get out until five for our lunch, and it was mostly the detail he objected to; he wanted to be sure that his salary was paid up until the last, and be sure that his dividends were paid, and details of that kind, small affairs.

Q. Was there something said about an electrical bill in connection with the Montreal property? A. Yes, and about transferring the property in Montreal, because the Laws in Montreal were different from our laws, and that was discussed by Mr. Hemenway.

Q. He took an active part? A. Yes, very active.

Q. Did he say anything at all indicating that he was objecting to carrying out the deal? A. No; as far as I could see, they were perfectly willing to go through with the deal.

Q. Did Mrs. Hemenway take any part in the discussion at that second meeting? A. Mrs. Hemenway seemed very friendly and satisfied; she said that they were going to invest their money in bonds, and seemed to be perfectly satisfied in every way; she told us that.

Q. Did she take any part in this discussion over the salary question or the dividends or their stock or the electrical bill on the Montreal property? A. Mr. Hemenway did most of that.

Q. Did Mrs. Hemenway? A. I don't think she said very much about it; she was right with

him, always right at his hand, sitting alongside of him.

Q. Mr. Hemenway did most of the talking? A. That day he did.

Cross Examination by Mr. Pratt:

Q. You say that on that day Mrs. Hemenway told you that she was perfectly satisfied with this deal, and told you what she was going to do with that money, Mrs. Smith? A. She didn't say she was perfectly satisfied, no, but she seemed to be satisfied; everything was very friendly. We shook hands good-bye, and she called me by my first name; she asked about my daughters, who were friends of hers; everything was very friendly.

Q. Mrs. Smith, didn't Mrs. Hemenway on that day tell you that you were taking from Mr. Hemenway the work of a lifetime? A. Not at all.

Q. She didn't tell you that? A. Not at all.

Q. She even discussed with you what she would do with the money that she and her husband were going to get? A. She mentioned they were going to invest in bonds; she didn't tell me personally. They mentioned that they were going to invest the money that we had given them, in bonds.

Q. Didn't Mrs. Hemenway say to you that the only reason under the sun they were selling this property was because Mr. Hemenway's health was bad, he couldn't stand a fight with you? A. Absolutely not.

Q. Quite sure of that? A. Quite sure of it.

Q. You are quite sure of it; you felt they were

perfectly satisfied to go through with the deal? A. Quite sure.

Q. You didn't think it was because your lawyer had written them that his waiting on them for a few weeks was no sign of weakness, and that they would either have to go through with the offer by the fifteenth or the company would go on with the dissolution? You didn't have any idea that that induced the sale? A. I didn't know much about that.

Q. You signed this petition over in New York, didn't you? A. Yes.

Q. You read it over before you swore to it, didn't you? A. Yes.

Q. You knew that the purpose of that petition was either to force Hemenway to sell or dissolve the company, didn't you? A. No, I did not.

Q. What did you think it was for, if it wasn't for that purpose? A. I thought the Hemenways were perfectly willing to buy us out, or sell out, or us to buy them out.

Q. When did you ever have that thought in your mind before, that they were willing to buy you out; did they ever make you an offer? A. I really didn't have much to do with the business part; that my husband attended to. I am not a business woman.

Q. If you thought they were willing to sell out to you or to buy out, why did you file this petition over in New York? A. I filed the petition, because I have absolute confidence in my husband

and I am always with him, and know that he is right.

Q. You were always with him? You were with him down at the Robert Treat Hotel? A. I was not.

Q. Mrs. Smith, on April 7, 1925, you say you didn't go to the Robert Treat Hotel? A. I absolutely did not go to the Robert Treat Hotel and know nothing about it.

Q. As a very dear friend of Mrs. Hemenway's you knew her handwriting, didn't you? A. I don't know whom you refer to.

Q. Mrs. John F. Hemenway? A. Yes, sir, I know her.

Q. Without reading the contents of that paper (witness shown paper), is that in Mrs. Hemenway's handwriting? A. It might be; I don't her writing well enough; I know her signature.

Q. You were very intimate with her for about twenty-five years? A. Not intimate; we have been friendly; the relations; because she lived in New York and I lived in New Jersey.

Q. You were intimate enough so she called you Julia? A. Not at that time we were not intimate; we were always good friends, and friends of the family.

Q. You were both officers of the company? A. Yes.

Q. You had seen Mrs. Hemenway's signature many times? A. Yes, I know her signature.

Q. You and her husband and the Hemenways were endorsers on hundreds of notes for a period

of years? A. I endorsed them when my husband asked me to.

Q. You were endorsers with Hemenways on hundreds of notes? A. I wouldn't say hundreds.

Q. Didn't you borrow money for twenty-five years on the joint endorsements of Mr. and Mrs. Hemenway? A. That I don't know.

Q. You don't know anything about the business of this company? A. I left everything to my husband.

Q. You held most of the stock in your name, though, didn't you? A. Not that I knew of.

Q. You had some of it in your name? A. Yes.

Q. Will you just give me your honest opinion; is that or is that not Mrs. Hemenway's writing? A. It looks as if it might be, but I don't know her writing, because I haven't had very many letters from her; I know her signature.

Q. Mrs. Smith, will you say that Mrs. Hemenway didn't make this writing in the presence of your husband and yourself, in order that there might be no dispute as to what talk you had at the Robert Treat Hotel? A. I never saw that letter, which you refer to, and I wasn't present at the Robert Treat; I told you that before.

Q. You are quite sure about that? A. I am positive I was not present.

Q. Did your husband meet them at the Robert Treat? A. I think he had a meeting; I think he spoke of it, but I was not there.

Q. As a matter of fact, you never had any talk about this transaction, except you casually went to Mr. Cohn's office to sign your name? A. I didn't go casually, no; I went with my husband, because it was my duty to go with him when we bought the business out, to sign the papers; being a stockholder, I had to give my signature.

Q. Did you know anything about the value of that company? A. They had money trouble and business trouble.

Q. I asked you about the value of that company. A. No.

Q. Did you know anything about the value of the company? A. No, I cannot say I did.

Q. 1925, when the Hemenways so willingly transferred their stock to you and your husband, did you then have any idea of the actual value of the stock which you and your husband were purchasing? A. No.

Q. You didn't know anything about that, did you? A. No.

Q. You did know what the book value of the company was, didn't you? A. No, I never looked at the books.

Q. Did you ever see a statement of the company's condition? A. No, I think I left that entirely to my husband.

Q. On these nights when your husband came home tired out and irritable, worried to death about his business, and when he walked the floor and couldn't sleep, didn't he ever tell you any-

thing about the condition of the company? A. He told me that he was very much worried and wanted to get out of the business.

Q. I ask you if he ever told you anything about the condition of the company, its value? A. He didn't tell me the value of the business, no.

Q. He told you he wanted to sell out? A. He wanted to get out.

Q. And the time that Isherwood came up there, your husband wanted to sell out to Hemenway at any price, for $100,00? A. He was willing to do either one, to buy or sell, just so he could get out of business.

Q. Was your husband willing to sell for $100,000 at that time? A. I think they had an agreement of that kind; I am not sure of that; I wasn't there

Q. You were in and out? A. No, not at all.

Q. Didn't you hear this conversation which lasted from the middle of the afternoon until after the supper hour? A. No, the conference was on the third floor of my home; my husband had an office on the third floor, and I was downstairs, but I remained home because Mr. Smith was very nervous, and he had this carbuncle, and he was a sick man at the time.

Q. Didn't you ever have any discussion about the purchase of that company by you and your husband at all? A. No.

Q. At its book value? A. No.

Q. Did you ever have any conversation or any writing between yourself and the Hemenways

about their buying it at book value? A. Not at all.

Q. You are quite sure about that? A. I never wrote to the Hemenways in any form at all.

Q. I didn't mean any letter, I meant in the form of an agreement. A. No, I had nothing to do with that.

Q. You did know that your hhusband, through Mr. Isherwood, proposed to buy Hemenway out by taking in exchange the stock of both Hemenway and his wife for $100 preferred stock, to be paid out over a period of, I think, something like twenty years. You knew that, didn't you? A. I knew that Mr. Isherwood came up to the house because Mr. Hemenway and my husband were having a very heated argument——

Q. I didn't ask you that. Just answer the question. (Last question repeated) A. I think Mr. Hemenway agreed to do that.

IN CHANCERY OF NEW JERSEY.

Between

Alice M. Hemenway individually and as executrix of the last Will and Testament of John F. Hemenway, deceased,

Complainant,

-and-

Landon P. Smith and Julia M. Smith,

Defendants.

Continuation of proceedings in the above entitled cause before Hon. Maja Leon Berry, Vice Chancellor, at the Chancery Chambers, Newark, New Jersey, on Wednesday, September 28th, 1927, at 10 A. M.

Present: Counsel as before stated.

Julia Mildred Smith, recalled for further Cross

Examination by Mr. Pratt:

Q. Mrs. Smith, during these negotiations and up to the time of the sale of the Hemenway stock to yourself and your husband, at all of the times that have been mentioned here in 1925, you were an officer and director of the company, were you not? A. Yes.

Q. And what office did you hold? A. I don't really know what office I held; I was a stockholder, I believe.

Q. Don't you know whether you were secretary? A. I never had any position at all as an officer in the company.

Q. Did you hold any office? A. I don't know.

Q. You were present at every directors' meeting, were you not? A. No, I don't think I was.

Q. Isn't it a fact that it was your custom to go to directors' meetings and have all four of the directors to sign the minutes of each meeting? A. Yes, I have signed, but I don't think I even read over many directors' meetings.

Q. So that you only signed the minutes after the meeting was held? A. I signed whenever my husband asked me; whenever it was necessary for me to sign, I signed them.

Q. You used to sign the minutes of the meetings? A. Yes, but I didn't read them.

Q. You just signed the minutes without going to the meeting? A. I think so, yes.

Q. You were there when dividends were declared on the stock different times? A. Where?

Q. At the directors' meetings. A. No.

Q. You were at any of the directors' or stockholders' meetings when a vote was had on the increasing of the capital stock? A. No, I don't think I was.

Q. Don't you know that you attended each of those meetings? A. Where were the meetings?

Q. If you will just answer my question. Don't

you know that you did attend the meetings of the company? A. No, I don't think I did; I think the meetings were held at my husband's office, and I very seldom went to my husband's office.

Q. Did you ever hear that the capital stock of this corporation was increased from a small amount up to $500,000? A. No.

Q. Do you know how much stock you had in the company? A. I had a very small amount; it didn't bother me much.

Q. I asked you how much you had. A. Not very much.

Q. You didn't know anything about this corporation at all, then, did you, outside of the fact that there was such a company? A. Yes, I knew there was a company, and I knew my husband was the president of it.

Q. And outside of that you didn't know whether it was incorporated for ten dollars or half a million? A. I don't know much about it; I left everything to my husband, because I am not interested in business.

Q. You were not interested in your ownership of stock in the company? A. Not particularly, no.

Q. Was that your stock, or your husband's stock carried in your name? A. It was in my name, I believe.

Q. You didn't pay for that in any way? A. A. No, I think he gave it to me.

Q. And carried it in your name? A. Yes, I always had to sign.

Q. You knew absolutely nothing about the business conditions of the company then? A. When?

Q. In 1925. A. I know that my husband was very much worried over business conditions, but I didn't——

Q. I asked you about the company, not about your husband. Did you know anything about the condition of the company in 1925? A. I only knew what my husband said; I didn't investigate it.

Q. You testified at the last hearing, as I recall it, that your husband never discused the condition of the company with you; you didn't know anything about the business condition of the company? A. Oh, yes, my husband did discuss it, but he didn't go into details of the matter.

Q. Did he ever go into details sufficient to let you know that you held the greater part of $200,000 worth of stock of the company; did he ever tell you that? A. I knew, of course, I had stock, but——

Q. He never indicated to you how much stock you had, did he? A. I don't think he did.

Q. So that you really never knew how much stock he had, is that right? A. I guess it is right.

Examination by the Court:

Q. Were dividends paid on the stock? A. Why, yes, I think they were.

Q. Did you ever receive any dividends? A. I think my husband deposited them for me. I really never had much to do with the business, because

I am not a business woman at all, and I didn't understand it, and I left it to him.

Q. I understand that, but counsel has asked you about your ownership of the stock, and I am trying to determine whether it was your stock or your husband's stock standing in your name. A. I suppose it was my stock; he told me that he had given me the stock, and I had to sign my name.

Q. I understand that; did you get the dividends on the stock or did he? A. He got the dividends.

Q. On your stock as well as his own? A. But I think he deposited them for me.

Q. He deposited them in your name, in your account? A. But I never received them.

Q. You didn't use them? A. No.

Q. If they were paid to you, you didn't have the benefit of them personally? A. No, sir.

Examination by Mr. Pratt:

Q. Didn't you have any information as to the book value of that company, as to how much it was worth on the books? A. I don't think I did know.

Q. You didn't know whether the company was worth $400.00 with a little surplus after charging off the stock outstanding or not, did you? A. No, I didn't.

Q. And you didn't know any of the details of how much money the company had in the bank at any time? A. No, I never bothered about it at all.

Q. You didn't know anything about Mr. Hem-

enway's work in the company? A. I knew, of course, Mr. Hemenway was the treasurer and secretary of the company.

Q. That is about all you knew about him? A. He was my husband's partner.

Q. Was that about all you knew about him? A. I never had much to do with the business. I never went to my husband's office.

Q. Was that all you knew about the business, that Mr. Hemenway was secretary or treasurer or something? A. That is about all, yes; I left everything to my husband; I have perfect confidence in him.

Q. You signed the petition for dissolution of this corporation in the proceeding in New York, did you not? A. Yes.

Q. Exhibit C-46? A. Yes.

Q. And did you read that over before you signed that and swore to it? A. I didn't read it over; I knew, of course, that my husband wanted to have the dissolution.

Q. You know that your husband wanted to bring this proceeding in order to force— A. What proceeding?

Q. This proceeding to dissolve the corporation, so as to force Mr. Hemenway to sell? A. Not all. My husband didn't say that.

Mr. Murray:—I object as improper. It is two questions combined in one.

Court:—Why is it improper?

Mr. Murray:—I object; it combines two

questions: that he wanted to bring this proceeding, and that he wanted to bring it for the purpose of forcing Mr. Hemenway to sell, the second.

Court:—Can't you answer the question as it is?

Witness:—I don't like the word "force."

Court:—He is not asking you whether you like the word "force". I ask you whether you can answer the question as it is.

Witness:—No, my husband——

Court:—Read the question over again.

(Last two questions and answers read to the witness).

Witness:—No, my husband did not.

Q. Do you know what he did bring the proceeding for; for what purpose? A. Mr. Smith was very anxious to get out of business, and he was willing to buy or sell.

Q. Did he ever tell Mr. Hemenway or Mrs. Hemenway that in your presence? A. Absolutely.

Q. And where was that that he told Mr. and Mrs. Hemenway in your presence that he was willing to buy or sell, and when? A. In my presence? I cannot say he said to both of them in my presence.

Q. So you were mistaken when you said that a moment ago? A. I know that he did want to.

Q. Just refresh your recollection. On the seventh of April, didn't your husband at the Robert Treat Hotel, in Newark, in your presence, say to Mr. and Mrs. Hemenway that he would

exchange $100,000 of preferred stock—no, $70,000 of preferred stock and the Montreal property to the Hemenways for their half interest in the company, with a provision that the $70,000 of stock should be retired at the rate of $5,000 a year, and that Mr. and Mrs. Hemenway said No; didn't he say, "That is a fair proposition; I will either buy or sell on that basis"? A. I told you at the last hearing that I was not present at the Robert Treat Hotel, and I have sworn to that fact.

Q. Did that ever occur in your presence between your husband and Mr. Hemenway? A. It never occurred in my presence, not at all.

Q. So that you don't know of your own knowledge that your husband ever offered to buy or to sell to the Hemenways? A. Only what he told me.

Q. This correspondence of Mr. Burnett, the letter of July first and the letter of July 28th, in which he stated in substance that your husband and yourself would not sell, did that letter ever come to your attention, or those letters? A. Not at all; I have never seen the letters.

Q. And the authority for that was given to Mr. Burnett by someone other than you, if it was given? A. I suppose so, yes; I never discussed it with Mr. Burnett.

Q. Did you understand that you were taking your oath that the contents of the petition for voluntary dissolution of the Smith & Hemenway Company was the truth of your own knowledge, and that you had read the foregoing petition, that

you know the contents thereof, that the same was true to your own knowledge, except as to matters alleged on information and belief; did you know that that was the oath that you took? A. Would you mind telling me when that was; do you know when that was?

Q. Yes; when you signed this petition to dissolve the company, September 21, 1925. A. Why, I signed it, yes, but I don't remember taking an oath.

Q . You said that you didn't read the petition, but did you understand that you were swearing that you had read it? A. I know what it was about, but I didn't go into all the detail of it. I have signed a good many papers that I haven't read, Mr. Pratt, thoroughly.

Q. Did you know that you were swearing that you read that petition; did you say that you didn't know you were taking an oath?

Court:—That is what she said.

A. Possibly I did. Was it in Mr. Cohn's office? I probably did, yes.

Q. This was not in Mr. Cohn's office; it was in the office of someone representing your husband and yourself. A. I don't remember where it was.

Court:—Do you remember signing a petition?

Witness:—Yes.

Q. Did you know at the same time you signed the petition, you took an oath as to its contents? A. No doubt I did.

Q. I am not asking you about whether you have any recollection of it? A. Yes.

Q. Did you know that you did? A. Yes.

Q. And did you know at the time you took the oath what you were swearing to? A. Yes.

Q. This petition states that the petitioners--that means yourself and your husband—deem it advisable to the interest of the stockholders, that the corporation be dissolved. Will you state to the Court what you meant by that in the petition, and what interest there would be to the stockholders through such dissolution? A. I only knew that my husband wanted the dissolution; that is why I signed the paper. Aside from that, I don't know.

Q. You thought because your husband wanted it, that that would be a benefit to the stockholders; is that right? A. I wasn't thinking particularly of the benefit; I suppose it was a benefit, yes.

Q. You were not thinking of the benefit of the stockholders in bringing this proceeding— A. No.

Q. —but of accomplishing the end of dissolution? A. My husband wanted the dissolution, yes.

Q. Unless he could buy out the Hemenway interests? A. Not necessarily buy them; they could buy us, if they wanted to ; they had the privilage of doing it.

Q. What price did you ever fix on your interest in the company? A. I never fixed any price.

Q. You never knew what interest you had in the company? A. I never fixed any price.

Q. You never knew what interest you had in the company? A. No.

Q. Nor whether it was worth one dollar or two hundred thousand? A. No.

Q. You did know that your husband was the plant manager, didn't you? A. What?

Q. The factory manager? A. Yes.

Q. And that he had charge of the manufacturing and the shipping end? A. Yes, I knew that.

Q. And that his brother D. G. Smith had charge of the sales end of the business? A. Yes.

Q. During the past twenty years your husband frequently went away to the South for the winter, didn't he? A. He went for his health when he was told to go by the doctor; he was ordered on account of bronchial trouble, which he has in the winter.

Q. And so substantially every winter you and he took a trip South for his health? A. We went South several times for his health, for the climate.

Q. You went down the winter of 1924-25, didn't you? A. Yes.

Q. And just preceding this April conversation when Mr. Isherwood came to your house, you had just come back from the South then, hadn't you? A. We had been in the South that winter, yes.

Q. You had only been back a little while when your husband became ill with these carbuncles and you had Mr. Isherwood? A. My husband was quite ill that winter.

Q. And while he was away Mr. Hemenway stayed in New York and Irvington and ran the business, didn't he? A. I suppose he ran it.

Q. And that was true of the next preceding winter also, wasn't it?

Court:—Preceding, not following, 1923.

Q. The winter of 1923-24. A. Yes, my husband was away for possibly two months, on account of his health.

Q. You went to Havana one winter because of your husband's health; do you recall that? A. We were in Havana a short time, possibly a week.

Q. That was also on business for the company, the company paying the expenses? A. My husband attended to business while we were in Florida and Havana; he saw all the customers.

Q. While he was away for his health, he did attend to business and the company paid the expenses? A. Yes, he did attend to business.

Q. And that had been true as far back as 1915? A. My husband always attended to business every place we have been.

Court:—You don't pay attention to the question, Madam. Answer the question.

Q. Your husband was away during winters as far back as 1915, substantially every winter? A. No, he has been away, I should say, four times to Florida, because Mr. Smith in the winter has bronchitis.

Q. You told us about his bronchitis; he had been to other parts of the South besides Florida, hadn't he? A. Mostly Florida.

Q. And on one of those occasions he was away for some months and Mr. Glover Way was in the factory? A. Yes.

Charles Niebling, sworn for defendants.

Direct Examination by Mr. Murray:

Q. You are the president of the American National Bank? A. I was the president.

Q. For several years prior to 1925 you were president of the American National Bank? A. Yes.

Q. And the Smith & Hemenway Company kept an account there, and during that time you were the active manager of the bank as well as president? A. Yes.

Q. And were you familiar with that account of the Smith & Hemenway Company in your bank? A. Yes.

Q. Did you ever talk to either Mr. Smith or Mr. Hemenway regarding the account? A. Yes.

Q. And with which one? A. Mr. Hemenway.

Q. In your dealings with the Smith & Hemenway Company with respect to that account, with whom did you deal for the most part? A. Mr. Hemenway.

Q. Did you ever have any conferences with Mr. Hemenway? A. Yes.

Q. What about? A. They borrowed money from time to time; kept an account—sometimes

the account wasn't conducted just as satisfactorily as it might have been; we discussed the financial situation of the company with reference to loans.

Q. Did you ever talk to Mr. Smith or have any conferences with him regarding the finances of the company or its financial condition or the company's account prior to 1925? A. I cannot recall that I did.

Q. Did you ever procure any financial statement from the company? A. Yes.

Q. Who furnished you with those? A. Mr. Hemenway.

Q. Personally or— A. As a rule, he called with the statement.

Q. Have you those statements with you? A. Yes.

Q. Will you produce them? A. (Producing batch of papers.)

Mr. Murray:— offer those in evidence.

Q. There seem to be about eight different statements here; there appear to be signed by the name of J. F. Hemenway; do you know whether that is Mr. Hemenway's signature or not? A. Yes, this (indicating).

Q. Will you look at the rest of them? A. They are all his except——

Mr. Pratt:—We will admit them.

If this gentleman has produced these from his files, we will admit them without spending a lot of time.

Mr. Murray:— will offer these in evidence as one exhibit.

(Marked Exhibit D-10.)

Q. You said a moment ago that sometimes the account was not in as satisfactory condition as you liked. What do you mean? A. They didn't keep balances commensurate with the loan accommodation extended.

Q. What was the accommodation which your bank extended? A. We loaned them as high as $25,000 at times.

Q. Have you any idea what their average balance was during that time? A. The average balance indicated on the books would show about $2500, but owing to the fact that they deposited a lot of checks and it took two or three days to collect, the actual balance showed an over-draft at times.

Q. Will you explain that process? A. For instance, a check is deposited on Irvington; it takes two days to collect it. Before the two days have transpired the money had been withdrawn, and we didn't have the money at the time the check came in withdrawing it.

Q. In other words, the practice was to draw against uncollected funds? A. Yes, before the money was actually in our hands.

Q. So while it was a bookkeeping entry caused by the credit of the deposited check, there was no actual money in the account, owing to the fact that your bank hadn't yet received the money from the Irvington bank? A. That is it.

Q. Was that only an occasional situation? A. It wasn't alone on the checks drawn on Irvington,

it was out of town checks, Smith & Hemenway did business all over the country, and some would take two days, four days and six days to collect, and while the balance looked as though it was substantial, yet owing to the fact that a lot of this money had not been collected, there was actually no money there.

Q. Did that happen only occasionally or frequently? A. It happened frequently; I would take it up with Mr. Hemenway, and there would be a little reform for a while and then we would go back again.

Q. Did he ever give any reason for this method of doing business? A. I don't know as he ever gave any reason; he alway promised to fix it up.

Q. Have you any record of the manner in which that account was handled? A. Yes, we made an analysis of that account, in order to show Mr. Hemenway that he was operating at a loss.

Q. When? A. Covering a period from February 25 to March 25 and from March 25 to April 25, 1925.

Q. Your analysis showed what? A. The analysis from February 25 to March 25, 1925, showed that the account was operated at a loss of $6.69, and for the period from March 25 to April 25, 1925, it showed that it was operated at a loss of $20.69.

Q. Did you take that up with Mr. Hemenway? A. Yes.

Q. What did you say to him? A. I told him we couldn't keep on that way.

Q. And was that one of the times when he promised to reform and do better? A. That was one of the many times.

Q. These borrowings were on the company's notes, were they not? A. Yes.

Q. Were they endorsed personally by Smith & Hemenway? A. They were endorsed personally by Mr. Smith and Mr. Hemenway.

10 Q. Why was that? Was that required by you you or voluntary, or what? A. Yes, it was required; it was asked when the accommodation was granted, owing to the fact that Smith & Hemenway was a closed corporation. As far as I knew, they were the only two parties in interest—perhaps some others, but they were the two parties most interested, and we insisted upon having endorsements.

20 Q. Did the financial condition of the company have anything to do with that requirment? A. I don't think I would have loaned the money without those endorsements, irrespective of the fact that they were the parties mainly in interest.

Q. Why not? A. Because I didn't think that the statement would warrant a commitment of that kind without any outside investigation.

30 Q. Referring to the statement of December 31, 1924, what is there on that statement which would lead you to that attitude? A. Total assets were $656,000 and their cash position at that time was $1651.88; they had accounts receivable at that time of $75,000, which makes their total cash and ac-

counts receivable $77,200; as against that entry—liabilities—they owed at that time by notes and accounts payable $99,374, which would indicate that their current position was not very good.

Q. Will you explain what you mean when you say it wasn't very good? A. You can pay bills only out of what moneys are received from the accounts receivable and from what cash you have on hand. You cannot pay any bills from the bricks that are in the building or from the machinery that is in the building, or from the merchandise that is on hand. The only money available to pay bills is what may come in from the accounts receivable and from the cash that is on hand, and their current position at that time was not such that it put them in a very favorable position was that standpoint.

Q. The combined accounts receivable and cash exceeded the combined notes and accounts payable, did it not? A. No it didn't; it was less.

Q. The combined cash and receivables was less than the combined notes and accounts payable? A. Yes.

Q. Would that mean that in order to pay in full those notes and accounts payable, if demanded, it would be necessary to cash in on some of the inventory or some of the assets, or borrow money elsewhere? A. Yes.

Q. Or borrow more money? A. Yes.

Q. On December 31, 1924, what was the attitude of your bank with reference to loaning Smith

& Hemenway any more money? A. We wouldn't loan them any more money.

Q. They had reached their limit, had they? A. $25,000 was the limit which we would give them.

Q. Mr. Niebling, did your bank finance Mr. Smith in whole or in part when he bought out the Hemenway interest? A. Yes.

Q. You financed him to what extent, do you remember? When I say "you", I mean your bank. A. We loaned Mr. Smith $45,000 on November 10, 1925, and loaned him an additional $25,000 on December 31, 1925.

Q. That loan was made to him personally? A. The note was made by Mr. Smith personally.

Q. You went over to Mr. Cohn's office, did you not? A. I never was in Mr. Cohn's office.

Q. Was the release which we have marked as Exhibit D-6, from the Estate of Mr. Hemenway, and from Alice Hemenway, to the Smiths, delivered to you, do you remember? A. What is the date of that?

Q. January 19, 1926. A. It must have been, but I cannot recollect; I am not sure.

Q. Did you ever attend any of these conferences incident to the closing up of this deal, whereby the Smiths purchased the Hemenway's interest? A. No, sir.

Cross Examination by Mr. Pratt:

Q. The Smith & Hemenway Company were still owing your bank substantially the $25,000 limit when you advanced Mr. Smith $70,000 additional; isn't that so? A. No.

Q. How much was the company owing you at that time in November? A. November they cleaned it up, the end of November.

Q. Yes, but on November 10 they hadn't cleaned it up, had they? A. At that time they were probably owing about $7500.

Q. So that you at least doubled the amount of credit which you would extend to either Smith or Hemenway, or both, with the company, without any additional security, didn't you? A. No, sir.

Q. Wasn't it a fact that both Mr. and Mrs. Smith were on the notes of the company? A. Mr. and Mrs. Smith?

Q. Yes. A. No, sir.

Q. Isn't it a fact that Mrs. Hemenway was on these notes? A. No, sir.

Q. You are quite sure about that? A. Positive.

Q. Didn't Mrs. Hemenway ever endorse at your bank? A. No, sir.

Q. Did you ever have a statement from her? A. No, sir.

Q. You had a financial statement from Mr. Hemenway? A. No, sir.

Q. Did you ever ask him for one? A. No, sir.

Q. You set a limit on what the company or what your bank would loan his company on his

endorsement without any information as to his personal responsibility? A. I asked him; he told me over the table, but I never had it in writing from him.

Q. Is it customary to make loans on personal endorsement where you had no signature showing the responsibility of the endorser? A. The primary security was good.

Q. So that you felt that up to $25,000 the security was good? A. It was fair, yes.

Q. When you covered the quick assets there as being $76,000, you didn't include the merchandise inventory of finished goods? A. No, sir.

Q. That would have some value as a quick asset? A. All of that merchandise was not finished goods.

Q. Let us take the part that was finished goods —that was about $90,000? A. I don't know now.

Q. Will you take a look at your statement and see the merchandise inventory of December 31, 1924; it is under trading assets. A. Merchandise $10,000.

Q. And goods in process that were not finished were upwards of $50,000, under working assets—just a couple of items above the trading assets, headed "Working Assets; shop supplies, goods in process." Haven't you any statement on there of goods in process? A. No, sir.

Q. Can I see the statement from which you are testifying, please? A. (Producing statement).

Q. They are all contained under "Working Assets, material, steel &c., $105,000"? A. Yes.

raw material.

Q. Raw material in the steel industry has a ready market, does it not? A. I don't know whether it has or not.

Q. It would have some value? A. Possibly.

Q. With assets of more than six to one of its total liabilities, exclusive of the stock issue, wouldn't you say that a company with a surplus of $500,000—$550,000 over liabilities, was good for a little more than $25,000 credit? A. Possibly, yes.

Q. Your point about this account was that the Smith & Hemenway Company, for instance, had carried at all times a collected balance of twenty-five per cent of the amount of their borrowings, then your bank would have realized eight per cent on your loan to them, is that right; if they had a free balance of twenty-five per cent of the amount of the loan? A. Yes, about that.

Q. That was a rule adopted by some banks along about 1925, wasn't it? A. That has always been a sort of a standard policy of all banks; you get about twenty per cent free balance.

Q. Where a company had, for instance, assets of six to one of its liabilities, and had total assets of some $650,000, it was not unusual for them to draw against checks which they deposited over their endorsement, was it? A. They should do it; they have done it, and do it.

Q. You know that in substantially every bank in the country, everyone whose credit is good at that bank is permitted to draw against uncollected deposits? A. No, sir.

Q. Do you have a rule down here, or any law against drawing against such deposits? A. The account is conducted at a loss when they do that.

Q. I asked you if you have any rule or any law against it. A. There is no rule of law, it is a business principle.

Q. The chief objection you had to this account was that Hemenway was drawing so close all the time that you couldn't make any money? A. That is it.

Q. What prompted your change of heart to double the credit to Mr. Smith alone when he bought this company out? A. I wanted to retain the account with Mr. Smith, and Mr. Smith put up good collateral, so I loaned him the money.

Q. You were desirous of retaining this account just the same? A. Yes.

Q. Even though you handled it at a loss? A. It might have been brought to a point where it would have been productive.

Q. And did he promise, as Mr. Hemenway had, that your company would be permitted to make a profit? A. He didn't promise anything like that; it was understood if I went along that the account would be conducted on a basis where we could make something out of it.

Q. Isn't it a fact that just prior to this controversy between Smith & Hemenway, along about April, that Mr. Smith declined to endorse the company's paper and the notes remained in your bank for some time without paying them, some days? A. I don't remember that.

Q. Would you swear that Mr. Smith didn't refuse to endorse personally at that time, when renewals were coming due? A. I don't remember that.

Q. You wouldn't swear that he didn't? A. I couldn't do that.

Q. You have looked this account up pretty carefully; didn't you run across anything about notes being overdue and past due? A. There were times when notes were not taken up promptly on the date they were due.

Q. I mean in the year 1925, this period where you checked up, from February 25 to April 25, 1925. A. What is the question?

Q. You made an analysis of this account between February 25, 1925, and April 25, 1925; didn't you run across anything there about past due paper in that period? A. I don't recall.

Q. When did you look for this data? A. We analyzed nearly all our accounts at that time.

Q. I asked you when did you look for this particular data for testimony here in court; yesterday or last week? A. I had this thing about a month ago when this case was to come to trial, and I looked up my files and I found that in there.

Q. Did you look it up again yesterday? A. Yes.

Court:—Have you the analysis there?

Witness:—Yes.

Court:—Does that show whether or not there was any overdue paper carried by your bank at that time?

Witness:—No.

Q. Mr. Hemenway was always agreeable in trying to get as much money as was necessary, to do what you asked him to? A. Yes.

Q. He was not an aggressive sort of fellow? A. He was a gentleman.

Q. A quiet congenial fellow? A. Yes.

Court:—You said the line was $25,000, and was that loan carried the limit most of the time?

Witness:—No.

Q. What was it? A. They would reduce it down to ten, they would come back and get it again; very seldom they ever cleaned up.

Q. Wasn't it a fact that it was down to $7500 at the date mentioned by you an unusual thing? A. They would get it down, but they would never get it all off.

Redirect Examination by Mr. Murray:

Q. Notwithstanding the book value of the permanent or fixed assets, the fact is, is it, Mr. Niebling, taking the situation as reflected in the December 31, 1924, balance sheet, that for no reason there was a stoppage of the collection on receivable accounts, that the company having only $1600 worth of cash, would be liable to suits at the instance of its creditors for accounts payable; that would be the fact, would it not? A. Yes.

Q. In such a situation as this, what would be considered a safe—in general banking circles,

what would be considered a safe amount—a minimum safe amount of cash for a company of this sort to have on hand? A. They ought to have at least—if they have to pay their outstanding accounts in thirty days, they should have at least one-half their outstanding current liabilities.

Q. Assume that their pay-roll for factory pay-roll, office pay-roll and salaries, was between five and six thousand dollars a week, what bearing would that have on your answer? A. They certainly should have enough to meet that.

Q. Just one week, six months or what? A. To be conservatively managed, they should have at least a month's pay-roll.

Q. In addition to the one-half of the accounts payable? A. Yes. They wouldn't need to have that all at once, but toward the end of the month, when their accounts were due, their balance should run up so they could meet them.

Recross Examination by Mr. Pratt:

Q. December 31, 1924, was at the close of one of the greatest periods of depression this country has ever known, in the years 1923-1924? A. Yes, it was a bad year; it was an off year.

Q. It was true that many concerns that were sound financially didn't carry any larger percentage of deposits than the Smith & Hemenway Company in that period, isn't that so? A. I wouldn't say so.

Q. Isn't it true that even with a conservative management, in times of light buying in a manu-

facturing industry, it is frequently necessary to pile up manufacturing goods on the shelves, and take a chance that your bank might let you have, for instance, $37,000, if all of your creditors should jump on you and sue you at once? A. That is possible.

Q. So that you wouldn't criticise Mr. Hemenway's management of the finances, in that he couldn't get his money in, or that the salesmen didn't sell the goods, would you? A. My analysis would be that his position was more or less embarrassing. His assets were frozen up in too much merchandise; he couldn't pay his bills; and second, he had too much of them.

Q. And if it happened that Mr. Hemenway was not the manufacturing end of the concern and had nothing to do with the manufacturing or sales, purchases of their supplies, &c., then you wouldn't say that he was responsible or that he was not conservative, would you? A. If he is financial director of the outfit, he is responsible.

Q. You think that he should take the full responsibility for either over-production or failure to sell in the field or failure of his creditors to pay him? A. I cannot pass on that.

Q. Isn't that your opinion, that he would be guilty in each of these instances? A. It seems to me if he is the financial director of the outfit, he should keep his finances in such shape that he is solvent at all times and can meet his liabilities.

Q. Do you know of any considerable number of concerns that do that? A. Oh, yes.

Q. You know a great many substantial concerns that don't? Isn't that right? A. I suppose there are. There are all kinds of concerns.

Q. You know, as a banker, that many concerns in that period of depression were not in as good condition to pay their current liabilities as the Smith & Hemenway Company, don't you? A. Yes; some were worse and some were better.

Q. You know many conservative concerns went to the wall from July of 1920 to 1924? A. Yes.

Redirect Examination by Mr. Murray:

Q. That so-called depression started in the spring of 1920, or came to a climax in 1920? A. Yes.

Q. And from then on it continued to improve? A. It lasted pretty well through 1921, the period of liquidation.

Q. And by 1924, December 31, which was after Coolidge had been elected, if I remember rightly, things were very much on the boom, were they not, generally? A. They improved, yes, and everybody was confident and so on.

Q. You say that the situation disclosed by this December 31, 1924, balance sheet was embarrassing; what do you mean by that? A. It was embarrassing to this extent, that they didn't have enough liquid capital available to meet their obligations; that they were in a position where they might be embarrassed by their creditors.

Q. When you made this loan to Mr. Smith per-

sonally, you said something about collateral; did he give you collateral for that loan? A. Yes.

Q. Without going into detail, what was the general nature of it? A. He gave me insurance policies on which the surrender value was, I think, nearly $20,000; he deeded to me properties in Lake Hopatcong, and Westchester County, New York, and his property in Newark.

Q. His home property, you mean? A. Yes; at any rate, the collateral which I had was far in excess—the value of which was far in excess of the amount of the loan.

Q. And were the Smith & Hemenway notes paid out of the proceeds of that person loan to Smith? A. I don't know; the first check of $45,000 was given to Mr. Smith; that check was turned over to Mr. Smith in settlement—in payment to Mr. Hemenway.

Q. The $5,000 check? A. The $45,000 check.

Recross Examination by Mr. Pratt:

Q. Suppose the creditors of the Smith & Hemenway Company had jumped on them, would you have loaned the same amount on the same collateral? Suppose they were embarrassed and about to be put out of business, would you have taken the same collateral when they didn't have enough to pay their other creditors $30,000? A. Yes, if Mr. Smith put it up.

Q. And if Mr. Hemenway and his wife had fifty or one hundred or a couple of hundred thousan dollars of good security, you might even have

loaned enough to pay their creditors on that collateral? A. Yes.

Q. Did Mr. Smith pay you some money for making this loan, beyond the six per cent interest? A. No.

Q. Did he pay you the sum of $10,000 for making this loan? A. No, sir.

Q. In any business there must be co-ordination of the different departments and co-operation among the officers, in order to make a success? A. Yes.

Q. So that if the financial end and the producing end pull apart, there is not very much chance for success? A. No.

Joseph Scharfenberger, recalled for further direct examination by Mr. Murray:

Q. You were on the stand before; you said that you had charge of what part of the business? A. Purchasing department; I was acting as purchasing agent, in charge of accounts payable.

Q. Did you have anything to do with the handling of the funds of the company in the various banks? A. Yes.

Q. What was your practice with regard to the withdrawing of funds that had been deposited; was it customary to wait until they had been collected by the bank in which they were deposited before they were drawn against, or was it cus-

tomary to draw against them before they had been collected?

Court:—Hasn't the custom already been shown?

Mr. Murray:—That was one bank.

A. It was customary to draw against them as soon as we entered them on our books.

Q. What was the reason for that? A. To try to meet some of the bills that were out; as soon as the deposit was made, we would make checks against it and pay bills.

Q. Without waiting for the collection? A. Without waiting for the collection.

Q. Did you ever give checks when you had no deposit to meet them, even on uncollected deposit? A. No, I never gave that.

Q. Do you know whether checks were ever sent out before the amount was in the bank by way of a deposit to meet it? A. No, I wouldn't say it was sent out before.

Q. What was the practice?

Court:--He said before that they were drawn and held until the deposit was made.

Q. Were they always held? A. Yes.

Q. Never sent out before? A. They were never sent out without money was shown on the books.

(No Cross Examination).

Dew G. Smith, sworn for defendants.

Direct Examination by Mr. Murray:

Q. Mr. Smith, you are a brother of L. P. Smith, one of the defendants? A. I am.

Q. How long have you been associated with Mr. Smith and Mr. Hemenway? A. Since early in 1898.

Q. When did they first become associated together? A. Early part of 1898.

Q. What was the business in connection with which they first became associated? A. Importing Swedish hardware and Swedish telephones.

Q. Not manufacturers? A. No.

Q. When did they first start to manufacture? A. When they bought the Irvington Manufacturing Company, or bought an interest, I should say, the latter part of 1910 or early part of 1911; I don't remember exactly.

Q. Going back to the time when they first became associated, did they get along from the beginning amicably or otherwise, from your observation and personal knowledge? A. They did, I should say, for the first three or four years, get along very well.

Q. Where was your office at that time? A. The company's office? At first it was on Warran Street, possibly a couple of years, and then 296 Broadway.

Q. Both in New York? A. Yes.

Q. At the end of that three or four years how did they get along? A. They were beginning in

the early part of 1901 to have serious differences.

Q. Was that evidenced in any way; was that obvious to any one who would see them? A. To any employee, yes, who was with them.

Q. In what way? A. At times they didn't speak for quite some time, although their desks were very close together.

Q. In what way? A. Except about business matters I understood they spoke; but for a matter of two or three years they didn't speak, except as I understand at stockholders' meetings.

Q. As you understand—were you in the same office where they were? A. I was.

Q. Did you have an opportunity to see whether they were talking or not? A. Yes.

Q. What do you mean you understand; do you mean what you observed or from what someone told you? A. What I observed myself.

Q. How long would you say these periods would be they didn't speak? A. One time it was certainly about two years; then after that, it varied; sometimes for a short space of time, then again a longer period.

Q. Did Mr. Hemenway ever tell you what their differences were which brought about these periods of non-communication with each other? A. Once he said something——

Mr. Pratt:—Please fix the time.

A. (Continuing) It was at Nelson, British Columbia—he and I were there to go up to a mine; I don't know what brought it about, but something had happened down here——

Court:—What year?

Witness:—I went to Canada January 1, 1909; either 1909, 1910 or 1911, I don't know.

Mr. Pratt:—I object as too remote.

Court:—Do you mean to say that these people were at loggerheads for twenty-five years and yet continued in business?

Witness:—I mean that due to this friction, in past years, there wasn't the co-operation that there must be——

Court:—I will hear it, but I will tell you now, you are wasting time in putting it in, because I don't think it amounts to anything. I will hear all you want to put in on that score.

Witness:—They had some differences at that time and he seemed to be quite wrought up, and his remark was that he was going to see my brother in the depths, in Hell sometime yet.

Q. Did he tell you what the cause of that was? A. It was so continuous, Mr. Murray——

Q. No, at that particular time. A. No.

Q. And that was, you say, in 1909 or 1910? A. Yes, about that time.

Q. Speaking generally, from then on down to, say, 1920, how did they get along(so far as you could observe personally? A. They were never cordial; there were times when they didn't get along at all; at other times they would speak and go along, but their differences would apparently occur when they would go out together, and

they would come back and we could all see that something was out of line again.

Q. They would go out of the office for a conference? A. Yes.

Q. And then come back; would you see there was something wrong? A. Yes.

Q. You were sales manager, were you not? A. In later years, yes.

Q. When did you become sales manager? A. I think I began to sign as sales manager about 1917 or 1918.

Q. Commencing at that time who had charge of the finances of the company and who had charge of the production end of the business and who was your immediate superior? A. Mr. Smith had charge of the manufacturing and, Mr. Hemenway of the financial end, and they were both my immediate superiors.

Q. As sales manager what did your duties consist of? A. Carrying out instructions very largely that came from one or the other, and seeing that sales were made to our various lines of customers.

Q. And directing the salesmen in their activities? A. Yes.

Q. While you were sales manager, who fixed the prices? A. The prices were fixed——

Q. In your case I mean, to the customers. A. —by the sales price, whatever the sales price might be of our competitors; we usually followed them.

Q. Who would determine how closely it was to

be followed, you or Smith or Hemenway? A. Mr. Smith and Mr. Hemenway would discuss to some extent, and sometimes we would start to discuss it and wouldn't finish, and then we would follow manufacturers in the market of similar classes of goods.

Q. You fixed the price of your goods with reference to the price at which your competitors were selling similar goods, is that right? A. Yes.

Q. Were the instructions which you received from Smith and Hemenway usually in harmony or were they conflicting or what; what was the situation in regard to that? A. As a rule I would get instructions from one; sometimes I would then get different instructions from the other.

Q. Did that happen frequently or was it an occasional thing? A. Sometimes it would occur quite often; then again I wouldn't have any of them for some months.

Q. But from 1923 to 1924 and 1922, what was the situation in that regard? A. 1923, there were quite a lot of crossing wires; 1924, not so much.

Court:—Under those circumstances, what did you do; follow your own judgment?

Witness:—I would go to one and try to find out just what to do, and then I would go to the other. I would get them together, and then as a rule I would get to some place where I could act under that ruling.

Q. You didn't follow either one's direction? A. Yes, I had to follow their directions.

Q. In case of different directions, which would you follow? A. If I couldn't get them agreed, then I followed Mr. Hemenway.

Q. Did you make any attempt, or to your knowledge did Mr. Smith make any attempt to adjust the price of your goods to your customers with reference to your manufacturing costs? A. Not so far as I know, or could ever find out, because I don't think they ever knew their manufacturing cost.

Q. Did you ever try to find out what the manufacturing costs were, to assist you in helping fix the price to your customers? A. Quite often.

Q. I ask the same question with reference to 1922, 1923, and 1924; in those years did you make efforts to find out what the manufacturing costs were? A. Yes.

Q. And did you succeed in finding out what the costs were? A. Sometimes they would give me one cost on an item, and in another week they would give me a different cost on the same item. I remember an incident, on staple pullers, for a matter of two months, when I was negotiating with this concern for some hundred of dozens, I tried eight or ten times to get the cost and make a price; each time I got a different cost; then I had to give it up.

Q. Give what up? A. Give up trying to take the order.

Q. You didn't get the order? A. No.

Q. In whose department was the keeping of

the cost system? A. That came in Mr. Feddersen's department.

Q. Mr. Feddersen's superior was who? A. Mr. Hemenway.

Q. Mr. Feddersen, what was his position? A. Accountant.

Q. Did you ever make any protest to anybody about the way this cost system was handled? A. Yes.

Q. To whom? A. Mr. Feddersen and Mr. Smith.

Q. Did you ever make it to Mr. Hemenway? A. No, he was seldom there.

Q. What results would you get, if any, if you made those protests? A. I didn't get any results.

Q. You said that Mr. Hemenway was not there very often; you had a New York office, didn't you —up until what time? A. Up until we sold out, I think—no, we didn't; it must have been possibly a year before we sold out.

Q. While the New York office was being maintained, who ran that? Mr. Hemenway.

Q. And he was there more than he was at the factory? A. I cannot say.

Q. And where was Feddersen at the time with the bookkeeping system? A. At the Irvington plant.

Q. Out here? A. Yes.

Q. And Smith was at that place? A. Yes.

Q. Who had charge of the advertising? A. It was under Mr. Hemenway, I think.

Q. Do you know? A. Well, I am quite sure it was.

Q. Did anybody else have anything to do with the advertising? A. Not at the Irvington plant.

Q. Or of the company anywhere? A. He had an agent of some sort in New York that placed the advertising.

Q. But nobody else in the company had anything to do with the advertisement but Mr. Hemenway, did they? A. No.

Q. What was your policy, speaking from 1920 on, with reference to selling to jobbers, exclusively, or to retailers exclusively, or to the consumer trade exclusively? A. Our policy as outlined to the salesmen was to sell certain classes to all large retailers and all wholesalers they could; our advertisements, however, asked them to send sometimes ten cents or sometimes more, which would be termed advertising to the consumer.

Q. When you say your wholesaler customers, you mean jobbers who in turn sold to retail dealers? A. Yes.

Q. And this advertising which you speak of was directed to the jobber, the retail dealer or the ultimate consumer? A. Yes.

Q. Which was it? A. I think it was directed to the three, but it antagonized very often.

Q. At the same time? A. Yes. It antagonized the larger retailers and jobbers, because they said, "You are catering to the consumer."

Q. In other words, you were appealing—the advertising was appealing to the consumer over

the jobber's head, and the jobber was anticipating selling to them? A. Yes. I think Mr. Hemenway's intention was to advertise to all three, but the larger jobber and the larger retailer very often were antagonized, because of the fact that we did apparently advertise to the consumer.

Q. Did you receive any complaints from your wholesale or jobber customers about this system of selling over their heads to the retail trade? A. Yes.

Q. Did you ever make any—did you ever call the attention of Mr. Hemenway or Mr. Feddersen to this situation? A. Mr. Feddersen wouldn't have had anything to do with it.

Q. Did you call it to Mr. Hemenway's attention? A. Mr. Hemenway was a hard man to approach.

Q. Did you ever call it to his attention? A. No.

Q. Ever call it to anybody's attention? A. I called it to Mr. Smith's attention, thinking he had some influence with Mr. Hemenway.

Q. Did any results come from your protest? A. No, sir.

Q. Was that subject of trying to sell to all three classes of the trade at the same time a regular policy, or was it occasional or intermittent, or what was it, during the last five years? A. I should say it was regular; I think our advertisement had that in it.

Q. Do you remember when two representatives

of the Crescent Tool Company came to Newark, in the fall of 1925? A. I do.

Q. Who were they that came? A. Mr. Moore and Mr. Swisshelm.

Q. Do you remember on what day they came? A. October 29, 1925.

Q. Will you state just how they happen to come and what they did, so far as you know, and where you went, and so on? A. I don't know why they happened to come, unless you will let me tell you what they said when they came.

Q. What reason did they give you for coming? A. They said they had been through the Peck, Stow & Wilcox plant, Southington, Connecticut, and from there they came here to see some machines, and while they were here——

Q. When you say "here," you mean the Smith & Hemenway plant in the City of Newark? A. City of Newark—and while they were here, as Mr. Moore had never been in our plant, he and Mr. Swisshelm desided to visit us.

Q. Did you see them that day? A. I did.

Q. When did you first see them and where on that day? A. They came to the Irvington office, I should judge, around eleven o'clock.

Q. Did you know that they were coming? A. No, sir.

Q. When they came what did you do? A. I shook hands with them and invited them in the office and sat down and started to talk.

Q. Then what did you do? A. I called Mr. L. P. Smith, or went to his office, I don't remember

which, and we talked there until lunch time, and then we all went to lunch together at the Elks Club.

Q. In Irvington? A. Yes.

Q. After lunch what did you do? A. They came back to the office; how long they stayed, I don't remember, because I went to my office, and I remember that Mr. Yakey, or one of the people in the plant, took them down into the plant and showed them around, as Mr. Yakey had been up to their plant at some previous time and gone through it.

Q. And did you see them again that day? A. No, I did not, unless I saw them when they were leaving; I probably saw them then and said goodbye.

Q. Give your conversation that day before lunch; was there anything said at all about the Crescent Tool Company being in the market for a plant such as the Smith & Hemenway plant, of having investigated the Utica Drop Forge Company with the idea of purchasing it? Had there been anything said up to lunch time? A. No, sir.

Q. Did you know that they were in the market up to that time? A. I never heard that they were.

Q. Or that they were thinking of buying the Utica Drop Forge Co.? A. No, I had no such idea.

Q. Was anything said at lunch in regard to that at all? A. In conversation with Mr. Swisshelm—I don't know how it came about—he hap-

pened to mention that at some time previous, he didn't say when, they had been considering purchasing the Utica plant.

Q. Did you make any reply to that? A. I didn't, because I don't like to ask questions of a competitor regarding what his business is, so I said nothing and he said nothing further.

Q. What was the nature of this visit? A. Just a friendly visit.

Q. To your knowledge is it customary for one concern to visit the plant and go through the plant of another concern without any reference or any idea of buying it? A. Why, yes, Mr. Peckstow, of the Peckstow & Wilcox plant, and I have been in the Jamestown plant about six or eight times.

Q. When was the last time, prior to this visit of October 29, 1925; when was the last time you had been in the Jamestown plant? A. I cannot give the date, but I took Mr. Shaffer, who was our foreman at that time, up there to get some bolts.

Q. A matter of months or days or years? A. Probably a year, or year and a half previous to 1925.

Q. What was the nature of the conversation at lunch, just immediately prior to this remark; was it with regard to the business of your two companies or what was it? A. Just he same as any four people who are acquainted sit down and talk. No, there was nothing particularly about business; just general conversation, I would say.

Q. And this remark was made? A. I don't know how it came up, but Swisshelm and I know

each other very well, we usually meet at conventions, and in some way he happened to say to me personally—Mr. Smith and Mr. Moore were talking at the time—he said that they had or he had been to see the Utica regarding the purchase of that plant some time previous; he didn't give any date.

Q. After the remark was made, I understood you to say you made no reply to it? A. No.

Q. Was it discussed any further? A. No.

Q. Was it discussed in any way? A. No.

Q. By them? A. No.

Q. Did you see them before they left Newark that night? A. Not after they left the office that day.

Q. At any time on that visit was there anything said in your presence or in your hearing by anybody, that the Crescent Tool Company was in the market for a plant, or had been negotiating with the Utica Drop Forge Company for a plant? A. No.

Q. Did you see Mr. Swisshelm or Mr. Moore or the president of the Crescent Tool Company, Mr. Peterson, again, following that date? A. Yes.

Q. On what date did you next see any of them? A. I saw Mr. Swisshelm the night of November 4th.

Q. Where? A. Jamestown, New York.

Q. How did you happen to go to the Crescent Tool Company plant in Jamestown on November 4th? A. Shall I tell how I led to go there?

Q. Yes. A. Mr. L. P. Smith was not in very good condition; he had just bought out Mr. Hemenway's interest. The afternoon of November 2nd I was leaving here to go to the Automobile Association meeting, in Chicago—Automobile Equipment Association, in Chicago, so I went to his office—we were going over things, and I wanted particularly to discuss with him going out into Minnesota after the convention.

Q. On a business trip? A. On a business trip.

Q. This Chicago convention was a business matter? A. Yes. He was very nervous; his face was very red, very much wrought up about something, and in place of quieting down after the purchase, he was still up in the air, and I suggested that he sell the business if he could. He wanted to know who would buy it. That was his question. I said I was going to Buffalo, and then I recalled this remark of Swisshelm to me about having tried to purchase Utica at some time, I presumed that year, and I wanted to know if it would be agreeable to him——

Q. Smith? A. To Mr. Smith—if from Buffalo, I went to Jamestown and saw Mr. Peterson.

Q. Of the Crescent Tool Company? A. Yes. Well, he didn't particularly care one way or the other for a moment, and he finally said if I wanted to, yes; so I decided to go from Buffalo down to Jamestown to see Mr. Peterson, to see if he was interested; if so, then furnish him with whatever data he wanted. I did that.

Q. You did see Mr. Peterson? A. I saw him on the morning of November 5th.

Q. And out of that conversation with Mr. Peterson—— A. He was interested and wanted to know something about the details; he wanted to know if we knew what we wanted for it; what we had. Of course, I had no inventory or list of machinery with me or anything, and I wrote back here from Jamestown, or from Cleveland—I went that night on to Cleveland, the night of November 5th, and asked them here to supply him with whatever facts or figures that they wanted to let him have; that he was interested.

Q. And out of that conference—out of the remark made at lunch by Mr. Swisshelm or Moore to you, and your following conversation with Smith, and your following conversation or conference with Peterson, grew the contract between Smith and the Crescent Tool Company, whereby the latter bought out the Smith & Hemenway Company? A. That is a fact.

Q. For the three or four or five years immediately prior to 1925, what was the situation, so far as you personally observed it, with regard to the filling of orders, the promptitude with which orders of customers were filled? A. We were very much behind in filling orders; very slow. We back ordered and shipped again; we shipped part of an order, and very frequently we then shipped again another part, leaving another back order; sometimes making three or four shipments on the same order, but we were very slow in filling all orders.

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Q. What would be the normal time for shipment after the order was accepted? A. I think I can illustrate that by saying I went to the shipping room and said, "When is this order going to be shipped?" He said, "The order isn't sixty days old," which would be equivalent to saying, if he shipped them in sixty days would ship them quick. Orders were sometimes six or seven months old.

Q. What is the customary good practice in shipping orders of that kind? A. Manufacturers should ship within three to ten days, unless it is a private branding.

Q. You mean where the purchaser's name is stamped, or trade mark is stamped on the goods? A. Yes.

Q. And thus take longer? A. Yes.

Q. Was there any difficulty, or did you receive any complaints about this subject from customers? A. Yes, we did. All salesmen and the firm received many complaints. It was daily, in every mail. Either we should make shipment, or purchase elsewhere, or we will cancel our order.

Q. Were orders cancelled? A. Yes.

Q. How prevalent was that condition of affairs during 1922, 1923 and 1924? A. It was at all times. It existed along at all times; we were very much behind in shipment.

Q. Do you know what the cause of it was? A. I would go to Mr. Smith and Mr. Yakey——

Q. Who was he? A. Superintendent at the time—to try to find out when I could get certain orders: "Well, we need this equipment; we can-

not do it, owing to this machine being down," or—

Mr. Lum:—Was Mr. Hemenway present at this conversation you had with these other people?

Witness:—Very seldom.

Mr. Lum:—I object to this line of testimony.

Court:—Objection sustained.

Q. Did you succeed in ascertaining what was the difficulty, what was the cause of the slowness with which accepted orders were filled by your company? A. I had accepted their statement of lack of equipment or lack of proper equipment.

Court:—According to the statement which was offered this morning there was from $90,000 to $100,000 worth of finished goods on hand.

Q. How many different kinds of types and sizes of articles did your factory make? A. I never counted, but I should say between 350 and 450; counting the numbers and sizes, maybe 500. I could answer that definitely later today for you.

Q. Do you know what the nature of this stock of finished merchandise was as shown by this 1924 balance sheet? A. I can answer your question by saying that a plier will be made in four, five, six and eight inch size, one number. A man might have all sizes; we might have only one or two sizes in stock and be out of two or three. That would apply on all orders. But he might order one size or two sizes of cold chisels; we might be

out of those and have six other sizes in stock. That might apply practicaly to our entire line of goods. Therefore that $100,000 stock didn't necessarily mean that we could fill fifty per cent of the orders inside of thirty days.

Q. If the orders called for the particular stuff or particular articles that you have in the $100,000 worth of finished articles, you could finish the order immediately? A. That could be shipped and we could back order.

Court:—I am wondering how important this line of testimony is; what is the purpose of it?

Mr. Murray:—As I understand complainant's contentions now, they are that in bad faith Mr. Smith and Mrs. Smith started the dissolution proceedings in New York for dissolution of the company, and they started it without reason or rhyme of cause.

Court:—Your answer to that is, that the condition was such at the factory that it was unbearable, and there had to be some change of some kind, and that is the only way they could do it?

Mr. Murray:—Right.

Court:—How much testimony along that line do you want to put in? You have already put in evidence that for twenty-five years these people were at loggerheads and dissension in the plant growing worse all the time. I don't see that you can make it any stronger

than you have, if you keep on with this line of testimony for a couple of days longer.

This is exactly the same line as other testimony which has gone in. You have the same testimony from other sources. I should say you had it from three or four witnesses. I don't want to limit your testimony, but I don't want you to take up any more time than is absolutely necessary.

Q. Did your company manufacture all of the goods which it sold? A. No, sir.

Q. Where did you get the goods which you didn't manufacture yourself? A. Bought them from outside manufacturers; we bought hack saws plates from the Bay State Saw & Tool Company; we bought snips from Begman & Compton Shear Company, and other goods.

Q. On the balance sheet of December 31, 1924, it shows merchandise of $104,096; can you say whether that included both the goods which you manufactured and that which you bought outside, or not?

Court:—How does he know?

Witness:—May I ask you if this represents the inventory?

Mr. Murray:—I don't know.

Q. Can you tell by just looking at the balance sheet? A. Yes, that would include both.

Mr. Pratt:—It only shows one merchandise inventory. I assume it must necessarily cover all of the complete merchandise.

Court:—The only person who would know it would be the man who made it up.

Q. The slowness in the shipment of orders to which you referred related to what; the goods which you manufactured or the goods which you purchased outside and merely resold, or both? A. Sometimes it applied to both, but very largely to the goods that we made ourselves.

Q. During 1923, 1924 and 1925, how often was Mr. Hemenway at the plant at Irvington? A. I think Mr. Hemenway came on an average of four times a week, usually after three o'clock in the afternoon.

Q. And leave when? A. He would leave between half past four and six; as a rule, I should say, about five.

Cross Examination by Mr. Pratt:

Q. This shipping clerk was directly under you, wasn't he? A. No, sir.

Q. He was directly under your brother? A. Yes, under the superintendent.

Q. Under Mr. Yakey, who was under your brother? A. Yes.

Q. And your brother did have full charge of the manufacturing and shipping and work at the plant, did he not? A. Yes.

Q. And he also had access to the books there in the office with Mr. Feddersen? A. That I cannot answer; I don't know.

Q. You had an office right there with Feddersen and your brother, didn't you? A. My office

was in one corner, and Mr. Feddersen and my brother was in the other.

Q. How many feet away? A. Possibly fifty.

Q. You were familiar with the bookkeeping system there to some extent? A. No, I was not.

Q. Did you ever go in there and start to figure out the cost yourself with Mr. Fedderson, on cost cards? A. Mr. Hemenway didn't allow anyone to interfere with the books or look into them.

Mr. Pratt:—I move to strike that out as not responsive.

Witness:—I am answering the question.

Court:—I don't think it is an answer to the question. Strike it out, and read it again.

Q. (Question read.) A. I was not allowed to, no, sir.

Q. You did some figuring with Mr. Fedderson on cost of these staple pullers? A. I would ask for figures which he would furnish.

Q. Your brother, Mr. Landon Smith, had charge of the keeping of these records at the factory, of putting tools through processes and getting the cost of different tools? A. That was under Mr. Feddersen.

Q. Mr. Feddersen was just a bookkeeper there, who took orders from your brother and Mr. Hemenway, as they were given? A. Yes.

Q. And your brother did give him orders which he obeyed? A. Yes.

Q. And your brother did have full charge of the manufacturing of the articles in the plant, did he not? A. He was in charge of the plant.

Q. That was the machinery, purchase of raw material and keeping of the stock room, and all those things, didn't he? A. I think you will find that Mr. Hemenway ordered the steel as a rule.

Q. Your brother was the one that transmitted the orders, wasn't he, and told Mr. Hemenway if he made the order how much you had to have? A. I have no doubt that he made up the specifications, but that was not in my department.

Q. Do you want this court to understand that over this period of many years, from 1911 down here at Irvington an unbearable condition existed between Mr. Hemenway and your brother, because the factory didn't either manufacture goods or ship them? A. I didn't say anything about an unbearable condition; I was asked if there was friction, and I said Yes.

Q. Did you have in mind the failure of your brother to get out sufficient quantities, or carry stock, or to ship goods when they should be shipped, was responsible for any friction between him and Mr. Hemenway? A. I haven't placed any responsibility with either; I simply stated a fact as I saw it and know it to be.

Q. In this advertisement that you spoke of, where the reader of the advertisement could send in a small amount of money and procure the article, that applied solely to glass cutters, didn't it? A. No, sir.

Q. What else did it apply to? A. During a course of years it applied to many articles.

Q. How about 1925, the year this condition be-

came unbearable? A. I think you will find a No. 444 plier and 999 came in that period, 1924 or 1925; that is two I remember.

Q. And those were cheap pliers that were advertised to the public at a very small amount? A. No.

Q. Those advertised to the public were to sell direct to the consumer? A. I think Mr. Hemenway's advertisement was to increase the business in whatever direction it might be possible. It was a three-way advertising, and those two individual tools are not cheap tools.

Q. He did advertise two individual tools that your company would sell direct to the consumers? A. He advertised many of them, but that is two I remember.

Q. That is true of many in the industry; Peckstow will sell direct to the consumer? A. No.

Q. He sells some mail order houses? A. A mail order house isn't a consumer; he may sell them.

Q. He sells the same article to be sold at a mail order house at practically the same price as he charges his other customers? A. I cannot say; I don't know.

Q. In the period of something like sixteen years as sales manager, don't you know what has been going on in the industry in that regard? A. I have my opinion, but I have no knowledge. I cannot swear to it. I think that is the only way I can answer it.

Q. So that if Mr. Hemenway tried to sell some-

thing to the individual, rather than the wholesale jobber, you think that that was because of an unbearable situation between your brother and himself? A. I didn't say that.

Q. That isn't your opinion either, is it? A. I didn't say that that caused friction.

Q. Just answer my question. That isn't your opinion either? A. Please read the question.

Q. (Question read) So that if Mr. Hemenway tried to sell something to the individual, rather than the wholesale jobber, you think that that was because of an unbearable situation between your brother and himself? A. I don't think that would have caused the amount of friction that existed at all; that is one of the minor things.

Q. This failure to manufacture and ship the goods that you and your sales force obtained was not one of the causes of friction either, was it? A. At times, yes.

Q. You mean that Mr. Hemenway criticised Mr. Smith for not getting orders out on time? A. I think it came more from the salesmen, perhaps, criticising the manufacturing end for not shipping.

Q. Your brother was under fire from the sales force, because his orders didn't get out? A. Yes.

Q. And that made him get at Mr. Hemenway, didn't it? A. No.

Q. It created an unbearable situation between them, so your brother then could get rid of Mr. Hemenway in any event? A. No, sir.

Q. Did you think that was a good reason why your brother should buy Hemenway out for $100,000?

Mr. Murray:—I object.

Mr. Pratt:—I withdraw it.

Q. Coming down here to 1925, you were quite active in the business at that time, were you not? A. I have been since 1898.

Q. You know Mr. Swisshelm very well, you said? A. Yes.

Q. One of your closest friends in the industry, wasn't he? A. I wouldn't say that; a friend of the industry. I know him, and have known him for some years and I liked him, yes.

Q. What do you mean when you say you knew him very well? A. I mean that, the same as I know any sales manager that I meet once or twice or three times a year.

Q. You didn't mean to indicate that you knew Mr. Swisshelm any better than other sales managers? A. Better than a good many, yes.

Q. You did go out with him socially whenever you got together with him at a convention? A. I never did go out with him socially anywhere.

Q. So that if he thought that you did and testified that you did, here; then he was mistaken about that? A. If he testified so, he is mistaken.

Q. If he testified that he went out with you at Atlantic City and spent a sociable evening with you, then he was wrong about that? A. Absolutely.

Q. Did you ever have lunch with him where you had an opportunity to chat with him? A. Just a friendly conversation once in Syracuse, about seven or eight years ago, the first and last time we ever met on the road, and this time in Irvington, October 9, 1925.

Q. So that when you say you knew him very well, you confined that substantially to one friendly conversation seven years ago and one here just recently, is that right? A. No, I said I met him at conventions quite often.

Q. Did you spend a social evening with him at conventions? A. No, never.

Q. Never talked with him there outside of saying hello? A. Yes.

Q. The first time you heard from anyone in the trade that the Jamestown Company wanted to take on a plier line similar to yours was when Swisshelm mentioned it, right out of a clear sky? A. The first time I heard it was when Mr. Swisshelm mentioned it.

Q. He mentioned that for no reason; he simply mentioned it? A. There must have been something that led up to it, but what it is, I don't know.

Q. It hadn't been a talk that you had with him down at Atlantic City, that L. P. was about to acquire the company? A. No, sir.

Q. When you saw Swisshelm down at Atlantic City did you know that your brother Landon was about to acquire the company? A. That depends entirely upon when I saw Mr. Swisshelm; before I

went there I didn't know it, but before I left there I did.

Q. That convention was October, 1925? A. I think it was the twentieth to twenty-third; of that, however, I wouldn't be sure.

Q. Did you know that Mr. Burnett, at your brother's instance, has given Mr. Hemenway until the fifteenth as the last day on which he would state the conditions on which he would buy or have the company sold out?

Mr. Murray:—I object to that; there is no such statement.

A. No.

Court:—He has answered it; he said No.

Mr. Pratt:—I intended to quote that letter accurately; I think I quoted it substantially.

Q. Did your brother tell you that he had brought proceedings in New York City on September 21 or about that time, to dissolve this company? A. I know about the proceeding at some time, but just when—if I gave my impression, I would say Atlantic City.

Q. During the summer you knew Mr. Hemenway had pneumonia? A. No, I did not.

Q. Were you at the plant? A. Yes.

Q. You knew that he was ill with pneumonia? A. I knew that he was not at the plant and I asked Mr. Feddersen one day if there was something wrong with Mr. Hemenway; the first time he told me that they had telephoned and said he had fever and thought perhaps it would be typhoid fever. Several days later I asked again, and he said that

they had telephoned that Mr. Hemenway had symptoms of pneumonia.

Q. You knew that Mr. Hemenway was sick and that that was the reason he was absent from the business during the summer, didn't you? A. I knew that he was absent because of illness, yes, but the disease I didn't know.

Q. Did you know at that time that your brother was carrying on negotiations whereby he tried to purchase Mr. Hemenway's interest for upwards of $70,000, to be paid over a period of six years, together with the Montreal proprety at $30,000? A. No.

Q. Your brother never took you into his confidence on that? A. He didn't tell me anything of it.

Q. So that right up until this convention in Atlantic City on the twenty-first of October, you didn't have any information at all that your brother was about to either sell the company out in dissolution proceedings or buy out the Hemenways' interest; is that right? A. Yes.

Q. Where did you go to Atlantic City from? A. The Irvington plant, or from Newark, my home.

Q. Were you in the Irvington plant for some days before the Atlantic City Convention? A. I presume I was.

Q. Was your brother there? A. That I cannot say; I don't know.

Q. Was there any friction between you and your brother? A. No, not that I remember.

Q. There had been considerable friction between you over a period of years? A. Like any two brothers, I believe, that sometimes have a word now and then.

Q. And sometimes you wouldn't have any words, for the reason that you didn't speak to each other; isn't that a fact? A. No, it is not a fact.

Q. There never was a time when you and your brother were not speaking to each other? A. No.

Q. But there was a time, or there were many times, when you were mad at each other, isn't that a fact? A. I answered that question by saying that brothers often get up in the air about things and then come down.

Q. And you and your brother in a brotherly fashion often went up in the air and after the lapse of some time did come down again? A. There were no exceptions to that. We were like all other brothers; it might be five minutes. If I had something else to go to him with five minutes later, I went to him.

Q. And that had existed over these twenty-seven years that you had been with the Smith & Hemenway Company? A. It existed about fifty-three or fifty-four years, I guess—since I could talk.

Q. You never found that situation intolerable? A. No.

Q. After you had negotiated this sale in Jamestown— A. I didn't negotiate it; I beg your

pardon; I simply went there to find out if they would be interested in purchasing.

Q. You were one of the parties to that contract up there at Jamestown, one of the sellers? A. I think my name is in it.

Q. You and your brother were selling out the Smith & Hemenway Company, were you not, and your brother's wife? A. I think my name is in the contract.

Q. You didn't by any chance know what interest you had in this company to sell at that time, did you? A. Yes.

Q. What interest did you have? A. I had $4000 worth of stock I think.

Q. Anything else? A. Yes, salary.

Q. You are a half-owner of record of the Irvington plant, which is valued at $150,000 today, aren't you? A. No, sir.

Q. Are you a third owner? A. No, sir.

Q. You are an owner of record, aren't you? A. No, sir.

Q. You are quite sure about that? A. I am.

Q. If the deed to that property should be partly in your name, this is the first time you ever knew about it? A. Absolutely.

Q. Are you a party to the lease made to the Crescent Tool Company? A. No, sir.

Q. Are you a partner in the glass cutter business? which was reserved when some of the assets were sold to the Crescent Tool Company? A. I am.

Q. When you were out to Jamestown, on the night of November 4th, you say you no inventory with you? A. No, I did not.

Q. But you did have the inventory brought to date and delivered to Mr. Peterson in Jamestown, on the twelfth of November, did you not? A. I cannot answer that; I can simply say that I wrote either from Jamestown or Cleveland, where I went to from Jamestown, for them to furnish from here data to Mr. Peterson to work on, to see whether he wanted to purchase.

Q. Do you know whether your brother, Landon P. Smith, furnished an inventory checked to date, within seven days after your visit to Jamestown? A. I understand that Mr. Fedderson—I was told by Mr. Fedderson that he furnished them with a copy of some inventory; I cannot tell whether it was——

Q. It was refigured before it was sent out there, wasn't it? A. No, sir.

Q. And brought down to date? A. I don't think so.

Q. Were you very well acquainted with some of the other salesmen in the industry generally? A. In the plier industry?

Q. Yes. A. Yes, I know a good many of them.

Q. You never heard from any of them that the Utica Drop Forge and Tool Company was in dificulty and that the Jamestown Company was trying to buy them out? A. I think it was commonly known for some years that they were in financial difficulty; I never heard that they were

for sale, I never heard that any one was trying to purchase it.

Q. You mean to say that you heard that the Drop Forge and Tool Company was in financial difficulties prior to February, 1925? A. I think perhaps ten years previous to that, or five or six years previous to that they had been in serious financial difficuities, yes.

Q. Might I ask you from whom you obtained that information? A. I think it was very general in the trade, some years ago.

Q. Didn't you ever hear that it was only in November, 1925, when the president of the company absconded, that they were first in difficulties? A. I never knew that any president absconded.

Q. Never heard that he was arrested in a western state and brought back? A. I think that was the superintendent and vice-president.

Q. The general manager? A. And the president, too.

Q. He was the president, too? A. I don't nk so.

Q. Do you know what his name was? A. Kellerman.

Q. Mr. Kellerman ran that company for twenty years back in all that time? A. He had been superintendent there for a number of years; how many, I don't know.

Q. He was the owner of half of the common stock? A. Not to my knowledge.

Q. At the time that Mr. Feddersen told you that his company was in the market to buy a busi-

ness or had been in the market, even though you had known for some eight or nine days that your brother had acquired the Smith & Hemenway Company, it didn't occur to you then that you might sell it to the Crescent Tool Company? A. Mr. Feddersen never made any statement to me.

Q. I mean Mr. Swisshelm. A. No, it didn't occur to me, because it is rather difficult to explain any one's situation with the Smith & Hemenway; Mr. Smith and Mr. Hemenway were rather difficult men to approach on any subject.

Q. Mr. Smith, do you think, was rather hard to approach also? A. He had his notions, and Mr. Hemenway was a different type and had his notions.

Q. Mr. Smith was a hard man to approach after he bought the company, to see if he would sell? A. I said he was rather a hard man to approach on certain things. When I saw the conditon that he was apparently in, then I suggested if it were possible to try to sell the business.

Q. That was some days later? A. That was on November 2nd.

Q. That was the day that he actually received in his own hands the signed agreement of the Hemenways to sell, wasn't it? A. I don't know.

Q. You knew that he had it in his hands either that day or the day before? A. I did not.

Q. When did you leave Irvington? A. The night of November second.

Q. You took the sleeper to Buffalo? A. I presume I did.

Q. And stayed in Buffalo the third? A. May I refer to my book? I can give it to you exactly.

Q. Just your recollection. A. Yes.

Q. And went down to Jamestown the next morning? A. No, I went down to—as I recall it, I went on the New York Central to the station down below there, at the head of the Lake, and took the Electric Line over and got there about seven or seven-thirty in the evening.

Q. You went to Mr. Swisshelm's house that night? A. I called him up on the 'phone after having dinner; he came down and talked for a time and went up to his house.

Q. You are part owner or partner in the glass cutter business? A. Yes.

Q. That was reserved out of that sale? A. It was.

Q. Do you know what volume of business you did in the glass cutter business in 1926?

Mr. Murray:—I object.

Court:—It might have some bearing and it might not; I will hear it. I think I see the reason for its offer.

A. I think around $200,000.

Q. And the average margin of profit on these glass cutters was between thirty and forty per cent, wasn't it? A. No, it is not.

Q. How much?

Mr. Murray:—I object.

Court:—I will receive it.

A. I cannot say what it is this year.

Q. I said 1926. A. I should say around thirty per cent.

Q. So that that showed a profit of substantially $60,000 for that year, is that right? A. The net profits would be much less than that.

Q. You didn't maintain any factory? A. No.

Q. You purchased under an exclusive contract the output of the glass cutter company? A. Yes.

Q. Was was the name of that company? A. New England Novelty Company.

Q. You sold those glass cutters under the trade name Red Devil, didn't you? A. Yes.

Q. And that was also retained out of the sale to the Crescent Tool Company? A. Glass cutters and glass tools only.

Q. What was the length of duration that that contract had to run in 1926, or has to run now? A. Approximately eighteen years, I think.

Q. To run yet? A. Yes.

Q. And isn't it the fact that the Red Devil glass cutter has the largest sale of any glass cutter in the United States?

Mr. Murray:—I object.

Court:—I will receive it.

A. I would like to believe that, yes.

Q. You had disposed of the manufacturing plant and the plier business, which was not breaking even quite, and kept the most profitable end of the business when the sale was made to Jamestown, isn't that right? A. That was my view of the matter.

Q. You placed a valuation on what you had left or rather of the glass cutter business, of $700,000?

Mr. Murray:—I object.

A. No.

Q. What valuation have you placed in the talks with the boys generally?

Mr. Murray:—I object.

Court:—How does that matter?

Mr. Pratt:—I withdraw the question.

Redirect Examination by Mr. Murray:

Q. I show you a contract and ask you if this is the contract which constitutes the glass cutter business? A. I never saw it in my life.

Q. Were you in the confidence of your brother in regard to this business, or of Mr. Hemenway, of the Smith & Hemenway Company matters, up to October 29, 1925? A. No, sir.

Q. Do you know whether Mr. Smith ever gave any orders to Mr. Feddersen as to how the cost system was to be run?

Court:—Why encumber the record with a lot of testimony that has absolutely no weight with me in the decision of this case? I don't think it makes any difference. The pertinent fact is that there was friction there. That has been covered time and time again. It is also plain that the supervision of the plant out here was under Smith and the New York office was under Hemenway. This man's

testimony here could have been confined to fifteen minutes, so far as I am concerned.

Q. Mr. Smith, did you in October, 1925, at the convention in Atlantic City, on the Twenty-first, twenty-second or twenty-third, see Mr. or Mrs. Hemenway at Atlantic City? A. I did.

Q. Which one? A. Both.

Q. Did you have any talk with them? A. Yes, with both of them.

Q. At the same time or different conversations? A. They were both together at three or four different times that I talked with them and they talked with me.

Q. At any of those conversations when they were both present, was anything said about the deal whereby they were selling to Mr. Smith? A. Yes, sir.

Q. Just State what was said by all parties at that conference. A. Mrs. Hemenway did the majority of the talking at the three or four times I talked with them and they talked with me.

Q. When was this? A. October, at the Atlantic City Convention, 1925, Mrs. Hemenway was quite wrought up, quite angry, I should say, and remarked that my brother had never treated me right and I should not stay with him, I ought to get out; they were selling the business to him, and that I should not stay with him at all; I ought to get out. They said I could have bought the business I had more than three times enough securities in my own safe deposit box to have bought more than the whole business.

Q. Did you make any reply to that? A. I did not.

Q. At that time did you know of your brother's action in bringing this dissolution proceeding in New York, or did you know at that time of any negotiations pending between Mr. Smith and Mr. Hemenway regarding the purchase or sale of their respective interests in the Smith & Hemenway Company? A. No, I know very decidedly I didn't know it, because shortly after this first talk with Mrs. Hemenway I got him down on the next floor under the first floor in the Dennis Hotel and asked him some questions regarding it.

Q. Who? A. Mr. L. P. Smith.

Q. Did you know to what the Hemenways were referring in the conversation which you have just related? A. No, that is why I said nothing in this first interview.

Q. You mean you didn't know what they were talking about? A. I knew there had been trouble with them and at three or four different times in the past one or the other was going to buy, and I thought this was another recurrence of the same thing.

Q. This was the first you had heard of this particular occasion? A. Yes.

Q. And the first you heard of it was from your brother when you went with him to the floor below in the Dennis Hotel and asked him about it? A. Yes.

Recross Examination by Mr. Pratt:

Q. I show you Exhibit C 39, the original lease, purporting to be between L. P. Smith, J. Mildred Smith and Dew G. Smith, as owners and lessors, to the Smith & Hemenway Company, Inc., leasing the Irvington plant, and I ask you if that is your original signature attached to that lease? A. Yes, it is.

Q. You didn't know that you were leasing this property to the Smith & Hemenway Company after the stock had been transferred to the Crescent Tool Company? A. I had Mr. Burnett draw up something which is signed that released me from all of those things, because I was not interested financially in them.

Redirect Examination by Mr. Murray:

Q. The contract with the Crescent Tool Company was made between Landon P. Smith, J. M. Smith, and Dew G. Smith, of one part, and the Smith & Hemenway Company of another part, and the Crescent Tool Company, of another part? A. Yes.

Q. The only reason you signed that contract was because you held this $4,000 worth of stock of the company? A. Yes.

Q. You never owned the Irvington plant, did you, or any part of it? A. Originally I owned $2500 worth of stock in the Irvington plant, and in

the switching of the stock and a stock dividend, I got $4,000 worth of stock in the transfer.

Q. But you never had title to the real estate, did you? A. No.

Q. What is your interest in the glass cutter business now? A. Fifteen per cent.

Q. Did you have any other interest in the Smith & Hemenway Company of any kind other than your salary and the $4,000 worth of stock which you owned? A. No, sir.

Q. Did you ever make a transfer of any real estate which at one time had been owned by the company, to Mr. Smith and Mrs. Smith? A. Yes, I think so.

Q. Did you have any ownership in that property——

Mr. Pratt:—The record would be the best evidence.

Q. Whether you took title to the Irvington plant or not at one time as a part of the transfer to the Crescent Tool Company, did you have any interest in it, ownership in it? A. I never had anything in it.

Q. Oother than the fifteen per cent stock interest in the old company which you mentioned? A. Five per cent in the old, not fifteen in the old.

Q. On that glass cutter business, you didn't manufacture in 1926, did you? A. No, sir.

Q. Simply bought outside and resold the property? A. Yes.

Q. Did you sell any other glass cutters than the ones that you made under this Woodward contract? A. Yes.

Q. Did you sell any other glass cutters prior to—did the old Smith & Hemenway Company ever sell any glass cutters other than the Woodward glass cutters? A. Yes, sir.

Q. In 1926 did you sell any goods other than glass cutters? A. Yes.

Q. What kind? A. We sold glaziers' point drivers, glass pliers, file sharpeners.

Court:—Small tools relating to glass business?

Witness:—No, sir, they are not.

Q. The figures which you gave in reference to the glass cutter business included the business done in these other light lines of tools? A. The total business of Landon P. Smith, Inc., from all sales.

Q. You have an entirely new organization there, have you not? A. Yes.

Recross Examination by Mr. Pratt:

Q. How much business did you do in all of the other lines which you took on in addition to the line which you reserved out of the Smith & Hemenway Company in the year 1926? A. I never separated them; the sales showed that at the end of the month.

Q. The glass cutter business in 1925 was about $200,000? A. I cannot answer; I don't know; we were not allowed to have figures in the old firm; therefore, I don't know.

Q. You were not allowed to know how much

business passed through your hands as sales manager in a year? A. No.

Q. How about 1924? A. I cannot answer, for the same reason; the business, apparently, was running approximately the same year by year. I can answer that.

Q. And it would run about the same in 1926, again? A. I should think so.

Q. And the new lines which you have spoken of were a very small part of this $200,000? A. No, they were a pretty fair part.

Q. About how much; what in your judgment? A. That would be a matter of guess.

Q. What is your best guess? A. Thirty or thirty-five thousand dollars.

Q. You did $165,000 of the old business? A. I think we surely did that.

Q. At thirty per cent profit? A. Yes.

Redirect Examination by Mr. Murray:

Q. Do you know why that was reserved from the sale to the Crescent Tool Company? A. Yes.

Q. Why? A. They didn't want it.

Q. Who? A. Mr. Peterson.

Q. Did he say he didn't want it? A. Yes, he said so; he said it was foreign to his line and he didn't want it.

Q. What was their line? A. Pliers and wrenches.

Q. They didn't want to take this glass cutter business offer? A. No, sir.

Landon P. Smith, sworn for defendants.

Direct Examination by Mr. Murray:

Q. Mr. Smith, how old are you? A. Fifty-nine years old.

Q. And for the last ten years what has been your condition of health? A. I have suffered every winter from bronchial trouble; very severely in cold weather.

Q. Have you gone away in the winter, because that that trouble, occasionally? A. I have for about seven years.

Q. Every year for seven years? A. No, not every year; 1918 I did not go away, and 1925 I did not go away; the balance of the years since 1918 I did.

Q. When did you usually go and when did you usually come back? A. After our inventory the first of the year, I would map out a policy for the manufacturing department and get away just as quickly as I could. That varied, to the best of my recollection, from about the seventh or eighth of the month up to the first of February.

Q. What was the longest of those winter trips that you took? A. The longest that I recall, that I ever took, was about sixty to seventy days.

Q. And when was that? A. That was in 1920.

Q. And aside from that, what was your longest winter trip? A. Six to eight weeks.

Q. Did you used to go away in the summer in addition to that? A. I went to my home in Lake Hopatcong, and commuted all summer.

Q. When did you used to go on these winter trips? A. As I remarked, from the seventh to eighth, according to the weath; from the seventh to——

Q. Where? A. I went to Florida; I went to Louisiana, and then came around by Florida and one year I went to Cuba and opened our Cuban office there and established two new salesmen.

Q. While away on these trips, did you do any business for the company? A. Yes.

Q. What was the nature of it? A. The nature of it was selling goods for the company.

Q. How much of your time when you were away did you spend selling goods? A. My bronchial trouble as a rule cleared up anywhere from a week to ten days after I would get into a warm climate and change of atmosphere, and then I would begin work, working part of the time, as I felt like it, with the different jobbers in the South, and I established all of our southern trade in Florida. We had no customers there except isolated small orders.

Q. Did you travel when you were down there from one place to another? A. I did. I went to the entire Atlantic seaboard, including Texas.

Q. Without going too much into detail, prior to 1920, what was your relation with Mr. Hemenway; what was the cause of it? A. Not pleasant.

Q. What were they? A. We were in financial straits when we lost our original capital in the telephone business in 1906 to 1909, sinking around $90,000.

Q. Complete loss, was it? A. Heavy loss, yes. Our capital stock was then only around twenty.

Mr. Pratt:—When was that; what date?

Witness:—I don't remember the exact date; between 1906 and 1909. Mr. Hemenway had entire charge of the telephone business; I had charge of the hardware business. We got involved in Beatrice, Nebraska, to the extent of about $90,000. We were threatened by all hands, even in my little hardware business at that time, which was very small, and I had to personally go around and see our creditors.

Q. Threatened with what? A. Suit, law suit.

Q. Why did that cause any friction—A. Loss of accounts.

Q. —between you and Mr. Hemenway? A. I was after Mr. Hemenway to know why he squandered all our money out there. We were drawn on continuously from $500 to $1000 a week by some relative of his that had charge of it.

Q. Had you had friction with him prior to that time? A. No. During that time our first friction arose, that I can recall, to the best of my memory. Prior to that the relations were cordial. We grew, we started very small; the total capital of the company being less than $5,000, and everything was harmonious. We always ate our lunch together and talked over the business situations, and when this stress came I was asked to go out to lunch with him one day, and went out to lunch, and he said, "You are very severe on me about this telephone business." I said, "I have been; I have a

perfect right, J. F." I said. "We are bankrupt; we are gone; we are hopeless, unless we can get some assistance." Our banks wouldn't give us any line of credit; we couldn't borrow $5,000 at that time; we were turned down on a $2,500 loan by one bank. He said, "Now, listen; my sister has some money and she will buy some common stock." There wasn't anything but common at that time. I said, "That is all right; how much will she put in?" I don't remember the amount, it wasn't large. I said, "I will think it over." The next day we went out to lunch together, and I said, "J. F., we have started in this business; our original contract called for a partnership fifty-fifty . Your sister wants to buy some stock; I think that is very nice. Mrs. Smith has a little money, and I would like for her to buy the same amount of stock." He said, "Now, Mr. Smith, you will never control this company." I said, "Now, Mr. Hemenway, I don't want to control, and I will obligate myself now never to use my wife's stock unless you use your sister's."

Q. What happened? A. He got very angry and got up and left, and we didn't speak except on actual business matters for a period of something over two years.

Q. In the meantime business ran how? A. In the meantime we issued bonds against the Telephone Exchange in the West, and a relative, brother-in-law, went out to sell them. The exact amount of bonds that he sold, I don't know, but we finally sacrificed the Exchange, and got nothing

out of it. In the meantime I went to see the creditors of the factories which we represented; we were sales agents then for factories, and we had some little jobbing business, and I agreed to pay them on deferred payments, as we couldn't get money in, which we did.

Q. How long did it take before you got that straightened out in that manner? A. About three or four years.

Q. That brought you down to what date? A. I should say somewhere in the neighborhood of between '10 and '12—1910 and 1912.

Q. From 1910 to 1914, the date of the beginning of the European War, what was your relationship to each other? A. Our relations were strained in 1908 or 1909 by the severance of sales organization with the Utica Drop & Forge Company. We were sales agents for them for a good many years. That account I had when Mr. Hemenway came with me, and we continued it. It was worth, to the best of my recollection, around $75,000 a year in commissions.

Q. And you lost it? A. Yes.

Q. In what year? A. I think 1908.

Q. What were your relations towards each other along in 1911, 1912, 1913 and 1914? A. Our relations were cordial so far as business was concerned.

Q. No particular amount of friction? A. There was always more or less controversy. His ideas of things and mine differed in a great many ways.

Q. What, for instance? Over sales policy, financial matters, personal antagonism or what? A. There was no personal antagonism between us; it was matters of business.

Q. Did you sit down and discuss that frankly and try to reach a settlement? A. We tried to discuss it, and it was procrastination from start to finish in our business.

10 Q. On whose part? A. Mr. Hemenway would never give me an out and out answer in the twenty-five years we were together. He would never say definitely Yes or No; "I will think it over."

Q. What were your relations to each other during the War period, from 1914 to 1918? A. In 1917 we had so many complaints from the trade relative to the service, that the New York office was given up, and I moved the office arbitrarily to Irvington.

20 Q. In what year? A. 1917. I couldn't get Mr. Hemenway over here; he had accepted a position as sales manager for the American Wringer Company.

Q. Did that have anything to do with your company? A. He devoted practically all of his time to that business.

Q. Did the Smith & Hemenway Company have anything to do with the Wringer Company? A. Absolutely nothing. They tried to get us to loan

30 our sales organization or take charge of the sales; I wouldn't have anything to do with it. Mr. Hemenway forced an issue where our salesmen had to go out and sell against our wishes; took our sales-

men to the American Wringer plant, showed them how the goods were made, &c., and tried to force an issue and make our salesmen sell wringers.

Q. Did they? A. Yes, they did; they had to.

Q. For how long? A. Eighteen months or two years.

Q. Ending when? A. 1915 or 1916.

Q. Exactly what brought this New York office business to a head in 1917? A. I had a great many letters from the trade complaining of receiving no bills, as far as Denver, Colorado. Goods were received by the trade and no bills. I went to New York—our office in the meantime had been removed from 249-250 Chambers Streets, taking on office above the American Wringer Company, on the second floor. Mr. Hemenway was sales manager, and my organization was upstairs, and the American Wringer Company downstairs. I was moved over here to be at the factory. When these complaints continued to come in, I went to New York; I heard rumors, but I paid no attention to them; I went to New York and found that my organization of about fourteen or fifteen people over there were spending two-thirds of their time on American Wringer Company's business. I made an engagement over the 'phone with him—

Q. Who? A. Mr. Hemenway—to meet me the next day at ten o'clock at our own office. At ten o'clock I arrived. He didn't show up. I waited until twelve. He didn't show up, and I wrote him a letter, a copy of which is in the correspondence

there, and told him that I would protect the interest of the Smith & Hemenway Company to the limit, and I was therefore moving the office to Irvington, where we could give service to the trade.

Q. And was there a New York office maintained by your company after that? A. Yes, continuously. I moved everything out of New York, except his desk and his stenographer.

Q. What was there before, the bookkeeping system? A. Everything, and all things manufactured over here, we had to make an invoice on New York, and New York made the invoice to the trade, and all the books were kept there, and bookkeeping—all this was a manufacturing plant.

Q. After this removal, all the office consisted of was a desk for Mr. Hemenway? A. He had from one to three stenographers.

Q. All the bookkeeping was out in Irvington? A. Yes.

Q. I show you two letters; is this the copy of the letter you referred to, April 6, 1927? A. Yes, that is my letter.

Mr. Murray:—I offer it in evidence.

(Marked Exhibit D 11.)

Q. Mr. Smith, during the War years the company made considerable money, did it not? A. Yes.

Q. What did it do; it created a surplus, did it not? A. We paid it out in dividends; we kept the company skinned.

Q. All of it, or what portion of it? A. Just about as close as we felt that it was possible to get it.

Q. Did you agree on that policy? A. Yes, Mr. Hemenway would usually—I wouldn't say "usually", but invariable, always prepared the resolutions in New York and brought them over to me to read them.

Q. And would there be any discussion of these dividend withdrawals before the meeting? Would you agree on a policy before that, or leave that to him? A. I would leave that to him, because I was never a bookkeeper and never paid attention to the books. I was trying my best to run the factory with what I had there and build the business up, and my hands were a little bit more than full.

Q. From 1918, the end of the War, down to 1920, there was a considerable falling off of business, was there not? A. In 1919 I think our business was the largest year we ever had.

Q. The slump came in 1920? A. No, the slump came in 1921, as I recall it.

Q. You said that you were away in 1920—1919 or 1920, for several weeks. A. In 1920 I went to Florida, the early days of January. I left a schedule of changes and production for Mr. Way, who had charge of the plant production, to follow.

Q. Mr. Way was in charge of the plant when you left? A. Yes.

Q. Who hired him? A. Mr. Hemenway.

Q. With your consent or what? A. Mr. Way was hired for the purpose of looking up a larger plant, and to investigate a certain number of plants that were offered us in Pennsylvania, war plants.

Q. Was it by your consent or his consent, or by joint agreement, that Mr. Way was put in charge of the plant in Irvington? A. Mr. Way was very late in October, I think, or the first of November, to make a survey of the plant, to show the weaknesses. I was told and led to believe that he was a production engineer and he was a very plausible talker. He was put in there as production engineer. When I left Mr. Yakey, the superintendent of the plant, was taking his order from Mr. Way, so far as changes in the plant for workmen was concerned. I therefore took up the changes that I felt were necessary. I might explain this, that during the War the variety and kinds of tools had to be reduced, and we were allowed to make black tools—that is, any kind of a tool would pass, but we were not allowed polishing and nickelplating or finishing our tools, so that we had that period to go back, and I laid out this schedule for Mr. Yakey and Mr. Way and Mr. Ketzer and Mr. Schafer and Mr. Hemenway; we all went over it together. I wrote the copy and gave it to them. I then went to Florida, travelling through the Virginias, North and South Carolina; spent about five weeks in Florida covering the trade there, and then went as far south as Memphis, Tennessee, and Alabama, Georgia and Ten-

nessee. When I returned home Mr. Way was in charge of the plant and Mr. Yakey had been fired, who was a practical tool man.

Q. He had been with the company how long? A. He came with the company when we bought it in 1909 or 1910. We took him from the Utica, of which we were formerly sales agent.

Recess:

Q. Who was the superintendent when you left? A. George L. Yakey.

Q. Who was superintendent when you came back? A. Paul R. Ketzer.

Q. Did you consent to his employment? A. He was put in charge while I was absent.

Q. Did you consent to it? A. No, I tried to get rid of him as soon as I came back.

Q. Do you know who hired him? A. Mr. Way, I was told.

Q. I show you a paper bearing the signature of S. G. Way, dated February 1, 1920; do you know what that is? A. That is an order that was issued making Paul R. Ketzer factory superintendent, Harry L. Schafer, foreman.

Q. Whose signature is that? A. I would say it was Mr. Way's to the best of my knowledge.

Mr. Murray:—I offer that in evidence.

(Marked Exhibit D-11a).

Q. Mr. Way testified that he increased production in the factory fifty per cent. What were the facts as you discovered them when you returned? A. I asked Mr. Feddersen, who had charge of the records, through his cost department downstairs,

to get me up a record of the production from January first to date. He didn't succeed in getting it up until the latter end of June, and then I wrote a note in the meantime, Mr. Way had disappeared, to Ketzer and Schafer, telling them just the condition that the factory had been run in.

Q. Is that the letter dated July 6, 1920, signed by yourself, which you referred to? A. Yes.

Q. Can you by referring to that paper, refresh your recollection as to what the conditions were? A. The conditions were very bad.

Q. In what way? A. They were running January and March double shifts, night and day shifts; and April, May and June they ran day shifts, after I came back.

Q. Before you left had they been running night shifts? A. Yes.

Q. Now did the production which had gone on while you were away compare with what it had been previously? A. I can give you the facts as this memoranda is furnished me by the cost department, which was in charge of Mr. Feddersen.

Q. Go ahead. A. This shows an increase in pliers for the second quarter over the first quarter, of fourteen per cent.

Court:—Aren't you reading the paper? It wasn't given to you for that purpose. It was given to you to refresh your recollection.

Witness:—I wrote the letter.

Court:—Don't read the memorandum into the record, because that is same as putting

the paper in evidence. State what the conditions were as you found them, without reading the letter.

Witness:—Bad.

Q. In what way? How did the percentage of production compare? A. Very low.

Q. How low? A. Pliers had increased fourteen per cent, and the miscellaneous tools, like nail pullers and electrical tools, climbers and miscellaneous tools, of which we made a great many, were neglected entirely.

Q. How did the production in the factory of items compare, during the period while you were away with while you were there? A. Lower.

Q. How much lower? A. I cannot tell, without reading the memorandum.

Q. Refresh your memory from the record. A. It is twenty per cent behind the previous quarter.

Q. Did you examine what was produced? A. Yes.

Q. The articles which were produced? A. Yes.

Q. What did you find the situation to be? A. We threw away between seventy and eighty thousand tools approximately valued at forty-five cents each.

Q. Made when? A. Made during the first six months of 1920; they were worthless.

Q. What was the matter with them? A. You couldn't open them; they didn't have any cutting edges on them; they didn't match.

Q. Did you examine the finished product which had been boxed, ready for shipment? A. I did.

Q. What did you find the condition of that to be? A. The same condition; I had the stock reinspected, taken off the shelves and unboxed.

Q. Were the finished goods which were defective labeled on the boxes as defective? A. No, they were being shipped out as first quality.

Q. What percentage, about, of the finished goods ready for shipment, made during that period, did you find to be defective? A. I cannot give you the exact figures, but if my recollection serves me, it was around seventy per cent that had to be thrown away.

Q. What was the cause of that condition? A. It was due to a number of causes.

Q. What were they? A. In 1918, we were working one hundred per cent for the Government, and our machinery was run night and day with any kind of help that we could get into the factory, and was ruined.

Q. The machinery was worn out; what was the condition due to, you speak of? A. The irresponsible help that we had to employ at that time, the laxity of management——

Q. When? A. Beginning with the superintendent—managers, superintendent; and foremen.

Q. Who was responsible for them being there? A. Mr. Way.

Q. Was Mr. Yakey there when you came back? A. No, sir.

Q. He had been fired, had he? A. Understood he had been fired by Mr. Hemenway and Mr. Way—

Q. How long had he been with the company?

Mr. Pratt:—Counsel has been over this many times, and I think once is enough.

Q. When you found this condition to exist, when you came back did you take up the matter with Mr. Hemenway? A. I did.

Q. And did you receive a letter from him, dated August 28, 1920? A. Yes, I received this.

Q. Is that the letter? A. Yes.

Mr. Murray:—I offer that letter in evidence.

(Marked Exhibit D-12.)

"August 28th, 1920.

Mr. L. P. Smith,

Hopatcong, N. J.

My dear L. P. S:

Since our talks last April and May and your finally saying to me that 'I cannot afford to accept your offer', you have said nothing to me regarding your position in the business, what you proposed or what you want.

I believe that in all our relations I have always been frank, fair and prompt and it does seem to me that the business demands action and attention now in an unusual way, and unless we come to some understanding regarding its future, it will be hurt by further delay.

You were away some in 1919 but when you went away in January, 1920 and remained away for three months, I was better equipped with men than I have been since your more recent illness. Since Mr. Way left us last April, the factory has been lacking in many ways,

and I do not feel like making changes or taking on any one until we come to some understanding ourselves, nor can I consent to have the present conditions continue longer because it is quite against the interest of the business. Moreover, you have during all these months, drawn the full salaries from both Companies as when you were active in the work.

There is precedent on our records of a time previously when I did not give all my time to our business and during that period I received much less compensation from our business than you received.

I am instructing Mr. Scharfenberger to make no salary checks for either of us until we can arrange in some manner for August and the future, on a mutually satisfactory basis.

I believe that then I can handle the business and stop the continual friction which retards progress and production and which, if continued, would eventually do us great harm. May I hear from you soon, and when and where can we meet?

No one can regret more than I do your continued ill health.

With best wishes, I am

Very truly yours,

F. J. HEMENWAY,

Treasurer.

(Signed) J. F. HEMENWAY."

Q. Was your salary check stopped in February? A. Yes.

Q. By Mr. Hemenway? A. Yes, sir.

Q. Did you see him after you received that letter? A. I received that letter while I was in a sanitarium, suffering from stomach trouble.

Q. What did you do when you received it? A. As soon as they would permit me to leave, I went right to New York from Boston, where I was, and called on Mr. Hemenway; we had quite a lengthy talk. I said, "I will sell out, in the state of health I am in, and the condition I find things here, and the orders that you have contradicted since I left here, and people that you have disposed of, puts us in no position to go ahead; we are bound to lose money; we cannot help it.

Q. Did he criticise you, or did he hold you—did he say that he held you responsible for the way the factory had been run, owing to your absence?

Court:—We will get along much faster, if you don't use such leading questions. You are answering the question you want to ask. Ask what was said.

Q. What was said by Mr. Hemenway; did he make any complaints against you? A. None whatever, except when I returned, I didn't recognize my own tools that were being shipped out, and I sent for Mr. Way to come to my office, and I said, "Mr. Way, when I left here in January, I gave you a schedule to follow and changes to make. I

don't even recognize my own tools. Where did this change occur, and by whose order?" He said, "I will find out and let you know." I said, "We will have to, because we cannot ship these for the tools we have sold and catalogued.' He got up and left my office, and I never saw him until I saw him on the stand, the other day, with the exception of the time that I closed the factor and attended Mr. Hemenway's funeral in New York.

Q. What did Mr. Hemenway—did Mr. Hemenway say anything in regard to this conference which you had with him following the receipt by you of this letter of August 28, 1920? A. Nothing other than a general line of talk.

Q. Along what line? A. Along the line that we had to get some competent man to run the factory; that I was not physically able, I was nervous, I had stomach trouble and had bronchial trouble every winter, and to try to run the factory in that condition, it was impossible. I was down —to the best of my recollection, I returned in April, I spent a month there, and went down with stomach trouble in June; I came back in August, and the latter part of August I was advised and was sent to the sanitarium.

Q. Just at that conference what was said on the part of either of you about selling out? A. Mr. Hemenway said, "What will you take for your interest in the business?" I said, "I will take $125,000."

Q. What did he say? A. He said, "I will not buy it."

Q. Did he make you any offer at all? A. I said, "What will you pay me for the business?" He said, "I will give you $150,000 in preferred stock, if you resign as a director and an officer of the company, and pay the notes off at the rate of $10,000 a year."

Q. What notes? A. He would retire the preferred stock at the rate of $10,000 a year.

Q. He offered to give you $150,000 of preferred stock and retire it at the rate of $10,000 a year? A. Yes. I then asked him if he would give me a mortgage to secure the payment; he said, "No."

Q. Did you accept that offer? A. I did not.

Q. Was there any arrangement entered into with Mr. Hemenway at that time regarding the improvement of conditions in the factory? A. Yes, I had been asking him since I return, to get rid of Schafer and Ketzer and put the old superintendent back.

Q. Did he agree to it? A. He didn't agree to it until late in October.

Q. Did he finally come back? A. I finally brought him back about the first days of December.

Q. You said that one of the causes for this condition was that the machinery was worn out, owing to its war work. Was there any new machinery bought while you were away? A. Yes, while I was away Mr. Way,— so I was informed, I was not there, but I found twelve milling machines bought from a war plant that was sold down here

on the flats somewhere, which were absolutely worn out when they bought them.

Q. Did you ever get them to work? A. No, part of them never. We had to spend as much money as we paid for them, to even get them to run.

Q. Were those machines responsible for the defective production you turned out during that period? A. Partially, but our furnaces were all burned out, during the 1919 and 1918 period, when we were running full tilt. We had four furnaces, and two of them were down half of the time being repaired. They have to be repaired with fire brick, and they were so badly cracked, that we could not hold the heat in them uniform.

Q. Did you have any discussion with Mr. Hemenway regarding that condition? A. I did.

Q. What was it? A. I took him through the factory and showed it to him with the superintendent, and took him in the milling room. I said, "It is too much like a tin can factory." The machines were rattling, the housing was loose, the vices were loose; we couldn't hold a tool in a definite position to mill it to make the joints fit.

Q. Did either of you make any suggestion as to how that condition could be remedied, or would be remedied? A. He suggested that we send certain machines off, take out two or four at a time and have them repaired. We did that, sent two to some place up in New York State here, if my recollection serves me. We paid $350 to have

them repaired, and inside of thirty days when they came back, they were just as bad or worse than they were when they left.

Q. Was any suggestion by either of you made as to what you should do then? A. I suggested that we buy a few machine at a time, as we could pay for them, and I had a contract, or a verbal contract with the milling machine company that they would take payments in twelve monthly payments as we could make them, dividing the payments over twelve months.

Q. What response did Mr. Hemenway make to that? A. He said no, he wouldn't consent to it.

Q. Did he say why? A. I don't recollect.

Q. Do you know whether or not the company was in a financial position then to buy new machines? A. Mr. Murray, I can truthfully say that I cannot tell anything about our books, the way they were kept—not any more than a school child.

Q. Do you know at that time whether the company was or was not in a financial position to put in new machinery? A. I had to depend upon what Mr. Hemenway told me.

Q. What did he tell you? A. He wouldn't tell me anything; just simply procrastinate.

Q. You were drawing dividends, both of you, during this period? A. Yes; not in that period—yes, we were in that period.

Q. Why were not dividends cut off and necessary new machinery purchased? A. I think I testified that all resolutions were prepared in New

York and brought over here and submitted to me, and I in turn would take them down to my wife and have her sign them. It was a case of getting all I could, while the getting was good, and if he took out $10,000, I took it out, and if he took out five, I would do the same.

Q. Regardless of consequences? A. As treasurer of the company, I thought he knew his business; he had been the treasurer since he started, with a very small sum.

Q. Did you write him a letter—Mr. Hemenway a letter on November 11, 1920, with regard to factory conditions? A. I show you what purports to be a copy. A. Yes, sir, I wrote that letter.

Mr. Murray:—I call for the production of the original.

Mr. Pratt:—We cannot find any such document.

Q. That is a true copy of the letter you wrote him? A. Yes.

Q. When was that copy made? A. When the original letter was written.

Q. That is a carbon copy? A. Yes.

Q. That letter was sent just as that appears in the copy? A. Yes, with the pencil memorandum attached there, down in the corner, "Dictated in the presence of Mr. F. P. Tenney", who testified here.

Q. One of your salesmen? A. Yes, one of our oldest salesmen.

Mr. Murray:—I offer that in evidence.

(Marked Exhibit D-13.)

Q. I show you another, dated December 15, 1920—

Mr. Murray:—I will consent that objection to these letters may be made later on.

A. Yes, I wrote that letter.

Q. That is a carbon? A. That is a true copy of the original.

Court:—Was the original memorandum delivered with the letter?

Witness:—Yes; a true copy of it is right there from the pencil memorandum.

Q. And that also was delivered to Mr. Hemenway with the letter? A. Yes, sir.

Q. There is a letter attached to D-13, which appears to be in handwriting; that is from whom? A. That is from Mike Sinn, one of the foremen in the plant. A true copy of the letter is attached there.

Q. The letter in handwriting, dated August 10, 1920, was sent to Mr. Hemenway, a copy of it with the letter of November 11, 1920? A. Yes.

Mr. Murray:—I offer the whole business.

Q. In 1923 was there any discussion between you and Mr. Hemenway as to selling out the business? A. Yes, sir.

Q. What was that conversation, as nearly as you can recall, and fix the time and place? A. The nearest that I can fix the time is sometime in the month of May, 1923, a gentleman called on me in the interest of the Harriman Company.

Q. Who was it? A. Mr. John Drake.

Q. Of West Orange? A. Yes, seeking to buy a business of the character of ours. Negotiations were begun and he called up——

Q. With whom? A. With Mr. Drake.

Q. By whom? A. After a conversation at the Athletic Club of Mr. Hemenway, Mr. Drake and myself, he asked to go through our records. It took all of the month of May and part of June and into the early days of July.

Q. What did? A. His investigation.

Q. Was he at that plant during that time? A. Almost every Saturday afternoon and night, with an accountant.

Q. Did you and Mr. Hemenway agree on what you would sel out the business for at that time? A. Yes.

Q. You and Mr. Hemenway between you? A. Not up to that time we hadn't.

Q. As a result of your negotiations with Mr. Drake, did you and Mr. Hemenway agree as to what you would sell the whole business for? A. May I tell the story as it occurred?

Court:—Yes.

Witness:—Mr. Drake called me up at Lake Hopatcong and asked me if he could come out. I invited him out; he said, "I have gone far enough into the matter now, and I would like to know what your price is." About the first days—in the month of June, Mr. Hemenway, without any notice to me whatever, came over to the factory, just about four- thirty in the afternoon. I had to leave the factory at

four-forty-five in order to catch my train at South Orange. Just as I was closing my desk, he came in and said, "Good-bye, L. P., I am going to Europe tomorrow morning."

Q. Was that the first you heard of his proposed trip? A. That was the first I knew he had any idea of leaving, and I said, "What?" He said, "Yes, I am sailing tomorrow morning and I will be gone for two or two and one-half months." Well, I was shocked. I went on home, caught my train, and when Mr. Drake delivered the message to me, that he was ready for a price——

Q. Did Mr. Hemenway go? A. He did.—I then cabled Mr. Hemenway to know what price he would put on the business. He cabled back, not understanding the cable. I had it repeated. He still cabled back to know the terms. I repeated. No, I didn't; he cabled that he would get home, and he came home the latter days of August.

Q. Having been gone how long? A. About two months. Mr. Drake in the meantime had discovered some, what he claimed to be serious errors in our bookkeeping, and he continued his investigation until along in October.

This is the best that I can give you, on dates. And then he asked for a conference at the Harriman office. Mr. Hemenway telephoned me to come by the New York office. I did, and we walked down together, and he wanted to know what idea I had for a price on the bsuiness. I said, "Mr. Hemenway, I know nothing about the books; I will leave that entirely to you." "Well", he said,

"if you can get $250,000, I am will to accept that." I said, "All right, if you are willing, I am willing." We continued to Harriman's office, and there met a Mr. Smith and Mr. Drake. The figures were submitted, and Mr. Smith looked them over. He said, "Well, the way you are going, I don't want it."

Mr. Pratt:—Who said that?

Witness:—Mr. Smith. After a few minutes' talk, he said, "If you want to take $190,000 for the whole damn shooting match, we will take it." Mr. Hemenway got up and said, "You think we are a pair a d—— fools. Good day, gentlemen." And that ended it.

Q. Were there any further negotiations along that line? A. No, not with the Harrimans.

Q. Or with Drake? A. Mr. Drake at a later date wanted to take up negotiations, but Mr. Hemenway and I decided that we would hire some competent man to take charge of the factory, which we did in January—or rather the latter days of December, 1923.

Q. Whom did you hire? A. Mr. Herman Voges.

Q. You and Mr. Hemenway agreed on him, did you? A. We did.

Q. Was there at that time or prior to that time, any attempt to govern or lay out a plan of expenditure and management of the financial end of of the company? A. We had many conferences.

Q. Who do you mean? A. With Mr. Hemenway, and I endeavored for years to get him to

give me a budget which I could divide to the different depart heads for betterment. For instance, we had fourteen different divisions of the factory. If I had $10,000 to spend a month, I would divide it and put it where it would do the most good. In other words, we would plan a budget system, thirty—sixty or nicty days, and give orders to the factory and hold them responsible for exceeding that budget; or if they went under it, they had that much more to spend.

Q. Is that what you did? A. That is what I tried to do for years, but never succeeded.

Q. Did you ever come to any agreement with Mr. Hemenway with respect to that? A. Yes.

Q. When? A. Mr. Vorges proved to be a boomerang and a four-flusher. I went South, as usual, that year.

Q. What year? A. 1924. That year I went to Cuba, to open the Cuban office; going down to New Orleans and Southern Texas, and taking a steamer over to Havana, and opening the Havana office; going from Havana to Florida and working the territory, and working south as far as Memphis and back to Tennessee, South and North Caralina and Virginia, and came home. When I got home, Mr. Vorges had not done one thing toward production with the factory but had spent, I was told by Mr. Feddersen, between twenty-eight and thirty thousand dollars in changing office toilets and shipping room.

Q. When you were away in 1920, was there any

raw material or material of any kind purchased whille you wree away? A. Yes.

Q. What? A. A carload or carload and a half probably two carloads of material purchased for lock washers.

Q. Do you know what it cost? A. I cost approximately—the various sizes——

Q. Altogether I mean. A. Around $3500.

Q. Anything else? A. We couldn't work it after we got it.

Q. What became of it? A. It was there when we sold it to—the major portion of it was there when we sold it to Crescent.

Q. Do you ever try to sell it?

Mr. Lum:—I object. I don't see that this has any possible relevancy.

Court:—I have already told him two or three times there was a wealth of testimony already on that point already in.

Q. When you came back—when did you get this balance sheet of December 31, 1924? A. About the twentieth of January.

Q. What did you do when you got it? A. I immediately told Mr. Hemenway that I wasn't satisfied to go along with the business.

Q. Why were you dissatisfied? A. I knew from the cash balance there that we didn't have enough money to go on, and knowing the condition that business was in, it was impossible for me to function in the factory, and that if collections didn't come in, in order to cover us up, we were

broke, and I was nervous and sick and my stomach went all to pieces on me.

Q. What made you think you wuold be broke if collections didn't come in? A. We had no balance—fifteen or sixteen hundred dollars balance, at the end of the year, with about $48,000 of bills payable, and a loan at the bank of over $50,000.

Mr. Pratt:—May I see that statement of December 31?

(Paper produced).

Q. Did you make any attempt to—did you make any suggestion to Mr. Hemenway in regard to getting in some money in any way? A. I did.

Q. What was it? A. I suggested that we would use our bank; our cashier had been to me a few days previous and said that had had a number of accounts that were threatened to be put in the hands of attorney for collection. His remark was, "Pay no attention to that; we are up to our limit; I will take care of it."

Q. What limit did he say; what limit did he refer to? A. I said, "Why not use our banks" He said, "We are up to our limit."

Q. Did either of you make any suggestion as to how money could be gotten? A. I said I couldn's go on this way; couldn't sleep and my stomach had gone back on me, and "unless I have some rest or some change or some let-up in this condition, I simply will go all to pieces, and I would rather be a live man

without money than a dead man with it." "Well", he said, "What is your suggestion?" I said, "I will loan any amount of money out of my personal funds up to $40,000 that you will put in. I have confidence that the business can be kept in shape." "Oh,,' he said, "forget it. You know the bankers here in town; go down town and get a mortgage on the factory.

Q. Did you try? A. Yes.

Q. Where? A. I went to the Prudential Insurance Company, the Mutual Benefit and the Howard Savings, and one other bank—I don't remember the name of it now; that is in the block between Clinton and Broad (?) Street— and finally I went to the West End Building and Loan. The Howard Savings Bank looked the property over; we paid for the examination, and they agreed to loan us $50,000, but we had to pay off $5,000 each six months until we had it reduced to $30,000, and then it would remain permanent. I went to the West End Building and Loan; I had their committee come up and examine it, and they said if I would tkae up the present mortgage of $35,000, they would let us have $50,000 on a first mortgage. I reported this to Mr. Hemenway, got all the figures together; he said, "Let us go to it." I said I wouldn't do it.

Q. Why not? A. Simply because we were owing at that time between forty and fifty thousand dollars, and we had a big loan in the bank and had a mortgage of $35,000, so if we took up

the $35,000 we would have $15,000 left to run the business, and I had no working capital.

Q. So $50,000 was the most you could succeed in getting granted to you? A. Yes.

Q. What did you do then, anything? A. Yes, I told him we had to have an understanding; I was either going to get out, or I was going to ask the Court to appoint a receiver in equity to wind the business up.

Q. Where was it you told Mr. Hemenway that? A. First at the Athletic Club. He didn't believe me. He said I was a sick man. I had carbuncles on the back of my neck.

Q. When was that at the Athletic Club? A. That was in March, 1925. Then we had another meeting at the Nankin Garden.

Q. When was that? A. In the same month; I would say a week or ten days later.

Q. What was said or done at that meeting? A. Just the same thing. Just a repetition of what had been going ever since the January statement had been handed me.

Q. What did Mr. Hemenway say? A. He wanted to go on with the business until December, and then we would liquidate it, getting the full benefit of the year.

Q. What next was said? A. I said, "No, I cannot get you over here to confer with me. I telephone you that I will be in New York and you won't keep an engagement; you come over here and you avoid me; I cannot get you to sit down

and talk with me. I am sick and tired and worn out, and I won't go on any longer."

Q. When was your next talk with him? A. About the first days of April. April first, at noon, at my house, I telephoned him to come down there, I was sick.

Q. Did he come? A. Yes.

Q. Is that the occasion when Mr. Isherwood attended? A. Yes.

Q. Tell us what happened there from the very beginning. A. He arrived at the house, as near as I can fix the time, between eleven and twelve o'clock, and we took until four-thirty and we got no where.

Q. What was the substance of your talk? A. The substance of the talk was that I was going to get out of the business, that I was going to buy him out and turn the business over to the employees of the company to operate it and co-operate with me. He wouldn't consent to that, and then I said, "All right, then the last and only resort that I have is to apply to the courts, and I am going to it." You can believe me or not, I have stood this just as long as I intend to; I won't go a day longer without something definite. Now, if you want to know what my mind it, I am giving it to you now; I will not go on. Is that plain to you?" He said, "Yes, that is plain", but when I got well, I would feel different and business could go along. I said, "All right, I will apply the court, as soon as I can possibly get a lawyer to

take the case." He said, "What will that mean?" I said, "I don't know." "Well", he said, "don't you think we should have some advice on the subject?" I said, "We can get it, and get it now. I want action." He said, "Do you know any lawyer?" I said, "Yes, Judge Mason; Judge Charles Mason lives right down here." It was then around five o'clock. He said, "Call him up to see if we can see him." I caleld him up and he wasn't in, and then I called up Mr. Isherwood, and asked him if he would come up there. I said, "I am not in fit condition to come downtown, and if you will come up here, you will greatly oblige me." And he did. He took a taxicab and came to the house. We talked for, I will say, half or three-quarters of an hour and got nowhere.

Q. When Mr. Isherwood came did you tell him anything as to the reason why you called him in? A. I don't think I met him; I think my wife met him at the door, or the servant, and he came up.

Mr. Lum:—Was Mr. Hemenway there?

Witness:—Yes, he had been there since between eleven and twelve o'colck. When he came upstairs, I said, "Mr. Isherwood, this is my partner, Mr. Hemenway. We have a business difference and we would like a little advice." We sat down and talked for a few minutes and didn't get anywhere.

Q. What was said? A. Oh, good God, I cannot tell you; this was a three-cornered conversation.

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Q. Generally, what did you and what did Mr. Hemenway say? A. I wouldn't stay in any longer; either he would have to get out, or I would get out, but there had to be a change in the business and the refinancing or some change necessary to relieve me from the stress and the distressed condition that I was in.

Q. Go ahead. A. I don't remember now who suggested one retiring, but as it was in my home, I said I would go downstairs; I did, and in the course of say half an hour I was called back.

Q. By whom? A. By Mr. Isherwood.

Q. Do you mean that Mr. Hemenway and Mr. Isherwood were together during that time you were away? A. Yes, they were up on the third floor in my office at my home. When I walked into the room, Mr. Isherwood said, "Mr. Smith, Mr. Hemenway says that he cannot run this factory without you; he wants to know if you will go ahead." I said, "I have told him, not once, but fifty times, between eleven and four-thirty, that I will not go ahead." He said, "Will you pay him $100,000 for his interest?" I said, "Wait a minute. On one condition. He invested $46,000 of our money in the Canadian property, that I wouldn't agree to, but he did it over my head."

Q. That is referred to as the Montreal property? A. Yes; he invested some money in some bonds in the Aralia Hardware, which was a hardware concern in very precarious condition, which I wouldn't consent to. I said, "If he will take the

bonds that he bought and the Montreal property which we have written down from $46,000 to $30,000 on our books, I will accept his proposition." I then made him an offer; the offer was, as I remember it, in this shape: $5,000 on the signing of the contract and $5,000 each six months, secured by a first mortgage on the property at Irvington.

Q. At that conference was there anything said about your selling out to Mr. Hemenway? A. Yes, sir.

Q. What and by whom? A. By Mr. Hemenway. I said, "Mr. Hemenway, you are the treasurer of the company; you know exactly what the business is worth; what are you willing to take for yours? I am willing to take the same amount for myself." He wouldn't make a price, and the price was made by Mr. Isherwood after I returned.

Mr. Pratt:—You said he would not make a price?

Witness:—He would not make a price, and the offer came through Mr. Isherwood.

Q. Who communicated this offer to you?

Mr. Pratt:—He hasn't said anything about an offer, except he said he would buy for $100,000.

Court:—There was an offer to sell by Mr. Hemenway.

Q. Who communicated that offer to you? A. I just told you; I just answered it; Mr. Isherwood.

Q. Mr. Hemenway was right there? A. Yes.

Q. Did you accept it or reject it? A. I just told you I accepted it.

Court:—Subject to a condition.

Q. What was said by Mr. Hemenway or Mr. Isherwood in regard to these conditions which you attached? A. Mr. Hemenway said, or Mr. Smith—"I think that Mr. Isherwood ought to draw up a contract." I said, "All right." We then turned to Mr. Isherwood and asked him to draw a contract, and we were to meet at his office the following Tuesday.

Q. Did you meet at Mr. Isherwood's office? A. No, sir.

Q. The following Tuesday? A. No, the engagement was not kept.

Q. By whom? A. By Mr. Hemenway.

Q. Now, when did you next see Mr. or Mrs. Hemenway? What was the occasion? I don't mean the date. A. Mr. Hemenway came to the factory the following week and asked me if I would go downtown and have a conference with him.

Q. Did you agree to go? A. I went with him to the Robert Treat Hotel, and we went up on one of the upper floors, and he opened a door with a key and in that room was Mrs. Hemenway. He didn't tell me anything about her being there.

Q. Before you actually saw her in the hotel room, did you know that you were going to meet her there? A. I did not.

Q. When you went in, what happened? A. When I went in, Mrs. Hemenway greeted me and asked me what I was having a case of brain storm amout.

Q. What did you say? A. I simply said, "Mrs. Hemenway, I have lost entire confidence in Mr. Hemenway; as much as I regret to state it, I will not and canont go with him any further, and there must be some definite change made in the business."

Q. What did she say to that? A. She said that I was sick and that I ought to go off and take a rest and when I felt better, she felt sure that our being together as long as we had, that things could be patched up, and that Mr. Hemenway was willing to close the New York office and go to the factory, which he had steadfastly refused to do since 1917. I said, "No, I will not continue. Is that definite? Is that positive?" And then the conversation got very personal and very heated, and Mrs. Hemenway got very personal, and I said, "Good day; I am still a gentleman"; put on my hat, walked out and left them.

Q. At that conference was there anything said by anybody in regard to the agreement which Mr. Hemenway and you had made at the meeting in your home regarding the sale by Hemenways of their interest? A. To the best of my recollection, Mrs. Hemenway said, "I own this company; I own control of the stock, and I will not sell it at any such price." I said, "Mrs. Hemenway, Mr. Hemenway made the offer; I didn't."

Q. Did he make any reply to that? A. I think the personalities then began, and I immediately got up and left.

Q. Did Mr. Hemenway take any part in that conversation? A. Yes, he did.

Q. What did he say? A. He said, "We have been going a long time and we have had our differences all these years, but we have been able to patch them up and go along and we have done very well, why can't we do it now?" Then I had to come out and tell Mrs. Hemenway and Mr. Hemenway, too, that I had lost absolute confidence in his ability to attend to business.

Q. Did Mr. Hemenway make any reply to that? A. No, he didn't.

Q. When did you next see Mr. or Mrs. Hemenway? A. The next day I saw Mr. and Mrs. Hemenway in Mr. Isherwood's office, with Mr. Cohn and Mr. Isherwood and myself.

Q. Tell us what happened there. A. Mr. Cohn, I think it was, handed Mr. Isherwood a contract that they had drawn, and Isherwood turned and said, "Well, this ain't a selling contract; it is a buying contract," and told me the substance of it. "Well," I said, "this is the offer that you made me in 1920, to give me paper and let me go out work for a living; I won't accept it."

Q. Did Mr. or Mrs. Hemenway say anything about why the agreement which they then offered differed from what you had agreed upon at the meeting with Mr. Hemenway at your home? A.

No, Mr. Isherwood told me that it was their selling out instead of buying. They didn't say a word.

Q. You mean Mr. Isherwood said that you were selling, with reference to that agreement?" A. With reference to the agreement that Mr. Cohn handed him that day, he said, "This is not the contract that you agreed to at Mr. Smith's house; you have reversed it."

Q. I show you the agreement and ask you if that is the one that was handed to you by Mr. Cohn? A. Yes, sir.

Mr. Murray:—I offer that in evidence.

(Marked Exhibit D-14.)

Q. At that meeting, Mr. Smith, did anyone, you or anyone else, refer to any agreement that you had previously made, verbal or otherwise, whereby you were to sell out to Mr. Hemenway? A. Yes, I think Mrs. Hemenway referred to it.

Q. What did she say? A. She said in substance, "Well, that is all you wanted to pay us for the business, and I have decided to take it for that." My remark was that "I was going to secure you as to the payments, but you offer me nothing but preferred stock."

Q. At that meeting, Mr. Smith, did anyone, you or anyone else, refer to any agreement that you had previously made, verbal or otherwise, whereby you were to sell out to Mr. Hemenway? Prior to that meeting had you made any agreement with Mr. and Mrs. Hemenway whereby you were to sell out to them? A. No.

Q. Was there any reference at that last meeting to which you have testified, about any such agreement by you? A. None whatever.

Q. When this offer was made to you, this written agreement was tendered to you, and draft of the contract was tendered to you, D-14, did you make any counter offer or suggestion? A. No, sir.

Q. Did either Mr. or Mrs. Hemenway, or Mr. Cohn, make any other offer than the one here D-14? A. None other than that.

Q. At that meeting was there any attempt by either or anyone to negotiate a new agreement or this agreement? A. No, sir.

Q. It was testified by some of the complainants' witnesses, Mr. Smith, that at some time you made a remark to the effect that you had been broke twice in your life, and that you didn't care whether you were broke again; you didn't care, you would start over again, and didn't care if you wrecked the company. Did you ever make any such remark or anything like it? A. I recall in talking with Mr. and Mrs. Hemenway, that a remark of this kind was made, that I had been broke before, but I could start over again. "I will not go on with Mr. Hemenway, I have lost entire confidence, and he will not co-operate with me, nor will he give me any time at the factory, or the condition of our finances." Mrs. Hemenway insisted that I continue; I said, "Mrs. Hemenway, I would rather start life over again than to live the life that I have lived for the last five years. I won't

do it." I said, "I have started twice; I don't have a dollar in New York; nine months after I landed here, I was robbed by a partner. I was robbed of the first money that I ever saved as a boy in an investment, and I would rather start life over again with peace of mind than to have all the money that is in the world," but as for using the words "wreck the company," never such a word entered my mind, because I never thought we would wreck the company.

Q. Did you ever mention to any of the Hemenway family, Mr. or Mrs. Hemenway or the nephews, any of them, make any remark to the effect that you had been broke twice in your life, and would just as soon start over again, if you had to; anything of that kind? A. I don't recall that I did. Mr. Elden and Thomas Hemenway called on me about the sixth or seventh of October, and asked me if I wouldn't consider going ahead with the business and patching it up. Mr. Thomas Hemenway told me that he had a similar condition in his own business, where they didn't speak or they didn't agree with each other's policy, and they finally got together and wiped out their differences, and he bought him out. I refused to discuss the business end of it except in the presence of my attorney.

Q. On that occasion, at that time, did you refer to having been broke twice in your life? A. I don't know, I may have.

Q. When you talked to Mr. Isherwood in Mr.

Hemenway's presence, at the meeting in your home, was there any discussion had as to the probable effect on the company and its business of a receiver—on an application for a receiver? A. Yes.

Q. Did you ask Mr. Isherwood's advice on that point? A. That is what we brought him there for.

Q. Did he give it to you? A. Yes.

Q. What did he say? A. He simply said that a receiver in equity. if we were solvent, we couldn't get it, in the State of New Jersey, but if we could get it, the business would continue, and while the business would be limited, we would probably get a very substantial loss under a receivership.

Q. At that meeting at the hotel conference was the question as to the effect, or its effect on the business of the application for a receiver disclosed at all? Was anything said at all as to the possible or probable effect on the business of the company of the application for a receiver? A. Nothing whatever.

Q. Or at the meeting following, at Mr. Isherwood's office? A. I don't think we got that far, because I was so incensed that I left the meeting, and another case of procrastination.

Q. Up until the first of August, 1925, what was Mr. Hemenway's condition of health, so far as you observed? A. He was at the factory more than usual, and so far as I know, was in perfect condition.

Q. How old was he? A. Well, I think he was twelve or thirteen years older than myself.

Q. That would make him how old at that time? A. It would make him sixty-nine or seventy.

Q. And up to that time had be been attending to business? A. As much as he had in previous years.

Q. In September, the twenty-eighth or twenty-ninth or thirtieth, of 1925, this dissolution proceeding in New York was filed, and an article regarding it appeared, I think, on the thirtieth of October in the New York Times.

Mr. Pratt:—September 29.

Q. Did you have anything to do with the putting of that article in the New York Times? A. I did not.

Q. Did you know that it was going in before it appeared? A. No, I picked up the morning paper —it was as much a shock to me as his death was when I picked it up on the morning of the second of January.

Q. Why was it a shock to you? A. I said it was as much of a shock to me as his death was on the morning of January 2nd, 1926.

Q. What was there to shock you; what was there about it that shocked you? A. That the thing should be published in the newspaper. I had no idea that it would be inserted.

Q. Have you any idea at all how it got into the paper? A. I have not.

Q. Mr. Smith, when did you first learn or have

any idea that the Crescent Tool Company would be interested, or might be interested, in buying this plant of yours, or any other similar plant? A. I think it was the day after my brother went to Buffalo, Jamestown, on his way to Chicago, to an automotive convention, of which he was a delegate and an officer, I believe.

Q. From whom did you first get the idea that it might be interested in buying the plant? A. My recollection is that Mr. Swisshelm and Mr. Moore called on us on the twenty-ninth of October, after the convention was closed, and Mr. D. G. Smith brought him into my office, and I had met both of them; we chatted for a few minutes and then we took them to lunch at the Elks Club, in Irvington.

Q. Were you there at that lunch? A. Yes. Mr. Swisshelm and Mr. Smith being sales managers, and myself and Mr. Moore being interested in the factory, the production end; we talked and they talked. Mr. Moore asked the privilege of going through the factory after his return. I said, "Why, everything is wide open to you. Look at the many times that you have entertained me at your factory, and not only me, but my superintendens and my foremen." He thought it was very nice, so we returned to the factory, and I turned him over to Mr. Yakey, the then superintendent, with instructions to take him through the factory.

Q. Did you go through the factory with them personally? A. No, I did not; it was not my cus-

tom to go through the factory. They returned, as I recall, just before five o'clock, and bid us good-bye; that is the last I saw of them.

Q. Was there anything said on that day, in your presence, by Mr. Swisshelm or Moore, which led you to believe that the Crescent Tool Company might be interested in buying your plant? A. Nothing whatever; in fact, I know that they had no authority, because Mr. Peterson owns the Crescent Tool Company.

Q. Was there any remark made, or was there anything said by anybody at that luncheon, to the effect that the Crescent Tool Company had been trying to buy the Utica Drop Forge Company? A. I don't recall the remarks, but I think it was the following morning that my brother came in and asked me if I had heard that "remark I was asking Mr. Moore about manufacturing." He said they did admit he investigated the Utica Drop Forge and Tool Plant at some previous time, he didn't know when. I was busy with my morning orders at that time, so the matter was dropped. When we went to lunch, he said, "Why don't you in your state of health, you cannot run this factory, it will kill you, you have been sick, almost every month you have had stomach trouble, why don't you let me try and sell the factory?" I said, "You cannot sell it." He said, "I can only try." I said, "I want to run this factory for the benefit of my employees. I would like to see every man here that is worthy of consideration, be a part and

particle of this, and let me step down and take a little rest."

The Court:—We are not interested in that conversation.

A. (Continuing) The upshot was that I told him to go ahead and try it. He said, "I have got to go to Chicago." So he went out, and the next thing I knew, or the first thing I knew, that they were interested, was a letter from him stating they were interested, and to send on the inventory.

Q. You said that they had entertained—the Crescent Tool Company had entertained you at your plant? A. Yes.

Q. And also your superintendents? A. Yes.

Q. When was that?

Mr. Pratt:—It seems to me that is entirely immaterial to the issue. We have had considerable testimony that is incompetent.

Court:—It doesn't make any difference to me. It is a fact that it is in by half a dozen witnesses, that it is the custom among the trade.

Mr. Pratt:—We will concede that it was customary and we won't put in any rebuttal testimony on that subject.

Mr. Murray:—I withdraw the last question.

Q. Prior to October 29 when was the last time that you had been entertained at the Crescent Tool Company factory? A. In 1922, the superintendent——

Mr. Pratt:—I object to counsel containuing on this line any further.

Witness:—1922.

Q. Do you remember the meeting at Mr. Cohn's office, which was held in order to cousummate the contract by which Mr. and Mrs. Hemenway agreed to sell out their interest to you? A. Yes.

Q. Do you remember about the date of that first meeting? A. November 4.

Q. At Mr. Cohn's office? A. November 4.

Q. Tell us what happened then. A. Nothing; everything was very pleasant; Mrs. Smith and Mrs. Hemenway were chatting; Mr. Hemenway and I were chatting, and Mr. Burnett and Mr. Murray were taking care of the——

Q. Who? A. Mr. Burnett and Mr. Cohn were taking care of the business matters.

Q. You signed various papers there, did you, including some minutes of the company? A. Yes.

Q. And Mr. and Mrs. Hemenway also signed them? A. Yes.

Q. I show you some papers, and I ask you if that is what you have reference to? A. Yes, I signed that.

Q. Mr. and Mrs. Hemenway signed it also? A. Yes.

Q. And I sho wyou another paper. A. I signed that also.

Q. I show you a third paper. A. That is also my signature.

Mr. Murray:—I offer the copy of the minutes in evidence.

(Marked Exhibit D-15.)

Q. At that meeting was anything said by Mr. or Mrs. Hemenway indicating any objection to going through with this deal? A. Nothing whatever.

Q. Or by Mr. Cohn? A. Nothing.

Q. There was a later meeting at Mr. Cohn's office, attended by all four parties? A. Yes.

Q. And the two lawyers? A. Yes.

10 Q. Do you remember when that was? A. Yes.

Q. When? A. From 12:15 December 9, until about 5:30 that day.

Q. Tell us what happened from the beginning to the end. A. Mrs. Smith and I had very little to say; nothing, in fact, as Mr. Burnett, Mrs. Smith and I were in the anteroom, and entered Mr. Cohn's private office. Mrs. Hemenway said to me, "I understand you sold your plant to the Crescent Tool Company." I said, "Not yet, Mrs.
20 Hemenway." Then there was nothing said further than that until Mr. Hemenway and Mrs. Hemenway got into a very heated argument with Mr. Cohn and Mr. Burnett about the settlement.

Q. What part of the settlement? A. The notes; Mr. Burnett insisted that we were trying to sell the factory, the property, and we wanted the notes made non-negotiable so that we could take them up.

Q. And they wanted what? A. They finally
30 agreed, I think, to make the one note that they wanted to cash right away, because they had made some investment in securities and they wanted to use it.

Q. Were there any other details of settlement in which Mr. or Mrs. Hemenway took personal part? A. Yes.

Q. What? A. Mr. Hemenway insisted upon having his salary and dividends, and the Smith & Hemenway Company should pay for some repairs or electrical installations on the Montreal property, and that is all that I can recall at this moment.

Q. Was there anything said at that meeting by either Mr. or Mrs. Hemenway or Mr. Cohn indicating that they had any reluctance about carrying through this deal? A. No, Mr. Burnett very plainly told them that we were trying to sell the property, and we insisted upon the notes being held in escrow, I think by Mr. Cohn, so that we could take them up and anticipate them and anticipate the payments.

Q. At that time did you have any idea of selling to the Crescent Tool Company? A. After I got my brother's letter asking me to send on the inventory, the matter was up in the air, I had nothing in the shape of an agreement that would hold them to anything; they could have quit any time they wanted to, and I couldn't hold them.

Q. Was there anything said on November 4 about the Crescent Tool Company matter? A. Not a word; in fact, I didn't know it myself on November 4th.

Q. I show you an agreement dated January 19,

1926, and ask you if that is the contract with the Crescent Tool Company?

Mr. Pratt:—That is the same as Exhibit C-38 and is already in evidence.

Q. So far as you could observe it, what was the condition of Mrs. Hemenway's health in October and November, 1925? A. When he was down at Atlantic City he was using a cane, but he looked remarkably well; he was a little white.

Q. Did you see him down at Atlantic City? A. Yes.

Q. When? A. At the Atlantic City Convention 1925. I think it was 20th, 21st or 22nd of October.

Q. He was using a cane there? A. Yes.

Q. What was his apparent condition at the meetings of November 4th and December 9th? A. He was very wide awake at them.

Q. You are speaking of him mentally? A. Yes.

Q. What about his physical condition? A. He didn't look to be decrepit in any way, shape or form.

Q. Did he appear weak? A. Not at all.

Q. Did you see him at the factory after December 9th? A. I sent for him; he expressed a desire—we shook hands and bid each other good-bye and he wished me luck in my new enterprise on the ninth of December, and expressed a desire to come to the factory. He had some personal matters he would like to check up, and wanted to know if I would send the factory car over. The factory car

is a Ford, and I said, "I will be very glad to have my private car come over," and I did send over for him, and I think he had his nephew Elden come over to the factory, and I sent him back home that night.

Q. When was that? A. I think it was about the twenty-first of December; I wouldn't be positive of the date, about that date.

Q. What was his apparent condition then? A. He said he had had trouble with his heart and the doctor advised him to be very quiet, but with the exception of that, he seemed to be in good shape.

Q. Did he say anything as to whether his heart condition was serious or not? A. No, he said the doctor advised him to be quiet.

Q. Did he say what that heart condition was due to? A. No.

Q. Prior to August 1, 1925, had you ever heard of there being anything wrong with his heart? A. No, sir, never had.

Q. When did the fact that the Crescent Tool Company was interested in this company become a matter of common knowledge around the factory, do you know? A. That I cannot say.

Q. When did the Crescent Tool Company actually take possession? A. We turned the business over to him as of December 21.

Q. On what date did you turn it over to him physically? A. Actually on January 19, 1926.

Q. The very day of the contract? A. Yes.

Q. And you stepped out from then and the

Crescent Tool Company officially stepped in? A. Yes.

Q. Going back for a moment: it was customary for and Mr. Hemenway to endorse all the company's notes personally? A. Yes.

Q. Why was that, do you know.

Mr. Pratt:—He hasn't told us about that?

Court:—We have had it in the record right from the banker's own lips.

Q. Did he ever refuse, Mr. Smith, to endorse any of the company's notes? A. Once.

Q. When? A. In the early days of September, 1925. I told Mr. Hemenway—he asked me to endorse some notes; I said, "I will not endorse no note; I will not obligate myself any further; I am telling you, as I have told you since the early spring, that I will not go ahead with you.

Q. Did you eventually in that year endorse the notes which you formerly refused to? A. I did not sign any more notes.

Q. Did the bank take the notes without your endorsement? A. We did not borrow any more money.

Q. What about renewal notes? A. The renewals I naturally had to sign, if there was any; I don't recall that there was any.

Q. Did you talk to Mr. or Mrs. Hemenway at the Atlantic City convention? A. Only spoke to them socially.

Q. Was there anything said at all about business in any way? A. Not at all.

Q. Was the attitude of Mr. or Mrs. Hemenway then toward you antagonistic or not? A. Not at all; they were very pleasant and speaking to me; that is all we did.

Q. Did Mr. or Mrs. Hemenway ever put any money into this company when you didn't? A. No, sir, they did not. Let me correct myself there. Mr. Hemenway loaned the company in 1898, for which he had my notes, $5,138, which notes were to be surrendered——

Mr. Pratt:—In 1918?

Witness:—1898—when I organized the Smith and Hemenway and the Erickson Telephone.

Q. That is years ago? A. Yes.

Q. Aside from that, did Mr. or Mrs. Hemenway put in any money into the company in any form, by way of loans or otherwise, unless it was accompanied by an equal amount of yours? A. I am positive that they did not.

Q. In any of your meetings with Elden Hemenday in 1925, did you say that if there was a dissolution of the company that neither you nor the Hemenways would get much out of it? A. I probably did, if we were forced through a receivership.

Q. Did you ever tell the Hemenways or their nephews or anybody else that you would not sell out your interest on any terms, that you were not open to an offer to sell out your interest? A. I positively did not.

Q. I show you a letter from Mr. Feddersen, directed to yourself, dated May 12, 1925, and ask you how that letter came to be written, if you know? A. I asked Mr. Feddersen to give me an estimate of how much capital was necessary to finance this business, in the event that Mr. Hemenway and I went through with the proposition of April 1, 1925, and this is his answer, that I must raise $100,000 in order to have sufficient stock to fill orders promptly.

Q. You said that the question has been raised as to why, with $104,000 worth of finished goods on hand, it was that the orders couldn't be filled promptly. Will you explain that? A. Easy enough. Would a shoe merchant order his entire stock of number sevens?

Q. How does that apply? A. That applies the same way. The pliers are sold in four, five, six or eight—seven or eight, ten inch, and in some cases 12 inch. When a merchant puts in a stock of pliers, he orders all these sizes. We might have two hundred thousand of one size and none of the other. Furthermore, Mr. Murray, there was only approximately $69,000 to $70,000 worth of tools that we made in our own factory there. The balance of the stock was miscellaneous goods that we were jobbing, in order to do $800,000 to $900,000 of business yearly, say from $750,000 to $1,000,000 of business, which was the range of our business over those years of 1918 to 1925. You couldn't, to save your life, promptly fill orders and

turn your finished goods over eight or nine times, it is impossible.

Q. How many times could you turn it over? A. The very quickest that it can be turned over under ordinary circumstances, manufacturing economically, is four times a year. It is a long process to bring a plier from a bar of steel to the box in shipment.

Q. How long, approximately? A. Approximately ninety days.

Q. How many different items and sizes was your company turning out or making in 1924? A. Of everything?

Q. Yes. A. 1700 to 1710.

Q. Your brother said three or four or five hundred. A. He doesn't know. Our catalogue will show it. That means each individual item that we have to have in stock to fill orders with. May I further explain that and say, that we have had $50,000 worth of hack-saw blades and couldn't fill an order because they were carried in different size teeth for different purposes and different lengths.

Q. Did these various articles have the same salability, or was there a difference in the numbers of quantities which you would sell.

Mr. Pratt:—This is clearly immaterial.

Court:—I don't want to hear it; I have tried to impress you all day with the fact that I didn't care anything about this, and I don't.

Q. Did you ever tell anyone or make any re-

mark in 1925 as to what the profits of the business would be? A. Yes, I think I did.

Q. When and what was it? A. As to what the profits would be?

Q. Yes. A. No.

Q. Or the losses would be? A. Yes.

Q. What did you say and to whom? A. I went to Mr. Feddersen when this controversy came up—I think it was just prior to going to the Robert Treat with Mr. Hemenway, and I said, "Mr. Feddersen, how are we running?"

Mr. Lum:—Was this communicated to Mr. Hemenway? Was Hemenway there?

Witness:—Yes; I went to Mr. Feddersen, who had——

Mr. Lum:—Was Mr. Hemenway there at the time you were talking to Mr. Feddersen?

Witness:—No; Mr. Hemenway was not there.

Mr. Lum:—I object.

Court:—Objection sustained.

Q. Did you ever have any conversation with Mr. Hemenway as to the probable losses in 1925? A. Yes.

Q. Confine yourself to that and state when it was. A. I simply made the remark in this conversation at the Robert Treat, that Mr. Feddersen had informed me that we were running wholly to cheap tools, and that we would probably lose $25,000; that was his estimate, and I simply quoted it.

Cross Examination by Mr. Pratt:

Q. Mr. Smith, at one time you operated a separate office from the Smith & Hemenway Company, did you not, while you were in the company? A. No, sir.

Q. Didn't you operate a file point business on your own account? A. No, sir.

Q. Quite sure about that? A. I am.

Q. So that during the entire time you were in the Smith & Hemenway Company you had no other interest? A. Yes, I had interests in a file company, but it was operated by the officers of the company, of which Mr. Moody was general manager.

Q. You had other interests that Smith & Heminway Company? A. Yes, a financial interest.

Q. Mr. Hemenway took a reduced salary during the time when he was managing director of the American Wringer Company, did he not? A. Yes.

Q. And he so stated in the letter which you have offered in evidence, of 1920? A. Yes.

Q. When the salesmen of the Smith & Hemenway Company sold wringers, the Smith & Hemenway Company received the commissions, did they not? A. Yes, presumably; I never say them.

Q. You didn't see the checks that came in; you don't mean to say or insinuate that the company didn't receive them? A. No, I cannot say.

Q. You don't mean to imply that Mr. Hemenway didn't turn the commissions in to the com-

pany? A. They undoubtedly were not sent to Mr. Hemenway.

Q. Prior to the time that you had your salesmen carry a side line of wringers, you had carried a side line of the Utica Drop Forge and Tool Company? A. No, that was our major line, our bread and butter.

Q. Whether that was a side or major line, you sold for that company on commission? A. We sold for all companies on commission.

Q. Including the American Wringer? A. Yes. I must qualify that, because I said "all." Certain little lines, like glass cutters and nail clippers, were not sold on commission.

Q. In 1898, you and Mr. Hemenway started in with $12,000 between you, is that right? A. We did not.

Q. How much did you start in with between you? A. If you will let me refer to the contract, I can tell you.

Q. Just roughly, if you know. A. Between ten and eleven thousand dollars.

Q. All right, then. After 1898 did you ever put in any more capital? A. Yes.

Q. How much? A. I cannot tell you without reference to the record.

Q. About how much? A. From $2,000 up to as high as $8,000 loaned to the company at various periods.

Q. I didn't ask you about loans to the company, but I mean invested in stock account. Did you invest any further money in the company other than loans? A. Yes.

Q. How much more? A. I cannot tell you that.

Q. Approximately. A. I cannot tell you that.

Q. Can you say within $100,000 how much? A. Yes. We never put in $100,000, either of us, or both together.

Q. Did you both together put in as much as $50,000? A. No, the business made it.

Q. Did you put in any money outside of the first ten or eleven thousand dollars except what you made in the company? A. You mean buy additional stock?

Q. Yes. A. We did.

Q. Money received from outside sources? A. No; money received from salaries or dividends of the Smith & Hemenway Company, we turned it back and took stock.

Q. So that beginning with ten to eleven thousand dollars, and without adding any outside capital, from 1898 to 1925 you increased the company from $10,000 to approximately something over $400,000, isn't that right? A. Yes.

Q. That was in spite of the fact that you had a big loss of $90,000 on telephones? A. Yes.

Q. So that you finally took the big loss, on which there was no salvage—— A. I cannot give you the exact amount of salvage that we got. We sold some of the bonds, but just how many, I don't remember.

Q. But you helped pay the loss? A. I certainly did, and paid it out of the hardware business.

Q. You don't know anything about how much it was? A. I can only tell you what the auditor told me at that time.

Q. That is just hearsay, then, so far as you are concerned? A. It was the auditor of the company.

Q. Outside of the $90,000 loss were there heavy losses that the company had? A. You mean outside investment?

Q. Yes. A. The Montreal property.

Q. You dropped $16,000 there? A. No.

Q. From $46,000 to $30,000? A. But we had to repair the building and spent a good deal of money.

Q. Didn't you use the building for a Montreal office? A. My recollection is——

Q. Did you or didn't you? A. No.

Q. You never used the Montreal building in your business at all? A. No.

Q. You had a Montreal office? A. Yes.

Q. You had a Cuban office? A. Yes.

Q. In addition to that loss, you did take out dividends, so, as you stated it, you kept the company skinned right along during that period of thirty years, is that right, or twenty-eight years? A. We didn't pay any substantial dividends until the War period.

Q. How much more money did you take out of the company in dividends beside the four per cent that was levied in 1925? A. I cannot tell you that without reference to the books.

Q. Approximately how much in dividends? A.

I should say we took in the thirty-three years about thirty thousand dollars apiece. That is only a guess, however.

Q. Isn't it a fact that from 1911 to 1925, over fourteen years, you took out upwards of $75,000 apiece in dividends? A. No, we took out to the best of my recollection four per cent on the common stock; one-quarter of one per cent in lieu of salary.

Q. Besides the $30,000? A. Yes.

Q. That would make about $75,000 between you then altogether? A. I am not going to say; you can compute it as well as I.

Q. Coming down to the talk at which Mr. Isherwood was present at your house, did you on that occasion state that you were willing to sell for $100,000? A. I made no offer; the offer was made to me through Mr. Isherwood.

Q. Did you say to Mr. Isherwood that you would sell, on that occasion, and insist on selling? A. Yes.

Q. But you made no price at which you would sell? A. No.

Q. When Mr. Isherwood stated a price of $100,000, did you say you would buy or sell at that price? A. No, sir.

Q. As a matter of fact, you were entirely unwilling to sell at $100,000? A. If I could have given——

Q. Just answer Yes or No; were you willing?

A. I cannot answer it unless you let me answer it in my way.

Court:—He may answer.

Witness:—In my state of health, if he had offered me $100,000, secured; not preferred stock, with nothing to secure it, he could have had the business.

Q. That is, you were willing to sell for $100,000 on that day? A. Yes.

Q. And did you tell Mr. Hemenway? A. I did not.

Q. Did you ever tell Mr. Hemenway that? A. I don't recall that I did.

Q. At that conference when you got down to the Robert Treat Hotel and Mrs. Hemenway was there, she did say to you that she refused to sell on any basis of $100,000, didn't she? A. No, sir, she did not.

Q. What did you mean in your testimony, in which you said in substance, that Mrs. Hemenway said that she owned the majority of the stock, and that she would not sell on any such basis? A. That was her remark.

Q. That is what she said? A. Yes.

Q. So she did say, then, that she wouldn't sell on the basis that you were offering to buy, didn't she? A. I would say that she did, to the best of my recollection.

Q. Did she say that she didn't consider the proposition fair? A. I don't recall that she did.

Q. She simply refused to sell? A. She simply

refused to sell, and wanted me to continue with John Francis, as she called him.

Q. At that time did you tell her that you would accept the same proposition from them? A. I did not.

Q. I show you a paper and ask you if that is not Mrs. Hemenway's writing? A. Without taking time to read it carefully, I would say to the best of my knowledge it is Mrs. Hemenway's writing.

Q. And she wrote it on that occasion in that room while you were there? A. Wrote what?

Q. This paper. A. I don't know; I cannot testify to that; she didn't do any writing at the Robert Treat. I will tell you they got into personalities so quick that the room was warm and I got out.

Q. Just what were the personalities? A. I don't want to repeat it unless the Court instructs me.

Mr. Pratt:—I withdraw the question. I ask that this paper be marked and received in evidence.

Mr. Murray:—I object.

Court:—I cannot admit that, unless it is proved in the regular way. He says it was not written at that time. Did you ever see it before?

Witness:—No, sir; never laid eyes on it.

Q. Did Mrs. Hemenway say to you, in words or substance, "I do not consider the proposition

fair''? Did you say that you considered it just and fair, and that you would accept from them the same proposition, with the exception of the Montreal property; that is, that you would accept $100,000 in preferred stock, payable at the sum of $5,000 principal a year, with six per cent interest, until paid? A. That is made out of whole cloth. I never had any such—there was no such statement made, nor did I ever dream or hear of any such proposition until you just read it.

Q. You read this statement of Mrs. Hemenway's? A. I never did.

Q. Would you care to read it? A. No, sir.

Q. That is the statement you characterize as being made out of the whole cloth? A. I characterize that as being made out of the whole cloth. There wasn't one single word mentioned in that conference except they wanted me to continue, and that I was a sick man and——

Q. Didn't Mrs. Hemenway say to you that that was not a fair proposition? A. I don't recall that she did; she might have. She said a good many things to me.

Q. And among them, was that you would be taking Mr. Hemenway's earnings of a lifetime? A. Not at all; that was not brought up.

Q. She was angry, wasn't she? A. Yes, but she never made any such remark as that to me.

Q. She was seeking to have you stay in the company by being angry? A. No, she indulged in personalities and she brought my wife into the matter.

Q. Mr. Smith, you knew what the book value of this company was in 1925, didn't you? A. I did not, and I had to go to our bookkeeper, and he gave me the book value of approximately $390,000, and told me that if I could sell it and get $225,000, that I would do very well, indeed.

Q. Who was the bookkeeper that told you that? A. Mr. Feddersen.

Q. Did you consider him an expert on what would be the value of a sale of a company of that kind? A. He represented the treasurer.

Q. Just answer my question. (Question repeated.) A. I certainly do. I had to take his word for it.

Q. And without further inquiry, you believed, then, that if you could possibly get $225,000 for it, you would be doing very well, is that right?

Witness:—Read the question.

Mr. Pratt:—I withdraw it.

Q. You had a copy of the company's statement in January, 1925? A. I did.

Q. That showed the company's worth, net, approximately $400,000. A. If you want to count the trash that we had up there, scrap and everything else, I would say Yes; not $400,000; it never did represent that much.

IN CHANCERY OF NEW JERSEY.

Between
Alice M. Hemenway, individually and as executrix, etc.,
Complt.,
-and-
Landon P. Smith, et al.,
Defts.

Continuation of testimony in the above entitled cause before Hon. Maja Leon Berry, Vice Chancellor, at the Chancery Chambers, Newark, New Jersey, on Tuesday, October 4, 1927, at 10 A. M.

Present:—Counsel as before stated.

Landon P. Smith, recalled for further

Cross Examination by Mr. Pratt:

Q. Mr. Smith, the last time, I asked you about the amount of dividends that you and Mr. Hemenway withdrew; you said you thought it was about $30,000 apiece? A. That is to the best of my recollection.

Q. You didn't include in that the salaries that you drew? A. No.

Q. That was outside of the salaries which you each drew? A. Yes.

Q. During the entire twenty-nine years that you were together, or twenty-seven years, whatever it was, you drew a salary continuosuly, did

you not? A. Yes, except when it was stopped by Mr. Hemenway, in my absence.

Q. For what period? A. I think it was in 1920.

Q. For how long a time? A. A short period.

Q. How long? A. About a month.

Q. Then you afterwards collected that month's salary? A. I did.

Q. So that you actually did receive a salary during all the time that you were with the company? A. Yes.

Q. This Telephone Company business was originally your business under a contract between yourself and the Swedish Company, isn't that right? A. All of the business was originally my business.

Q. I didn't ask you about all of it; please answer what I asked you, so we can save time. The telephone business was yours under the contract with the Swedish Company, isn't that a fact? A. Yes.

Q. And you incorporated that company under the name of the Erickson Telephone Company? A. Yes.

Q. And then you had what you referred to here as "my little hardware business," which was incorporated under the name of Smith & Hemenway, Inc.? A. Yes.

Q. Down through the years whenever there has been any loss to the company or any claim of loss, you have always blamed that on Mr. Hemenway, haven't you? A. Why, no.

Q. Was there ever a time that you were to blame for any mismanagement or loss to the company?

A. I remember one case, yes, where I made a bad deal.

Q. And did you call Mr. Hemenway down about that? A. Did I?

Q. Yes. A. No.

Q. There has only been one time in twenty-seven years that you have made any mistake in that business, is that right? A. I cannot answer it in that way.

Q. You only admit one mistake; isn't that right? A. That I individually assumed without consulting him.

Q. This stock being equally divided, no arrangement or authority for borrowing money could be had without the consent of both yourself and Mr. Hemenway, isn't that right? A. Right.

Q. So that Mr. Hemenway could make no financial arrangement for supporting the company, except with your consent; isn't that true? A. That is true.

Q. Only by resolution of the Board of Directors? A. Yes.

Q. When that Montreal property was bought, you voted in the meeting to authorize that purchase, didn't you? A. I did, because it was two against one.

Q. Your wife was a director at that time, wasn't she? A. Yes, of the Smith & Hemenway Company.

Q. It was the Smith & Hemenway Company that bought the Montreal property? A. Yes.

Q. So it was two and two, then, wasn't it. A.

Right; on refreshing my memory, I would say yes.

Q. So that your testimony that Mr. Hemenway did that over your head, was erroneous? A. No, it wasn't.

Q. You and your wife voted in that Board of Directors meeting authority to buy that property, didn't you? A. The property was bought with Mr. D. G. Smith and Mr. Hemenway being in Montreal and then—

Q. Just a moment. A. I cannot answer your question as you ask it.

Q. You and your wife voted in that Board of Directors meeting authority to buy that property, didn't you? A. Yes, we did.

Q. What year did Mr. Hemenway talk of selling the company through a Mr. Drake? A. 1923.

Q. And your arrangements with Mr. Drake consisted of two letters, one written in July and one in October, did they not? A. I cannot tell you as to that.

Q. What is your best recollection as to that? A. I cannot tell you because the matter has left me entirely.

Q. I show you a carbon copy of a letter addressed to John Drake, West Orange, offering to sell or granting an option for the sale of the Smith & Hemenway Company for $500,000 for ninety days, and ask you if that is the original carbon copy of your transaction with Mr. Drake? A. I would say to the best of my recollection Yes.

Mr. Pratt:—I offer that in evidence.

(Marked Exhibit C-70.)

Q. Thereafter, in October a further option for thirty days was granted to Mr. Drake, was there not? A. I think there was.

Q. I show you a paper and ask you if that is the office copy, with the pencil change, of the further letter given to Mr. Drake? A. I cannot say as to that.

Q. What is your best judgment? A. I cannot tell you. The figures are Mr. Hemenway's figures; that I can testify to.

Q. Your testimony the other day that the figure given to Mr. Drake was $250,000 was erroneous, was it not? A. I didn't testify to that.

Q. You didn't mean to convey the impression to the Court then that Mr. Hemenway and you agreed to sell out for $250,000? A. I will try and recall just what I did say. May I answer it?

Court:—Answer the question as put, and if any explanation is required, it may be made later. Answer it Yes or No.

Q. (Repeated) You didn't mean to convey the impression to the Court then that Mr. Hemenway and you agreed to sell out for $250,000? What I am driving at: did you intend to convey the impression that the entire plant was offered to Mr. Drake for $250,000, or only Mr. Hemenway's one-half? A. The entire plant.

Q. Then your statement to that effect was erroneous, was it not? A. I didn't make any such statement.

Q. You say you didn't testify in substance that

you and Mr. Hemenway had offered the plant to Mr. Drake for $250,000? A. I did not.

Q. Just what did you mean by this: "And then he (referring to Mr. Drake) asked for a conference at the Harriman office. * * * I said, 'Mr. Hemenway, I know nothing about the books; I will leave that entirely to you.' 'Well,' he said, 'if you can get $250,000, I am willing to accept that.' I said, 'All right, if you are willing, I am willing.'" Just what did you mean by that? A. Mr. Hemenway asked me to come to the New York office in advance—

Q. I didn't ask you to repeat what happened. I asked you what did you mean by that testimony. A. That Mr. Hemenway and I had agreed before going to Harriman's that he and I would accept $250,000 for the business from Drake.

Q. Will you swear that this paper which I have shown you, bearing October date, giving a further thirty days option on this property for $500,000, was not the office copy of the extension given Mr. Drake? A. I cannot swear to that paper; I never saw it before.

Q. You did know that with the making of Exhibit C-70, that from July 6 until October 6, 1923, that the asking price of both yourself and Mr. Hemenway was $500,000 for that property; is that right? A. Asking price, yes.

Q. And you say without putting it in writing that you reduced that price $250,000; is that right? A. I said by agreement with Mr. Hemenway we did.

Q. Just Yes or No, did you? A. Repeat the question.

Q. And you say without putting it in writing that you reduced that price $250,000; is that right? A. I didn't reduce it; we agreed to accept $250,000.

Court:—You mean that was the agreement between you two?

Witness:—Between Hemenway and I.

Court:—You are willing to take five hundred if you could get it?

Witness:—I was willing to take most anything we could get.

Q. When did you ever offer that company to anyone else for most anything you could get? A. We offered it to a Canadian concern for $350,000 and we assume the mortgage.

Q. Have you got the proposal on that? A. No, sir, that was a verbal proposal between Mr. Hemenway and a gentleman from Canada.

Q. This proposal given to Mr. Drake was signed by both yourself and Mr. Hemenway, was it not? A. My recollection is that we both signed it.

Q. And you wouldn't sign it until he signed it, isn't that right? A. No, sir, I signed it first, if I remember correctly.

Q. In his presence, didn't you? A. We did; we signed it together.

Q. Isn't it a fact that that is the only offer you would ever make to sell this property and sign it? A. No, sir.

Q. When did you sign any other offer to sell

that property? A. We never signed any other offer that I recall.

Q. Did you ever sign any other agreement to sell your share of the stock in that company under any circumstances? A. No.

Q. You are absolutely sure about that? A. I am quite sure.

Q. There isn't any doubt about it in your mind? A. No doubt in my mind.

Q. In 1924 the book value of that company was something like $400,000, was it not? A. I told you repeatedly that I did not know the book value.

Q. According to the company's statement? A. I repeat again, I did not know the book value.

Q. I ask you if under an agreement of some sort between you and Mr. Hemenway a statement was gotten out the thirty-first of December of each year fixing the value of that company? A. There was an annual statement gotten out, yes.

Q. Under an agreement between you and Mr. Hemenway of some kind? A. No, sir, there never was an agreement of any kind between us to get out an annual statement.

Q. You are quite sure about that? A. I am.

Q. Didn't you and Mr. Hemenway have an agreement that in the event of the death of one, the other would buy out at the book value of the company; did you make some kind of an agreement to that effect? A. We did.

Q. Didn't that provide for a statement each year? A. It probably did, but I don't recall it.

Q. You haven't said anything about that contract here, have you? A. I haven't been asked.

Q. Have you got a copy of that contract? A. I think I have.

Q. And on what basis were you going to buy Mr. Hemenway out under that contract?

Mr. Murray:—The contract itself is the best evidence of that.

Court:—Is the contract in existence?

Mr. Pratt:—I simply want to test his recollection.

Court:—What difference does it make what his recollection is? You want to show what the agreement was.

Mr. Pratt:—I had a definite purpose. I would like to ask a couple of questions, if the Court will bear with me.

Court:—All right.

Q. (Last question read). A. I don't recall the terms of the contract.

Q. You didn't pay any attention to it when you signed it, did you? A. I probably read it at the time; it was drawn by Mr. Hemenway in Mr. Cohn's office, and they called me over there, as they had—

Mr. Pratt:—I didn't ask you about that, and move to strike it out as not responsive.

Court:—Strike it out.

Q. Mr. Smith, you and your wife signed that contract, didn't you? A. I think we did.

Q. And that contract was in effect on the day that John F. Hemenway died, except for the contract which is in controversy here, wasn't it?

Mr. Murray:—I think that calls for a conclusion of law.

Court:—I think I will let the question stand. I think I understand what the question means and I think the witness does.

A. I don't think that the contract was ever cancelled.

Q. As a matter of fact you do know that it was not cancelled, don't you? A. To the best of my recollection it never was.

Court:—Unless it was replaced by this contract?

Witness:—Unless it was replaced by this contract.

Q. Is this the original contract (witness shown paper). A. I would say Yes.

(Offered in evidence and marked Exhibit C-71.)

Q. That contract provided that the survivor should buy out at the book value as of the next preceding January first statement, the interest of the deceased partner and his wife, isn't that so? A. That is my recollection of it.

Q. And he was to pay for it at the rate of $10,000 yearly? A. I don't remember the terms of the contract; I have never seen it since it was signed.

Q. Didn't you have a copy of it? A. Until I delivered it to Burnett & Murray.

Q. You had a copy of it, didn't you? A. I did; I probably have now.

Q. But you never took the trouble to see what

kind of an agreement you had signed? A. I did at the time I signed it, yes, sir.

Q. Mr. Hemenway was away from the office a great deal in April and May, 1925, wasn't he. A. No.

Q. Was he there in April, May and June? A. He was there in April, May and June.

Q. And right up until the time of his illness? A. Yes.

Q. Down to his New York office daily and over to the Irvington plant about every other day? A. He was at the Irvington plant about three times a week.

Q. About every other day? A. Yes.

Q. And in the New York office during the business hours of the day? A. I cannot say.

Q. You wouldn't say that he was not in the New York office? A. I should say I called him up many times at ten or eleven o'clock and I couldn't get him; I was informed by the help that he hadn't gotten down.

Q. You don't know of your own knowledge that he wasn't there? A. No.

Q. There were many days that you were not at the Irvington plant before nine, ten or eleven o'clock? A. No, sir, except when I was ill.

Q. You were ill the greater part of the time? A. No, sir.

Q. Suffering from stomach trouble? A. A good part of the time.

Q. So that you were away a good deal? A. At intermittent periods, yes.

Q. So that during the months of April, May and June and down to the first of July, Mr. Hemenway was then at the office and looking after the books? A. I should say Yes, in 1925.

Q. Drawing most of the checks? A. Yes.

Q. In Mr. Burnett's letter to Mr. Cohn, of July first, (Exhibit C-10), he says, referring to you: "He (that means you) tells me that the preliminary estimates will show a loss of $25,000." Had you made any preliminary estimates at that time? A. Yes.

Q. Personally? A. No.

Q. Did you tell Mr. Burnett that you had made preliminary estimates which would show a loss of $25,000? A. I told Mr.—

Q. Did you or didn't you? A. Yes.

Q. You did tell him that? A. Yes.

Q. Did you know that in that six months period, that against the preceding year, the same six months period, that in 1925, that is the period just ended, when you made this statement, that you had a selling profit of $50,000 as against $27,000 the year before; did you know that? A. I cannot tell you without refreshing my memory by the records.

Q. Did you know that instead of a loss of $2227 as in the preceding year, that the company made a net profit from operations, or net income from operations of $24,963? A. I said I couldn't tell you unless you showed me the figures; I don't know.

Q. I am reading these figures from the company balance sheet as of June 30, 1925. A. Let

me see it. (Examining paper). The figures show it.

Q. Whereas you had lost $2,000 the year before and had made substantially $25,000 the first six months of 1925, you reported to Mr. Burnett that you were losing $25,000 during those six months; isn't that so? A. From hearsay, yes.

Q. Did you tell him from your own preliminary estimates, as he stated? A. No, sir, I did not.

Q. You believed that you had a $50,000 greater loss in 1925 than you had the preceding year; is that right? A. I only repeated what was told me.

Q. Did you believe that? A. I did believe it.

Q. Within three weeks you got those figures and knew differently, didn't you? A. What is the date of Mr. Burnett's letter?

Q. On July first, Mr. Burnett said: "He (referring to you) tells me that it is true the inventory is about to be taken; it will be approximately three weeks before all the extensions are made." A. I would say that is correct.

Q. Were those extensions made in about three weeks from that time? A. Yes, I would say so.

Q. Which would be about July first? A. Yes.

Q. So on July 28, when Mr. Burnett again wrote Mr. Cohn, you knew that instead of a $50,000 loss, you had made a $25,000 gain, didn't you? A. I knew the figures that were presented to me; it shows for itself.

Q. And at that time and with that knowledge did you tell Mr. Burnett or authorize him to state this: "Mr. Smith has no intention of selling and

is entirely unwilling in view of his comparative youth as compared with Mr. Hemenway, to consider any proposition relating to selling. He is willing to buy on the terms stated in my letter of July first, but that is all. If Mr. Hemenway desires to accept his proposition, well and good; if not, I take it there is no use negotiating further, and that our only recourse will be to institute proceedings for dissolution." Did you authorize him to say that? A. I cannot say that I did.

Q. You deny that you did? A. I don't think that I did.

Q. So you think that Mr. Burnett took it upon himself to write that letter? A. I do.

Q. Without any authority from you? A. I do.

Q. Did you authorize him to say that "Mr. Smith is insistent on dissolving the company, and the only possible alternative I can see is a purchase by him of the Hemenway interests"? A. I told him that I was insistent upon dissolving the company.

Q. Did you tell him that? A. I would prefer not to say Yes or No on that; I don't recall.

Q. You know when you signed this petition over in New York City and on the twenty-first of September, that the company had made a profit of $25,000 during the first six months of the year? A. Book profit, yes.

Q. And still you swore that the company was losing money, didn't you? A. In that petition?

Q. Didn't you? A. I don't think I did.

Q. Do you remember what you said? A. In substance, yes.

Q. Mr. Hemenway had only been away from the office during the time of his illness from April, 1925, on, isn't that right? A. He wasn't ill in April.

Q. He had been at the other office from April on except during the time of his illness? A. Yes.

Q. You stated in the petition that this corporation is hampered and blocked in its proceedings, by the fact that half of the Board of Directors and one of the two officers have practically ceased to function and have lost all interest and activity in the affairs of the corporation, didn't you? A. Yes.

Q. You knew that Mr. Hemenway hadn't lost any activity in the corporation, didn't you? A. I certainly did.

Q. You testified here at the last hearing that right up until November—right up until July, I think it was, that Mr. Hemenway was active and did as much in the corporation as he had done for twenty-five years? A. Which was not much.

Q. So that he hadn't ceased to function very suddenly in 1925, then, had he? A. I would say Yes, decidedly so.

Q. You did testify at the last hearing, didn't you, that Mr. Hemenway right up to the time of signing this contract, took as much interest and did as much as he had during the preceding twenty-five years? A. That didn't necessarily carry that he was attending to business very hard.

Q. I didn't ask you that; I asked you if you testified to that. Can you answer the question? A. Will you read it?

Court:—He is reading from the testimony, evidently.

Mr. Pratt: — I cannot find that particular testimony.

Court:—The point is this, as I understand it: there is a claim in this letter from Mr. Burnett that Mr. Hemenway had ceased to function.

Mr. Pratt:—In the petition in the New York courts they asked to dissolve the New York corporation because Mr. Hemenway had suddenly ceased to function.

Court:—The witness says that his attitude and lack of functioning was not new and had been going on for twenty-five years. The point counsel is trying to make is that there was no difference, as I understand it, in his conduct now than it had been for the last twenty-five years, and that is what I understand the testimony of the witness to be.

Mr. Pratt:—It is in here somewhere substantially that way; I won't take up the time with it now.

Q. You have already testified, as I understand, that Mr. Hemenway did borrow up to the limit of the company's credit; is that right? A. I cannot say as to that. I always took his word for it.

Q. What is your judgment about it? A. I didn't pass on those things; it was entirely in his hands.

Q. Didn't you see his notes that you endorsed personally for the company? A. I did.

Q. You heard this banker testify here that he borrowed up to the limit of his credit, didn't you? A. I did.

Q. And that is one of the things that you are complaining about of Mr. Hemenway, isn't it? A. Yes.

Q. And yet when you complained that $15,000 was not enough operating capital for you in the summer of 1925 and when you had an unused credit right here in this bank from which the president testified the other day, of $17,500, you refused to endorse the company's notes to borrow more money, didn't you? A. No, sir.

Mr. Murray:—There isn't any testimony to that effect.

A. No, sir, I did not.

Court:—I don't recall whether there is or not; this is cross examination. That was the testimony of the banker who was on the stand; I don't just remember what it was. Your question is whether at that time this witness did not refuse to endorse further notes?

Mr. Pratt:—Yes, sir.

Court:—Is that so or isn't it?

Witness:—The only notes that I ever refused to endorse was in September, the early days of September, 1925.

Q. What notes were they? A. They were notes for further borrowed money; I told him I wouldn't obligate myself for any further money personally; the matter had to be settled.

Q. Your chief complaint against him is that he

couldn't secure credit enough to run your business; then you further complained that you refused to sign notes in September, 1925, saying you would not obligate yourself further. A. At that time I refused to sign any personal obligations.

Q. Prior to that time and in the summer you declined to consent to mortgaging the corporation to give him that extra $15,000 working capital? A. In the spring I declined.

Q. And all of this time you were complaining that Mr. Hemenway's was derelict in his duty solely because he didn't finance the corporation, isn't that right? A. I didn't complain that he was derelict in his duty solely from trying to finance the company.

Q. From failing to finance it; isn't that your complaint? A. My complaint was procrastination; he would not come to the factory and sit down and talk the matter over in such a way that we could go and lay out a program that we could go and work under for a period of thirty, sixty or ninety days.

Q. He never talked with you about any such program, did he? A. Yes, many times, but never got anywhere.

Q. That is the most you could say against him, that he procrastinated? A. Continuously.

Q. For twenty-one years? A. I wouldn't say all the time. There were a few years that we made money and we got along and we co-operated reasonably close.

Q. That was all back in 1908, you said? A. Not altogether.

Q. Didn't you testify that you were never very friendly after 1908? A. I said that we spoke on business matters, but we were not as close as we were prior to 1906 to 1908.

Q. In this petition and as a reason for dissolving this corporation, you said, "The treasurer has failed to fulfill the duties so assumed by him; the result is, that the duties of the treasurer have not been adequately performed; that such failure has repeatedly resulted in the president being uninformed as to the financial status of the company." That was your chief complaint against him, then? A. That was one of them.

Q. That he didn't keep you adequately informed? A. Yes.

Q. And still Mr. Feddersen was in the office in the Irvington plant, and the books, according to your own version, were open to you every day in the year, were they not? A. Yes.

Q. And your lawyer Mr. Burnett said, "Your client has equal access to and knowledge of the facts with you" (referring to the condition of the company); is that right? in this letter of July 1, 1925. A. Yes.

Q. Did you tell him that? A. I am confused a little for just a moment; read that again.

Q. You claim that you were not informed as to the condition of the books, but on July first, 1925, when Mr. Burnett was making this offer on your behalf to purchase over a period of years at an

eventual amount of $100,000 in money and property, he wrote to Mr. Cohn, that "Your client (meaning Mr. Hemenway) has equal access to and knowledge of the facts"?. A. Yes.

Q. Did you tell him that, that Hemenway had equal knowledge and access to the books with you? A. I don't recall that I did.

Q. So that you wouldn't say that you authorized Mr. Burnett to make that statement either, would you? A. I went over matters with Mr. Burnett in generalities and gave him my side of the case.

Q. Just answer my question. A. I cannot say definitely whether I authorized Mr. Burnett to make that statement or not.

Q. There was never any time that you couldn't go into that office from 1920 on, right in Irvington, New Jersey, to get the last statement that was out, isn't that right? A. Yes.

Q. There was a trial balance taken every month, wasn't there? A. No, sir.

Q. How often was it done? A. I have known cases where we have run as high as six and eight months without a trial balance.

Q. Then you were familiar with what was done in the bookkeeping line? A. I was never familiar with what was done in the bookkeeping line.

Q. You knew whether a trial balance was taken off monthly, did you not? A. I have asked for them and couldn't get them.

Q. You had access to the check book and a right to sign the checks? A. I did.

Q. And on that check book which was kept

footed up, the company's balance was there? A. No.

Q. Quite sure about that? A. I am.

Q. Never was any way that you could find out how much money there was on the check book? A. I never went to the check book; I don't recall in all the years of our business relations that I ever had a check drawn, except through the cashier, and the checks were brought to me torn off of a pad; there was no check book.

Q. So you don't know whether the balance was carried on the check book or on a cash book or not? A. There was no check book.

Q. You must have had a record of the checks that went out? A. They were pads; they were voucher checks padded, and the checks were brought to me and I signed them.

Q. You didn't sign them without knowing whether or not the company had the money in the bank or not? A. I certainly did.

Q. Just tell us in what particular Mr. Hemenway was derelict outside of being unable to get more than $50,000 credit on notes and outside of antagonizing customers by asking them to pay their bills, and outside of not paying the creditors when he couldn't get the money from the customers; tell us what else he was derelict in. A. In the first place I never attempted to do anything at the factory without first—

Q. Wait a minute.

Mr. Murray: — Counsel has asked a very broad question. He asked Mr. Smith to detail

all his complaints against Mr. Hemenway. He either should withdraw the question or let him answer it.

Q. (Question repeated).

Court:—I see no objection to that question.

A. First he wouldn't attend the meeting at the factory to discuss the manufacturing methods; to lay out a program; second, he wouldn't give me any cost figures on which I could base my selling price; third, he wouldn't give me any co-operation relative to the betterment of the plant; fourth, I never attempted to spend any money without first going to him and asking for an appropriation; I never got it in all the years we were together.

Q. That is in building a plant up from a $10,000 capital to $600,000, you mean to say that you never got any money from the treasurer to buy tools, machinery, or make improvements?

Mr. Murray:—He didn't say that; that is misquoting the testimony. He said he never got an appropriation.

Court:—You may answer the question.

A. I never made any such statement.

Q. What did you mean by failing to get appropriation? A. When conditions were such that we couldn't get goods through the plant, I would take it up with Mr. Hemenway and show him the bottle neck in the plant and ask him how much money we could afford to put in betterments for the next three or six months, and then I would allocate it where it would do the most good. "Go on, go on, I will take care of that, what you have got to have; nothing else."

Q. Mr. Hemenway, who at the beginning of business January, 1925, had already borrowed up to $50,000 for the company, desired to get along as close to the boards as he could, isn't that a fact? A. I cannot answer that.

Q. Didn't he tell you to get along with just what you had to have? A. I always heard that.

Q. You were complaining that at that time your creditors might jump on you and put your company out of business in a very few days for want of $37,000 to pay your accounts payable, weren't you? A. I was told we were up to our limit in the bank.

Q. You were in that critical situation, weren't you, where you couldn't meet the obligations that you had; you might be put out of business for want of $37,000; is that right? A. We owed over $90,000.

Q. But only $37,000 of it was your merchandise creditors? A. I cannot tell you as to that now, without referring to the statement.

Q. You had about $100,000 accounts receivable, didn't you? A. No, sir.

Q. How much did you have? A. Around seventy or seventy-five.

Q. You had over $100,000 in merchandise on your shelves? A. Miscellaneous merchandise which we couldn't ship any order complete, any fair sized or reasonable order complete.

Q. These cost figures in any plant are worked out by the superintendent and the men putting through different prices, aren't they? A. No, sir.

Q. You are sure about that? A. I am.

Q. And if that is the custom up in our company, that is a different custom from what you have down here? A. Yes, we had a cost man.

Q. You did have a cost man? A. Presumably, in Mr. Feddersen.

Q. You say that Mr. Hemenway never gave you any figures himself? A. I am referring to his department, not to him personally.

Q. You are not referring to him personally? A. No, not in that particular. Mr. Feddersen was under Mr. Hemenway.

Q. In this petition in New York State to dissolve the corporation, you made this statement, that Mr. Hemenway's failure to notify you of unused borrowing capacity, production cost, the amount of cash on hand, &c., and his failure to perform his duties, that this has resulted in depleting the surplus of the company to a point where it now has insufficient working capital to enable it to conduct its business to the best interest of the stockholders. Had the company's surplus been depleted at that time? A. I should say it was.

Q. The company's surplus was more on the first day of January, 1925, than on the first day of January, 1924, wasn't it? A. I cannot tell you from memory.

Q. And on the first day of July, just two months before you made this statement, and before you filed this petition, the company's statement showed that you had added to the company's surplus over $8,000 during the first six months of the year after charg-

ing off inventory adjustment made by you personally of over $9,000? A. I beg your pardon.

Q. Is that right? A. I beg your pardon; I personally did not handle that statement at all; I saw it finished.

Q. You saw it finished before the twenty-first of September, when you swore to this petition, didn't you? A. Yes.

Q. You saw the net profit for the period $17,660.32? A. I did.

Q. You saw an allowance, less inventory adjustment of $9527? A. Yes, I saw that.

.Q Making a net profit and gain to that surplus account of $8,132.71 for six months next preceding your statement in this petition? A. Yes.

Q. You knew when you made that statement that your surplus was not being depleted, but was building up, didn't you? Yes or No. A. I cannot answer it that way.

Q. But you say that "due to the failure of the treasurer, Mr. Hemenway, to keep the petitioner, Mr. Smith, informed as to the state of the company's finances, with facts and figures relative to the cost of conducting the business, your petitioner has been obliged to expend corporate funds for corporate purposes in ignorance of the exact financial condition of the company." You had access to the statements that were made up every six months, didn't you? A. Yes.

Q. You knew how much you had in your capital account, didn't you? A. Yes.

Q. You said further, "That without your petitioner, Mr. Smith (that is you), the business cannot go on, and that if due to illness or for any other cause he (meaning you) could not give his continuous personal attention to it, serious and irreparable losses to the corporation would immediately result, as the treasurer, due to his age and his unfamiliarity with the working details of the company's working operations and his apparent lack of interest therein, would be unable to carry it on successfully, and the continuance of the business under such circumstances seriously jeopardizes the interests of all concerned." You were ill all of the time, weren't you? A. No, sir.

Q. The company went on with you away from the business three months a year for seven years, didn't it? A. I didn't average three months for seven years.

Q. You took more than three months out of the office in a year? A. No, I did not.

Q. In 1920, you were away over three months, on one trip? A. No, sir, I was not.

Q. Didn't you testify that you were away three months on one trip? A. A little less than three months; I reached here—

Q. Wait a minute. With all this continual illness—you say you have been a sick man for so many years—didn't you lose an occasional day from the business? A. Occasionally, yes.

Q. The business went on, didn't it? A. Yes.

Q. You said that by reason of Mr. Hemenway's attitude and conduct toward the company's cus-

tomers and employees, that they were invariably antagonized by reason whereof the company has lost valuable customers and the morale of the employees has been seriously injured. Which is true: was Hemenway over there interfering with the plant, or was he staying away and not taking any interest; which do you say? A. The statement made in that petition is as near the truth as I see it, or saw it, and have seen it for a good many years. Mr. Hemenway couldn't come in contact with one in ten customers that he didn't antagonize him; he was continually antagonizing the employees; there was a tendency of nervousness the moment that he would come and start some of his sarcastic remarks to them; and I never in all the years that we were together saw him compliment a man or woman in our employ for doing anything in excess of their ordinary requirements.

Q. You haven't recalled to us one sarcastic remark that Mr. Hemenway ever made, have you? A. I have not been asked to.

Q. You were asked to give your version of the disagreement here. A. I will waive that. You didn't consider this company worth book value, did you? A. No, sir.

Q. And when you sold out to the Crescent Tool Company, you didn't feel that you treated them just exactly fair, did you? A. I didn't sell out; I was sold out.

Q. You were sold out; you were sold out twenty-five or thirty years ago by your first partner, weren't you, who robbed you? A. No.

Q. Didn't you say that? A. No; he ran away with my funds.

Q. You were robbed by him, then, weren't you? A. I should say that is robbery.

Q. You have been sold out or robbed by everybody that you ever did business with, haven't you? A. No.

Q. Whom did you ever have any dealings with as a partner that you were not sold out by or robbed by? A. A great many people.

Q. Whom were you in partnership with that didn't rob you? A. That would be rather a long story. If the Court wants to hear it, I can recite it.

Q. We will waive that, then. When you sold out to the Crescent Tool Company, you retained the land and buildings of the Smith & Hemenway Company yourself, did you not? A. Yes.

Q. You received $15,000 a year rent from that property? A. Yes.

Q. And have given an option to the Crescent Company on it for $150,000, haven't you? A. Yes.

Q. And that property is worth $150,000, isn't it? A. I would think so.

Q. You received $270,000 in cash from the Crescent Tool Company, did you not? A. Yes.

Q. You received also, or retained out the accounts receivable of the Smith & Hemenway Company, amounting to $92,198.37, didn't you? A. I did not. There were not that many accounts payable.

Q. Whatever accounts payable were shown on the contract, you retained, didn't you? A. Yes.

Q. The contract says $92,198.37, unless my

stenographer has copied it incorrectly; was the contract correct? A. It was not.

Q. You had checked this transaction from November until January before you signed the contract, hadn't you? A. I never checked the books.

Q. You never had any one check them up to see what you were keeping on this transaction? A. No; Mr. Feddersen kept the books.

Q. That was the amount of accounts named in the contract, wasn't it? A. It was.

Q. You also kept out the glass cutter merchandise? A. Yes.

Q. How much merchandise of the company did you keep out that wasn't mentioned in the contract? A. Oh, to the best of my recollection now, about $4100.

Q. Is that all of the stock that you carried of the glass cutter business, $4100? A. Yes.

Q. What other merchandise did you keep out that the Crescent Tool Company didn't take? A. Nothing that I recall, except glass cutter business.

Q. So that you received or retained a total of $516,000 and some odd hundreds, against which you assumed bills payable of $132,000, didn't you? A. You have got the figures.

Q. Leaving almost $400,000 for the stock of that company after taking out the only lucrative part of it, the glass cutter business? A. Read the question.

Q. (Question repeated). A. I cannot answer the question in that way.

Q. After taking out the glass cutter business, or keeping it out, did you? A. I received what is

stated in the contract and kept the glass cutter business and real estate.

Q. That is what it figures up to? A. I haven't figured it up.

Q. Over $383,000? A. I haven't figured it up.

Q. And out of that you paid Mr. Hemenway $90,000 and still retained the glass cutter business, is that right? A. You have the contract; it specifically states what I paid him.

Q. So that you have left on this transaction substantially $300,000 and the glass cutter business, isn't that right? A. You have the figures; you can figure it out.

Q. You didn't think that that whole transaction the whole shooting match, as you put it, was worth over $225,000, did you? A. I told you that that is what Feddersen told me it was worth.

Q. You took his word for that? A. I did.

Q. And the first time in your life that you ever thought of selling out the business yourself was on the day that D. G. came in to you, and you were tired out and sick and worried—what you were going to do with the business; he said, "L. P., why don't you sell out the business? I am going to Chicago; let me see the Crescent Tool Company"? A. That is right.

Q. You didn't mention that to Mr. Burnett between the second day of November, when you told D. G. that, and the fourth of November, when you went over to Cohn's office, did you? Just Yes or No. A. Read the question again.

Q. (Question read). A. I don't recall that I did.

Q. And still on the fourth of November Mr. Burnett insisted that the notes that you were to give would be non-negotiable because he made it perfectly clear you intended to sell the company? A. I don't recall that that was the fourth of November; my recollection is it was the ninth.

Q. You testified here the last time that you did say that in the event this company was dissolved that neither side would get very much, didn't you? A. By advice of counsel, yes.

Q. You believed that, didn't you, that if it was dissolved, neither side would hardly get a dollar out of it? A. I thought we would stand a substantial loss.

Q. If it was worth only $225,000 in a going condition without any receivership, you thought there wouldn't be anything left after a sale under the hammer, didn't you? A. I didn't care what was left.

Q. I didn't ask you what you cared; just answer the question. (Last question repeated) A. Very little.

Q. In this petition, in which you asked the Supreme Court of New York State to dissolve this company, you said that "Your petitioners (meaning you and your wife) deem it beneficial to the interests of the stockholders that the corporation should be dissolved and are induced to desire its dissolution for the reason stated in the preceding

paragraph," &c. Is that right? A. You have read so much I cannot catch it all.

Q. You know that you were swearing that it would be for the best interests of the stockholders of this corporation to dissolve it, when you signed that petition? A. I believed it.

Q. You know that if it wasn't for the best interest of the stockholders, that you couldn't dissolve it in the New York courts? A. I didn't know anything about the New York laws.

Q. Didn't your lawyers inform you about that? A. Only in a general way.

Q. There is one apparent discrepancy that I would like to clear up here in your testimony, about the time Isherwood was down to your house. You testified:

> "I said, 'Mr. Hemenway, you are the treasurer of the company; you know exactly what the business is worth; what are you willing to take for yours? I am willing to take the same amount for myself'."

What did you mean by that; that you were offering to sell to Mr. Hemenway at $100,000, the price stated on that day? A. I think I covered that in my testimony.

Q. I am asking you now what did you mean by that? A. I meant that I was sick and if his interest was only worth $100,000—

Q. No, what did you mean by, "I am willing to take the same amount for myself"? A. I cannot answer it unless you let me answer it in

my own phraseology. If you are going to stop me every time I start, I cannot answer it.

Mr. Pratt:—It seems to me that is a fair question.

Court:—Tell us what you meant by it.

Witness:—I have tried to.

Q. Tell us again. A. I meant that if he fixed a value of $100,000 or $150,000 or $200,000, whatever he fixed, I was willing to take the same for mine.

Q. There is no question about that? A. Not at that time.

Q. There is no question either, but what Mr. Isherwood did draw an agreement following that talk on your behalf, I mean he drew up an agreement on your behalf? A. At the request of Mr. Hemenway he drew up an agreement.

Q. You haven't produced the agreement here, have you? A. I haven't it.

Q. Isn't it a fact that, as Mr. Cohn testified, the agreement, which is Exhibit No. C-3, and which you refused to sign, was identical with the one Mr. Isherwood drew except the names were transposed, and you were to pay them cash in place of the Montreal property? A. No, it is not identical.

Q. Mr. Cohn testified that it was the same, except in those particulars. A. Mr. Cohn was wrong.

Q. Tell the Court in what particulars the contract which Isherwood drew for you and for Hemenway to sign, differed from the one which was tendered to you and which you refused. A. Can I

state it in my own phraseology or will you stop me?

Court:—Proceed.

A. (Continuing) Mr. Hemenway said, "Well, Mr. Isherwood, you might as well draw up the contract and I will be at your office—

Court:—That is not an answer to the question. The question is how did the contract which Mr. Isherwood prepared differ from this one which Mr. Cohn prepared?

Witness:—First he was to take the Montreal property and I was to pay him $5,000 on signing the contract. I am stating this only from memory. I was to give him a first mortgage on the entire property, be free to liquidate the indebtedness at the rate of $10,000 a year. He was to hold his stock and not surrender it until the last note had been paid.

Q. So that then the difference is that in the contract Mr. Isherwood drew you were giving security by way of mortgage, is that right? A. Security and cash.

Q. In your testimony the other day you were asked this question and you answered (page 42): "You mean Mr. Isherwood said that you were selling, with reference to that agreement? A. With reference to the agreement that Mr. Cohn handed him that day, he said, 'This is not the contract that you agreed to at Mr. Smith's house; you have reversed it.'" You testified to that the other day in substance? A. Yes.

Q. Did you mean that? A. No.

Q. You did understand that the contract had been reversed, didn't you, in substance? A. In substance, yes, but as to payment, no.

Q. And you refused at that time to sell to Mr. Hemenway on any condition, didn't you? A. No, sir, I never refused to sell to him.

Q. You said that you didn't communicate to Mr. Hemenway the fact that you wanted security, didn't you? That the reason you wouldn't sign was because you didn't have security? A. Didn't I tell you he submitted the same contract in 1920 and again in 1921?

Q. Just answer the question. A. Read the question and I will try again.

Q. (Question repeated). A. I didn't think it necessary.

Q. You thought all that it was necessary for you to do was simply say "No, I won't sign that, even though your lawyer says you have reversed the contract that I have drawn"; is that right? A. I didn't hear it.

Court:—You will be given an opportunity to answer. You may have it read, if you didn't hear it.

Witness:—If I understand the question, I will try and answer it.

Court:—Read the question.

Q. (Question repeated). A. I don't think I gave it any consideration.

Q. In your answer here, where you refer to the talk had in Mr. Cohn's office on December 9th, when you were asked about the sale to the Crescent Tool

Company, the defendants, that is, you and your wife, you say the reason for such statement was that inasmuch as the contract annexed to the bill had theretofore been entered into, such inquiry was impertinent and without right on the part of the compainant or John F. Hemenway, and that as a consequence Landon P. Smith was entitled to answer such inquiry in such manner as he saw fit regardless of the facts. You read this answer, didn't you, before you signed it? A. I think I did.

Q. And you did feel free, at that time, not being under oath, to tell the Hemenways whatever you saw fit, without reference to the facts, as you have said in your answers? A. I didn't state anything but facts.

Q. But you state in your answer that you felt perfectly free, that you were entitled to answer such inquiry in such manner as you saw fit, regardless of the facts, for the reason that the inquiry of what you were going to do with your property was impertinent on the part of the Hemenways? A. I don't remember that.

Q. You signed it? A. Yes.

Q. You swore to it? A. Yes.

Q. I would like to ask one question in connection with Mrs. Hemenway at the Robert Treat Hotel. I just want to ask you, Mr. Smith, if you say that Mrs. Hemenway conducted herself in an unladylike manner on that occasion? You said you still were a gentleman and you walked out. Did you mean to— A. I didn't use that remark.

Q. Did she conduct herself in a lady-like manner? A. If you call flying into a rage or passion in a discussion—

Q. She didn't swear, did she? A. I refuse to answer that.

Court:—Answer the question.

Witness:—I think she did use some light swear words.

Q. Is that as strong as you will put it? A. Yes, as strong as I care to put it.

Q. For a period of twenty years did you ever hear Mrs. Hemenway swear on any occasions? A. Many times.

Q. You say that it was Mrs. Hemenway's custom to swear, is that right? A. No, sir, I did not.

Q. You say she was proven a lady? A. No, I wouldn't say.

Q. You heard her swear many times? A. Many times.

Q. From around January, 1925, down to the first day of November, 1925, when this contract was signed by the Hemenways to sell their stock to you and your wife, was finally delivered into your hands, it was your sole purpose at all times, to either dissolve this corporation or to buy out the Hemenways' interest at from $70,000 to $90,000 in cash in addition to the Montreal property; isn't that true? A. No.

Q. And at the Robert Treat Hotel you didn't say that your proposition was a fair one and that you were willing to sell on the same terms? A. I did not.

Q. And you didn't figure out in Mrs. Hemenway's presence, and she did not write down on a paper at that time: Mr. Smith had figured if the $70,000 preferred stock, with interest, ran the fourteen years, it would amount to $132,000, meaning $132,000 that the Hemenways would eventually get for fourteen years for their share in the company? A. There was not one single piece of writing done by either of the three in that room as long as I was there.

Q. Did you figure that the $70,000 with interest over fourteen years would be $132,000? A. I made no figures whatever.

Q. Had you ever figured before? A. No, sir.

Redirect Examination by Mr. Murray:

Q. Did you ever hear Mrs. Hemenway swear except when she was in a hysterical rage? A. No, I don't know that I ever did.

Q. I show you balance sheet of December 31, 1923, which is part of Exhibit D-10, and the balance sheet of December 31, 1924, and ask you what those balance sheets showed the surplus to be, in 1923 first? A. The surplus in 1923 was $254,30.82.

Q. December 31, 1924? A. $4,939.52.

Q. A drop from $25,000 to $4949? A. Yes.

Q. Did you ever see this contract which you said that Mr. Isherwood drew? A. I don't recall now that I did.

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Q. So far as you know, my office never had it, is that correct? A. I don't recall ever having turned it over to you.

Q. Or ever having seen it anywhere? A. I don't recall ever having seen the contract.

Q. When you sold out to the Crescent Tool Company, you retained certain accounts having a face value of ninety-two or ninety-three thousand dollars; how much, if anything, have you succeeded in collecting on account of those accounts? A. About fifty-four or fifty-five thousand dollars.

Q. And have any of the uncollected accounts been written off? A. Yes.

Q. About how many? About how much? A. Around seventeen or eighteen thousand dollars.

Q. Have you any idea—can you give us any idea as to the age of those that have not been written off? A. The statement of the account would be the best evidence.

Court:—I don't see that it makes much difference anyway; the fact is that he took $90,000 worth of accounts; that is in the testimony. He has collected $55,000 of them and there is still more to collect.

Q. Can't you give us any idea of the age of the accounts not yet written off and not yet collected? A. I know that some of them go back of 1918, during the War period, and some of them are of more recent years.

Q. In 1925, prior to September, 1925, did you ever refuse to sign as an officer of the company, any of the company's notes for the purpose of borrowing money or for renewing notes that had al-

ready been given by the company? A. I did not.

Q. In September, 1925, did you refuse to sign as an officer of the company any notes of the company for any purpose? A. As an officer, no.

Q. Though you refused to sign them personally, is that correct? A. That is correct.

Court:—That was the rule of the bank requiring it. The testimony is that the bank required the personal endorsements in order to—

Mr. Murray:—I want to show that he was not refusing as an officer of the company.

Court:—In effect it deprived the company of the capital, as they couldn't borrow without his endorsement.

Mr. Murray:—The question is whether he was under any obligation.

Court:—He was no more or no less under obligation than Mr. Hemenway was.

Q. In regard to the estimated loss of 1925, when and where did you get your information on that point? A. Mr. Feddersen. I think it was late in May I asked him how the business was going, and he simply said, "The way we are running now is to cheap tools, and we will probably lose twenty or twenty-five thousand dollars.

Q. You communicated that to Mr. Burnett? A. I told him that was his estimate.

Q. Did you ever tell anybody other than Mr. Burnett that? A. I don't recall that I did.

Q. The contract by which Hemenway or you were to buy out the survivor in case of death was drawn by whom? A. By Mr. Cohn.

Q. And he was the attorney of the company and of you or Hemenway or both personally? A. He never did any personal work for me; he was the attorney for the company.

Q. Do you know whether he was the personal attorney for the Hemenways or not? A. I was told that he was the personal attorney for both Mr. and Mrs. Hemenway; in fact, I heard Mrs. Hemenway make the remark in Mr. Cohn's office.

Q. You mentioned a $350,000 proposal, to sell to some Canadian concern for $350,000; when was that? A. That was in June, 1925.

Q. And what were the terms of it; I mean what was the purchaser to get and what was he to give?

Mr. Pratt:—I object on the ground that the offer is the best evidence, if there was any.

Court:—You brought it out on your cross examination.

A. This gentleman appeared and went through the factory; Mr. Hemenway and I sat down and talked the matter over and asked what price we should put on it; he said, "We will deliver him the property for $350,000 clear of encumbrances."

Q. What do you mean by encumbrances? A. I suppose the mortgage and debts of the company. This gentleman said, "I thank you; I will take it under consideration." And about, probably, a week or ten days later, we had a letter from him and he stated that he wasn't interested.

Q. The mortgage at that time was how much? A. Around $35,000.

Q. And the debts were around how much? A. I cannot recall, Mr. Murray.

Q. The statement will show that? A. Yes.

Court:—That included the glass cutter business?

Witness:—Everything.

Q. Did it include the accounts receivable? A. Everything except the accounts payable and the mortgage, as I understood it.

Q. You were to pay all the debts and give them all the assets, including the accounts receivable? A. For $350,000.

Q. This $500,000 option that was given to Mr. Drake, was there anything paid for that option? A. Nothing.

Q. What was the purpose of it, do you know; how did it come to be made? A. Mr. Drake requested it so that he might have something definite with which to negotiate with people that he wanted to interest, I presume.

Q. You said that you voted, you and Mrs. Smith voted to buy the Montreal property, and you also said something about it already having been purchased; what did you mean by that? A. I went to Montreal to look over the property when it was first offered to us. I didn't like the looks of it, the location, and I returned home and told Mr. Hemenway I didn't approve of it, that it was out of the business district, and it was a very old building, and had to have a lot of money spent on it in order to make it habitable. He went up about ten days or two weeks later, I should say, and purchased it for $46,000—

Q. What do you mean, took title or signed a

contract or got an option, or what? A. Sign a contract to purchase it for $46,500; my brother and he were directors of the Smith Hardware Company, which was the Canadian end of the Smith & Hemenway business.

Q. Which company purchased it, the Hardware Company or the Smith & Hemenway Company? A. My recollection is that the Smith & Hemenway Company assumed the payment, because we had to put a pretty big mortgage on it.

Q. And that was a matter that you voted on? A. That was the matter I voted on.

Q. I show you a contract and ask you if this is the contract which constituted the glass cutter business so-called, dated January 17, 1907, between Frank R. Woodward and others and the Smith & Hemenway Company? A. Yes, sir, that is the original contract.

Mr. Murray:—I offer it in evidence.

(Marked Exhibit D-16, October 4, 1927.)

Recross Examination by Mr. Pratt:

Q. After paying the debts, then, if you had sold under this proposal made in June, 1925, you and Mr. Hemenway would have had net about $70,000 apiece? A. I don't know; I don't recall the debts at that time.

Q. The debts according to the company's statement were $102,694, and you say the selling price was $350,000, and you were to pay debts out of that money; is that right? A. I don't think we were to pay the bank loans; the bank loans were

to continue, but we were to pay the current debts and the mortgage, that is the bills payable.

Q. The bills payable were $37,000 and the mortgage was how much? A. I think it was thirty-five at the time.

Q. In June? A. In June.

Q. The statement on June 30th shows $37,000. A. I am stating it from memory; the statement is right.

Q. I beg your pardon; the accounts payable were: trade acceptances $15,056; purchases $37,801; others, $12,836, so that there was substantially $65,000 outside of your notes payable, of indebtedness at that time, you were to pay all of those? A. That is my recollection.

Q. And in addition were to pay $35,000 mortgage? A. Whatever the mortgage was.

Q. So that you would have received, then, substantially $250,000, or about $125,000 apiece, is that right? A. If you have the figures.

Q. How long after you had the refusal of this Canadian company was it that you had Mr. Burnett write that you had no intention of selling and were entirely unwilling to sell out of this business? A. I don't know that I ever used those words to Mr. Burnett.

Q. Didn't you testify this morning that you did authorize him to say that because of your comparative youth as compared with Mr. Hemenway, that you wouldn't consider any proposition relating to selling? A. I don't recall that; I might have made such a remark in that conversation with him.

Q. You wouldn't swear that you didn't tell him that? A. To the best of my recollection I didn't tell him; I always had an idea that sooner or later one or the other would have to assume the purchase of the business.

Mr. Pratt:—I move to strike that out.

Court:—Strike it out.

Q. In that same letter, too, Mr. Burnett said "Mr. Smith is insistent on dissolving the company, and the only possible alternative I can see is a purchase by him of the Hemenways' interests." A. That is Mr. Burnett's opinion.

Q. How long was that after the Canadian Company turned down this verbal offer? A. I think the Canadian Company's verbal offer was in the month of June.

Q. How long afterwards was this letter written, do you know? A. I cannot tell you; probably two or three weeks.

Q. The Canadian Company didn't turn down the offer until July, then, did it? A. Yes, they did. They appeared in June, so that this verbal offer was made, to the best of my recollection, in the early days of June; I don't remember the exact date.

Q. Where was it made? A. In our office.

Q. Mr. Hemenway happened to come over that particular day? A. Yes, he was there.

Q. And who was the gentleman in Canada that he made the offer to? A. His name was Mr. Querr.

Q. Do you know what his address was? A. I cannot give it to you offhand; I can probably look it up.

Q. As a matter of fact, the day that Elden Hemenway and his brother Thomas came over to see you, after the filing of this petition in New York City, while you kept them waiting outside in your office, or perhaps it was Elden and Mrs. Hemenway, you had some people in your office then negotiating a sale of this plant? A. I did not.

Q. You are quite sure that you didn't keep them outside of your office, for something over an hour, while you discussed a proposed sale? A. Mrs. Hemenway and Elden?

Q. Either Mrs. Hemenway and Elden or Thomas and Elden. A. The day that Thomas and Elden came there I was talking to a customer.

Q. How big a dividend was declared in 1924? A. I cannot give the statement; the figures will show.

Q. You don't know how much of the shrinkage of surplus of $20,000 was made up of dividends paid out of surplus? A. There is no use of my guessing at it; there are the figures which show what dividends were paid.

Q. The statement shows that $9,000 dividends was paid; was that during the last six months of 1924? The half year balance sheet, December 1924, shows payment of dividends of $9194; is that right? A. I cannot understand you from there, Mr. Pratt.

Q. I will show you the balance sheet as of December 31, 1924, which shows payment of over $9,000 in dividends in that year? A. Yes.

Q. That accounts for $9,000 of the shrinkage of

surplus, then, does it not? A. If you notice, we reduced our salary and took dividends instead.

Q. How much salary did you draw in 1924? A. I think it was $7500 or $7000.

Q. And about $5,000 or dividends besides? Is that right? A. No, my recollection is it was $3,000 in dividends to each of us.

Q. $3,000 each six months, wasn't it? A. No, for the total year.

Q. So that the company really paid you and Mr. Hemenway something like $20,000 a year, didn't it? A. Yes.

Q. In salaries and dividends? A. Yes.

Redirect Examination by Mr. Murray:

Q. Mr. Smith, do you know why the Crescent Tool Company wanted that business when they bought it?

Mr. Pratt:—I submit that calls for a mental operation, and Mr. Peterson was here.

Court:—What difference does it make? The fact is they paid a certain sum of money for it. The fact is, the sale was made.

Mr. Murray:—I ask an exception.

Court:—No, you may ask the question, if you want to.

Q. Do you know why the Crescent Tool Company bought this business? A. Mr. Peterson said he was going to develop a line of pliers and he could buy machinery as cheap, and with all our experimental work in developing a line, he didn't buy the

property; he didn't want the real estate or the glass cutter business.

Court:—You didn't sell it to him, did you?

Witness:—No.

Recross Examination by Mr. Pratt:

Q. Was it just a coincidence that in December, 1924, and January, 1925, when the Crescent Tool Company, through Mr. Swisshelm, was trying to buy the Utica Drop Forge & Tool Company and couldn't buy it, that you for the first time decided that you couldn't possibly go on with Mr. Hemenway, and that you were determined to either dissolve the company or buy him out for sums aggregating $70,000 over fourteen years, together with this Montreal property?

Witness:—I cannot answer the question as it is asked; there is too much of it.

Mr. Murray:—I object; it is half a dozen questions in one.

Court:—The question can be answered Yes or No. If he doesn't know, he can answer.

A. No.

Q. It wasn't just coincidence? A. It was.

Q. Was it just a coincidence that on the twenty-ninth of October, just after the final draft of the agreement with Hemenway had been agreed upon and it had been signed in Mr. Cohn's office, that Mr. Swisshelm and the other representatives of the Crescent appeared at the Irvington plant? A. Yes.

Q. Was it just a coincidence that on the second day of November, the day that this signed agreement finally came to your actual possession, that is

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the agreement with Hemenway to sell to you, that for the first time, your brother D. G. said, "Landon, why don't you sell this business?" and you then for the first time considered selling the business and sent him out to Jamestown to appear there November 4th, to sell to Mr. Peterson; was that just a coincidence? A. This developed by his conversation of two or three days previous at lunch.

Q. And you considered your good fortune in making this extremely lucky sale and this coincidence alone responsible for your now having the benefits that you now have had of this company? A. I certainly do.

Q. You never at any time intended to make your partner Hemenway sell out to you for less than half of the actual value of this company, did you? A. I never made a price on my stock.

Q. Please answer that question. A. I never intended to force him in any way.

Q. And you sincerely believed when you filed this petition for dissolution, that that dissolution and destruction of the assets of the company, which you knew would follow would be for the best interests of the stockholders of the company; is that right? A. I knew that if that condition—

Q. Please answer that question. A. To continue as we were going, we would have lost everything we had.

Court:—That does not answer the question. The question is, did you believe at the time you filed that petition for dissolution, that such a dissolution was for the best interests of the stockholders?

Witness:—I certainly did.

Q. And the company at that time was going on in the same manner it had gone on for many years? A. I wouldn't say so.

Q. Didn't you testify that the same condition between you and Mr. Hemenway had existed for twenty-five years, and he never took care of his end of the business? A. No, I didn't testify to that.

Q. For how many years would you say? A. For about seven or eight—wait a minute—since 1915 or 1916.

Q. You said since 1908, didn't you? A. From 19__ about 1906 to 1909 we had our real difference first; then matters went along as usual in a business way.

Q. Until what time? A. About 1914—between 1914 and 1916, when he assumed charge of the American Wringer Company's sales.

Q. During the next eleven years business had gone along in the same way of procrastination on his part? A. Decidedly so.

Q. And the company had increased its capital assets from about $150,000 to $400,000? A. I cannot say as to that; the statement will show.

John Drake, sworn for defendants:

Direct Examination by Mr. Murray:

Q. What is your business now? A. I am handling a campaign for the jewelry industry.

Q. Where do you live? A. West Orange, New Jersey.

Q. And in 1923 did you make a survey of the Smith & Hemenway plant? A. I did.

Q. Up to that time had you had any experience in making surveys or analysis of businesses and plants? A. I had done it from time to time since 1907.

Q. In what capacity? A. As receiver trustee in the interest of directors and in my own interest.

Q. How did you come to make this survey of this plant in 1923? A. The matter was brought to my attention by a real estate man here in Newark.

Q. For what purpose did you make this survey? A. For the purpose of the possible purchase of the business.

Q. And over what period did that survey extend? A. About ten years. You mean what period was I making the survey?

Q. Yes. A. From the middle of 1923 to about the fall of 1924.

Q. What did you do by way of making a survey or analysis? A. We went right through the plant and went through the books, took off statements; tried to check their cost records, and finally had to develop our own figures in order to arrive at a figure to find out the actual worth of the business.

Q. Was that a matter of a day or two that you spent there at the plant? A. I should say I spent possibly altogether several months at odd times; we worked nights and worked Saturdays, and worked during the week.

Q. Did you investigate the conditions in the manufacturing end of the business? A. Particularly.

Q. And in the office end of the business, sales end? A. Sales end; we went right through the plant; also made a trade survey.

Q. What do you mean by that? A. Went outside to get what information we could as to the standing of the Smith & Hemenway Company in the trade, and as to how they felt about the merchandise, and so forth.

Q. What did you find the factory conditions to be? A. I wouldn't call them good.

Q. What was the matter with them? A. Badly disorganized.

Q. In what way? A. Manufacturing was not consecutive; it was not carried out in units as it might have been; there seemed to be a lot of friction in the factory with the superintendent there.

Q. Superintendent and whom? A. The Officers of the company. There seemed to be a difference of opinion as to the manager and how to conduct the factory.

Q. What did you find the condition in the office to be? A. Fair; the books were kept in pretty good shape.

Q. What was to prevent it from being good? A. Well, it is pretty difficult to answer that ques-

tion, except in this way: as we discovered there, Mr. Smith would issue orders and Mr. Hemenway would be inclined to countermand them, and vice versa, so that the help didn't know just what to do.

Q. What did you find the condition in the sales end of the business to be? A. About the same.

Court:—How was that brought to your attention?

Witness:—By the help.

Q. Did you investigate to find out— A. We questioned the help to find out just what the attitude of the principals was.

Q. Did you question Mr. Hemenway and Mr. Smith to find out why the orders were countermanded, if they were? A. That was brought up, but we got no satisfaction on that.

Q. Did you find out that orders of Hemenway were countermanded by Smith? A. Yes.

Q. That worked both ways? A. Yes, it worked both ways, as I say.

Court:—You didn't say so.

Witness:—I said vice versa.

Court:—I beg your pardon.

Q. Did you examine into the financial policy that the company was and had been pursuing? A. Except in so far as it appeared on the books; we were not particularly interested, except to get at an average of their earnings; that was the only interest we had in that.

Q. Did you find that the concern was losing money or making money? A. The concern was making money; they were losing money in one department and making it in another.

Q. Which department were they losing money in? A. In the manufacturing.

Q. And making it—? A. Making it in the glass cutter.

Q. What do you say as to the equipment in the plant in the manufacturing part of it? A. It was up to date and modern; it could have been improved.

Q. What did you find its condition to be in regard to its cash capital and inventory and bills payable? A. That is always a matter of record; I cannot give you that from my head. I don't recall; I haven't been in touch with this situation in four years or three years.

Q. Did you finally make an offer or did any one through you make an offer to Smith & Hemenway? A. There was an offer made for the purpose at the conclusion of our survey.

Q. Where was it made? A. In New York.

Q. Who was there? A. Mr. Smith and Mr. Hemenway and another Mr. Smith and myself. This other Mr. Smith is no relation to Mr. L. P. Smith.

Q. And what happened at that conference? A. We made an offer starting at $160,000 and finally got up to $190,000 for the business.

Q. What happened? A. It was refused by Mr. Hemenway.

Q. Was Mr. Smith present? A. He was, and they both left the room.

Q. Who refused it; both of them? A. Mr. Hemenway made the remark that we two must have thought them a pair of damn fools; those were the actual words that Mr. Hemenway used, and Mr. Smith and Mr. Hemenway got up and left the room.

Q. Were you the Mr. Drake that got the $500,000 option? A. Yes.

Q. How did you come to get that and what was it for? A. That was the price that the Smith & Hemenway people asked and wanted for the business, and naturally, before wasting a lot of time, I wanted some agreement whereby, should we decide to buy the business after an investigation of it, that our time wasn't wasted, nor could it be jumped—the figure raised.

Q. Did you have to pay anything for the option? A. No, sir; we put a lot of time in on it, and we felt that we had done them a service.

Q. Nothing came of your investigation or your offer? A. No.

Q. Did you make up a report at that time? A. I did.

Q. Is this it (witness shown paper)? A. Yes.

Mr. Murray:—Any objection to this going in evidence?

Court:—How is it evidential?

Mr. Murray:—We with draw it.

Cross Examination by Mr. Pratt:

Q. You were looking the plant over for a purchaser, were you not? You represented the buying end, and not the selling end? A. I represented the buying end.

Q. And you were out to make a dollar out of the deal, if you could? A. We were out to buy the business if it was interesting.

Q. You found that Mr. Hemenway had entire charge of the glass cutter business which was earning money, didn't you? A. I did not.

Q. Who did have charge of it? A. The sales manager.

Q. Didn't Mr. John F. Hemenway have full charge and go to the factory up in New Hampshire every month and do all the business in the glass cutter business? A. I don't know; I didn't go to New Hampshire.

Q. Didn't you go to New York, to the office? A. Twice.

Q. Didn't you make an inquiry of the help where Mr. Hemenway was on some of those occasions when he was away? A. I had no occasion to do that; it didn't concern me.

Q. It didn't concern you as to whether he was running the glass cutter business or going up to the factory or anything like that; you were not interested in that? A. No.

Q. Didn't you observe that Mr. Hemenway always never came over to that plant and was never there when he was wanted? A. I met him there a number of times.

Q. Did he come there while you were there? A. Yes.

Q. Did you ever see him go out in the plant and countermand any orders? A. No, sir.

Q. Did you ever see him out in the plant? A. Yes, I went through the plant with him.

Q. Is that the only time you ever saw him out in the plant? A. The only time.

Q. When he came there he want into his office? A. I don't know where he went.

Q. What orders did Mr. Hemenway countermand that Mr. Smith gave? A. That I don't know. I am simply giving the information I got from the help.

Q. Was it claimed that Mr. Hemenway never came to the plant and didn't know anything about what went on in the manufacturing end; didn't Mr. Smith tell you that? A. I don't recall what Mr. Smith told me.

Q. This offer of $160,000 that you made, did you contemplate that Mr. Hemenway and Mr. Smith would pay the firm obligations out of that, too? A. Absolutely.

Q. In other words, you would have after that paid $30,000 or $40,000 yet for the business. A. No, we offered them $160,000 for the business as it stood.

Q. Who would assume the liabilities? A. We would.

Q. You discovered that the lucrative end of that business was the glass cutter business? A. No question about that.

Q. That was making about $60,000 a year, wasn't it? A. I don't recall the figures, but that is what saved them from going into bankruptcy, in my opinion.

Q. If they had discarded the manufacturing plant, they would have had an income of $60,000 a year clear money? A. That I cannot say, without referring to my figures.

Q. Did you notice who hired and fired the help around there? A. No.

Q. Did you notice who was in charge of the factory operations? A. They had a superintendent there.

Q. Who was over the superintendent? A. I think D. G. Smith passed on the orders through the general office.

Q. That is, on the orders D. G. Smith was over the salesmen? A. I don't know who was over the factory superintendent.

Q. Wasn't Mr. Landon P. Smith in charge of the factory operations there? A. I don't know; we were not concerned as to who was operating the plant; we were concerned as to whether the plant was worth so much money to us to purchase.

Q. You said you investigated this thing so as to determine the value and investigated how the partners here or the officers got along? A. We found there was disagreement among the partners, which was not conducive to getting the most out of the plant.

Q. You did inquire about that? A. I did.

Q. You cannot remember any single occasion when Mr. Hemenway actually countermanded any order of Mr. Smith's? A. That I have no knowledge of.

Defendants Rest.

Elden Hemenway recalled, direct.

Elden Hemenway, recalled in rebuttal for complainants:

Direct Examination by Mr. Pratt:

Q. How old are you, Mr. Hemenway? A. Forty years.

Q. How long a time did you know Alice M. Hemenway? A. All my life.

Q. And it was your custom to go to her home frequently each week? A. Yes.

Q. Saw her almost weekly? A. Yes, I did; the last few years.

Q. After this transaction and transfer of the Hemenway interests to the Smiths, did you see her frequently about that? A. Yes.

Q. You heard her discuss it many times? A. Many times.

Q. And you did know that she felt very much wrought up about it, didn't you? A. Yes.

Mr. Murray:—I object, as not binding on us.

Court:—What time are you relating to?

Mr. Pratt:—The closing days of her life, 1926.

Court:—I thought you meant the time of the transaction.

Mr. Pratt:—May I amend the question to say between April 1st, 1925, and the second day of January, 1926?

Mr. Murray:—I object that that.

Court:—When was the contract closed? Wasn't that November?

Elden Hemenway, recalled, cross.

Mr. Pratt:—The contract was signed November first and delivered and executed in part November 4 and part December 9, and in part January 2nd, as I understand.

Court:—I will permit the question.

Q. And you did know that she felt very much wrought up about it, didn't you? A. Yes.

Q. What did she say? Did you hear your aunt, Mrs. Hemenway, use any word of profanity in your entire life? A. No, I did not.

Cross Examination by Mr. Murray:

Q. Confining yourself to January 2nd, did she tell you that she was dissatisfied with the deal? A. Yes.

Q. On January 2nd? A. I don't know that date.

Q. Prior to January 2nd? A. She was at all times dissatisfied with the deal.

Q. I show you a release dated January 19, that is signed by Mrs. Hemenway, isn't it? A. Yes, that seems to be her signature.

Q. It seems to be her acknowledgment on the back? A. It seems to be.

Q. How do you explain that, if she was dissatisfied with the deal? A. I don't know; I merely know that she was dissatisfied with the deal in her discussion with me.

Elden Hemenway, recalled, redirect.
Elden Hemenway, recalled, recross.

Redirect Examination by Mr. Pratt:

Q. Did she explain to you the signing of that release? Counsel has asked you that. Go on and explain what she said about it. A. She did not want to sign it at all, and said she signed it under protest and only signed it at the instance of her attorney, who said that she had to sign it, due to the fact that she had signed a contract, forcing her to sign it.

Q. Is it a fact that when this release was returned to Mr. Cohn, that she refused to sign any release, any new release or any release; do you know why she refused to sign any further release? A. I don't remember that any further release was discussed.

Recross Examination by Mr. Murray:

Q. Her lawyer drew that release, didn't he? A. I think so.

Q. He had her sign? A. He told her she had to sign it, due to the fact that it was part of the contract.

Q. Were you there? A. I don't remember.

Q. Are you sure you don't remember whether you were there or not? A. At the lawyer's office?

Q. When that release was signed.

A. I do not remember that; she talked to me a good deal about it and I did not always go to the lawyer's office.

Q. How many times in January, 1926, were you in Mr. Cohn's office? A. I don't know.

Elden Hemenway, recalled, recross.

Q. Were you there at all? A. I probably was; she usually asked me to go to Mr. Cohn's office with her the last year of her life.

Q. You don't remember that being signed? A. I don't remember actually the time she signed it.

Q. You don't know whether what you have been telling us about the signing of the release and protesting against signing it is based on what you heard at Mr. Cohn's office or what she told you outside of Mr. Cohn's office? A. I know just what she told me outside of his office; I don't know what occurred in his office, if anything.

Mr. Murray:—There is a stipulation that the New York Law, both statutory and decision, will be considered subject to your Honor's consent as a matter of law rather than a question of fact.

Court:—Do you mean by that, that you are agreed on what the law is?

Mr. Murray:—No, that we will argue the New York law the same as we will argue the New Jersey law, instead of having the law of the foreign state and question of fact as it normally is.

Mr. Pratt:—We had a stipulation that the general corporation law of New York State, the stock corporation law and the decisions construing proceedings to dissolve corporations similar to the one taken in the Smith & Hemenway case should be considered in evidence; that is, could be referred to without putting them in evidence, the same as if they were in evidence.

Elden Hemenway, recalled, recross.

In case there is any question about the certificates of incorporation being in, it is stipulated that subject to the consent of the Court, they may be deemed in evidence. I have certified copies which I intended to put in, but perhaps I didn't; if not, I will furnish them.

Mr. Murray:—That is agreed on.

Both Sides Rest.

Court:—Counsel for complainants may serve their brief on counsel for defendants within two weeks after they receive the testimony, and counsel for defendants may have two weeks in which to reply.

EXHIBIT C-1.

Exemplified copy of Last Will & Testament of John F. Hemenway, deceased, together with Probate thereof and Letters Testamentary granted thereon. Said Will having been duly executed and proven agreeably to the Laws and usages of the State of New York and admitted to probate as of personal property on the 3rd day of January, 1926, appointing Alice M. Hemenway, executrix thereof.

EXHIBIT C-2.

Exemplified record of Last Will & Testament of Alice M. Hemenway, executed, proven and probated in the State of New York May 16, 1927, appointing J. Harrison Montague, Eldon C. Hemenway and Martin B. Cohn, executors of the Last Will & Testament of said Alice M. Hemenway.

EXHIBIT C-4.

May 28, 1925.

Martin Cohn Esq.,
Alexander, Cohn & Sondheim,
51 Chambers Street,
New York City.

Dear Mr. Cohn:

Clients, Landon P. Smith and wife, inform us you are counsel for John F. and Alice M. Hemenway.

The situation which has developed in the affairs of Smith & Hemenway Inc., has brought these parties into irreconcilable conflict respecting the management of its affairs. Lack of confidence, amounting to affirmative district, has crippled the successful conduct of operations and will, in our judgment, eventually paralyze all activities of the company.

We see nothing to be gained from a discussion as to which party is at fault and hence forebear from opening the personal issues in which the parties have evidently indulged almost constantly and usually acrimoniously.

We deem the only avenue of relief most consonant to the best interests of both parties to be dissolution pursuant to the provisions of the statutes of New York in such case made and provided.

Before instituting such proceedings, we beg to

inquire if your clients have any alternative proposition to suggest.

Very truly yours,

BURNETT, SORG, MURRAY & DUNCAN,
By (Signed) D. Frederick Burnett.

Received June 1, 1925.

EXHIBIT C-5.

June 1st, 1925.

Messrs. Bernard, Sorg, Murray & Duncan,
810 Broad Street,
Newark, N. J.
Attention of Mr. D. Fdk. Burnett.

Dear Sirs:

Re Smith & Hemenway Inc.

We acknowledge the receipt of your communication of the 28th ult. As our Mr. Cohn expects to me in Newark on Thuresday, June 4th, he will take this occasion to call on you relative to the above entitled matter. If this arrangement is not satisfactory to you kindly communicate with us.

Very truly yours,

ALEXANDER, COHN & SONDHEIM.

MBC-R

EXHIBIT C-6.

June 15, 1925.

Martin Cohn Esq.,
51 Chambers Street,
New York City.

Dear Mr. Cohn:

This is remind you of our telephone conversation during the heated term by which you requested postponement of our proceedings for dissolution of Smith & Hemenway, Inc., until the following week, in the hope of cooler weather.

That week has now passed and an turning over my dairy this morning, I am reminded that a new week is beginning.

As client is desirous of having this matter carried over with dispatch, may I not ask you ring me up and arrange for conference early this week.

Very truly yours,

(Signed) D. FREDERICK BURNETT.

Received June 16, 1925.

EXHIBIT C-7.

June 23rd, 1925.

#6414.
Messrs. Burnett, Sorg, Murray & Duncan,
810 Broad Street,
Newark, N. Y.
Attention of Mr. Burnett.
Dear Mr. Burnett:

Re Smith & Hemenway, Inc.

This is to acknowledge receipt of your communication of the 18th. I have been out of town since the 19th and just returned. On that date, however, I had an interview with Mr. Hemenway in connection with the proposed sale of his interest in Smith & Hemenway, or the purchase of Mr. Smith's interest therein. He informs me that they are about to take their semi-annual inventory, which will be completed this week, and it occurs to me that both parties will be better informed as to the actual value of their interests after such inventory has been taken. In the meantime, however, I suggest that you give me your client's views with regard to the terms upon which the purchase or sale would be made after the price has been determined.

Very truly yours,

ALEXANDER, COHN & SONDHEIM.

MBC-R.

EXHIBIT C-8.

June 18, 1925.

Martin Cohn, Esq.,
51 Chambers Street,
New York City.

Re Smith & Hemenway, Inc.

Dear Mr. Cohn:

Please let me have your offer of sale along lines we discussed on Monday without further delay. Client is getting restive and insists on action.

Very truly yours,
(Signed) D. FREDERICK BURNETT.
G.

Received June 23, 1925.

EXHIBIT C-9.

July 2nd 1925.

Messrs. Burnett, Sorg, Murray & Duncan,
810 Broad Street,
Newark, N. J.

Attention of Mr. Burnett:

My Dear Mr. Burnett:

Re Smith & Hemenway, Co.

Your letter of the 1st was received by me this morning and I am under the impression that you have misinterpreted my communication of the 23rd of June. It was not my intention to indicate in

any way that Mr. and Mrs. Hemenway were willing to sell their interest, but rather I wanted to get your suggestion as to a plan of payment, no matter who the purchaser was, and that we would follow some plan similar to the one which you used in another case as to which one would pay the most for the other's interest.

Your letter coming on the day when I leave for my vacation makes it impossible for me to have a conference with my client in time for an answer on July 6th, as indicated in your communication. I intend to return to New York on the 8th for a few days interruption of vacation on account of other business matters and have sent a copy of your letter to Mr. Hemenway, asking him to call at my office on one of these days to take the matter of your communication up with me. Personally I see no reason why this haste and why the entire matter should not go until after the inventory has been completed. The impression I gained in my last interview with Mr. Hemenway would indicate "that the length of time before all the extensions are made and final computation of the inventory had" was somewhat exaggerated by Mr. Smith.

I shall write you further on the subject after my conference with clients.

Very truly yours,

ALEXANDER, COHN & SONDHEIM.

MBC-R.

EXHIBIT C-10.

July 1, 1925.

Martin B. Cohn Esq.,
51 Chambers Street,
New York City.

Re Smith & Hemenway Inc.

Dear Mr. Cohn:

I duly received yours of the 23rd ult. and because of Mr. Smith's dates conflicting with mine, we have not been able to have a conference until today. He tells me that while it is true that inventory is about to be taken, nevertheless, it will be approximately three weeks or more before all the extensions are made and final computation of the inventory had. He tells me that his preliminary estimates will show a loss of $25,000. That statement, however, is not to be taken as a representation or warranty or condition. It is simply Mr. Smith's belief. Your client has equal access to and knowledge of the facts. His guess is as good as ours. We are willing to stand by our figures hereinafter mentioned, but only for the time hereinafter mentioned.

Mr. Smith says that the trend has been toward the cheaper and less profitable line of tools. He does not appear to me nearly so keen to purchase the business for himself as he was a month ago. His proposition, therefore, to be accepted, must be accepted without further delay. Otherwise it is understood that it automatically lapses. If affairs

continue on their present trend much longer, he will not buy on any conditions. I must therefore ask that I hear from you definitively by Monday, July 6th, on the following proposition:

Mr. and Mrs. Hemenway to sell their entire holdings of stock to Mr. Smith for $100,000, payable as follows: $40,000 cash; $30,000 by conveyance forthwith to your nominee of the Montreal property; and the balance of $30,000 in six annual installments of $5,000 each, the first payable in one year with interest at 5%; the second in two years with interest at 5%, and so on. All the capital stock thus acquired and Mr. and Mrs. Smith's present holdings, to be deposited in escrow, endorsed in blank as collateral security for the payment of the proferred installments. Mutual general releases to be exchanged. Mr. and Mrs. Hemenway to covenant that they will do nothing to injure, prejudice, embarrass, or hinder the corporation or Mr. Smith in the prosecution of its business, nor to solicit its customers, and further not to entice away from its employ any of its present or future employees, and further not to employ, directly or indirectly, any of its past, present or future employees.

May I have your definitive answer one way or the other not later than Monday, the 6th?

I expect to go on my own vacation shortly and desire to have the matter either settled or else the

liquidation proceedings legally instituted and well under way before I go.

Very truly yours,

(Signed) D. FREDERICK BURNETT.

G.

EXHIBIT C-11.

July 2nd 1925.

Mr. John F. Hemenway,
230 West 76th Street,
City.

My Dear Mr. Hemenway:

Enclosed please find copy of a letter which I received this day from Burnett, Sorg, Murray & Duncan, and my reply thereto.

I am leaving for my vacation tonight but as I expect to be back in New York on Wednesday and Thursday of next week, I will be pleased to see you either one of those days in connection with this matter.

Very truly yours,

ALEXANDER, COHN & SONDHEIM.

MBC-R.

EXHIBIT C-12.

July 9, 1925.

Messrs. Burnett, Sorg, Murray & Duncan,
810 Broad Street,
Newark, N. J.
Att. Mr. Burnett:

Dear Sir:

I endeavored to get into communication with you by 'phone today, but was informed that you were out of town. I desired to confer with you with reference to conference had with Mr. and Mrs. Hemenway. I understand that the inventory has been completed and that within a very short period of time the extensions will be made so that both parties can intelligently negotiate in connection with the purchase or sale of their respective interests. I would suggest that a plan similar to the one that you showed me which was used by you in settling another matter be adopted in this case. That an agreement be entered into between the parties fixing the percentage to be paid in cash terms as to the balance, and such other matters as we might deem necessary to be incorporated in said agreement.

In the event that the Hemenways sell, they are willing to take in addition to the cash provided for in the agreement the Montreal property at a valuation of $27,500. This is carried on the books at $25,000.

I am leaving for my camp tonight to be absent for a few weeks. Any communication addressed to me, C/o Green Mountain Camp, Brandon, Vermont, will, however, receive my attention.

I am sorry that I was not able to talk personally with you today.

Very truly yours,

ALEXANDER, COHN & SONDHEIM.

MBC:GS.

EXHIBIT C-13.

July 28, 1925.

Martin B. Cohn Esq.,
Green Mountain Camp,
Brandon, Vermont.

Re Smith & Hemenway Inc.

Dear Mr. Cohn:

I duly received yours of the 2nd and of the 9th, and have been awaiting to hear that had returned from vacation as I hesitate very much to bother you on vacation. However, the month is passing by and on Friday I leave for my vacation and will be gone during the month of August, and this matter must receive attention and have action. I am sending the original of this letter to your camp and a copy to your office, in the event that perchance you have already returned from vacation.

—Exhibit C13

It appears from your letters that the inventory is complete, and I take it that by now all the extensions have been made. I have not seen Mr. Smith recently, but presume that in the absence of word to the contrary that the proposition which I set forth in my letter to you of July 1st can still be worked out. Mr. Smith has no intention of selling, and is entirely unwilling, in view of his comparative youth as compared with Mr. Hemenway, to consider any proposition relating to selling. He is willing to buy on the terms stated in my letter of July 1st, but that is all. If Mr. Hemenway desires to accept this proposition, well and good. If not, I take it that there is no use of negotiating further, and that our only recourse will be to institute proceedings for dissolution.

As I have but a few days in the office before my own vacation, I have taken the matter up with my partner, Mr. Murray, to whom henceforth all correspondence should be addressed for his attention. Personally I hope that the matter can be settled amicably, but Mr. Smith is insistent on dissolving the company, and the only possible alternative that I can see is a purchase by him of the Hemenway interests.

I am genuinely sorry to bother you with this matter while on your vacation, but it seems to me that all you will have to do will be to answer yes or no. If "yes" Mr. Murray will at once arrange

for the purchase. If "no" he will draw the papers in the proceedings for dissolution.

Very truly yours,

(Signed) D. FREDERICK BURNETT.

G.

EXHIBIT C-14.

August 4th, 1925.

Burnett, Sorg, Murray & Duncan, Esqs.,
810 Broad Street,
Newark, New Jersey.
Attention of Mr. Norberry C. Murray:

Re Smith & Hemenway Inc.

My dear Mr. Murray:

Mr. Burnett's letter of the 28th ult., reached me at Camp on the 31st ult., and as I expected to leave for New York the following Monday, concluded to defer answering same until my return.

Upon reaching my office I was informed that Mr. Hemenway had been critically ill for the last three weeks with pneumonia, and the doctors in charge will not permit him to take up any business matters until he has fully recovered. Mrs. Hemenway has informed me that he is steadily improving.

You can therefore see that I have no further information to give you at this time, and with re-

spect to the inventory, I have no further knowledge other than what was contained in my communication of July 9th. Mr. Smith is probably better posted as to whether the inventory was completed and extensions made. If the inventory has been completed and extensions made, I wish you would secure for me a copy of the financial statement.

I see no reason for immediate action and would therefore suggest that the matter be held in abeyance until I have an opportunity to see my client.

Very truly yours,

ALEXANDER, COHN & SONDHEIM.

MBC-CB.

EXHIBIT C-15.

August 4th, 1925.

Mrs. J. F. Hemenway,
230 West 76th Street,
New York City.

My dear Mrs. Hemenway:

Enclosed please find a copy of the letter sent by us to Mr. Smith's attorney this day, which is in reply to his letter, a copy of which is in your possession.

Very truly yours,

ALEXANDER, COHN & SONDHEIM.

MBC-CB.

EXHIBIT C-16.

August 5, 1925.

Alexander, Cohn & Sandheim,
51 Chambers Street,
New York City.
Attention Mr. Cohn:

Gentlemen:

Re Smith & Hemenway Inc.

We have yours of the 4th instant re Smith & Hemenway Inc.

Much as we would like to accomodate you personally, inasmuch as the matter has been already held in abeyance for an undue length of time, we cannot see our way clear for so holding it any longer.

The writer has no knowledge at all regarding the inventory and extentions and financial statement referred to, but will look up the matter.

Very truly yours,

BURNETT, SORG, MURRAY & DUNCAN,
by (Signed) Norberry C. Murray.

F.
Received Aug. 6, 1925.

EXHIBIT C-17.

August 7th, 1925.

Mrs. John F. Hemenway,
230 West 76th Street,
New York City.

Dear Madam:

Enclosed please find copy of a communication from Burnett, Sorg, Murray & Duncan, which we received yesterday, and our reply thereto.

Very truly yours

ALEXANDER, COHN & SONDHEIM.

MBC-R.

EXHIBIT C-18.

August 7th, 1925.

Messrs. Burnett, Sorg, Murray & Duncan,
810 Broad Street,
Newark, N. J.
Attention of Mr. Norberry C. Murray.

Dear Sirs:

Re Smith & Hemenway Inc.

We acknowledge receipt of your communication of the 5th. We regret that you do not see fit to hold this matter in abeyance until Mr. Hemen-

way has fully recovered, to give us an opportunity to discuss business matters with him. We must therefore advise you that any action taken by Mr. Smith for the dissolution of the company will be vigorously opposed, as in your opinion such action will greatly prejudice the stockholders.

Should you receive a copy of the financial statement resulting from the last inventory we would appreciate a copy thereof.

Very truly yours,
ALEXANDER, COHN & SONDHEIM.

MBC-R.

EXHIBIT C-19.

August 10, 1925.

Alexander, Cohn & Sondheim,
51 Chamber Ctreet,
New York City.

Attention Mr. Martin B. Cohn.

Gentlemen:

Re Smith & Hemenway Inc.

This is to acknowledge receipt of yours of the 7th inst., in re the above matter.

Very truly yours.
BURNETT, SORG, MURRAY & DUNCAN,
By (Signed) Norberry C. Murray.

F.

Received Aug. 11th 1925.

EXHIBIT C-20.

October 1st, 1925.

O'Brien, Malevinsky & Driscoll,
152 West 42nd Street,
City.

Dear Sirs:

In Re Smith & Hemenway.

We are attorneys for John F. Hemenway and Alice M. Hemenway, two of the stockholders of the above company. We note that you, on behalf of Landon P. Smith and Julia M. Smith, have commenced proceedings in the Supreme Court, New York County, for the dissolution of said corporation under Section 172 of the General Corporation Law, and that in accordance with the order of the Hon. Justice Wasservogel, Charles F. Hoffman was appointed Referee to hear the order to show cause on November 25th, the return day mentioned in the order. Will you kindly favor us with a complete copy of the order, petition and schedules. At the same time will you be kind enough to let us know who in your office has charge of this matter, in the event that we desire to communicate by telephone.

Thanking you in advance we are,

Very truly yours,

ALEXANDER, COHN & SONDHEIM.

MBC-R.

EXHIBIT C-21.

October 6, 1925.

Martin B. Cohn Esq.,
51 Chambers Street,
New York City.

Dear Mr. Cohn:

Thursday noon, October 1st, Mr. Smith telephoned me that Mrs. Hemenway and her nephew were at the factory and wanted to ask him certain questions; that he was willing to answer their questions in my presence but would not discuss the matter with them; and asked for an immediate appointment and they would come down together to my office. As I was leaving at that moment for luncheon and had an appointment for 2.30, I could not see them any earlier than 3.30. At 4 o'clock they arrived, i. e. Mr. Smith, Mrs. Hemenway and her nephew.

They said they had read in the New York Times that morning, I think, the notice of the action which had been started by us in New York. They said they knew nothing of it, thought it unfair to institute proceedings without notifying them, and asked why they had received no notice. Mr. Smith asked me to answer the question which I did by informing them that we had notified you, and in fact had been negotiating with you for several months and had threatened these very proceedings, and that I could not communicate with them but only with their counsel.

Mr. Hemenway asked me if it was true that I had said that Mr. Smith would not consider any offer for sale of his holdings. I told him that was not true at all; that Mr. Smith had been and would be at all times open to an offer for the sale of his holdings, but that no offer had ever been made to me; that I had made to you an offer to purchase Mr. Hemenway's holdings, but that this offer had lapsed because of non-acceptance; that no counter-figures had ever been submitted by you to me; that you had asked me to make my offer to buy in the shape of an offer to buy or sell at a certain figure, but that I had absolutely refused to make any such proposition stating that to do so was really making a double offer and giving you the advantage of deciding on which one to accept; that I had told you that we were not interested at all in selling out our holdings and had no offer to make on that behalf; that the only offer we had to make was one for the purchase of Mr. Hemenway's interests; that I thought this statement was the basis, or the color for the impression that they had evidently gained as manifested by their question.

They asked several incidental questions relative to the procedure and the conduct of the sale, and the right of each party to bid thereat. Mr. Hemenway asked if it was still not possible for the parties to get together and settle the matter amicably, to which, I, of course, answered in the affirmative and said that I had had such hope and had for several months delayed action hoping that such happy result could be accomplished, but that

I was afraid that you and they had construed my hope of effecting an amicable settlement as a confession of weakness, and therefore I had been compelled to institute this suit when I found no way of avoiding it, and now that it was in court it would have to go on to a finish unless negotiations between you and me were resumed for settling it. Mrs. Hemenway said that this was a result greatly to be desired, and that she would take it with you. Mr. Hemenway expressed himself to the same effect, adding that otherwise it would probably mean a great loss to both Mr. Hemenway and Mr. Smith.

I had to terminate the interview a few minutes before 5 in order to leave for New York to give my lecture at the Law School, else I should have written you that night. Friday I played golf all day and developed an infection of the eye, and have been out of the office ever since, coming back today for the first time since last Thursday.

I am writing you at length because I felt embarrassed to have your client in my office without you being present,and think you ought to know exactly how it came about, and substantially what was said and done.

The hearings start November 25th next. Prior thereto it is necessary to serve a copy of the Order to Show Cause upon all of the creditors and stockholders of the corporation; also to publish the order once a week for three weeks. I purpose to start this publication and serve these notices as soon as I return from a week-end trip in the Adir-

ondacks over the coming Columbus Day. If it is still the wish of your clients to settle this matter amicably and before further damage is done to the business by publications and notices to creditors, it will be necessary that your offer me in my hands not later than Thursday, October 15th. Under no circumstances will I delay the hearing or any of the preliminaries necessary thereto.

Very truly yours,

(Signed) D. FREDERICK BURNETT.

G.

Received Oct. 8th 1925.

EXHIBIT C-22.

October 6th 1925.

In Re Smith & Hemenway Co. Inc.

Messrs. Alexander, Cohn & Sondheim.
51 Chambers Street,
New York City.

Attention of Mr. Cohn:

Gentlemen:

We acfinowledge receipt of your letter dated October 1st, 1925.

We will shortly serve you the papers requested in that letter.

Complainant's Exhibits.
—*Exhibit C23*

This matter is in charge of the undersigned.

Very truly yours,

O'BRIEN, MALEVINSKY & DRISCOLL.
By (Signed) Richard J. Mackey.

RJM:IW.
Received Oct. 7th, 1925.

EXHIBIT C-23.

October 12th 1925.

Messrs. Burnett, Sorg, Murray & Duncan,
810 Broad Street,
Newark, N. J.

Attention of Mr. E. F. Burnett:

Dear Mr. Burnett:

Re Smith & Hemenway Co.

This is to acknowledge receipt of your communication of the 6th with respect to the interview had by you with Mrs. Hemenway and her nephew and we appreciate your frankness in transmitting to us the details of this interview.

I desire respectfully to call your attention to the inconsistency contained in the third paragraph of your letter in reference to the sale of Mr. Smith's stock, in which you state "that Mr. Smith has been and would be at all times open to an offer for the sale of his holding but that no offer had

ever been made to me." Your attention is directed to my communication of the 2nd of July and of the 9th of July, and in particular to your reply of July 28th. However, it would seem to me that discussion on these points is immaterial at this time in view of the situation that has been created by the filing of the petition for dissolution. You and I both realize that the prosecution of this proceeding will entail a sacrifice and an expense which will not enure to the benefit of either one of the parties, and should be avoided if at all possible.

Mr. Hemenway feels, as we do, that there is no occasion for a dissolution of the company and no sound foundation therefor, especially in view of the fact that his health is improving and that business conditions generally are considerably on the mend and the prospects for a profitable continuation are almost assured.

While you seem to have some objection, and so indicate in your letter, to make an offer to buy or sell at a certain figure in that you thought this was making a double offer and giving us the advantage of deciding which one to accept, we have no such hesitation, in order to save the situation, and we are authorized to make you the following offer for the purchase of the Smith interests, or to sell the Hemenway interests upon the same terms and conditions:

The purchase or sale price to be $125,000, payable as follows: $5,000 upon signing the contract;

$45,000 ten days after the signing of the contract, without interest; $30,000, the agreed value for the Montreal property, to be taken over by the party selling his shares of stock, free from all encumbrances, subject to a lease, however, rent on said property to start to the seller from November 1st, 1925; the amount of $30,000 to be credited on account of the purchase price; $25,000 cash on or before December 31, 1925, without interest; $20,000 to be paid $2,500 each three months beginning April 1, 1926, with interest from January 1, 1926, at the rate of 6% per annum, interest to be paid semi-annually July 1 and January 1 of each year. Total $125,000.

The stock, after it is transferred on the books of the company, will be endorsed in blank and deposited in such amount as you and I will agree upon as being necessary so that the selling parties will be fully protected, in escrow, with any bank or trust company, as collateral security for the deferred payment of $20,000.

An agreement is to be made by the purchaser with the seller that until the final payment has been made as hereinabove provided the capital assets of the company shall not be depleted excepting as may result from the ordinary course of business, and such other safeguards as contained in your letter of July 1st.

Complainant's Exhibits.
—Exhibit C24

Will you kindly give this matter your immediate attention and let us hear from you promptly.

Very truly yours,
ALEXANDER, COHN & SONDHEIM.
MBC-R.

EXHIBIT C-24.

October 13, 1925.

Alexander, Cohn & Sondheim,
51 Chambers Street,
New York City.

Attention of Martin B. Cohn Esq.,

Re Smith & Hemenway.

Dear Mr. Cohn:

Confirming telephone conversation, this is to verify that I, in behalf of Mr. Landon P. Smith and Mrs. J. Mildred Smith, being thereunto duly authorized, accept your offer in behalf of Mr. and Mrs. John F. Hemenway to sell the Hemenway interests at the price and upon the terms and conditions as set forth in your offer of October 12th.

As mentioned over 'phone, if you will draft the agreement of sale and send it to us, we will cause

it to be duly executed by clients and the first installments of $5,000 paid forthwith.

Very truly yours,

(Signed) D. FREDERICK BURNETT.

G.

Received Oct. 14, 1925.

EXHIBIT C-25.

October 14, 1925.

Messrs. Burnett, Sorg, Murray & Duncan,
810 Broad Street,
Newark, N. J.

Attention Mr. D. F. Burnett.

Dear Mr. Burnett:

Enclosed please find duplicate of an agreement I have prepared in connection with the sale of the Hemenway stock to the Smiths, which I trust, upon examination, you will find satisfactory.

Q. With respect to the transfer of the Montreal property, this being a corporate matter, we will co-operate on any plan which you may have in mind for the purpose of carrying out this provision of the agreement.

I am leaving tomorrow for Atlantic City upon the order of my physician for a few days rest, but will be back again Sunday night and will have the

Hemenways sign the agreement, if satisfactory, Monday morning.

Very trulys yours,

ALEXANDER, COHN & SONDHEIM.

MBC-R

EXHIBIT C-26.

October 17th, 1925.

Alexander, Cohn & Sondheim,
51 Chambers Street,
New York City.

Attention Mr. Martin Cohn.

Re: Smith & Hemenway Inc.

Dear Mr. Cohn:

I have yours of the 14th in response to mine of the 13th, and note that you will be back in New York on Monday, at which time this letter will reach you.

I sincerely hope that your brief respite from work, at Atlantic City, will do you the world of good.

The agreement you have drafted in many respects substantially conforms to your offer of October 12th, and my acceptance of October 13th, but in certain respects makes radical departures therefrom. The formal agreement should follow the latter. The points in question are:

—Exhibit C26

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1. You say to convey a "good and indefeasible title" to the Montreal property. We will convey whatever title Smith & Hemenway acquired free from all encumbrances, subject to the least, just as set out in your letter, and I will recommend a covenant against grantor's acts, but clearly I cannot counsel a good and indefeasible title because I do not know that the corporation acquired the same. Why not make it all the right, title and interest of the corporation of, in and to the Montreal property, etc. etc.

2. The draft provides for the delivery to you of all the shares of stock sold, endorsed in blank, together with resignations as officers and directors, to take effect on December 31, 1925. That is not in accord with the offer. The offer contemplates an immediate sale with deferred payments. The stock is to be transferred forthwith. The resignations are to be effective immediately. I have no objection to your holding shares of stock after they have been transferred into the name of my clients and have been by them endorsed in blank, for you to hold in escrow. That will effectuate the agreement which was for the immediate transfer, and at the same time will give you the security for the deferred payments. I am perfectly willing to have you act solely as the escrow agent from beginning to end, rather than to have you hold part of the time and me for the rest. To correspond with the offer as accepted, let the draft take this form:

Complainant's Exhibits.
—Exhibit C26

Let the time of closing be ten days after the date of the contract. At that time we pay $45,000 in cash and give the deed for the Montreal property. At the same time and concurrently with such delivery the shares of the Hemenways are delivered to the Smiths, new shares issued to the Smiths and endorsed by the Smiths in blank, and delivered to you to hold in escrow for the purposes:

1. To secure the payment of the $25,000 due on December 31st which we will evidence by a promissory note; and

2. To secure the $20,000 to be paid in eight installments, and we will deliver the eight promissory notes then and there.

You are to hold the stock until the last one of the above mentioned nine promissory notes are paid and thereupon to deliver to me for the Smiths. The provisions you have about what happens in case of default in payment of any one note are O. K.

All the other propositions set forth in your agreement are O. K.

Mr. Smith telephones me this morning that he is sending me by special delivery a check to my order at attorney for $5,000.

Kindly redraft along the lines indicated and have executed by the Hemenways, sent to me in escrow and trust to have executed by Smith and wife, and I will return to you one copy properly executed together with check to your order as attorney for $5,000 representing the payment due at the time of the signing of the agreement.

Complainant's Exhibits.

—Exhibit C26

If you could send this redraft out to me by messenger on Monday, before 2 p. m., I can have it executed and give it to your messenger if he will wait a little while, and return it to you so that you have it in your hands on Monday.

Very truly yours,

(Signed) D. FREDERICK BURNETT.

G—

Received Oct. 19, 1925.

October 22nd, 1925

Messrs. Burnett, Sorg, Murray & Duncan,
810 Broad Street,
Newark, N. J.

Attention Mr. D. F. Burnett.

Re. Smith & Hemenway.

Dear Sirs:

Replying to your letter received by me on the 19th, I have undertaken to rewrite the agreement to cover some of the matters contained in your letter, but owing to the absence of my clients, who are in Atlantic City, and with whom I have not had an opportunity to go into the details of your commission, I cannot at this time take up with you the suggestions made, seriatim. As you can appreciate, there are certain features on which it will be necessary for me to obtain the consent of

my clients before they can be incorporated as a part of the agreement.

I received a letter from Mr. Hemenway that he will take up these points with me on Monday, but there are certain features that you and I can discuss for the reason that they are legal matters and have to do only with carrying out the intent of our clients.

As explained to you in connection with paragraph number 1 in your letter a doubt arose in our mind as to whether the corporation could give a deed of the premises for a personal obligation of Mr. Smith unless the corporate records were so constructed that the corporation could give a deed which would have a good consideration, and it was for that reason that we further suggested that our clients would assist you in their official capacity to carry out this transaction. We did not intend that the corporation should convey any better title than it has. From conversation had with Mr. Hemenway before we sent you the contract, it seems that they have a peculiar method of conveyance in Canada, with which he is thoroughly familiar, and one of the things that he outlined to me was that it would be necessary to have a meeting of the board of directors authorizing such transfer. There are other details on which I am hazy but which will be cleared up, no doubt, when the board meets.

Paragraph number 2 is a matter concerning which I will have to have further advice from my

clients, but with regard to my acting as sole escrow agent I have no objection and will so modify the agreement.

I have some hesitancy in agreeing with your suggestion about the transfer of the stock in the name of your clients until December 31st, as indicated in our agreement. I would like to take this matter up with you personally and discuss other features in your letter and I would appreciate your calling at our office when you are next in New York.

Very truly yours,

ALEXANDER, COHN & SONDHEIM.

MBC—R—

EXHIBIT C-27.

October 20th, 1925.

Mr. M. B. Cohn,
New York City.

Dear Mr .Cohn:

Thinking of the matter since talking with you over the telephone on Monday, I believe it would be unwise to meet any suggestions towards leniency in the terms for payment or otherwise.

Some of my friends who know the man (let us call him Smith) think he is going to fall down and

his effort is to gain time, in which to manipulate matters, the assets, etc.

We could not sign contracts here, for the reason that we will want to discuss any possible changes with you very carefully before signing.

They accepted our proposition and must live up to it. Until the principal sum of $75,000 is paid in cash and the Montreal property transferred to me, the S. & H. Co. Inc. must continue to pay my salary ($7,000 per annum) and the dividends on my preferred stock.

This is only fair as no interest is paid until after Dec. 31/25 on the deferred payments of $20,000 to be made in eight quarterly payments of $2,500 each.

Very truly yours,

(Signed) JOHN F. HEMENWAY.

EXHIBIT C-28.

October 21st, 1925

Mr. John F. Hemenway,
Hotel St. Denis,
Atlantic City, N. Y.

My dear Mr. Hemenway:

This is to acknowledge receipt of your communication of yesterday, which will receive our attention, and I am enclosing herewith a copy of Mr. Burnett's letter, concerning which I telephoned you before you left.

I will write Mr. Burnett a letter today, stating that I expect to take up with you on Monday of next week the changes which he has suggested.

Trusting that your stay will be of considerable benefit to you, with my personal regards to Mrs. Hemenway, I remain,

Very truly yours,

ALEXANDER, COHN & SONDHEIM.

MBC—R

Complainant's Exhibits.
—Exhibit C29

EXHIBIT C-29.

October 22, 1925.

Martin B. Cohn, Esq.,
51 Chambers Street,
New York City.

Re Smith & Hemenway.

Dear Mr. Cohn:

Today, Thursday, and no word from you since Monday. I cannot let the time go by for publishing the notices and making the publication to the creditors. I doubt seriously your authority to stipulate for an extension of time. Undoubtedly you could stipulate for Hemenway, but question as to your stipulation binding the creditors. I don't want the court to lose jurisdiction and have to start all over again with concomitant expense.

Please impress on Mr. Hemenway that he has nothing to gain by delay. Holding this matter over into November will not give him any November salary. The agreement calls for immediate sale and closing on a basis as of November 1st. It is from that time that you are to take the rents of the Montreal property. It is from that time that his salary ceases. Please advise promptly. We had trouble once before because of Hemenway's delays.

Very trulys yours,
(Signed) D. FREDERICK BURNETT.

G—

Received Oct. 23, 1925.

EXHIBIT C-30.

October 23rd, 1925.

Martin B. Cohn, Esq.,
Alexander, Cohn & Sondheim,
51 Chambers Street,
New York City.

Dear Mr. Cohn:

Thanks for yours of the 22nd which crossed mine in the mail. You are perfectly fair and have said everything in the letter which you said on telephone Monday. I have no fault with you. My complaint is that the matter is not finished. I understand what you mean about the Canada property, and as I told you over the 'phone, we will give you not merely a covenant against grantors acts, but also a covenant for further assurance. I think the trouble is that Hemenway has got it it in his head that if he can only stall off and delay this thing he will get a few more dollars out of it. Therein lies the fallacy. He takes my courtesy as a confession of weakness. That was done once before, as you know, and with expensive and disastrous results. I say what I mean and mean what I say. The $5,000 has been in my hands since last Saturday afternoon, arriving here just after I had mailed my letter to you of Saturday. We have done everything on our part. I therefore cordially commend that you get in touch with Mr. Hemenway at once.

Complainant's Exhibits.

—Exhibit C30

I note your request for conference at your office, but I haven't got the time to do it, and I am not adjourning it on that basis or any other. Everything is in black and white—your offer and our acceptance. We accepted it exactly as you made it. There are no other terms to be added except what's in there. It needs no conference. I will do whatever is right and fair, but must insist upon it being done.

I have to leave and will not be back again this afternoon and so Miss Grosch will sign this letter for me and mail it to you this afternoon.

Personally, I send you kind regards.

Very truly yours,

(Signed) D. FREDERICK BURNETT.

G— Received Oct. 26, 1925.

Complainant's Exhibits.
—Exhibit C31

EXHIBIT C-31.

October 27, 1925.

Burnett, Sorg, Murray & Duncan, Esqs.,
810 Broad Street,
Newark, New Jersey.

Re: Smith & Hemenway.

Attention Mr. Frederick Burnett.

Dear Mr. Burnett:

I am herewith enclosing redrafted agreement in connection with the above entitled matter which I trust that upon examination you will find conforms with the understanding had between ourselves. If they meet with your approval will you kindly have the Smiths sign and return to me and I will secure the signature of the Hemenways on the original. I am also enclosing a copy of the agreement for your file.

In order to expedite the carrying out of the transfer of the real estate which I believe is your desire, will you kindly let me know when a meeting of the Board can be arranged for in New York, as I doubt very much whether Mr. Hemenway will be able to take the trip to Newark without some risk to his health.

Very truly yours,

ALEXANDER, COHN & SONDHEIM.

MBC—SS

EXHIBIT C-32.

October 29th, 1925.

Martin B. Cohn, Esq.,
Alexander, Cohn & Sondheim,
51 Chambers Street,
New York City.

Re Smith & Hemenway.

Dear Mr. Cohn:

Herewith I hand you contract dated October 29th between the Hemenways and the Smiths, being the redraft enclosed in your letter of October 27th, which I have examined and approved.

Pursuant to our telephone conversation I see that you have incorporated into the contract on page 7, a provision that until the resignations become effective as therein provided, the salary of the party of the first part shall be continued at the same rate as at present, which, as you and I understand, means up to the time of the delivery of the deed for the Montreal property at which the salary stops and the rent begins.

Ordinarily I would not approve a stipulation of this kind because to some extent your co-operation is needed in getting this thing through on time. I am, however, absolutely satisfied of your own good faith in the matter, and in express reliance thereon I am approving the contract as aforesaid.

I note your request to have a meeting of the Board of Directors arranged for in New York.

Complainant's Exhibits.

—Exhibit C32

Will you at once arrange for the meeting. No formal notice need be sent out because all Directors will be present and they can waive notice.

In this connection you said that you would indicate the procedure which was necessary to the validity of the deed. Personally, I see nothing required except a meeting of the Board of Directors to authorize the making of the deed, followed by its execution and delivery.

Kindly advise if there is anything more. I presume it would be best for me to attend that meeting. Will it be convenient for you to hold it at your office on Monday, November 2nd at 2:30 p. m.? If that is not agreeable, then Wednesday, November 4th, at 12:15 noon. I am depending on you to co-operate to the fullest extent. I am holding both of those periods open and hope I may hear from you by return mail.

On page 6 of the agreement I note that you have incorporated our telephone conversation as to our procuring the cancellation of Mr. Hemenway's endorsements. It was my understanding that we would do this so as to eventually relieve him from all personal liability. Of course, we cannot take up those endorsements at the present moment, but as the notes severally fall due they will be taken up. I note that you have not named any specific time, and therefore I take it to be a reasonable time and that we are in accord as to what your wording means. Conversely I have no hesitancy in saying that it is my understanding that the

stock which you are to hold in escrow pursuant to the agreement is to be held not merely to secure the payment of the notes, but also our performance of this agreement to exonerate Mr. Hemenway as well.

Subject to the foregoing I have had Mr. and Mrs. Smith each execute the enclosed agreement as you will see, and have signed the same myself and now understand that you will at once have Mr. and Mrs. Hemenway duly execute it and that you will likewise sign and return this original copy to me.

Pursuant to the agreement I now hand you check to your order as attorney of Mr. and Mrs. Hemenway for $5,000.

May I ask that you have this executed tomorrow, Friday, and the original back in my hands on Saturday morning, so that I may at once take the necessary steps to have the action now pending in the Supreme Court, New York County, withdrawn and discontinued as our time has just about expired, as you know.

Very truly yours,

(Signed) D. FREDERICK BURNETT.

G—

Received Oct. 30, 1925.

EXHIBIT C-33.

October 30th, 1925.

Messrs. Burnett, Sorg, Murray & Duncan,
810 Broad Street,
Newark, N. J.

Attention of Mr. D. F. Burnett.

Dear Mr. Burnett:

Re Smith & Hemenway Co. Inc.

We herewith acknowledge receipt of the signed agreements by the Smiths together with check to my order as attorney of Mr. and Mrs. John F. Hemenway for $5,000. Owing to the inclemency of the weather today, we are having quite a snow storm, and in accordance with the doctor's advice, Mr. Hemenway, who had arranged to be here this afternoon, was unable to attend. I have arranged a conference at their home later in the evening, but probably too late to have the signed agreements returned to you as requested.

Relative to the various matters touched upon in your communication; the salary as I take it is to stop after the payment of the additional $45,000, and the delivery of proper deed for record of the Montreal property, and rents to be adjusted up to that time. You can be assured of my co-operation not to cause any unnecessary delay to bring about this condition.

With regard to the meeting of the board of directors, you will hear from me by Monday's mail

which of the dates indicated in your letter is most satisfactory to us. With regard to the cancellation of Mr. Hemenway's endorsement on the outstanding notes, I see no objection to your interpretation of this clause, and until Mr. Hemenway is released from all the endorsements I am to hold the stock as provided for in the agreement.

I am writing you this letter so that you will understand why the signed agreements of Mr. and Mrs. Hemenway will probably not be in your hands on Saturday.

We are enclosing herewith our bill, concerning which our Mr. Cohn talked with you some time ago and would appreciate if you would see that same is paid promptly.

Very truly yours,

ALEXANDER, COHN & SONDHEIM.

MBC—R

EXHIBIT C-34.

October 31st, 1925.

Messrs. Burnett, Sorg, Murray & Duncan,
810 Broad Street,
Newark, N. J.

Attention of Mr. D. F. Burnett:

My dear Mr. Burnett:

Kindly find enclosed the duplicate agreement duly signed by Mr. Hemenway and Mrs. Hemen-

way. For your information I beg to inform you that I have had deposited with me the resignation of Mr. Hemenway as Secretary, Treasurer and directory of the company, to take effect when as provided for in the agreement dated the 29th day of October, and also the resignation of Mrs. Hemenway as a director. Furthermore, there has been deposited with me, in accordance with the agreement, all the shares of stock, endorsed in blank by the respective owners.

Your attention is respectfully directed to the fact that the dividend checks for October have not yet been issued although I understand they were prepared. This should be attended to at once, as well as a check to Mr. Hemenway for his Atlantic City expenses, which have been filed in the office.

With respect to the meeting of the board of directors, this will be held at my office on Wednesday, November 4th at 12:15 as suggested in your letter.

Mr. Hemenway has called my attention to the following:

He is under the impression that the old minute book, not the one in present use, containing the requirements necessary for conveyance of the Montreal property. It would seem, according to his statement, that the Smith & Hemenway Hardware Co., of some such name, transferred the property to the Smith & Hemenway Co., and the procedure required is set forth in the minutes; so will you kindly have Mr. Smith bring with him to the direc-

tors' meeting both the old minute book and the new one for the preparation of the necessary papers and minutes in connection with this transfer.

Very truly yours,

ALEXANDER, COHN & SONDHEIM.

MBC—R

EXHIBIT C-35.

November 2, 1925.

Mr. Martin B. Cohn,
51 Chambers Street,
New York City.

Dear Mr. Cohn:

Re Smith & Hemenway.

I have yours of October 30th and 31st, with enclosures as mentioned. As regards dividend check dividend check for October, that will be sent out shortly. As regards Mr. Hemenwey's expense account, I say frankly to you that I do not think it is warranted for everything that you have said and I have heard indicates that he is a very sick man and it would seem that his trip to Atlantic City was more for his own account than for the benefit of the firm. However, Mr. Smith tells me that he will honor the item as presented, so we can call that settled.

As regards your bill for services re tax mat-

ters, Mr. Smith has no information as Mr. Hemenway has been the one who has always handled that end of it and has asked me to advise him as to whether the amount of the bill is proper. Will you therefore kindly send me, not necessarily in the form of an itemized bill, but rather a letter so that I have before me sufficient and proper data to form an independent, intelligent judgment. Please state the amount of time spent, the nature of the work and the results achieved.

I confess I do not relish the job of passing on your bill but I suppose it is in the day's work and what I am asking you therefore is full and complete ammunition.

As regards the minute book, Mr. Smith does not know where it is and thinks it is in Mr. Hemenway's possession. Likewise as to the deed for the Montreal property. Cannot you locate this and telephone Mr. Smith so that he can in turn locate them and bring them to the meeting.

I will be at your office on Wednesday, November 4th, at 12:15 p. m.

Very truly yours,

(Signed) D. FREDERICK BURNETT.

G—

Received November 4th, 1925.

EXHIBIT C-36.

AGREEMENT.

N. W. B.

JOHN F. HEMENWAY and ALICE M. HEMENWAY

-with-

LANDON P. SMITH and J. WILDRED SMITH
(Orig)

Law Offices of
ALEXANDER, COHN & SONDHEIM
51 Chambers Street, New York

THIS AGREEMENT made and entered into this 29th day of October, 1925, by and between JOHN F. HEMENWAY and ALICE M. HEMENWAY, of the City of New York, State of New York, parties of the first part, and LANDON P. SMITH and J. MILDRED SMITH, of the City of Newark, State of New Jersey, parties of the second part.

RECITALS.

John F. Hemenway is the owner of 212 shares of Class B. common and 499 shares of Class B preferred stock of Smith & Hemenway Co. Inc., a

New York corporation, and Alice M. Hemenway is the owner of 1238 shares of Class B common and one share of Class B preferred stock of Smith & Hemenway Co. Inc.

It is the intention of the parties of the second part, on certain terms and conditions hereinafter set forth, to acquire all of the shares of Class B common stock, namely 1450 shares, owned by the parties of the first part, and Class B preferred stock, namely 500 shares, owned by the parties of the first part.

NOW, THEREFORE, in consideration of the sum of one dollar, by each of the parties to the other in hand paid, the receipt whereof is hereby mutually acknowledged, and in further consideration of the premises hereby contained, it is agreed between the parties hereto as follows:

The parties of the first part hereby sell and the parties of the second part hereby purchase from the parties of the first part 1450 shares of Class B common stock of Smith & Hemenway Co. Inc. and 500 shares of Class B preferred stock of Smith & Hemenway Co. Inc. for the sum of One hundred and twenty-five thousand ($125,000) Dollars, and the parties of the second part hereby agree to pay therefor or follows:

Five thousand ($5,000) Dollars upon the signing and the mutual exchange of this agreement.

Forty-five thousand ($45,000) Dollars ten days from the date hereof, without interest.

Twenty-five thousand ($25,000) Dollars on or before December 31st, 1925, without interest.

Complainant's Exhibits.
—Exhibit C36

Twenty thousand ($20,000) Dollars in quarterly installments of Twenty-five hundred ($2500) Dollars each, beginning April 1st, 1926, with interest from January 1st, 1926, at the rate of six (6%) per cent per annum, interest to be paid semi-annaully July 1st and January 1st of each year.

Thirty thousand ($30,000) Dollars by the corporation, on or before November 21st, 1925, deeding and conveying to the parties of the first part or their nominee, all of the corporations' right, title and interest in and to the Real estate with the improvements thereon belonging to the Corporation located in the city of Montreal, Province of Quebec, Canada, free and clear from any and all incumbrances. liens or claims but subject to any and all existing leases thereon, the rent under and such lease to be apportioned as of the date of the delivery of the deed. The said deed to contain a covenant against grantor's acts and also a covenant for further assurance and to be in proper form for record.

The parties of the first part, upon the signing of this agreement, will deliver to their attorney, Martin B. Cohn, all of the shares of stock herein referred to as sold by them to the parties of the second part, endorsed in blank, together with their resignations as officers and directors of the Smith & Hemenway Co. Inc.

It is agreed by the parties of the first part that upon the payment by the parties of the second part of the first payment of $5000., the second payment of $45,000 and the delivery of the deed

of the said real estate in the City of Montreal, all as above provided for, that said Martin B. Cohn shall and is hereby authorized to deliver the said resignations and the shares of stock above set forth, endorsed to the parties of the second part, and receive in exchange therefor nine certain promisory notes made by the parties of the second part to the order of the parties of the first part or their nominee bearing even date with the delivery of said resignations the first of said notes shall be for the sum of Twenty-five thousand ($25,000) Dollars payable December 31st, 1925, without interest, and the balance of said notes for the sum of Twenty-five hundred ($2,500) Dollars each, the first of which shall be payable April 1st, 1926, and the other quarterly thereafter, each of such eight last mentioned notes to bear interest at six (6%) per cent per annum to be computed from January 1st, 1926; such interest to be payable on all of the unpaid notes semi-annually on July 1st and January 1st of each year. Upon default in the payment of any one of said notes, or the interest of any of said notes or the interest of any of said notes, when due, all of the remaining unpaid notes shall forthwith become due and payable at the option of the parties of the first part.

Simultaneously with the delivery of the above mentioned nine notes to the said Martin B. Cohn, there shall also be delivered to the said Martin B. Cohn all of the shares of stock hereby sold, which

shares shall have been transferred to the names of the parties of the second part and endorsed by them in blank, which said shares shall be retained by the said Martin B. Cohn in escrow for the purposes (1) To secure the payment of the Twenty-five thousand dollar note due on December 31, 1925, and (2) to secure the payment of the Twenty thousand Dollars to be paid in eight installments as above provided; the said Martin B. Cohn to hold the stock until the above last mentioned notes are paid with interest, and thereupon deliver to D. Frederick Burnett, attorney for the parties of the second part, for their use. In the event, however, of default in the payment of any of said notes or interest, the said Martin B. Cohn is hereby authorized to offer said shares of stock for sale at public or private sale, upon five days' notice to the parties of the second part or to D. Frederick Burnett, their attorney, and from the proceeds of said sale the parties of the first part shall be entitled to receive the amount of the unpaid balance of said notes with interest together with the expense of sale, any excess over the above said amount to be turned over to the parties of the second part; in the event of a sale as herein provided the parties of the first part may bid for and purchase said shares of stock in their names or otherwise.

Wherever this agreement refers to interest on any note or amount due it shall refer only to such note or notes or amounts as shall according to the terms hereof bear interest.

It is further understood and agreed that the parties of the second part, at any time, may anticipate the payment of the purchase price or any part thereof.

It is specifically understood and agreed as a condition of this purchase and sale that until the entire purchase price is paid in full with interest, as herein provided, the capital structure or charter of the corporation shall in no way be altered, changed or modified without the written consent of the parties of the first part.

It is further agreed by the parties of the second part and as a condition for the sale by the parties of the first part of their stock, that, until final payment has been made as hereinabove provided, the capital assets of the company shall not be depleted excepting as may result from the ordinary course of business.

The parties of the second part specifically agree that they will procure the cancellation of any endorsement of John F. Hemenway, one of the parties of the first part to or on any note or notes or other negotiable instruments made by the company upon which said John F. Hemenway is individually an endorser, and the parties of the second part further agree to hold the said John F. Hemenway harmless from any and all liability on or because of any such endorsement.

Until the resignations of the parties of the first part as directors and officers shall be effective, as hereinabove provided, the salary of the parties

of the first part shall be continued at the same rate as immediately prior hereto.

Mutual general releases are to be executed by the parties hereto, to be held in escrow by the respective attorneys and to be exchanged upon the final payment herein provided.

The parties of the first part hereby covenant that they will no nothing to injure, prejudice, embarrass or hinder the Smith & Hemenway Co. Inc. or the parties of the second part, in the transaction of its business, and further agree that they will not solicit its customers or entice away from its employ any of its present or future employees, and further agree not to employ, directly or indirectly, any of its past, present or future employees.

Upon the exchange of this agreement the proceedings now pending in the Supreme Court, New York County, for the dissolution of said corporation, shall be forthwith withdrawn and discontinued.

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

In presence of

(signed)

L. P. Smith (L. S.)

D. FREDERICK BURNETT.

Julia M. Smith (L. S.)

John F. Hemenway (L. S.)

M. B. COHN.

Alice M. Hemenway (L. S.)

—*Exhibit C37*

We, the undersigned, respective attorneys for the parties hereto, having read the above agreement, hereby agree to the terms thereof insofar as they apply to the undersigned.

(Signed)

D. FREDERICK BURNETT.
MARTIN B. COHN.

EXHIBIT C-37.

MEMORANDUM OF AGREEMENT Made this 18th day of December, 1925, BETWEEN LANDON P. SMITH and DEW G. SMITH of Newark, N. J., parties of the first part; and SMITH & HEMENWAY CO. INC., a New York Corporation, party of the second part; and the CRESCENT TOOL COMPANY, a New York Corporation, party of the third part, WITNESSETH that the parties hereto, for and in consideration of the mutual covenants herein set forth and other valuable considerations do agree and covenant as follows:

First. The said parties of the first part hereby covenant and agree to and hereby do sell, assign, transfer and set over unto the said Crescent Tool Company 100% of the issued and outstanding capital stock of the Smith & Hemenway Company Inc. of all kinds and classes, delivery to be made the day of at

Second. That upon the delivery of said stock the said Crescent Tool Company shall pay unto the said parties of the first part an amount equal to the outstanding indebtedness of the Smith & Hemenway Company Inc., as shown by its balance sheet on that date, which said sum the parties of the first part agree to at once apply to the payment of such indebtedness. Upon the production to the said Crescent Tool Company of satisfactory evidence of payment of such indebtedness said Crescent Tool Company shall thereupon pay the balance of such purchase price in cash.

Third. It is agreed that the corporation of Smith & Hemenway Company at the time of the transfer shall be the owners, unincumbered, of all of the assets set forth in the inventory of the Smith & Hemenway Company made by the parties hereto and identified by their several signatures as of this date.

IT IS FURTHER AGREED that prior to the sale the said corporation, in consideration of the payment of its indebtedness by the said Smiths, may sell and convey to them the Glass Cutter Business as formerly conducted together with all accounts receivable and notes receivable, and the real estate of the corporation.

IT IS FURTHER PROVIDED AND AGREED that the conveyance of the said real estate from the said corporation to the said Smiths shall reserve unto the said corporation a lease of said premises for a term of three years from January 1st, 1926 at an annual rental of $15,000 to be

New Jersey State Library

paid in monthly instalments, and the owner to pay all taxes and other charges against said premises and to be in form attached hereto. Said conveyance shall also be in the form attached hereto and shall reserve a 3-year option to the Smith & Hemenway Company Inc. to purchase said premises at a price of $150,000 provided, however, that in case of purchase, if Smith & Hemenway Company shall decide within three years from January 1st 1926 to sell the same, such premises must be offered to the parties of the first part at a price of $150,000 and shall be sold to other parties only in event that said Smiths shall decline to purchase. The said price of $150,000 to be increased by the cost price of any additions made to the said premises by the said Smith-Hemenway Company.

All trade marks, trade names and patents are to be and remain the property of the Smith & Hemenway Corporation except that the parties of the first part are to have the right and privilege of using the "Red Devil" trade mark as to Glass Cutters in the same manner and to the same extent as heretofor used and any patents on glass cutters shall be transferred to said parties of the first part, and the company shall relinguish any claim to the trade name "Eclipse" in connection with this business.

The said parties of the first part do hereby generally and severally warrant, guarantee and represent that the said Smith & Hemenway Company own no debts, obligations, taxes or other claims

whatsoever upon the date of the transfer and that in the event any claim shall be made by any person, firm, corporation or governmental authority against said corporation, they will defend the same and save harmless the corporation from the said claim and from any expense in connection with the defense thereof.

IT IS FURTHER AGREED that this guarantee shall be reserved in the conveyance of the corporation to the said parties of the first part, and that the real property to be transferred herein shall stand as security for this guarantee.

Annexed hereto and made a part hereof are the form of deed of conveyance from the corporation to the parties of the first part. The form of lease from the parties of the first part to the corporation and the form of option.

The parties of the first part shall not be under any obligation, however, to protect the trade marks of the corporation against any future action.

IN WITNESS WHEREOF, etc.

EXHIBIT C-38.

MEMORANDUM OF AGREEMENT.

Date—Parties.

MADE this 19th day of January, 1926, by and between LANDON P. SMITH, J. M. SMITH and DEW G. SMITH, all of Newark, New Jersey, parties of the first part, SMITH & HEMENWAY CO, Inc., a New York Corporation, party of the second part, and the CRESCENT TOOL COMPANY of Jamestown, New York, party of the third part.

Consideration.

WITNESSETH: That the parties hereto, for and in consideration of One and more dollars, by each paid to the other, and in consideration of the mutual covenants herein set forth, do hereby covenant and agree, as follows:

Subject of Sale.

1. The parties of the first part do hereby sell, assign, transfer and set over unto the Crescent Tool Company 100% of the issued and outstanding capital stock of the Smith & Hemenway Co. Inc., of all kinds and classes, and do covenant and agree to deliver the same on or before the 1st day of February, 1926, and to deliver therewith the resignations of all present officers and directors of the said Smith & Hemenway Co. Inc., and to deliver the Stock Ledger, Stock Cerificate Book, Minute Book and Books of Account showing the

issuance of such stock and that there is no other stock issued and outstanding, and that the same is validly issued. Also all of the corporations's financial records and books of accounts.

Price.

2. The purchase price is $270,000 which the Crescent Tool Company covenants and agrees to pay as follows:

Payment.

3. $90,000 of the purchase price shall be paid to the parties of the first part, or to their order upon receipt of an Order and Assignment sufficient to require delivery to the third party of all shares of such stock now held as collateral.

Upon delivery of the stock as aforesaid, the third party to pay the amount of $132,782.13 being the amount of outstanding indebtedness of the Smith & Hemenway Co. Inc. on December 21st, 1925, as appears from the balance sheet attached hereto and marked Exhibit "A".

Upon the payment by the said parties of the first part, of all the indebtedness shown on such balance sheet and the filing of satisfactory proof thereof, said Crescent Tool Company is to pay the balance of such purchase price to the parties of the first part.

Effective Date.

4. It is agreed that the effective date of this sale shall be December 21st, 1925, and that all receipts and receivables accruing subsequent to said

date, remain the property of the Smith & Hemenway Co. Inc., and the parties of the first part shall not be obligated to pay any part of the indebtedness or expense accruing after said December 21st, 1925. The purpose hereof being to make said transfer effective for all purposes as of December 21st, 1925.

Property Owned.

5. The parties of the first part covenant and agree that the balance sheet attached hereto, is in all respects accurate and correct. That the corporation owns in fee simple the real estate referred to therein and particularly described in the form of deed attached hereto, and that the said corporation owns all of the assets set forth in the Inventory of December 21st, 1925 identified by their signatures hereto and that all of said assets, real and personal, are free from encumbrances of every name and nature. The parties of the first part covenent and agree that they will pay and discharge all of the indebtedness shown on said balance sheet and that to the end that the corporation may be free of all debt whatsoever on the effective date of the transfer of such stock.

Sale to Smiths.

6. In consideration of the payment by the said parties of the first part of all the debts of the said Smith & Hemenway Co. Inc., as of December 21, 1925, it is covenanted and agreed that prior to the delivery of the stock, said corporation shall con-

vey to the said parties of the first part, or their order or assigns, the following assets:

(a) The real estate described in the annexed form of deed, said conveyance to be in the form of said annexed deed, marked Exhibit "B".

(b) The corporation shall convey to the parties of the first part the Glazier Tool jobbing business as formerly conducted, including the good will and contract thereof; said conveyance to be in the form and contain the covenants as in the Bill of Sale attached hereto and marked Exhibit "C".

(c) The corporation shall convey by simple Assignment, without guarantee as to payment or collectibility, all accounts and notes receivable of the Smith & Hemenway Co. Inc.

Lease Reserved.

7. The said Smith & Hemenway Co. Inc., shall at the time of the conveyance of the real estate above described, receive from the parties of the first part a Lease of said premises and appurtenances for a term of three (3) years from January 1st, 1926 at an annual rental of $15,000 per annum payable monthly; the owners (the parties of the first part) to pay all taxes and charges thereon and the said Smith & Hemenway Co. Inc. to have the right to make additions and alteration therein. Said lease to be in the form of Schedule "D" attached hereto.

Option Reserved.

8. There shall further be provided in said Lease that the Smith & Hemenway Co. Inc. shall have the right, privilege and option to purchase, at any time within a period of three (3) years from January 1st, 1926, the said described real estate and appurtenances for the sum of $150,000, the conveyance to be made for said consideration free and clear of all encumbrances whatsoever. Such conveyance shall be made by warranty deed, and an Abstract of Title showing marketable title in the parties of the first part shall be furnished. Said option shall be exercised by filing a Notice of election to exercise the same in writing which shall be accompanied by the Affidavit of the President of the said Smith & Hemenway Co. Inc. to the effect that the purchase is being made in good faith by the Smith & Hemenway Co. Inc., not for the purposes of resale but for use in its own business and that it has not any contract, arrangement, agreement or present expectations of resale of the same.

In the event of the exercise of said option if the said Smith & Hemenway Co. Inc., shall determine to resell the same within the period ending January 1st, 1929, the same shall be offered to the parties of the first part at the sum of $150,000 plus the cost of certain additions and improvements and shall be sold to other parties only if the offer to the said Smiths shall be rejected. The first parties shall have 10 days after receiving the

offer to accept same and if not accepted within such period, it shall be deemed to be rejected.

Collection of Accounts.

9. It is agreed that the accounts receivable assigned by the said corporation to the parties of the first part, may be paid to, and payment shall be received by the said Smith & Hemenway Co. Inc. in due course of business, and that amounts so received shall be paid over to the parties of the first part on demand. The said Smith & Hemenway Co. Inc. in the collection of such accounts, acts as agent only and does not guarantee or assume any responsibility for the collection of the same, and shall incurr any expense therein without indemnification by the parties of the first part. The said Smith & Hemenway Co. Inc. agrees to execute an individual assignment of any account covered by the said general assignment upon request of the parties of the first part.

Guarantee No debts.

10. The parties of the first part covenant, warrant, guarantee, and represent to the Crescent Tool Company, as follows:

(a) That the said Smith & Hemenway Co. Inc. owes no debts, notes, bonds or obligations whatsoever at the time of the delivery of the stock, and that on December 21st, 1925, it owed only such debts, notes and obligations as were shown upon the balance sheet and the books of said corporation.

(b) That the said corporation has at all times properly reported all incomes to the Federal Government and has properly made and filed all tax returns required by the laws of the State of New York or New Jersey, and by the Federal Government, and that the said corporation does not owe any taxes or penalties to any Government, state, federal or municipal

(c) That the said parties of the first part will defend and protect the corporation and save free and harmless from any claim, demand or assessment made by any party whatsoever including any deficiency claims in taxes, and that the said first parties will deliver at the time of the delivery of the stock, a suitable $10,000 surety company bond guaranteeing performance of the conditions hereof for six years. This obligation is not extended to the claim of any future infringement under existing or future patents or trade marks, but shall obligate the first parties to the payment of any claims or judgments of infringement prior to December 21st, 1925, and this guarantee does not apply to continuing contracts of advertising, materials or supplies assumed by the corporation.

Not to Compete.

11. The parties of the first part, in consideration of the sale herein made, covenant and agree that they will not directly or indirectly, as manufacturers, salesmen, jobbers or otherwise, either on their own account or as employees of others, engage in the plier or wrench business for a per-

iod of ten (10) years from the date of this contract within the confines of the United States or the Dominion of Canada, and the party of third part agree to not enter into glazier tool business under like conditions for same period.

IN WITNESS WHEREOF the parties of the first part have set their hands and seals the day and year first above written, and the parties of the second and third parts have caused the execution of these presents by their officers thereunto duly authorized.

L. P. SMITH L. S.
DEW G. SMITH L. S.
J. MILDRED SMITH L. S.
SMITH & HEMENWAY COMPANY, INC.
By L. P. SMITH,
Seal President.

CRESCENT TOOL COMPANY,
By Karl Peterson,
Seal Pres.

STATE OF NEW JERSEY, }
County of } ss.:
City of Newark. }

On this 19th day of January, 1926, before me the subscriber, personally appeared LANDON P. SMITH, J. M. SMITH and DEW G. SMITH, to me personally known and known to me to be the same persons described in and who executed

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the foregoing Instrument, and they duly and severally acknowledged to me that they executed the same.

GEORGE L. YAKEY,
Notary Public.

Seal

STATE OF NEW YORK,)
County of } ss.:
City of .)

On this 19th days of January, 1926, before me personally came P. L. Smith, to me known who, being by me duly sworn, did depose and say that he resides in Irvington, N. J.; that he is the President of the Smith & Hemenway Co. Inc., the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

GEORGE L. YAKEY,
Notary Public.

Seal

STATE OF NEW YORK,)
Chautauqua County, } ss.:
City of Jamestown.)

On this 21st day of January, 1926, before me personally came Karl Peterson, to me know who,

being by me duly sworn, did depose and say that he resides in Jamestown, New York; that he is the President of the Crescent Tool Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

CHAS. H. ORR,
Seal Notary Public.

EXHIBIT A.

Smith & Hemenway Co. Inc.
Balance Sheet
December 21st, 1925

ASSETS:		
Capital Assets:		
Land and Buildings	$150,200.72	
Machinery and Equipment	187,331.25	
Automobile	436.90	
Office Furniture and Fixtures	6,690.62	
Electros	500.00	
Total Capital Assets		345,159.49
Investments:		
National Hardware Co...	1,390.00	

43/45 St. Maurice St.....	30,000.00	
Life Insce. Executives....	3,737.26	
Mfrs. Liability Ins. Co...	330.50	
Total Investments		35,457.76
Working Assets:		
Material, steel, etc.....		102,009.48
Trading Assets:		
Mdse. Inventory		101,911.17
Current Assets:		
Accounts Receivable	73,308.01	
Cash	18,890.36	
Total Current Assets		92,198.37
Deferred Debit Items:		
Unexpired Insurance	3,118.50	
Interest Prepaid	276.70	
Total Deferred Debit Items		3,395.20
TOTAL ASSETS		$680,131.47
LIABILITIES:		
Capital Liabilities:		
Capital Stock, Preferred.	$100,000.00	
Employees 7%	1,500.00	
Common	294,000.00	
Total Issued		$395,500.00
Employees Stock Subscription Mortgages		
C. Stopper	15,000.00	
J. Ross & Co.....	15,000.00	
Total Mortgages		30,000.00
Current Liabilities:		

Complainant's Exhibits.

—Exhibit C38

Notes Payable	27,500.00	
Trade Acceptances	18,760.87	
Accounts Payable	56,521.26	
Purchases		
Others		
Loans from Executives		
Total Current Liabilities..		102,782.13
Depreciation Reserves:		
Machinery	101,761.38	
Buildings	33,818.72	
Total Depreciation Reserve		135,580.10
Surplus		16,269.24
TOTAL LIABILITIES..		$680,131.47

EXHIBIT "C."

BILL OF SALE

KNOW ALL MEN BY THESE PRESENTS that the SMITH & HEMENWAY COMPANY, Inc., a New York Corporation, for and in consideration of One or more Dollars, and other valuable considerations, receipt of which is hereby acknowledged, does hereby sell, assign, transfer and convey unto LANDON P. SMITH, J. M. SMITH and DEW G. SMITH of Newark, New Jersey, the following property:

All of the accounts, bills and notes receivable and other holdings as specified in Schedule A appearing upon the books of this corporation on De-

cember 21st, 1925, together with the right to collect the same. This assignment, however, is without any guarantee of the validity, collectiblity or payment of the said claims.

Also the Glazier Tool business, including all of the good will thereof as heretofore conducted by the said Smith & Hemenway Co. Inc., together with the exclusive right to use in perpetuity and without compensation all patents, trade names, trade marks, labels and slogans heretofore applied to the Glazier Tool business, including the name or trade mark "Red Devil" and the trade name "Eclipse." The same to be used by the assignee hereof only as applied to Glazier tools.

Said Smith & Hemenway Co. Inc. agrees to take any steps requested in writing by the assignee from time to time to keep the registration of such trade names, trade marks, labels and slogans alive by re-registration when necessary to be done, at the expense of the assignee.

That the said assignee will be allowed the privilege of prosecuting and bringing suits or other proceedings for the infringement of any of the above mentioned patents, trade names, trade marks, labels and slogans as applied to Glazier tools, the same to be without expense to the said Smith & Hemenway Co. Inc., but the said Smith & Hemenway Co. Inc. will become a party to such action for the purposes of maintaining the same without expense, however, to itself.

This assignment is made with no covenant,

guarantee or representation as to the validity or right to use any of such patents, trade names, trade marks, labels or slogans and without obligation to defend the same, or the title thereof, other than is herein set forth.

IN WITNESS WHEREOF said Smith & Hemenway Company, Inc. has caused the execution of these presents by its duly authorized officers and the assignees have set their hands and seals to this instrument this 19 day of January, 1926.

SMITH & HEMENWAY COMPANY, Inc.
By L. P. Smith, Pres.
L. P. Smith L. S.
Dew G. Smith L. S.
(Seal) J. Mildred Smith L. S.

EXHIBIT C-39.

INDENTURE OF LEASE.

AGREEMENT made this 19 day of January, 1926,

BETWEEN L. P. Smith, J. Mildred Smith, Dew G. Smith of the City of Irvington in the County of Essex and State of New Jersey, hereinafter referred to as Lessors, parties of the first part,

.AND Smith & Hemenway Company, Inc., a corporation duly organized and existing under and by virtue of the Laws of the State of New York and duly authorized to do business in the State of

Complainant's Exhibits.
—Exhibit C39

New Jersey, hereinafter referred to as Lessee, party of the second part:

WITNESSETH:—The said parties of the first part have agreed to let and hereby do demise and let, and the said party of the second part has agreed to take and hereby does take the following described premises:

Buildings (including boiler and piping for heating, sprinklers and electric wiring), grounds and premises located on the easterly side of Coit Street, Irvington, New Jersey, the northerly boundary of premises being distant Four Hundred (400) feet southerly from the southerly line of Nye Avenue, formerly Cottage Street, with a frontage on Coit Street of Four Hundred (400) feet and a depth of Two Hundred (200) feet, and known as No. 130 Coit Street, Irvington, New Jersey,

upon the terms and conditions hereinafter set forth:

Term and Rental.

1. The period covered by this lease is from the 21 day of December, 1925, to the First day of January, 1929, at an annual rental of Fifteen Thousand Dollars ($15,000.00) payable in equal monthly installments in advance on the first day of each and every month.

Taxes, Assessments and Charges.

2. The Lessor covenants to pay when due all taxes and assessments, extraordinary as well as

ordinary, which shall, during the term of this lease, be charged, assessed, imposed or become due or payable upon or on account of said premises or any appurtenances thereof, by virtue of or under any present or future law or requirement of any governmental authority, and all fees and charges of the City of Irvington, N. J., or other public or governmental authority for construction, maintenance, occupation or use during said term of any vault, passageway or space in, over or under any street or sidewalk adjacent to said premises or for the construction, maintenance or use during said term of any part of any building covered by this lease within the limits of any street.

Repairs.

3. The Lessee covenants, during the term of this lease, to keep in good order and repair, inside and out, all buildings and structures which are now or shall hereafter be constructed on or appurtenant to said premises, and all equipment thereof. It is also understood and agreed that the Lessee may make at any time it desires and at its own cost and expense any and all alterations to buildings and/or build and construct any new buildings or additions it may deem necessary and raze or destroy any of the buildings now on the property, providing the Lessee surrenders the property at the end of the term in as good state and condition, except for use and wear thereof, as

when it entered upon the premises under this lease.

Surrender on expiration of Term.

4. The Lessee covenants that it will on the last day of the term hereby demised or on the last day of any renewal hereof, if this lease shall be renewed, peaceably and quietly leave, surrender and yield up unto the Lessor the demised premises, including all improvements added to the premises by either of the parties hereto, in as good state and condition as reasonable use and wear thereof will permit, damage by fire and other elements excepted.

Fire.

5. The Lessee agrees that, in case of damages by fire or the elements, the Lessee will give immediate notice thereof in writing to the Lessor, and, if a part only of said buildings shall be damaged, but not so as to render the premises wholly untenable, the rent shall abate proportionately and the Lessor shall commence within Ten (10) day after notice to repair the same at their own cost and expense, and complete said repairs with due and reasonable diligence; if the damage shall be so extensive as to render said buildings wholly untenantable the rent shall cease from the time the Lessor shall be notified by the Lessee of such damage until said buildings are restored to a tenantable condition and, after said buildings are restored to a tenantable condition, the rent shall again begin

to run and be payable as before the damage; but, in case the said buildings shall be totally destroyed by fire or the elements, or the damage shall be so great that it will be necessary to rebuild entire buildings or erect new buildings on the site, the rent shall be apportioned pro rata and paid up to the time of such destruction or damage, and upon payment being duly made by the Lessee this lease shall come to an end.

Covenant of Quiet Enjoyment.

6. The Lessor covenants that the Lessee on paying the rent reserved and performing the covenants and agreements herein set forth shall at all times during the term peaceably and quietly have, hold and enjoy the said demised premises. The Lessor further covenants that they have good title to the demised premises and that the same are free and clear of all liens, encumbrances, violations and leases.

Covenant to Bind Heirs.

7. It is agreed that the provisions, covenants and conditions of this lease shall bind and enure to the benefit of the legal representatives, heirs, successors and assigns of the parties.

Option to Purchase.

8. It is further understood and agreed by and between the parties hereto that the said Lessee shall have the right, privilege and option, and the

right, privilege and option is hereby given by the Lessor to the Lessee, to purchase at any time during the term of this Lease, the above-described buildings, grounds and premises for the sum of One Hundred Fifty Thousand Dollars ($150,000.00), conveyance of said property to be made for said consideration free and clear of any and all liens, encumbrances and charges of any kind, nature and description whatsoever. Such conveyance to be made by Warranty Deed and an Abstract of Title showing marketable title in the parties of the first part. The said option to purchase shall be exercised by the Lessee by filing a notice of election to exercise the same in writing which said written notice of election shall be accompanied by an affidavit of the then President of the said Lessee to the effect that the purchase is being made in good faith by the said Lessee for the use in its own business and not for the purposes of resale and that it has no contract, arrangement, agreement or present expectations of resale of the same. In the event that the said Lessee exercises its option to purchase and does purchase the said property and shall subsequently determine to resell the same within the period ending January 1st, 1929, then and in that event the said Lessee shall offer the said property to the said Lessor at the sum of One Hundred Fifty Thousand Dollars ($150,000.00) plus the cost of any and all additions and improvements, and the said property shall not be sold during said period to January

1st, 1929, to any other party or parties unless and until the offer to the said Lessor shall be rejected. The said Lessor shall have Ten (10) days after receiving the said offer in which to accept same and if not accepted within said period of Ten (10) days it shall be deemed to be rejected.

IN WITNESS WHEREOF the parties of the first part have set their hands and seals the day and year first above written, and the party of the second part has caused the execution of these presents by its officers thereunto duly authorized.

L. P. SMITH L. S.
DEW G. SMITH L. S.
J. MILDRED SMITH L. S.
SMITH & HEMENWAY COMPANY, INC.
By L. P. Smith, Pres. L. S.

Seal.

STATE OF NEW JERSEY,
County of } ss.:
City of Newark.

On this 19 day of January, 1926, before me, the subscriber, personally appeared L. P. Smith, J. Mildred Smith and Dew G. Smith, to me personally known and known to me to be the same persons described in and who executed the foregoing instrument, and they duly and severally acknowledged to me that they executed the same.

GEORGE L. YAKEY,
(Seal.) Notary Public.

—Exhibit C39

STATE OF
County of } ss.:
City of

On this 19 day of January, 1926, before me personally came to me known, who, by me being duly sworn, did depose and say that he resides in Irvington, N. J.; that he is the President of Smith & Hemenway Company, Inc., the corporation described and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal and that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

GEORGE L. YAKEY,
(Seal.) Notary Public.

Defendants' Exhibits.

Exhibit D-1.

EXHIBIT D-1.

THIS AGREEMENT made and entered into this day of October, 1925, by and between JOHN F. HEMENWAY and ALICE M. HEMENWAY, of the City of New York, State of New York, parties of the first part, and

LANDON P. SMITH and J. MILDRED SMITH, of the City of Newark, State of New Jersey, parties of the second part.

RECITALS.

John F. Hemenway is the owner of 212 shares of Class B common and 499 shares of Class B preferred stock of Smith & Hemenway Co., Inc., a New York corporation, and Alice M. Hemenway is the owner of 1238 shares of Class B common and one share of Class B preferred stock of Smith & Hemenway Co., Inc.

It is the intention of the parties of the second part, on certain terms and conditions hereinafter set forth, to acquire all of the shares of Class B common stock, namely 1,450 shares, owned by the parties of the first part, and Class B preferred stock, namely 500 shares, owned by the parties of the first part.

NOW, THEREFORE, in consideration of the sum of one dollar, by each of the parties to the other in hand paid, the receipt whereof is hereby mutually acknowledged, and in further considera-

tion of the promises hereby contained, it is agreed between the parties hereto as follows:

The parties of the first part hereby sell and the parties of the second part hereby purchase from the parties of the first part 1450 shares of Class B common stock of Smith & Hemenway Co., Inc., and 500 shares of Class B preferred stock of Smith & Hemenway Co., Inc., for the sum of One hundred and twenty-five thousand ($125,000) dollars, and the parties of the second part hereby agree to pay therefor as follows:

Five thousand ($5000) Dollars upon the signing and mutual exchange of this agreement;

Forty-five thousand ($45,000) Dollars ten days from the date hereof, without interest;

Twenty-five thousand ($25,000) Dollars on or before December 31st, 1925, without interest;

Twenty thousand ($20,000) Dollars in quarterly installments of Twenty-five hundred ($2500) Dollars each, beginning April 1st, 1926, with interest from January 1st, 1926, at the rate of six (6%) per cent per annum, interest to be paid semi-annually July 1st and January 1st of each year.

Thirty thousand ($30,000) Dollars by the corporation, on or before November 1st, 1925, deeding and conveying to the parties of the first part, or their nominees, a good and indefeasible title in and to the real estate with the improvements thereon belonging to the corporation located in the City of Montreal, Province of Quebec, Canada, free and clear from any and all incumbrances,

liens or claims but subject to any and all now existing leases thereon.

The parties of the first part, upon the signing of this agreement, will deliver to their attorney, Martin B. Cohn, all of the shares of stock herein referred to as sold by them to the parties of the second part, endorsed in blank, together with their resignations as officers and directors of the Smith & Hemenway Co., Inc., to take effect on December 31st, 1925, provided the parties of the second part have complied with all the terms of purchase as hereinbefore set forth and required to be performed by them on or before December 31st, 1925.

It is agreed by the parties to the first part that upon the performance of the terms of purchase by the parties of the second part to be performed by them on or before December 31st, 1925, that said Martin B. Cohn shall and hereby is authorized to deliver the resignations and the shares of stock above set forth, endorsed in blank, and receive in exchange therefor eight (8) certain promissory notes, made by the parties of the second part to the order of the parties of the first part, or their nominees, dated December 31st, 1925, each for the sum of Twenty-five hundred ($2500) Dollars, the first of which shall be payable April 1st, 1926, with interest at six (6%) per cent from January 1st, 1926, and the others quarterly thereafter. The said stock so delivered shall be forthwith transferred on the books of the company to the names of the parties of the second part in such

proportion as they may decide, and there shall be delivered to D. Frederick Burnett, attorney for the parties of the second part, 1001 shares of Class B stock, endorsed in blank, the said 1001 shares of Class B stock above referred to shall be held by the said Burnett as security for the payment of the last mentioned eight notes. Upon default in the payment of any one note, all the balance remaining unpaid shall become due and payable forthwith. In the event of default in the payment of said notes as above set forth the said Burnett agrees to deliver the said shares of stock to the parties of the first part, or their attorney, who are authorized to offer said shares of stock for sale at public or private sale upon five days notice to the said parties of the second part or their attorney, and from the proceeds of said sale the parties of the first part shall pay themselves the amount of the unpaid balance on said notes together with the expenses of sale, any excess over and above said amount to be returned to the parties of the second part. In the event of the sale as herein provided the parties of the first part may bid for and purchase said shares of stock in their name or otherwise.

It is further understood and agreed that the parties of the second part, at any time, may anticipate the payment of the purchase price as hereinabove provided.

It is specifically understood and agreed as a condition of this purchase and sale that until the

entire purchase price is paid in full with interest, as herein provided, the capital structure or charter of the corporation shall in no way be altered, changed or modified without the written consent of the parties of the first part.

It is further agreed by the parties of the second part and as a condition for the sale by the parties of the first part of their stock that, until final payment has been made as hereinabove provided, the capital assets of the company shall not be depleted excepting as may result from the ordinary course of business.

Mutual general releases are to be executed by the parties hereto, to be held in escrow by the respective attorneys and to be exchanged upon the final payment herein provided.

The parties of the first part hereby covenant that they will do nothing to injure, prejudice, embarrass or hinder the Smith & Hemenway Co., Inc., or the parties of the second part, in the transaction of its business, and further agree that they will not solicit its customers or entice away from its employ any of its present or future employees, and further agree not to employ, directly or indirectly, any of its past, present or future employees.

Upon the exchange of this agreement the proceedings now pending in the Supreme Court, New York County, for the dissolution of said corporation, shall be forthwith withdrawn and discontinued.

Defendants' Exhibits.

Exhibit D-2.

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

In presence of

(LS)
(LS)
(LS)
(LS)

WE, the undersigned, respective attorneys for the parties hereto, having read the above agreement, hereby agree to the terms thereof insofar as they apply to the undersigned.

EXHIBIT D-2.

The undersigned, D. Frederick Burnett, representing Landon P. Smith and Julia M. Smith, and Martin B. Cohn, representing John F. Hemenway and Alice M. Hemenway, each duly authorized in their behalf, in order to facilitate the closing of the matters contained in the agreement heretofore made by the parties, dated October 29th, 1925, hereby stipulate the following:

Receipt is hereby acknowledged of the nine (9) promissory notes referred to in said agreement of October 29th, aggregating $45,000.00, and eight (8) of said notes, each for $2500, are to be held in escrow by Martin B. Cohn until five days prior to their respective maturities; the purpose of this arrangement being that the notes will be avail-

able for delivery should the Smiths desire to anticipate the payment thereof.

The Smiths will cause the Smith & Hemenway Co. to pay a bill of George W. Read & Co., Ltd., dated November 12th, 1925, amounting to $66.00.

The Smiths will cause the Smith & Hemenway Co. to pay for the insurance on the building at Montreal up to December 8th, 1925, and Lyman's fees up to that date. The Hemenways do assume the balance of the insurance premium.

A question having arisen as to a notice from the Electric Commission of the City of Montreal, published in the Gazette of Montreal of October 23rd, requiring the owners of premises 43-45 St. Maurice Street within sixty days following the publication of this notice to arrange that the electric wiring inside of said building should be connected with the cables of the said underground conduit system, and who is to pay the expense thereof, it is agreed that this situation is to be examined by both attorneys and neither side waives anything by closing the title today. The question for discussion is whether this notice comes within the terms and provisions of the contract of October 29th. If it does then the Smiths are to pay therefor; otherwise there is no liability on the part of the Smiths. This question is to be formulated accurately by the two attorneys and submitted to a responsible Canadian firm with which neither attorney has had any connection or dealings, and the decision of that firm is to be

binding. The charge of the Canadian firm will be borne equally between the two parties.

Mr. Smith undertakes that he will cause the Smith & Hemenwey Co. to give a covenant for further assurance pursuant to the contract of October 29th, said contract of further assurance to run to and in favor of Mr. and Mrs. Hemenway, their heirs and assigns.

Martin B. Cohn acknowledges receipt from Landon P. Smith and Julia M. Smith, of certificates of stock of Smith & Hemenway Co., Inc., being No. 5 for 1450 shares of the Class B common stock and No. 4 for 500 shares of the Class B preferred stock, each endorsed in blank, which he is to hold in escrow pursuant to the agreement of October 29th, 1925.

Rents on the Montreal property for December are to be collected by the Hemenways and apportioned eight days to Smith & Hemenway Co.

The Smiths agree to have the corporation duly execute an assignment of the existing lease entered into with the tenant of the Montreal property to the Hemenways.

All the papers in connection with the Montreal property, if returned to Smith & Hemenway Co., to be delivered over to Martin B. Cohn.

Dated, New York, December 9th, 1925.

MARTIN B. COHN,
D. FREDERICK BURNETT.

Defendants' Exhibits.

Exhibit D-6.

EXHIBIT D-6.

GENERAL RELEASE.

TO ALL TO WHOM THESE PRESENTS SHALL COME OR MAY CONCERN: GREETING: KNOW YE, That we, John F. Hemenway and Alice M. Hemenway, for the sole consideration of the sum of One Dollar and other valuable considerations, lawful money of the United States of America to us in hand paid by Landon P. Smith and J. Mildred Smith, the recepit whereof is hereby acknowledged, have remised, released, and forever discharged and by these presents do for ourselves and our respective heirs, executors and administrators, remise, release and forever discharge the said Landon P. Smith and J. Mildred Smith and their respective heirs, executors and administrators, of and from all, and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckoning bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents executions, claims and demands whatsoever, in law or in equity, which against them or either of them, we or either of us ever had, now have or which our respective heirs, executors or administrators, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents. Excepting from the operation

hereof, however, the matters still to be performed contained in stipulation between Cohn and Burnett, representing the respective parties hereto, dated December 9th, 1925.

IN WITNESS WHEREOF, we have hereunto set our hands and seals the 19th day of January in the year one thousand nine hundred and twenty-six.

ESTATE OF JOHN F. HEMENWAY.
Alice M. Hemenway (L. S.)
Executrix.
Alice M. Hemenway (L. S.)

Sealed and delivered in
the presence of
M. B. Cohn.

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

On the 19th day of January in the year one thousand nine hundred and twenty-six before me personally came ALICE M. HEMENWAY, individually and as Executrix of John F. Hemenway, deceased, to me known, and known to me to be the individual described in, and who executed the foregoing instrument, and she duly acknowledged to me that she executed the same.

ALICE T. ROOK,
Commissioner of Deeds,
New York City.

Defendants' Exhibits.

Exhibit D-9.

Kings Co. Clerk's No. 186, Reg. No. 6078.
N. Y. Co. Clerk's No. 248, Reg. No. 26103.
Commission expires Oct. 21, 1926.

EXHIBIT D-9.

LAW OFFICES OF
ALEXANDER, COHN & SONDHEIM
51 Chambers Street, New York
Telephone Connection
Martin B. Cohn Harry J. Sondheim
Herbert A. Cone

October 1st, 1925.

O'Brien, Malevinski & Driscoll,
152 West 42nd Street,
City.

Dear Sirs:

In re Smith & Hemenway

We are attorneys for John F. Hemenway and Alice M. Hemenway, two of the stockholders of the above company. We note that you, on behalf of Landon P. Smith and Julia M. Smith, have commenced proceedings in the Supreme Court, New York County, for the dissolution of said corporation under Section 172 of the General Corporation Law, and that in accordance with the order of the Hon. Justice Wasservogel, Charles F. Hoffman was appointed Referee to hear the order to show cause on November 25th, the return day men-

tioned in the order. Will you kindly favor us with a complete copy of the order, petition and schedules. At the same time will you be kind enough to let us know who in your office has charge of this matter, in the event that we desire to communicate by telephone.

Thanking you in advance, we are,

Very truly yours,

ALEXANDER, COHN & SONDHEIM.
By M. B. COHN.

MBC—R

EXHIBIT D-10.

SMITH & HEMENWAY CO., INC.
Balance Sheet December 31st, 1917

ASSETS:

Capital Assets:		
Industrial Realty Co.....	$ 14,671.52	
Irvington Co. Capital Stock	50,000.00	
Smith Hardware Co.	30,000.00	
National Hardware Co....	1,600.00	
Total Capital Assets		96,271.52
Working Assets:		
Furniture and Fixtures...	2,250.00	
Electros	500.00	
Total Working Assets....		2,750.00

Defendants' Exhibits.

Exhibit D-10.

Trading Assets:		
Inventories Mdse.		82,912.49
Current Assets:		
Executive Life Insurance.	709.80	
Irvington Co. Advances...	11,723.46	
Accounts Receivable	59,702.91	
Cash	13,320.93	
Total Current Assets		85,457.10
Deferred Debits Items:		
Unexpired Insurance		383.25
TOTAL ASSETS		$267,774.36
LIABILITIES:		
Capital Liabilities:		
Capital Stock,		
Preferred $100,000.00		
Common 50,000.00		
Total Issued		150,000.00
Current Liabilities:		
Accounts Payable Purchases	3,095.98	
Accounts Payable Others.	3,569.75	
Accounts Payable Trust Funds	1,600.00	
Total Current Liabilities..		8,265.73

Defendants' Exhibits.

Exhibit D-10.

United States Taxes 1917.		14,028.81
Surplus, 1916	58,886.50	
Less Dividends	6,000.00	
	52,886.50	
Net profit, 1917	56,662.13	
	109,508,63	
Less 1917 Taxes Accrued.	14,028.81	
Net Surplus		95,479.82
TOTAL LIABILITIES..		267,774.36

We hereby certify that the above statement has been taken from the books of the Smith & Hemenway Co. Inc. under date of December 31st, 1917, and is in every respect true and correct.

J. F. HEMENWAY,
Secretary & Treasurer.

F. FEDDERSON,
Accountant.

Defendants' Exhibits.

Exhibit D-10.

Smith & Hemenway Co. Inc.

Statement—December 31st, 1919.

ASSETS:		
Capital Assets:		
Land and Buildings.....	$ 53,703.50	
Machinery	5,150.28	
Investments	45,350.00	
Furniture and Fixtures...	2,750.00	
Life Ins. Executives.....	1,814.92	
Liberty Bonds	3,500.00	
Total Capital Assets.....		$112,268.70
Trading Assets:		
Mdse. Inventory		57,456.92
Current Assets:		
Irvington Co.	100,847.14	
Accounts Receivable	69,133.44	
Cash	6,305.05	
Accrued Interest	411.21	
Total Current Assets.....		176,696.84
Deferred Debit Items		655.44
TOTAL ASSETS		347,077.90
LIABILITIES:		
Capital Stock		175,000.00
Mortgage		4,116.67
Current Liabilities:		
Notes Payable	10,000.00	
Accounts Payable	21,165.72	
Total Current Liabilities..		31,165.72

Defendants' Exhibits.

Exhibit D-10.

Depreciation Reserve	3,379.27
Surplus	133,416.24
TOTAL LIABILITIES..	347,077.90

We certify that the above statement has been taken from the books of the Smith & Hemenway Co. Inc. under date of December 31st, 1919, and is to the best of our knowledge true and correct.

F. FEDDERSEN,
Accountant.

J. F. HEMENWAY,
Secretary-Treasurer.

To The American National Bank
Newark, N. J.
Statement of Smith & Hemenway Co. Inc
Dec. 31, 1924.

ASSETS:	
Cash in Bank .....$	1,651.88
Cash on Hand	
Accounts Receivable for Merchandise (all good and not transferred or pledged)	75,548.42
Notes Receivable for Merchandise (all goods—Due from Customers.....	
Notes and Accounts Receivable:	
Not for Merchandise	105,638.30
Merchandise (at actual present value)	104,096.45
Other Quick Assets (itemize).....	
Total Quick Assets .....$	286,935.05

Defendants' Exhibits.

Exhibit D-10.

Machinery and Fixtures	184,292.03
Land and Buildings (see schedule on back)	146,624.77
Other Assets (itemize):	
Auto	430.72
Unexpired Insurance	3,067.94
Interest Prepaid	375.37
Investments	35,137.01
Total	$656,862.89
LIABILITIES:	
Accounts Payable(due or to become due)	$ 48,874.02
Borrowed Money (from Banks or Trust Companies)	
Borrowed Money (from members of firm, partners, individuals, corporations or others)	
Notes Payable for Merchandise	50,500.00
Other Current Liabilities	
Total Current Liabilities	$ 99,374.02
Liens, Mortgages or Encumbrances on Merchandise or other Assets, aside from Real Estate Mortgages	
Mortgages on Real Estate (schedule on back)	35,312.22
Other Liabilities (itemize):	
Employees Stock Subscrip.	425.00
Employees deposit 7%	1,700.00
Reserve for depreciation	116,857.28

Defendants' Exhibits.

Exhibit D-10.

Capital Stock Pref. 100,000.00
Common 294,000.00
Surplus 9,194.37

Total $656,862.89

Contingent Liability:
Upon Accommodation Notes or Endorsements $.....
Upon Customer's Notes Discounted $.....
Merchandise. On what basis valued. Cost or market .....
Finished $..... Unfinished $.....
Raw $..... If any goods on consignment, state amount and circumstances.....
Sales and Profits Last Fiscal Year:
Net Sales $..... Net Profits $.....
Do you discount your bills?.....
On what basis do you pay your accounts?.....
How often do you take account of stock.....
State last date of Inventory.....
Do you balance your books regularly?.....
Names of all partners in the firm.....
Accounts and Notes Payable. If any are past due state amount and circumstances.....
Accounts and Notes Payable. State amount and circumstances.
(a) If any are past due or doubtful.....
(b) If any are pledged.....
(c) If any are due from employees, relatives or similar sources .....
Insurance. Fire, on Buildings $.....
Merchandise $..... Life $.....

Defendants' Exhibits.

Exhibit D-10.

Who is beneficiary?.....

Date started present business.....My age is....

Do you do business with other banks?.....

Other Remarks:.....

The undersigned, for the purpose of procuring credit from time to time from you for the negotiable paper of the undersigned, or otherwise, furnishes you with the following statement and information which fully and truly sets forth the financial condition of the undersigned on the....day of .....192.., which you can consider as continuing to be full and accurate, unless notice of change is given you. The undersigned agrees to notify you promptly of any change that materially reduces the pecuniary responsibility of the undersigned. In consideration of the granting of such credit, the undersigned agrees that if the undersigned at any time fail or become insolvent, or commit an act of bankruptcy, or a petition in bankruptcy be filed by or against the undersigned, or a judgment or judgments be recovered against the undersigned in a court of record, or a general assignment be made by the undersigned for the benefit of creditors, or if any of the representations made above prove to be untrue, or if the undersigned fail to notify you of any material change as before agreed, then and in either such case all obligations of the undersigned held by you shall immediately become due and payable without demand or notice, and the same may be charged against the balance of any deposit ac-

count of the undersigned with you, the undersigned hereby giving a continuing lien upon such balance of deposit account from time to time existing to secure all obligations of the undersigned held by you.

Signed in the presence of

.....

(Copy of signed report.)

Smith & Hemenway Co. Inc.

Balance Sheet 31st December, 1924.

ASSETS:

Capital Assets:		
Land and Buildings	$146,624.77	
Machinery and Equipment	177,961.45	
Automobile	430.72	
Office Furniture and Fix..	5,830.58	
Electros	500.00	
Total Capital Assets.....		$331,347.52
Investments:		
National Hdwe. Co.....	1,390.00	
43/45 St. Maurice St.....	30,000.00	
Life Insce. Executives....	3,417.01	
Mfrs. Liability Ins. Co....	330.00	
Total Investments		35,137.01
Working Assets:		
Material, Steel, etc.....		105,638.30
Trading Assets:		

Defendants' Exhibits.

Exhibit D-10.

Mdse. Inventory		104,096.45
Current Assets:		
Accounts Receivable	75,548.42	
Cash	1,651.88	
Total Current Assets		77,200.30
Deferred Debit Items:		
Unexpired Insurance	3,067.94	
Interest Prepaid	375.37	
Total Deferred Debit Items		3,443.31
TOTAL ASSETS		$656,862.89
LIABILITIES:		
Capital Liabilities:		
Capital Stock		
Preferred $100,000.00		
Employees 7%	1,700.00	
Common	294,000.00	
Total Issued		395,700.00
Employee Stock Subscriptions		425.00
Mortgages:		
C. Stopper	15,000.00	
J. Ross & Co.....	20,312.22	
Total Mortgages		35,312.22
Current Liabilities:		
Notes Payable	50,500.00	
Trade Acceptances		

Defendants' Exhibits.

Exhibit D-10.

Accounts Payable:		
Purchases	42,652.38	
Others	6,221.64	
Loans from Executives...		
Total Current Liabilities..		99,374.02
Depreciation Reserves:		
Machinery	87,568.37	
Buildings	29,288.91	
Total Depreciation Reserve		116,857.28
Surplus	4,939.52	
Net Profit 1924	13,994.95	
Total	18,934.47	
Less Federal Tax $710.85; Dividends, $9,029.25....	9,740.10	
		9,194.37
TOTAL LIABILITIES ..		$656,862.89

We hereby certify that the above figures have been compiled from the books of the Smith & Hemenway Co. Inc. and are true and correct.

J. F. HEMENWAY,
Sec'y-Treas.

F. FEDDERSEN,
Auditor.

Defendants' Exhibits.

Exhibit D-10.

Accounts Payable:		
Purchases	42,652.38	
Others	6,221.64	
Loans from Executives...		
Total Current Liabilities..		99,374.02
Depreciation Reserves:		
Machinery	87,568.37	
Buildings	29,288.91	
Total Depreciation Reserve		116,857.28
Surplus	4,939.52	
Net Profit 1924	13,994.95	
Total	18,934.47	
Less Federal Tax $710.85; Dividends, $9,029.25....	9,740.10	
		9,194.37
TOTAL LIABILITIES ..		$656,862.89

We hereby certify that the above figures have been compiled from the books of the Smith & Hemenway Co. Inc. and are true and correct.

J. F. HEMENWAY,
Sec'y-Treas.

F. FEDDERSEN,
Auditor.

Defendants' Exhibits.

Exhibit D-10.

Deferred Debit Items:		
Unexpired Insurance	352.77	
Interest	400.77	
Advance Payments	4,958.95	5,712.49
TOTAL ASSETS		354,229.81
LIABILITIES:		
Capital Liabilities:		
Capital Stock		
Preferred	100,000.00	
Common	55,000.00	
Total Issued		155,000.00
Current Liabilities:		
Notes Payable	15,000.00	
Accounts Payable Mdse...	7,804.40	
Accounts Palable Trust Funds	1,600.00	
Total		24,404.40
United States Taxes, 1918		55,169.14
Surplus	95,479.82	
Less Dividends	16,000.00	
	79,479.82	
Net Profit, 1918.....	95,345.59	
	174,825.41	

Defendants' Exhibits.

Exhibit D-10.

Less 1918 Taxes Accrued.	55,169.14	
Net Surplus		119,656.27
TOTAL LIABILITIES...		354,229.81

We hereby certify that the above statement has been taken from the books of the Smith & Hemenway Co. Inc. under date of December 31st, 1918, and is in every respect true and correct.

J. F. HEMENWAY,
Secretary & Treasurer.

F. FEDDERSEN,
Accountant.

Smith & Hemenway Co. Inc.
Statement—December 31st, 1920.

ASSETS:		
Capital Assets:		
Land and Buildings	$ 92,970.71	
Machinery	5,150.28	
Investments	39,100.00	
Furniture and Fixtures...	2,250.00	
Life Insurance Executives	2,126.27	
Liberty Bonds	500.00	
Total Capital Assets		142,097.26
Trading Assets:		
Inventory Mdse.		130,992.94
Current Assets:		
Irvington Co.	102,301.68	
Accounts Receivable	91,076.94	

Defendants' Exhibits.

Exhibit D-10.

Cash	6,940.91	
Accrued Interest	302.39	
Total Current Assets		200,621.92
Unexpired Insurance		566.83
TOTAL ASSETS		474,278.95
LIABILITIES:		
Capital Stock		175,000.00
Mortgage new Ross Property		20,000.00
Current Liabilities:		
Notes Payable	59,000.00	
Trade Acceptances	18,669.31	
Loans by Executives	11,100.00	
Accounts Payable	36,406.45	
Total Current Liabilities		125,175.76
Depreciation Reserve		5,526.65
Surplus 1/1/20	133,416.24	
Profits 1920	33,015.01	
	166,431.25	
Loss 4th L. Loan, $3,990; Fed. Tax, $4,864.71; Dividends, $9,000	17,854.71	
Net Surplus Dec. 31, 1920.		148,576.54
TOTAL LIABILITIES...		474,278.95

Defendants' Exhibits.

Exhibit D-10.

We certify that the above statement has been taken from the books of the Smith & Hemenway Co. Inc. under date of December 31st, 1920, and is to the best of our knowledge true and correct.

F. FEDDERSEN,
Accountant.

J. F. HEMENWAY,
Secretary-Treasurer.

Smith & Hemenway Co. Inc.
Balance Sheet of December 31, 1921.

ASSETS:

Land and buildings	$ 96,090.61	
Machinery	5,150.28	
Investments	39,100.00	
Furniture and Fixtures	2,516.62	
Life Insurance Executives	2,443.50	
Liberty Bonds 4th	15,000.00	
Total Capital Assets		160,301.01
Trading Assets:		
Inventory Mdse.		112,099.70
Current Assets:		
Irvington Co.	97,934.30	
Accounts Receivable	65,917.37	
Cash	10,970.20	
Accrued Interest	132.81	

Defendants' Exhibits.

Exhibit D-10.

Total Current Assets		174,954.68
Unexpired Insurance		776.04
Interest Paid in Advance.		533.58
TOTAL ASSETS		448,665.01
LIABILITIES:		
Capital Stock		175,000.00
Mortgage Ross Co.		20,312.22
Current Liabilities:		
Notes Payable	61,000.00	
Loans by Executives	20,000.00	
Accounts Payable	33,060.68	
Total Current Liabilities..		114,060.68
Depreciation Reserve		7,955.63
Surplus 1/1/21	147,088.66	
Adjustment year 1918	16,533.94	
	130,554.72	
Federal Tax 1920, 2467.09; Dividends, 1921, 9000.00	11,467,09	
	119,087.63	
Net Income 1921	12,248.85	
Net Surplus 12/31/21.....		131,336.48
TOTAL LIABILITIES...		448,665.01

We certify that the above statement has been taken from the books of the Smith & Hemenway

Defendants' Exhibits.

Exhibit D-10.

Co. Inc. under date of December 31st, 1921, and is to the best of our knowledge true and correct.

F. FEDDERSEN,
Accountant.

J. F. HEMENWAY,
Secretary-Treasurer.

Smith & Hemenway Co. Inc.
Balance Sheet December 31st, 1922.

ASSETS:		
Capital Assets:		
Irvington Co. Stock.....	$ 56,250.00	
National Hdwe. Co.	1,600.00	
Lockwasher Machinery ..	5,150.28	
Furniture and Fixtures...	2,394.39	
Electros	500.00	
43-5 St. Maurice St.....	30,000.00	
128 Coit St.	25,123.45	
Ross Property	40,967.16	
Life Insurance Executives	2,764.15	
Liberty Bonds 4th	15,000.00	
Trading Assets		$179,749.43
Mdse. Inventory		115,723.03
Current Assets:		
Irvington Mfg. Co.	95,476.53	
Accounts Receivable	104,679.95	
Cash	3,454.17	
Accrued Interest	132.81	
Deferred Debit Items.....		203,743.46
Unexpired Insurance	909.82	
Interest paid in advance..	513.39	
		1432.21
TOTAL ASSETS		$500,639.13

Defendants' Exhibits.

Exhibit D-10.

	LIABILITIES:		
	Capital Liabilities:		
	Capital Stock		
	Preferred	100,000.00	
	Common	225,000.00	
	Total Issued		325,000.00
10	Mortgage J. Ross & Co...		20,312.22
	Current Liabilities:		
	Notes Payable	50,862.50	
	Trade Acceptances	2,394.06	
	Accounts Payable:		
	Purchases	36,450.53	
	Others	6,131.64	
	Loans from Executives...	30,000.00	
	Judgment Chemung Co...		
	Total		125,838.73
20	Depreciation Reserve		10,384.61
	Surplus	131,336.48	
	Chemung Judgment Reversed	16,533.94	
	Imco Stock Dividend.....	18,750.00	
	Net Profit 1922	12,533.50	
		$179,153.92	
	Federal Tax, $1050.35; dividends, $159,000.00	160,050.00	
30	Net surplus		19,103.57
	TOTAL LIABILITIES ..		$500,639.13

Defendants' Exhibits.

Exhibit D-10.

We hereby certify that these figures have been taken from the books of the Smith & Hemenway Co. Inc. and are true and correct.

J. F. HEMENWAY,
Secretary-Treasurer.

F. FEDDERSEN,
Accountant.

To The American National Bank
Newark, N. J.
Statement of Smith & Hemenway Co. Inc
Dec. 31, 1923.

ASSETS:

Cash in Bank and on hand	$ 3,337.30
Accounts Receivable for Merchandise (all good and not transferred or pledged)	83,216.78
Notes Receivable for Merchandise (all good—Due from Customers)	
Notes and Accounts Receivable (not for merchandise)	144,202.38
Merchandise (at actual present value)	95,239.39
Other quick assets (itemize):	
Total Quick Assets	$325,995.85
Machinery and Fixtures	172,606.57
Land and Buildings (see schedule on back)	138,090.61

Defendants' Exhibits.

Exhibit D-10.

Other Assets (Itemize):	
Auto	430.72
Unexpired Insurance	3,040.42
Coal	323.13
Interest paid in advance	618.78
Investments	35,020.27
Total	$676,126.35
LIABILITIES:	
Accounts Payable (due or to become due)	$ 45,816.27
Borrowed Money (from Banks or Trust Companies)	40,750.00
Borrowed Money (from members of firm, partners, individuals, corporations or others)	19,858.13
Notes Payable for Merchandise	28,020.39
Other Current Liabilities	
Total Current Liabilities	$134,444.79
Liens, Mortgages or Encumbrances on Merchandise or other Assets, aside from Real Estate Mortgages	
Mortgages on Real Estate (schedule on back)	35,312.22
Other Liabilities (Itemize):	
Res. for Depreciation	107,429.82
Capital Stock Pref.	100,000.00
Common	293,750.00
Surplus	5,189.52
Total	$676,126.35

Defendants' Exhibits.

Exhibit D-10.

Contingent Liability:
Upon Accommodation Notes or Endorsements $.....
Upon Customer's Notes Discounted $.....
Merchandise. On what basis valued. Cost or market .....
Finished $..... Unfinished $.....
Raw $..... If any goods on consignment, state amount and circumstances.....
Sales and Profits Last Fiscal Year:
Net Sales $..... Net Profits $.....
Do you discount your bills?.....
On what basis do you pay your accounts?.....
How often do you take account of stock.....
State last date of Inventory.....
Do you balance your books regularly?.....
Names of all partners in the firm.....
Accounts and Notes Payable. If any are past due state amount and circumstances.....
Accounts and Notes Payable. State amount and circumstances.
(a) If any are past due or doubtful.....
(b) If any are pledged.....
(c) If any are due from employees, relatives or similar sources .....
Insurance. Fire, on Buildings $.....
Merchandise $..... Life $.....
Who is beneficiary?.....
Date started present business.....My age is....
Do you do business with other banks?.....
Other Remarks: .....

Defendants' Exhibits.

Exhibit D-10.

The undersigned, for the purpose of procuring credit from time to time from you for the negotiable paper of the undersigned, or otherwise, furnishes you with the following statement and information which fully and truly sets forth the financial condition of the undersigned on the....day of .....192.., which you can consider as continuing to be full and accurate, unless notice of change is given you. The undersigned agrees to notify you promptly of any change that materially reduces the pecuniary responsibility of the undersigned. In consideration of the granting of such credit, the undersigned agrees that if the undersigned at any time fail or become insolvent, or commit an act of bankruptcy, or a petition in bankruptcy be filed by or against the undersigned, or a judgment or judgments be recovered against the undersigned in a court of record, or a general assignment be made by the undersigned for the benefit of creditors, or if any of the representations made above prove to be untrue, or if the undersigned fail to notify you of any material change as before agreed, then and in either such case all obligations of the undersigned held by you shall immediately become due and payable without demand or notice, and the same may be charged against the balance of any deposit account of the undersigned with you, the undersigned hereby giving a continuing lien upon such balance of deposit account from time to time exist-

Defendants' Exhibits.

Exhibit D-10.

---

ing to secure all obligations of the undersigned held by you.

Signed in the presence of

.....

Smith & Hemenway Co. Inc.

Balance Sheet, December 31st, 1923.

ASSETS:

Capital Assets:		
Land and Buildings	$138,090.61	
Machinery and Equip.	164,755.59	
Automobile	430.72	
Office Furn. and Fix.	3,726.37	
Electros	500.00	
Total Capital Assets		$307,503.29
Investments:		
National Hdwe. Co.	1,600.00	
43/45 St. Maurice St.	30,000.00	
Life Insc. Executives	3,090.27	
Mfrs. Liability Ins. Co.	330.00	
Total Investments		35,020.27
Working Assets:		
Goods in Process	38,452.77	
Shop Supplies	8,605.08	
Material	12,918.36	
Steel	34,651.82	
Coal	323.13	
Dies and Cutters	3,624.61	
Sundry Materials	611.36	
Total Working Assets		99,187.13
Trading Assets:		

Defendants' Exhibits.

Exhibit D-10.

Mdse. Inventory		144,202.38
Current Assets:		
Accounts Receivable	83,216.78	
Cash	3,337.30	
Total Current Assets.....		85,554.08
Deferred Debit Items:		
Unexpired Insurance	3,040.42	
Interest Paid in Advance.	618.78	
Total Deferred Debit Items		3,659.20
TOTAL ASSETS		$676,126.35
LIABILITIES:		
Capital Liabilities:		
Capital Stock		
Preferred $100,000.00		
Common 293,750.00		
Total Issued		$393,750.00
Mortgages:		
C. Stopper	15,000.00	
J. Ross & Co.....	20,312.22	
Total Mortgages		35,312.22
Current Liabilities:		
Notes Payable	40,750.00	
Trade Acceptances	28,020.39	
Accounts Payable:		
Purchases	45,816.27	
Others	13,658.13	
Loans from Executives...	6,200.00	
Total Current Liabilities..		134,444.79

Defendants' Exhibits.

Exhibit D-10.

Depreciation Reserves:		
Machinery	81,761.89	
Buildings	25,667.93	
Total Depreciation Reserve		107,429.82
Surplus	25,430.82	
Net Profit 1923	15,821.20	
	41,252.02	
Less Dividends	36,062.50	
Total Surplus		5,189.52
TOTAL LIABILITIES..		$676,126.35

We certify that the above statement has been taken from the books of the Smith & Hemenway Co. Inc., under date of December 31st, 1923, and is to the best of our knowledge true and correct.

F. FEDDERSEN,
Accountant.

J. F. HEMENWAY,
Secretary and Treasurer.

Smith & Hemenway Co. Inc.
Balance Sheet, June 30, 1925.

ASSETS:		
Capital Assets:		
Plant and Equipment		$343,185.17
Investments:		
43/45 St. Maurice St.....$	30,000.00	
Bonds, stocks and Life Ins.	5,137.51	
		35,137.51

Defendants' Exhibits.

Exhibit D-10.

Working Assets:		
Material and Goods in Process		94,894.25
Trading Assets:		
Mdse. Inventory		93,079.75
Current Assets:		
Accounts Receivable	89,449.73	
Cash	4,685.49	
		94,135.22
Deferred Debit Items:		
Unexpired Ins. and Interest prepaid	5,279.89	
TOTAL ASSETS		665,711.79
LIABILITIES:		
Capital stock		395,500.00
Employees' Stock Subscription		200.00
Mortgages:		
J. Ross & Co	15,261.70	
Chas. Stopper	15,000.00	
		30,261.70
Current Liabilities:		
Notes Payable	37,000.00	
Trade Acceptances	15,056.06	
Accounts Payable	50,638.73	
		102,694.79
Depreciation Reserve		122,843.53

Defendants' Exhibits.

Exhibit D-11.

Surplus	9,135.06	
Less Dividends	3,056.00	
	6,079.06	
Net Profit for Period.....	8,132.71	14,211.77
TOTAL LIABILITIES..		665,711.79

We hereby certify that the above statement has been taken from the books of the Smith & Hemenway Co. Inc. and is true and correct.

L. P. SMITH,
President.

EXHIBIT D-11.

February 21, 1920.

N-O-T-I-C-E.

Commencing February 23rd, Mr. Paul R. Ketzer will assume the duties of Factory Superintendent, and Mr. Harry Shaffer will become General Foreman of the factory.

S. G. WAY.

Defendants' Exhibits.
Exhibit D-12.

EXHIBIT D-12.

SMITH & HEMENWAY CO, INC.
Tool Manufacturers
114 to 130 Coit Street
Irvington, N. J. U. S. A.

August 28th, 1920.

Address your reply to the New York City Office.
Replying to your favor of

Mr. L. P. Smith,
Hopatcong, N. J.

My dear L. P. S.:

Since our talks last April and May and your finally saying to me that "I cannot afford to accept your offer", you have said nothing to me regarding your position in the business, what you proposed or what you want.

I believe that in all our relations I have always been frank, fair and prompt and it does seem to me that the business demands action and attention now in an unusual way, and unless we come to some understanding regarding its future, it will be hurt by further delay.

You were away some in 1919 but when you went away in January 1920 and remained away for three months, I was better equipped with men than I have been since your more recent illness. Since Mr. Way left us last April, the factory has been lacking in many ways, and I do not feel like making changes or taking on anyone until we come to some understanding ourselves; nor can I con-

sent to have the present conditions continue longer because it is quite against the interest of the business. Moreover, you have during all these months, drawn the full salaries from both Companies as when you were active in the work.

There is a precedent on our records of a time previously when I did not give all my time to our business and during that period I received much less compensation from our business than you received.

I am instructing Mr. Scharfenberg to make no salary checks for either of us until we can arrange in some manner for August and the future, on a mutually satisfactory basis.

I believe that then I can handle the business and stop the continual friction which retards progress and production and which, if continued, would eventually do us great harm. May I hear from you soon, and when and where can we meet?

No one can regret more than I do your continued ill health.

With best wishes, I am

Very truly yours,

J. F. HEMENWAY,

Treasurer.

JFH:ER

Defendants' Exhibits.

Exhibit D-13.

EXHIBIT D-13.

Irvington, N. J.
Nov. 11, 1920.

Mr. J. F. Hemenway, Treas.

Dear Sir:

For months I have been trying to get at a true situation here at the factory.

I feel it my duty as President of this company to put in front of you as strong as I possible can, the actual conditions that exist.

It must be obvious to you that these conditions cannot continue for any length of time.

I hand you file of statistics and comparisons for the several years, 1918, 1919 and 1920, so that you may study the conditions with me and see if we cannot arrive at some definite decision on matters pertaining to the manufacturing end.

Some action, (and I might say radical move) is necessary to check conditions as quickly as possible.

Were it not for the very high prices which we were able to obtain during the year of 1920 you could readily see that our condition would even be worse than the figures show for the 10 months.

You will note by referring to the production records of

1918 was 88,229 tools
1919 was 103,651 tools
1920 was 79,995 tools

Defendants' Exhibits.

Exhibit D-13.

In the year 1920 there are a great many cheap tools, such as cold chisels, and wrecking bars that go in to make up the quantity that were not made in 1918 or 1919.

I refer you particularly to Schedule #5 showing the values of 1918 production on the basis of 1920 prices.

Also 1919 production at the prices of 1920, showing the values.

In 1918 we were at war and in 1919 nine months of strike and strike conditions to contend with.

I also refer you to the foremen on Page #2 of the annalysis showing an increase in this department of over 50%.

In 1918 and 1919 we had five foremen in the shop.

In 1920 we have thirteen.

Nickle Plating.

The same condition prevails in the Nickle Plating room with a decreased production and increase of expenses of 157%.

The private brand shop tickets on Page #3 is a condition that is hard to realize and to know that any man or set of men that claim to have any mental capacity could allow to exist.

Never in the history of our organization would I give credit to any man who claims to be a mechanic of doing such a foolish stunt.

Polishing Room Rates.

These rates were obtained from our competitor here in town for comparison with our own.

New Jersey State Library

Defendants' Exhibits.

Exhibit D-13.

About Sept. 8th, Mr. Shaffer was sent to Jamestown to ascertain how #3925 pliers were to be made.

On October 2nd, he came to my desk and wanted to know if we were ready to start on the #3925s.

I asked him what steel he was going to use.

He said 40 to 50 carbon.

He wanted to know whether we would put up a special hardening furnace for same, which had not been bought.

He wanted two additional tumbling barrels, which had not been bought.

I then asked him the following questions:

How did they mill the noses of pliers?

He did not know.

How did they harden?

On plates in water.

How did they nickle plate?

In single pieces. From the nickle plating bath they assemble them and they go to the shipping room.

I asked him if he was mistaken?

He was quite positive that he was not.

I asked him if they buffed them? "No."

I asked him if they ground the noses? 'No."

I then called for Sharkey and he contradicted Shaffer in every remark that he made about the nickle plating, grinding the nose and buffing.

You can therefore see that the information he obtained was useless to us.

Forging Received From Die Blocks.

He told me that they got from 50,000 to 75,000 forgings from each die block.

New Jersey State Library

I immediately wrote to Jamestown and they report that on 19 sets of dies on which record was kept they received 24,400 forgings, and on the second set of double holes with more experienced forgers they received 34,000 single pieces. This shows you how correct he is in his statemnet.

I herewith hand you a typewritten copy of a letter of Mike Sinn, which I am numbering #10.

The goods represented in dollars and cents lying on this floor which have been carefully stored away to keep out of sight, represents in the neighborhood of $15,000. This is only an estimate, and this is from a letter written by Sinn as near as is could be copied.

This condition of affairs was not new to me, but I had not been able to get at the facts in the case because goods was being side-tracked and hidden from me and excuses offered me as to why it could not be gotten through.

I immediately called for a stock on the 2nd of October to be taken of that floor, by calling a meeting of the different foremen and begging them to try and catch anything coming through that would hold up production and ordered an inventory of the second floor, polishing room.

I finally received this, after fighting, on October 26th, but even then it was not honestly taken, as I found, by wandering through the Ross Building, they had taken out and not put on the inventory 8,222 of 950 forgings, represented in dollars and cents between $3000 and $3500. These were re-

turned as forgings, although we had paid for milling them and grinding the inside of the joints.

When I discovered this I asked for a history of them and I was told that they were placed back in the forging stock to go through as forgings and to be paid for a second time.

I also discovered that they had passed through approximately 900 dozen #725-6½" as firsts, to the stock room, charging them in as firsts, making a difference in our inventory of $3.00 a dozen, or $2700, besides extra work to make them seconds, of unboxing and paying for grinding the names off and reboxing.

Another example of the management is on November 5th I came in the back door of the forging shop and found that the entire forge shop was closed down and 16 men were unloading one flat car of steel at a total cost to us of $44.55, for wages paid them, as they are on the hourly rate when not on their hammers, as against our former price of unloading steel of $15 to $16 a car.

This does not include the loss of production from the drop shop for one half day with not production.

950 Pliers.

Notwithstanding we have had for the last 7 or 8 months between 8,000 and 10,000 forging partially machined, we have not been able to get into the shipping room one single lot of goods that we could class as Red Devil Tools to ship to the trade.

Defendants' Exhibits.

Exhibit D-13.

The following tickets:
#8716 25 dozen #1024-6″ dated July 29, 1919.
#8702 25 dozen #1024-6″ dated July 29, 1919.
#8718 25 dozen #1924-6″ dated July 29, 1919.
#3038 also bearing #288, 25 doz. changed to read 300 pieces #950-7″ dated Aug. 13, 1920.
#7155 25 dozen #1025-6½″ dated May 4, 1920.
#7689 600 pieces #1025-6″ dated Aug. 6, 1920.
#5872 25 dozen #1024-6½″ dated Dec. 13, 1919.
#3876 600 pcs. #925-8″ dated Sept. 16, 1920.
#3514 600 pcs. #925-6″ dated Aug. 27, 1920.
#3675 300 pr. #1024-6½″ dated Sept. 2, 1920.
#3677 224 pcs. #1024-6½″ dated Sept. 2, 1920.
#3676 300 pcs. #1024-6½″ dated Sept. 2, 1920.
#3525 600 pcs. #925-6″ dated Aug. 27. 1920.
#3523 600 pcs. #925-6″ dated Aug. 27. 1920.

were located by the Cost Dept. in the polishing room. Although this work had gone through and been paid for, the tickets remained in the polishing room and I am satisfied in my own mind that at intervals when they felt that they could, these were slipped in on us and paid for a second time.

Polishing Room.

We spent approximately $5,000 for installing an addition to the polishing room and up to this moment the entire line of shafting cannot be used and must be changed due to the fact that it is speeded up so high that we cannot get men to sit in front of it.

I could go on for hours and tell you of the errors that are creeping in, but I feel that this would

be only burdening you with useless data, but in a general way I am safe in saying that at least 33 1/3% of all goods that are sent to the shipping room have to be returned to be made over, either in firsts or seconds, thereby paying for the work twice and probably having them go into seconds, even after the extra work is put on the tools.

First—There is no system.

Second—No one is in authority.

Third—The factory would be better off without either Mr. Ketzer of Mr. Shaffer in the plant as they spend their time trying to get something on the other fellow.

I therefore recommend that we close the shop until new management in the manufacturing department can be had.

I am not saying this hastily, but I have weighed the matter most carefully and feel that this is the only thing to do to bring matters to a concrete conclusion.

To show you the latest orders issued I am handing you a copy of a letter of November 9th, written by Ketzer.

May I have an early conference with you on this subject and a final decision so that matters can be mandled for the best interest of the business.

LS:FM LANDON SMITH.

I neglected to also mention the fact that we have added almost 50% to our milling machine capacity, and yet the production is going backwards.

Defendants' Exhibits.

Exhibit D-13.

The same remark applies to the polishing room. I am simply mentioning this so that you will have the vision in front of you when reading this report.

LS:FM LANDON SMITH.

On the 1st of the month, F. P. Tenney came to my desk and said to me "I have been rambling around through the shop and Mike wants to see you bad. He says if he can't see you he is going to quit, that he is discouraged, disheartened and disgusted and he told me things that even I as a salesman, was surprised to hear, but his fear was that he could not see and talk to you as he would like to, and I told him that we were all here working for each other and that he was not working for you any more than he was working for the business. I am talking plain to you, as I know that you were anxious to know conditions as they were."

Last night I made an engagement with him to see him, and he gave me the following information:

"I have been with you for eleven years, and I hand you a memorandum here of conditions in my department only, which I believe you do not know as fully as you should.

The quantities here are only estimates, but you can see for yourself that what I told Mr. Tenney,

Defendants' Exhibits.

Exhibit D-13.

I have a right to be discouraged. I have guessed at the quantities.

100 doz. #417 milled in August and Sept. wrong, cannot be assembled.

1000 #510-8½ and 10″, the hand work is more than we get for the pliers.

60 dozen #2050-8″, scrapped.

100 dozen #950-7″ already polished, no edges, scrapped.

6 doz. pcs. 950-7″—milled wrong—scrapped.

12 dozen #1024-6″ and #925-6″, polished—not mates.

100 doz. handles for bolt cutters, wrong, cannot be assembled.

100 doz. jaws all completed, milled and drilled wrong, cannot use them.

50 doz. jaws for bolt cutters, all assembled, milled too deep, cannot use them.

#72-7″, all of them tight in joints and scrapped.

60 doz. #715—mill wrong, have to make them by hand.

600 pieces #424 drilled wrong, scrapped.

600 pieces #904 bad castings.

#542-6″ all bad, have to make by hand.

#622-5½ bad cutters, cannot cut.

50 doz. #654-6″ and 7″ bad—split noses.

20 doz. #777-6″ bad—split noses.

#942-5″, 2400 bad, cannot get out a good plier.

#925-8″, half of them are thrown away in the milling room, don't match.

Defendants' Exhibits.

Exhibit D-13.

I get no help from Shaffer, and Ketzer don't know anything about the tools to tell me. I do the best I can with what they give me."

"Bolts and nuts for slip joint pliers are wasted terribly. Mr. Yakey never allowed this. He made us pick them up. Now the floor is full of them. The same with washers for Connectors. Mr. Yakey used to tell us these things cost four or five cents a piece, count up the money and hand it to us. The Connectors are milled properly to go together.

Flat pliers are filed by the men and thrown under the bench and never fitted, and when they are ready to assemble, they are rusted and will not fit and they have to go into the scrap heap.

Lynn does not know how to handle his department and has no control over his people. Would like to see him come back, as I am disheartened at the way work is going. Would not like to see Moyer come back, but believe that if you got Otto to take charge again, you would be better off as we never had tools sent up in his day as we now get them.

Mr. Yakey used to show us how to do the work and would take the files and show us by actual work how it should be done, and would not allow us to throw any goods away. Mr. Connors, the old inspector was the best man we ever had in this department, as he would take care of the work and was a practical tool maker.

For three months I had no testing silk, although

I asked for it continuously, which they said they could not get. Work is being paid for on tickets two and three times. This should not be.

Split rivets were sent to me and I was told to use them on #407, although I knew they would go into seconds. I have not made any #417 for over a week because I cannot get them drilled right, as we have no drilling fixture, although I have been after this almost every day.

For rivets on #510 jaws, I was told to use nails, as I had no rivets. Often I riveted up 25 dozen with nails and then after they are ground and finished, there are 5 or 6 dozen that have to done over. This is wasting money and time. If Mr. Smith promises me there will be a change, I will stay here, as I like to work here and recently bought a home in the neighborhood, but the way things have been going, I am discouraged."

LS:HP.

10-8-20

Mike Sinn says been with you 11 years work in my dept. that is scrap.

100 doz. 417 milled Aug and Sept. 10in connector.

1,000 510 hand work 8½ and 10 inch pliers.

60 doz. 2050-8" box joints.

100 doz 950 no edges 7in. ready polished bad edge.

Defendants' Exhibits.

Exhibit D-13.

6,000 pieces 950 7in bad edge.

1,000 doz. 1029 6in. and 925.6″.

100 doz. handles, handles bad. Bolt Cutters.

100 doz. jaws drilled and milled wrong, Bolt Cutters.

50 doz. jaws can't fit, Bolt Cutters.

72 doz. 7in. type tight joints.

60 doz. 715 2 mo 10 in. connectors.

600 pieces 424 drilled wrong 9in connectors.

600 pieces 904 8in bad casting.

542 6in. bad all of them.

622 5½ bad cut, all bad, can't cut.

50 doz. 654 6 and 7in. bad, split noses.

20 doz. 777 6in. bad, split nose.

942 5in. about 200 doz. bad.

I did count up there but guessed at quantities by bbl. lots

925 8in. half thrown away when matched, don't match.

Get no help from Shaffer.

Get no help from Ketzer.

Have best with what they gave me.

Wasting bolts and nuts.

Wasting washers for connectors. by not drilling properly, small pliers filed by men and thrown under bench and never fitted, then when ready to assemble they are rusty and not filed and have to go into scrap, Lynn does not know how to handle his dept. much and no control of his people, would like to see him come back he used to show us,

Defendants' Exhibits.

Exhibit D-13.

---

and would not like losing Mr. Connolack would like to see Otto come back.

Mr. G. used to show us if we did not know and would not let us throw goods away as now.

Conners was a good man, and took care of the work. 3 Mos. Had no testing silk for cutting pliers. I asked but did not get it, work is being paid for on ticket two and three times and maybe more.

417 sent in with split holes. handed me this washer and told me to use it (washer split).

strap on 417 for over 1 week because I can't get them drilled right so I can put together.

Rivets for 510—Jaws. I was told to use nails, had no rivets—after I rivet 25 doz. with nails before they are ground and finished there 500 6 doz. loose and have to be done over.

Oct. 11, 1920.

Mr. L. P. Smith:

I found the following tickets in the polishing room. The work has gone through and the tickets are still in the polishing room.

The following tickets:

#8716 25 dozen #1024-6" dated July 29, 1919.
#8702 25 dozen #1024-6" dated July 29, 1919.
#8718 25 dozen #1924-6" dated July 29, 1919.

Defendants' Exhibits.

Exhibit D-13.

#3038 also bearing #288, 25 doz. changed to read 300 pieces #950-7" dated Aug. 13, 1920.
#7155 25 dozen #1025-6½" dated May 4, 1920.
#7689 600 pieces #1025-6" dated Aug. 6, 1920.
#5872 25 dozen #1024-6½" dated Dec. 13, 1919.
#3876 600 pcs. #925-8" dated Sept. 16, 1920.
#3514 600 pcs. #925-6" dated Aug. 27, 1920.
#3675 300 pr. #1024-6½" dated Sept. 2, 1920.
#3677 224 pcs. #1024-6½" dated Sept. 2, 1920.
#3676 300 pcs. #1024-6½" dated Sept. 2, 1920.
#3525 600 pcs. #925-6" dated Aug. 27. 1920.
#3523 600 pcs. #925-6" dated Aug. 27. 1920.

The work is paid for, yet tickets are still in the polishing room.

This is only the first collection that I brought you this morning, and other tickets are there in quantities which I will collect and tabulate the same as these.

This work has gone through the factory, paid for and yet the tickets are in the polishing room. The work cannot be located on these tickets.

Very truly yours,

P. R. KETZER,
Supt.

PRK:HP.

Defendants' Exhibits.

Exhibit D-13a.

EXHIBIT D-13a.

Irvington, N. J.
December 15th, 1920

Mr. J. F. Hemenway.

Dear Sir:

In talking to you yesterday you dropped a remark that made me think a great deal last night, as I having been thinking along the same lines for some time, i. e., the placing of responsible heads in the different departments and holding them responsible for the work. I am going to suggest the following headings, and in order to give you a better idea of what is in my mind I will express myself as frankly as possible, subject to criticisms, suggestions and corrections.

We are just about to begin a new year, and I believe we can segregate this work in such a way that we will have a much more harmonious organization and get better results by pinning responsibility on to someone and looking to them for results.

The following headings are suggested:

Advertising and Accounting in the charge of Mr. J. F. Hemenmay, assisted by Mr. F. Feddersen.

Manufacturing and Purchasing in charge of Mr. L. Smith, assisted by Messrs. G. L. Yakey and J. Schaffenberg.

Sales and Shipping also Jobbing Lines in

charge of Mr. D. G. Smith, assisted by H. A. Knight.

Plant Effieciency and Production in charge of Mr. G. L. Yakey, assisted by Mr. R. L. Smith.

These several headings I would like to have your views on.

I would suggest that each one of the department heads receive all orders for his department from the principals of the firm, and that no orders be shipped or letters written that are going to conflict or interfere with the management of that department. In this way the department head cannot say he has been over-ridden.

My suggestion is also that at stated intervals you and I get together and decide upon a policy and issue orders to the department heads and these department heads are to see these orders are carried out.

You will appreciate that this is only a rough draft, and is susceptible to much improvement.

In thinking this matter over, you will be able to form ideas of what each department should be held responsible for, and I believe this rough draft will be of some benefit.

In the meantime, I also will try and to likewise.

Your work and mine should be so closely connected that either of us would be thoroughly in touch with the situation by receiving copies of all important matters taken up by the other parties, such as contracts for steel, machinery, changes, orders to the factory, and outside purchases for supplies.

Defendants' Exhibits.

Exhibit D-13a.

In this way we would know the thought of the other party and act accordingly.

I trust you will give this your earnest consideration.

While I realize the time is short before your departure, you may have some spare moments on the boat and in your rest hours to wander over the situation in such a way that good will result from this letter, and so that at the beginning of the new year we will be able to definitely define the responsibility.

Yours very truly,

LANDON SMITH.

LS:DW.

Defendants' Exhibits.

Exhibit D-14.

EXHIBIT D-14.

(This agreement was presented to me by Smith as constituting Hemenway's offer and, of course, I advised him not to accept.)

JOHN F. HEMENWAY and ano.

-with-

LANDON P. SMITH and ano.

Copy .....

AGREEMENT

Martin Cohn

Law Offices of
ALEXANDER, COHN & SONDHHEIM,
51 Chambers Street, New York

Defendants' Exhibits.

Exhibit D-14.

THIS AGREEMENT made and entered into this day of April, 1925, and and between JOHN F. HEMENWAY and ALICE M. HEMENWAY, of the City of New York, State of New York, parties of the first part, and

LANDON P. SMITH and J. MILDRED SMITH of the City of Newark, State of New Jersey, parties of the second part.

RECITALS.

John F. Hemenway is the owner of 212 shares of Class B common and 499 shares of Class B preferred stock of Smith & Hemenway Company, Inc., a New York corporation, and Alice M, Hemenway is the owner of 1230 shares of Class B common and 1 share of Class B preferred stock of Smith & Hemenway Company, Inc.

Landon P. Smith is the owner of 212 shares of Class A common and 499 shares of Class A preferred stock of Smith & Hemenway Company, Inc., a New York corporation, and J. Mildred Smith is the owner of 1238 shares of Class A common and 1 share of Class A preferred stock of Smith & Hemenway Company, Inc.

It is the intention of the parties of the first part, on certain terms and conditions hereinafter set forth, o acquire al of the shares of Class A common stock, namely, 1450 shares owned by the parties of the second part, and the parties of the second part are willing to dispose of the common stock above referred to, namely, 1450 shares, and accept in payment therefor, 500 shares of Class

B preferred stock, the property of the parties of the first part.

NOW, THEREFORE, in consideration of the sum of one dollar, by each of the parties to the other in hand paid, the receipt whereof is hereby mutually acknowledged, and in further consideration of the promises herein contained, it is agreed between the parties hereto as follows:

1. The parties of the second part will sell, transfer and assign all of the shares of Class A common stock of Smith & Hemenway Company, Inc. owned by them, namely, 1450 shares, to the parties of the first part, in such proportion as may, in writing, be designated by the parties of the first part, and accept from the parties of the first part, in full payment of such sale, transfer and assignment, 500 shares of Class B preferred stock of Smith & Hemenway Company, Inc., now owned by the parties of the first part.

II. The parties of the first part agree to sell, transfer and assign the said 500 shares of Class B preferred stock in exchange for the transfer of said 1450 shares of Class A common stock, and agree to make such sale, transfer and assignment to the parties of the second part in such proportion as may be designated by the parties of the second part.

III. Landon P. Smith will, simultaneously with the sale, transfer and assignment of the shares of stock hereinbefore provided, deliver to John F. Hemenway his resignation, directed to the board of directors of Smith & Hemenway Com-

pany, Inc., as President and director of the Smith & Hemenway Company, Inc.

IV. J. Mildred Smith will, simultaneously with the sale, transfer and assignment of the shares of stock hereinbefore provided, deliver to John F. Hemenway her resignation, directed to the board of directors of Smith & Hemenway Company, Inc., as director of the Smith & Hemenway Company, Inc.

V. The parties hereto agree to promptly proceed to a reclassification of the stock of Smith & Hemenway Company, Inc., pursuant to Section 36 of the Stock Corporation Law, such reclassification to be as follows:

One thousand (1000) shares of the par value of one hundred dollars ($100) each will be known as preferred stock:

One thousand (1000) shares of the par value of one hundred dollars ($100) each will be known as Employees' Preferred stock:

Four thousand (4000) shares, of the par value of one hundred dollars ($100) each, will be known as Common stock.

The designations, preferences, privileges, voting powers, restrictions and qualifications of said stock will be as follows:

The holders of the preferred stock shall be entitled to receive in each year out of the accumulated profits of the corporation, in excess of such sum, if any, as shall have been fixed and reserved as a working capital, a non-cumulative dividend of six per cent (6%), payable quarterly, half-yearly

or yearly, as the directors may from time to time determine, before any dividend shall be set apart or paid on the Employees' Preferred stock, or on the general or common stock of the corporation. If the accumulated profits in excess of the sum fixed and reserved as a working capital shall not be sufficient to pay in any year a dividend of six per cent (6%) on said Preferred stock, then such dividend shall be paid thereon as such excess of accumulated profits will suffice to pay; the dividends thereon shall not be cumulative, but shall be payable for each year only out of accumulated profits in excess of the sum fixed and reserved as a working capital, and not out of the accumulated profits of any subsequent year or years. Upon dissolution of the corporation, or upon final distribution of its assets, and after the payment of its debts, the Preferred stock shall be redeemed at par if the assets of the corporation, including surplus and accumulated profits, are sufficient. If the assets are not sufficient to redeem said Preferred stock, then all of such assets or their proceeds, shall be distributed ratably among the holders of said Preferred stock. If the assets are more than sufficient to redeem the Preferred stock at par, all remaining after such redemption shall first be applied to the redemption of Employees' Preferred stock, together with accumulated dividends thereon, and the balance, if any, ratably among the holders of the general or common stock of the corporation. The Preferred Stock shall be redeemed out of surplus at par plus

accrued dividends to the extent of at least Five thousand ($5000) Dollars par value thereof in each year, which redemption shall be made yearly, half-yearly or quarter-yearly at the option of the board of directors, and which redemption shall not necessarily be pro rata among all the holders of Preferred stock, but may be confined solely to the stock of any one or more holders of said Preferred stock.

The Preferred stock shall have no voting power, excepting where the law expressly requires the voting or consent of the holders of a certain proportion of all stock or of all classes of stock.

The holders of Employess' Preferred stock shall be entitled to receive cumulative dividends at the rate of seven per cent (7%) per annum out of surplus payable quarterly, half-yearly or yearly, as the directors may from time to time determine, before any dividend shall be set apart or paid on the common stock of the corporation.

Upon dissolution or distribution of the assets of the corporation, the holders of Employees' Preferred stock shall be paid in full both as to principal and accrued dividends before any payment on account of principal or dividends shall be made to the holders of common stock, but only after all payments of principal and dividends then due shall have been made in full to holders of Preferred stock.

Employees' Preferred stock shall have no voting power excepting where the law expressly re-

quires the vote or consent of the holders of a certain proportion of all stock or of all classes of stock.

Employees' Preferred stock may be redeemed out of surplus at 103, plus accrued dividends at any time after one year of issuance, at the option of the board of directors, which redemption shall not necessarily be pro rata among all holders of Employees' Preferred stock, but may be confined solely to the stock of any one or more holders of Employees' Preferred stock.

Except where the law expressly requires the vote or consent of the holders of a certain proportion of all stock or of all classes of stock, the entire voting power shall be in the common stock.

The parties of the second part agree to sign and execute any and all instruments necessary to carry the reclassification above provided into effect.

VI. The number of directors of the corporation shall be reduced from four to three and the parties hereto agree to sign and execute any and all instruments necessary to carry into effect said reduction of directors in accordance with Section 35 of the Stock Corporation Law.

VII. The reclassification of stock hereinabove provided shall be made either by unanimous consent of all the stockholders of all classes and preferences of the corporation, or, if such consent cannot be obtained, then by resolution of a special meeting of the stockholders of the corporation

authorizing and directing such reclassification, and the parties hereto mutually agree to vote in favor of such resolution. Simultaneous with the execution of the instruments necessary to be filed with the Secretary of State, authorizing this reclassification, (either by unanimous consent or by stockholders' meeting) the sale, transfer and assignment of the shares of stock by the parties of the first part to the parties of the second part, and by the parties of the second part to the parties of the first part, as hereinabove provided, shall be made.

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

In presence of

(L. S.)

(L. S.)

(L. S.)

(L. S.)

EXHIBIT D-15.

WAIVER OF NOTICE OF SPECIAL MEETING OF STOCKHOLDERS.

WE, the undersigned, owning all the stock issued and outstanding of the Smith & Hemenway Co., Inc., a corporation organized and existing under the laws of the State of New York, hereby waive notice of the time and place and the purpose of a special meeting of the stockholders of said company to be held at the office of Alexander, Cohn & Sondheim, 51 Chambers Street, New York City, at 12.15 P. M. November 4, 1925 and consent that the same be held at that time and place with the same effect as if regularly called by due notice to all concerned. And we hereby waive all requirements of the State of New York as to notice of said meeting and publication thereof, and consent to the transaction of such business as may properly come before said meeting.

The said meeting is a special meeting for the purpose of passing any necessary resolutions connected with the sale of the land and building on St. Maurice Street, Montreal, now owned by the Smith & Hemenway Co., Inc., and to be taken over by Landon P. Smith or his nominees.

And we do by signing this instrument severally acknowledge due and sufficient notice of the meeting aforesaid.

Defendants' Exhibits.

Exhibit D-15.

Dated, New York, November 4th, 1925.

L. P .SMITH.
DEW G. SMITH.
JULIA M. SMITH.
JOHN F. HEMENWAY.
ALICE M. HEMENWAY.

SPECIAL MEETING OF THE BOARD OF DIRECTORS OF SMITH & HEMENWAY CO., INC., held at the office of Alexander, Cohn & Sondheim, 51 Chambers Street, New York City, on the 4th day of November, 1925, immediately after the adjournment of the special meeting of stockholders.

PRESENT:

Landon P. Smith
J. Mildred Smith
John F. Hemenway
Alice M. Hemenway

Mr. Landon P. Smith as President of the company called the meeting to order, Mr. John F. Hemenway, Secretary of the company, acted as such.

The minutes of the special meeting of the stockholders were read and upon motion the same were approved.

The following resolution was thereupon unanimously adopted:

RESOLVED, that for the consideration to be expressed in said deed as one dollar and other good and valuable considerations, the directors hereby authorize the sale of the land and the build-

situate thereon located on St. Maurice Street, Montreal, to Mr. Landon P. Smith, and that the officers of the corporation be and the same are hereby authorized and directed to engage the services of , a Notary at Montreal, Province of Quebec, for the purpose of effecting the proper conveyance of said property to Landon P. Smith or his nominees, and that said Notary Public be and he is hereby authorized to sign and execute before a Notary Public practicing in the Province of Quebec, Dominion of Canada, a deed of sale from the company to Landon P. Smith or his nominees of the property aforesaid fronting on St. Maurice Street, Montreal, known as civic numbers 43 and 54 St. Maurice Street, being lot No. 1860 and a strip from the rear end of lot No. 1879 on the official plan and book of reference of St. Ann's Ward of the City of Montreal. And be it further

RESOLVED that the officers of this company be authorized and directed to sign any and all instruments necessary to carry this resolution into effect. The said conveyance is to be free and clear from any and all encumbrances, liens or claims but subject to any and all now existing leases thereon, the said deed to contain a covenant against grantor's acts and also a covenant for further assurance and to be in proper form for record.

Mr. Landon P. Smith designated as nominees under the aforesaid resolution John F. Hemenway and Alice M. Hemenway, his wife.

Mr. Smith stated to the meeting that it was his

and his wife's distinct understanding that there was to be no charge made on the corporation books against Mr. and Mrs. Hemenway, or either of them, in respect to the transfer or sale of the above mentioned property, and that the entire consideration of said transfer insofar as the corporation is concerned was to be charged against Mr. Smith's personal account.

Upon motion is was unanimously resolved that the corporation make this conveyance relying upon the statement made by Mr. Smith.

No further business appearing the meeting adjourned.

Dated, New York, November 4th, 1925.

JOHN F. HEMENWAY,
Secretary.

APPROVED:
Landon P. Smith,
Julia M. Smith,
John F. Hemenway,
Alice M. Hemenway,
Directors.

SPECIAL OF THE STOCKHOLDERS OF SMITH & HEMENWAY CO., INC., held at the office of Alexander, Cohn & Sondheim, 51 Chambers Street, New York City, on the 4th day of November, 1925, at 12.15 P. M., pursuant to waiver signed by all of the stockholders.

The meeting was called to order by Mr. Landon P. Smith, President of the company, Mr. John F. Hemenway, Secretary of the Company, acting as such.

Defendants' Exhibits.

Exhibit D-15.

A rollcall having been had there were found present in person all of the stockholders of the corporation.

The Secretary of the company read the waiver signed by all the stockholders, and upon motion the same was ordered spread upon the minutes and appears at the end hereof.

The following resolution was thereupon unanimously adopted:

RESOLVED, that for the consideration to be expressed in said deed as one dollars and other good and valuable considerations, the stockholders hereby authorize the sale of the land and the building situate thereon located on St. Maurice Street, Montreal, to Mr. Landon P. Smith, and that the officers of the corporation be and the same are hereby authorized and directed to engage the services of , a Notary at Montreal, Province of Quebec, for the purpose of effecting the proper conveyance of said property to Landon P. Smith or his nominees, and that said Notary Public be and he is hereby authorized to sign and execute before a Notary Public practicing in the Province of Quebec, Dominion of Canada, a deed of sale from the company to Landon P. Smith or his nominees of the property aforesaid fronting on St. Maurice Street, Montreal, known as civic numbers 43 and 45 St. Maurice Street, being Lot No. 1860 and a strip from the rear end of Lot No. 1879 on the official plan and book of reference of St. Ann's Ward of the City of Montreal. And be it further

Defendants' Exhibits.

Exhibit D-15.

RESOLVED that the officers of this company be authorized and directed to sign any and all instruments necessary to carry this resolution into effect. The said conveyance is to be free and clear from any and all encumbrances, liens or claims but subject to any and all now existing leases thereon, the said deed to contain a covenant against grantor's acts and also a covenant for further assurace and to be in proper form for record.

No further business appearing, the meeting adjourned.

Dated, New York, November 4th, 1925.

JOHN F. HEMENWAY,
Secretary.

Stockholders

John F. Hemenway,
Julia M. Smith,
L. P. Smith,
Alice M. Hemenway.

Defendants' Exhibits.

Exhibit D-16.

EXHIBIT D-16.

MEMORANDUM OF AGREEMENT made this Seventeenth day of January, A. D. 1907, by and between FRANK R. WOODWARD and ELLA E. WOODWARD, both of the town of Hill in the State of New Hampshire, co-partners and doing business under the firm name and style of the NEW ENGLAND NOVELTY WORKS, parties of the first part, THE WOODWARD GLAZIER TOOL CO., a corporation duly organized and existing under and by virtue of the laws of New Hampshire and having a place of business at Hill, N. H., party of the second part, and SMITH & HEMENWAY CO., a corporation duly organized and existing under and by virtue of the laws of the State of West Virginia, and having an usual place of business at 108-110 Duane St. in the City, County and State of New York, party of the third part.

WHEREAS said parties of the first part are manufacturers of glass cutters, and wheels and pinions to cover the same and have heretofore made a contract with party of the second part for selling their said product exclusively to said party of the second part, and whereas party of the third part is desirous of purchasing said glass cutters and wheels and pinions to cover the same exclusively from said parties of the first part, witnesseth this agreement.

FIRST:—That said parties of the first part agree to sell exclusively to said party of the third

part, for the period of forty-eight years and six months, their entire product of glass cutters and wheels and pinions to cover the same, and to refer any and all inquiries in connection therewith, and transact all business direct with said party of the third part, *except certain circular cutters* not manufactured by said parties of the first and magazine cutters now made by Schatz Hardware Manufacturing Company and said party of the third part agrees to buy and purchase from said parties of the first part exclusively, all glass cutters, and wheels and pinions to cover the same, during said period of forty-eight years and six months, and it is agreed that when the party of the first part shall manufacture said circular cutters the party of the third part shall use all of same manufactured and shall sell no other glass cutters except those made by the party of the first part.

SECOND:—Said parties of the first part agree to sell, and said party of the third part agrees to buy said glass cutters, and wheels and pinions to cover the same, as per the attached schedule of prices, said prices to hold good during the life of this contract, but, in the event of an advance or decline in the labor and material used in making and constructing said glass cutters and wheels and pinions to cover the same, then, and in that event, said prices are to be re-adjusted on the basis of said advance or decline, as it may be. It being further understood and agreed that said parties of the first part shall receive and said party of the third part shall pay an additional twenty-five

cents per gross, when shipments of said glass cutters are made in individual boxes and cartons, not now so shipped. Also it is further understood and agreed that when shipments of said glass cutters that are now packed in individual boxes and cartons are *not* so packed there shall be an allowance of twenty-five cents per gross deducted from the present price on said glass cutters. All changes in prices are to be written out in duplicate and signed by the parties of the first part on one side, and accepted and signed by party of the third part on the other side. Said changes of prices to be attached to this contract, and made a part thereof.

THIRD:—It is agreed that settlements are to be made on the tenth and twenty-fifth of each month. Goods arriving between the twenty-fifth and tenth of any month shall be settled and paid for on the tenth of that month, and goods arriving between the tenth and twenty-fifth of any month are to be settled and paid for on the twenty-fifth of that month, less a discount of two per cent (2%). Where goods are sent to customers direct date of shipment instead of arrival shall be taken as basis of settlement.

FOURTH:—All goods are to be delivered F. O. B. New York City, except where shipments are made direct, and then and in that event, goods are to be delivered F. O. B. Hill, New Hampshire.

FIFTH:—Said parties of the first part agree to carry a complete stock of finished goods at their

factory for direct shipment to customers of the said party of the third part.

SIXTH:—The party of the second part for and in consideration of the sum of One Dollar and other valuable consideration does hereby consent that irrespective of the contract between it and the parties of the first part to the making of he agreement hereinabove specified with the party of the third part and for the purposes of this agreement, does hereby waive all its rights and privileges under the said agreement between it and the said party of the first part except as hereinbefore stated.

SEVENTH:—This contract is to take effect from the first day of January, A. D. 1907, and to continue in full force and effect for the term mentioned in article first of this contract.

EIGHTH:—It is distinctly understood and agreed that the covenants herein contained do bind the heirs, executors, administrators and assigns of the parties of the first part and the successors or assigns of the parties of the second and third parts. Further, it is understood and agreed that should another tool be brought out at any time which takes the place of said glass cutters and is demanded by the trade, thereby reducing the sale of said glass cutters; then and in that case, the parties hereto hereby agree to arrange and will arrange on the best possible terms for the making and selling of said tool or tools. Also it is hereby mutually agreed that the NEW ENGLAND NOVELTY WORKS, are to and will man-

ufacture the said tools and SMITH AND HEMENWAY CO. are to and will sell the said tools, at such prices and on such terms as may be mutually agreed between the parties hereto.

NINTH:—The party of the third part hereby agrees to use its best endeavors during the life of this contract to sell as many of the glass cutters, and wheels and pinions to cover the same, manufactured by the party of the first part as is possible and to use its best endeavors in increasing the sale of same and the demand therefor and irrespective of any of the covenants herein contained it is mutually understood and agreed that the party of the third part shall not be required to purchase of or receive from the party of the first part more goods manufactured by the party of the first part than it can sell in the ordinary course of trade under the covenants herein contained.

IN WITNESS WHEREOF the parties of the first part have hereunto set their hands and seals and the parties of the second and third parts have hereunto signed their names by their officers authorized so to do and have affixed their corporate seals the day and year first above written.

(Signed) Frank R. Woodward
Ella E. Woodward

WOODWARD GLAZIER TOOL CO.

(Seal) Ella E. Woodward, Secy.

SMITH & HEMENWAY CO.

Landon P. Smith, Pres.

(Seal) John F. Hemenway, Secy.

Defendants' Exhibits.

Exhibit D-16.

STATE OF NEW HAMPSHIRE, } ss.:
County of Merrimac. }

On the 12th day of October, 1907, before me personally appeared Frank R. Woodward and Ella E. Woodward, doing business under the firm name and style of New England Novelty Works, to me known and known to me to be the individuals described in and who executed the foregoing instrument in writing and they severally acknowledged to me that they executed the same.

(Signed) GEO. A. SUMNER,
Justice of the Peace.

STATE OF NEW HAMPSHIRE, } ss.:
County of Merrimac. }

On this 12th day of October, 1907, before me personally came (Ella E. Woodward) to me personally known who being by me duly sworn did depose and say that she is the Secretary of the Woodward Glazier Tool Co., one of the parties described in the foregoing instrument. That she knows the corporate seal of said Woodward Glazier Tool Co., That the seal affixed to the said instrument is such corporate seal and that she affixed the seal to said instrument and subscribed her name thereto to as Secretary of said corpora-

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tion by order and direction of the Board of Directors of said Corporation.

(Signed) GEO. A. SUMNER,
Justice of the Peace.

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

On this second day of October, 1907, before me personally came Landon P. Smith and John F. Hemenway, to me personally known, who being by me duly sworn did depose and say that they are the President and Secretary of the Smith & Hemenway Company, one of the parties described in the foregoing instrument. That they know the corporate seal of said Smith & Hemenway Co. That the seal affixed to the said instrument is such corporate seal and that they affixed the said seal to said instrument and subscribed their names thereto as President and Secretary of said corporation by order and direction of the Board of Directors of said Corporation.

(Signed) J. F. FLETCHER,
(Seal) Notary Public.
53.

Defendants' Exhibits.

Exhibit D-16.

Price for Glass Cutters Made Jan. 17, 1907.

Number	Price Per Gross	
0	$2.95	
00	2.10	
10	3.05	
XX	4.40	Packed in individual Boxes & Cartons.
XXX	5.75	Packed in individual Boxes & Cartons.
10 K.K.	5.90	
14	3.85	
023	3.05	
024	3.25	Packed in individual Boxes & Cartons.
025	2.95	
026	3.85	
028	5.75	Packed in individual Boxes & Cartons.
030	4.25	Packed in individual Boxes & Cartons.
302	3.60	Packed in individual Boxes & Cartons.
035	8.70	
036	10.35	
44	3.10	
45	2.50	
2P	3.85	
197	2.95	
198	3.10	
199	5.60	
212	3.00	

240		3.25	Packed in individual Boxes & Cartons.
242	Wheels	1.10	
00	"	.70	
251		3.10	
252		3.10	
256		3.10	
291		2.10	
292		3.50	
293		2.45	
295		2.60	
296		3.85	
298		2.50	

CONCLUSIONS.

IN CHANCERY OF NEW JERSEY.

Between

Alice M. Hemenway, individually and as executrix of the last will and testament of John F. Hemenway, deceased,

Complainant,

-and-

Landon P. Smith and Julia M. Smith,

Defendants.

On Bill, &c.

On Final Hearing

Conclusions

61/66

Not to be printed in any report.

Lum, Tamblyn & Colyer (Mr. Ralph E. Lum),

George W. Alger, Esq., and W. R. Pratt, Esq., (of the New York Bar) for Complainants.

Burnett & Murray (Norbury C. Murray, Esq.) for Defendants.

BERRY, V. C.

This bill is filed to rescind a sale by Alice M. Hemenway and John F. Hemenway of one-half of the capital stock of Smith & Hemenway, Inc., a New York corporation, to the defendants for the sum of $125,000 on the ground of duress.

Mr. Hemenway and Mr. Smith had been associated in business together in two enterprises since 1898, when the combined capital of the two enterprises was between ten and eleven thousand dollars. The contract of sale, rescission of which is here sought, was dated October 29, 1925. According to the testimony of the defendant Landon P. Smith, he and Mr. Hemenway had been at loggerheads over their business and had engaged in frequent quarrels during the greater portion of the period during which they were in business together, but in spite of that fact their business had grown from the modest beginning in 1898 to the net worth, exclusive of good-will, trade name, etc., of $409,711.77 on June 30, 1925, and this without the addition of any outside capital. This book value represented accumulations of profits during the period indicated and during that period both Mr. Smith and Mr. Hemenway had drawn substantial salaries and dividends from the company. The stock of the company was equally divided between

Hemenway and his wife and Smith and his wife. On June 9, 1924, a stockholders' agreement was entered into under the provisions of which the Smiths and Hemenways could sell their interest in the business only to each other and in the event of death of one, the survivor agreed to buy the share of the deceased at the book value as shown by the company's statement. That agreement was never rescinded or cancelled unless it was superseded by the agreement which is the subject of this suit. By its terms the agreement of June 9, 1924, was to be construed in all respects according to the laws of the State of New York.

This corporation was for all practical purposes a partnership in corporation form, the active members of the corporation being the defendant Landon P. Smith, who was president and director and who had charge of the manufacturing and plant operations at Irvington, New Jersey, and Mr. Hemenway, treasurer and director, who maintained the New York office and had charge of the finances of the company. Mr.s Smith and Mrs. Hemenway were merely figureheads. In the spring of 1925 there was considerable dissension and disagreement between Smith and Hemenway, Smith alleging that this was due to Hemenway's inattention to business and failure to supply financial support for the proper conduct of the business. Mr. Hemenway is not here to refute these charges. He died on January 2, 1926, a few days after the consummation of the agreement the subject of this suit. He was at that time about sev-

enty years old, the defendant Landon P. Smith some ten years his junior. In the spring of 1925 matters had reached such a point that Smith refused to continue the business any longer in association with Hemenway and at a conference between the two it was suggested by Smith that one or the other had to get out and Smith offered to sell. Hemenway tried to pacify him and induce him to continue in the business. Smith was adamant and finally refused either to continue in the business with Hemenway or to sell, but insisted upon buying Hemenway's share and threatened that if Hemenway refused to sell proceedings for dissolution of the company would be institutes. Such proceedings were actually instituted in the New York courts, some time during the summer of 1925, and, as a result of these proceedings, after Smith's refusal to submit a buy or sell proposition, Mr. Hemenway, through his counsel, under date of October 12, submitted an offer to buy or sell for the sum of $125,000. The offer to sell was immediately accepted by Mr. Smith by telephone and later confirmed in writing, and a formal agreement embodying the terms of the offer executed under date of October 29, 1925, and finally performed on December 9, 1925. Without going into the evidence in detail, I may say that Smith's charge of inattention to business by Hemenway is not supported by any substantial evidence and I find as a fact that there was no dereliction of duty on the part of Hemenway. Whether or not there was any valid ground for dissolution of the com-

pany, and whether the allegations of the petition for dissolution were false or true, it is unnecessary for me to decide. Shortly after the sonsummation of the agreement of October 29, 1925, the defendant sold a portion of the Smith and Hemenway Company business to the Crescent Tool Company for $270,000 in cash. He retained the most profitable portion of the business and assets valued at approximately $300,000 included in which was real estate valued at $150,000 and which the Crescent Tool Company leased from Smith for an annual rental of $15,000. It is alleged in the bill that negotiations for the sale of a portion of the Smith & Hemenway business to the Crescent Tool Company had been opened by Smith in the spring of 1925, about the time he refused to sell his interest in the concern to Hemenway, and that this fact accounts for his attitude. While the circumstances surrounding this transaction are suspicions, I do not feel warranted in finding as a fact that actual negotiations touching this sale had been opened prior to October 12, 1925. It is an admitted fact, however, that such negotiations were begun shortly thereafter andt hat they were practically complete before the sale from Hemenway to Smith was consummated. The memorandum of the proposed written agreement was dated December 18, 1925; the formal agreement January 19, 1925, and this provided for settlement as of December 21, 1925. The theory underlying this action is that Smith, seeing an opportunity to make a profitable

deal with the Crescent Tool Company, had determined to force Hemenway out of the picture and seized upon the dissolution proceedings as a means to that end and that by threatening destruction of the business through these proceedings, which it is claimed were unfounded, the Hemenways were forced to sell out at an inadequate price on pain of greater loss on dissolution. As already indicated Mr. Hemenway died very shortly after the sale was consummated. Mrs. Hemenway survived him but died before final hearing in this cause. After Mr. Hemenway's death and on January 19, 1925, Mrs. Hemenway executed in her own behalf and as executrix of ther husband's estate, a release of the Smiths which was provided for in the contract of sale. This bill seeks a rescission of this sale and and an account of the profits on the Tool Company purchase and an accounting of the business up to the date of the decree. I have no difficulty in arriving at the conclusion was not the result of duress in view of the letter of October 12th from Hemenway's lawyer to Mr. Smith's attorney in which the buy or sell proposition was submitted, coupled with the fact that subsequently and before the performance of the agreement which was entered into on October 29th, Hemenway had ample time for reflection and could, if he had been so minded, have rescinded the sale and stopped the dissolution proceedings. His attitude, however, as gleaned from the various exhibits in evidence, was one of affirmation of the

transaction continually up until the final settlement and there is no evidence that he ever expressed dissatisfaction with the transaction even after its consummation. On the contrary, his letter to Mr. Cohn, his attorney, written from Atlantic City after the execution of the contract, but before performance, indicates a desire and an intention to hold Mr. Smith to the terms of the agreement. In reaching this conclusion I have not lost sight of the fact that the dissolution proceedings were not discontinued until after the contract of October 29, 1925, was executed, but I do not consider those proceedings to have been the compelling influence behind this transaction to the extent of rendering the contract involuntary on the part of the Hemenways. It is a significant fact, and, to my mind, somewhat controlling here, that the contract of sale, rescission of which is now sought, was the direct result of a buy and sell offer made by Hemenway himself. It is, I think, a reasonable presumption that Hemenway would have bought the Smiths' interest on the same price basis of which complaint is now made had Smith accepted Hemenway's offer to buy rather than that to sell, and would no doubt have resisted any attempt of Smith to thereafter deprive him of the advantage of that transaction, which is exactly and only what the Smiths are doing here. After all, the important question to be determined here is whether or not the minds of the Hemenways were so subjected to the will and control of the Smiths, however ex-

ercised, that the Hemenways were deprived of their free agency to the extent that their acts were really the acts of the Smiths.

> "The question in each case is, Was the person so acted upon by threats of the person claiming the benefit of the contract, as to be bereft of the quality of mind essential to the making of a contract, and was the contract thereby obtained?" 9 R. C. L. p. 716, Title "Duress," Sec. 7.

In my judgment, that question should be answered in the negative here. Hemenway was not compelled to make the buy or sell offer. He could have resisted the attempt at dissolution had he been so minded, and perhaps successfully. That he chose to do the former, acting as a free agent, there is no ground of complaint now, especially in view of his subsequent attitude after time for reflection.

I will advise a decree dismissing the bill of complaint.

Decided June 16, 1928.

FINAL DECREE.

IN CHANCERY OF NEW JERSEY.

Between Alice M. Hemenway, individually and as executrix of the last Will and Testament of John F. Hemenway, deceased, *Complainant,* *-and-* Landon P. Smith, et al., *Defendants.*	*On Bill, &c.* *Final* *Decree*

This cause, coming on to be heard in the presence of Ralph E. Lum (George W. Alger and W. R. Pratt of the New York Bar), solicitors of complainant, and Norbury C. Murray, solicitor of the defendants, and it having been suggested on the record that complainant, Alice M. Hemenway, died subsequent to the filing of the bill and prior to the final hearing, and that J. Harrison Montague, Eldon C. Hemenway and Martin B. Cohn were the duly appointed and qualified executors of the Last Will and Testament of said Alice M. Hemenway, and that Eldon C. Hemenway is the duly appointed, qualified and sole acting executor of the Last Will and Testament of John F. Hemenway, and that by the consent of all of the parties to said proceedings, said executors of said two Last Wills and Testaments, as such, were made complainants in lieu and instead of and in substitution for the Alice M. Hemenway, deceased, and the matter and

the evidence of the complainants and of the defendants having been given and heard, and the same, together with arguments of counsel thereon having been considered, and the Court having determined therefrom that the bill of complaint and the allegations therein are without merit, and that the bill should be dismissed.

It is, on this 26 day of June, 1928, ORDERED, ADJUDGED and DECREED that the bill of complaint filed in the above entitled cause be, and the same hereby is, dismissed, and that the lis pendens filed in connection therewith be, and the same hereby is, discharged and nullified, and that said substuted executor complainants, as such, or their counsel, forthwith cancel the same of record.

And it is further ORDERED, ADJUDGED and DECREED that the defendants' costs to be taxed be paid by said substituted executor complainants, as such, and that there be included therein the sum one One hundred and thirty-five 20/100, representing the amount paid by the defendants for the Court's copy of the stenographic transcript of the testimony given in said cause.

And it is further ORDERED, ADJUDGED and DECREED that there also be, and hereby is, allowed to solicitors of the defendants as and for a counsel fee, the sum of One Thousand Dollars, and that the same be included in said bill of costs to be taxed and paid, as aforesaid.

Respectfully advised.

MAJA LEON BERRY,
V. C.

11FEB.T.1929

Filed after the Oral Argument by leave of Court.

New Jersey Court of Errors and Appeals

ALICE M. HEMENWAY, individually and as executrix of the last will and testament of John F. Hemenway, deceased,
Complainant,

and

LANDON P. SMITH, *et al.*,
Defendants.

On Appeal from Court of Chancery.

SUPPLEMENTAL BRIEF FOR DEFENDANTS-RESPONDENTS.

BURNETT, MURRAY & TRELEASE,
Solicitors for Defendants-Respondents.

NORBURY C. MURRAY,
Of Counsel.

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

By virtue of permission granted at the argument, we submit the following supplement to our original brief:

SUPPLEMENT TO POINT IV (at page 41).

Smith, having the right under the New York Statute to institute the Dissolution Proceeding, could not be charged with "Duress" or "Coercion" for prosecuting that right even if his motive in so doing had been an improper one (which it was not). *Aalfo* v. *Kinney* (N. J. Adv. Rep. Vol. VII, No. 7, p. 328).

Dickerman v. *Northern Trust Company*, 176 U. S. 181 (at p. 190).

The rule in New York as to "Duress" is the same as in New Jersey. *Hart* v. *Walsh*, 146 N. Y. Supp. 235 (Sup. Ct. App. Term). (Affirmed Sup. Ct. App. Div. 1914, 147 N. Y. Supp. 1115.)

In that case, the defendant agreed to pay plaintiff a royalty in order to prevent the plaintiff from instituting injunction proceedings to prohibit the continued production of a play, which plaintiff claimed infringed its copyright. The defendant later sought to avoid payment of the agreed royalty on the ground that the contract had been procured by "Duress." The Court said in part,

"When the plaintiff made this claim, the defendants had the right either to resist his claim and any legal proceedings which he might have upon that claim, or they had the right to buy their peace. They adopted the latter alternative, made the agreement upon which the plaintiff sues, and failed to pay the amount which they agreed to pay. Upon these facts, the plaintiff could not be turned out of court because after the contract was entered into, he made a state-

ment calculated to convey the false impression that he had a copyright for the plays which he claimed to own."

The rule in other jurisdictions also is the same:

Minneapolis Land Co. v. *McMillan,* 82 N. W. 591, 79 Minn. 287 (Minn. Sup. Ct.). (Cited Williston on Contracts, Vol. III, Sect. 1606.)

In that case, the defendant having $7,000 invested in a corporation, under protest and to protect his investment, gave his own notes of $700 to pay a bond of the corporation not then due, under threat of the holder of the bond that if the defendant did not, he would institute Receivership proceedings against the corporation. The Court held,

"The defendant was not compelled to execute the notes to satisfy a wrongful claim or unjust demand made upon the corporation, or upon himself, which would, if not complied with, have resulted in serious disaster and loss of property. There was no duress in this case on any of the authorities."

(That case has been consistently followed by the Minnesota courts. (See *Zimmermin* v. *Benz,* 202 N. W. 272 (Sup. Ct. 1925).

Respectfully submitted,

BURNETT, MURRAY & TRELEASE,
Of Counsel for Respondents.

NORBURY C. MURRAY,
Of Counsel.

INDEX TO SUPPLEMENT

Complainants Exhibits.

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Complainant's Exhibits.
Exhibit C-3.

EXHIBIT C-3. N. W. B.

AGREEMENT

(Original)
4-11-25.

THIS AGREEMENT made and entered into this day of April, 1925, by and between JOHN F. HEMENWAY and ALICE M. HEMENWAY, of the City of New York, State of New York, parties of the first part, and LANDON P. SMITH and J. MILDRED SMITH of the City of Newark, State of New Jersey, parties of the second part.

RECITALS.

John F. Hemenway is the owner of 212 shares of Class B common and 499 shares of Class B preferred stock of Smith & Hemenway Company, Inc., a New York corporation, and Alice M. Hemenway is the owner of 1238 shares of Class B common and 1 share of Class B preferred stock of Smith & Hemenway Company, Inc.

Landon P. Smith is the owner of 212 shares of Class A common and 499 shares of Class A preferred stock of Smith & Hemenway Company, Inc.,

It is the intention of the parties of the first part, on certain terms and conditions hereinafter set forth, to acquire all of the shares of Class A common stock, namely, 1450 shares owned by the parties of the second part, and the parties of the

second part are willing to dispose of the common stock above referred to, namely, 1450 shares, and accept in payment therefor, 500 shares of Class B preferred stock, the property of the parties of the first part.

NOW THEREFORE, in consideration of the sum of one dollar, by each of the parties to the other in hand paid, the receipt whereof is hereby mutually acknowledged, and in further consideration of the promises herein contained, it is agreed between the parties hereto as follows:

I. The parties of the second part will sell, transfer and assign all of the shares of Class A common stock of Smith & Hemenway Company, Inc., owned by them, namely, 1450 shares, to the parties of the first part, in such proportion as may, in writing, be designated by the parties of the first part, and accept from the parties of the first part, in full payment of such sale, transfer and assignment, 500 shares of Class B preferred stock of Smith & Hemenway Company, Inc. now owned by the parties of the first part.

II. The parties of the first part agree to sell, transfer and assign the said 500 shares of Class B preferred stock in exchange for the transfer of said 1450 shares of Class A common stock, and agree to make such sale, transfer and assignment to the parties of the second part in such proportion as may be designated by the parties of the second part.

Complainant's Exhibits.
Exhibit C-3.

III. Landon P. Smith will, simultaneously with the sale, transfer and assignment of the shares of stock hereinbefore provided, deliver to John F. Hemenway his resignation, directed to the board of directors of Smith & Hemenway Company, Inc., as President and director of the Smith & Hemenway Company, Inc.

IV. J. Mildred Smith will, simultaneously with the sale, transfer and assignment of the shares of stock hereinbefore provided, deliver to John F. Hemenway her resignation, directed to the board of directors of Smith & Hemenway Company, Inc., as director of the Smith & Hemenway Company, Inc.

V. The parties hereto agree to promptly proceed to a reclassification of the stock of Smith & Hemenway Company, Inc., pursuant to Section 36 of the Stock Corporation Law, such reclassification to be as follows:

One thousand (1000) shares of the par value of one hundred dollars ($100) each will be known as preferred stock;

One thousand (1000) shares of the par value of one hundred dollars ($100) each will be known as Employees' Preferred stock;

Four thousand (4000) shares, of the par value of one hundred dollars ($100) each, will be known as Common stock;

The designations, preferences, privileges, voting powers, restrictions and qualifications of said stock will be as follows:

Complainant's Exhibits.
Exhibit C-3.

The holders of the preferred stock shall be entitled to receive in each year out of the accumulated profits of the corporation, in excess of such sum, if any, as shall have been fixed and reserved as a working capital, a non-cumulative dividend or six per cent (6%), payable quarterly, half-yearly or yearly, as the directors may from time to time determine, before any dividend shall be set apart or paid on the Employees' Preferred stock, or on the general or common stock of the corporation. If the accumulated profits in excess of the sum fixed and reserved as a working capital shall not be sufficient to pay in any year a dividend of six per cent (6%) on said Preferred stock, then such dividend shall be paid thereon as such excess of accumulated profits will suffice to pay; the dividends thereon shall not be cumulative, but shall be payable for each year only out of accumulated profits in excess of the sum fixed and reserved as a working capital, and not out of the accumulated profits of any subsequent year or years. Upon dissolution of the corporation, or upon final distribution of its assets, and after the payment of its debts, the Preferred stock shall be redeemed at par if the assets of the corporation, including surplus and accumulated profits, are sufficient. If the assets are not sufficient to redeem said Preferred stock, then all of such assets or their proceeds, shall be distributed ratably among the holders of said Preferred stock. If the assets are more than sufficient to redeem the

Complainant's Exhibits.
Exhibit C-3.

Preferred stock at par, all remaining after such redemption shall first be applied to the redemption of Employees' Preferred stock, together with accumulated dividends thereon, and the balance, if any, ratably among the holders of the general or common stock of the corporation. The Preferred Stock shall be redeemed out of surplus at par plus accrued dividends to the extent of at least Five thousand ($5000) Dollars par value thereof in each year, which redemption shall be made yearly, half-yearly or quarter-yearly at the option of the board of directors, and which redemption shall not necessarily be pro rata among all the holders of Preferred stock, but may be confined solely to the stock of any one or more holders of said Preferred stock.

The Preferred stock shall have no voting power, excepting where the law expressly requires the voting or consent of the holders of a certain proportion of all stock or of all classes of stock.

The holders of Employees' Preferred stock shall be entitled to receive cumulative dividends at the rate of seven per cent (7%) per annum out of surplus payable quarterly, half-yearly or yearly, as the directors may from time to time determine, before any dividend shall be set apart or paid on the common stock of the corporation.

Upon dissolution or distribution of the assets of the corporation, the holders of Employees' Preferred stock shall be paid in full both as to principal and accrued dividends before any pay-

ment on account of principal or dividends shall be made to the holders of common stock, but only after all payments of principal and dividends then due shall have been made in full to holders of Preferred stock.

Employees' Preferred stock shall have no voting power excepting where the law expressly requires the vote or consent of the holders of a certain proportion of all stock or of all classes of stock.

Employees' Preferred stock may be redeemed out of surplus at 103, plus accrued dividends at any time after one year of issuance, at the option of the board of directors, which redemption shall not necessarily be pro rata among all holders of Employees' Preferred stock, but may be confined solely to the stock of any one or more holders of Employees' Preferred stock.

Except where the law expressly requires the vote or consent of the holders of a certain proportion of all stock or of all classes of stock, the entire voting power shall be in the common stock.

The parties of the second part agree to sign and execute any and all instruments necessary to carry the reclassification above provided into effect.

VI. The number of directors of the corporation shall be reduced from four to three and the parties hereto agree to sign and execute any and all instruments necessary to carry into effect said deduction of directors in accordance with Section 35 of the Stock Corporation Law.

Complainant's Exhibits.
Exhibit C-3.

VII. The reclassification of stock hereinabove provided shall be made either by unanimous consent of all the stockholders of all classes and preferences of the corporation, or, if such consent cannot be obtained, then by resolution of a special meeting of the stockholders of the corporation authorizing and directing such reclassification, and the parties hereto mutually agree to vote in favor of such resolution. Simultaneously with the execution of the instruments necessary to be filed with the Secretary of State, authorizing this reclassification, (either by unanimous consent or by stockholders' meeting) the sale, transfer and assignment of the shares of stock by the parties of the first part to the parties of the second part, and by the parties of the second part to the parties of the first part, as hereinabove provided, shall be made.

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

In presence of

(L.S.)

(L.S.)

(L.S.)

(L.S.)

Complainant's Exhibits.
Exhibit C-40.

EXHIBIT C-40.

June 30, 1925

TOTAL INVENTORIES

Material	$ 6,303.87
Shop Supplies	7,531.25
Oil and Coal	1,255.50
Steel	18,005.15
Goods in Process	63,800.86
Finished Goods Imco	81,416.20
Outside Purchases	21,118.96
E. B. Board Supplies	2,847.87
Boxes and Labels	5,056.87
Advertising Matter	1,913.73
Stationery and Printing	741.90
Shippng Supplies	628.78
Samples and Sample Rolls	4,000.00
Total	$218,721.94

Complainant's Exhibits.
Exhibit C-41.

EXHIBIT C-41.

Smith & Hemenway Co., Inc.

June 30th, 1925

ASSETS:		
Land & Buildings		$150,000.00
Machinery & Equipment		219,711.00
Furniture & Fixtures		5,839.53
Material	6,303.87	
Supplies	7,531.25	
Oil & Coal	1,255.50	
Steel	18,005.15	
Goods in process	63,800.86	
Finished goods	82,606.19	
E. B. Board Supplies	2,948.87	
Boxes & Labels	5,056.87	
Advertising	1,913.73	
Stationery and Printing	741.90	
Shipping supplies	628.78	
Samples & Rolls	4,000.00	
Mdse. outside	30,023.20	
		224,816.17
Insurance Interest and Taxes prepaid		5,279.89
Total Assets		605,646.59

EXHIBIT C-42

SMITH & HEMENWAY CO. INC.

Balance Sheet

June 30, 1925

ASSETS:		
Capital Assets:		
Land	$ 18,000.00	
Buildings	130,775.06	
Machinery and Equipment	181,716.09	
Power Plant	5,000.00	
Automobile	436.90	
Office Furniture	6,757.12	
Electros and Woodcuts	500.00	
Total Capital Assets		343,185.17
Investments:		
National Hdwe. Co.	1,390.00	
43/45 St. Maurice St	30,000.00	
Life Ins. Executives	3,417.01	
Mfrs. Liab. Insce. Co	330.50	
Total Investments		35,137.51
Working Assets:		
Shop Supplies	7,531.25	
Goods in Process	58,083.43	
Steel	18,005.15	
Dies and Cutters	3,715.05	
Material	6,303.87	
Coal	159.00	
Oil	1,096.50	
Total Working Assets		94,894.25
Trading Assets:		

Complainant's Exhibits.
Exhibit C-42.

Merchandise Inv.		93,079.75
Current Assets:		
Accounts Receivable	89,449.73	
Cash	4,685.49	
Total Current Assets		94,135.22
Deferred Debit Items:		
Unexpired Insurance	3,029.68	
Interest Prepaid	600.21	
Taxes Prepaid	1,650.00	
Total		5,279.89
TOTAL ASSETS		$665,711.79
LIABILITIES:		
Capital Liabilities:		
Capital Stock Preferred	$100,000.00	
Common	294,000.00	
Employees	1,500.00	
Total Issued		$395,500.00
Employees Stock Subscription		200.00
Mortgages:		
J. Ross & Co.	15,261.70	
Chas. Stopper	15,000.00	
Total Mortgages		30,261.70
Current Liabilities:		
Notes Payable	37,000.00	
Trade Acceptances	15,056.06	
Accounts Payable:		

Complainant's Exhibits.
Exhibit C-42.

Purchases		37,801.80	
Others		12,836.93	
Total Current Liabilities			102,694.79
Depreciation Reserve:			
On Machinery and Equipment		91,292.99	
On Buildings		31,550.54	
Total Depreciation Res			122,843.53
Surplus		9,135.06	
Less Dividends		3,056.00	
		6,079.06	
Net Profit for Period		8,132.71	
Total Surplus			14,211.77
TOTAL LIABILITIES			$665,711.79

SMITH & HEMENWAY CO. INC.

Statement of Profit and Loss

	1924 Jan. 1—June 30		1925 Jan. 1—June 30	
Sales	$466,168.93		$444,610.91	
Less Frt. & Express	3,735.97		3,707.74	
Net Sales		$462,432.96		$440,903.17
Cost of Goods Manufactured:				
Prime Cost:				
Labor Direct	89,335.85		66,175.56	
Material	12,078.88		5,828.54	
Steel	24,499.94		13,116.78	
Total Prime Cost		125,914.67		85,120.88

Complainant's Exhibits.
Exhibit C-42.

	1924 Jan. 1—June 30	1925 Jan. 1—June 30
Manufacturing Overhead:		
Shop Supplies	11,209.98	11,035.17
Coal	231.78	113.34
Repairs Machinery ...	2,681.20	4,445.97
Dies & Cutters.....	11,826.85	12,973.34
Depreciation Machinery	6,062.83	3,561.82
Supt. & Foremen.....	9,895.24	11,112.39
Labor Indirect	5,060.86	15,700.77
Engin'rs & Watchman.	3,857.36	2,589.16
Light & Power	4,871.98	5,191.98
Fuel Oil	7,626.60	8,078.02
Draftsman	800.00	
Patterns		119.32
Royalty		445.12
Total Mfg. Overhead..	64,124.68	75,376.40
General Factory Overhead:		
Freight & Express....	9.52	
Supply Room Wages..	2,007.79	1,561.75
Executive Salaries	3,750.00	1,000.00
Cost and Payroll Wages, etc.	1,196.00	1,904.00
General Expense		287.93
Taxes 3/4	1,443.00	1,531.20
Insurance 82%	2,635.78	2,733.57
Mortgage Int. 82%....	861.00	819.57
Bldg. Depreciation 82%	1,495.18	1,608.54
Bldg. Repairs 82%....	2,261.33	1,009.95
Gen. Factory Overhead	15,659.60	12,456.51

Complainant's Exhibits.
Exhibit C-42.

	1924 Jan. 1—June 30	1925 Jan. 1—June 30
Manufacturing Cost ..	205,698.95	172,953.79
Deduct		
Scrap Sales	843.33	464.78
Outside Work		48.01
Tot. Mfg. Cost.....	204,855.62	172,441.00
Goods in Process		
Add Inventory Decrease		
Deduct Inv. Increase..	5,443.70	541.69
Cost of Goods Mfgd....	199,411.92	171,899.31
Finished Goods		
Add Inv. Decrease....	25,102.91	3,625.21
Deduct Inv. Increase		
Cost of Goods Mfg. and Sold	224,514.83	175,524.52
Packing, Boxing, Inspecting Wages		4,068.97
Supplies		4,974.23
Total		9,043.20
Total Cost Mfg. Goods Sold	224,514.83	184,567.72
Outside Mdse.		
Purchases	129,392.68	139,207.80
Freight and Express ..	1,095.04	915.60
Total Cost Outside Mdse.	130,487.72	140,123.40

Complainant's Exhibits.
Exhibit C-42.

	1924 Jan. 1—June 30		1925 Jan. 1—June 30	
Shipping Expense				
Shipping Supplies	8,929.68		3,663.38	
Shipping Wages	13,032.68		7,892.35	
Total	21,962.36		11,555.73	
Total Cost of Goods Sold		376,964.91		336,246.85
Gross Profit on Sales..		85,468.05		104,656.32
Selling Expense:				
Commissions & Exps..	32,209.09		31,006.24	
Traveling Expenses....	1,096.20		10.76	
Advertising	15,245.90		14,070.51	
Electros	808.96		588.95	
Catalogues	397.06		301.50	
E. B. Board Dept.....	8,167.56		7,692.08	
Total Selling Expense.		57,924.77		53,670.04
Selling Profit		27,543.28		50,986.28
Gen. & Adm. Exp.....				
Office Payroll	12,933.05		13,744.93	
Stationery	1,729.42		1,660.74	
Sundry Expenses	2,259.49		1,286.29	
Telephone & Telegrams	687.24		543.60	
Exchange	286.35		99.36	
Legal Expense	1,897.10		488.49	
Postage	1,651.33		1,119.36	
Executive Salaries	7,500.00		5,999.96	
Auto Rep. & Chauffeur	826.38		1,079.60	

Complainant's Exhibits.
Exhibit C-42.

	1924 Jan. 1—June 30		1925 Jan. 1—June 30	
Total Gen. & Adm. Exp.		29,770.36		26,022.33
Net Income Operations		2,227.08		24,963.95
Income Other Sources:				
Discount on Purchases	2,931.91		3,797.85	
Interest	131.72	3,063.63	373.46	4,171.31
Total		836.55		29,135.26
Montreal Building:				
Rent Received	2,050.02		2,050.02	
Cost of Maintenance				
Taxes				
Depreciation	300.00		300.00	
Repairs	673.14		427.37	
Insurance	85.50		85.50	
Total Cost	1,058.64		812.87	
Profit on Montreal Bdg.		991.38		1,237.15
Total		1,827.93		30,372.41
Deductions from Income:				
Discount on Sales	7,237.62		6,922.34	
Rents	1,004.20		950.04	
Insurance 18%	578.58		569.15	
Interest	2,328.35		2,132.09	
Depreciat'n Bldgs. 18%	328.21		353.09	
Repairs Bldgs. 18%	496.39		221.69	
Bad Debts	1,063.94		709.77	

Complainant's Exhibits.
Exhibit C-43.

	1924 Jan. 1—June 30	1925 Jan. 1—June 30
Taxes 1/4	480.99	510.40
Auto Depreciation	43.07	43.07
Furniture & Fixtures	257.93	300.45
Life Ins. Executives		
Total Deductions	13,819.28	12,712.09
Net Loss for Period	11,991.35	
Net Profit for Period		17,660.32
Less Inv. Adjustments		9,527.61
		8,132.71

EXHIBIT C-43.

Net result for six months, $17,660.32, after inventory a reserve against inv. loss made by L. P. Smith of $9,527.61, leaving net profit for 6 months of $8,132.71.

Inventory values are very low, plier prices at least 40% less than cost or market.

Book value net $409,711.77.

Complainant's Exhibits.
Exhibit C-44.

EXHIBIT C-44.

Smith & Hemenway Co. Inc.
Comparative Balance Sheet
December 31st, 1924, and 1925

	December 31st, 1924		December 31st, 1925	
ASSETS:				
Capital Assets:				
Land & Buildings.....	$146,624.77		$150,200.72	
Machinery & Equipm't.	177,961.45		187,331.25	
Automobile	430.72		436.90	
Office Furn. & Fxtures.	5,830.58		6,690.62	
Electros	500.00		500.00	
Total Capital Assets...		331,347.52		345,159.49
Investments:				
National Hdwe. Co....	1,390.00		1,390.00	
43/45 St. Maurice St..	30,000.00		30,000.00	
Life Ins. Executives...	3,417.01		3,737.26	
Mfrs. Liab. Ins. Co....	330.00		330.50	
Total Investments		35,137.01		35,457.76
Working Assets:				
Material, steel, etc....		105,638.30		102,009.48
Trading Assets:				
Mdse. Inventory		104,096.45		101,911.17
Current Assets:				
Accounts Receivable ..	75,548.42		73,308.01	
Cash	1,651.88		18,890.36	
Total Current Assets.		77,200.30		92,198.37
Deferred Debit Items:				

Complainant's Exhibits.
Exhibit C-44.

	December 31st, 1924		December 31st, 1925	
Unexpired Insurance..	3,067.94		3,118.50	
Interest Prepaid.....	375.37		276.70	
Total Def. Debit Items		3,443.31		3,395.20
TOTAL ASSETS		656,862.89		680,131.47
LIABILITIES:				
Capital Liabilities:				
Capital Stock Prefd...	100,000.00		100,000.00	
Employees 7%	1,700.00		1,500.00	
Common	294,000.00		294,000.00	
Total Issued		395,700.00		395,500.00
Employees Stock Sub.		425.00		
Mortgages:				
C. Stopper	15,000.00		15,000.00	
J. Ross & Co.....	20,312.22		15,000.00	
Total Mortgages		35,312.22		30,000.00
Current Liabilities:				
Notes Payable	50,500.00		27,500.00	
Trade Acceptances			17,760.87	
Accounts Payable			61,122.50	
Purchases	42,652.38			
Others	6,221.64			
Loans from Executives				
Tot. Current Liabilities		99,374.02		107,383.37
Depreciation Reserves:				
Machinery	87,568.37		107,813.07	
Buildings	29,288.91		34,460.26	

Complainant's Exhibits.
Exhibit C-44.

		December 31st, 1924		December 31st, 1925	
Total Dep. Reserve....			116,857,28		142,273.33
Surplus			9,194.37	9,194.37	
Net Profit 1925.....				22,058.11	
				31,252.48	
Less					
Federal Tax..	$ 59.31				
Legal Fees....	5,000.00				
Power Plant ..	3,800.00				
Dividends	5,725.17				
Reserve Tax..	5,000.00				
Ad. Dep. 1924.	6,693.23			26,277.71	4,974.77
			656,862.89		680,131.47

EXHIBIT C-46.

PETITION AND ORDER.

At a Special Term, Part II of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House in the Borough of Manhattan, City, County and State of New York on the 26th day of September, 1925.

Present: Hon. Isidor Wasservogel, *Justice.*

In the Matter of the Voluntary Dissolution

-of-

Smith & Hemenway Company, Inc.

Upon reading and filing the petition of LANDON P. SMITH and JULIA MILDRED SMITH, verified September 21st, 1925, whereby it appears that the said petitioners constitute one-half of the board of directors of the Smith & Hemenway Company, Inc., and whereby it appears that the said Smith & Hemenway Company, Inc., has an even number of directors who are equally divided respecting the management of its affairs, and that the entire stock of the corporation is owned by directors who are even in number and equally divided respecting the management of its affairs, and since from said petition it appears that the

case is one of those specified Sec. 172 of the General Corporation Law, and on reading and filing the notice of this application dated September 14th, 1924, with proof of due service thereof and of the said petition, and of a copy of this order upon the Attorney General, and after hearing Richard J. Mackey, Esq., of counsel for the petitioners, and the Attorney General not opposing;

NOW, on motion of O'BRIEN, MALEVINSKY & DRISCOLL, attorneys for the petitioners, it is hereby

ORDERED, that all persons interested in said corporation show cause before Charles L. Hoffman, Esq., of 141 Broadway, who is hereby appointed Referee for that purpose, at his office, 141 Broadway, in the Borough of Manhattan, City of New York, on the 25th day of November, 1925, at 2 o'clock in the afternoon, why said corporation should not be dissolved; and it is further

ORDERED, that a copy of this order be published at least once a week for three weeks immediately preceding the time fixed herein for showing cause, in the New York Law Journal of New York, which paper is published in the City and County of New York; and it is further

ORDERED, that until the hearing and determination of this application, all creditors of said corporation be and they hereby are enjoined from instituting any action or legal proceeding against

said corporation, or interfering with its property or assets.

Enter. I. W.

Justice of the Supreme Court.

Filed 9/28/25

NEW YORK SUPREME COURT—New York County.

In the Matter of the Voluntary Dissolution

-of-

Smith & Hemenway Company, Inc.

TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK:

The petition of LANDON P. SMITH and JULIA MILDRED SMITH, respectfully shows and alleges:

1. That your Petitioners are two of the four directors of Smith & Hemenway Company, Inc., a domestic corporation organized and existing under and by virtue of the laws of the State of New York.

2. That the stock of the corporation, so far as the voting privileges are concerned, is equally divided into not more than two independent owner-

ships or interests and that one-half of the stock of the corporation is owned by persons favoring the course of half of the Board of Directors, and one-half thereof is owned by persons favoring the course of the other half of the Board of Directors.

3. That the officers of the corporation consist of one representative of one half of the stock holdings as president, and one representative of the other half of the stockholdings as secretary and treasurer, and each of these officers follows the course of the half of the directors with whom he is allied.

4. That your petitioners deem it beneficial to the interests of the stockholders that the corporation should be dissolved and are induced to desire its dissolution for the reasons stated in the preceding paragraphs and for the further reasons, namely, that this corporation is hampered and blocked in its proceedings by the fact that half of the Board of Directors and one of the two officers have practically ceased to function and have lost all interest and activity in the affairs of the corporation; that it is impossible to remove said directors or such officer because of the fact that they are maintained in their present status by the ownership of one-half of the stock of the corporation and the control of one-half of the directorate; that the company manufactures and sells about 1,000 kinds of tools and hardware specialties; that the profitable prosecution of such business involves the closest kind of economy and constant attention to the production and selling details

which are constantly changing; that in recognition of the fact that neither the Petitioner, Mr. Smith, nor the Treasurer of the Company, John F. Hemenway, alone could attend to all of the details and policies of the company's business, a division of the management of the company's business was agreed upon between said two officers: The President, Mr. Stimh, assuming charge of the manufacturing and selling operations, and the Treasurer, Mr. Hemenway, assuming charge of all of the financial and office detail; that pursuant to this arrangement, for several years your petitioner, Mr. Smith, has been attending to the phases of the work so assumed by him, but the Treasurer has failed to fulfill the duties so assumed by him; that the result is that the duties of the Treasurer have not been adequately performed; that such failure has repeatedly resulted in the President being unimformed as to the financial status of the company, the amount of cash on hand, unused borrowing capacity and productions costs, by reason whereof the Petitioner has been obliged to conduct the company's operations to a large extent, blindly; that it is a physical impossibility for the petitioner, Mr. Smith, to perform both his own and the Treasurer's duties; and this in turn has resulted in depleting the surplus of the company to a point where it now has insufficient working capital to enable it to conduct its business to the best interests of the stockholders; that owing to the equal division of the stock-

holdings and the Board of Directors, it has been impossible to elect a new Treasurer who will function and to make any changes in the Board of Directors.

5. That due to the failure of the Treasurer from time to time to keep the Petitioner, Mr. Smith, informed as to the state of the company's finances and with facts and figures relative to the cost of conducting the business, your Petitioner has been obliged to expend the corporate funds for corporate purposes in ignorance of the exact financial condition of the company and without definitely knowing whether such expenditures would or would not unduly encroach upon the company's liquid funds; and that due to the Treasurer's failure to function, the company has never had a budget laid out, in spite of the fact that the company's interests demanded it and in spite of constant efforts on the part of the Petitioner to obtain it.

6. That after a number of years of persistent effort on the part of your Petitioner, Mr. Smith, he succeeded in getting the Treasurer to agree to appoint the superintendent and the general manager of the office, as a committee to carry into effect plans and policies to be laid down by the President and the Treasurer, who were to furnish a budget as a guide for the President and Committee in conducting the company's business; that this agreement was made on September 16th, 1924, between the President and the Treasurer of the company; that pursuant to this agreement, the

first meeting was held September 19th, 1924, and the second meeting on September 23rd, 1924, and the third meeting on September 30th, 1924; that since that time meetings were discontinued, due to the fact that your Petitioner, Mr. Smith, was unable to get the Treasurer to attend same; that the result has been that no budget plans have been adopted, and large sums of money have been expended without due regard to the amount of the funds of the company available.

7. That experience has taught your petitioners that if this condition of affairs cannot be relieved, it is eventually bound to cause a serious financial loss to the corporation; that without your Petitioner, Mr. Smith, the business cannot go on and that if due to illness, or if for any other cause he could not give his continuous peronal attention to it, serious and irreparable losses to the corporation would immediately result, as the Treasurer, due to his age and his unfamiliarity with the working details of the company's operations in respect to production and selling, and his apparent lack of interest therein, would be unable to carry it on successfully; and that the continuance of the business under such circumstances seriously jeopardizes the interests of all concerned.

8. That on the comparately few occasions when the Treasurer comes into contact with the company's customers and employees, his attitude and conduct toward them is such that they are almost invariably antagonized, by reason whereof the

company has lost valuable customers and the morale of the employees has been seriously injured.

9. That all efforts on the part of one of the said interests to induce the other to cooperate in the furtherance of the charter purposes of the corporation have failed, and instead of cooperating, the said other interest has successfully prevented the regular conduct of the business of the corporation and still continues to prevent the same.

10. That the principal office of the said corporation is located at No. 261 Broadway, in the Borough of Manhattan, New York City.

11. That your petitioners have hereunto annexed and made a part of this petition a schedule marked "A" containing a statement of the matters required by Chapter 23, Article 9, Section 174 of the Consolidated Laws, as far as your petitioners know, or have the means of knowing the same.

12. The purposes for which this corporation was organized were to buy, sell, manufacture and deal in hardware, cutlery, hardware specialities, appliances and supplies pertaining to the hardware trade, and any and all appliances involving the use of electricity and to acquire and take over the business theretofore conducted by Smith & Hemenway Company, a West Virginia corporation.

13. The present authorized capitalization of the company is $600,000 consisting of 500 shares

of Class A preferred stock of a par value of $100. per share, 500 shares of Class B preferred stock of a par value of $100. a share, 2,000 shares of Class A common stock of a par value of $100. a share, 1,000 shares of Employees' preferred stock of a par value of $100. per share.

14. That the Board of Directors consists of four members, divided into two classes, namely Class A directors and Class B. directors; that by the Certificate of Incorporation and/or by-laws, the Class A. directors are voted for and elected exclusively by the holders of the Class A. common and Class A. preferred stock; that the Class B. directors are voted for and elected exclusively by the holders of the Class. B. common and Class B. preferred stock; that neither Class A. common nor Class A. preferred stock has any vote whatever for Class B. directors, nor Class B. common nor Class B. preferred stock for Class A. directors; that with the exception of twenty (20) shares of Class A. common stock and twenty (20) shares of Class B. common stock, all of the Class A. common stock and Class A. preferred stock is owned by your Petitioners, and that all of the Class B. common and Class B. preferred stock is owned by John F. Hemenway and Alice M. Hemenway on the other hand, have an equal and unbreakable stock and directorate control of the company.

WHEREFORE, your Petitioners pray for a final order of this court dissolving the said cor-

poration, and for an injunction restraining the institution and prosecution of any action at law against it, and for such other and further relief as may be just and proper.

Dated New York, Dec. 1, 1925.

LANDON P. SMITH,
J. MILDRED SMITH,
Petitioners.
JULIA MILDRED SMITH,
Petitioners.

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

JULIA MILDRED SMITH, being duly sworn, deposes and says that she is one of the petitioners in the above entitled proceeding; that she has read the foregoing petition and knows the contents thereof; that the same is true to her own knowledge, except as to the matters alleged on information and belief, and that as to those matters she believes it to be true.

JULIA MILDRED SMITH.

Sworn to before me this
21st day of September, 1925.
Etta C. Grosch,
A Notary Public of N. J.

Complainant's Exhibits.
Exhibit C-46.

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

LANDON P. SMITH, being duly sworn, deposes and says that he is one of the petitioners in the above entitled proceeding; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters alleged on information and belief, and that as those matters he believes it to be true.

LANDON P. SMITH.

Sworn to before me, this
21st day of September, 1925.
Etta C. Grosch,
A Notary Public of N. J.

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

I, John H. Scott, Clerk of the county of Essex (and also Clerk of the Circuit Court and Court of Common Pleas, the same being Courts of Record of the aforesaid County, having by law a seal)

Do hereby certify, That ETTA C. GROSCH, Esquire, whose name is subscribed to the attached

certificate of acknowledgement, proof or affidavit, was at the time of taking said acknowledgement, proof or affidavit, a Notary Public, duly commissioned and sworn and residing in said State, and was, as such Notary Public, an officer of said State duly authorized by the laws thereof to take and certify the same, as well as to take and certify the proof and acknowledgement of deeds for the conveyance of land, tenements or hereditaments, and other instruments of writing to be recorded in said state, and that the said acknowledgement is duly executed and taken according to the laws of said state, and that full faith and credit are and ought to be given to his official acts; and I further certify that I am well acquainted with his handwriting and verily believe that the signature to the attached certificate is his genuine signature. And I do further certify that the impression of the seal of such Notary Public is not required by the laws of this State to be filed in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, this 22 day of Sept. A. D. 1925.

JOHN H. SCOTT,
Clerk.

Complainant's Exhibits.
Exhibit C-47.

EXHIBIT C-47.

NOTICE.

SUPREME COURT—New York County.

In the Matter of the Voluntary Dissolution

-of-

Smith & Hemenway Company, Inc.

SIR:

PLEASE TAKE NOTICE, that upon the petition of LANDON B. SMITH, and JULIA MILDRED SMITH, two of the directors of Smith & Hemenway Company, Inc., and owners of one-half of the entire stock of said corporation having a voting power in the management thereof, and the schedule thereto annexed, copies of which are herewith served upon you, we shall apply at a Special Term, Part II of the Supreme Court, New York County, to be held in and for the County of New York, at the County Courthouse in the Borough of Manhattan, City of New York, on the 25th day of September, 1925, at 2:00 P. M., for an order requiring all persons interested in said corporation to show cause why the said corporation should not be dissolved and an injunction granted against the institution or prosecution of any action against

---

said corporation, a copy of which proposed order is served upon you herewith.

Dated, New York, September 14th, 1925.

Yours, etc.,

O'BRIEN, MALEVINSKY & DRISCOLL,
Attorneys for Petitioners,
Office & P. O. Address,
No. 152 West 42d Street,
Manhattan Borough,
New York City.

To:
Albert C. Ottinger, Esq.,
Attorney General.

EXHIBIT C-48.

ORDER.

At a Special Term, Part II of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City, County and State of New York, on the 19th day of November, 1925.

Complainant's Exhibits.
Exhibit C-48.

Present: Hon. John Ford,
Justice.

In the Matter of the Voluntary Dissolution

-of-

Smith & Hemenway Company, Inc.

Upon reading and filing the petition of Richard J. Mackey, verified November 18th, 1925, whereby it appears that the petitioners in this proceeding desire to amend nunc pro tunc the order to show cause made by Mr. Justice Wasservogel on September 26th, 1925, so as to provide that the date of hearing therein be changed from November 25th, 1925 to January 25th, 1926, and upon proof of due service of said petition under the Attorney General;

NOW, upon motion of O'BRIEN, MALEVINSKY & DRISCOLL, attorneys for the petitioners, it is hereby

ORDERED, that the order to show cause instituting the above entitled proceeding be and the same hereby is amended nunc pro tunc so as to change the date of hearing noticed before Charles L. Hoffman, Esq., as Referee, for November 25th,

1925, at 2 o'clock in the afternoon, to January 25th, 1926, at the same time and place.

Enter.

JOHN FORD,
J. S. C.

Filed Nov. 24, 1925.
Co. Clerk's Office.

SUPREME COURT:—New York County.

In the Matter of the Voluntary Dissolution

-of-

Smith & Hemenway Company, Inc.

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

The petition of RICHARD J. MACKEY, respectfully shows and alleges:

FIRST: Your petitioner is a counsellor at law of the State of New York, associated with the firm of O'Brien, Malevinsky & Driscoll, attorneys for the petitioners in the above entitled proceeding.

SECOND: That on September 26th, 1925, an order to show cause was duly made and entered in this proceeding whereby it was provided that all persons interested in the said corporation show cause before Charles L. Hoffman, Esq., of No. 141 Broadway, as Referee, at his office at the above

address on November 25th, 1925, at 2 o'clock in the afternoon, why the said corporation should not be dissolved.

THIRD: That said order likewise provided that a copy thereof be published at least once a week for three weeks immediately preceding the time fixed for showing cause, in the New York Law Journal, and the Statute governing the action provided that a copy of such order be personally served upon or mailed to each of the creditors and stockholders of the corporation sought to be dissolved.

FOURTH: The said order has not been published or mailed to any one and on account of the preparation of proof for the hearing, the petitioners have been unavoidably delayed in proceeding. However, the petitioners intend to hold the hearing in regular form and hereby ask that the said order to show cause of Justice Wasservogel be amended nunc pro tunc so as to change the date fixed for the hearing from November 25th, 1925, at 2 o'clock in the afternoon to January 25th, 1926, at 2 o'clock in the afternoon. This change will enable the petitioners to make service required by publication and will not harm any one interested in the proceeding.

WHEREFORE, your petitioner prays that an order be made, amended nunc pro tunc the order to show cause of Mr. Justice Wasservogel, made on the 26th day of September, 1925, in this proceeding so as to provide that all persons interested in said corporation show cause before

Complainant's Exhibits.
Exhibit C-48.

Charles L. Hoffman, Esq., of 141 Broadway, who is hereby appointed Referee for that purpose, at his office, 141 Broadway, in the Borough of Manhattan, City of New York, on the 25th day of January, 1926, at 2'clock in the afternoon, why said corporation should not be dissolved, instead of on the 25th day of November, 1925, at 2 o'clock in the afternoon, and for such other and further relief as may be proper.

Dated, N. Y., Nov., 1925.

Approved Charles L. Hoffman, Referee.

(Nov. 19th)

Nov. 1925.

RICHARD J. MACKEY,
Petitioner.

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

RICHARD J. MACKEY, being duly sworn, deposes and says that he is the petitioner in the foregoing petition; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

RICHARD J. MACKEY.

Complainant's Exhibits.
Exhibit C-70.

Sworn to before me, this
18th day of November, 1925.
Lillian E. McMahon,
Notary Public.

EXHIBIT C-70.

Irvington, N. J. July 6th, 1923.

John Drake,
West Orange, N. J.

Dear Sir:

In consideration of your promise to us, the giving of which we hereby acknowlege, to devote your efforts to purchase from us and/or sell for us, the entire capital stock of the Smith & Hemenway Company, for the sum of $500,000.00.

We agree to grant and hereby grant to you, the right to purchase from us and/or sell for us, the entire capital stock of the Smith & Hemenway Company, for the sum of $500,000.00, for and during a period of ninety (90) days from the date of this letter.

Very truly yours,

Complainant's Exhibits.
Exhibit C-71.

EXHIBIT C-71.

4-25-24.

AGREEMENT.

(Duplicate)

THIS AGREEMENT made and entered into by and between

LANDON P. SMITH, of Newark, New Jersey, party of the first, JULIA MILDRED SMITH, of Newark, New Jersey, party of the second part, JOHN F. HEMENWAY, of the City of New York, party of the third part, and ALICE M. HEMENWAY, of the City of New York, party of the fourth part, WITNESSETH:

RECITALS.

At the time of the signing, sealing and delivering of this agreement, the party of the first part is the owner of four hundred and ninety-nine (499) shares of Class A preferred and two hundred and twelve (212) shares of Class A common stock of Smith & Hemenway Company, Inc., the party of the second part is the owner of one (1) share Class A preferred and twelve hundred and thirty-eight (1238) shares of Class A common stock of Smith & Hemenway Company, Inc.; the party of the third part is the owner of four hundred and ninety-nine (499) shares of Class B preferred and two hundred and twelve (212) shares of Class B common stock of Smith & Hemenway Company,

Complainant's Exhibits.
Exhibit C-71.

Inc., and the party of the fourth part is the owner of one (1) share of Class B preferred and twelve hundred and thirty-eight (1238) shares of Class B common stock of said company.

Smith & Hemenway Company, Inc. is a New York corporation and the stocks hereinabove referred to are the only classes of stock of the company which have the privilege of voting. The company has also authorized the issuance of One thousand shares of the par value of One hundred Dollars each of employees' preferred stock, which has no voting power excepting in certain statutory proceedings.

It is the intention of the parties hereto to enter into an agreement which shall provide in effect for the acquiring of one another's stock upon the happening of certain events and this agreement is understood to be made for the mutual benefit of all the parties hereto.

NOW, THEREFORE, for and in consideration of the sum of one dollar by each of the parties to the other in hand paid, the receipt whereof is hereby acknowledged, and the mutual covenants herein contained, it is agreed between the parties hereto as follows:

I. The party of the first part represents and agrees that he has or fourthwith will properly and duly make and execute a last will and testament, or a codicil to an existing will, which provides or will provide, in addition to such other provisions as the party of the first part may desires, that he

gives and bequeaths upon his death all of his stockholdings of any kind or nature in Smith & Hemenway Company, Inc., to his wife, Julia Mildred Smith absolutely for her sole use and benefit but subject to the terms of this agreement.

The party of the second part represents and agrees that she has or forthwith will properly and duly make and execute a last will and testiment, or a codicil to any existing will, which provides or will provide, in addition to such other provisions as the party of the second part may desire, that she gives and bequeaths upon her death all of her stockholdings of any kind or nature in Smith & Hemenway Company, Inc. to her husband, Landon P. Smith, absolutely for his sole use and benefit but subject to the terms of this agreement.

The party of the third part represents and agrees that he has or forthwith will properly and duly make and execute a last will and testament, or a codicil to any existing will, which provides or will provide, in addition to such other provisions as the party of the third part may desire, that he gives and bequeaths upon his death all of his stockholdings of any kind or nature in Smith & Hemenway Company, Inc. to his wife, Alice M. Hemenway, absolutely for her sole use and benefit but subject to the terms of this agreement.

The party of the fourth part represents and agrees that she has or forthwith will properly and duly make and excecute a last will and testament, or a codicil to any existing will, which provides

or will provide, in additions to such other provisions as the party of the fourth part may desire, that she gives and bequeaths upon her death all of her stockholdings of any kind or nature in Smith & Hemenway Company, Inc. to her husband, John F. Hemenway, absolutley for his sole use and benefit but subject to the terms of this agreement.

II. It is understood and agreed that the four preceding paragraphs are made for the benefit of all the parties to this agreement and for the purpose, among other things, of making effiective the provisions hereinafter contained and are a condition precedent to the making of this agreement. It is further understood and agreed that the provisions contained in the four preceding paragraphs may be enforced by any of the parties hereto.

III. For the purpose of this agreement, the stock owned by the parties of the first and second parts shall be designated as "Group A" stock, and the stock of the parties of the third and fourth parts shall be designated as "Group B" stock. Upon the death of either the party of the first or second parts the survivor of them shall be and is hereinafter referred to as the "evenual owner" of the "Group A" stock. Upon the death of either the party of the third or fourth parts the survivor of them shall be and is hereinafter referred to as the "eventual owner" of the "Group B" stock.

IV. It is agreed between the parties hereto that in the event of the death of the party of the

first part prior to the death of the party of the third part, the party of the third part, and also the party of the fourth part if living, agree to purchase, and the "eventual owner" of the "Group A" stock (or in the event that Landon P. Smith has become the "eventual owner", then his estate) agrees to sell all of the "Group A" stock at the price and upon the terms and conditions hereinafter set forth, and in the event that the party of the third part shall predecease the party of the first part, then the party of the first part, and also the party of the second part if living, agrees to purchase, and the "eventual owner" of the "Group B" stock (or in the event that John F. Hemenway has become the "eventual owner", then his estate) agrees to sell all of the "Group B" stock at the price and upon the terms and conditions hereinafter set forth.

V. The value of the stock for the purpose of purchase and sale, as described in the last preceding paragraph, shall be as follows: The value of preferred stock of either group shall be taken at par, plus an amount representing six (6%) per cent. interest from the date of the dividend last paid on the preferred stock up to the date of purchase, the date of purchase for the purpose of this agreement meaning the date on which the notes hereinafter provided for are delivered to the "eventual owner." The value of common stock of either group shall be ascertained as follows: Inventories of the affairs of the company,

showing its assets and liabilities, shall be taken annually as of the 31st day of December in each year and after each such stocktaking each of the parties hereto will affix his or her signature thereto. For the purpose of this agreement the good will of the corporation shall not be considered as an asset. After deducting from the net assets the value of the preferred stock as hereinabove set forth, and the par value of any employees' preferred stock issued and outstanding, at par, plus an amount representing seven (7%) per cent. cumulative interest thereon from the date of the last dividend paid thereon, and after also deducting proper reserves for taxes, State and Feredal, the balance shall be divided by the total number of issued and outstanding Class A and Class B common stock, to arrive at the value of each share of the common stock, and the amount thus determined as the value of each share of common stock shall be considered as the value per share for any and all purposes provided for herein. As above ascertained, the value of said common stock on the stocktaking last preceding the death of the party of the first or third part, as the case may be, shall be the value of the common stock for the purposes of this agreement, provided, however, that any dividends that may have been paid after said stocktaking out of the profits of the prior year's earning should first be deducted from the net assets as above ascertained.

VI. The party of the first part (and the party

of the second part if living) or third part (and the party of the fourth part if living), as the case may be, shall purchase all of the "Group A" or "Group B" stock, as the case may be, upon the following terms: Ten (10%) per cent of the value thereof shall be paid in cash within sixty days after the qualification of an executor or administrator of the estate of the party of the first or third part, as the case may be, and coincident therewith there shall be turned over to the seller the purchaser's or purchasers' joint ten non-negotiable promissory notes representing the balance of the purchase price, payable in ten equal annual installments, each bearing interest at the rate of five (5%) per cent. per annum, payable semi-annually, from the date of purchase as above defined. Nothing herein contained, however, is to prevent the purchaser from anticipating payment of any of the notes. Until all of said notes shall have been paid in full with interest, the seller shall hold the stock sold and the same shall remain in the possession of the seller, and the seller shall vote the same and have all the privileges of ownership excepting that dividends declared and paid on any such stock shall be credited on the note or notes next due. Upon the payment of the entire purchase price with interest the stock of the seller, properly endorsed, shall be turned over to the purchaser with all stamp taxes, if any, paid thereon. In the event that any of said notes shall not be paid with interest within ten days after the same become due, the seller shall, at his

or her option, upon ten days prior notice in writing to the purchaser, served either personally or by registered mail, addressed to the last known post office address of the purchaser, declare all of the unpaid notes due and payable and shall have the right to sell all of the stock so held by him or her, at public or private sale, at the best price obtainable, and shall credit the price obtained therefore, less the expense of sale, on said notes and interest thereon, and should the amount realized on any such public or private sale exceed the balance due on the said notes with interest, such excess, if any, after deducting all expenses of sale, shall be turned over to the maker of said notes.

For the purposes of this agreement it is provided that in the event that the party of the first part shall predecease the party of the second part that the party of the second part shall be considered the seller, and in the event that the party of the first part shall survive the party of the second part the estate of the party of the first part shall be considered as the seller. For the purposes of this agreement it is provided that in the event that the party of the third part shall predecease the party of the fourth part that the party of the fourth part shall be considered the seller, and in the event that the party of the third part shall survive the party of the fourth part the estate of the party of the third part shall be considered as the seller.

Complainant's Exhibits.
Exhibit C-71.

VIII. None of the parties, during the term of this agreement, will sell, transfer, mortgage, pledge, exchange, hypothecate or otherwise dispose of or encumber his or her shares of stock in the corporation excepting as hereinafter provided, without the consent in writing of the other parties to this agreement, and each of the certificates of stock held by the respective parties hereto, except as hereinafter provided, shall bear an endorsement worded as follows: "Subject to the terms of an agreement made between the stockholders the 9th day of June, 1924". Nothing herein contained, however, shall be construed as preventing a sale or transfer between the parties hereto, one to the other. It is further understood and agreed that the holders of the "Group A" stock and "Group B" stock may transfer to outsiders portions of their stock, provided that at all times the parties hereto of each group shall retain and own a sufficient number of shares to constitute a majority of the voting stock of the class of stock owned by them, and that as to those portions of stock actually sold and transferred the terms of this agreement are waived. It is further understood and agreed that the holders of the "Group A" stock and the Group B" stock may pledge or hypothetecate to outsiders shares of stock, provided that at all times the parties hereto of each group shall retain and own, unencumbered, a sufficient number of shares to constitute a majority of the voting stock of the class of stock owned by them. Said pledged

stock, however, shall be subject to the provisions of this agreement as to purchase and sale by and between the parties hereto provided said pledge stock will be redeemed and become available for sale to the purchaser. For the purpose of making provision for the foregoing exceptions to the application of the terms of this agreement as to selling, transferring, mortgaging, pledging, exchanging, hypothetcating or otherwise disposing of or encumbering shares of stock, five hundred (500) shares of "Group A" stock and five hundred (500) shares of "Group B" stock shall not be endorsed subject to the terms of this agreement.

VIII. In the event of the purchase and sale of any of the stock as provided in paragraphs IV, V and VI, it is understood and agreed that should the corporation become liable for the payment of any monies, which liability was not set up on the books as of December 31st preceding the death but which had accrued at that time, the value of the shares of stock shall be reduced proportionately and the purchaser receive proportionate credit on all unpaid notes, and, per contra, should any of the reserves for taxes set up on said December 31st stocktaking be not actually expended, or the company receive any asset not set up but to which they would have been entitled at that time, the seller shall receive his proportionate credit therefor and to the extent of such proportionate credit the sale price of the stock

aforesaid shall be increased and the purchaser agrees to give his or their non-negotiable promissory notes for such additional purchase price, payable in equal installments, due respectivly on the same dates as the balance of the notes unpaid, given for the original purchase price.

IX. In the event that any of the stock of either group should be sold at public or private sale upon a default, as provided in paragraph VI, the stock so sold at public or private sale shall be sold free of the terms of this agreement, and the party hereto selling said stock at public or private sale, or the purchaser thereof upon any such sale, shall be entitled to new certificates free from any endorsement to the effect that such stock is subject to the terms of this agreement. Such public or private sale shall in no way affect the liability of the party or parties hereto who are in default.

X. If any paragraph of this agreement, or provision hereof, shall be illegal or unenforcible at law or equity, the remainder of this agreement and/or other provisions thereof shall remain unaffected and shall not be invalidated.

XI. A waiver of any of the provisions of this agreement in any one or more instances shall constitute a waiver of that provision in that instance only and shall not be considered as a general waiver of any such provision or provisions.

XII. The within agreement and all the provisions hereof and the rights of the parties hereunder shall be construed in all things and in all

particulars according to the law of the State of New York.

XIII. This agreement shall be binding upon and enure to the benefit of the parties hereto, their executors, administrators, legal representatives and assigns.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the 9th day of June, 1924.

In presence of
M. B. Cohn,

LANDON P. SMITH (L.S.)
J. MILDRED SMITH (L.S.)
JOHN F. HEMENWAY (L.S.)
ALICE M. HEMENWAY (L.S.)

New Jersey Court of Errors And Appeals.

Alice M. Hemenway, individually and as executrix of the last Will and Testament of John F. Hemenway, deceased, *Complainant,* *-and-* Landon P. Smith, et al., *Defendants.*	*On Appeal from Court of Chancery.*

BRIEF FOR COMPLAINANT-APPELLANT.

STATEMENT OF CASE.

This is an appeal from a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 26th day of June, 1928, adjuding that the Bill of Complaint filed in the above entitled cause be dismissed; that the *lis pendens* filed in connection therewith be discharged and concelled of record and awarding costs to the defendants.

New Jersey State Library

The Bill was filed to rescind a sale by Alice M. Hemenway and John F. Hemenway of one-half of the capital stock of Smith & Hemenway, Inc., a New York Corporation, to the defendants for the sum of One Hundred Twenty-Five Thousand Dollars ($125,000.00) on the ground that the same was procured by fraud and deception of the defendants and by a course of conduct by them including trickery, bad faith and abuse of the New York Statutes, and process, all amounting to duress.

FACTS.

Mr. Hemenway and Mr. Smith had been associated in business together in two enterprises since 1898, when their combined capital was between $10,000.00 and $11,000.00. Without the addition of any outside capital, their business had increased until on June 30, 1925, the corporation of Smith & Hemenway, Inc., had a net worth, exclusive of good-will, trade name, etc., of $409,711.77. This represented accumulations of profits during the period indicated and was in addition to substantial salaries and dividends which Mr. Smith and Mr. Hemenway had drawn from the company. (Book, page 726).

The stock of the corporation was equally divided between Hemenway and his wife and Smith and his wife.

On June 9, 1924, a stockholders agreement was entered into under the provisions of which the Smiths and Hemenways could sell the interests of the business only to each other and in the event of death of one, the survivor agreed to buy the share of the deceased at the book value as shown by the company's statement. That agreement was never rescinded or cancelled unless it was superceded by the agreement which is the subject of this suit. (which is not determined by the learned Chancellor in his decision). By its terms, the agreement of June 9, 1924, was to be construed in all respects according to the laws of the State of New York.

The defnedant, Landon P. Smith, was President of the corporation and a Director therein while Mr. Hemenway was Treasurer and also a Director maintining a New York office and having charge of the finances of the company. (Book, page 727).

In the Spring of 1925, the Crescent Tool Company, a New York Corporation of Jamestown, N. Y., was in the market for the purchase of a business similar to the tool business of the Smith & Hemenway Company, having attempted in January preceding to purchase the Utica Drop Forge & Tool Company, a competitor of Smith & Hemenway, Inc. Pages 270-271. This fact was well known in the trade generally, the Crescent Sales Manager having discussed it with traveling men in the same line throughout the territory. Page

272. D. G. Smith, brother of the defendant was Sales Manager of Smith & Hemenway, Inc., and frequently met the Crescent Sales Manager, saw him probably about March or April, 1925. Page 270. Early in April, 1925, Smith sent for Hemenway to meet him at his, Smith's home, with his, Smith's attorney. Smith said he was sick, was going to quit the company, his health was more to him than the Smith & Hemenway business. He had boils, he wanted to sell and would let Hemenway fix the price. Pages 175-76-77. Smith said, "I am ready to either buy or sell and I will let you fix the price." Page 177. Smith's attorney submitted a proposed agreement for Smith to purchase the Hemenway interest at One Hundred Thousand Dollars ($100,000.00). Hemenway's lawyer, however, using the Smith contract, reversed the names and drew a contract whereby Hemenways were to purchase. The parties met at the office of Smith's attorney, one Ischerwood, April 13, 1925. Smith refused to sell. He was willing to buy but would not sell. Mrs. Hemenway called attention to a converence between the Smiths and Hemenways at which she had complained of the unfairness of the agreement and at which Mr. Smith made the statement that he would sell. Smith said he had changed his mind. Page 84-85. Smith did not deny the statement that he had agreed to sell under the terms contained in the agreement. Mrs. Hemenway criticised the offer of One Hundred Thousand Dollars ($100,00.00) at which Smith wanted to buy and

her attorney, Cohn, attempted to get Smith to increase his offer but without success. Page 87. That Smith wanted to buy and not to sell and that his statement that he was willing to do either was made in bad faith and with no intention to go through unless he could purchase is plainly evident.

Having failed to buy Hemenway's share, Smith threatened that if Hemenway refused to sell, that he would institute proceedings in New York State for the dissolution of the company. (Book, page 728). In that connection, Smith stated to Hemenways that in the event of dissolution neither side would get very much and he believed that if the dissolution proceedings, involving a receivership went on, that there would be very little left to divide between the partners. Page 532. In connection with this threat to dissolve the company and cause Hemenway a loss of the greater part of his life's earnings if he should refuse to sell, Smith had his attorney, Burnett, on July 1st, write that inventory had been taken and that a preliminary estimate would show a loss of Twenty-Five Thousand Dollars, ($25,000.00) in the preceding six months operations. (Ex. C-10). In that letter, an ultimatum was delivered to Hemenway that if he did not accept Smith's offer of One Hundred Thousand Dollars($100,000.00) by July 6th, that the proceedings for dissolution would go on and that Smith would not buy on any conditions (Ex. C-10).

Instead of showing a loss of Twenty-Five Thousand Dollars ($25,000.00), the company showed a gain of Twenty-Five Thousand Dollars ($25,000.00). Page 514. The surplus was increased by Eight Thousand Dollars ($8,000.00) after charging off over Nine Thousand Dollars ($9,000.00) from the inventory. There was a total net gain for the six months period of Seventeen Thousand Six Hundred Sixty Dollars and Thirty-Two Cents ($17,660.32). Pages 525-526.

Hemenway, having refused to bend under the threat of ruin and having failed to be convinced by the misrepresentation as to the company's condition, would not sell.

Already an old man, harrassed by the assault upon his half interest in the company, he became ill with pneumonia. Seizing upon the illness of his partner, Smith with-held from Hemenway and his attorneys, the balance sheet which Hemenway's attorney Cohn asked for by letter August 7th. (Ex. C-18). No copy of the financial statement was ever furnished so far as appears.

On September 28th, the Hemenways having continued to refuse to sell, Smith filed a verified petition for dissolution of the corporation in the Supreme Court in New York City, procured a Referee to be appointed to hear the matter on November 25th, the return day thereof. No copies of the papers were ever served on the Hemen-

ways or delivered to Mr. Cohn, their counsel although Cohn, by request in writing, (Ex. C-20) asked for copies of the papers. Page 102. While the New York Statute required service of the papers on Mr. and Mrs. Hemenway, Smith's New Jersey Lawyer instructed New York Counsel to furnish copies of the papers only upon payment therefor. He said they would have been obliged to pay Two Hundred Dollars ($200.00) for outside stenographic services. Page 306. At this time, Mr. Hemenway's condition was very bad; he was pasty, white, unsteady and worried about himself. Dr. Kenyon, a niece, said he should have someone with him all the time. She examined his heart and say an X-ray of it later. There was an enlargement of the heart, the beats were far apart and abnormal. Any excitement or worry was likely to produce sudden death. Three months later he was dead of this condition. Page 141. On the day an article appeared in the New York Times concerning the filing of dissolution proceedings, he lost consciousness at the factory; was extremely weak and very much worried. Page 148. Mrs. Hemenway and a nephew, Eldon Hemenway, went to New Jersey, saw Smith, saw his lawyer Burnett, stated that Hemenway was ill; asked Smith why he had broken his promise to Mr. Hemenway that he would with-hold forcing the issue until the first of the year. Smith refused to discuss the matter, saying it was in his lawyer's hands but did discuss the fact that continuance of the procedings would wreck the business and

neither would get a substantial sum out of it, remarking that he had been bankrupt twice in his life and could be so again. Pages 151-152. Smith's Testimony 476-477. They arrived at Burnett's office, the latter said "Mrs. Hemenway's Jew Lawyer evidently thought they were bluffing". Page 153. He gave them 10 days to make some settlement. Smith said he would not sell. Pages 154-155.

The dissolution proceedings in New York City, were based on various charges against Hemenway which we will discuss under the points herein, all of the charges being without foundation. As to this phase of the case, the learned Chancellor in his Book, page 728, says:

> **"Without going into the evidence in detail, I may say that Smith's charge of inattention to business by Hemenway is not supported by any substantial evidence and I find as a fact that there was no dereliction of duty on the part of Hemenway."**

On October 6th, Burnet wrote Cohn, Ex. C-21, stating that he was afraid that the Hemenways had construed his attempts at an amicable settlement as a confession of weakness; that the dissolution proceedings would go on unless negotiations were resumed for settling it, and stated that Mrs. Hemenway and her nephew had stated that there would be a great loss to both Mr. Hemenway and

Mr. Smith if the dissolution proceedings went on. Burnett then said that if the Hemenways wished to settle amicably and **before further damage was done to the business, by publication and notices to creditors,** that an offer from Hemenways must be in his hands by Thursday, October, 15th, saying that under no circumstances would he delay the hearing or any of the preliminaries.

In this same letter, Exhibit C-21, Burnett states that his client will not make an offer to buy or sell; states that he denied to Mr. Hemenway's nephew, in the presence of Mrs. Hemenway, that he had said that Mr. Smith would not consider any offer for sale of his holdings. Page 585. This in the face of his letter to Mr. Cohn, Ex. C-13 (page 577) in which he said:

> "Mr. Smith has no intention of selling and is entirely unwilling in view of his comparative youth as compared to Mr. Hemenway, to consider any proposition relating to selling. He is willing to buy on the trems stated in my letter of July 1st, but that is all."

He said that he had refused to make any proposition of buy or sell because it gave Hemenway the advantage of deciding which one to accept. He then delivered his ultimatum that an offer from the Hemenways must be in his hands not later than Thuresday, October 15th, stating that under no circumstances would he delay the hearing. In

answer to this document, Mr. Cohn in Ex. C-23, calls attention to Burnett's inconsistency in his communications with reference to a buy or sell proposition; states that a discussion on these points **"is immatrial at this time in view of the situation that has been created by the filing of this petition for dissolution;"** states that the prosecution of the proceedings will entail sacrifice and expense; states that **"in order to save the situation"** he is making the offer which is contained in the letter.

As we will point out, Mr. Hemenway did not wish to buy, particularly in view of his physical condition at the time of the forced "offer"; he was not in a position to do so. As we will show, neither side contemplated that Smith would sell. In replying to the "offer", Burnett made no mention of Hemenway's offer to buy but treated the transaction as only one to sell and refernce was made to that portion of the letter on the trial of the action, for the first time, so far as Smith is concerned.

The contract on the part of Hemenway to sell to Smith for One Hundred Twnety-Five Thousand Dollars ($125,000.00) part of which was taken in property, was made a few days thereafter and immediately Smith entered upon negotiations with the Crescent Tool Company which resulted in a sale of a part of the assets of the corporation for a sum almost equal to the book value thereof,

while retaining the most valuable part of the business. In other words, in the sale of Hemenway's share, of a part of the business, he received almost twice the amount which he paid therefor, and still retained the best portion. These matters will be further discussed with reference to the testimony under the points herein.

POINT I.

THE LEARNED CHANCELLOR ERRED IN HIS FINAL CONCLUSION THAT THE DISSOLUTION PROCEEDINGS WERE NOT THE COMPELLING INFLUENCE BEHIND THE TRANSACTION TO THE EXTENT OF RENDERING THE CONTRACT INVOLUNTARY ON THE PART OF THE HEMENWAYS AND IN HIS CONCLUSION THAT THE CONTROLLING FACT WAS THAT THE CONTRACT OF SALE WAS THE DIRECT RESULT OF A BUY OR SELL OFFER MADE BY HEMENWAY HIMSELF.

The learned Vice-Chancellor in his Book, page 728, finds that Smith:

> "refused to either continue in the business with Hemenway or sell but insisted upon buying Hemenway's share and threatened that if Hemenway refused to sell, proceedings for

> dissolution of the company would be instituted. Such proceedings, were actually instituted * * * **and, as a result of these proceedings, after Smith's refusal to submit a buy or sell proposition, Mr. Hemenway, through his counsel, under date of October 12th, submitted an offer."**

The learned Chancellor therefore holds that **the buy or sell offer was brought about by the proceedings** but also holds that **they were not "the compelling influence behind this transaction to the extent of rendering the contract involuntary."** Page 731, lines 13-17.

His conclusion is apparently due to his having lost sight of a part of the most important testimony. That the proceeding was the compelling influence he finds. His further finding **that the contract was not wholly involuntary is directly contrary to the undisputed evidence.**

The Court will search in vain for any testimony by any witness that the Hemenways were ever willing to sell. On the contrary they steadfastly refused until faced with ruin. This is clearly established by the evidence on both sides. The cold blooded artifice, misrepresentation, threats and misuse of the Statutes and Courts of New York State which culminated in forcing the Hemenways to sell their interest for a fraction of its value, must be almost without parallel in jurisprudence.

If these acts did not render the making of the contract involuntary, then we believe that duress, sufficient to defeat a wrong of this character, is imposible of proof. We respectfully call the Court's attention to the following propositions:

a. The "compelling influence" was the fact that all of the parties believed that ruin would follow the carrying on of the dissolution proceedings whether they eventually resulted in a dissolution of the Corporation or not.

b. The only benefit which Mr. Hemenway could have gained by contesting the proceedings would have been to make Smith suffer a loss equal to his own. Smith was determined that he would acquire the company for almost nothing or bankrupt both himself and his partner.

c. Hemenway's physical condition was such that under the undisputed evidence, he probably could not have lived to carry on the contest, and the excitement attendant thereon would have taken his life. What more compelling influence could be exerted upon Mr. Hemenway than the threat of financial ruin and death?

d. Mr. Hemenway's letter to his attorney, Mr. Cohn, Ex. C-27, was not an expression of satisfaction on the part of Mr.

Hemenway, but was a direction to his attorney to compel Smith at least to comply with the terms under which Mr. Hemenway was forced to sell out. The Hemenways continuously expressed dissatisfaction with the deal, and there is no evidence to the contrary in the record.

e. Nor did Hemenway have time for reflection or an opportunity to rescind, for the dissolution procedings were not discontinued until after the entire transaction was concluded and Hemenway was dead.

We will take up the evidence supporting the above propositions in order.

PROPOSITION A.

Smith, claiming that he was acting under advice of counsel, admits he represented to the Hemenways that in the event the company was dissolved, that neither side would get very much. Page 532, lines 11-14. He believed, himself, that neither side would get any substantial amount, i. d. lines 15-26.

That he urged this upon the Hemenways in his talks with Mrs. Hemenway and the two nephews, cannot be doubted, nor is it denied by him. He excuses himself by saying that it was by advice of counsel.

This threat of loss was present when Smith first attempted to trick the Hemenways into selling by representing that he, Smith, wanted to sell out. At that time we find Smith's attorney, Ischerwood, stating to Hemenway, pages 178-179, that failure of an agreement would wreck the concern. He said of Smith:

> "From the man's attitude it is apparent he is not going to stay in the business and it is simply going to wreck the concern if you are going to pull apart from each other."

This was impressed upon Mr. Cohn and he recognized that the dissolution of the company would greatly prejudice the stockholders as shown by his letter of August 7th, Ex. C-18. This was when Mr. Hemenway was too ill to be seen.

Up to that point, Ischerwood, Hemenway and Cohn were apparently agreed that dissolution proceedings would depreciate the holdings of both sides.

With Hemenway too ill to discuss the matter, Mrs. Hemenway and Eldon Hemenway visited Smith. It was stated by Mr. Smith and Mr. Eldon Hemenway that neither side would get much out of the company if the dissolution procedings went on. Page 152. They went to Burnett's office where the same proposition was discussed.

Burnett was then urging the resulting loss unless the Hemenways gave up their stock. In his letter of October 6th, Ex. C-21, he says:

> "It will probably mean a great loss to both Mr. Hemenway and Mr. Smith."

In this letter, Burnett points out that Mrs. Hemenway is impressed with the idea of loss.

The same letter also recites that further damage will be done to the business by publication and notices to creditors and if this is to be avoided that the Hemenways must make an offer not later than October 15th. All of the parties then had in contemplation the great loss to be sustained if the dissolution proceedings went on.

The day after this talk, Eldon Hemenway and Thomas Hemenway again went to Newark and saw Smith. Smith at that time said that there would be a serious loss if the proceedings went on. Page 174. That this was believed by Thomas and Eldon Hemenway also appears.

With all of the parties conceding that dissolution of the company meant wrecking the same; and with Hemenway in a critical condition, Burnett pressed the advantage in his letter of October 6th, Ex. C-21, in which he said to Cohn:

> "If it is still the wish of your clients to settle this matter amicably and before further damage is done to the business by publications

and notices to creditors, **it will be necessary that your offer be in my hands not later than Thursday October 15th. Under no circumstances will I delay the hearing or any of the preliminaries necessary thereto."**

In the same letter, Burnett said he was afraid they had construed his hope of effecting an amicable settlement as a confession of weakness. Page 586, lines 1-5, and he said to Mrs. Hemenway and Eldon Hemenway that:

> "Mrs. Hemenway's Jew Lawyer evidently thought they were bluffing; that they were not bluffing at all." Page 153, lines 10-14.

Nor did Burnett deny this while on the witness stand.

PROPOSITION B.

The learned Vice-Chancellor states that it is unnecessary for him to decide whether there was any valid ground for dissolution of the company. Pages 728-729. He does state, however, that the charge made against Hemenway of inattention to business is not supported by any substantial evidence and that there was no dereliction of duty on his part, Page 728, lines 27-32. He recognized that Hemenway would no doubt have succeeded had he been in a position to resist the attempt at dissolution and so indicates in his findings at page 732, lines 5-7 where he states the following:

"He might have resisted the attempt at dissolution had he been so minded and perhaps successfully."

The point is, however, that the appointment of the Receiver, asked for by Smith and notice to creditors, together with general publicity would seriously damage the business. The ultimate outcome was of no consequence except that Hemenway, by fighting the proceeding could have compelled Smith to take an equal loss with himself. As shown by our previous proposition, the defendants, through Mr. Burnett, were insisting that they would go through to the bitter end and under no circumstances would they let up or even grant any delay in any of the proceedings. Smith went so far as to say that he had been bankrupt twice and would be so again, if necessary, Pages 151-152 and 476-477.

Therefore, even if Hemenway had been a well man, his fighting the proceedings would not have resulted in any substantial gain to him. He was under the necessity of losing his money, anyway.

PROPOSITION C.

But the threat against Hemenway was even greater. The record overwhelmingly discloses the critical condition of his health. Even if he did not fight the proceedings, but let them go through to a conclusion, the worry and agitation probably

would kill him. Cohn, realizing this brought pressure to bear to compel Hemenway to sell in the hope of saving his life. Mrs. Hemenway was actuated by the same motive. Mr. Hemenway was worried about himself and was fully aware of the danger. Smith, his partner, seeking to rob him at the threshold of the grave, fully realized his condition and hypocritically said that he, Smith, was so worried about Mr. Hemenway that he walked the street nights thinking about him. Page 154, lines 13-21.

Eldon Hemenway told Burnett so that it was then that he put on the screws and insisted on closing the matter within ten days. Page 153, lines 20-33. Page 154, lines 6-21.

This threat against Hemenway's health was what induced Mrs. Hemenway to act. Page 101, lines 10-20. She so stated to the defendants. id. Cohn told Burnett that he had induced the Hemenways to sell out on account of Mr. Hemenway's ill health. Page 119, lines 17-18-19-20.

As we have pointed out, the compelling influence behind the sale by the Hemenways was this threat of ruin accompanied with the promise of almost certain death if Mr. Hemenway resisted. Smith and Burnett realized this beyond any question and inexorably forced the sale. Again we ask what more compelling threat could anyone have made against the Hemenways? An automatic

pressed into Hemenway's back by a gunman could not have been more "compelling".

We do not deem it necessary to review the considerable amount of testimony as to Hemenway's actual condition. We have pointed this out to some extent in the statement of facts. He died in the manner and of the ailment which was feared by himself, his wife, his attorney and his medical advisors.

Burnett, in his letter of November 2nd, Ex. C-35, objects to the payment of Hemenway's expenses to Atlantic City, saying:

> "As regards Mr. Hemenway's expense account, I say frankly to you that I do not think it is warranted **for everything that you have said and I have heard indicates that he is a very sick man and it would seem that his trip to Atlantic City was more for his own account than for the benefit of the firm."**

Mr. Cohn, in his letter Ex. C-33 of October 30th, to Burnett, page 610, states that Mr. Hemenway was unable to come to Cohn's office on account of his doctor's advice.

And on October 27th, Cohn, in his letter, Ex. C-31, page 604, wrote Burnett that the meeting of the Board of Directors to close the deal must be held in New York as Hemenway would be unable to take the trip to Newark without risk to his health.

PROPOSITION D.

Exhibit C-27, a personal letter from Hemenway to Mr. Cohn was accidentally marked in evidence. It was incompetent, had no place in the record and was only offered by mistake. Much has been made by the defense that this was an expression of satisfaction with the deal. The learned Vice-Chancellor seems to have misunderstood the letter. It appears from the letter written October 20th, that Smith was seeking greater leniency in the terms of payment of the small purchase price which he was giving to Hemenway. Hemenway said, page 598, lines 29-34:

> "I believe it would be unwise to meet any suggestion towards leniency in the terms for payment or otherwise.
>
> **Some of my friends** who know the man (let us call him Smith) **think he is** going to fall down and his effort is to gain time in which to manipulate matters, the assets, etc."

Hemenway was bitter at having been forced into this deal, not of his liking; did not wish to extend any leniency to enable Smith to manipulate the assets and make the $45,000.00 payment in cash. A fair reading of the letter indicates a hope that Smith will "fall down", and a direction that no further concessions be made.

The signed contract was delivered on November 1st. On November 4th the parties met in Cohn's office. Mrs. Hemenway criticized the entire transaction but Cohn told her that, having signed the agreement, she was obliged to go through with it. Page 98, lines 10-25. She said the property was worth much more than the book value, page 107, lines 27-30. Mrs. Hemenway accused Smith of underhanded motives and said the entire transaction was distasteful to her; was forced upon them. She asked if part of the plant was being sold to the Crescent people. Smith denied it. Page 100, lines 25-33. Page 101, lines 1-2. Mrs. Hemenway said to Mr. Smith that if it were not for Mr. Hemenway's health he would never sell; that the entire transaction had ruined his health. Page 100, lines 10-20. Smith denied that he had any negotiations with the Crescent Tool Company. Page 100, line 28. Page 102, lines 1-10. Cohn at that time told Burnett that the only reason the Hemenways were going through with the deal was on account of Hemenway's health. He said:

> "That was the inducing thing that compelled us to sign the agreement." Page 102, lines 10-17.

Cohn mailed Hemenway a General Release to be signed under the terms of the agreement but Hemenway did not sign. Page 102, lines 18-21.

While Smith now claims he answered truthfully the inquiry made to him about the Crescent transaction, in his answer he states that the contract

having been signed, he felt perfectly free to make any statement that he desired regardless of the facts. Again on December 9th, when the parties met in Mr. Cohn's office, Mrs. Hemenway was very despondent. Page 123, lines 14-15. Hemenway had failed and his condition was such that everyone could notice that he was not in good health on both November 4th and December 9th. Page 133.

PROPOSITION E.

The learned Vice-Chancellor in his final conclusions, page 731, lines 10-14, said:

> "I have not lost sight of the fact that the dissolution proceedings were not discontinued until after the contract of October 29, 1925, was executed."

As we have already pointed out, there was no change in Hemenway's condition of health for the better. He took almost no part in the discussions in Mr. Cohn's office, Mrs. Hemenway doing all of the talking. For him to have attempted to back out at that time or to fight the dissolution proceedings would have brought about the same result financially and physically as at any previous time.

The learned Vice-Chancellor erred in his finding on page 730 that:

> "Before the performance of the agreement which was entered into on October 29th, Hem-

enway had ample time for reflection and could, if he had been so minded, have rescinded the sale and stopped the dissolution proceedings."

There is no evidence in the record of any change in the conditions. It appears in evidence that the dissolution proceedings were simply adjourned. They were held over the Hemenways until the deal was consumated and Hemenway was dead. As we have pointed out he died on January 1st. The defendants can point to no evidence of any changed condition unless the nearing consumation of the Crescent deal late in December had been known to the Hemenways. That deal, however, was not closed until January 19, 1926, page 729, although negotiations were opened November 4th, the defendant declaring he first thought of selling to the Jamestown people when he talked to his brother two or three days previous to November 4th. Page 550. He had consistently denied any such negotiations to the Hemenways under his claim it was none of their business.

Mature reflection could only impress more strongly upon Mr. Hemenway, the danger to his health if any move were made. There was never any loosening of the bonds by Smith insofar as appears in the record. The dissolution proceedings have never been discontinued in New York although, of course, no further move was made after the Hemenways capitulated. They were only

held as a continuing threat until Smith had secured to himself all the advantage of this ruinous deal with Hemenway.

POINT II.

THE DISSOLUTION PROCEEDINGS WERE BROUGHT IN NEW YORK IN BAD FAITH AND ON A FALSE PETITION BY THE DEFENDANTS IN DIRECT VIOLATION OF THEIR DUTIES AS STOCKHOLDERS, OFFICERS AND DIRECTORS OF THE CORPORATION. THERE WAS NO VALID GROUND FOR DISSOLUTION AND THE PROCEEDINGS CONSTITUTED A MISUSE OF THE NEW YORK STATUTES AND COURTS FOR THE PURPOSE OF ACCOMPLISHING A FRAUD.

The Corporation Law of the State of New York and the decisions of the New York Courts involving the questions here presented were stipulated in evidence. Pages 255-563.

The Smith & Hemenway Company was a New York Corporation; the proceedings for dissolution were filed in Supreme Court in New York State and the New York Law is controlling as to the acts of fraud and duress involved in this case.

We will take up first the proposition that there was no valid ground for dissolution. In this connection we point out to the Court:

a. Dissolution could only be decreed where it would be beneficial to the corporation and its stockholders (which was directly opposite from this case).

b. Unpleasantness between officers and directors or injury to personal feelings was not a sufficient ground.

c. Only an actual division as to policy coupled with a refusal on the part of one half of the control to do some act necessary for the welfare of the corporation would be sufficient to decree dissolution and this would be subject to the first proposition above stated.

The statute under which the proceedings for dissolution were brought constitutes Section 172 of the General Corporation Law of New York and reads as follows:

"PETITION WHEN DIRECTORS OR TRUSTEES DO NOT AGREE: If a corporation created under a general statute of the State for the formation of corporations, or under any special act or charter has an even number of trustees or directors who are equally divided respecting the management of

its affairs, or if the stock of such corporation is equally divided into not more than two independent ownerships or interests, or if the entire stock of the corporation is at that time owned by the trustees or directors who are even in number or equally divided representing the management of its affairs or if the stock is so divided that one half thereof is owned or controlled by persons favoring the course of part of the trustees or directors and one half thereof is owned by persons favoring the course of the other trustees or directors, the trustees or directors or the stockholders or one or more of them may present a petition as prescribed in Section 170 of this chapter."

Turning now to Section 170, that section reads as follows:

"PETITION FOR VOLUNTARY DISSOLUTION OF CORPORATION: If a majority of the directors, trustees or other officers having the management of the sales of a corporation created by or under the laws of the State discover that the stock effects and other property thereof are not sufficient to pay all just demands for which it is liable or to afford a reasonable security to those who may deal with it, or if for any reason they deem it beneficial to the interests of the stockholders, that the corporation should be dissolved, they may present a petition to the Supreme Court pray-

ing for a final order dissolving the corporation as prescribed in this article."

The law of New York is clear that it is necessary in order to maintain any such proceeding that the petition should show and the facts should show that the voluntary dissolution prayed for is for the best interests of the stockholders. It must be not only alleged in the petition, it must be the truth and appear in the proof.

We quote from the opinion in the Matter of Ehret, 70 Misc., page 580, a case squarely in point, the following:

> **"But, conceding that the stock of the corporation is equally divided into not more than two independent ownerships or interests, it must be further shown that it would be beneficial to the interests of the stockholders that the corporation should be dissolved.** It is alleged in the petition that the present directors are friendly to the petitioner's interest, and, by reason of the equally divided stock and the impossibility of anyone voting a majority of the stock against them, that they cannot be ousted; that the earnings of the company have been greatly increased under the management of the present officers and of the petitioners; that the company is solvent, with large surplus, and is earning large profits. Under such circumstances, how is it beneficial to the stockhold-

ers that this corporation should be dissolved? There is not as much shown here as was stated in the petition in Matter of Pyrolusite Manganese Co., 29 Hun, 431, which the Court held to be entirely insufficient. **The sole reason seems to be (so far as the petition discloses the reason) that it is unpleasant for the officers and directors to continue to hold over, knowing that one-half of the stockholders desire to make a change.** However, their personal feelings may be hurt, it does not and should not interfere with their giving their best endeavors, which have been so signally beneficial to the stockholders in the past; and the consciousness of a duty well performed should be a sufficient balm for their wounded feelings."

The petition, Exhibit 46, generally charges that half of the Board of Directors and particularly Mr. Hemenway, has practically ceased to function and has lost all interest and activity in the affairs of the corporation; alleges that Smith could not carry on the corporation alone nor could Mr. Hemenway; charges that the Treasurer, Mr. Hemenway, has failed to fulfill the duties assumed by him; that the surplus of the company has been depleted; that Mr. Hemenway, by reason of his age and unfamiliarity with the working details of the company's operations could not carry on the company alone in case of illness by Mr. Smith.

In the Pyrolusite Manganese case, 29 Hun, 430, where the identical statute was under consideration, charges similar to those, stated in much stronger terms however, were passed on by the court and held insufficient. The court said in the opinion:

> **"By the petition it was stated and the proof taken establishes the fact, that one-half the shares of the corporate stock was owned by the petitioners, who were two of the trustees of the company proceeded against, and the other one-half was owned by the individual appellants'** And it was for the reason, as it was stated, that these parties differed concerning the management of the affairs of the company, that the proceedings for its dissolution were instituted. But why the corporation should be dissolved because of that difference was not clearly stated in the petition. The statement upon that subject was, that the petitioners were convinced that if the "methods and plans advocated and pursued by the said Edward H. Woodward and Arthur T. Woodward, in relation to the management of said corporation, be carried out, the result would be the financial ruin of the said corporation." What these plans and methods were was in no manner stated in the petition, **neither was it shown on ac-**

> **count of this disagreement, or for any other reason, that it would be deemed beneficial to the interests of the stockholders that the corporation should be dissolved. And at least as much as that has been required by Section 2419 of the Code of Civil Procedure to justify and support this proceeding.** In this respect the petition was quite defective, and it was objected to as such by the appellants in the answers which they filed before the referee."

The foregoing are cited in the foot notes under the Statutes which are construed and are unquestionably the law of New York State at this time.

In the case of Kavanaugh against Kavanaugh Knitting Company, 226 N. Y., 185, the Court of Appeals had to consider the question of the propriety of a dissolution under a different section of the General Corporation Law but in which the same principle is involved. This section 221 required a resolution by the directors adopted by a vote of the majority that it is in their opinion advisable to dissolve such corporation forthwith. In construing this section, the court lays down the general principles applicable in New York to the dissolution of corporations. It says, page 192:

> "The plaintiff does not complain concerning the regularity in form of the pro-

> ceeding and the resolution of April 26, 1918. He avers that the resolution was adopted by the Board of Directors in bad faith and with and because of the intention to free the corporation of the plaintiff and all right on his part in the business in which the corporation was engaged. We are therefore to consider at the outset whether or not the legislature in enacting the statute intended that the directors shall proceed at the meeting of the Board in good faith and in or through the honest belief that the action of the Board is and will be beneficial and profitable to the corporation and stockholders."

The court declares that such good faith and such honest belief was essential. At page 192, it says:

> "The directors in reaching their belief cannot consider or give weight to their personal wishes, comfort or advantage. Whether or not the dissolution is wise or expedient for themselves as apart from the corporation or any or all of the other stockholders they can neither question nor determine. Their action must be based upon the belief that the interests and welfare of the corporation and the stockholders generally will be promoted by the dissolution. The belief may be

erroneous or illfounded **but it must be formed in good faith."**

It says at page 196:

> "The courts cannot pass upon the question of the expediency of the dissolution for that is the very question which the legislature has authorized the Board of Directors and the stockholders to decide. They can, however, and will whenever the facts presented to them in the appropriate action demand, inflexibly uphold and enforce in accordance with established quitable principles the obligations of the fiduciary relation. The good faith of the individual defandant is a proper and fundamental subject to be adjudged. Bad faith, fraud, or other breach of trust constitutes a foundation for equitable relief." Citing cases.

It further holds that in taking such action under the statute, the stockholders are acting for the corporation and for each other and they cannot use their corporate power in bad faith or for their individual advantage or business. The court said at page 197-198:

> **"Obviously, facts are alleged which permit, if they do not compel, the inference that the directors conceived and progressed the scheme of dissolving the**

> **corporation, irrespective of the welfare or advantage of the corporation, and of any cause or reason related to its condidition or future, through the desire and determination to take from the corporation and to secure to themselves the corporate business freed from interference or participation on the part of the plaintiff.** Moreover allegations of the complaint are, in effect, that the judgment or opinion of the directors was not honest, their action was not the result of good faith the exercise of an honest judgment and an honest and unbiased consideration of any fact or circumstances affecting the general interests of the corporation and of all of its stockholders, and was in bad faith **and for the sole purpose of permitting the individual defendants Kavenaugh to dissolve the corporation for the purpose of depreciating the value of the corporate property and the plaintiff's** proportionate interest therein."

It has been held that dissolution would be decreed where the owner of one-half of the stock refused to consent to a necessary increase of capital stock.

Matter of Brown 181, N. Y. S. 460.

In the case at bar, however, there is presented, **no evidence of any matter ever presented to the**

Board of Directors by the defendants which was opposed or repudiated by the decedents.

The refusal of Smith in bad faith, to endorse the company's paper in order to take advantage of his partner, would come within the prohibition laid down in the Kavenaugh case. And even where dissolution has been lawfully decreed the courts have authority to set aside and vacate the order of dissolution where substantial justice will be subserved.

Matter of Automatic Chain Co., 119 N. Y. S. 379, affirmed 118, N. Y., 618.

and in the matter of:

Livingston Sportsmen's Assn. 2 N. Y. S. 63.

> "Where it is apparent that a corporation is perfectly solvent, that it answers to a considerable degree the purposes for which it was formed and that although perhaps a majority of the stockholders desire a dissolution, yet the interests and rights of the minority would be best served by refusal to decree a dissolution, it will not be granted. Matter of Livingston Sportsmen's Assn. (1888)."

In the preceding point we have made it clear that all of the parties, their attorneys and mediators conceded or claimed that dissolution would

destroy the assets of the corporation. It is elementary that destruction of the assets would not be "for the best interests of the stock-holders in the corporation."

Conditions, according to Smith were so different than they had been for twenty years during which the corporation had enjoyed marked success. The very purpose of the proceedings was to either destroy the value of the corporation assets or force a sale of Hemenways' half interest for less than its value. Both of these objects were antagonistic to the law under which the proceeding was brought and to the construction placed upon the statute by the courts.

On any honest statement of the facts, the proceedings must have fallen. Smith's attorneys realized this when they alleged in the petition, Ex. C-46, the following:

> "4. That your petitioners deemed it beneficial to the interests of the stockholders that the corporation should be dissolved."

All of the witnesses, including the defendant Smith testified that the dissolution proceedings would bring about ruin or .substantially that Smith in particular testified at page 532:

> "Q. You believed that, didn't you, that if it was dissolved, neither side would hardly get a dollar of it.

A. I thought we would stand a substantial loss.

* * * You thought there wouldn't be anything left after a sale under the hammer didn't you?

A. I didn't care what was left.

Q. I didn't ask what you care, just answer the question.

A. Very little."

Burnett in his letters was urging additional loss; Cohn and the Hemenways were all fearful of it. Any claim that there was in anyone's mind, any idea that the corporation or stockholders would be benefited by dissolution is an insult to the intelligence of Court and Counsel. Under the law and the facts as we have set them forth, we believe it is demonstrated beyond any doubt, reasonable or otherwise that no valid ground existed for dissolution.

We now come to the question of good faith on the part of Smith.

It must already be clear to the Court that the proceeding was brought, not to dissolve the company but to force the Hemenways to sell.

In the petition, it was necessary to give some excuse upon which to base the application for ap-

pointment of a Referee, to be followed by receivership, etc.

The truth of the allegations, which were under oath would measure the good faith of Mr. Smith. If he sought this dissolution upon truthful statements, he might lay some claim to good faith. As his statements were untrue, the court cannot readily reconcile perjury with good faith. It is already obvious that when Smith said he deemed it beneficial to dissolve the corporation that his statement was untrue since he testified as we have quoted just above.

On page 2 of the petition, Ex. C-46, Smith charged against Mr. Hemenway:

> "That the corporation is hampered and blocked in its proceedings by the fact that half of the Board of Directors and one of the two officers have practically ceased to function and have lost all interest in activity of the affairs of the corporation."

This refers to the Hemenways, of course.

Under cross-examination, pages 512-516, Smith testified Hemenway was at the office from April on as usual except during the time of his illness.

The Vice-Chancellor remarked in this connection at page 517:

> "Court:—The witness says that his attitude and lack of functioning was not new and had been going on for twenty-five years. The point counsel is trying to make is that there was no difference, as I understand it, in his conduct now than it had been for the last twenty-five years, and that is what I understand the testimony of the witness to be."

and again as to this charge of dereliction on the part of Hemenway, the learned Vice-Chancellor said in his final conclusions, page 728:

> **"Without going into the evidence in detail I may say that Smith's charge of inattention to business by Hemenway is not supported by any substantial evidence and I find as a fact that there was no dereliction of duty on the part of Hemenway."**

This finding by the Vice-Chancellor is sufficient answer to the charges against Hemenway which formed the basis of the petition for dissolution. There was ample evidence on the part of the complainants to substantiate the untruth of the charges and as the learned Vice-Chancellor has pointed out, Smith did not produce any substantial evidence to support them.

Smith did testify that when he wanted more working capital Hemenway was willing to mortgage the corporation property but Smith refused, page 466. Smith then denied that he refused to en-

dorse company notes to borrow more money, page 518 then reversed himself and admitted that he was the one who had refused to endorse notes for further borrowing, page 518, lines 21-33. Page 519, lines 1-5.

With the respect to Smith's accusation that Hemenway neglected the business, Smith testified at page 512:

> "Q. Mr. Hemenway was away from the office a great deal in April and May, 1925, wasn't he? A. **No.**
>
> Q. Was he there in April, May and June?
> A. He was there in April, May and June.
>
> Q. **And right up until the time of his illness?**
> A. **Yes.**
>
> Q. **Down to his New York office daily and over to the Irvington plant about every other day?** A. **He was at the Irvington plant about three times a week.**
>
> Q. **About every other day?** A. **Yes.**

The petition further stated that Hemenway, as Treasurer, repeatedly failed to keep the President informed as to the financial status of the company. The books, upon Smith's insistence, were kept at the plant where he admits he had access to them every day in the year, and Burnett, in his

letter of July 1st, stated that Hemenway had "equal access to and knowledge of the facts with (Smith)." Page 520, lines 7-33; 521, lines 1-4.

The petition, on page 3 asserted that failure of Hemenway to keep Smith informed as to the company's condition, etc.,

> "has resulted in depleting the surplus of the company to a point where it now has insufficient working capital to enable it to conduct its business to the best interests of the stockholders."

Smith testified, however, that three weeks after July 1st and prior to July 28th he knew that the company had in the previous six months, made a $25,000 gain. Page 514, lines 26-30. **The surplus had been increased by more than $8000 after charging over $9000 off from the inventory.** Page 525, lines 28-33; page 526, lines 1-16. Smith denied making this adjustment, id., but Mr. Fedderson said that he and Smith were the ones who refigured the inventory. Page 224, lines 1-2.

The petition further said on page 4:

> "That without your Petitioner, Mr. Smith, the business cannot go on and if due to illness, or if for any other cause he could not give his continuous personal attention to it, serious and irreparable losses to the corporation would immediately result, as the

Treasurer, due to his age and his unfamiliarity with the working details of the company's operations in respect to production and selling and his apparent lack of interest therein, would be unable to carry it on successfully; and that the continuance of the business under such circumstances seriously jeopardizes the interests of all concerned."

Smith pretended a desire to sell in the dissolution proceeding (thereby realizing practically nothing), for fear he might become ill and Hemenway be unable to go on. This is inconsistent with the testimony of himself, his wife and his physician; that he had been a sick man for many years, spending his winters in the South (at the company's expense), Mr. Hemenway running the business for a considerable part of at least seven winters. It is also inconsistent with his attorney's letter of July 28th, asserting that he was entirely unwilling to sell to Hemenway on any terms because of his (Smith's) youth and virility.

The petition also alleged that Mr. Hemenway antagonized everyone, customers, employees, the Smiths, etc. It would take too long to review the evidence of the witnesses on both sides who agreed that Mr. Hemenway was a quiet, unobtrusive, kindly, courteous gentleman. Nowhere in the record is there any evidence to support this allegation except the claim that when the company had large amounts in their accounts receivable

and were short up for ready cash, that Mr. Hemenway endeavored to get in collections to carry the business.

We thus find a lack of good faith in every allegation contained in the petition for dissolution except the statements as to the ownership of stock.

This hypocritical fiction was carried on by the Smiths as late as November 18, 1925, when their New York attorneys, by Ex. C-48, addressed a petition to the Supreme Court in the dissolution matter, alleging that the petitioners had been unavoidably delayed in proceedings with the hearing and service of notices "on account of the preparation of proof for the hearing," and further stating that the petitioners intended to hold the hearing in legal form and asking that the matter be further set over until January 25, 1926. On this petition, made long after the Hemenways had been tied up on a contract, Supreme Court Justice John Ford amended the original order and set the matter over until January 25, 1926, for the proceedings to go on and for a hearing to be held.

Before the allotted time, Smiths has procured the Hemenway interests; had collected from the Crescent Tool Company; were in possession of the profitable glass cutter business and Mr. Hemenway was dead. The carrying on of these proceedings is evidence of a guilty conscience and a fear that some slip might occur and that the Hemen-

ways might make a final determined stand for their rights.

The Smiths were not preparing evidence for a hearing as represented by their counsel under oath, but were rushing to realize the benefits of their dishonesty.

POINT III.

THE LEARNED VICE-CHANCELLOR ERRED IN FAILING TO APPLY THE MODERN LAW OF DURESS WHICH IS CLEARLY APPLICABLE TO THE ACTS OF THE DEFENDANTS AND WHICH REQUIRE THAT THE SALE BE SET ASIDE AND THAT THE DEFENDANTS REQUIRED TO ACCOUNT TO THE COMPLAINANTS IN ACCORDANCE WITH THE PRAYER OF THE BILL.

The general law on duress is well established and particularly so in the State of New York in which this corporation was organized and in which the major steps to deprive Mr. Hemenway of his property were taken.

While there have been comparatively few cases on this branch of law in New Jersey, they do not indicate any dissent from the general rules accepted and applied in New York and other Ameri-

can States. The learned Vice-Chancellor took no cognizance of the modern rule in his final conclusions and we believe mistakenly applied even the ancient rule.

The complainants' right to recover is founded upon the following established principles:

a. Money paid or property parted with by reason of a threatened exercise of power to injure plaintiff's property, where the right does not actually exist, comes within the principle of illegal duress.

b. The person coerced need not apply his legal remedy but may submit to the duress, and afterwards rescind in equity.

c. Where a fiduciary relationship is shown to exist as in this case, the burden is upon the person securing the benefit to show that the transaction is just and fair.

d. Coercion or duress by threats or acts which will affect the husband, will render a transfer by a woman void.

The facts previously stated and the proof in the case have clearly shown an attempt made by the defendant Smith to take unconscionable advantage of the illness and weakness of his old associate John F. Hemenway, coerce him by duress and illegal abuse of the statutes of New York,

under which the Smith-Hemenway corporation was incorporated, to sell his valuable interest in this company at far less than its actual value by threat of ruin if he did not do so.

Each step in this remorseless and malignant effort to deprive Mr. Hemenway of the fruit of his life work at a fraction of its value is clearly shown by the record. The question which concerns the court is mainly whether or not the means employed are consistent with the standards of equity and the requirements of fair dealing. As the Supreme Court of Pennsylvania has well said in Commonwealth Title and Insurance Company against Seltzer, 227 Penn., 410:

> "Equity will apply even when each separate step taken by itself be legal if the purpose and effect is inequitable."

The record clearly shows, notwithstanding all the shifting efforts at evasion practiced by Smith in dealing with his old partner, a steady and continuous purpose on his part of compelling Mr. Hemenway to sell his stock and to sell it to Smith. That Mr. Hemenway was in very poor health throughout the whole period with which we have to deal, cannot be questioned. His weakened physical condition made him susceptible to strong-arm methods to a marked degree.

We will take up first the general rule applicable to duress and then specific decisions where it

is accomplished as in this case. The general rule is stated in Corpus Juris, Vol. 13, under the heading "Contracts," at page 398, and following, the text being supported by an exhaustive citation of cases.

Hemenway's condition had an important bearing in application of the rule.

The rules thus stated are as follows:

> **"According to the modern doctrine, threats of destruction of property or duress of goods under opporeive circumstances will avoid contract on the ground of duress because in such cases there is nothing but the form of agreement without its substance. This is particularly true where the person by reason of mental or physical infirmity is the more easily influenced to act to his own injury. "Corpus Juris. Vo. 13. P. 402. Section 330. Page 405.**

The rule as it now exists is that the question of duress is one of fact in the particular case to be determined on consideration of the surrounding circumstances such as age, sex, capacity, situation and relation of the parties and that duress may exist whether or not the threat is sufficient to overcome the mind of a man of ordinary courage, it being sufficient to constitute duress that one party to the transaction is prevented from exercising his free

will by reason of threats made by the other, and that the contract is obtained by reason of such fact. Unless these elements are present duress does not exist. The test is not so much the means by which the party was compelled to execute the contract as it is the state of mind induced by the means employed—the fear which made it impossible for him to exercise his own free will."

Corpus Juris, Vol. 13, P. 402, Section 319.

In the New York case of Van Dyke vs. Wood, 60 A. D., 208, and 70 N. Y. S. 324, the rule is laid down by Mr. Justice Rumsey, page 328, as follows:

"The rule as laid down by Mr. Pomeroy is that **whenever a person is in pecuniary necessity or distress, so that he would be likely to make any undue sacrifice, and advantage is taken of such a condition to obtain from him a conveyance or contract which is unfair, made upon an inadequate consideration, and the like, even though there be no actual distress or threats, equity may relieve defensively or affirmatively. .Pom. Eq. Jur. 948."**

The opinion reviews the various cases in which duress has been exercised by misuse of the process or of legal proceedings. At page 329 of the

opinion, the early case of Neilson vs. McDonald is reviewed. In that case there was a sale of property under execution at a great sacrifice, and under a threat to sell further property under execution, the plaintiff was induced to give a mortgage of $2,500, when the amount which he owed was only $500. The Court held that duress by threats of injury in this manner, even though the process was legal, would render the transaction void. We quote at length from the opinion which was as follows:

> "The case of Neilson vs. McDoland, 6 Johns. Ch. 201, seems to be practically in point here. In that case a levy under an execution had been made against the plaintiff's property, which was worth several thousand dollars over the amount of the execution. The defendants who were the plaintiffs in the execution, caused a portion of the property to be sold to satisfy the judgment and it was sold at a very great sacrifice. **They then proposed to sell the remainder, the result of which would have been that to secure a debt of about $500, property worth many times that amount would be sacrificed.** To induce the judgment creditors to refrain from selling the remainder of the property, the plaintiff made a bond and mortgage, by which he not only agreed to pay his own debt of $480, but he also became

responsible for the debts of his son, who was insolvent, to the amount of $1,600, and in consideration of his giving his bond and mortgage for $2,500, for those purposes the property sold was restored to him and the execution was satisfied.

All this was done for the purpose of oppressing him. No harm was threatened to him personally or to his property. There is no doubt that an action at law could have been maintained for the conversion of the property and for the damages resulting from the conspiracy of the defendants. But yet the Court held that under those circumstances the whole contract was void, and it was set aside. It was held that the giving of the bond and mortgage was not a free and voluntary act, but that he was coerced into it by the distress under which he labored and the ruin that was threatening him. **It is quite true that in that case the defendants' conspiracy involved oppression by an officer of the court, but the act which was set aside was that of the defendants, and not of the officer, which was important only because, like the judgment of foreclosure in this case, it made it possible for the defendants to practice an extortion.**

> The case of James v. Kerr, 40 Ch. Div. 449, is also in point. In that case James for the purpose of carrying on certain litigation, made a bond to Kerr, by which Kerr agreed to advance whatever money was necessary to carry on the litigation, the result of which was quite doubtful and to receive his money back, with 5 per cent interest and a bonus of £225, if the action was successful. The action coming to a successful completion, he was called upon to pay the loan and also the bonus, and it was held that the payment of the bonus was extorted from him by his necessities. Kerr did not stand in any confidential relation to the plaintiff in that action, and nevertheless the court, as one reason for setting aside the bond, held that **he was at the mercy of the lender, and was bound to consent to whatever terms he chose to exact, and for that reason it was held that he was entitled to a cancellation of the bond on payment of the money advanced and that he need not pay the bonus."**

At page 330, the Court reviews an Illinois case in which an attachment was levied on perishable goods and where the defendant would have sustained a loss by interposing a defense and enforcing his legal rights. The Court held that he might submit to the duress and recover his money back

in equity. The opinion, in reviewing this case, states at page 330:

> "In the case of Spaids vs. Barrett, 57 Ill., 289, an action was brought to recover a sum of money which was claimed to have been extorted from the plaintiff by the defendants. The plaintiff had a large quantity of perishable goods in transportation. The defendants procured an attachment to be levied on the goods, so that the carrier could not deliver them, and to enable the plaintiff to get possession of them he was required to pay to the defendant $2,000 more than he actually owed; and he brought the action to recover back that sum. The defense was that the plaintiff had paid that amount for the purpose of securing possession of his goods and the release of the attachment, and the only question presented to the court was whether the act of the plaintiff in paying that sum for the release was a voluntary act, so that it prevented him from recovering it back under the circumstances. The court held that, although the only object of his paying the money was to secure possession of his goods, yet as the payment was compelled, because there was no other sufficient remedy for the wrong which had been done him by the defendants, he was entitled to

recover it back. **It was urged in that case, as it might be here, that there was a perfect remedy at law by replevin, and the court conceded that to be the fact; but it was held that, although there was that remedy at law, yet, as it was necessary for the plaintiff to get possession of the goods needed for his business, he was not restricted to that remedy, and, having submitted to the extortion, he was at liberty to recover back the money."**

In the case of Buckley vs. Mayor, 30 A. D., 463, and 52 N. Y. S. 452, authorities of the City of New York, demanded money from the plaintiff under threat of legal proceedings, which would have held up the completion of an unfinished building. There was no legal right to compel payment of the money, which was demanded for a license. The Court held that the money was obtained under duress and could be recovered. It was unnecessary for the defendant to oppose the proceedings, which he might have done successfully, even as the Hemenways might have done in this case. Being under duress he could submit and afterwards recover back what was his due.

The Court in this case also reviews the law in New York State and elsewhere, and we quote the opinion at some length, page 454 and following (N. Y. S.):

"The defendant's threats were certainly threats of actionable acts whereby his estate would be lessened. Every day that was thus lost to him was a serious pecuniary injury. And yet we are told by the appellant that the payment was voluntary, because Walker personally was not arrested or threatened with arrest, and because his tangible property was not actually seized or threatened with seizure. This contention proceeds upon an entire misapprehension of the true rule. His property, in a legal sense was injured by the acts of the defendant's servants. **It was the threatened exercise of power which Walker believed they possessed that was likely to take money out of his pocket every day that it continued.** Interest on his capital would be running, and increment from rents would be postponed. The rule upon this branch of the case was stated with great clearness by Mr. Justice Field in Radich vs. Hutchins, 95 U. S., 210, 213, as follows:

'To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary * * * there must be some actual or threatened exercise of power possessed, or believed to be possessed by the party exacting property of another, from which the latter has no

other means of immediate relief than by making the payments.'

It is the 'moral coercion' spoken of by Judge Brown in Adams vs. Bank, 116 N. Y., 611, 23 N. E. 7, which entitled the plaintiff to recover the money paid because of it. The narrowness of the strict common law rule with regard to duress was said in that case to have been 'much mitigated,' and money paid under practical compulsion allowed in many cases to be recovered. 'The very words used to describe an involuntary payment,' said Judge Peckham in Tripler vs. Mayor, etc., 125 N. Y., 625, 26 N. E. 723, 'implies that there is some fact or circumstance which overcome the will and imposes a necessity of payment in order to escape further ills,' so in Maxwell vs. Griswold, 10 How., 256, **it was said that it suffices to make a payment involuntary if it 'is caused on the one part by an illegal demand and made on the other part reluctantly, and in consequence of that illegality, and without being able to regain possession of his property except by submitting to the payment.' This was there called the obtaining of money by a moral duress not justified by law."**

Here again it was urged, as Smith has urged in this case, that the defendant should have fought

the proceedings taken against him even though such defense was ruinous. The Court held it to be unnecessary, saying in the opinion:

> "It is also contended that Walker had a legal remedy, and should have resorted to it. He might, doubtless, have essayed an action in equity to restrain the defendant, or he might have brought an action at law for his damages. Or he might have directed his employees to defy the public authorities, and take their chances with a habeas corpus. **But, while any of these various remedies was taking its regular course, what was to become of his unfinished building? He might have been ruined before even partial redress could thus be afforded him.**
>
> As far back as Astley vs. Reynolds, 2 Strange, 915, a legal remedy was held to be no answer to an action like the present. 'We think,' said the court in this case, 'that this is a payment by compulsion. The plaintiff might have such an immediate want of his goods that the action of trover would not do his business. * * * We must take it he paid the money relying upon his legal remedy to get it back.' This case was cited with approval in Harmony vs. Bingham, 12 N. Y., 109, Judge Edwards saying that it was referred to with approbation by Lord Mans-

field in the case of Smith vs. Bromley, 2 Doug., 697. Note: and he adds, 'I have not found any English case in which it has been doubted.' ''

So, also, if the Hemenways had opposed the dissolution proceedings, they might, after the success which they would unquestionably have achieved, have brought an action against the Smiths for damages and have recovered a judgment. However, the ability of Smith to respond in damages after the ruin of the business, would be questionable. The greatest threat of all, however, was to Hemenway's health, and he could not have recovered his life then any more than his executors can recover it for him now. Had Hemenway been in good health, under the decisions which we have cited, he would nevertheless be entitled to succeed in this action if he had lived to bring it personally. The condition of his health, as we have seen by the decisions, rendered the duress even greater. The Hemenways had no means of relief other than giving up their property at less than its value. That this constituted coercion or duress, cannot be questioned.

Radich vs. Hutchins, 95 U. S., 210.
Adams vs. Irving National Bank, 116 N. Y., 608.
Briggs vs. Boyd, 56 N. Y., 289.
Stenton vs. Jerome, 54 N. Y., 480.
Bates vs. N. Y. Insurance Co., 3 Johns., 238.
Scholly vs. Mumford, 60 N. Y., 498.

By carrying out the threat of dissolution so far as having a Referee appointed, the defendants overcame the will and imposed the necessity of sale upon the Hemenways in order that they might save the total loss of their property, and save the shock and consequent injury to Mr. Hemenway's health which the worry, loss and litigation would bring about.

The last was of little avail as Mr. Hemenway died. That the worry and entire transaction hastened his death, cannot be doubted.

Mrs. Hemenway was under the same pressure of threatened loss of value in her stock-holdings as Mr. Hemenway. In addition, the effect of her husband's physical condition is recognized by the law as rendering her subject to duress. Duress by threats or acts which will affect the husband will render a transfer by a woman void.

Eadie vs. Slimon, 26 N. Y., 9.
Barry vs. Eq. L. Assur. Soc., 59 N. Y., 592.
Frank vs. Mutual Life Insurance Co., 102 N. Y., 273.
Peyzer vs. Mayor, 70 N. Y., 601.

COMPLAINANTS ARE ENTITLED TO AN ACCOUNTING OF THE PROFITS ON THE SALE TO THE CRESENT TOOL COMPANY, AND TO A ONE-HALF INTEREST ON THE PORTION OF THE BUSINESS REMAINING, AFTER CREDITING THE AMOUNT ALREADY RECEIVED.

We do not deem it necessary to review the evidence from which it is plainly evident that Smith forced this sale to himself because he knew a profitable deal could be made with the Crescent Tool Company. It is true that he did not open negotiations direct with the Tool Company, until he had the actual signed contract of the Hemenways in his hands. Once he possessed that, his brother appeared in Jamestown, New York, as soon as a railroad train could take him there. The learned Vice-Chancellor in his final conclusions said:

> While the circumstances surrounding this transaction are suspicious, I do not feel warranted in finding as a fact that actual negotiations touching this sale had been opened prior to October 12th, 1925."

From this it is apparent that the court was impressed with the suspicious conditions surrounding the entire transaction, and believed that some talk was had with the Sales Manager of the Crescent Tool Company, when he was in Newark about October 12th, although Mr. Smith denied that he

had any conversation in that connection at that time.

Regardless of the time when negotiations were opened, Smith is bound to account for the profits, and it must be apparent that this gain furnished the motive for forcing the Hemenways to sell out.

It is the law that the victim in such a case as this can either bring an action in equity for an accounting of the profits, or an action at law for damages.

In the case of Von Au vs. Magenheimer, 110 N. Y. S., 629, a sale of shares procured by coercion was rescinded. It was held by the court that an accounting of the profits would be inadequate and a large verdict was sustained in an action at law, the court holding, however, that an accounting could have been had. The court said in the opinion:

> "In Walsham vs. Stainton, 1 DeG. J. & S., 678, the leading English case most nearly analogous, directors conspired to depress the value of the shares so as to purchase them for less than their value. The scheme resorted to was the withholding of funds belonging to the corporation so as to reduce the apparent earnings and the preparation of fictitious balance sheets. This action was in equity to set aside the sale and to compel the wrong-

doers to account for all dividends and bonuses paid in respect of the shares sold. The Lord Justices on appeal reversed the ruling of the vice-chancellor sustaining the demurrer to the bill, and held that the action was maintainable. * * *

The process applied to the plaintiff in this case has become so common with the growth of corporations that a colloquial phrase to express it has become current. See Century Dictionary, 'to freeze out.' The plaintiff's withdrawal was not voluntary. She was constrained as most of us would be, to take the best terms offered." * * *

I have no doubt that a court of equity would have little difficulty in setting aside this sale and in compelling the defendants to account for all profits received, but that remedy would not be adequate, for it would only put the plaintiff back in the hands of the wrongdoers."

and in the case of Vogt vs. Vogt, 104 N. Y. S., 164, where plaintiff was fraudulently induced to join in the dissolution of a company and her stock was thereby rendered valueless, it was held that plaintiffff could recover her damages.

The Von Au case seems to be squarely in point with this case, for the Hemenways were certainly

subjected to the "freezing out" process. The court should have little difficulty in reaching a decision that the Smiths must account.

Up to the time of the trial, the Smiths had received in cash and its equivalent, upwards of almost $400,000.00 against the sum of $125,000.00 received by the Hemenways in cash and property. In addition, the Smiths still had the glass cutter business, which was the best part of the Smith & Hemenway Co., and which has been earning $50,000.00 or more yearly. We did not deem it necessary to point out the evidence on this subject since this point is not disputed.

POINT IV.

THE GIVING OF THE RELEASE BY MRS. HEMENWAY IS NO BAR TO THIS ACTION AS IT WAS OBTAINED AS AN INTEGRAL PART OF ONE PLAN, CONSISTING OF ONE TORT; PROCURED AS THE FINAL ACT BEFORE THE DURESS WAS REMOVED.

The release was never executed by Mr. Hemenway. It was executed by Mrs. Hemenway January 19th. "She signed it under protest * * * at the instance of her attorney, who said that she had to sign it due to the fact that she had signed the contract." Page 562.

This evidence was brought out by Mr. Murray who asked Eldon Hemenway to explain the signing of the release if Mrs. Hemenway was dissatisfied. Page 561-562.

Where a release, obtained as an integral part of one plan, consisting of one tort, thought out from the beginning and comprising the obtaining of the release as a final act, it is not a defense to the cause of action arising out of the tort.

Willett vs. Chase National Bank, 219 A. D., 441, 219 N. Y. S. 281.

The duress was continuing for the double reason that the dissolution proceedings were still pending and were adjourned to January 25, 1926, which was after the release was signed. See Ex. C-48. Mrs. Hemenway could not get her money without executing it. It was an integral part of the transaction schemed out by Smith or his attorney in advance. Where the duress continued the release was void and constitutes no defense.

Guilleaume vs. Rowe, 94 N. Y., 268.

It is conceded that no consideration was paid for the release unless it can be said that the agreement of the defendants not to continue the dissolution proceedings upon the sale by the Hemenways for an inadequate price, is a consideration which will be upheld by the courts.

The influence of duress must be removed before any act can be construed as affirmance.

St. Lewis etc. Railroad Co. vs. Gorman,
28 L. R. A. N. S., 327.
N. J. Rule stated in *Bodin vs. Morgan,*
37 N. J. Equity, 426.

POINT V.

THE LEARNED VICE-CHANCELLOR GAVE UNDUE WEIGHT TO THE WORDING OF THE "OFFER" WHICH HEMENWAY WAS FORCED TO MAKE.

Smith personally and through his attorney refused to sell.

In April, 1925, he said that he was willing to sell on the terms which he offered Hemenway. When the Hemenways appeared at his attorney's offices and offered to buy he refused.

Later on, when Cohn and Burnett first commenced to negotiate, the latter suggested that each of the parties make a bid, place the same in sealed envelopes that the envelopes be opened and the highest bidder take the property. Page 112. This was about June 15th. Page 111.

Cohn relying on this, by Ex. C-7, on June 23rd wrote Burnett, that the parties should get to-

gether as to the terms of payment on which the sale was to be made, the price to be determined by the sealed bids.

Burnett ignored this and by Ex. C-8, letter of June 18th wrote Cohn as follows:

"Dear Mr. Cohn:

Please let me have your offer of sale * * * without further delay."

On July 1st Burnett wrote that a preliminary estimate of the business would show a loss of $25,000.00 for the preceding six months; that Smith was not nearly "so keen to purchase the business for himself as he was a month ago," saying further, **"If affairs continue on the present trend much longer, he will not buy on any conditions."** He then makes an offer of $70,000.00 payable over a period of six years, plus the Montreal property, and demands a definite answer by July 6th, five days after the letter was written. Burnett and Smith both ignored the possibility of Hemenway purchasing.

Cohn, however, by letter of July 2nd, Ex. C-9, again called Burnett's attention to the fact that Mr. and Mrs. Hemenway did not wish to sell and refers to prior communications which must have called to Burnett's attention the fact that he had in mind the making of sealed offers by both sides. He asks to have the matter held over until the in-

ventory is completed and points out that Mr. Hemenway says that Smith's representation as to the length of time it will take to complete the inventory must be exaggerated.

Again on July 9th, Cohn, by letter Ex. C-12, says that he understands the inventory has been completed and suggests that the parties follow out Burnett's original idea of making competitive bids in sealed envelopes, and stating the terms which would be agreeable if the Hemenways sold out.

On July 28th Burnett, by Ex. C-13, replied to Cohn's letter stating:

> "**Mr. Smith has no intention of selling and is entirely unwilling** in view of his comparative youth as compared with Mr. Hemenway, **to consider any proposition relating to selling. He is willing to buy on the terms stated in my letter of July 1st, but that is all. If Mr. Hemenway desires to accept this proposition, well and good. If not,** I take it that there is no use of negotiating further, and that **our only recourse will be to institute proceedings for dissolution** * * *
>
> **I hope that the matter can be settled amicably, but Mr. Smith is insistent on dissolving the company, and the only possible alternative that I can see is a purchase by him of the Hemenway interests.** * * *

All you will have to do will be to answer yes or no. If "yes," Mr. Murray will at once arrange for the purchase. If "no," he will draw the papers in the proceedings for dissolution."

On August 4th Cohn by Ex. C-14, wrote that Hemenway had been critically ill with pneumonia for three weeks and could not be seen; he asked for a copy of the inventory and financial statement and that the matter be held in abeyance until Hemenway can be seen. The following day, August 5th, Burnett's partner, Murray, wrote Cohn, that they would wait no longer.

Again on August 7th, by Ex. C-18, Cohn asked for a copy of the inventory sheet; said that a dissolution would greatly prejudice the stockholders and that the same would be vigorously opposed. It will be borne in mind that at this time Cohn believed that Hemenway would recover his health and was unaware of the heart condition which made it probable that any excitement would kill Hemenway.

It will be noted that no financial statement was ever furnished. This was undoubtedly because the statement, instead of showing a loss of $25,000.00, showed a net gain of $17,000.00, besides a substantial sales gain.

On September 28th, Hemenway went to the office at Newark, he lost consciousness and had to be taken to his home. On this same day, an order appointing a Referee to dissolve the company was obtained (without notice to the Hemenways), at New York City.

At this time Smith knew Hemenway had lost consciousness at the office; he was informed by Mrs. Hemenway, on October 1st, of her husband's critical condition; she upbraided him for having broken his word, stating that he had agreed to withhold pressing this matter until the first of the year; Smith claimed that he was also very much worried about Mr. Hemenway, saying he had walked the street nights worrying about Hemenway's condition.

It was at this point that Mrs. Hemenway, Smith, her nephew, and Smith's lawyer, Burnett, got together.

To this sorrowing woman, begging for a respite for her husband, whom she believed to be at the doorway of death, Burnett refused to let up; said to her that:

"Mrs. Hemenway's Jew Lawyer evidently thought they were bluffing!"

In order that there might be no hope of any let-up, Burnett confirmed his attitude by writing Cohn. His letter, Ex. C-21, says:

> **"I was afraid that you and they (Cohn and the Hemenways), had construed my hope of effecting an amicable settlement as a confession of weakness, and therefore I had been compelled to institute this suit * * *"**

He then said:

> **"It will be necessary that your offer be in my hands not later than Thursday, October 15th. Under no circumstances will I delay the hearing or any of the preliminaries necessary thereto."**

He further says that Smith would make no buy or sell offer for the reason that that would be:

> "Giving you the advantage of deciding on which one to accept."

Smith had stated on October 1st that he would not sell.

However, Burnett in his letter above referred to, Ex. C-21, points out that no offer was made to him for the sale of Smith's holdings.

Cohn's letter in reply to this ultimatum Ex. C-23, was sent on October 12th, 1925, and it is this letter which the learned Vice-Chancellor appears to have misinterpreted. Cohn points out the inconsistency of Burnett's statement that no offer

had ever been made to Smith and calls his attention to his letters of July 2, 9 and 28th, in which he had stated unequivocally that Smith would not sell; points out that the prosecution of the proceedings will entail a severe sacrifice; says that Hemenway feels that there is no occasion for dissolution of the company and no foundation therefor.

He then says that while Burnett objects to giving Hemenway the advantage of a buy or sell offer, that:

"In order to save the situation"

they are making the offer which is forced upon them and they are also willing to buy at the figure at which they are forced to sell.

This offer was involuntary; the letter recites that Hemenway does not want a dissolution; does not want to sell and that **the offer is made solely "in order to save the situation."**

An offer to buy or sell, made to a person who wishes only to buy, of course constitutes only an offer to sell, as was shrewdly pointed out by Burnett.

Upon receipt of the letter Smith and his attorney waited no longer than it took to put through a telephone call from Newark to New York to say they would buy. Neither one ever considered the

fact that Hemenway was willing to buy. Burnett in his letter makes no reference to anything except the Smiths buying. In this letter Ex. C-24, he says:

> "Confirming telephone conversation this is to verify that I * * * accept **your offer * * * to sell the Hemenway interests.**"

When Burnett accepted over the telephone Cohn told him:

> "That on account of the worries over this dissolution proceeding affecting Mr. Hemenway's health, that **I had succeeded in inducing him to sell and go through with it, rather than fight it out.**" Page 135.

None of the parties therefore considered that Hemenway could buy under any terms and Cohn stated both in his letter and by word of mouth that Hemenway was selling solely because of the condition of his health and "rather than fight it out."

We have already pointed out that there was never any satisfaction in the minds of the Hemenways with the deal. Mrs. Hemenway always insisted that the stock was worth more than the book value, page 107; she continually accused Smith of bad faith, as we have pointed out with references to the testimony; it was an obsession with her that Smith was selling out to the Cres-

cent Tool Co. The evidence proved that she was right; that the company was worth much more than the book value; that Smith was negotiating with the Crescent interests and that he was selling out at large profit.

The Hemenways were tied up under the contract not to sell to any person other than the Smiths.

To say, as the learned Vice-Chancellor has said, that the fact that "the contract of sale was the direct result of a buy or sell offer made by Hemenway himself, is controlling in this case," is erroneous and must be the result of the learned court having overlooked the important points which we have here set forth. But for the unfortunate fact that Cohn said in his letter that Hemenway would buy on these inadequate terms, apparently the learned Vice-Chancellor would have decided the case in favor of the complainants.

Hemenway's letter to his own attorney, which apparently so impressed the court, seems to us to express only contempt for the partner who was holding him up, and a sincere hope that he will be unable to raise the money to put through this forced sale. Hemenway said:

> "Some of my friends who know this man (let us call him Smith) think he is going to fall down and his effort is to gain time, in which to manipulate matters, the assets, etc."

Hemenway insisted that no further concessions be made; stated that Smith, having accepted their forced proposition should at least have to pay up according to its terms. The evidence discloses that Smith did not do so and apparently experienced difficulty in meeting his payments. He was many days overdue in payment of one item.

We respectfully insist that there is no single word of testimony in the entire record of any willingness on the part of Hemenway at any time to sell; that the testimony on both sides shows that to the extent of his strength and resistance he attempted to hang on to his own property and finally, in fear of death himself, and by the urging of his wife and counsel, only gave in to save his life and save some little money out of the wreck, he gave in "rather than fight it out" with a robust, tricky, unscrupulous partner who was stopping at nothing to impress upon the Hemenways that their "Jew Lawyer" was mistaken when he thought they were bluffing.

We respectfully urge that the decision of the learned Vice-Chancellor should be reversed and judgment granted to the complainants.

LUM, TAMBLYN & COLYER,
Solicitors for Complainants-Appellants.

RALPH E. LUM,
WILLARD R. PRATT (Of N. Y. Bar)
Of Counsel.

POINTS.

I. As the contract was based upon the formal written offer made by the Hemenways through their counsel, in which they fixed their own price and terms, there could be no duress.

II. That the contract was voluntary is conclusively established by the Hemenways' subsequent attitude and numerous acts in consummation thereof.

III. The general release executed by Mrs. Hemenway after her husband's death and three months after the offer, is an effective bar to this action.

IV. The dissolution proceedings were rightfully and properly brought in good faith, and did not constitute duress or abuse of process.

V. Mr. Hemenway's illness is not a factor in the case.

VI. The resale by Smith to Crescent Tool Company was not contemplated by Smith and was a wholly unexpected stroke of good fortune.

VII. In no event could there be a right to an accounting for profits, in view of the stockholders' agreement of June 9, 1924 (C. 71, p. 774).

VIII. Conclusion.

Stripped of verbiage and reduced to fundamentals, complainants' contention is that Smith, by "duress," (*i. e.*, by the institution in the New York Court of a proceeding to dissolve the Company), "compelled" the Hemenways to sell their stock. A clear picture of the transaction as a whole can best be gained by giving, at the outset, a Statement of Facts.

Chronological Statement of Facts.

Prior to 1925.	Over 20 years serious dissention between Smith and Hemenway (p. 413) admitted by practically every witness.
1925.	
January 20:	Smith receives Balance Sheet (Exhibit D-10, p. 660) of December 31, 1924, of Smith-Hemenway Company. It shows cash of only $1,651.88—a little over two days payroll; bank loans of $50,500.; Accounts Payable of $48,874.02; Accounts Receivable of a face value of $75,548.42, (some of which dated back to the War and were uncollectable) (p. 240, 539-40). Smith is advised that the Company was threatened by attorneys with suit for overdue accounts (p. 465). Smith tells Hemenway that he is not satisfied to go on with the business (p. 464-5).
Jan.-Mar.	Smith, at Hemenway's suggestion, tries to raise a mortgage loan on plant for working capital. Largest mortgage obtainable would, after payment of existing encumbrances, increase working capital by only $15,000. (p. 466-7)
March	Smith tells Hemenway that he, Smith, is either going to get out of the Company or have a receiver appointed. (p. 467)
April 1.	Smith and Hemenway meet at Smith's home and discuss the situation. They jointly call in Isher-

	wood (not the personal attorney of either) for advice as to obtaining appointment of a Receiver. Isherwood, on Hemenway's behalf, offers to sell to Smith the Hemenway stock for $100,000., payable part cash, part by taking over the Montreal property. Smith accepts. (p. 470-1)
April 7.	Smith meets Mr. and Mrs. Hemenway at Robert Treat Hotel, and Mrs. Hemenway (Mr. Hemenway has nothing to say) refuses to go through with the deal. (p. 472-3)
April 13.	Cohn, attorney of the Hemenways, presents, and Smith refuses to sign, a contract drawn by Cohn whereby Smith was to sell his stock to the Hemenways for $100,000., payable in preferred stock. (D-14, p. 703)
May 28.	Burnett, attorney of Smith, writes Cohn, attorney of Hemenways (Exhibit C-4, p. 566) stating it as his intention to commence dissolution proceedings in New York, under New York statute. (C-4)
May 28-Sept. 27	Conference and correspondence between Burnett and Cohn, involving postponement of commencement of proposed dissolution proceedings.
July 11-Aug. 11	Mr. Hemenway ill with pneumoina.
Sept. 28	Petition for dissolution filed in New York Court. (C-46)
Oct. 1	Mrs. Hemenway and Elden Hemenway (J. F. Hemenway's nephew)

call on Smith at the factory. Smith refuses to discuss matter except in presence of Burnett and they go to Burnett's office, (p. 151) and in the course of such conference, Burnett tells them "that Mr. Smith had been and would be at all times open to an offer for the sale of his holdings, but that no offer had ever been made to him". (p. 282).

Oct. 6 — Burnett writes Cohn to that effect. (C-21, p. 584)

Oct. 7 — Elden Hemenway and another nephew, Thomas Hemenway, to act as "mediary" (unauthorized) (p. 164) call on Smith at Smith's office to induce him to continue with Hemenway, as they had been doing. Smith refuses "to commit himself in any way". (p. 170)

Oct. 7-Oct 12 — Cohn, Mr. and Mrs. Hemenway and the nephews hold family conferences with regard to making an offer to buy from or *sell* to Smith. (p. 119-120, p. 155) (C-23, p. 588)

Oct. 12. — *Cohn, on behalf of the Hemenways, makes detailed and formal offer to Burnett to buy from or to sell to Smith for $125,000. (C-23, p. 588)*

Oct. 13. — Burnett, on behalf of Smith, elects to buy, and accepts Cohn's offer by telephone and letter. C-24, p. 591) (At this point, all parties became bound by a legally enforcible contract and the Smiths, as equitable owners of the stock, had a right to re-sell it.)

Oct. 14. Cohn prepares draft of formal contract and submits it to Burnett. (C-25, p. 592)

Oct. 17. Burnett suggests changes in same. (C-26, p. 593)

Oct. 22. Cohn (C-26, p. 596) replies and says in regard to such changes: "* * * I will have to have further advice from my clients * * *" and "* * * There are certain features on which it will be necessary for me to obtain the consent of my clients * * *" (then in Atlantic City).

Oct. 21. Cohn sends copy of Burnett's Oct. 17th letter to Hemenway in Atlantic City (C-28, p. 600)

Oct. 20-21. Telephone conversation between Cohn and Hemenway (presumably in regard to such changes). (C-27, p. 598)

Oct. 20. Hemenway writes Cohn, his attorney, (C-27, p. 599) as follows: "* * * Some of my friends who know the man (referring to Smith) think he is going to *fall down* * * *". "* * * They (referring to the Smiths) *accepted our proposition and must live up to it.*" (Mrs. Hemenway was then in Atlantic City with Mr. Hemenway, (D. G. Smith, p. 431) and unquestionably that letter expressed her sentiments as well as his.) (Thus we find that the Hemenways, who were "duressed" into signing the the contract and who now, on that ground, seek to rescind it, fearful

that it will not be consummated, and saying that the Smiths "*must* live up to it".

Oct. 27. Cohn draws and sends to Burnett, for Smith's signature, final draft of contract, (C-31, p. 604)

Oct. 29. Burnett returns final draft of contract, signed by Smiths and accompanied by $5,000. payment on account. (C-32, p. 605)

Oct. 30. Cohn acknowledges receipt. (C-33, p. 608)

Oct. 31. Cohn mails Burnett final draft of contract signed by Hemenways. (C-34, p. 609)

Oct. 29. Moore, General Superintendent, and Swisshelm, Sales Manager, of Crescent Tool Company, in connection with a trip to Newark to buy a machine owned by one Scott (p. 256) on Broad Street, pay a friendly visit to the Smith-Hemenway Co. plant, (unexpected, so far as the Smiths were concerned) (p. 404-407) which friendly visits are customary in the trade, in order that the personnel may keep abreast of the times as to improved methods of manufacture, etc. (p. 258, 260, 267, 201)

Oct. 29. In the course of such visit, L. P. Smith and D. G. Smith, Moore and Swisshelm, go to lunch, and in the course of luncheon Swisshelm casually remarks that they had tried to buy the "Utica Drop Forge Co.", but had been unable to come to

terms, whereupon that subject was dropped. (p. 405-6, 267, 268)

Oct. 29. After lunch, D. G. Smith, because of Swisshelm's chance remark, obtained permission of L. P. Smith to stop off at the Crescent Tool Co.'s plant in Jamestown, on his way to Chicago, to see if he could interest it in the purchase of the Smith-Hemenway Co. (p. 408, 481-483) Up to this time, the Crescent Tool Co. had no idea that Smith-Hemenway Co. could be purchased, and the Smiths had no idea that the Crescent Tool Co. would be interested in its purchase. (p. 480-1, 214, 405, 357, 261, 268)

Nov. 5. D. G. Smith is introduced to Peterson, President of the Crescent Tool Company, by Swisshelm, and succeeds in interesting Peterson to the extent that Peterson requests detailed data. (p. 209, 267, 268, 271, 408)

Nov. 4. The Hemenways, Cohn, the Smiths (L. P. and his wife, Julia) and Burnett meet at Cohn's office in New York and hold a Directors' meeting to carry out the Smith-Hemenway contract. (p. 97) Cohn says, (p. 102) that Mrs. Hemenway asked Smith if he had sold Smith-Hemenway Co. to the Crescent Tool Company, and that Smith denied it. Burnett (p. 301) and Smith (p. 484) say that no such question was asked until the December 9th meeting, and that then

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Smith said "Not yet." (Cohn must be mistaken as to the date of the question, because, as has been seen, it was not until the next day (November 5) that the subject was even opened up with the Crescent Tool Company. December 9th is unquestionably the only date on which the question was asked, because on November 14th data was sent to the Crescent Tool Co., and obviously, that information reached the Hemenways, hence their question in regard to it at the December 9th meeting.)

Nov. 14. Smith furnished inventory and data to Crescent Tool Company (p. 209)

Dec. 9. The Hemenways, Smith, Cohn and Burnett, meet at Cohn's office in New York to carry out contract. New stock certificates are made out, title to Montreal property is straightened out, notes of $45,000. are delivered, and other details attended to. (Cohn, p. 98, 99) (p. 289 to 296) (D-2, p. 650) At this meeting all agree that Mrs. Hemenway asked Smith if he had sold out to the Crescent Tool Company. Cohn says that Smith denied it. Smith and Burnett say that he said "Not yet." Either statement was entirely true.

Dec. 18. Tentative contract for sale to Crescent Tool Company submitted. (C-37, 620)

Dec. 18 to) Feb. 4, 1926)	Miscellaneous details incident to consummating contract completed.
1926.	
Jan. 1.	John F. Hemenway dies.
Jan. 19.	General release (D-6, p. 653) by the Hemenways, (prepared by and executed before Mr. Cohn) to the Smiths, signed by Mrs. Hemenway and subsequently delivered to Burnett. (p. 299; also Cohn's letter to Burnett of January 2.)
Jan. 19.	Final contract between the Smiths and the Crescent Tool Company signed. (C-38, p. 624)
Jan. 19.	Possession of Smith-Hemenway plant given to Crescent Tool Co.
June 3.	Mrs. Hemenway files bill in this Court.

POINT I.

As the contract was based upon the formal written offer made by the Hemenways through their counsel, in which they fixed their own price and terms, there could be no duress.

The offer (C. 23 p. 588) was made in letter form by the Hemenways through their counsel, Cohn, after seven (7) months of negotiations and immediately after a Hemenway family conference, at which the offer was decided upon (p. 120). It was in "Buy or Sell" form and was made in response to Burnett's invitation (C. 21 p. 584) to make an offer to buy. It was not the product of fraud, concealment, misrepresentation or mistake. Hemenway, as admitted financial head of the Smith Hemenway Company, and Cohn, its counsel for twenty (20) years (p. 104), had a more intimate knowledge of its financial affairs and worth than did Smith, who attended to the manufacturing and selling (Brief p. 3).

The Court below correctly stated the law; (p. 732):

> "The question in each case is, was the person so acted upon by threats of the person claiming the benefit of the contract, as to be bereft of the quality of mind essential to the making of a contract, and was the contract thereby obtained."

The rule was also well stated by this Court in *Ballentine* v. *Stadler,* (132 Atl. 664, at p. 666; 99 N. J. Eq. 404):

> "Duress is defined to be that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or in apprehension to overcome the mind of a person of ordinary firmness."

> "And the agreement must have been entered into because of the fear of the threatened injury; otherwise there is no duress, which will ordinarily invalidate a contract entered into after opportunity for deliberate action."

also:

> "It would be strange indeed if *duress* were imposed upon the 'men directing the affairs of the company' while they were in the presence of and under the protection of counsel of their choice who was advising them with reference to the transaction."
>
> (*Byron* v. *Byron, Heffernan & Co.*, 119 Atl. p. 12 at p. 14; 98 N. J. L. 127 at p. 132).
>
> "As a rule duress will not prevail to invalidate a contract entered into with full knowledge of all the facts, with ample time and opportunity for investigation, consideration, consultation, and reflection." (*Clement* v. *Buckley Merchantile Co.*, 172 Mich. 243, 137 N. W. 657—cited Corp. Jur. 13 p. 397 N. 43). Also see 202 N. W. 20.

In view of the facts, it is impossible to say that the Hemenways were "bereft of the quality of mind essential to the making of a contract," or that "their minds were overcome". Both they and their able counsel had "full knowledge of all the facts, with ample time and opportunity for investigation, consideration, consultation and reflection"—seven (7) months prior and three (3) months after the offer, before the general release was executed and delivered by Mrs. Hemenway.

It is argued (Brief Points I, III, IV and V) that the Hemenways offer was "compelled" by the institution by Smith in the Courts of New York of the proceeding to dissolve the Company (Brief Point II). Institution of such proceeding is the only act of duress charged to defend-

ants. (We discuss that proceeding at length under Point IV). To appreciate fully the voluntary character of the offer, it is necessary to read the correspondence between counsel: Cohn for the Hemenways and Burnett for the Smiths (C. 4 to C. 35, pp. 566 to 612). It speaks for itself.

In March (p. 467) and in April (p. 176, 468), Smith told Hemenway that due, among other things, to the admittedly serious dissention of long standing (Page 412) between them, and the disastrous effect thereof on the company's business and prospects, that he was unwilling to continue longer in association with Hemenway.

The Hemenways had $125,000. available for the purpose of buying the Smith's stock (Bill, Par. 18, Page 18). Smith then, on behalf of himself and wife, offered either to buy from or sell to the Hemenways their respective stock holdings, Hemenway to fix the price (Admitted, Brief, Page 4). Hemenway fixed as the price for such one-half of the stock of the company, $100,000. in cash, real estate and bonds, and elected to sell. Hemenway refused to carry out his agreement and had his attorney, Cohn, reverse the contract (Admitted, Brief, Page 4), so as to make of it a contract whereby Hemenway was to *buy* instead of sell, and providing therein that the price should be payable in preferred stock (Exhibit D-14—Page 704) instead of cash (Page 471). Smith refused to agree to this.

October 1st, Mrs. Hemenway and a nephew, Eldon C. Hemenway, called on Smith and pretended to think that he had refused to sell (Page 155, 167). Smith refused to discuss the matter,

except in the presence of his lawyer, Burnett (Page 159, 170).

They went to Burnett's office (Page 164) and Burnett called (p. 282) their attention to the fact that Smith had never received any offer of purchase from Hemenway. Burnett summarized that conference in his letter of October 6 to Cohn (Exhibit C-21, Page 584) in which he said in part:

> "Mr. Hemenway asked me if it was true that I had said that Mr. Smith would not consider any offer for the sale of his holdings. I told him that was not true at all; that Mr. Smith had been and would be at all times open to an offer for the sale of his holdings, but that no offer had ever been made to me;"

The Court below evidently overlooked that letter and the fact that no offer of purchase had ever been received from the Hemenways after Burnett came into the case, which was in May. The Court below was, therefore, clearly mistaken when it said (Page 728, Line 12) that Smith refused to sell.

Burnett's letter of October 6th is important because it leads directly to Cohn's offer of October 12th (C. 23, p. 588), on which the contract was based. From the admission in the Brief (Page 10) that Hemenway was unwilling to buy, it is apparent that from the beginning in March to the end in October, that all of the Hemenways' pretensions as to their desire to purchase were a complete sham (repeated in the Brief, pp. 5, 6, 8, 9, 10, etc.), and were merely part of clever negotiations by their astute counsel Mr. Cohn—with the sole end in view of *selling,* and naturally, at the highest possible price. **Instead of making an offer to buy Smith's stock, when requested**

by Burnett so to do (October 6th letter) the **Heminways, by their own attorney, Mr. Cohn, made an offer to "buy or sell," fixing their own price of $125,000** (C-23, page 588—referred to by the Court below in its conclusions, Page 728, Line 20). Cohn followed it up by drawing a formal draft (D-1, p. 645), and, later, a corrected formal draft of the contract (C-36, p. 613).

The "buy or sell" offer of $125,000. came out of a clear sky. The last offer was for $100,000., made by Burnett, July 1, (C-10, Page 573). The Hemenway's offer contained the $25,000 increase in price for which they and their counsel had been cleverly maneuvering for months, while pretending that they wished to buy.

On October 9th the Hemenways and their nephews had a family conference (Page 120) due to Burnett's letter of October 6th.

At that conference they decided to make the "Buy or Sell" offer to Smith, and fixed the price, and authorized Cohn to make his offer of October 12th.

That offer refers to Burnett's invitation to make an offer to buy Smith's holdings. When instead of so doing, they had Cohn make the "buy or sell" offer, it is impossible, with any show of reason, for them to claim that such offer was involuntary or was made under duress. Why did they not make merely an offer to buy? The answer is that they did not wish to buy (Admitted, Brief, Page 10) *and were afraid if they did make an offer that Smith would accept it.* That was the reason why, throughout the months of negotiations, the Hemenways never made an offer to buy.

The inescapable conclusion is, that, finding in March that Smith would not continue longer in association with Hemenway, the Hemenways then determined to sell to Smith at the highest possible price, and to accomplish this result, personally, (and through their counsel, Cohn) consistently during the following seven months of negotiations, by means of their pretended desire to purchase, instilled in Smith's mind the idea that they wished to buy, not to sell. Finally, when they considered that Smith was really convinced of that fact, they brought their maneuvering to fruition in the form of the increase of $25,000. in the price over that at which Hemenway had originally agreed to sell. That was the sole end sought by the Hemenways throughout the negotiations, which they protracted to the limit.

The seven months of negotiations; the Hemenways' clever pretences; the skillful handling of their affairs by their counsel; the discussion of the entire matter at the family conference; the refusal to make an offer to buy when invited to do so; the making of the "Buy or Sell" offer; render it impossible to say that the Hemenways' offer was "involuntary," "compelled" or made under "duress," and the Court below properly held it to be voluntary and free from duress. The Court below properly held the offer to be free from duress.

While the foregoing answers in its entirety appellants' contention, we desire to refer specifically to a few matters mentioned in the Brief:

Although the *Bill* fairly reeks with charges of fraud, the *evidence* is wholly barren of fraud and of "artifice, misrepresentation and threats" (Brief, Page 12). The brief (p. 5, 6) attempts to

create the impression that there was misrepresentation as to the earnings for the first half of 1925. A reading of the letter (C. 10, p. 572) shows that it expressly states that the $25,000. loss is only a "preliminary estimate," made before (not after) the actual taking of the inventory and that by its expressed terms, it was "*not* to be taken as a representation, warranty or condition. It is simply Mr. Smith's belief. Your client has equal access to and knowledge of the facts. His guess is as good as ours."

The statements (Brief, page 6) that no balance sheet was furnished the Hemenways is a flat misstatement of fact. Federson (whose right name was Hans Ditmar Frederick) appellants' own witness, testified (p. 223) and it was not disputed, that he delivered the balance sheet to Hemenway and discussed it with him. Moreover, appellants then and there marked it in evidence (C. 42, C. 43, p. 223).

It is argued (Brief, page 14), that Hemenway died before he had time for reflection or an opportunity to rescind. The offer was made October 12, after seven months of negotiations. He died January 1, 1926. That he had ample time for reflection both before and after the offer, is self-evident.

The Brief states (p.15), "Smith first attempted to trick the Hemenways into selling by representing that he, Smith, wanted to sell out."

There is not a scintilla of evidence to warrant that statement. The evidence of Isherwood and Smith is undisputed and it is corroborated by Cohn, that in March, Smith meant what he said and that he would then have sold if Hemenway had elected to buy instead of sell.

It was Hemenway who agreed to sell for One Hundred Thousand Dollars ($100,000) Cash and Property and then repudiated his agreement and had Cohn reverse the contract into a contract for Smith to sell and receive the purchase price in the form of Preferred Stock.

Smith never received another offer of purchase. Whatever "trickery" there was was on the part of Hemenway in pretending that he wished to buy when, as is now admitted, he never intended to buy, and in having Cohn go through the motions of making the absurd proposition to Smith whereby the latter was to exchange his common stock for preferred stock and get out of the business, but leave his money in and subject to the hazards of the business, to be then run by Hemenway who admittedly (p. 178) knew nothing of manufacturing!

POINT II.

That the contract was voluntary is conclusively established by the Hemenways' subsequent attitude and numerous acts in consummation thereof.

October 14th, two days after the offer, Cohn wrote (C-25, p. 592) Burnett and enclosed draft of formal contract (C-26).

In response to objections (Exhibit C-26, p. 593) Cohn replied, October 22 (Exhibit C-26—596) stating that he had undertaken to rewrite the agreement and also saying:

> "but there are certain features that you and I can discuss for the reason that they are legal matters and have to do only with *carrying out the intent of our clients.*" (Italics ours.)

By Hemenway's letter of October 20th (Exhibit C-27, p. 598), written when he and Mrs. Hemenway (p. 421) were in Atlantic City to their counsel, Cohn, they conclusively established the voluntary character of the transaction. That letter reads: (capitalization ours)

"October 20th, 1925.

"Mr. M. B. Cohn,
"New York City.

"Dear Mr. Cohn:

"Thinking of the matter since talking with you over the telephone on Monday, I believe it would be unwise to meet any suggestions towards leniency in the terms for payment or otherwise.

"Some of my friends who know the man (let us call him Smith) think he is going to fall down and his effort is to gain time, in which to manipulate matters, the assets, etc.

"WE could not sign contracts here, for the reason that we will want to discuss any possible changes with you very carefully before signing.

"THEY ACCEPTED OUR PROPOSITION AND MUST LIVE UP TO IT. UNTIL THE PRINCIPAL SUM OF $75,000. IS PAID IN CASH AND THE MONTREAL PROPERTY TRANSFERRED TO ME, THE S. & H. CO. INC. MUST CONTINUE TO PAY MY SALARY ($7,000. per annum) AND THE DIVIDENDS ON MY PREFERRED STOCK.

"This is only fair as no interest is paid until after Dec. 31/25 on the deferred payments of $20,000. to be made in eight quarterly payments of $2,500. each.

"Very truly yours,

"(Signed) JOHN F. HEMENWAY."

It is no wonder appellants contend (Brief, p. 21) that it was "accidentally marked in evidence"—"and was only offered by mistake." However or for whatever purpose it was offered the fact remains that *it unambiguously speaks for itself as to the Hemenways' attitude of affirmance.* They had obtained for their stock their own price and terms and they were determined Smith "must live up to" what they so aptly termed "*our* proposition." Appellants, realizing the dispositive character of the letter desperately try to explain it away. They say (Brief, p. 21):

> "A fair reading of the letter indicates a *hope that Smith will 'fall down.'* " (Italics ours.)

If appellants substitute the word "fear" for the word "hope," we will agree with the statement. Every word in that letter indicates the Hemenways' affirmative frame of mind: "It would be unwise to meet any suggestions towards leniency." "*We* will want to discuss any possible changes with you very carefully"; "our proposition" and "must live up to it"; "must continue to pay my salary—and the dividends."

As the Court below pointed out, the Hemenways' complete satisfaction with the contract which they themselves had made and referred to in the above letter as "*our* proposition" is further incontrovertibly shown by their subsequent conduct: *i. e.,* October 22, 27, 31: redrafting and executing final formal draft of contract and the acceptance by the Hemenways of $5,000. under it (C-30, 31, 32, p. 602-609), conferences between Cohn and Burnett regarding the phraseology of the form of the formal contract; November 4: holding directors' meeting of Smith & Hemenway Co. Inc. in order to carry out terms of contract; December 9: consummation of con-

tract; preparing new stock certificates; adjusting dividends and salary due Hemenway, which he insisted on having to the last penny (p. 288-299); transferring Montreal property to the Hemenways; December 18, 1925 to February 4, 1926: completing miscellaneous details incident to consummation of contract; January 19: execution by Mrs. Hemenway on behalf of herself and her deceased husband, of the general release (D-6, p. 653) prepared by and executed before Cohn, provided for in the contract. Appellants say (Brief, p. 63), she signed it because:

> **"Mrs. Hemenway could not get her money without executing it."**

There can be nothing stronger by way of affirmation of the transaction by Mrs. Hemenway than that act and motive—especially in view of the fact that Mr. Hemenway was then dead and his illness could, therefore, no longer be used as an excuse.

(As appellants have, for some reason, neglected to include in the record all of Exhibit D-8 (constituting the correspondence between Cohn and Burnett), we here add such of the omitted portions as show further acts of confirmation):

ALEXANDER, COHN & SONDHEIM,
51 Chambers Street, New York

October 30th, 1925.

Messrs. Burnett, Sorg, Murray & Duncan
810 Broad Street,
Newark, N. J.

Attention of Mr. D. F. Burnett.

Dear Mr. Burnett:

Re Smith & Hemenway Co., Inc.

We herewith acknowledge receipt of the signed agreements by the Smiths together

with check to my order as attorney of Mr. & Mrs. John F. Hemenway for $5000. Owing to the inclemency of the weather today, we are having quite a snow storm, and in accordance with the doctor's advice, Mr. Hemenway, who had arranged to be here this afternoon, was unable to attend. I have arranged a conference at their home later in the evening, but probably too late to have the signed agreements returned to you as you requested.

Relative to the various matters touched upon in your communication; the salary as I take it is to stop after the payment of the additional $45,000. and the delivery of proper deed for record of the Montreal property, and rents to be adjusted up to that time. You can be assured of my co-operation not to cause any unnecessary delay to bring about this condition.

With regard to the meeting of the board of directors you will hear from me by Monday's mail which of the dates indicated in your letter is most satisfactory to us. With regard to the cancellation of Mr. Hemenway's endorsement on the outstanding notes, I see no objection to your interpretation of this clause, and until Mr. Hemenway is released from all the endorsements I am to hold the stock as provided for in the agreement.

I am writing you this letter so that you will understand why the signed agreements of Mr. and Mrs. Hemenway will probably not be in your hands on Saturday.

We are enclosing herewith our bill, concerning which our Mr. Cohn talked to you

some time ago, and would appreciate if you would see that same is paid promptly.

Very truly yours,
ALEXANDER, COHN & SONDHEIM
By (unsigned)

MBC-R

ALEXANDER, COHN & SONDHEIM
51 Chambers Street, New York

October 31st, 1925

Messrs. Burnett, Sorg, Murray & Duncan
810 Broad Street,
Newark, N. J.

Attention of Mr. D. F. Burnett.

My dear Mr. Burnett:

Kindly find enclosed the duplicate agreement duly signed by Mr. Hemenway and Mrs. Hemenway. For your information I beg to inform you that I have had deposited with me the resignation of Mr. Hemenway as Secretary, Treasurer and director of the company, to take effect when and as provided for in the agreement dated the 29th day of October, and also the resignation of Mrs. Hemenway as a director. Furthermore, there has been deposited with me, in accordance with the agreement, all the shares of stock, endorsed in blank by the respective owners.

Your attention is respectfully directed to the fact that the dividend checks for October have not yet been issued although I understand they were prepared. This should be attended to at once, as well as a check to Mr. Hemenway for his Atlantic City expenses, which have been filed in the office.

With respect to the meeting of the board of directors, this will be held at my office on Wednesday, November 4th, at 12.15, as suggested in your letter.

Mr. Hemenway has called my attention to the following: He is under the impression that the old minute book, not the one in present use, contains the requirements necessary for conveyance of the Montreal property. It would seem, according to his statement, that the Smith & Hemenway Hardware Co., or some such name, transferred the property to the Smith & Hemenway Co. and the procedure required is set forth in the minutes; so will you kindly have Mr. Smith bring with him to the directors' meeting both the old minute book and the new one for the preparation of the necessary papers and minutes in connection with this transfer.

Very truly yours,
ALEXANDER, COHN & SONDHEIM
By (signed) M. B. Cohn

ALEXANDER, COHN & SONDHEIM
51 Chambers Street, New York

November 11th, 1925

Messrs. Burnett, Sorg, Murray & Duncan,
810 Broad Street,
Newark, N. J.

Attention of Mr. Burnett.

Dear Mr. Burnett:

Re Smith & Hemenway Co., Inc.

This is to acknowledge receipt of your communication of the 10th. The copy of your letter to Mr. Dickson was received by

me and I am somewhat surprised that you have received no reply thereto.

However, the payments provided for in the agreement are entirely independent of the time of the consummation of the Canadian transaction and has nothing to do with the transfer of the property. The payment of $45,000. should have been made on the 9th of November as provided for in the agreement. The provision was made that these payments should not bear interest for the period indicated in the agreement with the understanding, however, that the payments would be made on the dates set forth in the agreement. We will expect Mr. Smith to send a check to us by return mail with interest on the $45,000. from the 9th day of November, 1925, at the rate of 6%.

Your attention is also directed to the fact that Mr. Hemenway has not as yet received the check for his Atlantic City expense account, which Mr. Smith agreed to send him promptly. Will you also kindly call this to Mr. Smith's attention.

Very truly yours,

ALEXANDER, COHN & SONDHEIM

By (signed) M. B. Cohn

MBC*R

ALEXANDER, COHN & SONDHEIM
51 Chambers Street, New York

"November 13, 1925.

Burnett, Sorg, Murray & Duncan, Esqs.,
810 Broad Street,
Newark, New Jersey.

Dear Mr. Burnett:—

I have your letter of the 12th and note that you state that the Montreal situation is being cleared up and that you expect a certification of the recording of the deed by Monday of next week.

I must still insist that the statement contained in my letter of the 11th, that the payment of the $45,000. instalment is entirely independent and has nothing to do with the transfer of the Montreal property. You can recall that I said that it would take some time to effect the transfer in accordance with the Canadian law and it is for that reason that the rent was to be apportioned as of the date of the actual transfer.

It was at all times expected that the salary of Mr. Hemenway was to continue until his resignation as director and officer would be effective and the contract specifically provides when this is to take place.

The reason that there was no interest on the payment of the $45,000. was that at the time the offer was made we did not know who the purchasers would be and felt that both parties would require at least ten days to effect the financial arrangements no matter who the purchaser was. All the rights of the respective stockholders and officers should be maintained until the actual transfer of the stock, as provided for in the agreement. We certainly expected the payment on the

9th inst. and both Mr. and Mrs. Hemenway made certain engagements in connection with the re-investment of this which entails a loss because of Mr. Smith's failure to make payment.

I believe, upon reflection, you will see clearly that we are absolutely within our legal and moral rights when we insist upon the payment of interest until the date of the payment of this instalment.

While on this subject, I might call your attention to the fact that another dividend check is payable on the 15th.

Very truly yours,
ALEXANDER, COHN & SONDHEIM
By (signed) M. B. Cohn

ALEXANDER, COHN & SONDHEIM
51 Chambers Street, New York

November 19th, 1925

Messrs. Burnett, Sorg, Murray & Duncan,
810 Broad Street,
Newark, N. J.

Attention of Mr. Burnett.

Dear Mr. Burnett:

Re Smith & Hemenway Co.

I have yours of the 18th and note what you state. I am glad that you appreciate the position that I took in connection with the payment of the $45,000., that the same was independent of the transfer of the Montreal property. I have induced my clients to waive the payment of the interest provided that the amount is paid not later than the 23rd inst. and that the dividend check due on the 15th

of the month is paid, and with the understanding that the salary is to be continued until the actual transfer of the Montreal property is consummated and their resignations become effective.

We trust this will meet with your approval.

Very truly yours,
ALEXANDER, COHN & SONDHEIM
By (signed) M. B. Cohn

MBC-R

ALEXANDER, COHN & SONDHEIM
51 Chambers Street, New York

November 23rd, 1925

Messrs. Burnett, Sorg, Murray & Duncan,
810 Broad Street,
Newark, N. J.

Dear Mr. Burnett:

Re Smith & Hemenway Co.

I herewith acknowledge receipt of your communication of the 21st with enclosure of cashier's check of $45,000. of the American National Bank to the order of Landon P. Smith and Julia M. Smith, endorsed by them payable to my order as attorney for Mr. and Mrs. Hemenway.

I cannot agree with you in your statement that Mr. and Mrs. Hemenway are not entitled to the dividend payable November 15th. From my understanding of the question of dividends, these were declared the early part of the year, payable monthly, and until the actual transfer of the stocks, which is to take place at the time that the transfer of the Montreal property is made the record

holders of the stock are entitled to the dividends. The payment of the $5000. which was made on October 29th did not in any way require the Hemenways to turn the stock over to me, but this was done simply as an extra precaution on my part to be able to make the delivery of the stock in accordance with the agreement when the $45,000, had been paid and the transfer of the Montreal property made.

You can readily see how it was possible for Mr. Smith not to be able to comply with the terms of the contract and it then could not be reasonably said that he would be entitled to the dividends on the Hemenway stock. In fact the $45,000. payment required under the contract was delayed two weeks.

This transaction should not be considered any different than any ordinary transaction for the purchase of stock where the actual delivery of the stock is made. In such cases the record owner of the stock is entitled to the dividends up to the actual delivery and transfer on the books of the corporation, and this rule should apply in this case. The date of the transfer is fixed in the contract and takes place when the deed for the Montreal property has been delivered. We must therefore insist upon the payment of the dividend check due November 15th.

When you are ready to make a delivery of the deed I would suggest that we have a meeting of the board of directors at this office, at which time the Hemenway stock can be transferred on the books of the com*l*any to the Smiths while Mr. Hemenway still is an officer of the corporation to sign the certificates, and thereafter the resignations can be filed and acted upon. If this meets with

your approval I would suggest that the certificate book and the seal of the corporation be brought to this office on the date fixed for the meeting of the board of directors.

Will you kindly use your good offices to have Mr. Smith send us a check for the bill which we rendered so that that matter can be out of the way.

Very truly yours,
ALEXANDER, COHN & SONDHEIM
By (signed) M. B. Cohn

MBC-R

ALEXANDER, COHN & SONDHEIM
51 Chambers Street, New York

December 1st, 1925

Messrs. Burnett, Sorg, Murray & Duncan
810 Broad Street,
Newark, N. J.

Attention of Mr. Burnett.

Dear Sirs:

We beg to inform you that the deed has been forwarded to Montreal, duly signed by the Hemenways. We have endeavored to follow the instructions given by Mr. Norval Dickson in connection with this deed of sale and believe that we have fully complied with them. In our letter of transmittal we have requested Mr. Dickson to send us a bill covering all the charges and outlay in connection with this transaction and have also requested him to notify us as soon as the transfer has been actually completed. We are doing this to expedite the date of actual closing.

I understood from our telephone communication had the other day that you were writing me in connection with the dividend check, but the only thing that I received was your letter in which you assumed, on behalf of your client, the expenses for the transfer of the Montreal property.

Kindly let us have a day or two notice for the director's meeting so that we can arrange a time satisfactory to everybody.

Very truly yours,
ALEXANDER, COHN & SONDHEIM
By (signed) M. B. Cohn

MBC-R

ALEXANDER, COHN & SONDHEIM
51 Chamber Street, New York

December 8th, 1925

Messrs. Burnett, Sorg, Murray & Duncan,
810 Broad Street,
Newark, N. J.

Attention of Mr. Burnett.

Dear Sir:

Re Smith & Hemenway Co., Inc.

Confirming telephone communication had with you this day, Mr. Burnett will be at my office at a quarter of twelve tomorrow, Wednesday. He calls particular attention, however, to the fact that the salary check has not been paid and insists that all matters be closed tomorrow, so that no ends are left over to be disposed of at a later date. Will you kindly call Mr. Smith's attention to these

things so that we will have no unusual delay at the closing as arranged.

Very truly yours,
ALEXANDER, COHN & SONDHEIM
By (signed) M. B. Cohn

MBC-R

ALEXANDER, COHN & SONDHEIM
51 Chambers Street, New York

December 10th, 1925

Messrs. Burnett, Sorg, Murray & Duncan,
810 Broad Street,
Newark, N. J.

Attention of Mr. D. F. Burnett.

Dear Sir:

We herewith enclose two copies of the Electrical Commission of the City of Montreal's letter for your use under the stipulation entered into in the Smith & Hemenway matter. Your attention is also directed to the fact that the seal of the corporation is not attached to the certificates of stock left with me and I would suggest, upon your next visit to New York, that you bring the same with you so that it can be put on the certificates.

Very truly yours,
ALEXANDER, COHN & SONDHEIM
MBC—R By M. B. Cohn.

ALEXANDER, COHN & SONDHEIM
51 Chambers Street, New York

February 1st, 1926

Messrs. Burnett, Sorg, Murray & Duncan.
810 Broad Street,
Newark, N. J.

Attention of Mr. D. F. Burnett.

Dear Mr. Burnett:

This is to acknowledge receipt of your letter of the 28th as well as letter received this date. With reference to your letter of the 7th, the reason that was not promptly answered was that we have been expecting daily a return to us of the deed given by Smith & Hemenway Co. to Mr. and Mrs. Hemenway but up to the present time it has not materialized. We have again written Mr. Dickson, even date herewith, requesting, that, if it is possible, to secure the return of the original deed to us from the record office, or if not to furnish us with a copy, so that we can transmit it for your files.

I am herewith returning to you copy of the charter of the Smith & Heminway Co., Inc. and would kindly ask you to have the same certified to as being correct as I presume that it will be necessary to have this certification for any purpose for which we may desire to use it in the Canadian proceedings.

I am also enclosing, as per your request, a copy of the reclassification of the stock.

With respect to the release, in order to facilitate securing Mrs. Hemenway's acknowledgment to a new release, can I ask you to mail back the one delivered by me to the Bank, which I will undertake to hold

for you until a new release has been signed by Mrs. Hemenway in substitution for it, embodying therein part of the suggestions contained in your letter of the 29th.

In the last paragraph of the letter you state that it is your understanding with me over the telephone "that everything in the contract of October 29th, 1925, to be performed by the Smiths as well as items specified in the stipulation of December 9th, have been complied with". In this you are mistaken for the reason that the matters contained in the stipulation of December 9th and one of the matters contained in the contract have not yet been complied with, and this is borne out by your letter of the 28th..

With respect to the assignment of the lease we understand that Mr. D. Smith took all the papers up to Montreal and we are still having difficulty in locating them.

Very truly yours,

ALEXANDER, COHN & SONDHEIM

MBC—R By (signed) M. B. Cohn.

ALEXANDER, COHN & SONDHEIM
51 Chambers Street, New York

February 4th, 1926

Messrs. Burnett, Sorg, Murray & Duncan,
810 Broad Street,
Newark, N. J.

Attention of Mr. D. F. Burnett.

My Dear Mr. Burnett:

Enclosed please find original lease Smith & Hemenway Co., Inc., with Sterling Printing Service, Ltd., which is being transmitted to you for the endorsement of an assignment

thereof to John F. Hemenway and Alice M. Hemenway.

Very truly yours,
ALEXANDER, COHN & SONDHEIM
MBC—R By M. B. Cohn

POINT III.

The general release executed by Mrs. Hemenway after her husband's death and three months after the offer, is an effective bar to this action.

The general release was executed three months after Hemenways' offer. It was drawn by and executed before her counsel, Cohn.

In an attempt to explain away its effect appellants contend (Brief, p. 63) that the "duress" which "compelled" the offer also "compelled" this release for the double reason that:

(a) the dissolution proceedings were still pending.

(b) "Mrs. Hemenway could not get her money without executing it."

Appellants contend (Brief, p. 24) that the Hemenways could not contest the dissolution proceedings during Mr. Hemenway's life because of the danger to his health, and that in view of his health, the dissolution proceedings constituted a "compelling influence" (Brief, pp. 13, 19). If that be true, then the "compelling influence" was wholly removed by his death, as Mrs. Hemenway was admittedly vigorous in mind and body (118).

Since her admitted motive was "to get her money," *i. e.*, obtain the benefit of the contract, she cannot thereafter repudiate the source of those benefits—especially when she executes the

release and "gets her money" after a lapse of three months after her carefully considered offer and of nineteen days after her husband's death.

If anything further were needed to show her affirmative frame of mind, her delay under such circumstances until June, before filing the bill, was alone sufficient.

It never would have been filed had she not learned that Smith had resold to Crescent Tool Co. at a profit.

The appellants contend that the release was signed under protest (Brief, p. 62). Cohn, who drew it, and who had Mrs. Hemenway execute it, makes no mention of any such protest. The nephew, Eldon Hemenway, zealous to aid appellants' case, was the only one who attempted so to testify. He admitted (pp. 562, 563) that he did not know whether he was there when it was executed or not.

Cohn, on January 19th, the very date on which the release was executed, wrote Burnett as follows:

ALEXANDER, COHN & SONDHEIM,
51 Chambers Street, New York

January 19th, 1926.

Messrs. Burnett, Sorg, Murray & Duncan,
810 Broad Street,
Newark, N. J.

Attention of Mr. Burnett.

Dear Sirs:

Enclosed please find the following checks of the Estate of John F. Hemenway: No. 1 for $14.22; No. 4 for $24.78, representing Federal tax on the transfers of stock; also check to Landon P. Smith and J. Mildred

Smith for $73.46, the amount of adjustment of taxes and insurance on the Montreal property against the rent check in accordance with the letter of Mr. Smith of January 12th.

I have also received checks for the State revenue stamps for the stock, which I will endeavor to secure in time for delivery to the messenger when payment is made on the notes, but in the event that they have not been secured by that time, they will be forwarded to you at a latter date.

Very truly yours,
ALEXANDER, COHN & SONDHEIM
MBC—R By (signed) M. B. Cohn
R.

(That letter was admitted in evidence (part of Exhibit D-8) but appellants, for some reason, neglected to include the same in the State of Case.)

Supported as it is by the voluntary character of the offer, and the numerous subsequent acts of affirmation (see Point II hereof) the general release is depositive of the entire case.

ALEXANDER, COHN & SONDHEIM
51 Chambers Street, New York

December 22nd, 1925

Messrs. Burnett, Sorg, Murray & Duncan,
810 Broad Street,
Newark, N. J.

Attention of Mr. Burnett.

Re Smith & Hemenway Co.

Dear Mr. Burnett:

I acknowledge receipt of your several communications of the 14th. On account of

the rush of business incident to the closing of the year I have been unable up to the present time to prepare the general releases referred to in your letter, but will do so immediately and have the same signed by Mr. and Mrs. Hemenway and deposited with me in escrow, sending you a copy of the same for similar execution on the part of your clients.

I note the several things that you intend doing in this matter, and on my part as soon as the deed has been returned to us will have a copy thereof struck off for your files, and as soon as the rents are received from the Montreal property the apportionment will be delivered to the Smiths.

In the meantime will you kindly have a copy of the charter of the Smith Hardware Co. as well as the Smith & Hemenway Co. prepared and certified to by one of the officers of the corporation, which, you will recall, was requested in order to secure a Provincial authority for the transfer of the Montreal property.

In connection with the matter concerning which your secretary telephoned me even date herewith, I believe an examination of the stock certificate book will disclose the three classes of stock, that is the Class A, Class B and the Employees stock. Mr. Hemenway informs me that it is his impression that the stock transfer book and register are in the safe of the Smith & Hemenway Co. Your attention is called to the fact that the Smith & Hemenway Co., being a New York corporation these books should, as a matter or right, be located at some office in New York City for examination by the State authorities should they so desire.

Replying to your other communication of the same date in which you enclose a copy for my signature, to be sent to you for filing with the American National Bank, and in which you ask that I acknowledge notice of an assignment of the stock held in escrow by me to the American National Bank, I do not desire to appear technical and am perfectly willing to comply with your request, but I think that, to secure ample protection under my escrow arrangement I should either have a copy of the assignment, certified by the bank, filed with me, or a statement signed by Mr. and Mrs. Smith to the effect that the stock has been assigned to the American National Bank and that I am to turn the stock over to them upon the interest of my client being satisfied, pursuant to the contract of October 29, 1925, unless otherwise previously instructed to the contrary by the American National Bank.

Wishing you the Compliments of the Season I remain

Very truly yours,
ALEXANDER, COHN, & SONDHEIM
By M. B. Cohn

ALEXANDER, COHN & SONDHEIM
51 Chambers Street, New York

"January 2, 1926.

Burnett, Sorg, Murray & Duncan, Esqs.,
810 Broad Street,
Newark, New Jersey.

Re: Smith & Hemenway, Inc.

Gentlemen:

Acknowledge receipt of your communication of the 28th and that the various matters therein contained are receiving your attention and also a copy of the letter sent by you to Mr. Smith.

I beg to inform you of the sudden death of Mr. Hemenway concerning which you probably have also been notified by Mr. Smith.

The releases that were to be signed and left with me in escrow and were not executed by Mr. Hemenway but I shall see that the Executors of his Estate sign on behalf of Mr. Hemenway as soon as they qualify.

In this morning's mail Mrs. Hemenway received the enclosed check of $341.67 for the December rent but as it is made out to the order of Smith & Hemenway, Inc., we are transmitting in full to you for deposit. Of this check $88.17 belongs to your clients. Will you kindly send me a check for $253.50 representing the amount due my clients. If you can, have the check made out to Alice M. Hemenway.

Very truly yours,
ALEXANDER, COHN & SONDHEIM
By (signed) M. B. Cohn

ALEXANDER, COHN & SONDHEIM
51 Chambers Street, New York

"January 8th, 1926

Messrs. Burnett, Sorg, Murray & Duncan,
810 Broad Street,
Newark, N. J.

Attention of Mr. Burnett.

Re: Smith & Hemenway, Inc.

Dear Sirs:

I acknowledge receipt of your communication of the 7th enclosing letter signed by Mr. and Mrs. Smith acknowledging the assignment of their stock interest to the American National Bank. I am therefore returning to you your letter of the 14th with reference to that matter, duly signed by me. As Mrs. Hemenway is the sole executrix under the Will of Mr. Hemenway I will have the release signed by her at the time that she is qualified to do so, both in her official capacity and individually.

With reference to the stamps on the stocks, this will also receive my attention in due course. I took this matter up with Mr. Hemenway during his lifetime but nothing was done in the matter pending his call to the office, which never occurred. However, as soon as Mrs. Hemenway qualifies as executrix I shall also attend to this.

Very truly yours,
ALEXANDER, COHN & SONDHEIM
By (signed) M. B. Cohn

POINT IV.

The dissolution proceedings were rightfully and properly brought in good faith, and did not constitute duress or abuse of process.

The dissolution proceedings were brought under a New York statute, hereafter referred to. The situation confronting the company and Smith in 1925 was so serious that action was required. After negotiations with Hemenway to buy out or sell out proved fruitless, Smith took the only course open. He had an absolute right, under the circumstances, to bring those proceedings and in having done so, he cannot be charged with "bad faith," "duress" or "abuse of process."

> "A threat to do what one has a legal right to do cannot constitute duress." (Corp. Jur. 13, p. 399). (155 N. E. 589) (*Martin* v. *New Rochelle Water Co.*,—42 N. Y. Sup. Ct. App. Div. 1896—affirmed, Ct. of App. 162 N. Y. 599) (*Lillienthal* v. *Bechtel,* 102 N. Y. Sup. 1051) (R. C. L. 9, p. 722).

To constitute duress:

> It must be of such a character that the party "has no other means of immediate relief, than by making the payment," and the payment must be made "not with the intention of giving up a right, but under the immediate necessity and with the intent of preserving the right to dispute the legality of the demand."
>
> (*Radich* v. *Hutchins*, 95 U. S. Sup. Ct. 210, 24 L. Ed. 409, cited with approval, *Kamentsky* v. *Corcoran,* 164 N. Y. Supp. 297, N. Y. Sup. Ct. App. Div.)

To appreciate the propriety of the dissolution proceedings, it is necessary to consider in detail the situation then confronting Smith.

Smith's attitude was: Harassed by dissention extending over a period of over twenty years,

worried beyond endurance by the resulting precarious financial condition and prospects of the company, and justly hopeless of improvement, he determined, in March, 1925, to sever relations with Hemenway, by the only means available, i.e., either by selling out to or by buying out the Hemenways, or by having the company dissolved.

The increasing dissention was so clearly established that the Court was moved to remark (p. 412): "How much testimony along that line do you want to put in. You have already put in evidence that for twenty-five years these people were at logger-heads and dissention in the plant growing worse all the time. I don't see how you can make it any stronger than you have, if you keep on with this line of testimony for a couple of days longer," and also (p. 430), "The pertinent fact is that there was friction there. That has been covered time and time again."

We will not, therefore, go into the details of such dissention. We do call attention, however, to Hemenway's letter to Smith (D. 12, p. 684) of August 28, 1920. This was written in connection with the stoppage of salaries and the request of Hemenway for Smith's resignation. That request, complainants' witness, Way, said (p. 200): "was what caused the trouble." Hemenway's letter of August 28th, reads in part:

> "* * * I believe that then I handle the business and *stop the continual friction which retards progress and production and which, if continued, would eventually do us great harm.*" (Italics ours.)

Smith did not resign. The "continual friction" did not stop. It continued to the very end. "Progress and production" continued to be "retarded" and "great harm" was eventually done.

Examination of the balance sheets (Exhibit D. 10, pp. 670, 666) shows that net profits declined from $33,015.01 in 1920 to $13,994.95 in 1924. Surplus declined from $133,416.24 in 1920 to $4,939.52 in 1924. (This is partly due to losses and partly to changes in capital structure, and partly due to the stripping of the company of ready cash in order to pay dividends). This was Hemenway's policy. Smith participated in it to the extent that he would not leave his share in the company if Hemenway would not leave his (pp. 457, 458). Smith asked, but Hemenway refused, or at least failed, to use some of it for replacement of obsolete (p. 343) equipment in order to place it on a competitive manufacturing basis (pp. 457-458).

At the end of 1924, the company, against bank loans of $50,500., Accounts Payable of $48,874.02, had Accounts Receivable (some of which dated back to the War and were uncollectible) of a face value of $75,548.42, and cash of $1,651.88 (pp. 465, 232, 234). The payroll amounted to $4,500. per week, besides the expenses of 15 salesmen on the road. *A little over two days' payroll.*

Frederic, the Auditor, Hemenway's right-hand man, admitted that two out of the three banks which financed the company had been complaining of the lack of a balance commensurate with their loans (p. 233).

Niebling, President of American National Bank said that Hemenway made a practice (pp. 378, 379), over his repeated protests, of drawing against uncollected funds, creating overdrafts, and that its financial condition was not good, and that his bank would not loan it any more money (pp. 380, 381, 382). He says (p. 393):

"They didn't have enough liquid capital available to meet their obligations; that they were in a position where they might be embarrassed by their creditors," and (p. 389) they should have "at least a month's payroll" in cash. Scharfenberg (Frederic's assistant) also testified to the same system of handling checks on the other banks (pp. 337, 338, 339) and that they would draw checks to pay bills and then hold them until enough cash came in to meet them (pp. 339).

There were then on December 31, 1924, available liquid resources of only the following:

Cash	$ 1,651.88
Collectible Accounts Receivable, about	40,000.00
	$41,651.88

Against it were:

Bank Loans	$50,500.00
Accounts Payable	48,874.82
	$99,374.20

The merchandise inventory was not in reality a liquid asset. It consisted largely of unsaleable merchandise left over since the War and of broken and incomplete lines of pliers (pp. 490, 491).

In regard to the Accounts Receivable, after the lapse of a year, Smith, who retained them in the re-sale to Crescent Tool Co., was able to collect only something like $55,000. (p. 540) out of $90,000. (the then amount). On that basis the $75,548.42 of Accounts Receivable existing in 1924 would have been collectible to the extent of about $40,000. over the period of a year. Federson, (p. 501) Hemenway's assistant, told Smith

that while the book value was about $390,000. they would do well if they could sell it for $225,000.

In short, the condition of the company was such that if there was any interruption in the continuous influx of cash from Accounts Receivable, the company could not have met its payroll and would have been unable to continue (p. 465).

When Smith, on January 20, 1925, received the 1924 Balance Sheet, he was thoroughly alarmed and disgusted and took up the matter with Hemenway (pp. 464, 465). Smith (p. 466) offered personally to loan the Company $40,000. if Hemenway would do likewise. Hemenway refused. Hemenway suggested that inasmuch as they were up to "their limit" at the banks (p. 465) they raise the necessary working capital by means of a mortgage on the plant. Between January and March Smith applied to various concerns for a mortgage loan and the best that he could do was to obtain a loan, which after payment of existing encumbrances, would leave net proceeds of about $15,000., which was entirely inadequate to the company's requirements (pp. 466, 467). Federson, the Auditor, and Hemenway's right-hand man, in the Spring of 1925 told Smith they needed an additional $100,000. working capital (p. 490).

In April, then, Smith was faced with this situation: Smith and Hemenway were at loggerheads; the dissention was "common talk" (p. 342) and had communicated itself to and had partially disorganized the working personnel. Hemenway would not cooperate with him (p. 467); the company was threatened by some of its creditors (p. 465); it was in dire need of a very substantial addition to working capital; its

borrowing capacity at the banks and by way of mortgage loans was exhausted; it had only two days' payroll in cash (assuming that there had been no substantial change in its cash position since December 31, 1924, and there is no evidence that it had except the balance sheet of June 30, 1925, shows cash of $4,685.49—less than one week's payroll).

They were manufacturing over 1700 different sizes and styles of articles (p. 491); the market becoming increasingly competitive, and a large part of the plant equipment and machinery was obsolete, worn out and uneconomical (pp. 343, 450) (Crescent Tool Co. actually "junked" about $51,777. worth, pp. 217-218); they had no funds with which to purchase new equipment, and Hemenway would not agree to such policy in any event (p. 523); Hemenway failed to keep proper costs records (pp. 400, 401, 523), with the result that they never knew whether they were selling a given article at a profit or a loss (pp. 400, 401). Orders were not filled because of delay owing to lack of proper equipment, and were cancelled (pp. 409, 410); Hemenway's advertising policy antagonized their jobber customers (pp. 402, 403).

Hemenway and Smith gave conflicting instructions to the sales manager (pp. 399, 400). Hemenway never would discuss the company's business frankly and exhaustively, but continually procrastinated (pp. 457, 519). Smith, for years unsuccessfully tried to have Hemenway "budget" the various departments to avoid waste and to afford accurate knowledge of results of operations (pp. 463, 523). Hemenway would not get out a trial balance for some times as long as eight months (p. 521). Hemenway's personality was such he antagonized the company's cus-

tomers and employees (p. 528). Salesmen's salaries and commissions were not being paid when due, due to lack of funds (pp. 337, 325, 331). Hemenway came to the factory, which was the office of the financial department of which Hemenway had charge, only late in the afternoons, three or four times a week (p. 351).

As the dissolution petition charged, Hemenway admitted he could not run the business without Smith (p. 180) because he knew nothing of the manufacturing business. Smith could not attend to manufacturing, selling, be on the road and attend to the finances (p. 177). In the event of the death or incapacity of either, the business would have at once been in even a more precarious condition than it was.

A comparison of the allegations of the dissolution petition (C-46) with the testimony shows that practically every allegation is supported by ample proof.

"Efficiency," "close cooperation" and "mass production" have for several years been by-words in the business world. No concern which ignored them as did the Smith & Hemenway Co., Inc., could hope to survive in the face of then existing and prospective keen competition and diminishing margins of profit.

Smith realized the hopelessness of trying to continue longer in association with Hemenway, under such conditions, and so told him. They called in an impartial lawyer (Isherwood) to advise them in regard to the effect of a Receivership (pp. 468, 470).

When Mrs. Hemenway repudiated her husband's agreement to sell to Smith (made in March or April) and Smith refused to sell (p.

473) to them for $100,000., payable in preferred stock, there was nothing left for Smith except recourse to the Courts. The right to obtain the appointment of a receiver inasmuch as the company was then solvent, was doubtful (Isherwood so advised them (p. 478)). Smith then chose the only other course open, *i. e.*, dissolution proceedings under the New York statute.

Smith's attitude and feeling were well expressed to Mrs. Hemenway (p. 476) "I had been broke before but I could start over again. I will not go on with Mr. Hemenway. I have lost entire confidence and he will not cooperate with me, nor will he give me any time at the factory, or the condition of our finances * * * I would rather start life all over again than to live the life that I have lived for the last five years. I won't do it." And to Mr. and Mrs. Hemenway in the Robert Treat Hotel in April (p. 473): "No, I will not continue. Is that definite?" Also to the same effect at the Isherwood conference (p. 468) and again in January, 1925, when he told Hemenway (pp. 465-466) "I would rather be a live man without money than a dead man with it." He felt that it would be better for all concerned to have a dissolution then, when the concern was at least solvent, than to wait until it had become insolvent, or as he puts it in answer to counsel's question (p. 533) it was "for the best interests of the stockholders." He knew, as did every one that the result of that proceeding would probably be that they would not realize anything like the book value. That is what he meant when he very frankly said (p. 532) "I thought we would stand a substantial loss." Smith also knew that they would inevitably sustain a "substantial loss" if they

continued together to the point where the concern should become actually insolvent.

Appellant's challenge as to Smith's good faith goes not to the *wisdom* of the proceeding, but to *his honesty of purpose.*

That Smith honestly believed that the dissolution proceeding was, under all the circumstances, to the best interests of both, and that he had ample justification for so believing, and that he intended to carry it to a conclusion, is not open to doubt. Smith (p. 528) accurately expresses the situation: "The statement in the Petition is as near the truth as I see it or saw it and have seen it for a good many years."

Smith's determination to effect dissolution was arrived at months before Hemenway was taken ill. Smith did not "seize" upon on Hemenway's illness (brief, p. 6) as the time to act. He merely refused to postpone after September putting into effect his previously announced intention (p. 465):

> "I said I couldn't go on this way; I couldn't sleep and my stomach had gone back on me, and 'unless I have some rest or some change or some let-up in this condition, I simply will go all to pieces, and I would rather be a live man without money than a dead man with it.' "

From that time on Smith never once swerved from his announced determination in some way to effect a severance of relations with Hemenway.

The testimony conclusively shows that that attitude was amply justified.

When Smith determined and instructed Burnett to commence dissolution proceedings, he did not do so in order to force Hemenway to sell, but because all negotiations for sale by one to the

other had fallen through and nothing was being accomplished toward a severance, and they were merely "drifting."

Smith was ill and worried (p. 176) and had reached the limit of his endurance of conditions. He was desperate. He felt that way and made no effort to conceal his feeling. He knew that the business couldn't go on under Hemenway without him (Isherwood) says Hemenway himself said: "I simply cannot go on with the business; I don't know how to run the manufacturing end" (p. 178).

He knew that if they attempted to go on together, under the circumstances, that the concern would soon be insolvent and would, in any event, be in the hands of a Receiver within a short time.

The entire situation then present was exactly the situation contemplated by the New York Statute.

The commencement of the dissolution proceeding did not constitute "Duress" or "Coercion."

It was brought under the New York General Corporation Law. Section 172 thereof reads (italics ours):

> "§172. PETITION WHEN DIRECTORS OR TRUSTEES DO NOT AGREE. If a corporation, created under a general statute of the state for the formation of corporations or under any special act or charter has an even number of trustees or directors *who are equally divided respecting the management of its affairs,* or *if the stock of such corporation is equally divided into not more than two independent ownerships* or interests, or if the entire stock of the corporation is, at that time, owned by the trustees or directors who are even in number or equally divided representing the management of its

affairs, or if the stock is so divided, that one-half thereof is owned or controlled by persons favoring the course of part of the trustees or directors and one-half thereof is owned by persons favoring the course of the other trustees or directors, the trustees or directors or the stockholders or one or more of them *may present a petition as prescribed in section one hundred and seventy of this chapter.*''

The Smith-Hemenway Company was a New York corporation. It was controlled by directors who were ''equally divided respecting the management of its affairs.'' (Mr. and Mrs. Hemenway and Mr. and Mrs. Smith.) The stock was equally divided into ''not more than two independent ownerships or interests.'' The charter contained a peculiar provision. By it the directors were divided into ''Class A'' and ''Class B'' directors. Voting stock (common) was likewise divided into ''Class A'' and ''Class B.'' ''Class A'' directors were voted for and elected exclusively by ''Class A'' stockholders, and ''Class B'' directors were voted for and elected exclusively by ''Class B'' stockholders. ''Class A'' stock carried no vote for ''Class B'' directors, nor ''Class B'' stock for ''Class A'' directors. The Hemenways held all of the ''Class B'' Common Stock (except 20 shares) and the Smiths all of ''Class A'' Common Stock (except 20 shares); D. G. Smith (defendant's brother) held the excepted 20 shares of ''Class A'' and 20 shares of ''Class B''; such holdings, however, gave him no power to break the deadlock.

There was, therefore, an absolute and unbreakable equality of voting power. In fact, the very purpose of that peculiar arrangement was to create that very unbreakable equality.

The situation, as presented in the case in hand, was such that it came within, not only one, but in fact all, of the situations contemplated by that section of the Statute.

The jurisdictional facts prescribed by that section of the statute were all present and alleged. (C-46).

Section 170 reads:

> §170. PETITION FOR VOLUNTARY DISSOLUTION OF CORPORATION. If a majority of the directors, trustees, or other officers, having the management of the concerns of a corporation created by or under the laws of the state, discover that the stock, effects, and other property thereof are not sufficient to pay all just demands for which it is liable, or to afford a reasonable security to those who may deal with it; or if, for any reason, they deem it beneficial to the interests of the stockholders that the corporation should be dissolved, they may present a petition to the supreme court praying for a final order dissolving the corporation, as prescribed in this article."

The Petition for Dissolution (C-46, p. 757), Paragraph 4, states, in the words of Section 170, the only remaining jurisdictional fact: "They deem it beneficial to the interests of the stockholders that the corporation shall be dissolved * * *."

The Dissolution Petition presented to the New York Court, just one question: *i. e., Was it or was it not, under the circumstances then presented, beneficial to the interests of the stockholders that the corporation be dissolved?*

Neither this nor any Court in this collateral suit at this late day can speculate upon or guess at what view the New York Supreme Court would have taken on that question after a full hearing

on the merits, in view of the overwhelming proof of serious and continued dissention between Smith and Hemenway, and the disorganization and precarious financial condition of the company.

The very utmost that this court can do is to determine whether there was *any* evidence on which a dissolution *could* have been decreed.

Smith had an absolute right, under the statute, to have the New York Court pass on that question. Section 178 provides (italics ours):

> "§178. ACTION BY COURT UPON PETITION FOR DISSOLUTION. In a case specified in sections one hundred and seventy-one and one hundred and seventy-two of this chapter, the court may, in its discretion, entertain or dismiss the application. Where it entertains the application, or where the cause is one of those specified in Section one hundred and seventy of this chapter, the court must make an order, *requiring all persons interested in the corporation to show cause before it, or before a referee designated in the order, at a time and place therein specified, not less than six weeks after the granting of the order, why the corporation should not be dissolved.*" (Italics ours.)

The complainants could then have asserted all of the objections and defenses which they now assert. They contend that the reason that they did not contest the proceeding on its merits was because Hemenway was ill. If that contention had merit, it is inconceivable that the New York Court would not have adjourned the matter on application to it for the purpose. Cohn made no such application. Cohn (p. 126) says: "I recall, but I am not sure, that I spoke to Mr. Burnett about an extension of time. I believe that Mr. Burnett said that we ought to be ready at that

time to dispose of the matter, and let it go at that."

Hemenway's illness was not the reason for failure to contest the dissolution proceedings. Otherwise his counsel, Mr. Cohn, would have applied for an adjournment instead of making an offer to "buy or sell."

Smith had ample reason, as the proofs show, to believe that the then situation presented a proper case for dissolution under the New York Statute. So believing, particularly as he was acting under advice of counsel, he had a right to assert to and have his view of the proper course of action passed upon by the New York court.

His exercise of that right did not and could not constitute duress, or "abuse of process" and he cannot properly be charged with "bad faith" in so doing.

The value of Hemenway's stock as it then appeared, was highly problematical. Over $50,000. had to be written off for worn-out machinery; at least another $30,000. for uncollectable accounts. No one knows what the inventory was actually worth, in view of the fact that some of it was unsalable and had been carried on the shelves since the War. The price obtained by Smith on resale was an unexpected stroke of pure luck. This situation cannot properly be viewed with the help of "hind-sight" but only from the facts as they then appeared. It is admitted by all that both Hemenway and Smith, in the Spring of 1925, before the New York dissolution proceedings were ever thought of by Smith, discussed selling their respective one-half interests for $100,000. That establishes beyond question

what they both then thought it was actually worth.

By reason of the peculiar facts present, the Kavanaugh case can have no application to the case at bar (226 N. Y., 185) (Brief, Page 31). It was admitted (by demurrer) that the purpose of the proceeding complained of was to enable the officers to obtain salaries in an amount which was "unfair and unreasonable and enormously greater than is paid by similar or greater corporations" and also that the directors "then well knew the corporation was exceedingly prosperous and making enormous net profits" and had actual contracts for its entire output for the coming year which assured even larger profits than the preceding year, and that the resolution complained of "was for the purpose of depreciating the value of the corporate property and of the plaintiff's proportionate interest therein."

The Court's remarks quoted by counsel were all addressed to that situation and must be read in the light thereof.

There was, in fact, no fiduciary relation existing between the Hemenways and the Smiths. They had been at loggerheads with each other for years. Through their counsel in this matter they dealt throughout, at "arms length." The very lack of trust and confidence in each other, which is the foundation of a fiduciary relation, probably had much to do with the precarious condition of the company's affairs.

In *the matter of Brown* (181 N. Y. S. 460) (Brief, Page 34) dissolution was decreed at the instance of a holder of one-half of the stock. The Court said in part: (Italics ours)

> "* * * The facts show the necessity for an increase of the capital stock to avoid

> the borrowing of money upon the personal indorsement of the owners of the stock. *The stockholders are therefore at a variance upon a vital program of business management.* It is for the interest of Mr. Brown, the owner of one-half of the stock, that the corporation should be dissolved, now, rather than be continued if there is to be a substantial disagreement with the owner of the other half of the stock, with the possibility of a refusal to indorse corporate paper and actively manage the business. *It is unreasonable to require the business to be continued in the present form without the acquiescence of the owner of either half of the stock.''*

The situation there present is almost ''on all fours'' with the case at bar. The Brief (Page 35) refers to ''the refusal of Smith in bad faith to endorse the company's paper in order to take advantage of his partner.'' That statement is a gross distortion of the evidence. Federson or Frederic, the company's auditor (and Hemenway's ''right-hand man'' and their witness) said (p. 226) he never knew of Smith refusing to endorse the company's paper. Smith, (Page 518) said he never refused to endorse the company's paper as an officer or individually until September, 1925, and then only individually for ''*further* borrowed money.'' Smith's continued individual endorsement of the company's paper is exceptionally strong evidence that he did not determine to dissolve the corporation in order to ''wreck it.'' He could have accomplished that purpose at any time by merely refusing to endorse individually the company's renewal notes ($50,500.) as required by the banks. Such refusal would have brought its creditors, banks and otherwise, down upon it forthwith. Instead of taking that course, after a delay of months,

with nothing accomplished, he resorted to the New York dissolution proceedings, through which liquidation of the company's business would be conducted in a conservative and orderly manner.

On no theory can it be contended that Smith was under any obligation, legal or moral, to jeopardize by means of his individual endorsements, his separate estate in the interest of the company.

The decree of dissolution in *the matter of Automatic Chain Co.* (119 N. Y. S. 379) (Brief, Page 35) was vacated because the party opposing dissolution was the owner of the majority of both common and preferred stock and personally guaranteed payment of the corporation's liabilities, whereas the party pressing for dissolution held but five shares of stock.

The case of *Livingston Sportsmen's Assn.* (2 N. Y. S. 63) involved a non-profit-making corporation. There were no debts, the club was supported by dues of $5. from each member, plus a small deficiency assessment. Dissolution was denied because of doubt as to the applicability of the general corporation law thereto.

The jurisdictional facts for the dissolution proceeding requisite under the New York Statute were present. The evidence, was ample not only to warrant, but so strong as to require, the New York court, on the merits, to decree dissolution. If Hemenways felt otherwise, the New York courts were open to him. A reading of the correspondence alone shows conclusively that the offer was made with the intention of giving up any right to contest the proceeding they may have fancied they had. Under such circumstances, there is no shadow of a claim that it

"compelled" the offer, or constituted "abuse of process" or "bad faith."

POINT V.

Mr. Hemenway's illness is not a factor in the case.

Appellants, throughout the Brief, lay much stress upon Hemenway's illness, and among other misstatements say, (Brief, p. 6) that Smith "seized upon the illness" of Hemenway.

As early as March Smith announced his determination in some way to sever his relations with Hemenway. Hemenway was not taken ill until July 11th, and then with pneumonia, which lasted one month, and as a result of the pneumonia his heart was apparently weakened (p. 144).

On May 28, (C-4, p. 566) Burnett announced his intention to institute dissolution proceedings. The correspondence then following shows that it was *Cohn* who asked for a delay in the institution of such proceedings. Hemenway's illness then intervened and Cohn (C-14, p. 578) on August 4th asked that the matter be held in abeyance, which request Burnett granted and accordingly withheld the proceedings until September 29th, but refused longer to hold the matter in abeyance because nothing was being accomplished towards a severance of Smith and Hemenway's relations.

In short, Smith did not make Hemenway's illness the occasion of the institution of the dissolution procedings, he merely refused longer to delay proceeding with his determination, announced by him in the Spring, months before Hemenway's illness.

If, as appellants now contend, Hemenway's illness was such as to preclude him from contesting the dissolution proceedings, his counsel, Cohn, should have applied to the New York court for an adjournment thereof. That court could and would have satisfied itself in the usual manner by a physical examination or otherwise, as to the merits of the application, and could have made such disposition of the matter as the then appearing facts warranted. The fact that Cohn did not even make such an application can only be taken to mean that Hemenway's condition was such that it afforded no basis for such an application.

If a defendant in a suit at law in this State, claiming to be ill, did not bring the matter before the trial court on an application for adjournment, but saw fit to compromise the claim, certainly this court would not undertake to set aside that compromise on the ground that the intervention of the defendant's illness, coupled with the plaintiff's refusal further to adjourn the suit, constituted "duress"!

Clearly, Hemenway's illness cannot enter into the determination of this court.

POINT VI.

The resale by Smith to Crescent Tool Company was not contemplated by Smith and was a wholly unexpected stroke of good fortune.

As the circumstances surrounding the resale by Smith to Crescent Tool Co. constituted an unusual coincidence and because the Court referred to them as "suspicious," it is proper that that phase of the matter be reviewed in detail.

Credibility of witnesses; L. P. Smith and D. G. Smith are of course interested witnesses. Burnett and Cohn, while not interested, might, be called partisan. *Peterson,* President of Crescent Tool Co., *Swisshelm,* Sales Manager, and *Moore,* General Superintendent of Crescent Tool Company are all wholly disinterested witnesses. Their credibility is beyond question, unassailed and unassailable. Complainants, vouched for Peterson's credibility, by calling him as their own witness. Moore, Swisshelm, Peterson, L. P. Smith, D. G. Smith, all say that what happened was this:

Swisshelm and Moore, on October 29th (Hemenway's offer to "buy or sell" was made Oct. 12) came to Newark on behalf of Crescent Tool Co. to look at (with a view to purchasing) a machine owned by one Scott (p. 256, 266) on Broad street. While in Newark, they determined to pay a friendly visit (unexpectedly, to the Smiths (p. 404-407, 480) to the Smith-Hemenway plant. It was customary among the various plants in the country to exchange such occasional visits in order to keep abreast of the times as to methods, etc. (p. 258, 260, 267). They went through the plant with the Superintendent (p. 405, 480, 259). As a courtesy, the Smiths took them to lunch. In the course of the general conversation during lunch, Swisshelm casually and by chance remarked that they had some time previous negotiated for the Utica Drop Forge Co. (p. 268, 269, 405, 406, 481), but had been unable to come to terms. The subject was dropped, as would any casual remark. After lunch D. G. Smith asked his brother if he had any objection to him stopping off at Jamestown (where the Crescent Tool Co. was located), on his way to Chicago, to see if he could interest it in the purchase of the

Smith-Hemenway Co. L. P. Smith gave him permission (p. 408, 481). D. G. Smith arrived in Jamestown November 4th. On November 5th Swisshelm introduced him to Peterson (p. 209, 267, 268, 271, 408).

Peterson did not even know he was coming, and even at the trial did not know how D. G. Smith happened to go to Jamestown (p. 213, 214). He asked D. G. Smith for figures and data, which Smith was unable to give him (p. 209, 210). Nothing more was done until the data arrived from Newark, November 14th (p. 210, 409). Not even a tentative contract was made until December 13th (C-37, p. 620). (Comparison of the record (page 210) with the Exhibit, shows that the record is incorrect as to the date. It should be December 18th, not November 18th). The final contract (C-38, p. 24) was not made (and it was the only one ever signed) until January 19, 1926, on which date possession was given under it. Until November 5th, they did not know the Smith-Hemenway Co. could be purchased (p. 268) and that, as far as they knew, none of the Smiths knew that the Crescent Tool Co. was in the market, or as Peterson put it (page 152) "We were willing to consider a proposition" (p. 213, 214, 257, 268, 405).

Burnett says he never even heard of the Crescent Tool Co. matter until December 9th, and then from Mrs. Hemenway (page 301). Smith was, in fact, planning to reorganize the business by interesting others in it, Niebling among others (p. 321), rather than selling it. The fact that Swisshelm and Moore came to the plant on October 29th, the very day on which Burnett sent the contract signed by the Smiths, with the $5,000. check, was PURE COINCIDENCE. *Not a scintilla of evidence was introduced to the contrary.*

The Court, appreciating the conclusive character of the proof to that effect, very pertinently asked counsel (p. 252):

> **"I would like to ask you, Mr. Lum, how you tie up the negotiations with the Crescent Tool Company and the sale to that company by Smith with the prior transactions between Smith and Hemenway."**

Counsel, also appreciating the fact that their whole idea on that score had been a mistake, virtually abandoned it when in answer to that question and to the Court's further question (p. 253):

> "Your contention then, as I understand it, is that irrespective of whether he had any immediate prospect and purchaser for the plant, the method by which he acquired the holdings of Mr. and Mrs. Hemenway was in effect a fraud?"

said:

> **"It was. That is our view and our situation, and would be the same if he held the stock today."**

The statement (brief, p. 59) that "Smith forced the sale to himself because he knew a profitable deal could be made with Crescent Tool Co." is wholly untrue and without evidence to support it. The fact is that until October 29, Smith had no more idea that the business could be sold to Crescent Tool Co. than the Hemenways. D. G. Smith's stop-off in November at that Company's plant in Jamestown was merely "a shot in the dark." There is likewise no basis in fact for the statement (brief, p. 60) that Smith is bound to account for the profits.

POINT VII.

In no event could there be a right to an accounting for profits, in view of the stockholders' agreement of June 9, 1924 (C-71, p. 774).

The stockholders' agreement of June 9, 1924 (C-71, p. 774) was admittedly (brief, p. 3) not rescinded or cancelled, except by virtue of the sale, which is the subject matter of this suit. The rescission of such sale would, therefore, revive the "stockholders' agreement." The result would be that there would be a sale thereunder pursuant to its terms, but there would be no right to "an accounting of the profits—," as contended for by appellants (brief, p. 59).

Conclusion.

1. The dissension between Smith and Hemenway, the consequent demoralization of the Company, its precarious financial condition and lack of favorable future prospects, rendered a severance of the Smith-Hemenway relationship highly desirable from the standpoint of both individuals and necessary from the standpoint of the stockholders and creditors to avert insolvency of the Company.

2. When the negotiations between Smith and Hemenway in the Spring of 1925 to buy each other out failed, no other recourse except dissolution was left.

3. Well founded dissolution proceedings were brought in the New York Court under the New York Statute, rightfully and in good faith and did not constitute "duress".

4. As a result of negotiations conducted by counsel of the respective parties from May 28 to October 6, 1925, and of the Hemenway

family conference, the Hemenways voluntarily fixed the price at $125,000 (a $25,000. increase over all previously discussed figures), and formally offered to buy or sell.

5. The voluntary character of the offer was conclusively established by the subsequent affirmative conduct of the Hemenways.

6. There was no knowledge or even thought on the part of Smith when the offer was made and accepted that a resale might be made to Cresent Tool Co. or anyone else.

7. Under no view of the matter would appellants be entitled to an accounting of the profits.

8. This is no basis for the rescission of the wholly consumated voluntary contract in question.

Respectfully submitted,

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Of Counsel for Respondents.